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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001194-MR

JANE P. THOMAS; KENT DYER;
MELISSA DYER; JOSEPH L. HUFF;
PATRICIA A. HUFF; H. T. POWER;
HARLAN T. POWER, JR.; TINKER
JONES — APPELLANTS

v.

APPEAL FROM HARRISON CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 06-CI-00014

CYNTHIANA-HARRISON COUNTY-
BERRY JOINT PLANNING COMMISSION;
LYNDEN PLATT (CHAIRMAN, PLANNING
COMMISSION0; KEN ABNER (PLANNING
COMMISSION MEMBER0; THOMAS BOLAND
(PLANNING COMMISSION MEMBER); RICHARD
SING (PLANNING COMMISSION MEMBER);
DAVE KENNEDY (PLANNING COMMISSION
MEMBER); JEFF CLAYPOOL (PLANNING
COMMISSION MEMBER; PATTY EDWARDS
(PLANNING COMMISSION MEMBER);
HARRISON COUNTY BOARD OF ADJUSTMENTS;
KAREN BEAR (CHAIRPERSON, BOARD OF
ADJUSTMENTS); DAN CLIFFORD (BOARD OF
ADJUSTMENTS MEMBER); STEVE EADS
(BOARD OF ADJUSTMENTS MEMBER);

DON JOHNSON (BOARD OF ADJUSTMENTS
MEMBER); DAVID LAWLER (BOARD OF
ADJUSTMENTS MEMBER); HARRISON COUNTY
FISCAL COURT; DEAN PEAK (HARRISON
COUNTY FISCAL COURT AND COUNTY
JUDGE-EXECUTIVE); TAWASHA, INC.;
CHRISTINE TAWASHA; NADER (NED)
TAWASHA APPELLEES

OPINION
AFFIRMING IN PART, VACATING
IN PART, AND REMANDING

** ** ** ** **

BEFORE: VANMETER AND THOMPSON, JUDGES; HENRY,[1] SENIOR JUDGE.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

HENRY, SENIOR JUDGE: Jane P. Thomas, Kent Dyer, Melissa Dyer, Joseph L. Huff, Patricia A. Huff, H. T. Power, Harlan T. Power, Jr., and Tinker Jones appeal from a series of orders of the Harrison Circuit Court which dismissed their various challenges to the rezoning and development of property located in Leesburg, Kentucky, and the approval of a site plan to permit the construction of a convenience store and gas station at the location. For the reasons stated below, we affirm in part, vacate in part, and remand.

FACTUAL AND PROCEDURAL BACKGROUND

Appellees Nader Tawasha, Christine Tawasha, and Tawasha, Inc. (collectively Tawasha) own a 1.48 acre tract of property located at the corner of U.S. Highway 62 and Leesburg-Newtown Pike in Harrison County, Kentucky. In 2005 Tawasha began efforts to construct and operate a convenience store and gas station on the property. In order to do this it was necessary to obtain a rezoning of the property through the Harrison County Fiscal Court; a conditional use permit from the Harrison County Board of Adjustments (Board) to operate the gas station aspect of the project; and site development approval from the Cynthiana-Harrison County-Berry Joint Planning Commission (Planning Commission).

On June 17, 2005, Tawasha filed an application for a map amendment for the site seeking to rezone the property from Rural Development Community (RDC) to Rural Residential Business (RRB). On July 18, 2005, the Planning

Commission considered the application at which time, among other actions, it voted to recommend a waiver be granted to Tawasha from the 1.5 acre lot size requirement for RRB zoning. On August 15, 2005, the Planning Commission voted to recommend approval of the zone change to the Harrison Fiscal Court.

On September 13, 2005, the Harrison Fiscal Court voted to approve the zone change; however, it is uncontested that the Fiscal Court failed to take final action on the map amendment by having a second reading thereon. Accordingly, the zone change as recommended by the Planning Commission became final by operation of law on November 13, 2005, - 90 days following the Planning Commission's vote to recommend the change. *See* Kentucky Revised Statutes (KRS) 100.211(1) and KRS 100.211(7).

The operation of a gas station is a conditional use for RRB zoning and requires the obtaining of a conditional use permit from the Board of Adjustments. Accordingly, on September 26, 2005, Tawasha filed an application for a conditional use permit with the Board of Adjustments. The Board met on October 11 and November 8, 2005, to consider the application. At the conclusion of the November 8 meeting the Board of Adjustments voted to issue a conditional use permit for the gas station aspect of the project. In connection with the approval the Board imposed 15 conditions upon the project and listed 5 recommendations for the Planning Commission to consider at the site development plan review.

On November 18, 2005, Tawasha filed an application with the Planning Commission for approval of its site development plan. Following a

public hearing, on December 19, 2005, the Planning Commission voted to approve Tawasha's proposed site development plan. The plan as adopted included the 15 conditions as imposed by the Board of Adjustments, and all of the Board's recommendations except one.

On January 18, 2006, the appellants filed a "Complaint and Appeal" in Harrison Circuit Court. The filing consisted of a planning and zoning appeal pursuant to KRS 100.347 and a petition for declaratory judgment pursuant to KRS 418.040. As subsequently amended, Counts I through IV alleged various errors and shortcomings in the approval process; Count V sought a restraining order preventing Tawasha from commencing construction on the project; and Count VI sought a declaration of rights that the project as approved was, for various reasons, in violation of KRS Chapter 100.

On November 21, 2006, the trial court entered an order dismissing Counts II – VI of the amended complaint and those portions of Count I insofar as they related to actions taken by the Commission or Board of Adjustments prior to December 19, 2005, upon the grounds that the 30-day limitations period to bring a planning and zoning appeal had run as to those causes of action. The foregoing left for decision only issues relating to the Commission's approval of the site development plan pursuant to its December 19, 2005, vote.

On April 2, 2007, the trial court affirmed the Planning Commission's approval of the site development plan. By order entered May 14, 2007, the trial

court denied the appellants' motion to alter, amend, or vacate. This appeal followed.

VIOLATION OF DEVELOPMENT STANDARDS

In their first argument the appellants allege that the Planning Commission erred in approving Tawasha's development plan (1) in that the lot did not meet the Zoning Ordinance's requirements for lot size, building line width, and road frontage; (2) in that the development plan provides for a "restaurant," which is not allowed by RRB zoning; (3) "by allowing a new building to be constructed on a non-conforming lot;" and (4) in that "on the record, the property was not [properly] [re]zoned RRB but remained zoned Rural Residential District (R-R)."

STANDARD OF REVIEW

The standard of review, when addressing an appeal from an administrative decision, "is limited to determining whether the decision was erroneous as a matter of law." *McNutt Construction v. Scott*, 40 S.W.3d 854, 860 (Ky. 2001). Kentucky Courts have long held that "judicial review of administrative action is concerned with the question of *arbitrariness* . . . . Unless action taken by an administrative agency is supported by substantial evidence it is arbitrary." *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964) (emphasis in original). Substantial evidence is defined as "that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the

mind of a reasonable person." *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409 (Ky. App. 1994). In weighing the evidence, "the trier of facts is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it." *Bowling*, 891 S.W.2d at 409-10. A reviewing court may not substitute its own judgment on a factual issue "unless the agency's decision is arbitrary and capricious." *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458-59 (Ky. App. 2003). Once a reviewing court has determined that the agency's decision is supported by substantial evidence, the court must then determine if the agency applied the correct rule of law to those factual findings in making its determination. If so, the final order of the agency must be upheld. *Bowling*, 891 S.W.2d at 410. On the other hand, matters of statutory construction are subject to *de novo* review. Because statutory interpretation is a matter of law reserved for the courts, we are not bound by the Circuit Court's interpretation. *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327, 330 (Ky. App. 2000).

SIZE, WIDTH, FRONTAGE

Section 645.4 of the Zoning Ordinance lists the development standards for RRB zoning. Among those standards are (1) a minimum lot size of one and one-half acres; (2) a minimum width at the building line of 200 feet; and (3) a minimum road frontage of 200 feet. As reflected on the development plan presented by Tawasha to the Planning Commission for approval, the lot size of the

subject property is 1.48 acres; the width of the property at the building line is 145.45 feet; and the road frontage of the property is 145.45 feet.

At the July 18, 2005, Planning Commission meeting the Commission addressed the acreage issue. The minutes reflect that the original lot size was 1.744 acres, but that as a result of the realignment of U.S. 62 and the attendant utility easements the lot size was reduced to 1.48 acres. It was further noted that "[t]he reduction of the lot size was not an action of the applicant but was purchased that way making it a legal nonconforming lot." Based upon the foregoing, a motion was made "to find that the requirement of commercial minimum lot of 1.5 acres under Section 645.4 of the Zoning Ordinance was met, in that it was a legal nonconforming lot." The motion passed 6-0. As a result, this finding was incorporated into the Commission's recommendation of approval forwarded to the Harrison Fiscal Court. As previously noted, the Fiscal Court failed to take final action on the recommendation within 90 days thereof, and the zone change as recommended by the Commission (with the acreage variance) became final by operation of law on November 13, 2005. KRS 100.211(1) and KRS 100.211(7). The finality of the zone change was not timely appealed pursuant to KRS 100.347 and, it follows, the appellants' challenge to the acreage variance is not timely.

We can locate no similar waiver or variance in the record, however, addressing the Zoning Ordinance standards for building line width and road frontage, nor are we directed to such by the appellees.

KRS 100.243 sets forth the findings necessary for the granting of a variance and evidences a bias against granting such relief. The statute provides as follows:

> (1) Before any variance is granted, the board must find that the granting of the variance will not adversely affect the public health, safety or welfare, will not alter the essential character of the general vicinity, will not cause a hazard or a nuisance to the public, and will not allow an unreasonable circumvention of the requirements of the zoning regulations. In making these findings, the board shall consider whether:
>
> > (a) The requested variance arises from special circumstances which do not generally apply to land in the general vicinity, or in the same zone;
> >
> > (b) The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant; and
> >
> > (c) The circumstances are the result of actions of the applicant taken subsequent to the adoption of the zoning regulation from which relief is sought.
>
> (2) The board shall deny any request for a variance arising from circumstances that are the result of willful violations of the zoning regulation by the applicant subsequent to the adoption of the zoning regulation from which relief is sought.

The burden of proof in convincing the decision maker is on the one seeking the variance. *Gentry v. Ressnier*, 437 S.W.2d 756 (Ky. 1969). "By setting forth findings that must precede the granting of a variance, the statute protects the overall zoning scheme from the ill effects of light and transient changes."

Bourbon County Board of Adjustment v. Currans, 873 S.W.2d 836, 837 (Ky. App. 1994).

The site plan as approved by the Planning Commission is clearly in violation of Zoning Ordinance Section 645.4 of the Zoning Ordinance in that the site development plan does not comply with the building line width and road frontage development standards for the section. The section requires a minimum width of 200 feet at the building line and a minimum road frontage of 200 feet. The site development plan as presented by Tawasha and approved by the Commission reflects a width of 145.45 feet at the building line and road frontage of 145.45 feet. We are thus constrained to vacate the Planning Commission's approval of the development plan as in violation of these provisions of the Zoning Ordinance. Upon remand Tawasha may seek a variance from the width at building line and road frontage requirements.

RESTAURANT

Tawasha's site development plan provides for a deli area with 6 booths seating a total of 24 persons. The record discloses that Tawasha employees will, at minimum, prepare sandwiches for consumption on-site. The appellants contend that the proposed deli amounts to a restaurant, and that restaurants are not permitted use in RRB zoning under the Zoning Ordinance.

We agree with the appellants that the on-site preparation and consumption of food (however characterized) is not a permitted principal or conditional use specifically listed in Section 645 for RRB zoning. However,

conditional uses permitted in RRB zoning are the same as for R-R zoning as listed in Section 644, and R-R zoning permits a conditional use for "[n]eighborhood type business[es] meeting local daily needs." Thus while the proposed deli is not a permitted use for RRB zoning, we construe a deli to be a permitted conditional use under the foregoing provision.

Tawasha's September 23, 2005, application for a conditional use permit requested a permit only for a "service station convenient store." It did not, however, request a permit to operate the deli. As such, we conclude that the Planning Commission erroneously approved the Tawasha site plan insofar as the plan provided for a deli in the absence of a conditional use permit. Upon remand, Tawasha may seek a conditional use permit before the Board of Adjustments for the operation of its proposed deli.

NEW BUILDING

The appellants contend that "the Planning Commission approved a development plan that would expand the non-conforming use on a non-conforming lot, by allowing a new building to be constructed on a non-conforming lot, in violation of Zoning Ordinance Article V."

The record on appeal contains pages 44 – 48 of the Zoning Ordinance which includes, as relevant to this appeal, Section 644 applicable to R-R zoning, and Section 645 applicable to RRB zoning. Record on appeal, pages 369-373. We are unable to locate Article V in the record on appeal, nor do the appellants cite

us to its location in the record.[2] Because this argument is based in large part on the provisions of Article V, and that provision of the Zoning Ordinance is not contained in the appellate record, we are unable to review this argument upon the merits. In the event of further proceedings upon remand, however, the appellants may raise this argument in the appropriate forum.

RURAL RESIDENTIAL

The appellants contend that "on the record, the property was not zoned RRB but remained zoned 'Rural Residential District (R-R),' as it was zoned when Tawasha acquired the property, where there is no record that Tawasha has ever sought to change the zone from Rural Residential to any other zoning designation."

As we construe this argument, the appellants allege that the subject property was zoned R-R at the time Tawasha filed its application for a map amendment, but Tawasha indicated on its rezoning application that it sought to change the zoning from RDC to RRB instead of R-R to RRB. Because of this alleged technical deficiency, the appellants argue that the property remains zoned R-R, a zoning classification which would not permit the operation of a business as proposed by Tawasha.

[2] The appellants include in Appendix 7 of their brief various sections of the Zoning Ordinance, including Article V, which are not included in the record on appeal. However, it is impermissible to include extraneous materials as attachments to an appellate brief not contained in the trial court record. Accordingly, we have disregarded those portions of the Zoning Ordinance contained in Appendix 7, including the Article V provisions. CR 76.12(4)(c)(vii) ("Except for matters of which the appellate court may take judicial notice, materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs." *See also Rankin v. Blue Grass Boys Ranch, Inc.*, 469 S.W.2d 767, 769 (Ky. 1971) (The presentation of extraneous material in briefs is improper).

The minutes of the various proceedings below reflect that all concerned were operating under the assumption that the rezoning was from RDC to RRB. The appellants provide us with no citation to any source to support its claim that the subject property was actually zoned RR rather than RDC at the time of the map amendment application. In the absence of any evidentiary foundation in support of this argument, we are constrained to conclude there is no reversible error.

In any event, as previously noted, following the Planning Commission's August 15, 2005, vote to approve the proposed zone change, the Harrison County Fiscal Court failed to take final action thereon, resulting in the change becoming effective by operation of law on November 13, 2005 – 90 days following the August 15 vote. Because the appellants failed to timely appeal from the effective date of the zone change, this issue is not properly before us.

DECLARATION OF RIGHTS

As previously noted, in addition to filing a planning and zoning appeal pursuant to KRS 100.347, the appellants also filed a declaratory judgment action pursuant to KRS 418.040. The declaratory judgment portion of their Complaint and Appeal raised various claims alleging that the rezoning, issuance of a conditional use permit by the Board, and approval of the site plan by the Planning Commission were improper because:

1. the minimum lot size of 1.5 acres for RRB zoning was not met;

2. because of the aforementioned alleged technical error in the Tawasha's rezoning application which sought to rezone from RDC to RRB rather than from R-R to RRB;

3. because the Fiscal Court failed to undertake a first and second reading passing an ordinance adopting the map amendment (the normal way of adopting a zone change);

4. because of the aforementioned failure of the lot to meet the width at building line and road frontage requirements;

5. because at the Board of Adjustments November 8, 2005, hearing the Planning Commission Chairman gave advice to the Board which indicated that the Commission, rather than the Board, was the proper tribunal to consider certain environmental impact matters;

6. that Tawasha had failed to obtain a conditional use permit to operate a restaurant or serve food and, further, such was not authorized in an RRB zoning district as either a principal or conditional use; and

7. that a restraining order should be entered to prevent further construction on the subject property until and unless the Tawasha obtains a building permit.

Though all of the foregoing, except for item 7, relate to issues directly arising out of the planning and zoning procedures surrounding Tawasha's efforts to gain approval for the convenience store and gas station, the appellants nevertheless seek to raise the issues by way of a declaratory judgment motion. We further note that the issues raised substantially overlap with the issues already addressed in the previous section (items 1, 2, 4, and 6 have already been addressed).

Though the issues raised primarily relate directly to the planning and zoning procedures before the various administrative tribunals, the appellants nevertheless contend that they are entitled to raise "a broader challenge to the

procedures used by the Planning Commission and Fiscal Court" by way of a declaratory judgment proceeding. In support of this proposition they cite us to *Simpson v. Laytart,* 962 S.W.2d 392 (Ky. 1998); *City of Louisville v. McDonald*, 470 S.W.2d 173 (Ky. 1971); *McCord v. Pineway Farms,* 569 S.W.2d 690 (Ky. App. 1978); and *Greater Cincinnati Marine v. City of Ludlow*, 602 S.W.2d 427 (Ky. 1980). While these cases do lend support for that proposition, at best the entitlement is limited to claims "which are broader in scope than what is implicated within the context of the ordinary zoning appeal." *Laytart*, 962 S.W.2d at 395. With the exception of item 7, the above listed claims are claims which could be asserted in "the context of [an] ordinary zoning appeal," and are not "broader in scope than what is implicated within the context of such an appeal." As such, these issues are not properly brought in a petition for declaratory judgment.

Moreover, items 1, 2, 3, and 5 seek to circumvent the 30-day limitations period contained in KRS 100.347. KRS 100.347 sets forth the statutory process for appealing from a decision of a board of adjustment, a planning commission, and/or the legislative body of the city. The statute provides as follows:

> (1) Any person or entity claiming to be injured or aggrieved by any final action of the board of adjustment shall appeal from the action to the Circuit Court of the county in which the property, which is the subject of the action of the board of adjustment, lies. Such appeal shall be taken within thirty (30) days after the final action of the board. <u>All final actions which have not been appealed within thirty (30) days shall not be subject to</u>

judicial review. The board of adjustment shall be a party in any such appeal filed in the Circuit Court.

(2) Any person or entity claiming to be injured or aggrieved by any final action of the planning commission shall appeal from the final action to the Circuit Court of the county in which the property, which is the subject of the commission's action, lies. Such appeal shall be taken within thirty (30) days after such action. Such action shall not include the commission's recommendations made to other governmental bodies. All final actions which have not been appealed within thirty (30) days shall not be subject to judicial review. Provided, however, any appeal of a planning commission action granting or denying a variance or conditional use permit authorized by KRS 100.203(5) shall be taken pursuant to this subsection. In such case, the thirty (30) day period for taking an appeal begins to run at the time the legislative body grants or denies the map amendment for the same development. The planning commission shall be a party in any such appeal filed in the Circuit Court.

(3) Any person or entity claiming to be injured or aggrieved by any final action of the legislative body of any city, county, consolidated local government, or urban-county government, relating to a map amendment shall appeal from the action to the Circuit Court of the county in which the property, which is the subject of the map amendment, lies. Such appeal shall be taken within thirty (30) days after the final action of the legislative body. All final actions which have not been appealed within thirty (30) days shall not be subject to judicial review. The legislative body shall be a party in any such appeal filed in the Circuit Court.

. . . .

(5) For purposes of this chapter, final action shall be deemed to have occurred on the calendar date when the vote is taken to approve or disapprove the matter pending before the body. (Emphasis added).

Thus, KRS 100.347 requires that final actions by a board of adjustments, a planning commission, or a legislative body be appealed within 30 days and, if the objecting party fails to do so, the final actions "shall not be subject to judicial review." It follows that KRS 100.347 is the exclusive means by which to challenge a final action by these bodies, and that such actions may not be challenged by way of a declaratory judgment outside of the 30-day requirement in order to circumvent the limitations period.[3] We do not believe that the authorities cited by the appellants hold otherwise. Thus items 1, 2, 3, and 5 are barred by the KRS 100.347 limitations period, and the appellants may not circumvent the requirement merely by recasting the issues as a request for declaratory judgment.

The only issue we construe as being "broader" than issues which may be raised in a usual planning and zoning appeal is the appellants' motion for a declaration of rights to prevent Tawasha from commencing construction on the project. However, in support of its motion for summary judgment upon this claim Tawasha filed an affidavit stating to the effect that it did not intend to commence construction until this matter is fully resolved. The appellants failed to produce evidence in contradiction thereof. As such, we believe the trial court properly granted summary judgment upon the issue. *Steelvest, Inc. v. Scansteel*

[3] As previously noted, however, under certain circumstances claims "which are broader in scope than what is implicated within the context of the ordinary zoning appeal" may be brought by way of a petition for declaratory judgment outside of this 30-day period. *Laytart*, 962 S.W.2d at 395.

Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991). We note, however, that this remedy remains available to the appellants in the event of improper construction activity on the property.

RECONCILIATION OF DECISIONS/SEPARATION OF POWERS

In their final argument the appellants request that we reconcile various zoning case decisions and address separation of powers issues implicated by the planning and zoning process. However, the appellants do not cite us to their preservation of this issue and, indeed, appear to concede that review of these issues is not preserved.

Nevertheless, because we have on several occasions in this opinion stated that the appellants did not timely appeal the rezoning which became effective by operation of law on November 13, 2005, we will briefly discuss one issue alluded to in this argument heading - when the limitations period begins to run when a rezoning becomes effective by operation of law under KRS 100.211.

In this case, the Fiscal Court did not take a "final action" in approving the rezoning in the usual sense in that it did not undertake a first and second vote adopting an ordinance approving the rezoning. *See Leslie v. City of Henderson*, 797 S.W.2d 718 (Ky. App. 1990). Instead, it failed to take a final action within 90 days as required by KRS 100.211(7) (The fiscal court or legislative body shall take final action upon a proposed zoning map amendment within ninety (90) days of the date upon which the planning commission takes its final action upon such proposal). As a result, the Planning Commission recommendation became

effective by operation of law pursuant to KRS 100.211(1). The relevant provision of KRS 100.211(1) provides as follows:

> It shall take a majority of the entire legislative body or fiscal court to override the recommendation of the planning commission and it shall take a majority of the entire legislative body or fiscal court to adopt a zoning map amendment whenever the planning commission forwards the application to the fiscal court or legislative body without a recommendation of approval or disapproval due to a tie vote. Unless a majority of the entire legislative body or fiscal court votes to override the planning commission's recommendation, such recommendation shall become final and effective and if a recommendation of approval was made by the planning commission, the ordinance of the fiscal court or legislative body adopting the zoning map amendment shall be deemed to have passed by operation of law.

Read together, KRS 100.211(7) and KRS 100.211(1) provide that if the legislative body does not override a recommendation of approval within 90 days, the rezoning map amendment shall be deemed to have passed by operation of law. *See Evangelical Lutheran Good Samaritan Society, Inc., v. Albert Oil Company, Inc.*, 969 S.W.2d 691 (Ky. 1998). As such, the foregoing is the functional equivalent of a "final action" as defined in KRS 100.347(5). Thus, we are persuaded that for purposes of the limitations period contained in KRS 100.347, the "final action" of the legislative body under the foregoing circumstances must be deemed to occur on the 90th day following the Planning Commission's vote, and that the aggrieved party would then have 30 days from that date to file a notice of appeal.

Because of the lack of preservation and inapplicability to any other matters before us, we do not further address other issues raised under this argument heading.

CONCLUSION

For the foregoing reasons we affirm in part, vacate in part, and remand the case to Harrison Circuit Court for entry of a judgment consistent with this opinion.

VANMETER, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEES, NADER NED TAWASHA, CHRISTINE TAWASHA, AND TAWASHA, INC.:

Sannie Overly
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