IN THE MISSISSIPPI SUPREME COURT

N0. 2010-CC-00046

EDWARD PAYTON

PETITIONER / APPELLANT

VS.

BOOMTOWN CASINO AND
BALLY GAMING AND SYSTEMS

DEFENDANTS / APPELLEES

On Appeal From The Circuit Court of Harrison County, Second Judicial District
No. A2402-2005-67

BRIEF OF APPELLEE, BALLY GAMING AND SYSTEMS

Oral Argument Not Requested

Kathryn H. Hester (MSB No. [redacted])
WATKINS LUDLAM WINTER & STENNIS, P.A.
190 East Capitol Street Suite 800
Jackson, Mississippi 39201
P. O. Box 427
Jackson, Mississippi 39205-0427
(601) 949-4900
(601) 949-4804 Fax
khester@watkinsludlam.com

IN THE MISSISSIPPI SUPREME COURT

N0. 2010-CC-00046

EDWARD PAYTON

PETITIONER / APPELLANT

VS.

BOOMTOWN CASINO AND
BALLY GAMING AND SYSTEMS

DEFENDANTS / APPELLEES

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 Judge of this Court may evaluate possible disqualification or recusal.

1. David Morrison, The Morrison Law Firm, Counsel for Petitioner-Appellant Edward Payton;

2. Will Bardwell, Will Bardwell Law Firm, PLLC, Counsel for Petitioner-Appellant, Edward Payton;

3. Edward Payton, Petitioner-Appellant;

4. Luther T. Munford and James Shelson, Phelps Dunbar, Counsel for Defendant-Appellee, Boomtown Casino;

5. Boomtown Casino, Defendant-Appellee;

6. Kathryn H. Hester, Watkins Ludlam Winter & Stennis, P.A., Counsel for Defendant-Appellee, Bally Gaming and Systems ("Bally Gaming"); and

7. Bally Gaming and Systems, Defendant-Appellee.

This the 25th day of August, 2010.

Respectfully submitted,

BALLY GAMING AND SYSTEMS

By Its Attorneys,
WATKINS LUDLAM WINTER & STENNIS, P.A.

By: Kathryn H. Hester

Kathryn H. Hester
khester@watkinsludlam.com

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

Page

STATEMENT OF THE ISSUES

1. After a two-month investigation, the Executive Director of the Mississippi Gaming Commission found that the slot machine Edward Payton ("Payton") was playing malfunctioned and that had it completed its play, Payton would have been entitled to 80 credits or $20.00. Payton sought a hearing on that decision. Did Payton prove by a preponderance of the evidence that the Executive Director's decision was wrong?

2. The Gaming Commission Hearing Examiner, in a January 21, 2005, decision affirmed by the Gaming Commission on April 21, 2005, found that the slot machine that Payton was playing malfunctioned and that had it not malfunctioned, Payton would have been entitled to 80 credits or $20.00. Is there any record evidence to support the Commission's decision?

3. Payton claims that his due process rights were violated and that he is thus entitled to the primary progressive jackpot of $2.1 million. Did Payton prove that any due process rights were violated or that he was otherwise entitled to a $2.1 million jackpot?

4. Payton claimed for the first time on appeal that there was spoliation of evidence, and he asked the Circuit Court to award him the $2.1 million primary progressive jackpot on a spoliation / deprivation of due process theory. In this Court Payton asks the Court to reverse and remand for a hearing on the issue. May an appellant raise an issue at the appellate level which he did not first raise at the trial level?

INTRODUCTION

When the slot machine he was playing on February 14, 2004 malfunctioned, Payton told the Gaming Agent that he was entitled to $10,000. At the trial of this matter, Payton and his expert told the Hearing Examiner that they could not determine what Payton won. On appeal to the circuit court, Payton asked that court to award him a $2.1 million primary progressive jackpot because his due process rights were violated. In this Court, Payton asks for a remand for a factual finding on his new theory of spoliation of evidence – a claim that he did not make in the first instance before the trial court – the Mississippi Gaming Commission - and a claim he does not support with *any* facts or record citation here.

In asserting this new theory, Payton, without facts or even one citation to the record, claims that the Gaming Commission investigation was botched and that evidence was lost because a Boomtown slot technician opened and closed the door of the slot machine. *See* Appellant Brief at 1, 2 and 7. Such an argument both misapprehends the operation of a slot machine and has been waived by the failure to raise it at the trial.

There was no spoliation. As the Hearing Examiner and Circuit Court understood, a slot machine is, simplistically, a computer in a cabinet with bells-and-whistles, and the play of each game is captured on the computer's central processing unit – also described as a computer board – in RAM or random access memory.[1] *See* Hearing

[1] *Cf. Thomas v. Isle of Capri Casino and CDS Systems*, 781 So. 2d 125, 133 (Miss. 2001) ("The information contained in the CPU of slot machine 2947 would have conclusively established whether Thomas had in fact won any jackpots on the night in question, and how much time had elapsed since it occurred.").

Examiner at 8 and fn 12; (Vol 2 of 2, MGC 46 CP 421-422) (R.E. 8)[2]. Payton's expert likewise "acknowledge[ed] that all slot machines approved by the Gaming Commission must be able to retain game data in their memory despite the opening and closing of the door, and despite a loss of power,..." Hearing Examiner at 10. (R.E. 8).

In exhaustive detail, both the Mississippi Gaming Lab engineer and the Hearing Examiner in her analysis discussed why there was no loss of evidence through any actions of the casino or manufacturer's employees. There was no evidence lost and no denial of due process. *See* Vol 2 of 2 Ex. 1 at 119-123 (R.E. 9), Hearing Examiner at 8-11 (R.E. 8). And since the Gaming Lab and the Hearing Examiner have already detailed why no evidence was compromised by the opening and shutting of the slot machine doors or the rebooting of the machine, there is no basis for a remand on a spoliation theory to the Mississippi Gaming Commission, even if the argument had not been waived for failure to raise it at trial.

Moreover, this Court has found that even a trial court (here the Gaming Commission) finding of spoliation does not warrant an award of a jackpot to a patron when there is sufficient evidence to prove that there was no jackpot. *See Thomas v. Isle of Capri*, 781 So. 2d 125, 133 (Miss. 2001). The Hearing Examiner detailed the evidence in support of the Executive Director's decision and the lack of *any* evidence to refute that finding. Consequently, even Payton's new claim of spoliation would not provide Payton with the primary progressive jackpot he now seeks.

---

[2] Vol 1 of 2, Tr. references the Trial Transcript; Vol 2 of 2 is the Gaming Commission Record: Vol 2 of 2 MGC is the Gaming Commission File Pleadings 1-46; and Pleadings 47-64; Vol 2 of 2, Ex. references the Trial Exhibits; Vol. 1 – 4 of 4 CP references the Clerk's Papers; R.E. is the Record Excerpt from either the Appellant (1 – 5) or Bally Gaming (6 – 10).

There was no botched investigation; there was no spoliation; and there is no basis to reward a patron who has had more than ample opportunity to present his case and his claims and his changing theories to the Mississippi Gaming Commission and has failed to bear his burden of proving that the Gaming Commission decision was wrong.

Following is the record evidence in support of that contention.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Commission Below

This case involves Payton's play of a Bally Gaming Millionaire 777's quarter primary progressive slot machine game at Boomtown Casino on the early evening of February 14, 2004. The game started the bonus round and failed to complete the play. (Vol 2 of 2, Ex. 1 at 3, 5, 6) (R.E. 9). The Executive Director of the Mississippi Gaming Commission, through Agents Steve McComb and Dave Kingman, investigated the dispute and sought assistance from the Mississippi Gaming Lab to determine what happened on the play of the game in question. (Vol 2 of 2, Ex. 1 at 5, 22, 24-26) (R.E. 9). The Gaming Lab investigation determined that the game malfunctioned when Payton attempted to enter the bonus round, and that if the game had not malfunctioned, Payton would have won 80 credits or $20.00. (Vol 2 of 2, Ex. 1 at 119-126) (R.E. 9). The Executive Director of the Mississippi Gaming Commission, based on the investigation of his agents and the diagnostic testing of the computer game board by the Gaming Laboratory, notified Payton on April 19, 2004, that he found that the game had malfunctioned when Payton attempted to enter the bonus round and that had the game completed the bonus round, Payton would have been entitled to 80 credits or $20.00.

Consequently the Executive Director declined to find that Payton won the $10,000 he had requested. (Vol 2 of 2, MGC 3 and 5 00004-00006, 00010-00012).[3]

Payton disagreed with the finding and sought a hearing on his claim. A two-day trial before the Hearing Examiner for the Mississippi Gaming Commission was held on November 3 and 4, 2004. Boomtown moved for dismissal of Payton's claim at the close of his case in chief, a motion in which Bally Gaming joined. (Vol 2 of 2, MGC 46 00326-00327). The Hearing Examiner took the motion under advisement, and on January 21, 2005, the Hearing Examiner entered a detailed 16-page decision and order upholding the decision of the Executive Director. (Vol 2 of 2, MGC 46, 00313-00333).

Six days later, Payton sought to reopen the evidence to place into evidence an affidavit of his testifying expert and to allow him to put his case on in rebuttal and impeachment. On February 2, 2005, Payton sought a reconsideration of the Hearing Examiner's decision. (Vol 2 of 2, MGC 47, 48, 49, 00339-00343). On February 22, 2005, the Hearing Examiner denied Payton's Motion to Reconsider, Alter/Amend and Issued a Show Cause Order as to Why Payton's Motion for Relief of the Judgement and to Reopen the Record Should Not Be Denied. (Vol 2 of 2, MGC 52, 00391-00397). Payton responded to the Show Cause Order on March 22, 2005. (Vol 2 of 2, MGC 56, 00408-00412).

---

[3] Although Payton requested $10,000 at the time of the malfunction (see Payton patron statement at Vol 2 of 2, Ex. 1 at 7, 10, 16)(R.E. 9), at trial he recanted that request and stated that he thought he should get the entire $2 million primary progressive jackpot. As he testified:

> Q. (Continuing:) Did Boonetown [sic] give you the fourteen credits that were on the machine?
> A. Yeah, they gave me fourteen.
> Q. Now, what is it you want Boonetown [sic] and Bally to do? What remedy are you asking the judge to provide you?
> A. Well, I really wanted the whole two million. I want the whole two million.

(Vol 1 of 2, Tr. at 17).

On March 24, 2005, the Hearing Examiner found that

> Payton is asking that the record be re-opened so that he can search for new evidence to impeach Kerley's[4] investigative report. The hearing examiner finds no justification for such a request. In any event, any such impeachment evidence would be cumulative and would not require a different result from that in the hearing examiner's order of dismissal.

(Vol 2 of 2, MGC 58, 00419-00426).

On April 4, 2005, Payton filed a Motion to Reconsider Order Denying Petitioner's Motion for Relief from the Judgment and to Reopen the Record. (Vol 2 of 2, MGC 59, 00427-00436).

On April 6, 2005, the Hearing Examiner dismissed Payton's motion on the grounds that she had already submitted her January 21, 2005 decision for consideration by the Mississippi Gaming Commission at its April 21, 2005, regular commission meeting and that she no longer had jurisdiction to reconsider her January 21, 2005, decision. (Vol 2 of 2, MGC 60, 00437-00439). The Mississippi Gaming Commission on April 21, 2005, notified David Morrison, Payton's attorney, that at the meeting of the Commission on that date

> [T]he Commission adopted the hearing examiner's findings and declined to further review her decision in accordance with Miss. Code Ann. §75-76-119 and -181, 1990. The Hearing Examiner's decision has now become the final decision of the Mississippi Gaming Commission.

(Vol 2 of 2, MGC 63, 00444-00446).

Payton appealed the January 21, 2005, decision of the Hearing Examiner and the Gaming Commission April 21, 2005, affirmation of that decision to the Harrison

---

[4] Ames Kerley was the Gaming Lab Engineer who conducted the investigation – under D.C. Ladner's supervision - into the malfunction which occurred during Payton's play of the Millionaire 777's Game. (Vol 2 of 2, Ex. 1 at 120) (R.E. 9) Kerley's name is spelled "Curley" throughout the transcript. See, e.g., Vol 1 of 2, Tr. at 353-354.

County Circuit Court by a Petition for Judicial Review filed on May 10, 2005. (Vol 1 of 4, CP 9 – 33).

Following oral argument on May 16, 2008, the Circuit Court determined, in a detailed eighteen-page opinion, entered on December 1, 2008, that there was clearly evidence in the record which supported the Hearing Examiner findings and the subsequent adoption of those Findings by the Mississippi Gaming Commission. The Circuit Court further found that Payton had not established any record evidence to support his claim of violation of his due process rights and that the Gaming Commission decision had to be upheld. (Vol 3 of 4, CP 418-435) (R.E. 4).

On December 4, 2008, Payton filed a three sentence Motion for Reconsideration, asserting that "The Petitioner/Appellant believes and would argue that the Court has misapplied the law to the facts and has not given proper consideration to those facts." (Vol 3 of 4, CP 436-437). Oral argument followed on November 20, 2009, and the Circuit Court denied the Motion from the bench in an order entered on December 29, 2009, finding that the argument was simply a re-argument of the matters that Payton made in support of his appeal in a two-hour hearing in May 2008, and that Payton's argument did not provide any law or fact which the Circuit Court had overlooked or misapprehended as is required for a Motion for Reconsideration. (Vol 4 of 4, CP 556-558) (R.E. 5). The Circuit Court also granted Bally Gaming's Motion for Sanctions to the extent of the fees and expenses occasioned by Payton's rescheduling of the October 16, 2009, hearing on the Payton Motion for Reconsideration late in the afternoon prior to the hearing. (Vol 4 of 4, CP 556-558) (R.E. 5). On January 5, 2010, Payton filed an appeal to this Court from "Order on Edward Payton Motion for

Reconisderation [sic] and Bally Gaming and Systems Motion for Sanctions of the Court entered in this case on December 30, 2009." (Vol 4 of 4, CP 559).

B. Statement of Facts

Payton was playing a Bally Gaming Millionaire 777's quarter slot machine game at Boomtown Casino in the early evening of February 14, 2004, when the game malfunctioned as Payton sought to enter the Bonus Round. (Vol 2 of 2, Ex 1 at 6, 10) (R.E. 9).

The game in question, the Millionaire 777's quarters, has a primary system with three reels that allows the player to win varying amounts. If the three Millionaire 777's symbols are selected by the random number generator and four credits have been wagered, then the patron is allowed to play the bonus round by pressing the Spin Button. The bonus round provides the patron with an opportunity to win amounts ranging from 20 credits ($5.00) to the primary progressive jackpot, which was $2.1 million that evening. (Vol 1 of 2 Tr. at 44, Vol 2 of 2, Ex. 1 at 121) (R.E. 9).

According to the testimony of the patron, and according to the results of the Gaming Lab investigation, when Payton pressed the Spin Button, the bonus round did not complete its play. According to the Gaming Lab Report and the testimony of Payton's expert D.C. Ladner[5], and the correspondence of his attorney,[6] the game

[5] Payton's expert, D.C. Ladner, was the supervisor of the Mississippi Gaming Lab and in charge of the investigation of this case up until three weeks before the report of the Gaming Lab investigation was released. Ladner was terminated from the Lab on February 28, 2004. The Gaming Lab Report was released March 18, 2004. (Vol 1 of 2 Tr. at 296, Vol 2 of 2, Ex. 1 at 121-123) (R.E. 9). Because Miss. Code Ann. § 25-4-105 precludes a State employee from being compensated in connection to a case in which he was directly involved, Bally Gaming moved to strike the testimony of D.C. Ladner. (Vol 2 of 2, MGC 50, 000381-00387).

[6] "Mr. Payton's position is simply that; he had played the maximum number of credits entitling him to a second spin, for which he had the opportunity to win upwards to the maximum payout, which I believe was approximately 2.1 million dollars. The machine malfunctioned after he won the first stage and he was prevented by this malfunction from having his rightful opportunity to

malfunctioned at the point Payton pressed the Spin Button. According to the Gaming Lab investigation, if the malfunction had not occurred and if the game had completed the bonus round, it would have awarded Payton a win of 80 credits or $20.00. (Vol 2 of 2, Ex. 1 at 123) (R.E. 9).

The Gaming Lab was able to determine the outcome of the game because when the player initiates the play of the base game, the machine's random outcome generator instantly determines the outcome and stores that information in the random access memory ("RAM"). (Vol 1 of 2, Tr. at 375-377). If that outcome includes hitting the combination on the base game that entitles the player to play the bonus game, the outcome of the bonus game is also determined instantly and stored in the RAM (SafeRam is the term used in the Gaming Lab report). (Vol 1 of 2, Tr. at 375-377, Vol 2 of 2, Ex. 1 at 121, 123) (R.E. 9). In the event of a malfunction, that memory can be recalled once the machine is restarted. Ladner explained that the RAM was similar to the storage that occurs when a personal computer freezes. (Vol 1 of 2, Tr. at 376). The data is stored and once the computer is restarted, that information can be recovered. The data related to Payton's play of the game was stored in the SafeRam from which the Gaming Lab extracted it. This is how the Gaming Lab was able to determine that Payton would have won 80 credits or $20.00. (Vol 2 of 2, Ex. 1 at 121-123) (R.E. 9).

According to Payton's expert Ladner there was no conclusive evidence to determine what amount Payton was entitled to as a result of the malfunction, and he

---

play for the bonus jackpot on the progressive machine. Mr. Payton will simply maintain that he is entitled to more than the minimum and, quite possibly, the full amount of the progressive jackpot."

(Vol. 2 of 2, Ex. 3, David Morrison June 11, 2004 letter to Hearing Examiner Joan Myers).

disputed the Gaming Lab results.[7] At the time of the malfunction, Payton told the Gaming Agent that he would be satisfied with $10,000. *See* Mississippi Gaming Commission Case Report from Agent Steve McComb. ("Synopsis. ... Mr. Payton stated he would be satisfied with a $10,000 award and feels it is not his fault that the machine stopped working"). (Vol 2 of 2, Ex. 1 at 3) (R.E. 9).

At trial, however, when asked what Payton was seeking from the Gaming Commission, David Morrison, Payton's counsel, stated that he could not give the Hearing Examiner an amount, but that because Payton's due process rights were violated, Payton was entitled to the top progressive award.[8]

The Gaming Commission, through Agents Steve McComb and Dave Kingman, made a detailed investigation and sought assistance from the Mississippi Gaming Lab to determine what happened on the play of the game in question. When the first casino employee arrived at the machine, there were 14 credits on the machine, the Coins-In LED showed a wager of 4 credits, and the reels displayed three Millionaire 777's symbols, a wager which would have allowed Payton to play the Bonus Round. (Vol 2 of 2, Ex. 1 at 16) (R.E. 9). Those same credits, wager and symbols on the pay line were present on the machine when Gaming Agent McComb arrived at the casino and took the photographs which are part of the Gaming Commission file. (Vol 2 of 2, Ex. 1 at 15)

---

[7] 13 erroneous. I don't believe there is any
14 conclusive evidence to support whether Mr.
15 Peyton would have won nothing,$20.00, or the
16 jackpot.

(Vol 1 of 2, Tr. at 97).

[8] MR. MORRISON: We would suggest in the shadows of Hallmark, that he's entitled to the whole 2.1 million dollars. Because we're going to show his whole due process rights were completely violated by the procedures that weren't followed.
(Vol 1 of 2, Tr. at 35-36).

(R.E. 9). For ease of reference, and because Payton charges the Gaming Commission with a botched investigation, Bally Gaming has included the Gaming Commission Investigatory File as Record Excerpt 9. Steve McComb was the Mississippi Gaming Commission Agent who handled the investigation on the evening of February 14, 2004. (Vol 2 of 2, Ex. 1 at 3-6) (R.E. 9). Dave Kingman was the Senior Agent who assisted in the investigation. (Vol 2 of 2, Ex. 1 at 3, 5) (R.E. 9).

Agents McComb and Kingman

- interviewed, and assembled witness statements from, the five casino employees who witnessed the event as well as the manufacturer's technician;
- interviewed the patron and his witness;
- had the patron and his witness complete an incident report form;
- had the Bally Gaming technician test the game to insure that there were no loose connections or circuit breakers;
- obtained copies of the MEAL card from the machine;
- obtained copies of the Boomtown and Bally Gaming transaction and exception reports;
- took photographs of the reels on the machine in the positions resulting from the patron's play as well as the face of the game;
- locked down the machine;
- and reviewed and obtained a copy of the surveillance tape, which provided coverage of the game from the time the patron sat down to play until the game board was taken from the game.

(Vol 2 of 2, Ex. 1 at 3-118) (R.E. 9); (Ex. 2).

At the conclusion of the investigation on the premises that evening, Agent McComb took the computer game board to the Mississippi Gaming Lab for analysis of the data on the CPU and for diagnostic testing. (Vol 2 of 2, Ex. 1 at 25-26) (R.E. 9).

Following the recommendations of the Gaming Agents and the Mississippi Gaming Lab, the Executive Director of the Gaming Commission determined that the game had malfunctioned and that if the game had not malfunctioned, Payton would have been entitled to 80 credits or $20.00 and not the $10,000 that Payton had requested. (Vol 2 of 2, Ex. 1, last two pages) (R.E. 9). The Hearing Examiner after a two-day trial, determined that "Payton failed to present evidence to show that the Executive Director's decision should be reversed or modified." (Vol 2 of 2, MGC 46 at 3, 00326).

SUMMARY OF THE ARGUMENT

Under the Gaming Control Act, a patron who claims that a licensee has failed to pay him the winnings to which he is entitled may request an investigation by the Executive Director of the Mississippi Gaming Commission. (Miss. Code Ann. § 75-76-159). Any party who is not satisfied with the results of the Executive Director's investigation may request a trial before the Hearing Examiner of the Mississippi Gaming Commission. (Miss. Code Ann. §75-76-161). The party requesting the hearing before the Hearing Examiner has the burden of proving the correctness of his position (Miss. Code Ann. §75-76-163) in the same way as does a plaintiff in a civil suit.

The Executive Director's investigation found that the machine on which Payton was playing malfunctioned and that if the game had completed the bonus round, Payton would have been entitled to 80 credits or $20.00 (this was a quarter machine).

The patron's attorney and his expert agreed with the Executive Director's finding that the game malfunctioned. Neither, however, could tell the Commission or the Hearing Examiner what amount Payton was entitled to win or whether $20.00 was the correct amount. The patron Payton said he wanted the whole amount of the

progressive jackpot because his attorney and his expert told him he did not get a fair chance to win the money. The patron therefore sought to have the Commission award him the top progressive award on the basis that his due process rights had been denied.

The Hearing Examiner had an opportunity to observe the demeanor and actions of the witnesses: the gaming agent who performed the investigation and the patron, the patron's expert and the casino slot technician. She also heard extensive testimony related to the Gaming Lab investigation as well as the investigation by the Gaming Agents. In a detailed sixteen-page decision she granted the Boomtown Casino and Bally Gaming Motion to Dismiss at the close of Payton's case and upheld the Executive Director's findings. The Gaming Commission adopted the Hearing Examiner Decision as its own.

The role of the circuit court or the Supreme Court in an appeal from the Mississippi Gaming Commission is to determine whether there is *any* evidence to support the Hearing Examiner's decision which the Gaming Commission adopted as its own decision. Since the patron and the patron's expert agreed with the Executive Director that the game malfunctioned, the only issues on which there were a dispute were the amount to which Payton was entitled as a win and whether Payton was entitled to win the top progressive award because his due process rights were denied. The Hearing Examiner found that the patron did not prove his claim, and record evidence supports that decision.

The Hearing Examiner, moreover, found that Payton did not present sufficient evidence to find that the Gaming Commission's determination, which relied on the computer board, was not correct. In fact, neither Payton, his attorney nor his expert

could tell the Hearing Examiner what in fact they claimed Payton had won. Only that it "*could have been*" something different from the $20.00 the Gaming Lab determined was the outcome of his play. "Could have been" does not meet the burden of proving wrong the Executive Director's finding that $20 was the outcome of Payton's play of the game.

In his circuit court brief, for the first time in this case, Payton told the court that he was entitled to a spoliation of evidence "consideration" and asked the court to award him the $2.1 million primary progressive jackpot because of a purported intentional destruction of evidence. Here Payton asks the Court for an equally unwarranted remand to the Gaming Commission to determine that there was spoliation of evidence, without giving this Court or counsel opposite, any suggestion of what evidence he claims was not available at trial.

Both the Gaming Lab and the Hearing Examiner detailed the reasons there was sufficient evidence from the game's computer board to determine the outcome of the game. There was no destruction of evidence, and this request for a spoliation factual finding and conclusion was not presented at trial. That request may not be decided for the first time on appeal.

ARGUMENT

A. Supreme Court and Gaming Control Act Hold That If There is Any Evidence to Support the Gaming Commission Decision, It Must Be Upheld.

The Mississippi Gaming Control Act establishes a deferential standard of review of a Gaming Commission decision. The reasons that the findings of the Gaming Commission are given such deference are threefold: First, gaming is a very specialized industry, and the expertise of the Gaming Commission staff in gaming matters is far superior to that of a lay-person. Before a slot machine is placed in a casino, it is tested and approved by the Gaming Commission, and the Commission staff generally have a

better understanding of the machine's workings than does either the casino or the patron. Second, the Legislature has given the Commission's decisions great deference to assure the integrity of the regulation of gaming in Mississippi. Third, the credibility of the witnesses plays a major role in most patron disputes, and the Legislature granted *exclusive* authority to the Commission to weigh the credibility of witnesses who testify in a patron dispute hearing.

The Mississippi Supreme Court has interpreted the Gaming Control Act as written: if there is *any evidence* to support the decision of the Gaming Commission, then that decision must be upheld. The Court made that finding first in *Mississippi Gaming Comm'n v. Freeman*, 747 So. 2d 231 (Miss. 1999), as described in *IGT v. Kelly*, 778 So. 2d 773, 776 (Miss. 2001) as follows:

> In *Mississippi Gaming Comm'n v. Freeman*, this Court recently held that the proper standard of review "is determined by the [Mississippi Gaming Control] Act." 747 So. 2d 231 at 240. Consequently, ***Freeman*** **rejected the "substantial evidence" standard and held that the "any evidence" standard should apply due to the plain language of the statute.** Id. In the present case, IGT's assertion that a "substantial evidence standard should be used is misplaced, and **this Court will instead apply the "any evidence" standard as set forth in *Freeman*.**
>
> We must now address whether any evidence existed to support the commission's conclusion that the signage on the machine was ambiguous.

IGT v. Kelly, 778 So. 2d 773, 775-76 (Miss. 2001) (emphasis added). The case cited by Payton, *Pickle v. IGT*, 830 So. 2d 1214 (Miss. 2002), contains a comprehensive discussion of the standard of review in a patron dispute case:

> STANDARD OF REVIEW
>
> ...we must adhere to a "deferential standard of review of an administrative agency. . . ." *Miss. Gaming Comm'n v. Freeman*, 747 So. 2d 231, 238 (Miss. 1999). See also *IGT v. Kelly*, 778 So. 2d 773, 775 (Miss. 2001). **In Nevada, which employs the identical statutory standard of review, the Nevada Supreme Court held that "a reviewing court should affirm a decision of the Board which is supported by any evidence**

> **whatsoever, even if that evidence is less than 'that which a reasonable mind might accept as adequate to support a conclusion.'** " *Sengel v. IGT*, 116 Nev. 565, 2 P.3d 258, 261 (Nev. 2000) (emphasis in original) (citations omitted).
>
> DISCUSSION
>
> I. WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE HEARING EXAMINER'S FINDINGS THAT PICKLE DID NOT WIN THE $4,724,894.39 PROGRESSIVE JACKPOT.
>
> Pickle asserts that her substantial rights were violated because the Hearing Examiner's decision was not supported by the substantial weight of the evidence. ... **Pickle entirely misconstrues the proper standard of review**. ... As quoted above, **Miss. Code Ann. § 75-76-171(3) is quite clear that the proper standard of review is the "unsupported by any evidence" standard**. In two prior opinions, we have quoted Miss. Code Ann. § 75-76-171(3) as the proper standard of review. See *Kelly*, 778 So. 2d at 775; *Freeman*, 747 So. 2d at 238. Thus, our inquiry will now turn to whether there was "any evidence" sufficient to deny Pickle the jackpot.

Pickle v. IGT, 830 So. 2d 1214, 1220 (Miss. 2002) (emphasis added).

The proper standard of review of the Gaming Commission decision in this case is *whether there is any evidence* to support a finding that the game Payton was playing malfunctioned and that Payton would have won $20.00 if the bonus round had completed. There was more than just "any evidence" to support the Gaming Commission's decision in this case, and it must therefore be upheld.

B. Payton Had the Burden of Proving the Executive Director Wrong.

Under the Mississippi Gaming Control Act, when the Executive Director determines that a patron in a patron dispute with a gaming licensee is not entitled to the monies which he or she claims, then the patron may appeal the Executive Director's decision to a hearing examiner. Miss. Code Ann. § 75-76-161. The patron then has the burden of proving that the Executive Director's determination was not correct. Miss. Code Ann. §75-76-163. In shouldering that burden, the patron must persuade the hearing examiner that the patron's version of the facts is correct. Miss. Code Ann. § 75-

76-163; Mississippi Gaming Commission ("MGC") Regulations, Section H. Player Disputes.

C. The Decision of the Mississippi Gaming Commission is Supported by the Evidence Required Under the Mississippi Gaming Control Act.

On the early evening of February 14, 2004, when the Bally Gaming Millionaire 777's game that Payton was playing failed to complete the bonus round and the Boomtown Casino personnel were unable to clear the bonus tilt, after determining that the circuit breakers of the game were not tripped, the Gaming Commission was called to assist in an investigation of the malfunction and to determine what Payton would have been entitled to win in the bonus round. (Vol 2 of 2, Ex. 1 at 5, 26-27) (R.E. 9).

After an extensive investigation that included assistance from the Mississippi Gaming Lab which ran diagnostic tests to determine the outcome of the malfunctioning game, the Executive Director issued the following decision in an April 19, 2004, letter to Payton's attorney, David Morrison:

> As Executive Director of the Mississippi Gaming Commission, I have determined from the investigation that the slot machine in question at Boomtown did indeed malfunction, resulting in Mr. Payton not being rewarded the bonus spin to which he was entitled. The results of the tests conducted by the Mississippi Gaming Commission lab indicate that the payout that would have resulted from this bonus spin would have been $20. Therefore, I find no evidence to substantiate your client's claim that he is entitled to $10,000.00.

(Vol 2 of 2, Ex. 1, last two pages) (R.E. 9), (MGC 5, 00010-00012, Executive Director of the Gaming Commission Decision).

As the party aggrieved by the Executive Director's finding, Payton had the burden of proving the Executive Director wrong. As the reviewing court, this Court must determine whether there was any evidence to support the Gaming Commission's affirmance of the Executive Director's finding.

The Executive Director made two factual findings: 1. that the machine on which Payton was playing malfunctioned; and 2: that Payton was entitled to 80 credits or $20.00 and not the $10,000 that he had requested. (Vol 2 of 2, MGC 5, 00010-00012). Payton had the burden of proving both findings wrong.

1. Payton does not dispute that there was a malfunction.

Payton's attorney and expert agreed that the machine was malfunctioning. Prior to trial, Payton's attorney David Morrison wrote to the Hearing Examiner and included the letter as an exhibit at trial:

> Mr. Payton's position is simply that; he had played the maximum number of credits entitling him to a second spin, for which he had the opportunity to win upwards to the maximum payout, which I believe was approximately 2.1 million dollars. The *machine malfunctioned* after he won the first stage and he was prevented *by this malfunction* from having his rightful opportunity to play for the bonus jackpot on the progressive machine.

(Vol 2 of 2, Ex. 3, David Morrison June 11, 2004 letter to Hearing Examiner Joan Myers) (emphasis added). See also footnote 6 *supra*. Payton's expert testified at trial as follows:

> Q. Did you consider what happened on this machine when Mr. Peyton was playing it and it failed to initiate the bonus round, did you consider that to be a malfunction?
>
> A. [Ladner] *It's not a proper operation. Malfunction, yes. It could be a malfunction, yes.*

(Vol 1 of 2, Tr. at 234) (emphasis added).

Consequently Payton did not dispute the Executive Director's determination that the game malfunctioned and that Payton was not awarded the bonus spin to which he was entitled. Thus the only issue at trial and on review is whether Payton proved that he was entitled to more than the $20.00 to which the Executive Director's investigation determined he was entitled.

2. Payton kept changing the amount he was seeking from the Gaming Commission.

As the Hearing Examiner held, Payton changed his request to the Gaming Commission related to the amount of his winning. (Vol 2 of 2, MGC 46, 00327). At the casino, when the Gaming Agent asked what amount Payton was seeking, Payton, in both his written Patron Dispute Form and in his conversation with Agent McComb, stated that he was seeking $10,000 after the machine malfunctioned. *See, e.g.*, Mississippi Gaming Commission Case Report from Agent Steve McComb, "Synopsis. ... Mr. Payton stated he would be satisfied with a $10,000 award and feels it is not his fault that the machine stopped working." (Vol 2 of 2, Ex. 1 at 3, 7) (R.E. 9).[9]

Prior to trial, however, Payton's attorney notified the Hearing Examiner that Payton might be seeking the top award. (Vol 2 of 2, Ex. 3, David Morrison June 11, 2004 letter to Hearing Examiner Joan Myers).

At trial when asked what amount he was seeking, Payton stated that he wanted the whole $2.1 million because he did not get a fair chance to complete the bonus round.

> Q. (Continuing:) Did Boonetown[10] give you the fourteen credits that were on the machine?
>
> A. Yeah, they gave me fourteen.
>
> Q. Now, what is it you want Boonetown and Bally to do? What remedy are you asking the judge to provide you?
>
> A. Well, I really wanted the whole two million. I want the whole two million.
>
> Q. And what makes you think you're entitled to that?

---

[9] "and feel that 10,000 thousand would be alright but I would of hit for 2 million but it's not my fault that the Machine stop; that's not right." Mississippi Gaming Commission Complaint by Gaming Patron Form, Handwritten by Payton. (Vol 2 of 2, Ex. 1 at 10) (R.E. 9).

[10] Boomtown Casino was consistently misspelled "Boonetown" throughout the transcript, and Payton was misspelled "Peyton."

A. Well, I didn't have a fair chance.

Q. And why did you not have a fair chance?

A. Because my lawyer and expert told me.

Q. Now, Mr. Peyton, so you don't know what the outcome would have been.

A. No, sir.

(Vol 1 of 2, Tr. at 17).

Then in answer to the Hearing Examiner's question, Payton's attorney first responded that he could not tell the Hearing Examiner an amount that Payton was seeking and then noted that Payton would be seeking the top award because of denial of his due process rights as would be proved by Payton's expert Ladner.

> HEARING OFFICER TO MORRISON:
>
> And if I could, at this point, Mr. Morrison, in the letter you state that quite possibly you believe he's entitled to the amount up the progressive jackpot.
>
> Are you asking—what are you asking for today?
>
> MR. MORRISON: Well the experts will tell you that the premise of this case, our premise of the case, Judge, is that in a normal circumstance through the procedures and guidelines set forth by the Mississippi Gaming Commission, in almost every time when you have a problem where there's a lock up or gaming issue with one of these machines, there are procedures in place that allow the Mississippi Gaming Commission lab to determine what the player would have won. We disagree with the conclusions of the Mississippi Gaming lab, and our position is simply that no one can determine what was won on that day. And because of that and other evidence that we will provide to you, that Mr. Peyton is entitled to the benefit of the doubt because we believe that the company knew ahead of time that there were problems with this machine, and we have evidence to substantiate that position. When you have an unfair machine, you have unfair results, and it trickles down. And that's our position. We cannot—and I will tell you for the record, we cannot offer you a specific number because the research, the gaming lab's conclusion is wrong, it's based on wrong information, and the evidence has been tainted, if you will, and we will show that. But no, we cannot give you an exact number. I would love to be able to say that I can honestly give you an exact number. But Mr. Ladner, who is well-versed on this subject, will testify as to the facts, and will tell this court that there is no way anyone could have determined what he would have won because of all of the things that happened to the machine.

(Vol 1 of 2, Tr. at 31-32).

> HEARING EXAMINER:
>
> So you cannot give me an amount that your client is seeking?
>
> MR. MORRISON: No, ma'am.
>
> HEARING EXAMINER:
>
> You're asking the Gaming Commission to determine what amount that he's entitled to. And I realize that the lab report had three potential remedies, but I believe the Executive Director's decision awarded $20.00 to Mr. Peyton.
>
> MR. MORRISON: We would suggest in the shadows of *Hallmark*, that he's entitled to the whole 2.1 million dollars. Because we're going to show his whole due process rights were completely violated by the procedures that weren't followed.

(Vol 1 of 2, Tr. at 35-36).

3. Payton did not prove that the Executive Director's amount was incorrect.

In addition to changing the amount of his claim, at trial Payton agreed that he did not know what the outcome of the play of the game in question would have been.

> Q. And so you didn't get that chance to play the progressive round.
>
> A. I didn't have a chance, a fair chance. No, I didn't.
>
> Q. And if you had had that chance on the night of February 14, you can't tell us what the outcome would have been, can you?
>
> A. (Indicated)
>
> Q. You need to answer out loud.
>
> A. No, sir.

(Vol 1 of 2, Tr. 22).

Payton's expert Ladner likewise could not tell the Gaming Commission what Payton won or would have won:

> Q. Pardon me, but I don't believe that was responsive to my question. My question was: You don't know whether bottom line conclusion of Mr. Curley [sic] is right or wrong, do you?

See, e.g., American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50, 143 L. Ed. 2d 130, 119 S. Ct. 977 (1999); *Diamondhead Country Club & Prop. Owners Ass'n v. Montjoy*, 820 So. 2d 676, 681 (Miss. Ct. App. 2000).

The governmental entity – the Mississippi Gaming Commission – is not a party to this suit. Nonetheless, due process under both the United States and Mississippi Constitutions requires the *governmental entity* to provide notice and an opportunity to be heard. *See Pickle,* 830 So. 2d at 1222-23 (Miss. 2002); *Booth v. Mississippi Employment Sec. Com'n*, 588 So. 2d 422, 427-28 (Miss. 1991) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

The Executive Director's decision was rendered on April 19, 2004, and Payton made a request for a hearing shortly thereafter. Payton hired his expert Ladner in June 2004. (Vol 1 of 2, Tr. at 357). The hearing was originally scheduled for the end of July 2004, and then was rescheduled three times to accommodate one of more of the parties, (Vol 2 of 2 MGC 13, 24, 25), until November 3 and 4, 2004. (See also Vol 2 of 2, Ex 3. June 11, 2004 Letter from David Morrison). Consequently, Payton had notice of the hearing, six and a half months to prepare for the hearing, and two days to present the evidence he had to dispute the Executive Director's decision.

The Hearing Examiner was experienced in gaming matters, and her opinion reflects a clear understanding of how a slot machine operates and the technical aspects of the Gaming Lab Report.

Ladner, Payton's expert and the head of the Mississippi Gaming Lab up until three weeks before the Investigative Report was released, testified that the investigation was proper and he could not point to any defect in the Gaming Lab Report – a report which he had supervised. He testified that he simply did not know if the lab

investigation was done correctly from the language in the report. (Vol 1 of 2, Tr. 353-354). Such an effort by Ladner to undermine the senior engineer at the Gaming Lab (Kerley) whom he had supervised and trained for nine years was entitled to no credibility.

Payton was provided a two-day hearing at a time and place of his choosing and ample opportunity to present evidence in his behalf. Legally, Payton received the due process which was required. There is more than "any evidence" to support the Gaming Commission's finding that Payton was not denied due process. There was no denial of due process, and that is reflected in the lack of specifics and record citations in the Appellee Brief.

1. Mississippi Gaming Act Procedures Were Followed.

Payton's tactic at trial was to criticize the investigation done by the Gaming Lab in order to persuade the Gaming Commission Hearing Examiner that it was so faulty that the results of the investigation could not be trusted. Then Payton sought to take that to the level of showing that his procedural due process rights were denied and he was therefore entitled to the $2.1 million primary progressive jackpot. Now here on appeal, Payton asks this Court to remand the case to the Gaming Commission so that the Hearing Examiner can determine whether un-cited facts support a spoliation finding, a conclusion Payton did not ask the Hearing Examiner to make and a request which, from the detailed discussion of the evidence, would have been unavailing.

Without any indication of what evidence Payton claims was lost or spoiled, it is difficult to respond in specifics. The Hearing Examiner and the Gaming Lab Engineer detailed the basis for the finding. The evidence contained on the computer board – evidence which the computer is required by regulation to store upon the play of the

game – was more than adequate to reveal Payton's play and the outcome of that play. While very technical in nature, the Gaming Lab Report nonetheless provided the data and the detail necessary for the Executive Director to make a finding of what Payton would have won, had the game not malfunctioned. (Vol 2 of 2, Ex. 1 at 119-123) (R.E. 9). The Circuit Court summarized that information in layman's terms.[11] *See* Vol 3 of 4 CP 413-435 (R.E. 4). The casino and manufacturer data (Vol 2 of 2, Ex. 1 at 6, 40-118) (R.E. 9), the surveillance tape (Vol 2 of 2, Ex. 2) and the witness statements (Vol 2 of 2, Ex. 1 at 15,-22) (R.E. 9) all refuted any suggestion that there was actually a primary progressive jackpot, and not even Payton claims that he actually won the primary progressive jackpot. He seeks that amount, however, for unspecified violations of his due process or unspecified lost evidence.

a. The Gaming Agents' Investigation was Appropriate and Thorough.

Payton's attorney told the Hearing Examiner that Payton was entitled to the top award because his due process rights were denied and that Payton's expert Ladner would outline the basis for such a finding. (Vol 1 of 2, Tr. at 35-36). In his Supreme Court Appellant Brief at 5, Payton makes the following "argument" without citation to any fact in the record:

> As in *Hallmark,* and unlike in *Pickle,* Boomtown's employees did not lock down the machine and refrain from manipulation prior to the arrival of the Gaming Commission's agent. *Compare Hallmark, 823* So. 2d at 1186 ("Before Commission employees arrived, the machine was entered and

[11] "Most slot machine players are unaware of the fact that the spinning reels are simply for entertainment. The outcome of the game is determined by the computer program of the slot machine long before the reels spin and stop. That outcome is stored in the Random Access Memory (RAM) of the machine for a certain period of time and can be later retrieved. This RAM in Payton's case is on a chip that is on the CPU. Ames Kerley at the MGC Laboratory received the CPU from the machine that Payton had been playing and performed the testing and analysis on that device. Kerley's report reflects a summary of this testing and analysis." (Vol 3 of 4, CP 421) (R.E. 4).

manipulated by casino employees who testified that the reels were spun and removed from the machine"), *with Pickle,* 830 So. 2d at 1223 ("all entries into the machine were monitored").

Similarly, in the case at bar, because of the repeated manipulations, "the agent for the Commission did not have the benefit of conducting an investigation on the machine as it existed directly after the alleged jackpot." *Hallmark,* 823 So. 2d at 1186. *Contra Pickle,* 830 So. 2d at 1216 (first person to inspect the machine after a disputed jackpot was the Commission's agent).

And even after the agent in the case at bar arrived on the scene, he removed the machine's CPU and left it for three days in a plastic bag in his desk drawer - a far cry from the steps taken by the Commission's agent in *Pickle,* who removed the entire machine from the casino floor and brought it immediately to a secure location for further investigation. *Pickle,* 830 So. 2d at 1218.

Payton Appellant Brief at 5.

The Hearing Examiner found that

Moreover, Payton has presented no evidence to show a violation of his constitutional rights. Although there were suggestions that Boomtown employees should not have tried to clear the problem with the machine before contacting the Gaming Commission, it is clear that this matter had not yet ripened into a patron dispute when the Boomtown employees made these efforts. Error conditions which result in lock-up of slot machines are common occurrences and are routinely cleared by casino personnel. In fact, current Mississippi Gaming Regulations provide that many types of error conditions, including program errors and reel-spin errors, must disable game play and may be cleared only by an attendant (as opposed to being automatically cleared by the gaming device). *See* Mississippi Gaming Regulation VIII B.8.

...

When Boomtown personnel found that they could not clear the machine, they promptly contacted the Gaming Commission, before the matter ripened into a patron dispute. At that time Boomtown had not refused payment of alleged winnings to Payton. Viewing the evidence in the light most favorable to Payton, there has been no showing of a violation of Payton's due process rights or any other constitutional rights. See *Pickle v. IGT and Sam 's Town Hotel and Gambling Hall,* 830 So. 2d 1214 (Miss. 2002); *Mississippi Gaming Commission v. Freeman,* 747 So. 2d 231 (Miss. 1999).

(Vol 2 of 2 MGC 46, 00313-00315, Hearing Examiner Decision at 14-16) (R.E. 8)

There was more than "any" evidence to support the Hearing Examiner's finding and conclusion. Gaming Agent Steve McComb was the first gaming agent on the scene at Boomtown Casino, and his over 100-page detailed investigation is summarized earlier in this brief on page 10 and is Record Excerpt 9. At trial Agent McComb testified about the investigation that he performed and responded to Payton's cross examination as follows:

> Q. Well, let me ask you this: As an agent, I'm talking to you just cop talk, how can you, with a serious position, come to the conclusion that Mr. Peyton was only allowed $20.00 when he never--according to your report--the machine never allowed Mr. Peyton to spin or activate the bonus. So how can you come to the conclusion that he's entitled to $20.00 when your own report says that he never had a chance to get the twenty bucks?
>
> A. Well, I reached that conclusion from my different interviews from all the people that I talked to. I talked to Mr. Peyton and Ms. Reed. And by the fact that the slot accounting data that I received from the casino is not showing any kind of large jackpot or wide area progressive jackpot hit that was showing. And just different matters such as that.

(Vol 1 of 2, Tr. at 203).

> Q. Steve, would it be fair to say that your report was based in part by the Gaming Lab report?
>
> A Sure.
>
> Q. Now, wouldn't it be true that if the Gaming Lab report was faulty, then your conclusion could be faulty also?
>
> A. I don't feel that either one of them was faulty.

(Vol 1 of 2, Tr. at 204).

Payton claimed that the Gaming Agents' investigation denied him due process, but Payton's expert, Ladner, testified that he thought that Agent McComb's investigation followed proper procedure.

> Q. Do you contend that the game board was altered or corrupted between the time it was removed from the machine until it was given to Ayes Curley? [sic]
>
> A. Under proper handling procedures, I would think that would be a low risk.

Q. Do you think proper handling procedures were followed?

A. According to the testimony from agent McComb, yes, I do.

(Vol 1 of 2, Tr. at 336).

Ladner – the only witness on the issue other than the Gaming Agent – testified that Agent Steve McComb followed procedure. Because Payton's own expert Ladner found that Agent McComb handled the game board appropriately, Payton did not present any evidence on point, much less any other evidence, from which the Hearing Examiner could find that the Gaming Agents' investigation denied him due process.[12] Moreover the Hearing Examiner was entitled to judge Agent McComb's credibility, and she found him to be truthful and reliable.

b. Gaming Lab Investigation did not deny Payton due process.

Senior Engineer Ames Kerley performed the technical investigation of the game board on behalf of the Mississippi Gaming Lab. Ladner's tortuous testimony with regard to that investigation was that he would not have made the same conclusion as the Gaming Lab did in the report that was released just three weeks after Ladner was terminated as supervisor of the Lab.

Q. (Continuing) If all of this information was presented to you in your position as director of the Mississippi Gaming Lab , would you have came to the same conclusion as Curley?

A. No, I would not have.

(Vol 1 of 2, Tr. at 165).

The Payton Investigation was begun during the time that Ladner was Director of the Gaming Lab.

[12] Bally Gaming does not agree that the manner in which the Gaming Commission conducted an investigation would subject *Bally Gaming* to a legitimate deprivation of due process claim. Since that was part of the original Payton claim, however, the facts are provided to refute any suggestion that the investigation was substandard.

Q. Okay. Now, I tried to go through this both your report and your testimony yesterday, to see what it was that gave you pause about Mr. Curley's report because, in fact, Mr. Curley began this report and investigation while you were supervisor of the lab. Did he not?

A. It would appear to be on his report.

(Vol 1 of 2, Tr. at 296).

The *Payton* Investigation was performed by the same Senior Engineer who performed the investigation of the only other malfunction on a Bally Millionaire 777's game, Ames Kerley.[13] That malfunction occurred in December 2003.

The Investigative Reports of the December 2003 Investigation and of the Payton Investigation are nearly identical in both form and substance. Compare Exhibit 1 at 121- 126 with Exhibit 9. (Vol 2 of 2, Ex. 1 (R.E. 9) Ex. 9). In the December 2003 Investigation Kerley found that the bonus round had been initiated but not completed. That finding was approved by Ladner. (Vol 2 of 2, Ex. 9 at 2 and 5).

In the *Payton* Investigation, Kerley found that the bonus round had initiated but had not completed, (Vol 2 of 2, Ex. 1, at 123) (R.E. 9), which report Payton now criticizes.[14]

Kerley used the exact same equipment in doing the tests of the game board from the machine Payton was playing as he did on other tests on game boards. See Ladner Testimony.

Q. And this report followed the—I would say—the template or the format for all other lab reports that came out of your office; did it not?

---

[13] Ames Kerley would clearly qualify as an expert in the field of forensic investigation of slot machine gaming boards, given his work under D.C. Ladner's supervision at the Mississippi Gaming Lab for nine years, as is reflected in D.C. Ladner's testimony.

[14] In the face of the Gaming Lab Report, it is specious to say that "it is undisputed" that the game Payton was playing "never entered the bonus round." The Lab Report, (Vol 2 of 2, Exhibit 1 at 121-123) (R.E. 9), states the fact that the bonus round initiated but failed to complete no less than seven times.

A. Basically.

Q. And he used the exact same equipment in doing these tests as he did on other tests on game boards, did he not?

A. Yes, he did.

(Vol 1 of 2, Tr. at 296-97).

The language in the 2003 Investigative Report approved by Ladner is identical to that in the Payton Investigative Report which was begun under his supervision.[15] There is no difference in the report that Ladner approved prior to his termination and the one he supervised until three weeks prior to its release.

Kerley, who found that Payton won 80 credits in the game in question, was trained and supervised closely by D.C. Ladner for nine years. Kerley, who found that Payton won 80 credits in the game in question, knew what the Lab procedures were and followed those procedures during the time that Ladner was Director of the Lab. Kerley, who found that Payton had won 80 credits, was the same engineer who worked under Ladner for nine years and in whose ability and skill Ladner had full confidence. See Ladner Testimony:

Q. Mr. Ladner, how long did Ames Curley work under your direct supervision?

A. He came on somewhere around, I believe, December '95 and he's still currently employed.

Q. So he worked under you the entire time, just about?

A. Absolutely.

---

[15] In the December 2003 Investigation, "Utilizing the HMI 68000 emulator the RAM image was uploaded into the Laboratory PC workstation for analysis" and then "power was applied to the CPU and the initial gaming machine indications were recorded." (Vol 2 of 2, Exhibit 9 at 3). In the Payton Investigation, "Utilizing the HMI 68000 emulator the entire RAM image was uploaded from the target board into the Laboratory PC workstation for analysis" and then "power was applied to the CPU and the initial gaming machine indications were recorded." (Vol 2 of 2, Ex. 1 at 121-122) (R.E. 9).

Q. Eight, nine years?

A. Correct.

Q. And he was one of your two senior engineers?

A. Correct.

Q. You had full confidence in his ability and skill, did you not?

A. Yes, I did.

(Vol 1 of 2, Tr. at 344-45).

The Executive Director relied on the Gaming Lab Report for his conclusion that Payton's payout for the bonus round was $20.00 and not the $10,000 to which Payton had claimed entitlement.

Payton failed to present the requisite evidence to contradict that finding, and the Hearing Examiner upheld the Executive Director's decision. The Hearing Examiner, after a detailed review of the Gaming Lab's report, was entitled to rely on the Gaming Lab investigation and to find that it was reliable. Ladner had been in charge of the Lab during the investigation, he had worked for nine years with Senior Engineer Ames Kerley who wrote the report, and he had trained Ames Kerley. Under Ladner's supervision, Kerley had investigated the only other malfunction on a Bally Gaming Millionaire 777's game only two months before the Valentine's Day incident. Kerley had written the Gaming Lab investigative report on the December 2003 incident which Ladner approved and which used the same format, the same testing methods and the same equipment as did the Payton report.

Moreover, the Hearing Examiner determines the credibility of the witnesses, and she was entitled to disregard Ladner's testimony which criticized the findings of the agency that he oversaw for nine years and which investigation began under his tenure. Ladner was the supervisor of the Gaming Lab at the time Ames Kerley investigated the

game in question. Ladner met with personnel from Bally Gaming to discuss the malfunction.[16] Ladner reviewed a draft of the Gaming Lab Investigation prior to being terminated from the Lab.[17] Moreover Ladner had trained Ames Kerley, the senior engineer who signed the report, and, as he testified, he had full confidence in Kerley's decisions. (Vol 1 of 2, Tr. at 344-345).

In the face of the testimony from Mr. Ladner, if his testimony is allowed, the statement "I have no determinative conclusion whether his [Kerley's / Gaming Lab's] conclusion is correct," fails miserably and is not sufficient to prove by a preponderance of the evidence that the Executive Director's decision was incorrect.

2. Hearing Examiner Was Entitled to Disregard Other Alleged Improprieties of the Investigation.

Payton appeared to assert two other bases for asking the Gaming Commission to find that the investigation of the Gaming Lab was based on incorrect information. The first had to do with whether the casino employees and the manufacturer's technician properly documented the times the door of the slot machine was opened to run diagnostic tests. Payton's expert Ladner, however, testified that the MEAL card entries were appropriate. (Vol 1 of 2, Tr. at 162-163).

---

[16] To my knowledge, on the following day, it must have been February 18, I would imagine, I actually sat in a meeting, I guess, with Huntley Biggs and Mark Carmella (phon. sp.) to discuss the issues as proffered by this letter.
Q. And tell us about that meeting, if you can recall.
A. I don't recall the details. There was a concern of irregularities of the Millionaire Sevens machines, and from a technical perspective we were trying to discuss resolution of those issues. (Vol 1 of 2, Tr. at 93).

[17] Q. Did you read a draft of this report before you left the lab?
A. No, I did not. I don't recall reading it. I read several drafts. This specific one, I don't recall. (Vol 1 of 2, Tr. at 350-351).

Ladner also asserted that the failure of the Boomtown and Bally Gaming transaction reports to show activity during a two-hour period made the reports suspect. (Vol 1 of 2, Tr. at 309).

If Ladner had reviewed the Gaming Agent's Report, however, he would have seen that the Bally Gaming technician arrived at Boomtown Casino around 20:30 and requested an agent from the Gaming Commission to be present before the slot machine was opened, that the Gaming Agent arrived at Boomtown at 22:00, and that the Bally Gaming technician started working on the slot machine at approximately 22:22. (Vol 2 of 2, Ex. 1 at 15, 20) (R.E. 9). Consequently, the lack of entries on the Bally Gaming exception report reflected that there was no activity on the slot machine between the time the Bally Gaming technician arrived at the casino and the time the Gaming Commission Agent arrived and gave the technician permission to open the slot machine to see if the bonus round would complete. (Vol 2 of 2, Ex. 1 at 5, 15) (R.E. 9). There was nothing suspect about the lack of entries, and the Hearing Examiner was entitled to discount Ladner's criticism.

Payton also criticized the Gaming Lab Investigation because it gave three amounts to which Payton might be entitled, and if the report were correct, according to Payton, it would have had only one. The Hearing Examiner, however, found that the three options were all valid options for resolving the dispute – not three amounts which the Gaming Lab found that Payton had actually won.

> HEARING EXAMINER:
>
> I read the report to say that the engineer, Curley, determined that he should have won $20.00, that he listed some other options for resolving the dispute. My interpretation of his report is that he is entitled to $20.00. I don't think that he said the evidence shows that he should have won $91.49 or he should have done so and so. These are the options that are available for resolving this dispute.

(Vol 1 of 2, Tr. at 203).

Ladner's criticisms were solely criticisms amid his assertion that he would not have reached the same conclusion. He could not and did not, however, tell the Gaming Commission that the Gaming Commission conclusion was wrong.

E. Payton's Claim to Success Through *Hallmark v. Grand Casino Biloxi* is Misplaced.

Payton also claims that his facts mirror the facts in the controversial decision of *Grand Casino Biloxi v. Hallmark*, 823 So. 2d 1185 (Miss. 2002) and that the sole issue in this case is whether, under *Hallmark*, "a botched investigation amounting to a violation of due process requires the Mississippi Gaming Commission to view the case's evidence through the lens of spoliation." Even assuming continuing validity to *Hallmark*, the circuit court distinguished the facts in *Hallmark* and *Payton*, (Vol 3 of 4, CP 423-428), as outlined in the Boomtown Appellee Brief.

To reiterate, because the patron in *Hallmark*[18] walked away from the casino after the MGC Gaming Agent investigated and told him there was no jackpot and then waited thirty days before asking for another investigation; there was no computer game board in *Hallmark*; there was no surveillance tape of the investigation; there were no documents of the event from the casino and the game manufacturer, all having been written over after the Gaming Agent told the patron there was no jackpot; and the patron left the casino. *Hallmark*, 823 So. 2d at 1190.

---

[18] Former Harrison County Circuit Court Judge John Whitfield adopted nearly verbatim the Hallmark Circuit Court Appellant Brief, in creating his own findings of fact which this Court affirmed. *See Hallmark* Dissent, "Our function is to review the evidence presented to the Commission to determine if the decision violated any constitutional provisions. Id. In affirming the judgment of the circuit court, the majority finds that the reasoning of the circuit court is appropriately based on a decision that the Commission's decision violated Hallmark's due process rights. The majority ignores the fact that the circuit court adopted, virtually verbatim, Hallmark's findings of fact and conclusions of law from his brief to that court." *Hallmark*, 823 So. 2d at 1195 (Smith in Dissent).

There was no evidence of a botched investigation here or in *Pickle v. IGT*, 830 So. 2d 1214 (Miss. 2002), which Payton references. The Mississippi Gaming Lab tested the computer game board in both *Pickle* and here; the back up data from both the casino and the licensee manufacturer of the progressive game were available and reviewed; surveillance coverage was maintained on the slot machine from the time the patron sat down to pay until the game board was removed for testing at the gaming lab, the gaming agent was on site within an hour of being called, and he conducted an exhaustive investigation which he documented in detail. (See Vol 2 of 2, Ex. 1 at 1-130) (R.E. 9); (Ex. 2).

Hallmark v. Grand Casinos Biloxi does not support Payton's claim in any of its iterations, and the Court should reject such an argument. Two other early patron dispute cases likewise refute Payton's argument.

Even though there was neither a botched investigation nor any evidence lost through the opening and closing of the slot machine doors, as the Hearing Examiner held, even if there were, this Court has held that failure to preserve evidence or a licensee's failure to notify the Gaming Commission timely of a dispute does not entitle a patron to a jackpot when the evidence shows that the patron did not win. See *Mississippi Gaming Commission v. Freeman,* 747 So. 2d 231 (Miss. 1999) (related to due process requirements and notice to the Gaming Commission), and *Thomas v. Isle of Capri Casino,* 781 So. 2d 125 (Miss. 2001) (related to spoliation of evidence in a gaming patron dispute).

In *Freeman,* this Court, in its first discussion of the Gaming Control Act patron dispute statutes, among other things, outlined the requirements related to due process for a gaming patron and the appropriate remedy for failure of the private gaming

licensee to follow the Gaming Control Act requirements.[19] According to *Freeman*, due process requires notice and an opportunity to be "heard at a meaningful time and in an appropriate manner" at the hearing challenging the Executive Director's decision.[20] Moreover, *Freeman* held that a failure to notify the Gaming Commission timely would not entitle a patron to jackpot winnings which the evidence shows he did not win. *Freeman*, 747 So. 2d at 244.

Thomas v. Isle of Capri Casino, 781 So. 2d 125 (Miss. 2001) followed two years later, and in *Thomas* this Court outlined the steps which should be taken if the patron requests a finding that the gaming licensee has lost evidence. If the Hearing Examiner finds spoliation, the Hearing Examiner must still determine whether there is sufficient evidence to overcome the negative presumption resulting from the spoliation finding. In *Thomas*, this Court held that even failure to preserve evidence does not entitle a patron to a jackpot which he did not win if there is sufficient evidence to overcome the negative

---

[19] Assuming Splash Casino should have notified and failed, then the appropriate remedy is addressed by Miss. Code Ann. § 75-76-159 (3), which states that 'failure to notify the executive director or patron as provided in subsection (1) is grounds for disciplinary action pursuant to 75-76-103 through 75-76-119, inclusive.' The circuit court is therefore correct in stating that 'there is no evidence that either Splash or CDS were disciplined for violation of this reporting requirement.' However, a failure to notify would not entitle Freeman to the jackpot winnings which the evidence shows she did not win. Otherwise, this Court would be unduly punishing CDS beyond the mandates of the statute and granting Freeman a jackpot she did not win." *Mississippi Gaming Commission v. Freeman*, 747 So. 2d 231, 244 (Miss. 1999).

[20] "An administrative board must afford minimum procedural due process under the Fourteenth Amendment to the United States Constitution and under Art. 3, § 14 of the Mississippi Constitution consisting of (1) notice and (2) opportunity to be heard. *State Oil & Gas Board v. McGowan*, 542 So. 2d 244, at 248 (Miss. 1989); citing *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985); *Davis v. Scherer,* 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Varner v. Varner,* 588 So. 2d 428, 428 (Miss. 1991).

Freeman was given an opportunity to be heard at a meaningful time and in an appropriate manner at the reconsideration hearing. Therefore, we hold that circuit court is reversed and the decision of the Commission reinstated, because the requirements of due process have been satisfied." *Freeman*, 747 So. 2d at 246.

presumption that even a negligent loss of evidence would engender. *Thomas v. Isle of Capri Casino*, 781 So. 2d 125, 134 (Miss. 2001).

Freeman and *Thomas*, as well as *Pickle* all refute Payton's claim, and his claim must be rejected.

F. There Was No Spoliation and Payton Cannot Claim Spoliation of Evidence on Appeal for the First Time

On appeal, for the first time in this case, Payton asks this Court to remand the case for a finding that there was spoliation of evidence, without any suggestion of what evidence he claims was intentionally destroyed and without any citation to the record. The fact that he seeks a remand before this Court and sought an award of the $2.1 million primary progressive jackpot before the circuit court on appeal, does not make the remedy requested here any less unwarranted.

As the Mississippi Supreme Court affirmed in *Graves v. Dudley Maples, L.P.*, 950 So. 2d 1017 (Miss. 2007), the appellate court may not consider a matter that was not first presented to the trial court. In *Graves* the Court stated:

> This argument that Maples should have been joined in the action as an individual **was never raised at trial or in any post-trial motion. Accordingly it is barred**. See *McLemore,* 669 So.2d at 24 (before appellate court can review "all new matters" must be first presented to the trial court). This decision is not made capriciously, but under "the ordinarily sound principle that this Court sits to review actions of trial courts and that we should undertake consideration of no matter which has not first been presented to and decided by the trial court." *Purvis*, 791 So.2d at 203.

Graves, 950 So. 2d at 1022 (emphasis added).

In the first week in August, in three disparate opinions, this Court reiterated that a party may not argue a theory or claim before this Court that he did not argue to the trial court. See *Shelia Regan v. South Central Regional Medical* Center, No. 2009-CA-00268-SCT, 2010 WL 3036506, *2 (Miss. August 5, 2010) ("Regan failed to argue that

she was entitled to relief under subsection (4) at the trial court level, and is now precluded from raising it for the first time on appeal."); *A-1 Pallet Company v. City of Jackson, Mississippi,* No. 2009-CA-00756-SCT, 2010 WL 3036749, *2 (Miss. August 5, 2010) ("This Court repeatedly has held that an issue not raised before the lower court is deemed waived and is procedurally barred."); *Lent E. Thomas, Jr. v. Board of Supervisors of Panola County, Mississippi*, No. 2009-CA-00347-SCT, 2010 WL 3036745, *6 (Miss. August 5, 2010) ("Panola County did not raise the issue of mistake at the hearing or in any of its filings. This issue is not properly before this Court.").

Payton's claim of spoliation of evidence consequently is not properly before this Court.

CONCLUSION

Payton has simply presented no evidence to show that the award of 80 credits ($20.00) for his bonus feature is incorrect. Mere speculation that it is incorrect is insufficient to meet Payton's burden of showing that the Executive Director's decision should be reversed or modified.

Payton had every opportunity through direct, cross and re-direct of his witnesses to persuade the Gaming Commission that Payton's payout for the bonus round was not $20.00. The testimony of his expert that he could not determine whether the Gaming Lab's finding was correct is not proof by a preponderance of the evidence that the Executive Director is wrong.

Moreover Payton failed to prove that his due process rights were in any way denied. He had a six and a half month notice of the hearing and an opportunity to present his evidence to the Hearing Examiner over a two-day period. That is what due process required.

Finally, there was no spoliation of evidence, and the fact that the patron did not present that theory for a factual finding to the Gaming Commission in the first instance precludes this Court from undertaking its own factual finding on the issue and should conclude the appeal.

Bally Gaming respectfully submits that the appellate court's role in a patron dispute is to determine whether there is record evidence to support the Gaming Commission's factual findings and conclusions, not to make factual findings on its own. Payton had the burden of proving that the Gaming Commission was wrong in finding that the machine malfunctioned and that the amount of bonus round winnings would have been 80 credits or $20.00. Payton also had the burden of proving that he was entitled to a greater award because of his theory of denial of due process. This Payton failed to do at trial.

Using the proper standard of review of a patron dispute, there was evidence, indeed overwhelming evidence, to support the Gaming Commission decision that Payton would have won $20.00 if the game had not malfunctioned, and that decision must be upheld.

This the 25th day of August, 2010.

Respectfully submitted,

BALLY GAMING AND SYSTEMS

By Its Attorneys

WATKINS LUDLAM WINTER & STENNIS, P.A.

By: _____

Kathryn H. Hester
khester@watkinsludlam.com

Kathryn H. Hester, MSB No. [redacted]
WATKINS LUDLAM WINTER & STENNIS, P.A.
190 East Capitol Street Suite 800
Jackson, Mississippi 39201
P. O. Box 427
Jackson, Mississippi 39205-0427
(601) 949-4900
(601) 949-4804 (fax)

CERTIFICATE OF SERVICE

I, Kathryn H. Hester, attorney for Appellee Bally Gaming and Systems, do hereby certify that I have this day filed the Brief of Appellee Bally Gaming and Systems with the clerk of this Court and have mailed, via United States mail, postage prepaid, and properly addressed a true and correct copy of the Brief of Appellee Bally Gaming and Systems to

David C. Morrison, Esq.
THE MORRISON LAW FIRM
P.O. Box 322
Biloxi, Mississippi 39533

Will Bardwell, Esq.
WILL BARDWELL LAW FIRM, PLLC
P.O. Box 13305
Jackson, MS 39236
ATTORNEYS FOR APPELLANT EDWARD PAYTON

Luther T. Munford, Esq.
James W. Shelson, Esq.
PHELPS DUNBAR LLP
111 East Capitol Street, Suite 600
Post Office Box 23066
Jackson, MS 39225-3066
ATTORNEYS FOR APPELLEE BOOMTOWN CASINO

Honorable Lisa Dodson
Circuit Court Judge
Second Circuit Court District
P.O. Box 1461
Gulfport, MS 39502

This the 25th day of August, 2010.

Kathryn H. Hester
khester@watkinsludlam.com