

IN THE SUPREME COURT OF MISSISSIPPI

KATHERINE L. BUCHANAN

APPELLANT

V.

CAUSE NO. 2006-CA-01375

AMERISTAR CASINOS, INC.

APPELLEE

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE RECORD IS MORE THAN SUFFICIENT FOR PURPOSES OF THIS APPEAL.

As correctly noted by Ameristar at Page 6 of its Brief, "At the time this appeal was filed, Buchanan designated... all clerk papers, trial transcripts and exhibits filed taken or offered in this case." (Appellee's Brief p. 6) Appellee further states, "Somewhat inexplicitly, and for reasons which are unclear, Buchanan later amended her designation to include only the transcript from the punitive damages phase of trial." (Appellee's Brief p. 7)

In response unto this Court, not Ameristar, when Katherine Buchanan designated the entire record, a record into which duplication after duplication had been dumped by Ameristar in an effort, somewhat successfully, to drown Buchanan in "paper," she received the Clerk's estimate for the just the Clerk's portion of the record in the sum of \$19,000.00, a copy of which is attached hereto and incorporated herein as Exhibit "A."

Faced with just the a Clerk's estimate alone of \$19,000.00 Katherine was forced to drastically restrict her designation of the record to concentrate upon the most egregious error in this case, the perjured testimony of Kelvin Mays, which occurred in the punitive damage phase of the trial.

Contrary to Appellee's statement that, "Unfortunately, this Court has no way to determine what evidence the jury considered in reaching its verdict because the only evidence Buchanan designated for this Court's review is one small piece of it- the thirty minute testimony of Kelvin Mays," (Appellee's Brief p. 11) this Court has more than sufficient record to determine the effect of the perjury of Kelvin Mays.

Although no doubt Ameristar would like to decide for this Court whether or not

the record is sufficient for the consideration of this Court the present record before this Court clearly establishes: (1) that the jury in the actual damages phase of the trial had already found that Ameristar had “no arguable reason” to deny Katherine’s worker’s compensation claim, (2) that Kelvin Mays was the only witness and who testified that Katherine’s claim was the only claim out of 1,940 claims that was ever denied and (3) that Mays’ testimony was false.

The cases cited by Ameristar, Robinson v. Lee, 821 So.2d 129 (Miss. Ct. App.2000) (a case where the record was devoid of any evidence supporting the appellant’s claim that he was a child of tender years) and Smoot v. State, 780 So.2d 660 (Miss. Ct. App.2001) (where the record was devoid of the alleged order appellant contended would support the reversal of his conviction) do not support Ameristar’s unpersuasive argument on this point.

The record that Katherine Buchanan was forced to designate is more than sufficient to establish that the jury had already found Ameristar had no arguable reason to deny her claim and that Kelvin Mays falsely testified that Katherine’s claim was the only claim ever denied out of 1,940 claims and was perjury. Given the fact that Kelvin Mays is the only witness that testified in the punitive damages phase of the trial, it is inescapable that this perjured testimony of necessity affected the decision of the same jury which had already found that Ameristar had no arguable reason at all (which is very high standard in and of itself) to deny her claim and this contention by Ameristar is without merit.

II. THE MISCHARACTERIZATION OF THE TESTIMONY OF KELVIN MAYS AND WILLIAM PATTERSON.

Ameristar, at best, mischaracterizes Kelvin Mays’ testimony when at page 14 of

its brief it states that, "Ameristar had initially denied only one of them as to compensability-that of Buchanan." (Appellee's Brief p. 14)

Kelvin Mays did not testify that Ameristar had "initially" denied more than one claim.

Mays testified:

Q: And of these 1,332 claims up until 2003 on how many of those claims did Ameristar deny compensability?

A: Only one.

Q: And that was Ms. Buchanan?

A: Yes. (V. 5, p.64)

Mays continued:

Q: Would you tell the jury- since Mr. Sessums raised it, let's go back to 1994 and 1995- of those 608 people how many of them's claims was denied.

A: None.

Q: Alright. So now we have -1994 to 2003 we have a total of how many when we add 608 to 1,332? Might I suggest to you since I have got the pen that it is 1,940?

Mays continued:

Q: Okay. Now, on teaching the lesson, what lesson should 1,940 people have learned about when they get hurt at Ameristar? What did those 1,940 learn?

A: That they should-

A. That they shall file their claim; that they should report their work-related injury.

Q: Okay. And that it was - if you take Katherine Buchanan as a lesson, that is 1,940 separate lessons isn't it?

A: Absolutely. (V. 5, p. 79-80)

So much for trying to change what Kelvin Mays did and did not say. He did not testify that Ameristar had only "initially" denied only Katherine's claim. He testified that Katherine's claim was the only one ever denied.

Nevertheless, Ameristar continues to twist where at page 18 of its brief it states that Katherine Buchanan's claim was the only worker's compensation claim which, "was initially denied by Ameristar." On this point alone Ameristar twice seeks to mischaracterize to this Court the testimony of Kelvin Mays as if Mays false testimony to the jury itself was not bad enough.

At page 15 of its brief Ameristar also seeks to mischaracterizes the testimony of its worker's compensation attorney, William Patterson, where it stresses to this Court, "Buchanan introduced this as her 'smoking gun', [referring to Paterson's letter to Ameristar]" relying heavily on **Patterson's** comment in the letter that "certain employees may think twice before filing a claim due to the fact that Ameristar did not pay benefits to Ms. Buchanan because she was claimed she hurt on the job." (Appellee's Brief p. 15) and representing that on direct examination Patterson "admitted" to the jury that the statements included in that letter regarding the effects of contesting questionable claims "were **entirely his own opinions** and did not reflect the policy of Ameristar." (Appellee's

Brief p. 15)

Nowhere in its brief does Ameristar acknowledge that the reason Patterson's testimony was relevant, and indeed admissible at the trial of this bad faith matter, is that Ameristar pled advice of counsel as an affirmative defense.

Ameristar adopted the position of Patterson as its own affirmative defense yet now, as it disingenuously did at trial, seeks to distance itself from Patterson's advice by representing to this Court that Patterson's opinion was "entirely his own opinions" and not the official, affirmatively pled position of Ameristar.

It is quite curious to say the least that Ameristar first adopts Patterson's advice as its position and defense and then states to this Court that, "It clearly did not agree with any implication in Patterson's letter of 'making an example' of Buchanan...." (Appellee's Brief p. 16)

Ameristar clearly agreed with Patterson's opinion and position as it pled and adopted this position as its own at trial and it was this defense that allowed Patterson's file to be discovered in the first place and allowed Patterson's and Ameristar's "make an example of her" letter to be introduced into evidence and read to the jury.

Finally, at page 18 of Ameristar's brief it states that, "Buchanan had the records containing the information Mays testified to at trial for almost three years" yet cites no portion of the record for this position other than a cover letter found at R450. Simply providing a list of all worker's compensation cases is a far cry and completely different from Mays testifying that Katherine's claim was the only one ever denied.

To suggest that Mays' perjured testimony was disclosed in discovery by simply providing a list of over a thousand comp claims filed is the height of misdirection.

Katherine would have had to review 1,939 different files on a page by page basis to know whether or not Ameristar had denied one or more of such claims and even if this had been physically feasible it still would not have altered her that Mays would testify that only her claim had even been denied.

Disclosing the raw data of 1,940 claims is totally different than Mays taking the stand and telling the jury that Katherine's claim was the only one ever denied.

III. THE EFFECTS OF PERJURY.

Ameristar cites Tirouda v. State, 919 So.2d 211 (Miss.Ct.App. 2005) arguing that because only one witness in this case, Kelvin Mays, presented perjured testimony that no reversible error has occurred. Ameristar argues that because in Tirouda every witness that testified gave perjured testimony that perjury of a single witness is not sufficient to show fraud upon the Court. What Ameristar conveniently forgets is that Kelvin Mays was the only witness, and therefore, every witness, who testified in the punitive damage phase of this trial.

At page 21 of its brief Ameristar again seeks to deflect from this perjury when it argues to this Court, "that it was **GAB or a subsequent claims consultant** who completed the forms disputing benefits, **NOT AMERISTAR.**" (Appellee's Brief p. 21)

Perhaps the official answers denying compensability filed with the Worker's Compensation Commission which clearly showed Ameristar as the employer were not the Answers of Ameristar after all? Is this what Ameristar is now arguing to this Court? If so this is not what Ameristar argued to the jury through the perjured testimony of Kelvin Mays.

While the testimony of Kelvin Mays to the jury was brazen enough in and of itself

there apparently is limit to Ameristar's audaciousness as on page 22 of its brief Ameristar states, "First, there is no evidence that Mays gave perjured testimony." (Appellee's Brief p. 22) Such brass is breathtaking when one considers that Mays, without equivocation, testified that the claim of Katherine Buchanan was the **only one** out of 1,940 cases that Ameristar **ever** denied especially when contrasted against the documented, and certified, records from the Worker's Compensation Commission establishing without doubt that Ameristar clearly denied claims other than that of Katherine Buchanan.

Perhaps because even Ameristar cannot for any great length of time continue to contend with a straight face that, "There is no evidence that Mays gave perjured testimony," at page 23 of its brief Ameristar tempers this somewhat by stating, "Even assuming that Mays' testimony was slightly inaccurate....there is no significant difference between what Mays testified to-that 99.9% of claims made were not contested as to compensability-and what Buchanan now claims is fact-that 99.7% of claims made uncontested by Ameristar." (Appellee's Brief p.23-24).

The impact that Ameristar intended to have on the jury **was not one of statistics**. The intended, and successful, impact intended by Ameristar was to convince the jury that Katherine's claim was the **only one ever** denied by Ameristar, hoping that the jury would find that Ameristar was not so bad after all and not assess punitive damages.

IV. THE JURY RETURNED A VERDICT AGAINST AMERISTAR, FINDING THAT AMERISTAR HAD LACKED A JUSTIFIABLE OR ARGUABLE BASIS FOR DENYING/DELAYING PAYMENT OF BENEFITS.

Perhaps if something other than false and perjured testimony had been presented

in the punitive damage phase of the trial Ameristar would be correct that the jury's verdict on punitive damages was not against the overwhelming weight of the evidence as obviously punitive damages are not automatic.

However, when perjured testimony is the only different thing presented during the punitive damages phase of the trial it is inescapable that this fraudulent and tainted evidence clearly had an effect on the same jury which had already found that Ameristar had no arguable basis, (at all, none,) for denying Buchanan's claim for worker's compensation benefits.

Contrary to Ameristar's argument at page 28 of its brief that, "This was not a case where the facts were highly unusual. This was not a case where the defendant's conduct was egregious," this was a case where Ameristar adopted the position and opinion of its worker's compensation attorney to make an example of Katherine. The evidence clearly showed that Ameristar had sought to make an example of Katherine so that other Ameristar employees would see what had been done to her and therefore be reluctant to file their own claims for worker's compensation benefits.

To combat this Kelvin Mays falsely testified before the jury that Katherine's claim was the only claim that Ameristar had ever denied. Obviously this false testimony had its intended effect as the verdict of the jury in the punitive damages phase of the case, being based wholly on perjured testimony, is against the overwhelming weight of the evidence.

SUMMARY

Due to Ameristar's successful "papering of the file" Katherine Buchanan simply

did not have the resources to first pay \$19,000.00 for just the clerk's records, and then turn around and pay the court reporter's anticipated fee for the entire trial and was of necessity forced to designate only the most egregious error in this trial, the perjured testimony of Kelvin Mays.

Kelvin Mays was the only witness to testify in the punitive damage phase of this case. Kelvin Mays was under oath. Kelvin Mays testified without equivocation that Katherine Buchanan's worker's compensation claim was the only claim ever denied by Ameristar out of 1,940 claims. This was false. False statements made under oath are perjury.

Kelvin Mays testimony was material to the sole issue under consideration; whether or not punitive damages should be assessed.

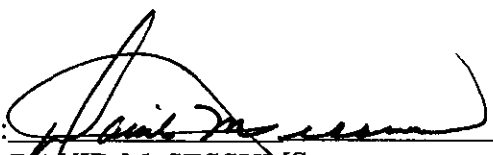
The intended effect of Mays' testimony on the jury was that Katherine's case was an aberration and that Ameristar did not need to be punished for an aberration.

The simple fact is that Ameristar did not have any legitimate reason to deny Katherine's claim and yet did so and when it was caught with its hand in the cookie jar presented the testimony of Kelvin Mays to lie its way out of the predicament it had gotten itself into in the first place.

The only possible way out of this predicament for Ameristar is for this Court to rule that the perjured testimony of Mays could have been discovered had Mays been deposed prior to trial but even this assumes Mays would not have lied in his deposition. Taking all of the facts and circumstances into consideration, hopefully this Court will not do so.

Respectfully submitted,

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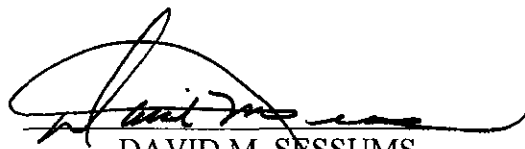
CERTIFICATE OF SERVICE

I, David M. Sessums, Attorney for Katherine L. Buchanan, do hereby certify that I have this day mailed, postage prepaid, by United States Mail, a true and correct copy of the above and foregoing Reply Brief of Appellant to the following counsel of record:

Bethany Brantley Johnson, Esquire
100 Concourse Drive, Suite 204
1052 Highland Colony Parkway
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Honorable Frank G. Vollor
Circuit Court Judge
Warren County Courthouse
Vicksburg, Mississippi

This the 29th day of November, 2007.


DAVID M. SESSUMS

**SHELLY ASHLEY-PALMERTREE
WARREN COUNTY CIRCUIT CLERK
POST OFFICE BOX 351
VICKSBURG, MS 39181**

AUGUST 21, 2006

To: DAVID SESSUMS

**Re: KATHERINE BUCHANAN VS AMERISTAR
99-0169-CI**

Please provide the following information for the above styled and numbered case so that we may process the appeal record:

Notice of Appeal (M.R.A.P. R. 3 and 4)

Designation of Record (M.R.A.P. R. 10)

Supreme Court Clerk Fee 100.00

XXX Clerks estimated cost of appeal in the amount of (M.R.A.P. R. 11) \$19,000.00

Certificate of Compliance with Rule 11

We appreciate your prompt attention to the above request. If we can be of any assistance to you, please contact us.

Sincerely,

**Shelly Ashley-Palmertree, Circuit Clerk
Warren County, Mississippi**

By: Shelly Ashley-Palmertree D.C.



**** This is an estimate only. The cost may be more or less than estimated above. ~~cost only includes the clerk's preparation of the record. The court reporter will have to estimate her cost.~~**

**CC: BETTY SEPHTON
SUPREME COURT**

EXHIBIT

("A")