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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Bentley D. Price., Circuit Court Judge

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.

FINAL BRIEF OF APPELLANT

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II. **Did the circuit court's order disregard the existing precedent set forth by the South Carolina Supreme Court in Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (2012), which provides that a conduct can still be illegal gambling even if skill is the predominant factor in determining the outcome?**

III. **Is the circuit court's order an improper advisory opinion that does not follow the binding Supreme Court precedent set forth in Allendale Cnty. Sheriff's Off. v. Two Chess Challenge II, 361 S.C. 581, 606 S.E.2d 471 (2004), which mandates a machine-by-machine forfeiture process in South Carolina and prohibits rulings on future devices?**

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VI. **Is the circuit court's appellate finding that the trial court's interpretation of § 12-21-2710 – a statute that applies to the possession and ownership of gaming machines – could result in the prohibition of local spelling bees, the Heritage Golf Tournament, and the Governor's Cup fishing tournament clear error?**

STATEMENT OF THE CASE

This action began with Appellant's seizure of one (1) Dragon's Ascent device on November 19, 2021. The seized device was taken to the Honorable Rad S. Deaton, a Berkeley County Magistrate, for examination in accordance with S.C. Code Ann. § 12-21-2712. After reviewing the device, Judge Deaton signed an Order of Destruction. However, Respondents timely challenged this order, and a post-seizure hearing on this one device was held on February 4, 2022. On August 11, 2022, Judge Deaton applied existing Supreme Court precedent and held that, although he believed that skill was the predominant factor in determining the outcome of the game, the seized device was nonetheless an illegal device on which individuals gambled, wagered, and received cash payouts in violation of South Carolina law. (Deaton Order)(R. pp. 3-15).

Respondents timely appealed Judge Deaton's decision to the circuit court. (Circuit Court Notice of Appeal)(R. pp. 35-36). Because Judge Deaton found that the machine was an illegal gambling device, Appellant did not appeal Judge Deaton's findings related to skill being the predominant factor in determining the outcome of the game.[1] The Honorable Bentley D. Price heard appellate arguments on the case on December 12, 2022. On February 27, 2023, despite acknowledging cash payouts on the device, Judge Price reversed the trial court's finding that the device was an illegal gambling device. (Price Order)(R. pp. 16-31). Appellant filed a timely Rule 59 motion to alter, amend, and reconsider, which Judge Price denied. (Motion to Reconsider)(Price Order Denying Reconsideration)(R. pp. 32-34). This appeal follows.

[1] This decision would of course be subject to future challenge in accordance with South Carolina's machine-by-machine forfeiture process that will be discussed more fully below.

STATEMENT OF THE FACTS

SLED received a complaint that there was a possible illegal gambling device in LG's By the Creek, which is a restaurant located in Suite 105 of 1005 Tanner Ford Blvd. in Hanahan, SC 29410 (Trial Tr. p. 89)(R. p. 215). SLED Special Agent Ryan Wood subsequently conducted three (3) separate undercover surveillance operations at this location. (Trial Tr. p. 113)(R. p. 239). During these operations, Wood wagered and gambled on the Dragon's Ascent device, received a cash payout from the play of 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. 231, 246).

Dragon's Ascent is a gaming device initiated by the insertion of U.S. Currency into a bill acceptor on the device. (Price Order p. 3)(R. p. 18). The amount inserted by the player establishes the credits that can be used by the player. *Id*. The object of the game is to use a joystick to "point and shoot" in an effort to capture dragons of varying sizes, colors, and point values that move across the play screen for the chance to win money. *Id*. The stated "Goal" of the game is to, "Shoot dragons to win credits! Credits are redeemable for cash." (Player's Guide)(R. p. 411).

The device has a "Raise Shot Cost" button that allows the player to select the value of each shot – between $.10, .20, .50, 1.00, or 2.00 per shot. (Trial Tr. p. 92)(R. p. 218). The more the player commits to a shot, the more the player stands to win with that shot. *Id*. The device has a "Ticket Button" that the player uses to print a redeemable ticket which can be exchanged for cash." (Price Order p. 3)(R. p. 18). The prize for shooting one individual dragon - the Rainbow Dragon – was $614, $1,555.41, and $1,783 at different times prior to and during the post-seizure hearing. (Trial Tr. pp. 52, 96, and 115)(R. pp.

178, 222, 241). The "Rainbow Dragon" feature is a "progressive jackpot that exhibits a monetary figure on the dragon, enticing a player to shoot that dragon to win that amount." (Deaton Order p. 8)(R. p. 10).

The trial court also noted that "a player may successfully play Dragon's Ascent using keen hand/eye coordination, memorization, and recognition of learned patterns, timing, accuracy in aiming, reflexes and reaction time, manual dexterity, mental aptitude, concentration, and deductive analysis." (Deaton Order p. 8)(R. p. 10). However, the trial court found that Dragon's Ascent is a game played predominantly in establishments that serve alcohol. While it is possible for anyone over the age of eighteen (18) to play Dragon's Ascent, it is not probable that most Dragon's Ascent players will exercise the dedication, patience, and deductive analysis in order to play the game successfully" *Id*. Ultimately, the trial court noted that "while Dragon's Ascent is a game that requires a high degree of skill to master its complexities, the Court believes that it is a game designed to make money for the 'house' not the player, in the context of regular game play and brings with it the dire concerns referenced by Chief Justice Toal in her concurring opinion in Chimento". *Id*.

The evidence in this matter conclusively established that a player could insert $1.00 into the Dragon's Ascent device, could shoot the Rainbow Dragon, and could win a $1,783 cash payout. (Trial Tr. pp. 52, 92)(R. pp. 178, 218).

STANDARD OF REVIEW

"Determining the proper interpretation of a statute is a question of law" subject to *de novo* review. Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

"Upon hearing the appeal the [circuit court sitting as an] appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all of the parties and for errors of law or fact." S.C. Code § 18-7-170.

"[T]he Court of Appeals will presume that an affirmance by a Circuit Court of a magistrate's judgment was made upon the merits where the testimony is sufficient to sustain the judgment of the magistrate and there are no facts that show the affirmance was influenced by an error of law." Burns v. Wannamaker, 281 S.C. 352, 357, 315 S.E.2d 179, 182 (Ct.App.1984). However, the "Court of Appeals still retains de novo review of whether the facts show the circuit court's affirmance was controlled or affected by errors of law." Bowers v. Thomas, 373 S.C. 240, 245, 644 S.E.2d 751, 753 (Ct. App. 2007).

"At a post-seizure hearing, the burden is on the owner of the *res* [the seized device] to show why the seized property should not be forfeited and destroyed." Union County Sheriff's Office v. Henderson, 395 S.C. 516, 719 S.E.2d 665, 666 (2011).

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).

ARGUMENTS

1. The circuit court's interpretation of S.C. Code Ann. § 12-21-2710, which allows cash payouts on a gaming device, does not accomplish the clear and unambiguous intent of the South Carolina Legislature to prohibit cash payouts and gambling on gaming devices.

The circuit court erroneously disregarded the clear and unambiguous intent of the South Carolina Legislature by specifically allowing cash payouts for the play of the device in question. The intent of the South Carolina Legislature in passing S.C. Code Ann. § 12-21-2710 (§ 12-21-2710), particularly the amendments enacted in 1999, was to specifically **prohibit** cash payouts on devices in South Carolina. These amendments also famously brought an end to video poker and the havoc it had wreaked on the State of South Carolina for years. The circuit court's order disregards the Legislative intent and seemingly ignores the dark history of cash payouts on devices and the damage that resulted therefrom in South Carolina. Accordingly, the circuit court's decision to allow cash payouts on devices, which may well usher in a new era of gambling on gaming devices in South Carolina, must be reversed. *See* Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003) ("The cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent."); Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute."); Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675 (2007)("[I]t is beyond this Court's power to effect a change in the statutes enacted by the Legislature.").

In 1999, the South Carolina Legislature passed 1999 S.C. Act 125 to specifically put an end to cash payouts on gaming devices in South Carolina. The introductory language of this Act provides a clear recitation of the explicit intent of the South Carolina Legislature in this regard. This bill was,

> AN ACT TO AMEND SECTIONS 12-21-2710, AS AMENDED, 12-21-2712, 12-21-2720, AS AMENDED, AND 12-21-2726, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO COIN-OPERATED MACHINES OR DEVICES, SO **AS TO EXTEND THE PROHIBITION ON SLOT MACHINES AND OTHER MACHINES OR DEVICES PERTAINING TO GAMES OF CHANCE TO VIDEO GAMES WITH A FREE PLAY FEATURE OR ANY OTHER COIN-OPERATED MACHINE OR DEVICE USED FOR GAMBLING**, TO EXTEND THE SEIZURE AND DESTRUCTION PROVISIONS APPLICABLE TO GAMES OF CHANCE TO THESE EXPANDED PROHIBITIONS,…
>
> AND TO REPEAL SECTIONS 12-21-2703, 16-19-60, AND ARTICLE 20, CHAPTER 21 OF TITLE 12 RELATING RESPECTIVELY TO THE RETAIL LICENSE REQUIREMENT FOR A LOCATION WITH VIDEO GAMES WITH A FREE PLAY FEATURE, THE EXEMPTION OF VIDEO GAMES WITH A FREE PLAY FEATURE FROM THE GAMBLING OFFENSES, AND THE VIDEO GAMES MACHINES ACT, **ALL OF THE ABOVE ENACTED FOR THE PURPOSE OF PROHIBITING CASH PAYOUTS FOR CREDITS EARNED ON VIDEO GAME MACHINES ON AND AFTER JULY 1, 2000**;….(emphasis added).

Should this clear language not be enough evidence the intent of the Legislature, "PART I" of this bill is also specifically entitled **"Prohibition on Payouts"**. 1999 S.C. Act 125 (emphasis added).

In Westside Quik Shop v. Stewart, the South Carolina Supreme Court acknowledged the purpose of the 1999 amendments to § 12-21-2710 indicating:

> [f]inally in an extra session called by the Governor in June 1999 S.C. Act No. 125 providing for a November referendum to be held statewide to decide the fate of video gaming. Voters would be asked whether cash payouts for video gaming machines should continue to be allowed after June 30, 2000. If voters answered "no," Part 1 of the Act would become effective

> July 1, 2000. **This part of the Act repeals § 16-19-60, which allows nonmachine cash payouts, and amends S.C. Code Ann. § 12-21-2710 (2000) to remove the exception for video gaming machines, thereby rendering the possession of these machines illegal**…. Further, under S.C. Code Ann. § 12-21-2712 (2000), these machines are then subject to forfeiture and destruction by the State.... Before the referendum was held, an action was brought challenging its constitutionality. After taking the case in our original jurisdiction in October 1999, this Court struck down the referendum, but severed it from the remaining parts of the Act. Specifically, we found Part I, which bans the possession or operation of these machines, to be a free standing legislative enactment and therefore valid. Joytime Distrib. and Amusement Co. v. State, 338 S.C. 364, 528 S.E.2d 647 (1999). **Accordingly, on July 1, [2000] under § 12-21-2710 and -2712, these machines will become contraband subject to forfeiture and destruction regardless of their use or operability.**

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).(emphasis added). The Supreme Court also specified that

> The plain language of the statute [§ 12-21-2710] makes clear the legislature's intent to outlaw mere possession of such machines. The statute makes it unlawful "for any person to keep on his premises *or* operate" certain gambling machines. S.C. Code Ann. § 12–21–2710 (Supp.1998) (emphasis added); *see also* State v. Appley, 207 S.C. 284, 288, 35 S.E.2d 835, 836 (1945) (possession of a machine is a violation in itself, separate from the crime of operation). **The circuit court correctly ruled possession of these machines is illegal, regardless of their intended use or operation.**

State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 187-89, 525 S.E.2d 872, 878-79 (2000)(emphasis added). Accordingly, it is without question that the Legislature amended § 12-21-2710 in 1999 for the express purpose of prohibiting cash payouts.

However, despite this clear and unambiguous Legislative intent directly to the contrary, the circuit court's order specifically allows for cash payouts for the play of this gaming device. To that end, the circuit court's order openly acknowledges that "the game also features a "Ticket Button" that the player uses to print a redeemable receipt which the

player can exchange for cash." (Price Order p. 4)(R. p. 19). In fact, the evidence in this matter indicated a player could win more than $1,783 for the play of this machine. (Trial Tr. p. 52)(R. p. 178). Cash payouts did not matter to the circuit court. Rather, the circuit court interpreted the statute enacted "for the purpose of prohibiting cash payouts for credits earned on video game machines…" to allow cash payouts for credits earned on a video game machine. This is not only clear and reversible error, but it also absurdly results in the tacit allowance of gambling on a gaming device in direct contravention of South Carolina's longstanding prohibitions on such. *See* 1999 S.C. Act 125 *see also* 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."); Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (courts do "not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly").

The South Carolina Supreme Court has long acknowledged that it "consistently has deferred to the Legislature's determination of which gaming devices must be sacrificed for the public welfare. Furthermore, forfeiture serves a deterrent purpose both by preventing the further illicit use of the property and by imposing an economic penalty, thereby rendering the illegal behavior unprofitable." Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 303-4, 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) *see also* S.C. Const. Art. I, § 8 (mandating separation of powers). This rationale acknowledges the exclusive policymaking role of the South Carolina Legislature. *See* Wilson ex rel. State v. City of Columbia, 434 S.C. 206,

213, 863 S.E.2d 456, 460 (2021) ("Where, as here, the General Assembly establishes policy via legislation, it is our solemn duty to uphold that law absent a clear constitutional infirmity.")

In South Carolina, S.C. Code Ann. § 12-21-2710 is the South Carolina Legislature's determination of the types of machines and devices that are prohibited. It states in pertinent part:

> 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 vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine **or device licensed pursuant to Section 12-21-2720 and used for gambling** or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance….

The plain language of this statute prohibits all "device[s] licensed pursuant to Section 12-21-2720 and used for gambling…." Accordingly, the Legislature has established and long maintained a clear and unambiguous policy determination that gambling on gaming machines is illegal in South Carolina. *See* S.C. Code Ann. § 12-21-2710. The circuit court decision erroneously disregards this longstanding and clear Legislative policy and inexplicably opens to the door to conduct that South Carolina law was specifically designed to prohibit. Accordingly, this order should be reversed in its entirety. *See* Wilson ex rel. State v. City of Columbia, 434 S.C. 206, 213, 863 S.E.2d 456, 460 (2021).

It is also noteworthy that, while § 12-21-2710 has been amended since 1999, the Legislative policy decision to prohibit cash payouts on gaming devices has not changed. In May of 2022, the Legislature amended § 12-21-2710 to allow federally licensed South Carolina gaming device manufacturers to produce and sell items to out-of-state jurisdictions. *See* 2022 Act No. 190. However, this amendment did not change the clear prohibition on machines or devices used for gambling nor did it authorize cash payouts on machines in South Carolina. Moreover, there have been specific attempts to legislatively legalize gambling of "games of skill" in South Carolina. In fact, House Minority Leader Todd Rutherford filed former House Bill 4521 on November 11, 2021, which would have done exactly that. However, this effort was rejected by the Legislature, which only further signifies the tacit Legislative intent to prohibit cash payouts – even on games of skill.

The South Carolina Legislature has established and long maintained a clear and unambiguous policy determination that cash payouts and gambling on gaming machines are prohibited in South Carolina. *See* S.C. Code Ann. § 12-21-2710; 1999 S.C. Act 125. The circuit court's interpretation of § 12-21-2710 that inexplicably allows cash payouts for the play of this Dragon's Ascent gaming device is clear reversible error. In addition, the circuit court's decision not only leads to the absurd result that a statute, enacted for the purpose of prohibiting cash payouts, authorizes them; but the circuit court's ruling leads to a dangerous and very real concern that there will be a reemergence of the havoc wreaked on South Carolina by video gambling prior to 1999. Therefore, the circuit court's decision must be reversed and the trial court's finding that this device is an illegal gambling device that must be destroyed should be restored.

2. The circuit court's order disregards the existing precedent set forth by the South Carolina Supreme Court in Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (2012), which provides that conduct can still be illegal gambling even if skill is the predominant factor in determining the outcome.

The circuit court also committed reversible error in disregarding the precedent set by the South Carolina Supreme Court precedent in Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (2012). In *Chimento*, the South Carolina Supreme Court conclusively determined that South Carolina's gambling prohibitions can still apply to all games where skill predominates over chance in South Carolina.[2] Specifically, the Supreme Court held that "[t]he statutory meaning of the word 'gambling' in South Carolina includes games in which skill outweighs chance." *Id.* at 532. While the conduct at issue in *Chimento* was Texas Hold'em poker and the statute being challenged in that case was S.C. Code Ann. § 16-19-40 (South Carolina's "Unlawful games and betting statute), the Supreme Court did ***not*** limit the *Chimento* decision to § 16-19-40. Rather, the Supreme Court was clear and unequivocal in its use of the phrase "the statutory meaning of the word gambling ***in South Carolina***…". *Id.* (emphasis added). Had the Supreme Court intended to limit the *Chimento* decision to S.C. Code Ann. § 16-19-40, as the circuit court ruled, the Court most assuredly would have explicitly said so. The Court did not. Rather, the Court ruled that the word "gambling" that exists in all South Carolina statutes, including § 12-21-2710, "includes games in which skill outweighs chance." *Id*. The circuit court erred in failing to follow this binding Supreme Court precedent. *See* Daniels v. City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993)(decisions of the Supreme Court bind as precedent).

[2] Appellant acknowledges again that it did not appeal the trial court's finding that Dragon's Ascent is predominantly a game of skill choosing to leave that fight for a subsequent seizure pursuant to 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).

In accordance with *Chimento* and since 2012 in South Carolina, "[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." *Id*. at 533. This is the test that was properly employed and analyzed by the trial court. (Trial Court Order pp. 10-12)(R. pp. 12-14). To that end, 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. 13). It is undisputed that this device has a "Raise your cost" button that directly facilitates a player's ability to increase the amount committed per play, which correspondingly increases the size of the prize available per play. *Id*. 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. 218). Wood also testified that "it was obvious that was some type of wager button." *Id.* Wood further testified that he was able to continuously wager on the Dragon's Ascent device and that "the more you wagered the more you stood to win if you were successful destroying that particular dragon." (Trial Tr. p. 94)(R. p. 220). 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*.

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. 246). As such, Special Agent Wood's testimony established that an individual can wager and, thus, can illegal gamble on this device rendering it an illegal gambling device prohibited by § 12-21-2710. *See* Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (2012). Accordingly, the circuit court's decision must be reversed.

The circuit court also improperly relied on the *Speedmaster* case rather than applying the subsequent precedent that was established in the *Chimento* case. This was reversible error. Even the South Carolina Court of Appeals in *Speedmaster* acknowledged the existence of the *Chimento* case and the possibility that the Supreme Court may clarify South Carolina law on "games of skill" noting "[w]e are aware of a case currently under consideration by the South Carolina Supreme Court, *Town of Mt. Pleasant v. Chimento* (heard October 19, 2010), which may address this issue." *See* S.C. L. Enf't Div. v. 1-Speedmaster S/N 00218, 397 S.C. 94, 98, *fn 1*, 723 S.E.2d 809, 811 (Ct. App. 2011). As predicted by the Court of Appeals, the Supreme Court did in fact clarify gambling law in South Carolina. Again, in the context of whether "skillful" conduct can still be gambling, the Supreme Court held that courts must evaluate "whether there is money or something of value wagered on the game's outcome." Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830, 838 (2012).

The trial court's decision was not a departure from a "multiple-decades-old definition" of gambling as articulated by the circuit court. Rather, this was the Supreme Court expanding the clear anti-gambling policy set by the South Carolina Legislature and ruling accordingly. Simply put, the gambling analysis on gaming devices in South Carolina still begins with the analysis of the historical elements of gambling - chance, prize and consideration. *See* Ward v. West Oil Co., 387 S.C. 268, 692 S.E.2d 516 (2010) *see also* Harvie v. Heise, 150 S.C. 277, 148 S.E. 66, 68 (1929) (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."). In that regard, should a device be determined to be predominantly a game of chance on which a player pays consideration to win a prize, the device is illegal. *Id*. However, after *Chimento*, even if a device is determined to be predominantly a game of skill, there is an additional analysis to determine whether the conduct is still illegal gambling. Specifically, courts must also determine "whether there is money or something of value wagered on the game's outcome." Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830, 838 (2012). Former Chief Justice Toal articulated the reasoning behind the need for adding this additional consideration because allowing wagering and cash payouts for "games of skill"

> would also open the door wide to *all* heretofore illegal gaming practices in this state, including video poker. *See* S.C.Code Ann. § 16–19–40(g) (proscribing the playing of "any machine or device ... used for gambling purposes"). Because of this very real consequence, I am concerned that striking this critical language from the statute would beget, as elucidated by the General Assembly in 1816 when amending section 16–191–40, the "impoverishment of many people, corruption of the morals and manners of youth, ... the tendency which is vice, misery and crime, as examples in this state have abundantly proven." These dire concerns resonate as much today as they did nearly 200 years ago. I do not need to remind any person of the havoc wreaked upon this State as a result of the "pernicious" practice of video poker. Although there are other sound provisions outlawing video

> poker, *see* S.C.Code Ann. §§ 1221–2710, 2712 (2000), I am loathe to strike the critical language from the general ban on gaming in the event that it guts these provisions, and consequently, South Carolina's longstanding prohibition against gambling.

Town of Mount Pleasant v. Chimento, 401 S.C. 522, 537–38, 737 S.E.2d 830, 840 (2012).

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).

The circuit court's interpretation of § 12-21-2710 to allow a "cunning mechanical invention" to facilitate cash payouts is contrary to the specific intent of the South Carolina Legislature and, without reversal, opens the door to the dire concerns of the havoc wreaked upon this State as a result of the "pernicious" practice of video poker. The Supreme Court in *Chimento* sought to avoid this outcome. The trial court's decision avoids this outcome. Unfortunately, the circuit court disregarded former Chief Justice Toal's warnings from *Chimento* and issued a decision that facilitates this dire outcome. This decision, which does not follow the binding Supreme Court precedent must be reversed. *See* Daniels v. City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993); (recognizing decisions of the Supreme Court bind as precedent); S.C. Const. Art. V, § 9. The trial court properly applied the *Chimento* precedent and the trial court's finding that this Dragon's Ascent device is an illegal gambling device on which individual's wager, gamble, and receive cash payouts should be reinstated.

3. The circuit court's order is an improper advisory opinion that does not follow binding Supreme Court precedent that is set forth in Allendale Cnty. Sheriff's Off. v. Two Chess Challenge II, 361 S.C. 581, 606 S.E.2d 471 (2004) mandating a machine-by-machine forfeiture process in South Carolina.

The circuit court's decision also disregards binding South Carolina jurisprudence and attempts to adjudicate the legality of all Dragon's Ascent machines – even ones not properly before the circuit court in this post-seizure hearing appeal. Put simply, this action involved one (1) Dragon's Ascent device that was seized by SLED from LG's By the Creek for which the procedures of S.C. Code Ann. § 12-21-2712 were followed. The circuit court's broad finding that "Dragon's Ascent is a game predominantly based on skill" is clearly intended to improperly adjudicate future Dragon's Ascent devices, including ones that were not capable of being lawfully ruled upon in this action. This finding is directly contrary to binding South Carolina jurisprudence and South Carolina's longstanding machine-by-machine forfeiture process. Specifically, in Allendale Cty. Sheriff's Off. v. Two Chess Challenge II case, the South Carolina Supreme Court found

> In the present case, the magistrate ruled on the legality of the two machines before the court and "all those [machines] operating in an identical manner." This broad ruling exceeded the scope of the magistrate's authority and is contrary to the machine-by-machine forfeiture process outlined in the statute and carried out in other cases. Therefore, we find that the magistrate court lacked jurisdiction to determine the legality of machines not before court.

361 S.C. 581, 586–87, 606 S.E.2d 471, 474 (2004). The Court also noted that

> As to the two machines seized, examined, and deemed legal, there is nothing preventing the Sheriff's Office or other law enforcement officials from seizing the machines once again for the magistrate's examination. Because video machines may be manipulated so as to change their nature from lawful to unlawful, law enforcement may, based on probable cause, seize the machines in question once again. In other words, the effect of the magistrate's order is that it deems the machines lawful *at the time* they were seized and examined.

Allendale Cnty. Sheriff's Off. v. Two Chess Challenge II, 361 S.C. 581, 587, 606 S.E.2d 471, 474 (2004).

The circuit court's decision is not properly limited to the one (1) Dragon's Ascent machine at issue in this action, nor did it acknowledge that the machine can only be adjudicated as it existed at the specific point in time that it was seized. Rather, the circuit court attempts to improperly foreclose future seizures and to improperly adjudicate the legality of future devices. This is directly contrary to binding precedent in South Carolina and must be reversed. *Id*. Courts in South Carolina have long rejected attempts to foreclose law enforcement seizures of gaming machines and the circuit court committed reversible error in failing to do so. *See generally* Harvie v. Heise, 150 S.C. 277, 148 S.E. 66 (1929) (denial of a request to enjoin actions regarding prosecutions for possession of slot machines).

Similarly, to the extent the circuit court's decision attempts to adjudicate future devices without a pending case or controversy, it is an improper advisory opinion that must be reversed. The South Carolina Supreme Court has long held that courts have no jurisdiction to "enter the field of advisory opinions." Power v. McNair, 255 S.C. 150, 155, 177 S.E.2d 551, 553 (1970). Further, it "is elementary that the courts of this State have no jurisdiction to issue advisory opinions." Booth v. Grissom, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975). Therefore, the circuit court's attempt to improperly exercise non-existent jurisdiction to rule on all Dragon's Ascent machines and issue an improper advisory opinion must be reversed in compliance with South Carolina's longstanding machine-by-machine forfeiture precedent. Allendale Cnty. Sheriff's Off. v. Two Chess Challenge II, 361 S.C. 581, 587, 606 S.E.2d 471, 474 (2004).

4. The circuit court order does not properly apply the gambling capability analysis required by South Carolina law.

In furtherance of the South Carolina Legislature's longstanding prohibition on gambling devices in South Carolina, the South Carolina Supreme Court has long interpreted § 12-21-2710 to prohibit even the mere possession of devices on which individuals **can** gamble. Specifically, as far back as 2000, the Supreme Court noted that

> The plain language of the statute [S.C. Code Ann. § 12-21-2710] makes clear the legislature's intent to outlaw mere possession of such machines. The statute makes it unlawful "for any person to keep on his premises *or* operate" certain gambling machines. S.C. Code Ann. § 12–21–2710 (Supp.1998) (emphasis added); *see also* State v. Appley, 207 S.C. 284, 288, 35 S.E.2d 835, 836 (1945) (possession of a machine is a violation in itself, separate from the crime of operation). The circuit court correctly ruled possession of these machines is illegal, regardless of their intended use or operation.

State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 187-89, 525 S.E.2d 872, 878-79 (2000) (emphasis added). The Supreme Court has also long held that

> an allegedly illegal video gaming machine is deemed an unlawful gambling device at the moment of seizure, *i.e.,* the machine is contraband *per se* because it is illegal to possess and not susceptible of ownership. Moreover, this conclusion is appropriate in light of South Carolina's long-established statutory prohibitions on the ownership or use of specified gambling devices, including video gambling devices developed in recent years. *See Johnson [v. Collins Entertainment Co.],* 88 F.Supp.2d [499]…502 n. 1 [D.S.C. 1999)] ("[l]egislation designed to control 'the mischiefs of gambling' was enacted by the South Carolina colonial legislature in 1712").

Mims Amusement Co. v. S. Carolina Law Enforcement Div., 366 S.C. 141, 154, 621 S.E.2d 344 (2005). The evidence at the post-seizure hearing demonstrated not only the capability of gambling; but actual wagering, gambling, and cash payouts on the seized Dragon's Ascent device. Specifically, SLED Agent Wood testified that he personally wagered and gambled on this device during each of his three undercover operations at the location in question. He testified that he "put money in" this Dragon's Ascent machine,

that he "wagered different amounts" during his play, 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". (Trial Tr. p. 94)(R. p. 220). Further, S/A Wood specifically acknowledged:

> This -- this game is pretty simple to me. I could put in whatever amount of money I want to put in and I have the chance to win more money than that. That's gambling to me. If I can put in a dollar and I'm able to win $20 that's gambling. I'm also able to lose that. So you're able to lose or you might win. You're gambling your money and that is -- to me that's the point of this game. If there was no chance of winning money at this game I don't see any entertainment value for bar patrons. I see there's games all over bars that don't offer payouts and they're not getting paid. When I go in a bar and a game is getting played like this and they're winning money but they're playing it because they're – it's a gambling.

(Trial Tr. p. 121)(R. p. 247).

The evidence in this matter also established that a player could win up to $1,783.00 for the play of this machine. Special Agent Wood testified that the amount of the "Rainbow Dragon"[3] during his first undercover operation at LG's By the Creek was "$614." (Trial Tr. p. 96)(R. p. 222). During his second undercover operation, Wood acknowledged that the "Rainbow Dragon" was worth in the "$700 range". (Trial Tr. p. 110)(R. p. 236). During his final undercover operation, the amount available to win for the "Rainbow Dragon" was "$1,555.41". (Trial Tr. p. 115)(R. p. 241). In court, the value of the "Rainbow Dragon" was "1,783". (Trial Tr. p. 52)(R. p. 178). As such, the evidence in this case proved that the device facilitated illegal cash payouts. Therefore, the device is illegal in South Carolina – regardless of other intended, capable, or other possible uses, and the circuit court's contrary decision must be reversed.

[3] This is the only dragon on the entire game that displays its value and operates like a progressive jackpot to entice players. (Deaton Order p. 8)(R. p. 10).

5. The circuit court's order improperly renders the phrase "device licensed pursuant to Section 12-21-2720 and used for gambling" in § 12-21-2710 meaningless and redundant to the phrase "other device pertaining to games of chance of whatever name or kind" in § 12-21-2710.

In interpreting statutes in South Carolina, "we must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'" Senate by & through Leatherman v. McMaster, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018). South Carolina Code § 12-21-2710 separately prohibits many different types of machines and devices. When broken apart to highlight the different categories of illegal machines for clarity, this statute provides,

> 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 vending or slot machine, or
>
> any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or
>
> other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or
>
> any machine or **device licensed pursuant to Section 12-21-2720 and used for gambling** or
>
> any punch board, pull board, **or**
>
> **other device pertaining to games of chance of whatever name or kind**, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return

> in value for each coin deposited and in which there is no element of chance…. (emphasis added).

The plain language of this statute evidences a clear Legislative policy decision to separately prohibit devices that are "used for gambling" and devices "pertaining to games of chance of whatever name or kind". The trial court improperly joined these two provisions finding that the determination of whether skill or chance predominates is the end of the inquiry into the legality of an alleged gambling device in South Carolina. This decision not only disregards the binding precedent of *Chimento*, as discussed more fully above, but it also renders these separate phrases in § 12-21-2710 redundant and superfluous. This is clear and reversible error that should be reversed.

As discussed above, in a post-*Chimento* § 12-21-2710 analysis, court should inquire into whether a "device pertains to games of chance" or whether a device "is constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance." South Carolina Code § 12-21-2710. If a machine fails this test, it is subject to forfeiture and destruction. *Id*. If, however, skill predominates over chance on the device, the device does not "pertain to games of chance" and the analysis shifts to whether or not the device is "used for gambling". In *Chimento*, the South Carolina Supreme Court specifically clarified the "statutory definition of the word gambling in South Carolina includes games in which skill outweighs chance" and the analysis becomes "whether there is money or something of value wagered on the game's outcome." Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830, 838 (2012). The evidence in this case clearly establishes that there were wagers on this device and that the more you pay the more you stand to win. (Trial Transcript. pp. 92, 94)(R. pp. 218, 220).

The circuit court's decision to combine the analysis of the phrase "device licensed pursuant to Section 12-21-2720 and used for gambling" in § 12-21-2710 with the phrase "other device pertaining to games of chance of whatever name or kind" in § 12-21-2710 renders both surplusage and superfluous and negates the Legislature's intent to prohibit both devices pertaining to games of chance and devices that are used for gambling. Therefore, this decision must be reversed. *See* Senate by & through Leatherman v. McMaster, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018) *see also* Wilson ex rel. State v. City of Columbia, 434 S.C. 206, 213, 863 S.E.2d 456, 460 (2021) ("Where, as here, the General Assembly establishes policy via legislation, it is our solemn duty to uphold that law absent a clear constitutional infirmity."). Further, the trial court's ruling that this Dragon's Ascent is an illegal device subject to forfeiture and destruction should be restored.

6. The circuit court's finding that the trial court's interpretation of § 12-21-2710 – a statute that applies to the possession and ownership of gaming machines – could somehow result in the prohibition of local spelling bees, the Heritage Golf Tournament, and the Governor's Cup fishing tournament is clear error.

The trial court found that "the evidence in the record clearly establishes that players select the amount of money to play on individual shots and the amount of money the player stands to win directly correlates to the amount wagered – *i.e.*, the more you pay to play, the more you stand to win on this device." (Deaton Order p. 11)(R. p. 13). Accordingly, the trial court found that "the credible evidence before the Court supports the conclusion that money or something of value is wagered on the outcome of each Dragon's Ascent 'play' and players do so with the expectation of a larger regard for further play." (Deaton Order pp. 11-12)(R. pp. 13-14). And, in "using the Chimento Court's reasoning, this Court finds that although Dragon's Ascent is a game in which skill predominates, a person 'gambles' when money is wagered in so playing. To hold otherwise would effectively legalize wagering and payouts for all games of skill, including golf, basketball, and the like." (Deaton Order p. 12)(R. p. 14). Contrary to the circuit court's finding, the trial court did not hold, find, or even suggest that the payment of an entry fee to compete in spelling bees, professional golf tournaments, NASCAR races, fishing tournaments, and country club memberships was illegal in South Carolina. (Price Order p. 14)(R. p. 29). Rather, the trial court, like the Supreme Court in *Chimento*, acknowledged that "wagering" on a device or on the outcome of a contest – *i.e.*, the act of paying more to increase the size of the available prize illegal gambling. Simply put, the trial court did not rule that an entry fee into a local golf or basketball tournament was illegal. It is not. However, if there is a contest, whether it is golf or basketball, where players can choose to pay differing amounts of money to increase the size of the available prize, or if individual golfers make wagers

amongst themselves on the outcome of the contest – this is conduct that would likely be considered illegal gambling in South Carolina. However, the discussion of other activities is in fact dicta, and is certainly not determinative in this action. Rather, as the 4th Circuit Court of Appeals has noted,

> South Carolina has taken a measured approach to enforcement for the eighty-one years § [12-21-]2710 and its predecessor statutes have been in effect. There is no indication that SLED officers might burst into a family's living room and yank a Monopoly board from the hands of a shocked child. Appellants could not refer the Court to a single instance demonstrating that South Carolina has enforced these statutes in this kind of draconian fashion.

Martin v. Lloyd, 700 F.3d 132, 137 (4th Cir. 2012) *see also* Darlington Theatres v. Coker, 190 S.C. 282, 2 S.E.2d 782, 787 (1939) (courts should "not to inquire into the theoretical possibilities of the scheme, but to examine it in actual practical operation.").

Simply put, the legality of other conduct is simply not relevant to the analysis, and the only relevant question in this case was the legality of the Dragon's Ascent device on which players can pay money to increase the size of the cash prizes and can receive cash prizes. To that end, the payment of an entry fee to participate in a professional sports competition stands in stark contrast to a player inserting money into a gaming machine on which a player can use the "Raise Your Shot" button to select between $.10, .20, .50, 1.00, or 2.00 per shot per play and have that selection directly correlate to the amount the player can win in cash prizes. A distinction made clear by the trial court. However, any discussion that does not in any way involve a machine or any device would not even fall under the purview of § 12-21-2710 in any conceivable way and should not bear on the outcome of this case. To the extent the circuit court misconstrued the trial court's analysis on this issue, the circuit court should be reversed.

CONCLUSION

In conclusion, based on the foregoing, the applicable laws of the State of South Carolina, the specific intent of the South Carolina Legislature to prohibit cash payouts on gaming machines, the binding Supreme Court precedent established in Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (2012), and the entire record in this matter; this Court should reverse the circuit court decision in its entirety and should restore the trial court's finding 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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