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.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for the Petitioners certifies that a Petition for Rehearing was made and ruled on by the Court of Appeals on October 22, 2013.

ISSUES PRESENTED

Pursuant to Rule 242, SCACR, the Petitioner respectfully requests the Court to consider these novel and narrow questions of law:

1. Does the Court of Appeals' decision directly conflict with controlling Supreme Court precedent that bars a person who admittedly engages in an illegal act from suing to recover losses that result from their illegal conduct?

2. Does the South Carolina Unfair Trade Practices Act abrogate the common-law doctrine of *in pari delicto* to permit a person admittedly engaged in illegal gambling to sue to recover illegal gambling losses?

3. Does S.C. Code section § 32-1-10 provide the exclusive remedy to a person who loses money in an *illegal wager* for the recovery of the *illegal wager*?

STATEMENT OF THE CASE

This case was brought Respondent Laura Proctor, who claimed to be a habitual gambler. (R. 214-227). Respondent was employed by a company (owned by Respondent'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 Petitioners 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 pled guilty and was ordered to pay $755,000 in restitution. (R. 3). Proctor then filed suit against Petitioners to recover gambling losses she supposedly incurred. (R. 15-23).

Petitioners moved for summary judgment, alleging that Respondent's claims were barred because, under the doctrine of *in pari delicto*, Respondent may not recover money lost while engaged in illegal gambling. (R. 249). Respondent moved for partial summary judgment as to the liability of Petitioners. (R. 263). The lower court granted Respondent's motion for partial summary judgment and denied Petitioners' motion for summary judgment that was based on *in pari delicto*. (R. 11-12).

By a decision filed May 15, 2013, the Court of Appeals issued an opinion affirming the denial of Petitioner's motion for summary judgment and affirming the granting of Respondent's motion for partial summary judgment on the issue of liability [App. 1]. The Court of Appeals asserted that, based on case and statutory law, the doctrine of *in pari delicto* had been abrogated and did not bar Respondent's action for recovery of such losses. [App. 7].

Petitioner filed a Petition for Rehearing [App. 9], which was denied on October 23, 2013. [App. 29].

ARGUMENT

I. The Court of Appeals erred in finding that *in pari delicto* had been abrogated, in contradiction to opinions issued by this Court and creating a new cause of action that allows a gambler to recover for her own illegal acts.

The Court of Appeals' opinion directly contradicts opinions issued by this court and creates new law opening the civil judicial system to a flood of lawsuits by disgruntled criminals suing other criminals for business disputes. Under the doctrine of *in pari delicto*, this Court has held that a person 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).[1] The long established defense has been repeatedly

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[1] 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 recission of such a

recognized. 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.).

The Court of Appeals 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 of Appeals' opinion ignores the express limitations of the statutes and the prior opinions of this Court.

Section 32-1-10[2] 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.[3] 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 Court of Appeals, in finding that *in pari delicto* has been completely abrogated by these statutes, ignored the cases that refuse to allow

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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.)

[2] 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).

[3] It is also undisputed that under S.C. Code § 16-19-40, both a person gambling on a video poker machine and the operator of the machine are guilty of a misdemeanor.

gamblers to recover and the 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).[4]

Furthermore, the Court of Appeals, 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.[5] Because these codes are the exclusive remedy, the Court of Appeals' 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 Court of Appeals' Opinion fails to distinguish between legal conduct and illegal conduct, and have created a new and novel cause of action under the South Carolina Unfair Trade Practices Act.

The Court of Appeals has misinterpreted 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 defense of *in pari delicto* was not permitted and plaintiffs were

[4] The Court of Appeals' 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 [Petitioners] 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.

[5] One of the cases cited by the Court actually supports the Petitioners' 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.

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:

> 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).

While the plaintiffs in Johnson could proceed under SCUTPA, 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, the video gambling machines became illegal in 2000 and thus, 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 Petitioners. It was illegal for Respondent to gamble, whether she won (which would require Petitioners to pay her) or lost (in which Respondent was essentially paying Petitioners). 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, Respondent 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).

The Court of Appeals held that the factual differences are meaningless because there are three "tenets" in Johnson that lead to the same conclusion that *in pari delicto* has been abrogated. However, these supposed "tenets" do not apply, as more fully set forth below.

1. The Court of Appeals states that statutes and case law support a policy of limiting excessive gambling, citing S.C. Code § 32-1-10 and Johnson. However, the Court ignores the small time frame allowed for recovery set forth in §32-1-10, which has clearly expired in this case. Any "policy" of allowing a gambler to recover is very limited by the express language of the statute and the Court of Appeals erred in trying to broaden the effect of the statute and intent of the General Assembly, especially in light of this Court's rulings in Rice and Wootan, *supra*. Furthermore, the Court's citing of Johnson to explain why Johnson applies is circular.

2. The Court of Appeals finds that the parties are not actually in *in pari delicto* because the gambler is acting under "uncontrollable impulses" and must be protected by law. However, Court of Appeals ignores the fact that the gambler is protected by law, but that protection is narrowly tailored. For example, in Johnson, this Court recognized that the Video Gaming Act ("VGA"), S.C. Code § 12-21-2791, was designed to protect the gambler by limiting payouts of an otherwise **legal** gambling enterprise. Thus, the

anti-gambling statutes and the VGA Gaming Act, as recognized by Johnson, were not repugnant and in fact, were consonant in that they both included protective provisions: the anti-gambling statute (S.C. Code § 32-1-10) protected gamblers from excessive losses, while the VGA's payout limitations protected a gambler from excessive wins. When video poker was repealed, the gambler was further protected as there were **no** payouts to sway his or her "uncontrollable impulses." As a result, the only protection Respondent has to recover for an illegal gambling loss is under S.C. Code § 32-1-10.

3. The Court of Appeals found that the statutes were not the exclusive avenues for recovery and that a party could recover for gambling losses under SCUTPA , again citing to Johnson. In Johnson, the conduct for which the SCTUPA claim was permitted was legal as the Video Gaming Act, S.C. Code § 12-21-2791 (now repealed) allowed video poker but limited payouts. It is apodictic that SCUTPA can only apply to a legal trade or commerce, and video poker has been illegal in South Carolina since 2000.

Essentially, the Court of Appeals' 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 and existing opinions of this Court. 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 that act; this rule applies at both law and in equity and whether the cause of action is in contract or tort.)

III. The case law from other jurisdictions does not apply or support the Court of Appeals' holding that anti-gambling statutes abrogate the doctrine of *in pari delicto.*

The Court of Appeals relied on cases from other jurisdictions for its finding that the *in pari delicto* defense did not bar the recovery of gambling losses where a statutory remedy existed. However, the cases relied upon do not apply and cannot overrule the decisions of this Court. For example, the Court of Appeals cites to O'Neil v. Crampton, 18 Wash. 2d 579, 583-84, 140 P.2d 308, 310 (1943) for the proposition that that despite *in pari delicto*, the state of Washington created a statute to allow for the recovery of sums lost while gambling. While that statement is true, it actually supports Petitioner's argument that the only exception to *in pari delicto* is the statutory exception created by S.C. Code § 32-1-10. Had Respondent timely filed under that statute, *in pari delicto* would not apply.[6] However, the O'Neil case does not support the Court of Appeals' holding that a statutory remedy completely abrogates the defense of *in pari delicto.*[7]

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.[8] In this matter, there is no doubt here that Respondent bears "equal

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[6] However, as repeatedly, stated, it is undisputed that Respondent did not and could not assert a claim under that section as she filed her case more than 90 days after her gambling losses.

[7] Similarly, the case of Major League Baseball Properties, Inc. v. Price, 105 F.Supp.2d 46 (E.D.N.Y. 2000), simply recognizes that New York has a statute allowing gambling losses, but also noted "[t]he right to recovery is purely statutory and should be restricted to the extent and area clearly defined by law."

[8] 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

responsibility."[9] 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 named 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 pled guilty and was ordered to pay $755,000 in restitution. (R. 3). In fact, Respondent has not disputed that her conduct was illegal, but simply claims that the doctrine of *in pari delicto* had been abrogated.

CONCLUSION

The Court of Appeals' opinion, concluding that the defense of *in pari delicto* has been abrogated, contradicts prior opinions of this Court. Furthermore, by allowing the South Carolina Unfair Trade Practices Act to apply to an illegal trade, the Court of Appeals has created a novel issue of law by opening up the court system to be

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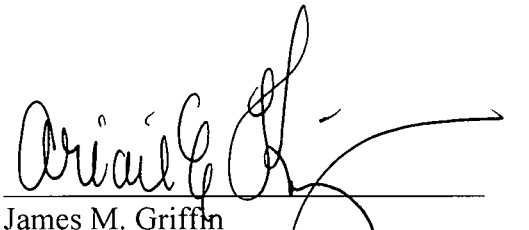
induced respondents to purchase stock in the corporation by divulging false and materially incomplete information about the corporation on the pretext that it was accurate inside information. The United States Supreme Court considered whether the doctrine of *in pari delicto* barred the action and noted 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.

[9]Furthermore, even under the "equal fault" standard adopted by the Court of Appeals, 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 Circuit Court, as well as the Court of Appeals, 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).

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 that contradicts prior decisions of this Court, and will allow new causes of action never before permitted, Petitioners respectfully submit that this matter is appropriate for a grant of certiorari under Rule 242, SCACR.



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November 21, 2013

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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 **Petition for Writ of Certiorari**, 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
November 21, 2013