

IN THE SUPREME COURT OF MISSISSIPPI

AMERISTAR CASINO VICKSBURG, INC.

APPELLANT

V.

NO. 2006IA-01877-SCT

JIMMY L. DUCKWORTH

APPELLEE

INTERLOCUTORY APPEAL FROM THE
CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT AMERISTAR CASINO VICKSBURG, INC.

ORAL ARGUMENT NOT REQUESTED

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I. ARGUMENT

Duckworth's response very deftly attempts to distract from the single question before this Court: whether there is some exception to the MGC's exclusive jurisdiction over *all gaming matters*. Duckworth argues at length about the dispute over whether he was a valid entrant in the Giveaway. (At times, he seems to argue or imply that no dispute exists.) This, however, is a non-issue. There most assuredly *is a dispute* about whether Duckworth was a valid entrant in the Giveaway. Duckworth believes he was (although he does not explain how). ACVI is adamant he was not. If there were no dispute, we would not be here.

Duckworth further argues that the check in his name from ACVI was a negotiable instrument. This is also a non-issue, as ACVI agrees. The fallacy in Duckworth's argument is that a (1) dispute over (2) a negotiable instrument is somehow the one gaming dispute that is not subject to the exclusive jurisdiction of the MGC. In fact, Duckworth so desperately tries to distract from the real, sole question for the Court, that he argues his claim involves a "negotiable instrument" *and not* a "gaming debt."¹ This implies that a "gaming debt" is somehow removed from the exclusive jurisdiction of the MGC when evidenced by a "negotiable instrument." This would mean that only cash transactions would be subject to the exclusive jurisdiction of the MGC. Of course, such a suggestion is without merit and contrary to reason. The dispute between Duckworth and ACVI is over a "gaming matter," and it must be

¹See Duckworth Response Brief p. 7 ("The legal action brought by Duckworth against Ameristar does not seek recovery of a gaming debt, *but rather* a negotiable instrument") (Emphasis added).

decided by the MGC.

In fact, Duckworth admits in his Response that the MGC has *exclusive jurisdiction* over disputes between patrons and licensees over "gaming debts."² He also admits that the MGC has jurisdiction over *his dispute with ACVI*.³ He argues *only that* the "executive director's jurisdiction in this case is not *exclusive*."⁴ Thus, according to Duckworth, it is up to him to decide in which forum to initiate a claim. For this proposition that the MGC's jurisdiction is somehow elective, Duckworth disingenuously cites Miss. Code Ann. § 75-76-157's use of the word "may."⁵ However, this section refers specifically to gaming debts not evidenced by a "credit instrument," which is defined as a debt owed to a "person who holds a license . . .," i.e., a "licensee"—one who holds a gaming license.⁶ Accordingly, the use of the word "may" refers to debts owed to the Casino by a patron, not the other way around.

Yet again, Duckworth's argument is nothing more than a red herring. Even if the plain language of the Act and the prior decisions of this Court did not make it clear that Duckworth's suggestion is

²See Duckworth's Response Brief, p. 7 in which Duckworth states as follows:

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.

³*Id.*

⁴See Response Brief, p. 7.

⁵See Response Brief, p. 10.

⁶See §75-76-5(g), (s) and (t).

without merit, Duckworth's "may" paradigm of elective jurisdiction would have the MGC's considerable interest in making sure promotions are conducted fairly and honestly trumped by the whim of patrons. As a matter of public policy, such a paradigm would be untenable.

Likewise, Duckworth's arguments about the definition of a "game" as it relates to the jurisdiction of the MGC are nothing more than sleight of hand. The Act broadly defines its scope as matters pertaining to debts and alleged winnings related to **any game approved by the commission**, or as this Court has stated, "all gaming matters."⁷ As the MGC has stated, a **promotion** in connection with the operation of a casino, regardless of whether it also serves a marketing function, is a "game" as it is "a **system whereby value was given to a patron for playing a game at the casino.**"⁸

In any case, it is not surprising that Duckworth admits that the MGC has jurisdiction over his claims, especially in light of the fact that Duckworth initiated a complaint with the MGC after ACVI stopped payment on his check,⁹ a fact which Duckworth does not deny. Duckworth only argues that he never **filed** a complaint with the MGC. While he also argues that the Notice of Violation issued to ACVI is not properly in the record, Duckworth (notably) **never once disputes that**

⁷Miss. Code Ann. § 75-76-5(k) (defining a "game" as "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 . . . **or any other game or device 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."); *Grand Casino Tunica v. Shindler*, 772 So. 2d 1036 (Miss. 2000).

⁸R p. 51.

⁹R p. 31.

ACVI was issued a Notice of Violation by the MGC.¹⁰ In fact, Duckworth goes so far as to make ACVI's case for it by correctly pointing out that the Mississippi Gaming Control Act (hereinafter "the Act") provides that a Casino *must* notify the MGC of a dispute or be subject to a Notice of Violation.¹¹ He even argues that the fact ACVI did not immediately notify the MGC amounts to a violation of his due process rights.¹² Never mind that the case he cites does not support his proposition, Duckworth cannot have it both ways. That ACVI should have immediately notified the MGC *only further illustrates that the dispute is subject to the exclusive jurisdiction of the MGC.*

Even were the Notice of Violation not in the record (which ACVI denies),¹³ the conclusion that the dispute is subject to the exclusive jurisdiction of the MGC is inescapable. This is illustrated by the cases from this Court deciding appeals from the MGC on cases dealing with "promotions," including at least one very similar to the Giveaway.¹⁴ This is also illustrated by the fact the MGC has stated

¹⁰Duckworth also asserts that ACVI has taken the position that the Trial Court should be found "in error" for not considering the Notice of Violation. This is untrue. ACVI never made this argument. Rather, ACVI's position is that the Trial Court was in error in not finding that Duckworth's claims are not subject to the exclusive jurisdiction of the MGC.

¹¹Miss. Code Ann. § 75-76-159(1) (a).

¹²Duckworth cites *Grand Casino Biloxi v. Hallmark*, 823 So. 2d 1185 (Miss. 2002) for the proposition that his due process rights were violated. The facts in *Hallmark* are such that it is no way analogous to the case at bar. *Hallmark* dealt with a slot machine that had been opened and manipulated before notice to the MGC. In that case, the casino had also erased video footage of the incident. There are no spoliation issues in this case.

¹³The Court denied Duckworth's Motion to Strike the Notice of Violation from the Record. See Record Excerpt 3 denying Duckworth's Motion to Strike.

¹⁴See *Mississippi Gaming Comm'n v. Treasured Arts, Inc.*, 699 so. 2d 936 (Miss. 1997) (dealing with phone card promotion) and *Burse v. Harrah's Vicksburg Corp.*, 919 So. 2d 1014 (Miss. App. 2005) (mailouts and drawings). Although Duckworth argues that *Burse* has "no bearing" in this case, he is

that a "promotion" in connection with the operation of a casino is subject to its exclusive jurisdiction.¹⁵ This is why the MGC: (1)

required that Ameristar submit the rules for the Giveaway for the MGC's approval;¹⁶ (2) approved the rules;¹⁷ and (3) required those rules state that any dispute would be subject to the MGC's exclusive jurisdiction.¹⁸ As if all of this did not make the issue clear enough, this conclusion is cemented by this Court's pronouncement that the Act provides that **all gaming matters** are subject to the exclusive jurisdiction of the MGC.¹⁹

Even if his claims were not subject to the exclusive jurisdiction of the MGC per the terms of the Act, Duckworth has consented to (and thus, waived any right he might have had to contest) the MGC's exclusive jurisdiction. Pursuant to the Rules of the Giveaway as

incorrect. The *Burse* case is illustrative of the fact that "promotions" are subject to the exclusive jurisdiction of the MGC, as *Burse* involves the appeal of an MGC decision regarding mailouts and "drawings."

Duckworth also argues that *Shindler* is distinguishable from the case at bar, because it involved a "gambling game" and not a promotion. (See Response Brief at p. 16). However, Duckworth is incorrect. Either through design or inadvertence, Duckworth misses the point of the *Shindler* decision: **all gaming matters are subject to the exclusive jurisdiction of the MGC**. This makes Duckworth's attempt to distinguish the *Shindler* decision on the basis of the **type** of gaming matter involved more than ironic.

¹⁵See R p. 49-51, *Jacobs v. Lady Luck*.

¹⁶R p. 34, 35, 39 and 40.

¹⁷*Id.*

¹⁸R p. 31. See also Petition for Interlocutory Appeal, Exhibit #5. While Duckworth attempts to argue that the Giveaway was somehow one step away from an illegal lottery (See Response Brief, p. 12), the fact that the MGC approved the Giveaway rules is proof that his argument is without merit.

¹⁹*Grand Casino Tunica v. Shindler*, 772 So. 2d 1036, 1038 (Miss. 2000) ("The Mississippi Gaming Control Act codified the idea by making all gaming matters the exclusive jurisdiction of the Mississippi Gaming Commission.")

approved by the MGC, by participating in the Giveaway, Duckworth agreed that any disputes would be subject to the MGC's exclusive jurisdiction. Specifically, the rules of the Giveaway provide that "[p]articipation in this Promotion is an agreement to abide by the rules of the Promotion."²⁰ As mandated by the MGC for all promotions, the Rules for promotion also provided as follows:

28. The Mississippi Gaming Commission reserves the right to investigate any and all complaints and disputes regarding tournaments, promotions and drawings. Such disputes and complaints will be resolved in accordance with the Mississippi Gaming Control Act and Mississippi Gaming Commission Regulations.

29. Any dispute or situation not covered by the above rules will be resolved by ACVI management in a manner deemed by them to be the fairest to all concerned, and that decision shall be final and binding on all participants.

"It is hornbook law that the rules of a contest constitute a contract offer and that the participant's entering the contest 'constitute[s] and acceptance of that offer, including its terms and conditions.'"²¹

This means having this dispute decided by the Mississippi Gaming Control Act pursuant to Mississippi Gaming Commission Regulations.²²

There is a reason Duckworth failed to address this issue in his response: it is fatal to his case.

²⁰R p. 37, ¶ 27.

²¹*Ermolaou v. Flipside, Inc.*, 2004 WL 503758 (S.D.N.Y. Mar. 15, 2004) (quoting *Fujishima v. Games Mgmt. Servs.*, 443 N.Y.S.2d 323, 327 (S.Ct. Queens County 1981)).

²²Duckworth cannot have it both ways. If, as he says, he was a valid entrant in the Giveaway, by participating in the Giveaway he agreed to follow its Rules (approved by the MGC and posted in the Casino).

II. CONCLUSION

Even Duckworth does not argue that the Trial Court ruled correctly. That is, neither of the parties contend that the Giveaway was a "raffle." However, Duckworth would still have this Court conclude that his claim is outside the exclusive jurisdiction of the MGC. Unhappily for Duckworth, the MGC has stated unequivocally that casino "promotions" such as the Giveaway at issue in this case are subject to the MGC's exclusive jurisdiction. This is why the MGC required that ACVI submit the rules of the Giveaway for its approval and in fact, approved those rules. More important, the MGC's jurisdiction is an absolute. This Court has stated that "[t]he Mississippi Gaming Control Act . . . [made] *all gaming matters* the exclusive jurisdiction of the [MGC]."²³ As if this were not dispositive of the issue, Duckworth consented to the exclusive jurisdiction of the MGC when he participated in the Giveaway. Duckworth's brief spent page after page tilting at windmills, but tellingly never disputed this one very important fact. Duckworth, like every other claimant, should be required to pursue his claim in the forum dictated by the legislature, the forum in which he originally registered a complaint immediately after learning of his dispute with ACVI: the MGC.

Respectfully submitted,

AMERISTAR CASINO VICKSBURG, INC.

BY: _____

Timothy D. Moore, MSB #10494

²³Shindler, 772 So. 2d at 1038 and 1040.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this day served a true and correct copy of the foregoing United States Mail, postage fully prepaid to the following:

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The Honorable Isadore W. Patrick
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THIS the 4th day of FEBRUARY, 2008.



Timothy D. Moore