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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,

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SC Court of Appeals

v.

Whitlark & Whitlark, Inc. d/b/a Rockaways Athletic Club and Pizza Man, Forrest Whitlark, Paul Whitlark, Charlie E. Bishop, and Brett Blanks,

Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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I. *Johnson v. Collins Entertainment* does not support Respondents' argument that the doctrine of *in pari delicto* was abrogated.

Respondents concede that under the doctrine of *in pari delicto*, a person may not recover money lost while engaged in illegal gambling. See Resp. Brief, p. 9, citing *Livingston v. Wootan*, 10 S.C.L. 178 (1818). However, Respondents argue that the doctrine has been abrogated by the passage of S.C. Code §§ 32-1-10, 32-1-20 and the South Carolina Unfair Trade Practices Act. 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...

Section 32-1-20 allows a person other than the loser:

> In case any person who shall lose such money or other thing as aforesaid shall not, within the time aforesaid, really and bona fide and without covin or collusion sue and with effect prosecute for the money or other things so by him or them lost and paid and delivered as aforesaid, it shall be lawful for any other person, by any such action or suit as aforesaid, to sue for and recover the same and treble the value thereof, with costs of suit, against such winner or winners as aforesaid, the one moiety thereof to the use of the person that will sue for the same and the other moiety to the use of the county in which the offense shall have been committed.[1]

Respondent argues that these sections completely abrogate the doctrine of *in pari delicto*. However, these sections do not abrogate the doctrine but merely provide a narrow exception to the rule by allowing a person who suffered losses from legal or illegal gambling to recover if an action under this statute is timely filed:

[1] This section has no effect on this case as the lower court has already determined that Trans-Union National Title Insurance has no standing to bring an action under this section.

> ...Berkebile posits the more compelling argument, that the statute has the effect of protecting a gambler, regardless of the legality of the game, from abusing the vice and exceeding limits which bring harm to the gambler and his or her family.

Berkebile v. Outen, 311 S.C. 50, 54, 426 S.E.2d 760, 762-63 (1993). Procter has not sought to recover under these code sections and it is undisputed that the time allowed for recovery under those statutes had expired by the time Procter filed her lawsuit.

Respondent's reliance on the decision in *Johnson v. Collins Entertainment*, 349 S.C. 613, 564 S.E.2d 653 (2002), is misplaced. In that case, the Supreme Court considered the issue of whether plaintiffs could seek to recover losses under the Video Game Machines Act and the South Carolina Unfair Trade Practices Act, or if the plaintiffs were limited to the remedies in S.C. Code §§ 32-1-10 and -20. At the time, gambling machines were legal in South Carolina, albeit with certain restrictions contained in the now-repealed Video Game Machines Act. The Court found that the plaintiffs could pursue recovery under all three statutes.

However, the *Johnson* case did not hold that the doctrine of *in pari delicto* was abrogated by S.C. Code §§ 32-1-10 and -20. In fact, while S.C. Code §§ 32-1-10 and -20 "were originally adopted in 1712 as part of the Statutes of Anne,"[2] there are cases after that date that refused to allow a gambler to recover, by applying the doctrine of *in pari delicto*. See, *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); *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 statutes of Anne). Respondent has not attempted to distinguish this controlling authority. Furthermore, in a 2006 case involving unfair trade practices and other claims, this Court recognized the doctrine of *in pari delicto* as a

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[2] *Johnson*, 349 S.C. at 634, 546 S.E.2d at 664.

valid defense. See, *Myatt v, RHBT Financial Corporation*, 370 S.C. 391, 635 S.E.2d 545 (Ct. App. 2006)

In *Johnson,* the South Carolina Supreme Court merely held that the defense of *in pari delicto* was not available as a defense for the gambling operators in that case, stating:

> 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....

349 sc at 639, 564 at 667. The Court concluded that the plaintiff there were not without fault, but were not equally culpable, and thus the *in pari delicto* defense could not be applied.

As previously noted, gambling was legal, but highly regulated, at the time of the *Johnson* case. Thus, the Court held the operators to higher standing in understanding the restrictions contained in the law. Now however, gambling machines are completely illegal, not licensed or regulated, and Proctor knew that the machines were illegal at the time she participated in the activity: "I mean, I played I can tell you that I played before it was illegal and after it was illegal...." (SR. 2) Since gambling was illegal and Proctor knew that it was illegal, there can be no "greater knowledge or understanding of the laws" attributable to Respondents that would deprive them of the defense of *in pari delicto.*

Respondent attempts to create some inequality of culpability between the parties, arguing that under S.C. Code § 16-19-40, a "tavern keeper" who allows gambling in his tavern is subject to stronger penalties that the gambler. Respondent claims that the different penalties demonstrate that the legislature acknowledged the tavern keeper to be more at fault than the gambler. However, the difference in the penalties is not based on fault or culpability, but the fact that the tavern keeper has provided a forum for gambling, thereby extended opportunity for

multiple gamblers to engage in illegal activity. It is the repetitive nature of the tavern keeper's conduct that warrants stronger punishment. *See, e.g.* 39 *Am.Jur.2d Habitual Criminal* § 2 (enhanced punishment statutes thus serve to protect law-abiding citizens from the clear danger posed by the high incidence of repeat offenses).

In effect, in attempting to rely on S.C. Code § 16-19-40, Respondent is comparing apples and oranges. *In pari delicto* applies as a defense in a civil matter, not a criminal case. *State v. Posey*, 88 S.C. 313, 70 S.E. 612, 614 (1911). In the context of unclean hands and *in pari delicto*, courts have recognized that alleged "misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character" and therefore, Proctor's admitted participation in illegal gambling is sufficient, regardless of the penalties under S.C. Code § 16-19-40.[3] *Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co.,* 324 U.S. 806, 815, 65 S.Ct. 993, 89 L.Ed. 1381 (1945); *accord Pecorella v. Greater Buffalo Press, Inc.,* 107 A.D.2d 1064, 1065, 486 N.Y.S.2d 562, 563 (4th Dep't 1985) (holding that with respect to unclean hands, the misconduct that will bar relief "need not be sufficient to constitute the basis of a legal action"). Moreover, courts have found that the nature of the penalties does not affect the culpability of the parties:

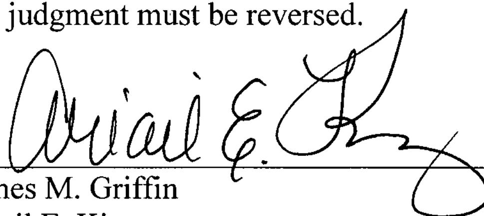
> It is true that the penalties of the act seem to be directed solely to the lender, and the advantages or benefits, aside from the provisions permitting an outrageous interest charge by the lender, reserved solely for the borrowers. But these penalties were designed to prevent oppression of the weak and poor; they were not designed as rewards for the perfidy of the borrower. Where no oppression is involved, no advantage taken by the lender of the borrower, the transaction being entered into with the deliberate purpose of defeating the statute, the parties are both particeps criminis and in pari delicto, and the rule not the exception applies.

[3] In addition, the extent of Proctor's participation and culpability is an issue of fact, not one of law, and thus, should not be determined at the summary judgment stage.

Ryan v. Motor Credit Co., 28 A.2d 181, 183 (N.J. App. 1942). Because Proctor knowingly and deliberately entered into the illegal gambling transactions, the rule of *in pari delicto* applies and Proctor's claims are barred.[4]

CONCLUSION

The doctrine of *in pari delicto* is still valid in South Carolina. Respondent admits to participating in illegal activity and thus, her claims against Appellants are barred by the doctrine of *in pari delicto.* The lower court's order denying Appellants' motion for summary judgment and granting Respondent's Motion for summary judgment must be reversed.



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[4] Whether Proctor has a gambling addiction, as she claims in the Statement of Facts, also has no effect on the application of the doctrine. In *Bradley v. Doherty*, 30 Cal. App. 3d 991, 997 (Ct. App. 1973), a California appellate court found that both parties knew that they were engaging in unlawful gambling and thus the *in pari delicto* doctrine applied, holding [a] compulsive gambler is no less In pari delicto when indulging in illegal gambling than a noncompulsive one."

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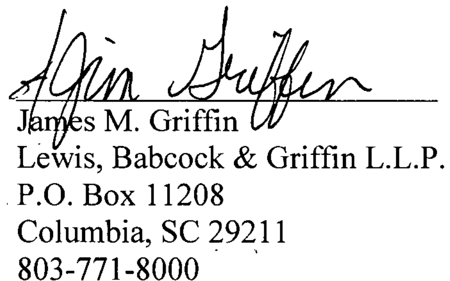
CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Reply 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 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:

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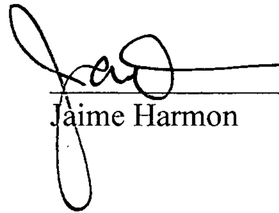

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