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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-461

Filed: 2 July 2019

Craven County, No. 16 CVD 319

TERRI L. ONIZUK, Plaintiff,

v.

JOSEPH ONIZUK, Defendant.

Appeal by defendant from order entered 31 October 2017 by Judge Walter Mills in Craven County District Court. Heard in the Court of Appeals 13 November 2018.

Chesnutt, Clemmons & Peacock, P.A., by Carolyn T. Peacock, for plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, and Greene Wilson, P.A., by Kelly L. Greene, for defendant-appellant.

BRYANT, Judge.

Where the trial court properly considered equitable distribution prior to the award of alimony, where the trial court entered sufficient findings of fact to support a determination of marital misconduct, and where there was sufficient evidence to support findings of fact that plaintiff's mental health was compromised, we affirm.

We reverse and remand the award of alimony for life and the award of attorney fees for further findings of fact. We also reverse and remand for further findings of fact the trial court's determination that an equal distribution of marital property was not equitable.

On 9 March 2016, plaintiff Terri L. Onizuk filed a complaint against defendant Joseph Onizuk in Craven County District Court seeking divorce from bed and board, post-separation support and alimony, attorney's fees, equitable distribution, and interim distribution. On 3 March 2017, the District Court entered a temporary memorandum of judgment/order in which defendant was ordered to continue to pay the mortgage and utility bills for the family residence at 51 Cherokee Dr., Havelock, NC and to pay plaintiff \$900.00 a month through the time of trial. On 31 May 2017, the court entered a pre-trial order signed by counsel for each party in which the court set out stipulations to which both parties agreed.

Plaintiff and defendant were married on 18 January 1987. The marriage produced two children; both children were over the age of eighteen and out of high school at the time of the pre-trial order. The parties agreed to the distributional status and value of certain marital assets and debts including checking and savings accounts, defendant's military retirement, the marital home, vehicles, retirement investments, and personal property. The pre-trial order also set forth the property about which distributional status or valuation the parties disagreed. "The parties

[did] not agree as to whether . . . [p]laintiff [wa]s entitled to an unequal distribution of the parties' marital and divisible property and debt"; post-separation support; alimony; and attorney's fees.

On 24 July 2017, the trial court entered an order directing a portion of defendant's military retirement benefits to be paid to plaintiff, specifically awarding plaintiff 45.6% of defendant's disposable military retired pay. Defendant did not appeal this order.

On 31 October 2017, the trial court entered an order in which it concluded that defendant had engaged in marital misconduct during the course of the marriage and willfully abandoned plaintiff by moving out of the marital home on 7 November 2015. The court concluded that plaintiff was a dependent spouse and defendant was a supporting spouse. The court further concluded that plaintiff was entitled to an unequal distribution of the parties' marital estate. The trial court awarded plaintiff permanent alimony in the amount of \$1,950.00 a month, as well as attorney fees. Defendant appeals.

On appeal, defendant argues the trial court erred by (I) entering its alimony/equitable distribution award and (II) finding defendant committed marital misconduct. Defendant argues that (III) the trial court's order for alimony is not supported. Defendant argues that the trial court erred by (IV) finding plaintiff's

mental health was compromised by the marriage dissolution, (V) making an unequal distribution, and (VI) awarding attorney fees.

I

Defendant argues that the trial court erred by entering its alimony award without first taking into consideration the equitable distribution of the marital and divisible property. Defendant contends that the trial court's failure to consider each party's estate upon the distribution of marital and divisible property before awarding plaintiff alimony amounts to reversible error. Defendant is in essence arguing that the trial court is required to determine equitable distribution before alimony. We disagree.

“[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.” *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004) (citation and quotation marks omitted). “While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*.” *Id.* (citation omitted). We review the trial court's distribution of property for an abuse of discretion. *Embler v. Embler*, 159 N.C. App. 186, 187, 582 S.E.2d 628, 630 (2003) (citation omitted).

Romulus v. Romulus, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011).

Defendant cites *Capps v. Capps*, 69 N.C. App. 755, 318 S.E.2d 346 (1984), where this Court vacated and remanded a trial court order awarding alimony and

child support because the trial court failed to equitably distribute marital property. *Id.* at 756, 318 S.E.2d at 347. In its reasoning, this Court cited General Statutes, section 50-20 of the Equitable Distribution Act.

The court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties. After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7.

Id. (quoting N.C. Gen. Stat. § 50-20(f)). Reading this statute in conjunction with section 50-21 (“[u]pon application of a party to an action for divorce, an equitable distribution of property shall follow a decree of absolute divorce,” *id.* at 757, 318 S.E.2d at 347–48 (quoting N.C. Gen. Stat. § 50-21(a)), this Court reasoned that

[e]quitable distribution, when properly demanded, must be granted upon the divorce decree being entered; and if alimony and child support has not been previously awarded, equitable distribution must be made first; but if alimony or child support has already been awarded, the awards must be reconsidered upon request after the marital property has been equitably distributed.

Id. at 757, 318 S.E.2d at 348.

Plaintiff points out that General Statutes, Chapter 50 has been amended since the filing of the 1984 *Capps* opinion. And pursuant to section 50-16.3A (“Alimony”)—codified in 1995, well after the *Capps* opinion— “[a] claim for alimony may be heard on the merits prior to the entry of a judgment for equitable distribution, and if

awarded, the issue[] of amount . . . may be reviewed by the court after the conclusion of the equitable distribution claim.” N.C. Gen. Stat. § 50-16.3A(a) (2017). *See also Taylor v. Taylor*, No. COA11-258, 2012 WL 698360, at *2 (N.C. Ct. App. Mar. 6, 2012) (holding that based on our General Statutes, sections 50-16.3A(a) and 50-20(f) (2011), the trial court “was not required to decide the equitable distribution claim first before addressing the alimony claim”). Defendant’s argument is overruled.

In its 31 October 2017 order, the trial court entered an award for alimony and equitable distribution. The court made findings of fact regarding the amount and duration of alimony to which plaintiff was entitled followed by findings of fact regarding equitable distribution. Defendant argues that the trial court erred by awarding alimony first with

no consideration of the fact that Plaintiff in this case is receiving 60% of the parties’ marital and divisible estate and a total net value of \$228,960.54. . . . This includes cash payments from [defendant] totaling \$31,939.94 representing plaintiff’s share of past retirement payments plus ongoing military retirement payments.

Defendant goes on to point out that the trial court’s alimony award fails to mention that Plaintiff would receive her own IRA worth over \$75,000.00 along with substantial portions of defendant’s retirement savings and the post-separation accruals in those accounts.

We note that in the 31 October 2017 order, the trial court referenced a 31 May 2017 pre-trial order in which the parties agreed to the classification of marital and

divisible property such as the marital home, IRAs, checking and savings accounts, debts, vehicles, and other personal property. Moreover, the record contains a 24 July 2017 order also awarding plaintiff 45.6% of defendant's disposable military retired pay (not to include disability retired pay). Accordingly, this argument is overruled.

II

Next, defendant argues that the trial court erred by finding defendant committed marital misconduct during the marriage, rendering the court's alimony decision unsound. Defendant contends that the trial court's finding he engaged in marital misconduct or "illicit sexual behavior" was either erroneously based on a 1992 incident which plaintiff condoned or an unsupported finding that defendant and his girlfriend entered into a sexual relationship prior to his separation from plaintiff. We hold defendant's argument moot.

The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term. In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors, including:

(1) The marital misconduct^[1] of either of the spouses.

¹ Pursuant to General Statutes, section 50-16.1A,

(3) "Marital misconduct" means any of the following acts that occur during the marriage and prior to or on the date of separation:

a. Illicit sexual behavior. For the purpose of this section, illicit sexual behavior means acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in G.S. 14-27.20(4), voluntarily engaged in by a spouse with someone other than the other spouse;

N.C. Gen. Stat. § 50-16.3A(b)(1) (2017).

Plaintiff argues that while condoned acts of illicit sexual behavior will not be considered in determining whether one is entitled to alimony, *any* marital misconduct may be considered in determining the amount, duration, and manner of payment of alimony. *Id.* § 50-16.3A(a) and -16.3A(b)(1). Defendant does not challenge the trial court’s findings of fact and conclusions of law as to abandonment. *See* N.C. Gen. Stat. § 50-16.1A(3)c. (“ ‘Marital Misconduct’ includes “[a]bandonment of the other spouse[.]”). Unchallenged findings of fact are binding on appeal. *State v. Ashworth*, ___ N.C. App. ___, ___, 790 S.E.2d 173, 176 (“Findings of fact that are not challenged on appeal are binding and deemed to be supported by competent evidence.” (citing

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- b. Involuntary separation of the spouses in consequence of a criminal act committed prior to the proceeding in which alimony is sought;
 - c. Abandonment of the other spouse;
 - d. Malicious turning out-of-doors of the other spouse;
 - e. Cruel or barbarous treatment endangering the life of the other spouse;
 - f. Indignities rendering the condition of the other spouse intolerable and life burdensome;
 - g. Reckless spending of the income of either party, or the destruction, waste, diversion, or concealment of assets;
 - h. Excessive use of alcohol or drugs so as to render the condition of the other spouse intolerable and life burdensome;
 - i. Willful failure to provide necessary subsistence according to one’s means and condition so as to render the condition of the other spouse intolerable and life burdensome.

N.C. Gen. Stat. § 50-16.1A(3) (2017).

State v. Biber, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011))), *disc. review denied*, 369 N.C. 190, 793 S.E.2d 694 (2016).

In its 31 October 2017 order, the trial court made the following unchallenged findings of fact: “The Defendant moved out of the marital residence without the Plaintiff’s knowledge and/or consent on November 7, 2015”; and “[t]he Defendant committed acts of misconduct. As shown by the evidence, this misconduct includes . . . abandonment.” The court concluded that “[t]he Defendant willfully abandoned the Plaintiff by moving out of the marital residence on November 7, 2015, without just cause or provocation emanating from the Plaintiff.”

Abandonment is a type of marital misconduct for which alimony may be awarded. *See* N.C.G.S. § 50-16.1A(3)c. Here, given the fact that abandonment is a proper, independent basis for a finding of marital misconduct and the trial court’s award of alimony, we agree with plaintiff that defendant’s contention as to illicit sexual behavior is moot.

We note that while the trial court did not specifically conclude that abandonment was a type of marital misconduct, the trial court acknowledged that abandonment was one of the acts of misconduct committed by defendant. Nevertheless, for the record, assuming the trial court’s determination of marital misconduct was predicated solely on defendant’s sexual relationship with a third party during the course of the marriage and prior to separation, the trial court’s

extensive findings of fact regarding that relationship supported by record evidence supports the conclusion of marital misconduct.

III

Next, defendant argues that the trial court's order does not support the amount or permanent duration of alimony. Defendant contends that the trial court committed reversible error by failing to make findings of fact to establish (A) the parties' respective current incomes or the parties' respective needs and expenses. (B) Defendant contends the trial court also erred by failing to provide any reasoning for the amount and permanent duration of its alimony award. We address only defendant's contention set forth in (B), and we agree.

Pursuant to General Statutes, section 50-16.3A ("Alimony"), "[t]he court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment." N.C. Gen. Stat. § 50-16.3A(c) (2017).

B.

Defendant argues that the trial court erred by failing to provide any findings of fact for the amount and permanent duration of its alimony award.

"If the trial court 'fail[s] to state any reason for the amount of alimony, its duration, or the manner of payment,' the order must be remanded." *Lucas v. Lucas*, 209 N.C. App. 492, 500, 706 S.E.2d 270, 276 (2011) (alteration in original) (quoting

Crocker v. Crocker, 190 N.C. App. 165, 172, 660 S.E.2d 212, 217 (2008)) (citations omitted).

Defendant cites *Squires v. Squires*, 178 N.C. App. 251, 631 S.E.2d 156 (2006), holding that where the trial court failed to make findings regarding the reasons for the amount, duration, and manner of alimony payments, the court violates General Statutes, section 50-16.3A(c). *Id.* at 263–64, 631 S.E.2d at 163 (citing *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 421, 588 S.E.2d 517, 522–23 (2003)). In *Squires*, “[the trial court] ordered that alimony continue until the death of one of the parties, or plaintiff’s remarriage or cohabitation, but failed to make any finding about the reasons for this duration.” *Id.* at 264, 631 S.E.2d at 163. Despite a finding that the plaintiff had no income after thirty-eight years of marriage, this Court held that the trial court’s order lacked sufficient findings of fact and remanded the matter to the trial court for further findings. *Compare Juhnn v. Juhnn*, 242 N.C. App. 58, 64–65, 775 S.E.2d 310, 315 (2015) (upholding a trial court order directing alimony be paid for a period of eighteen years supported by over seventy-six findings of fact addressing the parties’ relative earning capacities; defendant’s marital misconduct, reported income suppression, and financial support for his paramour while denying support for his wife and children compelling plaintiff to rely on the support of family and friends).

Here, the trial court ordered that

[t]he Defendant shall pay to the Plaintiff permanent alimony in the amount of \$1,950.00 per month. . . . The Defendant's obligation to pay alimony shall continue at the rate of \$1,950.00 per month until the Plaintiff dies, the Defendant dies, the Plaintiff remarries, or the Plaintiff cohabits [sic] with a third party”

In support of its order, the trial court made findings of fact 6 to 17, 17.a through 17.nnn, and 18 through 45. As stated in the findings, the parties' marriage lasted 28 years; shortly after they married, plaintiff gave birth to twins and then ended her career with the United States Military, Marine Corps. The family moved dependent upon where defendant (who remained in the Marine Corps) was stationed. Over the course of the marriage, the family lived in Hawaii, Maryland, Virginia, Michigan, and North Carolina. On several occasions, plaintiff quit her job in order to relocate when defendant received orders to report to a new station. Over the course of the marriage, defendant continued his training and education, earning an Associate's Degree, Bachelor's Degree, and Master's Degree and obtaining the officer's rank of Major. Following his retirement from the United States Marine Corps, defendant began working for the Department of Defense. At the end of the marriage, defendant's projected gross income was projected to be in excess of \$140,000.00 per year. During the marriage defendant admitted that he engaged in illicit sexual behavior with a third party in 1992, for which plaintiff forgave him. In the fall of 2015, defendant had extensive text/cell phone communications with a female co-worker. Defendant helped the co-worker move out of her marital home and within a week following

defendant leaving his marital home, the female co-worker was observed entering defendant's apartment with her key. Defendant held his co-worker out as his girlfriend, and at the time of the hearing before the trial court, defendant was living with his girlfriend and one of her minor children in a home defendant purchased.

During the marriage, plaintiff's primary role was that of homemaker, mother, and wife. During the marriage, plaintiff obtained her North Carolina real estate license. In 2004, the parties invested plaintiff's \$130,000.00 inheritance for the purchase of two business franchises that were ultimately lost as a result of a poor economy. Plaintiff then began working part-time, earning between \$13.00 and \$15.00 per hour working twenty hours per week. Plaintiff has undergone surgeries to address health concerns, and since defendant's decision to end the marriage, has engaged a mental health counselor. No evidence was presented that plaintiff engaged in illicit sexual behavior with any third person since marrying defendant. Defendant has no other legal obligations of support other than to plaintiff.

While the trial court's findings of fact indicate the financial disparity that existed between the parties during the course of the twenty-eight year marriage as well as the sacrifices both parties, especially plaintiff, made in furtherance of defendant's career, the findings do not indicate plaintiff's age or whether she is incapable of furthering her education or prospects for earning a higher income. Accordingly, we hold the findings of fact do not support an award of alimony for life

and remand this matter for additional findings of fact. *See Squires*, 178 N.C. App. 251, 631 S.E.2d 156.

IV

Next, defendant argues that the trial court committed reversible error by finding plaintiff's mental health was "compromised" or *caused* by the dissolution of the marriage without medical evidence to support such a finding. We disagree.

"It is well-established that a lay witness may testify as to the present state of his health" *Bradley v. Bradley*, 78 N.C. App. 150, 154, 336 S.E.2d 658, 661 (1985) (citing *Carter v. Bradford*, 257 N.C. 481, 126 S.E.2d 158 (1962); 1 H. Brandis, *Brandis on North Carolina Evidence* Sec. 129 (rev. 2d ed. 1982)).

Plaintiff testified that she began seeing a therapist "[t]he week after defendant left," and she continued to see her every other week until she sustained a physical injury rendering her unable to drive. Following her recovery, she resumed her therapy sessions.

In its findings of fact, the trial court stated the following:

17. . . .

. . . .

u. . . .

. . . .

- (7) The Plaintiff had significant troubles dealing with the Defendant's decision

to end the parties' marriage. As a result of the end of the marriage, the Plaintiff has seen a mental health counselor on a regular and consistent basis.

....

38.

....

c. . . . [T]he Plaintiff's mental health has been compromised as a result of the Defendant's decision to end the parties' marriage[.]

We hold the trial court had sufficient evidence to support its finding that plaintiff's mental health was compromised as a result of defendant's decision to leave the marriage. Accordingly, defendant's argument is overruled.

V

Defendant argues that the trial court erred by making an unequal distribution absent any finding that the presumption of an equal distribution was not equitable. Defendant contends that the trial court distributed the marital estate to plaintiff and defendant 60 percent and 40 percent, respectively, absent a finding that an equal distribution was not equitable. Plaintiff acknowledges that the trial court failed to make this finding of fact. We agree.

The task of a trial court when faced with an action under N.C.G.S. 50-20 is to equitably distribute the marital property between the litigants. . . . Once the trial court orders a distribution, it has held *sub silentio* that such

distribution is fair and equitable. A specific statement that the distribution ordered is equitable is not required.

White v. White, 312 N.C. 770, 778, 324 S.E.2d 829, 834 (1985). *Cf. Lucas v. Lucas*, 209 N.C. App. 492, 504, 706 S.E.2d 270, 278 (2011) (“[I]n order to divide a marital estate other than equally, the trial court must first find that an equal division is not equitable and explain why. Then, the trial court must decide what is equitable based on the factors set out in N.C. Gen. Stat. § 50–20(c)(1)–(12) after balancing the evidence in light of the policy favoring equal division.”); *e.g., id.* at 503–04, 706 S.E.2d at 278 (“Here, the trial court found that ‘an unequal distribution of marital property is equitable’ rather than that ‘an equal division by using net value of marital property’ is not equitable. . . . Given the language of the trial court’s order, we cannot be assured that the trial court gave proper consideration to the policy favoring an equal division of the estate.” (citing *White v. White*, 312 N.C. 770, 776–77, 324 S.E.2d 829, 832–33 (1985)). *See also Carpenter v. Carpenter*, 245 N.C. App. 1, 14, 781 S.E.2d 828, 838–39 (2016) (“While there is no case law requiring a trial court to use ‘magic words’ indicating that an equal distribution is not equitable, it is clear that the trial court’s finding that the ‘presumption’ favoring an equal distribution had been ‘rebutted’ by [the] defendant was not sufficient”); *Alexander v. Alexander*, 68 N.C. App. 548, 552, 315 S.E.2d 772, 776 (1984) (“[T]he trial court should clearly set forth in its order findings of fact based on the evidence which support its conclusion that an equal division is not equitable.”).

“[T]his Court reviews the trial court’s actual distribution decision for abuse of discretion.” *Mugno v. Mugno*, 205 N.C. App. 273, 276, 695 S.E.2d 495, 498 (2010) (citation omitted).

Here, the trial court concluded that “Plaintiff is entitled to an unequal distribution of the parties’ martial estate, pursuant to North Carolina General Statute § 50-20(c)(1)(3)(5) and (7).” We hold that the trial court’s conclusion is not sufficient to satisfy the requirements of section 50-20(c). *See Lucas*, 209 N.C. App. at 504, 706 S.E.2d at 278. As stated in *Lucas*, “[g]iven the language of the trial court’s order, we cannot be assured that the trial court gave proper consideration to the policy favoring an equal division of the estate. On remand, the trial court must make the determinations required by N.C. Gen. Stat. § 50–20(c) and *White*.” *Id.* at 504, 706 S.E.2d at 278. Accordingly, we remand this matter to the trial court for additional findings of fact.

VI

Defendant argues that the trial court erred by making its award of attorneys’ fees related to spousal support where it made no findings of reasonableness.

Pursuant to General Statutes, section 50-16.4 (“Counsel fees in actions of alimony, postseparation support”), “[a]t any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A . . . the court may, upon application of such spouse, enter an order for reasonable counsel fees, to be paid and secured by the

supporting spouse in the same manner as alimony.” N.C. Gen. Stat. § 50-16.4 (2017). “A party can recover attorney’s fees only if such a recovery is expressly authorized by statute.” *Robinson v. Robinson*, 210 N.C. App. 319, 336, 707 S.E.2d 785, 797 (2011) (citation omitted). In *Robinson*, this Court reasoned that where the action before the lower court addressed claims for equitable distribution, alimony, and child support, the trial court’s findings of fact as to the award of attorney fees should have reflected only the fees incurred with respect to the alimony and/or child support awards. *Id.* at 337, 707 S.E.2d at 797.

[But] even when awarding attorney’s fees in matters involving child support and alimony, the trial court does not possess “unbridled discretion; it must still make findings of fact to support its award.” *Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002) (citing *Hudson v. Hudson*, 299 N.C. 465, 471, 263 S.E.2d 719, 723 (1980)). In its order awarding attorney’s fees, the court must include findings as to the basis of the award, including: the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested. *See, e.g., id.; Coleman v. Coleman*, 74 N.C. App. 494, 499, 328 S.E.2d 871, 874 (1985). Once these “statutory requirements have been met, the amount of attorney’s fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion.” *Burr*, 153 N.C. App. at 506, 570 S.E.2d at 224 (citing *Hudson*, 299 N.C. at 472, 263 S.E.2d at 724).

Id. at 337, 707 S.E.2d at 798.

Here, the trial court made the following findings of fact:

44. The Plaintiff has incurred attorney’s fees in this

matter on the issues of spousal support and attorney's fees [sic]. The attorney's fees granted to the Plaintiff are \$12,450.00.

45. The Plaintiff is entitled to reimbursement of these attorney's fees based upon the disparity in income of the parties, as well as the marital misconduct committed by the Defendant during the course of the parties' marriage.

As stated in plaintiff's brief on appeal to this Court, she

does not disagree with the principles set forth in Defendant-Appellant's brief that require the court **to make findings** of the 'reasonableness' of attorney's fees; and **does not disagree** the attorney's fees [sic] award should be remanded for the **limited purpose** of . . . making additional findings on 'reasonableness'

Plaintiff's primary argument is that defendant failed to preserve this issue before the trial court. However, as plaintiff concedes, the trial court's findings of fact do not "include findings as to the basis of the award, including: the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested." *Id.* Thus, the order fails to include findings of fact to support the reasonableness of the attorney's fee award. Accordingly, we reverse the award of attorney's fees and remand the matter to the trial court for further findings of fact.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).