IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO. 2016-CA-01270

THE CITY OF GULFPORT, MISSISSIPPI — PLAINTIFF-APPELLANT

VERSUS — (LOWER COURT CAUSE NO.: 96-01102)

DEDEAUX UTILITY COMPANY, INC. — DEFENDANT-APPELLEE

APPEAL FROM SPECIAL COURT OF EMINENT DOMAIN OF HARRISON COUNTY, FIRST JUDICIAL DISTRICT, MISSISSIPPI

REPLY BRIEF OF APPELLANT, CITY OF GULFPORT, MISSISSIPPI

ORAL ARGUMENT IS NOT REQUESTED

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A. Preface

In its principal "Brief of Appellee," Dedeaux has taken liberties in attempting to re-characterize what the current appeal proceeding involves. For instance, Dedeaux intimates that this appeal is the "fourth" one regarding the "fair market value of the public water and sewer utility company" it owned years ago. *See* Brief of Appellee, p. 2. However, the current appeal does not challenge the jury verdict on the principal sums owed in the underlying eminent domain proceeding. Rather, it seeks review of the methodology and mechanism used to determine a rate of interest on this uncontested jury award in a case of first impression in this State. As this Honorable Court well knows, previously it was assumed that interest in an eminent domain proceeding involving the acquirement of a public utility may be governed by *Miss. Code Ann.* § 75-17-1. However, the express wording of § 75-17-1 limits its application to "notes, accounts and contracts" and did not extend to include eminent domain proceedings. Subsequent review of Mississippi's statutes led to the conclusion that the best fit under current and existing laws is § 75-17-7 . Even then, applying § 75-17-7 to eminent domain proceedings relies on the implication that since there are no statutes which specifically address this type of action (condemnation of public utilities), that this statute was the nearest sized "round peg" to fit in this "square hole." Therefore, the Mississippi Supreme Court held in *Dedeaux* III that § 75-17-7 is the most applicable statute currently existing in Mississippi to address the methodology of determining interest on jury awards in those actions involving condemnation of public utilities. Truly, there is no prior precedent in Mississippi (no preceding case law) directly on point to speak to application of § 75-17-7 in these types of proceedings. In essence, then, this case represents one of first impression in Mississippi. It is against this backdrop that Dedeaux has

sought to re-define what the current appeal involves and has now further tried to argue the City's appeal is somehow "frivolous." Each of Dedeaux's points will be addressed in turn.

B. Revisionism and Past Jury Awards; Payments

Again, this case arises out of efforts to purchase a utility company located within the extended corporate boundaries of the City by way of condemnation. What often gets lost in a recount of the history of this case is the fact that Dedeaux continued to function as an ongoing concern from the filing of the complaint until December 20, 2004, when the City physically took over the utility. *City of Gulfport. v. Dedeaux Utility Co., Inc.*, 187 So. 3d 139, 150 (Miss. 2016) (*Dedeaux III*). From 1996 until late 2004, Dedeaux Utilities was able to operate their business and enjoy the profits therefrom. To award a "rate of return" for the period during which Dedeaux continued to operate and to produce profits therefrom would be tantamount to pyramiding damages and allowing unjust enrichment.

Much behind Dedeaux's position in this case is that the City should be made to pay it a "fair" and "just" amount that should be considered part of the "just compensation" analysis under principles of condemnation (i.e., as part of the "take"). Dedeaux goes to great strides to try and paint a picture of blame toward the City for years of delay in this case. Dedeaux does this by avoiding the fact that it appealed the jury verdicts in *Dedeaux I* and *Dedeaux II*. Similarly avoiding the facts, Dedeaux baldly asserts that Gulfport "has time and again delayed payment of 'just compensation' for the property interests it has taken from Dedeaux." *See* Brief of Appellee, p. 31. Exhibit "P-1" submitted during the July 25, 2016, hearing sets out in summary fashion a listing of the payments the City has made heretofore to Dedeaux during various stages of this case. As seen, Gulfport paid Dedeaux the full principal judgment amount awarded by the jury in *Dedeaux I* in 2004 as well as accrued interest through such date and paid Dedeaux what was

owed in principal and interest following the jury verdict in *Dedeaux II* in 2008, taking into consideration the offset from the City's earlier *Dedeaux I* payments. In 2016, and following the Supreme Court's affirmance of the jury verdict in *Dedeaux III*, Gulfport similarly paid Dedeaux the remaining principal amount due under this final verdict, less what had previously been paid to it by the City. All that currently remains unpaid is interest on the new principal emanating from the *Dedeaux III* jury award in 2014. Dedeaux would have the City punished for not being clairvoyant and accurately predicting what would unfold in the future after the *Dedeaux I* jury issued its verdict in 2008, which as we now know included a modification and altering of the permitted processes and methods of valuing public utilities in eminent domain proceedings over the course of the past fourteen (14) years and in response to Dedeaux's various appeals to the Supreme Court.

C. Dedeaux's Attempt to "Back-Door" Issues on Appeal; Waiver

Dedeaux did not file a cross-appeal in the current proceedings before this Honorable Court. Thus, the only issues before the Court, as included in the City's "Statement of Issues" surround application of *Miss. Code Ann.* § 75-17-7 and the determination of a rate of "interest" on a judgment rendered previously by way of a jury verdict. Again, there was no appeal sought (nor is there one pending) that seeks further review of the jury verdict emanating from the trial in *Dedeaux III* (*i.e.*, the principal judgment award in this matter).[1] In fact, and as set out *supra*, the City paid this principal award previously to Dedeaux years ago, and no party is disputing the amount of this payment made to Dedeaux by the City. Accordingly, Dedeaux did not take exception to the Trial Court's rulings on objections that Dedeaux made during the July 25, 2016,

[1]While Dedeaux did not pursue a cross-appeal in the pending proceedings, nor did it seek further review of the jury verdict from *Dedeaux III*, one could hardly take away this appreciation upon review of Dedeaux's "Brief of Appellee" in this proceeding.

hearing held on the interest rate issue or with respect to Dr. Kelly's expert opinions. Despite this, though, Dedeaux is attempting to seek the benefit of preserving these objections in the Trial Court and tries to raise these issues on appeal in its principal brief. It is bright-line law, however, that what Dedeaux now seeks is legally impermissible. *See Dunn v. Dunn*, 853 So. 2d 1150, 1152 (Miss. 2003) ("'[i]n order for the appellee to gain reversal of any part of the decision of a trial court about which the appellant brings no complaint, the appellee is required to file a cross-appeal'") (quoting *Delta Chemical & Petroleum, Inc. v. Citizens Bank of Byhalia, Miss.*, 790 So. 2d 862, 878 (Miss.App. 2001)); *see also Architex Assocsaiation, Inc. v. Scottsdale Insurance Company*, 27 So. 3d 1148, 1154, n. 11 (Miss. 2010) (recognizing issue raised in brief but not properly asserted on appeal cannot be considered); *Board of Trustees v. Knox*, 688 So. 2d 778, 782, n. 1 (Miss. 1997) (declining to consider "points of error" raised by appellee who did not file cross-appeal); *Hajj v. Roat*, 2002 WL 571785, * 1 (Mich.Ct.App. 2002).

D. Dedeaux's Improper Attempt to Pursue Appellate Review of Dr. G. W. Kelly's Expert Testimony.

Dedeaux spends much time arguing that Dr. Kelly's opinions "were untimely and did not meet the requirements for admissibility under Mississippi law." *See* Brief of Appellee, p. 10. Dedeaux further contends that Dr. Kelly's testimony was "allowed" by the Trial Court "over Dedeaux's objection." *See id.*, p. 6. With these arguments scattered throughout its principal Brief, Dedeaux attempts to parrot its defunct "Motion to Strike Affidavit of G. W. Kelly" (R. 173-178) that was filed with the Trial Court in the proceedings below. As evidenced by the Trial Court's rulings during the subject July 25, 2016, hearing (to determine a rate of interest in this matter), these objections espoused in Dedeaux's Motion were denied as were those Dedeaux similarly raised in the midst of this hearing.

In its prior "Motion to Strike," Dedeaux argued that the City failed to timely designate Dr. Kelly as an expert for the July 25 hearing. See R. 174. Dedeaux further claimed that Dr. Kelly's opinions "did not meet the standard for the admissibility of expert opinions," asserting that his opinions (as stated in his Affidavit) were "irrelevant and unreliable." See R. 177. Obviously, these same protestations sound familiar (since they now also appear in Dedeaux's "Brief of Appellee"). *See e.g.*, Brief of Appellee, p. 10. However, during the July 25 hearing, the Trial Court overruled Dedeaux's objections.[2] (T. 28-29). In addition, following questioning from counsel for Dedeaux at this hearing, the Trial Court accepted Dr. Kelly as an expert in the fields of economics and finance. Specifically, the Court held that Dr. Kelly was permitted to "testify as an expert concerning what an interest rate is and what market interest rates are." (T. 38). In addition, Dr. Kelly provided expert testimony regarding the meaning and application of the "prudent investor" standard, the definition of an interest rate, and historical data of actual rates of interest that would satisfy the prudent investor standard for the relevant time periods. For good reason, Dedeaux did not object to any of these expert opinions elicited during the July 25 hearing. And while the utility company did choose to object to Dr. Kelly testifying about what rates of interest the City of Gulfport actually (and historically) obtained from 1996 through 2016, the Court found this objection without merit and overruled the same. (T. 43). Notably, Dedeaux has not filed a cross-appeal on any of these issues that were previously decided by the Trial Court and with which Dedeaux tries to take issue in this appeal. Quite obviously, Dedeaux

[2]While the Trial Court subsequently had an Order entered on August 5, 2016, which held that Dedeaux's "Motion to Strike" (Affidavit of Dr. Kelly) was "granted to the extent stated in [the Trial Court's] evidentiary rulings or in the [Trial] Court's bench opinion, but are (sic) otherwise denied as moot" (R. 201), it is clear that the Trial Court refused to go along with Dedeaux's argument that the July 25, 2016, hearing was a "trial" or that Dr. Kelly had been "untimely" presented to the Court for expert testimony. *See* T. 28-29.

is precluded from now contending (in a response brief on appeal) that Dr. Kelly was impermissibly permitted to testify at the July 25, 2016, hearing or that his opinions were inadmissible.[3] *See Dunn*, 853 So. 2d at 1152; *Delta Chemical & Petroleum, Inc.*, 790 So. 2d at 878; *see also Architex Association, Inc.*, 27 So. 3d at 1154, n. 11; *Board of Trustees v. Knox*, 688 So. 2d at 782, n. 1. The bottom line on this is that Dr. Kelly was accepted by the Trial Court as an expert and permitted to provide expert testimony at the July 25 "interest rate hearing." His testimony provided the only admissible and credible evidence the Court had before it regarding the essence and understanding of rates of interest in the fields of economics and finance, as well as the understanding of the "prudent investor" standard within these fields and historical data regarding actual rates of interest that rates of 3-4% prevailed during the relevant time periods in question.[4]

Dedeaux further goes to great lengths to try and argue Dr. Kelly's opinions "did not meet the standard for the admissibility of expert opinions." *See* Brief of Appellee, p. 20. Once again, though, the Trial Court overruled Dedeaux's objections and, even so, Dedeaux did not file any

[3]Dedeaux contends that *May v. Ticor Title Ins.*, 422 S.W.3d 93 (Tex.Ct.App. 2014) "dealt with a similar issue" involving expert testimony at a post-trial hearing. This Texas case is no where near similar. First, it involved the assessment of attorneys' fees and under Texas law expert testimony is required to support an award of such fees. The plaintiff in May failed to timely designate an expert during the trial phase of this case and then attempted to utilize an attorney as an expert after trial to substantiate their substantive claim for fees. The Texas Court found this attempt by the May plaintiffs to be untimely and the May plaintiffs appealed this issue for further review. In the case at hand, the setting of a rate of interest by the Trial Court at a hearing was not understood or realized by the Trial Court until after issuance of the Supreme Court's decision in *Dedeaux III*. Moreover, Dedeaux has failed to pursue an appeal on this issue.

[4]In an effort to deflect the fact that it failed to submit any admissible evidence to the Trial Court during this July 25 hearing, Dedeaux contends it submitted something during the July 25 hearing to "establish[ ] the effective rate of 8% simple interest is actually under 5%, when payment is delayed by almost twenty years." See Brief of Appellee, p. 22, n. 27.

appeal in this matter. Stated differently, Dr. Kelly's opinions were admitted into evidence and existed as the only evidence properly before the Trial Court to weigh and consider.

E. Dedeaux's Failure to Submit Anything of Evidentiary Value During the July 25, 2016, Hearing

Without question, Dedeaux failed to submit any admissible proof during the July 25 hearing to assist the Court in determining a rate of interest in this proceeding. Against this back drop, Dedeaux argued to the Trial Court that it should follow alleged past patterns of rates of investments that counsel for Dedeaux "pulled off the internet" and attached as an exhibit to the Motion that sought the establishment of a rate of interest.[5] Dedeaux further argued the Trial Court should rely on alleged past returns that individuals made from real estate investments (i.e., from information obtained "from the internet" purportedly through the "National Council on Real Estate Investment Fiduciaries ("NCREIF").) Significantly, Dedeaux cannot now hide the fact that it failed to seek to properly admit any such information, documents, or data into evidence at the July 25 hearing.

F. The Trial Court's Discretion was bound by Dr. Kelly's opinions

Dedeaux asserts the Trial Court had completely unfettered discretion to pick any numbers it desired to set a rate of interest in this case.[6] *See* Brief of Appellee, p. 22-23. In fact, the

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[5]Dedeaux referred to this information as allegedly emanating from the "S & P 500" stock portfolio. <u>See</u> Brief of Appellee, p. 22. Dr. Kelly testified that the "S & P 500" is a "standard implored by the collection of 500 very, very large large (sic) cap companies and their equity securities. It is the measure of their equity security and market capitalizations and returns over time." (T. 51). This "index" does not include the costs and transactional fees involved with investments in this portfolio, nor does it include taxes realized on "gains." Dr. Kelly unequivocally stated that the "S & P 500" would not be reliable for shedding light on rates of interest over a period of time. (T. 53). It would not be classified as an "interest rate" in the fields of economics and finance. *Id.*

[6]Dr. Kelly attested without objection that "credit worthiness" and "risk" determine "rates of interest" in the fields of economics and finance. (T. 54). With this background, Dr. Kelly

opposite is the law in Mississippi. "Where the exercise of the court's discretion is not supported by the evidence, [the appellate] Court is **obligated** to find an abuse of discretion." *Robinson v. Lee*, 821 So.2d 129, 133 (¶10) (Miss.App. 2000) (emphasis added). Here, the Appellants miss the mark with respect to Gulfport's argument. Gulfport's argument has nothing to do with the fact that Dr. Kelly's testimony was un-contradicted (although that is an interesting point to keep in mind); rather, Gulfport's argument is that Dr. Kelly's testimony was the ONLY evidence properly in the record and that the exercise of the Trial Court's discretion, by relying on the PERS documents alone, was not supported by the evidence. Dedeaux had no obligation to put on any proof and, in fact, did not put on any proof. Dedeaux only presented attorney argument and made no attempt to place in the record those documents which it had earlier attached to its motion concerning interest. The ONLY properly introduced evidence in the record was that proffered by Gulfport, which included Dr. Kelly's testimony. Because Kelly's testimony was the only testimony in the record, the Trial Court's decision with regard to interest in this matter is not supported by the evidence and was, therefore, an abuse of discretion. *Robinson*, 821 So. 2d at 133 (¶19) (Miss. App. 2000).

Dedeaux goes to great lengths to claim that a lone case decided by the Mississippi Court of Appeals in *Mississippi Baptist Health Systems, Inc. v. Kelly*, 88 So. 3d 769 (Miss. Ct. App. 2011) is dispositive of the issue concerning unfettered exercise of a trial court's discretion in

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opined that when attempting to establish a rate of interest on a "forced purchase" of a utility company, one must consider the "credit worthiness" of the party that is seeking to force the sale or purchase of the company. *Id.* The "market" determines this and "credit scores" for municipalities are typically seen in the bond ratings that are assigned to them in the marketplace. (T. 54-55). In his experience, in situations involving "forced purchases" or "forced sales," where there is one party in a transaction that is an "unwilling" participant, rates of interest utilized in such "financed" arrangements are determined by "market rates" according to the factors of "risk" and "time"; meaning, these would gravitate toward rates of interest that are "risk averse" (adhering to the "prudent investor" standard). (T. 57-58).

determining a rate of interest under § 75-17-7. However, this decision in *Mississippi Baptist Health Systems, Inc.* revolved around a tort claim (one involving allegations of medical malpractice). It had absolutely nothing to do with the use of eminent domain by a political subdivision of this State, or, more specifically, condemnation of a utility company. Additionally, the Court of Appeals in this 2011 decision noted that the purpose of "an award of interest is to make the aggrieved plaintiff whole, that is, to fully compensate the party." *Mississippi Baptist Health Systems, Inc.*, 88 So. 3d at ¶ 50 (citing 47 C.J.S. *Interest & Usury* § 12 (2005)). This perspective on damages is tailored to one associated with tort claims that are fundamentally different from the underlying eminent domain proceeding that gives rise to this appeal.

G. Dedeaux's Opinion that Attorneys Should be Required to Object in the Midst of Trial Court's Rulings

Dedeaux has repeatedly asserted that Gulfport failed to raise certain "objections" to matters that arose in the midst of the Trial Court issuing its ruling in this matter at the end of the subject July 25, 2016, hearing. Each of the cases cited on this point by Dedeaux, however, deal with the failure to raise objections during testimony to evidence being proffered by an opposing party.[7] None of these cases address objections to the ultimate ruling of a court. To interrupt a judge, while that judge is in the process of delivering his or her ruling on a matter would unquestionably constitute an egregious breach of respect to the Court and an act of contempt. *See e.g.*, *In re Weiskopf*, 123 P.3d 453, 454-55 (Utah App. 2005) (holding that continual objections to ruling interrupted hearing and constituted contempt); *Ward v. State*, 354 So. 2d 438, 439 (Fla.App.3d 1978) (recognizing importance of orderly conduct of trial court proceedings); *see also Sacher v. United States*, 343 U.S. 1, 14 (1952).

[7]Dedeaux's purported authorities further refer to and involve trial proceedings. As referred to previously, and in accordance with the Mississippi Supreme Court's directive on remand, the instant proceeding concerned a hearing (and not a trial).

Rule 3.02 of the Uniform Circuit and County Court Rules (URCCC 3.02) provides that "[a]ttorneys should manifest an attitude of professional respect toward the judge…." Professional respect toward a judge dictates that an attorney not interrupt a judge once, and certainly not repeatedly, while the judge renders his ruling. To require that a party object to matters with which it disagrees in a judge's bench ruling while that ruling is being given would result in a matter, essentially, being re-argued DURING a ruling. In addition, such a requirement would encourage or promote disruption of court proceedings during periods of time when a trial judge is in the act of memorializing his or her decision on a motion. During such a point, the trial court is in the course of transitioning his or her thoughts into an actual ruling, and requiring counsel to voice objections in the middle of this process would frustrate the court's objective to render just and fair results supported by the law. Hence, what purpose could possibly be served by voicing an objection to a Court's decision in the middle of it being issued from the bench?[8] Without question, one party or another is going to be aggrieved by the decision of a judge, but never has an aggrieved party been required to voice objections DURING a bench ruling in order to preserve those objections. The purpose of an "appeal" is to address those matters ruled upon by the Judge to which the non-prevailing party objects. *See e.g.*, *In Re Dellinger*, 502 F.2d 813, 816 (7th Cir. 1974) ("lawyers are required to obey even incorrect orders; the remedy is on appeal") (citation omitted); *Maness v. Meyers*, 419 U.S. 449, 458-460 (1975) ("[r]emedies for

[8]Although the July 25, 2016, proceeding was a hearing and not a trial, possible reasons to require contemporaneous objections to rulings made by a trial court during trial proceedings often include to provide trial judges with the opportunities to rule intelligently and to avoid unnecessary reversals and mistrials. In the case at hand, the parties had concluded their arguments at the July 25 hearing and the opportunity to present evidence in connection with these positions had concluded when the Trial Court began to announce its final ruling from the bench at this hearing's end. In fact, the Trial Court stated in the course of its ruling that it had actually pre-determined its decision over a month earlier. Clearly, in the mind of the Trial Court, it had been afforded an opportunity to rule intelligently on the issue presented to it on remand.

judicial error may be cumbersome but the injury flowing from an error generally is not irreparable, and orderly processes are imperative to the operation of the adversary system of justice"). Once a trial court has ruled, counsel and others involved in the action must abide by the ruling even though one may question the correctness of the court's decision. To require otherwise would diminish the decorum and respect required in our courtrooms and disrupt the orderly flow of court proceedings. Dedeaux's endeavor to fashion a new, but convenient, procedural requirement has no merit whatsoever.

H. In order to assure due process, the Trial Court was required to give the parties advance notice of the PERS documents prior to the hearing.

In its "Brief of Appellee," Dedeaux argues that due process should be thrown out the window because the July 25, 2016, hearing "was not even required…in the first place." *See* Brief of Appellee, p. 27. Whether or not the hearing in question was required is irrelevant. The fact remains that a hearing was held, and, unless it was nothing but a sham hearing, the parties should have been afforded minimum due process during and in advance of the hearing. As the Mississippi Supreme Court noted in *Akins v. Mississippi Dept. of Revenue*, 70 So. 3d 204, 208 (¶12) (Miss. 2011), "generally, due process requires notice and a meaningful opportunity to be heard." In this matter, neither the City nor Dedeaux was afforded any notice of the Trial Court's intent to rely on the PERS documents to substantiate the Court's ruling. Absent advance notice of such intent, the City was not given an opportunity to attempt to rebut the information contained therein or present testimony to refute the reliability of the data contained in the PERS documents. The matter of timeliness is addressed elsewhere in this Rebuttal Brief.

I. Dedeaux's Version of "Just Compensation"

Dedeaux argues without saying that "just compensation" must not only include the "worth of that being taken to the person having to sell his property," but also the interest on such

amount until paid. *See* Brief of Appellee (citing *Dedeaux II*, 63 So. 3d at 523). Dedeaux cites to "*Dedeaux II*" and a 1906 decision in *King v. Vicksburg Ry. & Light Co.*, 42 So. 204, 205 (Miss. 1906). However, neither of these decisions stand for this proposition. The only other authority Dedeaux refers to in its argument is one out of the United States Court of Appeals for the Ninth Circuit (*i.e., U.S. v. 429.59 Acres of Land*, 612 F.2d 459 (9th Cir. 1980)).

J. Misuse of the "Prudent Investor" Standard

Again, Dedeaux maintains that the determination of an "interest rate" in an eminent domain case "must take into consideration" the "constitutional requirement of 'just compensation.'" *See* Brief of Appellee, p. 10. Making this argument, Dedeaux jumps to the proposition that the standard which should be utilized to establish such a rate of "interest" is one that reviews what an "investor" would have "invested" the funds received as "pecuniary value of his property" in a "reasonably prudent manner." *See id.* (Citation omitted). The problem with Dedeaux's contention, however, is the fact that it submitted absolutely no proof in the record before the Trial Court about what a "prudent investor" would have reasonably done under the facts and circumstances of this case. Consequently, even if Gulfport were incorrect and a "prudent investor" standard were to be utilized to determine the rate of "interest" in this condemnation proceeding, the only existing evidence in the record that would speak toward this approach was proffered by the City by way of the expert testimony of Dr. Kelly.

Dr. Kelly testified that the "prudent investor" standard in the fields of economics and finance, otherwise referred to as the "prudent man rule," is understood to be judged by those decisions of "an investor who will not risk the loss of capital or principal. So it is a very conservative risk-averse investor." (T. 50). Further, "risk averse" in these fields means those who "don't like" risks, and a "prudent investor would gravitate toward low risk vehicles for

placing surplus moneys." *Id.* Dr. Kelly attested that examples of such "low risk vehicles" in the field of interest rates would include CD's and treasury rates. (T. 51). According to the undisputed expert testimony of Dr. Kelly, a prudent investor, as one who is risk averse, would have a "highly diversified portfolio" (T. 69). While Dedeaux presented nothing of evidentiary value to the Trial Court during the July 25 hearing regarding this standard, it now attempts to fashion its own legal test for this measure. *See* Brief of Appellee, p. 24.

As noted, Dr. Kelly identified treasury notes as being indicative of the types of investments that a so-called "prudent investor", as one who is risk averse, would seek out. Such investments, for example a 20 year treasury note, for the 20 years relevant in this matter, averaged an interest rate of 4.04%. (T. 4-50) Dr. Kelly's testimony on this point was un-contradicted.

K. Trial Court's decision to rely upon the PERS document prior to the hearing did, in fact, constitute a due process violation.

Dedeaux's arguments with regard to the question of due process totally miss the mark. Dedeaux argues that, simply because a hearing was held and Gulfport put on proof, that the hearing was fair and provided the constitutionally required procedural due process to the parties. Gulfport has never claimed that a hearing was not held. Nor has Gulfport ever claimed that it was not afforded an opportunity to present a case. Gulfport's position is that the hearing itself was not valid because the outcome of the hearing had been predetermined. *See Marconi v. Chicago Heights Police Pension Board*, 863 N.E. 2d 705, 727 (Ill. App. 2005) (reversed on other grounds); *see also Matthews v. Harney County Oregon, School District No. 4,* 819 F. 2d 889, 893 (9th Cir. 1987); *Continental Box Co. v. National Labor Relations Board*, 113 F. 2d 93, 95-96 (5th Cir. 1940). The Trial Judge's own statements, as he was delivering his ruling, are proof that, sometime *before June 15* (which was over a month before the July 25 hearing), he decided that

he would base the rate of interest in this matter on the PERS rates of return. As such, the matter was predetermined. To require that a judge not predetermine a matter is certainly not an impractical standard, as Dedeaux would have this Court believe, but rather to require that a judge not predetermine a matter is a basic element of due process and an element of fairness. The "well" had been poisoned long before the City knew there was anything even in it to be concerned about! The matter of timeliness is addressed elsewhere in this Rebuttal Brief.

L. Dedeaux's Argument that Gulfport's Appeal is "Frivolous"

Dedeaux contends that Gulfport's appeal is "frivolous." *See* Brief of Appellee, p. 29. The standard for determining if an appeal is "frivolous" within the meaning of MISS. R. APP. P. 38 is whether an appeal has "no hope of success." *Choctaw, Inc. v Campbell-Cherry-Harrison-Davis and Dove*, 965 So. 2d 1041, 1045 (Miss. 2007) (referring to definition of "frivolous" found in MISS. R. CIV. P. 11) (citations omitted); *Smith v. Malouf,* 597 So.2d 1299, 1303 (Miss.1992) (quoting *Bean v. Broussard,* 587 So.2d 908, 912 (Miss. 1991)). "Though a case may be weak or 'light-headed,' that is not sufficient to label it frivolous." *Leaf River Forest Products, Inc. v. Deakle,* 661 So. 2d 188, 197 (Miss. 1995). As demonstrated previously, this case is a matter of first impression regarding the determination of an "interest rate" applicable to the condemnation of a public utility. Until the Mississippi Supreme Court's decision in *Dedeaux III*, it was believed that interest in proceedings involving the condemnation of a public utility were controlled by *Miss. Code Ann.* § 75-17-1.

Significantly, Dedeaux did not previously assert or argue that Gulfport's position in the Trial Court was without any hope of success. *See Adams v. Board of Supervisors of Union City,* 177 Miss. 403, 170 So. 684, 685 (Miss. 1936) ("It is a long-established rule in this state that a question not raised in the trial court will not be considered on appeal"); *InTown Lessee Assoc.,*

LLC v. Howard, 67 So. 3d 711, 719 (Miss. 2011) (citation omitted); *see also City of Hattiesburg v. Precision Construction, LLC*, 192 So. 3d 1089, 1093 (¶ 18) (Miss. App. 2016) ("[A] question not raised in the trial court will not be considered on appeal. Moreover, it is not sufficient to simply mention or 'discuss' an issue at a hearing….[A] trial judge cannot be put in error on a matter which was never presented to him for decision"); *Williams v. Gamble*, 912 So. 2d 1053, 1059 (Miss.App. 2005) (citations omitted) ("failure to raise an issue in the trial court by way of objection or otherwise bars the appellant from raising this issue for the first time on appeal"); *Trustmark National Bank v. Jeff Anderson Regional Medical Center*, 792 So. 2d 267, 278 (Miss.App. 2000) (citation omitted) ("[f]ailure to raise a contemporaneous objection constitutes a waiver of the issue on appeal"). Rather, Dedeaux has waited on appeal to now make this claim. First, Dedeaux contends that Gulfport "failed to cite a single authority in support of its argument that the trial court was prohibited from considering various rates of return in setting legal interest" in an eminent domain proceeding. *See* Brief of Appellee, p. 30. Notably, the same argument is applicable to Dedeaux. It speaks volumes that Dedeaux did not cite to a single case where "rates of return" were utilized in establishing an "interest rate" in a condemnation case.

Even so, Gulfport cited to legal authorities to demonstrate the express wording of the applicable statute (§ 75-17-7) must be read and given its plain meaning and understanding under well-settled principles of statutory construction.[9] *See* Brief of Appellant, p. 14-16. Again, Dedeaux did not submit anything of evidentiary value in the record before the Trial Court to offer any different understanding or interpretation of "interest rate" as used in § 75-17-7. Rather,

[9] To make its argument that Gulfport's issue here is "frivolous," Dedeaux turns logic on its head by claiming the City was obligated to cite authorities to show where the trial court was "prohibited from considering various rates of return in setting legal interest." Dedeaux misses the point. The plain meaning of the statute prohibited consideration of "rates of return," and Gulfport presented legal authorities and expert testimony in support thereof.

Dedeaux chose to rely solely on rates of interest that were found to apply in various **court decisions** that notably were **not** eminent domain proceedings. As noted above, Dr. Kelly, an esteemed and tenured Professor and Chair in the Department of Economics and Finance at the University of Southern Mississippi and previously at Mississippi State University, provided un-contradicted expert testimony regarding the ordinary understanding of the terms "interest" and "rate" as utilized in § 75-17-7 and how the plain meaning of these would not include what is commonly understood to constitute "rates of return." On this foundation, a trial court cannot simply grasp at whatever it thinks might be a good "rate of return" to make this fit into the category of a "rate of interest." Gulfport's appeal clearly has merit, and Dedeaux cannot demonstrate it has "no hope of success."

With very broad and sweeping pronouncements, Dedeaux argues that the issues of interest, as set forth herein, were decided in *Union Carbide v. Nix*, 142 So. 3d 374 (Miss. 2014). Unfortunately, in doing so, Dedeaux makes a comparison where none, in reality, exists. The Supreme Court's decision in *Union Carbide* does not reflect if a single particle of evidence was submitted to the Trial Court on the issue of interest by either party. From a review of the Court's decision, all we know is that "Nix requested that the court set post judgment interest at the rate of four percent per annum to accrue from the day after the jury rendered its verdict…" and that "Union Carbide argues that the court should have used the federal rate of postjudgment interest…." *Union Carbide*, 142 So. 3d at 392 (¶52). While an 8% interest rate was affirmed by the Court in Union Carbide based on what appears to be the unfettered discretion of the trial court, in the instant matter, because of (un-contradicted) evidence placed in the record by Gulfport, the trial court's discretion must be exercised within the confines of the evidence before

it. *Robinson v. Lee*, 821 So.2d 129 (Miss. App. 2000) (holding that where Court's discretion is not supported by the evidence, appellate Court obligated to find abuse of discretion).

Notwithstanding, "[t]o deem a question of law 'frivolous, groundless in fact or in law, or vexatious' merely because there is no existing Mississippi law on the subject would have a chilling effect on all litigation involving questions of first impression." *Scruggs v. Saterfiel*, 693 So. 2d 924, 927 (Miss. 1997). Again, application of § 75-17-7 to a case involving the condemnation of a public utility is a first in this State.

CONCLUSION

There being no credible evidence properly in the record to support the discretionary findings of the trial court as to interest rate and those findings, therefore, being a textbook example of an abuse of discretion, the City respectfully asserts to this Court that the findings of the trial court as to interest rate should be reversed. Further, the City respectfully submits to this Court that the uncontradicted evidence properly in the record supports only one conclusion: that the proper interest rate should be established at either 3% on the low end or 4% on the high end of the range of the applicable and appropriate interest rates, as established through the testimony of Dr. Gary Wayne Kelly. Further, this Court should render a FINAL decision in this matter and find an appropriate interest rate not to exceed 4%, particularly in light of the fact that Dedeaux Utlities continued as an on-going concern from the date of filing of the complaint (1996) until December 20, 2004, and enjoyed a positive cash flow during that time period.

RESPECTFULLY SUBMITTED, this the 31st day of May, 2017.

CITY OF GULFPORT, MISSISSIPPI

BY: /s/ *Margaret Murdock, Esq.* .
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CERTIFICATE OF SERVICE

I, Margaret E. Murdock, Esq., Attorney for the City of Gulfport, Mississippi, do hereby certify that I have this day had electronically filed the above and foregoing Reply Brief of Appellant of City of Gulfport, Mississippi with the Clerk of the Court using the electronic filing system, which should send notification of such filing and copies of such document to Honorable William Barnett, 2248 Sheffield Drive, Jackson, Mississippi 39211-5852; and to all counsel of record, including, Peter C. Abide, Esq., Attorney for Defendant-Appellee, 925 Tommy Munro Drive, Suite H, Biloxi, Mississippi 39532; and to any other counsel of record in this cause to date.

This the 31st day of May, 2017.

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