IN THE
INDIANA COURT OF APPEALS

31A01-0711-CV-530

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

BRIEF OF APPELLEE GENEVIEVE M. KEPHART

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

CASES **PAGES**

STATUTES, RULES, AND REGULATIONS

BOOKS AND TREATISES

STATEMENT OF ISSUE

Appellee Genevieve M. Kephart ("Kephart") disagrees with the "Statement of the Issue" by Appellant Caesars Riverboat Casino LLC ("Caesars") and, instead, says the issue is exactly as worded by the Trial Court in its Order granting the request for an interlocutory appeal:

> *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?*

STATEMENT OF CASE

Kephart disagrees with Caesars' Statement of the Case. Comments, such as "Kephart contends that, despite this Court's holding in *Stulajter* . . . , she has a cause of action against Caesars even though she never placed herself on the list," (Appellant's Br., p. 1.) would seem to indicate that the key component to be discussed revolves around a voluntary exclusion list, and a case which discusses that. Such is not this case.

This case concerns whether a casino has a duty to those it knows to be pathological gamblers. Given this knowledge, can it take advantage of their condition, take their money, and harm them in other ways? That was the issue framed by the trial court. (Order, Appellant's App., p. 0118-0119.)

This issue, deemed by the trial court to be worthy of consideration by the Court of Appeals, and accepted by this court on December 8, 2007, was presented to it after Caesars filed suit against Kephart for checks that were written by her during a gambling episode, and returned for uncollected funds. (Complaint, Appellant's App., pp. 0052-0066.) Kephart filed an answer and a counterclaim, pointing out that she was a pathological gambler, and that Caesars took advantage of her condition. (Appellant's App., pp. 0002-00067.)

Caesars' filed a Motion to Dismiss the Counterclaim, pursuant to T.R. 12(B)(6). After briefing (Appellant's App., 0075-0117.) and oral argument (Appellant's App., pp. 0006-0051.), it was overruled. (Appellant's App., p. 0005.) Caesars alleges that the Court ruled without stating its reasoning. (Appellant's Br., p. 2.) By inference, one could conclude the court agreed with the reasoning offered by Kephart. On October 22, 2007, the trial court granted Caesars' request for an interlocutory appeal, "as to the following concise statement of the issues to be addressed in the interlocutory appeal:

> 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., 0118-0119.) Caesars still has not addressed the issues.

The standard of review of a trial court's decision on a motion to dismiss for failure to state a claim is *de novo*. The court must view the allegations of the counterclaim and reasonable inferences therefrom in the light most favorable to the non-moving party and determine whether the counterclaim states any facts upon which the trial court could have granted relief. *Thompson v. Hayes*, 867 N.E.2d 654 (Ind. Ct. App. 2007).

STATEMENT OF FACTS

Kephart visited Caesars on March 18, 2006. (Appellant's App., p. 0052.) On this particular trip, Caesars paid her to come to the Casino from her home in Tennessee, and offered a free hotel room, alcohol, and meals. (Counterclaim, Appellant's App., p. 0071.) While there, she gambled, and lost to the extent that Caesars provided counter checks for her to continue gambling. There were six checks, totaling $125,000, written on Kephart's account. (Complaint, Appellant's App., pp. 0052-0053, Exhibits A and B, pp. 0056-0065.)

Caesars accepted these checks without ever checking to see if Kephart had the funds to cover them. (Counterclaim, Appellant's App., p. 0071.)

Pathological gambling is a form of addiction which is recognized both in medical literature, and by Caesars itself. (Counterclaim, Appellant's App., p. 0070.) Kephart is a pathological gambler. Caesars knew this, and willingly took advantage of her condition by taking actions well-known to it which would entice her to gamble. (Counterclaim, Appellant's App., p. 0070.)

Caesars, knowing that Kephart did not have the capability to resist such enticements, entered into a scheme where it did not extend credit but, instead, offered her a way to gamble by obtaining funds from a bank account in which it knew, or should have known, were insufficient funds. (Counterclaim, Appellant's App., p. 0073.)

After the checks were returned for "uncollected funds," Caesars proceeded to parlay the $125,000 checks into more money by filing suit against Kephart on January 23, 2007, for payment of the checks, treble damages, and attorney fees. (Complaint, Appellant's App., pp. 0052-0066.)

As a result of Caesars' actions, Kephart has lost money and incurred emotional distress and other suffering. The experience has affected her relationships with family and friends, and diminished her enjoyment of life. She has also incurred medical expenses. (Counterclaim, Appellant's App., pp. 0073-0074.)

On April 2, 2007, Kephart filed an answer to the complaint and a counterclaim. (Appellant's App., pp. 0002-00067.) Caesars moved to dismiss the counterclaim but the trial court denied its motion. (Appellant's App., p. 0003, Appellant's Br., pp. 1-2.) Caesars thereafter requested an interlocutory appeal. The trial court granted the motion, stating the issue. (Order,

Appellant's App., pp. 0118-0119.) This issue is the same as set out in Kephart's Statement of the Issue, (Appellee's Br., p. 1.) but not as represented by Caesars in its Statement of the Issue. (Appellant's Br., p. 1.)

SUMMARY OF ARGUMENT

In deciding this appeal, the Court need only address the issue certified by the trial court. This issue is ignored by Caesars. Instead of examining the facts of this case as they relate to applicable law, Caesars instead wagers that the case of *Stulajter v. Harrah's Ind. Corp.*, 808 N.E.3d 746 (Ind. Ct. App., 2004) will help it sidestep the issues to result in a win. *Stulajter* is a case which dealt with a failure "to find and evict a patron on its self-exclusion list before that patron gambled money in its casino." *Id*, at p. 749. Kephart is not alleging that Caesars failed to **find** her and exclude her. In this case, the complaint states that the casino (1) knew her, (2) knew she was an addicted gambler, (3) intentionally took advantage of her condition, (4) and caused her harm.

The law should not allow casinos to "go after" patrons whom it knows suffer from a recognized malady in order to take their money. While this proposition may seem self-evident, it also withstands close scrutiny under the common law analysis of duty, foreseeability, and public policy.

Promulgation of regulations by the Indiana Gaming Commission does not prevent Kephart from recovery. Much of Caesars' argument deals with self-excluded persons. However, Kephart was not self-excluded. Furthermore, even if she had self-excluded, the Indiana legislature specifically rejected a law proposed to give immunity to casinos.

Public policy supports a duty to Kephart.

ARGUMENT

I. INDIANA LAW RECOGNIZES A DUTY TO PROTECT AGAINST UNREASONABLE RISK OF HARM, AND THUS WOULD SUPPORT KEPHART'S PRIVATE CAUSE OF ACTION AGAINST CAESARS.

Indiana courts have long recognized that the existence of a common law negligence action requires that a court find "a duty on the part of the defendant in relation to the plaintiff." *Miller v. Griesel*, 261 Ind. 604, 611, 308 N.E.2d 701, 706 (1974). "The duty to exercise care for the safety of another arises as a matter of law out of some relation existing between the parties, and it is the province of the court to determine whether such a relation gives rise to such a duty." *Neal v. Homebuilder's, Inc.*, 232 Ind. 160, 169, 111 N.E.2d 280, 285 (1952).

Legal scholars have commented: "[C]hanging social conditions lead constantly to the recognition of new duties. No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists." William Lloyd Prosser & W. Page Keaton, *Prosser & Keeton on Torts* §53, at 58-59 (Supp. 1988), quoted in *Gearing Constr. Co., Inc. v. Foster*, 519 N.E. 2d 1224, 1227 (Ind. 1988).

Of course, for purposes of ruling on a motion to dismiss, the facts pled in the counterclaim must be accepted as true. *Abdul-Wadood v. Batchelor, 865 N. E. 2d 621, 622 (Ind. Ct. App. 2007).* In her complaint, Kephart pled that (1) pathological gambling is a form of addiction; (2) the addiction is recognized by Caesars; (3) Caesars knew that Kephart is a pathological gambler; (4) Caesars breached the duty of care it owed to Kephart by enticing her to gamble; (5) Caesars caused injury and damages to Kephart.

Given this set of facts, a reasonable person must agree that a duty exists.

Webb v. Jarvis, 575 N. E. 2d 992, 995 (Ind. 1991) has been firmly entrenched as the case which analyzed the issue of duty in Indiana. It identified three factors to balance in determining whether a duty should be imposed: (1) relationship between the parties; (2) foreseeability; (3) public policy. Each of these factors will be discussed below.

A. Relationship Between the Parties

Kephart was a patron of Caesars. The law is well-established that business owners owe a duty to their business invitees to use reasonable care for their protection while they are on the landowner's premises. *Burrell v. Meads,* 569 N.E.2d 637, 639 (Ind. 1991). Kephart would qualify as a business invitee because she was invited to enter Caesars' property for a purpose, gambling, for which the property is held open to the public. *Frye v. Trustees of Rumbletown Free Methodist Church*, 657 N.D. 2d 745, 748 (Ind. Ct. App. 1995).

Our Supreme Court in *Burrell* adopted the following language from the Restatement (Second) of Torts § 343 (1965):

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk to invitees, and
>
> (b) should expect that they will not discover or realize the dangers, or will fail to protect themselves against it, and
>
> (c) fail to exercise reasonable care to protect them against the danger.

Id. at 639-640

Under the facts as pled in the counterclaim, these factors all applied to Caesars.

As a business invitee, there was a relationship which underpins the duty owed to Kephart by Caesars.

B. Foreseeability

The imposition of a duty is "limited to those instances where a reasonably foreseeable victim is injured by a reasonably foreseeable harm." *Williams v. Cingular Wireless*, 809 N.E. 2d 473, 477 (Ind. Ct.App. 2004). Even though the foreseeability component of a duty analysis is a more general, and "lesser inquiry" than the foreseeability component of proximate cause (*Williams, id*, at 477), in this case, it makes no difference. The analysis encompasses the facts plead by Kephart—thus, the facts accepted as true include that Caesars recognizes pathological gambling and its risks, including the harm that befell Kephart. (Counterclaim, Appellant's App., pp. 0069-0074.)

When a casino, in this case, Caesars, knows that an individual, Kephart, is an addicted gambler, is it foreseeable that if it entices her to gamble so it can profit, she will be harmed? The answer is yes.

C. Public Policy

Can it be that the public policy of this State would allow a business entity to intentionally take advantage of a person's psychological condition to harm her?

Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. *Iroquois Underwriters v. State ex rel Morgan*, 211 Ind. 463, 472, 5 N.E. 2d 908 (1937)

"Pathological gambling is a form of addiction which is recognized generally, in pertinent medical literature, and by Caesars itself. . . . Kephart is a pathological gambler. . . . Caesars knowingly and willingly takes advantage of such persons who are addicted to gambling." (Counterclaim, Appellant's App., p. 0070.)

As stated in *Webb, id.*, at 997, "[d]uty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of public policy which lead the law to say that the plaintiff is entitled to protection." Various factors play into this policy consideration, including convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, and the moral blame attached to the wrongdoer. *Ousley v. Board of Comm'rs of Fulton County*, 734 N.E. 2d 290, 294 (Ind. Ct. App. 2000), *trans denied.*

Preventing a casino from pursuing pathologically addicted gamblers would not be difficult. Affirming a duty to refrain from enticing them to gamble, casinos would, or at least should, stop. In order to pursue a cause of action, a victimized gambler would have to *prove* the knowledge of the casinos of the addiction, and that, armed with this information, the casino caused harm. Such a public policy would prevent further injuries; its ease of administration would be easier than administering the self-exclusion program.[1]

Because it has violated public policy, that policy would be promoted by having the violator bear the loss. In this case, a casino would be returning ill-gotten gains. Moral blame would be, and should be, attached to the wrongdoer: a casino which takes unfair advantage of a psychologically infirm patron.

D. Stulajter Does Not Apply

Caesers argues that Kephart's claim is "squarely foreclosed" by *Stulajter, id.* at 746. It further says that all courts that have considered the issue of whether compulsive

[1] This is discussed later in Section III of this Brief.

gamblers can recover their losses in "similar circumstances" have decided in favor of the casinos. (Appellant's Br., p.4.) Such statements are overbroad and wrong.[2]

Stulajter was a case where a patron sued a casino, claiming he had a private right or action based upon the casino's alleged violation of a statutory duty by sending him marketing materials and admitting him to the casino after he placed himself on the casino's voluntary self-exclusion list. Caesars misstates the facts of this case. Indeed, the court in *Stulajter* itself characterized the case as one where a casino operator failed to

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[2] On page 5 of its brief, Caesars lists cases in footnote 2; such dependence on these cases is misplaced. A reading of the cases supplied by Caesars shows opinions that say courts have no duty to *prevent* patrons from gambling at casinos. However, none of them discuss the issues in the case at bar. A brief review of all the cases cited by Caesars confirms this. *Stulajter, id.,* merely ruled that a casino operator was not liable for failing to find and evict a patron on its self-exclusion list. *Merrill v. Trump Ind., Inc.*, 320 F.3d 729 (7th Cir. 2003) opined that there was no statute or regulation that imposed a duty to eject a gambler who requested to be placed on casino's eviction list, and that the casino had no duty to prevent the gambler from gambling. [*Merrill* is further discussed on page 13 of this Brief.] One must wonder why Caesars cited *Brown v. Argosy Gaming Co.*, 384 F.3d 413 (7th Cir. 2004), since the court found that the question was fact-intensive and would not apply to future litigants. The case was filed by the wife of a compulsive gambler who sought certification of the question of whether the casino had a duty to the wife of a compulsive gambler to bar him upon the wife's request. *Williams v. Aztar Ind. Gaming Corp.*, 351 F.3d 294 (7th Cir. 2003) was a federal case that was vacated because of a lack of federal jurisdiction. *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291 (3d Cir., 1995) was a case where a casino patron sought to recover gambling losses allegedly incurred while intoxicated. He filed dram shop actions; the court ruled such actions did not include gambling losses. *Logan v. Ameristar Casino Council Bluffs, Inc.*, 185 F. Supp 2d 1021 (S.D. Iowa 2002) decided limited issues: that licensing regulation did not provide a private cause of action, and that there was no contract which created a covenant of good faith and fair dealing. *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) was one where issues of contract law were raised, which are not applicable to the case at bar. In applying New Jersey law, this Virginia court said that the casinos had no duty to stop the gambler from gambling. It did not address the question of persuading such a person to gamble. *Harrah's Club v. Van Blittner*, 902 F.2d 774 (9th Cir 1990) is not applicable; it dealt with the validity of a judgment from federal court in Nevada on a claim under credit instruments given by the debtor for a gambling debt.

"**find** and evict a patron on a self-exclusion list before that patron gambles money in its casino." *Stulajter*, id., at 749. (Emphasis supplied)

Also, Stulajter based his case upon violation of a statutory duty. Kephart's cause of action is not based upon a violation of a statutory duty. In fact, she was not on a self-exclusion list.

Stulajter claimed Harrah's breached its statutory duty by sending him marketing materials and admitting him to its casino after he placed himself on the casino's voluntary self-exclusion list. Apparently, Stulajter was claiming a case of "gotcha."

In its attempt to use the *Stulajter* case as a buoy for its efforts to keep its arguments from sinking, Caesars makes many representations about the case which are simply wrong. When it represents that the casino "encouraged" Stulajter to gamble (Appellant's Br., p. 6), it was only by marketing -- a far cry from the personal enticement to Kephart. When it discusses the issue as "can [a casino] be held liable for taking affirmative steps to persuade the patron to gamble?" Caesars goes on to represent that "this is precisely the claim that was rejected" in *Stulajter*. (Appellant's Br., p 8). It tries to equate sending marketing materials with the enticement of Kephart -- again, a far cry from the facts pled:

- Offering enticements to gamble, such as free hotel rooms, meals, limousine transportation, and alcohol;
- Paying to come to the casino to gamble;
- Extending credit in amounts and by methods that no reputable business would arrange;

- Providing forms for checks to be written, and cashing them, without even knowing if there are sufficient funds.

(Counterclaim, Appellant's App., p. 0071.)

And yet, Caesars accuses Kephart of a "play on words" to avoid a holding that is "directly on point." (Appellant's Br., p. 8.) Caesars goes on to represent that "[it] is not liable for Kephart's gambling losses, even if it advertised to her when it was aware she was a compulsive gambler." (Appellant's Br., p. 8.). Never has the allegation been made by Kephart that her counterclaim was based upon any advertising; instead, it is personal contact by Caesars employees, holding out tempting offers to facilitate her gambling, with the explicit knowledge that Kephart was a pathological gambler.

Kephart's claim is far different, and easy to distinguish. Her counterclaim states that Caesars' knew her and, by various methods, "lured her to the casino . . . taking her money with its knowledge that she was helplessly addicted to gambling." (Counterclaim, Appellant's App., p. 0073.) Such actions by Caesars breached the duty it owed Kephart.

Even if Kephart was self-excluded, the regulations promulgated by the Gaming Commission do not foreclose her claim. Aside from the fact that no regulation deals with the intentional solicitation of individuals known by a casino to be an addicted gambler, legislation does not preempt the common law. Rather, it merely designates minimal duties which do not thereby relieve persons from otherwise exercising reasonable care.

In *Picadilly, Inc. v. Colvin,* 519 N.E. 2d 1217 (Ind. 1988), a bar was sued for furnishing alcohol to an intoxicated person, who later caused an automobile wreck

resulting in injuries. The bar contended that absent a violation of the statute[3] prohibiting the furnishing of alcoholic beverages to intoxicated persons, there could be no independent common law liability for injuries caused by a customer's intoxication. Our Supreme Court ruled that the Dram Shop Act did not modify the common law with respect to liability of persons negligent in providing alcoholic beverages—it merely designated certain conduct, the violation of which is punishable criminal conduct. It recognized that proof of such conduct may be used as evidence of negligence in a civil lawsuit, citing *Elder v. Fisher*, 247 Ind. 59, 217 N.E. 2d 847 (1966).

> The rule of this statute in the scheme of common law Dram Shop liability is analogous to the relation of motor vehicle driving offense statutes to the common law duty of drivers to exercise reasonable care for the safety of others. **Rather than preempting the common law, such statutes designate certain minimal duties but do not thereby relieve persons from otherwise exercising reasonable care.** *Picadilly, Inc.*, id., at 1220. [Emphasis supplied.]

Caesars represents that "Kephart has conceded that ruling in Caesars' favor would be consistent with Indiana Law." (Appellants Br., p 10.), citing Appellant's App., p. 93. Here is what Kephart stated:

> Given the rapid expansion of gambling casinos in this country and the growing problem of compulsive gambling, the role of casinos in this regard must be addressed. Kephart suggests that this court can make one of two rulings in this case:
>
> > One: Rule for Caesars, leaving the law in a state where the 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."

Kephart stands by this statement. *Stulajter* does not address the problem of the

[3] Ind. Code §7.1-5-10-15: It is unlawful for a person to sell, barter, deliver, or give away an alcoholic beverage to another person who is in the state of intoxication if the person knows that the other person is intoxicated.

predatory acts of Caesars—and if this Court would rule for Caesars, it will "leave the law in a state where casinos can do what they will with gamblers."

II. INDIANA'S GAMING LAWS DO NOT PREEMPT THE COMMON LAW, OR ABOLISH THE DUTY TO PROTECT ANOTHER AGAINST UNREASONABLE RISK OF HARM.

Caesars would argue that because of *Stulajter*, it has no obligations to anyone outside the Gaming Commission for anything it may do to Kephart or any other problem gambler. It cites *Merrill v. Trump Ind. Inc.*, 320 F 3d 729 (7th Cir. 2003) and *Brown v. Argosy Gaming Co., L. P.*, 384 F. 3d 413, 416 (7th Cir. 2004) for support that "[a]t most the rules impose upon [a casino] a duty to the state through the gaming commission, not to [a gambler]." (Appellant's Br., p. 10) However, who benefits from this rule? Does the State of Indiana benefit when compulsive gamblers are excluded from casinos? It is doubtful. Does a casino benefit? Clearly, no. Who benefits? Those people who can not otherwise control their urges to gamble, and as a result lose more money than they can afford.

This analysis is important because if it appears that the duty imposed by a statute is for the benefit of both the public and particular individuals, a private cause of action may be inferred. *Whinery v. Roberson*, 819 N.E.2d 465, 475 (Ind. Ct. App. 2006). As the court in that case said, "it makes little sense to preclude recovery for violations of specific rights merely because the public receives an ancillary benefit from the statute conferring the rights." Id. at p. 475.

The court in *Merrill* wrote that the closest analogy is "that of a tavern's liability to exercise reasonable care to protect its patrons." *Merrill, id.*, at 732. However, the court did not analyze the facts in accordance with *Webb v. Jarvis.* Furthermore, it is not a

sound analogy. The harm to be protected in Dram Shop Act cases is to a third party, who is injured. Any benefit to the tavern for its acts would be merely the money it makes from the sale of the alcoholic beverages. For example, ten beers might cost thirty dollars.

In Kephart's case, the harm is to her, and the money to the casino is much more. There is no third person. $125,000 for a night's entertainment is a different comparison.

Returning to *Merrill,* the court also said that "[w]hen a statue is silent regarding the imposition of civil liability, the Indiana Supreme Court looks to legislative intent to determine whether a private cause of action exists." *Merrill, id.*, at 732.

Turning to an examination of legislative intent, just two months after the ruling in *Merrill*, the Indiana legislature (on April 26, 2003) passed House Enrolled Act No. 1470, Ind. Code §4-33-4-3. (This 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 give 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.

What does this mean? The legislature considered immunity. There is no immunity. What does that mean? The legislative history is not silent. There can be a lawsuit. (*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.)

III. PUBLIC POLICY PROMOTES CAUSES OF ACTION IN THOSE CASES WHERE ACTS ARE INJURIOUS TO THE PUBLIC OR AGAINST THE PUBLIC GOOD.

Ceasars attempts to support its case by *Stulajter,* a case which deals with a casino's failure to find a compulsive gambler, and by regulations regarding self-exclusion, in a case where there was no self-exclusion. In a last-ditch effort, it claims that public policy prevents Kephart's counterclaim.

Public policy has already been addressed in this brief. (See Appellee's Br., p. 7-8), but there is more to say in response to Ceasars.

Caesars argues that allowing Kephart to bring suit would have the "perverse result" of encouraging compulsive gamblers not to participate in their voluntary exclusion program. Before reaching such a conclusion, one must take a common-sense approach to the goal of the program.

It seems axiomatic that people self-exclude because they have a problem with gambling. The *Diagnostic and Statistical Manual of Mental Disorders* (4th Ed. 2001), American Psychiatric Association (cited in Kephart's Counterclaim, Appellant's App., p. 0070) indicates that it is common for pathological gamblers to have "repeated unsuccessful efforts to control, cut back, or stop gambling." Furthermore, they "often return another day to get even," and "need to gamble with increasing amounts of money in order to achieve the desired excitement." *Id.*, at 671-674.

Thus, it would seem that everyone should agree that gambling is a bad thing for these gamblers. So, it made sense that the Indiana legislature passed a law that specifically deals with such unfortunate people. It recognized that they need help beyond their own powers.

Caesars argues that if Kephart sues, everyone will want to sue; the logical extension of that argument, *a fortiori*, is that if you want an even better lawsuit against the casino, lose even more! If it is Caesars' conclusion that pathological gamblers are cold, calculating persons who methodically plan what's in their best interests, then we might understand why it makes this argument.

However, gambling addicts are sick. Some recognize this and are able to place themselves on the program. But, not everybody does. It is hard to understand, but mental ailments are difficult to understand. Nonetheless, it is undisputable that these people are pathological. At least, if they are self-excluded, the duties of the casinos are outlined.

Casinos probably dislike self-exclusion programs. One reason is that to administer such a program creates more duties; *e.g.*, keeping the list, checking IDs, and asking people to leave. It makes sense that there is a second reason casinos dislike self-exclusion programs: these are their best customers. If a person who visits a casino is preoccupied with gambling, returns another day to get even after losing money gambling, and needs to gamble with increasing amounts of money in order to achieve the desired excitement, that's a jackpot for the casino!

Returning to a consideration of public policy, does it have a role in what should be done regarding persons who have such persistent and recurrent maladaptive gambling behavior? Caesars advocates casinos have no duty.

It is fundamental that a duty is "an obligation to which the law would give recognition and effect, to conform to a particular standard of conduct toward another." *City of Muncie v. Weidner*, 831 N. E. 2d. 206, 211 (Ind. Ct. App. 2005). Movie theaters,

car washes, lawn services—none of them would have a duty to Kephart. None of them would have a reason to recognize her problem.

When Caesars recognized her problem, what was its duty? Does it not make sense that it should have treated her as a self-excluded gambler? She would have been an "excluded gambler." Why not? It is inconceivable that people would have a right to gamble. Casinos are private property: owners can prohibit whomever they want. Even if the casino chooses not to exclude, it could at least refrain from the acts that entice such people to gamble; *i.e.*, just leave her alone.

Rather than the "perverse result" of encouraging compulsive gamblers not to participate in their voluntary exclusion program, allowing Kephart to sue will result in encouraging casinos to help gambling addicts to participate in such programs.

Instead, what did Caesars do? It "knowingly and willingly" took advantage of Kephart by encouraging her to gamble, "offering enticements," "paying [her] to come to the casino to gamble," and "extended [her] credit" when she ran out of money. (*See*, Kephart Counterclaim, Appellant's App., pp. 0070-0071)

The case at bar is not like *Stulajter*, where the casino failed to recognize him, or failed to find him. In this case, Caesar knew who Kephart was, knew that she had a problem, and took advantage of her, to its own gain. As alleged in its complaint, just on the last night, March 18, 2006, Kephart lost $125,000. (*See*, checks attached to Caesars' Complaint, Exhibit A, Appellant's App., pp. 0056-0062) Add to this treble damages and attorneys fees and it is understood: these are good customers.

Caesars says, "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 loses—

essentially gambling risk free." (Appellant's Br., p. 16) What the casino forgets is that Kephart, or any other plaintiff, has the burden to prove what is in the complaint—each and every allegation. Kephart looks forward to doing so.

CONCLUSION

Genevieve M. Kephart respectfully requests that the Court affirm the decision of the Harrison Circuit Court to deny Caesars' Motion to Dismiss, and to remand the case for further proceedings not inconsistent with this Order.

Respectfully submitted,
NoffsingerLAW, p.c.

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CERTIFICATE OF COMPLIANCE and SERVICE

I hereby certify that no documents filed by Appellee are to be excluded from public access, pursuant to Admin. R. 9(G)(1), and that on the 21st day of May, 2008, a true and complete copy of the foregoing document was served upon Steven P. Langdon, and Gene F. Price, FROST BROWN TODD LLC, 120 W. Spring St., Suite 400, New Albany, IN 47150, by depositing the same in the United States mail in an envelope properly addressed and affixed with sufficient first class postage.

_____
Terry Noffsinger