THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-8578
Appellate Case No. 2014-002638

Francis P. Maybank and Jane H.P. Maybank, as trustee for the Francis P. Maybank Family Insurance Trust, ...Plaintiffs

Of whom Francis P. Maybank is..Respondent/Appellant,

v.

BB&T Corporation, Branch Banking & Trust Company, successor in merger to Branch Banking & Trust Company of SC, and Sterling Capital Management, LLC, successor in merger to BB&T Asset Management, LLC..............................Appellants/Respondents.

Initial Respondents' Brief of Appellants/Respondents

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Table of Contents

Table of Authorities iii

Statement of Issues on Appeal 1

Statement of the Case 2

Statement of the Facts 2

A. Maybank's Mischaracterization of the "Cost" of the PVFCs Fails to Account for the Significant Benefits of the Transactions 3

B. Maybank Exaggerates the Amount to Terminate the First PVFC. 3

C. Maybank's Financial Difficulties Arose from the Sharp Reduction in BB&T Stock Dividends, Not from the PVFCs. 4

D. Maybank Knew and Understood that a PVFC Would Not Guarantee that He Would Receive Dividend Payments at any Particular Level. 6

E. Maybank Was Aware of the Upfront Cost of the First PVFC. 8

F. Maybank Was Aware of the Cost of Unwinding and Rolling the Prepaid in January of 2009. 9

G. Maybank Recovered the Entire Cost of the 2009 Unwind and Roll During the Life of the Remaining PVFCs. 10

H. The Oliver Memorandum Was an Internal Communication that Accurately Described the 2006 PVFC. 12

I. There Is No Evidence in the Record Showing that PVFCs Were a "Preferred Solution." 16

J. BB&T AM Cut its Fee by More than Half for the First PVFC. 17

K. The Fee Rebate Letter Accurately Represented that BB&TAM Was Not Required to Refund the Advisory Fees. 18

L. The Defendants Did Not Solicit the Sale of Additional Life Insurance to Maybank in June of 2007. 19

M. Maybank Was Not Forced Out as a Client. 20

ARGUMENT 20

I. The Trial Court Properly Denied Maybank's Motion for Prejudgment Interest. 20

A. South Carolina law regarding the awarding of prejudgment interest. 21

B. The facts of this case illustrate that Maybank's alleged damages were neither a sum certain, nor capable of being reduced to a certainty through the application of a clear mathematical calculation which cannot be changed by the proof. 23

C. South Carolina authorities support the trial court's denial of prejudgment interest in this case. 29

D. The authorities from South Carolina and other jurisdictions cited by Maybank are inapplicable or distinguishable from this case. 32

II. Maybank Waived his Right to Collect Prejudgment Interest Through the Limitation of Damages Provision of the Wealth Management Agreement. 36

Conclusion 37

TABLE OF AUTHORITIES

Page(s)

Cases

Babb v. Rothrock,
310 S.C. 350, 426 S.E.2d 789 (1993) 33

Beckman Concrete Contractors, Inc. v. United Fire & Cas. Co.,
360 S.C. 127, 600 S.E.2d 76 (Ct. App. 2004) 22

Boykin Contracting, Inc. v. Kirby,
405 S.C. 631, 748 S.E.2d 795 (Ct. App. 2013) 33

Butler Contracting, Inc. v. Court St. LLC,
369 S.C. 121, 631 S.E.2d 252 (2006) 21, 22, 33

Daley v. Chang (In re Joy Recovery Tech. Corp.),
291 B.R. 111 (Bankr. N.D. Ill. 2003) 35

Helms v. Roti (In re Roti),
271 B.R. 281 (Bankr. N.D. Ill. 2002) 35

Historic Charleston Holdings, LLC v. Mallon,
381 S.C. 417, 673 S.E.2d 448 (2009) 21, 22, 30, 31

Keane v. Lowcountry Pediatrics, P.A.,
372 S.C. 136, 641 S.E.2d 53 (Ct. App. 2007) 23

McDermott v. Party City Corp.,
11 F. Supp. 2d 612 (E.D. Pa. 1998) 34

Rios v. H.C. Sharp Co.,
203 S.W.3d 761 (Mo. Ct. App. 2006) 35

Smith v. Fairfax Realty, Inc.,
82 P.3d 1064 (Utah 2003) 35

Smith-Hunter Constr. Co., Inc. v. Hopson,
365 S.C. 125, 616 S.E.2d 419 (2005) 33

State v. McCray,
332 S.C. 536, 506 S.E.2d 301 (1998) 33

Sundown Operating Co. v. Intedge Indus., Inc.,
No. 2007-UP-091, 2007 S.C. App. Unpub. LEXIS 132 (S.C. Ct. App. Feb. 23, 2007) 21, 22, 29, 30, 31

Vaughn Development, Inc. v. Westvaco Development Corp.,
372 S.C. 576, 642 S.E.2d 757 (Ct. App. 2007) 30, 31

Wilder Corp. v. Wilke,
330 S.C. 71, 497 S.E.2d 731 (1998) 33

The Woodward School for Girls, Inc. v. City of Quincy,
13 N.E.3d 579 (Mass. 2014) 34

Rules

S.C. Rule of Civil Procedure 208(b)(1)(C) 2

Statutes

S.C. Code Ann. § 34-31-20(A) 1, 20, 22, 23, 34

Other Authorities

22 Am. Jur. 2d *Damages* § 489 (2003) 21, 22

Google Finance 25

Statement of Issues on Appeal

Did the trial court correctly rule that Respondent/Appellant was not entitled to prejudgment interest pursuant to S.C. Code Ann. § 34-31-20(A) where Respondent/Appellant's alleged damages were not a sum certain and where the measure of recovery and methodology for calculating that measure were not fixed by conditions existing at the time the alleged claims arose?

Did the trial court correctly rule that Respondent/Appellant was not entitled to prejudgment interest pursuant to S.C. Code Ann. § 34-31-20(A) where Respondent/Appellant expressly waived any right to recover prejudgment interest in the controlling Wealth Management Agreement?

Statement of the Case

Appellants/Respondents BB&T Corporation ("BB&T Corp"), Branch Banking and Trust Company ("BB&T Bank"), and Sterling Capital Management, LLC, successor in merger to BB&T Asset Management LLC ("BB&T AM") (collectively "Defendants") incorporate the Statement of the Case set forth in their Initial Appellants Brief of Appellants/Respondents as if fully set forth herein.

In his initial brief, Maybank contends that post-judgment interest continues to run despite the fact that the trial court allowed deposit of the judgment amount. (App. Br. of Resp./App. at 6, n. 7). This statement improperly interjects argument into the Statement of the Case. *See* Rule 208(b)(1)(C), SCACR. Moreover, this position is inconsistent with the trial court's order allowing the deposit of the judgment amount. The trial court found that "[p]ost-judgment interest will not accrue once the funds are deposited." (Order Granting Mot. for Leave to Deposit Judgment Funds at 1). This Order was entered with no opposition from Maybank. (*Id.*) Maybank did not appeal the order.

Statement of the Facts

Maybank included 22 pages of facts in his initial brief appealing the denial of prejudgment interest. Maybank's version of the facts mischaracterizes the record and in many instances are inaccurate and directly refuted by the testimony and exhibits introduced at trial. The Defendants have already submitted a Statement of Facts in their initial appellate brief, but take this opportunity to address several factual assertions made by Maybank in his recent brief.

A. Maybank's Mischaracterization of the "Cost" of the PVFCs Fails to Account for the Significant Benefits of the Transactions.

Maybank complains in his brief about "the enormous cost of $3,500,000" of the first and second PVFCs. (App. Br. of Resp./App. at 26). But this ignores the over $1.5 million in dividends received during the life of the PVFCs as well as over $800,000 in reduced tax liability. (Def. Exs. 173-175; Tr. 1725, 1730). Maybank also received $828,457 in stock appreciation when he terminated the final prepaid in 2012. (Def. Ex. 173; Tr. 1197-98). Only by analyzing the financial impact of all five PVFCs during the entire time they were in effect (2006 to 2012) can their value properly be assessed.

This is the analysis performed by Defendants' expert, Robert Thorne. On a simple one-page chart, (Def. Ex. 173), he showed the net cash flow from all five PVFCs and took into account dividends, appreciation, taxes, and the margin debt payoff, resulting in net cash to Maybank of $4,750,623. (Def. Ex. 173; Tr. 1193-99). Thorne then calculated the net cash flow from a hypothetical sale of the stock, as advocated by Maybank's securities expert Craig McCann. (Tr. 922). After accounting for the immediate tax liability, loss of dividends, and the margin debt payoff, a sale of the stock would have resulted in net cash to Maybank of $5,219,549. (Def. Ex. 173; Tr. 1193-99). The difference is only $468,926, or just 5% of the original value of the BB&T stock in August of 2006, the time of the first PVFC. (Tr. 1199).

B. Maybank Exaggerates the Amount to Terminate the First PVFC.

Maybank misstates the cost of terminating the 2006 PVFC, resulting in an exaggeration of the total cost of the transaction. He states in his brief that he would have had to pay back $9,318,364 in cash at the end of the three-year term if he wanted to keep his stock. (App. Br. of Resp./App. at 21, n.23). This is incorrect. To keep the stock,

Maybank would only need to pay a sum of cash equal to the value of the stock *at the time of termination*. This is shown in the settlement illustration. (Def. Ex. 16). The lower the value of the stock, the lower the termination payment. In fact, in January of 2009, when Maybank decided to terminate the PVFC early, he paid only $4,301,000. (Def. Ex. 57; Def. Ex. 173).[1] This was over $5 million less than the sum represented in Maybank's appellate brief. (App. Br. of Resp./App. at 21, n.23). The net effect of the first PVFC was that Maybank sold his stock for $7.1 million in August of 2006, then bought it back in January 2009 for only $4.3 million. Maybank's own damages expert recognized that the first PVFC had a net positive cash benefit to Maybank of $2.8 million. (Tr. 929). This represents the risk hedging protection provided by the PVFC in a bear market with sharply declining stock values.

C. Maybank's Financial Difficulties Arose from the Sharp Reduction in BB&T Stock Dividends, Not from the PVFCs.

Maybank contends that the PVFCs resulted in the "destruction of his retirement savings." (App. Br. of Resp./App. at 25). Quite the opposite is true. At the time of the first PVFC, Maybank had run up a huge margin debt of over $2.8 million in his Scott & Stringfellow brokerage account. (Def. Ex. 64.42). The PVFC allowed Maybank to generate millions in cash proceeds without having to sell any stock and without incurring large capital gains taxes. Maybank applied some of the PVFC proceeds to pay off the margin debt. (Def. Ex. 64.43). Had he not entered the PVFC and retired his margin debt, Maybank would have been hit with numerous margin calls as the value of his BB&T

[1] The Defendants' expert, Robert Thorne, explained that he added the $43,000 advisory fee for the second PVFC to the $4,301,000 termination price to assess the total cost of unwinding the first PVFC. (Tr. 1196-97). This is why Thorne's summary chart shows a total termination price for the first PVFC of $4,344,000. (Def. Ex. 173).

stock plummeted during the global financial crisis in 2008 and 2009. (Tr. 1527). This would have left him with only $133,960.14 as of the end of 2010. (Tr. 1528). Rather than destroy him, the PVFCs allowed Maybank to overcome his margin debt, hedge the risk of his concentrated position, and survive the global financial crisis. Maybank's own securities expert recognized that Maybank was better off entering into the PFVCs, rather than doing nothing and just continuing to hold his stock without any risk hedging protection. (Tr.926-28). By the end of 2012, after the last PVFC had terminated, Maybank still had $2 million of stock in his brokerage account to go along with his cattle farm in Abbeville, an adjoining 185 acres of land, and his wife's home in Greenville, where they lived.[2] (Def. Ex. 65-2; Tr. 414-17).

The record reflects the real reason for Maybank's financial difficulties. Rather than being caused by the PVFCs, they were the result of the 68% reduction by BB&T of its stock dividend mandated by poor economic conditions in 2008 and 2009. Maybank's dividend income was reduced from over $413,600 a year to just $132,000 a year. (Agr. Ex. 67.5; Agr. Ex. 67.6). This dividend income was essential to Maybank. He already had a history of spending far beyond the dividend amount (requiring margin borrowing), (Def. Ex. 73; Def. Ex. 74), and he certainly could not have afforded to lose the dividend without significantly cutting his expenses.

Maybank never complained to the Defendants about his PVFCs until the summer of 2010, after the dividend had been reduced and he realized it would not be increased

[2] Maybank also had been given the family home on Meeting Street in Charleston valued at over $1.5 million, but he chose to put that into a personal residency trust for the benefit of his children. (Tr. 413-17). Additionally, he owned a second farm in Gray Court with a house and 160 acres, which he gave to his children 8-10 years ago. (*Id.*)

again any time soon. (Tr. 372; 1413). This demonstrates that the PVFCs had performed as intended. Only when the dividend was reduced did Maybank experience financial distress and the reality that no one was 100% safe during the global financial meltdown. At no time during trial did Maybank's experts offer any alternative to a PVFC which would have guaranteed dividend payments at any particular level to protect him against the dividend cut. Instead, Maybank's securities expert advocated that a stock sale was the appropriate recommendation, (Tr. 922). A stock sale, however, would have ensured the loss of the dividends in their entirety back in August of 2006 and left Maybank unable to meet his high expenses.[3]

D. Maybank Knew and Understood that a PVFC Would Not Guarantee that He Would Receive Dividend Payments at any Particular Level.

Maybank contends that at the time of the roll of the PVFC in 2009, he believed that his BB&T stock dividends would be "protected at the contractual levels in the PVFC." (App. Br. of Resp./App. at 25). He offered no specific basis for this alleged belief during trial and could only vaguely testify that "I was told that the bank had special expertise" in protecting dividends with PVFCs. (Tr. 356). No document was ever presented at trial that suggested in any manner that dividends were guaranteed. To the contrary, the PVFC disclosure statement provided in advance of the first PVFC made it

[3] The opinion of Maybank's securities expert Craig McCann that the BB&T stock should have been sold in August of 2006 is completely inconsistent with other statements of Maybank wherein he states that he was depending on the dividend income from the stock. For example, on page 27 of his brief, he describes the BB&T dividends as the "income he depended on to survive." (App. Br. of Resp./App. at 27, n.31). The conflicting positions of McCann and Maybank were never reconciled during trial. As Defendants' securities expert Ross Tulman pointed out, McCann's suggestion that the stock be sold and the proceeds invested could never have generated the same income that the BB&T stock dividend was providing. (Tr. 1785-87). In short, the dividend could not be replicated with other investments, and Maybank knew this.

clear that "investors may not receive dividends from the contributed shares." (Agr. Ex. 3). A conversation that Maybank had with Mike Lackey on or before January 7, 2009 (before the second PVFC) makes it clear that Maybank fully understood that a PVFC would not guarantee dividend payments if BB&T later decided to reduce its stock dividend:

> Frank wants to know whether a dividend cut between now and the valuation date of his contract (8/11/2009) causes an increase in his cash settlement amount or otherwise adversely affects him. ***He knows that a dividend cut will reduce the dividend payout that is passed along to him during the course of the contract.***

(Agr. Ex. 30) (emphasis added). Lackey confirmed at trial that Maybank made this statement to him. (Tr. 1565). Maybank did not deny making this statement to Lackey, and his only retort at trial was to say that "I really remember very little contact with him" and "I really don't" have a recollection of having discussions with him. (Tr. 355). He admitted, however, that he knew BB&T had the ability to reduce its stock dividends. (Tr. 508).

Moreover, as Maybank considered whether to roll the PVFC, he had already entered into the first PVFC over two years earlier and had received his transaction confirmation statement which made clear what the terms were with respect to dividends.[4] (Agr. Ex. 9). That trade confirmation had a section delineated with a heading in bold face type: **"Payments and Deliveries in Respect of Dividends."** (*Id.*) Nowhere in that section or anywhere else in the confirmation is there a guarantee that dividend payments would be made at any particular level. In fact, the confirmation provisions show that the

[4] Maybank received this confirmation as indicated by his signature on the last page. (Agr. Ex. 9, at BB&T_0126).

opposite occurs. If a dividend exceeds certain specified contractual levels, then Maybank would actually have to pay the excess to Bear Stearns. (Agr. Ex. 9, at BB&T_0118-19). Maybank had over two years of experience with this system before entering into his second PVFC. During those two years, he received larger dividend payments as BB&T increased its dividend from 42¢ a share to 47¢ a share. (Agr. Ex. 66.4, 66.15). Maybank clearly understood through his own personal experience that even with a PFVC in place, his dividend payments would fluctuate by any changes that BB&T made as it declared its stock dividend each quarter.

E. Maybank Was Aware of the Upfront Cost of the First PVFC.

Maybank contends in his brief that he was unaware of the cost of the first PVFC "until this litigation." (App. Br. of Resp./App. at 21, n.23). The record shows otherwise. Maybank had received back in 2006 a detailed summary of PVFCs. During discovery, he produced this document from his own personal files.[5] (Agr. Ex. 2). Maybank conceded during cross examination that he had read this overview, and that he did so *prior to* the first PVFC. (Tr. 460). This overview provides an example in which it is explained that the difference in the market value of the stock and the upfront payment "represents the interest component of the advance, which is paid up front as opposed to regular interest payments." (Def. Ex. 2, at 3). Maybank knew the market value of his stock on the date of the transaction, $9.3 million, and he knew the upfront proceeds were $7.1 million, leaving a difference of $2.2 million.[6] Maybank also knew, however, that by entering into

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[5] This is indicated by the "Maybank" bates number in the lower right hand corner. (Def. Ex. 2).

[6] This is clearly reflected in the settlement overview for the transaction. The settlement overview was emailed to Mahfood, and Mahfood would have given the

the PVFC, he would continue to receive the BB&T stock dividends, benefit from stock appreciation, defer taxes, payoff his margin account, and also earn income from the MP account created by the PVFC proceeds.

F. Maybank Was Aware of the Cost of Unwinding and Rolling the Prepaid in January of 2009.

Maybank asserts that he was not told until after the execution of the second PVFC that the cost to unwind and roll would be $1.3 million. (App. Br. of Resp./App. at 26). This is directly rebutted by documents introduced at trial. The roll of the first PVFC into the second PVFC was executed on January 20, 2009. (Agr. Ex. 39). The week before the execution of the second PVFC, Maybank asked Mahfood, "[H]ow much it would cost to unwind," as evidenced by the January 13, 2009 email from Mahfood.[7] (Def. Ex. 96). In response, Deal emailed Mahfood two settlement illustrations the next day on January 14, 2009. (Def. Ex. 194). Mahfood testified that he gave these illustrations to Maybank ***before*** the PFVC was executed. (Tr. 1326-27). Both of these illustrations show that the cost of the unwind and roll would exceed $1 million. (Def. Ex. 194).

The evidence is indisputable that Maybank received these illustrations because they were both found in his own personal files, as indicated by the "Maybank" bates

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document to Maybank before the call with Bear Stearns to execute the first PVFC transaction. (Tr. 1310-14). Maybank had this settlement overview during the call with Bear Stearns. (Tr. 1314)

[7] Maybank always knew there would be a risk of a high cost to unwind the PVFC early. This fact was included in the disclosure statement Maybank was provided in August of 2006 when he entered into the first PVFC. This disclosure statement provided that it can be "expensive to dispose of the securities and unwind the position prior to [the PVFC's] contractual maturity." (Def. Ex. 20, at BB&T_0106). Maybank read and signed this disclosure before entering into the first PVFC. (Tr. 462-63; Def. Ex. 20).

stamp in the lower corner. (Def. Ex. 203, 204).[8] Moreover, one of the preliminary settlement overviews for the unwind and roll was found in the files of Maybank's accountant. (Tr. 1551-52). This settlement overview had a fax line on it indicating it had been faxed by BB&T to the accountant *on January 12, 2009, eight days before the transaction.*[9] (Def. Ex. 43). This settlement illustration provides that the total cost of the unwind and roll would exceed $1 million. (*Id.*) This illustration, like the other preliminary illustrations, was also found in Maybank's personal files, meaning that it had been given to him. (Def. Ex. 202, at Maybank 002117).

G. Maybank Recovered the Entire Cost of the 2009 Unwind and Roll During the Life of the Remaining PVFCs.

Maybank accuses the Defendants of being "inexplicably incompetent" by not advising him during the 2009 PVFC transaction that for a cost of $1.3 million, he would receive only $827,200 in dividends. (App. Br. of Resp./App. at 26, n.30). This shallow analysis is incomplete and fails to take into account the huge potential for appreciation in the market value of BB&T stock. (Tr. 1595-97; 1608-09). On the date of the transaction, January 20, 2009, the BB&T stock price was near its lowest point in years, at just $18.52

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[8] The first illustration attached to the email (Def. Ex. 194) is contained in Def. Ex. 203 at bates page Maybank 002143 (R.__), and the second illustration attached to the email is contained in Def. Ex. 204 at bates page 5470. (R.__). These are clearly preliminary illustrations, as the stock price and terms changed between January 14, 2009 and the date of the PVFC on January 21, 2009. This is apparent from a comparison to the final settlement illustration for the second PVFC. (Def. Ex. 57). There is no reason that anyone would have given Maybank *preliminary* illustrations *after* the transaction. The only reason to give preliminary illustrations to Maybank is to show *what was going to happen* as he considered whether to unwind and roll early.

[9] It is indisputable that this fax was sent to the accountant. There was another transmission from BB&T to the accounting firm later in 2009 that bears the identical typeface fax lines and demonstrates that BB&T was sending information, like the settlement illustrations, directly to the accountant. (Def. Ex. 81; Tr. 1550-51).

a share. (Def. Ex. 222). The second PVFC guaranteed to Maybank that he would receive all appreciation in the value of the stock up to the price of $24.80, which would amount to $1,091,387 (25% appreciation). (Def. Ex. 57). Adding in two years of dividends during the term of the PVFC at the then current annualized level of $413,600 results in a total potential upside of the transaction of $1,918,587, far eclipsing the upfront cost of the unwind and roll.

When Maybank rolled the PVFC again in December of 2010, the value of his BB&T stock had increased to over $26 a share. (Def. Ex. 222; 207, 208). This meant that Maybank was entitled to over $1 million in appreciation. (Def. Ex. 57). If in December of 2010 Mabank had settled the second PVFC by handing over stock, instead of paying cash to roll again, he would have been allowed to keep $1,091,387 in stock along with the dividends he had received for the two year period. (*Id.*). Rather than keep this appreciation, Maybank chose to roll the PVFC again. (Tr. 520). This allowed him to continue receiving the dividends for another two years. Maybank eventually recovered the entire $1.3 million cost of the 2009 unwind and roll. Between January of 2009 and the termination of the last PVFC in 2012, Maybank received dividends, appreciation, and cash that combined exceeded $1.4 million.[10] (Tr. 1190-92).

January 2009 was also a favorable time for Maybank to unwind and roll the first PVFC. Maybank recognized this and contacted Mike Lackey on January 9, 2009 to

[10] Nate Deal of BB&T AM effectuated the 2009 unwind and roll, and testified that he saw significant benefit in that transaction for Mr. Maybank. (Tr. 1595-97; 1608-09). When Maybank approached the Defendants on two separate occasions later that same year, Nate Deal with BB&T AM evaluated the potential transaction and advised Maybank to not roll again so soon. (Tr. 1610-12). Deal recognized that rolling too often too soon would add more cost without adding commensurate benefits.

inquire about unwinding before maturity because it would cost less. During an in person meeting, he stated the following to Lackey, which Lackey recorded in his notes taken during the meeting:

> Frank feels that BB&T shares are close to a bottom and that it is a favorable time for him to roll his [PVFC] [because] net cash flow [required] to roll is lower. . . . [He] says time is what he has going for him [and] he wants to buy more time. [He] needs dividend income [and] does not want to liquidate real estate holdings.

(Def. Ex. 36; Tr. 1566). Maybank's experience and understanding of PVFCs proved to be correct. It cost him significantly less to unwind and roll in January of 2009 rather than wait until the scheduled maturity of the PVFC in August of 2009. The Defendants' expert, Robert Thorne, performed the calculations and determined that it would have cost Maybank $1.7 million if he had waited until August of 2009 to unwind and roll, which was $400,000 more than the actual cost. (Tr. 1190).

H. <u>The Oliver Memorandum Was an Internal Communication that Accurately Described the 2006 PVFC.</u>

Maybank relies significantly on a two-page internal memorandum (Agr. Ex. 7) submitted by Anthony Mahfood of BB&T Bank to Pat Oliver of BB&T Corporation ("Oliver Memorandum"). (App. Br. of Resp./App. at 16-21). Maybank mischaracterizes the purpose and accuracy of this memorandum in an effort to make this document relevant to his claims. The record shows, however, that the memorandum was accurate in every respect, and in no manner did the Defendants attempt to use it to improperly influence Maybank. Indeed, the memorandum is not even addressed to Maybank. It was an internal disclosure document.

The purpose of the Oliver Memorandum was to satisfy Section IV.B.2 of the BB&T Code of Ethics that required prior approval by the General Counsel when BB&T

employees sought to engage in a transaction involving their BB&T stock. (Agr. Ex. 6). This part of the Code of Ethics was meant to ensure compliance with securities laws and avoid the appearance of impropriety by employees trading in company stock. (*Id.*) It was not a separate suitability determination, as demonstrated by the fact that it was not required when non-employees were involved. (*Id.*)

Maybank asserts twice in his brief that he received the memorandum "prior to" the execution of the first PVFC, suggesting that he somehow relied on it. (App. Br. of Resp./App. at 16, 18 n.19). There is no evidence in the record, however, which supports this contention. During his direct testimony, Maybank gave no indication as to when he received the memorandum:

> Q. . . . Now, *at some point* did they provide you with this letter or this memorandum that's on the board?
>
> A. Yes, they did

(Tr. 328) (emphasis added). Nothing further was said about the receipt of the memorandum. There is no email or fax line that shows when Maybank would have received it. All that is known is that the memorandum was dated the same date as the execution of the PVFC, meaning that it was not intended to be an advance disclosure provided to Maybank. (Agr. Ex. 7). The PVFC disclosures had all been provided to Maybank *a month* before the transaction on July 10, 2006, the date Maybank reviewed and signed them. (Agr. Ex. 3; Def. Ex. 199). At no time did Maybank ever testify that he relied on the memorandum when making his decision to execute the PVFC.[11] (Tr.

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[11] Although there is no evidence whatsoever that Maybank received the memorandum before the transaction, Maybank states in his brief that he "relied upon the representations contained" in the memorandum when "deciding to enter the VPFC." (App. Br. of Resp./App. at 19). A close review of the cited transcript pages demonstrates

328-333). Maybank's statement in his brief that the memorandum "was also provided to [him] *as a part of the discussions and recommendations* centered around the initial VPFC" simply is not correct. (App. Br. of Resp./App. at 18) (emphasis added).

Maybank asserts that representations made in the Oliver memorandum were false. (App. Br. of Resp./App. at 19). He asserts that the memorandum suggested that the Defendants had "fully researched and developed" the PVFC strategy and had conducted an "analysis" for Maybank's situation. (*Id.*) Maybank never explains what the "analysis" should have included. The memorandum itself lays out each of the reasons the PVFC was a perfect fit for Maybank's situation—he had a concentrated position in stock with a low tax basis and needed to retain the dividends. (Agr. Ex. 7). Nowhere does the memorandum suggest that any particular analysis was done that was not actually performed. This argument is nothing more than an effort by Maybank to fabricate a misrepresentation that does not exist in the document.

There are only three substantive paragraphs in the Oliver memorandum. (Agr. Ex. 7). Despite Maybank's suggestions to the contrary, (App. Br. of Resp./App. at 18), each of these paragraphs is completely accurate in every way. In fact, during Maybank's direct examination, he testified that he was the one that provided some of the information in the memorandum. (Tr. 328-29). Maybank makes no specific reference to any alleged inaccuracies in the memorandum with respect to the way in which the PVFC was described. A review of the second paragraph of the memorandum, and comparing that to

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that Maybank never says he relied on the memorandum when making any decisions. (Tr. 328-33).

the PVFC confirmation letter, (Agr. Ex. 9), demonstrates that it accurately represents the structure and terms of Maybank's first PVFC. (Agr. Ex. 7).

Maybank introduced into evidence a form document that he contends was used for the preparation of memoranda seeking General Counsel approval of BB&T employee stock transactions. (Pl. Ex. 91). He states that this shows that the Defendants had determined that PVFCs were appropriate for every holder of a concentrated position in BB&T stock. (App. Br. of Resp./App. at 20). What Maybank fails to explain, however, is the fact that the statements made about PVFCs in the memorandum were so basic that they in fact would be true for any BB&T employee. For example, the form approval memorandum states that the employee will continue to own the shares, will benefit from share appreciation, will continue to collect future dividends, and will be protected from an extraordinary reduction in his overall investment portfolio. (Pl. Ex. 91). Every one of these statements would be true for any employee with a concentrated position in BB&T stock. Maybank offers no argument in his brief about the accuracy of these statements, but merely criticizes the fact that a custom memorandum was not prepared for the purpose of seeking approval of his PVFC in August of 2006.

With no evidentiary support, Maybank also makes the assertion that the form document suggests that the Defendants "were using these Form Approval Letters to market VPFCs as the preferred solution to concentrated positions." (App. Br. of Resp./App. at 20-21). This assertion is patently incorrect. The approval memoranda were directed to the General Counsel, not to the owner of the stock. Moreover, as discussed above, the approval memoranda were needed only if a BB&T employee was

involved in the transaction. These were never used with regular non-employee customers, and certainly were not part of any type of marketing program.

I. There Is No Evidence in the Record Showing that PVFCs Were a "Preferred Solution."

Maybank states that the Defendants began in 2004 to market alternative investment strategies. (App. Br. of Resp./App. at 11). He also contends that PFVCs were the Defendants' "preferred recommendation" to clients with concentrated stock positions.[12] (*Id.* at 12). At trial, he offered no empirical data showing the number of customers with concentrated positions being advised by the Defendants and who chose to pursue PVFCs. There is no evidence that the Defendants recommended a PVFC because of any company initiative as opposed to the PVFC being a good fit for the customer. Indeed, the testimony of wealth advisor Anthony Mahfood shows that it was Maybank who approached him and asked him to set up a meeting with Shawn Gibson of BB&T AM to discuss PVFCs.[13] (Tr. 1305-07). Not a single document was offered by Maybank at trial which suggested that the Defendants had adopted PVFCs as a "preferred solution." In fact, when Maybank makes reference to "*Appellants*' internal sales presentations" to support this argument in his brief, he actually cites to a presentation of Scott & Stringfellow (Pl. Exs. 92,100), a non-party to the lawsuit. (App. Br. of

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[12] As purported "evidentiary" support for these factual assertions, Maybank relies in part and cites to his own attorneys' opening statement at trial. (App. Br. of Resp./App. at 11-12) (citing to pages 175, 177-80, and 194 of the trial transcript).

[13] Not a single email or other documents shows any effort by the Defendants to solicit Maybank's business with respect to advising him regarding his investment assets. The record instead shows that Maybank had become deeply involved in advising another customer, Effie Bowers, regarding her PVFC and that is what started his interest in the transaction as a solution to his own concentrated position in BB&T stock. (Tr. 453, 1036; Def. Exs. 10, 177, 214).

Resp./App. at 16, n.16) (emphasis added). The evidence shows only that the Defendants assisted with the PVFC because it was a perfect fit for Maybank—an investor with a concentrated position in low tax basis stock and who wanted to retain the dividend.

J. BB&T AM Cut its Fee by More than Half for the First PVFC.

Maybank suggests that the Defendants were more interested in generating fees from him than in giving good advice. (App. Br. of Resp./App. at 12). But he ignores the fact that BB&T AM cut his fee for the first PVFC by over 50%, reducing it from 0.75% to just 0.35% of the transaction.[14] (Tr. 464-65). Maybank also was under no obligation to open a portfolio account with BB&T Bank with the PVFC proceeds. He already had a brokerage account with Scott & Stringfellow, and he was certainly aware that he could have deposited the PVFC proceeds into that account. Instead, he chose to place the proceeds with BB&T Bank and allow portfolio manager Kris Kapoor to actively invest his funds. Maybank testified that he believed Kapoor did a good job handling his MP account. (Tr. 487-88). As with the PVFC, BB&T Bank also "deeply discounted" the fee being charged to manage the MP Account. (Tr. 1399). There was no testimony from Maybank or any other witness that the Defendants were actively soliciting the opportunity to manage the PVFC proceeds or were taking any actions purely for the purpose of generating fees.

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[14] The standard fee disclosure shows that 0.75% is the advisory fee for an alternative investment involving $5 million to $10 million. (Agr. Ex. 3). This would have resulted in an advisory fee of $69,887 for Maybank's PVFC which involved 220,000 shares of his BB&T stock valued at $9,318,364. Maybank was charged a fee of only $32,614. (Agr. Ex. 11).

K. The Fee Rebate Letter Accurately Represented that BB&T AM Was Not Required to Refund the Advisory Fees.

In November of 2012, BB&T Bank refunded to 130 customers the advisory fees paid between 2006 and 2009 related to alternative investments.[15] (Borrello 30(b)(6) Dep. at 7-9). The SEC had inquired about the advisory fees as part of a routine examination and indicated it believed charging the fees without a broker-dealer license was in a gray area. (Fisher Indiv. Dep. at 175). The SEC never said that BB&T AM could not charge the fees, nor did it ever require the refund. (*Id.*; Fisher 30(b)(6) Dep. at 23). BB&T AM chose to voluntarily refund the fees. As explained by BB&T Bank officer David Fisher:

> We were not compelled to do this, but decided it was the right thing to do for clients.
>
> * * *
>
> We weren't being forced by the regulator to do it. We weren't gonna get in a fight over it, wasn't worth it. If they think it's a gray area, we'll just clean that up.

(Fisher 30(b)(6) Dep. at 23).

Maybank accuses the Defendants of misrepresenting the basis for the fee rebate in its letter to customers and trying to conceal improper conduct. (App. Br. of Resp./App. at 29). This is incorrect. The letter stated, "While we are not required to rebate these fees, we choose to do so as a reflection of our corporate values." (Agr. Ex. 50). This statement is completely true.[16] There is no evidence the SEC required (or even

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[15] These investments included many different types of transactions and were not limited to just PVFCs. (Pl. Ex. 90).

[16] In addition to the fact that there is no misrepresentation in the letter, it was not sent to Maybank until 11 months after he had filed his lawsuit and was represented by counsel. This was over two years after Maybank discontinued his investing relationship with the Defendants. It was impossible for this letter to support any of Maybank's claims because he never relied on it. No evidence was ever admitted that any customer receiving this letter was in any way harmed.

suggested) that BB&T AM should refund the fees. Accordingly, it was a decision by the company leaders to issue the refund. (Fisher 30(b)(6) Dep. at 23). Moreover, while the SEC may have viewed the charging of the advisory fee as a gray area for BB&T AM (which was a registered investment advisory firm), the evidence presented at trial firmly established that it was completely proper. (Tr. 1751-55). The jury agreed, finding for the Defendants on all alleged violations of the South Carolina Securities Act, including the allegation that BB&T AM improperly charged the fee. (Verdict Form).

L. The Defendants Did Not Solicit the Sale of Additional Life Insurance to Maybank in June of 2007.

Maybank asserts that it was the Defendants that "sold Mr. Maybank an additional $2,000,000 in life insurance policies" which doubled the annual premium expense of his insurance trust to $135,000 annually. (App. Br. of Resp./App. at 27, n.32). This is simply not correct. When Maybank made this assertion at trial, he failed to name anyone who made the purported recommendation, nor did he offer any document supporting his position. (Tr. 344). The answer to this issue was provided when Edgar Norris of Scott & Stringfellow testified. Norris was Maybank's longtime stock broker. (Tr. 1375). Norris testified that it was Maybank's idea to purchase the additional life insurance coverage:

> Q. In 2007, did Mr. Maybank also come to you about buying insurance?
>
> A. Yes, he did.
>
> Q. And, again, was that something that you sought to sell him?
>
> A. No, I did not.
>
> Q. It was his idea to come to you asking for more insurance?
>
> A. That's correct.

(Tr. 1380). Neither Norris nor Scott & Stringfellow were ever named as defendants in the lawsuit.

M. Maybank Was Not Forced Out as a Client.

Maybank contends that his wealth division relationship with BB&T Bank "was terminated by BB&T Bank" in 2010. (App. Br. of Resp./App. at 27). He asserted at trial that he was told that his account "was too small for them to manage." (Tr. 371). As with many other Maybank assertions, there is no documentary evidence supporting his positions. Ross Walters was the BB&T Bank team director for the wealth division in Greenville. (Tr. 1387-88). Walters testified that if a client's net worth were to fall below the thresholds for his division, he and the other wealth advisors would still continue to work with the client. (Tr. 1395-96). In fact, Walters said there were other clients this happened to, and BB&T Bank continued to work with them. (*Id.*) Walters also testified that the only reason BB&T Bank resigned as trustee of the Insurance Trust was because Maybank wanted to try to sell one of his life insurance policies, which would have required time to analyze the transaction by BB&T Bank. (Tr. 1415-16; 1465). By resigning and allowing the contingent trustee, Jane Maybank (a daughter), to become trustee, the sale of the life insurance policy could be expedited and whatever opportunity Maybank saw for the sale of the policy would not be lost. (*Id.*)

ARGUMENT

I. The Trial Court Properly Denied Maybank's Motion for Prejudgment Interest.

In its November 10, 2014 Order, the trial court correctly denied Maybank's motion for an award of prejudgment interest holding that "Maybank's damages were not a sum certain as required by S.C. Code Ann. §34-31-20(A)." (11/10/14 Order at 31).

This Court should affirm the denial of prejudgment interest in this case because Maybank's damages were unliquidated, and were neither a sum certain nor capable of being reduced to a certainty based on an undisputed mathematical calculation that was fixed by conditions existing at the time his alleged claims arose. Contrary to the arguments now asserted by Maybank in this appeal, the evidence and damages theory offered by Maybank below establishes the uncertain and variable nature of Maybank's damages and the inappropriateness of prejudgment interest in this matter.

A. South Carolina law regarding the awarding of prejudgment interest.

South Carolina law "permits the award of prejudgment interest when a monetary obligation ***is a sum certain, or is capable of being reduced to certainty***, accruing from the time payment may be demanded either by the agreement of the parties or the operation of law." *Historic Charleston Holdings, LLC v. Mallon,* 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009) (emphasis added) (*citing Butler Contracting, Inc. v. Court St. LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 259 (2006)). "Stated another way, prejudgment interest is allowed on a claim of liquidated damages; i.e., the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties." *Butler Contracting*, 369 S.C. at 133, 631 S.E.2d at 258-59. In order for damages to be capable of being reduced to a certainty, the amount must be "a sum which cannot be changed by the proof." *Sundown Operating Co. v. Intedge Indus., Inc.*, No. 2007-UP-091, 2007 S.C. App. Unpub. LEXIS 132, at *9 (S.C. Ct. App. Feb. 23, 2007)[17] (quoting 22 Am. Jur. 2d *Damages* § 489 (2003)). In contrast, "[p]rejudgment interest is

[17] As the *Sundown* case is an unpublished opinion of the South Carolina Court of Appeals, it is not cited as precedent, but as an example of persuasive reasoning from the Panel that decided that case.

not recoverable on an unliquidated claim in the absence of an agreement or statute." *Id.* "'[D]amages are unliquidated where they are an uncertain quantity, depending on no fixed standard, referred to the wise discretion of the jury, and can never be made certain except by accord or verdict.'" *Beckman Concrete Contractors, Inc. v. United Fire & Cas. Co.*, 360 S.C. 127, 131-132, 600 S.E.2d 76, 78-79 (Ct. App. 2004) (quoting 22 Am. Jur. 2d *Damages* § 489 (2003)).

Where a claim is capable of being reduced to certainty by a simple mathematical calculation, it is considered to be liquidated for the purpose of awarding prejudgment interest. *Id.* "The fact that the amount due is disputed does not render the claim unliquidated for purposes of awarding prejudgment interest." *Historic Charleston*, 381 S.C. at 435, 673 S.E.2d at 457. "Rather, the proper test is 'whether [or not] the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose.'" *Id.* (quoting *Butler Contracting,* 369 S.C. at 133, 631 S.E.2d at 259. While a dispute as to the *amount of the damages* alone does not render prejudgment interest inapplicable, a dispute as to *the methodology* for determining the measure of damages does render prejudgment interest inapplicable.

Additionally, S.C. Code Ann. § 34-31-20(A) allows for an award of prejudgment interest in certain limited circumstances. This section provides that "[i]n all cases of accounts stated[18] and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum." S.C. Code Ann. § 34-31-20(A). The

[18] There is no contention in this case that Maybank's claims are for an "account stated."

general rule discussed above applies to the application of section 34-31-20(A). *See Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 147-48, 641 S.E.2d 53, 59-60 (Ct. App. 2007). Thus, for section 34-31-20(A) to apply, the sum of money must be a sum certain or capable of being reduced to a certainty in order for it to be "ascertained" within the meaning of this statute. *Id.*

Thus, Maybank's entitlement to prejudgment interest depends on whether his damages were either a sum certain, or capable of being reduced to a certainty through the application of a clear mathematical calculation which cannot be changed by the proof. Additionally, the measure of Maybank's damages had to be fixed by the conditions existing at the time his claim arose. If Maybank's damages were uncertain in any way, and did not depend on a fixed undisputed standard for their determination, such that methodology for determining the measure of damages was left to the discretion of the jury, then they are unliquidated and do not support an award of prejudgment interest.

B. The facts of this case illustrate that Maybank's alleged damages were neither a sum certain, nor capable of being reduced to a certainty through the application of a clear mathematical calculation which cannot be changed by the proof.

Maybank is not entitled to an award of prejudgment interest because not only was the measure of his alleged damages disputed, this measure was neither a sum certain nor capable of being reduced to certainty through the application of a clear and undisputed mathematical calculation. In contrast to Maybank's argument that his damages were ascertainable, the evidence at trial (including Maybank's own evidence) proves otherwise.

With regard to the amount of his alleged damages, Maybank relied entirely upon the expert testimony of Craig McCann who opined that Maybank should have been

advised to sell his BB&T stock in August of 2006. (Tr. 890). McCann then suggested two alternative investment possibilities that he testified should have been recommended for the proceeds from that stock sale: (1) investing in 70% bonds and 30% stocks; or (2) investing 100% of the proceeds in bonds. (Tr. 899). Thus, Maybank's claims would have arisen in August 2006 – the time period where McCann testified that his BB&T stock should have been sold with the proceeds being placed either entirely or primarily in bonds.

In connection with this testimony regarding his proposed alternative investment options, McCann proposed damages calculations based on his hypothetical investment strategies. (Tr. 911, 913-14, 932, 937-40, Agr. Ex. 72 at Exs. (PVFC) 3-4, 8-9). McCann testified that, based on his proposed 70%/30% bonds/stocks investment strategy, Maybank's damages would have been $2,861,302, and that, based on his proposed 100% bonds investment strategy, Maybank's damages would have been $3,362,185. (Tr. 911-14, Agr. Ex. 72 at Exs. (PVFC) 3-4, 8-9). Thus, McCann presented the jury with alternative investment strategy proposals that amounted to a wide range of between 70% and 100% bonds. The variance between these two bonds percentages then resulted in ***projected alleged damages figures that varied by over $500,000.00***. Maybank's counsel argued this "range" of possible actual damages during his closing argument. (Tr. 1947-48).

Additionally, McCann's calculations regarding Maybank's alleged damages were not fixed by conditions existing at the time Maybank's claim arose – August 2006. To the contrary, McCann's two damages assessments were based on the assumption that the proceeds from an August 2006 sale of the BB&T stock would be invested in either a

70%/30% split between a Vanguard Total Bond Market Index Fund and a Vanguard S&P 500 Index Fund, or 100% in the Vanguard Total Bond Market Index Fund. (Agr. Ex. 72 at Exs. (PVFC) 3-4, 8-9). These calculations merely began in August 2006 and ran up to February 2010. (*Id.*, Tr. 912).

These two index funds were unilaterally selected by McCann to serve as the basis for all damages calculations to follow. There was no evidence that Maybank would have selected these particular index funds (or any specific index fund). While index funds share the same goal of creating a fund based on a specific category of investment, no two index funds are precisely the same and the performances will vary, sometimes widely, between funds. For example, the Vanguard Total Bond Market Index Fund (VBMFX) used by McCann had approximately a 6.4% increase in value during the time period of mid August 2006 to late February 2010.[19] In contrast, the similar Dreyfus Bond Market Index Fund (DBMIX) had only a 5.78% increase in value, and a similar Vanguard fund – Vanguard Total Bond Market II Index Fund (VTBIX) had only a 2.47% increase in value, during the identical period.[20] The performance of McCann's unilaterally selected bond fund is the central component of both of his damages calculations. Far from being certain, his calculations are highly variable considering the absence of any certainty as to which fund or funds would have been selected and the varying performance of the possible funds.

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[19] *See* Google Finance, https://www.google.com/finance?q=VBMFX &ei=dUb XVcGaDIm5e_DPndAM (last visited Aug. 20, 2015).

[20] *See* Google Finance, https://www.google.com/finance?q=MUTF%3ADBMIX&ei=rEvXVdmAEoWkecrQgbAD (for DBMIX) (last visited Aug. 20, 2015); https://www.google.com/finance?q=vtbix&ei=d0_XVbn2CueZe4Hds_gP (for VTBIX) (last visited Aug. 20, 2015).

Both the amount and the proper methodology for calculating Maybank's alleged damages were strenuously disputed at trial. Evidence was presented that Maybank suffered no damages whatsoever. Specifically, McCann, conceded that Maybank's entering into the 2006 PVFC left Maybank in a better position than if he had taken no action. (Tr. 926-28). Additionally, there was evidence that compared the result of the PVFC to the hypothetical situation where Maybank had entered into an outright sale of his BB&T stock in August 2006. Specifically, Defendants' expert Robert Thorne testified that, under this comparison the difference between the two scenarios was, at most, $468,926.00. (Tr. 1193-99; Def. Ex. 173). Moreover, if Maybank had invested the proceeds of a stock sale in stocks (as opposed to bonds), the value of that investment would have declined by 50% by early 2009 due to the stock market's dramatic overall decline during 2008 and early 2009. (Tr. 1287).

McCann's alleged damages methodology required the jury to assess and determine how conservative Maybank was willing to be with his liquid assets (i.e., what percentage of bonds would have been appropriate for and acceptable to Maybank), and then estimate a damage figure within the wide range provided by McCann based on index funds unilaterally selected by McCann. A great deal of evidence was presented by both sides as to the level of risk that was appropriate in light of Maybank's investing history, financial sophistication, and expressed objectives. (Tr. Tr. 420, 422, 428-31, 474, 478-80, 486-87, 1044-47, 1083-84, 1107, 1112-13, Agr. Ex. 16). McCann's damages scenarios assumed that Maybank would have agreed to an investment strategy that placed his assets in at least 70% bonds. This was an improper assumption, and far from an established fact. There was significant evidence offered at trial contradicting the

assumption that Maybank would have agreed to or allowed his portfolio to be focused primarily or entirely in bonds. Specifically, from 1997 through 2006, Maybank ***never*** had bonds in his portfolio. (Tr. 419-22; 427-31; Def. Exs. 64, 64.35, 64.42, 197). Even in 2012 and 2013, over a year after the lawsuit had been filed alleging he should have been placed in bonds, Maybank had zero bonds in his brokerage account. (Def. Exs. 65.2, 65.7). This was consistent with Maybank's desire to be invested only in stocks to minimize "inflation risk," something he perceived as being a "huge risk." (Tr. 400-01).[21] Additionally, Maybank chose 100% equities as his investment objective for his BB&T investment account in 2006 and reaffirmed this decision twice in 2008. (Agr. Exs. 14, 24, 28). Prior to selecting his investment objective, Maybank met several times with his portfolio manager, Kris Kapoor, and had long discussions with Kapoor about what the investment objective should be. (Tr. 478). Kapoor recommended that Maybank diversify into other asset classes, but Maybank expressed a clear preference for 100% equities. (Tr. 1044-48). Kapoor testified that, based on his years of working with Maybank and his several conversations with him about his portfolio, Maybank would not have allowed his account to be weighted with 70% or more in bonds.[22] (Tr. 1047-48).

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[21] The testimony of Judy Schoemer ("Schoemer") also illustrated Maybank's personal aversion to investing in bonds. Schoemer worked with Maybank both before and after he sold Southeastern to BB&T. Schoemer testified that Maybank had an "all equities" investment philosophy for his own customers. (Tr. 1107). Clients of Southeastern who were 70-80 years old were invested in all equities because Maybank "didn't feel bonds were really appropriate." (Tr. 1107). When Schoemer worked with Maybank, he had always had equities in his portfolio and no bonds. (Tr. 1112). When she told Maybank that during a review of his MP Account, it was observed that some bonds had been purchased, Maybank said, "I don't ever want bonds in an account," and the bonds were sold. (Tr. 1131).

[22] Significantly, McCann's assumption required that the BB&T investment

The wide range in the alternative investment theories and their respective damages presented by Maybank and the questions of fact that the jury had to necessarily decide in coming to an actual damages amount prove that the damages were not a sum certain or capable of being reduced to certainty and which was fixed by conditions existing in August 2006. Maybank's theory of damages presented the jury with a highly ***variable*** and speculative method for computing damages. Specifically, the jury had to speculate whether Maybank would have willingly sold his BB&T stock in August 2006.[23] Then, the jury had to exercise its discretion to determine whether Maybank would have invested the proceeds from such sale in bonds. Next, the jury had to exercise its discretion to determine the proportion of bonds to stocks in which Maybank would have willingly invested. Finally, the jury would have to use its discretion to determine if the two isolated Vanguard index funds used by McCann provided a reasonable basis for computing damages based on the alternative investment performance theories proffered by McCann. Thus, there was no fixed standard for the computation of Maybank's damages, and there was no simple mathematical calculation based on undisputed factors that allowed the jury to reach a non-discretionary conclusion.[24]

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account be heavily invested in bonds for the *entire 4 year period* from August 2006 to December 2010. (Agr. Ex. 72 at Exs. (PVFC) 3-4, 8, 9). In 2008, however, after a steep drop in the stock market, Maybank took a $400,000 draw on his BB&T credit line and then invested that cash in stocks. (Tr. 352; Agr. Ex. 65.27). This shows that Maybank would not have stayed in 70% bonds for the entire 4 year hypothetical period.

[23] The date of a sale of the BB&T stock is determinative of how much proceeds Maybank would have received from the sale. This amount, in turn is a core component for all damages figures that follow based on alternative investment strategies of those proceeds.

[24] As argued in the Defendants' appellate brief, Maybank's evidence of damages was so speculative that judgment should be reversed in favor of Defendants.

Ultimately, the jury awarded actual damages on $3,100,000.00. (Verdict Form). Significantly, this number was different from the two options presented by McCann and Maybank's counsel. This difference illustrates that that jury exercised discretion in considering the variables discussed above and came to a completely different conclusion as to the amount of the damages. The fact that the jury selected a number within Maybank's proposed "range" does not establish that the damages were a sum certain at the time the claim arose. To the contrary, the jury's selection of a number somewhere within the wide $500,000.00 range offered by Maybank illustrates that the actual damages amount was far from a certainty. Additionally, the jury's damages verdict should not be assumed to indicate their adoption of Maybank's damages theory. Defendants offered contrasting damages arguments and it is unknown what methodology, was utilized by the jury in coming to $3,100,000.

C. South Carolina authorities support the trial court's denial of prejudgment interest in this case.

South Carolina's case law interpreting and applying its rules regarding prejudgment interest illustrate the inappropriateness of prejudgment interest in this case. In *Sundown Operating Co. v. Intedge Indus., Inc.*, No. 2007-UP-091, 2007 S.C. App. Unpub. LEXIS 132, at *9 (S.C. Ct. App. Feb. 23, 2007), the plaintiff was denied prejudgment interest on damages from a restaurant fire. *Id.* at *6. On appeal, the Court of Appeals affirmed the denial of prejudgment interest because the damages were "simply not of the type that can be made certain or cannot be changed by proof." *Id.* at *9. The court stated, "In order to determine the damages to be awarded, the master had to consider the testimony of fact witnesses, expert witnesses and exhibits admitted into evidence. There was no fixed formula used for determining the amount of [the

plaintiff's] damages." *Id.* The court further noted that at the time the claim arose, the conditions were not fixed for determining the amount of damages and many of the damages "did not even arise until after the date of the fire, such as the lost profits and revenues, loan and interest charges, legal and permit fees, storage charges, and rental income." *Id.* at *9-10. Accordingly, the court held the plaintiff was not entitled to an award of prejudgment interest. *Id.*

Similarly, in *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009), this Court revered an award of prejudgment interest on the distribution of proceeds from the sale of properties because the sum was not liquidated. This Court found that the record revealed disagreement between the parties over the method of accounting for and dividing the proceeds between the parties. In light of the dispute, this Court found that "the measure of recovery for prejudgment interest was unliquidated at the time the parties' claims to proceeds arose," and therefore, the plaintiff was not entitled to prejudgment interest. *Id.* at 436, 673 S.E.2d at 458.

The case of *Vaughn Development, Inc. v. Westvaco Development Corp.*, 372 S.C. 576, 642 S.E.2d 757 (Ct. App. 2007), illustrates the proper analysis of the question of whether damages are actually capable of being reduced to a certainty. *Vaughn* involved a dispute between a developer and a contractor over the scope of sewer main work performed by the contractor. The contractor contended it was owed $88,691.00, representing the cost for two sewer mains, manholes and four service crossings. *Id.* at 578, 642 S.E.2d at 758. The developer responded stating that it would only pay $18,746.12, representing the cost of one sewer main. *Id.* The jury awarded the contractor $37,492.24, which was equivalent to the cost of two sewer mains. *Id.* The Court of

Appeals reversed an award of prejudgment interest on this amount holding that the measure of damages was not fixed in this case. *Id.* at 580-81, 642 S.E.2d at 759-60. Rather, "[t]here was an intermediate question that had to be decided before the measure of damages could be ascertained. Under the terms of the contract, the scope of work required was not certain and the damages could only be measured after that determination was made." *Id.* at 580-81, 642 S.E.2d at 759.

The holdings in *Sundown Operating Co.*, *Charleston Holdings, LLC* and *Vaughn Development* are relevant to the instant case and support the finding that Maybank is not entitled to prejudgment interest. Here, the amount of damages was hotly contested by the parties who presented extensive expert testimony on this issue. Just like the holdings in the cases discussed above, the amount of damages was not a sum certain or capable of being reduced to certainty by a simple mathematical calculation at the time the claim arose. Rather, as was the case in *Vaughn Development*, there were numerous intermediate questions that the jury had to decide in order to determine the measure of damages.

Additionally, like *Sundown Operating Co.*, a substantial amount of Maybank's damages did not arise until after Maybank's claim arose. In *Sundown Operating Co.*, the court found that because some of the damages arose after the claimed injury, this fact demonstrated that the damages could not be a sum certain and plaintiff was not entitled to prejudgment interest. *Sundown Operating Co.*, 2007 S.C. App. Unpub. LEXIS 132, at *10 (noting the damages for lost profits and revenues, loan and interest charges, legal and permit fees, storage charges, and rental income arose after the date of the fire). In the instant case, Maybank's damages theory centers on his assertion that he should have been

advised to sell his BB&T Stock in August 2006. (Tr. 890). Thus, if he had damages that were capable of being ascertained to a sum certain, it would have to be as of that date. However, that is not how Maybank attempts to calculate his damages. Instead, Maybank's expert, McCann, using hindsight, selected two Vanguard index funds he opined should have been used in Maybank's investment strategy. (Tr. 912, Agr. Ex. 72 at Exs. (PVFC 3-4, 8-9)). McCann then used the performance of those cherry-picked funds from August 2006 to February 2010 as the basis for his calculation of Maybank's damages. (*Id.*). These "damages" occurred long after Maybank's claim for bad financial advice arose. Consequently, Maybank's damages were not a sum certain or capable of being reduced to certainty at the time his claim arose.

Maybank also asserts that the jury's verdict of $3,100,000 in actual damages, itself, shows that it was "capable of ascertainment." (Appellant's Brief of Respondent/Appellant at 39). In making this argument, Maybank is ignoring the key point that an award of prejudgment interest requires more than the jury coming to some amount of actual damages. Every jury that finds for a plaintiff comes to an actual damages figure. The test is whether there was nothing discretionary about that determination. Only where the actual damages figure is the result of a clear mathematical computation that is not subject to dispute is prejudgment interest allowable. Where the jury is required to exercise its discretion to come to that amount, the damages are unliquidated and are not subject to prejudgment interest.

D. The authorities from South Carolina and other jurisdictions cited by Maybank are inapplicable or distinguishable from this case.

The South Carolina cases cited by Maybank regarding prejudgment interest, rather than support his position, actually illustrate why such an award would be improper

in this case. Unlike the situation at hand, these cases involved actual damages amounts that were easily ascertainable and certain. For example, in *Butler Contracting, Inc. v. Court Street, LLC*, 369 S.C. 121, 134, 631 S.E.2d 252, 259 (2006), a subcontractor was held to be entitled to prejudgment interest because the amount it was owed was readily capable of being reduced to a certainty by looking to the contractual provisions, the change orders, and the amounts already paid by the contractor. In *Boykin Contracting, Inc. v. Kirby*, 405 S.C. 631, 642-43, 748 S.E.2d 795, 800-01 (Ct. App. 2013), prejudgment interest was awarded in a contractor dispute based on the undisputed invoice amount after simple adjustments were made by the court to remove unsupported charges and a set percentage of profit. In *Smith-Hunter Constr. Co., Inc. v. Hopson*, 365 S.C. 125, 128-29, 616 S.E.2d 419, 421 (2005), prejudgment interest was awarded based on damages established through invoices and an uncontested adjustment for profit and overhead. In *Babb v. Rothrock*, 310 S.C. 350, 353-54, 426 S.E.2d 789, 791 (1993) prejudgment interest was awarded based on an easily established pro-rata share of a set note amount.

In his brief, Maybank also cites to several cases from other jurisdictions as support for the proposition that prejudgment interest is part of the measure of damages for a breach of fiduciary duty claim. This argument, however, was not presented to the trial court and has not been preserved. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Additionally, where the appellate argument differs from the ground stated to the trial court, the issue is not preserved. *See State v. McCray*, 332 S.C. 536,

542, 506 S.E.2d 301, 303 (1998). The sole argument put forward Maybank's motion for prejudgment interest was that "the amount of the damages suffered was ascertainable to a sum certain" and, thus, prejudgment interest was awardable under S.C. Code Ann. § 34-31-20(A)." (Pl.'s Mot. for Prejudgment Interest, ¶¶ 8-9; Tr. of 8/19/14 Hearing at 97-107). Additionally, the trial court's Order on the prejudgment interest issue addressed only the applicability of S.C. Code Ann. § 34-31-20(A). (11/10/14 Order at 31) (holding "I find that Mr. Maybank's damages were not a sum certain as required by S.C. Code Ann. § 34-31-20(A) and I therefore deny Mr. Maybank's motion for prejudgment interest on that ground."). Therefore, this issue was neither raised nor ruled upon by the trial court and is not properly preserved.

Even if this issue had been properly preserved for appellate review, Maybank's reliance on these outside cases is misplaced, as they are either distinguishable from this matter, or wholly inapplicable. Maybank first cites the case of *The Woodward School for Girls, Inc. v. City of Quincy*, 13 N.E.3d 579 (Mass. 2014), as support for the award of prejudgment interest in this matter. However, *Woodward School* is distinguishable because, under Massachusetts law, "prejudgment interest is part and parcel of the award of damages itself" for the alleged breach of trust. *Id.* at 599. This is not the rule in South Carolina. Similarly, the case of *McDermott v. Party City Corp.*, 11 F. Supp. 2d 612 (E.D. Pa. 1998), is also distinguishable because under the law applicable in that case (Pennsylvania), "it is within the discretion of the Court to award prejudgment interest with regard to unliquidated sums." *Id.* at 633. Such discretion does not exist under South Carolina law.

Maybank's reliance on *Rios v. H.C. Sharp Co.*, 203 S.W.3d 761 (Mo. Ct. App. 2006), and *Daley v. Chang (In re Joy Recovery Tech. Corp.)*, 291 B.R. 111 (Bankr. N.D. Ill. 2003), is also misplaced. In *Rios*, the court applied an exception that existed under Missouri law to the general rule on prejudgment interest that allowed prejudgment interest where a defendant's tortious conduct confers a benefit upon the defendant. *Rios*, 203 S.W.3d at 764-65. *Joy Recovery* is distinguishable because it is a bankruptcy court case, and the bankruptcy court has the discretion to award such interest where it is compensatory and equitable. *Helms v. Roti (In re Roti)*, 271 B.R. 281, 292-93 (Bankr. N.D. Ill. 2002).[25]

Finally, Maybank's citation to the case of *Smith v. Fairfax Realty, Inc.*, 82 P.3d 1064 (Utah 2003), does not alter this analysis. *Fairfax Realty* involved a rule similar to South Carolina's allowing prejudgment interest where the damages were complete and could be measured by "fixed rules of evidence and known standards of value." *Id.* at 1068. *Fairfax Realty* is distinguishable from this matter because the damages involved centered on the fair market value of real property. The jury awarded $410,000 in actual damages based on the evidence presented as to the fair market value of the property. *Id.* at 1067, 1070. In Utah, fair market valuations of real property has been accepted as a "known standard or measure of value" that permits the award of prejudgment interest. *Id.* at 1069. We have no valuation of real property in this case.

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[25] The *In re Joy Recovery* Court relied on *In re Roti* with regard to its analysis as to prejudgment interest. *In re Joy Recovery*, 291 B.R. at 116.

II. <u>Maybank Waived his Right to Collect Prejudgment Interest Through the Limitation of Damages Provision of the Wealth Management Agreement.</u>

Alternatively, the trial court's denial of an award of prejudgment interest should be affirmed based on the provisions in the Wealth Management Agreement Maybank entered into with BB&T Bank and BB&T AM. Specifically, Paragraph II F.1 of the Wealth Management Agreement expressly waives any right of Mr. Maybank to recover incidental, indirect, special, consequential, or punitive damages from Defendants. (Agr. Ex. 14). This provision states:

> F. <u>Limitation of Liability and Indemnification</u>. Client agrees:
>
> 1. Bank and Investment Advisor shall not be liable with respect to their services under this Agreement except for any loss attributable to their negligence or willful misconduct. *In no event shall Bank or Investment Advisor be liable for any incidental, indirect, special, consequential or punitive damages.*

(*Id.* at 5) (emphasis added). The only remedy allowed is "any loss" attributable to negligent or willful misconduct. All other monetary remedies are barred. Accordingly, Maybank has waived his right to recover prejudgment interest as a measure of damages.[26] There is no agreement between Maybank and any of the Defendants which would allow the recovery of prejudgment interest or which otherwise provides for that remedy.

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[26] The Defendants make reference to Section III of the Appellants' Brief of Appellants/Respondents for a full discussion as to the enforceability of Paragraph F.1. of the Wealth Management Agreement.

Conclusion

For the foregoing reasons, this Court should affirm the trial court's denial of prejudgment interest.

Respectfully submitted,

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August 24, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-8578
Appellate Case No. 2014-002638

Francis P. Maybank and Jane H.P. Maybank, as trustee for the Francis P. Maybank Family Insurance Trust, ...	Plaintiffs,
Of whom Francis P. Maybank is the, ...	Respondent/Appellant,

v.

BB&T Corporation, Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, and Sterling Capital Management, LLC, Successor in merger to BB&T Asset Management, LLC, ...	Appellants/Respondents.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants/Respondents, 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 to the following address(es):

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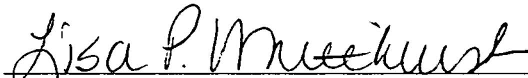
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August 24, 2015