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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

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

v.

South Carolina Law
Enforcement Division, Appellant.

**RESPONDENTS' BRIEF IN RESPONSE TO
AMICUS CURIAE BRIEFS**

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INTRODUCTION

Pursuant to the Court's order of September 11, 2024, Respondents respectfully submit this brief in response to the amicus curiae briefs filed by the Attorney General ("AG Brief") and the South Carolina Education Lottery Commission ("SCELC Brief").

ARGUMENT

I. The Argument Based on the Title of Act 125 Is Unpreserved and Meritless

The SCCLC attempts to bolster SLED's argument, *see* SLED Br. at 7-11, that the phrase "for the purpose of prohibiting cash payouts" in the title of 1999 S.C. Act 125 demonstrates legislative intent to ban all cash payouts, even on games of skill, despite the absence of any such language in the text of S.C. Code Ann. § 12-21-2710. SCCLC Br. at 7-9. The SCCLC's arguments are without merit.

First, the SCCLC ignores that SLED waived this argument by failing to timely present it to the circuit court. Rather, SLED made this argument for the first time in its motion for reconsideration under Rule 59(e), SCRCP. A motion under Rule 59(e) "allow[s] a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004). A Rule 59(e) motion is *not* an opportunity for the losing party to raise *new* arguments in hopes of getting a better result. "An issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prod. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009); *see Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999) ("[I]t appears the first time Commercial Credit made this argument was in its Rule 59(e) motion for reconsideration. Accordingly, this issue is not properly preserved for our review.").

Second, the argument fails on its merits. The SCCLC contends that the title of an

act may be used to discern legislative intent even when a statute is not ambiguous. SCELC Br. at 9 & n.4. This argument is contrary to settled South Carolina law, which provides that if the language of a statute is clear and unambiguous there is no basis for a court to consider anything other than the statutory text. See *Connelly v. Main St. Am. Grp.*, 439 S.C. 81, 89, 886 S.E.2d 196, 200 (2023) (citing *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). “Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning.” *Smith v. Tiffany*, 419 S.C. 548, 556, 799 S.E.2d 479, 483 (2017). Just as with other interpretive aids, resort to the caption of a statute or the title of an act is appropriate only when necessary to resolve ambiguity in the statutory text. *Garner v. Houck*, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993) (“[T]he title of a statute and heading of a section are of use only when they shed light on some ambiguous word or phrase and as tools available for resolution of doubt.”).

The cases cited by the SCELC are not to the contrary. Rather, each of the cited cases looked to title of an act solely as confirmation of the plain statutory text. See *Hock RH, LLC v. S.C. Dep’t of Rev.*, 423 S.C. 208, 214-15, 813 S.E.2d 540, 543-44 (Ct. App. 2018) (looking to the title of act to confirm legislative intent that statutory amendment would operate retrospectively, contrary to the usual rule that legislative changes operate prospectively only); *Rhame v. Charleston Cnty. Sch. Dist.*, 412 S.C. 273, 276-77, 772 S.E.2d 159, 161 (2015) (finding that title of statute confirmed plain statutory text); *Lindsay v. Southern Farm Bureau Cas. Ins. Co.*, 258 S.C. 272, 276-78, 188 S.E.2d 374, 376 (1972) (same).

Unlike in the cases it cites, here the SCELC seeks to use the title of Act 125 to *change or limit* the plain meaning of § 12-21-2710. This is prohibited by bedrock rules of statutory

construction:

For interpretative purposes, the title of a statute and heading of a section are of use only when they shed light on some ambiguous word or phrase and as tools available for resolution of doubt, *but they cannot undo or limit what the text makes plain.*

Garner, 312 S.C. at 486, 435 S.E.2d at 849] (emphasis added). Our Supreme Court and this Court have repeatedly cited *Garner* for precisely this proposition. See *Perry v. Bullock*, 409 S.C. 137, 142, 761 S.E.2d 251, 253–54 (2014) (citing *Garner* as “holding the title of a statute and heading of a section can be used to clarify ambiguity or doubt in a statute provided the interpretation does not undo or limit the plain meaning of the text”); *Savannah Riverkeeper v. S.C. Dep’t of Health & Env’tl. Control*, 400 S.C. 196, 202–03, 733 S.E.2d 903, 906 (2012) (rejecting argument based on title of statute because the statute was not ambiguous; citing *Garner*); *Gaster v. Evatt*, 326 S.C. 33, 35 n.1, 483 S.E.2d 197, 198 n.1 (1997) (“To the extent appellant’s argument relies on the fact that § 16–3–655 is captioned ‘Criminal Sexual Conduct with Minors’, it also fails. The title of a statute is ‘of use only when [it] shed[s] light on some ambiguous word or phrase ... but [it] cannot undo or limit what the text makes plain.’ *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993).”); *Ashfort Corp. v. Palmetto Const. Grp., Inc.*, 318 S.C. 492, 494, 458 S.E.2d 533, 535 (1995) (citing *Garner* in support of holding that “the title of the Rule 43[, SCRC], may not limit the plain meaning of Rule 43(k)”; *McInnis v. McInnis*, 348 S.C. 585, 592, 560 S.E.2d 632, 636 (Ct. App. 2002) (citing *Garner*’s holding that “[a]lthough the title and headings of a statute may not be construed to limit the plain language of a statute, they may be used to shed light on an ambiguous word or phrase”).

The text of § 12-21-2710 says nothing whatsoever about prohibiting cash payouts based on playing a game of skill. Because the statutory text is plain, there is no basis for this Court to look beyond it to the title of Act 125. The title of Act 125 cannot be used to insert language – prohibiting cash payouts even on games of skill – that does not appear in § 12-21-2710.

That § 12-21-2710 does not prohibit payouts based on games of skill is confirmed by decisions of this Court and our Supreme Court recognizing that § 12-21-2710 permits cash payouts on machines that offer games of skill but not on machines containing games of chance. For example, in *Allendale County Sheriff's Office v. Two Chess Challenge II*, our Supreme Court affirmed the legality of “a coin-operated game that has a payout feature,” specifically recognizing that “games of skill ... are lawful to possess.” 361 S.C. 581, 583, 588, 606 S.E.2d 471, 472, 475 (2004); *see also Ward v. West Oil Co.*, 387 S.C. 268, 278, 692 S.E.2d 516, 521-22 (2010) (holding that “pull-tab” games violate S.C. Code Ann. § 12-21-2710 because they “created an element of chance”); *Sun Light Prepaid Phonecard Co. v. State*, 360 S.C. 49, 54, 600 S.E.2d 61, 64 (2004) (holding that phone card dispensers violated § 12-21-2710 because they “present[ed] the element of chance”). Similarly, this Court has ruled that games of skill are legal under § 12-21-2710. *See S.C. Law Enf't Div. v. 1-Speedmaster S/N 00218*, 397 S.C. 94, 99-100, 723 S.E.2d 809, 812 (Ct. App. 2011); *see also S.C. Dep't of Revenue v. Meenaxi, Inc.*, 417 S.C. 639, 658, 790 S.E.2d 792, 802 (Ct. App. 2016) (holding that machines violated § 12-21-2710 because they “contained games of chance”).

The text of a statute is the first and best guide to legislative intent. Here, the plain text of § 12-21-2710 unambiguously prohibits only machines or devices offering games

where the outcome is predominantly determined by chance. *See Speedmaster*, 397 S.C. at 99-100, 723 S.E.2d at 812 (holding that a machine is “used for gambling” if it presents a game of chance). Consistent with the plain statutory text, courts have recognized that the dividing line of legality under § 12-21-2710 is skill vs. chance—not whether there is a payout for successful play of the game.

II. *Chimento* Did Not Change the Meaning of “Gambling” in South Carolina

Both Amici also attempt to bolster SLED’s argument, *see* SLED Br. at 12-16, that the Supreme Court’s decision in *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012), must be broadly applied such that a machine is illegal under § 12-21-2710 even if it involves a game where the outcome is determined predominantly by the player’s skill.¹ This argument is without merit.

The Attorney General contends that “[i]f the *Chimento* Court had intended to limit its definition of ‘gambling’ to [S.C. Code Ann.] § 16-19-40, it could easily have said so.” AG Br. at 10. In fact, the *Chimento* Court did exactly that, repeatedly tying its discussion of “gaming” and “gambling” to the specific context of § 16-19-40. *See Chimento*, 401 S.C. at 531, 737 S.E.2d at 836 (“The circuit court ... [held] that ‘gaming’ *as used in § 16-19-40*

¹ As a preface to its discussion of *Chimento*, the Attorney General indulges in lengthy speculation regarding the possible impetus for the General Assembly to include the “used for gambling” language in Act 125. AG Br. at 16-22. Among other things, this portion of the Attorney General’s brief relies on cases having to do with the wholly irrelevant issue of whether a device is “contraband *per se*.” *Id.* at 20-21. Moreover, *none* of the cases discussed on pages 16-22 of the Attorney General’s brief holds, or even suggests, that “used for gambling” was intended by the General Assembly to make games of skill illegal.

applies only to betting on games of chance[.]” (emphasis added)); *id.* at 532, 737 S.E.2d at 837 (describing issue as “whether ... betting on a card game ... is unlawful gaming” and citing, *inter alia*, § 16-19-40); *id.* (“Under the plain language of § 16-19-40, gambling on a game of skill is a violation if that gambling is being done in a prohibited location.” (emphasis added)); *id.* (“A violation of *the gaming prohibition of § 16-19-40* does not depend on whether the particular game involves more skill than chance.” (emphasis added)); *id.* at 533, 737 S.E.2d at 837 (“[T]here is precedent that indicates § 16-19-40 is *concerned with wagering* regardless of the skill involved in the game wagered upon.” (emphasis added)); *id.* (“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.” (emphasis added)).

Amicis’ insistence that the 2012 *Chimento* decision adopted a new definition of “gaming” and “gambling” for all purposes, including application of § 12-21-2710, is contrary to every decision by all courts at *every* level of South Carolina’s judicial system. Just like every court before *Chimento*, every court after that decision has consistently continued to apply *the dominant factor test* to determine the legality of a video game.²

² See **Administrative Law Court**: *S.C. Dep’t of Rev. v. Chestnut*, 2021 WL 4822858, at *6 (S.C. Admin. Law Ct. Oct. 8, 2021) (stating that “games of chance [are] prohibited by [S.C. Code Ann.] § 12-21-2710”); **Court of Common Pleas**: *Smith v. S.C. Law Enft Div.*, 2013 WL 8477943, at *2-3 (S.C. Ct. Com. Pl., Anderson County, Nov. 6, 2013) (“[A]n apparatus is a gambling device where there is anything of value to be won or lost as the result of chance[.]” (internal quotation marks omitted)); **Court of Appeals**: *Meenaxi*, 417 S.C. at 658, 790 S.E.2d at 802 (“[T]he Department showed the Products Direct and Gift Surplus machines contained games of chance in violation of section 12-21-2710[.]”); **Supreme Court**: *Richland Cty. Sheriff’s Dep’t v. Awde*, No. 2014-MO-024, 2014 WL 3016205, at *1 (S.C.

Even the Attorney General, post-*Chimento*, has continued to recognize that skill games are not illegal under § 12-21-2710. See Op. S.C. Atty Gen., 2017 WL 4707542 (S.C.A.G. Oct. 11, 2017) (stating that “South Carolina gambling laws” prohibit “games of chance”). Additionally, if the *Chimento* Court had actually intended to redefine “gambling” for all purposes including § 12-21-2710, it would necessarily have had to overrule prior decisions, cited *supra*, in which legality under § 12-21-2710 turned solely on the question of skill vs. chance, and not on the question of whether there was a payout.

This Court’s decision in *Speedmaster* is particularly relevant in this regard. In *Speedmaster*, this Court squarely held that if skill predominates over chance, no further inquiry is necessary to determine the legality of the machine under § 12-21-2710. See *Speedmaster*, 397 S.C. at 100, 723 S.E.2d at 812. In that case, SLED argued that “the magistrate [court] erred in finding [that § 12-21-2710] contained a requirement that a machine must be used for gambling to be illegal.” *Id.* at 99, 723 S.E.2d at 811-12. Relying on the Supreme Court’s decision in *Ward*, this Court stated, “SLED is correct that section 12-21-2710 does not specifically require that an illegal gaming device be used for gambling.” *Id.* at 99-100, 723 S.E.2d at 812 (citing *Ward*, 387 S.C. at 278, 692 S.E.2d at 522, for the proposition that “[A]n apparatus is a gambling device where there is anything of value to be won or lost as the result of *chance*, no matter how small the intrinsic value” (emphasis in original; internal quotation marks omitted)). Rather, the Court of Appeals

July 2, 2014) (affirming magistrate court’s finding “that two ‘Chess Challenge II’ devices before it were games of skill”).

made clear, “the term gambling” as used in § 12-21-2710 “*necessarily encompasses the element of chance.*” *Id.* (emphasis added). Because the Speedmaster game was predominantly one of skill, “we conclude the circuit court properly affirmed the magistrate’s ruling *the Speedmaster was not ‘used for gambling.’*” *Id.* at 100, 723 S.E.2d at 812 (quoting § 12-21-2710; emphasis added).

The Attorney General’s interpretation of *Chimento* also flies in the face of *Richland County Sheriff’s Department v. Awde*, No. 2014-MO-024, 2014 WL 3016205 (S.C. July 2, 2014) (per curiam). In *Awde*, the same five justices who decided *Chimento* only two years earlier unanimously affirmed a magistrate court’s “finding that two ‘Chess Challenge II’ devices before it were legal games of skill.” *Id.* The parties’ briefs raised arguments concerning, *inter alia*, the “used for gambling” prong of § 12-21-2710, and the Attorney General submitted a letter to the Court identifying *Chimento* as supplemental authority.³ If the Supreme Court had intended *Chimento* to apply when determining the legality of a machine under § 12-21-2710, it surely would not have issued an affirmance in *Awde*. The fact that the Court affirmed – in an unpublished, per curiam opinion – strongly indicates that *Chimento* does not apply to the analysis of whether a game is legal under § 12-21-2710.

Chimento has *never* been cited for the proposition that *all* video games that involve consideration and a potential prize or reward are illegal, even if the outcome is

³ The filings in *Awde* are available at <https://ctrack.sccourts.org/public/caseView.do?csIID=50448> (last visited Sept. 30, 2024).

determined by the player's skill. To the contrary, at least one court has cited *Chimento* in the context of determining whether a video machine was legal under § 12-21-2710, and in that case the circuit court decided under *the dominant factor test* that the machine *was not* illegal under *Chimento* simply because it involved payment of consideration. See *Smith v. S.C. Law Enft Div.*, 2013 WL 8477943, at *2-3 (S.C. Ct. Com. Pl., Anderson County, Nov. 6, 2013).

In its argument regarding *Chimento*, the SCELIC notes that “[s]ections 12-21-2710 and 16-19-40 both use the language ‘any machine or device licensed pursuant to Section 12-21-2720 and used for gambling’ in prohibiting certain conduct.” SCELIC Br. at 11. The SCELIC ignores, however, that the “any machine or device” language was not at issue in *Chimento*. The primary question presented in *Chimento* was whether a person's residence could qualify under S.C. Code Ann. § 16-19-40 as a prohibited “house used as a place of gaming” when used for the playing of a game of skill, *i.e.*, Texas Hold'em. See *Chimento*, 401 S.C. at 527, 737 S.E.2d at 832. In affirming the defendants' convictions, the *Chimento* Court held that it is the “prohibited location,” not the character of the game being played, that determines illegality under § 16-19-40. *Chimento*, 401 S.C. at 532, 737 S.E.2d at 837. The *Chimento* majority made no reference whatsoever to the fact that both § 16-19-40 and § 12-21-2710 contain the phrase “any machine or device licensed pursuant to Section 12-21-2720 and used for gambling.” In fact, the *Chimento* majority referenced the “any machine or device” language in § 16-19-40 only in quoting the statute as a whole, and it *did not even cite § 12-21-2710*. In short, there is nothing at all in *Chimento* to support any kind of connection between the meaning of “gaming” in “a house used as a place of

gaming” and the meaning of “machine or device used for gambling.”

The SCELIC is equally misguided in criticizing Respondents for discussing the exchange of views between Chief Justice Toal’s concurrence and Justice Hearn’s dissent, which the SCELIC contends “is only marginally related to the issue here.” SCELIC Br. at 10. However, the referenced exchange is directly relevant because it confirms that the majority opinion is limited to interpretation of § 16-19-40 and does not apply to § 12-21-2710. Specifically, Chief Justice Toal declined to join Justice Hearn, who would have held that § 16-19-40 was unconstitutionally vague, because she feared that the unconstitutional phrase “house used as a place of gaming” could not be severed from the statute—meaning that § 16-19-40 would have to be struck “in its entirety,” potentially “open[ing] the door wide to *all* heretofore illegal gaming practices in this state, *including video poker.*” *Chimento*, 401 S.C. at 537, 737 S.E.2d at 839-40 (Toal, C.J., concurring) (second emphasis added). Justice Hearn responded that this fear was unwarranted because “[t]he prohibition of video poker is found in Section 12-21-2710 of the South Carolina Code (2000),” and thus would not be impacted by any change to § 16-19-40. *See Chimento*, 401 S.C. at 552, 737 S.E.2d at 848 (Hearn, J., dissenting). What is important about this exchange is that the *Chimento* majority did not challenge Justice Hearn on this point, although it responded to other aspects of her dissent. *See Chimento*, 401 S.C. at 535 n.6, 737 S.E.2d at 838 n.6. Together with its repeated references to § 16-19-40, the majority’s silence on this point further shows that the *Chimento* Court did not intend to change the meaning of “gambling” as used in § 12-21-2710.

III. Amici's Other Arguments Are Without Merit

The Attorney General and the SCCLC's briefs make various additional arguments that this Court should reject as meritless.

A. The Attorney General's Additional Arguments

In its Conclusion, the Attorney General's amicus brief refers to individuals betting on the outcome of a game of baseball or making "side wagers" as referenced in *Holliday v. Governor of South Carolina*, 78 F. Supp. 918, 925 (W.D.S.C. 1948), in which the machine at issue was determined to be a game of chance, not one of skill. However, this case does not involve a "side wager" scenario or other circumstance where money is won or lost based on the performance of a third party; rather, the outcome of a game of Dragon's Ascent is determined by the player's exercise of his or her own skill.

Likewise inapposite is the Attorney General's quotation of the *dissenting* opinion in *Dew-Becker v. Wu*, 178 N.E.3d 1034 (Ill. 2021), which concerned whether betting on a fantasy sports roster was gambling under the dominant factor test. AG Br. at 25. The dissent would have held that fantasy-sports betting is a game of chance (and therefore, is gambling under Illinois law) because the person betting selects a roster of players but has no control over how those persons play. *Id.* at 1044. The dissent distinguished this scenario from "contests in which the participant's *own skill* has the opportunity to overcome chance." *Id.* (emphasis added). Here, it has already been established and is the law of the case that Dragon's Ascent is a game of skill, *i.e.*, one in which the player's skill predominates over chance in determining the outcome.

B. The SCEL C's Additional Arguments

The SCEL C improperly urges the Court to reverse on the basis of the magistrate court's holding that Dragon's Ascent violates S.C. Code Ann. § 16-19-50. SCEL C Br. at 13. Although S.C. Code Ann. § 12-21-2712 provides for destruction of a machine if it is illegal under § 12-21-2710 "or any other law of this State," the language "or any other law of this State" is irrelevant here. The only question presented in this case is whether Dragon's Ascent is legal under § 12-21-2710, not any other statute. This is clear from the Order of Destruction/Notice of Post-Seizure Hearing, which states that the Dragon's Ascent machine was before the court for a determination of whether it was "prohibited pursuant to S.C. Code Ann. § 12-21-2710." (R. p. 1.)

Since the Dragon's Ascent machine was seized exclusively on the grounds that it was prohibited under § 12-21-2710, it was manifestly improper for the magistrate court to consider forfeiture on the basis of different statutes, S.C. Code Ann. §§ 16-19-40 and 16-19-50, that were never mentioned in the Notice. Moreover, SLED abandoned any argument on this point by failing to raise it on appeal. Accordingly, the Court should refuse to consider it.

CONCLUSION

"The term 'amicus curiae' means friend of the court, not friend of a party." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). The amicus briefs filed by the Attorney General and the SCEL C are like "[t]he vast majority of amicus curiae briefs ... filed by allies of litigants," in that they merely "duplicate the arguments made in the litigants' briefs." *Id.* However, repeating the arguments made by SLED does

not make them better. Repetition does not transform a meritless argument into one that does have merit. It remains the case, as explained in Respondents' brief, that the position of SLED and its amici, if accepted by this Court, would fundamentally rewrite long-standing South Carolina law by eliminating any notion of chance as a required element of illegal gambling. Accordingly, this Court should affirm.

Signatures on following page.

Respectfully submitted,

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October 11, 2024
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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

1 Dragon’s Ascent Video Gaming Machine;
SC Games of Skill, LLC, Respondents,

v.

South Carolina Law Enforcement Division, Appellant.

PROOF OF SERVICE

I certify that on October 11, 2024, the foregoing **Respondents’ Brief in Response to Amicus Curiae Briefs** was served on Appellant South Carolina Law Enforcement Division, Amicus Attorney General of South Carolina, and Amicus South Carolina Lottery Commission by emailing a copy to counsel of record using the primary email address listed in the Attorney Information System, as set forth below:

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