IN THE SUPREME COURT OF FLORIDA

BLUE SKY GAMES, LLC,

Petitioner,

v. CASE NO.: SC18-1821

FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATIONS, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,

Respondent.
_____/

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal, First District State of Florida

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STATEMENT OF THE CASE AND FACTS

This case centers over whether a computer game is a slot machine, pursuant to §849.16, Florida Statutes. Most of the facts in this case are not in dispute. Appellant, Gator Coin II, Inc. ("Gator Coin"), is a Jacksonville-based company which leases various coin-operated machines to businesses in the Jacksonville/Northeast Florida area. The machines it leases include a wide variety of devices such as juke boxes, pool tables, video games, and cigarette machines. [R.III, 1402].

This case arose after agents of the Appellee issued, "Notice of Violation," which stated that certain machines Gator Coin had leased "may be considered slot machines" in violation of §849.16, Florida Statutes, and ordered the machines to be removed from the premises within ten (10) days of the Notice. [R.III, 1129-30, 1409-11].

The machines at issue are a computer game with software developed by Intervenor, Blue Sky Games, LLC. The game is called, "Blue Sky Games Version 67 ("Version 67"). [R.III, 1407]. The game has a mandatory "preview" function which requires a player of the game to view the outcome of each game prior to playing it. [R.III, 1487]. When the game is first activated, the screen reads as follows: "Each game play is known to the player without insertion of anything of value. Play button will not appear until preview has been pressed. This removes chance and hope

of gain on all available game plays. Please touch screen to play for fun." [R.III, 1415]. As a result, "[y]ou can't engage in playing the game unless you preview the outcome." *Id.*

The outcome shown via the preview is the actual outcome one hundred percent (100%) of the time. *Id.* No insertion of money or any commitment to play the game is required to see the previews that are available for every game theme which can be played. *Id.* Moreover, if a player does not like the outcomes he or she sees via the preview, the player is free to walk away without any financial commitment. [R.III, 1502]. Finally, there is nothing a player can do to change the outcome presented in the preview, therefore, the game involves no skill. [R.III, 1487-88].

Given the Notices of Violation issued by the Appellee, and believing that the machines described above are not slot machines as contemplated by §849.16, Florida Statutes, because no skill is involved, and the preview feature eliminates chance and unpredictability since each game outcome is known to a player one hundred percent (100%) of the time prior to playing, Gator Coin brought a declaratory judgment action in circuit court in Leon County. [R.I, 14-28].

The matter preceded to a non-jury trial which was held on February 8 and 9, 2017. [R.III, 1372-1633]. Importantly, the trial court viewed and "played" the game machine at issue, which was admitted as Plaintiff's Exhibit 3. [R.III, 1413-1424].

At the conclusion of the trial, the trial court ruled from the bench, in the Appellant's and Intervenor's favor, that the game at issue was not a slot machine as defined by §849.16, and further that one game equals one play, that the game involved no skill, and that there was no element of chance or unpredictable outcome in the game. [R.III, 1626, 1629-30]. The trial court also "tried to rationalize" why people would play the game and commented that there "can be any number of reasons why people play these games." [R.III, 1627]. However, the trial court noted that it was not a psychologist, and that upon reading the statute, why people play was not a "relevant consideration," but rather something that should be left for the legislature to change or modify the statute, should it feel the need to do so. [R.III, 1627]. The trail court thereafter issued a final declaratory judgment in Appellant's and Intervenor's favor on March 15, 2017, and incorporated its oral ruling therein. [R.III, 1158-61].

Subsequently, the Appellee moved for rehearing. [R.III, 1162-68]. No new evidence was taken at the rehearing. *Id.* After hearing arguments from counsel, the trial court reversed its prior ruling and ruled in favor of the Appellee, i.e., that the game is a slot machine, pursuant to §849.16, Florida Statutes. [R.III, 1336-1350]. In doing so, the trial court reaffirmed its prior conclusion that the game involved no skill. [R.III, 1341]. However, the trial court reversed course on its findings as to whether there was an element of chance or an unpredictable outcome in the game.

More specifically, the trial court found that while the outcome of each game is displayed and known to the player through the mandatory preview function, because the known outcome was determined by a pseudorandom number generator (PRNG), before the start of play, this supplied the element of chance and unpredictability. [R.III, 1339-40]. The trial court also found that the play of the game was a series of games and that nothing in the statute suggested that each game must be analyzed in isolation without considering its relationship to subsequent games or outcomes. [R.III, 1340]. The court went on to conclude that because each game unlocks the opportunity to play subsequent games, the outcomes of which are unknowable at the time the first game is played, and because such subsequent games offer the user an opportunity to receive something of value, the machines are slot machines within the meaning of §849.16, Florida Statutes [R.III, 1340] (citing *Ferguson v. State*, 99 N.E. 806, 807 (Ind. 1912)).

The trial court's Order on Rehearing and Final Declaratory Judgment was entered on July 10, 2017, from which the appeal below followed. [R.III, 1351-53]. Appellant Gator Coin II, Inc. and Intervenor, Blue Sky Games, LLC filed their Notice of Appeal on July 21, 2017, and on August 30, 2018, the First District Court of Appeals filed its Opinion (see Appendix), which Intervenor seeks to challenge here. Appellant's and Intervenor's Motions for Rehearing were denied by the First

District Court of Appeals on October 1, 2018. Appellant's Notice of Intent to Invoke Discretionary Jurisdiction was filed on October 29, 2018.

SUMMARY OF THE ARGUMENT

The First District Court of Appeals held that the game known as "Version 67" is a slot machine, despite the fact that: "...[I]t is true that the user is advised of the outcome of the game at hand, ahead of time, through the preview feature..." That ruling is in conflict with this Court's ruling in *Deeb v. Stoutamire*, 53 So.2d 873 (Fla. 1951), which held: "We conclude that in the process from the insertion of a coin... the score totaled has not depended on chance or other result unpredictable by the player..."

The decision under appeal concludes it does not matter that the outcome is wholly predictable to the player at all times – what matters to the district court is the operation of the game before the player enters the picture. On the other hand, *Deeb v. Stoutamire*, 53 So.2d 873 (Fla. 1951) articulates the more rational view that what matters is the predictability of the outcome from the player's point of view beginning with the insertion of a coin.

Thus, the petitioner contends that the decision of the First District Court of Appeals expressly and directly conflicts with the decision of this Court in *Deeb v. Stoutamire*, 53 So.2d 873 (Fla. 1951).

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal on the same point of law. Art. V, §3(b)(3) Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN *Deeb v. Stoutamire*, 53 So.2d 873 (Fla. 1951).

The First District Court of Appeals interprets §849.16, Florida Statutes, by finding that predictability of outcome from the point of view of the player does not matter. This contradicts this Court's decision in *Deeb v. Stoutamire*, 53 So.2d 873 (Fla. 1951), in which this court stated the characteristics which differentiate an innocent machine from a guilty one as: "any element of chance or of other outcome of such operation unpredictable by him [the player]," and, "element of chance or unpredictable outcome." *Deeb v. Stoutamire*, 53 So.2d 873 (Fla. 1951) holds unpredictability from the player's point of view is the hallmark of whether an activity or a game is gambling.

Contrary to *Deeb*, the district court here held that the player's knowledge is irrelevant and what matters is how the machine operates, fully disregarding the fact

that the outcome is known to the player at all times, and that nothing in the machine can change that known outcome.

Gambling, and what constitutes gambling, has always been a "hot" topic, but this has been especially true over the past approximately five years. At least a dozen criminal prosecutions have involved "Version 67" games, in which the player knows the outcome at all times and has the opportunity to not play and even to receive back money which has been inserted into the machine. Some juries and even prosecutors have found that the knowable outcome means there is no element of chance and hence not gambling. These machines have been placed in many 501(c)(3) clubs such as the American Legion, the VFW, the Moose and others. The managers of these clubs believe the machines do not violate the gambling prohibition and the club members want these games for entertainment.

The undersigned believes there is a real, practical need for this Court to determine and define the limits of the prohibitions against gambling. Historically, "an element of chance" is the sine qua non of gambling. Chapter 849 of the Florida Statutes is entitled, "Gambling." Does it really make sense that any activity with a one hundred percent knowable outcome should be called gambling? In *Deeb, Supra*, this Court understood and ruled that knowledge of the outcome, from the player's point of view, was the deciding factor. The District Court's Opinion overturns that

common sense position and allows factors which have no effect on the outcome to supply the element of chance.

CONCLUSION

The district court determination that the player's point of view is not relevant to the issues of predictability and hence that Version 67 is a slot machine, directly and expressly conflicts with this Court's ruling in *Deeb, Id.* As a result, Intervenor respectfully requests this Court accept jurisdiction to resolve this conflict on a significant legal issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, via the Florida Court's E-filing Portal, to all counsel of record on this _____ day of November, 2018.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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