[Cite as *Boyd v. Archdiocese of Cincinnati*, 2015-Ohio-1394.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

MICHAEL BOYD	:	
	:	
Plaintiff-Appellant	:	Appellate Case No. 25950
	:	
v.	:	Trial Court Case No. 09-CV-975
	:	
ARCHDIOCESE OF CINCINNATI, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendants-Appellees	:	
	:	

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O P I N I O N

Rendered on the 10th day of April, 2015.

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HALL, J.

{¶ 1} Michael Boyd appeals the dismissal of the 14 claims for relief asserted in his second amended complaint against multiple defendants. We conclude that the trial court properly dismissed all of the claims except the one for breach of written contract against Our Lady of the Rosary Parish.[1] We therefore affirm in part and reverse in part.

I. FACTS

{¶ 2} The trial court dismissed the claims under Civ.R. 12(B)(6), so the factual allegations in the second amended complaint, the operative complaint here (and to which the word *complaint* in this opinion refers), "establish the material facts for our review," *Dombroski v. WellPoint, Inc.*, 119 Ohio St.3d 506, 2008-Ohio-4827, 895 N.E.2d 538, ¶ 3.

{¶ 3} In 2007, Boyd applied for the position of principal at Our Lady of the Rosary School, a Catholic school in Dayton run by Our Lady of the Rosary Parish. The parish is part of the Archdiocese of Cincinnati, which at the time was led by Archbishop Daniel E. Pilarczyk and had the Rev. Joseph R. Binzer as its chancellor. In July 2007, Boyd was

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[1] We cannot avoid noticing that the second amended complaint was attached to the "plaintiff's Request for leave to file * * *," filed September 17, 2010, in which the plaintiff moved "for leave to file and serve" the attached document. The trial court granted leave in its Decision, Order and Entry, filed April 10, 2012, wherein the court found "Plaintiff's September 17, 2010 Motion to Amend well-taken and **SUSTAIN[ED]** said Motion." (emphasis in original). However, the Decision did not indicate that the proposed second amended complaint would be considered as having been filed. Thereafter, plaintiff did not cause the second amended complaint to be separately filed, or served. Ordinarily, we would conclude that there is no second amended complaint before the court, and perhaps the trial court could have dismissed the entire action for that reason. We also note that the operative complaint, and four attached documents, could have been dismissed because it violates Civ.R. 8 in that the sixty-two page, 232 paragraph filing is not "a short and plain statement of the claim." *Id.* Nonetheless, the parties proceeded to file the Motions to Dismiss and the trial court proceeded to adjudicate them as if the second amended complaint were sufficient and had been filed. Therefore, so shall we.

interviewed by Father Michael Holloran, the parish's priest. During the interview, it was alleged that Father Holloran mentioned a few of the terms of employment, including that the employment contract would be for 3 years. Father Holloran offered Boyd the job, and he accepted.

{¶ 4} Later that year, in October, a few days after Boyd started, Father Holloran stopped by Boyd's office with a written employment agreement ("Elementary School Lay Principal Contract") for Boyd to sign. Reading over the agreement, Boyd noticed that several terms were different from the terms that Father Holloran had mentioned at the interview. In particular, paragraph two of the written agreement states that his employment term was to be only 9 months: "The term of Employee's employment hereunder shall commence on October 1, 2007 and shall terminate on June 30, 2008 unless sooner terminated by either party as provided in this Agreement."[2] When Boyd asked about the differences, it was alleged that Father Holloran said that the agreement had been drafted by the Archdiocese and was the standard employment agreement for all school principals. Having already left his previous job, Boyd felt that he had no choice but to sign, and so he did.

{¶ 5} Early on in his tenure, Boyd applied for a $107,000 grant from the Mathile Family Foundation, which the foundation approved. The foundation stated, however, that the money must be used for certain types of projects. Not long after the school received word of the grant, Boyd learned that Father Holloran and Al Dix, the parish's business manager, planned to temporarily " 'use some of it [the grant money] to resolve cash flow issues for the Parish,' " (*Second Amended Complaint*, ¶ 28). On January 9, 2008, the day

[2] The written agreement is attached to the second amended complaint as Exhibit A and is incorporated into the complaint.

that the grant money was to be delivered, Father Holloran asked Boyd to meet with him and Dix. At the meeting, Boyd alleges he "decr[ied] the planned misappropriation of restricted school funds," and also criticized "the underreporting of school-associated income and the sloppy and unethical character of the financial practices in place." (*Id*. at ¶ 27). At one point during the meeting, Boyd alleges further that "Dix * * * came out of his chair, leaned across the table, menacingly placed the palm of his hand in [Boyd's] face and said, 'Let me ask you! Why do you care? It's not your business.' " (*Id*.). Dix "clenched his fists, placed them on the table, and continued to lean in on and stand over [Boyd], glaring unrelentingly." (*Id*.). After Dix sat down, Boyd told him, "Don't put your hand in my face again. Don't disrespect me." (*Id*.). "Dix smirked at [Boyd] and again came out of his chair and, in a menacing effort to coerce and physically intimidate [him], again shoved the palm of his hand into [his] face, saying, with substantial sarcasm, 'I'm not dis-re-specting you. I'm asking you a question! Why—do—you—care?!' Dix continued to stand, lean-in on and menacingly glare at [Boyd] with clenched fists." (*Id*.). After Dix sat down this time, Boyd told him bluntly, " 'You put your hand in my face again and I'll assume you're wanting me to come out of *my* chair.' " (Emphasis sic.) (*Id*.).

{¶ 6} Almost two weeks after the January meeting, Father Holloran called Boyd into his office and gave him an undated memo with the subject line "Final Warning Concerning Threats and Other Serious Misconduct."[3] Father Holloran told Boyd that he had "shared that memo's assertions with others," "including Archdiocesan personnel," who Father Holloran said had "assisted in 'creating' the memo's final form." (*Id*. at ¶ 31).

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[3]This memo is in the record, attached to *Defendants' Motion to Dismiss Plaintiff's September 17, 2010 Amended Complaint*, as Exhibit C.The memo is incorporated into the complaint.

The memo contains a recitation of the events at the January meeting, but they were not how Boyd remembered them. The full memo reads:

> On January 9, 2008 you met with myself and Al Dix, the parish business manager, to review new procedures for payment of school bills and other school related financial matters. The meeting was fairly constructive and I thought that the three months of strained relations between yourself and Mr. Dix was on the mend. Then there were some mutual irritations, and a remark made that you interpreted as a jab at you by Mr. Dix. You challenged him on this, which by itself would not have been inappropriate, but in a very heated and defiant manner. This was tided over. At the end of the meeting Mr. Dix cut short extended remarks being made by you about procedures that would affect primarily parish personnel in the rectory office by asking "What's it to you?" This could have been phrased more diplomatically, but your reaction was extreme, saying that he was asking a disrespectful question, was acting like an ass as he had at a previous meeting between the two of you, and that if it didn't stop you would be across the table at him. When I tried to calm things by observing that your Irish was up and Mr. Dix's Dutch was up and that none of this was helpful, your retort was that in a contest between your Irish and his Dutch his Dutch would not be worth much. As you got up from the table Mr. Dix responded saying, "Don't threaten me". Your response was, while standing over him, "I just did!". With that you walked out of the room.
>
> Upon your exit I brought to Mr. Dix's attention the way in which he

provoked you with his disrespectful tone and choice of words. However, your threat to physically assault Mr. Dix, and your reiteration of the threat before leaving the room, was behavior that one would expect from a street thug rather than a composed professional, and can only be interpreted as the kind of intimidation that the Archdiocesan Personnel Policies mentions as conduct that may justify immediate dismissal. In those policies, March 2002 revision, reasons are given for immediate dismissal of an employee, which are as follows:

1. Insubordination or intimidation.

2. Reporting to work under the influence of alcohol or drugs.

3. Theft or misappropriation of property or funds.

4. Conduct contrary to or detrimental to the religious and professional character of the Parish or the policies.

5. Serious breach of confidentiality.

6. Other inappropriate behavior of a significant nature or degree.

Your threat against Mr. Dix is clearly intimidation, and also contrary to the religious and professional character of the parish. I am giving this written warning as notice to you that if there are any further violations on your part of any of the above reasons for immediate dismissal you will be immediately dismissed from the employ of Our Lady of the Rosary Parish.

{¶ 7} On the morning of February 4, a week or two after Boyd was given this disciplinary memo, he emailed the Archbishop and the Chancellor a letter regarding "intentional underreporting of income on annual canon reporting; advisement of Parish's

unlawful scheme to divert restricted gift funds; attention to self-servingly inadequate Parish financial governance practices; and, request for timely forensic audit." (*Second Amended Complaint*, Attachment "B") (the letter's subject line).[4] Late that same day, according to Boyd's brief—we are unable to find this allegation in the complaint—Father Holloran came to Boyd's office and told him, in essence, that he was fired.

{¶ 8} A year later, in 2009, Boyd filed suit pro se against Father Holloran, the parish, Dix, the Archdiocese, the Archbishop, and the Chancellor. He also named as defendants Genevieve Ritzel and Brenda Stampfli, both teachers at the school, and John Does 1-75. Boyd later identified John Doe 1 as the Cincinnati Catholic Religious Communities (CCRC), which, he alleges, is the actual employer of the Archdiocese's teachers and principals, and identified John Doe 2 as the Joseph L. Bernardin-Archdiocese of Cincinnati Trust, which, alleges Boyd, owns the Archdiocese's school property. The 232-paragraph second amended complaint asserts 14 claims: fraud in the inducement - job misrepresentation, fraud, fraudulent misrepresentation, breach of contract not in writing, breach of promise, estoppel, breach of written contract, intentional interference with contract, libel, slander, intentional infliction of emotional distress, failure to supervise, civil conspiracy (individual), and civil conspiracy (organizational).

{¶ 9} The defendants moved to dismiss all of the claims. The trial court granted the motions and dismissed the claims under Civ.R. 12(B)(6).

{¶ 10} Boyd appealed.

II. ANALYSIS

[4]The letter is dated February 4, 2007. We assume that this simply is a mistake.

{¶ 11} Boyd assigns 14 errors to the trial court. Thirteen assignments challenge the dismissal of the claims, and of these thirteen, three specifically challenge the dismissal of the claims against the CCRC, the Trust, and the Archdiocese. The remaining assignment of error alleges that the trial judge is biased or prejudiced against Boyd.

A. The Dismissal of the Claims

{¶ 12} "The function of a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief may be granted is to test the legal sufficiency of a claim, generally contained in the complaint." (Citation omitted.) *Thomas v. Progressive Cas. Ins. Co., Inc*., 2011-Ohio-6712, 969 N.E.2d 1284, ¶ 8 (2d Dist.). "In order to withstand a Civ.R. 12(B)(6) challenge, a complaint must plead the 'operative grounds' relating to a claim for relief." *Id.* at ¶ 18, citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 532 N.E.2d 753 (1988); *see also Collins v. Natl. City Bank*, 2d Dist. Montgomery No. 19884, 2003-Ohio-6893, ¶ 8 (saying that a Civ.R. 12(B)(6) motion "necessarily asserts that the pleader has failed to plead the operative grounds constituting a claim").

{¶ 13} "When reviewing a judgment granting a Civ.R. 12(B)(6) motion to dismiss * * *, an appellate court must independently review the complaint to determine whether dismissal is appropriate."(Citation omitted.) *Ament v. Reassure Am. Life Ins. Co.*, 180 Ohio App.3d 440, 2009-Ohio-36, 905 N.E.2d 1246, ¶ 60 (8th Dist). "A court is bound to assume that the facts pleaded in the complaint are true, but the same does not apply to conclusions of law that the pleader contends are proved by those facts." *Thomas* at ¶ 19. As to the pleaded facts, a court is not required to "consider unsupported conclusions that may be included among, but not supported by, the factual allegations of the complaint." *Wright v. Ghee*, 10th Dist. Franklin No. 01AP-1459, 2002-Ohio-5487, ¶ 19; *see also*

Mitchell at 192 ("Unsupported conclusions that appellant committed an intentional tort are not taken as admitted by a motion to dismiss and are not sufficient to withstand such a motion.").

{¶ 14} Review of a Civ.R. 12(B)(6) motion is "limited to the allegations contained in the complaint." *Williams v. Barrick*, 10th Dist. Franklin No. 08AP-133, 2008-Ohio-4592, ¶ 26; *see also Thomas* at ¶ 9, citing *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 680 N.E.2d 985 (1997). Material incorporated in the complaint, however, is considered part of the complaint. *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, fn. 1, 673 N.E.2d 1281 (1997) ("Material incorporated in a complaint may be considered part of the complaint for purposes of determining a Civ.R. 12(B)(6) motion to dismiss."). This material includes "exhibits incorporated into a complaint." *Columbus Green Bldg. Forum v. State*, 2012-Ohio-4244, 980 N.E.2d 1, ¶ 23 (10th Dist.), citing Civ.R. 10(C). Incorporated material may also include a "copy of a written instrument upon which a claim is predicated." *Fillmore v. Brush Wellman, Inc.*, 6th Dist. Ottawa No. OT-03-029, 2004-Ohio-3448, ¶ 8. The incorporated material need not be attached to the complaint. *Irvin v. Am. Gen. Fin., Inc.*, 5th Dist. Muskingum No. CT2004-0046, 2005-Ohio-3523, ¶ 6.

{¶ 15} In sum, in deciding a Civ.R. 12(B)(6) motion, a court must evaluate the legal conclusions urged by the plaintiff "against the facts pleaded in order to determine whether the standard of proof applicable to a particular claim can be satisfied at trial." *Thomas*, 2011-Ohio-6712, 969 N.E.2d 1284, at ¶ 18. And the court may grant the motion "when the facts concerned fail to provide that support, but only when it appears 'beyond doubt * * * that the [plaintiff] can prove no set of facts warranting relief.' " *Id.*, quoting *State ex rel.*

Crabtree at 248.

1. Fraud, breach of oral contract, estoppel

{¶ 16} The sixth and seventh assignments of error allege that the trial court erred by dismissing the claims for fraud, fraud in the inducement - job misrepresentation, fraudulent misrepresentation, breach of promise, breach of contract not in writing, and estoppel. Each of these claims is based on the conflict between Father Holloran's alleged oral promise of a 3-year term of employment and the written employment agreement's promise of only 9 months. The trial court dismissed all of the claims after concluding that they are barred by the parol evidence rule. The trial court's conclusion is correct.

{¶ 17} " 'The parol evidence rule is a rule of substantive law that prohibits parties to a contract from later contradicting the express terms of the contract with evidence of other alleged or actual agreements. Absent claims of fraud, mistake or some other invalidating cause, the parties' written agreement may therefore not be varied, contradicted, or supplemented by or on account of evidence of prior or contemporaneous oral agreements, or by written agreements which the terms of the principal contract do not expressly authorize.' " *Katz, Teller, Brant & Hild, L.P.A. v. Farra*, 2d Dist. Montgomery No. 24093, 2011-Ohio-1985, ¶ 23, quoting *Evilsizor v. Becraft & Sons Gen. Contractors, Ltd.*, 156 Ohio App.3d 474, 2004-Ohio-1306, 806 N.E.2d 614, ¶ 12 (2d Dist.). "An integration clause is essentially a contract's embodiment of the parol evidence rule, i.e., that matters occurring prior to or contemporaneous with the signing of a contract are merged into and superseded by the contract." *Simon Property Group, L.P. v. Kill*, 3d Dist. Allen No. 1-09-30, 2010-Ohio-1492, ¶ 15, citing *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27-28, 734 N.E.2d 782 (2000).

{¶ 18} It is true that " 'the parol evidence rule does not prohibit a party from introducing parol or extrinsic evidence for the purpose of proving fraudulent induce-ment.' " *Katz* at ¶ 24, quoting *Galmish* at 28. But the rule "may not be avoided" by a claim alleging that the inducement to sign the written agreement was an oral promise that directly contradicts a written term. *Galmish* at 29. In other words, " 'an oral agreement cannot be enforced in preference to a signed writing which pertains to exactly the same subject matter, yet has different terms.' " *Id.*, quoting *Marion Prod. Credit Assn. v. Cochran*, 40 Ohio St.3d 265, 533 N.E.2d 325 (1988), paragraph three of the syllabus. Indeed, " 'attempts to prove such contradictory assertions [are] exactly what the Parol Evidence Rule was designed to prohibit.' "*Id*., quoting Shankers, *Judicial Misuses of the Word Fraud to Defeat the Parol Evidence Rule and the Statute of Frauds (With Some Cheers and Jeers for the Ohio Supreme Court)* (1989), 23 Akron L.Rev. 1, 7.

{¶ 19} Paragraph nine of the written employment agreement here contains an integration clause, providing that the written agreement "contains the entire agreement of the parties and fully supersedes any and all prior agreements or understandings, whether oral or written." Boyd's fraud and breach-of-oral-contract claims require evidence that Father Holloran orally promised Boyd a 3-year term of employment,[5] but paragraph two of the written employment agreement expressly defines the term of employment as 9 months. The parol evidence rule therefore would prevent Boyd from introducing evidence

[5]The claims of fraud, fraud in the inducement, and fraudulent misrepresentation all have essentially the same elements, one of them being that a false representation was made. *See Rieger v. Podeweltz*, 2d Dist. Montgomery No. 23520, 2010-Ohio-2509, ¶ 8 (elements of fraud); *Info. Leasing Corp. v. Chambers*, 152 Ohio App.3d 715, 2003-Ohio-2670, 789 N.E.2d 1155, ¶ 84 (1st Dist.) (elements of fraudulent inducement); *Bradford v. B & P Wrecking Co., Inc*., 171 Ohio App.3d 616, 2007-Ohio-1732, 872 N.E.2d 331, ¶ 62 (6th Dist.) (elements of fraudulent misrepresentation).

at trial of the oral promise. And, without that evidence, Boyd would be unable to prove any of his fraud claims or breach-of-oral-contract claims. These claims were properly dismissed.

{¶ 20} The promissory estoppel claim was also properly dismissed. The equitable doctrine of promissory estoppel applies to enforce an oral promise when justice requires it. *Walker v. Univ. Med. Services*, 2d Dist. Montgomery No. 20141, 2004-Ohio-1321, ¶ 14. But " '[t]he unambiguous conditions of a written employment agreement are controlling of any contrary oral promises concerning the same matters that either party made prior to executing the employment agreement.' " *Vickers v. Wren Industries, Inc.*, 2d Dist. Montgomery No. 20914, 2005-Ohio-3656, ¶ 43 (quoting the trial court). Therefore a promissory estoppel claim " 'cannot lie where a subsequent unambiguous written agreement relieves the obligations imposed by prior oral promises.' " *Id.* (quoting the trial court); *see also Baker v. Northwest Hauling*, 6th Dist. Wood No. WD-02-050, 2003-Ohio-3420, ¶ 10 (holding that a signed employment application that stated the plaintiff "may be terminated at any time" rendered the plaintiff's breach-of-contract and promissory estoppel claims invalid).

{¶ 21} The sixth and seventh assignments of error are overruled.

2. Breach of written contract

{¶ 22} The eighth assignment of error alleges that the trial court erred by dismissing the claim for breach of written contract.

{¶ 23} Paragraph 1(f) of the written employment agreement provides that the principal of the school "shall" "work cooperatively and civilly with the Archdiocesan staff, the School staff, the Parish Pastor, parent/guardians of those having custody of students,

and students." And paragraph 5(b) provides that the parish may terminate Boyd's employment "upon any breach of this Agreement or any other good cause." Also, the complaint alleges that Boyd told Al Dix, "You put your hand in my face again and I'll assume you're wanting me to come out of *my* chair." (Emphasis sic.) (*Second Amended Complaint*, ¶ 27). The trial court concluded that this allegation shows that the parish did not breach the agreement by firing Boyd: "The maker of such a statement cannot claim to be working cooperatively and civilly. Such a statement is a clear violation of the contract." (Motion to Dismiss Decision, 9).The court cited *Cottrell v. Ohio Dept. of Job & Family Servs*., 10th Dist. Franklin No. 05AP-798, 2006-Ohio-793, for the proposition that "[o]ne employee's act or threat of physical violence to another employee is sufficient just cause." (*Id*. at 9-10).

{¶ 24} But what *Cottrell* actually says is that "[a]n employee's act or threat of physical harm to another employee *may* constitute just cause for discharge." (Citation omitted.) (Emphasis added.) *Cottrell* at ¶ 13. Moreover, *Cottrell* concerned the determination of just cause for discharge under the Unemployment Compensation Act, which implicates concerns that are not relevant to a just-cause determination under a private employment agreement. *See Hicks v. Ohio Department of Job and Family Services*, 10th Dist. Franklin No. 13AP-902, 2014-Ohio-2735, ¶ 33 ("A just-cause determination must be consistent with the legislative purpose underlying the Unemployment Compensation Act: to provide financial assistance to individuals who are involuntarily unemployed through no fault or agreement of their own.").

{¶ 25} The complaint here alleges that Boyd performed his obligations and that the parish's proffered reason for his termination is pretext. Boyd's words to Dix could

constitute a breach of the agreement or "other good cause" that allows his discharge. We conclude that cannot be determined on a motion to dismiss solely from the allegations of the complaint where our review analyzes only whether beyond doubt that the plaintiff can prove no set of facts warranting relief. Whether this claim merits trial may better be determined under Civ.R. 56.

{¶ 26} There remains the issue of who may be liable for any proved breach of the written contract. "[A] contract is binding only upon parties to a contract and those in privity with them." (Citation omitted.) *Samadder v. DMF of Ohio, Inc.*, 154 Ohio App.3d 770, 2003-Ohio-5340, 798 N.E.2d 1141, ¶ 25 (10th Dist.). The issue of contractual privity " 'goes to the very heart of actionable breach' and, consequently, is essential to a claim for breach of contract." *DVCC, Inc. v. Medical College*, 10th Dist. Franklin No. 05AP-237, 2006-Ohio-945, ¶ 55, quoting *Mark-it Place Foods, Inc. v. New Plan Excel Realty Trust*, 156 Ohio App.3d 65, 2004-Ohio-411, 804 N.E.2d 979, ¶ 22 (4th Dist.). Generally, "only a party to a contract or an intended third-party beneficiary thereof may be named as a defendant in an action for breach of a contract." *Kirby v. Cole*, 163 Ohio App.3d 297, 2005-Ohio-4753, 837 N.E.2d 839, ¶ 11 (3d Dist.), citing *Grant Thornton v. Windsor House, Inc.*, 57 Ohio St.3d 158, 161, 566 N.E.2d 1220 (1991).

{¶ 27} This breach-of-contract claim here names as defendants the Archdiocese, the parish, the CCRC, and the Trust. Only the parish is a party to the written employment agreement. The first paragraph of the agreement states that the agreement is "between Michael Boyd ('Employee') and the Our Lady of the Rosary Parish ('Employer')," and the agreement is signed only by Father Holloran and Boyd. The only way that the agreement could be enforced against these nonparties is through a liability theory like " 'assumption,

piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.' " *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009) (saying that " 'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through" these theories of liability), quoting 21 Lord, *Williston on Contract*s, Section 57:19, at 183 (4th Ed.2001). Of these theories, the only ones that might possibly apply to impose liability on the Archdiocese, the CCRC, or the Trust are alter ego (corporation is the alter ego of the shareholders) and piercing the corporate veil (parent corporation liable for subsidiary's misconduct). The *Belvedere* test applies to determine liability under either theory. *Minno v. Pro-Fab, Inc.*, 121 Ohio St.3d 464, 2009-Ohio-1247, 905 N.E.2d 613, ¶ 11. That test looks for "control over the corporation by those to be held liable [that] was so complete that the corporation has no separate mind, will, or existence of its own" and for "control over the corporation by those to be held liable [that] was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity." *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 289, 617 N.E.2d 1075 (1993). Even assuming that either of these theories could, as a matter of law, apply in this case to the Archdiocese, the CCRC, or the Trust, the complaint does not allege operative facts that these entities exercised the requisite complete control.

{¶ 28} The Archdiocese, the CCRC, and the Trust were properly dismissed from the breach-of-written-contract claim. But the trial court erred by dismissing that claim against the parish.

{¶ 29} The eighth assignment of error is sustained in part and overruled in part.

3. Intentional interference with contract

{¶ 30} The ninth assignment of error alleges that the trial court erred by dismissing the claim for intentional interference with contract. The complaint asserts that the Archbishop, the Chancellor, Father Holloran, Dix, Ritzel, and Stampfli interfered with the written employment agreement.

{¶ 31} "Tortious interference with contract requires an actor to improperly interfere with the performance of a contract between two other persons." *Dorricott v. Fairhill Ctr. for Aging*, 2 F.Supp.2d 982, 989-990 (N.D.Ohio 1998), citing *Miller v. Wikel Mfg. Co., Inc.*, 46 Ohio St.3d 76, 79, 545 N.E.2d 76 (1989). The interference must be "by someone who is not a party or agent of the party to the contract or relationship at issue." *Id.*; *see also Condon v. Body, Vickers & Daniels*, 99 Ohio App.3d 12, 22, 649 N.E.2d 1259 (8th Dist.1994) ("Tortious interference with a business contract occurs when one party to a contract is induced to breach the contract by the malicious acts of a third person *who is not a party to the contract*." (Emphasis sic.)). For an agent to have tortiously interfered with a principal's contract, the agent must have "benefited solely in a personal capacity." *Miller* at 79. Accordingly, "[t]o maintain a tortious interference claim against an employee of a party to the relationship at issue, a plaintiff must demonstrate that the employee acted solely in his or her individual capacity and benefitted from the alleged interference." (Citations omitted.) *Fitzgerald v. Roadway Express, Inc.*, 262 F.Supp.2d 849, 860 (N.D.Ohio 2003). *See Condon* at 22 (concluding that an office manager of a firm was not a third party subject to liability for tortiously interfering with an employment contract to which the firm was a party).

{¶ 32} Here, Father Holloran, Dix, Ritzel, and Stampfli are each identified in the complaint as being either an employee or a volunteer of the parish, making them the parish's agents. The exception for an agent acting and benefiting individually does not apply because the complaint fails to allege sufficient facts showing that any of these parties acted solely in a personal capacity or personally benefited. While the Archbishop and the Chancellor are third parties, the complaint fails to allege sufficient facts describing what either did to procure the agreement's breach, let alone sufficient facts showing that either's actions were malicious. The intentional-interference claim was properly dismissed.

{¶ 33} The ninth assignment of error is overruled.

4. Defamation—libel and slander

{¶ 34} The tenth assignment of error alleges that the trial court erred by dismissing the two defamation claims—libel and slander. For our analysis of those claims, we note that the operative complaint is no more, and no less, than a vitriolic diatribe of sixty-two pages consisting of 232 enumerated paragraphs and four attached documents. But we have sifted through the rhetoric to evaluate the efficacy of allegations of defamation. The complaint attempts to say so much but alleges so little.

{¶ 35} " 'Defamation is a false publication causing injury to a person's reputation, or exposing the person to public hatred, contempt, ridicule, shame or disgrace or affecting him adversely in his trade or business.' Defamation can be in the form of either slander or libel. Slander generally refers to spoken defamatory words while libel refers to written or printed defamatory words. The essential elements of a defamation action, whether

slander or libel, are that the defendant made a false statement of fact, that the false statement was defamatory, that the false defamatory statement was published, that the plaintiff was injured and that the defendant acted with the required degree of fault." (Citations omitted.) *Matikas v. Univ. of Dayton*, 152 Ohio App.3d 514, 2003-Ohio-1852, 788 N.E.2d 1108, ¶ 27 (2d Dist.), quoting *Matalka v. Lagemann*, 21 Ohio App.3d 134, 136, 486 N.E.2d 1220 (10th Dist.1985).

{¶ 36} Even if a defamation claim for a particular statement is adequately pleaded, the statement may not be actionable if the statement is privileged. A conditional, or qualified, privilege protects the maker of the statement "in the absence of ill will or malice." *Burkes v. Stidham*, 107 Ohio App.3d 363, 372, 668 N.E.2d 982 (8th Dist.1995); *see also Evely v. Carlon Co*., 4 Ohio St.3d 163, 166, 447 N.E.2d 1290 (1983) ("Once [defendant] asserted the defense that its statements were made in good faith, [plaintiff] had the burden of showing that [defendant] acted with actual malice and could not merely rely on allegations in the complaint."). A qualified privilege covers statements made about the activities of an employee arising out of employment, and not directed to the employee as an individual separate and apart from his employment, "concerning matters of common business interest between the parties and, accordingly, there must be a showing that they were made with actual malice in order for the appellant to prevail." *Evely* at 165; *see also Matikas* at ¶ 28 (saying that remarks made by a supervisor to superiors that are made within the scope of the supervisor's duties are "within the qualified privilege and are not actionable absent a showing of actual malice"); *Crase v. Shasta Beverages, Inc.*, 10th Dist. Franklin No. 11AP-519, 2012-Ohio-326, ¶ 47 (saying that there is "a qualified privilege to allegedly defamatory statements that corporate officers made to other officers

and supervisory personnel about an employee's on-the-job activities"). "In a qualified privilege case, 'actual malice' is defined as acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity." *Jacobs v. Frank*, 60 Ohio St.3d 111, 116, 573 N.E.2d 609 (1991).

{¶ 37} "[T]he defense of qualified privilege is an affirmative defense." *Stepp v. Wiseco Piston Co., Inc.*, 11th Dist. Lake No. 2013-L-059, 2013-Ohio-5832, ¶ 28. A court may not dismiss a complaint for failure to state a claim "unless the face of the complaint obviously or conclusively establishes the affirmative defense." *Cristino v. Bur. of Workers' Comp.*, 2012-Ohio-4420, 977 N.E.2d 742, ¶ 21 (10th Dist.); *see also Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, 956 N.E.2d 814, ¶ 13 ("A complaint may be dismissed under Civ.R. 12(B)(6) for failing to comply with the applicable statute of limitations when the complaint on its face conclusively indicates that the action is time-barred."). Here, the complaint anticipates the privilege defense, expressly stating that the defendants were without privilege to make the allegedly defamatory statements and that the defendants acted with malice. The trial court concluded that qualified privilege excluded all the defamation allegations, except the post-firing alleged letter to parents and others, without analyzing the complaint's bald allegation that the defendants acted with malice. To that extent, the trial court was wrong and erred by dismissing the libel and slander claims for those reasons. At this stage of the proceedings, although the malice allegation is not supported by any evidence, the allegations of the complaint must be taken as true. Accordingly, qualified privilege cannot be the basis for dismissal at this time. Nevertheless, our review of the motion to dismiss is de novo, and we conclude that there is no potential defamation claim that survives. We

reach this conclusion, however, for reasons different from those addressed by the trial court.

i. Libel

{¶ 38} With respect to the libel claim, the complaint alleges four libelous documentations: (1) the disciplinary memo written by Father Holloran about the events of the January 9 meeting; (2) a pre-termination email that Brenda Stampfli sent to Father Holloran requesting Boyd's termination; (3) a non-specific wilful campaign of libelous documentation by "one or more persons" sent to Holloran to support Boyd's termination and incorporated into the complaint as "attachment 2" (Compl. ¶176); and (4) a letter that Holloran later wrote to the school community about Boyd's departure.

{¶ 39} Boyd was dismissed from employment on February 4, 2008, within hours of his electronic transmission of his accusation letter to the Archdiocese. We carefully have combed the allegations of the complaint. There is no "attachment 2" to the complaint and none of the actual attachments (A through D) can reasonably be construed to be the documentation by Holloran to which this portion of the complaint refers. Without doubt, alleged libelous documents one, two and three above were created and published before, and in support of, Boyd's dismissal on February 4, 2008. Boyd's original complaint was filed February 5, 2009. A cause of action for defamation is barred by the applicable statute of limitations. R.C. 2305.11(A) provides that "[a]n action for libel, slander * * * shall be commenced within one year after the cause of action accrued." "A cause of action for libel accrues upon the first publication of the defamatory matter." *Reimund v. Brown*, 10th Dist. Franklin No. 95APE04-487, 1995 WL 643939, *3 (Nov. 2, 1995), citing *Guccione v. Hustler Magazine*, 64 Ohio Misc. 59, 60, 413 N.E.2d 860 (Franklin C.P.1978). Therefore,

with respect to the first three documentations, the plaintiff can prove no set of facts entitling him to relief. Accordingly, we affirm the dismissal of any libel claim based on allegations about the disciplinary memo written by Holloran, the e-mail from Stampfli to Holloran, and the non-specific campaign of alleged libelous documentation forwarded to Holloran by "others" to support Boyd's dismissal.

{¶ 40} The letter plaintiff alleges was created and sent on February 5, 2008 to parents, students, and others offering explanations for his dismissal, on the record before us, would not be time barred. Defendants attached the letter they assert was the letter they sent out as attachment "D" to their motion to dismiss filed April 24, 2012. The only reference in that letter to the plaintiff is the first sentence, which says "our principal, Michael Boyd, has left our employ." We agree with the defendants that nothing in that letter is defamatory. However, we return again to the requirement that a motion to dismiss is limited to the allegations of the complaint. The letter is not included in the complaint. But there is an additional reason why there is no libel claim related to the letter to parents. In his brief, "*Appellant concedes that particular letter is insufficient to constitute libel under Ohio law*" (Appellant's Brief at pg. 27 (underline in original)). With this concession, there remains no written communication for which the complaint states a claim. Accordingly, we affirm the trial court's dismissal of any alleged claim for libel.

ii. Slander

{¶ 41} The slander claim concerns oral statements that were allegedly made beginning around February 4, 2008 to students, parents, and other employees about Boyd's personal life and his competence as an educational professional that purported to explain why he no longer was at the school. These statements allegedly included: " 'He

threatened AI Dix and wouldn't take back the threat,' " " 'He engaged in intimidation,' " and " 'He was given the chance to retract his threat and apologize and didn't.' " (Second Amended Complaint, ¶ 192). Also, the complaint alleges that Father Holloran told the head of the Parish's school board that what Boyd had been saying about the school's use of restricted grant funds was untrue, because the foundation had authorized the school to use the grant funds in other ways. How any interpretation of any allegation that Holloran's statements to third persons about the grant funds' use constitutes an actionable claim for slander we cannot tell.

{¶ 42} The slander claim is only asserted "Against Defendants Archdiocese, OLR Parish, Holloran, Dix, Rietzel [a parish 'employee or volunteer'], Stampfli ['a part-time employee or/and volunteer'] and Does 1-75" (Complaint and unfiled Second Amended Complaint "Eleventh Cause of Action.").[6] With respect to the Archdiocese or Parish, they obviously cannot make oral statements themselves. Moreover, Boyd alleges that the slander was committed "in furtherance of their individual conspiratorial purposes" (Second Amended Complaint, ¶ 192), "out of hatred and ill will * * * to retaliate * * * and to intentionally, wilfully and maliciously interfere with Plaintiff's career." (*Id*., ¶ 195.). There is no allegation of liability alleged to either religious entity on the basis of respondeat superior and no allegation that those entities caused, encouraged, or ratified the alleged slanderous statements. Contrarily, intentional, malicious, and wilful acts, as Boyd has alleged, in furtherance of individual conspiracy, as he also alleged, are the antithesis of

[6] For purposes of this discussion, we ignore "Does 1-75." The record does not demonstrate that the parties characterized by any of these fictitious names were served with the complaint before the passing of one year from the filing of the original complaint and therefore there is no viable cause of action commenced against any of them. *Hummons v. Dayton*, 2d Dist. Montgomery No. 23116, 2009-Ohio-5398, ¶19-21.

employment activity that can result in liability upon an employer. Accordingly, Boyd has not stated a slander claim against these non-individual entities.

{¶ 43} With respect to Rietzel and Stampfli, the slander portion of the complaint fails to even mention their names (except in the non-allegational heading) and fails to state what they said, or to whom, or how or when. The second amended complaint simply does not state a slander claim against them. Although not in the slander section of the complaint, paragraph 15 does mention that during his employment Rietzel said that Boyd failed to meet deadlines and that Boyd "was in over his head and not interested in meeting deadlines." Assuming those statements were said, and assuming only for the sake of analysis that the statements were untrue, the statements were alleged to have been made during his employment. As we indicated in our discussion of the libel allegations, Boyd's employment ended February 4, 2008. Any claim about statements made before then are barred by the one-year statute of limitation.

{¶ 44} For Dix, the only non-amorphous slander allegation that contains any reference to him is that "Holloran, made those utterances as though they were fact despite his complete awareness that his words were false and defamatory and were created by him and by Dix as a pretext for causing Plaintiff to be terminated." *Id*, ¶ 193. We reiterate, Boyd was terminated on February 4, 2008. Any allegation that Dix said anything that resulted in Boyd's firing on February 4, 2008 is barred by the one-year statute of limitation. Accordingly, the complaint fails to state a slander claim against Dix.

{¶ 45} That leaves Holloran as the only remaining defendant in regard to the slander allegations. The complaint alleges the following was said: "He [Boyd] threatened Al Dix and wouldn't take back the threat," "He engaged in intimidation," and "He was given

the chance to retract his threat and apologize and didn't." Any fair reading of the entirety of the complaint reveals these statements are true.

{¶ 46} Truth is a complete defense to a charge of defamation. " 'It is sufficient to show that the imputation is substantially true, or as it is often put, to justify the "gist," the "sting," or the "substantial truth" of the defamation.' " *Scaccia v. Dayton Newspapers, Inc.*, 2d Dist. Montgomery No. 22813, 2009-Ohio-809, ¶ 9, quoting Prosser, *Law of Torts*, 798-799 (4th Ed.1971). This broad definition of the truth defense prevents a defamation claim from resulting in an argument over semantics. Here, in the complaint Boyd admits that he "threatened" Dix. ("Plaintiff looked back at Dix and matter-of-factly stated, 'You put your hand in my face again and I'll assume you're wanting me to come out of *my* chair.' ") (*Second Amended Complaint*, ¶ 27) (Emphasis sic.). Furthermore, any reasonable interpretation of the complaint acknowledges that Boyd was given a chance to apologize and that he did not. The statements that form the basis of the slander claim must therefore be considered substantially true, sufficiently so that based on the allegations of the complaint, alone, it is apparent that Boyd has failed to state a claim.

{¶ 47} Finally, we return once more to the one-year statute of limitation. Boyd makes the allegation about the assertion that he "coerced and intimidated defendant Dix and that [Boyd's] conduct was such as to justify his termination and that plaintiff was purportedly a 'thug,' again indicating a need to terminate" (*Id*., ¶ 178) in regard to the documentation included in the memo Holloran prepared before, and in support of, Boyd's termination. Boyd's employment ended February 4, 2008. Any claim about statements made on or before then is barred by the one-year statute of limitation.

{¶ 48} The tenth assignment of error is overruled.

5. Intentional infliction of emotional distress

{¶ 49} The twelfth assignment of error alleges that the trial court erred by dismissing the claim for intentional infliction of emotional distress. The trial court concluded that the complaint alleges no conduct by any of the defendants that was extreme or outrageous. We agree.

{¶ 50} "One who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 453 N.E.2d 666 (1983), syllabus, abrogated on other grounds by *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051.

> "In order to recover damages for the intentional infliction of serious emotional distress, four elements must be proved: a) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff; b) that the actor's conduct was extreme and outrageous, that it went beyond all possible bounds of decency and that it can be considered as utterly intolerable in a civilized community; c) that the actor's actions were the proximate cause of the plaintiff's psychic injury; and d) that the mental anguish suffered by plaintiff is serious and of a nature that no reasonable person could be expected to endure it."

Thomas, 2011-Ohio-6712, 969 N.E.2d 1284, at ¶ 12, quoting *Pyle v. Pyle*, 11 Ohio App.3d 31, 463 N.E.2d 98 (8th Dist.1983), paragraph two of the syllabus.

{¶ 51} Here, the primary conduct cited in the complaint is Boyd's unjust termination and the making of the defamatory statements discussed above, chiefly, that Father Holloran lied about what happened in the meeting with Boyd and Dix. Concerning the nature of a defendant's conduct, the Ohio Supreme Court has explained:

> "It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' "

Yeager at 374-375, quoting Restatement of the Law 2d, Torts, Section 46, Comment (1965). Boyd's complaint is that his termination, supported by the alleged defamatory communications, constitutes intentional infliction of emotional distress. We agree with the trial court that none of the factual conduct alleged in the complaint comes close to meeting the standard set out in *Yeager*. Moreover, where defamation is the basis for an intentional infliction of emotional distress claim, the applicable one-year statute of limitations for defamation also applies to the emotional distress claim. *Ibenez v. Hutchins*, 10th Dist. Franklin No. 12AP–319, 2012–Ohio–5040, ¶ 9. The claim for intentional infliction of emotional distress was properly dismissed.

{¶ 52} The twelfth assignment of error is overruled.

6. Failure to supervise

{¶ 53} The eleventh assignment of error alleges that the trial court erred by dismissing the claim for failure to supervise, which the court did because Boyd was an employee and because the claim does not allege an intentional tort.

{¶ 54} " '[A]n underlying requirement in actions for negligent supervision and negligent training is that the employee is individually liable for a tort or guilty of a claimed wrong against a third person, who then seeks recovery against the employer.' " *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, ¶ 23, quoting *Strock v. Pressnell*, 38 Ohio St.3d 207, 216, 527 N.E.2d 1235 (1988). "[A]n employee bringing a claim of negligent supervision against her employer is precluded from doing so by Ohio's workers' compensation scheme." *Blough v. Hawkins Mkt., Inc.*, 51 F.Supp.2d 858, 865-866 (N.D.Ohio 1999).

{¶ 55} The complaint here alleges that the Archdiocese had a duty to supervise the parish, Father Holloran, Dix, and others, including the Archbishop and the Chancellor, and that Father Holloran had a duty to supervise, among others, Ritzel, Stampfli, and Dix. The Archdiocese and the parish, alleges the complaint, "did not simply negligently fail to supervise, but willfully and tortiously turned their backs to their responsibilities * * *." (*Second Amended Complaint*, ¶ 215). Although this language suggests an intentional tort, it is not sufficient by itself to constitute such a claim. An employee may recover for an employer intentional tort only when the employer acts with *specific intent* to cause an injury. *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253, ¶ 23. An intentional tort does not encompass "

'accidental injuries caused by the gross, wanton, *willful*, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury.' " *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 99-100, quoting 6 Larson, *Workers' Compensation Law*, Section 103.03 (2008). The complaint here does not allege conscious, deliberate intent by any defendant to harm Boyd. Therefore the claim for failure to supervise was properly dismissed.

{¶ 56} The eleventh assignment of error is overruled.

7. Civil conspiracy

{¶ 57} The thirteenth assignment of error[7] alleges that the trial court erred by dismissing the two conspiracy claims—one against the individual defendants, the other against the organizational defendants.

{¶ 58} A civil-conspiracy claim requires an underlying bad act:

> "A claim for civil conspiracy requires proof of 'a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damage.' "*Kimmel v. Lowe's, Inc.*, 2d Dist. Montgomery No. 23982, 2011-Ohio-28, ¶ 20, quoting *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 419, 650 N.E.2d 863 (1995). "A claim for conspiracy cannot be made [the] subject of a civil action unless something is done which, in the absence of the conspiracy allegations, would give rise to an independent cause of action." *Cully v. St. Augustine Manor*, 8th Dist. Cuyahoga No. 67601, 1995 WL 237129, *4

[7] "The Lower Court erred in dismissing Boyd's Civil Conspiracy claims because there were qualifying underlying sufficiently pled causes of action."

> (April 20, 1995). In other words, "[a]n underlying unlawful act is required before a civil conspiracy claim can succeed." *Id*., quoting *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475, 700 N.E.2d 859 (1998).

Davis v. Clark Cty. Bd. of Commrs., 2013-Ohio-2758, 994 N.E.2d 905, ¶ 20 (2d Dist.).

{¶ 59} Here, all of the claims alleging unlawful acts were properly dismissed. As for the sole remaining claim, "[i]t is not a tort to breach a contract, no matter how willful or malicious the breach." *The Salvation Army v. Blue Cross & Blue Shield of N. Ohio*, 92 Ohio App.3d 571, 578, 636 N.E.2d 399 (8th Dist.1993). Therefore the claims for civil conspiracy cannot succeed and were properly dismissed.

{¶ 60} The thirteenth assignment of error is overruled.

8. Other Assignments of Error

{¶ 61} The first and second assignments of error make general allegations about the trial court's dismissal of the all of the claims. The third, fourth, and fifth assignments of error make specific allegations about the dismissal of the Archdiocese, the CCRC, and the Trust. For all of the issues raised in these five assignments of error, they were either addressed in our discussion above or are without merit. These five assignments of error are overruled.

B. The Trial Judge's Alleged Bias or Prejudice

{¶ 62} The fourteenth assignment of error asserts that the trial judge should have recused herself under Jud. Cond. R. 2.11(A)(1), which provides that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: * * *

The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding."

{¶ 63} As we have said, "[i]ntermediate appellate courts, such as this one, have no jurisdiction to disqualify a judge based on claims of bias or prejudice; such claims must be brought to the Chief Justice of the Ohio Supreme Court." *Bank of Am., N.A. v. Litteral*, 2d Dist. Montgomery No. 25086, 2013-Ohio-38, ¶ 15, citing *Beer v. Griffith*, 54 Ohio St.2d 440, 441-442, 377 N.E.2d 775 (1978). Boyd has not done this.

{¶ 64} The fourteenth assignment of error is overruled.

III. CONCLUSION

{¶ 65} We have considered the other issues raised in Boyd's pro se appellate brief and conclude that they are without merit.

{¶ 66} Because we sustained in part the eighth assignment of error, that part of the trial court's judgment dismissing the claim for breach of written contract against the parish is reversed. The rest of the judgment is affirmed. This case is remanded for further proceedings.

. . . . . .

FROELICH, P.J., and WELBAUM, J., concur.

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