

District Court of Appeal of Florida, Fourth District.
SEMINOLE TRIBE OF FLORIDA, Appellant,

v.

Jason E. STARKMAN, Appellee.

No. **4D10-3256**.

March 11, 2011.

Lower Case No.: 10-7536-CA 11

Answer Brief of Appellee, Jason Starkman

W. Barry Blum (379301), Aaron S. Blynn (073464), Genovese Joblove & Battista, Attorneys for Appellant, Miami Tower, 44th Floor, 100 Southeast Second Street, Miami, Florida 33131, (305) 349-2300 Telephone, (305) 349-2310 Facsimile, bblum@gjb-law.com.

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STATEMENT OF THE CASE AND THE FACTS

In November 2009, Appellant Seminole Tribe of Florida (“the Tribe”) loaned Appellee Jason E. Starkman \$1.2 million, paid in casino chips, for the purpose of gambling in the Tribe's casino. [VI 2, 35] The gambling loan was made under an agreement dated June 10, 2008, which provided that Florida law applied to the loans and to any checks given in connection with the debt. [VI 7] Starkman lost the \$1.2 million playing blackjack, pai gow poker and baccarat, all Class III banked card games that were illegal in Florida before April 28, 2010. [FN1] [V1 35-36, 50]

FN1. Class III gaming is defined in the Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. § 2701 *et seq.*, in an unhelpful manner, as “all forms of gaming that are not class I gaming or class II gaming.” 25 U.S.C. § 2703(8) (1988). For present purposes, “Florida law distinguishes between nonbanked (Class II) card games and banked (Class III) card games. A “banking game” is one “in which the house is a participant in the game, taking on players, paying winners, and collecting from losers ...” *Fla. House of Representatives v. Crist*, 999 So. 2d 601, 614 (Fla. 2008) (footnote omitted). See § 285.710(13)(b), Fla. Stat. (2010); § 285.710(15)(c), Fla. Stat. (2009). Starkman played Class III games at the Tribe's casino. [V1 35-36]

The Tribe sued Starkman in February 2010 to collect on the \$1.2 million gambling debt. Count I was for worthless checks, the “markers” given in exchange for the gambling loan, and Count II was for breach of the June 2008 agreement. [V1 3-5] The Tribe specifically alleged in the Complaint that the money lent to Starkman in November 2009 was “to be used in [the Tribe's] casino in Hollywood, Florida.” [V1 2]

The Tribe did not allege any facts explaining whether or how Class III banked card games were legal at the Tribe's casino in November 2009. Nor did the Tribe plead the existence of any compact

with the State of Florida allegedly making gambling legal on Tribe property in November 2009, or any facts pertaining to money paid to the State related to gaming at any Tribe casinos.

Starkman served an answer and affirmative defenses on March 13, 2010. [V1 24-27] Starkman's answer did not put in issue facts about any compact between the Tribe and the State, or any amounts paid by the Tribe connected with gaming. Starkman alleged that the debt to the Tribe was incurred for the purpose of gambling transactions not authorized by Florida law. Starkman affirmatively raised defenses of illegality and application of [§ 849.26, Fla. Stat.](#) (2008), which provides that all gambling debts or contracts “are void and of no effect,” unless the “gambling transaction [is] expressly authorized by law.”^[FN2] [V1 26-27] The Tribe did not file any reply in avoidance of Starkman's affirmative defenses.

FN2. Florida courts are not authorized to enforce debts made to enable gambling activity other than “wagering on parimutuels or any gambling transaction expressly authorized by law.” [§ 849.26, Fla. Stat.](#) (2008); *Carnival Leisure Indus., Ltd. v. Herman*, 629 So. 2d 882 (Fla. 4th DCA 1993) (per curiam); *Carnival Leisure Indus., Ltd. v. Arviv*, 655 So. 2d 177, 180 (Fla. 3d DCA 1995); *Froug v. Carnival Leisure Indus., Ltd.*, 627 So. 2d 538, 539 (Fla. 3d DCA 1994); *Barquin v. Flores*, 459 So. 2d 436, 436-37 (Fla. 3d DCA 1984); *Carp v. Fla. Real Estate Comm'n*, 211 So. 2d 240, 241 (Fla. 3d DCA 1968); *Dorado Beach Hotel Corp. v. Jernigan*, 202 So. 2d 830, 831 (Fla. 1st DCA 1967). See *In re Bill Hionas*, 361 B.R. 269 (Bankr. S.D. Fla. 2006).

Starkman served a motion for summary judgment and supporting affidavit on March 15, 2010. [V1 28-36] That motion did not raise any factual or legal issues related to any compact between the Tribe and the State or the fact of any payments the Tribe

made to the State. The summary judgment was set for hearing on July 1, 2010.

On June 10, the Tribe filed a response to Starkman's motion for summary judgment and a cross-motion for summary judgment with no supporting affidavit (“June 10 Response”). [V1 49-102] The June 10 Response argued, for the first time, issues relating to the alleged existence of a compact, which is a written agreement between the Tribe and the State of Florida, signed in 2009 (“2009 Compact”). The Tribe acknowledged that the alleged 2009 Compact was never approved by the Florida Legislature [V1 54], but it nevertheless argued that Starkman's debt was not void as an illegal gambling debt under [§ 849.26, Fla. Stat.](#) (2008) because “the Tribe was conducting these games under a gaming compact that had been signed by Governor Crist in August of 2009.” [V1 51] The Tribe also claimed that payments by the Tribe to the State allegedly on account of gaming revenues made the gambling legal as of November 2009. [V1 55-56]

The 2009 Compact was never authenticated, filed or put into evidence, below. It was not attached to the June 10 Response. The 2009 Compact is not in the record on this appeal, and there is no competent evidence in the record showing the existence, execution, or terms of the 2009 Compact. Nor is there evidence in the record before this Court related to the existence, amount or circumstances of any specific payments by the Tribe to the State.

On June 25, six days before the summary judgment hearing, the Tribe served a supplemental memorandum in response to Starkman's motion and in support of the Tribe's cross-motion for summary judgment (“June 25 Supplement”). [V2 149-156] In the June 25 Supplement, the Tribe admitted that “the 2009 compact [upon which the June 10 Response was based] never came into effect.” [V2 149] The Tribe instead argued for the first time that the Class III games were authorized by Florida law under a compact signed by the Tribe and the Governor in 2007 (“2007 Compact”). [V2 150] The Tribe argued that the decision of the Florida Su-

preme Court in *Fla. House of Representatives v. Crist*, 999 So. 2d 601 (Fla. 2008), which held that the 2007 Compact violated Florida law, was not binding on the State and did not affect the validity of the 2007 Compact. The Tribe acknowledged that the argument based on the 2007 Compact was a new argument not made even in the June 10 response.^[FN3] [V2 150]

FN3. The Tribe also attached to the June 25 Supplement an unauthenticated copy of a letter purporting to be from an unidentified individual with an illegible signature signing on behalf of an unidentified “Assistant Secretary-Indian Affairs” at the United States Department of the Interior. [V2 154-56] That document was not properly before the Court and could not be considered at the summary judgment hearing. *Hollywood Towers Condo. Ass'n v. Hampton*, 993 So. 2d 174 (Fla. 4th DCA 2008); *Bifulco v. State Farm Mut. Auto. Ins. Co.*, 693 So. 2d 707, 709 (Fla. 4th DCA 1997); cf. *First Union Nat'l Bank v. Ruiz*, 785 So. 2d 589 (Fla. 5th DCA 2001) (“merely attaching an unsworn document, in this case the EEOC letter, to a motion for summary judgment does not, without more, satisfy the procedural strictures inherent in *Florida Rule of Civil Procedure 1.510(e)*”).

Starkman objected to the Tribe's arguments based on the 2009 Compact and the 2007 Compact because the facts of the execution, terms or circumstances of those compacts, and the Tribe's arguments based on them, are matters of avoidance of Starkman's affirmative defenses that the Tribe failed to plead in a reply to Starkman's affirmative defenses as required to under *Fla. R. Civ. P. 1.100(a)*. [V1 107-08, 158-59]

After a hearing on July 1, 2010, the circuit court granted Starkman's motion for summary judgment, denied the Tribe's cross-motion for summary judgment, and entered final judgment in Starkman's favor on the Tribe's claims. [V1 110-11] This appeal

ensued.

SUMMARY OF ARGUMENT

This case is controlled by a long line of cases, including authority from this Court, holding that gambling debts are unenforceable in Florida courts under § 849.26, *Fla. Stat.* (2008), if the gambling transaction on which the debt is based is not expressly authorized by Florida law.

The Tribe's arguments rest on facts and legal theories regarding the 2009 Compact signed by the Tribe and the Governor and alleged payments by the Tribe to the State of Florida. No evidence as to those matters was in the record below, and the matters are outside the record on appeal. Arguments based on matters outside the record are improper and may not be considered in reviewing the decision of a lower court.

Starkman affirmatively pleaded defenses of illegality and unenforceability of the gambling debt under § 849.26, *Fla. Stat.* (2008). The Tribe did not file a reply to those affirmative defenses under *Fla. R. Civ. P. 1.100(a)*. In addition to being outside the record on appeal, the Tribe may not argue matters in avoidance of Starkman's affirmative defenses not put in issue by the pleadings below.

In November 2009, the banked card games Starkman played with the loan proceeds -- blackjack, baccarat and pai gow poker -- were prohibited by Florida law. The Tribe's loan to Starkman was made for the purpose of gambling transactions not “expressly authorized” by Florida law. Accordingly, § 849.26, *Fla. Stat.* (2008), makes the loan transaction and debt “void and of no effect.”

The Tribe erroneously contends that banked card games at Tribe facilities were “specifically authorized” by Florida law and public policy because “[t]he State and the Tribe were operating under the 2009 Compact at the time.” As the Tribe admitted below, “the 2009 compact never came into effect.” [V2 149]

In 2009, the Legislature granted the Governor specifically limited authority to negotiate and sign a compact with the Tribe “substantially in the form” of a “Model Compact” specified by the Legislature in § 285.711, Fla. Stat. (2009). The Governor had no authority to bind the State to a compact not substantially in the form of the Model Compact. The Tribe concedes, as it must, that the 2009 Compact was not substantially in the form of the Model Compact. [V1 54]

The Legislature also stated in § 285.710(3), Fla. Stat. (2009), that any compact signed by the Governor, in whatever form, “shall not be deemed entered into by the state unless and until ratified by the Legislature.” The Model Compact itself expressly provided that it was not effective until ratified by the Legislature. The 2009 Compact was never ratified by the Legislature. To the contrary, the Legislature specifically stated in § 285.710, Fla. Stat. (2010), that the 2009 Compact was “not ratified or approved by the Legislature,” and instead declared that it was “void” and “not in effect.”

The Legislature also specifically expressed its intent that the 2010 legislation approving Class III gaming at certain Tribe locations not be applied retroactively. The Legislature stated unequivocally in § 285.710(12) (2010) that the State's acceptance and retention of any funds paid by the Tribe on account of gaming prior to April 2010 “does not legitimize, validate or ratify ... the operation of class III games by the Tribe for any period prior to” April 28, 2010.

The public policy of Florida derives from Florida law; public policy cannot override the express laws enacted by the Legislature. The Legislature specifically stated that Class III banked card games were not legitimate or valid at Tribe facilities prior to 2010. The Tribe cannot be heard to argue that Florida public policy “authorized” the illegitimate and invalid gaming as of November 2009.

Under close scrutiny, the Tribe argues that the 2010 legislation approving the 2010 Compact should be

applied retroactively. There is, however, no intent in the law for retroactive application. To the contrary, the Legislature states; unequivocally that no party should even be permitted to argue that the 2010 legislation legalizing casino gaming be applied retroactively. The Tribe's argument that the banked card games it operated were “expressly authorized” by Florida law or public policy in November 2009 is without merit.

***9 ARGUMENT**

I.

The Tribe's Arguments Rest Entirely on Matters Not in Evidence in the Circuit Court and Outside of the Record on Appeal

The Tribe's arguments on this appeal all rest upon the 2009 Compact. Initial Brief of Appellant (“*Init. Br.*”) at 3, 5, 12-13, 16, 17. A “compact” is a contract between two sovereign states. *Fla. House of Representatives v. Crist*, 999 So. 2d 601, 608 (Fla. 2008). The Tribe offered no “pleadings, depositions, answers to interrogatories, admissions, affidavits, or other materials as would be admissible in evidence” below regarding the existence, execution or terms of the 2009 Compact, the contract on which its entire appeal rests. As a consequence, no competent evidence authenticating the 2009 Compact was before the circuit court, and no evidence of the 2009 Compact is in the record on appeal. Nor is there any evidence in the record substantiating the alleged payments by the Tribe to the State that the Tribe argues dramatically changed Florida public policy and made illegal gambling legal at Tribe facilities in November 2009. *Init. Br.* at 3, 10, 16, 18.

“It is fundamental that an appellate court reviews determinations of lower tribunals based on the records established in the lower tribunals.” *Altchiler v. State Dep't of Prof'l Regulation*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983). “It is axiomatic that appellate review is confined to the record on appeal.” *Thornber v. City of Fort Walton Beach*, 534 So. 2d

754, 755 (Fla. 1st DCA 1988). “It is the *10 lower tribunal that is the court of record. As such, its judgments or decrees are to be supported, as well as tested by what its record in a particular case may show.” *Id.* Thus, “[a]n appellate court will not consider evidence that was not presented to the lower tribunal” *Hillsborough County Bd. of County Comm'rs v. Public Employees Relations Comm'n*, 424 So. 2d 132, 134 (Fla. 1st DCA 1982).

“That an appellate court may not consider matters outside the record is so elemental there is no excuse for an attorney to attempt to bring such matters before the court.” *Poteat v. Guardianship of Poteat*, 771 So. 2d 569, 572-73 (Fla. 4th DCA 2000) (quoting *Thornber*, 534 So. 2d at 756)). It has been held repeatedly, that “when a party refers to such matters in its brief, it is proper for the court to strike same.” *Ullah v. State*, 679 So. 2d 1242, 1244 (Fla. 1st DCA 1996); *cf. Poteat*, 771 So. 2d at 572-73 (striking motion to supplement record); *Thornber*, 534 So. 2d at 755-56 (“It is inappropriate . . . to inject matters into the appellate proceedings which were not before the trial court.”).

The Tribe's arguments on this appeal rely on facts and interpretations of events outside the record on appeal. Neither the 2009 Compact nor any evidence of monetary payments to the State or other negotiations between the Tribe and the State were put in evidence below or are in this record. The Court would be justified in striking the Tribe's Initial Brief to the extent it refers to those facts. In any event, the Tribe's arguments based on matters outside the record may not *11 properly be considered in reviewing the circuit court's judgment. The judgment of the circuit court must be affirmed.

II.

The Tribe's Arguments Based on the 2009 Compact Were Not Put in Issue Below Because the Tribe Did Not Avoid Starkman's Affirmative Defenses under Rule 1.100(a)

The Tribe's arguments based on the 2009 Compact

are matters in avoidance of Starkman's affirmative defenses of illegality. They may not be considered on this appeal because the Tribe “failed to properly plead any legal theory that would have avoided” Starkman's affirmative defenses of illegality and unenforceability of gambling debts under § 849.26, Fla. Stat. (2008). *CJM Fin., Inc. v. Castillo Grand LLC*, 40 So. 3d 863, 864 (Fla. 4th DCA 2010); *see Moore Meats, Inc. v. Strawn*, 313 So. 2d 660, 661-62 (Fla. 1975); *N. Am. Philips Corp. v. Boles*, 405 So. 2d 202, 203 (Fla. 4th DCA 1981).

The Tribe does not dispute that § 849.26 makes gambling debts unenforceable if the gambling transaction is not “expressly authorized” by Florida law. Nor does the Tribe dispute that Class III banked card games, including blackjack, baccarat and pai gow poker, were illegal gambling under Florida law in November 2009. *See* § 849.086(15)(a), Fla. Stat. (2007); *Crist*, 999 So. 2d at 614 (“*Blackjack*, baccarat . . . are banked card games. They are therefore illegal in Florida.”). The Tribe argues instead that (1) it alone was authorized in November 2009 to operate Class III games based on the 2009 Compact, a written agreement. *12 between the Governor and the Tribe, *Init. Br.* 3, 5, 12-13, 16, 17, and (2) the State's acceptance of money from the Tribe over some period of time “authorized” Class III gaming on Tribe property as of November 2009. *Id.* 3, 10, 16, 18. However, the 2009 Compact was not ratified by the Legislature and thus had no effect under Florida law. The 2009 Compact and any payments the Tribe made to the State are, therefore, new facts in avoidance of the statutory prohibition against enforcement of gambling debts raised by Starkman as an affirmative defense.

The record below establishes that the Tribe loaned money to Starkman for the purpose of gambling in Class III games which were illegal under Florida law. [V1 39-40, 49-50] The Tribe did not allege facts as to why or how Class III gaming was legal at its specific casinos. Neither the Tribe's Complaint nor Starkman's Answer and Affirmative De-

fenses pleaded or even mentioned the existence of the 2009 Compact or any other fact allegedly making gambling legal on Tribe property in November 2009. Starkman pleaded affirmative defenses based on the debt being incurred in connection with gambling transactions not authorized by Florida law, and he specifically raised the unenforceability of gambling debts under § 849.26, Fla. Stat. (2008). [V1 24-27] The Tribe did not file any reply in avoidance of Starkman's affirmative defenses.

The Tribe's arguments based on the 2009 Compact or any payments to the State of Florida are not mere denials of Starkman's illegality defenses. Instead, the *13 Tribe argues facts creating an alleged exemption from the Florida laws making Class III gaming illegal, applicable only to the Tribe. Because the Tribe did not file a reply in avoidance under Rule 1.100(a), Fla. R. Civ. P., its claims that either the 2009 Compact or monetary payments to the State "authorized" Class III gaming on Tribe property and exempted the gambling loan transaction from § 849.26, Fla. Stat., were not put in issue by the pleadings. *CJM Fin.*, 40 So. 3d at 864-65.

The Tribe's argument here that it was authorized to conduct otherwise illegal gaming in November 2009 is not properly before the Court. The circuit court's judgment must be affirmed.

III.

The Class III Gambling Transactions for Which the Gambling Debt Was Incurred Were Not "Expressly Authorized by Law" in November 2009

Even if the Tribe had pleaded facts or theories related to the 2009 Compact or the history of gaming by the Tribe in Florida, and if the record on appeal contained any competent evidence of those matters, the judgment under review must be affirmed because Class III banked card games were illegal under Florida law until April 2010. In *Crist*, 999 So. 2d 601, the Florida Supreme Court stated that "Florida law prohibits banked card games ...

Blackjack, baccarat, and [pai gow poker] are banked card games. They are therefore illegal in Florida." *Id.* at 614. In April 2010, when the Florida Legislature approved the April 7, 2010 *14 compact with the Tribe ("2010 Compact"), the Legislature specifically stated that the legislation authorizing such games does not in any way "*legitimize, validate or otherwise ratify any previously proposed compact or the operation of Class III games by the Tribe for any period prior to the effective date of the [April 2010] compact.*" § 285.710(12), Fla. Stat. (2010) (emphasis added); *see also* § 285.710(2)(a), (b), Fla. Stat. (2010).

By arguing under any guise that such games were legal or "expressly authorized" in November 2009, the Tribe blatantly asks this Court to ignore Florida law, which, respectfully, the Court cannot do. Courts are "without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications" because to do so "would be an abrogation of legislative power." *Am. Bankers Life Assurance Co. v. Williams*, 212 So. 2d 777, 778 (Fla. 1st DCA 1968) (cited in *Moecker v. Antoine*, 845 So. 2d 904, 913 (Fla. 4th DCA 2003)).

The Tribe's arguments on this appeal fly directly in the face of the legislative history surrounding the Tribe's efforts to conduct Class III gaming in its casinos in Florida. Nothing the Tribe argues changes the fact that, at all times prior to April 29, 2010, "banked card games [were] illegal in Florida," and "what is illegal in Florida is illegal [on Tribe land]." *Crist*, 999 So. 2d at 614.

***15 A. The 2007 Compact - Struck Down by The Florida Supreme Court**

The Tribe and the Governor signed the 2007 Compact on November 14, 2007. *Crist*, 999 So. 2d at 603. The 2007 Compact purported to authorize the Tribe to operate otherwise-illegal Class III games at its gambling facilities. *Id.* The Florida House of Representatives quickly sued the Governor to challenge the 2007 Compact, The Tribe sought and was

granted leave to intervene as a respondent in that case. *Id.* at 606.^[FN4]

FN4. The 2007 Compact was not put into evidence before the circuit court and is not in the record on appeal. The discussion of the 2007 Compact here is taken from the Florida Supreme Court's decision in *Crist*, 999 So. 2d 601. The 2007 Compact is reprinted as an Appendix to the *Crist* opinion. *Id.* at 622-643.

The Florida House argued, *inter alia*, that, in signing the 2007 Compact allowing gambling that was illegal under Florida law, the Governor encroached on the powers of the Legislature, acted without authority, and violated the separation of powers doctrine. The Florida Supreme Court agreed and struck down the 2007 Compact, holding “that the Governor does not have the constitutional authority to bind the State to a gaming compact that clearly departs from the State's public policy by legalizing types of gaming that are illegal everywhere else in the state.” *Id.* at 603. In its opinion, the supreme court noted that “Florida law prohibits banked card games,” and such games “are therefore illegal in Florida.” *Id.* at 614. As to the Governor's authority to bind the State to a compact that makes legal any otherwise illegal gaming, the court stated:

***16** The Governor has no authority to change or amend state law. Such power falls exclusively to the Legislature. Therefore, we hold that the Governor lacked authority to bind the State to a compact that violates Florida law as this compact does.

Id. at 616. The Florida Supreme Court struck down the 2007 Compact, confirmed that Class III games such as blackjack, baccarat and pai gow poker are illegal in Florida and held that only the Florida Legislature can change that fact.

The relief sought in *Crist* was a writ of *quo warranto*. The Tribe began offering Class III banked card games at its facility in Hollywood, Florida before the supreme court's decision in the case. The supreme court granted the petition on July 3, 2008,

but withheld issuance of the writ because the court “believe[d] the parties w[ould] fully comply with the dictates of th[e] opinion.” *Id.* The court's confidence in the Tribe proved to be misplaced, however, and the Tribe chose to continue to operate the Class III games the Florida Supreme Court held to be illegal under Florida law.

B. The 2009 Compact - Unauthorized, Never Ratified and Declared to Be Void by the Florida Legislature

In 2009, the Legislature enacted ch. 2009-170, L.O.F. (the “Gaming Act”), which included §§ 285.710, 285.711, Fla. Stat. (2009). Among other provisions, the Gaming Act gave to the Governor specifically limited statutory authority to negotiate and execute a gaming compact with the Tribe for Class III gaming. The Legislature mandated precise requirements for any compact, stating expressly that ***17** any compact between the Governor and the Tribe must be in “the form substantially” the same as the provisions the Legislature dictated in § 285.711, Fla. Stat. (2009) (the “Model Compact”). See *Init Br.* At 13. The Model Compact set forth in detail the terms the Governor was authorized to negotiate, including specific requirements regarding guaranteed minimum payments to the State, limited exclusivity for the Tribe, and a 15-year term for any compact. See § 285.711, Parts XI, XII, XIII B., Fla. Stat. (2009). The Model Compact also specifically provided that it would become effective only “upon ratification of the Legislature.” *Id.*, Part XVIA.

The Tribe is disingenuous when it suggests that the Model Compact “set forth the compact *recommended* by the Legislature.” *Init. Br.* at 14 (emphasis added). The Model Compact was not a recommendation. It was the only compact the Governor had authority to sign. § 285.710, Fla. Stat. (2009). In this regard, the Florida Supreme Court explained that establishing the terms of a compact allowing expanded Class III gaming, is “precisely the type of action particularly within the Legislature's power.” *Crist*, 999 So. 2d at 615.

In addition, the statute authorizing the Governor to negotiate and sign a compact within the specific parameters of the Model Compact, provides that. “[a]ny such compact *shall not be deemed entered into by the state unless and until it is ratified by the Legislature.*” § 285.710(3), Fla. Stat. (2009) (emphasis *18 added). Indisputably, the Gaming Act expressly required that any negotiated or signed compact be ratified by the Legislature. *Id.* Until ratified by the Legislature, no compact signed under the Gaming Act was entered by the State or had any force or effect under Florida law.

The 2009 Compact, which the Tribe claims it entered on August 31, 2009, was not put in evidence below and is not in the record on appeal. The Legislature, never ratified the 2009 Compact and it was never entered into by the State. To the contrary, the Legislature specifically stated that the 2009 Compact was “not ratified or approved by the Legislature.” § 285.710(2)(a), Fla. Stat. (2010). Instead, in April 2010, the Legislature declared that the 2009 Compact “is void, and is not in effect.” *Id.* The Tribe has conceded this point, acknowledging below that “the 2009 compact never came into effect.”^[FN5] [V2 149]

FN5. The IGRA provides that “Class III gaming activities shall be lawful on Indian land only if such activities are . . . conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect.” 25 U.S.C. § 2710(d)(1)(C) (1988).

Whatever the terms of the 2009 Compact were, it “was not based on the [Model Compact] specified in the act.” *See* Fla. S. Comm. On Regulated Indus., SB 622 (2010) Staff Analysis 4 (Mar. 20, 2010) (“*March 20 Analysis*”).^[FN6] “[T]here *19 were many provisions that *substantially deviated* from the parameters established by the Legislature in the model compact, as well as some terms that were omitted entirely.” Fla. H. R. Select Comm. On Seminole Indian Compact Review, HB 7221 PCB SICR 10-03 (2010) Staff Analysis 6 (Apr. 13, 2010)

(“*April 13 Analysis*”) (emphasis added).^[FN7] In 2010, the Legislative Staff itemized more than 20 subject matter areas of the 2009 Compact that differed from the Legislature's requirements, spanning over five pages of a Staff Analysis. *March 20 Analysis* at 5-10. Among the terms the Legislature noted were omitted from the 2009 Compact were “provisions relating to the collection and remission of state taxes.” *April 13 Analysis* at 6.

FN6. On file with Comm., available at <http://www.myfloridahouse.gov/Sections/Documents/load-doc.aspx?FileName=2010s0622-pcs.ri.docx&DocumentType=Analysis&BillNumber=0622&Session=2010>. *See also* Fla. S. Comm. on Regulated Indus., CS/SB 622 (2010) Staff Analysis 4 (Mar. 24, 2010) (on file with Comm.), available at <http://www.myfloridahouse.gov/Sections/Documents/loadaddoc.aspx?FileName=2010s0622.ri.docx&DocumentType=Analysis&BillNumber=0622&Session=2010>. That same staff report noted that in March 2010 that “[c]urrently, banked card games . . . are illegal in Florida.” *Id.* at 26.

FN7. On file with Comm., available at <http://www.myfloridahouse.gov/Sections/Documents/loadaddoc.aspx?FileName=h7221.SICR.doc&DocumentType=Analysis&BillNumber=7221&Session=2010>.

The Tribe does not seriously contest this point. It acknowledged below that “[t]he Tribe was *unable to commit to those minimum guaranteed payments* [required in the Model Compact] without the exclusive right to conduct those games. . . . [The 2009 Compact] provided less exclusivity than the Tribe wanted, *20 *but more than the State wanted to give*. It also provided for *lower guaranteed minimum payments than the State wanted*, but more than the Tribe wanted to give.” [V1 54] (emphases ad-

ded). The Tribe admittedly refused to sign the Model Compact and its contention at page 10 of its brief that the Class III games “were operated pursuant to the specific standards set forth by the Legislature” is simply false.

Contrary to the Tribe's position at page 16 of its Initial Brief, the 2009 Compact was not entered into “[p]ursuant to [Section 285.710](#),” because the authority granted to the Governor was expressly “[s]ubject to the limitations in [s. 285.711](#) [the Model Compact].” [§ 285.710\(3\), Fla. Stat. \(2009\)](#). Dictating the terms of a compact is “precisely the type of action particularly within the Legislative's power.” *Crist*, 999 So. 2d at 615. The Governor thus was not authorized by the Legislature to sign a compact not in the form of the Model Compact. A compact signed by a Governor without authority is not ever entered by the State. *Crist*, 999 So. 2d at 614; *Kickapoo Tribe of Indians v. Babbitt* 827 F. Supp. 37, 46 (D.D.C. 1993) (a compact signed by a Governor without authority is not entered by the state, does not comply with federal Indian gaming laws and “is invalid”). As a matter of law, the 2009 Compact never validly existed.

*21 Of course, as noted above at pages 9-11 *supra*, the Tribe is precluded from relying on the 2009 Compact in any event because the agreement is outside the record on this appeal and was never put before the circuit court.

C. The 2010 Compact - Expressly Rejecting the Tribe's Contention that the 2009 Compact Was Valid or in Effect

The fallacy of the Tribe's position is established further by the Legislature's approval and ratification of the 2010 Compact signed by the Tribe and the Governor on April 7, 2010, signed into law effective April 28, 2010. [§ 285.710, Fla. Stat. \(2010\)](#). That statute expressly and directly rejects the Tribe's arguments here that the 2009 Compact had any validity or authority under Florida law. The Florida Legislature stated unequivocally that the 2009 Compact was and is void, and no Class III

gaming conducted by the Tribe prior to April 28, 2010 was legitimate under Florida law. Specifically, [§ 285.710\(2\)\(b\), Fla. Stat. \(2010\)](#), states as follows:

The agreement executed by the Governor and the Tribe on August 28, 2009, and August 31, 2009, respectively, and transmitted to the President of the Senate and the Speaker of the House of Representatives, *is not ratified or approved by the Legislature, is void, and is not in effect.*

Id. (emphasis added). See [§ 285.710\(2\)\(a\), Fla. Stat. \(2010\)](#) (providing the same as to 2007 Compact).

The Legislature went further, however, anticipating and repudiating the very argument the Tribe makes here. The Legislature stated expressly that the State's, *22 acceptance and retention of funds paid by the Tribe on account of any gaming prior to April 2010 “*does not legitimize, validate or ratify any previous compact “or the operation of class III games by the Tribe for any period prior to”* April 28, 2010. [§ 285.710\(12\), Fla. Stat. \(2010\)](#) (emphasis added).

The Legislature spoke clearly, and the Governor signed legislation, expressly stating that the operation of Class III games by the Tribe prior to April 2010 was not legitimate or valid. The Legislature's unequivocal language establishes as a matter of law that the 2009 Compact, whatever it might provide, was void, was not ratified and has not been ratified, and the Tribe's argument that Class III banked card games at its facilities were “authorized by Florida law” in November 2009 is incorrect as a matter of law. Such games, by definition, remained illegal as stated by the Florida Supreme Court in *Crist* and were not “expressly authorized” by Florida law in November 2009.

It is “established that the State will not lend its judicial arm to the collection of monies wagered in such enterprises not authorized by the law of the State of Florida.” *Dorado Beach Flotel Corp. v. Jernigan*, 202 So. 2d 830, 831 (Fla. 1st DCA 1967). As this Court has noted, [Fla. Stat. § 849.26 \(2008\)](#)

exempts only “transactions expressly authorized by Florida law.” *Carnival Leisure Indus., Ltd. v. Herman*, 629 So. 2d 882, 882 (Fla. 4th DCA 1993) (per curiam). Because Class III gaming was not expressly authorized by Florida law in November 2009, the *23 gambling debt in this case is void and unenforceable under § 849.26, Fla. Stat. (2008).

IV.

The Tribe's Argument that “Public Policy” Authorized and Legalized Class III Gaming Expressly Prohibited by Florida Law Is Without Merit

The Tribe contends that in November 2009, when “Starkman gambled at Hard Rock, the Legislature had changed the public policy of the state to authorize and allow such games at Hard Rock and other specified Seminole lands under State compacts with the Tribe.” *Init. Br.* at 4. The Tribe argues further that “[t]he 2009 legislation, which changed the public policy of the State to legalize the games at Hard Rock, was in effect when Starkman incurred his debt to the Tribe; thus, the debt is enforceable.” *Id.* at 17 (emphasis added). The Tribe argues, therefore, that “public policy” dictates whether gambling is legal under Florida law regardless of what the Florida Statutes expressly provide. That argument is spurious.

Public policy is determined by the express language of the Florida Statutes; public policy does not override the express language of the Florida Statutes. “There is no better way for a state to declare its public policy than through its lawmaking power.” *Atl. Coast Line R.R. Co. v. Beazley*, 54 Fla. 311, 392, 45 So. 761, 787 (1907). Thus, “the state's public policy [is] expressed in its law.” *Crist*, 999 So. 2d at 612. *Cf.* *24 *Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191, 205 (Fla. 4th DCA 2001) (discussing “the Legislature's primary role in defining public policy under the Constitution”).

Class III banked card games were illegal under Florida law in November 2009, and operating Class

III games in the state was a felony. § 849.086(12)(a), (15)(a), Fla. Stat. (2007). Class III games were illegal on tribal land in 2009 because, based on “state and federal provisions, what is legal in Florida is. legal on tribal lands, and what is illegal in Florida is illegal there.” *Crist*, 999 So. 2d at 614.

Under Florida law, all contracts or debts of any type or kind based upon “any gambling transaction whatsoever, regardless of its name or nature ... are void and of no effect” unless the specific “gambling transaction [is] expressly authorized by law.” § 849.26, Fla. Stat. (2008). Florida courts have consistently held that gambling debts are unenforceable in Florida courts unless the gambling transaction is “expressly authorized” by Florida law, even if the gambling was legal where it took place and the debt was incurred. *See Barquin*, 459 So. 2d at 436-37; *Dorado Beach Hotel*, 202 So. 2d at 831; *Froug*, 627 So. 2d at 539.

Section 849.26 sets forth Florida law and it sets forth Florida public policy regarding illegal gambling debts. A contract that is “in contravention of our statute ... would also be opposed to public policy.” *Atl. Coast*, 54 Fla. at 392, 45 So. at 787. No “public policy” can validate debts that are expressly made void by the Legislature. *Cf. Moecker v. Antoine*, 845 So. 2d 904, 913 (Fla. 4th DCA 2003) (a *25 court may not invoke “public policy” to interpret an unambiguous statute to mean other than what the express language provides).

The fallacy of the Tribe's position is rooted in its argument that gambling debts are “enforceable in Florida if the Legislature has *either* authorized the gambling activity *or* changed the public policy of the State regarding that gambling activity.” *Init. Br.* at 4 (emphases added). There is no such “either/or” construct under Florida law. Instead, all gambling debts are unenforceable, “void and of no effect” under Florida law unless the specific “gambling transaction is expressly authorized by law.” § 849.26, Fla. Stat. (2008) (emphases added). Florida courts are not authorized to enforce debts made to enable

gambling activity other than “wagering on parimutuels or any gambling transaction expressly authorized by law.” *Id.*; see *Carnival v. Herman*, 629 So. 2d at 882; cases cited in note 2 *supra*.

The Tribe suggests that a gambling debt is enforceable even if the “gambling transaction” on which it is based is not “expressly authorized by law” if the Legislature has changed the public policy of the State regarding that “gambling activity.” That argument is sophistry because public policy is derived from the law. *Cf. Crist*, 999 So. 2d at 612 (“even if the Governor has authority to execute compacts, its terms cannot contradict the state’s public policy, as expressed in its law”).

*26 Moreover, Florida law has long permitted “limited forms of Class III gaming.” *Id.* at 614. The state lottery “offers various Class III games” and pari-mutuel wagering . . . on dog and horse racing” is Class III gaming. *Id.* Still, Class III banked card games remained illegal and against Florida public policy. *Id. Froug v. Carnival Leisure Indus., Ltd.*, 627 So. 2d 538, 539 (Fla. 3d DCA 1993) (adoption of lottery, a Class III game, did not change public policy of Florida against other Class III gaming).

Section 849.26 allows enforcement of gambling debts only if the “gambling *transaction* [is] expressly authorized by law.” (Emphasis added). It does not, as the Tribe suggests, make enforceable gambling debts based on “gambling activity” that the Legislature hypothetically might allow under certain other circumstances.

Florida public policy does not, for example, allow a “bookie” to enforce debts based on betting on horse races at Gulfstream Park in Hallandale, even though betting on horse races is a legal “gambling activity” under Florida law and consistent with Florida public policy. See § 550.001 *et seq.*, Fla. Stat. (2010). Although pari-mutuel betting on horse races is a legal “gambling activity” in Florida, the “gambling transaction” between a bookie and a bettor is not one “expressly authorized” by Florida law. A debt owed to the bookie is “Void and of no

effect.” That reality holds even if the bookie sends part of his revenue to the State.

*27 Here, the Tribe has a less compelling legal argument than the bookie. At least horse racing is a legal “gambling activity” in Florida. As of November 2009, Class III banked card games were expressly illegal under Florida law, whether conducted on Tribe land or anywhere else. So, in November 2009, a gambling debt created for the purpose of Class III banked card games was not based either on legal “gambling activity” or a “gambling transaction ... expressly authorized by law.”

Neither the Gaming Act authorizing the Governor to enter into a compact with the Tribe under specific parameters, which was never done, nor the signing of the unauthorized and void 2009 Compact legalized Class III banked card games on Tribe land in November 2009. Florida public policy follows Florida law, and gambling that is not conducted as expressly permitted by the Legislature is not consistent with Florida public policy.^[FN8]

FN8. The Tribe’s argument is internally illogical. The Tribe’s own notion of “changed public policy” is founded upon the Class III gambling being conducted “under State compacts with the Tribe.” *Init. Br.* at 4. The Tribe admits, however, that no compact was ever in effect until 2010 [V2 149], and so admits that the Class III gaming in 2009 was not conducted under a compact with the State. The Florida Supreme Court struck down the 2007 Compact and the 2009 Compact was never approved by the Legislature. The Legislature specifically stated that the 2009 Compact was “void, and is not in effect.” See § 285.710(2)(b), Fla. Stat. (2010). That specific statement by the Legislature further confirms the public policy of Florida, and the Tribe can’t argue otherwise.

The Tribe erroneously cites *Lamkin v. Faircloth*, 204 So. 2d 747 (Fla. 2d DCA 1968), as supporting

the Tribe's "public policy" argument. In *Lamkin*, the *28 court considered whether operating certain amusement games at a state fair was illegal gambling. Florida law, specifically § 849.14, Fla. Stat. (1967), made it illegal to wager on any contest of skill, and the circuit judge found that the amusement games were contests of skill under the statute. *Lamkin*, 204 So. 2d at 748-49. The Legislature, however, had also passed a law specifically setting forth standards by which the specific amusement games must be conducted in the state. *Id.* That law, § 616.091, Fla. Stat. (1967), neither defined the games as contests of skill or games of chance, nor exempted the games from the prohibition of wagering on contests of skill in § 849.14. The court of appeal found that the Legislature's enactment of specific standards for the amusement games in § 616.091, Fla. Stat. (1967), evidenced a legislative intent to make them legal "so long as they meet the specific requirements of the statute." *Lamkin*, 204 So. 2d at 750. The determining factor in the court's reasoning was that the amusement games would be played in accordance with the standards set forth by the Legislature. The court explained:

[W]e conclude that Chapter 616.091 specifically sets forth a legislative intent to authorize certain games and devices which would not be in degradation of the gambling laws as set forth in Chapter 849, Fla.Stat, F.S.A., **when such games are conducted in accordance with the standards set forth in said statute.**

Id. (emphasis added).

The Tribe's discussion of *Lamkin* ignores the indisputable fact that the 2009 Compact did **not** comply with the standards established by the Legislature in the *29 Model Compact. "[T]here were many provisions [of the 2009 Compact] that **substantially deviated** from the parameters established by the Legislature in the model compact, as well as some **terms that were omitted entirely.**" *April 13 Analysis* at 6 (emphases added). There were, in fact, differences on nearly every material provision, including the term of the agreement, guaranteed minimum

payments to the State, the Tribe's obligation to collect and remit state taxes, and the ability of the State to inspect the gaming operations. *Id.*; *March 20 Analysis* at 5-10.

The Tribe's reliance on *Lamkin* is badly misplaced because the Tribe has admitted that it refused to comply with the standards set forth in the Model Compact. [V1 54]^[FN9] Unlike the state fair amusement operators in *Lamkin*, the Tribe did not conduct the games in accordance with the standards established by the Legislature. Quite to the contrary, the Tribe conducted those games according to its own standards in derogation of the exacting standards set forth by the Legislature in the Model Compact.

FN9. The Tribe cites *Lamkin*, 204 So. 2d 747, for the proposition that "whether a gambling activity is or is not 'expressly authorized' is often difficult to discern." *Init. Br.* at 7. The case did not discuss § 849.26, Fla. Stat. (1967), and neither statute involved included the words "expressly authorized." Moreover, if *Lamkin* sets the standard for how "often" it is difficult to determine whether a gambling activity is "expressly authorized" by Florida law, the Court should note that *Lamkin* has never been cited by any other published decision in the 43 years since it was decided. Florida courts have no difficulty discerning what gambling is illegal. It is simply a matter of reading the Florida Statutes.

*30 The Tribe cannot credibly argue that the Legislature intended to "authorize" Class III gaming conducted in accordance with the Tribe's standards rather than the Legislature's standards set forth in the Model Compact. No legislative intent may be inferred or implied to exempt the Tribe's Class III gaming in November 2009 from the Florida law expressly making such games illegal. Class III gaming in derogation of the standards established in the Model Compact was illegal and not consistent with the public policy of Florida. The judgment of the

circuit court must be affirmed.

V.

The 2010 Compact Does Not Apply Retroactively

The Tribe's attempt to legitimize Class III gaming at its casino in November 2009 based on "public policy" is, in truth, an attempt to apply the 2010 Compact retroactively. The Tribe was candid about this in the lower court when it acknowledged its argument to be "[f]or all intents and purposes, however, the final [2010] compact was retroactive to November 14, 2007, since the State enjoyed the benefits of the compact at all times after that date." [V1 52 n.3]^[FN10] That position is wholly unfounded.

FN10. The Tribe's suggestion at page 17 of its Initial Brief that ratification of the 2010 Compact was a "technicality" that "did not affect the Tribe's or the State's conduct as to the games or their relationship in any substantive way" also seems to argue for retroactive application of the 2010 legislation.

*31 A law affecting substantive rights may be retroactively applied only when the law expresses an intent of retroactive application and, if so, when the retroactive application is constitutional. *Old Port Cove Holdings, Inc. v. Old Fort Cove Condo. Ass'n One*, 986 So. 2d 1279, 1284 (Fla. 2008). To support retroactive application of a substantive law, there must be "an express indication, that such is the Legislature's intent." *Hassen v. State Farm Mut. Auto. Ins Co.*, 674 So. 2d 106, 108 (Fla. 1996). "[I]n the absence of clear legislative intent to the contrary, a law is presumed to operate prospectively." *Old Port Cove*, 986 So. 2d at 1284; *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994).^[FN11]

FN11. Section 285.710, Fla. Stat. (2010), the law ratifying the 2010 Compact is a substantive statute creating rights and ob-

ligations that did not exist prior to its enactment. It makes significant changes to Florida law, including granting exemptions from Florida's criminal laws relating to illegal gambling operations. See *Crist*, 999 So. 2d at 615-16. Because the law is substantive, it is presumed to apply only prospectively. *Old Port Cove*, 986 So. 2d at 1284.

Nothing in § 285.710, Fla. Stat. (2010) or the legislative history preceding its adoption expresses a legislative intent that the statute apply retroactively to legalize or authorize Class III gaming at the Tribe's casinos as of any prior date. To the contrary, the Legislature conveyed its clear intent that the 2010 statute was *not* to apply retroactively. The Legislature expressly stated that nothing in the 2010 legislation makes any prior compact valid or makes the prior operation of Class III games legal, valid or legitimate. The Legislature specifically stated also that neither the 2009 Compact nor the 2007 Compact were approved or ratified. It *32 instead expressly declared them to be "void" and "not in effect," § 285.710(2)(a), (b), Fla. Stat. (2010). And, lest there be any doubt that the 2010 legislation does not apply retroactively, subsection (12) unambiguously states that:

Any moneys remitted by the Tribe before the effective date of the [2010] [C]ompact shall be deposited into the General Revenue Fund and are released to the state without further obligation or encumbrance. *The Legislature further finds that acceptance and appropriation of such funds does not legitimize, validate, or otherwise ratify* any previously proposed compact or *the operation of class III games by the Tribe for any period prior to the effective date of the [2010] Compact.*

§ 285.710(12), Fla. Stat. (2010) (emphases added).^[FN12]

FN12. That provision disposes of the argument in Section B (iii) of the Tribe's Initial Brief that the State's acceptance of revenue from the Tribe authorized the Class III

gaming under Florida law. *Init. Br.* at 18.

The Legislature spoke clearly and adamantly in 2010 that [§ 285.710, Fla. Stat. \(2010\)](#) does not apply retroactively. Instead, the Legislature specifically sought to prevent any retroactive application of the 2010 legislation or 2010 Compact. When it is clear that there is no legislative intent for a law to be applied retroactively, no further analysis is required. *Old Port Cove*, 986 So. 2d at 1284.

As a matter of law, the enactment of the 2010 Compact applies prospectively only, and it does not retroactively legalize or expressly authorize operation of Class III games by the Tribe prior to April 2010. Class III gaming was not “expressly authorized” by Florida law in November 2009, or at any other time prior to April 29, 2010. The Tribe cannot undermine clear legislative intent by dressing up as *33 “public policy” an argument for retroactive application of the statute. The judgment of the circuit court must be affirmed.

CONCLUSION

For the foregoing reasons, Appellee Starkman respectfully requests that this Court issue an opinion summarily affirming the judgment of the circuit court, and that the Court grant Starkman's motion for appellate attorney's fees and award Starkman costs on appeal. The Court should provide in its mandate that the amounts of appellate fees and costs shall be determined by the United States Bankruptcy Court for the Southern District of Florida in accordance with that Court's order granting relief from the automatic stay to allow this Court to decide the matter on the merits.

SEMINOLE TRIBE OF FLORIDA, Appellant, v.
Jason E. STARKMAN, Appellee.
2011 WL 1494209 (Fla.App. 4 Dist.) (Appellate
Brief)

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