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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DAN TATE et al., Cross-complainants and Appellants, v. DAVID REID et al., Cross-defendants and Respondents.	B280115 (Los Angeles County Super. Ct. No. KC066219)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dan Thomas Oki, Judge. Affirmed.

Horowitz + Armstrong, John R. Armstrong; Stream Kim Hicks Wrage & Alfaro, Eugene Kim and Robert J. Hicks for Cross-complainants and Appellants.

Robert C. Baker, Laurence C. Osborn and Christopher K. Mosqueda for Cross-defendants and Respondents.

During his tenure as the Director of Asset Management at Azusa Pacific University (APU), respondent David Reid negotiated a build-to-suit lease for the university on land owned by appellant W. Daniel Tate. Reid also personally entered into a side partnership with Tate concerning the same development. APU eventually learned of the partnership and filed suit against Reid. Reid cross-claimed against Tate, who in turn filed a cross-complaint against Reid. As relevant here, Tate asserted causes of action for rescission, intentional misrepresentation, negligent misrepresentation, and suppression of facts, alleging that Reid falsely informed him that APU had given Reid permission to enter into the partnership and falsely promised Tate additional deals with APU that did not materialize. Reid moved for summary judgment, and the trial court granted the motion. Tate appeals. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2007, Tate owned vacant land in Victorville. According to Tate's deposition testimony, APU became interested in developing a regional campus, the High Desert Regional Center, on Tate's land "early on in 2007." In February 2007, Tate and Reid, then the Director of Asset Management at APU, also corresponded via email about "entering a JV [joint venture] . . . for the development of the APU Victorville campus."[1] Tate was aware that Reid worked at APU.

In May 2007, Tate prepared notes identifying the terms of the nascent business relationship between himself and Reid. He emailed the notes to Reid on May 12, 2007, with a cover email

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[1] The parties dispute which of them initiated the discussions. This dispute is immaterial, as there is no dispute that they ultimately entered into an agreement.

stating, "This is the start of the partnership agreement to memorialize our agreement. I am working on the LLC.as [*sic*] a separate agreement." The notes constitute the only written record of the terms of the partnership, which otherwise was negotiated and entered into orally.

The notes state that Tate owned approximately four acres of vacant land in Victorville with his wife and the Tate Family Trust, and that Reid and his wife "desire to acquire fifty percent (50%) of said land" and seek "mutual ownership of said property in an equal percentage." Under the agreement as reflected in the notes, Tate would contribute the property, "free and clear of any encumbrances," to a newly created LLC. Reid would contribute $609,840, "in the form of cash, payable on or before June 1, 2007, or upon formal creation of this partnership document and Tate's ability to contribute land." The notes explained that the "purpose of the partnership is to develop an office building of 36,000 (+/-) square feet with the intention of leasing said building to a credit tenant"—APU. Per the notes, "Tate and Reid will share equally all gains,, [*sic*] profits, losses from the ownership of said property," and "will each share equally all future capital contributions required to process plans to secure any needed approvals to build said Office building." The notes expressly limited the agreement "to the property being developed. Each partner understand [*sic*] that the other partner is actively engaged in the real estate business in general, and that the activities outside this venture may be in direct competition with this development. This agreement is not intended to restrict either partner from freely conducting business outside of this agreement without the permission of the either [*sic*] partner."

The notes do not say anything about Reid's connections to APU, or any requirement that he demonstrate to Tate that he had permission from APU to participate in the partnership. However, the parties present as undisputed fact that "[a]s early as 2007, W. Daniel Tate alleges he required David Reid to provide him with a written authorization from Azusa Pacific University for David Reid to be a partner in the High Desert Regional Center as W. Daniel Tate understood that Azusa Pacific University questioned whether it was appropriate under Azusa Pacific University's policies and guidelines to have David Reid be an owner in the High Desert Regional Center development project." No written authorization ever materialized. Tate maintains, in his deposition and separate statement, that Reid said he had oral authorization, and promised to provide written authorization.

Tate formally organized Sun Country Campus Development, LLC (SCCD LLC) on July 6, 2007. According to Reid's declaration, Tate, on or about July 27, 2007, "accepted the Reids' first $50,000 payment on the High Desert Regional Center development without first receiving any written authorization from Azusa Pacific University for David Reid to be a partner in the High Desert Regional Center." Reid stated that Tate accepted a second $50,000 check from Reid and his wife on or about September 4, 2007, again without receiving any written authorization from APU. Tate admitted in his deposition that he did not "raise the issue" of written authorization from APU when he accepted the checks.

After much negotiation, APU and SCCD LLC eventually executed a build-to-suit net lease for a single tenant office building on the Victorville land. The effective date of that

agreement was June 9, 2008.

On March 8, 2009, Reid sent an email to several people, including Tate. That email informed the recipients that "the University is not comfortable with me [Reid] having any ownership in the project due to a conflict of interest with my role at the University." It further stated that Reid "respect[ed] their wisdom and opinion" despite viewing the matter differently, and accordingly would leave Tate to "be the sole economic partner in the project." On March 9, 2009, Tate replied to a later email in the thread: "I am sorry to lose David as a partner. His role has been significant and really paramount to moving the development forward."

On April 29, 2009, Tate and his wife transferred the Victorville property to SCCD LLC. Two days later, on May 1, 2009, Tate accepted a $548,856.00 check from Reid, despite his March 9, 2009 email acknowledging Reid's potential conflict of interest at APU and his withdrawal as a partner. The memo portion of the check stated "1/2 Land." Reid claimed in his declaration that Tate accepted the payment "without requiring or first receiving any written authorization from Azusa Pacific University for David Reid to be a 50% owner/member in the SUN COUNTRY CAMPUS DEVELOPMENT, LLC." Tate disputed that assertion in his separate statement, citing his deposition to support his claim that "Reid continued to represent that he had already received oral authorization from Bob Johansen, and that he would be providing written authorization."[2] Nevertheless, Tate stated in his deposition that he accepted the $548,856.00

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[2] According to his email signature and Reid's declaration, Bob Johansen was the "Vice President of Business Affairs and Chief Financial Officer" at APU.

check without raising the issue of written authorization.

There is no written agreement indicating that Reid and/or his wife were members of SCCD LLC. The entity's operating agreement, which was prepared in early 2009, does not mention the Reids. However, during his deposition, Tate stated that he considered Reid to be a member of SCCD LLC, "[b]ased on his then capital contribution. And then based on his advice to me that he had spoken personally to Bob Johansen and that they would work out the issues with Mark Dickerson regarding the conflict of interest. And that he would get permission to come back into the partnership." Federal tax forms for 2009, 2010, and 2011 listed Reid as a 50 percent partner or manager in SCCD LLC. Tate agreed during his deposition that he and Reid "shared the profits and losses and equally owned the capital at that time."

SCCD LLC began making monthly distributions to Reid in or about May 2009. Reid contended in his declaration that the distributions "represented the Reids' 50% membership interest in SCCD LLC." Tate disputes that, citing to his deposition testimony that the payments were "land draws, not income from the investment," and "were to allow Reid to pay his investor back."[3] Either way, the parties agree in the statement of

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[3] Tate alleged in the cross-complaint that he "restored" $512,717.34 of Reid's initial investment from the construction loan by January 2010, and that SCCD LLC made monthly distributions totaling $150,819.48 to Reid between February 2012 and February 2013, after "APU took possession of the completed tenant improvements and began making monthly lease payments." As he explained in his deposition, "We reimbursed all predevelopment moneys, and then we started drawing – the lender had agreed to a loan – a land draw to pay back the land value. And David [Reid] said that – because I looked at it as I

undisputed facts that SCCD LLC made identical monthly payments to Tate and Reid through February 1, 2013. They further agree that SCCD LLC made the distributions "without requiring or first receiving any written authorization from Azusa Pacific University for David Reid to be a partner in the High Desert Regional Center, or owner/member in [SCCD LLC]."

The parties agree in the statement of undisputed facts that there is no "email, writing, agreement, or memorandum that represents, indicates, or refers to any requirement or condition that David Reid first provide the Tates with any written authorization from [APU] for David Reid to be an owner or member in the [SCCD LLC] project as a condition of the Reids becoming a 50% owner/member in the High Desert Regional Center project, or the [SCCD LLC]." The parties also agree that Reid's membership in SCCD LLC was not conditioned on Reid obtaining a lower interest rate or a refinance of the loan on the project, and that Tate made multiple, unsuccessful attempts to lower the interest rate on the project.

In March 2010, a senior vice president at APU sent an email to Reid and others at APU congratulating them on the High Desert facility. Reid forwarded the email to Tate. Tate responded, "I only wish you were able to take your bows as the man who rereally [*sic*] made this happen[.]" Tate explained at his deposition that he was referring to Reid's "role in making the contract happen." Tate further explained that he used the language about bows "because at that time he [Reid] was prevented from being a partner; and so he was not making his

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was contributing the land, David's buy-in was his 600- and change. He wanted his money back to pay the friend of the college," from whom he borrowed the buy-in money.

ownership known to anybody."

In February 2013, Reid resigned his employment with APU. SCCD LLC made its last payment to Reid around the same time. Tate stated in his deposition that he ended the partnership for three reasons: (1) Reid's capital account had been "completely returned," (2) he learned that Reid had "intentionally directed" another APU project away from him, and (3) he learned that Reid never made any effort to lower the interest rate on the partnership's loan, despite promising to do so.

APU filed suit against Reid on August 1, 2013. According to the separate statement, it alleged "that David Reid's involvement and participation in ownership of certain real property to which [APU] held a lease was in violation of a conflict of interest policy of [APU]." APU did not sue or threaten to sue Tate, his wife, their trust, or SCCD LLC. APU likewise did not cancel its lease with SCCD LLC, nor did it bar Tate from any future dealings with it. Despite agreeing with these facts, Tate asserted in his deposition that Reid's "fraudulent actions" damaged his "business reputation" with APU.

Reid, his wife, and their trust filed cross-claims against APU, the Tates, and SCCD LLC in September 2013. The Reids alleged that Tate and SCCD violated the partnership agreement and refused to pay distributions to which they were entitled. The Tates filed the cross-claims at issue here in December 2014: rescission, intentional misrepresentation, negligent misrepresentation, and suppression of facts. They sought damages on the misrepresentation and suppression of facts claims.

Reid moved for summary judgment on Tate's cross-complaint, or, in the alternative, summary adjudication of 15

discrete issues. The trial court granted summary judgment. It concluded Tate could not prevail on the rescission claim because he could not establish that Reid's promises about written authorization were material; that he suffered material harm from those dishonored promises; that he suffered other damages; or that he detrimentally or justifiably relied on any of Reid's promises. The court additionally concluded that Tate's contention that he relied on Reid's claims that he would provide a written authorization from APU was subject to the defenses of waiver and estoppel. The court further concluded that the "second, third and fourth causes of action fail, because they cannot establish the elements of justifiable detrimental reliance or resulting damages due to the Statute of Frauds defense."

The Tates and SCCD LLC timely appealed.

DISCUSSION

I. Summary Judgment Standard

"A court may grant a summary judgment only if there is no triable issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. (*Id.*, subd. (p)(2).)" (*Garrett v. Howmedica Osteonics Corporation* (2013) 214 Cal.App.4th 173, 180-181 (*Garrett*).) "The defendant can satisfy its burden by presenting evidence that negates an element of the cause of action or evidence that the plaintiff does not possess and cannot reasonably expect to obtain evidence needed to establish an essential element." (*Id.* at p. 181.) If the motion is based upon an affirmative defense, the defendant can satisfy its initial burden by showing that undisputed facts

support each element of the affirmative defense. (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.) If the defendant meets its burden, the burden then shifts to the plaintiff to present evidence creating a triable issue of material fact. (*Garrett*, *supra*, 214 Cal.App.4th at p. 181.)

We review the trial court's ruling on a summary judgment motion de novo, liberally construe the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opponent." (*Garrett*, *supra*, 214 Cal.App.4th at p. 181.) "We must affirm a summary judgment if it is correct on any of the grounds asserted in the trial court, regardless of the trial court's stated reasons. [Citation.] Even if the grounds entitling the moving party to a summary judgment were not asserted in the trial court, we must affirm if the parties have had an adequate opportunity to address those grounds on appeal." (*Ibid.*)

"The first step in analyzing any motion for summary judgment is to identify the elements of the challenged cause of action or defense in order to isolate those targeted by the motion." (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 757.) From there, we determine whether the moving party has met its burden, and, if so, whether the opposing party has produced evidence demonstrating a triable issue of material fact. (*Hinesley v. Oakshade Tower Center* (2005) 135 Cal.App.4th 289, 295 (*Hinesley*).) "Like the trial court, we view the evidence in the light most favorable to the opposing party and accept all inferences reasonably drawn therefrom." (*Ibid.*)

II. Reliance

Tate's cross-complaint alleged four causes of action: rescission due to fraud in the inducement or unilateral mistake of

fact, intentional misrepresentation, negligent misrepresentation, and suppression of facts. Each required him to establish reliance.

Fraud in the inducement, intentional misrepresentation, and suppression of facts are all species of actual fraud. (Civ. Code, § 1572; see *Hinesley*, *supra*, 135 Cal.App.4th at p. 294.) "The elements of fraud are (a) a misrepresentation (false representation, concealment, or nondisclosure); (b) scienter or knowledge of its falsity; (c) intent to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Id.* at p. 294.) Negligent misrepresentation differs from fraud only in that it does not require the plaintiff to prove that the defendant had scienter or knowledge of the falsity. (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1252.) "The elements of negligent misrepresentation are '(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.'" (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1252.) Reliance on the misrepresentation is a common element of all these claims.

Reliance is also necessary to Tate's claim that rescission is warranted due to his unilateral mistake of fact that Reid had authorization from APU to participate in the partnership. A unilateral mistake of fact may support a cause of action for rescission where the mistake renders enforcement of the contract unconscionable. (*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 281.) When the alleged mistake is the "'belief in the present existence of a thing . . . which does not exist,' (section 1577, Civil Code), it must be one material to the contract. The mistake must be one such that it animated and controlled the conduct of the

party; go to the essence of the object in view and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved." (*Reid v. Landon* (1958) 166 Cal.App.2d 476, 483.) In other words, the party seeking rescission must have relied on the mistake.

"Actual reliance occurs when a misrepresentation is "'an immediate cause of [a plaintiff's] conduct, which alters his legal relations,'" and when, absent such representation, "'he would not, in all reasonable probability, have entered into the contract or other transaction.'" [Citations.] 'It is not . . . necessary that [a plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing the conduct. . . . It is enough that the representation played a substantial part, and so has been a substantial factor, in influencing his decision.' [Citation.]" (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 976-977.) "Moreover, a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. [Citation.] A misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question' [citations], and as such materiality is generally a question of fact . . . ." (*Id.* at p. 977.) However, summary judgment may be granted where the moving party has produced evidence showing the opposing party did not rely on the alleged misrepresentation. (See *ibid.*) Here, to survive summary judgment, Tate must demonstrate a triable issue as to whether he justifiably relied on Reid's representations.

Whether reliance was justifiable or reasonable is a question of fact, and may be decided as a matter of law only if the facts permit reasonable minds to reach just one conclusion. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.) The standard is not whether a reasonable person would have relied, but rather whether it was reasonable for this person to have relied. (See *Seeger v. Odell* (1941) 18 Cal.2d 409, 415; *Boeken v. Phillip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1666.) "Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled." (*Seeger v. Odell*, *supra*, 18 Cal.2d at p. 415.) However, a party alleging misrepresentation "'may not put faith in representations which are preposterous, or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.' [Citation.]" (*Ibid.*) Put another way, the party alleging misrepresentation cannot recover if his or her conduct was manifestly unreasonable in light of his or her own intelligence and information. (*Ibid.*)

The representations at issue at summary judgment were Reid's assertions that he would provide written authorization from APU to participate in the partnership, would guarantee Tate similar development opportunities with APU on the same terms as the Victorville deal, and would work with the lender to get a lower interest rate. We address the evidence concerning Tate's reliance on each of those representations in turn.

In support of his summary judgment motion, Reid submitted evidence showing that Tate knew, from the outset, that Reid worked at APU, the entity for whom Tate wanted to

develop the project. Even if it were reasonable for Tate to fail to discern the potential conflict of interest at that time, Reid made the issue very clear for Tate in March 2009. In an email, Reid unequivocally informed Tate and others that APU did not approve of Reid's personal participation in the project, and Tate acknowledged Reid's resignation from the project due to APU's concern about a conflict of interest. Tate nevertheless accepted Reid's $548,856.00 check and treated him as a partner, despite purposefully omitting Reid's name from the SCCD LLC corporate documents. In early 2010, Tate remarked that he wished Reid could "take [his] bows" on the project, and explained at his deposition that he said that "because at that time he [Reid] was prevented from being a partner; and so he was not making his ownership known to anybody."

Tate's deposition testimony that Reid's contrary representations were very important to him and that he relied on those representations in accepting Reid's financial contribution to the project and making him a partner is contradicted by his behavior and his actions at the time. No reasonable trier of fact could conclude that Tate justifiably relied on Reid's representations that their transaction was authorized when he expressly stated his awareness that Reid "was prevented from being a partner," took actions to conceal Reid's involvement in the project, and made no effort to discuss his concerns with anyone at APU. (See *Hinesley*, *supra*, 135 Cal.App.4th at p. 303.)

The next representation was that Reid would guarantee Tate similar opportunities with APU. Reid presented evidence—Tate's written notes outlining the terms of the partnership—that Tate understood the parties' agreement from the outset to reach only "the property being developed," the Victorville property. In

addition, Tate stated at his deposition that he knew Reid did not have the power to decide who would get to participate in future deals with APU; Reid was only one member of a committee that had to approve development projects. Tate also knew, as discussed above, that APU did not approve of Reid's personal involvement in this land deal, let alone additional similar deals. Therefore, Tate's statements that he nevertheless reasonably relied on Reid's representations about future deals ring hollow, even when his deposition testimony about the existence of the promise is credited. No reasonable trier of fact could conclude that Tate justifiably relied on Reid's representations about future projects.

Finally, Tate alleged that Reid promised him that he, Reid, would get the lender on the project to lower the interest rate. Tate does not address the interest rate issue in his opening brief and therefore has forfeited any challenge related to that claim. "Though summary judgment review is de novo, review is limited to issues adequately raised and supported in the appellant's brief." (*Christoff v. Union Pacific Railroad Company* (2005) 134 Cal.App.4th 118, 125.)

Reid carried his burden of presenting evidence negating the essential justifiable reliance element of Tate's cross-claims. Tate did not meet his burden of presenting evidence creating a triable issue of material fact on that element. Summary judgment accordingly was warranted.

III. Damages

Even if Tate were able to prove reliance, summary adjudication would be warranted on Tate's misrepresentation and suppression of facts claims because there is no evidence in the record supporting his claims of damages.

In his opening brief, Tate explains his damages thusly, with no citations to the record: "First, but for Reid's misrepresentations, Tate would not have taken him on as a partner and would have kept one hundred percent of the proceeds himself. As a result, he has lost fifty percent of the development and income on the land, in an amount totaling at least $650,000. Second, Reid told Tate that he was going to get the interest on the predevelopment loan lowered, and for two years told Tate not to get involved in order to conceal his [Reid's] involvement in the deal from the lenders. Were it not for these misrepresentations, Tate could have gotten a lower interest rate on his own. Third, Reid has damaged Tate's business reputation within the community and with Azusa Pacific University. Finally, Reid actively worked against Tate's interests during his time as partner, for example, Reid helped Paul Newkirk secure a development in Murrieta that he had orally promised to Tate as further inducement to allow his investment."

"Any statement in a brief concerning matters in the appellate record—whether factual or procedural and no matter where in the brief the reference to the record occurs—must be supported by a citation to the record." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2013) ¶ 9:36, p. 9-12, citing Cal. Rules of Court, rule 8.204(a)(1)(C).) Tate's failure to adhere to this fundamental rule of appellate practice alone supports affirming the trial court's ruling. We do not presume the existence of error. Rather, we are required by the rules of appellate review to presume that the trial court's ruling was correct. (*Denham v. Superior Court of Los Angeles County* (1970) 2 Cal.3d 557, 564.) Even on review of a summary judgment, "[t]he appellant has the burden of showing error

occurred." (*Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1140.)

Setting this obligation aside, much of the evidence that plausibly could support Tate's claims of damages was stricken from the record when the trial court sustained Reid's evidentiary objections to Tate's declaration. Tate has not challenged these rulings and accordingly cannot rely on the stricken statements concerning Paul Newkirk and his development deal with APU, the interest rate on the loan, and damage to his business reputation to meet his burden on summary judgment. He is left with his deposition testimony, which is not only internally inconsistent but also contradicts his current assertions. (Cf. *Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1451 ["A party cannot create an issue of fact by a declaration which contradicts his prior pleadings."].) For instance, Tate asserted in his separate statement that the "Reids never purchased one half the land investment" and that the payments to Reid "were land draws, not income from the investment." He supported both of those claims with deposition testimony. He cannot now claim that he was damaged by paying Reid "fifty percent of the development and income on the land, in an amount totaling at least $650,000." Similarly, Tate conceded during his deposition that he tried and failed to secure a lower interest rate on the loan on his own; he cannot now claim that he made no such attempt because he relied on Reid to do so.

Tate's deposition testimony about the damage to his reputation—that he perceived unnamed individuals at APU to be "stonewalling" him—is too speculative to constitute evidence of damages. Tate did not dispute that APU did not sue or threaten to sue Tate, his wife, their trust, or SCCD LLC, or that it did not

bar him from future dealings with the university. Tate likewise did not present any evidence of the damages he allegedly incurred in connection with the other APU deals he was promised, or any evidence showing that his business reputation in the broader community was damaged. Without such evidence, Tate did not carry his burden on summary judgment.

DISPOSITION

The judgment of the trial court is affirmed. Respondents may recover their costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.