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NO. 96-CA-0644-MR

RITA C. GELLHAUS;
WINSTON L SHELTON;
HAZEL W. SHELTON;
LLOYD S. HALL;
LAURA S. HALL; and
THE ASSOCIATION OF
CHENOWETH RUN ENVIRONMENTALISTS — APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, JUDGE
CIVIL ACTION NO. 94-CI-002642

LOUISVILLE & JEFFERSON COUNTY
PLANNING COMMISSION and
TRIAD DEVELOPMENT/ ALTA GLYNE INC. — APPELLEES

AND: NO. 96-CA-2016-MR

RITA C. GELLHAUS;
WINSTON L SHELTON;
HAZEL W. SHELTON;
LLOYD S. HALL;
LAURA S. HALL — APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, JUDGE
CIVIL ACTION NO. 96-CI-000926

LOUISVILLE & JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT;
JEFFERSON COUNTY ACTING BY AND
THROUGH JEFFERSON COUNTY
DEPARTMENT OF WORKS;
LOUISVILLE & JEFFERSON COUNTY
PLANNING COMMISSION and
TRIAD DEVELOPMENT/ ALTA GLYNE INC. — APPELLEES

OPINION
AFFIRMING IN PART AND REVERSING AND REMANDING IN PART
NO. 96-CA-0644-MR

AND

OPINION AFFIRMING NO. 96-CA-2016-MR

* * * * *

BEFORE: BUCKINGHAM, GUIDUGLI and JOHNSON, Judges.

GUIDUGLI, JUDGE. This consolidated appeal arises from several rulings of the Jefferson Circuit Court concerning the proposed Alta Glyne innovative subdivision (the subdivision). Appellant, Rita C. Gellhaus (Gellhaus) appeals from an order of the Jefferson Circuit Court entered February 23, 1996, granting summary judgment in favor of appellees, Louisville & Jefferson County Planning Commission (the Commission) and Triad Development/Alta Glyne, Inc. (Triad). Appellant, Winston L. Shelton (Shelton) appeals from an order of the Jefferson Circuit Court entered on May 29, 1996, dismissing his complaint against appellees, Louisville & Jefferson County Metropolitan Sewer District (MSD), Jefferson County Department of Public Works (Public Works), the Commission, and Triad. We affirm in part and reverse and remand in part.[1]

Triad is the owner of 117 acres of unimproved land located at the intersection of Billtown Road and the Gene Snyder Freeway in Jefferson County. In 1992, Triad applied for approval

[1] Gellhaus and Shelton own land adjacent to the proposed subdivision. They are each a party to the other's lawsuit.

of the Alta Glyne subdivision plan pursuant to the Innovative Regulations of the Development Code for All of Jefferson County, which is administered by the Commission. On March 11, 1993, the Commission held a public hearing on the proposed subdivision. During the hearing, 9 people spoke in favor of the subdivision while 23 people, most of whom were adjoining landowners, spoke in opposition of the subdivision. As noted by the minutes of the meeting, the Commission took the following position at the end of the hearing:

> Whereas, the Commission finds that additional information is necessary concerning the Erosion Sediment Control Plan and specific guidelines addressing this issue, approval of the sewage treatment plant and other issues; now, therefore, be it
>
> Resolved, that the Louisville and Jefferson County Planning Commission does here DEFER action on this request until all issues have been resolved. (emphasis added).

The minutes for the Commission's meeting on April 7, 1994, indicate that Triad submitted a soil erosion and sedimentation control plan to MSD and the Commission on March 19, 1993. The minutes further indicate that Triad withdrew its application for a change in zoning for a portion of the property from R-4 to C-N, but still sought approval for the subdivision. The Commission once again deferred approval of the plans "in order for [Triad] to address the issue of on-site storm water retention."

The Commission met again on April 21, 1994. According to the minutes, Triad submitted a revised erosion control plan on

April 14, 1994. According to the revised plan, Triad agreed to retain the first 1/2" of runoff from the subdivision site. The Commission resolved as follows:

> That the Louisville and Jefferson County Planning Commission does hereby APPROVE the preliminary plan for Alta Glyne...subject to the following binding elements:
>
> * * *
>
> 9. Detailed construction plans for soil erosion and sedimentation control plan shall be developed in accordance with the Revised Erosion and Sediment Control Plan...and implemented prior to any grading, site disturbance or construction activities. The detailed construction plans shall be submitted to the Metropolitan Sewer District for their review and approval.

Following the Commission's approval of the subdivision, Gellhaus, Shelton, Lloyd D. Hall, and the Association of Chenoweth Run Environmentalists, Inc. sought review of the Commission's decision. In the complaint and statement of appeal filed with the trial court on May 20, 1994 (the Gellhaus Complaint), Gellhaus alleged that the Commission: (1) acted in excess of its powers in approving the subdivision; (2) denied the aggrieved property owners the due process right to be heard and to confront evidence presented ex parte to the Commission following the public hearing; and (3) made findings which were contrary to the findings of its staff and unsupported by substantial evidence. On January 9, 1995, Triad filed a motion for summary judgment with the trial court alleging that the Commission's approval of the subdivision was neither arbitrary

nor capricious and denying the due process violation allegations of the Gellhaus Complaint.

On February 28, 1995, Gellhaus filed a motion with the trial court seeking leave to file an amended or supplementary complaint (the Gellhaus amended complaint). The basis of the Gellhaus amended complaint was that Triad had made various misrepresentations to the Commission regarding residential density, and that on October 14, 1994, Triad "reneged" on its agreement to retain the runoff from the subdivision. Prior to any action on Gellhaus' motion to amend, Triad moved to strike the Gellhaus amended complaint on March 16, 1995, on the ground that it was a sham.

On March 28, 1995, the trial court entered an order granting Gellhaus' motion to file the amended complaint. The trial court also entered an order granting Gellhaus' motion to remand Triad's motion for summary judgment until completion of discovery. The order further provided that Triad could supplement its motion for summary judgment upon completion of discovery and that Gellhaus could file an additional response.

A hearing was held before the trial court on September 18, 1995. Our review of the videotape of the hearing shows that counsel for Triad addressed three motions at the hearing: (1) a renewed motion to strike the amended complaint filed on August 25, 1995; (2) a motion to compel answers to interrogatories filed on September 18, 1995; and (3) a motion to cut off discovery filed on August 3, 1995. Counsel for Gellhaus

argued that Triad had failed to produce a court-ordered privileged document log pertaining to several documents which counsel for Triad claimed were privileged.

At the outset of the hearing, counsel for Triad moved to amend its motion to cut off discovery to a motion requesting a briefing schedule. Triad requested that the trial court order briefing on the issue of whether a cause of action was set forth in the Gellhaus amended complaint and that if the trial court found that a cause of action existed, that it be permitted to take discovery to prepare for trial. Counsel for Triad also requested that the trial court rule that the Gellhaus amended complaint was a sham and that it make a determination that Gellhaus' action was an appeal from an administrative proceeding to be judged by the standard set forth in American Beauty Homes Corp. v. Louisville & Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450 (1964). Counsel for Gellhaus responded by arguing that their discovery showed uncontroverted proof that Triad was not in compliance with the binding elements imposed by the Commission in their approval of the subdivision and summarized their proof to the trial court.

On January 10, 1996, the trial court entered an order granting Triad's motion to strike the Gellhaus amended complaint. The order read in its entirety:

> Defendant having moved and the Court being sufficiently advised,
>
> IT IS ORDERED that Plaintiffs' Amended and Supplementary (sic) Complaint is hereby STRICKEN from the record.

On February 23, 1996, the trial court entered an order granting summary judgment in favor of Triad and the Commission. The trial court deferred to the Commission's calculations regarding the residential density of the subdivision and found that the Commission acted within its authority in approving the subdivision. The trial court also found that Gellhaus was not entitled to a second hearing in order to confront evidence presented to the Commission following the public hearing on March 11, 1993. The trial court held that the ex parte evidence considered by the Commission did not pertain to anything that had not been addressed at the hearing, and that pursuant to Minton v. Fiscal Court of Jefferson County, Ky. App., 850 S.W.2d 52 (1992), Gellhaus was not entitled to a second hearing. The trial court found that the Commission's findings were supported by substantial evidence and that its approval of the subdivision was not arbitrary. Summary judgment was entered in favor of Triad and the Commission and the Gellhaus complaint was dismissed with prejudice. On February 26, 1996, Gellhaus filed a notice of appeal seeking review of the trial court's motion granting summary judgment.

On February 12, 1996, Shelton filed a complaint with the trial court seeking to challenge acts and omissions of Triad, the Commission, MSD, and Public Works occurring after the Commission's approval of the subdivision on April 21, 1994 (the Shelton complaint). The Shelton complaint alleged that: (1) Triad made misrepresentations to the Commission before the

approval of the subdivision; (2) Triad repudiated its agreement to retain storm water runoff after the subdivision was approved; and (3) the Commission, MSD, and Public Works refused to enforce the binding element pertaining to storm water runoff as imposed by the Commission.

On March 26, 1996, Triad filed a motion to dismiss the Shelton complaint alleging that the claims arose from the same facts and cause of action adjudicated by the trial court in the Gellhaus action. Triad requested that the Shelton complaint be dismissed with prejudice pursuant to the doctrines of collateral estoppel and res judicata. MSD filed a similar motion to dismiss on April 3, 1996. The Commission and Public Works filed their motion to dismiss on May 2, 1996.

The trial court entered its order on the motions to dismiss on May 29, 1996. In its order, the trial court specifically stated that the dismissal of the Gellhaus amended complaint "was based on the Court's belief that there was no merit to the Plaintiff's assertions of fraud and misrepresentation," and that its entry of summary judgment in the Gellhaus action addressed the balance of the issues before the trial court. The trial court found that the issues raised in the Shelton complaint were the same as the issues raised in the Gellhaus amended complaint and that the Shelton complaint was barred by the principles of res judicata and collateral estoppel. The trial court further found that MSD and Public Works were also protected by res judicata and collateral estoppel even though

they were not parties to the Gellhaus action. Shelton now appeals from the dismissal of the Shelton complaint. We will address each party's appeal separately.

The Gellhaus Appeal

Gellhaus' first argument on appeal is that the trial court erred by refusing to review the factual basis for the Commission's calculation of residential density to determine if the Commission acted in excess of its authority in approving the subdivision. Gellhaus points out that pursuant to Kentucky Revised Statutes (KRS) 100.193, the Jefferson Fiscal Court is granted the power to create a zoning district map, and pursuant to KRS 100.213 the Jefferson Fiscal Court has the power to amend the zoning map only upon a finding that the original zoning was inappropriate, improper, or no longer feasible due to unanticipated changes in the area. Additionally, the Fiscal Court has provided as follows in Section 9.5 of the Jefferson County Development Code pertaining to innovative subdivisions:

> Innovative residential proposals developed according to this section may not increase the density in excess of the density permitted in the applicable zone. Innovative residential proposals requiring a density variation will be subject to a zoning amendment to another zoning classification.

Jefferson County Development Code Section 9.5(A).

According to the preliminary innovative development plan for the subdivision submitted by Triad to the Commission on December 30, 1992, Section 1 of the subdivision would have 52 dwelling units on 12.76 acres resulting in a residential density

of 4.07 dwelling units per acre. However, Gellhaus contends that in calculating the density, Triad "tacked" onto Section 1 "open spaces" which were in other sections in order to conceal an actual residential density of 8 dwelling units per acre which is almost double the permissible density.[2] Gellhaus argued before the trial court that because the Commission approved the plan based in part on Triad's misrepresentations as to density the approval caused a de facto change in zoning which was outside of the Commission's authority. However, the trial court held that it was not its duty to recompute the findings of the Commission and stated:

> Acknowledging the expertise of the Commission, this Court will not re-figure the commission's math. The density requirements for R-4 zoning are not changed by this subdivision. Therefore, this Court finds that the Commission had the authority pursuant to KRS 100.273 to regulate and approve the innovate subdivision.

On appeal, Gellhaus contends that the trial court erred in refusing to review the factual basis of the Commission's findings as to density.

As this Court has previously indicated, "judicial review of administrative action is concerned with the question of arbitrariness." American Beauty Homes, 379 S.W.2d at 456. In reviewing factual decisions of an administrative body, however,

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[2] Gellhaus argues that Triad's use of 4.82 acres of open space not in Section 1, 1.02 acres of space in designated retention areas, and .39 acres of space in isolated parcels in calculating residential density was prohibited by Sec. 9.5A.2., 9.5A.9.a., and 9.5A.9.c. of the Development Code.

"a circuit court...is confined to the record of proceedings held before the administrative body and is bound by the administrative decision if it is supported by substantial evidence." Commonwealth Transportation Cabinet Department of Vehicle Regulation v. Cornell, Ky. App., 796 S.W.2d 591, 594 (1990). In reaching factual conclusions, the administrative body is given discretion to consider all of the evidence as a whole and base its decision on that evidence it chooses to believe. Cornell, 796 S.W.2d at 594. Although the reviewing court may arrive at a different conclusion following its consideration of the evidence in the record, "this does not deprive the agency's decision of support by substantial evidence." Transportation Cabinet, Department of Highways, Commonwealth of Kentucky v. Thurman, Ky. App., 897 S.W.2d 597, 600 (1995). Stated another way, the duty of the circuit court on appeal of an administrative action is merely that of review, not reinterpretation. Jones v. Cabinet for Human Resources, Division for Licensure and Regulations, Ky. App., 710 S.W.2d 862, 866 (1986).

Based on our review of the record, we find that the decision of the Commission in regard to residential density is supported by substantial evidence. As pointed out by Triad, Adrian Freund [Freund], Director of the Jefferson County Department of Planning and Management, testified at his deposition on July 21, 1995, that the commission was not misled as to the open space and developed space ratios as submitted in the plan. In a second deposition taken on August 22, 1995,

Freund testified that Triad "is required to meet open space requirements for the development as a whole. Not to balance each little section in terms of open space." Thus, the Commission's decision regarding the residential density of the subdivision is supported by substantial evidence and we are thus bound by it. The fact that Gellhaus believes that the calculations should be performed differently does not automatically deprive the Commission's decision of support by substantial evidence. Thus, the trial court did not err in refusing to recalculate the residential density calculation.

Gellhaus also contends that the trial court erred when it approved the Commission's refusal to allow the adjoining property owners to confront evidence presented to the Commission after the public hearing was held. As noted by the trial court, among the evidence submitted to the Commission was a letter dated April 14, 1994, from Triad's engineer to the Commission which was accompanied by the revised erosion and sediment control plan. As summarized by the trial court, most of the evidence in question concerns the issues of on-site water retention and sewage treatment and disposal. Pointing to Triad's claim that its engineers were not familiar with the 1/2" criteria, Gellhaus argues that if they would have been given the opportunity to test the engineer's familiarity at a second public hearing, the Commission may have withheld approval of the subdivision.

It is well-recognized that parties to an administrative proceeding pertaining to zoning are entitled to procedural due

process. Morris v. City of Catlettsburg, Ky., 437 S.W.2d 753, 755 (1969). In order to satisfy due process, parties to a zoning dispute are entitled to a trial type hearing including the taking and weighing of evidence, a finding of fact based upon the offered evidence, and conclusions supported by substantial evidence. City of Louisville v. McDonald, Ky., 470 S.W.2d 173, 177 (1971). Furthermore, the evidence upon which the administrative body bases its decision "must come as a result of a due process hearing." Resource Development Corp. v. Campbell County Fiscal Court, Ky., 543 S.W.2d 225, 227 (1976).

In Resource Development, the Planning and Zoning Commission held a public evidentiary hearing on an application for zoning change. Based on the evidence produced at the hearing, the Commission recommended that the fiscal court approve the application. Without a hearing, the fiscal court denied the application after reviewing not only the evidence from the hearing before the Commission, but also numerous letters and written protests which were received by the various members of the fiscal court. After noting that an administrative body must base its decision on evidence presented at a due process hearing, the Court stated:

> since the legislative body did not conduct a trial-type hearing, it was limited to the evidence produced at the due process trial-type hearing held by the Planning and Zoning Commission. The full proceeding before the Planning and Zoning Commission was submitted to the fiscal court, and it could have... conducted a due process trial-type hearing of its own...which it did not do.

* * *

> [T]he fiscal court was not at liberty to consider the additional exhibits which took the form of letters and written petitions of protest which it received and which appellants were not afforded the opportunity to rebut.

Resource Development, 543 S.W.2d at 228. See also, Kaelin v. City of Louisville, Ky., 643 S.W.2d 590 (1983) (noting that purpose of trial-type hearing is to allow parties opportunity to subject all evidence to scrutiny to determine trustworthiness).

Triad relies on Minton v. Fiscal Court of Jefferson County, Ky. App., 850 S.W.2d 52 (1993), in support of its argument that Gellhaus was not entitled to a second public hearing on the evidence submitted by Triad after the initial hearing. In Minton, an application for zoning change was modified following a public hearing. Minton argued that the Planning Commission acted arbitrarily in approving the plan because it did not hold a hearing on the modified plan. After noting that the plan approved by the Commission was less intrusive than the original plan, the Court held, "[t]here is no requirement that a new public hearing must be held any time there is a revision." Minton, 850 S.W.2d at 56.

Minton is easily distinguishable from the case at bar as Minton only involved modifications to the original proposal. While Triad, like Minton, did modify its plan in that it withdrew its application for a zoning change, the record shows that Triad submitted additional evidence to the Commission regarding sewage treatment and storm water runoff control, both of which were

hotly contested issues. In fact, one of the documents submitted after the hearing was the Revised Erosion and Settlement Control Plan which was approved by the Commission.

This is not a case involving mere modifications to the original plan. As noted in the minutes of the public hearing, the Commission deferred making a decision on the plan due to the need for additional information concerning erosion and sediment control. Because the Commission's approval of the subdivision was based in part on the revised erosion control plan, under Resource Development and Kaelin, Gellhaus was denied the opportunity to subject the additional evidence to scrutiny and rebuttal. See Danville-Boyle County Planning and Zoning Commission v. Prall, Ky., 840 S.W.2d 205 (1992) (use of planning director's report was not violative of due process when plaintiffs were given time to study and respond to report). Thus, the trial court erred in holding that Gellhaus was not entitled to a second public hearing to address the additional evidence submitted to the Commission.

Gellhaus' final argument is that the trial court erred in striking the Gellhaus amended complaint.[3] Gellhaus contends

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[3] Triad contends that this issue is not properly preserved for our review because Gellhaus did not give notice of an intent to appeal from the order striking the Gellhaus amended complaint in the notice of appeal filed on February 26, 1996. This argument is entirely without merit.

Although CR 73.03 requires the notice of appeal to identify the judgment or order appealed from, CR 73.02(2) provides:

> The failure of a party to file timely a notice of appeal, cross-appeal, or motion for

that the Gellhaus amended complaint was filed when they discovered that Triad has "reneged" on its plan to retain runoff water on site. The Gellhaus amended complaint alleged that the Commission approved the subdivision in reliance on Triad's representations that storm water runoff would be retained on site. Gellhaus argues that unless the trial court considers the allegations of fraud raised by the Gellhaus amended complaint, it could not determine the true state of facts as they existed at the time the subdivision was approved and therefore could not determine if the Commission's approval was supported by substantial evidence.

Triad filed a motion to strike the Gellhaus amended complaint on March 16, 1995, alleging that the pleading was a sham. Triad renewed its motion on August 25, 1995, alleging that discovery showed that the motion to strike was well-founded. The trial court held a hearing on several motions, including Triad's

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> discretionary review shall result in a dismissal or denial. Failure to comply with other rules relating to appeals or motions for discretionary review does not affect the validity of the appeal or motion[.]

See also, Ready v. Jamison, Ky., 705 S.W.2d 479 (1986) (adopting policy of substantial compliance with rules of civil procedure as provided by CR 73.03(2)).

Furthermore, in Blair v. City of Winchester, Ky. App., 743 S.W.2d 23 (1987), this Court held that failure to name an interlocutory order in the notice of appeal does not result in waiver of the issue because "one can only appeal from a final judgment and...all interlocutory orders or judgments are "readjudicated finally" upon entry of a final judgment disposing of all issues making it unnecessary to name any judgment in the notice of appeal other than the final one." (citations omitted). Blair, 743 S.W.2d at 31.

motions to strike, on September 18, 1995. Although counsel for Gellhaus and Shelton allege that the purpose of this hearing was to discuss several pending discovery issues, our review of the videotape of the hearing shows that Triad's motions to strike were specifically addressed and argued at that time. In fact, the trial court gave Gellhaus an opportunity to present evidence in support of the Gellhaus amended complaint when it asked counsel for Gellhaus if he had any evidence to support his claim of fraud or misstatement on the part of Triad.

Under CR 12.06, a court may order any pleading stricken from the record if it determines that it is a sham. A pleading will be deemed to be a sham when it is found to be "so palpably and manifestly false on its face as to leave no room for doubt thereof, and of such a character that the court on a mere inspection may pronounce it to be indicative of bad faith in the pleader." Commonwealth v. Murphy, Ky., 174 S.W.2d 681, 683 (1943).

At the September hearing, the trial court informed counsel for Gellhaus that based on the evidence produced at the hearing, unless Gellhaus had any other evidence concerning fraud or misstatement on the part of Triad, Triad's request for a briefing schedule would be proper. Additionally, Freund testified at his deposition that he did not believe that Triad had misled either him or the Commission. We hold that the trial court's decision to strike the Gellhaus amended complaint was not an abuse of discretion.

The Shelton Appeal

Shelton contends on appeal that the trial court erred in holding that the Shelton complaint was barred by the doctrines of res judicata and collateral estoppel. Shelton claims that the Shelton complaint alleged claims which accrued after the Commission's approval of the subdivision and were not part of the Gellhaus action, that the causes of action in the Shelton complaint were based on legal theories not raised in the Gellhaus action, that claims were made against parties who were not parties to the Gellhaus action, and that the Gellhaus action was not decided on the merits.

Kentucky recognizes the doctrines of res judicata and collateral estoppel. Louisville v. Louisville Professional Firefighters Association, Ky., 813 S.W.2d 804, 808 (1991). The doctrine of res judicata precludes litigation of a cause of action which has not, in fact, been litigated but should have been alleged in an earlier related suit. Newman v. Newman, Ky., 451 S.W.2d 417, 419 (1970). The doctrine of collateral estoppel precludes re-litigation of an issue which has actually been litigated and determined in a prior lawsuit. City of Covington v. Board of Trustees of the Policeman's and Firefighters' Retirement Fund of the City of Covington, Ky., 903 S.W.2d 517, 521 (1995). The doctrines of res judicata and collateral estoppel work to preclude a cause of action when there is identity of parties, identity of causes of action, and a decision upon the merits in the prior case. Newman, 451 S.W.2d at 419.

As to the allegations raised against Triad in Count V of the Shelton complaint, Shelton argues that the trial court's order striking the Gellhaus amended complaint was not a decision on the merits. We disagree.

First, in its order dismissing the Shelton complaint, the trial court specifically stated that its order dismissing the Gellhaus amended complaint "was based on the Court's belief that there was no merit to the Plaintiff's assertions of fraud and misrepresentation." We agree that the hearing held on September 18, 1995, was not a hearing on discovery issues only, and that the claims in Count V were adjudicated on the merits.

Even without the assertion in the trial court's order that the Gellhaus amended complaint was decided on its merits, under CR 41.02(3):

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this Rule, and any dismissal not provided for in Rule 41, other than a dismissal for lack of jurisdiction, for improper venue, for want of prosecution under Rule 77.02(2), or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Thus, unless the judgment or order of dismissal fits one of the exceptions set forth in CR 41.02(3), the judgment will be construed as being with prejudice unless otherwise indicated on the face of the order. Commonwealth v. Hicks, Ky., 869 S.W.2d 35, 38 (1994).

As to Counts I, II, III and IV of the Shelton complaint, we agree that they were properly barred by the doctrine of res judicata. Our decision is governed by the

principle that a party may not split a cause of action and attempt to try it in a piecemeal fashion. Kirchner v. Riherd, KY., 702 S.W.2d 33, 34 (1985). As stated in Newman:

> When a matter is in litigation, parties are required to bring forward their whole case; and "the plea of res judicata applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. (citations omitted).

Newman, 451 S.W.2d at 419.

We agree with Triad's assertion in their brief that during the 18 months of litigation of this matter, the property owners/plaintiffs in the Gellhaus and Shelton actions had every opportunity to assert what Shelton alleges are new claims against Triad, the Commission, MSD, and Public Works. Although Shelton alleges that these new claims did not come to light until after the Gellhaus action was filed, the proper way to assert those new claims would have been a motion to amend the Gellhaus complaint pursuant to CR 15.04.

Having considered the parties' arguments in this matter, the orders of the Jefferson Circuit Court dismissing the Shelton complaint and striking the Gellhaus amended complaint are affirmed. The order of the Jefferson Circuit Court granting summary judgment in favor of Triad on the Gellhaus complaint is reversed and this matter is remanded for further proceedings in conformance with this opinion.

BUCKINGHAM, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN PART, DISSENTS IN PART AND WRITES A SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I concur with the Majority Opinion in part, but I respectfully dissent as to the affirmance of the trial court's dismissal of Shelton's complaint. I do not believe that the doctrine of res judicata and collateral estoppel are applicable to bar Shelton's claims. Shelton's alleged claims that accrued after the action taken by the Commission; the Gellhaus action was an administrative appeal that did not involve all of the Shelton claims or all of the same parties; and the issues raised by the Shelton complaint were not litigated on the merits in the Gellhaus administrative appeal.

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