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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Tonya A. Gee,
Circuit Court Judge

Appellate Case No. 2015-001845

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SC Court of Appeals

John M. McIntyre and Silver Oak Land
Management LLC, ...

Appellants,

v.

Securities Commissioner of South Carolina, ...

Respondent.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Securities Commissioner

TRACY A. MEYERS
Deputy Securities Commissioner

MARILYN E. GARTLEY
Assistant Attorney General

Office of the Attorney General
State of South Carolina
Securities Division
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-4172

Attorneys for the Respondent

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(803) 734-4172

Attorneys for the Respondent

TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of Issues on Appeal	v
Statement of the Case.....	1
Statement of Facts.....	2
Argument.....	6
I. The circuit court properly reviewed the factual findings of the Securities Commissioner under the standard mandated by Section 35-1-609 of the South Carolina Code.	6
II. The membership interests in the LLCs are securities.	10
III. The conduct underlying the violations of Section 35-1-501 as found by the Securities Commissioner and circuit court did occur in connection with the offer, sale, or purchase of the LLC interests.	15
IV. The Appellants' due process rights were not violated by initiating an enforcement action prior to promulgating the rules applicable for such an action.	18
V. Competent, material, and substantial evidence exists in the record to support the findings of the Securities Commissioner.	20
Conclusion	23

TABLE OF AUTHORITIES

Cases

<u>Bursey v. S.C. Dep’t of Health & Envtl. Control</u> , 369 S.C. 176, 631 S.E.2d 899 (2006).....	11
<u>Garrett v. Snedigar</u> , 293 S.C. 176, 359 S.E.2d 283 (Ct. App. 1987).....	10, 13
<u>Great Lakes Chemical Corp. v. Monsanto Co.</u> , 96 F. Supp. 2d 376 (D. Del. 2000)	15
<u>Hamm v. AT&T</u> , 302 S.C. 210, 394 S.E. 2d 842 (1990).....	9
<u>Hopper v. Terry Hunt Constr.</u> , 373 S.C. 475, 646 S.E.2d 162 (2007).....	11
<u>In re Vora</u> , 354 S.C. 590, 582 S.E.2d 413 (2003).....	20
<u>Jacoby v. South Carolina State Board of Naturopathic Examiners</u> , 219 S.C. 66, 64 S.E.2d 138 (1951).....	21
<u>Kennedy v. South Carolina Retirement System</u> , 345 S.C. 339, 549 S.E.2d 243 (2001)	19
<u>Majors v. S.C. Securities Comm’n</u> , 373 S.C. 153, 644 S.E.2d 710 (2007)	16
<u>Multi-Medical Convalescent and Nursing Center of Towson v. National Labor Relations Board</u> , 550 F.2d 974 (4th Cir. 1977)	21
<u>Paschal v. State Election Comm’n</u> , 317 S.C. 434, 454 S.E.2d 890 (1995).....	19
<u>Queens Grant II Horizontal Property Regime v. Greenwood Development Corp.</u> , 368 S.C. 342, 628 S.E.2d 902 (2006)	7
<u>Richards v. City of Columbia</u> , 227 S.C. 538, 88 S.E.2d 683 (1955)	22
<u>Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc.</u> , 840 F.2d 236 (4th Cir. 1988)	14
<u>S.C. Uninsured Employers Fund v. House</u> , 360 S.C. 468, 602 S.E.2d 81 (Ct. App. 2004)	11

Securities and Exchange Commission v. W.J. Howey Co. et al., 328 U.S. 293, 66 S.Ct. 1100

(1946)..... 5

State v. Wilson, 274 S.C. 352, 264 S.E.2d 414 (1980)..... 20

Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997)..... 8, 19, 21

Summersell v. S.C. Dep't. of Pub. Safety, 337 S.C. 19, 522 S.E.2d 144 (1999) 8, 19, 21

Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 467 S.E.2d 913 (1996) 9

Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003)..... 8

Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981) 4, 13, 14

Statutes

S.C. Code Ann. § 33-41-310(1)..... 14

S.C. Code Ann. § 33-41-370..... 14

S.C. Code Ann. § 33-41-510(5)..... 14

S.C. Code Ann. § 33-42-430..... 13

S.C. Code Ann. § 33-42-630 (2006)..... 12

S.C. Code Ann. § 33-44-301(b) (2006) 11

S.C. Code Ann. § 33-44-303 13

S.C. Code Ann. § 33-44-303(a) (2006)..... 11

S.C. Code Ann. § 33-44-404 (2006)..... 11, 12, 13

S.C. Code Ann. § 35-1-102(29)(D) (Supp. 2015)..... 16

S.C. Code Ann. § 35-1-501 (Supp. 2015)..... 16

S.C. Code Ann. § 35-1-605 (Supp. 2015) 19

S.C. Code Ann. § 35-1-609 (Supp. 2015)..... 11

Other Authorities

Limited Liability Company Membership Interests as Securities,

Office of the South Carolina Secretary of State Statement of Policy 95-2 (June 16, 1995).	12
Scott Y. Barnes et al., <u>South Carolina Limited Liability Companies and Limited Partnerships</u> 97 (South Carolina Bar Continuing Legal Education eds., 4th ed. 2012)	12

STATEMENT OF ISSUES ON APPEAL

- I. The circuit court properly reviewed the factual findings of the Securities Commissioner under the standard mandated by Section 35-1-609 of the South Carolina Code.
- II. The membership interests in the LLCs are securities.
- III. The conduct underlying the violations of Section 35-1-501 as found by the Securities Commissioner and circuit court did occur in connection with the offer, sale, or purchase of the LLC interests.
- IV. The Appellants' due process rights were not violated by initiating an enforcement action prior to promulgating the rules applicable for such an action.
- V. Competent, material, and substantial evidence exists in the record to support the findings of the Securities Commissioner.

STATEMENT OF THE CASE

On April 19, 2013, the Securities Division of the Office of the Attorney General of the State of South Carolina (the “Division”) initiated this action by issuing an Order to Cease and Desist naming John M. McIntyre and Silver Oak Land Management, LLC as Respondents (the “Cease and Desist Order”). In the Cease and Desist Order, the Division alleged that the Respondents (Appellants before this Court), jointly and severally, violated S.C. Code Ann. § 35-1-501. Pursuant to their rights granted in the South Carolina Uniform Securities Act of 2005 (the “Act”), Appellants filed a timely Answer and Request for Hearing on June 3, 2013.

The Securities Commissioner appointed a hearing officer in the matter (the “Hearing Officer”) with the authority to “take all actions he deems relevant or material to his recommending findings as to the matters alleged in the Order to Cease and Desist issued April 19, 2013, and his recommending appropriate action based on his findings.” (July Tr., Ex. 1, R. p. 1215). A hearing was held over four days: July 30, 2013, and October 1–3, 2013. Over the course of the hearing witnesses were examined and cross-examined by both parties and documentary evidence was introduced by both parties.

On May 6, 2014, the Hearing Officer recommended to the Securities Commissioner that he find the investments at issue to not be securities and therefore dismiss the Cease and Desist Order. (R. p. 0031). The Securities Commissioner found that the Hearing Officer applied an incorrect legal test for determining whether or not the investments at issue were securities. (R. pp. 0051–55). The Securities Commissioner found that the membership interests at issue are investment contracts and thus securities under the Act. (R. pp. 0055–60). The Securities Commissioner then ordered the Hearing Officer to make a recommendation as to whether or not

violations of S.C. Code Ann. § 35-1-501 occurred as it related to an offer or sale of the securities at issue. (R. p. 0061).

The Hearing Officer subsequently issued a recommendation that found seventy-eight violations of S.C. Code Ann. § 35-1-501. (R. pp. 0062–74). The Securities Commissioner issued an order dated November 20, 2014, in which he concurred with the Hearing Officer except as to the number of violations. (R. pp. 0075–86). The Securities Commissioner found violations of S.C. Code Ann. § 35-1-501 in connection with the offer and sale of fifty-four securities. (R. p. 0085). The Securities Commissioner imposed a civil penalty of \$10,000 per violation, totaling \$540,000.

Pursuant to rights provided in the Act, Appellants filed a Petition for Review with the Richland County Court of Common Pleas on December 19, 2014. A hearing was held on April 17, 2015, before Judge Tonya Gee of the Richland County Court of Common Pleas. The court upheld the decision of the Securities Commissioner through an order dated May 7, 2015. (R. pp. 0087–101). On or around May 28, 2015, Appellants filed a motion for reconsideration before Judge Gee. (R. pp. 1014–15). On July 21, 2015, Judge Gee denied the motion for reconsideration. (R. p. 0102). On or about August 27, 2015, Appellants filed a notice of appeal with this Court.

STATEMENT OF FACTS

This case involves the offer and sale of membership interests by Appellants in seven manager-managed LLCs. Six of the entities were created for the stated purpose of timber farming and possible development for higher and better use (the “Silver Oak Land Entities”). (R. pp. 1070–71). The last entity, Silver Oak Energy, was created for the stated purpose of planting certain grasses for development of biomass as a renewable energy source. (R. pp. 1111, line 19–

p. 1112, line 22). To fund the LLCs, Appellants obtained investors in each entity at the outset. (July Tr., State's Exs. 2 (R. pp. 0886-87, 0889, 0892-95, 0901-03), 3 (R. pp. 1217, 1222), 4 (R. pp. 0904-05, 0907, 0909-12, 0915-18), 5 (R. pp. 1225, 1227), 6 (R. pp. 1229-30, 1234), 7 (R. pp. 1242), 8 (R. pp. 0962-63, 0965, 0967-71, 0978-82), 10 (R. pp. 0867-69, 0871-77, 0885) & 11 (R. pp. 1246-47, 1262); Resp'ts Ex. 3 (R. pp. 0985-86, 0988, 0990-94, 0997); October Tr., State's Ex. 14 (R. pp. 0935-36, 0938, 0940-44, 0960)). With respect to the first Silver Oak Land Entity, there was an additional solicitation of investments well after the initial capitalization in which two additional investments of money were made by two new investors. (R. p. 1086, lines 1-17). The number of investors in each entity ranged from five to twenty-four. (July Tr., State's Exs. 2 (R. pp. 0886-87, 0901-03), 3 (R. pp. 1217, 1222), 4 (R. pp. 0904-05, 0915-18), 5 (R. pp. 1225-27), 6 (R. pp. 1229-30), 7 (R. pp. 1236-37, 1242), 8 (R. pp. 0962-63, 0978-82), 10 (R. pp. 0867-68, 0875-77, 0885) & 11 (R. pp. 1246-47, 1262); Resp'ts Ex. 3 (R. pp. 0985-86, 0997, 1002); October Tr., State's Ex. 14 (R. pp. 0935-36, 0955-56, 0960)). Each entity is governed by a substantially similar operating agreement. (July Tr., State's Exs. 2 (R. pp. 0886-903), 3 (R. p. 1217), 4 (R. pp. 0904-34), 5 (R. p. 1227), 6 (R. p. 1230), 7 (R. p. 1242), 8 (R. pp. 0962-82), 10 (R. pp. 0867-85) & 11 (R. pp. 1246-62); Resp'ts Ex. 3 (R. pp. 0985-1013); October Tr., State's Ex. 14 (R. pp. 0935-60)). The operating agreements provide that the manager will make all decisions effecting the operation of the company. See e.g., (R. p. 0966). The operating agreements do not provide for the removal of the manager.

After conducting an investigation pursuant to S.C. Code Ann. § 35-1-602, the Division issued the Cease and Desist Order on April 19, 2013. In the Cease and Desist Order, the Division alleged that Appellants, jointly and severally, violated S.C. Code Ann. § 35-1-501. Pursuant to

their rights granted in the South Carolina Uniform Securities Act of 2005 (the “Act”), Appellants filed a timely Answer and Request for Hearing on June 3, 2013.

The Securities Commissioner appointed the Hearing Officer with the authority to “take all actions he deems relevant or material to his recommending findings as to the matters alleged in the Order to Cease and Desist issued April 19, 2013, and his recommending appropriate action based on his findings.” (R. p. 1215). A hearing was held over four days. At the hearing, the Division, who carried the burden of proof, submitted its case by examining witnesses and submitting documentary evidence. Appellants had the opportunity to cross-examine all witnesses called by the Division. Appellants then presented their defense by calling witnesses and submitting documentary evidence.

On May 6, 2014, the Hearing Officer recommended to the Securities Commissioner that, “[b]ased on the analysis set forth along the lines of *Williamson*,” he found the investments at issue to not be securities and therefore to dismiss the Cease and Desist Order. (R. p. 0031). The Williamson test noted in the Hearing Officer’s recommendation references Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981), cert. denied, 454 U.S. 897 (1981). (R. p. 0019).

The Securities Commissioner found that the investments at issue, interests in manager-managed limited liability companies, are presumed to be securities. (R. pp. 0033–51). By contrast, the Securities Commissioner noted the Williamson test relied upon by the Hearing Officer creates a rebuttable presumption that interests in a *general partnership* are not securities. (R. pp. 0051–53). Applying the correct test, the Securities Commissioner found that the membership interests at issue are investment contracts and thus securities under the Act. (R. pp. 0054–60). Alternatively, the Securities Commissioner found that the LLC interests are securities by also satisfying the Howey test and even at least one prong of the rigorous Williamson test. (R.

pp. 0055–60 (citing Securities and Exchange Commission v. W.J. Howey Co., 328 U.S. 293, 66 S. Ct. 1100 (1946)). The Securities Commissioner then ordered the Hearing Officer to make a recommendation as to whether or not violations of S.C. Code Ann. § 35-1-501 occurred as it relates to the offer or sale of the securities at issue. (R. p. 0061).

The Hearing Officer issued a subsequent recommendation which found seventy-eight violations of S.C. Code Ann. § 35-1-501. (R. pp. 0062–74). In that order, the Hearing Officer explained that as to each of the seven entities, Appellants, in connection with the offer and sale of the securities at issue, made statements as to the purpose of the entity and the use of the funds invested that were false or misleading. (R. pp. 0069–74). The Hearing Officer also identified omissions of material facts occurring in connection with the offer and sale of the securities at issue. (R. pp. 0069–73).

The Securities Commissioner issued an order dated November 20, 2014, in which he concurred with the Hearing Officer except as to the number of violations. (R. pp. 0075–86). The Securities Commissioner identified misstatements made by Appellants in connection with the offer and sale of the securities at issue with each entity. (R. pp. 0076–85). Further, the Securities Commissioner identified that “[a] central problem with the way the memberships in the SOLT Entities were offered and sold relates to what investors were not told.” (R. pp. 0077–82). The Securities Commissioner went on to identify several material omissions. The Securities Commissioner identified that Appellants began to misappropriate investor money by at least mid-2007. (R. p. 0084). Therefore, the fifty-four investments sold after that point needed explicit and detailed disclosures made in connection with the offer and sale thereof, which Appellants failed to make. (R. pp. 0084–85). The Securities Commissioner found violations of S.C. Code Ann. § 35-1-501 in connection with the offer and sale of those fifty-four securities. (R. p. 0085).

The Securities Commissioner imposed a civil penalty of \$10,000 per violation, totaling \$540,000. (R. pp. 0085–86).

Pursuant to rights provided in the Act, Appellants filed a Petition for Review with the Richland County Court of Common Pleas on December 19, 2014. A hearing was held on April 17, 2015, before Judge Tonya Gee of the Richland County Court of Common Pleas. The circuit court upheld the decision of the Securities Commissioner through an order dated May 7, 2015. On or around May 28, 2015, Appellants filed a motion for reconsideration before Judge Gee. On July 21, 2015, Judge Gee denied the motion for reconsideration. On or about August 27, 2015, Appellants filed a notice of appeal with this Court initiating this proceeding.

ARGUMENT

I.

The circuit court properly reviewed the factual findings of the Securities Commissioner under the standard mandated by Section 35-1-609 of the South Carolina Code.

Appellants assert that the circuit court failed to properly review the factual findings of the Securities Commissioner to determine if they were supported by competent evidence. This argument should fail because: (1) Appellants failed to preserve this issue for appeal because it was not raised to or ruled upon by the lower court and was not raised in Appellants' Rule 59 motion, (2) the lower court is under no duty to raise the issue of competency *sua sponte*, (3) the lower court did determine the evidence to be credible, and (4) unquestioned competent, material, and substantial evidence exists in the record to independently support the findings of the Securities Commissioner.

Appellants failed to raise this matter on appeal to the lower court; thus, it is not preserved for appeal to this Court. "In order for an issue to be properly preserved for appeal, it must have

been both raised to and ruled upon by the trial court.” Queens Grant II Horizontal Property Regime v. Greenwood Development Corp., 368 S.C. 342, 372, 628 S.E.2d 902, 919 (2006). On appeal to the circuit court, Appellants failed to allege that evidence was incompetent. Further, Appellants failed to provide any example of evidence Appellants believed to be incompetent. In fact, the only reference to admissibility of evidence in Appellants’ appeal to the lower court is in reference to the promulgation of rules regarding evidence admissibility. There was no argument below that evidence was incompetent. Therefore, this issue is not properly preserved for appeal to this Court.

Appellants cannot complain now that the lower court failed to rule on an issue that they failed to raise. In their Petition for Review, Appellants’ only mention of the admissibility of evidence is in the context of a due process argument. (R. p. 0111). Appellants argued that “the Attorney General’s Office never had prepared, issued, published or disseminated any rules, forms, orders or interpretive opinions, as was expressly required by S.C. Code Ann. § 3[5]-1-605[; therefore,] the hearing was conducted with no procedural safeguards, including, without limitation . . . (ii) no ascertainable standards for the admission of evidence, for example, with respect to the authentication of documents and the admission of hearsay” (R. pp. 0108–09). The circuit court later found that Appellants did not “specify what evidence should or should not have been admitted.” (R. pp. 0093–94). No issue regarding the competency of any evidence was raised or argued, and thus, there was no issue for the lower court to decide on appeal. Therefore, there is no decision for this Court to review.

In Appellants’ Rule 59(e) Motion, no mention of evidence competency or admissibility, or the failure of the circuit court to decide such an issue was made. (R. pp. 1014–15). If an issue is not decided by a lower court and not raised in a post-trial motion, it is error for the appellate

court to consider it. Summersell v. S.C. Dep't. of Pub. Safety, 337 S.C. 19, 22, 522 S.E.2d 144, 146 (1999) (citing Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997)). Having not been raised by Appellants before the lower court, decided by the lower court, or raised in a Rule 59(e) Motion, the fact that the lower court did not review the issue is not preserved for appeal here.

If the Court deems that Appellants' due process argument regarding a lack of hearing rules concerning the admissibility of evidence sufficiently raises the issue of the competency of specific evidence, the lower court found the issue abandoned. If the circuit court did not rule on the issue, and the party failed to seek consideration of the issues pursuant to Rule 59, SCRPC, the issue is not preserved for appellate review. Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 103, 580 S.E.2d 100, 101 (2003). The lower court found Appellants had failed to specify what evidence should or should not have been admitted. (R. p. 0094). Specifically, the court concluded, "Appellants fail to cite to any authority for their argument and instead rely solely on bald conclusions. Accordingly, I find the Appellants have abandoned this issue on appeal." (R. p. 0094). Once abandoned, Appellants did not broach the subject in their Rule 59(e) motion. Therefore, the issue no longer remains an issue for this Court to review.

Addressing the merits of the argument, Appellants contend that, based on the language of S.C. Code Ann. § 35-1-609, the lower court should have taken up the issue of competency *sua sponte*. This reading of the statute flips the burden. Appellants have the burden to prove convincingly that the agency's decision is unsupported by the evidence. Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996) (citing Hamm v. AT&T, 302 S.C. 210, 394 S.E. 2d 842 (1990)). The burden is on Appellants to identify and support with legal argument why the evidence relied upon is not competent. Where the appellant in a case does not raise the issue of evidence credibility, a court is under no duty to perform that

task on behalf of the appellant. There is no error of law if a court does not take on that duty and perform that analysis without being asked to do so by Appellants.

Further, the circuit court did find that evidence was competent. “After carefully reviewing the record, I find that **competent**, material, and substantial evidence — namely the operating agreements, bank records, and testimony from Sandra Matthews, Phil Hartman, Richard Silver, Paul Finn, and James Russell Paris — supports the Commissioner’s finding that the Appellants violated section 35-1-501(2)” (R. p. 0099) (emphasis added). Clearly, the circuit court reviewed the record and found that the evidence it relied upon and listed was competent.

Lastly, the vast majority of evidence in the record that supports the findings of the Securities Commissioner has not even been challenged here as incompetent. Respondent will address why the specific evidentiary objections noted in Appellants’ brief are unavailing in responding to Appellants’ fifth argument below. However, removing all evidence challenged by Appellants here, there is still competent, material, and substantial evidence to support the Securities Commissioner’s Order. Testimony regarding what was said in connection with the offer and sale of the securities, testimony regarding the operation of the entities, the operating agreements, bank records for each entity, testimony of McIntyre himself, and other unchallenged evidence all support the Securities Commissioner’s finding that misstatements and material omissions occurred in connection with the offer and sale of the securities at issue here.

This Court should reject this argument because: the issue was not properly preserved for appeal to this Court; the lower court is under no duty to raise the issue of competency *sua sponte*; the lower court did determine the evidence to be credible, and unquestioned competent, material; and substantial evidence in the record supports the findings of the Securities Commissioner.

II.

The membership interests in the LLCs are securities.

Appellants argue that the members retained ultimate control over the Silver Oak entities and because of such, the membership units purchased by the investors do not qualify as securities. Primarily, Appellants claim that the statutory provision providing members the ability to remove a manager by vote and to dissolve the LLC provide enough control to remove an investment from the third prong of the Howey test.

Whether or not a particular investment constitutes a security is a mixed question of law and fact. Garrett v. Snedigar, 293 S.C. 176, 359 S.E.2d 283 (Ct. App. 1987) (holding that the circuit court erred in ruling as a matter of law that partnership interests constituted securities as defined by the Uniform Securities Act because further inquiry into the facts was needed to determine how control was allocated). “Statutory interpretation is a question of law. But whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard.” Hopper v. Terry Hunt Constr., 373 S.C. 475, 479–80, 646 S.E.2d 162 (2007) (citing Bursey v. S.C. Dep’t of Health & Envtl. Control, 369 S.C. 176, 184–85, 631 S.E.2d 899, 904 (2006); S.C. Uninsured Employer’s Fund v. House, 360 S.C. 468, 470, 602 S.E.2d 81, 82 (Ct. App. 2004)). Therefore, in analyzing Appellants’ argument, any factual determinations of the Securities Commissioner and circuit court should be upheld if supported by competent, material, and substantial evidence. S.C. Code Ann. § 35-1-609 (Supp. 2015). The circuit court found that “substantial evidence supports the finding of the Securities Commissioner that the investors expected that their profits, if any, would derive primarily from the efforts of Appellants.” (R. pp. 0098–99). To the extent that Appellants are asking the Court to

alter that factual finding, the holding should not be disturbed unless not supported by competent, material, and substantial evidence. S.C. Code Ann. § 35-1-609 (Supp. 2015).

The Securities Commissioner and the circuit court are correct that the investments in the Silver Oak entities are securities. The Hearing Officer and Securities Commissioner determined that the businesses at issue are manager-managed limited liability companies. The operating agreements relating to each entity state that all operative decisions will be made by the manager. According to state law, “in a manager-managed [limited liability] company, a member is not an agent of the company for the purpose of its business solely by reason of being a member.” S.C. Code Ann. § 33-44-301(b)(1) (2006). Further, the members, or a manager, are not personally liable for a debt or liability of the company solely by reason of being or acting as a member or manager. S.C. Code Ann. § 33-44-303(a) (2006). In a manager-managed limited liability company, with only limited exceptions, “any matter relating to the business of the company may be exclusively decided by the manager” S.C. Code Ann. § 33-44-404(b)(2) (2006). Therefore, members of a manager-managed limited liability company are not agents of the company and are statutorily unable to act for the company without express authorization in the operating agreement. Again, in this case no authorization was provided.

Because of those structural norms, it is commonly held that interests in manager-managed limited liability companies are presumed to be securities. It has long been the position of the Securities Commission that interests in manager-managed limited liability companies constitute securities absent strong evidence indicating the purchaser’s retention of rights of control. See Limited Liability Company Membership Interests as Securities, Office of the South Carolina Secretary of State Statement of Policy 95-2 dated June 16, 1995. Other authorities agree with the Commission; “For LLC memberships, the generally held presumption is that

memberships in member-managed LLCs are not securities (by analogy to general partnerships) but those in manager-managed LLCs are.” Scott Y. Barnes et. al., South Carolina Limited Liability Companies and Limited Partnerships 97 (South Carolina Bar Continuing Legal Education eds., 4th ed. 2012). The weight of authority indicates that both manager-managed limited liability companies and their analogous partnership form (limited partnership) are entitled to a presumption that investments therein are securities.

Interests in manager-managed limited liability companies are closely related to limited partnership interests. Limited partnerships involve a general partner or a group of general partners that retain the rights and powers associated with a partner in a general partnership. S.C. Code Ann. § 33-42-630 (2006). A limited partner in a limited partnership does not take part in the control of the organization and has no liability for the debts of the organization. Similarly, in a manager-managed limited liability company “any matter relating to the business of the company may be **exclusively** decided by the manager” S.C. Code Ann. § 33-44-404(b)(2) (2006) (emphasis added). The members of a manager-managed limited liability company “have no rights in the management and conduct of the company’s business unless otherwise provided in an operating agreement.” S.C. Code Ann. § 33-44-404 cmt. (2006). Again, based on the structural norms, limited partnership interests generally are presumed to constitute securities and just as the threshold is high before general partnership interests are considered securities, the presumption that limited partnership interests are securities is equally high. See Garrett v. Snedigar, 293 S.C. at 181, 359 S.E.2d at 286; Williamson v. Tucker, 645 F.2d at 423–24.

Importantly, limited partners and members of manager-managed LLCs may participate in certain ways, including voting on the admission or removal of general partners, amending the partnership agreement, or being an agent or employee or contractor for the limited partnership

without losing their limited liability. S.C. Code Ann. § 33-42-430 (limited partnerships), S.C. Code Ann. § 33-44-303 (LLCs). It is a statutory default to allow members of manager-managed LLCs to vote on management. S.C. Code Ann. § 33-44-404(b)(3) (2006). The operating agreements do not delineate procedures for the removal of the manger, thus, the statute is controlling. As stated above, despite that common provision, there is a widespread presumption that interests in manager-managed LLCs are securities. It is inconsistent with South Carolina law to allege that the statutorily granted power to vote to remove general partners, or by analogy, managers of manager-managed LLCs, overcomes the presumption that interests in manager-managed LLCs or limited partnerships are securities.

The Securities Commissioner found that competent, material, and substantial evidence clearly indicated that with each LLC at issue, the profits were to be derived primarily from the efforts of Appellants. (R. pp. 0039–45). The Securities Commissioner went on to find that, upon applying the correct legal test, the investments at issue are securities. (R. p. 0056). This finding was upheld by the circuit court. (R. pp. 0098-99).

In making his initial recommendation, the Hearing Officer relied primarily on Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981), cert. denied, 454 U.S. 897 (1981). (R. p. 0031). The Williamson decision imposes an “extremely difficult factual burden” on claims that *general partnerships* are securities. Williamson, 645 F.2d. at 425 (emphasis added). The Fourth Circuit stated that Williamson “identified a narrow exception to the strong presumption that a **general partnership** is not a security.” Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc., 840 F.2d 236, 240 (4th Cir. 1988) (emphasis added). This burden is applied because of the factual and legal assumptions that surround the general partnership form of business. General partners all have equal rights in the management and conduct of the partnership business, S.C.

Code Ann. § 33-41-510(5); all have the authority to bind the partnership, S.C. Code Ann. § 33-41-310(1); and all are liable for the debts of the partnership. S.C. Code Ann. § 33-41-370. General partners are assumed to have both the ability and the incentive to act for the partnership and not remain passive. Hence, courts have applied Williamson to create a rebuttable presumption against a finding that a general partnership interest is a security. However, the case at issue does not involve a general partnership. Therefore, the reasons for applying the Williamson presumption against finding an investment contract do not exist in this matter.

Appellants cite to the Great Lakes case for the proposition that LLC members' authority to remove a manager by vote provides sufficient control over the entity such that profits do not come solely from the efforts of others. Great Lakes Chemical Corp. v. Monsanto Co., 96 F. Supp. 2d 376 (2000). This proposition is incorrect. Great Lakes is highly distinguishable and is not controlling in this case. In Great Lakes, an entity ("Buyer") alleged securities fraud against two entities ("Sellers") from which Buyer purchased an LLC company. Id. Sellers owned 100% of the LLC memberships and Buyer purchased 100% of the LLC memberships in the transaction at issue. Id. Therefore, Buyer owned the entity outright. The court analyzed whether the memberships were securities under the Howey test. Id. The court found that the memberships failed the second prong of the Howey test, an investment in a common enterprise, because Buyer was not pooling its money with any other investors. Id., at 389–90. The court went on to find that the investment also failed the third prong of the Howey test, profits to be derived solely from the efforts of others. Id. Vitally important to the court's holding is the fact that Buyer owned 100% of the entity. "Because [Buyer] was the sole owner of [the LLC entity at issue], its power to remove managers was not diluted by the presence of other ownership interests." Id. at 392.

Here, the Silver Oak entities all had multiple investors. (R. pp. 0014–15; 0017; 0066–73; 0085; 0875–77; 0901–03; 0915–18; 0960; 0978–82; 0997; 1002; p. 1069, line 17–p. 1070, line 1; p. 1139, line 16–p. 1140, line 10; p. 1262). The number of investors ranged from five to twenty-four. The undiluted power to remove managers relied upon by the Great Lakes court is not present with any of the Silver Oak entities. Great Lakes cannot be read to hold that any authority to remove a manager removes an investment from the efforts of others prong. Rather, 100% ownership and undiluted authority to remove a manager, as in the facts of Great Lakes, prevents that 100% owner from claiming that the profits of the entity that it owns outright would be derived solely from the efforts of others.

Further, the test in South Carolina is not whether profits come **solely** from the efforts of others as used in Great Lakes, but rather whether profits come **primarily** from the efforts of others. S.C. Code Ann. § 35-1-102(29)(D) (Supp. 2015); Majors v. S.C. Securities Comm’n, 373 S.C. 153, 163–67, 644 S.E.2d 710, 716–18 (2007). This further distinguishes Great Lakes from the matter at issue here. The investments at issue in this case were properly held to be securities under the Act.

III.

The conduct underlying the violations of Section 35-1-501 as found by the Securities Commissioner and circuit court did occur in connection with the offer, sale, or purchase of the LLC interests.

Appellants argue that the Securities Commissioner and the circuit court failed to make any findings that the conduct alleged to be fraudulent was made in connection with the offer, sale or purchase of the securities at issue. It is unquestioned that the Act requires a person to commit the fraudulent activity directly or indirectly “in connection with the offer, sale, or purchase of a

security” to violate section 501 thereof. S.C. Code Ann. § 35-1-501 (Supp. 2015). However, it is clear that the fraudulent activity complained of here, namely making untrue statements of material fact and omitting to state material facts, occurred directly or indirectly in connection with the offer and sale of the securities at issue. The conduct Appellants allege occurred after the offer and sale of the securities is proof that the statements made in connection with the offer and sale of the securities were untrue and that Appellants withheld material facts from investors. Therefore, there is no question that the conduct alleged and found to be in violation of the Act occurred directly or indirectly in connection with the offer and sale of the securities at issue.

The Securities Commissioner clearly found that the activity it identified as fraudulent occurred in connection with the offer and sale of the securities at issue. The Securities Commissioner states:

Thus, whereas Respondents represented to investors **in connection with the offer and sale of the securities of the various entities** that the investors’ money would be used in furtherance of the entity in which they invested, as a common business practice Respondents nonetheless diverted entity funds for personal use or enrichment and made multiple transfers and so-called loans between the various entities, resulting in a commingling of funds among the various Land Trusts and SOE.

(R. pp. 0078–79) (emphasis added). Further, the Securities Commissioner found that a “central problem with the way memberships in the SOLT entities were **offered and sold** relates to what investors were not told.” (R. p. 0077) (emphasis added). The misstatements and material omissions are clearly the fraudulent activity identified by the Securities Commissioner and are the basis for his holding. Proof of Appellants’ misappropriation of company funds, including purchases at Victoria’s Secret, veterinary and kennel expenses, dentist bills, personal tax bills, college application fees, commingling of company funds with other entities, and wholesale

transfers of company funds to Appellants (R. pp. 0078–81) show the statements made at the time of the offer and sale were false, and that Appellants failed to tell investors material facts necessary to their investment decisions.

This evidence proved that misstatements and omissions were made in connection with *each and every* sale of securities at issue here. However, the Securities Commissioner seemingly hedged on that holding and took a step which addresses Appellants' argument here. The Securities Commissioner identified that the misappropriation of investor funds began in or around the middle of 2007. (R. p. 0084). The Securities Commissioner found violations of the Act only for those sales of securities that occurred after the misappropriation began. The misappropriation and the undermining of the stated principal purpose of the entities was ongoing at the time of the offer and sale of the fifty-four securities sold after that date. Therefore, the Securities Commissioner found that “[c]learly, at that point, if not before, risk factors existed that called for explicit, detailed disclosure, which was never forthcoming.” (R. p. 0084).

The circuit court likewise found that misstatements and material omissions were made in connection with the offer and sale of the securities at issue. The circuit court found that, “Appellants paid themselves management and consulting fees **in excess of what was allowed in the operating agreements and disclosed to investors.**” (R. p. 0099) (emphasis added). Further, “Appellants **failed to disclose to investors** that their money would be used to financially support different entities.” (R. p. 0099) (emphasis added). Thus, contrary to Appellants' contention, the Securities Commissioner and the circuit court made the requisite findings.

The activity which forms the basis of the violations of the Act identified by the Securities Commissioner and the circuit court, the misstatements and omissions, clearly occurred in connection with the offer and sale of the securities at issue here.

IV.

The Appellants' due process rights were not violated by initiating an enforcement action prior to promulgating the rules applicable for such an action.

Appellants assert that the decision of the Securities Commissioner not to promulgate rules related to the procedure of administrative hearings held pursuant to the Act violated their procedural due process rights. This argument should be dismissed because the issue is not preserved for review before this Court. The lower court found that this issue was abandoned on appeal and thus did not rule on its merits. (R. p. 0094). The issue was not raised in Appellants' Rule 59 motion. As explained above, if the issue is not presented to the circuit court, not explicitly ruled upon in the final order of the circuit court, and not raised in a post-trial motion, it is error for the appellate court to consider it. Summersell v. South Carolina Dep't. of Public Safety, 337 S.C. 19, 22, 522 S.E.2d 144, 146 (1999) (citing Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997)). This issue was not decided below and was not preserved through a post-trial motion and thus is not preserved for review.

Even if preserved, the statute cited by Appellants to create a requirement for the Securities Commissioner to promulgate rules is permissive in nature, not mandatory. The statute reads: "The Securities Commissioner **may** . . . issue forms and orders and, after notice and comment, may adopt and amend rules necessary or appropriate to carry out this chapter and may repeal rules, including rules and forms governing registration statements, applications, notice filings, reports, and other records" S.C. Code Ann. § 35-1-605 (Supp. 2015) (emphasis added). The statute applies to the entire Act and is not applicable only to the portion of the Act which relates to administrative enforcement actions and hearings. Taken to its extreme, Appellants' argument would require an enabling rule for any portion of the Act to be enforced.

The statute at issue is clear and unambiguous, and therefore, the Court need not employ the statutory construction techniques promoted by Appellants. “If a statutes’ language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.” Kennedy v. South Carolina Retirement System, 345 S.C. 339, 346, 549 S.E.2d 243, 246 (2001) (quoting Paschal v. State Election Comm’n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995)). It is well understood that the use of the term “may” signifies permission and generally means that the action spoken of is optional or discretionary. State v. Wilson, 274 S.C. 352, 356, 264 S.E.2d 414, 416 (1980). The Act clearly indicates that the promulgation of rules is allowed but not required. There is no ambiguity to be clarified by the use of contorting statutory interpretation techniques.

Finally, due process requirements are not technical and no particular form or procedure is necessary. In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003) (citations omitted). As noted by Appellants, due process requires “(1) adequate notice, (2) adequate opportunity for a hearing, (3) the right to introduce evidence, and (4) the right to confront and cross-examine witnesses.” Id. The procedure followed in this matter easily met the requirements of due process. There seems to be no challenge to the adequacy of notice. Appellants were afforded the opportunity to hear the Division’s case presented against them, cross-examine all witnesses, subpoena witnesses of their own, and present evidence and witnesses. The hearing took place over four days at which the Division had the burden to prove its case. Appellants were further provided the opportunity for judicial review of the final order of the Securities Commissioner. This clearly meets the requirements of an opportunity for a hearing, the right to introduce evidence, and the right to confront and cross-examine witnesses. Appellants do not cite to any

authority for their assertion that a lack of promulgated procedural rules guiding every aspect of the administrative process violates Appellants' due process rights. The hearing process adhered to by the Securities Commissioner in this case clearly afforded Appellants due process.

V.

Competent, material, and substantial evidence exists in the record to support the findings of the Securities Commissioner.

Appellants argue that substantial evidence does not exist to support the Securities Commissioner's findings because certain evidence was inadmissible. This issue is not properly preserved for review before this Court. As noted above, the issue of the admissibility of certain evidence was not raised to the lower court on appeal. If it was raised to the lower court, the issue was subsequently deemed abandoned and was not ruled on by the lower court. Further, it was not mentioned in Appellants' Rule 59(e) motion to the lower court. Thus, it is not preserved for review before this Court and would be in error for this Court to review the issue. Summersell v. South Carolina Dep't. of Public Safety, 337 S.C. 19, 22, 522 S.E.2d 144, 146 (1999) (citing Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997)). The argument should be dismissed.

Even if preserved, administrative hearings are not bound by the formal rules of evidence and no attempt has been made by Appellants to argue that the hearing held in this matter is or should be held to such a standard. "An administrative or quasi judicial [*sic*] body is allowed a wide latitude of procedure and not restricted to the strict rule of evidence adhered to in a judicial court." Jacoby v. South Carolina State Board of Naturopathic Examiners, 219 S.C. 66, 90, 64 S.E.2d 138, 149 (1951). For example, the reception of hearsay evidence, as defined by the Rules of Evidence, is allowed in administrative hearings. Further, "in a nonjury trial, whether in the district court or before an administrative law judge, little harm can result from the reception of

evidence that could perhaps be excluded.” Multi-Medical Convalescent and Nursing Center of Towson v. National Labor Relations Board, 550 F.2d 974, 977 (4th Cir. 1977). Thus, the Fourth Circuit strongly advises administrative law judges “if in doubt, let it in.” Id. at 978. Further, hearsay evidence may not only be let in, but may be relied upon as long as there is some evidence with rational probative force in the record. Richards v. City of Columbia, 227 S.C. 538, 552–53, 88 S.E.2d 683, 690 (1955).

Without arguing that the hearing at issue should have been held subject to the rules of evidence, Appellants seek to have certain evidence excluded under those rules. However, Rich Silver’s testimony, objected to by the Appellants, was as current manager of the Silver Oak Land entities in question, not as an expert. (R. p. 0332, line 14–p. 0333, line 15). As to his testimony regarding Silver Oak Energy, of which he was not manager, Rich Silver was submitted as an expert and properly deemed qualified. (R. p. 0337, line 3–p. 0343, line 12). The investor questionnaires Appellants complain of were submitted to show the basis for opening and conducting an investigation and not for the truth of the matter asserted therein. (R. p. 0599, lines 4–19). As such, they are not hearsay. Further, there is no reference in any administrative order or circuit court order to the investor questionnaires and no indication they were relied upon. The QuickBooks records the Appellants complain of were created by Appellants. (R. p. 1096, lines 17–18). As such, they are a statement of the party opponent and are not hearsay. If deemed to be hearsay, the QuickBooks records are records kept in the regular course of business and as such are exempt from the hearsay exclusionary rule. Testimony revealed that they were created by Appellants (R. p. 1096), provided to Mr. Silver by the Appellants (R. p. 0349, line 21–p. 0351, line 2), and provided to Sandra Matthews of the Securities Division directly by Mr. Silver (R. p. 0603, lines 4–13). The documents were then admitted through testimony of Ms. Matthews. (R. p.

0602, line 1–p. 0603, line 22) Thus, they were properly authenticated. The evidence complained of would have been admitted even in a forum subject to the South Carolina Rules of Evidence.

Finally, Appellants suffered no prejudice because mounds of evidence not complained of by Appellants is in the record and would independently support the findings of the Securities Commissioner and the circuit court. The bank records complained of by Appellants are only a small portion of the bank records and relate only to Silver Oak Land Trust I, Silver Oak Land Trust VII, and Silver Oak Energy. (Oct Trans., State’s Exs. 19 (R. pp. 1311–1649) & 20 (R. pp. 1650–1789)). Most of the bank records submitted into evidence by the Division were submitted with an affidavit of authenticity from the custodian of records at the bank from which the records were obtained. (R. p. 0617, line 14–p. 0626). These bank records, which relate to each and every LLC at issue, are alone sufficient to prove to the court that the management of the business was not in accordance with the statements made at the time of the offer and sale, and that material omissions were made in connection with the offer and sale of the securities at issue. As to what was said and what was not said in connection with the offer and sale of the securities at issue, there is plenty of evidence, including testimony from McIntyre himself and several investors, as well as documentary evidence including offering circulars and the operating agreements, to show what was said and what was not said.

For all of these reasons, this argument is unavailing because the issue was not properly preserved for appeal, administrative hearings are not bound by the rules of evidence, the evidence complained of would have been admitted under the rules of evidence, and there is substantial evidence not complained of in the record to support the findings of the Securities Commissioner and the circuit court.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court uphold the circuit court order affirming the order of the Securities Commissioner.

Respectfully submitted,

ALAN WILSON
Securities Commissioner

By: Tracy Meyers
TRACY A. MEYERS
Deputy Securities Commissioner

MARILYN E. GARTLEY
Assistant Attorney General

Office of the Attorney General
State of South Carolina
Securities Division
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-4172

Attorneys for the Respondent

Columbia, South Carolina
November 16, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Tonya A. Gee,
Circuit Court Judge

Appellate Case No. 2015-001845

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SC Court of Appeals

John M. McIntyre and Silver Oak Land
Management LLC, ...

Appellants,

v.

Securities Commissioner of South Carolina, ...

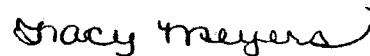
Respondent.

CERTIFICATE OF COUNSEL

The undersigned does hereby certify that the Final Brief of Respondent materially complies with Rule 211(b), SCACR. The Respondent would note that the Final Brief of Respondent also reflects clarifying formatting changes, and the Final Brief of Respondent further includes citations to the Supplemental Record on Appeal, which the Respondent will file with the Court in short order as explained in the Respondent's correspondence of November 9, 2016.

Respectfully submitted,

ALAN WILSON
Securities Commissioner



TRACY A. MEYERS
Deputy Securities Commissioner

MARILYN E. GARTLEY
Assistant Attorney General

Office of the Attorney General
State of South Carolina
Securities Division
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-4172

Attorneys for the Respondent

Columbia, South Carolina
November 16, 2016