[Cite as *Greenzalis v. Nationwide Mut. Ins. Co.*, 2016-Ohio-8344.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Michael W. Greenzalis,	:	
Plaintiff-Appellant,	:	No. 16AP-139 No. 16AP-382
v.	:	(C.P.C. No. 14CVH-57)
Nationwide Mutual Insurance Company,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 22, 2016

On brief: *James R. Leickly* and *William P. Tedards, Jr.*, for appellant. **Argued:** *William P. Tedards, Jr.*

On brief: *Bricker & Eckler LLP, Quintin F. Lindsmith*, and *Ali I. Haque*, for appellee. **Argued:** *Quintin F. Lindsmith*.

APPEALS from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} In this consolidated appeal, plaintiff-appellant, Michael W. Greenzalis, appeals from the January 26, 2016 judgment entry of the Franklin County Court of Common Pleas, which granted the motions for summary judgment filed by appellee, Nationwide Mutual Insurance Company, on appellant's claims for breach of contract and fraud and appellee's counterclaim for default on a promissory note, and appeals from the April 20, 2016 judgment denying appellant's Civ.R. 60(B)(5) motion. For the following reasons, we affirm both trial court judgments.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} The following pertinent facts are undisputed unless otherwise noted. On July 20, 2005, appellant, a former insurance agent, and appellee, an insurance company, entered into an Agency Executive Program Performance Agreement ("original AE agreement"), whereby appellant agreed to participate in appellee's Agent Executive Program ("AE program"). The original AE agreement provided access to a loan from Nationwide Bank[1] guaranteed by appellee. If appellant met certain requirements, the balance of a loan could qualify for a waiver. Appellant agreed that in the event of termination of the original AE agreement, appellant would remain responsible for any financial obligation incurred in relation to the agreement.

{¶ 3} Appellant did obtain a loan from Nationwide Bank in the amount of $300,000, evidenced by a Credit Agreement and Promissory Note ("promissory note") dated July 25, 2005. Appellant promised to pay the note to Nationwide Bank, its successors, and assigns. Under the acceleration clause of the promissory note, on default all amounts outstanding under the loan became immediately due. In bold, capitalized print above the signature line, the promissory note states that the loan remains appellant's obligation regardless of whether appellee reimburses the bank for all or any part of the loan. On the same day, July 25, 2005, appellant executed a security agreement to secure the loan with stated collateral.

{¶ 4} On October 4, 2007, appellee sent a letter to appellant indicating that appellant had elected an option to extend his participation in the AE program and execute a modification to the original AE agreement, rather than continue under the terms of the original AE agreement or exit the program in exchange for a full or partial waiver of all loans to Nationwide Bank. Sometime between November 2007 and June 2008, appellant received a draft of the modification to the AE agreement.

{¶ 5} On July 17, 2008, appellant signed a First Modification to Agency Executive Program Performance Agreement ("modified agreement") and initialed each page. The modification changed the time period and measurements for appellant's production targets and enabled appellant to earn several hundred thousand dollars in cash

[1] Formerly known as Nationwide Federal Credit Union.

disbursements to use toward the business pursuant to a cash infusion schedule. Appellant again agreed to repay any portion of the loan and interest not waived and that, on cancellation or termination of the modified agreement, appellant remained responsible for any principal and interest on any loan from Nationwide Bank.

{¶ 6} Around October 2009, appellant stopped making payments on the note. In January 2010, appellee cancelled the AE agreement. On March 11, 2010, Nationwide Bank assigned all of its rights, title, and interest in the promissory note and the security agreement to appellee in consideration of appellee's payment of the guaranteed amount. Several days later, on March 16, 2010, Nationwide Bank sent appellant a letter stating that his loan was paid in full.

{¶ 7} On May 1, 2013, appellee sent appellant a letter indicating that appellee purchased appellant's debt to Nationwide Bank and obtained the right to collect on the loan, pursuant to an assignment from the bank, and asked appellant to make arrangements to pay the outstanding amount on the loan.

{¶ 8} Appellant initiated suit against appellee on January 3, 2014, and later filed an amended complaint asserting two claims: (1) breach of contract and the covenant of good faith and fair dealing; and (2) fraud. On March 5, 2014, appellee filed its answer, denying the merits of appellant's suit and asserting an array of affirmative defenses, along with a counterclaim for "breach of promissory note/amounts due and owing" and equitable indemnification. (Appellee's Answer and Countercl. at 13.)

{¶ 9} On May 1, 2015, appellee filed a motion for summary judgment on both the breach of contract and fraud counts, which incorporated its earlier filed motion for judgment on the pleadings. On the same day, appellant filed a motion for partial summary judgment related to the breach of contract claim.

{¶ 10} The trial court judge held a hearing on the motions on September 9, 2015, and thereafter granted appellee's motion for summary judgment, denied appellant's motion for partial summary judgment, and dismissed appellant's amended complaint. In doing so, the trial court found, in effect, the case involved one modified or amended agreement, rather than two separate agreements, and that appellant did not allege a breach of the agreement as amended and adopted the reasoning and analysis of *Frisch v.*

Nationwide Mut. Ins. Co., 553 Fed.Appx. 477 (6th Cir.2014), as it relates to the breach of contract claim. Furthermore, the trial court found appellant's allegations sounding of fraudulent inducement to enter the amended agreement failed because appellant could not justifiably rely on alleged misrepresentations which directly contradicted the express language of the amendment, which he signed and initialed. Regarding appellant's separate fraud claim, the trial court likewise reasoned that appellant's allegations did not amount to fraud and additionally found that the cause of action for his claims of fraudulent inducement and fraud accrued on August 28, 2009 at the latest. Therefore, those claims were barred under the statute of limitations.

{¶ 11} Appellee then moved for summary judgment on its counterclaim for default on the promissory note signed by appellant for the outstanding balance of $273,868.71 plus interest. The trial court addressed appellant's arguments that the note was paid in full, that appellee cannot collect under the theory of "estoppel by election," that the previously resolved claims of breach of contract and fraud barred payment, that the case *Lucarell v. Nationwide Mut. Ins. Co.*, 7th Dist. No. 13 MA 74, 2015-Ohio-5286, relieved him of the obligation to pay the note, and that the trial court should use its equitable powers to deny enforcement of the note. Finding each argument to lack merit, on January 26, 2016, the trial court granted appellee's motion. (Jan. 26, 2016 Decision & Jgmt. Entry at 2.)

{¶ 12} On February 25, 2016, appellant filed both a motion for relief from final judgment, pursuant to Civ.R. 60(B)(5), and a timely notice of appeal from the trial court's January 26, 2016 judgment. This court remanded the matter to the trial court for the limited purpose of ruling on the Civ.R. 60(B) motion, in which appellant alleged the trial court's decision on summary judgment for the breach of contract claim conflicted with *Lucarell*. The trial court denied appellant's Civ.R. 60(B) motion on April 20, 2016, and appellant filed a timely appeal from that decision. The two appeals were consolidated and are now ripe for review.

II. ASSIGNMENTS OF ERROR

{¶ 13} Appellant presents two assignments of error:

> [1.] The trial court erred as a matter of law in granting Defendant/Appellee Nationwide's Motion for Summary

> Judgment on Plaintiff/Appellant Greenzalis' claim for Breach of Contract.
>
> [2.] The trial court erred as a matter of law in granting Defendant/Appellee Nationwide's Motion for Summary Judgment on its Counterclaim.

III. STANDARD OF REVIEW

{¶ 14} We review a summary judgment motion de novo. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994), citing *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711 (4th Dist.1993). When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.*, 83 Ohio App.3d 103, 107 (10th Dist.1992); *Brown* at 711. We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 15} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978).

{¶ 16} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). " 'The requirement that a party seeking summary judgment disclose the basis for the motion and support the motion with evidence is well founded in Ohio law.' " *Vahila v. Hall*, 77 Ohio

St.3d 421, 429 (1997), quoting *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115 (1988). Thus, the moving party may not fulfill its initial burden simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. *Dresher* at 293.

{¶ 17} Rather, the moving party must support its motion by pointing to some evidence of the type set forth in Civ.R. 56(C), which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. *Id.* If the moving party has satisfied its initial burden under Civ.R. 56(C), then "the nonmoving party * * * has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Id.*

IV. DISCUSSION

A. First Assignment of Error

{¶ 18} Under the first assignment of error, appellant contends that the trial court erred in granting appellee's motion for summary judgment because appellant established the necessary elements of breach of contract and because the trial court decided a factual issue—whether appellee terminated the AE agreement—on which reasonable minds could differ.

{¶ 19} We first note that appellant does not challenge the trial court's ruling on the fraud claim or argue this assignment of error in terms of Civ.R. 60(B) legal standards. Therefore, our review on appeal is confined to whether the trial court erred in granting summary judgment to appellee on the breach of contract claim under the parameters of summary judgment standard of review.

{¶ 20} A breach of contract claim must, as a starting point, establish the contract from which to identify a breach. *Gianetti v. Teakwood, Ltd.*, 10th Dist. No. 15AP-413, 2016-Ohio-213, ¶ 12, quoting *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, ¶ 18 (10th Dist.) (" 'To recover upon 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.' ").

{¶ 21} Here, appellant's argument is based on an allegation that appellee breached its original AE agreement[2] by "unilaterally" terminating that original agreement without a contractual basis and in a fraudulent manner, which allegedly allowed appellant no choice but to sign the modification or surrender his business and leave the program rather than to continue on the terms of the original agreement. (Appellant's Brief at 8.) Appellant additionally argues that appellee breached the covenant of good faith and fair dealing by indicating in a letter that appellant had selected the option of modifying the original AE agreement, which appellant asserts as a falsity, and in allegedly not permitting appellant to return to the original terms of the AE agreement. Appellant does not assert a separate "stand alone" cause of action based on the covenant of good faith and fair dealing. (Appellant's Reply Brief at 11.) For the following reasons, we disagree with appellant's position.

{¶ 22} First, appellant's argument does not address the effect, if any, that the modification to the original AE agreement has on resolving the assignment of error. In this case, appellant undisputedly chose to sign a modification to the original AE agreement, clearly stated as such, enabling him to access several hundred thousand dollars in an additional cash infusion and chose to proceed on the AE agreement terms as modified. Although appellant alludes to either being pressured into signing the modification to the AE agreement or having no choice but to do so, appellant does not articulate an argument on appeal, framed within and supported by legal authority, to call the validity of the modification of the AE agreement into doubt.[3] Therefore, even assuming appellant's allegations to be true on these points for sake of argument, appellant's arguments nonetheless fall short of demonstrating error on appeal. *Watkins v. Holderman*, 10th Dist. No. 11AP-491, 2012-Ohio-1707, ¶ 11; App.R. 16(A).

{¶ 23} Second, contrary to appellant's position, the trial court did not improperly decide a factual issue regarding whether appellee terminated the AE agreement. As stated above, prior to establishing a breach, which is ordinarily a question of fact within the

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[2] As appellant does not assert a breach of the modification to the AE agreement, we do not reference those terms within this decision.

[3] For example, in his appellate brief, appellant did not set forth supported legal arguments or even delineate as claims, fraudulent inducement or duress relating to the modification.

province of the jury, appellant had to establish the existence of the contract itself. *Hanna v. Groom*, 10th Dist. No. 07AP-502, 2008-Ohio-765, ¶ 14, 16. Whether a contract exists and interpretation of that contract is a question of law. *Id.* at ¶ 9. As a question of law, the trial court did not err in determining that the AE agreement was modified by the parties rather than terminated. Having determined that the parties modified the AE agreement, the question of whether appellee breached the termination term stated in the original AE agreement was immaterial and, therefore, not a factual issue necessary for the trial court to put before a jury.

{¶ 24} Third, on independent review, we agree with the trial court's conclusion that the modified AE agreement controlled the parties' relationship and determines the outcome here. Under established contract law principles, it is self-evident that a valid modification of an agreement determines the contractual relationship of the parties rather than the preexisting, unmodified terms of the original agreement. *Ohio Farmers Ins. Co. v. Cochran*, 104 Ohio St. 427 (1922), paragraph three of the syllabus. *See, e.g., Pate v. Quick Solutions, Inc.*, 10th Dist. No. 10AP-767, 2011-Ohio-3925, ¶ 22.

{¶ 25} Here, the express language of the modification to the AE agreement is unambiguous, clearly establishing its status as a modification and a continuation of the AE agreement. Appellant signed the agreement and has not articulated a viable basis to challenge the validity of that modification. Appellant chose to proceed with the AE agreement as modified and take his chances with the new terms and benefits therein. Appellant does not allege a breach of the AE agreement as modified. Considering the above, appellant cannot maintain an action for breach of contract and the breach of the covenant of good faith and fair dealing based on the original AE agreement.

{¶ 26} As noted by the trial court and by appellee, a consistent result was reached in *Frisch* under similar circumstances. *Id.* at 480-84. In *Frisch*, after determining that the plaintiff did not have a viable claim for breach of the original AE agreement, the court held that under Ohio law, the plaintiff could not maintain a separate cause of action for breach of the implied covenant of good faith and fair dealing. Within its analysis, the *Frisch* court reasoned "[h]aving accepted the modification and with no basis to now challenge the validity of that modification, Plaintiff cannot sustain a claim for breach of

the unmodified [agency agreement] because the modified terms govern the parties' contractual relationship." *Id.* at 482. Two trial court level cases that have considered this issue, *Varnadore v. Nationwide Mut. Ins. Co.*, S.D.Ohio No. 2:13-cv-827 (May 20, 2014), and *Forbes v. Nationwide Mut. Ins. Co.*, Franklin C.P. No. 14-CV-4944 (May 19, 2015), reached the same conclusion.

{¶ 27} Appellant asserts that *Frisch* conflicts with *Lucarell*,[4] a case where the plaintiff brought claims and a jury awarded damages to the plaintiff based on the original and the modified AE agreement separately, and that as an Ohio case, *Lucarell* should control here. Appellee urges us to not consider appellant's argument regarding *Lucarell* as appellant did not raise the case or the trial court's Civ.R. 60(B) determination on *Lucarell* in his principal appellate brief.[5] Appellee additionally argues that *Lucarell* is inapplicable, as the appellate court expressly stated that it could not review appellee's arguments regarding the breach of contract claims for error.

{¶ 28} "A reply brief is not the place for raising new arguments. Rather, it is merely a forum for replying to appellee's brief. App.R. 16(C)." *Spires v. Div. of Mineral Resources Mgmt.*, 7th Dist. No. 06 BE 54, 2007-Ohio-5038, ¶ 30. To the extent that appellant cites *Lucarell* for the first time in his reply as a means to interject new issues and bases to overrule the trial court, we decline to consider those issues for the first time. *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, ¶ 18. To the extent that appellant uses *Lucarell* in response to appellee's citation to *Frisch* in its brief, we considered the case but disagree with appellant's argument. Contrary to appellant's position, we cannot say that the *Lucarell* court rejected or otherwise ruled on the issue considered in *Frisch* or the case here. The issue considered in *Lucarell*, as framed in the opinion, is whether the jury allegedly found a breach of the duty of good faith and fair dealing without finding a breach of the contract at issue. *Id.* at ¶ 68. The court expressly stated that it could not review appellee's claim for error. *Id.* at ¶ 71. We also note that

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[4] The Supreme Court of Ohio recently accepted discretionary appeal of *Lucarell*. *See Nationwide Mut. Ins. Co. v. Lucarell*, 146 Ohio St.3d 1469, 2016-Ohio-5108.

[5] The Seventh District Court of Appeals decided *Lucarell* on December 17, 2015—several months after the trial court's September 2015 judgment on appellee's motion for summary judgment on appellant's claims. As stated in the facts, appellant raised the *Lucarell* case to the trial court within its ensuing Civ.R. 60(B) motion and in response to appellee's motion for summary judgment on its counterclaim.

whereas *Frisch* considered a scenario "with no basis to now challenge the validity of that modification," *Lucarell* considered a scenario where the jury excused the agent's performance under the contracts either due to prevention of performance or duress. *Frisch* at 482; *Lucarell* at ¶ 81. Considering all the above, we do not find *Lucarell* determinative in this case.

{¶ 29} In summary, as appellant has not alleged a breach of the AE agreement as modified, he cannot prevail on a claim for breach of contract and the covenant of good faith and fair dealing. In the circumstances of this case, our independent review shows no genuine issue of material fact remains to be litigated, appellee is entitled to judgment as a matter of law, and even viewing the evidence most strongly in favor of appellant, reasonable minds can come to but one conclusion, that conclusion being adverse to appellant. *Harless* at 66. Therefore, summary judgment is appropriate in favor of appellee.

{¶ 30} Accordingly, on the facts of this case, we overrule appellant's first assignment of error.

B. Second Assignment of Error

{¶ 31} Under the second assignment of error, appellant contends that the trial court erred as a matter of law in granting appellee's motion for summary judgment on its counterclaim. For the following reasons, we disagree.

{¶ 32} Appellant poses two arguments to support reversible error. First, appellant argues that appellee's claim for breach of promissory note fails because the assignment of the note from Nationwide Bank to appellee is null and void. Appellant reasons that appellee's payment of the note in full extinguished the note, thereby rendering the assignment a nullity. As such, appellant asserts that appellee cannot bring an action on the note. Second, appellant argues that appellee's claim for equitable indemnification fails because appellee did not present an equitable case.

{¶ 33} The crux of appellant's first argument is that because the note was paid in full, the note no longer existed when Nationwide Bank assigned the note to appellee. Appellant cites to *Minks v. Byerly*, 60 Ohio App. 240 (5th Dist.1938), in support of this proposition. In *Minks*, the plaintiffs were co-makers and principal debtors on a

promissory note with the defendants. The payee on the note demanded payment, and the plaintiffs paid the remaining balance. The bank assigned its interest in the note to plaintiffs "[f]or $1 and other valuable consideration." *Id.* at 242. The timing of the payment of the remaining balance in full in relation to the assignment is not exactly clear but appears to have both occurred on the same day.

{¶ 34} Based on the facts of the case, the *Minks* court determined that the plaintiff could not base its action on the note but, rather, had an action in reimbursement. However, *Minks* also recognized cases involving similar scenarios that did give rise to a cause of action on the note. For example, *Zuellig v. Hemerlie*, 60 Ohio St. 27 (1899), recognized that although payment of a note generally extinguishes the note, a surety who pays a debt and concurrently takes an assignment of the note may maintain an action at law on the note. *Minks* at 243-44, citing *Zuellig* at 34.

{¶ 35} The scenario discussed in *Zuellig* is consistent with general principles of guaranty law. As discussed in Restatement of the Law 3d, Suretyship and Guaranty, although a guarantor may have a cause of action in reimbursement or restitution, where a guarantor totally satisfies an underlying obligation, such as paying off a promissory note entirely, general principles of guaranty law establish a guarantor's right to step into the shoes of a payee to enforce the note against the principal debtor. Restatement of the Law 3d, Suretyship and Guaranty, Section 27 (1996). In such a circumstance, although the guarantor completely discharged the underlying obligation, the law permits the guarantor to enforce the rights of the payee as though the underlying obligation had not been satisfied. Restatement of the Law 3d, Suretyship and Guaranty, Section ¶ 27, Comment a, and Section 28(1) (1996). This principle, subrogation, is "often called an equitable assignment." Restatement of the Law 3d, Suretyship and Guaranty, Section 27, Comment a (1996). "[I]t is a rule that the law adopts to compel the eventual satisfaction of an obligation by the one who ought to pay it." Restatement of the Law 3d, Suretyship and Guaranty, Section 27, Comment a (1996).

{¶ 36} However, enforcement of the note by a guarantor is not limited to actions in equity. As explained in Restatement of the Law 3d, Suretyship and Guaranty, Section 28, Comment h (1996), "[i]n some cases, a subrogated secondary obligor would not be able to

enforce certain rights of the obligee unless those rights are formally assigned to the secondary obligor. In such cases the obligee must execute any instruments necessary to enable the subrogated secondary obligor to enforce those rights." *See also* Restatement of the Law 3d, Suretyship and Guaranty, Section 27, Comment a (1996) ("Subrogation does not spring from contract although it may be confirmed or qualified by contract."). Relatedly, under commercial paper law, "[a]n accommodation party who pays the instrument is entitled to reimbursement from the accommodated party *and* is entitled to enforce the instrument against the accommodated party." (Emphasis added.) R.C. 1303.59(E); U.C.C. 3-419. *See also Metro. Bank & Trust Co. v. Rebound Rehab. Servs.*, 8th Dist. No. 77198 (Nov. 2, 2000) (noting the settled commercial practice of guarantors paying consideration for an assignment of debt to protect its interests); *Rice v. Montgomery*, 10th Dist. No. 02AP-1261, 2003-Ohio-5577, ¶13, 18-19, *appeal not accepted for review*, 101 Ohio St.3d 1488, 2004-Ohio-1293, citing R.C. 1303.22(A) (upholding a guarantor's right to purchase an unpaid promissory note from a payee bank and subsequently bring a cause of action for breach of contract against others still obligated on the note).

{¶ 37} Here, undisputed facts establish both appellee's contractual and equitable claims. The promissory note clearly obligates appellant to pay Nationwide Bank's assigns and obligates appellant to pay back the loan regardless of whether appellee reimburses Nationwide Bank for all or any part of the loan. Appellant agreed to the loan terms and defaulted on those terms triggering acceleration of the loan. Appellant did not pay back the outstanding loan amount and does not dispute the amount. Appellee, as guarantor of the loan, paid the note in full. In consideration for appellee's payment of the guaranteed amount, Nationwide Bank assigned all of its rights, title, and interest in the promissory note and the security agreement to appellee. Considering the facts of this case, appellant's arguments regarding appellee's contractual and equitable claims for breach of promissory note lack merit. Therefore, we find the trial court did not err as a matter of law in granting appellee's motion for summary judgment on its counterclaim.

{¶ 38} Accordingly, on the facts of this case, we overrule appellant's second assignment of error.

V. CONCLUSION

{¶ 39} Having overruled appellant's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

DORRIAN, P.J., and BRUNNER, J., concur.

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