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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1178

Filed: 19 September 2017

Union County, No. 15 CVS 2821

JEFFREY G. EDWARDS, EXECUTOR OF THE ESTATE OF CARROLL M. EDWARDS, Individually and Derivatively on Behalf of TRANSWORLD HEART CORPORATION, Plaintiff,

v.

CHARLES L. RICHARDSON, Individually and as Director of TRANSWORLD HEART CORPORATION, Defendant.

Appeal by Intervenor-Plaintiff from an order entered 29 June 2016 by Judge Theodore S. Royster in Union County Superior Court. Heard in the Court of Appeals 17 May 2017.

*Helms Robison & Lee, P.A., by R. Kenneth Helms, Jr. and Stephen M. Bennett, for Intervenor Plaintiff-Appellant.*

*Koehler & Associates, by Stephen D. Koehler, for Defendant-Appellee.*

*No brief filed on behalf of Plaintiff.*

HUNTER, JR., Robert N., Judge.

R. Dean Harrell (“Intervenor-Plaintiff”) appeals the trial court’s 29 June 2016 order denying Intervenor-Plaintiff’s motion to intervene to assert individual claims

against Charles L. Richardson, individually (“Defendant”) and as director of TransWorld Heart Corporation, (“Defendant Corporation”). Because *res judicata* bars the claims Intervenor-Plaintiff proposes to assert in an individual capacity in this action, we conclude the trial court properly denied Intervenor-Plaintiff’s motion to intervene.

### **I. Factual and Procedural Background**

Intervenor-Plaintiff’s forecast of evidence tends to show the following. Carroll M. Edwards (“Edwards”) was a minority shareholder of Defendant Corporation. Edwards owned 2,960,000 shares of Defendant corporation, which consisted of approximately 11 percent of the Defendant-Corporation’s outstanding shares. Edwards is deceased, and Jeffrey G. Edwards, as executor of Edwards’s estate (“original Plaintiff”), now represents Edwards.

Defendant is the Chairman of the Board of Directors of Defendant Corporation, as well as the President and majority shareholder of Defendant Corporation.

Intervenor-Plaintiff, like Edwards, is a minority shareholder of Defendant Corporation and owns not less than 3,100,101 shares of stock in Defendant Corporation.

On 21 October 2015, original Plaintiff, individually and derivatively as a minority shareholder, filed a complaint against Defendant individually and in his capacity as director of Defendant Corporation. Here, original Plaintiff sued Defendant for breach of fiduciary duty, duty of loyalty, conversion, unjust

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enrichment, a constructive trust and an accounting, and unfair and deceptive trade practices. In addition to a jury trial, original Plaintiff sought damages and treble damages based on an accounting and a constructive trust, as well as attorneys' fees.

On 15 April 2016, Intervenor-Plaintiff, filed a motion to intervene into original Plaintiff's lawsuit pursuant to Rule 24 of the North Carolina Rules of Civil Procedure.

Here, Intervenor-Plaintiff sought intervention by right as well as permissive intervention into original Plaintiff's 2015 action. Intervenor-Plaintiff, in an individual and derivative capacity, seeks to sue Defendant personally and as Director of Defendant Corporation for breach of fiduciary duty, duty of loyalty, conversion, unjust enrichment, a constructive trust and accounting, and unfair and deceptive trade practices. Intervenor-Plaintiff alleged Defendant's actions were for Defendant's personal benefit and not in the best interest of the shareholders. In addition to a jury trial, Intervenor-Plaintiff seeks damages and treble damages based on an accounting and a constructive trust, as well as attorneys' fees.

In his motion to intervene, Intervenor-Plaintiff alleged he had an interest in the property or interests obtained by Defendant Richardson with company funds and subject to original Plaintiff's action. Intervenor-Plaintiff also argued since he and original Plaintiff are minority shareholders, they are similarly situated. Further, Intervenor-Plaintiff claims a disposition of the 2015 action without his participation would impair his ability to protect his interests in the property or interests Defendant

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wrongfully obtained. Intervenor-Plaintiff also argued if original Plaintiff was allowed to proceed alone against Defendant, property or interests at issue would be diluted or irreparably harmed. In addition, Intervenor-Plaintiff contended his claims and the claims set forth by original Plaintiff in the 2015 Action have common questions of law and fact, and intervention would not unduly delay or prejudice the adjudication of the rights of the original parties to the 2015 action.

In the complaint attached to his motion to intervene, Intervenor-Plaintiff, alleged Defendant Richardson, in his capacity as Chairman of the Board of Directors, President, and majority shareholder breached his fiduciary duty through a number of actions. Intervenor-Plaintiff alleged Defendant converted his investment for his own benefit and self-interested purposes rather than for the benefit of Defendant Corporation. Intervenor-Plaintiff also alleged Defendant Richardson was unjustly enriched through his actions. Intervenor-Plaintiff requested an accounting of all financial transactions engaged in by Defendant Richardson in Defendant Corporation's name and the imposition of a constructive trust. Finally, Intervenor-Plaintiff alleged Defendant Richardson engaged in unfair and deceptive trade practices because he willfully and intentionally misappropriated Intervenor-Plaintiff's money.

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On 10 May 2016, original Plaintiff filed a response to Intervenor-Plaintiff's motion to intervene stating it did not oppose Intervenor-Plaintiff's Motion to Intervene.

On 27 June 2016, the trial court heard Intervenor-Plaintiff's motion to intervene. During the hearing of the motion, counsel for Defendant asserted Intervenor-Plaintiff's claims were derivative in nature, and therefore Intervenor-Plaintiff did not have a basis to intervene as of right. Defendant also asserted the defense of *res judicata*, because the dismissal of Intervenor-Plaintiff's individual claims against Defendant in an earlier action barred Intervenor-Plaintiff's claims in a subsequent action. Defendant's Counsel requested the trial court deny Intervenor-Plaintiff's Motion to Intervene.

Defendant's counsel introduced the judgment from a 2015 action by Intervenor-Plaintiff against Defendant Corporation and Defendant.<sup>1</sup> Counsel for Defendant explained "under *res judicata* all claims that were asserted or could have been asserted in this prior lawsuit are resolved. That means Mr. Harrell has no claims individually against my client."

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<sup>1</sup> 13 CVS 2174. Intervenor-Plaintiff sued Defendant and Defendant Corporation. The trial court dismissed Intervenor-Plaintiff's claims against Defendant and Defendant Corporation with prejudice. Here, the trial court found Intervenor-Plaintiff did not contract to loan money to Defendant Corporation, and therefore the trial court concluded Defendant "could not have guaranteed a loan of money by [Intervenor] Plaintiff to Defendant Corporation."

In response, Intervenor-Plaintiff's counsel contended his earlier lawsuit and the original Plaintiff's lawsuits were wholly unrelated except for some commonality between the parties involved. Intervenor-Plaintiff also asserted even with due diligence in the earlier action, Intervenor-Plaintiff could not have known about the claims by original Plaintiff in the pending 2015 Action.

The trial court concluded the hearing by stating:

[T]he whole point of the lawsuit is if you file the lawsuit about something you should have included and you could have included other things you should have or else the one judgment bars you. It's pretty clear on that, you have an individual claim this close to the transactions that are involved in this prior lawsuit so I think individually you pretty much shot yourself in the foot.

In an order entered on 29 June 2016, the trial court denied Intervenor-Plaintiff's motion to intervene with regard to any individual claims against Defendant Richardson based on *res judicata*. However, the trial court granted Intervenor-Plaintiff's motion to intervene in the 2015 action as a shareholder regarding any derivative claims asserted against Defendant Richardson.

On 28 July 2016, Intervenor-Plaintiff timely entered notice of appeal.

## **II. Standard of Review**

The denial of a motion to intervene as of right, brought under Rule 24(a)(2), is reviewed *de novo* by this Court. *Harvey Fertilizer & Gas Co. v. Pitt County*, 153 N.C. App. 81, 89, 568 S.E. 2d 923, 928 (2002). "A court empowered to hear a case *de novo*

is vested with ‘full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court.’ *Caswell County v. Hanks*, 120 N.C. App. 489, 491, 462 S.E.2d 841, 843 (1995) (quoting *In Re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964)).

The denial of “[p]ermissive intervention by a private party under Rule 24(b) rests within the sound discretion of the trial court and will not be disturbed on appeal unless there was an abuse of discretion.” *Holly Ridge Assocs., LLC v. N.C. Dep’t of Env’t & Natural Res.*, 361 N.C. 531, 538–39, 648 S.E.2d 830, 836 (2007) (quoting *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 460, 515 S.E.2d 675, 683 (1999) (citations omitted)).

### **III. Appellate Jurisdiction**

We first address the issue of appellate jurisdiction. Because we conclude this appeal is interlocutory, but that the appealed order denying Intervenor-Plaintiff’s individual claims against Defendant affects a substantial right of Intervenor-Plaintiff, we conclude this matter is immediately appealable.

An order is interlocutory if it does not fully dispose of the entire case and “leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). “A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal.”

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*Curl v. American Multimedia, Inc.*, 187 N.C. App. 649, 652, 654 S.E.2d 76, 78-79 (2007) (quoting *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993)). However,

[A]n interlocutory order may be immediately appealed (1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C. R. Civ. P. 54(b) or (2) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

*Anderson v. Seascope at Holden Plantation, LLC*, 232 N.C. App. 1, 6, 753 S.E.2d 691, 696 (2014) (quoting *Stinchcomb v. Presbyterian Medical Care Corp.*, 211 N.C. App. 556, 560, 710 S.E.2d 320, 323 (2011)).

Here, Intervenor-Plaintiff argues the trial court's denial of his motion to intervene affects a substantial right. "Whether a party may appeal an interlocutory order pursuant to the substantial right exception is determined by a two-step test." *Wood v. McDonald's Corp.*, 166 N.C. App. 48, 55, 603 S.E.2d 539, 544 (2001). "[T]he right itself must be substantial and the deprivation of that substantial right must potentially work injury to [appellant] if not corrected before appeal from final judgment." *Id.* at 55, 603 S.E.2d at 544 (quoting *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990)). This Court's analysis of whether an appellant has demonstrated the existence of a substantial right "is not defined by fixed rules applicable to all cases of a certain type, but rather is based on an individual

determination of the facts and procedural context presented by each case.” *Boyce & Isley, PLLC v. Cooper*, 169 N.C. App. 572, 574-75, 611 S.E.2d 175, 176 (2005).

Under the facts presented here, we conclude the trial court’s order affects a substantial right of Intervenor-Plaintiff. *Cf. United States Auto Ass’n v. Simpson*, 126 N.C. App. 393, 395, 485 S.E.2d 337, 339 (1997) (concluding that an order denying the appellants’ motion to intervene affected a substantial right); *Alford v. Davis*, 131 N.C. App. 214, 216, 505 S.E.2d 917, 919 (1998) (concluding that the denial of a motion to intervene affected a substantial right). This action concerns Intervenor-Plaintiff’s pursuing claims against Defendant both derivatively and individually. The original Plaintiff, Edwards’s estate, can proceed both individually and derivatively against Defendant. Limiting Intervenor-Plaintiff’s involvement to only a derivative suit affords only the original Plaintiff the ability to fully recover. Therefore, the trial court’s order only allows the original Plaintiff in this action an opportunity to be made whole from this litigation. We conclude the order denying Intervenor-Plaintiff’s motion to intervene in an individual capacity affects a substantial right and is immediately appealable.

#### **IV. Analysis**

Intervenor-Plaintiff contends the trial court erred in denying his motion to intervene under Rules 24(a)(2) and Rule 24(b) of the North Carolina Rules of Civil

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Procedure. Because we conclude *res judicata* bars Intervenor-Plaintiff's individual claims against Defendant, we affirm the trial court.

Rule 24 of the North Carolina Rules of Civil Procedure determines when a third party may intervene as a party to a lawsuit." *Virmani v. Presbyterian Health Services.*

*Corp.*, 350 N.C. 449, 458, 515 S.E.2d 675, 682 (1999). Under Rule 24(a)(2):

[A]nyone shall be permitted to intervene in an action . . . .  
When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C. Gen. Stat. § 1A–1, Rule 24(a)(2) (2016).

Additionally, Rule 24(b)(2) states upon a timely application anyone shall be permitted to intervene in an action “[w]hen an applicant's claim or defense and the main action have a question of law or fact in common.” N.C. Gen. Stat. § 1A–1, Rule 24(b)(2) (2016). It is within the trial court’s discretion “whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” *Id.* Therefore, Rule 24 serves as a means to control and limit intervention by third parties.

In North Carolina, the doctrine of *res judicata* or claim preclusion “prevents the relitigation of all matters . . . that were or should have been adjudicated in the prior action.” *Williams v. Peabody*, 217 N.C. App. 1, 5, 719 S.E.2d 88, 92 (2011)

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(quoting *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004)). This Court concluded three elements are required in order for *res judicata* to apply. *Id.* at 5, 719 S.E.2d at 92. First, “a party must show that the previous suit resulted in a final judgment on the merits[.]” *Id.*, at 5, 719 S.E.2d at 92 (quoting *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413–14, 474 S.E.2d 127, 128 (1996)) Second, the “same cause of action is involved.” *Id.* at 5, 719 S.E.2d at 92 (quoting *Tucker* at 413-14, 474 S.E.2d at 128). Third, “both the party asserting *res judicata* and the party against whom *res judicata* is asserted were either parties or stand in privity with parties.” *Id.* at 5, 719 S.E.2d at 92 (quoting *Tucker* at 413-14, 474 S.E.2d at 128).

This Court stated the doctrine of *res judicata* extends “not only to matters actually determined but also to other matters which in the exercise of due diligence could have been presented for determination in the prior action.” *Gaither Corp. v. Skinner*, 241 N.C. 532, 535-36, 85 S.E.2d 909, 911 (1955). The purpose of *res judicata* requires parties to bring all claims “which might or should have been pleaded in one action.” *Skinner v. Quintiles Transnational Corp.*, 167 N.C.App. 478, 482, 606 S.E.2d 191, 193 (2004). Therefore, *res judicata* bars any additional action when the subsequent action involves the same parties and the same cause of action as the initial action. *Id.* at 482, 606 S.E.2d at 193. “A final judgment bars not only all matters actually determined or litigated in the prior proceeding, but also all relevant and material matters within the scope of the proceeding which the parties, in the

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exercise of reasonable diligence, could and should have brought forward for determination.” *Id.* at 482, 606 S.E.2d at 193-94.

Here, the first element necessary for *res judicata* is a final judgment on the merits. The judgment in 13 CVS 2174, Intervenor-Plaintiff’s action against Defendant and Defendant Corporation, satisfies this requirement.

We next address the third element, which is whether the parties involved in the claim are the same as in the previous action. Here, and in 13 CVS 2174, Intervenor-Plaintiff, Defendant and Defendant Corporation are all parties.

Finally, this Court addresses the element requiring the same cause of action from the previous suit to be involved in the present action. This Court articulated “[t]he defense of *res judicata* may not be avoided by shifting legal theories or asserting a new or different ground for relief[.]” *Williams* at 7, 719 S.E.2d at 94 (quoting *Rodgers Builders, Inc. v. McQueen*, 76 N.C.App. 16, 30, 331 S.E.2d 726, 735 (1985)).

Further, this Court held:

The plea of *res adjudicata* applies, . . . not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject in litigation and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it.

*Id.* at 7, 719 S.E.2d at 94 (quoting *Edwards v. Edwards*, 118 N.C. App. 464, 472, 456 S.E.2d 126, 131 (1995)).

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On appeal, Intervenor-Plaintiff argues his present claims should not have been litigated in the previous action. Intervenor-Plaintiff contends this is because his present claims are material and relevant matters not within the scope of the prior action's pleadings. In making this argument, Intervenor-Plaintiff relies on *Sanderford v. Duplin Land Development, Inc.*, in which this Court held the plaintiff's action was not barred by *res judicata* because plaintiff asserted a "separate cause of action for damages for breach of fiduciary duty[.]" \_\_\_ N.C. App. \_\_\_, \_\_\_, 789 S.E.2d 503, 507 (2016). Intervenor-Plaintiff contends his claims should not have been litigated in his prior action because his present claims are not "material and relevant matters" within the scope of the pleadings of the 2013 action. We disagree.

In *Sanderford*, Buyer filed an action against Seller in federal court seeking enforcement of Addendum B to his lot purchase agreement, liability under the Interstate Land Sales Full Disclosure Act ("ILSFDA") and the Unfair and Deceptive Trade Practices Act ("UDTPA"), and a claim for fraud. *Id.* at \_\_\_, 789 S.E.2d at 504. The federal district court granted summary judgment in favor of Seller, and summary judgment was affirmed on appeal. *Id.* at \_\_\_, 789 S.E.2d at 504. Four years after the filing of that suit, Buyer then filed an action in state court alleging breach of implied warranty and breach of fiduciary duty, "contending that the lot was not suitable for construction of a single-family residence." *Id.* at \_\_\_, 789 S.E.2d at 505. Both parties moved for summary judgment, and the trial court granted Seller's motion on Buyer's

breach of implied warranty claim, but denied Seller’s motion on Buyer’s breach of fiduciary duty claim. *Id.* at \_\_\_, 789 S.E.2d at 505.

Buyer alleged Seller failed “through its agent Mac Rogerson, who [Buyer] claimed was also his realtor and ‘stood in a fiduciary relationship to [Buyer]’ ‘to disclose all material facts known to [Seller] regarding the Lot.’” *Id.* at \_\_\_, 789 S.E.2d at 506. Specifically, Buyer alleged:

[A] “Soil Bearing Test uncovered buried organic material beginning approximately three feet below the surface” indicating that “the Lot is unsuitable for construction.” Moreover, “[t]he Unsuitable Buried Material is approximately eighteen (18) to twenty four (24) inches thick across the Lot[,]” and “[u]pon information and belief, . . . [Seller] covered the Unsuitable Buried Material with fill dirt, in order to cover and obscure” it, rather than remove it.

*Id.* at \_\_\_, 789 S.E.2d at 506. This Court reasoned Buyer’s “current claim is not a material and relevant matter within the scope of the pleadings of the federal suit, which *focused solely on Addendum B.*” *Id.* at \_\_\_, 789 S.E.2d at 507. (citation and internal quotation marks omitted) (emphasis added). Therefore, this Court concluded *res judicata* did not bar Buyer’s claim since:

[Buyer] has not merely presented a new legal theory regarding specific enforcement of Addendum B or misrepresentations regarding the confirmatory report. Rather, [Buyer] has asserted a separate cause of action for damages for breach of fiduciary duty regarding [Seller’s] alleged duty, and breach of such duty, to disclose that the lot was unsuitable for a single-family residence.

*Id.* at \_\_\_, 789 S.E.2d at 507.

Additionally, this Court noted the Buyer's original suit in *Sanderson* dealt with the "specific enforcement of Addendum B, relief for violations of ILSFDA and UDTPA, and a claim for fraud." *Id.* at \_\_\_, 789 S.E.2d at 506. The Buyer in *Sanderson* should not have included an allegation for breach of fiduciary duty since the Buyer's initial claims "surrounded [his] dissatisfaction with how [Seller] handled the testing and reporting of the fecal coliform issue." *Id.* at \_\_\_, 789 S.E.2d at 506.

The instant case is distinguishable from *Sanderson*. Here, Intervenor-Plaintiff first litigated issues revolving around the business decisions and practices of Defendant Corporation and Defendant. Intervenor-Plaintiff alleged he made three loans to Defendant Corporation and Defendant personally guaranteed those loans. The purpose of those loans was to "pay for expenses including, *without limitation*, payment of attorney fees, continuing with the development of the medical devices and obtaining required government approvals." (emphasis added). At the heart of this lawsuit lies a dispute regarding the business decisions and practices of Defendant Corporation and Defendant, its primary shareholder.

Now, in the present lawsuit, Intervenor-Plaintiff alleges Defendant Richardson used corporate assets, including the Intervenor-Plaintiff's personal investment, for Defendant Richardson's own personal gain. Intervenor-Plaintiff thereby contends Defendant Richardson breached his fiduciary duties by

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misappropriating the assets of Defendant Corporation for his own benefit. These are claims Intervenor-Plaintiff, in exercising reasonable diligence, could have brought forward in his initial lawsuit along with his direct claims against Defendant Richardson.

Additionally, the timelines to these actions reveal Intervenor-Plaintiff filed his original lawsuit against Defendant on 9 August 2013. On 21 October 2015, original Plaintiff filed the current action. On 28 December 2015, the trial court dismissed Intervenor-Plaintiff's original lawsuit with prejudice. Therefore, the trial court correctly noted the lawsuits were so close in time "[Intervenor-Plaintiff] would have known about any other claims at that point." We conclude due to the short timeline overlap between these two lawsuits, Intervenor-Plaintiff, in exercising reasonable diligence, could have added his additional claims before his original lawsuit was adjudicated.

The doctrine of *res judicata* is designed to protect parties from "the burden of relitigating previously decided matters and to promote judicial economy by preventing unnecessary litigation". *State ex. rel. Pilard v. Berninger*, 154 N.C. App. 45, 54, 571 S.E.2d 836, 842 (2002) (quoting *Holly Farm Foods, Inc. v. Kuykendall*, 114 N.C. App. 412, 417, 442 S.E.2d 94, 97 (1994)). "*Res judicata* not only bars the re-litigation of matters determined in the prior proceeding but also 'all material and relevant matters within the scope of the pleadings, which the parties, in the exercise

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of reasonable diligence could and should have brought forward.” *Holly Farm Foods* at 416, 442 S.E.2d at 97 (quoting *Ballance v. Dunn*, 96 N.C. App. 286, 290, 385 S.E.2d 522, 524 (1989). “All of a party’s damages resulting from a single wrong must be recovered in a single action.” *Id.* at 416, 442 S.E.2d at 97.

Because Intervenor-Plaintiff wishes to assert a “material and relevant” matter which with the “exercise of reasonable diligence” Intervenor-Plaintiff could and should have brought forward in his original lawsuit, we affirm the trial court’s ruling *res judicata* bars Intervenor-Plaintiff’s motion to intervene in an individual capacity.

AFFIRMED.

Judges DAVIS and MURPHY

Report per Rule 30(e).