OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31

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The Supreme Court of South Carolina

In the Matter of Dean D. Porter, Petitioner.

ORDER

Respondent was suspended on April 3, 2006, for a period of ninety (90) days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

July 25, 2006

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ronald De'Ray Skipper, Respondent,

v.

South Carolina Department of Corrections, Appellant.

Appeal From Marlboro County
A. Victor Rawl, Circuit Court Judge

Opinion No. 4141
Submitted June 1, 2006 – Filed July 31, 2006

REVERSED

Christopher L. Murphy and James A. Stuckey, Jr., both of Charleston, for Appellant.

Ronald De'Ray Skipper, of Bishopville, pro se.

BEATTY, J.: The South Carolina Department of Corrections (SCDC) appeals the circuit court's order finding Ronald De'Ray Skipper was denied both a liberty interest in prison employment and due process with regard to

SCDC's drug-testing policy. SCDC contends there is no liberty interest in prison employment and that Skipper was afforded due process prior to his disciplinary conviction for drug possession. We reverse.[1]

FACTS

Skipper, an inmate at Evans Correctional Institution,[2] was employed at the facility through SCDC and the privately run Prison Industries Enterprises. Prison Industries is a voluntary program which serves the SCDC by employing and training inmates. Inmates choosing to participate in the program receive the prevailing wage of the local area for the particular job they perform with deductions taken for taxes, victim compensation, and room and board.

On January 18, 2001, Skipper was randomly selected for testing under the SCDC drug-testing policy, and he tested positive for marijuana. On January 31, 2001, Skipper was re-tested and his urine was again positive for marijuana. Immediately following this test, a follow-up test was performed and it confirmed the positive result.

On February 7, 2001, a disciplinary hearing was held before prison officials, and Skipper was found guilty of possession of marijuana. This disciplinary conviction resulted in Skipper losing fifteen days of canteen privileges. Additionally, as per Prison Industries' policy, Skipper was terminated from his job because of this disciplinary conviction. On September 21, 2001, Skipper was transferred from Evans Correctional Institution to Lee Correctional Institution, a facility which does not utilize the Prison Industries program.

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[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

[2] Skipper is serving a sentence of twenty years to life for murder and several counts of assault of a high and aggravated nature.

Skipper appealed his disciplinary conviction through a two-step inmate grievance procedure. His appeal was reviewed and denied by the institutional grievance coordinator and the warden. After exhausting his inmate grievance appeals, Skipper appealed to the Administrative Law Judge Division (ALJD). The ALJ dismissed Skipper's appeal for lack of subject matter jurisdiction on the ground the SCDC "did not infringe a liberty interest when it punished Skipper with canteen restrictions for violating a prison disciplinary rule."

Skipper then appealed to the circuit court, and the court remanded the matter back to the ALJD to consider whether the possible effect of the challenged disciplinary conviction on Skipper's parole chances implicated a protected liberty interest. The ALJ again dismissed the appeal for lack of subject matter jurisdiction stating "the mere possibility of an effect on parole eligibility is too tenuous to constitute a deprivation of a liberty interest." The ALJ further found "no liberty interest is implicated when an inmate is faced with lesser penalties such as the loss of television, canteen, or telephone privileges."

Skipper again appealed to the circuit court, and the court ruled in his favor. The court found as a matter of law that Skipper's loss of employment implicated a liberty interest, and SCDC's refusal to send Skipper's urine for further testing interfered with his right to due process. SCDC appeals.

DISCUSSION

I. Mootness

In its brief, SCDC asserts the circuit court erred in finding: (1) SCDC's refusal to provide Skipper with Gas Chromatography/Mass Spectrometry (GC/MS) confirmation of his drug test result interfered with Skipper's right to due process in his disciplinary conviction; and (2) Skipper had a liberty interest in prison employment which potentially afforded a basis for a claim under 42 U.S.C. § 1983.

Although we will address these arguments, we find it necessary as a threshold matter to analyze whether the issue regarding Skipper's prison employment is moot.

In its May 23, 2003 order, the circuit court, in finding violations of a liberty interest and due process rights, stated only that Skipper was entitled to "some relief." SCDC filed a motion to alter or amend the judgment and included a request that, in the alternative, the circuit court clarify what relief should be awarded to Skipper. In response, the circuit court issued a Form 4 order denying the motion. The court failed to address the issue of specific relief.

During the course of his appeal, Skipper was transferred to the Lee Correctional Institution, a facility which does not provide the privilege of employment with Prison Industries Enterprises. Given the authority to determine an inmate's location rests with SCDC, this court may not order his return to Evans Correctional Facility or to another correctional facility which offers Skipper's desired employment. Consequently, as will be discussed, we find any issue regarding potential employment relief for Skipper is moot.

Generally, this court does not have the authority to dictate to the SCDC where an inmate should be housed. In South Carolina, the authority to determine where an inmate is housed is vested in the Department of Corrections. See S.C. Code Ann. § 24-3-30(A) (Supp. 2005) ("Notwithstanding any other provision of law, a person convicted of an offense against the State must be in the custody of the Department of Corrections, and the department shall designate the place of confinement where the sentence must be served."); see also S.C. Const. art. XII, § 2 ("The General Assembly shall establish institutions for the confinement of all persons convicted of such crimes as may be designated by law, and shall provide for the custody, maintenance, health, welfare, education, and rehabilitation of the inmates.").

Absent an atypical and significant hardship on the inmate, or an arbitrary, capricious, or biased decision by the prison, the court has no authority to interfere with inmate housing decisions. See Sandin v. Conner,

515 U.S. 472, 486 (1995)(holding that thirty days of solitary confinement when compared with inmate's overall prison environment, was not the "type of atypical, significant deprivation in which a State might conceivably create a liberty interest"); Al-Shabazz v. State, 338 S.C. 354, 381, 527 S.E.2d 742, 756 (2000) (finding judicial review of inmate disputes is limited to "determine whether 'the challenged conditions or degree of confinement are within the sentence imposed and are not otherwise violative of the Constitution,' or whether prison officials have acted arbitrarily, capriciously, or from personal bias" (quoting Brown v. Evatt, 322 S.C. 189, 194, 470 S.E.2d 848, 851 (1996))); Crowe v. Leeke, 273 S.C. 763, 764, 259 S.E.2d 614, 615 (1979) (holding transfer within prison system or downgrading of custody status is not subject to judicial review as long as prison officials do not act arbitrarily, capriciously, or from personal bias or prejudice).

Because Skipper has not specifically challenged his transfer to the Lee Correctional Institution and our authority with respect to internal inmate decisions is limited, we are placed in a position of not being able to grant effectual relief. Given we are unable to grant this relief, we find the issue is moot. See Collins Music Co. v. IGT, 365 S.C. 544, 549, 619 S.E.2d 1, 3 (Ct. App. 2005)(noting a matter becomes moot when some event occurs making it impossible to grant effectual relief).

II. Liberty Interest in Prison Employment and Due Process

SCDC argues the circuit court erred in finding that Skipper had a liberty interest in prison employment which potentially afforded him a basis for a claim under 42 U.S.C. § 1983. We agree.

Even though this court is without authority to grant Skipper relief in terms of ordering a transfer to a facility offering the Prison Industries program, we address the merits of this issue in the interest of thoroughness given Skipper's liberty interest argument may be broadly construed as also including a challenge to his transfer to a facility that does not offer the employment program.

"[A]dministrative matters entitled to review by the ALJD 'typically arise in two ways: (1) when an inmate is disciplined and punishment is imposed and (2) when an inmate believes prison officials have erroneously calculated his sentence, sentence-related credits, or custody status.'" Sullivan v. South Carolina Dep't of Corr., 355 S.C. 437, 441, 586 S.E.2d 124, 126 (2003) (quoting Al-Shabazz v. State, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000)). We also recognize that a condition of confinement could implicate a state-created liberty interest, thus requiring minimal due process. See Sullivan, 355 S.C. at 442, 586 S.E.2d at 126 ("[S]tates may create liberty interests which are protected by the Due Process Clause, but . . . 'these interests will be generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" (quoting Sandin v. Conner, 515 U.S. 472, 484 (1995))).

"Courts traditionally have adopted a 'hands off' doctrine regarding judicial involvement in prison disciplinary procedures and other internal prison matters, although they must intercede when infringements complained of by an inmate reach constitutional dimensions." Al-Shabazz, 338 S.C. at 382, 527 S.E.2d at 757. In other words, an inmate's complaint must encompass an infringement of a liberty interest that imposes an atypical and significant hardship on the inmate to trigger due process guarantees and judicial review.

The Prison Industries program, like a work release program, is statutorily created. See S.C. Code Ann. § 24-3-430(A) (Supp. 2005) ("The Director of the Department of Corrections may establish a program involving the use of inmate labor . . . in private industry for the manufacturing and processing of goods, wares, or merchandise or the provision of services or another business or commercial enterprise considered by the director to enhance the general welfare of South Carolina."); S.C. Code Ann. § 24-3-20 (Supp. 2005) (outlining guidelines for inmates recommended for work release). Both have the general purpose of providing inmate employment during incarceration as a means of rehabilitation. Because the work release program is similar to the Prison Industries program, we find instructive precedent analyzing the work release program.

Our supreme court has decided that "[t]he Board of Corrections has discretion whether to allow an inmate even to participate in a work release program." Gunter v. State, 298 S.C. 113, 116, 378 S.E.2d 443, 444 (1989), overruled in part on other grounds by Griffin v. State, 315 S.C. 285, 433 S.E.2d 862 (1993). "Participation in a work-release program is a privilege, not a right. Thus, the denial of participation in a work-release program, standing alone, affords no basis for a claim under 42 U.S.C. § 1983." Quillian v. Evatt, 315 S.C. 489, 491, 445 S.E.2d 639, 640 (Ct. App. 1994) (citation omitted).

In an analogous situation, the Fourth Circuit Court of Appeals has stated:

> It is well settled that federal courts do not occupy "the role of super wardens of state penal institutions," and "do not sit to supervise state prisons." In particular, the classifications and work assignments of prisoners in such institutions are matters of prison administration, within the discretion of the prison administrators, and do not require fact-finding hearings as a prerequisite for the exercise of such discretion. To hold that they are "within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges."

Altizer v. Paderick, 569 F.2d 812, 812-13 (4th Cir. 1978) (citations omitted).

More recently, the United States Supreme Court took the opportunity to clarify the law with respect to state-created liberty interests in prison systems that are protected by the Due Process Clause. Sandin v. Conner, 515 U.S. 472 (1995). The Court noted that "these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of

its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Id. at 484 (citations omitted). In ruling on Conner's case, the Court established directives for future cases. Specifically, the Court held that "Conner's discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest." Id. at 486.

Applying the above-outlined principles, we find Skipper's participation in the Prison Industries program is not a right, but a privilege. Not all prisons provide this opportunity to their inmates, and those that do provide this option are inundated with inmate requests and forced to maintain long waiting lists. This employment program does not meet the test for a state-created liberty interest as outlined in Sandin because it does not present an atypical, significant hardship on inmates who are not permitted to participate. Consequently, Skipper, in being terminated from his prison employment, did not suffer an infringement upon his liberty interests.[3] Moreover, it is not a requirement of the due process and equal protection clauses of either the State or the United States Constitutions that if the State undertakes to provide rehabilitative facilities, it must provide such facilities to all prisoners or to none. See McLamore v. State, 257 S.C. 413, 424, 186 S.E.2d 250, 256 (1972) (finding that inmate was not denied constitutional rights under the Due Process or Equal Protection clauses of the State and United States Constitutions where certain educational and rehabilitative services available to some inmates at the SCDC were not available to him).[4]

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[3] We note that Skipper has not challenged the circuit court's findings that the disciplinary action will not affect his parole eligibility or that the loss of canteen privileges does not infringe on a liberty interest.

[4] Additionally, we note that Skipper was employed in a state that recognizes the doctrine of employment at-will. See Prescott v. Farmers Tel. Coop., Inc., 335 S.C. 330, 334, 516 S.E.2d 923, 925 (1999) (noting that South Carolina recognizes the doctrine of employment at-will). Because Skipper's employment did not fit within any of the established exceptions to the at-will employment doctrine, his employment was terminable at any time by Prison Industries. Thus, it would be incongruous to find Skipper had a state-created

We are cognizant that our holding on this issue may initially appear to be in conflict with our supreme court's decision in Wicker v. South Carolina Department of Corrections, 360 S.C. 421, 602 S.E.2d 56 (2004). We believe, however, that the two cases are distinguishable. Like Skipper, Wicker participated in the Prison Industries Program at the Evans Correctional Institute. During the first 320 hours of his employment, Wicker was paid $.25-.75 per hour. After completing his training, Wicker was paid an hourly wage of $5.25 per hour. Due to this wage disparity, Wicker filed an inmate grievance in which he asserted his training wages violated the Prevailing Wage Statute outlined in section 24-3-430(D). This section specifically provides that "[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector." Id. at 423, 602 S.E.2d at 57. After the Department of Corrections (DOC) denied Wicker's grievance, Wicker appealed to the ALJ. The ALJ ruled in favor of Wicker, finding there was no statutory authority for the DOC to pay less than the prevailing wage. Id. The circuit court affirmed the ALJ. On appeal, the DOC contended Wicker was not entitled to relief under the applicable statute. The supreme court affirmed the decision of the circuit court. In so holding, the court found that "the state's statutory mandate that inmates be paid the prevailing wage" created a liberty interest which may not be denied without due process. Id. at 424-25, 602 S.E.2d at 58. Accordingly, the court held Wicker could not be denied this right without being afforded due process of law. Id. at 424, 602 S.E.2d at 57.

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liberty interest in his employment. See id. ("At-will employment is generally terminable by either party at any time, for any reason or for no reason at all."); Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 6, 605 S.E.2d 744, 746 (Ct. App. 2004) (outlining the following established exceptions to the at-will employment doctrine: (1) an employee has recourse against his employer for termination in violation of public policy; (2) an at-will employee may not be terminated for exercising constitutional rights; and (3) an employee has a cause of action against an employer who contractually alters the at-will relationship and terminates the employee in violation of the contract).

The instant case is distinguishable from Wicker given there is no statutory requirement that all correctional facilities employ the Prison Industries Program or that an inmate participate. In fact, the statute which creates the program specifically provides the establishment of the program is discretionary and that an inmate's participation in the program is voluntary. See S.C. Code Ann. § 24-3-430(A) (Supp. 2005) ("The Director of the Department of Corrections may establish a program involving the use of inmate labor . . . in private industry.")(emphasis added); S.C. Code Ann. § 24-3-430(C) (Supp. 2005) ("An inmate may participate in the program established pursuant to this section only on a voluntary basis and only after he has been informed of the conditions of his employment.")(emphasis added); see also Kennedy v. South Carolina Ret. Sys., 345 S.C. 339, 352-53, 549 S.E.2d 243, 250 (2001) ("The use of the word 'may' signifies permission and generally means that the action spoken of is optional or discretionary unless it appears to require that it be given any other meaning in the present statute."). Because there is no statutorily-created right for an inmate to participate in the program or remain in the program indefinitely, we find in Skipper's case, unlike Wicker's, there does not exist a state-created liberty interest.

III. Drug Test

SCDC further contends the circuit court erred in finding its refusal to provide Skipper with a Gas Chromatography/Mass Spectrometry (GC/MS) test to confirm the result of his failed drug test interfered with Skipper's right to due process. We agree.

In establishing the minimal requirements of due process in a prison disciplinary proceeding involving serious misconduct, our supreme court has relied on precedent from the United States Supreme Court's decision in Wolff v. McDonnell, 418 U.S. 539, 563-72 (1974). In Al-Shabazz, our supreme court outlined the requirements as follows:

> (1) that advance written notice of the charge be given to the inmate at least twenty-four hours before the

> hearing; (2) that factfinders must prepare a written statement of the evidence relied on and reasons for the disciplinary action; (3) that the inmate should be allowed to call witnesses and present documentary evidence, provided there is no undue hazard to institutional safety or correctional goals; (4) that counsel substitute (a fellow inmate or a prison employee) should be allowed to help illiterate inmates or in complex cases an inmate cannot handle alone; and (5) that the persons hearing the matter, who may be prison officials or employees, must be impartial.

Al-Shabazz, 338 S.C. at 371, 527 S.E.2d at 751 (citing Wolff v. McDonnell, 418 U.S. 539, 563-72 (1974)).

Here, there has been no allegation that these requirements were not satisfied by the SCDC procedure. The argument posed by Skipper and accepted by the circuit court is that SCDC's failure to send Skipper's urine samples for further testing deprived him of due process. We fail to see how the due process requirements delineated in Al-Shabazz could be construed in this fashion, and we find that SCDC complied with the procedural due process requirements in this matter.

Moreover, SCDC developed drug-testing procedures which were followed for Skipper's testing. Contrary to Skipper's assertions, it was not the policy of SCDC to send all "first-time positive" test results for GC/MS testing to confirm the results. Rather, SCDC randomly sent a minimal number of tests to be confirmed by GC/MS testing in order to insure the accuracy of their "test strip" testing. Furthermore, we disagree with the circuit court's finding that to deny Skipper's request "upon Skipper's offer to pay for same [GC/MS testing] interferes with Skipper's right to due process in his disciplinary conviction." Due process in prison drug testing does not require that a prisoner be afforded duplicative testing, nor does it require utilizing a testing method chosen by the prisoner.

CONCLUSION

Because Skipper has, during the course of his appeal, been transferred to a facility which does not provide his desired employment, we do not believe this court can grant any effectual relief. Nevertheless, in the interest of thoroughness, we address the merits of the appeal. We hold the circuit court erred in finding as a matter of law that Skipper's dismissal from prison employment infringed upon a liberty interest and in finding SCDC's drug testing of Skipper violated his due process rights. Based on the foregoing, we reverse the circuit court's order and find the ALJ should have dismissed Skipper's appeal given his grievance did not implicate a state-created liberty interest.[5]

REVERSED.

HUFF and STILWELL, JJ., concur.

[5] We believe the ALJ improperly dismissed Skipper's appeal on the ground that it lacked subject matter jurisdiction. In light of our decision that Skipper's grievance did not implicate a state-created liberty interest, we find the ALJ had jurisdiction to dismiss the appeal on the merits. See Slezak v. South Carolina Dep't of Corr., 361 S.C. 327, 331, 605 S.E.2d 506, 508 (2004), cert. denied, 544 U.S. 1033 (2005) ("While the ALJD has jurisdiction over all inmate grievance appeals that have been properly filed, we emphasize that the Division is not required to hold a hearing in every matter. Summary dismissal may be appropriate where the inmate's grievance does not implicate a state-created liberty or property interest."). We would, however, note that neither the ALJ nor the circuit court had the benefit of our supreme court's decision in Slezak.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

J. Carroll Rushing, Individually and on behalf of Pentaura, Ltd., Inc., Rushing-Marlow Properties, Inc., and Shasta Enterprises, L.L.C., Appellants,

v.

Larry A. McKinney, Ivan Block and Jefferey J. Weiss, and Pentaura Ltd., Inc., Respondents.

Appeal from Greenville County
Henry F. Floyd, Circuit Court Judge

Opinion No. 4142
Heard November 10, 2005 – Filed July 31, 2006

AFFIRMED

J. Richard Kelly and Seann Gray Tzouvelekas, both of Greenville, for Appellants.

Mason A. Goldsmith, of Greenville, for Respondents.

BEATTY, J.: J. Carroll Rushing brought suit against Larry A. McKinney, Ivan Block, Jeffrey J. Weiss, and Pentaura Ltd., Inc. (collectively Respondents) asserting breach of contract, fraudulent inducement, fraud, negligent misrepresentation, breach of good faith and fair dealing, breach of fiduciary duty, promissory estoppel, and equitable estoppel arising out of the operation of Pentaura. After a bench trial, the trial court entered a verdict in favor of Respondents, and Rushing appeals.[1] We affirm.

FACTS

Pentaura was a business incorporated on October 16, 1995, by McKinney, Block, and Weiss to design, sell, and market high-end contemporary furniture. McKinney, Block, and Weiss were the only shareholders, with McKinney and Block contributing most of the initial capital and Weiss acting as a manager. Additional funding was obtained for Pentaura in the form of $500,000 in notes payable to Branch Banking and Trust (BB&T) and personally guaranteed by the three shareholders.

At some point in 1996, Block approached Rushing to invest in Block's separate paint coatings business. Although Rushing was not interested in the paint coatings business, he learned more about Pentaura from Weiss and decided to invest in the company. At that time, Pentaura's balance sheet reflected $500,000 in notes payable to BB&T, $372,309.29 in inventory, a negative total equity, and showed Pentaura was operating at a loss.

On April 23, 1997, Rushing wrote a letter to McKinney and Block indicating the terms under which Rushing would invest in Pentaura. Rushing agreed to make a capital contribution of $350,000 to Pentaura, making him a thirty-two percent owner of the total outstanding capital, provided that: Rushing and Richard Grant, Rushing's personal accountant, would become officers of the corporation; Rushing would assume all financial responsibility and control; and Block would take responsibility for the manufacturing

[1] Weiss defaulted below and is not a party to this appeal.

process. An adjusted balance sheet attached to the April letter indicated $150,000 would be deducted from the equity of McKinney and Block to account for Rushing's portion of the BB&T notes. Respondents indicated they agreed with the proposal by signing and returning the letter to Rushing. From that point on, Rushing and Grant ran Pentaura, with Grant making payments on Pentaura's note with BB&T from January 1998 until June 2000.

After Rushing became a shareholder, he learned Pentaura's inventory was $277,781 less than he initially believed. Thus, Pentaura's need for additional funds was greater. He proposed the other shareholders either contribute more to Pentaura or reduce their percentage ownership in the corporation. McKinney and Block both decided to reduce their percentage interest in Pentaura, making Rushing a forty-eight percent shareholder.

The underlying controversy centers on what occurred at a meeting between Rushing, Grant, McKinney, Block and Weiss on February 3, 1998 (the February Meeting). Grant prepared an agenda with financial information for this meeting, but no one took minutes. According to Rushing, he informed the other shareholders that he would give additional funds to Pentaura if Respondents would agree to be personally responsible for the loans. Rushing testified Respondents did not reply in any way, which led him to believe they had an agreement. On February 20, 1998, Rushing sent a letter (the February Letter) to McKinney, Block, and Weiss "to confirm the agreement" they reached at the February Meeting. Among other topics, the February Letter detailed Pentaura's then-current cash needs and requested a capital contribution of $115,720 from Block, $88,560 from McKinney, and $39,000 from Weiss. McKinney had already submitted his share by the time the letter was written. Nothing in the February Letter confirmed an agreement by the parties for the Respondents to be personally liable for the loans made to Pentaura.

On March 2, 1998, Grant wrote a memorandum to Rushing indicating Block was having serious financial problems. Block confirmed this memorandum with a letter to Rushing on April 3, 1998. Block never paid the requested capital contribution from the February Meeting.

Rushing advanced money to Pentaura from Janauary 1, 1998, to September 24, 2001. Rushing evidenced the advances by a series of one hundred and sixty-six demand notes prepared and executed by Grant on behalf of Pentaura. In December of 2001, a schedule of the loans indicated the total outstanding principal and interest were $4,381,747.38 and $895,950.95, respectively. Each note is payable to Rushing and draws interest at a rate of ten percent.[2] No writing evidences any person or entity (other than Pentaura) as being liable for repayment of these loans.

Pentaura continued to operate at a net loss. On August 18, 1999, Rushing wrote to McKinney, Block, and Weiss indicating he had provided cash funding to Pentaura and had made payments on the BB&T notes. Attached to this letter is an accounting that details the advances made by Rushing to Pentaura and the pro rata share of these loans for each shareholder. The allocation shows McKinney owed $637,941 and Block owed $856,702. Rushing received no response to this letter. Pentaura continued to make payments on the BB&T notes until June 7, 2000. Grant finally wrote McKinney and Block on August 7, 2000, indicating Rushing had made payments on the BB&T notes. These letters allege that McKinney and Block "were given credit for these notes in determining equity percentages of ownership" between the shareholders when Rushing made his initial contribution. Grant asked that McKinney and Block reimburse Pentaura for these payments.

Pentaura operated at a net loss of $1,043,276.62 during the year 2000. In September 2000, Rushing informed his banker, Barry Maness, that he was going to approach Respondents to determine if they wanted to "retain their ownership interest by putting in their prorata [sic] share of the $3,000,000 which [Rushing] has invested in the company and matching it going forward

[2] Although Rushing points out the funds he advanced to Pentaura were borrowed, the "cost" of these funds to Rushing varied between six percent and 8.875 percent, as evidenced by Rushing's credit line summary. Therefore, if Pentaura (or McKinney, Block, and Weiss on its behalf) had repaid the loans, the portions repaid to Rushing would have provided Rushing a profit based on the difference in interest rates.

or by simply getting out by paying off the debt that existed prior to [Rushing's] entry in to the business which is to BB&T." (Maness Memo) On December 19, 2000, Rushing wrote McKinney, Block, and Weiss indicating he was "not prepared to extend further credit to you and Pentaura." Nevertheless, Rushing continued to put money into Pentaura as evidenced by more notes.

On June 28, 2001, Rushing again wrote to McKinney, Block, and Weiss and stated: "I agreed to provide capital in the form of a loan to fund the investments each partner has made. We now need to settle up the pro rata share of this loan as we need to finalize a plan to continue to invest, close the operation, find new partners, or sell out, if possible." Rushing provided a data sheet showing that he had given over $4,000,000 to Pentaura in notes. Of that amount, he contended McKinney owed $987,178.30, Block owed $1,269,298.13, and Weiss owed $282,119.83.

McKinney and Block both responded by letters dated July 20, 2001. McKinney indicated he did not agree to an "out-of-pocket pro rata share of any loans." He indicated he had made "all the intended investment in the company at the time the investments were made." Block expressed surprise that Rushing was still operating Pentaura, and indicated: "In June of 2000 you told me that you were closing the plant due to poor sales." Block stated that he had refused to make capital contributions twice in the past and that he did not believe himself personally liable for Pentaura's debts. Rushing responded to their letters, asserting that Respondents "knew" that he agreed to "fund Pentaura with loans to be repaid on a pro-rata share of ownership. Never have I heard that you didn't intend to pay me back or reduce your percentage of ownership." (emphasis added).

Rushing filed a complaint on March 1, 2002, an amended complaint on April 10, 2003, and a second amended complaint on April 23, 2003. In his second amended complaint, Rushing asserted causes of action against McKinney, Block, and Weiss for breach of contract, fraudulent inducement, fraud, negligent misrepresentation, breach of good faith and fair dealing, piercing the corporate veil, breach of fiduciary duty, promissory estoppel, and

equitable estoppel.[3] Rushing also brought a derivative action on behalf of Pentaura against McKinney, Block, and Weiss, seeking reimbursement for payments made by Pentaura on the BB&T notes. Weiss defaulted. McKinney and Block answered, denying the existence of a contract and any allegations of wrongdoing. They also raised several affirmative defenses, including the statute of frauds, statute of limitations, unclean hands, and a violation of securities laws by Rushing. Furthermore, McKinney and Block asserted a cross-claim against Weiss for his share of the BB&T notes.

The case was tried without a jury in April and May of 2003. The trial court entered an order finding Rushing was not entitled to recover under any of his causes of action against McKinney and Block. In addition, the trial court held the statute of frauds, securities laws, and the statute of limitations would preclude Rushing from recovering under certain causes of action if he had prevailed. This appeal followed.

SCOPE OF REVIEW

This appeal involves both legal and equitable causes of action. When both legal and equitable causes of action are maintained in one suit, each must be analyzed separately according to its own identity as legal or equitable. Jordan v. Holt, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005); Future Group, II v. Nationsbank, 324 S.C. 89, 97, 478 S.E.2d 45, 49 (1996). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "In an action in equity, tried by the judge alone, without a reference, on appeal the [appellate court] has jurisdiction to find facts in accordance with its views of the preponderance of the evidence." Id.

[3] In addition, Rushing brought causes of action against Pentaura for rent due to Rushing-Marlow Properties, Inc. and Shasta Property, L.L.C., and for collection on the promissory notes of Pentaura payable to Rushing. The court found Rushing could proceed on the action for rent. The current appeal does not concern the rent cause of action.

Rushing asserted causes of action against McKinney and Block alleging breach of contract, fraudulent inducement, fraud, negligent misrepresentation, breach of good faith and fair dealing, and breach of fiduciary duty arising from this alleged contract. These are legal causes of action. See Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc., 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004) ("An action for breach of contract is an action at law."); Bivens v. Watkins, 313 S.C. 228, 230, 437 S.E.2d 132, 133 (Ct. App. 1993) (applying a legal standard of review on appeal from causes of action alleging fraud, negligent misrepresentation, and breach of fiduciary duty). Therefore, the findings of fact of the trial court will not be disturbed on appeal unless found to be without evidence that reasonably supports the court's findings. Townes, 266 S.C. at 86, 221 S.E.2d at 775.

However, Rushing also asserted rights under the doctrines of estoppel. "[E]quitable estoppel . . . should be tried by the court as an equitable issue." Gaymon v. Richland Mem'l Hosp., 327 S.C. 66, 68, 488 S.E.2d 332, 333 (1997). "The doctrine of promissory estoppel is equitable in nature." West v. Newberry Elec. Co-op., 357 S.C. 537, 541-42, 593 S.E.2d 500, 502 (Ct. App. 2004). Therefore, on appeal from these causes of action, we have jurisdiction to find facts in accordance with our view of the preponderance of the evidence. Townes, 266 S.C. at 86, 221 S.E.2d at 775.

LAW/ANALYSIS

I. Breach of Contract

Rushing argues a contract arose with Respondents at the February Meeting, and thus, the trial court erred in finding he failed to prove the existence of contract. We disagree.

"For a contract to arise there must be an agreement between two or more parties. There must be an offer, there must be an acceptance, and there must be a meeting of the minds of the parties involved." Hughes v. Edwards, 265 S.C. 529, 536, 220 S.E.2d 231, 234 (1975). "A contract is an obligation

which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 439 (Ct. App. 2003).

Rushing testified that Respondents were silent at the February Meeting when he proposed that they would be responsible for their pro rata share of the money Rushing put into Pentaura. Thus, he stated, they agreed with his proposal. However, Rushing made various allegations concerning the specifics of the alleged agreement with Respondents. Rushing's second amended complaint describes the agreement as one in which "Rushing would advance monies from time to time necessary to fund Pentaura operations in the form of loans with the understanding that in the event Pentaura was unsuccessful, the monies would be treated as loans by [the shareholders] based on the percentage ownership interest of each of them in Pentaura." In his deposition, Rushing stated he "advanced money for other people for capital contributions." Later in the deposition, Rushing said he had not made loans to individuals, but he had put money into Pentaura on their behalf. He also testified in his deposition that the money was "loaned to Pentaura to use as capital." On direct examination, Rushing testified he would loan Respondents "some money to put in their part" with the loans coming due only if Pentaura could not pay them off from earnings. Rushing later testified "[t]his [money] was a loan to Pentaura—no, it's a loan to the shareholders that Pentaura was using" and "Pentaura was the recipient of the money. My loan of the money was to the shareholders."

Grant and Weiss, who were at the February Meeting, testified that the agreement was that Respondents would "settle up" or "pay the Piper" with Rushing regarding the loans if Pentaura became unsuccessful. Grant admitted that "settle up" was not defined and that the parties had been given options of settling up in the past by making contributions or giving up some percentage of stock.

Respondents denied that anything rendering them personally responsible was proposed or that they agreed to be personally responsible.

The trial court found no oral contract existed because: "(1) the proposal by Rushing, if made, was too vague and uncertain, (2) there was no meeting of the minds, and (3) silence by Defendants McKinney and Block cannot under the present circumstances be deemed acceptance." The record is replete with evidence reasonably supporting the trial court's finding.

We agree with the trial court that it is unclear exactly what the alleged agreement entailed. Rushing alternately asserted the money given to Pentaura was either a loan to the company, a loan to Respondents for Pentaura, or a capital contribution on behalf of Respondents. The February Letter, summarizing what occurred at the February Meeting, failed to mention that Respondents agreed to be personally liable for the notes to Pentaura. Even Rushing's witness, Grant, testified that the agreement to "settle up" was not defined. Further, the summary of Rushing's statements to his banker in the Maness Memo indicate Rushing was seeking alternative relief from Respondents in the form of a pro rata contribution or giving up a percentage of stock. Contrary to Rushing's allegation that Respondents agreed to reimburse him, his July 24, 2001 letters to Block and McKinney indicate that the parties had the option of paying him back or reducing their percentage of stock. Finally, the notes evidencing the money given to Pentaura only hold Pentaura liable for the funds. This evidence reasonably supports the trial court's finding that the agreement as alleged by Rushing was vague and that no meeting of the minds occurred.

It is also unusual that Rushing documented other agreements regarding the shareholders and their relationship to Pentaura, but he failed to document the alleged agreement here. Rushing confirmed the agreement with respect to his entry into Pentaura by letter. Rushing wrote a memorandum to Grant with respect to the February Meeting stating: "Did we get minutes and signatures to show that [McKinney and Block] gave up some ownership? This needs to be documented to avoid any future misunderstanding." The February Letter is the only writing sent to McKinney and Block that memorializes the February Meeting. While it confirms various other agreements and discussions that occurred at the February Meeting, it makes no mention of an agreement for Rushing to loan money to McKinney, Block, Weiss, or Pentaura. In fact, it specifically details Pentaura's cash needs and

the requested capital contributions of each shareholder. Rushing testified on direct examination he "thought it was very important . . . if there was any monies put into [Pentaura] or loans made, that there [should be] a clear paper trail that accountants could go in, their accountants, my accountants, court accountants, anybody could go through [the paperwork] . . . to have a basis by which the understanding was made." The lack of a writing evidencing the alleged contract here sits in stark contrast to this pattern.

Finally, the record reveals significant tension existed between the parties at the time the alleged contract occurred. This tension is inconsistent with Rushing's assertion he relied on the silence of McKinney and Block to enter into the contract here. Rushing contended Block did not perform his responsibilities under the April 23, 1997 letter. On May 13, 1997, Block responded to Rushing's inquiries as to why manufacturing was not running properly by indicating Pentaura lacked complete sets of parts. Further tension was added when the South Carolina Department of Health and Environmental Control did not issue a painting permit to Pentaura. Rushing testified that "right after [he] got into this business . . . Pentaura receive[d] letters that came to [his] attention from attorneys . . . demanding payment of back invoices[.]" Rushing also stated customers were getting mad at him. According to Rushing, Block did not undertake to solve any of the problems after Rushing began investing. The problems climaxed after a physical inventory indicated a $277,781 inventory shortage on the February 28, 1997 balance sheet, which Rushing had relied upon to invest in Pentuara. Block was also upset when his recommendations regarding expensive equipment were not followed. These circumstances reasonably support the trial court's finding that an oral agreement among the shareholders to fund Pentaura is improbable.

The trial court's determination that no contract arose at the February Meeting is reasonably supported by Rushing's inability to articulate the alleged agreement between the parties, Respondents' denial of the existence of the agreement, the lack of a writing evidencing the alleged agreement when Rushing had reduced similar agreements to written form, and the overriding tension between the parties before the alleged agreement occurred.

II. Estoppel

Rushing argues the trial court erred in failing to grant equitable relief under theories of equitable estoppel and promissory estoppel. We disagree.

A. Equitable Estoppel

Rushing argues that because Respondents knew Pentaura needed additional funding, he had the right to rely on their silence as assent when he proposed the alleged agreement. Thus, he argues, Respondents are equitably estopped to assert there was no agreement.

"The doctrine of estoppel applies if a person, by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury." Hubbard v. Beverly, 197 S.C. 476, 480, 15 S.E.2d 740, 741 (1941). "Prejudice to the other party is an essential element of equitable estoppel." Janasick v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992). With regard to the party estopped, the elements of equitable estoppel are: (1) conduct amounting to a false representation or concealment of material facts, "or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;" (2) the intention or expectation that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. Southern Dev. Land & Golf Co., v. South Carolina Pub. Serv. Auth., 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993). "As related to the party claiming the estoppel, the essential elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position." Id.

The trial court held that the doctrine of estoppel was not available to Rushing because he failed in his corporate duties, had unclean hands,[4] was

[4] The trial court found Rushing had unclean hands because even if the alleged oral agreement existed, it would have meant that Rushing essentially

not justified in relying on McKinney's or Block's silence, and should not have proceeded without a clear, unambiguous written agreement.

Rushing did not lack the means of knowledge to discover McKinney's and Block's true intentions with respect to the alleged agreement at the February Meeting, and his reliance on their silence is unreasonable. "One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been mislead (sic)." Southern Dev. Land & Golf, 311 S.C. at 34, 426 S.E.2d at 751. As discussed above, Rushing knew to put agreements in writing in order to avoid later misunderstandings. For example, Rushing testified "[t]wo things I've always thought was very important (sic) . . . . the second thing if there was any monies put into this thing or loans made, that there was a clear paper trail." Despite this knowledge, Rushing did not get a signed writing evidencing a potentially unlimited line of credit from McKinney and Block to put into a limited liability enterprise. Rushing had ample opportunity to ask McKinney and Block to sign a writing containing the terms of the alleged agreement or to memorialize the alleged agreement in a writing addressed to McKinney and Block. Under these circumstances, we hold Rushing did not lack the means necessary to discover the true intentions of McKinney and Block, and Rushing's reliance on the alleged oral agreement or silent acquiescence of McKinney and Block is unreasonable.

B. Promissory Estoppel

Rushing argues Respondents should be estopped from denying the existence of the agreement because they made promises that induced him into paying Pentaura's operating expenses for years.

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sold either stock or interest in Pentaura's debt without making full disclosures. Thus, the court found, Rushing's actions violated the securities laws in effect at the time. See S.C. Code Ann. § 35-1-1210 (Supp. 2004) (holding that it is unlawful for a person to omit material facts in connection with the offer or sale of a security). Rushing also raises this issue on appeal. Because we affirm the trial court's order based upon his findings that there was no contract and estoppel did not apply, we decline to address this issue.

The elements of promissory estoppel are:

> (1) the presence of a promise **unambiguous in its terms**; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise.

Woods v. State, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993).

Rushing failed to show the existence of an unambiguous promise. As discussed above, Rushing could not clearly articulate the terms of the alleged oral contract, including whether the money would be treated as a loan or capital contribution, how much money would ultimately be forwarded to Pentaura, or how Respondents would "settle up." Moreover, as previously discussed, Rushing's reliance on the alleged promise of McKinney and Block is unreasonable in light of the tension between the parties and the ambiguities of the alleged promise. Therefore, Rushing is precluded from recovering on a theory of promissory estoppel.

CONCLUSION

We hold the evidence reasonably supports the trial court's conclusion that no agreement arose at the February Meeting that would allow Rushing to advance unlimited money to Pentaura on behalf of McKinney and Block. Moreover, Rushing is not entitled to equitable relief based on his advances to Pentaura. For the foregoing reasons, the decision of the trial court is

AFFIRMED.[5]

[5] Rushing also appeals portions of the trial court's order finding that: (1) the alleged agreement violated the statute of frauds; (2) the alleged agreement violated the securities laws; (3) McKinney and Block were not personally

HEARN, C.J., and HUFF, J., concur.

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liable for the payments made on the BB&T notes; and (4) the statute of limitations barred Rushing's claim on any notes made prior to March 1, 1999. Because we affirm based on the contract and estoppel arguments, we decline to address these additional sustaining grounds.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kenneth Navy, Jr., Appellant.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 4143
Heard March 7, 2006 – Filed July 31, 2006

REVERSED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General

Norman Mark Rapoport; and Solicitor Warren Blair Giese, all of Columbia; for Respondent.

BEATTY, J.: Kenneth Navy appeals his conviction for homicide by child abuse, arguing the trial court erred in: (1) admitting three inculpatory statements; and (2) refusing to grant a new trial as a result of the State's treatment of defense witnesses and closing argument. We reverse.

FACTS

On February 9, 2003, Navy and his neighbor, Terry Crocker, were at Navy's residence watching television. Navy's twenty-three-month-old son, Kenneth Navy, III (the "victim"), was upstairs taking a nap. At some point the victim became distressed, and 911 was called. Emergency workers responding to that call observed Navy administering CPR to the victim. The victim was transported to the hospital and pronounced dead shortly after arrival. Navy informed the emergency workers, the nurse who greeted him at the hospital, and a child life specialist at the hospital that the victim had been born four months premature, had lung and heart problems, and had fallen from his highchair a few days prior to his death without any serious injuries. Navy also stated he went upstairs to check on the victim, who had been fussy that day, he went downstairs to get the victim a bottle, and the victim was not breathing when he returned. Navy gave essentially the same version of events to a police detective at the hospital and to the coroner.

The coroner examining the victim's body discovered four rib fractures that had occurred at different times over a period of weeks prior to the victim's death. The coroner opined the victim had been suffocated. A tipster called and met with another coroner from the same office to say that she believed the victim had been suffocated and pushed down the stairs. The tipster, whom police were able to identify, wished to remain anonymous and was not identified at trial because she feared retaliation from her family and Navy's family.

After learning of the autopsy results and the information from the tipster, Lieutenant James Smith and Sergeant Lancy Weeks drove to Navy's home on the day of the victim's funeral visitation and asked if Navy would be willing to accompany them to the police station for more questioning. After Navy inquired as to whether the questioning could wait until after the funeral, he was informed that it could not wait. Navy was not placed under arrest, but he agreed to ride with the officers in their car to the police station. Navy was not given his Miranda[1] warnings, and he gave a statement at 9:50 a.m. describing the events on the day the victim died. Navy initially stated that he went to check on the crying victim in his crib, he patted him on the back to comfort him, and he went downstairs to get a bottle. Upon his return, he realized the victim was having difficulty breathing, he panicked, ran up and down the stairs, and then returned to find the victim lifeless. The officers typed up the statement ("first written statement"), had Navy sign it, and then informed a shocked Navy that the victim died from suffocation and had broken ribs.

Smith then asked Navy to describe exactly how he comforted the victim. Navy stated he may have popped the victim on his back and patted the victim on his mouth to stop him from crying ("oral statement"). Navy was then given his Miranda warnings, and he signed a written waiver agreeing to talk with police at 11:35 a.m. In his second written statement given at 11:40 a.m., Navy indicated he put his hand over the victim's mouth when he could not get the child to be quiet. He stated he did not hold his hand there. Navy further stated: "I knew I knocked out his breath and I figured he would catch it by the time I got back up to the room. I heard him making that noise. It was like he was still trying to catch his breath. That was when I panicked. He quit breathing . . . ." Navy admitted he could have placed his hand over the victim's nose as well.

After taking Navy's second written statement, Weeks consulted with the coroner. The coroner opined that Navy had to have held his hand over the victim's mouth and nose for more than just a brief period. Police confronted Navy with this information, and Navy gave a third written

[1]Miranda v. Arizona, 384 U.S. 436 (1966).

statement at 12:25 p.m. in which he said he could have held his hand over the victim's mouth and nose for a minute, but not more than two minutes. Navy stated the child was gasping for breath when he removed his hand. Navy was questioned for a total of approximately three hours.

Navy was placed under arrest for homicide by child abuse. He moved to suppress the oral statement and the second and third written statements prior to trial. After the Jackson v. Denno[2] hearing, the trial court denied the motion to suppress, finding the first statement was not a custodial statement and the second and third statements were given after Navy was given his Miranda warnings.

At trial, the State presented evidence that although the victim had serious lung difficulties immediately after his premature birth, the victim was healthy at the time of his death. Dr. Teresa Baggett, the pediatrician who treated the victim a few months prior to his death, testified that when the victim was born, he required oxygen and an apnea monitor for a few months, later suffered from an asthma-type condition called reactive airway disease, and required treatment with Albuteral, a nebulizer, monthly shots, and injections of Synergist to protect him from the respiratory syncytial virus (RSV). Dr. Baggett stated the victim was having difficulty breathing in August 2001, and the parents were instructed to perform aggressive chest physiotherapy, or pounding of the chest, to loosen lung secretions. At his October 2002 visit, the victim was wheezing and had an ear infection. However, when the victim returned for a follow up visit in November 2002, Dr. Baggett testified his lungs were clear and she advised the victim's mother to decrease the frequency of his nebulizer treatments.

A radiologist examined the victim's x-rays from his August 2001 treatment and from his autopsy. The radiologist testified that although the first of the three August 2001 x-rays was of poor quality, the other two showed no rib fractures. The radiologist also opined that the four rib fractures visible in the victim's autopsy x-ray were caused by forceful trauma and could not have occurred from a fall or during aggressive chest

[2] Jackson v. Denno, 378 U.S. 368 (1964).

physiotherapy or CPR. Further, Dr. Clay Nichols, the coroner who conducted the victim's autopsy, testified the victim's lungs were clear, normal, and not inflamed or filled with mucous at the time of death.

Navy presented evidence to show that he was not a violent person, that the victim's death could have resulted from his lung deficiencies, and that the rib fractures were old fractures from August 2001 that had not healed. Navy's orthopedic surgery expert, Dr. Thomas Trancik, testified the victim had four rib fractures based on the first August 2001 x-ray, which was of poor quality. He admitted he could not locate the fractures in the subsequent two August 2001 x-rays. Trancik also opined the rib fractures could be consistent with the administration of CPR at the time of the victim's death. During cross-examination, the State commented that Trancik was "no expert," Navy objected to the comment, it was struck from the record, and Navy did not request further instructions to the jury or a mistrial.

Navy's neighbor, Terry Crocker, Navy's sister, the victim's speech therapist, Navy's wife, and Navy's father all testified that they never witnessed Navy being violent with his children. Crocker, who was in Navy's home at the time the victim stopped breathing, testified that Navy was not upset that day, that he witnessed Navy go upstairs to check on the victim, and that Navy returned downstairs very fast, saying the victim was not breathing.

Navy testified he never abused his children and did not suffocate his son. During cross-examination, the solicitor asked Navy to admit that "every time we took a break when the jury was gone you were laughing and cutting up, weren't you?" Navy's objection was sustained and no further instructions were requested. When the solicitor began screaming at Navy, the court instructed the solicitor to treat Navy "with respect." The State also brought out on cross-examination of the defense witnesses that although Navy had never been convicted of a violent crime, police had been called to his home numerous times for violent arguments, he had been suspended from high school for punching a coach, he had been accused of attempting to assault a sixteen-year-old girl, and he had been in a physical altercation with his father.

Navy was convicted of homicide by child abuse and sentenced to twenty years imprisonment. His motion for a new trial was denied, and this appeal follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Appellate review of whether a person is in custody for Miranda purposes is limited to a determination of whether the trial judge's ruling is supported by the record. State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003). Further, the trial court's decision to deny a motion for a new trial will not be disturbed absent an abuse of discretion. State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 69 (Ct. App. 2000).

LAW/ANALYSIS

I. Suppression of Statements

Navy argues the trial court erred in refusing to suppress his three inculpatory statements. We agree.

"The purpose of the Miranda warnings is to apprise the defendant of [his] constitutional privilege not to incriminate [himself] while in the custody of law enforcement." Evans, 354 S.C. at 583, 582 S.E.2d at 409. Miranda requires that warnings be given to a suspect after he or she has been taken into custody or deprived of his or her freedom in any significant way. Id. at 583, 582 S.E.2d at 410 (citing Miranda, 384 U.S. 436, 444 (1966)). This language has been interpreted to mean a "formal arrest or detention associated with a formal arrest." State v. Easler, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997). Whether a suspect is in "custody" for Miranda purposes is an objective determination based upon the totality of the circumstances, including "the individual's freedom to leave the scene and the purpose, place and length of the questioning. . . ." Id. "The relevant inquiry

is whether a reasonable man in the suspect's position would have understood himself to be in custody." Bradley v. State, 316 S.C. 255, 257, 449 S.E.2d 492, 493-94 (1994). The custodial determination is not based upon the subjective views of the suspect or the interrogating officers. Easler, 327 S.C. at 128, 489 S.E.2d at 621.

A. Inculpatory Oral Statement

Navy argues the trial court erred in refusing to suppress his inculpatory oral statement because he was in custody at the time and he was not given his Miranda warnings prior to making the statement.

At the Jackson v. Denno hearing, Lieutenant James Smith testified that Navy voluntarily accompanied him and Sergeant Lancy Weeks back to the station to discuss the case. Smith testified he did not administer Miranda warnings because Navy was not under arrest, Smith informed Navy that he was not under arrest, and Navy was very cooperative with investigators despite being upset and crying. Smith stated he would not have taken Navy to the Sheriff's Department if Navy did not want to go. Once at the Sheriff's Department, Smith testified Navy was given a soda and escorted outside to smoke a cigarette. According to Smith, Navy would have been allowed to leave had he requested to do so.

Smith admitted he had the coroner's autopsy report prior to questioning Navy. After about one hour of questioning, Navy signed the first written statement that was substantially similar to the story given at the hospital. Smith testified he then confronted Navy with the coroner's opinion that the victim had been suffocated and had four fractured ribs. In response to Smith's question regarding how he comforted the victim, Navy gave the oral statement that he popped the victim on his back and may have patted the victim's mouth to calm the crying. At that point, they took a break so Navy could smoke another cigarette outside. Smith testified he escorted Navy outside to smoke a cigarette because no one was allowed to wander the Sheriff's Department alone. Smith stated Navy was still not in custody and would have been allowed to go home if he had requested to do so. However,

out of an abundance of caution, Smith stated he gave Navy his Miranda warnings when they returned to his office.

Navy testified at the Jackson v. Denno hearing that he was extremely upset and had not slept or eaten in three days when Smith and Weeks requested that he accompany them to give a statement. Navy stated he only completed the ninth grade in school and had difficulty reading cursive writing. Navy denied that he was given Miranda warnings after his oral statement, testifying that either he was not given Miranda warnings until his third statement or that he could not recall when he was given Miranda warnings. Navy testified that the first written statement, substantially similar to the statement he gave at the hospital, was the only correct statement. He claimed the officers placed the second and third written statement along with the first written statement in front of him, the officers required him to sign all three typed statements at one time before he could go home, and Navy did not read the statements before signing them.

Citing State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003), Navy's counsel argued any reference to his oral statement that he "popped" the victim on the back should be suppressed because Navy was operating under an emotional disability and was not given Miranda warnings prior to making the statement. The trial court determined Navy was not in custody at the time he voluntarily gave his first statement[3] because he was free to leave. The court distinguished Evans from Navy's situation, finding there was a "bullying atmosphere" in questioning Evans and the police ignored her requests for help.

In Evans, the mentally disabled defendant was aggressively questioned at the police station about a fire at her home that killed her three children. During her three-hour interview, police repeatedly told her they did not believe her theories of how the fire could have started, and they ignored her repeated requests to "get her some help." Evans was escorted to and from the bathroom, and relatives who had accompanied her to the police station were

[3] It is unclear from the record whether the court was referring to the first written statement or to the inculpatory oral statement.

not allowed to see her. The trial court suppressed the inculpatory statement Evans eventually gave, finding Evans was in custody at the time and was not given her Miranda warnings. In making the custodial determination, the court: found Evans was not free to leave; considered the fact that the interrogation occurred in a back office at the police station; considered the fact that the interrogation was three hours long; and was concerned with the officers' purpose in their method of questioning. The supreme court held the trial court's order reflected that the court objectively considered the totality of the circumstances in determining that Evans was in custody. Evans, 354 S.C. at 583-84, 582 S.E.2d at 410.

Reviewing the totality of the circumstances, we find the present case is substantially similar to Evans such that the trial court erred in finding Navy was not in custody at the time of the oral inculpatory statement. Navy was informed by officers that questioning at the station could not wait. Thus, despite Navy's testimony that he willingly accompanied the officers, one could reasonably interpret the officers' refusal to delay the questioning until after the funeral as a mandate to accompany the officers. Navy was further transported to the Sheriff's Department in the backseat of a patrol car, rendering him unable to return home on his own. Further, Navy was not allowed to walk about the Sheriff's Department freely, and he was accompanied for smoke breaks. Although the officers claimed they merely wanted a statement of the events on the date of the victim's death, Navy was repeatedly questioned for a length of time. Finally, the officers were familiar with the autopsy report prior to questioning Navy, indicating the purpose of the questioning was to obtain an inculpatory statement.

Viewing the length, location, and purpose of the questioning, a reasonable person would believe themselves to be in custody. Accordingly, Navy's oral statement should not have been admitted.

B. Second and Third Written Statements

Navy argues the trial court erred by failing to suppress his second and third written statements because they were obtained as a result of information learned from the oral inculpatory statement made prior to Miranda warnings.

Generally, an "initial failure to administer Miranda warnings before a statement is given does not taint a subsequent statement, made after a suspect has been fully advised of and has waived his Miranda rights, when both statements are voluntary." State v. Campbell, 287 S.C. 377, 379, 339 S.E.2d 109, 110 (1985); see Oregon v. Elstad, 470 U.S. 298, 309 (1985) ("It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.").

However, the United States Supreme Court has recently held unconstitutional the police tactic of "question-first," where officers intentionally question a suspect until inculpatory information is given and then provide Miranda warnings prior to having the suspect repeat the inculpatory information. Missouri v. Seibert, 542 U.S. 600, 613 (2004) (noting that Miranda warning given mid-interrogation, after a defendant had given an unwarned confession, was ineffective in informing a suspect that she could decide not to speak further with police after essentially saying everything there was to say; thus, the confession repeated after the warning was given was inadmissible at trial). The plurality in Seibert noted as follows:

> [W]hen Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." Moran v. Burbine, 475 U.S. 412, 424, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). By the same token, it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted

> questioning as independent interrogations subject to independent evaluation simply because Miranda warnings formally punctuate them in the middle.

Seibert, 542 U.S. at 613-14.

The Seibert plurality went on to distinguish the admissibility of subsequent statements elicited in an Elstad-type of confession from statements elicited pursuant to the "question-first" tactic.[4] Noting that the failure to give a warning prior to the confession in Elstad was merely an oversight whereas the "question-first" tactic was purposefully designed to undermine Miranda warnings, the Seibert court pointed out several considerations to determine whether mid-interrogation Miranda warnings are effective, rendering subsequent statements admissible:

> The contrast between Elstad and this case reveals a series of relevant facts that bear on whether Miranda warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

[4] In Elstad, the defendant was arrested for burglary at his home. Officers stopped in the living room on the way out of the home to inform his mother of the charges. While in the living room, Elstad confessed to being at the scene of the burglary. Officers then gave Elstad Miranda warnings prior to obtaining subsequent statements. The United States Supreme Court held that the simple failure to administer Miranda warnings prior to a confession, where no evidence of coercion or calculation was present, did not render subsequent, post-warning statements inadmissible. Oregon v. Elstad, 470 U.S. 298, 309 (1985).

> In Elstad, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the Miranda warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.

Seibert, 542 U.S. at 615-16.

Applying the Seibert factors, we find the questioning of Navy was an integrated, coordinated, and continuing interrogation such that giving warnings mid-interrogation was ineffective and rendered the second and third written statements inadmissible. Navy was questioned at the police station, over a period of three hours, and by the same officers. The officers asked similar questions with each statement, and the three statements overlapped in content. The officer's questions to Navy post-Miranda warning were related to the oral inculpatory statement, indicating the officer treated the "second round as continuous with the first." Further, because the officers were familiar with the coroner's opinion that the victim was suffocated prior to questioning Navy, it can hardly be said that the failure to give Miranda warnings prior to obtaining the oral inculpatory statement was inadvertent, as was the case in Elstad. Because the officers' actions in the present case are substantially similar to those in Seibert,[5] we find the trial court erred in finding the second and third statements were admissible.

[5] We are cognizant of the fact that Seibert was decided a week after the trial in this case, and Navy's counsel did not refer to the "question-first" tactic in moving to suppress Navy's statements. However, Navy's counsel argued that the written statements should be suppressed because Navy did not give a voluntary waiver. He argued the statements were taken from Navy "in furtherance and in addition and based upon unconstitutionally gathered information, violating his rights by getting the information about 'popping'

To summarize, we find Navy was in custody at the time he gave his oral inculpatory statement, and the mid-interrogation Miranda warning given to Navy in this situation was not effective in advising him of his rights or the consequences of abandoning them. Accordingly, we reverse the trial court's finding that all three inculpatory statements were admissible.

II. Solicitor's Closing Argument

Citing Toyota of Florence v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994), Navy argues the trial court erred in refusing to grant him a new trial because the State's closing argument was outrageous. We disagree.

The trial court is given broad discretion in determining the appropriateness of a solicitor's closing argument. State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003). The trial court's ruling will not be disturbed on appellate review absent an abuse of discretion. Id. An appellant must prove both an abuse of discretion and resulting prejudice to warrant reversal. State v. Sierra, 337 S.C. 368, 373, 523 S.E.2d 187, 189 (Ct. App. 1999).

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). In reviewing a solicitor's closing argument, the court must determine whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Caldwell, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990). Improper comments do not require reversal if they are determined not to be prejudicial to the defendant. Rudd, 355 S.C. at 550, 586 S.E.2d at 157. Arguments of counsel are not considered so inflammatory

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before he had been Mirandized." Thus, the substance of Navy's argument is preserved for review.

as to require a reversal where "counsel responds in kind to a previous argument of opposing counsel." Dial v. Niggel Assocs., Inc., 333 S.C. 253, 258, 509 S.E.2d 269, 271 (1998). "On appeal, an appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Rudd, 355 S.C. at 550, 586 S.E.2d at 157.

During the solicitor's closing argument, he evaluated all of the evidence and testimony presented in Navy's defense. The solicitor referred to Navy's assertions in closing, his witnesses, or other evidence presented in Navy's defense as "lies," "liars," or "untrue" statements on at least seventeen occasions. Navy never objected to any of these statements. In his later motion for a new trial, Navy argued he was entitled to a new trial because the solicitor's argument was "extremely inflammatory" by attacking Navy's character, by referencing all the uncharged violent offenses, and by calling Navy's witnesses liars. Navy admitted he did not object to the closing argument, but he argued he was entitled to a new trial pursuant to Toyota of Florence v. Lynch due to the outrageousness of the closing argument. The court denied the motion for a new trial.

Generally, a party must make a contemporaneous objection to improper arguments or the objection is waived. Dial, 333 S.C. at 256-57, 509 S.E.2d at 271; State v. Young, 364 S.C. 476, 494, 613 S.E.2d 386, 395 (Ct. App. 2005). However, our supreme court has held that "even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." Toyota of Florence v. Lynch, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) (holding a new trial should be granted, despite the lack of contemporaneous objections to closing argument, where counsel used posters in closing argument that invoked racial stereotypes and were highly prejudicial). The Toyota of Florence v. Lynch court described the circumstances of that particular case as "extraordinary," and the court noted that it did not condone the failure to make a contemporaneous objection. Id.; State v. Peay, 321 S.C. 405, 413, 468 S.E.2d 669, 673-74 (Ct. App. 1996) (noting the supreme court in Toyota of Florence v. Lynch "did not condone the failure to

contemporaneously object, and described the circumstances in that case as 'extraordinary'").

The solicitor's closing argument in the present case was certainly aggressive. However, we do not find "extraordinary" circumstances present in this case that would excuse the failure to make a contemporaneous objection. Navy's defense at trial centered on his claim that he was not a violent person and that his son's injuries were the result of his lung disease and medical treatments. In this context, the solicitor's closing argument was a direct response to Navy's defense and merely pointed out the problems with Navy's argument based on the evidence of record. We do not find these remarks so inflammatory as to fall under the Toyota decision. See Dial, 333 S.C. at 258, 509 S.E.2d at 271 ("In this case, counsel's 'deceit and lies' remark was in response to opposing counsel's repeated accusation of deception. In context, this remark was not so inflammatory as to come within the ambit of our decision in Toyota."). Accordingly, Navy's failure to raise any objection to the solicitor's closing argument waived the issue for review and the trial court did not err in refusing to grant Navy a new trial.[6]

CONCLUSION

We find the trial court erred in admitting Navy's voluntary oral statement and the second and third written statements. However, the court did not err in refusing to grant Navy a new trial based on the solicitor's closing argument. Nevertheless, because the court erred in admitting the three statements, Navy's conviction and sentence are

REVERSED.

[6] Navy also argues that he was entitled to have a new trial pursuant to Toyota due to the outrageousness of the State's trial tactics in bringing out his prior violent acts, pointing out that he was laughing during breaks to the jury, and saying Trancik was not an expert. Toyota, however, only addressed outrageous conduct during closing argument. We decline to extend Toyota to apply to general trial tactics and cross-examination.

HEARN, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Christine L. Myatt, as Receiver
of Elfindepan, S.A. and
Strategic Asset Funds, S.A., Appellant,

v.

RHBT Financial Corporation
and Robert M. Yoffie, Defendants,

of whom RHBT Financial
Corporation is the, Respondent.

Appeal from York County
James R. Barber, III, Circuit Court Judge

Opinion No. 4144
Heard May 9, 2006 – Filed July 31, 2006

AFFIRMED

J. Scott Hale, of Greensboro, North Carolina; and Russell T. Burke and Amy Harmon Geddes, both of Columbia, for Appellant.

Robert Y. Knowlton and Sarah P. Spruill, both of Columbia, for Respondent.

BEATTY, J.: Christine L. Myatt, as receiver of Elfindepan, S.A. and Strategic Asset Funds, S.A. (SAF), appeals the trial court's order granting RHBT Financial Corporation's (the Bank's) summary judgment motion on Myatt's claims for breach of contract, breach of fiduciary duty/constructive fraud, negligence/gross negligence, negligent supervision, unfair and deceptive trade practices, and aiding and abetting a breach of fiduciary duty.[1] We affirm.

FACTS

Elfindepan is a Costa Rican corporation that orchestrated high-yield investment schemes. SAF is a Panamanian entity that also facilitated these schemes. Tracy Calvin Dunlap, Jr., acted as president of both of these entities.

In early 2000, Stephen Dennis introduced Dunlap to Robert M. Yoffie. At the time, Yoffie acted as the Senior Vice President and Trust Officer of the Bank. On February 23, 2000, Dunlap entered into an agency agreement with the Bank. This agreement provided that the Bank would act as an agent for Elfindepan, which was listed as the principal. The agreement created a banking account at the Bank and listed Dunlap as the signatory on the account.

[1] The trial court's order indicates RHBT Financial Corporation "is the holding company for Rock Hill Bank & Trust." Rock Hill Bank & Trust is the entity that engaged in the actions relevant to this appeal. Because the status of these entities has no bearing on this appeal, we refer to both as "the Bank."

On May 22, 2000, Dunlap entered into another banking agreement with the Bank. The account owner was "Tracy Dunlap DBA S.A.F." Dunlap was the only signatory on this agreement. On June 8, 2000, Dunlap changed this agreement to a corporate account, indicating SAF was the account owner and authorizing himself and Katherine Kennedy to be signatories on the account. Dunlap later deposited checks made payable to Elfindepan and SAF into these accounts and directed the Bank to distribute the deposited funds to various people and entities.

Subsequently, the United States Securities and Exchange Commission (SEC) filed a complaint in federal court against Elfindepan, SAF, and Dunlap, alleging they defrauded investors. The federal court later issued orders appointing Myatt as the receiver of both Elfindepan and SAF. On November 15, 2002, Myatt (the Receiver), acting in this capacity, filed a complaint against the Bank and Yoffie, alleging causes of action for breach of contract, breach of fiduciary duty/constructive fraud, negligence/gross negligence, negligent supervision, unfair and deceptive trade practices, and aiding and abetting a breach of fiduciary duty.

The Bank answered, denying all of the Receiver's claims and asserting numerous affirmative defenses. After discovery, the Bank moved for summary judgment on several grounds, including the doctrine of in pari delicto. In addition, the Receiver moved for summary judgment on her claim for aiding and abetting a breach of fiduciary duty. The trial court denied the Receiver's motion and granted summary judgment to the Bank, holding the doctrine of in pari delicto barred all of the Receiver's claims. The court also granted summary judgment to the Bank on the alternative grounds that: (1) Dunlap controlled all aspects of SAF's and Elfindepan's business; (2) the Bank did not breach any duty to the two corporations; (3) the constructive fraud claim was barred because the Bank did not make any false representations; (4) any potential claim under the unrecognized cause of action for aiding and abetting a breach of fiduciary duty was barred because there was no evidence that the Bank knowingly participated with Dunlap to breach a fiduciary duty to the two corporations; (5) the Receiver's unfair trade practices claim failed because the Bank's action of releasing the funds pursuant to Dunlap's instructions were permitted under the law; and (6) the

Receiver could not show that the Bank's actions damaged the two corporations.[2] This appeal followed.

STANDARD OF REVIEW

"An appellate court reviews the grant of summary judgment under the same standard applied by the trial court." Houck v. State Farm Fire & Cas. Ins. Co., 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005). The trial court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Gadson v. Hembree, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005). To determine whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005).

The burden of clearly establishing the absence of a genuine issue of material fact is upon the party seeking summary judgment. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 376, 597 S.E.2d 181, 183 (Ct. App. 2004). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the non-moving party's case, the non-moving party cannot simply rest on mere allegations or denials contained in the pleadings. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004). Rather, the non-moving party must come forward with specific facts showing a genuine issue for trial. Peterson v. W. Am. Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999).

LAW/ANALYSIS

The Receiver contends the trial court erred in holding the doctrine of in pari delicto barred all of her claims. We disagree.

[2] After the trial court heard the Bank's motion for summary judgment, Yoffie also moved for summary judgment. The trial court stayed this motion pending our decision in this case.

The doctrine of in pari delicto is "[t]he principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." Black's Law Dictionary 794 (7th ed. 1999). In South Carolina, this doctrine precludes one joint tort-feasor from seeking indemnity from another. See Rock Hill Tel. Co. v. Globe Commc'ns, Inc., 363 S.C. 385, 389 n.2, 611 S.E.2d 235, 237 n.2 (2005) ("In general, there is no right to indemnity between joint tortfeasors."); Atlantic Coast Line R. Co. v. Whetstone, 243 S.C. 61, 68, 132 S.E.2d 172, 176 (1963) (holding that there generally is no right to indemnity between joint tortfeasors). However, the "adverse interest" exception applies where the actions of one wrong-doer, usually an agent, are clearly adverse to the other party's interests. See Little v. S. Cotton Oil Co., 156 S.C. 480, 483-84, 153 S.E. 462, 463 (1930) ("The general rule is that when an agent is engaged in a transaction in which he is interested adversely to his principal, the principal will not be charged with knowledge of the agent acquired therein."). Under this exception, the wrongs of the agent would not be imputed to the principal and in pari delicto would not apply.

No case in South Carolina directly addresses the issue of whether a party can assert the defense of in pari delicto against the receiver of a corporation that engaged in past wrongdoing. However, we think the decisions of the Seventh Circuit Court of Appeals in Scholes v. Lehmann, 56 F.3d 750 (7th Cir. 1995), and Knauer v. Jonathon Roberts Financial Group, Inc., 348 F.3d 230 (7th Cir. 2003), should inform our decision in this case.

In Scholes, Michael Douglas created three corporations that he used to perpetuate Ponzi schemes. The SEC filed a complaint against Douglas and the corporations, and the federal court appointed a receiver for the corporations. The receiver brought suit against the transferees of the money collected from the Ponzi scheme, asserting a cause of action for fraudulent conveyance. The Seventh Circuit Court of Appeals held the receiver had standing to sue these transferees because "the defense of in pari delicto loses its sting when the person who is in in pari delicto is eliminated." Scholes, 56 F.3d at 754.

The Scholes court relied on two important factors in reaching its decision. First, it applied the adverse interest exception to the general rule that the knowledge of corporate agents is imputed to the corporation. Id. at 754. Additionally, the Seventh Circuit noted the receiver in Scholes sued the beneficiaries of the fraudulent conveyances. See id. at 755 ("Now that the corporations created and initially controlled by Douglas are controlled by a receiver whose only object is to maximize the value of the corporations for the benefit of their investors and any creditors, we cannot see an objection to the receiver's bringing suit to recover corporate assets . . . ."") (emphasis added).

In Knauer, a receiver was appointed for two entities operating a Ponzi scheme. The entities were created for the purpose of collecting money from investors, but the officers and directors failed to invest the funds and allocated money to their own personal use. The receiver brought causes of action sounding in tort against several brokers that helped sell securities from these entities. The district court dismissed the receiver's claims, noting the receiver's complaint acknowledged the participation of the entities in the Ponzi schemes and, therefore, the entities were barred from suing the bank under the doctrine of in pari delicto. Knauer, 348 F.3d at 232-33.

In affirming the district court's decision, the Seventh Circuit Court of Appeals held "[i]f the case before us involved the voiding of a fraudulent conveyance . . . we would likely apply Scholes . . . ." Knauer, 348 F.3d at 236. Furthermore, it noted "[t]he key difference, for purposes of equity, between fraudulent conveyance cases such as Scholes and the instant case is the identities of the defendants." Id. "The receiver here is not seeking to recover the diverted funds from the beneficiaries of the diversions . . . Rather, this claim is a claim for tort damages from entities that derived no benefit from the embezzlements, but that were allegedly partly to blame for their occurrence." Id.

Similarly, the Receiver in the present case was seeking tort damages from the Bank for its actions regarding the accounts. The Receiver was not seeking to recover diverted funds from the Bank. Thus, relying on the Knauer decision, we hold that, in the absence of a fraudulent conveyance

case, the receiver of a corporation used to perpetuate fraud may not seek recovery against an alleged third-party co-conspirator in the fraud. In this case, the Receiver does not dispute the fact that Dunlap, the president of both Elfindepan and SAF, used these corporations to perpetrate a fraud on investors. The apparent sole purpose for the existence of these corporations was to perpetuate the investment scheme. Moreover, the Bank handled the accounts exactly as it was bound to do pursuant to the account agreements. Thus, Receiver did not make any claim against the Bank for fraudulent conveyance. Therefore, the trial court properly applied the doctrine of in pari delicto in granting the Bank's motion for summary judgment.

CONCLUSION

For the foregoing reasons, the trial court's decision is

AFFIRMED.[3]

HUFF, and STILWELL, JJ., concur.

[3] Because we find the trial court correctly granted summary judgment based on in pari delicto, we need not address the remaining alternative sustaining grounds. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (holding the decision to address any additional sustaining grounds is within the appellate court's discretion).