REL: January 15, 2021

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190175

Barbara Terrell

v.

Oak & Alley Homes, LLC

Appeal from Dale Circuit Court
(CV-19-900029)

HANSON, Judge.

Barbara Terrell appeals from a judgment of the Dale Circuit Court awarding Oak & Alley Homes, LLC ("Oak & Alley"), $27,037.70 on its claims against Terrell. For the following reasons, we affirm.

Facts and Procedural History

In February 2018, Terrell's house was damaged by water in an incident that triggered casualty-insurance coverage. Following the completion of initial cleanup work, Terrell contacted Nicholas Davis, the sole member of Oak & Alley, and requested that he provide her with an estimate to repair her house. In response, Davis visited Terrell's house and, using specialized software utilized in the construction industry for estimating the cost of insurance jobs, generated a 15-page estimate detailing the repair work proposed to be done. Davis estimated that the repair work would cost $64,686.99. At Terrell's request, Davis submitted the estimate to Terrell's insurance company. He did not send a copy of the estimate directly to Terrell, but, on March 12, 2018, he informed her via text message that he had estimated that the proposed repairs would cost "close to $65,000." Terrell sent Davis a text message on March 19, 2018, stating: "You can start work on the house as soon as possible." She

followed up on March 23, 2018, with a text message to Davis, stating: "Your proposal for the work ... has been approved. Let me know when you are ready to start and I will give you access to the house." Sometime thereafter, Oak & Alley began work on Terrell's house.

On May 22, 2018, Oak & Alley sent Terrell the first of three invoices, setting forth therein current charges of $5,966.60. The first invoice stated that the "contract amount" was $64,686.99. Terrell paid the current charges stated on the first invoice. On August 2, 2018, Oak & Alley sent Terrell a second invoice setting forth current charges of $25,500; that second invoice, like the first invoice, identified the total contract price as $64,686.99. Terrell paid the current charges stated on the second invoice. On October 1, 2018, Oak & Alley sent Terrell a third and final invoice in the amount of $24,820.39.

In response to the third invoice, on or about October 22, 2018, Terrell wrote Davis a letter, which stated, in part:

> "I believe that there is a huge misunderstanding over the cost of the work done at my house. ... You were never contracted or guaranteed the amount you submitted to [my insurance company]. The insurance money is mine to pay for the actual work completed. You were instructed ... to submit

> an amount that would replace the items in the home at today's cost. That price that was submitted was to return the home to its original state.
>
> "After the estimate was submitted I then decided to alter the decor that would be going back into the home so that it would be more cost efficient and economical. I eliminated the wallpaper for paint because of the cost of supplies and for installation. I also chose to eliminate the cost of custom cabinets, vanities, solid oak flooring, and a custom hand painted mural. All of those items were priced when the estimate was given. There is no conceivable way that sheetrock, paint, vinyl flooring for 3 rooms, manufactured vanities, toilet, and a shower could result in the amount that you are asking for. I personally paid for the lights, fans, mirrors, bathroom accessories, and flooring in the game room and bath areas. What I need from you is an itemized statement of the actual expenses, to include original receipts of supplies and true labor costs.
>
> "....
>
> "I pray that we can resolve this misunderstanding of your payment when I receive the original receipts of supplies and true labor costs."

On October 22, 2018, Davis replied by letter, which stated, in part:

> "This letter is in response to your letter which I received in the mail on Monday, October 22, 2018. In February of this year you contacted me about possibly completing work on your ... home. ...
>
> "Your original quote was for $64,686.99 which was approved by your insurance company and yourself. After

> starting the project, the scope of work changed out of necessity and your preferences. You made several changes in order to save money; however, you also made changes that increased the cost of the project. ...
>
> "Contrary to what you believe, the invoices that you have received from me have been based on the actual work completed, not the amount that was originally submitted to your insurance company."

Davis's letter also informed Terrell that he had received two additional invoices from subcontractors and that the outstanding balance for the work completed on her house was $28,597.56. Terrell made no further payments to Oak & Alley.

On February 14, 2019, Oak & Alley initiated its action against Terrell seeking $27,037.70, which Oak & Alley alleged was the unpaid balance for the work it had performed on Terrell's house. In its complaint, Oak & Alley alleged a breach-of-contract claim and a work-and-labor-done claim. Terrell moved for a summary judgment, arguing, in part, that Oak & Alley's claims were barred as a matter of law because, she said, Oak & Alley had failed to enter into a "valid written contract" as required by Ala. Code 1975, § 34-14A-7(f), a portion of the Home Builders Licensure Act, Ala. Code 1975, § 34-14A-1 et seq ("the Act"). The trial court denied

Terrell's motion for a summary judgment, and a bench trial on Oak & Alley's claims was conducted on October 22, 2019.

At trial, Davis testified that, at all pertinent times, he and Oak & Alley had held a valid residential-homebuilders license issued by the Alabama Home Builders Licensure Board ("the Board").[1] Davis stated that he had previously done a remodeling job for Terrell. Davis testified that, at Terrell's instruction, he had prepared an estimate to repair the damage to Terrell's house; that he had estimated that the necessary repairs would cost $64,686.99; that, at Terrell's request, he had sent that estimate to Terrell's insurer; that he had informed Terrell that the amount of his estimate was "close to $65,000"; and that Terrell had informed him that his proposal had been accepted and requested that he begin performing the contemplated repair work. Copies of the parties' text messages evidencing their exchange, along with the estimate submitted to Terrell's insurer, were admitted into evidence at trial.

[1]Oak & Alley's residential-homebuilders license designated Davis as the "qualifying representative" of Oak & Alley. The parties agree that Oak & Alley's work at Terrell's house fell within conduct regulated by the Act.

Davis testified that, as the repair work had progressed, Terrell had made several changes from the original proposal, some of which had reduced the estimated cost and some of which had entailed extra costs that had not been included in the original estimate. Further, Davis testified that he had encountered unexpected conditions that increased the cost of the work and had caused delay. For example, Davis stated that, during the renovation work, he had discovered water leaking from Terrell's basement wall, which, he claimed, had resulted in several thousand dollars' worth of extra work attempting to locate and repair the problem. Davis testified that, despite some additional charges, the work was completed for less than the original $64,686.99 estimate. He further stated that the amount he had billed to Terrell represented actual work performed by Oak & Alley or its subcontractors at Terrell's house. Davis admitted that there was no formal written contract signed by Terrell related to the remodeling work performed by Oak & Alley, but he contended that their agreement was sufficiently memorialized by the parties' text messages, the written estimate, and the invoices provided to Terrell.

Terrell testified that her insurance policy had provided coverage that, she said, would reimburse her for the cost to restore her house to its condition before the water damage. She stated, however, that she had planned to market her house for sale after completion of the renovation work and, thus, had not intended for the house to be restored to its precise pre-repair condition; rather, she admitted, she had intended to use less expensive materials to restore the house. For example, she noted that she had substituted vinyl flooring for the original oak flooring, painted walls for wallpaper, and a manufactured vanity to replace custom cabinetry. Terrell, nevertheless, stated that she had intended to pay Oak & Alley for the work it completed but opined that the amount billed to her by Oak & Alley had exceeded the value of the labor and materials actually provided by Oak & Alley. Terrell, however, offered no evidence directly relating to the value of the work actually performed by Oak & Alley. Terrell also expressed her displeasure with the length of time it had taken Oak & Alley to complete the restoration work. Terrell testified that Davis had previously completed a smaller job at another house she owned and that she had, therefore, trusted him.

On October 24, 2019, the trial court entered a judgment in favor of Oak & Alley and against Terrell, concluding as follows:

> "After considering all the evidence presented the Court finds as follows: The Court finds that the main issue in this case is whether a contract existed. The Court finds there was mutual assent of the parties. There was an offer and acceptance. The Court finds that the repair work to be done listed in the estimate was agreed to at the price of $65,000. The Court finds consideration from the evidence for a contract. The Court finds the parties had the capacity to enter into a contract. The Court finds the contract to be a valid legal contract as contemplated in [§] 34-14A-7(f). The Court finds that the estimate and text messages together provide enough to make a valid written contract. The Court finds the changes in the contract were not material and that [Oak & Alley] substantially performed the provisions of the contract. When a party to an agreement owes a duty to perform and fails to fulfill her obligation, she is said to have breached the contract. The Court finds that [Terrell's] failure to pay the final invoice breached the contract of the parties. Therefore, it is hereby ORDERED, ADJUDGED and DECREED a Judgment for [Oak & Alley] and against [Terrell is rendered] in the amount of $27,037.70, for which execution may issue."

(Capitalization in original.) Terrell filed a timely notice of appeal from the judgment.

Standard of Review

> "'"When ore tenus evidence is presented, a presumption of correctness exists as to the trial court's findings on issues of fact; its judgment

based on these findings of fact will not be disturbed unless it is clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence. J & M Bail Bonding Co. v. Hayes, 748 So. 2d 198 (Ala. 1999); Gaston v. Ames, 514 So. 2d 877 (Ala. 1987). When the trial court in a nonjury case enters a judgment without making specific findings of fact, the appellate court 'will assume that the trial judge made those findings necessary to support the judgment.' Transamerica Commercial Fin. Corp. v. AmSouth Bank, 608 So. 2d 375, 378 (Ala. 1992). Moreover, '[u]nder the ore tenus rule, the trial court's judgment and all implicit findings necessary to support it carry a presumption of correctness.' Transamerica, 608 So. 2d at 378. However, when the trial court improperly applies the law to [the] facts, no presumption of correctness exists as to the trial court's judgment. Allstate Ins. Co. v. Skelton, 675 So. 2d 377 (Ala. 1996); Marvin's, Inc. v. Robertson, 608 So. 2d 391 (Ala. 1992); Gaston, 514 So. 2d at 878; Smith v. Style Advertising, Inc., 470 So. 2d 1194 (Ala. 1985); League v. McDonald, 355 So. 2d 695 (Ala. 1978). 'Questions of law are not subject to the ore tenus standard of review.' Reed v. Board of Trustees for Alabama State Univ., 778 So. 2d 791, 793 n.2 (Ala. 2000). A trial court's conclusions on legal issues carry no presumption of correctness on appeal. Ex parte Cash, 624 So. 2d 576, 577 (Ala. 1993). This court reviews the application of law to facts de novo. Allstate, 675 So. 2d at 379 ('[W]here the facts before the trial court are essentially undisputed and the controversy involves questions of law for the court to consider, the [trial] court's judgment carries no presumption of correctness.')." '

> "[Farmers Ins. Co. v. Price-Williams Assocs., Inc.,] 873 So. 2d [252,] 254-55 [(Ala. Civ. App. 2003)] (quoting City of Prattville v. Post, 831 So. 2d 622, 627-28 (Ala. Civ. App. 2002))."

Kellis v. Estate of Schnatz, 983 So. 2d 408, 412 (Ala. Civ. App. 2007).

Analysis

Terrell's chief contention on appeal is that the trial court erred in entering a judgment in favor of Oak & Alley because, she says, no signed written contract executed by the parties existed. In support of that contention, Terrell cites § 34-14A-7(f), Ala. Code 1975, which provides that a licensed residential homebuilder "shall utilize a valid written contract when engaging in the business of residential home building." Terrell argues that because there was not a written agreement signed by her and by Oak & Alley, the parties' agreement violated Alabama's public policy and was, therefore, unenforceable. Consistent with that argument, Terrell also challenges the trial court's finding "that the estimate and text messages together provide[d] enough to make a valid written contract" sufficient to satisfy the written-contract requirement in § 34-14A-7.

Before addressing Terrell's argument as to whether the evidence in this case sufficiently sets forth a written agreement sufficient to satisfy § 34-14A-7(f), we first address Terrell's central premise that an unwritten agreement between a licensed home builder and a homeowner contravenes public policy and is, therefore, unenforceable. "It is true that '[i]t has long been the law in Alabama that when a contract is made in violation of a statute, that contract is generally void and unenforceable.' " Grand Harbour Dev., LLC v. Lattof, 127 So. 3d 1230, 1236 (Ala. Civ. App. 2013) (quoting Kilgore Dev., Inc. v. Woodland Place, LLC, 47 So. 3d 267, 270 (Ala. Civ. App. 2009)). Nevertheless,

> " '[t]he principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reason on which the doctrine rests.' Lowery v. Zorn, 243 Ala. 285, 288, 9 So. 2d 872, 874 (1942); see also, e.g., Livingston v. Tapscott, 585 So. 2d 839 (Ala. 1991); Ex parte Rice, 258 Ala. 132, 61 So. 2d 7 (1952). As our Supreme Court explained in Milton Construction Co. v. State Highway Department, 568 So. 2d 784 (Ala. 1990),
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> > " ' "The courts are averse to holding contracts unenforceable on the ground of public policy unless their illegality is clear and certain. Since the right of private contract is no small part of the liberty of the citizen, the usual and most important function of courts of justice is to maintain and enforce

> contracts rather than to enable parties thereto to escape from their obligations on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare. ...
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> "'"Many courts have cautioned against recklessness in condemning agreements as being in violation of public policy. Public policy, some courts have said, is a term of vague and uncertain meaning which it is the duty of the law-making power to define, and courts are apt to encroach upon the domain of that branch of the government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law. Other courts have approved the statement of an English judge that public policy is an unruly horse astride of which one may be carried into unknown paths. Considerations such as these have led to the statement that the power of the courts to declare an agreement void for being in contravention of sound public policy is a very delicate and undefined power and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." '

"568 So. 2d at 788 (quoting 17 Am. Jur. 2d Contracts § 178 (1964) (last emphasis added; other emphasis supplied by the Supreme Court in Milton)." [2]

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[2]Milton was subsequently abrogated in Ex parte Alabama Department of Transportation, 978 So. 2d 17, 22-23 (Ala. 2007), to the extent Milton had purported to address the propriety of maintaining a

Alfa Specialty Ins. Co. v. Jennings, 906 So. 2d 195, 199-200 (Ala. Civ. App. 2005).

In this case, there is reason to doubt that public policy requires the invalidation of a licensed residential homebuilder's contract on the basis that the parties have failed to strictly adhere to § 34-14A-7(f). To be sure, that section provides that a licensed residential homebuilder "shall utilize a valid written contract when engaging in the business of residential home building." The Act, however, does not expressly render an oral contract entered by a licensed residential homebuilder void or unenforceable. That the legislature did not include such a provision is instructive, because the Act does expressly prohibit the enforcement of residential-homebuilding contracts under certain other circumstances. For example, § 34-14A-14(d), Ala. Code 1975, provides that "[a] residential home builder, who does not have the license required, shall not bring or maintain any action to enforce the provisions of any contract for residential home building which he or she entered into in violation of" the Act. The fact that the Act

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civil action against an agency of this state in a court of this state.

expressly prohibits the enforcement of residential-homebuilding contracts under those expressly enumerated circumstances indicates that the same penalty was not intended with regard to oral contracts entered into by licensed residential homebuilders. See, e.g., Jefferson Cnty. v. Alabama Criminal Justice Info. Ctr. Comm'n, 620 So. 2d 651, 658 (Ala. 1993) ("Under the principle of expressio unius est exclusio alterius, a rule of statutory construction, the express inclusion of requirements in the law implies an intention to exclude other requirements not so included.").

Moreover, the legislature set forth within the Act specific penalties and remedies respecting a licensed residential homebuilder's violations of the Act, which penalties and remedies do not include rendering a building contract unenforceable. The Act and the associated regulations promulgated by the Board pursuant to authority granted in the Act provide that a licensed residential homebuilder may be disciplined by the Board for failing to utilize a valid written contract. Under the Act, however, the discipline authorized for such a violation is limited to revoking or suspending the offending residential homebuilder's license, requiring the offending homebuilder to complete remedial-education

courses, and levying administrative fines not to exceed $5,000. See § 34-14A-8, Ala. Code 1975; Ala. Admin. Code (Home Builders Licensure Board), r. 465-x-5-.07(1)(d) (providing that that Board "may revoke or suspend the respondent's license, may require the successful completion of builder education course(s), and may levy and collect administrative fines not to exceed $5,000 per violation of the Act or these rules ... upon a finding ... that the licensee has failed to use a valid written contract when engaging in the business of residential home building").[3] Likewise, the Act establishes a "Homeowners' Recovery Fund" from which an aggrieved homeowner may collect a judgment obtained against a licensed residential homebuilder arising from a violation of the Act. See § 34-14A-15, Ala. Code 1975; Ex parte Bradford, 795 So. 2d 652 (Ala. 2000). Again, that the legislature set forth clear and specific penalties and remedies for a licensed residential homebuilder's violation of the terms of the Act that do not include avoidance of a contract, while simultaneously proscribing

[3] We have cited to, and quoted from, the current version of r. 465-x-5-.07(1), which became effective October 15, 2020. At all times relevant to this case, what is currently r. 465-x-5-.07(1)(d) was r. 465-x-5-.07(1)(e).

the enforcement of contracts entered into by unlicensed residential homebuilders, indicates that it is not the public policy of Alabama to preclude enforcement of oral contracts by licensed residential homebuilders. See Water Works & Sewer Bd. of Prichard v. Polyengineering, Inc., 555 So. 2d 1050, 1053-54 (Ala. 1990) (holding that violation of professional-corporations statute was not ground to declare a contract void and unenforceable when that statute provided that violations could result in the loss of corporation's franchise or in the dissolution of the corporation but not for the voiding of contracts); K. Miller Constr. Co. v. McGinnis, 238 Ill. 2d 284, 297-301, 938 N.E.2d 471, 480-82, 345 Ill. Dec. 32, 41-43 (2010) (holding that oral contract for home remodeling was not unenforceable despite contractor's violation of provision of Illinois Home Repair and Remodeling Act requiring use of a signed written contract; the act did not state that oral contracts were unenforceable and set forth other remedies for violations).

Furthermore, we note that the stated purpose of requiring licensure of residential homebuilders is to protect the public from "unqualified, incompetent, or dishonest home builders and remodelers [that may]

provide inadequate, unsafe, or inferior building services." Ala. Code 1975, § 34-14A-1; see also Hooks v. Pickens, 940 So. 2d 1029, 1031-32 (Ala. Civ. App. 2006). In this case, however, Oak & Alley held a valid homebuilders license, satisfying the regulatory purpose of the Act. Indeed, other jurisdictions that have addressed whether a licensed contractor or professional can enforce an unwritten agreement under similar licensing schemes have concluded that "public safety" concerns are not implicated when the contractor at issue is duly licensed. See Rasmus Constr. Corp. v. Nagel, 168 Misc. 2d 520, 646 N.Y.S.2d 926 (Sup. Ct. 1996); Felix v. Zlotoff, 90 Cal. App. 3d 155, 153 Cal. Rptr. 301 (1979).

Accordingly, we conclude that the language and the purpose of the Act indicate that its harshest penalties, including the inability to enforce a completed contract, are to be reserved for unlicensed residential homebuilders[4] and that it is not the public policy of Alabama to deprive

[4]The Act also imposes criminal liability on unlicensed residential homebuilders. § 34-14A-14(a), Ala. Code 1975 ("Any person who undertakes ... the business of residential home building without holding a current and valid residential home builders license ... shall be deemed guilty of a Class A misdemeanor.").

licensed residential homebuilders the ability to recover payment for work performed, notwithstanding the lack of a signed written contract. Thus, Oak & Alley was not precluded from bringing a breach-of-contract or work-and-labor-done action to enforce its agreement with Terrell.

Having determined that Oak & Alley was not prohibited from pursing its claims, we next determine whether the evidence was sufficient to support the trial court's finding that there existed a binding contract between the parties. " 'The basic elements of a contract are an offer and an acceptance, consideration, and mutual assent to the essential terms of the agreement.' " Stacey v. Peed, 142 So. 3d 529, 531 (Ala. 2013) (quoting Hargrove v. Tree of Life Christian Day Care Ctr., 699 So. 2d 1242, 1247 (Ala. 1997)).

> "It is well settled that whether parties have entered a contract is determined by reference to the reasonable meaning of the parties' external and objective actions. Conduct of one party from which the other may reasonable draw an inference of assent to an agreement is effective as acceptance."

SGB Constr. Servs., Inc. v. Ray Sumlin Constr. Co., 644 So. 2d 892, 895 (Ala. 1994).

On appeal, Terrell argues that there was not mutual assent regarding the price of Oak & Alley's work. There was, however, substantial evidence supporting the existence of such mutual assent. The record reveals evidence indicating that Oak & Alley prepared an estimate detailing its proposed work and the cost thereof and, at Terrell's request, sent it to Terrell's insurer and notified her of the approximate price, to which Terrell assented. Accordingly, the trial court's finding of mutual assent was supported by the evidence.

Finally, Terrell argues that the contract between her and Oak & Alley was not enforceable because, she contends, the contract was fatally indefinite. Specifically, she points to testimony indicating that she had had the ability to make changes to the scope of the renovations at any time. With regard to indefiniteness, our supreme court has explained:

> " 'To be enforceable, the [essential] terms of a contract must be sufficiently definite and certain, Brooks v. Hackney, 329 N.C. 166, 170, 404 S.E. 2d 854, 857 (1991), and a contract that " 'leav[es] material portions open for future agreement is nugatory and void for indefiniteness' " ....' Miller v. Rose, 138 N.C. App. 582, 587-88, 532 S.E.2d 228, 232 (2000) (quoting MCB Ltd. v. McGowan, 86 N.C. App. 607, 609, 359 S.E.2d 50, 51 (1987), quoting in turn Boyce v. McMahan, 285 N.C. 730, 734, 208 S.E. 2d 692, 695 (1974)). 'A lack of definiteness in an

> agreement may concern the time of performance, the price to be paid, work to be done, property to be transferred, or miscellaneous stipulations in the agreement.' 1 Richard A. Lord, Williston on Contracts § 4:21, at 644 (4th ed. 2007). 'In particular, a reservation in either party of a future unbridled right to determine the nature of the performance ... has often caused a promise to be too indefinite for enforcement.' Id. at 644-48 (emphasis added). See also Smith v. Chickamauga Cedar Co., 263 Ala. 245, 248-49, 82 So. 2d 200, 202 (1955) (' "A reservation to either party to a contract of an unlimited right to determine the nature and extent of his performance, renders his obligation too indefinite for legal enforcement." ') (quoting 12 Am.Jur. Contracts § 66). Cf. Beraha v. Baxter Health Care Corp., 956 F.2d 1436, 1440 (7th Cir. 1992) (an indefinite term may 'render[] a contract void for lack of mutuality' of obligation).
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> " 'Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.' 17A Am. Jur.2d Contracts § 183 (2004). 'The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.' Id. (emphasis added). See also Smith, 263 Ala. at 249, 82 So. 2d at 203."

White Sands Grp., L.L.C. v. PRS II, LLC, 998 So. 2d 1042, 1051 (Ala. 2008). Furthermore,

> "[a] court will, if possible, interpret doubtful agreements by attaching a sufficiently definite meaning to a bargain if the parties evidently intended to enter into a binding contract. This is particularly true if the plaintiff has fully or partly performed because the performance may either remove the

> uncertainty or militate in favor of recovery even if the uncertainty continues."

1 Richard A. Lord, Williston on Contracts § 4:21 (4th ed. 2007) (footnotes omitted); see also Poole v. Prince, 61 So. 3d 258, 275 (Ala. 2010) (further noting that, for a contract to be considered void on the basis of indefiniteness, the indefiniteness much "reach the point where construction becomes futile").

In this case, all the essential terms of the contract were sufficiently certain. That the parties agreed, as the renovation progressed, to substitute various materials and finishes at Terrell's request that had not been originally proposed did not thereby render the agreement unenforceable.

Conclusion

Based on the foregoing, the judgment of the trial court is affirmed.

AFFIRMED.

Thompson, P.J., and Moore and Donaldson, JJ., concur.

Edwards, J., concurs in the result, without writing.