IN THE
INDIANA COURT OF APPEALS

Case No. 31A01-0711-CV-530

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

APPELLEE'S
PETITION FOR REHEARING

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QUESTION PRESENTED ON REHEARING

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? Did the Court of Appeals err when it ruled that there is no such duty?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page Number(s)**

Statutes, Rules and Regulations

Books and Treatises

Other Sources and Authorities

STATEMENT OF ISSUES

I. By its ruling that Caesars Riverboat Casino, LLC ("Caesars") has no duty to an addicted gambler, Genevieve M. Kephart ("Kephart"), the Court of Appeals is not just giving immunity for what would otherwise be a tort, it is also countenancing the intentional infliction of harm to a person with a known malady which makes that person more susceptible to the wrongful acts of the casino.

II. The Court of Appeals based its Opinion on statements which depart from the facts in the record. By wrongly characterizing the conduct of the casino as mere "marketing" (a common business term with positive connotations), when the facts pled are much more sinister, it is reason to grant a rehearing. The majority is bound by the facts in the record.

III. By ruling that Caesars has immunity, the Court creates a class of persons which receives disparate treatment, and thus violates equal protection guarantees of the Constitution of both Indiana and the United States. It also violates the maxim that one shall not profit by his own wrong.

ARGUMENT

When the majority concluded that a casino has no common law duty obligating it to refrain from enticing people it knows to be compulsive gamblers, it gave its imprimatur to predatory gambling; *i.e.*, the practice of using gambling to prey on a person with a mental disorder and illness for profit. In making this ruling, there were mistakes of law, which Kephart respectfully points out, and asks this Court to reconsider its ruling.

The reasons the Petitioner Kephart believes a rehearing is necessary are as follows:

I. The Law Does Not Allow the Intentional Infliction of Harm to Another, Especially If the Person Is Impaired. Pathological gambling is not a "weakness" which can be compared to a mere lack of discipline or self-control. Pathological gambling is a form of illness which results from changes in brain chemistry. It has been recognized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, 671-674, §312.31 (4th rev. ed. 2000) (hereinafter "DSM-IV-TR").

The fact that a casino exploited an impaired person must be kept in mind when considering the serious tests to determine if a duty exists under negligence:

(A) Relationship Between the Parties. The majority seems to draw a line between physical and other harm. However, this demarcation is contrary to law. In fact, *Shuamber v. Henderson,* 579 N.E. 2d 452, 456 (Ind. 1991) stated that:

> [w]hen. . . a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person, . . . such a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any **physical** injury to the plaintiff (emphasis supplied).

There is no question the parties had a relationship, or that Caesars took advantage of that relationship. Comparison of Kephart to a compulsive shopper fails. Compulsive shopping is not recognized by medical authority as a mental disorder. Also, a department store customer does not walk away owing $125,000[1], plus treble damages and attorneys fees, after one night among the clothing racks.

(B) Foreseeability. In its Opinion, the majority acknowledged that "[w]ithout more, [the cases cited by Kephart] might support finding reasonable foreseeability of harm on the part of Caesars" (Slip Op., p. 10). However, citing to "bilateral foreseeability," the Opinion states that Kephart "voluntarily" placed herself in the way of foreseeable harm. If that were the standard, no driver of an automobile would ever have a claim when injured by a negligent driver on the roadways. Everyone knows it is foreseeable that if you drive, you could be in an accident. The real question is under what circumstances did the person drive, (or, in this case, sign counter checks) which is a question of fact, to be determined by a jury.

Smith v. Baxter, 796 N.E.2d (Ind., 2003) is authority that comparative knowledge of a possessor of land and an invitee regarding known or obvious dangers may properly be considered in determining whether the possessor breached the duty of reasonable care. However, such comparative knowledge is not a factor in assessing whether a duty exists.

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[1] Not even considered is the fact that a clothing store would do a credit check, as opposed to Caesars, which "extend[ed] lines of credit to such patrons in amounts and by methods that no reputable business would arrange." Counterclaim, Appellant's App., p. 0070.

Generally, whether a duty exists is a question of law for the Court to decide; however, sometimes the existence of a duty depends on the underlying facts that require resolution by the trier of fact. *Rhodes v. Wright*, 805 N.E.2d 382-386 (Ind. 2004). Such is the case at bar.

To obtain a reversal in this case, "[Caesars] must establish that, considering only the evidence and reasonable inferences favorable to the plaintiff, there is **no substantial evidence** supporting an essential issue in the case" (emphasis supplied) (*Smith, id.* at 245).

The analogy made by the majority was of a participant injured during a sporting activity, when the other participant intentionally caused the injury. However, Kephart's counterclaim *does* allege that Caesars "**intentionally**, recklessly, and/or negligently" enticed her to gamble (emphasis supplied). The majority is bound by the facts in the record. Thus, because Kephart alleged that the acts of Caesars were intentional, her counterclaim must survive, even by the standards set forth in the Opinion.

(C) Public Policy. It is not an established public policy to excuse negligence by offering immunity, unless it is specifically legislated. The majority rests on "the General Assembly's decision to legalize and regulate certain types of gambling, including Kephart's activities" (Slip Op., p. 13). It says that because Ind. Code § 4-33-4-3 (2003) requires that the Indiana Gaming Commission "promulgate rules that require casino operators to make all reasonable attempts . . . to cease all direct marketing efforts to a person participating in the self-exclusion program," that "argument is more properly addressed to the Commission or to the General Assembly" (*Id.*). Kephart respectfully disagrees that this is the law.

What is clear is that the Commission does not want casinos marketing to those persons participating in the self-exclusion program. Common sense says that the intent of the Commission was that problem gamblers should not be targeted. Since the rules don't specifically address cases such as that presented by Kephart, what does it mean? Because there are *some* rules promulgated by the Commission, does it mean that Caesars has immunity, even if the rules do not address the issue of immunity? The answer is no.

First of all, even if the Indiana Administrative Code deals with some aspects of gambling and problem gamblers, that fact alone would not provide a protection from a civil suit. This issue has been dealt with in other cases. A regulation cannot be construed to mean what an agency intended but did not adequately express; therefore, it has been held that the violation of an administrative regulation can subject private entities to civil sanctions. *Midwest Steel Erection Co., Inc. v. Commissioner of Labor*, 482 N.E.2d 1369, 1371 (Ind. App. 1985). In the case at bar, the regulation does not even provide for immunity to casinos.

Secondly, the Indiana Legislature **has** addressed this issue. On April 26, 2003, it passed House Enrolled Act No. 1470, codified as I.C. § 4-33-4-3. The law dealt with various matters regarding the duties of the Indiana Gaming Commission, including the self-exclusion list. The legislative history of that act shows that the legislature considered, but voted down, language which would have given immunity to casinos for allowing persons whose names appear on casino exclusion lists to gamble at an Indiana casino. The original bill as proposed included a provision for immunity for those casinos and others who permitted a self-excluded person to gamble. This provision was struck from the bill that eventually passed.

Thus, the legislature has considered immunity. There is no immunity. Because the legislative history is not silent, there can be a lawsuit.[2]

Since the legislature considered immunity and rejected it, the fact that the Commission promulgated rules for casinos does not provide immunity to casinos; the Indiana Legislature has spoken.

Self-exclusion is not the quintessential issue in this case.

Self-exclusion is tantamount to notification; *i.e.*, a gambler with an addiction problem communicates that he or she has the problem to the casino. In this case, by the facts pled, Caesars knew very well that Kephart had that problem.

Self-exclusion asks the patient to diagnose his or her problem. Some can. However, by the very nature of pathological gamblers, that is not always true. Pathological gamblers are known to conceal the extent of their involvement with gambling. (*See*, DSM-IV-TR, p. 671, Kephart's Counterclaim, Appellant's App., p. 0070.) Distortion in thinking, *i.e.*, denial, is not unusual. A comparison can be made to another mental disorder, anorexia. Just as an emaciated anorexic believes she is fat, in spite of undeniable evidence to the contrary, so it is that an addicted gambler believes by gambling, she will replace her losses by winning the next time.

The ruling by this Court removes incentive from casinos to promote self-exclusion. Why should they, when the probability is that the gamblers who lose the most money (and then, as in

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[2] (*See,* proposed Act, the Act as passed [Ind. Code §4-33-4-3], and the Action List for House Bill 1470, Exhibits A, B, and C, respectively, to Kephart's July 17, 2007 Response to Caesars' Motion to Dismiss, Appellant's App., pp. 0099-0110.)

this case, borrow $125,000 more, without even a credit check) are the ones who are the most sick? Who is most aware of these people's problems? Casinos.

(D) Balancing of Duty Factors. In consideration of this factor, the majority states that "Kephart's own behavior tips the balance" (Slip Op., p.15). What this says is that the amateur knows more than the professional, the experience of one outweighs the experiences of many, and the unlicensed qualifies more than the licensed. Indeed, the loser discerns more than the winner, and the foolish victim recognizes more than the brains behind the scheme.[3] Surely this is not where we are as a society.

II. The Majority Is Bound by the Facts in the Record. When reviewing a motion to dismiss for failure to state a claim brought pursuant to Indiana Trial Rule 12(B)(6), the Court must accept as true the facts alleged in the complaint. *Richards & O'Neil, LLP v. Conk*, 774 N.E.2d 540 (Ind. App. 2002).

The facts alleged in Kephart's Counterclaim show a sad situation. It states that she is a pathological gambler, and that Caesars lured her to the casino and took her money with full knowledge that she was helplessly addicted to gambling (Counterclaim, Appellant's App., p. 0069-74).

Kephart must prove these facts in order to prevail at trial.

However, for the purposes of this Appeal, those facts must be taken as true. But the Opinion of the Court of Appeals departs from the facts.

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[3] Such as offering credit with no credit check, providing ready-made counter checks and claiming treble damages and attorneys fees.

While the counterclaim says that Caesars "lured" Kephart to the casino, the majority Opinion refers to mere "marketing." It stated that "marketing by casino operators to compulsive gamblers is not reckless conduct" (Slip Op., 15). However, the counterclaim also alleges that Caesars "enticed," used a "scheme," "extend[ed] lines of credit . . . that no reputable business would arrange," and "actually pay[ed] such patrons to come to the casino to gamble." (Counterclaim, Appellant's App., p. 0071-73). Kephart lives in Nashville, Tennessee (Complaint, Appellant's App., p. 0052). Caesars offered free transportation from there to the casino in Indiana (Counterclaim, Appellant's App., p. 0071).

The facts alleged amount to far more than marketing. Marketing is to the facts of this case as asking for a date is to kidnapping. The analysis of the Court is flawed.

The Opinion states that "Kephart actually knew the dangers involved in gambling and could have easily protected herself against the dangers, but apparently chose not to do so" (Slip Op. p. 16). Compare this statement to the facts alleged in the counterclaim: Caesars "knew that she did not have the capabilities to resist such enticements" (Counterclaim, Appellant's App., p. 0073). Kephart is a pathological gambler. She is addicted. "Habitual psychological and physiological dependence upon a practice that is **beyond voluntary control** is an addiction." (emphasis supplied) Stedman's Medical Dictionary (27th ed. 2000).

Some facts stated in the majority Opinion, specifically the benign nature of Caesars' tactics (versus its predatory aggressiveness) and Kephart's ability to easily resist (versus her psychological and physiological dependence), do not match up to the facts pled.

III. By Ruling That Casinos Have Immunity, the Court Violates Equal Protection Guarantees.

When this Court ruled that a business can intentionally prey on a person's mental disorder and illness to take money from them, it disregarded both an ancient maxim and raised issues of basic precepts of the state and federal constitutions.

"It is a maxim of the law of high authority that one shall not profit by his own wrong." This is a quotation from the first Indiana Appellate Reporter, 118 years ago. *Mathis v. Barnes,* 1 Ind. App. 164, 27 N.E. 308 (1891). It is still sound law. *Estate of Troxel v. S.P.T.*, 851 N.E.2d 345 (Ind. App. 2006).

Such a core canon is a principle of social conduct so universally recognized that the violation of it tramples on moral and humanitarian considerations imparted by our constitutions.

The due process clause of the Fourteenth Amendment to the United States Constitution in relevant part states that "[n]o state shall deprive any person of life, liberty, or property without due process of law." Art. I, §12 of the Indiana constitution provides that: "[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due cause of law. Justice shall be administered freely, and without purchase; completely, and without denial, speedily, and without delay."

There can be no doubt that Kephart had property taken by Caesars.[4] Also, by its granting of immunity to Caesars, this Court gives an unfair advantage to a corporate entity over a citizen.

[4] Even a driver's license is a protected property interest, entitled to protection under a due process analysis. *See, Reynolds v. State*, 698 N.E.2d (Ind. App.1998).

The Court's interpretation of I.C. §4-33-4-3 is unreasonable and arbitrary. Article I, §23 of the Indiana Constitution affirms that "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which upon the same terms, shall not equally belong to all citizens."

A thorough analysis of the privileges and immunities clause is contained in *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994). There, the Supreme Court established a two-part standard: first, the nature of the classifications of citizens upon which the legislature is basing its disparate treatment (*Id.* p. 78). A casino should not have immunities merely because it is a licensed riverboat. By this interpretation, the state becomes the partner of the casino, to the exclusion of others.[5] Second, the Supreme Court recognized the need for uniformity and equal availability of the preferential treatment for all persons similarly situated (*Id.*). There is no basis for granting immunity to one party to a (gambling) transaction, to Caesars, and not the other, Kephart.[6]

For these reasons, the Petition for Rehearing should be granted.

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[5] "The comments . . . during the [Constitutional] Convention reveal that the purpose of Section 23 was to prohibit state entanglement in private profit-seeking ventures and to avoid the creation of monopolies." *Collins v. Day*, 644 N.E.2d 72, 76 (Ind. 1994).

[6] There is even a lack of uniformity and equal availability among tort claimants – gamblers vs. non-gamblers, or even self-excluded gamblers vs. non-self-excluded gamblers.

CONCLUSION

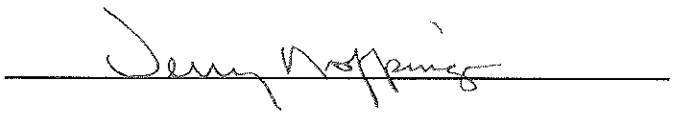
WHEREFORE, Appellee, Genevieve M. Kephart, by counsel, respectfully requests this Honorable Court to **GRANT** Rehearing of this cause and, thereafter, to enter an Order **REVERSING** its Opinion, **REMANDING** this matter to the Trial Court with instructions to **REINSTATE** the Order originally entered by the Trial Court on July 20, 2007, **AFFIRMING** the denial of Caesars' Motion to Dismiss of July 20, 2007, and providing for all such further relief to Kephart as may be appropriate under the circumstances.

WORD COUNT CERTIFICATE

Pursuant to Ind. Appellate Rule 44(F), I hereby verify that this Petition for Rehearing contains 2,801 words, as determined by the word count feature of Microsoft Word 2003, the word-processing system used to prepare said Petition.

Respectfully submitted,

NoffsingerLAW, p.c.



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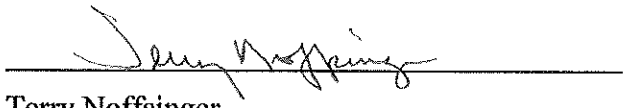
CERTIFICATION OF COMPLIANCE WITH IND. TRIAL RULE 5(G)

Pursuant to Ind. Appellate Rule 9(J), I hereby certify that the foregoing pleading or paper complies with the requirements of Ind. Trial Rule 5(G) with regard to information to be excluded from public access under Ind. Administrative Rule 9(G).



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I hereby certify that a copy of the foregoing pleading or paper has been served on the following person(s), by depositing same in the United States mail, first-class postage prepaid, on this 15th day of April, 2009:

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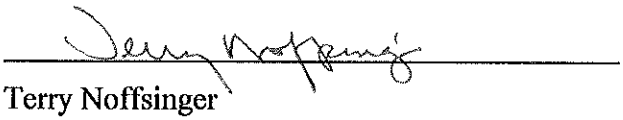

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