THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2012-CP-40-00626

The Catawba Indian Nation a/k/a
The Catawba Indian Nation of South Carolina a/k/a
The Catawba Indian Tribe of South Carolina — Appellant,

vs.

State of South Carolina and Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division — Respondents.

Appellate Case No. 2012-212118

FINAL BRIEF OF RESPONDENTS

ALAN WILSON
Attorney General

ROBERT D. COOK
Deputy Attorney General
SC Bar No.: 1373
Email: AGRCOOK@scag.gov

C. HAVIRD JONES, JR.
Assistant Deputy Attorney General
SC Bar No.: 3178
Email: AGSJONES@scag.gov

Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3970
Fax: (803) 734-3524
ATTORNEYS FOR RESPONDENTS.

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in its Order granting summary judgment in favor of Respondent, therein concluding that the Supreme Court's decision in *Catawba Indian Tribe of South Carolina v. State,* 372 S.C. 519, 642 S.E.2d 751 (2007) served to bind the Appellant as *res judicata* and collateral estoppel in this action?

II. Did the Circuit Court err in its Order granting summary judgment in favor of Respondent, therein concluding that, pursuant to the State's Settlement Agreement with the Catawba Tribe, the Gambling Cruise Act of 2005 did not authorize by state law the Tribe to operate video poker and electronic gaming on its Reservation?

STATEMENT OF THE CASE

Subsequent to the Supreme Court's 2007 decision in *Catawba Indian Tribe of South Carolina v. State, supra* ("*Catawba Tribe*") which concluded that, pursuant to the Settlement Agreement between the Tribe and State, the Catawba Tribe possesses no current right to video poker and electronic gaming on its Reservation, the Tribe filed this action on January 4, 2012 against the State and Mark Keel, in his official capacity as the Chief of the State Law Enforcement Division. The Complaint in this action sought a declaratory judgment interpreting the same provision in the Settlement Agreement which the Supreme Court had previously interpreted in 2007 in *Catawba Tribe.* Specifically, the relief sought in the current action is the same as sought previously – a declaration that the Settlement Agreement bestows the right to offer video poker and electronic gaming on its Reservation. Appellant contends that the identical gaming activities referenced in the Gambling Cruise Act of 2005, S.C. Code Ann. Section 3-11-100 *et seq.* are now also "authorized" on the Tribe's Reservation. The Gambling Cruise Act authorizes counties and municipalities to "opt out" of a 1992 amendment of the federal Johnson Act. Such 1992 amendment represented a Congressional authorization to permit gambling aboard

U.S. flag vessels, including so-called cruises to nowhere, but only after the cruise vessel left the State's territorial waters. In the current action, the Tribe also sought a temporary injunction restraining law enforcement officials from threatening to arrest and prosecute gaming activities on the Reservation pending a declaration by the court concerning the rights of the parties.

Prior to the hearing on the motion for temporary injunction, the parties agreed to seek expedited resolution of the declaratory judgment action, and the Appellant agreed to refrain from engaging in any gaming operations pending an order from the court. The parties further stipulated that the underlying issues were purely matters of law and both parties filed motions for summary judgment. On April 2, 2012, the Honorable J. Ernest Kinard, Jr., Judge, Fifth Judicial Circuit heard oral arguments from both parties. On April 23, 2012, the Circuit Court granted summary judgment to Respondents, concluding that the 2007 Supreme Court decision was *res judicata* to the Tribe's current action and that, in any event, the Gambling Cruise Act did not authorize the Tribe to operate video poker and electronic devices on its Reservation as required by the Settlement Agreement. On May 23, 2011, Appellant timely filed and served a Notice of Appeal.

STATEMENT OF FACTS

The *Catawba Tribe* decision of the Supreme Court in 2007 provides a detailed summary of the historical background leading up to South Carolina's Settlement Agreement with the Tribe in 1993. There, the Supreme Court stated:

> [i]n 1993, after many years of litigation and extensive negotiations, Respondent, the State, and the United States entered into a settlement that ended a dispute over the right to possession of 144,000 acres of land located in York, Lancaster, and Chester Counties ... . This settlement was memorialized in an Agreement in Principle ("Settlement Agreement").

> Federal legislation ... ("Federal Act") and state legislation ... . ("State Act") implemented the Settlement Agreement. The Federal Act requires the Settlement Agreement and the State Act to be complied with as if they had been implemented by federal law. 25 U.S.C.A. §941b(a)(2) (2001).
>
> As part of the settlement, Respondent (Tribe) waived its right to be governed by the Indian Gaming Regulatory Act ... . 25 U.S.C.A. § 941ℓ(a); Settlement Agreement § 16.1. Respondent [Catawba Tribe] instead agreed to be governed by the terms of the Settlement Agreement and the State Act with regard to games of chance. 25 U.S.C.A. § 941ℓ(b); § 27-16-110(A) (2007); Settlement Agreement § 16.2. The Settlement Agreement and the State Act give Respondent specific rights related to bingo and video poker or similar electronic play devices. S.C. Code Ann. § 27-16-110(B) - (H); Settlement Agreement § 16.3-.9.
>
> Respondent brought this declaratory judgment action against Appellants seeking, *inter alia*, a declaration that pursuant to the terms of the Settlement Agreement and the State Act, Respondent has a present and continuing right to operate video poker or similar electronic play devices on its Reservation ... . On cross-motions for summary judgment, the circuit court ruled in favor of Respondent.

Catawba Tribe, 372 S.C. at 522-523, 642 S.E.2d at 752-753.

In addition, it is useful to summarize the historical background leading to the enactment of the Gambling Cruise Act. This history is summarized in *Stardancer Casino, Inc. v. Stewart*, 347 S.C. 377, 380, 556 S.E.2d 357, 358-359 (2001). There, the South Carolina Supreme Court explained:

> [p]rior to 1992, federal law prohibited gambling on any United States flag ship. See 18 U.S.C. § 1081 (2000) ... .; 15 U.S.C. § 1175(a) ... . The effect of these federal statutes was to put U.S. flag vessels at a competitive disadvantage in the passenger cruise industry, since the statutes did not prevent foreign flag vessels from offering gambling once the ship was beyond state territorial waters. See *Casino Ventures v. Stewart*, 183 F.3d 307 (4th Cir. 1999), cert. denied, 528 U.S. 1077, 120 S.Ct. 793, 145 L.Ed.2d 669 (2000); *United States v. One Big Six Wheel*, 987 F.Supp. 169 (E.D.N.Y. 1997). In 1992, Congress amended § 1175 of the Johnson Act and created several exceptions to its general prohibition on the use or possession of any gambling device on a U.S. flag vessel. 15 U.S.C. § 1175(b). Pursuant to the amendment, the possession or transport of a gambling device within state territorial waters is not a violation of § 1175(a) if the device remains on board the vessel and is used outside

> those territorial waters. § 1175(b)(1). Although the effect of this subsection was to permit the operation of "day cruises," ["cruises to nowhere"] another section provided states with a method for having "day cruises" remain a federal offense. § 1175(b)(2)(A). Thus, "day cruises" such as that operated by respondent may be subject to federal prosecution under § 1175(a) if they begin and end in a state that "has enacted a statute the terms of which prohibit that use ... ." *Id.*

Stardancer concluded that South Carolina had not "enacted a statute the terms of which prohibit that use ..." and thus, pursuant to the 1992 amendment to the Johnson Act, found that "cruises to nowhere" were legal in South Carolina under federal law. According to the *Stardancer* Court, Act No. 125 of 1999 confirmed that the State did not intend to prohibit "cruises to nowhere," stating therein that the Legislature "has no intent to enact any provision allowed by 15 U.S.C. 1175, or to create any state enactment authorized by the Johnson Act." In *Stardancer*, our Supreme Court reviewed the various gambling statutes then on the books at the time of the decision, including § 12-21-2710, and concluded as follows:

> [i]n light of the intent clause of 1999 Act No. 125, we agree with the circuit court that the legislature did not intend that either § 12-21-2710 or 16-19-50 apply to "day cruise" operations. Further, we conclude that the General Assembly's rejection of statutes which would explicitly criminalize day cruises is evidence of its understanding that none of our existing statutes applies to such operations. Since the devices are not unlawful, they are not subject to seizure under either § 12-21-2712 or 16-19-120.
>
> Respondent is not subject to criminal prosecution under any *existing* criminal statute, and therefore we need not address its "selective enforcement" argument. We have construed these statutes as they apply to "day cruises to nowhere.", that is, cruises on United States flag vessels operating out of a South Carolina port, making no intervening stops, and permitting gambling only when the ship is beyond the State's territorial waters ... . Our decision rests on the intent of the Legislature expressed in 1999 Act No. 125; *nothing in that Act is indicative of any intent to otherwise restrict the scope and application of laws criminalizing gambling activities in this State.* Further, we emphasize that the General

> Assembly is free to enact legislation which effectively bans or makes a state crime "day cruise" operations such as that operated by respondent.

(emphasis added).

Following *Stardancer*, "cruises to nowhere" were legal in South Carolina and began operating in response to the *Stardancer* decision. In reaction to *Stardancer*, counties and cities began an effort to prohibit or regulate such cruises. However, in two cases, *Palmetto Princess v. Town of Edisto Beach,* 369 S.C. 50, 631 S.E.2d 76 (2006) and *Palmetto Princess v. Georgetown County,* 369 S.C. 34, 631 S.E.2d 68 (2006) our Supreme Court concluded that as a matter of state law these political subdivisions were preempted from being able to "opt out" of the Johnson Act without legislative authorization. Accordingly, in 2005, the General Assembly enacted the Gambling Cruise Act, which provided political subdivisions with express authority to opt out of the federal Johnson Act.

SUMMARY OF ARGUMENT

The issue presented here is simple. But even more importantly, the fundamental question involved has already been decided against Appellant by our Supreme Court. The essence of the present action is that Appellant, Catawba Indian Tribe of South Carolina, seeks, pursuant to the Settlement Agreement between the State and Tribe, to have declared that the Tribe possesses a present right to video gambling on its Reservation. However, in *Catawba Indian Tribe of South Carolina v. State*, *supra* – involving the very same provision of the Settlement Agreement – the Supreme Court held that the Tribe has no such right. Such ruling is binding and dispositive here. Moreover, Appellant's claims here lack merit.

In *Catawba Tribe,* the Supreme Court interpreted § 16.8 of the Settlement Agreement and § 27-16-110(G) of the Settlement Act, which provides that the Tribe may offer video poker or other electronic gaming on its Reservation "to the same extent the devices are authorized by state law." According to the Supreme Court, such provision means that Appellant possesses no current right to video poker and other video gaming on its Reservation. The Court reasoned that the General Assembly's enactment of Act No. 125 of 1999, now codified at § 12-21-2710, compelled a "statewide ban" on all video gaming *throughout South Carolina.* In the Court's view, this "statewide ban" applied to the Catawba Nation as well because of the Settlement language, which requires the Tribe to be governed "to the same extent" that gambling devices are "authorized" by "state law." Thus, in the Supreme Court's opinion, application of this unambiguous provision of the Settlement Agreement in light of statewide ban, means that the Tribe "may not currently allow the devices on its Reservation." 372 S.C., *supra* at 527, n. 7, 642 S.E.2d *supra* at 755, n. 7.

Catawba Tribe is not only binding upon Appellant, but is dispositive of Appellant's claims here. The circuit court correctly so held. There has been no change since the Supreme Court ruled against Appellant in 2007. The Settlement Agreement's pertinent language, which the Court found unambiguous, remains unchanged. The "statewide ban" on video gaming is still in place, and has been upheld by the Supreme Court and recognized by this Court after *Catawba Tribe* was decided. Thus, the Circuit Court's grant of summary judgment to Respondents should be affirmed.

Appellant attempts to avoid *Catawba Tribe* by characterizing its gaming rights as "unique," see, *Appellant's Brief* at 15, and by relying upon the Gambling Cruise Act of 2005. The Gambling Cruise Act concerns so-called "cruises to nowhere," which travel to points outside the three mile limit of the territory of South Carolina so that persons may gamble aboard the vessel beyond the State's borders. But such Act has no bearing whatever upon Appellant's situation on its Reservation.

First of all, contrary to Appellant's contention, see e.g. *Appellant's Brief* at 11, the Gambling Cruise Act is not an "authorization" pursuant to "state law" of video gaming devices, as required by the unambiguous language of the Settlement Agreement. As the Gambling Cruise Act states, and as Appellant appears to concede, that Act delegates to counties and municipalities in South Carolina the authority to "opt out" of the federal Johnson Act, a 1992 federal Act, which immunizes "possession or transport of a gambling devices within state territorial waters ... if the device remains on board the vessel and is used only outside those territorial waters." *Palmetto Princess, LLC v. Georgetown County*, 369 S.C., *supra* at 37, 631 S.E.2d, *supra* at 70. Thus, rather than constituting an authorization of gambling devices pursuant to "state law," which the

Settlement Act requires, the legalization of "cruises to nowhere" and their accompanying gambling outside a State's three mile limit occurred in 1992, as a result of amendment of *the federal Johnson Act*. Such provision was applied to South Carolina in *Stardancer Casino Inc. v. Stewart, supra.* [Cruises to nowhere are legal in South Carolina pursuant to the federal Johnson Act because the State has not opted out of such Act]. Thus, gambling outside the State's territorial waters aboard cruises to nowhere was legal in South Carolina years before the Gambling Cruise Act was ever enacted, and such Act is a means by which coastal counties and municipalities may ban such cruises. Accordingly, pursuant to the literal terms of the Settlement Act, the Gambling Cruise Act is insufficient to operate as an "authorization" pursuant to "state law" to trigger the applicable provision of the Settlement Agreement and Settlement Act (§ 27-16-110(G)). Instead, the Gambling Cruise Act constitutes South Carolina's mechanism for localities to remove themselves from the Johnson Act's authorization of gambling off the State's coast (and outside South Carolina territory) on such cruises to nowhere.

Furthermore, even, assuming arguendo that the Gambling Cruise Act may be deemed an "authorization" to possess video gaming devices, such Act bestows no such right to the Tribe on its Reservation. The Gambling Cruise Act, which deals only with gambling on cruises, in no way alters or undermines South Carolina's "statewide ban" of video gaming in South Carolina but expressly preserves such ban. Thus, the Tribe's central argument in this case – that the Gambling Cruise Act's "authorization" of gambling outside South Carolina's territorial waters gives it the same right to video gaming on its Reservation – is wholly without merit.

According to the Tribe, passage of the Gambling Cruise Act served to authorize it to "permit on its Reservation the same range of gambling activity as is authorized by the Gambling Cruise Act." *Appellant's Brief* at 12. Appellant dwells upon the fact that, pursuant to the Johnson Act, the State may exercise gambling authority beyond the three mile limit. *Id.* at 11-12. But in this regard, Appellant ignores the force of the 2007 ruling in *Catawba Tribe*, choosing to dwell upon the Court's use of the word "current" therein to argue that, while the Supreme Court had held the Tribe had no "current" right to gaming, the Gambling Cruise Act now gives it such a right. *Appellant's Brief* at 4. According to Appellant, the Settlement Agreement and § 27-16-110(G) of the Settlement Act possess no "geographic" component, and thus *any authorization* of video gambling by the Legislature – even an authorization outside South Carolina – bestows to it the very same rights to gaming on the Reservation. In short, even though the text of the Gambling Cruise Act reaffirms South Carolina's prohibition of gambling *in South Carolina,* the Tribe argues, nevertheless, that, *the General Assembly's authorization of gambling anywhere* (even outside the State) is sufficient to meet the Settlement Agreement's requirement that gaming devices be "authorized by state law."

Such reasoning is patently flawed. Any police power the State is given by the Johnson Act beyond the three mile limit relates solely to cruises to nowhere and nothing else. And, any credence lent to the Tribe's argument means that in enacting the Gambling Cruise Act, the Legislature – mindful of the Settlement Agreement and Act, and cognizant that it had previously banned video poker and other electronic gaming throughout the State – still intended to re-institute video gaming only on the Tribe's Reservation. However, the Gambling Cruise Act plainly states that it "may not be

construed" to "repeal or modify" South Carolina's gambling laws. § 3-11-400(B)(1). Such laws would clearly encompass § 12-21-2710, which has long banned video gambling throughout the State. Yet, Appellant insists upon arguing that such Act indeed authorizes all video gambling on the Reservation even though such gambling is prohibited in all other places in South Carolina.

This Court should reject such a tenuous argument. Just as the Supreme Court concluded in *Catawba Tribe* that the Settlement Agreement does not bestow upon the Catawbas preferred video gaming rights vis-à-vis other South Carolinians, this Court should as well. The Gambling Cruise Act adds nothing to the Appellant's arguments made in the earlier case. In making its argument, Appellant chooses to ignore the plain holding of the *Catawba Tribe* decision, the broad reach of the State's ban on video gaming, as well as the limited purpose of the Gambling Cruise Act and its clear language that it does not affect State gambling laws. Appellant's legal theory would rewrite not only the Settlement, but the Johnson Act as well. The Johnson Act was not intended to undermine state gambling laws. Consistent with federal law, the Gambling Cruise Act supports the authority to ban cruises to nowhere.

First, contrary to Appellant's contention that the Settlement Agreement and Act impose no geographic limitations, *Catawba Tribe* interpreted the Settlement in just the opposite fashion. At the time of the *Catawba Tribe* decision, cruises to nowhere were debarking from South Carolina coastal ports to allow video gaming outside state waters, and had been doing so since *Stardancer* was decided in 2001. Yet, in *Catawba Tribe*, the Supreme Court construed the Settlement Agreement and Act's pertinent provision (§ 27-16-110(G)) to mean that the "statewide ban" on video gaming in South Carolina,

compelled by § 12-21-2710, operated to the "same extent" on the Tribe's Reservation as everywhere else in the State. Thus, even though Appellant's argument here regarding the Gambling Cruise Act was not formally presented by the Tribe to the Court at that time, there can be little doubt that the Supreme Court saw no virtue in any interpretation of the Settlement to the effect that "gaming devices authorized anywhere, means the same devices are authorized on the Reservation," the interpretation which the Tribe essentially now presents. The Supreme Court held unequivocally that the "statewide ban," imposed by § 12-21-2710, is dispositive of the question of the Tribe's video gaming rights.

Thus, we take strong issue with the Tribe's contention that "the Supreme Court most certainly did not hold that the Catawba Nation has no right to permit video gambling so long as § 12-21-2710 remains in effect." *Appellant's Brief* at 16. Indeed, that is precisely what *Catawba Tribe* did hold.

It is clear, moreover, that the Gambling Cruise Act, like the Johnson Act, was enacted for a very narrow purpose. The Gambling Cruise Act did not amend, modify or undermine § 12-21-2710's "statewide ban," but expressly recognizes such ban. It provides that the Act should not be construed to undermine the State's gambling laws. Both the federal Johnson Act, as well as the Gambling Cruise Act, specify that the gambling devices transported aboard cruises to nowhere may not be operated in South Carolina waters, but may be used only outside the State's territorial boundaries. See, § 3-11-400. Therefore, while the Appellant relies upon the Gambling Cruise Act as triggering the "authorization" of the enumerated gaming devices on its Reservation, at the same time, it ignores the express limitations that such devices may be used only outside the State, limitations which are imposed by that very same Act. When enacting the

Gambling Cruise Act, the Legislature was obviously aware of the Catawba Settlement Agreement and Act, as well as acutely cognizant of the statewide ban on video gaming. Thus, if the General Assembly had intended the Gambling Cruise Act to create a right in the Appellant to video gaming on the Reservation, as now claimed, exception would most certainly have made for the Tribe in the Act's recognition in § 3-11-400(B)(1) that the Gambling Cruise Act "must not be construed to ... (1) repeal or modify any other provision of law relating to gambling ...." Such a broad legislative assurance that the Gambling Cruise Act does not affect existing gambling laws must be deemed to mean exactly what it says. Yet, Appellant would ask this Court to rewrite such Act, reading into it an exception not there, and giving it a right no one else possesses. There is not even the slightest suggestion of the existence of such a right.

In short, Appellant's legal theory stretches South Carolina law well past the breaking point. Notwithstanding the Gambling Cruise Act, *Catawba Tribe's* holding that the Tribe "may not currently allow ... [gaming] devices on its Reservation." must be given full effect. Notwithstanding the Gambling Cruise Act, this remains the law today just as in 2007. And it binds the Tribe just as surely now as it did then. As one Court has aptly written in another context, using words which could easily be applicable here, "the authority to do one thing is not an authority to do another and different thing." *People v. Mau*, 36 N.E.2d 235, 239 (Ill. 1941).

To summarize, Appellant is simply seeking to relitigate the same case decided against it five years ago, now employing a different legal theory, but one which is completely inapplicable and utterly irrelevant. Appellant relies upon the very same provision of the Settlement Act which was argued in the *Catawba Tribe* case. In both

this action and in the previous one, the Tribe argued that such provision of the Settlement Agreement (§ 16.8) bestowed upon it a right to video gaming on its Reservation. Importantly, the Gambling Cruise Act became effective and was available to it in its first action. Yet, the Tribe chose then not to offer the theory it now urges. Based upon the fundamental principles of *res judicata* and collateral estoppel, Appellant is not entitled to a second bite at the apple. *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011).

And, even if Appellant is permitted that second bite, its new legal theory, based upon the Gambling Cruise Act, provides it with no greater right to video gambling on its Reservation than was found in the earlier decision in *Catawba Tribe.* In short, none. The fact that the Johnson Act and the Gambling Cruise Act gives authority over gambling beyond the three mile limit is irrelevant to the State's ban on video gambling within South Carolina. The Gambling Cruise Act is limited to cruises to nowhere and does not undermine the State's anti-gambling laws. As *Catawba Tribe* held, the "statewide ban" on video gaming, including video poker operates on the Tribe's Reservation as everywhere else in the State. Video gaming devices remain contraband *per se* throughout South Carolina, *including on Appellant's Reservation.* As the Circuit Court correctly concluded, the Gambling Cruise Act has no legal impact upon the status of video gaming there and it remains illegal there, as everywhere in South Carolina.[1]

[1] Appellant also details a line-by-line enumeration of all the legal and factual "errors" of the circuit court. See *Appellant's Brief* at 19-28. What purpose such a detailed list of alleged mistakes by the lower court serves is far from clear. Appellant obviously does not agree with the circuit court's ruling; otherwise, the Tribe would not be appealing. We assume the purpose, therefore, is to leave the impression that, the circuit court made so many "errors," its conclusion must be wrong. All this is irrelevant, however. If the Order is correct in its result, it will be affirmed. If not, it will not be.

STANDARD OF REVIEW

Both sides moved for summary judgment in this case. Consequently, there are no facts in dispute. Our Supreme Court, in *Catawba Tribe,* 372 S.C. *Id.* at 524, 642 S.E.2d *Id.* at 753 set forth the standard of review in a case such as this, as follows:

> A circuit court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). In determining whether any triable issues of fact exist, the circuit court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Manning v. Quinn*, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions and inferences arising in and from the evidence in a light most favorable to the non-moving party below. *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).
>
> The issue of interpretation of a statute is a question of law for the court. *Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) ("The determination of legislative intent is a matter of law."). We are free to decide a question of law with no particular deference to the circuit court. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000).

ARGUMENTS

I

THE CIRCUIT COURT DID NOT ERR IN ITS ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT, THEREIN CONCLUDING THAT THE SUPREME COURT'S DECISION IN *CATAWBA INDIAN TRIBE OF SOUTH CAROLINA v. STATE*, 372 S.C. 519, 642 S.E.2d 751 (2007) SERVED TO BIND THE APPELLANT AS *RES JUDICATA* AND COLLATERAL ESTOPPEL IN THIS ACTION.

The fundamental purpose of the doctrine of *res judicata* is to ensure that "no one should be twice sued for the same cause of action." *First Nat'l. Bank of Greenville v. U.S. Fid. and Guar. Co.,* 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945). A litigant may not receive a second bite at the same apple. As this Court has emphasized, "[a] final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of *res judicata* in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action." *Beall v. Doe and Conerly*, 281 S.C. 363, 369, n. 1, 315 S.E.2d 186, 190, n. 1 (Ct. App. 1984)."*Res judicata* is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies. Res judicata ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues." *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 108 (1999), quoting J. Flanagan, *South Carolina Civil Procedure*, p. 642 (1996) As our Supreme Court recently stated in *Judy v. Judy*, 393 S.C., *supra* at 172, 712 S.E.2d, *supra* at 414,

> ... we reiterate and rely on the conceptual framework recognized in *Plum Creek Dev. v. City of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999), wherein we stated:
>
> > Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or

> occurrence that was the subject of a prior action between those parties. Under the doctrine of res judicata, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit. *Id.* at 34, 512 S.E.2d at 109 (citations omitted).

The Court in *Judy* recognized four indicators to determine the applicability of *res judicata*, which should be "considered as factors, rather than rigid, independent tests." *Id.* at 173, 712 S.E.2d at 414. These factors are: (1) when there is identity of the subject matter in both cases; (2) when the first and second cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; (3) when there is the same evidence in both cases: (4) when the claims arise out of the same transaction or occurrence that is the subject of the prior action. *Id.*, at 172, n. 7, 712 S.E.2d at 414, n. 7.

Appellant's second lawsuit fully meets all these factors. Thus, summary judgment on behalf of Respondents was appropriate. The identical two parties are before the Court a second time – the Tribe and the State. The subject matter is the same – the construction or application of the same provisions of the Settlement Agreement and Act, i.e. § 27-16-110(G). Most importantly, the Tribe is asserting *the very same right* arising out of the same transaction it asserted the first time – the right, pursuant to the Settlement Agreement and Settlement Act, to have video gaming on its Reservation. However, the *Catawba Tribe* ruling by our Supreme Court forecloses any conclusion that the Tribe possesses such right because, pursuant to § 27-16-110(G) of the Settlement Act, the Tribe possesses the same video gaming rights as everyone else in South Carolina. Because, as *Catawba Tribe*, recognized, video gaming devices are banned "statewide" as contraband *per se*, the Supreme Court has therefore ruled adversely to the Tribe, holding that it

possesses no current right to video gaming on its Reservation. As a matter of law, that should end the matter. The circuit court correctly held that it did.

By way of background, Appellant's first action was brought on July 28, 2005, almost two months after the Gambling Cruise Act took effect on June 1, 2005. Just as here, Appellant Tribe there sought declaratory and injunctive relief, based upon its contention that

> it is entitled to judgment in its favor and an order of the Court permanently enjoining and restraining defendant [State of South Carolina] and its agents, employees or representatives from proceeding in any manner to interfere with the Tribe's right to conduct video poker or similar electronic play devices on its Reservation ... in accordance with the Settlement Act, the Settlement Agreement and the State Act prior to its wrongful amendment.

See *2005 Complaint,* Paragraph 41 at page 9, *Record*, at 99. [31A C.J.S., *Evidence*, § 96 ("A court may take judicial notice of pleadings filed in a case."] The Tribe referenced the language of § 27-16-110(G) in its 2005 Complaint. *Id.* at Paragraph 15, page 3. As here, the Appellant asked the Court in its 2005 Complaint to "determine its rights, status and other legal relations under the Settlement Agreement, Settlement Act and State Act" with respect to the operation of video poker or similar electronic play devices on its Reservation. *Id.*, Paragraphs 29-31, at page 7.

It is true enough that the Tribe offered a somewhat different legal theory in the first action than it does now, contending there that the Settlement Agreement and § 27-16-110(G) could not be "amended" by the General Assembly, based upon any future ban placed upon video poker. Now, ironically, it argues that such amendment is perfectly permissible, and indeed has taken place through enactment of the Gambling Cruise Act. There is no doubt, after *Catawba Tribe,* that the Legislature may give the Tribe the same

gaming rights as it affords everyone else. The point here is that in the first suit, the Tribe also had *the opportunity* to raise the very same arguments it now presents with respect to the effect of the Gambling Cruise Act upon the Tribe's gaming rights. While we do not agree with the arguments the Tribe now makes, it is clear that in the first suit, it could easily have argued that the Gambling Cruise Act constitutes sufficient "authorization" of video gaming devices for purposes of § 27-16-110(G) to allow the Tribe the right to operate such devices on its Reservation. But it did not. Having chosen not to do so, it is now foreclosed from such argument, based upon *res judicata* and collateral estoppel principles. *See, Eichman v. Eichman*, 285 S.C. 378, 329 S.E.2d 764 (1985) ["There can be no question that the same parties were previously before the Court relative to the same subject matter and that an adjudication was made. Certainly, the husband could have raised the same issue in the former action. Having failed to do so, he is now barred by the doctrines of res judicata and collateral estoppel."]. *See also, Sub-Zero Freezer Co. v. R. J. Clarkson Co.*, 308 S.C. 188, 189, 417 S.E.2d 569, 571 (1992) ["Res judicata also bars subsequent suit by the same parties when the claims arise out of the same transaction or occurrence that is the subject of the prior suit between those parties."]; *Aliff v. Joy Mfg. Co.*, 914 F.2d 39, 43 (4th Cir. 1990) ["The law, however, is well established that res judicata may apply even though the plaintiff in the first suit proceeded under a different legal theory."]; *Plum Creek Dev. Co., supra*, at 36, 512 S.E.2d at 110 (citing 50 C.J.S., *Judgments* 749 (1997)) ["(F)or purposes of res judicata, 'cause of action is not the form of action in which a claim is asserted but, rather the cause for action, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon.'"]; *Antrum v. Hartsville Production Credit Assn.*, 228 S.C. 201,

208, 89 S.E.2d 376, 379-80 (1955) ["The doctrine of res judicata is a fundamental rule of our jurisprudence and ... rests upon the sound principle of public policy that after final decision of a controversy by a court of competent jurisdiction the party against whom a decision was rendered, and those in privity with him, should not be permitted again to litigate, against the successful party or those in privity with him the issues that were there decided ... . While the doctrine has been generally said to bar relitigation not only of issues actually decided in the former proceeding, but also of such issues as could have been presented for decision, the application of the defensive bar to the latter rests, strictly speaking, upon the doctrine of estoppel rather than that of res judicata."].

The decision of the South Carolina Supreme Court in *Greenwood Drug Co. v. Bromonia Co.*, 81 S.C. 516, 62 S.E. 840, 841 (1908) is particularly instructive. In that case, the Supreme Court concluded that the former judgment against the Greenwood Drug Company for the value of a certain quantity of medicine was *res judicata* with respect to the Greenwood Drug Company's subsequent action against Bromonia for fraudulent misrepresentation "which induced the Greenwood Drug Company to enter into the contract sued on in the former action ...." The Court disposed of Greenwood Drugs' argument regarding fraudulent misrepresentation with the following:

> [w]e think the judgment should be affirmed. The general rule is that a judgment giving effect to a contract is conclusive evidence that it is free from fraud or illegality, although such issue was not raised in the action, except where the party objecting was ignorant of the fraud or illegality before judgment or was prevented from pleading it ... . Estoppel by judgment on the merits covers not only what was actually decided, but also what was necessarily implied in the final result ... . Hence a judgment on a note is conclusive that the maker's name was not forged.

Recently, in *Yelsen Land Co., Inc. v. State of South Carolina and the State Ports Authority*, 397 S.C. 15, 723 S.E.2d 592 (2012), our Supreme Court concluded that "newly

discovered" evidence of a sovereign grant to tidelands, even if probative, would not entitle appellant to relitigate his claim to the "newly created" highlands. Relying upon *Caston v. Perry*, 17 S.C.L. (1 Bailey) 533 (1830), the *Yelsen* Court concluded that "a defendant may not relitigate title based on newly discovered documents in his chain where those documents predate the first judgment." 397 S.C. at 21, 723 S.E.2d at 596. It is important to note that, in *Yelsen*, the Court found, as here, that *res judicata* principles are fully binding in an action where the State had previously obtained a judgment as a Defendant in a prior action. Moreover, the Supreme Court recognized in *Yelsen* that after-discovered documents are irrelevant to the second action if, as here, such documents were available at the time the first action was brought. Thus, the "sudden" availability of the Appellant's Gambling Cruise Act argument could have easily been made in the first action. Such is now foreclosed in this second suit. As this Court recently concluded, "[e]ven assuming arguendo that the unconstitutionality theory was neither raised nor ruled on in the 1996 action, *the theory could have been brought in the prior action challenging* the legality of the Council Reserves account. Hence, both the claim *and this theory* of relief are barred by the present action." *South Carolina Public Interest Foundation v. Greenville County*, 2012 WL 3104219 (Ct. App. 2012) (Slip Op. at 7), *withdrawn and superseded by South Carolina Public Interest Foundation v. Greenville County*, 401 S.C. 377, 737 S.E.2d 502 (Ct. App. 2013).

In short, the fact that Appellant advances a different legal theory in this second case (which, of course, we strongly disagree with on the merits), is irrelevant. Here, the parties to the second action are the same as the first. The provision of the Settlement Act – § 27-16-110(G) – is the same as in the first action. The subject matter – involving

whether or not Plaintiff possesses a "right" to video poker on its Reservation, pursuant to the Settlement Act – is the same as in the first action. An alternative legal theory, based upon the Gambling Cruise Act, thus makes no legal difference. Appellant Tribe could easily have asserted that alternate legal theory in the first action, but did not. The principles of *res judicata* and/or collateral estoppel foreclose Appellant from now asserting its theory in a second lawsuit.

Appellant argues that the principles of *res judicata* and collateral estoppel do not apply here because its action in *Catawba Tribe* was for a declaratory judgment. The Tribe relies upon *Robison v. Asbill*, 328 S.C. 450, 453, 492 S.E.2d 400, 401 (Ct. App. 1997), in support of its argument. In *Robison,* the Court pointed to the language from 22A Am.Jur.2d, Declaratory Judgments §§ 239 and 240 (1988) that "'[a] declaratory judgment is not *res judicata* as to matters not at issue and not passed upon.'"

As the circuit court correctly concluded, however, "*Robison* is inapposite." We agree with the reasoning of the lower court, distinguishing *Robison* as follows:

> [i]t's holding rested upon the well-recognized doctrine that "[w]hen the plaintiff in the earlier declaratory judgment action sought only declaratory relief, the plaintiff may later be permitted to seek additional, coercive relief based on the same claim." In *Robison*, unlike here, Plaintiff had *prevailed* in the first suit, and then later sought coercive relief in further support of its declaratory relief. By contrast, the Tribe was *unsuccessful* in the first action, and now tries again based upon the same claim, but seeking to employ a different legal theory. Thus, *Robison* provides no comfort to Plaintiff.

Record, at 11.

Further, as the lower court recognized,

> the same year the Court of Appeals decided *Robison*, that Court also rendered the decision in *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). In *Pye,* an earlier federal declaratory judgment action was deemed to operate as *res judicata* and collateral estoppel with respect to

the issue of liability. The Court stated that for *res judicata* to apply, "[t]he parties must be the same or their privies; (2) the subject matter must be the same; and (3) while generally the precise point must be ruled, yet where the parties are the same or in privity, the judgment is an absolute bar not only of what was decided but what might have been decided." 325 S.C. at 432, 480 S.E.2d at 458. *Pye* noted that "a fundamental test for comparing causes of action is to determine whether the primary right and duty and the delict and wrong are the same in each action." *Id.,* at 433, 480 S.E.2d at 458. *Pye* defined the "subject matter of the action" for purposes of *res judicata* as "a matter or thing concerning which a wrong has been done, which is ordinarily property, contract, or other thing involved, or main primary right from the breach of which a remedial right arises." *Id.*

Even though the first action involved a declaratory judgment, the *Pye* Court, nevertheless, concluded that *res judicata* applied. As the Court recognized, "[e]ven though the federal action is in the form of a declaratory judgment proceeding and the state action is under the ambit of intentional tort litigation, the subject matter is the same in both actions." 325 S.C. at 434, 480 S.E.2d at 459. Moreover, *Pye* found that the same parties were present and that "[t]he facts at issue in this case are identical to the facts at issue in the declaratory judgment action." *Id.* Inasmuch as there "was a prior adjudication of this issue by a court of competent jurisdiction" regarding Aycock's liability, *res judicata* governed such liability.

Finally, even assuming that *res judicata* applies only as to claims *actually litigated,* the claim the Tribe raises here was actually litigated in the first suit. Here, the Tribe asserts the same primary right as it maintained in the first action; the right pursuant to § 27-16-110(G) to have video gaming on its Reservation. The fact it now argues a different legal theory – the Gambling Cruise Act – to support the right to gaming under § 27-16-110(G), when that legal theory was available in the first action, does not avoid *res judicata.* Where, as here, Plaintiff "seeks the same declaratory relief against the same defendants ... but presents a different legal theory," on that same claim, *res judicata* applies. *Fogel v. Secretary of the Air Force*, 351 F.Supp.[2d] 47, 50 (E.D. N.Y. 2005). As has been stated, "[a]lternative theories of recovery for the same claim may not be brought in different lawsuits ...." 50 C.J.S. *Judgments* § 987.

In short, the governing rule is that "[i]f a declaratory judgment is valid and final, it is conclusive, *with respect to the matters declared ... .*" *Restatement* 2d *Judgments* § 33 (emphasis added). In the first action between the Tribe and State, the Supreme Court declared that "state law presently bans the possession and operation of video poker devices" and thus "under the plain language of § 12-16-110(G), [the Tribe] ... may not currently allow the devices on its Reservation.. "*Catawba Tribe*, 372 S.C.

> at 527, n. 7, 642 S.E.2d at 755, n. 7. Since that is a matter which was declared in the first declaratory judgment action, it is thus *res judicata* here. *Restatement, Id.*
>
> For the foregoing reasons, summary judgment in favor of Defendants is granted, and as to Plaintiff is denied.

Record, at 12-13.

The correctness of the circuit court's analysis is demonstrated by *Ortega v. First Republic Bank Fort Worth, N.A.*, 792 S.W.2d 452 (Tex. 1990). There, the Supreme Court of Texas deemed an earlier declaratory judgment to be *res judicata* even though it was urged that "the 1963 declaratory judgment did not address the question of whether they are contingent remaindermen eligible to receive a share of the corpus upon termination of the trust ..." and thus could not be *res judicata*. *Id.* at 455. The Texas Supreme Court rejected this argument, stating as follows:

> [e]ven if the identity of the trust contingent remaindermen had not been addressed in the 1963 action, litigation of that issue in the present action would nevertheless be barred because the remaindermen issue was connected with the 1963 cause of action and, with the use of diligence, might have been tried in that action as well as those issues which were actually tried.

Id. at 456. The identical conclusion should be applicable here as well.

II

THE CIRCUIT COURT DID NOT ERR IN ITS ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT, THEREIN CONCLUDING THAT, PURSUANT TO THE STATE'S SETTLEMENT AGREEMENT WITH THE CATAWBA TRIBE, THE GAMBLING CRUISE ACT OF 2005 DID NOT AUTHORIZE BY STATE LAW THE TRIBE TO OPERATE VIDEO POKER AND ELECTRONIC GAMING ON ITS RESERVATION.

Introduction

Assuming arguendo that *Catawba Tribe* does not bar Appellant's action pursuant to the principles of *res judicata* and/or collateral estoppel, Appellant's suit, nevertheless,

lacks merit. As our Supreme Court recently emphasized in *Union Co. Sheriff's Office v. Henderson*, 395 S.C. 516, 519-520, 719 S.E.2d 665, 666 (2011), "Section 12-21-2710 makes it unlawful to possess illegal gambling machines, even if they are not fully operational. The mere possession of the gambling devices, or even their component parts is unlawful." (citing *State v. 192 Coin-Operated Video Game Machines,* 338 S.C. 176, 525 S.E.2d 872 (2000)).. Section 12-21-2710 makes possession of illegal gaming devices a crime and § 12-21-2712 provides the procedure for the seizure, civil forfeiture, and destruction of such devices. Further, in *Catawba Tribe, supra*, the Court made clear that Act No. 125 of 1999, therein amending § 12-21-2710 to include video poker, "bans the possession and operation" of video gaming devices. Thus, explained the Court, § 27-16-110(G) of the Settlement Act, is an "unambiguous" provision, which allows the Tribe to have video gaming on its Reservation to the 'same extent that the devices are authorized by state law." As a result, this provision mandates that the Tribe "may not currently allow the devices on its Reservation." 372 S.C. at 527, n. 7, 642 S.E.2d 755, n. 7. As the Court held, the "statewide ban" applies to the Tribe just as it does to everyone else in the State. 372 S.C. at 527-528, 642 S.E.2d at 755-756.

Notwithstanding this clear holding of the Supreme Court in 2007 in *Catawba Tribe*, the Appellant nevertheless asserts that, upon passage of the Gambling Cruise Act, (see § 3-11-100 *et seq.*)., its right to offer the same gambling devices (games of chance) on its Reservation as may be operated outside the State's territorial waters, vested pursuant to § 27-16-110(G) of the Settlement Act. Plaintiff's theory is a simple one: if state law "authorizes" gaming devices under any conditions and anywhere – even if only operable on the high seas, and even though the statute recognizes the preservation of all

gambling laws in this State – the Settlement Act triggers the Tribe's right to the same video gaming devices on its Reservation. Putting aside for the moment the *res judicata* and/or collateral estoppel effect of this ruling by the Court, discussed extensively above, Plaintiff's "authorized anywhere" argument completely lacks merit.

The *Catawba Tribe* Court, by referencing and relying upon § 27-21-2710, which, bans gaming devices "within this State," disposed of Appellant's argument that § 27-16-110(G) of the Settlement Act contains no "geographic component." And, as will be discussed more extensively below, the Court's emphasis that the scope of § 12-21-2710's amendment by Act No. 125 of 1999, was to impose a "statewide ban" on all video gaming, including video poker, clearly demonstrates that this "geographic component" of the Settlement Agreement is operative. Thus, unless either the Settlement Act or § 12-21-2710 is modified or repealed – and to date neither has occurred – *Catawba Tribe* is completely dispositive of this case. Accordingly, Appellant's "non-geographic component" argument for the interpretation of § 27-16-110(G) cannot withstand scrutiny. The only way the Tribe would be "authorized" by state law to have video gaming on its Reservation would be if the General Assembly were to legalize video gaming *in South Carolina*. That has not happened and it is unlikely to happen in the foreseeable future.

Background of Gambling Cruise Act

Initially, it is helpful to provide the background as to how the Gambling Cruise Act came to be. We have already shown above that in *Stardancer Casino, supra,* our Supreme Court explained the circumstances surrounding the federal Johnson Act's authorization of "cruises to nowhere." It bears repeating that the *Stardancer* Court stated:

> [p]rior to 1992, federal law prohibited gambling on any United States flag ship. See U.S.C. § 1081 (2000) ...; 15 U.S.C. § 1175(a) ... . The effect of

> these federal statutes was to put U.S. flag vessels at a competitive disadvantage in the passenger cruise industry, since the statutes did not prevent foreign flag vessels from offering gambling once the ship was beyond state territorial waters. See *Casino Ventures v. Stewart*, 183 F.3d 307, (4th Cir. 1999), cert. denied, 528 U.S. 1077, 120 S.Ct. 793, 145 L.Ed.2d 669 (2000); *United States v. One Big Six Wheel*, 987 F.Supp. 169 (E.D.N.Y. 1997).
>
> In 1992, Congress amended § 1175 of the Johnson Act and created several exceptions to its general prohibitions on the use or possession of any gambling device on a U.S. flag vessel. 15 U.S.C. § 1175(b). Pursuant to the amendment, the possession or transport of a gambling device within state territorial waters is not a violation of § 1175(a) if the device remains on board the vessel and is used only outside those territorial waters. § 1175(b)(1). Although the effect of this subsection was to permit the operation of "day cruises," another section provided states with a method for having "day cruises" remain a federal offense. § 1175(b)(2)(A). Thus, "day cruises" such as that operated by respondent may be subject to federal criminal prosecution under § 1175(a) if they begin and end in a state that "has enacted a statue the terms of which prohibit that use ...." *Id.*

347 S.C. at 380, 556 S.E.2d at 358-359.

Following extensive analysis, *Stardancer* concluded that South Carolina's gambling laws, including Act No. 125 of 1999 – the statute which banned video poker in South Carolina – did not evidence an intent by the Legislature to "opt out" of the federal Johnson Act. As a result, day cruises or cruises to nowhere became legal in South Carolina. *Stardancer* found that if the Legislature wished to have South Carolina opt out of the federal law, and thus ban offshore gaming aboard cruises to nowhere, the State must do so by affirmative legislation. But recognizing the Johnson Act's respect for state gambling laws outside the cruise to nowhere setting, *Stardancer* further noted that such cruises did not violate the State's criminal laws so long as the conditions of the federal law are maintained – i.e. that gambling devices remain "on board the vessel and [are] used only outside [the State's] territorial waters." *Id.* Moreover, and most importantly

for purposes here, *Stardancer* made it clear that legalization of cruises to nowhere did not undermine state gambling laws.

It was these circumstances which ultimately led in 2005 to enactment of the Gambling Cruise Act. Because of the legal issues concerning preemption if counties and municipalities wished to opt out of the Johnson Act, explained more fully below, the Legislature, in adopting the Gambling Cruise Act, decided to employ a "local option" system. The Gambling Cruise Act thus delegated the power to prohibit or regulate gambling cruise vessels to counties and municipalities. See § 3-11-200. A county or municipality was authorized by the Act, if it so wished, to opt out of the Johnson Act and affirmatively ban or regulate "cruises to nowhere" leaving from its territory.

However, as noted above, § 3-11-400 of the Gambling Cruise Act, consistent with the Johnson Act, makes clear that gambling offenses and/or forfeitures outside the narrow parameters of the cruise to nowhere circumstances remain applicable. See, *In re Las Vegas Casino Lines, LLC,* 454 B. R. 223, 225, n. 1 (M.D.Fla. 2011) ["gambling on a cruise-to-nowhere takes place only after the ship travels outside the three mile limit"]; *Palmetto Princess, LLC v. Town of Edisto Beach, supra* [under *Johnson* Act, gambling device may be "used only outside [state's] ... territorial waters."]. Section 3-11-400 carefully specifies that the Gambling Cruise Act does not "repeal or modify any other provision of law relating to gambling" or "preclude prosecution for any other applicable gambling offense under state law." See § 3-11-400(B)(1) and (4). Further, the Gambling Cruise Act states that it may not be construed to allow gambling aboard any vessel while in the territorial waters of the State. § 3-11-400(B)(3). Prosecutions under the Johnson Act, 15 U.S.C. § 1175, are preserved. See, § 3-11-400(B)(5). Thus, the Gambling Cruise

Act, by its express terms, cannot undermine § 12-21-2710, which imposes the "statewide ban" upon which *Catawba Tribe* relied.

This dichotomy between in state gambling activity and gambling outside South Carolina aboard cruises to nowhere is fundamental to the proper disposition of this case. As a threshold matter, it is thus important to recognize that Appellant cannot rely upon a completely unrelated statute – the Gambling Cruise Act – to claim that the Legislature has now "authorized" gambling devices pursuant to "state law," sufficient to trigger the Settlement Act's provision relating to video gaming on the Reservation. Because the Gambling Cruise Act does not affect state gambling laws, that Act and the Settlement Act are like apples and oranges to one another and are completely unrelated.

Gambling Cruise Act Is Not An "Authorization" Pursuant to "State Law"

In addressing Appellant's arguments regarding the impact of the Gambling Cruise Act here, there are several specific reasons such Act has no bearing. First of all, although true that the Gambling Cruise Act is an enactment relative to gaming, it is not, contrary to Appellant's arguments, an "authorization" of gaming pursuant to "state law," as the Settlement requires, but is instead a natural consequence of the 1992 amendments to the federal Johnson Act and to the *Stardancer* decision which applied the Johnson Act. The Title of the Gambling Cruise Act (Act No. 104 of 2005) reflects the Legislature's clear purpose: "... To Delegate to Counties and Municipalities of This State *the Authority Conferred to This* State Pursuant to the Johnson Act, the Prohibit or Regulate the Operation of Gambling Vessels that Depart the Territorial Waters of this State Without An Intervening Stop ...." In light of *Stardancer's* holding that it is necessary for there to be *affirmative legislation* opting out of the Johnson Act's legalization of cruises to

nowhere, coastal cities and counties had begun adopting local ordinances banning such cruises in situations in which those cruises debarked within that county or municipality's boundaries. However, in *Palmetto Princess, LLC v. Town of Edisto Beach*, *supra* and *Palmetto Princess, LLC v. Georgetown County, supra*, the Supreme Court ruled that counties and municipalities did not possess such authority, as a result of being preempted by state law. Referencing *Stardancer*, the Court, in *Town of Edisto Beach,* concluded that "[b]ecause a gambling day cruise was a legal activity allowed by the State, Edisto's ordinance is unconstitutional because it makes a legal activity unlawful." 369 S.C. at 53, 631 S.E.2d at 78.

The Supreme Court also noted in *Town of Edisto Beach* the Legislature's efforts to fix this preemption problem, observing that "[s]ubsequent to the circuit court's order issued in this case, the General Assembly's Gambling Cruise Prohibition Act was signed into law by the governor with an effective date of June 1, 2005." The Court further stated that "Section 3-11-200(A) of this Act specifically allows the type of ordinance enacted by Edisto." *Id.*, at n. 2.

In other words, it is clear that the Gambling Cruise Act represents not an "authorization" of gaming pursuant to "state law," as the Settlement Agreement and Act require, but instead is an authorization by the Legislature to coastal cities and counties to "opt out" of the legalization of cruises to nowhere pursuant to the Johnson Act and *Stardancer*. Coastal localities are simply permitted to ban or regulate such day cruises if they so desire. Any such "opting out" would be in the form of an ordinance by that locality. It thus defies logic to conclude that passage of the Gambling Cruise Act meets the requirements of § 27-16-110(G) of the Settlement Act. Rather than an

"authorization" of gambling, the Gambling Cruise Act is more properly characterized as the means by which gambling aboard cruises to nowhere outside state waters may be prohibited. Thus, Appellant's arguments to the contrary are without merit.

Moreover, when the Supreme Court decided *Catawba Tribe* in 2007, the question of whether the Tribe possessed a right to video gaming pursuant to § 27-16-110(G) of the Settlement Act was the issue squarely before the Court. If the Court had thought that the Gambling Cruise Act, which had gone into effect on June 1, 2005, and which had been referenced by the Court in *Palmetto Princess, LLC v. Town of Edisto Beach, supra,* in any way controlled the question of the Tribe's gaming rights, undoubtedly, it would have considered that point as part of its interpretation of the Settlement Act. *See,* 4 C.J.S. *Appeal and Error*, § 680 ["It is within an appellate court's discretion to decide legal issues not suggested by the parties to an appeal."]; 5 C.J.S., *Appeal and Error*, § 831 [appellate court may affirm on any legal ground or theory apparent in the record even though not urged or argued by appellee]; *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) [an appellate court may affirm for any reason appearing in the record, but may reverse only for a reason raised to and rule upon by the trial court and argued on appeal.].

Gambling Cruise Act Relates Only to Territory Outside South Carolina Aboard Cruises to Nowhere And Does Not Undermine State Gambling Laws

Secondly, Appellant's argument concerning the Gambling Cruise Act lacks merit because that Act does not authorize gaming devices *in South Carolina*, but only speaks to territory *outside the State's jurisdiction.* Appellant's arguments that the State now possesses "authority" over gambling beyond the three mile limit are thus off the mark because such authority is limited solely to cruises to nowhere. In *Stardancer*, the

Supreme Court, addressed by analogy the very question at issue here – the impact of any legality in South Carolina of cruises to nowhere upon Act No. 125 of 1999 (§ 12-21-2710) and other state statutes relative to gambling. At the same time that the *Stardancer* Court found that none of South Carolina's gambling laws represented an "opting out" of the Johnson Act, it also recognized that§ 12-21-2710 and other state anti-gaming statutes were not undermined in any way by a legalization of cruises to nowhere. The Court carefully noted that

> [w]e have construed these statutes as they apply to "day cruises to nowhere," that is cruises on United States flag vessels operating out of a South Carolina port, making no intervening stops and permitting gambling only when the ship is beyond the State's territorial waters .... Our decision rests on the intent of the Legislature expressed in 1999 Act No. 125; *nothing in that Act is indicative of any intent to otherwise restrict the scope and application of laws criminalizing gambling activities in this State.*

347 S.C. at 386, 556 S.E.2d at 362 (emphasis added). In other words, cruises to nowhere involve a very narrow and specific issue concerning gambling aboard such vessels, outside the State's territory.

Thus, *Stardancer* emphasized what the Gambling Cruise Act subsequently stated expressly – that federal or state laws concerning cruises to nowhere do not alter, modify, undermine or circumvent state laws prohibiting video gaming and other games of chance *in South Carolina.* See § 3-11-400(B). Subsequently, in *Catawba Tribe*, the Supreme Court concluded that the "statewide ban" on video poker, and other video gaming mandated by § 12-21-2710 (as amended by Act No. 125) meant that the Tribe "may not currently allow the devices on its Reservation." 372 S.C. at 527, n. 7, 642 S.E.2d 755, n. 7.

Certainly, we may not assume that the Supreme Court in *Catawba Tribe* was unaware of its earlier decision in *Stardancer*. Both decisions examined Act No. 125 of 1999 in considerable detail. Again, the *Catawba Tribe* Court, obviously aware of the "cruise to nowhere" issue through its earlier *Stardancer* decision, certainly, could have – and undoubtedly would have – addressed that decision's impact or the subsequent Gambling Cruise Act's impact on the Tribe's gaming rights if it had thought either made any difference. Accordingly, *Stardancer* and *Catawba Tribe,* as well as the Gambling Cruise Act itself, make it altogether clear that the fact that "cruises to nowhere," are authorized by federal law and not made illegal by current South Carolina law, makes absolutely no difference with respect to state laws prohibiting gaming in South Carolina. It is thus inescapable, as *Catawba Tribe* concluded, that the Tribe *has no current right to video gaming on its Reservation.* The Gambling Cruise Act, rather than changing that conclusion, as the Tribe argues, instead reaffirms *Catawba Tribe's* holding that the Tribe possesses no such right.

In reality, however, Appellate makes the very argument that *Stardancer* rejected: that legalization of cruises to nowhere somehow undermines or modifies Act No. 125 of 1999, which served as the basis of the Supreme Court's conclusion in *Catawba Tribe* that the Tribe possesses no right to video gambling on its Reservation. But such a contention must inevitably fail. Just as *Stardancer* recognized that legalization of cruises to nowhere has no impact upon State laws prohibiting gambling, including video gambling, the Gambling Cruise Act does so as well. Section 3-11-400(B)(1) expressly states that the Gambling Cruise Act "must not be construed to (1) repeal or modify any other provision of law relating to gambling ... ."

Moreover, there is absolutely no conflict between the Gambling Cruise Act and Act No. 125 of 1999 which bans all video gaming devices throughout South Carolina. Each relates to a different subject – the latter, to cruises to nowhere outside South Carolina's territorial limits; the former, to a prohibition upon gambling devices within this State. If two statutes deal with different subjects, and may be construed where both can stand, the Court must do so. In that instance, the statutes are not in conflict. *In Interest of Shaw*, 274 S.C. 534, 265 S.E.2d 522 (1980). The *Catawba Tribe* decision relied upon § 12-21-2710 as controlling with respect to the Tribe's gaming rights *on the Reservation* and, as stated above, this statute expressly applies to "within this State." The Gambling Cruise Act thus cannot be deemed to create an exception *only for the Tribe* with respect to the statewide ban upon gambling devices, particularly in light of the Settlement Act's specific language "to the same extent the devices are authorized by state law." If Appellant is correct that the Tribe is "authorized" by the Gambling Cruise Act to have the same video gaming devices on its Reservation which are permitted on cruises to nowhere, surely, the General Assembly would have expressly noted such exception in its enactment of the Gambling Cruise Act. The Legislature's silence in this regard speaks volumes.

Catawba Settlement Has A "Geographic Component"

Further, the *Catawba Tribe* decision rejected Appellant's argument that the Settlement Agreement and Act does not contain a "geographic component." By recognizing that § 12-21-2710 constitutes a "statewide ban" on video gaming, and by applying such "statewide ban" to the Tribe on its Reservation, the Court read the Settlement Agreement as applying the same law to the Reservation (§ 12-21-2710) which

is applicable "within this State." This construction is especially telling, given the fact that the Court would have undoubtedly been aware of its earlier decision in *Stardancer*, as well as the fact that the Gambling Cruise Act was in force at the time the *Catawba Tribe* decision was rendered. While it is true that the Gambling Cruise Act was not formally argued to the Court, there can be little doubt that if such a legal theory had made a real difference in the outcome of the decision, the Supreme Court would have addressed it. Thus, Appellant's argument which is essentially that "gambling devices authorized anywhere, equals gambling devices authorized on the Reservation" is without merit.

Appellant also attempts to buttress its "authorized anywhere" argument by referencing a portion of the second sentence of § 27-16-110(G), which states that the Tribe "is subject to all taxes, license requirements, regulations, and fees governing electronic play devices provided by State law *except if the Reservation is located in a county or counties which prohibit the devices pursuant to state law [the Tribe] nonetheless must be permitted to operate the devices on the Reservation if the governing body of [the Tribe] so authorizes ....*" According to the Tribe's Brief, this sentence confirms that "geography is irrelevant: So long as the State has authorized gambling in a place over which the State has police power, the Catawba Nation may offer the identical gambling on its Reservation." *Appellant's Brief* at 14.

Appellant's analysis is far off the mark. It is a gigantic leap to compare the county where the Reservation is located which is, of course, in South Carolina, and the Gambling Cruise Act's scope, which is outside the State altogether. The purpose of this second sentence was in the context of a "county by county" referendum regarding video poker. The Tribe argued the very same second sentence of § 27-16-110(G) in the

Catawba Tribe case, and the Supreme Court there rejected that argument. The *Catawba Tribe* Court stated:

> [i]n the same year it enacted the State Act, the legislature also enacted a local option law permitting counties to hold an individual referendum to determine whether cash payouts for video gaming should remain legal. Act No. 164, Part II, § 19G, 1993 S.C. Acts 1138-1139, formerly codified at S.C. Code Ann. §§ 12-21-2806 and -2808 (repealed effective July 1, 2000). In light of this historical fact, the phrase in the second sentence of the State Act that refers to Respondent's right to operate video poker devices if "the Reservation is located in a county or counties which prohibit the devices" does not refer to a statewide ban on video poker devices; rather it refers to a county's ban on the devices. S. C. Code Ann. § 27-16-110(G). This history further demonstrates the legislature's clear intention to limit Respondent's right to operate video poker devices on its Reservation *to the same extent* state law authorizes the devices.

372 S.C. at 526, n. 6, 642 S.E.2d at 755, n. 6 (emphasis added). Thus, Appellant can take no comfort from this provision regarding a county-by-county referendum *which has now been repealed.* In the *Catawba Tribe* decision, the Supreme Court viewed this second sentence as irrelevant in interpreting the first sentence of § 27-16-110(G), which is at issue here. Such second sentence does not bestow a right to the Tribe any more today than when *Catawba Tribe* was decided. The Supreme Court certainly did not attribute a "non-geographic" intent to the sentence which dealt with counties of South Carolina, not territory outside South Carolina. Indeed the Court found, as discussed a clearly "geographic component."

The "statewide ban" on video gaming devices in South Carolina, imposed by Act No. 125 of 1999 (§ 12-21-2710), thus lies at the heart of the Supreme Court's ruling in *Catawba Tribe*. That ban forecloses the Tribe's arguments. The Court viewed the phrase "to the same extent the devices are authorized by state law," employed in the Settlement Agreement and Settlement Act, to bestow upon the Tribe the very same rights to video

gaming as John Q. Citizen possesses in South Carolina. Such conclusion is consistent with § 27-16-40 of the Act, which makes the Tribe subject to the State's civil and criminal jurisdiction as any other person, citizen, or land" and § 27-16-110 which deems the Tribe subject "to all laws, ordinances and regulations of South Carolina [which] govern the conduct of gambling ...." Moreover, by the express terms of the Settlement Act, the Tribe's rights are to the "same" or identical "extent" as state law permits or authorizes. Other citizens certainly cannot reasonably contend that the Gambling Cruise Act has authorized to them a right to operate illegal video games in South Carolina. Neither may the Tribe. The Supreme Court expressly rejected the argument that the Tribe's sovereign status prevented the State from applying its laws outlawing gambling to the Tribe. Now, the Tribe argues that the Gambling Cruise Act gives it a right superior to that given by the Act to other citizens. However, all that the Gambling Cruise Act confers are gambling rights *outside South Carolina waters* to the extent permitted by the locality from whose territorial limits the cruise to nowhere debarks. There can be no doubt, therefore, that, as *Catawba Tribe* held, Act No. 125 of 1999, banning all video gaming statewide in South Carolina, is applicable to the Tribe.

Gambling Cruise Act Expressly Preserves State Gambling Laws

The Gambling Cruise Act reaffirms the dichotomy between gambling outside of South Carolina aboard cruises to nowhere and gambling in the State through the use of the non-repealer provision contained in § 3-11-400(B). Accordingly, the Gambling Cruise Act simply means what it says: the Act authorizes gambling devices to be transported off shore, outside the territorial limits of South Carolina aboard such cruises where gaming may occur. However, consistent with *Stardancer*, as well as the Johnson

Act, the Gambling Cruise Act in no way undermines the scope of § 12-21-2710, nor the "statewide ban" of gambling devices which § 12-21-2710 imposes. Such "statewide ban" applies to the Tribe on its Reservation. If the Legislature had meant to legalize video gaming on the Tribe's Reservation when it enacted the Gambling Cruise Act, it would have expressly said so, rather than preserving all prohibitions of gaming *in South Carolina*. Yet, the Legislature, knowing full well the terms which had been agreed to in the Settlement Act, and fully cognizant of what it expressly prohibited in § 12-21-2710 – that all gaming devices are prohibited "within this State" – made no mention of the Tribe. No exception was made for the Tribe being entitled to video gaming on its Reservation because no such exception was intended. Such failure to carve out any exception is fatal to the Tribe's arguments.

Accordingly, the Gambling Cruise Act provides no comfort to the Tribe in its efforts to operate with impunity video gaming devices on its Reservation. *Stardancer* has already decided that Act No. 125's legalization of cruises to nowhere does not alter the State's ban of video gaming in South Carolina. Instead, the Gambling Cruise Act preserves state gambling laws. The fact that the Gambling Cruise Act allows only the transportation of gaming devices aboard a gambling vessel in order to gamble outside the territorial limits of South Carolina is hardly the "authorization" which § 27-16-110(G) of the Settlement Act requires for the Tribe to possess such devices on its Reservation.

As the Supreme Court emphasized in *Catawba Tribe*, in enacting the Settlement Act, "[t]he legislative intent was to *circumscribe* [the Tribe's] right to allow video poker devices on its Reservation to the *extent state law allowed the devices.*" 372 S.C. at 527, 642 S.E.2d at 755 (emphasis added). Like *Stardancer,* the Gambling Cruise Act

reaffirms South Carolina's laws prohibiting gambling and gambling devices *throughout South Carolina*. Such devices are, pursuant to § 12-21-2710, contraband *per* se. Thus, the Gambling Cruise Act cannot be used to alter the absolute ban on gaming devices in South Carolina. See, *State v. Four Video Slot Machines,* 317 S.C. 397, 453 S.E.2d 896 (1995) [exception for video game machines with free play feature does not alter general prohibition against slot machines]. If the Tribe wishes to take advantage of the Gambling Cruise Act, and operate a cruise to nowhere, it certainly may do so by seeking authorization from a coastal community which permits such cruises. But it cannot transform the limited right to transport gaming devices outside of South Carolina, which has been bestowed by the Johnson Act, and applied in *Stardancer*, to operate a day cruise to nowhere *outside South Carolina*, into a general right to gaming devices on its Reservation *in South Carolina*.

Statewide Ban on Video Gambling Post-*Catawba Tribe*

Recently, our Supreme Court reaffirmed South Carolina's "statewide ban" on video gambling. The Court stated that "Section 12-21-2710 makes it unlawful to possess illegal gambling machines, even if they are not fully operational." *Union County Sheriff's Office v. Henderson, supra. See also, Town of Mount Pleasant v. Chimento*, 737 S.E.2d 830, 848, 2012 WL 5870814 (2012) (Slip Op. at 17) (Hearn, J., dissenting) ("The prohibition of video poker is found in Section 12-21-2710 of the South Carolina Code (2000)" and is "a completely separate section (and title) ...."). According to the Supreme Court in *Henderson* and *Chimento*, the statewide ban on video gaming in South Carolina is alive and well throughout this State. Thus, the "same extent the devices are authorized by state law" language contained in § 27-16-110(G) of the Settlement Act means the very

same thing today as it did when the Supreme Court construed such language in 2007 in *Catawba Tribe*. As *Catawba Tribe* correctly held, it is, therefore, the "statewide ban" on video gaming which does "not currently allow the [Tribe] the [video gaming] devices on it Reservation." The Gambling Cruise Act, now raised by Appellant long after *Catawba Tribe* was decided (but on the books when it was decided), and which only recognizes the Johnson Act's authorization of gaming outside a state's territory, reinforces this statewide ban upon gaming in South Carolina. Such a recognition cannot be deemed to bestow upon the Tribe the right now to have video gaming on its Reservation.

Seminole Tribe Case

Particularly instructive is a federal decision, *Seminole Tribe of Fla. v. State of Fla.*, 1993 WL 475999 (S.D. Fla. 1993). This case involved application of the Indian Gaming Regulatory Act (IGRA).[2] The Seminole Tribe argued there that Florida permitted certain Class III gaming activities, including "cruises to nowhere," and thus the Tribe proposed to operate these same games on Tribal lands. Under IGRA, a conclusion that the State permitted such games could have resulted in the State being required to negotiate with the Tribe for purposes of providing such gaming on the Indian lands.[3]

With respect to the Seminoles' contention regarding "cruises to nowhere," the Court squarely rejected the Tribe's argument. Florida law prohibited "the possession of gambling paraphernalia." In the opinion of the federal court, Florida's authorization of "cruises to nowhere" in no way undermined the State's prohibition against gaming, nor

[2] The Indian Gaming Regulatory Act (IGRA) [25 U.S.C.A. §§ 2701-2721] has as its central purpose that of providing "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self sufficiency and strong tribal governments." § 2702(1).

[3] As *Catawba Tribe* points out, the Tribe waived its right to be governed by IGRA in the Settlement Agreement, choosing instead "to be governed by the terms of the Settlement Agreement and the State Act with regard to games of chance." 372 S.C. at 524, 642 S.E.2d at 753.

constituted an authorization of gaming to the Seminoles. The Court analyzed the issue as follows:

> Each case interpreting the IGRA which found permission of a Class III gaming activity presented some form of explicit legislative approval of the activity *within the State's territory.* The Tribe's theory would seem to place an affirmative duty on a state to eradicate means by which its citizens could legally gamble in other jurisdictions in order to demonstrate a public policy prohibiting Class III activities ... . *For the same reason, the Tribe's argument that the State's continued allowance of these cruises to use its ports must fail, especially in light of the fact that no gambling occurs within the State's boundaries. Thus, even when viewing the evidence before the Court in the light most favorable to the Tribe, we conclude that these cruises by foreign flag vessels cannot be fairly said to constitute permission of casino gambling by the State within the State and within the ambit of IGRA.*

Opinion, at page 14. (emphasis added). The Court thus found that authorization of "cruises to nowhere" by Florida did not constitute a "permission" to have casino gambling "within the State."

Such analysis governs here. Certainly, if, in *Seminole Tribe*, the Court was unwilling to construe the narrow exception provided by cruises to nowhere in the Indians' favor under IGRA, surely the Catawbas' similar argument here also must fail. This is particularly so in light of the fact that the Supreme Court of South Carolina has deemed both § 27-16-110(G) of the Settlement Act, as well as § 12-21-2710, to be unambiguous and thus not subject to the rules of statutory construction. In this instance, the Appellant does not operate under the far more generous IGRA, but is to be treated similarly to all persons in South Carolina for purposes of video gambling. No other person possesses the right to possess or operate gambling devices as such constitute contraband *per se. SLED v. Speedmaster*, 397 S.C. 94, 100, 723 S.E.2d 809, 812 (Ct.

App.: 2011) ["SLED is correct that § 12-21-2710 does not specifically require that an illegal gaming device be used for gambling."].

The bottom line is that the Tribe ignores the clear difference between the very broad "statewide ban" upon video gaming, established by Act No. 125 of 1999 (§ 12-21-2710), and recognized by *Catawba Tribe*, and the very narrow legality under the federal Johnson Act of cruises to nowhere to a point outside South Carolina, recognized by *Stardancer*. The two deal with entirely different matters. Of course, it is true that video gaming devices sit aboard the cruise ships in South Carolina ports. But those gaming devices are useless, because they are inoperable, until the State's three mile limit has been passed. See § 3-11-400(B)(3) and (5). Such devices cannot be played or operated until they are out of the State. Regardless, the Gambling Cruise Act cannot serve to create a right of the Tribe to operate video gaming on the Reservation. As the Court stated in *Seminole Tribe,* authorization of cruises to nowhere "cannot be fairly said to constitute permission of casino gambling by the State within the State."

Johnson Act's Extension of State Police Power

For this reason, it cannot be credibly argued that Appellant has a right to gaming devices on its Reservation because the Johnson Act amendments "extended the reach of state police power beyond state territorial waters; that provision permits states to change the content of federal law with respect to cruises to nowhere." *Casino Ventures v. Stewart*, 183 F.3d, 307, 311-312 (4th Cir. 1999), cert. denied. 528 U.S. 1077, 120 S.Ct. 793, 145 L.Ed.2d 669 (2000). As already discussed, *Stardancer* rejected any view that the amendments to the Johnson Act affected gaming laws inside the State's limits. Notwithstanding the extension of the state's police power in order to ban cruises to

nowhere if a State so desires, *such extension of the police power relates only to cruises to nowhere and nothing else*. Simply, the State is permitted to opt out of the Johnson Act and ban such cruises outside its territorial limit if it so desires. In *Stardancer*, the Supreme Court carefully distinguished between gambling aboard cruises to nowhere beyond the State's territorial limits, and gambling within South Carolina. The Court thus made clear that South Carolina law does not "restrict the scope and application of laws criminalizing gambling activities *in this State."* 347 S.C. at 386, 556 S.E.2d at 362 (emphasis added). Cases such as *Florida Dept. of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So.2d 954 (Fla. 2005), make this same point, rejecting any argument that travel aboard cruises to nowhere is exclusively "intrastate" commerce. The bottom line is that Appellant's argument that the State is now given authority to regulate gambling beyond the three mile limit is simply irrelevant.

Video gaming is currently banned in South Carolina and the Tribe's reliance upon legislation regulating "cruises to nowhere" does not lift, alter, or modify that ban. If it did, everyone in South Carolina could take advantage of the Gambling Cruise Act and could ignore the prohibition upon video gaming in the State. As the Court held in *Catawba Tribe,* the sovereignty of the Tribe is not a basis to disregard the laws prohibiting gaming devices in South Carolina.

Catawba Tribe tied the Settlement Agreement's language concerning video gaming on the Tribe's Reservation to the statewide ban upon video gaming devices *in South Carolina,* not whether they are made legal on the high seas by the federal Johnson Act. And, as our Supreme Court emphasized in *Stardancer*, nothing in Act No. 125 of 1999, making video poker devices and other video gaming devices contraband *per se*, is

"indicative of any intent to otherwise restrict the scope and application of laws criminalizing gambling activities *in this State*." 347 S.C. at 386, 556 S.E.2d at 362. (emphasis added). The Gambling Cruise Act of 2005, as well as the Settlement Agreement with the Tribe – which makes all laws related to gambling equally applicable to the Tribe – are in lockstep with *Stardancer's* words.

CONCLUSION

Appellant's interpretation of the Settlement Agreement is without legal foundation and is directly contradictory to the Supreme Court's decision in *Catawba Tribe*. Based upon the inapplicable Gambling Cruise Act, the Tribe, in essence, seeks to cast aside the Supreme Court's 2007 decision. Such attempt is foreclosed by principles of *res judicata* and/or collateral estoppel. Moreover, the Appellant's goal is to obtain from this Court a right which no one else in the State has – the right to operate video gaming within the territorial limits of South Carolina, on the Tribe's Reservation. *Catawba Tribe* rejected this contention. And, clearly, the Gambling Cruise Act affords no such right. Indeed, it expressly denies such right. The Gambling Cruise Act is not an "authorization" of video gaming under the Catawba Settlement. Moreover, the fact that the State is permitted to exercise its police power beyond the three mile limit is irrelevant. Such police power relates to cruises to nowhere and nothing else. The 2007 *Catawba Tribe* decision is based upon the "statewide ban" on video gaming "within the State" in South Carolina, imposed by Act No. 125 of 1999. Such ban remains in place and is not altered in any way, shape, or form by the Gambling Cruise Act, which forbids the operation of gaming devices in South Carolina waters.

Thus, in no way may the Gambling Cruise Act be transformed into a general right possessed by the Tribe to have video gaming on its Reservation pursuant to the Settlement Agreement's terms – providing that the Tribe may have video gaming devices on its Reservation to the "same extent such devices are authorized by state law." *Catawba Tribe* interprets these words as tied to the ban on video gambling in South Carolina, thereby defeating Plaintiff's "non-geographic component" argument in construing the Settlement Act. The Settlement Agreement and Congressional ratification thereof is clear: all gaming laws in South Carolina apply equally to the Tribe. State law bans video gaming throughout South Carolina. As the Court in *Seminole Tribe* correctly held, authorization of cruises to nowhere "cannot be fairly said to constitute permission of casino gambling by the State within the State." Should the Tribe wish to take advantage of the Gambling Cruise Act it is, of course, free to seek to operate a "cruise to nowhere" off the South Carolina coast. But state law forbids the Tribe to operate video gaming on its Reservation.

For all the foregoing reasons, the decision of the Circuit Court should be affirmed.

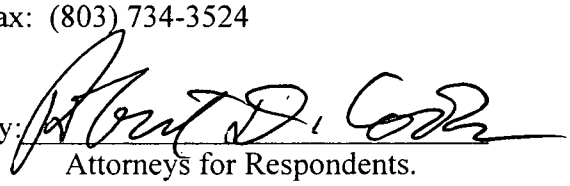
Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT D. COOK
Deputy Attorney General
SC Bar No.: 1373
Email: AGRCOOK@scag.gov

C. HAVIRD JONES, JR.
Assistant Deputy Attorney General
SC Bar No.: 3178
Email: AGSJONES@scag.gov

1000 Assembly Street
Rembert C. Dennis Building
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3970
Fax: (803) 734-3524

By: 
Attorneys for Respondents.

April 23, 2013.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2012-CP-40-00626

The Catawba Indian Nation a/k/a
The Catawba Indian Nation of South Carolina a/k/a
The Catawba Indian Tribe of South Carolina Appellant,

vs.

State of South Carolina and Mark Keel, in
his official capacity as Chief of the South
Carolina Law Enforcement Division Respondents.

Appellate Case No. 2012-212118

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General
ROBERT D. COOK
Deputy Attorney General
SC Bar No.: 1373
C. HAVIRD JONES, JR.
Assistant Deputy Attorney General
SC Bar No.: 3178
1000 Assembly Street
Rembert C. Dennis Building
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3970
Fax: (803) 734-3524

By: _____
Attorneys for Respondents.

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PROOF OF SERVICE

I certify that I have, this 23rd day of April, 2013, served the Final Brief of Respondents by depositing a copy of the same in the United States Mail, postage prepaid, and addressed as follows:

James W. Fayssoux, Jr., Esquire
Paul S. Landis, Esquire
Fayssoux Law Firm, PA
209 E. Washington Street
Greenville, South Carolina 29601

William W. Wilkins, Jr., Esquire
Nexsen Pruet, LLC
P. O. Drawer 10648
Greenville, South Carolina 29603

Gregory P. Harris, Esquire
Harris & Gasser, LLC
1529 Laurel Street
Columbia, South Carolina 29201

Susan H. Ballington

Office of the Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-3970