

[Cite as *Glover v. Ohio Dept. of Commerce*, 2009-Ohio-6987.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Richard E. Glover, Jr.,	:	
Appellant-Appellant,	:	No. 09AP-91
v.	:	(C.P.C. No. 08CVF08-12430)
Ohio Department of Commerce,	:	(REGULAR CALENDAR)
Division of Real Estate and	:	
Professional Licensing,	:	
Appellee-Appellee.	:	

D E C I S I O N

Rendered on December 31, 2009

The Law Office of Sean A. McCarter, and Sean A. McCarter,
for appellant.

Richard Cordray, Attorney General, and Cheryl R.
Hawkinson, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Appellant, Richard E. Glover, Jr., appeals from the judgment of the Franklin County Court of Common Pleas, which affirmed the order of the Ohio Real Estate Commission ("the Commission"). The Commission had adopted in part and rejected in part a Report and Recommendation by the Administrative Hearing Officer of the Department of Commerce, Division of Real Estate and Professional Licensing

("appellee"). For the reasons that follow, we affirm the decision of the court of common pleas.

{¶2} Appellant has been a real estate broker licensed to practice in Ohio since 1971 and a partner in Real Estate Opportunities since approximately 1991. (Hearing Examiner Tr. 82.) Appellant purchased a house from Peter C. Lee, located at 355 North Sunbury Road. Approximately a year later, appellant wrote Lee a letter explaining that he had encountered many significant problems with the house and it needed approximately \$75,000 in repairs. Appellant then received notification from appellee that alleged he engaged in misconduct, in violation of R.C. Chapter 4735, during the negotiation of the purchase of the house. The factual allegations which were in the Report and Recommendation of the Administrative Hearing Officer were that appellant had:

I. Negotiated the sale or exchange of the Subject Property directly with the seller knowing that such seller was represented by another broker under an exclusive right to sell listing contract in violation of R.C. § 4735.18(A)(19).

II. Accepted and/or charged a \$55,000.00 "consulting fee" from the seller that was not disclosed in the purchase contract in violation of R.C. § 4735.18(A)(13).

III. Failed to ensure all financial obligations and commitments regarding real estate transactions are in writing, expressing the exact agreement of the parties in violation of R.C. § 4735.18(A)(6) as that section incorporates Section II, Article 9 of the Canons of Ethics for the Real Estate Industry.

IV. Failed to endeavor to maintain and establish high standards of professional conduct and integrity in dealings with members of the public as well as with fellow licensees and, further, seek to avoid even the appearance of impropriety in any activities with a licensee. This constitutes

a violation of R.C. § 4735.18(A)(6), misconduct, as it incorporates the Canons of Ethics, Section I, Article I.

{¶3} The testimony at the hearing revealed that Lee owned the property at 355 North Sunbury Road and it was listed with an HER agent for approximately a year before Lee approached appellant and asked him to sell it. Lee and appellant had a business relationship for approximately 15 years. Since appellant was involved in mostly commercial real estate, he co-listed the property with Thomas McClanahan of Re/Max Affiliates in order to better market the house to residential customers. Lee entered an Exclusive Right to Sell Listing Contract on June 7, 2005 with McClanahan and appellant as a co-lister agent. (Exhibit B; Tr. 83.) Lee testified that appellant approached him to purchase the house, but appellant testified that Lee approached him to purchase the house. The hearing examiner found that Lee made several requests for appellant to purchase the property, and on November 8, 2005, appellant finally agreed to purchase it. (Report & Recommendation, ¶20.)

{¶4} On November 8, 2005, appellant and Lee completed a new Agency Disclosure Statement, where appellant represented himself and McClanahan was the sole agent for Lee. (Exhibit D.) Lee testified he did not understand that appellant was representing himself and not Lee. (Tr. 53.) Appellant testified that when Lee approached him to buy the house, the two discussed the things that were required for him to purchase the house and Lee agreed to them. The total was a payment from Lee to appellant for \$151,745 including: (1) a \$55,000 second mortgage note on appellant's house on Worthington Road, so appellant would have cash to fix that house to sell it; (2) \$55,000 as payment to appellant for things he had done for Lee in the past; (3) \$10,000 in closing costs; (4) \$10,400 to fix the pool and the rest constituted appellant's

commission on the sale of the Sunbury Road house. (Exhibit 3; Tr. 152.) After that conversation, which did not include McClanahan, appellant wrote a real estate purchase contract and delivered it to Lee's attorney for review. Prior to completing the contract, appellant telephoned McClanahan to inquire about the commission split. (Tr. 106; 145.)

{¶5} Appellant testified that he met with Lee and his attorney, Mr. Barone, on at least two occasions to make revisions to the purchase contract, but McClanahan was not included in those meetings. The final contract was signed on December 7, 2005, and the closing was December 15, 2005. (Exhibit G.) On October 21, 2006, appellant sent Lee a letter explaining the major problems he had experienced with the house, which repairs cost approximately \$75,000. Appellant felt Lee had failed to reveal the extensive problems and the letter explained appellant's willingness to exchange the forgiveness of the note and mortgage on the Worthington Road house. Soon after, appellant received the notice of hearing from appellee that alleged he engaged in misconduct, in violation of R.C. Chapter 4735, during the negotiation of the purchase of the Sunbury Road house.

{¶6} The hearing examiner found that appellant violated R.C. 4735.18(A)(19) when he negotiated the sale of the property directly with the seller when he knew the seller was represented by another broker. The hearing examiner also found appellant violated R.C. 4735.18(A)(13) by charging Lee a \$55,000 consulting fee that was not disclosed in the purchase contract and that appellant violated R.C. 4735.18(A)(6) as it incorporates Section II, Article 9 of the Canons of Ethics because appellant failed to ensure all financial obligations were in writing. The hearing examiner found appellant

did not violate charge number four, failure to maintain high standards of professional conduct and integrity.

{¶7} Appellant filed objections. The Commission overruled the objections and adopted in part and rejected in part the Report and Recommendation by the hearing examiner, finding appellant violated all four charges. The Commission imposed a total of \$7,000 and additional hours of continuing education requirements for each count as a penalty.

{¶8} Pursuant to R.C. 119.12, appellant filed a notice of appeal to the Franklin County Court of Common Pleas. The common pleas court affirmed the Commission's order. Appellant filed a notice of appeal and raised the following assignments of error:

[1.] The lower court erred in concluding that Appellant violated R.C. §4735.18(A)(19) as alleged in Count I by negotiating with a seller.

[2.] The lower court erred in determining that the \$55,000 consulting fee was an undisclosed commission in violation of R.C. §4735.18(A)(13).

[3.] The lower court erred in determining that Appellant's conduct with regard to documentation of the consulting fee established "dishonest or illegal dealing, gross negligence, incompetency or misconduct" sustaining a violation of R.C. §4735.18(A)(6).

[4.] The lower court erred in determining that Appellant had violated R.C. §4735.18(A)(6).

{¶9} In his first assignment of error, appellant contends that the common pleas court erred in concluding that appellant violated R.C. 4735.18(A)(19) as alleged in count one by negotiating with a seller.

{¶10} R.C. 119.12 provides the standard of review for the common pleas court, as follows:

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

{¶11} Reliable, probative and substantial evidence have been defined in *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571, as follows:

(1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

{¶12} The Supreme Court of Ohio recently clarified the standards of review under R.C. 119.12 in *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826. Pursuant to R.C. 119.12, a reviewing common pleas court conducts two inquiries, both a hybrid factual/legal inquiry and a purely legal inquiry. As to the hybrid factual/legal inquiry, the common pleas court must give deference to the agency's resolution of evidentiary conflicts. *Bartchy* at ¶37, citing *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 470-71. "[A]n agency's findings of fact are presumed correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable." *Id.* However, "the findings of the agency are by no means

conclusive.' * * * 'Where the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, and necessary to its determination, the court may reverse, vacate, or modify the administrative order.' " *Bartchy* at ¶37 quoting *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111.

{¶13} The second inquiry in the common pleas review under R.C. 119.12 requires the court to construe the law on its own. *Bartchy* at ¶38. On appeal, the standard of review is more limited than that of the common pleas court. "It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. The appellate court is to determine only if the trial court has abused its discretion." *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. An abuse of discretion "implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency." *Bartchy* at ¶41 quoting *State ex rel. Commercial Lovelace Motor Freight, Inc. v. Lancaster* (1986), 22 Ohio St.3d 191, 193. Appellate courts must not substitute their judgment for those of an administrative agency or a common pleas court absent the approved criteria for doing so. *Bartchy* at ¶42, citing *Rossford*, supra. An appellate court's scope of review on issues of law is plenary. *Bartchy* at ¶43, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶14} Appellant presents several arguments as to why the trial court's decision constitutes an abuse of discretion in concluding that appellant violated R.C. 4735.18(A)(19) as alleged in Count I. R.C. 4735.18(A)(19), as effective in 2005, provided as follows:

(A) Subject to section 4735.32 of the Revised Code, the superintendent of real estate, upon the superintendent's own motion, may investigate the conduct of any licensee. Subject to section 4735.32 of the Revised Code, the Ohio real estate commission shall, pursuant to section 4735.051 of the Revised Code, impose disciplinary sanctions upon any licensee who, whether or not acting in the licensee's capacity as a real estate broker or salesperson, or in handling the licensee's own property, is found to have been convicted of a felony or a crime of moral turpitude and shall, pursuant to section 4735.051 of the Revised Code, impose disciplinary sanctions upon any licensee who, in the licensee's capacity as a real estate broker or salesperson, or in handling the licensee's own property, is found guilty of:

* * *

(19) Having negotiated the sale, exchange, or lease of any real property directly with an owner, purchaser, lessor, or tenant knowing that such owner, purchaser, lessor, or tenant had a written outstanding contract granting exclusive agency in connection with such property to another real estate broker[.]

{¶15} Appellant contends that the common pleas court erred in requiring appellant to have obtained written authorization from the seller's agent to deal directly with the seller as required by the version of R.C. 4735.18(A)(19), as enacted in October 2006. Appellant argues that he informed the seller's agent, McClanahan, of the negotiations; thus, there can be no violation.

{¶16} In *Meeks v. Papadopoulos* (1980), 62 Ohio St.2d 187, 190, the court quoted *Sears v. Weimer* (1944), 143 Ohio St. 312, paragraph five of the syllabus, as follows: " '[w]here the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for * * * [resort] to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted.' "

{¶17} Appellant testified that at the time Exhibit D, a new Agency Disclosure Statement was signed, November 8, 2005, appellant represented himself and McClanahan was the sole agent for Lee. (Tr. 89.) He stated that all of the negotiations for the purchase did not include McClanahan, even though appellant knew that McClanahan was the listing agent and real estate agent for Lee and that appellant was not acting as a dual agent. (Tr. 89.) Appellant stated that he and Lee negotiated the sale of Lee's house in appellant's office and worked through the numbers using Exhibit 3.

{¶18} Regardless of whether the common pleas court reviewed the facts using the incorrect version of the statute, our scope of review on issues of law is plenary. Given appellant's testimony that he negotiated directly with the seller and the seller's agent was not involved with the negotiations, there is evidence that appellant violated the statute. While the 2006 version of the statute provides an exception to the objectionable conduct by providing that if the agent obtains a written authorization from the seller's agent to negotiate directly with the seller, then there is no violation.¹

¹R.C. 4735.18 as effective October 2006, provided, as follows:

(A) Subject to section 4735.32 of the Revised Code, the superintendent of real estate, upon the superintendent's own motion, may investigate the conduct of any licensee. Subject to section 4735.32 of the Revised Code, the Ohio real estate commission shall, pursuant to section 4735.051 of the Revised Code, impose disciplinary sanctions upon any licensee who, whether or not acting in the licensee's capacity as a real estate broker or salesperson, or in handling the licensee's own property, is found to have been convicted of a felony or a crime of moral turpitude, and shall, pursuant to section 4735.051 of the Revised Code, impose disciplinary sanctions upon any licensee who, in the licensee's capacity as a real estate broker or salesperson, or in handling the licensee's own property, is found guilty of:

(19) Having negotiated the sale, exchange, or lease of any real property directly with a seller, purchaser, lessor, or tenant knowing that such seller, purchaser, lessor, or tenant is represented by another broker under a written exclusive agency agreement, exclusive right to sell or lease listing agreement, or exclusive purchaser agency agreement with respect to such property except as provided for in section 4735.75 of the Revised Code[.]

However, in this case, there is no written authorization so any application is irrelevant. Appellant's conduct violated both the 2005 and 2006 versions of the statute. In the 2005 version of the statute, there is no exception or defense written into the statute and the plain language provides that if an agent negotiates directly with an owner while knowing that the owner is represented, the facts that appellant testified to in this case, then there is a violation and the statute provides that the Commission shall impose disciplinary sanctions.

{¶19} Appellant attempts to argue that McClanahan knew of the negotiations because appellant testified that he called to inquire about the commission split and since McClanahan did not testify and, thus, acquiesced in the negotiation. However, the 2005 statute provides for no direct negotiation with an owner who is represented by an agent. Whether McClanahan acquiesced or not is irrelevant. The trial court did not err in finding that there is reliable, probative, and substantial evidence to support the Commission's order that he violated R.C. 4735.18(A)(19) as alleged in Count I by negotiating with a seller and affirming the order. Appellant's first assignment of error is overruled.

{¶20} In his second assignment of error, appellant contends that the common pleas court erred in determining that the \$55,000 consulting fee was an undisclosed commission in violation of R.C. 4735.18(A)(13). R.C. 4735.18(A)(13) provided in 2005, as follows:

(A) Subject to section 4735.32 of the Revised Code, the superintendent of real estate, upon the superintendent's own motion, may investigate the conduct of any licensee. Subject to section 4735.32 of the Revised Code, the Ohio real estate commission shall, pursuant to section 4735.051 of the Revised Code, impose disciplinary sanctions upon any

licensee who, whether or not acting in the licensee's capacity as a real estate broker or salesperson, or in handling the licensee's own property, is found to have been convicted of a felony or a crime of moral turpitude, and shall, pursuant to section 4735.051 of the Revised Code, impose disciplinary sanctions upon any licensee who, in the licensee's capacity as a real estate broker or salesperson, or in handling the licensee's own property, is found of:

* * *

(13) Having accepted, given, or charged any undisclosed commission, rebate, or direct profit on expenditures made for a principal[.]

{¶21} Appellant testified that the \$55,000 that Lee paid to him was for previous work he had performed but had not billed Lee and Lee had not paid for such work. He stated that the fee was an inducement for the deal but not part of the deal because it was for work performed outside of this contract. (Tr. 91.) He testified that the fee was payment for working to get escrowed money released from the sale of another property, getting crops out of storage and selling them, borrowing his car, and being listed as the real estate agent in Lee's divorce decree and having the final decision-making power on the sale of real estate and such liability. (Tr. 94.) Appellant argues that the fee was not "undisclosed" because both Lee and his attorney knew about the fee.

{¶22} However, the fee was not disclosed in either written contract. Appellant alleges that it was disclosed in the December contract but that contract references only the second mortgage on the Worthington Road property. (Exhibit F-10.) In fact, the contract specifically sets forth that the contract constitutes the entire agreement and that there were no oral or written representations not incorporated within the contract. (Exhibit F-7 ¶12.2.) However, there was an entire agreement as to what constituted the

\$151,745 that Lee paid to appellant at the closing, but the \$55,000 "consulting fee" was not written into the contract. (Exhibit F-10.)

{¶23} Moreover, Ohio courts have held that regulatory agencies, including the Ohio Real Estate Commission, may rely on their own expertise in determining whether certain conduct violates professional standards. See *McAdams v. Ohio Dept. of Commerce, Div. of Real Estate & Professional Licensing*, 8th Dist. No. 86639, 2006-Ohio-2321; *Hughes v. Ohio Real Estate Comm.* (July 22, 1999), 8th Dist. No. 74480; *Richard T. Kiko Agency, Inc. v. Ohio Dept. of Commerce, Div. of Real Estate* (1990), 48 Ohio St.3d 74.

{¶24} In *Seith v. Ohio Real Estate Comm.* (1998), 129 Ohio App.3d 432, the Eighth District Court of Appeals observed that the Ohio Real Estate Commission has primary enforcement responsibility in the licensing and disciplining of real estate salespeople and the administrative agency must be accorded due deference.

{¶25} Thus, given the administrative agency may rely on its own expertise to determine whether certain conduct violates professional standards and its determinations should be accorded due deference, we find that the common pleas court did not abuse its discretion in finding that there is reliable, probative, and substantial evidence, and the order is in accordance with law regarding that appellant violated R.C. 4735.18(A)(13) because the \$55,000 consulting fee was an undisclosed commission. Appellant's second assignment of error is overruled.

{¶26} By his third assignment of error, appellant contends that the common pleas court erred in determining that his conduct with regard to documentation of the consulting fee established "dishonest or illegal dealing, gross negligence, incompetency

or misconduct" in violation of R.C. 4735.18(A)(6). Appellant was charged in Count III with failing to ensure that all financial obligations and commitments regarding the real estate transactions were in writing, in violation of R.C. 4735.18(A)(6), as that section incorporates Section II, Article 9 of the Canons of Ethics for the Real Estate Industry. R.C. 4735.18(A)(6) provided at that time, as follows:

(A) Subject to section 4735.32 of the Revised Code, the superintendent of real estate, upon the superintendent's own motion, may investigate the conduct of any licensee. Subject to section 4735.32 of the Revised Code, the Ohio real estate commission shall, pursuant to section 4735.051 of the Revised Code, impose disciplinary sanctions upon any licensee who, whether or not acting in the licensee's capacity as a real estate broker or salesperson, or in handling the licensee's own property, is found to have been convicted of a felony or a crime of moral turpitude, and shall, pursuant to section 4735.051 of the Revised Code, impose disciplinary sanctions upon any licensee who, in the licensee's capacity as a real estate broker or salesperson, or in handling the licensee's own property, is found guilty of:

* * *

(6) Dishonest or illegal dealing, gross negligence, incompetency, or misconduct[.]

{¶27} Section II, Article 9 of the Canons of Ethics for the Real Estate Industry provided "the licensee should see that financial obligations and commitments regarding real estate transactions are in writing, expressing the exact agreement of the parties; and that copies of all agreements, at the time they are executed, are placed in the hands of all parties involved."

{¶28} The hearing examiner found that the \$55,000 consulting fee was negotiated as part of the deal but was not included in either purchase contract, finding that the only time the consulting fee appeared in writing was in the handwritten notes by

Barone that never were a part of the purchase contract. Therefore, the hearing examiner found a violation and the Commission agreed.

{¶29} Appellant argues that the consulting fee was set forth in the December 7, 2005 real estate contract because it sets forth that Lee would pay \$151,745 to appellant which included the consulting fee. Therefore, appellant argues that the "in writing" requirement of Section II, Article 9 of the Canons of Ethics was met.

{¶30} In *Kiko*, supra, at paragraph two of the syllabus, the Supreme Court of Ohio defined "misconduct" under R.C. 4735.18(F), as including "unprofessional conduct or that conduct involving any breach of duty which is prohibited under professional codes of ethics, or conduct which is contrary to law." As already discussed, the Commission may rely on its own expertise in determining whether certain conduct violates its professional standards, and we give due deference to its findings.

{¶31} Appellant testified that the \$55,000 was an inducement on the deal and would not have purchased the house if it was not part of the deal. He also testified that he understood that all financial terms had to be in writing. (Tr. 92.) There was reliable, probative, and substantial evidence for the Commission to determine that appellant failed to ensure that all financial obligations and commitments regarding the real estate transaction was in writing, in violation of R.C. 4735.18(A)(6), as that section incorporates Section II, Article 9 of the Canons of Ethics for the Real Estate Industry and the common pleas court did not abuse its discretion in affirming the order. Appellant's third assignment of error is overruled.

{¶32} By his fourth assignment of error, appellant contends that the lower court erred in determining that appellant violated R.C. 4735.18(A)(6). As already stated, R.C. 4735.18(A)(6) provided at that time, as follows:

(A) Subject to section 4735.32 of the Revised Code, the superintendent of real estate, upon the superintendent's own motion, may investigate the conduct of any licensee. Subject to section 4735.32 of the Revised Code, the Ohio real estate commission shall, pursuant to section 4735.051 of the Revised Code, impose disciplinary sanctions upon any licensee who, whether or not acting in the licensee's capacity as a real estate broker or salesperson, or in handling the licensee's own property, is found to have been convicted of a felony or a crime of moral turpitude, and shall, pursuant to section 4735.051 of the Revised Code, impose disciplinary sanctions upon any licensee who, in the licensee's capacity as a real estate broker or salesperson, or in handling the licensee's own property, is found guilty of:

* * *

(6) Dishonest or illegal dealing, gross negligence, incompetency, or misconduct[.]

{¶33} The hearing examiner found that there was no violation of Count IV, which charged appellant with:

Failed to endeavor to maintain and establish high standards of professional conduct and integrity in dealings with members of the public as well as with fellow licensees and, further, seek to avoid even the appearance of impropriety in any activities as a licensee. This constitutes a violation of R.C. 4735.18(A)(6), misconduct, as it incorporates the Canons of Ethics, Section I, Article 1.

{¶34} Section I, Article I, of the Canons of Ethics provides, as follows:

Licensing as a real estate broker or salesman indicates to the public at large that the individual so designated has special expertise in real estate matters and is subject to high standards of conduct in the licensee's business and personal affairs. The licensee should endeavor to maintain and establish high standards of professional conduct and

integrity in dealings with the public as well as with fellow licensees and, further, seek to avoid even the appearance of impropriety in any activities as a licensee.

{¶35} The hearing examiner found that Lee was a sophisticated business person and real estate investor and understood the deal he agreed to before he entered into the transaction. Since the deal was an arms-length transaction between two persons knowledgeable in real estate and business, the hearing examiner concluded that appellant did not fail to maintain high standards of professional conduct.

{¶36} The Commission disapproved that portion of the Report & Recommendation and concluded that there was a violation of Count IV, finding that appellant's actions amounted to misconduct, appellant had failed to maintain high standards of professional conduct and did not avoid the appearance of impropriety.

{¶37} Appellant argues that the Commission could not reject the hearing examiner's legal conclusion without modifying his findings of fact because there were no facts to establish "gross negligence, incompetency or misconduct" as required by R.C. 4735.18(A)(6). However, as already discussed, the Commission found that appellant's actions amounted to misconduct when he negotiated directly with the owner and failed to ensure that all financial obligations and commitments regarding the real estate transaction were in writing. R.C. 119.09 permits the Commission to approve, modify, or disapprove the recommendation of the hearing examiner, and the Commission did so. Appellant's fourth assignment of error is overruled.

{¶38} For the foregoing reasons, appellant's four assignments of error are

overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.
