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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

THE HONORABLE ALISON RENEE LEE, CIRCUIT COURT JUDGE

CIVIL ACTION NO.: 2006-CP-40-1814

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

Respondents,

vs.

Appellate Case No. 2012-205510

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

Appellants.

**RETURN TO PETITION FOR REHEARING
OR REHEARING *EN BANC***

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Appellants filed a Petition for Rehearing or Rehearing *En Banc* pursuant to Rules 219 and 221 of the South Carolina Appellate Court Rules. In their petition, Appellants contend that the Panel overlooked or misapprehended Appellants' arguments and created new law. For the reasons that follow, Appellant's petition should be denied.

I. The Panel Decision Correctly Determined that S.C. Code Ann. §§ 32-1-10 and 32-1-20 Are Not Exclusive Remedies for Recovery of Gambling Losses.

Appellants contend that the Panel erred in concluding that S.C. Code Ann. §§ 32-1-10 and 32-1-20 were not the exclusive remedies for the recovery of gambling losses. Contrary to Appellant's argument, the Panel correctly noted that in Johnson v. Collins Entertainment Co., 349 S.C. 613, 634-35, 564 S.E.2d 653, 664-65 (2002), the South Carolina Supreme Court held that these sections 32-1-10 and 32-1-20 are not the exclusive remedies for gambling recovery. As such, the Panel committed no error requiring rehearing.

II. The Panel's Analysis of Johnson and the Defense of *In Pari Delicto* Were Correct.

In this case, the facts were essentially uncontroverted. Appellants operated illegal video poker machines at Rockaways and Pizza Man. Appellants provided Respondent food and alcoholic beverages to induce her to gamble and remain gambling. A tavern keeper who operates a gambling enterprise is subject to criminal punishment that is less severe than the punishment of a patron who is also engaged in gambling. See S.C. Code Ann. § 16-9-140 (punishment for tavern keeper is 12 months' imprisonment or \$2000 fine while punishment for the patron is 30 days' imprisonment or a \$100 fine.).

The Panel held that the circuit court did not err in rejecting the *in pari delicto* defense with respect to Respondent's claims under the South Carolina Unfair Trade Practices Act. The Panel's reasoned decision applied the main tenets of Johnson. Contrary to Appellant's argument

for rehearing, the Panel affirmatively recognized that the claims in Johnson were different, as video poker was illegal when Petitioner suffered her losses.

Nonetheless, the Panel noted that “statutory and case law in South Carolina support a policy of allowing plaintiffs to recover gambling losses as a way of both discouraging illegal gambling and protecting gamblers and their family members from imprudent gambling activities.” (Panel Decision at 5.) Additionally, in applying Johnson, the Panel noted that the owners of the machines were not truly *in pari delicto* with the persons who use the machines because “the habitual gambler is acting under the sway of ‘uncontrollable impulses’ and requires protection from his or her bad judgment. (Panel Decision at 5.) Finally, the Panel correctly held that sections 32-1-10 and 32-1-20 were not exclusive remedies to recover gambling losses and that recovery can be made if the gaming operator’s conduct violated the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*¹

Here, the Panel correctly applied the three main tenets of Johnson. The Supreme Court decided Johnson based upon certified questions from the United States District Court for the District of South Carolina. As such, the findings in Johnson are solely matters of law. In their Petition, Appellants do not challenge the Panel’s finding that statutory and case law support a policy of discouraging gambling and protecting gamblers when their impulses overcome their ability to pay.

Instead, Appellant’s argument focuses solely on the second and third tenets of Johnson. With respect to the *in pari delicto* defense, the Panel appropriately focused on Johnson. In Johnson, and as a matter of law, the South Carolina Supreme Court concluded that the operators of gambling machines are not *in pari delicto* with the players because the operators are held to a

¹ On direct appeal, the Appellants never challenged the circuit court’s finding that their conduct constituted an unfair trade practice under SCUTPA.

greater knowledge and understanding of the laws, “particularly where the laws are designed to protect the payer from his or own bad judgment.” Johnson, 349 S.C. at, 639 n. 13, 564 S.E.2d at 667 n. 13. The Panel decision properly applied Johnson in this case. As noted in section I, the Panel correctly applied the third tenet of Johnson, that the sections 32-1-10 and 32-1-20 were not the exclusive remedies for recovery of gambling losses.

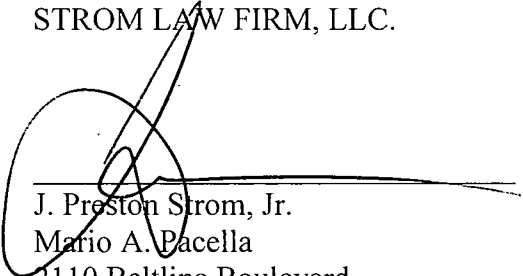
Finally, Appellants contend that the Panel broadened the remedies for gambling losses and this decision will open “the floodgates to lawsuits by gamblers.” (Petition at 4.) The panel’s decision, however, merely affirms the South Carolina policy that illegal gambling should be deterred, particularly where the gambling activity violates the South Carolina Unfair Trade Practices Act.

CONCLUSION

The Panel decision properly applied the tenets of Johnson in affirming the circuit court’s rejection of the *in pari delicto* defense to Respondent’s claims under the South Carolina Unfair Trade Practices Act. As a result, Appellant’s Petition for Rehearing or Rehearing *En Banc* should be denied.

RESPECTFULLY SUBMITTED, this 14th day of June, 2013. .

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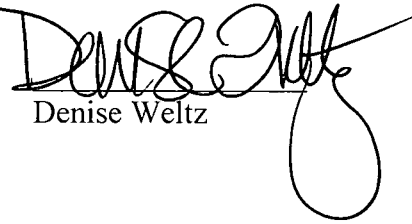
Appellants.

PROOF OF SERVICE

I Denise Weltz, an employee of the Strom Law Firm, LLC, certify that on this the 14th day of June, 2013, I have mailed a copy of Respondent's Return to Petition for Rehearing or Rehearing En Banc to the following counsel of record via U.S. Mail, with postage prepaid thereon and addressed as follows:

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