IN THE COURT OF APPEALS OF TENNESSEE

FILED

November 12, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

HISTORIC DANDRIDGE LIMITED PARTNERSHIP, FIVE RIVERS LAND COMPANY, General Partner, and ROGER CAMERON and wife, ELIZABETH CAMERON	:	JEFFERSON CIRCUIT CA No. 03A01-9604-CV-00153
Plaintiffs-Appellants	:	BEN W. HOOPER, II JUDGE
vs.	:	
MERRILL L. GASS and UNKNOWN CONTRACTOR	:	
Defendants-Appellees	:	AFFIRMED AND REMANDED

STANLEY F. RODEN, WITH TESTERMAN, WARREN & RODEN, OF KNOXVILLE, TENNESSEE, FOR APPELLANTS

R. LOY WALDROP, JR., WITH LEWIS, KING, KRIEG, WALDROP & CATRON, OF KNOXVILLE, TENNESSEE, FOR APPELLEE JEAN GASS, ADMINISTRATRIX OF THE ESTATE OF MERRILL GASS, DECEASED

O P I N I O N

Sanders, Sp.J.

The real parties in interest in this litigation are Plaintiffs Roger Cameron and Elizabeth Cameron and Defendant-Appellee Merrill Gass, who will be referred to in this opinion as the Plaintiffs and Defendant.

The Plaintiffs-Appellants, Roger Cameron and wife, Elizabeth Cameron, have appealed from a jury verdict in their suit

against Defendant-Appellee Merrill Gass for damages resulting to a party wall between adjoining buildings owned by the parties. We affirm.

In 1989 the Plaintiffs (hereafter the Camerons or Mr. Cameron) and Defendant (hereinafter Mr. Gass) owned adjoining business buildings located on the east side of Broad Street in the City of Dandridge. The buildings had a common brick store front or facade and had a party wall between the two buildings. The buildings were believed to have been constructed about 1875. They were two-story buildings but were lacking in modern plumbing, electrical wiring, central heating and air conditioning and the ravages of time had taken its toll and both buildings were in a very poor state of repair. Mr. Gass purchased his building from members of his family in 1965 for $10,700. He was a pharmacist and had formerly occupied the building, but it was vacant in 1989. By 1987 the building had reached such deteriorated state that the City of Dandridge issued an order to Mr. Gass to either repair the building or tear it down.

In October, 1989, Mr. Cameron purchased his building from Mr. James C. Smith. Mr. Smith had been operating an automobile parts store in the building but was retiring and Mr. Cameron's building was vacated. Mr. Cameron paid Mr. Smith $10,000 for the building. The building was not suitable for renting at the time Mr. Cameron purchased it. It was his intention, however, to refurbish the building, use the second story for his office, and lease or rent the other part of the building. Mr. Cameron had previous experience in buying and refurbishing old buildings in Greeneville and Knoxville. It appears he did not have much operating capital and had financed his previous operating expenses

by forming limited partnerships and selling interest in his developments and by borrowing from banks and pledging the properties as securities. This was also his plan for financing the Dandridge building. At the time Mr. Cameron purchased the building, he paid approximately $2,000 out of his personal funds and borrowed approximately $8,300 from First Peoples Bank.

It appears Mr. Gass had made no repairs to his building after receiving notice from the city to either repair or demolish his building, nor had Mr. Cameron repaired his building after his purchase of it. Consequently, in April, 1990, the city gave notice to each of them to either repair or demolish their buildings. The notice further stated: "If repairs or demolition is not started by 6-10-90, the building will be vacated and work will be completed by City." Mr. Gass elected to tear down his building and employed John Ed Smith & Son, Inc. (Smith) to do the work. Mr. Cameron, however, elected to repair his building and obtained a building permit from the city.

Gass's contractor, Smith, tore his building down and removed it from the premises in July and August, 1990, but left the party wall between the buildings intact.

Mr. Cameron proceeded with his plans for financing the remodeling of his building but no repairs were made. In April or May, 1990, Mr. Cameron made an application for a loan from the bank to partially finance the repairs to the building, which he estimated to be approximately $60,000. In August, 1990, Mr. Cameron prepared a list of expenses he estimated it would take to refurbish the building and put it in rentable condition. The total amount was $59,902.98. The biggest expense listed was "Demolition

& clean-up, including foundation demo. $10,290.00." He also talked to a number of people who expressed an interest in becoming limited partners in the project. In September, 1990, he obtained a certificate of limited partnership pursuant to the Tennessee Revised Uniform Limited Partnership Act, under the name of Historic Dandridge Limited Partnership. In April, 1991, Mr. Cameron and his wife, Elizabeth, executed a deed for the building to the Limited Partnership for a stated consideration of $10,000. Mr. and Mrs. Cameron were the only members of the partnership.

In October, 1990, Mr. Cameron was notified by the bank where he had made his application for a loan to repair the building that the loan had been denied. He testified that without the money he was expecting to get from this loan he did not have the funds to proceed with repairing the building as he had planned. He further testified that for this reason he had released from their commitments the people who had expressed an interest in becoming limited partners in the project.

No repairs were made to the Cameron building until about a year after the Gass building had been removed when it was discovered a portion of the foundation wall was beginning to deteriorate. Mr. Cameron got a crew of men into the basement of the building who took out wood post-and-beam type floor supports and put in metal jack posts on concrete footings. They also removed lumber and other items from the building to relieve extra weight. The foundation wall did ultimately collapse about September, 1991, but the metal jack posts placed under the building apparently kept the building from collapsing.

There had been no conflicts or problems between Mr. Cameron and Mr. Gass over the removal of the Gass building until about the time it became apparent a portion of the retaining wall or foundation under the party wall was in danger of collapsing. A disagreement grew out of the terms of a release from liability which Mr. Cameron was to give to Mr. Gass while employees of Mr. Cameron were working on Mr. Gass's property.

The Plaintiffs filed suit against the Defendant, alleging the parties owned adjoining buildings which shared a party wall. They alleged that in 1990 the Defendant hired a contractor to tear his building down and in the process the contractor damaged the party wall and interior of Plaintiffs' building. The Defendant and his contractor were negligent in failing to provide adequate lateral support to the party wall. Plaintiff alleged he had requested access onto Defendant's property in order to repair his own property, but Defendant had refused. Because Defendant had refused him permission to go upon his property to access the party wall, Plaintiff had been unable to mitigate damages to the wall. Plaintiffs asked for a mandatory injunction requiring Defendant to allow Plaintiffs to access the party wall over Defendant's property. Plaintiffs asked for compensatory damages in the amount of the estimated cost of repairs to the party wall or actual cost of repairs or $85,850.00.

The Defendant, for answer to the complaint, admitted the parties were the owners of adjoining buildings with a party wall. He admitted he hired a contractor to tear his building down in response to an order from the city. He denied, however, that he or his contractor were guilty of any acts of negligence resulting in damage to the party wall. Defendant admitted Plaintiff requested

permission to go upon his property for the purpose of making repairs to the party wall. He, in turn, granted Plaintiff permission on the condition Plaintiff give him a release and agreement to indemnify him for any damages anyone might suffer while on his property, but Plaintiff refused to sign such an agreement. Defendant, as an affirmative defense, alleged the Plaintiffs failed to mitigate any damages to the party wall and if the party wall was damaged it was more the fault of Plaintiff than the Defendant.

Shortly after the Defendant had filed his answer to the complaint, his death was suggested and an order was entered substituting his widow, Jean Gass, Executor of the Estate of Merrill L. Gass, as Defendant.

Upon the trial of the case, the Plaintiff offered proof to support a claim for lost rentals on the theory the damage to the party wall had caused a delay in his repairing the building and putting it in a tenable condition. This relief was not sought in the complaint but no objections were made at the trial by the defense.

At the close of Plaintiffs' proof and again at the close of all the proof, counsel for the Defendant moved for a directed verdict on the issue of lost rentals. In response to the motion, the court stated he didn't think it was proper to submit it to the jury because it was too speculative. The record fails to show that the court did direct a verdict but he did not charge the jury on the issue.

At the conclusion of the court's charge, the jury was given a "Comparative Fault Verdict Form." They returned the form showing they found the Plaintiff and Defendant each chargeable with 50% of the total fault. In answer to the question of total amount of damage, if any, they listed a zero after Plaintiff's name.

The Plaintiffs' motion for a new trial was overruled and they have appealed, presenting the following issues for review: "Did the Trial court err by not granting a new trial upon the insufficiency of the evidence to support the jury verdict? Did the Trial Court err in excluding the testimony of plaintiffs' witness, Howard Eugene Ford, as to threats made by the deceased, Merrill Gass? Did the Trial Court err by excluding as part of plaintiffs' proof of damages loss of income to real property?"

In considering Appellants' first issue, we must look to the provisions of Rule 13(d), TRAP, which, as pertinent, provides: "Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict." We find there was material evidence to support the verdict of the jury. The pivotal issue of damage to the party wall centered around the collapse of a portion of the foundation which supported the party wall.

The Plaintiffs offered the testimony of Mr. Jesse Mise, a structural engineer and a very credible expert witness, who testified that in his opinion the collapse of the wall was caused by the fact that after Mr. Gass's contractor removed the building and debris from the lot, the lot was leveled and railroad cross-ties were then placed at a 15º angle, resting on the sills of the party wall and extending some six feet back onto the vacant lot.

Plywood was placed on top of the railroad crossties and plastic was put on top of that. Then a thick layer of gravel was spread over the crossties and the entire vacant lot. This caused rainwater to pool on the lot and the weight of the water, as the ground became saturated, together with the weight of the crossties against the party wall, caused the foundation to collapse. Mr. Mise testified he had visited the building in March, 1992, which was approximately six months before the wall collapsed. On cross examination Mr. Mise testified that when he first saw the condition of the wall, he warned Mr. Cameron the wall was dangerous and needed to be fixed. He testified Mr. Cameron could have braced the wall from the inside and had Mr. Cameron contacted him earlier, he could have designed a bracing method to keep the wall from falling. He also said Mr. Cameron could have jacked the joist up and taken the old wall out and replaced it.

The Plaintiffs also called Mr. Howard Ford as a witness. Although he was not qualified as an expert, he worked for the railroad and was familiar with construction. His testimony corroborated the testimony of Mr. Mise as to the condition of the adjoining premises, the railroad ties, accumulation of water, and the causes of the collapse of the wall.

Plaintiffs also called Mr. John Greer, a professional real estate appraiser, to testify as to the value of the building before and after the wall collapsed. He testified that in his opinion the land on which the building was located had a value of $4,100. He also testified, in his opinion, the building had a value of $55,000 before the Gass building was torn down but after the foundation wall collapsed, it had a zero value. This corroborated the Plaintiff's testimony that in his opinion the

building had a value of $60,000 prior to the collapse of the wall but was not worth restoration after the wall collapsed.

The Defendant called Mr. Maynard Franscen who was city building inspector for the City of Dandridge from about 1985 to 1989. He was familiar with the condition of both the Gass building and the Cameron building. He issued the original repair or tear down notice to Mr. Gass on his building and discussed with Mr. Cameron the condition of his building. He described the Cameron building as being "very poor." He stated "the structure was probably salvageable but it (would take) a lot of work and expense." He described the brick fascia as loose. A lot of the morter was crumbling and needed to be remortered. The roof had to be repaired. The footings underneath had to be shored up "and there was one weight-bearing wall between that the other building that was torn down that was a common wall."

Defendant also called Mr. Sam Pipkin, a professional appraiser, to testify as to the value of the Cameron property in 1990. He did not make a before and after the collapse of the wall appraisal. He valued the property as of 1990 at a total of $20,000 and placed a value of $16,272 on the building and $3,681 on the land.

The Defendant also presented Mr. Jarvis Johnson who was employed by John Ed Smith and Sons, the contractor employed by Mr. Gass to tear his building down. Mr. Johnson prepared the bid on the contract for John Ed Smith and apparently supervised the workers when the building was torn down and the vacant lot was prepared after the building was removed. He explained why and how the railroad crossties were placed on the Gass property after the

building was removed and about which Mr. Mise and Mr. Ford testified as being on the property. Mr. Johnson said that after the Gass building had been removed there was a large hole leading from the Gass property into the basement of the Cameron building. (This apparently was where a part of the foundation under the party wall had previously fallen as mentioned in the testimony of Mr. Franscen.) Mr. Johnson explained that in order to keep the gravel being spread on the Gass property from falling into the basement of the Cameron building, they placed railroad ties on the Gass lot, extended them to the bottom of the party wall, and then placed plywood, plastic and gravel over the crossties. He stated the crossties were not resting on the building but were cantilevered. He further explained there was a "scuttle hole" leading from the Cameron basement under the Gass building and they covered the opening into the Cameron building to keep gravel from going into the Cameron basement through the opening of the scuttle hole.

The Defendant also called Mr. Brent Blalock, a licensed architect highly experienced in building construction. His testimony centered around the cause of the collapse of the foundation wall supporting the party wall. He testified he inspected the Cameron building and adjoining premises originally in January, 1994, but did not inspect the structural materials of the foundation to the party wall or go into the basement of the Cameron building at that time. As a result of his first inspection, he was of the same opinion as expressed by Mr. Mise and Mr. Ford that the accumulation of water on the Gass vacant lot had caused hydrostatic pressure to build up and cause the wall to collapse. He inspected the Cameron building a second time in June and again in July, 1995, which was only a few days before the trial. On these occasions he went into the basement of the building and inspected the materials

from which the collapsed foundation wall was constructed. He also learned for the first time of the "scuttle hole" ditch which extended from the Cameron building under the Gass building. These findings caused him to abandon his original theory that hydrostatic pressure had caused the wall to collapse. He testified he found the collapsed wall was lying in a horizontal position on the floor "and had been broken up significantly." He described the wall as having been constructed of concrete perhaps more than 100 years ago. There was no structural steel in the wall. The concrete was in "very, very poor condition." "This wall is very low quality concrete by modern day standards." "I'm not sure that this wall had the structural integrity to last much longer anyway." He testified he brought out a piece of the cement which was apparently a piece of the top of the wall and was asked by counsel to describe the consistency of the concrete to the jury. The following is part of his response: "I took that piece of concrete, and as I looked at it, I could tell that it is in very, very poor condition. I tried to be as careful with it as I could. I placed it in my car. When I arrived here today, I took it out of the car and put it in a bag. When I came in and sat down outside, I apparently sat [sic] it down too hard on the floor and it actually broke in two -- broke in numerous pieces. When I got out of the parking lot it was all in one piece when I put it in a bag." The bag containing the concrete was filed as an exhibit and, for the most part, it is pulverized into small gravel. Mr. Blalock testified the engineering principle behind the party wall was for the loading or weight on the wall to come from above, so the weight coming from the top of the wall always exceeded the loading or pressure coming from the side of the wall, or the wall would fail because there was no reinforcing in the wall. His rationale was that when the weight of the Gass building was removed from the top of the party wall,

the pressure from the fill of the vacant lot caused the horizontal wight to become disproportionate to the vertical weight and the wall failed. Mr. Blalock testified that in 1990 when Mr. Cameron noticed the wall was likely to fail, he could have saved the wall by buttressing it with 12-inch block. He stated that three buttresses of 12-inch block filled with concrete and with vertical rebar in each case, spaced equally along the wall, at a cost of approximately $6,000, could have been constructed inside the basement and, in his opinion, would have prevented the collapse of the wall.

The record shows the Plaintiff purchased the property in October, 1989. The trial of the case was in July, 1995. The only work the Plaintiff performed in that period of approximately six years was to place the metal jack post under the sills of the building in 1991. The main reason for not repairing the building during that time was lack of finances. Mr. Cameron filed a Chapter 13 petition in bankruptcy in June, 1993. In his bankruptcy petition, he listed the Cameron building at a value of $10,000 and the balance owed to Peoples Bank for the loan it made in 1990 on the building which had increased to approximately $600 more than the original loan.

Under the proof in the record, we find there was material evidence in the record to support the verdict of the jury as to degree of fault and liability.

In Appellants' second issue, they say the court was in error in sustaining the Appellee's objection to the testimony of Appellants' witness, Mr. Howard Ford, when he was asked to repeat certain statements Mr. Ford heard the deceased, Mr. Gass, make to

Mr. Cameron denying Mr. Cameron permission to go upon Mr. Gass's property.

The court sustained the objection on two grounds. He held that since Mr. Gass was now deceased, the testimony was barred by TCA § 24-1-203, known as the dead man's statute, and it was a violation of the hearsay rule. The Appellant made an offer of proof which, as pertinent, was as follows:

"Q. Mr. Ford, we previously referred to a conversation that you witnessed between Mr. Cameron and Mr. Merrill Gass. Can you, please, tell us what you heard?

"A. Mr. Cameron approached Mr. Gass....

"Q. When was this...?

"A. This was after the wall had collapsed.

"Q. Okay.

"A. I remember hearing Mr. Gass telling him not to get on the property.

"Q. Okay.

"A. And that's, basically, what I heard. At that point that conversation got heated, and I went on over to the workers and stayed with them.

"Q. Okay. When you mean heated, who was heated?

"A. Mr. Gass was. ....

"Q. Weren't real kind words, ...?

"A. I couldn't hear the words exactly. I know he was loud and argumentative."

TCA § 24-1-203, as pertinent, provides:

> In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator,

> intestate, or ward, unless called to testify thereto by the opposite party.

Since Mr. Ford was not a party to this litigation, we find he was eligible to testify as to what he heard Mr. Gass say to Mr. Cameron. In the case of **Spiller v. McDonald, Kuhn, Smith, Miller and Tait**, 735 S.W.2d 446 (Tenn.App.1986) the court, we think correctly and concisely, stated the two requirements to bring a case within the statute as follows:

> Two things must concur to bring a case within the operation of the statute and authorize the rejection of the evidence: (1) the proposed witness must be a party to the suit in such a way that judgment may be rendered for or against him; (2) the subject matter of his testimony must be of some transaction with or statement by the testator or intestate. **Montague v. Thomason**, 91 Tenn. 168 (1892).
>
> In **Montague**, an objection was made to the testimony of an agent of defendant concerning his conversation with plaintiff's decedent. In holding the evidence properly admitted, our Supreme Court said:
>
> > The contention that it was incompetent because the interview occurred while the witness was acting as agent of the defendants is unsound. The statute applies alone to <u>parties</u> to the litigation. Even persons directly interested in the result of the suit...are not precluded from testifying, <u>if not parties.</u>

Id. 448.

We find the court was in error in sustaining the objection to Mr. Ford's testimony. In view of our holding on this issue, we pretermit the issue of whether or not Mr. Ford's testimony would have been hearsay.

Rule 36(b), TRAP, provides, "A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment." Under this rule, when we find the trial court was in error in his

ruling, before we can reverse the judgment of the court and set aside the jury's verdict, we must find from considering the entire record that had the jury not been deprived of hearing Mr. Ford testify he heard Mr. Gass tell Mr. Cameron he was "not to get on the [Mr. Gass's] property," we must find the jury more probably than not would have rendered a verdict more favorable to Mr. Cameron. We fail to find the record supports such a probability.

There are two very strong reasons for our reaching this conclusion: 1. We think there is ample evidence in the record to convince the jury Mr. Cameron did not have permission to go upon Mr. Gass's property to make repairs on his own property and 2. The undisputed testimony of Mr. Cameron is he was tendered a document by his attorney granting him permission to go upon Mr. Gass's property provided he released Mr. Gass from liability. Mr. Cameron refused to sign the document because he thought the release was too broad and he testified, "I wadded it up and threw it in Mr. Jones's garbage can." The record fails to show Mr. Cameron ever requested his attorney or anyone on his behalf to try to negotiate a more satisfactory agreement, nor did Mr. Cameron himself try to negotiate another agreement.

Also, after the court sustained the objection to Mr. Ford's testimony as to what Mr. Gass said to Mr. Cameron, the next question by Plaintiff's counsel to Mr. Ford, and his answer, were:
"Q. As a result of this meeting, what happened?
"A. We couldn't go onto the property over there to repair damage to our building."

Considering the evidence in the record as a whole, we find the testimony of Mr. Ford as to what Mr. Gass said to Mr.

Cameron would have only been cumulative in establishing that Mr. Gass would not consent to Mr. Cameron's going upon his property.

The Plaintiffs' third and final issue is: "Did the trial court err by excluding as part of Plaintiffs' proof of damages loss of income to real property?"

The Appellants, in their statement of this issue, incorrectly state the action of the court in saying "the court erred by excluding as part of Plaintiffs' proof of damages to real property." In the trial of the case, the court did not exclude any part of Plaintiffs' proof on this issue. The court, however, did not charge the jury on the loss of rent. Prior to charging the jury, the court, in response to Appellee's motion for a directed verdict on this issue, said he thought the proof was too speculative to submit the issue to the jury. We agree with the trial court's holding.

There is, however, another compelling reason why the court must be sustained on this issue. The Plaintiffs offered no proof of what rental value, if any, the Cameron building had prior to its alleged damage by the Defendant, or what its rental value, if any, was after the damage. Upon the trial of the case, the Plaintiffs offered proof and testified the damages to the building were of a temporary nature and could be repaired. They argued to the court that, since the damage was temporary, the loss of rent rule, as recognized in this jurisdiction, was applicable. In offering their proof, however, they offered no proof as to the diminution in rent of the building before and after it was damaged. Thir proof was all premised on the assumption that had the building been refurbished prior to its damage, after the Gass building was

demolished it would have had a rental value of approximately $10 per square foot, but due to their delay in being able to refurbish the building because of the damage resulting from the Gass building's being demolished, it had no rental value and they had suffered loss of rents of approximately $50,000.

The most recent reported case in this jurisdiction addressing the lost rental rule applicable to temporary damages to real estate is **Citizens Real Estate v. Mountain States Development Co.**, 633 S.W.2d 763 (Tenn.App.1981). In that case, the plaintiff alleged it had, in 1970, purchased land adjoining defendant's property. After its purchase of the property, the defendant encroached upon plaintiff's property by constructing roads and platting and selling lots, purporting to be the owner thereof. Plaintiff asked the court to establish the boundary line between the plaintiff and defendant, award damages for the trespass, and enjoin defendant from coming on plaintiff's property. Upon the trial of the case, the trial court found the issues in favor of the plaintiff and, as pertinent, awarded damages. On appeal to this court, the appellant contended the court did not apply the proper rule for fixing damages. This court reversed and in doing so, as pertinent, said:

> It is necessary to comment upon the issue of damages since an improper measure of damages was applied by the trial court. Damages awarded in this case were based upon the "taking" of the acreage in question. The award is inconsistent with the order of the trial court that appellant must no longer encroach upon appellee's property. Plaintiff alleged a trespass and a trespass which is terminated by a court order is treated as a temporary injury.

Id. 766.

> The case of **Terminal Co. v. Lellyett**, 114 Tenn. 368, 85 S.W. 881 (1904), asserts the measure of damages for a temporary injury to property is "the injury to the value of the use and enjoyment

> [of the property], which may be measured, to a large extent, by the rental value of the property, and to what extent that rental value is diminished." 114 Tenn. at 404, 85 S.W. 881. This measure of damages has been cited many times by Tennessee cases and is well-settled law. See **Signal Mountain Portland Cement Company v. Brown,** 141 F.2d 471 (6th Cir.1944); **Stanford v. Tennessee Valley Authority**, 18 F.R.D. 152 (M.D.Tenn.1955); **Hendrix v. City of Maryville**, 58 Tenn.App. 457, 431 S.W.2d 292 (1968); **Caldwell v. Knox Concrete Products**, 54 Tenn.App. 393, 391 S.W.2d 5 (1964); **City of Columbia, v. Lentz**, 39 Tenn.App. 350, 282 S.W.2d 787 (1955); **Talley v. Baker**, 3 Tenn.App.321 (1926). Thus, the measure of damages for temporary injury to one's use and enjoyment of real estate is the diminution in the property's rental value during the period of injury and the reasonable cost of restoration of any physical injury to the land. Compare the old Tennessee case of **Vincent v. Hall**, 1 Shannon's Tenn.Cas. 597 (1876), which held where property wrongfully held is recovered by the true owner he is entitled to an account for rents and profits during the period of wrongful withholding. (Emphasis ours.)

Id. 767.

The citations in the case quoted above consistently held that the accepted method of proving the temporary damages to a leasehold estate is to show by competent testimony the value of the leasehold prior to the existence of the damage and then show the value of the leasehold after the damage. This the Plaintiffs did not do.

The judgment of the trial court is affirmed. The cost of this appeal is taxed to the Appellants and the case is remanded to the trial court for any further necessary proceedings.

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Clifford E. Sanders, Sp.J.

CONCUR:

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Herschel P. Franks, J.

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Charles D. Susano, Jr., J.