THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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SC Court of Appeals

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.

FINAL BRIEF OF APPELLANTS

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Statement of the Issues on Appeal

Did the lower court err in granting Respondents' Motion for partial summary judgment, while denying Appellant's motion by ruling that the South Carolina legislature abrogated the doctrine of *in pari delicto*?

Statement of the Case

This lawsuit began on March 29, 2006 in which the Respondent Proctor claimed that she had sustained gambling losses through machines of Appellant. (R. 15-23) The Complaint was amended twice; the first amended complaint added Trans-Union National Title Insurance ("Trans-Union) as a plaintiff and the Second Amended Complaint added Charlie Bishop and Brett Blanks as defendants. Ultimately, the Second Amended Complaint asserted causes of action for declaratory judgment, unjust enrichment, unfair trade practices, restitution, civil conspiracy and negligence[1]. (R. 228-242) Appellants answered and denied the allegations.[2] (R. 243-248)

In 2007, Appellants filed a motion asserting they were entitled to summary judgment under the defense of *in pari delicto*. (R. 268-278) Respondent also filed a motion for partial summary judgment as to the liability of Appellants. (R. 29-188) The lower court denied the motions without prejudice. (R. 1-12; 316, 333) In 2009, after the parties conducted additional discovery, both parties again filed motions for summary judgment on the same issues. (R. 263-267; 268-278) The lower court, through the Honorable Alison Renee Lee, issued an order dated September 9, 2011, granting Respondent's motion for summary judgment as to liability of Appellants, and denied Appellants' motion for summary judgment based on the *in pari delicto* defense. (R. 1-12) Appellants timely filed a Motion to Reconsider and/or to Alter or Amend,

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[1] The negligence cause of action was pled in the alternative.
[2] The other defendants, Charlie Bishop and Brett Blanks, have participated in the underlying case but are not a part of this appeal.

which was denied by Order dated November 15, 2011.[3] (R. 279-286;13-14) This appeal followed. (R. 287-312)

Statement of the Facts

This case was brought Respondent Laura Proctor, who claimed to be a habitual gambler. (R. 214-227) Proctor was employed by a company (owned by Proctor's mother) called State Title that was utilized by attorney Walter Smith to provide real estate closing services. (R. 333-334) Atlantic Title, now known as Trans-Union, was the title company that Smith and State Title used. (R. 3)

At some point in her employment, Proctor began stealing money from Smith's trust accounts by forging her mother's signature on checks made out to cash. (R. 3) She then used the money to gamble. (SR.3-4) Proctor claims that she played gambling machines in Rockaways and Pizza Man, establishments operated by Respondents Whitlark & Whitlark, Forest Whitlark, and Paul Whitlark. (SR. 3-4) Respondent knew that gambling was illegal but continued to play. (SR. 2) She testified that any money she won or could have won was spent on gambling and never returned to Attorney Smith's accounts. (R. 260) Proctor plead guilty and was ordered to pay $755,000 in restitution. (R. 3) Proctor then filed suit against Appellants to recover gambling losses she supposedly incurred. (R. 15-23)

[3] Judge Lee also found that Trans-Union did not have standing to assert any claims and that Proctor's equitable claims failed because she had unclean hands and therefore granted Appellants' motion for summary judgment on both of those motions. Those rulings were not appealed and therefore are the law of the case.

I. **The doctrine of *in pari delicto* completely bars Proctor's action against Appellants.**

Under the doctrine of *in pari delicto,* Respondent may not recover money lost while engaged in illegal gambling. 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).[4] The long established defense has been repeatedly recognized by South Carolina courts. See, *Rice, supra; Livinston, supra; White v. Commercial & Farmers Bank*, 66 S. C. 491, 511-12, 45 S. E. 94, 102 (1903) ("[n]o court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."); *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.).

[4]See also, *Owen v. Davis*, 1 Bail. 315, 1829 W.L. 7401 (1829) (money paid for a gaming debt cannot be recovered back by the loser, unless he brings suit for it within the period limited by the statute of anns); *Hasket v. Wootan* (1 Nott and McC 180, 181 W.L. 850 (1818)) (an illegal wager of $60, won on a horse raise, cannot be recovered; *Abers v. Elliott*, (2006 W.L. 2053425) (Minn. P. App. 2006) (doctrine of *in pari delicto* barred plaintiff's claim to seek payment of promised money from unlawful gambling proceeds); *Sikes v. Teleline, Inc.*, 281 F.3d 1350 (11th Cir. 2002) (plaintiff may be barred from bringing RICO claim based upon illegal gambling by doctrine of unclean hands); *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998) (holding that plaintiffs did not have standing to bring a civil RICO claim predicated on illegal gambling because they failed to allege "a compensable injury."); *Kelly v. First Astri Corporation*, 72 Cal. App. 4th 462 (1999) (under the *in pari delicto* doctrine, neither courts of law nor courts of equity will aid or assist a plaintiff to recover money lost in a gambling game that is prohibited by law, regardless of where it is played and even if the loss resulted from cheating, absent a statute authorizing recovery of the gambling losses); *Al-Ibrahim v. Edde*, 897 F.Supp. 620 (D.D.C. 1995) (doctrine of unclean hands barred plaintiff's suit to recovery taxes paid on behalf of the defendant for illegal gaming proceeds); *State v. Hair*, 114 N.C. App. 464, 442 S.E.2d 163 (1994) (one who pays gambling debt owed to another may not subsequently attempt to recover that which he is paid.); *People v. Coates*, 64 A.D. 2d 1 (Sup. Ct. Appellate Division, Second Department N.Y. 1978) (because the parties in an unlawful gambling activity are *in pari delicto*, the unsuccessful gambler has no common law right to recover his losses); *Reynolds v. Reynolds*, 238 Ga. 1, 230 S.E.2d 842 (1976) (the defense of *in pari delicto* prevents recovery based upon claims involving violation of gambling statutes which constitute a crime); *Grim v. Cheatwood*, 208 Okla. 570, 257 P.2d 1059 (1953) (the general rule is that losses sustained in the gambling game may not be recovered by the loser); *Wallace v. Oppenheim*, 73 Cal. App. 2d 25, 165 P.2d 709 (1946) (in the absence of statute authorizing recovery of gambling losses, loser engaging in a game of "21" which was prohibited by statute cannot maintain an action to recover his losses from the winner alleging using a deck of marked cards); *See also* 38 Am. Jur. 2d § 212, at 259 (1968) (independent of statute, the rule is that there is no remedy for the loser where money or property is delivered in payment of or on account of a gambling contract or transaction, since the law will not lend its aid to a party in either the execution or the recision of such a contract, the maxim, "*Ex Turpi Causa Non Oritur Actio*" applying, and the loser being regarded as *in pari delicto* with the winner in such cases.)

The lower court, however, improperly found that the South Carolina General Assembly abrogated this doctrine in passing certain statutes, in particular, S.C. Code §§32-1-10 and 32-1-20. Section 32-1-10 states:

> 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 so playing or betting, 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 then next ensuing, to sue for and recover the money or goods so lost....[5]

The ruling that S.C. Code §§ 32-1-10 and 32-1-20 abrogated the common law doctrine of *in pari delicto* is directly contrary to *Rice v. Gist* and *Livingston v. Wootan, supra*. See also, *Owen v. Davis*, 1 Bail. 315, 1829 W.L. 7401 (1829) (gambling losses cannot be recovered unless suit brought within the period of the Statute of Ann); *Hasket v. Wootan* (1 Nott and McC 180, 181 W.L. 850 (1818)) (an illegal wager of $60, won on a horse raise, cannot be recovered).

All of the cited cases involve the application of the common law doctrine of in *para delicto* and were decided after the enactment of the Statute of Anne, which is currently codified at S.C. Code § 32-1-10 et. seq. In *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993), the Supreme Court explained, "except for changing the monetary threshold this statute [S.C.Code § 32-1-10 et. seq.] has remained unchanged since 1712, when it was adopted from English law by the "reception statute" passed by the South Carolina colonial assembly." This statute, known as the English Statutes of Anne "was originally titled, "An Act for the Better Preventing of excessive and deceitful Gaming." *Id.* The South Carolina Supreme Court relied upon this legislative history in its ruling that Section 32-1-10 was not limited to illegal gambling, but allowed a person who lost money gambling on video poker machines, which were lawful then, to sue and recover under the Statute for losses exceeding $50. *Berekebile.*

[5] Section 32-1-20 applies a suit by a person other than the loser. Since the lower court's unappealed ruling is that Traus-Union has no standing, this section is irrelevant here.

Plaintiff Lauren Proctor admitted in her deposition and has alleged in the Complaint that she is seeking to recover money that she stole from her employer and allegedly lost to the Defendants while engaged in illegal gambling. Plaintiff Proctor testified that she gambled on video machines being operated at Defendant's restaurants. Under South Carolina law a person gambling on a video machine and the operator of the machine are both guilty of a misdemeanor offense. South Carolina law S.C. Code § 16-19-40 makes it unlawful for a person to play

> any game with cards or dice, any gaming table commonly called ABC or E, O or any gaming table known or distinguished by any other letters or by any figures ....or any machine or device licensed pursuant to § 12-21-2720 and used for gambling purposes. A person convicted of this offense is subject to imprisonment of not more than 30 days and a fine of not more than $100.[6]

Appellant has clearly admitted engaging in illegal gambling. However, Appellant did not attempt, in any of version of the complaint in this case, to invoke the statutory remedy. Of course, the remedy in S.C. Code § 32-1-10 would not apply here because the statute requires a person to file suit within 90 days of a loss; Appellant last lost money in July or August, 2005 (SR. 5), but did not file suit until March 29, 2006, well outside of the 3 month time period.

The lower court held that *Johnson v. Collins Entertainment*, 349 S.C. 613, 564 S.E.2d 653 (2002) was "on point that the doctrine of *in pari delicto* has been abrogated regarding suits for gambling losses under the South Carolina Unfair Trade Practices Act...." Order on Summary Judgment, (R. 10) However, that case was limited to its facts and has no application here.

The *Johnson* case was the South Carolina Supreme Court's answer to a certified question of Judge Joseph Anderson in connection with a federal class action lawsuit brought by gamblers

[6] 16-19-40 subjects a person who is operating a "gaming house" to a fine of $1,000 and prison of up to 1 year.

who lost money. At that time, video poker was legal in South Carolina. The issue in that lawsuit was whether the video poker operators unlawfully enticed players to gamble by offering jackpots in excess of the statutory limits of $125 per day. The operators allegedly attempted to evade the jackpot limitation in various ways, including making payments over a series of days, payments to proxies, or by requiring players to sign a form verifying that the player had not netted more than $125.

The Court found that the defense was not available to those video poker operators:

> On this point, defendants suggest an *in pari delicto* defense. The translation ends the inquiry-the phrase means "in equal fault." The operators and machines at issue are licensed to operate in a regulated area of the law. They should, therefore, 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. In any case, what the law prohibits is the *making* of the payouts in excess of the statutory cap. It does not directly address the *receipt* of the funds. Thus, while this court is not willing to suggest that the player who receives an excess payment is without fault, the fault or culpability is certainly not "equal."

Johnson v. Collins Entm't Co., Inc., 349 S.C. 613, 639, 564 S.E.2d 653, 667 (2002). As that quote demonstrates, at the time the *Johnson* case arose, it was not illegal for a person to play video poker and it had never been ruled unlawful for that a person playing could not receive a payout in excess of the statutory cap. The law at issue only limited the payout (not necessarily the receipt) of fund in excess of the statutory cap; that law, the South Carolina Video Game Machine Act, S.C. Code § 12-21-2770, has now been repealed.

Because the video gambling machines have now been made illegal, the nature of the claims in this case are different than the claims in *Johnson*. *Johnson* found that the video poker operators were more knowledgeable about regulations and the maximum payout permitted by law and thus the culpability of the operators and the gamblers was not equal. Here, there is no particular regulation or law that requires special knowledge, so Respondent's culpability is equal

to Appellants. It was illegal for Respondent to gamble, whether she won (which would require Appellant to pay her) or lost (in which Respondent was essentially paying Appellant). Respondent knew that gambling on the machines was illegal: "I mean, I played I can tell you that I played before it was illegal and after it was illegal...." (SR.2). At another point in her deposition, Proctor acknowledged that video gambling had been outlawed in 2000:

> Q: And then at some point in time, and I think the record will speak for itself, but I'd say end of June 2000, that video poker as we know it became unlawful in South Carolina?
>
> A: Right.

(SR. 2). Despite the illegality, Proctor continued to gamble with money stolen from her mother's employer.

> Q: Let me ask you, from, I guess let's just start in 2000, summer of 2000, June 31st or 30th, however many days June has, when video poker became illegal in South Carolina.
>
> A. Uh-huh (affirmative response)
>
> Q: From that date forward, did you ever gamble with your money, that wasn't ...
>
> A: That's hard to say.
>
> Q: ...that wasn't stolen?
>
> A: That's hard to say.

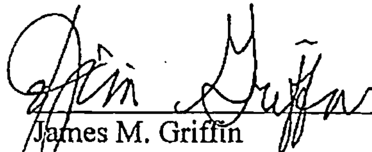
(SR 6). Respondent also admitted that had she won at gambling, she would not have repaid the stolen money and that she was "playing for keeps." (R. 260).

Proctor knew that gambling was illegal but did so anyway, on her own initiative and with money stolen from her mother's employer. Under the doctrine of *in pari delicto,* Proctor, as a participant in the wrongdoing, cannot not recover damages resulting from the wrongdoing. *Myatt, supra.* Contrary to the lower court's ruling, *Johnson* actually recognizes that *in pari*

delicto is a defense to an unfair trade practices claim, but merely found under that particular set of facts, the defense did not apply. Had the Court intended to abrogate the long-standing doctrine of *in pari delicto*, it could have said so, but did not. Furthermore, in 2006, this Court recognized the doctrine of *in pari delicto* as a defense to an unfair trade practices claim. See, *Myatt v, RHBT Financial Corporation*, 370 S.C. 391, 635 S.E.2d 545 (Ct. App. 2006). [7]Therefore, the lower court's order denying Appellants' motion for summary judgment and granting Respondent's Motion for summary judgment must be reversed.

CONCLUSION

The lower court erred in finding that the doctrine of *in pari delicto* had been abrogated by the South Carolina General Assembly. The doctrine of *in pari delicto* is still valid and is a complete affirmative defense to Respondent's claims as she was a participant in the wrongdoing. Thus, the lower court erred in granting Respondent's Motion for Summary Judgment and denying Appellant's Motion for Summary Judgment.



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[7]Similarly, 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 similar doctrine of "illegality" to bar claims brought under the South Carolina Unfair Trade Practices Act.

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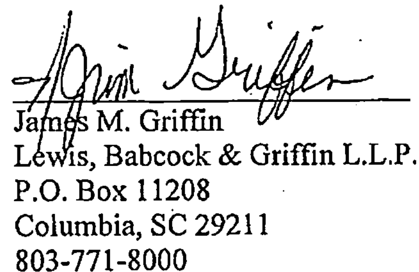
Athletic Club and Pizza Man, Forrest
Whitlark, Paul Whitlark, Charlie E. Bishop,
and Brett Blanks,

Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief contains all material proposed to included by any of the parties and not any other material, and that Appellant has complied with the August 13, 2007 Order of the Supreme Court on Personal Data Identifiers.



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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' Final Brief** 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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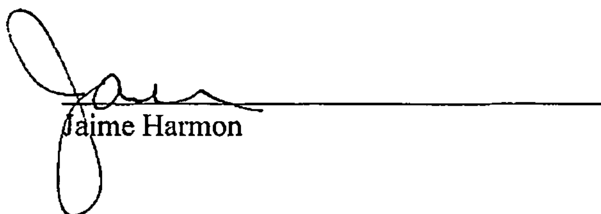

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Columbia, South Carolina
September 18, 2012

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I. Statement of the Issue on Appeal

Whether the Circuit Court erred in granting Respondent's Motion for Partial Summary Judgment, while denying Appellant's Motion for Summary Judgment by ruling that *in pari delicto* was not a defense in an action brought under the South Carolina Unfair Trade Practices Act.

II. Statement of the Case

Appellants' Statement of the Case fairly depicts the proceedings below.

III. Statement of the Facts

In or around 1995, Respondent began gambling heavily on video gaming machines throughout Columbia, South Carolina. (R. p. 33, ¶ 3) At that time, Respondent became addicted to gambling, particularly gambling on video games at bars and restaurants in South Carolina. (R. p. 33, ¶ 4) Even after July 2000, when operating video gaming machines became illegal, Respondent continued to gamble on video games at bars and restaurants in South Carolina. (R. p. 33, ¶ 5)

Beginning in 1999, and continuing until June 2005, Respondent gambled weekly, and many times multiple times during the week, through video game machines at Appellants' retail establishments, Rockaways Athletic Club and Pizza Man. (R. p. 33, ¶ 6) Respondent's gambling losses ranged from $1000 to $5000 weekly at Appellants retail establishments. (R. p. 34, ¶ 7) On several occasions, Appellants, through their retail establishments, provided cash advances on Respondent's credit card in order to pay Defendant gambling debt. (R. p. 34, ¶ 8) Appellants would charge Respondent's credit

card for food purchases in large dollar amounts, sometimes exceeding $1000 for this purpose. These credit card transactions utilized interstate communication facilities such as telephone lines to complete these credit card transactions. (R. p. 34, ¶ 9)

Appellants' Pizza Man establishment had two to three video gaming machines for gambling and Defendant's Rockaways establishment had three video gaming machines for gambling prior to those machines being seized by the FBI. (R. p. 34, ¶ 10) Respondent paid in excess of $500,000 in gambling debt to Defendant. This debt is documented by copies of checks paid to Appellants in the amount of $387,623.65, credit card transactions directly with Appellants in a total amount of $28,057.69, and debit card withdrawals from banks and checks cashed at banks where funds were then used to pay gambling debt in the amount of $ 91,598.47. (R. p. 34, ¶ 11)

Appellant continued to operate the gaming machines until an FBI sting operation in Fall, 2005. (R. p. 34, ¶ 13) Other individuals who gambled at Appellants establishments included, but are not limited to, Hugh Barenow, Hillary Helms, Dennis Constantino, Sam Bray, and two older women. (R. p. 34, ¶ 14) Paul Whitlark also gambled and sustained losses at Rockaways and Pizza Man. (November 7, 2007 Deposition of Forrest Whitlark, filed separately under seal)

Appellant Whitlark & Whitlark, Inc., is owned and operated by four principals, David Melson, Tom Dudek, Forrest Whitlark, and Paul Whitlark. (R. p. 52, lines 9-24) Appellants employed Hilary Helms. (R. p. 67; R. p. 97, lines 21-25) Appellants also had an employee named Bennett. (R. p. 101, lines 11-16) An employee named Graeme Mitchell worked for Defendant. (R. p. 104, lines 14-24) With respect to the owners, Forrest Whitlark and Paul Whitlark managed the gambling operation, and Tom Dudek,

Hillary Helms, Bennett, and Graeme Mitchell assisted Forrest and Paul Whitlark in collecting proceeds from Respondent and carrying such proceeds between Appellants' Rosewood area restaurants. (November 7, 2007 Deposition of Forrest Whitlark 127-129, filed separately under seal)

Appellants collected unlawful debt from Respondent in this manner on numerous occasions. To carry out the scheme to obtain money from Respondent for unlawful and unfair debt, Appellants utilized interstate communication facilities to charge Respondent's credit or debit cards and utilize interstate communication facilities to deposit checks made out to its business from Respondent or by Respondent to satisfy this unlawful. Because of the assertion of the Fifth Amendment privilege by Forrest Whitlark and Paul Whitlark, the facts as set forth above are essentially uncontradicted; the issues before the Circuit Court were whether Appellants' gaming enterprise constitutes an unfair trade practice in violation of South Carolina law and whether Respondent was entitled to recover her losses for same. In his second deposition, Forrest Whitlark waived his Fifth Amendment privilege and testified. The only fact he contests is that he estimates that Lauren Proctor lost only $115,000 to $135,000 between 2003 and 2005. (November 7, 2007 Deposition of Forrest Whitlark 18 – 25, filed separately under seal) The Circuit Court concluded based upon the evidence that Appellants violated the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-140. Further, the Circuit Court concluded Respondent could recover pursuant to S.C. Code Ann. § 39-5-120.

Appellants do not challenge the Circuit Court's finding that operating video poker machines for gambling purposes violates the South Carolina Unfair Trade Practices Act. Rather, Appellants contend that even though they may have violated the South Carolina

Unfair Trade Practices Act, Respondent own unlawful conduct bars recovery under the common law defense of *in pari delicto.* The Circuit Court properly concluded this defense was not available for gambling cases brought under the South Carolina Unfair Trade Practices Act, citing Johnson v. Collins Entertainment Co., Inc., 349 S.C. 613, 635, 564 S.E.2d 653, 664-65 (2002). (R. pp. 9-10)

IV. Standard of Review

"An appellate court reviews a grant of summary judgment under the same standard applied by the trial court." Lanham v. Blue Cross & Blue Shield of S. Carolina, Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). "Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Rule 56(c), SCRCP; Knight v. Austin, 396 S.C. 518, 521-22, 722 S.E.2d 802, 804 (2012). Determining the proper interpretation of a statute is a question of law, and the South Carolina Supreme Court reviews questions of law de novo. Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "The cardinal rule of statutory construction is that the intent of the legislature must prevail if it reasonably can be discerned from the words used in the statute." Cabiness v. Town of James Island, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011). "These words must be construed in context and in light of the intended purpose of the statute in a manner which harmonizes with its subject matter and accords with its general purpose." Id.

V. Argument

The Common Law Doctrine of *In Pari Delicto* Has Been Abrogated by the Statutory Scheme Involving Gambling in South Carolina and Under Federal Law.

The South Carolina Unfair Trade Practices Act prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C.Code Ann. § 39-5-20 (1985). "An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive; a practice is 'deceptive' when it has a tendency to deceive." S.C. Law of Torts at 372 (*quoting* Young v. Century Lincoln-Mercury, Inc., 302 S.C. 320, 396 S.E.2d 105, 108 (Ct.App.1989) *affirmed in part, reversed in part, on other grounds,* 309 S.C. 263, 422 S.E.2d 103 (1992) (*per curium*). S.C. Code Ann. § 39-5-140 authorizes a private cause of action. The Circuit Court found that Appellants' conduct violated the South Carolina Unfair Trade Practices Act. (R. p. 10) Appellants do not challenge that finding here. Rather, Appellants contend the Circuit Court erred in concluding that the common law defense of *in pari delicto* was inapplicable to the statutory cause of action here.

The common law doctrine of *in pari delicto*[1] is a common law doctrine that states that a court should not allow a person to recover money lost in an illegal venture. The South Carolina Supreme Court recognized this doctrine in very old gambling cases. Livingston v. Wootan, 10 S.C.L. 178, 1818 WL 849 (S.C.Const.App. 1818), Booker v. Wingo, 29 S.C. 116, 7 S.E. 49, 53 (1888). Owen v. Davis, 1 Bail. 315, 17 S.C.L. 315, 317 (1829).

However, the South Carolina legislature abrogated this doctrine in passing a number of statutes, including S.C. Code Ann. §§ 32-1-10, 32-1-20, and the South Carolina Unfair Trade Practices Act. In Collins Entertainment, the South Carolina Supreme Court had the opportunity to address the issue of whether the doctrine of *in pari*

[1] Black's Law Dictionary defines the Latin term *in pari delicto* as "in equal fault."

delicto at common law prohibited a person to recover gambling losses under the South Carolina Unfair Trade Practices Act. The Supreme Court explained that "[s]ections 32-1-10 and 20 promote "a policy which prevents a gambler from allowing his vice to overcome his ability to pay. The legislature adopted a policy to protect a citizen and his family from the gambler's uncontrollable impulses."" Collins Entertainment, 349 S.C. at 635, 564 S.E.2d at 664-665.

The Supreme Court further explained that sections 32-1-10 and 20 do not have preclusive effect regarding remedies afforded under the South Carolina Unfair Trade Practices Act because S.C. Code Ann. § 39-5-160 provides that powers and remedies under this section are cumulative and supplementary to all powers and remedies provided by existing law. Id. Because the common law doctrine of *in pari delicto* was abrogated by the passage of sections 32-1-10 and 32-1-20, and Respondent is in the class of persons that the statutes were designed to protect, Respondent is not barred from recovery under the doctrine of *in pari delicto*. Moreover, the statutory violations that serve as the basis or predicate for violation of the South Carolina Unfair Trade Practices Act, violations of 18 U.S.C. § 1952 (the Travel Act), 18 U.S.C. § 1955 (prohibition of illegal gambling business), 18 U.S.C. § 1956 (laundering of monetary instruments), and 18 U.S.C. §§ 1961 & 1962 (Racketeer Influenced Corrupt Organizations), were designed to protect those gamblers whose vice overcame their ability to pay. Because Collins Entertainment is on point that the doctrine of *in pari delicto* has been abrogated regarding suits for gambling losses under the South Carolina Unfair Trade Practices Act, Respondent is not barred from recovery merely because she gambled at Defendant's establishment.

Appellant's argument that Collins Entertainment is not on point because video

poker was legal at the time Collins was operating its video gaming enterprise and was in a better position than the consumer to understand what payouts were lawful and what payouts were unlawful also fails. The quotation from Collins Entertainment cited by Appellants is telling. In Collins Entertainment, the South Carolina Supreme Court specifically held, "[t]hus, while this court is not willing to suggest that the player who receives an excess payment is without fault, **the fault or culpability is certainly not 'equal.'**" (Emphasis added.) Collins Entertainment, 349 S.C. at 639, 564 S.E.2d at 667.

Thus, the doctrine of *in pari delicto* is applicable with respect to Respondent's conduct that arguably violated S.C. Code Ann. § 16-19-40 by playing at a tavern, inn, or store for retailing spirituous liquors, the punishment is imprisonment for a period not to exceed thirty days or a fine of $100. However, the legislature created an unequal punishment for the tavern keeper, recognizing that the tavern keeper was more at fault, making the maximum punishment to be imprisonment for a period not to exceed twelve months and a fine of two thousand dollars. Even based upon the disparate punishments under S.C. Code Ann. § 16-19-40, the legislature has made it clear that Respondent is less at fault than Defendant with respect to their conduct serving as the factual basis for this action.

The Circuit Court properly held that Respondent was entitled to Partial Summary Judgment under her claim that Appellants violated the South Carolina Unfair Trade Practices Act.

VI. Conclusion

For the above and foregoing reasons, the September 9, 2011 Order of the Circuit Court should be affirmed.

RESPECTFULLY SUBMITTED, this 17th day of September, 2012.

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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.

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FINAL REPLY BRIEF OF APPELLANTS

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I. *Johnson v. Collins Entertainment* does not support Respondents' argument that the doctrine of *in pari delicto* was abrogated.

Respondents concede that under the doctrine of *in pari delicto,* a person may not recover money lost while engaged in illegal gambling. See Resp. Brief, p. 9, citing *Livingston v. Wootan*, 10 S.C.L. 178 (1818). However, Respondents argue that the doctrine has been abrogated by the passage of S.C. Code §§ 32-1-10, 32-1-20 and the South Carolina Unfair Trade Practices Act. Section 32-1-10 states:

> 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 so playing or betting, 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 then next ensuing, to sue for and recover the money or goods so lost...

Section 32-1-20 allows a person other than the loser:

> In case any person who shall lose such money or other thing as aforesaid shall not, within the time aforesaid, really and bona fide and without covin or collusion 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, by any such action or suit as aforesaid, to sue for and recover the same and treble the value thereof, with costs of suit, against such winner or winners as aforesaid, the one moiety thereof to the use of the person that will sue for the same and the other moiety to the use of the county in which the offense shall have been committed.[1]

Respondent argues that these sections completely abrogate the doctrine of *in pari delicto.* However, these sections do not abrogate the doctrine but merely provide a narrow exception to the rule by allowing a person who suffered losses from legal or illegal gambling to recover if an action under this statute is timely filed:

[1] This section has no effect on this case as the lower court has already determined that Trans-Union National Title Insurance has no standing to bring an action under this section.

> ...Berkebile posits the more compelling argument, that the statute has the effect of protecting a gambler, regardless of the legality of the game, from abusing the vice and exceeding limits which bring harm to the gambler and his or her family.

Berkebile v. Outen, 311 S.C. 50, 54, 426 S.E.2d 760, 762-63 (1993). Procter has not sought to recover under these code sections and it is undisputed that the time allowed for recovery under those statutes had expired by the time Procter filed her lawsuit.

Respondent's reliance on the decision in *Johnson v. Collins Entertainment*, 349 S.C. 613, 564 S.E.2d 653 (2002), is misplaced. In that case, the Supreme Court considered the issue of whether plaintiffs could seek to recover losses under the Video Game Machines Act and the South Carolina Unfair Trade Practices Act, or if the plaintiffs were limited to the remedies in S.C. Code §§ 32-1-10 and -20. At the time, gambling machines were legal in South Carolina, albeit with certain restrictions contained in the now-repealed Video Game Machines Act. The Court found that the plaintiffs could pursue recovery under all three statutes.

However, the *Johnson* case did <u>not</u> hold that the doctrine of *in pari delicto* was abrogated by S.C. Code §§ 32-1-10 and -20. In fact, while S.C. Code §§ 32-1-10 and -20 "were originally adopted in 1712 as part of the Statutes of Anne,"[2] there are cases after that date that refused to allow a gambler to recover, by applying the doctrine of *in pari delicto*. <u>See</u>, *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); *Owen v. Davis*, 1 Bail. 315, 1829 W.L. 7401 (1829) (money paid for a gaming debt cannot be recovered back by the loser, unless he brings suit for it within the period limited by the statutes of Anne). Respondent has not attempted to distinguish this controlling authority. Furthermore, in a 2006 case involving unfair trade practices and other claims, this Court recognized the doctrine of *in pari delicto* as a

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[2] *Johnson*, 349 S.C. at 634, 546 S.E.2d at 664.

valid defense. See, *Myatt v, RHBT Financial Corporation*, 370 S.C. 391, 635 S.E.2d 545 (Ct. App. 2006)

In *Johnson,* the South Carolina Supreme Court merely held that the defense of *in pari delicto* was not available as a defense for the gambling operators in that case, stating:

> On this point, defendants suggest an *in pari delicto* defense. The translation ends the inquiry- the phrase means "in equal fault." The operators and machines at issue are licensed to operate in a regulated area of the law. They should, therefore, be held to a greater knowledge and understanding of the laws than their customers....

349 sc at 639, 564 at 667. The Court concluded that the plaintiff there were not without fault, but were not equally culpable, and thus the *in pari delicto* defense could not be applied.

As previously noted, gambling was legal, but highly regulated, at the time of the *Johnson* case. Thus, the Court held the operators to higher standing in understanding the restrictions contained in the law. Now however, gambling machines are completely illegal, not licensed or regulated, and Proctor knew that the machines were illegal at the time she participated in the activity: "I mean, I played I can tell you that I played before it was illegal and after it was illegal...." (SR. 2) Since gambling was illegal and Proctor knew that it was illegal, there can be no "greater knowledge or understanding of the laws" attributable to Respondents that would deprive them of the defense of *in pari delicto.*

Respondent attempts to create some inequality of culpability between the parties, arguing that under S.C. Code § 16-19-40, a "tavern keeper" who allows gambling in his tavern is subject to stronger penalties that the gambler. Respondent claims that the different penalties demonstrate that the legislature acknowledged the tavern keeper to be more at fault than the gambler. However, the difference in the penalties is not based on fault or culpability, but the fact that the tavern keeper has provided a forum for gambling, thereby extended opportunity for

multiple gamblers to engage in illegal activity. It is the repetitive nature of the tavern keeper's conduct that warrants stronger punishment. *See, e.g.* 39 *Am.Jur.2d Habitual Criminal* § 2 (enhanced punishment statutes thus serve to protect law-abiding citizens from the clear danger posed by the high incidence of repeat offenses).

In effect, in attempting to rely on S.C. Code § 16-19-40, Respondent is comparing apples and oranges. *In pari delicto* applies as a defense in a civil matter, not a criminal case. *State v. Posey*, 88 S.C. 313, 70 S.E. 612, 614 (1911). In the context of unclean hands and *in pari delicto*, courts have recognized that alleged "misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character" and therefore, Proctor's admitted participation in illegal gambling is sufficient, regardless of the penalties under S.C. Code § 16-19-40.[3] *Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co.*, 324 U.S. 806, 815, 65 S.Ct. 993, 89 L.Ed. 1381 (1945); *accord Pecorella v. Greater Buffalo Press, Inc.*, 107 A.D.2d 1064, 1065, 486 N.Y.S.2d 562, 563 (4th Dep't 1985) (holding that with respect to unclean hands, the misconduct that will bar relief "need not be sufficient to constitute the basis of a legal action"). Moreover, courts have found that the nature of the penalties does not affect the culpability of the parties:

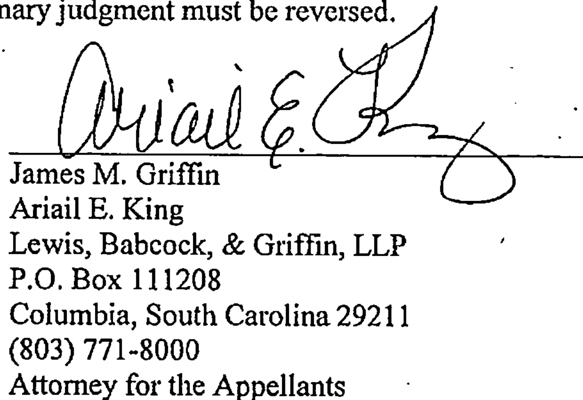
> It is true that the penalties of the act seem to be directed solely to the lender, and the advantages or benefits, aside from the provisions permitting an outrageous interest charge by the lender, reserved solely for the borrowers. But these penalties were designed to prevent oppression of the weak and poor; they were not designed as rewards for the perfidy of the borrower. Where no oppression is involved, no advantage taken by the lender of the borrower, the transaction being entered into with the deliberate purpose of defeating the statute, the parties are both particeps criminis and in pari delicto, and the rule not the exception applies.

[3] In addition, the extent of Proctor's participation and culpability is an issue of fact, not one of law, and thus, should not be determined at the summary judgment stage.

Ryan v. Motor Credit Co., 28 A.2d 181, 183 (N.J. App. 1942). Because Proctor knowingly and deliberately entered into the illegal gambling transactions, the rule of *in pari delicto* applies and Proctor's claims are barred.[4]

CONCLUSION

The doctrine of *in pari delicto* is still valid in South Carolina. Respondent admits to participating in illegal activity and thus, her claims against Appellants are barred by the doctrine of *in pari delicto.* The lower court's order denying Appellants' motion for summary judgment and granting Respondent's Motion for summary judgment must be reversed.



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[4] Whether Proctor has a gambling addiction, as she claims in the Statement of Facts, also has no effect on the application of the doctrine. In *Bradley v. Doherty*, 30 Cal. App. 3d 991, 997 (Ct. App. 1973), a California appellate court found that both parties knew that they were engaging in unlawful gambling and thus the *in pari delicto* doctrine applied, holding [a] compulsive gambler is no less In pari delicto when indulging in illegal gambling than a noncompulsive one."

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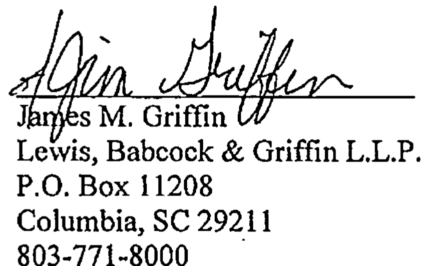
Athletic Club and Pizza Man, Forrest
Whitlark, Paul Whitlark, Charlie E. Bishop,
and Brett Blanks,

Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Reply Brief contains all material proposed to included by any of the parties and not any other material, and that Appellant has complied with the August 13, 2007 Order of the Supreme Court on Personal Data Identifiers.



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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' Final Reply Brief** 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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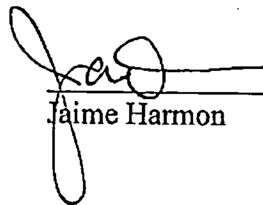

Jaime Harmon

Columbia, South Carolina
September 18, 2012