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.

RETURN TO PETITION FOR WRIT OF CERTIORARI

J. Preston Strom, Jr.
Mario A. Pacella
Strom Law Firm, LLC
2110 Beltline Boulevard
Columbia, South Carolina
(803) 252-4800
Attorneys for Respondent

Petitioners filed a Petition for Writ of Certiorari pursuant to Rule 242 of the South Carolina Appellate Court Rules. Petitioners contend that the Court of Appeals' decision conflicts with controlling Supreme Court precedent; that the Court of Appeals' erred in finding that the *in pari delicto* defense was not available to Petitioners in a gambling recovery case under the facts established; and that S.C. Code Ann. § 32-1-10 is the exclusive remedy for a person to recover losses in an illegal wager. For the reasons that follow, the Petition for Writ of Certiorari should be denied.

RESPONSIVE FACTS

Petitioners' Statement of the Case omits certain facts found relevant by the Court of Appeals. Petitioners' statement accurately reflects that Respondent pled guilty with respect to embezzling funds from the trust account of attorney Walter H. Smith. See In re Walter H. Smith, 370 S.C. 343, 635 S.E.2d 87 (2006). However, Petitioner fails to acknowledge this action was brought to recover funds that Walter H. Smith owes to Trans-Union National Title Insurance Company f/k/a Atlantic Title Insurance Company. Moreover, while pointing out that Respondent admittedly gambled at Rockaways and Pizza Man, Petitioners fail to acknowledge that they provided Respondent with cash advances on credit cards to fund her gambling and provided her free food and alcohol as an inducement to gamble. Proctor v. Whitlark & Whitlark, Inc., 750 S.E.2d 93, 94 (Ct. App. 2013). Finally, Petitioners fail to acknowledge the uncontroverted record that at least one of the Petitioners provided Respondent with drugs as an inducement to gamble. (R. at 156.)[1]

ARGUMENT

[1] Paul Whitlark asserted his Fifth Amendment privilege in his deposition on a question asking if he provided Respondent drugs. As such, Respondent is entitled to an adverse inference.

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

Petitioners contend that the Court of Appeals erred in concluding that S.C. Code Ann. § 32-1-10 was not the exclusive remedies for the recovery of gambling losses in South Carolina. Contrary to Appellant's argument, the Court of Appeals correctly noted that Johnson v. Collins Entertainment Co., 349 S.C. 613, 634-35, 564 S.E.2d 653, 664-65 (2002), held specifically that section 32-1-10 was not the exclusive remedy for a gambler to recover his or her losses! As such, no error occurred.

II. The Court of Appeal's Analysis of Johnson and the Defense of *In Pari Delicto* Was Correct.

In this case, the facts were essentially uncontroverted. Petitioners admittedly operated illegal video poker machines at Rockaways and Pizza Man, which were Columbia area restaurants that served food and alcohol. It was uncontroverted that Petitioners provided Respondent food and alcoholic beverages to induce her to gamble and remain gambling. Under South Carolina Law, a tavern keeper who operates a gambling enterprise is subject to criminal punishment that is more severe than the punishment of a patron who 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 Court of Appeals 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 court's reasoned decision applied the main tenets of Johnson. Contrary to Petitioner's argument for rehearing, the Court of Appeals affirmatively recognized that the claims in Johnson were different, as video poker was illegal when Respondent suffered her losses. Nonetheless, the court 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." Proctor, 750 S.E.2d at 95. Additionally, in applying Johnson, the Court of Appeals 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 impluses' and requires protection from his or her bad judgment." Proctor, 750 S.E.2d at 95. Finally, the appellate court 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.*[2]

Here, the Court of Appeals correctly applied the three main tenets of Johnson. This 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. Petitioners contend that the Court of Appeals, in recognizing the South Carolina policy to limit excessive gambling, the court failed to acknowledge the limited time frame as set forth in S.C. Code Ann. § 32-1-10. Petitioners' argument regarding the time limits in section 32-1-10 are misplaced, as the Court of Appeals correctly held that it was not the exclusive remedy for recovery of gambling losses.

Additionally, Petitioners argument focuses on the second and third tenets of Johnson. With respect to the *in pari delicto* defense, the Court of Appeals appropriately focused on Johnson. In Johnson, and as a matter of law, this Court concluded that the operators of gambling machines are not *in pari delicto* with the players because the operators are held to a greater knowledge and understanding of the laws, "particularly where the laws are designed to protect

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

the payer from his or own bad judgment." Johnson, 349 S.C. at, 639 n. 13, 564 S.E.2d at 667 n. 13. In this case, the Court of Appeals' properly applied Johnson. As noted in section I, the appellate court correctly applied the third tenet of Johnson, that 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 5.) However, the Panel's decision instead reaffirms South Carolina policy from statutes and case law that illegal gambling should be deterred, particularly where the gambling activity violates the South Carolina Unfair Trade Practices Act. Contrary to Petitioners' argument, the Court of Appeal evaluated the applicability of Johnson under the facts of this case, including the illegality of gambling on both sides of the gambling transaction.

III. The Petitioners' Argument that the Court of Appeals Misapplied Law from Other Jurisdictions Is Not the Basis for Review.

Petitioners contend that the Court of Appeals misapplied the law from other jurisdictions. Rule 242(b) of SCACR, provides guidelines that govern when review is typically granted. The non-exhaustive list of reasons provided by the rule does not include misapplication of out of state law. Since the list is non-exhaustive, Respondent submits that the application of out of state decisions from New York and Washington, Major League Baseball Props., Inc. v. Price,. 105 F. Supp. 2d 46 (E.D.N.Y. 2000) and O'Neil v. Crampton, 18 Wash.2d 579, 140 P.2d 308 (1943), stand for the proposition that states have expanded recovery for gambling losses to protect the gambler from his vice overcoming his ability to pay and rejecting the defense of *in pari delicto*. As such, the Court of Appeals concluded 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." Proctor, 750 S.E.2d at 96-97.

The Court of Appeals did not rely on Washington or New York state law. Rather, the Court of Appeals found the policy rationale from those states was similar to the policy under South Carolina law.

CONCLUSION

The Court of Appeals 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, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED, this 20th day of December, 2013.

STROM LAW FIRM, LLC.

J. Preston Strom, Jr.
Mario A. Pacella
2110 Beltline Boulevard
Columbia, South Carolina 29204
Tel: 803-252-4800
Fax: 803-252-4801

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CERTIFICATE OF SERVICE

I, April Gonzalez, an employee of Strom Law Firm, LLC, attorneys for Respondent, certify that I have served a copy of the Return to Petition for Writ of Certiorari, by mailing a copy of same by United States Mail, postage prepaid , to the following address:

James M. Griffin
Ariail E. King
Lewis, Babcock, & Griffin, LLP
P.O. Box 11208
Columbia, South Carolina 29211

April Gonzalez

Columbia, South Carolina
December 20, 2013