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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4750-16T4

HAROLD HANSEN,

Plaintiff-Appellant,

v.

RITE AID CORPORATION
and CRAIG MAURIELLO,

Defendants-Respondents,

and

ECKERD CORPORATION, MICHELLE
CAGA and LISA FORD,

Defendants.

Argued January 11, 2018 — Decided May 2, 2018

Before Judges Haas, Rothstadt and Gooden
Brown.

On appeal from an interlocutory order of
Superior Court of New Jersey, Law Division,
Monmouth County, Docket No. L-4790-08.

Denise Campbell argued the cause for
appellant (Campbell Legal Associates, PLLC,
attorneys; Denise Campbell, on the briefs).

James Bucci argued the cause for respondents
(Genova Burns, LLC, attorneys; James Bucci,

of counsel and on the brief; Peter F. Berk,
on the brief).

PER CURIAM

Plaintiff, Harold Hansen, a sixty-one-year-old gay man, appealed from a judgment dismissing his complaint after the first trial in this almost ten-year-old employment discrimination action resulted in a no-cause verdict in favor of defendants, Rite Aid Corporation (Rite Aid), Eckerd Corporation, Craig Mauriello, Michelle Caga, and Lisa Ford. In the first appeal, we vacated the judgment dismissing his complaint and remanded for a new trial because we disagreed with the trial court's barring of certain admissible evidence. Hansen v. Rite Aid Corp., No. A-2972-13 (App. Div. Jan. 20, 2016) (slip op. at 4).

The second trial ended in 2017 with a verdict in favor of plaintiff as to his sexual orientation-based discrimination claims under the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 to -49, and a finding of no cause as to his age-based claims. After the verdict, the trial court granted in part defendants' Rule 4:40-1 motion for judgment, declared a mistrial sua sponte, vacated the jury's verdict in favor of plaintiff, and ordered a new trial only as to defendant's sexual orientation-based discrimination claims. The trial court

declared the mistrial because it believed evidence presented during the trial relating to plaintiff's claim of disparate treatment should not have been admitted and, even if it was admissible, the trial court did not properly instruct the jury as to its use.

In this second appeal, plaintiff argues that the trial court erred in declaring a mistrial because (1) it incorrectly relied upon federal case law that was not binding on the court; (2) it gave the proper charge to the jury; and (3) defendants waived the issue of whether it was proper to present the disparate treatment evidence to the jury "by failing to object to evidence of such a comparison over nine years and two trials." Plaintiff further contends that the judge misapplied Rule 4:37-2 and Rule 4:40-1 and asserts that the trial court erred by denying his motion for reconsideration.

For the reasons that follow, we affirm the trial court's order declaring a mistrial and ordering a new trial, but reverse its order barring plaintiff from presenting evidence of disparate treatment.

In our earlier opinion, we summarized the history of plaintiff's employment with Rite Aid and the basis for his claims. We stated:

Plaintiff . . . began his career in retail pharmacy in 1973, and continued thereafter as an employee of defendants Eckerd Corporation and Rite Aid . . . ultimately becoming manager of a Rite Aid store in Spring Lake Heights. In May 2008, plaintiff's employment was terminated following an investigation of alleged shoplifting conducted by defendant Craig Mauriello, Rite Aid's Loss Prevention Manager. At all times relevant to this appeal, defendant Michelle Caga was plaintiff's immediate regional supervisor, and defendant Lisa Ford was Rite Aid's Senior Human Resources Manager.

Plaintiff filed a complaint in September 2008, alleging, among other causes of action, age, gender, and sexual orientation discrimination in violation of the [NJLAD] and defamation.

[Hansen, slip op. at 1-2.]

Plaintiff's complaint alleged that he was treated differently than his store's younger and heterosexual pharmacy manager, who was not terminated after a pharmacy department employee stole prescription drugs from the pharmacy, an area in which plaintiff had no involvement. At trial, the evidence established that Caga was plaintiff's supervisor and she reported to a regional vice president. The pharmacist reported to a different supervisor, who in turn reported to a different regional vice president. Plaintiff maintained primary responsibility for the entire store, including personnel and loss prevention, except for the pharmacy department, which was

under the sole purview of the pharmacist. Mauriello was Rite Aid's corporate loss prevention representative for both departments and Ford was the corporate representative responsible for both departments' human resource issues.

Rite Aid claimed it terminated plaintiff because he did not follow loss prevention procedures after his discovery of a shoplifting incident involving a store employee's daughter.¹ The evidence at trial about the pharmacist established that an employee working in the pharmacy department removed prescription medication and ten needles from the pharmacy's inventory for her own use, without the pharmacist knowing and that he failed to follow company policy when it was brought to his attention.² The

¹ On December 7, 2007, plaintiff hired a woman to work as a photo technician. Shortly after, plaintiff began to suspect the woman's daughter of shoplifting. Despite admitting that he had concerns about the daughter and being informed by two other employees of her potential shoplifting, plaintiff never reported her to Caga or to Ford. It was not until a customer's wallet was stolen in January 2008 that plaintiff reported the daughter to the police and also to Mauriello. According to defendants, it was plaintiff's disregard of the daughter's shoplifting that formed the basis for his termination.

² Defendants, having lost an earlier motion for summary judgment seeking to bar plaintiff's disparate treatment assertions, never objected to the introduction of the evidence regarding the pharmacist and the theft in the pharmaceutical department. Defendants believed that their denial of summary judgment in the previous trial precluded them from making the objection in the second trial. However, in the first trial, on November 26, 2013, the trial court granted defendants' motion in limine, (continued)

pharmacist also failed to take corrective action when the employee showed up to work in a "'drugged' state[.]" The same pharmacy employee also stole drugs to give to the store employee's daughter who had shoplifted from the front end. The pharmacy employee also took beverages, bags of potato chips, and makeup from the front end of the store, but plaintiff was unaware of these activities.

After the presentation of evidence in the second trial, defendants moved for a directed verdict pursuant to Rule 4:37-2(b),³ and for judgment pursuant to Rule 4:40-1.⁴ Defendants argued plaintiff's disparate treatment claim failed as a matter

(continued)

precluding plaintiff from "introducing witness testimony and other evidence relating or otherwise referring to Rite Aid's [subsequent] 2010 investigation of the . . . pharmacy." We glean from the record that Rite Aid conducted an investigation of the pharmacy department in 2010 relating to theft that occurred in that department from 2007 through 2010 by another technician, however no evidence of that investigation was presented to the jury at trial. We, like the trial judge, do not rely on that evidence in making our determination.

³ Rule 4:37-2(b) allows a defendant to move at the end of plaintiffs' case "for a dismissal of the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief."

⁴ Rule 4:40-1 permits a party to make "[a] motion for judgment, stating specifically the grounds therefor, . . . either at the close of all the evidence or at the close of the evidence offered by an opponent."

of law because he offered no evidence that he and the pharmacy manager were similarly situated. The court heard oral argument, denied defendants' motion for directed verdict, but reserved on the Rule 4:40-1 motion in accordance with Rule 4:40-2.⁵

In the trial court's ensuing jury instructions, it did not charge the jury on how to consider the evidence supporting plaintiff's disparate treatment claim. After the jury returned a verdict in favor of plaintiff, the trial court, sua sponte, declared a mistrial, and dismissed plaintiff's claim of disparate treatment, placing its reasons on the record on April 3, 2017.

Relying upon Lehman v. Toys "R" Us, Inc., 132 N.J. 587 (1993), the trial court turned to federal case law to determine the impact of its admission of disparate treatment evidence.⁶ Finding persuasive the analysis discussed in a Third Circuit

⁵ The Rule permits a court to "reserve decision . . . , submit the case to the jury and then decide the motion either before or within [ten] days after the verdict The court may enter judgment in accordance with the motion or in the interest of justice order a new trial." R. 4:40-2(a).

⁶ The trial court observed that there are no published New Jersey state cases regarding the standard for a disparate treatment claim for an employee who was terminated. According to the court, the closest case on point, Peper v. Princeton University Board of Trustees, 77 N.J. 55 (1978), dealt with disparate treatment in regard to one employee being promoted over another due to alleged discrimination.

case, Wilcher v. Postmaster General, 441 F. App'x 879, 882 (3d Cir. 2011), the trial court explained that disparate treatment evidence was admissible to prove that an employer's proffered reasons for terminating an employee are "a pretext for discrimination[.]" The court stated that plaintiff

may show that [defendant] has previously discriminated against him, that [defendant] has discriminated against other persons within his protective class, or within another protective class or that [defendant] has treated more favorably similarly situated persons not within the protective class. . . . A determination of whether employees are similarly situated takes into account factors such as the employee's job responsibilities, the supervisors and decision-makers, and the nature of the [misconduct.]

Applying that standard, the court concluded that the pharmacy manager in plaintiff's case was not an appropriate comparator for plaintiff because the circumstances surrounding the subject thefts and the pharmacist and defendant's job responsibilities were vastly different. The court relied upon the fact that the subject thefts were different in that one was committed by an employee and unlike plaintiff's situation, "there [was] no evidence . . . that [the pharmacy manager] knew that [the employee] was stealing."

Also, the court found their jobs to be "very different" and that the pharmacist's obligation to prevent theft by an employee

was "very different from what was going on with reference to the . . . circumstances with" plaintiff. The court noted that under Rite Aid's policies, plaintiff failed to take action when he learned about the shoplifting, while the pharmacist failed to "enact drug testing after [the employee] was found to be stealing, [or] after she came in looking somewhat under the influence" The trial court concluded that "the nature of the misconduct engaged in [was] completely different" and plaintiff and the pharmacist did not "have the same supervisor[,]" but even if they did "for purposes of loss prevention, . . . in terms of the employee's job responsibilities . . . in no way would anyone in . . . a million years be able to say that [plaintiff] had the obligation to prevent the theft of prescription drugs."

Because of the differences found between plaintiff and the pharmacy manager, the court determined that it should not have allowed the jury to consider the evidence of disparate treatment. Moreover, even if the evidence was admissible, the trial court should have charged the jury as to the findings it was required to make before determining plaintiff proved disparate treatment. The court stated:

[T]he jury absolutely would have had to have been given an instruction along the lines, If you determine that the

job responsibilities of [plaintiff] and [the pharmacy manager] were substantially similar, that they had the same supervisors, or that . . . Mauriello acted as the supervisors for both, and that the nature of the misconduct engaged in, that's alleged against [the pharmacy manager], as against - - alleged against [plaintiff], that they are substantially similar. Without giving the jury an instruction on that, they were permitted to hear the evidence, consider the evidence, and . . . basically, in a sense, they were told, its disparate treatment[.]

The day after placing its reasons on the record, the trial court supplemented its decision with a written statement of reasons. In its written decision, the court explained that even if it had instructed the jury to not consider the disparate treatment evidence,

the amount of evidence and argument presented by plaintiff at trial on the disparate treatment claim was substantial, and thus the court does not believe that the issue could have been addressed with an instruction to the jurors that the testimony and argument had been stricken and that they should disregard the evidence and argument presented.

It also reiterated its conclusion that even if the evidence was admissible, "[t]he lack of a jury charge on the issue, specifically instructing the jury on how to determine whether in fact plaintiff had been treated differently than others, and whether those others were similarly situated, results in a jury verdict that constitutes a miscarriage of justice." It again

identified the factors it discussed from Wilcher as being appropriate to this case and observed they were also addressed in Ewell v. MBA Properties, Inc., 94 F. Supp. 3d 612 (D.N.J. 2015). The court ordered that the matter be retried without reference to any disparate treatment claims "on the claim of sexual orientation discrimination against defendant Rite Aid, and on the claim of aiding and abetting sexual orientation discrimination against defendant . . . Mauriello." The court determined that, as to the remaining issues, a retrial was not necessary.

According to the court, there was no reason to retry the issues of "age discrimination . . . against Rite Aid, as well as the aiding and abetting claims against the three individual Rite Aid employees [or against] Caga . . . Ford, [or the] two individual Rite Aid employees, [that they] aided and abetted in the sexual orientation discrimination by Rite Aid." Plaintiff moved for reconsideration, seeking an order vacating the sua sponte declaration of a mistrial, reinstating the jury's verdict, and directing immediate jury selection and a trial on punitive damages. The trial court denied the motion and we granted leave to appeal.

The thrust of plaintiff's argument on appeal is that the trial court abused its discretion by declaring a mistrial

because it properly instructed the jury, improperly relied upon a federal case addressing disparate treatment, and failed to recognize that defendants did not object to the plaintiff's disparate treatment over the course of two trials.

We disagree with plaintiff's argument that the court erred in declaring a mistrial and ordering a new trial because the jury was clearly not properly instructed as to plaintiff's disparate treatment claim. We find merit, however, to plaintiff's contention that the trial court mistakenly granted defendant's Rule 4:40-1 motion because we conclude it improperly conducted a weighing of the evidence in its consideration of defendants' motion.

We begin by addressing the court's declaring a mistrial. Rule 1:7-5 allows a trial court "at every stage of the action, [to take] notice [of] any error of such a nature as to have been clearly capable of producing an unjust result, even though such error was not brought to its attention by a party." Under the Rule, "a trial court has a discretionary range . . . to grant a mistrial whether on its own motion or otherwise." State v. Rechtschaffer, 70 N.J. 395, 406 (1976) (citations omitted). "Whether an event at trial justifies a mistrial is a decision 'entrusted to the sound discretion of the trial court.'" State

v. Smith, 224 N.J. 36, 47 (2016) (quoting State v. Harvey, 151 N.J. 117, 205 (1997)).

Despite that discretion, mistrials should only be declared "with the greatest caution, under urgent circumstances, and for very plain and obvious causes." State v. Loyal, 164 N.J. 418, 436 (2000) (citation omitted). Accordingly, trial courts should exercise their discretion to grant a mistrial "only in those situations which would otherwise result in manifest injustice." Rechtschaffer, 70 N.J. at 406 (citations omitted); see also Boryszewski v. Burke, 380 N.J. Super. 361, 391 (App. Div. 2005) ("Jury verdicts should be set aside in favor of new trials only with great reluctance, and only in cases of clear injustice. . . . Neither trial nor appellate courts may grant a new trial unless it clearly appears there was a miscarriage of justice." (citations omitted)).

In our review, we will defer to a trial court's decision to declare a mistrial under Rule 1:7-5, "absent an abuse of discretion." See Harvey, 151 N.J. at 205 (citing State v. DiRienzo, 53 N.J. 360, 383 (1969)); see also Boryszewski, 380 N.J. Super. at 391 ("Appellate courts should give considerable deference to a trial court's decision to order a new trial because 'the trial court has gained a "feel for the case"

through the long days of the trial.'" (quoting Lanzet v. Greenberg, 126 N.J. 168, 175 (1991))).

Applying our deferential standard of review, we conclude the trial court did not abuse its discretion by declaring a mistrial because it did not instruct the jury as to how it should analyze the disparate treatment evidence plaintiff introduced at trial.

"Appropriate and proper charges to a jury are essential for a fair trial." Reynolds v. Gonzalez, 172 N.J. 266, 288 (2002) (quoting State v. Green, 86 N.J. 281, 287 (1981)). They "outline the function of the jury, set forth the issues, correctly state the applicable law in understandable language, and plainly spell out how the jury should apply the legal principles to the facts as it may find them" Ibid. (alteration in original) (quoting Velazquez v. Portadin, 163 N.J. 677, 688 (2000)). "A charge is a road map to guide the jury, and without an appropriate charge a jury can take a wrong turn in its deliberations [T]he court must explain the controlling legal principles and the questions the jury is to decide." N.Y.-Conn. Dev. Corp. v. Blinds-To-Go (U.S.) Inc., 449 N.J. Super. 542, 557 (App. Div. 2017) (alterations in original) (quoting Das v. Thani, 171 N.J. 518, 527 (2002)). "The failure to tailor a jury charge to the given facts of a case constitutes

reversible error where a different outcome might have prevailed had the jury been correctly charged." Reynolds, 172 N.J. at 289 (citing Velazquez, 163 N.J. at 688). "Therefore, '[e]rroneous instructions are poor candidates for rehabilitation as harmless, and are ordinarily presumed to be reversible error.'" Das, 171 N.J. at 527 (alteration in original) (quoting State v. Afanador, 151 N.J. 41, 54 (1997)).

"The first step in assessing the sufficiency of a contested jury charge . . . requires an understanding of the legal principles pertinent to the jury's determination." Estate of Kotsovska ex rel. Kotsovska v. Liebman, 221 N.J. 568, 592 (2015). In this case, plaintiff presented evidence of the pharmacy manager's disparate treatment in response to Rite Aide's explanation for terminating plaintiff's employment. Whether that disparate treatment occurred and proved Rite Aid's explanation was a pretext for discrimination was pertinent to the jury's determination.

In NJLAD cases, a plaintiff is entitled to offer evidence "whether unequal treatment has occurred, intentionally or as a result of a policy's impact on members of a protected group, [through] two approaches [that] have been generally accepted. . . . -- disparate treatment and disparate impact -- and we acknowledge both as cognizable under the [NJ]LAD."

Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 398 (2005) (citing Peper, 77 N.J. at 81-82). Disparate treatment is defined as where "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." Ibid. (quoting Peper, 77 N.J. at 81-82). In order to establish a claim for disparate treatment under the NJLAD:

[T]he plaintiff must demonstrate that he or she (1) belongs to a protected class; (2) applied for or held a position for which he or she was objectively qualified; (3) was not hired or was terminated from that position; and (4) the employer sought to, or did fill the position with a similarly-qualified person.

[Id. at 399 (citing Andersen v. Exxon Co., 89 N.J. 483, 492 (1982)).]

After a plaintiff demonstrates the four elements establishing a prima facie case, the "burden then shifts to the employer to prove a legitimate, non-discriminatory reason for the employment action." Ibid. (citing Andersen, 89 N.J. at 493). If the employer meets that burden, the plaintiff has an opportunity to show that the employer's purported reason is merely pretext.⁷ Ibid.

⁷ "In determining whether members of the classes protected by the [NJ]LAD have been subjected to unlawful discrimination in an employment setting, we have looked to 'the substantive and
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"Evidence of pretext sufficient to permit the employee to reach a jury may be indirect, such as a demonstration 'that similarly situated employees were not treated equally.'" Jason v. Showboat Hotel & Casino, 329 N.J. Super. 295, 304 (App. Div. 2000) (citations omitted). "An inference of discrimination may arise if similarly situated employees [but] of a different [sexual orientation] received more lenient treatment than that afforded plaintiff." Ewell, 94 F. Supp. 3d at 624 (citing Simpson v. Kay Jewelers, 142 F.3d 639, 645 (3rd Cir. 1998)). Plaintiff must present comparator evidence sufficient to prove that he or she is "similarly situated" to his or her comparators, and that these employees have been treated differently or favorably by their employer. See Williams v. Morton, 343 F.3d 212, 221 (3d Cir. 2003); Simpson, 142 F.3d at 645. "An 'inference of discrimination' does not [necessarily] arise 'anytime a single member of a non-protected group was

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procedural standards established under federal law' for general guidance." Gerety, 184 N.J. at 398 (citations omitted). In Gerety, the court modeled its disparate treatment analysis in accordance with "the burden-shifting framework enunciated in McDonnell Douglas Corp[oration] v. Green, 411 U.S. 792 (1973)." Gerety, 184 N.J. at 399 (citation omitted); see also Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005) ("To address the difficulty of proving discriminatory intent, New Jersey has adopted the procedural burden-shifting methodology articulated in McDonnell Douglas Corp[oration] v. Green, 411 U.S. 792 (1973)[.]").

allegedly treated more favorably than one member of the protected group, regardless of how many other members of the non-protected group were treated equally or less favorably.'" Jason, 329 N.J. Super. at 307 (citations omitted). There must be proof that the individuals being compared were similarly situated.

To determine whether employees are similarly situated, "courts tend to consider whether the plaintiff and the comparator had similar job responsibilities, were subject to the same standards, worked for the same supervisors, and engaged in comparable misconduct." Ewell, 94 F. Supp. 3d at 624 (citations omitted). That does "not mean to suggest that [the listed] aspects of "similarly situated" status are exhaustive or of equal significance in different employment contexts. The trial [court must] make a sensitive appraisal in each case to determine the most relevant criteria." Jason, 329 N.J. Super. at 305 (first alteration in original) (quoting Peper, 77 N.J. at 85). "Thus there is no bright-line rule for determining who is a 'similarly situated' employee." Ibid.

Applying these principles, the trial court here correctly determined that the jury was not properly instructed. The judge's charge to the jury did not contain any language concerning disparate treatment. In declaring a mistrial, the

trial court considered federal case law that involved a similar set of facts, and recognized it was not binding, but was persuaded that once it allowed the disparate treatment evidence to go to the jury, it should have given a proper charge that instructed the jury how to consider whether plaintiff proved that he and the pharmacy manager were similarly situated, before the jury could accept the evidence as establishing disparate treatment.

We reject plaintiff's argument that the trial court's delivery of the New Jersey Model Civil Jury Charge for NJLAD claims, see Model Jury Charges (Civil), 2.21, "The New Jersey Law Against Discrimination" (approved May 2003), was sufficient. Although the charge's introductory note states that it was developed for use in disparate treatment claims, it also recognizes that "because discrimination claims can arise in a rich variety of contexts [and] the law is in a state of continuing development[, courts] should develop a charge that best fits the particular facts of a case." Ibid. In determining that it failed to follow this instruction in this case, albeit post-verdict, the trial court fulfilled its obligation to recognize its error and its impact on the outcome of the trial.

We part company with the trial court, however, in its granting of defendants' Rule 4:40-1 motion and its barring of plaintiff's disparate treatment evidence at the new trial.⁸

In reviewing a motion . . . for judgment under Rule 4:40-1, we apply the same standard that governs the trial courts. . . .: "if, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied[.]" The motion should only "be granted where no rational juror could conclude that the plaintiff marshaled sufficient evidence to satisfy each prima facie element of a cause of action."

[Smith v. Millville Rescue Squad, 225 N.J. 373, 397 (2016) (third alteration in original) (citations omitted).]

In deciding a motion under the Rule, a court "is not to consider 'the worth, nature or extent (beyond a scintilla) of the evidence,' but only review 'its existence, viewed most favorably to the party opposing the motion.'" Lechler v. 303

⁸ We note that we find no merit to plaintiff's argument that because the trial court denied defendant's Rule 4:37-2 motion for an involuntary dismissal, it was bound to deny defendants' motion for judgment under Rule 4:40-1. The introductory note of Section 2.21 of the Model Jury Charge (Civil) specifically instructs that the latter motion is appropriate in response to evidence adduced by plaintiff that an employer's rationale for terminating an employee was a pretext for discrimination.

Sunset Ave. Condo. Ass'n, 452 N.J. Super. 574, 582 (App. Div. 2017) (quoting Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969)).


We conclude from our review of the evidence that plaintiff presented sufficient evidence that he and the pharmacist were similarly situated to warrant the matter being submitted to the jury. While it is true that the two were responsible for different areas of the same store, and the pharmacy's theft involved an employee while plaintiff's department did not, part of both of their responsibilities was to follow their employer's procedures and policies relating to thefts occurring within their departments. Moreover, while they each may have had their own immediate supervisors, plaintiff provided sufficient evidence that Mauriello was the corporate loss prevention representative for the store, including the pharmacy, and both plaintiff and the pharmacist were responsible for compliance with all corporate policies. Plaintiff's proofs established that each manager failed to comply with controlling policies relating to thefts, involving, in part, the same employee, but were treated differently. Under these circumstances, the question of whether plaintiff proved the two were similarly situated should have been left to the jury.

Because we agree with the trial court's determination that a new trial is required, and we conclude that plaintiff should

be permitted to pursue a disparate treatment claim in response to Rite Aid's explanation for plaintiff's termination, we need not address plaintiff's arguments regarding the denial of his reconsideration motion.

Affirmed in part, reversed and remanded in part. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION