

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Bank of Oklahoma, N.A.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-1199
Woodland Meadows Partners, LLC et al.,	:	(C.P.C. No. 07CVE01-920)
Defendants-Appellees,	:	(ACCELERATED CALENDAR)
(Integrity Plumbing Systems, Inc.,	:	
Defendant-Cross-Appellant)	:	
Belfor USA Group, Inc.,	:	
Defendant-Appellee).	:	

D E C I S I O N

Rendered on September 30, 2011

Jaffe, Raitt, Heuer & Weiss P.C., James W. Rose, Eric A. Linden; Schottenstein, Zox & Dunn Co., L.P.A., Alan G. Starkoff and Hansel H. Rhee, for appellee Belfor USA Group, Inc.

Dinsmore & Shohl, L.L.P., Donald B. Leach, Jr., and Peter W. Hahn, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Integrity Plumbing Systems ("Integrity"), appeals a judgment of the Franklin County Court of Common Pleas in favor of defendant-appellee, Belfor USA Group, Inc. ("Belfor"). For the following reasons, we affirm.

{¶2} On January 19, 2008, the Bank of Oklahoma, N.A., filed suit alleging that Woodland Meadows Partners, LLC ("Woodland Meadows") had defaulted on a loan secured by a mortgage. The Bank of Oklahoma sought a money judgment for the amount owing on the loan and foreclosure on the mortgage. In addition to suing Woodland Meadows, the Bank of Oklahoma also named Belfor and Integrity as defendants because of their interest in and/or liens on Woodland Meadows' property, a large apartment complex on the east side of Columbus.

{¶3} Integrity answered the complaint and filed a cross-claim against Belfor. Both Integrity and Belfor worked on an extensive project to repair the Woodland Meadows apartment complex after a December 2004 storm. Initially, Belfor was the general contractor on the project, and it subcontracted the plumbing aspects of the job to Integrity. In its cross-claim, Integrity alleged that from January to October 2005 it supplied plumbing services and materials to Belfor on the Woodland Meadows project. Integrity maintained that Belfor stopped paying Integrity for its work on August 9, 2005. Integrity thus asserted claims for breach of contract, unjust enrichment, and violation of R.C. 4113.61, commonly known as the Prompt Payment Act.

{¶4} Belfor responded to Integrity's cross-claim with a motion for dismissal or, in the alternative, summary judgment. Belfor attached to its motion the affidavit of Lexis Wegner, an assistant project manager for Belfor who worked on the Woodland Meadows project from December 2004 to mid-August 2005. Wegner testified that Belfor became the general contractor on the Woodland Meadows project pursuant to a December 29, 2004 contract between Belfor and Woodland Meadows. As the general contractor, Belfor

hired Integrity and paid it for the work that it performed from the beginning of the project through June 3, 2005.

{¶5} Wegner explained that on June 2, 2005, Belfor and Woodland Meadows executed a contract that changed Belfor's role on the project. Rather than continuing as a general contractor, Belfor committed to overseeing the repair project as a construction manager. Significantly, as a construction manager, Belfor did not hire or contract with trade contractors but instead evaluated and recommended for payment invoices submitted by trade contractors working directly for Woodland Meadows. According to Wegner, Belfor did not directly engage the services of or contract with Integrity after June 2005.

{¶6} Prior to the shift in Belfor's role, Wegner regularly met with its subcontractors, including Integrity, and advised them that "it was essential that they enter into a direct contract with Woodland [Meadows] if they wanted to be paid for their work after June, 2005." April 30, 2007 Wegner affidavit, at ¶5. Because the new arrangement made Woodland Meadows directly responsible for paying the trade contractors, Integrity demanded that Woodland Meadows pay it \$75,000 as security to ensure Woodland Meadows' prompt and timely payment. On May 31, 2005, Woodland Meadows issued Integrity the \$75,000 deposit check that it demanded.

{¶7} Integrity and Woodland Meadows entered into a contract entitled "Trade Contractor Agreement" that Integrity's president, Toni Zufall, signed on July 7, 2005. In the contract, Integrity agreed to provide "all labor, materials, supervision, tools, equipment, taxes, insurance, and all other items necessary or incidental to furnish and install and complete the repairs to damaged plumbing * * * of the Project." Trade

Contractor Agreement, at Exhibit A, ¶1. The Trade Contractor Agreement defined the "Project" as "a massive restoration project at [Woodland] Meadows" to repair damage to the apartment complex resulting directly from the December 2004 winter storm or indirectly from the loss of electricity and heat. *Id.* at Background Information (Recitals). In exchange for Integrity's plumbing services, Woodland Meadows agreed to pay Integrity on a time and materials basis. The Trade Contractor Agreement directed Integrity to submit all invoices to Belfor, as construction manager, for approval.

{¶8} Based on Wegner's testimony and supporting documentation, Belfor argued in its motion that it had fully paid Integrity for the plumbing work that it had hired Integrity to perform on the Woodland Meadows project. Belfor asserted that to the extent that Integrity was not paid for its work on the project, its recourse was with Woodland Meadows. According to Belfor, all the unpaid work was done when Woodland Meadows—not Belfor—was contractually obligated to pay for work on the project.

{¶9} Integrity responded to Belfor's motion with an affidavit from Zufall. Zufall averred that, "[f]rom approximately January 8, 2005 to October 2005, Integrity supplied plumbing services and materials * * * to Belfor USA Group, Inc. for the Woodland Meadows Project." Zufall affidavit, at ¶3. Zufall pointed to four invoices that she contended Integrity "submitted directly to Belfor pursuant to the contract Integrity had with Belfor." *Id.* at ¶8. Those invoices were:

Invoice no.	Dates work performed	Payment due date	Total
5648	June 12 to 25, 2005	July 17, 2005	\$73,355.59
5696	June 27 to July 10, 2005	July 30, 2005	\$87,001.75
5787	July 11 to 24, 2005	August 24, 2005	\$104,197.64
5826	July 25 to August 11, 2005	September 2, 2005	\$81,109.57

Zufall then stated that, "[t]he only substantive change in Integrity and Belfor's contract that occurred between January 2005 and October 2005 is that Belfor stopped paying Integrity in August 2005." Id. at ¶9.

{¶10} Zufall admitted in her affidavit that Integrity had contracted directly with Woodland Meadows, and that Woodland Meadows had paid it \$75,000 in addition to amounts that Integrity invoiced it for plumbing work. But, according to Zufall, "Belfor never indicated to Integrity that the document entitled Trade Contractor Agreement would terminate, or otherwise change the contract between Integrity and Belfor." Id. at ¶12.

{¶11} Based on Zufall's affidavit and the invoices, Integrity contended that a genuine issue of material fact remained regarding whether a contract between it and Belfor existed after June 2005. Integrity thus argued that summary judgment was inappropriate.

{¶12} In its reply brief, Belfor again relied on testimony from Wegner. In a second affidavit, Wegner identified an open invoice report dated October 17, 2005 that Zufall had drafted and forwarded to Belfor in its role as construction manager. The report listed each of the four invoices listed above as unpaid invoices for work performed on the Woodland Meadows project.¹ In the report, Zufall deducted a \$35,000 partial payment from the amount due under Invoice No. 5648, for work performed from June 12 to 25, 2005. Zufall also deducted from the total amount due the May 31, 2005 deposit payment of \$75,000. Through documents that Wegner verified, Belfor established that the partial and deposit payments were made by Woodland Meadows, not Belfor. Belfor argued that

¹ The report also included a fifth open invoice, dated March 24, 2005, which Zufall did not add into the total amount due. Zufall noted that the excluded invoice was "[d]ue by Belfor," which suggests that the other unpaid invoices were *not* "due by Belfor."

Woodland Meadows' payment of a portion of the amount due under the four invoices established that Woodland Meadows, not Belfor, owed Integrity for the remaining debt.

{¶13} Because both Belfor and Integrity relied on evidence outside the pleadings, the trial court decided to treat Belfor's motion as a motion for summary judgment. The trial court considered the parties' evidence and argument and, on November 29, 2010, granted Belfor's motion. As the trial court had previously entered a judgment of foreclosure and approved the subsequent sale of the property, the November 29, 2010 judgment granting Belfor's motion constituted a final appealable order.

{¶14} Integrity now appeals from the November 29, 2010 judgment, and it assigns the following errors:

[1.] The Court of Common Pleas erred in its November 29, 2010 Decision and Entry (Record Nos. 479 and 480) granting summary judgment to Appellee on Appellant's Breach of Contract Claim.

[2.] The Court of Common Pleas erred in its November 29, 2010 Decision and Entry (Record Nos. 479 and 480) granting summary judgment to Appellee on Appellant's Unjust Enrichment Claim.

[3.] The Court of Common Pleas erred in its November 29, 2010 Decision and Entry (Record Nos. 479 and 480) granting summary judgment to Appellee on Appellant's Prompt Payment Act claim.

{¶15} Entry of summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158,

2007-Ohio-5584, ¶29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶5; *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶6.

{¶16} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. The moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. *Id.*

{¶17} If the moving party meets its burden, then the nonmoving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. Civ.R. 56(E) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."). See also *Dresher* at 293; *Jackson v. Alert Fire and Safety Equip., Inc.* (1991), 58 Ohio St.3d 48, 52 (holding that " 'resting on mere allegations against a motion for summary judgment

and eschewing the mandate of Civ.R. 56(E) [to submit specific facts] is insufficient' "). If the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. Civ.R. 56(E); *Dresher* at 293.

{¶18} The principal purpose behind Civ.R. 56(E) is to force the nonmoving party to move beyond the allegations contained in the pleadings and proffer "specific facts" so that a court can analyze the evidence to ascertain whether an actual need for trial exists. *Ormet Primary Aluminum Corp. v. Employers Ins.*, 88 Ohio St.3d 292, 300, 2000-Ohio-330. A nonmoving party does not comply with its obligation to produce "specific facts" if it merely "replace[s] the conclusory allegations of the complaint or answer with conclusory allegations of an affidavit." *Lujan v. Natl. Wildlife Fed.* (1990), 497 U.S. 871, 888, 110 S.Ct. 3177, 3188. Thus, affidavits that just set forth conclusory statements are insufficient to meet the requirements of Civ.R. 56(E). *Jackson v. J-F Enterprises, Inc.*, 6th Dist. No. L-10-1285, 2011-Ohio-1543, ¶26; *H & H Properties v. Hodkinson*, 10th Dist. No. 10AP-117, 2010-Ohio-5439, ¶11; *Click v. S. Ohio Correctional Facility*, 152 Ohio App.3d 560, 2003-Ohio-2208, ¶14; *Gans v. Express-Med, Inc.* (Mar. 6, 2001), 10th Dist. No. 00AP-548. To defeat a motion for summary judgment, the proffered affidavits must also contain a recitation of the operative facts that give rise to the conclusory statements. *James Yeager Homebuilders, Inc. v. Foss*, 9th Dist. No. 23888, 2008-Ohio-548, ¶8; *Bhole, Inc. v. D & A Plumbing & Heating, Inc.*, 5th Dist. No. 2006-CA-00285, 2007-Ohio-3635, ¶20; *Citizens Bank v. Marzano*, 4th Dist. No. 04CA4, 2005-Ohio-163, ¶14; *Spatar v. Avon Oaks Ballroom*, 11th Dist. No. 2001-T-0059, 2002-Ohio-2443, ¶108.

{¶19} By its first assignment of error, Integrity argues that the trial court erred in granting Belfor summary judgment on Integrity's breach of contract claim. We disagree.

{¶20} To prevail on a breach of contract claim, a plaintiff must prove the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff. *Wells Fargo Bank, N.A. v. Sessley*, 188 Ohio App.3d 213, 2010-Ohio-2902, ¶32. In the case at bar, Belfor presented evidence that it did not contract with Integrity after it became the construction manager for the Woodland Meadows project. Once Belfor ceased operating as the general contractor, Integrity contracted directly with Woodland Meadows, making Woodland Meadows responsible for paying Integrity for work performed after June 2005. Belfor also presented evidence that it paid Integrity for all the work that Integrity performed as a subcontractor.

{¶21} In response to Belfor's evidence, Integrity presented the affidavit of Zufall, who summarily stated that from January to October 2005, Integrity and Belfor had a contract in which Belfor agreed to compensate Integrity for the supply of plumbing material and services to the Woodland Meadows Project. Zufall's affidavit, however, lacks the factual detail necessary to support this statement and rebut the evidence submitted by Belfor. Zufall did not specify exactly what plumbing work Integrity performed for Belfor after June 2, 2005, nor did Zufall explain how the work Integrity allegedly performed for Belfor differed from the work it performed under its contract with Woodland Meadows. These specific facts are essential because Integrity does not contest that it entered into a direct contract with Woodland Meadows to perform plumbing repair work after Belfor became the construction manager. Integrity's contract with Woodland Meadows obligated it to "complete the repairs to damaged plumbing" resulting from the

December 2004 storm. Trade Contractor Agreement, at Exhibit A, ¶1.² This broad scope of work left little (if not nothing) for Belfor to hire Integrity to do on the project. Belfor could not continue to contract with Integrity to perform the work that it initially hired Integrity to do because that work fell within the scope of the work set forth in the Trade Contractor Agreement. While Belfor conceivably could have hired Integrity after June 2005 to perform some sort of other plumbing work at Woodland Meadows, Zufall did not testify to this and nothing else in the record suggests this.

{¶22} Absent specific facts delineating what plumbing work Integrity contracted with Belfor to perform on the project after June 2005, we cannot accept Zufall's affidavit testimony as evidence that creates an issue of fact. See *H & H Properties* at ¶11 (" 'A court may disregard conclusory allegations in an affidavit unsupported by factual material in the record.' "). Merely stating that a contract exists in the face of evidence that it does not, cannot preclude the entry of summary judgment on a breach of contract claim.

{¶23} We recognize that Integrity questions the enforceability of the Trade Contractor Agreement because no one from Woodland Meadows signed it.³ We do not share Integrity's doubt over the validity of the Trade Contractor Agreement. Although Woodland Meadows did not execute the Trade Contractor Agreement, Jorge P. Newbery,

² From Integrity's perspective, the Trade Contractor Agreement does not embody the contract between it and Woodland Meadows. Integrity admits that it performed plumbing services for Woodland, but it contends that it completed its work under a different contract than the Trade Contractor Agreement. Nothing in the record describes the circumstances under which Integrity and Woodland Meadows allegedly entered this other contract, whether the contract is written or oral, or the terms of the contract. Moreover, Integrity does not explain how the other contract could supersede the Trade Contractor Agreement when the Trade Contractor Agreement states that it, the plans and specifications issued by Woodland Meadows, and the individual Construction Orders "constitute the entire contract between Woodland [Meadows] and [Integrity], and there are no other agreements[,] oral or written, by and between the parties []." Trade Contractor Agreement, at ¶20. Therefore, we apply the Trade Contractor Agreement in our analysis.

³ Zufall does not dispute that she signed the Trade Contractor Agreement on behalf of Integrity.

the managing member of Woodland Meadows, signed the Construction Order attached to the Trade Contractor Agreement. That order states:

Subject to the terms and conditions contained in the **Trade Contractor Agreement** executed between you as **Trade Contractor** and **Woodland Meadows Partners, LLC** * * * this Construction Order is hereby issued to cover all of the work normally performed under the Scope of Work identified in the **Trade Contract Agreement** * * *.

Thus, Newbery's signature on the Construction Order indicates that Woodland Meadows accepted and intended to proceed according to the terms of the Trade Contractor Agreement.

{¶24} Moreover, the failure of a party to execute a contract does not necessarily result in its unenforceability. *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.* (1978), 54 Ohio St.2d 147, 152. If one party does not sign a written contract, but the party performs as if the contract was in effect, then the contract is enforceable. *Benefits Evolution, L.L.C. v. Atlantic Tool & Die Co.*, 9th Dist. No. 25405, 2011-Ohio-4062, ¶26; *Hocking Valley Community Hosp. v. Community Health Plan of Ohio*, 4th Dist. No. 02CA28, 2003-Ohio-4243, ¶16. Here, nothing in the record indicates that Woodland Meadows did not intend the Trade Contractor Agreement to bind it. Rather, to the contrary, the evidence establishes that Woodland Meadows paid thousands of dollars for plumbing repairs pursuant to the Trade Contractor Agreement. Thus, Woodland Meadows accepted the Trade Contractor Agreement through its performance.

{¶25} Integrity also argues that Belfor's acceptance of invoices from Integrity after June 2, 2005 and Belfor's partial payment of Invoice No. 5648, for work performed from June 12 to 25, 2005, demonstrates that the contract between Belfor and Integrity extended beyond June 2, 2005. We are not persuaded. First, Belfor accepted invoices

from Integrity because its contract with Woodland Meadows required it to review and recommend for payment invoices from trade contractors working on the Woodland Meadows project. To facilitate this process, the Trade Contractor Agreement directed Integrity to send its invoices to Belfor. Thus, Belfor had no reason to object to the receipt of invoices from Integrity. Second, Integrity is wrong when it asserts that Belfor partially paid Invoice No. 5648. In fact, the evidence demonstrates that Woodland Meadows made the payment at issue. This evidence, therefore, actually supports Belfor's argument that Woodland Meadows was contractually obligated to pay for work that Integrity performed after June 2, 2005.

{¶26} Finally, Integrity argues that it created an issue of fact with Zufall's testimony that "Belfor never indicated to Integrity that the document entitled Trade Contractor Agreement would terminate, or otherwise change the contract between Integrity and Belfor." Zufall affidavit, at ¶12. According to Integrity, this statement establishes that there was no meeting of the minds that the Integrity/Woodland Meadows contract terminated the Integrity/Belfor contract. Integrity's argument misses the point. Belfor "fired" Integrity as a subcontractor when Belfor shifted from acting as general contractor to acting as construction manager. Belfor informed Integrity of its intent by instructing Integrity that "it was essential that [Integrity] enter into a direct contract with Woodland [Meadows] if [it] wanted to be paid for [its] work after June, 2005." April 30, 2007 Wegner affidavit, at ¶5.⁴ Implicit in Belfor's instruction is the warning that Belfor would no longer be hiring or paying Integrity for work on the Woodland Meadows project after June 2005. Thus, the Trade Contractor Agreement did not end Integrity and Belfor's

⁴ In her affidavit, Zufall does not specifically deny or otherwise address this communication to Integrity.

contractual relationship; it instead formalized Integrity and Woodland Meadow's contractual relationship.

{¶27} As Integrity failed to provide the trial court with specific facts showing a genuine issue of fact for trial, the court did not err in granting Belfor summary judgment on Integrity's breach of contract claim. Accordingly, we overrule Integrity's first assignment of error.

{¶28} By Integrity's second assignment of error, it argues that the trial court erred in granting Belfor summary judgment on Integrity's unjust enrichment claim. We disagree.

{¶29} "Unjust enrichment occurs when a person 'has and retains money or benefits which in justice and equity belong to another.' " *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, ¶20 (quoting *Hummel v. Hummel* (1938), 133 Ohio St. 520, 528). To establish a claim for unjust enrichment, a plaintiff must prove that it conferred a benefit on the defendant, the defendant knew of the benefit, and it would be unjust to permit the defendant to retain the benefit without payment. *Meyer v. Chieffo*, 193 Ohio App.3d 51, 2011-Ohio-1670, ¶37. The purpose of an unjust enrichment claim is not to remedy loss or damage suffered by a plaintiff, but to compensate the plaintiff for the benefit that it has conferred on the defendant. *Johnson* at ¶21.

{¶30} In the case at bar, Woodland Meadows, as owner of the apartment complex that Integrity helped repair, clearly benefited from Integrity's work. The benefit to Belfor, however, is more nebulous. Zufall testified in her affidavit that, "Belfor benefited by Integrity's services under the contract because Integrity's services were vital to Belfor's contract with Woodland [Meadows]." Zufall affidavit, at ¶15. Again, Zufall failed to

support this conclusory statement with specific facts. Thus, we turn to the contract itself to determine whether Zufall's conclusion is correct.

{¶31} As construction manager, Belfor agreed to "endeavor to obtain satisfactory performance from each of the Contractors." Construction Management Agreement, at sec. 2.3.7. Belfor also agreed to "determine in general that the Work of each Contractor is being performed in accordance with the requirements of the Contract Documents, endeavoring to guard the Owner against defects and deficiencies in the Work." *Id.* at sec. 2.3.13. However, the contract absolved Belfor of any "responsib[ility] for a Contractor's failure to carry out the Work in accordance with the respective Contract Documents." *Id.* at sec. 2.3.15. Moreover, Woodland Meadows agreed to pay Belfor a set fee for serving as construction manager, and Woodland Meadows' obligation to pay that fee did not depend on whether or not a trade contractor performed certain services. *Id.* at art. 12, 13.

{¶32} Based on the language of the construction management contract, we conclude that Integrity did not bestow any benefit on Belfor. Neither Belfor's ability to fulfill its contractual obligations nor Belfor's entitlement to payment was contingent upon Integrity providing its plumbing services. Accordingly, we conclude that the trial court properly granted Belfor summary judgment on Integrity's unjust enrichment claim, and we overrule Integrity's second assignment of error.

{¶33} By Integrity's third assignment of error, it argues that the trial court erred in granting Belfor summary judgment on its Prompt Payment Act claim. We disagree.

{¶34} R.C. 4113.61, commonly known as the Prompt Payment Act, requires a contractor to timely pay its subcontractor undisputed amounts under the parties' contract and sets forth penalties for noncompliance. *Masiogale Elec.-Mechanical, Inc. v. Constr.*

One, Inc., 102 Ohio St.3d 1, 2004-Ohio-1748, ¶10. Under the Act, a subcontractor "includes any person who undertakes to construct, alter, erect, improve, repair, demolish, remove, dig, or drill any part of any improvement under a contract with any person other than the owner, part owner, or lessee." R.C. 4113.61(F)(1); R.C. 1311.01(D). Here, Integrity failed to provide specific facts to rebut Belfor's evidence that it did not contract with Integrity after June 2005. As no contract existed between Integrity and Belfor when Integrity rendered the services for which it seeks payment, Integrity is not a subcontractor for purposes of the Prompt Payment Act. Accordingly, we conclude that the trial court properly granted Belfor summary judgment as to Integrity's Prompt Payment Act claim, and we overrule Integrity's third assignment of error.

{¶35} For the foregoing reasons, we overrule each of Integrity's assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.
