

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Tanya A. Gee
Circuit Court Judge

Case No. 2014-CP-40-07917

Appellate Case No. 2019-000455

John M. McIntyre and Silver Oak Land
Management LLC,

Petitioners

v.

Securities Commissioner of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242(f) of the South Carolina Appellate Court Rules, Respondents John M. McIntyre and Silver Oak Land Management, LLC (“Respondents”) submit this Return opposing the Securities Commissioner of South Carolina’s (“Securities Commissioner”) Petition for a Writ of Certiorari seeking review of the decision of the Court of Appeals in the above captioned matter: *McIntyre v. Sec. Comm’r of S.C.*, 425 S.C. 439, 823 S.E.2d 193 (Ct. App. 2018). For the reasons stated herein, the Court should deny the Petition and permit the well-reasoned decision of the Court of Appeals to stand.

Counter-Statement of the Questions Presented for Review

1. Did the Respondents preserve for appellate review their argument that the Securities Commissioner’s failure to promulgate rules deprived them of due process where the issue was raised to and ruled upon by the circuit court?
2. Did the Court of Appeals correctly determine that the Securities Commissioner’s failure to promulgate hearing rules violated the due process protections of Article I, § 22 of the South Carolina constitution?
3. Did the Court of Appeals properly find that the Securities Commissioner violated Respondents’ procedural due process rights by failing to promulgate hearing rules as contemplated by the Securities Act?
4. Do Respondents’ other appellate grounds represent additional sustaining grounds supporting the Court of Appeals’ decision reversing the circuit court?

Counter-Statement of the Case

This case centers on a proceeding before the Securities Commissioner which determined that membership interests in seven South Carolina limited liability companies (“LLC”) formed

between 2005 and 2009 constituted securities under the South Carolina Uniform Securities Act of 2005, Sections 35-1-101, *et seq.* (the “Securities Act”). (Circuit Court Order, App. 91.)

In 2012, the Attorney General, acting as the Securities Commissioner, issued a cease and desist order to Respondents. (Cease and Desist Order dated April 9, 2013, App. 5.) The Securities Commissioner alleged at least 39 violations of the anti-fraud provision of the Securities Act, section 35-1-501 of the South Carolina Code. (*Id.*, App. 11.)

At the outset of the hearing, Respondents raised concerns regarding the lack of due process afforded by the proceeding. Respondents contended that, pursuant to the Securities Act, the Securities Commissioner was required to create procedures that would govern how to conduct a fair hearing, but that no such procedures had been promulgated. (April 2015 Trans., App. 1019.)

Despite this concern, a hearing officer appointed by the Securities Commissioner took testimony and recommended findings of facts as to the matters alleged in the cease and desist order. (Hearing Officer Recommendation dated May 6, 2014, App. 14-35.) After a four-day trial, the hearing officer recommended that the Securities Commissioner dismiss the cease and desist order because the membership interests in the LLCs were not securities under the Securities Act. (*Id.*, App. 14.)

The Securities Commissioner, however, rejected the recommendation the hearing officer arrived at after presiding over the four-day trial, issued an order finding the membership interests constituted securities, and remanded the matter to the hearing officer for a determination as to whether violations of the Securities Act occurred. (Remand Order dated September 12, 2014, App. 36, 65.)

On remand, the hearing officer found violations of the Securities Act had occurred with respect to 78 investors. (Recommendation dated October 22, 2014, App. 66.) The Securities Commissioner accepted the recommendation in the final order, but reduced the number of violations—based on the time the violations allegedly occurred—to 54. (Final Order dated November 20, 2014, App. 79, 89.) The Securities Commissioner imposed a fine of \$540,000, ordered McIntyre and Silver Oak Land Management to cease and desist from transacting business in South Carolina, revoked any Securities Act exemptions, and ordered payment for the costs of the investigation and proceedings. (*Id.*, App. 90.)

Respondents petitioned for judicial review by the circuit court pursuant to section 35-1-609 of the South Carolina Code. (Petition for Review dated December 19, 2014, App. 107.) One of the arguments raised by Respondents, among others, was that the hearing process—particularly the Securities Commissioner’s failure to promulgate hearing rules—deprived them of procedural due process. (*Id.*, App. 112-13, 115.)

The circuit court conducted a lengthy hearing where this issue was argued in detail. (April 2015 Trans., App. 780-81, 785-86, 790-91, 796-97, 802, 809.) However, the circuit court affirmed the final order issued by the Securities Commissioner. (Order of Circuit Court dated May 7, 2015, App. 91.) Respondents moved for reconsideration of that order, which the circuit court denied. (Motion for Reconsideration, App. 992; Order denying Motion for Reconsideration, App. 106.) Respondents then appealed to the Court of Appeals.

On October 17, 2018, the Court of Appeals issued an opinion reversing and vacating the circuit court. Although Respondents raised five arguments, the Court of Appeals relied solely on its finding that the Securities Commissioner’s administrative enforcement action deprived Respondents of procedural due process. *McIntyre v. Sec. Comm’r of S.C.*, 425 S.C. 439, 442,

823 S.E.2d 193, 194 (Ct. App. 2018). More specifically, the Court of Appeals found that the Commissioner denied Respondents procedural due process by choosing not to promulgate any rules regulating the conduct or procedure appropriate for administrative hearings. *Id.* at 446, 823 S.E.2d at 196. In light of the disposition of this issue, the Court of Appeals noted that it need not address the remaining issues raised. *See id.* at 452, 823 S.E.2d at 200.

After the Court of Appeals denied rehearing, the Securities Commissioner filed the present Petition for a Writ of Certiorari with this Court.

Argument

I. Respondents' argument that the hearing process deprived them of due process was raised to and ruled upon by the circuit court and therefore preserved for appellate review.

The Court of Appeals correctly determined that the Securities Commissioner's administrative hearing process deprived Respondents of procedural due process. This issue was raised to the circuit court and directly ruled upon in its Order. Therefore, it was properly preserved for appellate review. The Securities Commissioner's argument to the contrary is without merit.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). There are four basic requirements for preserving an issue for appellate review: "[t]he issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641

S.E.2d 903, 907 (2007) (quoting Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina* 57 (2d ed. 2002)).

As this Court has explained, all it has ever required for preservation is that the questions presented for its decision must first have been fairly and properly raised in the lower court and passed upon by that Court.” *Sloan v. S.C. Dep’t of Rev.*, 409 S.C. 551, 555 n.4, 762 S.E.2d 687, 689 n.4 (2014) (quoting *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011)). In other words, the issue must have been “raised to and ruled upon by the trial judge.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Importantly, “[p]ost-trial motions are **not necessary** to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court **but not yet ruled upon by it.**” *Id.* (emphasis added).

As this Court has cautioned, issue preservation “is not a ‘gotcha’ game aimed at embarrassing attorneys or harming litigants.” *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). “[L]ongstanding precedent” recognizes this, providing that an issue should be resolved on preservation grounds only “when it *clearly* is unpreserved.” *Id.* at 330, 730 S.E.2d at 285 (emphasis in original). Thus, where it cannot be said that an argument is “clearly unpreserved and the ‘question of issue preservation is subject to multiple interpretations, **any doubt** should be resolved in favor of preservation.’” *Johnson v. Roberts*, 422 S.C. 406, 411-12, 812 S.E.2d 207, 210 (Ct. App. 2018), *reh’g denied* (Apr. 18, 2018), *cert. granted* (Oct. 18, 2018) (emphasis added) (quoting *Atl. Coast Builders*, 398 S.C. at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in part and dissenting in part)).

Respondents’ due process argument was preserved for review. In their Petition for Review, Respondents alleged a litany of due process concerns, including that the Security Commissioner’s failure to prepare and disseminate any rules, forms, orders, or interpretive

opinions as contemplated by S.C. Code Ann. § 36-1-605 resulted in the hearing being conducted without procedural safeguards. (Petition, App. 112-13.) Respondents identified the following nonexclusive list of deficiencies: (i) no ascertainable burden of proof, (ii) no ascertainable standards for the admission of evidence, for example, with respect to the authentication of documents and the admission of hearsay, (iii) no established method by which the Respondents could discover evidence in the possession of the Securities Commissioner and others, and (iv) no established method for Respondents to subpoena witnesses. (*Id.*, App. 113.) Respondents then reiterated that the Securities Commissioner's failure to promulgate any rules violated their right to due process. (*Id.*, App. 115.)

This issue was also extensively argued at the hearing before the circuit court. Respondents began their argument by discussing the mechanisms by which the Securities Commissioner could have proceeded, and argued that the Securities Commissioner improperly proceeded with a civil administrative proceeding without adopting any rules or guidance as contemplated by the Securities Act. (April 2015 Trans., App. 778-79.) Counsel and the circuit court devoted much of the hearing to addressing this due process issue. (*Id.*, App. 778-803, 809-10, 814-16.) Moreover, Respondents repeatedly asserted that the lack of rules resulted in a deprivation of due process. (*Id.*, App. 780-81, 785-86, 790-91, 796-97, 802, 809.)

After hearing the parties' various arguments, the circuit court issued its Order. The Order specifically addressed and ruled on Respondents' due process argument. The circuit court acknowledged that Respondents contended that their due process rights had been violated because "the Attorney General failed to adopt or promulgate any rules of procedure or evidence with regard to the administrative proceeding." (Order, App. 96.) The court explained that it found this argument "unavailing." (*Id.*) The court premised its conclusion on its determination

that S.C. Code Ann. § 36-1-605 only provided that the Securities Commissioner “may” promulgate rules, and thus did not require him to do so. (*Id.*, App. 97.) The circuit court further explained that although Respondents had asserted error due to the failure to adopt rules, they had not shown any prejudice and thus did not meet their burden of proving reversible error. (*Id.*, App. 98.)

Therefore, the due process issue was undoubtedly preserved for appellate review. Respondents raised the issue and the circuit court directly ruled on it. Respondents were not obligated to file a Rule 59(e) motion in light of this ruling, as such a motion is only required in the event the circuit court *fails to rule on an issue in the first instance*. See *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733. What matters for preservation purposes is whether a ruling was made with sufficient specificity, not whether the ruling was favorable. The circuit court’s statement that Respondents failed to “cite to any authority for their argument and instead rely solely on bald conclusions” represented the circuit court’s view of the *merits* and *strength* of Respondent’s argument—it had no bearing on whether the argument was actually raised to the court for consideration.

Finally, although the circuit court utilized an odd turn of phrase by stating that Respondents’ reliance on “bald conclusions” meant they “have abandoned this issue on appeal,” this was not the true essence of the circuit court’s finding.¹ The circuit court in no way

¹ The circuit court’s reliance on *Solomon v. City Realty Co.*, 262 S.C. 198, 201, 203 S.E.2d 435, 436 (1974) to support this finding was misplaced. In *Solomon*, the appellant only addressed the issue in question in one sentence in the brief, which the court found was a “bald conclusion.” Thus, the court found that the issue was abandoned since it was left “unargued.” Therefore, *Solomon* is distinguishable since the circuit court here never suggested that Respondents failed to sufficiently raise the rule promulgation issue. The circuit court was commenting on what it viewed as the lack of *merit* behind the argument rather than a lack of *effort* by Respondents to make said argument (which is what *Solomon* concerned).

suggested that Respondents withdrew or failed to present argument on the rule promulgation issue. Rather, this statement related to the circuit court's view that Respondents lack of cited authority on the rule promulgation argument rendered it conclusory. Again, however, this does not support that the issue was not sufficiently raised to and ruled upon by the circuit court. Regardless of the circuit court's view of the merits, it sufficiently passed on the due process question presented and therefore the issue is preserved for appeal. Finally, even if this statement cast doubt on the preservation question, those doubts should be resolved in favor of finding the issue preserved.

Respondents sufficiently preserved their due process argument for appellate review, and the Court of Appeals properly determined that Respondents' due process rights were violated by the Securities Commissioner's failure to promulgate rules for the hearing process. This Court should deny certiorari.

II. The Court of Appeals properly determined that the Securities Commissioner's failure to promulgate hearing rules violated Article I, Section 22 of the South Carolina constitution.

The Securities Commissioner primarily relies on *Majors v. S.C. Secs. Comm'n*, 373 S.C. 153, 644 S.E.2d 710 (2007) in attempting to overcome this conclusion. The Securities Commissioner's characterization of *Majors* as "identical" to the present case, however, is simply incorrect. First, the *Majors* Court was examining the pre-2005 version of the Securities Act, and the rule promulgation directive was not before the Court in that case. *See id.* at 159, 644 S.E.2d at 714 (examining the version of the Securities Act in the 2004 Supplement to the South Carolina Code, which was how the statute "read at the time the matter arose").

Additionally, the due process argument advanced in *Majors* was wholly different from Respondents' argument here. *Majors* addressed whether the "initial cease and desist order, prior

to a hearing, was permissible.” *Id.* at 160, 644 S.E.2d at 714. The Court likened the Securities Commissioner’s power to issue a cease and desist order pending a hearing to this Court’s power to issue an order of interim suspension of an attorney. *Id.* at 162, 644 S.E.2d at 715. Thus, it found that the petitioners were afforded due process, because the initial cease and desist order provided them with a right to a subsequent hearing. *Id.* Therefore, although *Majors* did concern a proceeding under the Securities Act, the procedural due process question before it was in a very different context than what is presented here. *Majors* does not conflict with the Court of Appeals’s decision here as the Securities Commissioner suggests.²

Furthermore, the Securities Commissioner’s reliance on *In re Vora*, 354 S.C. 590, 582 S.E.2d 413 (2003) is also misplaced. The four elements specified in that case are the “*minimum*” due process requirements. *Id.* at 595, 582 S.E.2d at 416 (emphasis added). The Court of Appeals properly found that in this instance, the General Assembly determined that procedural due process necessitated more than the minimum requirements. The General Assembly intended that the Commissioner would “promulgate rules (*i.e.*, a ‘mode of procedure’), after notice and comment, before holding administrative hearings.” *McIntyre*, 425 S.C. at 448, 823 S.E.2d at 197. In any event, the Securities Commissioner’s contention that no due process violation occurred because these minimum procedural hurdles were met ignores the applicable standard. The fundamental requirements of due process include “notice, *an opportunity to be heard in a meaningful way*, and judicial review.” *Harbit v. City of Charleston*, 382 S.C. 383,

² The discussion in *Majors* about the subsequent procedures afforded following the initial cease and desist order was *dicta*. See *Nash v. Tindall Corp.*, 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007) (“*Dicta* or, as it is also known, *dictum* ‘is a statement on a matter not necessarily involved in the case, and is not binding as authority. *Dictum* is an opinion expressed by a court, but which, not being necessarily involved in the case, is not the court’s decision.’” (quoting 21 C.J.S. *Courts* § 227 (2006))).

393, 675 S.E.2d 776, 781 (Ct. App. 2009) (emphasis added). Where, like here, the due process defects are structural and inherent in the process itself, they cannot be harmless error and *must* be reversed. *State v. Mouzon*, 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997) (explaining that “structural defects in the constitution of the trial mechanism . . . defy analysis by harmless error standards”).

The Court of Appeals properly found that the Securities Commissioner violated Article I, § 22’s guarantee of due process. Therefore, this Court should deny certiorari.

III. The Court of Appeals correctly determined that the Securities Commissioner violated Respondents’ procedural due process rights by failing to promulgate hearing rules.

In the Securities Act, the General Assembly authorized possible methods for the Securities Commissioner to utilize in order to regulate securities. Once such option permitted the Securities Commissioner to pursue civil relief. *See* S.C. Code Ann. §§ 35-1-603 and 604. The General Assembly did not provide for the rules to implement such civil proceedings, but instead allowed the Securities Commissioner to promulgate rules for a civil proceeding in the event he elected to implement such a proceeding. *See* S.C. Code Ann. § 35-1-605(a)(1). The Court of Appeals correctly found that because the Securities Commissioner failed to promulgate such rules but nevertheless pursued civil relief against Respondents, the Securities Commissioner violated Respondents’ due process rights.

The relevant provision of the South Carolina Code provides that:

(a) The Securities Commissioner may:

(1) 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(a)(1) (emphasis added). The plain language of section 35-1-605(a)(1) supports that the Securities Commissioner could not initiate a civil relief action under the Securities Act until the Securities Commissioner promulgated the rules for such proceedings. This interpretation has been recognized by leading South Carolina scholars addressing the civil enforcement process:

As of July 2005, the Securities Commissioner has not proposed new regulations in anticipation of the January 1, 2006 effective date of the S.C. Securities Act. The writer understands that the present intention of the Commissioner is to propose new regulations *to implement the new Act*

Gregory B. Adams, James R. Burkhard, *et al.*, *South Carolina Corp. Practice Manual*, 2d., Ch. 16, p. 366 n. 8 (2005).

The permissive “may” in section 35-1-605(a)(1) does not alter this result and does not excuse a failure to promulgate rules. Rather, the inclusion of “may” must be read in conjunction with the “to carry out this chapter” language also included in section 35-1-605(a)(1)—demonstrating that the General Assembly allowed the Securities Commissioner to create the rules of a civil proceeding in the event the Securities Commissioner elected to implement such a proceeding.

The Securities Commissioner contends that the agency’s interpretation of the statute should be afforded deference, relying on *Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707 (2014). As the *Kiawah* Court acknowledged, however, this deference does not apply where the statute or regulation directly speaks to the issue. *Id.* at 32, 766 S.E.2d at 717. In that instance, the court must utilize the clear meaning. *Id.* Additionally, if the statute or regulation is silent or ambiguous, the agency interpretation may be afforded deference only if the interpretation is “worthy of deference.” *Id.* at 33, 766 S.E.2d at

717. “Compelling reasons” rendering the interpretation unworthy of deference exist where the interpretation is “arbitrary, capricious, or manifestly contrary to statute.” *Id.* at 34-35, 766 S.E.2d at 718.

The Court of Appeals properly found that the plain meaning of the statute contemplated the promulgation of rules. Additionally, the Court of Appeals rightly determined that the Securities Commissioner’s position resulted in an arbitrary and capricious outcome. Therefore, the Securities Commissioner’s view was not entitled to deference here.

The Court of Appeals correctly determined that Respondents’ general procedural due process rights were violated by the Securities Commissioner’s failure to promulgate rules for the civil proceeding. Thus, the Court should deny certiorari.

IV. Respondents’ other appellate grounds are additional sustaining grounds supporting reversal of the circuit court and, therefore, the denial of certiorari.

A. The circuit court failed to properly review the factual findings of the Securities Commissioner under the standard mandated by section 35-1-609 of the South Carolina Code.

The South Carolina code contemplates that the Securities Commissioner’s factual findings are conclusive in review by the circuit court provided they are “supported by competent, material, and substantial evidence.” S.C. Code Ann. § 35-1-609. This contemplates a two part test in the circuit court’s judicial review: (1) a determination of whether the Securities Commissioner’s facts are supported by competent evidence and, if so, (2) whether that evidence is substantial.

Here, the circuit court failed to perform the threshold determination as to the competency of the evidence before the Securities Commissioner. The circuit court relied on the testimony of four witnesses (Sandra Matthews, Phil Hartman, Paul Finn, and James Paris) and the bank records of each LLC to find evidence existed to support the violations of section 35-1-501 found

by the Securities Commissioner. (Circuit Court Order p. 13, App. 103.) As Respondents detailed in their merits briefing to the Court of Appeals, during the hearing they objected to the admissibility of each item listed by the circuit court and, specifically, those portions of testimony or evidence related to the purported violations of section 35-1-501. (See Br. of Appellant at pp. 8-9, App. 1195-96.)

Despite these objections, the circuit court did not determine whether such evidence was properly admitted by the hearing officer. By failing to adhere to section 35-1-609 and verify whether the Securities Commissioner relied upon competent evidence, the circuit court erred as a matter of law. Therefore, this represents an additional sustaining ground for reversal.

B. The membership interests in the LLCs do not qualify as securities because the members retained ultimate control over the LLCs.

An investment contract qualifies as a security when there has been (1) an investment of money, (2) in a common enterprise, and (3) with an expectation of profits to be derived primarily from the efforts of a person other than the investor. *Majors v. S.C. Secs. Comm'n*, 373 S.C. 153, 163-67, 644 S.E.2d 710, 716-18 (2007) (relying upon *Secs. & Exch. Comm'n v. J.W. Howey Co.*, 328 U.S. 293 (1946)).

As the circuit court noted, this case hinged on the third factor of the test. The Securities Commissioner and circuit court found the third factor satisfied based on the LLC operating agreements and testimony (over the objection of Appellants), finding that the members lacked control over the management of the LLCs, and as a result, expected profit from the efforts of Appellants. However, this finding failed to account for the fact that the members possessed the ultimate control over the LLC by operation of law that allowed the members to remove any manager with or without cause and to dissolve the LLC without manager consent. See S.C. Code Ann. § 33-44-404(b)(3)(i) (setting forth the power of the members to remove the manager of an

LLC by simple majority vote); S.C. Code Ann. § 33-44-801 (allowing the members to dissolve the LLC by vote).

Courts recognize that when a member of a manager-managed LLC possesses such ultimate power over the manager and the LLC, then the membership interests do not qualify as securities. *See Great Lakes Chem. Corp v. Monsanto Co.*, 96 F. Supp. 2d 376 (D. Del. 2000) (applying the *Howey* test and finding that despite the LLC's members having no authority to directly manage the LLC, their power to remove any manager with or without cause and to dissolve the company meant the membership interests did not qualify as an investment contract).

Because the members of each Silver Oak LLC possessed the same power to remove Respondents as manager and dissolve the LLC as the member in *Great Lakes*, the membership interests could not qualify as securities under the South Carolina test. The circuit court's finding to the contrary was in error. Therefore, this is an additional sustaining ground supporting reversal.

C. Even if the membership interest qualified as a security, the evidence does not support a violation of section 35-1-501 because the conduct did not occur at the time of the offer, sale, or purchase of the LLC interests.

The general fraud statute in the Securities Act provides that:

It is unlawful for a person, *in connection with the offer, sale, or purchase of a security*, directly or indirectly:

- (1) to employ a device, scheme, or artifice to defraud;
- (2) to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- (3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

S.C. Code Ann. § 35-1-501 (emphasis added). The plain language of this provision establishes that the statute is limited in its application to conduct occurring in connection with the offer, sale, or purchase of a security. The placing of the limiting language immediately after the “[i]t is unlawful for a person” signifies the General Assembly’s intent to modify, qualify, or limit violations to conduct occurring with the offer, sale, or purchase of a security. *See, e.g., Total Env’tl. Sols., Inc. v. S.C. Pub. Servs. Comm’n*, 351 S.C. 175, 181-82, 568 S.E.2d 365, 369 (2002) (finding a subsequent phrase in the statute modified a preceding phrase and defined the scope of the statute).

Section 35-1-501, therefore, requires a finding that the conduct occur “in connection with the offer, sale, or purchase of a security” in order to violate the statute.³ The circuit court, however, erroneously upheld the Securities Commissioner’s finding that management activities occurring after the offer, sale, or purchase of the LLC membership interest supported a finding that Respondents violated the general fraud provision of the Securities Act, S.C. Code Ann. § 35-1-501. (Circuit Court Order p. 13, App. 103.) The Securities Commissioner and circuit court made no finding linking the conduct at issue to the offer, sale, or purchase of the LLC membership interest at issue in this matter. Imposing penalties without such a finding violates the rules of statutory construction. This represents another sustaining ground for the Court of Appeals’s reversal of the circuit court.

³ South Carolina’s securities act was modeled on the Uniform Securities Act of 2002, which contains a similar “purchase or sale of security” language in Rule 10b-5. *See* 17 C.F.R. § 240.10b-5. Courts have recognized the temporal limitation and construed this language to require that “[i]n order to establish a claim under Rule 10b-5, [the party] must prove fraud in connection with the purchase of securities.” *Robinson v. Glynn*, 349 F.3d 166, 169 (4th Cir. 2003); *see also Singer v. Reali*, 883 F.3d 425, 438 (4th Cir. 2018) (noting that Rule 10b-5 acts to “protect the integrity of the market in securities and prohibit fraud *in connection with the purchase or sale of a security*” (emphasis added)).

D. No substantial evidence exists in the record because the evidence relied on by the Securities Commissioner and circuit court was inadmissible.

The factual findings of the Securities Commissioner will only be upheld by the circuit court when substantial evidence supports such findings. S.C. Code Ann. § 35-1-609 (“The findings of the Securities Commissioner as to the facts, if supported by competent, material, and substantial evidence, are conclusive”). As Respondents detailed in their briefing before the Court of Appeals, the evidence cited by the Securities Commissioner and circuit court was inadmissible on various grounds or did not have any relevance to establish a violation of section 35-1-501. (See Br. of Appellant at p. 21, App. 1208.) As a result, the testimony and evidence should have been excluded, and, once excluded, there was no competent evidence to prove a violation of section 35-1-501. This represents yet another additional sustaining ground supporting reversal.

E. These additional sustaining grounds support that the Court of Appeals properly reversed the circuit court.

Each of these additional sustaining grounds offers a separate and distinct reason why the circuit court’s decision should be reversed. Therefore, in light of the overwhelming support for reversal, the Court of Appeals’s decision was proper and should be permitted to stand.

Conclusion

Based on the foregoing, this Court should deny the Securities Commissioner’s petition for a writ of certiorari.

Signature on Following Page

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May 6, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Tanya A. Gee
Circuit Court Judge

Case No. 2014-CP-40-07917

Appellate Case No. 2019-000455

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

Petitioners

v.

Securities Commissioner of South Carolina,.....

Respondent.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for John M. McIntyre and Silver Oak Land Management, LLC, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):


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Return to Petition for Writ of Certiorari

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