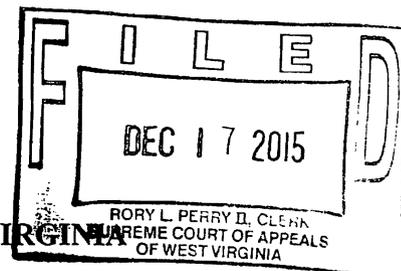


No. 15-0821



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STACY STEVENS, as Personal Representative
of the Estate of Scott Stevens, Deceased,**

Petitioner and Plaintiff Below,

v.

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

Respondents and Defendants Below.

**RESPONDENT INTERNATIONAL GAME TECHNOLOGY, INC.'S
BRIEF REGARDING CERTIFIED QUESTIONS**

Civil Action No. 5:14-cv-104
In the United States District Court for the Northern District of West Virginia
(Honorable Frederick P. Stamp, Senior Judge)

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**RESPONDENT INTERNATIONAL GAME TECHNOLOGY, INC.'S
BRIEF REGARDING CERTIFIED QUESTIONS**

Over 20 years ago in response to competition from neighboring states that threatened the survival of the valuable tourism resource represented by the State's pari-mutuel racing facilities, the West Virginia Legislature officially sanctioned what it labeled "limited video lottery games" or "lottery games which utilize advanced computer technology" as integral parts of the State-owned West Virginia Lottery to be offered at the racetracks. Under the authority conferred by the West Virginia Constitution, the Legislature has enacted video lottery legislation on at least three occasions, each time expressly and unequivocally vesting the West Virginia Lottery Commission with the exclusive authority to control the types of games to be offered, the rules of the games, the probabilities of winning, as well as the minimum and maximum payouts for each such game.

In this case, Plaintiff presents a sweeping challenge to the State's authority to control the content of video lottery games played on video lottery terminals. Though the West Virginia Constitution cedes authority over all aspects of the West Virginia Lottery to the State, Plaintiff wants the court system to circumvent that authority by wresting control of the video lottery system in West Virginia and becoming the arbiter of the content of all video lottery games offered in this State. This drastic departure from the statutory framework currently employed in West Virginia must not be permitted.

Scott Stevens embezzled millions of dollars from his employer, gambled them away, got caught, was fired, gambled away his family's savings, and then, in a calculated fashion, intentionally took his own life. Despite the loss of Mr. Stevens' considerable job and a substantial amount of money, Plaintiff (his widow) admits that she and the other members of the Stevens family were unaware of his alleged "addiction" and suicidal tendencies. Nevertheless,

shunning all notions of Scott Steven's personal responsibility for his own conduct, Plaintiff would have the courts place upon the legal purveyors of the West Virginia Lottery a duty to have psychologically evaluated Scott Stevens, prevented him from gambling away all that money, identified him as a suicide risk and prevented him from intentionally taking his own life. Distilled to its essence, Plaintiff is advocating for a special duty of care to be imposed on the gaming industry, a duty unrecognized by any court in the history of the American legal system. In the end, Plaintiff would have the courts of this State hold authorized vendors of the West Virginia Lottery liable for that which those closest to Scott Stevens could not discern and award her all amounts gambled away by her now deceased husband (including the embezzled funds) as well as wrongful death damages.

While the details of how this husband and father tragically took his own life necessarily engenders sympathy for his family and loved ones, the fact is that the instant case is but the latest in a series of lawsuits in search of a favorable jurisdiction for the inauguration of a brand new form of tort liability. International Game Technology, Inc. ("IGT"), respectfully submits that this Court should resist Plaintiff's plea for the creation of an unprecedented and dangerous strain of tort liability and answer the questions certified by the United States District Court for the Northern District of West Virginia in the negative.

I. STATEMENT OF THE CASE AND BACKGROUND:

As noted in the Order of Certification entered by the District Court, this case has been certified during the initial pleadings stage. The record before this Honorable Court is limited to Plaintiff's numerous allegations in her Complaint. Plaintiff has accurately recited those allegations in a general sense in her Brief. However, Plaintiff has omitted vital information framing her claims, including the statutory provisions underlying the entire gaming industry in

West Virginia, and has deemphasized important admissions contained in the Complaint. For that reason, IGT offers the following summary of the case and its historical background.

The Constitution of the State of West Virginia originally prohibited lotteries or games of chance. The West Virginia Legislature codified the constitutional prohibition against lotteries and made the promotion of a lottery a misdemeanor. W. Va. Code § 61-10-11 (1939). Interpreting these prohibitions, this Court recognized that lotteries were games in which a person, for consideration, was permitted to receive a prize or nothing “predominantly by chance.” Syl. Pt. 4, *State v. Hudson*, 128 W.Va. 655, 37 S.E.2d 553 (1946).

That changed in 1984, with the public ratification of an amendment to Article VI, Section 36 of the West Virginia Constitution and the establishment of a State-run lottery system. Article VI, Section 36 now permits the Legislature to “authorize lotteries which are **regulated, controlled, owned and operated by the State of West Virginia** in the manner provided by general law, either separately by this State or jointly or in cooperation with one or more states[.]” *Id.* (Emphasis added).¹ Shortly thereafter, the West Virginia Legislature enacted the West Virginia Lottery Act, establishing the West Virginia Lottery Commission and implementing a State-operated lottery under the supervision of the Commission. W. VA. CODE § 29-22-1, *et seq.* (1985). The Act provides that the “lottery shall be initiated and shall continue to be operated so as to produce the maximum amount of net revenues to benefit the public purpose described in this article consonant with the public good.” W. VA. CODE § 29-22-9(a) (1985).

In 1994 and in response to this Court’s decision in *State ex rel. Mountaineer Park v. Polan*, 190 W.Va. 276, 438 S.E.2d 308 (1993), the Legislature amended the Lottery Act and

¹ The phrase, “regulated, controlled, owned and operated by the State of West Virginia,” has proven significant to this Court when evaluating the legality of gaming in this State. Its importance in the analysis of the instant Plaintiff’s claims cannot be overstated. *See*, discussion at Section IV.A.2, *infra*.

enacted the Racetrack Video Lottery Act. W. VA. CODE § 29-22A-1, *et seq.* (1994). In so doing, the Legislature explicitly recognized that the pari-mutuel racing industry is a valuable tourism resource for the State threatened by increasing competition from neighboring states and that the survival of this valuable resource was in jeopardy “unless modern lottery games” were authorized at the racetracks. W. VA. CODE § 29-22A-2(e) (1994). The Legislature declared that video lottery games displayed on video lottery terminals are “lotteries” and, therefore, part of the State-owned, State-controlled and State-operated West Virginia Lottery. W. VA. CODE § 29-22A-2(a) (1994).

In 2001, the Legislature further expanded the scope of video lottery games when it enacted the Limited Video Lottery Act. W. VA. CODE §§ 29-22B-101, *et seq.* (2001). The purpose of the Act “was to establish a single state owned and regulated video lottery thus allowing the State to collect revenue therefrom, control the operators of the machines, and stem the proliferation of gambling in the State.” *Club Ass’n v. Wise*, 293 F.3d 723, 724 (4th Cir. 2002) (footnote omitted). Just a few years later, this Honorable Court recognized the constitutional authority of the Legislature to establish, control and operate these video lottery games, when it held that “video lottery as created in the Racetrack Video Lottery Act and the Limited Video Lottery Act constitutes a lottery for the purposes of W.Va. Const., Art. VI, § 36.” *State ex rel. Cities of Charleston, Huntington & its Counties of Ohio & Kanawha v. West Virginia Econ. Dev. Auth.*, 214 W. Va. 277, 291, 588 S.E.2d 655, 669 (2003).

Plaintiff alleges that her decedent operated VLTs (though she refers to them as “slot machines”) manufactured by IGT and located at the Mountaineer Casino, APP. 2, although proof in support of the claim has yet to be introduced. In her Complaint, Plaintiff makes an allegation of negligence and intentional “Breach of Duty of Care” against the Mountaineer Casino,

Racetrack & Resort and MTR Gaming Group, Inc. (“MTR”). APP. 15-18, Count I. She asserts a product liability claims against the Defendants in Count II (defective design) and Count III (use defect and failure to warn). APP. 18-21. Plaintiff makes a premises liability claim against MTR in Count IV. APP. 21-22. She then asserts claims for intentional infliction of emotional distress in Count V and wrongful death in Count VI against both Defendants. APP. 22-25.

What Plaintiff omits from her discussion of the specific allegations in the Complaint is as telling as what she includes. For instance, Plaintiff’s specific allegation of defect in the VLTs is not concerned with the machinery but rather the software. Plaintiff alleges that the problem is that the “algorithms that govern slot machines’ win/loss functions have been intentionally concealed” from patrons and “there are no appropriate warnings on the slots.” APP. 14, *Complaint*, ¶ 21. She alleges that all VLTs (not just those manufactured by IGT, displayed by MTR or owned by the State of West Virginia) “are engineered to promote longer, faster, and more intensive play, and to cause players to lose track of time and money.” APP. 10, *Complaint*, ¶ 15.a. It is the “interactive force” of the algorithms that Plaintiff indicts as defective. APP. 18-19, *Complaint*, ¶ 33.a. She complains of the failure to alter the rules of the game or provide additional warnings concerning the probabilities of success. APP. 19, *Complaint*, ¶ 33.c. She asserts that, in this respect, the VLTs were defective “in the sense that they were misleading, deceitful.” APP. 18, *Complaint*, ¶ 32. She alleges in conclusory fashion that “customers like Scott Stevens may become addicted to them.” APP. 19, *Complaint*, ¶ 33.b. In her arguments to the District Court, Plaintiff was even more explicit in detailing her true indictment of VLTs and more specifically, the programming of VLTs. Plaintiff asserted that VLTs in general “do not present true ‘games of chance,’ and instead are artfully and intentionally designed, through use

of mathematical programming and algorithms, to create the illusion of chance, while instead fostering the dissociated mental state which leads to addiction.” APP. 86, 118-19.

These alleged content “defects” form the foundation of her claims for product design defect, use defect and failure to warn, premises liability, intentional infliction of emotional distress and wrongful death. APP. 18-25. She specifically connects these asserted “defects” in the software to her claims for damages by alleging that this “misleading and deceitful” condition “proximately caused plaintiff’s injury, the addiction to slot machine gambling of Scott Stevens, and his subsequent suicidal state of mind.” APP. 19, *Complaint*, ¶ 33.d. Though Plaintiff admits she is not making a claim that MTR or IGT was in a special relationship with Scott Stevens, such as to be a caretaker of Scott Stevens during the times involved, APP. 4, Plaintiff neglects to mention the fact that she also makes no allegation that IGT knew Scott Stevens at all, much less knew that he availed himself of IGT video lottery terminals.

Plaintiff also omits from her discussion the fact she makes no allegation that the video lottery terminals manufactured by IGT, supplied to MTR, and allegedly played by Scott Stevens, failed to conform to the requirements of the West Virginia Lottery Commission or otherwise failed to comply with the Video Lottery Acts. These Acts specifically regulate the minimum and maximum payout percentage as well as the mathematical probabilities of all video lottery games in this State. W. VA. CODE § 29-22A-6 (2011); W. VA. CODE § 29-22B-909; W. VA. CODE § 29-22B-910. The Lottery Commission controls the rules of play and what “labels” may be placed on the video lottery terminals. W. VA. CODE § 29-22A-6; W. VA. CODE § 29-22B-907. By law, no change can be made to the rules of the game, the win/loss probabilities or the messages displayed on the VLT without the express permission and approval of the Commission. *Id.* Most importantly, the State of West Virginia owns the main logic boards, the software and all erasable

programmable read-only memory chips. W. VA. CODE § 29-22A-6(a)(7); W. VA. CODE § 29-22B-904(b). The Acts prescribe all offenses and penalties with respect to video lottery games and equipment, including civil and criminal penalties. W. VA. CODE § 29-22-27; W. VA. CODE § 29-22A-16; W. VA. CODE § 29-22B-1601 – 1607; W. VA. CODE § 29-22B-1701 – 1714. And, the Legislature specifically and unequivocally declared that the provisions of the Lottery Act and those with respect to limited video lottery games preempt all State and local laws or regulations. W. VA. CODE § 29-22-25; W. VA. CODE § 29-22A-4; W. VA. CODE § 29-22B-1902.

Based upon the record admissions, both express and implicit, the statutory environment and the lack of any authority for the claims asserted, the Defendants each filed F.R.Civ.P. 12(b)(6) motions. In the same Order that it certified three questions to this Honorable Court, the District Court denied the Defendants' motions, without prejudice, and without making findings of fact specific to the motions. The District Court did not offer answers to the certified questions.

II. SUMMARY OF ARGUMENT:

Though the first and second certified questions concern issues of first impression, the resolution of the questions can and should be addressed in summary fashion based upon well-settled principles of law. The third certified question involves a prior holding of this Honorable Court that can be adequately addressed by clarification of what is the clear implication of the Court's holding.

Video lotteries are by definition "games of chance." In the State of West Virginia, our Legislature has decided that these games will give patrons a chance to win specified amounts or nothing, while at the same time providing the State with a steady source of revenue to fund vital programs for the State and its citizens. To this end, video lottery terminals are legislatively

mandated to pay out less than they take in, to have a verifiable random number generator and minimum probability of winning the maximum payout for each play.

By statute, the content of these games (the mathematical algorithms, software or programming) is owned by the State of West Virginia. As the owner, the West Virginia Legislature placed ultimate authority for regulating this content with the West Virginia Lottery Commission. Once a game is approved by the Commission, no changes or alterations to the rules of play, win/loss probabilities or instructions/warnings to users may be made without Commission approval. Thus, the State of West Virginia is the sole arbiter of the rules of play, the win/loss probabilities and the warnings or messages provided to the players of the games.

The first certified question seeks to determine whether under the allegations made by Plaintiff either defendant owed a particular duty of care to casino patrons and must be answered in the negative. The legislatively imposed environment represented by the Lottery Acts does not make room for the assertion of common law claims with regard to the content of the games, including the rules of play, win/loss probabilities or messages provided to users. There is no room for a court of law to override the Lottery Commission's decisions through implementation of a common law "reasonable manufacturer" standard to be determined by jurors in piecemeal litigation. MTR, as a licensee under the statute, and IGT, as a manufacturer under the statute, owe only those duties expressly provided for in the Video Lottery Acts or required by the Lottery Commission. Put another way, 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. As Plaintiff has made no allegation that the video lottery terminals at issue failed to conform to the requirements of the statutes or the regulations and requirements of the West Virginia Lottery Commission, Plaintiff has failed to establish a legal duty owed under the circumstances.

Moreover, the common law claims asserted by Plaintiff have never been recognized in any court in this country and, under the facts pled, are not sufficient to state a claim under the law of the State of West Virginia. The requisite duty of care has been wanting in substantially similar cases across the country. And, Plaintiff has failed to allege the factors necessary to impose a particular duty to her decedent. While Plaintiff has generally alleged foreseeability of harm, the allegations made do not give any substance from which a court can determine the likelihood of injury, much less the burdens of guarding against it. Though she generally alleges there was a “risk” of users of VLTs becoming addicted and that these users “might experience” psychological effects, APP. 20, *Complaint*, ¶ 35 (emphasis added), Plaintiff does not quantify that “risk” such that a court could reasonably determine foreseeability of harm. Plaintiff only asserts that VLTs in general do not present a true game of chance but are designed to “create the illusion of chance,” APP. 86, 118-19, and that “use of slot machines can cause, or materially contribute, to social, mental, and physical harm to users and increase the chance of attempting and/or committing suicide.” APP. 15, 124-25. (Emphasis added).² Plaintiff has not alleged enough facts to determine whether, under *Robertson v. LeMaster*, 171 W.Va. 607, 612, 301 S.E.2d 563, 568 (1983) and its progeny, a common law duty was owed by the Defendants to her decedent. Further, the affirmative conduct rule adopted in *Robertson* has not been applied to products liability in West Virginia and does not fit within claims for products liability, such as the instant one, especially in the context of the scenario outlined in the first certified question. Given the unprecedented nature of her claims and based upon the limited allegations presented, the first certified question must be answered in the negative with respect to any common law claims.

² Plaintiff continually confuses video lottery terminals with the video lottery games displayed on those terminals. The terminal is just the hardware platform with a video screen. The content that Plaintiff challenges is part of the video lottery game displayed on that terminal (VLT).

The second certified question asks this Court to determine whether and to what extent algorithms or mathematical programming can be considered “products” under West Virginia’s strict products liability jurisprudence. The question may be moot if this Court determines that neither Defendant owes a common law duty to the Plaintiff and her decedent, but the ultimate answer to this second certified question must, likewise, be in the negative. Courts across the country examining products liability claims concerning computer programming and mathematical algorithms have determined that they are protected forms of expression, not products subject to criticism as defectively design or manufactured. Though this Court has yet to directly address the issue, it is clear that the strict products liability law of this State, beginning with *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 253 S.E.2d 666 (1979), was not intended to apply to interactive content, such as computer programming and mathematical algorithms.

The third certified question concerns a clarification of Syllabus Point 6 of *Moats v. Preston County Commission*, 206 W. Va. 8, 521 S.E.2d 180 (1999). The question posed is whether the second exception to the general rule against liability for suicide discussed in *Moats* can be applied where there is no allegation that the Defendant(s) had a special relationship with the deceased, such as caretaker. This certified question must also be answered in the negative. As this Court noted in *Moats*, the general rule is that a defendant cannot be held liable for the intentional act of suicide. The only recognized exception in this State is where the defendant has specialized knowledge of the particular person’s suicidal tendencies and has assumed a special relationship that places the defendant in a position from which it could reasonably be expected to have a duty to prevent the suicide, such as caretaker. Under the facts alleged in the instant case, such a situation is not at hand. Plaintiff specifically disclaimed any claim that the Defendants

were in a position of caretaker or had any specific knowledge of the suicidal tendencies of Scott Stevens. Instead, she is attempting to hold Defendants liable for Mr. Stevens' deliberate suicide solely based upon their alleged general knowledge of the suicidal tendencies of a small segment of the gaming public. Such an allegation is insufficient as a matter of law to hold either Defendant liable for Mr. Stevens' deliberate decision to commit suicide, as any action that the Defendants could have or should have taken would have been so far removed from the day-to-day existence of Mr. Stevens (whom Plaintiff does not even allege was personally known to IGT) as to negate any suggestion that their action or failure to act could have been a proximate cause of Mr. Stevens' suicide.

III. STATEMENT REGARDING ORAL ARGUMENT:

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, IGT respectfully submits that oral argument is appropriate in this case under Rule 20 of the Rules of Appellate Procedure as it involves matter of first impression, fundamental public importance, and the validity and interpretation of statutes and at least one prior ruling of this Honorable Court.

IV. ARGUMENT:

A. NEITHER MTR NOR IGT OWE A DUTY OF CARE TO PROTECT CASINO PATRONS FROM BECOMING ADDICTED TO VIDEO LOTTERY GAMES.

Question Certified: 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?

The first question certified by the District Court seeks guidance from this Court as to the common law duties of the respective Defendants under the above allegations. Hence, the phrase "as to each defendant" deliberately inserted by the District Court. The allegations of affirmative

conduct are somewhat distinct as to each Defendant, given that one is a premises owner and the other a manufacturer. Plaintiff admits as much by singling out the Defendants for separate treatment in her discussion of the purported duty. *Petitioner's Brief*, pp. 10-12. While Plaintiff alleges specific knowledge of Scott Stevens and his gaming habits on the part of Defendant MTR, she makes no such allegation against IGT. With respect to IGT, Plaintiff attempts to paint with a broad brush by claiming that alleged general knowledge of potential adverse reactions to its VLTs confers upon IGT a specific duty to protect against harm to Plaintiff's decedent.

There are general principles of law applicable to both Defendants which negate the existence of a common law duty, including statutory preemption and lack of foreseeability. But, for IGT, there is the added layer that lack of specific knowledge of the Plaintiff's decedent precludes a finding of duty.

- 1. The State of West Virginia Created The Video Lottery Gaming Industry By Statute And Retains Full And Exclusive Control Over Video Lottery Gaming In This State.**

With the amendment of the Lottery Act, and the adoption of the Racetrack Video Lottery Act and the Limited Video Lottery Act, the State of West Virginia has made it clear that video lottery games and the terminals on which they are displayed (VLTs) are a vital part of the West Virginia Lottery. The detailed history of those Acts is recited above. Through these statutory enactments, the Legislature has unequivocally declared that interactive electronic components of the VLTs (the logic boards and software) are owned and controlled exclusively by the State of West Virginia, through the West Virginia Lottery Commission. The Legislature has vested the Lottery Commission with the sole authority to determine the win/loss probabilities and mathematical algorithms to be employed, as well as the rules of the game and other messages to be supplied to players of such video lottery games and VLTs placed into operation within the

boundaries of the State of West Virginia. Time and again in arguments before the federal court Plaintiff erroneously asserted that the State merely provided for the “legality” of VLTs and ignored the express provisions of the Video Lottery Acts. APP. 92.

2. The West Virginia Legislature Has Expressly And Implicitly Preempted All Common Law Claims With Regard To The Programming Of Video Lottery Games Displayed On Video Lottery Terminals.

Plaintiff’s sole criticism of VLTs has to do with the software and algorithms operating in the electronic brain of the VLT and governing the rules of play of the various video lottery games displayed thereon. She is asserting that the Defendants have a duty to program the video lottery games in a different manner to protect patrons, such as her now deceased husband, from the speed of play and what she asserts is a “misleading and deceitful” impression of the rules of the game and the player’s chances of success. But it is precisely that software and algorithm that is owned and strictly controlled by the State of West Virginia. In this respect, Plaintiff is directly challenging the authority of the Lottery Commission to dictate these parameters of play for video lottery games.

“The primary responsibility for the control and regulation of any video lottery games and video lottery terminals operated pursuant to this article rests with the commission.” W. VA. CODE § 29-22A-6(g) (1994). See also, W. VA. CODE § 29-22B-102 (2001). This Court found the Video Lottery Acts constitutional precisely because the interactive controls of the VLTs and the software of the video lottery games are owned and controlled by the State. Syl. Pts 8 and 9, *State ex rel. Cities of Charleston, Huntington & its Counties of Ohio & Kanawha v. West Virginia Econ. Dev. Auth.*, 214 W. Va. 277, 588 S.E.2d 655 (2003). Expounding upon that finding, this Court held that:

Our review of the challenged Acts indicates that *the State's regulation, control, ownership, and operation of video lottery are extensive* and are certainly sufficient to bring the video lottery within the scope of the exception for authorized lotteries in W.Va. Const., Art. VI, § 36. For example, *video lottery terminals for use at licensed racetracks must be approved by the Lottery Commission and must conform to the exact specifications of the video lottery terminal prototype tested and approved by the Commission.* W.Va.Code § 29-22A-5(f) (1994). The Lottery Commission directly or through a third-party vendor, maintains a central site system of monitoring the lottery terminals which may immediately disable the video lottery games and video lottery terminals. W.Va.Code §§ 29-22A-6(14)(h) (2001) and 29-22B-305 (2001). Applicants for a video lottery license must meet several qualifications in order to be approved. W.Va.Code §§ 29-22A-7 (2000) and 29-22B-502 (2001). Finally, *the Lottery Commission is considered to own the main logic boards and all erasable programmable read-only memory chips.* W.Va.Code §§ 29-22A-6(a)(7) (2001) and 29-22B-311 (2001). We conclude, therefore, that video lottery is "*regulated, controlled, owned and operated by the State of West Virginia* in the manner provided by general law" within the scope of the exception to the prohibition against lotteries in W.Va. Const., Art. VI, § 36.

Id. at 292, 588 S.E.2d at 670.

With respect to Plaintiff's theory of labeling or warnings, the Commission is also the final authority in that regard.

The rules of play for each game shall be displayed on the video lottery terminal face or screen. The commission may reject any rules of play which are incomplete, confusing, misleading or inconsistent with game rules approved by the commission. ... All information required by this subdivision shall be displayed under glass or another transparent substance. *No 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) (emphasis added); *See also*, W. VA. CODE § 29-22B-907 (2001).

The State of West Virginia has extensively reviewed the situation, determined that video lottery games are *per se* beneficial to the economy of the State, and has assumed total and exclusive control over the video lottery industry in the State. The reading of the ordinary language of West Virginia Code, Section 29-22A-1, *et seq.*, and West Virginia Code, Section 29-

22B-101, *et seq.*, demonstrates that the Legislature looked at the pros and cons of gaming and made the conscious choice to encourage such gaming, including the explicit use of VLTs, to promote the health and well-being of the State through increased revenues, funding for education and programs for the elderly. W. VA. CODE § 29-22-18a (2010); W. VA. CODE § 29-22A-10 (2011); W. VA. CODE § 29-22B-1408 (2006).

Common law causes of action against the manufacturers and licensees are entirely inconsistent with that statutory purpose and scheme and have been expressly and implicitly preempted by the West Virginia Legislature. The subsection entitled “**Preemption of state laws or local regulation,**” of the Lottery Act, provides that:

No state or local law or regulation providing any *penalty*, disability, *restriction*, regulation or *prohibition* for the *manufacture*, transportation, storage, *distribution*, advertising, possession or sale of any lottery tickets or materials or *fo0r the operation of any lottery shall apply to authorized operations by or for the state lottery or commission.*

W. VA. CODE § 29-22-25(a) (1985) (Emphasis added).

The Racetrack Video Lottery Act expressly provides that, “[t]he provisions of article twenty-two of this chapter apply to this article...” W. VA. CODE § 29-22A-4 (1994). And, the Limited Video Lottery Act also declares that:

No state or local *law* or regulation providing 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 or persons licensed pursuant to this article or operations or activities that are authorized in this article.

W. VA. CODE § 29-22B-1902(a) (2001) (Emphasis added).

In addition to these express statements, it is abundantly clear from the extensive statutory and regulatory framework of the Lottery Acts that the Legislature intended to preempt the application of common law principles to these gaming platforms. In *State ex rel. Riffle v.*

Ranson, 195 W.Va. 121, 464 S.E.2d 763 (1995), this Court explained that the proper “approach to any statutory construction issue after the Legislature adopts explicit limitations to a preexisting common law rule must be to decide initially whether the Legislature preempted the field and thereby left any room for judicial discretion.” 195 W.Va. at 125, 464 S.E.2d at 767. The intent of the Legislature, as codified in the Racetrack Video Lottery Act, could not be any clearer.

The above statutes clearly evidence the Legislature’s intent to endow the Lottery Commission with absolute discretion to control the rules of the video lottery games, the win/loss probabilities and to codify a player’s waiver of any civil action by participation in the games. The express purpose of the Racetrack Video Lottery Act was “***to define and provide specific standards for the operation of video lottery games*** at pari-mutuel racing facilities licensed by the state racing commission pursuant to article twenty-three, chapter nineteen of this code.” W. VA. CODE § 29-22A-2(c).

The Legislature specifically found these video lottery games to be “lotteries,” subject to the ownership, control and operation of the State. W. VA. CODE § 29-22A-2(a); *SER Cities*, 214 W. Va. at 292, 588 S.E.2d at 670. The Legislature gave the Lottery Commission sole discretion to approve VLTs and video lottery games, within the parameters set by statute and taking into consideration “advancements in computer technology, competition from nearby states and the preservation of jobs in the West Virginia pari-mutuel racing industry.” W. VA. CODE § 29-22A-6(a) (1999). No VLT can be sold, leased or placed at a racetrack casino in the State of West Virginia without the express approval of the West Virginia Lottery Commission, W. VA. CODE § 29-22A-5(b), and only video lottery games “regulated, controlled, owned and operated by the commission” and utilizing “specific game rules” filed by the Commission may be displayed on

VLTs at the State's racetrack casinos. W. VA. CODE § 29-22A-5(a) (1994). Each VLT placed a racetrack casino "must conform to the exact specifications" approved by the Commission. W. VA. CODE § 29-22A-5(f) (1994) (Emphasis added). VLT manufacturers and the casino licensee are prohibited from changing "the assembly or operational functions" of any VLT placed in a racetrack casino without the express permission and approval of the Commission. W. VA. CODE § 29-22A-5(e) (1994).

The Lottery Act provides that, by participating in a lottery, a player "agrees to be bound by the lottery rules which apply to the lottery or game play involved," agrees that the determination of a winner is "subject to ... game play rules ... established by the commission" and "the determination of the winner by the commission shall be final and binding upon all participants in a lottery and shall not be subject to review or appeal." W. VA. CODE § 29-22-9(b)(13) (1994). The article goes on to state that the Commission shall fashion security and validation procedures "to ensure the honesty and integrity of the winner selection process for each lottery" and these procedures and techniques "shall not be subject to any discovery procedure in any civil judicial, administrative or other proceeding." W. VA. CODE § 29-22-9(b)(14) (1994). Utilizing the authority conferred by the Legislature, the Lottery Commission has established a Self-Exclusion Program through which compulsive or addicted gamblers can ask to be prohibited from admission to gambling facilities. W. VA. C.S.R. § 179-8-128 (2008).

The Legislature has prescribed all offenses and penalties with respect to video lottery games and equipment, including civil and criminal penalties. W. VA. CODE § 29-22-27; W. VA. CODE § 29-22A-16(a) (1994). The Act further provides that a licensee who knowingly "exposes for play, or allows to be conducted, carried on, operated or exposed for play" any video lottery game, video lottery terminal, or other device which has been tampered with or placed in a

condition, “the result of which tends to deceive the public or tends to alter the normal random selection of characteristics or the normal chance of the video lottery game which could determine or alter the result of the game” is guilty of a misdemeanor. W. VA. CODE § 29-22A-6(d) (1994) (Emphasis added). And, a person who “fails to perform any of the duties or obligations created and imposed by” the Act shall be subject to a civil penalty “as may be determined by the commission.” W. VA. CODE § 29-22A-6(i) (1994). The Limited Video Lottery Act also contains explicit civil penalties to be administered by the Commission, W. Va. Code § 29-22B-1601 – 1607, and criminal penalties comparable to those set forth in the Racetrack Video Lottery Act. *See*, W. Va. Code § 29-22B-1701 – 1714.

These statutory declarations of purpose and intent by the Legislature to own, control and manage all aspects of video lottery games and vest sole discretion in the Lottery Commission “discloses a clear legislative intent to preempt common law . . . claims with respect to the . . . matters identified and covered by the statutory protection.” *Hairston v. General Pipeline Const., Inc.*, 226 W. Va. 663, 670, 704 S.E.2d 663, 670 (2010) (finding statutory pre-emption of a limited class of grave desecration claims covered by West Virginia Code Section 29-1-8a (1993)); *see also*, *SER Riffle*, 195 W.Va. at 125, 464 S.E.2d at 767. There is no room for a common law claim on behalf of someone challenging the very rules of play and probabilities of winning, such as the instant Plaintiff.

This same principle of legislative exclusivity led other courts across the country to reject just such a claim against the gaming industry. In *Caesars Riverboat Casino, LLC, v. Kephart*, 934 N.E.2d 1120 (Ind. 2010), the casino sued Kephart to recover \$125,000 in counter checks, and Kephart filed a counterclaim against the casino. *Id.* at 1122. In striking similarity to the allegations in the instant case, Kephart (represented by *pro hac vice* counsel for the instant

Plaintiff) claimed Caesars owed her a common law duty to protect her from its enticements to gamble because it knew she was a pathological gambler and knowingly took advantage of her addiction. *Id.* Noting the comprehensive statutory framework covering “the entire subject of riverboat casino gambling,” including a program whereby compulsive gamblers are encouraged to place themselves on a self-exclusion list, the High Court observed that “the statutory scheme and Kephart’s common law claim are so incompatible that they cannot both occupy the same space.” *Id.* at 1124. The Supreme Court of Indiana rejected this attempt to create a new field of tort liability, holding that the lower court should have dismissed the counterclaim because “by unmistakable implication the Legislature has abrogated any common law claim that casino patrons might otherwise have against casinos for damages resulting from enticing patrons to gamble and lose money at casino establishments.” *Id.*

The Third Circuit Court of Appeals reached the same conclusion in *Hakimoglu v. Trump Taj Mahal Associates*, 70 F.3d 291 (3rd Cir. 1995). In an opinion authored by current United States Supreme Court Justice Alito, the Third Circuit rejected a patron’s claim that the casino got him intoxicated and took advantage to his detriment. The *Hakimoglu* Court explained that “[t]he intense state regulation of casinos is also important because, ‘[e]xtending common law dramshop liability into an area so fully regulated, without a glimmer of legislative intent, is not a predictable extension of common law tort principles...’” *Id.*, at 293, quoting, *Hakimoglu v. Trump Taj Mahal Assoc.*, 876 F.Supp. 625, 633 (D. N.J. 1994) (footnote omitted). *See also*, *Rahmani v. Resorts Intern. Hotel, Inc.*, 20 F.Supp.2d 932, 937 (E.D. Va. 1998), *aff’d*, 182 F.3d 909 (4th Cir. 1999) (applying *Hakimoglu* and concluding that plaintiff had “adduced no New Jersey law to support her suggestion that ... [the casinos] had a legal duty to stop her from gambling.... Nor is it arguable that such a duty is a ‘predictable extension of common law tort

principles' under New Jersey law.”). The Third Circuit observed that, “[c]onsidering the breadth of areas covered by statute and regulation, it would seem that if it were indeed the public policy of New Jersey to impose liability on casinos for allowing intoxicated patrons to gamble, that policy would have been enacted.” *Hakimoglu*, 70 F.3d at 294, quoting, *Tose v. Greate Bay Hotel and Casino Inc.*, 819 F.Supp. 1312, 1317 n. 8 (D. N.J. 1993), *aff'd*, 34 F.3d 1227 (3rd Cir. 1994) (internal quotations omitted). Finally, the Court noted that such an expansion of common law liability would be inherently fraught with “metaphysical problems of proximate causation, since sober gamblers can play well yet lose big, intoxicated gamblers can still win big, and under the prevailing rules and house odds, ‘the house will win and the gamblers will lose’ anyway in the typical transaction...” *Id.* at 294, quoting 876 F.Supp. at 636 (quoting, *Tose*, 34 F.3d at 1233 n.8) (internal citations omitted). Moreover, “such a cause of action could be fabricated with greater ease than a dram-shop action involving personal injury,” because, unlike specific notable accident events and reliable blood evidence available in dram shop litigation, “such reliability is largely absent after-the-fact in the casino gaming environment.” *Id.* at 294, quoting 876 F.Supp. at 637 (internal citations omitted).

The case for legislative preemption is even greater in the present situation. The West Virginia Constitution gives the State the authority to own and control these lotteries and the West Virginia Legislature has expressly preempted any law that would restrain or challenge the Commission’s authority in this arena. Unlike casino gaming in other parts of the country, the State of West Virginia actually owns the video lottery games, controls the rules of the games, including win/loss probabilities, and the information conveyed to the player on the video screen. In West Virginia, a manufacturer can be held criminally liable for altering the rules of play that have been set and approved by the Lottery Commission. It is, therefore, logically inconsistent to

suggest that a court of law could tell that same manufacturer to change the rules of the game under a common law “reasonable manufacturer” standard. As this Court instructed in *Arbaugh v. Board of Education*, 214 W. Va. 677, 681, 591 S.E.2d 235, 239 (2003), “we are unwilling to recognize a new and broad field of tort liability without express legislative designation of a private cause of action.” *Arbaugh*, 214 W. Va. at 683, 591 S.E.2d at 241.³ Where, as here, the Legislature has set the rules and designated the arbiter of those rules, the State’s comprehensive standards cannot co-exist with a common law standard to be determined by a jury.

3. There Is No Common Law Duty To Protect Patrons Of Video Lottery Gaming From The Effects Of Such Gaming.

“No action for negligence will lie without a duty broken.” Syl. Pt. 1, *Parsley v. General Motors Acceptance Corp.*, 167 W.Va. 866, 280 S.E.2d 703 (1981). *See also*, Syl. Pt. 4, *Jack v. Fritts*, 193 W.Va. 494, 457 S.E.2d 431 (1995); and Syl. Pt. 3, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000). Moreover, “[t]he determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law.” Syl. Pt. 5, *Aikens*, 208 W. Va. 486, 541 S.E.2d 576. While foreseeability of risk is a primary consideration in determining the scope of a duty an actor owes to another, “[b]eyond the question of foreseeability, the existence of duty also involves policy considerations underlying the core issue of the scope of the legal system’s protection” and “[s]uch considerations include the likelihood of injury, the magnitude of the burden of guarding against

³ Plaintiff is not alleging that the video lottery games failed to conform to West Virginia law, including the Commission’s standards. To the extent she would attempt to assert statutory violation as part of her analysis of the certified question, it must be observed the same comprehensive set of standards and regulations that preempts a common law cause of action does not provide a private cause of action for violation of its provisions. This Court further recognized in *Arbaugh* that where, as here, problems of causation would inhere in the analysis of the claim, the Courts must hesitate to extend private cause of action by implication to a statutory violation. *Arbaugh*, 214 W. Va. at 683, 591 S.E.2d at 241.

it, and the consequences of placing that burden on the defendant.” *Robertson v. LeMaster*, 171 W.Va. 607, 612, 301 S.E.2d 563, 568 (1983).

However, in order to form the basis for a valid cause of action, this duty must be brought home to the particular plaintiff, for “a duty owing to everybody can never become the foundation of an action until some individual is placed in position which gives him particular occasion to insist upon its performance ...”

Id., 171 W. Va. at 610-11, 301 S.E.2d at 567, quoting, T. Cooley, *Law of Torts* § 478 (4th ed. 1932). “Thus, a court’s overall purpose in its consideration of foreseeability in conjunction with the duty owed is to discern in general terms whether the type of conduct at issue is sufficiently likely to result in the kind of harm experienced based on the evidence presented.” Syl. Pt. 12, in part, *Strahin v. Cleavenger*, 216 W. Va. 175, 603 S.E.2d 197 (2004).

Plaintiff does little in her Brief to advance the discussion of what, if any, duty IGT would owe to her decedent in the absence of the comprehensive statutory network that preempts such a claim and has not “brought home to the particular plaintiff” the duty she is urging this Court to recognize. She does not explain how IGT could have reasonably foreseen that Scott Stevens would embezzle millions of dollars from his employer and gamble away those funds, get caught, be subject to prosecution for his crimes, gamble away his family’s life savings and then commit suicide. Instead of explaining how this unusual fact pattern was reasonably foreseeable, she merely recites the allegations of her Complaint regarding the “potential for addiction to IGT’s machines,” *Pet. Brief*, p. 9 (Emphasis added). She cites no authority, local or extra-jurisdictional, in which a specific duty to prevent addiction to gambling and subsequent suicide has been found under the allegations made.

Plaintiff’s sole citation to *Robertson* is unavailing under the circumstances. Not only does Plaintiff take the holding of *Robertson* completely out of context but she fails to explain how the duty calculus would play out under her theory and how this theory of duty fits within her

products liability claim against IGT, as spelled out in the first certified question. Simply put, there is no conceivable application of that solitary statement from *Robertson* that could justify the imposition of a duty on the part of IGT of the nature sought by Plaintiff in this case.

First, Plaintiff fails to identify what “affirmative conduct” IGT allegedly engaged in under the *Robertson* Restatement § 321 formula. By statute, IGT has to follow the requirements of the West Virginia Lottery Commission and produce algorithms that conform to the State’s specific criteria for win/loss probabilities, symbol pattern randomness and minimum and maximum payout rates. W. VA. CODE § 29-22A-6. Plaintiff inexplicably alleges that the “algorithms that govern slot machines’ win/loss functions have been intentionally concealed by IGT from patrons.” APP. 14, *Complaint*, ¶ 21. Yet, by law, each video lottery game must be “based upon computer-generated random selection of winning combinations based totally or predominantly on chance.” W. VA. CODE § 29-22A-3(y)(4). And, each VLT “shall have a random number generator to determine randomly the occurrence of each specific symbol or number used in video lottery games.” W. VA. CODE § 29-22A-6(b). The statutory framework described above makes it clear that those very algorithms and the resulting win/loss probabilities are not only known to the Lottery Commission but verified through rigorous testing. W. VA. CODE § 29-22A-5 and § 29-22A-6. In addition to the rules of the game, all messages displayed on the screen are verified in the process and the Commission may reject any such messages “which are incomplete, confusing, misleading or inconsistent” with the rules approved by the Commission. W. VA. CODE § 29-22A-6(a)(12). If IGT is providing such information to the Commission and the Commission is controlling what is conveyed to patrons, what is the “affirmative conduct” under *Robertson*?

Second, Plaintiff fails to indicate how the courts can evaluate the foreseeability of someone becoming a disordered gambler as a response to playing video lottery games tested, verified for randomness and approved by the Lottery Commission. She merely alleges that these games “cause players to lose track of time and money,” APP. 10, *Complaint*, ¶ 15.a, and “customers like Scott Stevens may become addicted to them.” APP. 19, *Complaint*, ¶ 33.b. The District Court adopted Plaintiff’s arguments before the Court to fashion the certified question and its assumption that the video lottery games “are designed through the use of mathematical programs and algorithms to create the illusion of chance while instead fostering a disassociated mental state.” But these allegations are not sufficient to permit a court to apply the *Robertson* formula and fulfill its obligation under *Aikens*.

In addition to the lack of quantifiable risk (or how much risk triggers a duty), Plaintiff’s own Complaint points to the difficulty of finding a common law cause of action for failure to identify and stop a “disordered gambler.” Her Complaint references the DSM-IV and DSM-V and the nine separate signs that are used to identify persons with a gambling disorder. APP. 11-12, *Complaint*, ¶ 18.a. A cursory review of these symptoms reveals that the vast majority are behaviors only apparent to those who interact with the patient on a personal level. Especially as Plaintiff admits IGT did not even know of Scott Stevens, it is impossible to see how such a cause of action could be established. Plaintiff is urging this Court and the District Court to find a general and comprehensive duty to all gaming patrons to identify them as disordered gamblers even though the hallmarks of such a diagnosis are known only to those closest to the person.

Third, Plaintiff’s sole argument as to a duty on the part of IGT is to recite the affirmative action duty adopted in *Robertson* and based upon Restatement (Second) of Torts § 321 (1965). *Petitioner’s Brief*, at p. 11. As the District Court indicated, the first certified question involves

whether or not the defendants owe a duty under allegations of design defect product liability (“What duty of care exists . . . 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...”). Plaintiff does not even attempt to explain how Restatement § 321 could apply in this context.

The fact is that this particular Restatement has never been applied to products liability claims in this State. Neither of this Court’s decisions applying Restatement § 321 involved an allegation of product design defect. *See, Courtney v. Courtney*, 186 W. Va. 597, 604-05, 413 S.E.2d 418, 425-26 (1991) (defendant gave drugs to co-defendant even though she knew he had violent tendencies when using the drugs and plaintiffs alleged defendant knew co-defendant was abusive to them); *Robertson*, 171 W. Va. at 612-13, 301 S.E.2d at 569 (defendant required its employee to work unreasonably long hours then drove him to his vehicle and sent him out on the highway in such an exhausted condition as to pose a danger to himself or others).

Restatement § 321 generally has no utility in the products liability context. *See, e.g., American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 438 (Tex. 1997) (Section 321 is “particularly ill-suited for application to what are essentially products liability claims because ... [it imposes] liability even when the manufacturer provides adequate warnings.... [W]hether a product is dangerous is determined when it leaves the manufacturer’s hands and enters the stream of commerce; subsequent acts have no bearing on the issue.”) (citations omitted). by solely relying upon *Robertson* and Restatement § 321, Plaintiff has failed to adduce any theory of duty that would claim against IGT.

The common law duty urged by the instant Plaintiff has never been recognized in West Virginia nor, for that matter, anywhere in the United States.⁴ As the United States District Court for the District of New Jersey put it, “[T]he great weight of authority supports Defendants’ position that common-law tort principles do not require casinos to rescue compulsive gamblers from themselves. ... Plaintiff asks this Court to adopt an extreme position, which departs radically from the New Jersey courts’ formulation of the common-law duty of care.” *Taveras v. Resorts Intern. Hotel, Inc.*, 2008 WL 4372791 *4 (D. N.J. Sept. 19, 2008) (Emphasis added; citations omitted).

Absent the suicide, the allegations in *Taveras* were essentially the same as those advanced in the instant case. Taveras, a former attorney, alleged that the defendant casinos “facilitated [her] gambling addiction and induced her to gamble away money belonging to her and others, causing her loss of money, emotional injury, and damage to reputation.” *Id.* at *1. She alleged several variations of negligence centered around the proposition that the casinos owed her a common law duty. *Id.* at *3. The District Court dismissed her claims on 12(b)(6) motions, observing that such a claim had never been recognized and the stringent regimen of regulation imposed on the industry was inconsistent with a common law cause of action. *Id.* at *4. “Plaintiff’s theory would, in effect, have no limit. For example, if adopted by this Court, her

⁴ Plaintiff is the latest in a long line of claimants who have crafted inventive legal theories blaming the gaming industry because the participants were “compulsive gamblers” in an attempt to force gaming institutions to return gaming losses and pay damages for emotional damages. No court has ever granted relief on such a claim and most have dismissed the claims on the pleadings. *See, Brown v. Argosy Gaming Co.*, 384 F.3d 413 (7th Cir. 2004); *Williams v. Aztar Ind. Gaming Corp.*, 351 F.3d 294 (7th Cir. 2003); *Merrill v. Trump Indiana, Inc.*, 320 F.3d 729 (7th Cir. 2003); *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291 (3rd Cir. 1995); *Taveras v. Resorts Intern. Hotel, Inc.*, 2008 WL 4372791 (D. N.J. Sept. 19, 2008); *Logan v. Ameristar Casino Council Bluffs, Inc.*, 185 F. Supp. 2d 1021 (S.D. Iowa 2002); *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); *Stulajter v. Harrah’s Indiana Corp.*, 808 N.E.2d 746, 749 (Ind. Ct. App. 2004) (“We conclude that Indiana’s gaming statutes and regulations do not create a private cause of action to protect compulsive gamblers from themselves”). At least two (2) of these cases involved *pro hac vice* counsel for the instant Plaintiff. *See, Aztar, supra; Kephart, supra.*

theory would impose a duty on shopping malls and credit-card companies to identify and exclude compulsive shoppers. This Court will not sacrifice common sense and stretch the common-law duty of care as Plaintiff urges.” *Id.*

The Seventh Circuit in *Merrill v. Trump Indiana, Inc.*, 320 F.3d 729 (7th Cir. 2003) came to the same conclusion. Merrill, an admitted “compulsive gambler,” alleged claims for fraud, strict liability, willful and wanton misconduct, negligence and breach of contract and the implied covenant of good faith and fair dealing. *Id.* at 731.⁵ Rejecting his tort claims, the Seventh Circuit noted that courts addressing the issue had “imposed on casinos no higher duty to their patrons than any on other business.” *Id.* at 732.

Represented by *pro hac vice* counsel for the instant Plaintiff, another admitted “gambling addict” sued a riverboat casino, alleging claims for RICO and common law claims, such as tortious breach of duty, premises liability and intentional infliction of emotional distress. *Williams v. Aztar Indiana Gaming Corp.*, 351 F.3d 294, 297 (7th Cir. 2003). The district court dismissed the RICO count but retained supplemental jurisdiction over the state law claims and granted summary judgment on all counts. *Id.* On appeal, the Seventh Circuit noted that *Merrill* was controlling, vacated the lower court’s order because it found the RICO claim and the appeal frivolous and remanded the case with instructions to dismiss the complaint for want of subject-matter jurisdiction. 351 F.3d at 300.

In *Stulajter v. Harrah's Indiana Corp.*, 808 N.E.2d 746 (Ind. Ct. App. 2004), the appellate court rejected the claims of a patron who sought to hold the casino responsible for his losses, noting that “Indiana’s gaming statutes and regulations do not create a private cause of

⁵ The 7th Circuit Court noted that, Merrill’s substantial gambling losses “fueled a need for money” that, although he didn’t specifically allege it, apparently led Merrill to rob banks in 1998, for which he was convicted in 1999 and was serving time at the time of his lawsuit. 320 F.3d at 730.

action to protect compulsive gamblers from themselves.” *Id.*, 808 N.E.2d at 749. *See also*, *Brown v. Argosy Gaming Co., L.P.*, 384 F.3d 413 (7th Cir. 2004) (applying *Stulajter* and *Merrill*); *Kephart*, 934 N.E.2d at 1123 (comprehensive statutory scheme abrogated any common law duty casino might have had to refrain from enticing a compulsive gambler to gamble).

Not surprisingly, this Honorable Court has never recognized a common law duty on the part of casino operations to identify and restrain addicted gamblers. Like Indiana and New Jersey, the State of West Virginia has enacted comprehensive statutory and regulatory law, conspicuously devoid of any recognition of a private cause of action on the part of allegedly compulsive gamblers. In fact, the West Virginia statutory scheme actually deems the allegedly offending algorithm the property of the State and places exclusive authority to determine the specifics of that algorithm, including the probabilities of win/loss, the rules of the game, and the warnings or messages to be displayed to the patron, within the West Virginia Lottery Commission. This extensive statutory scheme, by all accounts more extensive even than that in New Jersey and Indiana, does not make room for a common law claim for negligent design or strict products liability.

In addition, courts have rejected identical use defectiveness claims leveled at the makers of video games for reasons of foreseeability and causation. *See, e.g., Sanders v. Acclaim Entertainment, Inc., et al.*, 188 F.Supp.2d 1264, 1273-76 (D. Colo. 2002) (no basis under Colorado law to conclude that violence was likely consequence of exposure to video games and “no reasonable jury could find that the Video Game and Movie Defendants’ conduct resulted in Mr. Sanders’ death in ‘the natural and probable sequence of events.’”)(citations omitted); *Watters v. TSR, Inc.*, 904 F.2d 378, 381 (6th Cir. 1990) (game manufacturer had no duty under Kentucky tort law to anticipate and prevent the suicide of a disturbed player because to impose

liability in such circumstances “would be to stretch the concept of foreseeability ... to lengths that would deprive them of all normal meaning.”); and *James v. Meow Media, Inc.*, 90 F.Supp.2d 798, 804-06 (W.D. Ky. 2000), *aff’d*, 300 F.3d 683 (6th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003) (dismissing complaint against video game makers and distributors because high school shooter’s actions were not foreseeable result of exposure to video games and nothing makers “did or failed to do could have been reasonably foreseen as a cause of injury.”).

Likewise, it is patently absurd to suggest that, in addition to the rules of play specified by the West Virginia Lottery Commission, VLTs carry with them the warning of the obvious – that the odds are such that you will lose. After all, the publically available statutes enacted by the West Virginia Legislature make it explicitly clear that VLTs in operation in this State are **intended by State law** to take at least 5 and as much as 20 percent of all amounts played. W. VA. CODE § 29-22A-6(c)(1); W. VA. CODE § 29-22B-910. As one Court pointed out,

Beyond being foreseeable, it is common knowledge that more money is lost than is won by patrons at any casino. Common sense tells a reasonable person and all gamblers, compulsive or otherwise, that ‘the house usually wins.’ It is also foreseeable that marketing by the casino may lead an individual to gamble and lose at the casino.

Caesars Riverboat Casino, LLC v. Kephart, 903 N.E.2d 117, 125 (Ind. Ct. App. 2009), opinion vacated, 934 N.E.2d 1120 (Ind. 2010). Beyond the absurdity of the position that a gaming operation must put a warning that “the house usually wins,” the State of West Virginia regulates what messages VLTs may display and what labels the VLTs may bear. There is simply no common law cause of action against video lottery game manufacturers, such as IGT, and licensees, such as MTR, for negligence or strict product liability.

B. THE ALLEGEDLY DEFECTIVE SOFTWARE/MATHEMATICAL ALGORITHMS ARE NOT PRODUCTS UNDER WEST VIRGINIA STRICT PRODUCTS LIABILITY LAW.

Question Certified: Are the gambling machines or terminals and specifically the software in them a “product” under West Virginia products liability law?

The West Virginia Supreme Court of Appeals has dictated that “the general test for establishing strict liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended use.” *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 888, 253 S.E.2d 666, 683 (1979). This standard is determined by “what a reasonably prudent manufacturer’s standards should have been at the time the product was made.” *Id.* In West Virginia, an allegation of a failure to warn “is to be tested by what the reasonably prudent manufacturer would accomplish in regard to the safety of the product, having in mind the general state of the art of the manufacturing process, including design, labels and warnings, as it relates to the economic costs, at the time the product was made.” *Ilosky v. Michelin Tire Corp.*, 172 W. Va. 435, 443, 307 S.E. 2d 603, 611 (1983) (quoting *Morningstar*, 162 W. Va. at 888, 253 S.E.2d at 682-83).

As discussed above, the State owns and exclusively controls video lottery games in this State. Such games are not otherwise legal in this State. The State not only sets the state-of-the-art for the games but determines what messages or warnings may be displayed, either on the video screen or on the housing of the VLT. And, the State has expressly and implicitly preempted any common law claims with regard to video lottery games. A common law products liability claim challenging the interactive process of the software as a product that can be declared defective by a jury is entirely inconsistent with that statutory scheme. Nonetheless, even if these statutory hurdles did not exist, the algorithms and software that govern the rules of these games (and from

which all allegations of injury flow) are not “products” under common law strict products liability.

Plaintiff merely cites the Restatement (Third) of Torts: Prod. Liab. § 19, referring to the software as a “component” of the VLT and asserting that the entire VLT is defective. *Brief*, at p.12. Plaintiff then makes the strange assertion that no cases in West Virginia have found that VLTs or their software “are *not* ‘products’ within the meaning of West Virginia products liability.” *Id.* This argument is both misleading and short on reasoning. Though this is a case of first impression in West Virginia, courts across the country have applied the Restatement and found that the imagery and software of a video game (including a video lottery game) is not a static “tangible property” but, rather, a dynamic, interactive, communicative process that is exempt from the definition of “product,” as explained by the comments to Restatement § 19.

In *Sanders v. Acclaim Entertainment, Inc., et al.*, 188 F.Supp.2d 1264 (D. Colo. 2002), the survivors of Mr. Williams (a teacher killed in the Columbine High School massacre) alleged that video game manufacturers were liable for the tragedy under negligence and strict products liability for manufacturing and distributing violent video games, which were viewed by the Columbine killers. *Id.* at 1268-69. Eerily similar to the allegations in the instant case, the *Sanders* plaintiffs alleged that video game makers and distributors “**knew or should have known that their products and materials were in an unreasonably defective condition and likely to be dangerous for the use for which they were supplied.**” *Id.* at 1270 (Emphasis added). Just as in this case, the allegation was that the exposure to the game caused the actors to experience certain emotions and reactions. *Id.* at 1277.

Dismissing all claims on Rule 12(b)(6) motions, the district court concluded that the video game software was not a “product” under common law strict products liability analysis. As

the court observed, “any alleged defect stems from the intangible thoughts, ideas and messages contained within the movie and video games but not their tangible physical characteristics.” *Id.*

While computer source codes and programs may be construed as “tangible property” for tax purposes and as “goods” for commercial purposes, these classifications do not establish that intangible thoughts, ideas, and messages contained in computer video games or movies should be treated as products for purposes of strict liability.

Id., at 1278.

In coming to this conclusion, the *Sanders* Court specifically examined the very definition of “product” cited by the instant Plaintiff – that found in the Restatement (Third) of Torts: Prod. Liab. § 19. As the court noted, that definition makes a distinction between tangible and intangible properties. *Sanders*, at 1279; Restatement (Third) of Torts: Prod. Liab. § 19(a) (1998) (“A product is tangible personal property...”). Furthermore, “the commentary for § 19(a) of the Restatement (Third) of Torts notes that courts ‘have, appropriately refused to impose strict product liability’ in cases where the plaintiff’s grievances were ‘with the information, not with the tangible medium.’” *Sanders*, at 1279; Restatement (Third) of Torts: Prod. Liab. § 19, *comment d.* Accordingly, the court found that the interactive process – the programming of the video games – was not a product under strict products liability law. *Id.* See also, *Watters v. TSR, Inc.*, 904 F.2d 378, 379-81 (6th Cir.1990) (rejecting products liability claim against the maker of Dungeons & Dragons that plaintiff’s son “lost control” and “was driven to self-destruction” by playing the game); *James v. Meow Media, Inc.*, 90 F.Supp.2d 798 (W.D. Ky. 2000) (rejecting common law claims that *The Basketball Diaries* and the video games were “products” for purposes of the strict liability doctrine).

In *Wilson v. Midway Games, Inc.*, 198 F.Supp.2d 167 (D. Conn. 2002), the District Court for Connecticut dismissed a similar claim against the makers of *Mortal Kombat*. The plaintiff

mother alleged that the video game was designed “to addict players to the exhilaration of violence” and targeted a young audience, intending to addict them to the game.” *Id.* at 170. She alleged that her son’s death was, therefore, proximately caused by the makers of Mortal Kombat and their failure to put warning labels on their product. *Id.* at 169. Drawing upon the above-referenced litany of cases, the district court noted that these “game player” cases all

involve harm allegedly resulting from the intellectual aspects of magazine articles, games, motion pictures and internet web sites, that harm is a result of alleged exhortation, inspiration or “brainwashing”. . . The line drawn in these cases is whether the properties of the item that the plaintiff claimed to have caused the harm was “tangible” or “intangible.”

Id. at 173. The *Wilson* Court then noted that such a distinction was consistent with the Restatement definition of “product.” *Id.*

Like *Sanders*, *Watters* and *Wilson*, the instant Plaintiff alleges that the “interactive force” of the video lottery games caused the injuries of which she complains, including addiction and Scott Steven’s suicidal state of mind. This “interactive force” is an intangible product, exempted from the definition of “product.” *See*, Restatement (Third) of Torts: Prod. Liab. § 19, *comment d.* The interactive quality is different for each user and, as such, is incapable of being considered defective. As the Sixth Circuit noted in *Watters*,

The defendant cannot be faulted, obviously, for putting its game on the market without attempting to ascertain the mental condition of each and every prospective player. The only practicable way of insuring that the game could never reach a “mentally fragile” individual would be to refrain from selling it at all.

Watters, 904 F.2d at 381.⁶

⁶ The instant Plaintiff does not allege that IGT was aware of Scott Stevens’ personal fragility, including his willingness to embezzle, gamble away everything and commit suicide.

C. THE DEFENDANTS DID NOT OWE A DUTY OF CARE TO PREVENT THE SUICIDE OF SCOTT STEVENS.

Question Certified: What legal duties, if any, arise under Moats v. Preston County Commission, 206 W. Va. 8, 521 S.E.2d 180 (1990), given that the suicide of Scott Stevens was a possible intervening cause?

As this Court observed in *Moats*, “negligence actions seeking damages for the suicide of another have generally been barred because the act of suicide is considered deliberate and intentional, and therefore, an intervening act that precludes a finding that the defendant is responsible.” *Moats v. Preston Cnty. Comm’n*, 206 W. Va. 8, 16, 521 S.E.2d 180, 188 (1999).

Recovery for wrongful death by suicide may be possible where the defendant had a duty to prevent the suicide from occurring. In order to recover, the plaintiff must show the existence of some relationship between the defendant(s) and the decedent giving rise to a duty to prevent the decedent from committing suicide. Generally, such relationship exists if one of the parties, knowing the other is suicidal, is placed in the superior position of caretaker of the other who depends upon that caretaker either entirely or with respect to a particular matter.

Id. at Syl. Pt. 6.

The genesis of the third certified question is the last sentence of Syllabus Point 6. In her Complaint, Plaintiff specifically invokes the language of the second exception from Syllabus Point 6 of *Moats*. “Rather than cause the suicide, Mountaineer Casino, MTR, and IGT had a duty to prevent the suicide from occurring.” (*Doc. 1*, p. 18, ¶ 44). As the certified question implies, Plaintiff has not alleged a caretaker relationship between her decedent and either Defendant. Plaintiff has not alleged that IGT had any specific knowledge of her decedent at all or that anyone had knowledge that Scott Stevens was suicidal.

IGT respectfully submits that the answer to the question is clear. In order to trigger this second exception to the general rule against liability for suicide (the only one recognized by this Court to date), a plaintiff must allege and prove that a defendant was aware the decedent was

suicidal and that the defendant's relationship to the decedent was akin to a position of caretaker of the decedent.

This is the only construction consonant with the underlying reasoning of *Moats*. As this Court explained:

The latter exception, which is at issue in this case, has generally been applied to someone who has a duty of custodial care, knows that the potential for suicide exists, and fails to take the appropriate measures to prevent the suicide from occurring. Specifically, this exception has been applied to jails, hospitals, reform schools, and others having actual physical custody and control over such persons.

Moats, 206 W. Va. at 16, 521 S.E.2d at 188 (citations omitted). This Court later observed “[i]n *Moats*, this Court adopted a **specific standard of care applicable to wrongful death by suicide that requires the demonstration of a specific relationship between the deceased and the caretakers** which gives rise to a duty to prevent the decedent from committing suicide.” *State ex rel. Lloyd v. Zakaib*, 216 W. Va. 704, 705 n.5, 613 S.E.2d 71, 72 n.5 (2005) (*per curiam*).⁷

Plaintiff's quotation from *Harbaugh v. Coffinbarger*, 209 W. Va. 57, 65, 543 S.E.2d 338, 346 (2000) is misplaced. *Harbaugh* involved a situation that was either a game of Russian Roulette encouraged by the defendants or intentional suicide. This Court quoted the Eleventh Circuit, explaining that “[a]s a general rule, absent some type of custodial relationship, one cannot be held liable for the suicide of another.” *Harbaugh*, 209 W. Va. at 65, 543 S.E.2d at 346, quoting, *Wyke v. Polk County School Board*, 129 F.3d 560, 574 (11th Cir. 1997). “The rule's underlying rationale is that suicide constitutes an independent, intervening cause, which is not ordinarily foreseeable.” *Id.* The *Harbaugh* Court found no conflict in the evidence and upheld

⁷ The only other reference to the exceptions to the general by this Court was made in *Setser v. Harvey*, 2015 WL 1741136 (W.Va.Sup.Ct., Apr. 10, 2015) (Memorandum Decision). There, plaintiff alleged that the defendants actually caused his decedent's suicide. *Id.* This Court noted that, in *Moats*, it adopted the second exception to the general rule but “had not explicitly stated that a plaintiff could recover based on a cause of action for wrongful death by suicide under the first exception, ‘where the defendant is found to have actually caused the suicide.’” *Id.* at *3. This Court declined to consider whether to adopt the first exception in *Setser*. *Id.*

the circuit court's award of summary judgment for the defendant, concluding that the decedent acted intentionally and his acts constituted an intervening cause. *Harbaugh*, 209 W. Va. at 66, 543 S.E.2d at 347. In the instant case, just as in *Harbaugh*, there is no suggestion that the Defendants encouraged Scott Stevens to commit suicide. To the contrary, Plaintiff alleges that Scott Stevens made the conscious decision to get his hunting bag, drive to a local park, take the gun out of the bag, call 911 and, once the sheriff's deputies arrived, pull the trigger ending his own life. APP. 8-9, *Complaint*, ¶¶ 7, 12.

In *Watters*, where the same allegation of defective video game programming, addiction and suicide was leveled against the makers of Dungeons & Dragons, the Sixth Circuit illustrated the very reasons why the general rule against recovery for wrongful death by suicide exists. "We cannot tell why [Johnny committed suicide] or what his mental state was at the time. His death surely was not the fault of his mother, or his school, or his friends, or the manufacturer of the game he and his friends so loved to play. Tragedies such as this simply defy rational explanation, and courts should not pretend otherwise." *Watters*, 904 F.2d at 384. The inefficacy of such a claim is obvious. As the Sixth Circuit put it, "if Johnny's suicide was not foreseeable to his own mother, there is no reason to suppose that it was foreseeable to defendant TSR." *Watters*, 904 F.2d at 381. Similarly, in this case, if Scott Stevens' suicide was not foreseeable to his own family, there is no way for Plaintiff to argue that it was foreseeable to these Defendants.

Succinctly, a claim for wrongful death by suicide has never been recognized in the State of West Virginia under these circumstances. Plaintiff does not allege the facts necessary to make such a claim under *Moats* (i.e., custodial relationship and specific knowledge that Mr. Stevens was suicidal. Without specific knowledge and a custodial relationship, no defendant would have

the tools to prevent a suicide. Therefore, in the absence of allegations of such a relationship, the third certified question must be answered in the negative.

V. CONCLUSION.

The State of West Virginia has not only weighed the societal risks and, through the West Virginia Legislature, made a determination to legalize and promote the use of VLTs in the traditional racetrack casinos in this State, but the State of West Virginia actually owns the allegedly offending mathematical algorithms and software that governs the video lottery games displayed thereon. The significance of this distinction, which Plaintiff completely ignores in her Brief to this Honorable Court, cannot be overstated. By retaining ownership and exclusive control of the allegedly offending software and vital components of the VLTs, the State of West Virginia not only sets the standard but is the final authority on what can and cannot be included within that software. In addition, the Legislature has explicitly preempted any conflicting state or local law in this arena by statute. The comprehensive statutory and regulatory framework of video lottery games in this State necessarily preempts any common law claim for alleged “defects” in the State owned and controlled software. As the Supreme Court of Indiana observed, such a comprehensive scheme “abrogated the common law” to the point where “the statutory scheme and [a] common law claim are so incompatible that they cannot both occupy the same space.” *Caesars Riverboat Casino, LLC, v. Kephart*, 934 N.E.2d 1120, 1123-24 (Ind. 2010).

The overwhelming weight of authority holds that there is no recognized cause of action for negligence or strict products liability with respect to the rules of play of a video lottery game for good reason. Gaming institutions do not owe a duty to protect players from the detrimental effects of the game (i.e., gambling losses and the attendant social and psychological problems associated with such losses). Moreover, Plaintiff’s allegation that the mathematical algorithm or

programming of the games is defective directly challenges the interactive expression of the game and courts across the country have rejected such common law challenges to expression in the form of video game programming. Even if the allegation is that the mathematical algorithm or programming “create the illusion of chance” and foster a dissociated state of mind, any common law claim has been preempted by the Legislature and that interactive process is protected expression for which no common law duty of care is owed. For these reasons, the first certified question must be answered in the negative.

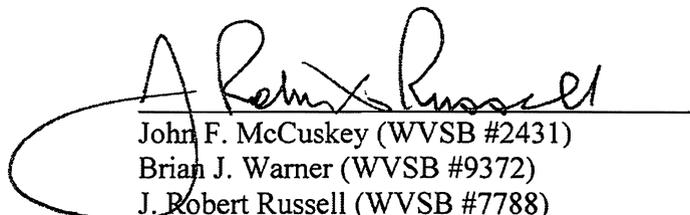
For the same reasons, the second certified question must be answered in the negative. Courts across the country have held that expressive content and messaging, in the form of video game programming, is not a “product” under strict products liability theory. Even the Restatement (Third) of Torts: Prod. Liab. § 19, the authority relied upon by Plaintiff, recognizes this fact. The Restatement makes it clear that messages and expressive content, such as mathematical computer programming, may be considered intangible personal property that can be copyrighted but it is not the type of tangible personal property for which a claim can be made for product defect. Because the content is what defines it, such intangible property cannot be considered defective, as a matter of law.

Finally, the answer to the third certified question is that a wrongful death claim cannot be maintained for the intentional suicide of Scott Stevens under the circumstances alleged in the instant Complaint. Plaintiff admits that the Defendants were not in a position of caretaker with respect to Scott Stevens. They neither had custody of Scott Stevens nor were they in a position to undertake responsibility for his physical well-being. Likewise, it is not alleged (nor can it be) that the Defendants knew of Scott Stevens’ propensity for addiction and suicidal ideation. According to the Complaint, his own family was not aware of his addiction and suicidal

thoughts. Plaintiff cannot escape the fact that, under *Moats*, the intentional act of suicide on the part of Scott Steven operates to legally break the chain of cause for any claim of wrongful death “because the act of suicide is considered deliberate and intentional, and therefore, an intervening act that precludes a finding that the defendant is responsible.” *Moats v. Preston Cnty. Comm'n*, 206 W. Va. 8, 16, 521 S.E.2d 180, 188 (1999).

Respectfully submitted.

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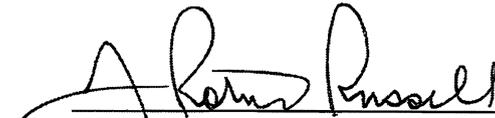
CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2015, I served true and correct copies of the foregoing "***International Game Technology, Inc.'s Brief In Regard To Certified Questions***" on the following counsel of record by United States mail, first class, postage paid, and addressed as follows:

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