

IN THE
INDIANA COURT OF APPEALS

Case No. 31A01-0711-CV-00530

CAESARS RIVERBOAT CASINO, LLC,)	Interlocutory Appeal,
)	from the Harrison Circuit Court
Appellant,)	
)	Case No. 31C01-0701-CC-005
v.)	
)	Hon. H. Lloyd Whitis,
GENEVIEVE M. KEPHART,)	Judge
)	
Appellee.)	

BRIEF OF APPELLANT
CAESARS RIVERBOAT CASINO, LLC

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STATEMENT OF THE ISSUE

1. Given this court's holding in *Stulajter v. Harrah's Ind. Corp.*, 808 N.E.2d 746, 747 (Ind. Ct. App. 2004), can a plaintiff successfully recover her gambling losses from a casino on the theory that the casino should have prevented her from gambling and stopped advertising to her, even though she neither asked the casino to stop marketing to her nor took the steps necessary to place herself on the voluntary exclusion list sponsored by the Indiana Gaming Commission.

STATEMENT OF THE CASE

After being sued for failing to pay her gambling debts, Appellee Genevieve Kephart ("Kephart") filed a Counterclaim asserting that she is a compulsive gambler and asking the trial court to hold Appellant Caesars Riverboat Casino LLC ("Caesars") liable for her own gambling losses. Kephart contends that, despite this Court's holding in *Stulajter* that gamblers who place themselves on a voluntary exclusion list do not have a private cause of action against casinos for failing to exclude and cease marketing to them, she has a cause of action against Caesars even though she never placed herself on the list.

Caesars filed a motion to dismiss Kephart's Counterclaim under Indiana Trial Rule 12(B)(6) for failure to state a claim, arguing that this Court has made clear that compulsive gamblers do not have a private cause of action against casinos for their gambling losses. After oral argument, the trial court denied that

motion on September 26, 2007, without stating its reasoning, and Caesars requested an interlocutory appeal. On December 18, 2007, this Court granted that request.

STATEMENT OF THE FACTS

Ind. Code § 4-33-4-3(c) (2008), implemented in 68 Ind. Admin. Code Article 6 (2007), allows a person to place herself on a list of people to be excluded from Indiana casinos. Casinos are to make all efforts to prevent that person from gambling and to cease marketing to her, and they can be sanctioned by the Indiana Gaming Commission if they fail to do so. Kephart refused to pay her \$125,000 gambling debt, and only after being sued for recovery has claimed that she is a compulsive gambler. Although she admits that she is not on the voluntary self-exclusion list maintained by the Indiana Gaming Commission, she claims that Caesars should be liable for her gambling losses because it failed to exclude her from the casino, enticed her to gamble, and extended credit to her. Appellant's App. pp. 70-73, Counterclaim ¶¶ 5-8. Kephart also seeks to recover for past, present, and future mental, emotional, and psychological damages; destroyed and/or strained relationships with family members and friends; doctor, hospital, pharmaceutical, or other medical expenses; loss of quality and enjoyment of life; and other expenses not yet known to her. *Id.* pp. 26-27, ¶ 10. Caesars does not accept the accuracy of the facts alleged by Kephart, but recognizes that, on a

motion to dismiss, the Court must accept those allegations as true. *See Morgan Asset Holding Corp. v. CoBank, ACB*, 736 N.E.2d 1268, 1271 (Ind. Ct. App. 2000).

SUMMARY OF THE ARGUMENT

Only after being sued for failure to pay her gambling debt, Kephart counterclaimed, and for the first time alleged that she is a compulsive gambler and that Caesars should be liable for her gambling losses and other related damages. This Court has previously held in *Stulajter* that a compulsive gambler does not have a claim against a casino for his losses, and therefore Kephart has no claim here. Moreover, the comprehensive regulation of casino activities, including the procedures relating to compulsive gamblers, by the gaming commission provides an additional basis for dismissing Kephart's claim. Unable to bring her claim under current Indiana law, Kephart has admitted that she now asks for the creation of a new private cause of action. Because Kephart has no cause of action either at common law or under the state voluntary exclusion regulations, and because creating a new cause of action would be contrary to controlling authority, the intent of the legislature in enacting the gaming statutes, and overarching principles of public policy, Kephart's claim should be dismissed for failure to state a claim under Rule 12(B)(6).

STANDARD OF REVIEW

This Court reviews a trial court's decision to deny a motion to dismiss under Rule 12(B)(6) for failure to state a claim under a *de novo* standard. *See Sims v. Beamer*, 757 N.E.2d 1021, 1024 (Ind. Ct. App. 2001). Under this standard, the Court should dismiss Kephart's Counterclaim if the facts alleged would not support the requested relief even if they were true. *See Randolph v. Methodist Hosps., Inc.*, 793 N.E.2d 231, 234 (Ind. Ct. App. 2003).¹

ARGUMENT

I. INDIANA LAW DOES NOT AFFORD KEPHART A PRIVATE CAUSE OF ACTION AGAINST CAESARS

Kephart's claim is squarely foreclosed by this Court's opinion in *Stulajter v. Harrah's Ind. Corp.*, 808 N.E.2d 746, 747 (Ind. Ct. App. 2004), which held that a compulsive gambler has no claim to recover his gambling losses from a casino, even when he is on a self-exclusion list and the casino continues to advertise to him. Indeed, every court that has considered whether compulsive gamblers can recover their losses in similar circumstances has answered the question in the negative.² Moreover, administrative law principles encouraging deference to

¹ This Court has recently suggested in *dicta* that when a plaintiff has no private right of action under a statute, it may be more appropriate to dismiss a case for lack of subject matter jurisdiction under Trial Rule 12(B)(1) than for failure to state a claim under Trial Rule 12(B)(6). *Kimrey v. Donahue*, 861 N.E.2d 379, 382 at n6 (Ind. Ct. App. 2007). If the Court believes that Rule 12(B)(1) applies to this case, it should dismiss Kephart's claims under that rule.

agencies dictate that gaming enforcement authority should remain with the Gaming Commission as the legislature intended, and a new private cause of action should not be established by the courts.

Though its formulation does not control this court's review, *see Budden v. Bd. of Sch. Comm'rs*, 698 N.E.2d 1157, 1166 (Ind. 1998), the trial court framed the issue for interlocutory appeal as: "When a casino knows that an individual is an addicted gambler, does it have a duty to refrain from attempting to induce such person to frequent the casino in an effort to gain money from her gambling losses?" Appellant's App. p. 119, Order p. 2. But this question does not squarely address the grounds for Caesars' motion to dismiss. The precise issue presented is whether an alleged compulsive gambler like Kephart has a cause of action to recover her gambling losses against a casino that allegedly enticed her to gamble, despite this Court's holding in *Stulajter* that even a compulsive gambler who has placed himself on a voluntary self-exclusion list cannot recover his gambling

² Many gamblers have sued casinos seeking a return of their losses, often alleging that their losses were caused by a compulsion or intoxication. No court has ever granted relief on such a claim, and most have dismissed the claims on the pleadings. *See Stulajter*, 808 N.E.2d 746; *see also Brown v. Argosy Gaming Co.*, 384 F.3d 413 (7th Cir. 2004); *Williams v. Aztar Ind. Gaming Corp.*, 351 F.3d 294 (7th Cir. 2003); *Merrill v. Trump Ind., Inc.*, 320 F.3d 729 (7th Cir. 2003); *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291 (3d Cir. 1995); *Logan v. Ameristar Casino Council Bluffs, Inc.*, 185 F. Supp. 2d 1021 (S.D. Iowa 2002); *Rahmani v. Resorts Int'l Hotel, Inc.*, 20 F. Supp. 2d 932 (E.D. Va. 1998), *aff'd*, 182 F.3d 909 (4th Cir. 1999); *Harrah's Club v. Van Blitter*, No. R-85-267 BRT, R-86-21 BRT, 1988 U.S. Dist. LEXIS 18348 (D. Nev. Feb. 16, 1988).

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framework governing the voluntary exclusion program was policed by the Indiana Gaming Commission and did not create a private right of action. *Id.* at 749. If it failed to abide by the regulations governing compulsive gamblers, the casino “must answer to the Commission, not a private citizen claiming harm from the alleged violation.” *Id.*

Kephart’s claim here is even less persuasive than *Stulajter*’s unsuccessful claim, because Kephart does not even allege that she placed herself on a voluntary exclusion list—in fact, it is clear from her Counterclaim that she never did. *See* Appellant’s App. p. 72, Counterclaim ¶ 7(c) (claiming that Caesars should have “remove[d] her from the premises upon learning of her presence, just as it does for those who place themselves on the self-exclusion list”). Even if she had made the request, she still would have no claim against Caesars for failing to abide by its statutory obligations, *Stulajter*, 808 N.E.2d at 749. Since a casino owes no special legal duty to a gambler on the exclusion list, Caesars certainly did not owe such a duty to Kephart, who has never even asked to be excluded. Thus, even though, under Indiana law, a casino owes no special legal duty to self-excluded gamblers, Kephart asks this Court to find that “Caesars had a duty to protect [her] from itself.” Appellant’s App. p. 72, Counterclaim ¶ 6. That conclusion is squarely contradicted by the *Stulajter* decision.

In the trial court, Kephart attempted to distinguish *Stulajter*, which held that there is not a private cause of action in Indiana “to protect compulsive gamblers from themselves,” by claiming that the court should find that a casino has a duty “to protect compulsive gamblers from *itself*.” Appellant’s App. p. 72, Counterclaim ¶ 6. This play on words is merely an attempt to avoid a holding that is directly on point. Whether the claimed duty is described as an obligation to protect a gambler from her own efforts to gamble or a duty to refrain from offering gambling to her, *Stulajter* makes clear that casinos are not liable for allowing compulsive gamblers to gamble.

Kephart has also attempted to avoid the full impact of *Stulajter* by claiming that “[i]t is Caesars’ *enticement* of Kephart to come to the casino that is the basis for her claim. She has claimed that the fact she was a compulsive gambler was well-known by the casino, which contacted her.” Appellant’s App. p. 89, Kephart’s Response to Motion to Dismiss p. 9. She frames the question at issue as “can [a casino] be held liable for taking affirmative steps to persuade the patron to gamble?” Appellant’s App. p. 90, Kephart Response p. 10. Once again, this is precisely the claim that was rejected by this Court in *Stulajter*. Just like Kephart, Mr. Stulajter claimed that Harrah’s enticed him to gamble by sending him marketing materials, though Stulajter also claimed that he had placed himself on the casino’s voluntary self-exclusion list. *Stulajter*, 808 N.E.2d at 747. Since

Stulajter had no claim against a casino for “enticing” him to gamble, neither does Kephart.

Kephart has further attempted to distinguish *Stulajter* by alleging that Caesars knew she was a compulsive gambler. Appellant’s App. p. 90, Kephart’s Response p. 10. This attempt fails as well because *Stulajter* also claimed that Harrah’s knew he was a compulsive gambler who wished to be excluded from the casino. *Stulajter*, 808 N.E.2d at 747. That assertion did not save *Stulajter*’s claim against Harrah’s, and it should not save Kephart’s claim against Caesars in this case.

Even before the *Stulajter* decision, the Seventh Circuit had reached the same conclusion as this Court. In *Merrill*, the court held that a casino could not be liable for failing to prevent Mark Merrill, who claimed he was a compulsive gambler and explicitly asked the casino to exclude him from the premises, from gambling. Merrill argued essentially what Kephart argues here: that “even in the absence of a statutory duty, [the casino] owed him a duty of care under common law.” 320 F.3d at 732. Judge Evans wrote for the court that

[t]he closest analogy to Merrill’s situation is that of a tavern’s liability to exercise reasonable care to protect its patrons. In Indiana, a tavern proprietor serving alcohol can be held liable, under certain conditions, if an intoxicated patron injures another patron or a third party. But a patron who drives while intoxicated, causing his own injuries, cannot recover from the tavern that served him alcohol.

Id. at 733 (internal citations omitted). Thus, a compulsive gambler causes her own losses and cannot recover those losses from the casino who marketed to her and allowed her to gamble. The court recognized that “[a]t most, the rules impose upon [a casino] a duty to the state through the gaming commission, not to [a gambler].” *Id.* at 732. See also *Brown v. Argosy Gaming Co., L.P.*, 384 F.3d 413, 416 (7th Cir. 2004) (“Indiana’s gaming statutes and regulations do not create a private cause of action to protect compulsive gamblers from themselves.”) (citing *Stulajter and Merrill*); *Williams v. Aztar Ind. Gaming Corp.*, 351 F.3d 294, 297 (7th Cir. 2003) (“we held [in *Merrill*] that Indiana law does not impose a duty of care on casino operators to protect gambling addicts from their own addictive and injurious behavior”).

The state of the law after *Stulajter* is clear: Caesars is not liable for Kephart’s gambling losses, even if it advertised to her when it was aware she was a compulsive gambler. Kephart’s claim can only go forward if this Court not only ignores the holding in *Stulajter*, but holds for the first time that Indiana law imposes liability on a casino for failing to exclude and stop marketing to a gambler *who is not even on the self-exclusion list*. Even Kephart has conceded that ruling in Caesars’ favor would be consistent with Indiana law. Appellant’s App. p. 93, Kephart’s Response p. 13.

B. Indiana's Gaming Laws Prevent Private Causes of Action by Compulsive Gamblers Attempting to Recover Their Gambling Losses from Casinos

Because *Stulajter* explicitly prohibits a private cause of action under the Indiana gaming statutes and regulations, Kephart asked the trial court to create new law outside the regulations and "recognize a duty and protect its citizens and visitors by imposing appropriate restrictions on its casinos..." Appellant's App. p. 93, Kephart's Response p. 13. But current Indiana law already protects its citizens and visitors through the state's gaming statutes and Gaming Commission regulations. The comprehensive structure of these laws and regulations makes clear that the legislature intended the Indiana Gaming Commission to hold sole responsibility for ensuring the integrity of casino operations, and that it has adequate authority to do so. This forecloses any private cause of action by compulsive gamblers against casinos for their losses.

When Indiana legalized riverboat gaming, it charged the Gaming Commission with "administering, regulating, and enforcing" casino gaming. Indiana Code § 4-33-4-1(a); *see also* I.C. § 4-33-3-1 (creation of Gaming Commission). The Commission has responded by promulgating detailed regulations governing all aspects of casino gaming. *See* 68 Indiana Administrative Code 1-1-1, *et seq.* The Commission can enforce these regulations itself, and may suspend, revoke, or restrict the license of any casino. I.C. § 4-33-4-8 (statutory

authority to revoke, suspend, restrict or place conditions on gaming licenses); *see* 68 I.A.C. 13-1-21(b)(1) (regulatory authority to revoke and suspend gaming licenses). The Commission can also sanction casinos with significant fines. *See* I.C. § 4-33-4-8 (statutory authority to impose civil fines); 68 I.A.C. 13-1-21(b)(3)-(5) (regulatory authority to impose civil fines). Finally, the Commission may take “any other action” it deems necessary “to ensure compliance” with Indiana’s gaming laws. *See* 68 I.A.C. 13-1-21(b)(6). The regulations do not create an express private cause of action, and as this Court held in *Stulajter*, it is not reasonable to create a private right of action for compulsive gamblers given the extent of gambling regulation in Indiana and the state’s comprehensive regulatory enforcement scheme. 808 N.E.2d at 749.

“[A] private cause of action will not be found where the legislature has expressly provided for enforcement of the statute.” *Stulajter*, 808 N.E.2d at 748 (citing cases). Here, “[t]he Commission is charged with providing ‘for the prevention of practices detrimental to the public interest and providing for the best interests of riverboat gambling.’” *Id.* at 748 (citing I.C. § 4-33-4-2(3)). Given the comprehensive regulatory power allocated by the legislature, “[t]he duty to determine the requirements of and enforce the voluntary exclusion program rests with the Commission.” *Id.* at 749 (citing I.C. § 4-33-4-3(a)(5); I.C. § 4-33-4-3(c)).

As this Court concluded, “proper enforcement . . . is through the Commission and not a private cause of action.” *Id.* at 749.

Indeed, each allegation by Kephart has already been addressed by the Gaming Commission, precluding a private cause of action. Kephart alleges that Caesars knew she was a compulsive gambler and breached a duty of care to her by (1) allowing her access to the casino, Appellant’s App. p. 72, Counterclaim ¶¶ 7 b-d; (2) enticing her to gamble, *Id.* p. 73, ¶ 8a; and (3) extending credit on an account in which it knew, or should have known, were insufficient funds, *Id.*, p. 73, ¶ 8b.

First, allowing a compulsive gambler access to a casino is thoroughly covered in the voluntary exclusion regulations. Every casino must have a process for identifying self-excluded persons, notifying “enforcement agents and security and surveillance” when a self-excluded person is detected, and must refuse wagers from any individual known to be a self-excluded person. 68 I.A.C. 6-3-4.

Likewise, directly marketing to compulsive gamblers, or “enticement” as Kephart refers to it, is well covered by the voluntary exclusion program. The statute states that “an owner of a facility under the jurisdiction of the commission shall make all reasonable attempts as determined by the commission to cease all direct marketing efforts to a person participating in the program.” I.C. § 4-33-4-3(c)(5). “Enticement” is further regulated in relation to complimentary chip and token distribution programs. 68 I.A.C. 1-12-1 *et seq.*

Finally, the Gaming Commission also comprehensively addresses the extension of credit to patrons. 68 I.A.C. 16. The Commission is charged with ensuring that extensions of credit are “conducted with integrity” and in accordance with the regulations, 68 I.A.C. 16-1-2(a)(3), and all procedures for extending credit must be approved by the Commission, 68 I.A.C. 16-1-3. The extension of credit to compulsive gamblers is also addressed in the voluntary exclusion regulations. I.C. § 4-33-4-3(c)(6) (“[A]n owner of a facility under the jurisdiction of the commission may not cash the check of a person participating in the program or extend credit to the person in any manner”). Casinos must also “[e]nsure that voluntarily excluded persons do not receive check cashing privileges or extensions of credit.” 68 I.A.C. 6-3-4 (b)(5).

The legislature has also made clear that the ultimate duty to gamble responsibly lies with each individual gambler. The very first section of the voluntary exclusion statute states that “a person who participates in the voluntary exclusion program *agrees to refrain from entering a riverboat or other facility under the jurisdiction of the commission.*” I.C. § 4-33-4-3(c)(1) (emphasis added). And the implementing regulations state that a voluntarily excluded individual has the ongoing obligation to “refrain from entering” casinos, and must “notify the commission if direct mailing items are received addressed to a voluntarily excluded person.” 68 I.A.C. 6-3-2(f). The actual form used by a gambler to

request voluntary exclusion includes a series of questions, including (1) "Do you understand that, if you are placed on the Voluntary Exclusion List, it will be your responsibility to stay out of all Indiana casinos?" and (2) "Do you understand that, according to the terms of this request form, it is not the responsibility of the various casino companies to stop you from entering an Indiana casino?" See Request for Voluntary Exclusion, State Form 51803 (6-04), available at <http://www.in.gov/gaming/vep/pdfs/vep-application-sample.pdf> (last visited April 18, 2008). Any gambler attempting to put herself on the voluntary exclusion list is thus informed that it is her responsibility, and not the casinos, to keep her out of casinos.

Finally, and perhaps most obviously, the voluntary exclusion regulations do not provide for a private cause of action on their face. This alone should be enough to prevent the Court from finding that Kephart has a private right of action. As this Court recognized in *Stulajter*, "[i]f the legislature intended to create a right to a private cause of action under the Commission rules for riverboat gambling, it could have included such a provision. Because it did not do so, we conclude that *Stulajter* does not have the right to bring a private cause of action." *Id.* at 749.

C. Public Policy Prevents Private Causes of Action by Compulsive Gamblers Attempting to Recover Their Gambling Losses from Casinos

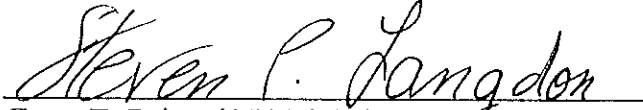
In addition to being foreclosed by this Court's holding in *Stulajter* and the Indiana gaming statutes and regulations, Kephart's Simmons contradicts sound public policy. Allowing Kephart to bring suit against Caesars would have the perverse result of encouraging compulsive gamblers *not* to participate in the voluntary exclusion program. If Kephart's Simmons stands, no person would ever avail herself of the protections of the voluntary exclusion regulations, because if she excludes herself, she cannot recover her losses (under *Stulajter*), but if she does not put herself on the list, she can always assert that she is a compulsive gambler at a later time (presumably after she loses money) and avoid any responsibility for her losses—essentially gambling risk-free.

CONCLUSION

For the foregoing reasons, Caesars respectfully requests the Court to reverse the Harrison County Circuit Court and grant its Motion to Dismiss under Rule 12(B)(6).

Respectfully submitted,

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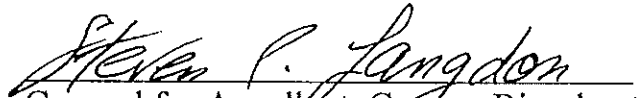
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The undersigned hereby certifies that a copy of the foregoing has been served, by depositing same in the United States Mail with sufficient postage prepaid, this 24th day of April, 2008, upon:

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