



In the Missouri Court of Appeals Eastern District

DIVISION ONE

STATE OF MISSOURI ex rel.,	)	No. ED108380
KIMBERLY GARDNER, in her capacity as	)	
the Circuit Attorney for the City of St. Louis,	)	
	)	
Appellant,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
vs.	)	1922-CC01013
	)	
GERARD T. CARMODY,	)	Honorable Joan L. Moriarty
in his capacity as Special Prosecutor,	)	
	)	
Respondent.	)	Filed: December 1, 2020

Kimberly Gardner, in her capacity as the Circuit Attorney for the City of St. Louis (“Gardner” or “the Circuit Attorney”), appeals the trial court’s judgment on the pleadings in favor of Gerard T. Carmody, in his capacity as Special Prosecutor (“Gerard T. Carmody” or “Carmody”) on Gardner’s petition in *quo warranto*. We affirm.

I. BACKGROUND

Sometime prior to June 27, 2018, the Police Division, City of St. Louis, Missouri (“the Police Division”), filed a motion for the disqualification of the Circuit Attorney’s Office (“the Circuit Attorney’s Office” or “the Office”) and for the appointment of a special prosecutor in the investigation and possible pursuit of criminal charges arising from the prosecution of former Governor Eric Greitens (“the Police Division’s motion” or “the Police Division’s motion for disqualification and for appointment of a special prosecutor”). The Police Division’s motion alleged the Circuit Attorney’s Office should be disqualified from the matter because the Office

had a conflict of interest in that there was currently underway an investigation into allegations of perjury committed by persons associated with the Office related to the prosecution of former Governor Eric Greitens and “the Circuit Attorney [wa]s a potential witness to the activity.”

On June 27, 2018, the Honorable Michael K. Mullen of the Circuit Court of the City of St. Louis (“Judge Mullen”) heard the Police Division’s motion for disqualification and for appointment of a special prosecutor and took it under submission. On June 29, Judge Mullen entered an order granting the Police Division’s motion, finding in relevant part:

The [c]ourt now finds the Circuit Attorney’s Office has a conflict of interest and hereby appoints Gerard T. Carmody, and Carmody MacDonald P.C. and its resources as Special Prosecutor to request subpoenas to aid in the Police Division’s investigation and to pursue criminal charges and prosecution should the investigation reveal probable cause to believe criminal activity occurred in connection with [the prosecution of former Governor Eric Greitens].

It is further ordered that said Special Prosecutor shall possess the same powers as the duly elected prosecutor for the purposes of the matter for which he is appointed.

(“Judge Mullen’s June 2018 Order” or “the June 2018 Order”).

Subsequently, Gerard T. Carmody, a member of the law firm of Carmody MacDonald P.C., “staffed” the special prosecutor matter and “select[ed] team members [from Carmody MacDonald P.C.] who ha[d] the experience and expertise to handle the matter effectively[,]” including: Carmody’s daughter Ryann Carmody (an attorney and employee of Carmody MacDonald P.C. continuously since September 2013); Carmody’s son Patrick Carmody (an attorney and employee of Carmody MacDonald P.C. continuously since March 2015); and “[o]ther attorneys . . . of Carmody MacDonald P.C.”

On May 17, 2019, Gardner filed the instant petition in *quo warranto* in the Circuit Court of the City of St. Louis against Gerard T. Carmody, along with suggestions in support and exhibits. The petition sought two, alternative forms of relief. First, Gardner requested the trial court to remove Carmody from his appointed office of special prosecutor on the grounds he

“named or appointed his adult children, Ryann Carmody and Patrick Carmody, to the public office or employment, as members of his prosecutorial team, in violation of Article VII[,] Section 6 of the Constitution of Missouri.”¹ Second, and in the alternative, Gardner’s petition in *quo warranto* requested the trial court to quash Judge Mullen’s June 2018 Order “to the extent the [June 2018] [O]rder unlawfully appointed an entire law firm as [s]pecial [p]rosecutor.”

The Honorable Joan L. Moriarty of the Circuit Court of the City of St. Louis (“the trial court” or “the court”) was assigned to Gardner’s cause of action. Gerard T. Carmody subsequently filed an answer to Gardner’s petition in *quo warranto*, along with suggestions in opposition and exhibits. Gardner then filed suggestions in further support of her petition, along with exhibits.

Thereafter, Gerard T. Carmody filed a motion for judgment on the pleadings on Gardner’s petition in *quo warranto*, which the trial court granted. Gardner appeals.

II. DISCUSSION

Gardner raises three points on appeal, arguing the trial court erred in granting judgment on the pleadings in favor of Gerard T. Carmody on Gardner’s petition in *quo warranto*. For the reasons discussed below, we disagree.

A. Standard of Review and Gardner’s Petition in *Quo Warranto* in this Case

An appellate court reviews a trial court’s grant of a motion for judgment on the pleadings *de novo*. *Woods v. Missouri Department of Corrections*, 595 S.W.3d 504, 505 (Mo. banc 2020); *French v. Missouri Department of Corrections*, 601 S.W.3d 299, 300 (Mo. App. W.D. 2020).

“A motion for judgment on the pleadings is properly granted if, from the face of the pleadings,

¹ As discussed below, Article VII, Section 6 of the Missouri Constitution provides: “[a]ny public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment” (“Missouri’s constitutional ban on nepotism”). Mo. Const. Art. VII, Section 6; *see Dryer v. Klinghammer*, 832 S.W.2d 3, 4 (Mo. App. E.D. 1992) (referring to this constitutional provision as “the Missouri constitutional ban on nepotism”).

the moving party is entitled to judgment as a matter of law.” *French*, 601 S.W.3d at 300 (quotation omitted); *see also Woods*, 595 S.W.3d at 505 (similarly finding).

As is evident below, the issues raised in Gardner’s points on appeal involve the application of a constitutional provision to the alleged facts set out in the pleadings in this case, statutory interpretation, and the interpretation of a court order, which are all issues of law our Court reviews *de novo*. *See State ex rel. George v. Verkamp*, 365 S.W.3d 598, 600 (Mo. banc 2012) (statutory interpretation and application of a provision of the Missouri Constitution to stipulated facts are reviewed by an appellate court *de novo*); *In re T.A.S.*, 62 S.W.3d 650, 657 (Mo. App. W.D. 2001) (“[t]he interpretation of a court order is a question of law which [an appellate] court reviews *de novo*”) (citing *Jacobs v. Georgiou*, 922 S.W.2d 765, 769 (Mo. App. E.D. 1996)).

In this case, Gardner’s petition in *quo warranto* requested, *inter alia*, the trial court to remove Carmody from his appointed office of special prosecutor on the grounds he “named or appointed his adult children, Ryann Carmody and Patrick Carmody, to the public office or employment, as members of his prosecutorial team, in violation of Article VII[,], Section 6 of the [Missouri] Constitution”

B. Relevant Law Regarding Missouri’s Constitutional Ban on Nepotism and Petitions in *Quo Warranto*

Article VII, Section 6 of the Missouri Constitution provides: “[a]ny public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment.” Mo. Const. Art. VII, Section 6. Under this self-executing provision, “a public officer ‘forfeits by the act forbidden, and therefore his act results in a status’ – that of interloper.” *State ex inf. Dykhous v. City of Columbia*, 509 S.W.3d 140, 150 (Mo. App. W.D. 2017) (quoting *State ex inf. Norman v. Ellis*, 28 S.W.2d 363, 366 (Mo. banc

1930)). It is undisputed in this appeal that a person such as Gerard T. Carmody who is appointed special prosecutor is a public officer who is subject to Missouri's constitutional ban on nepotism. See Mo. Const. Art. VII, Section 6; *Jenkins & Kling, P.C. v. Missouri Ethics Com'n*, 945 S.W.2d 56, 59 (Mo. App. E.D. 1997) (“[a] person who is appointed a special prosecutor becomes for that purpose a public officer”).

The Missouri Supreme Court has issued two decisions concerning Article VII, Section 6 of the Missouri Constitution that are relevant to this appeal: *State ex inf. Atty. Gen. v. Shull*, 887 S.W.2d 397, 398-401 (Mo. banc 1994) and *State ex inf. Ashcroft v. Alexander*, 673 S.W.2d 36, 38 (Mo. banc 1984). On the one hand, in *Shull*, the Supreme Court held “a public officer violates [Missouri's constitutional ban on nepotism] when he or she appoints, by participating in the appointing process [by casting a vote for the appointment], a relative who is within the forbidden degree of relationship to public office.” 887 S.W.2d at 398-401 (finding a presiding county commissioner violated Missouri's constitutional ban on nepotism and forfeited her office when, by virtue of her office, she participated in the process of appointing her sister-in-law to a board of trustees by casting a vote for the appointment even though the commissioner's vote was not a deciding vote) (overruled on other grounds by *State v. Olvera*, 969 S.W.2d 715, 716 n.1 (Mo. banc 1998)). On the other hand, in *Alexander*, the Missouri Supreme Court held that where a statute provides for the appointment of a person by a court, and therefore there is no provision in the law for such an appointment by a public officer, an allegation of nepotism against the public officer as to such an appointment must fail. 673 S.W.2d at 38.

In accordance with the principles that forfeitures are not favored and the ouster of a public officer is a drastic remedy which must be strictly construed, we hold the two aforementioned cases collectively provide: an allegation of nepotism against a public officer as to an appointment of a relative must fail if the law provides for the appointment at issue by a

court, there is no provision in the law for such an appointment by a public officer, and there are no facts showing the public officer participated in the appointing process by casting a vote for the appointment. *See id.*; *Shull*, 887 S.W.2d at 398-401; *see also State ex inf. Stephens v. Fletchall*, 412 S.W.2d 423, 424-28 (Mo. banc 1967) (involving an alleged violation of Missouri’s constitutional ban on nepotism and holding in relevant part that “[s]ince forfeitures are not favored, and the ouster of a public officer is a drastic remedy, the statutory provisions for removal are strictly construed”).

A petition in *quo warranto* is an appropriate remedy for enforcing a forfeiture resulting from a public officer’s violation of Missouri’s constitutional ban on nepotism. *City of Columbia*, 509 S.W.3d at 150 (citing, *inter alia*, *State ex rel. Nixon v. Belt*, 873 S.W.2d 644, 646 (Mo. App. W.D. 1994) (overruled on other grounds by *Shull*, 887 S.W.2d at 403)); *State v. Rhoads*, 399 S.W.3d 905, 906 (Mo. App. W.D. 2013); *Dryer v. Klinghammer*, 832 S.W.2d 3, 4 (Mo. App. E.D. 1992) (citing *State ex inf. Roberts v. Buckley*, 533 S.W.2d 551, 553 (Mo. banc 1976)). Finally, a party bringing a petition in *quo warranto* alleging a public officer violated Missouri’s constitutional ban on nepotism has the burden of proof to prove her case by a preponderance of the evidence. *Alexander*, 673 S.W.2d at 38.

C. Analysis of Gardner’s Arguments on Appeal

In this case, Gardner argues the trial court erred in granting judgment on the pleadings in favor of Gerard T. Carmody on Gardner’s petition in *quo warranto* because: first, Carmody had the power to appoint his children as special prosecutors; and second, the face of the pleadings show Carmody is not entitled to judgment as a matter of law. With respect to her second argument, Gardner specifically alleges the face of the pleadings show: Carmody violated Missouri’s Constitutional ban on nepotism in that “[he] used his position as special prosecutor to appoint his children to public office”; to the extent Carmody did not appoint his children to

public office, Judge Mullen’s June 2018 Order is ambiguous as to who was appointed special prosecutor; and, to the extent Judge Mullen’s June 2018 order appointed the law firm of Carmody MacDonald P.C. as a special prosecutor, the order is unlawful.

1. Gardner’s Argument that Carmody had the Power to Appoint his Children as Special Prosecutors

We first address Gardner’s argument that Carmody had the power to appoint his children as special prosecutors. Gardner contends Carmody had such power because, under section 56.130 RSMo 2016,² Carmody “possess[ed] the same power as [the circuit attorney],” and under section 56.540.1, “[t]he circuit attorney . . . may appoint . . . assistant circuit attorneys.” *See* section 56.130 (providing in relevant part that “[t]he person appointed [special prosecutor] shall possess the same power as the proper officer would if [s]he was present . . .”); section 56.540.1 (providing in relevant part that “[t]he circuit attorney of such circuit may appoint [, *inter alia*,] assistant circuit attorneys as the circuit attorney deems necessary for the proper administration of h[er] office”); *see also Jenkins*, 945 S.W.2d at 57-58 (clarifying section 56.130 applies to special prosecutors). Although this is a creative argument, we find it lacks merit for two independent reasons.

First, if we were to hold a special prosecutor has the authority to appoint staff as the circuit attorney does pursuant to section 56.540, this would necessarily support the absurd and unreasonable conclusion that a special prosecutor would not only have the authority to appoint assistant attorneys but also would have the authority to appoint a plethora of other staff and work with the St. Louis Board of Alderman to set and determine salaries for any staff. *See* section 56.540.1 and .2 (collectively providing in relevant part that “[t]he circuit attorney of such circuit may appoint one first assistant circuit attorney, one chief trial assistant, one warrant officer, one chief misdemeanor assistant[,], additional assistant circuit attorneys[,],” “one chief clerk, grand

² Unless otherwise indicated, all further statutory references are to RSMo 2016.

jury reporters, and as many clerks, criminal legal investigators, reporters, and stenographers as [s]he deems necessary for the proper administration of h[er] office”); *see* section 56.540.3 (providing “[s]alaries for all employees of the circuit attorney’s office shall be set and determined by the circuit attorney and the St. Louis [B]oard of [A]ldermen, subject to the approval of the board of estimate and apportionment of the [C]ity of St. Louis”). “Courts must avoid statutory interpretations that are unjust, absurd, or unreasonable.” *State ex rel. Nixon v. Premium Standard Farms, Inc.*, 100 S.W.3d 157, 162 (Mo. App. W.D. 2003); *see also Hamrick ex rel. Hamrick v. Affton School Dist. Bd. of Educ.*, 13 S.W.3d 678, 680 (Mo. App. E.D. 2000) (similarly finding).

Gardner’s argument that Carmody had the power to appoint his children as special prosecutors also lacks merit because Missouri law is clear only a court has the power to appoint one or more special prosecutors to a case where a prosecuting attorney or circuit attorney is disqualified. “[A] special prosecutor [is] appointed by the trial court pursuant to the trial court’s inherent authority and statutory authority, under section 56.110, to do the same.” *State v. Swartz*, 517 S.W.3d 40, 54 (Mo. App. W.D. 2017); *see also State ex inf. Fuchs v. Foote*, 903 S.W.2d 535, 537 (Mo. banc 1995) (recognizing a trial court has the power to appoint a special prosecutor pursuant to the court’s inherent and statutory authority and also finding “the power to appoint a special prosecutor . . . is not limited by section 56.110 or any other statute”) (discussing section 56.110 RSMo 1994) (overruled on other grounds by *Olvera*, 969 S.W.2d at 716 n.1).

“[T]he power to appoint a special prosecutor . . . is . . . a long-standing power inherent in the court, to be exercised in the court’s sound discretion, when for any reason, the regular prosecutor is disqualified.” *Foote*, 903 S.W.2d at 537; *see also State v. Copeland*, 928 S.W.2d 828, 840 (Mo. banc 1996) (“[t]he decision to disqualify the prosecuting attorney and appoint another attorney to prosecute a criminal case lies within the sound discretion of the trial court”)

(overruled on other grounds by *Joy v. Morrison*, 254 S.W.3d 885, 888-89, 888 n.7 (Mo. banc 2008)). Section 56.110, which gives a trial court statutory authority to appoint a special prosecutor, provides in relevant part:

If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his or her office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, *the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause.*

(emphasis added).

Missouri Courts have held a trial court has both inherent and statutory authority to appoint more than one attorney, and even an entire office, as a special prosecutor. *See Foote*, 903 S.W.2d at 537 (holding a trial court had the inherent authority and discretion to appoint a total of three special prosecutors because the initial appointed special prosecutor “needed assistance due to the time constraints of his regular job and the complexity of the issues”); *State v. Sweeney*, 5 S.W. 614, 615 (Mo. 1887) (holding “[i]t is within the discretion of the [trial] court whom it will appoint to prosecute, and whether one or more, and there may arise cases in which the demands of justice may require the appointment of more than one attorney to prosecute for the state”); *State v. Steffen*, 647 S.W.2d 146, 151-53 (Mo. App. W.D. 1982) (holding “the [trial] court was authorized and did legally appoint the office of the Attorney General as special prosecutor within the terms and intent of section 56.110 [RSMo 1978]”).³

Similarly, we find the language in section 56.110 providing “*the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause*” means a court may appoint one or more attorneys and/or a corporate body such as a law firm as special

³ See also *State ex rel. Healea v. Tucker*, 545 S.W.3d 348, 354 (Mo. banc 2018) (finding a party was not entitled to a writ of mandamus under circumstances where the party requested to disqualify the entire Attorney General’s Office from serving as special prosecutor and there was no indication in the record that the trial court made a ruling on the request); *State v. Starkey*, 380 S.W.3d 636, 641 (Mo. App. E.D. 2012) (case where “the Missouri Attorney’s General’s Office . . . act[ed] as [s]pecial [p]rosecutor”).

prosecutor(s). *See* section 56.110 (emphasis added); section 1.030.2 (“[w]hen any subject matter, party or person is described or referred to by words importing the singular number . . . several matters and persons, and females as well as males, and bodies corporate as well as individuals, are included”); *State v. Hunt*, 451 S.W.3d 251, 254 n.1, 259 n.10 (Mo. banc 2014) (“Missouri statutory construction dictates that when a statute refers to a party or person in the singular, the plural is included”) (citing section 1.030.2 RSMo 2000); *Arthaud v. Grand River Drainage Dist.*, 232 S.W. 264, 266-67 (Mo. App. 1921) (finding language in a statute providing a board “shall employ an attorney” “does not mean that the board is limited to one person[;] [t]he meaning is that the board may employ one or more; the singular including the plural”).

In sum, Missouri law is clear that only a court has the power to appoint one or more special prosecutors to a case where a prosecuting attorney or circuit attorney is disqualified.

2. Gardner’s Arguments that the Face of the Pleadings Show Carmody is not Entitled to Judgment as a Matter of Law

We now turn to Gardner’s arguments that the face of the pleadings demonstrate Carmody is not entitled to judgment as a matter of law because the pleadings allegedly show: Carmody violated Missouri’s Constitutional ban on nepotism in that “[he] used his position as special prosecutor to appoint his children to public office”; to the extent Carmody did not appoint his children to public office, Judge Mullen’s June 2018 order is ambiguous as to who was appointed special prosecutor; and, to the extent Judge Mullen’s June 2018 order appointed the law firm of Carmody MacDonald P.C. as a special prosecutor, the order is unlawful.

As explained in the previous subsection of this opinion, Missouri law is clear only a court has the power to appoint one or more special prosecutors to a case where a prosecuting attorney or circuit attorney is disqualified. Moreover, the pleadings in this case show Judge Mullen acted within his authority and discretion in appointing multiple special prosecutors to the case in which

the Circuit Attorney's Office was disqualified. Judge Mullen's June 2018 Order specifically provides:

The [c]ourt now finds the Circuit Attorney's Office has a conflict of interest and *hereby appoints Gerard T. Carmody, and Carmody MacDonald P.C. and its resources as Special Prosecutor* to request subpoenas to aid in the Police Division's investigation and to pursue criminal charges and prosecution should the investigation reveal probable cause to believe criminal activity occurred in connection with [the prosecution of former Governor Eric Greitens].

It is further ordered that said Special Prosecutor shall possess the same powers as the duly elected prosecutor for the purposes of the matter for which *he* is appointed.

(emphasis added).

Although Gardner attempts to argue the word "he" in the second sentence of Judge Mullen's June 2018 Order renders the order of appointment ambiguous, we disagree. Instead, examining the June 2018 Order in its entirety, and with an eye to making sense of all the relevant language used, we find, (1) the term "he" includes several matters and persons, and females as well as males, and bodies corporate as well as individuals, and (2) Judge Mullen intended to appoint "Gerard T. Carmody, and Carmody MacDonald P.C. and its resources as Special Prosecutor." *See Vogt v. Emmons*, 181 S.W.3d 87, 93 (Mo. App. E.D. 2005) (when interpreting a court order, "[t]he order should be examined in its entirety, with an eye to making sense of the language used") (quotation omitted); *see also* section 1.030.2 (providing that in the context of statutory interpretation, "[w]hen any subject matter, party or person is described or referred to by words importing . . . the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, are included").

Moreover, although Gardner contends Judge Mullen's June 2018 Order is unlawful to the extent it appointed the law firm of Carmody MacDonald P.C., we find Judge Mullen acted within his authority and discretion in doing so. As previously indicated, Missouri law provides a trial court has both inherent and statutory authority to appoint more than one attorney, and even an

entire office or law firm, as a special prosecutor. *See Foote*, 903 S.W.2d at 537; *Sweeney*, 5 S.W. at 615; *Steffen*, 647 S.W.2d at 151-53; section 56.110; *see also* section 1.030.2; *Hunt*, 451 S.W.3d at 259 n.10; *Arthaud*, 232 S.W. at 266-67.

At the time Judge Mullen’s June 2018 Order was entered, “resources” of Carmody MacDonald P.C. were attorneys then-employed at the firm, including Gerard T. Carmody’s children Ryann Carmody (an attorney and employee of the firm continuously since September 2013) and Patrick Carmody (an attorney and employee of Carmody MacDonald P.C. continuously since March 2015). It was Judge Mullen – in other words, a court – who appointed these resources of Carmody MacDonald P.C. as special prosecutors, notwithstanding the fact Gerard T. Carmody later “staffed” the special prosecutor matter and “select[ed] team members [from Carmody MacDonald P.C.] who ha[d] the experience and expertise to handle the matter effectively[,]” including Carmody’s children Ryann and Patrick Carmody and other attorneys of the firm.

Finally, because the law (both a court’s inherent authority and section 56.110) provides for the appointment of the resources of Carmody MacDonald P.C. (including Carmody’s children Ryann and Patrick Carmody) by a court, because there is no provision in the law for such an appointment by Gerard T. Carmody acting as a public officer, and because there are no facts showing Carmody participated in the appointing process by casting a vote for the appointment, Gardner’s claim of nepotism against Carmody set forth in her petition in *quo warranto* must fail as a matter of law. *See Alexander*, 673 S.W.2d at 38; *Shull*, 887 S.W.2d at 398-401; *see also Fletchall*, 412 S.W.2d at 424-28. In short, the face of the pleadings show Gerard T. Carmody did not “by virtue of his office or employment name[] or appoint[] to public office or employment any relative within the fourth degree, by consanguinity or affinity, [and]

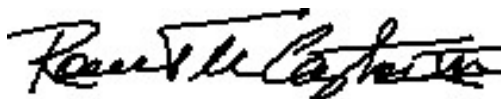
thereby forfeit his office or employment” within the meaning of Article VII, Section 6 of the Missouri Constitution. *See* Mo. Const. Art. VII, Section 6.

3. Conclusion as to Gardner’s Arguments on Appeal

The face of the pleadings show Gerard T. Carmody is entitled to judgment as a matter of law on Gardner’s petition in *quo warranto* because there was no forfeiture to enforce. *Cf. City of Columbia*, 509 S.W.3d at 150 and *Rhoads*, 399 S.W.3d at 906 and *Dryer*, 832 S.W.2d at 4 (all providing a petition in *quo warranto* is an appropriate remedy for enforcing a forfeiture resulting from a public officer’s violation of Missouri’s constitutional ban on nepotism). Therefore, the trial court did not err in granting judgment on the pleadings in favor of Carmody. *See French*, 601 S.W.3d at 300; *see also Woods*, 595 S.W.3d at 505. Points one, two, and three are denied.

III. CONCLUSION

Based on the foregoing, we affirm the trial court’s grant of judgment on the pleadings in favor of Gerard T. Carmody on Gardner’s petition in *quo warranto*.

A handwritten signature in black ink, appearing to read "Robert M. Clayton III", written over a horizontal line.

ROBERT M. CLAYTON III, Judge

Colleen Dolan, P.J., and
Mary K. Hoff, J., concur.