THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Greenwood County
Greenwood County Court of Common Pleas
Hon. Judge Donald B. Hocker, Family Court Judge, Presiding

2020-000917

Karen Petit…….……Appellant,

Versus

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

FINAL BRIEF OF APPELLANT

Respectfully Submitted,

s/Scarlet B. Moore

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Greenville, South Carolina
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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in granting the motions for summary judgment filed by the Respondents Phyllis Jean Krohn, USAA Federal Savings Bank and USAA Investment Management Co., respectively?

STATEMENT OF THE CASE

This matter is an appeal of the trial court's orders granting summary judgment to the Respondents and dismissing the Appellant's complaint and all causes of action in the above titled matter. (R. pp. 1-22;) This matter was initiated by the Appellant, Karen Petit, filing a Summons and Complaint seeking damages pursuant to multiple causes of action arising from the settlement of a USAA IRA account worth $454,332.00 held by the Appellant's Father, Dr. Edward Petit, who died on March 18, 2015. (R. pp. 35-45;) During Dr. Petit's lifetime, the Appellant had actual knowledge that she and her sister were the beneficiaries of the USAA IRA policy, with the sister's portion to be held in trust. (R. pp. 101-104;) On or about January 15, 2007, Dr. Petit executed a form entitled "Individual Retirement Account Designation of Beneficiary" form entirely in his handwriting, in which he named Karen (NMI) Petit and Kathy Elise Petit Trust as the beneficiaries. (R. pp. 101-104.) However, subsequent to Dr. Petit's death on March 18, 2015, the Appellant learned in 2017 that a change of beneficiary form had been executed on or about January 23, 2012, changing the beneficiaries from the Appellant and her sister in trust, to the Appellant's nieces. (R. pp. 149-152.) During Dr. Petit's lifetime and during the time that the change of beneficiary form would have been executed, the Respondent Phyllis Jean Krohn served as a companion to him. Given the fact that the beneficiaries had been changed without her knowledge, the Appellant on or about June, 2017, asked Ms. Krohn whether or not she knew how the IRA was changed. Ms. Krohn replied, "I did it." (R. p. 673, lines 15-21; p. 695, lines 5-11; p. 743, lines 11-21.) The Appellant asked her why she changed it, and Ms. Krohn advised that the Appellant's Father wanted to do something nice for his granddaughters and that ***Ms. Krohn*** had decided that this is what he could do – provide for them through the USAA IRA. (R. p. 695, lines 5-11.) Subsequently, Ms. Krohn apologized to the Appellant saying, "I'm so sorry,

I'm so sorry, you don't know how often I regretted the things that I did with your Dad." (R. p. 743, lines 11-21.) At the summary judgment hearing, the Appellant submitted an affidavit of Wallace M. Dorn corroborating the Appellant's recollection of the confrontation that took place between the Appellant and Ms. Krohn. (R. pp. 873-874; R. pp. 233-240;) Mr. Dorn described witnessing the conversation between the Appellant and Ms. Krohn, and observed that the Appellant was distraught and upset. (R. pp. 873-874; R. pp. 233-240;)

The Appellant eventually learned that on or about January 23, 2012, Ms. Krohn had completely filled out a USAA form entitled "Individual Retirement Account Designation of Beneficiary," which permitted Ms. Krohn to change the beneficiaries to the Appellant's nieces, with the form being signed by Dr. Petit. (R. pp.149-152;) The deposition testimony of Ms. Krohn also established that an agent for the company from Houston, Texas actually visited the home of Dr. Petit in Greenwood, S.C. to discuss financial accounts and services available to him through USAA on or about Fall of 2011. (R. p. 553, lines 15-21; R. p. 555, lines 1-10.) And, according to Ms. Krohn's deposition, USAA's agent provided the change of beneficiary form after visiting with Dr. Petit and Defendant Krohn in the Fall of 2011. (R. p. 554, lines 17-25; R. p. 555, lines 1-10.) The Appellant also learned that on or about January 26, 2009, Dr. Petit had executed a USAA Power of Attorney in favor of Ms. Krohn. (R. pp. 105-109;) The power of attorney was not executed pursuant to South Carolina law (which requires two (2) witnesses), and the document contains a specific limitation in section 1(d) which 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……."

The Appellant presented evidence at the summary judgment hearing that immediately

prior to her Father signing the change of beneficiary form in favor of the nieces, the 87 year-old Dr. Petit lost consciousness while on a cruise from Miami, and was taken from the ship to a hospital in Key West, Florida. (R. p. 550, line 19; p. 535 lines 8-12; p. 536, lines 2-9.) The hospital in Key West could not control Dr. Petit's heart condition and sent him to a hospital in Miami. (R. p. 536, lines 20-25; p. 537, lines 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. (R. p. 536, lines 10-15; p. 539;) (R. p. 662, lines 22-24.) When he was discharged from the hospital on January 22, 2012, Dr. Petit was not fully recovered. (R. p. 548, lines 5-7; p. 548, lines 11-15.) Even though Dr. Petit was not fully recovered and continued taking pain medication, he signed the beneficiary designation form in favor of the nieces the day after he was discharged from the hospital. However, Ms. Krohn testified in her deposition that she could not remember if she saw him sign it. (R. p. 557, lines 14-22.) However, Ms. Krohn admitted in deposition and requests to admit that she completed the change of beneficiary form and all the printed handwriting on the form is hers. (R. p. 551, lines 24-25; p. 552, lines 1-16;) (R. pp. 233-240; R. pp. 149-152;)

As stated, the Appellant filed suit on or about November 8, 2017, with the Greenwood County Court of Common Pleas naming USAA Federal Savings Bank and USAA Investment Management Co., and Phyllis Jean Krohn as Defendants. (R. pp. 35-45.) All Respondents filed Answers to the Plaintiff's Complaint. (R. pp. 53-66; R. pp. 46-51.) The parties engaged in some discovery, but discovery was not complete as of the time of the summary judgment motions. The Appellant was in the process of gathering additional medical information from the hospital in Miami, Florida, where her Father was taken after his medical emergency issues on the cruise ship. On or about May 2, 2019, Respondents USAA filed a motion for summary judgment

asking the court to dismiss all of the Appellant's causes of action. (R. pp. 67-68.)) The Respondent Ms. Krohn filed a motion for summary judgment on or about August 5, 2019, asking for the same relief. The parties appeared before Judge Donald Hocker on September 4, 2019, for a hearing pursuant to the Defendants' motions for summary judgment. (R. pp. 848-872.) The Appellant filed a Memorandum in Opposition to the Summary Judgment Motions. (R. pp. 233-240.) On January 15, 2020, Judge Hocker filed two separate orders granting the Respondents' motions. (R. pp. 1-22.) The Appellant timely filed a motion to reconsider both orders on or about January 27, 2020. (R. pp. 308-314.) Judge Hocker denied the Appellant's motion to reconsider both orders in separate orders filed on May 20, 2020. (R. pp. 23-34.) The Appellant filed a timely notice of appeal on June 17, 2020.

STANDARD OF REVIEW

An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56, SCRCP. *Quail Hill, LLC v. Cty. of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010).* "In cases applying the preponderance of the evidence burden of proof, the [nonmoving] party is only required to submit a . . . scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).* The South Carolina Supreme Court has held 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. Dept. 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.)*

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT PHYLLIS JEAN KROHN.

The trial court clearly erred in granting Respondent Phyllis Jean Krohn's motion for summary judgment in the case at bar. "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003)* (quoting Rule 56(c), SCRCP). Once the moving party meets this initial burden, the nonmoving party cannot simply rest on the allegations or denials contained in the pleadings. Rule 56(e), SCRCP. "[T]he nonmoving party must do more than 'simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.'" *Grimsley v. S.C. Law Enf't Div., 415 S.C. 33, 42, 780 S.E.2d 897, 901 (2015)* (quoting *Russell*, 353 S.C. at 220, 578 S.E.2d at 335). "Only disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).*

"In determining whether any triable issue of fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Grimsley*, 415 S.C. at 40, 780 S.E.2d at 900 (quoting *Quail Hill, LLC, 387 S.C. at 235, 692 S.E.2d at 505*). Summary judgment may be granted when the evidence is capable of only one reasonable interpretation. *Bell v. Progressive Direct Ins. Co., 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014*). However, summary judgment is a drastic remedy that "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues."

Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (quoting *Watson v. S. Ry. Co., 420 F. Supp. 483, 486 (D.S.C. 1975*).

"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." *Carolina*, supra, at 485, 523 S.E. 2d at 799 (citing *Gilliland v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577 (1990).* 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 affirmed, 319 S.C. 79, 459 S.E.2d 850 (1995).*

In reviewing the trial court's orders granting summary judgment to both defendants, it is clear that the court did not view the evidence in the light most favorable to the Appellant, the non-moving party. The court's orders focus on the factual summaries provided by the Respondents and are largely supported by the Respondents' discovery and Ms. Krohn's deposition testimony. The trial court did not apply the standards in the law of summary judgment as recited above. Specifically, the trial court reached conclusions and inferences of the credibility of the Appellant's evidence presented, contrary to *Carolina* and *Hansen*, supra. A review of the evidence and arguments of Appellant's counsel as recited below will bring this Honorable Court to the conclusion that summary judgment was improperly granted in favor of all defendants in this case, and the orders of Judge Hocker should be reversed.

Interference with a Contractual Relationship

The Appellant soundly plead that Respondent Phyllis Jean Krohn interfered with a contractual relationship formed pursuant to the facts of this case, which caused damages to the

Appellant Karen Petit. 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).* "Therefore, it does not protect a party to a contract from actions of the other party." Id. *Dutch Fork Dev. Grp. II, LLC v. Sel Props., LLC, 406 S.C. 596, 753 S.E.2d 840 (S.C. 2012)*

Additionally, South Carolina has specifically adopted the tort of intentional interference with prospective contractual relations. *Crandall Corp. v. Navistar Int'l Transp. Corp., 302 S.C, 265, 395 S.E.2d 179 (1990).* *Crandall* is a case in which the S.C. Supreme Court reversed the grant of summary judgment by the trial court finding that no such cause of action existed in the law of South Carolina. In reversing, the S.C. Supreme Court held that the Petitioners had furthered a sound cause of action, and the elements that a Plaintiff must prove are that (1) the Defendant intentionally interfered with the plaintiff's potential contractual relations; (2) for an improper purpose or by improper methods; (3) causing injury to the plaintiff. Further, if a defendant acts for more than one purpose (which the record of this case is devoid of any other purpose than a sinister one by Ms. Krohn), the improper purpose must predominate in order to create liability. Alternatively, a plaintiff can prove that the defendant's *method of interference* was improper under the circumstances – which in this case was clearly established by Ms. Krohn's own admissions regarding the change of beneficiary form and her acting outside the scope of the USAA Power of Attorney. This cause of action is precisely what is alleged in the

Appellant's complaint, and the admissions of Ms. Krohn in her deposition establishes much more than a scintilla of evidence when the evidence is viewed in the light most favorable to the non-moving party, the Appellant Karen Petit. Further, inconsistencies between the 2012 form and the 2007 form offer additional facts which make summary judgment inappropriate. The beneficiary designation form completed in 2007 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, despite the fact that there had been no material change in Kathy's circumstances at the execution of the second form. (R. pp. 101-109.)

Further, the facts are undisputed that USAA entered into a valid contract with Dr. Petit, given the admission of such in the pre-trial discovery process by the USAA defendants. (R. pp. 53-66.) It is also undisputed that the Appellant was a beneficiary of the contract, and undisputed that Ms. Krohn had actual knowledge of the account given her status as USAA Power of Attorney and her admitted act of changing the beneficiaries on the USAA form. (R. pp. 503-584.) There is also no doubt that Ms. Krohn's interference with the contract caused damages to the Appellant.

In the trial court's order granting summary judgment in favor of Ms. Krohn finding no scintilla of evidence supporting the facts viewed in the light most favorable to the Appellant Karen Petit regarding interference of a contractual relationship, the court errs in finding that Ms. Petit has a mere "expectancy in the benefits" of the IRA account, and thus no vested interest and standing to bring the present action, citing wholly inapplicable cases from jurisdictions not controlling in South Carolina. As an initial matter, the Respondents stipulated at the summary judgment motion hearing that the issue squarely presented to the court in this case of the Appellant's standing to pursue this matter as a contingent beneficiary of an IRA appears to be

one of first impression in South Carolina – thus would explain the trial court's citation of cases in jurisdictions outside South Carolina. Also cited by the trial court in its order granting Ms. Krohn's motion is the case of *Stribling v. Stribling, 369 S.C. 400, 406, 632 S.E. 2d 291, 294 (Ct. App. 2006)*. *Stribling* is particularly inapplicable to the overall facts at bar. However, contrary to the assertions of the Respondents in their summary judgment motions and accompanying memoranda, the *Stribling* case actually supports the conclusion that the Appellant had standing to bring her claims as her Father was deceased at the time of the filing of the lawsuit and unable to change the beneficiaries. The case of *Stribling* involved a dispute about a former spouse's entitlement to IRA funds given a valid marital settlement agreement entered in the Family Court wherein the Wife waived her rights to certain retirement accounts, but yet was still named as the beneficiary of an IRA policy at the time of the deceased husband's death. The court in *Stribling in mere dicta* points out that the Wife had a mere expectancy of benefits given her status as the named beneficiary to the IRA account and not a vested interest such that would defeat the valid marital settlement agreement entered in Family Court. This dicta can hardly be used by this Honorable Appellate Court to close the courthouse doors to the Appellant Karen Petit by challenging her basic standing to assert a cause of action which is clearly justiciable in the Courts of South Carolina. The trial court's interpretation and application of the alleged principle in *Stribling* of "mere expectancy" would bar litigants such as Ms. Petit to file lawsuits against wrongdoers (particularly those wrongdoers who admit their bad acts at the inception of a lawsuit as is present in this case) and would yield absurd results. Ms. Petit ultimately was not the beneficiary who received the proceeds of the USAA IRA – so the question becomes at what point would she have had standing to challenge the bad acts of Ms. Krohn if she could not do it during the lifetime of Dr. Petit, nor following his death due to the fact that she was not the vested

beneficiary as found by the trial court? Again, the conclusion reached by the trial court's application of wholly irrelevant cases on this issue has yielded an absurd result in barring the courthouse from the Appellant Karen Petit's claims – and she has not had a sufficient opportunity to present her case fully to a proper finder of fact, a jury.

If this Appellate Court were to find that the issue presented is one of first impression in South Carolina as stipulated by defense counsel at the summary judgment motion hearing, the case of *Mayer v. M.S. Bailey & Son, 347 S.C. 353, 555 S.E.2d 406 (S.C. App. 2001)* presents a much more analogous set of facts to the case at bar. In *Mayer,* the Appellants were contingent beneficiaries of the remainder of a trust established during the lifetime of the decedent, their Father. The Appellant children had concerns that the trust was being depleted and mismanaged to their detriment by the trustee M.S. Bailey & Son, Bankers, during the lifetime of the decedent. However, believing that they would not have a vested interest in the proceeds of the remainder until the death of the decedent, they did not file suit to challenge the acts of the trustee until after the death of their Father. The opinion of this Honorable Court in *Mayer* was that the Appellants' claims were barred by the statute of limitations set forth in Title 62 and Title 15 of the South Carolina Code (The Probate Code), affirming the trial court's grant of summary judgment. However, this Court disagreed with the Appellant children's assertion that as contingent remaindermen of the trust accounts, they did not have a justiciable interest and thus no standing to initiate a suit against Bankers until their interests became fully vested upon the death of their Mother (pursuant to the terms of the trust). This Court rejected this argument finding that as contingent beneficiaries to the trust that they were an "interested party" and had standing to assert their claims prior to the death of the decedent. Application of the principles of *Mayer* to the case at bar would yield a much more equitable result and conclusion that contingent

beneficiaries have standing not only prior to the death of a decedent to challenge the acts of admitted bad actors contrary to the intent and will of a decedent during their lifetimes, but also following the discovery of the bad acts that caused them harm to their contingency interests. Of note is that in the case at bar, the Appellant did not learn of the bad acts of Ms. Krohn until after her Father's death, in 2017. However, if the trial court's reasoning stands in this case and shuts the doors of the courthouse to Ms. Petit's claims against Ms. Krohn, the absurd result would be that there would be no remedy to redress the grievance against the bad actor that caused harm to Ms. Petit. Therefore, the trial court erred in granting summary judgment in favor of Ms. Krohn on the issue of interference of a contractual relationship, and this Honorable Court should reverse the order and remand back to the trial court for further proceedings.

Breach of Fiduciary Duty

In the case at bar, a clear fiduciary relationship existed between the Respondent Phyllis Jean Krohn and Dr. Petit. A fiduciary relationship exists by law and fact when one reposes special confidence in another so that the latter, in equity and in good conscience, is bound to act in good faith and with due regard to the interest of the one proposing the confidence. *O'Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992)*. And, it is clear that Ms. Krohn breached her fiduciary responsibility to Dr. Petit when she changed the beneficiaries of Dr. Petit's USAA IRA contrary to the scope of the authority granted to her by the USAA Power of Attorney, and she did not act in good faith in the change of beneficiaries transaction, as discussed below in the section titled "Undue Influence." The trial court erred in granting to Ms. Krohn summary judgment and Judge Hocker's order should be reversed.

Negligence

The Respondent Phyllis Jean Krohn is liable for damages to the Appellant Karen Petit for negligence due to the fact that Ms. Krohn voluntarily undertook a duty of due care to Plaintiff, a third party beneficiary of the USAA contract and Dr. Petit's daughter, when Krohn acted as Dr. Petit's alleged attorney-in-fact. Ms. Krohn breached her duty by negligent, reckless willful or wanton acts of mismanaging the IRA account, and changing the beneficiaries without proper authorization from the holder of the account, Dr. Petit. Evidence of the acts of Ms. Krohn were presented to Judge Hocker for his consideration at the summary judgment motion hearing, as well as in filings by the Appellant Karen Petit. Phyllis Jean Krohn's breach of duty of due care proximately caused damages to the Plaintiff. Although the trial court found that a negligence claim would not lie in this case based on the application of the "economic loss rule," the evidence presented at the summary judgment hearing established that the Appellant Karen Petit suffered emotional damages and nightmares as a result of the actions of Ms. Krohn as well as USAA. (Deposition of Karen Petit, R. p. 804, lines 10-18.) Certainly, these facts present more than a scintilla of evidence that could be considered by a jury and enough to defeat a motion for summary judgment. Therefore, Judge Hocker erred as a matter of law and his order should be reversed.

Undue Influence

By the Respondent Phyllis Jean Krohn's own admission to the Appellant, she exerted undue influence over the will and intent of Dr. Petit in the process of changing the beneficiaries

of the USAA IRA policy. It is more than curious that Ms. Krohn would actually apologize repeatedly to the Appellant Karen Petit for her involvement in the change of beneficiary form, because a valid form should have been executed pursuant to the specific will and intent of Dr. Petit. There would be no reason for Ms. Krohn to apologize and make the admissions that she did as discussed above and below, unless she knowingly had participated in an infirm and improper process interposing her will for Dr. Petit's will. And, given the discussion above regarding Ms. Krohn's interference with a contractual relationship, the Appellant clearly had standing to assert her claims against Ms. Krohn. Even if this Court were convinced by the arguments of counsel at the summary judgment hearing that Ms. Krohn served as the ***agent*** of Dr. Petit during this process due to the USAA power of attorney executed in her favor, the power of attorney was not executed pursuant to South Carolina law (which requires two (2) witnesses), and has only one witness to the document. (USAA Power of Attorney; R. pp. 105-109.) Further, the document contains a specific limitation in section 1(d) which 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 securities held in such investment accounts to himself or herself or to others."

A legal analogy adopted by the trial court in this matter was the execution of a will and the impact of undue influence by a bad actor. The formal execution of a will is admitted or proved, a prima facie case in favor of the will is made out, and the burden is then on the contestant to prove undue influence, incapacity or other basis of invalidation. The contestant continues to bear the burden of proof throughout the will contest. In determining whether the contestants sustained such burden, the evidence has to be viewed in the light most favorable to

the contestants. *Hellams v. Ross, 268 S.C. 284, 233 S.E.2d 98 (1977*); *Havird v. Schissell, 252 S.C. 404, 166 S.E.2d 801 (1969*); *Smith v. Whetstone, 209 S.C. 78, 39 S.E.2d 127 (1946).* The court will review the evidence relied upon by the respondents to prove the will was the product of undue influence. In the cases cited supra, the S.C. Supreme Court acknowledges that undue influence by its very nature will be mainly established by circumstantial evidence, and sanctions the use of circumstantial evidence to establish a claim of undue influence – finding that undue influence is not usually exercised openly so that it can be directly proved. However, in the case at bar, the Appellant Karen Petit challenged the motions for summary judgment with much more than just circumstantial evidence – she presented the direct admission in deposition testimony of the bad actor, Ms. Krohn. This direct evidence of undue influence was much more significant than a mere scintilla of evidence required to overcome a motion for summary judgment. Pursuant to the cases cited above, the circumstances must point *unmistakably and convincingly* to the fact that the mind of the testator was subjected to that of some other person so that the will is that of the latter and not of the former, and there can be no stronger evidence of such than an admission by Ms. Krohn of doing just that. *Havird, supra. Calhoun v. Calhoun, 277 S.C. 527, 290 S.E.2d 415 (S.C. 1982).*

The trial court cites *Calhoun,* supra, in support of its grant of summary judgment against the Appellant Karen Petit. In *Calhoun*, the 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 every day; 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 (contrary to the facts at bar based on Ms. Krohn's admissions). Appellant Calhoun 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. The South Carolina Supreme Court in *Calhoun* found that the record was devoid of any evidence that Appellant Virginia Calhoun interfered with the making of the will. The Court found that she may have been interested in the will and may have had more opportunities for persuasion than the Respondents. However, the Court found that this act alone does not constitute undue influence under the law.

The facts of *Calhoun* are distinguishable from the facts in the case at bar. 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. In the case at bar, Dr. Petit was an 87 year-old man with dementia hospitalized in the intensive or critical care unit for weeks after being removed from a cruise ship in Key West, FL, after undergoing two surgical procedures, and was taking pain medication when he signed the change of beneficiary designation. (R. p. 535, lines 8-12; p. 536 lines 2-15 and, lines 20-25; p. 537, lines 1-13; p. 539, lines 18-24; p. 542, lines 22-24; p. 548, lines 5-7 and 11-15; p. 550, line 19.) Ms. Krohn testified in her deposition that Dr. Petit lost consciousness on the cruise ship and was taken to the Key West Hospital, but had to be sent to a hospital in Miami that could better treat his very serious ailments. (R. pp. 503-584.)

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. Pursuant to Ms. Krohn's deposition testimony, although Dr. Petit was not fully recovered from the incident in Florida and continued taking pain medication, he signed the beneficiary designation form the day after he was discharged from the hospital in Florida. (R, pp. 503-584.) Additionally, Dr. Petit suffered from heart problems and glaucoma which made him unable to read. The evidence presented at the summary judgment hearing established that Ms. Krohn took care of Dr. Petit the way an LPN might. This is far more evidence than that presented in *Calhoun*, and much more than a mere scintilla of evidence to defeat a summary judgment motion. Again, the trial court simply did not apply the legal standard of viewing the evidence in the light most favorable to the non-moving party, Appellant Karen Petit, but rather made conclusions, inferences, and credibility determinations regarding the evidence presented at the hearing.

The South Carolina Supreme Court has also 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, 4 (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 have been evidence of threats, force, restricted visitation, *or an existing fiduciary relationship at the time of or before the will's execution*." (Emphasis added.) As has been well established by the facts at bar, a fiduciary relationship already existed between Dr. Petit and Ms. Krohn. Additionally, Ms. Krohn went to great lengths to conceal Dr. Petit's critical medical condition from his daughters when he was hospitalized in Florida. Ms. Krohn did not call Dr. Petit's daughters, but instead instructed Dr. Petit to call his daughters, even though Ms. Krohn admits he was "barely" able to call. (R. p.

546, lines 11-25; p. 547, lines 1-17.) Lastly, as has been discussed above, Ms. Krohn apologized to the Appellant Karen Petit and said, "I wish that I had never been involved with any of this." (R. p. 569, lines 10-14.) More than a scintilla of evidence exists for this matter to move forward for further proceedings, to a jury trial, and the Respondent Phyllis Jean Krohn's motion for summary judgment on this ground, undue influence, should have been denied.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS USAA FEDERAL SAVINGS BANK AND USAA INVESTMENT MANAGEMENT.

The Appellant adopts the Standard of Review and legal standards regarding granting summary judgment motions as a matter of South Carolina law, as stated in Argument I, above, as also applicable to the USAA Respondents. Throughout the entirety of the order granting summary judgment in favor of USAA, the trial court improperly engages in weighing evidence and making conclusions about the strength of the evidence that was presented by both sides – rather than looking at the evidence in the light most favorable to the non-moving party, the Appellant Karen Petit, and determining whether a scintilla of evidence existed to go forward with the case to trial. As a glaring example of this, the trial court finds in the USAA order granting summary judgment that the execution of the Durable General Power of Attorney in the Greenwood County Probate Court by Dr. Petit on or about February, 2012, following the emergency medical incident in Miami wherein Dr. Petit was removed from a cruise ship due to serious health complications, was "some evidence" that Dr. Petit was competent at the time he signed the designation of beneficiary form. (R. p. 16) The Appellant Karen Petit also presented at least "some evidence" of her Father's infirmity on the eve of his signing the change of beneficiary form at issue, as discussed above, which signing occurred approximately a month *prior* to the execution of the Power of Attorney. Add to the Appellant's evidence of her Father's infirmity the fact that Ms. Krohn actually apologized to the Appellant and expressed remorse for her involvement in the change of beneficiary form, and that creates an issue of material fact that is for the province of a jury. The trial judge summarily rejected the Appellant's evidence, but in doing so rejected the law of summary judgment which clearly favors denying the USAA Defendants' motion for summary judgment. Thus, the trial court's order on its face is infirm,

and should be reversed by this Honorable Court.

Breach of Contract

The USAA Defendants through counsel have stipulated and admitted that they were parties to a contract with Dr. Petit regarding the management of an IRA account. (R. pp. 145-148.) The contract was formed when Dr. Petit deposited funds into an IRA with USAA. And, the Appellant Karen Petit was a third-party beneficiary to this contract because Dr. Petit named her as a beneficiary to the contract. (R. pp.149-152) USAA breached the contract in multiple ways including but not limited to its use of a Power of Attorney that did not comply with South Carolina law, by permitting Ms. Krohn to access and make changes to Dr. Petit's IRA account without valid or legal authorization to do so, and by permitting Ms. Krohn to change the beneficiaries of Dr. Petit's IRA through their defective change of beneficiary form and defective power of attorney form invalid under South Carolina Law. USAA's breach of contract directly and proximately caused damages to the Plaintiff, and Judge Hocker erred in granting summary judgment to USAA on this ground.

Breach of Fiduciary Duty

The evidence that was presented to the trial court for the purpose of defeating a motion for summary judgment established significantly more than a "scintilla" of evidence that USAA developed a fiduciary relationship with and thus owed a duty to Dr. Petit. The trial court's order reads like a final order weighing the evidence presented not only in the light most favorable to the ***moving*** party, but clearly making conclusions about the evidence that is strictly reserved for the province of a jury. A fiduciary relationship exists by law and fact when one reposes special

confidence in another so that the latter, in equity and in good conscience, is bound to act in good faith and with due regard to the interest of the one proposing the confidence. *O'Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992)*. The trial court correctly cites *Rush v. South Carolina Nat'l. Bank, 288 S.C. 560, 562, 343 S.E.2d 667, 668 (Ct. App. 1986),* for the proposition that 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.*" (Emphasis added.) The undisputed facts of this case are that an agent of USAA from Houston, Texas actually visited Dr. Petit's home in Greenwood, S.C. to discuss USAA financial products, satisfying prong two of *Rush*. Due to the fact that the USAA Power of Attorney specifically prohibited Ms. Krohn from making changes to the beneficiaries of the IRA policy pursuant to section 1(d) as referenced above, the question becomes what was the intended purpose of the USAA Power of Attorney, executed following the visit from the USAA agent from Texas. Again, this is squarely for the jury to decide. The deposition testimony of Ms. Krohn establishes that there was more than just a creditor/debtor relationship between Dr. Petit and USAA, due to the fact that an agent for the company from Houston, Texas actually visited the home of Dr. Petit in Greenwood, S.C. to discuss financial accounts and services available to him through USAA on or about Fall of 2011. (R. p. 553, lines 15-21; p. 555, lines 1-10.) And, according to Ms. Krohn's deposition, USAA's agent provided the beneficiary form after visiting with Dr. Petit and Defendant Krohn in the Fall of 2011. (R. p. 554, lines 17-25; p. 555, lines 1-10.) The USAA 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 – inconsistent with the original beneficiary designation form. (R. pp. 233-240.) Regarding the concerning FedEx label, 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. (R. pp. 233-240.) The FedEx label itself contradicts 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. (R. p. 280.) Secondly, the label lists the sender, Dr. Petit, as the party who was billed, but USAA claims it provided the label to him as a "courtesy." (R. pp. 233-240.) However, the 2007 beneficiary designation form was completed entirely by Dr. Petit, and mailed via regular U.S. Mail to the correct address in the envelope provided by Defendant USAA. This evidence creates a genuine issue of material fact which should have defeated the summary judgment motion as the jury could infer from such evidence that there were irregularities with the execution and processing of the second change of beneficiary form at issue. USAA has an interest in ensuring its customers follow the instructions on its beneficiary designation form, but then does not follow its own form's instructions. (R. pp.233-240.) Interestingly, the 2007 (original) beneficiary designation form was completed entirely by Dr. Petit, and mailed to the correct address in the envelope provided by USAA. (R. pp. 233-240.)

Additionally, there existed more than a scintilla of evidence that a fiduciary relationship existed between USAA and Dr. Petit, as the defective USAA Power of Attorney contemplates Dr. Petit's attorney-in-fact conducting business with USAA above and beyond the simplicity of remotely changing a beneficiary form for an IRA account. (R. pp. 105-109.) And, the inference that could be drawn by the jury is that because the agent for USAA personally visited the home of Dr. Petit, the agent also would have had an opportunity to observe the condition of Dr. Petit and could describe such for the jury. Additionally, during Ms. Krohn's deposition she testified that the change of beneficiary form was requested during the Fall 2011 meeting, but the form

was not completed until January 23, 2012. (R. p. 555, lines 1-10.) The evidence presented at the summary judgment motion hearing creates a genuine issue of material fact and represents more than just a scintilla of evidence in favor of the non-moving party, Appellant Karen Petit, and Judge Hocker erred in granting summary judgment in favor of the USAA Respondents.

Negligence

There exists more than a scintilla of evidence viewed in the light most favorable to the Appellant Karen Petit that USAA is liable to her for their negligent acts. The USAA defendants owed a duty of care to Dr. Petit, and the beneficiaries that he chose, one of whom was the Appellant Karen Petit. The USAA Defendants breached their duty of care by negligent, reckless, willful and wanton acts and omissions, as describes above, including but not limited to providing an invalid and defective 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. The breach of duty of due care by the USAA defendants proximately caused damages to the Appellant Karen Petit. Although the trial court found that a negligence claim would not lie in this case based on the application of the "economic loss rule," the evidence presented at the summary judgment hearing established that the Appellant Karen Petit suffered emotional damages and nightmares as a result of this very concerning incident. (R. p. 804, lines 10-18.) Certainly, these facts present more than a scintilla of evidence that could be considered by a jury and enough to defeat a motion for summary judgment on the issue of USAA's negligence. The trial court erred in granting summary judgment to the USAA Defendants, and Judge Hocker's order should be reversed.

CONCLUSION

The Appellant Karen Petit respectfully prays that this Honorable Court will reverse the orders of Honorable Judge Donald Hocker granting the summary judgment motions by the Respondents Phyllis Jean Krohn and both USAA Respondents in this matter, remand this matter back to the trial court for further proceedings, and for any further relief that this Court deems necessary and appropriate.

Respectfully Submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Greenwood County
Greenwood County Court of Common Pleas
Hon. Judge Donald B. Hocker, Family Court Judge, Presiding

Appellate Case No. 2017-CP-24-01343

Karen Petit.....….....Appellant,

Versus

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

CERTIFICATE OF COUNSEL

I certify that the Final Brief of Appellant, Karen Petit, complies with Rule 211(b).

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March 16, 2021