NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5796-11T4

FRANCIS J. DOOLEY, ESQ.,

Plaintiff-Appellant,

v.

DIANA LA PADULA, ESQ., RICHARD W. WEDINGER, ESQ.; ANTHONY W. GUIDICE, ESQ.; LAUREL WEDINGER-GYIMESI, ESQ.; SEAN M. CONNELLY, ESQ.; THE LAW FIRM OF BARRY, MCTIERNAN AND WEDINGER, ESQS.; HARTFORD INSURANCE COMPANY; SPECIALTY RISK SERVICES, INC.;[1]

Defendants-Respondents,

and

GALLAGHER BASSETT SERVICES, INC., HELEN JOHNSON, Personally and as Guardian of THOMAS (TOMMY) JOHNSON, and the Estate of the Late THOMAS (TOMMY) JOHNSON,

Defendants.

Submitted November 20, 2013 – Decided April 25, 2014

Before Judges Lihotz, Maven and Hoffman.

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[1] We have corrected the caption as plaintiff's complaint improperly designated defendant Specialty Risk Services, Inc. as Selective Risk Services, Inc.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-5037-10.

Eichen Crutchlow Zaslow & McElroy, LLP, attorneys for appellant (Christian R. Mastondrea, on the brief).

Traub Lieberman Straus & Shrewsberry LLP, attorneys for respondents Diana LaPadula, Esq., Richard W. Wedinger, Esq., Anthony W. Guidice, Esq., Laurel Wedinger-Gyimesi, Esq., Sean M. Connelly, Esq., and the Law Firm of Barry, McTiernan and Wedinger, Esqs. (Aileen F. Droughton, of counsel and on the brief; Marta N. Kozlowska, on the brief).

Smith, Stratton, Wise, Heher & Brennan, LLP, attorneys for respondents Hartford Financial Services Group, Inc., and Specialty Risk Services, LLC (Thomas E. Hastings, of counsel and on the brief; William H. Hofmann, on the brief).

PER CURIAM

Plaintiff Francis J. Dooley, Esq. appeals from Law Division orders dismissing his complaint against various defendants. Plaintiff claimed that defendants engaged in tortious conduct that caused a former client to decline to utilize his services. For the reasons that follow, we affirm.

I.

From September 27, 2004 until April 3, 2007, plaintiff represented Tommy Johnson (Tommy)[2] in a product liability action

[2] Tommy sustained a severe brain injury in the subject accident that rendered him incompetent. On December 6, 2006, the court (continued)

arising out of a work-related accident which occurred on June 7, 2000. In the accident, Tommy sustained serious injuries when he fell from a side step on a side-loader garbage truck while it was making a left turn at an intersection in Franklin Lakes.

Plaintiff took over the case from another attorney in 2004 and proceeded to file an amended complaint and prepare the case for trial.[3] Plaintiff sued various defendants, including Fabrication LaBrie, Inc., and LaBrie Equipment, Ltd. (collectively LaBrie). Plaintiff alleged LaBrie negligently designed and manufactured the LaBrie 200 side-loader garbage truck involved in the accident and these defects caused the accident and Tommy's resulting injuries. The case proceeded to trial in January 2007. The jury found that the truck LaBrie had manufactured and sold to Tommy's employer was defective, but the design defect was not a proximate cause of Tommy's accident. The jury also found LaBrie's failure to provide any warning for the truck was unreasonable, but the absence of a warning was

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(continued)
appointed his mother, Helen Johnson (Mrs. Johnson), as his guardian.

[3] Plaintiff also took over Tommy's representation in his pending workers' compensation case. In March 2005, plaintiff successfully moved to compel payment of workers' compensation benefits for Tommy, including $63,000 in temporary disability payments. Plaintiff acknowledged receiving a check for $19,000 in payment of his services on the workers' compensation claim.

also not a proximate cause of Tommy's accident. As a result, the jury rendered a defense verdict of no cause of action and the trial judge dismissed the complaint on January 20, 2007.

Following the verdict, counsel for defendant Specialty Risk Services, LLC (SRS), the third-party administrator for Tommy's workers' compensation claim, corresponded with plaintiff about filing post-trial motions as well as the deadline for filing an appeal. According to those letters, plaintiff advised counsel for SRS that he would file the post-judgment motions only if SRS agreed to pay him $250 plus costs. SRS agreed and plaintiff filed the motions, which the court denied on March 2, 2007.

When plaintiff advised counsel for SRS that he did not intend to file an appeal, SRS retained the law firm of Barry, McTiernan and Wedinger (the Barry firm) to pursue an appeal of the case to preserve its subrogation rights.[4] At the time of trial, the workers' compensation lien totaled $257,109.66, and continued to accrue. On March 2, 2007, plaintiff sent a letter to Diana LaPadula, Esq. of the Barry firm, stating that

> [w]e have to . . . work out the money particulars. I assume that SRS, or whoever is going to pay for the appeal[,] is

[4] "[I]f the injured worker does not diligently pursue a third-party recovery, the compensation carrier is authorized to institute an action against the tortfeasor to directly enforce its subrogation right. N.J.S.A. 34:15-40(f)." Primus v. Alfred Sanzari Enters., 372 N.J. Super. 392, 405 (App. Div. 2004)

> including your fee. If the appeal is successful, this case will be retried. If so, I want to resume my status as trial counsel. But the expenses of the second trial will have to be borne by the [worker's] compensation carrier.

The Barry firm interpreted this letter to mean plaintiff did not intend to file an appeal on behalf of the Johnsons and, in fact, he did not. On April 3, 2007, the Barry firm timely filed a notice of appeal and on May 4, 2007, LaPadula sent a letter to plaintiff confirming her understanding that Tommy

> did not intend to pursue the liability action further.
>
> This correspondence accordingly confirms that your client will not be contributing to [a]pellate fees and costs (currently in excess of $4,500.00), as he will not be pursuing any appeal on his own behalf. Thus, should the [c]arrier wish to continue this appeal, it will proceed under the provisions of N.J.S.A. 34:15-40. Thereunder, it will seek reimbursement of the lien in full, and should there be any money remaining, same will go to your client, subject to the [c]arrier's rights for future credits, and without waiver of any of the [c]arrier's rights by [s]tatute.

On July 29, 2008, we decided the appeal of the no cause verdict in Tommy's case; we reversed and remanded for a new trial on the issue of proximate cause, concluding the trial judge erred in admitting evidence concerning Tommy's comparative fault and in charging the jury on comparative negligence. Johnson v. Navistar Int'l Transp. Corp., No. A-4045-06 (App.

Div. July 29, 2008) (slip op. at 1). In our opinion, we found no reason to disturb the jury's determinations of product defect regarding "the failure to install grab handles and the failure to warn of the danger of riding on the side step without grab handles." Id. at 28. We concluded these issues were "not so interrelated with proximate cause as to require a retrial on all issues." Id. at 29.

Upon learning of the successful efforts of the Barry firm on the appeal, Mrs. Johnson decided to formally retain that firm for the retrial, and a retainer agreement was prepared and executed. Before the retrial, the case settled for $1.5 million in December 2008. Because Tommy's injuries left him mentally incapacitated, a "friendly" hearing was held on December 16, 2008 for the court to approve the settlement. See Rule 4:44-3. Plaintiff appeared at the hearing before Judge Frances Antonin and argued that he remained the Johnson's attorney of record. The judge disagreed, finding that once plaintiff did not appeal the no cause verdict, he no longer remained the attorney of record. Nevertheless, Judge Antonin's order approving the settlement provided for the payment of plaintiff's costs:

> [T]he remaining sum of $6,823.50 shall be escrowed . . . for payment of costs incurred by predecessor counsel, provided predecessor counsel submits to the [Barry] firm . . . within thirty (30) days . . . proof that said costs are due from Mrs.

> Johnson . . . under any prior [r]etainer she may have signed in this matter . . . . In the event there are any monies remaining in this escrow after the thirty day time period has expired . . . said remaining monies shall be remitted to Mrs. Johnson . . .

Thereafter, plaintiff failed to submit the proof of his costs to the Barry firm, but instead sought payment directly from the Johnsons. Because plaintiff failed to submit the requisite proofs to the Barry firm, LaPadula paid the escrowed money to Mrs. Johnson, as required by the court's order.

Twenty-one months after the "friendly" settlement hearing, plaintiff commenced the litigation under review naming various defendants, including respondents Hartford Financial Services Group, Inc. (Hartford Financial),[5] SRS, and the Barry firm.[6] Plaintiff alleged that he and Mrs. Johnson had a continuing contractual relationship and the Barry firm and the workers' compensation defendants tortuously interfered with this contractual relationship, and otherwise "conspired . . . to

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[5] Tommy's workers' compensation carrier, Reliance Insurance Company, became insolvent in 2001. Plaintiff's complaint mistakenly alleged that Hartford Financial "replaced" Reliance as the insurer on Tommy's compensation claim; in fact, the entity designated to handle Reliance's claims retained SRS to administer Tommy's claim. At the time, SRS was a subsidiary of Hartford Financial.

[6] In addition to the Barry firm, plaintiff sued LaPadula and three other members of the firm individually. Further references to the Barry firm encompass the firm members plaintiff sued individually.

deprive the plaintiff compensation for services rendered to the [Johnsons]." He further alleged that the Barry firm's simultaneous representation of Mrs. Johnson and SRS presented an "extreme conflict of interest." Plaintiff claimed compensatory damages of $500,000 and also demanded punitive damages.

In lieu of answering, SRS and Hartford Financial filed motions; SRS moved to dismiss for failure to state a claim upon which relief could be granted and Hartford Financial moved for summary judgment. Plaintiff opposed both motions but did not dispute Hartford Group's statement of material facts.

On June 10, 2011, Judge Hector R. Velazquez granted both motions, dismissing all claims against defendants SRS and Hartford Insurance. The judge found that "there are no facts that would support a claim for tortious interference against SRS. There's no indication that SRS played any role in the decision by [Mrs.] Johnson to retain the Barry law firm." Similarly, the judge found "no basis . . . to support a claim under any theory of liability against Hartford Financial. This is especially true where in [plaintiff's] response to [requests] for admissions, he states that he does not know how Hartford is responsible for any loss he may have incurred."

The Barry firm also moved to dismiss plaintiff's complaint. Judge Velazquez denied the motion and permitted plaintiff full

discovery as to his claims against the Barry firm. One year later, following completion of discovery, the Barry firm defendants moved for summary judgment. On June 15, 2012, Judge Barry P. Sarkisian ruled in favor of the Barry firm and dismissed plaintiff's complaint, finding no material issue of fact present. In support of the motion, the Barry firm submitted a certification from Mrs. Johnson verifying that LaPadula never told her she was a certified trial attorney nor did she ever make disparaging remarks about plaintiff.

After reviewing the chronology of the case in detail, Judge Sarkisian concluded "the Barry firm's actions in no way were an inducement to discharge the plaintiff. . . . There was no impermissible action taken by the Barry firm nor was there any right to an expectation of a future relation between the Johnsons and . . . Mr. Dooley." Moreover, the court found the facts "sufficiently established that [plaintiff] did not prosecute this appeal in any way, shape or form. That was totally handled by the Barry firm."

Acknowledging that "a client is always entitled to be represented by counsel of his own choosing[,]" Jacob v. Norris, 128 N.J. 10 (1992), Judge Sarkisian noted that contracts between attorneys and clients are terminable at will. Therefore, he addressed the question whether plaintiff had "any reasonable

expectancy of a future relation," and concluded in the negative, finding "that concept really has no application to the facts in this case." The judge found the Barry firm's actions did not induce the client to discharge plaintiff. Rather, "[t]his was a voluntary action that was taken by the client." The judge also rejected plaintiff's claim of conflict of interest, because the Johnsons and the workers' compensation carrier had an "identity of interest in seeking to have the verdict of the jury overturned."

II.

We review the trial court's grant of summary judgment de novo and apply the same standard as the trial court. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). Pursuant to Rule 4:46, we "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

We likewise review de novo a trial court's order granting a motion to dismiss under Rule 4:6-2. Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div.), certif. denied, 185 N.J. 297, (2005). We limit our inquiry "'to examining the legal

sufficiency of the facts alleged on the face of the complaint[.]'" Nostrame v. Santiago, 213 N.J. 109, 127 (2013) (quoting Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989)). The test for determining the adequacy of a pleading is "whether a cause of action is 'suggested' by the facts." Ibid. (quoting Printing Mart-Morristown, supra, 116 N.J. at 746). Nevertheless, "if the complaint states no basis for relief and discovery would not provide one, dismissal is the appropriate remedy." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005).

Because a contract between an attorney and a client for the provision of legal services is terminable at will by the client, Cohen v. Radio-Elecs. Officers Union, 146 N.J. 140, 157 (1996), a claim alleging tortious interference with an attorney-client relationship should be evaluated as a claim for tortious interference with a prospective contractual relationship. Nostrame, supra, 213 N.J. at 121. The elements of such a claim are:

> "One who intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
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> (b) preventing the other from acquiring or continuing the prospective relation."
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> [Id. at 122 (quoting Restatement (Second) of Torts § 766B).]

In Nostrame, the Court reviewed the Restatement sections dealing with tortious interference with an existing contract, tortious interference with a prospective contractual relationship, and tortious interference when the parties are competitors. The Court noted that

> [u]nderlying all of these sections of the Restatement, including those that address relationships between competitors and that consider the implications of a contract terminable at will, however, is a recognition that the one who acts to induce another is not free to do so by any means whatsoever. Regardless of whether the focus is on an existing contract, a contract terminable at will, or a purely prospective contractual relationship, the means utilized may be neither improper, . . . nor wrongful[.]
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> . . . .
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> There can be no doubt that inducing another to end a contractual relationship through acts that amount to fraud or defamation would be wrongful. But even in the context of ordinary business competitors, our understanding of wrongfulness has been broadened beyond these traditional categories. Our Appellate Division, for example, has recognized that deceit and misrepresentation can constitute

> wrongful means. See Shebar v. Sanyo Bus. Sys. Corp., 218 N.J. Super. 111, 118 (App. Div. 1987) (holding that using deceit to prevent employee from accepting alternate employment while planning to terminate him would be actionable), aff'd, 111 N.J. 276 (1988) Similarly, our courts have concluded that "violence, fraud, intimidation, misrepresentation, criminal or civil threats, and/or violations of the law" are among the kinds of conduct that would be considered to be "wrongful means." E Z Sockets, Inc. v. Brighton-Best Socket Screw Mfg. Inc., 307 N.J. Super. 546, 559 (Ch. Div. 1996), aff'd, 307 N.J. Super. 438 (App. Div. 1997). On the other hand, lesser sorts of behavior have been found to fall short of constituting wrongful means in the ordinary business context. See Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 205-06 (App. Div.) (holding that "vigorous" solicitation of competitor company's customers was not wrongful), certif. denied, 141 N.J. 99 (1995); C.R. Bard, Inc. v. Wordtronics Corp., 235 N.J. Super. 168, 174 (Law Div. 1989) (holding that "sneaky" or "underhanded" acts are not "wrongful means").
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> [Id. at 123-24 (citing Restatement (Second) of Torts § 766, 766B, 768(1)).]

Additionally, attorneys are bound by the Rules of Professional Conduct which further limit how an attorney may approach a client who is already represented by another attorney. Id. at 125-26. Attorneys "are prohibited from making statements about another attorney that are defamatory or that amount to fraud[,]. . . . they may not make misrepresentations, may not use tactics to pressure or harass, may not . . . make

comparisons, may not disparage other attorneys, and may not offer promises about results." Id. at 126. In Nostrame, the court found that the mere fact that Nostrame's client discharged him was, in fact, not proof of wrongful or improper conduct; thus, the plaintiff did not establish a claim of tortious interference with contractual relations. Id. at 126, 129.

III.

Plaintiff first challenges on procedural grounds the Law Division orders granting summary judgment to Hartford Financial and granting the motion to dismiss filed by SRS. Plaintiff asserts the motions were premature, as the court denied him an opportunity to conduct discovery. We are not persuaded.

Plaintiff's complaint failed to allege SRS or Hartford Financial wrongfully interfered with any prospective economic advantage he may have had. To prove a claim, a plaintiff must show that it had a reasonable expectation of economic advantage that was lost as a direct result of defendants' malicious interference, and that it suffered losses thereby. Lamorte Burns & Co. v. Walters, 167 N.J. 285, 305-06 (2001). However, an entity's exercise of a valid business judgment in pursuit of its economic interest does not constitute tortious interference with prospective economic advantage. See Ideal Dairy, supra, 282 N.J. Super. at 199 (finding that "[r]educed to its essence,

the relevant inquiry is whether the conduct was sanctioned by the 'rules of the game.'" (citation omitted)).

The actions taken by SRS to pursue the appeal of the no cause verdict were both lawful and reasonable steps to pursue the subrogation interest of Tommy's worker's compensation carrier. Plaintiff's complaint failed to set forth a cause of action against either Hartford Financial or SRS. On that basis, both complaints were properly dismissed at the inception, before discovery.

Regarding plaintiff's claims against the Barry firm, the Court in Nostrame made clear that few such tortious interference claims will likely pass muster:

> Our analysis of the well-established elements that are required to state a claim for tortious interference is informed by our recognition that the attorney—client relationship is terminable at will and by our strong protections for clients who exercise their free will to retain and to discharge counsel. It is further guided by the recognition that competition among attorneys, although not precisely the same as competition found in other business pursuits, is not prohibited as long as it is conducted in adherence to the RPCs and is not otherwise wrongful or improper. In that context, we are confident that there will be only rare circumstances in which an attorney will behave in a manner that could translate into a claim by another attorney for tortious interference.
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> [Nostrame, supra, 213 N.J. at 128-29.]

Pursuant to Rule 1:11-3, an attorney's representation is terminated "upon the expiration of time for appeal from the final judgment or order." Thus, a trial attorney who does not pursue an appeal on behalf of his client has no continuing responsibility to his client with respect to that matter. Dinter v. Sears, Roebuck & Co., 278 N.J. Super. 521, 532 (App. Div.), certif. denied, 140 N.J. 329 (1995) (holding that attorney's retainer agreement terminated when he declined to prosecute an appeal and told his clients to retain another attorney if they wished to appeal). Therefore, plaintiff's representation of the Johnsons ceased when his post-trial motions were denied on March 2, 2007, and he thereafter declined to file an appeal. Accordingly, when the Johnsons retained the Barry firm for the appeal in August 2007, the contract for services between plaintiff and the Johnsons had already ended.[7]

Following the unfavorable jury verdict, plaintiff demonstrated clear reluctance to commit any more time or money to the case when he stated he would file the post-judgment motions only if SRS agreed to pay him a fee plus his costs.

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[7] Significantly, the contingent fee agreement here did not require plaintiff to undertake an appeal on behalf of Tommy, which states "[t]he permissible fee shall include legal services rendered on any appeal or review proceeding or on any retrial, but this shall not be deemed to require an attorney to take an appeal." See R. 1:21-7(d).

Plaintiff's complaint did not allege that he filed a notice of appeal, prepared any appellate briefs or participated in the appeal in any way. Plaintiff's complaint further acknowledges that the Barry firm, not plaintiff, handled the appeal on behalf of the Johnsons, and that SRS paid for the firm's services. The complaint also stated plaintiff agreed to this arrangement.

At the friendly hearing, Judge Antonin recognized that Rule 1:11-3 applied to plaintiff and meant that he was no longer the Johnson's attorney of record. As the judge explained to plaintiff:

> When the case is finished on the trial level . . . why are you under the impression that on appeal there has to be a substitution of attorney?
>
> . . . .
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> [S]ir, on the trial level[,] it was yours. You acknowledge that on the appellate level it was not. There is no substitution of attorney required on the [a]ppellate level. It's no longer trial level case. If [LaPadula] had gotten it on the trial level, then your argument might have some merit. It has no merit now. You are not the attorney of record. This case has gone up on appeal, has come back down [to the trial level]. You're not the attorney of record.

Plaintiff's complaint did not allege any facts that would have established he had a reasonable prospect that the Johnsons would decide to retain him again for the retrial. At most,

plaintiff alleged an expectation he would represent the Johnsons at any new trial, but he did not allege facts or circumstances that would support a conclusion his expectation was reasonable. A plaintiff's unilateral expectation is not enough to support the cause of action alleged. See Baldasarre v. Butler, 132 N.J. 278, 293 (1993) (in order to succeed on a tortious interference claim a plaintiff must show that he or she had a "reasonable expectation" of economic advantage). Whether plaintiff would ever realize his desire to resume representation of Tommy's tort claim was entirely up to Mrs. Johnson.

Plaintiff argues that a letter he sent to LaPadula on March 2, 2007, supports his contention he had an ongoing contractual relationship with the Johnsons with respect to the tort action. That letter, however, confirms plaintiff understood that he would no longer represent the Johnsons in the tort action once the appeal was filed. Specifically, he stated that if the appeal is successful, "I want to resume my status as trial counsel." He further indicated that "the expenses of the second trial will have to be borne by the [workers'] compensation carrier."

A client has the right to discharge his or her attorney at any time. Dinter, supra, 278 N.J. Super. at 533. Plaintiff's complaint alleges that the Mrs. Johnson, as the legal guardian

for her son, discharged plaintiff after the verdict was overturned. However, plaintiff effectively discharged himself when he declined to appeal the no cause verdict after the court denied his post-trial motions.[8] The decision of Mrs. Johnson not to retain plaintiff for the retrial of the tort action was neither unexpected nor surprising in light of the fact that plaintiff had tried the tort action to no cause verdict, and then refused to pursue the appeal. Likewise, it was neither unexpected nor surprising that Mrs. Johnson would choose to retain the attorneys who successfully pursued the appeal and had the case remanded for a new trial. Under these facts, plaintiff had no reasonable prospect of an economic advantage.

We are satisfied that the record clearly lacks the facts and circumstances that would give rise to the "rare circumstance," Nostrame, supra, 213 N.J. at 129, that would support a viable claim for tortious interference against another attorney. In conclusion, we discern no errors in the Law Division rulings under review and thus, no basis to disturb the orders dismissing plaintiffs' complaint with prejudice. We have

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[8] "The general rule is that a lawyer who abandons or withdraws from a case, without justifiable cause, before termination of a case and before the lawyer has fully performed the services required, loses all right to compensation for services rendered." International Materials v. Sun Corp., 824 S.W.2d 890, 895 (Mo. 1992) quoted with approval in Dinter, supra, 278 N.J. Super. at 533.

considered plaintiff's remaining arguments and have determined they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION