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 GENEVIEVE M. KEPHART'S PETITION TO TRANSFER REPLY BRIEF

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SUMMARY OF ARGUMENT

Caesars has failed to tell this court why it should not accept transfer. It cannot. In presenting old arguments, it dodges the record by wrongly characterizing this case as a "marketing" case.

It refers to cases which do not address the real issue: intentional harms. It claims that there are regulations which deal with the issue, when there are none.

Finally, it threatens, without substantiation, a slippery slope leading to causes of action involving compulsive disorders.

ARGUMENT

I. Caesars has ignored the real issue.

Caesars' Brief of Response to Petition to Transfer ("Caesars' Response") failed to address whether, under Ind. Appellate Rule 57(H), this case meets the criteria for transfer to the Supreme Court. It merely stated "[n]one of these considerations apply to the case." (Caesars' Response, p. 1.) Then, it re-argues the case presented to the Court of Appeals.

In that "re-argument," it misstates the issue: "[d]oes a cause of action exist at common law that allows a person claiming to be a compulsive gambler . . . ." (Caesars' Response, p. 2.) (emphasis added.) In ruling on a Motion to Dismiss under Ind. Trial Rule 12(B)(6), the court accepts as true the facts alleged in the complaint: "Mrs. Kephart is a pathological gambler." (Counterclaim, Appellant's App., p. 0070) Of this statement, there can be no dispute. In addition, the pleadings are viewed in the light most favorable to the non-moving party, and every reasonable inference in favor of that party is drawn. *City of New Haven v. Reinhart,* 748 N.E.2d 374 (Ind. 2001).

Caesars further states that " . . . the law in Indiana and the law in other jurisdictions . . . have consistently held that casinos do not have a special duty of care to protect compulsive gamblers from their own gambling losses." (Caesars'

Response, p. 2.) Again, this is not the issue, because Kephart's case is unlike other cases. Kephart has plead not that she was a victim of mere marketing, but that Caesars did knowingly and intentionally take advantage of her. Of course, Kephart has to prove this when she gets to trial, but by law, these facts are now accepted as true. No case cited by Caesars presented these facts.

When it argues that licensed casinos could be liable for intentional torts every time they allowed customers to gamble, it demonstrates either that Caesars does not understand this case, or worse, that it seeks to intentionally obfuscate the issue. Only "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."[1]

When Caesars cites other cases where compulsive gambling was an issue, it merely demonstrates the distinction between those cases and this one.[2] One of those cases is one in which Kephart's counsel represented a compulsive gambler. *Williams v. Aztar Indiana Gaming Corp.*, 351 F.3d 294 (7th Cir. 2003). Caesars' *ad hominem* attack at Kephart's counsel is unfortunate.[3] Also, the Seventh Circuit

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[1] This is the issue exactly as worded by the Trial Court in its Order granting the request for an interlocutory appeal. (Appellant's App., p. 0119.) It is worth noting that Caesars has never addressed this issue, changing it at every opportunity. (See, Statement of the Issues, Brief of Appellant, p. 1; Question Presented on Transfer, Appellant's Brief of Response to Petition to Transfer, p. i.)

[2] This was done in the Brief of Appellee, p. 9, footnote 2. The difference is those cases address whether there is a duty to prevent patrons from gambling, as opposed to going after them—indeed, in this case, to another state.

dismissed the appeal based upon a lack of jurisdiction because it held the RICO count invalid. It never ruled on the other theories plead.[4]

Also, as it has constantly done in this litigation, Caesars uses the word "marketing" to describe what Caesars did to Kephart. Never in the Counterclaim was this word used: it's a fiction, used by Caesars to mischaracterize its insidious acts. Instead, the words plead by Kephart were "takes advantage of," "threatening," "enticements," "paying," and "schemes," (not to mention "taking her money with its knowledge that she was helplessly addicted to gambling." (emphasis added) (Counterclaim, Appellant's App., p. 0070-73.)

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3 One would think that if it was really concerned about bad precedent, dragging in the lost cases of opposing attorneys would be a prototype to avoid. At least parties are protected by Ind. Evidence Rule 404(b).

[4] The *Williams* decision did not pass without criticism by legal scholars. Prof. John Kindt of the University of Illinois said

> [t]he court indicated that during oral argument, the plaintiff's counsel did "not point to one RICO case on which he relied, ...(much less an analogous case)." However, the court ignored the thirty-seven related cases listed in plaintiff-appellant's brief, as well as the fact that the RICO civil issues in *Williams* were obviously *de novo* for the Seventh Circuit, but were being pursued in multiple venues throughout the United States. Furthermore, the court expanded its purview beyond the Seventh Circuit's jurisdiction with such a statement but then overlooked the well-known federal case, *Johnson v. Collins Entertainment Co.*, [199 F.3d 710 (4th Cir. 1999), *Johnson v. Collins Entertainment Co.*, 564 S.E.2d 653 (S.C. 2002)] involving RICO. . . .

John W. Kindt, *Subpoenaing Information from the Gambling Industry: Will the Discovery Process in Civil Lawsuits Reveal Hidden Violations Including the Racketeer Influenced and Corrupt Organizations Act?* 82 Or. L. Rev. 221, 289 (2003).

Caesars argues that "common-law tort principles do not require casinos to rescue compulsive gamblers from themselves." (Caesars' Response, p. 6.) However, there's an immense difference between not rescuing someone, and pitching them overboard.

To lend support to its arguments Caesars cites cases such as *Taveras v. Resorts Int'l Hotel Inc.*, No. 07-4555, 2008 WL 4372791 (D.N.J. Sept. 19, 2008).[5] In that case, the trial judge said "Plaintiff offers a number of different accounts for why Defendants have a duty to identify and exclude compulsive gamblers from their casinos." (emphasis added) *Id*, p.4. This is a far cry from Kephart's allegations; she does not complain that Caesars failed to identify her—in fact, the problem is that it not only identified her, but targeted and pursued her. It is yet another case of no use to Caesars.

The brevity of Caesar's argument regarding Kephart's constitutional claims speaks volumes. It apparently has no response. Any statute, regulation, or case that permits a casino to intentionally harm a citizen cannot pass constitutional muster.

[5] This is just one of the cases cited by Caesars in which gamblers represented themselves, *pro se* – one wonders how their legal acumen affected the outcome.

II. The Legislature, Gaming Commission, and Court of Appeals have not regulated the intentional harm to casino patrons.

No matter how many times Caesars says that casinos are regulated, nothing it says addresses the harm in this case. Indeed, it argues that "Indiana's gaming statutes and regulations are clearly intended to cover all advertising and marketing efforts" (not the issue here) and "their interaction with problem gamblers" (no where does it address the instance of a casino intentionally preying on an addicted gambler).

III. Caesars fears claims based on compulsive disorders.

While one might applaud the casino's efforts to protect Pizza Hut, the argument carries little weight, even if patrons did gain some. If a Macy's employee took advantage of an impaired retail customer, in the manner that Caesars took advantage of Kephart (to the tune of $500,000 for one night's "entertainment"), perhaps Kephart is the case that would discourage that bad conduct. Does Caesars approve such actions?

CONCLUSION

The Court of Appeals significantly departed from the law of this state regarding intentional torts, duty, and immunity. Based upon the above, Kephart has demonstrated that this case presents an important question of law that should be decided by the Supreme Court. It should accept transfer, reverse the Court of

Appeals' decision, and affirm the decision of the trial court in denying Caesars' Motion to Dismiss.

Respectfully submitted,

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WORD COUNT CERTIFICATE

Pursuant to Ind. Appellate Rule 44(F), I hereby verify that this Petition for Transfer contains 997 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 29th day of July, 2009:

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