IN THE SUPREME COURT OF MISSISSIPPI

NO: 2006-TS-00139

SHIRLEY SMITH

Appellant

VERSUS

AMERISTAR CASINO VICKSBURG, INC.,
A MISSISSIPPI CORPORATION,

Appellee

APPEAL FROM CIRCUIT COURT OF WARREN COUNTY

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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REPLY ARGUMENT

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

REPLY TO POINT 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.

On page seven (7) of Appellants Brief and page seven (7) of Appellees Brief the Request No. 11 for Production is set forth by both parties:

> Produce copies of all of your written rules, guidelines, regulations, and procedures related to the reporting, prevention, and handling of injuries to Ameristar Casino, Vicksburg customers such as plaintiff.

A request for the written rules, guidelines, regulations, and procedures related to the prevention of injuries to Ameristar Casino customers is certainly such a request that would call for Casio Security Guard training manuals if those manuals related to the prevention of injuries in the Casino.

Here is the portion of request no. 11 that would have required the production of what ultimately turned out to be security manuals concerning the training of security guards. "...copies of all written rules, guidelines, regulations, and procedures related to the...prevention...of injuries to Ameristar Casino, Vicksburg customers such as plaintiff." (Emphasis added) Clearly request no. 11 includes manuals for the training for the security

guards if those manuals contain the requested information.

It appears in Ameristar's argument that Ameristar is arguing that if the Plaintiff cannot call for written rules, guidelines, regulations and procedures related to the prevention of injuries at Ameristar Caino by the name used by Ameristar Casino for those documents, then the Plaintiff should not get them. Discovery by its very nature is the discovery of relevant information held by the other party that would assist the requesting party in obtaining information concerning the accident and injury in question. Production request no. 11 would call for training manuals if that is how the documents are named by Ameristar, and the manuals are relevant to the prevention of injuries to Ameristar Casino customers.

Page eight (8) of Ameristar's argument is that the Plaintiff in request no. 11 never asked for manuals related to the training of Security Guards. Ameristar then argues that the plain language of request no. 11 does not request these materials. (Presumably manuals related to the training of security guards). Plaintiff made sufficient request for the written documents of Ameristar Casino that would have called for the security guard training manuals if that is where the rules were concerning the prevention of injuries Ameristar customers.

Ameristar Casino attempts a play on words that is outside the spirit and intent of the discovery rules. Apparently Ameristar would play a game in which the Casino gives names to its various written documents, and if the Plaintiff is not lucky enough to request the written documents by the name given to them by Ameristar, then the documents should not be

produced. This defeats the intent and purpose of discovery rules. (See 26(b)(1))

> (b) **Scope of Discovery**. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party. The discovery may include the existence, description, nature, custody, condition and location of any books, documents, electronic or magnetic data, or other tangible things; and the identity and location of persons (i) having knowledge of any discoverable matter or (ii) who may be called as witnesses at the trial. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The plaintiff was seeking discovery regarding the issues raised by the claims and defenses of the parties. The learned Trial Judge erred in denying plaintiff the requested discovery.

REPLY TO POINT 2

REPLY TO ARGUMENT THAT 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 thrust of the argument under point 2 appears to be that the requested material is not reasonably calculated to lead to the discovery of admissible evidence.

On page ten (10) of its Brief Ameristar again states "Even had the Appellant actually requested training manuals and the Lower Court denied that request, such a ruling would have been proper." Quite clearly the plaintiff asked for written rules, guidelines, regulations, and procedures related to the prevention, and handling of injuries to Ameristar Casino customers. (See Argument to point one *supra.*)

Here is what Mr. Murdock says in trial about his duties on the day and during the shift in which the plaintiff was injured...

Q. And on this particular day with you on this shift, you were doing, I think you called it earlier, roaming?

A. Yes.

Q. And what are the duties of a security guard that's roaming?

A. To keep an eye on the casino floor, help out on the entrance, answer all calls as far as table fills, markers, credit, escort, anything dealing with what's going on on the casino floor.

Q. And among your duties were to look out for patrons that were in the casino?

A. Yes.

Q. Because sometimes some of them might get drunk and get - - they need to be looked after?

A. Yes.

Q. Some of them get excited because they've hit a jackpot and they need to be

looked after or tended to, correct?

A. Correct.

Q. And that casino is basically a playground for adults, isn't it?

MR. MOORE: Your Honor, I object to the form of the question. I object. It's irrelevant and ambiguous.

THE COURT: I couldn't hear that last part.

MR. FELDER: If he can answer, Your Honor.

MR. MOORE: Irrelevant and ambiguous.

THE COURT: What was the last part of the question?

MR. FELDER: Isn't the casino a playground for adults?

THE COURT: I'll let him answer that.

A. Not just saying it's a playground for adults, but it's - - you can say it's somewhere for adults to come to enjoy theirself, not just say a playground. A playground means somewhere to just – to do whatever.

Q. And to help them do that, you have things like the blues bar to entertain them?

A. Yes.

Q. You have machines that make a lot of bingle and bangle and bungling, a lot of noise, these slot machines in that area, don't they?

A. Yes.

MR. MOORE: Please the Court.

Relevance, also 403.

THE COURT: I'll overrule that objection.

Q. All of these things are to attract the attention of the patrons and keep them happy and to enjoy themselves while they're in the casino, aren't they?

A. Yes.

Q. And these are the - - some of the things that you're looking out for as you're roaming in the casino, isn't it, Mr. Murdock?

A. Yes.

Ameristar argues that the fact that a security guard happened to be the unlucky person between the plaintiff and her "hot" slot machine is incidental. Ameristar then argues that all other casino employees walk through the floor at one time or another. Ameristar then argues that it could just as well have been the cook, slot tech, cocktail server, or even another patron who ran together with the plaintiff.

The testimony set forth above concerning the security guard, Richard Murdock, clearly illiterates that a part of the duties of a security guard is "roaming". "Roaming" is to keep eye contact on the casino floor. Among the duties are to look out for patrons on the casino floor; look after drunk patrons; look after excited patrons; and to look out all of those things that are to attract the attention of the patrons and keep them happy while they are in the casino. He then answered that these are some of the things that the security guard is looking out for in roaming.

Because the plaintiff only got discovery from Richard Murdock via deposition and on cross examination at trial, the duties and the responsibilities of the security guard at the Ameristar Casino concerning the prevention of injuries comes only from Mr. Murdock. Did I mention that he was the other party in the collision with the casino patron? Yes, I think plaintiff and Ameristar's attorney did numerous times.

It appears from the testimony that somewhere and someplace, and probably in the security training manuals, there are standards of conduct for security guards. The plaintiff was entitled to this information. It was relevant and necessary to establish the standard of conduct of the Ameristar Casino and its employee, and whether or not that the casino and its employee met that standard of conduct.

The plaintiff was put in an untenable position and having to asks the very person who is alleged to have been negligent and caused an injury to set the standard of care by him alone as to the material available to plaintiff to establish a standard of conduct. Plaintiff was entitled to know what a reasonable prudent person (a security guard) was doing or should have been doing at the time that security person contributed to the fall of a patron in the casino. Only then, could a jury have fairly considered the evidence and whether or not the casino was negligent in this case.

REPLY TO POINT 3

REPLY TO ARGUMENT 3 OF POINT I THAT 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 REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE.

As argued in the two preceding points, request no. 11 was a request that should have produced training manuals or whatever documents the casino had concerning the prevention of injuries to its customers.

Admittedly, counsel was inarticulate in the Motion to Compel of 4/16/04. However, after consulting the expert Professor Ken Braunstein, counsel was more articulate during the hearing on 11/18/04. The Court was urged to reconsider its ruling during a motion hearing on Ameristar's Motion to Strike the Plaintiff's Expert.

> "...every casino up and down the coast and up and down the river has manuals on what the security personnel are suppose to do, and we would urge the Court to reconsider its prior ruling on that, about not letting us have those security manuals, because I think it's important. I think when we started the case perhaps we did not know quite enough about what security guards did, but after talking with Professor Braunstein, it's pretty obvious to me that their role in the casino is much more than I ever thought it was. And this will certainly assist the trier of fact, the jury in this case."

At that point the argument reverts to the fact that "an Expert, very simply, Your Honor, could help a jury understand the duties of the security guard in the casino atmosphere and what their function is in the casino, and when the jury can take that information and put it together with what they see on tape." Tr. 89-90.

One page 96 of the transcript the plaintiff again asked for reconsideration on request no. 11.

> Secondly, we wish the Court would reconsider its earlier ruling on allowing us to get the manuals of the casino for - - to see their training of the security guard and what their requirements are of the security guard and see whether or not this security guard was following what the casino required of him. It has become relevant in this case as the discovery has progressed in this case, Your Honor. Tr. 96

The Court knew what materials the Plaintiff was trying to obtain, and for what purpose.

In ruling on the Expert Ken Braunstein, the Court stated its view of the case, and essentially bought the argument of Ameristar. Here's how the Court viewed the case from the bench:

> This is - - if it had been some sort of other case where security was of particular importance, such as a take-down or a rowdy client or something, patron - - excuse me - - or something else like that, which I've had in this court, now 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 alone 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.

B. THE REPLY TO ARGUMENT THAT THE LOWER COURT DID NOT ERR IN EXCLUDING "EXPERT" TESTIMONY IN "WALKING"

Ameristar quotes from a part of the paragraph under the comment to Rule 26. The entire paragraph reads:

> *Sweeping and abusive discovery is encouraged by permitting discovery confined only the by "subject matter" of a case – the language of Miss. Code Ann. § 13-1-226(b) (1972) – rather than limiting it to the issues presented. Discovery should be limited to the specific practices or acts that are in issue. Determining when discovery spills beyond "issues" and into "subject matter" will not always be easy, but M.R.C.P. 26(b)(1) is intended to favor limitations, rather than expansions, on permissible discovery. Accordingly, "admissible evidence" referred to in the last sentence emerges from the term "issues," rather than from the more sweeping term "subject matter."*

One of the issues in this case was the negligence of the Ameristar Casino security guard and the negligence of the casino in this trip and fall. The requested information was relevant to the issues presented.

Plaintiff must admit that Ameristar counsel framed the issue in such a way that the Trial Court bought the issue Ameristar counsel wanted before the jury. i.e. "Appellant complains that the Lower Court did not allow the testimony of an "expert" in walking". (Appellees Brief, page 11.)

In the argument on Ameristar's motion to strike plaintiff's expert witness, counsel stated plaintiff's objection to the striking of the expert. The need for an expert and the need for discovery as argued in point 1, *supra*, is reasonable as stated on pages 88, 89, and part of part of page 90, of the transcript.

> Two or three points I would like to make in opposition to Mr. Moore: When I think of a security guard, Your Honor, I think of the guy who patrols the warehouse to make sure nobody is breaking in, nobody is getting in, nothing is happening, the security is okay. Even when I think of a security expert in a

casino, until I got involved in this case, I tended to think of it as a guy walking around to make sure the money was okay, but it's more than that. Professor Braunstein points that out and the security guard himself, Mr. Murdock, when we took his deposition. One of the things that a security guard is supposed to do is to walk the floor and observe the floor and keep things from happening, keep problems from happening on a casino floor. That's what Mr. Murdock was supposed to be doing on this particular occasion.

Now, I'm not - - I'm not about to try to insult a jury by having Mr. Braunstein, Professor Braunstein, try to tell the jury what the guard was doing in walking and what Ms. Smith was doing in walking. A jury will be able to see that on the tape themselves. The important thing, though, is, what was the security guard supposed to be doing on that floor in addition to walking himself? What he was supposed to be doing was to be looking out for problems such as if someone's drunk. He's got to look at everybody. I mean, people don't get in a casino and put on a hat say, I've had a little bit to drink; you know, you try to figure out how drunk or not drunk I am. He's got to look at everybody int hat casino. He's got to observe them and try to keep problems from happening. In this case he became part of the problem. He walked into or stepped on or put his foot in front of Ms. Smith, whichever way a jury sees it, and that caused Ms. Smith to fall.

But what was this security guard - - what was his responsibility? This is where we need an expert, and this is where Mr. Braunstein is qualified. He's been out there a long time. He needs to let that jury know what is the responsibility of a security guard in this case so they can understand what Mr. Murdock was doing at the time this collision took place.

Now, the Court initially has denied us the use of the manuals. He argues in his brief that - - you know, he doesn't ever really say it. He kind of hits - - you know, there's got to be a body of material on this. Well, every casino up and down the coast and up and down the river had manuals on what these security personnel are supposed to do, and we would urge the Court to reconsider its prior ruling on that, about not letting us have those security manuals, because I think it's important. I think when we started the case perhaps we didn't know quite

> enough about what security guards did, but after talking with Professor Braunstein, it's pretty obvious to me that their role in the casino is much more than I ever thought it was. And this certainly will assist the trier of fact, the jury in this case. An expert, very simply, Your Honor, could help a jury understand the duties of the security guard in the casino atmosphere and what their functions in that casino, and then the jury can take that information and put it together with what they see on the tape. Tr. 88, 89, 90 to 1.12 (Emphasis added)

Professor Braunstein was not submitted as Expert on walking, as Ameristar claims, and the argument accepted by the learned Trial Judge.

The quotation above from the record pages 88, 89 and 90, clearly illustrate that plaintiff counsel was not attempting to get Professor Braunstein to say how the walking occurred and who walked into who.

A review of Professor Braunstein's Affidavit, which is set forth at page 10 and 11 of Appellants Brief, is set forth again for convenience.

> Conclusions
>
> From the available information, it is my opinion, at best, SO Murdock was badly trained and supervised. Due to the absence of Ameristar security policies and procedures, and the absence of any documentation that SO Murdock was trained, I am unable to state what his training was and whether or not it complied with Ameristar Casino guidelines.
>
> Based on what I have seen in SO Murdock's deposition and the security tape, it is my opinion that SO Murdock was not sufficiently trained, and that the Ameristar Casino did not sufficiently train and test SO Murdock to assure Ameristar Casino that SO Murdock has an acceptable knowledge of his duties and the required training to perform his duties.

It is my opinion that the reasonable prudent casino, Ameristar Casino in this case, would train its security officers such as SO Murdock and that if SO Murdock was properly trained and supervised, he would not have collided with Mrs. Smith.

It is further my opinion that a reasonably prudent security officer such as SO Murdock, being properly trained, would be aware of his surroundings, would be properly observant, and would observe the Casino for problems, rather than becoming a part of the problem as he did in this case by colliding with a casino customer, Shirley Smith, while he was distracted by music from an adjoining lounge.

It is my opinion that both the defendant Casino and security officer fell below the level of a reasonable prudent security officer and a reasonable prudent casino in their actions in the fall of Shirley Smith, and were a proximate contributing cause of the fall of Mrs. Smith.

THIS CONCLUDES MY REPORT

I hereby state under the penalty fo perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Dated this 23rd day of September, 2004.

s/Ken Braunstein
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The Court will see that no where in the conclusions and opinions by Professor Braunstein, did he attempt to tell the jury how to look at the "walking".

> Rather, Professor Braunstein expressed the opinion "...that a reasonably prudent security officer such as SO Murdock, being properly trained, would be aware of his surroundings, would be properly observant, and would observe the casino for problems, rather than becoming a part of the problem as he did in this case by colliding with a casino customer, Shirley Smith, while he was distracted by music from an adjoining lounge."
>
> It is my opinion that both the defendant Ameristar Casino and security officer fell below the level of a reasonable prudent security officer and a reasonable prudent casino in their actions in the fall of Shirley Smith, and were a proximate contributing cause of the fall of Shirley Smith. (R520) (Appellants Brief, page 11)

There was nothing before the Court by Professor Braunstein that attempted to tell the jury what he saw in the walking of the plaintiff and the casino employee security officer Murdock. His opinion went to what appeared to be a lack of training, or , if properly trained, a failure of the security officer to observe what he should have observe while "roaming", and the duty to prevent problems, rather than becoming a part of the problem.

Ameristar makes the argument in its Summary of the Argument that the plaintiff argues for a different standard of care for casinos. Ameristar then argues that the Court of Appeals has rejected a different standard for casinos in *Ratcliff v. Rainbow Casino-Vicksburg, L.P.*, 914 So. 2d 762 at 765 (Miss. App. 2005).

That argument in the Summary of the Argument was not carried over to Ameristar's point B.

The plaintiff did not ask for a different standard of care for casinos. In *Ratcliff supra*, the plaintiff was asking (1) that strict liability be applied to casinos; (2) that a stool be held

to be an inheritably dangerous object, and (3) that Mississippi should adopt a requirement that all premises liability claims must go to a jury. The plaintiff argued for no such thing in this case.

The instructions given by the Court on negligence is found at R991.

> The word "negligence" as used in these instructions means the doing of some act which a reasonably prudent person would not do under the same or similar circumstances, or the failure to do some act which a reasonable prudent person would do under the same or similar circumstances

There was no attempt by the plaintiff to change the standard of care for casinos as argued by Ameristar.

The instruction granted was very similar to the Modal Jury Instruction, 36.01:

> Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like or similar circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like or similar circumstances, or a failing to do something that a reasonably careful person would do under like or similar circumstances. MJI, 36.01, West Publishing Co., 1992.

Cited for authority for that instruction is *Smith v. City of West Point*, 475 So. 2d 816 (Miss. 1985)

The hill that the plaintiff could not overcome in this case was the plaintiff's ability to show what a reasonably careful person such as a security guard would do under like or similar circumstances, or what the security guard failed to do under like or similar

circumstances, because the plaintiff was not allowed to have the guidelines for the guard in his duties, nor allowed to have an expert to set forth guidelines.

Clearly, experts have been qualified in casino cases numerous times. This Trial Judge had qualified casino experts numerous times in other matters. Tr. 97, 98. He erred in now allowing one in this case.

CONCLUSION

The rulings of the Court on discovery matters and on an expert for the plaintiff was error, and was an abuse of discretion, and denied the plaintiff an opportunity to develop a standard of care to be applied to the casino and the security guard in this case.

The plaintiff respectfully request the Court to reverse the Lower Court and grant the plaintiff a new trial on all issues.

RESPECTFULLY SUBMITTED,

SHIRLEY SMITH

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CERTIFICATE OF SERVICE

I, Alfred Lee Felder, do hereby certify that I have this day served by United States mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant to:

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This the 29th day of August A.D., 2007.

ALFRED LEE FELDER