

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

GATOR COIN II, INC.,

Plaintiff,

BLUE SKY GAMES, LLC,

Intervenor,

v.

CASE NO.: 2015-CA-002629

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

Defendant.

ORDER FOR DECLARATORY JUDGMENT

This action was tried by the Court on Plaintiff's Complaint seeking issuance of a Declaratory Judgment, and the Court, having received evidence, having heard argument of counsel, and being otherwise advised in the premises, **FINDS:**

1. Plaintiff, GATOR COIN II, INC., is a business that leases coin-operated machines in various locations. It leases computer-operated games, pool tables, cigarette machines, and other similar devices. At issue in this matter is a computer game leased and operated by Gator Coin which is produced by Intervenor, BLUE SKY GAMES, LLC, that it designated as a multiple game system with preview feature version V.K.067. This game will be called **Version 67**.

2. Intervenor, BLUE SKY GAMES, LLC, designs, creates, and licenses software utilized in computer games typically found, but not limited to being found in, bars and sports bars. Blue Sky Games, LLC, also designs products for use in several other states. This Declaratory Judgment concerns only, and is limited to Blue Sky Games Multi Gaming System **Version 67**.

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LEON COUNTY, FLORIDA

Plaintiff, GATOR COIN, II, INC., utilizes only Version 67, and the evidence adduced at trial was limited to Version 67; no findings here are applicable to any other game software, including other iterations of Blue Sky's Multi Gaming Systems.

3. Defendant, FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, is an agency of the State of Florida that regulates the sale of alcoholic beverages and tobacco products. Agents of the FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, went to various locations at which alcohol is served, which lease equipment from GATOR COIN II, INC., and warned the proprietors of these establishments that the game, which is the subject of this action, is a gambling device, and unless it was removed, the establishments' licenses could be subject to penalty or revocation, and further, that other penalties, forfeiture, and criminal sanctions could result.

4. As a result of the FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO's warnings, GATOR COIN II, INC., removed all Version 67 games from leased locations, and placed the machines in storage. GATOR COIN II, INC., and its lessees have experienced a loss of revenue as a result of these actions of the FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO. Intervenor, BLUE SKY GAMES, LLC, has also experienced a loss of revenue from licensing fees as a result of the FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO's actions.

5. BLUE SKY GAMES, LLC, Version 67, has a mandatory preview feature which displays the outcome of each possible game before the game can be played. The outcome is displayed at all times, and additionally, the player must press a “preview” button before a play button can be activated. The outcome of the game is always identical to the result shown previously by the preview feature.

Florida Statute §849.16(1) states:

The term ‘slot machine or device’ means any machine or device or system or network of devices that is adapted for use in such a way that, upon activation, which may be achieved by, but is not limited to, the insertion of any piece of money, coin, account number, code, or other object or information, such device or system is directly or indirectly caused to operate or may be operated and if the user, whether by application of skill or by reason of any element of chance or any other outcome unpredictable by the user, may: (a) Receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit allowance, or thing of value or which may be given in trade; or (b) Secure additional chances or rights to use such machine, apparatus, or device, even though the device or system may be available for free play or, in addition to any element of chance or unpredictable outcome of such operation, may also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value. The term “slot machine or device” includes, but is not limited to, devices regulated as slot machines pursuant to chapter 551.

6. Defendant, FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, contends that Version 67 is a “slot machine,” under Florida Statute §849.16(1). Plaintiff and Intervenor contend that Version 67 is **not** a slot machine because, as a result of the preview feature, the game’s outcome is not the result of application of skill, any element of chance, or that the outcome is not predictable to the player.

7. This Court finds that skill is not utilized in the game because there is nothing the player can do to change the outcome. The result displayed by the preview is always the ultimate outcome. An “element of chance” and “whether the outcome is known to the player” are different

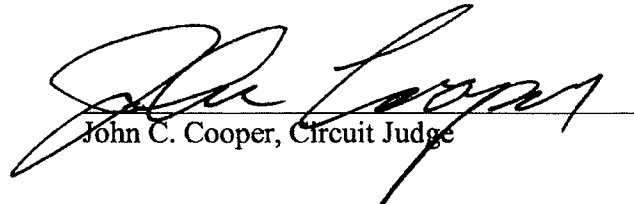
ways of saying the same thing for the purpose of Version 67. The game's outcome is always displayed and known to the player before the player commits any money to the "play" by activating the "play" button. As a result of the fact that the outcome is known to the player at all times, there is no element of chance in Version 67. The Court finds that, for purposes of Version 67, the terms "game" and "play" are equivalents because the outcome of the game is known with each single play.

8. This Court's ruling, made on February 9, 2017, is incorporated into this order. The Transcript of Proceedings from February 9, 2017, is attached, as Exhibit A.

It is therefore ADJUGED that:

- A. This Court has jurisdiction to issue a declaratory judgment on the facts of this case.
- B. Plaintiff, GATOR COIN II, INC., and Intervenor, BLUE SKY GAMES, LLC, have standing to bring this action.
- C. BLUE SKY GAMES, LLC's Multi Gaming System, Version 67, is not an illegal "slot machine", or a gambling device as these terms are defined in Florida Statutes.
- D. The presumption found in Florida Statute §849.16 has been rebutted by the proof that Version 67 is not an illegal slot machine or gambling device.
- E. This Court reserves jurisdiction to consider awards of costs of suit, in the event Plaintiff or Intervenor move for the same.

DONE AND ORDERED, in chambers, at the Leon County Courthouse, Tallahassee, Florida, this 9th day of March 2017.


John C. Cooper, Circuit Judge

cc: Ozarowski
ReMaggio
Turbo

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA,**

GATOR COIN II, INC.

Plaintiff,

and

BLUE SKY GAMES, LLC,

Intervenor,

v.

Case No. 2015-CA-2629

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

Defendant,

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED ORDER

Defendant Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco ("Division"), per the Court's bench ruling on February 9, 2017, hereby submits its specific objections to the proposed order submitted to the Court by Plaintiff and Intervenor. Plaintiff and Intervenor sent a copy of the proposed order to Defendant and Defendant then responded with objections. Defendant hereby submits that the proposed order does not completely reflect this Court's ruling¹, as follows:

1. In paragraph no. 5, the first sentence of the paragraph misstates the Court's ruling. The Court stated only that the mandatory preview feature "provides for a preview of every game that is played." (T. 187:24-25). Accordingly, Defendant objects to the implication that every possible game outcome is displayed in a single preview.

¹ References to the official transcript record will be indicated as "(T. ___)".

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CLERK OF COURT
LEON COUNTY, FLORIDA

2. Paragraph no. 8, subpart E states that the “Court reserves jurisdiction to consider awards of costs of suit, in the event Plaintiff or Intervenor move for same.” However, there is nothing in the transcript of the bench ruling regarding costs of suit or reserving jurisdiction for such consideration. Attorneys’ fees are not recoverable in a declaratory relief action absent a contractual provision or a statute authorizing them. *Price v. Tyler*, 890 So. 2d 246 (Fla. 2004). As for costs, Defendant had, prior to trial, given notice that Plaintiff’s expert’s bill for deposition was unreasonable and excessive. However, neither Plaintiff nor Intervenor moved to have reasonable fees determined by this Court during the trial. Accordingly, Defendant objects to the entirety of Paragraph 8E.

3. The proposed order omits mention of the Court’s finding that every “outcome is randomly determined by the random number generator” and that “how the game turns out is predetermined before you put your money in.” (T. 188:7-8 and 191:23-24).

4. The proposed order omits the Court’s finding that *Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco v. Broward Vending*, 696 So. 2d 851 (Fla. 4th DCA 1997) is neither binding nor persuasive in this matter “because, in that case the owner of the machine admitted that chance is an element of the game and that if a player does not manipulate the levers to improve the score, the machine is preset for the player to win 50 percent of the time. But the percentage can be modified by the adjustment of the machine. And it states, they made a finding that skill would significantly improve the player’s winning percentage. It did not eliminate the element of chance in the machine itself.” (T.190:22-191:7).

5. The proposed order omits the Court’s finding that because the outcome is always known the player, there is no element of chance in the game. (T. 191:23-192:1).

6. The proposed order omits the Court's finding that Plaintiff and Intervenor have standing to bring this declaratory action because at least two machines leased out by Gator Coin to vendors were pulled and returned to Gator Coin's warehouse, meaning loss of revenue from those machines for Gator Coin and Blue Sky. (T. 189:17 – 190:3).

7. Finally, the proposed order omits the Court's finding that the Court has subject matter jurisdiction over this declaratory judgment action applying a criminal statute because there are both civil and potentially criminal consequences of whether a machine violates the slot machine statute. (T.190:6-16).

Respectfully submitted this 17th day of February, 2017.

s/ Magdalena Ozarowski
Magdalena Ozarowski
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Shirley Barber - Objections to Plaintiff's Proposed Order

From: "Syfrett, Kathleen" <Kathleen.Syfrett@myfloridalicense.com>
To: "BarberS@leoncountyfl.gov" <BarberS@leoncountyfl.gov>
Date: 2/20/2017 3:38 PM
Subject: Objections to Plaintiff's Proposed Order
Attachments: 17-2-17 Defendant's Objections toPlaintiffs Proposed Order.docx

Good Afternoon Shirley,

In follow-up to my email of Friday:

The Plaintiff's attorney provided Magie with a copy of their proposed Order but she is not sure if it has been submitted to the Court as we have not been served notice that the Plaintiff's Proposed Order has been submitted or filed.

Magie wants to make sure Judge Cooper has the Defendant's Objections to Plaintiff's Proposed Order so I have attached a Word version of the objections. Magie wants to know if Judge Cooper wants the submission in Word format or if the objections need to be e-filed through the clerk's office?

Thank you for your help!
Kathy



Kathleen C. Syfrett, Administrative Assistant III
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CLERK & CONTROLLER
LEON COUNTY, FLORIDA

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JOHN C. COOPER
Circuit Judge

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
FOR LEON COUNTY, FLORIDA

Gator Coin II, Inc.,

Plaintiff,

vs.

CASE NO. 2015-CA-2629
CIVIL DIVISION

Florida Department of
Business and Professional
Regulation, Division of
Alcoholic Beverages and
Tobacco, an agency of the
State of Florida,

Defendant.

EXCERPT OF PROCEEDING

IN RE: Non-Jury Trial
BEFORE: Honorable John Cooper
DATE: February 9, 2017
TIME: Commenced at 9:00 a.m.
Concluded at 11:10 a.m.
LOCATION: Leon County Courthouse
Tallahassee, Florida
REPORTED BY: JO LANGSTON
Registered Professional Reporter

ACCURATE STENOGRAPHY REPORTERS, INC.
2894-A REMINGTON GREEN LANE
TALLAHASSEE, FLORIDA 32308
(850) 878-2221

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03/09/17

Gwen Marshall
Clerk, of Circuit Court
Leon County, FL

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EXCERPT OF PROCEEDING

* * *

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2
3 THE COURT: I don't have any particular notes or
4 outlines, so if you can think of something I need to
5 rule on, let me know and I will, but I'll try to cover
6 all the bases.

7 I first of all want to say to the lawyers that you
8 all did a really good job. You presented your side.
9 You did it effectively and you did it quickly and very
10 professionally. And so that's the way trials -- the
11 way this trial was handled by the lawyers is the way
12 trials are supposed to be handled. So you-all all did
13 a good job.

14 And unfortunately I can't make both sides happy.
15 If I could, I would try to figure out a way to do it.
16 So let me try to give you a few facts which I think are
17 undisputed, and I think if you look at the summary
18 judgment motions by both sides, you'll find pretty much
19 that the facts are laid out there undisputed. But what
20 we've talked about today is a computer that uses a
21 program made by Blue Sky and leased to Gator Coin, and
22 I'm going to confine my discussion to version 67.

23 And factually, based on the testimony, the only
24 versions that Gator Coin uses in the state of Florida
25 with its customer are version 67. That doesn't mean to

1 say that perhaps some other distributors use other
2 versions, but the only one Gator Coin uses are version
3 67.

4 It pays a royalty payment or a licensing payment
5 from Blue Sky for the program, and then Gator Coin
6 takes that program and puts it into a machine and then
7 leases the machines to various businesses around the
8 state, primarily ones -- primarily bars, sports bars,
9 things of that nature. It's not necessarily limited to
10 those places, but those are the most likely places.

11 Version 67 has a preview feature on it that
12 provides for a preview of every game that is played.
13 Every time you access the machine and attempt to play
14 it, you have to go through the preview feature. And
15 that preview feature will tell you whether you win, and
16 if you do win, how much you win, depending upon your
17 bet. And there's no evidence that that preview feature
18 is ever wrong.

19 That preview feature is -- that outcome is
20 randomly determined by the random number generator.
21 And that may not be the correct name, but that's -- the
22 State focused on that for a portion of its testimony.
23 This version 67 does not have a way where the business
24 owner that leases it from Gator Coin can easily or
25 readily decommission the preview, and there's no

1 evidence that the preview feature has been
2 decommissioned or turned off in any version 67 machine.
3 There are other versions which are not at issue in this
4 case that do permit that, and the outcome as to those
5 might be different than the outcome as to the version
6 67. But those are the facts as it relates to the
7 machine.

8 I believe, with the way these machines are played,
9 one play equals one game. The analogy I gave was a
10 football game, where obviously one play would not equal
11 one game. One play would just be, you know, one of
12 many to determine -- if you were betting on a
13 computerized football game, you couldn't determine the
14 outcome on one play. Version 67 provides for one play
15 for one game.

16 I tried to rationalize to myself why people would
17 play this game when they knew they were going to lose,
18 and I decided there's any number of explanations. I'm
19 not a psychologist, but I did take a course 40 years
20 ago in college. I probably doubt that makes me an
21 expert in psychology. So there can be any number of
22 reasons why people play these games.

23 But upon reading the statute, I'm not sure that's
24 a relevant consideration. That's a consideration
25 perhaps for the legislature in deciding whether it

1 wants to change or modify the statute or do nothing to
2 the statute. That's a policy consideration which I
3 don't think is appropriate for me to take into account.

4 The statute as to standing, I find that the
5 plaintiff and the intervenor do have standing as to the
6 version 67 software. And I generally agree with the
7 analysis contained in their pretrial papers, but the
8 essence of my decision on standing is that there have
9 been at least two version 67 machines pulled that were
10 leased by Gator Coin to vendors in Florida, thereby
11 those machines returned to Gator Coin's warehouse,
12 thereby meaning loss of revenue from those machines for
13 Gator Coin and additionally loss of revenue from Blue
14 Sky on licensing or commission payments on that
15 machine. So I believe that gives them standing. And
16 there are a number of cases that were cited in the
17 memos that I think are consistent with that.

18 There was a case cited by the State, and I think
19 it might have been a federal case, that talked about
20 that you should not use a dec action to interpret a
21 criminal statute. I am more persuaded by the plaintiff
22 and intervenor's cases that say that that's unique to
23 federal court versus Florida. That case does have
24 persuasive value, but it does not have binding -- it's
25 not binding precedent. I believe this is appropriate

1 because there are civil and potentially criminal
2 consequences of whether a machine violates the slot
3 machine statute or not.

4 When I look at three of the key factors in 849.16,
5 if the machine -- the machine is added as a factor,
6 which was not the case in earlier cases, the
7 application of skill or by reason of any element of
8 chance or any other outcome unpredictable.

9 I looked at the *Broward Vending* case and find that
10 it is not binding or particularly on point because in
11 that case the owner of the machine admitted that chance
12 is an element of the game and that if a player does not
13 manipulate the levers to improve the score, the machine
14 is preset for the player to win 50 percent of the time.
15 But that percentage can be modified by an adjustment of
16 the machine. And it states, they made a finding that
17 skill would significantly improve the player's winning
18 percentage. It does not eliminate the element of
19 chance in the machine itself.

20 Here there's no evidence that I find that's
21 credible to me that there's skill in this game. And I
22 take into account the testimony of the Gator Coin
23 official who appeared to be saying that. But just as I
24 don't buy that people play this game to see the shiny
25 lights and rotating wheels, I don't accept his

1 testimony that this was a skill game.

2 I think the experts are more knowledgeable in that
3 area. And I've just got to take the plain facts, is
4 that the result is what the result is, and that result
5 does not change based upon whether you're me playing it
6 or the world's greatest poker player playing it, that
7 the outcome is the same.

8 And so I find that this is not a -- the results of
9 the game do not change by application of skill or the
10 winning percentages or the -- how the game turns out is
11 predetermined before you put your money in.

12 I also find that there is no element of chance or
13 unpredictable outcome in this game, which means I find
14 for the plaintiff and the intervenor. And I'm doing
15 this based upon the preset feature, which is not
16 turn-offable, to coin a phrase. In other words, if you
17 could turn it off, the best analogy I could come up
18 with would be the automatic weapon or the semiautomatic
19 weapon that has an easy fix, where you can fix it and
20 turn off the limitation on that.

21 That's why I say as an aside and probably dicta,
22 that -- well, not dicta, but as an aside and the basis
23 for my ruling on this version, if you had a version
24 such as, I think it was 70 or 72, I've heard different
25 numbers, but if one could easily disable the feature

1 play, then I think that would present -- that would be
2 under the "other outcome unpredictable by the user,"
3 because one wouldn't know whether it had been disabled
4 or not. I suppose you would know, when it didn't show
5 up. But that would be a hybrid game, which would
6 probably make it illegal. I do not find that version
7 67 is a hybrid game. The preset is the preset. And my
8 finding is based upon the testimony and the factual
9 finding that every game you play, the result is known
10 before you put your money in.

11 So I think that also rebuts the presumption, the
12 statutory presumption. I mean, it does look like a
13 duck, and sometimes it might even quack like a duck,
14 but that presumption stops when I find out about the
15 preview function. So I think the presumption has been
16 successfully rebutted.

17 And I don't know that it's any more complicated
18 than that, unless there's some factual finding or issue
19 that you-all want me to rule on. But I generally find
20 the summary judgment defense and the motion for
21 judgment on the pleadings defense filed by the
22 plaintiff and intervenor to be the more legally
23 persuasive. I make no ruling on any version other than
24 67. So that's where I am. Anything else?

25 MR. DEMAGGIO: Not from the plaintiff, Your Honor.

1 MR. TURFFS: Just a question, Your Honor. Would
2 you like us to get the transcript of your ruling and --

3 THE COURT: You can do that or you can prepare
4 a -- my ruling is a broad-stroke ruling, to give you an
5 idea. And consistent with the broad strokes, you can
6 fill in the details with the counsel from the State.
7 If there's an objection to the details, that's fine.

8 But I feel like I'm sort of the architect that's
9 drawn a building for you, and I'm going to ask you to
10 put the structural elements where they should be. But,
11 I mean, I wouldn't go to extreme limits. I mean, the
12 central focal point is the preview factor. The facts
13 are pretty much not in dispute, and I do not find it's
14 a game of skill or chance or unpredictable outcome.

15 MR. TURFFS: Yes, Your Honor.

16 THE COURT: Anything from the State?

17 MS. OZAROWSKI: No, Your Honor.

18 THE COURT: Thank you very much. I'm going to ask
19 the plaintiff and intervenor to prepare an order.
20 Clear it with the State. If the State has an
21 objection, just let me know that the State has an
22 objection and they're going to be filing either their
23 specific points or a competing order if it gets to that
24 point. But I'll hold it until I find out from -- if
25 you send it to me, Plaintiff or Intervenor, you need to

1 tell me the State either agrees with it, that it
2 reflects my ruling, or they don't think it reflects my
3 ruling and they're sending something of their own.
4 Okay?

5 THE CLERK: Judge, on the record, could you
6 release Exhibit 3 to the plaintiff?

7 THE COURT: Any objection to me releasing the
8 machine to the plaintiffs? Okay. I'm going to release
9 Exhibit 3, the game, to the plaintiffs. The clerk is
10 correct. There's no good way the clerk has to store
11 that. Okay. Thank you.

12 (End of Excerpt)

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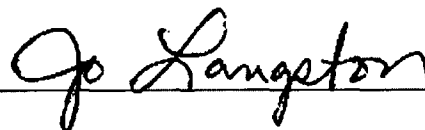
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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF LEON)

I, Jo Langston, Registered Professional Reporter,
do hereby certify that the foregoing pages 3 through 11,
both inclusive, comprise a true and correct transcript of
and excerpt of the proceeding; that said proceeding was
taken by me stenographically and excerpt transcribed by me
as it now appears; that I am not a relative or employee or
attorney or counsel of the parties, or a relative or
employee of such attorney or counsel, nor am I interested in
this proceeding or its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand
this 15th day of February 2017.



JO LANGSTON
Registered Professional Reporter