IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2006-TS-00139

SHIRLEY SMITH **APPELLANT**

VS.

AMERISTAR CASINO VICKSBURG, INC. **APPELLEE**

BRIEF OF APPELLEE AMERISTAR CASINO VICKSBURG, INC.

APPEAL FROM THE CIRCUIT COURT OF
WARREN COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

SUBMITTED BY:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Shirley Smith, Appellant/Plaintiff
2. Ameristar Casino Vicksburg, Inc., Appellee/Defendant
3. Albert Lee Felder, Counsel for Appellant/Plaintiff
4. Van Douglas Gunter, Counsel for Appellant/Plaintiff
5. Timothy D. Moore of Currie Johnson Griffin Gaines & Myers, P.A., in Jackson, Mississippi, counsel for Ameristar Casino Vicksburg, Inc., Appellee/Defendant
6. Honorable Frank Vollor, Judge for the Circuit Court of Warren County, Mississippi

TIMOTHY D. MOORE

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STATEMENT REGARDING ORAL ARGUMENT

The issues in this matter have been fully briefed and do not present any new or novel issues of law. Accordingly, Appellee asserts that an oral argument on the merits of this case will not aid or assist this Honorable Court in making its determination.

I. STATEMENT OF THE ISSUES:

1. The Lower Court did not err in failing to order the production of security training manuals, as (1) the Plaintiff never propounded a discovery request seeking those manuals, and (2) even if the plaintiff had requested those manuals, any such materials would not have been reasonably calculated to lead to the discovery of admissible evidence.

2. The Lower Court did not err in its role as Gatekeeper by excluding the testimony of an "expert" on "walking", as the proffered testimony was unreliable, would not have assisted the trier of fact, and would have amounted to an improper attempt to tell the jury how to decide the case.

II. STATEMENT OF THE CASE

Shirley Smith (hereinafter "Smith", "Plaintiff" or "Appellant") was at Ameristar Casino Vicksburg, Inc. (hereinafter "ACVI") walking behind an ACVI employee. Because she was in a hurry and the employee was walking too slowly, she attempted to go around him and cut directly across his path. When she cut in front of him, she tripped over his feet and fell.[1] When the employee attempted to assist her, Smith responded as follows:

I ain't got time to wait. I've got to go. My machine's hot.[2]

She immediately got up and returned to her machine. Later that same evening, she confessed to another ACVI employee that she tripped because she was not watching where she was going.[3]

Despite this admission, Smith sued ACVI alleging that the accident was the fault of the ACVI employee and that she was injured in that fall.[4] After hearing and seeing all of the evidence (which included surveillance footage showing the plaintiff cut in front and trip over the feet of the ACVI employee), the jury returned a verdict in favour of ACVI.[5] Appellant now asks that this Court reverse the Lower Court's judgment because the Court refused to: (1) compel ACVI

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[1]T pp. 389, ln 20-23; 403, ln 17-29; 406, ln 16-27.

[2]T p. 334, ln 23-24. At trial Smith feigned a lack of memory, but she never denied making these statements. Therefore, this is uncontradicted.

[3]T pp. 338, ln 10-20; 347, ln 12-14. At trial Smith feigned a lack of memory, but she never denied making these statements. Therefore, this is uncontradicted.

[4]R pp. 10-13.

[5]T p. 516.

to produce documents that Appellant never actually requested; and (2) accept the testimony of an "expert" who would have told the jury that the accident occurred because ACVI did not properly train its employee on how to walk.[6] It is a non-sequitur to say that the Lower Court could have erred in refusing to compel the production of records that were never requested. Likewise, it is also a logical fallacy to say that a person should be allowed to offer "expert" testimony on the decidedly "un-expert" subject of walking. The Lower Court did not abuse its discretion. Rather, it rightly refused to allow the plaintiff to confuse the jury and have the case decided on improper grounds.

[6]R pp. 498, 499

III. SUMMARY OF ARGUMENT

Appellant's argument for reversal is as follows:

> The Plaintiff in this trial was put in a position of trying to extract from the alleged negligent casino employee the standard of care of that employee. Because Plaintiff was not given the training manuals for security officers, and was not allowed to have the assistance of an expert in defining the standards for a security officer in the situation that existed at the time that security officer Murdock and Plaintiff Shirley Smith collided, Plaintiff was denied a fair trial.[7]

Put another way, Appellant's position is that this case is about ***"security"*** and the fact the accident happened to have occurred at a casino. She would have this Court believe that "manuals" regarding the "training" of security personnel would be probative of this issue, and that "an Expert could [have] help[ed] the jury understand the duties of a security guard ***in the casino environment*** . . ."[8] According to the Appellant, this environment is one where "adults . . . come and enjoy themselves" and "there are a lot of things to attract the attention of patrons and to keep them happy and help them enjoy themselves."[9]

Appellant's argument and requested relief are predicated on three fallacies. The first is that the plaintiff actually propounded a discovery request seeking security "training manuals." The second is that the jury would have been assisted by the testimony of an "expert" who would have told the jury that the accident occurred because ACVI did not train its employee on how to walk. The third and overriding fallacy is that: (1) this case has something to do with "security"

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[7]Appellant's Brief, p. 15

[8]*Id.* at 12.

[9]*Id.* at 15.

other than that the person unlucky enough to be between the plaintiff and her "hot" slot machine just happened to be an ACVI security guard; and (2) the fact the incident happened in a casino is somehow probative of the "standard of care" to be applied.

As for the first fallacy, the fact is that the plaintiff never propounded a discovery request seeking security training manuals. It is a logical fallacy to say that the Lower Court could have erred in refusing to order the production of records that were never requested. As for the second fallacy, a jury does not need an expert to assist them in determining whether two people who ended up occupying the same space at the same time were paying attention to where they were going. This is a matter within the common knowledge and experience of the jury and is not an appropriate subject of expert testimony. Plaintiff's proffered "expert" would only have improperly attempted to tell the jury how to decide the case. The Lower Court did not abuse its discretion in refusing to allow this testimony.

Overriding all of this is the third fallacy: Appellant's mistaken belief that the fact the accident happened (1) in a casino, (2) with a security guard means something. It does not. Appellant is fond of speaking about the "environment" in the casino and all of things in that environment calculated to distract patrons. The bottom line is that the plaintiff wanted the Lower Court to, and would have this Court, make its decisions based not on ***how*** the accident occurred, but instead on the fact it happened to occur in a casino.

The Court of Appeals rejected this very argument in *Ratcliff v.*

Rainbow Casino-Vicksburg, L.P.[10] in which the plaintiff argued for a different standard of care for casinos:

> Ratcliff argues that casinos are inherently different from other businesses, such as grocery stores, because it is the purpose if a casino to "seduce the invitee to get lost in time and space and to create the [sic] 'magical effects' and 'dream-like state'." However, Ratcliff fails to point out the examples that are more on point: bars, movie theatres, museums, musicals, nightclubs, amusement parks, state fairs, etc. All these businesses rely on being able to attract and keep customers entertained for hours. All these businesses employee flashy attractions designed to keep customers riveted. All do so for profit.[11]

The *Ratliff* Court declined to impose a different standard for casinos, and the Lower Court in this matter also rightly refused to have the case decided on the basis of whose ox would be gored. The plaintiff tripped over someone's feet. The accident happened to have occurred in a casino. The "someone" happened to be an ACVI employee. The employee also happened to be a security guard. All of these facts are incidental. It could have been any employee, any patron and could have occurred anywhere, at any business establishment. The bottom line is that this case has nothing to do with the training of security guards, was not a case for expert testimony, and Appellant's illogical argument regarding a non-existent discovery request is simply a red herring. The Lower Court did not abuse its discretion,[12] and this Court should allow the judgment of the Lower Court to stand.

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[10]914 So. 2d 762 (Miss. App. 2005)

[11]*Ratcliff*, 914 So. 2d at 765.

[12]The standard of review for the admission or suppression of evidence is an abuse of discretion. The decision of the trial judge should stand unless arbitrary or clearly erroneous. *Troupe v. McAuley*, 995 So. 2d 848, 855-56 (Miss. 2007); *Miss. Trans. Comm'n v. McLemore*, 863 So. 2d 31, 34 (Miss. 2003).

IV. ARGUMENT

A. THE LOWER COURT DID NOT ERR IN REFUSING TO ORDER THE PRODUCTION OF DOCUMENTS THE PLAINTIFF NEVER REQUESTED

1. Appellant argues that the materials she requested in Request No. 11 were materials related to the "training" of security guards. By the plain language of Request No. 11, Appellant's position is without merit.

Request for Production Number 11 is the sole discovery request at issue on appeal. What it requested was:

> . . . copies of all of [ACVI's] written rules, guidelines, regulations, and procedures related to the reporting, prevention, and handling of injuries to Ameristar Casino, Vicksburg customers such as plaintiff.

ACVI objected to producing these materials on grounds including (but not limited to) that any such documents were "not reasonably calculated to lead to the discovery of admissible evidence" and were "proprietary in nature."[13] In the hearing on plaintiff's motion to compel a response to Request No. 11, plaintiff's argument for why the documents should be produced was as follows:

> Your Honor, . . . we're asking for procedures related to the reporting, prevention and handling of injuries to these customers. That's all. The history of the case would show, Your Honor, that they did handle this. We'd like to know what their procedures are. We'd like to know if the procedures were handled correctly in this particular case. In other words, what are they supposed to do? Are they supposed to get a witness statement from her? Is that part of the thing they're supposed to do when she was in that jumbled state when she was slammed to the floor? We just want to know what the procedures were. If they have them, fine. If they don't, okay.[14]

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[13]R pp. 111, 32, 33, 97 and 98.

[14]T pp. 28 ln 14-28.

Plaintiff's argument mentioned nothing about "security manuals."

After the hearing on her motion to compel, the appellant changed her story and began to represent that request No. 11 sought the production of manuals related to the ***training of security guards***. For example, at the hearing on ACVI's Motion to Strike the testimony of her would-be expert, Ken Braunstein, Plaintiff asked the Court to "reconsider its earlier ruling [denying the production of] . . . manuals of the casino for . . . training of the security guard" so plaintiff could "see whether or not this security guard was following what the casino required of him."[15]

Appellant continues this argument on appeal, arguing that "[t]he requested materials would have allowed counsel to educate himself as to the duties and responsibilities of a security guard . . . [and] whether or not the security guard breached his duties and responsibilities as setforth [sic] by Ameristar Casino."[16] Appellant further argues that "the manuals could have been looked at to see whether or not Ameristar Casino had adequate training and regulations in place, or whether or not the casino itself was negligent, rather than by respondiat superior through the security guard in a failure to have adequate training, etc."[17]

Appellant's position that Request No. 11 calls for the production of manuals related to the training of security guards is a contrivance. **The plain language of request no. 11 does not request**

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[15]T p. 96 ln 19-25.

[16]See Appellant's Brief, p. 9, ¶ 1.

[17]*Id.* p. 9, ¶ 2.

these materials. This is confirmed by the fact that in moving to compel the production of the requested materials, plaintiff did not argue that the documents sought were materials related to the training of security guards. This is because the request does not ask for those materials, and plaintiff only concocted this argument after the fact. It is a non-sequitur to say that the Lower Court erred in refusing to order the production of materials that were not requested. The issue of the production of manuals was never before the Lower Court.

2. Even if the plaintiff had requested materials related to the "training" of security guards, the Lower Court's ruling still would have been proper, as any such materials would not be probative of any fact at issue nor would they have been reasonably calculated to lead to the discovery of admissible evidence.

The purpose of the rules of discovery is to clarify the issues and prevent trial by ambush.[18] These purposes are embodied in the litmus test outlining discovery and limiting what is discoverable to that which is not privileged ***and*** that which is "reasonably calculated to lead to the discovery of admissible evidence."[19] The comment to Rule 26 states that "[d]iscovery should be limited to the specific practices or acts that are in issue . . . [and] MRCP 26(b)(1) is intended to favor limitations, rather than expansions, on permissible discovery."[20]

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[18]*McCarty v. Kellum*, 667 So. 2d 1277 (Miss. 1995); *Townsend v. Warren*, 373 So. 2d 811 (Miss. 1979).

[19]Mississippi Rule of Civil Procedure 26(b)(1); *Scott v. Flynt*, 704 So. 2d 998, 1004 (Miss. 1996).

[20]*See also Mississippi Bar v. Land*, 653 So. 2d 899, 910-11 (Miss. 1995).

Even had the Appellant actually requested training manuals and the Lower Court denied that request, such a ruling would have been proper. The fact that a security guard happened to be the unlucky person between the plaintiff and her "hot" slot machine is incidental. All of the ACVI employees walk through the casino floor at one time or another. It could just as well have been the cook or the slot tech or cocktail server or even another patron who had the plaintiff trip over their feet. The accident had nothing to do with the "training" of security guards. It had everything to do with one person walking in a straight line and another not watching where she was going. Materials related to the "training" of security guards would not have been probative of any fact at issue nor would they have been reasonably calculated to lead to the discovery of admissible evidence. The Court would have been correct in refusing to order their production.[21]

3. The Lower Court did not abuse its discretion in refusing to order production of the materials actually requested by Plaintiff in Request No. 11, as those documents would not have been probative of any fact at issue nor would they have been reasonably calculated to lead to the discovery of admissible evidence.

As for the materials actually requested, i.e, "written rules, guidelines, regulations, and procedures related to the reporting, prevention, and handling of injuries to . . . [ACVI] customers . . .," the Lower Court appropriately asked the following question:

But how would that- if they did not follow their procedures,

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[21] *Taylor Machine Works, Inc. v. Great American Surplus Lines Ins. Co.*, 635 So. 2d 1357, 1363 (Miss. 1994)(noting denial of motion to compel is subject to abuse of discretion standard).

how would that affect their liability?[22]

To this question, appellant's counsel responded as follows:

> The liability would be a good question, Your Honor. There is a statement that she made in there that was produced to us that said that they got a statement from her. I don't think they should have compelled her to give a statement, a witness statement in the state that she was in.[23]

After hearing this argument, the Court ruled that the requested materials need not be disclosed.[24] This ruling was not an abuse of discretion. The question of whether ACVI personnel followed "procedure" in taking witness statements after the accident is simply not probative of any fact in issue and the materials actually requested were not reasonably calculated to lead to the discovery of admissible evidence.[25]

B. THE LOWER COURT DID NOT ERR IN EXCLUDING "EXPERT" TESTIMONY IN "WALKING"

Appellant complains that the Lower Court did not allow the testimony of an "expert" in walking. Appellant will likely argue this characterization is incorrect. However, any such argument would once again be rooted in the fallacy that this case has something to do with "security" or the fact this accident happened in a casino.

In its role as gatekeeper, the Lower Court was charged with the

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[22]T pp. 28 ln 19; 29 ln 1-2.

[23]T p. 29 ln 3-10.

[24]T p. 29 ln 11-14. The Court made it clear that the plaintiff could retool the request, and the ruling might be different.

[25]*See* Mississippi Rule of Civil Procedure 26(b)(1); Mississippi Rule of Evidence 401. ACVI also objected to the request on the grounds that it was vague and ambiguous as worded. While it is difficult to tell what the plaintiff is asking for, it is clear that the request does not seek the production of security training manuals.

duty to determine whether the proposed testimony of Ken Braunstein was both relevant ***and*** reliable.[26] This requirement of "relevance" means that the jury must have ***needed*** the assistance of the expert in weighing the evidence. "The touchstone of whether a witness may testify as an expert under Rule 702 is whether the witness would be helpful ***to the trier of fact***, not to the party's case."[27] If a jury can assess the facts "using only their common experience and knowledge," then expert testimony is not necessary and should be excluded.[28]

Applying this first "relevance" prong, the Lower Court excluded the testimony of Braunstein, ruling as follows:

> The Court is going to exclude the testimony of Ken Braunstein under Rule 702. The Court- before an expert can testify, he has to have some specialized knowledge that would be helpful to the trier of fact. And Mr. Braunstein may have some specialized knowledge in some other areas, but ***this is a case where two people walked in to each other.*** It's within the common purview of - the Court having watched the tape repeatedly of the incident, ***this is something - a matter of common knowledge with the jurors. They do not need specialized, expert testimony to tell people how to walk and pay attention to where they are putting their feet.***
>
> ***The Court has to be guarded against having some expert come in and tell the jury how to decide the case, and I think that's what Mr. Braunstein would do.*** He'd be trying to give some sort of - put his degree and all his expertise and his - whatever else, ***trying to tell people how to walk, and people know how to walk.*** And so the Court feels he does not have specialized knowledge in this particular case as to be

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[26]*Miss. Trans. Comm'n v. McLemore*, 863 So. 2d 31, 34 (Miss. 2003); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993). *See also* Mississippi Rule of Evidence 702.

[27]*Stonicher v. International Snubbing Services, LLC*, 2003 WL 22208577 at *1 (E.D.La. Sept. 19, 2003)(emphasis added)(citing *Hardin v. Ski Venture, Inc.*, 50 F.2d 1291, 1296 (4th Cir. 1995)).

[28]*Peters v. Five Star Marine Service*, 898 F.2d 448, 450 (5th Cir. 1990).

admissible and be helpful to the jury in this case. The Court is going to strike Mr. Braunstein's testimony.

This is - if it had been some sort of other case where security was of particular importance, such as a take-down of a rowdy client or something, patron - excuse me - or something else like that, which I've had in this court, how you take them down, how do you take a drunk out of the place or something like that, his testimony might be relevant. This is where two people walked and were walking along and tripped into each other. ***It doesn't matter whether he was the security guard or checker or whatever else.*** Two people bumped into each other. One of them ***happened to be*** an employee, and Ameristar is responsible for any negligence of that employee under vicarious liability. So that's the issue before the Court.[29]

As the Lower Court correctly noted, Braunstein's testimony would not be "expert" in nature. "Walking" is not a "scientific or technical" subject, and it strains the imagination to think how it is somehow "specialized" such that the jury needed an expert to explain it. While Braunstein tried (and the appellant is still trying) to couch his opinions in terms of "security" and "training," word-play cannot transform his opinions into something they are not. Mr. Brauntsein's opinions are a perfect example of the trend in "personal injury litigation in which 'expert testimony' is proffered concerning common sense issues with which the finders of fact need no expert assistance."[30] The Lower Court was correct in refusing to allow this

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[29]T. pp. 96 ln 28-29; 97; 98 ln 1-12 (emphasis added).

[30]*Roy v. Florida Marine Transporters, Inc.*, 2004 WL 551208 at *3 (E.D.La. March 18, 2004). This trend has been described as follows:

The testimony of an "expert" is tendered, who is an individual who happens to have some title, normally describing himself as a "consultant." A review of their "expert" reports normally reveals that the reports consist of the appreciation of the facts (some of which are usually in dispute), their conclusion as to what the law is or ought to be, as far as fixing the responsibility for the accident,

trend to continue.

While the Court did not reach the second "reliability" prong of its gatekeeping responsibilities, an examination of the reliability of Braunstein's opinions would also have required that his opinions be excluded. Frankly, calling his opinions "unreliable" is charitable. For example, Braunstein states that "there is no record of what Ameristar security policies and procedures required that security officers be required to learn"; "no record of documentation of [the security guard] being tested to determine what he learned from his on the job training"; and "no documentation that [the security guard] received any training." In the next breath, however, ***after swearing he knows nothing about what, if any, training and supervision ACVI's security officers may have had,*** Braunstein opines that "*at best, [the security guard] was badly trained and supervised*" and that ***had the security guard been "properly trained and supervised, he would not have collied with Mrs. Smith."*** Frankly, the extent to which these "opinions" are intellectually dishonest is astonishing.

If the record is devoid of any evidence of what training Ameristar provided its employee (ignoring, once again the fiction of the need to "train" people on how to walk), how can Braunstein say whether the training was or was not adequate or appropriate? Also, if appropriate training and/or supervision would have prevented the

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and for sure, a reservation at the end of the report to change their opinion if they learn more information.

Williams v. Eckstein Marine Services, Inc., 1992 WL 373616, *1 (E.D.La. 1992).

accident, what is that training or supervision that would have prevented the accident? Braunstein did not say. ***Essentially, according to Braunstein, the accident is proof of liability, and the fact he was hired by the plaintiff means it must have been the defendant's fault.***[31] This is nothing more than *ipse dixit* and is not reliable expert testimony.[32]

It is also worth noting that while Appellant complains she was somehow prejudiced by the fact she did not have the "security" manuals (never mind that she never asked for them), not having those manuals must not have been a problem for her self-professed "expert", who was able to conclude, even without any such "manual", that ACVI's security guard was "***badly*** trained and supervised"[33] and further, that had the guard been "***properly trained and supervised, he would not have collied with Mrs. Smith.***"[34] If her expert ***needed*** the manuals to form his opinions and he was being intellectually honest, his report would have said that he could not form his opinions without those materials. This is just further confirmation of the lack of merit in Appellant's position and the wisdom of the Lower Court in excluding Braunstein's testimony.

For expert testimony to be proper, it must be something more than

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[32]*Miss. Trans. Comm'n v. McLemore*, 863 So. 2d 31, 37 (Miss. 2003)

[33]Emphasis added.

[34]Emphasis added.

the lawyers could offer in argument,[35] and Braunstein's opinions are nothing more than the conclusory arguments of counsel, offered through a handsomely paid mouthpiece. This type of "argument by expert" does not assist, but rather only serves to confuse, the trier of fact. It is not permitted under Rule 702 or 403,[36] and the Lower Court was right to allow the jury to decide the issues, free from the bullying of a self-professed expert in walking.

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[35] *See* In re *Aircrash Disaster*, 795 F.2d 1230, 1233 (5th Cir. 1986).

[36] *See e.g., Hammond v. Coleman*, 61 F.Supp. 2d 533, 539-41 (S.D.Miss. 1999). *Hart v. State*, 637 So. 2d, 1329, 1339-40 (Miss. 1994). *See* also *Orthopaedic & Sports Injury Clinic v. Wang Lab., Inc.*, 922 F.2d 220, 225 (5th Cir. 1991). ACVI also moved to strike Braunstein's testimony under Mississippi Rule of Evidence 403, as it would only have confused the issues and been a waste of the Court's time and resources.

V. CONCLUSION

The jury watched video of the Plaintiff and an ACVI employee colliding. The jury further heard that the Plaintiff was in a hurry to get back to her "hot" slot machine and was not watching where she was going. Hearing all of this, the jury found for Defendant ACVI. Appellant would have this Court overturn the judgment below because the Court: (1) did not order the production of irrelevant documents that were never requested; and (2) refused to admit the speculative, unreliable, baseless testimony of an "expert" who would have told the jury that the accident would not have happened if ACVI had "trained" its employee how to walk, when such testimony would not have assisted and would only have served to confuse the trier of fact. Appellant's position is without merit.

The rulings of the Lower Court are entitled to great deference, and this Court must review those rulings regarding the admission or exclusion of expert testimony and the granting or denial of a motion to compel under an abuse of discretion standard.[37] **This means that the decisions of the Lower Court must stand unless its discretion is found to be arbitrary and clearly erroneous.**[38] The decisions of the Lower Court in this matter were not arbitrary or clearly erroneous. They were sound, reasoned and correct. This Court should affirm the

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[37] *Webb v. Braswell*, 930 So. 2d 387, 396-97 (Miss. 2006); *Stockstill v. Gammill*, 943 So. 2d 35, 44 (Miss. 2006); *Poole v. Avara*, 908 So. 2d 716, 721 (Miss. 2005); *Fred's Stores of Mississippi, Inc. v. M&H Drugs, Inc.*, 725 So. 2d 902, 919 (Miss. 1998).

[38] *Id.*

judgment of the Lower Court.

Respectfully submitted,

Ameristar Casino Vicksburg, Inc.

By: _____

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CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that a true and correct copy of the above and foregoing has this day been forwarded by U.S. Mail, postage fully prepaid, to the following counsel of record:

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Warren County Circuit Court Judge

This the 12th day of July, 2007.

TIMOTHY D. MOORE