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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

STEVE KUKLOVSKY, Plaintiff and Appellant, v. LAURA COOLEY, Defendant and Respondent.	B262938 (Los Angeles County Super. Ct. No. KC065880)

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

Cohon & Pollak, Jeffrey M. Cohon and Kristina S. Keller, for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Chris A. Knudsen, Assistant Attorney General, Kenneth C. Jones and Nancy G. James, Deputy Attorneys General, for Defendant and Respondent.

Plaintiff and appellant Steve Kuklovsky (Kuklovsky) sued his former supervisor, defendant and respondent Laura Cooley (Cooley), for harassment and emotional distress. He now appeals from the summary judgment granted in her favor. We conclude there is no triable issue of material fact, and affirm the summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

From 2006 through April 23, 2012, Kuklovsky worked for the California Department of Food and Agriculture (CDFA), most recently as a Special Investigator I. In August 2011, Cooley became his supervisor. In January 2012, Kuklovsky disclosed to Cooley that he is gay and HIV positive. After his employment was terminated for alleged unapproved absences, Kuklovsky sued Cooley and the CDFA.

The First Amended Complaint (FAC)

The operative FAC alleged three causes of action against Cooley for (1) harassment/hostile work environment in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940, subd. (j)(1)), (2) intentional infliction of emotional distress, and (3) negligent infliction of emotional distress. Kuklovsky also sought punitive damages against Cooley. The FAC alleged additional FEHA causes of action against the CDFA for discrimination, failure to engage in interactive process and failure to make reasonable accommodation.

As to Cooley, the FAC alleged that after Kuklovsky informed her of his HIV status and sexual orientation, she began treating him differently by micromanaging his work and routinely questioning him as to whether he was performing his job duties. She placed more stringent and difficult requirements on him regarding sick time than other employees. When he was hospitalized for a week in April 2012 for gall bladder surgery, she required him to call her every day from the hospital, and also to call her every day while he recovered at home. She also required him to provide additional doctor's notes. She refused to provide him with the paperwork necessary to obtain a disability leave. He has been unable to find further employment.

Cooley's Motion for Summary Judgment and Supporting Evidence[1]

Cooley argued she was entitled to summary judgment because she did not engage in actionable harassment, there was no evidence her actions were based on Kuklovsky's protected status, his emotional distress claims had no merit and were preempted by the workers' compensation law, he failed to exhaust his administrative remedies, and he could not prove he was entitled to punitive damages.

In support of her motion, Cooley relied on Kuklovsky's deposition transcripts in an effort to show that the actions she took which Kuklovsky complains about did not rise to the level of actionable harassment. Her evidence established the following as undisputed regarding her behavior after Kuklovsky's disclosure: She had a different attitude and demeanor toward him; she sometimes asked him up to eight times a day what he was working on, where he was going and when he would be back; he believed she did not require other employees to call in every time they were absent; her tone of voice was more intimidating and aggressive; she said "hello" or "good morning" to other employees in the morning but not to him; she kept more of a physical distance from him; when he sometimes asked her work-related questions he would "get one of those sighs, like, you know, 'What do you want now?' type of thing"; he believes she was "pushing" for his termination because she wanted to get rid of him; the most outrageous thing she did was push for his termination; and the only treatment he sought for the distress she caused him was talk therapy through his primary care physician and group therapy sessions through the AIDS Services Foundation. Cooley also submitted evidence showing that between January 1 and April 15, 2012, Kuklovsky was off work to the extent he exhausted all of his earned leave credits and was docked for a minimum of 54 full days out of 72 working days. During some of this time, Kuklovsky worked in the field.

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[1] Cooley and the CDFA brought separate motions for summary judgment. The trial court granted summary adjudication on Kuklovsky's harassment claim against the CDFA but otherwise denied the CDFA's motion. The CDFA is not a party to this appeal.

Opposition to Summary Judgment

Kuklovsky submitted the following evidence in opposition to Cooley's summary judgment motion:

Cooley was apprehensive about touching things related to Kuklovsky and sometimes wore rubber gloves; when picking up state equipment at Kuklovsky's house after his employment was terminated, Cooley told an accompanying employee "Let's get this over with," and was short and hurried with Kuklovsky during the visit; she had a fear of germs in the office, was constantly washing her hands and wiping down desks and tables, had a can of Lysol, and requested the installation of germicidal dispensers; other employees found Cooley to be unapproachable, unpredictable, untrustworthy, moody, controlling, overly critical, vindictive, and a micromanager; she told other investigators that if Kuklovsky came to them for help, to send him to her instead; she expressed annoyance when Kuklovsky did not immediately answer her calls on days he was not in the office; she maintained an arm's length distance from him at all times; in early 2012, when Kuklovsky was not in the office, Cooley had his desk moved from its central location of six years to an isolated part of the office and had his couch removed because it was "disgusting"; she asked the branch chief if HIV was contagious and was told it is not; office staff regularly joked and teased Kuklovsky about being a "drama queen" and made other "locker room talk" about being gay, sometime in his presence and sometimes not; after his employment was terminated, he lost his condo, became homeless and lived in his car for several weeks; and Cooley cleaned out Kuklovsky's desk wearing latex gloves after he was terminated.

Further Papers

Cooley filed a reply brief and a separate reply to Kuklovsky's statement of additional material facts. Both parties submitted evidentiary objections.

Ruling

After ruling on the parties' evidentiary objections, the trial court granted Cooley's motion for summary judgment, adopting its 10-page tentative ruling.

Kuklovsky filed this appeal from the summary judgment in favor of Cooley.

DISCUSSION

I. Standard of Review

We review a grant of summary judgment de novo. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We affirm the summary judgment if it is correct on any legal ground applicable to the case. (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1071.) A defendant moving for summary judgment may meet its burden either by showing that one or more elements of a cause of action cannot be established or by showing that there is a complete defense thereto. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the moving party's burden is met, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of material fact. (*Ibid.*) The plaintiff must produce "'substantial'" responsive evidence sufficient to establish a triable issue of fact. (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 417.) "[R]esponsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.)

II. Evidentiary Objections

We refuse Kuklovsky's request to review the trial court's rulings on the parties' evidentiary objections. In his opening brief, Kuklovsky merely states that "[m]ost, if not all, of Kuklovsky's objections were meritorious and should have been sustained," and that the "trial court erred in sustaining [Cooley's] unmeritorious objections to Kuklovsky's evidence." In ruling on the numerous objections, the trial court did not set forth its reasons. Kuklovsky provides no authority or analysis showing how the trial court allegedly erred in making its rulings. He simply asks us to reverse the trial court's rulings such that "all of his objections to Cooley's evidence which are set forth in his separate, detailed objection document be sustained," and "overrule each and every objection made by Cooley to the evidence present by Kuklovsky."

"It is inappropriate for an appellate brief to incorporate by reference arguments contained in a document filed in the trial court." (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 854, citing *Soukup v. Law Offices of Herbert Hafif* (2006) 39

Cal.4th 260, 294, fn. 20.) "Such practice does not comply with the requirement that an appellate brief 'support each point by argument and, if possible, by citation of authority.' (Cal. Rules of Court, rule 8.204(a)(1)(B).)" (*Serri v. Santa Clara University*, *supra*, at p. 854.) Accordingly, Kuklovsky has failed to meet his appellate burden of demonstrating error by the trial court in ruling on the evidentiary objections.

III. Harassment Claim

A. Applicable Law

In California, the FEHA makes it unlawful for any person to harass an employee because of the employee's physical or mental disability or sexual orientation. (Gov. Code, § 12940, subd. (j)(1).) Physical and mental disabilities include HIV/AIDS. (Gov. Code, § 12926.1, subd. (c).) A claim of harassment under the FEHA may be based on a theory of "hostile work environment." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1043.)

The elements of a prima facie claim for harassment based on a hostile work environment are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome harassment; (3) the harassment complained of was based on protected characteristic(s); and (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 (*Fisher*).)

Claims of a hostile or abusive working environment arise when a workplace is "'permeated with "discriminatory intimidation, ridicule, and insult . . ." that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." . . . '" (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1377.) "The requirement that the conduct be sufficiently severe or pervasive to create a working environment a reasonable person would find hostile or abusive is a crucial limitation that prevents . . . harassment law from being expanded into a 'general civility code.'" (*Ibid*.)

To be actionable as harassment, the working environment must be both objectively and subjectively hostile, "'one that a reasonable person would find hostile or abusive, and

one that the victim in fact did perceive to be so.'" (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284.)

"The working environment must be evaluated in light of the totality of the circumstances: '[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462.)

Harassment that is occasional, isolated, sporadic or trivial is insufficient. Rather, the employee must show a concerted pattern of harassment of a repeated, routine, or generalized nature. (*Lyle v. Warner Brothers Television Productions, supra,* 38 Cal.4th at pp. 284–285.)

B. Analysis

Cooley met her initial burden as the moving party of demonstrating that she did not engage in actionable harassment. Her evidence, which was largely taken from Kuklovsky's own deposition testimony, showed that after he disclosed his sexual orientation and HIV-positive status to her, she had a different attitude, demeanor and tone of voice; began micromanaging him by keeping closer tabs on what he was doing, where he was going and when he would be back; kept her distance from him; greeted other employees in the mornings but not him; sometimes sighed when he asked her work-related questions; and made him call in every day that he was absent from work. While these actions might be annoying and unpleasant, they were not sufficiently severe or pervasive so as to seriously affect the well being of a reasonable employee. Kuklovsky's complaints do not demonstrate an abusive or hostile environment. Indeed, Cooley's evidence showed that after Kuklovsky's disclosure, he worked 15 or fewer days over a four-month period, and some of that time he spent in the field. A supervisor's tone of voice, demeanor, sighs, and the like over 15 days cannot be considered pervasive. Thus, the burden shifted to Kuklovsky.

Kuklovsky's evidence failed to create a triable issue of material fact on his harassment claim. Kuklovsky's evidence that Cooley was apprehensive about touching things related to him and sometimes wore rubber gloves came from the deposition testimony of another employee. But further examination of this testimony shows that the employee did not know if Cooley's use of rubber gloves was a "general tendency of hers as opposed to something directed at Mr. Kuklovsky," and this employee retired years before Kuklovsky made his disclosure.

Kuklovsky also presented evidence that Cooley had a fear of germs, constantly washed her hands and wiped down desks and tables, had a can of Lysol and requested germicidal dispensers. Again, this evidence came from the deposition testimony of a fellow employee, and there was no evidence as to whether Cooley's fear of germs predated Kuklovsky's disclosure, that Kuklovsky was even aware of it during his employment, or that she only wiped down things touched by him.

Kuklovsky also relied on the deposition testimony of an employee that Cooley told this employee to send Kuklovsky to her if he asked for help. But further examination of this testimony shows this employee could not recall when this statement was made by Cooley, and he stated that it was made to him alone.

Kuklovsky's evidence that Cooley sighed and showed exasperation when he did not immediately return her phone calls was based on the testimony of an employee who stated that this happened once during a car ride with Cooley.

Kuklovsky's evidence that Cooley had his desk moved to a more remote area of the office, said his couch was "disgusting," and wore latex gloves to clean out his desk came from the deposition testimony of an employee who also testified that Cooley explained she wanted the desk space for a new investigator who would benefit from sitting next to more senior investigators and because Kuklovsky was never in the office. When asked if the couch was disgusting, this employee testified that it was "retro '80 . . . faux leather. It wouldn't be something that I would have in my house." She also testified that she had no reason to believe that the removal of Kuklovsky's desk or couch or Cooley's wearing of latex gloves were due to Kuklovsky's HIV status.

Kuklovsky's evidence that Cooley maintained an arm's length from him at all times came from the testimony of the employee who accompanied Cooley to retrieve state equipment from Kuklovsky's house after his employment was terminated. Thus, it was based on a single incident, and one that took place after Kuklovsky no longer worked for the CDFA.

Kuklovsky complains that Cooley placed more stringent requirements on him regarding sick leave than other employees. But his own evidence shows that she also asked other employees for doctor's notes or medical clearances after taking medical leaves.

Moreover, none of Kuklovsky's evidence shows that it was based on Kuklovsky's protected characteristics of being gay and HIV positive. Indeed, Kuklovsky's own evidence showed that other employees believed Cooley also micromanaged them. One employee testified that Cooley "wants to know every aspect of what you are doing, short of going to the bathroom." This same employee also testified that Cooley did not like to be asked questions about office policies or her own personal policies. Cooley also asked other employees for medical clearances when they were absent. And other employees testified that they did not have good relationships with her either. Yet, there is no evidence these employees shared Kuklovsky's protected characteristics. Kuklovsky's evidence that other employees sometimes made jokes about gays also does not assist him. The evidence was based on the deposition testimony of an employee who stated that while she heard some of this talk, she did not recall Cooley ever making any such comments. And the testimony suggested that the comments were made in 2010, prior to Cooley becoming Kuklovsky's supervisor.

Even assuming Cooley's attitude and demeanor changed after Kuklovsky's disclosure of his protected characteristics, the acts taken by Cooley just described were not so severe or pervasive as to alter the conditions of his employment and create an abusive work environment.

Kuklovsky's reliance on *Roby v. McKesson Corp*. (2009) 47 Cal.4th 686 (*Roby*), which he claims should dictate the outcome of this case, is misplaced. As Cooley notes,

the relevant holding in *Roby* was that the Court of Appeal erred in concluding there was insufficient evidence to support the jury's finding of harassment under the FEHA, because it should not have allocated the evidence between the harassment claim and the discrimination claim. (*Id*. at p. 693.) *Roby* stated that while the FEHA treats discrimination and harassment as distinct categories, nothing in it precludes the same evidence from being used to prove both claims. (*Id*. at p. 710.)

Roby found the evidence amply supported the jury's harassment verdict. The evidence showed that Roby developed panic attacks, took medication that caused unpleasant body odor, and developed a nervous disorder that caused her to dig her fingernails into her arms producing open sores. (*Roby, supra,* 47 Cal.4th at pp. 695–696.) Roby's supervisor did the following: Made negative comments in front of other workers about Roby's body odor; called Roby "'disgusting'" because of the sores on her arms and her excessive sweating; openly ostracized Roby in the office, refusing to respond to Roby's greetings and turning away when Roby tried to ask questions; made a facial expression of disapproval when Roby took rest breaks because of her panic attacks; ignored Roby at staff meetings and overlooked her when handing out gifts; excluded Roby from office parties by designating her to cover the office telephones; frequently reprimanded Roby in front of her coworkers; spoke about her in a demeaning manner; openly belittled her contribution to the company, calling her job a "'no brainer'"; and made degrading announcements when Roby called in sick. (*Id*. at p. 695.)

While Cooley likewise did not always greet Kuklovsky in the morning, sighed when he sometimes asked questions, and became frustrated when he did not answer her phone calls, the evidence of harassment does not rise to that in *Roby*. There was no evidence that Cooley openly ostracized Kuklovsky in the office, made demeaning facial expressions or gestures of disapproval, ignored him at meetings, excluded him from parties, reprimanded him in front of others or openly belittled him.

As the trial court stated, Kuklovsky's evidence, "based on the nature, frequency, timing and context of the alleged harassing conduct, fails to demonstrate that Cooley

harassed [Kuklovsky] based on his sexual orientation and/or HIV-positive status." The trial court properly ruled on the harassment claim.

IV. Emotional Distress Claims

Kuklovsky's remaining common law causes of action for intentional and negligent infliction of emotional distress are preempted by the exclusive remedy provisions of the workers' compensation law and, in any event, Kuklovsky did not create a triable issue of fact.

A. Preemption

In *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 902, our Supreme Court held that workers' compensation is the exclusive remedy for any injury that may have resulted from "'outrageous conduct' that was intended to, and did, cause plaintiffs 'severe emotional distress,' giving rise to common law causes of action for intentional infliction of emotional distress . . . [that] occurred at the worksite, in the normal course of the employer-employee relationship." (*Id*. at p. 902.) The court reiterated its prior holdings that "'So long as the basic conditions of compensation are otherwise satisfied (Lab. Code, § 3600), and the employer's conduct neither contravenes fundamental public policy . . . nor exceeds the risks inherent in the employment relationship [citation], an employee's emotional distress injuries are subsumed under the exclusive remedy provisions of workers' compensation.'" (*Miklosy v. Regents of University of California, supra,* at p. 902.)

In *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, the plaintiff sought damages for intentional infliction of emotional distress based on evidence that his supervisor berated and humiliated him, criticized his job performance, insulted him with profanities on a regular basis, once slammed shut a laptop computer onto the plaintiff's hand, and once shouted at him, grabbed his lapels, and threatened to throw him out of the office if he did not sign a release. (*Id*. at p. 367.) Despite finding these actions offensive and inappropriate, the reviewing court held that "absent a violation of a fundamental public policy, which has not been shown," and because the emotional distress was "based

exclusively on misconduct that occurred in the normal course of the employment relationship" the workers' compensation exclusivity rule applied. (*Id*. at p. 368.)

Likewise here, Kuklovsky's claims for emotional distress are based on his employment-related interactions with Cooley. Except for the employment-related visit to his home after his termination and her expressed frustration during the car ride there that he was not answering her calls, all of Kuklovsky's alleged distress was caused by conduct that occurred at the worksite in the normal course of employment. Accordingly, his emotional distress claims are subsumed by the workers' compensation law.

B. No Triable Issue of Fact

Even if the workers' compensation law did not bar his emotional distress claims, Kuklovsky did not create a triable issue of material fact as to these claims.

"""[T]o state a cause of action for intentional infliction of emotional distress a plaintiff must show: (1) outrageous conduct by the defendant; (2) the defendant's intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct."""" (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 832.)

Kuklovsky relies on cases for the argument that findings of sexual harassment (not at issue here) and sexual orientation harassment constitute the "outrageous conduct" element. (*Fisher, supra,* 214 Cal.App.3d at p. 618; *Kovatch v. California Casualty Management Co*. (1998) 65 Cal.App.4th 1256, 1277.) But he ignores that no such findings have been made here.

"Conduct is extreme and outrageous when it exceeds all bounds of decency usually tolerated by a decent society, and is of a nature which is especially calculated to cause, and does cause, mental distress. [Citation.] Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." (*Fisher, supra,* 214 Cal.App.3d at p. 617.) """Generally, conduct will be found to be actionable where the "recitation of the facts to an average member of the community would arouse

his resentment against the actor, and lead him to exclaim, 'Outrageous!'"""" (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494.)

The evidence pertaining to Cooley's alleged "outrageous" and "extreme" behavior came from Kuklovsky's own deposition testimony. When asked to describe how her behavior was outrageous, he replied that "[i]t's hard to really define. I mean it just—it just was outrageous." He agreed that Cooley's behavior was outrageous because it was "unfair." In response to the question of what was the most single outrageous thing Cooley did, Kuklovsky responded that it was her push for his termination. The evidence that she was pushing for his termination was his belief that she wanted to get rid of him. Kuklovsky clarified that it was Cooley's behavior altogether that was extreme, "just the whole attitude, how it changed, and how I was approached . . . everything changed." We conclude that as a matter of law, Cooley's behavior was not so outrageous that no reasonable person could be expected to tolerate it.

As to her intent, Kuklovsky did not dispute that his only evidence Cooley intended to harm him was the totality of the actions she allegedly took, and that she just "should have known" her actions would cause him emotional harm based on "common sense." He was not even sure "intend" was the right word to use.

As to the emotional distress he suffered, Kuklovsky stated in a declaration that he was "often apprehensive" about going into the office and that he suffered "extreme stress and depression," but he did not elaborate. He did not dispute that the only treatment he sought was talk therapy through his primary care physician and group therapy sessions through the AIDS Services Foundation. He testified that during the group sessions he talked "a little bit" about Cooley, but he was basically there "to learn about other people's experiences." While Kuklovsky's declaration mentions that several months after his termination, he lost his condo, became homeless, and lived in his car for several weeks, which no doubt added to his depression, these misfortunes were caused by the termination of his employment, an official action of his employer, and not any harassing act Cooley is alleged to have taken.

Again, we conclude that as a matter of law, Kuklovsky did not suffer severe "'''''emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.''''' (*Hughes v. Pair, supra*, 46 Cal.4th at p. 1051.)

Kuklovsky's negligent infliction of emotional distress claim fares no better. As Kuklovsky concedes, this is not an independent tort but the tort of negligence to which the traditional elements of duty, breach of duty, causation, and damages apply. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1377.) "[T]o recover damages for emotional distress on a claim of negligence where there is no accompanying personal, physical injury, the plaintiff must show that the emotional distress was 'serious.'" (*Ibid.*) "'[S]erious emotional distress'" is functionally the same as "'severe emotional distress.'" (*Id.* at p. 1378.) Thus, for the same reasons any emotional distress damages did not rise to the level of severity required to support a claim of intentional infliction of emotional distress, they also did not support a negligent claim of emotional distress.[2]

V. Reply Separate Statement

Kuklovsky argues the trial court erred by failing to strike or disregard Cooley's "highly improper and prejudicial" reply separate statement, and that for this additional reason summary judgment was improper. We find no merit to this argument for two reasons. First, Kuklovsky fails to identify in any manner how he was prejudiced by the filing of this document. Indeed, he admits that he filed a formal written objection to this document before the hearing on the summary judgment motion. Second, in this reply document, Cooley responded to the 57 additional facts set forth by Kuklovsky in his response to Cooley's original separate statement, and many of her responses were "undisputed." She also did not present any new evidence. For Cooley to leave these 57 new facts unaddressed would have placed an undue burden on the trial court.

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[2] In light of our conclusions, no claim for punitive damages remains. We also need not address the issue of failure to exhaust administrative remedies.

DISPOSITION

The summary judgment in favor of Cooley is affirmed. Cooley is entitled to her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
HOFFSTADT