IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC18-1821
L.T. CASE NO.: 1D17-2966; 1D17-3705; 2015-CA-2629

BLUE SKY GAMES, LLC.

PETITIONER,

V.

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

RESPONDENT.

ON REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL
RESPONDENT'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent, State of Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (the "Division" or "Respondent") rejects Petitioner Blue Sky Game, LLC's ("Petitioner") statement of the case and facts. Petitioner's statement improperly relies on facts that do not appear within the First District's unanimous opinion, is argumentative, and discusses matters not relevant to the threshold jurisdictional issue. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986); Fla. R. App. Pro. 9.120. The Division offers the following statement to assist the Court.

This action arises from civil proceedings initiated by Gator Coin II, Inc. ("Gator Coin") against the Division in the Second Judicial Circuit, seeking a declaratory judgment that the Version 67 software ("Version 67"), manufactured by Petitioner and distributed by Gator Coin, is not a slot machine or device as defined by section 849.16(1), Florida Statutes. Petitioner intervened in the matter on the side of Gator Coin.

Petitioner developed Version 67 with the goal of evading Florida's prohibitions on gambling through the use of a "preview" feature. (Petitioner's App. 2).

A non-jury trial took place, with the circuit court initially finding in favor of Gator Coin. The Division timely filed a Motion for Rehearing.

The declaratory judgment action was reheard on motion of the Division. The Order on Motion for Rehearing and Final Declaratory Judgment granted the Division's Motion for Rehearing, recognized the Seminole Tribe of Florida as *amicus curiae*, vacated the prior judgment(s), determined that the presumption set forth in section 849.16(3), Florida Statutes, was not overcome by the evidence presented by Gator Coin and Petitioner, and declared the software commonly known as Blue Sky Games Multi Gaming System Version 67 to be a slot machine pursuant to Florida law. Gator Coin and Petitioner appealed.

The First District Court of Appeal, after being briefed on the matter and hearing oral argument, issued a unanimous opinion finding in favor of the Division and recognizing the Version 67 gaming system to be a slot machine pursuant to section 849.16(1), Florida Statutes.

Petitioner now seeks review of the First District Court of Appeal's opinion based on an alleged conflict between the opinion and this Court's holding in *Deeb v. Stoutamire*, 53 So. 2d 873 (Fla. 1951).

SUMMARY OF THE ARGUMENT

Petitioner continues to misconstrue the language of this Court's decision in *Deeb* and now claims that the First District Court of Appeal's proper application of *Deeb* creates conflict between the case and the First District's unanimous opinion in this matter. It does not.

To obtain a determination that Version 67 is not a slot machine, Petitioner has asked that each court below ignore or incorrectly apply the test set forth in *Deeb*, which requires an examination of the machine itself, and to instead buy into Petitioner's "no-chance" argument. Both lower courts correctly declined to do so. Petitioner now seeks review for the privilege of asking this Court to do the same; to misapply this Court's own holding, overturn nearly 70 years of precedent, and open the State of Florida to untaxed and unregulated casino gambling.

Proper application of *Deeb* will not allow software inherently based on chance and a well-recognized gambling scheme to evade Florida's gambling prohibitions. The First District Court of Appeal recognized this, and properly applied *Deeb* and the cases stemming from that decision. Thus, the opinion does not give rise to any express conflict, nor any other basis for review by this Court.

Additionally, Petitioner attempts to introduce facts not contained in the First District's opinion, and asks this Court to decide issues beyond the scope of this matter. Therefore, this Court should decline to exercise its jurisdiction.

ARGUMENT

I. THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL DOES NOT IN ANY MANNER CONFLICT WITH ANY DECISION OF THIS COURT OR ANY DISTRICT COURT OF APPEAL.

Conflict jurisdiction exists when a decision of a court of appeal expressly and directly conflicts with either the Florida Supreme Court or another court of appeal on the same question of law. Art. V. § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction. *Reaves*, 485 So. 2d at 829-30; see also *The Florida Bar v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988).

The First District Court of Appeal based its determination on the following facts in the record on appeal:

> - Version 67 is a profitable game that depicts traditional slot machine symbols;
> - Version 67 has a mandatory preview feature that displays the outcome of the game selected before the insertion of any money;
> - The preview displays the actual result of the game 100% of the time, and players are not financially obligated to play;
> - Version 67 has a preset win/loss ratio;
> - The outcome that is displayed in the preview is generated by Version 67 with the use of a random number generator ("RNG");
> - When the first game is played, the outcome of the next game is automatically generated by the RNG and is

> stored in memory, and that outcome is displayed when the player presses preview for the next game; and
> - There is nothing a player can do to change the outcome that is randomly generated and selected by Version 67 from among millions of potential outcomes. (Petitioner's App. 3)

After a recitation of the facts and procedural background, the First District correctly recognized the sole issue in the matter as whether Version 67 fell within the purview of section 849.16(1), Florida Statutes. (Petitioner's App. 3). The First District then cited to *Deeb*, correctly summarizing this Court's explanation and guidance regarding how to differentiate a slot machine from innocent devices. (Petitioner's App. 7). Quoting *Deeb*, the First District acknowledged that "inasmuch as the machine itself is on trial…it should not be condemned unless" an element of chance or unpredictability is inherent within the machine's operation. (Petitioner's App. 7, quoting *Deeb*, 53 So. 2d at 874-5). The First District then addressed Petitioner's underlying argument by clarifying that pursuant to *Deeb*, it is the operation of the machine, not the player's knowledge, which is determinative as to whether any device is or is not a slot machine. (Petitioner's App. 7). The established facts show that Petitioner's device, aside from taking currency and awarding prizes, does nothing more than assign and display outcomes through the use of a random number generator, a statutorily defined material element of chance. § 546.10(3)(e)6, Fla. Stat. Chance is therefore inherent in the machine's operation.

The First District then addressed *Department of Business & Professional Regulation, Division of Alcoholic Beverages and Tobacco v. Broward Vending, Inc.*, 696 So. 2d 851 (Fla. 4th DCA 1997). In *Broward Vending*, the Fourth District Court of Appeal determined that, in accordance with the rationale set forth in *Deeb*, a machine that has a preset win/loss ratio is inherently infused with chance. (Petitioner's App. 7). The fact that Petitioner's machine has the same is well established, and Version 67 was similarly condemned as a slot machine. (Petitioner's App. 3, 8-9).

Thus, rather than create a conflict, the First District's opinion relies on, properly applies, and harmonizes with both this Court's and the Fourth District's precedent. Petitioner's misreading of *Deeb* and dissatisfaction with the First District's opinion does not create a conflict between the First District and this Court. Therefore, this Court should decline to review the matter.

II. PETITIONER IMPROPERLY REQUESTS THIS COURT DECIDE ISSUES OUTSIDE THE SCOPE OF THIS MATTER.

In further attempt to evade Florida's gambling prohibitions and cloud the true nature of their software, Petitioner requests, for the first time at any stage in this matter, for this Court to define the term "gambling". Petitioner appears to believe that because it considers gambling to be a "hot" topic, and because it chose to proliferate its software despite the software's then potential, now confirmed

illegality (IB. 8), that this Court should review this matter and provide a definition to sate Petitioner's curiosity (IB. 8).

Setting aside the fact that this Court has done so on multiple occasions, Petitioner's newest search for a loophole for Version 67 to exploit is both irrelevant to the issue decided by the First District, and procedurally improper. The declaratory judgment action before the trial court and the First District was limited to whether Version 67 did or did not meet the definition of a slot machine pursuant to section 849.16(1), Florida Statutes. At no point was the definition of the term "gambling" at issue, nor was it necessary to define "gambling" to make the determination required in this matter.

Petitioner's request simply reflects Petitioner's misunderstanding regarding this Court's holding in *Deeb*; while people may gamble, only a machine, separate and independent from a person, can be a slot machine. This is why the test in *Deeb* focuses on the machine's functions and the chance inherent in those functions, not a player's perspective, and why *Deeb* was properly applied by the First District in this matter.

Moreover, an appellate court generally cannot address a claim or issue for the first time on appeal. *Saka v. Saka*, 831 So. 2d 709 (Fla. 3rd DCA 2002), citing to *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978); *Manning v. Tunnell*, 943 So. 2d 1018, 1020 (Fla. 1st DCA 2006). The request for this Court to define the term

"gambling" does not meet any of the exceptions to that rule. *Manning*, 943 So. 2d at 1020 (citing to cases providing exceptions). Thus, even if the definition were relevant to this matter, raising the issue for the first time in a jurisdictional brief cannot provide basis for this Court to exercise its discretionary jurisdiction.

III. PETITIONER IMPROPERLY RELIES ON FACTS OUTSIDE OF THE FIRST DISTRICT'S OPINION IN AN EFFORT TO PERSUADE THIS COURT TO GRANT REVIEW.

Finally, Petitioner cites extensively to facts not found in the First District's opinion (IB. 2-5, 8). Some statements, such as the unsubstantiated assertion regarding the uncited opinions of "some juries and even prosecutors" regarding gambling, the beliefs of non-testifying and unidentified "managers" of establishments operating and profiting from Petitioner's slot machines, and Petitioner's perceived need for this Court to opine on what is or is not gambling (IB. 8), are not even a part of the record provided to the First District. Despite Petitioner's attempt to introduce such "facts" to the Court and the irrelevance of such facts to the determination in this matter, the discretionary jurisdiction of this Court is restricted to cases where the necessary conflict appears in the four corners of the majority decision. See *Reaves*, 485 So. 2d at 830. Even if these additional facts were to be considered, Petitioner still fails to demonstrate any express and direct conflict between the First District and this Court.

CONCLUSION

The First District Court of Appeal decided this matter in a manner that properly adhered to this Court's precedent and does not expressly and directly conflict with any District Court of Appeal decision. Petitioner has identified no legal basis for review by this Court.

For the foregoing reasons, Respondent respectfully requests this Court to decline to exercise its jurisdiction to review the lower court's decision.

Respectfully submitted.

/s [Daniel J. McGinn]
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Jurisdictional Brief has been served via electronic mail on Counsel for Petitioner, Robert E. Turffs, at turffs@gmail.com, and turffs.filing@gmail.com, on this 26th day of November, 2018.

/s/ [Daniel J. McGinn]
Daniel J. McGinn
Counsel for Respondent

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Jurisdictional Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

/s/ [Daniel J. McGinn]
Daniel J. McGinn
Counsel for Respondent