STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Court of Common Pleas
Tanya A. Gee, Circuit Court Judge
Appellate Case No. 2019-000455

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

Respondents,

v.

SECURITIES COMMISSIONER OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Securities Commissioner

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 19, 2019.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN REACHING THE RESPONDENTS' DUE PROCESS ARGUMENTS, WHICH WERE NOT PRESERVED FOR APPEAL BECAUSE THE RESPONDENTS ABANDONED THOSE CLAIMS BY FAILING TO RAISE THEM IN THEIR RULE 59(E), SCRCP, MOTION FOR RECONSIDERATION?

II. DID THE COURT OF APPEALS ERR IN CONCLUDING THAT THE CONSTITUTION MANDATES THE PROMULGATION OF ADMINISTRATIVE HEARING RULES BY THE COMMISSIONER?

III. DID THE COURT OF APPEALS ERR IN CONCLUDING THAT THE SECURITIES ACT MANDATES THE PROMULGATION OF ADMINISTRATIVE HEARING RULES BY THE SECURITIES COMMISSIONER?

STATEMENT OF THE CASE

This matter arose in the fall of 2012, when the Securities Division of the South Carolina Attorney General's Office received a complaint about Silver Oak Land Management, LLC ("Silver Oak"), and related entities, and Silver Oak's then general manager, John M. McIntyre ("McIntyre"). (App. 558). The complaint, by a Silver Oak investor, alleged that McIntyre was diverting funds from the company for his personal use. (App. 630). The Division sought testimony from Silver Oak and McIntyre during its investigation, but neither chose to comply with the Division's subpoena. (App. 6) Following its investigation, on April 19, 2013, the Securities Division exercised its authority under the South Carolina Uniform Securities Act of 2005 and issued an Order to Cease and Desist naming McIntyre and Silver Oak as Respondents (the "Cease and Desist Order"). (App. 5-13). In the Cease and Desist Order, the Securities Division alleged that the Respondents, jointly and severally, violated S.C. Code Ann. § 35-1-501 (general fraud), for, among other things, using investor money to pay extravagant consulting fees to themselves; misappropriating money by diverting it to themselves and entities they controlled; and paying for various personal items while mislabeling those transactions in Respondents' accounting books. (App. 10).

Pursuant to the Securities Act, the Respondents timely availed themselves of their right to a hearing by following the procedure outlined in the Cease and Desist Order. (App. 1267). Following established practice, the Securities Commissioner appointed a hearing officer in the matter (the "Hearing Officer") and delegated to

him 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." (App. 1279). A hearing was held over four days: July 30, 2013, and October 1-3, 2013. During the course of the hearing, witnesses were examined and cross-examined by both parties, and extensive 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. (App. 14-35). The Securities Commissioner considered the Hearing Officer's recommendation and rejected it. The Securities Commissioner found that the Hearing Officer applied the incorrect legal test for determining whether or not the investments at issue were securities. (App. 36-65). Following his own review of the record, the Securities Commissioner found that the membership interests at issue were investment contracts and thus securities under the Securities Act. The Securities Commissioner then returned the matter to the Hearing Officer and ordered the Hearing Officer to make a recommendation as to whether or not violations of S.C. Code Ann. § 35-1-501 occurred in connection with an offer or sale of the securities at issue. The Hearing Officer subsequently issued a recommendation that found seventy-eight violations of § 35-1-501. (App. 66-78). The Securities Commissioner issued an order dated November 20, 2014, concurring with the Hearing Officer's recommendation except

he reduced the number of violations to fifty-four, and he imposed a civil penalty of $10,000 per violation, totaling $540,000. (App. 79-90).

Respondents filed a Petition for Review, pursuant to the Securities Act, with the Richland County Court of Common Pleas on December 19, 2014. A hearing was held on April 17, 2015, before the Honorable Tonya A. Gee. Judge Gee affirmed the decision of the Securities Commissioner through an order filed on May 7, 2015. (App. 91-105). The Respondents subsequently filed a 59(e), SCRCP, motion for reconsideration, which Judge Gee denied on July 21, 2015. (App. 106). On August 27, 2015, the Respondents filed a notice of appeal with the Court of Appeals.

Subsequently, on November 24, 2015, the Beaufort County Grand Jury returned multiple true-billed indictments charging McIntyre with securities fraud and breach of trust with fraudulent intent. On December 14, 2016, McIntyre pled guilty to one count of breach of trust with fraudulent intent. (App. 2655-2670).

Arguments before the Court of Appeals were held on February 6, 2018. On October 17, 2018, the Court of Appeals issued an opinion reversing and remanding this matter to the circuit court. (App. 2671-2670). On November 1, 2018, the Securities Commissioner timely sought a rehearing by the Court of Appeals. (App. 2682-2693). The Court denied the Petition for Rehearing on February 19, 2019. This Petition for a Writ of Certiorari pursuant to Rule 242, SCACR, follows.

ARGUMENT

The Court of Appeals reached an issue that it was in error to consider, and then compounded that error by imposing the requirement of the promulgation of administrative hearing rules by the Securities Commissioner, which neither the Constitution nor the Securities Act requires. In order to correct these errors, the Securities Commissioner respectfully requests that this Court grant certiorari.

I. THE COURT OF APPEALS ERRED IN REACHING THE RESPONDENTS' DUE PROCESS ARGUMENTS, WHICH WERE NOT PRESERVED FOR APPEAL BECAUSE THE RESPONDENTS ABANDONED THOSE CLAIMS BY FAILING TO RAISE THEM IN THEIR RULE 59(E), SCRCP, MOTION FOR RECONSIDERATION

When the Respondents' sought judicial review of the Securities Commissioner's final order, they alleged that the hearing process deprived them of their right to due process. In its opinion below, the Court of Appeals agreed. It erred in reaching that issue. The Respondents did not raise a due process argument in their Rule 59(e), SCRCP, motion for reconsideration before Judge Gee, and therefore, they 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 Respondents initially raised the issue of due process in their petition for judicial review of the Securities Commissioner's Order before the Richland County Court of Common Pleas. (App. 107-117). According to the circuit court, this argument was wholly unsupported and relied solely on "bald conclusions." (App. 98). As a result, Judge

Gee's Order Affirming the Decision of the Securities Commissioner found the Respondents' due process argument to have been abandoned, citing *Solomon v. City Realty Co.*, 262 S.C. 198, 201, 203 S.E.2d 435, 436 (1974) (a "bald conclusion is not manifestly correct and leaves unargued the error assigned by this exception. Under the familiar rule, it is deemed abandoned.") (internal citations omitted).

After the issuance of the Order, the Respondents timely filed a Rule 59(e), SCRCP, Petition, but they made no mention of due process, and therefore, the Respondents left this due process argument and bald conclusions abandoned in the circuit court. The record does not include any suggestion that the Respondents asked for reconsideration of the circuit court's decision on their claims of a due process violation.[1] On the contrary, the Respondents' Rule 59(e) motion shows that the Respondents laid out detailed reasons they believed Judge Gee should alter or amend her decision, but they did not raise the issue of due process and offered nothing to counter the circuit court's conclusion that the Respondents' arguments were wholly unsupported, relied on bald conclusions, and had been abandoned. Only at the Court of Appeals did the Respondents 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). The case law from this Court is clear that after the Respondents failed to preserve their due

[1] The Record does reflect a summary denial of the Respondents' Rule 59(e) Motion. (App. 106).

process argument, the Court of Appeals erred in considering the question. *Id.* at 323, 730 S.E.2d at 285 ("[W]e should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved.")

By reaching and ruling on the Respondents' unpreserved arguments, the Court of Appeals erred, and the Securities Commissioner respectfully requests this Court grant certiorari to correct this error.

II. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE CONSTITUTION MANDATES THE PROMULGATION OF ADMINISTRATIVE HEARING RULES BY THE SECURITIES COMMISSIONER.

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 person is afforded his right to due process, including "due notice and an opportunity to be heard." The Court of Appeals erred in ruling that Article I, Section 22 requires the Securities Commissioner to promulgate administrative hearing rules. This is simply not the case. Rather, this Court did not determine that such a requirement was imposed on the Securities Commissioner when it reviewed an identical case in *Majors v. S.C. Sec. Comm'n,* 373 S.C. 153, 644 S.E.2d 710 (2007). In *Majors*, the appellant alleged that his right to due process was violated by the Securities Commissioner. This Court rejected Majors' argument, instead determining that the Securities Commissioner's hearing process afforded the appellant his constitutional right to due process. *Majors*, 373 S.C at 162, 644 S.E.2d at 715. This 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 Securities Commissioner, followed by an appeal, first to the circuit court and then to the Court of Appeals.[2] This is precisely the process that occurred during and after the Respondents' hearing. Despite this Court's ruling in *Majors*, the Court of Appeals ignored *Majors* in its opinion even though *Majors* is in direct conflict with its opinion. This was error.

Contrary to the Court of Appeals decision, due process requirements imposed on administrative hearings 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 Respondents were afforded each of these requirements. In accordance with the Securities Act, the Respondents were provided notice of their right to a hearing in the Order to Cease and Desist. (App. 12-13). The Respondents exercised their right to a hearing, and a four-day hearing followed, which included a two month break between the first and second hearing dates, that afforded the Respondents the opportunity to further refine their case. (App. 123).

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[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).

During the hearing, the Respondents were able to subpoena witnesses, examine and cross-examine witnesses, introduce evidence, and present clearly and fully their case before the Hearing Officer. In addition, the Respondents were well aware that 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). As a result of this process, the Respondents 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 Respondents to seek judicial review of the Securities Commissioner's Order, and the circuit court was free to consider issues of law without any deference to the Securities Commissioner.

This was a careful, deliberate process which, like *Majors*, even in the absence of promulgated hearing rules, afforded the Respondents "due notice and an opportunity to be heard" required by the Constitution. The Court of Appeals erred in ruling otherwise. *See United States v. Lovasco*, 431 U.S. 783, 790 (1977) ("Judges are not free, in defining due process, to impose on law enforcement officials our personal and private notions of fairness and to disregard the limits that bind judges in their judicial function." (internal quotations omitted)).

III. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE SECURITIES ACT MANDATES THE PROMULGATION OF ADMINISTRATIVE HEARING RULES BY THE SECURITIES COMMISSIONER.

In its opinion, the Court of Appeals reasoned that the Securities Act requires the Securities Commissioner to promulgate rules for the conduct of administrative hearings. It does not. In fact, the plain language of S.C. Code Ann. § 35-1-604(b) includes the constitutionally-mandated requirement of notice and 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). Further, the use of "may" in the Securities Act means simply "may," leaving the decision of whether to promulgate rules of procedure to the Securities 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 Securities Commissioner. For example, in Section 35-1-605, the Securities Act uses both "may" and "must" as 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 (f) (hearings *must* be public).

Further, § 35-1-605(a)(1) leaves in the Securities Commissioner's discretion whether or not rules, including rules of procedure, should be promulgated, and

explains 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 whether additional rules would be necessary or appropriate to carry out its statutory mandate. Moreover, 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) ("[W]e 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.")

In reviewing an agency's implementation of enabling legislation, 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 Securities Commissioner did not act in an arbitrary or capricious manner.

In reading into the hearing process a requirement of promulgated procedural rules, the Court of Appeals imposed a requirement on the Securities Commissioner beyond that which the Constitution, the Securities Act, and this Court require. The

Securities Commissioner respectfully requests that this Court grant certiorari to correct this error.

CONCLUSION

For the reasons set forth above, the Securities Commissioner respectfully submits that this Court should grant certiorari.

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PROOF OF SERVICE

I hereby certify that I have served the Petition for a Writ of Certiorari on the Respondents by mailing a copy to each of their attorneys of record at the address below via the United States Mail on April 15, 2019:

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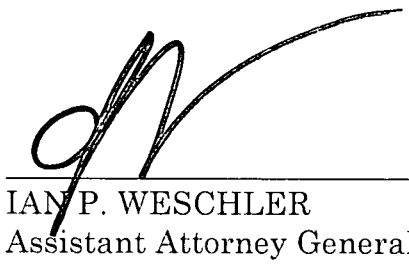

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