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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-764

Filed 4 June 2024

Buncombe County, No. 20 CVS 4200

TRACY MICHELLE BECK and CHARLES BILL BECK, Plaintiffs,

v.

CHARLES J. DePAOLO, M.D., CHARLES J. DePAOLO, M.D., P.A., and MISSION HOSPITAL, INC., Defendant.

Appeal by Plaintiff from an order entered 3 January 2023 by Judge Lisa C.

Bell in Buncombe County Superior Court. Heard in the Court of Appeals 5 March 2024.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, Adam L. Ross, and Jennifer M. Houti, for plaintiffs-appellants.

Roberts & Stevens, P.A., by David C. Hawisher, for Mission Hospital, Inc., defendant-appellee.

WOOD, Judge.

Tracy Beck (“Mrs. Beck”) and Charles Beck (together, the “Becks” or “Plaintiffs”) sued Dr. Charles DePaolo (“Dr. DePaolo”), Dr. DePaolo’s business entity (“DePaolo Orthopedics”), and Mission Hospital on 23 November 2020 for medical

malpractice and loss of consortium. The trial court granted Mission Hospital's motion for summary judgment. For the reasons stated below, we affirm.

I. Factual and Procedural History

Mrs. Beck was first evaluated by Dr. DePaolo on 20 June 2018 because she was experiencing significant pain in her left hip. After discussing treatment options with Mrs. Beck, Dr. DePaolo recommended an anterior approach total hip replacement to which Mrs. Beck agreed.

On 5 July 2018, Dr. DePaolo performed an anterior approach left total hip replacement on Mrs. Beck at a Mission Hospital-owned facility. Mission Hospital provided its staff to work in the operating room ("OR") with Dr. DePaolo. Two of Mission Hospital's circulating nurses were responsible for operating the Hana table on which Mrs. Beck's surgery was performed. The Hana table is a specially designed operating table often used in anterior approach hip replacements to allow nurses to manipulate the patient's leg and apply traction to open up the hip joint and provide visibility and access to the surgeon. During her recovery from the surgery, Mrs. Beck experienced numbness and weakness in her leg, which was discovered to be the result of an injury to her femoral nerve.

The Becks filed a complaint on 23 November 2020 and an amended complaint on 2 July 2021 against all three defendants, Dr. DePaolo, DePaolo Orthopedics, and Mission Hospital for medical malpractice and loss of consortium. Mission Hospital answered and denied liability, as did the DePaolo Defendants. On 2 September 2022,

Mission Hospital filed a motion for summary judgment on the Becks' claims against it. On 2 October 2022, Mission Hospital also filed a motion to dismiss for the Becks' alleged failure to meet the certification requirements for medical malpractice pleadings under N.C. R. Civ. P. 9(j). On 15 October 2021, Plaintiffs filed a designation of expert witness giving notice that they intended to call Dr. Brandon Boyce ("Dr. Boyce") as an expert witness at trial. Mission Hospital's motions came on for hearing on 21 November 2022. On 3 January 2023, the trial court granted Mission Hospital's motion for summary judgment and dismissed all of Plaintiff's claims against Mission Hospital with prejudice. Plaintiffs filed written notice of appeal on 13 January 2023.

II. Analysis

Plaintiffs argue the trial court erred by granting Mission Hospital's motion for summary judgment because there are genuine issues of material fact regarding whether it committed medical malpractice. Plaintiffs also argue that to the extent the trial court dismissed their claims on the basis of a failure to comply with N.C. R. Civ. P. 9(j), the trial court erred because their expert witness was willing to testify Mission Hospital did not comply with the applicable standard of care. We address the issues in turn.

A. Interlocutory Appeal

Plaintiffs argue that although the summary judgment order is not certified for immediate appeal pursuant to N.C. R. Civ. P. 54(b), it is immediately appealable under the "substantial right" doctrine. N.C. Gen. Stat. § 1-277(a) (2023) (allowing

appeal from an order of a superior court that affects a substantial right); N.C. Gen. Stat. § 7A-27(b)(3)(a) (2023) (same).

Addressing interlocutory appeals, this Court has explained:

Our Supreme Court has held that a grant of summary judgment as to fewer than all of the defendants affects a substantial right when there is the possibility of inconsistent verdicts, stating that it is the plaintiff's right to have one jury decide whether the conduct of one, some, all or none of the defendants caused his injuries. This Court has created a two-part test to show that a substantial right is affected, requiring a party to show (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exist.

Camp v. Leonard, 133 N.C. App. 554, 557–58, 515 S.E.2d 909, 912 (1999) (citation, quotation marks, and ellipsis omitted).

Specifically, Plaintiffs argue a risk of inconsistent verdicts exists if Plaintiffs and the DePaolo Defendants were to proceed to trial and if this Court subsequently were to reverse the trial court's grant of summary judgment to Mission Hospital. We agree. First, the same factual issues exist with regard to both the DePaolo Defendants and Mission Hospital. Plaintiffs' claim of medical malpractice arises out of one procedure, the hip replacement. Dr. DePaolo performed the hip replacement assisted by nurses employed by Mission Hospital. One of the prominent issues in the case is the factual issue of causation—that is, whether Dr. DePaolo committed medical malpractice by improper retractor placement or whether a nurse employed by Mission Hospital committed medical malpractice by implementing improper leg

traction. Therefore, the same factual issues would be present in both trials. As for the possibility of inconsistent verdicts, two different juries potentially could reach conflicting verdicts in this case. For example, the first jury could find only the DePaolo Defendants liable for malpractice, while the second jury could find Mission Hospital, through the actions of one or more of its nurses, solely or jointly and severally liable with the DePaolo Defendants. Therefore, the possibility of inconsistent verdicts exists. Accordingly, the trial court's grant of summary judgment as to fewer than all defendants affects Plaintiffs' substantial right.

In contesting this Court addressing Plaintiffs' interlocutory appeal, Mission Hospital argues this Court's holding in *Myers v. Barringer* stands for the proposition that because Mission Hospital provided a facility for Dr. DePaolo to practice medicine, the factual issues and relevant standards of care are different as to the DePaolo Defendants and Mission Hospital. 101 N.C. App. 168, 398 S.E.2d 615 (1990). *Myers* involved the plaintiffs' claims of medical malpractice against two doctors, an anesthesiologist, Wake Anesthesiology Associates, Inc. ("Anesthesiology Associates"), and Wake Psychiatric Hospital, Inc. ("Holly Hill"). *Id.* at 170, 398 S.E.2d at 616. One of the plaintiffs, Mr. Myers, received treatment at Holly Hill for depression and migraine headaches. His primary doctor recommended electroconvulsive therapy ("ECT"). *Id.* The plaintiffs sued Mr. Myers's primary doctor for misdiagnosis and negligently failing to recommend proper treatment; the doctor who administered the ECT treatments for negligent administration of such treatment, failure to adequately

diagnose Mr. Myers's condition, and failure to recommend proper treatment; the anesthesiologist and Anesthesiology Associates for improperly advising Mr. Myers of the side effects associated with ECT and for taking improper precautions; and Holly Hill because, through its employees, it allegedly failed to document and ensure Mr. Myers's treating physicians were aware of his complaints of pain and soreness and for failing to properly advise him of certain risks associated with the treatments. *Id.* at 170–71, 398 S.E.2d at 616–17.

The trial court granted summary judgment in favor of Holly Hill. *Id.* at 170, 398 S.E.2d at 616. The plaintiffs appealed that interlocutory order, and this Court analyzed whether the order affected a substantial right of the plaintiffs. *Id.* at 172, 398 S.E.2d at 617. This Court held the interlocutory order did not implicate a substantial right because the plaintiffs' claims

involve[d] medical malpractice claims against defendants, each of whom had a separate and distinct contract from the others and each of whom owed a different duty to the Myers. *An independent contractor physician stands legally apart from a hospital which provides an environment for the physician to practice medicine.* Thus, the claim against Holly Hill involves issues which are not factually the same, particularly the duty a hospital owes a patient and the duty owed by an independent contractor physician to his patient, and this appeal is premature.

Id. at 173, 398 S.E.2d at 618 (emphasis added) (citation omitted).

However, *Myers* is distinguishable from the case *sub judice*. The plaintiffs in *Myers* brought claims of medical malpractice based on distinct theories. For example,

they claimed Mr. Myers's primary doctor committed medical malpractice through misdiagnosis and negligently failing to recommend proper treatment. Their theory of Holly Hill's medical malpractice was separate and distinct. The plaintiffs alleged Holly Hill, "through its employees, failed to document and [e]nsure that the physicians treating Mr. Myers were aware of his complaints of pain and soreness [and] that Holly Hill failed to properly advise Mr. Myers of the risks of seizures and muscle contractions associated with ECT treatments." *Id.* at 171, 398 S.E.2d at 617.

We do not interpret the statement, "[a]n independent contractor physician stands legally apart from a hospital which provides an environment for the physician to practice medicine" to mean that in all cases in which a hospital provides an environment for a physician to practice medicine, there is no possibility of this Court hearing the merits of an interlocutory appeal. In *Myers*, for example, the primary doctor provided the diagnosis and recommend a particular treatment, while different providers administered the treatment. Here, Plaintiffs' claim of medical malpractice is not distinct as to the DePaolo Defendants and Mission Hospital. Unlike in *Myers*, Dr. DePaolo worked directly with nurses employed by Mission Hospital during the single procedure which Plaintiffs allege is the cause of Mrs. Beck's injury. Although the question of causation is focused on which defendant(s) in fact caused the injury, that factual question cannot be answered by different juries without creating the risk of arriving at inconsistent verdicts. Accordingly, we address the merits of Plaintiffs' appeal.

B. Summary Judgment

Plaintiffs argue the trial court erroneously awarded Mission Hospital summary judgment. They argue genuine issues of material fact exist as to whether Mission Hospital's nursing staff deviated from the applicable standard of care and whether the deviation proximately caused Mrs. Beck's rare femoral nerve injury.

This Court has articulated the proper standard of review of a trial court's order on summary judgment in the following manner:

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). A trial court's grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party.

Upon a motion for summary judgment, the moving party carries the burden of establishing the lack of any triable issue and may meet his or her burden by proving that an essential element of the opposing party's claim is nonexistent. If met, the burden shifts to the nonmovant to produce a forecast of specific evidence of its ability to make a *prima facie* case, which requires medical malpractice plaintiffs to prove, in part, that the treatment caused the injury.

Cousart v. Charlotte-Mecklenburg Hosp. Auth., 209 N.C. App. 299, 302, 704 S.E.2d 540, 542-43 (2011) (cleaned up). A plaintiff in a medical malpractice lawsuit "must offer evidence that establishes the following essential elements: (1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the

injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff.” *Id.* at 303, 704 S.E.2d at 543 (quotation marks omitted).

We only reach the issue of whether Plaintiffs can offer evidence establishing causation. “[E]xpert opinion testimony is required to establish proximate causation of the injury in medical malpractice actions.” *Id.* at 303, 704 S.E.2d at 543. The Court in *Cousart* explained a plaintiff’s burden in establishing proximate causation:

While proximate cause is often a factual question for the jury, evidence based merely upon speculation and conjecture is no different than a layman’s opinion, and as such, is not sufficiently reliable to be considered competent evidence on issues of medical causation.

...

Thus, Plaintiffs must be able to make a prima facie case of medical negligence at trial, which includes articulating proximate cause with specific facts couched in terms of probabilities.

Id. at 303–04, 704 S.E.2d at 543 (quotation marks and ellipsis omitted). In other words, an expert witness’s testimony regarding proximate causation cannot rest “upon mere speculation or possibility.” *Id.* at 303, 704 S.E.2d at 543.

As a threshold matter, we must determine Plaintiff’s burden for demonstrating proximate causation. Mission Hospital cites *Parkes v. Hermann* in arguing for a “more likely than not” standard. 376 N.C. 320, 852 S.E.2d 322 (2020). Mission Hospital argues that a plaintiff at the summary judgment stage must demonstrate

by a “more likely than not” standard that a defendant caused her injury. The plaintiff in *Parkes* alleged the defendant failed to diagnose timely and administer a tissue plasminogen activator (“tPA”), a time-sensitive stroke treatment, causing neurological damage. *Id.* at 322, 852 S.E.2d at 323. “[T]here was only a 40% chance that plaintiff’s condition would have improved if defendant had properly diagnosed plaintiff and timely administered tPA. By presenting evidence of only a 40% chance, plaintiff failed to show it was *more likely than not* that defendant’s negligence caused plaintiff’s current condition.” *Id.* at 322, 852 S.E.2d at 323–24 (emphasis added) (citation omitted).

The plaintiff further “claimed that the loss of the 40% chance itself was a cognizable and separate type of injury—her loss of chance at having a better neurological outcome—that warranted recovery.” *Id.* at 322–23, 852 S.E.2d at 324. In considering whether to establish loss of chance as a new and distinct negligence cause of action, our Supreme Court analyzed *Gower v. Davidian*, 212 N.C. 172, 193 S.E. 28 (1937), in which “the plaintiff sustained a neck fracture during a motor-vehicle accident.” *Id.* at 324, 852 S.E.2d at 325 (2020) (citing *Gower*, 212 N.C. at 173, 193 S.E. at 29). The court in *Gower* “considered whether a physician was negligent in failing to timely diagnose the neck fracture, which resulted in approximately a thirteen-day delay in diagnosis.” *Parkes*, 376 N.C. at 324, 852 S.E.2d at 325 (citing *Gower*, 212 N.C. at 174, 193 S.E. at 29). The plaintiff in *Gower* “argued that the delay in the diagnosis caused the fracture to develop a callus, preventing it from being set

properly once diagnosed.” *Parkes*, 376 N.C. at 324, 852 S.E.2d at 325 (citing *Gower*, 212 N.C. at 174, 193 S.E. at 29–30). The plaintiff’s expert testified “that had this case received immediate attention and had that fracture and dislocation reduced, his chances for further recovery, or for perfect recovery, would have been much greater.” *Gower*, 212 N.C. at 175, 193 S.E. at 30. The court in *Gower* held that the expert’s “opinion in this respect is based entirely upon an actual reduction of the fracture, which the evidence discloses could not be reduced, and he merely says that the chances for further recovery would have been much greater. The rights of the parties cannot be determined upon chance.” *Id.* at 176, 193 S.E. at 30. Having considered *Gower*, our Supreme Court in *Parkes* stated:

Even if the Court in *Gower* did not outright reject what is today called a loss-of-chance claim, *it firmly framed medical malpractice claims within the confines of traditional proximate cause, which allows a negligence claim to proceed when the evidence shows that the negligent act more likely than not caused the injury.* If the evidence falls short of this causation standard, then there is no recovery. The Court [in *Gower*] did not relax the proximate cause requirement for a medical malpractice claim when presented with the opportunity.

376 N.C. at 325, 852 S.E.2d at 325 (emphasis added). Ultimately, our Supreme Court declined to establish “loss of chance” as a new cause of action. *Id.* at 321, 852 S.E.2d 322, 322–23.

Our Supreme Court’s focus on the phrase “more likely than not” originates from this Court’s opinion in *Parkes*, which our Supreme Court affirmed in its opinion

discussed above. 265 N.C. App. 475, 828 S.E.2d 575 (2019). This Court stated, “To establish proximate cause, the plaintiff must show that the injury was more likely than not caused by the defendant’s negligent conduct.” *Id.* at 477, 828 S.E.2d at 577 (citing *White v. Hunsinger*, 88 N.C. App. 382, 386, 363 S.E.2d 203, 206 (1988)) (“Proof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient’s chances of recovery.”). This Court further stated:

Under the “traditional” approach, a plaintiff may not recover for the loss of a less than 50% chance of a healthier outcome. But, if the chance of recovery was over 50%, a plaintiff may recover for *the full value of* the healthier outcome itself that was lost by merely showing, more likely than not (greater than 50%), that a healthier outcome would have been achieved, but for the physician’s negligence.

Id. at 478, 828 S.E.2d at 578 (emphasis in original). In its use of the “more likely than not” phrase, this Court cited a Tennessee loss of chance case, *Valadez v. Newstart, LLC*, No. W2007-01550-COA-R3-CV, 2008 WL 4831306, at *5 (Tenn. Ct. App. Nov. 7, 2008), which states:

We are persuaded that the loss of chance theory of recovery is fundamentally at odds with the requisite degree of medical certitude necessary to establish a [causal link] between the injury of a patient and the tortious conduct of a physician. A plaintiff in Tennessee must prove that the physician’s act or omission more likely than not was the cause in fact of the harm.

(brackets and ellipsis omitted).

Thus it appears the specific verbiage “more likely than not” is applicable in loss of chance cases related to untimely diagnosis or treatment. Further persuading us of this interpretation is this Court’s statement in *Seraj v. Duberman*, “the rule that proximate causation requires a showing plaintiff probably would have been better off is not applicable in this case. The rule applies when there is a negligent delay in treatment or diagnosis.” 248 N.C. App. 589, 600, 789 S.E.2d 551, 558 (2016). Plaintiffs argue this means the “more likely than not” standard is inapplicable in this case because it does not concern a negligent delay in treatment or diagnosis. We agree.

Nevertheless, regardless of whether we apply the standard of proximate cause as explained in *Cousart* or the “more likely than not standard,” we agree with Mission Hospital that Plaintiffs fail to meet their burden of causation in this case.

Here, the record shows Dr. Boyce believed the cause of Mrs. Beck’s injury was one of two things—retractor placement or traction. During surgery, the doctor initially places the retractors on the patient’s tissue to open it up, creating a “window” for the doctor to operate. The doctor then gives the retractors “to the assistants to hold,” and they are supposed to apply pressure, or traction, to the patient who is positioned on the Hana table in order to hold open the patient’s joint space. Generally, the assistants do not exercise independent judgment regarding how much traction to apply, although the doctor cannot “watch over everything.” Both improper retractor placement and improper traction may injure the femoral nerve. Thus, the

pertinent question is whether Dr. DePaolo's retractor placement or the OR assistants' application of traction on the Hana table caused Mrs. Beck's injury.

In his deposition, Dr. Boyce was asked to describe specifically what he believed Dr. DePaolo did incorrectly during the procedure. Dr. Boyce stated, "I think he was responsible for a nerve injury that occurred. Again, this femoral nerve injury doesn't occur without injury to the nerve, either from traction or more likely due to placement of the retractor around the hip joint." Dr. Boyce further testified, "My opinion is that the nerve injury occurred at the time of surgery, most likely due to nerve -- or soft tissue retractor placement by Dr. DePaolo and/or during the traction on the leg itself by the employees that were in the operating room." This testimony reaffirms that either tractor placement or traction itself caused the injury.

As for which Defendant's conduct more likely caused the injury, Dr. Boyce testified, "Typically, it's from -- retractor placement is the most common, the anterior retractor." Asked if he had two theories as to how Mrs. Beck's injury occurred, Dr. Boyce responded, "[M]y opinion is that most likely [it] was due to retractor placement causing injury to the nerve at the joint. But the traction on the joint itself is the other most common way that the nerve can be injured." There was nothing specific within Mrs. Beck's medical records upon which Dr. Boyce relied in forming his opinion that traction was a possible cause of the injury; rather, his opinion was based on the statistics of how a femoral nerve injury may occur during a hip replacement. Dr. Boyce reiterated, "[L]ooking at the statistics and the numbers, it's much more likely

that it occurred from retractor placement rather than the traction.” Dr. Boyce testified it was fair to say that “it is *probable* that the injury occurred from the retraction [placement] and *possible* that it occurred from the traction.” (Emphasis added). In fact, it was so much more probable that retractor placement caused the injury that, Dr. Boyce testified, “it’s about ten to one due to misplaced retractors versus traction injury on the nerve.”

We hold that in light of Dr. Boyce’s testimony that retractor placement rather than traction more likely caused Mrs. Beck’s injury by a ratio of ten-to-one, the possibility that it was traction was mere speculation, conjecture, or possibility. It follows that because Plaintiffs did not establish causation pursuant to the standard articulated in *Cousart*, they also failed to meet the *more likely than not* standard under *Parkes*. Through Dr. Boyce’s testimony, Plaintiffs can demonstrate merely that Mission Hospital, vicariously through its nurses, *possibly* caused Mr. Beck’s injury. Therefore, Plaintiffs failed to satisfy the burden of demonstrating proximate cause at the summary judgment stage. Accordingly, we affirm the trial court’s order granting summary judgment in Mission Hospital’s favor.

We note that even if traction could be conclusively determined to be the cause of the injury, Dr. Boyce’s testimony contradicts the notion that Mission Hospital through its staff would be responsible for implementing improper traction. Dr. Boyce testified that even if improper traction caused the injury, “Dr. DePaolo ultimately was the one responsible for supervising those staff and making sure they were doing

correct operation and positioning of the patient.” He further testified that the surgeon directs the OR staff to apply traction until he says “stop” and that they are “really just doing whatever the surgeon tells them to do.” Moreover, Dr. Boyce’s opinion that traction possibly caused the injury was formed partially on the basis of what Dr. DePaolo allegedly told the Becks after the injury was discovered¹ and based on what Dr. DePaolo noted in Mrs. Beck’s medical records. In other words, Dr. Boyce’s review of the medical records did not indicate a medical reason to believe traction caused the injury. Dr. Boyce merely read that Dr. DePaolo had formed an opinion that the nurses used too much traction and therefore reached the conclusion that traction was a possible cause. While he was also aware traction could cause a femoral nerve injury based on the relevant statistics, that possibility was outweighed by the likelihood of improper retractor placement by a ratio of ten-to-one.

Plaintiffs argue that Dr. DePaolo’s post-operation explanation regarding the cause of the injury demonstrates OR staff, and therefore Mission Hospital, caused Mrs. Beck’s injury. Defendant argues such evidence is inadmissible because it does not originate from Plaintiffs’ expert, Dr. Boyce. Regardless of the admissibility of the statements, Plaintiffs are required to meet their evidentiary burden at the summary judgment stage through the testimony of an expert witness: “[E]xpert opinion testimony is required to establish proximate causation of the injury in medical

¹ At her follow up appointments, Dr. DePaolo repeatedly told the Becks that the nerve injury had been caused by one of Mission Hospital’s nurses using too much traction.

malpractice actions.” *Cousart*, 209 N.C. App. at 303, 704 S.E.2d at 543. Here, Dr. DePaolo is not Plaintiffs’ expert witness. Accordingly, we decline to consider Dr. DePaolo’s statements to the Becks and in the medical records in determining whether Plaintiffs satisfied their evidentiary burden in demonstrating proximate causation.

C. Rule 9(j)

Plaintiffs argue the trial court erred to the extent it granted Mission Hospital’s motion to dismiss under Rule 9(j). Rule 9(j) requires that a

complaint alleging medical malpractice . . . shall be dismissed unless . . . [t]he pleading specifically asserts that . . . a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence . . . is willing to testify that the medical care did not comply with the applicable standard of care.”

N.C. R. Civ. P. 9(j)(1).

Here, in its order granting Mission Hospital’s motion for summary judgment, the trial court noted it held a hearing on Mission Hospital’s “Motion for Summary Judgment under Rule 56, and their Motion to Dismiss under Rules 9(j) and 56.” However, the trial court simply “conclude[d] that there is no dispute of material fact and that Mission Hospital Inc. is entitled to judgment as a matter of law.” Therefore, it appears the trial court did not address Mission Hospital’s motion to dismiss under Rule 9(j). We need not address the issue because whether Plaintiffs complied with Rule 9(j) is immaterial as the trial court properly granted Mission Hospital’s motion for summary judgment for the reasons herein stated.

III. Conclusion

Because Plaintiffs' expert testified it was more likely by a ratio of ten to one that Dr. DePaolo caused the injury through improper retractor placement and that it was only possible the nurses used improper traction, we hold Plaintiffs failed to produce evidence that Mission Hospital, through its OR staff, proximately caused Mrs. Beck's injury. Accordingly, we affirm the order of the trial court.

AFFIRMED.

Judges ZACHARY and THOMPSON concur.

Report per Rule 30(e).