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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

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

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

v.

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

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ARGUMENT

I. The Securities Exemption Requires the Reversal of the UTPA Claim.

A. The decisions in *Rhoades*, *Ward*, and *Unisys* establish that securities-related transactions and conduct are exempted from the UTPA.

Maybank asks this Court to revisit its earlier decisions in *State ex rel. McLeod v. Rhoades*, 275 S.C. 104, 267 S.E.2d 539 (1980), and *Ward v. Dick Dyer & Associates, Inc.*, 304 S.C. 152, 403 S.E.2d 310 (1991), and redefine the securities exemption much more narrowly, applying it only to "public offering transaction[s]." (p. 9).[1] Maybank offers no rationale for this change in the law, nor does he address the consequences of doing so. Maybank also fails to show how his interpretation of the exemption would be consistent with the FTC's view of this issue, as required by § 39-5-20(b).

In *Rhoades*, the Court found the fact that securities transactions are "regulated by the Securities and Exchange Commission and under the South Carolina Uniform Securities Act" warranted the conclusion that "securities transactions" are exempt from the UTPA. *Id.* at 107, 267 S.E.2d at 541. The Court did not limit this exemption to any particular type of transaction. The breadth of the exemption intended by the Court in *Rhoades* is shown by a review of *State v. Piedmont Funding Corp.*, 382 A.2d 819 (R.I. 1978), the case on which the *Rhoades* Court relied for its holding. Initial public offerings were not even at issue in *Piedmont Funding.* In *Piedmont Funding*, the plaintiff's allegations involved multiple defendant entities and a "leverage funding program" recognized by the court to be a "security." *Id.* at 821. The court held, "because the conduct at issue was clearly subject to the control of governmental agencies on both the state and federal level, it is within the exemption provision and not subject to the

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[1] Citations to Respondent/Appellants brief will be designated by "(p._)."

mandates of the [Deceptive Trade Practices] Act." *Id.* at 822. The complaint was dismissed for all the defendants, regardless of whether they were selling, advising, lending, or acting as a bank custodian.[2]

Maybank acknowledges that this Court in its later decision in *Ward* carved out the securities exemption from its holding abolishing the general activity test. (p. 9). Maybank, however, argues that the Court in *Ward* intended to continue the exemption only for "initial public offering[s]" and nothing else.[3] (pp. 8-9). Maybank quotes the first part of the footnote in *Ward* that preserved the securities exemption (p. 9), but he omits the last critical sentence, "[W]e choose to follow the vast majority of jurisdictions in holding that *securities transactions* remain exempt from claims under the UTPA."[4] *Ward*, at 155 n.1, 403 S.E.2d at 312, n.1 (emphasis added). The Court used the phrase "securities transactions" when referring to the subject being exempted. In no manner did

[2] The leverage funding program involved the sale of life insurance policies with the premiums funded by loans and the loans secured by mutual funds. There were multiple defendants. One defendant sold the life insurance, another defendant would make the loan, another defendant would sell the mutual funds, and yet another defendant (Bank of New York) would act as the custodian of the mutual funds. 382 A.2d at 820-21.

[3] Maybank contends that the limitation to initial public offerings is warranted because it is a "unique" transaction. (p. 9, n.6). This rationale would certainly also apply to PVFCs, which, as Maybank's counsel described during closing argument, constitute "derivative transaction[s]" that "are a recent invention of Wall Street" and which were purportedly beyond the understanding of both Maybank (a 40 year securities industry veteran) and the wealth advisors at BB&T Bank. (Tr. 1942).

[4] Maybank notes this key language only in a footnote, then tries to negate it by reliance on a single, distinguishable California case. (p. 9, n.7). In California, there is no exemption provision to its statutory unfair competition law, resulting in a different analysis of this issue. *See* Cal. Bus. & Prof. Code § 17200 *et seq.*; *Bowen v. Ziasun Techs., Inc.*, 11 Cal. Rptr. 3d 522, 531-32 & n.9 (Dist. Ct. App. 2004). A review of cases from other jurisdictions exempting securities transactions from their trade practices acts demonstrates the broad application of the exemption to many different types of transactions and conduct. *See, e.g.*, *Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162, 166-68 (4th Cir. 1985) (reverse stock split); *In re Evergreen Mut. Funds Fee Litig.*, 423 F. Supp. 2d 249, 263-64 (S.D.N.Y. 2006) (payments of kickbacks to brokers); *Rogers v. CISCO Sys., Inc.*, 268 F. Supp. 2d 1305, 1316-17 (N.D. Fla. 2003) (corporation's fraudulent misrepresentation of earnings); *Caraluzzi v. Prudential Sec., Inc.*, 824 F. Supp. 1206, 1215 (N.D. Ill. 1993) (misleading portfolio statements); *Wyman v. Prime Disc. Sec.*, 819 F. Supp. 79, 87 (D. Me. 1993) (recommending high-risk securities); *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 675 (N.D. Ga. 1983) (unauthorized trades and churning); *Russell v. Dean Witter Reynolds, Inc.*, 510 A.2d 972, 977 (Conn. 1986) (broker misconduct); *Taylor v. First Jersey Sec., Inc.*, 533 So. 2d 1383, 1387-88 (La. Ct. App. 1988) (broker's improper purchase of stock for client-investor); *Sterner v. Penn*, 583 S.E.2d 670, 675-76 (N.C. Ct. App. 2003) (broker's failure to prevent stock trades); *Kittilson v. Ford*, 595 P.2d 944, 949 (Wash. Ct. App. 1979), *aff'd*, 608 P.2d 264 (Wash. 1980) (inducing purchase of real estate contracts).

Ward narrow the exemption as articulated in *Rhoades*.[5] Changing the law to narrow the securities exemption as advocated by Maybank would open the floodgates to UTPA claims where they never previously existed or were intended.[6]

The Court reaffirmed the securities exemption in *Unisys* by creating a similar exemption for transactions governed by the S.C. Procurement Code. Significantly, the *Unisys* Court did not identify particular procurement-related transactions that were exempted, but instead exempted *any type of transaction* that fell within the purview of the Code. 346 S.C. at 176, 551 S.E.2d at 273. The *Unisys* Court specifically referenced *Ward's* rejection of the general activity test, then held that "securities transaction[s]" were carved out of that holding and, "[s]imilarly, we hold that transactions under the Procurement Code are exempt from SCUTPA."[7] *Id.*

According to Maybank, *Ward* held that the securities exemption was limited to only those actions "undertaken in accordance with" the securities laws (p. 9), but *Ward* in fact did the opposite by carving out securities transactions from its holding abolishing the general activities test.[8] Similarly, in *Unisys,* the Court chose to apply the general activities test for procurement transactions, and did not require a showing that the alleged

[5] The Court in *Unisys Corp. v. S.C. Budget & Control Bd.*, 346 S.C. 158, 551 S.E.2d 263 (2001), explained what occurred in *Ward.* In *Unisys*, the Court recognized that it abolished the general activity test in *Ward*, but "retained" the "exemption recognized in [*Rhoades*]" for securities transactions. *Id.* at 176, 551 S.E.2d at 273. In other words, the Court in *Ward* was not trying to narrow the holding in *Rhoades*.

[6] For example, routine claims by investors that stock brokers made recommendations that were too risky or that they were advising the purchase of unregulated securities would become the subject of UTPA claims, even though for decades the securities industry, securities regulators, and the FTC have operated with the understanding that the federal securities laws, the state securities acts, and rules promulgated by the SEC and state securities commissioners provided the exclusive regulation of the industry.

[7] Maybank relies on *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, No. 2002-206987, 2015 WL 4112411 (S.C. July 8, 2015), suggesting that the Court rejected the general activities test. (p. 10). The defendant in *Wilson*, however, did not rely on the general activities test, but instead argued that "the FDA both *authorized and required* the use of that approved label." *Id.* at *15 (emphasis added). The defendant's argument in *Wilson* is not "analogous" to the Defendants' arguments here. (p. 10).

[8] Maybank attempts to characterize the Defendants' argument as one advocating a "theory of general regulation of the banking industry," (p. 11, n.9), and seeking an exemption for the "banking industry." (p. 9, n.5). This is not the Defendants' argument.

conduct was either *allowed or authorized* by the Procurement Code.[9] It was shown only that the contract at issue fell within the scope of the Procurement Code.

The decisions in *Rhoades*, *Ward*, and *Unisys* establish that the SEC and the S.C. Securities Division have exclusive province in the securities industry.[10] This conclusion is supported by the fact that the FTC has never attempted to regulate the securities industry. The General Assembly instructed in § 39-5-20(b) that courts look to the FTC when interpreting the UTPA.[11] Maybank offers no rebuttal to this point.[12]

B. The transactions and conduct at issue are regulated under the securities laws.

Maybank contends there was "no evidence" that a PVFC was a security and states that Defendants failed to cite to any such evidence in their brief.[13] (p. 17-18). Maybank, however, overlooks 2½ pages of argument and cites to the record on pages 13-15 of the Defendants' brief. The Defendants reference trial exhibits as well as testimony from

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[9] The alleged conduct included "the failure to meet federally mandated deadlines" and "fraud in the inducement of the contract." *Unisys*, 346 S.C. at 164, 551 S.E.2d at 267.

[10] Maybank contends that "no one was overseeing Appellants' actions," (p. 11, n.9), but the record shows that both the SEC and the S.C. Securities Division believed they had jurisdiction over Maybank's PVFCs. As explained by David Fisher, the SEC was inquiring about the advisory fees related to PVFCs and other alternative investments. (Fisher Indiv. Dep. at 175). Tracy Meyers, the Deputy Securities Commissioner, actually appeared at trial and testified outside of the presence of the jury that she reviewed Maybank's WMA, PVFC documents, and account statements for the MP Account and then initiated an inquiry into the facts. (Tr. 593-598). Without question, she believed the Securities Division had jurisdiction over Maybank's customer relationship with BB&T Bank and BB&T AM.

[11] This point is fully briefed on page 12 of the Defendants' initial appellate brief. The significance of looking to the FTC when interpreting the UTPA was reiterated recently in this Court's opinion in *State ex rel. Wilson*, 2015 WL 4112411, where the Court performed an analysis to ensure the UTPA standard being applied was in compliance with § 39-5-20(b) (mandating reference to the FTC's interpretation of the Federal Trade Commission Act) and made reference to FTC policy statements. *Id.* at *11, 14.

[12] Maybank also contends that the Defendants' view of the securities exemption would "allow the exemption to subsume the rule." (p. 9). This was the concern of the Court in *Ward*, but *Ward* was addressing whether a regulated activities test should be applied when determining the breadth of the exemption *for all industries*. *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. Almost every business is subject to some type of regulation."). Maybank incorrectly states that the Defendants are advocating for a return in *all situations* to the general activities test. (p. 8, n.4). The Defendants' arguments apply only to securities.

[13] Without any citation to a single appellate court decision of this state, Maybank contends that the question about whether a PVFC is a security is a question of fact. (p. 15, n.19). This Court, however, in *Majors v. S.C. Sec. Comm'n*, 373 S.C. 153, 644 S.E.2d 710 (2007), found that the determination of whether a transaction involved a security was a "question of law." *Id.* at 159, 644 S.E.2d at 713.

experts for both sides discussing the characteristics of PFVCs, including the fact that they have embedded options, placing them squarely within the definition of "security" in § 35-1-102(29).[14] Maybank also overlooks the impact of his position—any unlicensed person could give advice about PVFCs if they are not considered "securities." Moreover, Maybank fails to contest the fact that the MP Account was a custodial account holding stocks and, therefore, involved securities.[15] Instead, he argues that the Defendants "did not purchase or sell" any of the securities in the account. (p. 17, n. 20). That is irrelevant. Neither *Rhoades* nor *Ward* made the defendant's actual purchase or sale of securities a prerequisite to the application of the securities exemption.

Maybank identifies three acts which he contends did not involve securities and, therefore, could support his UTPA claim without invoking the securities exemption. (pp. 11-13). Maybank ignores the fact that all of the alleged wrongful conduct in this case flows from the original PVFC executed in August of 2006.[16] Moreover, the damages analysis by Maybank's expert, Craig McCann, establishes that all of the alleged damages

[14] Maybank cites to deposition testimony of the Defendants' expert Robert Thorne, arguing that he viewed PVFCs as not being securities. (p. 18). Thorne, however, made clear at trial that during his deposition he meant only that VPFCs are not "tradable" securities like stocks and bonds. (Tr. 1255-56). Thorne did not offer an opinion about whether a PVFC was a security because he considered such - correctly - to be a "legal conclusion." (Tr. 1256).

[15] Maybank incorrectly argues that the "only reasonable interpretation" of the jury verdict is that it concluded either that a PVFC was not a security or that the Defendants did not sell the PVFC. (p. 6, n.2, p. 17, n.21). This argument ignores the fact that the jury was charged on the five-year statute of repose for Securities Act claims and that the PVFC strategy was initiated in August 2006, more that five years before the Complaint was filed in December of 2011. (Tr. 2011). Additionally, the jury was charged that a finding that the Defendants employed a "scheme, or artifice to defraud" was necessary for a Securities Act claim based on misrepresentation, (Tr. 2009), which is a higher standard than the standard for the claims for negligent misrepresentation (mere negligence) and constructive fraud (no intent requirement). Additionally, there is no reason to believe that the jury would have concluded a PVFC was not a security when no party made that argument at trial. Regardless, jury findings have no impact on the issue of whether DV or JNOV should have been granted.

[16] Maybank erroneously contends that the Defendants did not appeal the trial court's conclusion that these three acts did not involve securities. (p. 14, n.17). On page 11 of their appellate brief, the Defendants actually quote from the same sentence on page 5 of the Order that Maybank contends they failed to appeal. The Defendants then state that the language "was error." (App. Br. of App./Resp. at 11).

flow from securities transactions.[17] Maybank offered no rebuttal to this point.

Maybank's reliance on the three alleged acts is also flawed because each one is in fact regulated under the securities laws.[18] The WMA, for example, is the operative agreement that allowed for the opening of the MP Account, and it granted BB&T AM discretionary authority to buy and sell securities in the account. The WMA also governs the PVFCs, as the addenda for those transactions incorporated the WMA by reference. (Agr. Exs. 3, 34). The securities regulation for investment advisors, S.C. Code Ann. Reg. § 13-502, includes several provisions governing advisory agreements and investment advisory contracts and is applicable to the WMA. *See* § 13-502(A)(11), (16), (18), (19). As for Maybank's contention that the Oliver Memorandum and fee rebate letter contained misrepresentations, those documents are also subject to securities regulations.[19] Subsection (21) of S.C. Code Ann. Reg. § 13-502(A) broadly prohibits the use of "any device, scheme, or artifice to defraud" or doing anything that would "operate as a fraud or deceit." § 13-502(A)(21). The Securities Act similarly prohibits the use of "a device, scheme, or artifice to defraud." S.C. Code Ann. § 35-1-509(f). Advisory fees are subject to additional regulation under subsections (8), (10), (11)(b), and (16) of S.C. Code Ann. Reg. § 13-502(A). A catchall provision in S.C. Code Ann. Reg. § 13-502(B) provides that engaging in any type of "deceptive practices" is grounds for license revocation or fines.[20]

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[17] This is discussed in depth at pages 15-16 of the Defendants' appellate brief.

[18] As an initial matter, none of the three acts can even support a cause of action because there were no misrepresentations and no reliance by Maybank. These arguments are fully briefed on pages 19-22, 41-46, 48-49, and 51 of the Defendants' appellate brief and on pages 12-16 and 18-19 of the Defendants' response to Maybank's appellate brief. Maybank's contention that these arguments were abandoned because they were not sufficiently discussed (p. 14, n.15) is without merit.

[19] A review of Section IV.B.2 of the BB&T Code of Ethics (Agr. Ex. 6) shows that the purpose of the Oliver Memorandum was to ensure compliance with the securities laws.

[20] Maybank erroneously accuses the Defendants of misrepresenting the stipulation read to the jury. The stipulation, however states exactly what the Defendants represented in their brief. (*Compare* App. Br. of

The Defendants easily establish the application of the securities exemption.[21]

C. The Defendants have not taken inconsistent positions.

Maybank contends that the Defendants are estopped from relying on the securities exemption and that Defendants are "changing [their] story."[22] (p. 16). The Defendants, however, have always taken the position that securities were involved in this case.[23] The Defendants opposed the Securities Act claim on several other grounds, but never contended that a PVFC was not a security. (Defs. Mot. for DV at 7-11). Maybank focuses on the Defendants' prior argument that Mahfood and Walters did not "participate in the sale" of a security. (p. 16). The Defendants made this argument in federal court when opposing Maybank's motion to remand because § 35-5-509(b) and -509(d) impose liability on one who "sells" a security under certain circumstances, and neither Mahfood nor Walters was a party to the sale. (Defs.' Resp. to Mot. Remand at 17-19). The Defendants are not now contending that they were a party to the sale of a security, nor is that a prerequisite for the application of the exemption.[24] They are contending only that securities were involved, and, thus, the securities exemption applies.

App./Resp. at 11, n.9 (BB&T AM is registered as an investment advisor), *with* transcript page 1922 ("BB&T Asset Management . . . is registered as a register[ed] investment advisor.")).

[21] Whether a UTPA exemption applies is frequently resolved under Rule 12(b)(6) and Rule 56 and is appropriate for resolution on a motion for directed verdict. *See, e.g., Unisys*, 346 S.C. at 166, 551 S.E.2d at 265 (motion to dismiss); *Rhoades*, 275 S.C. at 107, 267 S.E.2d at 541 (demurrer should have been upheld); *InMed Diagnostic Servs., LLC v. MedQuest Assocs., Inc.*, 358 S.C. 270, 594 S.E.2d 552 (Ct. App. 2004) (reversing judgment on verdict); *Miller v. Fairfield Communities, Inc.*, 299 S.C. 23, 382 S.E.2d 16 (Ct. App. 1989) (summary judgment); *Carr v. United Van Lines, Inc.*, 289 S.C. 194, 345 S.E.2d 734 (Ct. App. 1986) (summary judgment).

[22] The only party changing his story is Maybank. He argues on appeal that a PVFC is not a security, and, therefore, the securities exemption is inapplicable. (p. 18). However, since the inception of the litigation, he has asserted a Securities Act claim, (12/22/11 Pl.'s Compl. ¶¶ 106-111), and his counsel asked the jury to find for Maybank on the Securities Act claim during his closing argument. (Tr. 1939-40). Maybank even presented purported expert testimony at trial that charging transaction based fees related to the PVFCs requires a brokerage license. (Tr. 714-16). Only if Maybank believed PVFCs were securities would there be any reason to have pursued a Securities Act claim or contended that a brokerage license was needed.

[23] Beginning with the assertion of the exemption in their Notice of Removal and continuing through summary judgment and DV, the Defendants have always asserted that the PVFCs and MP Account involved regulated securities. (Not. of Removal at 11; Defs.' 7th Mot. Summ. J.; Defs.' Mot. for DV).

[24] Once Maybank had secured the state court venue, he later voluntarily dismissed Mahfood and Walters.

D. The Defendants' securities exemption argument is preserved.

Maybank argues that the Defendants waived the exemption issue because they requested a jury charge on the UTPA claim after the trial court had denied DV. (p. 7). This has no merit.[25] The Defendants have appealed the trial court's denial of DV and JNOV on the UTPA claim. The Defendants are not challenging any of the jury charges. Once the trial court denied DV and decided to allow the UTPA claim to go to the jury, the Defendants had no choice but to submit proposed charges relevant to the claim.[26] If Maybank's argument were accepted, the parties in any jury trial would be forced to forego the offering of jury charges on any claim upon which they believe they have grounds for appeal of a denial of DV. Maybank's preservation argument is directly contrary to Rule 50 and well established law that making a DV motion during trial and then reasserting the grounds in a motion for JNOV preserves the arguments for appeal. *See also Fettler v. Gentner*, 396 S.C. 461, 469, 722 S.E.2d 26, 30 (Ct. App. 2012) ("Once a party moves for a directed verdict on an issue, and that motion is denied, the party is not required to object again to the subsequent jury instruction regarding that issue" for the issue to be preserved.).

II. Maybank Failed to Establish Personal Jurisdiction Over BB&T Corp.

A. Maybank applies the wrong standard.

Maybank erroneously applies an "existence of evidence" standard to this issue. (p. 24). Maybank, however, carries the burden of proof, and was required to prove the

[25] The only case cited for support by Maybank is *Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997). In *Creech*, however, the trial court was never asked to rule on the issue prior to charging the jury, meaning that the issue on appeal was not part of a directed verdict motion, but instead was a pure jury charge issue. The procedural context of *Creech* is thus inapposite.

[26] For example, in *Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 345 S.E.2d 711 (1986), the trial court denied the defendant's directed verdict motion as to the bad faith claim, and the defendant then proposed a jury charge relevant to that claim. The fact that the defendant proposed the charge had no impact on the appealability of the denial of the directed verdict motion.

existence of personal jurisdiction by a preponderance of the evidence. *See Fassett v. Evans,* 364 S.C. 42, 47, 610 S.E.2d 841, 843 (Ct. App. 2005). The personal jurisdiction issue is decided by the court, and reversal is required where the decision is "unsupported by the evidence or influenced by an error of law." *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005).

B. The evidence is insufficient to establish personal jurisdiction.

Maybank relies exclusively on the Oliver Memorandum and the BB&T Code of Ethics in his effort to establish personal jurisdiction. Both were addressed on pages 18-22 of the Defendants' initial brief. For the reasons outlined therein, Maybank did not meet his burden of showing that either was an activity directed toward South Carolina or that any cause of action against BB&T Corp arose from those actions.[27] *See Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 331–32, 594 S.E.2d 787, 884 (Ct. App. 2004).

Maybank contends that he "receive[d] Ms. Oliver's approval memorandum *before* the execution of VPFC No. 1." (p.21, n.26). There is no evidentiary support for this. The memorandum was dated August 11, 2006, the same date as the execution of the PVFC, showing it was not provided with the standard disclosures.[28] (Agr. Ex. 7). Maybank never testified that he received the memorandum prior to the transaction, nor does he state that he relied on it in making his decision to enter into the PVFC.[29] (Tr. 327-34). With respect to timing, the only item Maybank was clear about was that he did *not* receive settlement

[27] Maybank's waiver argument in footnote 27 is without merit. (p.21, n.27.). Once the Court denied BB&T Corp's pretrial motion to dismiss and its subsequent requests for directed verdict, BB&T Corp had no choice but to participate in jury charges and discussions regarding the verdict form.

[28] Because the Oliver memorandum was not meant to be a disclosure document, there was no need to provide it to Maybank in advance. The actual disclosure documents for the PVFC were provided to Maybank a month before the transaction on July 10, 2006. (Agr. Ex. 3; Def. Ex. 199).

[29] Maybank testified that he was separately advised about some of the items in the memorandum, but at no point does he say that it was his actual *review of the memorandum* that formed the basis for any decisions. (Tr. 327-34). Maybank also testified that he "relied on the bank entirely" for the PVFCs, (Tr. 468), thereby indicating no reliance on BB&T Corp or the Oliver memorandum.

overviews in advance of the PVFCs. (Tr. 468). The only evidence cited in Maybank's brief in an effort to support his contention he received the Oliver Memorandum in advance was when he discussed his concerns that existed on *August 23, 2006*. (p. 21, n. 26; Tr. 340). The PVFC, however, was executed twelve days earlier on August 11, 2006. (Agr. Ex. 9).

Maybank advocates for the adoption of a "but-for" analysis for assessing personal jurisdiction, arguing that the PVFC "could not have" occurred without the approval of Pat Oliver.[30] (p. 23). The Defendants explained on page 21 of their brief the reasons that courts have rejected the "but-for" analysis. Maybank contends, however, that the Defendants misstated the position of the Eleventh Circuit on this issue. (p. 23, n.31). The case cited by Maybank, *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210 (11th Cir. 2009), does not support his assertion. The court in *Oldfield* actually acknowledges the lack of a rigid test applied in the Eleventh Circuit, distinguishing and disavowing the "but-for" approach adopted by the Ninth Circuit, and stating "[t]he problem with this but-for approach is that it is over-inclusive, making any cause of action, no matter how unforeseeable, necessarily 'related to' the initial contact." *Id.* at 1223.

C. Maybank has not met his burden of proving waiver.

"A waiver is the intentional relinquishment of a known right," and the burden of proof of waiver is on the party asserting it. *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 338, 676 S.E.2d 139, 145 (Ct. App. 2009). Maybank failed to

[30] This factual assertion was not proven at trial, thus preventing Maybank from relying on a "but-for" analysis. Under the Code of Ethics, BB&T AM would not have participated in the execution of the first PVFC unless it obtained General Counsel approval. Maybank's own purported expert, John Freeman, acknowledged that there are other advisors that could have assisted with the transaction. (Tr. 698). In fact, Maybank proceeded with three additional PVFC transactions, all with no assistance from BB&T AM or any other advisor. (Tr.519-23). Accordingly, Maybank failed to prove that, had BB&T AM refused to complete the PVFC because it lacked General Counsel approval, he would not have found another advisor or simply executed the PVFC with no advisor as he did in 2010, 2011, and 2012. (*Id.*; Def. Ex. 207-212).

satisfy this high standard. Maybank also fails to identify any prejudice or any judicial inefficiencies resulting from the timing of BB&T Corp's motion to dismiss.

Maybank contends that BB&T Corp meaningfully participated in the litigation for 2½ years before challenging the trial court's jurisdiction. (p. 19). During the first nine months, however, little happened as the case had been removed to federal court and was not remanded until August 3, 2012. (Notice of Removal; Order of Remand). While in federal court, BB&T Corp asserted its objection to personal jurisdiction in its Answer, thereby preserving it under Rule 12(h)(1).[31] (2/15/12 Ans. to Pl.'s Compl. 11, 13, 121). Because Maybank was questioning the subject matter jurisdiction of the federal court, the motion to remand needed to be resolved before a motion to dismiss was filed.

Seven months after remand, the case was formally referred to the Business Court. (2/25/13 Order). The first status conference with the trial judge occurred five months later on August 6, 2013, (7/26/13 Email setting conference), and, on that date, an initial scheduling order was entered. (8/6/13 Order). That scheduling order had a dispositive motion deadline of February 28, 2014. (*Id.* ¶ 5). Because BB&T Corp had grounds for seeking dismissal on the merits of the claims, it was more efficient to wait and file one motion prior to the deadline in the scheduling order.

On December 4, 2013, Maybank filed a motion to amend his Complaint, seeking to add his insurance trust as an additional plaintiff. (12/4/13 Pl.'s Mot. to Amend). On January 10, 2014, the scheduling order was amended to extend the dispositive motion deadline until May 7, 2014. (1/10/14 Order ¶ 4). BB&T Corp continued to wait until the dispositive motion deadline before filing its motion so that it could include all grounds

[31] Maybank amended his Complaint on February 22, 2012 and moved to remand the case. BB&T Corp again asserted lack of jurisdiction in its Answer. (3/14/12 Def. Ans. to Pl.'s 1st Am. Compl. ¶ 185).

for dismissal at one time. (5/7/14 BB&T Corp Mot.). This motion was denied. It was not until May 22, 2014 that the Second Amended Complaint was filed adding the new Plaintiff. (5/22/14 Pls.' 2d Am. Compl.). The Defendants filed an Answer, and BB&T Corp again asserted its defense of lack of personal jurisdiction. (Ans. to Pls.' 2d Am. Compl. ¶ 175). BB&T Corp renewed is motion to dismiss based on lack of personal jurisdiction at the close of Maybank's case-in-chief, at the close the evidence, and again in its motion for JNOV. (Defs.' Mot. for DV; Tr. 1021, 1811; Defs.' Mot. for JNOV).

This record establishes that BB&T Corp asserted lack of personal jurisdiction in each of its answers, including the last one filed in May of 2014. Finding waiver under these circumstances would render Rule 12(h)(1) a nullity because it *requires* that the assertion of the defense in the May 2014 Answer be given effect. Moreover, the record shows there was delay resulting from the federal court remand proceedings and the assignment to the Business Court. Maybank has not shown any examples of BB&T Corp actively pursuing discovery from other parties, filing discovery motions, serving subpoenas, participating in depositions, or producing any documents in the case.[32] The record shows only that BB&T Corp waited until an appropriate time to efficiently raise its personal jurisdiction argument along with its other arguments on the merits of the claims. Additionally, it would be unfair to find a waiver of a defense when the new Plaintiff was not formally added by amendment until just four weeks before trial. Maybank fails to cite any South Carolina precedent to support waiver where the defense

[32] Maybank states that BB&T Corp submitted its "own separate responses" to some of his discovery requests, (p. 20), but there is no cite to the record or indication that the responses were ever put in the record. Regardless, complying with the duty to respond to discovery requests is insufficient to support a finding of waiver of personal jurisdiction.

is preserved in the answer, but the motion to dismiss was not filed until later in the case.[33] The cases cited by Maybank from other jurisdictions are distinguishable.[34]

III. Punitive Damages Are Barred by Paragraph F.1. of the WMA.

Maybank characterizes Paragraph F.1. as an "exculpatory clause,"[35] but it is not because it does not bar liability and instead permits the recovery of "any loss attributable" to the Defendants' conduct.[36] (Agr. Ex. 14, ¶ F.1.). The Court in *Pride v. S. Bell*, explained the distinction, stating an exculpatory clause is an "agreement against liability" rather than a "limitation of liability." *Id.* at 618, 138 S.E.2d at 156. Only true exculpatory clauses will be "strictly construed against the party relying thereon." *Id.* at 619, 138 S.E.2d at 157.

There was no question for the jury because there is no ambiguity in Para. F.1.[37] Maybank argues the provision was "subject to multiple interpretations," (p. 35), but he fails to identify them. The plain language states "[i]n no event" will the Defendants have

[33] The only South Carolina state court case cited by Maybank is *Eaddy v. Eaddy*, 283 S.C. 582, 324 S.E.2d 70 (1984), which addressed the situation where a party failed to assert lack of personal jurisdiction as a defense, voluntarily appeared, and then moved to dismiss.

[34] In *Yeldell v. Tutt*, 913 F.2d 533 (8th Cir. 1990), lack of personal jurisdiction was raised in the answer, but not raised again *until the appeal*. *Id.* at 539. The party in *Yeldell* also "participated in a five-day trial, and filed post-trial motions, all without raising the issue of personal jurisdiction or requesting a ruling on it." *Id.* In *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58 (2d Cir. 1999), the case had been pending for three years before the assigned MDL judge for pre-trial proceedings, but the defendant never raised its personal jurisdiction objection during that time. *Id.* at 61.

[35] Maybank takes out of context a single phrase from one of the Defendants' summary judgment motions, implying that the Defendants called Paragraph F.1 an exculpatory clause and are now taking an inconsistent position. (p. 34, n.57). In their motion, however, the Defendants describe Paragraph F.1. as a "limitation of liability provision." (Defs.' 2d Mot. for Summ. J. at 3). In their reply brief, the Defendants stated: "The provision is *not* an exculpatory clause." (Defs.' Reply in Supp. of 2d Mot. for Summ J. at 1).

[36] This is a distinguishing feature from the clause that this Court addressed in a divided opinion in *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013). In *Gladden*, the provision limited the recovery to only the return of the home inspection fee. Here, Paragraph F.1. permitted Maybank to recover all his losses.

[37] Maybank contends that the Defendants' submission of a jury charge resulted in waiver of their position that the application of Paragraph F.1. is a question of law. (p. 35, n.58). The trial court, however, had already denied the Defendants' motion for directed verdict, leaving the Defendants with no choice except to submit charges on all claims and issues that the trial court had decided would be submitted to the jury.

liability for punitive damages "with respect to their services under this Agreement."[38] (Agr. Ex. 14, ¶ F.1.). There is only one reasonable reading of this provision.[39]

The Court should also reject Maybank's argument as to the scope of Paragraph F.1.[40] Maybank argues that the WMA description of "services" does not include the making of "misrepresentations." (p. 36). Thus, under Maybank's interpretation, Paragraph F.1. would apply only if the WMA referenced fraud and other wrongdoing as services being provided. This would render Paragraph F.1. a nullity, as no tort claim would fall within its scope. *See Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 416, 756 S.E.2d 148, 153 (2014) ("'[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous.'"). As explained on pages 27-29 of the Defendants' appellate brief, all of Maybank's claims arise from "services" provided under the WMA, and, thus, are subject to the damages limitation in Paragraph F.1.[41]

Maybank argues that Paragraph F.1. violates public policy because he was "not in an equal bargaining position." (p. 36). This argument has no merit. Maybank was a Harvard educated, 40-year veteran of the securities industry who started a portfolio company with $200 million in assets under management, then built a trust company with

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[38] Maybank argues that the reformation claim suggests there is an ambiguity in Paragraph F.1. (p. 36, n.59). The claim for reformation, however, applied only to the phrase "Bank shall" on page 1 of the WMA and had no impact on either Paragraph F.1. or the language of the WMA describing the types of services to be provided. (Defs.' Ans. to Pls.' 2d Am. Compl. ¶¶ 31-34).

[39] Maybank asserts that it is proper to submit questions of "enforceability" of contracts to the jury. (p. 35). This is not the law in South Carolina. *See Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 477, 465 S.E.2d 765, 770 (Ct. App. 1995) ("[E]nforcement of an unambiguous contract is a question of law for the court"). Moreover, the question as to whether an ambiguity exists in a contract is a question of law. *See N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237, 240 (2015).

[40] This is a question of the applicability of unambiguous language and, thus, is one for the trial court, not the jury. *See Richardson*, 411 S.C. at 378, 769 S.E.2d at 240 (reversing judgment on jury verdict, holding DV required by unambiguous contract terms).

[41] Maybank has chosen in this case to affirm the WMA despite his allegations of fraud. By doing so, he has elected to be bound by all of its terms.

$700 million in assets under management. (Tr. 278-84, 388-97). He had achieved the rank of senior vice-president at BB&T Bank and was a wealth advisor. (Tr. 290, 406, 1394). By all accounts, he was educated, sophisticated, and was under no handicap that prevented him from reading and understanding the WMA. He testified at trial that he read the provisions of the agreement.[42] (Tr. 476-78; 483-84). Moreover, Paragraph F.1. was not obscured in a form contract. Instead, it was set forth in a separately numbered paragraph with the underlined heading "Limitation of Liability."[43] (Agr. Ex. 14, ¶ F.1.).

Maybank argues he had no choice except to sign the WMA. (p. 38, n.62). This is not true. The WMA was needed to open the MP Account in which the PVFC proceeds would be deposited. Maybank already had an existing brokerage account at Scott & Stringfellow. If Maybank was dissatisfied with any terms of the WMA, he could have refused to sign and simply instructed that the PVFC proceeds be deposited into the Scott & Stringfellow account (where the BB&T stock had originally been held). He was under no obligation to place the proceeds with BB&T Bank or BB&T AM.

This case is distinguishable from *Anthony v. Atlantic Grp., Inc.*, 909 F. Supp. 2d 455, 487 (D.S.C. 2012), cited by Maybank. (pp. 36-37). In *Anthony*, the plaintiff had no choice because she could obtain employment only if she agreed to sign a release of liability. *Id.* at 487. Here, Maybank could have refused to sign the WMA and deposited the PVFC proceeds in his Scott & Stringfellow account. Additionally, the court in *Anthony* was addressing a true exculpatory clause, not a mere limitation on damages.[44]

Maybank also contends that there was unequal bargaining power because the

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[42] Maybank also testified that he was given time to read the WMA, that no one hurried him, and that employees were available to answer any questions. (Tr. 478).

[43] Maybank presented no evidence of an "evident intent to obscure" Paragraph F.1. as required by the Court in *Gladden* to support a finding of unconscionability. 402 S.C. at 145, 739 S.E.2d at 885.

[44] *Anthony* also involved employment claims that are subject to unique public policy considerations.

Defendants were in a fiduciary relationship with him before the execution of the WMA. (p. 37). This statement is not true with respect to BB&T Corp and BB&T AM. Maybank offered no evidence at trial showing he had any relationship with these two entities at the time the WMA was executed. With respect to BB&T Bank, it was a fiduciary only in its capacity as trustee of the insurance trust. BB&T Bank owed fiduciary duties only to the trust, however, not to Maybank.

Maybank improperly cites to the federal court decision in *Cooke v. Allstate Mgmt. Corp.*, 741 F. Supp. 1205 (D.S.C. 1990), for the proposition that "Courts of this state have held exculpatory clauses to be unenforceable on public policy grounds." (p. 37). This is not the holding in *Cooke*. In *Cooke*, the defendant was relying on a true exculpatory clause that provided "defendants would not be liable for any 'loss, injury or damage to person or property.'" *Id.* at 1207. The court then applied a strict interpretation to the clause, finding it did not apply because "the clause does not explicitly include the negligent acts of defendant." *Id.* at 1208. Paragraph F.1. is not an exculpatory clause that attempts to bar all liability. Therefore, a strict interpretation is unwarranted.

Nowhere in his brief does Maybank try to rebut the cases upholding the validity of punitive damages waiver provisions cited on pages 31-32 of the Defendants' brief. As shown by the absence of a trebling provision in the Securities Act, barring punitive damages in investor cases is consistent with public policy. This is especially true when, as here, the investor's actual losses are not barred. The Securities Commissioner is vested with the power to revoke licenses and issue fines to deter unlawful conduct. Under these circumstances, the Court should enforce Paragraph F.1. and honor "the fundamental right of freedom of contract." *Pride*, 244 S.C. at 619, 138 S.E.2d at 157.

IV. Maybank's Remedies Arose From a Single Wrong Requiring An Election.

Maybank claims that he is entitled to a **double** recovery of both punitive damages **and** treble damages by asserting that the UTPA claim and his common law claims are supported by different conduct and facts. (p. 54). Maybank misunderstands the purpose and application of election of remedies. The lynchpin in any elections of remedies analysis is whether there is a single primary wrong. *Cowart v. Poore*, 337 S.C. 359, 364, 523 S.E.2d 182, 185 (Ct. App. 1999). "Where a party has asserted only one *primary* wrong, he is entitled to only one recovery." *Jones v. Winn-Dixie Greenville, Inc.*, 318 S.C. 171, 175, 456 S.E.2d 429, 432 (Ct. App. 1995) (emphasis added). The fact that the different claims may be supported by different facts or different damages evidence, as asserted by Maybank; is immaterial. Here, the facts claimed by Maybank all stem from a single primary alleged "wrong" – the 2006 PVFC transaction. (Opp. Br. at 57).

The essential determination is whether the claims are based on the same conduct and involve damages that are the natural consequence of that same conduct. It does not matter if the various claims pursued have different elements (thus requiring different conduct or facts). *Smith v. Strickland*, 314 S.C. 192, 442 S.E.2d 207 (Ct. App. 1994) (election required as to four different causes of action with different elements, including UTPA). Nor does it matter if the differing claims had different measures of damages. *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994) (election required as to three different damages verdicts on claims with different measures of damages). An election is required even where different causes of action against different defendants stem from the same primary wrong. *Collins Music Co. v. Smith*, 332 S.C. 145, 503 S.E.2d 481 (Ct. App. 1998) (election required between two

different causes of action against two different defendants involving the same damages).

A proper elections analysis focuses on whether there is a primary wrong that serves as the genesis for any differing claims. Here, all of Maybank's claims arise from his allegations that the initial PVFC transaction was ill advised.[45] The fact that Maybank asserts multiple claims (with different elements and measures of damages) which rely on different facts or conduct does ***not*** change the fact that the genesis of all the claims is the the 2006 PVFC transaction. Even if Maybank's UTPA claim and the common law claims are supported by different conduct or facts, because they are all based on the alleged primary wrong of the 2006 PVFC transaction and all share the same damages, an election is still required between the punitive or exemplary damages remedies available. *Smith*, 314 S.C. at 197-98, 442 S.E.2d at 210.

Maybank's reliance on *Taylor v. Medencia*, 324 S.C. 200, 479 S.E.2d 35 (1996) continues to be misplaced. *Taylor* involved two clearly separate "wrongs" based on completely separate conduct and which caused entirely separate damages. The negligence claim in *Taylor* was based the use of a drug that had devastating results on the plaintiff's health. The separate UTPA claim in *Taylor* was based on the plaintiff being billed for unnecessary lab tests. Unlike *Taylor*, this matter does not involve two wholly separate wrongs that caused separate damages. Rather, Maybank's claims and the alleged damages for each claim all ultimately emanate from and focus upon the 2006 PVFC. Moreover, the fact the jury awarded one actual damages award, applicable as to all of his claims and damages arguments for those claims, illustrates that Maybank's claims and

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[45] Maybank asserts that his common law claims are based on Defendants' alleged "imprudent, unsuitable, and risky investment advice" and his UTPA claim is based on the WMA, the refund letter, and the Oliver Memorandum (p. 11-13, 57). Yet all of these allegations stem from Maybank entering into the 2006 PVFC transaction.

damages were based on them same conduct and involved the same damages that are the natural consequence of a single primary wrong.

The case of *Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 397 S.E.2d 774 (Ct. App. 1990), illustrates a proper elections analysis. There, the plaintiff sought to avoid an election of remedies as to exemplary damages between a fraud claim and a UTPA claim because "additional facts must be proved to make out a case for fraud" and, therefore, punitive damages for fraud "necessarily would be awarded to punish Imperial for conduct distinct from [the multiple damages awarded under the UTPA claim]." *Id.* at 14, 397 S.E.2d at 776. The *Inman* court found this argument to be meritless because both claims ultimately were based on the same conduct, despite the fact that additional facts and conduct applied solely to the fraud claim. *Id.* Just as in *Inman*, the facts that certain aspects of Defendants' alleged conduct might apply solely to the UTPA claim and others to the common law claims does not alter the fact that all claims center on the same primary "wrong." Maybank is entitled to, at most, one exemplary damages remedy based on that "wrong" and should be required to make an election.[46]

V. <u>It Was Error to Allow Freeman to Give "Expert" Opinions as to PVFCs.</u>

Absent from Maybank's arguments regarding John Freeman is any discussion of his education, training, or other background that might allow him to be qualified as an expert regarding PVFCs. (pp. 39-43). As stated in *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010), "the trial court must find that the proffered expert has indeed

[46] Maybank incorrectly contends that Defendants did not raise their elections of remedies arguments in their motion to alter or amend the Nov. 10, 2014 Order. To the contrary, Defendants asserted these arguments at length in their objections to Maybank's proposed order. (Defs.' Objections to Pl.'s Prop. Order and final Judgment, 4-17). Defendants' objections to the proposed order were fully incorporated into Defendants' motion to alter or amend the 11/10/14 Order. (Defs.' Mot. to Alter or Amend the Order and Final Judgment at ¶28. Thus, this issue was raised and ruled upon, and has been fully preserved.

acquired the requisite knowledge and skill to qualify as an expert *in the particular subject matter*." *Id.* at 446, 699 S.E.2d at 175 (emphasis added).

Maybank instead argues that the error in allowing Freeman to testify about PVFCs was "harmless" because the Defendants "did not suffer any prejudice." (p. 42). This is incorrect. Freeman's testimony substantially prejudiced the Defendants in many ways, namely by offering numerous incensing opinions about PVFCs not provided by McCann or any other witness. Freeman summarized his testimony for the trial judge:

> [W]hen it was sold in '06, the charge was $2.2 million. It was re-sold again 29 months later for 1.3 million. I will point that out to the jury, point out that that money was spent. That money is gone, and that that amounts to $3.5 million taken out of Maybank's wealth for the Pre-Paid Variable in 29 months. That amounts to about $120,000 a month going into this pre-paid. Those are just the facts. The jury can draw its own conclusion as to whether that's a good thing or a bad thing.

(Tr.674). At no time did McCann testify to the cost of the PVFCs as being $3.5 million. His analysis of the financial impact of the PVFCs was much less and was completely different from Freeman's analysis. (Tr. 911).[47] Freeman also testified that a PVFC is equivalent to a recommendation to hold stock, and then, with a reference to the Bible, he stated this created a conflict of interest for the Defendants. (Tr. 685). He criticized the Defendants' characterization of the PVFC transaction as not being speculative. (Tr. 692-93). He offered his opinion as to what a proper suitability analysis for a PVFC would be. (Tr. 712-13). He also concluded that Maybank would have had to generate a 130% return on the proceeds from the PVFC to pay the "ransom" to free his stock.[48] (Tr. 704-05).

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[47] McCann's report shows that the out-of-pocket losses for both PVFCs were $1.3 million, (Agr. Ex. 72, at Maybank 8952-54), far less than Freeman's $3.5 million estimate. When McCann testified about out-of-pocket losses, he used a $1.9 million figure with the jury, (Tr. 911), because he was including losses from the MP Account, which were around $600,000. (Agr. Ex. 72, at Maybank 8870).

[48] Freeman also testified that Maybank should have been referred to other advisors for the PVFC, (Tr. 698), that the PVFC was not a long-term investment, (Tr. 705-06), that the costs were not disclosed to Maybank, (Tr. 707), and that the Defendants' employees did not understand PVFCs. (Tr. 711-12).

McCann did not address any of these items.[49] Without question, the testimony of Freeman addressing PVFCs was highly prejudicial to the Defendants.

Finally, Maybank asserts that the Defendants "consented to Professor Freeman's qualifications." (p. 39). This is incorrect. To the contrary, Defendants repeatedly objected to Maybank's attempt to have Freeman testify as an expert with respect to PVFCs. (Tr. 644, 645, 661, 666-667, 670-72, 676). Freeman was initially offered, according to Maybank's counsel, merely as an expert in the general field of "proper conduct and misconduct, financial advising of planning professionals, trustees, and factual settings involving the offer of sale, of investment insurance products for service." (Tr. 645). Defense counsel specifically stated that Defendants objected to Freeman to the extent he was seeking to testify as an expert *with regard to PVFCs*. (Tr. 645). Maybank's assertion that Defendants "consented to" his qualification is meritless.[50]

VI. The Defendants Are Entitled to JNOV on the Remaining Claims and Issues.

BB&T Corporation. Maybank offers no rebuttal to the Defendants' arguments on pages 24-25 of their appellate brief that there is no evidence to support any cause of action against BB&T Corporation. This requires reversal of the judgment as against BB&T Corp, and, as discussed below, a new trial for any remaining defendants because the punitive damages verdict was tainted by the presence of BB&T Corp.[51]

Breach of Contract. Maybank relies exclusively on his argument that BB&T

[49] Although he had absolutely no experience with PVFCs, Freeman was asked to characterize them, and, in response, he described them as "[c]omplex, risky, dangerous, very expensive." (Tr. 699).

[50] Maybank suggests that because Freeman was initially qualified as to one limited area, all subsequent objections based on the testimony being beyond the scope of expertise go only to the weight of the testimony, and not as to its admissibility. (p. 40). Again, Maybank is incorrect. The Defense objection was clearly to Freeman's lack of expertise as to PVFCs, and therefore went to the admissibility of his "expert" testimony on that subject. Maybank cannot avoid this by initially qualifying an expert as to a general field and then later solicit "expert" opinions as to a highly specialized investment.

[51] As explained pages 19-23 and 48-49, 51 of the Defendants' appellate brief and pages 12-16 of their response brief, the Oliver memorandum cannot support any claim against BB&T Corp.

Bank was not permitted to rely on others to assist with the performance of its duties under the WMA. (pp. 27-28). The fallacy of this argument is addressed in pages 42-43 of the Defendants' appellate brief. Maybank also misstates the testimony of Ross Walters. He never testified that BB&T Bank breached the WMA, nor did he ever say that any obligations were "assigned." He also did not say it contained misrepresentations.[52] Rather, Walters and other witnesses testified that all obligations of BB&T Bank were performed by either BB&T Bank or BB&T AM.[53] Significantly, Maybank offered no rebuttal in his brief to the Defendants' argument that he had knowledge of performance of some of the duties by BB&T AM and thus waived his breach of contract claim or that this knowledge caused his breach of contract claim to be barred by the statute of limitations. Maybank also failed to point to any damages directly resulting from the alleged breach of the WMA, nor did he cite to any evidence showing a breach of the WMA on the part of BB&T AM.[54]

Breach of Fiduciary Duty. Maybank erroneously argues that BB&T AM did not appeal the trial court's denial of its motion for JNOV on the fiduciary duty claim. (p. 25). Maybank overlooks the Defendants' arguments (a) on page 50 of their brief that there was no evidence of a *fiduciary relationship* with either BB&T Bank or BB&T AM, (b) on page 48 of their brief that there was no evidence of a *breach* of fiduciary duty on the part of any defendant, and (c) on pages 36-41 of their brief that there was no evidence of

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[52] Maybank's cite to the record is to the *entire* deposition of Ross Walters. In one instance, he cites to a specific transcript page, but the testimony on that page shows only that Walters personally did not give investment advice. (Tr. 1417). Maybank fails to specify any part of the record supporting his characterization of Walters' testimony.

[53] This testimony is discussed on pages 44-46 of Defendants' appellate brief. Maybank makes one statement that whether the duties were actually performed was "hotly contested," (p. 27, n.39), but offers no cite to any part of the record suggesting that any specific term of the WMA was not performed by either BB&T Bank or BB&T AM.

[54] Maybank does not reference a single obligation in the WMA for which BB&T AM had responsibility.

damages sufficient to support any of the claims against any of the defendants. Accordingly, the two-issue rule is inapplicable.

Misrepresentation. Maybank does not rebut the Defendants' arguments about the inability of the WMA, the Oliver memorandum, or the fee rebate letter to support a claim for negligent misrepresentation or constructive fraud. Instead, he tries to point to additional purported representations to support his claims, namely, that the Defendants made representations about the "prudency" of the PVFC strategy and the "expertise" of employees. (p. 28). These statements are either not false or they are so generalized that they do not constitute a false statement of an existing fact necessary to support a claim.[55] As for the purported nondisclosures, Maybank fails to point to evidence that he would have acted differently had he known the truth or that he did not have knowledge of or access to the allegedly undisclosed facts.[56]

Actual Damages. Maybank contends that the Defendants' argument as to the speculative nature of McCann's damages analysis fails to recognize the appropriate JNOV standard. (p. 29). To the contrary, this Court has specifically held if the nature of the damages evidence is "purely speculative," judgment as a matter of law is required.[57] *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 531, 753 S.E.2d 428, 436 (2014). When

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[55] *See, e.g., AMA Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992) (noting that "not every statement made in the course of commercial dealings is actionable at law," and "[a] mere statement of opinion, commendation of goods or services, or expression of confidence that a bargain will be satisfactory does not give rise to liability in tort"); *Winburn v. Ins. Co. of N. Am.*, 287 S.C. 435, 439-40, 339 S.E.2d 142, 145 (Ct. App. 1985) ("To establish actionable fraud, there first must be a false representation. The false representation, however, must be one of fact as distinguished from the mere expression of an opinion. . . . Further, an actionable representation cannot consist of a mere broken promise, even if a party acts in reliance on the promise.").

[56] For example, Maybank contends he was unaware of the "bonus payment structure" for BB&T employees, (p.p. 28-29), but he was in fact a senior vice president and wealth advisor for BB&T Bank.

[57] In an analogous situation in *Gray v. S. Facilities, Inc.*, 256 S.C. 558, 570-71, 183 S.E.2d 438, 444 (1971), the plaintiff offered expert testimony as to damages, but the Court concluded the testimony was "speculative and insufficient to support a recovery" and affirmed the trial court's involuntary nonsuit.

considering a directed verdict motion, trial courts will deny the motion if the evidence supports the plaintiff's claim, but "'this rule does not authorize submission of speculative, theoretical, or hypothetical views to the jury.'" *Graves v. Horry-Georgetown Technical College*, 391 S.C. 1, 7, 704 S.E.2d 350, 354 (Ct. App. 2010). Maybank offers no rebuttal to the lack of evidentiary support for McCann's key assumptions. Instead, he points to the testimony of Freeman, saying that such testimony also supports his damages. (p. 30, n.49). But Freeman was not qualified to testify as an expert about PVFCs and his analysis of PVFC costs erroneously omitted dividends, appreciation, and tax consequences, thereby rendering his opinion both unreliable and speculative.

Statute of Limitations. Maybank offers no rebuttal to the fact that he was aware Kapoor was performing some of the duties under the WMA,[58] nor does he rebut the fact that he was aware of the sharp decline in the value of his portfolio account in October of 2008. These events triggered the running of the three-year statute of limitations.

VII. The Punitive Damages Verdict Is Tainted, Requiring a New Trial.

BB&T Corp should have been dismissed from the case prior to submission to the jury. There was no viable claim against it, nor was personal jurisdiction established. Its presence as a defendant during jury deliberations tainted the punitive damages verdict. "Where the verdict awards punitive damages, the courts have taken the view that on reversal of the judgment or setting aside of the verdict as to one of several defendant tortfeasors, it must also be set aside as to the others." *Gray v. Green Constr. Co.*, 263

[58] Contrary to Maybank's assertion, (p. 32, n.51), the Defendants did present to the trial judge the fact that Maybank had knowledge of the fact that others would be performing the WMA. (Defs.' Mot. for JNOV at 5). The Defendants also informed the trial judge at the DV stage that they relied generally on Maybank's knowledge in 2006, (Tr. 1021), and that they relied on all knowledge of Maybank to support a finding that the claims were barred by the statute of limitations. (Tr. 1810-11). The JNOV motion expressly incorporated all prior DV arguments, both oral and written. (Defs.' Mot. for JNOV at 1-2).

S.C. 554, 559, 211 S.E.2d 871, 874 (1975). Maybank knew he was taking the risk of a retrial by including BB&T Corp in the suit.[59] Maybank fails to address the holding in *Gray*. BB&T's presence was not harmless or cumulative, as Maybank suggests.

Maybank's counsel relied significantly during closing argument on the Oliver memorandum and the purported involvement by BB&T Corp's General Counsel:

> The memorandum to Pat Oliver, you have seen it several times. . . . Now we know that none of the representations in this letter are true. . . . *The general counsel signed it, although she knew it was not true*. Mr. Maybank is provided a copy, totally unaware that the memorandum is a fabrication . . . . You heard Professor Freeman say it was an outrageous violation of fiduciary standards . . . . [T]he rules were violated, and not in a simple oversight way, but in a deliberate misrepresentation of material facts. And it's just not more likely than not. It's absolutely true. You have the letter. . . . The general counsel letter saying that we are doing all of these things, when, in fact, they are not doing them, did not do them, misled Mr. Maybank.

(Tr. 1930–1932; 1940) (emphasis added). Maybank's counsel was plainly attempting to incite the jury to punish BB&T Corp for the alleged conduct of its General Counsel.[60] This taint on the punitive damages verdict can only be remedied by a new trial. The jury would also have been exposed to BB&T Corp's financial data in its Annual Reports,[61] (Agr. Ex. 81 at 28-31), where billions in assets and revenue would likely have influenced the jury's determination as to the amount of the punitive damages verdict, especially if it believed it had reason to punish BB&T Corp.[62]

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[59] Maybank could have avoided this issue altogether by dismissing BB&T Corp just before trial, as he did with the individual defendants, Anthony Mahfood and Ross Walters. (Pls.' 2d Am. Compl.).

[60] Maybank also used John Freeman to criticize BB&T Corp. After confirming that Pat Oliver was the General Counsel and one of the top executives of "BB&T Corporation," Freeman testified that the Oliver memorandum shows that "the highest corporate officers in the company have signed on to this program and signed onto this product and consider it to be appropriate and an appropriate way to sell it." (Tr. 694).

[61] BB&T Corp's annual reports do not separate the financial information of BB&T Corp and its subsidiaries, but, instead, present the information in a consolidated fashion.

[62] Maybank contends that any argument based on the Annual Reports is waived because there was no evidentiary objection. (p. 24-25). But any objection was negated by the fact that BB&T Corp was still (erroneously) in the case at the time, thus making the reports admissible.

CONCLUSION

For the foregoing reasons, as well as those asserted in Appellants/Respondents' initial brief, this Court should reverse the judgment entered below and enter judgment in favor of Appellants/Respondents as to all claims. Alternatively, this Court should enter judgment in favor of BB&T Corp., and order a new trial as to any remaining claims against BB&T Bank and BB&T AM not already rejected by the jury.

Respectfully submitted,

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September 3, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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

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

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

v.

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

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants/Respondents, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy to the following address(es):

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