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SC 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.

Appellants/Respondents' Petition for Rehearing

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, 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”) (collectively “Petitioners”) hereby file this petition for rehearing. Petitioners agree that in Opinion No. 27640, filed June 3, 2016, this Court correctly held that the punitive damages award was barred by the Wealth Management Agreement’s limitation on liability clause. *Maybank v. BB&T Corp., et al.*, Op. No. 27640 (S.C. Sup. Ct. filed June 3, 2016) (Shearouse Adv. Sh. No. 23 at pp. 35-40) (“Op. No. 27640”). However, Petitioners respectfully request a rehearing on this matter and/or the issuance of a new opinion on the issues of (a) whether the trial court erred by failing to grant Petitioners’ motion for JNOV as to the claim

for violation of the South Carolina Unfair Trade Practices Act (“UTPA”), (b) whether BB&T Corp waived its right to contest personal jurisdiction, and (c) whether BB&T Corp is entitled to JNOV as to all claims on the merits. Op. No. 27640. at pp. 28-35.

Significantly, the Opinion overlooked the decision in *Majors v. S.C. Sec. Comm’n*, 373 S.C. 153, 644 S.E.2d 710 (2007), holding that the determination as to whether a financial product qualifies as a security was a question of law. The Opinion also misapprehended the record in concluding that there was evidence suggesting a prepaid variable forward contract (“PVFC”) may not be a security. Additionally, the Opinion overlooked the role of the Managed Portfolio Account, which indisputably involves securities in the form of stocks and bonds. If maintained in its current form, Opinion No. 27640 could have a profound impact on the citizens of South Carolina by allowing unregulated individuals to participate in transactions involving PVFCs and other similar investment contracts. This Court should grant rehearing and issue a corrected opinion holding that PVFCs are securities, and that the UTPA exemption applied.

Introduction

In Opinion No. 27640 this Court affirmed the trial court’s denial of Petitioners’ motion for JNOV on the UTPA Claim. Specifically, while the Opinion acknowledged the exemption relied upon by Petitioners, it concluded that the “trial court correctly submitted the issue to the jury based on the alternative theories of relief posited by Maybank and based on Appellants’ position at trial that they were not subject to the Securities Act, and that they did not effectuate transactions and sell securities.” Op. No. 27640 at pp. 32-33 (citing S.C. Code. Ann. § 39-5-40 (1985)). The Opinion further concludes that “through the testimony of their own witnesses, Appellants put forth evidence that was susceptible to more than one reasonable inference regarding the applicability of the exemption.” *Id.* Respectfully, these conclusions are incorrect factually and legally.

First, Opinion No. 27640 overlooked the Court's correct conclusion that PVFCs are investment contracts that fall squarely within the South Carolina Uniform Securities Act's ("the Securities Act") definition of "security." Second, the Opinion overlooks South Carolina precedent establishing that the determination of a security is a question of law. Third, the Opinion misapprehended the factual record in this case. Petitioners never asserted, at trial or to this Court, that they were not subject to the Securities Act or that PVFCs were not securities. To the contrary, Petitioners simply asserted that they did not violate the Securities Act and the statute of repose was applicable (and the jury agreed). The Opinion misapprehended the testimony of Robert Thorne and David Fisher by misreading or misinterpreting their testimony to support the conclusion that the nature of PVFCs as securities is unclear. The Opinion misapprehended the uncontradicted evidence in the record establishing that PVFCs are securities under the Securities Act. Finally, the Opinion overlooks the fact that the Managed Portfolio Account played a central role in all of Maybank's claims and damages (including the UTPA claim), and that the Managed Portfolio Account clearly involved securities warranting application of the exemption.

Further, with regard to BB&T Corp, the Opinion misapprehended the application of waiver to the personal jurisdiction defense and failed to address or reference BB&T Corp's arguments that it is entitled to JNOV on all of Maybank's claims based on the lack of evidence showing involvement by any of its employees because it is merely a bank holding corporation.

Argument

I. The Opinion overlooked the established facts and misapprehended South Carolina's law by incorrectly concluding that whether PVFCs are securities was a jury question.

The Opinion correctly described a PVFC as "an investment contract by which stock is sold to an investment bank for an upfront payment of approximately seventy-five to ninety percent of its value." Op. No. 27640 at p. 17 (emphasis added). The Opinion further correctly noted that an

“investment contract” was specifically included in the definition of “security” by section 35-1-102(29) of the Securities Act. However, despite acknowledging that a PVFC is an “investment contract,” and that an investment contract is a “security,” the Opinion incorrectly concluded that the issue was for the jury to decide. There was no issue of fact for the jury. The facts were settled. PVFCs are investment contracts and investment contracts are securities under the Act. By characterizing the application of the exemption as an issue to be decided by the jury, the Opinion’s conclusion on this point deprived Petitioners of their right to due process. Petitioners were never on fair notice that the penalties of the Unfair Trade Practices Act could be levied against them under the circumstances described by the Court in its Opinion.

In addition to overlooking the established facts, the Opinion overlooked this Court’s holding in the case of *Majors v. S.C. Sec. Comm’n*, 373 S.C. 153, 644 S.E.2d 710 (2007). In *Majors*, the central issue was whether tax lien certificates constituted securities under the Securities Act. *Id.* at 159, 644 S.E.2d at 713. This Court held that this issue was “a novel question of law” that allows the Court “to decide the issue with no particular deference to the lower court.” *Id.* The same legal issue exists in this case – whether a PVFC was a security under the Securities Act. However, the Opinion overlooked the precedent established by this Court in *Majors*, and failed to recognize that this was an issue of law that this Court should decide with no deference to the lower court. Considering this to be a question of law is completely consistent with the part of the Opinion acknowledging that PVFCs clearly fall within the Act’s definition of securities. Accordingly, rehearing should be granted and this Court should reverse the trial court’s denial of JNOV on the UTPA claim based on the application of the securities exemption.

II. Petitioners did not assert that they were not subject to the Securities Act.

The Opinion's conclusion that whether a PVFC was a security was for the jury to decide was based in part on "Appellants' position at trial that they were not subject to the Securities Act, and that they did not effectuate transactions and sell securities." Op. No. 27640 at p. 33. This conclusion misapprehended the actual position that Petitioners have consistently maintained throughout this case. Petitioners have never asserted that they are not subject to the Securities Act. Rather, they have always asserted that they did not violate the Securities Act. Additionally, the Opinion overlooked the fact that while Petitioners were not the "seller" of the PVFCs, Petitioners remained subject to the Securities Act, which governs persons and entities that offer investment advice or are taking actions which require a securities license.

Maybank's Securities Act claim alleged three violations. The first was violation of section 35-1-509(b), which applies to one who sells a security by means of an untrue statement of material fact. The second was violation of section 35-1-509(d), which applies to one who is acting as an unregistered broker-dealer. The last alleged violation involved section 35-1-509(f), which addresses investment advisors who employ a device, scheme or artifice to defraud.

At the summary judgment and directed verdict stages of this matter, Petitioners consistently maintained that they did not violate these provisions. Petitioners' arguments included the statute of repose and the inability of Maybank to establish key elements of these violations. (R. 594-606, 988-990, 2311-2312, 2627-2632). One such element was the requirement in section 35-1-509(b) that the alleged violator *sell* the security. While securities were clearly involved in the form of the PVFCs, Petitioners did not sell the PVFCs, and, therefore, were not in violation of section 35-1-509(b). The Opinion misapprehended this argument as creating an issue of fact as to whether PVFCs are securities. There is no such issue.

Petitioners focused at trial on the conduct that was necessary to support a Securities Act violation, not whether the conduct involved a security. Significantly, section 35-1-509(f) did not contain the requirement that the defendant be a “seller,” and instead applied to persons providing investment advice regarding securities. Petitioners did not assert that the section 35-1-509(f) claim failed because no securities were involved. Rather, Petitioner’s consistent position (with which the jury agreed) was that there was no scheme to defraud Maybank. (R. 604-606, 989, 2312, 2632).

III. The Opinion misstated and misapprehended the testimony of Robert Thorne and David Fisher.

The Opinion concluded that more than one reasonable inference could exist regarding whether a PVFC was a security based on the testimony of two witnesses, Robert Thorne and David Fisher. Op. No. 27640 at p. 33. Specifically, the Opinion stated that Mr. Thorne, who was Petitioner’s Expert, “testified a Prepaid was not a security.” *Id.* Additionally, with regard to Mr. Fisher, the Opinion stated that he testified that “a Prepaid and the practice of advising on alternative investments created a gray area in the view of the SEC.” *Id.* The Opinion does not accurately reflect the substance of the testimony of Messrs. Thorne and Fisher.

A. Robert Thorne did not testify that a PVFC was not a security.

Mr. Thorne never testified that a PVFC was not a security. Rather he testified that he had no opinion as to, and could not answer, the question of whether it was a security under South Carolina law, because that is a legal conclusion. (R. 2394-2395). At trial, Mr. Thorne explained that in his previous deposition, when he was first asked whether a PVFC was a security, he interpreted the question to be whether a PVFC was *tradeable* like a security. He answered that it was not. (*Id.*). In that same deposition, Mr. Thorne later clarified that response to make it clear that his answer related to whether PVFCs were *tradeable*, not whether they were securities. (*Id.*). At trial, Mr. Thorne reiterated that he was not opining as to whether a PVFC was or was not a

security. (*Id.*). Thus, Mr. Thorne's testimony did not give rise to any inference for the jury to weigh on this issue.

The Opinion also noted that Mr. Thorne testified that "no sale occurred on the date the Prepaid was entered, and he believed the prepaid was a contract." Op. No. 27640 at p. 33. Neither of these statements gave rise to any inference regarding the applicability of the UTPA securities exemption. Mr. Thorne described a PVFC as an agreement between two investors that afforded one investor the opportunity or option to sell certain stock at some future date to the other investor in exchange for an up-front cash payment today. (R. 2369-2370). He further explained that the "sale" of the underlying stock did not occur at the time the parties first entered into the PVFC transaction. (R. 2393-2394). Rather, the "sale" of the underlying stock occurred when the transaction closed. (R. 2394). The Opinion misapprehended this testimony and overlooked the fact that, in a PVFC transaction, the date that the underlying stock was technically sold under that contract does not change the nature of a PVFC—it remains an investment contract which falls squarely within the Securities Act's definition of "security." No inference was created by this testimony about the timing of the sale because such testimony about timing of the sale cannot alter the characterization of an item as a security.

B. David Fisher did not testify that whether a PVFC was a security fell within a "gray area."

The Opinion characterized Mr. Fisher's testimony as stating that "a Prepaid and the practice of advising on alternative investments created a gray area in the view of the SEC." Op. No. 27640 at p. 33. This misapprehended and overlooked Mr. Fisher's testimony.

Mr. Fisher did not testify that whether a PVFC was a security was a "gray area" with the SEC. To the contrary, Mr. Fisher's consistent testimony with regard to the phrase "gray area" was that whether the charging of one-time fees caused an entity to be acting as a broker-dealer was a

“gray area.” (R. 2920, 2939, 2944, 2046, 2948). Specifically, Mr. Fisher testified that the SEC considered charging transactional fees while also charging non-transactional fees for the management of an account to be broker-esque and that this was a “gray area” in the SEC’s view because “it was not representative of the type of on-going advisory fee that a [Registered Investment Advisor] typically charges.” (R. 2920, 2939, 2948). The focus of Mr. Fisher’s “gray area” testimony was always whether an entity was acting as a broker dealer, not whether the investment product was a security. Therefore, rehearing should be granted.

IV. The only reasonable interpretation of the Evidence in the record was that PVFCs are securities.

The Opinion concluded that “through the testimony of their own witnesses, Appellants put forth evidence that was susceptible to more than one reasonable inference regarding the applicability of the exemption.” Op. No. 27640 at p. 33. As explained above, the Opinion misapprehended the testimony of both Mr. Thorne and Mr. Fisher that formed the sole stated support for this conclusion. The Opinion also misapprehended Petitioners’ position regarding the applicability of the Securities Act. However, even if the issue were not one of law, it remained error to send the issue to the jury because the evidence could support only one reasonable conclusion—that PVFCs constituted securities under the Securities Act.

There was no evidence in the record that would allow a reasonable jury to conclude that PVFCs were not “securities” as that term was defined by the Securities Act. Subsection (29) of § 35-1-102’s definition of “security” was not limited to traditional stocks and bonds; rather, it expressly includes any “investment contract” as well as any “put, call, straddle option or privilege on a security.”¹ S.C. Code Ann. § 35-1-102(29). The testimony from Maybank’s securities expert,

¹ 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).

Craig McCann, was that PVFCs are “[a]n over-the-counter derivative contract” and he further explained how PVFCs involve “put options and call options.” (R. 2237-40). This did not contrast with Petitioners’ securities expert, Robert Thorne, who explained that a PVFC was a contract or agreement between investors whereby one investor was afforded the option to sell stock at some future date in exchange for an up-front cash payment today. (R. 2369-71). There was no testimony contradicting these witnesses regarding the fact that a PVFC was a contract whereby a “put” and a “call” on a security are combined among two investors. This uncontradicted evidence, therefore, established not only that a PVFC was an investment contract within the definition of security, but also that the core components of that contract—the BB&T stock, the “put” option on the stock, and the “call” option on the stock—were each securities under the Act as well.

Additionally, the exhibits offered at trial further established, without any contrary evidence, that PVFCs were securities. The confirmation statements for the 2006 and 2009 PVFCs established that PVFCs fall within the securities laws because the statements included 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 explained that Rule 10b-10 promulgated under the 1934 Securities Exchange Act required the inclusion of the registered broker-dealer entity for Deutsche Bank as a signatory. (R. 3580). Further, after the PVFCs were executed, Maybank received periodic statements from broker-dealer entities affiliated with Bear Stearns and Deutsche Bank. (R. 3645, 3662).

Therefore, even if it was a question of fact rather than a question of law as to whether PVFCs fell within the Securities Act’s definition of “security,” the only reasonable conclusion from this record was that PVFCs constituted securities. Rehearing and/or the issuance of a new opinion should be granted.

V. The Opinion overlooked the role of the Managed Portfolio Account in Maybank's UTPA claim and damages.

The Opinion's discussion of Maybank's UTPA claim and the applicability of the securities exemption focused exclusively on whether there was evidence as to the nature of PVFCs that could have allowed the jury to find it was not a security. Op. No. 27640 at pp. 32-33. In addition to misapprehending and overlooking the points set forth above, the Opinion overlooked the fact that the Managed Portfolio Account played a key role in the UTPA claim and the resulting damages that were trebled as a result. Without question, the Managed Portfolio Account involved securities.

The undisputed evidence in the record established that the Managed Portfolio Account qualified as an investment account with a primary purpose of that account to buy and sell stocks and bonds. (R. 2333-2335). Likewise, the stocks and bonds that comprised the Managed Portfolio Account were securities. The account statements that show the securities held in the account confirmed this conclusion. (R. 3613).

Thus, the Managed Portfolio Account requires the application of the exemption.² This is significant because a large component of Maybank's alleged UTPA damages analysis relied on the existence of the Managed Portfolio Account, (R. 2290-91; R. 3762-65). Specifically, Maybank's damages evidence came exclusively from his expert, Craig McCann. McCann's damages reports claimed losses related exclusively to both the PVFCs and the Managed Portfolio Account. (R. 3668-3770).

² The Opinion upheld the denial of JNOV on the UTPA claim based on "three instances where the jury could have found Appellants liable for violating the UTPA." Op. No. 27640 at p. 34. Those three instances are: (a) the alleged unfulfilled promises in the Wealth Management Agreement, (b) the 2012 fee rebate letter, and (c) the memorandum to Pat Oliver. *Id.* However, this conclusion overlooked the fact that there was no evidence linking any alleged damages to these facts without reference to the PVFCs and the Managed Portfolio Account. Moreover, it overlooked the fact that each of these alleged acts was inextricably intertwined with the Managed Portfolio Account and, therefore, implicated the securities exemption.

Exhibits 8 and 9 of these reports calculated damages related to the Managed Portfolio Account and estimated those damages to be in the range of \$877,141 to \$1,405,565. (R. 2290-91, 3762-65). Exhibits 3 and 4 to his reports calculated damages related to the PVFCs to be in the range of \$1,956,620 to \$1,984,161. (R. 3769-70). The variation existed as a result of McCann's opinion that Maybank's Managed Portfolio Account investments should have been 100% bonds, or, at the very least, 70% bonds/30% stocks. (R. 2252). The high range of \$1,405,565 was based on the performance if the 100% bonds had been employed. (R. 3764-65). The low range of \$877,141 allowed for on 70% bonds. (R. 3762-63). Thus, McCann estimated that Maybank's combined total damages (involving both the PVFCs and the Managed Portfolio Account) were in a range of approximately \$2.8 million and \$3.3 million, with the difference in that range coming almost entirely from the variation between investing 100% in bonds and investing only 70% in bonds (a difference of \$528,424 based on McCann's calculations). The jury awarded Maybank \$3,100,000 in actual damages, representing the midpoint of McCann's calculations. (R. 54).

Significantly, the damages awarded were \$1.1 million more than McCann's highest estimated damages based solely on the PVFCs. Thus, that \$1.1 million portion of the actual damages award could only represent damages flowing exclusively from the Managed Portfolio Account. As illustrated above, because the managed Portfolio Account falls under the securities exemption, such damages should not be part of the UTPA claim. *The unjust result is that the trebled damages of \$9.3 million improperly included \$2.2 million resulting from the inclusion of \$1.1 million of damages flowing exclusively from the Managed Portfolio Account.*

This Court should grant rehearing to address the omission of the Managed Portfolio Account from the Opinion's discussion of the UTPA claim. When considered, the Managed Portfolio Account's central role in this claim warranted application of the exemption as well as the

grant of JNOV to Petitioners on this claim. Failing that, at minimum the trebled damages amount should be reduced and limited so as not to be based in any part upon the \$1.1 million in damages flowing exclusively from the manner in which the Managed Portfolio Account was managed.

VI. The Opinion misapprehended the record regarding the personal jurisdiction waiver issue.

The Opinion held that BB&T Corp waived its right to contest personal jurisdiction. Op. No. 27640 at p. 28. The basis for this conclusion was that BB&T Corp “failed to timely contest personal jurisdiction in a motion to dismiss and actively participated in litigation for more than one year. *Id.* This holding misapprehended the record in this matter.

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.³ This is what BB&T Corp did. 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 then filed a motion under Rule 12(b)(2) for dismissal based on lack of personal jurisdiction in accordance with the deadline set by the trial court. (R. 44 at ¶ 4, 648).

Moreover, the record shows there was delay resulting from the federal court remand proceedings and the assignment to the Business Court. Specifically, during the first nine months, little occurred in this matter because the case had been removed to federal court and was not remanded until August 3, 2012. (R. 358, 1). While in federal court, BB&T Corp asserted its objection to personal jurisdiction in its Answer, thereby preserving it under Rule 12(h)(1).⁴ (R.

³ 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).

⁴ Maybank amended his Complaint on February 22, 2012 and moved to remand the case. BB&T Corp again asserted lack of jurisdiction in its Answer. (R. 240 at ¶ 185).

189 at ¶¶ 11, 13; R. 206 at ¶ 121). Because Maybank was questioning the subject matter jurisdiction of the federal court, the motion to remand needed to be resolved *before* a motion to dismiss was filed.

Seven months after remand, the case was formally referred to the Business Court. (R. 16). The first status conference with the trial judge occurred five months later on August 6, 2013, (R. 5443), and, on that date, an initial scheduling order was entered. (R. 19). That scheduling order had a dispositive motion deadline of February 28, 2014. (R. 22 at ¶ 5). Because BB&T Corp had grounds for seeking dismissal on the merits of the claims, it was more efficient to wait and file one motion prior to the deadline in the scheduling order. On December 4, 2013, Maybank filed a motion to amend his Complaint, seeking to add his insurance trust as an additional plaintiff. (R. 534). On January 10, 2014, the scheduling order was amended to extend the dispositive motion deadline until May 7, 2014. (R. 42 at ¶ 4). BB&T Corp continued to wait until the dispositive motion deadline before filing its motion so that it could include all grounds for dismissal at one time. (R. R. 648). This motion was denied. It was not until May 22, 2014 that the Second Amended Complaint was filed adding the new Plaintiff. (R. 246). The Defendants filed an Answer, and BB&T Corp again asserted its defense of lack of personal jurisdiction. (R. 347 at ¶ 175).

Additionally, the record failed to support the conclusion that BB&T Corp actively participated in the litigation. The Opinion misapprehends the fact that the “participation” on which it relied was essentially mandatory. The opinion cited to the fact that BB&T Corp joined in the removal to federal court, filed an amended answer to the amended complaint, filed a corporate disclosure, opposed remand, and opposed a motion for attorneys’ fees. Op. No. 27640 at p. 29. Participating in the removal and opposing the remand motion are improper bases for a waiver finding. It is a party’s right to remove a case to federal court and then assert the personal

jurisdiction issue to that forum. Additionally, a party is required to respond to complaints and amended complaints, and has the option to file answers that assert the personal jurisdiction defense. The old method of special appearances for the purposes of contesting personal jurisdiction has been long abandoned. Similarly, the filing of a corporate disclosure is required by the court and is an improper basis for finding a waiver of the personal jurisdiction defense. The Opinion also based the waiver holding on the assertion that BB&T Corp submitted its “own responses to discovery requests separate from the other Appellants.” *Id.* However, nothing in the record supported this assertion. Regardless, complying with the duty to respond to discovery requests is insufficient to support a finding of waiver of personal jurisdiction.

“A waiver is the intentional relinquishment of a known right,” and the burden of proof of waiver is on the party asserting it. *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 338, 676 S.E.2d 139, 145 (Ct. App. 2009). This record establishes that BB&T Corp asserted lack of personal jurisdiction in each of its answers, including the last one filed in May of 2014. Finding waiver under these circumstances would render Rule 12(h)(1) a nullity because it *requires* that the assertion of the defense in the May 2014 Answer be given effect. The ruling set forth in the Opinion would essentially *require* a defendant to *immediately* file a Rule 12(b)(2) motion at the inception of the case or be considered to have waived that issue. Such a ruling violates the due process rights of a defendant who has fully complied with Rule 12(h), and the Opinion’s holding that BB&T Corp waived the issue of lack of personal jurisdiction amounts a violation of its basic right to due process.

VII. The Opinion overlooked and did not address BB&T Corp’s arguments that it was entitled to JNOV as to all claims on the merits.

Aside from its discussion of the personal jurisdiction issue, the Opinion did not address BB&T Corp’s argument that it was entitled to JNOV as to each of Maybank’s claims. BB&T Corp

was a mere bank holding corporation with no employees directly involved in advising Maybank or servicing his account. The Opinion overlooked this argument. Rehearing should be granted to address those arguments and enter judgment for BB&T Corp.

BB&T Corp constituted a separate entity from BB&T Bank and BB&T AM. Thus, Maybank was required to establish each of his claims against BB&T Corp with evidence distinct to BB&T Corp. Settled South Carolina law holds that a parent corporation's ownership of a separately incorporated subsidiary does not render the parent liable for the conduct of the subsidiary. *See Jones v. Enter. Leasing Co. SE*, 383 S.C. 259, 678 S.E.2d 819 (Ct. App. 2009) (granting summary judgment in favor of parent company finding there could be no liability for alleged torts of subsidiary); *Carroll v. Smith-Henry, Inc.*, 281 S.C. 104, 106, 313 S.E.2d 649, 651 (Ct. App. 1984) ("Stock ownership alone ordinarily does not render a parent corporation liable for the contracts of its subsidiary irrespective of whether the subsidiary is wholly owned or only partially owned.") (citing 38 A.L.R.3d 1102, 1123 (1971)). Rather, unless a plaintiff establishes the necessary factors to "pierce the corporate veil" and disregard the corporate separateness—a showing Maybank did not even attempt to make in this suit—a parent corporation can be liable only for its own wrongdoing. *Jones*, 383 S.C. at 268, 678 S.E.2d at 824.

Maybank's claims all centered upon the Managed Portfolio Account and his PVFC transactions. However, the Opinion overlooked the fact that BB&T Corp and its employees were not involved in either the Managed Portfolio Account or his PVFC transactions. Rather, they involved only employees of BB&T Bank and BB&T AM.⁵ The only name of any BB&T Corp employee on any document related to Maybank in this case was that of Pat Oliver, who was BB&T

⁵ Indeed, the Second Amended Complaint fails to make a single allegation of wrongdoing specific to BB&T Corp., and instead lumps all three corporate entities under the terms "Defendants," "BB&T," or "the Bank." (R. 246-294 at ¶¶ 6, 10).

Corp's General Counsel at the time of Maybank's first prepaid transaction. The BB&T Code of Ethics required the General Counsel's acknowledgment of any transaction involving a BB&T employee and BB&T stock. Ms. Oliver signed a memorandum sent to her on August 11, 2006 by Anthony Mahfood explaining the basic terms of the first prepaid transaction and requesting her approval. (R. 3501). Significantly, this memorandum was a representation to Ms. Oliver and BB&T Corp, not a representation by Ms. Oliver and BB&T Corp. Ms. Oliver approved subject to the caveat that Mr. Maybank would not be permitted to purchase additional BB&T stock with the proceeds from the transaction. (*Id.*). No aspect of her conduct, however, supported any of the claims against BB&T Corp. Ms. Oliver owed no duties to Mr. Maybank; and she did not make any recommendations or otherwise design any part of his investing strategy. She did not make any alleged representations directly to Maybank. She was merely part of the internal process at BB&T when employees of subsidiaries were going to enter into a transaction involving BB&T stock. There was no evidence that any aspect of her approval was for the purpose of providing advice or service to Mr. Maybank or any other customer.

In sum, there was no evidence in this case of any involvement on the part of any employee of BB&T Corp with Maybank's account, transactions, or client relationship. All business activities related to Maybank's PVFCs and Managed Portfolio Account were handled by employees of either BB&T Bank or BB&T AM. These points were overlooked in the Opinion, and this Court should grant rehearing and grant BB&T Corp JNOV as to all of Maybank's claims.

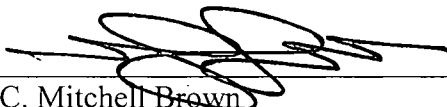
Conclusion

While this Court was correct in holding that punitive damages are barred by the Wealth Management Agreement's limitation on liability clause, the Court should grant a rehearing in this case and/or issue a new opinion granting Petitioners JNOV on the Unfair Trade Practices Act claim and dismissing BB&T Corp for lack of personal jurisdiction or granting BB&T Corp JNOV as to all claims.

Respectfully submitted,

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June 20, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUN 20 2016

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

Appellants/Respondents.

PROOF OF SERVICE

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