IN THE
INDIANA COURT OF APPEALS

31A01-0711-CV-530

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

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REPLY BRIEF OF APPELLANT, CAESARS RIVERBOAT CASINO, LLC

Gene F. Price
Steven P. Langdon
FROST BROWN TODD, LLC
120 West Spring Street, 4th Floor
New Albany, Indiana 47150
(812) 948-2800

Attorney for Appellant,
Caesars Riverboat Casino, LLC

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

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Gene F. Price
Steven P. Langdon
FROST BROWN TODD, LLC
120 West Spring Street, 4th Floor
New Albany, Indiana 47150
(812) 948-2800

Attorney for Appellant,
Caesars Riverboat Casino, LLC

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SUMMARY OF ARGUMENT

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. Kephart attempts to distinguish herself from *Stulajter* by arguing that Caesars' alleged attempts to market to her are somehow different from Harrah's attempts to market to Stulajter. Kephart also attempts to distinguish herself from *Stulajter* by pointing out that Stulajter placed himself on a self-exclusion list and she has not. If anything, this distinction should make Kephart's claim less persuasive, and furthermore, she repeatedly argues that as part of Caesars' duty to her, it should have treated her like a self-excluded gambler. With no precedent supporting her claim, and with controlling authority directly against her, Kephart argues that this Court should recognize a new duty and create a never-before-recognized cause of action for compulsive gamblers. Not only is this request foreclosed by this Court's holding in *Stulajter*, but it also is unsupported by the factors this court looks to in determining whether a new duty should be established.

ARGUMENT

I. KEPHART DOES NOT HAVE A CLAIM UNDER ESTABLISHED INDIANA LAW

Kephart's claim is barred by this Court's holding in *Stulajter v. Harrah's Ind. Corp.*, 808 N.E.2d 746 (Ind. Ct. App. 2004), which held that gamblers who

place themselves on a voluntary exclusion list do not have a private cause of action against casinos that continue to market to them and fail to exclude them. Kephart refuses to accept that *Stulajter* addressed almost the same facts as this case, arguing that *Stulajter* only addressed the duty of casinos to "find" self-excluded persons. Appellee's Br. at 9-10. In fact, both Stulajter and Kephart alleged that the casino defendants knew they were compulsive gamblers yet continued to market to them and failed to exclude them.

Kephart tries to differentiate the marketing that took place in *Stulajter* from "going after" patrons. *Id.* at 4. She states that marketing is far different from personal enticement, *Id.* at 10, but her distinction is fanciful; the purpose of marketing *is* personal enticement. The enticement Kephart alleges – free hotel rooms, meals, transportation, alcohol; "paying" to come to the casino; and the extension of credit in a manner that has been approved by the Gaming Commission – are all marketing activities. *Id.* at 10-11. The marketing efforts at issue in *Stulajter* closely resemble those alleged in Kephart's complaint. Some patrons may receive a flyer in the mail, others may be offered free meals, still others may be offered free nights in a hotel: all are marketing efforts.

Kephart further argues that her claim is "far different, and easy to distinguish" from Stulajter's because Caesars "lured her to the casino . . . taking her money with its knowledge that she was helplessly addicted to gambling." *Id.*

at 11. Again, this is *exactly* what Stulajter argued. Stulajter claimed that Harrah's knew he was an addicted gambler and attempted to "lure" him to the casino through marketing efforts. *Id.*; *Stulajter* 808 N.E.2d at 747 ("Harrah's sent Stulajter marketing material directed toward persuading him to visit its casino."). Although Kephart insists that Caesars' alleged actions are something more than marketing, that is exactly what they are. It is clear from the face of the *Stulajter* decision and Kephart's counterclaim that the facts of the two cases are virtually indistinguishable, and the result in this case should be the same: casinos do not owe a duty to self-described compulsive gamblers to prevent their losses.

The one main factual difference between Stulajter and Kephart is that Stulajter placed himself on a self-exclusion list, but Kephart did not. As noted in Caesars' opening brief, this makes Kephart's claim even *less* persuasive, as she did not even identify herself as a problem gambler until after she was sued by Caesars to recover her gambling losses. However, Kephart attempts to use this fact to her advantage and avoid the holding in *Stulajter* by stating that unlike Stulajter she was not self-excluded. Appellee's Br. at 4, 10, 15. But then Kephart claims that Caesars should have treated her like a self-excluded gambler, ignoring the holding in *Stulajter* that self-excluded gamblers *have no cause of action* against casinos for their losses. *Id.* at 17; Counterclaim at 6. Kephart points to the fact that she was not on the self-exclusion list when she attempts to escape *Stulajter*, but then argues

she should have been treated as a self-excluded gambler. *Id.* at 17. Self-contradiction is a hallmark of an ill-founded claim.

Kephart also characterizes Stulajter's claim as "a case of gotcha," presumably because he placed himself on the self-exclusion list and then waited to receive marketing materials and be admitted to the casino. *Id.* at 10. But Kephart's case must be even more of "a case of gotcha" than Stulajter's, because she chose not to participate in the self-exclusion program but now claims that she should have been treated like a self-excluded gambler. Kephart has not pointed to a single precedent supporting her novel claim, nor could she, because no other court in the country has recognized her asserted cause of action. With no supporting precedent, Kephart desires that this Court reject all authority to the contrary and recognize an entirely new type of liability[1].

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[1] Kephart argues that Caesars' reliance on the cases in footnote 2 of its brief is misplaced, offering instead a variety of misreadings of those precedents. Appellee's Br. at n.2. Kephart again mischaracterizes *Stulajter* as "merely" holding that a casino is not liable "for failing to find and evict" a compulsive gambler, once again ignoring the fact that *Stulajter* addressed direct marketing efforts and held that casinos do not owe a duty to compulsive gamblers. Kephart also fails to recognize that *Merrill v. Trump Ind., Inc.*, 320 F.3d 729 (7th Cir. 2003) specifically held that a compulsive gambler cannot recover losses from a casino who marketed to her and that casinos do not have a duty to compulsive gamblers. Kephart claims that *Brown v. Argosy Gaming Co.*, 384 F.3d 413, 416 (7th Cir. 2004) is not relevant, even though that decision states that "Indiana's gaming statutes and regulations do not create a private cause of action to protect compulsive gamblers from themselves."

Kephart insists that *Williams v. Aztar Ind. Gaming Corp.*, 351 F.3d 294, 297, 300 (7th Cir. 2003) is not relevant because the court dismissed it for lack of jurisdiction, but ignores the fact that the court rebuffed the plaintiff for asking the court to ignore its previous holding "that Indiana law does not impose a duty of care on casino operators to protect gambling addicts from their own addictive and injurious behavior," and for making frivolous arguments that simply

This is not the first time that counsel for Kephart has argued that a court should ignore established precedent and allow a compulsive gambler's meritless claim to proceed. Counsel represented claimed compulsive gambler David Williams against Casino Aztar before the Southern District of Indiana and the Seventh Circuit, alleging violations of RICO and other state law claims. *Williams v. Aztar Ind. Gaming Corp.*, 351 F.3d 294, 297 (7th Cir. Ind. 2003). The district court granted Aztar's motion for summary judgment on all counts and Williams appealed. The Seventh Circuit recognized that in appealing the grant of

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because "gambling is new in our country," settled law should be altered. Kephart states that *Hakimogu v. Trump Taj Mahal Assocs.*, 70 F.3d 291, 292 (3d Cir. 1995) is not relevant because it relates to an intoxicated gambler, but ignores the gambler's claim that the casino "intentionally and maliciously enticed him" to gamble, essentially what Kephart herself argues, and that the court said he had no claim. Kephart attempts to limit *Logan v. Ameristar Casino Council Bluffs, Inc.*, 185 F. Supp 2d 1021 (S.C. Iowa 2002) even though the court held that the gambler's negligence claim failed because the casino did not owe him a common law duty to prevent him from drinking and gambling. Kephart boldly states that *Rajmani v. Resorts Int'l Hotel, Inc.*, 20 F. Supp. 2d 932, 937 (E.D. Va. 1998) is not relevant because it dealt with contract law, but ignores the plaintiff's allegation that the casino "negligently permitted and encouraged [her to] continue to gamble even though they knew, or should have known, that she was a compulsive gambler." Kephart says the court did not address the question of persuading such a person to gamble, but the court specifically rejected a claim based on allegations that the casino "persistently and continuously solicit[ed] her business." *Id.* at 936. Indeed, in rejecting these claims the court stated that it is not even arguable that such a duty exists under common law tort principles.

Finally, Kephart challenges the application of the Ninth Circuit's ruling in *Harrah's Club v. Van Blitter*, 902 F.2d 774 (9th Cir. 1990), but Caesars did not cite this case. Caesars cited *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), where plaintiff alleged the casino breached a duty to her by encouraging her to gamble by offering her complimentary accommodations. The District Court said in that case that there was no liability in tort and that it "refuse[d] to create liability for casinos for mere solicitation and good treatment of its patrons." *Id.* at *7-8. The Ninth Circuit case that Kephart cites affirmed the Eastern District of California, which denied Van Blitter's motion to bar enforcement in California of the money judgment entered against her by the District Court of Nevada.

summary judgment on his tortious breach of a duty of care claim, Williams was "asking this court to either ignore our earlier decision in *Merrill v. Trump Indiana, Inc.*, 320 F.3d 729 (7th Cir. 2003), in which we held that Indiana law does not impose a duty of care on casino operators to protect gambling addicts from their own addictive and injurious behavior, or to certify the question to the Indiana Supreme Court notwithstanding our explicit rejection of a similar request in Merrill." *Williams,* 351 F.3d at 297. The Court of Appeals held that there was no ground for federal jurisdiction because the RICO claim had been dismissed, leaving only state law claims, and remanded the case for dismissal for lack of subject matter jurisdiction. Kephart's counsel had argued that because "gambling is new in our country," there was support for a "new" or "novel" invocation of the federal RICO statute. But the appeals court stated that they were "unpersuaded by his rhetoric" and found his reasoning to be a "[]frivolous argument for the extension or modification . . . of existing law or the establishment of new law." *Id.* at 300 (internal citations omitted). Indeed, the court directed the plaintiff to show cause why he should not be sanctioned. *Id.* at 300. Kephart's case is equally without merit. The binding precedent of *Stulajter*, coupled with the persuasive statements regarding Indiana law in *Merrill* and *Williams*, makes clear that compulsive gamblers have no claim against casinos for their gambling losses. The

Court should reject Kephart's request to establish a new cause of action for compulsive gamblers.

Kephart argues that despite the holding in *Stulajter*, Indiana's gaming statutes and regulations do not foreclose her claim because "legislation does not preempt the common law." Appellee's Br. at 11. In fact, statutes trump common law where the statute "undertakes to cover the entire subject treated and was clearly designed as a substitute for the common law." *Gregory & Appel Ins. Agency v. Phila. Indem. Ins. Co.*, 835 N.E.2d 1053, 1065 (Ind. Ct. App. 2005) (quoting *Irvine v. Rare Feline Breeding Ctr.*, 685 N.E.2d 120, 123 (Ind. Ct. App. 1997)). As detailed in Caesars' brief, Indiana's gaming statutes and regulations are clearly intended to cover all advertising and marketing efforts by casinos, their procedures for extensions of credit, and their interactions with problem gamblers. *See* Appellant's Br. at 11-15. These laws, as interpreted in *Stulajter*, provide that there is no private right of action by compulsive gamblers against casinos for allowing or enticing them to gamble. *See Stulajter*, 808 N.E.2d at 749 ("If 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.").

Kephart points to the legislative history of the self-exclusion program to argue that the legislature intends to allow private causes of action by compulsive gamblers against casinos. Appellee's Br. at 14. But the legislature's decision not to include immunity in the statute says nothing about whether Kephart has a claim here, particularly since *Stulajter*, which was decided more than a year after the statute was enacted, specifically held that the statute does not create a private right of action like the one Kephart now asserts against Caesars. The more important action by the legislature is its decision, in the wake of *Stulajter*, *not to create* a cause of action that would permit Kephart's claims to go forward.

II. INDIANA LAW FORECLOSES THE CREATION OF A NEW CAUSE OF ACTION

Since the Indiana courts have already addressed whether a casino owes a duty to prevent compulsive gamblers from suffering gambling losses, there is no need to apply the multi-factor test in *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991) for determining whether such a duty should be recognized by this Court. *See Mangold v. Ind. Dep't of Natural Res.*, 756 N.E.2d 970, 975 n.1 (Ind. 2001) ("[B]ecause this Court has already declared the nature of the duty a school owes its students, it is unnecessary to engage in the three-part Webb test to determine if the school has some other additional duty."); *Guy's Concrete, Inc. v. Crawford, 793 N.E.2d 288, 295* (Ind. Ct. App. 2003) ("[I]t is unnecessary for us to perform the Webb analysis because our Supreme Court and this court have already held that

contractors performing work owe a duty to third persons rightfully on the construction premises."); *Briesacher v. AMG Res., Inc.*, No. 2:03cv331, 2005 U.S. Dist. LEXIS 46045, at *24 (N.D. Ind. Dec. 16, 2005) ("[T]he Supreme Court's more recent rulings [regarding the duty of reasonable care at issue in the case] supercede the need to apply a Webb analysis."). Because this Court has already addressed the relationship between casinos and compulsive gamblers and found no duty of care to prevent gambling losses, an analysis under *Webb* is unnecessary.

Moreover, even if the Court were to conduct a *Webb* analysis – examining the relationship between the parties, foreseeability, and public policy – it should conclude that no new duty should be created.

A. The Relationship Between Kephart and Caesars Does Not Require Caesars to Prevent Kephart's Economic Harm

It is well established that Caesars would owe a duty of care to protect Kephart from physical harm while she is on its premises. Appellee's Br. at 6. Kephart, however, does not allege that she was physically harmed on Caesars' property. She alleges economic harm (in the form of gambling losses) that supposedly caused related mental, emotional, and psychological distress. *Id.* at 7. Kephart points to no case, and Caesars is aware of none, where a business owner has been held liable for economic harm suffered by a customer on its premises. Indeed, courts have held that "economic losses alone, without any claim of personal injury or damage to other property, cannot be recovered in a tort action."

Vacuum Industrial Pollution, Inc. v. Union Oil Co., 764 F. Supp. 507, 513 (N.D. Ill. 1991) (internal citations omitted); *see also Board of Education of City of Chicago v. A.C. & S., Inc.*, 546 N.E.2d 580, 587 (Ill. 1989) (confirming "the necessity of physical damage to other property or personal injury" for recovery in tort).

Establishing a duty to protect a business invitee from economic harm, as Kephart requests, would be wholly inconsistent with Indiana law. If such a duty existed, a customer could bring an action against a retail store for economic injury she suffered after spending too much money. The relationship between Caesars and Kephart does not establish a duty on the part of Caesars to protect Kephart from the economic harm she has alleged.

B. Kephart is Not a Foreseeable Victim and Her Alleged Harm is Not Foreseeable

As Kephart notes, the imposition of a duty is limited to those instances where a reasonably foreseeable victim is injured by a reasonably foreseeable harm. Appellee's Br. at 7. An analysis of foreseeability is unnecessary here because, as discussed above, Caesars does not have a duty to protect Kephart from economic harm. But notwithstanding that conclusion, the harm alleged by Kephart is not foreseeable. Thousands of people gamble in Indiana every day. Some will win and some will lose. Those that lose incur economic loss, but it is not foreseeable that those particular individuals are the ones that would suffer a loss, because, by

definition, they might also have won. To treat gambling losses as an economic injury would hold casinos liable for conducting a wholly legal activity, one that operates with the blessing of the Indiana legislature. That some gamblers lose is the nature of gambling, but those individuals cannot be treated as if they have suffered an economic injury without fundamentally undermining Indiana's decision to legalize gambling.

C. Public Policy Weighs Against Allowing Kephart to Hold Caesars Liable for Her Own Gambling Losses

Allowing Kephart's claim to go forward would have the perverse result of encouraging compulsive gamblers *not* to participate in the voluntary exclusion program. If Kephart's counterclaim 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.

Kephart advances the strange argument that public policy favors allowing causes of action by compulsive gamblers, because those cases would be easier to "administer" than the self-exclusion program. Appellee's Br. at 8. In fact, the self-exclusion program, which is developed, monitored and enforced by the

Gaming Commission, is certainly more efficient and effective than patrolling casinos' activities through piecemeal private causes of action.

The absurd extent to which Kephart believes Indiana law should be changed is fully apparent when she argues that "movie theaters, car washes, [and] lawn services" should be required to "recognize her problem." *Id.* at 16-17. She fails to recognize a fundamental distinction between the duty owed a patron to prevent her from physical harm and the proposed duty to protect her from suffering economic losses from gambling. The Court should decline to impose a broad new type of liability on every Indiana business from lawn services to movie theaters.

Although this Court need not perform an analysis under *Webb* to determine whether a new duty should be established because it has already held in *Stulajter* that no such duty exists, the *Webb* factors all confirm that a duty between casinos and compulsive gamblers does not exist.

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,

FROST BROWN TODD, LLC

Gene F. Price (15816-22)
Steven P. Langdon (20222-10)
120 West Spring Street, 4th Floor
New Albany, Indiana 47150
(812) 948-2800
(812) 948-7994 Facsimile

CERTIFICATE OF WORD COUNT

I verify that this brief contains no more than 7,000 words.

Counsel for Appellant,
Caesars Riverboat Casino, LLC

CERTIFICATE OF SERVICE

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 6th day of June, 2008, upon:

Terry Noffsinger
Noffsinger Law, p.c.
4424 Vogel Road, Suite 207
Evansville, IN 47715

Counsel for Appellant,
Caesars Riverboat Casino, LLC