

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

BRIEF OF APPELLANT

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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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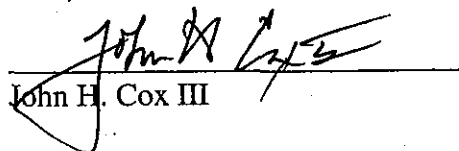
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Respectfully submitted this 1 day of March, 2011.



John H. Cox III

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STATEMENT OF ISSUES

- I. Whether or not Appellant knowingly provided false statements during his deposition and/or in answers to interrogatories propounded by Appellee and thereby committed a fraud upon the Court and prejudiced Defendant's ability to defend the action.
- II. Whether or not Appellant violated any Mississippi Rules of Civil Procedure which justifies a dismissal of Appellant's action pursuant to the legal authorities relied upon by the Circuit Court of Tunica County, specifically Miss. R. Civ. P. 37 and case authority: Gilbert vs. Ireland, 949 So.2d 784 (Miss. App. 2006).

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d/b/a SAM'S TOWN CASINO

APPELLEE

STATEMENT OF THE CASE

On December 9, 2008, Plaintiff Frankie Conklin filed a Complaint alleging negligence against Defendant Boyd Gaming Corporation d/b/a Sam's Town Casino ("Sam's Town" or "Appellee") for injuries he sustained when he fell while an invited guest at Defendant's business (R. 5). Sam's Town then filed an Answer to Plaintiff's Complaint on January 20, 2009, after which certain discovery took place (R. 12 - 17). On June 16, 2010, Plaintiff filed a Motion to Amend Complaint with a proposed Amended Complaint attached as an exhibit seeking leave of Court to amend complaint with a more definite statement of Plaintiff's allegations and damages including a specific recitation of injuries that included cuts and bruises to Plaintiff's right knee and ankle and infections to the knee and ankle (R. 18 - 23).

Appellee filed its Motion to Dismiss Pursuant to Miss. R. Civ. P. 37 with supporting exhibits and memorandum on July 8, 2010 (R. 24 - 105). The Motion to Dismiss filed by Appellee was heard on September 15, 2010, by the Honorable Kenneth L. Thomas, Senior Circuit Court Judge, in the Circuit Court of Tunica County, Mississippi.¹ On September, 22,

¹Judge Thomas retired from the bench on December 31, 2010.

2010, the trial court then entered its Order Granting Defendant's Motion to Dismiss Plaintiff's Claim (R. 170 - 173).

Appellant timely filed his Notice of Appeal of Order Granting Defendant's Motion to Dismiss together with his Designation of the Record on October 8, 2010, and this matter is now properly before this Court (R. 175 - 178).

STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

Appellant Frankie Conklin filed a Complaint in this cause as a result of an incident (slip and fall) that occurred while he was an invited guest at Sam's Town Casino in Robinsonville, Tunica County, Mississippi, on December 10, 2005 (R. 5, 6).

Appellant had been attending a cheerleader coaches' meeting. After the meeting, he proceeded to walk towards the front of the casino to catch a ride back to his hotel (R. 43). Upon entering the lobby area as Appellant was leaving the Sam's Town Casino, he slipped and fell in a puddle of water that had been on the floor for a significant period of time (R. 6, 43). Appellee Sam's Town had knowledge of the water on the floor yet failed to take any measures to warn and/or prevent Appellant from falling and injuring himself (R. 6). Appellant sustained an open wound injury to his right leg as a direct result of this fall, which developed into infection and abscesses and later required Appellant to be hospitalized and undergo surgery to treat his leg (R. 7). According to the incident report completed by Sam's Town Casino, Appellant suffered cuts and abrasions to his right leg (R. 146). One of Appellee's employees or agents bandaged Mr. Conklin's leg and placed him on a bench (R. 146). Appellant then went to the Tunica Resorts Medical Clinic on the night of the incident

for treatment and then returned to the hotel to rest for the night (R. 66). Appellant then sought treatment for his leg when his ankle and knee began to abscess, which he described as swollen with puss around it (R. 66). On or about December 20, 2005, Appellant was admitted to the St. Francis - Bartlett Hospital where he was administered IV antibiotics (R. 75). In January, 2006, he was readmitted to the hospital for continuing infections and pain in his right leg, and underwent a surgical procedure to drain the abscess that had developed as a result of this fall (R. 75).

Prior to this incident in August, 2005, Appellant had experienced temporary swelling/edema in his right leg with pain immediately after a lengthy airplane flight (R. 76, 79). Appellant presented to the Emergency Department at Saint Francis - Bartlett Hospital with concerns that he may have a blood clot or some other internal leg problem (R. 77). It should be noted that, according to the medical records from St. Francis - Bartlett Hospital during his visit in August, 2005, there was no external injury or wound to Appellant's leg and no signs of infection, drainage or blisters (R. 80). The doctors made a clinical impression (diagnosis) of leg swelling, but ordered a Venous Doppler study which produced the following diagnosis: "Varicosities, otherwise normal right lower extremity venous doppler study" (R. 76). Appellee has now accused Appellant of providing false statements and committing a fraud upon the Court, all based on one record that shows that a clinical impression as "cellulitis of Rt leg" (R. 80). As is shown in Appellant's affidavit which was filed in the trial court, Appellant was never told of this "impression" nor were the symptoms he was facing at that time the same as what he experienced following the fall at Sam's Town.

Appellant was forthright in the discovery process as to what knowledge he had about his injuries and his understanding of the history and nature of his illnesses. In Plaintiff's Responses to Defendant's First Set of Interrogatories No. 15, Appellant, with assistance from his attorneys, described the body part and nature of injuries he sustained as a result of the incident:

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 (R. 47).

In Appellant's response to an Interrogatory regarding prior physical injuries and problems relating to the body parts that were injured as a result of the accident, Appellant disclosed more information than was asked for and stated: "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. 47). Appellant was further forthright and compliant in the discovery process as he signed an undated HIPAA-Compliant Medical Authorization allowing Appellee to obtain copies of his medical, psychological, and even employment records (R. 80).²

During the discovery process, Appellant gave deposition testimony wherein counsel for Appellee asked Appellant if his response to the interrogatories stated above is "still the

²Appellant points out that Counsel for Appellee was in possession of all Appellant's medical records pertaining to his medical history of August, 2005 ER visit during the summer of 2009 at the time counsel deposed Appellant and one of his experts, Dr. Margarita Lamothe

case,” and Appellant replied “Yes” (R. 62). Counsel for Appellee did not follow up with any other questions nor have they ever disputed that Appellant still suffers from high blood pressure and diabetes. It is important to notice that Appellant went on to testify as follows:

Q. After you went to the Tunica Regional Clinic, kind of explain what happened next before you went back to the doctor.

A. After the visit that night, I went back to Horseshoe and went to bed. Then I remember – the competition was on Sunday. I was late because I slept in. I was late to the Sunday competition. That’s what I remember from the weekend.

Q. Well, what precipitated you going back to the doctor in regard to your right leg?

A. It started to abscess, the ankle did.

Q. Explain – I don’t know what that means.

A. I am sorry. I don’t either. I like that word. I think it was just – it started getting puffy and pussy in it around the knee area and the ankle area, and. . .

Q. So both the knee and ankle?

A. Yeah, and – from what I recall, yes.

Q. **So your knee and your ankle were beginning to abscess is the term you used and was pussy?**

A. Yes.

Q. Did it hurt?

A. Yes.

Q. And you went to the doctor?

A. Yes.

Q. Had you ever exhibited those type of symptoms before?

A. No. (Emphasis added.) (R. 66 - 67.)

Appellant did disclose his treating physicians who would be offered as experts at trial to testify as to their opinions relating to their treatment of Appellant (R. 42). One of those physicians was Margarita Lamothe, MD, who was also deposed (R. 71). Dr. Lamothe provided the following testimony regarding Appellant's injury after the fall and how it related to his medical history, especially dealing with his right lower extremity. Dr. Lamothe testified as follows in response to Counsel for Appellee's questioning:

Q. And then, 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 to be required to be hospitalized, let alone go to surgery, for leg infection prior to that fall (R. 73, 74) (emphasis added.)

Appellant filed an affidavit in opposition to the Appellee's motion to dismiss.

Appellant states in part as follows:

3. In early August, 2005, I was flying to Memphis from a trip to Los Angeles when I noticed swelling in both of my legs.

4. Several days after returning to Memphis, I went to the hospital to seek treatment for the swelling in my legs. There were no cuts, bruises, abrasions, or other scratches on my legs.

....

6. The medical professionals at the hospital were concerned that I may have blood clots, and that is the only discussion I remember regarding a possible diagnosis.

7. I do not remember any of the doctors, nurses, or healthcare providers consulting with me about any infection or possible infection in either of my legs. I only remember them discussing the swelling in my legs and possibility of clotting. I remember them discussing different diagnostic procedures to test for clotting. The hospital did perform a test to determine whether or not I had any blood clots in either leg.

8. I did not receive a copy of the medical records from the hospital regarding this hospital visit. Moreover, I did not read or review those medical records prior to giving my testimony at my deposition or verifying my responses to Defendant's interrogatories.

9. Prior to my fall at the Casino on December 10, 2005, I had not suffered from any infection to either leg which accumulated abscesses and puss and/or required surgery or hospitalization.

10. I do not remember anyone mentioning the word "cellulitis" to me in at 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

that it described a condition of fatty tissue which I now know by the name of "cellulite".

11. 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 00133)

Of great significance to this entire review is the fact that the Appellant signed blanket medical authorizations for the Appellee to use in order to obtain his medical history prior to the accident complained of and that the Appellee had all the medical records concerning the ER visit of August 5, 2005 prior to depositions of the Appellant and the Appellant's expert medical doctor. Although the Appellee had the medical records, they claim that Appellant has willfully concealed the fact of lower leg pain from them.

This matter was not set for trial at the time Appellee's underlying motion to dismiss was heard by the trial court, and otherwise discovery was still ongoing. Appellant files this appeal contending that the trial court erred by dismissing this action on the basis that the Plaintiff prejudiced the Defendant's ability to defend the action by failing to disclose information regarding previous issues with his leg during his deposition and/or in answers to interrogatories propounded by Appellee.

SUMMARY OF ARGUMENT

I. The Trial Court erred by finding that Appellant provided incomplete or inaccurate statements during his deposition and/or in answers to interrogatories propounded by Appellee and thereby prejudiced Defendant's ability to defend the action.

For purposes of this review, it is important to dissect the order to dismiss entered by the trial court. In that Court's analysis, the judge found that "the Plaintiff failed to disclose relevant information concerning previous issues involving the very leg that is the subject of this lawsuit". As previously indicated, the Appellant in this case signed blanket medical authorizations requested by the Appellee. The Appellee thereafter sent these medical authorizations to approximately ten medical providers in the Memphis area, all of whom had been disclosed by the Appellant to the Appellee in answers to interrogatories. It was from these medical authorizations that the Appellee obtained copies of the medical records of August 5, 2005 which indicated that the Appellant had had a temporary medical issue of leg swelling and pain that was treated in the emergency room of Saint Francis Hospital-Bartlett. Although the Appellant did not think that this leg swelling related in any way to the leg infections which occurred after the fall at the casino, the trial court is simply incorrect when it says the Appellant failed to disclose relevant information concerning the previous issue. Had he not signed the medical authorizations and had the Appellee found this medical condition or record through some other source, then the finding of the trial judge would have been correct. That simply did not happen in this case.

The Court also found that the Appellant's failure to disclose any previous issue with the leg in question "stretches the bounds of credibility" and "regardless of the Plaintiff's motives in failing to disclose his previous right leg ailments", that the Appellees have been prejudiced in their trial preparation and that the posture of the litigation has been changed. Unlike previous case law where the trial judge and/or appellate court finds without question

that a Plaintiff/Complainant gave false answers or testimony, the trial court in this case simply has no direct proof of a “false” answer. According to prior case law, “where discovery response was ambiguous and where it was “not clearly established that [Plaintiff] made false statements in discovery and it was certainly not established that the Plaintiff had engaged in a pattern of such false responses, dismissal of the action is not appropriate.”

Completely lacking in the Appellee’s proof and/or argument to the trial court is any evidence indicating that the Appellee’s trial preparation has in any way been prejudiced.

II. The Trial Court erred by dismissing Appellant’s action pursuant to Miss. R. Civ. P. 37 and *Gilbert vs Ireland*, 949 So. 2d 784 (Miss. App. 2006), especially when less harsh sanctions were available if necessary.

As argued hereinafter, a dismissal of an action for failure to discharge discovery obligations is the most draconian of sanctions that can be applied in our civil justice system. In dismissing the Appellant’s claim, the trial court failed to apply the criteria required of its consideration in reaching the decision for dismissal, namely:

- (a) Failure to comply with court orders as a result of willfulness or bad faith, as opposed to an inability to comply;
- (b) The deterrent value of the “death penalty” allowed by Rule 37 cannot be substantially achieved with less drastic sanctions;
- (c) The moving party has been prejudiced by the failure of the responding party to provide discovery;
- (d) The failure is grounded in confusion or misunderstanding of the Court’s order;
- (e) The discovery violation is not attributable to the party himself.

In this case, it is clear that the Appellant's answers to interrogatories and deposition responses were more likely the result of confusion and ambiguity caused by the questions of Appellee's attorneys than of a willful intent to commit perjury in order to conceal some past medical history. Not only does the proof fail to indicate an intentional nature of alleged violations by the Appellant, there is no pattern which would indicate a willful intent to conceal relevant facts concerning the Appellant's claim. In relying upon *Gilbert vs Ireland*, the trial judge, who was the subject of the reversal in *Gilbert* has compared apples and oranges with respect to the facts of the two cases. The facts of the *Gilbert* and the case at bar are as different as day and night and are hardly comparable. The Appellant would respectfully suggest that the Trial Court committed a clear error of judgment in the conclusion it reached by failing to weigh relevant factors in a proper manner.

ARGUMENT

I. The trial court erred by finding that Appellant provided incomplete or inaccurate statements during his deposition and/or in answers to interrogatories propounded by Appellee and thereby prejudiced Defendant's ability to defend the action.

Appellant filed this lawsuit for the injuries he sustained to his right leg as a result of a fall at Sam's Town Casino on December 10, 2005. Throughout this action, Appellant has claimed that he suffered injuries to his right leg that led to a severe infection requiring extensive medical treatment, including a surgical procedure in January, 2006. Appellant has claimed that his injury as a result of this accident was an infection and abscess of lower right leg. Although medical records use the term "cellulitis" in describing the swelling of his

lower extremities, as Appellant stated in his Affidavit filed in response to the motion to dismiss, he did not know what the term “cellulitis” meant until Appellee filed its motion to dismiss. Mr. Conklin confused the condition of “cellulite” with the term “cellulitis”. There is an important distinction between what Appellant knew about his medical condition versus what terms medical providers have used in records to describe his condition, care and treatment.

Appellee filed its motion to dismiss claiming that Appellant committed perjury and fraud upon the Court by knowingly and intentionally giving false statements through his deposition testimony, interrogatory responses, responses to requested documents, and disclosure of his medical history to his own healthcare providers. Appellee went on to claim that Appellant was attempting to “obfuscate discovery and subvert the judicial process” which prejudiced Appellee Boyd by not disclosing the he had suffered from cellulitis prior to the accident. Specifically, Appellee Boyd asserts that Mr. Conklin did not disclose that he had been diagnosed with cellulitis and treated for it at St. Francis Hospital-Bartlett in August 9 and 10, 2005. First, Appellant would submit that the medical records from this hospital visit in August 2005 only show that Mr. Conklin, after undergoing a Doppler Study, was diagnosed with swelling in both his left and right leg with varicosities and edema. He was not diagnosed with cellulitis and was never told by a healthcare provider that cellulitis was an issue. Additionally, Mr. Conklin did not receive a copy of the medical records from St. Francis Hospital Hospital-Bartlett until counsel for Appellee provided them to him. Mr. Conklin and his counsel had ordered medical records from Appellant’s healthcare providers

starting with the date of the accident and injury in December, 2005, and going forward. Appellant did not knowingly and intentionally provide false information in his testimony or discovery responses and especially did not withhold any requested information.

Mr. Conklin's Responses to Defendant's Discovery Requests

Appellant has been forthright throughout this case and has openly provided information to Appellee Boyd Gaming Corporation, especially concerning any medical treatment he has received both before and after the subject accident. It is important to first note that Appellant Conklin has signed numerous medical authorizations requested by Appellee so that they might seek out his entire past medical history. Appellant has never attempted to conceal or otherwise deny Appellee access to any records or documents dealing with any of his medical treatment, whether prior or subsequent to the accident in December 2005.

Appellant responded to interrogatories and requests for production of documents of Appellee, by and through his attorneys, and provided the information that he remembered and knew at that time. With respect to his answer to Interrogatory No. 15, Mr. Conklin indicated that he had injured his right leg, including numerous abscesses (cellulitis). This response was taken from the medical records of Mr. Conklin. With regard to Interrogatory No. 16, it specifically referred to the body parts claimed by Mr. Conklin to have been injured and that any physical injuries, problems or conditions for five years prior to the date of injury be disclosed. This case concerns Mr. Conklin's injury to the lower right leg and a subsequent condition of severe infection caused by the introduction of bacteria into open cuts suffered

in the fall. Although the term "cellulitis" has appeared in several medical records for treatment received after the accident in December 2005, Appellant honestly confused this term with a condition of fatty tissue ("cellulite") that exists in people who are obese and never associated the term with an infection prior to the issue being brought up in medical records and the motion to dismiss filed by Appellee. Most importantly, in responding to Interrogatory No. 16, there is a difference in Plaintiff's mind between a temporary swelling of the legs which dissipates within a few days, such as what he experienced in August 2005, and a severe leg infection that necessitates an extended hospitalization, surgery and treatment by hospitals and doctors. Nevertheless, Appellant did not intentionally or knowingly withhold any information in his answers and he at most made a mistake as to his previous conditions. As set forth above, Appellant and his counsel were cooperative throughout the discovery process in producing records requested from treatment subsequent to the injury and in signing any medical authorizations that Appellee asked to obtain records from before and after the accident. With regard to any argument that Appellant did not fully respond to any request for production of documents propounded by Appellee, Appellant would state that he produced all responsive documents and records in his possession and in his counsel's possession. Counsel for Appellant made it clear at the hearing on the Motion to Dismiss that it is customary for counsel for Plaintiff to only request records subsequent to the injury.

Mr. Conklin's deposition testimony

Appellant argues that he was truthful and answered the deposition questions posed to him by counsel to the best of his ability. Appellant would submit that while some of the

questions may have been confusing or convoluted, he still answered them based on the information he had at that time. Appellee urged the trial court that Mr. Conklin committed perjury through giving false testimony. However Appellant only gave answers concerning his knowledge at the time based on what he is claiming in the lawsuit.

Appellant urges this Court to look at an exchange between counsel for Appellee and Mr. Conklin during his deposition regarding the injury for which he has brought the lawsuit. It is an example of how Appellee has tried to mis-characterize Mr. Conklin and to even confuse Mr. Conklin. The sequence is as follows:

Q. Were you seen at St. Francis Hospital, in December of 2005, in regards to your, for lack of a better term, I'll say leg infection?

A. I would say it was a couple of weeks after the accident, but as far as dates go I'm not - -

Q. Well, how long - -

A. - - positive

Q. How long after the accident did the infection begin to manifest?

A. I don't recall exactly. I just remember going and getting treatment for it.

Q. Well, there's about a two week gap between the fall and when you went to get treatment, right?

A. I would say it was, yeah, at least ten days or so.

Q. But you don't remember when the infection began to exhibit signs that it was evident?

A. No, I don't recall.

Q. During that period, between your fall and when you went to the hospital in regards to the leg infection, had you kept the sites bandaged?

A. I kept them cleaned and four by four'd.

In the above exchange, it becomes more evident the distinction being made between Appellant and counsel for Appellee as to a condition of leg swelling and redness in his legs for which Appellant was seen in the hospital in August 2005 and an infection to the leg with abscesses and puss for which Appellant received treatment in December 2005 and January 2006. Another exchange during the deposition shows how Mr. Conklin may have been confused in responding to the interrogatories propounded by Appellee, but the exchange reveals more clearly how Mr. Conklin misunderstood the questions and how Appellee is mischaracterizing Mr. Conklin's testimony to make it appear that he was not truthfully testifying and committing perjury and obfuscating discovery. The series is as follows:

Q. One last follow up. He was asking about problems with your leg since the accident, right, with the oozing and changing bandages?

A. Yes.

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

A. No.

Q. Or with your groin?

A. No.

Appellant would urge this Court to closely review this exchange and look at how counsel for Appellee asks Mr. Conklin a question about the "oozing and changing bandages", which Mr. Conklin associates with the severe leg infection he suffered as a result of the

accident, and then follows it up with a question about prior leg problems. It is easy to see how Mr. Conklin was simply recalling the question about the oozing and bandages when responding that he had not had any prior problems to his leg before the accident. Appellant would also submit that counsel for Appellee never asked Mr. Conklin a question about whether he had suffered from cellulitis prior to the accident nor did Mr. Conklin ever testify that he had not suffered from cellulitis prior to the accident. Mr. Conklin simply did not know what cellulitis was; however he knew that he had never suffered an injury and infection to his leg like the one he faced after the accident.

Mr. Conklin's medical history given to his physicians

In its motion to dismiss, Appellee argued that Appellant failed to reveal a past history of "cellulitis" to his treating physician Dr. Margarite Lamothe who also offered expert testimony in this case. Appellant would argue that there is no proof in the record that he was ever formally or informally diagnosed with "cellulitis" and that even if he were, he was never told of any such diagnosis. Appellant would submit that the initial mention of cellulitis prior to the accident in December 2005 appears in a record at a hospital emergency department in August 2005 and is only an impression of a physician. The final diagnosis for his leg pain was later determined to be varicosities. Appellant would argue that the real question for this Court and what the trial Court failed to consider is whether or not Mr. Conklin intentionally failed to disclose to his treating and expert physician his history of one time lower extremity swelling in both the left and right leg for a period of no more than a week in August 2005. Appellant would point out that the response of Dr. Lamothe to a question of any previous

incident of cellulitis for Mr. Conklin is quite telling. Dr. Lamothe testified in her deposition in part as follows: "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." This testimony emphasizes the crux of what Appellant and his experts believe to be the main injuries he has suffered as a result of the accident in December 2005; namely a severe leg infection with abscess that required a significant hospitalization and surgery and not just a swollen leg that was warm to the touch. Appellee would have this Court believe that the condition of cellulitis is the only thing that Appellant is claiming he suffered as a result of the accident. Appellant did not even know what cellulitis was until the motion to dismiss was filed, but he did know that he has suffered from a severe leg infection for which he received treatment for from Dr. Lamothe.

In providing an analysis and application of legal principles to factual considerations, Mississippi Civil Procedure: Chapter 10- Sanctions for Violations of Obligations in Discovery (§ 10:10 Dismissal of action as a sanction for discovery violations) provides in part as follows:

"However, dismissal of an action for providing a false answer in discovery is not appropriate where the discovery response was ambiguous and where it was "not clearly established that [Plaintiff] had engaged in a pattern of such false responses." Even in a case where the court has found a party's dereliction alone sufficient to merit dismissal, it has held that an opposing party's own dilatory tactics and bad faith may be a mitigating factor making dismissal unwarranted. Likewise, where the disobedient party is unable rather than unwilling to comply with discovery, or where the complaining party cannot demonstrate prejudice caused by the disobedient party's discovery failures, a sanction of dismissal should not be granted by a Mississippi trial court.

II. The trial court erred by dismissing Appellant's action pursuant to Miss. R. Civ. P. 37 and Gilbert vs. Ireland, 949 So.2d 784 (Miss. App. 2006), especially when less harsh sanctions were available if necessary.

Mississippi Civil Procedure: Chapter 10- Sanctions for Violations of Obligations in Discovery (§10:10 Dismissal of action as a sanction for discovery violations) also provides in part as follows:

“The most draconian of sanctions is the dismissal of an action for failure to discharge discovery obligations. Not surprisingly, criteria for imposing this sanction are more strict than the imposition of lesser sanctions. The Mississippi Supreme Court has stated that only under the “most extreme circumstances” should a trial court dismiss an action for failure to comply with discovery obligations. ‘Dismissal with prejudice typically is appropriate only if the refusal to comply results from willfulness or bad faith and is accompanied by a clear record of delay or contumacious conduct’. Over a series of cases, the Mississippi Supreme Court has fashioned criteria for determining whether a trial court may dismiss an action as a sanction for violations of discovery obligations. The criteria, which were patterned after federal standards in this area, include whether:

- the failure to comply results from willfulness or bad faith, as opposed to an inability to comply
- the deterrent value of Rule 37 cannot be substantially achieved with less drastic sanctions
- the discovering party has been prejudiced by the failure of the responding party to provide discovery
- the failure is grounded in confusion or a misunderstanding of the court's order
- the party is blameless and the failure to comply is due to actions of counsel.

Appellant would submit that the trial court erred in relying upon Miss. R. Civ. P. 37 and Gilbert vs. Ireland, 949 So.2d 784 (Miss. App. 2006) in dismissing Appellant's action. In reviewing Miss. R. Civ. P. 37, the only portion of that rule that Appellant believes could be applicable to the ruling of the Court would be Miss. R.Civ. P. 37(e) which provides in part as follows:

[T]he 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. . . (ii) otherwise abuses the discovery process in seeking, making or resisting discovery. (emphasis added).

Appellant would first argue that this Court should reverse the trial court and find that the sanction of dismissal was not justified in this case. Additionally, Appellant would submit that the trial court erred in relying upon Miss. R. Civ. P. 37. in dismissing this case as this rule in section (b) requires a prior court order for the sanctions that were requested by Appellee and awarded by the trial court. There was no such court order in this case and there was certainly no discovery order violated by Appellant.

A trial court should only dismiss a cause of action for a discovery issue under the most extreme circumstances. *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).

A dismissal of an action with prejudice as a result of a discovery violation is reviewed under the abuse of discretion standard. A court reviewing the dismissal of an action should first ensure that the correct legal standard was applied by the trial court... If it is determined that the correct legal standard was applied, then the Court should then consider “whether the decision (to dismiss) was one of several reasonable ones which could have been made. *Barrett v. Jones, Funderburg, Sessums, Peterson & Lee, LLC*, 27 So. 3d 363, 370 (Miss. 2009).

According to Pierce v. Heritage Properties, Inc., 688 So.2d 1385, 1389 (Miss. 1997) the Mississippi Supreme Court, in adopting the language of a U.S. District Court decision, stated as follows:

The District Court agreed with the Defendants that the **focus must be on the intentional nature, as well as the pattern**, of the Plaintiff's conduct, which included deliberately providing false responses in three discovery mechanisms: the answers to the interrogatories, the request for production of documents, and the deposition testimony. (Emphasis added).

The Court went on to state as follows:

In this instance, Pierce's failure to comply was a result of willfulness. Pierce constantly obstructed the progress of the litigation by filing admittedly false responses to various discovery requests and by swearing to false testimony in depositions. The Circuit Court judge found that some of the answers provided by Pierce were 'manifestly false'. Pierce's conduct constitutes bad faith."

The facts in Pierce are radically different from those that are the basis of the trial court's order dismissing the case at bar. In Pierce, the Plaintiff from the very outset denied that there were any eye witnesses to the event. In fact, the Plaintiff was apparently in bed with a man at the time that the ceiling fan in question fell and injured her. Throughout discovery, in her deposition and through the first trial of the case, the Plaintiff Pierce denied that there were any eyewitnesses to the event. Subsequent to the first trial and prior to the second trial being conducted, Pierce's perjured statements were discovered by the Defendant and brought to the attention of the Court.

The present case is vastly different from Pierce in that there was no pattern of willful and intentional misrepresentations by Appellant. Further, there was no finding in the trial court that any of Mr. Conklin's responses or testimony were "manifestly false". Appellant

submits that in fact it is uncontradicted that Mr. Conklin never had knowledge of the prior "cellulitis" issue that Appellee's counsel suggests Mr. Conklin had knowledge of at the time he responded to interrogatories and gave his deposition testimony. Nevertheless, Appellant would argue that the trial court erred in dismissing this case without a finding that any incorrect information given was said or done intentionally or willfully by Mr. Conklin. Appellant submits that if there is a discrepancy in testimony, this is the type of matter that is left best for cross-examination and for impeachment, not dismissal of a case.

Appellant would submit that the trial court erred in dismissing this case without a finding that Mr. Conklin deliberately or intentionally gave false testimony or withheld information. Appellant would submit that the only way that dismissal could have been granted based on the current state of the law in this state was if the trial court concluded the following:

1. That Mr. Conklin, prior to December 10th, 2005, had a condition known as cellulitis which caused his legs to be infected to some extent and that he received treatment for that condition.
2. That Mr. Conklin knew of the condition of his legs (i.e. that his infected leg in December, 2005, and January, 2006, was equivalent to the swelling of his lower extremities in August, 2005).
3. That Mr. Conklin deliberately and, with intention of lying under oath, failed

to answer interrogatories truthfully; that he or his attorneys concealed medical evidence which would have revealed a pre-existing condition which had been knowingly and deceitfully hidden from Defendants.

4. That Mr. Conklin knowingly and intentionally lied and misrepresented the truth in response to questions of counsel at the deposition.

Appellant would respectfully submit that the trial court did not make a finding that included all of this information and that the trial court should be reversed on this matter. The medical records show that Mr. Conklin presented to the St. Francis Hospital-Bartlett emergency room on August 9 and 10, 2005 with a history of swelling and redness in both lower extremities suffered as a result of a long plane ride two days earlier. The initial impression of the physician was that of cellulitis in the legs. However, as a followup to an initial clinical diagnosis, that physician ordered a radiology examination known as a US Venous Doppler Study in order to determine the cause of swelling and to determine whether there were blood clots. The testing was done because there was not an exact diagnosis when Mr. Conklin first appeared at the hospital. The findings/impression from the study revealed that Mr. Conklin was suffering from varicosities and that otherwise the lower extremity study was normal. Even if cellulitis was mentioned as a possible diagnosis in the records, there is absolutely no evidence in the record that Mr. Conklin was ever told that he had a condition known as cellulitis and never told that he had any infection in his leg. Even assuming for purposes of argument that Mr. Conklin did have some type of cellulitis in August 2005, there is no proof that he had the condition at the time of the fall on December 10, 2005.

In considering motions to dismiss based upon Miss. R. Civ. P. 37 (and Fed. R. Civ. P. 37), Courts have uniformly stated that dismissal with prejudice (the death penalty) is a sanction of last resort. See *Batson v. Neal Spelce Associates, Inc.*, 765 F. 2d 511, (5th Cir. 1985), *Pierce*, 688 So.2d 1391, *Scoggins v. Elsey Beverage, Inc.*, 743 So. 2d 990, 996 (Miss. 1999). Appellant would submit that this case is not deserving of dismissal and this Court should reverse the trial court's ruling. The Supreme Court reversed a Circuit Court's dismissal where Defendant moved to dismiss based on what Defendant argued was Plaintiff giving false testimony in interrogatories. *Wood v. Biloxi Public School District*, 757 So. 2d 190 (Miss. 2000). In reversing the Circuit Court, the Court ruled as follows.

The school district notes that Woods was aware of the video surveillance at the time of the deposition, and it implies that Woods would not have been so forthcoming if he had not been aware of the surveillance. While this may or may not be true, the fact remains that the only discovery response which was contradicted by evidence at the hearing was one ambiguously worded response to one interrogatory question. Thus the present case is distinguishable from *Pierce* and *Scoggins* in that it was not clearly established that Woods knowingly made false statements in discovery and it was certainly not established that Woods had engaged in a pattern of such false responses.

...

The present case does not involve one of 'those rare instances where the conduct of a party is so egregious that no other sanction will meet the demand of justice.'

This Court finds that the alleged untruthfulness in Woods interrogatories, if any, does not constitute **a sufficiently egregious discovery violation such that 'no other sanction will meet the demands of justice'**. Therefore, the judgment of Harrison County Circuit Court is reversed, and the present case is remanded to the trial court for trial. *Wood*, 757 So. 2d at . (emphasis added).

This Court should follow this precedent and reverse the trial court because of the lack of willful and egregious conduct on behalf of Appellant. This matter should be remanded to the trial court for a trial.

This Court in T.K. vs. Simpson County School District, 843 So. 2d 312, 319 (Miss. Ct. App. 2003) reiterated that a dismissal of an action or the entry of a judgment as a sanction for any discovery violation is the most severe penalty and should only be used in the most egregious cases. “Sanctions that determine the merits of a case are only applied if no less drastic measure will protect the integrity of the judicial process and deter similar discovery violations and are generally applicable where the failure to disclose arose from a client’s own behavior.”

Appellant would submit that this Court only needs to look within the four corners of the trial court’s order dismissing this case to find that the criteria for such action was not followed or incorrectly applied. There was no finding that any actions by Mr. Conklin in discovery were “sufficiently egregious” to merit any other sanction, if necessary at all, other than dismissal. In fact, the trial court did not believe that it was even necessary to examine motives on the part of Mr. Conklin. The trial court states the following in the order of dismissal: “**Regardless of the Plaintiff’s motives** in failing to disclose his previous right leg ailments, his failure to disclose these previous conditions prejudiced the Defendant in its trial preparation and completely changes the posture of this litigation.” (emphasis added). The trial court did not apply the current state of the law in Mississippi which holds that the intent

and motive of the party is crucial in analyzing mistaken or wrong information provided during the discovery process.

CONCLUSION

A review of the Appellee's motion to dismiss, the Appellant's response, the exhibits to both motion and response and an analysis of the trial court's order can reasonably lead one to conclude the following:

(1) That based upon confusion and misunderstanding, the Appellant's answers to questions propounded to him in his deposition were incomplete but not willfully contrived with the design to mislead the Appellee's attorneys and to prevent them from discovering relevant information;

(2) The Appellant's answers to interrogatories which were prepared by his attorneys were based upon medical information in the possession of his attorneys at the time the answers were propounded. Subsequent to the Appellant's answers to interrogatories propounded by the Appellees, Appellees themselves came into possession of the medical records and evidence which were not in possession of the attorneys for the Appellant at the time the interrogatories were answered. With such information available to the Appellee's attorneys, there was no need to supplement requests for production of documents by providing the same medical records then already in the possession of the Appellees.

(3) There is no proof whatsoever that the Appellee's defense of this case has been prejudiced in any way. The only proof is that the Appellee had all of the medical evidence which it complains that the Appellant concealed from them at the time that it took

Appellant's deposition and the medical expert deposition but that the Appellee's attorneys chose not to cross examine the Appellant or his medical expert with the medical records which showed all information which they say Appellant failed to give.

(4) That the claim of the Appellant is one of personal injury resulting from a leg infection and abscesses requiring significant hospitalization and surgery; Appellant has never had infections, hospitalizations or surgery concerning his right or left leg prior to the fall at the Appellee's place of business on December 10, 2005.

Based upon the foregoing, the Appellant respectfully suggests that the trial court below committed a clear error of judgment in the conclusion it reached and failed to weigh all relevant factors according to the methodology set forth by the Mississippi Appellate Courts.

Finally, a reviewing court is not precluded from considering the conduct of a Defendant who is urging dismissal of the Plaintiff's action for their failure to abide by the discovery rules. In *Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So. 2d 1346, 1370 (Miss. 1990) the Court stated:

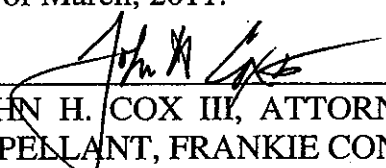
"However, in deciding to impose a drastic sanction as dismissal, the Defendant's own dilatory conduct may become a relevant and mitigating factor if deemed outside the realm of reasonableness and acceptability. ..."

Will this Court not 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 has concealed from them? How can the Appellee claim in good faith that its defense has been prejudiced by incomplete and inaccurate statements made by the Appellant

when the medical evidence clearly shows that the final diagnosis of the Appellant in the emergency room on August 5, 2008 was not cellulitis but varicosities?

The Appellant respectfully urges this Court to reverse the order of dismissal of the Circuit Court of Tunica County and to restore the Appellant's case to the docket of that Court.

Respectfully submitted this the 1 day of March, 2011.


JOHN H. COX III, ATTORNEY FOR
APPELLANT, FRANKIE CONKLIN

CERTIFICATE OF SERVICE

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

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This the 1 day of March, 2011.


JOHN H. COX III

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

CERTIFICATE OF SERVICE

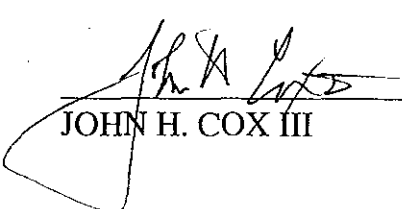
I, John H. Cox III, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the Appellate Brief to the following:

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

This the 1st day of March, 2011.



JOHN H. COX III