

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

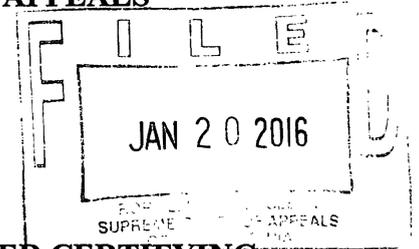
No. 15-0821

**STACY STEVENS, PERSONAL
REPRESENTATIVE OF THE ESTATE
OF SCOTT STEVENS, DECEASED,**

**Petitioner,
v.**

**MTR GAMING GROUP, INC., d/b/a
MOUNTAINEER CASINO & RESORT;
and INTERNATIONAL GAME
TECHNOLOGY, INC.,**

Respondents.



**(ON ORDER CERTIFYING
QUESTIONS FROM THE
UNITED STATES DISTRICT
COURT FOR THE NORTHERN
DISTRICT OF WEST VIRGINIA,
CIVIL ACTION NO.
5:14-CV-104)**

PETITIONER'S REPLY BRIEF IN SUPPORT OF CERTIFIED QUESTIONS

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STACY STEVENS, as Personal Representative of the Estate of Scott Stevens, Deceased.)	
)	
Plaintiff Below, Petitioner,)	
vs.)	
)	No. 15-0821
)	
MTR GAMING GROUP, INC., d/b/a)	
MOUNTAINEER CASINO, RACETRACK &)	
RESORT, and INTERNATIONAL GAME)	
TECHNOLOGY, INC.,)	
)	
Defendants Below, Respondents.)	

**PETITIONER STACY STEVENS’S REPLY BRIEF IN SUPPORT OF CERTIFIED
QUESTIONS**

Petitioner Stacy Stevens, as Personal Representative of the Estate of Scott Stevens, deceased, by counsel, respectfully submits this reply brief in support of the certified questions presented to this Court by the United States District Court for the Northern District of West Virginia (Judge Stamp).

INTRODUCTION

Respondents MTR Gaming Group Inc. (“MTR”) and International Game Technology Inc. (“IGT”) attempt to avoid direct responses to the straightforward legal questions presented in this case by instead engaging in unnecessary discussions of West Virginia legal authority to establish gambling facilities. To be clear, Ms. Stevens brings forward no challenge to the state laws and regulations of West Virginia that permit and regulate gambling. Her challenge is to the unscrupulous methods intentionally employed by Respondents to increase their profits at the risk of those like Scott Stevens who gambled at MTR on machines that are products supplied by IGT.

Furthermore, as Petitioner demonstrates below, West Virginia law fully supports the conclusion that Respondents had a duty of care to prevent the threatened harm to Scott Stevens, an addicted gambler. As Petitioner addressed in her opening brief, it is well-established that one who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm. As a self-touted global leader in gaming, IGT was certainly aware of the unreasonable risk of harm its product created, yet it chose not to address it or to minimize that risk in any fashion. MTR was similarly aware, yet it, too failed to warn patrons who used IGT's product at its casino of the risks involved.

Respondents' arguments attempt to reframe the certified questions and divert the Court's attention to matters that are not relevant to determine the issues before the Court in this proceeding. As the Complaint makes clear, Petitioner does not allege that MTR had a duty to discover that Scott Stevens was addicted to gambling, rather, she alleges that MTR knew that Scott Stevens was addicted to gambling. App. R. 11, 13-14. MTR took affirmative steps to induce, encourage, and facilitate Scott Stevens's continued gambling at its facility and on its slot machines. IGT acted with knowledge and intent to take advantage of casino patrons, including Scott Stevens, exploiting them and causing harm to them by engineering slot machines to promote behaviors associated with addiction. App. R. 10-11. The slot machines engineered, manufactured, and sold or leased by Respondent IGT to Respondent MTR, are intentionally designed to manipulate the human mind by creating a dissociated mental state in slot machine players. App. R. 14. These allegations set forth in the Complaint are accepted as true for this proceeding, in

which this Court will decide the questions of law that have been certified. W. Va. Code § 51-1A-1, *et seq.*; W. Va. R. Civ. P. 12(b).

I. THE WEST VIRGINIA LEGISLATURE’S CONTROL OVER VIDEO LOTTERY GAMING IS NOT ABROGATED OR REPUDIATED BY A RECOGNITION FROM THIS COURT THAT A DUTY OF CARE IS IN FACT OWED BY RESPONDENTS TO PETITIONER IN THIS CASE

The first certified question plainly asks whether a duty of care requires Respondents to protect casino patrons from becoming addicted to gambling.¹ That question does not in any way encompass a challenge to the state legislature’s authority over gambling, nor does it involve any challenge to the state’s right to collect revenue from gambling. Petitioner’s argument is not that gambling is illegal in West Virginia, rather, she contends that Respondents are negligent in their actions. In particular, Respondents’ actions of intentionally concealing the algorithms that govern the slot machines’ win/loss functions, and the failure to display any appropriate warning regarding the use of the machines, are negligent.

A. WARNINGS

In addressing Petitioner’s argument that Respondents had a duty to warn regarding the hazards of gambling on Respondents’ slot machines, Respondent IGT contends that the West Virginia Lottery Commission controls the rules of play and what labels may be placed on the video lottery terminals. This is not in dispute. Apparently, Respondents—who do not deny the dangers of using their products—contend that they are powerless to include any warnings on the slot machines used by Scott Stevens. IGT specifically contends, citing to the Video Lottery Acts, that “[b]y law, no change can be made to the rules of the game, the win/loss probabilities or the

¹ Specifically, the certified question is as follows: “What duty of care exists as to each defendant given the allegation that the slot machines or video lottery terminals are designed through the use of mathematical programs and algorithms to create the illusion of chance while instead fostering a disassociated mental state, to protect casino patrons from becoming addicted to gambling by using these machines or terminals?” App. R. 4.

messages displayed on the VLT without the express permission and approval of the Commission.” Respondent IGT’s Brief at 6. This language does not serve as a prohibition to warn consumers. In this regard, it is important to look at the code language itself. First, Petitioner is not seeking to alter the rules of the game, the win/loss probabilities, or to place unapproved messages on the machines themselves. The statutory language that IGT relies upon states “[n]o stickers or other removable devices shall be placed on the video lottery terminal screen or face without the prior approval of the commission.” W. Va. Code § 29-22A-6(a)(12) (1994). With this citation, Respondents suggest that they are powerless to warn about the effects of using their slot machines. That language of the West Virginia Code, however, does not restrict or prohibit warnings in places other than the “lottery terminal screen or face.” The machine does, in fact, have other parts where a warning could be visibly displayed if not on the terminal then near the terminal.² In addition, the statutory language does not prevent Respondents from seeking the approval of the Lottery Commission to include a warning. In this case, Respondents neither displayed a warning nor sought approval from the Lottery Commission to do so.

It is an accurate observation that, through the issuance of licenses and permits, Respondents enjoy a symbiotic relationship benefitting both themselves and the state. The laws regarding gaming in West Virginia include, as they must, a significant element of coordination between the state government and the gaming business owners and product manufacturers. For Respondents to suggest that they lacked the power to warn is simply erroneous, and it is not supported by the statutory language upon which they rely. Indeed, it is not supported by any statutory language at all or by common law, for that matter. Labeling or warning is not

² Certainly, MTR was not prohibited from displaying warnings in its casinos and easily could have done so. They were certainly free to request the Lottery Commission to approve warnings that actually would be displayed on the terminal screen or face.

impermissible and it is not prohibited by statute. As Petitioner argued in her opening brief, Respondents had a duty to warn. West Virginia has recognized that “[d]uty is not, however, an inflexible principle since “[i]t is not absolute, but is always relative to some circumstance of time, place manner, or person.” *Strahin v. Cleavenger*, 216 W. Va.175, 184, 603 S.E.2d 197, 206 (2004).

While it is true that the West Virginia Code permits gaming, the Code does not provide immunity from tortious acts or omissions. There is no law that permits Respondents to “cause, or materially contribute to social, mental, and physical harm to users and increase the chance of attempting and/or committing suicide,” or to intentionally conceal how the algorithms that govern the slot machines’ win/loss functions maximize time on device. App. R. 15. West Virginia’s gambling laws do not preempt the common law, and they do not abolish the duty to protect another against unreasonable risk of harm. Respondents essentially argue that following the enactment of the Racetrack Video Lottery Act, they owe no obligation to anyone outside the Lottery Commission for anything that they have done to Scott Stevens or to any other addicted gambler. This approach wholly misrepresents the content and purposes of the Act. West Virginia statutes regulating gambling devices do not eliminate the private causes of actions maintained by Petitioner in this case.

B. IMPLIED PREEMPTION

IGT asserts that any claim for common law negligence or strict product liability is preempted by the “comprehensive statutory scheme” enacted as part of the Video Lottery Acts. Respondent IGT’s Brief at 8. IGT further claims that because Ms. Stevens has failed to allege that the slot machines at issue failed to conform to the requirements of the statutes or regulations of

the West Virginia Lottery Commission, Plaintiff has not established a legal duty owed under the circumstance. On both matters, Respondent is flatly wrong. As this Court has noted in evaluating a claim of federal preemption, “[p]ut succinctly, preemption is disfavored in the absence of exceptionally persuasive reasons warranting its application.” *Morgan v. Ford Motor Co.*, 224 W. Va. 62, 68, 680 S.E. 2d 77, 83 (2009). Moreover, the West Virginia Limited Video Lottery Act expressly provides that conduct of the games must function in a manner that does not pose a threat to the public health, safety, or welfare of the citizens of West Virginia. The limited Video Lottery Act is unequivocal in identifying the responsibility of the licensee to “[c]onduct all video lottery activities and functions in a manner that does not pose a threat to the public health, safety or welfare of the citizens of this state, and which does not adversely affect the security or integrity of the lottery.” W. Va. Code § 29-22B-701. Petitioner has set forth in her Complaint the harm to the public health, safety, and welfare of Scott Stevens, as well as others who use Respondents’ products, and in so doing, has clearly asserted a violation of the controlling state statutes. While it is true that the state provides for the legality of the operation of slot machines by manufacturers and licensees, such as Respondents in this case, those operations are required to be safe and they are required not to pose a threat to public health, safety, or welfare of consumers. In raising this issue, Petitioner does not challenge the authority of the Lottery Commission to dictate the parameters of play for video lottery games, as IGT suggests. She does, however, raise viable common law tort claims that address the responsibility of Respondents to act in a manner consistent with their legal duties.

As noted above, Petitioner agrees that the Lottery Commission has the statutorily granted power to control the win/loss rations, but that said, there is nothing in the statutes that permits

Respondents' actions to conceal the known harmful effects of the use of the algorithms on the players of the machines. In determining whether a state statute preempts longstanding common law, the analysis begins with the principle that statutes that abrogate the common law must be strictly construed. *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 491, 647 S.E.2d 920, 927 (2007), quoting *Kellar v. James*, 63 W. Va. 139, 59 S.E. 939 (1907). Courts, therefore, should look for a legislature's specific intent to preempt common law. In their briefing, neither Respondent has cited to any demonstrated specific intent to preempt existing precedent, and neither Respondent addresses the required safety component included in the legislation, that is, that responsibility of the licensee to "[c]onduct all video lottery activities and functions in a manner that does not pose a threat to the public health, safety or welfare of the citizens of this state, and which does not adversely affect the security or integrity of the lottery." W. Va. Code § 29-22B-701. At bottom, Respondents argument is simply this: The requirement to operate in a manner that does not pose a threat to public health and safety is not subject to enforcement by any citizen. That is because, Respondents contend, they have complete immunity from tort claims because common law is preempted by language in the code that provides,

No state or local law or regulation providing for any penalty, disability, restriction, regulation or prohibition for the manufacture, transportation, storage, distribution, advertising, possession or sale of **any lottery video lottery terminal**, games or materials or for the **operation of any lottery** shall apply to operations by the lottery commission of persons licensed pursuant to the article or operations or activities that are authorized in this article.

W. Va. Code § 29-22B-1902(a) (2001) (emphasis added).

The problem for Respondents is that the above-quoted language refers to the lottery and lottery games; it does not, on its face, apply to the slot machines referenced in Petitioner's Complaint, whether or not they are called "video lottery terminals." Scott Stevens was not playing

the lottery. As the Complaint makes clear, Scott Stevens's gambling addiction involved what is commonly called a slot machine, having nothing to do with the state lottery or state lottery games. Respondents' broad assumption that the legislature intended to preempt the application of common law principles to the gaming platform referenced in the Complaint simply is not borne out by the statutory language. In light of the language of the State Lottery Act itself, it cannot reasonably be argued that the statute preempts common law, there being no clear legislative language to demonstrate attempt to repeal common law causes of action, replacing them with nothing to redress injuries caused by Respondents.

To support its preemption argument, IGT relies on *Hairston v. General Pipeline Construction, Inc.*, 226 W. Va. 663, 704 S.E.2d 663 (2010), suggesting that there was a clear legislative intent to preempt common law claims. In *Hairston*, the Court first recognized that the state statute intended to address the fact that existing state laws did not provide adequate protection for unmarked human graves, and through the legislation, it was the intent to address that issue. The Court stated that its "review of the statute discloses a clear legislative intent to preempt common law desecration claims with respect to the narrowly-defined matters identified and covered by the statutory protection." *Id.* at 670. Unlike the facts presented in the *Hairston* case, the instant case has no such clear determination to replace the common law, or even any passing reference to any existing law. The duty of this Court is to interpret, not expand or enlarge a statute's requirements. *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 23-24, 454 S.E.2d 65, 68-69 (1994).

Further, it is noteworthy that the State Lottery Act expresses the intent of the Act as follows:

The Legislature finds and declares that the purpose of this article is to establish and implement a state-operated lottery under the supervision of the state lottery commission and the director of the state lottery office who shall be appointed by the governor and hold broad authority to administer the system in a manner which will provide the state with a highly efficient operation.

W. Va. Code § 29-22-2. Unlike the *Hairston* case, there was no legislative expression of any need or intent to address, in any way, well-established common law or its applicability. Indeed, there is no language anywhere in the State Lottery Act permitting or prohibiting consumers from asserting tort claims.

The preemption language expressed in the State Lottery Act is not particularly mysterious when one considers that the legislature was establishing (for the first time) a state-run lottery. In stating that the “provisions of this article preempt all regulations, rules, ordinance and laws of any county or municipality in conflict herewith,” W. Va. Code § 29-22-25, it did not go so far as Respondent argues: There has been no demonstration of any “conflict” in the common law with the provisions of the State Lottery Act. Common law civil remedies remain available to Petitioner.

C. NON-WEST VIRGINIA CASES

None of the cases from other jurisdictions addressing gambling cited by Respondents involve similar claims to the instant case. None of those cases raise the issue of products liability and none of those cases present an argument that algorithms have been used unfairly and without warning to manipulate a consumer. As such, these cases do not present persuasive authority for this Court to consider.

Petitioner has not alleged that Respondents owed a duty to prevent Scott Stevens from simply losing money at MTR’s casino. The argument MTR makes to assert that it did not owe a

duty to a patron to protect him against simple monetary loss misapprehends the facts presented in the Complaint. As noted in the Complaint, MTR took affirmative actions to cultivate Scott Stevens's addiction to slot machines by purchasing or leasing machines from IGT which were engineered to foster addictive, compulsive, or disordered gambling by altering the physiology of the brain. App. R. 14.

MTR has mischaracterized Petitioner's cause of action throughout its brief. Petitioner is not merely alleging the MTR is liable in negligence because it breached a duty to protect Scott Stevens from losing money while gambling at Mountaineer Casino. Petitioner has alleged, with particularity, that MTR engaged in affirmative conduct and thereafter realized or should have realized that such conduct created an unreasonable risk of harm to Scott Stevens, thereby imposing upon MTR a duty to exercise reasonable care to prevent the threatened harm. *Robertson v. LeMaster*, 171 W. Va. 607, 611, 301 S.E.2d 563, 567 (1983). Under West Virginia law, it is well-established that one who engages in affirmative conduct and later realizes or should realize that such conduct has created an unreasonable risk of harm to another is under a duty to exercise reasonable care to prevent the threatened harm. *Id.*

D. THE SELF-EXCLUSION PROGRAM

MTR argues that West Virginia's voluntary self-exclusion program shifts the liability Petitioner claims from Respondent to Petitioner. This is not what the statute states. Unlike some states, the West Virginia statute does not offer immunity to MTR should a patron sign up for the voluntary program. The program provides, by statute that a person who has realized that he has a compulsive gaming disorder may request, in writing, to be excluded from the casino. W. Va. Code R. § 179-8-129 (2008).

MTR's position and reliance upon the state self-exclusion program ignores the reality of the situation. First, the issue alleged in the Complaint is that Respondents offered games that exploit addictive tendencies of certain gamblers, including Scott Stevens, and they knew it. For this, Respondents bear responsibility. Second, there is no record information regarding the enforcement of the self-exclusion requests. Finally, there is no information regarding the efficacy of the program. As the Complaint alleges, the slot machines used by Scott Stevens fostered physical changes in brain functioning and behavior, contributing to his loss of willpower and his dissociated state. Scott Stevens's inability to stop losing time and money to Respondents' gambling machines is not a failure to exercise willpower but, rather, an effect of physiological changes that erode and weaken willpower. App. R. 14.

II. THE SLOT MACHINES USED BY SCOTT STEVENS ARE TANGIBLE PRODUCTS UNDER WEST VIRGINIA LAW THAT CONTAIN AN INTEGRATED SOFTWARE COMPONENT

As discussed in Petitioner's opening brief, the gambling machines or terminals at issue in this case fall under the definition of "product" under West Virginia products liability law. The slot machines are no less a product because they operate electronically and contain a computer as part of their design.³ These machines include hardware along with software, resulting in a fully integrated tangible unit, a slot machine. Moreover, as the Complaint makes clear, the machines are defective and Scott Stevens's mental faculty was both foreseeable and an intended effect of the product.

Petitioner is not suing the owner of the software, the Lottery Commission. If Petitioner had done so, the Commission may have had a viable argument that the software rights that they

³ Respondents' argument essentially is that because they do not own the software component of the machines, the actual item that IGT designs and manufactures, and that MTR in turn leases or purchases for use in its casinos, is nothing more than an empty shell for which it has no liability when it is used as intended.

own are not products. Notably, the state owns the game. Again, Petitioner's claims are directed not at the game; her suit is directed to the end product itself.

Acknowledging that there is no West Virginia authority to support their position that software is not a product, *Sanders v. Acclaim Entertainment, Inc.*, 188 F.Supp. 2d 1264 (D. Colo. 2002) is proffered by Respondents as authority that slot machines (or video lottery terminals) are not a "product" under products liability law. Plaintiffs in the *Sanders* case alleged that Columbine High School students Dylan Klebold and/or Eric Harris were co-conspirators in a plot to assault, terrorize and kill Columbine teachers and students. According to Plaintiffs is *Sanders*, "certain video games made violence pleasurable and attractive and disconnected the violence from the natural consequences thereof, thereby causing Harris and Klebold to act out the violence, thereby causing the shootings." *Id.* at 1264. In *Sanders*, the federal district court concluded that "intangible thoughts, ideas, and expressive content are not 'products' as contemplated by the strict liability doctrine." *Id.* at 1279. Respondent's reliance upon *Sanders* to apply to the instant case fails for at least three reasons. First, video games and/or movies are simply not the same as numbers that are revealed on slot machines. There is no evidence that they are produced with the intention to harm third parties, *i.e.*, the victims of Klebold and Harris. The second reason that *Sanders* is not applicable to the instant case is the fact, pled in the Complaint, that the dangers of slot machine gambling are well-known to Respondents. App. R. 10-11, 14-15, 18-20. Not only are gambling addicts like Scott Stevens liable to literally gamble away everything they own and end up in crippling debt, but they are also likely to become suicidal at far higher rates than the general population and even the population of persons addicted to substances such as illegal drugs and

alcohol. About half the individuals in treatment for a gambling disorder have suicidal ideation, and about 17% have attempted suicide. App. R. 13. As stated in the Complaint:

Modern slot machines are engineered to promote longer, faster, and more intensive play, and to cause players to lose track of time and money. This design formula yields a product that, for all intents and purposes, approaches every player as a potential addict—*i.e.* as someone who does not stop playing until his means are depleted.

App. R. 10. Also, paragraphs 22 and 23 of the Complaint state,

No other form of gambling is known to manipulate the human mind as much as slot machines. Playing these machines produces in numerous gamblers a trance-like state in which their ability to make rational decision is eroded. Players become addicted to a dissociated mental state of diminished self-awareness and the suspension of a sense of time, money, value, and one's immediate surroundings. Slot machines cause and foster physical changes in brain functioning and behavior of patrons, such as Scott Stevens, and cause and contribute to their loss of willpower to the extent that patrons desire to continue in this dissociated state even when doing so is irrational or unhealthy. Their inability to stop losing time and money to these gambling machines is not a failure to exercise willpower but, rather, an effect of physiological changes that erode and weaken willpower.

App. R. 14-15. The dysfunction of compulsive gambling is reported in *The Diagnostic and Statistical Manual of Mental Disorders* (4th and 5th Editions), published by the American Psychiatric Association.

The third reason that Respondents' attempt to apply *Sanders* to this case must fail is that the use of mathematical algorithms programmed into the slot machine's microprocessor and shown to players on a machine via symbols displayed on its reels are tangible items, which are intentionally designed and engineered to create, cause, and encourage fast, continuous, and repeat betting. App. R. 9-10. Standing alone, the algorithms and software are intangible. In combination with the hardware designed for them to operate on, they become tangible items. Respondents fail

to appreciate the critical distinction between intangible properties and tangible properties for which strict liability can be imposed. As the Ninth Circuit stated in *Winter v. G.P. Putnam's Sons*, 938 F.3d 1033 (9th Cir. 1991), a case relied upon by *Sanders*, “[a] book containing Shakespeare’s sonnets contains two parts, the material and the print therein, and the ideas and expression thereof. The first may be a product but the second is not.” *Winter* at 1034. This is analogous to the case before this Court in that software, standing alone, is not tangible; however, when that software is incorporated and integrated with hardware, in this case, slot machines, it becomes tangible and, without doubt, a product. Indeed, the mathematical algorithms and computer programs of slot machines are an integral part of the machines, without which the slots will not work. Software is part of the product, just like a wheel is part of an automobile and a computer is part of a smartphone. In the end though, it is a tangible product.

In *Sanders*, the court found that the videos shown to Klebold and Harris were not “products.” While Respondents urge a similar result here, if this Court decides to apply *Sanders*, it necessarily would find that the slot machine is a product. Whether or not the Court finds that software standing alone is a “product” would not affect the conclusion that gambling machines and terminals that contain that same software are in fact “products.” Furthermore, Petitioner has sufficiently pled that the slot machines used by Scott Stevens were defective.

III. SCOTT STEVENS’S SUICIDE WAS REASONABLY FORESEEABLE AND AN EXCEPTION TO THE INTERVENING ACT THEORY RECOGNIZED IN *MOATS V. PRESTON*

In *Moats v. Preston Cnty. Comm’n*, 206 W. Va. 8, 521 S.E.2d 180 (1999), the Court left open the possibility that a claim for wrongful death, where a decedent committed suicide, could be entertained given certain facts. As Petitioner established in her opening brief, Respondents had a duty to prevent the suicide from occurring. The potential for the suicide was reasonably

foreseeable to the Respondents, and yet not only did they fail to take any actions to prevent the suicide from occurring, they continued to take affirmative actions to advance their own benefits.

We know the role that was played by Respondents because Scott Stevens left a note before taking his own life. We know that Respondents had some awareness of the mental condition of Scott Stevens leading up to his death, that they caused that mental condition by making their product available to him, and that they failed to intervene in any way to prevent Scott Stevens's death.

One of the most difficult wrongful death issues, and a particularly poignant illustration of how wrongful death expands liability beyond that at common law, is whether a wrongful death claim can be founded upon intentional infliction of emotional distress that caused the decedent to commit suicide. Such claims have been permitted. The first jurisdiction to allow such a claim was California, in 1960. In *Tate v. Rene Canonica*, 180 Cal. App. 898, 5 Cal. Rptr. 28 (1960), the complaint alleged that defendants "'intentionally made threats, statements and accusations against said deceased for the purpose of harassing, embarrassing, and humiliating him in the presence of friends, relatives, and business associates,' due thereto deceased became physically and mentally disturbed' and as a direct result committed suicide." *Id.* at 30-31. Just as in the case at bar, it is not alleged that the acts complained of were done for the purpose of causing Scott Stevens to commit suicide, but instead for the purpose of creating a condition that resulted in his suicide. The *Tate* court discussed the history of suicides as a basis for wrongful death actions and concluded: "Nevertheless, the complaint states the nucleus of a cause of action. It alleges wrongful acts done both intentionally and negligently, which caused a mental condition which resulted in the suicide." *Tate* at 42.

Other states have agreed. In *State of Mississippi v. Edgeworth, et. al*, 214 So.2d 579 (1968), in ruling on a case involving a wrongful death that allegedly occurred because of the intentional abuse of legal process by the defendants, the Mississippi Supreme Court discussed cases where wrongful death cases had been rejected where the decedent committed suicide on the ground that the suicide was an unforeseeable, intervening cause of death. *Id.* The court said that the cases reasoned that suicide is a new and independent agency which breaks the causal connection between the wrongful act and the death. Even so, it actually *declined* to follow those cases, reasoning that “[i]n short, the defendants’ intentional conduct is a legal cause of harm to plaintiffs if their individual acts were substantial factors in bringing about the harm.” *Id.*, citing *Restatement, Torts* §§ 279, 280 (1939). The court went on to “hold that where the suicide is committed in response to an uncontrollable impulse, recovery may be had if the mental state of the deceased was substantially caused by the defendants’ intentional wrongful acts, and whether they were substantial factors in bringing about the death by suicide may be issues for the jury.” *Id.* at 586-87.

One can only conclude that this is not new law. In the recent case of *Turcios v. The DeBruler Company*, 2014 IL App. (2d) 13-331, the Appellate Court of Illinois stated that a wrongful death action based upon a suicide can be maintained where the basis of the claims is an intentional act by the defendant. The court reasoned that “the weight of foreign authority, related principles of Illinois law, and the Restatement (Second) of Torts all disfavor a rule allowing a defendant to escape liability for an intentional wrongful act that proximately causes emotional distress that is a substantial factor in bringing about suicide.” As to the “weight of foreign

authority,” the court looked to recent decisions of the reviewing courts of Rhode Island,⁴ New Hampshire,⁵ Wyoming,⁶ and Indiana⁷ as well as the U.S. District Courts for the Western District of Pennsylvania,⁸ the District of Massachusetts,⁹ and the Northern District of Illinois.¹⁰ The courts in these cases all found that liability for wrongful death and survival may lie in the context of a suicide where the defendant’s conduct is intentional for two reasons based in general tort law. First, the law of torts recognizes that a defendant who intentionally causes harm has greater culpability than one who negligently does so; second, where the wrong alleged is intentional, the defendant is responsible for all injuries directly caused by it even when the injuries are not foreseeable.

The allegations regarding Scott Stevens’s suicide are directly related to the allegations of his severe emotional distress, which was directly and proximately caused by the intentional misconduct of Respondents, as previously discussed.

CONCLUSION

For the foregoing reasons and those set forth in Petitioner’s opening brief, Petitioner respectfully requests that the Court answer the certified questions as addressed above and in Petitioner’s initial brief.

⁴ *Clift v. Narragansett Television L.P.*, 688 A.2d 805, 812 (R.I. 1996).

⁵ *Mayer v. Town of Hampton*, 497 A.2d 1206, 1209-10 (N.H. 1985).

⁶ *R.D. v. W. H.*, 875 P.2d 26, 31 (Wyo. 1994).

⁷ *Kimberlin v. DeLong*, 637 N.E.2d 121, 126 (Ind. 1994) (citing 74 Am.Jur. 2d § 27, 642-43).

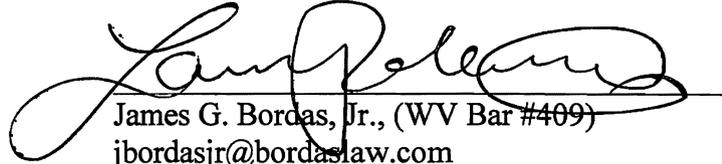
⁸ *Rowe v. Marder*, 750 F.Supp. 718, 723-24 (W.D. Pa. 1990).

⁹ *North Shore Pharmacy Services, Inc. v. Breslin Associates Consulting LLC*, 491 F.Supp. 2d 111, 134 (D. Mass. 2007).

¹⁰ *Collins v. Village of Weedbridge*, 96 F.Supp. 2d 744 (N.D. Ill. 2000).

Very respectfully submitted,

Stacy Stevens, Personal Representative of the Estate
of Scott Stevens, deceased, Petitioner,

A handwritten signature in black ink, appearing to read "James G. Bordas, Jr.", written over a horizontal line.

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CERTIFICATE OF SERVICE

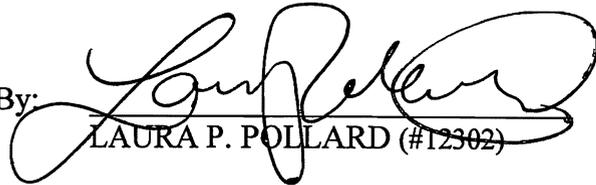
Service of the foregoing *Petitioner's Reply Brief in Support of Certified Questions* was had upon counsel of record herein by mailing a true and exact copy thereof, by regular United States Mail, postage prepaid, this 19th day of January, 2016 as follows:

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