
**IN THE
INDIANA SUPREME COURT**

Case No. 31A01-0711-CV-530

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

**APPELLEE'S
PETITION TO TRANSFER**

Terry Noffsinger, Esq.
NoffsingerLAW, p.c.
4424 Vogel Road, Ste 207
Evansville, IN 47715
Phone: (812) 437-2000
Fax: (812) 437-1000

*Attorney for Appellee (Plaintiff Below),
Genevieve M. Kephart*

QUESTION PRESENTED ON TRANSFER

Does the common law provide immunity to anyone who intentionally harms another; *i.e.*, is there an exception for a casino that takes advantage of a person whom it knows is a compulsive gambler in order to take her money?

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BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

Caesars Riverboat Casino, LLC (“Caesars”) filed suit against Genevieve M. Kephart (“Kephart”), alleging she failed to cover checks written while gambling at Caesars’ casino. Kephart countersued, alleging that Caesars took advantage of her pathological gambling condition to enrich itself unjustly.

After the trial court denied Caesars’ motion under Ind. Trial Rule 12(B)(6), Caesars appealed. The Court of Appeals, with dissent, reversed the decision, finding that the casino had no duty to refrain from taking advantage of Kephart, even though it knew she was a pathological gambler.

Kephart petitioned for rehearing, which was denied 2-1. She now asks for transfer to allow the Supreme Court to consider this case of public importance, which presents important questions of law that the Court of Appeals erroneously decided.

SUMMARY OF ARGUMENT

- I. The Supreme Court, rather than the Court of Appeals, should be the judicial body to decide this important question of law, an issue of first impression in a case of great public importance.
- II. The Court of Appeals wrongly overturned long-accepted common law principles of intentional torts and immunity.
- III. The Court of Appeals created an unconstitutional immunity that violates both the state and federal constitutions.

ARGUMENT

Harming another. Intentionally. Blessed by the government. Can this be true? In this country? The Court of Appeals has not only resolved an undecided question of law, but has also decided the question incorrectly.

There are three reasons why transfer should be granted in this case.

- I. **The Supreme Court, rather than the Court of Appeals, should be the judicial body to decide this important question of law, an issue of first impression in a case of great public importance.**

That this case was undecided before now is confirmed by Judge Crone, in his dissent, who said “[i]n this appeal, we consider as a matter of first impression for this Court whether a casino – a gambling enterprise that owes its existence to, is regulated by, and is a source of revenue for the State of Indiana – has a common law duty to refrain from enticing to its premises a known pathological gambler who has not requested that she be removed from the casino’s direct marketing list or excluded from the casino. (*Slip Op.*, p. 18). The majority agreed: “Indiana courts have not addressed the precise issue now before us...” (*Slip Op.*, p. 3). It would also be correct that the precise question, with the facts of this case presented upon a motion to dismiss, has not been decided by any other court in the country.

The great public importance of a correct decision is proved by the fact that, by its ruling, the Court gives immunity for what would otherwise be a tort. When the Indiana legislature opened the doors to legalized gambling in this state, nowhere in any of the

laws or regulations promulgated did it bless casinos with absolution for any intentional acts of wrongdoing. In fact, it did just the opposite.¹

Therefore, this Petition to Transfer meets the requirement of Ind. Appellate Rule 57(H)(4) for consideration governing the grant of transfer; *i.e.*, it presents undecided questions of law. That rule obligates the petitioner to show that the Court of Appeals has decided an important question of law or a case of great public importance that should be decided by the Supreme Court.

Can it really be the law (as pled in Kephart's counterclaim) that, knowing a person is addicted (*i.e.*, beyond voluntary control) to gambling, a casino can intentionally ensnare that person, insidiously prey on her Achilles heel, and knowingly leave her at the end of the night with \$125,000 in gambling losses,² which the casino enabled by providing "form" counter checks, leaving it in a position to parlay that gain by treble damages and attorneys' fees?

No. The dissent had it right: "[t]he statutes regulating gambling do not preclude the existence of a common law duty; in other words, the legislature has not specifically granted casinos immunity from common law tort claims." (*Slip Op.*, p. 21).

¹ On April 26, 2003, it passed House Enabled Act No. 1470, codified as Ind. Code §4-33-4-3. 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. (*See* Exhibits A, B, and C, respectively, to Kephart's July 17, 2007 Response to Caesars' Motion to Dismiss, Appellant's App. pp. 0099-0110.) The legislature, in its consideration of the issue of immunity, said no.

² This amount does not include any money she lost earlier in the evening, before resorting to counter checks.

II. The Court of Appeals wrongly overturned long-accepted common law principles of intentional torts and immunity.

The importance of a correct ruling in this case is further enhanced by considering its potential harmful precedent. Aside from the constitutional ramifications (considered later in this petition), what does it mean to post for all to see that Indiana businesses may prey on the weak, the impaired, and the addicted? Will this case be the beginning of manifold attempts to explore exceptions to what before was a generally accepted principle of the law, to wit: no one shall profit by his own wrong?

Can it be that the law would condone the active monitoring and manipulation of a pathological gambling disorder in order to gain as much revenue for Caesars as possible? If so, will it allow the exploiting of the infirm and elderly in other cases? It is well known that the mental condition of a party is an important factor in the consideration of a business transaction.

[W]here . . . it is the young and vigorous that are seeking to enforce an advantageous bargain of large consequence, against one who at the time was in no mental condition to engage in business matters of such moment, such court will scrutinize all the circumstances and details of the transaction and resolve all doubtful questions in favor of the weaker suppliant. *Stainbrook v. Low*, 842 N.E.2d 386, 398 (Ind.App. 2006), quoting *Ames v. Ames*, 46 Ind. App. 597, 91 N.E. 509, 512 (1910).

By its opinion, the Court of Appeals ignored principles of law that have been well-recognized as long as judicial opinions have been written in this state.

As acknowledged, Kephart presents a case of first impression. Gambling interests did not obtain legal absolution in Indiana until relatively recently. Before 1993, gambling casinos were illegal. Gambling raises issues not directly considered before by the courts.

However, certain maxims still must be true, even when considered through the smoke of casino interests. "There may be principles of social conduct so universally recognized as to be demanded that they be observed as a legal duty, and the relationship of the parties may impose obligations that would not otherwise exist." *L. S. Ayres v. Hicks*, 220 Ind. 86, 93-94, 40 N.E. 2d 334, 337 (1942), *Baker v. Fenneman & Brown Properties, LLC*, 793 N.E. 2d 1203, 1206 (Ind. App. 2003). The cases cited involve rescuing someone from physical harm; however, the principles are the same.

III. The Court of Appeals created an unconstitutional immunity that violates both the state and federal constitutions.

By ruling that a casino can intentionally entice known compulsive gamblers and take advantage of their ailment by taking their money, the Court of Appeals has created an unconstitutional immunity. Both the Fourteenth Amendment to the United States Constitution and Article I §12 of the Indiana Constitution provide for due process and equal access to the courts for injury done.

The legislature has provided certain immunities to employers,³ government employees,⁴ school teachers,⁵ medical providers,⁶ and others. However, in order to take advantage of these immunities, which were legislative fiats, those claiming them must be in good faith. The Court of Appeals in this case provided immunity without either the benefit of a statutory basis or a good faith action.

³ *Ind. Code §22-3-2-1, et seq.*

⁴ *Ind. Code §34-13-3-3.*

⁵ *Ind. Code §20-33-8-8* [effective July 1, 2009].

⁶ *Ind. Code §16-39-8-1.*

The Privileges and Immunities Clause of the Indiana Constitution provides: “[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.” *Ind. Const. Art. I §23*. By judicial ruling, the Court of Appeals has granted immunity for a civil lawsuit against a casino for a tort, which no other class of citizens has. No other person or corporation can, with impunity, intentionally do harm to another party who has diminished capacities.

The Court of Appeals decision also violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, in that “[n]o state shall deprive any person of life, liberty, or property without due process of law.” The Court of Appeals decision has taken Kephart’s right to claim damages from Caesars (*i.e.*, property, a chose in action⁷) without due process of law. Its action is tantamount to giving a business immunity simply because it is licensed by the state. No such immunity is given to pawnbrokers, bar owners, or even lawyers. The Court has created an impermissible, unconstitutional exception for a casino.

For what reasons does it give this immunity? In its opinion, the majority opined that because the legislature had legalized casino gambling, and the Indiana Gaming Commission had promulgated certain rules, including rules that required casinos to “cease all direct marketing attempts” to a person participating in the self-exclusion

⁷ A claim for damages has been considered to be a chose in action. *Indiana, B & W Ry. Co. v. Allen*, 113 Ind. 308, 15 N.E. 451 (1888).

program, it had provided certain protections.⁸ (*Slip Op.* p. 14.) However, the dissent correctly concluded that

Kephart's counterclaim is not based on an alleged breach of a statutory duty, but rather on an alleged breach of a common law duty. [Footnote omitted.] The statutes regulating gambling do not specifically preclude the existence of a common law duty; in other words, the legislature has not specifically granted casinos immunity from common law tort claims. (*Slip Op.*, p. 21.)

In a footnote, Judge Crone added the following:

[i]f the legislature believes that casinos are free to exploit the most vulnerable among us for economic and tax gain, then they should explicitly indicate that is the public policy of our state. In the absence of such a declaration, I believe that the common law affords some minimum level of protection. (*Slip Op.*, p. 21, FN 10.)

This case is not an attack on gambling *per se*. This court upheld the constitutionality of the statute in *Indiana Gaming Com'n v. Moseley*, 643 N.E.2d 296 (Ind. 1994).⁹ Kephart does not seek to challenge the legalization of gambling in Indiana. Instead, she directs this Court to a specific wrongdoing. Promulgation of gambling laws in our state was not intended to issue a license to steal to casinos. Knowingly taking money from a person who is unable to control her impulses to gamble is tantamount to that.

Finally, perhaps the serious nature of Kephart's ailment is the "elephant in the room." What is pathological gambling? It has been recognized in the

⁸ It puts the burden on the victims, who suffer from psychological issues.

⁹ This case also affirmed that the "[o]riginal purpose of state constitutional provision regarding equal privileges was to prohibit legislature from granting special privileges to private commercial enterprises." *Ind. Gaming Com'n.*, *id* at 303.

American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, 671-674, §312.31 (4th rev. ed. 2000). However, even more important to know is that pathological gambling can be very serious, leading to alcohol and drug abuse problems, anxiety, depression, financial, social, and legal problems (including bankruptcy, divorce, job loss, time in prison), heart attacks (from the stress and excitement of gambling), and suicide attempts. (See Lesieur, H. R., & Blume, S. B. (1987). *The South Oaks Gambling Screen (SOGS): A New Instrument for the Identification of Pathological Gamblers*, 144 Am. J. Psychiatry, Sept. 1987, at 1184-1187.) Legalized gambling, and other problems it brings with it, are not the issues in this case. What must be remembered is that granting transfer and reversing the Court of Appeals' opinion does not give Kephart a "win." She must yet prove the allegations of her counterclaim, according to the rules of evidence and procedure. What she is asking for is her day in court to present her case.

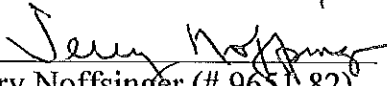
CONCLUSION

As Judge Crone noted, "[f]rom a moral standpoint, Caesars' predation and prosecution of a pathological gambler is repugnant. . . ." (*Slip Op.*, p. 26.) He is also correct that "to hold otherwise would be to conclude that there is no level below which a casino (and thus the State of Indiana) may not go in enticing patrons and encouraging their reckless behavior." (*Slip Op.*, p. 27.) To rule for Caesars, leaving the law in the state where casinos can "do what they will" with and to the gamblers, and leaving

untouched the problems of a pathological disease; *i.e.*, ignore the citizens entrapped by a serious problem not of their own making, would be a disservice not only to Kephart but also to the citizens of this state and the concept of justice for us all.

The dissent is correct, and this court should accept transfer, reverse the Court of Appeals' decision, and affirm the decision of the trial court in denying Caesars' Motion to Dismiss under T.R. 12(B)(6).

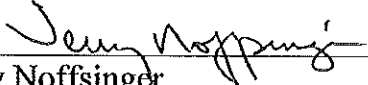
Respectfully submitted,


Terry Noffsinger (# 9651-82)
NoffsingerLAW, p.c.
4424 Vogel Road, Ste 207
Evansville, IN 47715
Phone: (812) 437-2000
Fax: (812) 437-1000

*Attorney for Appellee (Plaintiff Below),
Genevieve M. Kephart*

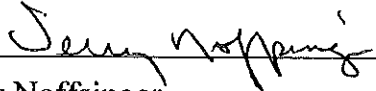
WORD COUNT CERTIFICATE

Pursuant to Ind. Appellate Rule 44(F), I hereby verify that this Petition for Transfer contains 2,292 words, as determined by the word count feature of Microsoft Word 2003[®], the word processing system used to prepare said Petition.


Terry Noffsinger

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).

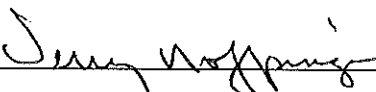


Terry Noffsinger

CERTIFICATE OF SERVICE

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 25th day of June, 2009:

Steven P. Langdon
Gene F. Price
FROST BROWN TODD LLC
120 W. Spring St., Suite 400
New Albany, IN 47150



Terry Noffsinger