

IN THE SUPREME COURT OF MISSISSIPPI

**COPY**

NO. 2006-IA-01877-SCT

AMERISTAR CASINO VICKSBURG, INC.

APPELLANT

V.

JIMMY L. DUCKWORTH

**FILED**

APPELLEE

DEC 18 2007

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

INTERLOCUTORY APPEAL FROM THE CIRCUIT  
COURT OF WARREN COUNTY, MISSISSIPPI  
CAUSE NUMBER 06,0106-CI

BRIEF OF APPELLEE  
JIMMY L. DUCKWORTH  
(Oral Argument Not Requested)

MARK W. PREWITT  
Attorney at Law  
MB [REDACTED]  
PO Drawer 750  
Vicksburg, MS 39181  
(601) 636-5921 (Telephone)  
(601) 631-8076 (Facsimile)

Attorney for Appellee

**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2006-IA-01877-SCT**

**AMERISTAR CASINO VICKSBURG, INC.**

**APPELLANT**

**V.**

**JIMMY L. DUCKWORTH**

**APPELLEE**

**CERTIFICATE OF INTERESTED PERSONS**

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

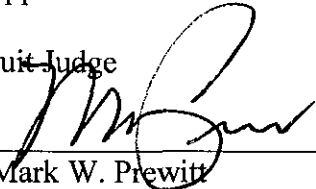
Jimmy L. Duckworth, Appellee

Ameristar Casino Vicksburg, Inc., Appellant

Timothy D. Moore, Esq., of Currie Johnson Griffin Gaines & Myers, P. A.,  
Counsel for Defendant/Appellant Ameristar Casino Vicksburg, Inc.

Mark W. Prewitt, Esq., counsel for Plaintiff/Appellee

Hon. Isadore W. Patrick, Warren County Circuit Judge

  
\_\_\_\_\_  
Mark W. Prewitt  
Attorney for Appellee, Jimmy L.  
Duckworth

## **TABLE OF CONTENTS**

<b><u>Section</u></b>	<b><u>Page</u></b>
Certificate of Interested Persons .....	2
Table of Authorities .....	4
Statement of the Case .....	5
Summary of the Argument .....	7
Argument .....	8
Conclusion .....	19
Certificate of Service .....	21

## **TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Pages</u></b>
<i>Bender v. North Meridian Mobile Home Park</i> , 636 So.2d 385 (Miss. 1994).....	13
<i>Bryan v. Aron</i> , 941 So. 2d 831, (Miss. Ct. App. 2006).....	18
<i>Burse v. Harrah's Vicksburg Corporation</i> , 919 So.2d 1014 (Miss. App. 2005).....	16
<i>Ermolaou v. Flipside, Inc.</i> 2004 WL 503758 (S. D. N. Y. (2004)).....	17
<i>Grand Casino Biloxi v. Hallmark</i> , 823 So. 2d 1185 (Miss. 2000).....	14
<i>Mills v. Nichols</i> , 467 So.2d 924 (Miss. 1985).....	14
<i>Mississippi Gaming Comm'n v. Henson</i> , 800 So.2d 110 (Miss. 2001).....	17
<i>Mississippi Gaming Comm'n v. Treasured Arts, Inc.</i> , 699 So.2d 936 (Miss. 1985).....	8, 12
<i>Tunica v. Shindler</i> , 772 So. 2d 1036 (Miss. 2000).....	16

## **RULES & STATUTES**

<i>M. R. C. P. 12(b)(1)</i> .....	5
<i>Miss. Code Ann. §75-3-104</i> .....	17
<i>Miss. Code Ann. §75-3-118</i> .....	18
<i>Miss. Code Ann. §75-76-1</i> .....	7
<i>Miss. Code Ann. §75-76-3</i> .....	12
<i>Miss. Code Ann. §75-76-5(k)</i> .....	9, 10, 11, 12
<i>Miss. Code Ann. §75-76-5(l)</i> .....	5
<i>Miss. Code Ann. §75-76-157</i> .....	7, 10, 11
<i>Miss. Code Ann. §75-76-159</i> .....	7, 10, 11, 14
<i>Miss. Code Ann. §75-76-165</i> .....	10
<i>Miss. Code Ann. §97-33-31</i> .....	12

## **STATEMENT OF THE CASE**

Pursuant to Rule 28(b), M. R. A. P., Appellee makes the following Statement of the Case.

### ***I. Proceedings***

After being declared the winner of a promotional drawing held by Ameristar Casino Vicksburg, Inc., (hereafter Ameristar) and given a prize of \$5,641.00 cash and a check for \$35,000.00 for a total of \$40,641.00 after taxes, Ameristar stopped payment on its check thus giving rise to a Complaint being filed by Jimmy L. Duckworth (hereafter Duckworth) on June 7, 2006, in the Warren County Circuit Court for collection of a check issued to him by Ameristar, breach of covenant and/or agreement, negligence, gross negligence and/or wantonness and bad faith. On July 27, 2006, Ameristar filed a Motion to Dismiss pursuant to *M. R. C. P. 12(b)(1)* and after the parties filed briefs, Ameristar filed its Answer, Affirmative Defenses and Counterclaim, which, in turn was answered on November 1, 2006.

### ***II. Disposition***

After having heard argument from counsel representing the parties on Ameristar's Motion to Dismiss Duckworth's Complaint stating that the Circuit Court lacked jurisdiction, the Circuit Judge on October 11, 2006, entered an Order denying the Motion finding that Ameristar's promotional drawing did not constitute a "gaming debt" as defined in *Miss. Code Ann. §75-76-5(1)*, thus retaining jurisdiction over the parties and subject matter.

### ***III. Relevant facts to the issues presented***

That on or about June 19, 2005, Ameristar held a promotional drawing at its

casino in Vicksburg, Mississippi, entitled “\$190,000.00 Dream Car Giveaway.”

Duckworth entered the drawing and was ultimately declared the winner and instead of taking possession of the car, he opted to take the cash value in its place. Accordingly, Duckworth received from Ameristar \$5,641.00 in cash and a check of \$35,000.00 for a total award of \$40,641.00, net after taxes. When Duckworth attempted to cash the \$35,000.00 check the following morning, he learned that Ameristar had placed a “stop payment” on the check claiming that Duckworth had acquired the winning ticket in an unauthorized manner in violation of the rules of the game and was therefore not a valid entrant. Duckworth contends that he received the contest entry form in a legally authorized manner and brought suit to collect the \$35,000.00 check issued to him by Ameristar alleging that the negotiable instrument constitutes an unconditional promise and agreement or novation to honor the check on demand and that Ameristar’s failure and/or refusal to honor the check constitutes a breach of its covenant and/or agreement made to Duckworth when it issued the check with him as payee. Duckworth further alleged that the failure of Ameristar to honor the check issued to him well after being declared the contest winner constituted negligence, gross negligence and wantonness causing him to suffer mental pain and anguish, intentional infliction of emotional distress, embarrassment, humiliation and ridicule. Duckworth also contends that Ameristar acted in bad faith.

In bringing suit, Duckworth states that once he was declared the winner of the promotional drawing staged by Ameristar and awarded the full prize by cash and check in the total amount of \$40,641.00, Ameristar cannot renege on its pronouncement by claiming Duckworth to be an illegal entrant. Any such claim, as herein asserted by

Ameristar, should have been determined prior to declaring Duckworth the contest winner.

In retaining jurisdiction, the Circuit Judge concluded that the promotional drawing conducted by Ameristar did not fall within the definition of “gaming” or “gaming debt” as set forth in *Miss. Code Ann. §75-76-1, et seq.*, therefore the question of jurisdiction raised by Ameristar was not well taken and accordingly denied.

### **SUMMARY OF THE ARGUMENT**

The legal action brought by Duckworth against Ameristar does not seek recovery of a gaming debt, but rather a negotiable instrument promising to pay him \$35,000.00. Ameristar raises the question of jurisdiction of the Circuit Court by asserting that jurisdiction lies exclusively with the *Mississippi Gaming Control Act, Miss. Code Ann. §75-76-1 through 75-76-301*.

Ameristar contends that the Mississippi Gaming Commission (hereinafter MGC) has exclusive jurisdiction to determine the legality of its stop payment order placed on its check signed and delivered to Duckworth who was already declared the winner of the promotional drawing held by Ameristar. *Miss. Code Ann. §§75-76-157 and 75-76-159* confer upon the executive director of MGC the exclusive authority to resolve disputes between a patron and licensee over gaming debts. Because Duckworth contends that a promotional drawing does not constitute a gaming debt contemplated by the statute, the executive director’s jurisdiction in this case is not exclusive.

While Duckworth represents that he obtained his entry ticket in accordance with Ameristar’s rules and regulations, Ameristar asserts in its Brief that an entry ticket could only be obtained “by earning it through casino play.” Ameristar’s position of entries based on casino play would fit the definition of a lottery and therefore would be illegal.

However, Ameristar's rules for the "\$190,000.00 Dream Car Giveaway" state that with an Ameristar Awards card with a valid photo ID permit "one free entry per day." (R. E. Tab 5, #3, sub-item 2) By giving away one free entry, Ameristar avoids conducting an illegal lottery. See *The Mississippi Gaming Commission v. Treasured Arts, Inc.*, 699 So.2d 936, ¶12 (Miss. 1997). Consequently, without any consideration, all Duckworth had to do to enter the drawing was obtain an Ameristar Awards card and present a valid photo ID.

### **ARGUMENT**

This matter was before the Circuit Judge of Warren County on Ameristar's Motion to Dismiss pursuant to MRCP 12(b)(1) primarily alleging that the Mississippi Gaming Commission (MGC) has exclusive jurisdiction over Duckworth's claims raised in his Complaint (R. Vol. 2, 4) and that the Circuit Court lacked subject matter jurisdiction. (R. Vol. 2, 16-19)

On September 13, 2006, the trial Judge heard argument of counsel on Ameristar's motion to dismiss (R. Vol. 1, 3-27) and on October 11, 2006, entered an Order denying Ameristar's motion, thus retaining jurisdiction. (R. Vol. 2, 54-55)

In contending that jurisdiction over Duckworth's claims stated in his Complaint lies exclusively with MGC, Ameristar asserts that a "dispute" exists between Duckworth and Ameristar concerning a factual question of whether Duckworth was a valid entrant in Ameristar's drawing held on or around June 19, 2005.

It is undisputed and admitted by Ameristar that it declared Duckworth as the winner of the drawing and awarded a prize of \$40,641.00, of which Duckworth received \$5,641.00 in cash and Ameristar's check of \$35,000.00. (R. Vol. 2, 57) No "dispute"



existed at the time Duckworth was declared the winner of Ameristar's drawing with all its fanfare and no "dispute" existed when Ameristar delivered the cash and check to Duckworth. At no time during the entire drawing process, from its inception to final payment, did any dispute arise as to who was the winner and thereby entitled to the prize. Consequently, after being declared the winner and receiving the prize, Duckworth left Ameristar later that same night and went home. The next day while attempting to negotiate Ameristar check, Duckworth learned that Ameristar had placed a stop payment order on its \$35,000.00 check. (R. Vol. 2, 58)

As to the question of jurisdiction, Duckworth submits that statutory interpretation is required, as was done by the trial Judge in this case. Turning to the Gaming Control Act (GCA) found in §§75-76-1 through 75-76-301 which sets out the jurisdiction of MGC, the terms "claim," "dispute," "game," "gambling game" and "gaming debt" are important on the issues presented. It is argued that MGC's exclusive jurisdiction is strictly limited by statute and the aforementioned terms are operative in conferring jurisdiction.

The terms "game" and "gambling game" are found in *Miss. Code Ann. §75-76-5(k)* which states:

Except as otherwise provided by law, "game," or "gambling game" means any banking or percentage game played with cards, with dice or with any mechanical, electromechanical or electronic device or machine for money, property, checks, credit or any representative of value, including, without limiting the generality of the foregoing, faro, monte, roulette, keno, fan-tan, twenty-one, blackjack, seven-and-a-half, big injun, klondike, craps, poker, chuck-a-luck (dai shu), wheel of fortune, chemin de fer, baccarat, pai gow, beat the banker, panguingui, slot machine, or any other game or devise approved by the commission. **However, "game" or "gambling game"**

**shall not include bingo games or raffles which are held pursuant to the provisions of Section 97-33-51.**

(Emphasis added)

\* \* \* \*

(1) “Gaming” or “gambling” means to deal, operate, carry on, conduct, maintain or expose for play any game as defined in this chapter.

Of all the games or gambling games mentioned in §75-76-5(k), a promotional drawing is neither mentioned nor referred to, and, excludes bingo and raffles which are covered elsewhere in the code.

Next, the terms “claim” and “gaming debt” are referred to in *Miss. Code Ann.*

§75-76-157 stating in-part:

(2) A **claim** by a patron of a licensee **for payment of a gaming debt** not evidenced by a credit instrument *may* be resolved by the executive director in accordance with Sections 75-76-159 through 75-76-169, inclusive.  
(Emphasis added)

Although the *Mississippi Gaming Control Act* does not define “gaming debt” as set forth in §75-76-157, a common sense approach to this term dictates that a gaming debt must arise from a patron engaging in a “game” or “gambling game” requiring some sort of a wager wherein something of value is made or placed at stake by a patron on the chance of receiving something of value in return from a legal casino. In other words, quid pro quo. *Webster’s New Collegiate Dictionary, A Merriam-Webster®*, provides as a second definition of “game, gamed; gaming” as “to play for a stake,” and defines “gaming” as “1: the practice of gambling.”

Section 75-76-157 requires that a patron make a claim “for payment of a gaming debt” which “may be resolved by the executive director in accordance with Sections 75-76-159 through 75-76-165, inclusive.” The term “dispute” is referred to in *Miss. Code Ann. §75-76-159*, the applicable part of which states:

(1) Whenever a licensee refuses payment of alleged winnings to a patron, the licensee and the patron are unable to resolve the **dispute** to the satisfaction of the patron... The executive director shall conduct whatever investigation is deemed necessary and shall determine whether payment should be made. (Emphasis added)

Obviously, according to §§75-76-5(k), 75-76-157 and 75-76-159 there must be a *dispute* over a *gaming debt* involving a *game* or *gambling game* in order for the executive director to have jurisdiction to conduct a investigation; and, should Duckworth's interpretation of the foregoing statutory terms and language be correct, then the question arises as to whether Ameristar's promotional drawing is interpreted to constitute a *game* or *gambling game* creating a *gaming debt* over which Duckworth asserted a *claim* for non-payment giving rise to a *dispute*. If not, then MGC does not have exclusive jurisdiction over the allegations contained in Duckworth's Complaint and the Circuit Judge's order denying Ameristar's motion to dismiss is correct.

In addressing this question, first considered is Ameristar's argument that entries for its drawing were only available to patrons, such as Duckworth, based upon their play at the casino. (Br. of Appellant, page 2) However, Ameristar's "Official Rules" provide for eight ways for entries to be obtained by patrons, one of which allows for "[O]ne free entry per day by presenting Ameristar Star Awards card with valid photo ID." (R. Vol. 2, 36) To allow patrons to obtain entries to its drawing based solely upon a patrons level of play of games in the casino would mean that a patron would have to give something of value (consideration) in order to acquire an entry form. If this is Ameristar's interpretation of its rules and represents this to the Court, then it is incorrect, for as previously stated, patrons may obtain one free entry per day into Ameristar's drawing regardless of level of play or other consideration, otherwise, Ameristar has violated the

criminal laws of this state by conducting an illegal lottery. (R. Vol. 2, 36)

*Miss. Code Ann. §97-33-31* prohibits lotteries in this state and to do so is punishable, “on conviction,” by imprisonment “in the penitentiary not exceeding five years.” *Miss. Code Ann. §75-76-3 (a) through (d)* of GCA likewise acknowledges the illegality of lotteries for which MGC is charged with enforcement through review of the official rules of promotional drawings held by casinos in this state to assure that at least one free entry is available to patrons. In *Mississippi Gaming Commission v. Treasured Arts, Inc.*, 699 So.2d 936, 938 at ¶12, our Supreme Court set forth the common law definition of a lottery as follows:

The common law definition of a lottery is: “(1) The offering of a prize; (2) the awarding of a prize by chance; (3) the giving of a consideration for the opportunity to win the prize; and all three of these elements must concur in order to constitute a lottery.” *Williams Furniture Co. v. McComb Chamber of Commerce*, 147 Miss. 649, 112 So. 579, 579-80 (1927). The offer of a prize and an award are not enough by themselves to be considered a lottery. A purchaser must actually give consideration for an opportunity to win the prize. *Id.*

Ameristar provided for one free entry, thus avoiding violation of the laws against lotteries. Concluding that Ameristar’s drawing required no consideration or *quid pro quo* for entry, then it follows that its promotional drawing is not an illegal lottery and allowed by law, otherwise the MGC would not have approved it.

For this Court’s consideration, Duckworth submits that *Miss. Code Ann. §75-76-5(k)* provides for many different types of casino gambling games which, by and large, consist of a variety of table games and electronic mechanical devices such as slot machines, video poker and the like. In order to participate in the various gambling games provided by casinos of this state, the patron must wager something of value, customarily

money, and take the chance of losing the wager.

Without question, the MGA authorizes and gives jurisdiction to MGC to police a “game” or “gambling game” wherein arises a “gaming debt.” MGA does not include non-gaming activities wherein no consideration is given by a patron to participate, as opposed to a gambling game requiring consideration. A promotional drawing does not create a gaming debt based upon consideration, therefore, not included or covered by the MGA. Accordingly, the Circuit Judge’s decision to deny Ameristar’s motion to dismiss is correct in this regard.

Next, Ameristar argues that the trial Judge should be held in error for not considering the “Notice of Violation” (R. E. Tab 7). Ameristar has placed this document in the Record Excerpts for this Court’s review and consideration, however, the “Notice of Violation” was not presented to the Circuit Judge for his consideration and is not contained in the trial record. Nonetheless, Ameristar has placed this document in the Record Excerpts as though it was part of the record. Moreover, Volume 1 of the trial transcript, consisting of approximately 25 pages of argument of counsel and exchange with the trial judge, is completely devoid of any mention of the “Notice of Violation” by Ameristar’s attorney. Duckworth moved this Court to strike the “Notice of Violation” on Ameristar’s petition for interlocutory appeal as not being a part of the trial record; however, a ruling by the Supreme Court on the Duckworth’s motion resulted in a denial due to Duckworth misnaming the document as an exhibit. In any event, in *Bender v. North Meridian Mobile Home Park*, 636 So.2d 385, 389 (Miss. 1994) the Supreme Court held:

This Court has stated that a trial judge cannot be put in error on a matter not presented to him for his decision.

*Mills v. Nichols*, 467 So.2d 924, 931 (Miss. 1985).

Because Ameristar failed to present the “Notice of Violation” to the trial Judge’s attention, this Court should likewise disregard the same as not a part of the record.

Further and although Duckworth contends the provisions of *Miss. Code Ann. §75-76-159 (1)(a)* to be inapplicable in cases of promotional drawings, however, should this Court be of the opinion that said section is applicable, then worthy of note is the fact that a licensee (casino) is required to “immediately notify the executive director” over a dispute of alleged winnings and failure to do so constitutes a denial of due process of law. This code section does not require the patron to undertake any affirmative act. The statutory duty of notice rests solely with the casino and there is no evidence in the record before this Court that Ameristar ever fulfilled its obligation in this respect. *Grand Casino Biloxi v. Hallmark*, 823 So. 2d 1185, stated:

Miss.Code Ann. § 75-76-159 states that “(1) whenever a licensee refuses payment of alleged winnings to a patron, the licensee and the patron are unable to resolve the dispute to the satisfaction of the patron and the dispute involves: (a) at least Five Hundred Dollars (\$500.00), the **licensee shall immediately notify the executive director;**” Miss.Code Ann. § 75-76-159(1). The circuit court found that, **despite this mandatory requirement, Grand Casino employees refused to immediately notify the executive director that a dispute had arisen.** (Emphasis Added)

Id., at 1187, ¶12

\*\*\*\*\*

Preservation of the evidence is paramount to providing proper notice. This Court finds that Hallmark’s **due process rights were violated** due to the casino’s failure to render immediate and meaningful notice to the Commission. (Emphasis Added)

Id., at 1189, ¶16

\*\*\*\*\*

As this Court stressed in a recent patron dispute case, *Freeman*, 747 So.2d at 247, “... patrons are at the mercy of [the] gaming system and the law, and the judicial system is

their only current safeguard.” Further, the statutes are designed to protect all parties involved in a dispute.

Id., at 1193, ¶33

\*\*\*\*\*

Again, this case does not involve a gaming device where alleged winnings are at issue, but arises from a non-gambling promotional drawing. Nonetheless and if applicable, there is nothing of record indicating that Ameristar ever contacted the MGC as required by law or even responded to the “Notice of Violation” it included in the Record Excerpts, *supra*. And, if Ameristar had a duty to immediately contact the MGC of an alleged dispute, its failure to do so violated Duckworth’s rights to due process. This is especially true on the issue of Ameristar’s factual claim that Duckworth was not a valid entrant in its drawing giving rise to the necessity of the preservation of all its evidence to support such an allegation. *Hallmark*, 823 So. 2d, at 1189.

Along this line, it should be noted that there is no machine, video tape or other device that MGC could investigate to determine whether Duckworth was properly or improperly entered Ameristar’s drawing, except maybe Ameristar’s computer system which is solely within its control, and, for all intents and purposes, Duckworth denies the unsupported allegation that he was not a valid entrant in Ameristar’s drawing.

Additionally, since Ameristar filed its Answer and Counterclaim to Duckworth’s Complaint on October 31, 2006, and the next day, November 1, 2006, requested an interlocutory appeal, thus removing jurisdiction to this Court, in the event of a remand a motion to amend Duckworth’s Complaint to include due process violations will be timely submitted to the lower Court. (R. Vol. 2, 56 and Petition of Ameristar Casino Vicksburg, Inc. for Interlocutory Appeal, Stay of Lower Court Proceedings and Expedited Appeal, Certificate of Service dated November 1, 2006, contained in this Court’s file in the

Supreme Court's cause number) It is also interesting to note that Ameristar's counter-suit seeks a judgment from Duckworth for return of the \$5,641.00 tendered to him as the winning participant, something Duckworth submits MGC is powerless to award.

Ameristar cites *Tunica v. Shindler*, 772 So. 2d 1036 (Miss. 2000) as authority in determining MGC's exclusive jurisdiction. This case involves bets placed in a gambling game (mini-baccarat) defined by the Mississippi's Gaming Control Act and not a promotional drawing which is not a gambling game. Therefore distinguishable from the case presently before the Court. Therein the Court stated that "[J]urisdiction and statutory interpretation are matters of law and are therefore reviewed de novo. Wright v. White, 693 So.2d 898, 900 (Miss.1997). Thus, this court sits in the same position as if it were the Circuit Court of Tunica County." Moreover the Court said, "[T]he success of Shindler's argument rests upon the premise that he does not seek "gaming debts" or "alleged winnings" as defined in the Act. Id. §§ 75-76-157 & 159." Here Duckworth asserts that the promotional drawing is not premised upon a gaming debt and there are certainly no "alleged winnings" because Duckworth was in fact the winner and, in fact, received the winnings. The alleged dispute was created by Ameristar well after the fact.

Next, Ameristar relies upon *Burse v. Harrah's Vicksburg Corporation*, 919 So.2d 1014 (Miss. App. 2005). This case concerned failure to exhaust administrative remedies after Burse had filed a Petition before MGC. Here, Duckworth filed no Petition before the MGC, as found by the trial Judge, but rather elected to sue on the \$35,000.00 check issued by Ameristar after he had already been declared the winner of its drawing. This case has no bearing on the case before the Court. Ameristar has not referred to any place in the record where Duckworth had filed a Petition with MGC, thus invoking its



jurisdiction, as no such Petition exists.

Duckworth has herein and heretofore addressed the issue raised by Ameristar in the case of *Mississippi Gaming Comm'n v. Henson*, 800 So.2d 110 (Miss. 2001), in that, no consideration was required to be given by Duckworth to enter Ameristar's drawing, otherwise it would be considered a lottery, thus illegal. Ameristar's own rules pre-submitted to MGC puts that question to rest. (R. Vol. 2, 36-38)

Ameristar's citing of *Ermolaou v. Flipside, Inc.*, 2004 WL 503758 (S. D. N.Y. 2004) is not persuasive on the issue of jurisdiction as this case goes to questions of fact concerning contracts, not jurisdiction which is the question on interlocutory appeal.

Accordingly, Duckworth argues that the unique facts contained in the record of this case separate it from the cases cited by Ameristar and are not applicable herein in resolving any question concerning jurisdiction as being exclusive with MGC.

Finally, Duckworth brought his action in Circuit Court seeking collection of the \$35,000.00 check awarded him. *Miss Code Ann. 75-3-104* defines a negotiable instrument:

- (a) Except as provided in subsections (c) and (d) "negotiable instruments" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:
  - (1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
  - (2) Is payable on demand or at a definite time; and
  - (3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money...
- (f) "Checks" means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank...

Having established the uncontroverted fact that 1) Duckworth was given a "check" by Ameristar, 2) payable to him in the amount of \$35,000.00, thus constituting a

promise or order to pay said amount, 3) that Duckworth is in possession as holder, 4) that the check is payable on demand and drawn on Ameristar's bank, 5) the check contains no conditions, undertakings or other instructions, then, 6) the check is a negotiable instrument enforceable as provided by law.

*Miss. Code Ann. §75-3-118* refers to the limitations of actions for lawsuits initiated for enforcement or collection. Subsection (c) of *75-3-118* states:

Except as provided in subsection (d), ***an action to enforce the obligation*** of a party to an unaccepted draft to pay the draft must be commenced within three (3) years after dishonor of the draft or ten (10) years after the date of the draft, whichever period expires first. (Emphasis added)

*§75-3-118* gives Duckworth the right to bring an action to enforce the obligation set forth in the check issued by Ameristar in a court of law as provided for by law.

Although turning on an issue of limitations of actions, an action was brought in the Circuit Court of Calhoun County, Mississippi, for the collection of a dishonored check in the amount of \$79,000.00, *Bryan v. Aron*, 941 So. 2d 831, (Miss. Ct. App. 2006). In this case the payee of the check had presented the check to the bank on at least four occasions over a four (4) year period. On each occasion the check was dishonored. After filing suit, the Defendant therein raised the statute of limitations as an affirmative defense. The Circuit Judge dismissed the action as being too late, the statute had run for enforcement.

On appeal, the Court of Appeals looked to the instrument sued on, stating:

In resolving the issue, we must first note the meaning of certain terms in order to give clarity to our analysis and holding. Mississippi Code Annotated section 75-3-104 (f) (Rev.2002) states that a "[c]heck" means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank..." Therefore, there is no question that Aron's

check to Bryan was a draft. We next examine what it means to present a draft for payment. Mississippi Code Annotated section 75-3-501 (a) (Rev.2002) states that “[p]resentation” means a demand made by or on behalf of a person entitled to enforce an instrument (i) to pay the instrument made to the drawee or a party obliged to pay the instrument or, in the case of a note or accepted draft payable at a bank, to the bank...”

\*\*\*

Therefore, in order to be timely, Bryan needed to *file his lawsuit* by December 2000. (Emphasis Added)

*Aron*, id at ¶6, ¶9

Collections and enforcement of checks is a common occurrence in our Courts of law and once Ameristar delivered the \$35,000.00 check to the Duckworth, it became subject to 75-3-101, *et seq.*, together with all rights, duties, claims and defenses thereunder.

### CONCLUSION

As opposed to Ameristar’s argument, the statutory scheme of the Gaming Control Act bestows jurisdiction over patron disputes involving games, gambling games and gaming debts. Ameristar’s drawing cannot be classified to fit any description contained in the *Gaming Control Act* giving the MGC jurisdiction, therefore, MGC’s jurisdiction is not exclusive.


A reasonable mind might conclude that had Ameristar been concerned about Duckworth’s proper entry into its drawing, it would have withheld payment pending an investigation, not declare him the winner and later stop payment on its check. Ergo, to coin a phrase, Ameristar wants to close the barn door after the horse has gotten out, and Ameristar simply cannot be allowed to unring the bell by saying it has a gaming dispute with Duckworth, not Duckworth with Ameristar, when it had a reasonable opportunity to determine eligibility prior to an award.

The decision of the Circuit Judge should be upheld and the case remanded for trial.

Respectfully submitted  
JIMMY L. DUCKWORTH,  
APPELLEE

BY: 

MARK W. PREWITT,  
Attorney for Appellee

MARK W. PREWITT  
MB   
PO DRAWER 750  
VICKSBURG, MS 39181  
(601) 636-5921 (TELEPHONE)  
(601) 631-8076 (FACSIMILE)


**CERTIFICATE OF SERVICE**

I, Mark W. Prewitt, attorney for Appellee, do hereby certify that I this day mailed, via U.S. Mail, postage pre-paid, a true and correct copy of the above and foregoing Brief of Appellee to the following:

Timothy D. Moore, Esq.  
P. O. Box 750  
Jackson, MS 39205-0750

Honorable Isadore W. Patrick  
Circuit Judge, 9<sup>th</sup> Judicial District  
P. O. Box 351  
Vicksburg, MS 39181-0351

DATED this the 18<sup>th</sup> day of December, 2007.

  
\_\_\_\_\_  
MARK W. PREWITT