IN THE SUPREME COURT OF MISSISSIPPI

NO. 2018-CA-01760-SCT

TODD KUHN, ANGELA KUHN AND VIRGIL G. GILLESPIE

v.

CHERYL L. HIGH

DATE OF JUDGMENT:	04/17/2019
TRIAL JUDGE:	HON. DINA RICHELLE LUMPKIN
TRIAL COURT ATTORNEYS:	ROBERT THOMAS SCHWARTZ STEVEN N. NEWTON VIRGIL G. GILLESPIE MALCOLM F. JONES
COURT FROM WHICH APPEALED:	HARRISON COUNTY SPECIAL COURT OF EMINENT DOMAIN
ATTORNEY FOR APPELLANTS:	VIRGIL G. GILLESPIE
ATTORNEY FOR APPELLEE:	STEVEN N. NEWTON
NATURE OF THE CASE:	CIVIL - OTHER
DISPOSITION:	AFFIRMED IN PART; REVERSED AND RENDERED IN PART - 09/03/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE KITCHENS, P.J., BEAM AND ISHEE, JJ.

KITCHENS, PRESIDING JUSTICE, FOR THE COURT:

¶1. This is the third time this dispute has been before this Court. In ***High v. Kuhn***, 191 So. 3d 113, 117 (Miss. 2016) (***High I***), we held that article 4, section 110, of the Mississippi Constitution forbade the condemnation of a private road across the property of Cheryl High for the benefit of Todd and Angela Kuhn. After this Court's mandate, High moved the Harrison County Special Court of Eminent Domain for attorney fees pursuant to Mississippi Code Section 11-27-37 (Rev. 2019). The special court found that Section 11-27-37 did not

apply. High appealed, and this Court reversed and remanded for the special court to consider the merits of the motion for attorney fees and the reasonableness of the amount of fees requested. ***High v. Kuhn***, 240 So. 3d 1198, 1201 (Miss. 2017) (***High II***).

¶2. On remand, High filed an amended motion requesting attorney fees for a frivolous filing under the Mississippi Litigation Accountability Act (LAA). After a hearing, the special court awarded attorney fees to High as a sanction for the Kuhns' frivolous filing. The special court found that the $29,049.60 requested by High was reasonable and assessed that amount jointly and severally against the Kuhns and their attorney, Virgil Gillespie. The special court denied the Kuhns' motion to reconsider and amended the judgment to add $1,000 in attorney fees that High had incurred in defending the motion for reconsideration.

¶3. The Kuhns and Gillespie appeal, arguing that the special court erred by (1) adopting High's findings of fact and conclusions of law, (2) awarding a judgment to one of High's attorneys who was not a party to the lawsuit, (3) imposing a sanction for a frivolous filing, (4) awarding interest, and (5) allowing attorney fees beyond those permitted by Section 11-27-37. Because the special court of eminent domain did not abuse its discretion by imposing the sanctions nor did it err in its application of the law, we affirm in part. We reverse and render in part to correct a scrivener's error in the amended judgment.

FACTS

High I

¶4. This saga began when the Kuhns filed a petition in the special court of eminent domain for the establishment of a private road across High's property in the City of Gulfport

pursuant to Mississippi Code Section 65-7-201 (Rev. 2012). ***High I***, 191 So. 3d at 115. Section 65-7-201 provides that

> When any person shall desire to have a private road laid out through the land of another, when necessary for ingress and egress, he shall apply by petition, stating the facts and reasons, to the special court of eminent domain created under Section 11-27-3 of the county where the land or part of it is located, and the case shall proceed as nearly as possible as provided in Title 11, Chapter 27 for the condemnation of private property for public use. The court sitting without a jury shall determine the reasonableness of the application. The owner of the property shall be a necessary party to the proceedings. If the court finds in favor of the petitioner, all damages that the jury determines the landowner should be compensated for shall be assessed against and shall be paid by the person applying for the private road, and he shall pay all the costs and expenses incurred in the proceedings.

Miss. Code Ann. § 65-7-201.With their petition, the Kuhns sought access to their property, which was landlocked save for a fifteen-foot easement in an inconvenient location. ***High I***, 191 So. 3d at 115. At the close of the Kuhns' evidence, High moved to dismiss on the ground that article 4, section 110, of the Mississippi Constitution prohibits the condemnation of a private road within an incorporated city or town. ***Id.*** at 116. Under article 4, section 110, "[t]he Legislature may provide, by general law, for condemning rights of way for private roads, where necessary for ingress and egress by the party applying, on due compensation being first made to the owner of the property; but such rights of way shall not be provided for in incorporated cities and towns." Miss. Const. art. 4, § 110.

¶5. The Kuhns acknowledged that article 4, section 110, prohibits the condemnation of a private road in the City of Gulfport but argued that article 4, section 110, violates the Equal Protection Clause of the United States Constitution. The Kuhns argued also that High had waived the constitutional argument by failing to raise it until the trial. ***High I***, 191 So. 3d at

116. The special court of eminent domain agreed with these arguments, condemned a private road across High's property, and ordered a jury trial on damages. ***Id.*** at 116-17.

¶6. This Court granted High's petition for an interlocutory appeal. ***Id.*** at 117.We held that article 4, section 110, "clearly prohibits the Legislature from creating the statutory right to condemn for a *private* road property within an incorporated city or town." ***Id.*** (citing Miss. Const. art. 4, § 110). We observed that the original version of Section 65-7-201 had provided that a landowner seeking condemnation of a private road must pursue relief by petitioning the board of supervisors of the county where the land is located. ***Id.*** at 118. In that manner, "the Legislature restricted applications to private roadways in land in the county (versus municipality) and thus avoided any constitutional conflict." ***Id.*** at 117-18. When the statute was amended in 2003 to provide for the filing of the petition with the special court of eminent domain, "this change in procedure did not alter the underlying substantive right, which is clearly limited by Section 110." ***Id.*** at 118. Therefore, the Kuhns "had no right in 2013 to petition the special court of eminent domain for a private road across High's property in Gulfport." ***Id.***

¶7. Pertinent to this appeal, we held that High had not waived her constitutional argument. ***Id.*** at 118-19. Addressing the Kuhns' argument that High had raised article 4, section 110, too late, we held that "the Kuhns bore the burden to present facts showing they were entitled to the relief they sought." ***Id.*** at 119. Therefore, once the Kuhns had rested, High was free to move to dismiss on the ground that the Kuhns had shown no right to relief. ***Id.*** (citing M.R.C.P. 41(b)). We found no equal protection violation because a rational basis existed for

Mississippi's Constitution to permit the Legislature to provide a statutory procedure for condemnation of private roads in rural areas but not in incorporated towns and cities. ***Id.*** We noted that the Kuhns had "not pursued any common-law remedies to gain access." ***Id.***

High II

¶8. After this Court's decision in ***High I***, High moved the special court for attorney fees and expenses under Section 11-27-37, which provides:

> In case the plaintiff shall fail to pay the damages and costs awarded to the defendant within ninety (90) days from the date of the rendering of the final judgment, if such judgment is not appealed from, or in case the suit shall be dismissed by the plaintiff except pursuant to settlement, or the judgment be that the plaintiff is not entitled to a judgment condemning property, the defendant may recover of the plaintiff in an action brought therefor all reasonable expenses, including attorneys' fees, incurred by him in defending the suit.

Miss. Code. Ann. § 11-27-37. The special court denied High's motion on the ground that, because article 4, section 110, barred the Kuhns' attempt to seek a private road from the special court, Section 11-27-37 did not apply. ***High II***, 240 So. 3d at 1200.

¶9. This Court again reversed the special court. ***Id.*** at 1202. We held that, because the Kuhns had "petitioned a statutorily created court . . . for a statutorily created right," "the statutes governing eminent domain actions—including Section 11-27-37—apply." ***Id.*** (quoting ***High I***, 191 So. 3d at 117). Although the statutory remedy sought by the Kuhns was unconstitutional, they chose to pursue that remedy, subjecting them to the possibility of attorney fees under Section 11-27-37 for filing an unsuccessful petition. ***Id.*** at 1201. We recognized that "the fact the Kuhns' petition was dead on arrival actually *supports* awarding High attorney's fees." ***Id.*** at 1200-01.

¶10. This Court addressed in detail the impact of the Kuhns' argument on High's potential entitlement to attorney fees. ***Id.*** at 1201 n.4. We observed that the Kuhns' argument that the special court of eminent domain lacked subject matter jurisdiction was inconsistent with their "position in ***High I***, in which they argued the special court of eminent domain was the only court that could afford them the relief they sought." ***Id.*** We noted that, "by insisting they filed an action in a court that lacked subject matter jurisdiction, the Kuhns are essentially conceding their action was 'frivolous'—opening up another statutory door for High to potentially recover attorney's fees" under the LAA. ***Id.*** (citing Miss. Code Ann. § 11-55-5(1) (Rev. 2012)). This Court reversed and remanded for the special court to determine in its discretion "whether to award statutory attorney's fees and expenses under Section 11-27-37 and, if so, in what amount . . . ." ***Id.*** at 1201.

Proceedings on remand

¶11. On remand, High filed a motion for attorney fees and costs for a frivolous filing under the LAA and a renewed motion for attorney fees, costs, and expenses under Section 11-27-37 and interest on the judgment under Mississippi Code Section 75-17-7 (Rev. 2016). On February 26, 2018, this Court appointed Special Judge Dina Richelle Lumpkin to preside over the proceedings, replacing Senior Status Judge Michael H. Ward. At a hearing, High explained that her motions requested attorney fees alternatively under Section 11-27-37 and under the LAA. High testified that two attorneys had represented her in the litigation. Robert Schwartz had handled the case initially until his withdrawal, at which time Steven Newton undertook the representation. Schwartz's bill for $18,052.18 was admitted into evidence.

Schwartz testified that his rate was $250 per hour and that his associate's rate was $175 per hour. He testified that his bill reflected the usual charge in the Gulfport area. Newton testified, and his bill for $9500 was admitted into evidence. His bill reflected an hourly rate of $43.18. Newton said that he had charged High $4500 to defend the case from the Kuhns' action and that the rest of his fee had been incurred in the pursuit of attorney fees, including the appeal in ***High II***. He testified that his fee was reasonable.

¶12. In defense, the Kuhns presented the testimony of Attorney Scott Cumbest, a practitioner in the area of eminent domain and other land matters. Attorney Cumbest testified that the amounts High's attorneys charged were reasonable. But he opined that High should not have incurred the fees in the first place because Attorney Schwartz should have raised the constitutional problem immediately after High was sued or in discussions before suit was filed. Attorney Cumbest testified that Schwartz should have discovered the constitutional problem right away because Mississippi Code Section 65-7-201 cross-references article 4, section 110. He testified that an attorney general opinion from 1999 concluded that Section 65-7-201 does not apply to land located within a municipality. *See* Miss. Att'y Gen. Op., No. 1999-0261, 1999 WL 535498, *Prichard* (May 28, 1999). Attorney Cumbest acknowledged that Attorney Gillespie had a duty to review the law before filing suit.

¶13. Attorney Gillespie testified about his thought process in filing the suit. He testified that he is a sole practitioner in Gulfport who has tried eminent domain cases for both sides. He said that he knew all along that the property at issue was in the city and that he had been well aware of article 4, section 110, and the attorney general opinion. Attorney Gillespie said

that he had known that Section 65-7-201 cross-references article 4, section 110, in the Mississippi Code. He explained that, because he had believed that article 4, section 110, violates the Equal Protection Clause of the United States Constitution, his strategy had been to file the petition and wait to see if High brought up article 4, section 110, at which point he planned to raise the equal protection argument. Attorney Gillespie likened his strategy to filing a time-barred lawsuit and then waiting to see if the defendant notices that the statute of limitations has expired. He testified that, when High raised article 4, section 110, he responded by raising equal protection. Because the special court had ruled in his favor on equal protection, Attorney Gillespie did not believe that the action was frivolous.

¶14. The special court disagreed and entered an order finding that High was entitled to her attorney fees for a frivolous filing under the LAA. The Kuhns filed a motion to reconsider, which the special court denied after another hearing. Then the special court entered a judgment with amended findings of fact and conclusions of law, which constitutes its final ruling. In the amended judgment, the special court reviewed the evidence presented at the hearing pertaining to the factors in Rule 1.5(a) of the Mississippi Rules of Professional Conduct and in ***McKee v. McKee***, 418 So. 2d 764 (Miss. 1982), and found that the amount of attorney fees High requested reasonably and necessarily had been incurred in defense of the matter. The Court found that High had requested attorney fees under both Section 11-27-37 and the LAA and that under the LAA, if another statute allows attorney fees, "the provision allowing the greater award shall prevail." Miss. Code Ann. § 11-55-11 (Rev. 2019).

¶15. The special court found that High was entitled to attorney fees under the factors listed in Section 11-55-7 of the LAA for a frivolous filing, defined as a filing with no hope of success. ***Scruggs v. Saterfiel***, 693 So. 2d 924, 927 (Miss. 1997); Miss. Code Ann. § 11-55-7 (Rev. 2019). The special court observed that this Court had said in ***High II*** that "the fact that the Kuhn's petition was dead on arrival actually *supports* awarding High attorney fees." Also, the special court relied on the Kuhns' argument from ***High II*** that the special court had lacked subject matter jurisdiction, meaning they knowingly had filed an action in a court with no subject matter jurisdiction. And the special court emphasized Gillespie's testimony at the hearing that, when he filed the petition, "he was fully aware of the limitations set forth in Article IV, Section 110 of the Mississippi Constitution which precluded the relief sought," yet the Kuhns had opposed all High's efforts to obtain a dismissal. The special court found that Gillespie had known the action was invalid at the inception and that "Gillespie . . . admitted that he knowingly and purposefully filed a cause of action [that] did not exist under the Mississippi Constitution and the laws of Mississippi in hopes that counsel for [High] would be ignorant of the law and would fail to raise the issue." Then, even after High raised the issue, the Kuhns continued to fight, "vigorously contest[ing High's arguments] through two appeals . . . ." Because Gillespie had brought suit knowing that no such cause of action existed under the Mississippi Constitution, the special court found that he had instigated the action in bad faith. The special court found that interest in the amount of 2.25% per annum was reasonable. The special court awarded High a judgment in the amount of $30,049.60,

which included an additional $1,000 requested by Newton for defense of the motion for reconsideration.

DISCUSSION

I. Whether the special court of eminent domain erred by adopting High's proposed findings of fact and conclusions of law.

¶16. The Kuhns and Gillespie (collectively, the Kuhns) argue that the special court erred by adopting most of High's proposed findings of fact and conclusions of law and that the error was aggravated because the special court did not afford the Kuhns an opportunity to submit their own proposed findings and conclusions. The Kuhns rely primarily on a principle announced in ***Rice Researchers, Inc. v. Hiter***, 512 So. 2d 1259 (Miss. 1987).

¶17. In ***Rice Researchers***, the chancery court adopted nearly *verbatim* the proposed findings of fact and conclusions of law submitted by the defendant. ***Id.*** at 1265. The Court held that "the matter of whether a trial court may adopt verbatim, in whole or in part, the findings of fact and conclusions of law of a party is within the court's sound discretion." ***Id.*** at 1266. But the Court announced that the deference given to the chancellor's decision would be lessened when the chancellor has adopted a near-*verbatim* version of a litigant's proposed findings of fact and conclusions of law. ***Id.*** at 1265-66. We said that

> [w]hile an appellate court may not summarily disregard findings adopted by a trial judge verbatim from the submission of the prevailing party, the appellate court must view the challenged findings of fact and the appellate record as a whole with a more critical eye to ensure that the trial court has adequately performed its judicial function.

Id. at 1265 (citing ***Ramey Constr. Co., Inc. v. Apache Tribe of Mescalero Rsrv.***, 616 F.2d 464 (10th Cir. 1980)). The Kuhns also cite several Court of Appeals cases that expressed a

similar conclusion, including ***Bluewater Logistics v. Williford***, 55 So. 3d 177 (Miss. Ct. App. 2010), *rev'd*, 55 So. 3d 148 (Miss. 2011).

¶18. The problem with the Kuhns' argument is that this Court no longer applies the heightened standard of review discussed in ***Rice Researchers***.[1] We abandoned that practice in our ***Bluewater Logistics*** decision, which reversed one of the Court of Appeals cases cited by the Kuhns as authority. In ***Bluewater Logistics***, this Court found that "our precedent provides little guidance as to how we are to comply with our duty to 'heighten' our scrutiny—which could be read to require us to review a case more carefully or, perhaps, to apply a different, more stringent standard to our review of the facts." ***Bluewater Logistics***, 55 So. 3d at 156 (Miss. 2011). We recognized that, under the abuse of discretion standard of review, "[the Court's] duty already requires us carefully to scrutinize every case." ***Id.*** at 157. In later cases, we have reaffirmed the abandonment of the heightened scrutiny test. ***Watson Lab'ys, Inc. v. State***, 241 So. 3d 573, 583 (Miss. 2018); ***Burnham v. Burnham***, 185 So. 3d 358, 360 (Miss. 2015). Because this Court no longer applies the standard urged by the Kuhns, this issue is without merit.

¶19. Next, the Kuhns posit that *ex parte* communication must have occurred between Judge Lumpkin and High's counsel. They base this notion on the facts that High submitted her proposed findings and conclusions after the court announced its decision and that the trial court did not solicit proposed findings and conclusions from the Kuhns. The Kuhns surmise

[1] We note that, by citing overruled case law to this Court, the Kuhns once again travel under a theory of law that cursory research disproves.

that Judge Lumpkin and High's counsel must have collaborated on the content of the judge's order.

¶20. The Kuhns' contention that improper *ex parte* contact occurred is wholly speculative and unsupported by the record. At the close of evidence, Judge Lumpkin made clear her intent to adopt an order drafted by the prevailing party: "Usually in a situation like this, what I will do is have my law clerk call y'all with my decision, and, then, based upon what my decision is, I will ask for one of you to prepare an order and we will go from there on it. Is that sufficient for all of y'all?" Counsel for both parties agreed to this two-part procedure. Then both of those things happened: (1) Judge Lumpkin's law clerk contacted Gillespie and informed him that Judge Lumpkin had ruled in favor of High and awarded her "everything that was sued for," and (2) Judge Lumpkin and Gillespie received an email from High's counsel containing High's proposed findings of fact and conclusions of law. At that point, the Kuhns filed a motion for a status conference or clarification. Without ruling on that motion, the special court entered an order that adopted much of High's proposed findings of fact and conclusions of law with a few notable changes, such as a reduction in the interest rate from High's proposed 5% to 2.25%.

¶21. The Kuhns also complain that they were not permitted to submit proposed findings of fact and conclusions of law, but High was. The Kuhns' motion for a status conference or clarification argued that Gillespie was "unable to reply, to object or submit a proposed Findings of Fact and Conclusions of Law to the Court, since he has not been informed by the Court or anyone on behalf of the Court exactly what Ruling the Court made." The Kuhns

requested ten days in which to file proposed findings and conclusions. But Judge Lumpkin's law clerk already had informed Gillespie that Judge Lumpkin would rule in favor of High and award "everything that was sued for." Although the Kuhns contend that the special court wrongly requested proposed findings and conclusions from one party but not the other, that really was not done in this case. Judge Lumpkin had told counsel for both parties at the hearing that, once the law clerk had contacted each party to announce the decision, the winning party would draft an order and submit it to the court. Judge Lumpkin followed the precise procedure she had announced. She did not solicit proposed findings and conclusions from the parties before reaching her decision, but instead requested that the winning party draft a proposed order. High did so. Both parties exercised their opportunity to argue their respective positions at the hearing, and the Kuhns were able to, and did, submit arguments to the Court at that time. We discern no error in the special court's use of High's proposed findings and conclusions in drafting the order in this case.

II. Whether the special court of eminent domain erroneously awarded a judgment to Attorney Schwartz, a nonparty.

¶22. The Kuhns argue that the special court awarded damages to Attorney Schwartz, a nonparty, and that the award to a nonparty was error. The special court awarded damages under the LAA. This Court has held that the LAA augments and does not conflict with Rule 11 of the Mississippi Rules of Civil Procedure, which allows sanctions for filing a frivolous motion or pleading. ***Rose v. Tullos***, 994 So. 2d 734, 738 (Miss. 2008) (citing ***Stevens v. Lake***, 615 So. 2d 1177, 1184 (Miss. 1993)). We have held that, under the language of Rule 11, attorney fees ordered as a Rule 11 sanction rightfully are awarded to a party and not to

the party's attorney. ***In re Spencer***, 985 So. 2d 330, 338 (Miss. 2008). ***Spencer*** noted that, although the LAA does not contain the limiting language found in Rule 11, in several cases affirming awards of sanctions under the LAA, the attorney fees were awarded to the party, not to the attorney.

¶23. A review of the special court's amended order shows that it did not award attorney fees to Attorney Schwartz. The amended order made the following award:

> a. Costs, attorneys' fees, and expenses incurred from Schwartz, Orgler, & Jordan, PLLC in the amount of $18,052.18.
>
> b. Costs, attorneys' fees, and expenses incurred from Steven N. Newton, Esq., in the amount of $10,500.00, minus the $1,801.00 already paid, totaling $8,699.00.
>
> c. 2.25% interest per annum on the total sum incurred and expended by Defendant, Cheryl L. High, from March 28, 2013 to the time of hearing, August 31, 2018 which equals $3,298.42.
>
> It is, therefore,
>
> **ORDERED, ADJUDGED, AND DECREED** that Defendant Cheryl L. High is entitled to recover of Petitioners Todd and Angela Kuhn, and their counsel, Virgil G. Gillespie, Esq., jointly and severally, in defense of the instant action and hereby awarded **$30,049.60**. The sum of $25,090.01 shall be paid directly to Ms. High to cover expenses already paid to the attorneys of record. The remaining balance of $4,959.59 shall be paid directly to the law firm of Schwartz, Orgler & Johnson to cover the costs of expenses incurred but not paid as of the date of this order.

The judgment awarded $30,049.60 to High and ordered Kuhn and Gillespie to pay a portion of that amount directly to Schwartz's law firm. It did not award a judgment to Attorney Schwartz.

¶24. Nonetheless, the Kuhns do point out an error in the judgment. The original judgment had awarded High $3,959.59 in expenses for Attorney Schwartz's law firm. The amended judgment increased the total award to High by $1,000 to account for Attorney Newton's requested fee for defending the motion to reconsider. In what High characterizes as a scrivener's error, the amended judgment added $1,000 to the amount to be paid directly to Attorney Schwartz's law firm and subtracted it from the amount payable to High. We reverse the amended judgment in part and render a judgment correcting this error. The amended judgment should set forth as follows:

> It is, therefore,
>
> **ORDERED, ADJUDGED, AND DECREED** that Defendant Cheryl L. High is entitled to recover of Petitioners Todd and Angela Kuhn, and their counsel, Virgil G. Gillespie, Esq., jointly and severally, in defense of the instant action and hereby awarded **$30,049.60**. The sum of $26,090.01 shall be paid directly to Ms. High to cover expenses already paid to the attorneys of record. The remaining balance of $3,959.59 shall be paid directly to the law firm of Schwartz, Orgler & Johnson to cover the costs of expenses incurred but not paid as of the date of this order.

III. Whether the special court of eminent domain erred by ordering sanctions for filing a frivolous lawsuit.

¶25. The special court imposed the attorney fees under the LAA, which provides that in any civil action, the court may order reasonable attorney fees against a party or his or her attorney upon a finding "that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification . . . ." Miss. Code Ann. § 11-55-5(1) (Rev. 2019). A claim that is "without substantial justification" is one that is "frivolous, groundless in fact or in law, or vexatious, as determined by the court." Miss. Code Ann. § 11-55-3(a)

(Rev. 2019). The LAA provides guidance to courts for determining whether a claim meets that standard:

> In determining the amount of an award of costs or attorney's fees, the court shall exercise its sound discretion. When granting an award of costs and attorney's fees, the court shall specifically set forth the reasons for such award and shall consider the following factors, among others, in determining whether to assess attorneys fee's and costs and the amount to be assessed:
>
> > (a) The extent to which any effort was made to determine the validity of any action, claim or defense before it was asserted, and the time remaining within which the claim or defense could be filed;
> >
> > (b) The extent of any effort made after the commencement of an action to reduce the number of claims being asserted or to dismiss claims that have been found not to be valid;
> >
> > (c) The availability of facts to assist in determining the validity of an action, claim or defense;
> >
> > (d) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith or for improper purpose;
> >
> > (e) Whether or not issues of fact, determinative of the validity of a party's claim or defense, were reasonably in conflict;
> >
> > (f) The extent to which the party prevailed with respect to the amount of and number of claims or defenses in controversy;
> >
> > (g) The extent to which any action, claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in the state, which purpose was made known to the court at the time of filing;
> >
> > (h) The amount or conditions of any offer of judgment or settlement in relation to the amount or conditions of the ultimate relief granted by the court;
> >
> > (i) The extent to which a reasonable effort was made to determine prior to the time of filing of an action or claim that all

> parties sued or joined were proper parties owing a legally defined duty to any party or parties asserting the claim or action;
>
> (j) The extent of any effort made after the commencement of an action to reduce the number of parties in the action; and
>
> (k) The period of time available to the attorney for the party asserting any defense before such defense was interposed.

Miss. Code. Ann. § 11-55-7 (Rev. 2019).

¶26. "This Court reviews a trial court's award of attorney's fees under the Litigation Accountability Act for an abuse of discretion." ***Guardianship of O.D. v. Dillard***, 177 So. 3d 175, 182 (Miss. 2015) (citing ***Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis & Dove***, 965 So. 2d 1041, 1045 n.6 (Miss. 2007)). "In the absence of a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors, the judgment of the court's imposition of sanctions will be affirmed." ***Spencer***, 985 So. 2d at 337 (internal quotation marks omitted) (quoting ***Wyssbrod v. Wittjen***, 798 So. 2d 352, 357 (Miss. 2001)).

¶27. The Kuhns argue that the special court's decision to impose sanctions was an abuse of discretion because Judge Ward had ruled in their favor on the constitutional issue. They argue that sanctions for a frivolous filing should not be affirmed when the sanctioned party won at the trial court level. The Kuhns cite no authority in support of their argument. Instead, Gillespie avers in the principal brief that "[a]n exhaustive search was made of Mississippi and all other states and federal jurisdictions, and the undersigned could not find a case where a Court of Record presided over by an experienced Judge had ruled in favor of a litigant and the litigant's attorney was sanctioned."

¶28. We find that the special court did not abuse its discretion in imposing sanctions for a frivolous filing. Attorney Gillespie testified that, when he filed the petition to condemn a private road across property located in the City of Gulfport, he knew that article 4, section 110, barred that very remedy. He averred that he had decided to file the petition in hope of prevailing in the event that High failed to assert the constitutional bar. Gillespie gave the following explanation of why he brought the claim despite his awareness of article 4, section 110: "It's just like if I had a case, if I had a serious personal injury case and the statute of limitations had run, I would file the lawsuit, and, then, if they brought it up, I would have to face that at that particular time."

¶29. A claim is frivolous "only when, objectively speaking, the pleader or movant has no hope of success." ***Leaf River Forest Prods., Inc. v. Deakle***, 661 So. 2d 188, 196-97 (Miss. 1995) (internal quotation marks omitted) (quoting ***Smith v. Malouf***, 597 So. 2d 1299, 1303 (Miss. 1992)). "A claim that is merely 'weak' or 'light-headed' does not meet this definition of frivolous." ***Perkins v. McAdams***, 234 So. 3d 413, 420 (Miss. 2017) (quoting ***Leaf River***, 661 So. 2d at 195). But "[i]f a defendant has a complete defense, then it follows that a plaintiff has no hope of success. It is the same as if [a] plaintiff filed and pursued a claim that was clearly barred by the statute of limitations." ***Tricon Metals & Servs., Inc. v. Topp***, 537 So. 2d 1331, 1336 (Miss. 1989).

¶30. The special court did not abuse its discretion by finding that, objectively speaking, the petition had no hope of success. The Kuhns' petition requested relief that was not available under the plain language of article 4, section 110. Moreover, as the special court recognized,

Gillespie averred that he knew that no remedy was available because of article 4, section 110, and compared his strategy to filing a personal injury case knowing the statute of limitations had run, indicating his subjective knowledge that the petition had no hope of success. Further, as noted by this Court in ***High II*** and as found by the special court, the Kuhns later asserted that they had filed the petition under the belief that the special court lacked subject matter jurisdiction.

¶31. The Kuhns argue that Judge Ward's having found in their favor should have insulated the petition from a finding of frivolousness. Before the special court, they argued that their petition was not without hope of success because, when High raised article 4, section 110, the Kuhns countered with the equal protection argument. They argue that because Judge Ward credited that argument and found the article 4, section 110, argument waived, the petition was not frivolous. But the Kuhns had not raised equal protection in their petition. Looking to the face of the petition, the Kuhns requested a remedy, condemnation of a private road in an incorporated city, clearly disallowed by Mississippi law. The LAA provides for the trial court to consider "[t]he extent to which any action, claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in the state, which purpose was made known to the court *at the time of filing*[.]" Miss. Code Ann. § 11-55-7(g) (emphasis added). Thus the LAA contemplates that a new theory of law should be made known to the court at the time of filing and should not be withheld until the opposing party raises its complete defense. *Id.* The Kuhns could have avoided sanctions by petitioning for a private road within the city on the ground that article 4, section 110, violated the Equal

Protection Clause. Instead, they waited until High raised article 4, section 110, to make that argument. We hold that the imposition of sanctions for a frivolous filing was within the special court's discretion.

IV. Whether the special court of eminent domain erred in its award of interest.

¶32. In ***High II***, this Court remanded the case for a determination of the merits of the attorney fees motion and the reasonableness of High's request for attorney fees and expenses, plus interest. ***High II***, 240 So. 3d at 1199. The special court awarded interest pursuant to Mississippi Code Section 75-17-7, which provides that

> All judgments or decrees founded on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. All other judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint.

Miss. Code Ann. § 75-17-7. The special court determined that a fair interest rate was 2.25% and ordered interest payable from the date of filing of the action. The Court reviews an interest award for abuse of discretion. ***Ground Control, LLC v. Capsco Indus., Inc.***, 214 So. 3d 232, 247 (Miss. 2017).

¶33. The Kuhns argue that the special court erred by deeming 2.25% a fair rate of interest. Citing ***City of Gulfport v. Dedeaux Utility Co.***, 237 So. 3d 164 (Miss. 2018), they argue that the special court lacked any evidence from which to determine a fair rate of interest. But ***Dedeaux*** found that the trial court had erred by conflating rates of return with market rates of interest. ***Dedeaux***, 237 So. 3d at 169. In this case, neither party put on evidence pertinent to the court's determination of a fair rate of interest. In ***Bluewater Logistics***, the Court said

that "[u]nder the statute, a two- or three-percent interest rate might sometimes be fair and reasonable, while, at other times, market conditions and other relevant factors might require the trial judge to set a higher rate." ***Bluewater Logistics***, 55 So. 3d at 164. The Kuhns point to nothing showing that the special court abused its discretion by selecting 2.25% as a fair rate of interest. We find no abuse of discretion.

¶34. The Kuhns complain also about the special court's decision to award interest from the date they filed suit instead of from the dates on which High paid her attorneys. Because they cite no authority, this issue is procedurally barred. ***Edmonds v. Edmonds***, 935 So. 2d 980, 988 (Miss. 2006). Nowithstanding the procedural bar, we find no error because the plain language of Section 75-17-7 provides that "the only limit regarding the time when interest can be awarded is that it can 'in no event [be] prior to the filing of the complaint.'" ***Miss. Baptist Health Sys., Inc. v. Kelly***, 88 So. 3d 769, 782 (Miss. Ct. App. 2011) (quoting Miss. Code Ann. § 75-17-7 (Rev. 2009)).

V. Whether the special court of eminent domain awarded attorney fees in excess of those permitted by Section 11-27-37.

¶35. The Kuhns' last argument is that the special court erred by awarding attorney fees in excess of those allowed by Section 11-27-37, which allows "the defendant to recover of the plaintiff . . . all reasonable expenses, including attorneys' fees, incurred by him in defending the suit." Miss. Code Ann. § 11-27-37. Because the special court awarded attorney fees under the LAA, not under Section 11-27-37, this argument is without merit.

High's Motion for Attorney Fees on Appeal

¶36. High has filed a motion for appellate attorney fees under Mississippi Rule of Appellate Procedure 27(a). "Typically, this Court awards attorney fees on appeal in an amount equal to half the amount awarded at trial." ***Huseth v. Huseth***, 135 So. 3d 846, 861 (Miss. 2014) (quoting ***Monroe v. Monroe***, 745 So. 2d 249, 253 (Miss. 1999)). But the "better practice . . . [is] for the party seeking attorney fees on appeal to file a motion in this Court, supported by affidavits and time records that establish the actual fees expended on appeal." ***Hatfield v. Deer Haven Homeowners Ass'n, Inc.***, 234 So. 3d 1269, 1277 (Miss. 2017). High's counsel requests a fee of $2,500 for defending the appeal, reflecting nineteen hours at an hourly rate of $131.58. He has submitted an affidavit and an invoice in support of the claim. We find that the amount requested is reasonable and grant the motion for attorney fees on appeal in the amount of $2,500.

CONCLUSION

¶37. Because the trial court committed no error in awarding attorney fees for a frivolous filing, we affirm in part. We reverse and render in part to correct a scrivener's error in the judgment.

¶38. **AFFIRMED IN PART; REVERSED AND RENDERED IN PART.**

RANDOLPH, C.J., KING, P.J., COLEMAN, MAXWELL, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR.