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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.

Final Appellants' Brief of Appellants/Respondents

C. Mitchell Brown
D. Larry Kristinik
Brian P. Crotty
Michael J. Anzelmo
NELSON MULLINS RILEY & SCARBOROUGH, LLP
Post Office Box 11070
Columbia, SC 29211-1070
(803) 799-2000

William S. Brown
NELSON MULLINS RILEY & SCARBOROUGH, LLP
104 South Main Street
Post Office Box 10084
Greenville, SC 26603-0084
(864) 250-2300

Attorneys for Appellants/Respondents BB&T Corporation, Branch Banking & Trust Company and Sterling Capital Management, LLC

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Statement of Issues

1. Did the trial court err in failing to grant Defendants directed verdict or JNOV on the UTPA claim because of the application of the securities exemption?

    a. Did the trial court err by not reserving for itself the issue of the applicability of the securities exemption and by not finding, as a matter of law, that the relevant transactions involved securities?

    b. Did the trial court err by failing to apply the correct standard for the application of the UTPA's securities exemption – whether securities transactions were involved or whether the acts were regulated under state or federal securities law?

    c. Did the trial court err by failing to find that Pre-paid Variable Forward Contracts and the Managed Portfolio Account involved securities that render the UTPA's securities exemption applicable?

    d. Did the trial court err by failing to find Maybank's claimed damages under the UTPA claim related exclusively to Pre-paid Variable Forward Contracts and the Managed Portfolio Account, rendering the securities exemption applicable?

2. Did the trial court err by failing to find that it lacked personal jurisdiction as to BB&T Corporation?

    a. Did the trial court err by failing to find that both specific and general jurisdiction were lacking because activities of subsidiary corporations do not provide a basis for jurisdiction and BB&T Corporation did not, itself, direct any activities towards South Carolina or engage in any activities giving rise to the claims?

    b. Did the trial court err in finding that BB&T Corporation waived its objection to the lack of personal jurisdiction?

3. Did the trial court err in failing to grant BB&T Corporation directed verdict or JNOV where there was no evidence as to BB&T Corporation supporting the individual claims or punitive damages?

4. Did the trial court err by failing to find that the Wealth Management Agreement barred Maybank's claims for punitive and treble damages where the provisions of that agreement applied to the relevant transactions, the plain language of the agreement barred such damages, and the provisions of the agreement are neither violative of public policy nor unconscionable?

5. Did the trial court err by refusing to require Maybank to elect between the punitive damages award and treble damages under the UTPA where Maybank suffered the same "wrong" as to all claims, and allowing a double recovery of exemplary damages violates due process?

6. Did the trial court err by failing to grant all Defendants directed verdict or JNOV because Maybank's damages were speculative and unsupported by the evidence?

7. Did the trial court err in failing to grant Defendants directed verdict or JNOV as to Maybank's claims because the elements were not supported?

    a. Did the trial court err in failing to grant directed verdict or JNOV as to the breach of contract claim because it was permissible for BB&T Asset Management to perform some functions under the agreement, Maybank was aware of this performance and waived any objection, all obligations were fully performed, and there were no damages resulting from any breach?

    b. Did the trial court err in failing to grant directed verdict or JNOV as to the breach of fiduciary duty claim because Maybank failed to establish the existence of a fiduciary relationship and failed to show fiduciary duties that were breached or damages that were proximately caused by such breach?

    c. Did the trial court err in failing to grant directed verdict or JNOV as to the negligent misrepresentation and constructive fraud claims because there was no evidence supporting a misrepresentation, and no detrimental reliance thereon?

    d. Did the trial court err in failing to grant directed verdict or JNOV as to the UTPA claim because there was no evidence Defendants engaged in any unfair or deceptive acts, no evidence such acts affected the public interest or were capable of repetition, and no evidence of damages proximately caused by such violations?

8. Did the trial court err in failing to grant directed verdict or JNOV as to all claims based on the statute of limitations?

9. Did the trial court err in allowing John Freeman to testify as an expert with regard to Pre-paid Variable Forward Contracts despite his lack of qualifications to do so?

10. Did the trial court err in granting Maybank's motion for treble damages under the UTPA because there was no evidence supporting the conclusion that Defendants conduct constituted a "willful or knowing" violation of the UTPA?

11. Did the trial court err in granting Maybank's motion for attorneys' fees and costs, because the motion lacked adequate support that allowed a proper evaluation, it was not reasonably limited to the fees and costs related to the UTPA claim, it improperly included a lodestar enhancement, and it included improper costs?

12. Did the trial court err in allowing and approving the punitive damages verdict because there was no evidence Defendants acted in a willful, wanton or reckless manner, and in its *Mitchell v. Fortis* analysis of the punitive damages?

Statement of the Case

Respondent/Appellant Francis P. Maybank ("Maybank") initiated this action on December 22, 2011, by filing a Complaint against Appellants/Respondents BB&T Corporation ("BB&T Corp"); Branch Banking and Trust Company ("BB&T Bank"), and Sterling Capital Management, LLC, successor to BB&T Asset Management LLC ("BB&T AM").[1] (R. 137). The Second Amended Complaint, filed on May 22, 2014, is the operative complaint.[2] (R. 246). Defendants timely answered. (R. 186, 212, 322).

Trial started on June 16, 2014. (R. 1751). Defendants sought directed verdict at the end of Maybank's case, (R. 981, 2309-2317), then again at the close of all evidence. (R. 2624-50). These motions were denied. (R. 2317, 2650-52). Maybank and the Trust voluntarily dismissed the claims for negligence and fraud. (R. 2628).

The jury returned a verdict in favor of Maybank and against all Defendants on five of the claims: (1) breach of contract, (2) breach of fiduciary duty, (3) UTPA, (4) constructive fraud, and (5) negligent misrepresentation. (R. 51). The jury returned a verdict in favor of Defendants on all other claims and as to all claims asserted by the Trust. (*Id.*). The jury awarded Maybank $3.1 million in actual damages and $5 million in punitive damages against all three Defendants. (*Id.*).

Defendants timely moved for JNOV and new trial absolute or, in the alternative, for a new trial *nisi remittitur*. (R. 1012, 1253). Defendants also filed a motion to compel an election of remedies. (R. 1060). Maybank filed motions for attorneys' fees and costs and to treble damages under the UTPA. (R. 1075, 1219). Maybank also moved for prejudgment interest. (R. 1066). Defendants opposed them and filed three motions

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[1] The Complaint also named Ross Walters and Anthony Mahfood, but they were later dropped.

[2] This pleading added the Francis P. Maybank Family Insurance Trust ("the Trust") as a plaintiff.

related to Maybank's requests for additional UTPA remedies. (R. 1232, 1237, 1244, 1364, 1374, 1432). A hearing on the post-trial motions was held on August 19, 2014. (R. 2749). Thereafter, Maybank submitted two proposed orders, and Defendants filed objections to those proposed orders. (R. 1538, 1595, 1689, 1726).

On November 10, 2014, the trial court ruled on the post-trial motions. (R. 56, 99). The trial court denied the Defendants' motions, denied Maybank's motion for pre-judgment interest, and granted his motions to treble damages and for attorneys' fees. (*Id.*). The actual damages were trebeled to $9.3 million. (*Id.*). The total award was $14.3 million. (*Id.*) The award of attorneys' fees was for $2,654,295 and $245,011 in costs. (*Id.*). A judgment for $17,199,306 was entered against all three Defendants. (*Id.*).

Defendants filed a motion to reconsider the November 10, 2014 Order. (R. 1736). The trial court denied the motion. (R. 133). Defendants then filed this appeal. (R. 5460). Maybank appealed the denial of post-judgment interest. (R. 5517). On March 5, 2015, this Court certified the appeal from the Court of Appeals. (R. 5559).

Statement of the Facts

After graduating from Harvard, Maybank worked in the investment advisory industry for nearly 50 years, spending two decades in New York City before moving to Greenville, South Carolina, where he started a successful investment advisory firm with over $200 million in assets under management. (R. 1848-53, 1957-61). Maybank then formed Southeastern Trust Company ("Southeastern"), which managed investments of over $700 million. (R. 1853-54, 1965-66). Maybank was an experienced and successful investor and money manager who spent decades advising customers about the stock market and how they should best invest their assets. (R. 1848-54).

In November 2001, Maybank sold his interest in Southeastern to BB&T in exchange for 246,000 shares of BB&T Corp stock (R. 1859-61), and he began working for BB&T Bank as a senior level wealth advisor in its Wealth Division. (R. 1860, 2475). He was named a senior vice-president of BB&T Bank and earned an annual salary of $100,000. (R. 1975, 5322). The tax basis in the BB&T shares received by Maybank was extremely low, about $3.00 a share, (R. 1973), meaning that a sale of the shares would generate significant capital gains tax liability. BB&T stock historically paid a significant dividend, which amounted to hundreds of thousands of dollars per year for Maybank's shares. (R. 2005). Maybank placed this stock in his brokerage account with Scott & Stringfellow ("S&S"), where these shares represented almost all of his liquid assets. (R. 1974, 1995). He recognized from the outset that having virtually all of his stock holdings in BB&T stock was a risky "concentrated" position, (R. 1974), although having all of his invested assets in stocks, rather than bonds, was consistent with his long-time investing philosophy. (R.1986, 1988, 1994-97, 2330, 2347, 2351-52).

Maybank had significant expenses that far exceeded his income. He paid for graduate and private school and other expenses for his children and grandchildren, he maintained two farms and a home on Meeting Street in Charleston, and he owned a horse racing business that operated at a loss almost every year. (R. 5200-5310, 1978-83, 1994, 2000-02, 2004, 2008-11). Rather than cut these expenses, Maybank chose to borrow on margin. (R. 1880-81). By July of 2006, Maybank had a margin debt of $2.7 million secured by his BB&T stock. (R. 5157). Maybank resisted selling his stock to diversify because he wanted to keep receiving the dividend (which was over 75% of his income) and he did not want to incur large capital gains. (R. 1993, 2020). Under the sale

agreement, Maybank was free to sell the BB&T stock in December 2003. (R. 1992-93).

In mid-2006, Maybank was working with one of his long-time clients, Effie Bowers ("Bowers"), to address her concentrated position in a single stock. (R. 2016-17). The agreed solution for Bowers was a prepaid variable forward contract ("PVFC"). (R. 2017-18). A PVFC is an investment contract in which the stock is sold to an investment bank for an upfront payment of around 75% - 90% of its value, but title to the stock is not transferred typically for 2-3 years, thereby deferring capital gains taxes and allowing the customer to continue to receive dividends and benefit from appreciation.[3] (R. 2369-71). A PVFC is a risk hedging strategy because the customer has the right to retain all of the upfront proceeds, no matter how low the value of the stock has fallen when the maturity date arrives. (R. 2370). Maybank was part of the team of people from BB&T Bank and BB&T AM assisting Bowers and was present when the option of a PVFC was discussed and, ultimately, selected by her. (R. 2323). During this process, Maybank posed key questions about the PVFC solution, showing an understanding of this type of a securities contract.[4] (R. 3423, 3458, 3465). Maybank had gained knowledge about PVFCs from written presentations circulated to him and other wealth advisors. (R. 2399-2400).

After becoming familiar with PVFCs, Maybank recognized that a PVFC was a good solution to his own situation, and he informed fellow BB&T Bank wealth management advisor Anthony Mahfood ("Mahfood") that he would like to enter into a PVFC. (R. 2407). Mahfood asked Shawn Gibson ("Gibson") of BB&T AM's alternative

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[3] A description of PVFCs is in written materials produced from Maybank's personal files. (R. 5093). Expert witness Robert Thorne also describes how a PVFC works. (R. 2369-77).

[4] Maybank's questions included (a) what would be the amount of the upfront proceeds; (b) what was the transaction cost; (c) what were the tax consequences; (d) what would be the costs of closing it out; (e) what would be the costs of "rolling" it into another PVFC; (f) what happens at the end of the PVFCs term; and (g) what happens if Bowers died before the term ended. (R. 3423, 3458, 3465).

investment team to prepare illustrations of the anticipated PVFC terms and to execute the transaction.[5] (R. 2409). Throughout this process, Maybank was involved in guiding how the transaction was structured. (R. 3005). Maybank demonstrated a high level of sophistication as his PVFC transaction proceeded. (R. 3036).

Maybank entered into a PVFC with Bear Stearns & Co. ("Bear Stearns"), and the transaction was executed on August 11, 2006. (R. 3505). Prior to the transaction, Maybank reviewed and signed all required agreements and disclosures, was provided with and reviewed a detailed description of the costs and benefits of PVFCs, and also consulted with his personal tax advisor regarding the tax implications of the PVFC. (R. 5311, 2530-2533, 2024, 2026-28, 5093, 5105, 5361). Maybank was required to participate in a conference call with Bear Sterns to go over the specific terms of the PVFC and to express his agreement to those terms. (R. 2415-16). Mahfood had informed Maybank of the PVFC terms prior to the call. (R. 2412).

Maybank's 2006 PVFC was for a three-year term ending in August 2009. (R. 3505). Maybank agreed to pledge 220,000 of his BB&T shares (then valued at approx. $9.3 million) in return for an upfront payment of over $7.1 million. (*Id.*). Upon receiving this upfront payment, Maybank paid off his large margin debt with S&S. (R. 1905). After the transaction, Maybank continued receiving the substantial BB&T dividends, and he had no capital gains tax liability in 2006 related to the transaction. (R. 2037). Had Maybank instead sold his stock to diversify, he would have immediately incurred a $1.6 million tax liability and would have lost the BB&T dividends, which, as of July of 2006,

[5] Gibson was an expert in stock options, a key feature of a PVFC, and leveraged this expertise to help clients with PVFCs. (R. 2970-83, 2996-3005). By the time of Maybank's PVFC, Gibson had already handled several PVFC transactions and had a thorough understanding of how PVFCs worked and their costs and benefits, as shown by the PVFC written presentation he prepared. (*Id.* at 2973, 2997; R. 3481).

were providing him income of nearly $400,000 annually. (R. 2369, 2388, 2590).

Shortly after executing the PVFC, Mabank entered into a Wealth Management Agreement ("WMA") with BB&T Bank and BB&T AM. (R. 3524). The WMA governed a managed portfolio account ("MP Account") created with the approximately $4.6 million in proceeds from the PVFC remaining after the margin debt had been paid off.[6] Prior to entering into the WMA, Maybank had several meetings with Kris Kapoor ("Kapoor"), a BB&T AM employee who served as the initial portfolio manager. (R. 2042, 2329). They had long discussions about Maybank's investment objectives and risk tolerance. (R. 2038, 2042, 2050, 2342-43). Kapoor advised that bonds be part of the portfolio, but Maybank preferred an aggressive growth 100% equities objective. (R. 2043-44, 2051, 2329, 2332, 2343). Maybank signed a form indicating this was his investment objective. (R. 3535). Kapoor diversified the portfolio by selecting "blue-chip" equities from a wide range of industry sectors. (R. 2051, 2330). Maybank considered this to be a conservative approach and was both comfortable and pleased with the selected stocks and the level of diversification they provided. (R. 2051-52).

After the PVFC, Maybank continued to receive the BB&T dividends as well as additional dividend and interest income from the $4.6 million invested in his MP Account. But he still had large expenses, and they continued to outpace his income. During 2007, his MP Account generated over $162,000 in income, but he withdrew over $500,000. (R. 5121). By September of 2008, he had income for the year of $88,000, but again had withdrawals of over $500,000. (R. 3613). Maybank also continued to use his margin account with S&S to meet expenses, and by June of 2008, his margin debt was

[6] Had Maybank sold his BB&T stock instead of entering into the PVFC, he would have had $5.2 million remaining after he paid the margin debt and the $1.6 million tax liability. (R. 2388).

back up to $721,000. (R. 2066-67; R. 5171). All of the BB&T dividend payments, over $400,000 a year, were going into Maybank's checking account, where they were quickly spent. (R. 2037).

In the fall of 2008, the global financial crisis occurred. By the end of 2008, Maybank had market losses in his MP Account of over $1 million. (R. 3633). Maybank chose to stay with his 100% equities investing philosophy, and confirmed this with a new investment objective form. (R. 5111; R. 2059-60). Also, the value of the 220,000 shares pledged to the PVFC had plummeted from $9.3 million in August of 2006 to just $3 million by March of 2009. (R. 5427). If Maybank had not entered into the PVFC and paid off his margin debt back in 2006, he would have experienced numerous margin calls in 2009 and 2010 that would have left him with only $133,000. (R. 2520-21). Maybank, however, was protected by the PVFC and had no obligation to return the $7.1 million in upfront proceeds he had received from Bear Stearns in 2006 and used in part to pay off his margin debt. (R. 2371-77).

In December of 2008, Maybank approached BB&T Bank and requested proposals for terminating his PVFC eight months early and entering into a new PVFC that would extend the time he would own the stock and receive the dividends (referred to as an "unwind and roll"). (R. 2067, 2543-45; R. 3462, 5331). BB&T stock had declined in value, but this had the positive result of lowering the out-of-pocket cost to unwind and roll.[7] (R. 2067, 2548-499). Maybank posed questions about the cost to unwind the first PVFC and recognized the potential for a dividend cut by BB&T prior to the end of the new PVFC due to the poor financial climate. (R. 3120; R. 2068, 2424, 2546). Maybank

[7] There was a $1.3 million out-of-pocket cost to unwind the first PVFC and to enter into the second one. (R. 5114; R. 2557). Had Maybank waited, it would have cost over $1.7 million. (R. 2382).

again involved his tax consultant to assess the tax impact. (R. 5113, 5312; R. 2072, 2537-38). Maybank selected a two-year PVFC with Deutsche Bank, and the PVFC was executed on January 20, 2009. (R. 2425-29, 2571-73). Maybank signed required agreements and disclosures and participated in a call with the investment bank, when the terms of the PVFC were explained. (R. 3566, 3567, 5425; R. 2430).

In June of 2009, BB&T Corp, like most other U.S. banks, cut its share dividend, reducing the annual dividends received by Maybank from approximately $400,000 to only approximately $130,000. (R. 2074). This greatly reduced Maybank's income, which had already been insufficient to meet his high expenses. It was only after this dividend cut that Maybank contacted BB&T Bank to complain about the PVFCs. (R. 1941).

Maybank closed his MP Account with BB&T Bank in February of 2010 and moved his remaining stock positions to his S&S portfolio. He later closed his S&S account and opened a brokerage account with Charles Schwab. (R. 2081). Maybank went on to unwind and roll his PVFC three more times himself, without any involvement of BB&T Bank or BB&T AM. (R. 5388-5424; R. 2078). These transactions were negotiated directly by Maybank with Deutsche Bank. (*Id.*). Maybank's PVFC transactions ended in December 2012 when he terminated his fifth PVFC. (R. 2081). At that time, due to the increase in the value of the BB&T stock and the terms of the PVFC, he was able to retain 27,978 of the pledged shares worth over $818,000. (*Id.*). Maybank added these released shares to his account at Charles Schwab, giving him an account value of nearly $2 million as of December 31, 2012. (R. 5177). During the 6 years the PVFCs were in effect, Maybank received over $1.5 million in dividends that he would have lost had he sold his BB&T stock in 2006. (R. 5328). Rather than paying over $1.6

million in capital gains taxes if he had sold his stock, the total taxes from the five PVFCs were $770,000. (R. 2590, 2594-95; R. 5329, 5330).

Argument

I. The Trial Court Erred by Failing to Enter JNOV on Maybank's UTPA Claim Based on the Securities Exemption.

Maybank's UTPA claim fails as a matter of law because it is based on securities related conduct and transactions that are exempted from the UTPA. Thus, the trial court should have granted judgment to the Defendants on Maybank's UTPA claim.

A. Whether alleged conduct or transactions fall within the securities exemption is an issue to be determined by the trial court, not the jury.

The trial court erred by not reserving for itself the determination as to whether the securities exemption applied. It is beyond the province of the jury to assess whether the exemptions set forth in § 39-5-40 apply. This determination necessitates reference to complex statutory schemes and regulations, and is a question of law.[8]

Further, whether securities are involved in Maybank's claims is a question of law. *See Majors v. S.C. Sec. Comm'n*, 373 S.C. 153, 159, 644 S.E.2d 710, 713 (2007) ("The issue in this case involves a decision of whether TLA's sale of TLCs constitutes the sale of securities. We find this is a novel question of law..."). Further, JNOV should have been granted because the only reasonable inference supported by the evidence is that the acts and practices at issue are exempted from the application of the UTPA. *Andrade v. Johnson*, 356 S.C. 238, 245, 588 S.E.2d 588, 592 (2003).

B. Securities related conduct and transactions are exempt from the UTPA.

[8] There is no practical means of charging the jury on the application of subsection (d) which exempts "[a]ny challenged practices that are subject to, and comply with, statutes administered by the Federal Trade Commission and the rules, regulations and decisions interpreting such statutes." S.C. Code Ann. § 39-5-40(d). This presents a complicated legal question for the trial court.

This Court first applied the securities exemption to the UTPA in *State ex rel. McLeod v. Rhoades*, 275 S.C. 104, 267 S.E.2d 539 (1980), *abrogated on other grounds by* 349 S.C. 613, 564 S.E.2d 653 (2002). There, the Attorney General commenced an action under the UTPA asserting unfair and deceptive acts and practices with respect to "the public offering and sale of the stock of Cartridge Televisions, Inc., from July, 1971 to July, 1973." *Id.* at 105, 267 S.E.2d at 540. The Court concluded that the complaint did not state a claim:

> In this action, appellants have shown that the transactions complained of *are regulated by the Securities and Exchange Commission and under the South Carolina Uniform Securities Act*. Violation of these regulations subjects an offender to liability. We, therefore, believe that securities transactions fall within the exemption provided at Section 39-5-40.

Id. at 107, 267 S.E.2d at 541 (emphasis added). Later, in *Ward v. Dick Dyer & Assocs., Inc.*, 304 S.C. 152, 403 S.E.2d 310 (1991), the Court adopted a more restrictive approach to the regulated entity exemption set forth in § 39-5-40. The Court, however, still retained a broad view of the exemption as it applied to securities transactions, stating:

> 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. Therefore, *we choose to follow the vast majority of jurisdictions in holding that securities transactions remain exempt from claims under the UTPA.*

Id. at 155 n.1, 403 S.E.2d at 312 n.1 (emphasis added). The Court again reaffirmed the securities exemption in *Unisys Corp. v. S.C. Budget & Control Bd.*, and used that decision to create a similarly broad exemption for transactions governed by the South Carolina Procurement Code, holding:

> In *Ward v. Dick Dyer and Assocs., Inc.*, 304 S.C. 152, 403 S.E.2d 310 (1991), we rejected a "general activity" analysis that would exempt all activities regulated by an administrative body. We retained, however, the exemption recognized in *State ex rel. McLeod v. Rhoades*, 275 S.C. 104, 267 S.E.2d 539 (1980), for a security transaction because it is a "unique transaction . . . subject to strict regulation and must comply with stringent requirements." 304 S.C. at

> 155 n.1, 403 S.E.2d at 312 n.1. Similarly, we hold transactions under the Procurement Code are exempt from SCUTPA and the State's SCUTPA cause of action is not a viable claim.

346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001).

Hence, under the precedent of *Ward*, *Rhoades*, and *Unisys*, the proper standard for applying this exemption is whether securities transactions were involved or whether the acts were regulated under state or federal securities laws.[9] In his November 10, 2014 Order, Judge Miller applied the incorrect standard for the exemption, requiring that there be evidence that the acts at issue be "authorized under laws administered by any regulatory body or permitted by any other South Carolina law." (R. 64). This was error.

The need for broadly exempting securities related activities from state unfair trade practices acts was succinctly stated in *Sterner v. Penn*, 583 S.E.2d 670, 675 (N.C. Ct. App. 2003): "[T]he UDTPA does not apply to securities transactions because such application would create overlapping supervision, enforcement, and liability in an area of law that is already pervasively regulated by state and federal statutes and agencies." *Id.* at 675. For this reason, and as recognized in *Ward*, "the vast majority of jurisdictions" hold that "securities transactions remain exempt from claims under the UTPA." *Ward*, 304 S.C. at 155 n.1, 403 S.E.2d at 312 n.1. The cases demonstrate that all types of conduct and activities relating to securities transactions are exempt from state unfair trade practices acts.[10]

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[9] The trial court's Order also suggested that only entities registered as broker-dealers can be covered by the securities exemption. (R. 64-65). *Rhoades* and *Ward* do not so hold. The Securities Act addresses unregistered securities and unregistered persons and entities. *See* S.C. Code Ann. §§ 35-1-301, 1-401 to 1-404, 1-509. Moreover, it was stipulated by the parties that BB&T AM is an entity registered with the securities authorities as an investment advisor. (R. 2674).

[10] *See, e.g., Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162, 165–67 (4th Cir. 1985) (addressing North Carolina UTPA); *Rogers v. CISCO Sys., Inc.*, 268 F. Supp. 2d 1305, 1316–17 (N.D. Fla. 2003) ("Numerous other courts have held that various state unfair trade practices acts do not apply to securities transactions"); *Mercer v. Jaffe, Snider, Raitt & Heuer, P.C.*, 713 F. Supp. 1019, 1030 (W.D. Mich. 1989), *aff'd*, 933 F.2d 1008 (6th Cir. 1991) ("'[O]verwhelming' majority of decisions declin[e] to apply state consumer protection statutes to the securities field.").

The conclusion that all securities-related conduct and transactions are exempt from the UTPA is further supported by reference to the Federal Trade Commission ("FTC") and the FTC Act. The General Assembly instructed the courts to look to the FTC and federal case law interpreting the FTC Act for guidance when interpreting the UTPA. *See* S.C. Code Ann. § 39-5-20(b). Addressing a similar provision of the Connecticut UTPA, the court in *Russell v. Dean Witter Reynolds, Inc.*, 510 A.2d 972 (Conn. 1986), held the CUTPA did not permit a claim based on securities-related allegations, stating, "[t]he FTC has never undertaken to adjudicate deceptive conduct in the sale and purchase of securities, presumably because such transactions fall under the comprehensive regulatory umbrella of the Securities and Exchange Commission" and thus concluding that "taking our guidance from the FTC, we must construe CUTPA as not purporting to cover transactions for the purchase and sale of securities." *Id.* at 977.

Many other jurisdictions interpreting similar statutory language have reached the conclusion that the FTC does *not* take action to regulate securities-related transactions, and thus the FTC Act does *not* extend to such transactions. Accordingly, reference by our General Assembly to the FTC and FTC Act further supports the conclusion that transactions involving securities are not subject to the UTPA.[11]

C. PVFCs constitute "securities" under the definition set forth in § 35-1-102(29).

The PVFCs that form the basis of Maybank's claims qualify as securities under the definition in the S.C. Securities Act as well as the definitions in the federal Securities

[11] *See, e.g., Spinner Corp. v. Princeville Dev. Corp.*, 849 F.2d 388, 392 n.4 (9th Cir. 1988) (Hawaii UTPA not applicable to securities); *Stephenson v. Paine, Webber, Jackson & Curtis, Inc.*, 839 F.2d 1095, 1101 (5th Cir. 1988) (Louisiana UTPA does not apply to securities transactions); *Wyman v. Prime Disc. Sec.*, 819 F. Supp. 79, 86 (D. Me. 1993) (same for Maine UTPA); *Conkling v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 575 F. Supp. 760, 762–65 (D. Mass. 1983) (same for Massachusetts UTPA); *Bowen v. Ziasun Techs., Inc.*, 116 Cal. App. 4th 777, 787 (Cal. Ct. App. 2004) (same for California's Unfair Competition Law); *Skinner v. E.F. Hutton & Co.*, 333 S.E.2d 236, 241 (N.C. 1985) ("[S]ecurities transactions are beyond the scope of N.C.G.S. 75-1.1").

Exchange Acts of 1933 and 1934.[12] Indeed, Maybank asserted in his Complaint a claim under the state Securities Act and presented expert testimony to support the claim.[13] (R. 253-54 at ¶¶ 37-38). Maybank's securities expert, Craig McCann, described a PVFC as "[a]n over-the-counter derivative contract" and explained how it includes "put options and call options." (R. 2237-40). The Defendants' securities expert, Robert Thorne, explained that a PVFC provides an investor with the option to sell stock at a future date, while allowing the investor to participate in future appreciation, receive dividends, and hedge the risk of a sharp drop in stock value. (R. 2369-71). The confirmation statements for the 2006 and 2009 PVFCs also make it clear that they fall within the securities laws, as the statements include references to the Securities Exchange Acts of 1933 and 1934, the Commodity Exchange Act, and SEC rules. (R. 3505, 3580). The confirmation for the 2009 PVFC explains that it is required pursuant to Rule 10b-10 promulgated under the 1934 Securities Exchange Act and includes as a signatory the registered broker-dealer entity for Deutsche Bank. (R. 3580). Further, after the PVFCs were executed, Maybank began receiving periodic statements from broker-dealer entities affiliated with Bear Stearns and Deutsche Bank. (R. 3645, 3662).

In subsection (29) of § 35-1-102 of the Securities Act, a "security" is broadly defined to include any "investment contract" as well as puts, calls, and options.[14] S.C. Code Ann. § 35-1-102(29). The definition of "security" applies to more than stocks and

[12] It is indisputable that the MP Account involves securities, as it was an investment account used for the buying and selling of stocks and other securities. (R. 2333-2335). This is confirmed by the account statements which show the securities held in the account. (R. 3613).

[13] The jury verdict for the Defendants on the Securities Act claim has no bearing on whether the alleged conduct and transactions are securities related. The basis for the jury's rejection of the Securities Act claim is unknown. The jury may have concluded that the other required elements of a Securities Act claim were not satisfied (*i.e.*, misrepresentation, engaging as a broker-dealer without being registered, etc.). Regardless, whether an exemption to the UTPA applies is a question of law for the trial judge.

[14] The same analysis is applicable with respect to the broad definition of "security" under federal law. *See* 15 U.S.C. § 77b(a)(1); 15 U.S.C. § 78c(10).

bonds. It applies to any contract that bears the basic characteristics of a security. *See McGaha v. Mosley*, 283 S.C. 268, 273, 322 S.E.2d 461, 464 (Ct. App. 1984) (holding written assignment of interest in profits under franchise agreement was a security).

A PVFC is a form of investment contract. The subject of the contract is BB&T stock, it involves options in the form of embedded puts and calls, it has a provision addressing the payment of dividends, it can involve the final disposition of the stock, and there is risk and benefit to the investor that are dependent on the movement of the stock price. The very fact that options are part of the PVFC standing alone requires a finding that these contracts are securities because "options," "puts," and "calls" are expressly delineated within the definition of "security" in § 35-1-102(29). Hence, Maybank's PVFCs constitute "securities" under the S.C Securities Act and federal securities laws and are therefore excluded from the application of the UTPA.[15] Other courts around the country have concluded that PVFCs are "securities" for purposes of application of the securities laws.[16] *See, e.g., Chechele v. Sperling*, 758 F.3d 463, 471 (2d Cir. 2014) ("[T]he PVFC transaction was a sale of stock; both the rights the Sperlings granted and received are 'put equivalent positions' deemed to be 'sale[s] of the underlying securities for purposes of section 16(b).'") (quoting 17 C.F.R. § 240.16b-6(a)); *Anschutz Co. v. Comm'r*, 664 F.3d 313, 315-16 (10th Cir. 2011) (holding entry into PVFC constituted sale of shares of stock and defining PVFC as "a species of forward contract" in which

[15] To defeat the securities exemption, Maybank must also overcome the fact that the MP Account involves securities. It is indisputable that the MP Account is an investment account that holds securities. Because a large component of Maybank's alleged UTPA damages analysis indisputably relies on the existence of the MP Account, (R. 2290-91; R. 3762-65), the entire judgment related to the UTPA claim (including the trebling of damages and award of attorneys' fees and costs) must be vacated.

[16] "[I]n construing the state act, [the Court] may look for guidance to cases construing its federal counterpart." *Majors v. S.C. Securities Comm'n*, 373 S.C. 153, 163, 644 S.E.2d 710, 715 (2007).

"the shareholder 'pledges' shares of appreciated stock to the counterparty, which is granted a security interest in the pledged shares"); *Kline v. First W. Gov't Sec.*, 24 F.3d 480, 482 (3d Cir. 1994) ("A 'forward contract' is a contract to purchase or sell a specified security, at a designated interest rate, on a fixed future date."); *Donaghue v. Patterson Cos.*, 990 F. Supp. 2d 421 (S.D.N.Y. 2013) (applying securities law to PVFC).

D. Maybank's damages relate only to the PVFCs and MP Account.

Under § 39-5-140 of the UTPA, Maybank must prove an "ascertainable loss of money . . . *as a result* of the use or employment by anther person of an unfair or deceptive method, act or practice." S.C. Code Ann. § 39-5-140(a). Thus, a UTPA claim cannot survive if there is no evidence to support a finding of actual damages proximately caused by the alleged unfair or deceptive conduct.

Because of the securities exemption, Maybank cannot rely on any alleged damages relating to the PVFCs or MP Account. Maybank's damages expert, Craig McCann, offered damages figures *related only to the PVFCs and MP Account*. Agreed Exhibit 72 includes the damages reports generated by McCann. Exhibits 8 and 9 of these reports calculate damages related to the MP Account and estimate those damages to be in the range of $877,141 to $1,405,565. (R. 3762-65). Exhibits 3 and 4 to his reports calculate damages related to the PVFCs to be in the range of $1,956,620 to $1,984,161. (R. 3769-70).

The trial court's Order references three separate facts supporting the UTPA claim which the trial court characterized as not relating to securities: (a) unfulfilled promises in the WMA, (b) the 2012 fee rebate letter, and (c) the memorandum to Pat Oliver. (R. 63). But there is no evidence linking any alleged damages to these facts without reference to the PVFCs and the MP Account. Moreover, each of these alleged acts is inextricably

intertwined with the PVFCs and MP Account and, therefore, is related to securities. For example, the WMA was the operative contract that governed the MP Account. (R. 3524). Hence, Maybank has no viable argument that non-securities activities, if any, could support his UTPA claim. Accordingly, the trial court erred by failing to grant JNOV for the Defendants as to this claim.

II. As To BB&T Corp, There Was No Personal Jurisdiction and No Evidence Supporting Any Claim or the Award of Punitive Damages.

A. Personal jurisdiction as to BB&T Corp does not exist.

BB&T Corp is a North Carolina corporation with no offices, employees, or operations in South Carolina. (R. 247 at ¶ 3). At no time did BB&T Corp provide any services to Maybank or any South Carolina customers, nor did BB&T Corp charge Maybank any fees or act as a custodian of any of his accounts.

"It is the plaintiff's burden to show that the court has personal jurisdiction over the defendant." *Fassett v. Evans*, 364 S.C. 42, 47, 610 S.E.2d 841, 843 (Ct. App. 2005). At trial, a plaintiff must do more than make a mere prima facie case, and must prove personal jurisdiction exists by a preponderance of the evidence. *See Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 399 (5th Cir. 2009). A finding of personal jurisdiction must be reversed if "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).

Personal jurisdiction may be "exercised as 'general jurisdiction' or 'specific jurisdiction,'" but in either instance "must comport with due process requirements and must not offend traditional notions of fair play and substantial justice." *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). "[D]ue process requirements must be met *as to each defendant* and thus the Court is to

assess individually each defendant's contacts with South Carolina." *Cockrell*, 363 S.C. at 492, 611 S.E.2d at 508 (emphasis added). Neither specific jurisdiction nor general jurisdiction was established as to BB&T Corp, and this requires that the judgment against BB&T Corp be reversed and a new trial granted for the remaining Defendants.

1. Personal jurisdiction over a parent corporation cannot be based on the activities of a subsidiary corporation.

The actions of BB&T Corp's subsidiaries occurring in South Carolina are insufficient to convey personal jurisdiction over BB&T Corp. *See, e.g., Yarborough & Co. v. Schoolfield Furniture Indus., Inc.*, 275 S.C. 151, 153, 268 S.E.2d 42, 44 (1980). An analogous case was addressed by the South Carolina Court of Appeals in *Builder Mart of Am., Inc. v. First Union Corp.*, 349 S.C. 500, 563 S.E.2d 352 (Ct. App. 2002), *overruled on other grounds*, *Farmer v. Monsanto Corp.*, 353 S.C. 553, 579 S.E.2d 325 (2003), where the Court of Appeals affirmed the trial court's ruling that it lacked personal jurisdiction over a bank holding company. The Court of Appeals held that even if the trial court could "exercise jurisdiction over [the subsidiary] because of its actions, that fact alone would not be sufficient to extend jurisdiction over First Union." *Id.* at 507, 563 S.E.2d at 356. The court explained: "Although FUNB(NC) is a subsidiary of First Union, the companies are separate legal entities operating under separate boards of directors with separate employees, assets, and places of business. As a general rule, a parent or holding corporation is not liable on the contracts of its subsidiary." *Id.* Here, Maybank made no argument that the corporate separateness should be disregarded.

2. The evidence does not support specific jurisdiction as to BB&T Corp.

"Specific jurisdiction is the State's right to exercise personal jurisdiction because the cause of action arises specifically from a defendant's contact with the forum."

Coggeshall, 376 S.C. at 16, 655 S.E.2d at 478. The existence of specific jurisdiction is determined under the South Carolina long-arm statute, S.C. Code Ann. § 36-2-803. While "[p]ersonal jurisdiction under the long-arm statute is subject to a two-step analysis: (1) the power prong and (2) the fairness prong," the "focus must center on *the contacts generated by the defendant*." *Builder Mart*, 349 S.C. at 506–507, 563 S.E.2d at 355. Further, the "power prong" is satisfied only where the court finds that a defendant "directed its activities to residents of South Carolina and that the cause of action arises out of" those activities. *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 331–32, 594 S.E.2d 787, 884 (Ct. App. 2004).

a. BB&T Corp did not direct any activities toward South Carolina, nor did any of its activities give rise to the claims.

There were no contacts by BB&T Corp in South Carolina that would satisfy the "power prong" or which would otherwise support a finding of specific jurisdiction. The trial court based its finding of jurisdiction on two documents: (1) a memorandum about Maybank's PVFC provided to Pat Oliver ("the Oliver Memorandum"), and (2) the BB&T Code of Ethics. (R. 73-74). Neither of these offer any support for a finding of specific jurisdiction over BB&T Corp.[17]

(1) The Oliver Memorandum does not support jurisdiction.

On August 11, 2006, Mahfood sent BB&T Corp's General Counsel, Pat Oliver, a memorandum providing notice that Maybank, was planning to enter into a PVFC involving BB&T stock, and requesting Oliver's approval as required by the BB&T Code

[17] Judge Miller referenced without discussion in his Order subsection (7) of S.C. Code Ann. § 36-2-803(A). (R. 73). This part of the long arm statute provides for the exercise of personal jurisdiction when the defendant has "ent[ered] into a contract to be performed in whole or in part by either party in this State." It is undisputed, however, that BB&T Corp was *not a party* to any contract with Maybank, and a review of the agreements introduced at trial confirms this fact. (R. 3478, 3524, 3566, 3590).

of Ethics. (R. 3501). Gibson with BB&T AM prepared the memorandum, and Mahfood reviewed it for accuracy before sending it to Oliver. (R. 2409). Oliver signed the memorandum, indicating she had reviewed it and approved the transaction. (R. 3501). Oliver dated her signature August 11, 2006, which was the same day that Maybank and Bear Stearns executed the PVFC transaction. (*Id.*, R. 3505).

Because Maybank was an employee of BB&T Bank, and because he was seeking to enter into a transaction involving his BB&T stock, the BB&T Code of Ethics required that the General Counsel be given notice and provide her approval. Section IV.B.2. of the Code of Ethics addressed employee stock ownership and the prohibition on insider trading. It stated in part:

> "You must not . . . engage in speculative trading with respect to BB&T Common Stock. This generally prohibits short sales and trading in puts, calls and other options or derivatives unless the transaction is for bona fide, non-speculative purposes and you have obtained the prior approval for any such transaction from the BB&T General Counsel."

(R. 3487). The provision also stated, "[C]are must always be taken to insure your compliance with certain securities laws and regulations and *avoid the appearance of impropriety* . . . ." (*Id.*) (emphasis added). It is clear from the Code of Ethics that approval by the General Counsel was for the purpose of avoiding violations of securities laws and protecting the integrity of the organization. The General Counsel approval has nothing to do with the suitability of the transaction for the employee. This is confirmed by the fact that there is no requirement for General Counsel approval for transactions in BB&T stock that involve non-employee customers. (R. 3108).

Oliver's approval does not constitute a contact with or directed toward South Carolina. Oliver's office was located in North Carolina, and her act of approving the

transaction occurred there. (R. 3501). Her approval had nothing to do with the fact that Maybank was a resident of South Carolina. The same process would have occurred had Maybank been a resident of any other state. The connection with South Carolina was merely "random" and "fortuitous," which cannot support jurisdiction. *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 262, 423 S.E.2d 128, 132 (1992).

The transaction approved did not involve a contract in which BB&T Corp was a party, so the approval did not seek to invoke the protections of the laws of South Carolina for the benefit of BB&T Corp, nor was the approval necessary to comply with South Carolina law. Moreover, courts addressing whether jurisdiction exists over a parent corporation reject the argument that a mere act of approval can serve as a basis for jurisdiction. *See e.g., Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175, 1178 (9th Cir. 1980) ("[T]he British parent's mere approval of a marketing scheme developed by its United States subsidiary does not constitute the kind of deliberate forum protection-invoking act which the law requires.").

For any particular contact to support a finding of specific jurisdiction, it is necessary that the cause of action "arises out of" those activities. *Moosally*, 358 S.C. at 331–32, 594 S.E.2d at 884. Oliver's approval does not constitute wrongdoing or the breach of any duty, nor can it form the basis of any of Maybank's claims against BB&T Corp. The memorandum was drafted by BB&T AM employee Gibson, (R. 2409), not by Oliver or any other employee of BB&T Corp. Also, the memorandum was directed to the attention of Oliver, not Maybank. (R. 3501). There is also no evidence that Oliver undertook any duty or attempted to advise Maybank.[18]

[18] Maybank contends he received a copy of the memorandum, but there was no evidence he received it *before* the PVFC transaction. During his testimony, he offered no indication as to when he received it. (R.

The trial court concluded that the PVFC "would not have been implemented" without Oliver's approval. (R. 73-74). This conclusion was the result of the erroneous application of a "but for" standard for determining whether a particular activity supported specific jurisdiction. Courts reject the application of a "but for" standard in this context. Instead, they require "'a closer and more substantial causal relationship between the relevant contacts and the alleged tort.'" *Fraser v. Smith*, 594 F.3d 842, 851 (11th Cir. 2010) (a pure "but-for approach is . . . over-inclusive.").[19]

A similar situation was presented in *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 423 S.E.2d 128 (1992). There, the Florida bank defendant issued a letter of credit to one of its Florida customers that would allow the customer to purchase goods from a South Carolina manufacturer. The *Southern Plastics* Court held that even though the letter of credit was a precursor to the sale by the manufacturer, "the Bank's nexus with South Carolina was extremely limited," and explained:

> The Bank merely issued a letter of credit in Florida at the request of Media Cell, a Florida company. We conclude that the Bank's mere issuance of a letter of credit to [the manufacturer], standing alone, is insufficient to constitute an act by which the Bank purposefully established minimum contacts with South Carolina. . . .

Id. at 263, 423 S.E.2d at 132. Here, as in *Southern Plastics*, there was no direct contact between BB&T Corp and Maybank, and the single, isolated act of approving a PVFC is

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1898, 2032-33). Additionally, Maybank testified that the same alleged misrepresentations were provided to him separate and apart from the memorandum, (R. 1899-1903), showing that he would have continued with the PVFC transaction regardless of whether he had reviewed the memorandum in advance. *See Fraser v. Smith*, 594 F.3d 842, 848 (11th Cir. 2010) (finding no personal jurisdiction, stating, "in the absence of any allegation that J&B Tours' solicitation activities in Florida *influenced the Frasers' decision* to charter the SUNDANCE, we cannot conclude that their claims 'aris[e] from' those activities."(emphasis added)).

[19] *See also, e.g., Harlow v. Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005) ("A 'but for' requirement . . . has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain."); *State ex rel. Circus Circus Reno, Inc. v. Pope*, 854 P.2d 461, 466 (1993) ("The Supreme Court of the United States does not apply a 'but for' test, and our reading of the pertinent Supreme Court cases convinces us that the Supreme Court would not do so.").

not sufficient to allow jurisdiction to be exercised over BB&T Corp.[20]

(2) The BB&T Code of Ethics does not support jurisdiction.

Section I of the BB&T Code of Ethics explains that the Code "serves as a basic guide for personal and professional day-to-day conduct" and that the Code "applies equally to all employees of BB&T and its subsidiaries." (R. 3488). The application of the Code of Ethics is not dependent on the location of the operations, employees, or business transactions. It has no provision that dictates how activities particular to South Carolina are to be conducted. In no manner is the Code of Ethics an activity directed toward South Carolina or which seeks to invoke the benefits and protections of the laws of South Carolina. The Code of Ethics also does not give rise to any of Maybank's claims. No evidence was offered suggesting that any provision of the Code was illegal or failed to comply with industry standards, nor was it argued that any statement within the Code was a misrepresentation upon which Maybank relied. Thus, the BB&T Code of Ethics cannot support a finding of specific jurisdiction.

b. The fairness prong for establishing jurisdiction is not satisfied.

"The determination of whether a court may exercise personal jurisdiction over a nonresident involves a two step analysis," and the second step requires "sufficient contacts with South Carolina so that the constitutional standards of due process are not violated." *White v. Stephens*, 300 S.C. 241, 245, 387 S.E.2d 260, 262 (1990). In analyzing this "fairness prong," a court must apply four factors: (1) duration of the

[20] *See, e.g., Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 303 S.C. 502, 402 S.E.2d 177 (1991) (faxing of a letter to South Carolina held insufficient); *Cribb v. Spatholt*, 382 S.C. 475, 485, 676 S.E.2d 706, 712 (Ct. App. 2009) ("[E]ntering into a contract or mere negotiations inside South Carolina without more is not enough to establish minimum contacts."); *Builder Mart*, 349 S.C. at 508–509, 562 S.E.2d at 356 (letter from holding corporation president to plaintiff "expressing concern and thereby demonstrating some minimal knowledge of and involvement with the Albemarle loan" held insufficient).

defendant's activity in South Carolina; (2) the character and circumstances of defendant's acts; (3) inconvenience to the parties; and (4) South Carolina's interest in exercising jurisdiction. *See Aviation Assocs.*, 303 S.C. at 508, 402 S.E.2d at 180.

The "fairness prong" is not satisfied. The act of approval by Oliver was one act. It did not occur in South Carolina, and the approval would have been requested regardless of Maybank's state of residence. Simply put, Oliver's approval did not "create a 'substantial connection' with the forum." *White*, 300 S.C. at 247, 387 S.E.2d at 263. All four fairness factors thus weigh against the exercise of personal jurisdiction.

3. The evidence does not support general jurisdiction as to BB&T Corp.

A court may assert general jurisdiction if the defendant has an "'enduring relationship' with the forum state." *Cockrell*, 363 S.C. at 495, 611 S.E.2d at 510. The contacts must be "both 'continuous and systematic'" and "must be '*so substantial* and of such a nature as to justify suit against [the defendant] on causes of action arising from dealings entirely different from those activities.'" *Id.* (emphasis added). The record clearly does not support a finding of general jurisdiction over BB&T Corp.

4. BB&T Corp did not waive its personal jurisdiction objection.

The trial court incorrectly held that BB&T Corp waived its defense based on lack of personal jurisdiction. (R. 74). This ruling is unsupported by the record.

Lack of jurisdiction was asserted by BB&T Corp in its answer to each complaint. (R. 206 at ¶ 121; R. 240 at ¶ 185; R. 347 at ¶ 175). BB&T Corp filed a motion under Rule 12(b)(2) for dismissal based on lack of personal jurisdiction, which was denied by the trial court. (R. 648; R. 49). BB&T Corp then made several requests during trial and post verdict for dismissal based on lack of personal jurisdiction. (R. 2314, 2634; R. 981, 1012, 1253).

Under Rule 12(h)(1), the defense of lack of personal jurisdiction can be preserved by including it in a responsive pleading. S.C.R.Civ.P. 12(h)(1). Defendants can then file a motion later in the case requesting dismissal.[21] This is what BB&T Corp did. It asserted its defense in each Answer and filed its motion to dismiss in accordance with the deadline set by the trial court. (R. 44 at ¶ 4).

B. There is no evidentiary support for the claims against BB&T Corp.

The trial court also erred by denying BB&T Corp judgment on the merits of the claims.[22] There was no evidence that employees of BB&T Corp were involved in Maybank's transactions, nor any evidence supporting the claims as to BB&T Corp.

A parent corporation's ownership of a separately incorporated subsidiary does not render the parent liable for the conduct of the subsidiary. *Jones ex rel. Jones v. Enter. Leasing Co.-Se.*, 383 S.C. 259, 267–68, 678 S.E.2d 819, 824 (Ct. App. 2009). Rather, unless a plaintiff establishes the necessary factors to "pierce the corporate veil" and disregard the corporate separateness—a showing Maybank did not attempt to make—a parent corporation is liable only for its own wrongdoing. *Id.* at 268, 678 S.E.2d at 824.

Maybank's MP Account and his PVFC transactions involved only BB&T Bank and BB&T AM, and all the business activities related to these transactions were handled by employees of either BB&T Bank or BB&T AM. BB&T Corp was not involved. It is undisputed that BB&T Corp was not a party to any agreement with Maybank. Only BB&T Bank and BB&T AM are named as parties to the 2006 and 2009 WMAs. (R. 3524, 5116). BB&T Corp neither communicated directly with Maybank, nor took action

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[21] When a pretrial motion to dismiss is denied, defendants can again raise lack of personal jurisdiction at trial. *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993).

[22] These arguments are in addition to the Defendants' arguments explaining why the surviving claims should have been dismissed in their entirety as to *all* Defendants.

that was unfair or deceptive. Maybank's fiduciary duty claim fails because there was no fiduciary relationship between Maybank and BB&T Corp. Maybank's communications regarding his PVFC's and the MP Account were exclusively with employees of BB&T Bank and BB&T AM. Maybank's claims for constructive fraud and negligent misrepresentation also fail as to BB&T Corp because these claims require a finding that there has been a misrepresentation of fact and detrimental reliance thereon. *See Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 334, 574 S.E.2d 502, 509 (Ct. App. 2002). Neither exist. Simply put, all activities related to Maybank's PVFCs and MP Account were handled by employees of either BB&T Bank or BB&T AM. The trial court thus erred by failing to grant judgment for BB&T Corp.

C. The inclusion of BB&T Corp tainted the punitive damages verdict, and, therefore, the other Defendants are entitled to a new trial.

At trial, Maybank's presented expert testimony about the net worth of BB&T Corp for punitive damages purposes. (R. 2301, 2304). This was reinforced by the introduction into evidence of several of BB&T Corp's annual reports and Forms 10-K, and Maybank's assertion in argument that the punitive damages should be a basis point of this net worth. (R. 2690; R. 3771-4963). This was improper as BB&T Corp should have been dismissed for lack of jurisdiction and lack of evidence. Thus, the jury's punitive damages verdict was tainted. When a judgment against one defendant is reversed, the judgment against any co-defendants should also be set aside when there is a verdict that includes punitive damages. *Gray v. Green Constr. Co., Inc.*, 263 S.C. 554, 559, 211 S.E.2d 871, 874 (1975) (holding that "[w]here 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.").

Additionally, S.C. Code Ann. § 15-33-125, does not permit a new trial as to punitive damages alone in this setting. Thus, a new trial absolute should be ordered.

III. The Trial Court Erred by Failing to Enter JNOV on Maybank's Claim for Punitive Damages Because Such Damages Are Barred by the WMA.

Paragraph F.1. of the WMA contains a provision barring consequential and punitive damages. (R. 3524). This provision states:

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

(*Id.* at 3528) (emphasis added). A similar provision was also included in the later WMA executed by Maybank on November 2, 2009. (R. 3590). Maybank's claim for punitive damages is barred as a matter of law by this provision.[23] While Maybank is permitted to seek recovery of alleged losses attributable to negligence or willful misconduct, punitive damages are expressly waived. Maybank sought to enforce the WMA during trial, and he should not be permitted to avoid the provisions which are unfavorable to his claims.

A. Paragraph F.1. is applicable to both the MP Account and the PVFCs.

The WMA was the instrument that created the MP Account, but it also governs all aspects of the investing relationship between Maybank, BB&T Bank, and BB&T AM. The WMA's terms apply to the MP Account and the PVFCs. This is a matter of contract construction that presents a question of law for the Court. *Hope Petty Motors of Columbia, Inc. v. Hyatt*, 310 S.C. 171, 175, 425 S.E.2d 786, 789 (Ct. App. 1992).

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[23] This same provision also prevents an award of treble damages under the UTPA. South Carolina law equats treble damages under the UTPA with common law punitive damages. *See Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204, 208, 391 S.E.2d 249, 251 (1990). Accordingly, punitive damages and treble damages should be treated equally under Paragraph F.1.

Maybank executed two separate Concentrated Stock Risk Management Addenda prior to the consummation of each PVFC. (R. 3478, 3566). These addenda provided key disclosures and terms governing the relationship between Maybank, BB&T Bank, and BB&T AM for the services provided related to the PVFCs. Each addendum expressly provides in the first sentence that it is an "Addendum to Wealth Management Agreement" between "Bank, Investment Advisor, and Client." There is no ambiguity or room for interpretation. Maybank readily acknowledged at trial that the WMA applied to the PVFCs. (R. 2049-50). Thus, the terms of the PVFC addenda are supplemented by the WMA terms, including the damages limitation provision in Paragraph F.1.[24,25]

B. Maybank's claims are within the scope of paragraph F.1.

The scope of the damages limitation provision in Paragraph F.1. is a simple matter of contract construction. There is no ambiguity present. The provision applies to any liability "with respect to [the Defendants'] services under this Agreement." (R. 3528). The record establishes that each of Maybank's causes of action is entirely dependent on allegedly improper services provided by the Defendants under the WMA and PVFC addenda. Moreover, the express language of Paragraph F.1. contemplates tort claims in addition to contract claims, as shown by the use of the terms "negligence,"

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[24] The trial court's post-trial Order noted the fact that the WMA was executed about two weeks after the first PVFC. (R. 72). It is immaterial, however, that the Concentrated Stock Risk Management Addendum for each PVFC was executed at a different time than the WMA. All three documents must be read together to ascertain all of the written terms governing the parties' relationship. *See Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977) ("[W]here the instruments have not been executed simultaneously but relate to the same subject matter and have been entered into by the same parties, the transaction comprising the contract will be considered as a whole. This is true even though the transaction consumed more than one day; the date of the writings constituting such transaction is immaterial.").

[25] A second copy of the addendum for the January 2009 PVFC introduced into evidence (R. 3567) states in error at the top that it is an addendum to the WMA *dated January 15, 2009*. This is the same date as the date that Maybank had signed the addendum, as indicated on the bottom of the form. Since there was only one WMA at that time (the one dated August 23, 2006), there can be no question as to the WMA to which the addendum applied.

"willful misconduct," and "punitive damages." (*Id.*) In the face of such a broadly worded provision, the trial court should have concluded that Paragraph F.1. applied to all of Maybank's causes of action. *See Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 262, 743 S.E.2d 868, 875 (Ct. App. 2013) ("[W]e find the arbitration clause in the purchase agreement was not intended to apply to claims arising in contract only and encompasses the [plaintiffs'] tort claims as well.").

The trial court erroneously concluded that Paragraph F.1. was inapplicable because the services described in the WMA "do not include making misrepresentations or material omissions." (R. 71-72). This construction misapplies the plain language of the provision. The alleged misrepresentations and omissions would only have occurred *in connection with* the Defendants' services and cannot be separated for purposes of trying to avoid the effect of Paragraph F.1.

The award of punitive damages must necessarily relate to the Defendants' services provided with respect to the MP Account and the PVFCs. Punitive damages are recoverable only if there are actual damages. *See Broach v. Carter*, 399 S.C. 434, 444, 732 S.E.2d 185, 190 (Ct. App. 2012). The only evidence of actual damages was the testimony and reports of Craig McCann. The record establishes that Maybank's purported actual damages were limited to alleged losses related to either the MP Account or the PVFCs. (R. 2261-67; R. 3762-65, 3768-70). Accordingly, only by relying on "services" provided under the WMA and addenda that led to the opening of the MP Account and execution of the PVFCs can Maybank have any claim for actual damages, without which a punitive damages verdict could not exist.

When considering the application of Paragraph F.1., the trial court noted that the

Defendants had raised a claim of reformation related to the WMA and then suggested that, for this reason, "the real terms" of the WMA "were in doubt." (R. 71). The trial court concluded, therefore, that "the determination of the terms of the WMA was a *question of fact* for the jury to decide." (*Id.*) (emphasis added). This was error. "The *construction* of a clear and unambiguous contract is a question of law for the court to determine." *See Williams v. GEICO*, 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014). It is immaterial that the Defendants pled a claim for reformation in the alternative. The reformation claim addressed only the language in Section I of the WMA and in no manner implicated Paragraph F.1. (R. 327-329 at ¶¶ 31-34). Thus, regardless of the reformation claim, the trial court was still charged with the duty of construing and applying the unambiguous language of Paragraph F.1.

Finally, the trial court erred by requiring that Paragraph F.1. be "narrowly interprete[d]" because it was an "exculpatory clause." (R. 71 n.4). There is a rule of strict construction applicable to *exculpatory clauses* that bar *all* liability and seek to shield a defendant from liability for the defendant's own negligence. *See Pride v. S. Bell Tel. & Tel. Co.*, 244 S.C. 615, 619, 138 S.E.2d 155, 157 (1964). This rule is inapplicable. Paragraph F.1. is not an exculpatory clause, as it allows for liability for actual losses upon a showing of negligence or willful conduct.

C. Paragraph F.1. is not violative of public policy.

The trial court ruled that enforcement of Paragraph F.1. would be against public policy. (R. 72). The only reason given was that the parties "are not in equal bargaining position." (*Id.*) This ruling by the trial court was error. The public policy of South Carolina is not offended by a damages limitation provision that allows for the meaningful recovery of actual losses.

"Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the court." *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012). The starting point for any analysis of a contract provision was set forth in *Jordan v. Security Group, Inc.*: "The Court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). This Court should enforce the agreed terms of the parties, thereby respecting the fundamental right of freedom of contract.

There is no contention that Paragraph F.1. is illegal or is in conflict with a state or federal statute or regulation. Only in the most extraordinary circumstances, not present here, would the public policy of South Carolina prohibit contracting parties from agreeing to a term where that term was not in violation of existing statutory law. The courts of South Carolina look to the legislature for guidance when determining the public policy of the state. *See McNeil v. S.C. Dept. of Corr.*, 404 S.C. 186, 191, 743 S.E.2d 843, 846 (Ct. App. 2013). The S.C. Securities Act provides the body of statutory law relevant to these circumstances and demonstrates no public policy reason to prohibit a punitive damages waiver provision. In § 35-1-509 of the Act, which provides for civil liability, there is no provision for either punitive damages or multiplying damages. Investors can recover only their actual losses, prejudgment interest, and attorneys' fees. The legislature instead conferred power upon the Securities Division of the Office of the Attorney General to enforce the provisions of the Securities Act and to promulgate regulations for that purpose. To the extent that conduct needs to be prevented in the future, the Securities Division has the authority and power to enjoin conduct and impose monetary penalties.

Contractual damages limitations similar to, and even more restrictive, than the one in Paragraph F.1. of the WMA have previously been upheld by the courts of this state. *See, e.g., Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013) (affirming summary judgment enforcing provision barring recovery of damages against defendant with exception of fee paid for services); *Pride*, 244 S.C. at 619–22, 138 S.E.2d at 157–58 (holding not violative of public policy for defendant to contractually limit liability for negligence to amount paid by plaintiff for placement of advertisement that was negligently published); *see also Fanczi Screw Co. v. Orix Fin. Servs., Inc.*, 114 F. App'x 548, 553 (4th Cir. 2004) (vacating jury award of punitive damages based on contractual provision that "prohibited the award of any damages other than actual damages"); *Seaside Resorts, Inc. v. Club Car, Inc.*, 308 S.C. 47, 61, 416 S.E.2d 655, 664–65 (Ct. App. 1992) (noting that limitation on consequential damages is enforceable if made part of parties' contract).

Decisions from courts in other jurisdictions illustrate that public policy does not prevent the enforcement of damages limitation provisions that bar punitive damages or other categories of damages, while still allowing for a meaningful recovery. *See, e.g., Youtie v. Macy's Retail Holding, Inc.*, 653 F. Supp. 2d 612, 630 (E.D. Pa. 2009) ("[T]he limitation of liability is reasonable in that it does not bar all liability, merely exemplary and punitive damages. Thus, defendants are not entitled to exemplary damages."); *Valve Corp. v. Sierra Entm't Inc.*, 431 F. Supp. 2d 1091, 1101 (W.D. Wash. 2004) ("Plaintiff may not recover special incidental, consequential, or punitive damages" because the claims are subject to the limitation of liability provision); *DynCorp v. GTE Corp.*, 215 F. Supp. 2d 308, 313 (S.D.N.Y. 2002) (same); *Amoco Oil Co. v. Gomez*, 125 F. Supp. 2d 492, 511 (S.D. Fla. 2000) (same); *see also Baumgardner v. Bimbo Food Bakeries Distrib.*, 697 F. Supp. 2d

801, 818-19 (N.D. Ohio 2010) (same).

D. The evidence cannot support a finding of unconscionability.

The trial court ruled that Paragraph F.1. was unenforceable because BB&T was Maybank's fiduciary and had a duty to disclose any terms in the WMA adverse to his interests. (R. 72). There is no legal doctrine in South Carolina supporting such a duty, when the information could easily be gleaned from a reading of the agreement. Indeed, Maybank testified he read the WMA prior to signing it. (R. 2040-42, 2047-48).

Avoiding undisclosed contract terms is a part of the doctrine of unconscionability.[26] As stated in *Gladden v. Boykin*: "Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract." 402 S.C. 140, 145, 739 S.E.2d 882, 884–85 (2013).

Maybank could never satisfy the high burden of establishing unconscionability sufficient to void Paragraph F.1., nor does he plead unconscionability. Maybank is certainly capable of reading and understanding the terms of the WMA, and he testified during trial that he was given the opportunity to sit down and read through the WMA before signing it. (R. 2040-42). He read both the WMA and the PVFC addendum before signing. (R. 2026-27, 2047-48). Paragraph F.1 was not an obscured term and was set forth in a provision in the WMA with the underlined heading, "Limitation of Liability and Indemnification." Thus, the evidence does not support a finding of unconscionability with respect to Paragraph F.1.

[26] Unconscionability is a question for the Court. *Wells Fargo Bank, NA v. Smith*, 398 S.C. 487, 730 S.E.2d 328 (Ct. App. 2012).

IV. The Trial Court Erred in Denying Defendants' Motion for Election of Remedies and Awarding Both Treble Damages and Punitive Damages.

After the verdict, Defendants filed a motion seeking to compel Maybank to elect between either UTPA treble damages or the punitive damages award. (R. 1060). The court denied the motion, holding that an election was not required because the UTPA claim was supported by theories that were "separate and distinct from the theories supporting the common law claims." (R. 78). This ruling improperly tried to "allocate" the alleged acts between the UTPA and common law claims, and ignored the fact that the jury returned a single actual damages verdict applicable to all claims.[27] A plaintiff may not recover punitive damages *and* treble damages in the same case when there is only one actual damages verdict. *Smith v. Strickland*, 314 S.C. 192, 197–98, 442 S.E.2d 207, 210 (Ct. App. 1994) (holding punitive damages may only be recovered once where they concern a single wrong); *Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204, 208, 391 S.E.2d 249, 251 (1990) (holding that award of both punitives and treble damages is an impermissible double recovery).

A. An election was required because the same damages were claimed for all causes of action.

Election of remedies serves the purpose of preventing multiple recoveries for the same conduct. *Brown v. Felkel*, 320 S.C. 292, 294, 465 S.E.2d 93, 95 (Ct. App. 1995). A plaintiff must chose between different remedies allowed by law on the same set of facts. *Inman v. Imperial Chrysler-Plymouth*, 303 S.C. 10, 13, 397 S.E.2d 774, 776 (Ct.

[27] Significantly, the jury made no separate factual findings as to Maybank's "theories" and it was improper for the trial court to conclude that the jury would have found for Maybank on the "theories" the trial court subsequently "allocated" to the UTPA claim. Maybank could have requested a verdict form that allowed the jury to make such finding, but he did not do so. (R. 2670-72). Therefore, this issue was waived. *S.C. Dep't of Transp. v. First Carolina Corp.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007); *see also Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002).

App. 1990). "The restriction is not on the potential theories of recovery a plaintiff might pursue, but instead, on the recovery itself."[28] *Id.*

The operative complaint sought identical damages for each claim that went to the jury. (R. 246). Maybank made no attempt to differentiate or categorize his alleged damages among his various claims. Rather, the claimed damages were the same for all causes of action. Thus, even though there may have been "separate and distinct" wrongful acts that applied to the different claims, the damages suffered were identical. *See Collins Music Co., Inc. v. Smith*, 332 S.C. 145, 503 S.E.2d 481 (Ct. App. 1998) (limiting a plaintiff to one of two separate judgments against different defendants). Thus, it was error to award both punitive damages and the trebling of actual damages.[29]

The trial court's reliance on *Taylor v. Medencia*, 324 S.C. 200, 479 S.E.2d 35 (1996), was misplaced. *Taylor* involved two separate claims that were based on separate conduct and *which caused separate damages*. In *Taylor*, there was a negligence claim for medical malpractice which resulted in the patient contracting a potentially fatal blood disease and suffering other significant injuries. In contrast, the UTPA claim was based upon the performance of unnecessary tests. Significantly, the jury rendered two separate actual damages awards for the two claims, and these separate damages awards ultimately

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[28] It does not matter if the various causes of action or theories are against different defendants. *Collins Music Co. v. Smith*, 332 S.C. 145, 503 S.E.2d 481 (Ct. App. 1998). Nor does it matter if the various causes of action asserted have different elements or different measures of damages. *Smith v. Strickland*, 314 S.C. 192, 442 S.E.2d 207 (Ct. App. 1994) (different elements); *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994) (different measures of damages).

[29] The trial court also applied an improper standard to the election of remedies issue, holding that, when viewed "in a light most favorable to the non-moving party, the record supports a reasonable conclusion that Defendants' liability under the UTPA is separate from that for the common law causes of action." (R. 79). This was in error. The standard of "light most favorable" applies to how evidence is viewed when considering dispositive motions. It has no bearing on a motion for election of remedies. Moreover, the trial court improperly entered the province of the jury and unilaterally made factual findings for the purpose of supporting the double exemplary recovery.

were held to each separately support their respective exemplary damages. *Taylor* is thus inapposite, and the trial court thus erred.

B. The improper allocation of "theories" results in damages related to the common law claims being improperly included in the UTPA trebling process.

The only actual damages that could be properly trebled are damages specific to the injury caused by the UTPA violation. The trial court, however, trebled the entire actual damages award of $3.1 million. To support the conclusion that Maybank was entitled to both punitive damages and treble damages, the trial court held that certain wrongful acts were separate and distinct from others and applied only to the UTPA claim. The trial court made no attempt to segregate or allocate the actual damages award between the common law and UTPA claims. Instead, the trial court acknowledged that the damages for all of the claims are the same. (R. 81 n.13).

It is this last point that illustrates how the trial court's ruling results in an impermissible double award of exemplary damages. If the damages for all of the claims are the same, and are trebled under the UTPA, then there is only one injury suffered. In that circumstance, both the appropriateness of the punitive damages award, and the amount of his trebled damages award are determined using precisely the same $3.1 actual damages amount. The due process analysis of the punitive damages (ratio of actual damages to punitives) would improperly include damages that relate solely to the UTPA claim, and the trebled damages would include damages that relate solely to the common law claims. Because the jury returned only one actual damages verdict, the only means of avoiding this inconsistency is to require an election of remedies. Hence, the judgment should be reversed and the case remanded to require an election.

V. The Trial Court Erred by Not Granting JNOV in Favor of the Defendants

Because Maybank's Alleged Damages Were Speculative.

Maybank's damages expert offered a hypothetical theory based on two implausible factual assumptions. The lack of evidence to support these assumptions renders Maybank's damages theory speculative. The trial court erroneously ruled there was sufficient evidence to support the damages verdict. (R. 75).

"Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." *Gray v. S. Facilities, Inc.*, 256 S.C. 558, 570–71, 183 S.E.2d 438, 444 (1971). Judgment as a matter of law is required where the evidence of damages is speculative. *Woodson v. DLI Props., LLC*, 406 S.C. 517, 753 S.E.2d 428 (2014). (affirming summary judgment because damages "purely speculative").

"The goal [of compensatory damages] is to restore the injured party . . . to the same position he or she was in *before* the wrongful injury occurred." *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (emphasis added). Thus, the proper inquiry requires a determination as to Maybank's financial position had he continued to own his BB&T stock without the benefit of a PVFC and had not become an investing customer of BB&T AM. Maybank offered no evidence addressing this determination because it would show that his situation was improved by the PVFC.

Had Maybank done nothing in August of 2006 and kept his BB&T stock in his S&S account, he would have been in a far worse position financially as compared to his situation after entering into the PVFCs. This is because Maybank would have been subjected to numerous margin calls in 2008 and 2009 as his large margin debt was increasing at the same time the value of his BB&T stock was dropping. (R. 2516; R. 5427). According to margin expert Bryan Teachey, Maybank's $8 million in equity in

his BB&T stock in August of 2006 would have been reduced by margin calls to just $133,960 by the end of 2010.[30] (R. 2516, 2521). Maybank's damages expert, Craig McCann, conceded that, by 2009, the PVFCs put Maybank into a better position than had he done nothing.[31] (R. 2279-81). This is because the PVFCs allowed Maybank to hedge the risk of a precipitous drop in the value of his BB&T stock. (R. 2260).

Because the PVFCs put Maybank in a better position as compared to taking no action, Maybank was forced to rely at trial on a speculative damages theory presented by McCann and based on two implausible factual assumptions that were directly contradicted by the evidence. First, McCann assumed that Maybank would have sold the BB&T stock back in August of 2006. (R. 2261, 2275, 2279). Second, he assumed that at least 70% and up to 100% of Maybank's funds would have been invested in fixed income investments (*i.e.*, bonds). (R. 2264-67, 2285, 2290-93). If both of these facts would have occurred, then, according to McCann, Maybank would have been between $2.8 million and $3.3 million better off as compared to his situation after having entered into the PVFCs and investing in equities. (R. 2264-67; R. 3762-65, 3769-70). It is pure speculation, however, as to whether Maybank would have taken action back in 2006 that would have allowed either of these facts to have occurred. Significantly, *both* facts had to occur before McCann's damages theory would have validity.

Courts reject this type of analysis in investor cases because it is speculative. The theory relies on a prediction of the subjective decision making of a litigant that would have occurred 8 years before trial. This issue was squarely addressed in *Messer v. E.F.*

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[30] Mr. Teachey's analysis revealed that at least 53 margin calls would have occurred had Maybank not entered into the PVFCs. (R. 2520). The PVFCs allowed him to extinguish the margin debt.

[31] McCann never attempted to quantify where Maybank would have been had he simply maintained his BB&T stock in his S&S account and allowed the margin debt to increase.

Hutton & Co., where the court affirmed JNOV in favor of the broker-dealer because the plaintiff could not show "with reasonable certainty that the defendant's wrongful conduct proximately *caused* damages." 833 F.2d 909, 923 (11th Cir. 1987). The plaintiff's damages theory required a finding that he would have followed the defendant's investment plan. In reviewing the evidence, the court concluded:

> [T]here is little reason to believe that Messer would have followed E.F. Hutton's investment plan. Messer had never before followed Hutton's investment plan and Messer's trading pattern-daily arbitraging-was completely opposite the buy and hold pattern outlined in the plan. Furthermore, there is little reason to believe that Messer would have stayed with the plan to the point it became profitable.

Id. Similarly, here, the evidence would only allow the jury to speculate as to whether Maybank would have either sold his stock in 2006 or invested heavily in bonds consistently between 2006 and 2010. There is no support in South Carolina law for the use of this speculative damages theory in a suit brought by an investor.

Further, the evidence contradicts McCann's assumption that Maybank would have sold his BB&T stock back in August of 2006. When Maybank first received the stock in 2001, he was required to hold it for two years. (R. 1973). But in 2004, after the restriction had lifted, he had refused to sell a single share. (R. 1992-93). Indeed, as of July of 2006, just before the first PVFC, he still had not sold a single share of his BB&T stock. (R. 1996-97). Maybank testified that the reasons he had not sold any of the BB&T stock were that he wanted to continue receiving the significant *dividends* and he did not want to incur a large *capital gains tax liability*. (R. 1993). Maybank had very high expenses in 2006 and simply could not have afforded to lose the BB&T stock dividend, which was the vast majority of his income. (R. 5239-78). McCann also recognized that there were psychological barriers for investors that could prevent the sale of stock, and

that, with respect to Maybank, "[t]here may have been hurdles to implementing [a] recommendation [to sell the stock]." (R. 2279). Maybank's reliance on BB&T stock and its dividend continued even after the initial PVFC. In September of 2006, he bought an additional 4,000 shares of BB&T stock. (R. 5167; R. 2063-64). McCann offered no factual basis for concluding that Maybank would have sold the stock and given up the significant dividends needed to support himself and his family while incurring an immediate $1.6 million capital gains tax liability.

The evidence also contradicts the assumption that Maybank would have invested at least 70% of his funds in bonds. During trial, Maybank was asked to review his investing history going back to 1997. This demonstrated that he never held any bonds in his brokerage accounts with other firms from 1997 through the time he opened the MP Account in 2006. (R. 1985-88, 1993-97; R. 5138, 5153, 5157, 5336). Even in 2012 and 2013, over a year after the lawsuit had been filed alleging he should have been placed in bonds, Maybank had zero bonds in his Charles Schwab brokerage account. (R. 5177, 5187). This was consistent with Maybank's desire to be invested only in stocks to minimize "inflation risk," something he perceived as being a "huge risk." (R. 1969-70).

Maybank chose 100% equities as his investment objective for the MP Account in 2006 and reaffirmed this decision twice in 2008. (R. 3532, 3548, 3563). Prior to selecting his investment objective, Maybank met several times with his portfolio manager, Kris Kapoor, and had long discussions with Kapoor about what the investment objective should be. (R. 2042). Kapoor recommended that Maybank diversify into other asset classes, but Maybank expressed a clear preference for 100% equities. (R. 2329-33). Kapoor testified that, based on his years of working with Maybank and his several

conversations with him about his portfolio, Maybank would not have allowed his account to be weighted with 70% or more in bonds.[32] (R. 2332-33).

Judy Schoemer worked for Maybank when Maybank owned Southeastern. Schoemer testified that Maybank had an "all equities" investment philosophy for his own customers. (R. 2347). Clients of Southeastern who were 70-80 years old were invested in all equities because Maybank "didn't feel bonds were really appropriate." (*Id.*). When Schoemer worked with Maybank, he had always had equities in his portfolio and no bonds. (R. 2351). When she told Maybank that during a review of his MP Account, it was observed that some bonds had been purchased, Maybank said, "I don't ever want bonds in an account," and the bonds were sold. (R. 2359).

The decision in *Resolution Trust Corp. v. Stroock & Strook & Lavan*, 853 F. Supp. 1422 (S.D. Fla. 1994), rejected the same speculative damages theory under similar circumstances. There, the plaintiff contended that its attorneys should have advised it against the purchase of junk bonds. *Id.* at 1424. The plaintiff actually made money from the junk bonds. To have any damages, the plaintiff tried arguing that it should have been advised to invest in BBB bonds, which would have produced an even greater return. *Id.* at 1424–25. Granting summary judgment, the court found "the record simply devoid of any evidence to show – much less, create 'reasonable certainty' – that [the plaintiff] would have bought BBB bonds . . . but for the alleged negligence of the defendants." *Id.* at 1425–26. The court explained, "Defendants offered a chart showing twenty-four different type[s] of investment options in which [the plaintiff] could have invested (e.g.

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[32] Significantly, McCann's assumption required that the MP account be heavily invested in bonds for the *entire 4 year period* from August 2006 to December 2010. (R. 3762-65, 3769-70). In 2008, however, after a steep drop in the stock market, Maybank took a $400,000 draw on his BB&T credit line and then invested that cash in stocks in his MP Account. (R. 1921; R. 3624). This shows that Maybank would not have stayed in 70% bonds for the entire 4 year hypothetical period.

real estate) and pointed out that [the plaintiff] had never been, either before or after the State instructed [the plaintiff] to sell the junk bonds, a regular purchaser of BBBs." *Id.* at 1429. The court concluded that the determination of damages was left to "conjecture and speculation" which could not support the recovery of damages. *Id.* at 1429. Hence, the trial court should have ruled that the evidence of alleged damages was speculative and then granted judgment for the Defendants.

VI. The Trial Court Erred in Failing to Grant Defendants' Motions for Directed Verdict or JNOV as to Each of the Claims.

A. Breach of Contract.

Defendants should have been granted judgment as to the breach of contract claim because the evidence established that BB&T Bank and BB&T AM fully performed their obligations under the WMA. The operative contract is the WMA executed in 2006. (R. 3524; R. 2637). The WMA was between three named parties: Maybank, BB&T Bank, and BB&T AM. (*Id.*). Maybank is the "Client," BB&T Bank is the "Wealth Manager" and "Custodian," and BB&T AM is the "Investment Advisor." (*Id.*).

Maybank's breach of contract claim centers exclusively on the duties identified in the WMA as being the responsibility of BB&T Bank. (R. 2637-38). Specifically, under the heading "Service as Wealth Manager," the WMA provides:

> As Wealth Manager, Bank shall (i) gather information from the client regarding the Client's investment objectives, risk tolerance and investment horizon, tax status, financial situation and needs, (ii) make recommendations to the Client regarding an investment program and investment guidelines for the Account and (iii) coordinate and supervise the services of the Investment Advisor and the Custodian for the account.

(R. 3524). Thus, under the WMA, it was BB&T Bank's responsibility to make sure (1) Maybank's relevant information was gathered; (2) recommendations about investments

were provided to Maybank; and (3) the necessary coordination and supervision of the Investment Advisor and Custodian occurred.

At trial, Maybank contended that Defendants breached these duties. (R. 2637-38). Maybank did not contend that the duties were not performed. Rather, the alleged breach is that BB&T Bank employees were not the ***only*** people who performed these duties. (*Id.*). Specifically, Maybank asserted that it was improper for BB&T AM to have performed any of these functions. (R. 2638). Maybank's breach of contract theory fails as both a matter of law based on the WMA's clear terms, and the evidence at trial.

1. It was proper for BB&T Bank to perform obligations under the WMA through BB&T AM personnel.

"[C]ontract duties are generally delegable, unless prohibited by statute, public policy, the terms of the contract, or if they involve the personal qualities or skills of the obligor." *Johnson v. Bank of Am., N.A.*, No. 3:09-1600-JFA, 2010 WL 1542560, at *4 (D.S.C. Apr. 16, 2010). There is no rule in South Carolina that prevents an obligor under a contract from performing the contract through another party. BB&T Bank was not required to accomplish its performance ***solely*** through BB&T Bank employees.

Maybank contended that the "assignment" of these functions to BB&T AM violated a separate provision of the WMA which required the written consent of the other parties in order to assign the *entire* agreement. (R. 2638). The provision of the WMA on which Maybank relies provides: "[n]o Assignment of this Agreement shall be made by any party without the other parties' written consent." (R. 3528). This provision does not relate to the manner or method of performing specific tasks under the WMA. Rather, it requires consent where an obligor seeks to assign the *entire* agreement, and its rights and obligations under the agreement, to another party. *Davis Oil Co. v. TS, Inc.*, 145 F.3d

305, 309 n.9 (5th Cir. 1998) (holding that an obligee's transfer of a contract right is known as an "assignment" of the right, and, in contrast, an obligor's empowering of another to perform the obligor's duty is known as a "delegation" of the performance of that duty). There was no "assignment" of the WMA here. BB&T Bank remained obligated to make sure the functions were performed. It did not "assign" its obligations. It merely chose to perform them through persons with the proper expertise.

2. Maybank was aware that BB&T AM was performing some of BB&T Bank's duties and waived any objection thereto.

The evidence at trial illustrated that Maybank was well aware of the fact that certain obligations of BB&T Bank would be and were performed by employees of BB&T AM, and, therefore, Maybank consented to BB&T AM's role in fulfilling the WMA and waived this alleged breach. First, the WMA itself makes clear the important role that BB&T AM would play in the relationship and Maybank's agreement to BB&T AM's involvement. (R. 3524). BB&T AM is an identified party to this contract and is identified as having the key role of the "Investment Advisor." (*Id.*). The signature page showed that Kapoor executed the WMA as a representative of BB&T AM, and Maybank knew Kapoor was his portfolio manager. (R. 2041-42, 2047). Appendix B to the WMA, which was also signed by Maybank, further explained the role of BB&T AM explaining:

> "Investment advisory services are available through BB&T Asset Management, Inc., a subsidiary of BB&T Corporation. BB&T Asset Management, Inc. advises customized investment portfolios, provides asset allocation analysis and offers investment related services to affluent individuals and businesses."

(R. 3533; R. 2048-49).

Additionally, Maybank was not a stranger to how a wealth management relationship actually worked. As a BB&T Bank wealth manager, Maybank would

personally sit in on meetings between clients and their BB&T AM portfolio managers. (R. 2012-13). Maybank also knew that BB&T Bank did not allow its wealth managers to provide investment advice, and instead such advice was obtained by the wealth manager coordinating with BB&T AM or a similar entity. (R. 2012-13, 2898, 3114-15). Thus, Maybank knew that certain duties in the WMA, while being the obligations of BB&T Bank, would be actually performed by employees of BB&T AM, and he agreed to this arrangement. At no point during the multiple years that the WMA was in effect did Maybank complain to anyone at BB&T Bank that the WMA's duties were not being performed, were performed improperly, or were being performed by the wrong people. (R. 2350-51, 2356, 2484). Such constitutes a waiver of any claim of breach. *Palmer v. Sovereign Camp, Woodmen of the World*, 197 S.C. 379, 392, 15 S.E.2d 655, 661 (1941) ("One party to a contract will not be permitted to make a show of continued leniency, or a pretense of liberality, repeated with such uniformity as to put the other off his guard, and afterwards, by a sudden change in his course of conduct, declare a forfeiture, where the other party is helpless to avert the consequences."); *Rakestraw v. Dozier Assocs., Inc.*, 285 S.C. 358, 360, 329 S.E.2d 437, 438 (1985) (holding mortgagee waived right to assert acceleration provision due to long-continued course of accepting nonconforming payments).

3. All of BB&T Bank's duties under the WMA were fully performed

The evidence at trial also established that all of BB&T Bank's obligations under the WMA were actually performed. The first obligation was to ensure that information was gathered from Maybank regarding his investment objectives, risk tolerance and investment horizon, tax status, financial situation and needs. (R. 3524). This was

accomplished by a combination of BB&T Bank and BB&T AM personnel. (R. 2483, 3100-01). Maybank admitted that in the summer of 2006, he took part in at least six meetings with BB&T Bank personnel (Mahfood, Clark Anderson) and BB&T AM personnel (Kapoor and Gibson), where these topics were discussed. (R. 1894, 2021, 2325-26, 2403, 2408). One of the purposes of those meetings was to determine Maybank's risk tolerances and investment objectives. (R. 2342-43). The testimony (including Maybank's) as to the discussion of investment objectives was that they were long discussions involving "rounds of give and take" before they settled on investment objectives acceptable to Maybank. (R. 2042, 2050, 2329).

The second obligation in the WMA was to ensure that recommendations were provided to Maybank regarding an investment program and investment guidelines. (R. 3524). As Maybank knew, BB&T Bank wealth managers did not personally perform this function. (R. 2012-13). Rather, the BB&T Bank wealth managers made sure that it was performed by the appropriate BB&T AM advisors.[33] (R. 2474, 2483, 2501, 3102). With respect to the PVFCs, this was performed by Gibson and, later, Nate Deal. (R. 1950, 2023-24, 2045, 2541-42, 2567-77, 2996-97, 3006, 3010-12). With respect to Maybank's MP Account, this was performed by Kapoor, and, later Alston Gore. (R. 2042-44, 2051-53, 2329-32, 2339, 2343, 2483, 2895). Maybank admitted that the "make recommendations" obligation was fully performed, and that BB&T AM did a good job as to his MP Account. (R. 2045, 2051-53).

The final obligation in the WMA was to coordinate and supervise the services of

[33] The WMA clearly provides that BB&T AM, as the "Investment Advisor" is involved in this process. In describing the roll of the "Investment Advisor" the WMA states: "In consultation with Investment Advisor and Wealth Manager, Client will establish investment objectives (Appendix A) for investing the assets in the Account." (R. 3524). Thus, the WMA itself informed Maybank that BB&T AM would have a key role in establishing objectives and providing recommendations.

the Investment Advisor and the Custodian for the account. (R. 3524). The evidence at trial established that this was fully performed by BB&T Bank. BB&T Bank personnel coordinated with BB&T AM personnel throughout. (R. 2320-21, 2326, 2407-35, 2483, 2542-57, 3010-3019, 3051, 3103-04). BB&T Bank also supervised the handling of Maybank's MP Account by performing an initial review of the account and subsequent annual reviews and informal supervisor reviews. (R. 2320-21, 2352, 2498). These reviews resembled audits where BB&T Bank personnel checked to ensure that Maybank's actual investments were in accordance with his stated investment objectives and guidelines. (*Id.*).

4. Even if a breach of the WMA occurred, Maybank suffered no damages as a result of such breach.

Assuming that a breach of the WMA did occur, Maybank failed to establish that any such breach caused him harm. Maybank was required to prove that he suffered some damage as a direct and proximate result of the breach. Maybank failed to establish how someone other than BB&T Bank performing any of functions set forth in the WMA proximately caused his damages. *Collins Entm't, Inc. v. White*, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005) (holding that directed verdict was proper where there was no evidence of damages attributable to any breach of contract.).

B. Breach of Fiduciary Duty

The Defendants should have been granted judgment as to Maybank's breach of fiduciary duty claim because Maybank failed to establish the elements of this claim. First, Maybank failed to prove that he had a fiduciary relationship with BB&T Bank related to the PVFCs or the MP Account. The normal relationship between a bank and its customer is one of creditor-debtor and is not fiduciary in nature. *Burwell v. S.C. Nat'l*

Bank, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986). A bank may only be held to a fiduciary duty if it undertakes to advise as part of its services. *Id.* The mere belief by Maybank cannot alone establish a fiduciary relationship. BB&T Bank had to also accept the role of fiduciary. *See Ellis v. Davidson*, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct. App. 2004) ("[A] fiduciary relationship cannot be created by the unilateral action of one party."). Whether a fiduciary relationship exists is an equitable issue to be determined by the court, *Hendricks v. Clemson Univ.*, 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003), and requires the Court to "look to the particulars of the relationship between the parties," *Armstrong v. Collins*, 366 S.C. 204, 222, 621 S.E.2d 368, 377 (Ct. App. 2005).[34]

There is no evidence that BB&T Bank accepted a fiduciary role with respect to the PVFCs or the MP Account.[35] The WMA states that BB&T Bank is the mere account custodian. (R. 3524). Advice relating to PVFCs and the MP Account was provided by employees of BB&T AM. (R. 2329-34, 2405-13, 2421-22). The WMA makes it clear that it is BB&T AM, not BB&T Bank, that is acting as the "investment advisor." (R. 3524). Mahfood, the wealth advisor and employee of BB&T assisting Maybank, never provided advice and was never acting in a fiduciary capacity. (R. 2399-2401). His only role was to connect Maybank to the expertise he needed with other entities. (*Id.*)

Maybank also failed to offer proof of a breach of fiduciary duty. At trial, Maybank relied heavily on the testimony of his purported expert John Freeman in

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[34] Despite Defendants' objections, the required division of legal and equitable issues did not occur at trial. Maybank did not request, and the court did not make, a finding that a fiduciary relationship existed between the Defendants and Maybank regarding any management of his investments, or any other part of their relationship. Therefore, the trial court erred in allowing the question of whether there was a fiduciary duty owed by Defendants to Maybank for the management of his assets to be decided by the jury.

[35] Because all evidence of damages is related to either the PVFCs or the MP account, a fiduciary role relating to anything else is immaterial. As for BB&T Bank's service as trustee of the Trust, the jury rejected all of those claims.

arguing for the existence of a breach of fiduciary duty. (R. 1469). But Freeman was not qualified to offer expert opinions as to PVFCs. Moreover, the purported conflicts of interest were fully known to Maybank, the costs of the PVFCs were explained in disclosures and during phone calls with the investment banks, and alleged misrepresentations related to the WMA, the Oliver Memorandum, and the November 2012 rebate letter cannot support a claim.

C. Negligent Misrepresentation and Constructive Fraud.

Maybank failed to establish a false representation, justifiable reliance, or any resulting damages, and thus did not prove negligent misrepresentation. *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010)(setting forth elements).

Maybank relies on the "Bank shall" provision in the WMA to support negligent misrepresentation, asserting that BB&T Bank was the only entity that could perform those duties, that it knew BB&T AM would perform some of those duties, and that this constituted a misrepresentation. (R. 2637-38; R. 3524). However, as discussed above, Maybank is misconstruing the WMA and the WMA was clear about the role BB&T AM had in the performance of the WMA. There is also no resulting injury based on the alleged misrepresentation in the WMA.

Maybank also attempts to rely on the Oliver Memorandum to support his negligent misrepresentation claim. (R. 2645-46; R. 3505). This reliance is misplaced as this memorandum is not a representation *to Maybank*. Rather, the memorandum was prepared by Gibson, an employee of BB&T AM, and was conveyed by Mahfood to Oliver who signed it on the same day Maybank and Bear Stearns executed the 2006 PVFC transaction. (R. 2409; R. 3505). While there was evidence that Maybank was

subsequently provided a copy, there was none that Maybank received it *before* he entered into the transaction, and hence, no evidence of reliance. (R. 1898, 2032-33).

Maybank also attempts to support this claim with the 2012 rebate letter. (R. 3598). This is meritless. First, the rebate letter was not sent to Maybank until several years *after* his relationship with Defendants ended and *after* this litigation had commenced. (R. 1954-55). Maybank could not have relied to his detriment upon a letter that did not exist until years after the PVFCs. *See Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 350, 565 S.E.2d 309, 315 (Ct. App. 2002). Further, the rebate letter merely stated that BB&T Bank was voluntarily rebating the fees charged by BB&T AM for the PVFCs. There was no evidence that BB&T Bank or BB&T AM were required to do so, and thus it did not constitute a false statement. (R. 3598; R. 2868-69, 2871-77).

Lastly, Maybank attempted to support the negligent misrepresentation claim by asserting that he was not informed of the costs of the 2006 PVFC. No evidence supports this contention. Maybank is a Harvard educated former employee of BB&T Bank, who worked in the Wealth Management Division for five years prior to the transactions and qualified as an accredited investor in August 2006. (R. 1848, 1860, 1974, 2270-71). With respect to the cost of the transaction, Maybank's expert, Craig McCann, testified that a person could calculate the costs for the 2006 PVFC in the aggregate. (R. 2273-74). It was a question of simple math. Additionally, Maybank signed the August 14, 2006 Equity Derivatives Confirmation from Bear Stearns and also signed the August 15, 2006 Standing Wire Instructions for the transfer of the PVFC proceeds. (R. 5108, 5110; R. 2034-37). Therefore, the record establishes only that Maybank was capable of determining the costs and was on notice of the same based on the documentation

provided and readily available to him. *See Doub v. Weathersly Breeland Ins. Agency*, 268 S.C. 319, 326, 233 S.E.2d 111, 114 (1977) ("It is well settled in this State that one cannot complain of fraud in the misrepresentation of the contents of a written instrument in his possession when the truth could have been ascertained by his reading the instrument.").

The basis for Maybank's constructive fraud claim is virtually the same as his negligent misrepresentation claim, and constructive fraud similarly was not established. (R. 2645-46). Specifically, Maybank again failed to establish any false statement, reliance, or resulting injury. *Florentine Corp. v. Peda I, Inc.*, 287 S.C. 382, 385-86, 339 S.E.2d 112, 113-114 (1985) (stating the elements of fraud). Also, the evidence failed to establish a fiduciary relationship with both BB&T Bank and BB&T AM required for a constructive fraud claim. Hence, Defendants were entitled to judgment.

D. Violation of the UTPA.

To recover under the UTPA, a plaintiff must prove the commission of an unfair or deceptive act in trade or commerce that proximately caused him damages. *Schnellmann v. Roettger*, 368 S.C. 17, 23, 627 S.E.2d 742, 745–46 (Ct. App. 2006). The evidence here fails to establish any unfair or deceptive conduct, any public impact, or any harm proximately caused to Maybank.[36]

First, there is no evidence that any of the three UTPA violations alleged by Maybank involved any unfair or deceptive act or practice. Even assuming BB&T Bank's delegation of certain duties to BB&T AM constituted a breach of the WMA, "a deliberate

[36] Maybank's post-trial filings stated his UTPA claims was "supported by three separate and distinct theories, factual circumstances, and deceptive acts": (1) the delegation of duties under the WMA, (2) the November 29, 2012 letter refunding certain fees, and (3) the assertion that the Oliver Memorandum was "merely a 'fill-in-the-blank' form letter." (R. 1448-51).

or intentional breach of a valid contract, without more, does not constitute a violation of the Unfair Trade Practices Act." *Perry v. Green*, 313 S.C. 250, 257, 437 S.E.2d 150, 154 (Ct. App. 1993). Likewise, the November 29, 2012 Rebate Letter from BB&T Bank to Maybank refunding certain fees was neither unfair nor deceptive. The letter's statement that "we are not required to rebate these fees, we choose to do so as a reflection of our corporate values," (R. 3598), was shown by the unrebutted testimony to be true.[37] Similarly, the Oliver Memorandum (R. 3501) contains no misrepresentations. Contrary to Maybank's arguments, this letter does not "purport[] to be an individualized assessment of his financial situation." (R. 1450). Rather the memorandum itself makes clear it is simply a disclosure by BB&T AM to BB&T Corp's General Counsel of Maybank's intent to enter the PVFC using BB&T Stock. Moreover, even if the memorandum *did* claim to be an individualized assessment of Maybank's situation, that claim was true. (R. 2409-12).

Second, there is no evidence that any of the three UTPA violations alleged by Maybank affected the public interest or are capable of repetition. *See Woodson v. DLI Props., LLC*, 406 S.C. 517, 530–31, 753 S.E.2d 428, 435 (2014). This showing must be specific, and the public impact must arise from the same unfair or deceptive act that proximately caused the plaintiff's injury. Here, the alleged breach of the WMA did not affect the public interest because, even if the WMA was a standardized agreement used with other customers, a breach of many similar contracts cannot support a UTPA claim

[37] *See* R. 2872 ("[W]hile we were not required to make this refund, we felt it was the right thing to do."); *id.* at R. 2875 ("[W]e made a business decision to refund these sums – we're not required to refund the sums . . . we felt it was the right thing to do."); R. 2943 (noting the fee issue was discovered as part of a routine SEC examination and that as a "reflection of our corporate values that we want our – we want to be to be above reproach . . . we decided to rebate the fees"); *id.* at R. 2946 ("We were not compelled to do this, but decided it was the right thing to do for clients.").

any more than the breach of a single contract can support such a claim. *See D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 548–49, 730 S.E.2d 340, 350–51 (Ct. App. 2012), *vacated in part on other grounds* 410 S.C. 319, 764 S.E.2d 701 (2014) (rejecting argument that the public impact was shown by the fact that Horton "routinely enters into similar contracts throughout the country," and instead holding that a breach of contract—even if intentional and done in a commercial setting—does not constitute a violation of the UTPA). Similarly, the letter refunding certain fees to Maybank and other customers is not capable of repetition because the Bank thereafter ceased charging such fees. (Borello Depo., 16-27). *See Daisy Outdoor Adver. Co., Inc. v. Abbott*, 322 S.C. 489, 496–97, 473 S.E.2d 47, 51 (1996) (equating public interest and capability of repetition and noting that public impact could be demonstrated by showing it was "likely they will continue to occur" or that "the company's procedures create a potential for repetition"). Likewise, even if the Oliver Memorandum was unfair or deceptive, there was no evidence of any impact it had on anyone but Maybank (assuming it affected him), nor was there evidence of a capability such actions would be repeated.

Third, there is no evidence that Maybank relied on any of these three alleged UTPA violations or that they proximately caused him any damages. A UTPA claim cannot survive if there is no evidence to support a finding of actual damages proximately caused by the alleged unfair or deceptive conduct. *See Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 318 S.C. 471, 482, 458 S.E.2d 431, 438 (Ct. App. 1995). Even if the tasks outlined in the WMA should have been performed by employees of BB&T Bank rather than by employees of BB&T AM, Maybank presented no evidence that this delegation of duties caused him any harm. Rather, Maybank's damages expert—Craig

McCann—provided damages figures related only to the suitability and performance of the PVFCs and the management of his MP Account. (R. 3668). McCann made no effort to isolate damages related only to the alleged unfair or deceptive statements in the WMA. Similarly, there is no evidence that the statements in the Rebate Letter refunding fees to Maybank induced any reliance or proximately caused any damage to him, as they were received by him after the filing of this action. There is also no evidence that the Oliver Memorandum induced reliance by Maybank, nor evidence of any resulting damages. Hence, the trial court should have granted judgment to the Defendants.

E. Maybank's claims were barred by the applicable statutes of limitations.

Each of Maybank's causes of action is time barred by the applicable three-year statutes of limitations,[38] and the trial court erred by failing to direct a verdict on his claims. "[T]he limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist." *Kelly v. Logan, Jolley, & Smith, LLP*, 383 S.C. 626, 633, 682 S.E.2d 1, 4 (Ct. App. 2009). This is an objective analysis. *Id.* The undisputed evidence showed Maybank was aware of the allegedly wrongful conduct more than three years before filing suit on December 22, 2011.

First, with regard to any loss arising from the WMA, Maybank's claims are based on alleged misrepresentations and breaches relating to the "Bank shall" provisions in the WMA, which was executed on August 23, 2006. (R. 3524; R. 2637-38). The evidence establishes that both before and immediately after the execution of the agreement, Maybank knew that BB&T AM was performing some of those functions. Maybank knew

[38] *See* S.C. Code Ann. §§ 15-3-530 and 39-5-150.

he was working with Kapoor—identified in the WMA as an employee and representative of BB&T AM—on the selection of stock positions for the MP Account. (R. 3524; R. 2041-42, 2047). Thus, Maybank had knowledge ***in 2006*** of the alleged misrepresentation and/or breach of the agreement.

To the extent Maybank's causes of action are premised upon loss or injury arising from his MP Account, the evidence established that, like all other investors in the market, his account experienced sharp declines in value during the Fall of 2008.[39] (R. 2053, 2056-57). These sharp declines were revealed to Maybank in his monthly MP Account statements, which he admittedly reviewed. (R. 2052). This put Maybank—who had *more* than common experience in investments—on notice that his alleged retirement funds were invested in a manner that subjected him to market risk. *See, e.g., Reed v. Prudential Sec. Inc.*, 875 F. Supp. 1285 (S.D. Tex. 1995) *aff'd*, 87 F.3d 1311 (5th Cir. 1996) ("[C]ourts throughout the United States have held that a sharp drop in the price of stock triggers an investor's duty to make diligent inquiry to discover the existence of possible fraud.").

To the extent Maybank's causes of action are premised upon losses arising from the PVFC, the evidence establishes he knew or should have known of the purportedly undisclosed costs associated with that transaction at its outset in August of 2006 as well as the alleged conflict of interest because the PVFC involved BB&T stock. (R. 1932-33, 2143, 2149-50). In sum, a reasonably prudent person would have been on notice prior to December of 2008 of the claims that Maybank asserted in this lawsuit.

VII. Defendants Should be Granted a New Trial Because John Freeman lacked

[39] In October of 2008 alone, Maybank's MP account had losses of $484,387. (R. 3624). The October 2008 MP account statement also showed that market losses for the year exceeded $1 million. (*Id.*).

the Qualifications Necessary to Serve as an Expert on PVFCs.

Over Defendants' objections, John Freeman ("Freeman") was permitted to testify as an expert witness with respect to PVFCs. He offered numerous opinions characterizing PVFCs as unreasonably risky and inappropriate for Maybank. (R. 2088b-2089, 2105, 2110-11, 2114-2120, 2143). Freeman, however, had no prior experience with PVFCs, and he was unqualified to offer any expert testimony or opinions as to PVFCs.

Under Rule 702, a witness can be qualified as an expert only if the witness has gained specialized "knowledge, skill, experience, training, or education" in the subject matter in which opinions are to be offered. S.C. R. Evid. 702. "[E]xpert testimony receives additional scrutiny relative to other evidentiary decisions," and "[t]rial courts should be cautious in conferring an expert label upon a witness because juries may accord excessive or undue weight to 'expert' testimony." *Watson v. Ford Motor Co.*, 389 S.C. 434, 446–49, 699 S.E.2d 169, 175–76 (2010). Thus, when "executing its gatekeeping duties, the trial court must . . . find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter." *Id.*

Here, Freeman possessed only a general knowledge of securities and lacked any prior experience with PVFCs, the specific securities transaction at issue in this case. (R. 2111-14, 2218-20). Never before had he been involved in a case or had any experience with PVFCs. (R. 2113, 2220). The decision in *Watson*, illustrates that general experience in the field is insufficient to confer expert status and that prior experience with the *specific* matter at issue is required when that subject matter is specialized. The decision in *Securities and Exchange Commission v. Tourre*, 950 F. Supp. 2d 666 (S.D.N.Y. 2013),

applies the principles set out in *Watson* in the context of securities litigation. In *Tourre*, the court held, "[The expert] does appear to have expertise in the general area of structured finance, but that is so broad a category as to become meaningless when particularized here to synthetic CDOs, a very specific type of security." *Id.* at 677–78. Here, Freeman has no prior experience with the specific subject matter in which he was proffered as an expert. During *voir dire* and cross-examination, Freeman's lack of specific experience with PVFCs was made evident.

All of Freeman's knowledge of PVFCs comes from his having read ***one article*** on the subject ***after*** he was retained in this case and ***after*** his deposition had already been taken. (R. 2112-13). This was the first case in which he had been asked to serve as an expert on the topic of PVFCs. (R. 2113, 2220). He has never assisted an investor with the execution of a PVFC and he has never given advice to an investor as to whether they should enter into a PVFC. (R. 2111-12). Freeman has never written any articles or taught any course about PVFCs. (R. 2112). He has never designed, or prepared written material for, a training program to educate investment advisors about PVFCs. (R. 2112). Prior to this case, he had never read any articles or publications addressing the appropriate disclosure of the costs of PVFCs. (R. 2112-13). He has never attended any courses that discussed the appropriate level of disclosure of costs required for PVFCs. (R. 2113-14). He has never worked as an employee of a bank, broker dealer, registered investment advisor, investment bank, or wealth management business and has never been a broker, an investment advisor, or a portfolio manager. (R. 2111, 2218-19). Finally, he has never taken the Series 7 exam, nor has he held any license through the NASD or FINRA or held the Chartered Financial Analyst or CFP designations. (R. 2219-20).

Freeman's opinions were clearly prejudicial and do not constitute mere harmless error. Freeman testified that the cost of PVFCs was extraordinarily high and that such cost made a PVFC unsuitable for Maybank. (R. 2143-59, 2165-66). Freeman was critical of virtually every aspect of the PVFCs. (R. 2223-26). Freeman was Maybank's primary witness on fiduciary duties, and Maybank relied heavily on Freeman's "expert" criticism of PVFCs to support his claim that fiduciary duties were breached. (R. 2676, 2678, 2680-81, 2684-85, 2688). Simply put, Freeman was a critical liability witness for Maybank, and his opinions were designed to greatly influence the jury. Because Freeman was improperly allowed to provide "expert" opinions regarding PVFCs to the prejudice of the Defendants, a new trial should be granted.

VIII. The Trial Court Erred by Trebling Damages Under the UTPA.

The trial court's trebling of damages under the UTPA was improper because the alleged conduct did not constitute "willful or knowing" violations of the UTPA. *See* S.C. Code Ann. § 39-5-140(a), (d). There is no evidence that the Defendants knew or should have known their conduct was violative of the UTPA.[40] The trial court found that the UTPA claim was supported by three theories: (1) the allegation that the WMA required that BB&T Bank alone perform the obligations, (2) the alleged representations in the Oliver Memorandum, and (3) the alleged representations in the 2012 rebate letter. (R. 63). None supports a finding of willful or knowing violations.

As explained above, the WMA allows the performance of its obligations to be performed by employees of other entities, such as BB&T AM. A mere difference in interpretation should not be viewed as a willful and knowing violation, especially

[40] As explained in Section I, *supra*, because the decisions of this Court hold that the UTPA does not apply to securities-related transactions, the Defendants would have had no basis for concluding that their acts violated the UTPA because the acts in question pertained entirely to securities-related transactions.

because Maybank knew Kapoor, an employee of BB&T AM, was performing some of the WMA obligations. Additionally, there is no evidence Defendants knew or should have known that the alleged breach of the WMA violated the UTPA because even "a deliberate or intentional breach of a valid contract, without more, does *not* constitute a violation of the Unfair Trade Practices Act." *Perry*, 313 S.C. at 257, 437 S.E.2d at 154 (emphasis added). As for the Oliver Memorandum, it cannot support a finding of a willful violation because there is no evidence Maybank ever relied on it or that it caused damages, nor was the memorandum even directed to Maybank. Similarly, Maybank could not have relied on any alleged misstatements in the 2012 Rebate Letter refunding certain fees, as this letter was not sent until long after Maybank initiated this lawsuit. Hence, the trial court erred in finding a knowing or willful violation of the UTPA. Thus, the Court should reverse the award of treble damages.[41]

IX. The Trial Court Erred as to the Award of Attorneys' Fees and Costs.

Concluding that eighty percent (80%) of the fees and costs were attributable to the UTPA claim, the trial court awarded Maybank $2,654,295 in fees and $245,011 in costs. (R. 85, 89-90). The attorneys' fee award reflected an enhancement by a 1.5 multiplier. (*Id.*). This award was in error as it lacked adequate documentation, was unreasonable, was improperly enhanced through a lodestar multiplier, and improperly included expert witness fees and unnecessary deposition expenses.

[41] In addition, the BB&T entities' lack of intent is shown by the jury's findings. Although the question of willfulness under the UTPA is for the court to decide, the jury's findings nevertheless provide a significant and persuasive basis upon which to conclude the Defendants did *not* engage in willful or knowing deception. Notably, the jury rejected Maybank's claims of fraudulent misrepresentation and breach of contract accompanied by fraudulent act, but found in favor of his claims for negligent misrepresentation, breach of contract, and constructive fraud. The difference between the claims the jury rejected and those it found was *intent*. The jury's award of punitive damages does not mean they found willful or knowing conduct. An award of punitive damages may be based on a finding of *reckless* conduct. *See Duncan v. Ford Motor Co.*, 385 S.C. 119, 137, 682 S.E.2d 877, 886 (Ct. App. 2009). Accordingly, the jury's award of punitive damages does not imply a finding that Defendants intentionally violated the UTPA.

The party seeking the fee award has the burden of presenting sufficient evidence. *Gainey v. Gainey*, 279 S.C. 68, 70, 301 S.E.2d 763, 764 (1983). Parties seeking a fee award under a UTPA claim can recover only those fees incurred in pursuing that claim. *Haley Nursery Co. v. Forrest*, 298 S.C. 520, 381 S.E.2d 906, 909 (1989). Also, a fee award cannot include fees relating to claims where the requesting party did not prevail. *Rice v. Multimedia, Inc.*, 318 S.C. 95, 100, 456 S.E.2d 381, 384 (1995).

Maybank's fee request was grossly inadequate and lacked the detail necessary for Defendants to meaningfully respond[42] and for the trial court to properly assess it.[43] By failing to provide any detailed billing statements identifying how the hours related to the different claims asserted, Maybank failed to establish that fees and costs awarded were actually in furtherance of the UTPA claim. Maybank pursued eleven claims at trial and prevailed only as to five. (R. 51). Additionally, the Trust also pursued eleven claims at trial and lost as to all claims. (*Id.*). Thus, out of twenty-two claims, Maybank prevailed only as to five, only one of which supports an award of fees. The trial court, however, reduced the total fees by only twenty percent, finding that "the causes of action are based upon a core set of common and intertwined facts."[44] (R. 84-85). Maybank's deficient application failed to provide the information necessary to segregate the work performed in furtherance of the UTPA claim from the seventeen claims on which Defendants

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[42] Defendants filed a motion outlining the deficiencies in the application for fees and seeking to compel Maybank to provide the additional information necessary for a proper review of the issue. (R. 1519). By failing to require Maybank to provide the information, Defendants were denied due process as their ability to rebut the application in a meaningful way was impeded. *See Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008).

[43] The trial court committed error when denying Defendants' motions to compel more information, to postpone consideration, and to strike the affidavit of John Freeman. With respect to the affidavit, it included numerous legal conclusions and lacked an adequate factual basis. For example, he never states what the "prevailing market rates" are. (R. 1104-28).

[44] Further, this conclusion is in direct conflict with the trial court's awarding of both punitive damages and treble damages based on its conclusion that there were UTPA "theories" which were "separate and distinct" from the other claims. (R. 78-79).

prevailed or from the four other claims on which Maybank prevailed.[45] The deficient application also affected the trial court's ability to properly weigh the factors set forth in *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997), in determining the reasonableness of the fees. Without meaningful records that identified how the claimed time was actually spent, it was impossible for the trial court to assess the time necessarily devoted to the case. Without a copy of the actual fee agreement, it was impossible to determine whether Maybank's "blended" fee arrangement weighed in favor of the award. (R. 86-87).

The trial court improperly applied a lodestar multiplier of 1.5 to enhance the fees award. (R. 87-89). Such a multiplier should only be used in "exceptional circumstances." *Layman v. South Carolina*, 376 S.C. 434, 460, 658 S.E.2d 320, 334 (2008). In *Layman*, those exceptional circumstances included the recovery of over $37 million for an entire plaintiff class and the termination of the further breach of contract by the State, as well as the fact that the case was litigated in this Court's original jurisdiction under an extraordinarily expedited schedule. *Id.* at 456–61, 658 S.E.2d at 332–34. The exceptional circumstances necessary to support a lodestar multiplier cannot duplicate the factors already to be considered under *Jackson v. Speed* as this would result in impermissible double counting.[46] Maybank and the trial court failed to point to any exceptional circumstances supporting a lodestar multiplier. Rather, the justifications

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[45] An additional example of the impropriety of the fees award is that it included over $65,000 in fees related to the remand of this case from federal court. Maybank was specifically denied an award of those fees by the federal court. (R. 23). As such, it was improper for those fees to be included in the present award based on the doctrines of *res judicata* and law of the case. *See Houden v. Todd*, 324 P.3d 1157, 1165–66 (Mont. 2014) (holding that it was error for a trial court to award fees relating to remand proceedings that had been denied by the federal court).

[46] *See, e.g., City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) ("[A]n enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar.").

given for the lodestar multiplier were already taken into account in the six *Jackson* factors. Thus, it was error to apply the lodestar multiplier.

Additionally, the costs awarded improperly include expert witness fees and unnecessary deposition expenses. The UTPA does not expressly identify expert fees as a recoverable cost, and, therefore, such costs are not properly awardable. *Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 319, 422 S.E.2d 128, 132 (1992) (holding that statutes allowing costs must be strictly construed and that "[f]ees for expert witnesses, beyond the ordinary fees authorized for witnesses generally, are not taxable as costs unless there is a statute specifically allowing such an expense"). Similarly, the costs attributable to unnecessary depositions are not properly awardable.[47] As for the other costs awarded, Maybank failed to establish the specific statutory authority allowing those costs, and thus they may not be recovered. *Black v. Roche Biomedical Labs.*, 315 S.C. 223, 230, 433 S.E.2d 21, 26 (Ct. App. 1993).

X. The Punitive Damages Award Was in Error.

Defendant should have been granted JNOV as to punitive damages because the $5 million punitive damage award is unsupported by the evidence, grossly excessive, and violates the Defendants' constitutional right to procedural and substantive due process.

A. There is an absence of clear and convincing evidence showing that the defendants acted in a reckless, willful, or wanton manner.

The entitlement to punitive damages must be established with "clear and convincing evidence." S.C. Code Ann. § 15-33-135. The Court of Appeals in *Cohen v. Allendale Coca-Cola Bottling Co.* stated:

Conduct is willful, wanton, or reckless when it is committed with a

[47] 20 C.J.S. *Costs* § 113 ("The expense of taking depositions may be allowed by some courts as an item of costs unless it appears that the depositions were unnecessary.").

> *deliberate intention* under such circumstances that a person of ordinary prudence would be *conscious* of it as an invasion of another's rights. It is the *present consciousness of wrongdoing* that justifies the assessment of punitive damages against the tortfeasor.

291 S.C. 35, 40, 351 S.E.2d 897, 900 (Ct. App. 1986). Punitive damages are improper when the evidence shows ordinary or gross negligence. *See Lengel v. Tom Jenkins Realty, Inc.*, 286 S.C. 515, 519–20, 334 S.E.2d 834, 837 (Ct. App. 1985). 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 Maybank and that PVFCs squarely fit his needs. (R. 2406-09, 2420-29, 2563-65, 2576-77, 2586, 3005-12). The PVFC's put Maybank in a better position than had he done nothing. (R. 2279, 2516-21, 2589-95, 2614-21). Indeed, with the additional income generated by the MP Account, Maybank's total income, including his BB&T dividend, increased during 2007-08. (R. 2020, 2054; 5121). It was the dividend cut in 2009 and Maybank's excessive spending that derailed his financial situation. (R. 2066-67, 2074).

The core dispute here is whether Maybank should have been encouraged to sell his BB&T stock rather than enter a PVFC. This dispute turns on the exercise of professional judgment and thus is a question of whether mere negligence has occurred. Maybank's attack focused on four items, none of which were supported. *First*, he contended he was deceived when not informed that BB&T AM would be performing some of the duties under the WMA. It is undisputed, however, that he knew that Kapoor, who signed as a representative of BB&T AM, was managing his account. (R. 2045-47; 3531). *Second*, Maybank argued that there was a conflict of interest because BB&T stock was involved, but he indisputably was aware of the purported conflict. Also, he never presented evidence that the purported conflict made any difference to the advice he

received. *Third*, Maybank contended that the Oliver Memorandum had misrepresentations, but there is no evidence that it was provided to him before PVFC, and, thus, no evidence it influenced him. (R. 3501, 1898). *Fourth*, Maybank complained that BB&T AM charged a fee, but that fee had been voluntarily discounted and there was no evidence that the desire to generate a fee was placed ahead of his interests. (R. 1889, 2028-29, 2384; R. 5109). Based on the lack of clear and convincing evidence, Defendants were entitled to JNOV as to punitive damages.[48]

B. The punitive damages award is unconstitutional and excessive.

In *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 587–88, 686 S.E.2d 176, 185–86 (2009), this Court articulated the method for conducting post-judgment review of a punitive damage award. The court should consider the degree of reprehensibility of the defendant's conduct, the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award (the ratio), and the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* Applying these factors demonstrates that the $5 million punitive damages verdict is unconstitutional.

As to reprehensibility, a court considers: (1) the harm caused was physical as opposed to 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. *Fortis*, 385 S.C. at 587, 686 S.E2d at 185. Here, these factors do not suggest a

[48] To the extent that Maybank attempts to rely on the alleged conduct of company employees to support the punitive damages award, such evidence is insufficient under the "complicity rule." *See, e.g., Scott v. Ameritex Yarn*, 72 F. Supp. 2d 587, 590 (D.S.C. 1999).

degree of reprehensibility that would warrant a multi-million punitive damages award.

The alleged harm to Maybank was economic only. In conducting an analysis of the second *Fortis* factor (health and safety), the trial court erred by mischaracterizing this factor and evaluating it based upon the "***financial*** health" of Maybank, and the "safety of his irreplaceable retirement ***assets***." (emphasis added) (R. 66). "Financial vulnerability" is specifically addressed in the third *Fortis* reprehensibility factor. *Id.*

Further, Maybank did not have financial vulnerability, the PVFCs were isolated events, and repeated wrongdoing was not involved. There was no intentional malice, trickery, or deceit involved. The PVFCs and activity in the MP Account represent the exercise of professional judgment and were done with full written disclosures. (R. 3478, 3567, 5093, 5361, 5363, 5364). In finding reprehensibility to be present, the trial court relied on Plaintiff's Exhibit 92, asserting that it shows that the Defendants viewed PVFCs as a "revenue opportunity." (R. 67 n.2). This exhibit, however, is not a document created by Defendants. It is a S&S document. (R. 2022-24; R. 3260, 5093). It was improper for the trial court to justify the punitive damages award by relying on the document of a third party. The testimony from current and former employees showed they believed the PVFCs were beneficial and offered protection from the risk of a drop stock price. (R. 2406-09, 2420-29, 2563-65, 2576-77, 2586, 3005-12). Thus, there was no reprehensible conduct on the part of the Defendants.

1. The ratio shows the punitive award is improper.

The ratio between the $5 million punitives verdict and the actual damages verdict of $3.1 million weighs in favor of vacating or substantially remitting punitive damages. Where "compensatory damages are *substantial*, then a lesser ratio, perhaps only equal to

compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm v. Campbell*, 538 U.S. 408, 425 (2003) (emphasis added). *See Casumpang v. Int'l Longshore & Warehouse Union*, 411 F. Supp. 2d 1201, 1220–22 (D. Haw. 2005) (1 to 1 ratio appropriate because damages substantial). The $3.1 million damages award was unquestionably substantial. Thus, under *State Farm*, a 1:1 ratio should be the maximum constitutional award.

2. Comparable civil penalties show the punitive award is improper.

Here, the difference between the punitives awarded and the comparable civil penalties for similar conduct also shows the jury's award is excessive. Because the alleged conduct involved securities, the South Carolina Securities Act provides the comparable civil penalty, stating that "the Securities Commissioner may impose a civil penalty in an amount not to exceed ten thousand dollars for each violation." S.C. Code Ann. § 35-1-604(d). Here, there were two transactions at issue: (1) the August 2006 PVFC; and (2) the January 2009 PVFC. Hence, the comparable civil penalty is, at most, $20,000. When a proper comparable civil penalties analysis is performed, the $5 million punitive damages award is 250 times the amount of the comparable civil penalty. Thus, none of the *Fortis* guidelines support the constitutionality of the punitive damages verdict, and this Court should vacate the verdict or remit it to a constitutional level.

Conclusion

For the foregoing reasons, 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,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

C. Mitchell Brown
D. Larry Kristinik
Brian P. Crotty
Michael J. Anzelmo
1320 Main Street
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

William S. Brown
104 S. Main Street, 9th Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorneys for Appellants/Respondents BB&T Corp., Branch Banking & Trust Co., and Sterling Capital Management, LLC

September 30, 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.

CERTIFICATE OF COUNSEL

The undersigned hereby certify that this Final Brief complies with Rule 211(b). SCACR.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

C. Mitchell Brown
D. Larry Kristinik
Brian P. Crotty
Michael J. Anzelmo
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

William S. Brown
104 S. Main Street, 9th Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorneys for Appellants/Respondents BB&T Corp., Branch Banking & Trust Co., and Sterling Capital Management, LLC

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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):

Pleadings: Final Appellants Brief of Appellants/Respondents

Counsel Served:

Mitchell M. Willoughby, Esquire
Elizabeth Zeck, Esquire
Chad Johnston, Esquire
John M.S. Hoefer, Esquire
Tracey Colton Green, Esquire
Willoughby & Hoefer, P.A.
Post Office Box 8416
Columbia, SC 29202

Bruce W. Bannister, Esquire
Bannister, Wyatt & Stalvey LLC
Post Office Box 10007
Greenville, SC 29603

Lisa P. Whitehurst
Administrative Assistant

September 30, 2015