

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2010-CC-00046

EDWARD PAYTON

APPELLANT

VS

**BOOMTOWN CASINO AND
BALLY GAMING AND SYSTEMS**

APPELLEES

**ON APPEAL FROM THE CIRCUIT COURT OF
HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT**

BRIEF OF APPELLEE BOOMTOWN CASINO

**Oral Argument
Not Requested**

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STATEMENT REGARDING ORAL ARGUMENT

Both the Mississippi Gaming Commission and the Circuit Court wrote careful opinions that rejected Edward Payton's claim. The Circuit Court's opinion is worthy of being adopted as the opinion of this Court.

In contrast, Payton's eight-page brief wholly fails to take either those opinions or the record evidence into account.

This Court should affirm without oral argument.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record 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 the Supreme Court and/or the judges of the Court of Appeals may evaluate disqualification or recusal.

Edward Payton, appellant.

David C. Morrison, The Morrison Law Firm, counsel for the appellant.

Will Bardwell, Will Bardwell Law Firm, counsel for the appellant.

Boomtown Casino, appellee.

Bally Gaming and Systems, appellee.

Luther T. Munford, James W. Shelson, Phelps Dunbar LLP, counsel for appellee Boomtown Casino.

Kathryn H. Hester, Watkins, Ludlam Winter & Stennis, counsel for appellee

Bally Gaming and Systems.

A handwritten signature in black ink, appearing to read 'L. Munford', is written over a horizontal line.

Luther T. Munford

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INTRODUCTION

Both the Mississippi Gaming Commission and the Circuit Court listened patiently to Edward Payton's complaints and issued detailed, reasoned, and fact-specific opinions explaining why his contentions have no merit. The MGC Examiner's opinion is 16 pages long, not counting three denials of rehearing. CP 16-31. RE 2. The Circuit Court's analysis is 18 pages long, not counting an order sanctioning Payton. CP 418-435, RE 4.

Payton now comes to this Court with an eight-page brief that provides not a single cite to the record and wholly fails to come to grips with the findings against him at both the Commission and Circuit Court levels.

The Commission found on the evidence that Boomtown Casino acted properly, that Boomtown did not do anything to impair the Commission's immediate on-site investigation, and that the evidence the Commission gathered from the slot-machine's computer showed that the "jackpot" Payton was supposed to win was \$20. CP 24, RE 2. The Circuit Court found that the evidence before the Commission justified that conclusion. CP 434-435, RE 4.

This Court should affirm the Circuit Court per curiam on the basis of its well-reasoned opinion.

STATEMENT OF THE ISSUES

1. Whether the Mississippi Gaming Commission had “any evidence” to support its conclusion that Payton was entitled to a progressive jackpot of \$20, and no more.
2. If it did, whether Boomtown Casino either did or even could deny Payton “due process.”

STATEMENT OF THE CASE

1. Course of proceedings

After Payton complained, the MGC lab engineer looked at the computer board from the slot machine Payton used and determined that he was entitled to \$20, and nothing more. AEx 1 p. 119, RE 9.¹ On April 19, 2004, the executive director rejected Payton’s claim that he was entitled to more. CP 14-15.

The MGC then held a hearing that produced a 405-page transcript and a similarly-sized set of exhibits. The hearing examiner rejected Payton’s claim, CP 16, RE 2, and denied three rehearing requests. CP 301, Boomtown RE 1; CP 310, Boomtown RE 2, and CP 323, Boomtown RE 3. Payton duly appealed to the Circuit Court of Harrison County.

¹ This brief will cite the MGC administrative record exhibits as “AEx _____,” the MGC hearing transcript as “ATr _____,” the Circuit Court Clerk’s Papers as “CP____,” the Payton and Bally Gaming Record Excerpts as “RE _____,” and the Boomtown Casino’s Record Excerpts as “Boomtown RE _____.” The Circuit Court held a hearing but it was not an evidentiary hearing. See RE 3.

The Circuit Court received briefs and held a hearing in 2008. On December 1 of that year the court issued its opinion affirming the MGC. CP 418, RE 4. Payton filed a one-page motion for reconsideration. CP 436. On December 30, 2009, the court denied reconsideration and sanctioned Payton for rescheduling a hearing at the last minute. CP 556, RE 5.

Payton filed a timely notice of appeal from the order on reconsideration and sanctions “entered on this case on December 30, 2009.” CP 559, Boomtown RE 4 (emphasis omitted). That is the only order he has properly appealed. *See* Miss. R. App. P. 3 (c) (notice must designate judgment from which appeal is taken). He has not appealed from the December 1, 2008 order on the merits.

However, while his brief does not discuss either order, it says he is appealing because the Circuit Court “affirmed” the MGC. Brief of Appellant at 2. For that reason, Boomtown will treat this case as if he had appealed the order which “affirmed,” i.e., the December 1, 2008 order. *See Fletcher v. Lyles*, 999 So.2d 1271, 1279 (Miss. 2009).

It should also be noted, however, that his brief fails to comply with Miss. R. App. P. 28(a)(4), which requires that statements of fact in a brief be followed by “appropriate references to the record.” There are no such references in the brief, and that has been given as a reason to rule against an appellant. *See Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 534 (1st Cir. 2009). This Court need

not consider that sanction here because, when the correct standard of review is applied, this case is easily resolved on the merits.

2. Statement of facts

On February 14, 2004, Payton played the “Millionaire Blazing Sevens” slot machine at Boomtown’s casino in Gulfport. He hit triple sevens, which was supposed to activate a bonus feature. ATr 39. While the potential payout on the bonus feature was quite large, the average payout was approximately \$90. AEx 1 p. 123, RE 9.

The slot machine malfunctioned. Two Boomtown slot technicians and a supervisor tried to get it to work, but were unsuccessful. Boomtown promptly notified an on-site representative of the machine’s manufacturer, Bally Gaming and Systems, and a local MGC agent, Steve McComb. ATr 245-248, AEx 1 p. 5, RE 9. They arrived within two hours but neither they nor an MGC supervisor were able to get the machine to function properly.

The MGC then took custody of the machine’s computer board (whose integrity tape was intact), its machine entry automation card, exception logs, records from the slot data system, photographs, and videotape of the attempts to work the machine, CP 21-23, RE 2; ATr 179-180, 189, 192-193, 206, 226-227. The casino offered Payton an opportunity to pursue a substitute bonus by playing another machine until it hit the bonus feature, but he declined. ATr 262.

An examination by the MGC Gaming Laboratory of the machine's computer board revealed that, if the machine had functioned properly, Payton would have won a bonus of \$20. The laboratory's report gave reasons why it believed that figure was accurate. AEx 1 p. 123, RE 9.

At the MGC hearing, Payton offered testimony from Desmond C. Ladner who had worked for the MGC laboratory before it "involuntarily terminated" his employment. ATr 277-278, 358. Ladner admitted that he could not say that the \$20 bonus figure was false. *Id.* at 353. He said that the MGC laboratory reports were insufficient to show that proper testing had been done. *Id.* at 80, 348, 353. Payton, however, did not call anyone from the laboratory to testify and so did not put on any evidence that affirmatively showed the testing procedures were not correct.

The MGC hearing examiner found that the MGC had preserved relevant evidence, CP 21-23, RE 2, and credited the laboratory's finding that the bonus would have been \$20 if the machine had not malfunctioned. *Id.* at 24, 27. The examiner found no fault with Boomtown's attempts to get the machine to work. *Id.* at 30. The MGC accepted those findings, CP 325-26, and the Circuit Court found that the evidence supported them. See CP 419-423, RE 4.

The Circuit Court carefully detailed the facts and contentions, *id.* at 420-423, surveyed the case law, *id.* at 423-429, and concluded "[t]here is no evidence to suggest that [Boomtown, Bally, or the MGC] destroyed or disposed of any

evidence or failed to investigate this matter,” *id.* at 429. The court also considered Payton’s claims concerning discovery and the conduct of the MGC hearing and found Payton had not shown how any of his objections would have had an impact on the hearing examiner’s consideration of the issues. *Id.* at 433-434.

SUMMARY OF THE ARGUMENT

This Court has said it will affirm a decision of the MGC in a casino’s dispute with its patron if there is “any evidence” to support the decision. The evidence here is the MGC lab investigation and report. The report found Payton was not entitled to any more than \$20. It relied on the same kind of evidence that this Court has said is sufficient to support laboratory findings in cases like this one.

There is no due process issue in this case. Boomtown is a private party and so could not have violated Payton’s constitutional rights. It owed Payton a contractual duty, but it satisfied that duty. It offered him a chance for a bonus on a another machine, but he rejected that chance. If he had been able to play for the bonus on the machine that malfunctioned, he would have won only \$20. The MGC afforded investigation, a resulting investigative report, a hearing, and a written statement of reasons why Payton could not recover any more than that. This case is wholly unlike a case where critical evidence has been lost or destroyed by the casino. The MGC laboratory had all the evidence it needed.

ARGUMENT

I. This Court is to affirm the MGC's decision if "any evidence" supports it

This Court has previously described the process by which a gaming patron can resolve disputes with a casino. The casino notifies the MGC of the dispute, the MGC investigates, holds a hearing, and rules on the dispute. The losing party can then appeal to the Circuit Court whose review "is confined to the record on review." *Mississippi Gaming Comm'n v. Freeman*, 747 So.2d 231, 239 (Miss. 1999), citing Miss. Code Ann. § 75-76-171 (1991).

The Circuit Court's function is to review the evidence presented to the Commission and then affirm the Commission if there is "any evidence" to support its decision. *Id.* at 240; *Pickle v. IGT*, 830 So.2d 1214, 1220 (Miss. 2002) (same). That is the standard of review that applies to this case. *See also* Miss. Code Ann. § 75-76-171(3) (listing grounds for reversal).

Here the MGC laboratory report, AEx 1 pp. 119-124, RE 9, is evidence that squarely supports the MGC's ruling, as both the hearing examiner and the Circuit Court explained at length. This court has twice affirmed MGC rulings based on similar evidence.

In *Freeman*, as in this case, the MGC agent investigated the surveillance tapes, the machine entry access log, and the slot data systems computer report. They refuted the patron's version of events and showed that the patron had not won the jackpot. *Freeman*, 747 So.2d at 234.

In *Pickle*, “the MGC Gaming Laboratory determined and IGT confirmed that the actual result of Pickle’s game was a losing combination,” 830 So.2d at 1222. The court rejected the patron’s contention that this conclusion was unduly speculative. *Id.*

There is no meaningful distinction between the laboratory report here and the lab report in *Pickle* and the evidence examined in *Freeman*. It is sufficient to satisfy the “any evidence” standard. The Court need not go any further to affirm the MGC ruling. To the extent this Court should wish to go further, the Circuit Court’s opinion accurately surveys the case law and compares it to the facts here in a detail that need not be repeated here. CP 423-429, RE 4.

II. Boomtown Casino did not deny Payton due process

In a tortured attempt to bring this case within the holding of this Court’s controversial decision in *Grand Casino Biloxi v. Hallmark*, 823 So.2d 1185 (Miss. 2002), Payton claims that he was denied “due process.” There are multiple reasons why he has no such claim against Boomtown. Once again the Circuit Court’s detailed discussion of his claims is instructive. CP 418-434, RE 4.

First, Boomtown’s relationship with Payton is contractual. *Eash v. Imperial Palace of Mississippi, LLC*, 4 So.3d 1042, 1047-48 (Miss. 2009) (patron could not recover more than maximum stated on slot machine). If the MGC decided, based on the evidence, that Payton was only entitled to \$20, then that is the maximum Payton could ever expect to recover from Boomtown.

Put differently, Boomtown is a private party and not a state actor. As a private party it cannot violate anyone's "due process" rights. If the MGC somehow violated Payton's due process rights, that might be a basis for requiring another hearing or for a claim against the MGC. It is not the basis for a claim against Boomtown.

Second, Payton received all the process to which he was entitled. He was given a notice, an opportunity to be heard, and a two-day hearing. *See Pickle, supra*, 830 So.2d at 1223. His expert did not dispute that Boomtown, Bally's, and the MGC had followed proper procedures. Rather, he questioned whether those procedures were adequate for a defective machine. But those were questions to which he could provide no answers. ATr 348-353. It was perfectly reasonable for the MGC to accept the report from its own employees over the testimony of someone it had fired.

Finally, the Circuit Court carefully distinguished *Hallmark* in ways that Payton's brief does not refute. CP 423-25, RE 4. This is the court's comparison:

This case

Patron did not think he won.

Casino called in the MGC

MGC took custody of data

Video files saved

Hallmark

Patron saw jackpot flashing

Casino refused to call MGC

Casino took away parts of machine

Video destroyed when it was recorded over

Custom buffer report saved

Custom buffer report lost

MGC interviewed witnesses

MGC did not interview witness

Compare CP 423-25, RE4 to *Hallmark*, 823 So.2d at 118. As the Circuit Court found, *Hallmark* distinguished *Freeman* because of the destruction of evidence in *Hallmark*. There was ample evidence here to support an MGC belief that there was no destruction in this case. Cp. 425, RE 4.

For each of these independent reasons, the Circuit Court correctly found no violation of due process here.

CONCLUSION

It is difficult to escape the conclusion that, in this case, the gaming spirit has infected the legal process. But the legal system deserves better.

It is one thing to put a quarter in a slot machine and hope for a million dollar jackpot. It is quite another thing to file an eight-page brief that wholly fails to cite or even consider the record and expect the same result. The place to roll the dice is a casino, not a courtroom.

For each of the reasons given in this brief, this Court should affirm the Circuit Court's ruling on the basis of its well-reasoned opinion.

This the 24th day of August, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the Brief of Appellee – Boomtown Casino has been served via U.S. Mail, postage prepaid, on the following:

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This the 24th day of August, 2010.



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