THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2006-CP-40-1814
Opinion 5131, filed May 15, 2013

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

Respondents,

v.

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

Petitioners.

APPENDIX

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Table of Contents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

Appellate Case No. 2012-205510

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5131
Heard March 7, 2013 – Filed May 15, 2013

AFFIRMED

Ariail Elizabeth King and James Mixon Griffin, both of Lewis Babcock & Griffin, LLP, of Columbia, for Appellants.

Louis H. Lang, of Callison Tighe & Robinson, LLC, of Columbia, and Mario Anthony Pacella, of Strom Law Firm, LLC, of Columbia, for Respondents.

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

(collectively, Appellants) appeal the circuit court's order granting Lauren Proctor's motion for summary judgment,[1] arguing the circuit court erred in finding that the South Carolina legislature has abrogated the doctrine of *in pari delicto* with regard to losses sustained by illegal gambling. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In 1995, Proctor began gambling on video gaming machines located in restaurants and bars in Columbia, South Carolina. From 1999 until 2005, Proctor frequently gambled on video poker machines located in the Pizza Man and Rockaways Athletic Club (Rockaways) restaurants.[2] During that time, Proctor lost between $1,000 and $5,000 per week from gambling on video poker machines at the two restaurants. According to Proctor, Pizza Man and Rockaways would provide her cash advances on her credit cards to enable her to fund her gambling as well as free food and alcohol.

Proctor was employed by State Title, which her mother owned. State Title provided real estate closing services to attorney Walter Smith. Proctor began forging her mother's name on checks and stealing money from Smith's trust account to use video poker machines. Because of Proctor's activities, Smith's trust account contained insufficient funds to satisfy the mortgages on several properties at closing. Accordingly, Trans-Union National Title Insurance Company[3] (Trans-Union), which acted as State Title's title insurance company, paid approximately $550,000 in claims arising from the shortages in Smith's trust account.

In July 2000, the operation of video poker machines became illegal in South Carolina. Proctor admitted she was aware her use of the video poker machines was illegal. Pizza Man and Rockaways continued to operate video poker machines in

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[1] To the extent Appellants appeal the circuit court's denial of their motion for summary judgment, we decline to address this issue because orders denying summary judgment are not appealable. *See Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003) ("[T]he denial of a motion for summary judgment is not appealable, even after final judgment.").

[2] Appellants Forrest Whitlark and Paul Whitlark are part owners of Whitlark & Whitlark, Inc. d/b/a Pizza Man and Rockaways (collectively, Whitlarks). Appellants Charlie E. Bishop and Brett Blanks co-owned Zodiac Distributing, LLC, which owned one of the video poker machines in Pizza Man.

[3] At the time, Trans-Union was named Atlantic Title Insurance Company.

their establishments until a Federal Bureau of Investigation sting operation in 2005.

On September 10, 2007, Proctor entered into a plea agreement with federal prosecutors and pled guilty to mail fraud under 18 U.S.C. § 1341. In addition, Proctor agreed to pay restitution in the amount of $565,475.25 to Trans-Union and $195,000 to Smith.

Proctor and Trans-Union brought the instant action against Appellants to recover the losses they incurred as the result of Proctor's gambling. Specifically, Proctor and Trans-Union asserted claims for unjust enrichment, violations of the South Carolina Unfair Trade Practices Act (SCUTPA), and civil conspiracy. Appellants filed a motion for summary judgment, arguing the doctrine of *in pari delicto* barred Proctor's claims and challenging Trans-Union's standing. In addition, Proctor moved for partial summary judgment against the Whitlarks on the issue of liability. The circuit court found Trans-Union lacked standing to bring the action and granted Appellants' motion for summary judgment on Proctor's unjust enrichment claim based on their unclean hands defense. However, the circuit court found that the doctrine of *in pari delicto* has been abrogated in South Carolina with regard to gambling losses. Accordingly, the circuit court granted Proctor's motion for partial summary judgment on the issue of liability against the Whitlarks and denied Appellants' motion for summary judgment based on the *in pari delicto* defense. This appeal followed.

LAW/ANALYSIS

Appellants argue the circuit court erred in granting Proctor's partial motion for summary judgment. Specifically, Appellants contend the circuit court erred in finding that the doctrine of *in pari delicto* has been abrogated in South Carolina with regard to losses sustained in illegal gambling. We disagree.

"The common-law defense at issue in this case derives from the Latin, *in pari delicto potior est conditio defendentis*: 'In a case of equal or mutual fault . . . the position of the [defending] party . . . is the better one.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 306 (1985) (alterations in original); *see also Myatt v. RHBT Fin. Corp.*, 370 S.C. 391, 395, 635 S.E.2d 545, 547 (Ct. App. 2006) ("The doctrine of *in pari delicto* is the principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." (internal quotation marks and alterations omitted)). South Carolina courts have previously applied the *in pari delicto* doctrine in certain cases

involving illegal gambling. *See, e.g., Rice v. Gist*, 32 S.C.L. (1 Strob.) 82, 85 (1846) ("[A]ll wagers are unlawful, and not to be recovered in courts of justice." (internal quotation marks omitted)). However, section 32-1-10 of the South Carolina Code (2007), which was originally adopted in 1712 as a part of the Statutes of Anne, explicitly allows the recovery of gambling losses in excess of fifty dollars. Specifically, section 32-1-10 provides as follows:

> Any person who shall at any time or sitting, by playing at cards, dice table or any other game whatsoever or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any person or persons . . . in the whole, the sum or value of fifty dollars and shall pay or deliver such sum or value or any part thereof shall be at liberty, within three months . . . to sue for and recover the money . . . from the respective winner or winners thereof, with costs of suit, by action to be prosecuted in any court of competent jurisdiction.

Similarly, if a person who lost money gambling does not bring suit pursuant to section 32-1-10 within three months of the gambling loss, section 32-1-20 allows any person to bring suit against the winner for treble damages within one year of the date of the loss. *See* S.C. Code Ann. § 32-1-20 (2007) ("In case any person who shall lose such money . . . shall not, within the time aforesaid, . . . sue and with effect prosecute for the money or other things so by him or them lost and paid and delivered as aforesaid, it shall be lawful for any other person . . . to sue for and recover the same and treble the value thereof, with costs of suit, against such winner or winners as aforesaid . . . .").

This court and our supreme court have recognized in more recent cases that sections 32-1-10 and -20 "promote a policy which prevents a gambler from allowing his vice to overcome his ability to pay" and "protect a citizen and his family from the gambler's uncontrollable impulses." *Johnson v. Collins Entm't Co.*, 349 S.C. 613, 635, 564 S.E.2d 653, 664-65 (2002) (internal quotation marks omitted); *see also McCurry v. Keith*, 325 S.C. 441, 444, 481 S.E.2d 166, 168 (Ct. App. 1997) ("The purpose of [section 32-1-10] is to punish excessive gaming and to prevent a gambler from allowing his vice to overcome his ability to pay."). In *Johnson*, the plaintiffs, a group of habitual gamblers, brought suit to recover losses they sustained on video poker machines owned or operated by the defendants. 349 S.C. at 621 & n.1, 564 S.E.2d at 657 & n.1. Specifically, the plaintiffs asserted causes of action under the Racketeer Influenced Corrupt Organizations Act,

SCUTPA, and sections 32-1-10 and -20 of the South Carolina Code. *Id.* at 621, 564 S.E.2d at 657. When the *Johnson* plaintiffs filed their suit in 1997, the operation and use of video poker machines were generally legal in South Carolina. *Id.* at 633, 564 S.E.2d at 664. However, the *Johnson* plaintiffs alleged that the defendants operated their machines in a manner that violated state law, such as offering the possibility of payouts in excess of $125. *Id.* at 621-31, 564 S.E.2d at 657-63.

In *Johnson*, the supreme court rejected the argument that section 32-1-10 provides the exclusive remedy to recover gambling losses and explicitly recognized that a plaintiff may also seek to recover gambling losses pursuant to SCUTPA. *Id.* at 634-35, 564 S.E.2d at 664-65. In addition, the court declined to apply the defendants' *in pari delicto* defense to the plaintiffs' SCUTPA claim. *Id.* at 639 n.13, 564 S.E.2d at 639 n.13. The court reasoned, in part, that because the operators of the video poker machines were operating in a regulated area of the law, they should "be held to a greater knowledge and understanding of the laws than their customers, particularly where the laws are designed to protect the player from his or her own bad judgment." *Id.*

Based upon the supreme court's holding in *Johnson*, we find the circuit court did not err in rejecting Appellants' *in pari delicto* defense. We acknowledge the facts of the instant case are distinguishable from those in *Johnson* because video poker gambling was illegal when Proctor suffered her losses. Nevertheless, three tenets recognized by the supreme court in *Johnson* are instructive to our analysis and lead to the same conclusion that the *in pari delicto* defense does not bar Proctor's claims. First, statutory and case law in South Carolina support the policy of allowing plaintiffs to recover gambling losses as a way of both discouraging illegal gambling and of protecting gamblers and their family members from imprudent gambling activities. *See Johnson*, 349 S.C. at 635, 564 S.C. at 664-65 (noting that sections 32-1-10 and -20 promote a policy of limiting excessive and/or unlawful gambling); S.C. Code Ann. §§ 32-1-10, -20. Second, the owners and operators of video poker machines are not truly *in pari delicto* with the persons who use the machines for gambling because in many cases, a habitual gambler is acting under the sway of "uncontrollable impulses" and, thus, requires protection from his or her bad judgment. *See Johnson*, 349 S.C. at 635, 564 S.C. at 664-65. Finally, sections 32-1-10 and -20 are not the exclusive avenues for plaintiffs to recover gambling losses and do not preclude plaintiffs from seeking recovery under other state law theories, including SCUTPA. *See Johnson*, 349 S.C. at 635, 564 S.E.2d at 665 (noting that sections 32-1-10 & and -20 do not preclude plaintiffs from recovering gambling losses under other remedies provided by law, including

SCUTPA). We find these tenets espoused by the supreme court in *Johnson* support the circuit court's holding that the defense of *in pari delicto* does not bar Proctor's claims.[4]

Courts in other jurisdictions have similarly found that the *in pari delicto* defense does not bar the recovery of illegal gambling losses. For example, in *O'Neil v. Crampton*, 140 P.2d 308 (Wash. 1943), the Washington Supreme Court employed a similar approach and explained the policy reasons for declining to apply the doctrine to gambling losses. The court acknowledged the general rule that "one cannot establish a right and invoke a remedy if he himself is a wrongdoer . . . ." *Id.* at 310. Nevertheless, the court found that a Washington statute providing for a civil remedy to recover money lost while engaged in gambling

> was a declaration of public policy based upon the idea that, if gambling is to be discouraged, one way in which it might be done would be to permit recovery by the loser and at the same time protect those inclined to gamble against their weakness and improvidence, notwithstanding that the loser was [*in pari delicto*] with the winner.

Id. The court noted that the fact that the gambler was engaged in an illegal activity should not preclude recovery because the statute criminalizing gambling was "but another attempt to discourage gambling." *Id.* at 311. The basis of allowing the recovery of losses sustained by illegal gambling "is that not only is the individual protected, but it is also a protection to the public, which is even more important, and this would be made more effective by allowing a recovery." *Id.* at 310; *see also Major League Baseball Props., Inc. v. Price*, 105 F. Supp. 2d 46, 53 (E.D.N.Y. 2000) (noting that the New York legislature passed a law allowing the recovery of gambling losses because the common law rule applying the doctrine of *in pari delicto* to such losses "did little to help effectuate the purposes of the gambling prohibitions, which were adopted with a view toward protecting the family man of meager resources from his own imprudence at the gambling tables" (internal quotation marks omitted)); *cf. Bateman Eichler, Hill Richards, Inc.*, 472 U.S. at 306-07 (noting that "[i]n its classic formulation, the *in pari delicto* defense was narrowly limited to situations where the plaintiff truly bore at least

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[4] Moreover, we are not persuaded by the cases cited by Appellants in support of their claim that *in pari delicto* applies based on the factual dissimilarities and more recent pronouncements of the supreme court.

substantially equal responsibility for his injury, because in cases where both parties are [*in delicto*], concurring in an illegal act, it does not always follow that they stand [*in pari delicto*]; for there may be, and often are, very different degrees in their guilt" (internal quotation marks omitted)).

Based on this case and statutory law and for the reasons set forth above, we find the circuit court did not err in granting Proctor's motion for summary judgment on the issue of liability against the Whitlarks. As noted by the supreme court in *Johnson*, statutory and case law in South Carolina support a policy of allowing plaintiffs to recover gambling losses as a way of both discouraging illegal gambling and of protecting gamblers and their family members from imprudent gambling activities. 349 S.C. at 635, 564 S.E.2d at 664-65. We hold that with respect to gambling losses under the circumstances of the instant case, the doctrine of *in pari delicto* has been abrogated for reasons of public policy and does not bar the recovery of such losses. Accordingly, we affirm the circuit court's order granting Proctor's motion for summary judgment.

CONCLUSION

Based on the foregoing, the circuit court's order granting Proctor's motion for summary judgment on the issue of liability against the Whitlarks is

AFFIRMED.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2006-CP-40-1814

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

Respondents,

v.

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

Appellants.

PETITION FOR REHEARING OR REHEARING EN BANC

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Appellants petition this Court for rehearing pursuant to Rule 221, SCACR, or for rehearing *en banc*, pursuant to Rule 219, SCACR. The Panel overlooked or misapprehended Appellant's arguments as set forth herein. Moreover, the Panel's opinion creates new law opening the civil judicial system to a flood of lawsuits by disgruntled criminals suing other criminals for business disputes. Such a drastic change in the law creates a matter of exceptional importance, rendering this matter proper for rehearing *en banc*.

I. The Panel's Opinion misapprehends the intention and effect of the statutes on gambling recoveries.

The Panel held that the policy in South Carolina, as evidenced by S.C. Code 32-1-10 and -20 and case law (also referred to as the Statute of Anne), supports the finding that *in pari delicto* has been abrogated. However, the Court's opinion ignores the express limitations of the statutes and the case law.

Section 32-1-10[1] is narrowly drawn, and only allows a gambler to recover if the suit is brought within three months. It is undisputed that Respondent's suit was initiated outside of that three month time limit. The Court then notes that Section 32-1-20 allows any other person to recover gambling losses and treble the value, if the lawsuit is brought within one year. The key to Section 32-1-20 however, is that the suit must be brought by a person other than the gambler (i.e., not Respondent), and thus, obviously does not apply here.

Together these code sections provide a very limited remedy for a person engaged in illegal gambling to recover. The Panel, in finding that *in pari delicto* has been completely abrogated by these statutes, ignored the cases that refuse to allow gamblers to recover and the

[1] According to the history of this statute, it was first adopted in 1712 and has remained unchanged except for the changing the monetary threshold. Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993).

fact that these cases were decided after the adoption of the statute. *See*, Rice v. Gist, 32 S.C.L. 82 (1846) (unlawful wagers are not to be recovered in courts of justice); Livingston v. Wootan, 10 S.C.L. 178 (1818) (at common law, the parties to a gambling transaction stand *in pari delicto* and money lost and paid over cannot be recovered).[2] Furthermore, the Panel, in holding that these code sections were not the exclusive remedy for losses sustained in illegal gambling, ignored the intent and scope of the law.[3] Because these codes are the exclusive remedy, the Panel's interpretation that South Carolina promotes a policy of allowing gamblers to recover under alternative theories, without regard to the bar of *in pari delicto*, is contrary to established law.

II. The Panel's Opinion misapprehends the intention and effect of statutes the case law and creates new law.

The Court of Appeals has also misapprehended or overlooked Appellants' argument and the holding in Johnson v. Collins Entertainment Co., 349 S.C. 613, 635, 564 S.E.2d 653, 664 (2002) and has created new law. In Johnson, the plaintiffs were allowed to proceed under the South Carolina Unfair Trade Practices Act, S.C. Code § 39-5-10, et seq. (SCUTPA), to recover certain gambling losses. Johnson, of course, took place when video poker was legal, unlike the facts of this case. The Panel held that those differences are meaningless because the "tenets" of

[2] The Panel decision refers to Rice but does explain why neither Rice nor Livingston control. The opinion states, in Footnote 4, that the court was "not persuaded by the cases cited by Appellants in support of their claim that in pari delicto applies based on the factual dissimilarities and more recent pronouncements of the [S]upreme [C]ourt." The opinion does not state which cases to which this statement applies or what the factual dissimilarities are.

[3] One of the cases cited by the Court actually supports the Appellants' argument that the code section provides the exclusive remedy and must be restricted to its own language. In Major League Baseball Properties, Inc. v. Price, 105 F. Supp. 2d 46, 53 (E.D.N.Y. 2000), there was a state law that allowed a person who paid for a lottery ticket to sue and recover double the sum of money paid. While that court's analysis of that statute in the context of a RICO case has no relevance, here, the court also clearly noted that "The right of recovery is purely statutory and should be restricted to the extent and area clearly defined by law." Id.

Johnson lead to same conclusion that *in pari delicto* does not apply- specifically, that a gambler has for recourse acting under his or her "uncontrollable impulses" either through S.C. Code § 32-1-10 or through SCUTPA.

While the plaintiffs in Johnson could proceed under SCUTPA,[4] that decision must be limited to the facts of that case. There, the video poker operators had engaged in "an unlawful trade practice" but were doing so **while in a lawful trade, as video poker was legal at that time**. The plaintiffs in Johnson were not engaged in illegal gambling or unlawful conduct, because the regulations governed the conduct of video poker operators. Here, Plaintiff Proctor readily admitted that she was engaged in illegal gambling and that her conduct was also criminal. The Panel opinion acknowledges, but ignores, that crucial factual distinction. While the unfair trade practices act prohibits unlawful and deceptive practices, it is apodictic that it only applies to a lawful "trade or commerce." The Panel's interpretation, allowing a participant in an illegal trade to sue under SCUTPA, opens the floodgates to lawsuits by gamblers (or participants in other illegal activity) who voluntarily participated in the illegal activity and would allow these new plaintiffs to profit from their illegal actions. Abrogation of the doctrine of *in pari delicto* eliminates the personal responsibility of the gambler and is contrary to the policy of this state. White v. Commercial & Farmers Bank, 66 S. C. 491, 511-12, 45 S. E. 94, 102 (1903)("No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."); Jackson v. Bi-Lo Stores, 313 S.C. 272, 437 S.E.2d 168 (Ct. App. 1993) (it is a well founded policy of the law that no person be permitted to acquire a right of action from his own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of

[4] Obviously, Section 32-1-10 has already been addressed and there is no need to repeat that argument again.

that act; this rule applies at both law and in equity and whether the cause of action is in contract or tort.)

Furthermore, the Panel seems to cast doubt on the equal fault of Respondent, citing to Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310-11, 105 S. Ct. 2622, 2629, 86 L. Ed. 2d 215 (1985) for the proposition that parties in an illegal act may not be in equal fault.[5] In this matter, there is no doubt here that Respondent bears "equal responsibility." She admitted that she knew that gambling was illegal but continued to play. (SR. 2). In fact, Respondent did not limit her illegal gambling to the establishments in this case, but engaged in illegal gambling in a variety of establishments. (R. p. 255, ll. 37:14-40:8). Respondent very clearly admitted she engaged in illegal gambling and theft. (R. 261, l. 78, l.15-79:18). She testified that any money she won or could have won was spent on gambling and never returned to replace her thefts. (R. 260). She plead guilty and was ordered to pay $755,000 in restitution. (R. 3). In fact, Respondent has not disputed that her conduct was illegal, r, but simply claims that the doctrine of *in pari delicto* had been abrogated.

[5] That case has actually has no real relevance here. In Bateman (a securities case, the plaintiff's suit was based on substantial trading losses after a securities broker and the officer of a corporation fraudulently induced respondents to purchase stock in the corporation by divulging false and materially incomplete information about the corporation on the pretext that it was accurate inside information. The United States Supreme Court considered whether the doctrine of *in pari delicto* barred the action and noted that the concept of "equal fault" should be narrowly defined in litigation arising under federal regulatory statutes, such as anti-trust or securities litigation. Id. The Court also recognized that where a plaintiff truly bore at least substantially equal responsibility for the violation, there was a valid defense of *in pari delicto*, even where the litigation involved a federal regulatory scheme. Id. at 308-09. Obviously, here there is no "federal regulatory scheme" that would limit the application of *in pari delicto*. Furthermore, as the Supreme Court recognized, whether the doctrine applied to bar the plaintiffs action depended upon whether, as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations for which he sought redress. *Id.* Here, the record is clear as to Respondent's equal responsibility.

Lastly, under the "equal fault" standard adopted by the Panel, Respondent was not entitled to partial summary judgment. There is sufficient evidence in the record from which a jury could find that Respondent was equally at fault with Appellants. The lower court, as well as the Panel, weighed the evidence at the summary judgment stage rather than applying the appropriate standard under Rule 56, S.C. Rules Civ. P. Anderson v. The Augusta Chronicle, 355 S.C. 461, 475, 585 S.E.2d 506, 513 (Ct. App.2003) (The weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge).

CONCLUSION

The Court of Appeals panel opinion overlooked or misapprehended both the statutory law and case law in this matter. By allowing the South Carolina Unfair Trade Practices Act to apply to an illegal trade, the Court has opened up the court system to be overwhelmed with lawsuits between participants in illegal activities and allowing those participants to profit from their illegal actions. The doctrine of *in pari delicto* was adopted to prevent such lawsuits. Since the Court of Appeals decision has created new law and will allow new causes of action never before permitted, Appellants respectfully submit that this matter the petition for rehearing and/or rehearing *en banc* be granted.

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May 20, 2013
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2006-CP-40-1814

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

Respondents,

v.

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

Appellants.

PROOF OF SERVICE

I, Jaime Harmon, the undersigned employee of Lewis, Babcock & Griffin L.L.P, attorney for Appellant Whitlark & Whitlark, Inc. d/b/a Rockaways Athletic Club and Pizza Man, ForrestWhitlark, Paul Whitlark, do hereby certify that I have served a copy of the foregoing **Petition for Rehearing or Rehearing En Banc**, in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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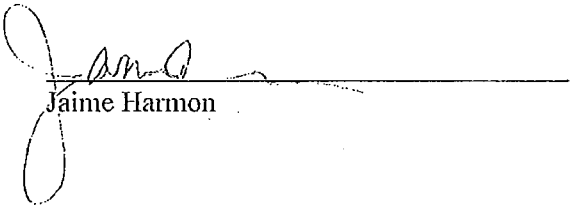

Jaime Harmon

Columbia, South Carolina
May 30, 2013

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

THE HONORABLE ALISON RENEE LEE, CIRCUIT COURT JUDGE

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

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

Respondents,

vs.

Appellate Case No. 2012-205510

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

Appellants.

RETURN TO PETITION FOR REHEARING
OR REHEARING *EN BANC*

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

STROM LAW FIRM, LLC.

J. Preston Strom, Jr.
Mario A. Pacella
2110 Beltline Boulevard
Columbia, South Carolina 29204
Tel: 803-252-4800
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IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

THE HONORABLE ALISON RENEE LEE, CIRCUIT COURT JUDGE

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

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

Respondents,

vs. Appellate Case No. 2012-205510

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

Appellants.

PROOF OF SERVICE

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

James M. Griffin
Ariail E. King
Lewis, Babcock, & Griffin, LLP
P.O. Box 111208
Columbia, South Carolina 29211

Louis H. Lang
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1812 Lincoln Street, Second Floor
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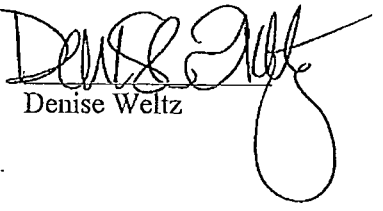

Denise Weltz

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2006-CP-40-1814

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

Respondents,

v.

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

Appellants.

APPELLANTS' REPLY TO RESPONDENT'S RETURN TO THE PETITION FOR REHEARING OR REHEARING EN BANC

James M. Griffin
Ariail E. King
Lewis, Babcock, & Griffin, LLP
P.O. Box 111208
Columbia, South Carolina 29211
(803) 771-8000
Attorney for the Appellants

Appellants submit this reply to Respondent Proctor's Return to the Petition for Rehearing or Rehearing *en banc.*

In the Petition for Rehearing, Appellants noted that the Opinion failed to address why neither Rice v. Gist, 32 S.C.L. 82 (1846) and Livingston v. Wootan, 10 S.C.L. 178 (1818) control. Rice held that there could be no recovery for an unlawful wager, stating the intent "to sweep from our Courts the whole body of wagers, great and small." Likewise, the Court in Livingston held that "[a]t common law, the parties to a gambling transaction stand in *pari delicto*, and money lost and paid over cannot be recovered." Respondent Proctor has ignored these decisions and fails to distinguish them in her Return. However, both of these cases are valid and controlling.

In addition, Respondent continues to rely on *Johnson v. Collins Entertainment Co.,* 349 S.C. 613, 635, 564 S.E.2d 653, 664 (2002), and ignores the crucial difference as to why *in pari delicto* could not be used as defense there–**the conduct at issue in *Johnson* was legal**. The plaintiffs in Johnson were engaged in gambling, but it was a legal form of gambling. Here, Respondent Proctor engaged in illegal gambling. Proctor admits that she engaged in illegal gambling and she also admits that she knew her conduct was illegal.. (S.R. p. 2). Neither *Johnson* nor any other decision relied upon in the Opinion involves a lawsuit brought by a plaintiff who knowingly engaged in criminal conduct seeking to recover financial losses resulting from her failed illegal endeavor.

The Panel's Opinion contradicts and undermines South Carolina's well established common law prohibition against allowing persons engaged in criminal ventures access to our

civil courts to resolve disputes arising from their own illegal conduct. [1] Appellants therefore respectfully request that this Court vacate the Panel's Opinion and conduct an *En Banc* re-hearing of this appeal.

James M. Griffin
Ariail E. King
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(803) 771-8000
Attorney for the Appellants

June 20, 2013

Columbia, South Carolina

[1] In *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 276-77, 437 S.E.2d 168, 170 (Ct. App. 1993) the Court applied the doctrine of "illegality" to bar claims brought under the South Carolina Unfair Trade Practices Act and noted "[i]t is a well founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act."

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2006-CP-40-1814

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

Respondents,

v.

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

Appellants.

PROOF OF SERVICE

I, Jaime Harmon, the undersigned employee of Lewis, Babcock & Griffin L.L.P, attorney for Appellant Whitlark & Whitlark, Inc. d/b/a Rockaways Athletic Club and Pizza Man, ForrestWhitlark, Paul Whitlark, do hereby certify that I have served a copy of the foregoing **Appellants' Reply to Respondent's Return to the Petition for Rehearing or Rehearing En Banc**, in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Mario Pacella
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2110 Beltline Blvd. Suite A
Columbia, SC 29204

Louis H. Lang
Callison Tighe & Robinson, LLC
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Columbia, SC 29201

Jaime Harmon

Columbia, South Carolina
June 20, 2013

The South Carolina Court of Appeals

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October 22, 2013

Mr. James Mixon Griffin
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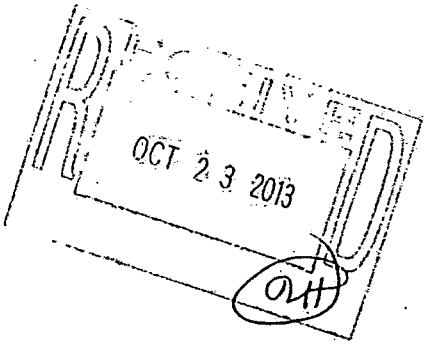
Columbia SC 29211



Re: Proctor, Lauren v. Whitlark
Appellate Case No. 2012-205510

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Louis H. Lang
Mario Anthony Pacella
Ariail Elizabeth King

The South Carolina Court of Appeals

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

v.

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

Appellate Case No. 2012-205510

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2006-CP-40-1814
Opinion 5131, filed May 15, 2013

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

Respondents,

v.

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

Petitioners.

CERTIFICATE OF SERVICE

I, Jaime Harmon, the undersigned employee of Lewis, Babcock & Griffin L.L.P, attorney for the Petitioners, do hereby certify that I have served a copy of the foregoing **Appendix, Final Brief of Respondent, Final Brief of Appellant and Final Reply Brief of Appeallant**, in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Mario Pacella
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2110 Beltline Blvd. Suite A
Columbia, SC 29204

Jaime Harmon

Columbia, South Carolina
November 21, 2013