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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2006-CP-40-1814

Lauren Proctor and Trans-Union National Title Insurance Company f/k/a Atlantic Title Insurance Company,

Respondents,

v.

Whitlark & Whitlark, Inc. d/b/a Rockaways Athletic Club and Pizza Man, Forrest Whitlark, Paul Whitlark, Charlie E. Bishop, and Brett Blanks,

Appellants.

PETITION FOR REHEARING OR REHEARING EN BANC

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Appellants petition this Court for rehearing pursuant to Rule 221, SCACR, or for rehearing *en banc*, pursuant to Rule 219, SCACR. The Panel overlooked or misapprehended Appellant's arguments as set forth herein. Moreover, the Panel's opinion creates new law opening the civil judicial system to a flood of lawsuits by disgruntled criminals suing other criminals for business disputes. Such a drastic change in the law creates a matter of exceptional importance, rendering this matter proper for rehearing *en banc*.

I. The Panel's Opinion misapprehends the intention and effect of the statutes on gambling recoveries.

The Panel held that the policy in South Carolina, as evidenced by S.C. Code 32-1-10 and -20 and case law (also referred to as the Statute of Anne), supports the finding that *in pari delicto* has been abrogated. However, the Court's opinion ignores the express limitations of the statutes and the case law.

Section 32-1-10[1] is narrowly drawn, and only allows a gambler to recover if the suit is brought within three months. It is undisputed that Respondent's suit was initiated outside of that three month time limit. The Court then notes that Section 32-1-20 allows any other person to recover gambling losses and treble the value, if the lawsuit is brought within one year. The key to Section 32-1-20 however, is that the suit must be brought by a person other than the gambler (i.e., not Respondent), and thus, obviously does not apply here.

Together these code sections provide a very limited remedy for a person engaged in illegal gambling to recover. The Panel, in finding that *in pari delicto* has been completely abrogated by these statutes, ignored the cases that refuse to allow gamblers to recover and the

[1] According to the history of this statute, it was first adopted in 1712 and has remained unchanged except for the changing the monetary threshold. Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993).

fact that these cases were decided after the adoption of the statute. *See*, Rice v. Gist, 32 S.C.L. 82 (1846) (unlawful wagers are not to be recovered in courts of justice); Livingston v. Wootan, 10 S.C.L. 178 (1818) (at common law, the parties to a gambling transaction stand *in pari delicto* and money lost and paid over cannot be recovered).[2] Furthermore, the Panel, in holding that these code sections were not the exclusive remedy for losses sustained in illegal gambling, ignored the intent and scope of the law.[3] Because these codes are the exclusive remedy, the Panel's interpretation that South Carolina promotes a policy of allowing gamblers to recover under alternative theories, without regard to the bar of *in pari delicto*, is contrary to established law.

II. The Panel's Opinion misapprehends the intention and effect of statutes the case law and creates new law.

The Court of Appeals has also misapprehended or overlooked Appellants' argument and the holding in Johnson v. Collins Entertainment Co., 349 S.C. 613, 635, 564 S.E.2d 653, 664 (2002) and has created new law. In Johnson, the plaintiffs were allowed to proceed under the South Carolina Unfair Trade Practices Act, S.C. Code § 39-5-10, et seq. (SCUTPA), to recover certain gambling losses. Johnson, of course, took place when video poker was legal, unlike the facts of this case. The Panel held that those differences are meaningless because the "tenets" of

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[2] The Panel decision refers to Rice but does explain why neither Rice nor Livingston control. The opinion states, in Footnote 4, that the court was "not persuaded by the cases cited by Appellants in support of their claim that in pari delicto applies based on the factual dissimilarities and more recent pronouncements of the [S]upreme [C]ourt." The opinion does not state which cases to which this statement applies or what the factual dissimilarities are.

[3] One of the cases cited by the Court actually supports the Appellants' argument that the code section provides the exclusive remedy and must be restricted to its own language. In Major League Baseball Properties, Inc. v. Price, 105 F. Supp. 2d 46, 53 (E.D.N.Y. 2000), there was a state law that allowed a person who paid for a lottery ticket to sue and recover double the sum of money paid. While that court's analysis of that statute in the context of a RICO case has no relevance, here, the court also clearly noted that "The right of recovery is purely statutory and should be restricted to the extent and area clearly defined by law." Id.

Johnson lead to same conclusion that *in pari delicto* does not apply- specifically, that a gambler has for recourse acting under his or her "uncontrollable impulses" either through S.C. Code § 32-1-10 or through SCUTPA.

While the plaintiffs in Johnson could proceed under SCUTPA,[4] that decision must be limited to the facts of that case. There, the video poker operators had engaged in "an unlawful trade practice" but were doing so **while in a lawful trade, as video poker was legal at that time**. The plaintiffs in Johnson were not engaged in illegal gambling or unlawful conduct, because the regulations governed the conduct of video poker operators. Here, Plaintiff Proctor readily admitted that she was engaged in illegal gambling and that her conduct was also criminal. The Panel opinion acknowledges, but ignores, that crucial factual distinction. While the unfair trade practices act prohibits unlawful and deceptive practices, it is apodictic that it only applies to a lawful "trade or commerce." The Panel's interpretation, allowing a participant in an illegal trade to sue under SCUTPA, opens the floodgates to lawsuits by gamblers (or participants in other illegal activity) who voluntarily participated in the illegal activity and would allow these new plaintiffs to profit from their illegal actions. Abrogation of the doctrine of *in pari delicto* eliminates the personal responsibility of the gambler and is contrary to the policy of this state. White v. Commercial & Farmers Bank, 66 S. C. 491, 511-12, 45 S. E. 94, 102 (1903)("No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."); Jackson v. Bi-Lo Stores, 313 S.C. 272, 437 S.E.2d 168 (Ct. App. 1993) (it is a well founded policy of the law that no person be permitted to acquire a right of action from his own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of

[4] Obviously, Section 32-1-10 has already been addressed and there is no need to repeat that argument again.

that act; this rule applies at both law and in equity and whether the cause of action is in contract or tort.)

Furthermore, the Panel seems to cast doubt on the equal fault of Respondent, citing to Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310-11, 105 S. Ct. 2622, 2629, 86 L. Ed. 2d 215 (1985) for the proposition that parties in an illegal act may not be in equal fault.[5] In this matter, there is no doubt here that Respondent bears "equal responsibility." She admitted that she knew that gambling was illegal but continued to play. (SR. 2). In fact, Respondent did not limit her illegal gambling to the establishments in this case, but engaged in illegal gambling in a variety of establishments. (R. p. 255, ll. 37:14-40:8). Respondent very clearly admitted she engaged in illegal gambling and theft. (R. 261, l. 78, l.15-79:18). She testified that any money she won or could have won was spent on gambling and never returned to replace her thefts. (R. 260). She plead guilty and was ordered to pay $755,000 in restitution. (R. 3). In fact, Respondent has not disputed that her conduct was illegal, r, but simply claims that the doctrine of *in pari delicto* had been abrogated.

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[5] That case has actually has no real relevance here. In Bateman (a securities case, the plaintiff's suit was based on substantial trading losses after a securities broker and the officer of a corporation fraudulently induced respondents to purchase stock in the corporation by divulging false and materially incomplete information about the corporation on the pretext that it was accurate inside information. The United States Supreme Court considered whether the doctrine of *in pari delicto* barred the action and noted that the concept of "equal fault" should be narrowly defined in litigation arising under federal regulatory statutes, such as anti-trust or securities litigation. Id. The Court also recognized that where a plaintiff truly bore at least substantially equal responsibility for the violation, there was a valid defense of i*n pari delicto*, even where the litigation involved a federal regulatory scheme. Id. at 308-09. Obviously, here there is no "federal regulatory scheme" that would limit the application of *in pari delicto*. Furthermore, as the Supreme Court recognized, whether the doctrine applied to bar the plaintiffs action depended upon whether, as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations for which he sought redress. *Id.* Here, the record is clear as to Respondent's equal responsibility.

Lastly, under the "equal fault" standard adopted by the Panel, Respondent was not entitled to partial summary judgment. There is sufficient evidence in the record from which a jury could find that Respondent was equally at fault with Appellants. The lower court, as well as the Panel, weighed the evidence at the summary judgment stage rather than applying the appropriate standard under Rule 56, S.C. Rules Civ. P. Anderson v. The Augusta Chronicle, 355 S.C. 461, 475, 585 S.E.2d 506, 513 (Ct. App.2003) (The weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge).

CONCLUSION

The Court of Appeals panel opinion overlooked or misapprehended both the statutory law and case law in this matter. By allowing the South Carolina Unfair Trade Practices Act to apply to an illegal trade, the Court has opened up the court system to be overwhelmed with lawsuits between participants in illegal activities and allowing those participants to profit from their illegal actions. The doctrine of *in pari delicto* was adopted to prevent such lawsuits. Since the Court of Appeals decision has created new law and will allow new causes of action never before permitted, Appellants respectfully submit that this matter the petition for rehearing and/or rehearing *en banc* be granted.

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May 30, 2013

Columbia, South Carolina

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PROOF OF SERVICE

I, Jaime Harmon, the undersigned employee of Lewis, Babcock & Griffin L.L.P, attorney for Appellant Whitlark & Whitlark, Inc. d/b/a Rockaways Athletic Club and Pizza Man, ForrestWhitlark, Paul Whitlark, do hereby certify that I have served a copy of the foregoing **Petition for Rehearing or Rehearing En Banc**, in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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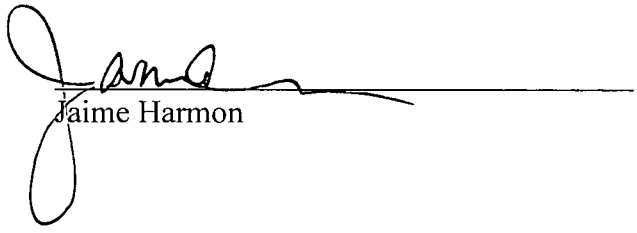

Jaime Harmon

Columbia, South Carolina
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