IN THE SUPREME COURT OF MISSISSIPPI

FRANKIE CONKLIN APPELLANT

vs. CAUSE NO. 2010-TS-01642

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

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

John H. Cox, III (MSB [redacted])
Cox Law Office, PC
PO Box 621
Greenville MS 38702-0621

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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 Justice of this Court may evaluate possible disqualification or recusal.

Appellant: Frankie Conklin

Appellant's Counsel: John H. Cox, III, MSB 7767
Cox Law Office PC
PO Box 621
Greenville MS 38702-0621
Phone: 662-332-2000
Fax: 662-332-2067

Jeffrey S. Rosenblum
Rosenblum & Reisman PC
80 Monroe Avenue, #950
Memphis TN 38103
Phone: 901-527-9600
Fax: 901-527-9620

Appellee: Boyd Gaming Corporation dba Sam's Town Casino

Appellees' Counsel:

Scott Burnham Hollis, MSB 10817
Robert T. Jolly, MSB 102241
Watkins Ludlam Winter & Stennis PA
6897 Crumpler Boulevard, #100
Olive Branch MS 38654
Phone: 662-895-2996

Other Interested Parties:

Honorable Kenneth Thomas
Circuit Court Judge, Retired
PO Box 548
Cleveland MS 38732

Respectfully submitted this 8th day of July, 2011.

John H. Cox, III

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF FACTS

Appellant Frankie Conklin ("Appellant" and "Mr. Conklin") relies on the facts as summarized in his initial Brief and makes reference to his Statement of the Case and Statement of Facts and will not attempt to restate that in this brief (Appellant Brief pp. 6 - 13). In its Statement of the Case and Statement of the Facts, Appellee Boyd Tunica, Inc. ("Appellee" and "Defendant Boyd"), in many ways, misconstrues the actual record in this case and in several areas adds its own interpretation of documents in the record without any factual support. Appellant must address several of these instances.

Throughout its brief, Defendant Boyd makes statements that are simply not supported by the medical records in this case, or any portion of the record for that matter, and those alleged facts should be disregarded under Rule 28 of the Mississippi Rules of Appellate Procedure. For example, Defendant Boyd begins by stating that Mr. Conklin "knowingly, intentionally, and deceitfully concealed the truth about the nature of his cellulitis." This is simply untrue and improper for Appellee to state that as a matter of fact, especially without any reference to the record to support such a bold statement (Appellee Brief, p. 7). Appellant would add that there was never a finding or any evidence in the trial court order dismissing this case that Mr. Conklin "knowingly, intentionally, and deceitfully" did anything (R. 175 - 178). In fact, it is Mr. Conklin's contention in his Brief that the trial court respectfully committed error by not making a finding as to motive as is required by this Court (Appellant Brief, pp. 29 - 31). Mr. Conklin further submits that the trier of fact, a jury in this case,

should have the responsibility to determine Mr. Conklin's motives as to whether he was forgetful, misunderstood the questions, or did not completely reveal all knowledge of his medical history, but this is not a matter to be decided by a judge as a matter of law. Mr. Conklin should be allowed his day in court, and that is what he is asking this Court to do.

Appellee Boyd continues to misstate the facts when stating that Mr. Conklin did "experience cellulitis in his right leg prior to the subject fall and attempt[ed] to conceal the truth from his doctor, Boyd, and the Trial Court" (Appellee Brief, p. 7). The undisputed fact is that Mr. Conklin did not have knowledge of any prior experience with cellulitis. There is no proof in the record that Mr. Conklin ever was provided with any "diagnosis of cellulitis" by anyone at the Emergency Room on August 9, 2005. Mr. Conklin submits that a notation in the records from an emergency room does not necessarily reflect that the patient was provided with this information. Mr. Conklin states that, throughout Appellee's Brief, counsel for Appellee inserted imagined facts of how Mr. Conklin would have provided to and received information from his healthcare providers and how the medical records were created. Not a single record relied upon was introduced through oral testimony or an exhibit. Appellee chooses certain words in medical records and somehow reaches the conclusion that Appellant himself was actually aware of the verbiage used in the records as well as their meaning. Mr. Conklin is simply shocked that Defendant Boyd would argue a case should be dismissed based on words circled or scratched through without any testimony as to whether the markings were significant or haphazard.

In its Statement of Facts, Defendant Boyd continues an attempt to mislead this Court with its interpretation of the facts and continues to insert statements that are not supported by the record or truth whatsoever. Defendant Boyd states that Mr. Conklin "reports to Dr. Latif that he had cellulitis of his lower extremity" and was treated in the emergency room (Appellee Brief, p. 8). There is nothing in the record that supports Appellee's contention. To the contrary, the proof in the record shows, through the testimony of Dr. Kashif Latif, that he does not "remember at this time whether [he] obtained this history from Mr. Conklin or whether [he] learned about this diagnosis of cellulitis from the records themselves, but [he] can state that [he] saw no signs of any cellulitis or any type of infection for that matter in his lower right extremity on September 22, 2005, when [he] saw him" (Affidavit of Latif (made part of the Supplemental Record by this Court's Order dated June 3, 2011, and Appellant's Excerpt of Supplemental Records filed contemporaneously herewith). Clearly, there is at least a disputed fact as to how Dr. Latif learned of any prior lower extremity issue suffered by Mr. Conklin.

Mr. Conklin is completely taken aback by Appellee's creation of an event on October 20, 2005, from which Mr. Conklin suffered from any problem with his right leg (Appellee Brief, p. 8). Defendant Boyd has taken a medical record dated December 20, 2005, that is hardly legible and which was arguably never properly placed before the trial court, and somehow interpreted a handwritten line that appears to read "cellulitis–RLE" and possibly "2 months" and manages to create an event that occurred two months prior to

December 20, 2005, in an attempt to mislead this Court to believe that Mr. Conklin had suffered from cellulitis for two months prior to the accident. There is simply no support to this statement. Defendant Boyd continues to blatantly misconstrue the facts by creating its own interpretation of medical records. On a record titled "Emergency Physician Record," Defendant Boyd created a "fact" that Mr. Conklin "circled" certain portions of the record and filled it out (Appellee Brief, p. 8). Defendant Boyd then, without any testimony from a keeper of records or the physician who presumably completed this form, finds significance in random words that are circled, such as "similar symptoms previously" which noticeably does not list any previous symptoms suffered by Mr. Conklin. All that to say, Defendant Boyd has grossly misinterpreted the facts and unfairly added to the record without any proof and support.

Defendant Boyd continues its misleading statement of facts in its recitation of the litigation history in this matter. Defendant Boyd states that Mr. Conklin "refused to provide the names or documents of any health care provider that previously treated [him] for any medical conditions to his right leg" (Appellee Brief, p. 9). This again could not be further from the truth. There is absolutely no support in the record that Mr. Conklin "refused" to provide any information during the discovery process of this matter. As argued and supported throughout his Brief, Mr. Conklin in fact provided information regarding his healthcare providers and agreed to provide and did provide Defendant Boyd with an unlimited medical authorization which was not necessarily a requirement of discovery. Mr.

Conklin was under no obligation to do this but had absolutely nothing to hide and voluntarily executed a HIPAA-compliant medical release form. Defendant Boyd utilized the release and obtained all records it desired.

Without question, Mr. Conklin suffered with discomfort (swelling, etc.) in his leg in August, 2005, while flying from Los Angeles to Memphis (R. Vol. 1, pp. 133 - 135). When asked about whether he had "any injuries, ailments, problems, and conditions of any nature whatsoever" in the "body parts," he claims to be injured, Mr. Conklin completely forgot about that incident. Appellant points out that the incident on the flight and his hospital visit to address that issue was approximately four years prior to responding to interrogatories. Then, armed with the medical records which Mr. Conklin freely provided to Defendant Boyd, on March 3, 2010, at his deposition, counsel for Defendant Boyd asked him if his interrogatories were accurate, and he said they were. Whereas Mr. Conklin had forgotten about the incident, Defendant Boyd was well aware of the incident as it has obtained records with Mr. Conklin's full cooperation.

In response to any assertions that he was not completely forthcoming in responding to discovery requests, Mr. Conklin points out that the incident in August, 2005, was not something fresh on his mind and again was an incident that he believes was very different from the injuries and infection he suffered as a result of the December 10, 2005, incident at the casino.

Defendant Boyd makes many other assertions in its facts that are not supported in the record. Without any support, Defendant Boyd states that there are "inaccuracies and falsehoods" in Mr. Conklin's affidavit filed in the trial court and attempts to contradict Mr. Conklin's statement that he did not understand what the term cellulitis meant until after the Motion to Dismiss was filed by Defendant Boyd (Appellee Brief, p. 9). Mr. Conklin reiterates that there is no proof that he knew what cellulitis was prior to the motion other than the uncontroverted statement in his affidavit. Further, Mr. Conklin points out that he is not a physician and does not claim to have any medical education or training. Additionally, Mr. Conklin states that he had never been provided with a diagnosis of cellulitis, and those facts are not disputed in the record (R. Vol. 1, pp. 133 - 135). Again, with regard to additional facts and in response to Defendant Boyd's statement of facts, Mr. Conklin makes reference to his Statement of Facts, pp. 7 - 13 of his original Brief.

ARGUMENT

Defendant Boyd begins its argument by characterizing Mr. Conklin's conduct in this matter as "egregious" without any support or basis for such a statement (Appellee Brief, p. 10). Defendant Boyd making a statement does not make it so, and, again, there is no reference to the record or any mention of how this statement is supported by the underlying decision of the trial court. Never was there any conduct that rose to the level of egregiousness in the record of this case, and Mr. Conklin submits that there was no pattern of willful and intentional misrepresentations on his part in the discovery response.

Defendant Boyd then attempts to argue that this Court is to ignore the Order of the Trial Court which clearly relies upon *Gilbert v. Ireland*, 949 So.2d 784 (Miss. App. 2006) and Rule 37 of the Mississippi Rules of Civil Procedure in its Order Dismissing this matter (R. 175 -178; Appellee's Brief, p. 11). Mr. Conklin clearly argued in his original Brief that the standard of review is abuse of discretion and that the trial court abused its discretion in dismissing this case and in relying upon Gilbert and Rule 37 of the Mississippi Rules of Civil Procedure. The case law relied on by Mr. Conklin in his original Brief clearly articulates the proper standard for review and is argued throughout Appellant's Brief. Appellant will not attempt to recite every point made in his original Brief to argue that the trial court abused its discretion when dismissing this case. Defendant Boyd clearly does not seem to recognize that dismissal of an action for a discovery issue should be used in the most extreme of cases and that it is to be the last resort of the court. *See Tinnon v. Martin*, 716 So. 2d 604, 611 (Miss. 1998); *Pierce v. Heritage Properties*, 688 So. 2d 1385; also citing *Hapgood v. Biloxi Reg. Med. Center*, 540 So. 2d 630, 634 (Miss. 1989); *Batson v. Neal Spelce Associates, Inc.*, 765 F. 2d 511, (5th Cir. 1985).

Appellant's case is clearly distinguishable from the authority that Defendant Boyd cites in support of its position that this case should be dismissed. Defendant repeatedly relies upon *Pierce* for support and authority that the trial court in this case did not abuse its discretion in dismissing this case. As is repeatedly stated in Mr. Conklin's original Brief, there was no pattern or repeated intentional misrepresentation by Appellant. Mr. Conklin

simply forgot about one instance of previous treatment to his leg prior to the December, 2005, fall at the casino, which occurred approximately four years prior to him receiving written discovery requests and approximately five years prior to providing his deposition, unlike the cases cited by Defendant Boyd. There was not a repeated pattern of issues with Mr. Conklin's leg. Mr. Conklin admits that some of his discovery responses were not complete, but he clarifies in his affidavit that he did not understand what cellulitis was and that he never was informed of any cellulitis or infection in the subject leg. Moreover, every single allegation about Mr. Conklin not completely responding to discovery answers concerns (1) a single event; (2) which occurred many years before being asked; (3) which Mr. Conklin understandably forgot about; and (4) was not related to or even similar in nature to the wounds he suffered when he fell at Sam's Town Casino. While Mr. Conklin's failure to remember might be the subject of impeachment at trial, Mr. Conklin sincerely hopes that this Court will agree that his failure to recall a single medical issue numerous years ago is a proper basis for dismissal of his complaint.

Prior to any depositions having been scheduled, Mr. Conklin signed a HIPAA authorization, which he was not legally required to produce, and without any objection, in an attempt to fully and completely cooperate with Defendant Boyd's discovery requests. Defendant Boyd had the records prior to any depositions being scheduled and very early in the discovery process. Defendant Boyd asserts that Mr. Conklin failed to produce any documents in response to a request for documents in his possession relating to prior treatment

to his leg (Appellee Brief, p. 14). That is a completely untrue statement. Mr. Conklin produced medical records in his possession and provided a HIPAA-compliant form for those that were not. In fact, one of the records upon which Defendant Boyd relies in support of its argument that Mr. Conklin was a liar and a fraud is a record that Mr. Conklin produced in response to Defendant Boyd's requests for production, namely the emergency room record dated December 20, 2005 (*See* R. Vol. 1, p. 83). Mr. Conklin again submits that his willingness to sign a HIPAA authorization is evidence that he was not trying to hide anything from Defendant and supports his position that he was attempting to disclose any previous treatment along with disclosing where he had treated in the past.

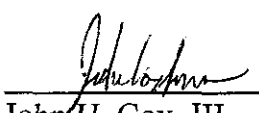
Defendant Boyd attempts to make the argument that Mr. Conklin had been suffering from an ongoing illness of cellulitis from August, 2005, through December, 2005, the time of the fall, and that Mr. Conklin had the same continual symptoms. Mr. Conklin has argued above and throughout that Defendant Boyd has misinterpreted the relevant medical records and in fact added "facts" that are not present in the record nor which can immediately be gleaned from the records. Appellant supplied an affidavit from his treating physician, Dr. Latif, in the trial court. As referenced above, Dr. Latif testifies that it is his opinion "that the possible cellulitis in [Mr. Conklin's] right leg in August of 2005, had nothing to do with the infections that he had in his right lower extremity in December of 2005, after he fell at the casino and [he] can provide this opinion within a reasonable degree of medical certainty" (Affidavit of Latif (made part of the Supplemental Record by this Court's Order dated

June 3, 2011). In other words, Dr. Latif has testified, through affidavit, that the cellulitis and injury suffered by Mr. Conklin after the fall was not related to anything that was possibly occurring with his leg prior to the fall.

CONCLUSION

For the foregoing reasons and for those set forth in Appellant's original Brief, Mr. Conklin respectfully requests that this Court reverse the trial court's dismissal of this matter and restore Appellant's case to the docket of the court for further proceedings and for such other relief to which he may be entitled. Mr. Conklin requests oral argument for this appeal due to the intense fact and legal issues.

Respectfully submitted,



John H. Cox, III
Jeffrey S. Rosenblum
Attorneys for Appellant, Frankie Conklin

CERTIFICATE OF SERVICE

I, John H. Cox, III, do hereby certify that on this 8th day of July, 2011, I have mailed, postage prepaid, a true and correct copy of the above pleading to the following:

Robert T. Jolley, Attorney
6897 Crumpler Boulevard, #100
Olive Branch MS 38654

Jeffrey S. Rosenblum, Attorney
80 Monroe Avenue, #950
Memphis TN 38103

John H. Cox, III