IN THE SUPREME COURT OF MISSISSIPPI
NO. 2008-IA-01043-SCT

KENDALL T. BLAKE, M.D., AND
JACKSON BONE AND JOINT CLINIC, L.L.P. **APPELLANTS**

VS.

ESTATE OF DAVID ALEXANDER CLEIN,
BY AND THROUGH ITS ADMINISTRATRIX,
DEBORAH CLEIN **APPELLEE**

REPLY BRIEF OF APPELLANTS, KENDALL T. BLAKE, M.D. AND JACKSON BONE AND JOINT CLINIC, L.L.P.

ORAL ARGUMENT REQUESTED

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INTRODUCTION

As this Court is aware, Appellants, Kendall T. Blake, M.D. and Jackson Bone and Joint Clinic, L.L.P., (collectively, "Dr. Blake"), were previously successful in their appeal of the Trial Court's verdict in favor of the Appellee, the Estate of David Alexander Clein (hereinafter "Clein"). See *Blake v. Clein*, 903 So.2d 710 (Miss. 2005).[1] Based on its decision to reverse and remand this matter back to the Trial Court, this Court issued its mandate on June 30, 2005, taxing all costs of the appeal to Clein.[2] Despite the fact that this mandate was issued approximately four-and-a-half (4½) years ago, Clein still has yet to pay the costs of appeal assessed by this Court.

As set forth in Dr. Blake's interlocutory appeal brief, dismissal of the underlying medical malpractice claim is sought on the basis of the express language of Miss. Code Ann. § 11-3-43, which provides that, where an unsuccessful appellee fails to pay the costs of appeal assessed by the Mississippi Supreme Court within two (2) years, "***the appellee, his heirs or assigns, shall not thereafter be entitled to proceed further at his own instance and the appellee's right of action, as well as his remedy, shall be forever barred and extinguished***." Miss. Code Ann. § 11-3-43 (2008) (emphasis added). In its appeal brief, Clein does not dispute that the costs assessed by this Court's June 30, 2005 mandate have not been paid. Instead, Clein argues that "there is no evidence of any sort to indicate that the estate is solvent." See *Appellee's Brief*, at 2. The alleged insolvency of Clein's estate, however, is simply irrelevant. Section 11-3-43 does contain any caveat that might excuse the payment of appeal costs where the party assessed such costs claims to be unable to pay. Rather, the statute clearly and unambiguously requires that the matter be dismissed where the costs of appeal have not been paid within two (2) years.

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[1] (R. 40-72; R.E. 023-55).

[2] (R. 21; R.E. 057).

In an effort to avoid the express statutory requirements of Section 11-3-43, Clein asserts a number of arguments that it contends mitigates against dismissal of the underlying claim. First, Clein argues the Trial Court's decision allowing it to proceed in forma pauperis was "a reasonable exercise of his discretion." See *Appellee's Brief*, at 5. This argument, however, is clearly at odds with the mandatory language of Section 11-3-43, which this Court has repeatedly held does not allow judicial discretion. Second, Clein argues that, because the merits of this matter are again pending before the Trial Court, it "should be allowed to proceed to trial *in forma pauperis*." See *Appellee's Brief*, at 6. Clien fails, however, to cite any authority in support of this argument, nor does it explain why the litany of authorities cited in Dr. Blake's brief, which hold that the right to proceed *in forma pauperis* exists only at the ***initial*** trial, should be disregarded by this Court. Finally, Clein argues that Dr. Blake's "proposed application of [Section 11-3-43] is unconstitutional." See *Appellee's Brief*, at 10. This argument likewise lacks any basis in law or in fact. While Clein claims that dismissal based on its failure to pay appeal costs would deny its right "to get into a Mississippi courtroom," this argument ignores the fact that Clein already has been afforded its day in Court, and exercised that right of access, presumably at considerable expense, without any claim of pauperism. Accordingly, any argument that Clein has been denied "the right to justice" simply strains credibility.

Even ignoring Clein's failure to pay the costs assessed in this Court's mandate within the two (2) year statutory period, the record in this matter clearly demonstrates that dismissal of the current civil action is nevertheless warranted. As set forth in Dr. Blake's interlocutory appeal brief, Clein's administratrix, Deborah Alexander Clein, is guilty of the repeated submission of false sworn testimony concerning matters material to this litigation, such that the sanction of dismissal is warranted as a matter of Mississippi law. Conspicuously absent from Clein's response to this argument is any assertion that Ms. Clein did not submit false sworn testimony or

misleading information in relevant Court filings. Instead, Clein attempts to characterize these "misstates" as being "completely free and apart from the liability and damage issues of the medical malpractice claim." See *Appellee's Brief*, at 12. This defense of Ms. Clein simply cannot be reconciled with the fundamental truth-seeking mission of our Court system. The record in this matter amply demonstrates that Ms. Clein has attempted to dramatically overstate the alleged debts owed by the estate, while concealing this litigation in other Court proceedings. These misleading statements were clearly designed to afford Ms. Clein and the estate some tactical or other financial advantage, further demonstrating a troubling disregard for the most basic tenets of the judicial process.

Because Clein failed to timely pay the costs assessed in this Court's June 30, 2005 mandate, as required by Section 11-3-43, coupled with the fact that Clein's Administratrix has repeatedly submitted false sworn testimony concerning matters material to this litigation, this matter must be dismissed with prejudice, in accordance with Mississippi law.

ARGUMENT

I. THE MANDATORY LANGUAGE OF MISS. CODE ANN. § 11-3-43 DOES NOT PERMIT LITIGANTS TO AVOID PAYMENT OF APPEAL COSTS BY CLAIMING PAUPERISM OR INSOLVENCY, NOR DOES SUCH VEST THE TRIAL COURT WITH DISCRETION TO PERMIT THE SAME.

In interpreting statutory language, Mississippi's appellate Courts have repeatedly acknowledged that "[w]hen used in a statute, ***the word 'shall' is mandatory ... [and] eliminat[es] any possible interjections of judicial discretion.***" *Stone County Pub., Inc. v. Prout*, 18 So.3d 300, 303 (Miss. 2009) (quoting *D.D.B. v. Jackson County Youth Court,* 816 So.2d 380, 383 (Miss. 2002)) (emphasis added); *Price v. Clark*, 21 So.3d 509, 519 (Miss. 2009) ("Simply stated, "shall" is mandatory, while "may" is discretionary."); see also *Franklin v. Franklin,* 858 So.2d 110, 114 (Miss. 2003); *Poindexter v. Southern United Fire Ins. Co.,* 838 So.2d 964, 971 (Miss.

2003) (recognizing that, unlike the discretionary nature of "may," the word "shall" is a mandatory directive); *Anderson v. Yungkau*, 329 U.S. 482, 485, 67 S.Ct. 428, 430 (1947) ("The word 'shall' is ordinarily 'The language of command'.") (citing *Escoe v. Zerbst*, 295 U.S. 490, 493, 55 S.Ct. 818, 819, 820 (1935)).

In light of the above authorities, it is abundantly clear that Clein's argument that the Trial Court's decision allowing it to proceed with the prosecution of this matter was "a reasonable exercise of discretion" lacks legal merit. Section § 11-3-43 expressly provides as follows:

> ... [I]n all cases wherein the appellant has paid the costs of his appeal and is the successful litigant and the action is reversed and remanded for further proceedings, with costs taxed against the appellee, ***the action shall not proceed further before the trial court, on application of the appellee, until the appellee has paid to the clerk of the trial court, for the benefit of the appellant, the costs so paid by the appellant in perfecting his successful appeal. Should the appellee fail to make such a refund of costs to the trial court within two (2) years ..., the appellee, his heirs or assigns, shall not thereafter be entitled to proceed further at his own instance and the appellee's right of action, as well as his remedy, shall be forever barred and extinguished.***

Miss. Code Ann. § 11-3-43 (2008) (emphasis added).

The above passage clearly establishes that, where an unsuccessful appellee fails to timely pay appeal costs taxed by the Supreme Court, dismissal of that party's claims is required.[3] The statute states, in mandatory terms, that the action may not proceed unless and until all appeal costs have been paid, and that the failure to make payment within the two (2) year period

[3] Clein argues that "MISS. CODE ANNO. § 11-53-69 (1972) gives the trial court a reasonable basis to delay the payment of expenses until the conclusion of the matter." See *Appellee's Brief*, at 5. Clein acknowledges, however, that this Court has expressly rejected the notion that Section 11-53-69 has any application in the context of appeal costs. *Id.* at FN 6 (citing *Martin v. Reikes*, 587 So.2d 285 (Miss. 1991)). In light of Clein's citation of Section 11-53-69, a closer examination of this Court's holding in *Reikes* is warranted. There, the Court expressly acknowledged the long-standing rule that "[c]osts in the Supreme Court are governed by their own separate rules ... ." *Reikes*, 587 So.2d at 288 (quoting *Meridian Coca Cola Co. v. Watson*, 145 So. 344, 344-45, 164 Miss. 389 (1933)). Thus, given that the costs at issue in the current matter are purely appeal costs, Section 11-53-69 has no application.

proscribed by the statute requires the action to "be forever barred and extinguished." See *Martin v. Reikes*, 587 So.2d 285, 289 (Miss. 1991) (observing that Section 11-3-43 is "in a sense is ***a statute of limitations***.") (emphasis added). Given this mandatory language, coupled with Clein's failure to timely repay the costs taxed in this Court's June 30, 2005 mandate, it is clear that the Trial Court lacked the discretion to allow Clein to proceed with this matter any further.[4]

In an attempt to distract this Court from the mandatory language of Section 11-3-43, Clein argues that the Trial Court's decision was justified based on the allegation that it "did not require the appeal bond which resulted in the astronomical costs taxed in this matter." See *Appellee's Brief*, at 5.[5] Clein further argues that it "attempted to schedule trial before the two year period" provided by Section 11-3-43 for payment of appeal costs. *Id.* These arguments, however, are simply irrelevant. Section 11-3-43 does not contain any caveat allowing litigants to circumvent its mandatory language by showing that they either did not require some form of security on appeal or were otherwise diligent in seeking to renew their prosecution of the underlying claim. Moreover, Clein fails to cite any authority suggesting or otherwise articulating why these allegations should be considered in this Court's analysis. Accordingly, this Court

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[4] The mandatory language of Section 11-3-43 is echoed in Miss. Code Ann. § 11-3-41, which provides that "[i] n cases where the Supreme Court assesses the costs against the appellee, ***the appellant shall, with no further court action, be entitled to a judgment against the appellee in the amount expended by the appellant on court costs***." Miss. Code Ann. 11-3-43 (2008) (emphasis added). Consistent with Section 11-3-41, Dr. Blake respectfully requests that, in addition to ordering the dismissal of this action, this Court should remand this matter to the Trial Court to enter a judgment in favor of Dr. Blake against Clein for the total appeal costs of $153,398.01, plus collection costs and interest.

[5] As Clein acknowledges, the Trial Court rejected the argument that Clein's actions played no role in generating the costs of appeal. See *Appellee's Brief*, at 5 (citing R. 240-47; R.E. 107-114). Specifically, the Court found that Clein's failure to expressly agree not to execute on the Trial Court's judgment "in express, clear and unambiguous written terms put the defendants in the position of having no option but to post such security as necessary to obtain a supersedeas appeal." (R. 242; R.E. 109).

should reverse the Trial Court's May 28, 2008 Order denying Dr. Blake's Motion to Dismiss, and dismiss this matter with prejudice.

II. APPELLEE HAS FAILED TO CITE ANY APPLICABLE AUTHORITY SUPPORTING ITS CLAIM THAT IT SHOULD BE EXCUSED FROM ITS OBLIGATION TO PAY THE APPEAL COSTS TAXED BY THE MISSISSIPPI SUPREME COURT IN ITS JUNE 30, 2005 MANDATE.

As set forth in Dr. Blake's interlocutory appeal brief, the procedural mechanism providing litigants with the ability to proceed *in forma pauperis* is found in Rule 3 of the Mississippi Rules of Civil Procedure, which provides that "[i]f a pauper's affidavit is filed in the action the costs deposit and security for costs may be waived." Miss. R. Civ. P. 3(c). Given that Rule 3 addresses "the commencement of the action," it is seems apparent that the right to proceed in forma pauperis may be claimed only at the outset of the litigation. In response to this argument, Clein asserts that other portions of Rule 3 address matters beyond the initial filing of the cause, including Rule 3(b), which "addresses the revision of costs deposits where the motion of the 'clerk or any party to the action' requires additional security on the part of the plaintiff," and Rule 3(d), which addresses the accounting for costs 'within sixty days of the conclusion of an action.'" See *Appellee's Brief*, at 6-7. From these provisions, Clein then extrapolates that "there is nothing in the Rules that prohibits a motion to proceed as a pauper after the commencement of the action." *Id.* at 7.

In arguing that the Mississippi Rules of Civil Procedure do not expressly prohibit a litigant from proceeding "as a pauper after the commencement of the action," Clein ignores the fact that the reverse of this argument is also equally true, i.e., that nothing in the Rules expressly authorizes or permits a litigant to proceed *in forma pauperis* beyond the initial trial, either. Clein further ignores the fact that Rule 6 of the Mississippi Rules of Appellate Procedure does expressly limit the right to appeal *in forma pauperis* to criminal cases, to the exclusion of civil matters such as the current action. See Miss. R. App. 6 (2008). Reading these rules in concert, it

is clear that, while the procedural provisions of our judicial system will not bar a truly impoverished litigant from seeking redress through the Courts, such do not contemplate a scenario where a civil litigant will initiate and prosecute a matter through the initial trial and appellate stages, only to then claim pauper status to avoid payment of appeal costs.

Clein's argument that the literal text of the Mississippi Rules of Civil Procedure does not prohibit further prosecution of this matter is further undermined by the litany of cases cited in Dr. Blake's brief, which specifically address the limits of a litigant's right to proceed *in forma pauperis*. See *Bessent v. Clark*, 974 So.2d 928, 931-32 (2007) ("***The right to proceed in forma pauperis in civil cases does not extend beyond the initial trial of the matter.***") (quoting *Slaydon v. Hansford*, 830 So.2d 686, 689 (Miss. Ct. App. 2002) (emphasis added); *Moreno v. State*, 637 So.2d 200, 202 (Miss. 1994) ("[A]ny right to proceed *in forma pauperis* in other than a criminal case ***exists only at the trial level.***"); *Nelson v. Bank of Mississippi*, 498 So.2d 365, 366 (Miss 1986) (holding that indigent civil litigant was required to pay costs required by Mississippi Supreme Court Rules in order to proceed with appeal); see also *Ivy v. Merchant*, 666 So.2d 445, 447 (Miss. 1995) ("We also hold that the trial court incorrectly granted Ivy leave to appeal *in forma pauperis*. ... [T]he right to appear *in forma pauperis* in a civil matter exists at the trial level only."); *Life & Cas. Ins. Co. v. Walters*, 190 Miss. 761, 200 So. 732, 733-34 (1941) (holding that Miss. Code Ann. § 11-53-17 authorizes *in forma pauperis* proceedings in civil cases at the trial level only).

The above-cited cases make it abundantly apparent that the right to proceed *in forma pauperis* exists only at the ***initial*** trial, and does not extend to the appeal stage or any subsequent proceedings before the Trial Court on remand. Notwithstanding the numerous authorities cited by Dr. Blake, Clein nevertheless argues that, because this case is no longer at the appellate stage and is back before the Trial Court, the cases cited by Dr. Blake are rendered inapplicable. See

Appellee's Brief, at 7. Conspicuously absent from Clein's presentation, however, is any reported case law supporting this argument. Unable to cite any published decisions, Clein is forced to rely solely on the Trial Court's opinion. *Id.* at 8. With all due respect for the Trial Court, however, its decision is clearly at odds with the prior decisions of this Court, as well as the Court of Appeals, as demonstrated by its express criticisms of the *Slaydon* decision.

Given Clein's reliance on the Trial Court's decision, its reasoning in allowing Clein to proceed *in forma pauperis* warrants additional scrutiny. An examination of the Trial Court's opinion reveals that its primary motivation appeared to be the general sense that it would be inequitable to deny a truly impoverished litigant to proceed with the prosecution of his claim.[6] While this sentiment is understandable, it is directly at odds with Mississippi law. First, as discussed above, Section 11-3-43 does not contain any language suggesting that the requirement that appeal costs be paid within two (2) years is somehow excused based on a showing of insolvency or pauperism. Instead, the language of Section 11-3-43 unequivocally states that the failure to timely repay such costs "forever bar[s] and extinguishe[s]" the right to pursue the claim any further. Second, the argument that the denial of the right to continue pursuit of a claim based solely on financial considerations would be unfair to impoverished litigants was specifically rejected in *Nelson v. Bank of Mississippi*, where this Court declined to allow an impoverished civil litigant to avoid payment of appeal costs. Given this Court's decision in *Nelson*, it cannot be said that Mississippi law allows a party to continue prosecution of a claim post-appeal when the costs of that appeal have not been paid.

In the context of Clein's poverty claim, it should further be observed that Clein admits to receiving what it characterizes as "legal loans" from various legal funding agencies, totaling

[6] (R.244-45; R.E. 111-12).

$136,850.00. See *Appellee's Brief*, at 3.[7] Clein further acknowledges that such funds served as "an advance on the civil claim, to be repaid upon successful resolution." *Id.* at FN 3.[8] What Clein does not state, however, is why these funds could not be used to satisfy at least some portion of the costs assessed by this Court in its June 30, 2005 mandate. It suffices to say, if Clein exercised the ability to use the underlying medical malpractice claim to obtain funds in excess of $136,000.00, it likewise should be required to pay the funds necessary under Mississippi law to continue the claim, if it desires further prosecution of the same. In sum, Clein has failed to demonstrate any factual or legal basis for this Court to disregard the requirements of Section 11-3-43, such that its failure to timely pay the costs taxed in this Court's June 30, 2005 mandate requires this matter to be dismissed with prejudice.

III. APPELLEE'S CLAIM THAT MISS. CODE ANN. § 11-3-43 IS UNCONSTITUTIONAL LACKS ANY LEGITIMATE BASIS IN FACT OR IN LAW.

Under Mississippi law, it is well-established that enactments of the Mississippi Legislature enjoy a strong presumption of validity. *Hemba v. Mississippi Dept. of Corrections*, 998 So.2d 1003, 1005 (Miss. 2009); *Richmond v. City of Corinth*, 816 So.2d 373, 375 (Miss. 2002); *Loden v. Mississippi Pub. Serv. Comm'n*, 279 So.2d 636, 640 (Miss. 1973); see also *Dilliard v. Musgrove*, 838 So.2d 261, 264 (Miss. 2003) ("a legislative enactment is cloaked with a presumption of constitutionality"). A party challenging the constitutionality of a statute "must prove the unconstitutionality of the statute beyond a reasonable doubt." *City of Starkville v. 4-County Elec. Power Ass'n*, 909 So.2d 1094, 1112 (Miss. 2005) (citing *Richmond*, 816 So.2d at 375); see also *Vance v. Lincoln County Dep't of Pub. Welfare*, 582 So.2d 414, 419 (Miss. 1991). Courts should strike down a statute as unconstitutional "only where it appears beyond all

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[7] (R. 349-50; R.E. 103-04).

[8] As discussed more thoroughly below, the exact nature of these funds, and whether such are subject to repayment, is apparently somewhat in dispute. That being said, Clein does not dispute that these funds were actually received.

reasonable doubt that such statute violates the constitution." *Wells v. Panola County Bd. of Educ.*, 645 So.2d 883, 888 (Miss. 1994).

All doubts as to the validity of a statute must be resolved in favor of the statute. *Richmond*, 816 So.2d at 375. "Courts cannot pass judgment upon the wisdom, practicality or even folly of a statute ... [t]his is solely the prerogative of people acting through their Legislature." *Wells*, 645 So.2d at 889. Moreover, Courts should interpret statutes "so as to render them constitutional rather than unconstitutional if the statute under attack does not clearly and apparently conflict with organic law after first resolving all doubts in favor of validity." *Id.* (citing *Loden*, 279 So.2d at 640).

In a final attempt to avoid the mandatory provisions of Section 11-3-43, Clein argues that Dr. Blake's proposed application of the statute is unconstitutional. See *Appellee's Brief*, at 9-11. As established by the above authorities, Clein carries a heavy burden in casting Section 11-3-43 as unconstitutional.[9] The legislature's enactment of Section 11-3-43 enjoys a presumption of constitutionality that can only be overcome by showing that such violates the constitution beyond a reasonable doubt. Apparently cognizant of the tenuous nature of its argument that

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[9] Clein's efforts to characterize Section 11-3-43 as unconstitutional is further belied by its failure to furnish notice of this challenge to the Mississippi Attorney General, as required by Rule 44 of the Mississippi Rules of Appellate Procedure. See Miss. R. App. Proc. 44(a) (2008) ("If the validity of any statute, executive order or regulation, municipal ordinance, franchise or written directive of any governmental officer, agent, or body is raised in the Supreme Court or the Court of Appeals, and the state, municipal corporation, or governmental body which enacted or promulgated it is not a party to the proceeding, the party raising such question shall serve a copy of its brief, which shall clearly set out the question raised, on the Attorney General, the city attorney, or other chief legal officer of the governmental body involved."); see also *Oktibbeha County Hosp. v. Mississippi State Dept. of Health*, 956 So.2d 207, 210 (Miss. 2007); ("We have procedurally barred previous challenges to the constitutionality of a statute because of a party's failure to notify the Attorney General of the constitutional attack."); *Powers v. Tiebauer*, 939 So.2d 749, 754-55 (Miss. 2005) (sending Attorney General the appellate brief per Miss. R. App. Proc. 44 was not sufficient notice under Miss. R. Civ. Proc. 24(d)); see also *Cockrell v. Pearl River Valley Water Supply Dist.*, 865 So.2d 357, 360 (Miss. 2004) (holding that constitutional claims are procedurally barred when notice is not provided to the Attorney General).

Section 11-3-43 is unconstitutional, Clein offers little analysis in support of the same. Instead, Clein merely asserts that "[t]he Mississippi Constitution guarantees that the court system will be open to all litigants and that the 'right to justice' and ability to get into a Mississippi courtroom shall be kept open to all those with issues before a tribunal." *Id.* at 8. While Clein does not actually state that such is the case, the obvious implication is that Clein believes it has been unconstitutionally denied its day in court.

Clein's failure to articulate how it has been denied access to the judicial system is easily explained -- Clein ***did*** have its day in Court. While Clein was able to prevail at trial, such did not occur without "multiple and substantial errors by the trial court," which this Court deemed sufficient to warrant reversal on appeal. *Blake*, 903 So.2d at 732. In many instances, the matters cited by this Court in support of its decision reversing the Trial Court were directly related to Clein's own litigation tactics. Specifically, this Court held that Clein opened the door to testimony excluded by the Trial Court concerning David Alexander Clein's belief that "his dead mother, who practiced witchcraft, had placed a curse on him," by offering medical records into evidence that referenced these beliefs. *Blake*, 903 So.2d at 726-727. Additionally, this Court held that the Trial Court's admission of an unqualified expert witness designated by Clein was an abuse of discretion. *Id.* at 728.[10] This Court further reversed the Trial Court's decision based on the admission of photos offered into evidence by Clein showing "a bloody, amputated limb, which served no probative evidentiary purpose other than to prejudice the defendant and to shock the jury." *Id.*

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[10] Clein's retention of Dr. Hans-Jorg Trnka, an Austrian physician, is symptomatic of another crucial flaw in Clein's argument. As set forth in Dr. Blake's appeal brief, Clein actively pursued this matter for nearly a decade prior to claiming pauper status, without making any allegation of poverty. Clein's decision and ability to retain an international expert is indicative of the financial resources already employed in this matter, and belies the claim that Clein is being unconstitutionally deprived the right to assert his alleged claim for relief in a Court of law.

In light of the rulings discussed above, it simply cannot be said that Clein's own conduct did not play a role in this Court's decision reversing the Trial Court. While Clein now attempts to convince this Court that it is a victim of circumstance, and that dismissal based on the failure to pay appeal costs would violate basic notions of due process, it is clear that Clein played a substantial role in creating the alleged predicament in which it now finds itself. Dr. Blake respectfully submits that, if Clein wished to obtain a judgment capable of preservation on appeal, it should have avoided the temptation to seek a verdict through questionable, and occasionally inflammatory, evidence and argument.

In the context of Clein's alleged constitutional deprivation, the fact that Clein has already been afforded a trial on the merits, as well as an appeal, should not be understated. Again, Mississippi case law clearly establishes that the right to proceed *in forma pauperis* exists only at the initial trial. *Bessent*, 974 So.2d at 931-32; *Slaydon*, 830 So.2d at 689; *Moreno*, 637 So.2d at 202. This Court's holding in *Nelson* further establishes that pauperism will not excuse a litigant from paying costs of appeal. *Nelson*, 498 So.2d at 366. Moreover, an examination of the *Nelson* decision gives no indication that an impoverished litigant would have any right to appeal even if the trial court committed reversible error. Dr. Blake respectfully submits that, if Mississippi law unequivocally would deny a litigant the right to proceed *in forma pauperis* at the appeal stage, regardless of the merits of the trial court's decision, there is no reason to suggest that it is inequitable to deny an impoverished litigant who has failed to prevail on appeal a right to continue the action.

While Clein alleges that Dr. Blake's proposed application of Section 11-3-43 would produce an unconstitutional result, it is clear that the only interpretation of this statute urged by Dr. Blake is a literal one. Section 11-3-43 requires the unsuccessful appellee to pay all appeal costs assessed by the Supreme Court within two (2) years. In the event such costs are not timely

paid, the statute unequivocally states that the action shall be forever extinguished. Nowhere in the statute is there any language suggesting that termination of the action after two (2) years can be avoided, whether through a claim of pauperism or otherwise. In the four-and-a-half (4½) years since this Court issued its June 30, 2005 mandate, Clein has failed to pay the costs assessed therein. By any standard, Clein has failed to demonstrate why this Court should disregard the presumption of constitutionality afforded to Section 11-3-43, much less than beyond a reasonable doubt. Thus, under the literal language of Section 11-3-43, Clein's action must be dismissed.

IV. THE FALSE TESTIMONY SUBMITTED BY APPELLEE'S ADMINISTRATRIX, DEBORAH CLEIN, IS MATERIAL TO APPELLEE'S PAUPERISM CLAIM, AND FURTHERS A PATTERN OF UNTRUTHFULNESS THAT IS WHOLLY INCONSISTENT WITH MISSISSIPPI LAW, WARRANTING DISMISSAL OF THE UNDERLYING MATTER.

As discussed in detail in Dr. Blake's interlocutory appeal brief, it is well-established under Mississippi law that dismissal of a plaintiff's claim is warranted where that plaintiff fails to respond truthfully to inquiries submitted during the litigation process. See *Scoggins v. Ellzy Beverages, Inc.*, 743 So.2d 990, 997 (Miss. 1999) (affirming dismissal with prejudice of premises liability claims, where plaintiff failed to truthfully acknowledge preexisting injuries); *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385, 1390-91 (Miss. 1997) (holding that trial court did not abuse its discretion in dismissing action based on plaintiff's willful misstatements in responses to discovery requests); see also *Jones v. Jones*, 995 So.2d 706 (Miss. 2008); *Grant v. Kmart Corp.*, 870 So.2d 1210, 1219 (Miss. Ct. App. 2001) (holding that store patron acted with willfulness and bad faith when she failed to answer interrogatories truthfully, and that dismissal was proper remedy for patron's discovery violation).

As set forth in detail in Dr. Blake's interlocutory appeal brief, Clein's administratrix, Deborah Alexander Clein ("Ms. Clein"), repeatedly submitted false sworn testimony, both in her deposition and in the pauper's affidavit submitted to the Trial Court. In its appeal brief, Clein

does not dispute that Ms. Clein is guilty of making false statements, but argues that "Mrs. Clein's alleged misstates are completely free and apart from the liability and damage issues of the medical malpractice claim." See *Appellee's Brief*, at 12.[11] This argument, however, ignores the fact that many of Ms. Clein's misstatements relate directly to the financial condition of Clein's estate, such that the same are clearly material to the issues currently before the Court. More fundamentally, the notion that Ms. Clein's false sworn statements may be excused because of their subject matter is irreconcilable with the fundamental truth-seeking mission of the judicial process.

Clein's attempt to downplay the false statements submitted by Ms. Clein begins with the argument that Ms. Clein did not overstate the debt owed by Clein's estate in the pauper affidavit submitted to the Trial Court. See *Appellee's Brief*, at 12. Again, this affidavit, which was attested to by Ms. Clein, identified five (5) separate transactions with legal funding entities, characterized as "loans" received from "creditors," which totaled $136,850.00 plus fees and

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[11] Clein's counsel expressly acknowledged Ms. Clein's submission of false sworn testimony concerning her criminal history and other matters before the Trial Court, stating as follows:

> With regard to the discovery violations, with regard to her testimony on her criminal history, **I have no explanation.**
>
> With regard to her testimony that she would not be suing her husband, had not sued her husband and the lawyer was not supposed to file a claim, **I have no explanation.**
>
> * * *
>
> With regard to her allegation that she had no contact with the Legal Funding people, and [counsel for Dr. Blake] presented an email where she did have some contact with them, **I have no explanation.**

(R. Vol. 6 [p. 104]; R.E. 320) (emphasis added).

interest.[12] Contrary to these representations, the agreements memorializing these transactions expressly state "[t]his funding is an investment and not a loan."[13] Thus, it is apparent that Ms. Clein employed misleading language in her affidavit, designed to persuade the Trial Court that the estate owed debts totaling $136,850.00 plus fees and interest, thereby furthering the pauperism claim and affording her and the estate a tactical advantage in this litigation.

Clein argues that Dr. Blake "offers no evidence, no analysis, not a scintilla of credible thought to support the contention that the estate did not meet the pauper criteria." See *Appellee's Brief*, at 12. Contrary to this assertion, the record plainly establishes that Clein sought and received funds totaling nearly $140,000.00 based solely on the pendency of the underlying medical malpractice claim. Regardless of whether these funds were "loans" subject to repayment or merely "investments" by the legal funding entities, Clein has not offered any explanation as to why these proceeds could not be used to satisfy the appeal costs assessed by this Court in its June 30, 2005 mandate.[14] To be certain, if Clein was capable of using this lawsuit to accomplish financial gain, it at least ought to be required to satisfy the financial obligations imposed by Mississippi law to continue prosecution of the same.

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[12] (R. 349-50; R.E. 103-04).

[13] (R. 409, 411; R.E. 142, 144) (emphasis added).

[14] In this regard, Clein's attorney expressly stated as follows to the Trial Court during the March 14, 2008 evidentiary hearing on Clein's pauperism claim:

> **It also dawned on me that, holy cow, this is a lot of money that this family could allegedly have and would be a huge big asset, and I can't even imagine the blood on that would be on the water if I had eliminated listing something which is potentially $125.000.00 in cash floating around, although all of that cash was gone, and its not in the bank accounts. I have no idea where that cash went. That was done some years ago.**

(R. Vol. 6 [pp. 103-04]; R.E. 319-20) (emphasis added).

Mississippi law expressly provides that Courts "may dismiss an action commenced or continued on affidavit of poverty, if satisfied that the allegation of poverty was untrue." Miss. Code Ann. § 11-53-19 (2008). Clein's receipt of funds totaling in excess of $136,000.00 derived wholly from the existence of this lawsuit cannot be reconciled with the assertion that it is unable to satisfy ordinary litigation expenses all other similarly situated Mississippi litigants are required to pay. Ms. Clein's blatant attempt to mischaracterize the nature of these funds in her sworn affidavit only further supports dismissal of this matter.

In addition to denying that Ms. Clein overstated the alleged debts of the estate, Clein further attempts to diminish the well-documented misrepresentations contained in Ms. Clein's bankruptcy filings. See *Appellee's Brief*, at 12-13.[15] Unable to dispute the fact that Ms. Clein submitted false information in her bankruptcy filings by denying the current claim's existence, Clein merely argues that "[t]he bankruptcy filing is meaningless." *Id.* at 12.[16] Clein's flippant disregard for the fact that Ms. Clein submitted false information concerning this lawsuit to a Court of law can only be described as troubling.[17] Dr. Blake respectfully submits that such

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[15] In its appeal brief, Clein neither addresses nor disputes the fact that Ms. Clein testified falsely during her August, 2007 deposition concerning her guilty plea and subsequent conviction of false pretenses, a crime involving *crimen falsi*, less then three (3) years prior. Similarly, Clein fails to address the argument that Ms. Clein's failure to acknowledge this claim in her bankruptcy filings further warrants dismissal under the doctrine of judicial estoppel. See *Superior Crewboats v. Hudspeth*, 374 F.3d 330 (5th Cir. 2004) (holding that debtor was judicially estopped from pursuing personal injury claim where claim was not included in schedule of assets).

[16] In her "Statement of Financial Affairs," filed with the United States Bankruptcy Court for the Southern District of Mississippi on May 1, 2007, Ms. Clein failed to identify the current claim, despite being requested to list "other contingent and unliquidated claims of every nature," and "all suits and administrative proceeds" to which she was a party during the year prior to her bankruptcy filing. (R. 429, 432; R.E. 266, 269).

[17] Clein's efforts to downplay the significance of the misrepresentations made in Ms. Clein's bankruptcy filings are further at odds with the Trial Court, which specifically acknowledged that "***Defendants submitted proof of Deborah Clein's false testimony about material matters in the case,***" and that "***the false statements by Clein are serious.***" (R. Supp. Vol. 2 at 222, 224; R.E. 017, 019) (emphasis added).

conduct is highly relevant, as such clearly demonstrates a blatant disregard for the fundamental truth-seeking mission of the judicial system. See *Scoggins*, 743 So.2d at 994-95 ("'***A trial is a proceeding designed to be a search for the truth.' When a party attempts to thwart such a search, the courts are obligated to ensure that such efforts are not only cut short, but that the penalty will be sufficiently severe to dissuade others from following suit.***") (quoting *Sims v. ANR Freight Systems, Inc.*, 77 F.3d 846, 849 (5th Cir. 1996)) (emphasis added). Given Ms. Clein's repeated and well-documented pattern of untruthfulness, Dr. Blake respectfully submits that dismissal of the current action is appropriate under Mississippi law.

CONCLUSION

For the reasons set forth herein, as well as those contained in their Interlocutory Appeal Brief, Appellants, Kendall T. Blake, M.D. and Jackson Bone and Joint Clinic, L.L.P., respectfully request that this Honorable Court render a judgment dismissing the current civil action with prejudice, and further remand this matter to the Circuit Court of Hinds County, Mississippi, with instructions to enter a judgment in favor of Kendall T. Blake, M.D. and Jackson Bone and Joint Clinic, L.L.P., Defendants in the case below, against the Estate of David Alexander Clein, Plaintiff in the case below, for the total appeal costs of $153,398.01, as taxed by the Mississippi Supreme Court's June 30, 2005 Mandate, plus collection costs and interest thereon.

Respectfully submitted, the 6th day of January, 2010.

KENDALL T. BLAKE, M.D. AND
JACKSON BONE AND JOINT CLINIC, L.L.P.

By: _____

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CERTIFICATE OF SERVICE

I, Stuart Robinson, Jr., one of the attorneys for Appellants, do hereby certify that I have this date served a true and correct copy of the foregoing Reply Brief of Petitioners, Kendall T. Blake, M.D., and Jackson Bone and Joint Clinic upon the following:

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