DR. MAJID MORIDANI	*	**NO. 2017-CA-0519**
VERSUS	*	**COURT OF APPEAL**
STONE CLINICAL LABORATORIES, LLC	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

* * * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2016-10459, DIVISION "L-6"
Honorable Kern A. Reese, Judge
* * * * * *
Judge Daniel L. Dysart
* * * * * *

(Court composed of Judge Daniel L. Dysart, Judge Rosemary Ledet, Judge Regina Bartholomew Woods)

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AFFIRMED

NOVEMBER 22, 2017

In this breach of contract case, the plaintiff-appellant, Dr. Majid Moridani, appeals the trial court's grant of a summary judgment in favor of defendant-appellee, Stone Clinical Laboratories, LLC ("Stone"), while Stone answers the appeal, seeking an award from this Court of damages for a frivolous appeal. For the reasons that follow, we affirm the trial court's judgment, but we decline to award frivolous appeal damages.

FACTS AND PROCEDURAL BACKGROUND

On October 21, 2016, Dr. Moridani filed a Petition for Breach of Contract (the "Petition") against Stone. In the Petition, Dr. Moridani alleged that he and Stone had entered into a written employment contract on August 16, 2016, by which Stone was to pay Dr. Moridani a base salary of $150,000 per year, plus $500 per month in expenses and moving expenses of $3,000. According to the Petition, Dr. Moridani began working for Stone on August 24, 2016; however, his employment with Stone was terminated on September 24, 2016 by email from Jody Lutz, Stone's Executive Vice President. Dr. Moridani alleged that, pursuant

to the terms of the employment contract, he was entitled to two months' notice prior to termination, in addition to his salary for that two-month period ($25,000), as well as monthly and moving expenses.

Dr. Moridani made demand for the payment of these wages on October 5, 2016. Stone notified him on October 17, 2016 that it would not make any payment to him. Dr. Moridani then filed this lawsuit seeking those amounts claimed due under the employment contract, in addition to attorney's fees and penalties of $37,500 pursuant to La. R.S. 23:631 and La. R.S. 23:632.

On December 23, 2016, Stone moved for summary judgment on the general basis that a final employment contract had not been signed by the parties. After a hearing on March 24, 2017, the motion for summary judgment ("Motion") was granted. Dr. Moridani requested written reasons for judgment, which were issued on April 12, 2017. Dr. Moridani timely filed an appeal of the December 23, 2016 judgment. Stone answered the appeal, seeking an award of damages for a frivolous appeal pursuant to La. C.C.P. art. 2164.

DISCUSSION

In an appeal involving the grant of a summary judgment, a *de novo* standard of review is applied by the appellate court, "using the same standard applied by the trial court in deciding the motion for summary judgment." *City of New Orleans v. Jazz Casino Co., LLC*, 15-1150, p. 4 (La. App. 4 Cir. 6/22/16), 195 So.3d 1252, 1255, *writ denied*, 16-1393 (La. 11/7/16), 209 So.3d 99, citing *Sanchez v. Harbor Const. Co., Inc*., 08-0316, pp. 3-4 (La. App. 4 Cir. 10/1/08), 996 So.2d 584, 587. That standard is set forth in La. C.C.P. art. 966 A(3), which provides that "a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and

that the mover is entitled to judgment as a matter of law." "The only documents that may be filed in support of or in opposition to the motion are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions." La. C.C.P. art. 966 A(4).

The burden of proof rests with the party moving for summary judgment. La. C.C.P. art. 966 D(1). However, "if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense." *Id*. Instead, the mover must "point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense." *Id*. "The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law." *Id*.

We have conducted a *de novo* review of the record and find that the trial court properly granted Stone's Motion.

Dr. Moridani's appeal is largely based on his contention that the parties entered into a "simple written and signed employment contract," which required "severance wages if [Stone] terminated [his] employment with or without cause." Dr. Moridani further maintains that the trial court's judgment was based on inadmissible parole evidence submitted by Stone in support of its Motion. Dr. Moridani contends that the trial court should have only considered the employment contract, itself, and that any documents that varied the terms of the contract should have been excluded from consideration.

The trial court rejected Dr. Moridani's contentions, finding in its reasons for judgment, "that the final contract had not been confected, there was no 'meeting of the minds' between the parties, and thus, an absence of an enforceable contract." After our *de novo* review of the record, we find that the trial court correctly granted summary judgment in Stone's favor.

We first address Dr. Moridani's argument that the trial court improperly considered Stone's "parole evidence in support of the motion without first considering and ruling on [his] filed objection" to this evidence.[1]

Under La. C.C.P. art. 966 D(2), when an objection has been made by way of a "timely filed opposition," the trial court is to "consider all objections prior to rendering judgment" and "specifically state on the record or in writing which documents, if any, it held to be inadmissible or declined to consider."[2] The transcript of the hearing on Stone's Motion reflects that the trial court did not state

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[1] Dr. Moridani states in his appellate brief that the trial court's failure to rule on his "objection to the submission of parole documentary evidence" is a "clear violation of C.C.P. Art. 966 and is legal error requiring the judgment to be reversed." In support of this contention, he cites the case of *Snider v. Louisiana Med. Mut. Ins. Co*., 13-0579, pp. 6-7 (La. 12/10/13), 130 So.3d 922, 929, and its internal cite to *Evans v. Lungrin*, 97-0541 (La. 2/6/98), 708 So.2d 731, 735. *Evans* is cited by the *Snider* Court for the principle that "[w]hen a prejudicial error of law skews the trial court's finding of a material issue of fact and causes it to pretermit other issues, the appellate court is required, if it can, to render judgment on the record by applying the correct law and determining the essential material facts *de novo*." *Snider*, 13-0579, pp. 6-7, 130 So.3d at 929. Neither case addresses the issue of a trial court's failure to rule on an objection to the admissibility of evidence in a motion for summary judgment and, thus, neither applies to the issue at hand.

[2] We note that, in a brief filed in reply to Dr. Moridani's opposition memorandum in the trial, Stone raises the issue of the timeliness of the opposition memorandum, noting that the new provisions of La. C.C.P. art. 966 B(2) require that an opposition to a motion for summary judgment must be filed and served not less than fifteen days prior to the hearing on the motion. According to Stone, the hearing date for its Motion was March 10, 2017 (as is also reflected in the Rule to Show Cause, which indicates a March 10, 2017 hearing date). Dr. Moridani's opposition memorandum, due no later than February 23, 2017, was filed on March 3, 2017. The judgment reflects a hearing date of March 24, 2017, although there is nothing in the record indicating that the March 10, 2017 hearing date was continued to March 24, 2017. Thus, on the face of the record, Dr. Moridani's opposition memorandum appears to have been untimely. Because there is no indication in the record that the timeliness of the opposition memorandum

on the record that it held any of the documents submitted in support of the Motion to be inadmissible or that it declined to consider any documents. And, while counsel for Moridani made mention of the objections by stating "[t]hat's why we've objected to the Court," at the hearing, the issue was otherwise not addressed at that time. Because we find that Dr. Moridani's objection to the documents submitted in support of the Motion to be without merit, the trial court properly considered those documents and was not required to make any specific statements on the record or in writing as to their admissibility.

There are no cases that address the issue of whether a trial court's failure to specifically address an objection to documents submitted on a motion for summary judgment under La. C.C.P. art 966 D(2) constitutes reversible error, as Dr. Moridani contends. However, we believe the mandate of Article 966 D(2) to be clear. Article 966 D(2) *only* requires that the trial court state on the record (or in writing) which documents, "if any," it deemed *inadmissible* or *otherwise declined to consider*. The inclusion of the language "if any" clearly supports our finding that, when all supporting documents are properly before a trial court, it is under no obligation to comment on their admissibility.

We further note that the only documents attached to Stone's Motion are depositions (of Dr. Moridani and Christopher Ridgeway, Stone's corporate representative). There can be no question that depositions are proper evidence in support of a motion for summary judgment, as La. C.C.P. art. 966 expressly provides that "[t]he only documents that may be filed in support of or in opposition to the motion [for summary judgment] are pleadings, memoranda, affidavits,

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was addressed by the trial court, we pretermit a discussion as to whether Dr. Moridani's objection was contained in a "timely filed opposition."

depositions . . . ." (Emphasis added). To the extent that Dr. Moridani's objection is to the documents attached to the depositions, it is clear that these documents were referred to and discussed during the depositions and the parties identified them without any objections to their authenticity. In fact, many of the documents were admittedly generated by Dr. Moridani, himself. Those document, therefore, were properly considered by the trial court and this Court, in its *de novo* review of the record. *See, e.g.*, *Boland v. W. Feliciana Par. Police Jury*, 03-1297, p. 7 (La. App. 1 Cir. 6/25/04), 878 So.2d 808, 814 ("as attachments to Boland's deposition that were identified, verified, and referred to in the deposition, the photographs were admissible on that basis . . . ."). We therefore find no merit to Dr. Moridani's contention that impermissible parole evidence was admitted into the record of this matter.

Nor are we persuaded by Dr. Moridani's contention that parole evidence may be considered only after a court finds that a written contract is ambiguous, citing *New Orleans Redevelopment Auth. v. Irving*, 15-1366, p. 11 n.2 (La. App. 4 Cir. 8/10/16), 198 So.3d 1193, for the principle that "the use of extrinsic evidence is proper only where a contract is ambiguous after examination of the four corners of the agreement." As discussed *infra*, in this case, there was no valid contract at the outset and therefore this general principle is inapplicable.

We next address the issue of whether the record demonstrates that Dr. Moridani and Stone had entered into a valid and enforceable contract, rendering Stone liable for contractual severance wages. We also consider the issue of whether, as Dr. Moridani contends, the trial court erred in making the factual determination that there was no "meeting of the minds" between the parties, an improper determination for the purposes of a summary judgment motion.

Under Louisiana law, "[a] contract is formed by the consent of the parties established through offer and acceptance." La. C.C. art. 1927. This Court has consistently noted that "[c]onsent is an absolute necessity to the formation of a contract, and 'where there is no meeting of the minds between the parties the contract is void for lack of consent.'" *Marseilles Homeowners Condo. Ass'n, Inc. v. Broadmoor, L.L.C.*, 12-1233, p. 18 (La. App. 4 Cir. 2/27/13), 111 So.3d 1099, 1111, quoting *Philips v. Berner*, 00-0103, p. 5 (La. App. 4 Cir. 5/16/01), 789 So.2d 41, 45; *see also*, *Landix v. Blunt*, 12-1231, p. 5 (La. App. 4 Cir. 3/20/13), 112 So.3d 376, 379 ("[a] binding contract requires consent of the parties, established through offer and acceptance, and a meeting of the minds.); *DePodesta v. Breaux*, 12-1594, p. 6 (La. App. 4 Cir. 5/29/13), 116 So.3d 1017, 1021.

In order for a contract to be formed, the "offer must be accepted as made." *Rodrigue v. Gebhardt*, 416 So.2d 160, 161 (La. App. 4th Cir. 1982). "A modification in the acceptance of an offer constitutes a new offer which must be accepted in order to become a binding contract." *Id*. *See also*, La. C.C. art. 1943 ("[a]n acceptance not in accordance with the terms of the offer is deemed to be a counteroffer."). In *Rodrigue*, for example, this Court found that because "defendant's 'acceptance' did not conform to plaintiffs' offer[,] no contract was formed." *Id*. To the contrary, because the defendant's acceptance "contained a modification of the terms of the offer," it was a "new offer." *Id*. *See also*, *ECW Recoveries v. Woodward*, 15-1915, p. 5 (La. App. 1 Cir. 6/3/16), 196 So.3d 122, 125 ("an acceptance not in accordance with the terms of the offer is deemed to be a counteroffer"); To*mbrello v. Bd. of Comm'rs of Caddo Levee Dist*., 129 So. 2d 595, 598 (La. App. 2nd Cir. 1961)("a modification in the acceptance of a [contract]

constitutes, in effect, a new offer which, in order to become a binding contract, must be accepted by the one first making the [offer]").

We further note that La. C.C. art. 1947 provides that "[w]hen, in the absence of a legal requirement, the parties have contemplated a certain form, it is presumed that they do not intend to be bound until the contract is executed in that form." This Court recognized that Article 1497 "codifies the long recognized concept that when the parties 'intended from the beginning to reduce their negotiations to a written contract, neither the plaintiff nor the defendant was bound until the contract was reduced to writing and signed by them.'" *JCD Mktg. Co. v. Bass Hotels & Resorts, Inc.*, 01-1096, p. 8 (La. App. 4 Cir. 3/6/02), 812 So.2d 834, 839; *See also*, *Rainey v. Entergy Gulf States, Inc*., 09-572, p. 20 (La. 3/16/10), 35 So.3d 215, 228, quoting *Fredericks v. Fasnacht*, 30 La. Ann. 117, 118 (La. 1878)("where the *negotiations contemplate and provide that there shall be a contract in writing*, neither party is bound until the writing is perfected and signed"(emphasis supplied).

We need only look to Dr. Moridani's deposition testimony and the documents identified by Dr. Moridani during his deposition to confirm that the parties intended to enter into an employment contract, but never reached an agreement as to its terms. As such, we agree with the trial court's finding that the parties never entered into a binding and enforceable contract.

According to Dr. Moridani, he was approached by a Stone employee about an employment opportunity, which led to a meeting between Dr. Moridani and Christopher Ridgeway (Stone's founder and CEO) on August 16, 2016. At that time, Mr. Ridgeway indicated that he was seeking a lab director for Stone, a company he was in the process of forming. The following day, Mr. Ridgeway

sent, by email, a letter to Dr. Moridani, which made an offer of employment, and which stated:

> Your execution of an at-will employment contract prepared by me that *will be submitted to you for review and execution* no later than August 22nd, 2016 [sic]. The at-will employment contract will contain, among other provisions, non-competition, non-solicitation, confidentiality and non-disclosure documents. (Emphasis added).

This letter was, as Mr. Ridgeway testified in his deposition, a "cover letter." It was accompanied by a second document that set forth further terms of the offer: a base salary of $120,000, a provision for a $10,000 bonus upon attainment of certain goals during the first year of employment, a 401K plan and fourteen days of paid vacation and/or sick leave. This second document contained signature lines for both Dr. Moridani and Mr. Ridgeway.

When questioned whether he understood from this letter "that there would be an at-will employment contract prepared that would contain other provisions," Dr. Moridani admitted that he "did underst[and] that, but [he] did not accept that."[3]

After a conversation on August 18, 2016, Mr. Ridgeway sent Dr. Moridani an updated offer on August 19, 2016, which increased the base salary to $150,000 and $500 per month for expenses. This offer was, again, comprised of two documents: a cover letter and a document setting forth the terms of the employment. The cover letter mirrored the language of the initial cover letter with respect to Dr. Moridani's "execution of an at-will employment contract . . . that will be submitted to [him] for review and execution."

[3] We note that Mr. Ridgeway testified that all Stone employees execute a written employment contract.

Shortly after receiving the updated offer letter, on August 19, 2016, Dr. Moridani sent Mr. Ridgeway an email indicating that, while he accepted the offer of "$150,000 + $500 per month," he sought some "adjustments." Those included fifteen days of vacation and five days of sick leave, "a minimum of 2 month[s'] notice (and his assurance that he would give two months' notice if he decided to leave), $5,000 in travel expenses, and up to $3,000 for moving expenses. Dr. Moridani also advised that, although he would agree to the confidentiality and non-disclosure provisions, he would not agree to the non-competition and non-solicitation clauses as they were "too vague for [his] position." He also indicated his intent to "do consulting services on [the] side as well [as] during after-hours on case by cases [sic] or weekends."

The following day, August 20, 2016, Dr. Moridani sent two emails to Mr. Ridgeway, indicating that he had made "a modification to [Mr. Ridgeway's] letter of offer with track[ed] changes," which he signed. Those changes included changes to the actual offer letter, to include a two-month notice provision and the deletion of the reference to non-competition and non-solicitation clauses. The agreement attached to the offer letter included some of the changes Dr. Moridani outlined in his August 19, 2016 email, but added other changes, including a salary adjustment "to $190,000 one month after the lab starts testing + bonuses TBD based on performance." Dr. Moridani requested that Mr. Ridgeway "let [him] know if [he] agree[d] with this modification.

Mr. Ridgeway revised the offer letter to include some of Dr. Moridani's requests; it was notably different in that it did not include Dr. Moridani's request that there be a salary adjustment with bonuses based on performance. Mr. Ridgeway signed the new offer letter (previously signed by Dr. Moridani);

however, Mr. Ridgeway modified the offer letter to delete the clause allowing for outside consulting work and placed his initials by that modification (and as Mr. Ridgeway testified in his deposition).[4] Dr. Moridani admitted that he understood that Mr. Ridgeway did not agree that he would be allowed to perform outside consulting work. Dr. Moridani agreed that this modified offer letter is the only document he received that Mr. Ridgeway had signed and that it indicated that Dr. Moridani could not perform outside work (i.e., varied from the terms Dr. Moridani sought).

Additionally, on August 21, 2016, Dr. Moridani sent an email to Mr. Ridgeway indicating that "there are a few items on this agreement that needs [sic] to be ironed out." Those items, again, included Dr. Moridani's refusal to agree to non-competition and non-solicitation provisions.

The record does not contain any documents reflecting discussions between Dr. Moridani and Stone until mid-September, 2016, although Dr. Moridani testified, in accordance with one of his emails, that negotiations continued between September 6 and September 20, 2016.

On September 20, 2016, Dr. Moridani received an email from Stone's president stating that "[t]he non-compete language is going to exist in your agreement." Dr. Moridani responded by email stating: "I do not agree with the non-compete after employment."

Stone's executive vice-president, Jody Lutz, sent an email to Dr. Moridani on September 22, 2016, with a revised employment contract, which Dr. Moridani admitted he never signed. Rather, Dr. Moridani responded to Ms. Lutz by sending

[4] Dr. Moridani's position is that Mr. Ridgeway verbally agreed to allow him to perform outside consulting work, despite Mr. Ridgeway's having stricken this modification to the offer letter.

yet another email with changes he sought to be made to the employment contract, including the deletion of the non-competition and non-solicitation clauses. This was met with an email from Ms. Lutz advising that, because the parties "could not come to an agreement and no employment contract [had] been signed [Stone would] no longer be utilizing [Dr. Moridani's] services."

The foregoing clearly demonstrates two salient points. First, as Dr. Moridani admitted, while offer letters were sent to him (the complete terms of which were never agreed to by the parties), he and Stone contemplated that there would be an employment agreement executed at a later date. Dr. Moridani's suggestion to the contrary is misplaced. Dr. Moridani states in his appellate brief that "nothing in the August 21, 2016 signed agreement . . . even suggest that . . . a follow-up contract was to be confected" is belied by both Dr. Moridani's own deposition testimony and by the fact that the document signed on August 21, 2016 was accompanied by an offer letter that clearly states that Dr. Moridani would have to execute an "at-will employment contract" that would be submitted to him "for review and execution."

Second, again as Dr. Moridani conceded, the parties never came to a full agreement as to all of the terms of the employment contract. Indeed, at all times, there were disagreements as to the content of the employment contract. On each occasion that Stone provided Dr. Moridani with an employment contract, Dr. Moridani requested various changes to it. Ultimately, the parties never signed a contract and, thus, the trial court properly found the "absence of an enforceable contract. *See JCD Mktg. Co.*, 01-1096, p. 8, 812 So.2d at 839-40 (where the parties "contemplated that the . . . Contract would be signed by both parties, yet the

[defendant] never signed it[,] [i]t follows that no contract was ever entered into between the parties.").

Moreover, as our jurisprudence clearly indicates, Dr. Moridani's changes to the drafts of the employment contract constituted counter-offers to Stone. *See JCD Mktg. Co*., p. 8., 812 So.2d at 839-40 (the plaintiff's altering of a proposed contract, "as a matter of law, was '[a]n acceptance not in accordance with the terms of the offer [and thus] is deemed to be a counteroffer.'"). Stone never accepted the changes sought by Dr. Moridani. Likewise, while Dr. Moridani steadfastly maintains that the signed offer letter of August 21, 2016 is an employment contract, it is clear that even that document constituted a counter-offer. Mr. Ridgeway clearly indicated that Stone would not permit outside consulting work, by striking that clause in the offer letter, thereby modifying the offer letter and evidencing a lack complete agreement with the terms of the offer letter.

We find Dr. Moridani's reliance on the case of *Dickerson v. Cajun Commc'ns of Texas, Inc*., 40,026 (La. App. 2 Cir. 8/17/05), 910 So.2d 477, to be misplaced. In *Dickerson*, the court found that a signed letter of intent bound the parties to an agreement. The court found that, "[a]lthough the letter of intent states that a 'formal agreement' would follow within 30 days of the beginning of the parties' association," the court did not find that "this demonstrate[d] an intent to be bound *only* by a subsequent document." *Id*., 40,026, p. 5, 910 So.2d at 480 (emphasis supplied). The fact that the defendant's owner "not only wrote the letter of intent but also signed it," demonstrated its consent. Because the plaintiff "went to work for [the defendant] *under the terms of the letter of intent* . . . his intent to be bound by its terms" was evidenced as well. *Id*. 40,026, p. 5, 910 So.2d at 481 (emphasis added).

Unlike *Dickerson*, and as we have found herein, there was never a full and complete agreement as to the terms of the offer letter. While the parties came to an agreement as to certain terms, Dr. Moridani never agreed to the non-competition or non-solicitation provisions, which the offer letter indicated would be contained in the subsequent employment contract; and Stone never agreed to allow Dr. Moridani to conduct outside consulting work.

Accordingly, there is no genuine issue of material fact that the fundamental elements of a contract – offer and acceptance, as set forth in La. C.C. art. 1927 – are absent in this case. We thus need not reach the issue of whether the trial court made a factual determination, improper for a motion for summary judgment, that there was no "meeting of the minds," as Dr. Moridani suggests, although we find that the record amply supports the conclusion that there was no meeting of the minds. Inasmuch as Dr. Moridani admitted that there was never a completed, signed contract by both parties, or an agreement as to all of the terms of the contract, it follows that there could be no meeting of the minds.

Having found that there was no valid employment contract between Dr. Moridani and Stone, we now turn to Stone's answer to the appeal, by which it seeks an award of damages for frivolous appeal.

Louisiana Code of Civil Procedure art. 2164 provides, in pertinent part, that an appellate court "may award damages, including attorney fees, for frivolous appeal . . . ."

This Court examined this Article and explained when frivolous appeal damages should be awarded in *Dugas v. Thompson*, 11-0178, p. 15 (La. App. 4 Cir. 6/29/11), 71 So.3d 1059, 1068:

> La. C.C.P. art. 2164 and Rule 2-19,[5] which allow damages for a frivolous appeal, are penal in nature and must be strictly construed in the appellant's favor. See *Levy v. Levy*, 02-0279, pp. 17-18 (La. App. 4 Cir. 10/2/02), 829 So.2d 640, 650. Appeals are favored, and frivolous appeal damages are not granted unless they are clearly due. *Haney v. Davis*, 04-1716, p. 11, (La. App. 4 Cir. 1/19/06), 925 So.2d 591, 598. Even when an appeal lacks serious legal merit, frivolous appeal damages will not be awarded unless the appeal was taken solely for the purpose of delay or the appellant's counsel is not serious in the position he advances. *Elloie v. Anthony*, 95-0238, p. 3 (La. App. 4 Cir. 8/23/95), 660 So.2d 897, 899.

In this matter, while we agree with Stone that Dr. Moridani's own deposition testimony confirms that no enforceable employment contract was created, we cannot say that the appeal was taken for the purpose of delay or that counsel for Dr. Moridani did not seriously believe in his contentions. Thus, we cannot say that Dr. Moridani's argument is so vacuous as to warrant damages for frivolous appeal; and we decline to make such an award in this appeal.

CONCLUSION

Based on the foregoing, we affirm the trial court judgment granting Stone's motion for summary judgment. The request for damages for frivolous appeal is denied.

AFFIRMED

[5] Rule 2-19 of the Uniform Rules, Courts of Appeal states: "The court may award damages for frivolous appeal in civil cases as provided by law."