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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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.

Initial Respondent's Brief of Respondent-Appellant Francis P. Maybank

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STATEMENT OF THE ISSUES ON APPEAL

Although Respondent-Appellant Francis P. Maybank (Mr. Maybank) is not dissatisfied with the Statement of Issues on Appeal of Appellants-Respondents (Appellants) and will therefore not submit a separate statement as permitted by Rule 208(b)(2), SCACR, Mr. Maybank will address the arguments relating to the stated issues on appeal as they were presented to and addressed by the trial court. Thus, Mr. Maybank will group arguments by reference to the motion in which the stated issue was raised. Although different than the ordering in the brief of Appellants, Mr. Maybank's presentation of the argument categorizes the issues by reference to a common standard of review. Additionally, other issues are addressed in the manner in which they would be addressed by the Court.

STATEMENT OF THE CASE

In the interest of the Court's time and resources, and pursuant to the procedures outlined in Rule 208(b)(6), SCACR, Mr. Maybank incorporates by this reference, as if set forth verbatim herein, the Statement of the Case set forth in his Initial Appellant's Brief on the cross-appealed issue of prejudgment interest.

STATEMENT OF FACTS

In the further interest of the Court's time and resources, and pursuant to the procedures outlined in Rule 208(b)(6), SCACR, **Mr. Maybank incorporates by this reference, as if set forth verbatim herein, the Statement of Facts set forth in his Initial Appellant's Brief on the cross-appealed issue of prejudgment interest**.

However, responding specifically to the Statement of Facts provided by Appellants, Mr. Maybank acknowledges that the parties have presented the Court with very different views as to what are the relevant facts of this case. This is a continuation of the litigation and trial of this case below, where the parties disagreed on, and Appellants contested, virtually every salient point and argument advanced. Fortunately for this Court, no determination of the facts is required in this appeal, as the parties submitted their respective positions and characterizations of the evidence to the jury, and the jury has spoken.

Indeed, while Mr. Maybank disagrees with many of the misstatements and mischaracterizations contained in Appellants' Statement of Facts, providing the Court with a point-by-point rebuttal is unnecessary. Appellants' depiction of the facts and selective citation to the record does not tell the real story of this case, but more importantly, Appellants presented this same version of the facts to the jury and it was rejected.

SUMMARY OF ARGUMENT

The evidence presented at trial fully supports the trial court's decision to both submit the appealed issues to the jury, as well as deny Appellants' motions for judgment notwithstanding the verdict (JNOV) and new trial absolute. Many of Appellants' arguments are subject to procedural defects which preclude their review by this Court. Of those arguments that are properly before the Court, most consist merely of a recapitulation of the rejected arguments advanced to the jury below which are irrelevant to the review of an appeal from a jury verdict and the denial of post-trial motions.

Appellants' attempted invocation of a "securities exemption" to excuse the unfair and deceptive business practices that the jury found to be in violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 *et seq.* ("UTPA"), fails for a number of reasons. Having requested that the issue of their entitlement to an exemption be submitted to the jury below, Appellants' argument on appeal that the issue is one for the Court is waived and unpreserved for appellate review. Further, Appellants misconstrue the standard for application of the exemption, are incorrect on the merits of the issue (as the conduct found to be violative of the UPTA did not involve the sale of a security), did not meet their statutory burden of proving entitlement to an exemption, and should be judicially estopped from advancing a convenient, but misleading, position on this point on appeal.

With respect to Appellants' remaining arguments regarding the denial of their motion for JNOV, the evidence of record fully supports the trial court's decision. The trial court properly exercised its jurisdiction over BB&T Corporation, which waived its right to challenge the trial court's jurisdiction based on its substantial participation in the

litigation and whose Executive Officer and General Counsel expressly approved the investment strategy developed and recommended by Appellants to Mr. Maybank. Importantly, and fatal to the JNOV, BB&T Asset Management did not appeal the trial court's denial of JNOV on the breach of fiduciary duty cause of action; therefore, at a minimum, the verdict is sustained as to BB&T Asset Management on that ground alone under the Court's longstanding application of the "two-issue rule." The remaining issues raised by Appellants' JNOV were properly submitted to the jury, and supported by the evidence. These include the application of the exculpatory clause contained in Appellants' form contract with Mr. Maybank, which Appellants expressly requested be submitted to the jury along with the determination as to the other issues in the contract. Further, Appellants' appeal of their motion for a new trial absolute based on the trial court's qualification of Professor John Freeman is similarly unpreserved and without merit, as Appellants consented to Professor's Freeman's qualification as an expert witness, and the exercise of the trial court's discretion in so-qualifying him is fully supported by its substantial inquiry into Professor Freeman's qualifications and expertise.

Moreover, although unnecessary for this Court's *de novo* review of the jury's award of punitive damages, the trial court's thorough and reasoned Order and Final Judgment ("Order") provide the Court with substantial justification and evidence to sustain the punitive award. With respect to Mr. Maybank's post-trial motions (outside of the denial of Mr. Maybank's motion for prejudgment interest, which is the subject of the cross-appeal), the evidence supports the trial court's exercise of its discretion in trebling the jury's award of actual damages and awarding reasonable attorneys' fees and costs under the UTPA, and in denying Appellants' motion for election of remedies.

ARGUMENT

I. The trial court's denial of Appellants' Motion for Judgment Notwithstanding the Verdict is fully supported by the evidence adduced at trial.

When reviewing the trial court's ruling on a motion for a directed verdict or for a JNOV, an appellate court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). "In considering a [motion for] JNOV, the trial judge is concerned with the existence of evidence, not its weight." *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003 "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below. *RTF Management Co., LLC v. Tinsely & Adams LLP*, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012) (citation omitted). "In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Id.*

a. Unfair Trade Practices Act

i. Because the trial court instructed the jury regarding an exemption from UTPA at Appellant's request, the exemption argument advanced in this appeal was waived and is unpreserved for this Court's review.

Throughout this litigation, Appellants have maintained that their unfair and deceptive conduct was exempt from the UTPA because "there was no question" but that a VPFC is a security.[1] Although Appellants had the burden of proving the exemption, *see*

[1] **(R. p.)** (Apps' 7th MSJ at 3; Mot. for Dir. Verdict at 11; Mot. for JNOV at 9).

discussion *infra* at 14, Appellants now contend that the trial court erred in submitting to the jury the contested issue of whether an exemption under S.C. Code Ann. § 39-5-40(a) applied to Appellants' conduct. App. Br. at 9. However, the trial court correctly denied Appellants' motions for summary judgment and a directed verdict on this ground, recognizing that the burden of proving an exemption rested with Appellants (which they had not met) and finding that the evidence was susceptible to more than one reasonable inference. (Tr. p.1829:18-25). Appellants may not seek review on this point because, at the close of all evidence, Appellants changed tack and requested the following instruction about a "securities" exemption:

> Section 39-5-40 of the South Carolina Code states, in pertinent part, that the Unfair Trade Practices Act does not apply to "[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law. Securities transactions are exempt from claims under the Unfair Trade Practices Act." *Ward v. Dick Dyer & Assoc., Inc.*, 304 S.C. 152, 155 n. 1, 403 S.E.2d 310, 312 n. 1 (1991).

(R. p.) (Apps' Requested Jury Charges at 36). Except for the citation to *Ward*, the trial court gave this requested charge verbatim. (Tr. p.2014:16-23). Understandably, having requested it, Appellants did not object to this charge. (Tr. p.2027:17–2028:23). After considering the evidence in light of the charge, the jury found that Appellants violated the UTPA through unfair and deceptive business practices in commerce.[2]

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[2] The court also instructed the jury that, in order for it to return a verdict under the Securities Act, S.C. Code Ann. §§ 35-1-101 *et seq.*, "[Mr. Maybank] must prove that the defendants sold a security in violation of the Act". (Tr. p.2009:4-5). The jury did not return a verdict under the Securities Act, suggesting that it concluded that VPFCs are not securities or that Appellants did not sell the VPFCs. Contrary to Appellants' contention otherwise, App. Br. at 14 n.13, the jury's verdict cannot be construed as concluding that there was no misrepresentation in view of its finding of liability on the causes of action for constructive fraud, negligent misrepresentation, and breach of fiduciary duty.

Because Appellants requested the exemption instruction without lodging an objection, they have waived any argument on appeal that the jury erred in finding against them on the exemption issue. *Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 35-36, 491 S.E.2d 571, 576-77 (1997). Like this case, the appellant in *Creech* initially asserted at trial that an issue was a question of law, but then requested and obtained a jury instruction on the same issue and made no contemporaneous objection to the charge. *Id.* at 35, 491 S.E.2d at 576. This Court held that the argument was unpreserved:

> As best we can discern, [appellant]'s complaint on appeal about the trial court's error in "submitting the issue to the jury" is a complaint about the jury charge; *i.e.*, the judge should not have charged the jury to determine, as a question of fact, the applicability of the Southern Building Code. Because [appellant] did not object to the jury instruction given—and, in fact, *requested* it—this issue is not preserved for our review.

Id. at 36, 491 S.E.2d at 577 (emphasis in original).[3] Because Appellants' exemption argument is unpreserved, the trial court's denial of JNOV should be affirmed based on this alternative sustaining ground. *See* Rule 220(c), SCACR.

ii. Appellants misconstrue the scope of the exemption under the UTPA.

Even if it is preserved (which Mr. Maybank denies), the trial court's ruling should be affirmed as Appellants' expansive exemption argument is unsupported by the case law that they cite. The breadth of the securities exemption is based on two cases decided by this Court. In the first, *State ex rel McLeod v. Rhoades*, 275 S.C. 104, 267 S.E.2d 539 (1980), the South Carolina Attorney General brought an UTPA action based on an initial public offering and sale of stock. *See id.* at 106, 267 S.E.2d at 540-41 ("Appellants urge

[3] *See also Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 214, 723 S.E.2d 597, 608 (Ct. App. 2012) ("When an appellant acquiesces to the trial court's ruling, that issue cannot be raised on appeal.") (citing, *e.g.*, *Ex parte McMillan*, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995)).

upon us the view that the securities transactions **involved in this case** cannot be subject to the general UTPA provisions since each alleged action is subject to regulation by both the Securities and Exchange Commission ... and under the South Carolina Uniform Securities Act ....") (emphasis added). After considering a decision by the Rhode Island Supreme Court, *State v. Piedmont Funding Corp.*, 382 A.2d 819 (R.I. 1978), which applied a broad policy that a party is exempt from the UTPA if it is subject to monitoring by a regulatory agency or officer for the general activity in question, this Court adopted the same "general activity test" applied in *Piedmont*. *Id.* at 107, 267 S.E.2d at 541. The Court held that the securities transactions "involved in this case" were exempt because they were specifically required to be registered with the Securities Commissioner under the Securities Act and to follow the procedures established by the Commissioner. *Id.*

Eleven years later, this Court revisited *Rhoades* in *Ward v. Dick Dyer and Associates, Inc.*, 304 S.C. 152, 403 S.E.2d 310 (1991), and expressly overruled the "general activity test," holding that "the exemption is intended to exclude those actions or transactions which are **allowed or authorized** by regulatory agencies or other statutes." *Id.* at 155, 403 S.E.2d at 312 (emphasis added); *Taylor v. Medenica*, 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996) (holding that the exemption "exclude[s] from the UTPA those actions or transactions which are allowed or authorized by a regulatory agency or other statutes.") (citing *Ward*). Despite this Court's rejection of a complete exemption from the UTPA based on general regulatory oversight, Appellants maintain that their transactions with Mr. Maybank are exempt from the UTPA because they are generally regulated.[4]

[4] By focusing on the general relationship between Appellants and Mr. Maybank, rather than the specific conduct found to support liability under the UTPA, a return to the general activity test is precisely what Appellants seek of this Court. *But see McTeer v. Provident Life & Acc. Ins.*, 712

Although Appellants base their argument on *dicta* from footnote 1 in *Ward,* a fair reading of that footnote reveals that the continued securities exemption was limited to the public offering transaction "involved" in *Rhoades*. *Ward*, 304 S.C. at 155 n.1, 403 S.E.2d at 312 n.1 ("We note that **the sale of securities is a unique transaction. Each public offering is subject to strict regulation and must comply with stringent requirements**. Very few, if any, other business transactions are subject to the strict scrutiny which is placed upon securities.") (emphasis added).[5] Unlike the broad reading advanced by Appellants, this reading is consistent with the *Rhoades* analysis in that transactions undertaken in accordance with specific procedures and regulations—such as the sale of securities in an initial public offering—are exempt from the UTPA while those undertaken by entities that may be merely subject to general regulation are not.[6] *Taylor, supra.* Adopting Appellants' interpretation would allow the exemption to subsume the rule in almost every situation. *Ward*, 304 S.C. at 154-55, 403 S.E.2d at 311 ("If we were to accept this contention, however, the UTPA would be rendered without meaning").[7]

F. Supp. 512, 516 (D.S.C. 1989) ("In other words, [the South Carolina Supreme Court] considered [in *Rhoades*] not whether the securities business in general is regulated but whether the challenged acts themselves are regulated.").

[5] *Ward* involved an exemption to the UTPA, but not for the banking industry. Neither this Court nor the court of appeals appear to have had occasion to discuss the availability of an exemption under § 39-5-40(a) to a defendant's sale of a security since the opinion in *Ward* was issued. The Court should decline to consider the question now.

[6] Unlike the routine purchase and sale of ordinary stocks and bonds, which this Court may take notice occurs collectively billions of times a day across the world, the issuance and initial public offering of new securities **is** unique **and** highly regulated.

[7] The final sentence of footnote 1 in *Ward* ("[W]e choose to follow the vast majority of jurisdictions in holding that securities transactions remain exempt from claims under UTPA") cannot be read as maintaining the broad exemption advanced by Appellants. Even jurisdictions recognizing securities exemptions do not adhere to Appellants' construction. *See, e.g., Strigliabotti v. Franklin Resources,* 2005 WL 645529 (N.D. Cal. 2005). Furthermore, by asserting the existence of a broad exemption for "securities **related** conduction and transactions" App. Br. at 10 (emphasis added), Appellants urge the existence of a holding that was not made by this

This Court rejected the same interpretation advanced by Appellants in renouncing the general activities test. *Id.* (quoting *Skinner v. Steele*, 730 S.W2d 335 (Tenn. App. 1987)).

The Court's recent opinion in *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, Op. No. 27502, 2015 WL 4112411 (S.C. Sup. Ct. filed Feb. 25, 2015, Withdrawn, Substituted and Refiled July 8, 2015), further illustrates the overbreadth of Appellants' claimed exemption. *Janssen* involved application of the UTPA to unfair and deceptive conduct by a pharmaceutical company in failing to properly disclose the risks and side effects of an antipsychotic drug.[8] This Court rejected a simplistic application of a regulated exemption to the appellant in *Janssen* simply because that it operated in a highly regulated industry and the deceptive label at issue had been submitted and approved by the FDA. *Id.* at *15-16. Thus, this Court rejected an argument analogous to that advanced by Appellants even though prescription drugs are one of the most highly regulated product industries and the label at issue was in fact submitted to and approved by the FDA. This Court undertook the same "allowed or authorized" analysis for the application of an exemption as outlined in *Ward*, which is contrary to the standard advanced by Appellants. App. Br. at 11. *Janssen* confirms that it is necessary to analyze the alleged deceptive conduct to determine whether it is lawful, does something required by law, or is authorized or allowed under other statutes or

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Court in *Ward* and which goes beyond the language employed by the Court, and harkening back to the Court's use of the (now-rejected) general activities test in *Rhoades*. To the contrary, this Court noted only "that the **sale of securities** is a unique transaction." Thus, related conduct and transactions are not implicated by the Court's observation in *Ward*. However, to the extent Appellants' now contend that they participated in a sale of the VPFC as contemplated in *Ward*, they should be judicially estopped from doing so. *See* discussion *infra* at 15-16.

[8] Rather than a private citizen action, *Janssen* involved an enforcement action brought by the Attorney General; however, the application of the statutory prohibitions under the UTPA are the same. 2015 WL 4112411 at *7-8.

regulations. 2015 WL 4112411 at *15-16. (quoting *Dema v. Tenet Physician Servs. Hilton Head, Inc.*, 383 S.C. 115, 678 S.E.2d 430 (2009).[9]

iii. Regardless of the frailties in the exemption argument, the conduct supporting the jury's verdict under the UTPA did not involve the sale of a security.

Appellants advance a much different story of this case on appeal (one in which each assertion of wrongdoing involved the sale of a security) than what was tried below.[10] The trial court cited at least three specific instances in which the jury could have found Appellants liable for violating the UTPA. The Court first considered Appellants' deceptive presentation of their form Wealth Management Agreement ("WMA") to Mr. Maybank and other customers. Order at 4. The trial court cited direct evidence demonstrating Appellants knew when they presented the WMA to Mr. Maybank that BB&T Bank could not fulfill the duties and obligations in the contract as written. **(R. p.)** BB&T Bank and its representatives were, in fact, restricted from fulfilling the duties and

[9] Appellants' secondary argument that they operate in regulated industries and are subject to state and federal securities laws, App. Br. at 11, was improperly made for the first time in the motion for JNOV. Order at 5-6. *In re McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001) (holding that only the grounds raised in the directed verdict motion may properly be presented in a JNOV motion). Moreover, Appellants misrepresent the stipulated fact that the trial court read to the jury, *i.e.*, that during the time in question, neither BB&T Asset Management nor BB&T Bank were registered as a Broker Dealer with either the SEC or the State of South Carolina. **(R. p.)** (Tr. p.1922:6-20). Even under Appellants' theory of general regulation of the banking industry, Appellants' actions in conducting unlawful activities demonstrate that the purpose of a regulated activity exemption was not fulfilled in this case and no one was overseeing Appellants' actions. *See* S.C. Code Ann. § 39-5-160 ("The powers and remedies provided by [the UTPA] shall be cumulative and supplementary to all powers and remedies otherwise provided by law.").

[10] Appellants' arguments regarding the allegations of Mr. Maybank's complaint are misplaced, App. Br. at 13, because at the close of evidence, Mr. Maybank moved to amend his pleadings to conform to the evidence presented at trial, under Rule 15, SCRCP. **(R. p.)** (Tr. p.1815-16). Appellants objected, but the trial court granted the amendment of the pleadings to conform to the evidence presented, finding that a court should freely allow for such an amendment under the rules. **(R. p.)** (Tr. p.1831). Thus, the claims considered and decided by the jury are based on the evidence presented at trial. Further, Appellants did not appeal from this ruling; therefore, their arguments based upon the content of the pleadings are unpreserved. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328-29, 730 S.E.2d 282, 284-85 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case.").

obligation which they contracted to perform. **(R. p.)** Notwithstanding that they knew of the errors contained in the WMA, Appellants presented the contract to all Wealth Management customers from at least 2006 until November of 2009 as a condition precedent to their provision of fiduciary services to these clients. **(R. p.)** Most damaging, Appellants admitted, through the testimony of their corporate representative Ross Walters, that they never notified Mr. Maybank or any other customer that the WMA would not be fulfilled as written despite knowledge of the misrepresentations contained in the WMA. **(R. p.)** The trial court found that this conduct by Appellants was unfair and deceptive, did not involve the sale of a security, and was neither allowed nor authorized by a regulation or statute. *Ward, supra.*

Further, the trial court found that Appellants engaged in an unfair and deceptive business practice by sending a letter, which accompanied refunds of certain transaction-based fees charged to Mr. Maybank and approximately 130 other customers for Appellants' services, which characterized the refunds as being simply the result of an error discovered by BB&T during a routine review of customer accounts. Order at 4; **(R. p.)** (Agreed Ex. 50, Refund Letter). Appellants represented that they were under no obligation to refund the charged fees but were doing so "as a reflection of their corporate values." *Id.* In reality, the refund resulted from criticism of BB&T Asset Management's fee practices by the Securities and Exchange Commission ("SEC") following an audit.[11] **(R. p.)** (Deposition of David Fisher). In other words, Appellants lied and misrepresented that they were being good corporate citizens and fiduciaries when, in truth, they were

[11] Appellants' Corporate Representative and Senior Executive of the BB&T Wealth Division, testified that the SEC told Appellants that the charging of these fees were "outside the bounds." **(R. p.)** (Video Deposition Testimony of David Fisher).

misleading their customers and hiding the nature of their business practices.[12] The trial court found that this conduct was unfair and deceptive,[13] did not involve the sale of a security, and was neither allowed nor authorized by a regulation or statute. *Ward, supra.*

Finally, the trial court found that the evidence supported a finding of a third unfair and deceptive act. Order at 4-5. Prior to the implementation of Appellants' investment strategy, Appellants presented Mr. Maybank with a memorandum that purported to reflect an individualized assessment of his financial situation. **(R. p.)** (Agreed Ex. 7, Approval Letter). However, unbeknownst to Mr. Maybank until the very eve of trial, that document was merely a "fill-in-the-blank" form letter used to assess the suitability of Variable Prepaid Forward Contracts ("VPFC") for many individuals *en masse* and to advance Appellants' alternative investments initiative. *Cf.* **(R. p.)** (Pl.'s Ex. 91, Form Approval Letter). The trial court found that this conduct also was unfair and deceptive, did not involve the sale of a security, and was neither allowed nor authorized by a regulation or statute.[14] *Ward, supra.*

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[12] Were it not for this lawsuit, Appellants' unfair and deceptive statements to Mr. Maybank and other customers almost certainly would have remained successfully hidden.

[13] Appellants' conduct in this regard is similar to that found to be a source of liability in *Janssen.* 2015 WL 4112411 at *5-6 (describing the false and misleading nature of a "Dear Doctor" letter from Janssen to health care providers regarding potential side effects of Risperdal and admissibility of such letter as tending to establish UTPA liability). What this Court called a "corporately sanctioned decision to affirmatively lie," *id.* at *24, parallels Appellants' omission from a letter to clients of the fact that the refund arose out of the SEC audit and criticism of BB&T Asset Management's imposition of transaction fees, and was misleading conduct as egregious as that condemned in *Janssen.*

[14] Promising special or individual treatment while providing only stock services has been found to violate the UTPA. *See deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 270-71, 536 S.E.2d 399, 407 (Ct. App. 2000).

Thus, the trial court found that evidence of Appellants' unfair and deceptive business practices supported the jury's verdict in at least these three ways[15] and should be affirmed. Order at 6.[16]

iv. *Arguments as to the applicability of an exemption fail on the merits.*

1. Appellants did not meet their burden of proving the applicability of an exemption to the UTPA.[17]

Although S.C. Code Ann. § 39-5-40(a)[18] expressly places "the burden of proving exemption from the provisions of this article ... upon the person claiming the exemption," Appellants claim that the exemption is a question of law for the court. App. Br. at 9.

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[15] In their exemption argument, Appellants devote a mere five sentences, totaling less than half a page, to the three separate bases found by the trial court to support the jury's verdict of a UTPA violation. App. Br. at 15-16. One of these sentences merely lists the three grounds. Because this superficial presentation is insufficient, Appellants have abandoned any argument regarding these three grounds. *Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (finding argument advanced through conclusory statements abandoned).

[16] *See Janssen*, 2015 WL 4112411 at *13 (applying an "any evidence" standard of review). Moreover, Appellants' arguments that their unfair and deceptive conduct did not proximately cause damages to Mr. Maybank, did not affect a public interest, and were not capable of repetition, *see* App. Br. at 50-53, were argued to the jury and properly charged by the trial court. Because these issues were jury questions, the jury's finding of an UTPA violation is supported by the evidence and should be affirmed. *Janssen*, 2015 WL 4112411 at *15. ("Whether Janssen's actions and representations to the medical community constituted a violation of SCUTPA was a jury question. The jury has spoken, and we are not permitted to weigh the evidence and invade the province of the jury.").

[17] The trial court also found that "Defendants failed to meet their burden to prove that each of these practices involved a security or securities transactions and was authorized under law administered by any regulatory body or permitted by any other South Carolina law." Order at 5. Because Appellants did not appeal from this finding, *see Atl. Coast Builders*, *supra*, the determination that these three examples of Appellants' conduct did not involve securities and are not subject to the UPTA is the law of the case.

[18] Appellants cite § 39-5-140(d) for the proposition that a determination as to the applicability of an exemption requires reference to complex statutory schemes and regulations. App. Br. at 9 n.8. Appellants' arguments referencing subsection (d) specifically, and the FTC generally, are unpreserved, as they are made for the first time on appeal. Beyond preservation problems, however, Appellants' arguments make little sense, as subsection (d) exempts from the applicability of the UTPA those activities and practices which are subject to FTC administration and regulation. The implication is one akin to preemption, such that, if the conduct is not subject to FTC regulation, then it is subject to scrutiny under the UTPA, based on subsection (d).

Because the exemption is subject to proof, the issue is not a pure legal question and may only be determined in the context of the facts and evidence that are introduced at trial.[19] As noted above, Appellants had the burden of introducing these facts and evidence, but they failed to do so. Order at 6 ("I find Defendants failed to meet their burden to present evidence proving an exemption from the UTPA...."). Appellants also did not appeal from this finding, which now makes it the law of the case and requires affirmance of the trial court's determination regarding the failure of proof. *See Atl. Coast Builders*, *supra*. In any event, Appellants cannot prevail because they have not cited to any evidence that they presented to the jury (because there is none) to support their claim of an exemption and meet their burden of proof. The trial court's ruling should be affirmed.

2. Appellants are estopped from arguing that they participated in effecting the sale of a security to Mr. Maybank.

The Court should find that Appellants are judicially estopped from arguing their involvement in "securities related conduct and transactions," App. Br. at 9, is exempt

[19] Issues subject to proof are, at a minimum, mixed questions of fact and law, and in this case, more likely a purely fact question. *See generally Mullis v. Winchester*, 237 S.C. 487, 491 118 S.E.2d 61, 63 (holding that an issue for which one party has the burden of proving is ordinarily a question of fact for the jury, and only becomes a question of law for the Court when the evidence is undisputed and susceptible to only one inference). Here, the sole basis by which Appellants claim an exemption is that a VPFC is a security. However, whether a VPFC is a security is a question of fact that can only be determined by the evidence presented at trial on that point. *See, e.g. Liverett v. Island Breeze Int'l, Inc.*, No. 2:12-CV-1285-PMD, 2012 WL 3264563, at *6 (D.S.C. Aug. 9, 2012) (finding that the question of whether a transaction involved a security was a question of fact to be determined from "[t]he details of the transactions"); *Tanenbaum v. Agri-Capital, Inc.*, 885 F.2d 464, 468 (8th Cir. 1989) (affirming the district court's refusal to direct a verdict and submission of the issue to the jury on the question of whether something was a security where evidence was susceptible to multiple interpretations); *United States v. McKye*, 734 F.3d 1104, 1110 (10th Cir. 2013) (holding that the question of whether something was a security is a mixed question of law and fact and finding the district court's instruction to the jury that the product *was* a security was erroneous based on that fact); *Zolfaghari v. Sheikholeslami*, 943 F.2d 451, 456 (4th Cir. 1991) (holding the question of whether mortgage pools were securities under federal securities laws was a question of fact); *Teague v. Bakker*, 35 F.3d 978, 990 (4th Cir. 1994) (reversing the district court's grant of a directed verdict on the question of whether a product constituted a security, holding "[s]uch a determination is properly made by a jury.").

from the UTPA. Appellants have asserted throughout this litigation that they did not participate in the sale of the VPFC to Mr. Maybank. A party seeking to invoke judicial estoppel must demonstrate certain elements: (1) the adopting of two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Cothran v. Brown*, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004). Appellants' changing story with respect to their participation in securities transactions has evolved since the inception of this case. When opposing remand of this case from federal court (after having removed it), Appellants asserted as follows:

> None of the Defendants can be liable under [the State Securities Act] because none of them *sold* the VPFCs at issue to the Plaintiff. The contracts for the purchase of the VPFCs are plainly between the Plaintiff and Bear Sterns, which later became JP Morgan Chase, and the Plaintiff and Deutsche Bank. No BB&T entity or either of the individual Defendants is a party to the agreements. Accordingly, subsection (b) of § 35-1-509 is inapplicable.

(R. p.) (BB&T Opp. to Mot. to Remand at 18). Appellants continued this theme at trial, arguing throughout that they were not liable under the Securities Act because, *inter alia*: they were not parties to the VPFCs, (Tr. p.210); clients like Mr. Maybank entered into VPFCs with third parties, not Appellants, (Tr. p.1174-75); the third party required the VPFC compliance calls, (Tr. p.1313); Appellants' expert witness Paul Merolla testified that a hallmark of being a broker-dealer was effecting transactions in securities and that Appellants did not do that, (Tr. p.1754-55); and Appellants were not broker-dealers,

telling the jury that the court would charge them that a broker-dealer "effectuates transactions and sells securities," (Tr. p.1986-87). As noted above, the jury did not find Appellants liable for violating the Securities Act.

Having evaded Securities Act liability below, Appellants now contend that, yes, after all, they did participate in the sale of the VPFC to Mr. Maybank and the UTPA exemption applies.[20] In arguing these two inconsistent positions, Appellants are trying to have it both ways and intentionally attempting to mislead this Court in the process. Having prevailed on the Securities Act claims, they now change course in an effort to gain an exemption from the UTPA. Because Appellants are attempting to mislead this Court in order to gain an advantage through characterization and mischaracterization of their role in failing to uphold their duties as Mr. Maybank's fiduciaries, the Court should find that Appellants are judicially estopped from asserting an exemption to the UTPA on this ground.

3. Appellants presented no evidence at trial from which the jury, the trial court, or this Court could determine that a VPFC is a security.

Even though they had the burden of proof, Appellants presented no evidence during trial to prove that a VPFC is a security.[21] Without any citation to evidence in the

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[20] This is also true for Appellants' secondary argument, *see* App. Br. at n.12 & n.15, which relies on the fact that Mr. Maybank's managed portfolio, over which Appellants exercised sole discretionary investment authority, contained securities. As discussed above, none of Appellants could effectuate the purchase or sale of securities in Mr. Maybank's managed portfolio as none of Appellants were registered as broker dealers. Consequently, Appellants did not purchase or sell any of the securities contained in the managed portfolio either, but instead placed those trades through independent and properly registered third-party brokers, as confirmed by the transaction descriptions on Mr. Maybank's account statements. *See, e.g.*, **(R. p.)** (Agreed Ex. 65.2 at 6-13 (listing the purchase or sale of securities in every instance "thru" third-parties)).

[21] The only reasonable interpretation of the jury's verdict is that it concluded either that the VPFC is not a security or that Appellants did not sell the VPFC. *See* discussion *supra* n.2. Either conclusion renders the exemption inapplicable.

record, Appellants now assert that a VPFC is a security. The trial court, however, found that "Defendants presented no evidence that the two VPFCs sold to Mr. Maybank were initial public offerings of securities or were even securities as contemplated by the exemption recognized in *Rhoades* and *Ward*." Order at 6.[22] Moreover, Appellants' expert witness Robert Thorne testified in his deposition that a VPFC was *not* a security, *see* (Tr. p.1255:11-21); **(R. p.)** (Maybank Memo in Opp. to BB&T 7th MSJ at 3 n.2), and demurred when cross-examined at trial about whether a VPFC is a security. **(R. p.)** (Tr. p.1254:22-1256). Mr. Thorne further testified that no sale occurred on the date the VPFC was entered, and that he viewed a VPFC as a "contract," or an "agreement." (Tr. p.1255:7-10; 1256:9-16). Thus, the testimony of Appellants' own expert witness created a disputed inference about the nature of a VPFC, requiring the jury to resolve the issue.[23] Appellants did not meet their burden of proof because they did not introduce any evidence to support a conclusion that a VPFC is a security, a predicate fact for invoking the UTPA exemption. The trial court should be affirmed.

b. BB&T Corporation

The trial court's exercise of jurisdiction over BB&T Corporation is based on that entity's participation in the conduct resulting in Mr. Maybank's damages and is more than the mere exercise of jurisdiction over a parent for the actions of a subsidiary.

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[22] Because Appellants did not appeal from this finding, it is now the law of the case and requires concluding that they did not meet their burden of proving the exemption.

[23] Appellants' cite to the Securities Act and cases from other jurisdictions—which addressed different questions—for the proposition that this Court should declare a VPFC a security as a matter of law, without any evidence from which this Court could evaluate this very complicated investment vehicle. As already noted, this question is not one of law. *See* discussion *supra* n.19. Further, such a determination would be unsupported by the record in this case. *But see* Rules 210 & 240, SCACR.

i. *Appellants' objections to the Court's jurisdiction over BB&T Corporation were waived based on the Corporation's full participation in the litigation for three years and failure to timely pursue a dismissal.*

The trial court correctly ruled that the Corporation waived its right to seek dismissal by waiting until a mere month before the scheduled trial, and after it had meaningfully participated in the defense of the litigation for almost two and a half years, to challenge the Court's jurisdiction over it. The defense of personal jurisdiction is a privilege that "may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939).[24] Accordingly, "'[a] litigant [must] exercise great diligence in challenging personal jurisdiction.'" *Luberda v. ex rel. Luberda v. Purdue Frederick Corp.*, 2014 WL 1315558, *1 n.1 (D.S.C. Mar. 28, 2014) (quoting 5 Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure*, § 1391). The defense of lack of personal jurisdiction must be timely asserted under Rule 12(b)(2), (h)(1), SCRCP, which rule merely "specifies the minimum steps that a party must take in order to preserve [the] defense, not the outer limits of a possible waiver." *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318 (9th Cir. 1998).

BB&T Corporation made nothing more than a perfunctory defense under Rule 12(h), SCRCP, by stating in the Answer that it "reserves its objection based on the Court's lack of *in personam* jurisdiction," **(R. p.)** (Answer to First Am. Compl. ¶1).[25] After answering, the Corporation fully participated in litigating this case, while taking no

[24] *See also Eaddy v. Eaddy*, 283 S.C. 582, 584, 324 S.E.2d 70, 72 (1984) ("*In personam* jurisdiction may be waived ....").

[25] *But see Yeldell v. Tutt*, 913 F.2d 533, 539 (8th Cir. 1990) (defense of personal jurisdiction waived because, "[w]hile the [defendants] literally complied with Rule 12(h) by including the jurisdictional issue in their answer, they did not comply with the spirit of the rule, which is to expedite and simplify proceedings in the . . . [c]ourts.") (internal quotation omitted).

further steps to advance its objection or otherwise move for dismissal until one month before trial. Most notably, the Corporation and the other Appellants initially removed this case to federal court, during which time BB&T Corporation answered the First Amended Complaint, filed its corporate disclosure, opposed remand, and opposed Mr. Maybank's motion for attorneys' fees. Not once during this time, though, did the Corporation advance its claim that the Court lacked personal jurisdiction over it, either in federal court or—at what would seem to have been an opportune moment—upon remand to state court on August 3, 2012. The Corporation also actively participated in subsequent litigation proceedings and discovery, even submitting its own separate responses to some of Mr. Maybank's discovery requests. *See Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 62 (2d Cir. 1999) (holding defense of personal jurisdiction waived when defendant "participated in pretrial proceedings but never moved to dismiss for lack of personal jurisdiction despite several clear opportunities to do so during the four-year interval after filing its answer"). In sum, BB&T Corporation has waived its defense of personal jurisdiction.

ii. *BB&T Corporation was properly subject to the trial court's jurisdiction.*

"A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's ... transacting any business in this State ... [or] "entry into a contract to be performed in whole or in part by either party in this State." S.C. Code Ann. § 36-2-803(A)(1), (7). In turn, "[t]he Due Process Clause is satisfied for personal jurisdiction purposes if a defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,' by establishing sufficient 'minimum contacts' such that maintenance of the suit does not offend traditional notions of 'fair play and substantial

justice.'" *Luberda*, 2014 WL 1315558, *2 (D.S.C. Mar. 28, 2014) (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 475-76 (1985)). The minimum contacts or "power prong" requires that "the defendant directed his activities to residents of South Carolina and that the cause of action arises out of or relates to those activities." *Cribb v. Spatholt*, 382 S.C. 490, 499, 676 S.E.2d 714, 719 (Ct. App. 2009). The "fairness prong" requires consideration of the following: "(1) the duration of the defendants' activity in this State; (2) the character and circumstances of its acts; (3) the inconvenience to the parties; and (4) the State's interest in exercising jurisdiction." *Id.*

Here, BB&T Corporation specifically directed its activities to this state by reviewing and approving the investment strategy devised and recommended to Mr. Maybank through its Executive Vice President, Secretary and General Counsel, Patricia Oliver.[26] **(R. p.)** (Agreed Ex.7). BB&T Corporation, through its officer and general counsel Oliver, specifically approved the investment strategy recommended to Mr. Maybank,[27] including a handwritten note with her signature that "[t]his approval by General Counsel is conditioned on Mr. Maybank not purchasing additional shares of

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[26] Contrary to the assertion otherwise, the evidence demonstrates that Mr. Maybank did receive Ms. Oliver's approval memorandum before the execution of VPFC No.1. **(R. p.)** (Agreed Ex.7, Approval Letter) (copy of letter produced from Mr. Maybank's files bearing "BB&T Legal Department" facsimile dateline of "Aug-11-2006 08:40am"); (Tr. p.340:6-11) ("Q: Do you have any idea on August the 23rd of 2006 that they – of how this – or any concern at that point in time about this strategy that the bank has recommended for you? A: No, I thought it had been thoroughly researched, and a letter from Ms. Oliver confirmed it at the highest levels of the bank were informed about the strategy."). Appellants also failed to preserve this issue by presenting it to the trial court. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("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.").

[27] Appellants waived any argument that BB&T Corporation was neither a party to any agreement or transaction with nor a fiduciary of Mr. Maybank by submitting a jury form (which was adopted by the trial court) that expressly requested that the jury make a determination as to BB&T Corporation's liability under the WMA. *See* discussion *infra* at n.100.

BB&T Corporation with proceeds from the prepaid variable forward transaction." *Id.* The General Counsel for BB&T Corporation, ostensibly after her own independent determination and exercise of due diligence, approved the failed investment strategy on the same date. *Id.* Far more than mere knowledge, the Approval Letter demonstrates that the strategy devised[28] and recommended to Mr. Maybank was reviewed and approved at the very highest levels of the Corporation, and the approval of the transaction was directed to South Carolina by its plain language. [29]

On appeal, Appellants continue to maintain that a parent is not liable for the activities of its subsidiaries, while ignoring the Corporation's own critical role in establishing duties to clients and customers of its subsidiaries generally and approving the VPFC strategy for Mr. Maybank specifically. Wealth Manager Mahfood was required pursuant to the BB&T Code of Ethics[30] to obtain approval of the investment strategy

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[28] In the Approval Letter to General Counsel Oliver, Mr. Mahfood stated that, "[f]or purposes of BB&T's Code of Ethics, please accept this memo as formal disclosure of the prepaid variable forward transaction we intend to execute with your approval." **(R. p.)** (Agreed Ex. 7). He further represented that "[n]either we nor Mr. Maybank consider this transaction to be 'speculative' as outlined in BB&T's Code of Ethics." *Id.* In closing, Mr. Mahfood stated that, '[f]urthermore, we feel that this transaction allows Mr. Maybank to maintain long-term share ownership [of BB&T Corporation stock], in line with the values put forth in the Code of Ethics." *Id.*

[29] Appellants argued in their motion for JNOV that BB&T Corporation was a mere holding company. **(R. p.)** (Mot. for JNOV at 14 ¶(7)(a)). Appellants now concede that its officer and general counsel, Ms. Oliver, reviewed and approved the strategy. App. Br. at 19 ("Oliver signed the memorandum, indicating that she had reviewed it and approved the transaction."). This alone is sufficient to ratify the trial court's denial of JNOV and its decision to submit BB&T Corporation's involvement in this matter to the jury.

[30] As part of furthering and advancing its business activities, the Corporation promulgated a Code of Ethics governing the activities of all of its subsidiaries. **(R. p.)** (Agreed Ex. 6, BB&T Code of Ethics at § I ("The Code applies equally to all employees of BB&T and its subsidiaries."). The Code of Ethics is intended to enhance the business operations of the Corporation and its subsidiaries by ensuring that all of these entities "continue to earn our client's trust and response by always upholding the highest standards of ethical and professional conduct in all that we do." *Id.* at § I, ¶2. BB&T Corporation, through the Code of Ethics, encourages its employees to fulfill these standards and expectations of their clients by ensuring that BB&T

devised for Mr. Maybank and make certain disclosures to the Corporation as part of the Code of Ethics. In turn, the Corporation was required to approve the investment strategy and did so through its officer and general counsel, Ms. Oliver. That this approval was more than perfunctory is shown by the requirement that she sign the disclosure and, importantly, by the conditions placed on the approval by Ms. Oliver. Indeed, Mr. Maybank's fiduciaries could not have implemented the investment strategy that they had devised for him without the Corporation's approval.[31] It was therefore reasonably foreseeable to the Corporation that it would be subject to jurisdiction in South Carolina for a request coming from BB&T's Greenville office, for a client and resident of Greenville, seeking individualized approval of an investment strategy that would be executed in Greenville, and which approval was returned to Greenville for execution. *See Burger King*, 471 U.S. at 474.

Further, the strategy developed for Mr. Maybank was predicated on his continued ownership of the Corporation's stock and was a fundamental element of the investment relationship that was authorized and approved by the Corporation, even though it was a conflict of interest for BB&T Corporation to make representations and give advice regarding its own stock. **(R. p.)** (Tr. p.683-88). The Corporation therefore had "fair warning that a particular activity will subject [it] to the jurisdiction of a foreign

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representatives "must always put the client's interests ahead of [their] own and that of BB&T." *Id.* at § IV.C, ¶3 "Fiduciary Obligations."

[31] Contrary to Appellants' erroneous representation, App. Br. at 21, the 11th Circuit applies a "but for" framework for evaluating a contact for personal jurisdiction purposes, as developed in *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210 (11th Cir. 2009). *See Fraser v. Smith*, 594 F.3d 842 (11th Cir. 2010).

sovereign...." *Burger King Corp.*, 471 U.S. at 472.[32] In sum, the Approval Letter far exceeds the "existence of evidence" standard required to uphold the denial of a JNOV, showing that the Corporation was more than just a passive out-of-state corporation but was a full participant in the fiduciary relationship with Mr. Maybank.[33]

iii. *Appellants' argument that the inclusion of evidence regarding the net worth of BB&T Corporation tainted the jury's consideration is without merit.*

Finally, even assuming that the issue of personal jurisdiction was incorrectly decided below and not waived (which is denied), Appellants' contention that including evidence regarding the net worth of the Corporation in the trial tainted the punitive damages verdict and the jury's consideration of the issues is without merit. Appellants point to the evidence of BB&T Corporation's Annual Reports and Forms 10-K. App. Br. at 25. However, Appellants may not challenge this evidence because they expressly consented to its introduction at trial. **(R. p.)** (Pl.'s Exhs. 76-85; Tr. p.302-305:13); *see Wilder Corp.*, *supra*, n.26. Moreover, Dr. Wood testified as to the net equity of both BB&T Corporation and BB&T Bank, **(R. p.)** (Tr. p.1003-12), providing evidence that the Corporation's largest asset was BB&T Bank, which comprised approximately 98% of the Corporation's assets. Because Appellants did not object to and do not appeal from the

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[32] *See also Fields v. INA Filtration Corp.*, 292 S.C. 614, 618, 358 S.E.2d 160, 163 (Ct. App. 1987) ("The length and duration of the nonresident's activity in this State need only be minimal when the plaintiff lives in this State and the cause of action arose out of the defendant's activities in this State").

[33] *Southern Plastics Co. v. South Commerce Bank*, 310 S.C. 256, 423 S.E.2d 128 (1992), cited by Appellants, is inapplicable. While the Florida bank in that case merely issued a letter of credit to one of its Florida customers (and specifically required presentation to take place in Florida), BB&T Corporation promulgated a Code of Ethics that included specific procedures requiring its involvement in and approval of all transactions involving employees and investment products like VPFCs. The application of those principles involved, by the Corporation's own hand, the approval and implementation of an investment strategy and scheme directed to and executed in South Carolina.

admission of Dr. Wood's testimony regarding BB&T Bank, any error in the admission of the Corporation's financials (which Mr. Maybank disputes) is harmless and cumulative to other evidence. *Taylor*, 324 S.C. at 216, 479 S.E.2d at 43.

c. Breach of Fiduciary Duty

The trial court's denial of the motion for JNOV with respect to the breach of fiduciary duty is supported by the evidence and should be affirmed. Initially, Appellants' argument on this ground only challenges the trial court's holding of a breach of fiduciary duty as to BB&T Bank, but makes no assertion that the trial court erred in denying JNOV as to BB&T Asset Management.[34] App. Br. at 46-48. Accordingly, the jury's verdict on the claim of breach of fiduciary duty as to BB&T Asset Management is the law of the case and, under the two-issue rule,[35] the jury award of actual damages and punitive damages against BB&T Asset Management is fully supported on that ground alone. *See Atl. Coast Builders*, 398 S.C. at 328-29, 730 S.E. at 284-85 (finding the law of the case and applying the two-issue rule to bar consideration of two causes of action appealed in that case on the basis that the master had rendered a verdict against the appellant on three causes of action, only two of which had been appealed).[36]

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[34] As discussed above, Appellants contend that denial of JNOV as to BB&T Corporation was erroneous as to all causes of action, including breach of fiduciary duty.

[35] If this Court finds that the award of actual damages under the general verdict is supported by any of the causes of action (against any of the Appellants), review of the remaining causes of action is unnecessary. *Anderson v. South Carolina Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 419, 472 S.E.2d 253, 254 (1996) ("Under the 'two issue' rule, when the jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed on appeal."). Further, the rule is properly invoked in the context of the jury's award of punitive damages because Appellants failed to appeal from the finding of liability for breaches of fiduciary duty, one of the three causes of action on which the jury awarded punitive damages.

[36] While the case law is developed on the issue of the failure of an appellant to appeal all of the findings of liability, as was the case in *Atlantic Coast Builders*, the application of the two-

Nonetheless, the evidence shows that both BB&T Bank and BB&T Asset Management were fiduciaries to Mr. Maybank and breached their concomitant obligations to him. Appellants' contention that no fiduciary relationship existed between Mr. Maybank and BB&T Bank is particularly absurd. Testimony presented at trial from Mr. Maybank, **(R. p.)** (Tr. p.305), as well as from Professor John Freeman, Mr. Maybank's expert on fiduciary standards **(R. p.)** (Tr. p.712-14), provided substantial evidence to support the jury's finding that BB&T Bank was Mr. Maybank's fiduciary. In fact, BB&T Bank's own employees (and, notably, one of Appellants' experts) even testified that they were fiduciaries to Mr. Maybank and owed him a fiduciary duty. **(R. p.)** (Judy Schoemer, Tr. p.1156; Appellants' expert witness Robert Thorne, Tr. p. 1184-85; Anthony Mahfood, Tr. p.1363; Ross Walters, Tr. p.1417-18). Based on this and other evidence, as well as his own knowledge of industry standards, Professor Freeman opined that Appellants had not met the industry standard of care for fiduciaries. **(R. p.)** (Tr. p.681-97, 712). The evidence therefore fully establishes a basis to support a finding that

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issue rule does not appear to have been applied in the context of multiple appellants, one of whom fails to appeal liability on one of multiple issues. Appellants' failure to appeal the breach of fiduciary duty verdict against BB&T Asset Management potentially has far-reaching implications in this appeal (particularly where, as here, Appellants are all affiliated entities—represented by a single counsel and filing a joint brief—who owed similar duties to Mr. Maybank and all participated in the wrongful conduct giving rise to liability); however, the scope of its effect has not been fully explored by this Court. Because the jury returned a verdict against each of the Appellants on the causes of action of breach of fiduciary duty, breach of contract, constructive fraud, negligent misrepresentation, and a violation of the UTPA, Appellants' failure to appeal the fiduciary cause of action as to BB&T Asset Management could, on the one hand, sustain the entire Order of the trial court as to all Appellants, but *at a minimum*, requires this Court to sustain the entire judgment and all causes of action as to BB&T Asset Management, including the award of punitive damages, *see Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 287 S.C. 190, 193, 336 S.E.2d 472, 474 (1985). Given the fact that Appellants' role as a fiduciary served as the very core of Mr. Maybank's reliance upon Appellants to provide him with prudent advice as his trusted wealth advisor, this Court would be justified in finding that this fiduciary relationship and the un-appealed breach thereof sustains the entire jury verdict as to all Appellants. Regardless, at a minimum, the failure to appeal the breach of BB&T Asset Management's fiduciary duty to Mr. Maybank sustains the denial of JNOV on this ground.

Appellants breached their fiduciary duties to Mr. Maybank. Accordingly, the trial court's denial of Appellants' motion for JNOV on this point should be affirmed.[37]

d. Breach of Contract

By merely repeating their jury arguments (*cf. Janssen, supra*[38]), Appellants have not surmounted their heavy burden to overcome the denial of a motion for JNOV because the evidence supports that denial as to the WMA. Appellants concede that a contract with Mr. Maybank—the WMA—existed. At trial, and at his deposition, Appellants' employee Ross Walters admitted that the WMA contained errors, misstatements, and deliberate misrepresentations. **(R. p.)** (Video Deposition Testimony of Ross Walters). Mr. Walters testified that Appellants did not fulfill the express terms of the contract and were, in fact, restricted by Bank policy from doing so. *Id.*; *see also* (Tr. p.1417). In breach of the WMA, Mr. Walters testified that BB&T Bank assigned certain of its express duties and responsibilities under the WMA to BB&T Asset Management,[39] without Mr. Maybank's knowledge or permission, and in further violation of the WMA's provision against assignment. **(R. p.)** (Agreed Ex. 14, WMA at 5). Thus, Appellants admitted breaching the

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[37] Appellants contend that the determination of whether a fiduciary duty existed was an issue for the court alone. App. Br. at 47 n.34. However, this ground was not made in Appellants' directed verdict or JNOV motions and therefore cannot now be raised in this Court. *Wilder, supra.* Furthermore, Appellants requested a charge that instructed the law regarding the nature of a fiduciary and the circumstances under which a fiduciary relationship may arise between a bank and its customer. (Def. Req. to Charge No. 22, Tr. p.2007:4–2008:17). Accordingly, this argument is also not preserved for review. *See Creech, Solley, supra.*

[38] "Many assignments of error are an attempt to relitigate factual disputes, which we are not permitted to do." *Janssen*, 2015 WL 4112411 at *8.

[39] Although Appellants' contend that all duties and obligations delegated by BB&T Bank were actually performed, the fact that this issue was hotly contested required its submission to the jury. Appellants further ignore their status as a fiduciary to Mr. Maybank, and Mr. Walters's testimony that BB&T Bank did not perform any of the three categories of services outlined in the WMA demonstrates the bank's failure to discharge its fiduciary obligations of supervision and oversight of the investment strategy implemented for Mr. Maybank—not to mention Appellants' duty of disclosure. **(R. p.)** (Tr. p.664-66, 677-83).

WMA contract, which constituted evidence from which the jury could (and did) reach the conclusion that Appellants breached the contract.[40] For these reasons, as well as the fact that Appellants' repetition of their jury arguments does not meet their burden on appeal, the trial court should be affirmed on this issue.

e. Negligent Misrepresentation and Constructive Fraud[41]

The trial court's denial of JNOV as to both negligent misrepresentation and constructive fraud should be affirmed because it is fully supported by the evidence in the record. Appellants' challenges to these two causes of action are merely an attempt to recast the evidence and testimony presented at trial, restating the same arguments made to and rejected by the jury. But in making these arguments, Appellants cite directly to evidence that supports the jury's imposition of liability for Appellants' negligent misrepresentations and constructive fraud. Moreover, with respect to these causes of action, the evidence fully demonstrates the following: 1) Appellants made multiple representations to Mr. Maybank regarding prudency of the VPFC investment strategy that turned out to be false, including that it was a way to avoid risk, protect the receipt of dividends from his BB&T Corporation stock, address outstanding debt issues, and avoid taxable events;[42] 2) Appellants and their employees were induced with a bonus payment

[40] The fact that Appellants counterclaimed for reformation of their own form WMA in order to attempt to cure their breaches of the contract further supports the denial of JNOV.

[41] Appellants address these separate causes of action in a single section and Mr. Maybank will do likewise.

[42] **(R. p.)** (Tr. p.305-06, 313-24, 329, 356). Appellants also represented to Mr. Maybank that their employees had special expertise in alternative investment strategies, but testimony revealed those employees had not received any training and did not consider themselves experts. **(R. p.)** (Tr. p.711, 1051, 1075, 1163, 1534).

structure to sell alternative investments, including VPFCs;[43] 3) Appellants were Mr. Maybank's fiduciaries, which required complete and truthful disclosure; 4) Appellants and their employees did not meet their fiduciary duty of disclosure; 5) but because Appellants served as his fiduciaries, Mr. Maybank had an absolute right to rely upon their representations about their fiduciary duties;[44] and 6) Mr. Maybank was damaged as a result.[45] Thus, there is not only evidence,[46] but an abundance of evidence, supporting the denial of the JNOV motion and this assignation of error should be rejected.

f. Evidence of the Nature of Mr. Maybank's Damages[47]

Appellants' argument as to the sufficiency of the expert testimony admitted in support of Mr. Maybank's damages misapprehends this Court's standard of review in evaluating an appeal from the denial of a motion for JNOV. Rather than argue that no evidence supports the award of actual damages, Appellants instead argue that the evidence presented by Mr. Maybank as to his damages was "speculative" and "hypothetical." In addition to being wrong, this is insufficient to meet their burden.

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[43] **(R. p.)** (Agreed Ex. 52, 2006 Mahfood Incentive Report; Agreed Ex. 53, 2009 Mahfood Incentive Report; Agreed Ex. 55, 2006 Mahfood Year-End Review; Agreed Ex. 56, 2009 Mahfood Year-End Review; Review; Pl.'s Ex. 89, 2006 Walters Mid-Year Review; Pl.'s Ex. 92, Revenue Opportunity Power Point; Pl.'s Ex. 100, Version No.2 of Revenue Opportunity Power Point; Pl.'s Ex. 103, Sales Credit for Incentive Bonus; Pl.'s Ex. 104, 2007 Incentive Data for Mahfood; Pl.'s Ex. 106, 2006 Walters Year-End Review; Pl.'s Ex. 107, Gibson Marketing E-mail).

[44] *See Regions Bank v. Schmauch*, 354 S.C. 648, 672-74, 582 S.E.2d 432, 444-46 (Ct. App. 2003) (holding that fiduciaries have an absolute obligation of disclosure of material facts to their clients and that clients have a right to rely upon those representations).

[45] **(R. p.)** (Agreed Ex. 72, Dr. McCann Damages Analysis and Summary; Pl.'s Ex. 98, Dr. McCann Summ. Ex.; Tr. p.908-14).

[46] Appellants concede that the elements of negligent misrepresentation and constructive fraud are "virtually the same." App. Br. at 50. Even so, the evidence demonstrates each element of constructive fraud, including that Appellants ought to have known of the falsity of their representations, and they very much intended for Mr. Maybank to rely upon their representations and hire them to manage his financial life.

[47] Responding to Appellants' argument No. V, Issue on Appeal No. 6. App. Br. at 36.

Curcio, 355 S.C. at 320, 585 S.E.2d at 274 ("In considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight."); *RTF Management Co.*, 399 S.C. at 332, 732 S.E.2d at 171 ("In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence."). Although insufficient to establish reversible error (*Janssen, supra*), Appellants' argument interestingly provides this Court with a condensed version of their arguments to the jury.

Despite the fact that Appellants' imprudent mismanagement resulted in nearly a complete loss in the value of the $10,000,000 in investable assets that Mr. Maybank submitted to Appellants' fiduciary control, they audaciously argue now, as they did to the jury, that their strategy "saved" Mr. Maybank. **(R. p.)** (Tr. p.236). However, Mr. Maybank's expert witnesses, Dr. McCann, Professor Freeman, and Dr. Wood, all provided testimony explaining his damages **(R. p.)** (Tr. p.647-782, 876-941, 1003-13). Dr. McCann, a noted expert in VPFCs, particularly testified as to the lack of suitability of the VPFC investment strategy devised and recommended to Mr. Maybank.[48] **(R. p.)** (Tr. p.888-890). In fact, the Court need look no further than Dr. McCann's damage analysis[49] for the evidentiary support of the jury's award of actual damages because the award of $3,100,000 fell precisely at the midpoint of the two damage scenarios presented by Dr.

[48] Dr. McCann's manner of calculating damages on VPFCs, which has been evaluated and admitted in other courts, was employed in this case to calculate Mr. Maybank's damages, which were admitted into evidence without objection, (Tr. p.884:11-13), and about which Dr. McCann provided expert testimony. (Tr. p.909-14; Pltf's Ex. 98, Dr. McCann Summ. Ex.).

[49] Professor Freeman also calculated the cost and lost value attributable solely to VPFCs No.1 and No.2 as $3,500,000. **(R p.)** (Tr. p.702).

McCann. *Id.* This evidence supports the jury's assessment of the damages suffered by Mr. Maybank[50] and the denial of JNOV on this point should be affirmed.

g. Statute of Limitations

The trial court's submission of the statute of limitations issue to the jury is fully supported by the evidence, and no evidence exists from which this Court could determine that Mr. Maybank knew or should have known about the injuries that would justify the application of the statute of limitations. Although Appellants do not dispute that the discovery rule applies, they failed to meet their burden to prove that Mr. Maybank knew or should have known of their bad conduct at a time that would justify the application of the statute of limitations. *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) ("The burden of establishing the bar of the statute of limitations rests upon the one interposing it."). Appellants did not meet their burden and fail to cite to any evidence suggesting otherwise. However, Mr. Maybank testified that he had no knowledge of the costs and risks of the VPFC strategy when it was implemented in 2006, **(R. p.)** (Tr. p.337). Instead, he was shocked to learn from Appellants *after* the first roll-over was executed in January 2009 of the additional $1,300,000 cost of the roll-over and that it had triggered unexpected income tax liability. **(R. p.)** (Tr. p.362-69). However, most of the specific details of Appellants' wrongful conduct were discovered only after this litigation was filed. Through depositions of Mr. Walters and others, the misrepresentations and

[50] Appellants ironically accuse Dr. McCann of relying on speculation and hypotheticals in his analysis while pointing to an Excel spreadsheet produced by a current BB&T employee tasked with creating a hypothetical situation in which Mr. Maybank did not hire Appellants and instead sat idly while incurring repeated margin calls until his $10,000,000 concentrated position in BB&T Corporation Stock was exhausted. **(R. p.)** (Tr. p.1529-35) ("Q: Do you [Bryan Teachey] have any idea why you were asked to prepare this hypothetical that did not occur, that Mr. Maybank did not request, and that the bank advisors did not recommend that he do with his BB&T stock? A: No, sir. [Counsel for the defendants] asked me to provide this...").

deceit in the WMA and the Refund Letter were revealed. But the full scope of the deceit and misrepresentations in the Approval Letter were not uncovered or disclosed until late on the Friday evening before the start of the trial on the following Monday. Implicitly acknowledging that no evidence supports their position, Appellants' arguments[51] consist of generalities and repetition of arguments made to the jury about portions of evidence.[52] This does not meet their burden because, at a minimum, the statute of limitations evidence conflicted in light of Mr. Maybank's testimony, which required submitting the issue to the jury. *See Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 338–39, 534 S.E.2d 672, 681–82 (2000) ("If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury."). This issue should be affirmed.

h. Punitive Damages[53]

Mr. Maybank submitted clear and convincing evidence from which the jury justifiably found that Appellants' actions were reckless, willful, or wanton, warranting

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[51] Appellants' brief purports to argue three bases for the application of the statute of limitations, but they did not argue in their motion for JNOV that the statute of limitations should apply based on either the language of the WMA (or Mr. Maybank's purported knowledge of Appellants' false and misleading contract), or his knowledge of the costs of the VPFCs and conflicts of interest related to the use of BB&T Corporation stock. *See* Appellants' Motion for JNOV at 13-14 ¶6; accordingly, this argument may not be considered. *Wilder Corp.*, *supra.*

[52] The jury was charged on the application of the statute of limitations, as requested by Appellants. **(R. p.)** (Jury Charges).

[53] In their post-trial motions, Appellants challenged the jury's award of punitive damages through motions for 1) JNOV, 2) new trial absolute, 3) new trial *nisi remittitur*, and 4) for review of the Constitutionality of the award under the Court's guideposts set forth in *Mitchell v. Fortis Insurance Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009). All that remains on appeal is Appellants' challenge to the punitive damages under its JNOV motion and the Constitutionality challenge under *Mitchell*. Appellants do not challenge the punitive damages award under the new trial absolute standard, or request that the award of actual or punitive damages be remitted under the new trial *nisi remittitur* standard. Thus, each of those arguments has been abandoned on appeal. *First Savings Bank v. McLean,* 314 S.C. 361, 444 S.E.2d 513 (1994).

the imposition of $5,000,000 in punitive damages. On appeal from the denial of a motion for JNOV as to punitive damages, this Court's review is limited to a determination of whether any evidence supports the trial court's submission of the issue to the jury. *See, e.g., Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000) ("The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton.").[54] Here, Appellants present no reason to look behind the jury's verdict and reverse the trial court's denial of JNOV. Instead, as in many other sections of their brief, Appellants merely repeat arguments they made to the jury about interpretations of the evidence. *See, e.g.*, App. Br. at 62 ("Here, the testimony of current and former employees of BB&T Bank and BB&T AM demonstrate that they believed that entering into a PVFC was a reasonable option for Mr. Maybank and that PVFCs squarely fit his needs."). The trial court fully and exhaustively evaluated the award of punitive damages, specifically citing evidence on 12 specific points which demonstrated Appellants' wrongful conduct. *See* Order at 9.[55] Because the jury—as well as the trial

[54] Because there is no appeal from the breach of fiduciary duties verdict against BB&T Asset Management, the jury's actual and punitive damages award is fully sustained by the two-issue rule. *See* discussion *supra* at 25-27.

[55] Each of these findings is supported by specific evidence in the record: **i.** (Tr. p.328-33, 340; Agreed Ex. 7, Approval Letter; Pl.'s Ex. 91, Form Approval Letter); **ii.** *Id.*; **iii.** (Tr. p.683-88; Pl.'s Ex. 114, BB&T Asset Mgmt Compliance Manual); **iv.** (Tr. p.351-52); **v.** (Tr. p.356, 1051, 1075, 1163-64, 1294, 1617); **vi.** *Id.*; **vii.** (Tr. p.897-98); **viii.** (Tr. p.330); **ix.** (Tr. p.179, 308, 1051-52, 1075, 1163-64, 1534-35, 1591-93, 1617); **x.** (Agreed Ex. 55, 2006 Mahfood Year-End Review; Agreed Ex. 56, 2009 Mahfood Year-End Review; Review; Pl.'s Ex. 89, 2006 Walters Mid-Year Review; Pl.'s Ex. 92, Revenue Opportunity Power Point; Pl.'s Ex. 100, Version No.2 of Revenue Opportunity Power Point; Pl.'s Ex. 103, Sales Credit for Incentive Bonus; Pl.'s Ex. 104, 2007 Incentive Data for Mahfood; Pl.'s Ex. 106, 2006 Walters Year-End Review; Pl.'s Ex. 107, Gibson Marketing E-mail); **xi.** *Id.*; and **xii.** (Tr. p.305-06, 313-24, 329, 356). Appellants do not appeal from these specific findings, any one of which supports the jury's verdict on the common law causes of action, as well as the basis for this Court's review of Appellants' conduct as a part of its Constitutionality review of the punitive damages award.

court at both the directed verdict and JNOV stages—rejected Appellants' employees' versions of the facts in favor of other documentary evidence and more credible testimony presented at trial, the denial of the motion for JNOV should be affirmed. *See Curcio*, 355 S.C. at 320, 585 S.E.2d at 274 (holding that an appellate court does not have the authority to decide credibility issues or to resolve conflicts in the testimony and evidence); *see also Janssen, supra* (recognizing that the Court may not permit an appellant to relitigate factual disputes in an appeal).

i. Wealth Management Agreement Exculpatory Clauses

The trial court properly submitted the terms of the WMA, including the exculpatory clauses and their enforceability regarding the conduct at issue, to the jury.[56] The determination that application of the clauses was a question for the jury is fully supported by the evidence. The evidence also fully supports the trial court's alternative findings that the exculpatory clauses violate public policy and that their enforcement in these circumstances would be unconscionable.[57]

Where the terms of a contract are subject to multiple interpretations, determining the intentions of the parties and application of contract to the parties' intent becomes a

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[56] Mr. Maybank was a party to two WMA's with Appellants, one signed in 2006, **(R. p.)** (Agreed Ex.14), and one signed in 2009, **(R. p.)** (Agreed Ex.42). The two exculpatory clauses are not identical and, in fact, the 2009 clause is even less restrictive, purporting to apply only to the "Account" of the client, not as to any other services or duties (*i.e.*, fiduciary) undertaken.

[57] Appellants now make a point of arguing that these provisions are not "exculpatory clauses," because exculpatory clauses are disfavored in South Carolina and narrowly construed against their drafter. *See Cooke v. Allstate Management Corp.*, 741 F. Supp. 1205, 1207 (D.S.C. 1990) ("South Carolina law on exculpatory clauses in contracts makes clear that such clauses are disfavored."); *South Carolina Elec. & Gas Co. v. Combustion Engineering, Inc.*, 283 S.C. 182, 322 S.E.2d 453 (Ct. App. 1984) (noting that exculpatory clauses are disfavored and are to be strictly construed). However, Appellants moved for summary judgment on the basis of the WMA provision, arguing "**[e]xculpatory contracts** similar to, and even more restrictive, than the one in the Wealth Management Agreement have been upheld by the courts of this state." **(R. p.).** (Appellants' 2nd Mot. for Summ. J.).

question of fact which should be submitted to the jury. *Hope Petty Motors of Columbia, Inc. v. Hyatt*, 310 S.C. 171, 175-76, 425 S.E.2d 786, 789 (Ct. App. 1992) (citing *Cafe Associates, Ltd. v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991)). The trial court submitted to the jury as a question of fact the issues of the parties' intent and the enforceability of the WMA's provisions because it found that the application and meaning of certain terms of the WMA were in doubt and subject to multiple interpretations. Order at 12-14; *see South Carolina Dept. of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) (holding that "[o]nce the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties" and the parties' intent is a question of fact for the jury); *see also Hann v. Carolina Cas. Inc. Co.*, 252 S.C. 518, 524, 167 S.E.2d 420, 422 (1969) (holding that the uncertainty in interpretation can arise from the words of the instrument, or in the application of the words to the object they describe). The jury specifically rejected Appellants' argument that the language of the WMA precluded Mr. Maybank's claims against them, a factual finding that is supported by the evidence and should be affirmed on appeal. *See Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).[58]

[58] Moreover, Appellants have waived any argument that the application of the exculpatory clause is one for the Court by acquiescing to the submission of the contract and its ambiguous terms to the jury for determination. In fact, Appellants requested a specific jury instruction as to the application of the exculpatory clauses with respect to consequential damages, *see* **(R. p.)** (Apps' Requested Jury Charges at 73-74), which begs the question of how the application of the clauses with respect to consequential damages is proper for the jury, but the application of those same clauses with respect to punitive damages is not. Having asserted that it was a jury issue as to consequential damages, the issue is waived as to punitive damages. *See Solley*; *Ex parte McMillan*; *supra.*

Even if applicable (which Mr. Maybank disputes), the exculpatory clauses do not shield Appellants from liability here. By their plain language, these clauses do not apply to Mr. Maybank's claims, which arose from conduct by Appellants outside the scope of services covered by the WMA. The exculpatory clause's limitation of liability applies only "with respect to [Bank and Investment Advisor's] **services** under this Agreement." **(R. p.)** (Agreed Ex. 14 at 5) (emphasis added). Thus, services not designated by the WMA are outside the scope of the exclusion.[59] Here, the "services" identified in Sections I, II, and III of the WMA do not include allowing fiduciary employees of BB&T to make misrepresentations or material omissions of relevant information to their clients. *See McPherson By & Through McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 319, 426 S.E.2d 770, 771 (1993) (requiring exclusionary clauses to be narrowly interpreted and against the Bank that drafted it). And Appellants have pointed to no authority for the proposition that they may be relieved from intentional, reckless, and fraudulent conduct as a fiduciary, particularly where the source of the supposed immunity is far from an arms-length transaction and is instead a form agreement presented by an employer (BB&T) to an employee (Mr. Maybank) who is not in an equal bargaining position.

Further, the exculpatory clauses are unenforceable because they are against public policy and unconscionable. Order at 13-14; *see also Anthony v. Atlantic Group, Inc.*, 909

[59] The fact that this issue was proper for submission to the jury is confirmed by reference to the fact that Appellants moved to reform their own form WMA by "mutual mistake," arguing that the "services" to be rendered by Appellants under the WMA were ambiguous and meant something other than the plain language appearing therein. Order at 11-12. Appellants are again duplicitous in their arguments, contending in one breath that meaning of the "services" is ambiguous for reformation purposes, and then in the next asking the Court to enforce the exculpatory clauses based on the "so-called" plain language application of those same services. Thus, convenient to Appellants, they argue the contract should be strictly and narrowly enforced with respect to the "services" to which the exculpatory clause applies, but should be disregarded and reformed with respect to their admitted breach of the contract's terms.

F. Supp. 2d 455 (D.S.C. 2009). The verdicts returned by the jury on Mr. Maybank's non-contractual, common law causes of action were based on breaches of fiduciary duty, negligent misrepresentations, and constructive fraud.[60] What makes Appellants' conduct and current position all the more unreasonable is the fact that they were serving as Mr. Maybank's fiduciary at the time the misconduct occurred and the contracts were executed. Courts in this state have held exculpatory clauses to be unenforceable on public policy grounds where the parties have substantially different bargaining power, including "attempts to exculpate 'for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or where public interest requires the performance of a private duty, or **when the parties are not on roughly equal bargaining terms**.'" *Cooke*, 741 F. Supp. at 1207 (quoting *Pride v. Southern Bell Telephone and Telegraph Co.*, 244 S.C. 615, 138 S.E.2d 155 (1964) (emphasis added)) (exculpatory clause at issue did not bar the plaintiff's claims because the clause was contained in a form contract and the plaintiff did not have equal bargaining power).[61]

In this case, Appellants presented the form WMA which they drafted to Mr. Maybank as a condition of the **expansion** of their role as fiduciary to him, a key distinction in this case, because Appellants were already serving as Mr. Maybank's

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[60] In support of their argument that the exculpatory clauses do not violate public policy, Appellants assert that this Court should consider the fact that the Securities Act does not provide for "punitive or multiplying damages." App. Br. at 30. Again, Mr. Maybank notes that the jury did not find a violation of the Securities Act and that Appellants' repeatedly asserted below that they did not participate in the sale of the VPFC. This is another example of the Appellants seeking the shelter of a harbor in which they have no right to anchor and should be rejected by this Court.

[61] Thus, in *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013), on which Appellants rely, this Court noted that buyers are protected in transactions with builders because they have inherently unequal bargaining power and that, through the Residential Property Condition Disclosure Act, the General Assembly imposed liability on "the party with the greatest access to information," which, in this case, is clearly Appellants. *Id.* at 144, 739 S.E.2d at 884.

fiduciary, dating back to 2001, as the fiduciary Trustee of the Insurance Trust. (Tr. p.713:17-714:20). Consequently, Appellants had an absolute duty of disclosure and obligation to ensure that Mr. Maybank understood the terms of the exculpatory clause, and Mr. Maybank had an absolute right to rely upon the representations Appellants made to him.[62] *See Regions Bank, supra.* No such explanation was provided. Based on the evidence surrounding the WMA, the trial court was entirely within its discretion to confirm the jury's rejection of the application of the exculpatory clauses to Mr. Maybank's claims. The Court should affirm this issue as well.

II. The trial court's denial of Appellants' Motion for New Trial Absolute is fully supported by the evidence adduced at trial.

The trial court properly denied Appellants' motion for a new trial because there is ample evidence supporting its decision. The grant or denial of new trial motions rests within the discretion of the trial court and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989).

[62] The evidence demonstrated that Mr. Maybank was not even provided a copy of the WMA (containing the exculpatory clause) until nearly two weeks after the implementation of the failed investment strategy, and far too late for Mr. Maybank to do anything other than sign the boilerplate language presented to him. Even when the WMA was provided, Appellants neither identified nor explained the exculpatory clause to Mr. Maybank. Order at 13-14.

a. Because Appellants did not object to Professor Freeman's qualifications to testify, because his testimony was within the scope of that expertise, and because the trial court conducted an extensive inquiry into Professor Freeman's qualifications and expected testimony regarding VPFCs, the trial court did not abuse its discretion in allowing Professor Freeman's testimony about VPFCs.[63]

Because Appellants consented to Professor Freeman's qualifications, and because the trial court properly exercised its discretion by fully considering all of the pertinent issues involving those qualifications, Professor Freeman's opinion testimony about the inappropriateness of VPFCs for Mr. Maybank does not entitle Appellants to a new trial. After *voir dire*, Professor Freeman was tendered "as an expert in the field of proper conduct and misconduct by ... financial advising and planning professionals and trustees, and factual settings involving the offer and sale of investments and insurance products and services." **(R. p.)** (Tr. p.660:20-25). Appellants did not object to Professor Freeman's expert qualifications. **(R. p.)** (Tr. p.661:3-5) ("[W]e would not have objection to his qualification in that field.").[64] Consequently, Appellants' later attempt to limit their assent to his qualifications, **(R. p.)** (Tr. p.661:7-12), was without effect and Professor Freeman's testimony with respect to VPFCs was within the scope of the topics on which he was qualified to testify.

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[63] Appellants did not appeal from the denial of their motion for a new trial absolute based on the excessiveness of the jury's award of actual or punitive damages and that issue has been abandoned. Appellants are therefore bound by the finding that "the evidence presented at trial fully supports the jury's verdict and further find that the verdict is neither grossly excessive nor the result of passion, caprice, prejudice, partiality, corruption, or some other improper motive." Order at 17; *See Atl. Coast Builders, supra*; *see also Lister v. NationsBank,* 329 S.C. 133, 153, 494 S.E.2d 449, 460 (Ct. App. 1997) (stating that a point raised for the first time in a reply brief will not be considered).

[64] To this extent, Appellants have waived any argument on appeal that Professor Freeman was not qualified to opine about their conduct. *See, e.g., Bodiford v. Spanish Oak Farms, Inc.*, 317 S.C. 539, 542, 455 S.E.2d 194, 196 (Ct. App. 1995).

A "witness qualified as an expert by knowledge, skill, experience, training, or education" may provide expert testimony if the court finds that "scientific, technical, or other specialized knowledge will assist the trier of fact." Rule 702, South Carolina Rules of Evidence ("SCRE"). The decision to qualify a witness as an expert is committed to the trial court's discretion and "will not be reversed absent an abuse of that discretion." *State v. Morris*, 376 S.C. 189, 203-04, 656 S.E.2d 359, 366-67 (2008). After a witness is qualified as an expert, challenges to the extent of the witness's knowledge go to the weight and not admissibility of the testimony. *Id.*

Appellants' assertions about Professor Freeman's qualifications involve putative challenges to his education and experience after he was qualified without objection[65] and, thus, were questions for the jury and not questions of law. App. Br. at 56 (characterizing challenges to Professor Freeman's education and experience in the context of VPFCs as a lack of qualifications); *see, e.g.*, *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 253, 487 S.E.2d 596, 598 (1997); *see also* **(R. p.)** (Tr. p.675:4-15) (finding that Appellants' arguments in this regard are "a jury argument"). By not objecting to his qualifications, Appellants' relief was limited to the thorough *voir dire* and cross-examination they conducted before the jury.[66]

But even if Appellants legitimately challenged Professor Freeman's qualifications to discuss VPFCs in rendering an opinion about Appellants' conduct, the trial court

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[65] Thus, this case is different than *SEC v. Tourre*, 950 F. Supp. 2d 666 (S.D.N.Y. 2013), *see* App. Br. at 56, because Professor Freeman was in fact qualified—without objection—and rendered testimony about the costs of the VPFCs and the lack of disclosure of those costs to Mr. Maybank, all of which was wholly consistent with his stipulated expertise.

[66] **(R. p.)** (Tr. p.773:24-25) (opening cross examination with statement that "I first want to start with a few questions about your work history"); (Tr. p.774:2-776:14) (questioning witness about work and employment history, experience, and professional designations and licenses).

specifically qualified Professor Freeman to give that testimony after carefully considering his knowledge and experience and the nature of the testimony that he would give with respect to VPFCs. Although it was not required to do so after their consent,[67] the court nevertheless allowed Appellants to *voir dire* Professor Freeman regarding his knowledge and experience in the specific context of VPFCs. **(R. p.)** (Tr. p.667:18-670:3). In response to the trial court's inquiries, Professor Freeman explained that he might "have some opinions that are based upon the facts that are in the record about the ... Pre-Paid Forward Contract," **(R. p.)** (Tr. p.674:1-3), and then went on to say that he would opine as to the costs of the VPFCs and that the "jury can draw its own conclusion as to whether that's a good thing or a bad thing," **(R. p.)** (Tr. p.674:4-17). Appellants' only response was that Professor Freeman "was very critical of a pre-paid transaction" in his deposition, calling it a "roach motel." **(R. p.)** (Tr. p.674:24-675:1). The trial court correctly recognized this jury argument for what it is and stated that "I'm going to qualify him. I'm going to let him testify." **(R. p.)** (Tr. p.675:13-15). The trial court then expressly found as follows: "I'm going to find that he is qualified as an expert. He's got the requisite

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[67] It appears that the trial court allowed this subsequent *voir dire* based on an initial misunderstanding that Professor Freeman would testify about the technical details of a VPFC. *Compare* **(R. p.)** (Tr. p.667:5-6) ("Well, are you tendering him as an expert for Variable Pre-Paid Forward Contracts?") *with* (Tr. p.672:4-6) ("Well, wait, let me get clear. What is it that—what opinions are you looking for him to state with respect to this transaction?") *and* (Tr. p.673:9-11) ("I don't suspect that Mr. Willoughby is going to get into asking him to analyze Pre-paid Variable, whatever they are."). Once the trial court understood that Professor Freeman's testimony regarding VPFCs would be rendered in the context of the Appellants' conduct toward Mr. Maybank, it qualified him to render testimony involving VPFCs. **(R. p.)** (Tr. p.673:20-22) ("My impression is that Mr. Willoughby is going after the underlying conduct of your client in forming the basis for recommending this ...."); (Tr. p.675:20-21) ("[H]e's just going to tell the jury that that's what it cost."). Thus, the trial court's decision to allow further *voir dire* after Professor Freeman was qualified without objection is best understood as an inquiry into whether he would be testifying about matters outside the scope of his stated expertise. **(R. p.)** (Tr. p.645:22-23) ("Well, if he gets outside the area of expertise, you can stand up and object.").

education, skill, training with respect to – and he's developed the knowledge to allow him to testify as an expert. We are splitting hairs here...." **(R. p.)** (Tr. p.676:4-8).[68]

This record more than adequately supports the trial court's exercise of its discretion. Even after Appellants' consent, the trial judge evaluated the nature and extent of Professor Freeman's challenged testimony regarding VPFCs. The court specifically qualified him to opine about the costs of these contracts for Mr. Maybank once it understood that Professor Freeman would be providing testimony about VPFCs consistent with his expertise in the "field of proper conduct and misconduct by ... financial advising and planning professionals and trustees, and factual settings involving the offer and sale of investments and insurance products and services." **(R. p.)** (Tr. p.660:20-25). Moreover, even assuming—without conceding—any error in the qualification of Professor Freeman, the error was harmless because Appellants did not suffer any prejudice from his testimony about VPFCs.[69] To the extent his testimony discussed VPFCs, Professor Freeman's testimony was largely cumulative to Dr. McCann's expert testimony regarding those items. **(R. p.)** (Tr. p.884:16-895:7). As noted

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[68] Then, further demonstrating the extensive and careful consideration underlying its decision, the trial court asked if there was "anything else" about which Professor Freeman was going to testify. **(R. p.)** (Tr. p.676:10-12). Professor Freeman reiterated that he was "going to talk about the costs that are involved, which I think are huge" and "where [Mr. Maybank] is at various ... time points vis-à-vis this product." **(R. p.)** (Tr. p.676:13-17.) He noted that his testimony would not involve "deep ... Ph.D. economics finance kind of stuff," but instead "this is what [Mr. Maybank] was sold and this is how it worked and ask yourself did he understand – did anybody bother to explain that" and "if they didn't explain that, is that good or bad?" **(R. p.)** (Tr. p.676:17-22) ("It's that common sense kind of stuff, judge."). Professor Freeman then testified without further objection by Appellants and consistent with the preview that he provided to the trial court. **(R. p.)** (Tr. p.700:12-21 ("Costs to me is the most dangerous worrisome thing about this product...."); (Tr. p.701:12-707:16 (opining as to cost issues and problems, and stating he had not seen "any evidence ... that the costs were appropriately disclosed").

[69] VPFCs were only a part of Professor Freeman's testimony regarding Appellants' improper conduct with respect to Mr. Maybank, and even then the testimony pertained not to the technical details of those contracts but to the costs and the lack of disclosure by Appellants.

above, the trial court extensively evaluated the nature and extent of Professor Freeman's testimony to ensure that it remained within the scope of his expertise. Based on this record as a whole, Appellants cannot establish prejudice from any alleged error. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 448-49, 699 S.E2d 169, 176 (2010).

III. The trial court's analysis of the constitutionality of the jury's award of punitive damages under this Court's decision in *Mitchell v. Fortis Insurance Co.* was thorough, supported by the evidence, and serves as an appropriate guide for the Court's *de novo* review of the punitive damage award.

The trial court properly conducted a post-judgment review of the jury's award of punitive damages under the rubric set forth by this Court in *Mitchell*. 385 S.C. at 587-89, 686 S.E.2d at 185-86 (simplifying analysis of factors from *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991) and *BMW of North America v. Gore*, 517 U.S. 559 (1996)). In reviewing a punitive damages award, this Court considers: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between actual or potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and civil penalties authorized or imposed in comparable cases. *Mitchell*. 385 S.C. at 587-89, 686 S.E.2d at 185-86. Although this Court's review of a punitive damages award on appeal is *de novo*, *see Mitchell*, 385 S.C. at 582-83, 686 S.E.2d at 182-83, the evidence cited by the trial court in its very thorough review of the punitive damages award under the test outlined in *Mitchell* demonstrates that the award was supported by the evidence, satisfies due process, and comports with South Carolina law. Order at 7-11.

a. Degree of Reprehensibility

In evaluating reprehensibility, courts must consider whether (1) the harm was physical or economic; (2) the tortious conduct evinced an indifference to or a reckless

disregard for the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit rather than mere accident. *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185. With respect to the first two prongs, the evidence adduced at trial supports a finding that Appellants demonstrated indifference and a reckless disregard for Mr. Maybank's financial well-being, inflicting substantial economic harm on Mr. Maybank through their self-serving, conflict-ridden, and imprudent investment strategy. Although physical harm was not present in this case, Appellants' conduct negatively impacted the financial well-being of Mr. Maybank and others. Similar to *Mitchell*,[70] the economic harm was particularly reprehensible due to Mr. Maybank's age and the fact that the corpus of the investment strategy involved stock in BB&T Corporation that constituted substantially all of his financial retirement assets. **(R. p.)** (Tr. p.677-88). These factors weigh in favor of finding that Appellants' conduct was reprehensible.

The final three factors articulated in *Mitchell* more strongly show that Appellants' actions were reprehensible. In particular, Mr. Maybank was financially vulnerable due to his age and the concentrated position in BB&T Corporation stock that he entrusted to Appellants, as well as the fact that the assets he turned over to Appellants for fiduciary management represented his irreplaceable retirement assets.[71] **(R. p.)** (Tr. p.199, 298). As Mr. Maybank's fiduciary and trustee, Appellants were aware of this financial

[70] In *Mitchell*, although the harm caused was economic, Fortis's conduct exposed Mitchell to further harm and physical danger. 385 S.C. at 589, 686 S.E.2d at 186.

[71] Appellants efforts to characterize their investment advice as a mere "exercise in professional judgment," App. Br. at 62 & 64, in the face of their status and express obligations undertaken as fiduciaries and trusted advisors to Mr. Maybank is reprehensible in and of itself.

vulnerability but they nevertheless recommended a risky and imprudent investment strategy centered on complex derivative option products that were unsafe and speculative. **(R. p.)** (Agreed Ex. 7, Approval Letter).[72] As a result of the evidence presented of Appellants' self-serving and imprudent advice, which was wrought with conflicts of interest, **(R. p.)** (Tr. p.677-88), the jury found Appellants' conduct constituted a breach of fiduciary duty, constructive fraud, and negligent misrepresentation. **(R. p.)** (Jury Verdict). The failed investment strategy devised and recommended to Mr. Maybank—who was 79 years old when he filed the original complaint in December 2011—caused the loss of millions of dollars of his irreplaceable assets. **(R. p.)** (Tr. p.367). These facts support a finding that Mr. Maybank was financially vulnerable and that Appellants recklessly disregarded his financial security.

Moreover, Appellants' conduct was not an isolated incident but involved repeated and compounding acts of indifference to Mr. Maybank. Following the ill-advised recommendation to enter into VPFC No.1, for which Appellants charged Mr. Maybank $32,614,[73] Appellants compounded their unsuitable advice by recommending and implementing an overly risky investment strategy for the managed account funded by the upfront loan proceeds from VPFC No.1, over which Appellants served as portfolio manager with sole investment discretion.[74] Appellants recommended an investment

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[72] Specifically, Mr. Maybank entrusted Appellants first with his business, Southeastern, and then later his retirement savings, the vast majority of which derived from the sale of Southeastern to Appellants. Appellants benefited from their acquisition of Southeastern, while Mr. Maybank was left with virtually nothing as a result of Appellants' grossly incompetent, conflicted, and imprudent advice. **(R. p.)** (Tr. p.677-88).

[73] **(R. p.)** (Agreed Ex. 11, Wiring Instructions for Fee; Agreed Ex. 12, Bear Stearns Statement showing fee).

[74] **(R. p.)** (Agreed Ex. 15, Investment Objectives, signed but undated; Agreed Ex. 16, Investment Objectives, signed and dated; Tr. p.341-42).

portfolio of 100% equities, with an investment guideline of "aggressive growth," misrepresenting to Mr. Maybank that this was the proper way to invest loan from a VPFC.[75] Thereafter, Appellants further compounded their initial flawed and self-serving advice by recommending Appellants' "ideal choice," *see* **(R. p.)** (Pl.'s Ex. 92, Revenue Opportunity Power Point at 13), that Mr. Maybank roll over VPFC No.1 into a second VPFC in 2009.[76] Appellants failed to disclose to Mr. Maybank that he would incur costs and fees of almost $1.3 million from the roll-over, *see* **(R. p.)** (Tr. p.362-63), but charged Mr. Maybank an additional $43,655 advisory fee for the imprudent advice and recommendation to enter VPFC No.2.[77]

Finally, the evidence also demonstrated that the harm was the result of intentional malice, trickery, or deceit rather than mere accident.[78] The VPFC investment strategy, including the charging of substantial upfront transaction fees for its implementation, was

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[75] Advice which Mr. Maybank testified that he relied upon. **(R. p.)** (Tr. p.341-42, 479).

[76] **(R. p.)** (Agreed Ex. 38, January 2009 WMA Statement at 11 (reflecting a $43,655 Advisory Fee for roll-over); Agreed Ex. 39, VPFC No.2).

[77] **(R. p.)** (Agreed Ex. 38, Wealth Management Account Statement Reflecting Fee; Agreed Ex. 40, VPFC No.2 Fee Documentation). Notwithstanding, in the testimony of the Corporate Representative and Senior Executive of the BB&T Wealth Division, Appellants expressly admitted that they were "out of bounds" when BB&T charged transaction based fees to Mr. Maybank and to more than 130 other customers. **(R. p.)** (Video Deposition Testimony of David Fisher). In fact, Appellants ultimately refunded over $1 million in such fees to its customers. *Id.*; (Video Deposition Testimony of Ralph Borrello). *See Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007) (holding that it is appropriate to consider harm to others in determining reprehensibility). But rather than fully explain the situation, or accept responsibility for charging improper fees, Appellants instead simply told customers that the refund was an implementation of their corporate values, **(R. p.)** (Agreed Ex. 50, Refund Letter), further reflecting the existence of intentional malice, trickery, or deceit.

[78] Further, the Senior Executive of the BB&T Wealth Division's comments to Mr. Maybank in 2010 constituted extreme indifference to Appellants' reprehensible conduct. The Senior Executive told Mr. Maybank that he was "disgracing himself," that any attempt by Mr. Maybank to pursue a claim for his losses against BB&T Bank "would cost [Mr. Maybank] a lot of money" and "would be useless," and that if Mr. Maybank ultimately pursued a claim against BB&T Bank it "would end badly" for Mr. Maybank. **(R. p.)** (Tr. p.372-75).

part of an alternative investment division initiative that showed Appellants inducing its employees to generate more revenue[79] (and thereby earn significant bonuses) for the introduction and sale of alternative investments, including VPFCs.[80] Although review of the punitive award is *de novo*, this Court may take particular note of the specific findings of intentional misconduct and breaches that the trial court found supported the jury's award and imposition of punitive damages. *See* Order at 9 (set forth herein and discussed *supra*, p.33 & n.55). In sum, the evidence adduced at trial more than supports a finding that Appellants' conduct was reprehensible under the factors set forth in *Mitchell*.

b. Ratio between actual and punitive damages

The amount of punitive damages awarded by the jury is also appropriate under *Mitchell*. The ratio between the award of $5 million in punitive damages and the award of $3.1 million in actual damages is 1.61 to 1. The ratio supports a finding that the award of punitive damages is reasonable in this case, as ratios which fall on the low end of the

[79] Although Appellants challenged the admission of Plaintiff's Ex. 92 in their motion for new trial absolute, and make passing reference to its use in the punitive damages section of their brief, they do not maintain a challenge to its admissibility in this appeal, App. Br. at 64, and any challenge to its admission has been abandoned. *First Savings Bank, supra* (issues not argued in the brief are deemed abandoned and will not be considered on appeal). Moreover, Appellants' argument as to Ex. 92 is irrelevant because they did not challenge Plaintiff's Ex. 100, which, as specifically noted by the trial court in its Order at 8 n.2, contains the verbatim reference by Appellants to VPFCs as "revenue opportunities." *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (holding that "whatever doesn't make any difference, doesn't matter").

[80] *See* **(R. p.)** (Agreed Ex. 52, 2006 Mahfood Incentive Report; Agreed Ex. 53, 2009 Mahfood Incentive Report; Agreed Ex. 55, 2006 Mahfood Year-End Review; Agreed Ex. 56, 2009 Mahfood Year-End Review; Review; Pl.'s Ex. 89, 2006 Walters Mid-Year Review; Pl.'s Ex. 92, Revenue Opportunity Power Point; Pl.'s Ex. 100, Version No.2 of Revenue Opportunity Power Point; Pl.'s Ex. 103, Sales Credit for Incentive Bonus; Pl.'s Ex. 104, 2007 Incentive Data for Mahfood; Pl.'s Ex. 106, 2006 Walters Year-End Review; Pl.'s Ex. 107, Gibson Marketing E-mail). Taken together, as recognized by the trial court, this evidence demonstrates that Appellants initiated a sales program to generate revenue through the introduction and sale of alternative investment products, including VPFCs, while the needs and best interests of Mr. Maybank were sacrificed by untrained, bonus-driven representatives incentivized to sell products, which they viewed as revenue opportunities. Order at 8 n.2; Pl.'s Ex. 92, Revenue Opportunity Power Point; Pl.'s Ex. 100, Version No.2 of Revenue Opportunity Power Point.

single digit spectrum have been most often upheld by South Carolina courts.[81] Dr. Wood's testimony that Appellants had net worth of over $21 billion shows that they have the ability to pay the award.[82] Where, as here, the ratio between the jury's award of actual and punitive damages is on the low end of the single-digit spectrum of ratios upheld by the Court,[83] there exists no basis for this Court to set aside the verdict and impose the 1:1 ratio sought by Appellants.

The award of punitive damages in this case also is both reasonable and proportionate to the level of harm to Mr. Maybank by caused Appellants' reprehensible actions as his trusted advisor and fiduciary. As seen in this case, breaches of fiduciary duty and misrepresentations can lead to significant and devastating client losses, particularly where the client's irreplaceable retirement assets are at issue. Moreover, as

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[81] *Mitchell*, 385 S.C. at 593, 686 S.E.2d at 188; *see also, e.g., Jenkins v. Few*, 391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2012) (affirming a 3.6 to 1 ratio pursuant to *Mitchell* analysis where jury found for plaintiff on conversion, trespass, and civil conspiracy); *Mackela v. Bentley*, 365 S.C. 44, 614 S.E.2d 648 (Ct. App. 2005) (affirming a 3.75 to 1 ratio in a conversion case). South Carolina courts also have upheld punitive damages awards in cases involving economic harm which fall on the high end of the single digit spectrum, as well as ratios exceeding single digits. *See, e.g., Mitchell*, 385 S.C. at 594, 686 S.E.2d at 188 (ratio of 9.2 to 1 satisfied due process where insurer rescinded health insurance policy even after learning that the basis for rescission was incorrect, exposing insured to a greater risk of physical danger); *Duncan v. Ford Motor Co.*, 385 S.C. 119, 682 S.E.2d 877 (Ct. App. 2009) (ratio of 5.087 to 1 upheld against vehicle manufacturer when defective switch destroyed owners' home and personal belongings); *Collins Entertainment Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003) (upholding a 9.9 to 1 ratio on an intentional interference with contract claim); *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996) (affirming a 28 to 1 ratio in a breach of contract and bad faith failure to pay insurance claim case).

[82] **(R. p.)** (Pl.'s Ex. 94, Assets, Liabilities & Equity of BB&T Corporation; Pl.'s Ex. 95, Balance Sheet of BB&T Corporation; Pl.'s Ex. 96, Assets, Liabilities & Equity of BB&T Bank; Pl.'s Ex. 97, Balance Sheet of BB&T Bank; Tr. p.1003-1012). In fact, Appellants have already paid the full award, less interest for the period between the date of the verdict and the trial court's order granting leave to deposit the judgment, into the clerk of Court for Greenville County, confirming their ability to pay. **(R. p.)**.

[83] *See, e.g., Mitchell*, 385 S.C. at 593, 686 S.E.2d at 188 ("South Carolina courts have most often upheld verdicts on the low end of the single-digit spectrum, but have frequently deviated from this norm in cases involving particularly egregious conduct.").

found by the trial court, the punitive damages award is likely to deter Appellants from similar conduct and will likely encourage better training of employees and improved suitability of investment advice, resulting in better protection of a client's irreplaceable assets. Order at 10.[84] The type of behavior proved in this case, including "[t]he potential harm to a senior citizen [by the] self-serving and deceitful investment advice [of trusted advisors,] can be catastrophic, leading to financial ruin and a life of dependency in a person's twilight years." Order at 10. The disclosure of these practices also has the potential to deter the conduct of other fiduciaries in a similar role, as "[c]orporations managing money for South Carolina's elderly citizens must know that their conduct and advice must be faithful, prudent, trustworthy, non-conflicted, and free from deceit, tricks and misrepresentations." *Id.* at 10.

c. The difference between punitive damages and civil penalties

Although nodding toward the requirement of a comparison "between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases," *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 186 (emphasis added), Appellants suggest that the Court look to the Securities Act as a reference even though the jury expressly found that they were not liable under that act.[85] However, as the trial court

[84] *See Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185 (requiring consideration of "the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay").

[85] Appellants' argument that all harm derives from securities transactions is simply wrong, misleading, and a continuation of their attempted recasting of this lawsuit to avoid UTPA liability. Moreover, Appellants know that punitive damages are not a remedy under the Securities Act, but deliberately ignore the fact that the jury returned a verdict on the three common law causes of action for breach of fiduciary duty, constructive fraud, and negligent misrepresentation, none of which are covered by the ambit of the Securities Act, but each of which supports the imposition of the punitive damages award imposed by the jury. Appellants' argument ignores the direction of this Court to look to "comparable cases" where punitive damages have been awarded,

correctly noted, no comparable civil penalties are applicable to Appellants' breaches of their fiduciary duties and their misrepresentations and fraudulent actions toward Mr. Maybank. Order at 11. The trial court faithfully followed this Court's directive, considering the comparable case of *Cody P. v. Bank of America, N.A.*, 395 S.C. at 632-33, 720 S.E.2d at 484-85 (Ct. App. 2011). In *Cody P.*, improper safeguards by Bank of America ("BOA") permitted a co-conservator for a minor child to withdraw the minor's funds and deposit them into her personal bank account. A jury found BOA negligent in, *inter alia*, "fail[ing] to set up Cody's accounts with the proper safeguards to protect his funds." *Id.* at 629, 720 S.E.2d at 629-30. The Court of Appeals upheld a jury verdict of $205,737.37 in actuals, and $1.583 million in punitives, a ratio of 7.69 to 1.

Thus, both *Cody P.* and this case involve significant economic harm caused by a bank's failure to safeguard a client's assets, over which they served as fiduciary. In fact, the reprehensibility of the conduct is greater in this case, as BOA merely failed to prevent the misconduct of a third party. Here, Appellants intentionally incentivized their employees to sell alternative investment strategies without providing those employees with the training necessary to ensure the investment strategies were in the best interests of their clients; in doing so, Appellants provided imprudent advice to Mr. Maybank, placing their own interests in generating fees for themselves above their fiduciary duty to him for safe management of his retirement assets. Based on a comparison of this case with *Cody*

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and that consideration of cases with comparable factors is most appropriate, including cases that involve: 1) the type of harm suffered by the plaintiff or plaintiffs; 2) the reprehensibility of the defendant's conduct; 2) the ratio of actual or potential harm to the punitive damages award; 3) the size of the award; and (4) any other factors the court may deem relevant. *Mitchell*, 385 S.C. at 588-89, 686 S.E.2d at 186.

P., which involved a much higher ratio of punitive to actual damages, the ratio upheld by the trial court in this case is entirely reasonable.

IV. The trial court's decision to treble the award of actual damages under the UTPA is supported by evidence in the record.

The trial court's decision to treble the jury's actual damages award was appropriate based on the evidence demonstrating that Appellants' conduct was both willful and knowing. Under S.C. Code Ann. § 39-5-140(a), the trial court was required to "award three times the actual damages sustained" if it determined that Appellants' unfair and deceptive conduct was "willful or knowing." Further, determination of whether the unfair or deceptive conduct is willful or knowing is left to the discretion of the trial court, the trial court's determination should be affirmed because there is more than ample evidence supporting its findings. *Townes Associates*, 266 S.C. at 86, 221 S.E.2d at 775; *Crary v. Djebelli*, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998). Before the trial court, Appellants erroneously argued that the requirement for imposing treble damages under the statute required a finding by the trial court of specific intent to violate the statute. However, the Court of Appeals has rejected this position with respect to the interpretation of § 39-5-140(a):

> We hold that this definition creates a statutory standard of willfulness different from the common law standard. For purposes of Section 39–5–110, conduct is "willful" if the defendant "should have known" it violates Section 39–5–20. The standard is not one of actual knowledge, but of constructive knowledge. If, in the exercise of due diligence, a person of ordinary prudence engaged in trade or commerce could have ascertained that his conduct violates the Act, then such conduct is "willful" within the meaning of the statute.

State ex rel. Medlock v. Nest Egg Soc. Today, Inc., 290 S.C. 124, 128, 348 S.E.2d 381, 384 (Ct. App. 1986);[86] *see also Haley Nursery Co., Inc. v. Forrest*, 298 S.C. 520, 525, 381 S.E.2d 906, 909 (1989) (agreeing that "the trial judge erred in applying the common law definition of willful in ruling there was no willful violation of the [UTPA]."). Thus, the correct standard for willfulness is whether Appellants could have with reasonable diligence ascertained that their conduct violated the UTPA.[87] *See also* S.C. Code Ann. § 39-5-140(d) (stating that "for the purposes of this section, a willful violation occurs when the party committing the violation knew or should have known that his conduct was in violation of Section 39-5-20").

Viewed under the standard set forth above, the trial court properly exercised its discretion in finding Appellants' conduct to be both willful and knowing. The trial court specifically found that each of the three separate unfair and deceptive business practices supporting the jury's verdict under the UTPA—the knowing presentation of a contract that BB&T Bank could not fulfill; the Refund Letter; and the Approval Letter—were employed through willful or knowing actions of Appellants. *See* discussion *supra* at 11-14.[88] In their brief, Appellants provide only a cursory and conclusory challenge[89] to the

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[86] The *Nest Egg* case involved the Attorney General's pursuit of civil penalties under the UTPA. Similar to § 39-5-140(a)'s reference to a finding of willful conduct, § 39-5-110(a) allows recovery of a civil penalty upon the finding of a "willful" violation of the UTPA. Additionally, like § 39-5-140(d), § 39-5-110(c) provides that "for the purposes of this section, a willful violation occurs when the party committing the violation knew or should have known that his conduct was in violation of Section 39-5-20."

[87] Consequently, the jury's determination that Mr. Maybank was entitled to punitive damages because Appellants acted willfully and recklessly in its conduct towards Mr. Maybank, **(R. p.)** (Jury Instructions), supports the trial court's finding of a willful and knowing violation of the UTPA based on *Nest Egg* and *Haley Nursery*.

[88] Appellants' citation to *Perry v. Green*, 313 S.C. 250, 437 S.E.2d 150 (Ct. App. 1993), misses the point. The trial court found *not* that Appellants' breach of the WMA was the unfair and deceptive act in commerce, but that their *presentation* of a knowingly and deliberately false

trial court's findings and imposition of treble damages. App. Br. at 57-58. However, the arguments made by Appellants demonstrate either a misapprehension or attempt to misconstrue the trial court's standard for evaluating a request to treble damages. Rather than attempt to argue against the trial court's finding of willful and knowing conduct, Appellants attempt to excuse their conduct by attributing knowledge of or reliance on their actions to Mr. Maybank. *Id.* Mr. Maybank's testimony directly disputes that he was aware of the falsity of and deceit in the WMA. Moreover, reliance on Appellants' unfair and deceptive actions is exactly what deceitful conduct is designed to accomplish. The important point is whether **Appellants** knew or should have known that their conduct would be in violation of the UTPA. Consequently, Appellants do not even meaningfully address the trial court's findings of willful and knowing conduct. Accordingly, the evidence presented at trial as well as the jury's determination of willfulness with respect to Appellants' conduct supports the trial court's decision to treble the jury's award of actual damages in this case and the imposition of treble damages should be affirmed.

WMA to Mr. Maybank was deceptive and supported the jury's UTPA verdict. Thus no "breach of contract" could have occurred at that stage. Appellants also assert that, because they were engaged in "securities-related transactions," the UTPA exemption that they contend applies in this case prevented them from having constructive knowledge that their acts were violative of the UTPA. App. Br. at 57 n. 40. In addition to relying upon an over-expansive reading of *Rhoades* and *Ward*, this assertion simply cannot be squared with Appellants' repeated assertions below that they did not participate in the sale of the VPFC.

[89] Courts have repeatedly rejected such conclusory arguments as insufficient and treated them as abandoned. *See, e.g., Mulherin-Howell, supra*; *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 298, 519 S.E.2d 583, 600 (Ct. App. 1999).

V. The trial court did not abuse its discretion in denying Appellants' Motion for an Election of Remedies where the evidence supports the finding that Appellants' conduct and actions underpinning the jury's verdict of violations of the UTPA were different than the conduct and actions supporting the common law causes of action giving rise to the jury's award of punitive damages.

The trial court's review and determination of the evidence before it, and its consideration of a motion for election of remedies, lies within its sound discretion. *See Franke Associates by Simmons v. Russell*, 295 S.C. 327, 331, 368 S.E.2d 462, 464 (1988) (holding that the issues raised by a motion for an election of remedies are within a trial judge's discretion). This Court has held that, when its standard of review is limited to an examination of the discretion of the trial judge, "[a]n abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502-03 (2006) (citing *Tri–County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990)).

This Court held in *Taylor*, 324 S.C. 200, 479 S.E.2d 35, discussed in-depth below, that a party is capable of recovering both punitive and treble damages where, as is the case here based on the jury's verdict, the UTPA and common law causes of action are supported by different conduct and facts supporting the allegations of wrongdoing.[90] Because this Court has held that recovering both punitive and treble damages is allowed based on the trial court's review and application of the facts and evidence before it to the party's conduct, the trial judge's decision in this case to permit the recovery of punitive and treble damages is not affected by an error of law. *See, generally, Wright v. Craft*, 372

[90] *See also Jones v. Winn–Dixie Greenville*, 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995).

S.C. 1, 26-29, 640 S.E.2d 486, 500-01 (Ct. App. 2006) (holding in a UTPA case that where prior precedent establishes the use of a legal concept, no error of law exists, and the inquiry is instead whether evidence exists to support the application of the legal concept in the case at hand). Under the applicable standard of review set forth above, this Court is thus limited to a determination of whether any evidence supports the trial court's finding that the conduct and allegations of wrongdoing supporting the jury's verdict under the UTPA were separate and distinct from Appellants' conduct supporting the common law causes of action on which the jury imposed an award of punitive damages.[91]

a. The trial court's finding that the conduct supporting the separate causes of action was separate and distinct is supported by the evidence.

The trial court's conclusion that this case does not require an election among punitive and treble damages is supported by evidence that demonstrates that each of those remedies is supported by independent facts and conduct of Appellants. The punitive damages award is based upon the common law causes of action of breach of fiduciary duty, constructive fraud, and negligent misrepresentation. The jury found for Mr. Maybank and also awarded punitive damages pertaining to those claims in the amount of $5,000,000.[92] Importantly, the Jury Verdict form **(R. p.)** (Jury Verdict), drafted by

[91] *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502-03 (2006) (holding that "[a]n abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support").

[92] Each of these common law causes of action was based on a breach of the professional duties and trusted advisor status undertaken by Appellants, not the unfair and deceptive conduct found by the trial court to support the UTPA verdict also returned by the jury. In imposing an award of punitive damages, the jury necessarily found Appellants' conduct in providing imprudent, unsuitable, uninformed, and reckless advice and negligent misrepresentations to Mr. Maybank to be reprehensible and warranting punishment. *See* discussion *supra* (relating to the evidence supporting the trial court's denial of Appellants' motion for JNOV as to the common law causes of action, as well as the discussion); and (regarding the evidence supporting the jury's imposition of punitive damages).

Appellants and accepted by the trial court, explicitly segregated the claims for which punitive damages could be awarded, from those, including the UPTA claim, for which punitive damages were not an appropriate remedy.[93] In contrast to the conduct underlying the common law claims, the verdict returned by the jury for the UTPA violations involved at least three distinct instances of unfair and deceptive business practices toward Mr. Maybank and other customers. *See* discussion *supra* at 11-14.

In finding that separate and distinct conduct supported the jury's verdict, the trial court relied on *Taylor*, wherein a patient brought a medical malpractice action against her doctor and the doctor's medical laboratory alleging, *inter alia*, negligence and unfair and deceptive business practices in violation of the UTPA. 324 S.C. 200, 479 S.E.2d 35. The jury returned a verdict in favor of the patient under the common law negligence claim and awarded punitive damages. The jury also returned a verdict for the patient for a violation of the UTPA. The trial court awarded treble damages and attorneys' fees and costs under the UTPA, but required the patient to elect between recovery for common law negligence and the UPTA. This Court held that the trial court erred in requiring the patient to elect because independent facts and conduct supported the distinct causes of action alleged for negligence and unfair and deceptive business practices. *Taylor*, 324 S.C. at 218-20, 479 S.E.2d at 44-45. Similar to this case, the *Taylor* court held that double recovery was not at issue because a breach of professional standards of care

[93] Specifically, the Jury verdict form provided, in pertinent part: "12. If you answer Yes to Questions 2 [Breach of Fiduciary Duty], 3, 6, 7, 8 [Constructive Fraud], or 9 [Negligent Misrepresentation], do you find by clear and convincing evidence that the acts of the defendant(s) warrant payment of punitive damages ...." Additionally, the Jury was instructed as to the possibility of imposing punitive damages on those causes of action and the specific standard required to do so. Thus, while its findings on punitive damages are instructive, the jury was not asked to award and, thus, did not decide to award punitive damages for the UTPA claim.

supported the negligence verdict whereas the UTPA verdict was based on the Doctor's unfair and deceptive business practice of ordering and performing useless and unnecessary lab tests. *Id.* at 218, 479 S.E.2d at 44-45 ("Election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action. It is the act of choosing between inconsistent remedies allowed by law on the same set of facts. Its purpose is to prevent double recovery for a single wrong." (citing *Thompson v. Watts*, 281 S.C. 504, 316 S.E.2d 393 (1984)) (emphasis added).[94]

Mr. Maybank's allegations of wrongdoing mirror those in *Taylor*, and the trial court's finding in this regard is fully supported by the evidence. The common law causes of action for which punitive damages were awarded—breach of fiduciary duty, constructive fraud, and negligent misrepresentation—were based on Appellants' violation of their fiduciary duties in actually providing imprudent, unsuitable, and risky investment advice to Mr. Maybank. In contrast, Appellants' unfair and deceptive business practices involved actions and efforts to induce certain actions, or inaction, by Mr. Maybank and other customers, such as knowingly presenting false contracts to potential clients, and providing deceptive and misleading documents to clients as to the level of their analysis of complex alternative investment strategies and the impetus behind the refund of improperly charged fees. Thus, the UTPA cause of action is supported by evidence of

[94] *See also Freeman v. A. & M. Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532, 536 (Ct. App. 1987) (upholding an award of punitive damages based on common law fraud and of treble damages pursuant to the SCUTPA); *Toyota of Florence v. Lynch*, 314 S.C. 257, 442 S.E.2d 611, 616 (1994) (holding that plaintiff could recover both doubled damages under the state "Regulation of Manufacturers, Distributors and Dealers Act" and punitive damages in connection with the common law claim because the Act allows both types of damages); *Columbia Teachers Fed. Credit Union v. Newsome Chevrolet-Buick*, 303 S.C. 162, 399 S.E.2d 444 (Ct. App. 1990) (same).

conduct and facts independent of the breaches of Appellants' professional common law obligations and duties owed specifically to Mr. Maybank as his fiduciary (as the evidence demonstrates the claims are not mutually exclusive). *See Taylor*, 324 S.C. at 219, 479 S.E.2d at 45; *see also* S.C. Code Ann. § 39-5-160 (providing that the provisions of the UTPA are "cumulative and supplementary to all powers and remedies otherwise provided by law"). Because the awards of punitive and treble damages are based on separate conduct, the trial court properly refused to require Mr. Maybank to elect his remedy.

b. The arguments advanced by Appellants present no reason to set aside the trial court's denial of the motion for election of remedies and are either waived or unpreserved for this Court's review.

In challenging the denial of their motion for election of remedies, Appellants do not contend that no evidence supported the finding but, instead, present various arguments that are unpreserved or waived and that do not in any event support the issues raised. Appellants contend the trial court erred in "allocating" Appellants' conduct between the UTPA and common law claims, while ignoring the fact the jury returned a general verdict. However, the trial court necessarily is required to examine the jury's verdict in addressing a motion for JNOV to determine if the evidence supports the verdict actually rendered. In that capacity, the trial court is not only permitted, but is required to make a determination of whether the evidence sustains each cause of action.[95] Moreover,

[95] Appellants' citation to *Adamson v. Marianne Fabrics, Inc.* and *Smith v. Strickland* do not apply here. 301 S.C. 204, 391 S.E.2d 249 (1990); 314 S.C. 192, 442 S.E.2d 207 (1994). In both of those cases, this Court simply cited the general proposition that where the harm alleged concerns a single wrong, a party may not collect both punitive damages under common law causes of action and treble damages under the SCUTPA. *See, e.g., Smith*, 314 S.C. at 197-98, 442 S.E.2d at 210 (involving the single issue of a purchase/sale of a business franchise, the Court held that "[h]ere, the defendants committed but a single wrong.") (emphasis added). Appellants' citation to *Inman v. Imperial Chrysler-Plymouth*, 303 S.C. 10, 397 S.E.2d 774 (Ct. App. 1990), is similarly misplaced because the plaintiff alleged only a single wrong for which it had already

contrary to Appellants' curious assertion that Mr. Maybank has waived certain issues that are actually included in the Order as findings of the trial court, *see* App. Br. at n.27, preservation works against Appellants here, where they failed to preserve their argument that the trial court improperly allocated theories and made factual findings in support of its denial of the motion for election of remedies.[96]

There are other problems with Appellants' arguments. They persist in relying on and arguing the allegations and claims of damages advanced in the written pleadings before trial. *See* App. Br. at 34. However, as discussed above, Mr. Maybank moved at the close of the evidence to amend his pleadings to conform to the evidence presented at trial, under Rule 15, SCRCP, **(R. p.)** (Tr. p.1815-16), and Appellants did not appeal from this finding. In addition, although they contend that allowing separate recoveries was not allowed because the jury returned a general verdict, the verdict form ultimately presented to the jury was, with very minor modification, the version drafted and submitted **by Appellants**,[97] **(R. p.)** (Tr. p.1856-66), including the request for a single blank for the

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recovered a judgment under the UTPA. Following payment of that judgment, the plaintiff sought to re-file a dismissed cause of action based on the same facts and transaction because he did not think the defendants "had been adequately punished" by the payment of the UTPA judgment. In sum, all of those cases involved issues with single wrongs.

[96] Even if this Court were inclined to accept Appellants' assertions—which, as explained above, have no legal basis or support—the trial court's inclusion of these supposedly erroneous "allocations" and findings of fact for the first time in the Order would have required Appellants to move to alter or amend the Order on that ground. *See* Jean Hoefer Toal, et al., Appellate Practice in South Carolina 60 (2d ed. 2002) ("[A] post-trial motion must be made when the trial court grants relief not requested or rules on an issue that was never raised at trial."). These issues were not raised in the motion to alter or amend and are unpreserved for this Court's review. *Id.*

[97] Mr. Maybank actually proposed a simpler form, but the trial court adopted the version submitted by Appellants, **(R. p.)** (Tr. p.1856-66); **(R. p.)** (Post-Trial Hearing Tr. p.24-25, 100-02). Following the Court's minor modification to the form to account for the voluntary dismissal of two causes of action, Appellants agreed completely with the final verdict form. **(R. p.)** (Tr. p.1915-16) ("Your Honor, we are fine with the changes). They cannot now allege any error about the form. *Shearer v. DeShon*, 240 S.C. 472, 484, 126 S.E.2d 514, 520 (1962).

award of actual damages. *Id.* Where, as here, the jury's award of a single amount of actual damages is dictated by the verdict form, it is not indicative of a finding that no distinct damages flow from the jury's determination of a violation of the UTPA. To the contrary, a general verdict form indicates that **any one or all of the causes of action** returned by the jury sustain the full amount of the actual damages.[98]

If, as now asserted, Appellants believed that no damages flowed from the cause of action under the UTPA, they should have requested a special interrogatory of the jury to that effect, or polled the jury following the return of the verdict. Appellants did neither. **(R. p.)** (Tr. p.2090-92). The trial court specifically inquired whether the parties had any questions of the jury after the verdict, and Appellants failed to make any inquiry.[99] Their failure to do so constitutes a waiver of the issue on appeal. *See Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 191, 708 S.E.2d 787, 797 (Ct. App. 2011) (holding that an appellant waived appellate review of an issue relating to the jury verdict

[98] *Cf. Jones v. Lott*, 379 S.C. 285, 665 S.E.2d 642 (Ct. App. 2008) (discussing the application of the two-issue rule, which provides that when a general verdict is supported by more than one cause of action, an appeal will be affirmed under the two-issue rule unless the appellant appeals all of the causes of action supporting the verdict), *aff'd* 387 S.C. 339, 692 S.E.2d 900 (2010) (citing *Anderson, supra*). Which fact is further evidenced by the fact that any one of the causes of action returned by the jury, including, singularly, the UTPA violation, would sustain the full actual damage award of $3,100,000. A parallel could be drawn to the concept of joint and several liability; just as any one defendant is liable for any or all of a judgment under the theory of joint and several liability, so too can the award of actual damages be supported by any one or all of the causes of action returned by the jury in this case under the verdict form created by Appellants.

[99] As the prevailing party, Mr. Maybank was under no obligation (or risk, for that matter) to ask the trial court for further action for preservation or waiver purposes. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review."); *see also* Rule 220(c), SCACR.

by failing to request a special interrogatory).[100] For these reasons, the trial court's denial of Appellants' motion for election of remedies should be affirmed.

VI. The trial court did not abuse its discretion in awarding attorneys' fees and costs to Mr. Maybank under the UTPA because its analysis of the *Jackson v. Speed* factors is supported by sufficient evidence in the record.

The trial court's award of attorneys' fees and costs under the UTPA is fully supported by the record and should be affirmed. See S.C. Code Ann. § 39-5-140(a) ("Upon a finding [by the fact finder] of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs."). The specific amount of any award pursuant to the Act is left to the sound discretion of the trial court.[101] The trial court presided over a two-week trial, participated in multiple pre- and post-trial hearings, and reviewed substantial written submissions of the parties, during which it observed Mr. Maybank's counsel first-hand on many occasions and perceived the quality of the service rendered in this complex case. *See* Order at 22-31. Because the trial court's reasoned analysis is supported by the record, no abuse of discretion occurred and the award of attorneys' fees and costs should be affirmed.

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[100] Fundamentally, a party should not be permitted to propose a course of conduct which is ultimately adopted, sit idly by during the execution of the course of conduct, and thereafter claim an appealable error based on the course of conduct proposed and implemented. *See Limehouse v. Southern Ry.*, 216 S.C. 424, 58 S.E.2d 685 (1950) (holding that where the verdict is objectionable as to form, the party who desires to complain should call that fact to the court's attention when the verdict is published; otherwise, the right to do so is waived); *Ex parte McMillan*, 319 S.C. at 335, 461 S.E.2d at 45 (finding a party cannot acquiesce to an issue at trial and then complain on appeal); *Bensch v. Davidson*, 354 S.C. 173, 179-80, 580 S.E.2d 128, 131 (2003) (holding an issue unpreserved for appellate review when the appellant did not object to the verdict at the time it was rendered, failed to request that the verdict be resubmitted for clarification, and allowed the jury to be discharged).

[101] *See Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008) (citing *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1987)).

In arguing against the award, Appellants misconstrue the standard for this Court's review of the award of fees and costs under the UTPA, repeatedly characterizing Mr. Maybank's motion and supporting affidavits and documentation based on their subjective views of "adequacy." However, the submissions of Mr. Maybank's counsel and expert witness is only one part of the trial court's analysis under the factors set forth in *Jackson*.[102] While no single factor is required or determinative, *see, e.g.*, *Layman*, 376 S.C. at 458, 658 S.E.2d at 333 (highlighting three of the six factors for emphasis under the facts of that case), this Court's role is limited to reviewing the evidence supporting the trial court's findings of fact rather than conducting a *de novo* review of the adequacy of Mr. Maybank's submissions. Moreover, Mr. Maybank's motion and memorandum for attorneys' fees and costs under the UTPA is comprehensive and detailed and included two affidavits of counsel of Mitchell Willoughby, one in support of the request for attorneys' fees, and one in support of the request for costs.[103] **(R. p.)** (Mot. for Attorneys' Fees & Costs; Mem. in Supp. of Mot. for Attorneys' Fees & Costs).

In addition to these substantial submissions, which alone support an award of attorneys' fees and costs under the UTPA and *Jackson* factors, Mr. Maybank also designated an expert witness on the subject of attorneys' fees and costs. Professor

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[102] A trial court is required to consider and make findings under six factors when determining a reasonable attorney's fee: 1) the nature, extent, and difficulty of the case; 2) the time necessarily devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) beneficial results obtained; and 6) customary legal fees for similar services. *Jackson*, 326 S.C. at 308, 486 S.E.2d at 760.

[103] These affidavits are substantial and specific in their detail regarding work performed on behalf of Mr. Maybank in advancing this litigation against Appellants, including specific actions undertaken, the exact number of hours worked and current hourly rate of each of the attorneys involved in the litigation, and a recitation of the professional standing of the attorneys involved. **(R. p.)** (Attorneys' Fee Affidavit of Willoughby). The affidavit for costs is similarly detailed, providing an exact accounting of the costs and expenses incurred in the prosecution of Mr. Maybank's claims.[103] **(R. p.)** (Cost Affidavit of Willoughby).

Freeman submitted a 25-page affidavit analyzing Mr. Maybank's submissions and rendering an opinion based on his first-hand observations of the issues raised by the *Jackson* factors. Professor Freeman's analysis comprehensively considered, *inter alia*, the quality and professional standing of Mr. Maybank's counsel and reasonableness of their rates in comparison to those of the community, the amount of hours expended, and the nature and difficulty of the case. **(R. p.)** (Freeman Affidavit on Attorneys' Fees and Costs). Appellants' conclusory[104] arguments that the trial court erred in accepting Professor Freeman's affidavit are meritless, and originate from their efforts to delay[105] consideration of Mr. Maybank's motion based ostensibly on the "unavailability" of an expert witness to review and respond to Mr. Maybank's motion for fees and costs.[106] The record contained more than sufficient evidence for Appellants to review and identify alleged issues with Mr. Maybank's motion but, rather than provide the trial court with any such analysis, Appellants simply attempted to delay the proceedings and argue for, in effect, separate discovery and a mini-trial procedure on the submission.[107] *But see*

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[104] *See Mulherin-Howell, supra*; *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 304 n.2, 433 S.E.2d 871, 873 n.2 (Ct. App. 1993) (holding that a one sentence argument is too conclusory to present to the Court).

[105] Appellants filed three motions aimed at delaying and bifurcating the Court's consideration of post-trial motions, including a motion to compel the production of additional information in support of the Mr. Maybank's motion for an award of costs and attorney fees, **(R. p.)**, a motion to strike Professor Freeman's expert affidavit submitted in support of Mr. Maybank's motion, **(R. p.)**, and a motion to delay consideration of Mr. Maybank's request for both attorneys' fees and costs and treble damages under the UTPA. **(R. p.)**.

[106] Notwithstanding the fact that Mr. Maybank's motion was filed on July 10, 2014, **(R. p.)**, Appellants waited until August 5 to seek delay and assert a denial of due process in allowing the post-trial hearing to proceed as scheduled on August 19. **(R. p.)**. However, Appellants had failed to disclose a witness on the issue of attorneys' fees at their expert disclosure deadline prior to trial, **(R. p.)**, despite Mr. Maybank having timely disclosed Professor Freeman on the issue. To this day, Appellants have never disclosed the identity of their "unavailable" expert witness.

[107] Appellants continue to advance the misconception that their ability to review, challenge the adequacy of, and ultimately respond to Mr. Maybank's motion for attorneys' fees is a

Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation.").

In sum, the trial court's discussion of the issue of attorneys' fees and costs in the Order is detailed and comprehensive. As required by *Layman* and *Jackson*, the trial court provides a thorough discussion of each of the six factors, complete with factual references and substantial evidentiary support for each of the factors. In recognition of the fact that fees and costs are permitted under the UTPA only for the time reasonably expended in advancing the litigation related to that cause of action, the trial court relied upon its close observation of the issues, evidence, and facts, developed throughout the life of the litigation and trial, in determining that a reduction of 20% of the number of hours submitted by Mr. Maybank's counsel was an appropriate and reasonable reflection of the time not spent in furtherance of facts and evidence that lent itself to the unfair and deceptive business practices of Appellants.[108] Based on the existence of substantial evidence to support the trial court's determination of reasonable attorneys' fees and costs

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condition precedent to the trial court's exercise of its discretion in considering a request for fees and costs under the UTPA. However, no such condition or requirement exists under S.C. Code Ann. § 39-5-140(a). The amount of attorneys' fees and costs that a trial court concludes is reasonable in any given case, including the amount and type of documentation that it requires to reach its decision, is left entirely to the discretion of the trial court. This also goes for Appellants' continued assertion that Mr. Maybank was required to provide the trial court with a copy of his fee agreement with counsel. However, the actual fee agreement simply has no relevance in a determination of reasonable fees under the lodestar calculation outlined by this Court in *Layman*, 376 S.C. at 459-60, 658 S.E.2d at 333-34, which requires an independent determination by the trial court as to a "reasonable hourly rate" ("determined by comparing the rates of the prevailing party's attorneys to the prevailing market rates in the community for similar services by lawyers of comparable standing"), and an independent determination as to a "reasonable time spent on the litigation." The actual fee agreement with the client, whether contingency or hourly (or some combination), is therefore unnecessary for the court's consideration, absent a request by the trial court (which this trial court, in its discretion, did not).

[108] In support of its conclusion as to the pervasiveness and interconnection of the facts supporting the UTPA claims, the trial court specifically noted that the Form Approval Letter, **(R. p.)** (Plf's Ex. 91), was not produced until late on the Friday before the trial began on Monday, June 16. Order at 26 n.18.

in this case, it is clear that the trial court did not abuse its discretion and its award of fees and costs should be affirmed.

CONCLUSION

For the reasons explained above, the trial court's order should be affirmed.[109]

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August 24, 2015
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[109] With the exception of the trial court's denial of Mr. Maybank's motion for prejudgment interest, which should be reversed.

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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

This is to certify that I, a paralegal of Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **Initial Respondent's Brief of Respondent-Appellant Francis P. Maybank** and **Designation of Matter to be Included in the Record on Appeal** via by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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