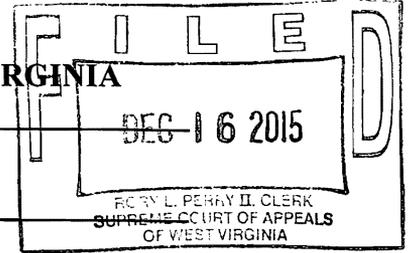


COPY



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0821

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

Petitioner,

v.

**MTR GAMING GROUP, INC., D/B/A/ MOUNTAINEER CASINO, RACETRACK &
RESORT; AND INTERNATIONAL GAME TECHNOLOGY, INC.,**

Respondent.

Respondent MTR Gaming Group, Inc.'s Brief on Certified Questions

**Certified Questions from the United States District Court
for the Northern District of West Virginia
(Civil Action No. 5:14-CV-104)**

**Robert J. D'Anniballe, Jr. (W. Va. # 920)
PIETRAGALLO GORDON ALFANO
BOSICK & RASPANTI, LLP
333 Penco Road
Weirton, WV 26062**

Telephone: (304) 723-6314

Facsimile: (304) 723-6317

Email: RJD@Pietragallo.com

Counsel for Respondent MTR Gaming Group, Inc.

TABLE OF CONTENTS

	Page
I. Certified Questions as Phrased by the U.S. District Court	1
II. Statement of the Case	2
A. <u>Parties</u>	2
B. <u>Facts and Proceedings Below</u>	2
III. Summary of Argument	3
IV. Statement of Oral Argument	5
V. Argument	6
A. <u>Standard of Review</u>	6
B. <u>First Certified Question - No Duty Exists Under West Virginia Law that Requires a Casino to Prevent a Patron from Becoming Addicted to a Specific Slot Machine or from Gambling</u>	6
C. <u>Second Certified Question Slot Machine Software is Not a Product under West Virginia Products Liability Law</u>	14
D. <u>Third Certified Question - A Casino has No Duty under West Virginia Law to Prevent its Patron’s Suicide</u>	17
VI. Conclusion	19

TABLE OF AUTHORITIES

<u>Case Law</u>	Page
<i>Bower v. Westinghouse Elec. Corp.</i> 206 W.Va. 133, 522 S.E. 2d 424, 429 (1999).....	6
<i>Caesars Riverboat v. Kephart</i> , 934 N.E. 2d 1120 (Ind. 2010).....	10
<i>Caesars Riverboat v. Kephart</i> , 930 N.E. 2d 117 (Ind. Ct. of App. 2009).....	11
<i>Gorran v. Atkins Nutritionals, Inc.</i> , 464 F. Supp. 2d 315, 325 (S.D.N.Y. 2006).....	15
<i>Hakimoglu v. Trump Taj Mahal Assoc.</i> , 70 F.3d 291, 293 (3d Cir. 1995)	8
<i>Harbaugh v. Coffinbarger</i> , 209, W.Va. 57, 543 S.E. 2d 338 (2000).....	17
<i>Jack v. Fritts</i> , 193 W.Va. 494, 457 S.E. 2d 431 (1995).....	6,7,8
<i>James v. Caserta</i> , 175 W.Va. 406, 332 S.E. 2d 872 (1985)	8
<i>Merill v. Trump Indiana, Inc.</i> , 320 F. 3d 729 (7th Cir. 2003)	8,10
<i>Moats v. Preston County Commission</i> , 206 W. Va. 8, 521 S.E.2d 180 (1990).. ..	5,17,18,19
<i>Morningstar v. Black and Decker Mfg. Co.</i> , 162 W.Va. 857, 862, 253 S.E.2d 666, 669 (1979).....	6
<i>Parsley v. General Motors Acceptance Corp.</i> 167 W.Va. 866, 870, 280 S.E. 2d 703, 706 (1981).....	6
<i>Rahamani v. Resorts Int'l Hotel, Inc.</i> , 20 F. Supp 2d 932, 937 (E.D. Va. 1998)	8
<i>Robertson v. LeMaster</i> , 171 W.Va. 607, 612, 301 S.E. 2d 563, 568 (1983).....	7,12
<i>Sanders v. Acclaim Entm't, Inc.</i> , 188 F. Supp. 2d 1264, 1278 (D. Colo. 2002).....	15
<i>Schrenger v. Caesars</i> , 825 N.E. 2d 879, 884 (Ind. Ct. App. 2005).....	12

<i>Taveras v. Resorts Intern. Hotel, Inc.</i> , 2008 WL 4372791 (U.S. Dist. NJ 2008).....	8,9,10
<i>Way v. Boy Scouts of Am.</i> , 856 S.W.2d 230, 239 (Tex. App. 1993).....	15
<i>Winter v. G.P. Putnam’s Sons</i> , 938 F.2d 1033, 1036 (9th Cir. 1991).....	15
<i>Wyke v. Polk County School Board</i> , 129 F.3d 560 (11th Cir.1997).....	18

Statues and Rules

West Virginia Rules of Appellate Procedure, Rule 18(a).....	5
West Virginia Rules of Appellate Procedure, Rule 20(a).....	6
W.VA. CODE § 29-22A-2(c) (1994).....	13
W.VA. CODE § 29-22A-3(y) (1994).....	16
W.VA. CODE § 29-22A-6 (1994).....	16,17
W.VA. CODE § 29-22A-9 (1994).....	17
W.VA. CODE § 29-22A-19 (1994).....	14
W.VA. CODE R. § 179-8-129 (2008).....	11,13

Other Authorities

Restatement (Third) of Torts: Prod. Liab. § 19 (1998).....	14,15
--	-------

TO: THE HONORABLE CHIEF JUSTICE
THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS

AND NOW comes Respondent, MTR Gaming, Inc.¹ (hereinafter “MTR” or “this Respondent”), by and through counsel, Robert J. D’Anniballe, Jr., Esq. of the law firm Pietragallo Gordon Alfano Bosick & Raspanti, LLP, and hereby submits the following brief setting forth its legal arguments regarding the certified questions presented by the United States District Court for the Northern District of West Virginia.

I. CERTIFIED QUESTIONS AS PHRASED BY THE U.S. DISTRICT COURT

1. 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?
2. Are the gambling machines or terminals and specifically the software in them a “product” under West Virginia products liability law?
3. 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?

¹ MTR Gaming Group, Inc. merged with Eldorado Resorts, Inc., effective September 19, 2014. Thus, MTR Gaming Group, Inc. no longer exists as a corporate entity. Notwithstanding the foregoing, for the purposes of this proceeding, the entity will continue to be referred to as MTR Gaming Group, Inc. or MTR. The information contained herein regarding MTR will be based upon its existence at the time of the events at issue in this appeal.

II. STATEMENT OF THE CASE

A. Parties

Stacey Stevens (hereinafter, “Petitioner”) is the widow of Scott Stevens (hereinafter, “the Decedent” or “Petitioner’s Decedent”) and has brought the instant claims as the personal representative of her husband’s estate. [Appendix Record, p. 7]. MTR Gaming Group, Inc. is the former parent company of Mountaineer Park, Inc. [Appendix Record, p. 27]. Mountaineer Park, Inc., currently a wholly owned subsidiary of Eldorado Resorts, Inc., owns and operates Mountaineer Casino, Racetrack & Resort (hereinafter, “MTR” or “this Respondent”). [Appendix Record, p. 27]. International Game Technology, Inc. (hereinafter, “IGT” or “Respondent IGT”) is a manufacturer and seller of electronic gambling equipment and software and supplied the slot machine(s) at issue in the instant case to MTR for use a Mountaineer Casino. [Appendix Record, p. 8].

B. Facts and Proceedings Below

Petitioner filed her Complaint against MTR and IGT (hereinafter, collectively referred to as, “Respondents”) alleging that each was negligent and that such negligence resulted in Petitioner’s husband, Scott Stevens, becoming addicted to gambling on a particular slot machine, gambling to an excessive degree, embezzling funds from his employer, and, eventually, committing suicide. [Appendix Record, pp. 10-25]. Specifically, Petitioner has brought claims against Respondents for Negligent and Intentional Breach of Duty of Care, Defective Product Design, Product Use Defectiveness and Failure to Warn, Premises Liability, Intentional Infliction of Emotional Distress, and Wrongful Death. [Appendix Record, pp. 7-26]. Petitioner has alleged that her deceased husband frequently visited MTR’s casino facility and became addicted to gambling on IGT slot machines located there. [Appendix Record, pp. 10-25]. Specifically, Petitioner has alleged that MTR and IGT

were negligent in breaching an alleged duty of care to prevent Scott Stevens from becoming addicted to gambling on the specific slot machines at issue in this case and by breaching an alleged duty to prevent Scott Stevens from continued gambling on these machines at MTR's casino facility. [Appendix Record, pp. 9-12]. Petitioner alleges that MTR had a duty to discover that Scott Stevens was addicted to gambling and likewise, had a duty to prevent Scott Stevens at its casino facility. [Appendix Record, pp. 9-12]. Petitioner admits that Scott Stevens did not seek assistance with his alleged gambling addiction through utilization of the Self-Exclusion program. [Appendix Record, p. 16].

Petitioner alleges that Scott Stevens, as a result of his gambling addiction, embezzled from his employer, was terminated from employment, withdrew funds from financial accounts upon which his family relied, and, eventually, committed suicide. [Appendix Record, p. 9]. The crux of the entirety of Petitioner's claim is the notion that the IGT slot machines at issue in this case are allegedly designed to addict casino patrons to them and that its win/loss function is concealed from casino patrons. [Appendix Record, pp. 14, 228-229].

MTR and IGT filed separate Motions to Dismiss Petitioner's Complaint. [Appendix Record, pp. 27-52, 53-83]. After holding oral argument on the pending motions, the Honorable Judge Stamp of the United States District Court for the Northern District of West Virginia denied the same without prejudice and thereafter certified the present questions, issues of first impression in West Virginia, to this Court. [Appendix Record, pp. 1-6].

III. SUMMARY OF ARGUMENT

There is no duty of care such as that upon which Petitioner's Complaint is based. Petitioner's Complaint goes to great lengths to provide an emotional narrative and present

psychological studies and other authored works in an effort to change carefully articulated law and to impose a duty of care upon a business which is wholly unsupported by the laws and policies of this State. Although the specific issue of the particular duty raised in Petitioner's Complaint has not yet been addressed in West Virginia, it has been addressed in multiple other jurisdictions with legalized gambling. In every single instance, the courts in those jurisdictions have consistently held that tort law simply does not support the relief sought by Petitioner in this case. Application of related West Virginia law leads to the same result in the instant matter. This Respondent cannot be held liable for Petitioner's deceased husband's actions, regardless of whether her husband was in fact a compulsive gambler. Petitioner is attempting to utilize the courts of West Virginia as a lobbying venue to make a public policy argument for a complete overhaul of tort law, a change contrary to well-established West Virginia law, both statutory and case-law. If a claim such as Petitioner's were permitted to proceed, it would open a flood-gate of claims by any individual who has lost money at a casino or might lose money in the future. Moreover, if Petitioner is able to pursue such claims, West Virginia tort law, essentially, would then indicate that the courtrooms of this State provide a safe haven where its citizens can shirk any and all responsibility for their own actions. Certainly, this is contrary to the law and public policy of this State. This Honorable Court must find that no duty exists under West Virginia law as presented by the District Court's first certified question.

To be clear, Petitioner has not alleged that the actual physical housing unit of the slot machines at issue is defective. Rather, Petitioner suggests that the software within the machine is defective. Under the applicable law governing products liability, the software within the slot machine at issue in this case, which Petitioner suggests is designed in a negligent way, does not fall within the definition of a "product" for the purposes of products liability claim. Moreover,

courts facing questions concerning whether software or a video game can be considered a product for purposes of a products liability claim have generally found that such intangible things are not products sufficient to serve as a basis for such a claim. Here, Petitioner has claimed that the software inside of a slot machine is negligently designed in such a way to addict its users – very similar claims have previously been rejected by virtue of the fact that an intangible thing is simply not a product. No court in West Virginia has found that a video game, computer game, slot machine, or other similar intangible thing is a product sufficient to set forth a basis for a products liability claim. This Honorable Court should confirm that intangible electronic media is not a product as defined by the products liability law of this State.

Finally, it is well-settled under West Virginia law that, in most cases, a claimant cannot bring a wrongful death claim where the decedent committed suicide. While this Court has found certain exceptions to that general principle, none is applicable to the facts of the instant case. It is clear that this Court intended to make a narrow exception to the general prohibition on wrongful death claims in cases of suicide – not to open courthouse doors to a barrage of wrongful death claims where the decedent’s suicide was an intentional and intervening act. Petitioner’s Decedent had no relationship with Respondent that would give rise to a successful wrongful death claim resulting from Petitioner’s Decedent’s suicide. Under the facts plead by Petitioner, this Court must find that no legal exists under *Moats* or any other applicable law to permit Petitioner to pursue a wrongful death claim for her husband’s suicide.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, as MTR submits that the decision process would be significantly aided by

such argument. Oral Argument is appropriate under Rules 20(a)(1) and 20(a)(2) because the herein matter involves issues of first impression (Rule 20(a)(1)) and also involved issues of fundamental public importance (Rule 20(a)(2)). Each of the three certified questions present by the District Court addresses a specific issue of the law which has not yet been addressed by this Court or is unsettled in this State, all involving issues of fundamental public important. Thus, oral argument is appropriate.

V. ARGUMENT

A. Standard of Review

When presented with a certified question from a federal district court, this Court's review is plenary. *Bower v. Westinghouse Elec. Corp.* 206 W.Va. 133, 522 S.E. 2d 424, 429 (1999). This principle is well established under West Virginia law. When reviewing legal issues presented by certified question, this Court "must of necessity determine the present law bearing on the issue certified." *Id.* (quoting *Morningstar v. Black and Decker Mfg. Co.*, 162 W.Va. 857, 862, 253 S.E.2d 666, 669 (1979)).

B. First Certified Question - No Duty Exists Under West Virginia Law that Requires a Casino to Prevent a Patron from Becoming Addicted to a Specific Slot Machine or from Gambling

A claim for negligence must establish that the defendant violated a duty it owed to the plaintiff, and "no action for negligence will lie without a duty broken." *Parsley v. General Motors Acceptance Corp.* 167 W.Va. 866, 870, 280 S.E. 2d 703, 706 (1981) (citations omitted). There is no applicable duty in this case. Whether the defendant owes the plaintiff a duty of care is a determination that "must be rendered as a matter of law by the court." *Jack v. Fritts*, 193 W.Va. 494, 457 S.E. 2d 431, 435 (1995) (citing *Parsley*, 167 W.Va. at 870, 280 S.E. 2d at 706).

A casino has no duty to protect a gambler at its facility from losing money when gambling. Likewise, a casino has no duty to protect a patron from his own behaviors, whether addictive or otherwise. Under West Virginia law, it is well established that foreseeability of risk is a primary consideration in finding whether one owes a duty another. *Robertson v. LeMaster*, 171 W.Va. 607, 612, 301 S.E. 2d 563, 568 (1983). Beyond foreseeability, “the existence of duty also involves policy considerations underlying the core issue of the scope of the legal system’s protection . . . includ(ing) the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant. *Jack*, 193 W.Va. at 457, S.E. 2d at 435 (quoting *Robertson*, 171 W.Va. at 612, 301 S.E. 2d at 568).

In the present case, the magnitude of the burden of guarding against casino patrons frequently utilizing slot machines is insurmountable. Likewise, the consequences of placing such a burden upon Respondents are outrageous and contrary to established law. A casino, and its employees and agents, do not have the expertise or ability to psychologically evaluate each of its casino patrons to determine whether he or she might be susceptible to problem gambling or addicted to gambling. Thus, a casino, and its representatives, cannot be held to a duty to protect a person from himself/ herself. The burden of determining whether each casino patron is addicted to a certain slot machine or other gaming activity would, effectively, make it impossible for casinos to operate within this State. As the West Virginia legislature has repeatedly made clear, the operation of casinos in this State is not only lawful, but also, encouraged for the economic and tourism benefits they bring. Moreover, the above law makes clear that the policy considerations at issue regarding both the legalization of gambling and the tort law established in this State must be contemplated when determining whether a duty of care exists. The remedies offered by our legal system are not to be invoked in such a way that each individual claimant can

escape accountability for his or her own actions. That is exactly what Petitioner in this case is asking this Court to do.

Where the existence, or lack thereof, of a duty of care is an issue of first impression, as is the case here, this Court often looks to other states, especially those with similar statutes, in developing its holding. *See, e.g. Jack v. Fritts, Jack*, 193 W.Va. at 494, S.E. 2d at 431 (looking to Virginia statutes and case-law in determining a duty of care in landlord – tenant relationships); *James v. Caserta*, 193 W.Va. 494, 332 S.E. 2d 872 (1985) (looking to authority from other jurisdictions in determining whether a cause of action existed in West Virginia). With the issue presented in this case, multiple other jurisdictions, constituting the majority of those in this country with legalized gambling, have already confronted and answered the present question. As every jurisdiction faced with this question has repeatedly held, a casino or other entity does not have a duty to prevent gamblers, compulsive or otherwise, from gambling nor a duty to protect them from financial loss or any other alleged injuries resulting from such action by the gambler or for any other negative consequences associated with such loss. *See, e.g. Hakimoglu v. Trump Taj Mahal Assoc.*, 70 F.3d 291, 293 (3d Cir. 1995); *Rahamani v. Resorts Int’l Hotel, Inc.*, 20 F. Supp 2d 932, 937 (E.D. Va. 1998); *Merill v. Trump Indiana, Inc.*, 320 F. 3d 729 (7th Cir. 2003); *Taveras v. Resorts Intern. Hotel, Inc.*, 2008 WL 4372791 (U.S. Dist. NJ 2008).

In *Hakimoglu*, the plaintiff brought a negligence claim against a casino because it allowed him to gamble though he was visibly intoxicated. 70 F. 3d 291 at 292. In that case, the Third Circuit, through an opinion written by then Judge Alito, now Justice of the Supreme Court of the United States, affirmed the lower court’s dismissal of the plaintiff’s claims, finding that the New Jersey Supreme Court was not likely to recognize such a claim. *Id.* at 293 (quoting the district court’s finding that there was not a “glimmer of legislative intent” to extend dram-shop

liability to the highly regulated gaming law and recognizing it “is not a predictable extension of common law tort principles”). In the present case, there is no allegation that Scott Stevens was intoxicated but, rather, that this Respondent encouraged him to gamble despite alleged knowledge that the Decedent was a compulsive gambler. As the Third Circuit in New Jersey recognized, gaming is highly regulated in each state where it is legalized, and, if the respective legislatures wish to impose an additional duty on casinos, whether it is for the intoxicated gambler or the compulsive gambler, they would do so. As in New Jersey, West Virginia law has not created such a duty.

In *Taveras*, the facts are exceptionally similar to those in the present case. 2008 WL 4372791. In that case, the plaintiff, Taveras, alleged she was a compulsive gambler who, as an attorney, embezzled client funds to spend on gambling at various casinos in Atlantic City, New Jersey. *Id.* at *1. Taveras’s family apparently told casino employees about her condition as a compulsive gambler – she lost an average of \$5,000 per hour and gambled five days a week. *Id.* Taveras received invitations, free hotel rooms, transportation to the casinos, food, entertainment, and gifts to entice her to continue to gamble at the defendant casinos facilities. *Id.* at *2. After receiving a nine month treatment for gambling addiction at a facility out of state, Taveras filed her claim, arguing negligence and intentional infliction of emotional distress, among other things. *Id.* In response, the defendants filed a 12(b)(6) motion to dismiss. *Id.* The New Jersey U.S. District Court granted defendants’ motions to dismiss. *Id.* at *9. Petitioner in this case has plead no facts to suggest the Decedent’s family told Respondents about his alleged gambling addiction nor have any facts been plead to suggest Respondents enticed Scott Stevens to gamble with any offers of free accommodations, transportation, food, and the like.

The District Court in *Taveras* pointed out that imposing a duty on casino to stop casino patrons from gambling too much would “have no limit” and that such a theory would extend to retail stores and credit card companies who would then be required to identify and exclude compulsive shoppers. *Id.* at *4. The *Taveras* court was not willing to “sacrifice common sense and stretch the common-law duty of care” as the plaintiff in that case had requested. *Id.* While the court in *Taveras* lies in New Jersey, its reasoning is certainly applicable in any state with gaming, including West Virginia.

In *Merill v. Trump Indiana*, the Appellate Court upheld the trial court’s dismissal of a gambler’s claim based upon allegations that the casino had failed to uphold its supposed duty to protect the plaintiff from gambling despite a gambling addiction, causing the plaintiff to become a bank robber. 320 F. 3d 729 (7th Cir. 2003). In that case, the plaintiff gambler had requested his own exclusion from the defendant casino; still, that court refused to find the casino owed the gambler a duty of care to prevent him from participating in gambling. *Id.* In the present matter Petitioner has admitted that her Decedent never even asked to be excluded from this Respondent’s casino facility.

In *Caesars Riverboat v. Kephart*, the casino brought suit against the gambler for failure to pay certain markers (gambling debts); Kephart brought a counter-claim that the casino breached its duty by capitalizing upon her gambling addiction. 934 N.E. 2d 1120 (Ind. 2010). Again, the gambler’s claim against the casino failed. The court there found that where the legislature has created a comprehensive statutory scheme which regulates gambling, a claim such as Kephart’s was incompatible with the same. The court explained that “[t]he existence of the voluntary exclusion program suggests the legislature intended pathological gamblers to take personal responsibility to prevent and protect themselves against compulsive gambling.” *Id.* at 1124. The

court went on to note that the legislature in Indiana made a calculated decision in not requiring casinos to identify and exclude problem gamblers, and as such, a common law claim by a problem gambler who was admitted to the casino directly contracts the choice of the legislature. *Id* (emphasis added). Allowing such a claim, the court noted, would “shift primary responsibility from the gambler to casino. It is apparent that the legislature intended otherwise.” *Id.*² The same reasoning is applicable in West Virginia, where the legislature has crafted a complete and well-versed statutory scheme which wholly governs the operation of legal gaming facilities in West Virginia. Like Indiana, West Virginia has created a Self-Exclusion program through which compulsive or addicted gamblers can ask to be prohibited from gambling. W.VA. CODE R. § 179-8-129 (2008). For this Court to then shift responsibility back to this Respondent would contradict the legislature’s intent.

In the case at hand, Petitioner has not even alleged facts that This Respondent in any way enticed or encouraged patronization by Scott Stevens through free hotel rooms, free meals, transportation, and the like. In fact, for the time period at issue in the Complaint, Petitioner does not even allege that Scott Stevens utilized this Respondent’s player’s club reward program which would track a gambler’s play and give rise to such rewards. Notably, Petitioner acknowledges

² This holding is similar to the reasoning of the trial court which noted: “The relationship between Kephart and Caesar’s is not remote . . . the harm is quite foreseeable, indeed predictable. However, the bilateral foreseeability of the harm associated with gambling does not support the establishment of a common law duty on the part of Caesar’s. The small opportunity to win and the substantial likelihood of losing is implicit in the act of gambling and is reasonably and equally foreseeable to the casino and to the gambler alike...Moreover, marketing by casino operators to compulsive gamblers is not reckless conduct. Most importantly, public policy does not support the imposition of a unilateral duty on casinos to protect compulsive gamblers from the casinos’ marketing activities and hosting. The General Assembly has made the public policy decision to legalize gambling and has set up a statutory and regulatory framework to govern how casinos do business in Indiana. Even if we were to assume that, under the facts presented in Kephart’s counterclaim, Caesar’s does indeed owe a duty to compulsive gamblers beyond that which is owed to any other business invitee, Kephart’s own behavior tips the balance of the duty factors. Despite knowledge of her proclivity towards compulsive gambling, Kephart took no action to cut off her ties with casinos. Additionally, Kephart only decided to seek treatment after losing a large amount of money that she could not pay back. While Caesar’s actions in allowing her to write six checks totaling \$125,000 are extremely concerning and should be examined . . . Kephart has a responsibility to protect herself from her own proclivities and not rely on a casino to bear sole responsibility for her actions. *Caesars Riverboat v. Kephart*, 930 N.E. 2d 117 (2009).

that Scott Stevens did not even avail himself to the Self-Exclusion offered by this Respondent and the West Virginia Lottery. Bewilderingly, though, Petitioner suggests that, somehow, this Respondent should have unilaterally determined that Scott Stevens should have been banned from gambling at its facility. This assertion flies in the face of logic and, more importantly, the statutory and regulatory framework governing gambling in West Virginia. As the above cases illustrate, even where a casino repeatedly enticed and encouraged a gambler to continue returning to its facility, or when a patron was intoxicated, or where a patron has asked to be excluded from a casino facility, the courts have refused to find the casino at fault for person's decision to gamble. Here, Petitioner does not even allege such facts but still attempts to have the Court hold Respondents liable for the actions of the Decedent.

Again, West Virginia law provides that foreseeability is a substantial factor in the Court's determination of whether to find that a duty of care exists. *Robertson* 171 W.Va. at 612, 301 S.E. 2d at 568. This Respondent is a business and, as such, operates to realize profits. It is apparent to any reasonable person or gambler, including even the compulsive gambler, that the overwhelming majority of gamblers lose money at casinos, which would not otherwise be in existence. As such, it is foreseeable that, in gambling at a casino, one will lose money; likewise, it is foreseeable that a casino will market to gamblers and encourage them to spend money at their facility. These facts are undeniable, even to the most compulsive gambler. A casino patron makes a conscious decision to visit and spend money at a casino. As a court in Indiana eloquently pointed out, "When a patron wagers at a casino, he is not simply 'giving' money to the casino, but instead he is spending his money-purchasing a chance to win even more." *Schrenger v. Caesars*, 825 N.E. 2d 879, 884 (Ind. Ct. App. 2005). Moreover, as courts in various jurisdictions have recognized, if an individual, specifically, a problem gambler, won money from

the casino, it is almost certain he would not file a lawsuit against the casino. *See, e.g. Caesars Riverboat Casino LLC v. Kephart*, 903 N.E. 2d 117, 125 (Ind. Ct. of App. 2009).

The West Virginia legislature regulates all aspects of casinos and gaming within the State of West Virginia. As indicated in the West Virginia Code,

The Legislature further finds and declares that the state can control and regulate a video lottery if the state limits licensure to a limited number of video lottery facilities located at qualified horse or dog racetracks, extends strict and exclusive state regulation to all persons, locations, practices and associations related to the operation of licensed video lottery facilities, and provides comprehensive law enforcement supervision of video lottery activities.

W.VA. CODE § 29-22A-2(c)(1994). Undoubtedly, the State of West Virginia has found that gambling at certain facilities is legal and beneficial to the economy and other aspects of society. If there are in fact certain risks associated with gambling at Petitioner alleges, the benefits of legalizing gambling to citizens of this State were deemed to outweigh such risks. Surely, then, operating a gambling facility in accordance with state laws and regulations is not an outrageous action, though Petitioner asks this Court to find it so. The fact that the West Virginia Code strictly and expressly regulates all aspects of gaming in this State makes clear what duties are imposed upon a casino in regard to its patrons. The laws and regulations of West Virginia purposely do not impose upon casinos a duty to protect problem gamblers from gambling – that duty, logically, belongs to the individual gambler.

West Virginia offers a ‘Self-Exclusion List’ whereby compulsive gamblers may ask that the casino not permit them at their property. The Code of State Regulations in West Virginia details duties imposed upon casinos, and also discusses compulsive gamblers. W.VA. CODE R. § 179-8-129 (2008). Beyond monitoring and accessing the West Virginia Lottery Commission’s Self-Exclusion List, West Virginia casinos owe no duty regarding compulsive gamblers. In fact,

West Virginia casinos owe the West Virginia Lottery Commission the duty of monitoring the Self-Exclusion List – not the individual gambler. In any event, Scott Stevens did not even take this step of putting his name on the Self-Exclusion List.

Compulsive gambling is in fact addressed by West Virginia law, but such provisions are limited to the creation of funding and administrative aspects of a Compulsive Gambling Treatment Fund. *See, e.g.* W.VA. CODE § 29-22A-19 (1994). Again, this is addressed in detail, but nowhere does the legislature create a duty for casinos to even discover or monitor compulsive gamblers at their facility. If the legislature had intended for casinos and other gaming establishments to be responsible for the financial losses of compulsive gamblers, it would have provided for the same in its vast regulations and standards required of these facilities. As the extensive amount of gaming regulations in this State illustrate, and the reasoning of courts of multiple jurisdictions which have addressed the present issue have held, the law does not provide for a cause of action for a gambler, not even the compulsive one, who becomes addicted to gambling or experiences financial loss, not matter how severe, due to his own actions at a casino. As the above law and reasoning demonstrates, without a duty of care, Petitioner’s claims against Respondents must fail. Simply put, Petitioner has failed to cross the hurdle that permits her to present her case in the courtroom. Under no set of facts, and certainly not under the facts alleged in Petitioner’s Complaint, can relief be granted for these claims. No interpretation of West Virginia’s statutory law or case-law can lead to the conclusion that a casino holds a duty of care to protect its patrons from excessive participation in gambling activities. Indeed, the law of this State makes it clear that there is no such duty.

C. Second Certified Question – Slot Machine Software is Not a Product under West Virginia Products Liability Law

A product is defined by the Restatement of Torts as:

. . . tangible personal property distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in this Restatement. Restatement (Third) of Torts: Prod. Liab. § 19 (1998).

Because information, or computer software, is not a tangible thing, most courts have found that it cannot qualify as a product for purposes of products liability claims. *See, e.g. Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991); *Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315, 325 (S.D.N.Y. 2006); *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1278 (D. Colo. 2002); *Way v. Boy Scouts of Am.*, 856 S.W.2d 230, 239 (Tex. App. 1993). The same legal reasoning applies to the software inside the slot machines at issue in this case, which Petitioner has argued are defectively designed in that they addict their users to gambling.

When determining whether a video game could be considered a product under the products liability law of Colorado, the District Court there looked to the Restatement's definition of "product" and reasoned that "the intangible thoughts, ideas, and expressive content" were not products. *Sanders v. Acclaim Entertainment, Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002). In that case, the products liability claim revolved around two intangible things: a movie and a video game. *Id.* Plaintiffs there alleged that the manufacturer to the video game at issue created a defective product because the video game depicted violent material and should have been equipped with a warning stating it could encourage its users to act violently. *Id.* The tragic event that led to the *Sanders* case was the horrific school shooting incident at Columbine High School. The argument presented was that the shooters would not have acted but for the negligence of the

video game manufacturers in creating a defective product. *Id.* Despite such an occurrence, the Colorado District Court was unable to define the intangible contents of a video game as a product in order for a viable products liability claim to proceed. *Id.* A similar analysis and result should be found in the instant case.

Petitioner’s statement that there is no case-law or statutory language to suggest that gambling software is not a product is accurate; it is also true that there is no case-law or statutory language suggesting that gambling software *is* a product. While this is another issue of first impression in West Virginia, there is no legal or statutory authority in this State to suggest that a mathematical algorithm used in the design of software game inside a slot machine would be considered a product subject to a products liability claim in this State. Like a video game within a gaming console, the gambling software within a slot machine is not a tangible thing but, instead, it is composed of information, ideas, and images. As such, any analysis of Petitioner’s claim reaches the conclusion that the software game within a slot machine is a not a product that would enable the pursuit of a products liability claim under West Virginia law.

In addition to the foregoing, Petitioner failed to point out a crucial detail regarding the slot machines at issue in this case and, particularly, the software within them. The West Virginia Lottery Commission, a state agency, owns the gaming software which Petitioner is claiming is defective. Specifically, the West Virginia legislature has defined a video lottery game as “. . . a commission approved, owned and controlled electronically simulated game of chance. . .” W.VA. CODE § 29-22A-3(y) (1994). With regard to the actual software that controls the function of the slot machines at issue, the State legislature has specified that “[t]he main logic boards and all erasable programmable read-only memory chips (EPROMS) are considered to be owned by the commission and shall be located in a separate locked and sealed area within the video lottery

terminal.” W.VA. CODE § 29-22A-6(a) (7) (1994). Moreover, the West Virginia Code goes into extreme detail on the various tests and requirements each video lottery terminal must meet with regard to the percentage of win and loss and payout. W.VA. CODE § 29-22A-6 (1994). For example, the legislature has required that each video lottery game at this Respondent’s casino, such as the machine(s) at issue in this case, “pay out no less than eighty percent and no more than ninety-five percent of the amount wagered.” W.VA. CODE § 29-22A-6(c)(1)(1994). Thus, the mathematical algorithm which Petitioner suggests is defective and dangerous is mandated by this State.

Finally, Petitioner is claiming that the broad language of the Racetrack Video Lottery Act which imposes a duty to operate “in a manner which does not pose a threat to the public health, safety, or welfare of the citizens of [West Virginia}. . .” supersedes the specific characteristics prescribed by lawmakers and regulators in regard to the video lottery terminals challenged by Petitioners. W.VA. CODE § 29-22A-9. In this flawed argument, Petitioner conveniently fails to acknowledge the language of this same subsection of the statute which requires manufacturers to create video lottery terminals and related equipment “in accordance with the specifications and procedures specified in sections five and six of this article.” *Id.*

D. Third Certified Question – There is No Duty under West Virginia Law for a Casino Facility to Prevent the Suicide of a Casino Patron

West Virginia courts have established that negligence claims for wrongful death in the event of suicide “have generally been barred because the act of suicide is considered deliberate and intentional.” *Moats v. Preston County Commission*, 206 W.Va. 8, 16, 521 S.E. 2d 180, 188 (1999). Though some claims have been permitted where the defendant actually caused the suicide or had a duty to prevent the suicide from occurring, the alleged facts in the instant case

do not fit within the boundaries of a permitted cause of action. *Id.* (citing *McLaughlin v. Sullivan*, 461 A.2d 123, 124-25 (1983)). Specifically, this Court held that

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.

In making such a holding, this Court made it crystal clear that the general principle barring wrongful death claims for suicide stands firm and that exceptions to the same are narrow. *Id.*

Further, it is clearly recognized that suicide, most often, is an intervening and superseding cause, making it, and not the negligence of another party, the proximate cause of the injury. *Harbaugh v. Coffinbarger*, 209 W.Va. 57, 543 S.E. 2d 338 (2000). In *Harbaugh*, this Court looked to the United States Court of Appeals for the Eleventh Circuit which stated that, “[a]s a general rule, absent some type of custodial relationship, one cannot be held liable for the suicide of another. The rule's underlying rationale is that suicide constitutes an independent, intervening cause, which is not ordinarily foreseeable.” *Id.* at 346 (quoting *Wyke v. Polk County School Board*, 129 F.3d 560 (11th Cir.1997)). In that case, the Court upheld summary judgment finding that a self-inflicted gunshot wound was an intervening cause. The decedent in that case had killed himself when partaking in a game of Russian Roulette, and this Court upheld the lower court’s finding that such an action, superseded any act of negligence by any other person present at the time. *Id.*

Petitioner does not allege that this Respondent actually caused the suicide, but rather, that it had a duty to prevent the suicide from occurring. Notably, Petitioner fails to allege that there was a special relationship between the Decedent and this Respondent that would give rise to this

Respondent preventing or having a duty to prevent the Decedent from committing suicide. However, the above case law on this issue from this Court clearly illustrates that there may only be a duty to prevent someone else from committing suicide when there is some type of custodial or caretaker relationship where the defendant knows a person is at risk for suicide and fails to prevent it – this relationship has been found in jails, hospitals, reform schools, and other areas where a person has physical custody and control over the person committing suicide. There is no such relationship here. The only relationship that existed between this Respondent and the Decedent was that of a business and its customer.

Clearly, the relationship between a casino and its patrons comes nowhere near the *Moats* standard – patrons are not under physical custody of the casino nor is there any relationship giving rise to a duty for the casino to prevent suicide. MTR was not, at any point in time, and especially at the time of the Decedent’s suicide, his caretaker or custodian. Scott Stevens committed suicide in a local park – far from this Respondent’s casino facility located in Chester, West Virginia. The law does not, and sensibly could not, impose a duty upon businesses to prevent a person who happens to be, or have been, its customer from carrying out the intentional and intervening act of committing suicide. It is not foreseeable to a business that its customer will, at some point, commit suicide, and it also is not reasonable, let alone judicious, to impose upon a casino the duty of preventing a gambler from making the decision to take his or her own life. Defendant had no position as caretaker of Scott Stevens creating any kind of duty to prevent suicide and any claim for wrongful death under these facts must fail. The law, for good reason, simply does not provide such an extreme and unjust remedy. Petitioner has not alleged any facts sufficient to pursue a wrongful death claim.

VI. CONCLUSION

For the foregoing reasons, this Court should hold that no duty of care exists as to this Respondent with respect to Plaintiff's allegations that the slot machine at issue addicts its users, casino patrons, to gambling. Additionally, this Court should hold that, under West Virginia law, the software within the slot machine is not a product for purposes of a products liability claim. Finally, this Court should find that no legal duty arises under *Moats* or otherwise that would make this Respondent liable for the suicide of Scott Stevens. What's interesting is that there are no allegations by Petitioner of this Respondent's breach of any law, rule, or regulation prescribed by law in this State, but yet, MTR is being sued for Negligent and Intentional Breach of Duty of Care, Defective Product Design, Product Use Defectiveness and Failure to Warn, Premises Liability, Intentional Infliction of Emotional Distress, and Wrongful Death.

WHEREFORE, the Respondent respectfully requests that this Court answer the district court's certified questions as outlined above and for any such other relief as this Honorable Court deems necessary, appropriate, and proper.

Respectfully Submitted,

**PIETRAGALLO GORDON ALFANO
BOSICK & RASPANTI, LLP**

By: */s/Robert J. D'Anniballe, Jr*
ROBERT J. D'ANNIBALLE, JR., ESQ.
WV Bar No. 920
333 Penco Road
Weirton, WV 26062
Telephone: (304) 723-0220
Facsimile: (304) 723-6317
RJD@Pietragallo.com
***Counsel for Respondent, MTR Gaming
Group, Inc.***

CERTIFICATE OF SERVICE

I do hereby certify that, on this 15th day of December, 2015, I served the foregoing ***Respondent MTR Gaming Group, Inc.'s Brief on Certified Questions*** by U.S. First Class mail to the parties at the addresses set forth below:

James G. Bordas, Jr., Esq.
Laura P. Pollard, Esq.
Sharon Y. Eubanks, Esq.
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
Email: jim@bordaslaw.com
Counsel for Petitioner

Terry Noffsinger, Esq.
HENSLEY LEGAL GROUP, P.C.
350 East New York Street, Suite 300
Indianapolis, IN 46204
Email: tnoffsinger@hensleylegal.com
Counsel for Petitioner

Brian J. Warner, Esq.
J. Robert Russell, Esq.
**SHUMAN & MCCUSKEY
& SLICER, PLLC**
1445 Stewartstown Road, Suite 200
Morgantown, WV 26505
Email: rrussell@shumanlaw.com
***Counsel for Respondent
International Game Technology,
Inc.***

**PIETRAGALLO GORDON ALFANO
BOSICK & RASPANTI, LLP**

By: */s/Robert J. D'Anniballe, Jr*
ROBERT J. D'ANNIBALLE, JR., ESQ.
WV Bar No. 920
333 Penco Road
Weirton, WV 26062
Telephone: (304) 723-0220
Facsimile: (304) 723-6317
RJD@Pietragallo.com
***Counsel for Respondent, MTR Gaming
Group, Inc.***