

IN THE SUPREME COURT OF MISSISSIPPI

AMERISTAR CASINO VICKSBURG, INC.

APPELLANT  
[REDACTED]

V.

CAUSE NO. 2006-CA-01375

KATHERINE L. BUCHANAN

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 Court may evaluate possible disqualifications or recusal.

- I. Estate of Katherine L. Buchanan;
- II. David M. Sessums and Varner, Parker & Sessums, P.A.;
- III. Ameristar Casino, Inc.
- IV. Ameristar Casino Vicksburg, Inc
- V. Robert P. Thompson, Esquire
- VI. Copeland Cook Taylor & Bush
- VII. Paul Kelly Loyocano, Esquire
- VIII. Herbert C. Erhardt and Bethany Johnson, Esquire
- IX. Lewis Fisher Henderson Claxton & Mulroy

THIS the 31<sup>st</sup> day of July, 2007.

Respectfully submitted,

KATHERINE L. BUCHANAN

BY: 

DAVID M. SESSUMS (MSB [REDACTED])

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## STATEMENT OF ISSUES

1. The Lower Court erred in overruling Plaintiff's Motion for New Trial based upon the false/perjured testimony of Kelvin Mays;
2. The Lower Court erred in allowing the testimony of Kelvin Mays;
3. The jury's verdict on the issue of punitive damages was against the overwhelming weight of the evidence.

Respectfully submitted,

KATHERINE L. BUCHANAN

BY: \_\_\_\_\_  
DAVID M. SESSUMS (MSB #6714)

### **STATEMENT OF THE CASE**

On May 27, 1999, Katherine Buchanan filed her Complaint before the Circuit Court of Warren County alleging that on March 8, 1997, she was injured during the course and scope of her employment with Ameristar and that Ameristar had wrongfully refused to pay her workers compensation benefits(Vol 1, Page 26)

During the course of the compensation proceedings the insurance company which insured Ameristar, Legion Insurance, was declared insolvent.

Trial commenced against Ameristar on April 10, 2006, on the actual damages portion of the bad faith case, at the conclusion of which the jury determined Ameristar did not have an arguable or good faith reason to deny Katherine Buchanan's claim for workers compensation benefits and returned its verdict on April 18, 2006, finding for Katherine Buchanan and assessing her actual damages in the sum of \$30,000.00. (Vol 3, Page 333)

Thereafter, the Circuit Court denied the Defendant's motion for directed verdict on the issue of punitive damages and allowed that issue to go to the jury after which the jury returned its verdict in the punitive damages phase of the trial on April 19, 2006, stating, "We, the jury, find for the Defendant."

Judgment was entered in favor of Katherine Buchanan and against Ameristar Casino Vicksburg, Inc on April 21, 2006, in the sum of \$30,000.00 (Vol 3, Page 333)

On April 28, 2006, the Plaintiff filed her Revised Motion for New Trial or in the Alternative for J.N.O.V. asserting, inter alia, that the jury's verdict on the issue of punitive damages was against the overwhelming weight of the evidence, that the lower court erred in allowing the testimony of Ameristar witness Kelvin Mays and that the lower court erred in refusing to sustain Plaintiff's

Motion for New Trial based upon the false and perjured testimony of Kelvin Mays. (Vol 3, Page 349-351)

Attached to Plaintiff's revised Motion for New Trial or on the Alternative for J.N.O.V. was a copy of the testimony of Kelvin Mays transcribed from April 19, 2006 (Exhibit "A" to said revised motion) and copies of the workers compensation claims of Ameristar employees which were denied by Ameristar prior to 2003 (Exhibit "B" to said revised motion)

On July 18, 2006, Katherine Buchanan filed her Plaintiff's Supplement to Motion for New Trial attaching as an Exhibit thereto the deposition testimony of former injured Ameristar worker Deborah Russell in that certain case styled "Deborah T. Russell vs Ameristar Casino Vicksburg and Hartford Fire Insurance Co.; MWCC No. 05 3353-J-2220." (Vol. 3, Page 421 et seq) This deposition testimony taken at the instance of Ameristar on July 6, 2006, (three months after the Buchanan trial) in a completely separate case established that Kevin May (sic) instructed other Ameristar employees not to discuss or have any contact with Deborah Russell regarding her case and established that Deborah Russell, like Katherine Buchanan, had her disability benefits denied by Kelvin Mays and Ameristar.

This is significant because at trial on April 19, 2006, Kelvin Mays had testified on direct examination that Katherine Buchanan's claim was the only claim for workers compensation benefits denied by Ameristar from 1996 through 2003. (Vol 5, Pgs 51-53) In direct contrast the copies of the claims of the Ameristar employees whose workers compensation claims were denied by Ameristar prior to 2003, (attached as Exhibit "B" to claimant's Revised Motion for New Trial or in the Alternative for J.N.O.V.) and the evidence from the denial of Deborah Russell's claim clearly show that the testimony presented by Mays to the jury was false.

This testimony was clearly material to and relied upon by the same jury which had already decided that Ameristar did not have any arguable or good faith basis for denying Katherine Buchanan's workers compensation claim and awarded actual damages of \$30,000.00. On the basis of May's testimony the jury decided that punitive damages should not be awarded (i.e.: obviously on the basis that Buchanan's claim was the only one denied by Ameristar out of 1,332 claims filed during 1996-2003 and out of 1,940 claims filed between 1994 and 2003.)

The lower court denied Plaintiff's Motion for New Trial or J.N.O.V. on July 26, 2006, and on August 14, 2006, Katherine Buchanan filed her Notice of Appeal (Vol 4, Page 452).

### **SUMMARY OF THE ARGUMENT**

After the jury determined that Ameristar did not have an arguable or good faith reason to deny Katherine Buchanan's claim for workers compensation benefits it awarded actual damages of \$30,000.00 and the case moved to the punitive damage phase of the trial.

Prior to proceeding with the punitive damage phase of the trial Katherine Buchanan moved ore tenus that Ameristar should not be allowed to go in to extraneous matters such as other claims submitted by other employers and allegedly paid by Ameristar. (Vol 5, Pg 55) This motion was overruled by the trial court. (Vol 5, Pg 56)

In the proceedings on the punitive damages phase of the trial Katherine Buchanan incorporated as part of her punitive damage case the testimony and exhibits presented during the actual damages phase of the case (Vol 5, Pg 56) and it was stipulated that Ameristar had a net worth of \$42,327,502.00. (Vol 5, Pg 56)

The Court instructed the jury that all the evidence previously heard for the past six days was considered to be incorporated into the evidence in the punitive damage phase of the case and

instructed the jury to consider such evidence just as if it had been presented all over again. (Vol 5, Pgs 56-57)

Over the objection of Plaintiff Ameristar was allowed in the direct examination of Kelvin Mays to introduce evidence of other claims of other Ameristar employees other than Katherine Buchanan alleging that 1,332 other completely separate workers compensation claims were paid by Ameristar from 1996 to 2003 thus confronting Katherine Buchanan with the impossible task of delving into whether 1,332 other cases were factually similar or different from the claim of Katherine Buchanan.

On redirect Kelvin Mays was allowed to testify that Katherine Buchanan's claim was the only one out of 1,940 claims that Ameristar had ever denied from 1994 to 2003.

Such testimony obviously had an effect on the same jury that after hearing six days of disputed testimony had reached the decision that Ameristar had no arguable reason to deny Katherine Buchanan's claim and had done so in bad faith. After hearing Mays' testimony this same jury returned a verdict for Ameristar on the issue of punitive damages obviously believing that Katherine Buchanan's case was the one and only isolated case where Ameristar had ever denied a workers compensation claim and on this basis decided that there was no need to award punitive damages.

### **ARGUMENT**

After Ameristar denied Katherine Buchanan's claim for workers compensation benefits the comp case proceeded to hearing before the Administrative Judge who found that Mrs. Buchanan's injury was compensable. Ameristar appealed.

The Mississippi Workers Compensation Commission without commend affirmed the



decision of the ALJ awarding benefits and Ameristar appealed to the Circuit Court of Warren County, Mississippi. The Circuit Court unhesitatingly affirmed the award of Mississippi Workers Compensation Commission and Ameristar then appealed to the Mississippi Supreme Court.

Shortly after perfecting its appeal to the Supreme Court Ameristar abruptly voluntarily dismissed its appeal but still refused to pay workers compensation benefits to Katherine Buchanan until some five months after all appeals had been extinguished.

**In its defense of the bad faith action Ameristar pled that it relied upon and followed the advice of its workers compensation counsel.**

At the trial of the present bad faith action in April 2006, the jury considered among other exhibits and testimony a letter from Ameristar's workers compensation attorney to Ameristar dated January 5, 1999, where, inter alia, the following was contained, to wit:

**"Though this is not the result that either you or I hoped for in this case, I think it should be kept in mind that in cases where there is conflicting proof, such as this one, it is important to take such cases to hearing since one never knows exactly what the Administrative Judge is going to do, and even if the claim is found compensable, that the employee is forced to hire a lawyer and go through the process of a hearing to obtain workers compensation benefits. I can assure you that her co-workers are aware of how much trouble she had to go through to obtain workers compensation benefits. Certain employees may think twice before filing a claim due to the fact that Ameristar did not pay benefits to Mrs. Buchanan just because she claimed she was hurt on the job."** (Plaintiff's Exhibit No. 43- found in envelope No. 1)

Although at trial Ameristar attempted to explain away and to disavow the contents of this letter the bad faith jury also heard Ameristar's own employees on cross and obviously considered this "make an example" letter in deciding that Ameristar had no arguable reason whatsoever to deny Katherine's claim for workers compensation benefits and awarded \$30,000.00 in actual damages for the bad faith denial of her workers comp claim.

During the punitive damage phase of the trial, Kelvin Mays (who should not have been allowed to give his testimony at all) was asked:

Q: Alright. Mr. Mays, I am going to represent to you in this case there is a letter that says – and the jury had heard it, and I can show you the letter if you'd like to see it– it says, We made it tough on Katherine Buchanan. We made her– forced her to hire a lawyer, and we made her go through the claim. And other employees will see the trouble she had and be reluctant to file their own claims. Okay? I am going to represent to you that letter exists, and the jury has seen it. Are you with me so far?

A: I think I am, yes, sir.

Q: Alright. Now, if Ameristar is making examples out of people, of Katherine Buchanan in this case, for the stated purpose– for the stated purpose of making certain employees think twice before filing their own claims, you'd agree with me that if that's what's happening then some people that get hurt may be reluctant to file their own claims, correct?

A: I– I wouldn't agree with that.

Q: You wouldn't agree? Tell me why you wouldn't agree with that. If Ameristar's lawyer writes to Ameristar and says– tell my why you agree–disagree with this lawyer. He is telling them, I can assure you that if her coworkers are aware of how much trouble she has had to go through to obtain workers compensation benefits certain employees may think twice before filing a claim due to the fact that Ameristar did not pay benefits to Mrs. Buchanan just because she claims she was hurt on the job. Now, you don't think if Ameristar is making an example out of Katherine

Buchanan that will make other employees think twice—think twice before filing their own claim?

A: No, I don't.

Q: You don't?

A: I don't. (Vol 5, Pg 70-71)

Ameristar obviously attempted, successfully as it turned out, to counter this “make an example” letter in evidence by presenting evidence that it did not make or try to make an example out of Katherine Buchanan. It did so by the perjured testimony of Kelvin Mays that Katherine Buchanan's claim was the only workers compensation claim which was denied out of 1,332 claims from 1996 through 2003 (May's direct examination) and out of 1,940 claims from 1994 to 2003 (May's redirect examination).

Mays testified on direct examination:

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 Mrs. Buchanan?

A: Yes. (Vol. 5, Pg 64)

Mays prefaced the above testimony by stating

Q: All right. And where are you employed?

A: Ameristar Casino in Vicksburg, Mississippi.

Q: All right. And how long have you been employed by Ameristar Casino in Vicksburg?

A: In May, it will be 6 years.

Q: Six years. At your request, the attorneys for Ameristar, did you undertake to go back and go through all the workers compensation claims filed from 1996 forward?

A: Yes. (Vol 5, Pg 62)

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Q: All right. What evidence do you have that you made this count?

A: A spreadsheet, an Excel spreadsheet.

Q: Okay. And does your Excel spreadsheet-what does it list on it?

A: It lists date, time, name, description, department code, the team member supervisor, OSHA code, paid amount, reserve amount, and the status of the claim.

(Vol 5, Pg 63)

Q: Let me ask this before I get into that number thing again. Why is it that Ameristar keeps these figures?

A: Why do we keep these figures?

Q: Yes.

A: It gives us a total of the amount of money that is paid on the workers comp claims.

(Vol. 5, Pgs 63-64)

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Q: All right. Now, let me just ask you this, Mr. Mays; Since 1996 through 2003, how many workers compensation claims were made to Ameristar by its employees?

A: 1,332

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

A: Only one.

Q: And that was Mrs. Buchanan?

A: Yes. (Vol 5, Pg 64)

After testifying on his direct examination that 1,332 claims were workers comp claims made from 1996-2000 and that none of them, except Buchanan's, was denied Mays also testified:

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 claim was denied?

A: None.

Q: Alright. So now we have-- from 1994 through 2003 we have a total of how many when we add 608 to 1,322? Might I suggest to you since I have got the pen that its 1,940? Does that sound--if the brothers taught me at St. Al how to do that thing, you believe me?

A: That sounds correct.

Q: Alright. Now, Mr. Sessums questioned you about teaching lessons, okay? And Katherine-- by denying Katherine Buchanan's claim we supposedly cracked the whip (indicating) and we told these other workers, no, don't--

Q: Did you have the intent to crack the whip on these other workers, these other 1,940 workers?

A: Never.

Q: Because they came forward, didn't they?

A: Absolutely.

Q: Okay. Now, as far as teaching anyone anything about filing a claim, how does Ameristar view what you taught 1,940 people vs 1?

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 people learn?

A: That they should—

A. That they should 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. (Vol 5, Pgs 79-80)

At trial, Katherine Buchanan had no way to know in advance that Kelvin Mays would present false and perjury testimony to the jury. In complete candor to this Court, Kelvin Mays was identified in discovery as a potential fact witness. However, so were many, many others and Katherine Buchanan simply did not have the resources, and would never have the resources, to depose each and every person on such an extensive witness list.

When Mays gave his testimony in the punitive damage phase of the case counsel for Buchanan was aware of another case (Deborah Russell) in the files back at his office, where Ameristar had in fact denied another Ameristar employee's workers compensation claim. Obviously, same was not available "on the spot" for cross examination of Mays.

After trial copies of other claims denied by Ameristar were obtained from the Workers Compensation Commission and attached as Exhibit "B" to Buchanan's Revised Motion for New

Trial clearly establishing that the testimony of Kelvin Mays was false and perjured.

A copy of said Exhibit "B" is also attached hereto.

This information confirmed that at a minimum the claims of Johnnie Peacock, Tracy Wallace, Lealon Garrison, Jennie Robinson, and Robert Harps were also denied by Ameristar.

In particular, this evidence indicated that the claim of Lealon Garrison was injured on July 15, 1995, and that his claim had been denied.

This information relating to Jennie Robinson indicated that Ameristar stated, "We are contesting the surgery due to the Claimant working for another employer after our injury. We are contesting (sic) benefits also."

This information regarding the claim of Robert Harps stated, "We are contesting that the accident of May 21, 1999, arose out of and during his course or scope of employment. This is based on the medical reports provided by Dr. Paul Pierce. We have denied the workers compensation claim."

Regarding the claim of injured employee Tracy Wallace Ameristar's denial of this claim stated, "ER/Carrier dispute condition as being work related as medical information suggest problem is related to pregnancy and not to any untoward event at work."

The denial of the claim of Johnnie Peacock stated, "ER/Carrier dispute entitlement to benefits as medical documentation is not supportive of work-related claim."

The deposition testimony of Deborah Russell (her deposition was noticed by Ameristar after the Buchanan trial) establishes that the claim was denied with the active participation of Kelvin Mays.

**The testimony of Kelvin Mays was false.** It was given under oath thus making it perjury.

In 66 C.J.S. New Trial, Section 35, the authors state:

“Misconduct of a party or his attorney in respect of matters relating to evidence may afford ground for new trial, as where the misconduct consists in inducing a witness to absent himself from the trial or to avoid the service of his subpoena or in the willful introduction of false evidence, or in suppressing evidence, or in the misconduct of a party while testifying as a witness in the case.” 66 C.J.S., New Trial, Section 35 at Page 125

In this case, the jury determined that Ameristar had no arguable reason for denying Katherine Buchanan’s workers compensation claim, and did so in bad faith, by considering the documentary and other evidence that Ameristar had sought to make an example out of Katherine so that other Ameristar employees would not file their own workers compensation claims. Then, Kelvin Mays got up and told the jury that Katherine’s case was the only one out of 1,940 workers compensation claims that had been denied by Ameristar and certainly the jury obviously took this into account in returning their verdict for Ameristar on the issue of punitive damages.

In 58 Am Jur 2d, New Trial, Section 291 the authors of that authority explain that:

“Any unconscionable advantage obtained during trial by one party over the other, by fraud or artifice, to the latter’s injury, is grounds for a new trial. Thus, whenever it appears that one of the parties to litigation has by fraud, connivance, conspiracy, or other dishonest act prevented his or her adversary from obtaining a fair trial, a court may rectify the wrong by vacating the judgment obtained and directing a new trial. It is ground for a new trial, for example, if the prevailing party causes incompetent and essentially prejudicial matters to be deliberately placed before the jury, give false testimony, conceals the name of a material witness, gives evasive or misleading answers to interrogatories, or threatens a witness for the opposing party.” 58 Am Jur. 2d, Section 291 at Page 301.

The authors in 47 Am. Jur. 2d, Judgments, Section 835 at Pages 311-312 state:

“In order to obtain relief from a judgment on the grounds of perjury, it must appear that the false testimony was willfully and purposely given, that it was material to the issue being tried, that it was not merely cumulative, but probably controlled the result.” 47 Am. Jur. 2d, Judgments, Section 835 at Pages 311-312



There is no way to contend that the testimony of Kelvin Mays was not false or misleading. It was simply and grossly not true and obviously relied upon the jury in the punitive damage phase of the trial.

The Court in Viskase Corporation v. American National Can Co., 979 F. Supp. 697 (N.D.

Ill.) stated:

“It must therefore be examined under Rule 60, F. R. Civ. P. Rule 60(b)(2) requires that a litigant seeking relief from judgment pursuant to newly discovered evidence show (1) the evidence was discovered following the trial; (2) due diligence on the part of the movant to discover the new evidence is shown or maybe inferred; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; (5) the evidence is such that a new trial would probably produce a new result. United States v Walus, 616 F 2d 283, 287-88 (Supp. Cir. 1980).

Under Rule 60(d)(3), however, in cases in which a court or jury is presented with perjured testimony which is relevant and material to the issues decided, the requirements are slightly different. Fraige v American-National Watermattress Corp, 996 F.2d 295, 299 (Fed. Cir. 1993). In such cases the Court should not attempt to weigh the effect of the perjured testimony on the trier of fact and should instead order a new trial.” 697 F. Supp. at Page 700.

Thus, under federal Rule 60 (b)(3) due diligence is not is not a requirement. Continuing to address due diligence the Viskase court stated:

“Viskase argues that ANC did not use due diligence to discover the new evidence because it did not take the deposition of anyone at Jordi Associates, despite receiving the Jordi report upon which Dr. Porter relied at trial and knowing from Dr. Porter’s deposition that Dr. Porter would rely on it.”

This argument was rejected in Viskase and is the same argument made by Ameristar in this case.

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After rejecting Viskase’s due diligence argument the Court stated:

“Thus, the principle question is whether Dr. Porter’s false trial testimony with respect

to his participation in the Jordi tests was material.”

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“Viskase offered almost no other testimony that would support its claim that Affinity is a linear polyethylene. Dr. Porter’s testimony was a central part of Viskase’s infringement case with respect to the Affinity films.” 979 F.Supp at 704

In the present case Ameristar offered only the testimony of Kelvin Mays.

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Continuing the Viskase court held:

“The last requirement of the rule 60(b)(2) is that the evidence would probably have produced a new result. Walus, 616 F. 2d at 288. This requirement, as noted earlier, does not exist under rule 60(b)(3). I cannot say whether if Dr. Porter had testified truthfully the outcome would have been different. It makes no difference. It might have been different since I conclude his testimony was materially false, ANC has satisfied its burden under Rule 60 (b)(3), Fed. R. Civ. P.” 979, Fed.2d at 704.

Obviously, in this case Ameristar will argue, as it successfully argued before the lower court, that Katherine Buchanan could have discovered the content of Kelvin May’s false testimony if he had been deposed. This is the same argument as Viskase advanced in Viskase Corp. v. American National Can Company, supra, rejected by that court explaining that cases relating to perjured testimony are different and that if the testimony is false and material a new trial is warranted. Just as in Viskase supra, in this case, “[Ameristar] offered no other testimony that would support its claim” other than “[Kelvin Mays] testimony which was the central part of “[Ameristar’s]” case.”

In Fraige v. American-National Watermattress Corporation, 996 F.2d, 295 (Fed. Cir.

1993) the court stated:

“When it became known that the jury was presented testimony based on fraudulent documentation, where that testimony was relevant and material to the issue of patent validity, all of the jury’s invalidity findings became suspect. See generally Minneapolis, St Paul and Sault Ste Marie Ry Co. v. Moquin, 283 U.S. 520, 521-522, 51 S. Ct. 501, 502, 75 L.Ed. and 1243 (1931) (litigant who engages in misconduct,

“will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.” In re: M/V Peacock, 809 F.2d 1403, 1405 (9<sup>th</sup> Cir. 1987) (where there is proof of an intentional scheme of misconduct, damage from the misconduct is presumed.” 996 F.2d at 299.

And, it should be recalled that the deposition testimony of Deborah Russell was taken by Ameristar three months after the Buchanan trial.

In this case the same jury which had already heard, rejected and disposed of all of Ameristar’s flimsy excuses for denying Katherine Buchanan’s workers compensation claim and held that Ameristar had no arguable reason for denying her claim, then turned around after hearing Kelvin Mays false testimony and rendered a defense verdict on this issue of punitive damages. The fact that Kelvin May’s testimony is false is inescapable in light of the documentary evidence of Ameristar’s denial of claims other than that of Katherine Buchanan.

While there are no Mississippi civil cases directly on point relating to the effect of perjury it is often times forgotten that the rules of evidence in civil cases are the same as those in criminal cases.

Rule 59 M.R.C.P. governs the granting of new trials and states that a new trial may be granted for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of Mississippi and while the hereinafter cited cases speak to the “due diligence” requirement which exists only under M.R.C.P. 60(b)( 3) this is not the same standard as that contained in the provisions of M.R.C.P. 60(b)( 1) relating to “fraud, misrepresentation or other misconduct of any adverse party.” (Note: F.R.C.P. 60(b)(3) equates with M.R.C.P. 60(b)(1))

With this significant MRCP distinction regarding the lack of a due diligence requirement in cases of fraud or perjury in mind, reference is made to the criminal cases of Smith v. State, 492 So.2d 260 (Miss. 1986), Tobias v. State, 584 So.2d 1276 (Miss. 1991) and Brown v. State, 890 So.2d

901 (Miss. 2004).

In Smith v. State, supra, the Court stated:

“However, the determination of whether a new trial should be granted must be made, by the trial court, on a case-by-case basis taking to account all the relevant facts and circumstances.

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To reiterate, the petitioner is entitled to a new trial only if he clearly proves his allegations concerning perjured testimony and only if the criteria of Townsel, supra, is met, including a finding that the perjured testimony was such that there is a probability that a different result will be reached upon a new trial.” 492 So.2d at 264.

In Brown v. State, supra, the Court stated:

“If perjury was committed, the defendant will be entitled to a new trial only if four factors are met. First, it must appear that the perjured testimony will probably change the result if a new trial is granted. Second, the perjury must have been discovered after the trial. Third, the perjury must not have been discoverable before the trial by the exercise of due diligence. Fourth, the perjury must be on an issue that is material to the case and not merely cumulative or impeaching. 890 So.2d at 917

In this particular case the perjury of Kelvin Mays was actually “discovered” during the course of trial in progress by the recollection of counsel for Katherine Buchanan that he was handling at least one other case (Deborah Russell) wherein Ameristar had denied compensability of a workers compensation claim. Admittedly, counsel for Buchanan could have requested a recess in order to dash back to his office to locate, retrieve and hurriedly review that other file while the Buchanan jury cooled its heels but this would have only interjected the different issues of that other case into the Buchanan trial, and, because it was coming from counsel for Buchanan, would probably have been viewed with some suspicion by the jury. Only after trial when copies of the other claims denied by Ameristar were obtained from the Mississippi Workers Compensation Commission did the gravity of Kelvin Mays’ perjured testimony become clear.

As previously mentioned, in addition to denying the claim of Katherine Buchanan, Ameristar

with the active participation of Kelvin Mays also denied the claim of a former Ameristar employee Deborah Russell which was shown to the lower court in Plaintiff's Supplement to Motion for New Trial.(Vol 3, Page 421)

As shown to the lower court from the deposition testimony taken at the instance of Ameristar on July 6, 2006, of Deborah Russell, Kelvin Mays (referred to by Deborah Russell as Kevin May) instructed other Ameristar employees not to have any contact with Deborah Russell. (Pages 722 and 23 of Deborah Russell's deposition; Exhibit "A" to said Supplement to Motion for New Trial-Vol 3, Page 421)

In her deposition (beginning at Vol 3, Page 429) Deborah Russell testified:

Q: Did you try to call anybody and see if you could get the day off work Saturday?

A: I called Davina. No, I didn't call Saturday, but I called Davina Sunday morning. Davina Hillard and I told her I had hurt my back. I didn't know what in the world I had done. It was just unbearable.

Q: When you say you told them you didn't know what you had done, did you at least tell them you thought it had happened at work?

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Q: And do you know who told them that.

A: Kevin May. Because Bea Willis called me at home and told me that.

Q: Who is Kevin May?

A: He is over risk management.

Q: Have you talked to Kevin May about what happened?

A: I filled out a report with him and sent it in, and that's how all of this got started.

Q: So is this like I was talking about earlier, was this an incident report, or was this something different that you filled out for him?

A: This is an incident report, yes.

Q: And that was-- when did you do that?

A: I think that Monday. I filled all the paperwork out and sent it in to him.

Q: Now, when you-- he's in risk management. Is he an attorney, or do you know?

A: No. He is just risk management.

Q: Okay. So Ms. Willis told you that Mr. May advised them not to speak with you about the incident.

A: She called me at home. Yes, she did. She also told my son that very same thing.

\*\*\*

Q: So they didn't follow up with your treatment--

A: Nothing.

Q: -- That you know of?

A: Nothing.

Q: Did you ever have an occasion to speak with Mr. May again at any point after your injury?

Q: Besides sending in the paperwork?

A: Just paperwork.

Q: Okay. He never called you or --

A: No.

Q: Did any attorney or anybody from the Casino at all ever call?

A: No. The only person that called me was the risk management guy from Louisiana. I think his

name was David Hutchins. He is the one that had told me that the claim had been denied.  
(Vol 3, Pgs 429-431)

\*\*\*

Q: Okay. So you didn't talk with anybody again after Mr. Hutchins and Vickie?

A: No. Except for Bea when she called and told me that Kevin May had a meeting and told them not to have any contact with me whatsoever. (Vol 5, Pg 434)

This sworn testimony from another workers compensation denied by Kelvin Mays is just one more example of why the testimony of Kelvin Mays before the Buchanan jury was false and perjured. And, this evidence did not manifest itself until July 6, 2006, when Ameristar itself took the deposition of Deborah Russell.

Now, just imagine trying to interject the facts of the Deborah Russell case into the Buchanan trial. Then imagine the minds of the Buchanan spinning trying to keep up with all the different facts and circumstances in that case in addition to the week of testimony they had already heard in the Buchanan case. Then imagine this multiplied by 1,939 other claims.

The lower court overruled Katherine's Motion for a New Trial on the basis that Mays testimony could have been ascertained in discovery had he been deposed but, under the Rule 60(b)(1) standard, "due diligence" is not required in this matter and even were "due diligence" have been required in the form of taking Kelvin May's pretrial deposition, this was a practical and financial impossibility given the large number of witnesses identified by Ameristar in response to interrogatories and Katherine's non-existent resources. (She had already struggled without workers comp benefits for numerous years)

Though the lower court obviously did not condone, and no one should ever understand, imply

or infer that any such insinuation is made or intended by the undersigned, the lower court simply did not reach the issue of Kelvin Mays' perjury on the basis that Mays had been identified as a potential witness in discovery responses and, on this basis only, decided that Buchanan's Motion for New Trial or J.N.O.V. should be overruled without ever discussing or reaching the merits of or the affect of Kelvin Mays' perjury before the jury.

Speaking to a situation where the lower court had not addressed the precise issue before it the Court in Tobias v. State, 584 So.2d 1276 (Miss. 1991) stated:

...this is one of those unfortunate cases where the trial judge failed to make "any findings of fact whatsoever."

\*\*\*

...the trial judge should state in his order, or otherwise place into the official record, his specific findings of fact and the legal standard applied to these facts in reaching his decision."

\*\*\*

In the final analysis, we hold that Tobias proved by a preponderance of the evidence that Perryman committed perjury, that Perryman's recantation was newly discovered evidence which could not have been discovered prior to trial by the exercise of due diligence, that Perryman's revelations are material to the issue and not merely cumulative or impeaching, and that the absence of Perryman's testimony at a new trial creates a substantial probability that a different result will be reached without the perjured testimony." 584 So.2d at Page 1279.

In this case, Katherine Buchanan either had to (1) assume that a witness under oath would and was going to commit perjury and anticipate the precise matter of the perjury or (2) depose at prohibitive cost every single witness listed by Ameristar, a requirement that would turn a trial into a venue of money and resources rather than a venue for the truth.

In short, the only way to discount or disregard the perjured testimony of Kelvin Mays is to shift the responsibility for such perjured testimony away from the perpetrator and on to the shoulders of Katherine Buchanan. Hopefully this Court will not do this. The law and lawsuits should not be turned into a game of, "Gottcha" or in this case one of "you didn't got us."



**KELVIN MAYS SHOULD HAVE NEVER BEEN ALLOWED  
TO TESTIFY IN THE FIRST INCIDENT**

Even had the testimony of Kelvin Mays been true and only one workers compensation claim out of 1,940 cases been denied by Ameristar such testimony still should not have been allowed before the jury.

Katherine Buchanan's case should have been decided on the facts of her case and not on the basis of other employee's cases.

The issue was not whether Ameristar sought to make examples of other employees but whether Ameristar sought to make an example of Katherine.

The evidence before the jury was that Ameristar sought to make an example out of Katherine Buchanan so that other Ameristar employees after seeing what a difficult time Katherine had in receiving benefits properly due her would not file their own claims for workers compensation benefits. The issue was not whether or not their plan worked but whether or not they had a plan.

Even accepting as true that Ameristar paid 1,939 other claims does not mean that Ameristar was still not seeking to make an example of Katherine Buchanan in order to prevent or hold down the filing of future claims by other employees. These other claims may well have been why it wanted to hold down costs by making an example of Katherine.

Rule M.R.E. 401 defines relevant evidence as any evidence having the tendency to make the existence of any fact more probable or less probable. The allegation that Ameristar paid 1,939 other claims besides that of Katherine Buchanan does not make it any more probable or less probable that it denied Katherine Buchanan's claim in bad faith so as to make an example of her in an attempt to hold down the filings of future workers compensation cases. Whether or not the attempt worked does not mean the attempt was not made.

In Plair v. State, 867 So. 2d 289 (Miss. App. 2004) the Court noted that the proper subject of inquiry of a witness testimony relates to whether the information has any tendency to make the existence of any fact that is of consequence to the determination of the issue more or less probable than it would be without the evidence. M.R.E. 401.

In this case the fact that Ameristar may or may not have paid 1,939 claims other than that of Katherine Buchanan does not make it any more or less probable that Ameristar was attempting to make an example of Katherine by wrongfully denying her claim. Someone has to be the example. The evidence in this case showed that example to be Katherine.

In objecting in advance to the testimony of Kelvin Mays (Vol 5, Pg 55) Katherine Buchanan correctly argued that the admittance of such evidence would interject the facts of all the other alleged workers compensation cases into the Buchanan trial.

The trial court in the actual damages phase of the case had granted the Plaintiff's Motion in Limine to exclude Ameristar from introducing evidence of other claims which had allegedly been made and paid. (Vol 5, Page 55) Before proceeding into the punitive damage phase of the case Katherine Buchanan renewed that motion ore tenus that Ameristar not be allowed to go into extraneous matters regarding other claims submitted and other claims paid. This motion was denied by the Court in the punitive damage phase. (Vol 5, Page 55)

In Yoste v. Wal-Mart Stores Inc., 822 So.2d 935 (Miss. 2002) the plaintiff claimed negligence in the maintenance of a parking lot where he fell and was injured and the trial court excluded evidence that two other persons had tripped and fallen in the lot, which ruling was affirmed on appeal on the basis that while other accidents might have been relevant to show a condition which was dangerous or might have provided notice to the defendant that such other alleged events were not competent unless such other accidents could be shown to be similar to the one in which Yoste was injured.

In this case, Kelvin Mays was simply allowed to interject into this trial that 1,939 cases other than Katherine Buchanan's had been paid and this was the exact impression Ameristar intended to be conferred on the jury. These other cases did not tend to prove or disprove that Ameristar had sought to make an example of Katherine by denying her claim.

Evidence that Ameristar may have paid other claims is simply not relevant to the issue of whether Ameristar denied Katherine Buchanan's claim in bad faith and without arguable reason. This is especially so since the jury had already found that Ameristar had no arguable reason to deny Katherine's claim.

In Sawyer v. Illinois Central Gulf Railroad Co, 606 So.2d 1069 (Miss. 1992) the plaintiff sought to show that there had been "near misses" at a particular railroad crossing arguing and that such "near misses" were admissible to show the dangerous character of the crossing and resulting notice to the person in control. In addressing this issue the Court noted that a "near miss" proved very little in and of itself and could be prejudicial in a case involving a railroad crossing accident since it did not necessarily imply fault or neglect by the person in control.

In this case that Ameristar may or may not have paid the claims of other employees other than Katherine Buchanan proves very little, and in fact proves nothing, regarding the issue of whether or not Ameristar wrongfully denied Katherine's claim or whether Ameristar sought to make an example of Katherine in order to cut down on the number of workers compensation claims filed by other Ameristar employees.

In Gaines v. K-Mart Corp, 860 So. 2d 1214 (Miss. 2003) the court noted that while M.R.E. 406 allows the admission of evidence tending to establish a businesses routine, habit or practice that M.R.E. 403 prohibits the use of any evidence that substantially confuses the issues. In that case, the plaintiff sought to introduce evidence that K-Mart routinely left defective ladders on its sales floors by introducing testimony of a former K-Mart employee regarding other ladders situated on K-Mart's

sales floors. The Court ruled that this testimony would have left the jury to speculate about the inferences that the ladder involved in the case then under consideration was defective and that such inferences muddled the issue and tended to confuse the jury.

Now, consider again the effect of interjecting just the Deborah Russell deposition discussed *infra* before the Buchanan jury and consider the confusion. Now multiply that confusion by 1,939 other claims. Had Katherine Buchanan sought to interject the Deborah Russell case into this trial would that have proved Ameristar denied Katherine's claim in bad faith? Obviously not. Yet Ameristar was allowed to interject (falsely) the claim that it paid 1,939 other claims.

In this case Ameristar was allowed to introduce evidence to the jury that it had denied only one of 1,939 claims (which was not true) leaving the jury to confuse the issue of alleged payment of 1,939 other claims with the issue of whether Ameristar acted in bad faith or intended to make an example of Katherine Buchanan. Stated another way, this evidence allowed the jury to speculate that because Ameristar had really paid 1,939 other claims that Ameristar had not acted so badly after all and that no punitive damages needed to be assessed.

The Court in Johnson v. Fargo, 604 So.2d 306 (Miss. 1992), a case for personal injuries received in a vehicular collision, the Court noted that the Rules of Evidence apply with equal force in both civil and criminal cases and in discussing M.R.E. 401 and M.R.E. 403 as they relate to the relevancy test regarding "non-existent" evidence stated:

"In this case, Johnson's response in which he revealed a non-existent murder conviction did not relate to an actual prior conviction; therefore, Rule 609 does not apply. Rule 401, regarding relevancy, does. Under the standard of Rule 401, the testimony bears no relevance or probative value whatsoever because it alleged an event that never happened. Thus, without any need to balance the testimony's value, the trial court found it wholly inadmissible." 604 So.2d at 310.

In this case Ameristar was allowed to present evidence of 1,939 other "non-happenings" in the form of its false claim that it did not deny 1,939 other claims. Alleging events that never happened is obviously irrelevant to the issue of whether or not it wrongfully denied Katherine

Buchanan's claims or whether or not it attempted to make an example of her.

In McCaffrey v. Puckett, 784 So.2d 197 (Miss. 2001) a patient sued a chiropractor for malpractice in connection with a spinal manipulation and at trial the lower court allowed evidence on behalf of the chiropractor that he had a clear disciplinary history with the State Board of Chiropractic Examiners and had never been the subject of any disciplinary complaints. On appeal, the Supreme Court held that evidence that the chiropractor had never been disciplined or the subject of any complaints was inadmissible, stating:

"At trial, Dr. Alfred Norville, a member of the State Board of Chiropractic Examiners, testified on Puckett's behalf. Dr. Norville stated that during the time that he had served on the Board, Puckett had never been subject to discipline nor had a complaint been filed against him. McCaffrey claims that this evidence served only to bolster Puckett's character. McCaffrey contends that the character evidence offered by Dr. Norville was simply not relevant to whether Puckett was negligent in his treatment of McCaffrey and whether that negligence proximately caused McCaffrey's injuries.

\*\*\*

In the instant case, the testimony that Puckett had never been disciplined by the State Board of Chiropractic Examiners would tend to show that he was a careful, non-negligent chiropractor.

\*\*\*

There is no Mississippi case law directly on point. However, at least two jurisdictions have determined that "bolstering" of a defendant physician's character is impermissible. In Holdiay v. Cutchin, 311 N.C. 277, 316 S.E.2d 55, 57 (1984), the North Carolina Supreme Court held that "the character of a defendant physician in a medical malpractice action is irrelevant to the ultimate issue of whether the physician acted negligently. Such evidence tempts the jury to base its decision on emotion and to reward good people or punish bad people, rather than to render a verdict based upon the facts before them."

\*\*\*

The trial court erred in allowing Dr. Norville to testify as to Puckett's disciplinary history. It would clearly be wrong under M.R.E. 404 to offer evidence that Puckett **had** in fact been disciplined. Offering evidence of the converse is just as improper. This ruling also constitutes reversible error." 784 So.2d at Pages 203-204.

Had Katherine Buchanan sought to introduce all the evidence from the denied claims of

Johnnie Peacock, Tracy Wallace, Lealon Garrison, Jennie Robinson, Robert Harps and Deborah Russell into the Buchanan trial the Buchanan jury would have had to try and consider all of the various facts, arguments and disputes in each of those cases and the introduction of such evidence would clearly have been wrong under M.R.E. 404 in an attempt to show that Katherine's claim had been wrongfully denied or that Ameristar had sought to make an example of Katherine. "Offering evidence of the converse is just as improper." McCaffrey v. Puckett, 784 So.2d at 204. Just as in McCaffrey v. Puckett, supra, offering the converse, that Ameristar did not deny other claims, constitutes reversible error in this case.

**THE JURY'S VERDICT WAS AGAINST THE OVERWHELMING  
WEIGHT OF THE EVIDENCE**

Inherent in each of the above assignments of error, that Kelvin Mays should never have been allowed to testify in the first instance and that his testimony was false and perjured, is that the jury's verdict, being based on this testimony, is against the overwhelming weight of the evidence.

The same jury that had listened for a week to Ameristar trying to squirm and explain away its inexcusable denial of Katherine's claim for workers compensation benefits, and flatly rejected Ameristar's lame excuses, then turned around after hearing Kelvin Mays, the only witness to testify live during the punitive damage phase of the case, and declined to award punitive damages based solely on false and perjured testimony.

That the testimony of Kelvin Mays was the sole basis upon which the jury could have declined to assess punitive damages is obvious as this very same jury had already flatly rejected all of Ameristar's spurious efforts to justify its denial of Katherine Buchanan's claim. The testimony of Mays was the only thing that was different between the actual and punitive damage phase of the case.

Although it is the general rule in Mississippi that when considering a motion for new trial a trial court, in the exercise of its sound discretion, may only overrule a jury's verdict where such verdict is against the overwhelming weight of the evidence or is contrary to law, Allstate Insurance Co. v. McGory, 697 So.2d 1171 (Miss. 1997) the converse has also long been true and a new trial should be granted where the verdict is against the overwhelming weight or clearly against the preponderance of the evidence. Fore v. Illinois Central Railway Co., 160 So. 903 (Miss. 1935)

In this case, in the absence of the false testimony of Kelven Mays there were no different facts in evidence which would substantiate or uphold the jury's verdict in the punitive damages phase of the case.

Without the false evidence of Kelvin Mays there was no evidence at all to support the jury's verdict on the issue of punitive damages.

Jury verdicts must be supported by proper evidence and where a verdict is not supported by any evidence it cannot be allowed to stand, or as stated by the Court in Brown Oil Tools, Inc. v. Schmidt, 148 So. 2d 685 (Miss. 1963);

"This Court will not sustain a judgment based upon a jury verdict, wholly unsupported by evidence. Payne v. Wynne, 126 Miss. 271, 88 So. 705; Bankston v. McKnight, 139 Miss. 116, 103 So. 807." 148 So. 2d at 689

Without the false testimony of Kelvin Mays the jury's verdict was wholly unsupported by the evidence and the judgment in this case cannot be based thereon.

Without the testimony of Kelvin Mays there was no evidence at all and it is clear that the jury verdict was against the overwhelming weight of the evidence and should have been set aside.

### **SUMMARY**

Kelvin Mays should never have been allowed to testify. What Ameristar did or did not do in other workers compensation cases have no bearing whatsoever on what Ameristar did to Katherine

Buchanan. The trial Court correctly excluded such evidence in the actual damages phase of the case and then erroneously allowed such evidence into the punitive damage phase of the case.

Even if Ameristar paid Johnnie, Suzie and little Debbie's workers comp claims it does not follow as a matter of logic or reason that it did not wrongfully deny Katherine's claim and try to make an example of her to other employees in order to save Ameristar money by holding down the number of workers compensation claims filed by other employees.

Secondly, even were the testimony of Kelvin Mays properly allowed, which it was not, it was patently and deliberately false and perjured. Just as obvious is that since such testimony was the only different testimony presented to the jury which had already rejected Ameristar's defenses and found that it acted in bad faith and without arguable reason, this false and perjured testimony was clearly outcome determinative in the jury's punitive damage verdict which would have been different without such false testimony.

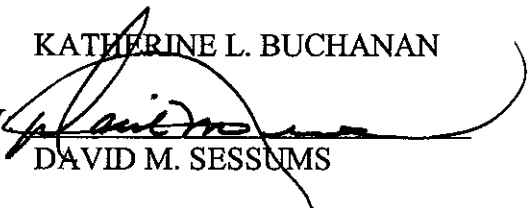
Due diligence is not required in cases involving "fraud, misrepresentation or the misconduct of an adverse party" and any requirement of same in this case would only serve to reward the perpetrator and punish the victim.

It is inescapable that the jury's punitive damage verdict, being based upon inadmissible and false testimony, is against the overwhelming weight of the evidence and based on the foregoing this Court should reverse and remand this matter back for trial on the issue of punitive damages only.

Respectfully Submitted,

KATHERINE L. BUCHANAN

BY

  
DAVID M. SESSUMS



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**CERTIFICATE OF SERVICE**

I, DAVID M. SESSUMS, do hereby certify that I have this date mailed, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to the following:

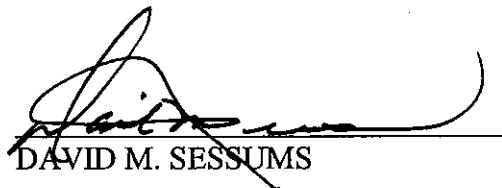
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Hon. Frank G. Vollor  
Warren County Courthouse  
Vicksburg, MS 39180

This the 31<sup>st</sup> day of July, 2007.

  
DAVID M. SESSUMS

IN THE CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI

KATHERINE L. BUCHANAN

PLAINTIFF

V.

**FILED**

CAUSE NO. 99-0169-CI(V)

APR 28 2006

AMERISTAR CASINO VICKSBURG, INC.  
AND LEGION INSURANCE COMPANY

SHELLY ASHLEY-PALMERTREE, CIRCUIT CLERK

DEFENDANTS

BY  D.C.

REVISED MOTION FOR NEW TRIAL ON THE ALTERNATIVE FOR J.N.O.V.

COMES NOW Katherine L. Buchanan, through counsel, and files this her Revised Motion for New Trial on the Alternative J.N.O.V. showing unto the Court as follows:

1. The Court erred in restricting Plaintiff's actual damages to only emotional distress caused specifically by bill collectors calling for her unpaid bills at University Medical Center;
2. The Court erred in restricting counsel for Plaintiff from commenting in closing argument on Ameristars failure to call its alleged lay eye witnesses, Flora Washington, Mary Harvey, Elsie King, and Terry Alexander;
3. The Court erred in prohibiting Plaintiff from bringing forth evidence that Plaintiff was terminated from her employment by Ameristar;
4. The Court erred in prohibiting Plaintiff from claiming damages from and after December 22, 1999;
5. The Court erred in prohibiting Plaintiff from introducing evidence that her claims for workers compensation benefits were not paid until May 5, 2000;
6. The Court erred in striking Exhibit P-81 and Exhibit P-84 from evidence.
7. The Court erred in the punitive damage phase of the case in prohibiting Plaintiff from arguing that Defendant had concealed its wrongdoing, specifically with reference to the alteration of the statement of witness Carolyn Britton and by making Carolyn



CERTIFIED AND ATTESTED A TRUE COPY

This 27 DAY OF July 2007

SHELLY ASHLEY-PALMERTREE, CIRCUIT CLERK

BY  D.C.

Britton unavailable for interview by its workers compensation attorney, Bill Patterson showing inter alia, that Ameristar conceded thereby its lack of a reason not to pay benefits;

8. That the Court erred in refusing to instruct the jury that Ameristar's attempts at concealment constituted a factor to be considered by them in considering the issue of punitive damages;
9. The Court erred in granting instruction A-2 as amended;
10. The Court erred in granting instruction A-3;
11. The Court erred in granting instruction A-4;
12. The Court erred in granting instruction A-6- as amended;
13. The Court erred in granting instruction A-8 and A-8 as amended;
14. The Court erred in granting instruction A-9 and A-9 as amended;
15. The Court erred in granting instruction A-11 as amended;
16. The Court erred in granting instruction A-13 as amended
17. The Court erred in granting instruction A-12 and A-12 as modified;
18. The Court erred in granting instruction A-19;
19. The Court erred in granting instruction A-20;
20. The Court erred in granting instruction A-21;
21. The Court erred in ruling that Plaintiff was prohibited to introduce evidence of an increased level of pain and suffering caused by Defendant's causing delay in her medical treatment;
22. The Court erred in refusing instruction P-3;
23. The Court erred in refusing instruction P-4;
24. The Court erred in refusing instruction P-5 as offered;

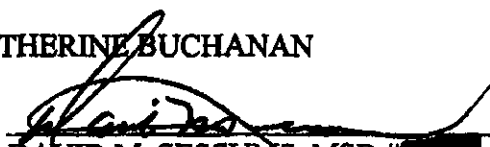

25. The Court erred in refusing instruction P-6-A as offered;
26. The Court erred in refusing instruction P-9;
27. The Court erred in refusing instruction P-10;
28. The Court erred in refusing instruction P-11;
29. The Court erred in refusing instruction P-12;
30. The Court erred in refusing instruction P-12A;
31. The Court erred in refusing instruction P-14;
32. The Court erred in refusing to allow Plaintiff to introduce evidence of emotional distress and mental pain and suffering caused by pain;
33. The Court erred in the punitive damage phase of the case by allowing testimony from Kelvin Mays regarding the number of claims other than that of Plaintiff alleged to have been paid by Defendant; specifically that out of 1,332 claims that, that of Plaintiff was the only claim Ameristar denied.
34. Kelvin Mays testified (see copy of transcribed testimony attached hereto as Exhibit "A") that out of 1,332 claims, Plaintiff's claim was the only one denied by Ameristar. Attached hereto as Exhibit "B" are copies of the claims of Ameristar employees which were denied by Ameristar prior to 2003, which information was received from the Mississippi Workers Compensation Commission.

WHEREFORE PREMISES CONSIDERED, Plaintiff moves for entry of this Court's order granting a new trial on the alternative J.N.O.V.

Respectfully Submitted:

KATHERINE BUCHANAN

By:

  
DAVID M. SESSUMS, MSB # 

OF COUNSEL:

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**CERTIFICATE OF SERVICE**

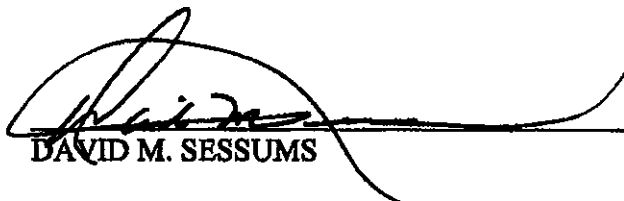
I, DAVID M. SESSUMS, do hereby certify that I have this date mailed, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Revised Motion for New Trial to the following:

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Robert P. Thompson, Esquire  
P.O. Box 6020  
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Paul Kelly Loyocano, Esquire  
1025 Jackson Street  
Vicksburg, MS 39180

THIS the 28<sup>th</sup> day of April, 2006.

  
DAVID M. SESSUMS

1 IN THE CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI  
2 NINTH JUDICIAL DISTRICT

3 KATHERINE L. BUCHANAN PLAINTIFF

4 VERSUS CAUSE NO. 99,0169-CI

5 AMERISTAR CASINO VICKSBURG, INC.,  
6 LEGION INSURANCE COMPANY AND GAB  
ROBINS NORTH AMERICA, INC. DEFENDANTS

7

8 \*\*\*\*\*

9 TRANSCRIPT OF EXCERPT OF TRIAL,

10 TESTIMONY OF KELVIN G. MAYS,

11 BEFORE HONORABLE FRANK G. VOLLOR, CIRCUIT JUDGE,

12 ON THE 19TH DAY OF APRIL, 2006

13 \*\*\*\*\*

14

15 APPEARANCES:

16

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RIDGELAND, MS 39158

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36 REPORTED BY:

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LUCRETIA R. SMITH

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OFFICIAL COURT REPORTER

39

CSR #1296

4-19-06 Buchanan v. Ameristar Testimony of Kelvin Mays

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LUCRETIA R. SMITH, CSR (601) 638-8981

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LUCRETIA R. SMITH, CSR (601) 638-8981

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3

1 MR. LOYACONO: We would next call Kelvin  
2 Mays.

3 THE COURT: Mr. Mays, please take the stand  
4 and be sworn in.

5 KELVIN G. MAYS,  
6 HAVING BEEN FIRST DULY SWORN,  
7 TESTIFIED AS FOLLOWS:

8 DIRECT EXAMINATION BY MR. LOYACONO:

9 Q. Mr. Mays, would you state your name for the Court  
10 and jury, please.

11 A. My name is Kelvin G. Mays.

12 Q. All right. And, Mr. Mays, where -- how old are  
13 you?

14 A. Forty-four.

15 Q. All right. And where are you employed?

16 A. Ameristar Casino in Vicksburg, Mississippi.

17 Q. All right. And how long have you been employed  
18 by Ameristar Casino in Vicksburg?

19 A. In May it will be six years.

20 Q. Six years. At our request, the attorneys for  
21 Ameristar, did you undertake to go back and go through  
22 all of the workers' compensation claims filed from 1996  
23 forward?

24 A. Yes.



4-19-06 Buchanan v. Ameristar Testimony of Kelvin Mays

25 Q. And did you -- did you actually perform those --  
26 that work yourself? Or you have aid of staff. But were  
27 you there when these searches were made?

28 A. I did it myself.

29 Q. All right. And would you tell the jury what you

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LUCRETIA R. SMITH, CSR (601) 638-8981

♀

4

1 found with regard to -- first of all, I asked you to  
2 give me 1997 and a year on each side of it; do you  
3 recall?

4 A. Yes.

5 Q. Okay. What happened the year before this  
6 happened in 1996 with regard to compensable claims?

7 A. The year prior --

8 Q. Yeah.

9 A. -- to 1996?

10 Q. No. No. In 1996, the year prior to this  
11 incident --

12 A. Uh-huh. (Affirmative Response.)

13 Q. -- that we're talking about here with Katherine  
14 Buchanan. What -- how many claims were made in 1996?

15 A. I would have to refer to --

16 Q. Oh. You got your -- have you got your --

17 A. No, I don't have it with me. I don't have it in  
18 front of me. I'm sorry.

19 Q. Thought you had them memorized.

20 (MR. LOYACONO PROVIDES THE WITNESS WITH DOCUMENTS.)

21 A. Sorry about that.

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22 Q. That's all right. And I'm glad that you asked me  
23 about that. In other words, actually, it probably  
24 explains it better. You didn't just do it. You  
25 actually had a printout of the ledger sheet, is that  
26 correct, there?

27 MR. SESSUMS: Object to leading, Your Honor.

28 THE COURT: That will be overruled.

29 Q. All right. What evidence do you have that you

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1 made this count?

2 A. A spreadsheet, an Excel spreadsheet.

3 Q. Okay. And does your Excel spreadsheet -- what  
4 does it list on it?

5 A. It lists date, time, name, description,  
6 department code, the team member supervisor, OSHA code,  
7 paid amount, reserve amount, and the status of the  
8 claim.

9 Q. Let me ask this before I get into that number  
10 thing again. Why is it that Ameristar keeps these  
11 figures?

12 A. Why do we keep these figures?

13 Q. Yes.

14 A. It gives us a total of the amount of money that's  
15 paid on the workers' comp claims.

16 Q. Okay. Is this required by any governmental  
17 agency?

18 A. Yes. The OSHA code is required for OSHA  
19 compliance.

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20 Q. Okay. So you have two reasons. You need to know  
21 how much money is --

22 MR. SESSUMS: Object to leading, Your Honor.

23 Q. So do you have two reasons, and what are they?

24 A. Well, the reasons would be, once again, for OSHA  
25 compliance and for us internally to know the number of  
26 claims that are filed and also the monetary amount  
27 that's paid out.

28 Q. All right. Now, let me just ask you this,  
29 Mr. Mays: Since 1996 through 2003 how many workers'

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1 compensation claims were made to Ameristar by its  
2 employees?

3 A. 1,332.

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

6 A. Only one.

7 Q. And that was Ms. Buchanan?

8 A. Yes.

9 MR. LOYACONO: We tender the witness, Your  
10 Honor.

11 MR. SESSUMS: Please the Court.

12 CROSS-EXAMINATION BY MR. SESSUMS:

13 Q. Mr. Mays, how are you doing today?

14 A. Pretty good, Mr. Sessums.

15 Q. How long have you been with Ameristar?

16 A. Almost six years.

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- 17 Q. And when did Ameristar start operating in  
18 Vicksburg?
- 19 A. I would have to guess on that one.
- 20 Q. You don't know that information?
- 21 A. No. No, sir. I wouldn't -- I would assume -- I  
22 think 1994 is when gaming actually came to Vicksburg,  
23 but I'm not sure as far as Ameristar.
- 24 Q. Were you asked to review the 1994 figures?
- 25 A. I can tell you. The '94 figures? Yes.
- 26 Q. You do have the '94 figures?
- 27 A. Let me see. Not in front of me, sir. No, sir.
- 28 Q. Were you asked to review the '94 figures?
- 29 A. I don't think I was asked to look at the '94

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- 1 ones.
- 2 Q. Do you know why you were not asked to look at the  
3 1994 figures?
- 4 A. Really, I think we were looking at -- I was just  
5 going by what the attorneys requested, and we were  
6 looking at a year -- the year of the incident, a year  
7 before and a year after.
- 8 Q. My question to you is, do you know why -- did  
9 anybody tell you why you were not asked to look at the  
10 1994 figures?
- 11 A. No, sir.
- 12 Q. All right. Did you look at the 1995 figures?
- 13 A. Well, I -- you know, if I could clarify. If I --  
14 am I allowed to clarify it?

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- 15 Q. I was just asking you a simple question.  
16 A. Okay. I'm sorry.  
17 Q. Did you look at the 1995 figures or not?  
18 A. Yes, sir.  
19 Q. You did?  
20 A. Yes, sir.  
21 Q. Do you have those in front of the jury today?  
22 A. I don't think I have them with me, no.  
23 Q. Do you know why you don't have them in front of  
24 the jury today?  
25 A. Let me make sure because I may have them.  
26 (BRIEF PAUSE.)  
27 A. Nope, I don't have them.  
28 Q. Mr. Mays, we got four lawyers now representing  
29 Ameristar. Did anybody tell you why you weren't

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- 1 supposed to bring the 1995 figures either?  
2 A. No, sir.  
3 Q. You don't? So the lawyers told you to start with  
4 1996; is that right?  
5 A. Those are the ones that I initially reviewed,  
6 yes, sir.  
7 Q. And who told you? Did the lawyers tell you to  
8 start with 1996?  
9 A. That was the request, yes, sir.  
10 Q. It was at the request of the lawyers?  
11 A. Yes, sir.

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12 Q. Okay. Thank you. Now, and you don't know why  
13 they told you, don't use '94; don't bring '95, and start  
14 with '96? You don't know the answer to that question?

15 A. No, sir, but I --

16 Q. I don't want you to guess. Do you know the  
17 answer or not?

18 A. No, sir.

19 Q. All right. Now, you say -- you talk about  
20 claims, and you gave that number of claims made. What  
21 was the number of injuries in 1996?

22 A. Total number of injuries in '96, 224.

23 Q. Now, you've given me that number of 224. Is that  
24 the number of injuries, or is that the number of claims  
25 made?

26 A. That's the number of claims. That's the number  
27 of actual claims made.

28 Q. Right.

29 A. That was the number of team members that actually

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1 reported a work-related accident.

2 Q. All right. Do you understand, Mr. Mays -- I  
3 mean, you've been instructed what to bring, and you've  
4 gotten all these instructions. But do you understand --

5 MR. LOYACONO: Objection, Your Honor. We  
6 are not instructing him what to bring.

7 THE COURT: Sustained.

8 Q. Mr. Mays, do you understand that there's a  
9 distinction between somebody getting injured and

10 somebody making a claim?

11 A. These are -- yes, I would know that there would  
12 be a difference, but these are the ones that were  
13 actually reported to us.

14 Q. Right. These are people not necessarily -- that  
15 doesn't necessarily reflect -- the 224 is people that  
16 stepped forward and made a claim, correct?

17 A. Yes.

18 Q. That's not necessarily the number of people that  
19 got hurt and didn't make a claim, is it?

20 A. These are the only ones that notified us that  
21 they were injured on the job.

22 Q. Okay. Well, I want you just to either agree or  
23 disagree with my premise here.

24 A. Okay.

25 Q. The number you've got is the people that stepped  
26 forward and made a claim, correct?

27 A. Yes, sir.

28 Q. Okay. Your number you're giving this jury is not  
29 necessarily the number of people that got hurt and

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1 didn't make a claim, correct?

2 MR. LOYACONO: Your Honor, we object to  
3 that. That's asking him to speculate about  
4 something he said -- that he can't know. If they  
5 don't tell him they're hurt, how can he even  
6 guess if somebody is hurt?

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MR. SESSUMS: It goes to Exhibit P-43, Your

Honor.

THE COURT: I'll overrule the objection.

Q. You follow my question?

A. No. Would you repeat it for me?

Q. I'll be glad to.

A. Yes, sir.

Q. You're coming here today telling this jury that  
224 claims were made, right?

A. Yes, sir.

Q. That's not the same thing as necessarily the  
number of people that got hurt and didn't step forward  
and make a claim, correct?

A. 224 would be the number of team members that  
actually communicated that they were involved in a  
work-related accident.

Q. Okay. And I apologize to you, Mr. Mays. I'm  
obviously doing a bad job. I'm asking you to agree or  
disagree, that just because 224 stepped forward and said  
they were hurt, that doesn't mean that there were only  
224 hurt, does it?

A. Those are the only 224 that I'm aware of.

Q. Can you agree or disagree with my question,

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1 Mr. Mays? I think it's a simple question. Just because  
2 224 said they made a claim, that's not necessarily the  
3 number that got hurt, is it?

4 MR. THOMPSON: Judge, I'm going to renew the  
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5 same objection we had, which is, how does he know  
6 someone was hurt if they didn't report it? He's  
7 asking him a question he can't answer.

8 THE COURT: Okay. I'm going to overrule the  
9 objection. You can answer it.

10 Q. I think everybody understands the question I'm  
11 asking you, Mr. Mays. My question to you is -- and you  
12 can disagree with it or agree with it.

13 A. Okay.

14 Q. But just because 224 say they're hurt in a given  
15 year, that's not necessarily the same number of people  
16 that did get hurt, is it?

17 A. That would be true.

18 Q. Thank you, sir. Now, in 19 -- that was 1996.  
19 How many people got injured in 1996?

20 A. From my records, 224.

21 Q. I thought -- okay. My bad. In 1997 how many  
22 people got injured?

23 A. 147.

24 Q. That's people that got injured, or is that the  
25 people that made claims?

26 A. Well, if you're going to distinguish it like  
27 that, I wouldn't know then. I'm going by my records,  
28 which is how many people reported work-related accidents  
29 for that year.

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1 Q. All right. Mr. Mays, I'm going to represent to

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2 you in this case there's a letter that says -- and the  
3 jury has heard it, and I can show you the letter if  
4 you'd like to see it -- that says, we made it tough on  
5 Katherine Buchanan. We made her -- forced her to hire a  
6 lawyer, and we made her go through the claim. And other  
7 employees will see the trouble she had and be reluctant  
8 to file their own claims. Okay? I'm going to represent  
9 to you that letter exists, and the jury has seen it.  
10 Are you with me so far?  
11 A. I think I am, yes, sir.  
12 Q. All right. Now, if Ameristar is making examples  
13 out of people, or Katherine Buchanan in this case, for  
14 the stated purpose -- for the stated purpose of making  
15 certain employees think twice before filing their own  
16 claims, you'd agree with me that if that's what's  
17 happening that some people that get hurt may be  
18 reluctant to file their own claims, correct?  
19 A. I -- I wouldn't agree with that.  
20 Q. You wouldn't agree? Tell me why you wouldn't  
21 agree with that. If Ameristar's lawyer writes to  
22 Ameristar and says -- tell me why you agree -- disagree  
23 with this lawyer. He's telling them, I can assure you  
24 that if her coworkers are aware of how much trouble she  
25 had to go through to obtain workers' compensation  
26 benefits certain employees may think twice before filing  
27 a claim due to the fact that Ameristar did not pay  
28 benefits to Ms. Buchanan just because she claims she was  
29 hurt on the job. Now, you don't think if Ameristar is

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1 making an example out of Katherine Buchanan that that  
2 will make other employees think twice -- think twice  
3 before filing their own claims?

4 A. No, I don't.

5 Q. You don't?

6 A. I don't.

7 Q. Okay. All right. Now, back to '97. You said  
8 there was 147 claims in '97. How many injuries were  
9 there?

10 A. I would stand by the 147.

11 Q. All right. Well, look, do we want to go through  
12 the whole drill again? You don't know how many people  
13 got injured in 1997. You know how many stepped forward  
14 and made a claim, correct?

15 A. Correct.

16 Q. All right. Well, maybe we can move this along.  
17 In 1998, after Katherine was injured, how many people  
18 got hurt on the job?

19 A. 122.

20 Q. All right. The number is kind of going down,  
21 isn't it? There was 224 claims in '96.

22 A. Was that a question?

23 Q. I'm asking you to agree with me, if you'd let me  
24 finish.

25 A. Okay. I'm sorry.

26 Q. Did you tell me there was 224 claims in 1996?

27 A. Yes, sir.

28 Q. And there were 147 in 1997?

29 A. Yes, sir.

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1 Q. And how many were there the next year, in 1998?

2 A. 122.

3 Q. Would you agree that those numbers seem to be  
4 declining?

5 A. If you use those three specific years, but if you  
6 would continue, you would also see that they rose again.

7 Q. Okay. I'm going to get to that. You've already  
8 covered that. But up to that point, the numbers  
9 declined from 1997, the year Katherine Buchanan got  
10 hurt, or do you even know that was the year she got  
11 hurt?

12 A. Yes, sir.

13 Q. All right. So they had 147 claims the year  
14 Katherine got hurt, and her claim was denied, correct?

15 A. Correct.

16 Q. And the number dropped from that year to the  
17 next, correct?

18 A. Correct.

19 Q. All right. Now, back to my question, even though  
20 122 claims were made in 1998, how many people got  
21 injured but didn't make claims?

22 A. No way I would know that.

23 Q. All right. 1999. I bet you could tell me the  
24 number of claims, can't you, for 1999?

25 A. Yes, sir.

26 Q. How many were there?

27 A. 145.

28 Q. 145. All right. You know my next question. How

29 many people got injured in 1999 and didn't report their

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1 claims?

2 A. No idea.

3 Q. No idea. 2000, how many people got injured and  
4 didn't report their claims?

5 A. I -- I would have no idea.

6 Q. No idea. How many -- I bet you could tell me how  
7 many claims were made, though, for 2000.

8 A. Absolutely. And that would be the only way that  
9 I would know. 223.

10 Q. That's still down from 1997, isn't it?

11 A. Yes.

12 Q. All right.

13 A. Okay.

14 Q. 2001, how many people got injured and didn't  
15 report their claim?

16 A. 167.

17 Q. That's how many people got injured and didn't  
18 report their claim?

19 A. Oh. I wouldn't know.

20 Q. wouldn't know.

21 A. I'm sorry.

22 Q. Okay. But 167 made claims is what you're telling  
23 us?

24 A. Yes, sir.

25 Q. All right. So you would agree with me, Mr. Mays,

4-19-06 Buchanan v. Ameristar Testimony of Kelvin Mays  
26 that in the -- in the three-year period following when  
27 Katherine Buchanan got hurt that the number even of  
28 claims actually made declined, wouldn't you?  
29 A. It appears there the number of claims reported

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1 did decline.

2 Q. Okay. That's my question.

3 A. Okay.

4 Q. 1997, 147 claims; 1998, 122 claims; 1999, 145;  
5 2000, it's still down below '97 because in 2000 it's  
6 still only 123. You agree with me?

7 A. 223, I think.

8 Q. You said 223. I thought you --

9 A. No, I think --

10 Q. Okay. You got the numbers there. I don't. Now,  
11 and would you tell me -- Ameristar is keeping track of  
12 these claims made. Do they keep any kind of records on  
13 people that are injured on the job and don't make claims  
14 to Workers' Compensation Commission?

15 MR. LOYACONO: Your Honor, you've -- you've  
16 overruled our objection a number of times, but  
17 he's continuing to ask the same question. He  
18 said, I can't answer.

19 THE COURT: Sustained as repetitious.

20 Q. Final question, Mr. Mays. You're here showing  
21 all these numbers, and we did this and we did that. And  
22 I want to be clear. Do you personally agree with this  
23 sort of language here? You see that highlighted part?

24 (BRIEF PAUSE.)

25 A. Okay. The highlighted part, I did read it.

26 Q. Do you agree with that?

27 A. Do I agree with it?

28 Q. Yes.

29 A. No.

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1 Q. Okay. And a follow-up question to that, every  
2 time somebody makes a claim it costs Ameristar money,  
3 doesn't it?

4 A. Yes. I could -- yes, uh-huh. Yes.

5 Q. Any particular reason you find that hard or  
6 reluctant to agree with that?

7 A. When you say costs us money, I guess it would  
8 cost -- cost money for medical expenses, a person going  
9 to -- to the physician.

10 Q. Right.

11 A. But --

12 Q. And the more money --

13 MR. LOYACONO: Objection. Let him finish  
14 his answer.

15 THE COURT: Sustained. Let him finish his  
16 answer.

17 Q. I'm sorry, Mr. Mays. Go ahead.

18 A. I think it would cost more money, you know, for  
19 the team member to go to a doctor, but that's not the  
20 way that we look at it. I mean, if a team member comes

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21 to us and let's us know that they're injured on the job,  
22 we -- we would want that team member to get treatment.  
23 You know, that goes in with our philosophy.  
24 Q. Okay. Finished?  
25 A. Yes, sir.  
26 Q. Okay. All right. So let me see if I understand  
27 you. You agree that every time somebody makes a claim  
28 for medical benefits or disability benefits it costs  
29 Ameristar money? Yes or no.

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1 A. Yes.  
2 Q. All right. So if Ameristar can find a way to cut  
3 down on the number of claims, Ameristar is going to save  
4 Ameristar some money, isn't it?  
5 A. Yes. But can I -- I do want to add on though, if  
6 I could.  
7 THE COURT: You may.  
8 A. Okay. Yes, but I think any company would want  
9 lesser workers' comp claims, and I think we -- we want  
10 lesser claims, but we want the team members to  
11 definitely let us know if they're injured on the job.  
12 Q. So if you can, say, in this case, make an example  
13 of somebody so the other employees would think twice and  
14 so you could keep those other employees from filing  
15 their other claims, Ameristar would save Ameristar a  
16 bundle of money, wouldn't it?  
17 A. The way that you're phrasing it, yes.  
18 Q. That's right. Because we're talking about a



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19 bundle of money when you got this many claims, right?

20 A. Yeah, uh-huh.

21 Q. So Ameristar would be interested in finding a way  
22 to cut down on this bundle of money and save money,  
23 wouldn't they?

24 A. Yes. And we -- and we do look at ways like that,  
25 from safety training, various safety training, lifting  
26 exercises, various ways to actually lower your claims.  
27 I think any company tries to lower their workers'  
28 compensation claims.

29 Q. And that was the goal of Ameristar, to find a way

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1 to lower these claims, correct?

2 A. That -- I don't think that was necessarily a  
3 goal. I think it would be a goal for any company.

4 Q. Thank you, sir.

5 THE COURT: Redirect?

6 MR. LOYACONO: Yes, Your Honor.

7 REDIRECT EXAMINATION BY MR. LOYACONO:

8 Q. Mr. Mays, my good friend Mr. Sessums indicated  
9 that I may have been asking you to hide stuff. Let me  
10 ask you, do you recall the reason why we were dealing  
11 with those three years at first in my office?

12 A. Yes, because I think it was the initial year of  
13 Katherine's injury and one year above it and one year  
14 below it.

15 Q. All right. And, now, just so there won't be

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16 anything hidden, he asked you about '94 and '95, and our  
17 industrious staff ran out and got some of these reports.  
18 First of all, let me ask you if you can identify them.

19 A. It looks like a copy of my Excel spreadsheet from  
20 the years 1995 and 1994.

21 Q. All right. Nobody asked us for those with a  
22 subpoena or anything, did they? Mr. Sessums didn't ask  
23 for those and we refused them, did he?

24 MR. SESSUMS: Object unless he can testify  
25 to his personal knowledge, Your Honor. That's  
26 leading.

27 THE COURT: He can answer the question.

28 Q. Yeah. Anybody ask you to -- did any other lawyer  
29 come in and say, Ameristar, Kelvin Mays, give me those

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1 records from 1994 --

2 A. No.

3 Q. -- and 1995?

4 A. No.

5 Q. Now, how many, according to your spreadsheets,  
6 claims of injury on the job were there then in 1994 and  
7 in 1995?

8 A. In 1994 there were 325.

9 Q. 325 in four. Okay. And 1995?

10 A. 1995 there were 283.

11 Q. 283. So follow me. If we take 325 and 283, that  
12 would be 608 additional persons claiming to be hurt on  
13 the job; would it not?

14 A. Correct.

15 Q. Would you tell the jury -- since Mr. Sessums  
16 raised it, let's go back to 1994 and 1995 -- of those  
17 608 people how many of them's claim was denied?

18 A. None.

19 Q. All right. So now we have -- from 1994 through  
20 2003 we have a total of how many when we add 608 to  
21 1,332? Might I suggest to you since I've got the pen  
22 that it's 1,940? Does that sound -- if the brothers  
23 taught me at St. Al how to do that thing, you believe  
24 me?

25 A. That sounds correct.

26 Q. All right. Now, Mr. Sessums questioned you about  
27 teaching lessons, okay? And Katherine -- by denying  
28 Katherine Buchanan's claim we supposedly cracked the  
29 whip (indicating) and told these other workers, no,

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1 don't --

2 MR. SESSUMS: Object to leading. If counsel  
3 wants to testify, he can take the stand. It's  
4 redirect examination.

5 MR. LOYACONO: Okay.

6 THE COURT: Be sustained.

7 Q. Did you have the intent to crack the whip on  
8 these other workers, these other 1,940 workers?

9 A. Never.

10 Q. Because they came forward, didn't they?

11 4-19-06 Buchanan v. Ameristar Testimony of Kelvin Mays  
12 A. Absolutely.  
13 Q. Okay. Now, as far as teaching anyone anything  
14 about filing a claim, how does Ameristar view what you  
15 taught 1,940 people versus 1?  
16 MR. SESSUMS: Please, the Court. That's  
17 improper redirect.  
18 MR. LOYACONO: He went -- Your Honor, David  
19 went into that.  
20 THE COURT: Be overruled.  
21 Q. Okay. Now, on teaching a lesson, what lesson  
22 should 1,940 people have learned about when they get  
23 hurt at Ameristar? What did those 1,940 people learn?  
24 MR. SESSUMS: Objection.  
25 A. That they should --  
26 MR. SESSUMS: (Shakes Head Negatively.)  
27 A. That they should file their claim; they should  
28 report their work-related injury.  
29 Q. Okay. And that was -- if you take Katherine  
Buchanan as a lesson, that's 1,940 separate lessons,

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1 isn't it?  
2 A. Absolutely.  
3 Q. Okay. We talked about increases and decreases.  
4 First of all, let me go by those numbers. In '94 we had  
5 325, and '95 we had 283. And if your testimony is two  
6 thousand two hundred -- I mean, 224 in '96. Then the  
7 year Katherine Buchanan got hurt there were only 147.  
8 They were already decreasing before she got hurt,

9 weren't they?

10 A. Absolutely.

11 Q. Okay. Now, in the one year after she got hurt it  
12 went to 122.

13 A. Correct.

14 Q. That was a decline of about 25.

15 A. Correct.

16 Q. And the next year though, '99, went up to 145,  
17 which just was two difference, correct?

18 A. Correct.

19 Q. Now, then in 2000, 2001, 2002, it all increased  
20 during those years, didn't it?

21 A. Yes.

22 Q. Okay. So those people felt free to come and  
23 report their on-the-job injuries.

24 A. Absolutely.

25 MR. SESSUMS: Object to leading.  
26 speculation, Your Honor.

27 MR. LOYACONO: All right.

28 THE COURT: Be overruled.

29 Q. Now, with regard to the reasons for changes in

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1 reporting, whether there was an increase or a decrease,  
2 if there were a decrease, tell us what you have  
3 instituted at Ameristar not just for claims but for the  
4 safety of your people so they won't get hurt.

5 MR. SESSUMS: Please the Court, this is

6 4-19-06 Buchanan v. Ameristar Testimony of Kelvin Mays  
improper redirect.

7 MR. LOYACONO: This --

8 MR. SESSUMS: I didn't go into safety  
9 programs.

10 MR. LOYACONO: He indicated that the only  
11 reason for the decline in claims was the lesson  
12 taught through Katherine Buchanan. I think a  
13 safety program is an answer to that.

14 THE COURT: Overruled.

15 MR. LOYACONO: Thank you.

16 Q. Mr. Mays, tell us about your safety program that  
17 you instituted.

18 A. Well, we -- we've instituted a safety program at  
19 Ameristar Casino. We have various safety officials that  
20 will come in and go through safe lifting exercises from  
21 showing them how to safely lift a box, videos, various  
22 -- various safety incentive programs, just various  
23 things to keep the team members safe.

24 Q. Right. So it's in the interest --

25 MR. SESSUMS: Object to leading.

26 THE COURT: Sustained.

27 Q. It's in the interest, is it not, of both parties  
28 to have a safe work environment?

29 A. Absolutely.

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1 Q. Okay. Mr. Sessums asked you about, well, the  
2 company loses money when it has to pay claims. You  
3 remember that question?

4-19-06 Buchanan v. Ameristar Testimony of Kelvin Mays

4 A. Yes, I do.

5 Q. The company also loses money when the worker is  
6 not present on his job, doesn't it?

7 A. Yes.

8 Q. Thank you.

9 MR. LOYACONO: That's all we have, Your  
10 Honor.

11 THE COURT: okay. You may step down.

12 (EXCERPT OF TRIAL CONCLUDED.)

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1 4-19-06 Buchanan v. Ameristar Testimony of Kelvin Mays  
STATE OF MISSISSIPPI

2 COUNTY OF WARREN

3

4 COURT REPORTER'S CERTIFICATE

5 I, Lucretia R. Smith, CSR No. 1296, Official Court  
6 Reporter for the Circuit Court of Warren County,  
7 Mississippi, Ninth Judicial District, do hereby certify  
8 that, to the best of my skill and ability, I have  
9 reported the proceedings in the herein-styled and  
10 numbered cause in the Circuit Court of Warren County,  
11 Mississippi, before Honorable Frank G. Vollar, Judge of  
12 the Circuit Court of Warren County, Mississippi, on the  
13 19th day of April, 2006, and that the above and  
14 foregoing pages contain a true and correct transcript of  
15 my stenographic notes and tapes taken in said  
16 proceedings.

17 I do further certify that my certificate annexed  
18 hereto applies only to the original and certified  
19 transcript. The undersigned assumes no responsibility  
20 for the accuracy of any reproduced copies not made under  
21 my control or direction.

22 WITNESS MY SIGNATURE on this the 26th day of April,  
23 2006.

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Lucretia R. Smith, CSR No. 1296  
Official Court Reporter

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# Fax

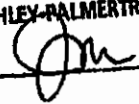
**Name:** Cherri Lindigrin  
**Organization:** Varner, Parker & Sessions  
**Fax:** 601-638-8666  
**Phone:** 601-638-8741  
**From:** Dorothy Irving  
**Date:** April 26, 2006  
**Subject:** Denied Claims for Employer Ameristar Casino  
**Pages:** 2

**Comments:**

# FILED

APR 26 2006

SHELLY ASHLEY-PALMERTREE, CIRCUIT CLERK

BY  D.C.

From the desk of...  
Dorothy Irving (E-mail)

EXHIBIT "B"

RPT-CLWRK  
14:33

## Mississippi Workers' Compensation Commission

Printed: 04/25/2006

Listing of Cases that has been denied /B-52 filed

Employer: Ameristar Casino - Vicksburg

4116 Washington Street

Vicksburg, MS 39180

<u>Mwcc-No.</u>	<u>Docket#</u>	<u>Injury-Date</u>	<u>Deny Date</u>	<u>Claimant Name</u>
0305127		03/31/2003	05/20/2003	PEACOCK, JOHNNIE
0306471		04/22/2003	06/18/2003	WALLACE, TRACY
<del>0404864</del>		<del>02/17/2004</del>	<del>04/09/2004</del>	<del>WINFIELD, BETTY</del>
<del>0413063</del>		<del>10/23/2004</del>	<del>01/09/2005</del>	<del>WHITE, TONYA</del>
<del>0413289</del>		<del>10/22/2004</del>	<del>02/16/2005</del>	<del>DUNMORE, EVANDIA</del>
<del>0504833</del>		<del>03/26/2005</del>	<del>04/29/2005</del>	<del>BLACKMORE, MARY</del>
9511999		07/15/1995	08/09/1995	GARRISON, LEALON
9715793	G-1561	07/27/1997	11/20/1997	ROBINSON, JENNY
9907982		05/21/1999	06/18/1999	HARPS, ROBERT

Records printed: 9

Go To Our Website: [www.mwcc.state.ms.us](http://www.mwcc.state.ms.us)  
Services Page, and register for First  
Report of Injury Search.

## First Report of Injury Detail

MWCC # : 9511999 DKT # :		Employer : AMERISTAR CASINO-VICKSBURG	<b>REDACTED</b>
GARRISON, LEALON	Gender: M	Carrier : LUMBERMEN'S UNDERWRITING ALLIANCE	
1711 MARTIN LUTHER KING	DOB :	Service Co :	
	Age : 36	Phone : (999)999-9999	
VICKSBURG, MS 39180		<b>REDACTED</b>	

County of Injury : WARREN	Carrier File # : MS123471	Date of Injury : 07/15/1995
Nature of Injury : ALL OTHER INJURIES - NEC	Returned to work : 07/17/1995	Part of Body : SKULL
Report Date : 08/09/1995	Cause of Injury : STATIONARY OBJECT	Hire Date : 07/10/1995
Wage : 220.00	Employer Aware : 07/15/1995	B-31 Rec'd :
Death Date :	# B-31's Rec'd : 00	

Scanned documents contained in this folder (documents in red are not publicly viewable):

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## THE MISSISSIPPI WORKERS' COMPENSATION LAW

## MISSISSIPPI WORKERS' COMPENSATION COMMISSION

Post Office Box 5300, Jackson, Mississippi 39205-5300

## EMPLOYER'S NOTICE OF CONTROVERSION

97-15793  
99-15793

EMPLOYER'S NAME <u>James Robinson</u>		MAY FILE NUMBER <u>97-15793</u>	
JOB TITLE <u>Truck Driver</u>		NATURE OF INJURY <u>Back</u>	
CITY <u>Vicksburg</u>		DATE OF INJURY <u>11/27/97</u>	
EMPLOYER'S ADDRESS <u>Amherst Collins</u> <u>4116 N. Washington Street</u> <u>Jackson MS 39218</u>		EMPLOYER'S PHONE <u>601-368-1677</u> <u>P.O. Box 16787</u> <u>Jackson MS</u>	

Pursuant to Section 71-3-97(4) of the Mississippi Workers' Compensation Act, the above named employer certifies employee's right to workers' compensation upon the following grounds:

*We are contesting the surgery, as to the claimant working for another employer after our injury.*

*We are contesting MS benefits also.*

I hereby certify that a copy of this notice has been served, by mail or personal delivery, to the above named employee at the address above indicated, which is the last known address of the employee as far as the employer is concerned.

Date: 11/17/97

James Robinson  
Signature of Employer or its Representative

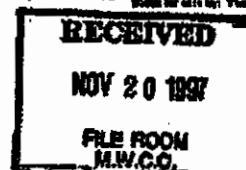
James Robinson  
Name of Employer

P.O. Box 16787  
Address

Jackson MS 39218  
City State Zip

Telephone number: (601) 368-4445

MWCC Form 6-22 (6-95)

**STATE FILE**

NOV 19 1997

**WITH MWC**

84

## THE MISSISSIPPI WORKERS' COMPENSATION LAW

## MISSISSIPPI WORKERS' COMPENSATION COMMISSION

Post Office Box 5300, Jackson, Mississippi 39286-5300

## EMPLOYER'S NOTICE OF CONTROVERSION

07982

to be signed

EMPLOYEE		EMPLOYER	
Robert Harps		Lexion Inc. Co.	
310 Bowman Street Apt., 304		4116 S. Washington Street	
Vicksburg, MS 39180		Vicksburg, MS 39180	
DATE OF BIRTH: 01-01-52		DATE OF BIRTH: 05-21-99	
AGE: 47		AGE: 36	
SEX: M		SEX: M	
RACE: W		RACE: W	
SSN: 311-58-1985		SSN: 311-58-1985	
DATE OF ACCIDENT: 05-21-99		DATE OF ACCIDENT: 05-21-99	
LOCATION OF ACCIDENT: Back		LOCATION OF ACCIDENT: Back	

Pursuant to Section 71-3-37(4) of the Mississippi Workers' Compensation Act, the above named employer hereby notified the employee of his right to workers' compensation upon the following grounds:

We are contesting that the accident on May 21, 1999, arose out of and during the course or scope of employment. This is based on the medical reports provided by Dr. Paul Pierce. We have denied the workers' compensation claim.

I hereby certify that a copy of this notice has been served, by mail or personal delivery, to the employee or his representative, at the address shown above, within the time required by this act, and that the employee has been notified of his right to workers' compensation.

Date: June 17, 1999

Signature of Employer/Authorized Representative: Terricia R. Smith

Title: W.C. Claims Examiner

F.O. Box 16787

Address: Jackson, MS 39236-6787

City: Jackson State: MS Zip: 39236-6787

Telephone number: (601) 346-4445, ext. 17

MWCC Form 9-92 (8-99)

RECEIVED STATE FILED

JUN 18 1999 JUN 17 1999

WITH MWCC  
FILE ROOM  
MWCC

## MISSISSIPPI WORKERS' COMPENSATION COMMISSION

Post Office Box 8300, Jackson, Mississippi 39298-8300

## EMPLOYER'S NOTICE OF CONTROVERSION

0306471

EMPLOYEE CLAIMANT <b>WALLACE, TRACY</b>		DOC. REC. NO. <b>426-49-1607</b>		NATURE OF CLAIM <b>Pregnancy</b>	
ADDRESS <b>205 POWELL STREET</b>		DATE OF BIRTH <b>7-31-80</b>		AGE <b>22</b>	
CITY <b>UTICA</b>		STATE <b>MS</b>		MOUNT DATE <b>6-22-03</b>	
EMPLOYER <b>AMERISTAR CASINO</b>		ADDRESS <b>4146 WASHINGTON ST</b>		CITY <b>MEMPHIS</b>	
ADDRESS <b>UTICA MS 39180</b>		ADDRESS <b>MEMPHIS LA 70011</b>		CITY <b>LA 70011</b>	

Pursuant to Section 71-3-37(4) of the Mississippi Workers' Compensation Act, the above named employer controverts the referenced employee's right to workers' compensation upon the following grounds:

ER/CARRIER - DISPUTE CONDITION AS BEING WORK RELATED AS MEDICAL INFORMATION SUGGEST PROBLEM IS RELATED TO PREGNANCY AND NOT TO ANY UNLAWFUL EVENT AT WORK.

I hereby certify that a copy of this notice has been served, by mail or personal delivery, to the above named employee at the most current address which can be determined by diligent inquiry or to his or her attorney, if represented.

Date: 6-5-03

**RECEIVED**  
JUN 18 2003  
M. W. C. C.  
CLAIMS DEPARTMENT  
JUN 18 2003  
KEY OFFICE 800

Signature of Employer/Carrier Representative  
Claim Consultant

Title  
P.O. Box 8853

Address  
Memphis LA 700

City  
Memphis

Telephone number:  
504 828-0320 x46

MWCC Form 6-42 (1993)

# MISSISSIPPI WORKERS' COMPENSATION COMMISSION

Post Office Box 5300, Jackson, Mississippi 39206-5300

## EMPLOYER'S NOTICE OF CONTROVERSION

EMPLOYEE CLAIMANT <b>JOHNNIE PEACOCK</b>		DOC. REC. NO. <b>426-78-8662</b>	NATURE OF ACCIDENT <b>NECK -</b>
ADDRESS <b>6426 BROCK CIR.</b>		DATE OF BIRTH <b>12-5-41</b>	SEX <b>M</b>
CITY <b>BRANDON</b>	STATE <b>MS</b>	HABIT DATE	
EMPLOYER <b>AMERISTAR CASINO</b>		[REDACTED]	
ADDRESS <b>4146 WASHINGTON ST</b>		[REDACTED]	
CITY <b>VERMILION</b>	STATE <b>MS</b>	ZIP <b>39180</b>	
EMPLOYER <b>AMERISTAR CASINO</b>		[REDACTED]	
ADDRESS <b>4146 WASHINGTON ST</b>		[REDACTED]	
CITY <b>VERMILION</b>	STATE <b>MS</b>	ZIP <b>39180</b>	

Pursuant to Section 71-3-37(4) of the Mississippi Workers' Compensation Act, the above named employer controverts the referenced employee's right to workers' compensation upon the following grounds:

ER/CARRIER DISPUTES ENTITLEMENT TO BENEFITS AS MEDICAL DOCUMENTATION IS NOT SUPPORTIVE OF WORK-RELATED CLAIM.

**RECEIVED**  
MAY 20 2003

**RECEIVED**  
MAY 15 2003  
KEY OFFICE 000

**FILE ROOM**  
MAY 12 2003

I hereby certify that a copy of this notice has been served, by mail or personal delivery, to the above named employee at the most current address which can be determined by diligent inquiry or to his or her attorney, if represented.

Date: 5-6-03

Signature of Employee/Carrier Representative

*Claims Consultant*

Title

*P.O. Box 853*

Address

*MECHANIC LA 7011*

City

State

Zip

Telephone number:

*504-828-0320 x446*

**RECEIVED**

MAY 12 2003

FILE ROOM  
M.V.C.C.