

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-~~TS~~^{CA}-00139

SHIRLEY SMITH

APPELLANT

VS.

2006-CA-00139

AMERISTAR CASINO VICKSBURG, INC.,
A MISSISSIPPI CORPORATION,

APPELLEE

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 disqualifications or recusal.

- | | |
|--|------------------|
| 1. Shirley Smith | Plaintiff |
| 2. Ameristar Casino Vicksburg, Inc. | Defendant |
| 3. Alfred Lee Felder | Attorney |
| 4. Van Douglas Gunter | Attorney |
| 5. Timothy D. Moore | Attorney |
| 6. Currie Johnson Griffin Gaines & Myers, P.A. | Attorneys at Law |



ALFRED LEE FELDER

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**THE LOWER COURT ERRED IN NOT ALLOWING PLAINTIFF TO
HAVE THE DEFENDANT'S WRITTEN RULES, GUIDELINES,
REGULATIONS, AND PROCEDURES RELATED TO THE REPORTING,
PREVENTION, AND HANDLING OF INJURIES AT THE DEFENDANT'S
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STATEMENT OF THE ISSUES

I.

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STATEMENT OF THE CASE

This case involves an injury to Shirley Smith while an invitee in the Ameristar Casino Vicksburg, Inc., on April 12, 2002. Richard Murdock was a Security Guard at Ameristar Casino Vicksburg, Inc., and was working within the course and scope of his employment when a collision occurred between the Security Guard, Richard Murdock, and the business invitee-patron Shirley Smith, on April 12, 2002.

As a result of the collision, Shirley Smith fell hard on her hands and knees. Her treating physician, Dr. Keith Melancon, an Orthopaedic Surgeon from the Southern Bone & Joint Clinic in Hattiesburg, Mississippi, testified that Shirley Smith would need a knee replacement of the knees in each leg. Medical expenses for these knee replacements, together with other treatment until the knee replacement, would exceed one hundred thousand dollars (\$100,000.00).

Following a jury verdict for the Defendant, and the entry of a FINAL JUDGMENT

on November 10, 2005, (R.1014) The Plaintiff, Shirley Smith, filed a Motion for a New Trial or in the Alternative Motion for Judgment Notwithstanding the Verdict. (R.1015)

Order denying Plaintiff's Motion for New trial or in the Alternative, Motion for Judgment Notwithstanding the Verdict was entered on December 22, 2005. (R.1022)

(R E 8)

Notice of Appeal was timely filed.

STATEMENT OF THE FACTS

On October 12, 2002, Shirley Smith went to the Ameristar Casino Vicksburg, Inc., in Vicksburg, Mississippi, a Casino that she had gone to many times. (R.360) She said that sometimes she would maybe go once a month. Then when she got to liking it better, she would go maybe twice a month, and then she might even go about once every week. She said she would stop for a while, and then she would start back. She enjoyed going to the Casino. (R.360)

On the day of the injury, she was playing a slot machine, Sizzling Seven's. (R.361) After playing the machine for a while, she decided to get a soft drink or water. She was going to get it either in the Blue's Bar, or the VIP section, of which she was a member. (R.363, 364) As the boat sits parallel to the riverbank in Vicksburg, Mississippi, Shirley Smith would have gone down stream in the boat, or toward the back of the boat for a short distance, and then would have turned in a westerly direction, or a direction that would have taken one across the river. It was after she made this turn that she would have been walking

across the Blue's Bar section and going away from the Vicksburg riverbank side toward the Louisiana side of the river. As Shirley Smith was near the entrance of the Blue's Bar, a collision took place between Shirley Smith and a Security Guard named Richard Murdock.

Plaintiff's Exhibit 10 is a DVD video of that collision, and Exhibit A is a video tape of the collision.

As a result of that collision Plaintiff suffered serious and permanent injuries, and as mentioned above, Dr. Keith Melancon has testified that she will need a knee replacement for each knee.

Plaintiff takes this appeal because of discovery rulings and evidentiary rulings by the trial judge that were an abuse of discretion and denied the Plaintiff and opportunity to establish a standard of care in this case, and denied the Plaintiff the opportunity to have an Expert witness assist the jury in understanding the responsibilities of the Casino Security Guard and the Ameristar Casino concerning its patrons such as Shirley Smith.

SUMMARY OF THE ARGUMENT

Plaintiff, Shirley Smith, was an invited guest of Ameristar Casino in Vicksburg on April 12, 2002. Richard Murdock was an employee of Ameristar Casino in Vicksburg on April 12, 2002, and as stipulated by the parties, was acting within the course and scope of his employment when a collision between the Plaintiff and Richard Murdock on that day. (R.353) According to Dr. Keith Melancon, Orthopaedic Surgeon from the Southern Bone & Joint Clinic in Hattiesburg, Mississippi, Shirley Smith will need a double knee replacement

as a result of her fall in the Ameristar Casino. Medical treatment at the time of trial exceeded \$18,000.00, and the cost of knee replacements were \$35,000.00 to \$45,000.00 per replacement. (Dr. Keith Melancon deposition at trial, page 32-34; Plaintiff Exhibit 1 for ID)

Plaintiff propounded Request for Production of Document that called for the written rules, guidelines, regulations, and procedures related to the reporting, prevention, and handling of injuries to Ameristar Casino Vicksburg customer's such as Plaintiff. The Defendant objected to Plaintiff's Request. The Defendant wanted this case tried as a case in which two individuals in the casino walked into each other, and let the jury determine which of the two individuals were at fault in the walking into each other as if the individuals were of equal standing.

The Plaintiff viewed the case as one between persons not of equal standings, or put another way, were in this casino for different reasons. Shirley Smith was a business invitee, a VIP patron of the Casino, and was there to have fun and enjoy herself. Richard Murdock was a Security Guard at the Casino, and at the time of the collision between Shirley Smith and Richard Murdock, it was Richard Murdock's responsibility to roam or move about the Casino to keep the property of the Casino safe and to look after the safety of the patrons. Plaintiff's theory of the case was that Richard Murdock failed in his responsibility to watch after the patrons in the Casino, and rather than prevent problems to Casino patrons, he became the problem by not properly doing his job. The video tape and DVD's of the collision between the Security Guard and the patron, Shirley Smith, would show that the

Security Guard was walking East to West while looking South into the Blue's Bar. At about the same time the activity in the Blue's Bar apparently caught the attention of Shirley Smith, who turned to go toward the Blue's Bar.

Instead of the Security Guard stopping and looking into the Blue's Bar to see whatever it was that attracted his attention, he continued to walk in a Westerly direction while looking in a Southerly direction. While the Security Guard was in this posture, he and Shirley Smith collided, causing Shirley Smith to fall and suffer serious injuries.

Plaintiff propounded Request for Production of Documents, specifically Request for Production No. 11, to assist him in determining the nature and extent of the training of Richard Murdock, and to determine Richard Murdock's duties and responsibilities as required by the Ameristar Casino. In other words, Plaintiff was trying to determine the standard of care required of Richard Murdock working as a security officer for Ameristar Casino. This discovery was denied to the Plaintiff by the trial judge, and is reversible error.

Having been denied the documents from Ameristar Casino which would assist Plaintiff in determining the standard of care from the view of Ameristar Casino, the Plaintiff hired a highly qualified Casino Security Expert to assist the Plaintiff in determining the standard of care for the Ameristar Casino Security Guard and the standard of care for Ameristar itself insofar as it concerned the training and responsibilities of the Security Guard, and whether or not the Casino adequately trained its Security Guards. Further the Expert would have established a standard of care that the Security Guard should have met and that the Casino

should have met concerning the incident the resulted in the injury to Shirley Smith. The trial Court on Motion by the Defendant would not let the Plaintiff use a Security Guard in this case.

Both of the above rulings by the trial judge were reversible error, and Plaintiff asks that this case be reversed and remanded for a new trial, at which time Plaintiff would receive the discovery material requested and can use an Expert in setting a standard of care for the Security Guard and the Casino under the circumstances of this incident.

ARGUMENT

I.

THE LOWER COURT ERRED IN NOT ALLOWING PLAINTIFF TO HAVE THE DEFENDANT'S WRITTEN RULES, GUIDELINES, REGULATIONS, AND PROCEDURES RELATED TO THE REPORTING, PREVENTION, AND HANDLING OF INJURIES AT THE DEFENDANT'S CASINO

Our Court has long held that where limitations on discovery are improvidently ordered or allowed and important information is denied a litigant, the Court will reverse the lower Court. That rule of law is set out in *Fred's Stores of Miss. v. M & H Drugs*, 725 So.2d 902 (Miss. 1998)(at ¶ 66):

¶ 66. The trial court's grant or denial of a motion to compel is subject to an abuse of discretion standard of review on appeal. *Taylor Machine Works, Inc. v. Great American Surplus Lines Ins. Co.*, 635 So.2d 1357, 1363 (Miss. 1994). "Where, however, limitations on discovery are improvidently ordered or allowed and important information is denied a litigant reversal will obtain." *Dawkins v. Redd Pest Control Co., Inc.*, 607 So.2d 1232, 1235 (Miss. 1992). In

Dawkins, guidelines were enumerated for determining whether there was an abuse of discretion:

[A] trial court's discretion in the discovery area is generally guided by the principles that (a) the court follow the general policy that discovery be encouraged, (b) limitations on discovery should be respected but not extended, (c) while the exercise of discretion depends on the parties' factual showings disputed facts should be construed in favor [of] discovery, and (d) while the importance of the information must be weighed against the hardships and cost of production and its availability through other means, it is preferable for the court to impose partial limitations on discovery rather than an outright denial. Any record which indicates a failure to give adequate consideration to these concepts is subject to the attack of abuse of discretion, regardless of the fact that the order shows no such abuse on its face.

Id. at 1236 (quoting 23 Am. Jur.2d, Depositions and Discovery § 5 (1983)).

In Plaintiff's First Request for Production to the Defendant, the Plaintiff made Request No. 11:

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.

The Defendant's response was: Response No. 11: Objection, this request is vague, ambiguous, assumes facts not in evidence, is not reasonably calculated to lead to the discovery of admissible evidence, and is calculated solely to harass and create an undue burden on ACVI.

In a Motion to Compel the Plaintiff stated as a reason for compelling supplementation:

There is nothing vague or ambiguous about this request, either Defendant has material or it does not. If it does not, it should say so. If it does have it, the request is certainly calculated to lead to the discovery of admissible evidence and has nothing to do with trying to harass and create an undue burden on anyone.

Subsequently, the Defendant Ameristar made a Supplemental Response as follows:

Supplemental Response: Objection. This request is vague, ambiguous, assumes facts not in evidence, is not reasonably calculated to lead to the discovery of admissible evidence and is calculated solely to harass and create an undue burden on ACVI. In addition, the request to documents are proprietary in nature such that, to the extent any Court should order the production of any responsive materials, said production should only be made with a protective order in place. (Emphasis added)

On September 17, 2004, the Court signed an Order which held in paragraph 15 “Plaintiff’s Motion to Compel Ameristar’s Response to Request No. 11 is denied.” (R. 497)

A Lawyer cannot possibility know everything about every subject that comes into his office. This Court in its wisdom adopted the Mississippi Rules of Civil Procedure. The rules on discovery, which are generally Rules 26 through Rule 37, allow counsel to learn about the intricacies concerning a particular case.

Plaintiff counsel generally thought of a security guard as one who patrols a warehouse. In the case of a Casino Security Guard, there are other responsibilities as plaintiff counsel learned during the evolving discovery.

The security guard is suppose to walk the floor and observe the floor and keep problems from happening on the casino floor. In this case the security guard became a part of the problem. The requested manuals would have allowed counsel to educate himself as to the duties and responsibilities of a security guard as seen by Ameristar Casino. Plaintiff counsel could then have seen whether or not the security guard breached his duties and responsibilities as setforth by Ameristar Casino. (See Affidavit of Ken Braunstein R. 520)

Secondly, 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. (Braunstein Affidavit R. 520)

The denial of the materials sought in Request No. 11 kept the Plaintiff from discovering important information in this case. It was a violation of Rule 26 and the intent of Rule 26. The ruling by the Judge was an abuse of digression.

If the information was proprietary as claimed by defense counsel, then a protective order could have been put in place as recommended by defense counsel in his Supplemental Response to Request No. 11. (Brief p.8) The error of the Court denied the Plaintiff a reasonable opportunity to discover important information about her case, and thus, a fair trial.

The Plaintiff respectfully request that she be granted a new trial due to this reversible error.

II.

THE LOWER COURT ERRED IN NOT ALLOWING THE PLAINTIFF TO USE AN EXPERT WITNESS IN THIS CASE

The Plaintiff filed a Supplemental Designation of Experts on September 24, 2004 naming Ken Braunstein as an Expert concerning security procedures at the Ameristar Casino. (R. 510) Attached to that Designation of Experts at (R. 511) was a Resume of the Expert.

In a Motion to Supplement Plaintiff's Response to Defendant's Motion for Summary Judgment, Plaintiff attached an Affidavit (R. 518, 519, 520, and 521) in response to the Defendant's Motion for Summary Judgment.

Ken Braunstein by Resume and Affidavit is a highly qualified Expert. His conclusions concerning the security at Ameristar Casino, Security Guard Murdock, and the training of Mr. Murdock are set forth in his conclusions at (R. 520). For convenience those conclusions are set forth below:

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
KEN BRAUNSTEIN
Licensed Security Consultant
Nevada License No. 388
3985 Riverhaven Drive
Reno, Nevada 89509

The Defendant made a Motion to Strike the Testimony of Ken Braunstein under Rule

The Court granted Defendant's Motion to exclude the testimony of Ken Braunstein under Rule 702. The Court's oral opinion has found at Tr. 96-98, (R E 15-17)

Essentially the Court ruled that this was a matter of two people who walked into each other, and an Expert would be invading the province of the jury if he told the jury who he believed walked into who. (Tr. 97)

The Plaintiff had argued at (R. 90) that an Expert could help the jury understand the duties of the security guard in the casino atmosphere, and the function of a security guard in the Casino. The jury could then take that information and put it together with what they saw on the tape.

Part of Plaintiff counsel's argument during the motion hearing sets forth Plaintiff's need for an Expert. (Tr. 88,89):

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 and 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 in that casino. He's got to observe them and try to keep problems from happening. In this case he became a 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 the security guard – what was his

responsibility? That is where we need an expert, and this is where Mr. Braunstein is qualified. He's been out there for a long time. He needs to let that jury know that 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.

An Expert was needed to help the jury understand what the security guard was suppose to be doing at the time the Plaintiff and the security guard collided. As Mr. Braunstein put in, in his Affidavit at R. 520 “ 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.”
(Emphases added)

Rule 702, testimony by Experts, states:

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

See Corley v. Evans, 835 So.2d 30 (Miss.2003), a case in which expert security witnesses testified concerning the events surrounding an injury.

The testimony of Ken Braunstein would have assisted the triers of fact to understand (1) The duties and responsibilities of a casino in training its security personnel; (2) The duties and responsibilities of a security guard in patrolling the casino floor and (3) the security guard's responsibility and duties to help prevent injuries and incidents from happening on the casino floor.

The two people who collided were not of equal standing in the casino. The Plaintiff, Shirley Smith, was a patron in the casino and was there to have a good time. She was in a casino, an adult playground provided by the defendant.

Security Officer Murdock was an employee of the casino at the time he and Plaintiff Shirley Smith collided. Murdock said on that day he was a "rover", which is a security officer that's walking around through the casino, making sure everything is being handled in the professional way. (Tr. 311, Line 23) He further states " I had just left the shuttle entrance checking on one of my fellow officers which was posted at the entrance. As I came around the corner walking in a straight line towards the elevator, I heard a boom, like a racket, in the Bottleneck Blue's Bar. So my job is to see actually what was going on at that time. So, once I looked to my left and turned back around, that's when Ms. Smith crossed my path. So, when she crossed my path, she fell." (Tr. 311, 312) (There are both videotapes and CD's as Exhibits A and #10 which the Court can look at as to what officer Murdock was doing and Plaintiff Shirley Smith was doing at the time of the collision.)

According to Mr. Murdock he had a responsibility to try to see what is happening at

all times on the floor. (Tr. 324, 325)

Mr. Murdock also said that a security guard who was roaming was to keep an eye on the casino floor, help out on the entrance, answer all calls as far as table fills, makers, credit, escort, anything dealing with what's going on, on the casino floor. (Tr. 330, Line 8-11) He admitted that security officers were to look out for patrons that were in the casino. (R.330) He admitted that sometimes patrons might get drunk and need to be looked after. He admitted that sometimes patrons get excited because they've hit a jackpot. (R. 330) He stated that he understood that a casino was somewhere for adults to come and enjoy themselves. (R. 331) He admitted that in a casino there are a lot of things to attract the attention of patrons and to keep them happy and help them enjoy themselves. (R. 331) He admitted that the above are some of the things that he looking out for as he is roaming in the casino. (R. 332)

The Plaintiff in this trial was put in the situation 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.

Plaintiff was reduced to establishing a standard of care by the negligent security officer, and through no one else, by the rulings of the lower Court. The rulings of the lower

Court denied the Plaintiff access to the training manuals of the casino. The rulings of the lower Court denied Plaintiff the assistance of an Expert witness. Ultimately, the standard of care in this case was set by an alleged negligent employee of the Defendant. Plaintiff was not given training manuals so that the truth, veracity, and knowledge of the employee could be tested. The Plaintiff was not given the assistance of an Expert witness who could have set a standard of care based upon years of experience, training, teaching, and work in the field. The rulings of the lower Court denied the Plaintiff an opportunity to establish a standard of care. Those rulings by the lower Court were an abuse of discretion and reversible error.

CONCLUSION

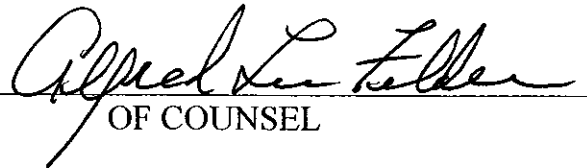
Both of the errors assigned in this case are reversible errors.

The Plaintiff respectfully request the Court to reverse the lower Court and to grant the Plaintiff a new trial.

RESPECTFULLY SUBMITTED,

SHIRLEY SMITH

BY


OF COUNSEL

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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 Brief of Appellant

to:

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Judge Frank G. Vollor
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This the 9th day of April A.D., 2007.



ALFRED LEE FELDER