STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas
Tanya A. Gee, Circuit Court Judge
Appellate Case No. 2015-001845

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SC Court of Appeals

SECURITIES COMMISSIONER OF SOUTH CAROLINA,

Respondent,

vs.

JOHN M. MCINTYRE AND SILVER OAK LAND MANAGEMENT, LLC,

Appellants.

RESPONDENT'S PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, the Securities Commissioner of South Carolina hereby files this petition for a rehearing. The Commissioner respectfully submits that this Court's Opinion of October 17, 2018, overlooked or misapprehended (a) that the Appellant's claim of a violation of due process rights was not preserved for review; and (b) that, even if that issue were preserved, the administrative hearing process (the "Hearing") was conducted in accordance with the South Carolina Constitution, the South Carolina Uniform Securities Act, and controlling precedent of the Supreme Court.

If maintained in its current form, the Opinion would have a profoundly negative impact on the citizens of South Carolina by impairing the ability of the

Commissioner to conduct administrative hearings to enforce the Securities Act. There are ample means by which the Court can prevent this result. Therefore, for the reasons set forth in this Petition, the Court should grant a rehearing on the Opinion and rule that the Appellants' claim of a violation of due process rights was not preserved for review, or in the alternative, find that the Hearing was conducted in accordance with the South Carolina Constitution, the South Carolina Uniform Securities Act, and controlling precedent of the Supreme Court.

<u>Argument</u>

I. Appellant's due process claims were not preserved for appeal.

In the Opinion, the Court considered and agreed with the Appellants' argument that their right to procedural due process was denied as a result of the Hearing. The Court should not have reached that issue. The Appellants did not raise a due process argument in their Rule 59(e), SCRCP, motion, and thus, failed to preserve this issue for appeal. *Summersell v. S.C. Dep't of Pub. Safety*, 337 S.C. 19, 22, 522 S.E.2d 144, 146 (1999) (citing *White v. Wilkerson,* 328 S.C. 179, 493 S.E.2d 345 (1997) ("If the issue is not raised in a post-trial motion, it is error for the appellate court to consider it.").

The Appellants initially raised the issue of due process in their petition for judicial review of the Commissioner's Order before the Richland County Court of Common Pleas. (R. p. 109). But, according to the circuit court, this argument was wholly unsupported and relied on "bald conclusions." (R. p. 94). As a result, Judge Tanya A. Gee's Order Affirming the Decision of the Securities Commissioner found

the issue of due process to have been abandoned, citing *Solomon v. City Realty Co.*, 262 S.C. 198, 201, 203 S.E.2d 435, 436 (1974). (R. p. 94).

The Appellants left this due process argument abandoned in the circuit court. The Record on Appeal does not include any suggestion that the Appellants asked for reconsideration of the circuit court's decision on their claims of a due process violation.[1] Moreover, were the Appellants' Rule 59(e) motion to have been included in the Record, it would show that the Appellants laid out detailed reasons Judge Gee should alter or amend her decision, but *did not raise the issue of due process*. Only on appeal to this Court did the Appellants attempt to resurrect this issue. When, as is the case here, a court's "review of the record establishes that an issue is not preserved, then [the court] should not reach it." *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). Following well-established case law, the Court should grant a rehearing and rule this issue unpreserved. *Id.* at 323, 730 S.E.2d at 285 ("we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved").

II. The Hearing complied with the Constitution, the Securities Act, and controlling precedent.

The Commissioner respectfully submits that, even if the Appellants' due process arguments were preserved for appeal, the Hearing complied with the

[1] The Record does reflect a summary denial of the Appellant's Rule 59(e) Motion. (R. p. 102).

requirements of the Constitution, in particular, Article I, Section 22; the Securities Act; and controlling precedent of the Supreme Court.

a. The Constitution

The South Carolina Constitution, Article I, Section 22, sets forth the requirements with which an administrative hearing must comply in order to ensure that a respondent is afforded his right to due process including "due notice and an opportunity to be heard." The Hearing met those requirements. 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). For an administrative proceeding to comply with Article I, Section 22, it must include "(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.* In the Hearing, the Appellants were afforded each of these requirements. In accordance with the Securities Act, the Appellants were provided notice of their right to a hearing in the Order to Cease and Desist. (R. p. 8). The Appellants exercised this right and a four day hearing followed—including a two month break during which the Appellants were afforded the opportunity to further refine their case. (R. p. 1017, p. 161).

The preponderance of the evidence standard of proof, which is generally applicable in administrative hearings under Supreme Court precedent, was applied in the Hearing. *See Anonymous (M-156-90) v. State Board of Medical Examiners,*

329 S.C. 496 S.E.2d 17 (1998). The Appellants were able to subpoena witnesses, examine and cross examine witnesses, introduce evidence, and state clearly and fully their case before the Hearing Officer. As a result of this process, the Appellants were provided "notice and opportunity to be heard at some point before" the Commissioner made his "final decision." *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997). Additionally, S.C. Code Ann. § 35-1-609 provided the means for the Appellants to seek judicial review of the Commissioner's Order, and the circuit court was free to consider issues of law without any deference to the Commissioner. Further, the Appellants failed to point to any specific portion of the Hearing that negatively impacted their right to procedural due process. It is a misapprehension of Article I, Section 22 to suggest that this careful, deliberate process did not afford the Appellants "due notice and an opportunity to be heard."

b. The Securities Act

In the Opinion, the Court reasoned that the Securities Act requires the Commissioner to promulgate rules for the conduct of administrative hearings. It does not. The use of "may" means simply may, leaving the decision of whether to promulgate rules of procedure up to the Commissioner. *State v. Wilson*, 274 S.C. 352, 356, 264 S.E.2d 414, 416 (1980) ("The use of the word "may" signifies permission and generally means that the action spoken of is optional or discretionary."). The drafters of the Securities Act were well aware of the difference between permissive and mandatory instructions to the Commissioner, as for instance, in Section 605, where the Securities Act uses both "may" including in

subsection (a)(1)-(4) (*may* issue orders, rules, definitions, fees), subsection (c) (*may* require the filing of financial statements by certain registrants and notice filers), subsection (d) (*may* provide interpretive opinions), and "must" subsection (f) (hearings *must* be public).

Further, S.C. Code Ann. § 35-1-605(a)(1) leaves in the Commissioner's discretion whether or not rules, including rules of procedure, should be promulgated, explaining that he may adopt rules that he considers to be "necessary or appropriate." With this delegation, the General Assembly was acting consistently with the principles of administrative law in passing an enabling statute and then granting the administrative agency the authority to determine which additional rules would be necessary or appropriate to carry out its statutory mandate. In interpreting their statutes, administrative agencies are granted wide discretion. *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) ("we give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations."). South Carolina Courts defer to an "agency interpretation unless it is arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 34–35, 766 S.E.2d at 718 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (internal quotations omitted). In relying on the due process protections established by the Securities Act rather than promulgating procedural hearing rules, the Commissioner cannot be considered to have acted in an arbitrary or

capricious manner. Indeed, the plain language of Section 604(b) includes the requirement of notice and the opportunity for a hearing, and is intended to "*provide due process protections for persons against whom an order...is issued.*" S.C. Code Ann. § 35-1-604 (Supp. 2017) S.C. Reporter's cmt. 2 (emphasis added).

Additionally, the Commissioner is not required to promulgate a rule setting forth a standard of proof for his hearing process; as the Securities Act is silent on this issue, it is for the courts, not the Commissioner, to decide. *Anonymous,* 329 S.C at 375–76, 496 S.E.2d at 19. (citing *Johnson v. Arkansas Bd. of Examiners in Psychology,* 305 Ark. 451, 808 S.W.2d 766 (1991)) ("Traditionally the judiciary defines the standard when the legislature has not.").

Lastly, in his appointment of the Hearing Officer to take testimony and prepare a written report and recommendation—while reserving his right to make a final ruling—the Commissioner was clearly acting within the authority granted to him by the Securities Act. *See* S.C. Code Ann. § 35-1-601(a) ("The Securities Commissioner may delegate any or all of his duties pursuant to this chapter to members of his staff, as he deems necessary or appropriate").

c. Controlling Supreme Court precedent

In determining the Hearing to be a violation of the Appellants' right to procedural due process, the Court overlooked the controlling Supreme Court precedent on the Commissioner's hearing process. In *Majors v. S.C. Securities Comm'n*, 373 S.C. 153, 644 S.E.2d 710 (2007), which was not cited in the Opinion,

the Supreme Court considered and upheld this same hearing process. In *Majors*, as in this case, the appellant alleged that his right to due process was violated by the Commissioner. The Supreme Court rejected this argument, instead determining that the Commissioner's hearing process afforded the appellant due process. *Majors*, 373 S.C at 162, 644 S.E.2d at 715. The Supreme Court reached that opinion after a careful analysis of an *identical hearing process* and its aftermath, which, akin to the present matter, included a report and recommendation to the Commissioner, followed by an appeal, first to the circuit court and then to the Supreme Court.[2] This is precisely the process that occurred during and after the Hearing. The Opinion overlooked or misapprehended *Majors*, and, therefore, the Court should grant a rehearing.

Conclusion

As set forth above, the Commissioner respectfully submits that the Opinion overlooked and misapprehended (a) that the Appellant's claim of a violation of due process rights was not preserved for review; and (b) that, even if that issue were preserved, the Hearing was conducted in accordance with the South Carolina Constitution, the South Carolina Uniform Securities Act, and controlling precedent of the Supreme Court. Without reconsideration of the Opinion, the Securities Act's administrative hearing process will be thrown into doubt, and along with it, the

[2] Majors continued his appeal to the United States Supreme Court, which denied his Petitions for a Writ of Certiorari and Rehearing. *Majors v. S.C. Sec. Comm'n*, 552 U.S. 975 (2007); *Majors v. S.C. Sec. Comm'n*, 552 U.S. 1133 (2008).

ability of the Commissioner to carry out his mandate to regulate the securities markets of South Carolina. The Court should, therefore, grant a rehearing on the Opinion.

Respectfully submitted,

ALAN WILSON
Securities Commissioner

TRACY A. MEYERS
Deputy Securities Commissioner

BY: ______________________________
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PROOF OF SERVICE

I hereby certify that I have served the Respondent's Petition for Rehearing upon the Appellants by mailing a copy to each of their attorneys of record at the address below via the United States Mail on November 1, 2018:

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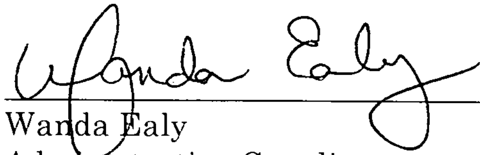

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November 1, 2018
Columbia, South Carolina

ALAN WILSON
SECURITIES COMMISSIONER

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VIA HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: ***John M. McIntyre and Silver Oak Management, LLC v. Securities Commissioner of South Carolina, Appellate No. 2015-001845***

Dear Ms. Kitchings:

Please find enclosed, for filing with your office, the original and six (6) copies of the Respondent's Petition for Rehearing in the above-referenced matter.

If I can be of any further assistance, please contact me at (803) 734-9916.

Sincerely yours,

Ian P. Weschler
Assistant Attorney General

cc: Cory E. Manning, Esq. (via First-Class mail)
Robert V. Mathison, Jr., Esq. (via First-Class mail)