THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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S.C. Supreme Court

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,

of whom Whitlark & Whitlark, Inc. d/b/a Rockaways Athletic Club and Pizza Man, Forrest Whitlark, Paul Whitlark are

Petitioners,

PETITIONERS' REPLY TO RESPONDENT'S RETURN TO THE PETITION FOR CERTIORARI

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Petitioners submit this reply to Respondent Proctor's Return to the Petition for Certiorari.

I. The holding in Johnson v. Collins Entertainment Co. that S.C. Code § 32-1-10 was not the exclusive remedy to recover gambling losses does not apply to cases such as this where the Plaintiff knowingly participated in illegal gambling.

As set forth in detail in the Petition for Certiorari, when Johnson v. Collins Entertainment Co., 349 S.C. 613, 635, 564 S.E.2d 653, 664 (2002) decided, gambling was illegal and a party was permitted to sue under South Carolina's law on Unfair Trade Practices.[1] Here, there is no legal "trade practice" and thus, the only remedy is the statutory remedy. It is undisputed that Respondent did not timely file a claim under S.C. Code 32-1-10[2]. Furthermore, the Court's ruling that S.C. Code § 32-1-10 is not the exclusive remedy to recover gambling losses does not apply to illegal gambling activities. This Court should therefore grant the Petition to clarify that the decision in Johnson v. Collis Entertainment Co., was not intended to allow participants in illegal activities to sue and recover losses resulting from their own illegal conduct.

II. Unlike Johnson v. Collins Entertainment, the operator is not held to any greater knowledge and the parties are truly *in pari delicito*.

Again relying on Johnson, Respondents argue that that the Court properly concluded that operators are held to a greater knowledge and understanding of the law, particularly where the laws are designed to protect the gamblers. (Rsp. Brief 4-5). As they have throughout this case, the Respondents ignore the fact that the "knowledge and understanding of the law" in Johnson was the Video Gaming Act, a complex set of limitations for what was then a *legal* activity. Here, no "greater knowledge or understanding of the law" is needed, as video poker is illegal,

[1] Respondent also claims that Appellants never challenged a finding that their conduct violated an unfair trade practice under SCUPTA, which is not accurate. Petitioners challenged the application of the statute as a whole; in that situation, Petitioners need not challenge the court's finding on the conduct itself.

[2] Respondent asserts as a "Responsive Fact" that Petitioner brought this action to recover funds that Walter H. Smith owes to Trans-Union National Title Insurance f/k/a Atlantic Title Insurance Company. The lower court granted Petitioners' summary judgment on TransUnion's claims on the grounds that there was no standing, and that ruling was not appealed. The purposes behind Respondent's lawsuit or what she intends to do with any proceeds have no bearing on whether or not the Court of Appeal erred in denying the defense of *in pari declicto*.

and both parties knew it.[3] While the facts in Johnson indicated that the players and the operators were not truly *in pari delicto*, the same cannot be said here.[4]

Respondents also casually brush away the potential for the multitude of lawsuits by gamblers, arguing that the Court of Appeals' decision deters illegal gambling. However, it does not deter the gambler – and in fact, encourages a gambler to continue his or her illegal activity safe in the knowledge that any monies lost can be recovered for ***years*** after the loss took place.

III. Case law from other states providing for expanded recovery for gambling losses have no effect on this case.

Respondent argues that cases from other states cited by the Court of Appeals stand for the proposition of expanding recovery for gambling losses and rejecting the defenses of *in pari delicto*. Respondents also claim that the Court of Appeals' reliance on these cases is appropriate and that the Court's opinion limited to their application to the circumstances of this case. However, whether other states have chosen to expand recovery for gambling losses has no effect of the public policy of this state. Furthermore, in the cases cited,[5] the "expanded recovery" for gamblers' recovery of losses **was set forth explicitly in statutory provisions enacted by the state legislatures.** Here, the South Carolina General Assembly has only created one statutory provision allowing recovery – S.C. Code § 32-1-10. There is no evidence that the General Assembly intended to allow illegal gamblers to recover their losses outside of that limited

[3] Respondent also insinuates that she is entitled to an adverse inference to Paul Whitlark's assertion of the Fifth Amendment on question regarding the provision of drugs to Respondent. However, this issue was not ruled upon by the trial court or the Court of Appeals. Furthermore, it is incorrect as a matter of law. To the extent an adverse inference may arise under the rules of evidence, this adverse inference cannot trump Proctor's own admission that she knew that she was engaged in illegal gambling.

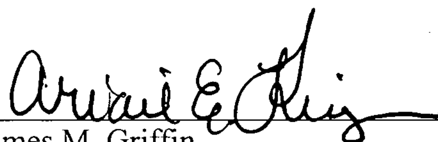
[4] Respondent claims that a gambler must be protected from "uncontrollable impulses," but the South Carolina General Assembly has provided such protection in S.C. Code 32-1-10 and -20. The additional protection of SCUTPA (which was permitted in Johnson) is not needed here, as gambling is now illegal. It is apodictic that the unfair trade practices act must only apply to a legal trade.

[5] O'Neil v. Crampton, 18 Wash. 2d 579, 583-84, 140 P.2d 308, 310 (1943) and Major League Baseball Properties, Inc. v. Price, 105 F.Supp.2d 46 (E.D.N.Y. 2000)

provision. The creation of extended recoveries by other states' legislatures has no relation to this case and do not support the Court of Appeals' holding that *in pari delicto* has been abrogated.

CONCLUSION

As set forth herein, and in the Petition for Certiorari, the Court of Appeals' decision abrogating *in pari delicto* 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. Petitioners therefore respectfully submit that the Petition for Certiorari should be granted.



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December 30, 2013
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Whitlark, Paul Whitlark are

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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 **Reply to Return on 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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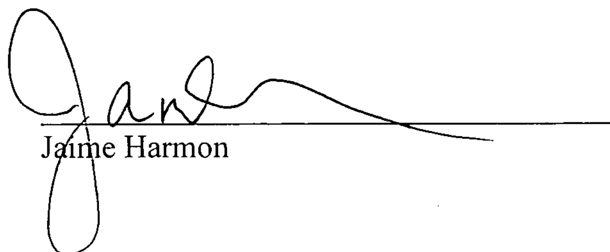

Jaime Harmon

Columbia, South Carolina
December 30, 2013