THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Hon. Donald B. Hocker, Circuit Court Judge

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Appellate Case No. 2020-000917
Trial Court Case No. 2017CP2401343

KAREN PETIT,.....APPELLANT,

v.

PHYLLIS JEAN KROHN, USAA FEDERAL SAVINGS BANK,
and USAA INVESTMENT MANAGEMENT CO.,.....RESPONDENTS.

RECORD ON APPEAL - VOLUME I

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STATE OF SOUTH CAROLINA	COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	EIGHTH JUDICIAL CIRCUIT
KAREN PETIT, *Plaintiff,* -*v*- PHYLLIS VAN SWOL *f/k/a/* PHYLLIS KROHN et al., *Defendants.*	Case No.: 2017-CP-24-01343

ORDER

Hocker, J.

This Matter Came Before the Court for a hearing on the Defendant Phyllis Van Swol's Motion for Summary Judgment. Heard by the Court sitting in Laurens County, Jane H. Merrill, Esq., appeared for the Plaintiff, and Joshua S. Nasrollahi, Esq., and William S. Brown, Esq., appeared for the Mrs. Van Swol and Defendants USAA Federal Savings Bank, and USAA Investment Management Co. respectively. On review of the file, and the motions and related documents submitted, and after considering the applicable law, I grant Mrs. Van Swol's motion and grant summary judgment in her favor.

FACTS

The Plaintiff is the daughter of the decedent Dr. Edward Petit. The Defendant Phyllis Van Swol (F/K/A/ Phyllis Krohn") was a "companion" of the decedent. On or around January 15, 2007, the decedent executed a form with the Defendant USAA Investment Management Co. (hereinafter "USAA") declaring his daughters as the primary beneficiaries of his IRA. Subsequently, in 2009, the decedent executed a form

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USAA power attorney in favor of the Defendant, which was never used by the Defendant. In 2012, the decedent changed the primary beneficiaries for his IRA to his grandchildren. The form in question was allegedly completed by the Defendant but signed by the decedent. That same year, the decedent granted Henry Dorn a durable general power of attorney, the validity of which was upheld by the Greenwood County Probate Court during capacity proceedings involving the decedent in 2014. The Defendant never executed any documents pursuant to the USAA powers of attorney, though she admitted that she completed the 2012 form except for the signature line.

Sometime in mid-2014, Mr. Dorn transferred the funds from the USAA IRA into an IRA he established with Wells Fargo, N.A. When Mr. Dorn set up the new IRA, he left the beneficiaries as the decedent had declared them in his 2012 declaration. The Defendant had no involvement with the establishment of the Wells Fargo IRA or the transfer of funds from USAA to Wells Fargo. The decedent passed away in 2015, at which point Peter Manning was appointed as the personal representative of the decedent's estate. Pursuant to the beneficiary designation established by Mr. Dorn, Wells Fargo distributed the funds held by it to the decedent's granddaughters. This lawsuit followed several years later.

LEGAL STANDARD

Summary judgment is appropriate only where there is no genuine issue of material fact and it is clear the moving party, who bears the burden of proof, is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from

the evidence must be viewed in the light most favorable to the nonmoving party. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011).

"[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Our Supreme Court has stated that great care should be used in the consideration of summary judgment motions. "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Carolina All. for Fair Emp't v. S.C. Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999) (citing *Etheredge v. Richland Sch. Dist. I*, 330 S.C. 447, 499 S.E.2d 238 (Ct. App. 1998)).

"Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.* at 485, 523 S.E.2d at 799 (citing *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990)). Our courts recognize that "questions of credibility make summary judgment inappropriate." *Hansen v. DHL Labs., Inc.*, 316 S.C. 505, 513, 450 S.E.2d 624, 628 (Ct. App. 1994), *decision aff'd*, 319 S.C. 79, 459 S.E. 2d 850 (1995).

ANALYSIS

The Plaintiff asserts four causes of action against the Defendant: tortious interference with a contract, breach of fiduciary duty, negligence, and undue influence. The Defendant's request for summary judgment as to each count is addressed below.

I. Tortious Interference with a Contract

The Plaintiff first asserts a cause of action for tortious interference with a contract. "The elements of a cause of action for tortious interference with contract 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). "[A]n action for tortious interference protects 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)(emphasis supplied). "Thus, '[t]he actions of a principal's agent are afforded a qualified privilege from liability for tortious interference with the principal's contract.'" Dutch Fork Dev. Grp. II, LLC v. SEL Properties, LLC, 406 S.C. 596, 605, 753 S.E.2d 840, 844 (2012)(quoting CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc., 357 F.3d 375, 385 (3d Cir. 2004))(alterations in the original). Moreover, as the contract at issue is an IRA case, even as a designated beneficiary, the Plaintiff has only an "expectancy in the benefits" which do not fully vest until the decedent passes away. Waller v. Pope, 715 So. 2d 958, 960 (Fla. Dist. Ct. App. 1998)(citing Cooper v. Muccitelli, 661 So.2d 52, 53 (Fla. 2d DCA 1995), *aff'd,* 682 So.2d 77 (Fla.1996)). Compare 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.") and 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.'"). However, there are instances in which a beneficiary's rights may be vested before the death of the accountholder. 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).

While there existed two legal contracts in this case—between the decedent and USAA and then later between the decedent and Wells Fargo—the Plaintiff was not a party to either contracts. The Plaintiff's previous status as a beneficiary to the decedent's account does create in her a vested interest. 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."); Luszcz v. Lavoie, 787 So. 2d 245, 248 (Fla. Dist. Ct. App. 2001)("[A] beneficiary's rights to proceeds [of an IRA] do not attach until the IRA owner's death. Until then, the beneficiary merely has an expectancy in the IRA because until the owner's death, the owner can do with the IRA as desired, including changing the beneficiary designation or cashing out the account altogether.") Because the Plaintiff was not a party to the USAA contract, she cannot

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assert or recover on a tortious interference cause of action. Cf. Ross v. Life Ins. Co. of Virginia, 273 S.C. 764, 766, 259 S.E.2d 814, 815 (1979)(citing Smith v. Citizens & Southern National Bank of S.C., 241 S.C. 285, 128 S.E.2d 112 (1962); Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945)) ("Moreover, the South Carolina cases recognizing a cause of action for tortious interference with a contract have been limited to situations where an action was brought against third persons rather than parties to the contract."). Plaintiff argued that she had a vested interested in the IRA because her father, Dr. Petit, lacked the ability to freely change beneficiaries on January 23, 2012, therefore the Plaintiff has a vested interest, requiring Defendant's motions to be denied. The Plaintiff claimed the decedent's health issues rendered him unable to change his beneficiary designation. In support of this claim, the Plaintiff argued that the decedent had dementia, heart problems, and glaucoma that made him unable to read. Additionally, the Plaintiff presented evidence that a short time prior to the beneficiary change the decedent lost consciousness of a cruise and underwent a heart catherization as a result. Still, while the evidence may demonstrate that the decedent was in poor health at the time the beneficiaries were changed, no evidence was presented demonstrating that the decedent was incompetent to execute the change. As such, Defendant's motion for summary judgment on this cause of action is granted.

II. Breach of Fiduciary Duty

Next, the Plaintiff alleges that the Defendant breached her fiduciary duty to the decedent by changing the beneficiaries of the decedent's former IRA. "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

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proximately resulting from the wrongful conduct of the defendant." RFT Mgmt. Co. v. Tinsley & Adams, 399 S.C. 322, 335-336, 732 S.E.2d 166 (2012)(citing Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct.App.2004); Spence v. Wingate, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011).

It is clear from the evidence submitted that Mrs. Van Swol owed the decedent as fiduciary duty when she given a power attorney by him. The Plaintiff argued that Mrs. Van Swol acted under her fiduciary duty when she filled out the 2012 form.

Plaintiff presents no legal principle, however, that this fiduciary duty extends to her as a beneficiary of the account, though she argued her interest was vested because her father, Dr. Petit, lacked the ability to freely change beneficiaries on January 23, 2012. Even if the Defendant breached a fiduciary duty owed to the decedent (which she does not concede), this is a breach of a duty owed by the Defendant to the *decedent* and not the Plaintiff. In this way, any resulting injury from such a breach would be to the decedent's estate, not to the Plaintiff personally. Plaintiff did not present more than a scintilla of evidence. Summary judgment as to the Plaintiff's second cause of action against Mrs. Van Swol must be granted in favor of Mrs. Van Swol.

III. Negligence

Thereafter, the Plaintiff asserts that Mrs. Van Swol's conduct in this case arises to the level of negligence. This claim must also fail because the Plaintiff cannot show that any of her resulting damages are non-economic. However, Plaintiff testified that she suffered emotional damages and nightmares defeats this assertion. The South Carolina Supreme Court has long held that "tort liability only lies where the damage done is to other property or is personal injury." Kennedy v. Columbia Lumber & Mfg. Co., Inc.,

299 S.C. 335, 341, 384 S.E. 2d. 730 (1989). This rule, known as the economic loss rule, finds its bedrock in products liability law but the principles which underpin its application are particularly prescient here. In Sapp v. Ford Motor Co., 687 S.E. 2d 47 (2009), the Supreme Court expressed that it was "cautious in permitting negligence actions where there is neither personal injury nor property damage." Id. at 149. The Court explained in Sapp,

> [t]he purpose of the economic loss rule is to define the line between recovery in tort and recovery in contract. Contract law seeks to protect the expectancy interests of the parties. Tort law, on the other hand, seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property.

This statement of public policy is abundantly applicable here. This is not a matter of personal injury or damage to property. Rather, it is a claim arising out of the Plaintiff's expectations—reasonable or not—under the IRAs here at issue. Any such claim is one in contract, not in tort.

At the same time, the Plaintiff cannot recover under a negligence theory because the Plaintiff cannot demonstrate that there was any duty to her by the Defendant with regard to the decedent's IRA, despite the Plaintiff's claims that she had a vested interest in the account. As already set forth in the section above, the Plaintiff is not a third-party beneficiary and therefore the Plaintiff would not have standing to seek damages from the Defendant *even if* South Carolina recognized a cause of action for breach of duty to a third-party beneficiary sounding in negligence. Moreover, it would be absurd to allow the Plaintiff to recover damages in a third-party negligence case where she could not recover damages in a third-party contract case.

IV. Undue Influence

Lastly, the Plaintiff accuses the Defendant exercising undue influence on the decedent, causing him to change the beneficiaries. The Plaintiff alleges that the Defendant improperly and unduly influenced the decedent because she "exercised complete control over [the decedent's life] . . . from what he ate to where he went, to what he wore. Sometimes, even when [the Plaintiff] could see him." In this regard, the Supreme Court's decision in Calhoun v. Calhoun, 277 S.C. 527, 290 S.E.2d 415 (1982), is instructive. Calhoun concerned itself with undue influence in the making of a will. The pertinent facts in Calhoun were succinctly stated by the Court:

> [t]he respondents attempted to prove that appellant Virginia Calhoun unduly influenced the testator to leave her the greatest portion of his estate. Their evidence consisted of the following: the testator was physically feeble; he was temporarily confused during a period of hospitalization one year before he executed the will; approximately two months after he executed the will, he was disoriented; appellant Virginia Calhoun visited the testator in the nursing home almost everyday; the testator sometimes would "fuss" at her when he was frustrated; the testator once was overheard to say that appellant Virginia Calhoun wanted it all; she asked Dr. Wilson to examine the testator before he made some changes in his will; and she drove the testator to his attorney's office to prepare the will. However, appellant Virginia Calhoun was not present during any of the testator's conferences with his attorney nor was she physically present when the will was executed. She did not have possession of the will after its execution; instead, testator's accountant, close friend, and a subscribing witness, Mr. Holbert, kept it in his possession. Mr. Holbert testified that on the date of the execution the testator was rational, was not rushed into signing the will, and seemed satisfied with it.

Id. at 532-33. Rejecting the respondents' claims of influence, the Court held that "the issue of undue influence should be resolved in the light of proposition that a sane testator has the right to dispose of his property as he chooses." Id. at 532 (citing Harris v. Berry, 231 S.C. 201, 98 S.E.2d 251 (1957)). Moreover, the Court reasoned "where the testator has had the unhampered opportunity to revoke his will subsequent to the operation of any undue influence upon him, but makes no changes in it, the court generally considers

the effect of the testimony bearing upon undue influence in a large measure destroyed." Calhoun, 277 at 533.

Plaintiff argued the *Calhoun* case is distinguishable. In *Calhoun*, the decedent was physically feeble, temporarily confused one year prior to executing the will, and disoriented about two months after signing the will. *Id.* at 532-33, 415 S.E.2d at 418. In the present matter, the decedent was an 87-year-old man with dementia hospitalized in the intensive or critical care unit for weeks, after undergoing two surgical procedures, and was taking pain medication when he signed the change of beneficiary designation. (Van Swol Depo. 33:8-12, 34:2-15, 34:20-25, 35:1-13, 37:18-24, 40:22-24, 46:5-7, 46:11-15, 48:19). This is far more evidence than that presented in *Calhoun.*

Plaintiff argued that our supreme court has recognized that "by the very nature of the case, the evidence of undue influence will be mainly circumstantial. It is not usually exercised openly so it can be directly proved." *Hembree v. Estate of Hembree*, 311 S.C. 192, 196, 428 S.E.2d 3, 5 (Ct. App. 1993) (*citing Byrd v. Byrd*, 279 S.C. 425, 427, 308 S.E.2d 788, 789 (1983)). "In cases where allegations of undue influence have been successful, there has been evidence of threats, force, restricted visitation, or an existing fiduciary relationship at the time of or before the will's execution." *Id.* at 196, 428 S.E.2d at 5 (*citing Byrd v. Byrd*, 279 S.C. 425, 308 S.E.2d 788 (1983) and *Moorer v. Bull*, 212 S.C. 146, 46 S.E.2d 681 (1948)).

Here, the court finds Plaintiff's evidence is not sufficient to defeat Defendant's motion for summary judgment. Evidence presented by Mrs. Van Swol demonstrates that the decedent was certainly competent enough to execute other legal binding documents prior to the 2014 finding of incapacity. In fact, he was found by the Probate Court to have

been perfectly capable of executing a power of attorney in favor of Mr. Dorn. In this way, the decedent was perfectly capable of making subsequent changes to his designation of beneficiaries. Even more remarkable is the fact that the Defendant had a power of attorney allowing her to make changes to the IRA, meaning that the application of any undue influence was completely unnecessary. Finally, the beneficiaries in question where the decedent's grandchildren, not the decedent or anyone closely associated with the decedent. It begs the question as to why the Defendant would exert such overbearing influence on the decedent for literally no gain whatsoever. As such, summary judgment in favor of Mrs. Van Swol must be granted as to this count as well.

Finally, it is significantly important to point out that the IRA which ultimately paid the beneficiaries in question—wrongfully or not—is not the IRA account established with USAA to which Mrs. Van Swol had access. This is a critical point germane to each of the counts leveled by the Plaintiff against Mrs. Van Swol. Rather, the IRA which is truly at issue in this litigation is one established with Wells Fargo, N.A., by the decedent's legal attorney in fact, Henry Dorn. There is no dispute in this case as to this fact or to the fact that Mr. Dorn was legally authorized to establish the said IRA. Moreover, there is no factual to dispute as to the Defendant's involvement in the establishment of this IRA—that is to say, none. So, even if, viewed in the light most favorable to her, the Plaintiff were able to show that Mrs. Van Swol had tortuously interfered with the Plaintiff's vested rights under the decedent's IRA with USAA, that plan had long been unfunded by Mr. Dorn by the time the decedent had passed away.

CONCLUSION

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For the reasons cited herein, the Defendant Phyllis Van Swol's Motion for Summary Judgment is GRANTED.

It Is So Ordered.

Presiding Circuit Court Judge
Eighth Judicial Circuit

On 1-15, 2019 20
At Laurens, S.C.

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Filed GP 8th Jud Cir Greenwood, SC
2020 JAN 15 PM 4:23

STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
Karen Petit, Plaintiff, vs. Phyllis Jean Krohn, USAA Federal Savings Bank, and USAA Investment Management Co., Defendants.	)	Civil Action No. 2017-CP-24-01343 **ORDER**

Defendants USAA Federal Savings Bank, and USAA Investment Management Co. (collectively "the USAA Defendants"), came before the Court for hearing on September 4, 2019. Jane H. Merrill appeared on behalf of Karen Petit ("Plaintiff"). Joshua S. Nasrollahi appeared on behalf of Phyllis Jean Krohn ("Krohn"). William S. Brown appeared on behalf of the USAA Defendants. Having heard the arguments and reviewed the record in this case and the submissions of the parties, the USAA Defendant's Motion for Summary Judgment is granted.

INTRODUCTION AND UNDISPUTED FACTS

Dr. Edward L. Petit ("Dr. Petit") held an Individual Retirement Account ("IRA") at USAA Federal Savings Bank (from 2002-2007), and subsequently with USAA Investment Management Co., from 2007 until 2014 (the "USAA IRA"). (USAA Def. Memo. at **Ex. A**; *Id.* at **Ex. B**.) On January 15, 2007, Dr. Petit completed a designation of beneficiary form, naming his two daughters, Plaintiff and Kathy Elise Petit ("Kathy"), as his beneficiaries. (*Id.* at **Ex. C**.)

On January 26, 2009, Dr. Petit completed a USAA Power of Attorney, naming Defendant Phyllis Krohn ("Ms. Krohn") as his Attorney-in-Fact. (*Id.* at **Ex. D**; Compl. ¶ 11.) Plaintiff claims that this Power of Attorney form prohibited the Attorney-in-Fact from changing the beneficiaries

of the USAA IRA. (Compl. ¶ 14.) Ms. Krohn did not sign or execute any documents under the January 26, 2009 USAA Power of Attorney. (Plaintiff Depo. at 151:11-20, 164:18-165:1, 166:25-167:10.) On November 9, 2010, Dr. Petit completed a subsequent USAA Power of Attorney, again naming Ms. Krohn as his Attorney-in-Fact. (USAA Def. Memo. at **Ex. G**.) The November 9, 2010 Power of Attorney did not prohibit the Attorney-in-Fact from changing the USAA IRA's beneficiaries. (*Id.*) Again, the evidence does not show, nor does Plaintiff contend, that Ms. Krohn signed or executed any documents under the November 9, 2010 Power of Attorney. (Plaintiff Depo. at 151:11-20; Krohn Depo. at 76:12-19.)

On January 23, 2012, Dr. Petit executed a designation of beneficiary form which designated his two Granddaughters, Leaman Mosby ("Leaman") and Caroline Mosby ("Caroline") as primary beneficiaries, and Plaintiff and her sister Kathy as secondary beneficiaries. (*See* USAA Def. Memo. at **Ex. I**; Compl. ¶ 6.) The form was filled out by Ms. Krohn, but signed by Dr. Petit.

On February 27, 2012, Dr. Petit executed a Durable General Power of Attorney, naming Henry A. Dorn, ("Mr. Dorn") as his Attorney-in-Fact. (USAA Def. Memo. at **Ex. J**; *see also id.* at **Ex. K**.) On May 15, 2013, the Probate Court of Greenwood County declared Dr. Petit incompetent, however, it found that Dr. Petit was competent to execute 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.*)

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. ¶ 10; Plaintiff Depo. at 96:13-24.) The beneficiaries of the Wells Fargo IRA were designated as Leaman and Caroline. (Plaintiff Depo. at 106:9-15.)

On March 18, 2015, Dr. Petit passed away. (Compl. ¶ 4.) He was survived by Plaintiff, and his two granddaughters, Leaman and Caroline. (*Id.* ¶ 6.) At the time of his death, Dr. Petit's Wells Fargo IRA was worth approximately $454,332, and his USAA IRA was closed. (*Id.* ¶ 10; Plaintiff Depo. at 96:13-24.) Wells Fargo released the funds to Leaman and Caroline, as they were the beneficiaries of the Wells Fargo IRA. (Compl. ¶ 16; Plaintiff Depo. at 106:9-15.)

On November 8, 2017, Plaintiff filed this action. Plaintiff asserted three causes of action against the USAA Defendants: (1) breach of contract, (2) breach of fiduciary duty, and (3) negligence. Plaintiff's claims are all based on the allegation that the beneficiaries of the USAA IRA were improperly changed. (*See* Compl.)

LEGAL STANDARD

"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 his complaint but must disclose the facts he intends to rely on by affidavit or other proof." *Id.*

LEGAL FINDINGS

I. There is no evidence that Dr. Petit's beneficiaries were improperly changed.

Plaintiff's breach of contract, breach of fiduciary duty, and negligence claims all arise out of Plaintiff's basic allegation that the beneficiaries of the USAA IRA were changed improperly. However, there is no evidence that the USAA Defendants caused the execution of the designation

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of beneficiary form at issue. The allegations in the Complaint focus on the USAA Defendants allegedly accepting a designation of beneficiary form purportedly executed by Ms. Krohn through an allegedly deficient power of attorney. But, Plaintiff has conceded that Dr. Petit signed the 2012 designation of beneficiary form that made Caroline and Leaman the beneficiaries of the USAA IRA.

Further, the designation of beneficiary form was signed by Dr. Petit a month before he executed a Durable General Power of Attorney in the Greenwood County Probate Court, which was later ratified by the Court on May 15, 2013, providing some evidence that Dr. Petit was competent at the time he signed the designation of beneficiary form. Plaintiff argued that Dr. Petit had been hospitalized in the days before he signed the designation of beneficiary form. However, Plaintiff has presented no evidence that he was incompetent, as opposed to merely having health issues.[1] The fact that Dr. Petit signed the designation of beneficiary form after being released from the hospital is not evidence that he was incompetent at the time he signed the designation of beneficiary form. Thus, the record shows that Dr. Petit, and not an Attorney-in-Fact or Krohn, signed the designation of beneficiary form, which designated Leaman and Caroline as his beneficiaries. Therefore, there is no dispute of material fact regarding the liability of the USAA defendants. Accordingly, the USAA Defendants' Motion for Summary Judgment must be granted.

II. Plaintiff lacks standing to assert her causes of action.

Furthermore, the Plaintiff lacks standing to bring this lawsuit. Under South Carolina law, the beneficiary of an IRA has no right to sue for the benefits until her rights have vested. *Shuler v. Equitable Life Assur. Soc. of U. S.*, 184 S.C. 485, 193 S.E. 46, 48 (1937) (holding that a

[1] There is no evidence in the record that the USAA defendants were ever informed of the hospitalization to cause them to question the validity of the signature of Dr. Petit.

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 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, Plaintiff never had a vested right in the IRA funds. Although Plaintiff tries to argue that Dr. Petit's hospitalization could have impacted his ability to execute documents, no medical evidence has been presented to support this argument. Additionally, Plaintiff admits that Dr. Petit had the right to freely change the beneficiaries of his IRAs during his lifetime.[2] (Plaintiff Depo. at 116:24-117:11; 156:5-157:10.) Further, Plaintiff was not the beneficiary of the IRA at the time of Dr. Petit's death. Dr. Petit changed his beneficiaries in 2012, from Plaintiff and her sister, to his granddaughters, Leaman and Caroline, who were also set as the beneficiaries of the Wells Fargo IRA. In 2015, Dr. Petit passed away, and the rights to the Wells Fargo IRA vested in the beneficiaries of the Wells Fargo IRA, Leaman and Caroline. (Compl. ¶ 16; Plaintiff Depo. at 106:9-15.) Thus, under South Carolina law, Plaintiff has no vested rights in the USAA IRA or the

[2] Additionally, Mr. Dorn had the ability to designate and change the beneficiaries of Dr. Petit's IRAs during Dr. Petit's lifetime. (Plaintiff Depo. at 156:5-157:10.)

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Wells Fargo IRA. Accordingly, Plaintiff lacks standing to bring this action, and therefore, the USAA Defendant's Motion for Summary Judgment must be granted.

III. The Plaintiff's individual causes of action fail as a matter of law.

A. The USAA Defendants did not owe a fiduciary duty to the Plaintiff.

To establish a claim for breach of fiduciary duty, the plaintiff must prove "a breach of that duty owed **to the plaintiff** by the defendant[.]" *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335, 732 S.E.2d 166, 173 (2012) (emphasis added). Plaintiff has alleged that the USAA Defendants owed a fiduciary duty to Dr. Petit, not to her. (*See* Compl. ¶ 49.) Further, the Plaintiff could not articulate any fiduciary duty owed to her. Thus, the only party that could have brought a suit against the USAA Defendants for a claimed breach of a fiduciary duty owed to Dr. Petit is Dr. Petit's estate.[3]

"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 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). A fiduciary relationship is an inherently personal relationship and arises out of a specific relationship between two parties. Thus, there can be no third-party beneficiary to a fiduciary relationship. Here, the Plaintiff and the USAA Defendants had no relationship, and a fiduciary duty between the Plaintiff and the USAA Defendants cannot arise out of Dr. Petit's relationship with the USAA Defendants. Accordingly, because the Plaintiff had no relationship with the USAA Defendants, there is no genuine dispute as to material fact that the USAA Defendants did not owe Plaintiff a fiduciary duty.

[3] Any claims by Dr. Petit's estate are barred by the statute of limitations because the IRA funds were disbursed by Wells Fargo more than three years ago. *See* S.C. Code Ann. § 15-3-530.

Nevertheless, the USAA defendants did not owe a fiduciary duty to either Dr. Petit or Plaintiff. 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 v. South Carolina Natl. Bank*, 288 S.C. 560, 562, 343 S.E.2d 667, 668 (Ct.App. 1986). The court makes the determination regarding the equitable issue of whether a fiduciary relationship exists. *Cowburn v. Leventis*, 366 S.C. 20, 37, 619 S.E.2d 437, 447 (Ct.App. 2005).

Plaintiff did not allege in her Complaint, nor present any evidence that the USAA Defendants held Dr. Petit's funds in trust or separated Dr. Petit's funds into a special account, or that the USAA Defendants undertook to advise Plaintiff or Dr. Petit as part of the services it offers. (Compl. ¶¶ 46-50.) It is only under such limited circumstances that South Carolina courts have been willing to entertain the potential existence of a fiduciary duty between banks and their customers. *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003); *Cowburn*, 366 S.C. at 43, 619 S.E.2d at 449. Plaintiff's only argument that the USAA Defendants undertook to advise Dr. Petit is that a Houston, Texas based agent traveled to Dr. Petit's home in Greenwood to discuss his account. (Krohn Depo. at 51:15-20). However, this alone is not evidence that the USAA Defendants undertook a fiduciary duty to advise Dr. Petit or that any such alleged duty was breached. Accordingly, there is no genuine issue as to material fact that the USAA Defendants did not owe Dr. Petit or the Plaintiff a fiduciary duty.

Further, although not recognized as one of two scenarios that create a fiduciary duty in a banking relationship under South Carolina law, Plaintiff alleged that the services the USAA Defendants provided for Dr. Petit, specifically, providing him with a Power of Attorney form, created a fiduciary duty. However, providing ministerial services, such as supplying form documents incidental to the IRA account does not create a fiduciary duty. *In re Int'l Payment Grp.*,

Inc., 733 F. App'x 98, 104 (4th Cir. 2018) (applying South Carolina law, holding that even where a depositor received unique services, no fiduciary duty was created because the relationship "did not differ significantly from the average depositor's relationship with the bank.") The USAA Defendants merely provided its client, Dr. Petit, with standard Power of Attorney and designation of beneficiary forms that he requested. This cannot be said to differ from the services that are provided to the average depositor. No fiduciary duty was owed to the Plaintiff or Dr. Petit, and Plaintiff's claim for breach of fiduciary duty fails as a matter of law. Accordingly, there is no genuine dispute as to material fact and summary judgment must be granted.

B. Plaintiff has presented no evidence of a duty created by any contract.

As discussed above, Plaintiff had no vested interest in the USAA IRA because Dr. Petit retained the ability to change beneficiaries during his lifetime, and because his granddaughters were the primary beneficiaries at the time Dr. Petit passed away. (Plaintiff Depo. at 116:24-117:11, 106:9-15; *see* USAA Def. Memo. at **Ex. I**.) Accordingly, the only legal duty was owed to Dr. Petit, the accountholder, and thus, the Plaintiff has no standing to bring this action.

Even if Plaintiff had standing to bring a claim for breach of contract, she does not specify a particular contract or any contractual provisions allegedly breached. (Compl. at ¶¶ 42-45.) The Complaint cites to the January 26, 2009 Power of Attorney between Dr. Petit and Ms. 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). However, 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 Ms. Krohn to perform tasks for Dr. Petit. Plaintiff cannot claim that the USAA Defendants breached an

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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 that was allegedly breached. Plaintiff does not allege that any provisions of any agreement between the USAA Defendants and Plaintiff or Dr. Petit were breached, and therefore, there is no genuine issue as to material fact that there is no breach of contract.

C. The USAA Defendants owed no common law duty to the Plaintiff.

The USAA Defendants owed no common law duty to the Plaintiff. Plaintiff contends that the USAA Defendants had a duty to ensure that Dr. Petit was the person signing his designation of beneficiary forms. As discussed above, Plaintiff has conceded that Dr. Petit signed the designation of beneficiary form, although Plaintiff argued Dr. Petit was incompetent to sign it on January 23, 2012. Additionally, 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*, 366 S.C. at 46, 619 S.E.2d at 451. 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). "If there is no duty, the defendant is entitled to judgment as a matter of law." *Id.* From the material submitted in this matter, the Court finds no common law duty owed by the USAA defendants to Plaintiff. Defendant's motion for summary judgment must be granted.[4]

[4] The USAA Defendants also raised issues regarding the statute of limitations. Because of the rulings made in this Order, the Court finds that it need not reach those issues.

CONCLUSION

For the reasons set forth above, as to all three causes of action the USAA Defendants' Motion to for Summary Judgment is GRANTED.

IT IS SO ORDERED

~~Honorable~~ Donald Hocker
Presiding Judge, Eighth Judicial Circuit

Laurens, South Carolina
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STATE OF SOUTH CAROLINA	COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	EIGHTH JUDICIAL CIRCUIT
KAREN PETIT, *Plaintiff,* *-v-* PHYLLIS VAN SWOL *f/k/a/* PHYLLIS KROHN et al., *Defendants*.	Case No.: 2017-CP-24-01343

ORDER

Hocker, J.

This Matter Came Before the Court by way of a motion for reconsideration filed by the Plaintiff in response to this Court's Order granting summary judgment in favor of the Defendant Phyllis Van Swol. For the reasons stated below, I deny the motion.

FACTS

The facts underyling this litigation are more fully set forth in this Court's Order Granting Summary Judgment dated and entered January 15, 2020, and those facts are incorporated by reference here. In summary for the purposes of this Order, however, the Plaintiff is the daughter of the decedent Dr. Edward Petit and the Defendant Phyllis Van Swol (F/K/A/ Phyllis Krohn") was the decedent's "companion." For a large period of time, the decedent held an IRA account with the co-Defendant USAA Investment Management Co. (hereinafter "USAA"). The Plaintiff and her sister were the original beneficiaries of the account until 2012, changed the designation of beneficiaries to his granddaughters. That same year, the decedent granted Henry Dorn a durable general power of attorney, the validity of which was upheld by the Greenwood County Probate

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Court during capacity proceedings involving the decedent in 2014. While the decedent had granted the Defendant various powers of attorney prior to 2012, there is no evidence that the Defendant acted in furtherance of any such powers or that any person other than the decedent changed the IRA's beneficiaries to his granddaughters.

In any event, after the decedent was declared incapacitated, Mr. Dorn, using his duly executed and judicially approved power of attorney, established an IRA account with Wells Fargo N.A., naming the grandchildren as the beneficiaries thereof. The USAA account was liquidated, transferred into the Wells Fargo account, and closed. When the decedent passed away in 2015, Wells Fargo distributed the account balance to the decedent's grandchildren. This lawsuit was filed several years later, asserting causes of action against the Defendant and USAA for, inter alia, tortious interference with a contract, breach of fiduciary duty, negligence, and undue influence. As stated above, summary judgment was granted in favor of the Defendant on all counts.

ANALYSIS

In her motion to reconsider, the Plaintiff asserts two major exceptions to the Court's ruling. First, the Plaintiff argues that the Court failed to consider that the Defendant told the Plaintiff that she had "unilaterally decided to change the beneficiaries on [the decedent's] IRA, and filled out the form to do so." The uncontroverted evidence in this case demonstrates that the forms submitted to USAA by the decedent to change beneficiaries were completed by the Defendant—in her deposition, she admitted to doing so. At the same time, the uncontroverted evidence also demonstrates that the decedent himself executed the completed forms. As discussed below, there is no evidence in the record that the decedent lacked capacity to sign the forms or that he executed the forms

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involuntarily or as a result of fraud or coercion. Moreover, the Plaintiff's allegations that the Defendant concealed the decedent's health condition from her, even in viewed in the light most favorable to the Plaintiff, does not provide any proof that the decedent's will was overborn by the Defendant. In short, there is no evidence in the record to demonstrate that the decedent executed the change of beneficiary forms involuntarily even if completed by the Defendant.

Next, the Plaintiff argues that the Court did not give due weight to the decedent's condition, specifically that he had "dementia, heart problems, and glaucoma that made him unable to read" and that the decedent had recently lost consciousness on a cruise, resulting in significant medical procedures and medication. While the Plaintiff does produce sufficient evidence showing that the decedent suffered from these maladies and was in a bad state at around the time he executed the change in beneficiaries form, she does not tie these facts to the decedent's capacity or any proof that the change in beneficiaries was anything other than voluntary. What the evidence does show, however, is that the decedent's condition continued to deteriorate until he was declared incapacitated by the Greenwood County Probate Court in 2014. All the while, the decedent continued to execute other legal documents which the Plaintiff did not challenge the legality of. One of those documents was the power of attorney executed in favor of Mr. Dorn, signed only a few months after the incident on the cruise and the decedent's change of beneficiaries with USAA. This document was adjudicated by the probate court to be a valid, durable power of attorney. Even when viewed in the light most favorable to the Plaintiff, if there were periods of time between the cruise incident and the execution of Mr. Dorn's power of attorney when the decedent lacked capacity to change his

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beneficiaries, the Plaintiff has failed to provide even a scintilla of evidence demonstrating that the change of the USAA account's beneficiaries occurred during a period of incapacity.

Finally, as a point that was not addressed by the Plaintiff in her motion, the account that made distributions to the decedent's grandchildren on his death was the Wells Fargo IRA and not the USAA account. This was the same account established by Mr. Dorn pursuant to his valid power of attorney and the beneficiaries thereto were designated, again, by Mr. Dorn pursuant to his valid power of attorney. This is a point that was repeated in this Court's Order Granting Summary Judgment. Ungirding this point is the dearth of evidence demonstrating that Mr. Dorn's conduct was in anyway improper or not otherwise in the best interest of the decedent, which is only equal to the absence of any evidence tending to show in any way that Mr. Dorn would have behaved differently under different circumstances.

CONCLUSION

For the reasons cited herein, the Plaintiff's Motion to Reconsider is DENIED.

It Is So Ordered.

_____
Presiding Circuit Court Judge
Eighth Judicial Circuit

On _____, 2020
At _____, S.C.

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Greenwood Common Pleas

Case Caption: Karen Petit VS Phyllis Jean Krohn , defendant, et al

Case Number: 2017CP2401343

Type: Order/Other

Circuit Court Judge

s/Donald B. Hocker, Judge Code 2167

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STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)))	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
Karen Petit, Plaintiff, vs. Phyllis Jean Krohn, USAA Federal Savings Bank, and USAA Investment Management Co., Defendants.	)))))))))))	Civil Action No. 2017-CP-24-01343 **ORDER**

On January 15, 2020, the Court issued an order granting Defendants USAA Federal Savings Bank, and USAA Investment Management Co.'s (collectively "the USAA Defendants") Motion for Summary Judgment (the "Order"). On January 27, 2020, Karen Petit ("Plaintiff") filed a Motion to Reconsider the Order. Having reviewed the record in this case and the submissions of the parties, Plaintiff's Motion to Reconsider is denied.

BACKGROUND AND PROCEDURAL HISTORY

On November 8, 2017, Plaintiff filed this lawsuit against the USAA Defendants and Phyllis Krohn ("Ms. Krohn"), asserting claims for breach of contract, negligence, and breach of a fiduciary duty against the USAA Defendants. (*See* Compl.) On August 5, 2019, the USAA Defendants moved for summary judgment on all of Plaintiff's claims asserted against them. The grounds for the USAA Defendants' motion were as follows: Plaintiff lacked standing to bring her causes of action; Plaintiff could not, as a matter of law, establish a breach of contract; there was no fiduciary relationship between the USAA Defendants and Plaintiff, and Plaintiff could not, as a matter of law, establish a breach of a fiduciary duty; Plaintiff could not, as a matter of law, establish that the USAA Defendants were negligent, and; that Plaintiff's claims against the USAA Defendants were

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barred by the Statute of Limitations. (*See* USAA Defendants Mot. Summ. J.) On September 4, 2019, a hearing was held on the USAA Defendants' Motion for Summary Judgment, at which time the Court heard arguments from counsel for all parties.

LEGAL STANDARD

Rule 59(e) allows a court to alter or amend a judgment upon a party's timely motion. A motion under Rule 59(e) has long been viewed as a "motion for reconsideration." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). A motion to reconsider pursuant to Rule 59(e), SCRCP, is appropriate in two basic situations. First, "[a] party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Id.* at 24, 602 S.E.2d at 780. Second, "[a] party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Id.* The decision to grant relief under Rule 59 rests within the sound discretion of the trial judge and will not be disturbed on appeal unless the "findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Brinkley v. S.C. Dep't of Corr.*, 386 S.C. 182, 184, 687 S.E.2d 54, 56 (Ct. App. 2009).

Under Rule 59(f), SCRCP, a Rule 59(e) motion "may in the discretion of the court be determined on the briefs filed by the parties without oral argument." *Pollard v. Cty of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994).

ARGUMENTS

I. Plaintiff's Motion Does Not Establish Grounds for Relief Under SCRCP 59(e).

A. The Court Properly Considered the Lack of Evidence of Incompetence.

Plaintiff claims that the Court should reconsider its Order because the Order cites a lack of

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medical records as a reason for granting the USAA Defendants' Motion for Summary Judgment. Plaintiff claims the lack of medical records was not cited in the USAA Defendants' motion, supporting memorandum, nor included in their oral argument. However, in its supporting memorandum, and at the hearing on the motion, the USAA Defendants argued that there was no evidence that Dr. Petit was incompetent when he signed the Designation of Beneficiary Form, and that the only evidence showed that a competent Dr. Petit signed the Designation of Beneficiary Form. (*See* USAA Memo. in Supp. Mot. Summ. J. at 3, 7-8, 14, 16, 17.) The USAA Defendants' argued, and the record reveals, that Plaintiff provided no evidence that Dr. Petit was medically incompetent. Dr. Petit having health issues, even if there was evidence that USAA was aware of them, does not equate to evidence of incompetence.

In determining a motion for summary judgment, a court considers all evidence in the record. *Anthony v. Padmar, Inc.*, 307 S.C. 503, 415 S.E.2d 828 (Ct.App.1992). The Rules of Civil Procedure allow the Court to note the lack of medical evidence in the record. Thus, not only was the issue brought to the Court's attention, but a review of the record reveals the lack of any medical evidence that Dr. Petit was incompetent at the pertinent time. Accordingly, Plaintiff's Motion to Reconsider is denied.

B. The Order Accurately Stated that Plaintiff Failed to Establish a Contract or Contractual Provision that was Breached

Plaintiff claims that the Order "inaccurately states Plaintiff did not specify a contract which was breached, when Defendants USAA admitted a contract existed in its Answer to Plaintiff's Complaint." (Pl.'s Mot. to Recons. At 2.) A review of the pleadings reveals that the USAA Defendants admitted that a contract existed with Dr. Petit, not with Plaintiff. There was no admission, and no evidence in the record, showing that a contract existed between the USAA Defendants and Plaintiff. Thus, the Order accurately states that Plaintiff did not point to a contract

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to which she was a party or a contractual provision that was breached. Accordingly, Plaintiff's Motion to Reconsider is denied.

C. The Order Appropriately Declined to Rule on the Statute of Limitations Argument.

Plaintiff argues that the Court erred because it did not rule on the USAA Defendants' statute of limitations argument. (Pl.'s Mot. to Recons. at 3.) However, in its Order granting the USAA Defendants' Motion for Summary Judgment, the Court noted: "[b]ecause of the rulings made in this Order, the Court finds that it need not reach [the statute of limitations issue]." (Order Granting USAA Defs.' Mot. Summ. J. at 9 n.4.) A court is not required to rule on every issue presented where its other rulings are dispositive. *Walbeck v. I'On Co., LLC*, 426 S.C. 494, 527, 827 S.E.2d 348, 365 (Ct. App. 2019), reh'g denied (May 22, 2019); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999); *Whiteside v. Cherokee Cty. Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993). Further, because this issue is not an adverse ruling against Plaintiff, there is no prejudice to her in not reaching this potential additional grounds for summary judgment. Accordingly, Plaintiff's Motion to Reconsider is denied.

D. The Order Accurately Stated Its Reasoning for Granting Summary Judgment.

Plaintiff claims the Court did not consider all of the evidence that she claims supports her position in the Order granting the USAA Defendants' Motion for Summary Judgment.

Plaintiff inserted a list of bullet points in her motion for reconsideration claiming that the Court failed to consider the listed "evidence" it the Orders.[1]

[1] Plaintiff has addressed the Orders granting Summary Judgment to the USAA Defendants and Ms. Krohn together. Some of the bullet points relate only to Ms. Krohn and cannot be a basis to challenge the Order regarding the USAA Defendants (points 1, 2, and 5).

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Bullets 3 and 4 relate to Dr. Petit's health, which the Court did consider in its Order. Specifically, the Court stated that there was no evidence that the USAA Defendants knew of Dr. Petit's hospitalization. (Order Granting USAA Defs.' Mot. Summ. J. at n.1.) Further the Court found that a competent Dr. Petit signed the change of beneficiary form.[2] (Order Granting USAA Defs.' Mot. Summ. J. at 2, 4, 9.) Thus, this was included in the Order.

In Bullet 6, Plaintiff claims that Dr. Petit had more than a banking relationship with the USAA Defendants. (Pl.'s Mot. to Recons. at 5.) The Court's Order contains over two pages of analysis regarding the lack of a fiduciary relationship between Dr. Petit (and/or Plaintiff) and the USAA Defendants. (Order Granting USAA Defs.' Mot. Summ. J. at 6-8.) The Court even expressly considered that a USAA Defendants' employee visited Dr. Petit's house, and the Court expressly rejected Plaintiff's argument that this was evidence of a fiduciary duty. (Order Granting USAA Defs.' Mot. Summ. J. at 7.)

In Bullet 7, Plaintiff claims that the Court failed to consider that Ms. Krohn filled out the Designation of Beneficiary Form. (Pl.'s Mot. to Recons. at 5-6.) However, this is noted in the Order (Order Granting USAA Defs.' Mot. Summ. J. at 2), but is rendered irrelevant by Plaintiff's admission that Dr. Petit, himself, signed the form, not Ms. Krohn.

Finally, in Bullet 8, Plaintiff discusses the FedEx label that was provided to Dr. Petit for him to return his Designation of Beneficiary Form. (Pl.'s Mot. to Recons. at 6.) Plaintiff's argument does not change the evidentiary impact of the FedEx label, which shows that Dr. Petit received the Designation of Beneficiary Form at his record address, signed it, and returned it to

[2] Although Plaintiff now argues that Dr. Petit was not competent to sign the Designation of Beneficiary Form, Plaintiff never alleged in her Complaint that Dr. Petit was incompetent. She merely alleged that the USAA Defendants were liable because Dr. Petit did not sign the Designation of Beneficiary Form. During discovery, this allegation was proven to be false, and Plaintiff has admitted that Dr. Petit signed the Designation of Beneficiary Form.

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the USAA Defendants using the FedEx label. Regardless of the address it was returned to, it was returned to the USAA Defendants. Further, Plaintiff's distinction regarding whether the label was provided to Dr. Petit at his request, or as a courtesy, is insignificant to the central issue in this case, which is, did Dr. Petit sign the Designation of Beneficiary Form. Plaintiff concedes that he did.

Summary judgment shall be granted if the evidence in the record shows that there is no genuine issue of material fact. *Anthony*, 307 S.C. 503, 415 S.E.2d 828. In this case, the Court issued the Order based on its review of the record, the oral arguments, and the submissions of the parties and determined that Plaintiff failed to present any genuine issue of material fact, and thus, granted the USAA Defendants' Motion for Summary Judgment. There is no requirement that the Court include all arguments of the non-prevailing party in its order. Accordingly, Plaintiff's Motion to Reconsider is denied.

CONCLUSION

Plaintiff has not shown that the Court erred in granting the USAA Defendants' Motion for Summary Judgment. Further, Plaintiff failed to meet the standard for altering or amending a judgment under Rule 59(e) of the South Carolina Rules of Civil Procedure. Therefore, Plaintiff's Motion to Reconsider is denied.

IT IS SO ORDERED.

_____

Honorable Donald Hocker
Presiding Judge, Eighth Judicial Circuit

_____, South Carolina
_____, 2020

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Greenwood Common Pleas

Case Caption: Karen Petit VS Phyllis Jean Krohn , defendant, et al

Case Number: 2017CP2401343

Type: Order/Other

Circuit Court Judge

s/Donald B. Hocker, Judge Code 2167

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)

IN THE COURT OF COMMON PLEAS

KAREN PETIT)
Plaintiff(s))

vs.

PHYLLIS JEAN KROHN, USAA FEDERAL SAVINGS BANK, AND USAA INVESTIMENT MANAGEMENT CO.)
Defendant(s))

CIVIL ACTION COVERSHEET

2017-CP - 24- 01343

Submitted By: Jane H. Merrill
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NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

If Action is Judgment/Settlement do not complete

- ☒ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
- ☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☒ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ General (130)
- ☒ Breach of Contract (140)
- ☐ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/ Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ Other (199) _____

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20___-NI-____-_____

- ☐ Notice/ File Med Mal (230)
- ☐ Other (299) _____

Torts – Personal Injury
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Assault/Battery (370)
- ☐ Slander/Libel (380)
- ☐ Other (399) _____

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499) _____

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599) _____

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899) _____

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799) _____

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999) _____

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699) _____
- ☐ Sexual Predator (510)
- ☐ Permanent Restraining Order (680)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Pre-Suit Discovery (670)

Submitting Party Signature: Jane H. Merrill **Date:** Nov 8, 2017

SCCA / 234 (03/2016)

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

State of South Carolina, County of Greenwood
In the Common Pleas Court, Eighth Judicial Circuit

Karen Petit Plaintiff, vs. Phyllis Jean Krohn, USAA Federal Savings Bank, and USAA Investment Management Co. Defendants.	Case No. 2017-CP-24- 01343 Summons

FILED
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

To the above named Defendants:

You are summoned and required to answer the Complaint in this action, a copy of which is served upon you, and to serve a copy of your Answer to the Complaint on the subscriber at her office at 410 Main Street, Greenwood, South Carolina, within thirty (30) days, exclusive of the day of service. If you fail to answer the Complaint within the requisite time, judgment by default will be rendered against you and Plaintiff will apply to the Court for the relief demanded in the Complaint.

HAWTHORNE MERRILL LAW, LLC

Jane H. Merrill

Jane H. Merrill, SC Bar # 74269
410 Main St. | Greenwood, SC 29646
864-229-1010 | jane@hmlawsc.com

November 8, 2017
Greenwood, SC

State of South Carolina, County of Greenwood
In the Common Pleas Court, Eighth Judicial Circuit

Karen Petit

Plaintiff,

vs.

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

Defendants.

Case No. 2017-CP-24-01343

Complaint

(Jury Trial Demanded)

FILED
6TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

JURISDICTION AND VENUE

1. Plaintiff is a resident and citizen of Greenwood County, South Carolina, and has been for more than one year prior to commencing this action.
2. Defendant Phyllis Jean Krohn (Defendant Krohn) is a resident and citizen of Greenwood County, South Carolina, and has been for more than one year prior to the commencement of this action.
3. Defendants USAA Federal Savings Bank and USAA Investment Managements Co. (collectively, Defendants USAA) are businesses engaged in insurance, banking, investments, and retirement planning, operating in South Carolina.

FACTUAL ALLEGATIONS

4. Dr. Edward L. Petit (Dr. Petit) died testate on March 18, 2015.
5. Attorney Peter J. Manning serves as the Personal Representative of Dr. Petit's estate.
6. Surviving Dr. Petit were his daughter Karen Petit (Plaintiff), and two granddaughters, Leaman Mosby McCarley and Caroline Mosby. Dr. Petit's wife, Helen, and daughter, Kathy Elise Petit, the mother of his granddaughters, predeceased him.

7. Plaintiff and Dr. Petit's granddaughters were the beneficiaries of his estate.
8. Defendant Krohn and Dr. Petit were companions beginning sometime in 2007 until Dr. Petit's death.
9. During Dr. Petit and Defendant Krohn's companionship they maintained separate residences; however, on various occasions Dr. Petit stayed at Defendant Krohn's home for weeks at a time during illness or recuperation from various medical procedures. The two occasionally traveled together. Defendant Krohn would often accompany Dr. Petit to his medical appointments.
10. At his death, Dr. Petit had an Individual Retirement Account (IRA) worth $454,332.00. This IRA account was originally held by Defendants USAA, and was transferred to Wells Fargo in approximately 2014.
11. On January 26, 2009, Dr. Petit allegedly appointed Defendant Krohn as his attorney in fact on a form entitled USAA POWER OF ATTORNEY.
12. Dr. Petit allegedly signed the USAA Power of Attorney before one witness, a notary public, Marie G. Marshall. South Carolina law requires two witnesses to the signing of a Power of Attorney.
13. The USAA Power of Attorney purports to grant the named attorney in fact, Defendant Krohn, access to the Grantor's accounts at USAA with certain limitations.
14. One specific limitation in section 1 (d) states:

> Limitations: My attorney does not have the authority to make himself or herself or others the co-owner or beneficiary of such investment accounts; does not have the authority to change ownership of such investment accounts; does not have a power of appointment over such investment accounts; and does not have the authority to make a gift

of the securities held in such investment accounts to himself or herself or to others.

15. Upon information and belief, despite this express limitation, Defendant Krohn unilaterally decided to change the beneficiaries from Plaintiff and her (late) sister Kathy, to Dr. Petit's granddaughters. The exact date Defendant Krohn changed the beneficiaries, without authorization, is unknown.
16. After Dr. Petit's death, Plaintiff was surprised to learn that she was not a beneficiary of her father's IRA. Until this discovery, Plaintiff believed that she and her sister, Kathy, were the beneficiaries. At that time, Plaintiff did not know when or who changed the beneficiaries.
17. In June 2017, Defendant Krohn approached Plaintiff in a public setting, and apologized for changing, without authorization, the beneficiaries of Dr. Petit's IRA.
18. Upon information and belief, Defendant Krohn unilaterally decided to change the beneficiaries of Dr. Petit's IRA, and made the changes herself as the alleged attorney in fact named in the USAA Power of Attorney.

First Cause of Action

Interference with a Contractual Relationship

Defendant Krohn

19. The preceding paragraphs are incorporated.
20. Dr. Petit's IRA existed because Dr. Petit and Defendants USAA entered into a contract. As part of this contract, Dr. Petit designated beneficiaries to receive any remaining funds in his USAA accounts at his death.
21. Defendant Krohn knew about the contract as evidenced by her accessing the account, allegedly being appointed as attorney in fact, and changing the beneficiaries for this account.
22. The contract between Defendants USAA and Dr. Petit included his designating his two daughters, Plaintiff and her (late) sister, Kathy,

as beneficiaries. Defendant Krohn intentionally interfered with this contract by changing the beneficiaries on Dr. Petit's account without justification or authorization.

23. Defendant Krohn's tortious interference with this contract caused damages to Plaintiff.

SECOND CAUSE OF ACTION

BREACH OF FIDUCIARY DUTY

DEFENDANT KROHN

24. The preceding paragraphs are incorporated.

25. 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 faith and with due regard to the interest of one proposing the confidence.

26. Defendant Krohn was acting as a fiduciary when she transacted business on behalf of Dr. Petit with Defendants USAA, as it did business with Defendant Krohn regardless of the invalidity of the USAA Power of Attorney. As such, Defendant Krohn was bound to act in good faith and with due regard to Dr. Petit's interest.

27. Defendant Krohn breached her fiduciary duty when she changed, without authorization, the beneficiaries of Dr. Petit's IRA. It does not matter that Defendant Krohn was operating under an alleged USAA Power of Attorney. Even if that Power of Attorney were valid, it expressly stated, "[Defendant Krohn] does not have the authority to make … herself or others the co-owner or beneficiary of such investment accounts."

28. Defendant Krohn's breach of fiduciary duty caused damages to Plaintiff.

THIRD CAUSE OF ACTION

NEGLIGENCE

DEFENDANT KROHN

29. The preceding paragraphs are incorporated.

30. Defendant Krohn voluntarily undertook a duty of due care to Plaintiff, a third party beneficiary of the USAA contract and Dr. Petit's daughter, when Defendant Krohn acted as Dr. Petit's alleged attorney in fact.
31. Defendant Krohn breached her duty by negligent, reckless, willful, or wanton acts of mismanaging the IRA account, accessing it without authorization, and changing the beneficiaries without authorization.
32. Defendant Krohn's breach of duty of due care proximately caused damages to Plaintiff.

FOURTH CAUSE OF ACTION

UNDUE INFLUENCE

DEFENDANT KROHN

33. The preceding paragraphs are incorporated.
34. Upon information and belief, Defendant Krohn unilaterally decided to change the beneficiaries of Dr. Petit's IRA, and made the changes herself as the attorney in fact named in the USAA Power of Attorney. Defendant Krohn told this to Plaintiff in June 2017.
35. Since Defendant Krohn is the source of this information, Plaintiff alleges, upon information and belief, that Defendant Krohn actually made the request to USAA to change the beneficiaries.
36. If, however, it is determined that Dr. Petit signed anything changing the beneficiaries, it was only because of Defendant Krohn's undue influence.
37. On January 26, 2009, Defendant Krohn took Dr. Petit to the hospital to sign three different documents, two power of attorney forms (one from Wachovia and one from USAA), and a health care power of attorney. Both prior to and after signing these documents, Dr. Petit employed an attorney for other legal matters and documents, and a CPA and/or financial advisor for other financial matters. Despite having these professionals to contact, it appears Defendant

Krohn filled out the forms, and Dr. Petit merely signed them in front of witnesses at the hospital.

38. Thereafter, Defendant Krohn inserted herself in Dr. Petit's financial matters repeatedly, and without Dr. Petit's prompting, and at times without his knowledge or consent.

39. Defendant Krohn added herself to Dr. Petit's checking account, including having her name printed on his checks as his "POA." However, a search of the Greenwood County public records does not show Dr. Petit executed a Power of Attorney appointing Defendant Krohn as his "POA."

40. Dr. Petit was susceptible to undue influence as a result of his physical condition, and later also because of his mental condition. Further, Dr. Petit and Defendant Krohn had a confidential relationship.

41. Defendant Krohn had the means and opportunity to unduly influence Dr. Petit in financial matters. Any such executed documents and/or transactions should be set aside because of Defendant Krohn's undue influence.

FIFTH CAUSE OF ACTION
BREACH OF CONTRACT
DEFENDANTS USAA

42. The preceding paragraphs are incorporated.

43. Defendants USAA and Dr. Petit entered into a contract when he deposited funds into an IRA at USAA. Plaintiff was a third-party beneficiary to this contract, because Dr. Petit named her as a beneficiary.

44. Defendants USAA breached this contract in several ways, including but not limited to, its use of a Power of Attorney that did not comply with South Carolina law; its permitting Defendant Krohn to access and make changes to Dr. Petit's IRA account without valid or legal authorization; and, its permitting Defendant Krohn to improperly and illegally change the beneficiaries of Dr. Petit's IRA.

That Defendant Krohn may have been operating under a Power of Attorney does not matter, because Defendants USAA's purported Power of Attorney included express language preventing an attorney in fact from changing the beneficiaries.

45. Defendants USAA's breach of contract directly and proximately caused damages to Plaintiff.

SIXTH CAUSE OF ACTION

BREACH OF FIDUCIARY DUTY

DEFENDANTS USAA

46. The preceding paragraphs are incorporated.

47. 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 faith and with due regard to the interest of one proposing the confidence.

48. Ordinarily, one transacting business with a financial institution creates a creditor debtor relationship rather than a fiduciary one. However, in some circumstances, a fiduciary relationship may be created.

49. Defendants USAA created such a fiduciary relationship when it sent a legal document, its Power of Attorney, to Dr. Petit. Defendants USAA's Power of Attorney did not require two witness's signatures as South Carolina law dictates it must. Even if Defendants USAA's Power of Attorney was valid, it expressly states an attorney in fact cannot change the beneficiaries. Defendants USAA breached its fiduciary duty by failing to follow the terms of its own legal document it provided to Dr. Petit.

50. Defendants USAA's breach of fiduciary duty caused damages to Plaintiff.

SEVENTH CAUSE OF ACTION

NEGLIGENCE

DEFENDANTS USAA

51. The preceding paragraphs are incorporated.

52. Defendants USAA owed a duty of care to Dr. Petit, and the beneficiaries he chose, one of whom was Plaintiff.
53. Defendants USAA breached its duty of care by negligent, reckless, willful, and wanton acts and omissions, including but not limited to providing an invalid Power of Attorney document to Dr. Petit, failing to realize the invalidity of the document, and failing to follow the terms of its Power of Attorney which limited and prevented an attorney in fact from changing beneficiaries.
54. Defendants USAA's breach of duty of due care proximately caused damages to Plaintiff.

Wherefore, Plaintiff prays to the Court for:

1. A jury trial.
2. Judgment against Defendants, jointly and severally, for actual damages, special damages, punitive damages, together with prejudgment and post judgement interest on her damages, as allowed by law, and the costs of this action.
3. And for such other relief as this Honorable Court may deem just and proper.

HAWTHORNE MERRILL LAW, LLC

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November 8, 2017
Greenwood, SC

STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

KAREN PETIT,
Plaintiff,

-v-

PHYLLIS KROHN ET AL.,
Defendants.

COURT OF COMMON PLEAS

EIGHTH JUDICIAL CIRCUIT

Case No.: 2017-CP-24-01343
(Jury Trial Demanded)

FILED C
8TH JUD
GRE
PLEAS
CUIT

ANSWER

Comes Now Phyllis Krohn, by and through undersigned counsel, and answers the Complaint as follows:

1. The Defendant is without sufficient information to admit or deny the allegations contained in paragraph 1 and to the extent that a response is necessary the Defendant denies the same.

2. The Defendant admits paragraph 2.

3. The Defendant is without sufficient information to admit or deny the allegations contained in paragraph 3 and to the extent that a response is necessary the Defendant denies the same.

4. The Defendant admits paragraph 4.

5. The Defendant admits paragraph 5.

6. The Defendant is without sufficient information to admit or deny the allegations contained in paragraph 6 and to the extent that a response is necessary the Defendant denies the same.

7. The Defendant admits paragraph 7.

8. The Defendant admits paragraph 8.

9. The Defendant admits paragraph 9.

10. The Defendant is without sufficient information to admit or deny the allegations contained in paragraph 10 and to the extent that a response is necessary the Defendant denies the same.

11. The Defendant admits paragraph 11.

12. The Defendant is without sufficient information to admit or deny the allegations contained in paragraph 12 and to the extent that a response is necessary the Defendant denies the same.

13. The Defendant is without sufficient information to admit or deny the allegations contained in paragraph 13 and to the extent that a response is neeessary the Defendant denies the same.

14. The Defendant is without sufficient information to admit or deny the allegations contained in paragraph 14 and to the extent that a response is necessary the Defendant denies the same.

15. The Defendant denies paragraph 15.

16. The Defendant is without sufficient information to admit or deny the allegations contained in paragraph 16 and to the extent that a response is necessary the Defendant denies the same.

17. The Defendant denies paragraph 17.

18. The Defendant denies paragraph 18.

19. In response to paragraph 19, the Defendant reiterates and incorporates by reference the responses heretofore plead.

20. The Defendant denies paragraph 20.

21. The Defendant denies paragraph 21.

22. The Defendant denies paragraph 22.

23. The Defendant denies paragraph 23.

24. In response to paragraph 24, the Defendant reiterates and incorporates by reference the responses heretofore plead.

25. Paragraph 25 constitutes a legal conclusion, which requires no response from the Defendant and, to the extent that a response is necessary, the Defendant denies the same.

26. Paragraph 26 constitutes a legal conclusion, which requires no response from the Defendant and, to the extent that a response is necessary, the Defendant denies the same.

27. The Defendant denies paragraph 27.

28. The Defendant denies paragraph 28.

29. In response to paragraph 29, the Defendant reiterates and incorporates by reference the responses heretofore plead.

30. The Defendant denies paragraph 30.

31. The Defendant denies paragraph 31.

32. The Defendant denies paragraph 32.

33. In response to paragraph 33, the Defendant reiterates and incorporates by reference the responses heretofore plead.

34. The Defendant denies paragraph 34.

35. The Defendant denies paragraph 35.

36. The Defendant denies paragraph 36.

37. The Defendant denies paragraph 37.

38. The Defendant denies paragraph 38.

39. The Defendant denies paragraph 39.

40. The Defendant denies paragraph 40.

41. The Defendant denies paragraph 41.

42. In response to paragraph 42, the Defendant reiterates and incorporates by reference the responses heretofore plead.

43. The Defendant denies paragraph 43.

44. The Defendant denies paragraph 44.

45. The Defendant denies paragraph 45

46. In response to paragraph 46, the Defendant reiterates and incorporates by reference the responses heretofore plead.

47. The Defendant denies paragraph 47.

48. The Defendant denies paragraph 48.

49. The Defendant denies paragraph 49.

50. The Defendant denies paragraph 50.

51. In response to paragraph 51, the Defendant reiterates and incorporates by reference the responses heretofore plead.

52. The Defendant denies paragraph 52.

53. The Defendant denies paragraph 53.

54. The Defendant denies paragraph 54.

55. The Defendant denies any and all other allegations not herein excepted to or otherwise qualified.

FOR A FIRST DEFENSE
(Failure to State Claim)

56. The Plaintiff has failed to state a claim upon which relief may be granted with regard to her first cause of action in that she was never a party to the agreement her at issue.

57. The Plaintiff further maintains that, as third-party beneficiary in an IRA account, she had only an expectancy in the benefits at issue. This is so because, under the terms of the agreement, the Decedent was free to change beneficiaries of the account at any time prior to his death. For this reason, the Plaintiff cannot maintain a tortious interference cause of action.

58. Additionally, the Plaintiff cannot maintain a tortious interference claim against the Defendant because, at all times, the Defendant acted as an agent for the Decedent and, for this reason, any such action cannot be construed as tortious interference.

FOR A SECOND DEFENSE
(Economic Loss)

59. The Plaintiff cannot recover purely economic damages under a negligence theory. For this reason, the Plaintiff's negligence cause of action must be dismissed.

Having answered the Complaint, the Defendant would pray the Court to dismiss the Complaint, deny the relief sought therein, and to award any and all other relief that the Court may deem just, proper, and equitable.

[Signature Follows on the Next Page]

Respectfully submitted,



Joshua S. Nasrollahi (SCBN 80227)

THE LAW OFFICE OF JOSHUA S. NASROLLAHI, LLC
215 Park Avenue
Greenwood, S.C. 29646
Telephone: (864) 538-6000
Facsimile: (864) 538-6014
josh@jsnasrollahi.com

Attorney for the Defendant

December 5, 2017

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Corporation Service Company
1703 Laurel Street
Columbia, SC 29201

9590 9402 1846 6104 5965 16

2. Article Number *(Transfer from service label)*

7016 1370 0001 6294 5365

PS Form 3811, July 2015 PSN 7530-02-000-9053

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

☐ Agent
☐ Addressee

B. Received by *(Printed Name)* Trey Williams

C. Date of Delivery 11/13/17

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type

☐ Adult Signature
☐ Adult Signature Restricted Delivery
☐ Certified Mail®
☐ Certified Mail Restricted Delivery
☐ Collect on Delivery
☐ Collect on Delivery Restricted Delivery
☐ Insured Mail
ad Mail Restricted Delivery
$500)

☐ Priority Mail Express®
☐ Registered Mail™
☐ Registered Mail Restricted Delivery
☐ Return Receipt for Merchandise
☐ Signature Confirmation™
☐ Signature Confirmation Restricted Delivery

Domestic Return Receipt

FILED IN COMMON PLEAS
8th JUDICIAL CIRCUIT
GREENWOOD, SC
2017 NOV 20 PM 2:36

2017-CP-24-01913

STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)))	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT JUDICIAL CIRCUIT
Karen Petit, Plaintiff, vs. Phylilis Jean Krohn, USAA Federal Savings Bank, and USAA Investment Management Co., Defendants.	))))))))))	Civil Action No. 2017-CP-24-01343 **ANSWER OF USAA FEDERAL SAVINGS BANK AND USAA INVESTMENT MANAGMENT CO.** Jury Trial Requested

FILED
GREENWOOD

COMES NOW, Defendants USAA Federal Savings Bank ("USAA FSB") and USAA Investment Management Co. ("USAA IMCO") (collectively "USAA"), by and through its undersigned counsel, respectfully submit this Answer to the Complaint of Plaintiff, Karen Petit ("Plaintiff"). Unless otherwise specifically admitted herein, USAA generally denies all Plaintiff's allegations contained in this Complaint.

FOR A FIRST DEFENSE

1. USAA is without sufficient information to form a belief as to the truth of the allegations contained in Paragraph 1 and therefore these allegations are denied.

2. USAA is without sufficient information to form a belief as to the truth of the allegations contained in Paragraph 2 and therefore these allegations are denied.

3. USAA admits so much of the allegations in Paragraph 3 as allege that USAA FSB and USAA IMCO are businesses engaged in banking and investments which are authorized to conduct business in South Carolina. All other allegations are denied.

4. USAA is without sufficient information to form a helief as to the truth of the allegations contained in Paragraph 4 and therefore these allegations are denied.

5. USAA is without sufficient information to form a belief as to the truth of the allegations contained in Paragraph 5 and therefore these allegations are denied.

6. USAA is without sufficient information to form a belief as to the truth of the allegations contained in Paragraph 6 and therefore these allegations are denied.

7. USAA is without sufficient information to form a belief as to the truth of the allegations contained in Paragraph 7 and therefore these allegations are denied.

8. USAA is without sufficient information to form a belief as to the truth of the allegations contained in Paragraph 8 and therefore these allegations are denied.

9. USAA is without sufficient information to form a helief as to the truth of the allegations contained in Paragraph 9 and therefore these allegations are denied.

10. USAA admits so much of the allegations of Paragraph 10 as allege that USAA FSB and USAA IMCO held an account owned by Ms. Petit which was an individual retirement account at some time in the past. The account was properly transferred to Wells Fargo prior to any distribution. Any other allegations contained in Paragraph 10 are denied.

11. USAA admits that Dr. Petit appears to have completed a USAA Power of Attorney Form on behalf of Defendant Krohn. Any and all other allegations contained in Paragraph 11 are denied.

12. Answering the allegations of Paragraph 12, this paragraph presents a conclusion of law, not an allegation of fact. To the extent Paragraph 12 asserts an allegation of fact, such allegation is denied.

13. Answering the allegations of Paragraph 13, this paragraph presents a conclusion of law and not an allegation of fact. To the extent Paragraph 13 asserts an allegation of fact, such allegation is denied.

14. Answering the allegations of Paragraph 14, this paragraph presents a conclusion of law and not an allegation of fact. To the extent that Paragraph 14 asserts an allegation of fact, such allegation is denied.

15. USAA denies the allegations of Paragraph 15.

16. USAA is without sufficient information to form a belief as to the truth of the allegations of Paragraph 16 and therefore these allegations are denied.

17. USAA is without sufficient information to form a belief as to the truth of the allegations of Paragraph 17 and therefore these allegations are denied.

18. USAA denies the allegations of Paragraph 18.

FOR A FIRST DEFENSE TO THE FIRST CAUSE OF ACTION
(Interference with Contractual Relationships Against Defendant Krohn)

19. Answering the allegations of Paragraph 19, USAA restates and reasserts each and every response provided above as if restated herein verbatim, to the extent not inconsistent herewith.

20. Answering the allegations of Paragraph 20, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

21. Answering the allegations of Paragraph 21, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

22. Answering the allegations of Paragraph 22, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

23. Answering the allegations of Paragraph 23, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

FOR A FIRST DEFENSE TO THE SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty Against Defendant Krohn)

24. Answering the allegations of Paragraph 24, USAA restates and reasserts each and every response provided above as if restated herein verbatim, to the extent not inconsistent herewith.

25. Answering the allegations of Paragraph 25, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

26. Answering the allegations of Paragraph 26, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

27. Answering the allegations of Paragraph 27, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

28. Answering the allegations of Paragraph 28, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

FOR A FIRST DEFENSE FOR THE THIRD CAUSE OF ACTION
(Negligence Against Defendant Krohn)

29. Answering the allegations of Paragraph 29, USAA restates and reasserts each and every response provided above as if restated herein verbatim, to the extent not inconsistent herewith.

30. Answering the allegations of Paragraph 30, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

31. Answering the allegations of Paragraph 31, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

32. Answering the allegations of Paragraph 32, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

FOR A FIRST DEFENSE TO THE FOURTH CAUSE OF ACTION
(Undue Influence Against Defendant Krohn)

33. Answering the allegations of Paragraph 33, USAA restates and reasserts each and every response provided above as if restated herein verbatim, to the extent not inconsistent herewith.

34. Answering the allegations of Paragraph 34, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

35. Answering the allegations of Paragraph 35, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

36. Answering the allegations of Paragraph 36, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

37. Answering the allegations of Paragraph 37, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

38. Answering the allegations of Paragraph 38, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

39. Answering the allegations of Paragraph 39, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

40. Answering the allegations of Paragraph 40, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

41. Answering the allegations of Paragraph 41, USAA contends that this paragraph does not assert allegations against the USAA entities. To the extent this paragraph is interpreted to assert allegations against the USAA entities, these allegations are denied.

FOR A FIRST DEFENSE TO THE FIFTH CAUSE OF ACTION
(Breach of Contract)

42. Answering the allegations of Paragraph 42, USAA restates and reasserts each and every response provided above as if restated herein verbatim, to the extent not inconsistent herewith.

43. Answering the allegations of Paragraph 43, USAA admits that at one time it was a party to a contract with Dr. Petit regarding the management of an IRA account. Any and all other allegations contained in Paragraph 43 are denied.

44. USAA denies the allegations of Paragraph 44.

45. USAA denies the allegations of Paragraph 45.

FOR A FIRST DEFENSE TO THE SIXTH CAUSE OF ACTON
(Breach of Fiduciary Duty)

46. Answering the allegations of Paragraph 46, USAA restates and reasserts each and every response provided above as if restated herein verbatim, to the extent not inconsistent herewith.

47. Answering the allegations of Paragraph 47, this paragraph presents a conclusion of law and not an allegation of fact. To the extent that Paragraph 47 asserts an allegation of fact, such allegation is denied.

48. Answering the allegations of Paragraph 48, this paragraph presents a conclusion of law and not an allegation of fact. To the extent that Paragraph 48 asserts an allegation of fact, such allegation is denied.

49. USAA denies the allegations of Paragraph 49.

50. USAA denies the allegations of Paragraph 50.

FOR A FIRST DEFENSE TO THE SEVENTH CAUSE OF ACTION
(Negligence)

51. Answering the allegations of Paragraph 51, USAA restates and reasserts each and every response provided above as if restated herein verbatim, to the extent not inconsistent herewith.

52. USAA denies the allegations of Paragraph 52.

53. USAA denies the allegations of Paragraph 53.

54. USAA denies the allegations of Paragraph 54.

55. USAA denies that Plaintiff is entitled to any of the relief sought in the prayer for relief.

FOR A SECOND DEFENSE
(Failure to State a Claim)

56. USAA contends that the Complaint fails to state a claim against the USAA entities for which relief can be granted and should be dismissed.

FOR A THIRD DEFENSE
(Denial of Breach)

57. USAA expressly denies the breach of any legally recognizable standard of care or legal duty or fiduciary duty, whether by act of commission or omission.

FOR A FOURTH DEFENSE
(Lack of Proximate Cause)

58. USAA expressly denies that any of its acts, whether by commission or omission, constitute a proximate cause of any alleged injuries or damages of which plaintiff has complained.

FOR A FIFTH DEFENSE
(Failure to Mitigate)

59. USAA raised the doctrine of failure to mitigate as a partial or total limitation to the alleged damages which Plaintiff claims. Such award must be reduced by the amount of which Plaintiff could have, but failed to, mitigate its damages.

FOR A SIXTH DEFENSE
(Good Faith)

60. Each of the causes of action alleged in Plaintiff's Complaint is barred by the fact that any actions taken by USAA were taken with proper business related reasons in good faith and were arbitrary, capricious or contrary to any public policy or unlawful.

FOR A SEVENTH DEFENSE
(Standing)

61. USAA would contend that Plaintiff lacks standing to assert the claims that have been presented, and therefore the Complaint must be dismissed.

FOR AN EIGHTH DEFENSE
(Economic Loss Rule)

62. USAA asserts that Plaintiff's negligence claims are barred by the economic loss rule.

FOR A NINTH DEFENSE
(Equitable Waiver)

63. Plaintiff's claims may be barred in whole or in part by the doctrine of laches, waiver, release, accord, and satisfaction.

FOR A TENTH DEFENSE
(Estoppel)

64. Plaintiff's claims may be barred in whole or in part by the doctrine of estoppel by reason of her own conduct and actions, including actions of commission and omission.

FOR AN ELEVENTH DEFENSE
(Failure to Join Indispensable Parties)

65. Plaintiff's Complaint may be barred by Plaintiff's failure to join indispensable parties without which the proper resolution in this matter cannot be obtained.

FOR A TWLEFTH DEFENSE
(No Fiduciary Duty or Duty)

66. Plaintiff's claims against USAA are barred in whole or in part because there was no confidential, fiduciary, special, or privity-like relationship between the parties. Furthermore, USAA owed no duty or obligation to Plaintiff.

FOR A THIRTEENTH DEFENSE
(No Legal Duty Owed)

67. USAA would show that it owed no legal duty to Plaintiff, and therefore Plaintiff's claims in tort fail as a matter of law.

FOR A FOURTEENTH DEFENSE
(Lack of Privity)

68. Plaintiff's causes of action are barred in whole or in part by the lack of privity between Plaintiff and USAA.

FOR A FIFTEENTH DEFENSE
(Statute of Limitations)

69. USAA would show that one or more of Plaintiff's claims may be barred in whole or in part by the applicable statute of limitations.

FOR A SIXTEENTH DEFENSE
(Intervening Negligence/Acts of Others)

70. USAA would show that Plaintiff's injuries may have been due to and proximately caused and occasioned by the intervening acts, omissions, negligence, recklessness, criminality, willfulness, and wantonness of a party or parties other than USAA, which occurred prior to or subsequent to any acts or omissions by USAA, which are expressly denied. USAA would further show that such intervening acts, omissions, negligence, recklessness, criminality, willfulness, and wantonness may have been the sole cause of Plaintiff's injuries. Therefore, Plaintiff cannot recover against USAA

FOR A SEVENTEENTH DEFENSE
(Comparative Negligence)

71. USAA pleads the Plaintiff's comparative negligence and on this basis requests a reduction of any judgment against it in an amount proportionate to the amount of negligence on the part of Plaintiff. Alternatively, to the extent that the negligence of the Plaintiff exceeds that of USAA, if any, the claims are barred. This defense includes not only the negligence of Plaintiff, but also any gross negligence and willfulness on the part of Plaintiff.

FOR AN EIGHTEENTH DEFENSE
(Standard of Care)

72. USAA exercised the degree of care and caution of a reasonably prudent entity under the circumstances in compliance with all applicable state and federal laws and regulations, and any damage sustained by Plaintiff were not the result of USAA's actions.

FOR A NINETEENTH DEFENSE
(Overlapping Recovery)

73. Plaintiff's alleged remedies are limited to the extent Plaintiff seeks overlapping and duplicative recovery based on various claims against USAA for any alleged single wrong.

FOR A TWENTIETH DEFENSE
(No Damages/Speculative Damages)

74. Plaintiff's claims are barred because she has not suffered any injury in fact and/or because her damages, if any, are too speculative to be recovered and were not caused by USAA.

FOR A TWENTY-FIRST DEFENSE
(Punitive Damages Inappropriate)

75. Punitive damages are inappropriate in this case as USAA engaged in no malicious, wrongful or intentional conduct upon which an award of such damages could be based.

FOR A TWENTY-SECOND DEFENSE
(Unconstitutionality of Punitive Damages)

76. An award of punitive damages can and does violate the United States Constitution and the South Carolina Constitution under certain circumstances. USAA reserves

the right to challenge any punitive damages award on the basis that it is a violation of law and the constitution.

FOR A TWENTY-THIRD DEFENSE
(Reservation of Rights)

77. At this time, USAA has not yet had an opportunity to conduct a sufficient and full investigation into or engage in adequate discovery regarding the circumstances of Plaintiff's allegations. USAA intends to act in good faith to inform itself as to the pertinent facts and prevailing circumstances surrounding the claims presented by Plaintiff, and thereby gives notice of its intent to assert any additional affirmative defenses of which it may become aware as information is gathered. USAA thus reserves the right to amend its Answer to such defenses.

WHEREFORE, having fully responded to each and every assertion of facts set forth in the Complaint, USAA would respectfully request an order which dismisses Plaintiff's claims with prejudice or awards Defendants the cost and expenses associated with this defense against these claims and for such other and further relief as the Court deems just and proper.

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January 25, 2018

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STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)))	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
Karen Petit, Plaintiff, vs. Phyllis Jean Krohn, USAA Federal Savings Bank, and USAA Investment Management Co., Defendants.	)))))))))))	Civil Action No. 2017-CP-24-01343 **USAA'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendants USAA Federal Savings Bank, and USAA Investment Management Co. (collectively "USAA"), by and though undersigned counsel, and pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, hereby move the court for an order granting summary judgment in favor of USAA and against Plaintiff Karen Petit ("Plaintiff"). The claims at issue involve IRA funds owned by Dr. Petit, Plaintiff's deceased father. There is no genuine dispute as to material fact that Plaintiff lacks standing to bring the claims, as she had no vested rights in the IRA funds. Further, there is no genuine issue of material fact that USAA owed no duty, fiduciary, contractual, or otherwise, to Plaintiff. There is no genuine issue of material fact that USAA did not breach any duty; fiduciary, contractual, or otherwise to Dr. Petit. Finally, there is no genuine issue as to material fact that Plaintiff's claims are barred by the statute of limitation, as Dr. Petit, his Attorney-in-Fact, and Plaintiff, could reasonably have discovered USAA's allegedly improper behavior more than three years before this action was brought.

In support of its motion, USAA relies on the Memorandum to be filed in Support of Summary Judgment, and arguments to be presented at any hearing on the motion.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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STATE OF SOUTH CAROLINA	COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	EIGHTH JUDICIAL CIRCUIT
KAREN PETIT, *Plaintiff,* *-v-* PHYLLIS KROHN ET AL., *Defendants*.	)

NOTICE OF MOTION &
MOTION FOR SUMMARY JUDGMENT

Comes Now the Defendant, Phyllis Van Swol F/K/A/ Phyllis Krohn, who would move this Honorable Court as soon as she may be heard for a summary judgment pursuant to Rule 56, SCRCP, on the basis that there is no factual dispute in this matter insofar as:

1. The Defendant did not owe any fiduciary obligations to the Plaintiff;
2. The Plaintiff was not a third-party beneficiary to any agreement here at issue;
3. The conduct here at issue is not that of the Defendant but, rather, is that of the decedent; and
4. The Plaintiff is the improper party to assert any of the claims here at issue.

For these reasons, the Defendant is entitled to judgment as a matter of law.

[Signature Follows on the Next Page]

Respectfully submitted,

/s/ Joshua S. Nasrollahi
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ELECTRONICALLY FILED - 2019 Aug 07 11:02 AM - GREENWOOD - COMMON PLEAS - CASE#2017CP2401343

STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)))	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
Karen Petit, Plaintiff, vs. Phyllis Jean Krohn, USAA Federal Savings Bank, and USAA Investment Management Co., Defendants.	)))))))))))	Civil Action No. 2017-CP-24-01343 **MEMORANDUM IN SUPPORT OF USAA'S MOTION FOR SUMMARY JUDGMENT**

Defendants USAA Federal Savings Bank, and USAA Investment Management Co. (collectively "the USAA Defendants"), by and through undersigned counsel, submits the following brief in support of its motion for summary judgment ("Motion") against Plaintiff Karen Petit ("Plaintiff").

INTRODUCTION AND FACTUAL BACKGROUND

On May 2, 2002, Dr. Edward L. Petit ("Dr. Petit") transferred his Individual Retirement Account ("IRA") funds to an IRA at USAA Federal Savings Bank (the "USAA IRA"). (Traditional IRA Account Form, attached as **Exhibit A**; IRA Transfer Request Form, attached as **Exhibit B**.) In 2007, the USAA IRA was transferred from USAA Federal Savings Bank to USAA Investment Management Co. On January 15, 2007, Dr. Petit completed a designation of beneficiary form, naming his two daughters, Plaintiff and Kathy Elise Petit ("Kathy"), as his beneficiaries. (January 15, 2007 Designation of Beneficiary Form, attached as **Exhibit C**.)

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On January 26, 2009, Dr. Petit completed a USAA Power of Attorney, naming Defendant Phyllis Krohn[1] ("Ms. Krohn") as his Attorney-in-Fact. (January 26, 2009 USAA Power of Attorney, attached as **Exhibit D**; Compl. at ¶ 11.) Plaintiff claims that this Power of Attorney form prohibited the Attorney-in-Fact from changing the beneficiaries of the USAA IRA. (Compl. at ¶ 14.) Also on January 26, 2009, Dr. Petit executed a Wachovia Power of Attorney, and a Health Care Power of Attorney, each naming Ms. Krohn as his attorney in fact. (Plaintiff Depo. at 51:22-53:21, 57:18-58:20, attached as **Exhibit E**; Krohn Depo. at 59:25-60:9, attached as **Exhibit F**.) Ms. Krohn did not sign or execute any documents under the January 26, 2009 USAA Power of Attorney. (Plaintiff Depo. at 151:11-20, 164:18-165:1, 166:25-167:10.) On November 9, 2010, Dr. Petit completed a subsequent USAA Power of Attorney, again naming Ms. Krohn as his Attorney-in-Fact. (November 9, 2010 Power of Attorney, attached as **Exhibit G**.) The November 9, 2010 Power of Attorney did not prohibit the Attorney-in-Fact from changing the USAA IRA's beneficiaries. (*Id.*) Ms. Krohn did not sign or execute any documents under the November 9, 2010 Power of Attorney. (Plaintiff Depo. at 151:11-20; Krohn Depo. at 76:12-19.)

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 51:15-52:16.) Dr. Petit requested that the USAA Defendants 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, attached as **Exhibit H**.) On December 29, 2011, the USAA Defendants sent Dr. Petit the requested designation of beneficiary form to the address listed in his file with a prepaid FedEx return envelope. (*Id.*; *see also* January 23, 2012 Designation

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

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of Beneficiary, attached as **Exhibit I**.) The requested designation of beneficiary form was completed and designated Leaman and Caroline as primary beneficiaries, and Plaintiff and her sister Kathy as secondary beneficiaries. (*See* **Exhibit I**; Compl. at ¶ 6.) The designation of beneficiary form was returned to the USAA Defendants in the prepaid FedEx envelope from the same address that the USAA Defendants sent it, Dr. Petit's record address, and it was signed by Dr. Petit. (*See* **Ex. I**; *see also* **Ex. H**; Krohn Depo. at 16:19-21.)

On February 27, 2012, Dr. Petit executed a Durable General Power of Attorney, naming Henry A. Dorn, ("Mr. Dorn") as his Attorney-in-Fact. (February 27, 2012 Power of Attorney, attached as **Exhibit J**; *see also In the Matter of Edward L. Petit*, 2013-GC-24-17 (2013), attached as **Exhibit K**.) Also on February 27, 2012, Dr. Petit exercised a Health Care Power of Attorney appointing Kathy as his agent to make his healthcare decisions. (*See* **Ex. K**.) On May 15, 2013, the Probate Court of Greenwood County declared Dr. Petit incompetent and appointed Plaintiff and Kathy as Co-Guardians for Dr. Petit, granting them authority to make health care decisions for Dr. Petit, as well as decide other affairs that concern his personal or living arrangements. (*Id.*) The court 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.*)

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; Plaintiff Depo. at 96:13-24.) The beneficiaries of the Wells Fargo IRA were designated as Leaman and Caroline. (Plaintiff Depo. at 106:9-15.)

On March 18, 2015, Dr. Petit passed away. (Compl. at ¶ 4.) He was survived by Plaintiff, and his two granddaughters, Leaman and Caroline. (*Id.* at ¶ 6.) 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 ¶

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10; Plaintiff Depo. at 96:13-24.) Wells Fargo released the funds to Leaman and Caroline, as they were the beneficiaries of the Wells Fargo IRA. (Compl. at ¶ 16; Plaintiff Depo. at 106:9-15.) On November 8, 2017, Plaintiff filed this action.

Plaintiff has asserted three causes of action against the USAA Defendants: (1) breach of contract, (2) breach of fiduciary duty, and (3) negligence. Each of these claims is based on the allegation that the USAA Defendants allowed Ms. Krohn to change the beneficiaries of the USAA IRA to Dr. Petit's granddaughters pursuant to an allegedly improper Power of Attorney. (Compl. at ¶¶ 44-45, 49, 53.)

LEGAL STANDARD

"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 his complaint but must disclose the facts he intends to rely on by affidavit or other proof." *Id.*

ARGUMENTS

I. Plaintiff lacks standing to assert her causes of action.

Plaintiff has no standing to assert her causes of action because she never had a vested right in the USAA IRA or the Wells Fargo IRA. Only if a beneficiary's rights to the funds have vested, would the beneficiary have a right to sue for the benefits. *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

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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 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, Plaintiff never had a vested right in the IRA funds. Plaintiff admits that Dr. Petit had the right to freely change the beneficiaries of his IRAs during his lifetime.[2] (Plaintiff Depo. at 116:24-117:11; 156:5-157:10.) In fact, Plaintiff was not the initial beneficiary of the IRA, but Dr. Petit changed the beneficiary to Plaintiff and her sister in 2007. (*See* **Ex. C**; *see also* **Ex. D**.) Thus, because Dr. Petit always had the legal right to change the beneficiaries of his IRA, no rights in the IRA could or did vest during his lifetime.

Further, Plaintiff was not the beneficiary of the IRA at the time of Dr. Petit's death. Dr. Petit changed his beneficiaries in 2012, from Plaintiff and her sister, to his granddaughters, Leaman and Caroline. (*See* **Ex. I**.) 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. (Plaintiff Depo. at 90:14-19, 96:13-24, 106:9-15.) In 2015, Dr. Petit passed away, and the rights to the Wells Fargo

[2] Additionally, Mr. Dorn had the ability to designate and change the beneficiaries of Dr. Petit's IRAs during Dr. Petit's lifetime. (Plaintiff Depo. at 156:5-157:10.)

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IRA vested in the beneficiaries of the Wells Fargo IRA, Leaman and Caroline. (Compl. at ¶ 16; Plaintiff Depo. at 106:9-15.) Thus, Plaintiff has no vested rights in the USAA IRA or the Wells Fargo IRA. Accordingly, Plaintiff lacks standing to bring this action, and it must be dismissed.

II. Plaintiff cannot, as a matter of law, establish a breach of contract.

Plaintiff alleges 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." (Compl. at ¶¶ 43-44.)

"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).

A. Plaintiff has not alleged any clause in any contract between Dr. Petit and the USAA Defendants that was breached.

The complaint does not specify a particular contract or any contractual provisions setting forth a duty on the USAA Defendant's part related to the alleged contractual obligations listed therein. (Compl. at ¶¶ 42-45.) 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. (**Ex. B**; **Ex C**.) 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 Ms. 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

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Dr. Petit and the USAA Defendants, but an instrument purporting to confer authority on Ms. Krohn to perform tasks for Dr. Petit. Plaintiff 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 that was allegedly breached. 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. Plaintiff 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.

B. Even if there is a contract or contract term that exists, Plaintiff has not shown how the USAA Defendants breached the term.

Even assuming there was a contract between Dr. Petit and the USAA Defendants preventing Ms. Krohn from changing the IRA beneficiaries, the USAA Defendants did not breach any such purported contract. First, Plaintiff offers nothing beyond the mere allegations in her complaint that Ms. Krohn changed the beneficiaries. In fact, Plaintiff admits that she has no evidence that Krohn changed the beneficiaries. (Plaintiff Depo. at 164:18-165:1, 166:25-167:10.) Further, the only evidence in this case shows that it was Dr. Petit that changed his beneficiaries, and not any Attorney-in-Fact. 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. (**Ex. H**; Krohn Depo. at 16:19-21, 51:15-52:16; *see also* **Ex. I**.) Additionally, Ms. Krohn stated that Dr. Petit changed his own beneficiaries. (Krohn Depo. at 16:19-21.) Finally, the change of beneficiary form was signed by Dr. Petit a

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month before he executed a Durable General Power of Attorney in the Greenwood County Probate Court, which was later ratified by the Court on May 15, 2013. (*See* **Ex. J**; *see also* **Ex. K**.) Therefore, the evidence shows that Dr. Petit, and not an Attorney-in-Fact, changed the beneficiaries of his IRA account.[3]

Because the only evidence in this case shows that Dr. Petit changed the beneficiaries of his IRA, there can be no breach, and therefore, there is no genuine issue as to material fact that there is no breach of contract.[4]

C. A breach of contract action can only be brought by Dr. Petit's estate.

To the extent the court finds a breach of contract, Plaintiff cannot recover because she had no vested rights under the contract. "The general rule is that an 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." 30 S.C. Jur. Contracts § 67 (citing *Professional Bankers Corp. v. Floyd*, 285 S.C. 607, 331 S.E.2d 362 (Ct. App. 1985); *Egrets Pointe Townhouses Property Owners Ass'n, Inc. v. Fairfield Communities, Inc.*, 870 F. Supp. 110 (D.S.C. 1994) (applying South Carolina law)). In this case, Plaintiff had no vested interest in the USAA IRA because Dr. Petit retained the ability to change beneficiaries during his lifetime, and because his granddaughters were the primary beneficiaries at the time Dr. Petit passed away. (Plaintiff Depo. at 116:24-

[3] The Power of Attorney that Plaintiff 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, Ms. Krohn was named Attorney-in-Fact in a subsequent Power of Attorney dated November 9, 2010. (*See* **Ex. G**.) 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.

[4] The USAA Defendants did not distribute the funds of the USAA IRA to the Plaintiff'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. (Plaintiff Depo. at 96:13-24, 106:9-15.)

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117:11, 106:9-15; **Ex. I**.) Additionally, Plaintiff was not a beneficiary of the USAA IRA when the funds from the USAA IRA were validly transferred to the Wells Fargo IRA and was never a beneficiary of the Wells Fargo IRA. (Plaintiff Depo. at 156:5-157:10, 90:14-16; 106:9-15; s*ee also* **Ex. I**.)

Accordingly, Plaintiff has no standing to bring an action for breach of contract, as she was not owed any legal duty under it. The only legal duty was owed to Dr. Petit, the accountholder, and thus, an action for breach of contract could only have been brought by his estate.[5]

III. There is no evidence that a fiduciary relationship was created between the USAA Defendants and Dr. Petit or between the USAA Defendants and the Plaintiff.

Plaintiff alleges that a fiduciary relationship was created when the USAA Defendants sent a Power of Attorney form to Dr. Petit. 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 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).

A. The relationship between the USAA Defendants and Dr. Petit was not a fiduciary relationship.

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

[5] Any claims by Dr. Petit's estate are barred by the statute of limitations because the IRA funds were transferred by the USAA Defendants to Wells Fargo about five years ago and disbursed by Wells Fargo more than three years ago. *See* S.C. Code Ann. § 15-3-530.

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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.

1. The USAA Defendants did not separate Dr. Petit's funds into a special account or advise Dr. Petit as part of the services it offered to him.

Plaintiff does 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, or that the USAA Defendants undertook to advise Dr. Petit as part of the services it offers. (Compl. at ¶¶ 46-50.) It is only under such limited circumstances that South Carolina courts have been willing to entertain the potential existence of a fiduciary duty between banks and their customers. *Regions Bank*, 354 S.C. at 671, 582 S.E.2d at 444; *Cowburn*, 366 S.C. at 43, 619 S.E.2d at 449. Because the Complaint lacks any allegation, and because Plaintiff offers no evidence, that the USAA Defendants separated Dr. Petit's funds into a special account, or that the USAA Defendants undertook to advise Dr. Petit as part of the services it offers, there is no genuine dispute as to material fact that no fiduciary duty arose, and thus, summary judgment in the USAA Defendant's favor is warranted.

2. The USAA Defendants did not create a fiduciary relationship by providing services incidental to Dr. Petit's IRA.

Although not recognized as one of two scenarios that create a fiduciary duty in a banking relationship under South Carolina law, Plaintiff does allege that the services the USAA Defendants

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provided for Dr. Petit, specifically, providing him with a Power of Attorney form, created a fiduciary duty. However, providing ministerial services, such as supplying form documents incidental to the IRA account does not create a fiduciary duty. *See Int'l Payment Group* at 104.

In *Int'l Payment Group*, the plaintiff contracted with the defendant bank to facilitate its foreign currency business. *Id*. at 100. In addition to the services provided under the contract, the bank also opened two foreign bank accounts for the plaintiff and excluded the plaintiff from a bank-wide policy prohibiting relationships with money service businesses. *Id*. After being informed by the plaintiff that the plaintiff had over a million dollars stolen from it, the bank blocked all of the plaintiff's employees from its online systems. *Id*. at 101. The plaintiff sued the bank, contending that the bank created a fiduciary duty when it provided additional services to the plaintiff, and that the bank breached this fiduciary duty when it cut off the services. *Id*. at 103. Applying South Carolina law, the Fourth Circuit Court of Appeals, affirming the District Court of South Carolina, found that no fiduciary duty existed, stating: "[w]hile [plaintiff] may have been a unique . . . client, the character of what [plaintiff] was doing through [the bank's] system did not differ significantly from the average depositor's relationship with the bank." *Id*. at 104. Finally, the court held that it was clear that the bank never segregated funds into a special account for the plaintiff, held any funds in trust, or advised plaintiff about its business, and therefore, no fiduciary duty was created. *Id*.

Similar to the plaintiff in *Int'l Payment Group* alleging a fiduciary duty was created by services incidental to a contract with a bank, Plaintiff is attempting to create a fiduciary duty out of services the USAA Defendants provided to Dr. Petit that were incidental to maintaining his IRA. In *Int'l Payments Group*, the court found that providing these incidental services did not create a relationship that differed "significantly from the average depositor's relationship with the

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bank." *Id*. at 104. In this case, the USAA Defendants merely provided its client, Dr. Petit, with standard Power of Attorney and designation of beneficiary forms that he requested. This cannot be said to differ from the services that are provided to the average depositor, especially considering the *Int'l Payments Group* Court held a defendant exempting the plaintiff from a company-wide policy was not enough to create a fiduciary duty. Because providing an account holder with documents necessary for them to maintain their account does not create a relationship significantly different from that of the average depositor's relationship, there is no genuine dispute as to material fact that the USAA Defendants did not owe Dr. Petit a fiduciary duty.

B. The USAA Defendant's actions that allegedly breached a fiduciary duty are outside the scope of the alleged fiduciary duty.

Even assuming that a fiduciary duty was created, its scope would have been to advise Dr. Petit on investments. The USAA Defendant's alleged behavior—failing to follow the terms of a power of attorney form—is outside the scope of that fiduciary duty. (Compl. at ¶ 49.)

Courts have held that even if a fiduciary duty is owed, the scope is limited to specific portions of the relationship. *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"). In this case, Plaintiff is claiming that the USAA Defendants provided an improper Power of Attorney form and allowed an unauthorized person to change the beneficiaries of Dr. Petit's account. As discussed above, the only possible fiduciary duty Plaintiff has alleged

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is a duty to advise. Providing Dr. Petit with a Power of Attorney form and allowing an attorney in fact to change the beneficiaries of Dr. Petit's IRA are outside the scope of that duty, as neither relates to advising Dr. Petit. Therefore, there is no genuine issue of material fact that there is no breach of a fiduciary duty.

C. Any claims alleging a duty to Dr. Petit must be brought by his estate.

Even if the Court finds a fiduciary duty was owed, it was owed to Dr. Petit, and thus, any claims must have been brought by his estate.[6] To establish a claim for breach of fiduciary duty, the plaintiff must prove "a breach of that duty owed **to the plaintiff** by the defendant[.]" *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335, 732 S.E.2d 166, 173 (2012) (emphasis added). Plaintiff has alleged that the USAA Defendants owed a fiduciary duty to Dr. Petit, not to her. (*See* Compl. at ¶ 49.) Further, the Plaintiff could not articulate any duty owed to her. The only party that could have brought a suit against the USAA Defendants for the breach of a fiduciary duty owed to Dr. Petit is Dr. Petit's estate. Thus, Plaintiff's claim for breach of a fiduciary duty should be dismissed.

D. The USAA Defendants did not breach any purported fiduciary duty.

Because no fiduciary duty existed between the USAA Defendants and Dr. Petit, Plaintiff cannot maintain a claim for breach of fiduciary duty. However, even assuming a fiduciary duty did exist, the USAA Defendants did not breach such duty. Plaintiff asserts that the USAA Defendants breached the alleged fiduciary duty because it improperly allowed an attorney in fact to change the beneficiary of Dr. Petit's IRA. However, the evidence shows that Dr. Petit is the person that changed his beneficiaries. (*See* **Ex. H**; *see also* **Ex. I**.) The evidence shows that Dr.

[6] Any claims by Dr. Petit's estate are barred by the statute of limitations because the IRA funds were disbursed by Wells Fargo more than three years ago. *See* S.C. Code Ann. § 15-3-530.

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Petit expressed a desire to change his beneficiaries to his granddaughters; that Dr. Petit requested a designation of beneficiary form from the USAA Defendants; that the USAA Defendants sent the form to the address in Dr. Petit's file; that the form was returned to the USAA Defendants from the address they had on file for Dr. Petit, and; that the form was signed by Dr. Petit. (*See* **Ex. H**; Krohn Depo. at 16:19-21, 51:15-52:16.) Additionally, Ms. Krohn stated that Dr. Petit changed his own beneficiaries. (Krohn Depo. at 16:19-21.) Finally, the change of beneficiary form was signed by Dr. Petit a month before he executed a Durable General Power of Attorney in the Greenwood County Probate Court, which was later ratified by the Court on May 15, 2013. (*See* **Ex. J**; *see also* **Ex. K**.) The evidence shows that a competent Dr. Petit changed his beneficiaries, not any Attorney-in-Fact acting under a power of attorney, and therefore, there is no genuine issue of material fact that the USAA Defendants did not breach any fiduciary duty allegedly owed to Dr. Petit, and therefore to Plaintiff.[7]

IV. Plaintiff cannot, as a matter of law, establish that the USAA Defendants were negligent.

In order to succeed on her negligence claim, Plaintiff 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).

[7] As stated above, the USAA Defendants did not distribute the funds of the USAA IRA to the Plaintiff'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. (Plaintiff Depo. at 96:13-24, 106:9-15.)

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A. The USAA Defendants did not owe a duty to Plaintiff.

Plaintiff claims that the USAA Defendants owed a common law duty to Dr. Petit and his beneficiaries, including Plaintiff. Although unclear from the complaint, Plaintiff appears to contend that the USAA Defendants had a duty to ensure that Dr. Petit was the person signing his designation of beneficiary forms. 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*, 366 S.C. at 46, 619 S.E.2d at 451. 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). "If there is no duty, the defendant is entitled to judgment as a matter of law." *Id.*

Plaintiff 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 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, Plaintiff'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

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Carolina law that places this burden on banks; in fact, the law is to the contrary.[8] *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.

B. 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, Plaintiff cannot maintain a claim for negligence. However, even assuming a duty existed, the USAA Defendants did not breach such duty.

Plaintiff 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. However, the evidence shows that Dr. Petit changed his own beneficiaries using a change of beneficiary form. (*See* **Ex. I**.) The evidence shows that Dr. Petit expressed a desire to change his beneficiaries to his granddaughters; that Dr. Petit requested a designation of beneficiary form from the USAA Defendants; that the USAA Defendants sent the form to the address in Dr. Petit's file; that the beneficiary form was returned to the USAA Defendants from the address they had on file for Dr. Petit, and; that the form was signed by Dr. Petit. (**Ex. H**; *see also* **Ex I**; Krohn Depo. at 16:19-21, 51:15-52:16.) Additionally, Ms. Krohn stated that Dr. Petit changed his own beneficiaries. (Krohn Depo. at 16:19-21.) Finally, the change of beneficiary form was signed by Dr. Petit a month before he executed a Durable General Power of Attorney in the Greenwood

[8] 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 **Ex. I**.)

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County Probate Court, which was later ratified by the Court on May 15, 2013. (*See* **Ex. J**; *see also* **Ex. K**.) Thus, the evidence shows that a competent Dr. Petit changed his beneficiaries, not an Attorney-in-Fact acting under a power of attorney. Therefore, there is no genuine issue of material fact that the USAA Defendants did not breach any duty it allegedly owed to Dr. Petit or to Plaintiff.

V. Plaintiff's claims are barred by the Statute of Limitations.

Breach of contract, breach of fiduciary duty, and negligence claims all have a statute of limitations of three years. S.C. Code Ann. § 15-3-530. "The three-year statute of limitations begins to run when the underlying cause of action reasonably ought to have been discovered." *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct. App. 2011) (internal quotations omitted). "The test for whether the injured party knew or should have known about the cause of action is objective rather than subjective." *Id.* "Therefore, this court must determine whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party may exist." *Id*.

A. The statute of limitations began to run when Dr. Petit and/or Mr. Dorn could have reasonably discovered the USAA Defendant's allegedly behavior.

"The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity of another alleged wrongdoer. If, on the date of injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run for all claims based on that injury." *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994). In this case, Plaintiff claims that Dr. Petit was sent an improper Power of Attorney form in 2009, and as a result, the USAA Defendants breached a contract with Dr. Petit, breached an alleged fiduciary duty owed to Dr. Petit, and negligently breached a duty to Dr. Petit. (*See* Compl. at ¶¶ 10, 44, 49, 53.) If this was truly a breach of any contractual, fiduciary,

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or other duty, Dr. Petit, the accountholder should have reasonably discovered the breach, as he received and signed the form. Accordingly, the statute of limitations on all claims arising out of the allegedly improper Power of Attorney form began to run in 2009, when the form was sent and executed. Thus, Plaintiff's claims, which are entirely based on this allegedly improper form, are barred by the statutes of limitations because Plaintiff brought this claim over 8 years after Dr. Petit discovered the alleged injury.

Additionally, to the extent Plaintiff is attempting to assert any claim regarding the beneficiary form, the statute of limitations on such a claim began to run in 2012. In 2012, Dr. Petit changed the beneficiaries of his own account. Although Plaintiff does not allege this 2012 change of beneficiaries was improper, she would be time barred from making such a claim because Dr. Petit and/or his Attorney-in-Fact, Mr. Dorn, should have reasonably discovered that his beneficiaries were changed in 2012 because the change of beneficiary form was requested from, sent to, and returned from Dr. Petit's record address. Thus, because he should have reasonably discovered that his beneficiaries were changed, any claim arising out of that change must have been brought within three years of its discovery. Plaintiffs' Complaint, which was filed in 2017, is well outside of the three-year statute of limitations starting in 2012.

B. Plaintiff knew or should have known that she was not the beneficiary of Dr. Petit's IRA on or before November 7, 2014.

Further, Plaintiff should have discovered that she was not the beneficiary of Dr. Petit's IRA on or before November 7, 2014. Plaintiff contends that she was very close with her father, and she was named as his health care power of attorney. Further, Plaintiff denied the USAA Defendant's request for her to admit that she had no right to prevent her father from changing the beneficiaries of his IRA. (USAA Defendant's First Requests for Admission at ¶ 16.) Plaintiff further stated that Dr. Petit ordinarily would have discussed that decision with her. (*Id.*) These

framed denials paint the picture that Plaintiff was closely involved in Dr. Petit's affairs, and as such, that she had the ability to discover that she was no longer a primary beneficiary of Dr. Petit's IRA. Even if she did not discover it at that point in time, she reasonably should be expected to find out soon after—certainly before November 7, 2014—as she was so involved in Dr. Petit's affairs that she could claim he did not have the right to make a change in his own IRA without her knowing.

Additionally, in the summer of 2014, Dr. Petit's IRA was transferred from the USAA Defendants to Wells Fargo. (Compl. at ¶ 10.) At this time, Dr. Petit's Attorney-in-Fact, Mr. Dorn, asked the USAA Defendants who the beneficiaries of Dr. Petit's IRA account were. Plaintiff was aware that this transfer of funds from the USAA Defendants to Wells Fargo was occurring in the summer of 2014. (USAA Defendant's First Requests for Admission at ¶ 16.) Plaintiff reasonably should have discovered at this point in time that she was no longer a primary beneficiary of Dr. Petit's IRA. Instead, she ignored the issue for more than 3 years after the USAA Defendants had any control over Dr. Petit's IRA, and then brought suit, seeking to recover from the USAA Defendants for allowing her father to legally change the primary beneficiaries of his own account to Plaintiff's nieces.

Now more than 4 years after the USAA Defendants have had any control over Dr. Petit's account, the USAA Defendants are forced to defend against these baseless allegations. "The purpose of the statute of limitations is to put to rest claims after the passage of time." *Nowlin v. Gen. Tel. Co.*, 310 S.C. 183, 186, 426 S.E.2d 114, 116 (Ct. App. 1992), *aff'd*, 314 S.C. 352, 444 S.E.2d 508 (1994). Allowing Plaintiff's claims to continue is in direct conflict with this purpose, and thus Plaintiff's claims should be time barred.

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Plaintiff had ample opportunity and time before November 8, 2014 to discover that the beneficiaries of Dr. Petit's IRA were changed, and thus, there is no genuine dispute as to material fact that her claims are time barred.

CONCLUSION

For the reasons set forth above, the USAA Defendants respectfully requests that the Court grant their Motion for Summary Judgment.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Greenville, South Carolina
August 7, 2019

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Exhibit A

9800 Fredericksburg Road
San Antonio, Texas 78288

USAA Federal Savings Bank

Traditional IRA Account

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If you have any questions, please call a USAA Member Service Representative:

1-800-IRA-USAA (1-800-472-8722) or at (210) 456-7516 in San Antonio
Monday through Friday 7:00 a.m. - 6:00 p.m. and Saturday 8:30 a.m. - 5:00 p.m. (CST). Fax 1-800-531-5717

Member Information

USAA Member Number _____

Name (First, Middle Initial, Last) EDWARD L. PETIT

Social Security Number _____ Date of Birth (month/day/year) _____

In the event we need to contact you regarding information you provide on this form, please supply:

Day Phone (864) 229-3824 Evening Phone (_____) SAME

Calculation Information

Under guidance issued from the IRS in January 2001, the RMD amount is generally determined by dividing your retirement plan balance as of the end of the prior year by your distribution period, which is based on life expectancy.

Special rules also apply if your spouse is your sole primary beneficiary and is more than ten years younger than you.

Have you previously named your spouse as the sole primary beneficiary for this plan? ☒ Yes ☐ No

If Yes, please provide spouse's date of birth _____ (month/day/year) and Social Security Number _____

This form is not a change of beneficiary form. Please call a member service representative if you would like for us to send you a change of beneficiary form.

Distribution Information

Account Number from which your distribution will be taken _____

(If you have more than one IRA, your distribution will be made from the account earning the lowest rate of interest unless you indicate otherwise.)

This form is for the required minimum distribution based only on your Federal Savings Bank balance for the above account. However, if you have more than one retirement plan, IRS minimum distribution regulations allow you to add together the RMD amounts for all like plan types and withdraw the total amount from any one or more of your like plans. For example, Traditional, SEP, and SIMPLE IRAs are like plans; 403(b) and 403(b)(7) are like plans; Keoghs are their own plan type.

If you would like a USAA representative to calculate an RMD amount for a like retirement plan at USAA and distribute that amount from the contract you indicated above, please indicate which other USAA plan(s) you would like us to include:

Like plans at:

☐ Life Company Fixed Annuity Contract Number(s) _____

☐ Life Company Variable Annuity Contract Number(s) _____

☐ Mutual Funds Account Number(s) _____

☐ Brokerage Account Number(s) _____

Continued on next page.

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USAA We know what it means to serve.®
INSURANCE · BANKING · INVESTMENTS · MEMBER SERVICES
83568-0202

Retirement Plan Distribution Authorization
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Distribution Information *continued*

Payment Amount (check one)

☒ in the minimum amount

OR

☐ in the amount of $ _____ *(Must meet or exceed IRS minimum distribution requirements)*

Payment Frequency (check one)

☐ Monthly ☐ Quarterly ☐ Semi-Annually ☒ Annually

Date for first distribution 12-31-03 *(month/day/year)* (must occur by April 1 of the year following the year in which you reach age 70 1/2)

***NOTE:** If you choose to delay your first distribution until the year after you reach age 70 1/2, you will be required to receive two minimum distributions in that calendar year. When you take two RMDs in the same year, you will owe income tax for both payments for that tax year.*

Date for subsequent distributions 12-31-04-05 *(month/day)* (must occur by December 31 of each year)

Payment Instructions

☐ Deposit proceeds into my existing USAA account.

(If you would like to open a new account, please call a Member Service Representative to discuss the type of account that might be best for you.)

☐ Federal Savings Bank: Account Number _____

☐ Life Insurance Company: Contract Number _____

☐ Mutual Funds: Account Number _____

☐ Brokerage: Account Number _____

OR

☐ EFT (Electronic Funds Transfer) to my account at another financial institution

Financial Institution Name _____

Financial Institution ABA Routing Number _____ Account Number _____

Name(s) on Account _____

Account Type ☐ Checking (please enclose voided check) ☐ Savings (please enclose voided deposit slip)

By indicating your preference for EFT, you agree to the following: "I authorize USAA Federal Savings Bank and any financial institution it uses to initiate electronic deposits (credits) of money owed by USAA Federal Savings Bank at the financial institution listed above, and to initiate withdrawals (debits) if necessary for any deposit entries made in error. I acknowledge that the origination of Automated Clearing House (ACH) transactions to my account must comply with the provisions of U.S. law. This authority is to remain in full force and effect until USAA Federal Savings Bank has received notification from me of its termination in such time and in such manner as to afford USAA Federal Savings Bank a reasonable opportunity to act."

OR

☒ Send check directly to me.

Income Tax Withholding

We are required to withhold federal income tax from your distribution unless you elect not to have withholding apply. If you elect not to have tax withheld, you are still liable for payment of federal income tax on the taxable portion of your withdrawals. You may incur penalties under the estimated tax rules if your withholding and estimated tax payments are not sufficient.

Please make your withholding election below, which is a substitute for IRS Form W-4P. **If no election is made, we are required to withhold 10% of your distribution.**

☐ I elect to have federal income tax withheld at the rate of _____ %. (must be between 1% and 100%)

☒ I elect NOT to have federal income tax withheld.
RMD CALCULATED AT 10E OF YEAR
+ QUARTELY TAXES PAID
ESTIMATED

Continued on other side.

Income Tax Withholding *continued*

State Withholding Tax

If Federal Income Tax withholding is elected, some states require that we withhold State Income Tax.

For certain states, State Income Tax withholding is optional. If you live in a state in which state withholding tax is optional, please elect whether you would like State Income Tax withheld.

☐ Withhold ☒ Do Not Withhold

(Due to the changing status of the states, the mandatory and optional states are not listed here. If you need assistance in determining whether you live in a mandatory or optional state, please contact a USAA Member Service Representative at the number listed on the front of this form.)

Authorization

I direct that the distribution(s) described above be made from the referenced account(s). I understand and acknowledge that USAA Federal Savings Bank will act solely on my representations and instructions as set forth in this form, and that USAA Federal Savings Bank will not independently verify whether or not I qualify for the type of distribution directed. I understand and acknowledge that I alone am responsible for the tax consequences that may result from taking such distribution(s) and that I should seek the advice of an attorney or accountant if I am uncertain as to my eligibility for the type of distribution(s) directed.

Signature Edward L Petit *(account owner)* Date 5-20-02 *(month/day/year)*

EQUAL HOUSING LENDER FDIC INSURED

Retirement Plan Distribution Authorization

EXHIBIT 120 CASE#2017CP2401343

Guide to Your Required Minimum Distribution (RMD)

Traditional IRA Account

If you have any questions, please call a USAA Member Service Representative:

1-800-IRA-USAA (1-800-472-8722) or at (210) 456-7516 in San Antonio
Monday through Friday 7:00 a.m. - 6:00 p.m. and Saturday 8:30 a.m. - 5:00 p.m. (CST). Fax 1-800-531-5717

Question and Answer Guide

What is an RMD?

Assets in most tax-deferred retirement plans cannot continue to grow tax-deferred indefinitely; therefore, once you reach age 70 1/2 you must withdraw at least a minimum amount beginning that year and each year thereafter. This amount is known as the Required Minimum Distribution (RMD). Generally, all tax-deferred retirement plans (other than Roth IRAs) are subject to RMDs.

When am I required to take my distributions?

Annual minimum distributions must be withdrawn no later than December 31 of each year beginning with the year in which you reach age 70 1/2. For the first calendar year in which you must start taking RMDs (i.e., the year in which you reach age 70 1/2), you may delay your withdrawal until April 1 of the following calendar year. *If you elect to delay your first distribution until April 1 of the year after you reach age 70 1/2, you will be required to receive two minimum distributions in that calendar year. When you take two RMDs in the same year, both payments are subject to federal income tax for that year.*

Below is an example of a timeline for someone who reaches age 70 1/2 on July 1, 2002.



What if I fail to take my RMD?

If you miss a withdrawal or take out too little, you will owe a 50% excess accumulation federal penalty tax on the shortfall. You must still withdraw the correct amount and pay any income tax due.

Is my RMD taxable?

Distributions from your retirement plans generally must be reported as ordinary income and are generally subject to taxation. Distributions attributable to non-deductible IRA contributions and other after-tax contributions are not taxable.

How is the RMD amount determined?

Under guidance from the IRS issued in January 2001, the RMD amount is generally determined by dividing your retirement plan balance as of the end of the prior year by your distribution period, which is based on life expectancy.

How do the rules apply when I have more than one retirement plan?

IRS minimum distribution regulations generally require you to calculate an RMD amount separately for each retirement plan you have. However, if you have more than one retirement plan, you may add together the RMD amounts for all like plan types and withdraw the total amount from any one or more of your like plans. For example, Traditional, SEP, and SIMPLE IRAs are like plans; 403(b) and 403(b)(7) are like plans; Keoghs are their own plan type.

Continued on other side.

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What are my options for RMD payouts?

You can choose to have your distributions made in the form of systematic withdrawals, or you can roll your plan over into an annuity and immediately begin receiving a lifetime stream of payments. Please call us for more information on annuitization.

Can I have my distributions automatically deposited into another USAA account of my choice?

Yes! This free service is fast and efficient, and sends your distribution directly to the account you choose. We have many account types from which you can choose. Call us today to find out more about how we can serve your needs.

How can I simplify the RMD process?

Our knowledgeable representatives can assist you with calculating your distribution amount. Feel free to call us at 1-800-IRA-USAA (1-800-472-8722) or at (210)456-7516 in San Antonio Monday through Friday 7:00 a.m. - 6:00 p.m. and Saturday 8:30 a.m. - 5:00 p.m. (CST).

This Question and Answer Guide is only a general overview of the subject matter discussed and should not be construed as tax or legal advice. The applicable law concerning retirement plans is very complex, the penalties for non-compliance are severe, and the applicable tax laws of your state may differ from the federal laws. Therefore, you should always consult your tax and legal advisors regarding the tax and legal consequences of your retirement plans.

Please detach and mail completed/signed Authorization Form in the enclosed envelope, or fax to 1-800-531-5717. →

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84242-0101

USAA®

MRS. EDWARD L PRATT
Name
104 HIGHLAND DR
Street Address
GREENWOOD
City and State
76247
Zip Code
IS THIS A CHANGE OF ADDRESS? ☐ Yes ☒ No

NO POSTAGE NECESSARY IF MAILED IN THE UNITED STATES

PSDC 2938296 PM 20 MAY 2017 USPS

BUSINESS REPLY MAIL
FIRST-CLASS MAIL PERMIT NO. 707 SAN ANTONIO TX
POSTAGE WILL BE PAID BY ADDRESSEE

9876 ATTN DEPOSIT SALES and SERVICE
USAA FEDERAL SAVINGS BANK
10750 MCDERMOTT FREEWAY
SAN ANTONIO TX 78284-8499

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Exhibit B

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USAA FEDERAL SAVINGS BANK

IRA TRANSFER REQUEST

IRA Participant, please complete and send this form to USAA Federal Savings Bank, ATTN: New Account Services, 10750 McDermott Fwy., San Antonio, TX 78288-0544. Also include a completed USAA Federal Savings Bank IRA Application and Adoption Agreement if you do not currently have a variable-rate IRA in which you would like to have these funds deposited. Complete this form ONLY for a direct transfer from another Individual Retirement Account. This form is not to be used for a rollover of funds. If you have any questions, please call us at 1-800-472-8722.

EXISTING CUSTODIAN INFORMATION:

Custodian Name RAYMOND JAMES

Address 880 CARILLON PARKWAY (CARILLON)

City, State, Zip Code St PETERSBURG, FLA 33716 Telephone (727) 573-3800

Account Number from which these funds are to be transferred (provide broker's name, if applicable) [redacted]

IRA PARTICIPANT INFORMATION:

Name EDWARD L PETIT USAA Number _____

Address 104 HIGHLAND DR

City, State, Zip Code GREENWOOD SC 29649-8957

Telephone (864) 229-3824 Social Security Number _____

It is my desire to directly transfer $ ENTIRER ACCT or 100% % of my above referenced IRA balance to my USAA Federal Savings Bank IRA. It is my intent to avoid constructive receipt of the amount to be transferred.

Effective Date of Transfer:
- ☐ at maturity of my current IRA (Maturity Date _____ - Required; please submit Transfer Request no earlier than 30 days prior to maturity)
- ☒ upon USAA Bank's receipt of this IRA Transfer Request (*you could potentially be charged an early-withdrawal penalty if transfer is made at a date other than the maturity date*)

Existing USAA Federal Savings Bank IRA (**if applicable**) into which these funds are to be deposited:

Account Name MAJOR EDWARD L PETIT Account Number _____

Current Custodian, this IRA Transfer Request is your authorization to forward the amount stated above in cash to USAA Federal Savings Bank; therefore, in accordance with USAA Federal Savings Bank's acceptance indicated below, your check for the proceeds should be made payable and mailed directly to USAA **Federal Savings Bank, ATTN: Individual Retirement Accounts, USAA Building, San Antonio, TX 78288-0544.**

DISTRIBUTION INFORMATION: *(must be completed if distributions are required to be made)*

Current Custodian, please complete the following information regarding election of payments on distributions. According to IRS regulations, **if the participant is required to take a minimum distribution from the transferring IRA for the year in which the transfer occurs, the amount of the minimum distribution cannot be transferred to the receiving custodian.**

IRA participant has elected ☐ Single Life Expectancy ☐ Joint Life Expectancy.

Life Expectancy ☐ is ☐ is not being recalculated. If joint life expectancy, please indicate:

Name and birth date of Beneficiary HELEN L PETIT Beneficiary is ☒ Spouse ☐ Non Spouse.

SIGNATURE AND CUSTODIAN ACCEPTANCE: *(Funds cannot be forwarded without participant's signature.)*

Edward L Petit — Signature of IRA Participant

5-2-02 — Date

USAA Federal Savings Bank accepts the appointment as successor custodian of the above IRA proceeds and requests the direct transfer of the funds as indicated above.

By Jeff Edwards — USAA Federal Savings Bank

5-6-02 — Date

IRA REC'D MAY 07 2002 83293-0800

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Exhibit C

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10750 McDermott Freeway
San Antonio, Texas 78288

Individual Retirement Account Designation of Beneficiary

What you need to do:
- Print in black ink.
- Complete all required sections.
- Sign the document where indicated.
- Return this document to USAA Federal Savings Bank.

1. Participant Information

PETIT, EDWARD L. MAJAFRET
Participant's Name — USAA Number

ACCT # 000000 - [redacted]

2. Beneficiary Information

IRA/ESA

A. Primary Beneficiary

I hereby revoke any Beneficiary Designation previously made with respect to this Plan. I hereby direct that in the event of my death any balance of my Individual Retirement Account(s) be paid as indicated below. In the event of my death, pay benefits to the following or the survivors thereof:

KAREN (NMI) PETIT
Name

20 SIMS ALLEY — COLUMBIA — S.C. — 29205
Address — City — State — ZIP Code

— — DAUGHTER
Birth Date — Social Security Number — Relationship

KATHY ELISE PETIT [redacted] TRUST
Name

104 HIGHLAND DR — GREENWOOD — S.C. — 29649
Address — City — State — ZIP Code

— — DAUGHTER
Birth Date — Social Security Number — Relationship

Section 2 continued on next page.

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2. Beneficiary Information

B. Secondary Beneficiary

If none of said beneficiaries survives me, pay benefits to the following or the survivors thereof:

Name

Address | City | State | ZIP Code

Birth Date | Social Security Number | Relationship

Name

Address | City | State | ZIP Code

Birth Date | Social Security Number | Relationship

3. Agreement with USAA Federal Savings Bank

I understand this Change of Designation of Beneficiary will be effective on the date of receipt by the Custodian and that upon any change of beneficiary, the right of all previously designated beneficiaries to receive benefits under this Plan shall cease.

I retain the right to revoke this designation of beneficiary and to designate a new beneficiary at any time by communicating to the Custodian in writing.

Edward L Pitt Maj AFRESRT 1-15-07

Participant's Signature | Date

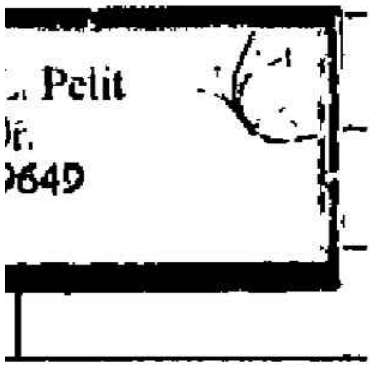
4. Delivery Instructions

Fax to: (800) 531-5717
Attn: IRA Sales & Service - Unit 94589

Mail to: USAA Federal Savings Bank
IRA Sales & Service - Unit 94589
10750 McDermott Freeway
San Antonio, Texas 78288-0544

IRA-Designation-of-Beneficiary-116.1 (12/07)

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☐ YES ☐ NO

UPSTATE P&DC 296
15 JAN 2007 PM 2 T
01/18/2007

USAA-000058

BUSINESS REPLY MAIL

FIRST-CLASS MAIL PERMIT NO. 707 SAN ANTONIO TX

POSTAGE WILL BE PAID BY ADDRESSEE

104

9876 ATTN DEPOSIT SALES AND SERVICE
USAA FEDERAL SAVINGS BANK
10750 MCDERMOTT FREEWAY
SAN ANTONIO TX 78284-8499

Exhibit D

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USAA Power of Attorney Instructions

Important Information. Please read

General. This USAA POWER OF ATTORNEY is intended to be used by you, a USAA member, to permit another person to conduct most transactions on personal USAA accounts that you, as Grantor, could conduct yourself. For example, you may want your agent (or "attorney-in-fact") to have access to your bank accounts, control over a life insurance policy you own or to take care of your auto and property transactions on your behalf. It provides your attorney-in-fact access to all of your lines of business with USAA and allows USAA and its affiliated companies to treat the signature of your attorney-in-fact as though it were your signature. For this reason, it is important that you designate a trusted family member or friend as your attorney-in-fact under this document. **The use of this form is limited to USAA business only** and would not be considered a general power of attorney. The USAA POWER OF ATTORNEY form will be accepted by all USAA companies for most business transactions with USAA companies.

Other Powers of Attorneys. If you have a military power of attorney (acceptable to USAA in most cases) or a power of attorney already on file at USAA, you may want to review it with your attorney to be sure it covers your business needs and is still in effect.

Cautionary Note: Carefully read any power of attorney form before you sign it. **Be sure to consult your attorney regarding its purpose and the legal rights that are affected by the grant of such power to another person.** Your particular circumstances may indicate the need for granting either broader or more restrictive rights than are provided for in this form. **This USAA POWER OF ATTORNEY is durable and is therefore valid and effective if you subsequently become disabled or incompetent.** In the event of your death, this USAA POWER OF ATTORNEY will terminate.

SOME LIMITATIONS ON THE USE OF THIS FORM INCLUDE:

Checkwriting Privileges. If checkwriting privileges are needed on accounts with USAA Federal Savings Bank and on mutual fund accounts with USAA Investment Management Company ("IMCO"), separate signature cards will be sent to the person to whom you have granted limited powers to your account(s).

Authority over Other Accounts. For business accounts, trust accounts, estate accounts, guardianship or conservatorship accounts, UGMA or UTMA accounts or similar accounts, other documents and applicable laws may limit your ability to grant this authority to another person. In such instances you should consult with an attorney as to the scope of your ability to grant such authority.

Electronic Services Agreement. IMCO's Information Provider Agreements require Electronic Services Agreements to be signed by the member to obtain access to accounts on **usaa.com** – agents (such as the Attorney-in-Fact) are not authorized to sign such Electronic Services Agreement for the member.

Stock transfers. Stock transfer agents for brokerage or mutual fund accounts may require a separate designation for your representative to execute a stock power before allowing him or her to trade.

Instructions to Complete the Form Below

If you decide to use this USAA POWER OF ATTORNEY form, please complete the following:

1. All applicable blanks in the form must be filled in.
2. Your signature must be acknowledged before either a notary public or a person authorized under 10 USC § 1044a to perform a notarial act for members of the armed services.
3. If you do not include a termination date, it will be presumed to be in effect until either your death or a written revocation is received by USAA.
4. You have the option of appointing an alternate attorney-in-fact to represent you in case your first appointee dies or is unwilling to serve.

If you have any questions on how to complete this form, please contact your attorney or military legal office.

For priority processing, it is important that you return the completed USAA POWER OF ATTORNEY form by faxing the printed form to 1-800-531-8877 or sending it to USAA, Power of Attorney Processing, 9800 Fredericksburg Rd., San Antonio, Texas 78288.

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USAA POWER OF ATTORNEY

USAA Member Number 273-39-01 Social Security Number _____

I, Edward L. Petit ("GRANTOR"), a legal resident of Greenwood [City], SC [State], and presently stationed or residing at 104 Highland Dr. [Address] desiring to execute this USAA POWER OF ATTORNEY, do hereby appoint Phyllis Jean Krohn, whose address is 526 Colonial Dr., Greenwood, SC and social security number is _ as my Attorney-in-Fact. If my Attorney-in-Fact is no longer able or is unwilling to serve as my legal representative, then I appoint Karen Petit whose address is 20 Sims Alley, Columbia, SC 29205 and social security number is _ to serve as my Attorney-in-Fact instead of the first named person. My Attorney(s)-in-Fact is/are United States citizen(s). I intend for my Attorney-in-Fact to act for me and in my name, to do all acts whatsoever concerning my property, accounts, policies and business relationships maintained, issued, managed, administered or held by United Services Automobile Association, or any of its subsidiaries or affiliates (collectively "USAA") necessary and advisable in the judgment of my said Attorney-in-Fact and as permitted by law, as fully as I could do if personally present and acting, including but not limited to:

1. INVESTMENT TRANSACTIONS

(a) Brokerage Accounts: to buy, sell and trade in stocks, bonds, options and any other securities or contracts relating to the same on margin or otherwise; except that my attorney-in-fact does not have authority to request that securities, cash and/or property be sent to me at my address or to another broker dealer or financial institution on my account and my attorney-in-fact is not authorized to withdraw such securities, cash and/or property in his own name as attorney-in-fact or for his own benefit.
(b) USAA Mutual Fund Accounts: to purchase, trade, exchange and redeem shares of USAA mutual funds.
(c) Generally: to execute and deliver good and sufficient instruments for the accomplishment thereof; to act as my attorney or proxy with respect to any stocks, shares, bonds, mutual funds or other investments, rights or interest as I may now or hereafter hold.
(d) Limitations: My attorney does not have the authority to make himself or herself or others the co-owner or beneficiary of such investment accounts; does not have the authority to change ownership of such investment accounts; does not have a power of appointment over such investment accounts; and does not have the authority to make a gift of the securities held in such investment accounts to himself or herself or to others.

2. BANKING TRANSACTIONS

(a) To deposit or withdraw for any purpose, in or from any bank or other financial institution, any funds, checks, or other credits which I now or hereafter may have on deposit or be entitled to, and to endorse, cash and receive the proceeds of any and all checks, vouchers, or other orders for money, to open or close accounts, and to receive statements, vouchers, notices or other documents from any bank or other financial institution concerning any and all accounts or banking transactions in my name or in which I may have an interest;
(b) To have access for all purposes to any or all safety deposit boxes or vaults rented in my name or in the names of any other person or persons and myself, with full power to use the same for safekeeping any property or papers, and to remove therefrom any time, or from time to time, all or any part of the contents of any such box or vault; and/or
(c) To borrow money on my behalf and pledge as security real or personal property of mine necessary to borrow, pay, renew, or extend the time of payment of a debt of mine.

3. INSURANCE TRANSACTIONS

(a) To pay the premiums on, terminate any property or casualty policies or execute rights on an annuity or any contract of insurance presently owned by me or hereafter acquired;
(b) Subject to underwriting requirements, to procure different or additional annuities or contracts of insurance on my life or with respect to protecting me or my property from ill health, disability, accident, liability or loss;
(c) To exercise any election or conversion rights, and to demand, receive or obtain any money, dividend, or other thing of value to which I am or to which I may become entitled as the proceeds or other return or profit arising out of any contract of insurance or of any one or more of the insurance transactions herein enumerated;
(d) To establish or change policy and billing addresses, although my Attorney-in-Fact does not receive the power to change ownership or make a gift of the annuity or contract of insurance;

(e) To receive all notices normally provided to the owner or named insured of any contract;
(f) To apply for, receive delivery, or amend any property and casualty insurance contract;
(g) To execute documents accepting or rejecting insurance coverages;
(h) To do all things necessary to the settlement of a claim, including but not limited to, the execution of releases, or execution of any documents necessary to transfer my interest in vehicles insured by USAA to effect loan payoff and salvage titling in the event that USAA determines that any such vehicle is a total loss or total theft; and/or
(i) To vote or designate a proxy to vote in matters placed before the members of USAA.

GENERAL PROVISIONS

(a) All business transacted pursuant to this USAA POWER OF ATTORNEY for me or for my account shall be transacted in my name, and all endorsements and instruments executed by my Attorney-in-Fact for the purpose of carrying out any of the foregoing powers, shall contain my name, followed by that of my Attorney-in-Fact and the designation, "Attorney-in-Fact." Additionally, I authorize my Attorney–in-Fact to use my member number, password and personal identification number ("PIN") to register and/or access the **usaa.com** website and perform transactions thereon on my behalf.
(b) I hereby ratify and confirm lawful acts done and caused to be done by my said Attorney-in-Fact pursuant to this USAA POWER OF ATTORNEY.
(c) This USAA POWER OF ATTORNEY is durable and is not affected by my subsequent disability or incapacity.
(d) If the authority contained herein shall be revoked, or terminated by operation of law, without notice, I hereby agree for myself, my executors, administrators, heirs and assigns, in consideration of my Attorney's willingness to act pursuant to this USAA POWER OF ATTORNEY, to save and hold my Attorney-in-Fact harmless from any loss suffered or any liability incurred by my Attorney-in-Fact in so acting after such revocation or termination without notice. Also, I will not hold USAA responsible for following the instructions of my Attorney-in-Fact. Revocation of this USAA POWER OF ATTORNEY is not effective until USAA receives actual notice of the revocation.
(e) Notwithstanding my insertion of a specific expiration date herein, if on the specified expiration date below I shall be, or have been, carried in a military status of "missing", "missing-in-action" or "prisoner of war," then this USAA POWER OF ATTORNEY shall automatically remain valid and in full effect until sixty (60) days after I have returned to United States military control following termination of such status.

TERMINATION

Unless sooner revoked or terminated by me by written notice addressed to USAA, 9800 Fredericksburg Rd., San Antonio, Texas 78288, this USAA POWER OF ATTORNEY shall become:

NULL and VOID from and after_____, 20__. [No date indicates the document remains effective until written revocation is received by USAA]. Upon termination or revocation, I agree to change and/or re-establish my PIN for access to the **usaa.com** website. USAA reserves the right, in its sole discretion, to discontinue honoring this USAA POWER OF ATTORNEY if you orally revoke it.

IN WITNESS WHEREOF, I have set my hand this 1-26- day of _____, 20 89.

Edward R Petit

GRANTOR SIGNATURE

TO BE VALID, YOU (THE PERSON GRANTING THESE POWERS OR BEING DEPLOYED) MUST SIGN THIS FORM AS GRANTOR IN THE PRESENCE OF EITHER A NOTARY PUBLIC OR A PERSON AUTHORIZED BY 10 USC 1044A TO PERFORM A NOTARIAL ACT FOR MEMBERS OF THE ARMED FORCES.

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CIVILIAN ACKNOWLEDGMENT

STATE OF SC (COUNTY) (CITY) (PARISH) Greenwood

I, Marie G. Marshall A Notary Public in and for the (County) (City) (Parish) and State aforesaid,

do hereby certify that on the 26th day of Jan, 2009, before me personally appeared Edward L. Ref (GRANTOR) who signed and executed the foregoing instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this day and year above.

Marie G. Marshall March 28, 2011

NOTARY PUBLIC My Commission Expires

MILITARY ACKNOWLEDGMENT

IF ACKNOWLEDGED BEFORE A PERSON AUTHORIZED TO PERFORM NOTARIAL ACTS FOR MEMBERS OF THE ARMED FORCES by 10 USC 1044a:

With the United States Armed Forces at: _____

I, _____ the undersigned do hereby certify that on this _____ day of_____, 20____, before me, personally appeared _____ (GRANTOR), who signed and executed the foregoing instrument. I do further certify that I am at the date of this certificate authorized under 10 USC 1044a to perform notarial acts for members of the armed forces, and that by statute no seal is required on this certificate.

_____
(ORGANIZATION AND STATION)

_____
SIGNATURE OF PERSON
AUTHORIZED TO PERFORM NOTARIAL ACTS

_____
(NAME, GRADE, ARMED FORCE)

USAA We know what it means to serve
INSURANCE · BANKING · INVESTMENTS · MEMBER SERVICES

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Exhibit E

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENWOOD)	C.A. NO. 2017-CP-24-01343

KAREN PETIT,)
)
PLAINTIFF,)
)
VS.)
)
PHYLLIS JEAN KROHN, USAA)
FEDERAL SAVINGS BANK AND)
USAA INVESTMENT MANAGEMENT)
COMPANY,)
)
DEFENDANTS.)

DEPOSITION

OF

KAREN PETIT

THE DEPOSITION OF KAREN PETIT, TAKEN BEFORE HOLLY W. WILSON, PROFESSIONAL VERBATIM REPORTER AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, COMMENCING AT THE HOUR OF 10:06 A.M., THURSDAY, THE 14TH DAY OF MARCH, 2019, AT THE OFFICES OF JOSHUA NASROLLAHI, LLC, 215 PARK AVENUE, GREENWOOD, SOUTH CAROLINA.

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A I just don't -- I don't know.
Q Okay. But you applied for a conservatorship and a guardianship nonetheless.
A We did.
Q Okay. Let me -- bear with me for just one second.
A Sure.
Q Did you ever -- when did you first become aware that your sister had obtained a healthcare power of attorney from your father?
A It was, I believe, the end of February. She called to tell me.
Q Okay. And at that point, did you have any reason -- and at that point or any later point, did you have any reason to contest her healthcare power of attorney?
A I was fine with her being his healthcare power of attorney.
Q Okay. So, you -- there's no question in your mind that it was a validly given power of attorney by your father?
A No, I don't have any reason to believe that.
Q Okay. I'm going to have that marked.

(MARKED FOR IDENTIFICATION, DEFENDANT'S EXHIBIT NUMBER 1, POA - WACHOVIA, ATTACHED.)

BY MR. NASROLLAHI:
Q I'm just going to pass these arounds. I'm going to put

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an extra copy right here in the middle, but this is the one I'm going to give you.

A Okay.

Q Can you identify the document that is marked as Plaintiff's [sic] Exhibit 1 or ---

A Yes, I see this.

Q Okay.

A I mean, I recognize it.

Q Okay. Can you tell me what that document purports to be.

A It is a document in which my father gave Ms. Krohn the power of attorney to manage his financial affairs with, at that time, Wachovia Bank.

Q Okay. And can you turn to the last page of the document and tell me if it provides you with the information to let you know when this document purports to have been executed?

A It was on January the 26th, 2009.

Q Okay. And tell me what, if any, issues you have with this power of attorney.

A In what respect?

Q Any respect. Is there any ---

A Okay.

Q Is there anything that gives you pause about this power of attorney?

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A Well, I believe it to be a legal binding document.
Q So you believe that this document is valid?
A I do.
Q Okay. And any actions taken by Phyllis, pursuant to the powers given under this power of attorney, would be valid?
A To the best of my knowledge.
Q Can you tell us just real quick -- and I'm not trying to put you on the spot. I just want to make sure I know where our baseline is. Tell us, as best you can, what is a power of attorney?
A A power of attorney, in my nonlegal understanding, gives someone the right to -- depending on whatever the power of attorney is for -- in this case to transact financial business at what was then Wachovia Bank, for my father.
Q Okay. So she would have been able to -- so long as she was acting with your father's best interest in mind, or whatever the legal standard is, she would have been able to transact business as if she were your father.
A Right.
Q Okay. And these are -- we've seen all these exhibits from the ---
A Sure.
Q --- from Phyllis's depositions -- deposition.

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signed it on the 26th day of 2089.
Q Okay. And since they are the notary ---
A Which was not caught by the notary, apparently.
Q Okay. Right. But the notary expresses a date of January 26, 2009, and it's the same notary on both documents. Is that not correct?
A That is correct.
Q Okay. Is it a safe assumption, or would you have any reason to disagree with me, to say that these documents are executed at or around the same time on the same day?
A I believe they probably were.
Q Okay. Do you have any information that would lead you to believe that they were not executed at or around the same time on the same day?
A No.
Q Okay.
(MARKED FOR IDENTIFICATION, DEFENDANT'S EXHIBIT NUMBER 3, HEALTHCARE POA, ATTACHED.)
BY MR. NASROLLAHI:
Q Just take that one.
A Thank you.
Q You've been handed Plaintiff's Exhibit Number 3. Can you tell us what that document purports to be.
A It purports to be a Healthcare Power of Attorney ---

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Q Okay.
A --- of my father giving the Healthcare Power of Attorney to Ms. Krohn.
Q Okay. And let's turn to the last page of Plaintiff's Exhibit 3. It's the exact same notary?
A It is.
Q Okay. And it was -- this document purports to have been executed, again, on the 26th day of January, 2009.
A Correct.
Q Okay. Do you have any reason to believe that this power of attorney is invalid?
MS. MERRILL: Objection.
THE WITNESS: I don't have any particular reason to believe it. It appears that the three were all signed at the same time.
BY MR. NASROLLAHI:
Q Okay. So, again, before I move on, there's no reason that you can think of that this document would be invalid?
A No.
Q Okay.
A I do want to -- may I go back for just a moment?
Q Absolutely.
A On Exhibit 2, the USAA Power of Attorney.
Q Okay.

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investigation, you had no issue with his continuing to serve?

A No, I did not. He had been my father's accountant for more than 30 years and my family had a good working relationship with him. My sister and I also had talked to Mr. Dorn at length about my father's accounts, and this was after February of 2012, and he allayed any concerns that we may have had.

Q Okay. And you wanted him, again, to continue serving as his attorney in fact.

A I did.

Q As your father's attorney in fact.

A I did.

Q What, if any, actions did Mr. Dorn take with regard to your father's retirement account held by USAA?

A He transferred the funds from USAA to Wells Fargo.

Q Okay. And to your knowledge, he did that with full legal authority.

A He did, to my knowledge.

Q Okay. All right. And this was after he was ordered by the probate court to investigate and find out all the funds and plans that your father had?

MS. MERRILL: Objection.

BY MR. NASROLLAHI:

Q I can refer you to the protective order and have you

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Q Okay. Do you have any evidence that he did not take into consideration any of your father's circumstances when he made these decisions?
A I believe that he took into account my father's best interest -- what would be in my father's best interest.
Q All right. And do you have any complaints to make about the conduct of Mr. Dorn in this regard?
A I don't.
Q Okay. Do you believe that, you know, he exercised proper judgment in establishing the Wells Fargo account?
A I do.
Q Do you believe that he exercised proper judgment in defunding and liquidating the USAA account?
A I assume so.
Q I'm asking you. Do you believe that he exercised proper judgment?
A I do.
Q Okay. And do you believe that he exercised proper judgment to close the USAA account?
A Yes.
Q Okay. The -- so your father was still alive at the time that the USAA account was closed.
A He was.
Q Okay. So, even if the account were open at the time of

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up an account at Wells Fargo?
A I'm sorry. Ask that again.
Q Do you believe that it is within his authority and his prerogative to rely on documents from USAA in order to set up an account at Wells Fargo?
A I do.
Q Okay. Is there anything improper about that?
A Not to my knowledge.
Q Okay. So -- and, again, these -- your nieces, the money that they received that you say half of which is rightfully yours, are funds that were disbursed from a retirement plan held by Wells Fargo, set up by Henry Dorn, acting pursuant to his -- to this court order and the power of attorney.
A Yes.
Q Okay. Please explain for me how Phyllis Krohn affected any of that.
A Ms. Krohn told me that -- okay. Let me just -- I'll back up.
Q Let's go to the -- I guess the farmer's market incident if that helps.
A Okay. Well, actually, we'll go beyond -- sooner than the farmer ---
Q After -- wherever you want to go.
A At the time of my father's death, when I learned that I

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The substance of this case is the funds that were paid by the Wells Fargo account?

A The substance of this ---

Q Right.

A --- laws- ---

Q Upon your father's passing, are you aware of any contractual relationships with any institution that were required to pay money to beneficiaries as a result of holding a retirement account for your father, other than Wells Fargo?

A I'm not sure.

Q You're not sure. Okay. What I -- I guess, what I'm trying to ask you is in what way did Phyllis interfere with a contractual relationship that your father had with Wells Fargo?

A My -- with Wells Fargo, I'm not sure of anything that Phyllis may have done with Wells Fargo.

Q Okay. With regard to the USAA agreement that he had for retirement, you were not a party to that contract.

A Which one?

Q The retirement account with USAA that was held by your father, were you a party to that agreement?

A No, I was not.

Q Okay. And is there anything in any document that you may have between your father and USAA saying that he

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was not allowed to change his beneficiaries?
A That he was not allowed to change his beneficiaries?
Q Right.
A That he, himself, was not allowed to change his beneficiaries?
Q Correct.
A Not that I'm aware of.
Q Okay. So, he was -- so, as long as he did it in a valid way, he was free to change his beneficiaries at any time up until his death, as far as you're aware?
A I suppose so.
Q Okay. In what way, then, were you -- are you entitled, as a third party to this contract, then to enforce this contract?

MS. MERRILL: Objection.

THE WITNESS: I don't quite understand what you mean by third party.

BY MR. NASROLLAHI:
Q Okay. You are not a member of this contract; correct?
A You mean the one ---
Q With USAA.
A Right.
Q Okay.
A Not now.
Q Were you ever?

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that he was of sound mind to sign this.
Q And do you have any basis to dispute that, on November 9th of 2010, that he was not competent to sign this?
A Not at that time, no.
Q Do you know who Kevin Dempsey is?
A I believe that he either is or was an accountant in Mr. Dorn's office.
Q But you weren't present when Exhibit 9 was executed. Is that correct?
A I was not.
Q Are you aware of any documents that Ms. Krohn signed under the authority granted by Exhibit 9?
A I don't know of any.
Q Are you aware of any documents that Ms. Krohn signed, under any power of attorney that she was provided by your father, that was ultimately submitted to USAA?
A I don't know.
Q As you sit here today, have you seen any such documents?
A I have not.
Q I'm going to ask you to pull out Exhibit 6 for me. Do you have that?
A I do.
Q And I think you testified to this, but I just want to make sure the record is clear. You were aware that

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powers hereinafter set forth; said powers not being in limitation of this general power but just by way of illustration."

BY MR. BROWN:

Q Okay. So the document says that it gives Mr. Dorn the ability to take any action that your father could have taken himself.

A Yes.

Q And by listing specific things within the power of attorney, it notes that those are illustrations of powers, not limitations on what can be done; correct?

A I do.

Q You agree with that?

A I do.

Q And, therefore, if your father had the legal ability to change beneficiaries on his accounts -- his IRA account, so could Mr. Dorn. Isn't that correct?

MS. MERRILL: Objection.

THE WITNESS: I don't know. I mean, I haven't read all of the fine print here. But just because Mr. Dorn could does not mean that Mr. Dorn personally would have considered that to be something he would do.

BY MR. BROWN:

Q All right. My question, though -- we just read the language that specifically says that, "The attorney in

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fact can act for me, and in my name, place and stead in any way in which I might or could do if I were personally present." So, anything that your father could have done, Mr. Dorn could do.

A He could have.

Q And, therefore, if your father could change the beneficiary on his IRA account, so could Mr. Dorn, couldn't he?

A He could have if he had deemed it to be something he wanted to do.

Q In two thous- -- in the summer of 2014, isn't it true that Mr. Dorn requested that all funds in Dr. Petit's IRA be transferred from USAA Investment Management Company to Wells Fargo?

A He did.

Q And did you ask him to do that?

A He consulted with me about doing it. We talked about it.

Q And did you ask him to do it?

A I told him to go ahead and make that change.

Q Did you initiate the thought of transferring the money, or did he?

A I did not initiate that. We were having a conversation about how, you know, he was not able to access those funds. And I asked what we might do, and he said he

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mean how many times or how frequently?
Q How frequently?
A Maybe once a month or so.
Q And ---
A Or he would call me if there were things that, you know, he wanted to ask me.
Q Okay. Did he ever call you about the beneficiaries of the IRA?
A He did not. Not to my recollection, no, he did not.
Q But you were aware, prior to the transfer, that the IRA was going to be transferred from USAA Investment Management Company to Wells Fargo.
A Yes, I did know that.
Q Have you consulted any handwriting experts about the signatures on any of the documents that you've been shown today?
A I have not.
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.
Q Have you seen any e-mails between USAA and Ms. Krohn about the IRA account?

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A I have not.
Q What do you believe USAA either -- well, let me back -- let me break it down.
What do you believe USAA Federal Savings Bank did wrong?
A In the matter of the IRA?
Q Yeah. Well, I mean, if you think they've done something else wrong that's an issue to your case, let me know, but anything that you contend they did wrong that impacts your case.
A Okay. Let me go back. On this power of attorney that was transacted in 2009 ---
MS. MERRILL: What's the exhibit number?
THE WITNESS: Oh, I'm sorry. Exhibit 2.
MR. BROWN: I think it's 2.
MS. MERRILL: Yeah, that's fine. Just -- it just helps ---
THE WITNESS: For the record. I know.
MS. MERRILL: Thank you.
THE WITNESS: So, 2009 and not 2089, as my father wrote, I don't understand why there maybe was not a witness and a notary required, because Wachovia declared that -- or required that. And that's possibly a policy or some decision that exists that I'm not aware of.

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I -- and I believe that USAA did not execute or due diligence in this individual retirement account change of beneficiary by not requiring a witness or a notary for that document.

USAA proudly touts itself as being a protector of the nation's military men and women and their families, and I believe that I -- my father, and I and my sister were not looked after with that due diligence. A simple witness or notary would have prevented us from probably being here today.

BY MR. BROWN:

Q All right. Anything else that you believe USAA Federal Savings Bank did wrong?

A Well, at the moment, no. But ---

Q And I think you've already said you really don't know the difference between USAA Investment Management and USAA Savings Bank. So just to be clear, is there anything in addition to that that you think USAA Investment Management Company did wrong?

A Well, I think -- I mean, we -- it's all under the same umbrella.

Q Okay. So, you're putting them together in terms of your claim.

A Yes.

Q Okay. All right. In terms of the first thing that you

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mentioned there with regard to Exhibit 2 needing a separate -- second witness notary, is there any change to the account that was done -- do you have any evidence that there was a change to the account -- the IRA account done pursuant to Exhibit 2?

A Beforehand?

Q At any time.

A At any time?

Q At any time.

A Do I have evidence? I don't have evidence.

Q Do you have any evidence that Ms. Krohn took any action with regard to the IRA account pursuant to the powers provided in Exhibit 2?

A I don't know.

Q With regard to the second thing, do you have any type of retirement account?

A Do I have an IRA? I do ---

Q Any type of retirement account that has a designated beneficiary.

A No, other than my state retirement account. And it's a small account separate from my main account.

Q In the execution or in the implementation of a designation of beneficiary, are you aware of any obligation imposed by any rule, regulation or law, which would require that a designation of beneficiary

Exhibit F

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENWOOD)	C.A. NO. 2017-CP-24-01343

KAREN PETIT,

PLAINTIFF,

VS.

PHYLLIS JEAN KROHN, USAA FEDERAL SAVINGS BANK AND USAA INVESTMENT MANAGEMENT COMPANY,

DEFENDANTS.

DEPOSITION

OF

PHYLLIS KROHN VAN SWOL

THE DEPOSITION OF PHYLLIS KROHN VAN SWOL, TAKEN BEFORE JILL BISHOP EDWARDS, CVR-CM, CERTIFIED VERBATIM REPORTER AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, COMMENCING AT THE HOUR OF 10:14 A.M., TUESDAY, THE 26TH DAY OF FEBRUARY, 2019, AT THE OFFICES OF HAWTHORNE MERRILL LAW, LLC, 410 MAIN STREET, GREENWOOD, SOUTH CAROLINA.

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A Twice.
Q Did you go anywhere else on what you describe as pleasure trips?
A I don't remember any others.
Q Did you and Edward Petit live together?
A No.
Q How did you come to be his power of attorney?
A He wanted to change beneficiaries.
Q Tell me about that.
MR. NASROLLAHI: Did you hear her question?
BY MS. MERRILL:
Q I'm sorry. Can you tell me more about that? You said he wanted to change beneficiaries. Can you tell me more about that?
A What is it that you want to know?
Q Okay. Well, how do you know he wanted to change beneficiaries?
A Because that's what he told me.
Q So were you made the power of attorney for the purpose of changing the beneficiary?
A No. He changed it on his own.
Q So how did you come to be his power of attorney?
A Because he asked me to do that for him.
Q Okay. Do you know when that was?
A I don't -- I don't know a date.

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was representing USAA.
Q And do you mean -- which ---
A Eddie Kramer.
Q Okay. And this is like a -- it looks like a FedEx label?
A Yes.
Q Okay. And Eddie Kramer's name is listed in the "Ship To." Is that correct?
A Yes.
Q Okay. And then who is this from?
A Dr. Petit.
Q Okay. Did you help Dr. Petit FedEx this document to USAA?
A I don't remember.
Q How do you know the name, Eddie Kramer?
A He was the person who came to meet with Dr. Petit about his investments.
Q Did you attend that meeting?
A Yes.
Q Where did he come, to Dr. Petit's home?
A Yes.
Q Do you know when that was, approximately?
A I -- I don't remember.
Q What did they discuss from the meeting?
MR. NASROLLAHI: I'm going to object. Go ahead.

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THE WITNESS: What his investments were, their value, and that Dr. Petit wanted to change the beneficiaries.

BY MS. MERRILL:

Q Okay. And then did Eddie Kramer assist him in changing the beneficiary? Did you fill out the -- did he fill out the form? I guess if you just said it was your handwriting, did you fill out the form while Eddie Kramer was there?

A I -- I don't remember.

Q Did you have Eddie Kramer's contact information after that meeting?

A I -- I don't remember.

Q And during that meeting, who did Dr. Petit say he wanted to change the beneficiaries to?

A To his two granddaughters.

Q Do you know when this form -- we're looking at Exhibit 6, still on the same page. Do you know when that form was filled out?

A Well, what I know is the date that -- beside Dr. Petit's signature.

Q Okay. And what's that date?

A 1/23/2012.

Q Do you know if that's the day he met with Eddie Kramer?

A No, that's not the date.

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Q Have you had enough time to look at it?
A Yes.
Q Okay. Would you agree with me that this appears to be an individual retirement account designation of beneficiary signed by Edward Petit on January 15, 2007?
A Yes.
Q And on the first page of that document, it lists Karen Petit and Kathy Elise Petit Trust as the beneficiaries on that form. Is that correct?
A Yes.
Q And is anyone listed as secondary beneficiary?
A No.
Q Did you fill out this form?
A No.
Q After Dr. Petit's death, how -- you mentioned earlier that after his death you were throwing away some paper. Was that from his house or your home?
A I was throwing away the papers at my home.
Q So what kind of paperwork did you keep at your house related to Dr. Petit?
A Some of the power -- the power of attorney is one that I remember, but ---
Q Which power of attorney did you keep at your house?
A I'm -- I don't remember.
Q Just so we're clear, I'm aware of what we've marked as

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Exhibit 1, which is the Wachovia power of attorney, Exhibit 2, which is the health care power of attorney, Exhibit 3, which is the USAA power of attorney executed in 2009, and Exhibit 5, which is the USAA power of attorney that was executed in 2010. Are there any other power of attorney forms that you're aware of that designated you as the agent or attorney-in-fact for Dr. Petit?

A No.

Q Did you have copies of all of those forms at your house? And when I say all of those, I'm talking about the four exhibits I just specifically listed.

A Well, probably, but they were in an envelope and I didn't check.

Q How do you know they were in an envelope?

A Excuse me?

Q How did you know they were in an envelope?

A Well, because I saw it.

Q Did you throw that away after his death?

A Yes.

Q Anything -- any other paperwork that you had? Was there any other paperwork that you had related to Dr. Petit at your home?

A Not that I remember.

Q Do you recall where the information was written for you

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A Somewhat.
Q At the top of the page there's a signature which purports to be his signature. Does that appear to be his signature to you?
A I think it is.
Q Do you have any reason to believe that he did not sign this document?
A No.
Q But you can't recall one way or the other whether you were present when he, in fact, signed it?
A I don't recall.
Q Pursuant to the power of attorney, which we've been talking about that's Exhibit 5, do you recall signing or executing any documents to USAA pursuant to that power?
A No.
Q All right. Do you think you did not sign any documents?
A I think I did not sign.
Q Okay. Correct me if I'm wrong, I think you testified that, for a period of years, you would see Dr. Petit, essentially, daily?
A Yes.
Q And as I understand it, there is an order from the probate court in May of 2013, which declared him

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Exhibit G

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Dorn Dempsey & Associates, PA

confidential fax

To:	**United Services Automobile Association**
Fax Number:	+1 (800) 531-8877
From:	**Sunny Sears**
Fax Number:	864-227-0862
Business Phone:	864-227-6620
Home Phone:	
Pages:	7
Date/Time:	11/9/2010 11:29:46 AM
Subject:	

From: Edward Petit

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Identification Form for You and Your Attorney-in-Fact

IMPORTANT INFORMATION. Federal law requires us to obtain, verify, and record the name, address, date of birth, and other information of you and your attorney-in-fact that will allow us to identify you or your attorney-in-fact when opening an account in certain other circumstances.

Your (Grantor) Information

Edward	L	Petit
Your Name: First	MI	Last

USAA Number	Social Security Number	Date of Birth (mm/dd/yy)

Your Attorney-in-Fact Information

Phyllis	J	Krohn
Name: First	MI	Last

N/A		
USAA Number (if applicable)	Social Security Number	Date of Birth (mm/dd/yy)

friend		864-388-9948
Relationship to member (e.g., parent, spouse, child or friend)		Telephone Number

536 Colonial Dr.	Greenwood	SC	29649
Physical Address (P.O. Box cannot be accepted)	City	State	Zip Code

Same			
Mailing Address (if different)	City	State	Zip Code

retired	N/A
Employer's Name	Occupation/Type of Business

N/A			
Employer's Address	City	State	Zip Code

Is your attorney-in-fact a senior political figure or family member or associate of a senior foreign political figure? ☐ Yes ☒ No

Is your attorney-in-fact a U.S. Citizen? ☒ Yes ☐ No

If no, please specify country of citizenship N/A AND provide one or more of the following valid numbers:

U.S. Alien Identification Card number N/A Passport Number Issued by Country of Citizenship

Resident Status: ☐ Resident Alien ☐ Non-resident Alien

PAGE 2/7 * RCVD AT 11/9/2010 10:29:44 AM [Central Standard Time] * SVR:PRODBFAX4W/8 * DNIS:1620005 * CSID:DornDempsey 227-0862 * DURATION (mm-ss):08-45

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Successor Attorney-in-Fact Information (if applicable)

N/A

Name: First MI Last

USAA Number (if applicable) Social Security Number Date of Birth (mm/dd/yy)

Relationship to member (e.g., parent, spouse, child or friend) Telephone Number

Physical Address (P.O. Box cannot be accepted) City State Zip Code

Mailing Address (if different) City State Zip Code

Employer's Name Occupation/Type of Business

Employer's Address City State Zip Code

Is your attorney-in-fact a senior political figure or family member or associate of a senior foreign political figure? ☐ Yes ☐ No

Is your attorney-in-fact a U.S. Citizen? ☐ Yes ☐ No

If no, please specify country of citizenship _____ AND provide one or more of the following valid numbers:

U.S. Alien Identification Card number Passport Number Issued by Country of Citizenship

Resident Status: ☐ Resident Alien ☐ Non-resident Alien

PAGE 3/7 * RCVD AT 11/9/2010 10:29:44 AM [Central Standard Time] * SVR:PRODDFAX4W/8 * DNIS:1620005 * CSID:DornDempsey 227-0862 * DURATION (mm-ss):08-45

USAA POWER OF ATTORNEY

I, Edward L Petit ("Grantor"), presently stationed or residing at 104 Highland Dr, Greenwood, SC 29649 (Address) desiring to execute this USAA POWER OF ATTORNEY, do hereby appoint Phyllis J Krohn (Name of Attorney-in-Fact), whose address is 536 Colonial Dr, Greenwood, SC 29649, as my Attorney-in-Fact. If my Attorney-in-Fact is no longer able to or is unwilling to serve as my legal representative, then I appoint N/A (Name of Successor Attorney-in-Fact), whose address is N/A, to serve as my Successor Attorney-in-Fact instead of the first named person. I intend for my Attorney-in-Fact to act for me and in my name, to do all acts whatsoever concerning my property, accounts, policies and business relationships maintained, issued, managed, administered or held by United Services Automobile Association, or any of its subsidiaries or affiliates (collectively "USAA") necessary and advisable in the judgment of my Attorney-in-Fact and as permitted by law, as fully as I could do if personally present and acting, including but not limited to **(CHECK BOX THAT APPLIES)**:

☒ **ALL THE POWERS LISTED BELOW.** Alternatively, you may check specific authorized powers for the designated USAA lines of business. Otherwise, by checking this box, ALL powers listed below apply and you need not check every box. However, if no box is checked, you agree that ALL powers listed below will apply.

☐ **INVESTMENT TRANSACTIONS**

(a) The agent, who is assigned POA, must complete a USAA Brokerage Services Option Account Application and/or USAA Brokerage Services Margin Application, as applicable, and must be approved for options and/or margin trading, before USAA Power of Attorney is granted on the margin/option account.

(b) To inquire, buy, sell (including short sales), exchange, convert and trade in stocks, bonds, mutual funds, including USAA mutual funds, ETFs, options and any other securities or contracts relating to the same on margin, if the account is approved to trade options, or otherwise; for or at the risk of my account(s);

(c) To inquire and provide instructions, reviews and set the investment objective for the management of my discretionary account(s);

(d) To execute and deliver good and sufficient instruments for the accomplishment of the above authority; to act as my attorney or proxy with respect to any stocks, shares, bonds, mutual funds or other investments, rights or interest as I may now or hereafter hold;

(e) To receive periodic account statements, confirms, proxies, prospectuses and other account disclosure documents; and

(f) To withdraw by check, order, or other means any cash, securities, or property from my account(s), regardless of the tax consequences of such a distribution. Such distribution may be made to me or to any third party, including my Attorney-in-Fact.

PAGE 4/7 * RCVD AT 11/9/2010 10:29:44 AM [Central Standard Time] * SVR:PRODBFAX4W/8 * DNIS:1620005 * CSID:DornDempsey 227-0862 * DURATION (mm-ss):08-45

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☐ **BANKING TRANSACTIONS**

(a) To deposit or withdraw for any purpose, in or from any bank or other financial institution, any funds, checks, or other credits which I now or hereafter may have on deposit or be entitled to, and to endorse, cash and receive the proceeds of any and all checks, vouchers, or other orders for money, to open or close accounts, and to receive statements, vouchers, notices or other documents from any bank or other financial institution concerning any and all accounts or banking transactions in my name or in which I may have an interest;

(b) To have access for all purposes to any or all safety deposit boxes or vaults rented in my name or in the names of any other person or persons and myself, with full power to use the same for safekeeping any property or papers, and to remove therefrom any time, or from time to time, all or any part of the contents of any such box or vault;

(c) To borrow money at an interest rate agreeable to my Attorney-in-Fact and pledge as security real or personal property of the principal necessary to borrow, pay, renew, or extend the time of payment of any of my debts;

(d) To receive bank statements, vouchers, notices, or similar documents from a financial institution and act with respect to them; and

(e) To continue, modify, or terminate an account or other banking arrangement made by me or on my behalf, including but not limited to changing automatic payment plan instructions for any loan payment or deposits.

☐ **INSURANCE TRANSACTIONS**

(a) To pay the premiums, terminate any property or casualty policies or execute rights on an annuity or any contract of insurance presently owned by me or hereafter acquired;

(b) To procure (subject to underwriting requirements) different or additional annuities or contracts of insurance on my life or with respect to protecting me or my property from ill health, disability, accident, liability or loss;

(c) To exercise any election or conversion rights, and to demand, receive or obtain any money, dividend, or other thing of value to which I am or may become entitled as the proceeds or other return or profit arising out of any contract of insurance or of any one or more of the insurance transactions herein enumerated;

(d) To establish or change policy and billing addresses, although my Attorney-in-Fact does not receive the power to change ownership or make a gift of the annuity or contract of insurance;

(e) To establish or change beneficiary designations applicable to any life insurance policy or annuity contract that I own;

(f) To receive all notices normally provided to the owner or named insured of any contract;

(g) To apply for, receive delivery of, or amend any property and casualty insurance contract;

(h) To execute documents accepting or rejecting insurance coverages.

(i) To do all things necessary to the settlement of a claim, including but not limited to, the execution of releases, receipt of insurance proceeds, authorization of repairs to insured property, or execution of any documents necessary to transfer my interest in vehicles insured by USAA to effect loan payoff and salvage titling in the event that USAA determines that any such vehicle is a total loss or total theft;

(j) To vote or designate a proxy to vote in matters placed before the members of USAA; and

(k) To execute subscriber agreements containing limited powers of attorney to effectuate the procurement of insurance policies to be provided by United Services Automobile Association.

PAGE 5/7 * RCVD AT 11/9/2010 10:29:44 AM [Central Standard Time] * SVR:PRODBFAX4W/8 * DNIS:1620005 * CSID:DornDempsey 227-0862 * DURATION (mm-ss):08-45

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GENERAL PROVISIONS APPLICABLE TO ALL SECTIONS

(a) All business transacted pursuant to this USAA POWER OF ATTORNEY for me or for my account shall be transacted in my name, and all endorsements and instruments executed by my Attorney-in-Fact for the purpose of carrying out any of the foregoing powers, shall contain my name, followed by that of my Attorney-in-Fact and the designation, "Attorney-in-Fact." Additionally, I authorize my Attorney-in-Fact to use my online/user identification, password and personal identification number ("PIN") to register and/or access the usaa.com website, mobile.usaa.com or other USAA channels of communication and perform transactions thereon my behalf. This includes, without limitation, the authority to sign up for (or suspend or cancel) electronic delivery of information, statements, confirmations, prospectuses, proxies, reports, bills, notices, disclosures, agreement forms, correspondence or other documents related to my USAA accounts and products, as well as electronic web bill pay.

(b) I hereby ratify and confirm any and all instructions, transactions, trades, dealings, or other lawful acts done or caused to be done by my Attorney-in-Fact pursuant to this USAA POWER OF ATTORNEY.

(c) **This USAA POWER OF ATTORNEY is durable and is not affected by my subsequent disability or incapacity.**

(d) If the authority contained herein shall be revoked, or terminated by operation of law, without notice, I hereby agree for myself, my executors, administrators, heirs and assigns, in consideration of my Attorney-in-Fact's willingness to act pursuant to this USAA POWER OF ATTORNEY, to indemnify, save and hold my Attorney-in-Fact harmless from any loss suffered or any liability incurred by my Attorney-in-Fact in so acting after such revocation or termination without notice. Also, I hereby agree for myself, my executors, administrators, heirs and assigns, in consideration of USAA following the instructions or directions of my Attorney-in-Fact to indemnify USAA, its officers, directors, trustees, employees, agents, successors, heirs and assigns and hold each of them harmless from any and all liability, losses, claims and costs, including attorney's fees, which may arise out of, in connection with, or related to any and all instructions, directions, transactions, trades, dealings, or other acts done or caused to be done by my Attorney-in-Fact (or USAA's justified refusal to follow such instructions). Revocation of this USAA POWER OF ATTORNEY is not effective until USAA receives notice of the revocation as specified in this document.

(e) Notwithstanding my insertion of a specific expiration date herein, if on the specified expiration date below I shall be, or have been, carried in a military status of "missing", "missing-in-action" or "prisoner of war", then this USAA POWER OF ATTORNEY shall automatically remain valid and in full effect until sixty (60) days after I have returned to United States military control following termination of such status.

TERMINATION

Expiration Date (Optional): _____. **(No date indicates the document remains effective until written or oral revocation is received by USAA).** Unless sooner revoked or terminated by me by written notice addressed to USAA, 9800 Fredericksburg Rd., San Antonio, Texas 78288, or by oral notice to a USAA member service representative, this USAA POWER OF ATTORNEY shall become NULL and VOID from and after the Expiration Date. Upon termination or revocation, I agree to change and/or re-establish my password and PIN for access to the **usaa.com** website, **mobile.usaa.com** and any other communication channel with USAA.

PAGE 6/7 * RCVD AT 11/9/2010 10:29:44 AM [Central Standard Time] * SVR:PRODBFAX4W/8 * DNIS:1620005 * CSID:DornDempsey 227-0862 * DURATION (mm-ss):08-45

IN WITNESS WHEREOF, I have set my hand this 9 day of Nov, 2010.

Edward L Pett
Grantor's Signature

TO BE VALID, YOU (THE PERSON GRANTING THESE POWERS) MUST SIGN THIS FORM AS GRANTOR IN THE PRESENCE OF EITHER (1) A NOTARY PUBLIC OR (2) A PERSON AUTHORIZED BY 10 USC §1044A TO PERFORM A NOTARIAL ACT FOR MEMBERS OF THE ARMED FORCES. FILL OUT ONLY ONE SECTION BELOW.

(1) CIVILIAN ACKNOWLEDGMENT

South Carolina, Greenwood County
State Of (County/City/Parish

I, Kevin S. Dempsey A Notary Public in and for the State aforesaid, do hereby certify that on the 9 day of November, 2010, before me personally appeared Edward L. Pett (GRANTOR), who signed and executed the foregoing USAA POWER OF ATTORNEY. IN WITNESS WHEREOF, I have hereunto set my hand and official seal this day and year above.

Kevin S Dempsey
Notary Public

8/8/2011
My Commission Expires

OR

(2) MILITARY ACKNOWLEDGMENT

IF ACKNOWLEDGED BEFORE A PERSON AUTHORIZED TO PERFORM NOTARIAL ACTS FOR MEMBERS OF THE ARMED FORCES by 10 USC §1044a:

With the United States Armed Forces at: _____

I, _____ the undersigned do hereby certify that on this _____ day of _____, 20____, before me, personally appeared _____ (GRANTOR), who signed and executed the foregoing USAA POWER OF ATTORNEY. I do further certify that I am at the date of this certificate authorized under 10 USC §1044a to perform notarial acts for members of the armed forces, and that by statute no seal is required on this certificate.

_____
(ORGANIZATION AND STATION)

_____
Signature of Person Authorized To Perform Notarial Acts
(Name, Grade, Armed Force)

THE ATTORNEY-IN-FACT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

PAGE 7/7 * RCVD AT 11/9/2010 10:29:44 AM [Central Standard Time] * SVR:PRODBFAX4W/8 * DNIS:1620005 * CSID:DornDempsey 227-0862 * DURATION (mm-ss):08-45

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Exhibit H

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STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)))	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
Karen Petit, Plaintiff, vs. Phyllis Jean Krohn, USAA Federal Savings Bank, and USAA Investment Management Co., Defendants.	)))))))))))	Civil Action No. 2017-CP-24-01343 **RESPONSE OF DEFENDANTS USAA TO PLAINTIFF'S SECOND SET OF DISCOVERY REQUESTS**

TO: JANE H. MERRILL, ATTORNEY FOR PLAINTIFF:

Pursuant to Rules 26 and 36 of the South Carolina Rules of Civil Procedure, Defendants USAA Federal Savings Bank ("USAA FSB") and USAA Investment Management Co. ("USAA IMCO") (collectively "USAA"), hereby respond to Plaintiff's Second Set of Discovery Requests as follows:

INTERROGATORIES

13. What document was in the envelope copied on page USAA-000052 in the discovery produced by USAA?

ANSWER: The document in the envelope at bates number USAA-000052 was the Individual Retirement Account Designation of Beneficiary which was previously produced as bates numbers USAA-000048 and USAA-00050. As a courtesy to Dr. Petit, USAA generated the return FedEx shipping label which was then returned and received by USAA on January 25, 2012, as shown by the receiving stamp on the left-hand margin of the document and the envelope.

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REQUESTS

15. Provide any documents referenced in response to Plaintiff's Interrogatory No. 13.

RESPONSE: The document in the envelope at bates number USAA-000052 was the Individual Retirement Account Designation of Beneficiary which was previously produced as bates numbers USAA-000048 and USAA-000050.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

William S. Brown
SC Bar No. 064164
E-Mail: william.brown@nelsonmullins.com
David C. Dill
SC Bar No. 101519
E-Mail: david.dill@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 373-2300

Attorneys for USAA Federal Savings Bank and USAA Investment Management Co.

Greenville, South Carolina

September 20, 2018

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CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for USAA Federal Savings Bank and USAA Investment Management Co., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

RESPONSE OF DEFENDANTS USAA TO PLAINTIFF'S SECOND SET OF DISCOVERY REQUESTS

Counsel Served:

Jane H. Merrill, Esq.
Hawthorne Merrill Law, LLC
410 Main Street
Greenwood, SC 29646

Joshua S. Nasrollahi, Esq.
The Law Office of Joshua S. Nasrollahi, LLC
215 Park Avenue
Greenwood, SC 29646

Susan Zeigler
Administrative Assistant

Sept. 20, 2018

Exhibit I

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10750 McDermott Freeway
San Antonio, Texas 78288

Individual Retirement Account Designation of Beneficiary

What you need to do:

- Print in black ink.
- Complete all required sections.
- Sign the document where indicated.
- Return this document to USAA Federal Savings Bank.

1. Participant Information

Edward L. Petit
Participant's Name

USAA Number

2. Beneficiary Information

A. Primary Beneficiary

I hereby revoke any Beneficiary Designation previously made with respect to this Plan. I hereby direct that in the event of my death any balance of my Individual Retirement Account(s) be paid as indicated below. In the event of my death, pay benefits to the following or the survivors thereof:

Leaman Elise Mosby
Name

407 Masters Dr. | Anderson | SC | 29626
Address | City | State | ZIP Code

Birth Date | Social Security Number | grand daughter
Relationship

Caroline Frances Mosby
Name

6598 Breezewood Blvd | Myrtle Beach | SC | 29588
Address | City | State | ZIP Code

Birth Date | Social Security Number | grand daughter
Relationship

Section 2 continued on next page.

USAA.012522012.17.02.538

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2. Beneficiary Information

B. Secondary Beneficiary

If none of said beneficiaries survives me, pay benefits to the following or the survivors thereof:

Karen Petit
Name

20 Sims Alley | Columbia | SC | 29205
Address | City | State | ZIP Code

Birth Date | Social Security Number | daughter
Relationship

Kathy Elise Petit
Name

230 E. Cambridge Apt 307 | Greenwood | SC | 29646
Address | City | State | ZIP Code

Birth Date | Social Security Number | daughter
Relationship

3. Agreement with USAA Federal Savings Bank

I understand this Change of Designation of Beneficiary will be effective on the date of receipt by the Custodian and that upon any change of beneficiary, the right of all previously designated beneficiaries to receive benefits under this Plan shall cease.

I retain the right to revoke this designation of beneficiary and to designate a new beneficiary at any time by communicating to the Custodian in writing.

Edward F Petit | 1/23/2012
Participant's Signature | Date

4. Delivery Instructions

Fax to: (800) 531-5717
Attn: IRA Sales & Service - Unit 94589

Mail to: USAA Federal Savings Bank
IRA Sales & Service - Unit 94589
10750 McDermott Freeway
San Antonio, Texas 78288-0544

USAA.012520012.17.02.

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From: (864) 229-3824
MAJOR EDWARD L PETIT

104 HIGHLAND DR

GREENWOOD, SC 29649

Origin ID: GSPA

FedEx Express

J1120110805022S

Ship Date: 29DEC11
ActWgt: 1.0 LB
CAD: 2822083/INET3210

Delivery Address Bar Code

Ref # 079-61729

RMA #:
Return Reason:

SHIP TO: (800) 292-8800 X 24778 BILL SENDER

EDDIE KRAMER
USAA WEALTH MANAGMENT
9800 FREDERICKSBURG RD

SAN ANTONIO, TX 78288

RETURNS MON-FRI
STANDARD OVERNIGHT

TRK# 0221 **7930 6760 0882**

78288
TX-US

50FG1/859F/F5F4

1. Select the 'Print' button to print 1 copy of each label.
2. The Return Shipment instructions, which provide your recipient with information on the returns process, will be printed with the label(s).
3. After printing, select your next step by clicking one of the displayed buttons.

Note: To review or print individual labels, select the Label button under each label image above.

Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com.FedEx will not be responsible for any claim in excess of $100 per package, whether the result of loss, damage, delay, non-delivery,misdelivery,or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim.Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic valueof the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental,consequential, or special is limited to the greater of $100 or the authorized declared value. Recovery cannot exceed actual documented loss.Maximum for items of extraordinary value is $500, e.g. jewelry, precious metals, negotiable instruments and other items listed in our ServiceGuide. Written claims must be filed within strict time limits, see current FedEx Service Guide.

USAA-01252012.17.03.

549

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Exhibit J

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201200001348
WATSON LAW FIRM
333 MAIN ST
GREENWOOD SC 29646

201200001348
Filed for Record In
GREENWOOD COUNTY SC
INGRAM MOON, COUNTY CLERK
02-27-2012 At 04:47 pm.
POWEROFATTO 18.00
Book 1298 Page 61 - 67

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)

DURABLE GENERAL
POWER OF ATTORNEY

Instrument 201200001348 Book 1298 Page 61

KNOW ALL MEN BY THESE PRESENTS that I, **Edward LeRoy Petit, 104 Highland Drive, Greenwood, SC 29649** (Principal") do hereby appoint **Henry A. Dorn, 222 Jennings Avenue, Greenwood, SC 29646** (Attorney") my true and lawful attorneys for the purposes hereinafter set forth. My Attorney is authorized, in such attorney's absolute discretion from time to time and at any time, to act for me and in my name, place and stead in any way which I might or could do if I were personally present as and for my true and lawful attorney-in-fact and to have all powers hereinafter set forth; said powers not being in limitation of this general power but just by way of illustration.

ITEM 1. **REAL PROPERTY TRANSACTIONS**:

(a) To purchase, contract to purchase, receive, lease or rent for any term, accept or otherwise acquire real estate or any option thereon or interests therein, wherever situated, on such terms conditions and considerations as my Attorney-in-fact shall deem proper, in my name, or jointly in my name and that of any other party or parties, including my Attorney-in-fact.

(b) To sell for cash or credit, contract to sell, mortgage, encumber, exchange, lease or rent for any term, grant options to purchase or otherwise deal in and dispose of any real estate in which I now have or may hereafter acquire any right, title or interest, whether such real estate be owned in joint tenancy, tenancy in common, or in any other manner or capacity, and in my name, or jointly with any other party or parties, including my Attorney-in-fact, on such terms conditions and considerations as my Attorney-in-fact shall deem proper, to sign, seal, execute, acknowledge and deliver any and all instruments in writing of any kind and nature, as may be necessary, containing such terms and conditions, and such warranties and covenants, if any, as my said Attorney-in-fact shall deem advisable.

(c) To manage, utilize, conserve, demolish, repair, rebuild, alter or improve any real estate or structure thereon, owned or claimed to be owned by me in whole or in part, and to protect the same by action, proceeding or otherwise, including, but not limited to, the recovery of possession thereof and the removal of tenants or other persons, animals or objects therefrom.

ITEM 2. **PERSONAL PROPERTY TRANSACTIONS**:

(a) To store, conserve, hold, buy, contract to buy, accept, sell for cash or credit, exchange, mortgage, encumber, pledge, lease or rent, contract for the repair of, and in any and every manner deal in and with any and all personal property of every kind whatsoever, tangible or intangible, which I may own or in which I now have or hereafter may acquire any right, title or interest, on such terms, conditions and considerations, as my Attorney-in-fact shall deem proper.

(b) To execute and deliver to the proper persons and authority any and all documents, instruments and papers necessary to effect the proper registration and licensing of any automobile,

C & P

WATSON LAW FIRM

vehicle, boat, motor or trailer in which I now or may hereafter have an interest.

(c) To enter into contracts for the storage and conservation of tangible personal property of every kind owned by me and to take possession and order the removal and shipment of any of my property from or to any warehouse or other place of storage, safekeeping or use, and to execute and deliver any release, receipt, shipping ticket, certificate or other instrument necessary or convenient for such purposes.

ITEM 3. **BUSINESS TRANSACTIONS**:

To demand, sue for, recover, receive, compromise, settle, adjust and pay all accounts, legacies, bequests, interest, dividends, annuities, demands, debts, invoices, medical expenses, living expenses, taxes and any and all other obligations, which may now or hereafter be due, owing or payable by or to me, and to carry on and transact every kind of business on my behalf, in my name or jointly in my name and that of any other person or persons, including my Attorney-in-fact, including, but not limited to, transactions concerning any and all investments and shares of stock, bonds, securities, certificates of deposit and savings or checking accounts, on such terms, considerations and conditions as my Attorney-in-fact may deem proper, and to invest and reinvest and exchange investments, and to execute and deliver good and sufficient instruments for the accomplishment thereof, and to act as my attorney or proxy with respect to any stocks, shares, bonds or other investments and rights or interests as I may now or hereafter hold.

ITEM 4. **FINANCIAL TRANSACTIONS**:

(a) To deposit or withdraw for any purpose, in or from any bank, savings and loan association, trust company or other financial institution any funds or other credits which I now or hereafter may have on deposit or be entitled to, and to draw, endorse, cash and receive the proceeds of any and all checks, drafts or other orders for money, to continue, contribute to, open, modify or close accounts (including individual retirement accounts), purchase or redeem certificates of deposit, or other evidences of deposits, and to receive statements, notices or other documents from any bank or other financial institution concerning any and all accounts or banking transactions in my name or in which I may have an interest.

(b) To have access for all purposes to any or all safety deposit boxes or vaults rented in my name or in the names of any other person or persons and myself, with full power to use the same for safekeeping any property or papers, and to remove therefrom at any time, or from time to time, all or any part of the contents of any such box or vault.

(c) To borrow money and to execute in my name any instrument including, but not limited to, promissory notes and credit card or securities margin account applications and agreements, evidencing indebtedness incurred on my behalf and to extend and renew the same, as well as any indebtedness heretofore incurred by me, for the payment of which I may in any way be liable, upon such terms, conditions and rates of interest as my Attorney-in-fact shall deem advisable and to use any credit card held in my name for purchases or to obtain cash advances and sign charge slips or drafts in connection therewith.

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(d) To prepare or have prepared from time to time financial statements concerning my assets and liabilities or income and expenses and to deliver such statements to any banker, banking institution or other person.

(e) To apply for and to receive letters of credit or travelers checks from any banker or banking institution, giving such indemnity or other agreements in connection therewith as my Attorney-in-fact shall deem desirable or necessary.

(f) To transfer any of my property to, withdraw principal or income from or terminate any revocable trust which I have created before or after the execution of this power of attorney for which I am during my lifetime, a primary income and principal beneficiary; however my attorney-in-fact shall have no authority to amend the dispositive provisions of any such trust or to create any such trust.

ITEM 5. **TAXES**:

For each of the years 1993 to and including 2025, to make, sign, execute and file income and all other tax returns and declarations of estimated tax required to be made by me by any law or regulation of any government or governmental authority, to represent and act for me in all tax matters in any audit, examination, dispute or litigation, in any governmental department, or other proceeding, to receive, endorse and collect checks in settlement of any refund of taxes, to execute consents agreeing to a later determination of taxes than is provided by statutes of limitation, to execute closing agreements relative to tax liabilities, to file claims for abatement, refund or credit of taxes, to make any adjustment or settlement, and to sign any and all receipts, waivers, settlements or agreements pertaining to any income or other taxes assessed against me or my property by law.

ITEM 6. **INSURANCE TRANSACTIONS**:

(a) To take out, pay the premiums on, modify, rescind, cancel, release, terminate, or execute any rights, privileges, or options of any contract of life, accident, health, disability, liability, property or other insurance presently owned by me or by any person on my behalf, or hereafter acquired.

(b) To procure new, different or additional contracts of insurance on my life or with respect to protecting me or my property from ill health, disability, accident, liability or loss.

(c) To apply for, and receive, any loan on the security of any contract of insurance, to surrender and receive the cash surrender value, to exercise or obtain any money, dividend or other thing of value to which I am or to which I may become entitled as the proceeds or other return or profit arising out of any contract of insurance or of any one or more of the insurance transactions herein enumerated.

ITEM 7. **REPRESENTATION AND EMPLOYMENT OF ASSISTANCE**:

(a) On my behalf and in my name or the name of my Attorney, to institute, prosecute, appear in, defend, compromise, arbitrate, settle or dispose of any legal, equitable or administrative hearings,

E & P

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actions, suits, attachments, claims or other proceedings, to which I am or may become a party or in which I have any interest.

(b) To hire, engage, employ and appoint agents, accountants, employees and counsel upon such terms and conditions and at such compensation as my said Attorney-in-fact shall deem proper in the exercise of the powers herein granted, to dismiss and remove at pleasure any such agent, employees and counsel, as well as any agents, accountants, employees and counsel heretofore or hereafter employed by me or in my behalf.

ITEM 8. **GIFTS, LOANS, MISCELLANEOUS**:

(a) To modify, reform, renegotiate or rescind any contract or obligation heretofore or hereafter made by me or in my behalf.

(b) To make gifts or loans to my spouse and any of my descendants (including my attorney-in-fact) and to tax-exempt organizations not exceeding in the aggregate $10,000 per year per donee except that gifts to my spouse are not subject to the above limit.

(c) To lend money to any corporation or partnership in which I hold a majority of ownership interest and to guarantee any loans made to any such entity by any third party.

(d) If I have not previously done so myself, to make advance arrangements and pay for my funeral and burial.

(e) To sign, seal, acknowledge and deliver any instrument necessary to accomplish any of the powers herein granted.

ITEM 9. **HEALTH CARE DECISIONS**:

To make decisions for me regarding my health care, including the power to consent or withhold consent on my behalf to health care. Such authority may be exercised at any time that I am "unable to consent" (as defined in the Adult Health Care Consent Act, Section 44-66-20(6) of the South Carolina Code of Laws of 1976 as amended) in regard to decisions concerning my health care.

ITEM 10. **GENERAL PROVISIONS**:

(a) All business transacted hereunder for me or for my account shall be transacted in my name, and all endorsements and instruments executed by my Attorney-in-fact for the purpose of carrying out any of the foregoing powers, shall contain my name, followed by that of my Attorney-in-fact and the designation, "Attorney-in-fact" or "AIF".

(b) This instrument shall be construed and interpreted as a general power of attorney. The enumeration of specific items, rights, acts or powers herein is not intended to, nor does it limit or restrict, and shall not be construed or interpreted as limiting or restricting, the general powers herein granted as to my Attorney-in-fact.

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(c) I do hereby declare as between me and my Attorney-in-fact a fiduciary relationship exists and that my Attorney-in-fact shall not satisfy his legal obligations out of any property subject to this Power of Attorney, nor may my Attorney-in-fact exercise this Power in favor of himself, his creditors, or the creditors of his estate; provided, however, I further declare that no person who may act in reliance upon the representations of my Attorney for the scope of authority granted to my Attorney shall incur any liability to me or to my estate as a result of permitting my Attorney to exercise any power, nor shall any person dealing with my Attorney be responsible to determine or insure the proper application of funds or property.

(d) The powers herein conferred may be exercised by either Attorney alone, and the signature or act of such Attorney on my behalf may be accepted by third persons as fully authorized by me and with the same force and effect as if done under my hand and seal and as if I were present in person acting on my own behalf and competent.

(e) My Attorney-in-fact may serve without bond and is not required to file any accounting with the Probate Court or any other court in connection with the use of the powers granted herein.

(f) The terms and conditions hereof shall inure to the benefit of and become binding upon the undersigned parties, their heirs, assigns, executors and administrators. All words used herein in the singular shall include the plural, and the masculine gender shall include the feminine.

(g) This power of attorney is granted for my personal convenience. The decision of whether to act on my behalf or not from time to time is vested solely in my Attorney, and my Attorney, his heirs, successors and assigns are hereby released and forever discharged from any and all liability upon any claim or demand of any nature whatsoever by me, my heirs or assigns, the beneficiaries under my will or under any trust which I have created or shall hereafter create or any person whomsoever on account of any failure to act of my Attorney pursuant to this power of attorney.

(h) If any part of this power of attorney shall be invalid or unenforceable under applicable law, said part shall be ineffective to the extent of such invalidity only, without in any way affecting the remaining parts of said provision or the remaining provisions of this power of attorney.

(i) My Attorney shall be entitled to reimbursement for all reasonable costs and expenses actually incurred and paid by him on my behalf pursuant to any provision of this power of attorney, but he shall not be entitled to compensation for services rendered hereunder.

(j) Notwithstanding any provision hereto to the contrary, my Attorney shall have no power or authority whatsoever with respect to (a) any policy of insurance owned by me on his life or (b) any trust created by him as to which I am a trustee.

ITEM 11. **DURATION, AMENDMENT AND REVOCATION:**

(a) THIS POWER OF ATTORNEY SHALL NOT BE AFFECTED BY PHYSICAL DISABILITY OR MENTAL INCOMPETENCE OF THE PRINCIPAL WHICH RENDERS THE PRINCIPAL INCAPABLE OF MANAGING HIS OWN ESTATE.

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(b) I direct that this Power of Attorney shall continue in effect until revoked by me in writing or terminated by law. No cancellation hereof, by operation of law or otherwise, shall be effective as to any person relying upon this Power of Attorney unless such person shall have received actual notice in writing of its cancellation.

(c) This power of attorney may be amended by me at any time and from time to time by written instrument executed by me, however, such amendment shall not be effective as to third persons dealing with my Attorney without actual notice of such amendment.

(d) If the authority contained herein shall be revoked or terminated by operation of law without notice, I hereby agree for myself, my executors, administrators, heirs and assigns, in consideration of my Attorney-in-fact's willingness to act pursuant to this Power of Attorney, to save and hold my Attorney-in-fact harmless from any loss suffered or any liability incurred by my Attorney-in-fact in so acting after such revocation or termination without notice of such revocation.

ITEM 12. Miscellaneous

(a) Whenever the words "Attorney" or "Principal" or any modifying or substituted pronoun therefor is used in this power of attorney, such words and respective pronouns shall be held and taken to include both the singular and the plural and the masculine, feminine and neuter gender thereof unless the context clearly requires otherwise.

(b) I direct that photographic copies of this power of attorney shall have the same force and effect as an original.

IN WITNESS WHEREOF, as Principal, I have executed this power of attorney this 27th day of February, 2012.

Edward LeRoy Petit - PRINCIPAL (L.S.)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)

ATTESTATION

The foregoing power of attorney was on February 27, 2012 signed, sealed, published and declared by the Principal as his appointment and empowerment of an attorney-in-fact in our presence, and at the Principal's request and in his presence and in the presence of each other we have hereunto subscribed our names as witnesses hereto.

Ann W. Lollis of Greenwood, South Carolina

Christina M. Lollis of Greenwood, South Carolina

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STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)

PROBATE

Personally appeared the undersigned, who being duly sworn, says that (s)he saw the within named Principal sign, seal and as the Principal's act and deed deliver the within power of attorney and that (s)he with the other witness whose signature appears above witnessed the execution thereof.

Witness

Sworn to before me on
February 27, 2012

Notary Public for South Carolina
My commission expires: 11/28/19

Exhibit K

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STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)	IN THE PROBATE COURT CASE NO: 2013-GC-24-17
IN THE MATTER OF EDWARD L. PETIT	)	ORDER APPOINTING CO-GUARDIANS

Petitioners: Kathy Petit and Karen Petit
Attorney for Petitioners: Hannah K. Metts, Esquire
Respondents: Edward L. Petit and Henry A. Dorn
Visitor: Michelle D. Powers, Esquire and R.N.
Guardian *Ad Litem* and Attorney for Edward L. Petit: Adam S. Bacot, Esquire

THIS MATTER COMES BEFORE THE COURT on Petition of Kathy Petit and Karen Petit [sometimes collectively hereinafter referred to as "Petitioners"], seeking an order from the Court appointing Petitioners as Co-Guardians for Edward L. Petit [hereinafter referred to as "Dr. Petit"]. A hearing was held on May 2, 2013, after due notice was provided pursuant to S.C. Code Section 62-5-309 (2009 & Supp. 2012) to all interested parties and family members as defined and required by statute. Present at the hearing were Petitioners and their attorney, Hannah K. Metts; Adam S. Bacot, the Court-appointed attorney and Guardian *Ad Litem* for Dr. Petit; Dr. Petit; Cynthia Glanton from the South Carolina Ombudsman's Office; and Eric Murdock, the husband of Kathy Petit.

The Court finds that Edward L. Petit's date of birth is December 10, 1924. Dr. Petit is currently residing in the nursing home facility at Wesley Commons in Greenwood, and Dr. Petit is a resident of the County of Greenwood, State of South Carolina.

The Court has personal and subject matter jurisdiction over this matter, and venue is proper.

From the testimony and evidence presented at the hearing, this Court is convinced that Dr. Petit needs assistance in attending to his person. The Court received and reviewed two affidavits from Anthony Holt, D.O., and Priya Kumar, M.D., as well as an examiner's report from Dr. Holt. Upon medical evaluations submitted by Dr. Holt and Dr. Kumar, Dr. Petit suffers from mental deficiency and physical illness or disability and requires assistance in basic care and daily activities. Both physicians feel that his

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condition is permanent and he is in need of a guardian to help make decisions for his day-to-day living and healthcare needs. These reports establish Dr. Petit's incapacity and need for an appointment of a guardian.

The Court also received and reviewed an affidavit from the Court-appointed visitor, Michelle Powers.

Dr. Petit executed two Powers of Attorney on February 27, 2012. One is a Healthcare Power of Attorney wherein Dr. Petit appoints Kathy Petit as agent to make his healthcare decisions. The other is a Durable General Power of Attorney wherein Dr. Petit appoints Henry A. Dorn as his agent, which includes making healthcare decisions, and which is recorded in Deed Book 1298 at Page 61 in the Office of the Clerk of Court for Greenwood County. Notwithstanding, efforts to use the authority given under the Healthcare Power of Attorney by Kathy Petit have met with objection from Dr. Petit, and a finding of incapacity is legally necessary to ensure that proper care is taken of Dr. Petit.

Mr. Dorn was properly served with the Amended Summons and Amended Petition in this matter. In his Answer, Mr. Dorn indicated that he does not desire to serve as guardian or healthcare agent for Dr. Petit, but does desire to continue to serve as his financial attorney-in-fact under that certain Durable General Power of Attorney dated February 27, 2012.

Dr. Petit expressed his concerns to the Court that he did not need help making decisions regarding his healthcare. He also expressed concerns that he was not able to get in touch with Kathy Petit by phone on a couple of occasions and that Karen Petit lived out of town. He indicated that he would prefer Jack Littlefield, a fishing buddy, to assist him with his healthcare needs but was resolute that he did not need help.

Mr. Bacot reported to the Court that he had conducted an investigation into this matter. He advised the Court that neither Dr. Petit nor anyone else had mentioned Jack Littlefield's name prior to the hearing, and that he had not spoken with him. Mr. Bacot further advised that in the event the Court determined the appointment of a guardian was proper, then Mr. Bacot believed that it was appropriate for Dr. Petit's family to serve in that capacity.

The Court has reviewed the requirements of Section 62-5-303, *et. seq.*, and finds that Dr. Petit meets the definition of an "incapacitated person" as contained in Section 62-5-101(1). The Court also finds that he meets the definition of a "legally incompetent adult"

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as defined under Federal SSA guidelines. Dr. Petit's condition is such that an appointment of a general guardian is warranted. The Court finds Kathy Petit and Karen Petit understand the responsibilities and obligations of being a guardian, that they are willing to undertake the responsibilities of being a guardian for Dr. Petit, and that are willing to submit themselves to the jurisdiction of the Court. Kathy Petit and Karen Petit have priority of appointment under Section 62-5-311. Accordingly, the Court appoints Kathy Petit and Karen Petit as Co-Guardians, acting alone or jointly, for Dr. Petit.

As Co-Guardians for Dr. Petit, Petitioners shall have the authority to make health care decisions for Dr. Petit, as well as decide other affairs that concern his person and living arrangements. The Guardianship shall not be restricted, and Petitioners shall have full authority over the affairs of Dr. Petit as outlined in Section 62-5-312. This authority shall be commensurate with that granted under the Adult Health Care Consent Act as contained in the 1976 South Carolina Code of Laws, Sections 44-66-10 through 44-66-80 (2002 & Supp. 2012), as amended.

The Court further orders that the two Powers of Attorney referenced above shall remain in effect; provided that Mr. Dorn shall not have the authority to make any healthcare decisions for Dr. Petit as this Court is herewith appointing Petitioners as Co-Guardians for Dr. Petit.

Petitioners shall promptly notify the Court if Dr. Petit's condition substantially changes for the better or worse or if it becomes necessary for Dr. Petit to relocated. Also, if contact information for the either of the Co-Guardians should change, the Court and the nursing home facility where Dr. Petit resides must be promptly notified.

Both Kathy Petit and Karen Petit are to keep Dr. Petit and the staff at Wesley Commons updated with contact information such a valid telephone number and mailing address. In the event any contact information changes, they shall notify Dr. Petit and the staff at Wesley Commons as soon as possible.

Further, Kathy Petit and Karen Petit shall have the authority to discuss all health care concerns with their father and take his wishes about his medical care into account with every decision they must make, so long as he is able.

In addition, the Court approves reasonable fees for Ms. Powers, Mr. Bacot, and Ms. Metts to be paid out of Dr. Petit's available funds.

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WHEREFORE, the Court appoints Kathy Petit[1] and Karen Petit as Co-Guardians, acting alone or jointly, for Edward L. Petit pursuant to the terms and conditions as outlined in this Order.

IT IS SO ORDERED.

Travis W. Moore, Probate Judge
Greenwood County
State of South Carolina

PUM #4

Greenwood, South Carolina
May 15, 2013

Certified A True Copy
Caroline R Nave
Clerk, Probate Court
Greenwood County, S.C.

[1] Kathy Petit is now known as Kathy Petit Murdock.

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STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	)	EIGHTH JUDICIAL CIRCUIT
KAREN PETIT, *Plaintiff,*	)	Case No.: 2017-CP-24-01343
-*v*-	)	
PHYLLIS KROHN ET AL., *Defendant*.	)	

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Comes Now Phyllis Krohn, by and through undersigned counsel, and moves this honorable Court for judgment on the pleadings pursuant to Rule 56, SCRCP. In support of this motion, the Defendant submits the following.

The facts of this case are relatively straight forward. The Plaintiff is the daughter of the decedent Dr. Edward Petit.[1] The Defendant Phyllis Van Swol (F/K/A/ Phyllis Krohn") was a "companion" of the decedent.[2] On or around January 15, 2007, the decedent executed a form with the Defendant USAA Investment Management Co. (hereinafter "USAA") declaring his daughters as the primary beneficiaries of his IRA.[3] Subsequently, in 2009, the decedent executed a form USAA power attorney in favor of the Defendant[4], which was never used by the Defendant.[5] In 2012, the decedent changed

[1] Compl. ¶ 6.
[2] Compl. ¶ 8.
[3] Petit Dep., Ex. 5.
[4] Petit Dep., Exs. 2 and 9.
[5] The decedent executed several powers of attorney in favor of the Defendant at around the same time. For example, the decedent granted the Defendant a healthcare power of attorney in addition to a power of attorney for the decedent's Wachovia bank accounts.

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the primary beneficiaries for his IRA to his grandchildren.[6] The form in question was allegedly completed by the Defendant but signed by the decedent.[7] That same year, the decedent granted Henry Dorn a durable general power of attorney,[8] the validity of which was upheld by the Greenwood County Probate Court during capacity proceedings involving the decedent in 2014.[9] The Defendant never executed any documents pursuant to the USAA powers of attorney.[10]

Sometime in mid-2014, Mr. Dorn transferred the funds from the USAA IRA into an IRA he established with Wells Fargo, N.A.[11] When Mr. Dorn set up the new IRA, he left the beneficiaries as the decedent had declared them in his 2012 declaration.[12] The Defendant had no involvement with the establishment of the Wells Fargo IRA or the transfer of funds from USAA to Wells Fargo.[13] The decedent passed away in 2015, at which point Peter Manning was appointed as the personal representative of the decedent's estate.[14] Pursuant to the beneficiary designation established by Mr. Dorn, Wells Fargo distributed the funds held by it to the decedent's granddaughters. This lawsuit followed several years later.

The Plaintiff asserts four causes of action against the Defendant: tortious interference with a contract, breach of fiduciary duty, negligence, and undue influence. The Defendant will show that insufficient facts have been alleged to maintain any litigation with regard to the first three causes of action.

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[6] Petit Dep., Ex. 4.
[7] Petit Dep. pp. 72:3-18, 73:3-24, 77:12-78:9, 169:5-14.
[8] Petit Dep., Ex. 6.
[9] Petit Dep., Ex. 7. The decedent was declared incapacitated in the referenced action.
[10] Petit Dep. pp. 141:1-4, 151:11-20
[11] Petit Dep. p. 90:14-19, 95:4-21.
[12] Petit Dep. p. 105:5-106:8.
[13] Petit Dep. p. 106:16-111:10.
[14] Compl. ¶¶ 4-5.

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I. Tortious Interference with a Contract

"The elements of a cause of action for tortious interference with contract 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). "[A]n action for tortious interference protects 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)(emphasis supplied). "Thus, '[t]he actions of a principal's agent are afforded a qualified privilege from liability for tortious interference with the principal's contract.'" Dutch Fork Dev. Grp. II, LLC v. SEL Properties, LLC, 406 S.C. 596, 605, 753 S.E.2d 840, 844 (2012)(quoting CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc., 357 F.3d 375, 385 (3d Cir. 2004))(alterations in the original). Moreover, as the contract at issue is an IRA case, even as a designated beneficiary, the Plaintiff has only an "expectancy in the benefits" which do not fully vest until the decedent passes away. Waller v. Pope, 715 So. 2d 958, 960 (Fla. Dist. Ct. App. 1998)(citing Cooper v. Muccitelli, 661 So.2d 52, 53 (Fla. 2d DCA 1995), *aff'd,* 682 So.2d 77 (Fla.1996)). Compare 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

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of insured, the action may be maintained by the beneficiary.") and 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.'").

The only parties to any contract referenced in the Plaintiff's first cause of action is the decedent and Defendant USAA. To this end, the Plaintiff is not a party to any contract here at issue. Without more, the Plaintiff has failed to established the first element of tortious interference as set out in Camp, infra. It is apparent, however, that the Plaintiff seeks to recover damages as a third-party beneficiary. The law requires a contrary result.

As explained under the legal principles set forth above, the Plaintiff acquired no vested rights in her capacity as a one-time beneficiary under the decedent's IRA. Instead, the law is clear that the decedent was free, under the terms of the IRA and under applicable South Carolina law, to change the beneficiary at any time during his lifetime. The main point of contention herein is that the power of attorney in question did not give the Defendant the authority to change beneficiary of the account.

Rather, the Plaintiff merely insists that she is a beneficiary of the plan—"Dr. Petit's IRA existed because Dr. Petit and Defendants USAA entered into a contract . . . the contract between Defendants USAA and Dr. Petit included his designating his two daughters, Plaintiff and her (late) sister, Kathy, as beneficiaries." Com. ¶ 22. Without any more, this does not establish that the Plaintiff the requirement that See Helms Realty,

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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."); Luszcz v. Lavoie, 787 So. 2d 245, 248 (Fla. Dist. Ct. App. 2001)("[A] beneficiary's rights to proceeds [of an IRA] do not attach until the IRA owner's death. Until then, the beneficiary merely has an expectancy in the IRA because until the owner's death, the owner can do with the IRA as desired, including changing the beneficiary designation or cashing out the account altogether.")

In this way, the Plaintiff has failed to set forth allegations which show that there was a valid contract between the Plaintiff and, frankly, anyone else in this case. Because the Plaintiff was not a party to the USAA contract, she cannot assert or recover on a tortious interference cause of action. Cf. Ross v. Life Ins. Co. of Virginia, 273 S.C. 764, 766, 259 S.E.2d 814, 815 (1979)(citing Smith v. Citizens & Southern National Bank of S.C., 241 S.C. 285, 128 S.E.2d 112 (1962); Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945)) ("Moreover, the South Carolina cases recognizing a cause of action for tortious interference with a contract have been limited to situations where an action was brought against third persons rather than parties to the contract.").

Furthermore, the fact that the Defendant's alleged change of beneficiaries in this case may or may not have complied with USAA's rules is of no moment to the instant case. This is so because there are no third-party beneficiary rights insofar as beneficiary changes are concerned. See Anton v. Merrill Lynch, 36 S.W.3d 251, 256 (Tex. App. 2001)(finding that plaintiff had no right as a third-party beneficiary of an IRA to ensure that a change in beneficiary designation substantially complied with Merrill Lynch's

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internal rules where compliance was for the benefit of Merrill Lynch and Merrill Lynch timely waived compliance with such rules when it accepted the change of beneficiary).

Finally, it is significantly important to point out that the IRA which ultimately paid the beneficiaries in question—wrongfully or not—is not the IRA account established with USAA to which the Defendant had access. Rather, the IRA which is truly at issue in this litigation is one established with Wells Fargo, N.A., by the decedent's legal attorney in fact, Henry Dorn. There is no dispute in this case as to this fact or to the fact that Mr. Dorn was legally authorized to establish the said IRA.[15] Moreover, there is no factual to dispute as to the Defendant's involvement in the establishment of this IRA—that is to say, none. So, even if viewed in the light most favorable to her, the Plaintiff were able to show that the Defendant had tortuously interfered with the Plaintiff's vested rights under the decedent's IRA with USAA, that plan had long been unfunded by Mr. Dorn by the time the decedent had passed away.[16]

II. Breach of Fiduciary Duty

Next, the Plaintiff alleges that the Defendant breached her fiduciary duty to the decedent by changing the beneficiaries of the decedent's former IRA. "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." RFT Mgmt. Co. v. Tinsley & Adams, 399 S.C. 322, 335-336, 732 S.E.2d 166 (2012)(citing Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct.App.2004); Spence v. Wingate, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011).

[15] Petit Dep. p. 92:7-23.
[16] Petit Dep. p. 96:1-97:9.

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Assuming for the sake of argument and viewing the matter in the light most favorable to the Plaintiff, there is no factual dispute concerning either the fiduciary relationship between the decedent and the Defendant or any alleged misconduct arising thereunder. Even if the Defendant breached a fiduciary duty owed to the decedent (which she does not concede), this is a breach of a duty owed by the Defendant to the *decedent* and not the Plaintiff. In this way, any resulting injury from such a breach would be to the decedent's estate, not to the Plaintiff personally.

Again, it bears worth repeating that the Defendant had no involvement whatsoever with regard to the Wells Fargo IRA that would, in the end, pay out the beneficiaries on the decedent's death. This is an uncontested point of fact. Rather, the IRA in question was legally and unilaterally established by Mr. Dorn, the decedent's attorney in fact.

III. Negligence

Simply put, the Plaintiff cannot maintain the present claim for negligence because her damages are purely monetary. The South Carolina Supreme Court has long held that "tort liability only lies where the damage done is to other property or is personal injury." Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 341, 384 S.E. 2d. 730 (1989). This rule, known as the economic loss rule, finds its bedrock in products liability law but the principles which underpin its application are particularly prescient here. In Sapp v. Ford Motor Co., 687 S.E. 2d 47 (2009), the Supreme Court expressed that it was "cautious in permitting negligence actions where there is neither personal injury nor property damage." Id. at 149. The Court explained in Sapp,

> [t]he purpose of the economic loss rule is to define the line between recovery in tort and recovery in contract. Contract law seeks to protect the

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> expectancy interests of the parties. Tort law, on the other hand, seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property.

This statement of public policy is abundantly applicable here. This is not a matter of personal injury or damage to property. Rather, it is a claim arising out of the Plaintiff's expectations—reasonable or not—under the IRAs here at issue. Any such claim is one in contract, not in tort.

Secondly, the Plaintiff cannot recover under a negligence theory because the Plaintiff cannot demonstrate that there was any duty to her by the Defendant with regard to the decedent's IRA. As already set forth in the section above, the Plaintiff is not a third-party beneficiary and therefore the Plaintiff would not have standing to seek damages from the Defendant *even if* South Carolina recognized a cause of action for breach of duty to a third-party beneficiary sounding in negligence. Moreover, it would be absurd to allow the Plaintiff to recover damages in a third-party negligence case where she could not recover damages in a third-party contract case.

Finally, and at the risk of beating a dead horse, it must again be stated that the IRA account that actually paid out funds on the decedent's death was *not* the USAA IRA that the Defendant purportedly had access to. This was an account, established with a completely different institution by a completely different person, acting pursuant to a completely different power of attorney. If anything, this is a textbook case of an independent, intervening act.

IV. Undue Influence

Lastly, the Plaintiff accuses the Defendant exercising undue influence on the decedent, causing him to change the beneficiaries. Here, the evidence supporting the

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Plaintiff's claims are so feeble as to be nearly non-existent. The Plaintiff alleges that the Defendant improperly and unduly influenced the decedent because she "exercised complete control over [the decedent's life] . . . from what he ate to where he went, to what he wore. Sometimes, even when [the Plaintiff] could see him."[17]

In this regard, the Supreme Court's decision in Calhoun v. Calhoun, 277 S.C. 527, 290 S.E.2d 415 (1982), is instructive. Calhoun concerned itself with undue influence in the making of a will. The pertinent facts in Calhoun were succinctly stated by the Court:

> [t]he respondents attempted to prove that appellant Virginia Calhoun unduly influenced the testator to leave her the greatest portion of his estate. Their evidence consisted of the following: the testator was physically feeble; he was temporarily confused during a period of hospitalization one year before he executed the will; approximately two months after he executed the will, he was disoriented; appellant Virginia Calhoun visited the testator in the nursing home almost everyday; the testator sometimes would "fuss" at her when he was frustrated; the testator once was overheard to say that appellant Virginia Calhoun wanted it all; she asked Dr. Wilson to examine the testator before he made some changes in his will; and she drove the testator to his attorney's office to prepare the will. However, appellant Virginia Calhoun was not present during any of the testator's conferences with his attorney nor was she physically present when the will was executed. She did not have possession of the will after its execution; instead, testator's accountant, close friend, and a subscribing witness, Mr. Holbert, kept it in his possession. Mr. Holbert testified that on the date of the execution the testator was rational, was not rushed into signing the will, and seemed satisfied with it.

Id. at 532-33. Rejecting the respondents' claims of influence, the Court held that "the issue of undue influence should be resolved in the light of proposition that a sane testator has the right to dispose of his property as he chooses." Id. at 532 (citing Harris v. Berry, 231 S.C. 201, 98 S.E.2d 251 (1957)). Moreover, the Court reasoned "where the testator has had the unhampered opportunity to revoke his will subsequent to the operation of any undue influence upon him, but makes no changes in it, the court generally considers

[17] Petit Dep. p. 125:1-7.

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the effect of the testimony bearing upon undue influence in a large measure destroyed." Calhoun, 277 at 533.

Here, the Plaintiff can offer no evidence regarding the circumstances under which the decedent's beneficiaries were changed.[18] Moreover, the evidence in this case demonstrates that the decedent was certainly competent enough to execute other legal binding documents prior to the 2014 finding of incapacity.[19] In fact, he was found by the Probate Court to have been perfectly capable of executing a power of attorney in favor of Mr. Dorn. In this way, the decedent was perfectly capable of making subsequent changes to his designation of beneficiaries. Even more remarkable is the fact that the Defendant had a power of attorney allowing her to make changes to the IRA, meaning that the application of any undue influence was completely unnecessary. Finally, the beneficiaries in question where the decedent's grandchildren, not the decedent or anyone closely associated with the decedent. It begs the question as to why the Defendant would exert such overbearing influence on the decedent for literally no gain whatsoever.

Yet again, the Defendant must bring to the Court's attention the singular fact that any alleged undue influence is only applicable to the USAA IRA, which was completely defunded at the time of the decedent's death.

CONCLUSION

For the reasons set forth above, the Defendant is entitled to summary judgment on all counts.

[Signature Follows on the Next Page]

[18] Petit Dep. p. 125:10-16, 127:24-129:23, 130:5:24,
[19] Petit Dep. p. 50:16-51:20; Petit Dep., Ex. 6.

Respectfully submitted,

/s/ Joshua S. Nasrollahi
Joshua S. Nasrollahi (SCBN 80227)

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August 12, 2019

Attorney for the Defendant

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aware, Henry Dorn had a durable power of attorney and was authorized to handle your father's finances.
A That's correct.
Q And your sister had a healthcare power of attorney. So she was able to make healthcare decisions for him.
A That's correct.
Q Okay. Explain to me why, then, you felt it necessary to have a guardian and conservator appointed for your father.
A Because -- I think I answered that, but we were concerned that my father's condition was worsening, and that there may be times that decisions would need to be made, and by the two of us in concert with each other.
Q Right.
A And to ensure that he was protected.
Q Right. But you already had the healthcare power of attorney, no?
A My sister had the healthcare power of attorney.
Q Okay. And it was a durable healthcare power of attorney; correct?
A That's my understanding.
Q And is it your understanding that a durable healthcare power of attorney survives your father's incapacity?
A No.
Q No, that's not your understanding?

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A I just don't -- I don't know.
Q Okay. But you applied for a conservatorship and a guardianship nonetheless.
A We did.
Q Okay. Let me -- bear with me for just one second.
A Sure.
Q Did you ever -- when did you first become aware that your sister had obtained a healthcare power of attorney from your father?
A It was, I believe, the end of February. She called to tell me.
Q Okay. And at that point, did you have any reason -- and at that point or any later point, did you have any reason to contest her healthcare power of attorney?
A I was fine with her being his healthcare power of attorney.
Q Okay. So, you -- there's no question in your mind that it was a validly given power of attorney by your father?
A No, I don't have any reason to believe that.
Q Okay. I'm going to have that marked.

(MARKED FOR IDENTIFICATION, DEFENDANT'S EXHIBIT NUMBER 1, POA - WACHOVIA, ATTACHED.)

BY MR. NASROLLAHI:

Q I'm just going to pass these arounds. I'm going to put

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reason ---

A No.

Q Okay. Turning back to Exhibit 4, it appears to be -- as far as the form is concerned, it appears to be the exact same form.

A You're asking me if the form ---

Q Not the handwriting on the form, but the actual form. Does this appear to be an almost identical form?

A It does.

Q Okay. But the handwriting is different?

A Yes, and the information is different.

Q Okay. And you were present at -- again, I keep asking if you were present, but do you recall at Phyllis's deposition where she admitted that that appeared to be her handwriting?

A On Exhibit 4.

Q Correct.

A Yes.

Q Okay.

MS. MERRILL: And we're looking at the first page?

MR. NASROLLAHI: That's right.

MS. MERRILL: I just want to clarify.

MR. NASROLLAHI: Yeah, that's fine.

BY MR. NASROLLAHI:

Q There does not appear to be any other person's

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handwriting on this -- on the first page of Exhibit 4.
A No.
Q Specifically, it does not appear that your father's handwriting appears on the first page of Exhibit 4.
A That is not my father's handwriting.
Q Okay. And on the second page, everything except for the signature line, it appear- -- the handwriting on that page appears to be the same as on the first page.
A Yes.
Q Okay. And, again, that's handwriting that Phyllis admitted was hers.
A Yes.
Q Okay. And it change -- this document purports to change the beneficiaries from the 2007 document to different designees.
A It does.
Q Okay. And it changes -- you -- and the 2007 document -- and I'm referring to Plaintiff's 5 -- listed you and Kathy -- or you and Kathy's trust as the beneficiaries of any retirement account.
A That's correct.
Q Okay. And this page -- the first page of Plaintiff's 4 changes it to Kathy's children.
A Correct.
Q Okay. And let's talk about the signature on the next

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A Not for the peripheral neuropathy.
Q For the ---
A That was for the spinal stenosis.
Q Spinal stenosis. I'm sorry. I got the two confused, but he was already on pain medication.
A Uh-huh.
Q And, so, he was taking additional pain medication and was -- I believe, as Phyllis testified, he was already very weak at the time -- in the month of January; correct?
A He was.
Q Okay. So, tell me again what is it about this signature that leads you to believe that it is not his signature? What specific facts do you have that you believe demonstrates that it is not your father's signature?

MS. MERRILL: Objection.

THE WITNESS: I think I've answered that question. It ---

BY MR. NASROLLAHI:

Q No. No. You've told me why you think you can't tell that it is, in fact, his. Now I want you to tell me -- you -- I've asked you if you could recognize his signature. You've not been able to confirm that it's his signature. I want you to now tell me why you think

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it might be someone else's signature.
A Well, I have no knowledge that it is his signature.
Q That's not my question.
A Okay.
Q My question is what specific facts can you tell me -- and if the answer is none, that's fine. What specific facts can you give me that demonstrate in any concrete way that that is not your father's signature?
A I can't give you concrete facts.
Q Okay.
A But I can say that, at the time that this document was signed, the day after they returned from the cruise -- we returned from the cruise, because we returned at the same time, my father had been a very sick man. In the days leading up to the signing of this document, there were numerous times when he was incoherent and not able to speak, not able to reason, not able to think on his own.
Q Okay. And do you have any evidence that leads you to believe that your father was incapable of physically expressing a signature?
A I don't have evidence of that.
Q Okay. Are you saying that your father was physically incapable of expressing his signature on January 23, 2012?

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investigation, you had no issue with his continuing to serve?

A No, I did not. He had been my father's accountant for more than 30 years and my family had a good working relationship with him. My sister and I also had talked to Mr. Dorn at length about my father's accounts, and this was after February of 2012, and he allayed any concerns that we may have had.

Q Okay. And you wanted him, again, to continue serving as his attorney in fact.

A I did.

Q As your father's attorney in fact.

A I did.

Q What, if any, actions did Mr. Dorn take with regard to your father's retirement account held by USAA?

A He transferred the funds from USAA to Wells Fargo.

Q Okay. And to your knowledge, he did that with full legal authority.

A He did, to my knowledge.

Q Okay. All right. And this was after he was ordered by the probate court to investigate and find out all the funds and plans that your father had?

MS. MERRILL: Objection.

BY MR. NASROLLAHI:

Q I can refer you to the protective order and have you

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BY MR. NASROLLAHI:

Q I've got to ask you, did you discuss your testimony during this break with any person?

A No, I did not.

Q Okay. I'm not -- I ask everybody that. So, don't ---

A Okay. That's fine.

Q Okay. I forgot what my last question, but -- so I may be repeating. So, Mr. Dorn funded the Wells Fargo retirement account with the funds from the USAA account.

A That's my understanding.

Q That's your understanding. And if that is an accurate description of what happened, you would -- would you have any reason to challenge his authority to have made that transfer?

A No.

Q Is it your understanding that if he -- if that -- let's assume for these next questions that he did, in fact, transfer the funds from the USAA account to the Wells Fargo account. That if he did that, that it was pursuant to his legal authority under this order and the power of attorney, one or both.

A Yes.

Q Okay. If Mr. Dorn were to have set up a retirement account at Wells Fargo with different beneficiaries

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Q Okay. Do you have any evidence that he did not take into consideration any of your father's circumstances when he made these decisions?
A I believe that he took into account my father's best interest -- what would be in my father's best interest.
Q All right. And do you have any complaints to make about the conduct of Mr. Dorn in this regard?
A I don't.
Q Okay. Do you believe that, you know, he exercised proper judgment in establishing the Wells Fargo account?
A I do.
Q Do you believe that he exercised proper judgment in defunding and liquidating the USAA account?
A I assume so.
Q I'm asking you. Do you believe that he exercised proper judgment?
A I do.
Q Okay. And do you believe that he exercised proper judgment to close the USAA account?
A Yes.
Q Okay. The -- so your father was still alive at the time that the USAA account was closed.
A He was.
Q Okay. So, even if the account were open at the time of

your father's passing, it would have had, as best as you know, a zero balance.

MS. MERRILL: Object to the form.

THE WITNESS: The IRA account ---

BY MR. NASROLLAHI:

Q The USAA account is the account I'm talking about. At the time of your father's passing, let's say, it had been liquidated; correct?

A That's my understanding.

Q Okay. So, even if the account was open, it would have a zero balance at the time of your father's passing.

A You're speaking of the IRA account.

Q I'm talking about the USAA account. Yes, the IRA, yes.

A Yes. That is my understanding.

Q So, based on the terms, zero -- there is no distribution that would have made out -- been made out of the account at your father's passing.

A There were some funds that I did receive from USAA. But from what specific accounts those came from, I'm not sure.

Q Did you receive any monies from the retirement account?

A The IRA?

Q Yes.

A Not of the nearly 450 thousand dollars.

Q Did you receive any money from his IRA held by USAA?

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up an account at Wells Fargo?
A I'm sorry. Ask that again.
Q Do you believe that it is within his authority and his prerogative to rely on documents from USAA in order to set up an account at Wells Fargo?
A I do.
Q Okay. Is there anything improper about that?
A Not to my knowledge.
Q Okay. So -- and, again, these -- your nieces, the money that they received that you say half of which is rightfully yours, are funds that were disbursed from a retirement plan held by Wells Fargo, set up by Henry Dorn, acting pursuant to his -- to this court order and the power of attorney.
A Yes.
Q Okay. Please explain for me how Phyllis Krohn affected any of that.
A Ms. Krohn told me that -- okay. Let me just -- I'll back up.
Q Let's go to the -- I guess the farmer's market incident if that helps.
A Okay. Well, actually, we'll go beyond -- sooner than the farmer ---
Q After -- wherever you want to go.
A At the time of my father's death, when I learned that I

was no longer a beneficiary of the IRA, I questioned -- I asked Henry about it. And he said that that was the form that had come via USAA to him when the funds were being -- when the funds were transferred.

Q Right.

A And I said, "Well, I don't know how that happened." And he said he didn't know how it had happened either.

Q Tell me again when this was happening -- when this conversation was happening.

A It was after my father died.

Q Okay.

A And I went to the -- and I went to Wells Fargo and I asked them how it was that this -- you know. And they said that the form for the beneficiaries had come to them from USAA. And they had no reason, of course, to change that.

Q And how did -- are you aware of how they got these "forms"?

A I would imagine ---

MS. MERRILL: Objection.

THE WITNESS: I don't know. I don't know how they would have gotten the forms. Not specifically.

MR. NASROLLAHI: Okay.

(MARKED FOR IDENTIFICATION, DEFENDANT'S EXHIBIT NUMBER 8, USAA - FAX, ATTACHED.)

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MS. MERRILL: I'm sorry, Josh. May I -- I mean, maybe I misunderstand. I didn't know who you were asking about the forms. So, when you ---

MR. NASROLLAHI: I don't remember my question.

MS. MERRILL: Okay.

THE WITNESS: You're talking about -- okay. So, this is Exhibit 8, the -- okay. All right.

BY MR. NASROLLAHI:

Q Can you ident- -- so you've identified -- can you identify as best you can Plaintiff's Exhibit 8?

A This says that it's the application for Dad's IRA, which contains the beneficiary information. So, this was done in 2014, when I suppose the funds were transferred.

Q Okay. And what, if anything, does this tell you? Let's go to the last page.

A So at the time that the funds were transferred that my niece was -- my two nieces were the beneficiaries.

Q Okay. And does this appear to be something that Mr. Dorn requested?

MS. MERRILL: Objection.

THE WITNESS: I don't know.

BY MR. NASROLLAHI:

Q Okay. Can you read on the very first page, underneath notes, what the language there says?

A The note says, "Hi, Mr. Dorn. Here is the application for Mr. Petit's IRA, which contains the beneficiary information."
Q Okay. And the date of this fax is?
A June the 30th, 2014.
Q Okay. So had your father passed away?
A He did in 2015.
Q Okay. So, your father was still alive at this time?
A He was.
Q And going back to Plaintiff's Number 7, the protective order is dated February 14, 2014.
A February the 18th, I believe.
Q I'm looking at the stamp at the top right corner of the probate ---
A Oh, where it was filed.
Q Correct. It says ---
A Oh, yes.
Q --- February 14, 2014.
A Uh-huh.
Q And it seems like we've got some time travel issues in this case because it looks like this was filed before it was signed by the judge. But -- okay.

So, prior to your father's death but during the time where he had a valid power of attorney and a court order, Mr. Dorn appears to have been aware of the

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beneficiaries of the USAA account.

A I ---

Q Based on Plaintiff's Number 8.

A Based on Plaintiff's Number 8, yes.

Q Okay. And do you have any idea when the USAA account was established? I mean, not the USAA -- I'm sorry, the Wells Fargo account was established?

A Sometime in 2014, I guess.

Q Okay. Do you know if it was after June 30th of 2014?

A I don't know.

Q Okay. But prior to your father's death, again, Mr. Dorn was aware of who the beneficiaries were for the USAA account?

A He must have been.

Q Okay. And you're saying -- your testimony today is, as best you understand it, the information 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?

MS. MERRILL: Objection.

BY MR. NASROLLAHI:

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Q 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 problems 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.
Q Okay. Do you believe that, if Mr. Dorn were to have had issues with the information that he appears to have had, that he was empowered under the power of attorney and protective order to take action?

MS. MERRILL: Objection.

THE WITNESS: I don't know.

BY MR. NASROLLAHI:

Q Let's say that Mr. Dorn reviewed Plaintiff's Exhibit 4 and said, "That's not Mr. -- that's not Dr. Petit's signature. This is a fraudulent transaction." Do you believe that Mr. Dorn would have been empowered to effect a change with regard to the beneficiaries?

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Q Okay. And in what way did she coerce or apply undue influence on your father, as your complaint alleges?
A Ms. -- during the course of their relationship, Phyllis exercised complete control over my father's life.
Q Okay.
A I mean, from what he ate to where he went, to what he wore. Sometimes, even to when we could see him.
Q So she -- he did whatever she told him to do?
A I would say 99 percent of the time.
Q So why do you believe it was necessary for her to forge his signature on the form, the Plaintiff's Exhibit 4?
A I don't know that she forged it. I just don't know whose signature it is.
Q Okay. So do you believe that it is likely that she forged his signature?
A I don't know.
Q Do you -- and if she exerted such undue influence on him and also believed -- she had a power of attorney; correct? You say it's invalid, but there's a power of attorney for USAA; correct?
A Right.
Q Okay. So she could have used the power of attorney to change the beneficiary.
A Well, she could have used that to -- she could have. I don't know. But I think in investment transaction, it

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at the same thing to keep -- I didn't mean to interrupt. I was just making sure I understood what y'all were looking at.

BY MR. NASROLLAHI:

Q For the record, can you state which section you were looking -- you were referring to.

A I am looking at the USAA Power of Attorney from January 2009, Section 1.

MS. MERRILL: This is Exhibit 2?

THE WITNESS: Yes, it's Exhibit 2, Section D.

BY MR. NASROLLAHI:

Q Okay. So, she can -- it says here, "My attorney does not have the authority to make himself or herself or others the co-owner or beneficiary of such investment accounts." Okay?

A Uh-huh.

Q So she didn't have the -- so, but your reading of this is she did not have the authority, even if she were acting under a power of attorney, to change this.

A Correct.

Q Okay. And not at issue is whether she used a power of attorney to change this, is it?

A I don't know what she did.

Q Okay. There's a piece of paper, Plaintiff's Exhibit 5, purporting to be Edward L. Petit's designation -- I

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believe it's Plaintiff's 4, excuse me. This document purports to be from Edward -- it purports to be signed by Edward Petit, changing the beneficiaries.

A Correct.

Q Okay. You are not saying that she -- that Phyllis forged your father's signature on that document?

A I don't know whose signature it is. She might have forged it. She may not have.

Q I'm -- my ---

A I'm just saying that I don't know whose signature it is.

Q I want a definitive -- I need a definitive answer. Are you saying that she forged his signature on that document?

A I don't know.

Q It's a yes or no question. Are you saying that she forged the question -- I mean, forged the signature on the ---

A I wasn't there. I didn't see it. And I can't answer any other way but to say I don't know how that signature occurred.

Q Okay. So do you have ---

A That's all I'm saying.

Q Do you have any evidence that she forged the signature that's on that?

A I don't have evidence of a forgery.
Q Okay. Do you have any evidence that someone other than your father signed that signature?
A I don't have evidence.
Q Okay. The only evidence -- the only thing that is objectional about that signature is that it doesn't look like his other signatures for a few different reasons.
A It doesn't look like his ---
Q Okay. And at the exact same time, you testified earlier -- or you didn't testify earlier that, given his condition on January 23, 2012 -- or 26th -- was it 26th or 23rd -- the date that he signed that -- he's alleged to have signed that document, you did not expect him to have his typical signature on that day.
A Right.
Q Okay. So, my question, before I move on, what tangible evidence can you produce, either in this deposition, through discovery or at trial in this case, what tangible evidence can you produce that your father did not sign that change of desig- -- change of beneficiary?
A I have no -- I cannot prove.
Q Okay.
A But none of the information that is filled out on these

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forms is my father's handwriting, and I don't understand why, if he were able to sign his name, why he also was not -- why he needed somebody else to fill out the form for him.

Q Okay. And you've already testified that you believe that your father had the right to change beneficiaries of this contract at any time.

A He could have.

Q Okay. And do you believe that, if he would have chang-- if he would have removed you as a beneficiary, if he would have done it lawfully, do you believe that you would have had a right to say, "No, you can't change that"?

A If I had known what was going on?

Q No. No.

A I'm sorry. I don't understand.

Q Let's say Phyllis Krohn -- Phyllis Van Swol never existed. And your father, who was in -- who was fit and fiddle, went and changed the designation of beneficiaries and removed you and your sister. Do you have any reason, do you have any evidence to challenge his ability to do that?

A If he had been, as you say fit as a fiddle, I would not have an -- I could not object.

Q Okay.

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Q Well, let me back up and ask the question. Under Exhibit 2, are you aware of Ms. Krohn signing any documents on behalf of your father?
A Not that I'm aware of.
Q Do you have any type of business relationship with Mr. Manning? Is he also your attorney in any way?
A No, he is not.
Q Has he ever represented you?
A One time.
Q Okay. When was that?
A I believe it was in 2009 or 2010.
Q And what did that representation relate to?
A It related to a matter that I had with my mortgage company.
Q So it was a dispute between you and the person who held the mortgage on your home?
A Yes.
Q Okay.
A And he represents the estate, of course, which would have been representing me to a certain extent, I guess. But he does not represent me now in any way, other than the estate.
Q Did Mr. Manning ever represent your sister, Kathy?
A I don't know.
Q Have you ever had any type of business relationship

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Q And that was deemed -- or those people deemed your father to be competent for the execution of that document at that time.
A At that time, yes.
Q And as you sit here today, you don't have any evidence one way or the other as to whether your father was in a competent condition at the time he executed Exhibit 4, the change of beneficiary form; correct?
A The evidence that I have is his signature, the fact that Ms. Krohn filled out all of this herself, this being filled out following an argument -- two arguments that Ms. Krohn and I had had. So I don't have any evidence, but I do know that my father was not a well man when this happened.
Q And on the face of Exhibit 4, is there anything that would indicate to a neutral third party that that document has been tampered with or doctored in any way?
A I'm sorry. Ask that again.
Q If you look at that Exhibit 4, the designation of beneficiary form, is there anything on the face of that document which would indicate to a neutral third party that the document has been altered or was falsified in any way?
A I don't know.
Q Do you see anything that you would say shows you that

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WARNING TO PERSON EXECUTING THIS DOCUMENT: This is an important legal document. It creates a power of attorney that provides the person you designate as your attorney-in-fact with the broad powers it sets forth.

- You have the right to terminate this power of attorney.
- If there is anything about this form that you do not understand, you should ask a lawyer to explain it to you.
- These powers of attorney shall continue even if you later become disabled or incapacitated.

This Durable Power of Attorney is for:

Account Title: Edward L. Petit Org.: —

Account Number(s): [redacted] Safe Deposit Box Number: 102

As used herein, the words "I", "Me", "My", "Myself" and "Mine" refer to the account holder (hereinafter "PRINCIPAL") who signs this Durable Power of Attorney.

Complete This Section In Pennsylvania Only

Notice

The purpose of this Power of Attorney is to give the person you designate (your "AGENT") broad powers to handle your property, which may include powers to sell or otherwise dispose of any real or personal property without advance notice to you or approval by you.

This Power of Attorney does not impose a duty on your AGENT to exercise granted powers, but when powers are exercised, your AGENT must use due care to act for your benefit and in accordance with this Power of Attorney.

Your AGENT may exercise the powers given here throughout your lifetime, even after you become incapacitated, unless you expressly limit the duration of these powers or you revoke these powers or a court acting on your behalf terminates your AGENT'S authority.

Your AGENT must keep your funds separate from your AGENT'S funds.

A court can take away the powers of your AGENT if it finds your AGENT is not acting properly.

The powers and duties of an AGENT under a Power of Attorney are explained more fully in 20 PA. C.S. CH. 56.

If there is anything about this form that you do not understand, you should ask a lawyer of your own choosing to explain it to you.

I have read or had explained to me this notice and I understand its contents.

_____ Principal

_____ Date

I, the undersigned, have made, constituted and appointed and by these presents do make, constitute and appoint: Phyllis Jean Krohn my true and lawful attorney in fact
(Type Name of Agent)
(hereinafter "AGENT") for me from time to time and in my name, place and stead:

NJ Only: "To conduct banking transactions as set forth in Section 2 of P.L. 1991 (C.46:2B-8 et seq.)"

1. To make, draw, sign, endorse, deposit, accept, and deliver checks, drafts and other instruments for the payment of money on the above identified account;
2. To acknowledge the correctness of any statement on the above identified account;

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Petit 026

Δ π EXHIBIT 1
Deponent K. Petit
Date 3/14 Rptr. HW
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3. To accept and receive notices and demands and sign receipts for canceled checks and vouchers on the above identified account, and generally to do all acts and things with reference to the above identified account with Wachovia Bank, National Association (hereinafter "BANK");
4. To open, deposit in, operate, withdraw from and close deposit accounts of all types.
5. To borrow money and to obtain credit for me from BANK on such terms as may seem to said AGENT advisable, and to make and deliver notes, drafts, acceptances, agreements, and any other obligations of mine in form satisfactory to BANK, and as security therefore to pledge any property of mine.
6. **In addition to the above powers, by signing my name on the line appearing after this 6th power, my AGENT shall also have the power to access the safe deposit box indicated above and to act for and in my stead and as fully and completely as if I was present and acting myself with regard to said box, to take and remove from or add to the contents of said box and to have full and absolute control over the same, and I hereby direct BANK to allow my AGENT to enter said box whenever he/she requests that privilege and presents a key and signs his/her name on BANK records using the signature affixed hereto.**

   Signed: Edward L Petit **(Principal's Signature)**
7. **In addition to the above powers, my agent shall also have the power to give written instruction to Bank with regard to all matters relating to my IRA Account as indicated above, including authorization to withdraw funds, but not the power to change or designate the beneficiary on my IRA Account.**

Granting unto my said AGENT full power and authority to do and perform all acts and things whatsoever in connection with the foregoing authority as fully and for all intents and purposes as I could do if personally present.

I also, hereby, authorize and direct BANK to receive, accept, pay and/or apply, without any duty of inquiry, without limit as to amount, and without regard to the application or the proceeds, any check, draft, or other instrument for the payment of money drawn by my said attorney on or payable from the above identified account including but not limited to those indorsed to the order of said AGENT or otherwise for the personal credit or account of or in payment of the individual obligation of my said AGENT to BANK or others.

I hereby ratify and confirm all previous acts of my said AGENT with the same force and effect as if said acts had been done after the delivery of this Durable Power of Attorney. In consideration of BANK acting in reliance hereon, I agree for myself and my legal representative to indemnify Bank and save it harmless from all expenses, losses or damages (including attorneys' fees at trial and on appeal) that it may sustain by relying upon the apparent authority of this Durable Power of Attorney after its termination by operation of law or otherwise, but before written notice and satisfactory proof of such termination is received by BANK and such of its departments, branches and correspondents as may be concerned. I also agree that any action taken by my AGENT purporting to be pursuant to this Durable Power of Attorney shall be binding upon myself, my estate and my personal representatives and heirs, so long as such action is taken before bank receives written revocation of this Durable Power of Attorney, written notice and satisfactory proof of my death, the pendency of a court proceeding to determine my competency or court appointment of a guardian of my person or property.

THIS DURABLE POWER OF ATTORNEY SHALL NOT BE AFFECTED BY MY DISABILITY EXCEPT AS PROVIDED BY STATUTE.

The following is a genuine specimen of the handwriting and form of signature to be used by the AGENT appointed hereby, if present; otherwise it may be found on the Affidavit and Indemnity Agreement:

Phyllis Jean Krahn

Signature of AGENT

Edward L. Petit (Seal)
Signature of PRINCIPAL

(Seal)
Signature of PRINCIPAL

California, Florida and South Carolina (two witnesses)

Cynthia A. Burns (Seal)
Witness

Marie G. Marshall (Seal)
Witness

Jan 26, 2009
Date

Pennsylvania Only

Acknowledgement Executed By Agent

I, _____, have read the attached Power of Attorney and am the person identified as the AGENT for the principal. I hereby acknowledge that in the absence of a specific provision to the contrary in the Power of Attorney or in 20 PA. C.S. when I act as AGENT:

I shall exercise the powers for the benefit of the principal.

I shall keep the assets of the principal separate from my assets.

I shall exercise reasonable caution and prudence.

I shall keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.

_____ AGENT

_____ Date

COMMONWEALTH OR STATE OF SC

Greenwood COUNTY/CITY

I, Marie G. Marshall, a notary public for said County and State or Commonwealth, do hereby certify that Edward L. Petit (Customer's Name) personally appeared before me this day and acknowledged the due execution of the foregoing Agreement.

Witness my hand and official seal, this 26th day of Jan, 2009.

(SEAL)

Marie G. Marshall
NOTARY PUBLIC

My commission expires March 28, 2011.

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Petit 028

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USAA

USAA Power of Attorney Instructions

Important Information. Please read

General. This USAA POWER OF ATTORNEY is intended to be used by you, a USAA member, to permit another person to conduct most transactions on personal USAA accounts that you, as Grantor, could conduct yourself. For example, you may want your agent (or "attorney-in-fact") to have access to your bank accounts, control over a life insurance policy you own or to take care of your auto and property transactions on your behalf. It provides your attorney-in-fact access to all of your lines of business with USAA and allows USAA and its affiliated companies to treat the signature of your attorney-in-fact as though it were your signature. For this reason, it is important that you designate a trusted family member or friend as your attorney-in-fact under this document. The use of this form is limited to USAA business only and would not be considered a general power of attorney. The USAA POWER OF ATTORNEY form will be accepted by all USAA companies for most business transactions with USAA companies.

Other Powers of Attorneys. If you have a military power of attorney (acceptable to USAA in most cases) or a power of attorney already on file at USAA, you may want to review it with your attorney to be sure it covers your business needs and is still in effect.

Cautionary Note: Carefully read any power of attorney form before you sign it. Be sure to consult your attorney regarding its purpose and the legal rights that are affected by the grant of such power to another person. Your particular circumstances may indicate the need for granting either broader or more restrictive rights than are provided for in this form. This USAA POWER OF ATTORNEY is durable and is therefore valid and effective if you subsequently become disabled or incompetent. In the event of your death, this USAA POWER OF ATTORNEY will terminate.

SOME LIMITATIONS ON THE USE OF THIS FORM INCLUDE:

Checkwriting Privileges. If checkwriting privileges are needed on accounts with USAA Federal Savings Bank and on mutual fund accounts with USAA Investment Management Company ("IMCO"), separate signature cards will be sent to the person to whom you have granted limited powers to your account(s).

Authority over Other Accounts. For business accounts, trust accounts, estate accounts, guardianship or conservatorship accounts, UGMA or UTMA accounts or similar accounts, other documents and applicable laws may limit your ability to grant this authority to another person. In such instances you should consult with an attorney as to the scope of your ability to grant such authority.

Electronic Services Agreement. IMCO's Information Provider Agreements require Electronic Services Agreements to be signed by the member to obtain access to accounts on usaa.com – agents (such as the Attorney-in-Fact) are not authorized to sign such Electronic Services Agreement for the member.

Stock transfers. Stock transfer agents for brokerage or mutual fund accounts may require a separate designation for your representative to execute a stock power before allowing him or her to trade.

Instructions to Complete the Form below:

If you decide to use this USAA POWER OF ATTORNEY form, please complete the following:

1. All applicable blanks in the form must be filled in.
2. Your signature must be acknowledged before either a notary public or a person authorized under 10 USC § 1044a to perform a notarial act for members of the armed services.
3. If you do not include a termination date, it will be presumed to be in effect until either your death or a written revocation is received by USAA.
4. You have the option of appointing an alternate attorney-in-fact to represent you in case your first appointee dies or is unwilling to serve.

If you have any questions on how to complete this form, please contact your attorney or military legal office.

For priority processing, it is important that you return the completed USAA POWER OF ATTORNEY form by faxing the printed form to 1-800-531-8877 or sending it to USAA, Power of Attorney Processing, 9800 Fredericksburg Rd., San Antonio, Texas 78288.

Petit 022

Δ π EXHIBIT 2
Deponent K. Petit
Date 3/14 Rptr. HW
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USAA POWER OF ATTORNEY

USAA Member Number [redacted] Social Security Number [redacted]

I, Edward L. Petit ("GRANTOR"), a legal resident of Greenwood [City], SC [State], and presently stationed or residing at 104 Highland Dr. [Address] desiring to execute this USAA POWER OF ATTORNEY, do hereby appoint Phyllis Jean Krohn, whose address is 526 Colonial Dr., Greenwood, SC and social security number is [redacted] as my Attorney-in-Fact. If my Attorney-in-Fact is no longer able or is unwilling to serve as my legal representative, then I appoint Karen Petit whose address is 20 Sims Alley, Columbia, SC 29205 and social security number is [redacted] to serve as my Attorney-in-Fact instead of the first named person. My Attorney(s)-in-Fact is/are United States citizen(s). I intend for my Attorney-in-Fact to act for me and in my name, to do all acts whatsoever concerning my property, accounts, policies and business relationships maintained, issued, managed, administered or held by United Services Automobile Association, or any of its subsidiaries or affiliates (collectively "USAA") necessary and advisable in the judgment of my said Attorney-in-Fact and as permitted by law, as fully as I could do if personally present and acting, including but not limited to:

1. INVESTMENT TRANSACTIONS

(a) Brokerage Accounts: to buy, sell and trade in stocks, bonds, options and any other securities or contracts relating to the same on margin or otherwise; except that my attorney-in-fact does not have authority to request that securities, cash and/or property be sent to me at my address or to another broker dealer or financial institution on my account and my attorney-in-fact is not authorized to withdraw such securities, cash and/or property in his own name as attorney-in-fact or for his own benefit.
(b) USAA Mutual Fund Accounts: to purchase, trade, exchange and redeem shares of USAA mutual funds.
(c) Generally: to execute and deliver good and sufficient instruments for the accomplishment thereof; to act as my attorney or proxy with respect to any stocks, shares, bonds, mutual funds or other investments, rights or interest as I may now or hereafter hold.
(d) Limitations: My attorney does not have the authority to make himself or herself or others the co-owner or beneficiary of such investment accounts; does not have the authority to change ownership of such investment accounts; does not have a power of appointment over such investment accounts; and does not have the authority to make a gift of the securities held in such investment accounts to himself or herself or to others.

2. BANKING TRANSACTIONS

(a) To deposit or withdraw for any purpose, in or from any bank or other financial institution, any funds, checks, or other credits which I now or hereafter may have on deposit or be entitled to, and to endorse, cash and receive the proceeds of any and all checks, vouchers, or other orders for money, to open or close accounts, and to receive statements, vouchers, notices or other documents from any bank or other financial institution concerning any and all accounts or banking transactions in my name or in which I may have an interest;
(b) To have access for all purposes to any or all safety deposit boxes or vaults rented in my name or in the names of any other person or persons and myself, with full power to use the same for safekeeping any property or papers, and to remove therefrom any time, or from time to time, all or any part of the contents of any such box or vault; and/or
(c) To borrow money on my behalf and pledge as security real or personal property of mine necessary to borrow, pay, renew, or extend the time of payment of a debt of mine.

3. INSURANCE TRANSACTIONS

(a) To pay the premiums on, terminate any property or casualty policies or execute rights on an annuity or any contract of insurance presently owned by me or hereafter acquired;
(b) Subject to underwriting requirements, to procure different or additional annuities or contracts of insurance on my life or with respect to protecting me or my property from ill health, disability, accident, liability or loss;
(c) To exercise any election or conversion rights, and to demand, receive or obtain any money, dividend, or other thing of value to which I am or to which I may become entitled as the proceeds or other return or profit arising out of any contract of insurance or of any one or more of the insurance transactions herein enumerated;
(d) To establish or change policy and billing addresses, although my Attorney-in-Fact does not receive the power to change ownership or make a gift of the annuity or contract of insurance;

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(e) To receive all notices normally provided to the owner or named insured of any contract;
(f) To apply for, receive delivery, or amend any property and casualty insurance contract;
(g) To execute documents accepting or rejecting insurance coverages;
(h) To do all things necessary to the settlement of a claim, including but not limited to, the execution of releases, or execution of any documents necessary to transfer my interest in vehicles insured by USAA to effect loan payoff and salvage titling in the event that USAA determines that any such vehicle is a total loss or total theft; and/or
(i) To vote or designate a proxy to vote in matters placed before the members of USAA.

GENERAL PROVISIONS

(a) All business transacted pursuant to this USAA POWER OF ATTORNEY for me or for my account shall be transacted in my name, and all endorsements and instruments executed by my Attorney-in-Fact for the purpose of carrying out any of the foregoing powers, shall contain my name, followed by that of my Attorney-in-Fact and the designation, "Attorney-in-Fact." Additionally, I authorize my Attorney–in-Fact to use my member number, password and personal identification number ("PIN") to register and/or access the usaa.com website and perform transactions thereon on my behalf.
(b) I hereby ratify and confirm lawful acts done and caused to be done by my said Attorney-in-Fact pursuant to this USAA POWER OF ATTORNEY.
(c) This USAA POWER OF ATTORNEY is durable and is not affected by my subsequent disability or incapacity.
(d) If the authority contained herein shall be revoked, or terminated by operation of law, without notice, I hereby agree for myself, my executors, administrators, heirs and assigns, in consideration of my Attorney's willingness to act pursuant to this USAA POWER OF ATTORNEY, to save and hold my Attorney-in-Fact harmless from any loss suffered or any liability incurred by my Attorney-in-Fact in so acting after such revocation or termination without notice. Also, I will not hold USAA responsible for following the instructions of my Attorney-in-Fact. Revocation of this USAA POWER OF ATTORNEY is not effective until USAA receives actual notice of the revocation.
(e) Notwithstanding my insertion of a specific expiration date herein, if on the specified expiration date below I shall be, or have been, carried in a military status of "missing", "missing-in-action" or "prisoner of war," then this USAA POWER OF ATTORNEY shall automatically remain valid and in full effect until sixty (60) days after I have returned to United States military control following termination of such status.

TERMINATION

Unless sooner revoked or terminated by me by written notice addressed to USAA, 9800 Fredericksburg Rd., San Antonio, Texas 78288, this USAA POWER OF ATTORNEY shall become:

NULL and VOID from and after_____, 20__. [No date indicates the document remains effective until written revocation is received by USAA]. Upon termination or revocation, I agree to change and/or re-establish my PIN for access to the usaa.com website. USAA reserves the right, in its sole discretion, to discontinue honoring this USAA POWER OF ATTORNEY if you orally revoke it.

IN WITNESS WHEREOF, I have set my hand this 1-26- day of _____, 20 89.

Edward K Petit
GRANTOR SIGNATURE

TO BE VALID, YOU (THE PERSON GRANTING THESE POWERS OR BEING DEPLOYED) MUST SIGN THIS FORM AS GRANTOR IN THE PRESENCE OF EITHER A NOTARY PUBLIC OR A PERSON AUTHORIZED BY 10 USC 1044A TO PERFORM A NOTARIAL ACT FOR MEMBERS OF THE ARMED FORCES.

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CIVILIAN ACKNOWLEDGMENT

STATE OF SC (COUNTY) (CITY) (PARISH) Greenwood

I, Marie G. Marshall A Notary Public in and for the (County) (City) (Parish) and State aforesaid,

do hereby certify that on the 26th day of Jan, 2017 before me personally appeared Edward L. Petit (GRANTOR) who signed and executed the foregoing instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this day and year above.

Marie G. Marshall March 28, 2011
NOTARY PUBLIC My Commission Expires

MILITARY ACKNOWLEDGMENT

IF ACKNOWLEDGED BEFORE A PERSON AUTHORIZED TO PERFORM NOTARIAL ACTS FOR MEMBERS OF THE ARMED FORCES by 10 USC 1044a:

With the United States Armed Forces at: _____

I, _____ the undersigned do hereby certify that on this _____ day of_____, 20____, before me, personally appeared _____ (GRANTOR), who signed and executed the foregoing instrument. I do further certify that I am at the date of this certificate authorized under 10 USC 1044a to perform notarial acts for members of the armed forces, and that by statute no seal is required on this certificate.

_____
(ORGANIZATION AND STATION)

_____
SIGNATURE OF PERSON
AUTHORIZED TO PERFORM NOTARIAL ACTS

_____
(NAME, GRADE, ARMED FORCE)

We know what it means to serve.
USAA INSURANCE · BANKING · INVESTMENTS · RELATED SERVICES

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HEALTH CARE POWER OF ATTORNEY

(South Carolina Statutory Form, Code of Laws Section 62-5-504)

1. DESIGNATION OF HEALTH CARE AGENT

I, Edward L. Petit (Principal), hereby appoint

Phyllis Jean Krohn (Agent)

526 Colonial Dr., Greenwood, SC 29649 (Address)

Home Telephone: 864-388-9948 Cell Work Telephone: 864-941-7705 as my agent to make health care decisions for me as authorized in this document.

2. EFFECTIVE DATE AND DURABILITY

By this document I intend to create a durable power of attorney effective upon, and only during, any period of mental incompetence.

3. HIPAA AUTHORIZATION

When considering or making health care decisions for me, all individually identifiable health information and medical records shall be released without restriction to my health care agent(s) and/or my alternate health care agent(s) named above including, but not limited to, (i) diagnostic, treatment, other health care, and related insurance and financial records and information associated with any past, present, or future physical or mental health condition including, but not limited to, diagnosis or treatment of HIV/AIDS, sexually transmitted disease(s), mental illness, and/or drug or alcohol abuse and (ii) any written opinion relating to my health that such health care agent(s) and/or alternate health care agent(s) may have requested. Without limiting the generality of the foregoing, this release authority applies to all health information and medical records governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 USC 1320d and 45 CFR 160-164; is effective whether or not I am mentally competent; has no expiration date; and shall terminate only in the event that I revoke the authority in writing and deliver it to my health care provider.

4. AGENT'S POWER

I grant to my agent full authority to make decisions for me regarding my health care. In exercising this authority, my agent shall follow my desires as stated in this document or otherwise expressed by me or known to my agent. In making any decision, my agent shall attempt to discuss the proposed decision with me to determine my desires if I am able to communicate in any way. If my agent cannot determine the choice I would want made, then my agent shall make a choice for me based upon what my agent believes to be in my best interests. My agent's authority to interpret my desire is intended to be as broad as possible, except for any limitations I may state below.

Accordingly, unless specifically limited by Section E, below, my agent is authorized as follows:

A. To consent, refuse, or withdraw consent to any and all types of medical care, treatment, surgical procedures, diagnostic procedures, medication and the use of mechanical or other procedures that affect any bodily function, including, but not limited to, artificial respiration, nutritional support and hydration, and cardiopulmonary resuscitation;

B. To authorize, or refuse to authorize, any medication or procedure intended to relieve pain, even though such use may lead to physical damage, addiction, or hasten the moment of, but not intentionally cause, my death;

C. To authorize my admission to or discharge, even against medical advice, from any hospital, nursing care facility, or similar facility or service;

D. To take any other action necessary to making, documenting, and assuring implementation of decisions concerning my health care, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, nursing care provider, or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my agent, or to seek actual or punitive damages for the failure to comply.

Δ π EXHIBIT 3
Deponent K. Petit
Date 3/14 Rptr. LTW
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E. The powers granted above do not include the following powers or are subject to the following rules or limitations: _____

N/A

5. ORGAN DONATION (INITIAL ONLY ONE)

My agent may EJW ; may not _____ consent to the donation of all or any of my tissue organs for purposes of transplantation.

6. EFFECT ON DECLARATION OF A DESIRE FOR A NATURAL DEATH (LIVING WILL)

I understand that if I have a valid Declaration of a Desire for a Natural Death, the instructions contained in the Declaration will be given effect in any situation to which they are applicable. My agent will have authority to make decisions concerning my health care only in situations to which the Declaration does not apply.

7. STATEMENT OF DESIRES AND SPECIAL PROVISIONS

With respect to any Life-Sustaining Treatment, I direct the following: (INITIAL ONLY ONE OF THE FOLLOWING 4 PARAGRAPHS).

(1) _____ GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged nor do I want life-sustaining treatment to be provided or continued if my agent believes the burdens of the treatment outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense involved, and the quality as well as the possible extension of my life in making decisions concerning life-sustaining treatment.

OR

(2) EJW DIRECTIVE TO WITHHOLD OR WITHDRAW TREATMENT. I do not want my life to be prolonged and I do not want life-sustaining treatment:

a. if I have a condition that is incurable or irreversible and, without the administration of life-sustaining procedures, expected to result in death within a relatively short period of time; or
b. if I am in a state of permanent unconsciousness.

OR

(3) _____ DIRECTIVE FOR MAXIMUM TREATMENT. I want my life to be prolonged to the greatest extent possible, within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery, or the cost of the procedures.

OR

(4) _____ DIRECTIVE IN MY OWN WORDS: _____

_____

_____

8. STATEMENT OF DESIRES REGARDING TUBE FEEDING

With respect to Nutrition and Hydration provided by means of a nasogastric tube or tube into the stomach, intestines, or veins, I wish to make clear that: (INITIAL ONLY ONE)

EJW I do not want to receive these forms of artificial nutrition and hydration, and they may be withheld or withdrawn under the conditions given above.

OR

_____ I do want to receive these forms of artificial nutrition and hydration.

IF YOU DO NOT INITIAL EITHER OF THE ABOVE STATEMENTS, YOUR AGENT WILL NOT HAVE AUTHORITY TO DIRECT THAT NUTRITION AND HYDRATION NECESSARY FOR COMFORT CARE OR ALLEVIATION OF PAIN BE WITHDRAWN.

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9. SUCCESSORS

If an agent named by me dies, becomes legally disabled, resigns, refuses to act, becomes unavailable, or if an agent who is my spouse is divorced or separated from me, I name the following as successors to my agent, each to act alone and successively, in the order named.

A. First Alternate Agent: Karen Petit

Address: 20 Sims Alley, Columbia, SC 29205

Telephone: 803-477-1971

B. Second Alternate Agent: Kathy Elise Petit

Address: 1010 Grace St, Apt. 16C, Greenwood, SC 29649

(PO Box 50402) Telephone: 864-377-3591

10. ADMINISTRATIVE PROVISIONS

a. I revoke any prior Healthcare Power of Attorney and any provisions relating to healthcare of any other prior power of attorney.

b. This power of attorney is intended to be valid in any jurisdiction in which it is presented.

11. UNAVAILABILITY OF AGENT

If at any relevant time the Agent or Successor Agents named herein are unable or unwilling to make decisions concerning my healthcare, and those decisions are to be made by a guardian, by the Probate Court, or by a surrogate pursuant to the Adult Healthcare Consent Act, it is my intention that the guardian, Probate Court, or surrogate make those decisions in accordance with my directions as stated in this document.

BY SIGNING HERE I INDICATE THAT I UNDERSTAND THE CONTENTS OF THIS DOCUMENT AND THE EFFECT OF THIS GRANT OF POWERS TO MY AGENT.

I sign my name to this Healthcare Power of Attorney on this 26 day of January, 2009.

My current home address is: 104 Highland Dr., Greenwood SC 29649

SS #: 248-22-6313

Signature: Edward L Petit

Print Name: Edward L. Petit

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WITNESS STATEMENT

I declare, on the basis of information and belief, that the person who signed or acknowledged this document (the principal) is personally known to me, that he/she signed or acknowledged this Healthcare Power of Attorney in my presence, and that he/she appears to be of sound mind and under no duress, fraud or undue influence.

I am not related to the principal by blood, marriage or adoption, either as a spouse, a lineal ancestor, descendant of the parents of the principal, or spouse of any of them. I am not directly financially responsible for the principal's medical care. I am not entitled to any portion of the principal's estate upon his/her decease, whether under any will or as an heir by intestate succession, nor am I the beneficiary of an insurance policy on the principal's life, nor do I have a claim against the principal's estate as of this time. I am not the principal's attending physician, nor an employee of the attending physicians. No more than one witness is an employee of a health facility in which the principal is a patient. I am not appointed as Healthcare Agent or Successor Healthcare Agent by this document.

Witness Number 1:

Signature: Cynthia A. Butler Date: 01.26.09

Print Name: Cynthia A. Butler Telephone: 725-4704

Residence Address: 1325 Spring Street

Greenwood, SC 29646

Witness Number 2:

Signature: Marie G. Marshall Date: 1.26.09

Print Name: Marie G. Marshall Telephone: 725-4111

Residence Address: 1325 Spring St.

Greenwood, S.C. 29646

Subscribed before me by Edward L. Petit, the principal, and subscribed and sworn to before me Cynthia A Butler the witness(es), this 26th day of Jan, 2009.

Marie G. Marshall
Signature of Notary Public

Notary Public for Green Wood

My commission expires: March 28, 2011
(SEAL)

* If qualified as a witness, the Notary Public may serve as a witness.

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10750 McDermott Freeway
San Antonio, Texas 78288

USAA®

Individual Retirement Account Designation of Beneficiary

What you need to do:
- Print in black ink.
- Complete all required sections.
- Sign the document where indicated.
- Return this document to USAA Federal Savings Bank.

1. Participant Information

Edward L. Petit — [redacted]
Participant's Name — USAA Number

2. Beneficiary Information

A. Primary Beneficiary

I hereby revoke any Beneficiary Designation previously made with respect to this Plan. I hereby direct that in the event of my death any balance of my Individual Retirement Account(s) be paid as indicated below. In the event of my death, pay benefits to the following or the survivors thereof:

Leaman Elise Mosby
Name

407 Masters Dr. | Anderson | SC | 29626
Address | City | State | ZIP Code

[redacted] | [redacted] | grand daughter
Birth Date | Social Security Number | Relationship

Caroline Frances Mosby
Name

6598 Breezewood Blvd | Myrtle Beach | SC | 29588
Address | City | State | ZIP Code

[redacted] | [redacted] | grand daughter
Birth Date | Social Security Number | Relationship

Section 2 continued on next page.

USAA. 01252012. 17: 02. 538

Δ π EXHIBIT 4
Deponent K. Petit
Date 3/14 Rptr. HW
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2. Beneficiary Information

B. Secondary Beneficiary

If none of said beneficiaries survives me, pay benefits to the following or the survivors thereof:

Karen Petit			
Name			
20 Sims Alley	Columbia	SC	29205
Address	City	State	ZIP Code
[redacted]	[redacted]		daughter
Birth Date	Social Security Number		Relationship
Kathy Elise Petit			
Name			
230 E. Cambridge Apt 307	Greenwood	SC	29646
Address	City	State	ZIP Code
[redacted]	[redacted]		daughter
Birth Date	Social Security Number		Relationship

3. Agreement with USAA Federal Savings Bank

I understand this Change of Designation of Beneficiary will be effective on the date of receipt by the Custodian and that upon any change of beneficiary, the right of all previously designated beneficiaries to receive benefits under this Plan shall cease.

I retain the right to revoke this designation of beneficiary and to designate a new beneficiary at any time by communicating to the Custodian in writing.

Edward F Petit — Participant's Signature

1/23/2012 — Date

4. Delivery Instructions

Fax to: (800) 531-5717
Attn: IRA Sales & Service - Unit 94589

Mail to: USAA Federal Savings Bank
IRA Sales & Service - Unit 94589
10750 McDermott Freeway
San Antonio, Texas 78288-0544

USAA. 01252012. 17:02. 539

From: (864) 229-3824
MAJOR EDWARD L PETIT
104 HIGHLAND DR
GREENWOOD, SC 29649

Origin ID: GSPA

FedEx Express

J1120110805022S

Ship Date: 29DEC11
ActWgt: 1.0 LB
CAD: 2822083/NET3210

Delivery Address Bar Code

Ref # 079-61729

RMA #:
Return Reason:

SHIP TO: (800) 292-8800 X 24778 BILL SENDER
EDDIE KRAMER
USAA WEALTH MANAGMENT
9800 FREDERICKSBURG RD

SAN ANTONIO, TX 78288

RETURNS MON-FRI
STANDARD OVERNIGHT

TRK# 0221 7930 6760 0882

78288
TX-US

50FG1855F/F5F4

1. Select the 'Print' button to print 1 copy of each label.
2. The Return Shipment instructions, which provide your recipient with information on the returns process, will be printed with the label(s).
3. After printing, select your next step by clicking one of the displayed buttons.

Note: To review or print individual labels, select the Label button under each label image above.

Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com.FedEx will not be responsible for any claim in excess of $100 per package, whether the result of loss, damage, delay, non-delivery,misdelivery,or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim.Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic valueof the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental,consequential, or special is limited to the greater of $100 or the authorized declared value. Recovery cannot exceed actual documented loss.Maximum for items of extraordinary value is $500, e.g. jewelry, precious metals, negotiable instruments and other items listed in our ServiceGuide. Written claims must be filed within strict time limits, see current FedEx Service Guide.

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10750 McDermott Freeway
San Antonio, Texas 78288

USAA®

Individual Retirement Account
Designation of Beneficiary

What you need to do:

- Print in black ink.
- Complete all required sections.
- Sign the document where indicated.
- Return this document to USAA Federal Savings Bank.

1. Participant Information

PETIT, EDWARD L. MAJAFRET 273 39 01
Participant's Name USAA Number

ACCT # 000000-[redacted]

2. Beneficiary Information

TRUST # [redacted]

A. Primary Beneficiary

ACCT # [redacted] IRA/ESA

I hereby revoke any Beneficiary Designation previously made with respect to this Plan. I hereby direct that in the event of my death any balance of my Individual Retirement Account(s) be paid as indicated below. In the event of my death, pay benefits to the following or the survivors thereof:

KAREN (NMI) PETIT
Name

220 SIMS ALLEY COLUMBIA S.C. 29205
Address City State ZIP Code

[redacted] (1956) [redacted] DAUGHTER
Birth Date Social Security Number Relationship

KATHY ELISE PETIT TRUST
Name

104 HIGHLAND DR GREENWOOD S.C. 29649
Address City State ZIP Code

[redacted] [redacted] DAUGHTER
Birth Date Social Security Number Relationship

Section 2 continued on next page.

Δ π EXHIBIT 5
Deponent K. Petit
Date 3/14 Rptr. HW
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2. Beneficiary Information

B. Secondary Beneficiary

If none of said beneficiaries survives me, pay benefits to the following or the survivors thereof:

Name			
Address	**City**	**State**	**ZIP Code**
Birth Date	**Social Security Number**		**Relationship**

Name			
Address	**City**	**State**	**ZIP Code**
Birth Date	**Social Security Number**		**Relationship**

3. Agreement with USAA Federal Savings Bank

I understand this Change of Designation of Beneficiary will be effective on the date of receipt by the Custodian and that upon any change of beneficiary, the right of all previously designated beneficiaries to receive benefits under this Plan shall cease.

I retain the right to revoke this designation of beneficiary and to designate a new beneficiary at any time by communicating to the Custodian in writing.

Edward L Pitt Maj AFRESERVE 1-15-07

Participant's Signature — Date

4. Delivery Instructions

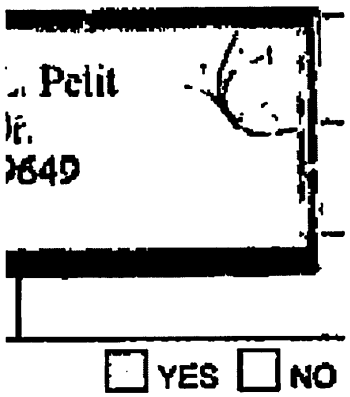
Fax to: (800) 531-5717
Attn: IRA Sales & Service - Unit 94589

Mail to: USAA Federal Savings Bank
IRA Sales & Service - Unit 94589
10750 McDermott Freeway
San Antonio, Texas 78288-0544

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UPSTATE P&DC 296
15 JAN 2007 PM 2 T
USAA-000058

BUSINESS REPLY MAIL

FIRST-CLASS MAIL PERMIT NO. 707 SAN ANTONIO TX

POSTAGE WILL BE PAID BY ADDRESSEE

9876 ATTN DEPOSIT SALES AND SERVICE
USAA FEDERAL SAVINGS BANK
10750 MCDERMOTT FREEWAY
SAN ANTONIO TX 78284-8499

216

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201200001348
WATSON LAW FIRM
333 MAIN ST
GREENWOOD SC 29646

201200001348
Filed for Record In
GREENWOOD COUNTY SC
INGRAM MOON, COUNTY CLERK
02-27-2012 At 04:47 pm.
POWEROFATTO 18.00
Book 1298 Page 61 - 67

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)

DURABLE GENERAL
POWER OF ATTORNEY

Instrument 201200001348 Book 1298 Page 61

KNOW ALL MEN BY THESE PRESENTS that I, Edward LeRoy Petit, 104 Highland Drive, Greenwood, SC 29649 (Principal") do hereby appoint Henry A. Dorn, 222 Jennings Avenue, Greenwood, SC 29646 (Attorney") my true and lawful attorneys for the purposes hereinafter set forth. My Attorney is authorized, in such attorney's absolute discretion from time to time and at any time, to act for me and in my name, place and stead in any way which I might or could do if I were personally present as and for my true and lawful attorney-in-fact and to have all powers hereinafter set forth; said powers not being in limitation of this general power but just by way of illustration.

ITEM 1. REAL PROPERTY TRANSACTIONS:

(a) To purchase, contract to purchase, receive, lease or rent for any term, accept or otherwise acquire real estate or any option thereon or interests therein, wherever situated, on such terms conditions and considerations as my Attorney-in-fact shall deem proper, in my name, or jointly in my name and that of any other party or parties, including my Attorney-in-fact.

(b) To sell for cash or credit, contract to sell, mortgage, encumber, exchange, lease or rent for any term, grant options to purchase or otherwise deal in and dispose of any real estate in which I now have or may hereafter acquire any right, title or interest, whether such real estate be owned in joint tenancy, tenancy in common, or in any other manner or capacity, and in my name, or jointly with any other party or parties, including my Attorney-in-fact, on such terms conditions and considerations as my Attorney-in-fact shall deem proper, to sign, seal, execute, acknowledge and deliver any and all instruments in writing of any kind and nature, as may be necessary, containing such terms and conditions, and such warranties and covenants, if any, as my said Attorney-in-fact shall deem advisable.

(c) To manage, utilize, conserve, demolish, repair, rebuild, alter or improve any real estate or structure thereon, owned or claimed to be owned by me in whole or in part, and to protect the same by action, proceeding or otherwise, including, but not limited to, the recovery of possession thereof and the removal of tenants or other persons, animals or objects therefrom.

ITEM 2. PERSONAL PROPERTY TRANSACTIONS:

(a) To store, conserve, hold, buy, contract to buy, accept, sell for cash or credit, exchange, mortgage, encumber, pledge, lease or rent, contract for the repair of, and in any and every manner deal in and with any and all personal property of every kind whatsoever, tangible or intangible, which I may own or in which I now have or hereafter may acquire any right, title or interest, on such terms, conditions and considerations, as my Attorney-in-fact shall deem proper.

(b) To execute and deliver to the proper persons and authority any and all documents, instruments and papers necessary to effect the proper registration and licensing of any automobile,

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WATSON LAW FIRM
MJL

Δ π EXHIBIT 6
Deponent K. Petit
Date 3/14 Rptr. HN
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vehicle, boat, motor or trailer in which I now or may hereafter have an interest.

(c) To enter into contracts for the storage and conservation of tangible personal property of every kind owned by me and to take possession and order the removal and shipment of any of my property from or to any warehouse or other place of storage, safekeeping or use, and to execute and deliver any release; receipt, shipping ticket, certificate or other instrument necessary or convenient for such purposes.

ITEM 3. BUSINESS TRANSACTIONS:

To demand, sue for, recover, receive, compromise, settle, adjust and pay all accounts, legacies, bequests, interest, dividends, annuities, demands, debts, invoices, medical expenses, living expenses, taxes and any and all other obligations, which may now or hereafter be due, owing or payable by or to me, and to carry on and transact every kind of business on my behalf, in my name or jointly in my name and that of any other person or persons, including my Attorney-in-fact, including, but not limited to, transactions concerning any and all investments and shares of stock, bonds, securities, certificates of deposit and savings or checking accounts, on such terms, considerations and conditions as my Attorney-in-fact may deem proper, and to invest and reinvest and exchange investments, and to execute and deliver good and sufficient instruments for the accomplishment thereof, and to act as my attorney or proxy with respect to any stocks, shares, bonds or other investments and rights or interests as I may now or hereafter hold.

ITEM 4. FINANCIAL TRANSACTIONS:

(a) To deposit or withdraw for any purpose, in or from any bank, savings and loan association, trust company or other financial institution any funds or other credits which I now or hereafter may have on deposit or be entitled to, and to draw, endorse, cash and receive the proceeds of any and all checks, drafts or other orders for money, to continue, contribute to, open, modify or close accounts (including individual retirement accounts), purchase or redeem certificates of deposit, or other evidences of deposits, and to receive statements, notices or other documents from any bank or other financial institution concerning any and all accounts or banking transactions in my name or in which I may have an interest.

(b) To have access for all purposes to any or all safety deposit boxes or vaults rented in my name or in the names of any other person or persons and myself, with full power to use the same for safekeeping any property or papers, and to remove therefrom at any time, or from time to time, all or any part of the contents of any such box or vault.

(c) To borrow money and to execute in my name any instrument including, but not limited to, promissory notes and credit card or securities margin account applications and agreements, evidencing indebtedness incurred on my behalf and to extend and renew the same, as well as any indebtedness heretofore incurred by me, for the payment of which I may in any way be liable, upon such terms, conditions and rates of interest as my Attorney-in-fact shall deem advisable and to use any credit card held in my name for purchases or to obtain cash advances and sign charge slips or drafts in connection therewith.

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(d) To prepare or have prepared from time to time financial statements concerning my assets and liabilities or income and expenses and to deliver such statements to any banker, banking institution or other person.

(e) To apply for and to receive letters of credit or travelers checks from any banker or banking institution, giving such indemnity or other agreements in connection therewith as my Attorney-in-fact shall deem desirable or necessary.

(f) To transfer any of my property to, withdraw principal or income from or terminate any revocable trust which I have created before or after the execution of this power of attorney for which I am during my lifetime, a primary income and principal beneficiary; however my attorney-in-fact shall have no authority to amend the dispositive provisions of any such trust or to create any such trust.

ITEM 5. TAXES:

For each of the years 1993 to and including 2025, to make, sign, execute and file income and all other tax returns and declarations of estimated tax required to be made by me by any law or regulation of any government or governmental authority, to represent and act for me in all tax matters in any audit, examination, dispute or litigation, in any governmental department, or other proceeding, to receive, endorse and collect checks in settlement of any refund of taxes, to execute consents agreeing to a later determination of taxes than is provided by statutes of limitation, to execute closing agreements relative to tax liabilities, to file claims for abatement, refund or credit of taxes, to make any adjustment or settlement, and to sign any and all receipts, waivers, settlements or agreements pertaining to any income or other taxes assessed against me or my property by law.

ITEM 6. INSURANCE TRANSACTIONS:

(a) To take out, pay the premiums on, modify, rescind, cancel, release, terminate, or execute any rights, privileges, or options of any contract of life, accident, health, disability, liability, property or other insurance presently owned by me or by any person on my behalf, or hereafter acquired.

(b) To procure new, different or additional contracts of insurance on my life or with respect to protecting me or my property from ill health, disability, accident, liability or loss.

(c) To apply for, and receive, any loan on the security of any contract of insurance, to surrender and receive the cash surrender value, to exercise or obtain any money, dividend or other thing of value to which I am or to which I may become entitled as the proceeds or other return or profit arising out of any contract of insurance or of any one or more of the insurance transactions herein enumerated.

ITEM 7. REPRESENTATION AND EMPLOYMENT OF ASSISTANCE:

(a) On my behalf and in my name or the name of my Attorney, to institute; prosecute, appear in, defend, compromise, arbitrate, settle or dispose of any legal, equitable or administrative hearings,

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actions, suits, attachments, claims or other proceedings, to which I am or may become a party or in which I have any interest.

(b) To hire, engage, employ and appoint agents, accountants, employees and counsel upon such terms and conditions and at such compensation as my said Attorney-in-fact shall deem proper in the exercise of the powers herein granted, to dismiss and remove at pleasure any such agent, employees and counsel, as well as any agents, accountants, employees and counsel heretofore or hereafter employed by me or in my behalf.

ITEM 8. GIFTS, LOANS, MISCELLANEOUS:

(a) To modify, reform, renegotiate or rescind any contract or obligation heretofore or hereafter made by me or in my behalf.

(b) To make gifts or loans to my spouse and any of my descendants (including my attorney-in-fact) and to tax-exempt organizations not exceeding in the aggregate $10,000 per year per donee except that gifts to my spouse are not subject to the above limit.

(c) To lend money to any corporation or partnership in which I hold a majority of ownership interest and to guarantee any loans made to any such entity by any third party.

(d) If I have not previously done so myself, to make advance arrangements and pay for my funeral and burial.

(e) To sign, seal, acknowledge and deliver any instrument necessary to accomplish any of the powers herein granted.

ITEM 9. HEALTH CARE DECISIONS:

To make decisions for me regarding my health care, including the power to consent or withhold consent on my behalf to health care. Such authority may be exercised at any time that I am "unable to consent" (as defined in the Adult Health Care Consent Act, Section 44-66-20(6) of the South Carolina Code of Laws of 1976 as amended) in regard to decisions concerning my health care.

ITEM 10. GENERAL PROVISIONS:

(a) All business transacted hereunder for me or for my account shall be transacted in my name, and all endorsements and instruments executed by my Attorney-in-fact for the purpose of carrying out any of the foregoing powers, shall contain my name, followed by that of my Attorney-in-fact and the designation, "Attorney-in-fact" or "AIF".

(b) This instrument shall be construed and interpreted as a general power of attorney. The enumeration of specific items, rights, acts or powers herein is not intended to, nor does it limit or restrict, and shall not be construed or interpreted as limiting or restricting, the general powers herein granted as to my Attorney-in-fact.

(c) I do hereby declare as between me and my Attorney-in-fact a fiduciary relationship exists and that my Attorney-in-fact shall not satisfy his legal obligations out of any property subject to this Power of Attorney, nor may my Attorney-in-fact exercise this Power in favor of himself, his creditors, or the creditors of his estate; provided, however, I further declare that no person who may act in reliance upon the representations of my Attorney for the scope of authority granted to my Attorney shall incur any liability to me or to my estate as a result of permitting my Attorney to exercise any power, nor shall any person dealing with my Attorney be responsible to determine or insure the proper application of funds or property.

(d) The powers herein conferred may be exercised by either Attorney alone, and the signature or act of such Attorney on my behalf may be accepted by third persons as fully authorized by me and with the same force and effect as if done under my hand and seal and as if I were present in person acting on my own behalf and competent.

(e) My Attorney-in-fact may serve without bond and is not required to file any accounting with the Probate Court or any other court in connection with the use of the powers granted herein.

(f) The terms and conditions hereof shall inure to the benefit of and become binding upon the undersigned parties, their heirs, assigns, executors and administrators. All words used herein in the singular shall include the plural, and the masculine gender shall include the feminine.

(g) This power of attorney is granted for my personal convenience. The decision of whether to act on my behalf or not from time to time is vested solely in my Attorney, and my Attorney, his heirs, successors and assigns are hereby released and forever discharged from any and all liability upon any claim or demand of any nature whatsoever by me, my heirs or assigns, the beneficiaries under my will or under any trust which I have created or shall hereafter create or any person whomsoever on account of any failure to act of my Attorney pursuant to this power of attorney.

(h) If any part of this power of attorney shall be invalid or unenforceable under applicable law, said part shall be ineffective to the extent of such invalidity only, without in any way affecting the remaining parts of said provision or the remaining provisions of this power of attorney.

(i) My Attorney shall be entitled to reimbursement for all reasonable costs and expenses actually incurred and paid by him on my behalf pursuant to any provision of this power of attorney, but he shall not be entitled to compensation for services rendered hereunder.

(j) Notwithstanding any provision hereto to the contrary, my Attorney shall have no power or authority whatsoever with respect to (a) any policy of insurance owned by me on his life or (b) any trust created by him as to which I am a trustee.

ITEM 11. DURATION, AMENDMENT AND REVOCATION:

(a) **THIS POWER OF ATTORNEY SHALL NOT BE AFFECTED BY PHYSICAL DISABILITY OR MENTAL INCOMPETENCE OF THE PRINCIPAL WHICH RENDERS THE PRINCIPAL INCAPABLE OF MANAGING HIS OWN ESTATE.**

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(b) I direct that this Power of Attorney shall continue in effect until revoked by me in writing or terminated by law. No cancellation hereof, by operation of law or otherwise, shall be effective as to any person relying upon this Power of Attorney unless such person shall have received actual notice in writing of its cancellation.

(c) This power of attorney may be amended by me at any time and from time to time by written instrument executed by me, however, such amendment shall not be effective as to third persons dealing with my Attorney without actual notice of such amendment.

(d) If the authority contained herein shall be revoked or terminated by operation of law without notice, I hereby agree for myself, my executors, administrators, heirs and assigns, in consideration of my Attorney-in-fact's willingness to act pursuant to this Power of Attorney, to save and hold my Attorney-in-fact harmless from any loss suffered or any liability incurred by my Attorney-in-fact in so acting after such revocation or termination without notice of such revocation.

ITEM 12. Miscellaneous

(a) Whenever the words "Attorney" or "Principal" or any modifying or substituted pronoun therefor is used in this power of attorney, such words and respective pronouns shall be held and taken to include both the singular and the plural and the masculine, feminine and neuter gender thereof unless the context clearly requires otherwise.

(b) I direct that photographic copies of this power of attorney shall have the same force and effect as an original.

IN WITNESS WHEREOF, as Principal, I have executed this power of attorney this 27th day of February, 2012.

Edward LeRoy Petit - PRINCIPAL (L.S.)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)

ATTESTATION

The foregoing power of attorney was on February 27, 2012 signed, sealed, published and declared by the Principal as his appointment and empowerment of an attorney-in-fact in our presence, and at the Principal's request and in his presence and in the presence of each other we have hereunto subscribed our names as witnesses hereto.

Lee W. Lollis of Greenwood, South Carolina

Christina M. Lollis of Greenwood, South Carolina

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Instrument 201200001348 Book 1298 Page 67

STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF GREENWOOD)

Personally appeared the undersigned, who being duly sworn, says that (s)he saw the within named Principal sign, seal and as the Principal's act and deed deliver the within power of attorney and that (s)he with the other witness whose signature appears above witnessed the execution thereof.

Dee W. Sellis
Witness

Sworn to before me on
February 27, 2012

Christina M. Sellis
Notary Public for South Carolina
My commission expires: 11/28/19

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STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)

IN THE PROBATE COURT
Case No.: 2014-GC-24-0004

Ex Parte:)
Karen Petit as Guardian for Edward)
L. Petit and Henry A. Dorn as)
Attorney-in-Fact for Edward L. Petit)
and as Successor Trustee of Trust)
U/W/O Helen L. Petit DTD 06/22/00,)
Petitioners.)
)
In the Matter of Edward L. Petit.)

Filed
FEB 2014
Probate Court
Greenwood, SC

PROTECTIVE ORDER

Upon reading the Verified Petition in this matter, and it being made satisfactorily to appear to me that the facts stated therein are true, IT IS ORDERED as follows:

(1) That Henry A. Dorn is a duly appointed and acting attorney-in-fact for Edward L. Petit, without specific limitation except as to his healthcare decisions, and is the duly appointed and acting Trustee of the Trust U/W/O Helen L. Petit dated 06/22/00;

(2) That Henry A. Dorn is authorized and directed to investigate all accounts in the name of Edward L. Petit and in the name of Trust U/W/O Helen L. Petit (or any variation thereof, *e.g.*, Helen M. L. Petit Trust U/W DTD 06/22/00);

(3) That USAA shall release any and all information related to said accounts to Henry A. Dorn;

(4) That Henry A. Dorn is further authorized to transfer all funds in the name of Edward L. Petit and in the name of the Trust U/W/O Helen L. Petit (or any variation thereof), with USAA to another banking or investment institution in his discretion and to close the accounts held at USAA;

(5) That Henry A. Dorn shall make a written report to this Court within 30 days of this Order of the results of the investigation as well as any action taken in connection with the USAA accounts and send a copy of such report to Karen Petit; and

(6) That reasonable attorneys' fees and costs incurred by Petitioners in connection with this matter shall be paid from funds in the name of Edward L. Petit and in the name of Trust U/W/O Helen L. Petit, equally.

IT IS SO ORDERED.

Travis W. Moore, Probate Judge
for Greenwood County

Date: Feb. 18, 2014

Certified A True Copy
Clerk, Probate Court
Greenwood County, S.C.

Δ π EXHIBIT 7
Deponent K. Petit
Date 3/14 Rptr. HW
WWW.DEPOBOOKPRODUCTS.COM

Petit 105



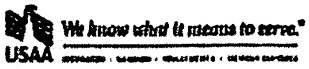
Fax Cover Sheet

Date	Monday, June 30, 2014	Time	9:29:52 AM
To	Henry Dorn	Fax	(888) 263-9574
From	Griffith, Mark	Phone	(210) 282-4054

Pages including Co 04

NOTES:

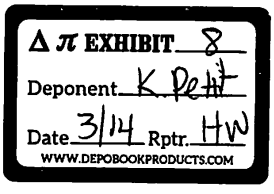
Hi Mr. Dorn, here is the application for Mr. Petit's IRA which contains the beneficiary information. Thank you



Access to USAA and your accounts is available day or night at usaa.com.

CONFIDENTIALITY NOTICE: This information contained in this transmission is CONFIDENTIAL and may be protected by one or more legal privileges. It is intended solely for the use of the addressee identified above. If you are not the intended recipient, you are hereby notified that reading, copying or disclosing the contents is STRICTLY PROHIBITED. If you have received this fax in error, you may reclaim confidentiality by destroying the accompanying transmission in its entirety. If you have received this transmission in error, please notify the sender immediately by telephone, and we will arrange to have the transmission returned at our cost to you. Thank You.

USAA Investment Management Company (USAIMCO), a registered broker-dealer.



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IMCO ONLINE NEW ACCOUNT APPLICATION INFORMATION

Form Code: ONAPRUMPR
File Tab: PAM
Description: On-Line Automated PR UMP Retirement App
Registration Type Code: 35
Automated Principal Review: 05/03/2012 3:08:35 PM

PRIMARY ACCOUNT HOLDER PERSONAL INFORMATION:

USAA Number: [redacted]
Name: EDWARD L PETIT
Date Of Birth: [redacted]
Social Security Number :
Address1: STERLING HOUSE
Address2: 1408 PARKWAY UNIT 305
City: GREENWOOD
State: SC
Zip: 29646
Home Telephone: 864-2293824-00000
Work Telephone: 864-3897049-00000
Primary E-mail address: pkrohn62@embarqmail.com
Secondary E-mail address:
Primary Citizenship: U.S. Citizen
Primary Senior Political Official: No
Primary Physical Address1: STERLING HOUSE
Primary Physical Address2: 1408 PARKWAY UNIT 305
Primary Physical City: GREENWOOD
Primary Physical State: SC
Primary Physical Zip Code: 29646
Marital Status: MARRIED
Account Number: [redacted]

EMPLOYMENT INFORMATION:

Employment Status: Retired
Occupation: RETIRED

REGULATORY INFORMATION:

Petit 154

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Employed by a registered broker/dealer: No
Company 10% Shareholder, director, policy making officer, executive officer: No
Approx net worth (excluding primary residence): $250,000 and over
Annual Income: $35351 - $85650
Investment Knowledge: Limited
Investment Objective: Growth
Tax Bracket: 25%
Tax Filing Status: Single

BROKERAGE ACCOUNT FUNDING INFORMATION:

Rollover Amount: 452256.00
Authorize Commingling: No

FINANCIAL INSTITUTION:

Financial Institution: USAA FEDERAL SAVINGS BANK
Bank/Transit Routing Number: [redacted]
Account Number: [redacted]
Account Type: SDA

ACCOUNT FEATURES:

USAA Managed Portfolios Householding Fees :Yes
Householding Commissions: Yes
Streamline Prospectuses and Reports: Yes
Cash Option: Brokerage Cash
Portfolio Model: UMP Moderately Aggressive Marketplace
Fixed Income Type: Taxable
Portfolio Mix: Marketplace
Online Document Delivery:

****

I agree to Trade Confirmation Waiver

****

Beneficiary information

USAA Number: [redacted]
Account Number: [redacted]

Petit 155

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Name of IRA Account Owner: EDWARD L PETIT
Beneficiary information

Designated Beneficiary
Type: Primary
USAA Number: OTHER
Name: Leaman E Moaby
Date Of Birth: [redacted]
Social Security Number :
Relationship to contributor: Non-Spouse
% of distribution if more than one Beneficiary survives: 50.00
Beneficiary 2
Type: Primary
USAA Number: OTHER
Name: Caroline F Moaby
Date Of Birth: [redacted]
Social Security Number :
Relationship to contributor: Non-Spouse
% of distribution if more than one Beneficiary survives: 50.00

Signed document list:

USAA Money Market Fund
USAA Managed Portfolios Program Brochure
USAA Managed Portfolios Investment Advisory Agreement
USAA Managed Portfolios Wrap Program Brochure Supplement
USAA Managed Portfolios IRA Account Terms and Conditions
USAA Traditional/Roth IRA Custodial Agreement and Disclosure Statement
Privacy Promise
Investment Strategy Recommendation
Business Continuation Disclosure Statement
Electronic Services Agreement

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USAA POWER OF ATTORNEY

I, Edward L Petit ("Grantor"), presently stationed or residing at 104 Highland Dr, Greenwood, SC 29649 (Address) desiring to execute this USAA POWER OF ATTORNEY, do hereby appoint Phyllis J Krohn (Name of Attorney-in-Fact), whose address is 536 Colonial Dr, Greenwood, SC 29649, as my Attorney-in-Fact. If my Attorney-in-Fact is no longer able to or is unwilling to serve as my legal representative, then I appoint N/A (Name of Successor Attorney-in-Fact), whose address is N/A, to serve as my Successor Attorney-in-Fact instead of the first named person. I intend for my Attorney-in-Fact to act for me and in my name, to do all acts whatsoever concerning my property, accounts, policies and business relationships maintained, issued, managed, administered or held by United Services Automobile Association, or any of its subsidiaries or affiliates (collectively "USAA") necessary and advisable in the judgment of my Attorney-in-Fact and as permitted by law, as fully as I could do if personally present and acting, including but not limited to (CHECK BOX THAT APPLIES):

☒ ALL THE POWERS LISTED BELOW. Alternatively, you may check specific authorized powers for the designated USAA lines of business. Otherwise, by checking this box, ALL powers listed below apply and you need not check every box. However, if no box is checked, you agree that ALL powers listed below will apply.

☐ **INVESTMENT TRANSACTIONS**

(a) The agent, who is assigned POA, must complete a USAA Brokerage Services Option Account Application and/or USAA Brokerage Services Margin Application, as applicable, and must be approved for options and/or margin trading, before USAA Power of Attorney is granted on the margin/option account.

(b) To inquire, buy, sell (including short sales), exchange, convert and trade in stocks, bonds, mutual funds, including USAA mutual funds, ETFs, options and any other securities or contracts relating to the same on margin, if the account is approved to trade options, or otherwise; for or at the risk of my account(s);

(c) To inquire and provide instructions, reviews and set the investment objective for the management of my discretionary account(s);

(d) To execute and deliver good and sufficient instruments for the accomplishment of the above authority; to act as my attorney or proxy with respect to any stocks, shares, bonds, mutual funds or other investments, rights or interest as I may now or hereafter hold;

(e) To receive periodic account statements, confirms, proxies, prospectuses and other account disclosure documents; and

(f) To withdraw by check, order, or other means any cash, securities, or property from my account(s), regardless of the tax consequences of such a distribution. Such distribution may be made to me or to any third party, including my Attorney-in-Fact.

Δ π EXHIBIT 9
Deponent K. Petit
Date 3/14 Rptr. HW
WWW.DEPOBOOKPRODUCTS.COM

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☐ BANKING TRANSACTIONS

(a) To deposit or withdraw for any purpose, in or from any bank or other financial institution, any funds, checks, or other credits which I now or hereafter may have on deposit or be entitled to, and to endorse, cash and receive the proceeds of any and all checks, vouchers, or other orders for money, to open or close accounts, and to receive statements, vouchers, notices or other documents from any bank or other financial institution concerning any and all accounts or banking transactions in my name or in which I may have an interest;

(b) To have access for all purposes to any or all safety deposit boxes or vaults rented in my name or in the names of any other person or persons and myself, with full power to use the same for safekeeping any property or papers, and to remove therefrom any time, or from time to time, all or any part of the contents of any such box or vault;

(c) To borrow money at an interest rate agreeable to my Attorney-in-Fact and pledge as security real or personal property of the principal necessary to borrow, pay, renew, or extend the time of payment of any of my debts;

(d) To receive bank statements, vouchers, notices, or similar documents from a financial institution and act with respect to them; and

(e) To continue, modify, or terminate an account or other banking arrangement made by me or on my behalf, including but not limited to changing automatic payment plan instructions for any loan payment or deposits.

☐ INSURANCE TRANSACTIONS

(a) To pay the premiums, terminate any property or casualty policies or execute rights on an annuity or any contract of insurance presently owned by me or hereafter acquired;

(b) To procure (subject to underwriting requirements) different or additional annuities or contracts of insurance on my life or with respect to protecting me or my property from ill health, disability, accident, liability or loss;

(c) To exercise any election or conversion rights, and to demand, receive or obtain any money, dividend, or other thing of value to which I am or may become entitled as the proceeds or other return or profit arising out of any contract of insurance or of any one or more of the insurance transactions herein enumerated;

(d) To establish or change policy and billing addresses, although my Attorney-in-Fact does not receive the power to change ownership or make a gift of the annuity or contract of insurance;

(e) To establish or change beneficiary designations applicable to any life insurance policy or annuity contract that I own;

(f) To receive all notices normally provided to the owner or named insured of any contract;

(g) To apply for, receive delivery of, or amend any property and casualty insurance contract;

(h) To execute documents accepting or rejecting insurance coverages.

(i) To do all things necessary to the settlement of a claim, including but not limited to, the execution of releases, receipt of insurance proceeds, authorization of repairs to insured property, or execution of any documents necessary to transfer my interest in vehicles insured by USAA to effect loan payoff and salvage titling in the event that USAA determines that any such vehicle is a total loss or total theft;

(j) To vote or designate a proxy to vote in matters placed before the members of USAA; and

(k) To execute subscriber agreements containing limited powers of attorney to effectuate the procurement of insurance policies to be provided by United Services Automobile Association.

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GENERAL PROVISIONS APPLICABLE TO ALL SECTIONS

(a) All business transacted pursuant to this USAA POWER OF ATTORNEY for me or for my account shall be transacted in my name, and all endorsements and instruments executed by my Attorney-in-Fact for the purpose of carrying out any of the foregoing powers, shall contain my name, followed by that of my Attorney-in-Fact and the designation, "Attorney-in-Fact." Additionally, I authorize my Attorney-in-Fact to use my online/user identification, password and personal identification number ("PIN") to register and/or access the usaa.com website, mobile.usaa.com or other USAA channels of communication and perform transactions thereon my behalf. This includes, without limitation, the authority to sign up for (or suspend or cancel) electronic delivery of information, statements, confirmations, prospectuses, proxies, reports, bills, notices, disclosures, agreement forms, correspondence or other documents related to my USAA accounts and products, as well as electronic web bill pay.

(b) I hereby ratify and confirm any and all instructions, transactions, trades, dealings, or other lawful acts done or caused to be done by my Attorney-in-Fact pursuant to this USAA POWER OF ATTORNEY.

(c) **This USAA POWER OF ATTORNEY is durable and is not affected by my subsequent disability or incapacity.**

(d) If the authority contained herein shall be revoked, or terminated by operation of law, without notice, I hereby agree for myself, my executors, administrators, heirs and assigns, in consideration of my Attorney-in-Fact's willingness to act pursuant to this USAA POWER OF ATTORNEY, to indemnify, save and hold my Attorney-in-Fact harmless from any loss suffered or any liability incurred by my Attorney-in-Fact in so acting after such revocation or termination without notice. Also, I hereby agree for myself, my executors, administrators, heirs and assigns, in consideration of USAA following the instructions or directions of my Attorney-in-Fact to indemnify USAA, its officers, directors, trustees, employees, agents, successors, heirs and assigns and hold each of them harmless from any and all liability, losses, claims and costs, including attorney's fees, which may arise out of, in connection with, or related to any and all instructions, directions, transactions, trades, dealings, or other acts done or caused to be done by my Attorney-in-Fact (or USAA's justified refusal to follow such instructions). Revocation of this USAA POWER OF ATTORNEY is not effective until USAA receives notice of the revocation as specified in this document.

(e) Notwithstanding my insertion of a specific expiration date herein, if on the specified expiration date below I shall be, or have been, carried in a military status of "missing", "missing-in-action" or "prisoner of war", then this USAA POWER OF ATTORNEY shall automatically remain valid and in full effect until sixty (60) days after I have returned to United States military control following termination of such status.

TERMINATION

Expiration Date (Optional): _____. **(No date indicates the document remains effective until written or oral revocation is received by USAA).** Unless sooner revoked or terminated by me by written notice addressed to USAA, 9800 Fredericksburg Rd., San Antonio, Texas 78288, or by oral notice to a USAA member service representative, this USAA POWER OF ATTORNEY shall become NULL and VOID from and after the Expiration Date. Upon termination or revocation, I agree to change and/or re-establish my password and PIN for access to the usaa.com website, mobile.usaa.com and any other communication channel with USAA.

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IN WITNESS WHEREOF, I have set my hand this 9 day of Nov, 20 10.

Edward L Pelt
Grantor's Signature

TO BE VALID, YOU (THE PERSON GRANTING THESE POWERS) MUST SIGN THIS FORM AS GRANTOR IN THE PRESENCE OF EITHER (1) A NOTARY PUBLIC OR (2) A PERSON AUTHORIZED BY 10 USC §1044A TO PERFORM A NOTARIAL ACT FOR MEMBERS OF THE ARMED FORCES. FILL OUT ONLY ONE SECTION BELOW.

(1) CIVILIAN ACKNOWLEDGMENT

South Carolina, Greenwood County
State Of (County/City/Parish

I, Kevin S. Dempsey A Notary Public in and for the State aforesaid, do hereby certify that on the 9 day of November, 20 10, before me personally appeared Edward L. Pelt (GRANTOR), who signed and executed the foregoing USAA POWER OF ATTORNEY. IN WITNESS WHEREOF, I have hereunto set my hand and official seal this day and year above.

Kevin S Dempsey
Notary Public

8/8/2011
My Commission Expires

OR

(2) MILITARY ACKNOWLEDGMENT

IF ACKNOWLEDGED BEFORE A PERSON AUTHORIZED TO PERFORM NOTARIAL ACTS FOR MEMBERS OF THE ARMED FORCES by 10 USC §1044a:

With the United States Armed Forces at: _____

I, _____ _____ the undersigned do hereby certify that on this _____ day of _____, 20____, before me, personally appeared _____ (GRANTOR), who signed and executed the foregoing USAA POWER OF ATTORNEY. I do further certify that I am at the date of this certificate authorized under 10 USC §1044a to perform notarial acts for members of the armed forces, and that by statute no seal is required on this certificate.

_____ _____
(ORGANIZATION AND STATION)

_____
Signature of Person Authorized To Perform Notarial Acts
(Name, Grade, Armed Force)

THE ATTORNEY-IN-FACT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

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ELECTRONICALLY FILED - 2019 Sep 03 9:50 PM - GREENWOOD - COMMON PLEAS - CASE#2017CP2401343

State of South Carolina, County of Greenwood
In the Court of Common Pleas, Eighth Judicial Circuit

Karen Petit Plaintiff, vs. Phyllis Jean Krohn, USAA Federal Savings Bank and USAA Investment Management Co. Defendants.	Case No. 2017-CP-24-01343 Memorandum Opposing Defendants' Motions for Summary Judgment

Plaintiff Karen Petit (Ms. Petit) submits the following brief in opposition to Defendants' motions for summary judgment.

FACTUAL BACKGROUND

Dr. Petit, Ms. Petit's father, died on March 18, 2015. A little more than two years after his death, Dr. Petit's former companion, Defendant Krohn, approached Ms. Petit at the Greenwood uptown market. Defendant Krohn confessed that she unilaterally decided to change the beneficiaries on Dr. Petit's IRA, and filled out the form to do so. (Petit Depo. at 73:5-11, and 121:11-21).[1] Defendant Krohn apologized to Ms. Petit for changing the beneficiaries. (Petit Depo. at 121:11-21).

Defendant USAA had more than a banking relationship with Dr. Petit because it advised him and even sent one of its financial advisors from Houston, Texas to Dr. Petit's home in Greenwood. (Krohn Depo. at 51:15-21).[2] Per Defendant Krohn, the change of beneficiary form was requested during this meeting in the fall of 2011, but the form was not completed until January 23, 2012. (Krohn Depo. at 53:1-10).

The facts and all reasonable inferences must be viewed in the light most favorable to Plaintiff, the nonmoving party. Defendants Krohn and USAA's factual summaries are largely supported by their own discovery

[1] Excerpts from Ms. Petit's deposition are included as Exhibit A.
[2] Excerpts from Defendant Krohn's deposition are included as Exhibit B.

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and Defendant Krohn's deposition testimony. The facts as presented by Defendants are not in the light most favorable to Plaintiff.

LEGAL STANDARD

Summary judgment is appropriate only where there is no genuine issue of material fact and it is clear the moving party, who bears the burden of proof, is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011).

"[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Our Supreme Court has stated that great care should be used in the consideration of summary judgment motions. "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Carolina All. for Fair Emp't v. S.C. Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999) (citing *Etheredge v. Richland Sch. Dist. I*, 330 S.C. 447, 499 S.E.2d 238 (Ct. App. 1998)).

"Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.* at 485, 523 S.E.2d at 799 (citing *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990)). Our courts recognize that "questions of credibility make summary judgment inappropriate." *Hansen v. DHL Labs., Inc.*, 316 S.C. 505, 513, 450 S.E.2d 624, 628 (Ct. App. 1994), *decision aff'd*, 319 S.C. 79, 459 S.E. 2d 850 (1995).

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LEGAL ARGUMENT

Standing and Breach of Contract (Defendant USAA) & Tortious Interference with Contract (Defendant Krohn)

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).

The record demonstrates Dr. Petit lacked the ability to freely change beneficiaries on January 23, 2012, therefore Ms. Petit has standing and a vested interest, requiring Defendants' motions to be denied.

Dr. Petit had dementia, heart problems, and glaucoma that made him unable to read. Defendant Krohn took care of his health in the same way an LPN might. (Krohn Depo. 27:7, 29:18-25, 30:16-18; Petit Depo. at 79:24-25, 80:1-5).

In January 2012, while on a cruise, 87-year-old Dr. Petit lost consciousness, and was taken from the ship to a hospital in Key West, Florida. (Krohn Depo. 48:19, 33:8-12, 34:2-9). The hospital in Key West could not control Dr. Petit's heart condition and sent him to a hospital in Miami. (Krohn Depo. 34:20-25, 35:1-13). While in Miami, Dr. Petit had a heart catherization, a heart ablation, and a defibrillator and pacemaker implantation, and was in either ICU or CCU. (Krohn Depo. at 34:10-15, 37:18-24; Petit Depo. at 40:22-24). When he was discharged from the hospital on January 22, 2012, Dr. Petit was not fully recovered. (Krohn Depo. at 46:5-7, 46:11-15).

Per Defendant Krohn, even though Dr. Petit was not fully recovered and continued taking pain medication, he signed the beneficiary designation form the day after he was discharged from the hospital. However, Defendant Krohn cannot remember if she saw him sign it. (Krohn Depo. at 55:14-21). However, she admits that she completed the form and all the printed handwriting on the form is hers. (Krohn Depo. at 49:24-25, 50:1-16 and Exhibit C).

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Inconsistencies between the 2012 form (Exhibit C) and the 2007 form (Exhibit D) offer additional facts which make summary judgment inappropriate. The beneficiary designation form completed in 2007 (Exhibit D) listed "Karen (NMI) Petit and Kathy Elise Petit Trust" as the beneficiaries, but the 2012 form (Exhibit C) lists "Karen Petit and Kathy Elise Petit" as contingent beneficiaries.

Evidence of a Fiduciary Relationship & Negligence (Both Defendants)

A fiduciary relationship does not exist 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). Defendant USAA knew or should have known, that it created a fiduciary relationship with Dr. Petit.

Defendant USAA created a fiduciary relationship, and advised Dr. Petit through its Houston, Texas based agent who traveled to Dr. Petit's home in Greenwood. (Krohn Depo. at 51:15-20). And if Defendant Krohn's sworn testimony is believed, Defendant USAA's agent provided the beneficiary form after visiting with Dr. Petit and Defendant Krohn in the fall of 2011. (Krohn Depo. at 52:17-25, 53:1-10). Defendant USAA's agent knew or should have known that something was amiss when the beneficiary designation form was returned to him several months later in someone else's handwriting . (Exhibit C). Defendant USAA states it has no obligation to verify signatures when documents are provided to it; however, banks have an obligation to prevent forgery and fraud.

Defendant USAA claims it generated the FedEx label on December 29, 2011, but provides no explanation or proof about who made the request, when the label was requested, or when it was sent to Dr. Petit. (Exhibit E). The FedEx label itself contradicts Defendant USAA's claim in two ways. First, the beneficiary designation form lists an address to which one should return the form, but the FedEx label was addressed to a different location. Second, the label lists the sender, Dr. Petit, as the party who was billed, but Defendant USAA claims it provided the label to him as a "courtesy." (Exhibit C).

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Defendant USAA has an interest in ensuring its customers follow the instructions on its Beneficiary Designation Form, but then it doesn't follow its own form's instructions. (Exhibit C). Interestingly, the 2007 Beneficiary Designation form was completed entirely by Dr. Petit, and mailed to the correct address in the envelope provided by Defendant USAA. (Exhibit D).

Defendant Krohn argued the economic loss rule applied because Ms. Petit only suffered financial harm. However, Ms. Petit's testimony that she suffered emotional damages and nightmares defeats this assertion. (Petit Depo. at 182:10-18).

These facts present more than a scintilla of evidence and are enough to defeat the motions for summary judgment. Whether a fiduciary relationship existed, and whether Defendants USAA and/or Krohn breached that duty is a matter for the jury to decide.

Statute of Limitations (Defendant USAA)

Defendant USAA ignores several crucial facts that contradict its statute of limitations argument. Defendant USAA argues that because Ms. Petit was close to her father, she should have discovered the beneficiaries changed. Defendant USAA's argument about whether Ms. Petit was close to her father contradicts summary judgment because only a jury can determine if Ms. Petit and her father were so close that she should have known about the beneficiary change.

In the fall of 2014, Dr. Petit told Ms. Petit that the beneficiaries of the IRA had not changed. (Petit Depo. at 163:3-18). Considering Dr. Petit's fragile health on January 23, 2012, as detailed above, coupled with his 2014 statement that the beneficiaries had not changed, a jury could find Dr. Petit himself did not know that the beneficiaries changed. If Dr. Petit did not even know the beneficiaries were changed, then it would have been impossible for him to tell his daughter. After receiving the beneficiary designation form in 2012, Defendant USAA did not mail a confirmation to Dr. Petit, and if they sent an electronic confirmation, it would have gone to Defendant Krohn's email address, and Dr. Petit would not have seen it. (Krohn Depo. at 68:13-24 & Exhibit F).

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Further, Ms. Petit did not handle her father's financial affairs. (Petit Depo. at 69:6-10). While Plaintiff was aware that Henry Dorn, Dr. Petit's attorney-in-fact, was transferring accounts to Wells Fargo, Plaintiff did not have access to this information, and was not authorized to access these accounts or the documents associated with them. Legally, there was no way for her to discover this information.

Ms. Petit discovered that she was not the beneficiary of the IRA after her father's death. (Petit Depo. at 106:25, 107:1-4). Even though she was surprised to learn she was not the beneficiary, it wasn't until Defendant Krohn confessed that she, and not Dr. Petit, changed the beneficiaries that Ms. Petit knew why she was not the beneficiary of the IRA. (Exhibit G, Affidavit of Wallace Dorn).

Undue Influence (Defendant Krohn)

It appeared Defendant Krohn was not moving for summary judgment on the undue influence cause of action based on her motion and supporting memorandum which stated, "The Plaintiff asserts four causes of action against the Defendant: tortious interference with a contract, breach of fiduciary duty, negligence, and undue influence. The Defendant will show that insufficient facts have been alleged to maintain any litigation with regard to the first three causes of action." (Defendant Krohn's Memorandum in Support of Motion for Summary Judgment, page 2). However, Defendant Krohn addresses the undue influence cause of action later in the supporting memorandum, so it will be addressed.

The sole case cited, *Calhoun v. Calhoun*, 277 S.C. 527, 290 S.E.2d 415 (1982), is distinguishable. In *Calhoun*, the decedent was physically feeble, temporarily confused one year prior to executing the will, and disoriented about two months after signing the will. *Id.* at 532-33, 415 S.E.2d at 418. In the present matter, Dr. Petit was an 87-year-old man with dementia hospitalized in the intensive or critical care unit for weeks, after undergoing two surgical procedures, and was taking pain medication when he signed the change of beneficiary designation. (Krohn Depo. 33:8-12, 34:2-15, 34:20-25, 35:1-13, 37:18-24, 40:22-24, 46:5-7, 46:11-15, 48:19). This is far more evidence than that presented in *Calhoun*.

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Our supreme court has recognized that "by the very nature of the case, the evidence of undue influence will be mainly circumstantial. It is not usually exercised openly so it can be directly proved." *Hembree v. Estate of Hembree*, 311 S.C. 192, 196, 428 S.E.2d 3, 5 (Ct. App. 1993) (*citing Byrd v. Byrd*, 279 S.C. 425, 427, 308 S.E.2d 788, 789 (1983)). "In cases where allegations of undue influence have been successful, there has been evidence of threats, force, restricted visitation, or an existing fiduciary relationship at the time of or before the will's execution." *Id.* at 196, 428 S.E.2d at 5 (*citing Byrd v. Byrd*, 279 S.C. 425, 308 S.E.2d 788 (1983) and *Moorer v. Bull*, 212 S.C. 146, 46 S.E.2d 681 (1948)).

At the time Dr. Petit allegedly executed the change of beneficiary form, a fiduciary relationship already existed between Defendant Krohn and Dr. Petit. (Exhibit H, Power of Attorney forms). Additionally, Defendant Krohn went to great lengths to conceal Dr. Petit's critical medical condition from his daughters when he was hospitalized in Florida. Defendant Krohn did not call Dr. Petit's daughters, but instead instructed Dr. Petit to call his daughters, even though Defendant Krohn admits he was "barely" able to call. (Krohn Depo. at 44:11-25, 45:1-17). Defendant Krohn apologized to Ms. Petit, and said, "I wish that I had never been involved with any of this."(Krohn Depo. at 67:10-14).

Sufficient facts exist to deny Defendant Krohn's motion for summary judgment on the undue influence cause of action.

CONCLUSION

Defendants Krohn and USAA's motions for summary judgment should be denied. Plaintiff presents numerous triable issues of fact on all causes of action, and thus exceeds the threshold of presenting a mere scintilla of evidence. Plaintiff respectfully requests the Court deny Defendants' motions for summary judgment.

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HAWTHORNE MERRILL LAW, LLC

s/ Jane H. Merrill
Jane H. Merrill, SC Bar # 74269
410 Main St. | Greenwood, SC 29646
864-229-1010 | jane@hmlawsc.com
Attorney for Plaintiff

September 3, 2019
Greenwood, SC

Exhibit A

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Q Okay. Tell me about the circumstances that -- and this was when -- approximately when in 2013?
A Well, the case was in May of 2013. So I believe my sister and I began the preparations for that earlier, like a couple of months beforehand.
Q But still in 2013?
A Yes.
Q So you had a final hearing in May of 2013 on the case.
A We did.
Q Okay. Tell me about the circumstances that led to your contacting an attorney and filing this probate action.
A Okay. So, I'll have to back up just a little bit.
Q That's fine. Start wherever you need to.
A So, after my father experienced the heart problems on the ship and he was taken to Miami, they -- he underwent two different heart procedures. One ---
Q When was that?
A I'm sorry?
Q When was that?
A That was January of 2012.
Q Okay.
A And he underwent two heart procedures. One was for an ablation of the heart, and one was for a defibrillator and pacemaker implantation.
Q Uh-huh.

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your sister decided that the circumstances did not justify going to probate court. But what other factors, other than Ms. -- than Phyllis taking your father to these appointments, what other factors influenced your decision in late winter, early spring of 2013 to take out paperwork for your father?

A We believed that Daddy's condition was worsening, and it was worsening. And that there might be occasions where decisions needed to be made by us, as his daughters, as guardians, and that legally we wanted to be able to make those decisions in concert together and, also, to ensure that someone else was not making decisions for him.

Q Okay. And that other person is primarily targeted at Phyllis ---

A Correct.

Q --- as to making sure that she wasn't making decisions for your father.

A That's correct.

Q Okay. And was that an overriding concern, making sure that she wasn't making decisions for your father, in your decision to make -- to get probate papers?

A No, it wasn't the overriding concern, but it was a concern.

Q Okay. And up until that point, as far as you are

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aware, Henry Dorn had a durable power of attorney and was authorized to handle your father's finances.

A That's correct.

Q And your sister had a healthcare power of attorney. So she was able to make healthcare decisions for him.

A That's correct.

Q Okay. Explain to me why, then, you felt it necessary to have a guardian and conservator appointed for your father.

A Because -- I think I answered that, but we were concerned that my father's condition was worsening, and that there may be times that decisions would need to be made, and by the two of us in concert with each other.

Q Right.

A And to ensure that he was protected.

Q Right. But you already had the healthcare power of attorney, no?

A My sister had the healthcare power of attorney.

Q Okay. And it was a durable healthcare power of attorney; correct?

A That's my understanding.

Q And is it your understanding that a durable healthcare power of attorney survives your father's incapacity?

A No.

Q No, that's not your understanding?

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deposits. She would withdraw money.

MR. NASROLLAHI: Right.

THE WITNESS: She -- I mean, she ran the household -- she managed the household accounts.

BY MR. NASROLLAHI:

Q Right. But how familiar with these transactions are you?

A Well, as I was his daughter and -- I would not have -- and I would not have access to everything that they did.

Q Okay. So ---

A So, a passing.

Q A passing. Okay. So, when you say that you find it unusual that they did not -- that on this particular date back in 2009, that he did not use an attorney to complete these documents, that is based on what degree of familiarity with his business transactions?

A I know that over the years, if there were powers of attorney or ---

Q Right.

A --- and their wills, significant documents, that they went to lawyers or accountants to have those -- to draw up those documents and have them witnessed and signed.

Q Are you testifying that, in every instance that they needed some sort of power of attorney or will or some

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handwriting on this -- on the first page of Exhibit 4.
A No.
Q Specifically, it does not appear that your father's handwriting appears on the first page of Exhibit 4.
A That is not my father's handwriting.
Q Okay. And on the second page, everything except for the signature line, it appear- -- the handwriting on that page appears to be the same as on the first page.
A Yes.
Q Okay. And, again, that's handwriting that Phyllis admitted was hers.
A Yes.
Q Okay. And it change -- this document purports to change the beneficiaries from the 2007 document to different designees.
A It does.
Q Okay. And it changes -- you -- and the 2007 document -- and I'm referring to Plaintiff's 5 -- listed you and Kathy -- or you and Kathy's trust as the beneficiaries of any retirement account.
A That's correct.
Q Okay. And this page -- the first page of Plaintiff's 4 changes it to Kathy's children.
A Correct.
Q Okay. And let's talk about the signature on the next

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A And by expressing, do you mean writing?
Q Writing, indicating in any shape or form that the mark that is on a piece of paper stands for his signature.
A I cannot say definitively that this is or is not my father's signature.
Q I want you to listen to my question.
A Okay.
Q My question is are you saying, are you testifying, are you alleging that your father, on January 23, 2012, was incapable of signing his name?
A I am alleging that.
Q You are alleging that. So you are saying that, on January 23, 2012, he did not have the physical capacity to sign his name?
A Or the mental capacity.
Q I'm asking physically.
A Physical.
Q He physically could not put pen to paper.
A I believe that.
Q Okay. And tell me about the mental capacity. What leads you to believe that?
A Well, my father was very sick.
Q Okay.
A And he was confused. And on this beneficiary form, I'm not sure that my father could even have read it because

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of his glaucoma and his inability to read. And he had quit reading books and newspapers. And it's interesting to me that, when he did the original individual retirement account, he gave the -- he was putting the money into a trust for my sister.

MS. MERRILL: And just to clarify, you're talking about Exhibit 5?

THE WITNESS: Yes, I am.

MS. MERRILL: Thank you.

MR. NASROLLAHI: Yeah, I think we're -- wait, no. We're talking about Exhibit 4. Oh, no. Sorry. Sorry. Sorry. You're correct, Jane.

MS. MERRILL: What she just read for us. I just want to make sure we're all on the same page when we go back to read the record.

MR. NASROLLAHI: I'm sorry about that.

THE WITNESS: Yes, Exhibit 5. Okay.

MS. MERRILL: That's the only reason I'm interrupting.

THE WITNESS: So, when he did the original beneficiaries, he designated funds for me and he designated funds for my sister's trust to ensure that she would always be taken care of, that there would be money in an account for any healthcare needs that she had.

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up an account at Wells Fargo?
A I'm sorry. Ask that again.
Q Do you believe that it is within his authority and his prerogative to rely on documents from USAA in order to set up an account at Wells Fargo?
A I do.
Q Okay. Is there anything improper about that?
A Not to my knowledge.
Q Okay. So -- and, again, these -- your nieces, the money that they received that you say half of which is rightfully yours, are funds that were disbursed from a retirement plan held by Wells Fargo, set up by Henry Dorn, acting pursuant to his -- to this court order and the power of attorney.
A Yes.
Q Okay. Please explain for me how Phyllis Krohn affected any of that.
A Ms. Krohn told me that -- okay. Let me just -- I'll back up.
Q Let's go to the -- I guess the farmer's market incident if that helps.
A Okay. Well, actually, we'll go beyond -- sooner than the farmer ---
Q After -- wherever you want to go.
A At the time of my father's death, when I learned that I

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was no longer a beneficiary of the IRA, I questioned -- I asked Henry about it. And he said that that was the form that had come via USAA to him when the funds were being -- when the funds were transferred.

Q Right.

A And I said, “Well, I don’t know how that happened.” And he said he didn’t know how it had happened either.

Q Tell me again when this was happening -- when this conversation was happening.

A It was after my father died.

Q Okay.

A And I went to the -- and I went to Wells Fargo and I asked them how it was that this -- you know. And they said that the form for the beneficiaries had come to them from USAA. And they had no reason, of course, to change that.

Q And how did -- are you aware of how they got these “forms”?

A I would imagine ---

MS. MERRILL: Objection.

THE WITNESS: I don’t know. I don’t know how they would have gotten the forms. Not specifically.

MR. NASROLLAHI: Okay.

(MARKED FOR IDENTIFICATION, DEFENDANT’S EXHIBIT NUMBER 8, USAA - FAX, ATTACHED.)

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just trying to see if I could find out from any of the financial or legal people whom I consulted without having to ask her.

Q Right.

A So she was there in my booth, and she walked off a little ways and I thought, well, she's here. I think I'll ask her. So, she had walked maybe -- I don't know, five or six feet away from the booth. Maybe not even that far. And I just went up to her and I said, "Phyllis, you know, I have a question about my dad's estate." And I said, "How were the beneficiaries on his IRA changed?" And she looked at me, and she said, "I did it." 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." And I said, "Phyllis, that was not your place to make that call." And she said, "I'm so sorry." And I said, "You're sorry?" I said, "Do you know the unhappiness and the concern that it has caused my family?" And she just repeated, "I'm so sorry." And I said, "That money in that IRA account was money that was not just my

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Q Yes.
A No, he did not.
Q And after January 23, 2012, your father never discussed with you changing of beneficiaries.
A On -- in the early fall of 2014, when I was considering taking early retirement for US- -- from USC, because my father's condition was worsening, and my sister had died and it was just a terrible time in our lives, I told my dad that I was considering taking early retirement and that, you know, I was trying to plan, you know, financially for what would happen. And I asked him, I said, "Now, I know that I had been the beneficiary of your IRA, and is that the case?" And he said, "Yes."
Q And when was that conversation, do you believe?
A The conversation was in either late summer, early fall.
Q Of 2014.
A Of 2014.
Q And it's your belief that, at that moment of that conversation, was he having a lucid moment or not?
A He appeared to.
Q How frequently have you had communications with Mr. Dorn since -- or after the time your father was declared in incompetent in May of 2013?
A That was a difficult time in my life, so I would -- you

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Q Any kind of duty.
A When Ms. Krohn assumed the power of attorney responsibilities for my father, I believe she had an obligation to act in his best interest, whether it was medically, financially or otherwise.
Q Right.
A And it was not her duty or responsibility to change beneficiaries or other things that he, when he was in his sound mind, had deemed his will.
Q Okay. Negligence against Ms. Krohn. Have you -- are any of your damages in a physical nature?
A A physical nature?
Q Have you suffered physical injury from any of Ms. Van Swol's conduct?
A Emotional damage, yes.
Q Okay. And what is -- how much are your damages in that regard?
A I have nightmares.
Q Okay. What I'm saying is if you're asking a jury to award you money to compensate you for nightmares and other emotional distress you've encountered, how much are you asking for?
A I don't know.
Q You don't know.
A I haven't determined a figure.

Exhibit B

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Q Okay. Were there any other doctor or medical appointments that you went with him to?
A Not that I can remember.
Q You have mentioned AFib as far as a heart condition. Are you aware of any other medical conditions for which he was being treated?
A Well, eventually dementia.
Q Do you know what physician or practice he went to for that condition?
A No.
Q Do you know when he was diagnosed with dementia?
A No.
Q Did you ever notice him having symptoms of dementia?
A No.
Q Did you ever notice him having any problems with his memory?
A No.

(MARKED FOR IDENTIFICATION, PLAINTIFF'S EXHIBIT NUMBER 4, EMAIL, ATTACHED.)

BY MS. MERRILL:
Q Ms. Krohn, I just handed you Exhibit 4. I'll give you a minute to read over that.
A (Reviewing.)
Q Have you had enough time to read it?
A Yes.

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Petit when you said "he"?
A Yes.
Q Okay. Do you recall that he had difficulty keeping up with calendar details?
A Well, he had trouble keeping up with the time that things started.
Q Anything else that he had trouble keeping up with?
A Not that I can remember.
Q Was there a time when he could keep up with calendar -- what you referred to as calendar details?
A I don't remember it being a problem.
Q So, when you said that, do you mean it wasn't always a problem and it became a problem?
A I -- I don't know. I don't -- I don't remember.
Q Let's go back to the health care power of attorney again, which we marked as Exhibit 2, and I'll ask you if you did anything else. You mentioned going to doctors' appointments. Did you go to the pharmacy with him or for him?
A I don't remember, specifically, but probably I picked up prescriptions for him a couple of times.
Q Did you help administer his medicine to him at any time?
A Yes.
Q Did you do that every day?

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A No.
Q When would you do that?
A After his surgeries.
Q What kind of surgery did he have?
A Back surgery.
Q Okay. Do you know about when that was?
A I don't remember dates.
Q So, are you saying you would help administer the medicine, like, when he came home after the surgery in the weeks after that while he was recovering?
A Yes.
Q Okay. Would you help him do other things during that recovery?
A Yes.
Q What would you do to help?
A He -- he came -- after one of them, he came to stay at my house. So feed -- like, I guess I did what an LPN would do.
Q I think, correct me if I'm wrong, did you say he had one back surgery or multiple back surgeries?
A I think he had two.
Q And did you help him during the recovery for both of those?
A Yes.
Q And did he come to your home both times after those,

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Q When was that?
A I don't remember.
Q So why was he hospitalized in -- did you say Key West and Miami?
A Yes.
Q Okay. Why was he hospitalized there?
A Because he had AFib?
Q Were the two of you already in Key West or did he travel there for some sort of surgical procedure?
A We were on a cruise.
Q Okay. Did he become ill on the cruise?
A Yes.
Q What were his symptoms he was having on the cruise that led to his hospitalization?
A I -- I don't remember the specifics.
Q When he became ill, were you already on the boat?
A Yes.
Q And did you have to -- did the boat have to, basically, turn around to go back so that he could get medical care?
A No.
Q Okay. So was it docked when y'all -- when he had these symptoms that required going to the hospital?
A No.
Q So how did he end up in Key West at a hospital?

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A That was the first port of call.
Q Okay. So did he become sick on the way to the first port of call?
A Yes.
Q And then, when you got to the first port of call, he sought medical treatment?
A Yes.
Q Okay. Was he hospitalized?
A Yes.
Q Did he have to have any sort of surgery?
A They did -- they did heart catheterization.
Q Was that in Key West?
A No.
Q Okay. Where was that?
A In Miami.
Q So when did he go from Key West to Miami?
A I'm sorry. Say that again.
Q When did he go from Key West to Miami?
A Oh, I don't know the dates.
Q Okay. So what I'm asking, when he went to the hospital in Key West, did they immediately send him to Miami or did he stay there for a few days?
A He was there for a day or two.
Q Did someone there, medical personnel, recommend he ---
MR. NASROLLAHI: Can we specify, where's “there”?

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MS. MERRILL: He was at Key West hospital?
THE WITNESS: Yes.
BY MS. MERRILL:
Q Okay. For a day or two?
A Uh-huh.
Q And then he went to a hospital in Miami?
A Yes.
Q Okay. Was that the recommendation of medical personnel?
A Yes.
Q Okay. Do you recall why they wanted him to go to a different hospital?
A They could not control his AFib.
Q When he got to the hospital in Miami, did he undergo any surgical procedures?
A That's where the catheterization was done.
Q Okay. Was anybody else with him in the hospital in Key West besides you, other than medical personnel? But, I mean, was there any other family member or anything like that?
A They came later.
Q Okay. Who is "they"?
A Karen and Kathy.
Q Okay. And those are Edward Petit's daughters?
A Yes.

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Q Do you recall what airport you flew into?
A GSP.
Q And that would be Greenville-Spartanburg? Is that what you mean?
A Yes.
Q Okay. Did Dr. Petit need additional help taking care of himself after returning from Miami?
A I -- I can't remember exactly.
Q Do you recall if you had to help administer his medicine or do things an LPN might do, as you said earlier, as you did after his back surgeries?
A I just -- I don't remember.
Q Okay. Did he go back home or did he go to your home when you came back from Miami?
A I think he went home after that.
Q Did you stay at his home?
A No.
Q While he was in Miami, was he in a regular hospital room?
A Yes.
Q So was he ever in, like, an ICU or CCU while in Miami?
A Yes.
Q Which one? Do you know if it's ICU or CCU?
A I don't remember.
Q So we talked about the back surgeries, the ENT, the

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Exhibit 3 in that stack, and then another one was done November 9, 2010, which is Exhibit 5?

MR. NASROLLAHI: Object to form. Go ahead.

THE WITNESS: Would you repeat the question again?

BY MS. MERRILL:

Q Sure. What I'm trying to figure out is why two different USAA power of attorneys were filled out and signed, and wondered if you knew?

A I do not know.

Q Did you have electronic access to the -- to Edward Petit's USAA financial information?

A Probably. It was set up, but I never used it.

Q Tell me about, did you set it up?

A I don't remember.

Q Then how do you know it was set up?

A Because when I was throwing away papers that had to do with Dr. Petit, I saw that.

Q Saw what?

A My password.

Q And you say -- do you mean password for accessing his USAA account online?

A Yes.

Q Okay. When did you throw those papers away?

A After he died.

Q When did he pass away?

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was going to be a missionary.
Q Okay. What was the response?
A Well, Karen just became very defensive about that.
Q Do you recall what was said?
A No.
Q Was Dr. Petit supportive of this relative?
A Yes.
Q Did you have any other verbal disagreements with Karen while y'all were in Miami at the hospital?
A Not that I remember.
Q Did you call Karen to let her know her father was in the hospital in Florida?
A No.
Q How did she find out -- find out about it?
A I asked her father to call her.
Q Was he able to call?
A I guess I would kind of say barely.
Q Do you know if he called her?
A Yes.
Q He -- yes, he did call her?
A Yes.
Q Did he call her from Miami or Key West?
A I think we were still on the ship.
Q So, if he called her from the ship, did he know -- had y'all decided at that point that he needed medical care

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off the ship and you would be leaving the ship when you could?

MR. NASROLLAHI: Object to form. Go ahead.

THE WITNESS: I -- I don't remember if we knew -- if we knew at that point.

BY MS. MERRILL:

Q Did you call Kathy and let her know that her dad was in the hospital?

A I did not.

Q Do you know if anyone called Kathy?

A I think her father did, but I don't remember for sure.

Q Do you know if Dr. Petit called Karen, at any time, from the hospital?

A I don't know.

Q Would he have been able, physically able, to call her from the hospital?

A I guess, what I said before, barely.

Q While you were in the hospital with Dr. Petit in Miami, did you stay overnight in the hospital with him every night?

A I don't know about every night, but most nights.

Q Would there have been nights that either Karen or Kathy stayed with him?

A I don't remember.

Q I think I asked this, but I just want to make sure -- I

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just want to clarify and make sure that I did. So you did not call Karen or Kathy at any time from either the hospital in Key West or in Miami. Is that correct?

A I don't remember that I did.

Q When Dr. Petit was discharged from the hospital in Miami, had he fully recovered?

A No.

Q How would you say he was doing at that time, when he was discharged from the hospital in Miami?

A I guess, kind of medium.

Q Let me ask it this way. Would he have been able, at that time, after he was discharged from Miami, to return home and resume all normal activities that he could already do at that point?

A Barely.

Q Prior to leaving on this trip, had Dr. Petit been having any issues with his heart?

A There were issues, but I don't -- I don't think there was AFib.

Q In your opinion, was he in good health when you left for the cruise?

A Yes.

Q Was he on any sort of regular medication when you left for the cruise?

A Well, I -- I guess he was supposed to be, but I don't

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A No, I didn't know before.
Q Did he get any sort of medical treatment while on the boat before you got to Key West?
A He went to the hospital part of the ship. I -- I don't know about treatment.
Q Did you go with him to the hospital part of the ship?
A Yes.
Q But you don't know what they did for him there?
A No.
Q Do you know if they did anything for him, to help him while he was on the ship?
A Well, they did something, but I don't -- I don't remember what they did.
Q Was he in pain?
A No.
Q I guess what I was trying to figure out is what symptoms was he having that caused him to go to the hospital part of the ship? What were his complaints?
A He lost -- lost consciousness.
Q So he lost consciousness while he was on the boat?
A Yes.
Q Okay. Anything else?
A Not that I recall.
Q When he got to the hospital in Key West, was he able to give his own medical history to the medical personnel

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there?
A I don't remember.
Q Do you know if he was able to give his own medical history when he was in the hospital in Miami?
A Well, I think that came with him with his release from the Key West hospital.
Q Do you recall if you gave -- provided any information about his medical history to the medical personnel at either hospital?
A I don't remember.
Q At that time, did you know his medical history well enough that you could have given that if you needed to?
A I knew some of it.
Q I understand you may not remember today, but at that time, would you have been able to tell medical personnel what medicines he regularly took?
A I don't know.
MS. MERRILL: Sorry. What number are we on? Six? Thank you.
(MARKED FOR IDENTIFICATION, PLAINTIFF'S EXHIBIT NUMBER 6, USAA INDIVIDUAL RETIREMENT ACCOUNT DESIGNATION OF BENEFICIARY, ATTACHED.)
BY MS. MERRILL:
Q Ms. Krohn, I've just handed you and counsel Exhibit 6 to your deposition. I'll give you a minute to look

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was representing USAA.
Q And do you mean -- which ---
A Eddie Kramer.
Q Okay. And this is like a -- it looks like a FedEx label?
A Yes.
Q Okay. And Eddie Kramer's name is listed in the "Ship To." Is that correct?
A Yes.
Q Okay. And then who is this from?
A Dr. Petit.
Q Okay. Did you help Dr. Petit FedEx this document to USAA?
A I don't remember.
Q How do you know the name, Eddie Kramer?
A He was the person who came to meet with Dr. Petit about his investments.
Q Did you attend that meeting?
A Yes.
Q Where did he come, to Dr. Petit's home?
A Yes.
Q Do you know when that was, approximately?
A I -- I don't remember.
Q What did they discuss from the meeting?
MR. NASROLLAHI: I'm going to object. Go ahead.

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A Yes.
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A Dr. Petit.
Q Okay. Did you help Dr. Petit FedEx this document to USAA?
A I don't remember.
Q How do you know the name, Eddie Kramer?
A He was the person who came to meet with Dr. Petit about his investments.
Q Did you attend that meeting?
A Yes.
Q Where did he come, to Dr. Petit's home?
A Yes.
Q Do you know when that was, approximately?
A I -- I don't remember.
Q What did they discuss from the meeting?
MR. NASROLLAHI: I'm going to object. Go ahead.

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THE WITNESS: What his investments were, their value, and that Dr. Petit wanted to change the beneficiaries.

BY MS. MERRILL:

Q Okay. And then did Eddie Kramer assist him in changing the beneficiary? Did you fill out the -- did he fill out the form? I guess if you just said it was your handwriting, did you fill out the form while Eddie Kramer was there?

A I -- I don't remember.

Q Did you have Eddie Kramer's contact information after that meeting?

A I -- I don't remember.

Q And during that meeting, who did Dr. Petit say he wanted to change the beneficiaries to?

A To his two granddaughters.

Q Do you know when this form -- we're looking at Exhibit 6, still on the same page. Do you know when that form was filled out?

A Well, what I know is the date that -- beside Dr. Petit's signature.

Q Okay. And what's that date?

A 1/23/2012.

Q Do you know if that's the day he met with Eddie Kramer?

A No, that's not the date.

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Q Okay. How do you know that?
A I remember it was in the fall of the previous year.
Q So, if Dr. Petit told Eddie Kramer from USAA during an in-person meeting he wanted to change the beneficiary, you're saying that he still didn't fill out the form that day?
A I don't -- I don't think they did. No, well, I know they didn't.
Q How do you know they didn't?
A Well, because of the date that's on here.
Q If he told -- did Mr. Kramer say there was a reason why if he wanted to change his beneficiaries that he couldn't do it that day that they were meeting in person?

MR. NASROLLAHI: Objection. You can answer.

THE WITNESS: Repeat the question, please.

BY MS. MERRILL:
Q Do you know if there was a reason why, when they were meeting in person, if Dr. Petit told Mr. Kramer that he wanted to change his beneficiaries, they didn't do it during that meeting?
A No, I don't know.
Q Did you go online and print out this -- on page three, print out this FedEx label? Again, I'm looking at Exhibit 6, I'm looking at the third page of that.

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a little bit of help still, in his home?
A I -- I don't -- I don't know.
Q Were you still seeing Dr. Petit after you returned home from Miami?
A Yes.
Q Did you see him regularly after you returned home from Miami?
A Yes.
Q Would that contact be daily contact with him?
A Yes.
Q So you saw him every day after you returned home from Miami?
A Yes.
Q Looking at Exhibit 6, the first page of that, you said that is your handwriting; correct?
A Yes.
Q Do you recall where you were when you filled out this form?
A No.
Q Do you recall -- let me ask you this. Did you see Dr. Petit sign the form?
A I don't remember.
Q In December 2011 and January 2012, where did you regularly bank?
A Well, it's called South State now. I don't know what

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that she was doing this in front of my friends.
Q Who were you with? What friends were you with?
A Susan Lawson, Betsy Russ. I don't remember whether the other friend that's in that group was with me that day or not.
Q Who would that be?
A Linda Halsey.
Q So were you upset from that conversation?
A Yes.
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.
Q Did y'all discuss anything else?
A I don't remember.
Q Where did you go after that conversation?
A To my car.
Q Had you ridden there -- ridden to the farmers market with your friends or were you driving by yourself?
A I had gone there with my friends.
Q Who was driving?

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A Me.
Q Is it fair to say that conversation at the farmers market was a heated conversation?
A Yes.
Q Who began the conversation?
A I don't remember.
Q Did you receive any communications from USAA about Dr. Petit's accounts via e-mail?
A I don't remember that I did.
(MARKED FOR IDENTIFICATION, PLAINTIFF'S EXHIBIT NUMBER 9, USAA FAX, ATTACHED.)
BY MS. MERRILL:
Q I've handed you Exhibit 9 and given copies to counsel. If you'll look at the second page of that four-page document, about halfway through, do you see where it says primary e-mail address?
A I guess I'm not finding it. Oh, yeah. Okay.
Q Okay. And what e-mail address is there? Is that your e-mail address?
A Yes.
Q And that's the pkrohn62@embarqmail.com?
A Yes.
Q And the account holder is Edward Petit?
A Yes.
Q Okay. And it lists his address at 1408 Parkway, Unit

Exhibit C

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10750 McDermott Freeway
San Antonio, Texas 78288

USAA®

Individual Retirement Account Designation of Beneficiary

What you need to do:

- Print in black ink.
- Complete all required sections.
- Sign the document where indicated.
- Return this document to USAA Federal Savings Bank.

1. Participant Information

Edward L. Petit — [redacted]

Participant's Name | USAA Number

2. Beneficiary Information

A. Primary Beneficiary

I hereby revoke any Beneficiary Designation previously made with respect to this Plan. I hereby direct that in the event of my death any balance of my Individual Retirement Account(s) be paid as indicated below. In the event of my death, pay benefits to the following or the survivors thereof:

Leaman Elise Mosby
Name

407 Masters Dr. | Anderson | SC | 29626
Address | City | State | ZIP Code

[redacted] | [redacted] | grand daughter
Birth Date | Social Security Number | Relationship

Caroline Frances Mosby
Name

6598 Breezewood Blvd | Myrtle Beach | SC | 29588
Address | City | State | ZIP Code

[redacted] | [redacted] | grand daughter
Birth Date | Social Security Number | Relationship

Section 2 continued on next page.

USAA. 01252012. 17:02.

538

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2. Beneficiary Information

B. Secondary Beneficiary

If none of said beneficiaries survives me, pay benefits to the following or the survivors thereof:

Karen Petit
Name

20 Sims Alley | Columbia | SC | 29205
Address | City | State | ZIP Code

[redacted] | [redacted] | daughter
Birth Date | Social Security Number | Relationship

Kathy Elise Petit
Name

230 E. Cambridge Apt 307 | Greenwood | SC | 29646
Address | City | State | ZIP Code

[redacted] | [redacted] | daughter
Birth Date | Social Security Number | Relationship

3. Agreement with USAA Federal Savings Bank

I understand this Change of Designation of Beneficiary will be effective on the date of receipt by the Custodian and that upon any change of beneficiary, the right of all previously designated beneficiaries to receive benefits under this Plan shall cease.

I retain the right to revoke this designation of beneficiary and to designate a new beneficiary at any time by communicating to the Custodian in writing.

Edward J Petit | 11/23/2012
Participant's Signature | Date

4. Delivery Instructions

Fax to: (800) 531-5717
Attn: IRA Sales & Service - Unit 94589

Mail to: USAA Federal Savings Bank
IRA Sales & Service - Unit 94589
10750 McDermott Freeway
San Antonio, Texas 78288-0544

USAA. 01252012.17.02. 539

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From: (864) 229-3824
MAJOR EDWARD L PETIT

104 HIGHLAND DR

GREENWOOD, SC 29649

Origin ID: GSPA

FedEx Express

J1120110805022S

Ship Date: 29DEC11
ActWgt: 1.0 LB
CAD: 2822083/INET3210

Delivery Address Bar Code

Ref # 079-61729

RMA #:
Return Reason:

SHIP TO: (800) 292-8800 X 24778 BILL SENDER

EDDIE KRAMER
USAA WEALTH MANAGMENT
9800 FREDERICKSBURG RD

SAN ANTONIO, TX 78288

RETURNS MON-FRI
STANDARD OVERNIGHT

TRK# 0221 **7930 6760 0882**

78288
TX-US

50FG1/859F/F5F4

1. Select the 'Print' button to print 1 copy of each label.
2. The Return Shipment instructions, which provide your recipient with information on the returns process, will be printed with the label(s).
3. After printing, select your next step by clicking one of the displayed buttons.

Note: To review or print individual labels, select the Label button under each label image above.

Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com.FedEx will not be responsible for any claim in excess of $100 per package, whether the result of loss, damage, delay, non-delivery,misdelivery,or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim.Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic valueof the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental,consequential, or special is limited to the greater of $100 or the authorized declared value. Recovery cannot exceed actual documented loss.Maximum for items of extraordinary value is $500, e.g. jewelry, precious metals, negotiable instruments and other items listed in our ServiceGuide. Written claims must be filed within strict time limits, see current FedEx Service Guide.

USAA.01252012.17:03.

549

Exhibit D

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10750 McDermott Freeway
San Antonio, Texas 78288

Individual Retirement Account Designation of Beneficiary

What you need to do:
- Print in black ink.
- Complete all required sections.
- Sign the document where indicated.
- Return this document to USAA Federal Savings Bank.

1. Participant Information

PETIT, EDWARD L. MAJ AFRET 273 39 01
Participant's Name USAA Number

ACCT # 000000 - [redacted]

2. Beneficiary Information TRUST # [redacted]

A. Primary Beneficiary ACCT # [redacted] IRA/ESA

I hereby revoke any Beneficiary Designation previously made with respect to this Plan. I hereby direct that in the event of my death any balance of my Individual Retirement Account(s) be paid as indicated below. In the event of my death, pay benefits to the following or the survivors thereof:

KAREN (NMI) PETIT
Name

120 SIMS ALLEY COLUMBIA S.C. 29205
Address City State ZIP Code

[redacted] [redacted] DAUGHTER
Birth Date Social Security Number Relationship

KATHY ELISE PETIT [redacted] TRUST
Name

104 HIGHLAND DR GREENWOOD S.C. 29649
Address City State ZIP Code

[redacted] [redacted] DAUGHTER
Birth Date Social Security Number Relationship

Section 2 continued on next page.

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2. Beneficiary Information

B. Secondary Beneficiary

If none of said beneficiaries survives me, pay benefits to the following or the survivors thereof:

Name

Address | City | State | ZIP Code

Birth Date | Social Security Number | Relationship

Name

Address | City | State | ZIP Code

Birth Date | Social Security Number | Relationship

3. Agreement with USAA Federal Savings Bank

I understand this Change of Designation of Beneficiary will be effective on the date of receipt by the Custodian and that upon any change of beneficiary, the right of all previously designated beneficiaries to receive benefits under this Plan shall cease.

I retain the right to revoke this designation of beneficiary and to designate a new beneficiary at any time by communicating to the Custodian in writing.

Edward L Pitt Maj AFRESRT 1-15-07

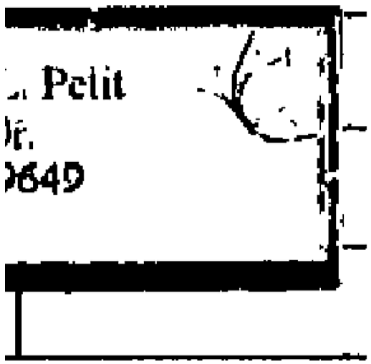
Participant's Signature | Date

4. Delivery Instructions

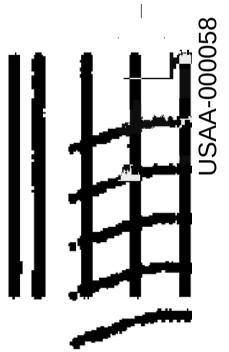
Fax to: (800) 531-5717
Attn: IRA Sales & Service - Unit 94589

Mail to: USAA Federal Savings Bank
IRA Sales & Service - Unit 94589
10750 McDermott Freeway
San Antonio, Texas 78288-0544

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☐ YES ☐ NO



UPSTATE P&DC 296

15 JAN 2007 PM 2 T

01/18/2007 03:24

BUSINESS REPLY MAIL

FIRST-CLASS MAIL PERMIT NO. 707 SAN ANTONIO TX

POSTAGE WILL BE PAID BY ADDRESSEE

284

9876 ATTN DEPOSIT SALES AND SERVICE
USAA FEDERAL SAVINGS BANK
10750 MCDERMOTT FREEWAY
SAN ANTONIO TX 78284-8499

Exhibit E

ELECTRONICALLY FILED - 2019 Sep 03 9:50 PM - GREENWOOD - COMMON PLEAS - CASE#2017CP2401343

STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)))	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
Karen Petit, Plaintiff, vs. Phyllis Jean Krohn, USAA Federal Savings Bank, and USAA Investment Management Co., Defendants.	)))))))))))	Civil Action No. 2017-CP-24-01343 **RESPONSE OF DEFENDANTS USAA TO PLAINTIFF'S SECOND SET OF DISCOVERY REQUESTS**

TO: JANE H. MERRILL, ATTORNEY FOR PLAINTIFF:

Pursuant to Rules 26 and 36 of the South Carolina Rules of Civil Procedure, Defendants USAA Federal Savings Bank ("USAA FSB") and USAA Investment Management Co. ("USAA IMCO") (collectively "USAA"), hereby respond to Plaintiff's Second Set of Discovery Requests as follows:

INTERROGATORIES

13. What document was in the envelope copied on page USAA-000052 in the discovery produced by USAA?

ANSWER: The document in the envelope at bates number USAA-000052 was the Individual Retirement Account Designation of Beneficiary which was previously produced as bates numbers USAA-000048 and USAA-00050. As a courtesy to Dr. Petit, USAA generated the return FedEx shipping label which was then returned and received by USAA on January 25, 2012, as shown by the receiving stamp on the left-hand margin of the document and the envelope.

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REQUESTS

15. Provide any documents referenced in response to Plaintiff's Interrogatory No. 13.

RESPONSE: The document in the envelope at bates number USAA-000052 was the Individual Retirement Account Designation of Beneficiary which was previously produced as bates numbers USAA-000048 and USAA-000050.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

William S. Brown
SC Bar No. 064164
E-Mail: william.brown@nelsonmullins.com
David C. Dill
SC Bar No. 101519
E-Mail: david.dill@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 373-2300

Attorneys for USAA Federal Savings Bank and USAA Investment Management Co.

Greenville, South Carolina

September 20, 2018

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Exhibit F

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USAA

Fax Cover Sheet

Date	Monday, June 30, 2014	Time	9:29:52 AM
To	Henry Dorn	Fax	(888) 263-9574
From	Griffith, Mark	Phone	(210) 282-4054

Pages including Co 04

NOTES:

Hi Mr. Dorn, here is the application for Mr. Petit's IRA which contains the beneficiary information. Thank you

USAA *We know what it means to serve.*

Access to USAA and your accounts is available day or night at usaa.com.

CONFIDENTIALITY NOTICE: The information contained in this facsimile message is CONFIDENTIAL and may be privileged. If you are not the intended recipient, you are hereby notified that any review, dissemination, distribution or duplication of this communication is strictly prohibited. If you are not the intended recipient, please notify the sender immediately by telephone and return the facsimile message to us at the above address via the U.S. Postal Service. Thank you.

USAA Investment Management Company (USAAIMCO), a registered investment adviser.

EXHIBIT 9
Deponent VanSwol
Date 2.26.19 Rptr. JE
WWW.DEPOBOOK.COM

IMCO ONLINE NEW ACCOUNT APPLICATION INFORMATION

Form Code: ONAPRUMPR
File Tab: PAM
Description: On-Line Automated PR UMP Retirement App
Registration Type Code: 35
Automated Principal Review: 05/03/2012 3:08:35 PM

PRIMARY ACCOUNT HOLDER PERSONAL INFORMATION:

USAA Number: [redacted]
Name: EDWARD L PETIT
Date Of Birth: [redacted]
Social Security Number :
Address1: STERLING HOUSE
Address2: 1408 PARKWAY UNIT 305
City: GREENWOOD
State: SC
Zip: 29646
Home Telephone: 864-2293824-00000
Work Telephone: 864-3897049-00000
Primary E-mail address: pkrohn62@embarqmail.com
Secondary E-mail address:
Primary Citizenship: U.S. Citizen
Primary Senior Political Official: No
Primary Physical Address1: STERLING HOUSE
Primary Physical Address2: 1408 PARKWAY UNIT 305
Primary Physical City: GREENWOOD
Primary Physical State: SC
Primary Physical Zip Code: 29646
Marital Status: MARRIED
Account Number: 50122738

EMPLOYMENT INFORMATION:

Employment Status: Retired
Occupation: RETIRED

REGULATORY INFORMATION:

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Employed by a registered broker/dealer: No
Company 10% Shareholder, director, policy making officer, executive officer: No
Approx net worth (excluding primary residence): $250,000 and over
Annual Income: $35351 - $85650
Investment Knowledge: Limited
Investment Objective: Growth
Tax Bracket: 25%
Tax Filing Status: Single

BROKERAGE ACCOUNT FUNDING INFORMATION:

Rollover Amount: 452256.00
Authorize Commingling: No

FINANCIAL INSTITUTION:

Financial Institution: USAA FEDERAL SAVINGS BANK
Bank/Transit Routing Number: [redacted]
Account Number: [redacted]
Account Type: SDA

ACCOUNT FEATURES:

USAA Managed Portfolios Householding Fees :Yes
Householding Commissions: Yes
Streamline Prospectuses and Reports: Yes
Cash Option: Brokerage Cash
Portfolio Model: UMP Moderately Aggressive Marketplace
Fixed Income Type: Taxable
Portfolio Mix: Marketplace
Online Document Delivery:

****

I agree to Trade Confirmation Waiver

****

Beneficiary information

USAA Number: [redacted]
Account Number: [redacted]

Petit 155

Name of IRA Account Owner: EDWARD L PETIT
Beneficiary information

Designated Beneficiary
Type: Primary
USAA Number: OTHER
Name: Leaman E Mosby
Date Of Birth: [redacted]
Social Security Number :
Relationship to contributor: Non-Spouse
% of distribution if more than one Beneficiary survives: 50.00
Beneficiary 2
Type: Primary
USAA Number: OTHER
Name: Caroline F Mosby
Date Of Birth: [redacted]
Social Security Number :
Relationship to contributor: Non-Spouse
% of distribution if more than one Beneficiary survives: 50.00

Signed document list:

USAA Money Market Fund
USAA Managed Portfolios Program Brochure
USAA Managed Portfolios Investment Advisory Agreement
USAA Managed Portfolios Wrap Program Brochure Supplement
USAA Managed Portfolios IRA Account Terms and Conditions
USAA Traditional/Roth IRA Custodial Agreement and Disclosure Statement
Privacy Promise
Investment Strategy Recommendation
Business Continuation Disclosure Statement
Electronic Services Agreement

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Exhibit G

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State of South Carolina, County of Greenwood
In the Court, Eighth Judicial Circuit

Karen Petit Plaintiff, vs. Phyllis Jean Krohn, USAA Federal Savings Bank and USAA Investment Management Co. Defendant.	Case No. 2017-CP-24-01343 Affidavit of Wallace M. Dorn

Personally appeared before me, the undersigned who, being first duly sworn, deposes and states as follows:

I am Wally Dorn. I am over the age of eighteen and capable of providing this affidavit.

In June 2017, I was with Karen Petit in her booth at the S.C. Festival of Flowers, located at the Uptown Market. I noticed an older woman, whom I did not know, with gray hair and of slight build, who was wearing sunglasses on top of her head, talking to Karen. Their conversation appeared to be congenial.

The woman walked away from the booth, and I then saw that Karen followed her. They stopped to talk, and I soon realized that the conversation had become emotional because Karen was gesturing with her hands, and Karen's facial expressions showed that she was upset.

Karen left the woman and returned to the booth and was extremely distraught. She was shaking, she could barely speak, and she was tearful. She was so upset, in fact, that I told her to sit down.

At that point, Karen told me that the woman was Phyllis Krohn, whom I never met. However, I was aware that she had been the companion to Karen's father, Dr. Edward Petit. Mrs. Krohn told Karen that

she decided that her father's IRA should go to his granddaughters, and she changed the beneficiary form to exclude Karen and her sister Kathy Petit from inheriting their father's IRA. Mrs. Krohn told her that she was sorry for the damage that she had caused her, and also for all of the other things that she had done while being his companion.

Karen continued to be so upset, on the verge of hysteria, that I left the booth and went to get her some ice and a cold beverage because I was worried that her state of distress, combined with the summer heat, would cause her to faint or become ill.

Further your Affiant sayeth not.

Wallace M. Dorn

SWORN TO AND SUBSCRIBED
before me this 18th day of August, 2019.

(L.S.)
Jane H. Merrill
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: October 18, 2020

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Exhibit H

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WACHOVIA

WACHOVIA BANK, NATIONAL ASSOCIATION
DURABLE POWER OF ATTORNEY

WARNING TO PERSON EXECUTING THIS DOCUMENT: This is an important legal document. It creates a power of attorney that provides the person you designate as your attorney-in-fact with the broad powers it sets forth.

- You have the right to terminate this power of attorney.
- If there is anything about this form that you do not understand, you should ask a lawyer to explain it to you.
- These powers of attorney shall continue even if you later become disabled or incapacitated.

This Durable Power of Attorney is for:

Account Title: Edward L. Petit Org.: —

Account Number(s): [redacted] Safe Deposit Box Number: 102

As used herein, the words "I", "Me", "My", "Myself" and "Mine" refer to the account holder (hereinafter "PRINCIPAL") who signs this Durable Power of Attorney.

Complete This Section in Pennsylvania Only

Notice

The purpose of this Power of Attorney is to give the person you designate (your "AGENT") broad powers to handle your property, which may include powers to sell or otherwise dispose of any real or personal property without advance notice to you or approval by you.

This Power of Attorney does not impose a duty on your AGENT to exercise granted powers, but when powers are exercised, your AGENT must use due care to act for your benefit and in accordance with this Power of Attorney.

Your AGENT may exercise the powers given here throughout your lifetime, even after you become incapacitated, unless you expressly limit the duration of these powers or you revoke these powers or a court acting on your behalf terminates your AGENT'S authority.

Your AGENT must keep your funds separate from your AGENT'S funds.

A court can take away the powers of your AGENT if it finds your AGENT is not acting properly.

The powers and duties of an AGENT under a Power of Attorney are explained more fully in 20 PA. C.S. CH. 56.

If there is anything about this form that you do not understand, you should ask a lawyer of your own choosing to explain it to you.

I have read or had explained to me this notice and I understand its contents.

_____ Principal

_____ Date

I, the undersigned, have made, constituted and appointed and by these presents do make, constitute and appoint: Phyllis Jean Krohn my true and lawful attorney in fact
(Type Name of Agent)
(hereinafter "AGENT") for me from time to time and in my name, place and stead:

NJ Only: "To conduct banking transactions as set forth in Section 2 of P.L. 1991 (C.46:2B-8 et seq.)"

1. To make, draw, sign, endorse, deposit, accept, and deliver checks, drafts and other instruments for the payment of money on the above identified account;
2. To acknowledge the correctness of any statement on the above identified account;

EXHIBIT 1
Deponent Van Swol
Date 2.26.19 Rptr. JE
WWW.DEPOBOOK.COM

ELECTRONICALLY FILED - 2019 Sep 03 9:50 PM - GREENWOOD - COMMON PLEAS - CASE#2017CP2401343

3. To accept and receive notices and demands and sign receipts for canceled checks and vouchers on the above identified account, and generally to do all acts and things with reference to the above identified account with Wachovia Bank, National Association (hereinafter "BANK");
4. To open, deposit in, operate, withdraw from and close deposit accounts of all types.
5. To borrow money and to obtain credit for me from BANK on such terms as may seem to said AGENT advisable, and to make and deliver notes, drafts, acceptances, agreements, and any other obligations of mine in form satisfactory to BANK, and as security therefore to pledge any property of mine.
6. **In addition to the above powers, by signing my name on the line appearing after this 6th power, my AGENT shall also have the power to access the safe deposit box indicated above and to act for and in my stead and as fully and completely as if I was present and acting myself with regard to said box, to take and remove from or add to the contents of said box and to have full and absolute control over the same, and I hereby direct BANK to allow my AGENT to enter said box whenever he/she requests that privilege and presents a key and signs his/her name on BANK records using the signature affixed hereto.**

   Signed: _____ **(Principal's Signature)**
7. **In addition to the above powers, my agent shall also have the power to give written instruction to Bank with regard to all matters relating to my IRA Account as indicated above, including authorization to withdraw funds, but not the power to change or designate the beneficiary on my IRA Account.**

Granting unto my said AGENT full power and authority to do and perform all acts and things whatsoever in connection with the foregoing authority as fully and for all intents and purposes as I could do if personally present.

I also, hereby, authorize and direct BANK to receive, accept, pay and/or apply, without any duty of inquiry, without limit as to amount, and without regard to the application or the proceeds, any check, draft, or other instrument for the payment of money drawn by my said attorney on or payable from the above identified account including but not limited to those indorsed to the order of said AGENT or otherwise for the personal credit or account of or in payment of the individual obligation of my said AGENT to BANK or others.

I hereby ratify and confirm all previous acts of my said AGENT with the same force and effect as if said acts had been done after the delivery of this Durable Power of Attorney. In consideration of BANK acting in reliance hereon, I agree for myself and my legal representative to indemnify Bank and save it harmless from all expenses, losses or damages (including attorneys' fees at trial and on appeal) that it may sustain by relying upon the apparent authority of this Durable Power of Attorney after its termination by operation of law or otherwise, but before written notice and satisfactory proof of such termination is received by BANK and such of its departments, branches and correspondents as may be concerned. I also agree that any action taken by my AGENT purporting to be pursuant to this Durable Power of Attorney shall be binding upon myself, my estate and my personal representatives and heirs, so long as such action is taken before bank receives written revocation of this Durable Power of Attorney, written notice and satisfactory proof of my death, the pendency of a court proceeding to determine my competency or court appointment of a guardian of my person or property.

THIS DURABLE POWER OF ATTORNEY SHALL NOT BE AFFECTED BY MY DISABILITY EXCEPT AS PROVIDED BY STATUTE.

The following is a genuine specimen of the handwriting and form of signature to be used by the AGENT appointed hereby, if present; otherwise it may be found on the Affidavit and Indemnity Agreement:

_____
Signature of AGENT

Signature of PRINCIPAL (Seal)

Signature of PRINCIPAL (Seal)

California, Florida and South Carolina (two witnesses)

Witness (Seal)

Witness (Seal)

Jan 26, 2009
Date

Pennsylvania Only

Acknowledgement Executed By Agent

I, _____, have read the attached Power of Attorney and am the person identified as the AGENT for the principal. I hereby acknowledge that in the absence of a specific provision to the contrary in the Power of Attorney or in 20 PA. C.S. when I act as AGENT:

I shall exercise the powers for the benefit of the principal.

I shall keep the assets of the principal separate from my assets.

I shall exercise reasonable caution and prudence.

I shall keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.

_____ AGENT

_____ Date

COMMONWEALTH OR STATE OF SC

Greenwood COUNTY/CITY

I, Marie G. Marshall, a notary public for said County and State or Commonwealth, do hereby certify that Edward h. Petit (Customer's Name) personally appeared before me this day and acknowledged the due execution of the foregoing Agreement.

Witness my hand and official seal, this 26th day of Jan, 2009.

(SEAL) Marie G. Marshall NOTARY PUBLIC

My commission expires March 28, 2011.

562423 (Rev 01 Page 3 of 3)

Petit 028

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HEALTH CARE POWER OF ATTORNEY

(South Carolina Statutory Form, Code of Laws Section 62-5-504)

1. DESIGNATION OF HEALTH CARE AGENT

I, Edward L. Petit (Principal), hereby appoint

Phyllis Jean Krohn (Agent)

526 Colonial Dr, Greenwood, SC 29649 (Address)

Home Telephone: 864-388-9948 Work (Cell) Telephone: 864-941-7705 as my agent to make health care decisions for me as authorized in this document.

2. EFFECTIVE DATE AND DURABILITY

By this document I intend to create a durable power of attorney effective upon, and only during, any period of mental incompetence.

3. HIPAA AUTHORIZATION

When considering or making health care decisions for me, all individually identifiable health information and medical records shall be released without restriction to my health care agent(s) and/or my alternate health care agent(s) named above including, but not limited to, (i) diagnostic, treatment, other health care, and related insurance and financial records and information associated with any past, present, or future physical or mental health condition including, but not limited to, diagnosis or treatment of HIV/AIDS, sexually transmitted disease(s), mental illness, and/or drug or alcohol abuse and (ii) any written opinion relating to my health that such health care agent(s) and/or alternate health care agent(s) may have requested. Without limiting the generality of the foregoing, this release authority applies to all health information and medical records governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 USC 1320d and 45 CFR 160-164; is effective whether or not I am mentally competent; has no expiration date; and shall terminate only in the event that I revoke the authority in writing and deliver it to my health care provider.

4. AGENT'S POWER

I grant to my agent full authority to make decisions for me regarding my health care. In exercising this authority, my agent shall follow my desires as stated in this document or otherwise expressed by me or known to my agent. In making any decision, my agent shall attempt to discuss the proposed decision with me to determine my desires if I am able to communicate in any way. If my agent cannot determine the choice I would want made, then my agent shall make a choice for me based upon what my agent believes to be in my best interests. My agent's authority to interpret my desire is intended to be as broad as possible, except for any limitations I may state below.

Accordingly, unless specifically limited by Section E, below, my agent is authorized as follows:

A. To consent, refuse, or withdraw consent to any and all types of medical care, treatment, surgical procedures, diagnostic procedures, medication and the use of mechanical or other procedures that affect any bodily function, including, but not limited to, artificial respiration, nutritional support and hydration, and cardiopulmonary resuscitation;

B. To authorize, or refuse to authorize, any medication or procedure intended to relieve pain, even though such use may lead to physical damage, addiction, or hasten the moment of, but not intentionally cause, my death;

C. To authorize my admission to or discharge, even against medical advice, from any hospital, nursing care facility, or similar facility or service;

D. To take any other action necessary to making, documenting, and assuring implementation of decisions concerning my health care, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, nursing care provider, or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my agent, or to seek actual or punitive damages for the failure to comply.

EXHIBIT 2
Deponent VAN SWOL
Date 2.26.19 Rptr. JE

E. The powers granted above do not include the following powers or are subject to the following rules or limitations: _____

N/A

5. ORGAN DONATION (INITIAL ONLY ONE)

My agent may EJP ✓ ; may not _____ consent to the donation of all or any of my tissue organs for purposes of transplantation.

6. EFFECT ON DECLARATION OF A DESIRE FOR A NATURAL DEATH (LIVING WILL)

I understand that if I have a valid Declaration of a Desire for a Natural Death, the instructions contained in the Declaration will be given effect in any situation to which they are applicable. My agent will have authority to make decisions concerning my health care only in situations to which the Declaration does not apply.

7. STATEMENT OF DESIRES AND SPECIAL PROVISIONS

With respect to any Life-Sustaining Treatment, I direct the following: (INITIAL ONLY ONE OF THE FOLLOWING 4 PARAGRAPHS).

(1) _____ GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged nor do I want life-sustaining treatment to be provided or continued if my agent believes the burdens of the treatment outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense involved, and the quality as well as the possible extension of my life in making decisions concerning life-sustaining treatment.

OR

(2) EJP DIRECTIVE TO WITHHOLD OR WITHDRAW TREATMENT. I do not want my life to be prolonged and I do not want life-sustaining treatment:

a. if I have a condition that is incurable or irreversible and, without the administration of life-sustaining procedures, expected to result in death within a relatively short period of time; or

b. if I am in a state of permanent unconsciousness.

OR

(3) _____ DIRECTIVE FOR MAXIMUM TREATMENT. I want my life to be prolonged to the greatest extent possible, within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery, or the cost of the procedures.

OR

(4) _____ DIRECTIVE IN MY OWN WORDS: _____

8. STATEMENT OF DESIRES REGARDING TUBE FEEDING

With respect to Nutrition and Hydration provided by means of a nasogastric tube or tube into the stomach, intestines, or veins, I wish to make clear that: (INITIAL ONLY ONE)

EJP I do not want to receive these forms of artificial nutrition and hydration, and they may be withheld or withdrawn under the conditions given above.

OR

_____ I do want to receive these forms of artificial nutrition and hydration.

IF YOU DO NOT INITIAL EITHER OF THE ABOVE STATEMENTS, YOUR AGENT WILL NOT HAVE AUTHORITY TO DIRECT THAT NUTRITION AND HYDRATION NECESSARY FOR COMFORT CARE OR ALLEVIATION OF PAIN BE WITHDRAWN.

Petit 019

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9. SUCCESSORS

If an agent named by me dies, becomes legally disabled, resigns, refuses to act, becomes unavailable, or if an agent who is my spouse is divorced or separated from me, I name the following as successors to my agent, each to act alone and successively, in the order named.

A. First Alternate Agent: Karen Petit

Address: 20 Sims Alley, Columbia, SC 29205

Telephone: 803-477-1971

B. Second Alternate Agent: Kathy Elise Petit

Address: 1010 Grace St, Apt. 16C, Greenwood, SC 29649

(PO Box 50402) Telephone: 864-377-3591

10. ADMINISTRATIVE PROVISIONS

a. I revoke any prior Healthcare Power of Attorney and any provisions relating to healthcare of any other prior power of attorney.

b. This power of attorney is intended to be valid in any jurisdiction in which it is presented.

11. UNAVAILABILITY OF AGENT

If at any relevant time the Agent or Successor Agents named herein are unable or unwilling to make decisions concerning my healthcare, and those decisions are to be made by a guardian, by the Probate Court, or by a surrogate pursuant to the Adult Healthcare Consent Act, it is my intention that the guardian, Probate Court, or surrogate make those decisions in accordance with my directions as stated in this document.

BY SIGNING HERE I INDICATE THAT I UNDERSTAND THE CONTENTS OF THIS DOCUMENT AND THE EFFECT OF THIS GRANT OF POWERS TO MY AGENT.

I sign my name to this Healthcare Power of Attorney on this 26 day of January, 2009.

My current home address is: 104 Highland Dr., Greenwood SC 29649

SS #: [redacted]

Signature: Edward L Petit

Print Name: Edward L. Petit

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WITNESS STATEMENT

I declare, on the basis of information and belief, that the person who signed or acknowledged this document (the principal) is personally known to me, that he/she signed or acknowledged this Healthcare Power of Attorney in my presence, and that he/she appears to be of sound mind and under no duress, fraud or undue influence.

I am not related to the principal by blood, marriage or adoption, either as a spouse, a lineal ancestor, descendant of the parents of the principal, or spouse of any of them. I am not directly financially responsible for the principal's medical care. I am not entitled to any portion of the principal's estate upon his/her decease, whether under any will or as an heir by intestate succession, nor am I the beneficiary of an insurance policy on the principal's life, nor do I have a claim against the principal's estate as of this time. I am not the principal's attending physician, nor an employee of the attending physicians. No more than one witness is an employee of a health facility in which the principal is a patient. I am not appointed as Healthcare Agent or Successor Healthcare Agent by this document.

Witness Number 1:

Signature: Cynthia A. Butler Date: 01.26.09

Print Name: Cynthia A. Butler Telephone: 725-7704

Residence Address: 1325 Spring Street

Greenwood, SC 29646

Witness Number 2:

Signature: Marie G. Marshall Date: 1.26.09

Print Name: Marie G. Marshall Telephone: 725-4111

Residence Address: 1325 Spring St.

Greenwood, S.C. 29646

Subscribed before me by Edward L. Petit, the principal, and subscribed and sworn to before me Cynthia A Butler the witness(es), this 26th day of Jan, 2009.

Marie G. Marshall
Signature of Notary Public

Notary Public for Green Wood

My commission expires: March 28, 2011
(SEAL)

* If qualified as a witness, the Notary Public may serve as a witness.

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USAA Power of Attorney Instructions

Important Information. Please read

General. This USAA POWER OF ATTORNEY is intended to be used by you, a USAA member, to permit another person to conduct most transactions on personal USAA accounts that you, as Grantor, could conduct yourself. For example, you may want your agent (or "attorney-in-fact") to have access to your bank accounts, control over a life insurance policy you own or to take care of your auto and property transactions on your behalf. It provides your attorney-in-fact access to all of your lines of business with USAA and allows USAA and its affiliated companies to treat the signature of your attorney-in-fact as though it were your signature. For this reason, it is important that you designate a trusted family member or friend as your attorney-in-fact under this document. **The use of this form is limited to USAA business only and would not be considered a general power of attorney.** The USAA POWER OF ATTORNEY form will be accepted by all USAA companies for most business transactions with USAA companies.

Other Powers of Attorneys. If you have a military power of attorney (acceptable to USAA in most cases) or a power of attorney already on file at USAA, you may want to review it with your attorney to be sure it covers your business needs and is still in effect.

Cautionary Note: Carefully read any power of attorney form before you sign it. **Be sure to consult your attorney regarding its purpose and the legal rights that are affected by the grant of such power to another person.** Your particular circumstances may indicate the need for granting either broader or more restrictive rights than are provided for in this form. **This USAA POWER OF ATTORNEY is durable and is therefore valid and effective if you subsequently become disabled or incompetent.** In the event of your death, this USAA POWER OF ATTORNEY will terminate.

SOME LIMITATIONS ON THE USE OF THIS FORM INCLUDE:

Checkwriting Privileges. If checkwriting privileges are needed on accounts with USAA Federal Savings Bank and on mutual fund accounts with USAA Investment Management Company ("IMCO"), separate signature cards will be sent to the person to whom you have granted limited powers to your account(s).

Authority over Other Accounts. For business accounts, trust accounts, estate accounts, guardianship or conservatorship accounts, UGMA or UTMA accounts or similar accounts, other documents and applicable laws may limit your ability to grant this authority to another person. In such instances you should consult with an attorney as to the scope of your ability to grant such authority.

Electronic Services Agreement. IMCO's Information Provider Agreements require Electronic Services Agreements to be signed by the member to obtain access to accounts on usaa.com – agents (such as the Attorney-in-Fact) are not authorized to sign such Electronic Services Agreement for the member.

Stock transfers. Stock transfer agents for brokerage or mutual fund accounts may require a separate designation for your representative to execute a stock power before allowing him or her to trade.

Instructions to Complete the Form Below

If you decide to use this USAA POWER OF ATTORNEY form, please complete the following:

1. All applicable blanks in the form must be filled in.
2. Your signature must be acknowledged before either a notary public or a person authorized under 10 USC § 1044a to perform a notarial act for members of the armed services.
3. If you do not include a termination date, it will be presumed to be in effect until either your death or a written revocation is received by USAA.
4. You have the option of appointing an alternate attorney-in-fact to represent you in case your first appointee dies or is unwilling to serve.

If you have any questions on how to complete this form, please contact your attorney or military legal office.

For priority processing, it is important that you return the completed USAA POWER OF ATTORNEY form by faxing the printed form to 1-800-531-8877 or sending it to USAA, Power of Attorney Processing, 9800 Fredericksburg Rd., San Antonio, Texas 78288.

EXHIBIT 3
Deponent Van SW01
Date 2.26.19 Rptr. JE
WWW.DEPOBOOK.COM

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USAA POWER OF ATTORNEY

USAA Member Number [redacted] Social Security Number [redacted]

I, Edward L. Petit ("GRANTOR"), a legal resident of Greenwood [City], SC [State], and presently stationed or residing at 104 Highland Dr. [Address] desiring to execute this USAA POWER OF ATTORNEY, do hereby appoint Phyllis Jean Krohn whose address is 526 Colonial Dr., Greenwood, SC and social security number is [redacted] as my Attorney-in-Fact. If my Attorney-in-Fact is no longer able or is unwilling to serve as my legal representative, then I appoint Karen Petit whose address is 30 Sims Alley, Columbia, SC 29205 and social security number is [redacted] to serve as my Attorney-in-Fact instead of the first named person. My Attorney(s)-in-Fact is/are United States citizen(s). I intend for my Attorney-in-Fact to act for me and in my name, to do all acts whatsoever concerning my property, accounts, policies and business relationships maintained, issued, managed, administered or held by United Services Automobile Association, or any of its subsidiaries or affiliates (collectively "USAA") necessary and advisable in the judgment of my said Attorney-in-Fact and as permitted by law, as fully as I could do if personally present and acting, including but not limited to:

1. INVESTMENT TRANSACTIONS

(a) Brokerage Accounts: to buy, sell and trade in stocks, bonds, options and any other securities or contracts relating to the same on margin or otherwise; except that my attorney-in-fact does not have authority to request that securities, cash and/or property be sent to me at my address or to another broker dealer or financial institution on my account and my attorney-in-fact is not authorized to withdraw such securities, cash and/or property in his own name as attorney-in-fact or for his own benefit.
(b) USAA Mutual Fund Accounts: to purchase, trade, exchange and redeem shares of USAA mutual funds.
(c) Generally: to execute and deliver good and sufficient instruments for the accomplishment thereof; to act as my attorney or proxy with respect to any stocks, shares, bonds, mutual funds or other investments, rights or interest as I may now or hereafter hold.
(d) Limitations: My attorney does not have the authority to make himself or herself or others the co-owner or beneficiary of such investment accounts; does not have the authority to change ownership of such investment accounts; does not have a power of appointment over such investment accounts; and does not have the authority to make a gift of the securities held in such investment accounts to himself or herself or to others.

2. BANKING TRANSACTIONS

(a) To deposit or withdraw for any purpose, in or from any bank or other financial institution, any funds, checks, or other credits which I now or hereafter may have on deposit or be entitled to, and to endorse, cash and receive the proceeds of any and all checks, vouchers, or other orders for money, to open or close accounts, and to receive statements, vouchers, notices or other documents from any bank or other financial institution concerning any and all accounts or banking transactions in my name or in which I may have an interest;
(b) To have access for all purposes to any or all safety deposit boxes or vaults rented in my name or in the names of any other person or persons and myself, with full power to use the same for safekeeping any property or papers, and to remove therefrom any time, or from time to time, all or any part of the contents of any such box or vault; and/or
(c) To borrow money on my behalf and pledge as security real or personal property of mine necessary to borrow, pay, renew, or extend the time of payment of a debt of mine.

3. INSURANCE TRANSACTIONS

(a) To pay the premiums on, terminate any property or casualty policies or execute rights on an annuity or any contract of insurance presently owned by me or hereafter acquired;
(b) Subject to underwriting requirements, to procure different or additional annuities or contracts of insurance on my life or with respect to protecting me or my property from ill health, disability, accident, liability or loss;
(c) To exercise any election or conversion rights, and to demand, receive or obtain any money, dividend, or other thing of value to which I am or to which I may become entitled as the proceeds or other return or profit arising out of any contract of insurance or of any one or more of the insurance transactions herein enumerated;
(d) To establish or change policy and billing addresses, although my Attorney-in-Fact does not receive the power to change ownership or make a gift of the annuity or contract of insurance;

(e) To receive all notices normally provided to the owner or named insured of any contract;
(f) To apply for, receive delivery, or amend any property and casualty insurance contract;
(g) To execute documents accepting or rejecting insurance coverages;
(h) To do all things necessary to the settlement of a claim, including but not limited to, the execution of releases, or execution of any documents necessary to transfer my interest in vehicles insured by USAA to effect loan payoff and salvage titling in the event that USAA determines that any such vehicle is a total loss or total theft; and/or
(i) To vote or designate a proxy to vote in matters placed before the members of USAA.

GENERAL PROVISIONS

(a) All business transacted pursuant to this USAA POWER OF ATTORNEY for me or for my account shall be transacted in my name, and all endorsements and instruments executed by my Attorney-in-Fact for the purpose of carrying out any of the foregoing powers, shall contain my name, followed by that of my Attorney-in-Fact and the designation, "Attorney-in-Fact." Additionally, I authorize my Attorney-in-Fact to use my member number, password and personal identification number ("PIN") to register and/or access the usaa.com website and perform transactions thereon on my behalf.
(b) I hereby ratify and confirm lawful acts done and caused to be done by my said Attorney-in-Fact pursuant to this USAA POWER OF ATTORNEY.
(c) This USAA POWER OF ATTORNEY is durable and is not affected by my subsequent disability or incapacity.
(d) If the authority contained herein shall be revoked, or terminated by operation of law, without notice, I hereby agree for myself, my executors, administrators, heirs and assigns, in consideration of my Attorney's willingness to act pursuant to this USAA POWER OF ATTORNEY, to save and hold my Attorney-in-Fact harmless from any loss suffered or any liability incurred by my Attorney-in-Fact in so acting after such revocation or termination without notice. Also, I will not hold USAA responsible for following the instructions of my Attorney-in-Fact. Revocation of this USAA POWER OF ATTORNEY is not effective until USAA receives actual notice of the revocation.
(e) Notwithstanding my insertion of a specific expiration date herein, if on the specified expiration date below I shall be, or have been, carried in a military status of "missing", "missing-in-action" or "prisoner of war," then this USAA POWER OF ATTORNEY shall automatically remain valid and in full effect until sixty (60) days after I have returned to United States military control following termination of such status.

TERMINATION

Unless sooner revoked or terminated by me by written notice addressed to USAA, 9800 Fredericksburg Rd., San Antonio, Texas 78288, this USAA POWER OF ATTORNEY shall become:

NULL and VOID from and after _____, 20__. [No date indicates the document remains effective until written revocation is received by USAA]. Upon termination or revocation, I agree to change and/or re-establish my PIN for access to the usaa.com website. USAA reserves the right, in its sole discretion, to discontinue honoring this USAA POWER OF ATTORNEY if you orally revoke it.

IN WITNESS WHEREOF, I have set my hand this 1-26- day of _____, 20 29

Edward R Petit
GRANTOR SIGNATURE

TO BE VALID, YOU (THE PERSON GRANTING THESE POWERS OR BEING DEPLOYED) MUST SIGN THIS FORM AS GRANTOR IN THE PRESENCE OF EITHER A NOTARY PUBLIC OR A PERSON AUTHORIZED BY 10 USC 1044A TO PERFORM A NOTARIAL ACT FOR MEMBERS OF THE ARMED FORCES.

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CIVILIAN ACKNOWLEDGMENT

STATE OF SC (COUNTY) (CITY) (PARISH) Greenwood

I, Marie C. Marshall A Notary Public in and for the (County) (City) (Parish) and State aforesaid,

do hereby certify that on the 26th day of Jan, 2017, before me personally appeared Edward L. Petet (GRANTOR) who signed and executed the foregoing instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this day and year above.

Marie D. Marshall March 28, 2011
NOTARY PUBLIC My Commission Expires

MILITARY ACKNOWLEDGMENT

IF ACKNOWLEDGED BEFORE A PERSON AUTHORIZED TO PERFORM NOTARIAL ACTS FOR MEMBERS OF THE ARMED FORCES by 10 USC 1044a:

With the United States Armed Forces at: _____

I, _____ the undersigned do hereby certify that on this _____ day of _____, 20____, before me, personally appeared _____ (GRANTOR), who signed and executed the foregoing instrument. I do further certify that I am at the date of this certificate authorized under 10 USC 1044a to perform notarial acts for members of the armed forces, and that by statute no seal is required on this certificate.

_____
(ORGANIZATION AND STATION)

_____
SIGNATURE OF PERSON
AUTHORIZED TO PERFORM NOTARIAL ACTS

_____
(NAME, GRADE, ARMED FORCE)

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ELECTRONICALLY FILED - 2020 Jan 27 5:07 PM - GREENWOOD - COMMON PLEAS - CASE#2017CP2401343

State of South Carolina, County of Greenwood
In the Court of Common Pleas, Eighth Judicial Circuit

Karen Petit Plaintiff, vs. Phyllis Jean Krohn, USAA Federal Savings Bank and USAA Investment Management Co. Defendants.	Case No. 2017-CP-24-01343 Motion to Reconsider

Plaintiff, through her undersigned attorney, hereby moves for reconsideration of the Orders Granting Summary Judgments to Defendants. The Court's orders are dated January 15, 2020, and this motion is timely made. Plaintiff incorporates all arguments made at any time during the pendency of this action, including arguments made in the Exhibits to this motion.[1]

This motion is made pursuant to Rule 59 of the South Carolina Rules of Civil Procedure and interpreting caselaw. A motion for reconsideration is proper when (1) a party seeks reconsideration of issues and arguments, (2) a party wants to call the court's attention to a possible misapprehension of an argument, (3) a party wants to afford a court to correct errors, and (4) a party asks the court to rule on a matter not contained in its order. *Elam v. S.C. Dep't of Transportation*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

Plaintiff respectfully requests the court reconsider its orders granting summary judgment for several reasons. First, the court erred because it relied on a ground that was neither included in the motion nor

[1] The court requested proposed orders from Defendants, and then requested proposed orders from Plaintiff granting Defendants' motions for summary judgment. Copies of the email correspondence and proposed orders are included as Exhibits A, B, and C to this motion.

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argued before the court. Second, the court erred because its order for Defendants USAA inaccurately states Plaintiff did not specify a contract which was breached, when Defendants USAA admitted a contract existed in its Answer to Plaintiff's Complaint. Third, the court erred because it did not rule on Defendants USAA's statute of limitations argument. Fourth, the court erred because its orders fail to address Plaintiff's evidence, which is contrary to the court's obligation to view all evidence in the light most favorable to Plaintiff.

ARGUMENT

The court erred because it relied on a ground that was neither included in the motion nor argued before the court.

"A court may not grant relief beyond the limits or scope of such notice," except if the issue was argued addressed sufficiently during oral arguments. *Turberville v. Floyd*, 288 S.C. 171, 174, 341 S.E.2d 651, 652-53 (Ct. App. 1986). Case law clearly shows that granting summary judgment on this ground is improper. *Id.*; *Friedberg v. Goudeau*, 279 S.C. 561, 309 S.E.2d 758 (1983) (reversing the court's granting of summary judgment on a ground not properly before the court); *Griffin v. Capitol Cash*, 310 S.C. 288, 423 S.E. 2d 143 (Ct. App. 1992) (reversing trial court because error of law for court to decide motion on a ground not raised by either party).

In its order for Defendants USAA, the court cites missing medical records as a ground for granting summary judgment. However, Defendants USAA did not cite this ground in their motion, or in their written or oral arguments. As in *Turberville*, the order granting summary judgment relied on a ground Defendants USAA neither included in its motion nor argued before the court.

The court erred because its order for Defendants USAA inaccurately states Plaintiff did not specify a contract which was breached, when Defendants USAA admitted a contract existed in its Answer to Plaintiff's Complaint.

Rule 56 of the South Carolina Rules of Civil Procedure requires the circuit court to consider the submitted pleadings, along with depositions,

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answers to interrogatories, admissions, and affidavits, when ruling on summary judgment. Moreover, our court of appeals has held that admissions in pleadings are sufficient to satisfy the mere scintilla of evidence required to withstand summary judgment. *Froneberger v. Smith*, 406 S.C. 37, 50-51, 748 S.E.2d 625, 632 (Ct. App. 2013) (vacating the circuit court's grant of summary judgment when Defendants admitted that an agency relationship existed).

As a ground to supports it order granting summary judgment to Defendants USAA, the court states Plaintiff did not specify a contract which was breached. This finding contradicts Defendants USAA's own admissions in their pleadings, in which they admitted USAA "was a party to a contract with Dr. Petit regarding the management of an IRA account."[2]

The court erred because it did not rule on Defendants USAA's statute of limitations argument.

"A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. S.C. Dep't of Transportation.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original). Via email, the court instructed Defendants' counsel to prepare proposed orders granting their motions for summary judgment and did not limit its reasons for granting the motions. See Exhibit A, page 5. Defendants USAA included all of its arguments in its first draft of the proposed order. See Exhibit B, page 2. However, after Plaintiff requested changes to the draft, Defendants USAA deleted the statute of limitations section in their proposed order sent to the court. See Exhibit B, pages 24 and 34. A ruling on this issue is necessary to preserve the issue for appellate review.

[2] See Paragraph 43 of Defendant USAA's Answer, and Paragraph 43 of Plaintiff's Complaint.

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The court erred because its orders fail to address Plaintiff's evidence, which is contrary to the court's obligation to view all evidence in the light most favorable to Plaintiff.

The court's orders include little, if any, of the evidence Plaintiff presented, despite that the facts and circumstances must be viewed in the light most favorable to the Plaintiff, as she is the non-moving party. *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003).

Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 108-09, 584 S.E.2d 375, 377 (2003) (holding that summary judgment should be denied even when there is no dispute as to evidentiary facts, if there is dispute as to conclusions to be drawn therefrom); *MacFarlane v. Manly*, 274 S.C. 392, 264 S.E.2d 838 (1980); *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 468, 581 S.E.2d 496, 501 (Ct. App. 2003); *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 280, 573 S.E.2d 830, 835 (Ct. App. 2002); *Hall v. Fedor*, 349 S.C. 169, 173-74, 561 S.E.2d 654, 656 (Ct. App. 2002); *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).

Below is some of the evidence offered by Plaintiff the court did not consider in its orders.

- A little more than two years after his death, Dr. Petit's former companion, Defendant Krohn, approached Ms. Petit at the Greenwood uptown market. Defendant Krohn confessed that she unilaterally decided to change the beneficiaries on Dr. Petit's IRA, and filled out the form to do so. During this conversation, Defendant Krohn apologized to Ms. Petit, and said, "I wish that I had never been involved with any of this."
- Wallace M. Dorn saw Defendant Krohn talking to Ms. Petit, and then immediately learned about the details of the conversation from Ms.

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Petit who was distraught and upset. (Affidavit of Wallace M. Dorn filed September 1, 2019).

- Dr. Petit had dementia, heart problems, and glaucoma that made him unable to read. Defendant Krohn took care of his health in the same way an LPN might.
- Defendant Krohn testified to the following in her deposition. In January 2012, while on a cruise, 87-year-old Dr. Petit lost consciousness, and was taken from the ship to a hospital in Key West, Florida. The hospital in Key West could not control Dr. Petit's heart condition and sent him to a hospital in Miami. While in Miami, Dr. Petit had a heart catherization, a heart ablation, and a defibrillator and pacemaker implantation, and was in either ICU or CCU. When he was discharged from the hospital on January 22, 2012, Dr. Petit was not fully recovered. Per Defendant Krohn, even though Dr. Petit was not fully recovered and continued taking pain medication, he signed the beneficiary designation form the day after he was discharged from the hospital in Florida.
- At the time Dr. Petit allegedly executed the change of beneficiary form, a fiduciary relationship already existed between Defendant Krohn and Dr. Petit. Additionally, Defendant Krohn went to great lengths to conceal Dr. Petit's critical medical condition from his daughters when he was hospitalized in Florida. Defendant Krohn did not call Dr. Petit's daughters, but instead instructed Dr. Petit to call his daughters, even though Defendant Krohn admits he was "barely" able to call.
- Defendant USAA had more than a banking relationship with Dr. Petit because it advised him and even sent one of its financial advisors from Houston, Texas to Dr. Petit's home in Greenwood. Per Defendant Krohn, the change of beneficiary form was requested during this meeting in the fall of 2011, but the form was not completed until January 23, 2012.
- Defendant Krohn admitted that she completed the 2012 beneficiary form and all the printed handwriting on the form is hers. The

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handwriting is notably difference than the handwriting on the 2007 form. The 2007 beneficiary designation form listed "Karen (NMI) Petit and Kathy Elise Petit Trust" as the beneficiaries, but the 2012 form lists "Karen Petit and Kathy Elise Petit" as contingent beneficiaries. In 2007 when there was no question about his capacity, Dr. Petit designated Kathy's portion be placed in trust.

- Defendant USAA claims it generated the FedEx label on December 29, 2011, but provides no explanation or proof about who made the request, when the label was requested, or when it was sent to Dr. Petit. The FedEx label itself contradicts Defendant USAA's claim in two ways. First, the beneficiary designation form lists an address to which one should return the form, but the FedEx label was addressed to a different location. Second, the label lists the sender, Dr. Petit, as the party who was billed, but Defendant USAA claims it provided the label to him as a "courtesy." However, the 2007 Beneficiary Designation form was completed entirely by Dr. Petit, and mailed via regular US Mail to the correct address in the envelope provided by Defendant USAA.[3]

The court did not address Plaintiff's evidence, or explain why it excluded it from its orders, even though it has an obligation to view all the evidence in the light most favorable to the non-moving party.

Had the orders included Plaintiff's evidence, it would be difficult, if not impossible, to reach the conclusion that summary judgment should be granted to Defendants because Plaintiff presented much more than a scintilla of evidence to overcome Defendants' motions. And if the orders excluded Plaintiff's evidence because the court disagreed with Plaintiff's analysis and drew different conclusions or inferences, it would still be error to grant summary judgment to Defendants. Even when there is no

[3] Sources for this evidence are included in Plaintiff's Memorandum Opposing Summary Judgment and exhibits thereto.

dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.

Conclusion

Plaintiff respectfully requests the court reconsider its orders granting summary judgments to Defendants for the following reasons: 1) the court erred because it relied on a ground that was neither included in the motion nor argued before the court; 2) the court erred because its order for Defendants USAA inaccurately states Plaintiff did not specify a contract which was breached, when Defendants USAA admitted a contract existed in its Answer to Plaintiff's Complaint; 3) the court erred because it did not rule on Defendants USAA's statute of limitations argument; and, 4) the court erred because its orders fail to address Plaintiff's evidence, which is contrary to the court's obligation to view all evidence in the light most favorable to Plaintiff.

Respectfully submitted,

Hawthorne Merrill Law, LLC

s/ Jane H. Merrill
Jane H. Merrill, SC Bar # 74269
410 Main St. | Greenwood, SC 29646
864-229-1010 | jane@hmlawsc.com
Attorney for Plaintiff

January 27, 2020
Greenwood, SC

ELECTRONICALLY FILED - 2020 Jan 27 5:07 PM - GREENWOOD - COMMON PLEAS - CASE#2017CP2401343

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HAWTHORNE MERRILL LAW, LLC

Jane H. Merrill <jane@hmlawsc.com>

Petit v. Krohn and USAA

Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org> Thu, Sep 26, 2019 at 2:10 PM
To: "Hocker, Donald B. Secretary (Regan A. Snow)" <dhockersc@sccourts.org>, Joshua Nasrollahi <josh@jsnasrollahi.com>, "Jane H. Merrill" <jane@hmlawsc.com>
Cc: William Brown <william.brown@nelsonmullins.com>, Katelyn Crawford <katie@jsn-law.com>

Good afternoon,

Judge Hocker is currently reviewing the Motions for Summary Judgment. Ensuring that our notes are correct, the USAA Beneficiary form dated 1/23/12 was actually signed by Dr. Petit but the form contents were completed by Ms. Krohn. Additionally, Dr. Petit's signature is not in dispute nor his competency in question on this date. Is this all correct?

Thank you,

Madison Hoffman

Law Clerk to

Honorable Donald B. Hocker

P.O. Box 972

100 Hillcrest Square

Laurens, S.C. 29360

dhockerlc@sccourts.org

[Quoted text hidden]

Exhibit A 01

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HAWTHORNE MERRILL
LAW, LLC

Jane H. Merrill <jane@hmlawsc.com>

Petit v. Krohn and USAA

Joshua Nasrollahi <josh@jsnasrollahi.com> Thu, Sep 26, 2019 at 2:15 PM
To: "Hocker, Donald B. Law Clerk (Madison Hoffman)" <dhockerlc@sccourts.org>
Cc: "Hocker, Donald B. Secretary (Regan A. Snow)" <dhockersc@sccourts.org>, "Jane H. Merrill" <jane@hmlawsc.com>, William Brown <william.brown@nelsonmullins.com>, Katelyn Crawford <katie@jsn-law.com>

My client's position is that there are no facts which put his signature or competency in dispute.

Joshua S. Nasro ah
215 Park Avenue
Greenwood, SC 29646
Te . (864) 538-6000
Fax (864) 538-6014
josh@jsnasrollahi.com

On Sep 26, 2019, at 2:10 PM, Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org> wrote:

Good afternoon,

Judge Hocker is currently reviewing the Motions for Summary Judgment. Ensuring that our notes are correct, the USAA Beneficiary form dated 1/23/12 was actually signed by Dr. Petit but the form contents were completed by Ms. Krohn. Additionally, Dr. Petit's signature is not in dispute nor his competency in question on this date. Is this all correct?

Thank you,

Madison Hoffman
Law Clerk to
Honorable Donald B. Hocker
P.O. Box 972
100 Hillcrest Square
Laurens, S.C. 29360
dhockerlc@sccourts.org

From: Hocker, Donald B. Secretary (Regan A. Snow) <dhockersc@sccourts.org>
Sent: Wednesday, August 14, 2019 3:47 PM
To: Joshua Nasrollahi <josh@jsnasrollahi.com>; Jane H. Merrill <jane@hmlawsc.com>
Cc: William Brown <william.brown@nelsonmullins.com>; Katelyn Crawford <katie@jsn-law.com>; Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org>
Subject: RE: Petit v. Krohn and USAA

Great. I will put the motion hearing on Judge Hocker's calendar for September 4th at 9:30 a.m. in Laurens.

Thank you,
Regan.

From: Joshua Nasrollahi [mailto:josh@jsnasrollahi.com]
Sent: Wednesday, August 14, 2019 2:58 PM
To: Jane H. Merrill <jane@hmlawsc.com>

Exhibit A 02

ELECTRONICALLY FILED - 2020 Jan 27 5:07 PM - GREENWOOD - COMMON PLEAS - CASE#2017CP2401343

HAWTHORNE MERRILL LAW, LLC

Jane H. Merrill <jane@hmlawsc.com>

Petit v. Krohn and USAA

William Brown <william.brown@nelsonmullins.com> Thu, Sep 26, 2019 at 2:21 PM
To: "Hocker, Donald B. Law Clerk (Madison Hoffman)" <dhockerlc@sccourts.org>, "Hocker, Donald B. Secretary (Regan A. Snow)" <dhockersc@sccourts.org>, Joshua Nasrollahi <josh@jsnasrollahi.com>, "Jane H. Merrill" <jane@hmlawsc.com>
Cc: Katelyn Crawford <katie@jsn-law.com>

On behalf of the USAA entities, I would respond that the only evidence is (1) the 1/23/12 beneficiary form was signed by Dr. Petit and (2) Ms. Krohn completed the form.

There is no evidence to dispute Dr. Petit's signature. There is also not evidence that Dr. Petit was not competent on that date. The probate court found him competent to execute documents which were executed one month after this (in February of 2012). Plaintiff has noted that Dr. Petit had just gotten out of the hospital in January 2012 when the form was executed, but has presented no evidence that this resulted in his incompetence at the time.

William S. Brown

Nelson Mullins Riley and Scarborough, LLP

(864) 373-2297

From: Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org>
Sent: Thursday, September 26, 2019 2:10 PM
To: Hocker, Donald B. Secretary (Regan A. Snow) <dhockersc@sccourts.org>; Joshua Nasrollahi <josh@jsnasrollahi.com>; Jane H. Merrill <jane@hmlawsc.com>
Cc: William Brown <william.brown@nelsonmullins.com>; Katelyn Crawford <katie@jsn-law.com>
Subject: RE: Petit v. Krohn and USAA

Good afternoon,

Judge Hocker is currently reviewing the Motions for Summary Judgment. Ensuring that our notes are correct, the USAA Beneficiary form dated 1/23/12 was actually signed by Dr. Petit but the form contents were completed by Ms. Krohn. Additionally, Dr. Petit's signature is not in dispute nor his competency in question on this date. Is this all correct?

Thank you,

Madison Hoffman

Law Clerk to

Honorable Donald B. Hocker

Exhibit A 03

ELECTRONICALLY FILED - 2020 Jan 27 5:07 PM - GREENWOOD - COMMON PLEAS - CASE#2017CP2401343

HAWTHORNE MERRILL LAW, LLC

Jane H. Merrill <jane@hmlawsc.com>

Petit v. Krohn and USAA

Jane H. Merrill <jane@hmlawsc.com> Thu, Sep 26, 2019 at 2:39 PM
To: Joshua Nasrollahi <josh@jsnasrollahi.com>
Cc: "Hocker, Donald B. Law Clerk (Madison Hoffman)" <dhockerlc@sccourts.org>, "Hocker, Donald B. Secretary (Regan A. Snow)" <dhockersc@sccourts.org>, William Brown <william.brown@nelsonmullins.com>, Katelyn Crawford <katie@jsn-law.com>

My client disputes whether Dr. Petit was competent on 1/23/12 because of his medical and mental condition. The day before this document was signed Dr. Petit had just been released from a lengthy hospital stay which included two surgical procedures, and he was taking prescription pain medication. No one disputes that he had just been released from the hospital. Even if he became competent later, whether he was competent on the date is signed the document is in dispute.

My client does not dispute that the USAA Beneficiary form dated 1/23/12 was actually signed by Dr. Petit and the form contents were completed by Ms. Krohn. Additionally, Dr. Petit's signature is not in dispute. However, as noted above, we dispute Dr. Petit's competency to sign the document on 1/23/12.

Thank you,
Jane

Jane H. Merrill, Attorney & Certified Mediator

Hawthorne Merrill Law, LLC
jane@hmlawsc.com | 864-229-1010
410 Main St. | Greenwood, SC 29646

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On Thu, Sep 26, 2019 at 2:15 PM Joshua Nasrollahi <josh@jsnasrollahi.com> wrote:

> My client's position is that there are no facts which put his signature or competency in dispute.
>
> Joshua S. Nasro ah
> 215 Park Avenue
> Greenwood, SC 29646
> Te . (864) 538-6000
> Fax (864) 538-6014
> josh@jsnasrollahi.com
>
> On Sep 26, 2019, at 2:10 PM, Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org> wrote:
>
> Good afternoon,
>
> Judge Hocker is currently reviewing the Motions for Summary Judgment. Ensuring that our notes are correct, the USAA Beneficiary form dated 1/23/12 was actually signed by Dr. Petit but the form contents were completed by Ms. Krohn. Additionally, Dr. Petit's signature is not in dispute nor his competency in question on this date. Is this all correct?
>
> Thank you,
>
> **Madison Hoffman**
> Law Clerk to

Exhibit A 04

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HAWTHORNE MERRILL LAW, LLC

Jane H. Merrill <jane@hmlawsc.com>

Petit v. Krohn and USAA

Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org> Fri, Sep 27, 2019 at 10:38 AM
To: Joshua Nasrollahi <josh@jsnasrollahi.com>, "Jane H. Merrill" <jane@hmlawsc.com>, William Brown <william.brown@nelsonmullins.com>
Cc: "Hocker, Donald B. Secretary (Regan A. Snow)" <dhockersc@sccourts.org>, Katelyn Crawford <katie@jsn-law.com>, "Hocker, Donald B." <dhockerj@sccourts.org>

Good morning,

After careful consideration Judge Hocker has decided to grant both Motions for Summary Judgment. He would like Mr. Brown and Mr. Nasrollahi to prepare orders and send them to Ms. Merrill for review before submitting the orders via E-Filing.

Thank you,

Madison Hoffman

Law Clerk to

Honorable Donald B. Hocker

P.O. Box 972

100 Hillcrest Square

Laurens, S.C. 29360

dhockerlc@sccourts.org

[Quoted text hidden]

Exhibit A 05

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HAWTHORNE MERRILL LAW, LLC

Jane H. Merrill <jane@hmlawsc.com>

Petit v. Krohn and USAA

William Brown <william.brown@nelsonmullins.com> Fri, Oct 4, 2019 at 1:40 PM
To: "Hocker, Donald B. Law Clerk (Madison Hoffman)" <dhockerlc@sccourts.org>, Joshua Nasrollahi <josh@jsnasrollahi.com>, "Jane H. Merrill" <jane@hmlawsc.com>
Cc: "Hocker, Donald B. Secretary (Regan A. Snow)" <dhockersc@sccourts.org>, Katelyn Crawford <katie@jsn-law.com>, "Hocker, Donald B." <dhockerj@sccourts.org>

Madison,

Attached please find the proposed order that Judge Hocker requested regarding the USAA defendants' motion for summary judgment. It has also been submitted through the e-filing system.

I provided it to Ms. Merrill for review at the beginning of the week. Based on her comments, I made some edits and provided it for her review again. She has indicated that she still has some issues, but I believe that this order is consistent with the record and the position the USAA Defendants presented. If the judge would like me to make any changes, please let me know, I am glad to do so. I provide you the WORD version in the event that the court wished to make any changes itself.

William

William S. Brown

Nelson Mullins Riley and Scarborough, LLP

(864) 373-2297

[Quoted text hidden]

Proposed Order Granting Summary Judgment 4841-8343-6456 v.1.docx
36K

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HAWTHORNE MERRILL LAW, LLC

Jane H. Merrill <jane@hmlawsc.com>

Petit v. Krohn and USAA

Jane H. Merrill <jane@hmlawsc.com> Fri, Oct 4, 2019 at 3:45 PM
To: "Hocker, Donald B." <dhockerj@sccourts.org>
Cc: William Brown <william.brown@nelsonmullins.com>, "Hocker, Donald B. Law Clerk (Madison Hoffman)" <dhockerlc@sccourts.org>, Joshua Nasrollahi <josh@jsnasrollahi.com>, "Hocker, Donald B. Secretary (Regan A. Snow)" <dhockersc@sccourts.org>, Katelyn Crawford <katie@jsn-law.com>

Would the court prefer I submit my objections to this order now or wait and provide them when both proposed orders have been received?

Thanks,
Jane

Jane H. Merrill, Attorney & Certified Mediator

Hawthorne Merrill Law, LLC
jane@hmlawsc.com | 864-229-1010
410 Main St. | Greenwood, SC 29646

Confidentiality Notice: This electronic transmission is intended for the individual or entity to which it is addressed. This communication may contain information that is privileged, confidential, protected by attorney-client privilege, or otherwise legally exempt from disclosure. If you are not the named addressee, you are not authorized to read, print, retain, copy or disseminate this message or any part of it. If you have received this message in error, please notify Jane H. Merrill immediately by phone (864-229-1010) or by return e-mail.

[Quoted text hidden]

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HAWTHORNE MERRILL LAW, LLC

Jane H. Merrill <jane@hmlawsc.com>

Petit v. Krohn and USAA

Hocker, Donald B. <dhockerj@sccourts.org> Fri, Oct 4, 2019 at 3:54 PM
To: "Jane H. Merrill" <jane@hmlawsc.com>
Cc: William Brown <william.brown@nelsonmullins.com>, "Hocker, Donald B. Law Clerk (Madison Hoffman)" <dhockerlc@sccourts.org>, Joshua Nasrollahi <josh@jsnasrollahi.com>, "Hocker, Donald B. Secretary (Regan A. Snow)" <dhockersc@sccourts.org>, Katelyn Crawford <katie@jsn-law.com>

Why don't you wait until we receive Josh's. Even though they may be very similar, there might be other matters in there. (dbh)

From: Jane H. Merrill <jane@hmlawsc.com>
Sent: Friday, October 4, 2019 3:45 PM
To: Hocker, Donald B. <dhockerj@sccourts.org>
Cc: William Brown <william.brown@nelsonmullins.com>; Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org>; Joshua Nasrollahi <josh@jsnasrollahi.com>; Hocker, Donald B. Secretary (Regan A. Snow) <dhockersc@sccourts.org>; Katelyn Crawford <katie@jsn-law.com>
Subject: Re: Petit v. Krohn and USAA

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. *******

Would the court prefer I submit my objections to this order now or wait and provide them when both proposed orders have been received?

Thanks,

Jane

Jane H. Merrill, Attorney & Certified Mediator

Hawthorne Merrill Law, LLC

jane@hmlawsc.com | 864-229-1010

410 Main St. | Greenwood, SC 29646

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On Fri, Oct 4, 2019 at 3:16 PM Hocker, Donald B. <dhockerj@sccourts.org> wrote:

Exhibit A 08

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HAWTHORNE MERRILL Law LLC

Jane H. Merrill <jane@hmlawsc.com>

Petit v. Krohn and USAA

Joshua Nasrollahi <josh@jsnasrollahi.com> Mon, Oct 14, 2019 at 10:56 AM
To: "Hocker, Donald B. Law Clerk (Madison Hoffman)" <dhockerlc@sccourts.org>
Cc: "Jane H. Merrill" <jane@hmlawsc.com>, William Brown <william.brown@nelsonmullins.com>, "Hocker, Donald B. Secretary (Regan A. Snow)" <dhockersc@sccourts.org>, Katelyn Crawford <katie@jsn-law.com>

Madison–

Please see attached. Jane is sending her objections to the proposed order separately. Thank you.
[Quoted text hidden]

On Oct 14, 2019, at 10:45 AM, Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org> wrote:

Thank you!

Madison Hoffman
Law Clerk to
Honorable Donald B. Hocker
P.O. Box 972
100 Hillcrest Square
Laurens, S.C. 29360
dhockerlc@sccourts.org

From: Joshua Nasrollahi <josh@jsnasrollahi.com>
Sent: Monday, October 14, 2019 10:44 AM
To: Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org>
Cc: Jane H. Merrill <jane@hmlawsc.com>; William Brown <william.brown@nelsonmullins.com>; Hocker, Donald B. Secretary (Regan A. Snow) <dhockersc@sccourts.org>; Katelyn Crawford <katie@jsn-law.com>
Subject: Re: Petit v. Krohn and USAA

*** **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

I sent Jane a proposed order last week. She got it back to me with some proposed changes and additions. I sent her a second draft including some of the changes and additions. I'm waiting to hear back from her on that.

Joshua S. Nasro ah
215 Park Avenue
Greenwood, SC 29646
Te . (864) 538-6000
Fax (864) 538-6014
josh@jsnasrollahi.com

Exhibit A 09

ELECTRONICALLY FILED - 2020 Jan 27 5:07 PM - GREENWOOD - COMMON PLEAS - CASE#2017CP2401343

Petit v. Krohn and USAA

Jane H. Merrill <jane@hmlawsc.com> Mon, Oct 14, 2019 at 11:28 AM
To: Joshua Nasrollahi <josh@jsnasrollahi.com>
Cc: "Hocker, Donald B. Law Clerk (Madison Hoffman)" <dhockerlc@sccourts.org>, William Brown <william.brown@nelsonmullins.com>, "Hocker, Donald B. Secretary (Regan A. Snow)" <dhockersc@sccourts.org>, Katelyn Crawford <katie@jsn-law.com>

Judge Hocker,

Attached (as one PDF) are the initial proposed orders with my requested changes noted in red. The proposed orders sent by each Defendant included some, but not all, of these requested changes.

In addition to the objections included in the attached PDF, I have further objections to the proposed order submitted by the Defendants USAA. The proposed order includes additional information that was not argued in the memos or during oral argument, in that it states medical records were required to prove certain matters. Plaintiff presented testimonial evidence, from her own and Def. Krohn's depositions, about Dr. Petit's health on the date he signed the change of beneficiary form. No one argued that only medical records could be used to show his condition or that medical records were required in addition to the testimonial evidence presented. The USAA proposed order leaves out the statute of limitations argument that was included in the first proposed order, and the court's instructions did not limit the basis on which it was granting the motion.

Thank you,
Jane

Jane H. Merrill, Attorney & Certified Mediator

Hawthorne Merrill Law, LLC
jane@hmlawsc.com | 864-229-1010
410 Main St. | Greenwood, SC 29646

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On Mon, Oct 14, 2019 at 11:03 AM Joshua Nasrollahi <josh@jsnasrollahi.com> wrote:

> Thank you.
>
> Joshua S. Nasro ah
> 215 Park Avenue
> Greenwood, SC 29646
> Te . (864) 538-6000
> Fax (864) 538-6014
> josh@jsnasrollahi.com
>
> On Oct 14, 2019, at 11:01 AM, Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org> wrote:
>
> Thank you, I'll pass this along to Judge Hocker.
>
> **Madison Hoffman**
> Law Clerk to
> Honorable Donald B. Hocker
> P.O. Box 972
> 100 Hillcrest Square

Exhibit A 10

ELECTRONICALLY FILED - 2020 Jan 27 5:07 PM - GREENWOOD - COMMON PLEAS - CASE#2017CP2401343

HAWTHORNE MERRILL
LAW LLC

Jane H. Merrill <jane@hmlawsc.com>

Petit vs. Krohn and USAA

Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org> Wed, Oct 30, 2019 at 2:39 PM
To: "Jane H. Merrill" <jane@hmlawsc.com>, "Hocker, Donald B." <dhockerj@sccourts.org>
Cc: "josh@jsnasrollahi.com" <josh@jsnasrollahi.com>, William Brown <william.brown@nelsonmullins.com>

Good afternoon,

Judge Hocker would like all parties to come to a consensus concerning Ms. Merrill's requested changes. If there are changes that cannot be agreed to, Ms. Merrill, can you please submit your requests in a different manner? The tracked changes in the Word document are difficult for Judge Hocker to follow when reviewing both proposed orders.

The Judge isn't being critical, he just needs a different format.

Thanks!

Madison Hoffman

Law Clerk to

Honorable Donald B. Hocker

P.O. Box 972

100 Hillcrest Square

Laurens, S.C. 29360

dhockerlc@sccourts.org

From: Jane H. Merrill <jane@hmlawsc.com>
Sent: Friday, October 18, 2019 4:09 PM
To: Hocker, Donald B. <dhockerj@sccourts.org>
Cc: josh@jsnasrollahi.com; William Brown <william.brown@nelsonmullins.com>; Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org>
Subject: Re: Petit vs. Krohn and USAA

*** **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

[Quoted text hidden]

Exhibit A 11

HAWTHORNE MERRILL
LAW, LLC

Jane H. Merrill <jane@hmlawsc.com>

Petit v. Krohn et al.

William Brown <william.brown@nelsonmullins.com> Tue, Nov 26, 2019 at 2:17 PM
To: "Jane H. Merrill (jane@hmlawsc.com)" <jane@hmlawsc.com>
Cc: Jake Taylor <jake.taylor@nelsonmullins.com>

Jane,

Attached is the draft of the Joint Memo regarding disputes on the proposed order. We have identified the location of the dispute with a heading. Then we put the USAA proposed language on the left, with our explanation for why we think our language is proper or why we think your change is not appropriate. The right column includes your proposed language, with a notation of where the changes are made within the language. Under each portion of your language is a blank section in which you will insert your explanation for the suggested change.

We accepted, for the most part, two of your suggested edits. In Section III.C., we accepted your edit to the second sentence and accepted most of your change to the third sentence. We merely changed it to read, "Plaintiff *argued* Dr. Petit was incompetent . . . ." You had "alleged", but we could not find that alleged in your complaint and believe "argued" is more accurate. Attached is a clean version of the USAA proposed order which incorporates those edits.

It is my understanding that once you insert your explanations, we will send to the Judge : (1) the joint memo, (2) USAA's proposed order, (3) Plaintiff's proposed order, and (4) the PDF of the red-line. Let me know if you disagree with this.

William

NELSON MULLINS

WILLIAM S. BROWN PARTNER

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Exhibit A 12

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3 attachments

19.11.22.Draft Order SJ, Def USAA.pdf
176K

Joint Memoradum to the Court Regarding Disputes over Language in the Proposed Order 4835-7480-0813 v.3.docx
44K

11.26.2019 - USAA - Proposed Order Granting Summary Judgment - 4818-2650-9742 1.docx
36K

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HAWTHORNE MERRILL LAW, LLC

Jane H. Merrill <jane@hmlawsc.com>

Petit v. USAA, et al.

Jane H. Merrill <jane@hmlawsc.com> Fri, Dec 20, 2019 at 12:37 PM
To: "Hocker, Donald B. Law Clerk" <dhockerlc@sccourts.org>
Cc: William Brown <william.brown@nelsonmullins.com>, Jake Taylor <jake.taylor@nelsonmullins.com>

Attached please find four documents related to Defendants USAA's motion for summary judgment: 1) a PDF of the redlined proposed order, 2) a memo which outlines the language on which we disagree, and each side's argument for excluding or including specific language, 3) a Word document of Defendants USAA's proposed order, and 4) a Word document of Plaintiff's proposed order.

Please let us know if you have any questions or need any additional information.

Thank you,
Jane

Jane H. Merrill, Attorney & Certified Mediator

Hawthorne Merrill Law, LLC
jane@hmlawsc.com | 864-229-1010
410 Main St. | Greenwood, SC 29646

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4 attachments

11.26.2019 - USAA - Proposed Order Granting Summary Judgment - 4818-2650-9742 1.docx
36K

19.12.19.Joint Memorandum to the Court Regarding Disputes over Language in the Proposed Order 4835-7480-0813 v.3 - 4825-6834-3983 1.docx
47K

Plaintiff's Redlined Version of the USAA Defendant's Proposed Order - 4825-2967-7743 1.docx
36K

PDF Redline of the USAA Defendant's Proposed Order - 4817-2496-1199 3.pdf
192K

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HAWTHORNE MERRILL LAW, LLC

Jane H. Merrill <jane@hmlawsc.com>

Petit v. USAA, et al.

Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org> Mon, Dec 23, 2019 at 9:38 AM
To: "Jane H. Merrill" <jane@hmlawsc.com>
Cc: William Brown <william.brown@nelsonmullins.com>, Jake Taylor <jake.taylor@nelsonmullins.com>, Joshua Nasrollahi <josh@jsnasrollahi.com>

Good morning,

I have received the most recent documents in this case. However, Judge Hocker is requesting the following:

- Ms. Merrill: Your proposed Orders as to BOTH defendants.

- Mr. Brown: Your proposed Order as to you client.

- Mr. Nasrollahi: Your proposed Order as to your client.

I realize you may have sent these items before, but to ensure that all prospective sides are heard and understood clearly, please submit them again.

Thank you!

Madison Hoffman

Law Clerk to

Honorable Donald B. Hocker

P.O. Box 972

100 Hillcrest Square

Laurens, S.C. 29360

dhockerlc@sccourts.org

From: Jane H. Merrill <jane@hmlawsc.com>
Sent: Friday, December 20, 2019 12:38 PM
To: Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org>

Exhibit A 15

Cc: William Brown <william.brown@nelsonmullins.com>; Jake Taylor <jake.taylor@nelsonmullins.com>
Subject: Petit v. USAA, et al.

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. *******

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HAWTHORNE MERRILL LAW, LLC

Jane H. Merrill <jane@hmlawsc.com>

Petit v. USAA, et al.

Jake Taylor <jake.taylor@nelsonmullins.com> Mon, Dec 23, 2019 at 9:47 AM
To: "Hocker, Donald B. Law Clerk (Madison Hoffman)" <dhockerlc@sccourts.org>, "Jane H. Merrill" <jane@hmlawsc.com>
Cc: William Brown <william.brown@nelsonmullins.com>, Joshua Nasrollahi <josh@jsnasrollahi.com>

Madison,

Attached please find the USAA Defendants' Proposed Order.

Thank you,

Jake

NELSON MULLINS

JACOB D. TAYLOR ASSOCIATE

jake.taylor@nelsonmullins.com

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From: Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org>
Sent: Monday, December 23, 2019 9:39 AM
To: Jane H. Merrill <jane@hmlawsc.com>
Cc: William Brown <william.brown@nelsonmullins.com>; Jake Taylor <jake.taylor@nelsonmullins.com>; Joshua Nasrollahi <josh@jsnasrollahi.com>
Subject: RE: Petit v. USAA, et al.

◄External Email► - From: prvs=52602dbf29=dhockerlc@sccourts.org

[Quoted text hidden]

Exhibit A 17

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11.26.2019 - USAA - Proposed Order Granting Summary Judgment - 4818-2650-9742 1.docx
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HAWTHORNE MERRILL

Jane H. Merrill <jane@hmlawsc.com>

Petit v. USAA, et al.

Joshua Nasrollahi <josh@jsnasrollahi.com> Mon, Dec 23, 2019 at 10:15 AM
To: "Hocker, Donald B. Law Clerk (Madison Hoffman)" <dhockerlc@sccourts.org>
Cc: "Jane H. Merrill" <jane@hmlawsc.com>, William Brown <william.brown@nelsonmullins.com>, Jake Taylor <jake.taylor@nelsonmullins.com>

Please see attached.

Joshua S. Nasro ah
215 Park Avenue
Greenwood, SC 29646
Te . (864) 538-6000
Fax (864) 538-6014
josh@jsnasrollahi.com

On Dec 23, 2019, at 9:47 AM, Jake Taylor <jake.taylor@nelsonmullins.com> wrote:

Madison,

Attached please find the USAA Defendants' Proposed Order.

Thank you,

Jake

NELSON MULLINS

JACOB D. TAYLOR ASSOCIATE
jake.taylor@nelsonmullins.com
GREENVILLE ONE | SUITE 400
2 W. WASHINGTON STREET | GREENVILLE, SC 29601
T 864.373.2287 F 864.373.2925
NELSONMULLINS.COM VCARD VIEW BIO

From: Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org>
Sent: Monday, December 23, 2019 9:39 AM
To: Jane H. Merrill <jane@hmlawsc.com>
Cc: William Brown <william.brown@nelsonmullins.com>; Jake Taylor <jake.taylor@nelsonmullins.com>; Joshua Nasrollahi <josh@jsnasrollahi.com>
Subject: RE: Petit v. USAA, et al.

◄External Email► - From: prvs=52602dbf29=dhockerlc@sccourts.org

Good morning,

I have received the most recent documents in this case. However, Judge Hocker is requesting the following:

Exhibit A 19

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HAWTHORNE MERRILL LAW, LLC

Jane H. Merrill <jane@hmlawsc.com>

Petit v. USAA, et al.

Jane H. Merrill <jane@hmlawsc.com> Tue, Dec 24, 2019 at 7:27 AM
To: "Hocker, Donald B. Law Clerk (Madison Hoffman)" <dhockerlc@sccourts.org>
Cc: Jake Taylor <jake.taylor@nelsonmullins.com>, Joshua Nasrollahi <josh@jsnasrollahi.com>, William Brown <william.brown@nelsonmullins.com>

I am out of state with my family for the holidays. I will submit these early next week when I'm back at my office.

Thank you.

Jane Merrill
[Quoted text hidden]
--
Jane H. Merrill Hawthorne Merrill Law, LLC 410 Main St. | Greenwood, SC 29646 864-229-1010 | jane@hmlawsc.com

Exhibit A 20

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HAWTHORNE MERRILL LAW, LLC

Jane H. Merrill <jane@hmlawsc.com>

Petit v. USAA, et al.

Jane H. Merrill <jane@hmlawsc.com> Tue, Dec 31, 2019 at 7:03 PM
To: "Hocker, Donald B. Law Clerk (Madison Hoffman)" <dhockerlc@sccourts.org>
Cc: Jake Taylor <jake.taylor@nelsonmullins.com>, Joshua Nasrollahi <josh@jsnasrollahi.com>, William Brown <william.brown@nelsonmullins.com>

The requested proposed orders (in MS Word format) are attached. Since Mr. Brown sent the redlined version of the order for Def. USAA, I am also sending a redlined version for Def. Krohn. Please let me know if you need anything else. Thank you for your patience.

Jane

Jane H. Merrill, Attorney & Certified Mediator

Hawthorne Merrill Law, LLC
jane@hmlawsc.com | 864-229-1010
410 Main St. | Greenwood, SC 29646

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[Quoted text hidden]

3 attachments

Petit Draft Order (Def. USAA).docx
35K

Petit Redlined Order (Def. Krohn).pdf
162K

Petit Draft Order (Def. Krohn).docx
34K

Exhibit A 21

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STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)))	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
Karen Petit, Plaintiff, vs. Phyllis Jean Krohn, USAA Federal Savings Bank, and USAA Investment Management Co., Defendants.	))))))))))))	Civil Action No. 2017-CP-24-01343 **ORDER**

Defendants USAA Federal Savings Bank, and USAA Investment Management Co. (collectively "the USAA Defendants"), came before the Court for hearing on September 4, 2019. Jane H. Merrill appeared on behalf of Karen Petit ("Plaintiff"). Joshua S. Nasrollahi appeared on behalf of Phyllis Jean Krohn ("Krohn"). William S. Brown appeared on behalf of the USAA Defendants. Having heard the arguments and reviewed the record in this case and the submissions of the parties, the USAA Defendant's Motion for Summary Judgment is granted.

INTRODUCTION AND UNDISPUTED FACTS

Dr. Edward L. Petit ("Dr. Petit") held an Individual Retirement Account ("IRA") at USAA Federal Savings Bank (from 2002-2007), and subsequently with USAA Investment Management Co., from 2007 until 2014 (the "USAA IRA"). (USAA Def. Memo. at **Ex. A**; *Id*. at **Ex. B**.) On January 15, 2007, Dr. Petit completed a designation of beneficiary form, naming his two daughters, Plaintiff and Kathy Elise Petit ("Kathy"), as his beneficiaries. (*Id*. at **Ex. C**.)

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On January 26, 2009, Dr. Petit completed a USAA Power of Attorney, naming Defendant Phyllis Krohn[1] ("Ms. Krohn") as his Attorney-in-Fact. (*Id*. at **Ex. D**; Compl. ¶ 11.) Plaintiff claims that this Power of Attorney form prohibited the Attorney-in-Fact from changing the beneficiaries of the USAA IRA. (Compl. ¶ 14.) Ms. Krohn did not sign or execute any documents under the January 26, 2009 USAA Power of Attorney. (Plaintiff Depo. at 151:11-20, 164:18-165:1, 166:25-167:10.) On November 9, 2010, Dr. Petit completed a subsequent USAA Power of Attorney, again naming Ms. Krohn as his Attorney-in-Fact. (USAA Def. Memo. at **Ex. G**.) The November 9, 2010 Power of Attorney did not prohibit the Attorney-in-Fact from changing the USAA IRA's beneficiaries. (*Id*.) Again, the evidence does not show, nor does Plaintiff contend, that Ms. Krohn signed or executed any documents under the November 9, 2010 Power of Attorney. (Plaintiff Depo. at 151:11-20; Krohn Depo. at 76:12-19.)

On January 23, 2012, Dr. Petit executed a designation of beneficiary form which designated his two Granddaughters, Leaman Mosby ("Leaman") and Caroline Mosby ("Caroline") as primary beneficiaries, and Plaintiff and her sister Kathy as secondary beneficiaries. (*See* USAA Def. Memo. at **Ex. I**; Compl. ¶ 6.) The form was filled out by Ms. Krohn, but signed by Dr. Petit.

On February 27, 2012, Dr. Petit executed a Durable General Power of Attorney, naming Henry A. Dorn, ("Mr. Dorn") as his Attorney-in-Fact. (USAA Def. Memo. at **Ex. J**; *see also id.* at **Ex. K**.) On May 15, 2013, the Probate Court of Greenwood County declared Dr. Petit incompetent, however, it found that Dr. Petit was competent to execute 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*.)

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

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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. ¶ 10; Plaintiff Depo. at 96:13-24.) The beneficiaries of the Wells Fargo IRA were designated as Leaman and Caroline. (Plaintiff Depo. at 106:9-15.)

On March 18, 2015, Dr. Petit passed away. (Compl. ¶ 4.) He was survived by Plaintiff, and his two granddaughters, Leaman and Caroline. (*Id*. ¶ 6.) At the time of his death, Dr. Petit's Wells Fargo IRA was worth approximately $454,332, and his USAA IRA was closed. (*Id*. ¶ 10; Plaintiff Depo. at 96:13-24.) Wells Fargo released the funds to Leaman and Caroline, as they were the beneficiaries of the Wells Fargo IRA. (Compl. ¶ 16; Plaintiff Depo. at 106:9-15.)

On November 8, 2017, Plaintiff filed this action. Plaintiff asserted three causes of action against the USAA Defendants: (1) breach of contract, (2) breach of fiduciary duty, and (3) negligence. Plaintiff's claims are all based on the allegation that the beneficiaries of the USAA IRA were improperly changed. (*See* Compl.)

LEGAL STANDARD

"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 his complaint but must disclose the facts he intends to rely on by affidavit or other proof." *Id*.

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LEGAL FINDINGS

I. There is no evidence that Dr. Petit's beneficiaries were improperly changed.

Plaintiff's breach of contract, breach of fiduciary duty, and negligence claims all arise out of Plaintiff's basic allegation that the beneficiaries of the USAA IRA were changed improperly. However, Plaintiff has conceded that Dr. Petit signed the designation of beneficiary form that designated Caroline and Leaman as the beneficiaries of the USAA IRA.

Further, the designation of beneficiary form was signed by Dr. Petit a month before he executed a Durable General Power of Attorney in the Greenwood County Probate Court, which was later ratified by the Court on May 15, 2013, indicating that Dr. Petit was competent at the time he signed the designation of beneficiary form. Plaintiff has not presented any evidence showing that Dr. Petit was incompetent when he changed the beneficiaries of the USAA IRA. Therefore, the record shows that Dr. Petit, and not an Attorney-in-Fact or Krohn, signed the designation of beneficiary form, which designated Leaman and Caroline as his beneficiaries, while he was competent. There is no evidence in the record to the contrary, and thus, no genuine issue of material fact. Accordingly, the USAA Defendants Motion for Summary Judgment must be granted.

II. Plaintiff lacks standing to assert her causes of action.

Furthermore, the Plaintiff lacks standing to bring this lawsuit. Under South Carolina law, the beneficiary of an IRA has no right to sue for the benefits until her rights 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

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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 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, Plaintiff never had a vested right in the IRA funds. First, Plaintiff admits that Dr. Petit had the right to freely change the beneficiaries of his IRAs during his lifetime.[2] (Plaintiff Depo. at 116:24-117:11; 156:5-157:10.) Further, Plaintiff was not the beneficiary of the IRA at the time of Dr. Petit's death. Dr. Petit changed his beneficiaries in 2012, from Plaintiff and her sister, to his granddaughters, Leaman and Caroline, who were also set as the beneficiaries of the Wells Fargo IRA. In 2015, Dr. Petit passed away, and the rights to the Wells Fargo IRA vested in the beneficiaries of the Wells Fargo IRA, Leaman and Caroline. (Compl. ¶ 16; Plaintiff Depo. at 106:9-15.) Thus, under South Carolina law, Plaintiff has no vested rights in the USAA IRA or the Wells Fargo IRA. Accordingly, Plaintiff lacks standing to bring this action, and therefore, the USAA Defendant's Motion for Summary Judgment must be granted.

III. The Plaintiff's individual causes of action fail as a matter of law.

A. The USAA Defendants did not owe a fiduciary duty to the Plaintiff.

To establish a claim for breach of fiduciary duty, the plaintiff must prove "a breach of that duty owed **to the plaintiff** by the defendant[.]" *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399

[2] Additionally, Mr. Dorn had the ability to designate and change the beneficiaries of Dr. Petit's IRAs during Dr. Petit's lifetime. (Plaintiff Depo. at 156:5-157:10.)

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S.C. 322, 335, 732 S.E.2d 166, 173 (2012) (emphasis added). Plaintiff has alleged that the USAA Defendants owed a fiduciary duty to Dr. Petit, not to her. (*See* Compl. ¶ 49.) Further, the Plaintiff could not articulate any duty owed to her. Thus, the only party that could have brought a suit against the USAA Defendants for the breach of a fiduciary duty owed to Dr. Petit is Dr. Petit's estate.[3]

However, the USAA defendants did not owe a duty to Dr. Petit's estate. 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 v. South Carolina Natl. Bank*, 288 S.C. 560, 562, 343 S.E.2d 667, 668 (Ct.App. 1986). The court makes the determination regarding the equitable issue of whether a fiduciary relationship exists. *Cowburn v. Leventis*, 366 S.C. 20, 37, 619 S.E.2d 437, 447 (Ct.App. 2005).

Plaintiff did not allege in her Complaint, nor present any evidence that the USAA Defendants held Dr. Petit's funds in trust or separated Dr. Petit's funds into a special account, or that the USAA Defendants undertook to advise Dr. Petit as part of the services it offers. (Compl. ¶¶ 46-50.) It is only under such limited circumstances that South Carolina courts have been willing to entertain the potential existence of a fiduciary duty between banks and their customers. *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003); *Cowburn*, 366 S.C. at 43, 619 S.E.2d at 449. The Plaintiff failed to present any evidence that the USAA Defendants separated Dr. Petit's funds into a special account, or that the USAA Defendants undertook to advise Dr. Petit as part of the services it offers.

[3] Any claims by Dr. Petit's estate are barred by the statute of limitations because the IRA funds were disbursed by Wells Fargo more than three years ago. *See* S.C. Code Ann. § 15-3-530.

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Further, although not recognized as one of two scenarios that create a fiduciary duty in a banking relationship under South Carolina law, Plaintiff alleged that the services the USAA Defendants provided for Dr. Petit, specifically, providing him with a Power of Attorney form, created a fiduciary duty. However, providing ministerial services, such as supplying form documents incidental to the IRA account does not create a fiduciary duty. *In re Int'l Payment Grp., Inc.*, 733 F. App'x 98, 104 (4th Cir. 2018) (applying South Carolina law, holding that even where a depositor received unique services, no fiduciary duty was created because the relationship "did not differ significantly from the average depositor's relationship with the bank.") The USAA Defendants merely provided its client, Dr. Petit, with standard Power of Attorney and designation of beneficiary forms that he requested. This cannot be said to differ from the services that are provided to the average depositor. No fiduciary duty was owed to the Plaintiff or Dr. Petit, and Plaintiff's claim for breach of fiduciary duty fails as a matter of law.

Accordingly, there is no genuine dispute as to material fact that the USAA Defendants did not owe the Plaintiff or Dr. Petit a fiduciary duty and summary judgment must be granted.

B. Plaintiff has presented no evidence of a duty created by any contract.

As discussed above, Plaintiff had no vested interest in the USAA IRA because Dr. Petit retained the ability to change beneficiaries during his lifetime, and because his granddaughters were the primary beneficiaries at the time Dr. Petit passed away. (Plaintiff Depo. at 116:24-117:11, 106:9-15; *see* USAA Def. Memo. at **Ex. I**.) Accordingly, the only legal duty was owed to Dr. Petit, the accountholder, and thus, the Plaintiff has no standing to bring this action.

Even if Plaintiff had standing to bring a claim for breach of contract, she does not specify a particular contract or any contractual provisions setting forth a duty on the USAA Defendant's part related to the alleged contractual obligations listed therein. (Compl. at ¶¶ 42-45.) Rather than

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citing a breached contract or contractual provision, the Complaint cites to the January 26, 2009 Power of Attorney between Dr. Petit and Ms. 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 Ms. Krohn to perform tasks for Dr. Petit. Plaintiff 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 that was allegedly breached. Plaintiff does not allege that any provisions of any agreement between the USAA Defendants and Plaintiff or Dr. Petit were breached, and therefore, there is no genuine issue as to material fact that there is no breach of contract.

C. The USAA Defendants owed no common law duty to the Plaintiff.

As discussed above, Plaintiff has conceded that Dr. Petit signed the designation of beneficiary form, and that there is no evidence to the contrary. Additionally, the USAA Defendants owed no common law duty to the Plaintiff. Although unclear from the Complaint, Plaintiff appears to contend that the USAA Defendants had a duty to ensure that Dr. Petit was the person signing his designation of beneficiary forms. 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*, 366 S.C. at 46, 619 S.E.2d at 451. It is incumbent upon "[t]he Court . . . to determine, as a matter of law, whether the law recognizes a particular duty." *Huggins v.*

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Citibank, N.A., 355 S.C. 329, 332, 585 S.E.2d 275, 276 (2003). "If there is no duty, the defendant is entitled to judgment as a matter of law." *Id.*

IV. Plaintiff's claims are barred by the Statute of Limitations.

Breach of contract, breach of fiduciary duty, and negligence claims all have a statute of limitations of three years. S.C. Code Ann. § 15-3-530. "The three-year statute of limitations begins to run when the underlying cause of action reasonably ought to have been discovered." *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct. App. 2011) (internal quotations omitted). "The test for whether the injured party knew or should have known about the cause of action is objective rather than subjective." *Id.* "Therefore, this court must determine whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party may exist." *Id.* Circumstances arose which should have put Plaintiff and/or Dr. Petit, or his Attorney-in-Fact, Mr. Dorn, on notice of the wrongs Plaintiff alleges prior to November 7, 2014, three years prior to the filing of the Complaint.

First, Plaintiff claims that Dr. Petit was sent an improper Power of Attorney form in 2009. (*See* Compl. ¶¶ 10, 44, 49, 53.) If this was truly a breach of any duty, Dr. Petit, the accountholder should have reasonably discovered the breach, as he received and signed the form. Accordingly, the statute of limitations on all claims arising out of the allegedly improper Power of Attorney form began to run in 2009, when the form was sent and executed, and therefore, Plaintiff's Complaint, which was filed in 2017, is well outside of the three-year statute of limitations starting in 2009.

Additionally, to the extent Plaintiff is attempting to assert any claim regarding the designation of beneficiary form, the statute of limitations on such a claim began to run in 2012. In

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2012, Dr. Petit changed the beneficiaries of his own account. Again, if this were truly a breach of any duty, Dr. Petit and/or his Attorney-in-Fact, Mr. Dorn, should have reasonably discovered that his beneficiaries were changed in 2012 because he signed the designation of beneficiary form and the form was requested from, sent to, and returned from Dr. Petit's record address. Thus, because he should have reasonably discovered that his beneficiaries were changed, any claim arising out of that change must have been brought within three years of its discovery. Plaintiffs' Complaint, which was filed in 2017, is well outside of the three-year statute of limitations starting in 2012.

Finally, in the summer of 2014, Dr. Petit's IRA was transferred from the USAA Defendants to Wells Fargo. (Compl. ¶ 10.) At this time, Dr. Petit's Attorney-in-Fact, Mr. Dorn, set the beneficiaries for the Wells Fargo IRA. Now more than 4 years after the USAA Defendants have had any control over Dr. Petit's account, the USAA Defendants are forced to defend against these baseless allegations. "The purpose of the statute of limitations is to put to rest claims after the passage of time." *Nowlin v. Gen. Tel. Co.*, 310 S.C. 183, 186, 426 S.E.2d 114, 116 (Ct. App. 1992), *aff'd*, 314 S.C. 352, 444 S.E.2d 508 (1994). Allowing Plaintiff's claims to continue is in direct conflict with this purpose, and thus, Plaintiff's claims are time barred.

CONCLUSION

For the reasons set forth above, as to all three causes of action the USAA Defendants' Motion to for Summary Judgment is GRANTED.

IT IS SO ORDERED

_____
Honorable Donald Hocker
Presiding Judge, Eighth Judicial Circuit

_____, South Carolina
_____, 2019

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	)	EIGHTH JUDICIAL CIRCUIT
Karen Petit,	)	Civil Action No. 2017-CP-24-01343
Plaintiff,	)	
vs.	)	**ORDER**
Phyllis Jean Krohn, USAA Federal Savings Bank, and USAA Investment Management Co.,	)	
Defendants.	)	

Defendants USAA Federal Savings Bank, and USAA Investment Management Co. (collectively "the USAA Defendants"), came before the Court for hearing on September 4, 2019. Jane H. Merrill appeared on behalf of Karen Petit ("Plaintiff"). Joshua S. Nasrollahi appeared on behalf of Phyllis Jean Krohn ("Krohn"). William S. Brown appeared on behalf of the USAA Defendants. Having heard the arguments and reviewed the record in this case and the submissions of the parties, the USAA Defendant's Motion for Summary Judgment is granted.

INTRODUCTION AND FACTS

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Dr. Edward L. Petit ("Dr. Petit") held an Individual Retirement Account ("IRA") at USAA Federal Savings Bank (from 2002-2007), and subsequently with USAA Investment Management Co., from 2007 until 2014 (the "USAA IRA"). (USAA Def. Memo. at **Ex. A**; *Id.* at **Ex. B**.) On January 15, 2007, Dr. Petit completed a designation of beneficiary form, naming his two daughters, Plaintiff and Kathy Elise Petit ("Kathy"), as his beneficiaries. (*Id.* at **Ex. C**.)

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On January 26, 2009, Dr. Petit completed a USAA Power of Attorney, naming Defendant Phyllis Krohn[1] ("Ms. Krohn") as his Attorney-in-Fact. (*Id*. at **Ex. D**; Compl. ¶ 11.) Plaintiff claims that this Power of Attorney form prohibited the Attorney-in-Fact from changing the beneficiaries of the USAA IRA. (Compl. ¶ 14.) Ms. Krohn did not sign or execute any documents under the January 26, 2009 USAA Power of Attorney. (Plaintiff Depo. at 151:11-20, 164:18-165:1, 166:25-167:10.) On November 9, 2010, Dr. Petit completed a subsequent USAA Power of Attorney, again naming Ms. Krohn as his Attorney-in-Fact. (USAA Def. Memo. at **Ex. G**.) The November 9, 2010 Power of Attorney did not prohibit the Attorney-in-Fact from changing the USAA IRA's beneficiaries. (*Id*.) Again, the evidence does not show, nor does Plaintiff contend, that Ms. Krohn signed or executed any documents under the November 9, 2010 Power of Attorney. (Plaintiff Depo. at 151:11-20; Krohn Depo. at 76:12-19.)

On January 23, 2012, Dr. Petit executed a designation of beneficiary form which designated his two Granddaughters, Leaman Mosby ("Leaman") and Caroline Mosby ("Caroline") as primary beneficiaries, and Plaintiff and her sister Kathy as secondary beneficiaries. (*See* USAA Def. Memo. at **Ex. I**; Compl. ¶ 6.) The form was filled out by Ms. Krohn, but signed by Dr. Petit.

On February 27, 2012, Dr. Petit executed a Durable General Power of Attorney, naming Henry A. Dorn, ("Mr. Dorn") as his Attorney-in-Fact. (USAA Def. Memo. at **Ex. J**; *see also id.* at **Ex. K**.) On May 15, 2013, the Probate Court of Greenwood County declared Dr. Petit incompetent, however, it found that Dr. Petit was competent to execute 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*.)

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

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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. ¶ 10; Plaintiff Depo. at 96:13-24.) The beneficiaries of the Wells Fargo IRA were designated as Leaman and Caroline. (Plaintiff Depo. at 106:9-15.)

On March 18, 2015, Dr. Petit passed away. (Compl. ¶ 4.) He was survived by Plaintiff, and his two granddaughters, Leaman and Caroline. (*Id.* ¶ 6.) At the time of his death, Dr. Petit's Wells Fargo IRA was worth approximately $454,332, and his USAA IRA was closed. (*Id.* ¶ 10; Plaintiff Depo. at 96:13-24.) Wells Fargo released the funds to Leaman and Caroline, as they were the beneficiaries of the Wells Fargo IRA. (Compl. ¶ 16; Plaintiff Depo. at 106:9-15.)

On November 8, 2017, Plaintiff filed this action. Plaintiff asserted three causes of action against the USAA Defendants: (1) breach of contract, (2) breach of fiduciary duty, and (3) negligence. Plaintiff's claims are all based on the allegation that the beneficiaries of the USAA IRA were improperly changed. (*See* Compl.)

LEGAL STANDARD

"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 his complaint but must disclose the facts he intends to rely on by affidavit or other proof." *Id.* "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only

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required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

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LEGAL FINDINGS

I. There is no evidence that Dr. Petit's beneficiaries were improperly changed.

Plaintiff's breach of contract, breach of fiduciary duty, and negligence claims all arise out of Plaintiff's basic allegation that the beneficiaries of the USAA IRA were changed improperly. However, Plaintiff has conceded that Dr. Petit signed the designation of beneficiary form that designated Caroline and Leaman as the beneficiaries of the USAA IRA.

Further, the designation of beneficiary form was signed by Dr. Petit a month before he executed a Durable General Power of Attorney in the Greenwood County Probate Court, which was later ratified by the Court on May 15, 2013, indicating that Dr. Petit was competent at the time he signed the Durable Power of Attorney on February 27, 2012. Plaintiff alleged Dr. Petit was incompetent to sign the form, and presented evidence that Dr. Petit signed the beneficiary form the day after being released from a lengthy hospital stay after undergoing two surgical procedures, and he was taking pain medication when he signed the change of beneficiary designation. (Krohn Depo. 33:8-12, 34:2-15, 34:20-25, 35:1-13, 37:18-24, 40:22-24, 46:5-7, 46:11-15, 48:19). When he was discharged from the hospital on January 22, 2012, Dr. Petit was not fully recovered. (Krohn Depo. at 46:5-7, 46:11-15). However, the record shows that Dr. Petit, and not an Attorney-in-Fact or Krohn, signed the designation of beneficiary form, which designated Leaman and Caroline as his beneficiaries. The Court finds the evidence Plaintiff presented about Dr. Petit's competency is not enough to meet the requirement that a "mere scintilla of evidence" must be presented to

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defeat a motion for summary judgment. Accordingly, the USAA Defendants Motion for Summary Judgment must be granted.

II. Plaintiff lacks standing to assert her causes of action.

Furthermore, the Plaintiff lacks standing to bring this lawsuit. Under South Carolina law, the beneficiary of an IRA has no right to sue for the benefits until her rights 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 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 . . . .").

Plaintiff argued Dr. Petit lacked the ability to freely change the beneficiaries because he was an 87-year-old man with dementia hospitalized in the intensive or critical care unit for weeks, after undergoing two surgical procedures, and was taking pain medication when he signed the change of beneficiary designation. (Krohn Depo. 33:8-12, 34:2-15, 34:20-25, 35:1-13, 37:18-24, 40:22-24, 46:5-7, 46:11-15, 48:19). The court finds this evidence presented by Plaintiff is less than a mere scintilla of evidence.

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In this case, Plaintiff never had a vested right in the IRA funds. First, Plaintiff admits that Dr. Petit had the right to freely change the beneficiaries of his IRAs during his lifetime.[2] (Plaintiff Depo. at 116:24-117:11; 156:5-157:10.) Further, Plaintiff was not the beneficiary of the IRA at the time of Dr. Petit's death. Dr. Petit changed his beneficiaries in 2012, from Plaintiff and her sister, to his granddaughters, Leaman and Caroline, who were also set as the beneficiaries of the Wells Fargo IRA. In 2015, Dr. Petit passed away, and the rights to the Wells Fargo IRA vested in the beneficiaries of the Wells Fargo IRA, Leaman and Caroline. (Compl. ¶ 16; Plaintiff Depo. at 106:9-15.) Thus, under South Carolina law, Plaintiff has no vested rights in the USAA IRA or the Wells Fargo IRA. Accordingly, Plaintiff lacks standing to bring this action, and therefore, the USAA Defendant's Motion for Summary Judgment must be granted.

III. The Plaintiff's individual causes of action fail as a matter of law.

A. The USAA Defendants did not owe a fiduciary duty to the Plaintiff.

To establish a claim for breach of fiduciary duty, the plaintiff must prove "a breach of that duty owed **to the plaintiff** by the defendant[.]" *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335, 732 S.E.2d 166, 173 (2012) (emphasis added). Plaintiff has alleged that the USAA Defendants owed a fiduciary duty to Dr. Petit, not to her. (*See* Compl. ¶ 49.) Plaintiff argued that because her rights in the IRA were vested on January 23, 2012, USAA Defendants owed a fiduciary duty to her. However, the court finds the only party that could have brought a suit against the USAA Defendants for the breach of a fiduciary duty owed to Dr. Petit is Dr. Petit's estate.[3]

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[2] Additionally, Mr. Dorn had the ability to designate and change the beneficiaries of Dr. Petit's IRAs during Dr. Petit's lifetime. (Plaintiff Depo. at 156:5-157:10.)

[3] Any claims by Dr. Petit's estate are barred by the statute of limitations because the IRA funds were disbursed by Wells Fargo more than three years ago. *See* S.C. Code Ann. § 15-3-530.

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However, the USAA defendants did not owe a duty to Dr. Petit's estate. 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 v. South Carolina Natl. Bank*, 288 S.C. 560, 562, 343 S.E.2d 667, 668 (Ct.App. 1986). The court makes the determination regarding the equitable issue of whether a fiduciary relationship exists. *Cowburn v. Leventis*, 366 S.C. 20, 37, 619 S.E.2d 437, 447 (Ct.App. 2005).

Plaintiff did not allege in her Complaint, nor present any evidence that the USAA Defendants held Dr. Petit's funds in trust or separated Dr. Petit's funds into a special account. (Compl. ¶¶ 46-50.) It is only under such limited circumstances that South Carolina courts have been willing to entertain the potential existence of a fiduciary duty between banks and their customers. *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003); *Cowburn*, 366 S.C. at 43, 619 S.E.2d at 449. However, Plaintiff argued USAA Defendants undertook to advise Dr. Petit that created a fiduciary relationship, when its Houston, Texas based agent traveled to Dr. Petit's home in Greenwood to advise him about his account. (Krohn Depo. at 51:15-20). The Plaintiff failed to present any evidence that the USAA Defendants separated Dr. Petit's funds into a special account.

Further, although not recognized as one of two scenarios that create a fiduciary duty in a banking relationship under South Carolina law, Plaintiff alleged that the services the USAA Defendants provided for Dr. Petit, specifically, providing him with a Power of Attorney form, created a fiduciary duty. However, providing ministerial services, such as supplying form documents incidental to the IRA account does not create a fiduciary duty. *In re Int'l Payment Grp., Inc.*, 733 F. App'x 98, 104 (4th Cir. 2018) (applying South Carolina law, holding that even where a depositor received unique services, no fiduciary duty was created because the relationship "did

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not differ significantly from the average depositor's relationship with the bank.") The USAA Defendants merely provided its client, Dr. Petit, with standard Power of Attorney and designation of beneficiary forms that he requested. This cannot be said to differ from the services that are provided to the average depositor. No fiduciary duty was owed to the Plaintiff or Dr. Petit, and Plaintiff's claim for breach of fiduciary duty fails as a matter of law.

Accordingly, there is no genuine dispute as to material fact that the USAA Defendants did not owe the Plaintiff or Dr. Petit a fiduciary duty and summary judgment must be granted.

B. Plaintiff has presented no evidence of a duty created by any contract.

As discussed above, Plaintiff had no vested interest in the USAA IRA because Dr. Petit retained the ability to change beneficiaries during his lifetime, and because his granddaughters were the primary beneficiaries at the time Dr. Petit passed away. (Plaintiff Depo. at 116:24-117:11, 106:9-15; *see* USAA Def. Memo. at **Ex. I**.) Accordingly, the only legal duty was owed to Dr. Petit, the accountholder, and thus, the Plaintiff has no standing to bring this action.

Even if Plaintiff had standing to bring a claim for breach of contract, she alleges that Dr. Petit entered into a contract with USAA Defendants when Dr. Petit deposited funds into an IRA at USAA to which Plaintiff is a third party beneficiary. (Compl. at ¶¶ 42-45.) The Complaint also cites to the January 26, 2009 Power of Attorney between Dr. Petit and Ms. 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). However, 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 Ms. Krohn to perform tasks for Dr. Petit. Plaintiff cannot claim that the USAA Defendants breached an agreement to hold Dr.

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Petit's IRA funds by pointing to the provision in a Power of Attorney between Dr. Petit and a third party that was allegedly breached. Plaintiff does not allege that any provisions of any agreement between the USAA Defendants and Plaintiff or Dr. Petit were breached, and therefore, there is no genuine issue as to material fact that there is no breach of contract.

C. The USAA Defendants owed no common law duty to the Plaintiff.

As discussed above, Plaintiff has conceded that Dr. Petit signed the designation of beneficiary form, although Plaintiff alleges Dr. Petit was incompetent to sign it on January 23, 2012. Additionally, the USAA Defendants owed no common law duty to the Plaintiff. Although unclear from the Complaint, Plaintiff appears to contend that the USAA Defendants had a duty to ensure that Dr. Petit was the person signing his designation of beneficiary forms. 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*, 366 S.C. at 46, 619 S.E.2d at 451. 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). "If there is no duty, the defendant is entitled to judgment as a matter of law." *Id.* The evidence presented by Plaintiff that USAA Defendants undertook to advise Dr. Petit is not enough to defeat Defendant's motion for summary judgment.

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IV. Plaintiff's claims are barred by the Statute of Limitations.

Breach of contract, breach of fiduciary duty, and negligence claims all have a statute of limitations of three years. S.C. Code Ann. § 15-3-530. "The three-year statute of limitations begins to run when the underlying cause of action reasonably ought to have been discovered."

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Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct. App. 2011) (internal quotations omitted). "The test for whether the injured party knew or should have known about the cause of action is objective rather than subjective." *Id.* "Therefore, this court must determine whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party may exist." *Id.* Circumstances arose which should have put Plaintiff and/or Dr. Petit, or his Attorney-in-Fact, Mr. Dorn, on notice of the wrongs Plaintiff alleges prior to November 7, 2014, three years prior to the filing of the Complaint.

First, Plaintiff claims that Dr. Petit was sent an improper Power of Attorney form in 2009. (*See* Compl. ¶¶ 10, 44, 49, 53.) If this was truly a breach of any duty, Dr. Petit, the accountholder should have reasonably discovered the breach, as he received and signed the form. Accordingly, the statute of limitations on all claims arising out of the allegedly improper Power of Attorney form began to run in 2009, when the form was sent and executed, and therefore, Plaintiff's Complaint, which was filed in 2017, is well outside of the three-year statute of limitations starting in 2009.

Additionally, to the extent Plaintiff is attempting to assert any claim regarding the designation of beneficiary form, the statute of limitations on such a claim began to run in 2012. In 2012, Dr. Petit changed the beneficiaries of his own account. Again, if this were truly a breach of any duty, Dr. Petit and/or his Attorney-in-Fact, Mr. Dorn, should have reasonably discovered that his beneficiaries were changed in 2012 because he signed the designation of beneficiary form and the form was requested from, sent to, and returned from Dr. Petit's record address. Thus, because he should have reasonably discovered that his beneficiaries were changed, any claim arising out

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of that change must have been brought within three years of its discovery. Plaintiff's Complaint, which was filed in 2017, is well outside of the three-year statute of limitations starting in 2012.

Finally, in the summer of 2014, Dr. Petit's IRA was transferred from the USAA Defendants to Wells Fargo. (Compl. ¶ 10.) At this time, Dr. Petit's Attorney-in-Fact, Mr. Dorn, set the beneficiaries for the Wells Fargo IRA. Now more than 4 years after the USAA Defendants have had any control over Dr. Petit's account, the USAA Defendants are forced to defend against these allegations. "The purpose of the statute of limitations is to put to rest claims after the passage of time." *Nowlin v. Gen. Tel. Co.*, 310 S.C. 183, 186, 426 S.E.2d 114, 116 (Ct. App. 1992), *aff'd*, 314 S.C. 352, 444 S.E.2d 508 (1994). Allowing Plaintiff's claims to continue is in direct conflict with this purpose, and thus, Plaintiff's claims are time barred.

Plaintiff presented evidence that in the fall of 2014, Dr. Petit told Ms. Petit that the beneficiaries of the IRA had not changed. (Petit Depo. at 163:3-18). Plaintiff argued that considering Dr. Petit's fragile health on January 23, 2012, as detailed above, coupled with his 2014 statement that the beneficiaries had not changed, a jury could find Dr. Petit himself did not know that the beneficiaries changed. If Dr. Petit did not even know the beneficiaries were changed, then it would have been impossible for him to tell his daughter. However, the court finds that this is not sufficient evidence to defeat USAA Defendants' motion for summary judgment.

CONCLUSION

For the reasons set forth above, as to all three causes of action the USAA Defendants' Motion to for Summary Judgment is GRANTED.

IT IS SO ORDERED

Honorable Donald Hocker

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Presiding Judge, Eighth Judicial Circuit

_____, South Carolina
_____, 2019

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STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
Karen Petit, Plaintiff, vs. Phyllis Jean Krohn, USAA Federal Savings Bank, and USAA Investment Management Co., Defendants.	)	Civil Action No. 2017-CP-24-01343 **ORDER**

Defendants USAA Federal Savings Bank, and USAA Investment Management Co. (collectively "the USAA Defendants"), came before the Court for hearing on September 4, 2019. Jane H. Merrill appeared on behalf of Karen Petit ("Plaintiff"). Joshua S. Nasrollahi appeared on behalf of Phyllis Jean Krohn ("Krohn"). William S. Brown appeared on behalf of the USAA Defendants. Having heard the arguments and reviewed the record in this case and the submissions of the parties, the USAA Defendant's Motion for Summary Judgment is granted.

INTRODUCTION AND UNDISPUTED FACTS

Dr. Edward L. Petit ("Dr. Petit") held an Individual Retirement Account ("IRA") at USAA Federal Savings Bank (from 2002-2007), and subsequently with USAA Investment Management Co., from 2007 until 2014 (the "USAA IRA"). (USAA Def. Memo. at **Ex. A**; *Id*. at **Ex. B**.) On January 15, 2007, Dr. Petit completed a designation of beneficiary form, naming his two daughters, Plaintiff and Kathy Elise Petit ("Kathy"), as his beneficiaries. (*Id*. at **Ex. C**.)

On January 26, 2009, Dr. Petit completed a USAA Power of Attorney, naming Defendant Phyllis Krohn ("Ms. Krohn") as his Attorney-in-Fact. (*Id*. at **Ex. D**; Compl. ¶ 11.) Plaintiff claims that this Power of Attorney form prohibited the Attorney-in-Fact from changing the beneficiaries

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of the USAA IRA. (Compl. ¶ 14.) Ms. Krohn did not sign or execute any documents under the January 26, 2009 USAA Power of Attorney. (Plaintiff Depo. at 151:11-20, 164:18-165:1, 166:25-167:10.) On November 9, 2010, Dr. Petit completed a subsequent USAA Power of Attorney, again naming Ms. Krohn as his Attorney-in-Fact. (USAA Def. Memo. at **Ex. G**.) The November 9, 2010 Power of Attorney did not prohibit the Attorney-in-Fact from changing the USAA IRA's beneficiaries. (*Id*.) Again, the evidence does not show, nor does Plaintiff contend, that Ms. Krohn signed or executed any documents under the November 9, 2010 Power of Attorney. (Plaintiff Depo. at 151:11-20; Krohn Depo. at 76:12-19.)

On January 23, 2012, Dr. Petit executed a designation of beneficiary form which designated his two Granddaughters, Leaman Mosby ("Leaman") and Caroline Mosby ("Caroline") as primary beneficiaries, and Plaintiff and her sister Kathy as secondary beneficiaries. (*See* USAA Def. Memo. at **Ex. I**; Compl. ¶ 6.) The form was filled out by Ms. Krohn, but signed by Dr. Petit.

On February 27, 2012, Dr. Petit executed a Durable General Power of Attorney, naming Henry A. Dorn, ("Mr. Dorn") as his Attorney-in-Fact. (USAA Def. Memo. at **Ex. J**; *see also id.* at **Ex. K**.) On May 15, 2013, the Probate Court of Greenwood County declared Dr. Petit incompetent, however, it found that Dr. Petit was competent to execute 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*.)

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. ¶ 10; Plaintiff Depo. at 96:13-24.) The beneficiaries of the Wells Fargo IRA were designated as Leaman and Caroline. (Plaintiff Depo. at 106:9-15.)

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On March 18, 2015, Dr. Petit passed away. (Compl. ¶ 4.) He was survived by Plaintiff, and his two granddaughters, Leaman and Caroline. (*Id*. ¶ 6.) At the time of his death, Dr. Petit's Wells Fargo IRA was worth approximately $454,332, and his USAA IRA was closed. (*Id*. ¶ 10; Plaintiff Depo. at 96:13-24.) Wells Fargo released the funds to Leaman and Caroline, as they were the beneficiaries of the Wells Fargo IRA. (Compl. ¶ 16; Plaintiff Depo. at 106:9-15.)

On November 8, 2017, Plaintiff filed this action. Plaintiff asserted three causes of action against the USAA Defendants: (1) breach of contract, (2) breach of fiduciary duty, and (3) negligence. Plaintiff's claims are all based on the allegation that the beneficiaries of the USAA IRA were improperly changed. (*See* Compl.)

LEGAL STANDARD

"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 his complaint but must disclose the facts he intends to rely on by affidavit or other proof." *Id*.

LEGAL FINDINGS

I. There is no evidence that Dr. Petit's beneficiaries were improperly changed.

Plaintiff's breach of contract, breach of fiduciary duty, and negligence claims all arise out of Plaintiff's basic allegation that the beneficiaries of the USAA IRA were changed improperly. However, there is no evidence that the USAA Defendants caused the execution of the designation

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of beneficiary form at issue. The allegations in the Complaint focus on the USAA Defendants allegedly accepting a designation of beneficiary form purportedly executed by Ms. Krohn through an allegedly deficient power of attorney form. But, Plaintiff has conceded that Dr. Petit signed the designation of beneficiary form that designated Caroline and Leaman as the beneficiaries of the USAA IRA.

Further, the designation of beneficiary form was signed by Dr. Petit a month before he executed a Durable General Power of Attorney in the Greenwood County Probate Court, which was later ratified by the Court on May 15, 2013, providing some evidence that Dr. Petit was competent at the time he signed the designation of beneficiary form. Plaintiff argued that Dr. Petit had been hospitalized in the days before he signed the designation of beneficiary form. However, Plaintiff has presented no medical evidence that he was incompetent.[1] The fact that Dr. Petit signed the designation of beneficiary form after being released from the hospital is not evidence that he was incompetent at the time he signed the designation of beneficiary form. Thus, the record shows that Dr. Petit, and not an Attorney-in-Fact or Krohn, signed the designation of beneficiary form, which designated Leaman and Caroline as his beneficiaries. Therefore, there is no dispute of material fact regarding the liability of the USAA defendants. Accordingly, the USAA Defendants' Motion for Summary Judgment must be granted.

II. Plaintiff lacks standing to assert her causes of action.

Furthermore, the Plaintiff lacks standing to bring this lawsuit. Under South Carolina law, the beneficiary of an IRA has no right to sue for the benefits until her rights have vested. *Shuler v. Equitable Life Assur. Soc. of U. S.*, 184 S.C. 485, 193 S.E. 46, 48 (1937) (holding that a

[1] There is no evidence in the record that the USAA defendants were ever informed of the hospitalization to cause them to question the validity of the signature of Dr. Petit.

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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 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, Plaintiff never had a vested right in the IRA funds. Although Plaintiff tries to argue that Dr. Petit's hospitalization could have impacted his ability to execute documents, no medical evidence has been presented to support this argument. Additionally, Plaintiff admits that Dr. Petit had the right to freely change the beneficiaries of his IRAs during his lifetime.[2] (Plaintiff Depo. at 116:24-117:11; 156:5-157:10.) Further, Plaintiff was not the beneficiary of the IRA at the time of Dr. Petit's death. Dr. Petit changed his beneficiaries in 2012, from Plaintiff and her sister, to his granddaughters, Leaman and Caroline, who were also set as the beneficiaries of the Wells Fargo IRA. In 2015, Dr. Petit passed away, and the rights to the Wells Fargo IRA vested in the beneficiaries of the Wells Fargo IRA, Leaman and Caroline. (Compl. ¶ 16; Plaintiff Depo. at 106:9-15.) Thus, under South Carolina law, Plaintiff has no vested rights in the USAA IRA or the

[2] Additionally, Mr. Dorn had the ability to designate and change the beneficiaries of Dr. Petit's IRAs during Dr. Petit's lifetime. (Plaintiff Depo. at 156:5-157:10.)

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Wells Fargo IRA. Accordingly, Plaintiff lacks standing to bring this action, and therefore, the USAA Defendant's Motion for Summary Judgment must be granted.

III. The Plaintiff's individual causes of action fail as a matter of law.

A. The USAA Defendants did not owe a fiduciary duty to the Plaintiff.

To establish a claim for breach of fiduciary duty, the plaintiff must prove "a breach of that duty owed **to the plaintiff** by the defendant[.]" *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335, 732 S.E.2d 166, 173 (2012) (emphasis added). Plaintiff has alleged that the USAA Defendants owed a fiduciary duty to Dr. Petit, not to her. (*See* Compl. ¶ 49.) Further, the Plaintiff could not articulate any fiduciary duty owed to her. Thus, the only party that could have brought a suit against the USAA Defendants for a claimed breach of a fiduciary duty owed to Dr. Petit is Dr. Petit's estate.[3]

"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 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). A fiduciary relationship is an inherently personal relationship and arises out of a specific relationship between two parties. Thus, there can be no third-party beneficiary to a fiduciary relationship. Here, the Plaintiff and the USAA Defendants had no relationship, and a fiduciary duty between the Plaintiff and the USAA Defendants cannot arise out of Dr. Petit's relationship with the USAA Defendants. Accordingly, because the Plaintiff had no relationship with the USAA Defendants, there is no genuine dispute as to material fact that the USAA Defendants did not owe Plaintiff a fiduciary duty.

[3] Any claims by Dr. Petit's estate are barred by the statute of limitations because the IRA funds were disbursed by Wells Fargo more than three years ago. *See* S.C. Code Ann. § 15-3-530.

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Nevertheless, the USAA defendants did not owe a fiduciary duty to either Dr. Petit or Plaintiff. 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 v. South Carolina Natl. Bank*, 288 S.C. 560, 562, 343 S.E.2d 667, 668 (Ct.App. 1986). The court makes the determination regarding the equitable issue of whether a fiduciary relationship exists. *Cowburn v. Leventis*, 366 S.C. 20, 37, 619 S.E.2d 437, 447 (Ct.App. 2005).

Plaintiff did not allege in her Complaint, nor present any evidence that the USAA Defendants held Dr. Petit's funds in trust or separated Dr. Petit's funds into a special account, or that the USAA Defendants undertook to advise Plaintiff or Dr. Petit as part of the services it offers. (Compl. ¶¶ 46-50.) It is only under such limited circumstances that South Carolina courts have been willing to entertain the potential existence of a fiduciary duty between banks and their customers. *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003); *Cowburn*, 366 S.C. at 43, 619 S.E.2d at 449. Plaintiff's only argument that the USAA Defendants undertook to advise Dr. Petit is that a Houston, Texas based agent traveled to Dr. Petit's home in Greenwood to discuss his account. (Krohn Depo. at 51:15-20). However, this alone is not evidence that the USAA Defendants undertook a fiduciary duty to advise Dr. Petit. Accordingly, there is no genuine issue as to material fact that the USAA Defendants did not owe Dr. Petit or the Plaintiff a fiduciary duty.

Further, although not recognized as one of two scenarios that create a fiduciary duty in a banking relationship under South Carolina law, Plaintiff alleged that the services the USAA Defendants provided for Dr. Petit, specifically, providing him with a Power of Attorney form, created a fiduciary duty. However, providing ministerial services, such as supplying form documents incidental to the IRA account does not create a fiduciary duty. *In re Int'l Payment Grp.,*

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Inc., 733 F. App'x 98, 104 (4th Cir. 2018) (applying South Carolina law, holding that even where a depositor received unique services, no fiduciary duty was created because the relationship "did not differ significantly from the average depositor's relationship with the bank.") The USAA Defendants merely provided its client, Dr. Petit, with standard Power of Attorney and designation of beneficiary forms that he requested. This cannot be said to differ from the services that are provided to the average depositor. No fiduciary duty was owed to the Plaintiff or Dr. Petit, and Plaintiff's claim for breach of fiduciary duty fails as a matter of law.

Accordingly, there is no genuine dispute as to material fact that the USAA Defendants did not owe the Plaintiff a fiduciary duty and summary judgment must be granted.

B. Plaintiff has presented no evidence of a duty created by any contract.

As discussed above, Plaintiff had no vested interest in the USAA IRA because Dr. Petit retained the ability to change beneficiaries during his lifetime, and because his granddaughters were the primary beneficiaries at the time Dr. Petit passed away. (Plaintiff Depo. at 116:24-117:11, 106:9-15; *see* USAA Def. Memo. at **Ex. I**.) Accordingly, the only legal duty was owed to Dr. Petit, the accountholder, and thus, the Plaintiff has no standing to bring this action.

Even if Plaintiff had standing to bring a claim for breach of contract, she does not specify a particular contract or any contractual provisions allegedly breached. (Compl. at ¶¶ 42-45.) The Complaint cites to the January 26, 2009 Power of Attorney between Dr. Petit and Ms. 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). However, 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 Ms. Krohn to

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perform tasks for Dr. Petit. Plaintiff 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 that was allegedly breached. Plaintiff does not allege that any provisions of any agreement between the USAA Defendants and Plaintiff or Dr. Petit were breached, and therefore, there is no genuine issue as to material fact that there is no breach of contract.

C. The USAA Defendants owed no common law duty to the Plaintiff.

The USAA Defendants owed no common law duty to the Plaintiff. Although unclear from the Complaint, Plaintiff appears to contend that the USAA Defendants had a duty to ensure that Dr. Petit was the person signing his designation of beneficiary forms. As discussed above, Plaintiff has conceded that Dr. Petit signed the designation of beneficiary form. Additionally, 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*, 366 S.C. at 46, 619 S.E.2d at 451. 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). "If there is no duty, the defendant is entitled to judgment as a matter of law." *Id*. From the material submitted in this matter, the Court finds no common law duty owed by the USAA defendants to Plaintiff. Defendant's motion for summary judgment must be granted.[4]

[4] The USAA Defendants also raised issues regarding the statute of limitations. Because of the rulings made in this Order, the Court finds that it need not reach those issues.

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CONCLUSION

For the reasons set forth above, as to all three causes of action the USAA Defendants' Motion to for Summary Judgment is GRANTED.

IT IS SO ORDERED

_____
Honorable Donald Hocker
Presiding Judge, Eighth Judicial Circuit

_____, South Carolina
_____, 2019

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STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
Karen Petit, Plaintiff, vs. Phyllis Jean Krohn, USAA Federal Savings Bank, and USAA Investment Management Co., Defendants.	)	Civil Action No. 2017-CP-24-01343 **ORDER**

Defendants USAA Federal Savings Bank, and USAA Investment Management Co. (collectively "the USAA Defendants"), came before the Court for hearing on September 4, 2019. Jane H. Merrill appeared on behalf of Karen Petit ("Plaintiff"). Joshua S. Nasrollahi appeared on behalf of Phyllis Jean Krohn ("Krohn"). William S. Brown appeared on behalf of the USAA Defendants. Having heard the arguments and reviewed the record in this case and the submissions of the parties, the USAA Defendant's Motion for Summary Judgment is granted.

INTRODUCTION AND UNDISPUTED FACTS

Dr. Edward L. Petit ("Dr. Petit") held an Individual Retirement Account ("IRA") at USAA Federal Savings Bank (from 2002-2007), and subsequently with USAA Investment Management Co., from 2007 until 2014 (the "USAA IRA"). (USAA Def. Memo. at **Ex. A**; *Id*. at **Ex. B**.) On January 15, 2007, Dr. Petit completed a designation of beneficiary form, naming his two daughters, Plaintiff and Kathy Elise Petit ("Kathy"), as his beneficiaries. (*Id*. at **Ex. C**.)

On January 26, 2009, Dr. Petit completed a USAA Power of Attorney, naming Defendant Phyllis Krohn ("Ms. Krohn") as his Attorney-in-Fact. (*Id*. at **Ex. D**; Compl. ¶ 11.) Plaintiff claims that this Power of Attorney form prohibited the Attorney-in-Fact from changing the beneficiaries

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of the USAA IRA. (Compl. ¶ 14.) Ms. Krohn did not sign or execute any documents under the January 26, 2009 USAA Power of Attorney. (Plaintiff Depo. at 151:11-20, 164:18-165:1, 166:25-167:10.) On November 9, 2010, Dr. Petit completed a subsequent USAA Power of Attorney, again naming Ms. Krohn as his Attorney-in-Fact. (USAA Def. Memo. at **Ex. G**.) The November 9, 2010 Power of Attorney did not prohibit the Attorney-in-Fact from changing the USAA IRA's beneficiaries. (*Id*.) Again, the evidence does not show, nor does Plaintiff contend, that Ms. Krohn signed or executed any documents under the November 9, 2010 Power of Attorney. (Plaintiff Depo. at 151:11-20; Krohn Depo. at 76:12-19.)

On January 23, 2012, Dr. Petit executed a designation of beneficiary form which designated his two Granddaughters, Leaman Mosby ("Leaman") and Caroline Mosby ("Caroline") as primary beneficiaries, and Plaintiff and her sister Kathy as secondary beneficiaries. (*See* USAA Def. Memo. at **Ex. I**; Compl. ¶ 6.) The form was filled out by Ms. Krohn, but signed by Dr. Petit.

On February 27, 2012, Dr. Petit executed a Durable General Power of Attorney, naming Henry A. Dorn, ("Mr. Dorn") as his Attorney-in-Fact. (USAA Def. Memo. at **Ex. J**; *see also id.* at **Ex. K**.) On May 15, 2013, the Probate Court of Greenwood County declared Dr. Petit incompetent, however, it found that Dr. Petit was competent to execute 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*.)

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. ¶ 10; Plaintiff Depo. at 96:13-24.) The beneficiaries of the Wells Fargo IRA were designated as Leaman and Caroline. (Plaintiff Depo. at 106:9-15.)

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On March 18, 2015, Dr. Petit passed away. (Compl. ¶ 4.) He was survived by Plaintiff, and his two granddaughters, Leaman and Caroline. (*Id*. ¶ 6.) At the time of his death, Dr. Petit's Wells Fargo IRA was worth approximately $454,332, and his USAA IRA was closed. (*Id*. ¶ 10; Plaintiff Depo. at 96:13-24.) Wells Fargo released the funds to Leaman and Caroline, as they were the beneficiaries of the Wells Fargo IRA. (Compl. ¶ 16; Plaintiff Depo. at 106:9-15.)

On November 8, 2017, Plaintiff filed this action. Plaintiff asserted three causes of action against the USAA Defendants: (1) breach of contract, (2) breach of fiduciary duty, and (3) negligence. Plaintiff's claims are all based on the allegation that the beneficiaries of the USAA IRA were improperly changed. (*See* Compl.)

LEGAL STANDARD

"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 his complaint but must disclose the facts he intends to rely on by affidavit or other proof." *Id*. "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LEGAL FINDINGS

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I. There is no evidence that Dr. Petit's beneficiaries were improperly changed.

Plaintiff's breach of contract, breach of fiduciary duty, and negligence claims all arise out of Plaintiff's basic allegation that the beneficiaries of the USAA IRA were changed improperly. The allegations in the Complaint focus on the USAA Defendants allegedly accepting a designation of beneficiary form purportedly executed by Ms. Krohn through an allegedly deficient power of attorney form. But, Plaintiff has conceded that Dr. Petit signed the designation of beneficiary form that designated Caroline and Leaman as the beneficiaries of the USAA IRA.

Further, the designation of beneficiary form was signed by Dr. Petit a month before he executed a Durable General Power of Attorney in the Greenwood County Probate Court, which was later ratified by the Court on May 15, 2013, indicating that Dr. Petit was competent at the time he signed the Durable Power of Attorney on February 27, 2012. Plaintiff argued Dr. Petit was incompetent to sign the form, and presented evidence that Dr. Petit signed the beneficiary form the day after being released from a lengthy hospital stay after undergoing two surgical procedures, and he was taking pain medication when he signed the change of beneficiary designation. (Krohn Depo. 33:8-12, 34:2-15, 34:20-25, 35:1-13, 37:18-24, 40:22-24, 46:5-7, 46:11-15, 48:19). When he was discharged from the hospital on January 22, 2012, Dr. Petit was not fully recovered. (Krohn Depo. at 46:5-7, 46:11-15). However, the record shows that Dr. Petit, and not an Attorney-in-Fact or Krohn, signed the designation of beneficiary form, which designated Leaman and Caroline as his beneficiaries. The Court finds the evidence Plaintiff presented about Dr. Petit's competency is not enough to meet the requirement that a "mere scintilla of evidence" must be presented to defeat a motion for summary judgment. Accordingly, the USAA Defendants Motion for Summary Judgment must be granted.

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The fact that Dr. Petit signed the designation of beneficiary form the day after being released from an extended stay in the hospital that included surgical procedures and treatment in the critical or intensive care unit is not evidence that he was incompetent at the time he signed the designation of beneficiary form. Thus, the record shows that Dr. Petit, and not an Attorney-in-Fact or Krohn, signed the designation of beneficiary form, which designated Leaman and Caroline as his beneficiaries. Therefore, there is no dispute of material fact regarding the liability of the USAA defendants. Accordingly, the USAA Defendants' Motion for Summary Judgment must be granted.

II. Plaintiff lacks standing to assert her causes of action.

Furthermore, the Plaintiff lacks standing to bring this lawsuit. Under South Carolina law, the beneficiary of an IRA has no right to sue for the benefits until her rights 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 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 . . . .").

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Plaintiff argued Dr. Petit lacked the ability to freely change the beneficiaries because he was an 87-year-old man with dementia hospitalized in the intensive or critical care unit for weeks, after undergoing two surgical procedures, and was taking pain medication when he signed the change of beneficiary designation. (Krohn Depo. 33:8-12, 34:2-15, 34:20-25, 35:1-13, 37:18-24, 40:22-24, 46:5-7, 46:11-15, 48:19). The court finds this evidence presented by Plaintiff is less than a mere scintilla of evidence.

In this case, Plaintiff never had a vested right in the IRA funds. Additionally, Plaintiff admits that Dr. Petit had the right to freely change the beneficiaries of his IRAs during his lifetime.[1] (Plaintiff Depo. at 116:24-117:11; 156:5-157:10.) Further, Plaintiff was not the beneficiary of the IRA at the time of Dr. Petit's death. Dr. Petit changed his beneficiaries in 2012, from Plaintiff and her sister, to his granddaughters, Leaman and Caroline, who were also set as the beneficiaries of the Wells Fargo IRA. In 2015, Dr. Petit passed away, and the rights to the Wells Fargo IRA vested in the beneficiaries of the Wells Fargo IRA, Leaman and Caroline. (Compl. ¶ 16; Plaintiff Depo. at 106:9-15.) Thus, under South Carolina law, Plaintiff has no vested rights in the USAA IRA or the Wells Fargo IRA. Accordingly, Plaintiff lacks standing to bring this action, and therefore, the USAA Defendant's Motion for Summary Judgment must be granted.

III. The Plaintiff's individual causes of action fail as a matter of law.

A. The USAA Defendants did not owe a fiduciary duty to the Plaintiff.

To establish a claim for breach of fiduciary duty, the plaintiff must prove "a breach of that duty owed **to the plaintiff** by the defendant[.]" *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335, 732 S.E.2d 166, 173 (2012) (emphasis added). Plaintiff has alleged that the USAA

[1] Additionally, Mr. Dorn had the ability to designate and change the beneficiaries of Dr. Petit's IRAs during Dr. Petit's lifetime. (Plaintiff Depo. at 156:5-157:10.)

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Defendants owed a fiduciary duty to Dr. Petit, not to her. (*See* Compl. ¶ 49.) Plaintiff argued that because her rights in the IRA were vested on January 23, 2012, USAA Defendants owed a fiduciary duty to her. However, the court finds the only party that could have brought a suit against the USAA Defendants for a claimed breach of a fiduciary duty owed to Dr. Petit is Dr. Petit's estate.[2]

"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 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). A fiduciary relationship is an inherently personal relationship and arises out of a specific relationship between two parties. Thus, there can be no third-party beneficiary to a fiduciary relationship. Here, the Plaintiff and the USAA Defendants had no relationship, and a fiduciary duty between the Plaintiff and the USAA Defendants cannot arise out of Dr. Petit's relationship with the USAA Defendants. Accordingly, because the Plaintiff had no relationship with the USAA Defendants, there is no genuine dispute as to material fact that the USAA Defendants did not owe Plaintiff a fiduciary duty.

Nevertheless, the USAA defendants did not owe a fiduciary duty to either Dr. Petit or Plaintiff. 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 v. South Carolina Natl. Bank*, 288 S.C. 560, 562, 343 S.E.2d 667, 668 (Ct.App. 1986). The court makes the determination regarding the equitable issue of whether a fiduciary relationship exists. *Cowburn v. Leventis*, 366 S.C. 20, 37, 619 S.E.2d 437, 447 (Ct.App. 2005).

[2] Any claims by Dr. Petit's estate are barred by the statute of limitations because the IRA funds were disbursed by Wells Fargo more than three years ago. *See* S.C. Code Ann. § 15-3-530.

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Plaintiff did not allege in her Complaint, nor present any evidence that the USAA Defendants held Dr. Petit's funds in trust or separated Dr. Petit's funds into a special account, or that the USAA Defendants undertook to advise Plaintiff or Dr. Petit as part of the services it offers. (Compl. ¶¶ 46-50.) It is only under such limited circumstances that South Carolina courts have been willing to entertain the potential existence of a fiduciary duty between banks and their customers. *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003); *Cowburn*, 366 S.C. at 43, 619 S.E.2d at 449. Plaintiff's only argument that the USAA Defendants undertook to advise Dr. Petit is that a Houston, Texas based agent traveled to Dr. Petit's home in Greenwood to advise him about his account. (Krohn Depo. at 51:15-20). However, this is not enough evidence to show that the USAA Defendants undertook a fiduciary duty to advise Dr. Petit. Accordingly, there is no genuine issue as to material fact that the USAA Defendants did not owe Dr. Petit or the Plaintiff a fiduciary duty.

Further, although not recognized as one of two scenarios that create a fiduciary duty in a banking relationship under South Carolina law, Plaintiff alleged that the services the USAA Defendants provided for Dr. Petit, specifically, providing him with a Power of Attorney form, created a fiduciary duty. However, providing ministerial services, such as supplying form documents incidental to the IRA account does not create a fiduciary duty. *In re Int'l Payment Grp., Inc.*, 733 F. App'x 98, 104 (4th Cir. 2018) (applying South Carolina law, holding that even where a depositor received unique services, no fiduciary duty was created because the relationship "did not differ significantly from the average depositor's relationship with the bank.") The USAA Defendants merely provided its client, Dr. Petit, with standard Power of Attorney and designation of beneficiary forms that he requested. This cannot be said to differ from the services that are

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provided to the average depositor. No fiduciary duty was owed to the Plaintiff or Dr. Petit, and Plaintiff's claim for breach of fiduciary duty fails as a matter of law.

Accordingly, there is no genuine dispute as to material fact that the USAA Defendants did not owe the Plaintiff a fiduciary duty and summary judgment must be granted.

B. Plaintiff has presented no evidence of a duty created by any contract.

As discussed above, Plaintiff had no vested interest in the USAA IRA because Dr. Petit retained the ability to change beneficiaries during his lifetime, and because his granddaughters were the primary beneficiaries at the time Dr. Petit passed away. (Plaintiff Depo. at 116:24-117:11, 106:9-15; *see* USAA Def. Memo. at **Ex. I**.) Accordingly, the only legal duty was owed to Dr. Petit, the accountholder, and thus, the Plaintiff has no standing to bring this action.

Plaintiff alleges that Dr. Petit entered into a contract with USAA Defendants when Dr. Petit deposited funds into an IRA at USAA to which Plaintiff is a third party beneficiary. (Compl. at ¶¶ 42-45.) The Complaint also cites to the January 26, 2009 Power of Attorney between Dr. Petit and Ms. 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). However, 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 Ms. Krohn to perform tasks for Dr. Petit. Plaintiff 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 that was allegedly breached. However, Plaintiff's Complaint states, "Defendants USAA breached this contract in several ways, including but not

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limited to, its use of a Power of Attorney that did not comply with South Carolina law." Nevertheless, there is no genuine issue as to material fact that there is no breach of contract.

C. The USAA Defendants owed no common law duty to the Plaintiff.

The USAA Defendants owed no common law duty to the Plaintiff. Plaintiff contends that the USAA Defendants had a duty to ensure that Dr. Petit was the person signing his designation of beneficiary forms. As discussed above, Plaintiff has conceded that Dr. Petit signed the designation of beneficiary form, although Plaintiff argued Dr. Petit was incompetent to sign it on January 23, 2012. Additionally, 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*, 366 S.C. at 46, 619 S.E.2d at 451. 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). "If there is no duty, the defendant is entitled to judgment as a matter of law." *Id*. The evidence presented by Plaintiff that USAA Defendants undertook to advise Dr. Petit is not enough to defeat Defendant's motion for summary judgment. From the material submitted in this matter, the Court finds no common law duty owed by the USAA defendants to Plaintiff. Defendant's motion for summary judgment must be granted.

IV. Plaintiff's claims are barred by the Statute of Limitations.

Breach of contract, breach of fiduciary duty, and negligence claims all have a statute of limitations of three years. S.C. Code Ann. § 15-3-530. "The three-year statute of limitations begins to run when the underlying cause of action reasonably ought to have been discovered." *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct.

App. 2011) (internal quotations omitted). "The test for whether the injured party knew or should have known about the cause of action is objective rather than subjective." *Id*. "Therefore, this court must determine whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party may exist." *Id*. Circumstances arose which should have put Plaintiff and/or Dr. Petit, or his Attorney-in-Fact, Mr. Dorn, on notice of the wrongs Plaintiff alleges prior to November 7, 2014, three years prior to the filing of the Complaint.

First, Plaintiff claims that Dr. Petit was sent an improper Power of Attorney form in 2009. (*See* Compl. ¶¶ 10, 44, 49, 53.) If this was truly a breach of any duty, Dr. Petit, the accountholder should have reasonably discovered the breach, as he received and signed the form. Accordingly, the statute of limitations on all claims arising out of the allegedly improper Power of Attorney form began to run in 2009, when the form was sent and executed, and therefore, Plaintiff's Complaint, which was filed in 2017, is well outside of the three-year statute of limitations starting in 2009.

Additionally, to the extent Plaintiff is attempting to assert any claim regarding the designation of beneficiary form, the statute of limitations on such a claim began to run in 2012. In 2012, Dr. Petit changed the beneficiaries of his own account. Again, if this were truly a breach of any duty, Dr. Petit and/or his Attorney-in-Fact, Mr. Dorn, should have reasonably discovered that his beneficiaries were changed in 2012 because he signed the designation of beneficiary form and the form was requested from, sent to, and returned from Dr. Petit's record address. Thus, because he should have reasonably discovered that his beneficiaries were changed, any claim arising out of that change must have been brought within three years of its discovery Plaintiff's Complaint, which was filed in 2017, is well outside of the three-year statute of limitations starting in 2012.

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Finally, in the summer of 2014, Dr. Petit's IRA was transferred from the USAA Defendants to Wells Fargo. (Compl. ¶ 10.) At this time, Dr. Petit's Attorney-in-Fact, Mr. Dorn, set the beneficiaries for the Wells Fargo IRA. Now more than 4 years after the USAA Defendants have had any control over Dr. Petit's account, the USAA Defendants are forced to defend against these allegations. "The purpose of the statute of limitations is to put to rest claims after the passage of time." *Nowlin v. Gen. Tel. Co.*, 310 S.C. 183, 186, 426 S.E.2d 114, 116 (Ct. App. 1992), *aff'd*, 314 S.C. 352, 444 S.E.2d 508 (1994). Allowing Plaintiff's claims to continue is in direct conflict with this purpose, and thus, Plaintiff's claims are time barred.

Plaintiff presented evidence that in the fall of 2014, Dr. Petit told Ms. Petit that the beneficiaries of the IRA had not changed. (Petit Depo. at 163:3-18). Plaintiff argued that considering Dr. Petit's fragile health on January 23, 2012, as detailed above, coupled with his 2014 statement that the beneficiaries had not changed, a jury could find Dr. Petit himself did not know that the beneficiaries changed. If Dr. Petit did not even know the beneficiaries were changed, then it would have been impossible for him to tell his daughter. However, the court finds that this is not sufficient evidence to defeat USAA Defendants' motion for summary judgment.

CONCLUSION

For the reasons set forth above, as to all three causes of action the USAA Defendants' Motion to for Summary Judgment is GRANTED.

IT IS SO ORDERED

_____
Honorable Donald Hocker
Presiding Judge, Eighth Judicial Circuit

_____, South Carolina
_____, 2019

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STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)))	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
Karen Petit, Plaintiff, vs. Phyllis Jean Krohn, USAA Federal Savings Bank, and USAA Investment Management Co., Defendants.	))))))))))))	Civil Action No. 2017-CP-24-01343 **ORDER**

Defendants USAA Federal Savings Bank, and USAA Investment Management Co. (collectively "the USAA Defendants"), came before the Court for hearing on September 4, 2019. Jane H. Merrill appeared on behalf of Karen Petit ("Plaintiff"). Joshua S. Nasrollahi appeared on behalf of Phyllis Jean Krohn ("Krohn"). William S. Brown appeared on behalf of the USAA Defendants. Having heard the arguments and reviewed the record in this case and the submissions of the parties, the USAA Defendant's Motion for Summary Judgment is granted.

INTRODUCTION AND UNDISPUTED FACTS

Dr. Edward L. Petit ("Dr. Petit") held an Individual Retirement Account ("IRA") at USAA Federal Savings Bank (from 2002-2007), and subsequently with USAA Investment Management Co., from 2007 until 2014 (the "USAA IRA"). (USAA Def. Memo. at **Ex. A**; *Id*. at **Ex. B**.) On January 15, 2007, Dr. Petit completed a designation of beneficiary form, naming his two daughters, Plaintiff and Kathy Elise Petit ("Kathy"), as his beneficiaries. (*Id*. at **Ex. C**.)

On January 26, 2009, Dr. Petit completed a USAA Power of Attorney, naming Defendant Phyllis Krohn ("Ms. Krohn") as his Attorney-in-Fact. (*Id*. at **Ex. D**; Compl. ¶ 11.) Plaintiff claims that this Power of Attorney form prohibited the Attorney-in-Fact from changing the beneficiaries

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of the USAA IRA. (Compl. ¶ 14.) Ms. Krohn did not sign or execute any documents under the January 26, 2009 USAA Power of Attorney. (Plaintiff Depo. at 151:11-20, 164:18-165:1, 166:25-167:10.) On November 9, 2010, Dr. Petit completed a subsequent USAA Power of Attorney, again naming Ms. Krohn as his Attorney-in-Fact. (USAA Def. Memo. at **Ex. G**.) The November 9, 2010 Power of Attorney did not prohibit the Attorney-in-Fact from changing the USAA IRA's beneficiaries. (*Id*.) Again, the evidence does not show, nor does Plaintiff contend, that Ms. Krohn signed or executed any documents under the November 9, 2010 Power of Attorney. (Plaintiff Depo. at 151:11-20; Krohn Depo. at 76:12-19.)

On January 23, 2012, Dr. Petit executed a designation of beneficiary form which designated his two Granddaughters, Leaman Mosby ("Leaman") and Caroline Mosby ("Caroline") as primary beneficiaries, and Plaintiff and her sister Kathy as secondary beneficiaries. (*See* USAA Def. Memo. at **Ex. I**; Compl. ¶ 6.) The form was filled out by Ms. Krohn, but signed by Dr. Petit.

On February 27, 2012, Dr. Petit executed a Durable General Power of Attorney, naming Henry A. Dorn, ("Mr. Dorn") as his Attorney-in-Fact. (USAA Def. Memo. at **Ex. J**; *see also id.* at **Ex. K**.) On May 15, 2013, the Probate Court of Greenwood County declared Dr. Petit incompetent, however, it found that Dr. Petit was competent to execute 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*.)

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. ¶ 10; Plaintiff Depo. at 96:13-24.) The beneficiaries of the Wells Fargo IRA were designated as Leaman and Caroline. (Plaintiff Depo. at 106:9-15.)

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On March 18, 2015, Dr. Petit passed away. (Compl. ¶ 4.) He was survived by Plaintiff, and his two granddaughters, Leaman and Caroline. (*Id*. ¶ 6.) At the time of his death, Dr. Petit's Wells Fargo IRA was worth approximately $454,332, and his USAA IRA was closed. (*Id*. ¶ 10; Plaintiff Depo. at 96:13-24.) Wells Fargo released the funds to Leaman and Caroline, as they were the beneficiaries of the Wells Fargo IRA. (Compl. ¶ 16; Plaintiff Depo. at 106:9-15.)

On November 8, 2017, Plaintiff filed this action. Plaintiff asserted three causes of action against the USAA Defendants: (1) breach of contract, (2) breach of fiduciary duty, and (3) negligence. Plaintiff's claims are all based on the allegation that the beneficiaries of the USAA IRA were improperly changed. (*See* Compl.)

LEGAL STANDARD

"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 his complaint but must disclose the facts he intends to rely on by affidavit or other proof." *Id*. "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LEGAL FINDINGS

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I. There is no evidence that Dr. Petit's beneficiaries were improperly changed.

Plaintiff's breach of contract, breach of fiduciary duty, and negligence claims all arise out of Plaintiff's basic allegation that the beneficiaries of the USAA IRA were changed improperly. ~~However, there is no evidence that the USAA Defendants caused the execution of the designation of beneficiary form at issue.~~ The allegations in the Complaint focus on the USAA Defendants allegedly accepting a designation of beneficiary form purportedly executed by Ms. Krohn through an allegedly deficient power of attorney form. But, Plaintiff has conceded that Dr. Petit signed the designation of beneficiary form that designated Caroline and Leaman as the beneficiaries of the USAA IRA.

Further, the designation of beneficiary form was signed by Dr. Petit a month before he executed a Durable General Power of Attorney in the Greenwood County Probate Court, which was later ratified by the Court on May 15, 2013, indicating that Dr. Petit was competent at the time he signed the Durable Power of Attorney on February 27, 2012. ~~providing some evidence that Dr. Petit was competent at the time he signed the designation of beneficiary form.~~ Plaintiff argued Dr. Petit was incompetent to sign the form, and presented evidence that Dr. Petit signed the beneficiary form the day after being released from a lengthy hospital stay after undergoing two surgical procedures, and he was taking pain medication when he signed the change of beneficiary designation. (Krohn Depo. 33:8-12, 34:2-15, 34:20-25, 35:1-13, 37:18-24, 40:22-24, 46:5-7, 46:11-15, 48:19). When he was discharged from the hospital on January 22, 2012, Dr. Petit was not fully recovered. (Krohn Depo. at 46:5-7, 46:11-15). However, the record shows that Dr. Petit, and not an Attorney-in-Fact or Krohn, signed the designation of beneficiary form, which designated Leaman and Caroline as his beneficiaries. The Court finds the evidence Plaintiff presented about Dr. Petit's competency is not enough to meet the requirement that a "mere scintilla

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of evidence" must be presented to defeat a motion for summary judgment. Accordingly, the USAA Defendants Motion for Summary Judgment must be granted.

~~that Dr. Petit had been hospitalized in the days before he signed the designation of beneficiary form. However, Plaintiff has presented no medical evidence that he was incompetent.[1]~~ The fact that Dr. Petit signed the designation of beneficiary form the day after being released from an extended stay in the hospital that included surgical procedures and treatment in the critical or intensive care unit ~~the hospital~~ is not evidence that he was incompetent at the time he signed the designation of beneficiary form. Thus, the record shows that Dr. Petit, and not an Attorney-in-Fact or Krohn, signed the designation of beneficiary form, which designated Leaman and Caroline as his beneficiaries. Therefore, there is no dispute of material fact regarding the liability of the USAA defendants. Accordingly, the USAA Defendants' Motion for Summary Judgment must be granted.

II. Plaintiff lacks standing to assert her causes of action.

Furthermore, the Plaintiff lacks standing to bring this lawsuit. Under South Carolina law, the beneficiary of an IRA has no right to sue for the benefits until her rights 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*

~~[1] There is no evidence in the record that the USAA defendants were ever informed of the hospitalization to cause them to question the validity of the signature of Dr. Petit.~~

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v. Gulf Life Ins. Co., 277 S.C. 336, 338, 287 S.E.2d 144, 146 (1982) ("Where the insured has 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 . . . .").

Plaintiff argued Dr. Petit lacked the ability to freely change the beneficiaries because he was an 87-year-old man with dementia hospitalized in the intensive or critical care unit for weeks, after undergoing two surgical procedures, and was taking pain medication when he signed the change of beneficiary designation. (Krohn Depo. 33:8-12, 34:2-15, 34:20-25, 35:1-13, 37:18-24, 40:22-24, 46:5-7, 46:11-15, 48:19). The court finds this evidence presented by Plaintiff is less than a mere scintilla of evidence.

In this case, Plaintiff never had a vested right in the IRA funds. ~~Although Plaintiff tries to argue that Dr. Petit's hospitalization could have impacted his ability to execute documents, no medical evidence has been presented to support this argument.~~ Additionally, Plaintiff admits that Dr. Petit had the right to freely change the beneficiaries of his IRAs during his lifetime.[2] (Plaintiff Depo. at 116:24-117:11; 156:5-157:10.) Further, Plaintiff was not the beneficiary of the IRA at the time of Dr. Petit's death. Dr. Petit changed his beneficiaries in 2012, from Plaintiff and her sister, to his granddaughters, Leaman and Caroline, who were also set as the beneficiaries of the Wells Fargo IRA. In 2015, Dr. Petit passed away, and the rights to the Wells Fargo IRA vested in the beneficiaries of the Wells Fargo IRA, Leaman and Caroline. (Compl. ¶ 16; Plaintiff Depo. at 106:9-15.) Thus, under South Carolina law, Plaintiff has no vested rights in the USAA IRA or the

[2] Additionally, Mr. Dorn had the ability to designate and change the beneficiaries of Dr. Petit's IRAs during Dr. Petit's lifetime. (Plaintiff Depo. at 156:5-157:10.)

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Wells Fargo IRA. Accordingly, Plaintiff lacks standing to bring this action, and therefore, the USAA Defendant's Motion for Summary Judgment must be granted.

III. The Plaintiff's individual causes of action fail as a matter of law.

A. The USAA Defendants did not owe a fiduciary duty to the Plaintiff.

To establish a claim for breach of fiduciary duty, the plaintiff must prove "a breach of that duty owed **to the plaintiff** by the defendant[.]" *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335, 732 S.E.2d 166, 173 (2012) (emphasis added). Plaintiff has alleged that the USAA Defendants owed a fiduciary duty to Dr. Petit, not to her. (*See* Compl. ¶ 49.) Plaintiff argued that because her rights in the IRA were vested on January 23, 2012, USAA Defendants owed a fiduciary duty to her. However, the court finds the ~~Further, the Plaintiff could not articulate any fiduciary duty owed to her. Thus, the~~ only party that could have brought a suit against the USAA Defendants for a claimed breach of a fiduciary duty owed to Dr. Petit is Dr. Petit's estate.[3]

"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 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). A fiduciary relationship is an inherently personal relationship and arises out of a specific relationship between two parties. Thus, there can be no third-party beneficiary to a fiduciary relationship. Here, the Plaintiff and the USAA Defendants had no relationship, and a fiduciary duty between the Plaintiff and the USAA Defendants cannot arise out of Dr. Petit's relationship with the USAA Defendants. Accordingly, because the Plaintiff had no relationship with the USAA

[3] Any claims by Dr. Petit's estate are barred by the statute of limitations because the IRA funds were disbursed by Wells Fargo more than three years ago. *See* S.C. Code Ann. § 15-3-530.

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Defendants, there is no genuine dispute as to material fact that the USAA Defendants did not owe Plaintiff a fiduciary duty.

Nevertheless, the USAA defendants did not owe a fiduciary duty to either Dr. Petit or Plaintiff. 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 v. South Carolina Natl. Bank*, 288 S.C. 560, 562, 343 S.E.2d 667, 668 (Ct.App. 1986). The court makes the determination regarding the equitable issue of whether a fiduciary relationship exists. *Cowburn v. Leventis*, 366 S.C. 20, 37, 619 S.E.2d 437, 447 (Ct.App. 2005).

Plaintiff did not allege in her Complaint, nor present any evidence that the USAA Defendants held Dr. Petit's funds in trust or separated Dr. Petit's funds into a special account, or that the USAA Defendants undertook to advise Plaintiff or Dr. Petit as part of the services it offers. (Compl. ¶¶ 46-50.) It is only under such limited circumstances that South Carolina courts have been willing to entertain the potential existence of a fiduciary duty between banks and their customers. *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003); *Cowburn*, 366 S.C. at 43, 619 S.E.2d at 449. Plaintiff's only argument that the USAA Defendants undertook to advise Dr. Petit is that a Houston, Texas based agent traveled to Dr. Petit's home in Greenwood to ~~discuss~~ advise him about his account. (Krohn Depo. at 51:15-20). However, this is not enough evidence to show ~~alone is not evidence~~ that the USAA Defendants undertook a fiduciary duty to advise Dr. Petit. Accordingly, there is no genuine issue as to material fact that the USAA Defendants did not owe Dr. Petit or the Plaintiff a fiduciary duty.

Further, although not recognized as one of two scenarios that create a fiduciary duty in a banking relationship under South Carolina law, Plaintiff alleged that the services the USAA Defendants provided for Dr. Petit, specifically, providing him with a Power of Attorney form,

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created a fiduciary duty. However, providing ministerial services, such as supplying form documents incidental to the IRA account does not create a fiduciary duty. *In re Int'l Payment Grp., Inc.*, 733 F. App'x 98, 104 (4th Cir. 2018) (applying South Carolina law, holding that even where a depositor received unique services, no fiduciary duty was created because the relationship "did not differ significantly from the average depositor's relationship with the bank.") The USAA Defendants merely provided its client, Dr. Petit, with standard Power of Attorney and designation of beneficiary forms that he requested. This cannot be said to differ from the services that are provided to the average depositor. No fiduciary duty was owed to the Plaintiff or Dr. Petit, and Plaintiff's claim for breach of fiduciary duty fails as a matter of law.

Accordingly, there is no genuine dispute as to material fact that the USAA Defendants did not owe the Plaintiff a fiduciary duty and summary judgment must be granted.

B. Plaintiff has presented no evidence of a duty created by any contract.

As discussed above, Plaintiff had no vested interest in the USAA IRA because Dr. Petit retained the ability to change beneficiaries during his lifetime, and because his granddaughters were the primary beneficiaries at the time Dr. Petit passed away. (Plaintiff Depo. at 116:24-117:11, 106:9-15; *see* USAA Def. Memo. at **Ex. I**.) Accordingly, the only legal duty was owed to Dr. Petit, the accountholder, and thus, the Plaintiff has no standing to bring this action.

Plaintiff alleges that Dr. Petit entered into a contract with USAA Defendants when Dr. Petit deposited funds into an IRA at USAA to which Plaintiff is a third party beneficiary. (Compl. at ¶¶ 42-45.) ~~Even if Plaintiff had standing to bring a claim for breach of contract, she does not specify a particular contract or any contractual provisions allegedly breached. (Compl. at ¶¶ 42-45.)~~ The Complaint also cites to the January 26, 2009 Power of Attorney between Dr. Petit and Ms. Krohn. "A power of attorney is an instrument in writing by which one person, as principal,

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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). However, 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 Ms. Krohn to perform tasks for Dr. Petit. Plaintiff 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 that was allegedly breached. However, Plaintiff's Complaint states, "Defendants USAA breached this contract in several ways, including but not limited to, its use of a Power of Attorney that did not comply with South Carolina law."~~Plaintiff does not allege that any provisions of any agreement between the USAA Defendants and Plaintiff or Dr. Petit were breached, and therefore~~ Nevertheless,~~,~~ there is no genuine issue as to material fact that there is no breach of contract.

C. The USAA Defendants owed no common law duty to the Plaintiff.

The USAA Defendants owed no common law duty to the Plaintiff. Plaintiff contends that the USAA Defendants had a duty to ensure that Dr. Petit was the person signing his designation of beneficiary forms. As discussed above, Plaintiff has conceded that Dr. Petit signed the designation of beneficiary form, although Plaintiff ~~alleges~~ argued Dr. Petit was incompetent to sign it on January 23, 2012. ~~.~~ Additionally, 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*, 366 S.C. at 46, 619 S.E.2d at 451. It is incumbent upon "[t]he Court . . . to determine, as a matter of law, whether the law recognizes a particular duty." *Huggins v.*

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Citibank, N.A., 355 S.C. 329, 332, 585 S.E.2d 275, 276 (2003). "If there is no duty, the defendant is entitled to judgment as a matter of law." *Id.* The evidence presented by Plaintiff that USAA Defendants undertook to advise Dr. Petit is not enough to defeat Defendant's motion for summary judgment. From the material submitted in this matter, the Court finds no common law duty owed by the USAA defendants to Plaintiff. Defendant's motion for summary judgment must be granted.[4]

IV. Plaintiff's claims are barred by the Statute of Limitations.

Breach of contract, breach of fiduciary duty, and negligence claims all have a statute of limitations of three years. S.C. Code Ann. § 15-3-530. "The three-year statute of limitations begins to run when the underlying cause of action reasonably ought to have been discovered." *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct. App. 2011) (internal quotations omitted). "The test for whether the injured party knew or should have known about the cause of action is objective rather than subjective." *Id.* "Therefore, this court must determine whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party may exist." *Id.* Circumstances arose which should have put Plaintiff and/or Dr. Petit, or his Attorney-in-Fact, Mr. Dorn, on notice of the wrongs Plaintiff alleges prior to November 7, 2014, three years prior to the filing of the Complaint.

First, Plaintiff claims that Dr. Petit was sent an improper Power of Attorney form in 2009. (*See* Compl. ¶¶ 10, 44, 49, 53.) If this was truly a breach of any duty, Dr. Petit, the accountholder should have reasonably discovered the breach, as he received and signed the form. Accordingly,

[4] ~~The USAA Defendants also raised issues regarding the statute of limitations. Because of the rulings made in this Order, the Court finds that it need not reach those issues.~~

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the statute of limitations on all claims arising out of the allegedly improper Power of Attorney form began to run in 2009, when the form was sent and executed, and therefore, Plaintiff's Complaint, which was filed in 2017, is well outside of the three-year statute of limitations starting in 2009.

Additionally, to the extent Plaintiff is attempting to assert any claim regarding the designation of beneficiary form, the statute of limitations on such a claim began to run in 2012. In 2012, Dr. Petit changed the beneficiaries of his own account. Again, if this were truly a breach of any duty, Dr. Petit and/or his Attorney-in-Fact, Mr. Dorn, should have reasonably discovered that his beneficiaries were changed in 2012 because he signed the designation of beneficiary form and the form was requested from, sent to, and returned from Dr. Petit's record address. Thus, because he should have reasonably discovered that his beneficiaries were changed, any claim arising out of that change must have been brought within three years of its discovery Plaintiff's Complaint, which was filed in 2017, is well outside of the three-year statute of limitations starting in 2012.

Finally, in the summer of 2014, Dr. Petit's IRA was transferred from the USAA Defendants to Wells Fargo. (Compl. ¶ 10.) At this time, Dr. Petit's Attorney-in-Fact, Mr. Dorn, set the beneficiaries for the Wells Fargo IRA. Now more than 4 years after the USAA Defendants have had any control over Dr. Petit's account, the USAA Defendants are forced to defend against these allegations. "The purpose of the statute of limitations is to put to rest claims after the passage of time." *Nowlin v. Gen. Tel. Co.*, 310 S.C. 183, 186, 426 S.E.2d 114, 116 (Ct. App. 1992), *aff'd*, 314 S.C. 352, 444 S.E.2d 508 (1994). Allowing Plaintiff's claims to continue is in direct conflict with this purpose, and thus, Plaintiff's claims are time barred.

Plaintiff presented evidence that in the fall of 2014, Dr. Petit told Ms. Petit that the beneficiaries of the IRA had not changed. (Petit Depo. at 163:3-18). Plaintiff argued that

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considering Dr. Petit's fragile health on January 23, 2012, as detailed above, coupled with his 2014 statement that the beneficiaries had not changed, a jury could find Dr. Petit himself did not know that the beneficiaries changed. If Dr. Petit did not even know the beneficiaries were changed, then it would have been impossible for him to tell his daughter. However, the court finds that this is not sufficient evidence to defeat USAA Defendants' motion for summary judgment.

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CONCLUSION

For the reasons set forth above, as to all three causes of action the USAA Defendants' Motion to for Summary Judgment is GRANTED.

IT IS SO ORDERED

Honorable Donald Hocker
Presiding Judge, Eighth Judicial Circuit

_____, South Carolina
_____, 2019

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STATE OF SOUTH CAROLINA) COUNTY OF GREENWOOD	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
Karen Petit, Plaintiff, vs. Phyllis Jean Krohn, USAA Federal Savings Bank, and USAA Investment Management Co., Defendants.	Civil Action No. 2017-CP-24-01343 **MEMORANDUM TO THE COURT REGARDING PROPOSED ORDER GRANTING USAA FEDERAL SAVINGS BANK, AND USAA INVESTMENT MANAGEMENT CO.'S MOTION FOR SUMMARY JUDGMENT**

USAA Federal Savings Bank, and USAA Investment Management Co. (collectively "the USAA Defendants") and Plaintiff Karen Petit ("Plaintiff") have discussed the Proposed Order granting the USAA Defendants' Motion for Summary Judgment. After discussion, the parties have been unable to agree regarding certain language in the Proposed Order. Thus, the parties hereby provide the Court with this memorandum, which sets forth each party's proposed language, and their respective positions on why they contend their language should be adopted by the court. As the USAA Defendants drafted the Proposed Order, USAA's proposed language will be in the left column and Plaintiff's suggested edits and deletions from the USAA Defendants' Proposed Order are in the right column. For ease of review, if a footnote is not in dispute, it has been omitted from the text in both columns.

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Plaintiff seeks to add language to the "Legal Standard" Section.		
USAA DEFENDANTS' LANGUAGE		**PLAINTIFF'S LANGUAGE**
"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 his complaint but must disclose the facts he intends to rely on by affidavit or other proof." *Id*.		Plaintiff seeks to add to the end of USAA Defendants' language: "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).
USAA DEFENDANT'S ARGUMENT		**PLAINTIFF'S ARGUMENT**
Plaintiff's proposed additional language is unnecessary. The "mere scintilla" language adds nothing to the standard for summary judgment, which requires Plaintiff to show unto the Court evidence which establishes the existence of a genuine issue of material fact. Here, the Court has found that Plaintiff has not met this standard, regardless of the language.		When the standard of proof is a preponderance of the evidence, the "mere scintilla" language is a correct statement of the law. Plaintiff merely requests the order accurately state the law.

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Accordingly, the addition should not be included in the Court's Order. Further, most of the grounds for summary judgment raised by the USAA Defendants are legal in nature.		
Plaintiff seeks to delete language from the first paragraph of Section I.		
USAA DEFENDANTS' LANGUAGE		**PLAINTIFF'S LANGUAGE**
Plaintiff's breach of contract, breach of fiduciary duty, and negligence claims all arise out of Plaintiff's basic allegation that the beneficiaries of the USAA IRA were changed improperly. However, there is no evidence that the USAA Defendants caused the execution of the designation of beneficiary form at issue. The allegations in the Complaint focus on the USAA Defendants allegedly accepting a designation of beneficiary form purportedly executed by Ms. Krohn through an allegedly deficient power of attorney form. But, Plaintiff has conceded that Dr. Petit signed the designation of beneficiary form that designated Caroline and Leaman as the beneficiaries of the USAA IRA.		Plaintiff seeks to delete the second sentence: "However, there is no evidence that the USAA Defendants caused the execution of the designation of beneficiary form at issue."
USAA DEFENDANT'S ARGUMENT		**PLAINTIFF'S ARGUMENT**
The sentence which Plaintiff seeks to delete is accurate and necessary to ensure the record is accurate as well. Plaintiff has not cited any evidence stating that USAA Defendants caused the execution of the designation of beneficiary form which is at issue in this case. In		There is evidence that USAA's agent from Texas went directly to Dr. Petit's home in South Carolina, and discussed the beneficiary form, and it was USAA who sent him the form and the courtesy FedEx label. As such, Plaintiff disagrees there is

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fact, the evidence shows that Dr. Petit requested the change of beneficiary form, signed it himself, and returned it to USAA. Plaintiff conceded that Dr. Petit, himself, executed the form. Thus, the inclusion of this statement is appropriate and necessary here to accurately depict the facts of this case and the role of the USAA Defendants, and thus, should be included in the Order.		"no evidence" about USAA causing the execution of the form.
Revision to the second and third paragraphs of Section I		
USAA DEFENDANTS' LANGUAGE		**PLAINTIFF'S LANGUAGE**
Further, the designation of beneficiary form was signed by Dr. Petit a month before he executed a Durable General Power of Attorney in the Greenwood County Probate Court, which was later ratified by the Court on May 15, 2013, providing some evidence that Dr. Petit was competent at the time he signed the designation of beneficiary form. Plaintiff argued that Dr. Petit had been hospitalized in the days before he signed the designation of beneficiary form. However, Plaintiff has presented no medical evidence that he was incompetent. [1] The fact that Dr. Petit signed the designation of beneficiary form after being released from the hospital is not evidence that he was incompetent at the time he signed the designation of beneficiary form. Thus, the record shows that Dr. Petit, and not an Attorney-in-Fact or Krohn, signed the designation of beneficiary form, which designated Leaman and		Plaintiff edited much of the paragraphs after the introductory phrase, to: Further, the designation of beneficiary form was signed by Dr. Petit a month before he executed a Durable General Power of Attorney in the Greenwood County Probate Court, which was later ratified by the Court on May 15, 2013, indicating that Dr. Petit was competent at the time he signed the Durable Power of Attorney on February 27, 2012. Plaintiff argued Dr. Petit was incompetent to sign the form, and presented evidence that Dr. Petit signed the beneficiary form the day after being released from a lengthy hospital stay after undergoing two surgical procedures, and he was taking pain medication when he signed the change of beneficiary designation. (Krohn Depo. 33:8-12, 34:2-15, 34:20-25, 35:1-13, 37:18-24, 40:22-24, 46:5-7, 46:11-15, 48:19). When he was discharged from the hospital on January 22, 2012, Dr. Petit was not fully recovered. (Krohn Depo. at 46:5-7, 46:11-

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Caroline as his beneficiaries. Therefore, there is no dispute of material fact regarding the liability of the USAA defendants. Accordingly, the USAA Defendants' Motion for Summary Judgment must be granted. 1. There is no evidence in the record that the USAA defendants were ever informed of the hospitalization to cause them to question the validity of the signature of Dr. Petit.		15). However, the record shows that Dr. Petit, and not an Attorney-in-Fact or Krohn, signed the designation of beneficiary form, which designated Leaman and Caroline as his beneficiaries. The Court finds the evidence Plaintiff presented about Dr. Petit's competency is not enough to meet the requirement that a "mere scintilla of evidence" must be presented to defeat a motion for summary judgment. Accordingly, the USAA Defendants Motion for Summary Judgment must be granted. The fact that Dr. Petit signed the designation of beneficiary form the day after being released from an extended stay in the hospital that included surgical procedures and treatment in the critical or intensive care unit is not evidence that he was incompetent at the time he signed the designation of beneficiary form. Thus, the record shows that Dr. Petit, and not an Attorney-in-Fact or Krohn, signed the designation of beneficiary form, which designated Leaman and Caroline as his beneficiaries. Therefore, there is no dispute of material fact regarding the liability of the USAA defendants. Accordingly, the USAA Defendants' Motion for Summary Judgment must be granted
USAA DEFENDANT'S ARGUMENT		**PLAINTIFF'S ARGUMENT**
There are three disputes with the Plaintiff's edits: First, the USAA Defendants' language indicates that the ruling of the Greenwood County Probate Court on May 15, 2013 that Dr.		USAA's arguments about the language in this section cites to numerous factual disputes which undermine their argument for summary judgment.

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Petit was competent on February 27, 2012 provides some evidence that Dr. Petit was competent when he signed the change of beneficiary form a month prior, on January 23, 2012. Again, this is an accurate statement. While the parties dispute the exact significance of the Probate Court's ruling, it cannot be disputed that it is at least ***some*** evidence of Dr. Petit's competence on January 23, 2012. A ruling that a person is competent on a certain date is, at the very least, circumstantial evidence that the same person was competent one month prior. Thus, Plaintiff's proposed changes should not be accepted, and the USAA Defendants' language should be included in the Court's Order without any of Plaintiff's revisions. Second, Plaintiff strikes language in the USAA Defendants' Proposed Order which states that Plaintiff failed to set forth any medical evidence of Dr. Petit's alleged incompetency and replaces it with statements partially supported by Ms. Krohn's testimony. However, a review of the record will indicate that there is no medical evidence. Plaintiff cannot rely Ms. Krohn's, or her own, testimony that Dr. Petit had medical issues to establish his competence. Having medical issues and being incompetent are not the same. There is no expert testimony, no testimony from Dr. Petit's doctors, and no medical records in evidence. Further, the only evidence regarding pain medication is Ms.		First, if there is evidence of Dr. Petit's competency and incompetency, whether he was competent is a factual issue for a jury to decide. Second, USAA did not argue in their memo or at the hearing that medical evidence was required. In fact, this language was not included in USAA's initial draft, and was added only after Plaintiff requested her changes be included in the order. No party disputed Plaintiff's or Ms. Krohn's testimony about his condition, and Plaintiff's suggested language is accurate. Third, Plaintiff agrees there is no evidence that USAA knew of Dr. Petit's hospitalization, but that alone is not dispositive about whether USAA should question the validity of the signature because there is evidence that a USAA agent personally met with Dr. Petit, and it was this agent to whom the FedEx package containing the signed form was returned. If the USAA agent undertook to assist Dr. Petit, it should have been a red flag to him when the handwriting is obviously different from Dr. Petit's prior forms and from his prior signature.

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Krohn's recollection that Dr. Petit most likely would have been taking it following his return from the hospital. (Krohn Depo. at 78:21-23.) There is no evidence which shows he was impaired by pain medication at the time he signed the designation of beneficiary form at issue. Thus, the USAA Defendants' language is accurate and necessary to ensure that the Proposed Order contains a proper depiction of the record and, therefore, the Court should use the USAA Defendants' language in its Order without any of Plaintiff's revisions. Third, Plaintiff seeks to delete the footnote that states there is no evidence in the record that the USAA Defendants were ever informed of the hospitalization to cause them to question the validity of the signature of Dr. Petit. This is an accurate statement and shows the USAA Defendants cannot be responsible to act on facts never relayed to them.		
Revisions to Section II, Regarding Standing		
USAA DEFENDANTS' LANGUAGE		**PLAINTIFF'S LANGUAGE**
In this case, Plaintiff never had a vested right in the IRA funds. Although Plaintiff tries to argue that Dr. Petit's hospitalization could have impacted his ability to execute documents, no medical evidence has been presented to support this argument. Additionally, Plaintiff admits that Dr. Petit had the right to freely change the beneficiaries of his IRAs during his		Plaintiff adds a new second paragraph to this section: Plaintiff argued Dr. Petit lacked the ability to freely change the beneficiaries because he was an 87-year-old man with dementia hospitalized in the intensive or critical care unit for weeks, after undergoing two surgical procedures, and was taking pain medication when he signed the change of

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lifetime. (Plaintiff Depo. at 116:24-117:11; 156:5-157:10.) Further, Plaintiff was not the beneficiary of the IRA at the time of Dr. Petit's death. Dr. Petit changed his beneficiaries in 2012, from Plaintiff and her sister, to his granddaughters, Leaman and Caroline, who were also set as the beneficiaries of the Wells Fargo IRA. In 2015, Dr. Petit passed away, and the rights to the Wells Fargo IRA vested in the beneficiaries of the Wells Fargo IRA, Leaman and Caroline. (Compl. ¶ 16; Plaintiff Depo. at 106:9-15.) Thus, under South Carolina law, Plaintiff has no vested rights in the USAA IRA or the Wells Fargo IRA. Accordingly, Plaintiff lacks standing to bring this action, and therefore, the USAA Defendant's Motion for Summary Judgment must be granted.		beneficiary designation. (Krohn Depo. 33:8-12, 34:2-15, 34:20-25, 35:1-13, 37:18-24, 40:22-24, 46:5-7, 46:11-15, 48:19). The court finds this evidence presented by Plaintiff is less than a mere scintilla of evidence. Plaintiff also seeks to delete the second sentence of the of the final paragraph: In this case, Plaintiff never had a vested right in the IRA funds. Additionally, Plaintiff admits that Dr. Petit had the right to freely change the beneficiaries of his IRAs during his lifetime. (Plaintiff Depo. at 116:24-117:11; 156:5-157:10.) Further, Plaintiff was not the beneficiary of the IRA at the time of Dr. Petit's death. Dr. Petit changed his beneficiaries in 2012, from Plaintiff and her sister, to his granddaughters, Leaman and Caroline, who were also set as the beneficiaries of the Wells Fargo IRA. In 2015, Dr. Petit passed away, and the rights to the Wells Fargo IRA vested in the beneficiaries of the Wells Fargo IRA, Leaman and Caroline. (Compl. ¶ 16; Plaintiff Depo. at 106:9-15.) Thus, under South Carolina law, Plaintiff has no vested rights in the USAA IRA or the Wells Fargo IRA. Accordingly, Plaintiff lacks standing to bring this action, and therefore, the USAA Defendant's Motion for Summary Judgment must be granted.

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USAA DEFENDANT'S ARGUMENT		**PLAINTIFF'S ARGUMENT**
The USAA Defendants' second sentence of the last paragraph of this section is accurate and should not be deleted. It was Plaintiffs' burden to establish that Dr. Petit was incompetent. Plaintiff presented no evidence of incompetence and no medical evidence of any kind. Plaintiff cannot rely on her own, or Ms. Krohn's testimony as that Dr. Petit had a medical condition to establish incompetence. Thus, the USAA Defendants' language is accurate and necessary to ensure that the Proposed Order contains an accurate depiction of the record and, therefore, the Court should use the USAA Defendants' language in its Order. Further, the USAA Defendants believe Plaintiff's addition is unsupported by the record. There is no evidence that Dr. Petit had dementia ***at the time*** he executed the designation of beneficiary form, or that Dr. Petit was impaired by pain medicine at the time he signed the designation of beneficiary form. Lastly, the USAA Defendants again object to Plaintiff's addition of the "mere scintilla" language. The USAA Defendants showed that there is no genuine issue of material fact, and thus, that it is entitled to summary judgment. Thus, this language is unnecessary.		Again, USAA did not argue until the second draft of the proposed order that the Plaintiff must present medical evidence. Moreover, at the summary judgment stage, Plaintiff is not required to prove anything. Instead, Plaintiff, the non-moving party, is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment, and Plaintiff has presented her own and Defendant Krohn's testimonial evidence about Dr. Petit's incompetency. Plaintiff's suggested language is supported by the record. Plaintiff testified that Dr. Petit was exhibiting signs of dementia in 2010. (Plaintiff Depo. 151:21-25). Plaintiff testified that Dr. Petit was taking pain medication on January 24, 2012. (Plaintiff Depo. 75:7-17).

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Revisions to Section III.A, first paragraph regarding fiduciary duty.		
USAA DEFENDANTS' LANGUAGE		**PLAINTIFF'S LANGUAGE**
To establish a claim for breach of fiduciary duty, the plaintiff must prove "a breach of that duty owed **to the plaintiff** by the defendant[.]" *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335, 732 S.E.2d 166, 173 (2012) (emphasis added). Plaintiff has alleged that the USAA Defendants owed a fiduciary duty to Dr. Petit, not to her. (*See* Compl. ¶ 49.) Further, the Plaintiff could not articulate any fiduciary duty owed to her. Thus, the only party that could have brought a suit against the USAA Defendants for a claimed breach of a fiduciary duty owed to Dr. Petit is Dr. Petit's estate.		Plaintiff seeks to delete and replace the third sentence: To establish a claim for breach of fiduciary duty, the plaintiff must prove "a breach of that duty owed **to the plaintiff** by the defendant[.]" *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335, 732 S.E.2d 166, 173 (2012) (emphasis added). Plaintiff has alleged that the USAA Defendants owed a fiduciary duty to Dr. Petit, not to her. (*See* Compl. ¶ 49.) Plaintiff argued that because her rights in the IRA were vested on January 23, 2012, USAA Defendants owed a fiduciary duty to her. However, the court finds the only party that could have brought a suit against the USAA Defendants for a claimed breach of a fiduciary duty owed to Dr. Petit is Dr. Petit's estate.
USAA DEFENDANT'S ARGUMENT		**PLAINTIFF'S ARGUMENT**
The USAA Defendants object to Plaintiff's proposed changes because Plaintiff never articulated any argument that the USAA Defendants owed her, not Dr. Petit, a fiduciary duty. Her only arguments regarding a fiduciary duty related to the USAA Defendants' relationship with Dr. Petit, not the USAA Defendants' relationship with her, which was nonexistent. Accordingly, the USAA Defendants' language should be kept, and		Plaintiff argued the fiduciary duty was owed to her because her rights were vested. Defendant simply does not want Plaintiff's argument included because it disagrees with it. Interestingly, Defendant claims this language should not be included because Plaintiff did not make an argument about it, yet Defendant wants language about medical evidence in the order even though there was no argument about medical evidence.

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Plaintiff's proposed deletions and additions should not be incorporated into the Court's Order. Further, Plaintiff's argument that her rights vested on January 23, 2012 are not legally sound. By law, rights vest in two ways: upon the death of the accountholder, or when there is a legal impediment that prevents the accountholder from changing the beneficiaries (such as language in the contract or policy). Plaintiff has cited no law supporting the proposition that alleged temporary infirmity of an accountholder causes a beneficiary's rights to vest. Such an argument does not hold up to scrutiny. If the law was as Plaintiff proposes, a beneficiary's rights would vest and divest as an accountholder gained and regained "competence" from temporary health conditions. In fact, in this case, Plaintiff's rights would have divested—assuming that they could have ever vested in the first place—at least by February 27, 2012 because Dr. Petit was ruled to be competent on that day. This is not a reasonable interpretation of the law. In this case, it is undisputed that either Dr. Petit or his attorney in fact at all times had the legal ability to change beneficiaries. Accordingly, Plaintiff's arguments are not sound, and thus, should not be included in the Court's Order.		
Revisions to Section III.A, fourth paragraph regarding Dr. Petit's dealings with the USAA Defendants.		

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USAA DEFENDANTS' LANGUAGE		**PLAINTIFF'S LANGUAGE**
Plaintiff did not allege in her Complaint, nor present any evidence that the USAA Defendants held Dr. Petit's funds in trust or separated Dr. Petit's funds into a special account, or that the USAA Defendants undertook to advise Plaintiff or Dr. Petit as part of the services it offers. (Compl. ¶¶ 46-50.) It is only under such limited circumstances that South Carolina courts have been willing to entertain the potential existence of a fiduciary duty between banks and their customers. *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003); *Cowburn*, 366 S.C. at 43, 619 S.E.2d at 449. Plaintiff's only argument that the USAA Defendants undertook to advise Dr. Petit is that a Houston, Texas based agent traveled to Dr. Petit's home in Greenwood to discuss his account. (Krohn Depo. at 51:15-20). However, this alone is not evidence that the USAA Defendants undertook a fiduciary duty to advise Dr. Petit. Accordingly, there is no genuine issue as to material fact that the USAA Defendants did not owe Dr. Petit or the Plaintiff a fiduciary duty.		<u>Plaintiff seeks to edit the third and fourth sentences:</u> Plaintiff did not allege in her Complaint, nor present any evidence that the USAA Defendants held Dr. Petit's funds in trust or separated Dr. Petit's funds into a special account, or that the USAA Defendants undertook to advise Plaintiff or Dr. Petit as part of the services it offers. (Compl. ¶¶ 46-50.) It is only under such limited circumstances that South Carolina courts have been willing to entertain the potential existence of a fiduciary duty between banks and their customers. *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003); *Cowburn*, 366 S.C. at 43, 619 S.E.2d at 449. Plaintiff's only argument that the USAA Defendants undertook to advise Dr. Petit is that a Houston, Texas based agent traveled to Dr. Petit's home in Greenwood to advise him about his account. (Krohn Depo. at 51:15-20). However, this is not enough evidence to show that the USAA Defendants undertook a fiduciary duty to advise Dr. Petit. Accordingly, there is no genuine issue as to material fact that the USAA Defendants did not owe Dr. Petit or the Plaintiff a fiduciary duty.
USAA DEFENDANT'S ARGUMENT		**PLAINTIFF'S ARGUMENT**
The Plaintiff's edits are not supported by the record. While a USAA representative did discuss Dr. Petit's account with him, there is no evidence that any advice was given. In fact,		Plaintiff's arguments should be included to accurately reflect the arguments made by all parties. USAA's argument focuses on factual disputes

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when asked what was discussed, Ms. Krohn said: "[w]hat [Dr. Petit's] investments were, their value, and that Dr. Petit wanted to change the beneficiaries." (Krohn Depo. at 51:24 – 52:3.) A simple summary of person's IRA account balance and his beneficiaries is not evidence that the USAA Defendants advised Dr. Petit of anything. Accordingly, the USAA Defendants' proposed language should be included in the Court's Order without any of Plaintiff's prosed edits.		which undermines their argument for summary judgment.
Edits to Section III.B, second paragraph regarding Contract or Contractual Provision.		
USAA DEFENDANTS' LANGUAGE		**PLAINTIFF'S LANGUAGE**
Even if Plaintiff had standing to bring a claim for breach of contract, she does not specify a particular contract or any contractual provisions allegedly breached. (Compl. at ¶¶ 42-45.) The Complaint cites to the January 26, 2009 Power of Attorney between Dr. Petit and Ms. 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). However, 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 Ms. Krohn to perform tasks		Plaintiff edited the second paragraph to change the first sentence and the last sentence as follows: Plaintiff alleges that Dr. Petit entered into a contract with USAA Defendants when Dr. Petit deposited funds into an IRA at USAA to which Plaintiff is a third party beneficiary. (Compl. at ¶¶ 42-45.) The Complaint also cites to the January 26, 2009 Power of Attorney between Dr. Petit and Ms. 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). However, the January 26, 2009 Power of Attorney is not a contract between

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for Dr. Petit. Plaintiff 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 that was allegedly breached. Plaintiff does not allege that any provisions of any agreement between the USAA Defendants and Plaintiff or Dr. Petit were breached, and therefore, there is no genuine issue as to material fact that there is no breach of contract.		Dr. Petit and the USAA Defendants, but an instrument purporting to confer authority on Ms. Krohn to perform tasks for Dr. Petit. Plaintiff 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 that was allegedly breached. However, Plaintiff's Complaint states, "Defendants USAA breached this contract in several ways, including but not limited to, its use of a Power of Attorney that did not comply with South Carolina law." Nevertheless, there is no genuine issue as to material fact that there is no breach of contract.
USAA DEFENDANT'S ARGUMENT		**PLAINTIFF'S ARGUMENT**
The USAA Defendants argued that Plaintiff failed to point to (or present evidence) regarding which contract, or to which contractual provision, the USAA Defendants allegedly breached. Plaintiff merely alleges conduct that supposedly breached a contract, but without a contract or a specific contractual obligation to which to compare the alleged conduct, there can be no real assessment of whether there was a breach. Plaintiff's proposed changes to the Order miss this important aspect as to why there was no breach. Plaintiff simply failed to provide any evidence of what contractual provision was breached by the conduct Plaintiff alleges occurred. Accordingly, for a full and accurate		In the Complaint, Plaintiff alleges the IRA was a contract which was breached, and has maintained that position throughout litigation. Regardless of the final decision, orders should accurately reflect the arguments presented by all parties. Defendant's proposed language ignores and excludes Plaintiff's position. Just because they disagree with Plaintiff's position does not mean it should be excluded from the order.

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analysis of the case and the law by which the Court makes it ruling, the USAA Defendants' proposed language should remain unchanged in the Court's Order.		
Addition to Paragraph III.C, regarding the lack of a common law duty to plaintiff.		
USAA DEFENDANTS' LANGUAGE		**PLAINTIFF'S LANGUAGE**
The USAA Defendants owed no common law duty to the Plaintiff. Plaintiff contends that the USAA Defendants had a duty to ensure that Dr. Petit was the person signing his designation of beneficiary forms. As discussed above, Plaintiff has conceded that Dr. Petit signed the designation of beneficiary form, although Plaintiff argued Dr. Petit was incompetent to sign it on January 23, 2012. Additionally, 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*, 366 S.C. at 46, 619 S.E.2d at 451. 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). "If there is no duty, the defendant is entitled to judgment as a matter of law." *Id.* From the		Plaintiff adds a new sentence, third from the end of the paragraph: The USAA Defendants owed no common law duty to the Plaintiff. Plaintiff contends that the USAA Defendants had a duty to ensure that Dr. Petit was the person signing his designation of beneficiary forms. As discussed above, Plaintiff has conceded that Dr. Petit signed the designation of beneficiary form, although Plaintiff alleges Dr. Petit was incompetent to sign it on January 23, 2012. Additionally, 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*, 366 S.C. at 46, 619 S.E.2d at 451. 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). "If there is no duty, the defendant is entitled to judgment as a matter of law." *Id.* The

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material submitted in this matter, the Court finds no common law duty owed by the USAA defendants to Plaintiff. Defendant's motion for summary judgment must be granted.		evidence presented by Plaintiff that USAA Defendants undertook to advise Dr. Petit is not enough to defeat Defendant's motion for summary judgment. From the material submitted in this matter, the Court finds no common law duty owed by the USAA defendants to Plaintiff. Defendant's motion for summary judgment must be granted.
USAA DEFENDANT'S ARGUMENT		**PLAINTIFF'S ARGUMENT**
The record does not support Plaintiff's suggested added language. While a USAA representative did discuss Dr. Petit's account with him, there is no evidence that any advice was given. In fact, the discussion involved: "[w]hat [Dr. Petit's] investments were, their value, and that Dr. Petit wanted to change the beneficiaries." (Krohn Depo. at 51:24 – 52:3.) A simple summary of person's IRA account balance and his beneficiaries is not evidence that the USAA Defendants advised Dr. Petit of anything. Accordingly, the USAA Defendants' proposed language should be included in the Court's Order without Plaintiff's prosed edits.		Again, Defendant does not want language about Plaintiff's arguments included. Even if Defendant disagrees with Plaintiff's argument, it doesn't negate that Plaintiff made the argument, and an order should accurately reflect the legal arguments presented by all parties.

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Inclusion of Statute of Limitations Section in Plaintiff's Version of the Proposed Order as Section IV.		
USAA DEFENDANTS' LANGUAGE		**PLAINTIFF'S LANGUAGE**
Included as a Footnote: The USAA Defendants also raised issues regarding the statute of limitations. Because of the rulings made in this Order, the Court finds that it need not reach those issues.		**IV. Plaintiff's claims are barred by the Statute of Limitations.** Breach of contract, breach of fiduciary duty, and negligence claims all have a statute of limitations of three years. S.C. Code Ann. § 15-3-530. "The three-year statute of limitations begins to run when the underlying cause of action reasonably ought to have been discovered." *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct. App. 2011) (internal quotations omitted). "The test for whether the injured party knew or should have known about the cause of action is objective rather than subjective." *Id.* "Therefore, this court must determine whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party may exist." *Id.* Circumstances arose which should have put Plaintiff and/or Dr. Petit, or his Attorney-in-Fact, Mr. Dorn, on notice of the wrongs Plaintiff alleges prior to November 7, 2014, three years prior to the filing of the Complaint. First, Plaintiff claims that Dr. Petit was sent an improper Power of Attorney form in 2009. (*See* Compl. ¶¶ 10, 44, 49, 53.) If this was truly a breach of any duty, Dr. Petit, the accountholder should

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		have reasonably discovered the breach, as he received and signed the form. Accordingly, the statute of limitations on all claims arising out of the allegedly improper Power of Attorney form began to run in 2009, when the form was sent and executed, and therefore, Plaintiff's Complaint, which was filed in 2017, is well outside of the three-year statute of limitations starting in 2009. Additionally, to the extent Plaintiff is attempting to assert any claim regarding the designation of beneficiary form, the statute of limitations on such a claim began to run in 2012. In 2012, Dr. Petit changed the beneficiaries of his own account. Again, if this were truly a breach of any duty, Dr. Petit and/or his Attorney-in-Fact, Mr. Dorn, should have reasonably discovered that his beneficiaries were changed in 2012 because he signed the designation of beneficiary form and the form was requested from, sent to, and returned from Dr. Petit's record address. Thus, because he should have reasonably discovered that his beneficiaries were changed, any claim arising out of that change must have been brought within three years of its discovery Plaintiff's Complaint, which was filed in 2017, is well outside of the three-year statute of limitations starting in 2012. Finally, in the summer of 2014, Dr. Petit's IRA was transferred from the USAA Defendants to Wells Fargo. (Compl. ¶ 10.) At this time, Dr. Petit's Attorney-in-Fact, Mr. Dorn, set the beneficiaries for the Wells Fargo IRA. Now more

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		than 4 years after the USAA Defendants have had any control over Dr. Petit's account, the USAA Defendants are forced to defend against these allegations. "The purpose of the statute of limitations is to put to rest claims after the passage of time." *Nowlin v. Gen. Tel. Co.*, 310 S.C. 183, 186, 426 S.E.2d 114, 116 (Ct. App. 1992), *aff'd*, 314 S.C. 352, 444 S.E.2d 508 (1994). Allowing Plaintiff's claims to continue is in direct conflict with this purpose, and thus, Plaintiff's claims are time barred. Plaintiff presented evidence that in the fall of 2014, Dr. Petit told Ms. Petit that the beneficiaries of the IRA had not changed. (Petit Depo. at 163:3-18). Plaintiff argued that considering Dr. Petit's fragile health on January 23, 2012, as detailed above, coupled with his 2014 statement that the beneficiaries had not changed, a jury could find Dr. Petit himself did not know that the beneficiaries changed. If Dr. Petit did not even know the beneficiaries were changed, then it would have been impossible for him to tell his daughter. However, the court finds that this is not sufficient evidence to defeat USAA Defendants' motion for summary judgment.
USAA DEFENDANT'S ARGUMENT		**PLAINTIFF'S ARGUMENT**
While the USAA Defendants believe that Summary Judgment could have been grated based on its arguments regarding the statute of limitations, these arguments were not addressed at		Defendant included this section in its initial draft. After reviewing Plaintiff's suggested changes to the proposed order, it completely removed this section from its proposed order. In its instructions,

oral argument and the USAA Defendants believe that the Court does not need to reach this issue because there were multiple other grounds for granting their Motion for Summary Judgment. Accordingly, the inclusion of this entire argument into the Court's order is unnecessary.		the Court did not limits its provisional grant of summary judgment to certain arguments, and therefore, the grounds argued by all parties should be presented.

The Parties hereby respectfully submit this memorandum regarding the remaining disputes in the Proposed Order.

Respectfully Submitted,

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Respectfully Submitted,

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STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)))	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
Karen Petit, Plaintiff, vs. Phyllis Jean Krohn, USAA Federal Savings Bank, and USAA Investment Management Co., Defendants.	))))))))))))	Civil Action No. 2017-CP-24-01343 **ORDER**

Defendants USAA Federal Savings Bank, and USAA Investment Management Co. (collectively "the USAA Defendants"), came before the Court for hearing on September 4, 2019. Jane H. Merrill appeared on behalf of Karen Petit ("Plaintiff"). Joshua S. Nasrollahi appeared on behalf of Phyllis Jean Krohn ("Krohn"). William S. Brown appeared on behalf of the USAA Defendants. Having heard the arguments and reviewed the record in this case and the submissions of the parties, the USAA Defendant's Motion for Summary Judgment is granted.

INTRODUCTION AND UNDISPUTED FACTS

Dr. Edward L. Petit ("Dr. Petit") held an Individual Retirement Account ("IRA") at USAA Federal Savings Bank (from 2002-2007), and subsequently with USAA Investment Management Co., from 2007 until 2014 (the "USAA IRA"). (USAA Def. Memo. at **Ex. A**; *Id*. at **Ex. B**.) On January 15, 2007, Dr. Petit completed a designation of beneficiary form, naming his two daughters, Plaintiff and Kathy Elise Petit ("Kathy"), as his beneficiaries. (*Id*. at **Ex. C**.)

On January 26, 2009, Dr. Petit completed a USAA Power of Attorney, naming Defendant Phyllis Krohn ("Ms. Krohn") as his Attorney-in-Fact. (*Id*. at **Ex. D**; Compl. ¶ 11.) Plaintiff claims that this Power of Attorney form prohibited the Attorney-in-Fact from changing the beneficiaries

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of the USAA IRA. (Compl. ¶ 14.) Ms. Krohn did not sign or execute any documents under the January 26, 2009 USAA Power of Attorney. (Plaintiff Depo. at 151:11-20, 164:18-165:1, 166:25-167:10.) On November 9, 2010, Dr. Petit completed a subsequent USAA Power of Attorney, again naming Ms. Krohn as his Attorney-in-Fact. (USAA Def. Memo. at **Ex. G**.) The November 9, 2010 Power of Attorney did not prohibit the Attorney-in-Fact from changing the USAA IRA's beneficiaries. (*Id*.) Again, the evidence does not show, nor does Plaintiff contend, that Ms. Krohn signed or executed any documents under the November 9, 2010 Power of Attorney. (Plaintiff Depo. at 151:11-20; Krohn Depo. at 76:12-19.)

On January 23, 2012, Dr. Petit executed a designation of beneficiary form which designated his two Granddaughters, Leaman Mosby ("Leaman") and Caroline Mosby ("Caroline") as primary beneficiaries, and Plaintiff and her sister Kathy as secondary beneficiaries. (*See* USAA Def. Memo. at **Ex. I**; Compl. ¶ 6.) The form was filled out by Ms. Krohn, but signed by Dr. Petit.

On February 27, 2012, Dr. Petit executed a Durable General Power of Attorney, naming Henry A. Dorn, ("Mr. Dorn") as his Attorney-in-Fact. (USAA Def. Memo. at **Ex. J**; *see also id.* at **Ex. K**.) On May 15, 2013, the Probate Court of Greenwood County declared Dr. Petit incompetent, however, it found that Dr. Petit was competent to execute 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*.)

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. ¶ 10; Plaintiff Depo. at 96:13-24.) The beneficiaries of the Wells Fargo IRA were designated as Leaman and Caroline. (Plaintiff Depo. at 106:9-15.)

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On March 18, 2015, Dr. Petit passed away. (Compl. ¶ 4.) He was survived by Plaintiff, and his two granddaughters, Leaman and Caroline. (*Id*. ¶ 6.) At the time of his death, Dr. Petit's Wells Fargo IRA was worth approximately $454,332, and his USAA IRA was closed. (*Id*. ¶ 10; Plaintiff Depo. at 96:13-24.) Wells Fargo released the funds to Leaman and Caroline, as they were the beneficiaries of the Wells Fargo IRA. (Compl. ¶ 16; Plaintiff Depo. at 106:9-15.)

On November 8, 2017, Plaintiff filed this action. Plaintiff asserted three causes of action against the USAA Defendants: (1) breach of contract, (2) breach of fiduciary duty, and (3) negligence. Plaintiff's claims are all based on the allegation that the beneficiaries of the USAA IRA were improperly changed. (*See* Compl.)

LEGAL STANDARD

"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 his complaint but must disclose the facts he intends to rely on by affidavit or other proof." *Id*. "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LEGAL FINDINGS

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I. There is no evidence that Dr. Petit's beneficiaries were improperly changed.

Plaintiff's breach of contract, breach of fiduciary duty, and negligence claims all arise out of Plaintiff's basic allegation that the beneficiaries of the USAA IRA were changed improperly. The allegations in the Complaint focus on the USAA Defendants allegedly accepting a designation of beneficiary form purportedly executed by Ms. Krohn through an allegedly deficient power of attorney form. But, Plaintiff has conceded that Dr. Petit signed the designation of beneficiary form that designated Caroline and Leaman as the beneficiaries of the USAA IRA.

Further, the designation of beneficiary form was signed by Dr. Petit a month before he executed a Durable General Power of Attorney in the Greenwood County Probate Court, which was later ratified by the Court on May 15, 2013, indicating that Dr. Petit was competent at the time he signed the Durable Power of Attorney on February 27, 2012. Plaintiff argued Dr. Petit was incompetent to sign the form, and presented evidence that Dr. Petit signed the beneficiary form the day after being released from a lengthy hospital stay after undergoing two surgical procedures, and he was taking pain medication when he signed the change of beneficiary designation. (Krohn Depo. 33:8-12, 34:2-15, 34:20-25, 35:1-13, 37:18-24, 40:22-24, 46:5-7, 46:11-15, 48:19). When he was discharged from the hospital on January 22, 2012, Dr. Petit was not fully recovered. (Krohn Depo. at 46:5-7, 46:11-15). However, the record shows that Dr. Petit, and not an Attorney-in-Fact or Krohn, signed the designation of beneficiary form, which designated Leaman and Caroline as his beneficiaries. The Court finds the evidence Plaintiff presented about Dr. Petit's competency is not enough to meet the requirement that a "mere scintilla of evidence" must be presented to defeat a motion for summary judgment. Accordingly, the USAA Defendants Motion for Summary Judgment must be granted.

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The fact that Dr. Petit signed the designation of beneficiary form the day after being released from an extended stay in the hospital that included surgical procedures and treatment in the critical or intensive care unit is not evidence that he was incompetent at the time he signed the designation of beneficiary form. Thus, the record shows that Dr. Petit, and not an Attorney-in-Fact or Krohn, signed the designation of beneficiary form, which designated Leaman and Caroline as his beneficiaries. Therefore, there is no dispute of material fact regarding the liability of the USAA defendants. Accordingly, the USAA Defendants' Motion for Summary Judgment must be granted.

II. Plaintiff lacks standing to assert her causes of action.

Furthermore, the Plaintiff lacks standing to bring this lawsuit. Under South Carolina law, the beneficiary of an IRA has no right to sue for the benefits until her rights 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 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 . . . .").

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Plaintiff argued Dr. Petit lacked the ability to freely change the beneficiaries because he was an 87-year-old man with dementia hospitalized in the intensive or critical care unit for weeks, after undergoing two surgical procedures, and was taking pain medication when he signed the change of beneficiary designation. (Krohn Depo. 33:8-12, 34:2-15, 34:20-25, 35:1-13, 37:18-24, 40:22-24, 46:5-7, 46:11-15, 48:19). The court finds this evidence presented by Plaintiff is less than a mere scintilla of evidence.

In this case, Plaintiff never had a vested right in the IRA funds. Additionally, Plaintiff admits that Dr. Petit had the right to freely change the beneficiaries of his IRAs during his lifetime.[1] (Plaintiff Depo. at 116:24-117:11; 156:5-157:10.) Further, Plaintiff was not the beneficiary of the IRA at the time of Dr. Petit's death. Dr. Petit changed his beneficiaries in 2012, from Plaintiff and her sister, to his granddaughters, Leaman and Caroline, who were also set as the beneficiaries of the Wells Fargo IRA. In 2015, Dr. Petit passed away, and the rights to the Wells Fargo IRA vested in the beneficiaries of the Wells Fargo IRA, Leaman and Caroline. (Compl. ¶ 16; Plaintiff Depo. at 106:9-15.) Thus, under South Carolina law, Plaintiff has no vested rights in the USAA IRA or the Wells Fargo IRA. Accordingly, Plaintiff lacks standing to bring this action, and therefore, the USAA Defendant's Motion for Summary Judgment must be granted.

III. The Plaintiff's individual causes of action fail as a matter of law.

A. The USAA Defendants did not owe a fiduciary duty to the Plaintiff.

To establish a claim for breach of fiduciary duty, the plaintiff must prove "a breach of that duty owed **to the plaintiff** by the defendant[.]" *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335, 732 S.E.2d 166, 173 (2012) (emphasis added). Plaintiff has alleged that the USAA

[1] Additionally, Mr. Dorn had the ability to designate and change the beneficiaries of Dr. Petit's IRAs during Dr. Petit's lifetime. (Plaintiff Depo. at 156:5-157:10.)

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Defendants owed a fiduciary duty to Dr. Petit, not to her. (*See* Compl. ¶ 49.) Plaintiff argued that because her rights in the IRA were vested on January 23, 2012, USAA Defendants owed a fiduciary duty to her. However, the court finds the only party that could have brought a suit against the USAA Defendants for a claimed breach of a fiduciary duty owed to Dr. Petit is Dr. Petit's estate.[2]

"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 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). A fiduciary relationship is an inherently personal relationship and arises out of a specific relationship between two parties. Thus, there can be no third-party beneficiary to a fiduciary relationship. Here, the Plaintiff and the USAA Defendants had no relationship, and a fiduciary duty between the Plaintiff and the USAA Defendants cannot arise out of Dr. Petit's relationship with the USAA Defendants. Accordingly, because the Plaintiff had no relationship with the USAA Defendants, there is no genuine dispute as to material fact that the USAA Defendants did not owe Plaintiff a fiduciary duty.

Nevertheless, the USAA defendants did not owe a fiduciary duty to either Dr. Petit or Plaintiff. 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 v. South Carolina Natl. Bank*, 288 S.C. 560, 562, 343 S.E.2d 667, 668 (Ct.App. 1986). The court makes the determination regarding the equitable issue of whether a fiduciary relationship exists. *Cowburn v. Leventis*, 366 S.C. 20, 37, 619 S.E.2d 437, 447 (Ct.App. 2005).

[2] Any claims by Dr. Petit's estate are barred by the statute of limitations because the IRA funds were disbursed by Wells Fargo more than three years ago. *See* S.C. Code Ann. § 15-3-530.

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Plaintiff did not allege in her Complaint, nor present any evidence that the USAA Defendants held Dr. Petit's funds in trust or separated Dr. Petit's funds into a special account, or that the USAA Defendants undertook to advise Plaintiff or Dr. Petit as part of the services it offers. (Compl. ¶¶ 46-50.) It is only under such limited circumstances that South Carolina courts have been willing to entertain the potential existence of a fiduciary duty between banks and their customers. *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003); *Cowburn*, 366 S.C. at 43, 619 S.E.2d at 449. Plaintiff's only argument that the USAA Defendants undertook to advise Dr. Petit is that a Houston, Texas based agent traveled to Dr. Petit's home in Greenwood to advise him about his account. (Krohn Depo. at 51:15-20). However, this is not enough evidence to show that the USAA Defendants undertook a fiduciary duty to advise Dr. Petit. Accordingly, there is no genuine issue as to material fact that the USAA Defendants did not owe Dr. Petit or the Plaintiff a fiduciary duty.

Further, although not recognized as one of two scenarios that create a fiduciary duty in a banking relationship under South Carolina law, Plaintiff alleged that the services the USAA Defendants provided for Dr. Petit, specifically, providing him with a Power of Attorney form, created a fiduciary duty. However, providing ministerial services, such as supplying form documents incidental to the IRA account does not create a fiduciary duty. *In re Int'l Payment Grp., Inc.*, 733 F. App'x 98, 104 (4th Cir. 2018) (applying South Carolina law, holding that even where a depositor received unique services, no fiduciary duty was created because the relationship "did not differ significantly from the average depositor's relationship with the bank.") The USAA Defendants merely provided its client, Dr. Petit, with standard Power of Attorney and designation of beneficiary forms that he requested. This cannot be said to differ from the services that are

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provided to the average depositor. No fiduciary duty was owed to the Plaintiff or Dr. Petit, and Plaintiff's claim for breach of fiduciary duty fails as a matter of law.

Accordingly, there is no genuine dispute as to material fact that the USAA Defendants did not owe the Plaintiff a fiduciary duty and summary judgment must be granted.

B. Plaintiff has presented no evidence of a duty created by any contract.

As discussed above, Plaintiff had no vested interest in the USAA IRA because Dr. Petit retained the ability to change beneficiaries during his lifetime, and because his granddaughters were the primary beneficiaries at the time Dr. Petit passed away. (Plaintiff Depo. at 116:24-117:11, 106:9-15; *see* USAA Def. Memo. at **Ex. I**.) Accordingly, the only legal duty was owed to Dr. Petit, the accountholder, and thus, the Plaintiff has no standing to bring this action.

Plaintiff alleges that Dr. Petit entered into a contract with USAA Defendants when Dr. Petit deposited funds into an IRA at USAA to which Plaintiff is a third party beneficiary. (Compl. at ¶¶ 42-45.) The Complaint also cites to the January 26, 2009 Power of Attorney between Dr. Petit and Ms. 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). However, 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 Ms. Krohn to perform tasks for Dr. Petit. Plaintiff 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 that was allegedly breached. However, Plaintiff's Complaint states, "Defendants USAA breached this contract in several ways, including but not

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limited to, its use of a Power of Attorney that did not comply with South Carolina law." Nevertheless, there is no genuine issue as to material fact that there is no breach of contract.

C. The USAA Defendants owed no common law duty to the Plaintiff.

The USAA Defendants owed no common law duty to the Plaintiff. Plaintiff contends that the USAA Defendants had a duty to ensure that Dr. Petit was the person signing his designation of beneficiary forms. As discussed above, Plaintiff has conceded that Dr. Petit signed the designation of beneficiary form, although Plaintiff argued Dr. Petit was incompetent to sign it on January 23, 2012. Additionally, 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*, 366 S.C. at 46, 619 S.E.2d at 451. 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). "If there is no duty, the defendant is entitled to judgment as a matter of law." *Id*. The evidence presented by Plaintiff that USAA Defendants undertook to advise Dr. Petit is not enough to defeat Defendant's motion for summary judgment. From the material submitted in this matter, the Court finds no common law duty owed by the USAA defendants to Plaintiff. Defendant's motion for summary judgment must be granted.

IV. Plaintiff's claims are barred by the Statute of Limitations.

Breach of contract, breach of fiduciary duty, and negligence claims all have a statute of limitations of three years. S.C. Code Ann. § 15-3-530. "The three-year statute of limitations begins to run when the underlying cause of action reasonably ought to have been discovered." *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct.

App. 2011) (internal quotations omitted). "The test for whether the injured party knew or should have known about the cause of action is objective rather than subjective." *Id*. "Therefore, this court must determine whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party may exist." *Id*. Circumstances arose which should have put Plaintiff and/or Dr. Petit, or his Attorney-in-Fact, Mr. Dorn, on notice of the wrongs Plaintiff alleges prior to November 7, 2014, three years prior to the filing of the Complaint.

First, Plaintiff claims that Dr. Petit was sent an improper Power of Attorney form in 2009. (*See* Compl. ¶¶ 10, 44, 49, 53.) If this was truly a breach of any duty, Dr. Petit, the accountholder should have reasonably discovered the breach, as he received and signed the form. Accordingly, the statute of limitations on all claims arising out of the allegedly improper Power of Attorney form began to run in 2009, when the form was sent and executed, and therefore, Plaintiff's Complaint, which was filed in 2017, is well outside of the three-year statute of limitations starting in 2009.

Additionally, to the extent Plaintiff is attempting to assert any claim regarding the designation of beneficiary form, the statute of limitations on such a claim began to run in 2012. In 2012, Dr. Petit changed the beneficiaries of his own account. Again, if this were truly a breach of any duty, Dr. Petit and/or his Attorney-in-Fact, Mr. Dorn, should have reasonably discovered that his beneficiaries were changed in 2012 because he signed the designation of beneficiary form and the form was requested from, sent to, and returned from Dr. Petit's record address. Thus, because he should have reasonably discovered that his beneficiaries were changed, any claim arising out of that change must have been brought within three years of its discovery Plaintiff's Complaint, which was filed in 2017, is well outside of the three-year statute of limitations starting in 2012.

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Finally, in the summer of 2014, Dr. Petit's IRA was transferred from the USAA Defendants to Wells Fargo. (Compl. ¶ 10.) At this time, Dr. Petit's Attorney-in-Fact, Mr. Dorn, set the beneficiaries for the Wells Fargo IRA. Now more than 4 years after the USAA Defendants have had any control over Dr. Petit's account, the USAA Defendants are forced to defend against these allegations. "The purpose of the statute of limitations is to put to rest claims after the passage of time." *Nowlin v. Gen. Tel. Co.*, 310 S.C. 183, 186, 426 S.E.2d 114, 116 (Ct. App. 1992), *aff'd*, 314 S.C. 352, 444 S.E.2d 508 (1994). Allowing Plaintiff's claims to continue is in direct conflict with this purpose, and thus, Plaintiff's claims are time barred.

Plaintiff presented evidence that in the fall of 2014, Dr. Petit told Ms. Petit that the beneficiaries of the IRA had not changed. (Petit Depo. at 163:3-18). Plaintiff argued that considering Dr. Petit's fragile health on January 23, 2012, as detailed above, coupled with his 2014 statement that the beneficiaries had not changed, a jury could find Dr. Petit himself did not know that the beneficiaries changed. If Dr. Petit did not even know the beneficiaries were changed, then it would have been impossible for him to tell his daughter. However, the court finds that this is not sufficient evidence to defeat USAA Defendants' motion for summary judgment.

CONCLUSION

For the reasons set forth above, as to all three causes of action the USAA Defendants' Motion to for Summary Judgment is GRANTED.

IT IS SO ORDERED

Honorable Donald Hocker
Presiding Judge, Eighth Judicial Circuit

_____, South Carolina
_____, 2019

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STATE OF SOUTH CAROLINA	COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	EIGHTH JUDICIAL CIRCUIT
KAREN PETIT, *Plaintiff,* -*v*- PHYLLIS VAN SWOL *f/k/a/* PHYLLIS KROHN et al., *Defendants*.	Case No.: 2017-CP-24-01343

ORDER

Hocker, J.

This Matter Came Before the Court for a hearing on the Defendant Phyllis Van Swol's Motion for Summary Judgment. Heard by the Court sitting in Laurens County, Jane H. Merrill, Esq., appeared for the Plaintiff, and Joshua S. Nasrollahi, Esq., and William S. Brown, Esq., appeared for the Mrs. Van Swol and Defendants USAA Federal Savings Bank, and USAA Investment Management Co. respectively. On review of the file, and the motions and related documents submitted, and after considering the applicable law, I grant Mrs. Van Swol's motion and grant summary judgment in her favor.

FACTS

The Plaintiff is the daughter of the decedent Dr. Edward Petit. The Defendant Phyllis Van Swol (F/K/A/ Phyllis Krohn") was a "companion" of the decedent. On or around January 15, 2007, the decedent executed a form with the Defendant USAA Investment Management Co. (hereinafter "USAA") declaring his daughters as the primary beneficiaries of his IRA. Subsequently, in 2009, the decedent executed a form

Exhibit C 02

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USAA power attorney in favor of the Defendant, which was never used by the Defendant. In 2012, the decedent changed the primary beneficiaries for his IRA to his grandchildren. The form in question was allegedly completed by the Defendant but signed by the decedent. That same year, the decedent granted Henry Dorn a durable general power of attorney, the validity of which was upheld by the Greenwood County Probate Court during capacity proceedings involving the decedent in 2014. The Defendant never executed any documents pursuant to the USAA powers of attorney.

Sometime in mid-2014, Mr. Dorn transferred the funds from the USAA IRA into an IRA he established with Wells Fargo, N.A. When Mr. Dorn set up the new IRA, he left the beneficiaries as the decedent had declared them in his 2012 declaration. The Defendant had no involvement with the establishment of the Wells Fargo IRA or the transfer of funds from USAA to Wells Fargo. The decedent passed away in 2015, at which point Peter Manning was appointed as the personal representative of the decedent's estate. Pursuant to the beneficiary designation established by Mr. Dorn, Wells Fargo distributed the funds held by it to the decedent's granddaughters. This lawsuit followed several years later.

ANALYSIS

The Plaintiff asserts four causes of action against the Defendant: tortious interference with a contract, breach of fiduciary duty, negligence, and undue influence. The Defendant's request for summary judgment as to each count is addressed below.

I. Tortious Interference with a Contract

The Plaintiff first asserts a cause of action for tortious interference with a contract. "The elements of a cause of action for tortious interference with contract are: (1)

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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). "[A]n action for tortious interference protects 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)(emphasis supplied). "Thus, '[t]he actions of a principal's agent are afforded a qualified privilege from liability for tortious interference with the principal's contract.'" Dutch Fork Dev. Grp. II, LLC v. SEL Properties, LLC, 406 S.C. 596, 605, 753 S.E.2d 840, 844 (2012)(quoting CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc., 357 F.3d 375, 385 (3d Cir. 2004))(alterations in the original). Moreover, as the contract at issue is an IRA case, even as a designated beneficiary, the Plaintiff has only an "expectancy in the benefits" which do not fully vest until the decedent passes away. Waller v. Pope, 715 So. 2d 958, 960 (Fla. Dist. Ct. App. 1998)(citing Cooper v. Muccitelli, 661 So.2d 52, 53 (Fla. 2d DCA 1995), *aff'd,* 682 So.2d 77 (Fla.1996)). Compare 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.") and Waters v. S. Farm Bureau Life Ins. Co., 365 S.C. 519, 523, 617 S.E.2d 385, 387 (Ct. App. 2005)(quoting

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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.'").

While there existed two legal contracts in this case—between the decedent and USAA and then later between the decedent and Wells Fargo—the Plaintiff was not a party to either contracts. Most importantly no evidence has been presented that demonstrates that the Plaintiff had a vested interest in either contract. The Plaintiff's previous status as a beneficiary to the decedent's account does create in her a vested interest. 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."); Luszcz v. Lavoie, 787 So. 2d 245, 248 (Fla. Dist. Ct. App. 2001)("[A] beneficiary's rights to proceeds [of an IRA] do not attach until the IRA owner's death. Until then, the beneficiary merely has an expectancy in the IRA because until the owner's death, the owner can do with the IRA as desired, including changing the beneficiary designation or cashing out the account altogether.") Because the Plaintiff was not a party to the USAA contract, she cannot assert or recover on a tortious interference cause of action. Cf. Ross v. Life Ins. Co. of Virginia, 273 S.C. 764, 766, 259 S.E.2d 814, 815 (1979)(citing Smith v. Citizens & Southern National Bank of S.C., 241 S.C. 285, 128 S.E.2d 112 (1962); Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945)) ("Moreover, the South Carolina cases recognizing a cause of action for tortious interference with a

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contract have been limited to situations where an action was brought against third persons rather than parties to the contract.").

II. Breach of Fiduciary Duty

Next, the Plaintiff alleges that the Defendant breached her fiduciary duty to the decedent by changing the beneficiaries of the decedent's former IRA. "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." RFT Mgmt. Co. v. Tinsley & Adams, 399 S.C. 322, 335-336, 732 S.E.2d 166 (2012)(citing Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct.App.2004); Spence v. Wingate, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011).

It is clear from the evidence submitted that Mrs. Van Swol owed the decedent as fiduciary duty when she given a power attorney by him. The Plaintiff presents no evidence or legal principle, however, that this fiduciary duty extends to her as a beneficiary of the account. Even if the Defendant breached a fiduciary duty owed to the decedent (which she does not concede), this is a breach of a duty owed by the Defendant to the *decedent* and not the Plaintiff. In this way, any resulting injury from such a breach would be to the decedent's estate, not to the Plaintiff personally. For this reason, summary judgment as to the Plaintiff's second cause of action against Mrs. Van Swol must be granted in favor of Mrs. Van Swol.

III. Negligence

Thereafter, the Plaintiff asserts that Mrs. Van Swol's conduct in this case arises to the level of negligence. This claim must also fail because the Plaintiff cannot show that

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any of her resulting damages are non-economic. The South Carolina Supreme Court has long held that "tort liability only lies where the damage done is to other property or is personal injury." Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 341, 384 S.E. 2d. 730 (1989). This rule, known as the economic loss rule, finds its bedrock in products liability law but the principles which underpin its application are particularly prescient here. In Sapp v. Ford Motor Co., 687 S.E. 2d 47 (2009), the Supreme Court expressed that it was "cautious in permitting negligence actions where there is neither personal injury nor property damage." Id. at 149. The Court explained in Sapp,

> [t]he purpose of the economic loss rule is to define the line between recovery in tort and recovery in contract. Contract law seeks to protect the expectancy interests of the parties. Tort law, on the other hand, seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property.

This statement of public policy is abundantly applicable here. This is not a matter of personal injury or damage to property. Rather, it is a claim arising out of the Plaintiff's expectations—reasonable or not—under the IRAs here at issue. Any such claim is one in contract, not in tort.

At the same time, the Plaintiff cannot recover under a negligence theory because the Plaintiff cannot demonstrate that there was any duty to her by the Defendant with regard to the decedent's IRA. As already set forth in the section above, the Plaintiff is not a third-party beneficiary and therefore the Plaintiff would not have standing to seek damages from the Defendant *even if* South Carolina recognized a cause of action for breach of duty to a third-party beneficiary sounding in negligence. Moreover, it would be absurd to allow the Plaintiff to recover damages in a third-party negligence case where she could not recover damages in a third-party contract case.

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IV. Undue Influence

Lastly, the Plaintiff accuses the Defendant exercising undue influence on the decedent, causing him to change the beneficiaries. The Plaintiff alleges that the Defendant improperly and unduly influenced the decedent because she "exercised complete control over [the decedent's life] . . . from what he ate to where he went, to what he wore. Sometimes, even when [the Plaintiff] could see him." In this regard, the Supreme Court's decision in Calhoun v. Calhoun, 277 S.C. 527, 290 S.E.2d 415 (1982), is instructive. Calhoun concerned itself with undue influence in the making of a will. The pertinent facts in Calhoun were succinctly stated by the Court:

> [t]he respondents attempted to prove that appellant Virginia Calhoun unduly influenced the testator to leave her the greatest portion of his estate. Their evidence consisted of the following: the testator was physically feeble; he was temporarily confused during a period of hospitalization one year before he executed the will; approximately two months after he executed the will, he was disoriented; appellant Virginia Calhoun visited the testator in the nursing home almost everyday; the testator sometimes would "fuss" at her when he was frustrated; the testator once was overheard to say that appellant Virginia Calhoun wanted it all; she asked Dr. Wilson to examine the testator before he made some changes in his will; and she drove the testator to his attorney's office to prepare the will. However, appellant Virginia Calhoun was not present during any of the testator's conferences with his attorney nor was she physically present when the will was executed. She did not have possession of the will after its execution; instead, testator's accountant, close friend, and a subscribing witness, Mr. Holbert, kept it in his possession. Mr. Holbert testified that on the date of the execution the testator was rational, was not rushed into signing the will, and seemed satisfied with it.

Id. at 532-33. Rejecting the respondents' claims of influence, the Court held that "the issue of undue influence should be resolved in the light of proposition that a sane testator has the right to dispose of his property as he chooses." Id. at 532 (citing Harris v. Berry, 231 S.C. 201, 98 S.E.2d 251 (1957)). Moreover, the Court reasoned "where the testator

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has had the unhampered opportunity to revoke his will subsequent to the operation of any undue influence upon him, but makes no changes in it, the court generally considers the effect of the testimony bearing upon undue influence in a large measure destroyed." Calhoun, 277 at 533.

Here, the Plaintiff can offer no evidence regarding the circumstances under which the decedent's beneficiaries were changed. Moreover, the evidence in this case demonstrates that the decedent was certainly competent enough to execute other legal binding documents prior to the 2014 finding of incapacity. In fact, he was found by the Probate Court to have been perfectly capable of executing a power of attorney in favor of Mr. Dorn. In this way, the decedent was perfectly capable of making subsequent changes to his designation of beneficiaries. Even more remarkable is the fact that the Defendant had a power of attorney allowing her to make changes to the IRA, meaning that the application of any undue influence was completely unnecessary. Finally, the beneficiaries in question where the decedent's grandchildren, not the decedent or anyone closely associated with the decedent. It begs the question as to why the Defendant would exert such overbearing influence on the decedent for literally no gain whatsoever. As such, summary judgment in favor of Mrs. Van Swol must be granted as to this count as well.

Finally, it is significantly important to point out that the IRA which ultimately paid the beneficiaries in question—wrongfully or not—is not the IRA account established with USAA to which Mrs. Van Swol had access. This is a critical point germane to each of the counts leveled by the Plaintiff against Mrs. Van Swol. Rather, the IRA which is truly at issue in this litigation is one established with Wells Fargo, N.A., by the decedent's legal attorney in fact, Henry Dorn. There is no dispute in this case as to this

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fact or to the fact that Mr. Dorn was legally authorized to establish the said IRA. Moreover, there is no factual to dispute as to the Defendant's involvement in the establishment of this IRA—that is to say, none. So, even if, viewed in the light most favorable to her, the Plaintiff were able to show that Mrs. Van Swol had tortuously interfered with the Plaintiff's vested rights under the decedent's IRA with USAA, that plan had long been unfunded by Mr. Dorn by the time the decedent had passed away.

CONCLUSION

For the reasons cited herein, the Defendant Phyllis Van Swol's Motion for Summary Judgment is GRANTED.

It Is So Ordered.

_____
Presiding Circuit Court Judge
Eighth Judicial Circuit

On _____, 2019
At _____, S.C.

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STATE OF SOUTH CAROLINA	COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	EIGHTH JUDICIAL CIRCUIT
KAREN PETIT, *Plaintiff,* -*v*- PHYLLIS VAN SWOL *f/k/a/* PHYLLIS KROHN et al., *Defendants*.	Case No.: 2017-CP-24-01343

ORDER

Hocker, J.

This Matter Came Before the Court for a hearing on the Defendant Phyllis Van Swol's Motion for Summary Judgment. Heard by the Court sitting in Laurens County, Jane H. Merrill, Esq., appeared for the Plaintiff, and Joshua S. Nasrollahi, Esq., and William S. Brown, Esq., appeared for the Mrs. Van Swol and Defendants USAA Federal Savings Bank, and USAA Investment Management Co. respectively. On review of the file, and the motions and related documents submitted, and after considering the applicable law, I grant Mrs. Van Swol's motion and grant summary judgment in her favor.

FACTS

The Plaintiff is the daughter of the decedent Dr. Edward Petit. The Defendant Phyllis Van Swol (F/K/A/ Phyllis Krohn") was a "companion" of the decedent. On or around January 15, 2007, the decedent executed a form with the Defendant USAA Investment Management Co. (hereinafter "USAA") declaring his daughters as the primary beneficiaries of his IRA. Subsequently, in 2009, the decedent executed a form

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USAA power attorney in favor of the Defendant, which was never used by the Defendant. In 2012, the decedent changed the primary beneficiaries for his IRA to his grandchildren. The form in question was allegedly completed by the Defendant but signed by the decedent. That same year, the decedent granted Henry Dorn a durable general power of attorney, the validity of which was upheld by the Greenwood County Probate Court during capacity proceedings involving the decedent in 2014. The Defendant never executed any documents pursuant to the USAA powers of attorney, though she admitted that she completed the 2012 form except for the signature line.

Sometime in mid-2014, Mr. Dorn transferred the funds from the USAA IRA into an IRA he established with Wells Fargo, N.A. When Mr. Dorn set up the new IRA, he left the beneficiaries as the decedent had declared them in his 2012 declaration. The Defendant had no involvement with the establishment of the Wells Fargo IRA or the transfer of funds from USAA to Wells Fargo. The decedent passed away in 2015, at which point Peter Manning was appointed as the personal representative of the decedent's estate. Pursuant to the beneficiary designation established by Mr. Dorn, Wells Fargo distributed the funds held by it to the decedent's granddaughters. This lawsuit followed several years later.

LEGAL STANDARD

Summary judgment is appropriate only where there is no genuine issue of material fact and it is clear the moving party, who bears the burden of proof, is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from

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the evidence must be viewed in the light most favorable to the nonmoving party. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011).

"[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Our Supreme Court has stated that great care should be used in the consideration of summary judgment motions. "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Carolina All. for Fair Emp't v. S.C. Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999) (citing *Etheredge v. Richland Sch. Dist. I*, 330 S.C. 447, 499 S.E.2d 238 (Ct. App. 1998)).

"Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.* at 485, 523 S.E.2d at 799 (citing *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990)). Our courts recognize that "questions of credibility make summary judgment inappropriate*." Hansen v. DHL Labs., Inc.*, 316 S.C. 505, 513, 450 S.E.2d 624, 628 (Ct. App. 1994), *decision aff'd*, 319 S.C. 79, 459 S.E. 2d 850 (1995).

ANALYSIS

The Plaintiff asserts four causes of action against the Defendant: tortious interference with a contract, breach of fiduciary duty, negligence, and undue influence. The Defendant's request for summary judgment as to each count is addressed below.

I. Tortious Interference with a Contract

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The Plaintiff first asserts a cause of action for tortious interference with a contract. "The elements of a cause of action for tortious interference with contract 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). "[A]n action for tortious interference protects 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)(emphasis supplied). "Thus, '[t]he actions of a principal's agent are afforded a qualified privilege from liability for tortious interference with the principal's contract.'" Dutch Fork Dev. Grp. II, LLC v. SEL Properties, LLC, 406 S.C. 596, 605, 753 S.E.2d 840, 844 (2012)(quoting CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc., 357 F.3d 375, 385 (3d Cir. 2004))(alterations in the original). Moreover, as the contract at issue is an IRA case, even as a designated beneficiary, the Plaintiff has only an "expectancy in the benefits" which do not fully vest until the decedent passes away. Waller v. Pope, 715 So. 2d 958, 960 (Fla. Dist. Ct. App. 1998)(citing Cooper v. Muccitelli, 661 So.2d 52, 53 (Fla. 2d DCA 1995), *aff'd,* 682 So.2d 77 (Fla.1996)). Compare 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

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of insured, the action may be maintained by the beneficiary.") and 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.'"). However, there are instances in which a beneficiary's rights may be vested before the death of the accountholder. 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).

While there existed two legal contracts in this case—between the decedent and USAA and then later between the decedent and Wells Fargo—the Plaintiff was not a party to either contracts. The Plaintiff's previous status as a beneficiary to the decedent's account does create in her a vested interest. 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."); Luszcz v. Lavoie, 787 So. 2d 245, 248 (Fla. Dist. Ct. App. 2001)("[A] beneficiary's rights to proceeds [of an IRA] do not attach until the IRA owner's death. Until then, the beneficiary merely has an expectancy in the IRA because until the owner's death, the owner can do with the IRA as desired, including changing the beneficiary designation or cashing out the account altogether.") Because the Plaintiff was not a party to the USAA contract, she cannot

Deleted: Most importantly no evidence has been presented that demonstrates that the Plaintiff had a vested interest in either contract

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assert or recover on a tortious interference cause of action. Cf. Ross v. Life Ins. Co. of Virginia, 273 S.C. 764, 766, 259 S.E.2d 814, 815 (1979)(citing Smith v. Citizens & Southern National Bank of S.C., 241 S.C. 285, 128 S.E.2d 112 (1962); Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945)) ("Moreover, the South Carolina cases recognizing a cause of action for tortious interference with a contract have been limited to situations where an action was brought against third persons rather than parties to the contract.").

Plaintiff argued that she had a vested interested in the IRA because her father, Dr. Petit, lacked the ability to freely change beneficiaries on January 23, 2012, therefore Ms. Petit has a vested interest, requiring Defendant's motions to be denied.

Dr. Petit had dementia, heart problems, and glaucoma that made him unable to read. Mrs. Van Swol took care of his health in the same way an LPN might. (Van Swol Depo. 27:7, 29:18-25, 30:16-18; Petit Depo. at 79:24-25, 80:1-5).

In January 2012, while on a cruise, 87-year-old Dr. Petit lost consciousness, and was taken from the ship to a hospital in Key West, Florida. (Van Swol Depo. 48:19, 33:8-12, 34:2-9). The hospital in Key West could not control Dr. Petit's heart condition and sent him to a hospital in Miami. (Van Swol Depo. 34:20-25, 35:1-13). While in Miami, Dr. Petit had a heart catherization, a heart ablation, and a defibrillator and pacemaker implantation, and was in either ICU or CCU. (Van Swol Depo. at 34:10-15, 37:18-24; Petit Depo. at 40:22-24). When he was discharged from the hospital on January 22, 2012, Dr. Petit was not fully recovered. (Van Swol Depo. at 46:5-7, 46:11-15).

Per Mrs. Van Swol, even though Dr. Petit was not fully recovered and continued taking pain medication, he signed the beneficiary designation form the day after he was discharged from the hospital. However, Mrs. Van Swol cannot remember if she saw him

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sign it. (Van Swol Depo. at 55:14-21). However, she admits that she completed the form and all the printed handwriting on the form is hers. (Van Swol Depo. at 49:24-25, 50:1-16 and Exhibit C to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment).

Plaintiff also argued that inconsistencies between the 2012 form (Exhibit C to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment) and the 2007 form (Exhibit D to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment) offer additional facts which make summary judgment inappropriate. The beneficiary designation form completed in 2007 (Exhibit D to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment) listed "Karen (NMI) Petit and Kathy Elise Petit Trust" as the beneficiaries, but the 2012 form (Exhibit C) lists "Karen Petit and Kathy Elise Petit" as contingent beneficiaries.

The court finds this evidence presented by Plaintiff is less than a mere scintilla of evidence needed to Defendant's motion for summary judgment. As such, Defendant's motion for summary judgment on this cause of action is granted.

II. Breach of Fiduciary Duty

Next, the Plaintiff alleges that the Defendant breached her fiduciary duty to the decedent by changing the beneficiaries of the decedent's former IRA. "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." RFT Mgmt. Co. v. Tinsley & Adams, 399 S.C. 322, 335-336, 732 S.E.2d 166 (2012)(citing Moore v.

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Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct.App.2004); Spence v. Wingate, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011).

It is clear from the evidence submitted that Mrs. Van Swol owed the decedent as fiduciary duty when she given a power attorney by him. The Plaintiff argued that Mrs. Van Swol acted under her fiduciary duty when she filled out the 2012 form.

Plaintiff presents no legal principle, however, that this fiduciary duty extends to her as a beneficiary of the account, though she argued her interest was vested because her father, Dr. Petit, lacked the ability to freely change beneficiaries on January 23, 2012. Even if the Defendant breached a fiduciary duty owed to the decedent (which she does not concede), this is a breach of a duty owed by the Defendant to the *decedent* and not the Plaintiff. In this way, any resulting injury from such a breach would be to the decedent's estate, not to the Plaintiff personally. Plaintiff did not present more than a scintilla of evidence. Summary judgment as to the Plaintiff's second cause of action against Mrs. Van Swol must be granted in favor of Mrs. Van Swol.

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III. Negligence

Thereafter, the Plaintiff asserts that Mrs. Van Swol's conduct in this case arises to the level of negligence. This claim must also fail because the Plaintiff cannot show that any of her resulting damages are non-economic. However, Plaintiff testified that she suffered emotional damages and nightmares defeats this assertion. (Petit Depo. at 182:10-18). The South Carolina Supreme Court has long held that "tort liability only lies where the damage done is to other property or is personal injury." Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 341, 384 S.E. 2d. 730 (1989). This rule, known as the economic loss rule, finds its bedrock in products liability law but the principles

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> [t]he purpose of the economic loss rule is to define the line between recovery in tort and recovery in contract. Contract law seeks to protect the expectancy interests of the parties. Tort law, on the other hand, seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property.

This statement of public policy is abundantly applicable here. This is not a matter of personal injury or damage to property. Rather, it is a claim arising out of the Plaintiff's expectations—reasonable or not—under the IRAs here at issue. Any such claim is one in contract, not in tort.

At the same time, the Plaintiff cannot recover under a negligence theory because the Plaintiff cannot demonstrate that there was any duty to her by the Defendant with regard to the decedent's IRA, even though Plaintiff argued that she had a vested interest in the IRA because her father lacked the ability to freely change beneficiaries on January 23, 2012, and presented testimonial evidence of herself and Mrs. Van Swol. As already set forth in the section above, the Plaintiff is not a third-party beneficiary and therefore the Plaintiff would not have standing to seek damages from the Defendant *even if* South Carolina recognized a cause of action for breach of duty to a third-party beneficiary sounding in negligence. Moreover, it would be absurd to allow the Plaintiff to recover damages in a third-party negligence case where she could not recover damages in a third-party contract case.

IV. Undue Influence

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Lastly, the Plaintiff accuses the Defendant exercising undue influence on the decedent, causing him to change the beneficiaries. The Plaintiff alleges that the Defendant improperly and unduly influenced the decedent because she "exercised complete control over [the decedent's life] . . . from what he ate to where he went, to what he wore. Sometimes, even when [the Plaintiff] could see him." In this regard, the Supreme Court's decision in Calhoun v. Calhoun, 277 S.C. 527, 290 S.E.2d 415 (1982), is instructive. Calhoun concerned itself with undue influence in the making of a will. The pertinent facts in Calhoun were succinctly stated by the Court:

> [t]he respondents attempted to prove that appellant Virginia Calhoun unduly influenced the testator to leave her the greatest portion of his estate. Their evidence consisted of the following: the testator was physically feeble; he was temporarily confused during a period of hospitalization one year before he executed the will; approximately two months after he executed the will, he was disoriented; appellant Virginia Calhoun visited the testator in the nursing home almost everyday; the testator sometimes would "fuss" at her when he was frustrated; the testator once was overheard to say that appellant Virginia Calhoun wanted it all; she asked Dr. Wilson to examine the testator before he made some changes in his will; and she drove the testator to his attorney's office to prepare the will. However, appellant Virginia Calhoun was not present during any of the testator's conferences with his attorney nor was she physically present when the will was executed. She did not have possession of the will after its execution; instead, testator's accountant, close friend, and a subscribing witness, Mr. Holbert, kept it in his possession. Mr. Holbert testified that on the date of the execution the testator was rational, was not rushed into signing the will, and seemed satisfied with it.

Id. at 532-33. Rejecting the respondents' claims of influence, the Court held that "the issue of undue influence should be resolved in the light of proposition that a sane testator has the right to dispose of his property as he chooses." Id. at 532 (citing Harris v. Berry, 231 S.C. 201, 98 S.E.2d 251 (1957)). Moreover, the Court reasoned "where the testator has had the unhampered opportunity to revoke his will subsequent to the operation of any undue influence upon him, but makes no changes in it, the court generally considers

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the effect of the testimony bearing upon undue influence in a large measure destroyed." Calhoun, 277 at 533.

Plaintiff argued the *Calhoun* case is distinguishable. In *Calhoun*, the decedent was physically feeble, temporarily confused one year prior to executing the will, and disoriented about two months after signing the will. *Id.* at 532-33, 415 S.E.2d at 418. In the present matter, Dr. Petit was an 87-year-old man with dementia hospitalized in the intensive or critical care unit for weeks, after undergoing two surgical procedures, and was taking pain medication when he signed the change of beneficiary designation. (Van Swol Depo. 33:8-12, 34:2-15, 34:20-25, 35:1-13, 37:18-24, 40:22-24, 46:5-7, 46:11-15, 48:19). This is far more evidence than that presented in *Calhoun*.

Plaintiff argued that our supreme court has recognized that "by the very nature of the case, the evidence of undue influence will be mainly circumstantial. It is not usually exercised openly so it can be directly proved." *Hembree v. Estate of Hembree*, 311 S.C. 192, 196, 428 S.E.2d 3, 5 (Ct. App. 1993) (*citing Byrd v. Byrd*, 279 S.C. 425, 427, 308 S.E.2d 788, 789 (1983)). "In cases where allegations of undue influence have been successful, there has been evidence of threats, force, restricted visitation, or an existing fiduciary relationship at the time of or before the will's execution." *Id.* at 196, 428 S.E.2d at 5 (*citing Byrd v. Byrd*, 279 S.C. 425, 308 S.E.2d 788 (1983) and *Moorer v. Bull*, 212 S.C. 146, 46 S.E.2d 681 (1948)).

Here, Plaintiff presented evidence that at the time Dr. Petit allegedly executed the change of beneficiary form, a fiduciary relationship already existed between Mrs. Van Swol and Dr. Petit. (Exhibit H to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment, Power of Attorney forms). Additionally, Mrs. Van Swol went to

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great lengths to conceal Dr. Petit's critical medical condition from his daughters when he was hospitalized in Florida. Mrs. Van Swol did not call Dr. Petit's daughters, but instead instructed Dr. Petit to call his daughters, even though Mrs. Van Swol admits he was "barely" able to call. (Van Swol Depo. at 44:11-25, 45:1-17). Mrs. Van Swol apologized to Ms. Petit, and said, "I wish that I had never been involved with any of this."(Van Swol Depo. at 67:10-14).

However, the court finds Plaintiff's evidence is not sufficient to defeat Defendant's motion for summary judgment. Evidence presented by Mrs. Van Swol demonstrates that the decedent was certainly competent enough to execute other legal binding documents prior to the 2014 finding of incapacity. In fact, he was found by the Probate Court to have been perfectly capable of executing a power of attorney in favor of Mr. Dorn. In this way, the decedent was perfectly capable of making subsequent changes to his designation of beneficiaries. Even more remarkable is the fact that the Defendant had a power of attorney allowing her to make changes to the IRA, meaning that the application of any undue influence was completely unnecessary. Finally, the beneficiaries in question where the decedent's grandchildren, not the decedent or anyone closely associated with the decedent. It begs the question as to why the Defendant would exert such overbearing influence on the decedent for literally no gain whatsoever. As such, summary judgment in favor of Mrs. Van Swol must be granted as to this count as well.

Finally, it is significantly important to point out that the IRA which ultimately paid the beneficiaries in question—wrongfully or not—is not the IRA account established with USAA to which Mrs. Van Swol had access. This is a critical point germane to each of the counts leveled by the Plaintiff against Mrs. Van Swol. Rather, the IRA which is

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truly at issue in this litigation is one established with Wells Fargo, N.A., by the decedent's legal attorney in fact, Henry Dorn. There is no dispute in this case as to this fact or to the fact that Mr. Dorn was legally authorized to establish the said IRA. Moreover, there is no factual to dispute as to the Defendant's involvement in the establishment of this IRA—that is to say, none. So, even if, viewed in the light most favorable to her, the Plaintiff were able to show that Mrs. Van Swol had tortuously interfered with the Plaintiff's vested rights under the decedent's IRA with USAA, that plan had long been unfunded by Mr. Dorn by the time the decedent had passed away.

CONCLUSION

For the reasons cited herein, the Defendant Phyllis Van Swol's Motion for Summary Judgment is GRANTED.

It Is So Ordered.

_____
Presiding Circuit Court Judge
Eighth Judicial Circuit

On _____, 2019
At _____, S.C.

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STATE OF SOUTH CAROLINA	COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	EIGHTH JUDICIAL CIRCUIT
KAREN PETIT, *Plaintiff,* -*v*- PHYLLIS VAN SWOL *f/k/a/* PHYLLIS KROHN et al., *Defendants*.	Case No.: 2017-CP-24-01343

ORDER

Hocker, J.

This Matter Came Before the Court for a hearing on the Defendant Phyllis Van Swol's Motion for Summary Judgment. Heard by the Court sitting in Laurens County, Jane H. Merrill, Esq., appeared for the Plaintiff, and Joshua S. Nasrollahi, Esq., and William S. Brown, Esq., appeared for the Mrs. Van Swol and Defendants USAA Federal Savings Bank, and USAA Investment Management Co. respectively. On review of the file, and the motions and related documents submitted, and after considering the applicable law, I grant Mrs. Van Swol's motion and grant summary judgment in her favor.

FACTS

The Plaintiff is the daughter of the decedent Dr. Edward Petit. The Defendant Phyllis Van Swol (F/K/A/ Phyllis Krohn") was a "companion" of the decedent. On or around January 15, 2007, the decedent executed a form with the Defendant USAA Investment Management Co. (hereinafter "USAA") declaring his daughters as the primary beneficiaries of his IRA. Subsequently, in 2009, the decedent executed a form

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USAA power attorney in favor of the Defendant, which was never used by the Defendant. In 2012, the decedent changed the primary beneficiaries for his IRA to his grandchildren. The form in question was allegedly completed by the Defendant but signed by the decedent. That same year, the decedent granted Henry Dorn a durable general power of attorney, the validity of which was upheld by the Greenwood County Probate Court during capacity proceedings involving the decedent in 2014. The Defendant never executed any documents pursuant to the USAA powers of attorney, though she admitted that she completed the 2012 form except for the signature line.

Sometime in mid-2014, Mr. Dorn transferred the funds from the USAA IRA into an IRA he established with Wells Fargo, N.A. When Mr. Dorn set up the new IRA, he left the beneficiaries as the decedent had declared them in his 2012 declaration. The Defendant had no involvement with the establishment of the Wells Fargo IRA or the transfer of funds from USAA to Wells Fargo. The decedent passed away in 2015, at which point Peter Manning was appointed as the personal representative of the decedent's estate. Pursuant to the beneficiary designation established by Mr. Dorn, Wells Fargo distributed the funds held by it to the decedent's granddaughters. This lawsuit followed several years later.

LEGAL STANDARD

Summary judgment is appropriate only where there is no genuine issue of material fact and it is clear the moving party, who bears the burden of proof, is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from

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the evidence must be viewed in the light most favorable to the nonmoving party. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011).

"[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Our Supreme Court has stated that great care should be used in the consideration of summary judgment motions. "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Carolina All. for Fair Emp't v. S.C. Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999) (citing *Etheredge v. Richland Sch. Dist. I*, 330 S.C. 447, 499 S.E.2d 238 (Ct. App. 1998)).

"Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.* at 485, 523 S.E.2d at 799 (citing *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990)). Our courts recognize that "questions of credibility make summary judgment inappropriate*." Hansen v. DHL Labs., Inc.*, 316 S.C. 505, 513, 450 S.E.2d 624, 628 (Ct. App. 1994), *decision aff'd*, 319 S.C. 79, 459 S.E. 2d 850 (1995).

ANALYSIS

The Plaintiff asserts four causes of action against the Defendant: tortious interference with a contract, breach of fiduciary duty, negligence, and undue influence. The Defendant's request for summary judgment as to each count is addressed below.

I. Tortious Interference with a Contract

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The Plaintiff first asserts a cause of action for tortious interference with a contract. "The elements of a cause of action for tortious interference with contract 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). "[A]n action for tortious interference protects 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)(emphasis supplied). "Thus, '[t]he actions of a principal's agent are afforded a qualified privilege from liability for tortious interference with the principal's contract.'" Dutch Fork Dev. Grp. II, LLC v. SEL Properties, LLC, 406 S.C. 596, 605, 753 S.E.2d 840, 844 (2012)(quoting CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc., 357 F.3d 375, 385 (3d Cir. 2004))(alterations in the original). Moreover, as the contract at issue is an IRA case, even as a designated beneficiary, the Plaintiff has only an "expectancy in the benefits" which do not fully vest until the decedent passes away. Waller v. Pope, 715 So. 2d 958, 960 (Fla. Dist. Ct. App. 1998)(citing Cooper v. Muccitelli, 661 So.2d 52, 53 (Fla. 2d DCA 1995), *aff'd,* 682 So.2d 77 (Fla.1996)). Compare 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

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of insured, the action may be maintained by the beneficiary.") and 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.'"). However, there are instances in which a beneficiary's rights may be vested before the death of the accountholder. 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).

While there existed two legal contracts in this case—between the decedent and USAA and then later between the decedent and Wells Fargo—the Plaintiff was not a party to either contracts. The Plaintiff's previous status as a beneficiary to the decedent's account does create in her a vested interest. 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."); Luszcz v. Lavoie, 787 So. 2d 245, 248 (Fla. Dist. Ct. App. 2001)("[A] beneficiary's rights to proceeds [of an IRA] do not attach until the IRA owner's death. Until then, the beneficiary merely has an expectancy in the IRA because until the owner's death, the owner can do with the IRA as desired, including changing the beneficiary designation or cashing out the account altogether.") Because the Plaintiff was not a party to the USAA contract, she cannot

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assert or recover on a tortious interference cause of action. Cf. Ross v. Life Ins. Co. of Virginia, 273 S.C. 764, 766, 259 S.E.2d 814, 815 (1979)(citing Smith v. Citizens & Southern National Bank of S.C., 241 S.C. 285, 128 S.E.2d 112 (1962); Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945)) ("Moreover, the South Carolina cases recognizing a cause of action for tortious interference with a contract have been limited to situations where an action was brought against third persons rather than parties to the contract."). Plaintiff argued that she had a vested interested in the IRA because her father, Dr. Petit, lacked the ability to freely change beneficiaries on January 23, 2012, therefore the Plaintiff has a vested interest, requiring Defendant's motions to be denied. The Plaintiff claimed the decedent's health issues rendered him unable to change his beneficiary designation. In support of this claim, the Plaintiff argued that the decedent had dementia, heart problems, and glaucoma that made him unable to read. Additionally, the Plaintiff presented evidence that a short time prior to the beneficiary change the decedent lost consciousness of a cruise and underwent a heart catherization as a result. Still, while the evidence may demonstrate that the decedent was in poor health at the time the beneficiaries were changed, no evidence was presented demonstrating that the decedent was incompetent to execute the change. As such, Defendant's motion for summary judgment on this cause of action is granted.

II. Breach of Fiduciary Duty

Next, the Plaintiff alleges that the Defendant breached her fiduciary duty to the decedent by changing the beneficiaries of the decedent's former IRA. "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

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It is clear from the evidence submitted that Mrs. Van Swol owed the decedent as fiduciary duty when she given a power attorney by him. The Plaintiff argued that Mrs. Van Swol acted under her fiduciary duty when she filled out the 2012 form.

Plaintiff presents no legal principle, however, that this fiduciary duty extends to her as a beneficiary of the account, though she argued her interest was vested because her father, Dr. Petit, lacked the ability to freely change beneficiaries on January 23, 2012. Even if the Defendant breached a fiduciary duty owed to the decedent (which she does not concede), this is a breach of a duty owed by the Defendant to the *decedent* and not the Plaintiff. In this way, any resulting injury from such a breach would be to the decedent's estate, not to the Plaintiff personally. Plaintiff did not present more than a scintilla of evidence. Summary judgment as to the Plaintiff's second cause of action against Mrs. Van Swol must be granted in favor of Mrs. Van Swol.

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Thereafter, the Plaintiff asserts that Mrs. Van Swol's conduct in this case arises to the level of negligence. This claim must also fail because the Plaintiff cannot show that any of her resulting damages are non-economic. However, Plaintiff testified that she suffered emotional damages and nightmares defeats this assertion. The South Carolina Supreme Court has long held that "tort liability only lies where the damage done is to other property or is personal injury." Kennedy v. Columbia Lumber & Mfg. Co., Inc.,

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At the same time, the Plaintiff cannot recover under a negligence theory because the Plaintiff cannot demonstrate that there was any duty to her by the Defendant with regard to the decedent's IRA, despite the Plaintiff's claims that she had a vested interest in the account. As already set forth in the section above, the Plaintiff is not a third-party beneficiary and therefore the Plaintiff would not have standing to seek damages from the Defendant *even if* South Carolina recognized a cause of action for breach of duty to a third-party beneficiary sounding in negligence. Moreover, it would be absurd to allow the Plaintiff to recover damages in a third-party negligence case where she could not recover damages in a third-party contract case.

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Plaintiff argued that our supreme court has recognized that "by the very nature of the case, the evidence of undue influence will be mainly circumstantial. It is not usually exercised openly so it can be directly proved." *Hembree v. Estate of Hembree*, 311 S.C. 192, 196, 428 S.E.2d 3, 5 (Ct. App. 1993) (*citing Byrd v. Byrd*, 279 S.C. 425, 427, 308 S.E.2d 788, 789 (1983)). "In cases where allegations of undue influence have been successful, there has been evidence of threats, force, restricted visitation, or an existing fiduciary relationship at the time of or before the will's execution." *Id.* at 196, 428 S.E.2d at 5 (*citing Byrd v. Byrd*, 279 S.C. 425, 308 S.E.2d 788 (1983) and *Moorer v. Bull*, 212 S.C. 146, 46 S.E.2d 681 (1948)).

Here, the court finds Plaintiff's evidence is not sufficient to defeat Defendant's motion for summary judgment. Evidence presented by Mrs. Van Swol demonstrates that the decedent was certainly competent enough to execute other legal binding documents prior to the 2014 finding of incapacity. In fact, he was found by the Probate Court to have

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been perfectly capable of executing a power of attorney in favor of Mr. Dorn. In this way, the decedent was perfectly capable of making subsequent changes to his designation of beneficiaries. Even more remarkable is the fact that the Defendant had a power of attorney allowing her to make changes to the IRA, meaning that the application of any undue influence was completely unnecessary. Finally, the beneficiaries in question where the decedent's grandchildren, not the decedent or anyone closely associated with the decedent. It begs the question as to why the Defendant would exert such overbearing influence on the decedent for literally no gain whatsoever. As such, summary judgment in favor of Mrs. Van Swol must be granted as to this count as well.

Finally, it is significantly important to point out that the IRA which ultimately paid the beneficiaries in question—wrongfully or not—is not the IRA account established with USAA to which Mrs. Van Swol had access. This is a critical point germane to each of the counts leveled by the Plaintiff against Mrs. Van Swol. Rather, the IRA which is truly at issue in this litigation is one established with Wells Fargo, N.A., by the decedent's legal attorney in fact, Henry Dorn. There is no dispute in this case as to this fact or to the fact that Mr. Dorn was legally authorized to establish the said IRA. Moreover, there is no factual to dispute as to the Defendant's involvement in the establishment of this IRA—that is to say, none. So, even if, viewed in the light most favorable to her, the Plaintiff were able to show that Mrs. Van Swol had tortuously interfered with the Plaintiff's vested rights under the decedent's IRA with USAA, that plan had long been unfunded by Mr. Dorn by the time the decedent had passed away.

CONCLUSION

For the reasons cited herein, the Defendant Phyllis Van Swol's Motion for Summary Judgment is GRANTED.

It Is So Ordered.

Presiding Circuit Court Judge
Eighth Judicial Circuit

On _____, 2019
At _____, S.C.

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STATE OF SOUTH CAROLINA	COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	EIGHTH JUDICIAL CIRCUIT
KAREN PETIT, *Plaintiff,* -*v*- PHYLLIS VAN SWOL *f/k/a/* PHYLLIS KROHN et al., *Defendants*.	Case No.: 2017-CP-24-01343

ORDER

Hocker, J.

This Matter Came Before the Court for a hearing on the Defendant Phyllis Van Swol's Motion for Summary Judgment. Heard by the Court sitting in Laurens County, Jane H. Merrill, Esq., appeared for the Plaintiff, and Joshua S. Nasrollahi, Esq., and William S. Brown, Esq., appeared for the Mrs. Van Swol and Defendants USAA Federal Savings Bank, and USAA Investment Management Co. respectively. On review of the file, and the motions and related documents submitted, and after considering the applicable law, I grant Mrs. Van Swol's motion and grant summary judgment in her favor.

FACTS

The Plaintiff is the daughter of the decedent Dr. Edward Petit. The Defendant Phyllis Van Swol (F/K/A/ Phyllis Krohn") was a "companion" of the decedent. On or around January 15, 2007, the decedent executed a form with the Defendant USAA Investment Management Co. (hereinafter "USAA") declaring his daughters as the primary beneficiaries of his IRA. Subsequently, in 2009, the decedent executed a form

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USAA power attorney in favor of the Defendant, which was never used by the Defendant. In 2012, the decedent changed the primary beneficiaries for his IRA to his grandchildren. The form in question was allegedly completed by the Defendant but signed by the decedent. That same year, the decedent granted Henry Dorn a durable general power of attorney, the validity of which was upheld by the Greenwood County Probate Court during capacity proceedings involving the decedent in 2014. The Defendant never executed any documents pursuant to the USAA powers of attorney, though she admitted that she completed the 2012 form except for the signature line.

Sometime in mid-2014, Mr. Dorn transferred the funds from the USAA IRA into an IRA he established with Wells Fargo, N.A. When Mr. Dorn set up the new IRA, he left the beneficiaries as the decedent had declared them in his 2012 declaration. The Defendant had no involvement with the establishment of the Wells Fargo IRA or the transfer of funds from USAA to Wells Fargo. The decedent passed away in 2015, at which point Peter Manning was appointed as the personal representative of the decedent's estate. Pursuant to the beneficiary designation established by Mr. Dorn, Wells Fargo distributed the funds held by it to the decedent's granddaughters. This lawsuit followed several years later.

LEGAL STANDARD

Summary judgment is appropriate only where there is no genuine issue of material fact and it is clear the moving party, who bears the burden of proof, is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from

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the evidence must be viewed in the light most favorable to the nonmoving party. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011).

"[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Our Supreme Court has stated that great care should be used in the consideration of summary judgment motions. "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Carolina All. for Fair Emp't v. S.C. Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999) (citing *Etheredge v. Richland Sch. Dist. I*, 330 S.C. 447, 499 S.E.2d 238 (Ct. App. 1998)).

"Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.* at 485, 523 S.E.2d at 799 (citing *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990)). Our courts recognize that "questions of credibility make summary judgment inappropriate*." Hansen v. DHL Labs., Inc.*, 316 S.C. 505, 513, 450 S.E.2d 624, 628 (Ct. App. 1994), *decision aff'd*, 319 S.C. 79, 459 S.E. 2d 850 (1995).

ANALYSIS

The Plaintiff asserts four causes of action against the Defendant: tortious interference with a contract, breach of fiduciary duty, negligence, and undue influence. The Defendant's request for summary judgment as to each count is addressed below.

I. Tortious Interference with a Contract

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The Plaintiff first asserts a cause of action for tortious interference with a contract. "The elements of a cause of action for tortious interference with contract 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). "[A]n action for tortious interference protects 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)(emphasis supplied). "Thus, '[t]he actions of a principal's agent are afforded a qualified privilege from liability for tortious interference with the principal's contract.'" Dutch Fork Dev. Grp. II, LLC v. SEL Properties, LLC, 406 S.C. 596, 605, 753 S.E.2d 840, 844 (2012)(quoting CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc., 357 F.3d 375, 385 (3d Cir. 2004))(alterations in the original). Moreover, as the contract at issue is an IRA case, even as a designated beneficiary, the Plaintiff has only an "expectancy in the benefits" which do not fully vest until the decedent passes away. Waller v. Pope, 715 So. 2d 958, 960 (Fla. Dist. Ct. App. 1998)(citing Cooper v. Muccitelli, 661 So.2d 52, 53 (Fla. 2d DCA 1995), *aff'd,* 682 So.2d 77 (Fla.1996)). Compare 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

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of insured, the action may be maintained by the beneficiary.") and 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.'"). However, there are instances in which a beneficiary's rights may be vested before the death of the accountholder. 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).

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While there existed two legal contracts in this case—between the decedent and USAA and then later between the decedent and Wells Fargo—the Plaintiff was not a party to either contracts. The Plaintiff's previous status as a beneficiary to the decedent's account does create in her a vested interest. 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."); Luszcz v. Lavoie, 787 So. 2d 245, 248 (Fla. Dist. Ct. App. 2001)("[A] beneficiary's rights to proceeds [of an IRA] do not attach until the IRA owner's death. Until then, the beneficiary merely has an expectancy in the IRA because until the owner's death, the owner can do with the IRA as desired, including changing the beneficiary designation or cashing out the account altogether.") Because the Plaintiff was not a party to the USAA contract, she cannot

Deleted: Most importantly no evidence has been presented that demonstrates that the Plaintiff had a vested interest in either contract

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assert or recover on a tortious interference cause of action. Cf. Ross v. Life Ins. Co. of Virginia, 273 S.C. 764, 766, 259 S.E.2d 814, 815 (1979)(citing Smith v. Citizens & Southern National Bank of S.C., 241 S.C. 285, 128 S.E.2d 112 (1962); Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945)) ("Moreover, the South Carolina cases recognizing a cause of action for tortious interference with a contract have been limited to situations where an action was brought against third persons rather than parties to the contract.").

Plaintiff argued that she had a vested interested in the IRA because her father, Dr. Petit, lacked the ability to freely change beneficiaries on January 23, 2012, therefore Ms. Petit has a vested interest, requiring Defendant's motions to be denied.

Dr. Petit had dementia, heart problems, and glaucoma that made him unable to read. Mrs. Van Swol took care of his health in the same way an LPN might. (Van Swol Depo, 27:7, 29:18-25, 30:16-18; Petit Depo. at 79:24-25, 80:1-5).

In January 2012, while on a cruise, 87-year-old Dr. Petit lost consciousness, and was taken from the ship to a hospital in Key West, Florida. (Van Swol Depo, 48:19, 33:8-12, 34:2-9). The hospital in Key West could not control Dr. Petit's heart condition and sent him to a hospital in Miami. (Van Swol Depo, 34:20-25, 35:1-13). While in Miami, Dr. Petit had a heart catherization, a heart ablation, and a defibrillator and pacemaker implantation, and was in either ICU or CCU. (Van Swol Depo, at 34:10-15, 37:18-24; Petit Depo. at 40:22-24). When he was discharged from the hospital on January 22, 2012, Dr. Petit was not fully recovered. (Van Swol Depo, at 46:5-7, 46:11-15).

Per Mrs. Van Swol, even though Dr. Petit was not fully recovered and continued taking pain medication, he signed the beneficiary designation form the day after he was discharged from the hospital. However, Mrs. Van Swol cannot remember if she saw him

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sign it. (Van Swol Depo, at 55:14-21). However, she admits that she completed the form and all the printed handwriting on the form is hers. (Van Swol Depo, at 49:24-25, 50:1-16 and Exhibit C to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment).

Plaintiff also argued that inconsistencies between the 2012 form (Exhibit C to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment) and the 2007 form (Exhibit D to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment) offer additional facts which make summary judgment inappropriate. The beneficiary designation form completed in 2007 (Exhibit D to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment) listed "Karen (NMI) Petit and Kathy Elise Petit Trust" as the beneficiaries, but the 2012 form (Exhibit C) lists "Karen Petit and Kathy Elise Petit" as contingent beneficiaries.

The court finds this evidence presented by Plaintiff is less than a mere scintilla of evidence needed to Defendant's motion for summary judgment. As such, Defendant's motion for summary judgment on this cause of action is granted.

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II. Breach of Fiduciary Duty

Next, the Plaintiff alleges that the Defendant breached her fiduciary duty to the decedent by changing the beneficiaries of the decedent's former IRA. "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." RFT Mgmt. Co. v. Tinsley & Adams, 399 S.C. 322, 335-336, 732 S.E.2d 166 (2012)(citing Moore v.

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Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct.App.2004); Spence v. Wingate, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011).

It is clear from the evidence submitted that Mrs. Van Swol owed the decedent as fiduciary duty when she given a power attorney by him. The Plaintiff argued that Mrs. Van Swol acted under her fiduciary duty when she filled out the 2012 form.

Plaintiff presents no legal principle, however, that this fiduciary duty extends to her as a beneficiary of the account, though she argued her interest was vested because her father, Dr. Petit, lacked the ability to freely change beneficiaries on January 23, 2012. Even if the Defendant breached a fiduciary duty owed to the decedent (which she does not concede), this is a breach of a duty owed by the Defendant to the *decedent* and not the Plaintiff. In this way, any resulting injury from such a breach would be to the decedent's estate, not to the Plaintiff personally. Plaintiff did not present more than a scintilla of evidence. Summary judgment as to the Plaintiff's second cause of action against Mrs. Van Swol must be granted in favor of Mrs. Van Swol.

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III. Negligence

Thereafter, the Plaintiff asserts that Mrs. Van Swol's conduct in this case arises to the level of negligence. This claim must also fail because the Plaintiff cannot show that any of her resulting damages are non-economic. However, Plaintiff testified that she suffered emotional damages and nightmares defeats this assertion. (Petit Depo. at 182:10-18). The South Carolina Supreme Court has long held that "tort liability only lies where the damage done is to other property or is personal injury." Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 341, 384 S.E. 2d. 730 (1989). This rule, known as the economic loss rule, finds its bedrock in products liability law but the principles

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which underpin its application are particularly prescient here. In Sapp v. Ford Motor Co., 687 S.E. 2d 47 (2009), the Supreme Court expressed that it was "cautious in permitting negligence actions where there is neither personal injury nor property damage." Id. at 149. The Court explained in Sapp,

> [t]he purpose of the economic loss rule is to define the line between recovery in tort and recovery in contract. Contract law seeks to protect the expectancy interests of the parties. Tort law, on the other hand, seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property.

This statement of public policy is abundantly applicable here. This is not a matter of personal injury or damage to property. Rather, it is a claim arising out of the Plaintiff's expectations—reasonable or not—under the IRAs here at issue. Any such claim is one in contract, not in tort.

At the same time, the Plaintiff cannot recover under a negligence theory because the Plaintiff cannot demonstrate that there was any duty to her by the Defendant with regard to the decedent's IRA, even though Plaintiff argued that she had a vested interest in the IRA because her father lacked the ability to freely change beneficiaries on January 23, 2012, and presented testimonial evidence of herself and Mrs. Van Swol. As already set forth in the section above, the Plaintiff is not a third-party beneficiary and therefore the Plaintiff would not have standing to seek damages from the Defendant *even if* South Carolina recognized a cause of action for breach of duty to a third-party beneficiary sounding in negligence. Moreover, it would be absurd to allow the Plaintiff to recover damages in a third-party negligence case where she could not recover damages in a third-party contract case.

IV. Undue Influence

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Lastly, the Plaintiff accuses the Defendant exercising undue influence on the decedent, causing him to change the beneficiaries. The Plaintiff alleges that the Defendant improperly and unduly influenced the decedent because she "exercised complete control over [the decedent's life] . . . from what he ate to where he went, to what he wore. Sometimes, even when [the Plaintiff] could see him." In this regard, the Supreme Court's decision in Calhoun v. Calhoun, 277 S.C. 527, 290 S.E.2d 415 (1982), is instructive. Calhoun concerned itself with undue influence in the making of a will. The pertinent facts in Calhoun were succinctly stated by the Court:

> [t]he respondents attempted to prove that appellant Virginia Calhoun unduly influenced the testator to leave her the greatest portion of his estate. Their evidence consisted of the following: the testator was physically feeble; he was temporarily confused during a period of hospitalization one year before he executed the will; approximately two months after he executed the will, he was disoriented; appellant Virginia Calhoun visited the testator in the nursing home almost everyday; the testator sometimes would "fuss" at her when he was frustrated; the testator once was overheard to say that appellant Virginia Calhoun wanted it all; she asked Dr. Wilson to examine the testator before he made some changes in his will; and she drove the testator to his attorney's office to prepare the will. However, appellant Virginia Calhoun was not present during any of the testator's conferences with his attorney nor was she physically present when the will was executed. She did not have possession of the will after its execution; instead, testator's accountant, close friend, and a subscribing witness, Mr. Holbert, kept it in his possession. Mr. Holbert testified that on the date of the execution the testator was rational, was not rushed into signing the will, and seemed satisfied with it.

Id. at 532-33. Rejecting the respondents' claims of influence, the Court held that "the issue of undue influence should be resolved in the light of proposition that a sane testator has the right to dispose of his property as he chooses." Id. at 532 (citing Harris v. Berry, 231 S.C. 201, 98 S.E.2d 251 (1957)). Moreover, the Court reasoned "where the testator has had the unhampered opportunity to revoke his will subsequent to the operation of any undue influence upon him, but makes no changes in it, the court generally considers

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the effect of the testimony bearing upon undue influence in a large measure destroyed." Calhoun, 277 at 533.

Plaintiff argued the *Calhoun* case is distinguishable. In *Calhoun*, the decedent was physically feeble, temporarily confused one year prior to executing the will, and disoriented about two months after signing the will. *Id.* at 532-33, 415 S.E.2d at 418. In the present matter, Dr. Petit was an 87-year-old man with dementia hospitalized in the intensive or critical care unit for weeks, after undergoing two surgical procedures, and was taking pain medication when he signed the change of beneficiary designation. (Van Swol Depo, 33:8-12, 34:2-15, 34:20-25, 35:1-13, 37:18-24, 40:22-24, 46:5-7, 46:11-15, 48:19). This is far more evidence than that presented in *Calhoun*.

Plaintiff argued that our supreme court has recognized that "by the very nature of the case, the evidence of undue influence will be mainly circumstantial. It is not usually exercised openly so it can be directly proved." *Hembree v. Estate of Hembree*, 311 S.C. 192, 196, 428 S.E.2d 3, 5 (Ct. App. 1993) (*citing Byrd v. Byrd*, 279 S.C. 425, 427, 308 S.E.2d 788, 789 (1983)). "In cases where allegations of undue influence have been successful, there has been evidence of threats, force, restricted visitation, or an existing fiduciary relationship at the time of or before the will's execution." *Id.* at 196, 428 S.E.2d at 5 (*citing Byrd v. Byrd*, 279 S.C. 425, 308 S.E.2d 788 (1983) and *Moorer v. Bull*, 212 S.C. 146, 46 S.E.2d 681 (1948)).

Here, Plaintiff presented evidence that at the time Dr. Petit allegedly executed the change of beneficiary form, a fiduciary relationship already existed between Mrs. Van Swol and Dr. Petit. (Exhibit H to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment, Power of Attorney forms). Additionally, Mrs. Van Swol went to

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great lengths to conceal Dr. Petit's critical medical condition from his daughters when he was hospitalized in Florida. Mrs. Van Swol did not call Dr. Petit's daughters, but instead instructed Dr. Petit to call his daughters, even though Mrs. Van Swol admits he was "barely" able to call. (Van Swol Depo. at 44:11-25, 45:1-17). Mrs. Van Swol apologized to Ms. Petit, and said, "I wish that I had never been involved with any of this."(Van Swol Depo. at 67:10-14).

However, the court finds Plaintiff's evidence is not sufficient to defeat Defendant's motion for summary judgment. Evidence presented by Mrs. Van Swol demonstrates that the decedent was certainly competent enough to execute other legal binding documents prior to the 2014 finding of incapacity. In fact, he was found by the Probate Court to have been perfectly capable of executing a power of attorney in favor of Mr. Dorn. In this way, the decedent was perfectly capable of making subsequent changes to his designation of beneficiaries. Even more remarkable is the fact that the Defendant had a power of attorney allowing her to make changes to the IRA, meaning that the application of any undue influence was completely unnecessary. Finally, the beneficiaries in question where the decedent's grandchildren, not the decedent or anyone closely associated with the decedent. It begs the question as to why the Defendant would exert such overbearing influence on the decedent for literally no gain whatsoever. As such, summary judgment in favor of Mrs. Van Swol must be granted as to this count as well.

CONCLUSION

For the reasons cited herein, the Defendant Phyllis Van Swol's Motion for Summary Judgment is GRANTED.

It Is So Ordered.

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Presiding Circuit Court Judge
Eighth Judicial Circuit

On _____, 2019
At _____, S.C.

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STATE OF SOUTH CAROLINA	COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	EIGHTH JUDICIAL CIRCUIT
KAREN PETIT, *Plaintiff,* -*v*- PHYLLIS VAN SWOL *f/k/a/* PHYLLIS KROHN et al., *Defendants*.	Case No.: 2017-CP-24-01343

ORDER

Hocker, J.

This Matter Came Before the Court for a hearing on the Defendant Phyllis Van Swol's Motion for Summary Judgment. Heard by the Court sitting in Laurens County, Jane H. Merrill, Esq., appeared for the Plaintiff, and Joshua S. Nasrollahi, Esq., and William S. Brown, Esq., appeared for the Mrs. Van Swol and Defendants USAA Federal Savings Bank, and USAA Investment Management Co. respectively. On review of the file, and the motions and related documents submitted, and after considering the applicable law, I grant Mrs. Van Swol's motion and grant summary judgment in her favor.

FACTS

The Plaintiff is the daughter of the decedent Dr. Edward Petit. The Defendant Phyllis Van Swol (F/K/A/ Phyllis Krohn") was a "companion" of the decedent. On or around January 15, 2007, the decedent executed a form with the Defendant USAA Investment Management Co. (hereinafter "USAA") declaring his daughters as the primary beneficiaries of his IRA. Subsequently, in 2009, the decedent executed a form

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USAA power attorney in favor of the Defendant, which was never used by the Defendant. In 2012, the decedent changed the primary beneficiaries for his IRA to his grandchildren. The form in question was allegedly completed by the Defendant but signed by the decedent. That same year, the decedent granted Henry Dorn a durable general power of attorney, the validity of which was upheld by the Greenwood County Probate Court during capacity proceedings involving the decedent in 2014. The Defendant never executed any documents pursuant to the USAA powers of attorney, though she admitted that she completed the 2012 form except for the signature line.

Sometime in mid-2014, Mr. Dorn transferred the funds from the USAA IRA into an IRA he established with Wells Fargo, N.A. When Mr. Dorn set up the new IRA, he left the beneficiaries as the decedent had declared them in his 2012 declaration. The Defendant had no involvement with the establishment of the Wells Fargo IRA or the transfer of funds from USAA to Wells Fargo. The decedent passed away in 2015, at which point Peter Manning was appointed as the personal representative of the decedent's estate. Pursuant to the beneficiary designation established by Mr. Dorn, Wells Fargo distributed the funds held by it to the decedent's granddaughters. This lawsuit followed several years later.

LEGAL STANDARD

Summary judgment is appropriate only where there is no genuine issue of material fact and it is clear the moving party, who bears the burden of proof, is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from

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the evidence must be viewed in the light most favorable to the nonmoving party. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011).

"[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Our Supreme Court has stated that great care should be used in the consideration of summary judgment motions. "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Carolina All. for Fair Emp't v. S.C. Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999) (citing *Etheredge v. Richland Sch. Dist. I*, 330 S.C. 447, 499 S.E.2d 238 (Ct. App. 1998)).

"Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.* at 485, 523 S.E.2d at 799 (citing *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990)). Our courts recognize that "questions of credibility make summary judgment inappropriate*." Hansen v. DHL Labs., Inc.*, 316 S.C. 505, 513, 450 S.E.2d 624, 628 (Ct. App. 1994), *decision aff'd*, 319 S.C. 79, 459 S.E. 2d 850 (1995).

ANALYSIS

The Plaintiff asserts four causes of action against the Defendant: tortious interference with a contract, breach of fiduciary duty, negligence, and undue influence. The Defendant's request for summary judgment as to each count is addressed below.

I. Tortious Interference with a Contract

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The Plaintiff first asserts a cause of action for tortious interference with a contract. "The elements of a cause of action for tortious interference with contract 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). "[A]n action for tortious interference protects 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)(emphasis supplied). "Thus, '[t]he actions of a principal's agent are afforded a qualified privilege from liability for tortious interference with the principal's contract.'" Dutch Fork Dev. Grp. II, LLC v. SEL Properties, LLC, 406 S.C. 596, 605, 753 S.E.2d 840, 844 (2012)(quoting CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc., 357 F.3d 375, 385 (3d Cir. 2004))(alterations in the original). Moreover, as the contract at issue is an IRA case, even as a designated beneficiary, the Plaintiff has only an "expectancy in the benefits" which do not fully vest until the decedent passes away. Waller v. Pope, 715 So. 2d 958, 960 (Fla. Dist. Ct. App. 1998)(citing Cooper v. Muccitelli, 661 So.2d 52, 53 (Fla. 2d DCA 1995), *aff'd,* 682 So.2d 77 (Fla.1996)). Compare 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

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of insured, the action may be maintained by the beneficiary.") and 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.'"). However, there are instances in which a beneficiary's rights may be vested before the death of the accountholder. 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).

While there existed two legal contracts in this case—between the decedent and USAA and then later between the decedent and Wells Fargo—the Plaintiff was not a party to either contracts. The Plaintiff's previous status as a beneficiary to the decedent's account does create in her a vested interest. 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."); Luszcz v. Lavoie, 787 So. 2d 245, 248 (Fla. Dist. Ct. App. 2001)("[A] beneficiary's rights to proceeds [of an IRA] do not attach until the IRA owner's death. Until then, the beneficiary merely has an expectancy in the IRA because until the owner's death, the owner can do with the IRA as desired, including changing the beneficiary designation or cashing out the account altogether.") Because the Plaintiff was not a party to the USAA contract, she cannot

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assert or recover on a tortious interference cause of action. Cf. Ross v. Life Ins. Co. of Virginia, 273 S.C. 764, 766, 259 S.E.2d 814, 815 (1979)(citing Smith v. Citizens & Southern National Bank of S.C., 241 S.C. 285, 128 S.E.2d 112 (1962); Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945)) ("Moreover, the South Carolina cases recognizing a cause of action for tortious interference with a contract have been limited to situations where an action was brought against third persons rather than parties to the contract.").

Plaintiff argued that she had a vested interested in the IRA because her father, Dr. Petit, lacked the ability to freely change beneficiaries on January 23, 2012, therefore Ms. Petit has a vested interest, requiring Defendant's motions to be denied.

Dr. Petit had dementia, heart problems, and glaucoma that made him unable to read. Mrs. Van Swol took care of his health in the same way an LPN might. (Van Swol Depo. 27:7, 29:18-25, 30:16-18; Petit Depo. at 79:24-25, 80:1-5).

In January 2012, while on a cruise, 87-year-old Dr. Petit lost consciousness, and was taken from the ship to a hospital in Key West, Florida. (Van Swol Depo. 48:19, 33:8-12, 34:2-9). The hospital in Key West could not control Dr. Petit's heart condition and sent him to a hospital in Miami. (Van Swol Depo. 34:20-25, 35:1-13). While in Miami, Dr. Petit had a heart catherization, a heart ablation, and a defibrillator and pacemaker implantation, and was in either ICU or CCU. (Van Swol Depo. at 34:10-15, 37:18-24; Petit Depo. at 40:22-24). When he was discharged from the hospital on January 22, 2012, Dr. Petit was not fully recovered. (Van Swol Depo. at 46:5-7, 46:11-15).

Per Mrs. Van Swol, even though Dr. Petit was not fully recovered and continued taking pain medication, he signed the beneficiary designation form the day after he was discharged from the hospital. However, Mrs. Van Swol cannot remember if she saw him

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sign it. (Van Swol Depo. at 55:14-21). However, she admits that she completed the form and all the printed handwriting on the form is hers. (Van Swol Depo. at 49:24-25, 50:1-16 and Exhibit C to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment).

Plaintiff also argued that inconsistencies between the 2012 form (Exhibit C to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment) and the 2007 form (Exhibit D to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment) offer additional facts which make summary judgment inappropriate. The beneficiary designation form completed in 2007 (Exhibit D to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment) listed "Karen (NMI) Petit and Kathy Elise Petit Trust" as the beneficiaries, but the 2012 form (Exhibit C) lists "Karen Petit and Kathy Elise Petit" as contingent beneficiaries.

The court finds this evidence presented by Plaintiff is less than a mere scintilla of evidence needed to Defendant's motion for summary judgment. As such, Defendant's motion for summary judgment on this cause of action is granted.

II. Breach of Fiduciary Duty

Next, the Plaintiff alleges that the Defendant breached her fiduciary duty to the decedent by changing the beneficiaries of the decedent's former IRA. "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." RFT Mgmt. Co. v. Tinsley & Adams, 399 S.C. 322, 335-336, 732 S.E.2d 166 (2012)(citing Moore v.

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Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct.App.2004); Spence v. Wingate, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011).

It is clear from the evidence submitted that Mrs. Van Swol owed the decedent as fiduciary duty when she given a power attorney by him. The Plaintiff argued that Mrs. Van Swol acted under her fiduciary duty when she filled out the 2012 form.

Plaintiff presents no legal principle, however, that this fiduciary duty extends to her as a beneficiary of the account, though she argued her interest was vested because her father, Dr. Petit, lacked the ability to freely change beneficiaries on January 23, 2012. Even if the Defendant breached a fiduciary duty owed to the decedent (which she does not concede), this is a breach of a duty owed by the Defendant to the *decedent* and not the Plaintiff. In this way, any resulting injury from such a breach would be to the decedent's estate, not to the Plaintiff personally. Plaintiff did not present more than a scintilla of evidence. Summary judgment as to the Plaintiff's second cause of action against Mrs. Van Swol must be granted in favor of Mrs. Van Swol.

III. Negligence

Thereafter, the Plaintiff asserts that Mrs. Van Swol's conduct in this case arises to the level of negligence. This claim must also fail because the Plaintiff cannot show that any of her resulting damages are non-economic. However, Plaintiff testified that she suffered emotional damages and nightmares defeats this assertion. (Petit Depo. at 182:10-18). The South Carolina Supreme Court has long held that "tort liability only lies where the damage done is to other property or is personal injury." Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 341, 384 S.E. 2d. 730 (1989). This rule, known as the economic loss rule, finds its bedrock in products liability law but the principles

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which underpin its application are particularly prescient here. In Sapp v. Ford Motor Co., 687 S.E. 2d 47 (2009), the Supreme Court expressed that it was "cautious in permitting negligence actions where there is neither personal injury nor property damage." Id. at 149. The Court explained in Sapp,

> [t]he purpose of the economic loss rule is to define the line between recovery in tort and recovery in contract. Contract law seeks to protect the expectancy interests of the parties. Tort law, on the other hand, seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property.

This statement of public policy is abundantly applicable here. This is not a matter of personal injury or damage to property. Rather, it is a claim arising out of the Plaintiff's expectations—reasonable or not—under the IRAs here at issue. Any such claim is one in contract, not in tort.

At the same time, the Plaintiff cannot recover under a negligence theory because the Plaintiff cannot demonstrate that there was any duty to her by the Defendant with regard to the decedent's IRA, even though Plaintiff argued that she had a vested interest in the IRA because her father lacked the ability to freely change beneficiaries on January 23, 2012, and presented testimonial evidence of herself and Mrs. Van Swol. As already set forth in the section above, the Plaintiff is not a third-party beneficiary and therefore the Plaintiff would not have standing to seek damages from the Defendant *even if* South Carolina recognized a cause of action for breach of duty to a third-party beneficiary sounding in negligence. Moreover, it would be absurd to allow the Plaintiff to recover damages in a third-party negligence case where she could not recover damages in a third-party contract case.

IV. Undue Influence

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Lastly, the Plaintiff accuses the Defendant exercising undue influence on the decedent, causing him to change the beneficiaries. The Plaintiff alleges that the Defendant improperly and unduly influenced the decedent because she "exercised complete control over [the decedent's life] . . . from what he ate to where he went, to what he wore. Sometimes, even when [the Plaintiff] could see him." In this regard, the Supreme Court's decision in Calhoun v. Calhoun, 277 S.C. 527, 290 S.E.2d 415 (1982), is instructive. Calhoun concerned itself with undue influence in the making of a will. The pertinent facts in Calhoun were succinctly stated by the Court:

> [t]he respondents attempted to prove that appellant Virginia Calhoun unduly influenced the testator to leave her the greatest portion of his estate. Their evidence consisted of the following: the testator was physically feeble; he was temporarily confused during a period of hospitalization one year before he executed the will; approximately two months after he executed the will, he was disoriented; appellant Virginia Calhoun visited the testator in the nursing home almost everyday; the testator sometimes would "fuss" at her when he was frustrated; the testator once was overheard to say that appellant Virginia Calhoun wanted it all; she asked Dr. Wilson to examine the testator before he made some changes in his will; and she drove the testator to his attorney's office to prepare the will. However, appellant Virginia Calhoun was not present during any of the testator's conferences with his attorney nor was she physically present when the will was executed. She did not have possession of the will after its execution; instead, testator's accountant, close friend, and a subscribing witness, Mr. Holbert, kept it in his possession. Mr. Holbert testified that on the date of the execution the testator was rational, was not rushed into signing the will, and seemed satisfied with it.

Id. at 532-33. Rejecting the respondents' claims of influence, the Court held that "the issue of undue influence should be resolved in the light of proposition that a sane testator has the right to dispose of his property as he chooses." Id. at 532 (citing Harris v. Berry, 231 S.C. 201, 98 S.E.2d 251 (1957)). Moreover, the Court reasoned "where the testator has had the unhampered opportunity to revoke his will subsequent to the operation of any undue influence upon him, but makes no changes in it, the court generally considers

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the effect of the testimony bearing upon undue influence in a large measure destroyed." Calhoun, 277 at 533.

Plaintiff argued the *Calhoun* case is distinguishable. In *Calhoun*, the decedent was physically feeble, temporarily confused one year prior to executing the will, and disoriented about two months after signing the will. *Id.* at 532-33, 415 S.E.2d at 418. In the present matter, Dr. Petit was an 87-year-old man with dementia hospitalized in the intensive or critical care unit for weeks, after undergoing two surgical procedures, and was taking pain medication when he signed the change of beneficiary designation. (Van Swol Depo. 33:8-12, 34:2-15, 34:20-25, 35:1-13, 37:18-24, 40:22-24, 46:5-7, 46:11-15, 48:19). This is far more evidence than that presented in *Calhoun*.

Plaintiff argued that our supreme court has recognized that "by the very nature of the case, the evidence of undue influence will be mainly circumstantial. It is not usually exercised openly so it can be directly proved." *Hembree v. Estate of Hembree*, 311 S.C. 192, 196, 428 S.E.2d 3, 5 (Ct. App. 1993) (*citing Byrd v. Byrd*, 279 S.C. 425, 427, 308 S.E.2d 788, 789 (1983)). "In cases where allegations of undue influence have been successful, there has been evidence of threats, force, restricted visitation, or an existing fiduciary relationship at the time of or before the will's execution." *Id.* at 196, 428 S.E.2d at 5 (*citing Byrd v. Byrd*, 279 S.C. 425, 308 S.E.2d 788 (1983) and *Moorer v. Bull*, 212 S.C. 146, 46 S.E.2d 681 (1948)).

Here, Plaintiff presented evidence that at the time Dr. Petit allegedly executed the change of beneficiary form, a fiduciary relationship already existed between Mrs. Van Swol and Dr. Petit. (Exhibit H to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment, Power of Attorney forms). Additionally, Mrs. Van Swol went to

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great lengths to conceal Dr. Petit's critical medical condition from his daughters when he was hospitalized in Florida. Mrs. Van Swol did not call Dr. Petit's daughters, but instead instructed Dr. Petit to call his daughters, even though Mrs. Van Swol admits he was "barely" able to call. (Van Swol Depo. at 44:11-25, 45:1-17). Mrs. Van Swol apologized to Ms. Petit, and said, "I wish that I had never been involved with any of this."(Van Swol Depo. at 67:10-14).

However, the court finds Plaintiff's evidence is not sufficient to defeat Defendant's motion for summary judgment. Evidence presented by Mrs. Van Swol demonstrates that the decedent was certainly competent enough to execute other legal binding documents prior to the 2014 finding of incapacity. In fact, he was found by the Probate Court to have been perfectly capable of executing a power of attorney in favor of Mr. Dorn. In this way, the decedent was perfectly capable of making subsequent changes to his designation of beneficiaries. Even more remarkable is the fact that the Defendant had a power of attorney allowing her to make changes to the IRA, meaning that the application of any undue influence was completely unnecessary. Finally, the beneficiaries in question where the decedent's grandchildren, not the decedent or anyone closely associated with the decedent. It begs the question as to why the Defendant would exert such overbearing influence on the decedent for literally no gain whatsoever. As such, summary judgment in favor of Mrs. Van Swol must be granted as to this count as well.

CONCLUSION

For the reasons cited herein, the Defendant Phyllis Van Swol's Motion for Summary Judgment is GRANTED.

It Is So Ordered.

Presiding Circuit Court Judge
Eighth Judicial Circuit

On _____, 2019
At _____, S.C.

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