RECEIVED

OCT 27 2014

S.C. Supreme Court

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
Appellate Case No. 2013-002470

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.

PETITIONERS' REPLY BRIEF

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

Table of Contents

Table of Authorities

Cases

Statutes

ARGUMENT

I. Because video poker is illegal, the South Carolina Unfair Trade Practices Act cannot provide Respondent with a remedy and S.C. Code 32-1-10 is her exclusive remedy for gambling losses.

Respondent continues to assert that under Johnson v. Collins Entertainment Co., 349 S.C. 613, 635, 564 S.E.2d 653, 664 (2002), the South Carolina Unfair Trade Practices Act[1] provides Respondent with a remedy to recover her gambling losses. Respondent correctly notes that SCUTPA prohibits any unfair methods of completion and unfair and deceptive acts or practices in the conduct of any trade or commerce. However, Respondent ignores the fact that by using the language "trade or commerce", the legislature clearly intended for the law to apply to legal businesses. If Respondent's interpretation is accepted, the unfair trade practices act would apply to all illegal trades and allow one criminal to sue another for losses from an illegal transaction based on "deceptive acts" in an illegal trade. Obviously, such construction leads to an absurd result and should not be adopted.

Other courts have found that *in pari delicto* applies to prevent recovery for illegal gambling losses, despite the causes of action asserted. In Bradley v. Doherty, 30 Cal. App. 3d 991, 996, (Ct. App. 1973), the court considered the plaintiff's complaint to recovery gambling losses from a cocktail lounge, styled as action for negligent supervision and fraud. Despite the plaintiff's attempts to avoid the application of *in pari delicto* through creative pleading, the court held:

> The answer to that is that no matter what the happenings were called, or how they were brought about, the simple fact is that they constituted gambling prohibited by law and voluntarily entered into by the parties.

[1] S.C. Code § 39-5-10, et seq.

Id. The court also rejected plaintiff's claim that he was a compulsive gambler and thus, the doctrine should not apply:

> A compulsive gambler is no less in pari delicto when indulging in illegal gambling than a noncompulsive one. Moreover, to distinguish between compulsive and noncompulsive gamblers would encourage the latter to claim they are compulsive.

Bradley, 30 Cal. App. 3d at 997.

The South Carolina General Assembly has clearly limited a gambler's right to recover for illegal gambling losses to the remedies found in S.C. 32-1-10.[2] The use of an unfair trade practices claim to include an illegal business goes beyond the scope of S.C. Code 39-5-10, et seq. because "[t]he gambling activity engaged in in the instant case can only be classified as an unlawful and forbidden enterprise to which the doctrine of in pari delicto applies." Bradley.

II. The defense of *in pari delicto* is available to respondents despite *Johnson v. Collins Entertainment Co.*, because Respondent was equally at fault in engaging in illegal gambling.

Respondent argues that the Court of Appeals correctly held that, under Johnson, the defense of *in pari delicto* was not applicable for gambling losses sustained at a tavern. Respondent points to a quote in Johnson, in which this Court stated that the culpability who receives an excess payment was not equal to the game operators. This Court stated:

> 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....

Johnson, 349 S.C. at 639, 564 S.E.2d at 667. As recognized in that quote, time, video gambling was then legal and there were complex laws and regulations governing the conduct of video game operators, known as the Video Gaming Act. Respondents ignore the fact here, no "greater

[2] The other remedy for gambling losses, S.C. Code 32-1-20, is only available to a "person other than the loser." Since Respondent is the losing gambler, she comes within the ambit of § 32-1-10 but not 32-1-20.

knowledge or understanding of the law" is needed, as video poker is illegal, and both parties knew it. While the facts in Johnson indicated that the players and the operators were not truly *in pari delicto*, the same cannot be said here. Obviously, the game operators were supposed to know the law regulating payouts, and were held to a higher standard of culpability for violating those detailed regulatory laws, thereby eliminating the defense of *in pari delicto* in Johnson; here, no such specialized knowledge of the law is needed.

Furthermore, contrary to Respondents' claim, the disparate punishments under S.C. Code § 16-19-40 do not indicate legislative intent that the gambler is considered less culpable than the establishment. The punishments contained in that statutes are for two different offenses. Section 16-19-40 sets forth the penalty for a person who "plays at any tavern, inn," etc. any illegal game. The second part of the statute sets forth the penalty for any person "keeping such tavern, inn" etc. In other words, a tavern keeper can be convicted even if he does not gamble himself. The culpability of the gambler versus the tavern keeper cannot be compared. More importantly, Petitioners were not charged with any such offense. Respondent is merely trying to avoid the consequences of her own illegal conduct.

III. Case law from other jurisdictions support the application of *in pari delicto* in this case, not the abrogation of the doctrine.

Respondent argues that cases from other jurisdictions actually supports the idea that the doctrine of *in pari delicto* does not apply and should be abrogated. However, there are multiple cases that recognize *in pari delicto* prevents a gambler from recovering for illegal gambling losses. Where the parties voluntarily engage in a gambling game which is prohibited by law, neither courts of law nor of equity, in the absence of a statute authorizing a recovery of gambling losses, will aid or assist either party to enforce rights growing out of the illegal transaction. *See*, Wallace v. Opinham, 165 P.2d 709 (1946) (Where the parties voluntarily engage in a gambling

game which is prohibited by law, neither courts of law nor of equity, in the absence of a statute authorizing a recovery of gambling losses, will aid or assist either party to enforce rights growing out of the illegal transaction); Mrowiec v. Polish Army Veterans Ass'n of Am., Post 124 of Syracuse, N.Y., 73 N.Y.S.2d 361, 364 (Sup. Ct. 1947)(losses from slot machine gambling place both winner and loser in pari delicto and prevents recovery); Saunders v. Baker, 99 S.W. 51, 53 (Mo. App. 1907)(The legal turpitude of both parties to a gambling deal is equal).

The case of Bradley v. Doherty (discussed in Section I, *supra*) held the doctrine gambling losses could not be recovered, despite being the claim being styled as a cause of action for negligent supervision or otherwise, and explicitly rejected the argument that the compulsive nature of gambling warrants protection. In fact, the United States Supreme Court has recognized that the wide application of the doctrine: "... many courts have given the *in pari delicto* defense a broad application to bar actions where plaintiffs simply have been involved generally in 'the same sort of wrongdoing' as defendants." Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S., 134, 138 (1981).[3]

Respondent cites Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985) for the argument that abrogation of *in pari delicto* has been expanded and that abrogation applies here. However, that case actually does not support Respondent's argument as it involved fraud by a securities broker, not illegal gambling. Furthermore, that holding is limited at 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. (emphasis added).

[3] The parties are not at equal fault or involved in the same kind of wrongdoing when one party is not only gambling, but is cheating during the gambling at issue. *See, e.g.,* Grim v. Cheatwood, 257 P.2d 1049, 1049 (Ok. 1953) (where plaintiff entered poker game without knowledge that defendant and his confederates were using marked cards to defraud plaintiff, the parties were not in pari delicto). Here, there was no fraud or cheating by either party and Respondent was at fault in voluntarily participating in illegal gambling.

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; 311. Obviously, here there is no "federal regulatory scheme" that would limit the application of *in pari delicto*. Furthermore, Respondent clearly admitted her equal fault in the illegal gambling.[4]

CONCLUSION

As set forth herein, and in Petitioner's opening brief, Respondent failed to timely file under this State's exclusive statutory remedy for gambling losses. The doctrine of *in pari delicto* applies to bar Respondent's other causes of action to recover illegal gambling losses. Appellant's motion for motion for summary judgment should have been granted. The decision of the lower court should thus be reversed.

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

October 27, 2014
Columbia, South Carolina

[4] The other cases cited by Respondent, O'Neil v. Crampton, 140 P.2d 308, 310 (Wash. 1943), also provides no support. Respondent cites the case as finding that the public policy of that state was served by permitting the recovery of money lost at gambling. However, South Carolina's public policy, as evidenced by S.C. Code § 32-1-10, provides the sole remedy for gambling losses in this state, regardless of the public policy of the state of Washington discussed in O'Neil.

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
Appellate Case No. 2013-002470

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

Respondents,

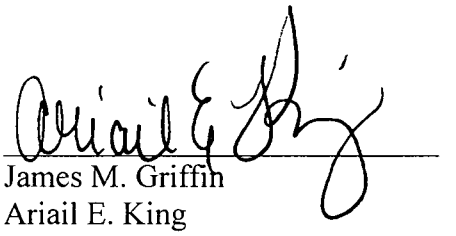
v.

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 COUNSEL

The undersigned hereby certifies that this Reply Brief complies with Rule 211, SCACR, and with the August 13, 2007 Order of the South Carolina Supreme Court which requires redaction of certain personal identifying information.



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

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
Appellate Case No. 2013-002470

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 **Petitioners' 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:

Mario Pacella
J. Preston Strom, Jr.
Strom Law Firm, LLC
2110 Beltline Blvd. Suite A
Columbia, SC 29204

Jaime Harmon

Columbia, South Carolina
October 27, 2014

A. CAMDEN LEWIS
KEITH M. BABCOCK
JAMES M. GRIFFIN
ARIAIL E. KING
J. RYAN HEISKELL*
MARGARET N. FOX**

* ALSO ADMITTED IN D.C.
** ALSO ADMITTED IN N.C

LB&G

LEWIS, BABCOCK & GRIFFIN L.L.P.

1513 HAMPTON STREET
P.O. BOX 11208 (29211)
COLUMBIA, S.C. 29201
FACSIMILE: 803-733-3541
TELEPHONE: 803-771-8000

WEBSITE: WWW.LBGLEGAL.COM

EMAIL: JLH@LBGLEGAL.COM

October 27, 2014

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

Re: Lauren Proctor, et al. v. Whitlark & Whitlark, Inc., et al.
Opinion No. 5131, filed May 15, 2013
Appellate Case No. 2013-002470

Dear Mr. Shearouse:

Enclosed please find the original and seventeen copies of Petitioners' Reply Brief in the above-referenced case. Please file these documents and return two copies to this office via our courier.

By copy of this letter and as evidenced on the Certificate of Service, I am serving counsel of record.

If you have any questions, please do not hesitate to contact this office.

With kind regards, I am

Very truly yours,

Jaime Harmon
Assistant to James M. Griffin

/jh
Enclosures

cc: Mario Pacella
J. Preston Strom, Jr.