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

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

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

1. Whether Appellee's case should be dismissed with prejudice based on Appellee's failure to pay the appeal costs taxed by the Mississippi Supreme Court in its June 30, 2005 Mandate within two (2) years, as required by Miss. Code Ann. § 11-3-43?

2. Whether the repeated submission of materially false sworn testimony by Appellee's Administratrix, Deborah Clein, warrants dismissal of the current matter?

STATEMENT OF THE CASE

Appellants are Kendall T. Blake, M.D. and Jackson Bone and Joint Clinic, L.L.P., Defendants in a medical malpractice action filed by David Alexander Clein (collectively, "Dr. Blake") (R. Supp. Vol. 1 at 1; R.E. 001).[1] This action is currently pending in the Circuit Court of the First Judicial District of Hinds County, Mississippi ("the Trial Court"), and is styled as *The Estate of David Alexander Clein vs. Kendall T. Blake, M.D. and Jackson Bone and Joint Clinic, L.L.P.*, No. 251-97-1003-CIV. (*Id.*). Appellee is the Plaintiff in that case (hereinafter "Clein"). (*Id.*).[2]

The initial trial in this matter, conducted in February, 2002, resulted in a jury verdict for Clein, which Dr. Blake subsequently appealed to the Mississippi Supreme Court. (R. Supp. Vol. 1 at 7-8; R.E. 007-08). This Court reversed the verdict and remanded this matter to the Trial Court. See *Clein v. Blake*, 903 So.2d 710 (Miss. 2005) (R. 40-72; R.E. 023-55). This Court further denied Clein's Motion for Rehearing. (R. 22; R.E. 056). Subsequently, on June 30, 2005, this Court issued its Mandate taxing all appeal costs to Clein. (R. 21; R.E. 057). Following the Mandate, Dr. Blake filed a Motion to Assess Costs, Enter Judgment for Costs and to Bar Further Prosecution of Matter Pending Full Payment of Costs in the Trial Court, requesting that the Trial Court direct the Circuit Clerk of Hinds County to prepare a Bill of Costs reflecting the taxation of costs in the amount of $153,398.01. (R. 17-20; R.E. 058-61).

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[1] David Alexander Clein died November 25, 2006. (R. 250; R.E. 117). Thereafter, the Trial Court entered an Order substituting the Estate of David Alexander Clein, by and through its Administratrix, Deborah Clein, as the party plaintiff in the above styled and numbered action. (R. 330; R.E. 022).

[2] While the Estate of David Alexander Clein was not the Plaintiff at the time of the initial trial, for purposes of uniformity and clarity, Dr. Blake uses the term "Clein" interchangeably in this brief to refer to either the current Plaintiff (the Estate) or the former Plaintiff, David Alexander Clein, deceased.

Notwithstanding the failure to pay the costs assessed by this Court, Clein subsequently filed a Motion to Set Trial in the Trial Court. (R. 29-30; R.E. 062-63). Hearings on Dr. Blake's Motion to Assess Costs and Clein's Motion to Set Trial were held on June 9, 2006. (R. Vol. 6 [pp. 1-34]; R.E. 064-99).[3] Thereafter, the Trial Court issued a Memorandum Opinion assessing Clein with all costs incurred by Dr. Blake in the appeal, but allowing Clein the opportunity to proceed with the prosecution of this matter *in forma pauperis*. (R. 240-47; R. E. 107-14).[4] However, the Trial Court conditioned further prosecution of the case upon Clein's ability to submit a legitimate pauper's affidavit, stating that "Defendants shall have thirty (30) days from the date Clein files his affidavit to investigate his poverty claim and file a motion to strike same if convinced the claim is false." (R. 247 [FN 21]; R.E. 114).

As previously noted, the trial plaintiff, David Alexander Clein, passed away on November 25, 2006, before an Order consistent with the Trial Court's September, 2006 Memorandum Opinion was entered. (R. 248-50; R.E. 115-17). After a subsequent status conference, the Trial Court entered an Order dated July 11, 2007, which reiterated that all appeal costs assessed by the Supreme Court's June 30, 2005 Mandate, plus interest, are due to Dr. Blake, and which again stated that Clein would be allowed to proceed, *in forma pauperis*, despite the fact that the appeal costs assessed by this Court's Mandate had not been paid. (R. 331-32; R.E. 118-19).[5] Similarly, the Trial Court again conditioned Clein's ability to proceed *in forma*

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[3] Among the materials submitted by Clein in response to Dr. Blake's Motion to Assess was an affidavit from Deborah Clein, which made various allegations regarding Clein's financial difficulties. (R. 79-81; R.E. 100-02). This was but the first of two (2) affidavits ultimately submitted by Ms. Clein in this case. (R. 349-52; R.E. 102-06).

[4] The Trial Court dated its Memorandum Opinion September 8, 2006. (R. 247; R.E. 114). The docket sheet indicates that this Memorandum Opinion was filed on September 11, 2008. (R. Supp. Vol. 1 at 12; R.E. 012).

[5] While this Order was filed on July 11, 2007, it appears to have been signed by the Honorable Judge Bobby DeLaughter on June 29, 2007. (R. 332; R.E. 119).

pauperis on the ability to submit a legitimate pauper's affidavit. (*Id.*). Specifically, the Trial Court required that Clein "first 'file the affidavit required by Section 11-53-17, and this must be done within ten (10) days of entry of [this] order." (R. 331-32; R.E. 118-19). The Court further ruled that "defendants have the right to challenge [the pauperism] claim, if and when [the plaintiff's] affidavit is filed." (R. 332 [FN 1]; R.E. 119).

As of July 1, 2007, two (2) years had elapsed since this Court issued its Mandate ordering Clein to pay Dr. Blake's appeal costs, yet such costs still had not been paid. (R. 21; R.E. 057). Accordingly, on July 19, 2007, Dr. Blake filed a Motion to Dismiss Respondent's cause of action pursuant to the express requirements of Miss. Code Ann. § 11-3-43, which provides that ***"[s]hould the appellee fail to make such a refund of costs to the trial court within two (2) years ... 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). (R. 333-37; R.E. 120-24). When Clein subsequently failed to file the pauper's affidavit within ten (10) days, as required by the Trial Court's July 11, 2007 Order, Dr. Blake amended his Motion to Dismiss, requesting that Clein's claims be dismissed on the additional ground that Clein failed to timely file the pauper's affidavit in accordance with the Trial Court's express Order. (R. 341-44; R.E. 125-28).

In response to Dr. Blake's Amended Motion to Dismiss, and having been alerted to the fact that the Court's deadline for submitting the required pauper's affidavit had expired, Clein belatedly submitted an affidavit from Deborah Clein, which purported to detail Clein's financial status. (R. 349-52; R.E. 103-06).[6] The pauper's affidavit submitted by Ms. Clein identified five (5) separate transactions with various legal funding entities, identified as "loans" received from "creditors," totaling $136,850.00 plus fees and interest. (R. 349-50; R.E. 103-04). However, the

[6] Having previously submitted an affidavit in support of Clein's Response to Dr. Blake's Motion to Assess Costs, this was the second affidavit submitted by Ms. Clein in this case.

agreements memorializing these transactions expressly state that "***[t]his funding is an investment and not a loan.***" (R. 409, 411; R.E. 142, 144) (emphasis added).[7]

Having finally received the pauper's affidavit required by the Trial Court, Dr. Blake noticed the deposition of Ms. Clein, consistent with the Trial Court's previous order allowing limited discovery as to Clein's pauperism claim. (R. 470-570; R.E. 145-245). During Ms. Clein's deposition, Dr. Blake learned that the funds received by Clein from the legal funding entities were not subject to repayment unless "there is a recovery in this case." (R. 507; R.E. 182). Further, when questioned regarding her criminal history, Ms. Clein denied having pled guilty or been convicted of any crime. (R. 477; R.E. 152).[8] Despite this sworn testimony, Ms.

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[7] The documents evidencing Clein's transactions with the legal funding entities were obtained by Dr. Blake pursuant to discovery authorized by the Trial Court regarding Clein's pauperism claim. It should be observed, however, that Clein's counsel did not produce all documents requested by Dr. Blake, and instead submitted certain documents to the Trial Court for *in camera* review. (R. 586-590; R.E. 129-33). With respect to the documents submitted for *in camera* review, Clein's counsel described such as discussing "***the perceived judicial philosophy of the trial judge then assigned (Yerger) and the Mississippi Supreme Court.***" (R. 587; R.E. 130) (emphasis added). Dr. Blake has designated these documents for inclusion in the record on this appeal, and counsel for Dr. Blake has been advised by the Mississippi Supreme Court Clerk's office that these documents remain under seal, and are available for review by this Court.

[8] Specifically, Ms. Clein testified as follows:

> Q: Since your last deposition of 2001, have you pled guilty to or been convicted of any crime?
>
> A. **No, not to my knowledge, I haven't.**

(R. 477; R.E. 152) (emphasis added). It should be observed that, near the conclusion of her deposition, Ms. Clein was granted the opportunity to correct any incorrect or otherwise false testimony, but failed to do so:

> Q. [BY MR. ROBINSON]: Is there anything you want to correct in the testimony that you have provided today?
>
> A. [BY MS. CLEIN]: **Not that I'm aware of.**

(R. 525; R.E. 200) (emphasis added).

Clein, in fact, pleaded guilty and was convicted of the crime of false pretenses in December, 2004 (R. 441-56; R.E. 246-61).

During the discovery authorized by the Trial Court in regard to Clein's alleged pauperism, it was revealed that Ms. Clein made numerous misrepresentations in her various bankruptcy filings that failed to acknowledge the current lawsuit. (R. 425-36; R.E. 261-73). Specifically, in response to a request that she list "other contingent and unliquidated claims of every nature," Ms. Clein responded that she had none. (R. 429; R.E. 266). Similarly, when asked to identify "all suits and administrative proceeds" to which she was a party during the year prior to her bankruptcy filing, Ms. Clein again responded "none." (R. 432; R.E. 269).[9] Additionally, despite the fact that she had been appointed as the Administratrix of the Estate of David Alexander Clein on December 19, 2006 (R. 254-57; R.E. 274-77), Ms. Clein denied that she held or controlled any "property owned by another person." (R. 434; R.E. 271).

Subsequently, the Trial Court dismissed Clein's action against Dr. Blake with prejudice on August 22, 2007. (R. 368-70; R.E. 278-80). In its Order, the Trial Court expressly stated that it had "gone to great lengths to afford the plaintiff its day in Court," and that its decision to dismiss the case was based upon Clein's failure "to abide the dictates of either the Mississippi Supreme Court (pay the cost of the defendants' successful appeal) or this Court (in lieu of paying those costs, timely file a pauper's affidavit)." (R. 368; R.E. 278). Given the basis for its ruling, the Trial Court held that it was unnecessary to address Dr. Blake's argument under Miss. Code Ann. § 11-3-43, preserving that issue for this appeal. (R. 370; R.E. 280). Thereafter, Clein filed a Motion for Reconsideration, which was granted by the Court on or about December 10, 2007. (R. 575-76; R.E. 281-82). While the Trial Court reinstated Clein's action, it specifically found "that the claim of indigency and all other grounds for dismissal of Plaintiff's claims stated by the

[9] Ms. Clein's "Statement of Financial Affairs" was filed with the United States Bankruptcy Court for the Southern District of Mississippi on May 1, 2007. (R. 436; R.E. 272).

Defendants in both their Amended Motion to Dismiss, and in their Response and Memorandum in Support thereof to the Plaintiff's Motion for Reconsideration, including Plaintiff's failure to comply with Miss. Code Ann. § 11-3-43, warrant further review." (R. 575; R.E. 281).

The Trial Court subsequently held an evidentiary hearing on March 14, 2008, which was conducted before the Honorable Judge Bobby DeLaughter. (R. Vol. 6 [pp. 67-113]; R.E. 283-329).[10] At the hearing, Dr. Blake presented evidence in support of his Motion to Dismiss, including evidence of repeated false sworn testimony offered by the Administratrix for the Estate of David Alexander Clein, Deborah Clein, both in the form of affidavits and deposition testimony regarding the pauperism claim. (Ex. 1 to March 14, 2008 hearing; R.E. 333-84). Ultimately, adjudication of Dr. Blake's Motion to Dismiss was assigned to the Honorable Judge William F. Coleman, and a second evidentiary hearing before Judge Coleman was held on May 15, 2008. (R. Vol. 6-7 [pp. 114-168]; R.E. 385-439).[11] At this hearing, Dr. Blake again presented evidence in support of his Motion to Dismiss, including evidence of repeated false sworn testimony offered by Deborah Clein. (Ex. 2 to May 15, 2008 hearing; R.E. 443-92). On May 29, 2008, the Trial Court denied Dr. Blake's Motion to Dismiss, despite its own express acknowledgment 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).[12] It is this Memorandum Opinion and Order which Dr. Blake appeals. (R. Supp. Vol. 2 at 221-26; R.E. 016-21).

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[10] It should be observed that a civil subpoena was served on Deborah Clein, commanding her to appear at the evidentiary hearing, but she failed to do so. (Ex. 2 to March 14, 2008 hearing; R.E. 330-32).

[11] Ms. Clein was again subpoenaed to appear at the May 15, 2008 evidentiary hearing, and again failed to appear. (Ex. 3 to May 15, 2008 hearing; R.E. 440-42).

[12] For his part, Clein's counsel stated at the March 14, 2008 hearing that he had "no explanation" for Ms. Clein's submission of false sworn testimony. (R. Vol. 6 at 104; R.E. 320).

SUMMARY OF THE ARGUMENT

As of the filing of this Interlocutory Appeal Brief, the appeal costs assessed against Clein via this Court's June 30, 2005 Mandate still have not been paid. Well over four *(4) years* have lapsed in the interim and, pursuant to the Trial Court's May 29, 2008 Memorandum Opinion and Order, Clein is being allowed to continue pursuit of this claim, contrary to the requirements of Miss. Code Ann. § 11-3-43, which requires payment of appeal costs within two (2) years. Because Clein has failed to satisfy the requirements of Miss. Code Ann. § 11-3-43, this matter should be finally dismissed with prejudice, in accordance with the express language of the statute.

Dismissal of the current matter is further warranted based on the repeated submission of false sworn testimony by Deborah Clein, the Administratrix for the Estate of David Alexander Clein, regarding matters material to this litigation. These false submissions have greatly prejudiced Dr. Blake, and Mississippi law supports dismissal of Clein's claims on this basis. Dr. Blake respectfully submits that Ms. Clein's pattern of dishonest behavior is inconsistent with the fundamental truth-seeking mission of the judicial system, and should be punished by this Court. Accordingly, dismissal of the current matter, with prejudice, is both warranted and appropriate.

ARGUMENT

I. APPELLEE'S CLAIMS SHOULD BE DISMISSED WITH PREJUDICE BASED ON APPELLEE'S FAILURE TO PAY THE APPEAL COSTS TAXED BY THE MISSISSIPPI SUPREME COURT IN ITS JUNE 30, 2005 MANDATE WITHIN TWO (2) YEARS, AS REQUIRED BY MISS. CODE ANN. § 11-3-43.

A. The Trial Court's Order Allowing Appellee To Proceed With The Prosecution Of This Matter Is Contrary To Mississippi Law.

Dr. Blake submits that Clein's failure to pay the appeal costs assessed by this Court's June 30, 2005 Mandate within two (2) years requires dismissal of the current action under Mississippi law. Miss. Code Ann. § 11-3-41 provides, in relevant part, that where the Supreme Court has assessed 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. § 11-3-41 (2008) (emphasis added). Miss. Code Ann. § 11-3-43 further 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***.

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

Miss. Code Ann. § 11-3-43 also requires that the payment of costs assessed via Mandate from the Supreme Court must be paid or otherwise satisfied within two (2) years of the same:

> ***Should the appellee fail to make such a refund of costs to the trial court within two (2) years*** next after the date of the judgment of reversal and remand by the Supreme Court, ***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***.

Id. (emphasis added); see also *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).

In the current matter, Dr. Blake posted a supersedeas bond and incurred other necessary costs to perfect his appeal totaling $153,398.01, plus costs of collection of that judgment and interest thereon from June 30, 2005, the date of this Court's Mandate. Following Dr. Blake's successful appeal, this Court taxed all appellate costs to Clein. Pursuant to Section 11-3-43, these costs had to be repaid before Clein could proceed with any further prosecution of this case. With all due respect to the Trial Court, its May 29, 2008 Order denying Dr. Blake's Motion to Dismiss cannot be reconciled with the mandatory language found in Miss. Code Ann. § 11-3-43, which mandates that the failure to pay appeal costs within two (2) years "***forever bar[s] and extinguishe[s]***" the party's right to maintain an action. Miss. Code Ann. §

11-3-43 (emphasis added). Moreover, Dr. Blake is entitled to a judgment against Clein in the amount of the appeal costs, totaling $153,398.01, plus costs of collection of that judgment and interest thereon from the date of this Court's Mandate. See Miss. Code Ann. § 11-3-41 (providing that prevailing 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***.") (emphasis added).

B. Appellee Should Not Be Allowed To Belatedly Claim Pauper Status In Order To Avoid Paying The Appeal Costs Assessed By The Supreme Court.

As the Trial Court expressly acknowledged, it went "to great lengths" to allow Clein's Estate its day in court by allowing it to claim pauper status following an unsuccessful appeal, thus allowing it to avoid the repayment of the appeal costs taxed by this Court's June 30, 2005 Mandate. This ruling, however, is contrary to Mississippi law. Fundamentally, the mechanism allowing persons to proceed *in forma pauperis* is found in Rule 3 of the Mississippi Rules of Civil Procedure, which governs "commencement of the action."[13] Given that Rule 3 addresses the commencement of the action, it follows that pauper status must be present at the outset of the case, and may not be invoked solely to avoid costs of an appeal assessed long after the action was commenced. Moreover, while the Mississippi Rules of Appellate Procedure also provide a mechanism for maintaining an appeal *in forma pauperis*, the plain language of the rule clearly limits this practice to appeals in criminal cases. See Miss. R. App. 6 (2008)

Whether a civil litigant may proceed with litigation *in forma pauperis* at the appellate and/or post-appellate stage was previously addressed in *Slaydon v. Hansford*, 830 So.2d 686 (Miss. Ct. App. 2002). There, the Court of Appeals offered the following relevant discussion:

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[13] Specifically, Rule 3(c) 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).

> ***The right to proceed in forma pauperis in civil cases does not extend beyond the initial trial of the matter.*** ... In this case, the trial court in its discretion granted Slaydon leave to appeal his case *in forma pauperis*. ***This sets a dangerous precedent and we caution trial courts against granting parties leave to appeal* in forma pauperis *in the future except in those limited areas of the law where such an appeal would be mandated under considerations addressed in* M.L.B. v. S.L.J., *519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996).***

Slaydon, 830 So.2d at 689 (emphasis added) (internal citations omitted).[14]

This Court's opinion in *Slaydon* specifically recognized that a litigant's right to proceed *in forma pauperis* does not extend beyond "***the initial trial***." *Slaydon*, 830 So.2d at 689 (emphasis added); see also *Bessent v. Clark*, 974 So.2d 928, 931-32 (2007). Similarly, in *Moreno v. State*, 637 So.2d 200 (Miss. 1994), this Court likewise held that "any right to proceed *in forma pauperis* in other than a criminal case ***exists only at the trial level***." *Moreno*, 637 So.2d at 202 (emphasis added) (citing *Nelson v. Bank of Mississippi*, 498 So.2d 365 (Miss 1986); 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).

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[14] *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed2d 473 (1996), involved the termination of parental rights, rather than a claim for monetary damages. The Court specifically acknowledged that the concerns addressed in that case did not extend "***to the broad array of civil cases***," but rather, only to those concerns "***involving state controls or intrusions on family relationships***." *M.L.B.*, 519 at 116, 117 S.Ct. at 563-64 (emphasis added). The Court further reasoned that the issue of parental rights was "'***more substantial than mere loss of money.***'" *Id.* at 121, 117 S.Ct. at 566 (quoting *Addington* v. *Texas*, 441 U.S. 418, 424, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979))." In the current matter, Clein's alleged deprivation does not implicate the fundamental concerns at issue in *M.L.B.*, but rather, merely involves a claim for monetary damages. Accordingly, consistent with the Court of Appeals' decision in *Slaydon*, the right to proceed *in forma pauperis* should not be extended to Clein in this civil case.

In *Nelson*, the Mississippi Supreme Court expressly held that an indigent civil litigant could not pursue an appeal to the Mississippi Supreme Court *in forma pauperis*, and that the obligation to pay appeal costs was a necessary prerequisite to pursuing any post-trial appeal. *Nelson v. Bank of Mississippi*, 498 So.2d at 366. In so ruling, the Court offered the following relevant discussion:

> We have considered the question of whether there is a constitutionally-based right to appeal *in forma pauperis* in a civil action. We do not find that the Supreme Court of the United States has ever expressly recognized any such right. The closest case in point [*Ortwein v. Schwab,* 410 U.S. 656, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1973)] held that an Oregon welfare recipient had no federal constitutional right to appeal a denial of welfare benefits to the Oregon Court of Appeals without prepayment of the prescribed court filing fee.
>
> The petition of Dorothy S. Nelson for writ of certiorari, for writ of mandamus, or other relief shall be, and the same is hereby denied; provided, however, that the said Dorothy S. Nelson shall have fifteen (15) days from the date of the release of this opinion within which to finally perfect her appeal ***by prepayment of the costs of preparation of the record on appeal as required by Miss.Sup.Ct.Rule 48(h).***

Nelson v. Bank of Mississippi, 498 So.2d at 366 (emphasis added).

In its Memorandum Opinion, the Trial Court expressly disagreed with the Court of Appeal's holding in *Slaydon*, finding that "with all due respect, to state that the right [to proceed *in forma pauperis*] is limited to the initial or first trial was neither necessary nor correct."[15] With all due respect for the Trial Court, Dr. Blake submits that the Court of Appeals' decision in *Slaydon* was correct in its determination that the right to proceed *in forma pauperis* exists only at the initial trial stage, and that this holding is consistent with prior decisions from the Mississippi Supreme Court, and the *Nelson* case in particular. The *Nelson* case makes it clear that a civil litigant cannot escape the post-trial financial obligations imposed on civil litigants by Mississippi law. In light of the holding in *Nelson*, it simply defies logic to suggest that a civil litigant would

[15] (R. 244; R.E. 111).

be denied the opportunity to appeal a case based on the inability to make pre-payment of appeal costs, but would be allowed to continue prosecution of a claim post-appeal when the costs of that appeal remain unpaid, despite the statutory requirements of Miss. Code Ann. § 11-3-43.

Reading the above cited authorities in concert, it is abundantly clear that Mississippi law prohibits a civil litigant from proceeding *in forma pauperis* at the post-appellate stage. In this regard, it must be observed that the current matter was initially filed on August 29, 1997, more than eleven (11) years ago. For nearly nine (9) years, Clein pursued this action, presumably at considerable expense, without making any claim that he was, or should be, treated as a pauper. Only after this Court issued its June 30, 2005 Mandate assessing the costs of appeal did Clein allege pauper status. The Trial Court's ruling allowing this belated pauperism claim is clearly contrary to Mississippi statutory and case law, as well the Rules of Civil Procedure and Rules of Appellate Procedure, as promulgated by this Court. Moreover, the Trial Court's decision fundamentally prejudices Dr. Blake, who is required to continue to bear all expense of the appeal, as well as the continued costs of defending this litigation.[16]

II. THE REPEATED SUBMISSION OF MATERIALLY FALSE SWORN TESTIMONY BY APPELLEE'S ADMINISTRATRIX, DEBORAH CLEIN, WARRANTS DISMISSAL OF THE CURRENT MATTER.

Under Mississippi law, it is well-established that a plaintiff who fails to truthfully respond to written discovery requests and/or examination questions under oath is subject to the

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[16] Dr. Blake has also requested that a judgment be entered against Clein for the total costs of appeal, $153,398.01, plus collection costs and interest accruing from the date of the Supreme Court's June 30, 2005 Mandate. Notwithstanding the requirements of Miss. Code Ann. § 11-3-41, the Honorable Trial Court declined to enter such a judgment against Clein. See Miss. Code Ann. § 11-3-41 (2006) ("In 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.") (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.

sanction of dismissal. *Scoggins v. Ellzey Beverages, Inc.*, 743 So.2d 990, 997 (Miss. 1999); *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385, 1390 (Miss. 1997); 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 a proper remedy for patron's discovery violation).

In *Scoggins*, this Court affirmed the dismissal with prejudice of claims brought by a store patron allegedly injured while on the store's premises. *Scoggins*, 743 So.2d at 997. Specifically, the Court found that discrepancies between the plaintiff's written discovery responses concerning the existence of any preexisting injuries and her medical records required that the plaintiff's case be dismissed with prejudice. *Id.* at 993. Similarly, in *Pierce*, this Court found that the plaintiff's conduct "constitute[d] bad faith," justifying dismissal, where the plaintiff responded untruthfully to both written discovery requests and inquiries posed during her sworn deposition. *Pierce*, 688 So.2d at 1390. In so ruling, the Court expressly held that "***Pierce consistently obstructed the progress of the litigation by filing admittedly false responses to various discovery requests and by swearing to false testimony in depositions.***" *Pierce*, 688 So.2d at 1390 (emphasis added) (citations omitted).

In its July 11, 2007 ruling allowing Clein to proceed with this matter in *forma pauperis*, the Trial Court specifically conditioned its ruling on the submission of a truthful affidavit that legitimately established Clein's alleged poverty.[17] Specifically, the Trial Court stated that "[i]f the Court determines from the credible evidence at a hearing that [Clein] is not, in fact, impoverished and swore a false affidavit ..., the Court is authorized to dismiss [this] lawsuit in

[17] (R. 331-32; R.E. 118-19).

its entirety under MISS. CODE ANN., Section 11-53-19."[18] In response to the Trial Court's Order, Clein submitted an affidavit that not only fails to establish the veracity of the pauperism claim, but which also reveals a pattern of untruthfulness on the part of Ms. Clein that is wholly inconsistent with the Court's requirement that a legitimate, truthful affidavit be submitted if this matter is to be pursued *in forma pauperis*. Indeed, in the Memorandum Opinion and Order from which the current appeal is taken, the Trial Court 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***."[19]

A. Appellee's Pauper Affidavit Dramatically Overstates Its Alleged Debts.

As set forth above, the pauper affidavit submitted by Ms. Clein identified five (5) separate transactions with legal funding entities, totaling $136,850.00 plus fees and interest.[20] While Ms. Clein attempts to categorize these transactions as "***loans***" received from "***creditors***,"[21] the agreements memorializing these transactions clearly provide that "***[t]his funding is an investment and not a loan***."[22] Dr. Blake respectfully submits that the language employed by Ms. Clein in her affidavit was a clear attempt to misinform both the Dr. Blake and the Trial Court regarding Clein's true financial status.

In characterizing the transactions with the legal funding entities as "loans," Clein clearly attempted to persuade the Trial Court that the estate owed debts totaling $136,850.00 plus fees and interest. Obviously, such a debt would significantly reduce the financial standing of Clein's

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[18] (R. 332; R.E. 119).

[19] (R. Supp. Vol. 2 at 222, 224; R.E. 017, 019) (emphasis added).

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

[21] (*Id.*).

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

Estate, thus furthering the pauperism claim. During the deposition of Ms. Clein, however, it was revealed that the monetary amounts provided via these legal funding transactions would not have to be repaid unless "there is a recovery in this case."[23] It follows that the pauper's affidavit submitted clearly and deliberately overstates the allegedly impoverished condition of Clein's Estate by nearly $137,000.00. Accordingly, a dismissal of the current matter is warranted. See Miss. Code Ann. § 11-53-19 (***"The court may dismiss an action commenced or continued on affidavit of poverty, if satisfied that the allegation of poverty was untrue."***) (emphasis added).

B. Appellee's Administratrix Repeatedly Testified Falsely Under Oath, Furthering A Pattern Of Untruthfulness Inconsistent With Mississippi Law.

As set forth above, Ms. Clein testified falsely concerning her criminal history during her August, 2007 deposition, at a time when she was acting as the administratrix of Clein's Estate, and was therefore a party to this litigation.[24] Notwithstanding her sworn testimony that she had not been convicted of any crime since 2001, Deborah Clein pleaded guilty and was convicted of false pretenses, a crime involving *crimen falsi*, less then three (3) years prior to her sworn deposition.[25] Given the proximity of this conviction to her sworn deposition, any suggestion that such testimony was the product of simple inadvertence or poor memory simply

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[23] (R. 507; R.E. 182).

[24] Q: Since your last deposition of 2001, have you pled guilty to or been convicted of any crime?

A. **No, not to my knowledge, I haven't.**

(R. 477; R.E. 152) (emphasis added).

[25] (R. 441-56; R.E. 246-61). See Miss. R. Evid. 609(a)(2) (2008) ("[E]vidence that any witness has been convicted of a crime shall be admitted, if it involved dishonesty or false statement, regardless of punishment."); Miss. R. Evid. 609, cmt. (2008) ("The phrase 'dishonesty or false statement' in 609(a)(2) means crimes such as perjury or subornation of perjury, false statement, fraud, forgery, embezzlement, **false pretense** or other offense in the nature of crimen falsi ...") (emphasis added); see also *Craft v. State*, 656 So.2d 1156, 1167 (Miss. 1995) (Banks, J., concurring) ("[o]ne can hardly imagine conduct bearing more directly on character for truthfulness than a prior falsehood under oath.") (emphasis added).

strains credibility.

While the fact that Ms. Clein was convicted of false pretenses might not shed light on Clein's claim to pauper status, Ms. Clein's decision to testify falsely under oath about her guilty plea and conviction of false pretenses demonstrates a pattern of untruthfulness that cannot be reconciled with either the specific requirements of the Trial Court's July 11, 2007 Order, or Mississippi law in general.[26] The fact that Deborah Clein would testify falsely under oath regarding a prior criminal conviction and other matters deemed "serious" and "material" by the Trial Court, a fact for which Clein's own counsel admitted there was "no explanation," demonstrates that she simply lacks any respect for the truth-seeking mission of the Courts and the sanctity of the oath. Unfortunately, this is not the first time this Court has been called upon to address the issue of Ms. Clein's truthfulness in the context of the current action. See *Blake v. Clein*, 903 So.2d 710, 731 (Miss. 2005) (addressing Deborah Clein's failure to disclose shoplifting conviction).

Also relevant is the fact that Ms. Clein made numerous misrepresentations in her bankruptcy filings. In these Court filings, Ms. Clein repeatedly sought to conceal her interest in the current matter by denying its existence on multiple occasions.[27] Indeed, notwithstanding

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[26] Again, it must be observed that Ms. Clein was granted the opportunity to correct her false testimony under oath during her August, 2007 depositon, but instead chose not to do so:

> Q. [BY MR. ROBINSON]: Is there anything you want to correct in the testimony that you have provided today?
>
> A. [BY MS. CLEIN]: Not that I'm aware of.

(R. 525; R.E. 200).

[27] Specifically, Ms. Clein responded negatively to inquiries regarding whether she possessed any interest in "other contingent and unliquidated claims" (R. 429; R.E. 266), or any "suits and administrative proceedings" to which she was a party during the year prior to her bankruptcy filing. (R. 432; R.E. 269).

the fact she previously had been vested with control over the Estate of David Alexander Clein,[28] Ms. Clein expressly denied that she held or controlled any "property owned by another person" in her bankruptcy filings.[29] Dr. Blake respectfully submits that such conduct constitutes a flagrant disregard for the truth-seeking mission of our Courts, and that Ms. Clein's failure to respect one of the most fundamental tenets of the judicial system should not be rewarded by this Court. Moreover, such conduct cannot be reconciled with the on-going efforts to perpetuate this action *in forma pauperis*, such that this case should be further dismissed pursuant to 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).

As acknowledged by the Court in *Scoggins*, "***'[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.***" *Scoggins*, 743 So.2d at 994-95 (quoting *Sims v. ANR Freight Systems, Inc.*, 77 F.3d 846, 849 (5th Cir. 1996)) (emphasis added). Ms. Clein, the Administratrix for the Estate of David Alexander Clein, has deliberately and repeatedly attempted to overstate Clein's alleged pauper status, while consciously, if not actively, suppressing information that exposes the tenuous nature of Clein's claim to poverty. Moreover, Ms. Clein testified falsely in her deposition, which was taken by Dr. Blake in furtherance of the Trial Court's July 11, 2007 order imposing conditions on Clein's ability to proceed *in forma pauperis*. Given this pattern of untruthfulness, Dr. Blake respectfully submits that dismissal of the current action is appropriate under Mississippi law.

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[28] (R. 254-57; R.E. 274-77).

[29] (R. 434; R.E. 271).

CONCLUSION

Appellee, the Estate of David Alexander Clein, has failed to pay the costs of appeal taxed by the Mississippi Supreme Court via its June 30, 2005 Mandate within two (2) years, as required by Miss. Code Ann. § 11-3-43. Pursuant to the express, mandatory language of Section 11-3-43, the current civil action must be dismissed with prejudice. Miss. Code Ann. § 11-3-43 (*"**Should the appellee fail to make such a refund of costs to the trial court within two (2) years ... the appellee's right of action, as well as his remedy, shall be forever barred and extinguished.**"*) (emphasis added). Additionally, because Appellee's Administratrix, Deborah Clein, has repeatedly offered false sworn testimony concerning material matters in this case, dismissal with prejudice is further warranted. Accordingly, for the reasons set forth hereinabove, Appellants, Kendall T. Blake, M.D. and Jackson Bone and Joint Clinic, L.L.P., respectfully request that this Honorable Court dismiss 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 19th day of October, 2009.

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 Interlocutory Appeal Brief of Petitioners, Kendall T. Blake, M.D., and Jackson Bone and Joint Clinic to the following:

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This the 19th day of October, 2009.

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