

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

Robin B. Stilwell, Circuit Court Judge

Case No.: 2014-CP-04-00214

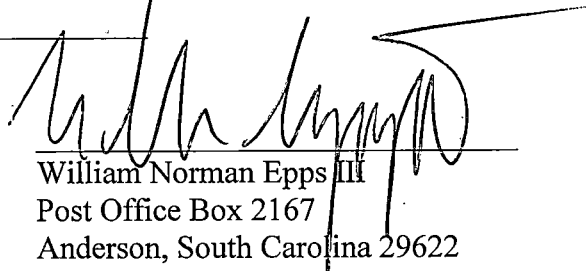
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SC Court of Appeals

Wanda Gambrell.....Respondent

v.

Christopher A. Smith.....Appellant.

APPELLANT'S INITIAL BRIEF



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STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN FINDING THAT THE CONTRACT FOR PURCHASE WAS NOT VOID FROM IT'S INCEPTION OR VOID AB INITIO AND ILLEGAL?

2. IF THE CONTRACT FOR PURCHASE WAS NOT VOID AB INITIO AND ILLEGAL DID THE CIRCUIT COURT ERR IN FINDING APPELLANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE HIS CAUSE OF ACTION FOR BREACH OF CONTRACT WITH FRAUDULENT INTENT?

3. DID THE CIRCUIT COURT ERR IN FINDING THAT APPELLANT FAILED TO DEMONSTRATE BY A PREPONDERANCE OF THE EVIDENCE THAT THE RESPONDENT NEGLIGENTLY MISREPRESENTED ANY MATERIAL INFORMATION?

STATEMENT OF THE CASE

On February 4, 2014, the Respondent filed a Summons and Complaint, Case No. 2014-CP-04-214, in the Court of Common Pleas for Anderson County, State of South Carolina alleging three causes of action. The Appellant filed a Motion to Dismiss on March 7, 2014. The Appellant filed an Answer and Counterclaim on March 17, 2014. The Appellant withdrew his Motion to Dismiss without prejudice on April 16, 2014. Respondent filed her Answer to Counterclaim on April 4, 2014. Appellant filed a Reply to Respondent's Answer to Counterclaim on May 2, 2014. A bench trial was held before the Honorable Robin B. Stilwell on February 11, 2015. The Order granting Relief was filed March 2, 2015 awarding judgment of \$20,000,00 to Respondent. The Appellant received written notice of this Order on March 4, 2015 and filed his Rule 52(b) and 59(e) Motion to Alter or Amend on March 16, 2015. Judge Stilwell denied the Appellant's Motion to Alter or Amend in an Order filed April 6, 2015. Appellant filed his Notice of Appeal on May 5, 2015.

STATEMENT OF FACTS

The Appellant and Respondent, hereinafter "Smith" and "Gambrell" entered into a contract for purchase on February 22, 2013, whereas Smith purchased the business known as Ma's Bingo which included any and all fixtures and equipment located within the business as of February 22, 2013. The sale included caller station, bingo board, all tables and chairs, tv's, atm machine, desk, stands, counter areas, and any and all other items not addressed therein. The purchase price was \$100,000.00 which was paid as follows: Smith paid Gambrell the sum of \$10,000.00 on February 22, 2013, with the remaining balance being paid at the rate of \$65,000.00 upon Smith receiving his bingo license. Then upon receipt of said \$65,000.00 Gambrell shall finance the balance of \$25,000.00 in the amount of \$2,500.00 per month for ten (10) months, with the first payment due thirty (30) days from the date in which Gambrell has received proof that Smith has a valid South Carolina Bingo License. (Plaintiff's Exhibit 1- Contract for Purchase).

Because this was a bingo operation, Gambrell explained to Smith how the business ran in terms of the relationship with the Greenwood Shrine Club. (Tr. p. 28). On March 26, 2013, Smith and Phillip Ray Dorn of the Greenwood Shrine Club entered into a agreement, where Greenwood Shrine Club would lease the premises including all fixtures and equipment located at 621 McGee Road, Anderson, South Carolina for the purpose of bingo in the amount of \$5,000.00 per month (Plaintiff's Exhibit 2- Lease). Gambrell had a similar agreement with the Greenwood Shrine Club and in order to apply for a bingo license you have to have a lease agreement for the building and the equipment. (Tr. p. 28 and p.38).

On March 26, 2013, Smith and the Greenwood Shrine Club signed a contract wherein

Greenwood Shrine Club retained Smith as promoter for the Greenwood Shrine Club Bingo d/b/a Fun City Bingo. The contract stated in part that Smith would be compensated weekly, \$5.00 per person, per bingo session who enters to play bingo, plus 5% of gross revenues to be paid quarterly. (Plaintiff's Exhibit 3- contract). Also on March 26, 2013, Smith and the Greenwood Shrine Club entered into a solicitor and charity contract, where the Greenwood Shrine Club retained Smith as solicitor to promote bingo games at 621 McGee Road, Anderson, South Carolina. (Plaintiff's Exhibit 4- Solicitor and Charity Contract).

Gambrell was present at the signing of these three contracts on March 26, 2013 and did notarize the solicitor and charity contract between Smith and the Greenwood Shrine Club (Tr. pp. 45-48 and Plaintiff's Exhibit 4). Gambrell told Smith that she would help him get his license and told Smith that he would be entering into these agreements with the Greenwood Shrine Club. (Tr. p. 45). Gambrell told Smith that these contracts with the Greenwood Shrine Club is what is required by law to open up bingo. (Tr. p. 47). Gambrell further testified that she represented to Smith that the contracts were what the State required, what his pay would be. (Tr. pp. 46-47). Smith testified that Ray Dorn of the Greenwood Shrine Club and Gambrell told him on March 26, 2013 that he was going to be paid the \$5,000.00 per month for the lease, as well as get \$5.00 per head and 5 % of the revenues to be paid quarterly. (Tr. pp. 89-90). Smith was never paid by Greenwood Shrine Club on the lease or contract between sponsor or promoter. (Tr. p. 90 and Tr. pp. 71-72).

Gambrell operated Ma Cat's Bingo from February 2010 until June of 2013, when Smith got his license and started operating Fun City Bingo. (Tr. pp. 35-37). Beginning in June of 2013, Gambrell was a customer at Fun City Bingo nearly every night. (Tr. pp. 35-36). Fun City Bingo

operated for about eleven (11) months. (Tr. p. 124). A total of \$80,000.00 was paid by Smith to Gambrell. (Tr. p. 96).

Gambrell operated Ma Cat's Bingo in the following manner, she had video games of chance in Ma Cat's Bingo. (Tr. pp. 49-50). These games were Palmetto Gold Video Games i.e. poker machines. (Tr. p. 96). Gambrell profited off these video games of chance at Ma Cat's Bingo. (Tr. p. 50, pp. 124-125, pp. 141-142 and p. 153). Hope McCullough testified that she ran a snack bar inside of Ma Cat's Bingo and that Gambrell approached her and told her that if SLED or anyone came into the facility to say that she and Kathryn Vaughn were in control of the machines and they had nothing to do with bingo. (Tr. pp. 141-142). Ben Gentry, a employee of Ma Cat's Bingo and Fun City Bingo testified that Gambrell said the video machines had to be removed because she heard that SLED was in town and that they were removed for a period of time. (Tr. pp. 153-154).

Gambrell had a Class B license, which meant that she could have one session of bingo per day, and she could not exceed \$8,000.00 in a session. (Tr. p. 52). Gambrell admitted to exceeding the \$8,000.00 limit in a session. Gambrell admitted to holding late games that went over the limit during sessions. The daily paperwork for Ma Cat's Bingo and Fun City Bingo was all handwritten. Gambrell testified that she had to have paperwork for each session of bingo. (Tr. p. 42 and Defendant's Exhibit 1-1/2/14 Daily Details). Gambrell admitted to erasing some of her paperwork when she exceeded \$8,000.00 in a session and then copying it on another piece of paperwork to make up for it. (Tr. p. 52). Gambrell admitted to allowing people to play bingo games on credit. She admitted to giving people bingo paper and they not providing money for that bingo paper. Gambrell testified that she would charge it to the end of the month if they were

a good customer. (Tr. p. 53). Gambrell admitted to keeping a handwritten list of these individuals who had a charge account. (Tr. p. 53). Gambrell admitted to having players that she had agreements with that if they won bingo, that she would divide the winnings with them. (Tr. p. 54). Gambrell also testified that she ran all aspects of Ma Cat's Bingo and that the Greenwood Shrine Club had very little to do with Ma Cat's Bingo. Gambrell testified that the Greenwood Shrine Club never showed up to see what was going on, if they came, it was to sign the checks. (Tr. p. 54). Gambrell testified that she never told Greenwood Shrine Club about the video machines in the building. (Tr. pp. 54-55).

Summer McAuley testified that she was an employee of both Ma Cat's Bingo and Fun City Bingo. (Tr. pp. 123-124). Summer testified that the video games of chance were in Ma Cat's Bingo for a significant amount of time and she saw Gambrell get money from these machines nightly. (Tr. p. 125). She also testified to assisting Gambrell in keeping nightly run sheets which Summer explained kept up with the total sales of each bingo game. Summer testified that there were times that Gambrell erased, modified or did something with the run sheets. (Tr. p. 126). She testified to the house players that would divide the proceeds and winnings with Gambrell if they won and to the book she kept where she wrote in the people who borrowed or played that owed her money. (Tr. p. 127).

Phillip Ray Dorn, the treasurer for the Greenwood Shrine Club testified that he did not remember signing the contract between sponsor and promoter and the solicitor and charity contract with Smith. (Tr. p. 69). He testified that the Greenwood Shrine Club was the charitable organization that Ma Cat's Bingo and Fun City Bingo went through. (Tr. p. 67). When asked if the Greenwood Shrine Club had very little to do with Ma Cat's Bingo and Fun City Bingo, Dorn

testified that there were about ten of us that got together and went up there one time. And then myself and a friend of mine went up there three or four times over the years. (Tr. p. 70). He testified to filing the quarterly reports to the Department of Revenue. (Tr. p. 70). However he was not the one who filed the quarterly reports with the Department of Revenue. He testified that the Greenwood Shrine Club never paid Smith the \$5,000.00 a month lease. He testified that Smith was never compensated for the weekly \$5.00 per person, per bingo session. (Tr. pp. 71-72). He testified that he did not have any knowledge of the video games of chance that were in Ma Cat's Bingo or knowledge of players coming in and playing on credit or not paying for bingo paper. (Tr. p. 73). He testified that he had no knowledge of any late games being played or Ma Cat's Bingo exceeding \$8,000.00 a day. He did not have knowledge of Gambrell keeping a book of individuals who did not pay for the bingo paper. (Tr. p. 75).

Dorn testified that he did not have access to the information regarding the gross proceeds derived from the games. He testified that he did not have access or knowledge that items of expenses incurred were paid for the quarter regarding the conduct of the bingo games. He testified that he did not have a copy or the knowledge for expenditures made or to be made, with the description of the merchandise purchases or the services rendered for the conduct of bingo, the bingo games during that quarter. (Tr. p. 77). When asked if he had any knowledge of the net proceeds derived from the games, Dorn testified that he knew we got checks from the Department of Revenue periodically. (Tr. p. 77). He then testified that Darrell Patterson submitted the quarterly reports. When asked that if he knew that some video games of chance or illegal video games were in Ma Cat's Bingo what would he have done, Dorn testified that he would have shut the place down then and there. (Tr. p. 78). When asked what would he do if he

knew that Ma Cat's Bingo was exceeding the daily limit of \$8,000.00, Dorn testified he would probably congratulate them. (Tr. p. 78). When asked what would he do if he knew that individuals were playing on credit or if the winnings were being split with Gambrell, Dorn testified he would shut them down. (Tr. p. 79). Dorn also testified that sometimes he signed checks for Ma Cat's Bingo and Fun City Bingo well in advance and that sometimes he did not know what they were going out for. (Tr. p. 82).

Smith testified that someone came to him and said that Gambrell was interested in selling Ma Cat's Bingo. That for a period of time, Smith owned some sweepstake businesses and was involved in some litigation involving those businesses. That some of the same people that visited some of the sweepstake businesses, also frequented Ma Cat's Bingo. (Tr. p. 85). Smith never had been involved in bingo before. He went into Gambrell's bingo two or three times during a negotiation period and started looking into the law regarding bingo and the regulation of bingo once he and Gambrell talked about the deal. He testified that he and Gambrell discussed that Ma Cat's Bingo was for sale and that he was buying her out. That Smith was basically buying the bingo business. (Tr. pp. 85-86 and pp. 104-105).

When Smith was asked what did you think that you were buying in terms of the business known as Ma Cat's Bingo, he testified everything and explained he was getting all the equipment, the player base, all the furnishings, everything. (Tr. p. 86). Smith testified that Gambrell told him that there was a charity that was involved but that he did not have to worry about them. You never saw them. They stayed out of the picture and she ran it. It was hers. (Tr. p. 87). Smith testified that he trusted Gambrell a lot of what she was telling him about the bingo business and the income that she told him she was earning. (Tr. p. 88). Smith testified

that Gambrell showed him a W2 that was right at \$100,000.00. Also that Gambrell told him that you would have a contract with the Greenwood Shrine Club and that in the event that you have a slow month, you still have a contract and you are getting money. He testified that he put a lot of faith in the lease and the headcount. That he viewed the business multiple nights, and was looking at headcount at \$5.00 a head. And they were averaging a 100+ people a night. That thinking that we got \$500.00 revenue a night, plus the lease, worse case scenario, if the business does not make enough money, then we should at least be able to make the lease amount which would help us recoup our initial investment. (Tr. pp. 89-90).

Smith testified that prior to February 22, 2013, Gambrell explained to him how the bingo worked and that the Greenwood Shrine Club would compensate him. That if he had known going into this that he would not be compensated pursuant to the contracts with the Greenwood Shrine Club, he absolutely would not have entered into the contract of purchase with Gambrell. (Tr. p. 93). Further the contract for purchase and the contracts with the Greenwood Shrine Club were contingent upon Smith getting a license with the State of South Carolina to be a promoter. (Tr. p. 93). After Smith starting running the bingo business, he did not receive payment from the Greenwood Shrine Club regarding the lease and compensation. (Tr. p. 95). Smith contacted Gambrell about the lease. At that time, Gambrell explained to him that the lease contract and all those numbers are basically overinflated numbers to make sure that the Shrine Club did not get anything. But if you don't get money or if the business isn't profitable, you don't get that money. (Tr. p. 95). Smith testified that he was made aware of this after he got his license and started the business. (Tr. p. 95). Smith went to the Greenwood Shrine Club about the lease and compensation, when they needed money from them about two months into the business but they

never paid it. (Tr. p. 103).

When Smith took over the bingo business, he removed the video poker machines. Smith stopped the practice of exceeding the daily limit or payout. He stopped the practice of allowing people to play on credit or paying for a customer to play and splitting proceeds or winnings with them. (Tr. pp. 97-98). No one from the Greenwood Shrine Club came to Fun City Bingo. (Tr. p. 98). Smith testified that once he made the changes, he knew he was in trouble, because you just couldn't make any money. (Tr. p. 101). People left as a result of those changes. (Tr. p. 129). Gambrell would say derogatory things about Smith or anybody else with Fun City Bingo, that affected the business. (Tr. p. 130 and p. 146). Smith closed the doors around May of 2014 and sold the equipment for \$50,000.00. (Tr. p. 109).

Laurie Capell invested monies in Ma Cat's Bingo on the agreement between Smith and Gambrell. She and her husband cashed out their 401k and paid a total of \$75,000.00 to Gambrell. (Tr. p. 162). She testified that she believed she buying the entire business. That Smith was relying on monies from the Greenwood Shrine Club. (Tr. p. 165). She would not have cashed out her 401k and invested it, if there was no guaranteed stream of money. (Tr. p. 166). She would not have paid that much money for equipment. (Tr. p. 166). An inventory was done of the equipment in the building and sold for \$50,000.00. (Tr. pp. 167-173 and Defendant' Exhibit 2- Equipment Inventory List).

ARGUMENTS

I. STANDARD OF REVIEW

An action for breach of contract seeking money damages is an action at law. *Eldeco, Inc. v. Charleston County Sch. Dist.*, 372 S.C. 470, 476, 642 S.E.2d 726, 729 (2007). On appeal of an action at law tried without a jury, the findings of fact of the trial court will not be disturbed unless found to be without evidence which reasonably supports the trial court's findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "Stated another way, the trial court's findings of fact will not be disturbed on appeal unless wholly unsupported by the evidence or unless it clearly appears the findings were influenced or controlled by an error of law." *Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 127, 631 S.E.2d 252, 255 (2006). In such a case, the trial court's findings are equivalent to a jury's findings in a law action. *Id.* Further, questions concerning credibility and the weight to be accorded evidence are exclusively for the trial court. *McCall v. IKON*, 380 S.C. 649, 670 S.E.2d 695 (Ct. App. 2008).

II. THE CIRCUIT COURT ERRED IN FINDING THAT THE CONTRACT FOR PURCHASE WAS NOT VOID FROM IT'S INCEPTION OR VOID AB INITIO AND ILLEGAL

The contract for purchase was void from its inception or *void ab initio* and illegal pursuant to this State's constitutional provisions, statutory law and judicial decisions. The Circuit Court found as a fact that the parties entered into a contract drafted by the Appellant for the purchase by the Appellant of the business and its assets owned by the Respondent known as Ma's Bingo. (Order Granting Relief at ¶ 1). In it's Order Granting Relief the Court did not address Smith's argument that the contract for purchase was void from its inception or *void ab initio* and illegal. (See Order Granting Relief). The Court in it's Order Denying Defendant's Motion to

Alter or Amend only addressed this issue in one sentence, "The evidence in this case did not demonstrate that the business was an illegal gambling operation. (Order Denying Defendant's Motion to Alter or Amend). This violates Rule 52 of the South Carolina Rules of Civil Procedure, in that it did not substantially comply with the Rule or adequately state the basis for the result it reached and was error. *See In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 131, 568 S.E.2d 338, 342 (2002).

The business known as Ma Cat's Bingo which is the subject matter of the contract for purchase was an illegal gambling operation in violation of S.C. Const. Art. XVII, § 7 "Lotteries", S.C. Code Ann. § 12-21-3910, et seq., "Bingo Tax Act of 1996", including S.C. Code Ann. § 12-21-3935-Video poker play prohibited, S.C. Code Ann. § 12-21-3990-Manner of playing bingo, S.C. Code Ann. § 12-21-4000-Procedures applicable to conduct of bingo, S.C. Code Ann. § 12-21-4005-Operation of bingo games; scope, S.C. Code Ann. § 12-21-4009-Limitations on use of electronic or mechanical devices, S.C. Code Ann. § 12-21-4020-Classes of bingo licenses; taxes, S.C. Code Ann. § 12-21-4030-Entrance fee surcharges, S.C. Code Ann. § 12-21-4090-Bingo checking and savings accounts, S.C. Code Ann. § 12-21-4100-Record keeping and reporting requirements, S.C. Code Ann. § 12-21-4150-Posing as a bingo player" and S.C. Code Ann. § 12-21-2710-Types of machines and devices prohibited by law, as amended.

The evidence showed without a doubt that Ma Cat's Bingo was an illegal gambling/lottery operation and Gambrell had no authority or right to sell an actual bingo business, which in this case was the province of the Greenwood Shrine Club. Gambrell's own testimony was that the contract for purchase was solely for the equipment located at McGee Road, not the business itself, contrary to the Court's finding that the business was conveyed.

(Order Granting Relief at Conclusions of Law ¶ 1).

S.C. Code Ann. § 12-21-3930 reads in part, “The game of bingo is not a lottery when....(4) the game is conducted in accordance with the provisions of Sections 12-21-3990 and 12-21-4000 and approved cards are used. *Id.* Gambrell admitted that she had house players who played for free and divided winnings with her. (Tr. pp. 52-55). This is a violation of S.C. Code Ann. § 12-21-4150 and S.C. Code Ann. § 12-21-3990, which reads in part, “(A)(1).....Each player must pay face value for each card to be played during the course of a game and may purchase the card for a specified number of games. All cards sold for a game must sell for face value and cards may not be given to players as prizes or for free. *Id.*

As a Class B license holder, Gambrell admitted to holding late games that exceeded the daily limit of \$8000.00, in violation of S.C. Code Ann. § 12-21-3990(2). She admitted to allowing individuals to play on credit. She admitted to erasing portions of or deleting required daily documentation that is required to be kept in accordance with the Bingo Tax Act in violation of S.C. Code Ann. § 12-21-4100. (Tr. pp. 52-55).

Gambrell admitted to profiting off of illegal video games of chance, i.e video poker machines, that were being operated out of Ma Cat’s Bingo. (Tr. p. 50, pp. 124-125, pp. 141-142 and p. 153). This in violation of S.C. Code Ann. § 12-21-3935, S.C. Code Ann. § 12-21-4005, which excludes machines and lottery games, including video poker lottery from the operation of bingo games, S.C. Code Ann. § 12-21-4009 and S.C. Code Ann. § 12-21-2710, as amended. Gambrell admitted to what was basically a sham contract with the Greenwood Shrine Club, who engaged in absolutely no oversight, that allowed Gambrell to operate an illegal gambling/lottery operation with impunity. (Tr. pp. 46-47 and Tr. pp. 67-79 and p. 82). Ray Dorn testified that if he

had known of Gambrell's illegal activities at Ma Cat's Bingo, he would have shut it down. He also testified that if he knew that Ma Cat's Bingo was exceeding the daily limit of \$8,000.00, Dorn would probably congratulate them. (Tr. p. 78).

What Gambrell negotiated and offered to sell was an illegal gambling/lottery operation, with inaccurate and fraudulent financial records, sham contracts with the Greenwood Shrine Club, and representations of income that were actually derived from illegal bingo games and illegal video games of chance, video poker machines.

Our South Carolina State Supreme Court held in *Ward v. West Oil Co.*, 387 S.C. 268, 692 S.E.2d 516 (S.C. 2010):

Although R & B correctly references our appellate court rules regarding error preservation, we find these rules are inapplicable as this Court will not "lend its assistance" to carry out the terms of a contract that violates statutory law or public policy. See *McMullen v. Hoffman*, 174 U.S. 639, 654, 19 S.Ct. 839, 43 L.Ed. 1117 (1899) ("The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract."); *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004) ("The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions."); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App.2002) (holding that illegal contracts are void and unenforceable, such that actions for its breach may not be maintained).

Because this Court will not enforce an illegal contract, we find the question regarding the legality of the "pull-tab" cards and machines is appropriate for this Court's review. See *Hyta v. Finley*, 137 Idaho 755, 53 P.3d 338, 340-41 (2002) (holding, in a partnership dissolution action involving a bar that primarily profited from illegal gaming machines, appellate court could sua sponte raise issue of whether underlying contract was illegal); *Parente v. Pirozzoli*, 87 Conn. App. 235,

866 A.2d 629, 635 (2005) (“It is generally true that illegality of a contract, if of a serious nature, need not be pleaded, as a court will generally of its own motion take notice of anything contrary to public policy if it appears from the pleadings or in evidence, and the plaintiff will be denied relief, for to hold otherwise would be to enforce inappropriately an illegal agreement.” (quoting 6 Richard A. Lord, *Williston on Contracts* § 12:5 at 56-64 (4th ed.1995))); *see also* 17A Am. Jur.2d *Contracts* § 323 (2004) (“[I]f a question of illegality develops during the course of the trial, a court must consider that question, whether pleaded or not.”). *Id.* at 692 S.E.2d at 520.

Further the contract for purchase is wholly inoperative under governing law of South Carolina because Gambrell’s admitted course of conduct during the course of her performance of the contract was illegal. Gambrell engaged in fraudulent acts with fraudulent intent by inducing Smith to enter into contracts with the Greenwood Shrine Club, when Gambrell knew that was a condition precedent and that said amounts listed in the contracts were not going to be paid by the Greenwood Shrine Club to Smith. The actions of Gambrell as set forth herein are inseparable from her alleged damages.

Our South Carolina Court of Appeals held in *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 437 S.E.2d 168 (S.C. App., 1993):

Respondents maintain that the Bi-Lo contract is wholly inoperative under the governing law of South Carolina because the partner's admitted course of conduct during the course of their performance of the contract was illegal. They further maintain that because partners' alleged damages consists solely of lost profits from this illegal contract, they are barred from any recovery. We agree.

It is a well founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act. 86 C.J.S. Torts § 12 (1954). This rule applies at both law and in equity and whether the cause of action is in contract or in tort. 1A C.J.S. *Actions* § 29 (1985). *See also Graham v. Graham*, 276 S.C. 341, 278 S.E.2d 345 (1981); *Nelson v. Bryant*, 265 S.C. 558, 220 S.E.2d 647 (1975); *Roundtree v. Ingle*, 94 S.C. 231, 77 S.E. 931

(1913); Restatement (Second) of Torts § 774 (1977).

The illegality doctrine has also been recognized by the United States Supreme Court which, in *McMullen v. Hoffman*, 174 U.S. 639, 19 S.Ct. 839, 43 L.Ed. 1117 (1899), held illegality is a defense to a contract action:

The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract.

Id. at 654, 19 S.Ct. at 845 (emphasis added). South Carolina courts have reached similar conclusions refusing to aid plaintiffs who are themselves guilty of an illegal act. In *Roundtree*, the court concluded that "[his] whole transaction is without the pale of the law, and [he] cannot invoke the aid of the courts in enforcement of any claim depending on it." *Id.* 77 [313 S.C. 277] S.E. at 932. *See also, Berkebile v. Outen*, --- S.C. ----, ----, 426 S.E.2d 760, 762 (1993) ("an illegal contract has always been unenforceable ... South Carolina courts will not enforce a contract which is violative of public policy, statutory law or provisions of the Constitution."). *Id.* at 437 S.E.2d at 170.

Gambrell's actions and conduct as set forth herein, tainted the entire endeavor and she should be barred from recovery. The illegality of the contract developed over the course of the trial, and the Court must consider that question and did not. This was error. Therefore the Appellant respectfully requests that this Court reverse the Circuit Court or vacate its decision and find that the underlying contract is *void ab initio* and unenforceable, as it violates the South Carolina Constitution, our statutory law and public policy.

III. IF THE CONTRACT FOR PURCHASE WAS NOT VOID AB INITIO AND ILLEGAL DID THE CIRCUIT COURT ERR IN FINDING APPELLANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE HIS CAUSE OF ACTION FOR BREACH OF CONTRACT WITH FRAUDULENT INTENT

If the Court makes a finding that the contract for purchase is not void from its inception or *void ab initio*, then the Appellant respectfully requests that this Court reverse the Circuit Court's denial of Appellant's cause of action for breach of contract with fraudulent intent.

The Circuit Court found that Smith has failed to prove by a preponderance of the evidence the elements of fraud and that Appellant failed to exercise due diligence in the purchase of the business. (See Order Granting Relief and Order Denying Defendant's Motion to Alter or Amend). This was error. It is not necessary to allege elements of common law fraud and deceit. Fraud and breach of contract with fraudulent intent are not based on the same elements. *See Harper v. Ethridge*, 290 S.C. 112, 348 S.E.2d 374 (S.C. App., 1986)(The action for breach of contract accompanied by a fraudulent act is not based on the same elements as the action in tort for fraud and deceit. *McCullough v. The American Workmen*, 200 S.C. 84, 20 S.E.2d 640 [290 S.C. 119] (1942). In order to state a claim for breach of contract accompanied by a fraudulent act, the plaintiff must plead facts establishing three elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 336 S.E.2d 502 (Ct. App.1985). It is not necessary to allege the elements of common law fraud and deceit. *See Welborn v. Dixon*, 70 S.C. 108, 49 S.E. 232 (1904); *Sullivan v. Calhoun*, 117 S.C. 137, 108 S.E. 189 (1921). The fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design).

Further, Smith did present evidence of Gambrell's fraudulent intent and a fraudulent act by the Gambrell. As set forth herein, Gambrell engaged in fraudulent acts with fraudulent intent

by inducing Smith to enter into what amounted to fictitious contracts with the Greenwood Shrine Club, when Gambrell knew that was a condition precedent and that said amounts listed in the contracts were not going to be paid by the Greenwood Shrine Club to Smith. (Tr. pp. 89-90 and p.95). Gambrell's conduct was characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design. Here she wrongfully appropriated \$80,000.00 from Smith.

Therefore, Appellant respectfully asks that the Court reverse the Circuit Court's denial of Appellant's cause of action for breach of contract with fraudulent intent.

IV. THE CIRCUIT COURT ERRED IN FINDING THAT APPELLANT FAILED TO DEMONSTRATE BY A PREPONDERANCE OF THE EVIDENCE THAT THE RESPONDENT NEGLIGENTLY MISREPRESENTED ANY MATERIAL INFORMATION

The Court found that Appellant failed to demonstrate by a preponderance of the evidence that the Respondent negligently misrepresented any material information. (See Order Granting Relief and Order Denying Defendant's Motion to Alter or Amend). This also violates Rule 52 of the South Carolina Rules of Civil Procedure, it that it did not substantially comply with the Rule or adequately state the basis for the result it reached and was error.

The testimony and evidence clearly showed that Gambrell negotiated and offered to sale an illegal gambling/lottery operation. She induced Smith to enter into contracts with the Greenwood Shrine Club, knowing full well that said amounts in the contracts were not going to be paid. (Tr. pp. 89-90 and p.95).

Again, Gambrell told Smith that these contracts with the Greenwood Shrine Club is what

is required by law to open up bingo. (Tr. p. 47). Gambrell further testified that she represented to Smith that the contracts were what the State required, what his pay would be. (Tr. pp. 46-47). Smith testified that Ray Dorn of the Greenwood Shrine Club and Gambrell told him on March 26, 2013 that he was going to be paid the \$5,000.00 per month for the lease, as well as get \$5.00 per head and 5 % of the revenues to be paid quarterly. (Tr. pp. 89-90). Smith was never paid by Greenwood Shrine Club on the lease or contract between sponsor or promoter. (Tr. p. 90 and Tr. pp. 71-72). The above is certainly false representations of material fact.

The case of *Harrington v. Mikell*, 469 S.E.2d 627, 321 S.C. 518 (S.C. App., 1996) holds:

One may bring a common law action in tort for negligent misrepresentation. *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990); *Winburn v. Insurance Co. of North America*, 287 S.C. 435, 339 S.E.2d 142 (Ct. App.1985). If the damage alleged is a pecuniary loss, the plaintiff [321 S.C. 522] must allege and prove the following essential elements to establish liability for negligent misrepresentation: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon this representation. *AMA Management Corp. v. Strasburger*, 309 S.C. 213, 420 S.E.2d 868 (Ct. App.1992). As part of his case, the plaintiff must show that his reliance on the misrepresentation was reasonable. *Id.* at 223, 420 S.E.2d at 874. "There is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence." *Id.* Reliance can be justified only if the relationship of the parties is such that the defendant occupies a superior position to the plaintiff with respect to knowledge of the truth of the statement made. *O.C. Gruber v. Santee Frozen Foods, Inc.*, 309 S.C. 13, 419 S.E.2d 795 (Ct. App.1992). *Id.* at 469 S.E.2d at 629.

As set forth above, Gambrell made false representations to Smith. Gambrell had a pecuniary interest in making the statement, it was in the course of Gambrell's business. Gambrell owed a duty of care to see that she communicated truthful information to Smith, where as here

she possessed expertise in the bingo business, and Smith relied on Gambrell who was in a superior position, and has a pecuniary interest in the transaction. Gambrell breached that duty by failing to exercise due care as set forth above, and Smith justifiably relied on the representations. Smith suffered a pecuniary loss as the proximate result of his reliance upon this representation in the amount of \$30,000.00. No amount of due diligence by Smith would have ascertained that said amounts listed in the contracts were not going to be paid by the Greenwood Shrine Club to Smith, contracts that were a condition precedent to the contract for purchase he had with Gambrell.

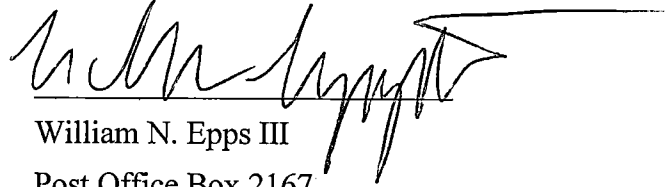
CONCLUSION

Based on the above, the Appellant respectfully requests that this Court reverse the Circuit Court or vacate its decision and find that the underlying contract for purchase is *void ab initio* and unenforceable, as it violates the South Carolina Constitution, our statutory law and public policy.

If this Court makes a finding that the contract for purchase is not void from its inception or *void ab initio*, then the Appellant respectfully requests that this Court reverse the Circuit Court's Order awarding judgment of \$20,000,00 to Respondent and reverse the denial of Appellant's cause of action for breach of contract with fraudulent intent and negligent misrepresentation.

Respectfully submitted,

EPPS NELSON, EPPS & PERKINS

A handwritten signature in black ink, appearing to read "William N. Epps III", written over a horizontal line. The signature is stylized and cursive.

William N. Epps III

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Anderson, South Carolina 29622

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December 23, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

Robin B. Stilwell, Circuit Court Judge

Case No.: 2014-CP-04-00214

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SC Court of Appeals

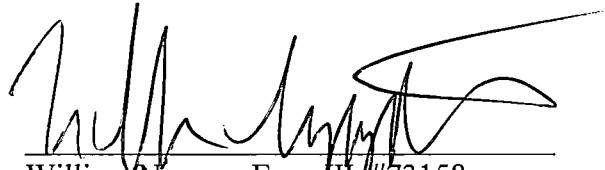
Wanda Gambrell.....Respondent

v.

Christopher A. Smith.....Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief and Designation of Matter on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on December 23, 2015, addressed to her attorney of record, J. Stephen Welch, Esq., Post Office Box 1778, Anderson, South Carolina 29622 and John S. Nichols, Esq., Post Office Box 7965, Columbia, South Carolina 29202.



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December 23, 2015

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December 23, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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SC Court of Appeals

RE: Wanda Gambrell v. Christopher A. Smith
Appellate Case No.: 2015-000988
My File No.: M15-2562

Dear Ms. Kitchings:

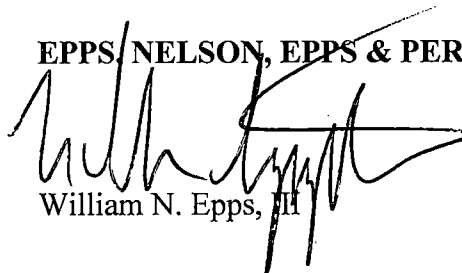
Enclosed for filing, please find the original and one (1) copy of each of the **Initial Brief of the Appellant and Appellant's Designation of Matter** to be included in the Record on Appeal, and our **Proof of Service** for these documents referenced herein and in regard to the above-referenced matter.

Please return a filed-stamped copy of these documents to us in the enclosed self-addressed stamped envelope which I have provided for your convenience.

By copy of this letter, we are serving opposing counsel with same.

Sincerely yours,

EPPS, NELSON, EPPS & PERKINS



William N. Epps, III

WNEIII/III
Enclosures

cc: J. Stephen Welch, Esq. (w/enclosures)
John S. Nichols, Esq. (w/enclosures)

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