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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2006-CP-40-1814

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,

Appellants.

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SC Court of Appeals

FINAL BRIEF OF APPELLANTS

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Statement of the Issues on Appeal

Did the lower court err in granting Respondents' Motion for partial summary judgment, while denying Appellant's motion by ruling that the South Carolina legislature abrogated the doctrine of *in pari delicto*?

Statement of the Case

This lawsuit began on March 29, 2006 in which the Respondent Proctor claimed that she had sustained gambling losses through machines of Appellant. (R. 15-23) The Complaint was amended twice; the first amended complaint added Trans-Union National Title Insurance ("Trans-Union) as a plaintiff and the Second Amended Complaint added Charlie Bishop and Brett Blanks as defendants. Ultimately, the Second Amended Complaint asserted causes of action for declaratory judgment, unjust enrichment, unfair trade practices, restitution, civil conspiracy and negligence[1]. (R. 228-242) Appellants answered and denied the allegations.[2] (R. 243-248)

In 2007, Appellants filed a motion asserting they were entitled to summary judgment under the defense of *in pari delicto*. (R. 268-278) Respondent also filed a motion for partial summary judgment as to the liability of Appellants. (R. 29-188) The lower court denied the motions without prejudice. (R. 1-12; 316, 333) In 2009, after the parties conducted additional discovery, both parties again filed motions for summary judgment on the same issues. (R. 263-267; 268-278) The lower court, through the Honorable Alison Renee Lee, issued an order dated September 9, 2011, granting Respondent's motion for summary judgment as to liability of Appellants, and denied Appellants' motion for summary judgment based on the *in pari delicto* defense. (R. 1-12) Appellants timely filed a Motion to Reconsider and/or to Alter or Amend,

[1] The negligence cause of action was pled in the alternative.
[2] The other defendants, Charlie Bishop and Brett Blanks, have participated in the underlying case but are not a part of this appeal.

which was denied by Order dated November 15, 2011.[3] (R. 279-286;13-14) This appeal followed. (R. 287-312)

Statement of the Facts

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

[3] Judge Lee also found that Trans-Union did not have standing to assert any claims and that Proctor's equitable claims failed because she had unclean hands and therefore granted Appellants' motion for summary judgment on both of those motions. Those rulings were not appealed and therefore are the law of the case.

I. The doctrine of *in pari delicto* completely bars Proctor's action against Appellants.

Under the doctrine of *in pari delicto*, Respondent 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).[4] The long established defense has been repeatedly recognized by South Carolina courts. 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.).

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[4]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 recision of such a 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.)

The lower court, however, improperly found that the South Carolina General Assembly abrogated this doctrine in passing certain statutes, in particular, S.C. Code §§32-1-10 and 32-1-20. Section 32-1-10 states:

> Any person who shall at any time or sitting, by playing at cards, dice table or any other game whatsoever or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any person or persons so playing or betting, in the whole, the sum or value of fifty dollars and shall pay or deliver such sum or value or any part thereof shall be at liberty, within three months then next ensuing, to sue for and recover the money or goods so lost....[5]

The ruling that S.C. Code §§ 32-1-10 and 32-1-20 abrogated the common law doctrine of *in pari delicto* is directly contrary to *Rice v. Gist* and *Livingston v. Wootan, supra*. See also, *Owen v. Davis*, 1 Bail. 315, 1829 W.L. 7401 (1829) (gambling losses cannot be recovered unless suit brought within the period of the Statute of Ann); *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).

All of the cited cases involve the application of the common law doctrine of in *para delicto* and were decided after the enactment of the Statute of Anne, which is currently codified at S.C. Code § 32-1-10 et. seq. In *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993), the Supreme Court explained, "except for changing the monetary threshold this statute [S.C.Code § 32-1-10 et. seq.] has remained unchanged since 1712, when it was adopted from English law by the "reception statute" passed by the South Carolina colonial assembly." This statute, known as the English Statutes of Anne "was originally titled, "An Act for the Better Preventing of excessive and deceitful Gaming." *Id.* The South Carolina Supreme Court relied upon this legislative history in its ruling that Section 32-1-10 was not limited to illegal gambling, but allowed a person who lost money gambling on video poker machines, which were lawful then, to sue and recover under the Statute for losses exceeding $50. *Berekebile*.

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[5] Section 32-1-20 applies a suit by a person other than the loser. Since the lower court's unappealed ruling is that Trans-Union has no standing, this section is irrelevant here.

Plaintiff Lauren Proctor admitted in her deposition and has alleged in the Complaint that she is seeking to recover money that she stole from her employer and allegedly lost to the Defendants while engaged in illegal gambling. Plaintiff Proctor testified that she gambled on video machines being operated at Defendant's restaurants. Under South Carolina law a person gambling on a video machine and the operator of the machine are both guilty of a misdemeanor offense. South Carolina law S.C. Code § 16-19-40 makes it unlawful for a person to play

> any game with cards or dice, any gaming table commonly called ABC or E, O or any gaming table known or distinguished by any other letters or by any figures ....or any machine or device licensed pursuant to § 12-21-2720 and used for gambling purposes. A person convicted of this offense is subject to imprisonment of not more than 30 days and a fine of not more than $100.[6]

Appellant has clearly admitted engaging in illegal gambling. However, Appellant did not attempt, in any of version of the complaint in this case, to invoke the statutory remedy. Of course, the remedy in S.C. Code § 32-1-10 would not apply here because the statute requires a person to file suit within 90 days of a loss; Appellant last lost money in July or August, 2005 (SR. 5), but did not file suit until March 29, 2006, well outside of the 3 month time period.

The lower court held that *Johnson v. Collins Entertainment*, 349 S.C. 613, 564 S.E.2d 653 (2002) was "on point that the doctrine of *in pari delicto* has been abrogated regarding suits for gambling losses under the South Carolina Unfair Trade Practices Act...." Order on Summary Judgment, (R. 10) However, that case was limited to its facts and has no application here.

The *Johnson* case was the South Carolina Supreme Court's answer to a certified question of Judge Joseph Anderson in connection with a federal class action lawsuit brought by gamblers

[6] 16-19-40 subjects a person who is operating a "gaming house" to a fine of $1,000 and prison of up to 1 year.

who lost money. At that time, video poker was legal in South Carolina. The issue in that lawsuit was whether the video poker operators unlawfully enticed players to gamble by offering jackpots in excess of the statutory limits of $125 per day. The operators allegedly attempted to evade the jackpot limitation in various ways, including making payments over a series of days, payments to proxies, or by requiring players to sign a form verifying that the player had not netted more than $125.

The Court found that the defense was not available to those video poker operators:

> 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). As that quote demonstrates, at the time the *Johnson* case arose, it was not illegal for a person to play video poker and it had never been ruled unlawful for that a person playing could not receive a payout in excess of the statutory cap. The law at issue only limited the payout (not necessarily the receipt) of fund in excess of the statutory cap; that law, the South Carolina Video Game Machine Act, S.C. Code § 12-21-2770, has now been repealed.

Because the video gambling machines have now been made illegal, 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 Appellants. It was illegal for Respondent to gamble, whether she won (which would require Appellant to pay her) or lost (in which Respondent was essentially paying Appellant). 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, Proctor 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). Despite the illegality, Proctor continued to gamble with money stolen from her mother's employer.

Q: Let me ask you, from, I guess let's just start in 2000, summer of 2000, June 31st or 30th, however many days June has, when video poker became illegal in South Carolina.

A. Uh-huh (affirmative response)

Q: From that date forward, did you ever gamble with your money, that wasn't ...

A: That's hard to say.

Q: ...that wasn't stolen?

A: That's hard to say.

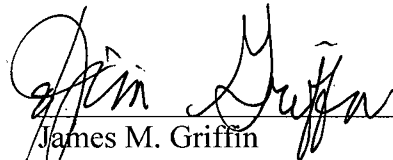
(SR 6). Respondent also admitted that had she won at gambling, she would not have repaid the stolen money and that she was "playing for keeps." (R. 260).

Proctor knew that gambling was illegal but did so anyway, on her own initiative and with money stolen from her mother's employer. Under the doctrine of *in pari delicto,* Proctor, as a participant in the wrongdoing, cannot not recover damages resulting from the wrongdoing. *Myatt, supra.* Contrary to the lower court's ruling, *Johnson* actually recognizes that *in pari*

delicto is a defense to an unfair trade practices claim, but merely found under that particular set of facts, the defense did not apply. Had the Court intended to abrogate the long-standing doctrine of *in pari delicto*, it could have said so, but did not. Furthermore, in 2006, this Court recognized the doctrine of *in pari delicto* as a defense to an unfair trade practices claim. See, *Myatt v, RHBT Financial Corporation*, 370 S.C. 391, 635 S.E.2d 545 (Ct. App. 2006). [7]Therefore, the lower court's order denying Appellants' motion for summary judgment and granting Respondent's Motion for summary judgment must be reversed.

CONCLUSION

The lower court erred in finding that the doctrine of *in pari delicto* had been abrogated by the South Carolina General Assembly. The doctrine of *in pari delicto* is still valid and is a complete affirmative defense to Respondent's claims as she was a participant in the wrongdoing. Thus, the lower court erred in granting Respondent's Motion for Summary Judgment and denying Appellant's Motion for Summary Judgment.



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[7]Similarly, in *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 276-77, 437 S.E.2d 168, 170 (Ct. App. 1993) the Court applied the similar doctrine of "illegality" to bar claims brought under the South Carolina Unfair Trade Practices Act.

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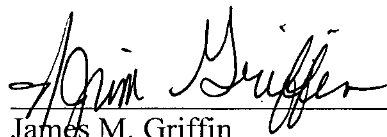
CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief contains all material proposed to included by any of the parties and not any other material, and that Appellant has complied with the August 13, 2007 Order of the Supreme Court on Personal Data Identifiers.



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I, Jaime Harmon, the undersigned employee of Lewis, Babcock & Griffin L.L.P, attorney for Appellant Whitlark & Whitlark, Inc. d/b/a Rockaways Athletic Club and Pizza Man, ForrestWhitlark, Paul Whitlark, do hereby certify that I have served a copy of the foregoing **Appellants' Final 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:

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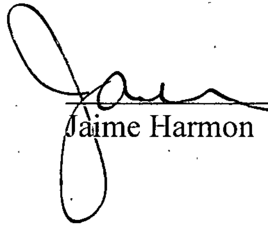

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September 18, 2012