

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FRANKIE CONKLIN

APPELLANT

VS.

CAUSE NO. 2010-CA-01642

**BOYD GAMING CORPORATION d/b/a
SAM'S TOWN CASINO**

APPELLEE

BRIEF OF APPELLEE BOYD TUNICA, INC.

**APPEALED FROM THE CIRCUIT COURT
OF TUNICA COUNTY, MISSISSIPPI
CIVIL ACTION NO. 2008-0341**

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ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

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TABLE OF CONTENTS

Certificate of Interested Parties.....	2
Table of Contents	4
Table of Authorities	6
Statement of the Issue	7
Statement of the Case.....	7
Statement of the Facts	8
Summary of the Argument.....	10
Argument	10
I. Whether the Trial Court Abused its Discretion in Dismissing Appellant Frankie Conklin’s Cause of Action Based on Mr. Conklin’s Serious Discovery Violations, False Deposition Testimony and Submission of a False Affidavit	10
A. <u>Standard of Review</u>	10
B. <u>Mr. Conklin’s Multiple False Statements and Contumacious Conduct</u>	12
1. Mr. Conklin’s False Interrogatory Responses:	12
2. Mr. Conklin’s Failure to Produce Documents:	14
3. Mr. Conklin’s Failure to Disclose His Relevant Medical History to His Own Expert – Dr. Lamothe:	15
4. Mr. Conklin’s False Deposition Testimony:	16
5. Mr. Conklin’s False Affidavit:	18
C. <u>The Trial Court Applied the Proper Standard and Law</u>	22
1. Mississippi Rule of Civil Procedure 37 and the Mississippi Appellate Courts’ Decisions in <i>Pierce</i> , <i>Scoggins</i> , and <i>Gilbert</i> Reveal that the Trial Court did not Abuse its Discretion:	23

2. Mr. Conklin's Willfulness, Bad Faith and Ability to Comply:	26
3. Use of Less Drastic Sanctions:	27
4. Prejudice to Boyd:	29
5. Attributable Neglect:	30
D. <u>Mr. Conklin's Blame is His, and His Alone</u>	30
Conclusion	31
Certificate of Service	33
Certificate of Filing.....	34

TABLE OF AUTHORITIES

	Page(s)
 CASES	
<i>Amiker v. Drugs for Less Inc.</i> , 796 So.2d 942, 948 (Miss. 2000).....	24
<i>Batson v. Neal Spelce Assocs., Inc.</i> , 765 F. 2d 511, 514 (5 th Cir. 1985)	12
<i>Cooper v. State Farm Fire & Cas. Co.</i> , 568 So.2d 687, 692 (Miss. 1997).....	12
<i>Gilbert v. Ireland</i> , 949 So.2d 784 (Miss. Ct. App. 2006)	11, 23, 25, 27, 28
<i>Palmer v. Biloxi Regional Medical Center</i> , 564 So.2d 1346, 1367, 1370 (Miss.1990).....	11, 30, 31
<i>Pierce v. Heritage Properties, Inc.</i> , 688 So.2d 1385, 1387, 1388, 1389 (Miss. 1997).....	11, 12, 13, 23, 24, 25, 29
<i>Scoggins v. Ellzey Beverages, Inc.</i> , 743 So.2d 990, 991, 996 (Miss. 1999).....	11, 12, 23, 24, 25
<i>Smith v. Cessna Aircraft Co.</i> , 124 F.R.D. 103, 105, 107 (D.Md.1989).....	13, 29
<i>White v. White</i> , 509 So.2d 205, 207 (Miss. 1989).....	11
 COURT RULES	
Miss. R. Civ. P. 37	12, 13, 23, 24, 25, 26, 28
Miss. R. App. P. 25	34

STATEMENT OF THE ISSUE

- I. Whether the Trial Court Abused its Discretion in Dismissing Appellant Frankie Conklin's Cause of Action Based on Mr. Conklin's Serious Discovery Violations, False Deposition Testimony and Submission of a False Affidavit.**

STATEMENT OF THE CASE

This is a casino slip and fall case. Among other things, the Appellant Frankie Conklin ("Mr. Conklin") is claiming he suffered cellulitis in his right leg as a result of his alleged fall. On numerous occasions, Mr. Conklin denied any prior instances of cellulitis – or any other problems – with his right leg. However, medical information which Appellee Boyd Tunica, Inc.¹ ("Boyd") independently discovered clearly demonstrates Mr. Conklin knowingly, intentionally, and deceitfully concealed the truth about the nature of his cellulitis. Despite his sworn responses and testimony to the contrary, the truth is that Mr. Conklin did experience cellulitis in his right leg prior to the subject fall and attempted to conceal the truth from his doctor, Boyd, and the Trial Court.

Accordingly, Boyd filed a Motion to Dismiss on July 8, 2010. (R. Vol. 1, pp. 24-27). Following both parties thorough briefing, the Trial Court conducted a lengthy hearing on September 15, 2010 in which it entertained arguments by counsel for both parties. (R. Vol. 3, pp. 1-35). Following the hearing, the Court entered an Order on September 20, 2010, granting Boyd's Motion to Dismiss. (R. Vol. 2, pp. 170-173). Mr. Conklin timely filed a notice of appeal and this matter is now properly before this Court. (R. Vol. 2, p. 175).

¹ As noted in the Certificate of Interested Persons, Boyd Tunica, Inc., *not* Boyd Gaming Corporation is the proper party defendant.

STATEMENT OF THE FACTS

Below is a timeline of relevant dates in regards to Mr. Conklin's medical treatment to his right leg and multiple discovery violations.

Pre-Fall:

- * August 9, 2005: Mr. Conklin, complaining of problems with his right leg, is admitted to the Emergency Room with a diagnosis of cellulitis. (R. Vol. 1, pp. 77-80).
- * September 22, 2005: Mr. Conklin reports to Dr. Latif that he had cellulitis of his lower extremity and was treated with antibiotics at the emergency room. (R. Vol. 1, p. 81).
- * October 20, 2005: based on Mr. Conklin's post-fall emergency room records, Conklin reports suffering from previous "similar symptoms" of cellulitis to his right leg on or near this date. (R. Vol. 1 p. 83).

Post-Fall:

- * December 10, 2005: Mr. Conklin allegedly falls at Boyd's Casino. (R. Vol. 1, pp. 5-8).
- * December 20, 2005: Mr. Conklin presents to Saint Francis Hospital's emergency room complaining of redness, swelling and pain in his right leg. Mr. Conklin's "post-fall" complaints regarding his allegedly injured right leg are identical to the pre-existing complaints Mr. Conklin lodged when he was previously diagnosed with cellulitis on August 9, 2005. (R. Vol. 1, pp. 82-83) and (R. Vol. 1, pp. 77-80).
- * December 20, 2005: The documents from this treatment reveal Mr. Conklin's awareness of the prior instance(s) of cellulitis to his right leg. On the "Emergency Physician Record" used for instances of a "Skin Rash/Abscess," Mr. Conklin circled the box labeled "Similar symptoms previously." The same document reveals under "other problems," Mr. Conklin reported cellulitis of his right lower extremity for the past two (2) months. (R. Vol. 1, p. 83).
- * December 20, 2005 –December 27, 2006: Based on records from Saint Francis Hospital, Mr. Conklin is seen and receives extensive treatment from multiple doctors regarding his cellulitis. During this period, Mr. Conklin fails to reveal the true nature and extent of his medical history to his treating physician/expert Dr. Lamothe. (Supp. R. Vol. 1, pp. 63-75); (Supp. R. Vol. 1, pp. 76-79); (Supp. R.

Vol. 1, pp. 80-85); (Supp. R. Vol. 1, pp. 86-87); (Supp. R. Vol. 1, pp. 88-89); (Supp. R. Vol. 1, pp. 90-94); (Supp. R. Vol. 1, pp. 95-97); (Supp. R. Vol. 1, p. 98); (Supp. R. Vol. 1, pp. 99-105); (Supp. R. Vol. 1, pp. 106-108); (Supp. R. Vol. 1, pp. 109-112); and (Supp. R. Vol. 1, pp. 113-116).

- * December 9, 2008: On the eve of the expiration of the statute of limitations, Mr. Conklin files his Complaint asserting injuries to his right leg from infection. (R. Vol. 1, pp. 5-8).
- * May 1, 2009: In his responses to Boyd's requests for production of documents, Mr. Conklin refused to provide the names or documents of any health care provider that previously treated Mr. Conklin for any medical conditions to his right leg. This includes records relating to either his August 9, 2005 "pre-fall" emergency room visit or his treatment for cellulitis on or about October 20, 2005. (R. Vol. 1, p. 57-58).
- * May 13, 2009: Mr. Conklin provided answers to Boyd's interrogatories in which he states he "seriously injured his right leg, including numerous abscesses (cellulitis), as a direct result of the negligence of Defendant." (R. Vol. 1, p. 47).
- * May 13, 2009: When responding to Boyd's interrogatory requesting Mr. Conklin to identify and describe in detail any and all physical injuries, ailments, problems and conditions of any nature whatsoever prior to the date of the subject fall; Mr. Conklin did not mention cellulitis, but simply responded that he has received treatment for high blood pressure and diabetes. (R. Vol. 1, p. 47).
- * March 3, 2010: Mr. Conklin provides false testimony regarding the true nature and extent of his important and relevant medical history while under oath at his deposition. (R. Vol. 1 pp. 61-62), (R. Vol.1, pp. 63-64), (R. Vol. 1, pp. 65-67), (R. Vol. 1 pp. 68-70).
- * July 8, 2010: Boyd filed the subject Motion to Dismiss. Mr. Conklin claims it is only after the Motion was filed that he understood what the term "cellulitis" meant. (R. Vol. 1. pp. 24-26) and (R. Vol. 1 pp. 133-135).
- * August 26, 2010: Mr. Conklin filed a Response in Opposition to Boyd's Motion to Dismiss. Mr. Conklin attaches an affidavit to his Response which contains numerous inaccuracies and falsehoods. (R. Vol. 1 pp. 133-135).

SUMMARY OF THE ARGUMENT

The Trial Court did not abuse its discretion in Granting Boyd's Motion to Dismiss. Mr. Conklin's repeated false deposition testimony, his false interrogatory responses, his failure to produce requested documents, his failure to disclose his true medical history to his treating physician/expert, and his submission of a false affidavit represents a deliberate attempt to thwart discovery and subvert the judicial process. Furthermore, Mr. Conklin's egregious conduct substantially prejudiced Boyd's ability to conduct discovery and prepare for trial. Due to Mr. Conklin's conduct, the Trial Court properly held that dismissal with prejudice is the only sanction that will meet the demands of justice.

Furthermore, the Trial Court applied the correct legal standard and made its ruling only after both parties thoroughly briefed the issues and participated in a lengthy hearing. The Trial Court did not commit a clear error of judgment in the conclusion it reached after weighing the relevant factors. Accordingly, the Trial Court's decision granting Boyd's Motion to Dismiss was not an abuse of discretion and should be affirmed.

ARGUMENT

I. Whether the Trial Court Abused its Discretion in Dismissing Appellant Frankie Conklin's Cause of Action Based on Mr. Conklin's Serious Discovery Violations, False Deposition Testimony and Submission of a False Affidavit.

A. Standard of Review

Mr. Conklin's Brief attempts to distort the standard of review of this appeal and essentially requests a *de novo* review of the Trial Court's ruling. For evidence of this distortion, one need only look to Mr. Conklin's Statement of the Issues. (Appellant's Brief p. 5). The issue on appeal is not whether Mr. Conklin "provided false statements during his deposition and/or in answers to interrogatories" thereby committing a "fraud upon the Court" and prejudicing Boyd's

“ability to defend this action.” (Appellant’s Brief p. 5). Rather, the limited scope of review on appeal is whether the Trial Court abused its discretion in making those findings.² Although Mr. Conklin’s Brief avers many of the same points and arguments he originally made to the Trial Court, Mr. Conklin’s Brief fails to articulate how the Trial Court abused its considerable discretion in rendering its decision.

The decision to impose sanctions for discovery abuse is vested in the trial court’s discretion. *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385, 1388 (Miss. 1997) (citing *White v. White*, 509 So.2d 205, 207 (Miss.1987)). The provisions for imposing sanctions are designed to give the court great latitude. *Pierce v. Heritage Properties, Inc.*, 509 at 1388 (citing *White v. White*, 509 So.2d at 207). The power to dismiss is inherent in any court of law or equity, being a means necessary to the orderly expedition of justice and the court’s control of its own docket. *Pierce* at 1388 (citing *Palmer v. Biloxi Regional Medical Center*, 564 So.2d 1346, 1367 (Miss.1990)).

In appropriate circumstances under Rule 37 of the Mississippi Rules of Civil Procedure, trial courts may impose sanctions by “dismissing the action or proceeding or any part thereof.” *Scoggins v. Ellzey Beverages, Inc.*, 743 So.2d 990, 996 (Miss. 1999) (quoting Miss. R. Civ. P. 37(b)(2)(C)). Such dismissals by the trial court are reviewed under an abuse of discretion standard. *Scoggins v. Ellzey Beverages, Inc.*, 743 So.2d at 996. When the Mississippi appellate courts review a decision that is within the trial court’s discretion, it first asks if the court below

² Similarly, the issue on appeal is not whether Mr. Conklin violated any “Mississippi Rules of Civil Procedure” or the legal authority in “*Gilbert v. Ireland*, 949 So.2d 784 (Miss. App. 2006)” justifying dismissal of Mr. Conklin’s action. *Id.* Again, the limited scope of review on this appeal is whether the Trial Court abused its discretion in reaching that decision.

applied the correct legal standard.³ *Scoggins* at 996. If the trial court applied the right legal standard, then the appellate Court will affirm the trial court's decision unless there is a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors." *Id.* (citing *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385, 1388 (Miss.1997) (quoting *Cooper v. State Farm Fire & Cas. Co.*, 568 So.2d 687, 692 (Miss.1990) (emphasis added))).

B. Mr. Conklin's Multiple False Statements and Contumacious Conduct

The Trial Court did not abuse its discretion in dismissing Mr. Conklin's claim. This is true because the Trial Court had before it ample evidence of Mr. Conklin's multiple attempts to thwart discovery and subvert the judicial process.

1. Mr. Conklin's False Interrogatory Responses:

Mr. Conklin provided false answers in his sworn interrogatory responses. Accordingly, the Trial Court did not abuse its discretion in analyzing these misrepresentations in granting Boyd's Motion to Dismiss. The relevant interrogatories are as follows:

INTERROGATORY NO. 15. Identify each body part you claim was injured in this incident and describe the nature of the injuries.

RESPONSE: Plaintiff seriously injured his right leg, including numerous abscesses (cellulitis), as a direct result of the negligence of Defendant. Plaintiff was required to undergo surgery to treat the injury to his right leg and has suffered greatly as a result of this injury.

INTERROGATORY NO. 16. Regarding only the body parts you are claiming in this suit were injured, please identify and describe in detail any and all physical

³ In *Pierce*, the Mississippi Supreme Court adopted the Fifth Circuit's holding in *Batson v. Neal Spelce Assocs., Inc.*, 765 F.2d 511, 514 (5th Cir.1985) in evaluating the appropriateness of dismissal as a sanction for discovery violations. *See Pierce*, 688 So.2d at 1389. Thus, Mississippi courts consider several factors in determining whether dismissal is authorized. These factors are: (1) whether the failure to comply with the court's order results from willfulness or bad faith, and not from the inability to comply; (2) whether the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions; (3) whether the other party's preparation for trial was substantially prejudiced and (4) whether the party's neglect is plainly attributable to an attorney rather than a blameless client, or when a party's simple negligence is grounded in confusion or sincere misunderstanding of the court's orders. *See Pierce*, 688 So.2d at 1389.

injuries, ailments, problems and conditions of any nature whatsoever which you had during the five year period preceding the date of the subject fall.

RESPONSE: Plaintiff has received treatment for high blood pressure and diabetes during the five year period preceding the date of the subject fall to the present.

(R. Vol. 1, p. 47) (emphasis added). Mr. Conklin's response is false. As the record clearly reveals, Mr. Conklin was treated for much more than just diabetes and high blood pressure in the five (5) years predating his alleged fall. Prior to the subject fall, Mr. Conklin was admitted to the Emergency Room with a diagnosis of cellulitis. (R. Vol. 1, pp. 77-80). Similarly, prior to the subject fall, Mr. Conklin reported to Dr. Latif he had cellulitis of his lower extremity and was treated with antibiotics at the emergency room. (R. Vol. 1, p. 81). Additionally, based on Mr. Conklin's post-fall emergency room records, Conklin reported suffering from previous "similar symptoms" of cellulitis roughly two (2) months prior to his post-fall emergency room visit for cellulitis. (R. Vol. 1 p. 83).

However, instead of answering Boyd's unambiguous and clearly drafted interrogatories truthfully and honestly, Conklin deliberately omitted he experienced cellulitis – or any other injury, ailment problem or condition in his right leg – prior to his subject fall at Boyd's casino.

In *Pierce*, the Mississippi Supreme Court addressed the importance of truthful and honest interrogatory responses. The *Pierce* Court held that "[a]n implicit condition in any order to answer an interrogatory is that the answer be true, responsive and complete. A false answer is in some ways worse than no answer; it misleads and confuses the party." *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385, 1389 (Miss.1997) (quoting *Smith v. Cessna Aircraft Co.*, 124 F.R.D. 103, 107 (D.Md.1989)). Mr. Conklin's fraudulent conduct in failing to truthfully and honestly respond to Boyd's interrogatory requests alone would warrant a severe sanction.

However, the breadth of Mr. Conklin's fraudulent and deceptive behavior extends much further. Thus, the Trial Court did not abuse its discretion by granting Boyd's Motion to Dismiss.

2. Mr. Conklin's Failure to Produce Documents:

Mr. Conklin failed to produce documents regarding his prior treatment for cellulitis. Accordingly, the Trial Court did not abuse its discretion in analyzing this failure in granting Boyd's Motion to Dismiss. Early in the litigation, Mr. Conklin produced medical documents to Boyd, along with the letter from Dr. Lamothe, indicating that Mr. Conklin's cellulitis was related to his alleged fall. However, these documents did not reveal the scope of Mr. Conklin's prior treatment for cellulitis. Although Boyd unambiguously and clearly requested documents specifically relating to any prior treatment Mr. Conklin received to his right leg, Mr. Conklin denied having any responsive documents. (R. Vol. 1, pp. 57-58). However, Boyd later obtained additional medical documents through the use of a HIPAA authorization executed by Mr. Conklin. These documents reveal that Mr. Conklin's right leg was treated for cellulitis prior to his alleged fall. (R. Vol. 1, pp. 77-80) and (R. Vol. 1, p. 81).

Mr. Conklin's Brief asserts that since he signed a HIPAA authorization – *at Boyd's insistence* – his false interrogatory responses, false deposition testimony, and false affidavit should be ignored. (Brief pp. 9, 14). This assertion lacks merit and is akin to the illogical notion that a thief is not guilty of robbery if the theft is discovered by the owner. Mr. Conklin failed to provide pre-existing medical records despite Boyd's request. Sensing something was amiss, Boyd independently obtained a portion of Mr. Conklin's pre-existing medical records.⁴ However, in order to obtain those pre-existing medical records, Boyd could only work with the information provided by Mr. Conklin for his "post-fall" treatment. Thus, to date, only the names

⁴ Boyd provided Mr. Conklin with a copy of these documents.

of doctors and medical providers Mr. Conklin saw after his alleged fall have been provided to Boyd by Mr. Conklin (i.e. there may be other as-yet-unknown medical providers who also treated Conklin for cellulitis – or other issues with his right leg – prior to the fall).

Fortunately for Boyd, Mr. Conklin was treated at the same facility for a portion of both his pre-existing and alleged post-fall cellulitis.⁵ Thus, Boyd was able to obtain some pre-existing medical records relating to Mr. Conklin's cellulitis from St. Francis. However, Boyd remains in the dark as to any other treatment Mr. Conklin received relating to his pre-existing cellulitis. Such treatment could very well include treatment Mr. Conklin received for cellulitis on or near October 20, 2005,⁶ at a facility other than St. Francis Hospital-Bartlett. Despite Mr. Conklin's best attempts to conceal the nature of his cellulitis, Boyd found the proverbial "needle in a haystack" and Mr. Conklin fell victim to his own deception.

Mr. Conklin's failure to produce documents regarding his prior treatment for cellulitis, or even identify where such documents might be found, further evidences his deceitful conduct. Accordingly, the Trial Court did not abuse its discretion in dismissing Mr. Conklin's case with prejudice.

3. Mr. Conklin's Failure to Disclose His Relevant Medical History to His Own Expert – Dr. Lamothe:

While seeking treatment for his "post-fall" cellulitis, Mr. Conklin never informed his own medical expert, Dr. Marquita Lamothe, about any previous instances of cellulitis regarding his right leg. Mr. Conklin's omission is fundamental and fatal. This is so because Dr. Lamothe based her opinion – that Mr. Conklin's fall and subsequent treatment for cellulitis were causally

⁵ This facility was St. Francis Hospital in Bartlett, Tennessee.

⁶ The October 20, 2005, date is on or near the date Mr. Conklin claims to have suffered from previous symptoms of cellulitis when treated for his alleged post-fall cellulitis in December 2005.

related – on Mr. Conklin’s own misrepresentations and omissions. Dr. Lamothe wrote a letter based on the incomplete facts Mr. Conklin supplied in which Dr. Lamothe stated: “Before his fall at the casino, he did not have a history of cellulitis, and I therefore believe that the fall at the casino caused the right lower extremity cellulitis.” (R. Vol. 1, p. 75). (emphasis added).

When questioned at her deposition about Mr. Conklin’s medical history regarding cellulitis, Dr. Lamothe testified as follows:

Q. ...finally, the last sentence says, “Before his fall at the casino, he did not have a history of cellulitis, and I therefore believe that the fall at the casino caused the right lower extremity cellulitis.”

A. By history, he did not portray any previous problems with his legs. And I do not have any knowledge of him having required to be hospitalized, let alone go to surgery, for right leg infection prior to that fall.

Q. So you would have learned that information solely from Mr. Conklin.

A. Correct. As far as any previous hospitalization for that or anything related to that office visit or ER visits or whatever prior to that incident, correct.

(R. Vol. 1, pp. 71-74). According to Dr. Lamothe, Mr. Conklin failed to inform her that he previously suffered from cellulitis. Given Mr. Conklin’s predisposition to conceal the truth, it comes as no shock that he omitted his relevant medical history to his treating physician upon whom he relies to relate his injury to his alleged fall. However, no matter how hard Mr. Conklin tries to conceal the truth, he cannot escape the fact that he had cellulitis prior to the alleged fall at Boyd’s casino. Mr. Conklin’s misrepresentations and omissions to Dr. Lamothe further evidence his fraudulent, deceitful and deliberate behavior. Trial Court did not abuse its discretion in relying on these facts when dismissing Mr. Conklin’s case.

4. Mr. Conklin’s False Deposition Testimony:

At his deposition, Mr. Conklin repeatedly provided false testimony regarding the true extent of his medical history. The Trial Court did not abuse its discretion in considering and

analyzing this false testimony as further evidence of Mr. Conklin's fraudulent conduct. Likewise, the Trial Court did not abuse its discretion in granting Boyd's Motion to Dismiss based on Mr. Conklin's fraudulent deposition testimony. Mr. Conklin was provided numerous opportunities to disclose the falsehood of his sworn interrogatory responses, but failed to do so. Regarding his sworn interrogatory responses, Mr. Conklin testified as follows:

Q. In Interrogatory Number 16, we asked "Regarding only the body parts you are claiming in this suit were injured, please identify and describe in detail any and all physical injuries, ailments, problems and conditions of any nature whatsoever which you had during the five year period preceding the date of the subject fall." Do you understand the question?

A. Yes.

Q. Your response is "The Plaintiff had received treatment for high blood pressure and diabetes during the five year period preceding the date of the subject fall to the present." That was your answer, if you want to look at it. I just want to verify that.

A. Okay.

Q. All right. And that's still the case?

A. Yes.

(R. Vol. 1, pp. 61-62) (emphasis added). Regarding other medical conditions for which he sought treatment, Mr. Conklin testified as follows:

Q. So, other than the left ankle, the migraines, the kidney stones, the gallbladder, the high blood pressure, the diabetes, have you ever sought medical treatment and gone to the ER, the doctor or the hospital for any other type of injuries or ailments --

A. No.

Q. -- prior to the accident?

A. No.

(R. Vol. 1, pp. 63-64) (emphasis added). At the conclusion of his deposition, Mr. Conklin was given one last opportunity to provide Boyd with the truth regarding his prior instances of cellulitis – or any other issues with his right leg. Yet again, Mr. Conklin provided false testimony:

Q. You didn't have any prior problems with your leg prior to the accident?

A. No.

(R. Vol. 1, pp. 68-69) (emphasis added). Accordingly, although questioned on several different occasions about the true nature of his medical history, Mr. Conklin provided false testimony time after time. The evidence of Mr. Conklin's false testimony was properly before the Trial Court. Based on this evidence, the Trial Court did not abuse its discretion by dismissing Mr. Conklin's case with prejudice.

5. Mr. Conklin's False Affidavit:

As evidenced above, Mr. Conklin has repeatedly and falsely denied any prior instances of cellulitis – or any other problem with his right leg. In Response to Boyd's Motion to Dismiss, Mr. Conklin attached an Affidavit in an attempt to convince the Trial Court that his failure to disclose his previous treatment for cellulitis was just a big misunderstanding. (R. Vol. 1, pp. 133-135). However, the sworn statements contained in Mr. Conklin's affidavit contradict the documentary evidence and further highlight his deception. In his affidavit, Conklin states:

I do not remember anyone mentioning the word "cellulitis" to me in at [sic] the emergency room at St. Francis Hospital-Bartlett in August, 2005, or at any time prior to my fall at the casino. Prior to my review of the medical records in this case, I did not know what the word "cellulitis" meant. I thought it described a condition of fatty tissue which I now know by the name "cellulite." (See Collective Exhibit 1).

(R. Vol. 1, p. 134). This statement is false. If true, how does Mr. Conklin explain the fact that following his visit to the St. Francis emergency room in August 9, 2005, he later informed Dr.

Latif of his treatment for cellulitis? The answer is, he cannot. On September 22, 2005, Mr. Conklin was seen by Dr. Kashif Latif. (R. Vol. 1, p. 81). On that date, Mr. Conklin reported to Dr. Latif that he had cellulitis of his lower extremity and was treated with antibiotics at the emergency room. *Id.* Thus, Mr. Conklin not only received treatment for cellulitis prior to his alleged fall in December 10, 2005, but he was absolutely aware of the diagnosis and treatment of cellulitis – as evidenced by his disclosure of the treatment to Dr. Latif.

Mr. Conklin's disclosure to Dr. Latif is not the only instance evidencing Mr. Conklin's knowledge of his pre-fall treatment for cellulitis. Ten days after his alleged fall, Mr. Conklin presented to Saint Francis Hospital's emergency room on December 20, 2005. (R. Vol. 1, pp. 82-83). The documents from Conklin's "post-fall" visit on December 20, 2005, reveal Conklin's awareness of the prior instance(s) of cellulitis to his right leg. (R. Vol. 1, p. 83). On the "Emergency Physician Record" used for instances of a "Skin Rash/Abscess," Mr. Conklin caused the box labeled "Similar symptoms previously" to be circled. *Id.* Furthermore, the same document reveals under "other problems," that Mr. Conklin reported cellulitis of his right lower extremity for the past two (2) months. *Id.* Since his emergency room visit occurred only ten days after his alleged fall, the stated two (2) month time frame clearly pre-dates Mr. Conklin's alleged fall at the casino on December 10, 2005.

The two (2) month period of previous "similar symptoms" reported by Mr. Conklin at the emergency room sheds further light on the falsehoods contained in his affidavit. For instance, Mr. Conklin's Affidavit states:

Following the emergency room visit at St. Francis Hospital-Bartlett on August 10, 2005, I had no further problems with swelling in either leg until after my fall at Sam's Town Casino on December 10, 2005.

(R. Vol. 1 p. 135). As indicated above, Mr. Conklin's "post-fall" visit to the emergency room for cellulitis reveals that Mr. Conklin experienced "similar symptoms" two (2) months prior. Thus, these "similar symptoms" would have manifested themselves on or about October 20, 2005. This October date clearly falls between Conklin's first visit to the emergency room for pre-existing cellulitis on or about August 10, 2005, and his subsequent visit to the emergency room for "post-fall" cellulitis on December 20, 2005. Accordingly, Mr. Conklin's statement that, following his pre-fall August 2005 emergency room visit, he had "no further problems with swelling in either leg until after" his fall at Boyd's casino is patently false. (R. Vol. 1, p. 135). Accordingly, the Trial Court did not abuse its discretion by granting Boyd's Motion to Dismiss based on the false statements contained in Mr. Conklin's Affidavit.

Another glaring example of Mr. Conklin's deception is contained in his statement that:

...Prior to my review of the medical records in this case, I did not know what the word "cellulitis" meant. I thought it described a condition of fatty tissue which I now know by the name "cellulite." (See Collective Exhibit 1).

(R. Vol. 1, p. 134). This statement alone should illustrate that the Trial Court did not abuse its discretion in dismissing Mr. Conklin's claim. Mr. Conklin's Brief indicates that he did not know what the term cellulitis meant until after Boyd filed its Motion to Dismiss. (Brief p. 17). Mr. Conklin's alleged injury occurred on December 10, 2005. (R. Vol. 1, pp. 5-8). Boyd filed its Motion to Dismiss on July 8, 2010. (R. Vol. 1, pp. 24-26). Mr. Conklin's Affidavit asked the Trial Court to believe his assertion that he came to understand what the term "cellulitis" meant only after the term was used by Boyd in its Motion to Dismiss – some four and a half years after Mr. Conklin's injury. Mr. Conklin asked the Trial Court to adopt this false assertion without regard to the following:

* despite being admitted to the emergency room on 12/20/2005 for cellulitis in his right leg (Supp. R. Vol. 1, pp. 61-62);

- * despite being seen and treated for cellulitis in his right leg by Dr. Gisele Goff on 12/21/2005, 12/22/2005 (Supp. R. Vol. 1, pp. 63-75);
- * despite being seen and treated for cellulitis in his right leg by Mohammad N. Qureshi on 1/5/2006 and 1/14/2006 (Supp. R. Vol. 1, pp. 76-79);
- * despite being seen and treated for cellulitis in his right leg by Dr. Margarita Lamothe on 1/5/2006, 1/6/2006, 1/7/2006, 1/8/2006, 1/10/2006, 1/13/2006 (Supp. R. Vol. 1, pp. 80-85);
- * despite being seen and treated for cellulitis in his right leg by Dr. William Walsh on 1/9/2006 (Supp. R. Vol. 1, pp. 86-87);
- * despite being seen and treated for cellulitis in his right leg by Dr. Melvin Payne on 1/10/2006, surgery associated with cellulitis on 1/11/2006 and post-op follow-up after surgery related to cellulitis on 1/13/2006 (Supp. R. Vol. 1, pp. 88-89);
- * despite receiving physical therapy wound care for cellulitis in his right leg on 1/12/2006, 1/13/2006, and 1/14/2006 (Supp. R. Vol. 1, pp. 90-94);
- * despite receiving care from Methodist Healthcare Alliance Health services for cellulitis in his right leg on 1/14/2006, 1/16/2006 and 1/23/2006 (Supp. R. Vol. 1, pp. 95-97);
- * despite receiving treatment for cellulitis in his groin on 12/20/2006 at the emergency room (Supp. R. Vol. 1, p. 98)
- * despite receiving treatment for cellulitis in his groin from Dr. Rehn Sajjad on 12/20/2006, 12/21/2006, 12/23/2006, 12/24/2006, 12/25/2006, 12/26/2006, 12/27/2006 (Supp. R. Vol. 1, pp. 99-105);
- * despite receiving treatment for cellulitis in his groin from Dr. Bryan Jackson on 12/20/2006, 12/21/2006 (Supp. R. Vol. 1, pp. 106-108);
- * despite being seen and treated for cellulitis in his groin by Dr. Mohammad N. Qureshi on 12/20/2006, 12/24/2006 (Supp. R. Vol. 1, pp. 109-112);
- * despite being treated by Dr. Lamothe for cellulitis on 12/21/2006, 12/22/2006, 12/25/2006, 12/27/2006 (Supp. R. Vol. 1, pp. 113-116).
- * despite using the term cellulitis in his sworn interrogatory responses on 5/13/2009 (R. Vol. 1, p. 47);

As a result of cellulitis, Mr. Conklin endured multiple visits to many medical providers, endured several hospital stays and underwent surgery. Mr. Conklin knew good and well the condition from which he suffered and that his condition existed before the incident at Boyd's casino. It was only after being caught in a lie that Mr. Conklin concocted an excuse and perpetuated a deception on the Trial Court by submitting a false affidavit. Mr. Conklin asked the Trial Court to believe that in his mind the surgery, all the medical care, and all antibiotics merely concerned "fatty tissue." (R. Vol. 1, p. 134). One can not reasonably argue or conclude that the Trial Court abused its discretion by refusing to adopt Mr. Conklin's false explanation. To the contrary, had the Trial Court held otherwise, a strong argument would exist that the Trial Court did abuse its discretion by overlooking the above stated evidence.

Mr. Conklin has known for a long time the true nature of his medical condition. Armed with that knowledge, Mr. Conklin engaged in deceptive and dishonest tactics to conceal the truth from Boyd and the Trial Court. Based on Mr. Conklin's false deposition testimony, his failure to provide Boyd with necessary relevant medical documents; his failure to truthfully respond to Boyd's interrogatories; his failure to disclose his prior history to Dr. Lamothe; and his submission of a false affidavit, the Trial Court did not abuse its discretion in dismissing Mr. Conklin's Case with prejudice. Due to the multiple instances evidencing Mr. Conklin's false and contumacious conduct, dismissal of Mr. Conklin's claims – with prejudice – was the only sanction that met the demands of justice.

C. The Trial Court Applied the Proper Standard and Law

Mr. Conklin's Brief attempts to cast doubt on the Trial Court's decision by challenging the standard and law employed by the Trial Court in arriving at its decision to grant Boyd's Motion to Dismiss. This contention is ironic in light of Mr. Conklin's own incorrect attempt to

distort the standard of review on this appeal from an abuse of discretion standard to a *de novo* review. Regardless, the Trial Court applied the correct standard and properly followed the law in reaching its decision.

1. Mississippi Rule of Civil Procedure 37, the Mississippi Supreme Court Decisions in *Pierce* and *Scoggins*, and the Mississippi Court of Appeals Decision in *Gilbert*, Indicate that the Trial Court did not Abuse its Discretion:

Mr. Conklin avers that the Trial Court “erred in relying on Miss. R. Civ. P. 37.” (Brief p. 25). Mr. Conklin’s averment ignores the wealth of cases wherein Rule 37 is the vehicle by which courts dismiss cases based on the same type of fraudulent and contumacious conduct exhibited by Mr. Conklin. Mr. Conklin asserts that Rule 37 “requires a prior court order for the sanctions that were requested” and awarded by the Trial Court. (Brief p. 25). This assertion has no basis in the law.

While some of the language contained in particular subsections of Rule 37 might suggest that sanctions may only be awarded following an order compelling discovery, Rule 37(e) has no such requirement. Mississippi Rule of Civil Procedure 37(e) states:

In addition to the application of those sanctions, specified in Rule 26(d) and other provisions of this rule, the court may impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and attorneys’ fees, if any party or counsel (i) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(c), or (ii) otherwise abuses the discovery process in seeking, making or resisting discovery.

See Mississippi Rule of Civil Procedure 37(e). Thus, pursuant to Rule 37(e), there is no requirement that a specific court order be violated prior to the imposition of sanctions for the type of fraudulent conduct committed by Mr. Conklin. To require otherwise would obviate the obligations contained in the discovery rules and necessitate a specific order issued by every court at the onset of all litigation instructing the parties to conduct themselves truthfully and honestly.

Moreover, the Mississippi Supreme Court has previously stated that the trial courts possess the inherent authority to dismiss a case as part of their power to control their own docket. *Amiker v. Drugs for Less Inc.*, 796 So.2d 942, 948 (Miss. 2000).

Regardless of Mr. Conklin's assertions, multiple cases have cited to Rule 37 as the basis to dismiss a case due to fraudulent conduct on the part of the plaintiff. In *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385, 1388 (Miss. 1997), the Mississippi Supreme Court affirmed the trial court's imposition of dismissal of the plaintiff's case as a discovery sanction under Rule 37(b)(2) & (e). *Pierce*, 688 So.2d at 1387. The plaintiff in *Pierce* submitted false responses to various discovery requests and swore to false testimony at her deposition.⁷ *Id.* at 1390. Affirming the trial court's dismissal of plaintiff's case, the Mississippi Supreme Court cited to the court's inherent power to protect the integrity of the judicial process where a plaintiff willfully conceals important facts. *Id.* at 1387.

In *Scoggins*, the Mississippi Supreme Court affirmed the trial court's dismissal under Rule 37, based upon a finding that the plaintiff had repeatedly misrepresented her prior medical history. *Scoggins v. Ellzey Beverages, Inc.*, 743 So.2d 990, 991 (Miss.1999). The plaintiff in *Scoggins* stated in her interrogatories and at her deposition that she had never been treated for injuries to her arms, legs, back, or hips prior to the accident at issue. However, Scoggins's medical records revealed that she had been treated for pain or numbness in those areas several times, diagnosed with widespread arthritis, and undergone a medical procedure on her back. *Id.* at 992. The Mississippi Supreme Court found that Scoggins's deliberate lies went to the heart of

⁷ The plaintiff repeatedly lied under oath that she alone was in her apartment when a ceiling fan fell injuring her. *Id.* at 1387-1388. However, a male companion was in plaintiff's apartment and witnessed the incident. *Id.* The Plaintiff admitted her misconduct only after the defendant uncovered the truth. *Id.*

the issue of damages. *Id.* at 994. Similarly, Mr. Conklin's lies concern issues central to this case and have direct impact on the important elements of causation and damages.

The Mississippi Court of Appeals in *Gilbert v. Ireland*, 949 So.2d 784 (Miss. Ct. App. 2006), reversed and rendered a matter in which the trial court entered an order preventing the plaintiff from falsely testifying about her alleged loss of sex drive and social isolation. The plaintiff in *Gilbert* had been untruthful in both her testimony, as well as her statements to her expert witness regarding her medical history and psychological condition. The appellate court in *Gilbert* held that disallowing the testimony was not an adequate sanction in light of the plaintiff's willful discovery violations and false testimony. *Id.* at 788-789. The appellate court in *Gilbert* further held that the defendant was prejudiced in his ability to prepare for trial. *Id.* at 789. Similarly, Mr. Conklin has mislead the Court, Boyd and his own expert as to issues essential to this litigation. A sanction less than dismissal would not be just.

Much like the plaintiffs in *Pierce*, *Scoggins*, and *Gilbert*, Conklin submitted false answers to interrogatories, failed to produce relevant documents, repeatedly lied at his deposition, failed to disclose his prior treatment of cellulitis to his own expert, and has consistently lied about the true nature of his relevant medical history. The issue of damages and whether Mr. Conklin's cellulitis was proximately caused by his alleged fall, are absolutely central to this case. Conklin concealed important and vital facts that are essential to the survival of his claims against Boyd. Accordingly, based on Mississippi Rule of Civil Procedure 37 – as well as the holdings in *Pierce*, *Scoggins*, and *Gilbert* – the Trial Court properly applied the correct legal standard and did not abuse its discretion in dismissing Mr. Conklin's case in light of his egregious and fraudulent conduct.

2. Mr. Conklin's Willfulness, Bad Faith and Ability to Comply:

As evidenced above, the Trial Court had before it ample evidence of Mr. Conklin's evidence of willfulness and bad faith. Thus, the Trial Court did not abuse its discretion in dismissing Mr. Conklin's case. Mr. Conklin's actions were not the result of his inability to comply with Boyd's discovery requests or deposition questions. Mr. Conklin was fully aware of his prior instances of cellulitis in his right leg. Nothing, other than his deceit, prevented Mr. Conklin from revealing the truth about his relevant medical history.

Similarly, the Trial Court did not abuse its discretion by not adopting Mr. Conklin's excuse that he simply forgot about his prior treatment for cellulitis. This is true because Mr. Conklin's willfulness and bad faith in concealing his prior instance(s) of cellulitis is highlighted when compared to his ability to remember numerous other conditions he experienced both prior to and after the alleged fall. These include: gallbladder removal; high blood pressure; diabetes; twisted ankle; kidney stones; migraines; and pneumonia. (R. Vol. 1, pp. 63-64). Amazingly, Mr. Conklin's selective memory regarding his medical history was even sharp enough to recall a broken nose as a child.

Q. No broken arms, broken leg, broken –

A. I broke – I'm sorry. I broke my nose when I was a kid.

Q. Okay.

A. Does that count?

Q. That counts, but –

A. That was 40 years ago.

(R. Vol. 1, pp. 84-85). If Mr. Conklin can recall a broken nose from the 1970s, he must surely be able to recall treatment to his right leg for cellulitis – or any other condition – in the few short

months preceding his alleged fall. Mr. Conklin's failure to disclose his prior cellulitis was not due to his inability to comply or mere forgetfulness, but rather the result of his willful and deceitful intent. This is especially true in light of the fact that during the emergency room visit pre-dating his fall, Mr. Conklin was unable to ambulate and required the use of a stretcher due to that condition. (R. Vol. 1, p. 130).

Giving Mr. Conklin the benefit of the doubt regarding his alleged misunderstanding of cellulitis, his failure to reveal his complete and relevant medical history was deliberate and inexcusable. Accordingly, the Trial Court properly held that,

“[e]ven if the Court were inclined to believe that the Plaintiff did not understand that he had been diagnosed and treated for cellulitis, the fact that he failed to disclose any previous issue with the leg in question stretches the bounds of credibility.”

(R. Vol. 2, p. 172). Based on the foregoing, it is evident that the Trial Court did not abuse its discretion by failing to believe Mr. Conklin's excuses as to why he failed to reveal the true nature of his previous medical condition. Instead, Mr. Conklin's willful conduct clearly evidences bad faith and was deserving of the Trial Court's dismissal.

3. Use of Less Drastic Sanctions:

Considering the repeated contumacious conduct evidenced by Mr. Conklin throughout the course of this litigation, the Trial Court did not abuse its discretion by not ordering lesser sanctions. This is true because lesser sanctions in this case would erode the deterrent value of Rule 37. For example, merely limiting Conklin's testimony regarding his claim would not be an adequate sanction. As discussed *supra*, the plaintiff in *Gilbert* had been untruthful in both her testimony, as well as her statements to her expert witness regarding her medical history and psychological condition. The appellate court in *Gilbert* held that disallowing the testimony was

not an adequate sanction in light of the plaintiff's willful discovery violations and false testimony. *Id.* at 788-789.

In the case at bar, Mr. Conklin's egregious conduct is not simple fodder for cross-examination as Mr. Conklin suggests. (Brief p. 27). Mr. Conklin's deception does not concern a mere discrepancy in testimony or slight irregularity with a secondary fact or issue. Instead, Mr. Conklin's dishonest conduct concerns central issues of this litigation – namely similar previous medical treatment directly related the same body part alleged to be at issue in this case. Furthermore, Mr. Conklin's conduct does not involve a singular instance of dishonest conduct. To the contrary, Mr. Conklin has repeatedly concealed the truth about his true medical history throughout the entire course of this litigation.

Additionally, as evidenced by the Trial Court's Order, the Trial Court gave Mr. Conklin the option to agree to a lesser sanction. Surprisingly, Mr. Conklin refused. The Trial Court's Order states:

When asked by the Court if he would consider dropping some of his claims for recovery in light of his own discovery violations, he indicated he would not.

(R. Vol. 2, p. 172). It is disingenuous for Mr. Conklin to assert that the Trial Court should have imposed lesser sanctions when Mr. Conklin himself indicated he would not agree to any lesser sanction – other than allowing the cross-examination of Mr. Conklin at trial. Such a “sanction” amounts to no “sanction” at all.

Based on Mr. Conklin's false deposition testimony, his failure to provide Boyd with necessary relevant medical documents; his failure to truthfully respond to Boyd's interrogatories; his failure to disclose his prior history to Dr. Lamothe; and his submission of a false affidavit, the Trial Court did not abuse its discretion in dismissing Mr. Conklin's Case with prejudice.

4. Prejudice to Boyd:

The Trial Court did not abuse its discretion in holding that Mr. Conklin's failure to disclose his prior right leg ailments have prejudiced Boyd "in its trial preparation and completely chang[ed] the posture of this litigation." (R. Vol. 2, p. 172). Clearly, Boyd has been prejudiced by Mr. Conklin's conduct. Even if Mr. Conklin were to "come-clean" and provide truthful and honest testimony and documents regarding his medical history, Boyd would still suffer prejudice. In *Smith v. Cessna Aircraft Co.*, 124 F.R.D. 103, 107 (D.Md.1989), the dismissed plaintiff asserted, on appeal, that his ultimate production of the disputed documents dissipated any prejudice to the defendants. Citing to *Smith*, the Mississippi Supreme Court in *Pierce v. Heritage Properties, Inc.*, held that the plaintiff's perjury throughout discovery cast serious doubt on the credibility of the rest of his testimony, both during discovery and at trial. *Pierce* at 1389 (citing *Smith* at 105). Accordingly, the *Pierce* and *Smith* Courts held that the defendants were still prejudiced and dismissal was warranted even though the defendant was eventually provided with the disputed documents.

Similarly, going forward, Boyd cannot rely on the credibility of Mr. Conklin's sworn responses or testimony regarding any matter, nor can it rely on Mr. Conklin to provide truthful and complete discoverable information. More importantly, Mr. Conklin's deception does not involve an unrelated or irrelevant previous medical condition. Rather, Conklin's deception relates directly to his claims for cellulitis — a condition he suffered from previously and one that is now central to this case. Furthermore, Mr. Conklin's medical expert based her opinion regarding causation on Mr. Conklin's misrepresentations and omissions that he did not have any prior instances of cellulitis. Boyd's ability to defend this action and prepare for trial has been severely hampered as a result of Mr. Conklin's deceit. Boyd does not know, nor can it ever rely

on Conklin to provide, full and complete responses to discovery. Accordingly, the Trial Court did not abuse its discretion in finding that Mr. Conklin's conduct prejudiced Boyd.

5. Attributable Neglect:

The Trial Court did not abuse its discretion by not finding Mr. Conklin's conduct to be the result of attributable neglect. The record clearly indicates that Mr. Conklin's deception is not the result of attributable neglect, but rather fraudulent and deceptive conduct attributable to Mr. Conklin alone. Boyd does not contend that either his attorneys or doctors share any blame for Mr. Conklin's repeated deception and fraudulent conduct. Mr. Conklin is not a blameless client snared by a lawyer's mistake, nor does Mr. Conklin's conduct exemplify simple negligence grounded in confusion or a sincere misunderstanding. Rather, Mr. Conklin's conduct represents a deliberate attempt to subvert the judicial process in order to garner a windfall at the expense of Boyd. The Trial Court's refusal to sanction Mr. Conklin's conduct as mere "attributable neglect" does not constitute an abuse of discretion.

D. Mr. Conklin's Blame is His, and His Alone

At the conclusion of his Brief, Mr. Conklin erroneously attempts to shift blame to Boyd. (Brief p. 32). This attempt is derisory. How can Mr. Conklin argue with a straight face that Boyd shares any blame for Mr. Conklin's own contumacious conduct? Citing to *Palmer v. Regional Medical Center, Inc.*, 564 So.2d 1346, 1370 (Miss. 1990), Mr. Conklin requests this court to:

consider the fact that the Appellee throughout the entire course of this litigation have had the medical records of the Appellant which they claim that the Appellant concealed from them?

(Brief p. 32). There are several things wrong with this request and citation to *Palmer*. First, Mr. Conklin's reliance on *Palmer* is misplaced. That case does not deal with the serious issues of

fraudulent and dishonest conduct of the plaintiff or defendant. Rather *Palmer* merely dealt with delays in discovery of which both parties were guilty. Mr. Conklin's own citation to *Palmer* speaks in terms of "dilatory conduct." (Brief p. 32) (citing *Palmer v. Regional Medical Center, Inc.*, 564 So.2d 1346, 1370 (Miss. 1990)). Dilatory conduct is not alleged by either Mr. Conklin or Boyd in the case at bar. Thus, the Mississippi Supreme Court's holding in *Palmer* has no bearing on the case at bar.

Secondly, Boyd was not required to confront Mr. Conklin about his deception at his deposition. Indeed, Boyd presented Mr. Conklin with multiple opportunities to come-clean and repeatedly asked Mr. Conklin clear and unambiguous questions regarding his previous medical history. Mr. Conklin gladly provided answers regarding gallbladder removal; high blood pressure; diabetes; twisted ankle; kidney stones; migraines; pneumonia; and a broken nose from forty (40) years ago. (R. Vol. 1, pp. 63-64, 84-85). However, Mr. Conklin utterly failed to disclose any prior treatment to his right leg – the very body part at issue in this case.

CONCLUSION

The Trial Court did not abuse its discretion in Granting Boyd's Motion to Dismiss. Mr. Conklin's material misrepresentations directly pertained to the merits of the underlying claim. Mr. Conklin's repeated false deposition testimony, his false interrogatory responses, his failure to produce requested documents, his failure to disclose his true medical history to his treating physician/expert, and his submission of a false affidavit represents a deliberate attempt to thwart discovery and subvert the judicial process. Furthermore, Mr. Conklin's egregious conduct substantially prejudiced Boyd's ability to conduct discovery and to prepare for trial. Due to Mr. Conklin's conduct, the Trial Court properly held that dismissal with prejudice is the only sanction that will meet the demands of justice.

Furthermore, the Trial Court applied the correct legal standard and made its ruling only after both parties thoroughly briefed the issues and participated in a lengthy hearing. The Trial Court did not commit a clear error of judgment in the conclusion it reached after weighing the relevant factors. Accordingly, the Trial Court's decision granting of Boyd's Motion to Dismiss was not an abuse of discretion and should be affirmed.

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served, by U.S. Mail, postage prepaid, a true and correct copy of the foregoing document to:

Honorable Kenneth Thomas
Circuit Court Judge, Retired
P.O. Box 548
Cleveland, MS 38732-0548

Honorable Johnny E. Walls, Jr.
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John H. Cox, III
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Jeffrey S. Rosenblum, Esq.
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This the 24th day of May, 2011.



ROBERT T. JOLLY

CERTIFICATE OF FILING

I, Robert T. Jolly, attorney for Appellee Boyd Tunica, Inc. in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the Brief of Appellee by mailing the original of said document and three (3) copies thereof via United States Mail to the following:

Kathy Gillis, Mississippi Supreme Court Clerk
P.O. Box 249
Jackson, Mississippi 39205-0249

THIS the 24th day of May, 2011.


ROBERT T. JOLLY