THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Bentley D. Price., Circuit Court Judge

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Appellate Case No. 2023-000783

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1 Dragon's Ascent Video Gaming Machine; SC Games of Skill, LLC. — Respondents,

v.

South Carolina Law Enforcement Division (SLED) — Appellant.

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# INITIAL REPLY BRIEF OF APPELLANT

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## STATEMENT OF FACTS

SLED Special Agent Ryan Wood conducted three (3) separate undercover surveillance operations regarding the one Dragon's Ascent device that was seized from LG's By the Creek and is the only device at issue on this appeal. (Trial Tr. p. 113)(R. p. ). During each of these operations, S/A Wood wagered and gambled on the Dragon's Ascent device. (Trial Tr. pp. 105, 120)(R. pp. ). To that end, SLED Special Agent Wood specifically testified that he "cycled through the raise your shot cost button", which allowed the player to select his wager between $.10, .20, .50, 1.00, or 2.00 per shot. (Trial Tr. p. 92)(R. p. ). Wood also testified that "it was obvious that was some type of wager button" and "the more you wagered the more you stood to win if you were successful destroying that particular dragon." (Trial Tr. p. 92, 94)(R. p. ). On at least one occasion, Wood received a cash payout from gambling on the device and witnessed at least one other individual receive a cash payout from the play of this device. (Trial Tr. pp. 105, 120)(R. pp. ). Further, the evidence in this matter conclusively established that a player can walk up to this Dragon's Ascent device, can insert $1.00 into the device, can shoot the "Rainbow Dragon", and can win up to a $1,783 cash payout. (Trial Tr. pp. 52, 92)(R. pp. ).

## ARGUMENTS

1. The Dragon's Ascent device at issue on which individuals wager, gamble, and receive cash payouts violates the spirit, the intent, and the black letter application of S.C. Code Ann. § 12-21-2710.

The South Carolina Supreme Court has also long acknowledged that,

> [i]n no field of reprehensible endeavor has the ingenuity of man been more exerted than in the invention of devices to comply with the letter but to do violence to the spirit and thwart the beneficent objects and purposes of the laws designed to suppress the vice of gambling. Be it said to the credit of the expounders of the law that such fruits of inventive genius have been allowed by the courts to accomplish no greater result than that of demonstrating the inaccuracy and insufficiency of some of the old definitions of gambling that were made before the advent of the era of greatly expanded, diversified and cunning mechanical inventions.

Harvie v. Heise, 150 S.C. 277, 148 S.E. 66, 69 (1929). This appeal ultimately comes down to whether the spirit, intent, and black letter application of S.C. Code Ann. § 12-21-2710 (§ 12-21-2710) prohibits a device on which a bar patron can insert $1.00, can make a wager (with the more committed to the play generally resulting in a higher available prize), can shoot one single dragon, and can walk away with a $1,783 cash payout. The answer to that question is a resounding and unequivocal YES. Simply put, § 12-21-2710, which is a statute designed to suppress the vice of gambling and prohibits all machines and devices that are or are capable of being "used for gambling" in South Carolina, clearly prohibits this Dragon's Ascent device. The evidence and testimony in this matter established that individuals wager, gamble, and receive cash payouts on this device. SLED Special Agent Wood testified unequivocally that he did exactly that during his undercover operations at LG's By the Creek. (Trial Tr. pp. 105, 120)(R. pp. ). Accordingly, this device is an unlawful device that was illegally used for gambling in South Carolina and the circuit court's contrary finding should be rejected.

In pertinent part, § 12-21-2710 provides that it "is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State … any machine or device licensed pursuant to Section 12-21-2720 and used for gambling…."[1] As far back as 1929 the South Carolina South Carolina Supreme Court has acknowledged that a "machine is a gambling device where its operation is such that, although the player in any event will receive something, he stands a chance to win something in addition." Harvie v. Heise, 150 S.C. 277, 148 S.E. 66, 68 (1929) (quoting 27 C. J. 989). Further, in analyzing whether the device at issue was "used for gambling" in violation of § 12-21-2710, this Court also cannot simply disregard the history and legislative intent behind this statute as sought by Respondents. As noted by the South Carolina Supreme Court, a "statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. And the history of the period in which the Act was passed may be considered." Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 815–16 (1942). Tellingly, the South Carolina Supreme Court directly quoted the original preamble of South Carolina's gambling prohibition law from 1802 and recounted a significant portion history of this statute when analyzing this statute in the Town of Mount Pleasant v. Chimento decision. *See* 401 S.C. 522, 529-30 737 S.E.2d 830 (2012)(analyzing 1802 S.C. Acts No. 1796; 1816 S.C. Acts No. 2096; and a number of historical cases and jurisprudence). Accordingly, contrary to Respondents' suggestion, it is proper and in fact logical for this Court to review and consider the history of § 12-21-2710 when analyzing its application to this case.

[1] Notably, this prohibition stands separate and apart from the specific prohibition on devices pertaining to games of chance in § 12-21-2710, the history of which distinction will be discussed more fully below.

It is also axiomatic that the cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). As further noted by the South Carolina Supreme Court

> It often happens that the true intention of the Legislature, though obvious, is not expressed by the language employed in a statute when that language is given its literal meaning. In such cases, the carrying out of the legislative intention, which is the prime and sole object of all rules of construction, can be accomplished only by departure from the literal interpretation of the language used. Hence, Courts are not always confined to the literal meaning of a statute; the real purpose and intent of the lawmakers will prevail over the literal import of the words…
>
> [i]t is a familiar canon of construction that a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. It is an old and well established rule that the words ought to be subservient to the intent and not the intent to the words.

Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 815-16 (1942).

Accordingly, gambling has been illegal in South Carolina for centuries. *See* 1802 S.C. Acts No. 1786. Slot machines have been illegal in South Carolina since around 1922. *See* Section 196, Vol. 2, Code of 1922. In 1932, the Legislature extended this prohibition to include "any vending or slot machine, punch boards, pull boards, or other devices pertaining to games of chance of whatever name or kind…." *See* Alexander v. Martin, 192 S.C. 176, 6 S.E.2d 20, 22-3 (1939) (analyzing Section 1301-A of the Code of 1932). In 1976, the Legislature added a prohibition for "video games with a free play feature." *See* S.C. Code § 52-15-10 (1976). Around that same time, the Legislature also enacted S.C. Code § 16-19-60, to prohibit "any machine which disburses money or property to the player." However, in 1986, the South Carolina Legislature amended S.C. Code § 16-19-60 to specifically remove the prohibition on machines dispensing property to the player. 1986

S.C. Act 540. This amendment to the South Carolina Appropriations Act ushered in the video poker era in South Carolina. In State v. Blackmon, the South Carolina Supreme Court noted that

> Section 16–19–60 plainly states that coin-operated nonpayout machines with free play features are exempt from the reach of Section 16–19–40 as long as the machines themselves do not disburse money to the player. Since the poker machines involved in this case fall within this specific statutory exemption, Blackmon cannot be indicted under Section 16–19–40. Although this result appears anomalous, as it allows activity which seems to be unlawful gambling to go unpunished, it is nonetheless clear that this outcome reflects the intent of the legislature.

304 S.C. 270, 274, 403 S.E.2d 660, 662 (1991). From 1986 through 1999 the pernicious practice of video poker wreaked havoc throughout South Carolina. However, in 1999, South Carolina law changed specifically to bring an end to video poker.

With the passage of 1999 S.C. Act 125, the South Carolina Legislature sought specifically to "extend the prohibition on slot machines and other machines or devices pertaining to games of chance [which had been illegal for over 50 years at that time] to video games with a free play feature or any other coin-operated machine or device used for gambling." Notably, this was the first time in South Carolina's history that the phrase "used for gambling" was included in § 12-21-2710. Further, the South Carolina Legislature specifically acknowledged that this these amendments were also enacted "for the purpose of prohibiting cash payouts for credits earned on video game machines on and after July 1, 2000…".) As recently acknowledged by the South Carolina Attorney General, ". . . the title or caption of an act may be properly considered to aid in the construction of a statute and to show the intent of the Legislature." *See* S.C. Atty. Gen. Op. dated August 11, 2023 (written to the Honorable G. Murrell Smith, Jr., Speaker of the House of Representatives.)

If the specific words of the Act and title were not clear enough on the intent of the Legislature, the South Carolina Supreme Court surely resolved any lingering doubt by acknowledging that 1999 S.C. Act 125 specifically prohibited "nonmachine cash payouts" and resulted in all machines on which individuals pay out cash for game play becoming "contraband subject to forfeiture and destruction regardless of their use or operability." Westside Quik Shop v. Stewart, 341 S.C. 297, 301-2, 534 S.E.2d 270, 272 (2000) *overruled on other grounds by* Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005).

Despite the clear intent of the South Carolina Legislature and the clear Supreme Court pronouncements regarding the impact of § 12-21-2710, the circuit court disregarded the Legislative history and intent and ruled that a machine on which SLED Special Agent Wood gambled and received a cash payout did not violate § 12-21-2710's prohibition on machines and devices that are used for gambling. (Trial Tr. pp. 105, 120)(R. pp. ). This is a manifestly absurd result that should not be repeated by this Court. *See* Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def., 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (courts "will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature."; McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964) ("A sensible construction, rather than one which leads to irrational results is always warranted.") Further, a "literal application of language which leads to absurd consequences should be avoided whenever a reasonable application can be given consistent with the legislative purpose." U.S, v. Rippetoe, 178 F.2d 735, 737 (4th Cir. 1950). South Carolina law is clear, machines on which individuals can gamble and receive cash payouts, like the Dragon's Ascent at issue in this action, are prohibited in South Carolina. *See* S.C. Code Ann. § 12-21-2710.

In addition, contrary to Respondents' assertion, SLED clearly preserved its arguments regarding the intent of the South Carolina Legislature's 1999 amendments to § 12-21-2710. Specifically, SLED directly quoted from the South Carolina Supreme Court opinion in Westside Quik Shop v. Stewart and the Supreme Court's analysis of the intent of 1999 amendments to § 12-21-2710 throughout this litigation. (Appellant's Initial Brief in Support of the Destruction of an Illegal Gambling Device p. 6)(R. p. ). Furthermore, the issue in question is the intent of the South Carolina Legislature behind the application of § 12-21-2710, which is of course properly aided by consulting "the title or caption of an act …to aid in the construction of a statute and to show the intent of the Legislature…." *See* S.C. Atty. Gen. Op. dated August 11, 2023 (written to the Honorable G. Murrell Smith, Jr., Speaker of the House of Representatives.) In addition, a "statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. And the history of the period in which the Act was passed may be considered." Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 815–16 (1942).

Ultimately, understanding the history of South Carolina's anti-gaming and anti-gambling prohibitions and the myriad of South Carolina jurisprudence regarding the same, it is simply inarguable that the South Carolina Legislature intended for a device on which individuals wager, gamble, and received cash payouts to be legal in South Carolina. Because the circuit court ruling disregards the intent of the Legislature, it should be reversed in its entirety.

2. Wagering and receiving cash payouts on a device is illegal gambling in South Carolina even if skill is determined to be the predominant factor in determining the outcome.

Contrary to the Respondents' assertions, the South Carolina Supreme Court decision in Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (2012) applies to this case. As an initial matter, of course the Supreme Court devoted the bulk of the Chimento opinion to analyzing S.C. Code Ann. § 16-19-40 – that was the statute Mr. Chimento and his codefendants were arrested and charged with violating. However, this is simply not determinative in this matter. Rather, the parallel between Chimento and this present case is unmistakable. In Chimento, "[t]he circuit court held that respondents were entitled to directed verdicts because it is not unlawful to gamble on a game of skill in a residence", which is essentially the same finding by the circuit court in this matter. Town of Mount Pleasant v. Chimento, 401 S.C. 522, 527, 737 S.E.2d 830, 832 (2012). However, the Supreme Court flatly rejected the argument that skillful conduct cannot constitute unlawful gambling specifically finding that "the statutory meaning of the work 'gambling' in South Carolina includes games in which skill outweighs chance." *Id*. It was error for the circuit court to disregard this pronouncement, and the circuit court in this case should be overturned just like the circuit court was in Chimento. *Id.*

It is also noteworthy that in the Chimento decision itself, the Supreme Court acknowledged that its finding that "the statutory meaning of the word 'gambling' in South Carolina includes games in which skill outweighs chance" extends beyond S.C. Code Ann. § 16-19-40. The very next line in the opinion reads:

> For example, S.C. Code Ann. § 32–1–10 (2007), found in an article captioned "Gambling Contracts," permits persons who have lost money or other thing(s) of value in an amount equal to at least $50 at cards, at a dice table, or "at any other game whatsoever," or by betting on those games, to

> recover their losses under certain circumstances. The plaintiffs in such a suit are almost uniformly referred to as "gamblers" regardless whether the enterprise was unlawful. *See* Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993). Gambling as defined in South Carolina includes betting money on the outcome of any "game" whatsoever, regardless of the amount of skill involved in the game. § 32–1–10.

Town of Mount Pleasant v. Chimento, 401 S.C. 522, 532–33, 737 S.E.2d 830, 837 (2012). This is a clear indication that the Supreme Court intended for the Chimento decision to apply beyond the specific confines of S.C. Code Ann. § 16-19-40. It is also notable that the Berkebile v. Outen decision cited therein involved a video poker lawsuit.

In addition and again contrary to Respondents assertions, the Supreme Court did in fact reference South Carolina's gaming machine laws in the Chimento decision itself – albeit the reference was to S.C. Code Ann. § 12-21-2712 rather than § 12-21-2710. However, this is ultimately of no consequence because S.C. Code Ann. § 12-21-2712 states

> Any machine, board, or other device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if satisfied that it is in violation of Section 12-21-2710 or any other law of this State, direct that it be immediately destroyed.

Specifically, the Court held that

> We hold that one "games" within the meaning of § 16–19–40 when money is wagered on Texas Hold'em, even though it is a game in which skill predominates. *See* Atchison v. Gee, 15 S.C.L. (4 McCord) 211 (1827) (betting on horse racing is gaming); State v. O'Neal, 210 S.C. 305, 42 S.E.2d 523 (1947) (poker is gaming); State v. White, 218 S.C. 130, 61 S.E.2d 754 (1950) (room where poker played for money is gambling room); *cf.* Allendale County Sheriff's Office v. Two Chess Challenge II, 361 S.C. 581, 606 S.E.2d 471 (2004) (video game in which player's skill could alter outcome not a "game of chance" within the meaning of that term in § 12–21–2712).

> Whether an activity is gaming/gambling is not dependent upon the relative roles of chance and skill, but whether there is money or something of value wagered on the game's outcome. The circuit court erred in holding that respondents were entitled to directed verdicts because they were not gaming within the meaning of § 16–19–40.

Town of Mount Pleasant v. Chimento, 401 S.C. 522, 533, 737 S.E.2d 830, 837–38 (2012). The Court's use of the intro signal "cf." when referencing the Allendale decision is also instructive. "Cf" does not connote a negative inference or contradiction like "Contra", "but see", or "but cf." Rather, "cf." is used when the analogous proposition indirectly supports the textual statement. In this instance, in finding conduct to be illegal gambling despite skill predominating, the Supreme Court noted that the Allendale decision indirectly supports the Court's ultimate finding, which was that "[t]he statutory meaning of the word 'gambling' in South Carolina includes games in which skill outweighs chance" and that conduct involving wagering is illegal in South Carolina regardless of the skill/chance ratio. Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (2012). Respondents' attempts to have this Court disregard the analysis and holding in Chimento should not stand. In South Carolina, the statutory meaning of the word "gambling" in South Carolina includes games in which skill outweighs chance and the circuit court's finding to the contrary should be reversed.

Even if the Court were to hold that Chimento is not binding precedent, which is not conceded, this Court should acknowledge as a matter of first impression that the phrase "any machine or device licensed pursuant to Section 12-21-2720 and used for gambling" in § 12-21-2710 does in fact prohibit games of devices in which skill outweighs chance.[2]

[2] Contrary to Respondents' assertion SLED does not now and has never conceded that Dragon's Ascent is a game of skill. Rather, SLED merely acknowledged the trial court's findings and SLED's decision to leave that fight for a subsequent seizure of a Dragon's

To that end, SLED would advocate that this Court apply the analysis from Chimento that "[w]hether an activity is gaming/gambling is not dependent upon the relative roles of chance and skill, but whether there is money or something of value wagered on the game's outcome" to § 12-21-2710 in this action. *See* Town of Mount Pleasant v. Chimento, 401 S.C. 522, 533, 737 S.E.2d 830 (2012).

In that regard, the trial court correctly held that the "evidence in the record clearly established that players select the amount of money to play on individual shots and that the money the player stands to win correlates to the amount wagered – *i.e.* the more you pay to play, the more you stand to win on the device." (Deaton Order p. 11)(R. p. ). The ability to increase the amount of the prize by increasing the amount played constitutes an illegal wager that renders an activity illegal gambling in South Carolina.

At the post-seizure hearing in this matter, SLED Special Agent Wood specifically testified that he "cycled through the raise your shot cost button", which allowed the player to select his wager between $.10, .20, .50, 1.00, or 2.00 per shot. (Trial Tr. p. 92)(R. p. ). Wood also testified that "it was obvious that was some type of wager button." *Id.* Wood further testified "the more you wagered the more you stood to win if you were successful destroying that particular dragon." (Trial Tr. p. 94)(R. p. ). Specifically, Wood noted "I noticed that if I was wagering ten cent and selected the small pink dragons going across the screen and was successful destroying it then I would get 60 cents. If I moved my bet to 20 cents I would -- for that same dragon I would get a $1.20." *Id*.

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Ascent device in line with South Carolina's machine-by-machine forfeiture process. *See* Allendale Cnty. Sheriff's Off. v. Two Chess Challenge II, 361 S.C. 581, 606 S.E.2d 471 (2004).

Ultimately, Special Agent Wood confirmed unequivocally that he "put money in" this Dragon's Ascent machine, that he "wagered different amounts", that "the more you wagered the more you stood to win if you were successful destroying that particular dragon", and that he "sometimes walked away with more money". *Id*. Moreover, Wood testified that he also witnessed other players winning money on the play of this device. (Trial Tr. p. 120)(R. p. ). As such, Special Agent Wood's testimony established that an individual can wager and, thus, can illegally gamble on this device rendering it a device that is "used for gambling" that is prohibited by the spirit, intent, and plain language of § 12-21-2710. Accordingly, the circuit court opinion to the contrary should be reversed.

## CONCLUSION

Respondents incorrectly assert that SLED's position in this appeal "fundamentally re-writes long-standing South Carolina law by eliminating any notion of chance as a required element of illegal gambling". (Initial Brief of Respondents p. 25). This is simply not true. SLED is merely advocating that this Court acknowledge the evolution of South Carolina gambling law over the years, which has resulted in the inexorable reality that there are scenarios where predominantly skillful conduct can still be illegal gambling in South Carolina. *See* Town of Mount Pleasant v. Chimento, 401 S.C. 522, 533, 737 S.E.2d 830 (2012). Given the procedural posture of this case, this action presents one of these times. In that regard, SLED seeks only that this Court to acknowledge that this device, which provides a player in South Carolina with the ability to insert money into a machine for the chance to win a cash prize, is a device that is "used for gambling" in violation of § 12-21-2710. Accordingly, this Court should reverse the circuit court's decision and hold that the Dragon's Ascent device at issue in this action on which individuals wager, gamble, and receive cash payouts is an illegal gambling device in violation of S.C. Code Ann. § 12-21-2710 that should be forfeited and destroyed.

Respectfully Submitted,

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October 23, 2023

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**PROOF OF SERVICE**

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I hereby certify that I served the **Initial Reply Brief of Appellant** on the Respondents by sending a copy of the same to all counsel of record using each counsel's primary email address listed in the Attorney Information System (AIS) as noted below:

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