

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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SC Court of Appeals

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

v.

South Carolina Law
Enforcement Division, Appellant.

REPLY IN SUPPORT OF
PETITION FOR REHEARING

The possibility of besting one’s competitors and earning a prize incentivizes the develop-
ment of skill, whether in playing a video game, golfing, or “chucking” a hockey puck. Under this
Court’s decision, *all* such incentives are now illegal. However well-intentioned, the decision does
not further the basic aim of South Carolina’s longstanding policy against “gaming” and
“gambling,” which is to ensure that the gullible and desperate are not parted from their money
by an unrealistic *chance* at obtaining a disproportionate reward. Accordingly, the Court should
grant rehearing.

SLED incorrectly suggests that the Court’s expansion of the *Chimento* majority’s holding
is necessary to avoid rendering “used for gambling” in § 12-21-2710 superfluous. (Return at 2.)
Not so. For example, many machines licensed under § 12-21-2720 may be games of chance, but

they are allowed because they are played only for amusement. But if, for example, the owner of one of these machines began making cash payouts based on players' scores, the machine would be "used for gambling" and thus illegal.¹ Alternatively, a skill-based game would be "used for gambling" if *non-players* bet on the outcome. See Op. Atty. Gen., 2002 WL 31341812, at *3 (S.C.A.G. Aug. 28, 2002) ("Of course, placing a wager on the outcome of any skill-based activity is illegal (i.e. betting on the outcome of a sporting event).")² Both of these scenarios give content to the phrase "used for gambling" without requiring the Court to adopt an overly broad and incorrect reading of *Chimento*.

As Respondents pointed out in the Petition, the Court's unwarranted extension of *Chimento* to the context of § 12-21-2710 necessarily means that any skill-based contest where there is an entry fee and a prize is illegal gambling, including amateur and professional sporting events like golf tournaments and promotional events like "turkey shoots," "chuck a puck" and "closest to the pin" contests. See Op. Atty. Gen., 2006 WL 3522434, at *5 (S.C.A.G. Nov. 1, 2006) (determining that a "chuck a puck" promotion "is primarily a game of skill and thus not violative of the South Carolina gambling laws"); see also Op. Atty. Gen., 2011 WL 3918174, at *3 (S.C.A.G. Aug. 17, 2011) (holding that the outcome in a "closest to the pin" golf contest is determined by

¹ The South Carolina Department of Revenue has relied on exactly this reasoning. See S.C. Revenue Ruling No. 16-3, 2016 WL 8794170, at *2 n.1 (S.C. Dept. Rev. May 5, 2016) (recognizing that an electronic tablet used for ordering and paying at a restaurant, which also offered "applications, puzzles, cartoons, videos, and/or games" for patrons' amusement, could be "used for gambling" in violation of § 12-21-2710).

² Cf. *Midwestern Enters., Inc. v. Stenehjem*, 625 N.W.2d 234, 240 (N.D. 2001) (phone-card vending machine was "used for gambling" because it dispensed a chance to win \$500 along with each phone card purchased); *State v. 26 Gaming Machines*, 145 S.W.3d 368, 374-75 (Ark. 2004) ("In short, these countertop machines are more akin to video arcade machines intended for amusement, because a player inserts money and can play gambling-like games but never receives anything in return except amusement. We agree with the circuit court that these machines are not actually used for gaming due to the absence of any payoff mechanism or reward.").

skill and therefore is not “gambling” under South Carolina law).

Attempting to counter this, SLED contends that because this case only involves the legality of a machine under § 12-21-2710, the Court’s reasoning would not apply outside of that context. SLED conveniently ignores that the **only** question in *Chimento* was whether a location was a “house used as a place of gaming” under S.C. Code Ann. § 16-19-40, not whether a machine or device was “used for gambling” under § 12-21-2710, a different statute the *Chimento* majority never cited or even made reference to in any manner whatsoever. Nevertheless, this Court held that *Chimento* redefined “gambling in South Carolina” to mean “betting money on the outcome of any ‘game’ whatsoever,” even if the player’s skill is the predominant factor in determining the outcome. (Opinion at 8 (emphasis omitted).) There is no rational way to limit the Court’s reasoning solely to the context of § 12-21-2710.

The Petition points out that numerous statutes define “gaming” or “gambling” in terms of chance and that courts at every level of our judicial system, as well as the Attorney General, have continued to rely on the dominant factor skill-vs-chance test even *after Chimento*. Rather than attempting to refute the substance of these arguments, SLED chastises Respondents for relying on unpublished appellate decisions, circuit court orders, and administrative decisions because they are “non-binding.” (Return at 3.) But Respondents have never contended otherwise, and that is not why these rulings were cited. Most importantly, Respondents do not claim that this Court is literally bound by the Supreme Court’s order in *Richland County Sheriff’s Department v. Awde*, No. 2014-MO-024, 2014 WL 3016205 (S.C. July 2, 2014) (per curiam). Not only was *Awde* unpublished, it involved a completely different (albeit also skill-based) machine. Nevertheless, *Awde* is highly relevant because it speaks directly to the Supreme Court’s understanding of its *Chimento* decision, issued only two years earlier by the same five Justices who decided *Awde*. If the Supreme Court had intended for the “wagering” analysis used in *Chimento* to be universally

applicable because it changed the longstanding definition of gambling as recognized by our Legislature, courts at every level *could not* have ruled that the machine at issue in *Awde* was legal under § 12-21-2710. The ruling in *Awde* is thus powerful evidence that this Court erred in expanding *Chimento* to the context of § 12-21-2710.

Likewise, Respondents did not claim that the circuit court orders and administrative decisions cited in the Petition constitute binding authority. These orders and decisions are relevant because they demonstrate that courts throughout the State, and even the Attorney General, have not interpreted *Chimento* as creating a novel “wagering” test to replace the dominant factor test. Rather, they uniformly recognized and applied the traditional and longstanding dominant factor, skill-vs-chance test—further supporting Respondent’s argument that the Court’s decision is incorrect and that rehearing should be granted..

Finally, SLED makes no attempt to explain why, if *Chimento* really did redefine “gaming” and “gambling” as requiring only consideration and prize (rather than consideration, chance—as opposed to *skill*—and prize), the majority did not simply and clearly state that it was overruling prior decisions to the contrary—as our Supreme Court has *routinely* done in other cases.³ The only logical explanation is not that the *Chimento* majority wanted to see if lower courts would figure it out for themselves, but rather that it did *not* intend to make such a basic, fundamental change to longstanding law.

For the reasons explained in the Petition and further articulated in this Reply, the Court should grant rehearing.

³ See, e.g., *Paradis v. Charleston Cty. Sch. Dist.*, 433 S.C. 562, 564, 861 S.E.2d 774, 775 (2021); *Proctor v. Whitlark & Whitlark, Inc.*, 414 S.C. 318, 320, 778 S.E.2d 888, 890 (2015); *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 477, 527 S.E.2d 763, 765 (2000); *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 196–97, 525 S.E.2d 872, 883 (2000).

Respectfully submitted,

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