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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1543-12T3

BEVERLY TIPTON and TIPTON SPARROW, LLC d/b/a SPARROW, A TRANSPORTATION COMPANY,

Plaintiffs-Respondents,

v.

U-GO, INC. and MICHAEL HODOSKE,

Defendants-Appellants,

and

ESTATE OF KEITH STINGER,[1]

Defendant,

and

U-GO, INC. and MICHAEL HODOSKE,

Third-Party Plaintiffs,

v.

CAROL BERNHARDT,[2]

Third-Party Defendant.

Argued April 2, 2014 - Decided August 28, 2014

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[1] Keith Stinger passed away prior to trial. All claims against and asserted by Stinger were dismissed with consent.

[2] All claims against Carol Bernhardt were voluntarily dismissed prior to trial.

Before Judges Sapp-Peterson, Maven and Hoffman.

On appeal from Superior Court of New Jersey, Law Division, Cumberland County, Docket No. L-574-08.

Timothy D. Lyons argued the cause for appellants (Lomurro, Davison, Eastman & Muñoz, P.A., attorneys; Mr. Lyons, of counsel and on the brief).

Joseph M. Chiarello argued the cause for respondents (Jacob & Chiarello, LLC, attorneys; Mr. Chiarello, on the brief).

PER CURIAM

Defendants, U-Go, Inc. and Michael Hodoske, appeal from the trial court order entered, following a bench trial before Judge Richard Geiger, dismissing their counterclaim asserted against plaintiff, Beverly Tipton, a former employee of U-Go. We affirm.

I.

We derive the facts from the record presented before the trial court. U-Go is a company that, for more than twenty-five years, has provided daily van service for physically and/or mentally disabled individuals employed by Easter Seals of New Jersey (Easter Seals) located in Millville and North Brunswick. Its sole owner is Hodoske, but it was formerly owned by Keith Stinger until he sold it to Hodoske. Tipton was U-Go's operations manager for its Millville facility, a position she held for ten years before her resignation effective May 23, 2008.

She reported directly to Stinger. She never signed an employment contract, a confidentiality agreement, or a restrictive covenant agreement with U-Go.

According to Tipton, U-Go acquired its customers through referrals and was unaware that it incurred time or expense or engaged in any other activity to obtain its customers. Each customer signed a contract. The contract was automatically renewable, had a term of one year unless, pursuant to the written terms in the contract, the contract was "cancelled by either party." There was no notice requirement, and U-Go customers could discontinue the service at any time and for any reason. No customer with a contract who stopped using U-Go had ever sent written notice of the cancellations.

Some Easter Seals workers were clients of the New Jersey Department of Human Services, the Divisions of Vocational Rehabilitation Services ("DVRS"),[3] and Developmental Disabilities ("DDD"). DVRS issued checks to its clients for transportation expenses, and Tipton believed that the only purpose for the U-Go customer contracts was to authorize Easter Seals to get those checks endorsed by the DVRS clients and transmit them to U-Go. In contrast, U-Go did not require contracts from the Easter

[3] The parties and the court referenced DVRS as "DVR."

Seals workers who were DDD clients, because DDD paid transportation providers directly.

Although U-Go had contracts with individual customers, it did not have a contract with Easter Seals, which was free to refer its workers to any transportation provider. For its regular DVRS clients, as part of the client intake process, Easter Seals' case manager supplied information about transportation options, without recommending a specific transportation provider. That choice was left to the client. DDD, however, made the provider choice on behalf of its clients. Prior to Tipton's departure in May 2008, U-Go had approximately eighty to ninety Millville workers as customers. The record contained written U-Go contracts with inception dates from January 1, 1994 to January 1, 2007, for forty-five U-Go customers, who later signed contracts with Sparrow, plaintiff's new company Tipton formed following her departure from U-Go.

In 2006 and 2007, Tipton attempted to purchase U-Go. She and Stinger could not agree on the terms so Stinger sold the business to Michael Hodoske, who had been serving as U-Go's vice president of its south operation. When Tipton met Hodoske in 2008, she wanted to know what he planned to do to keep her and he extemporaneously responded that he would possibly give her a

one-percent interest in U-Go. He believed Tipton was a "great employee" and was doing a "great job."

In a letter dated May 16, 2008, Tipton advised Hodoske that her last day of work would be May 23, 2008. Tipton also sent an e-mail, intended for distribution to all U-Go drivers, advising them that she had "just sent" her letter of resignation to management. Carol Bernhardt, one of U-Go's drivers and a friend of Tipton's, also resigned from U-Go at that time. Tipton had already told Bernhardt about her plans to form her own company, Sparrow. They had an understanding that Bernhardt would be the first driver Sparrow hired. Tipton also told John Warren, another friend and U-Go driver, that she was going to resign from U-Go, and she offered to hire him if she had enough work.

Hodoske called Tipton after receiving her resignation letter and asked if she was going to pursue the Easter Seals workers. She responded, "[y]eah, that's on the table, Michael, so chew on that for a while." Tipton denied making such a comment and testified "[t]here was no discussion about what I was going to do."

On May 19, 2008, Tipton sent a letter to Christopher McMahon, Easter Seals' Millville site director, introducing Sparrow to Easter Seals, representing that it had state and federal operating authority, indicating its rates, and

describing its vans. According to McMahon, Tipton came to his office to discuss Sparrow just before he received her letter. Their discussion, however, was limited to "[j]ust the fact that she was willing to start transporting clients if there was a need." He indicated that Tipton did not solicit passengers, disparage U-Go, or say that U-Go lacked authority to operate. He added Sparrow to the transportation information his case managers provided to DVRS clients.

On May 21, 2008, Tipton had a breakfast meeting with U-Go drivers where she discussed her plans and the fact that if she had work to give to the drivers, she would. She also shared with the workers that U-Go owed "some money" and the fact that a van was being held for payment. She additionally told the drivers that job applications were available at Easter Seals. Deborah Adams was present at the breakfast. Although she had completed a job application for Sparrow the previous day, she remained with U-Go because Tipton did not have enough work to give her a definite start date. At the breakfast meeting, Tipton told her and the other drivers present that U-Go was in financial trouble and withdrawing from the region. Tipton also told the drivers that U-Go's outside mechanic, Gerald Ushler, was restraining a U-Go van. Ushler, when deposed, acknowledged that U-Go had delayed paying him for his work, which he

attributed to delays in U-Go receiving its payments from the State. He stated he never impounded a U-Go van, and any U-Go vans at his garage were simply parked there.

Hodoske and his son went to Tipton's house, collected all of U-Go's physical documents, and removed all of U-Go's electronic files from the personal computer that Tipton had been using for U-Go work. Tipton did not keep any U-Go materials.

Sparrow entered into its first contracts with former U-Go customers on May 28, 2008, and began soliciting U-Go's clients on June 1, 2008 by going directly to their homes. She told these prospective clients that Sparrow would not be charging a co-payment. Five U-Go customers signed up that day, and others signed up over the next few days. By June 5, 2008, Sparrow had nineteen former U-Go clients.

In his deposition testimony, Stinger testified the proprietary information Tipton used to contact U-Go customers consisted of their "[n]ames, address[es], [and] telephone number[s]." Neither he nor Hodoske ever accused Tipton of using other information.

Hodoske learned from an Easter Seals' employee, Donald Guice, that Tipton told Guice U-Go was going out of business, that it was "leaving the county" because its owner "didn't want to be there anymore," and that U-Go's vans had been impounded

because he owed money to a mechanic. After Hodoske informed Guice that none of Tipton's assertions were true, Guice agreed to stop referring Easter Seals workers to transportation providers other than U-Go.

On May 28, 2008, Stinger wrote to the New Jersey Motor Vehicle Commission (MVC) complaining that Tipton had "filed for NJ DOT[4] rights" and "is running the same service" that U-Go was already providing. He accused her of soliciting his customers and asked if he could "object to her activity." On May 30, 2008, U-Go's counsel wrote to Tipton demanding that she cease all activity that would "infringe" on U-Go's business.

On June 5, 2008, the MVC wrote to U-Go and Sparrow to advise them that neither company had "valid authority to operate." It explained that U-Go had failed to renew its operating authority, while Sparrow had not completed its application. The MVC offered to provide temporary emergency authority to each company "upon sufficient proof that there is an emergent need for the service." That same day, Sparrow completed its application for transportation licensing and the MVC issued it temporary emergency authority. Also on June 5, Sparrow sent a fax to Easter Seals, stating that it had received temporary emergency authority and offered to provide service

[4] New Jersey Department of Transportation.

"[i]f you need additional transportation service in lieu of U-Go, Inc.'s current lack of authority."

On June 10, 2008, plaintiffs filed a defamation complaint against U-Go, Stinger, and Hodoske. Plaintiffs also filed an order to show cause (OTSC) seeking temporary restraints prohibiting U-Go from providing transportation services until it rectified its lack of operating authority. The court issued the temporary restraints. U-Go, Stinger, and Hodoske denied the allegations contained in the complaint and asserted a counterclaim against plaintiffs and a third-party complaint against one of Sparrow's drivers, Carol Bernhardt, who had previously worked for U-Go. The counterclaim alleged breach of the duties of loyalty and honesty, tortious interference with U-Go's contractual relations, tortious interference with U-Go's prospective economic advantage, unlawful solicitation of U-Go's employees, unfair competition, and misappropriation of U-Go's confidential and proprietary business information. Defendants later added a claim for spoliation of evidence, but it was not addressed below and defendants do not pursue it on appeal.

On July 15, 2008, the court denied the relief requested in the OTSC and dissolved the temporary restraints against U-Go. At some point in 2009, Bernhardt was dismissed as a party. The court conducted a bench trial commencing on September 10, 2012.

It dismissed, by consent, the claims against and asserted by Singer, who died prior to the trial. Upon completion of the trial, the court issued a written opinion dismissing both the complaint and counterclaim. The court also declined to award attorneys' fees or costs to either side. The present appeal followed.

On appeal, defendants contend the court erred when it dismissed their counterclaim because the dismissal was against the weight of the evidence. We disagree.

Appellate "review of a trial court's fact-finding is a limited one. Trial court findings are ordinarily not disturbed unless 'they are so wholly unsupportable as to result in a denial of justice[.]'" Meshinsky v. Nichols Yacht Sales, 110 N.J. 464, 475 (1988) (citing Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 483-84 (1974)); accord Meyer v. MW Red Bank, LLC, 401 N.J. Super. 482 (App. Div. 2008). In particular, when the challenge to the trial judge's ruling is that it was against the weight of the evidence, we decide de novo whether a miscarriage of justice has occurred and defer to the trial judge's findings only with regard to "those intangible aspects of the case not transmitted by the written record," such as witness demeanor and credibility and the "feel of the case." Needham v. New Jersey Ins. Underwriting Ass'n, 230 N.J. Super.

358, 368 (App. Div. 1989). Measured under these standards, we reject defendants' contentions.

II.

An employee who is not subject to a non-compete agreement "may anticipate the future termination of [her] employment and, while still employed, make arrangements for some new employment by a competitor or the establishment of [her] own business in competition with [her] employer." Auxton Computer Enters. v. Parker, 174 N.J. Super. 418, 423 (App. Div. 1980). "The mere planning, without more, is not a breach of an employee's duty of loyalty and good faith to [her] employer." Id. at 424.

However, the employee "may not solicit [her] employer's customers for [her] own benefit before [she] has terminated [her] employment," id. at 423, and she may not "do other similar acts in direct competition with the employer's business," ibid., or "contrary to the employer's interests" while still employed. Id. at 425; accord Chernow v. Reyes, 239 N.J. Super. 201, 202 (App. Div.), certif. denied, 122 N.J. 184 (1990). Such conduct "would constitute a breach of the undivided loyalty which the employee owes to [her] employer while [she] is still employed." Auxton, supra, 174 N.J. Super. at 423-24; accord Chernow, supra, 239 N.J. Super. at 204-05.

While competition without wrongful conduct "may eventually

prove harmful to the former employer," the right of an employee without contractual restrictions to change jobs means that the cause of action requires "something more than preparation" that "is so harmful as to substantially hinder the employer in the continuation of" its business. Auxton, supra, 174 N.J. Super. at 424. "It is the nature and character of the act performed that will determine if there has been an actionable wrong and whether or not the act has caused some particular injury to the employer." Ibid. Each case must be decided on its particular facts, because the question of whether the employee's conduct is actionable "is a matter of degree." Ibid.

The trial court found Tipton's conduct did not amount to a breach of the duty of loyalty, honesty, and good faith Tipton owed U-Go. This finding is supported by substantial credible evidence in the record. First, Tipton had no employment contract, confidentiality agreement, or non-compete agreement. She was an employee-at-will and a long-time employee as well. While she reached out to Easter Seals prior to her last day of work with U-Go, Easter Seals was not one of U-Go's customers. Further, the judge credited the testimony presented that she told the U-Go drivers at the May 21, 2008 breakfast meeting not to discuss her plans with U-Go's clients. Moreover, as the judge noted, defendants presented no evidence during the trial

that Tipton's communication with Easter Seals prior to May 23, 2008, the effective date of her resignation, actually led to the loss of any U-Go clients prior to May 23, 2008. Thus, the evidence presented, which the court credited, more than supported the judge's conclusion defendants failed to prove Tipton breached her duty of loyalty and honesty to defendants.

III.

Likewise, we reject defendants' contention they were entitled to judgment on their interference with contractual relations claim because Tipton knew that a contract between U-Go and a customer was enforceable until the customer cancelled. Notwithstanding this knowledge, defendants urge the evidence demonstrated that after her departure, Tipton wrongfully solicited these clients. In addition, defendants urge that other acts of interference with its contractual relations established at trial included Tipton filing the OTSC from which temporary restraints were issued against it preventing it from operating its business and impelling Easter Seals to refer U-Go's customers to her.

A claim of tortious interference with contract requires a plaintiff to prove: (1) actual interference with a contract; (2) that the interference was inflicted intentionally by a defendant who is not a party to the contract; (3) that the interference

was without justification; and (4) that the interference caused damage. Dello Russo v. Nagel, 358 N.J. Super. 254, 268 (App. Div. 2003). The interference must not only be "intentional," but also "improper." Nostrame v. Santiago, 213 N.J. 109, 122 (2013) (citing Restatement (Second) of Torts § 766 (1979)).

Stinger and Hodoske admitted that the contracts did not have a specific term or otherwise bind the customers, but they insisted that the customers had to notify U-Go they were switching providers. Although the contracts provided that customers were required to give notice to U-Go if they intended to cancel the contract, the contracts did not specify the manner of notice, leaving the client free to simply discontinue using U-Go as a form of notice. Even if the U-Go contracts could be interpreted as requiring some form of formal written notice from clients, Tipton was under no obligation to ensure that U-Go's customers performed their obligation to formally notify U-Go before switching to Sparrow.

Defendants' other argument, that plaintiffs initiated the defamation as a subterfuge for seeking the temporary restraining order, is a factual argument, which the court, pursuant to its fact-finding discretion, was not compelled to accept. On the contrary, the record supported findings that Tipton did not even consider any transportation provider's authority to operate

until Stinger and Hodoske made it an issue. Furthermore, U-Go's legal inability to operate due to a lack of authority arose from the MVC's letter of June 5, 2008, not from the temporary restraining order of June 10, 2008. In other words, as of June 5, 2008, U-Go was on notice from the MVC it was not authorized to transport its customers. Thus, irrespective of the OTSC initiated by Tipton on June 10, 2008, U-Go no longer had authority to operate.

IV.

Next defendants contend U-Go had a reasonable expectation of continued economic relations with its customers, which made those relationships a protectable interest, even for the customers who participated in Easter Seals through DDD and therefore did not have U-Go contracts. Defendants further urge this expectation existed whether or not U-Go had contracts with its customers, and Tipton's actions interfered with defendants expectation of continued economic relations with its customers. We disagree.

A cause of action for tortious interference with prospective economic advantage protects the right to pursue one's business or occupation without harassment or undue influences. Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 750 (1989). The actionable conduct is the "luring

away, by devious, improper and unrighteous means, of the customer of another." Ibid. (quoting Louis Kamm, Inc. v. Flink, 113 N.J.L. 582, 586 (E. & A. 1934)). The cause of action extends the protection that the case law affords for "contracts already made" to contracts that would have been made in the absence of wrongful interference. Harris v. Perl, 41 N.J. 455, 462-63 (1964); accord Jenkins v. Region Nine Hous. Corp., 306 N.J. Super. 258, 265 (App. Div. 1997), certif. denied, 153 N.J. 405 (1998).

Tortious interference with prospective economic advantage requires "a reasonable expectation of economic advantage that was lost as a direct result of [the] defendants' malicious interference," plus resultant actual damages. Lamorte Burns & Co. v. Walters, 167 N.J. 285, 306 (2001). Stated differently, what is contemplated is the determination that but for the intentional and wrongful interference, "there was a reasonable probability that the victim of the interference would have received the anticipated economic benefits." Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 199 (App. Div.), certif. denied, 141 N.J. 99 (1995) (quoting Leslie Blau Co. v. Alfieri, 157 N.J. Super. 173, 185-86 (App. Div.), certif. denied sub nom., Leslie Blau Co. v. Reitman, 77 N.J. 510 (1978)). The malicious nature of the intentional interference

does not refer to emotional motivation, that is merely, spiteful behavior. Lamorte, supra, 167 N.J. at 306.

As noted earlier, U-Go, through its former owner, Stinger, contacted MVC to complain about Tipton, which ultimately resulted in a letter to both Sparrow and U-Go, days later, that neither company was authorized to engage in the transportation business. There was nothing improper thereafter with Tipton advising Easter Seals of its authorization, albeit temporary, to transport Easter Seals clients if such transportation services were needed, given U-Go's lack of authority to do so at that time. The information conveyed did not misrepresent the existing fact of U-Go's lack of authorization. Nor was the information conveyed wrongful. Nostrame, supra, 213 N.J. at 124 (stating "deceit and misrepresentation can constitute wrongful means," whereas "lesser sorts of behavior have been found to fall short of constituting wrongful means in the ordinary business context").

U-Go's customers were not contractually bound, and they had to pay a copayment that Sparrow did not charge. Even if U-Go were nonetheless assumed to have a reasonable expectation that its customers would continue to use its service, this cause of action still required "malice" in the form of actionably improper conduct, which the trial court found lacking here.

Substantial credible evidence in the record supported the trial court's findings in relation to this claim.

V.

We next address defendants' claim the evidence supported a finding that plaintiffs engaged in tortious interference by employee solicitation. Defendants specifically point to the undisputed evidence that Tipton met with U-Go drivers before she stopped working for U-Go, misrepresenting the status of its business. The trial court found an absence of actionable misconduct in Tipton's recruitment of U-Go drivers. The court stated:

> The employees in question were van drivers, a relatively unskilled position. This case did not involve employees who were highly skilled, highly trained, highly educated, scarce in the job force or difficult to replace. Moreover, defendants did not prove that plaintiffs engaged in conduct that could be characterized as improper employee pirating. On the contrary, at the breakfast meeting on May 21, 2008, Tipton advised the van drivers that she was starting her own company, job applications were available at Easter Seals, she would like to hire them all, but she had no work for them at that point. On cross-examination, Tipton testified that she gave the drivers the application forms at the breakfast meeting. She later denied handing out the application forms at the meeting. Nevertheless, several drivers submitted job applications to Sparrow dated May 21, 2008. When asked about the stability of U-Go, Tipton told the drivers about a U-Go van being held for payment.

Employers can compete for at-will employees as long as they do not use "improper means." Avtec Indus. v. Sony Corp. of Am., 205 N.J. Super. 189, 193 (App. Div. 1985) (citing Restatement (Second) of Torts, § 768 (1979)). Obvious examples are "fraud, misrepresentation, intimidation, obstruction and molestation." Id. at 194. Other actionable activity is "conduct which fails to accord with generally accepted standards of morality[,]" namely, "egregious conduct directed toward destruction of a competitor's business." Id. at 194-95. Nonetheless, "'it has never been thought actionable to take away another's employee, when the defendant wants to use him in his own business, however much the plaintiff may suffer.'" Id. at 196 (quoting Harley & Lund Corp. v. Murray Rubber Co., 31 F.2d 932, 934 (2d Cir.), cert. denied, 279 U.S. 872, 49 S. Ct. 513, 73 L. Ed. 1007 (1929)).

Here, the court concluded Tipton's actions lacked malice and that her actions were motivated by her desire to support her business rather than to destroy U-Go's business. Of note, McMahon testified that when Tipton told him of her plans, she did not disparage U-Go. The court, when considering the proofs as a whole, was therefore permitted, within its factual findings, to credit Tipton's and Adam's testimony that Tipton, at the May 21 breakfast meeting, said no more about U-Go's business than

her comment that Ushler was holding a van for payment. It was also within the trial court's authority as the fact finder to conclude the statement, albeit incorrect based upon Ushler's testimony, was not a deliberate distortion, particularly given Ushler's acknowledgement of U-Go's late payments and the fact that vans were parked at his garage.

VI.

We find no merit to defendants' claims the court erred in dismissing their counterclaims asserting unfair competition and misappropriation of confidential information. Nor do we find merit to the claim the court erred by rejecting the methodology employed by its damages expert to calculate their damages. We conclude these contentions are without sufficient merit to warrant extensive discussion in a written opinion. R. 2:11-3(e)(1)(A) and (E). We add the following brief comments.

"There is no distinct cause of action for unfair competition. It is a general rubric which subsumes various other causes of action" for unlawful interference with a current or prospective economic interest. C.R. Bard, Inc. v. Wordtronics Commc'ns, 235 N.J. Super. 168, 172 (Law Div. 1989). There was no evidence that Tipton retained copies of the U-Go information that Hodoske and his son removed from her home office. The record also established she had been a longtime U-

Go employee and had spent the ten years leading up to her resignation in 2008 serving as U-Go's operations manager, from which it may reasonably be inferred she developed the knowledge of a client base, independent of any lists. Therefore, the court's finding that Tipton did not use confidential or proprietary information to identify and contact the small number of former U-Go customers whom she obtained by solicitation before the suspension of U-Go's service, is supported by substantial credible evidence in the record.

Additionally, the court found that Tipton did not retain any U-Go business records past the end of her employment. It observed that the rudimentary customer information U-Go maintained would not be "of any competitive value" in any event, "given the availability of the identity and addresses of Easter Seals [customers] from Easter Seals itself"

Finally, the court was entitled to reject the expert opinion presented by defendants' expert. It found the methodology employed to calculate defendants' damages assumed "that every one of Sparrow's clients was wrongfully obtained from U-Go, no matter the particular circumstances which led each of those clients to choose Sparro instead of U-Go." The court proceeded to articulate why this assumption was not supported by the record:

> U-Go charged clients a $2 co-pay, which Sparrow did not.
>
> U-Go was not authorized to transport its client from June 5, 2008 to June 19, 2008.
>
> Easter Seals advised U-Go's clients in writing on June 11, 2008 that U-Go would not be transporting them starting the next day until at least June 23, 2008, and provided them with the names and phone numbers of other providers including Sparrow.
>
> Easter Seals did not advise U-Go clients in writing that U-Go was back in business until June 25, 2008.
>
> Tipton and Sparrow were legally permitted to solicit U-Go clients after May 23, 2008.
>
> U-Go has not proven that plaintiffs solicited its customers on or before May 23, 2008.
>
> U-Go has not proven that any of its customers entered into contracts with Sparrow on or before May 23, 2008.
>
> U-Go's client list was not proprietary or confidential -- the identity of potential riders, including U-Go's clients, was readily obtainable from Easter Seals.
>
> Clients are allowed to pick the busing company they use and are free to ride with the carrier of their choice at any time despite the[] written contract some of them entered into with U-Go.
>
> U-Go has not demonstrated that the loss of any drivers to Sparrow resulted in the loss of clients.

Given the erroneous premise upon which the court found the opinion was based, the court rejected the expert's methodology.

An expert's opinion is not entitled to more weight than the facts upon which it is based, State v. Jenewicz, 193 N.J. 440, 466 (2008). Moreover, a trial court in discharging its fact-finding responsibilities is free to accept or reject an expert's testimony. City of Long Branch v. Liu, 203 N.J. 464, 491-92 (2010). Having assessed the expert's credibility in light of its factual findings, it was within the court's fact-finding authority to reject the expert's opinion. Ibid.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION