THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

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APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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Appellate Case No. 2014-002638

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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.

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# Final Reply Brief of Respondent-Appellant Francis P. Maybank

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## ARGUMENT

### I. The parties presented their competing versions of the facts to the jury and the jury rejected Appellants' version, returning a verdict against Appellants.

Because this case was tried to a verdict by a jury, this Court's review on appeal does not encompass a review, much less a relitigation, of the facts. *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, Op. No. 27502, 2015 WL 4112411 at *8 (S.C. Sup. Ct. filed Feb. 25, 2015, Withdrawn, Substituted, & Refiled July 8, 2015). ("Many assignments of error are an attempt to relitigate factual disputes, which we are not permitted to do."). Notwithstanding the jury verdict, and consistent with the strategy employed throughout this litigation, *see* Order at 25 (describing Appellants' litigation approach as a "challenge every issue" defense), Appellants disagree with the recitation of the facts, testimony, and other evidence Mr. Maybank submitted to the jury in support of his claims against his fiduciaries.

However, after considering all of the testimony, arguments, and the parties' respective characterizations of the evidence, the jury returned a verdict in favor of Mr. Maybank. In considering the weighty task of the jury, the trial court noted that "I observed the jury and found the panel to be attentive, thoughtful, diligent, and deliberate in its consideration of the evidence presented during this lengthy trial." Order at 2. In short, "[t]he jury has spoken, and [this court is] not permitted to weigh the evidence and invade the province of the jury." *Janssen, supra*. Nonetheless, Appellants spend 18 pages of their Respondent's Brief in a misguided argument for the Court to do exactly that. *See Janssen*, 2015 WL 4112411 at *8; *see also* S.C. Const. Art. V §5. In their brief, Appellants without foundation characterize Mr. Maybank's version of the facts as "directly refuted by testimony and exhibits introduced at trial." Respondent's Br. at 2.

However, the exceptions that follow consist of nothing more than a recapitulation of Appellants' characterizations of the evidence and theories advanced to, but rejected by, the jury, complete with whole sections dedicated to Appellants' ***subjective perceptions*** of Mr. Maybank's knowledge, understanding, awareness, and reliance, as well as their disagreement with the arguments advanced by Mr. Maybank to the jury.[1] All of this was considered and rejected by the jury.

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[1] Throughout their criticism of Mr. Maybank's Statement of the Facts, and in an effort to create the misperception that Mr. Maybank's Statement of the Facts is unsupported by the evidence of record, Appellants cite only to pages of Mr. Maybank's Appellant's Brief rather than provide the record citations to the testimony and documentary evidence that were provided in the Appellant's Brief. *See* Resp. Br. Statement of the Facts, *passim*.

Beyond this attempt at deception, Appellants' selective citations are designed to take statements from Mr. Maybank's brief out of context in order to create "straw man" arguments where Appellants then seek to relitigate factual issues that were decided by the jury. For example, in Section A, Appellants label Mr. Maybank's statement that VPFC Nos. 1 and 2 cost $3,500,000 a "mischaracterization." Resp. Br. at 3. However, Appellants' rejoinder to that factually accurate statement of cost does not even address, much less dispute the evidence demonstrating that the costs of the VPFCs were $3,500,000. Instead, Appellants continue to argue their rejected perceptions of "benefits" of the VPFCs, *see id.*, which are irrelevant to the bottom line costs of the derivative investment strategy.

Even Appellants' recitation of the perceived benefits of the VPFCs is false and merely a smokescreen to continue BB&T's fantasy that a VPFC "was a perfect fit for Mr. Maybank." *See* Resp. Br. at 17. Appellants point to Mr. Maybank's receipt of $1,500,000 in dividends over the life of the VPFCs, but ignore the expert testimony of Dr. McCann that demonstrated the borrowing costs of the VPFCs connected to the continued receipt of those dividends "destroyed the economic value of those dividends," rendering the receipt of them through a VPFC worthless. **(R. pp.2244-48)** (Trans. p.891-95). Appellants also ignore the fact that entering the VPFCs on Appellants' advice required Mr. Maybank to hold his concentrated position of BB&T Corporation stock, and during the pendency of VPFCs Nos. 1 and 2, his investment in BB&T Corporation stock lost approximately $5,000,000 in value (but Appellants nonetheless point to a recovery of $828,457 of that $5,000,000 loss as a "benefit" conferred on Mr. Maybank). **(R. pp.2597-99)** (Trans. p.1741-43).

Further, Appellants' arguments are entirely inconsistent: on the one hand, Appellants highlight a reduction in income tax liability to Mr. Maybank of $800,000 as a result of the VPFCs (ignoring the fact that they were pitched the VPFC investment strategy to Mr.

During the trial, Appellants' strategy involved cherry-picking facts that they believed would engender resentment in the jury towards Mr. Maybank and his substantial financial losses.[2] However, Appellants' version of the facts below and on appeal is, like the Bank's investment advice, flawed and self-serving, and importantly, the same version of the facts they presented to the jury, which was rejected. *See, e.g., Odom v. Weathersbee*, 225 S.C. 253, 261, 81 S.E.2d 788, 792 (1954) ("The jury heard all the questions and all the answers, and they had a right to believe a part, nothing, or all that the witnesses said, and the fact that they took that part of the witnesses' testimony which is unfavorable to the appellants is no reason for this Court to conclude that their finding

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Maybank as a tax avoidance vehicle, **(R. pp.1883-84, 1937)** (Trans. p. 313-14, 368), while failing to acknowledge the testimony of their own expert witness, Hugh Penny, who testified Mr. Maybank paid approximately $770,000 in income taxes as a result of the VPFCs, **(R. p.2597)** (Trans. p.1741), which completely contradicts Appellants' later statement in their brief that "[t]he [VPFC] allowed Maybank to generate millions in cash proceeds without having to sell any stock and without incurring large capital gains taxes," Resp. Br. at 4. In short, the VPFC strategy was a financial disaster for Mr. Maybank but a financial goldmine for Appellants.

[2] A small sampling of Appellants' efforts are highlighted in the factual recitation of the Appellant's Brief in the primary appeal and in their Respondent's Brief on the cross-appealed issue of prejudgment interest, *e.g.*, Mr. Maybank's Harvard education, experience in the financial industry, livestock and farming businesses, and supposedly unnecessary and generous spending on (of all things) his grandchildren's education. Appellants' efforts at disparaging their one-time client (to whom they owed a fiduciary duty) mirror the comments made to Mr. Maybank by their Senior Executive of BB&T's Wealth Division. **(R. pp.1941-44)** (Tr. p.372-75).

Simply put, Appellants' characterization was rejected by the jury. No point-by-point rebuttal of Appellants' re-asserted jury arguments is necessary where these arguments unfailingly consist of their subjective characterizations of Mr. Maybank's knowledge or Appellants' disagreement with his testimony—or that of his experts—all of which was submitted to and resolved by the jury. *See Townes Associates, Ltd. v. City of Greenville,* 266 S.C. 81, 221 S.E.2d 773 (1976) ("In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings.").

was illogical."). Moreover, Appellants' depiction of the facts and selective citation to the record does not tell the real story of this case based on the entire record.

Mr. Maybank does feel compelled to correct some of the more egregious misrepresentations of Appellants in their brief. The first is contained in their "Statement of the Case." Resp. Br. at 2. In Mr. Maybank's Appellant's Brief (on the cross-appealed prejudgment interest issue) and in his own Statement of the Case, App. Br. at 6, Mr. Maybank noted his contention to the trial court that Appellants failed to deposit the proper judgment amount with the Court upon their post-Order request, as they did not include the accrued interest for the period between the date of the jury's verdict and the entry of the Order and Final Judgment by the trial court. App. Br. at n.6 (citing S.C. Code Ann. § 15-37-30). Mr. Maybank's recitation of this point does not interject argument, as Appellants incorrectly assert, but merely recounts the unresolved issue in the interest of providing the Court with full information and a complete picture of the current landscape of this case. Contrary to Appellants' contention, Rule 208(b)(1(C), SCACR, does not preclude references to argumentative matter but, rather "contested matter." There can be no violation of the rule as it is certainly beyond contest that the trial court's order left unresolved the issue raised by Mr. Maybank under S.C. Code Ann. § 15-37-30. Thus, this is merely the history of the case required by the rule. Further, Rule 208(b)(1(C) expressly states that a party is bound by its statement of the case. Were Mr. Maybank to have omitted this from his statement, Appellants would surely assert that the issue had been waived.[3]

[3] With respect to Appellants' actual motion for leave to deposit the judgment, Mr. Maybank saw no reason to oppose depositing all of the judgment and some of the

Appellants misrepresent even inconsequential facts in their brief, such as their assertion that Mr. Maybank "never complained" about the VPFCs until the summer of 2010. Resp. Br. at 5-6. However, as Mr. Maybank plainly testified, following the January 2009 roll-over into VPFC No.2, he immediately complained to Appellants and requested that they unwind the trade (which they either could not or would not do). **(R. pp.1932-33)** (Trans. p.363-64). Moreover, Mr. Maybank's testimony about his belief that his BB&T Corporation stock dividend would be protected while in a VPFC is confirmed by the terms of the VPFC, for those that are untrained and inexperienced in VPFCs, which describe the dividend payment as a "Contractual Dividend." **(R. p.3508)** (Agreed Ex.9, VPFC No.1 at 4).[4]

Appellants' mischaracterizations also extend to the Approval Letter **(R. pp.3501-04)** (Agreed Ex. 7) and the Form Approval Letter **(R. pp.3257-59)** (Pl. Ex. 91). Appellants first attempt to avoid Mr. Maybank's receipt and reliance on the Approval Letter in making his decision to follow Appellants' flawed investment strategy. However, the evidence demonstrates Mr. Maybank *did* receive General Counsel Oliver's approval memorandum prior to the execution of VPFC No.1, and there is a facsimile line that

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interest, but *did* object to the amount of interest Appellants sought to deposit. Rather than take up the issue at that time, the trial court expressly stated that "[t]he Court notes the Plaintiff's position that, pursuant to § 15-37-30 of the South Carolina Code, interest should be deemed to run from the time of the verdict. The Court reserves ruling on this issue until such time that a motion is made for the distribution of the funds deposited with the Court." Appellants' statement that "Maybank did not appeal the order" is misleading because the trial court did not rule on the issue, even though the import of § 15-37-30 confirms Mr. Maybank's position.

[4] The VPFC further provides that "[i]n the event that the Issuer changes the frequency of its dividends or does not declare a dividend when expected, the Calculation Agent **may adjust the terms of this Transaction *to preserve* the economic effect of the dividend** frequency expected by Bear Stearns at the Trade Date." **(R. p.3508)** (Agreed Ex.9, VPFC No.1 at 4) (emphasis added).

shows Mr. Maybank's receipt at 8:40am. **(R. pp.3501-04)** (Agreed Exh. 7, Approval Letter) (copy of letter produced from Mr. Maybank's files bearing "BB&T Legal Department" facsimile dateline of "Aug-11-2006 08:40am"); *see also* **(R. p.1910)** (Tr. p.340:6-11) ("Q: Do you have any idea on August the 23rd of 2006 that they – of how this – or any concern at that point in time about this strategy that the bank has recommended for you? A: No, I thought it had been thoroughly researched, and a letter from Ms. Oliver confirmed it at the highest levels of the bank were informed about the strategy."). That evidence aside, Appellants failed to argue in their motion for JNOV that Mr. Maybank's receipt of the Approval Letter prior to the implementation of the strategy, so Appellants' argument in that regard is unpreserved for this Court's review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

Moreover, Appellants astonishingly argue that the Approval Letter "was accurate in every respect," Resp. Br. at 12, despite the testimony from their employee and putative drafter of the Approval Letter, Anthony Mahfood, that he had neither written the letter nor conducted any analysis to confirm any of the promises and representations that the Approval Letter stated were done for Mr. Maybank. **(R. p.2439)** (Trans. p.1340). Further, Mr. Mahfood testified that he was, in fact, prohibited by BB&T Bank policy from performing any such analysis or from making any recommendation or providing any

wealth management advice, notwithstanding his title as Mr. Maybank's Wealth Management Advisor. **(R. pp.2437-39)** (Trans. p.1338-40).[5]

## II. Appellants merely restate their disagreement with the testimony supporting Mr. Maybank's damages, and neither adequately address the issue on appeal nor explain why Mr. Maybank's damages are incapable of ascertainment by computation to a sum certain.

Similar to Appellants' attempted relitigation of the facts, Appellants' argument on appeal as to prejudgment interest rests on the fact that they disagreed with Mr. Maybank's expert testimony and presented competing testimony of their own. Resp. Br. at 24-28. At bottom, Appellants still misapprehend the damages analysis presented by Dr.

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[5] Appellants' accusation that Mr. Maybank is attempting to "fabricate a misrepresentation," *see* Resp. Br. at 14, is belied by the jury verdict, which conclusively found negligent misrepresentations, constructive fraud, and unfair and deceptive business practices. Likewise, Appellants' contention that there is no evidentiary support for the assertion that the Form Approval Letter was used to deceptively sell this investment strategy to other BB&T clients is belied by reference to the emails accompanying the Form Approval Letter in Plaintiff's Ex. 91, **(R. pp.3257-59)**, which show the use of the letter with an additional "BB&T employee client" of Appellants and reference similar approval of General Counsel Patricia Oliver being required. *Id.* at 1. As we know from Appellants' incentive data and performance reviews, Appellants were marketing VPFCs to their customers under their alternative investment Division Initiative, *see* **(R. pp.3123-32)** (Agreed Exs. 52-53); **(R. pp.3135-36)** Agreed Ex. 55 at 3-4 (Mr. Maybank's wealth advisor Anthony Mahfood's 2006 year-end review, congratulating him on producing the 9th most fee revenue "in the company" and for "being the top producer of Alternative Investment fee income" and stating "he is to be commended for being a leader in the Alternative Investment arena"), **(R. pp.3138-43)** Ex. 56 (2009 Mahfood Year-End Review); **(R. p.3147)** Pl.'s Ex. 89 at 4 (Greenville Wealth Management team leader Ross Walters' 2007 mid-year review, stating "Ross took a leadership role in the introduction an delivery of Alternative Investments and closed some significant business in 2006" and that "Ross can be counted on to support division initiatives, such as the introduction of alternative investments"); **(R. pp.3260-78, 3339-52)** Exs. 92, 103-104, and 106-107). However, Plaintiff's Ex. 100 demonstrates that internal sales presentations touting VPFCs as a "revenue opportunity" were **distributed directly to Appellants' employees**, including Mr. Maybank's advisors. **(R. pp.3279-3314)** (Pl. Ex. 100); **(R. p.3952)** (Pl. Ex. 107).

McCann.[6] More importantly, Appellants' argument does not address the Court's standard for evaluating a party's entitlement to prejudgment interest. Prejudgment interest would never be awarded if the calculation depended on the parties' agreement to the entitlement to and method of calculating damages. *See Babb v. Rothrock*, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993) ("The fact that the sum due is disputed does not render the claim unliquidated for the purposes of an award of prejudgment interest.") (citing *Wayne Smith Constr. Co., Inc. v. Wolman, Duberstein & Thompson*, 294 S.C. 140, 363 S.E.2d 115 (Ct. App. 1987)).[7]

Appellants seek to evade the fact that the damages they caused Mr. Maybank to suffer were determinable to a sum certain. They do so by reasserting several irrelevant, "red herring" arguments that they unsuccessfully made at trial. First, they attempt to cast doubt on the two benchmark portfolios[8] that Dr. McCann testified would have been

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[6] Appellants' misrepresentations and mischaracterizations of Dr. McCann's analysis appear early and often, beginning with the incorrect assertion that the analysis was based on the sale of Mr. Maybank's BB&T Corporation stock in August of 2006 and investment of those hypothetical proceeds into benchmark portfolios. Appellants have taken Dr. McCann's answer to a single conceptual question of whether Mr. Maybank would have been better off selling the BB&T stock than entering the VPFC, **(R. p.2243)** (Trans. p.890), and used that answer to completely misrepresent the basis of Dr. McCann's analysis and other testimony. **(R. pp.2250-67)** (Trans. p.897-914).

[7] Appellants contend that "[w]hile a dispute as to the *amount of the damages* alone does not render prejudgment interest inapplicable, a dispute as to *the methodology* for determining the measure of damages does render prejudgment interest inapplicable." Resp. Br. at 22. However, Appellants cite no case law for their desired "methodology" standard.

[8] Benchmark portfolios and indices such as those used by Dr. McCann are the standard measure of damages in cases in the financial industry and routinely accepted by courts to determine the losses resulting from unsuitable and imprudent financial advice. *See, e.g., California Ironworkers Field Pension Trust v. Loomis Sayles & Co.*, 259 F.3d 1036, 1047 (9th Cir. 2001); *GIW Indus., Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 895 F.2d 729, 733–34 (11th Cir. 1990); *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2nd Cir. 1985); *Alco Indus., Inc. v. Wachovia Corp.*, 527 F. Supp. 2d 399, 408 (E.D. Pa.

suitable and prudent for a man 74 years of age heading into retirement. Resp. Br. at 25. In doing so, they simply resurrect their jury argument about the weight to be given Dr. McCann's testimony even though they did not object to his qualifications. **(R. p.2237)** (Trans. p. 884); *see Watson v. Ford Motor Co.*, 389 S.C. 434, 446-47, 699 S.E.2d 169, 175 (2010) (holding that, after expert is qualified by the trial court, the jury may assign the witness's testimony "such weight as it deems appropriate"). Moreover, disregarding Dr. McCann's expert testimony regarding the suitability of those specific portfolios, Appellants present for the first time on appeal comparisons to two other bond funds which, unsurprisingly, show lower benchmark returns. In doing so, Appellants implicitly concede that a benchmark portfolio is appropriate here.[9] Moreover, because Appellants presented no testimony at trial that one or both of these two other bond funds would have been a more appropriate measure of damages, this contention is unpreserved for review. *See Wilder Corp., supra.*

Second, Appellants persist in arguing that they do not believe Mr. Maybank would have invested in the age-suitable portfolios testified to by Dr. McCann. Resp. Br. at 27. This contention is simply wrong. Mr. Maybank unfailingly, but to his great detriment, followed the advice of his fiduciaries with respect to all aspects of the comprehensive investment strategy devised and recommended to him by Appellants. He testified that he was essentially the "perfect customer" of the Bank, because he accepted every service that his fiduciaries recommended that he purchase. **(R. pp.1912-13)** (Trans.

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2007); *Williams v. Sec. Nat. Bank of Sioux City, Iowa*, 358 F. Supp. 2d 782, 805 (N.D. Iowa 2005); *Dasler v. E.F. Hutton & Co., Inc.*, 694 F. Supp. 624 (D. Minn. 1988).

[9] *Cf. Alco Indus.*, 527 F.Supp. at 1056 n.10 (defendant conceded appropriateness of benchmark portfolio calculation by proposing one of its own).

p.342-43). Mr. Maybank further testified that he followed Appellants' recommended aggressive growth investment objective consisting of 100% equity investments because he believed Appellants' representations that this was the appropriate way to invest the proceeds of a VPFC, with which he had no previous experience. **(R. pp.1911-12)** (Trans. p.341-42, 479). In fact, Mr. Maybank's testimony directly refutes Appellants' argument on this point (made both at trial and on appeal); when asked "[i]f the bank had advised you that the right strategy was to sell the stock, pay the margin position, create a diversified portfolio with the balance of the proceeds, would you have done that?," Mr. Maybank responded, "[y]es, I would have."[10] **(R. p.1887)** (Trans. p.317). The self-serving contrary testimony of Appellants' employees at trial was presented to the jury, Resp. Br. at 26-27, but was rejected in favor of Mr. Maybank's testimony.

Moreover, Appellants continue to muddle this issue by arguing that the jury improperly rejected their version of the facts, rather than focusing on the issue of whether Mr. Maybank's damages were capable of assessment to a sum certain. Dr. McCann's testimony focused on how Appellants' investment strategy centered on a VPFC was wholly unsuitable for Mr. Maybank. **(R. pp.2242-43)** (Trans. p.889-90). In testifying that Appellants' so-called investment strategy substantially increased Mr. Maybank's risk, he provided his expert opinion that a reasonable and prudent fiduciary in Appellants' position, tasked with advising a client with Mr. Maybank's investable assets and at Mr. Maybank's station in life (on the precipice of retirement), would not have advised him to enter the VPFC strategy but would have instead recommended investments in a minimum

[10] Mr. Maybank was further asked, "can you remember any advice that the bank gave you that you did not follow?" and he responded "I can't think of anything." **(R. p.1887)** (Trans. p.317).

of 70% low risk, investment grade bonds (and 30% equities), or a portfolio of 100% bonds. **(R. pp.2251-52, 2262-67)** (Trans. p.898-99, 909-14). Thus, while Dr. McCann's testimony criticized the prudency of the VPFC recommendation by Mr. Maybank's fiduciaries vis-à-vis the industry standards, Appellants sought (and still seek) to turn the issue into a heads-we-win-tails-you-lose referendum on Mr. Maybank. None of this rejected jury argument addresses the issue of whether Mr. Maybank's damages are capable of ascertainment by computation to a sum certain.

## III. The cases cited by Appellants neither address the type nor analyze the nature of the damages at issue in this case and are therefore not helpful to the Court's analysis of the issues.

None of the cases cited by Appellants involve the mismanagement of financial assets turned over to a fiduciary with complete discretionary control and which were used to confer a benefit on the fiduciary (to the detriment of the principal). Consequently, they are inapposite to the issue before the Court and are unhelpful to assessing Mr. Maybank's substantive claim to prejudgment interest.

Appellants rely heavily on the case of *Sundown Operating Co. v. Intedge Industries, Inc.*, Unpublished Op. No. 2007-UP-091 (S.C. Ct. App. filed February 23, 2007), to support their contention that prejudgment interest is inappropriate in this case. *See* Resp. Br. at 29-32. However, "[m]emorandum opinions and **unpublished orders have no precedential value and *should not be cited* except in proceedings in which they are directly involved**." Rule 268(d)(2), SCACR (emphasis added). Appellants give lip service to the restriction on citing unpublished opinions "as precedent," *see* Resp. Br. at n.17, but nevertheless flout the rule against citation, arguing that the opinion is "an example of persuasive reasoning from the Panel that decided that case," whatever that

means, and later disregard Rule 268(d)(2) altogether and suggest that *Sundown* is "South Carolina authorit[y]. *See* Resp. Br. at 29. However, the rule against citation of unpublished opinions is not contingent upon the proponent's view of the opinion's persuasive reasoning. The opinion itself warns that it "has no precedential value" and "**should not be cited or relied on as precedent in any proceeding** except as provided by Rule [268](d)(2), SCACR." *Sundown, supra.* Accordingly, *Sundown Operating* cannot support Appellants' position[11] on appeal and this Court may strike, in its discretion, or disregard out of hand Appellants' arguments based on the case. *See, e.g. Ford v. Beaufort Cnty. Assessor*, 398 S.C. 508, 515 n.3, 730 S.E.2d 335, 339 n.3 (Ct. App. 2012).

Even beyond those problems, the facts of *Sundown* are easily distinguishable from the facts of Appellants' egregious misconduct as Mr. Maybank's fiduciary. Notably, Appellants cite only to *dicta* from the memorandum opinion because the court of appeals' decision to uphold the master's denial of prejudgment interest actually rests on the appellant's failure to plead for prejudgment interest in its complaint. *Sundown, supra* (citing, *inter alia, McMillan v. S.C. Dep't of Agric.*, 364 S.C. 60, 74, 611 S.E.2d 323, 330 (Ct. App. 2005)). The portion of the memorandum opinion cited by Appellants merely supplements that dispositive holding.

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[11] Notwithstanding, Appellants contend *Sundown* represents "case law interpreting and applying its rules regarding prejudgment interest [and] illustrat[ing] the inappropriateness of prejudgment interest in this case," (Resp. Br. at 29), and later state that *Sundown* is "relevant to the instant case and support[s] the finding that Maybank is not entitled to prejudgment interest," (Resp. Br. at 31). In fact, in their purported penultimate statement of the law, Appellants directly recite the *dicta* from *Sundown*, claiming that a sum certain must be reached "through the application of a clear mathematical calculation which cannot be changed from proof." *Compare* Resp. Br. at 23, *with Sundown* (which also cites no case law for this proposition). So Appellants misrepresent their true reason for citing to a memorandum opinion of the court of appeals.

Moreover, contrary to the quotations Appellants cite from *Sundown*, the court of appeals did not hold that the fact that the lower court relied on the testimony of fact witnesses, expert witnesses, and exhibits in reaching its award of damages prevented the application of prejudgment interest. Instead, the court of appeals relied upon that very evidence to reach its conclusion that the party's measure of recovery was not fixed on the date of the restaurant fire (and thus not capable of being reduced to a sum certain on that date). In this case, reliance upon Mr. Maybank's expert witnesses demonstrates the opposite: a set formula can be used to determine Mr. Maybank's damages at any time. As held by the court of appeals in a ***published*** opinion—*Builders Transp., Inc. v. S.C. Prop. & Cas. Ins. Guar. Assoc.*, 307 S.C. 398, 406, 415 S.E.2d 419, 424 (Ct. App. 1992) (cited in *Sundown*)—otherwise unliquidated claims capable of being reduced to certainty by mathematical calculation may be considered liquidated for the purpose of awarding prejudgment interest under South Carolina law. This is precisely what the expert witness presented by Mr. Maybank demonstrated. Therefore, unlike those in *Sundown*, Mr. Maybank's damages were capable of ascertainment by computation to a sum certain.

Similarly, neither *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 673 S.E.2d 448 (2009) nor *Vaughn Development, Inc. v. Westvaco Development Corp.*, 372 S.C. 576, 642 S.E.2d 757 (Ct. App. 2007), involve the mismanagement of financial assets turned over to a fiduciary. *Historic Charleston Holdings* involved a dispute as to the division of proceeds held in escrow after the sale of property. 381 S.C. at 436, 673 S.E.2d at 458. Meanwhile, *Vaughn Development* is notable for its recitation of the history of prejudgment interest—including an observation that the trend nationally is for a more liberal rule for awarding prejudgment interest—but ultimately is based on the unique

facts presented in the case involving an intermediate question of required work under the contract at issue. 372 S.C. at 580-81, 642 S.E.2d at 759-60. Because the scope of work was not settled, the court of appeals held that damages deriving from that undetermined work could not be ascertained. *Id.* In this case, unlike *Historic Charleston Holdings* and *Vaughn Development*, the duties undertaken by Appellants as fiduciary wealth manager advisor to Mr. Maybank and the nature of the investment were certain and the testimony that those duties were either unfulfilled or egregiously breached was clear.

As discussed above, Appellants mistakenly argue that Mr. Maybank's damages could not be ascertained because they did not agree with the testimony of Mr. Maybank's expert witnesses and presented competing testimony of their own. *See* Resp. Br. at 30 (asserting that "the amount of damages was hotly contested by the parties who presented extensive expert testimony on this issue."). However, this point is irrelevant and provides no support for the proposition that prejudgment interest is inappropriate under these circumstances. This Court has expressly held that "[t]he fact that the sum due is disputed does not render the claim unliquidated for the purposes of an award of prejudgment interest. *Babb*, 310 S.C. at 353, 426 S.E.2d at 791 (1993) (citing *Wayne Smith Construction*, 294 S.C. 140, 363 S.E.2d 115).

Moreover, although the amount of damages was capable of fluctuating due to the nature of the financial assets Mr. Maybank turned over to Appellants for fiduciary investment services, the categories of damages did not fluctuate because those were set on the date Appellants recommended the failed investment strategy. To those set damages categories, (consisting of 1) the costs and fees of the VPFCs, and 2) Appellants' discretionary investment of the proceeds of the VPFCs in a managed account of 100%

equities with an investment objective of aggressive growth), Dr. McCann applied a mathematical calculation to ascertain Mr. Maybank's damages. **(R. pp.3668-3770)** (Agreed Ex. 72); **(R. p.5092)** (Pltf's Ex. 98). And contrary to Appellants' the continued mischaracterization of Dr. McCann's damages calculations, that analysis evaluated the damages actually caused by Appellants' imprudent and improper investment advice. Dr. McCann in fact considered the costs and fees of the VPFCs actually recommended by Appellants, rather than performing a useless calculation based on a hypothetical sale of Mr. Maybank's BB&T Corporation stock in 2006 (which is the basis of Appellants' criticism on appeal and at trial). In sum, the cases cited by Appellants are inapposite and do not support the proposition that prejudgment interest was properly denied by the trial court.

## IV. Appellants' preservation argument with respect to the additional supporting case law advanced by Mr. Maybank in support of his entitlement to prejudgment interest is wholly without merit.

Appellants misconstrue Mr. Maybank's claim in this cross-appeal regarding his entitlement to prejudgment interest under § 34-31-20(A) and in doing so attempt to manufacture a preservation issue out of the case law cited in the Appellant's brief in support of reversal of the trial court on this limited issue. However, Appellants' preservation argument is deserving of the scant attention given it in their brief. Resp. Br. at 33-34. At bottom, Appellants assert that Mr. Maybank is prohibited from citing to additional case law on appeal which would support his contention that prejudgment interest is properly awarded on the actual damages verdict rendered by the jury on three causes of action, including breach of fiduciary duty. *Id.* Of course, Appellants cite no case law for this novel application of the Court's preservation rules.

Regardless, the case law from other jurisdictions cited by Mr. Maybank in his Appellant's Brief does not alter the basis for his claim of prejudgment interest, which is based solely on S.C. Code Ann. § 34-31-20(A). The cases cited from other jurisdictions[12] provide additional support for the concept that damages arising in situations, like here, where a fiduciary undertakes the control and management of the principal's investable assets (which necessarily fluctuate based on market tendencies inherent to the trade), and the fiduciary's wrongful actions confer a monetary benefit on the fiduciary, the principal's damages are capable of ascertainment by computation—often through expert witnesses—to a sum certain. Appellants' cursory treatment of these cases fails to address this key distinction and therefore fails to meaningfully rebut the proposition advanced by Mr. Maybank. As explained in his Appellant's Brief, Mr. Maybank maintains that the measure of damages involved in this case and proved at trial below were ascertainable to a sum certain under § 34-31-20(A) and support the imposition of prejudgment interest.

## V. The exculpatory clauses of the Wealth Management Agreements do not support a waiver argument as to prejudgment interest.

Appellants' alternative waiver argument is unsupported by the plain language of the exculpatory clause or any case law permitting the application of a broadly worded

[12] *See The Woodward School for Girls, Inc. v. City of Quincy*, 13 N.E.3d 579 (Mass. 2014); *McDermott v. Party City Corp.*, 11 F. Supp.2d 612, 633 (E.D. Penn. 1998); *In re Joy Recovery Tech. Corp.*, 291 B.R. 111, 114 (2003); *Smith v. Fairfax Realty, Inc.*, 82 P.3d 1064, 1068 (2003); *Josephson v. Marshall*, 2002 WL 1315604 at * 4 (S.D.N.Y. 2002); *McCoy v. Goldberg*, 810 F.Supp. 539 (S.D.N.Y. 1993); *Quintel Corp., N.V. v. Citibank, N.A.*, 606 F. Supp. 898 (S.D.N.Y. 1985); *In re Estate of Wernick*, 535 N.E.2d 876 (Ill. 1989); *Rois v. H.C. Sharp Co.*, 203 S.W.3d 761 (Mo. Ct. App. 2006); *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746 (Mo. App. 1990).

limited liability provision to a right established by statute.[13] Initially, this argument is conclusory and advanced without citation to any authority to support the desired application of a contractual exculpatory clause to Mr. Maybank's statutory right to prejudgment interest. *Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (finding an argument advanced through conclusory statements with no argument or supporting authority abandoned). Appellants have cited no case law, and Mr. Maybank is aware of none, where an exculpatory clause like the one included in Appellants' form WMA has been applied to restrict the assessment of statutory prejudgment interest. By failing to present any supporting authority, Appellants have failed to meet their burden of adequately raising an issue for this Court's consideration and the Court may deem it abandoned.

Regardless, nothing in the plain language of the exculpatory clause supports Appellants' position that prejudgment interest is a measure of damages (awarded based on Appellants' misconduct), as opposed to the statutory right set forth in § 34-31-20(A) ("... shall draw interest ...."). Nor do Appellants provide any explanation or support for their presumed argument that statutory prejudgment interest qualifies as one of the five categories of damages that the exculpatory clause purports to exclude. **(R. p.3528)** (Agreed Ex.14, WMA at 5 (stating "[i]n no event shall Bank or Investment Advisor be liable for any incidental, indirect, special, consequential, or punitive damages")).

[13] As argued by Mr. Maybank in his Respondent's Brief in the primary appeal, the exculpatory clauses have no application in this case, and Mr. Maybank incorporates by reference the arguments in Section I.i. of his brief against the exculpatory clauses as if set forth verbatim herein. *See* Rule 208(b)(6), SCACR.

Moreover, exculpatory clauses are disfavored in South Carolina, *see Cooke v. Allstate Management Corp.*, 741 F. Supp. 1205, 1207 (D.S.C. 1990), are to be narrowly interpreted against the drafter, *see McPherson By & Through McPherson v. Mich. Mut. Ins. Co.*, 310 S.C. 316, 319, 426 S.E.2d 770, 771 (1993), and are otherwise strictly construed, *see S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc.*, 283 S.C. 182, 322 S.E.2d 453 (Ct. App. 1984). Nothing in the exculpatory clause would have suggested that a statutory right to prejudgment interest was being waived, as now argued by his former fiduciary.[14] Indeed, no mention of prejudgment interest appears at all. Yet the United States Supreme Court has held that contractual provisions will not operate to waive a statutory right unless such waiver is explicitly stated. *See Metro. Edison Co. v. N.L.R.B.*, 460 U.S. 693, 707-08 (1983) ("[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable.") (citing *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 283 (1956)).[15] Here, where the plain language of the exculpatory clause contains no express or implied reference to prejudgment interest, this Court has no basis to find that Mr. Maybank has waived his statutory right to prejudgment interest.

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[14] As Mr. Maybank's fiduciary at the time he was presented the form WMA, Appellants had an absolute duty to disclose and explain material facts contained in the WMA to him, including every patent and latent implication of the exculpatory clause. *See Regions Bank v. Schmauch*, 354 S.C. 648, 672-74, 582 S.E.2d 432, 444-46 (Ct. App. 2003) (holding that fiduciaries have an absolute obligation of disclosure of material facts to their clients and that clients have a right to rely upon those representations). No such explanation was ever provided.

[15] *See also Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2nd Cir. 1982); *NLRB v. S. Ca. Edison Co.*, 646 F.2d 1352, 1364 (9th Cir. 1981); *Communication Workers of Am., Local 1051 v. NLRB*, 644 F.2d 923, 927 (1st Cir. 1981).

Moreover, Appellants' expansive reading of the exculpatory clauses confirms and further demonstrates the public policy arguments against Appellants' unconscionable use of those provisions. Courts have been skeptical of a party's efforts to enforce an exculpatory clause where that party is in a substantially higher bargaining position and the clause is a part of a form, boilerplate contract. *See Cooke*, 741 F. Supp. at 1207-08 (rejecting "attempts to exculpate 'for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or where public interest requires the performance of a private duty, or ***when the parties are not on roughly equal bargaining terms***,'" and noting the "extremes to which the South Carolina courts have gone to avoid enforcing a broad reading of an exculpatory clause") (quoting *Pride v. S. Bell Tel. & Tel. Co.*, 244 S.C. 615, 138 S.E.2d 155 (1964) (emphasis added)).[16] This is particularly true in this case, where Appellants, despite being his fiduciary, did not even provide Mr. Maybank with a copy of the WMA until nearly two weeks after the implementation of the investment strategy. Even then, Appellants did not explain any of the exclusionary effects of the exculpatory clause, including this particular reading asserted to pertain to prejudgment interest that has been concocted by Appellants after the jury's verdict. Appellants have provided the Court no basis to find that the

[16] This is also the case in other jurisdictions. *See, e.g.*, *Chemical Bank of New Jersey Nat. Ass'n v. Bailey*, 687 A.2d 316 (N.J. Super. App. 1997) (courts will not enforce exculpatory clause if party benefiting from exculpation is subject to positive duty imposed by law or is imbued with public trust, or if exculpation of party would adversely affect public interest); *Erlich v. First Nat. Bank of Princeton*, 505 A.2d 220, 227 (Ch. Div. 1984) (exculpatory clause in custodian management securities account agreement providing that bank would not be liable in any way for recommendations made in good faith or for failure to make recommendations, was void and unenforceable).

exculpatory clauses act as a waiver of Mr. Maybank's statutory right to prejudgment interest, and this alternate sustaining ground should be rejected.

## CONCLUSION

For the reasons explained above and in the Appellant's brief, the trial court erred in failing to award Mr. Maybank statutory prejudgment interest on the jury's award of actual damages and should be reversed on that single issue.

Respectfully submitted,

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September 30, 2015
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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Appellate Case No. 2014-002638

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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.

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## CERTIFICATE OF COUNSEL

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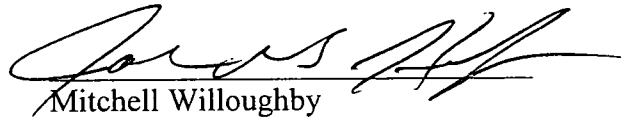
The undersigned hereby certifies that the Final Briefs of Respondent-Appellant Francis P. Maybank comply with Rule 211(b), SCACR.

[SIGNATURE PAGE FOLLOWS]



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## PROOF OF SERVICE

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

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This 30th day of September, 2015.