NO. COA 12-1226
NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2013

WILLIAM R. COUCHON, JR.,
Individually and as Personal
Representative of the ESTATE
OF TRICIA ANN COUCHON,
Deceased,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. TA-13518

N.C. DEPARTMENT OF
TRANSPORTATION and STATE
BOARD OF TRANSPORTATION,
Defendants.

Appeal by plaintiff from opinion and award entered 8 June 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 March 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmundar, for defendant-appellee.

Lennon, Camak & Bertics, PLLC, by George W. Lennon and Michael W. Bertics, for plaintiff-appellant.

HUNTER, JR., Robert N., Judge.

William R. Couchon appeals from an 8 June 2012 decision of the North Carolina Industrial Commission (the "Commission")

denying him compensation under North Carolina's Tort Claims Act. *See* N.C. Gen. Stat. § 143-291, *et seq.* (2011). Upon review, we affirm.

I. Facts & Procedural History

At about 2:35 PM on 4 September 1992, Tricia Ann Couchon ("Tricia") was driving on I-40 West ("I-40W") to her home from UNC-Wilmington. I-40 is a four-lane, divided interstate highway. As Tricia drove through Pender County, she approached a left-hand curve in the highway. Shortly before the curve, Tricia lost control of the car. Her car traveled off the left-hand side of the road, crossed the median, and entered the eastbound lanes. As soon as Tricia entered the eastbound lanes, her car collided into a commercial truck. She died from the crash.

State Highway Patrol Trooper Charles Ryan Lee ("Trooper Lee") arrived at the scene shortly after the accident. Trooper Lee examined the scene and completed a Collision Report Form. Although it was raining when Trooper Lee arrived, he did not see any water pooling where Tricia's car lost control. Trooper Lee was not aware of any prior pooling on that stretch of highway.

After Tricia's death, her parents hired investigators to determine the accident's cause. First, they hired Ernest Mallard ("Mr. Mallard"), a former North Carolina Department of

Transportation ("NCDOT") engineer, to examine the highway's design. Secondly, they hired Dr. L. Ellis King ("Dr. King"), the former chair of the civil engineering department at UNC-Charlotte, to investigate the effect of "Slippery When Wet" signs on driver behavior.

On 2 September 1994, Tricia's father, William R. Couchon, Jr. ("Plaintiff"), filed a claim for damages with the Commission alleging negligence on the part of NCDOT and the Board of Transportation (collectively, "Defendants"). *See* N.C. Gen. Stat. § 143-291, *et seq.* (2011). Specifically, Plaintiff alleged NCDOT and the Board of Transportation were negligent by: (i) failing to inspect I-40 for "unusual ultrahazardous conditions presented by inadequate drainage of rain water from the main traveled portion of the roadway"; (ii) failing to design a highway that is reasonably safe for public use in rainy conditions; and (iii) failing to warn the public of known concealed hazards.

On 14 October 1994, Defendants filed an answer: (i) moving to dismiss the claim for failure to allege negligence of a named employee pursuant to N.C. Gen. Stat. § 143-291 (2011); (ii) denying any negligence; (iii) denying that any alleged negligence proximately caused Tricia's death; and (iv) asserting Tricia was contributorily negligent.

On 21 November 2007, Plaintiff filed a motion to amend his claim for damages to list individual state employees. Defendants opposed Plaintiff's motion based on the length of time that had passed between its filing and the initiation of his claim. On 12 December 2007, the Commission allowed the amendment. On 11 February 2008, Defendants filed an amended answer adding the following defenses: (i) sovereign immunity doctrine; (ii) public officer immunity doctrine; (iii) public duty doctrine; (iv) failure to specifically allege negligence by a particular employee; (v) lack of jurisdiction; and (vi) failure to state a claim.

On 11 July 2011, Deputy Commissioner George T. Glenn, II ("Commissioner Glenn") heard the case. At the hearing, Plaintiff presented testimony from his expert witnesses, Mr. Mallard and Dr. King. They testified that: (i) the "Slippery When Wet" signs near I-40 on-ramps were inadequate to warn drivers of water hazards; and (ii) pooling water from highway design deficiencies caused Tricia to hydroplane.

On 20 September 2011, Commissioner Glenn entered a decision and order: (i) denying Plaintiff's claim; and (ii) dismissing Plaintiff's claim with prejudice. Commissioner Glenn reasoned that: (i) Plaintiff failed to show Defendants were negligent;

and (ii) even if Defendants were negligent, Plaintiff failed to show their negligence proximately caused Tricia's death.

On 22 September 2011, Plaintiff timely appealed to the Full Commission. *See* N.C. Gen. Stat. § 97-85 (2011). On 8 June 2012, the Commission, relying on the evidence presented to the Deputy Commissioner, denied the claim. The Commission found this evidence competent to show the following facts.

I-40, like most highways, uses slopes, banks, and grading to promote water drainage. In I-40's straight stretches, the pavement has a 2% slope from the inside of the road toward the outside. However, when the highway makes left-hand curves, it banks toward the inside to help cars maintain traction. Thus, there is necessarily a short transition area before left-hand curves where the road has no side-to-side slope. In these transition areas, water does not drain as well as in areas with a side-to-side slope.

To remedy this drainage problem, highway engineers developed a longitudinal grading technique. This technique uses inclines running in the direction of travel. When the technique is implemented, water in the transition areas first flows toward straight stretches with a side-to-side slope, and then drains off the road. Overall, the process allows for proper drainage in areas with no side-to-side slope.

The stretch of I-40W where Tricia lost control of her car is a transition area with no side-to-side slope. Still, it had a 0.2% longitudinal grade running in the direction of travel from east to west.

The Commission considered Plaintiff's experts in the context of these findings. Mr. Mallard testified to Commissioner Glenn that this low level of longitudinal grade was insufficient to provide adequate drainage. Mr. Mallard further testified that on major highways like I-40, insufficient drainage would create a hazardous condition where cars could hydroplane. Mr. Mallard opined that Tricia's accident likely resulted from such hydroplaning. He concluded Defendants were likely at fault because they failed to construct a sufficient longitudinal grade.

To warn drivers about potential water hazards, NCDOT placed 30 inch by 30 inch "Slippery When Wet" signs near all I-40 entrance ramps. Although these signs were in place on the day of Tricia's accident, Dr. King testified the signs were not large enough or close enough to the hazardous areas to be effective. However, the Commission rejected Dr. King's opinion and determined the signs provided adequate warning to drivers.

On 8 June 2012, the Commission entered an opinion and award affirming Commissioner Glenn's denial of Plaintiff's claim.[1] Specifically, the Commission determined Plaintiff failed to prove by a preponderance of the evidence that: (i) Defendants were negligent; and (ii) their negligence proximately caused Tricia's death. The Commission also determined Plaintiff failed to produce any "evidence in the record to determine that there was any ponding or pooling of water at the accident site." According to the Commission, Plaintiff's only evidence that Tricia's crash resulted from hydroplaning was the "pure speculation" of Mr. Mallard and Dr. King.

On 3 July 2012, Plaintiff filed timely notice of appeal to this Court.

II. Jurisdiction & Standard of Review

This Court has jurisdiction to hear the instant case pursuant to N.C. Gen. Stat. § 143-293 (2011) ("Either the claimant or the State may, within 30 days after receipt of the decision and order of the full Commission . . . appeal from the decision of the Commission to the Court of Appeals.").

[1] Only two of three commissioners agreed Plaintiff's claim should be denied. Commissioner Christopher Scott dissented from the majority's decision because he believed the testimony of Mr. Mallard and Dr. King established that pooling from highway design deficiencies caused Tricia's crash.

Under the Tort Claims Act, "[t]he standard of review for an appeal from the Full Commission's decision . . . shall be for errors of law only under the same terms and conditions [governing] appeals in ordinary civil actions, and the findings of fact of the Commission [are] conclusive if there is any competent evidence to support them." *Simmons ex rel. Simmons v. Columbus Cnty. Bd. of Educ.*, 171 N.C. App. 725, 727, 615 S.E.2d 69, 72 (2005) (quoting N.C. Gen. Stat. § 143-293 (2003)) (internal quotation marks omitted). Thus, "[a]s long as there is competent evidence in support of the Commission's decision, it does not matter that there is evidence supporting a contrary finding." *Id.* at 728, 615 S.E.2d at 72. "[D]eciding among reasonable inferences remains the role of the Commission and these inferences may not be overturned on appeal." *Id.* at 729, 615 S.E.2d at 73 (internal quotation marks and citation omitted).

Overall, our review in this case "is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision." *Id.* at 728, 615 S.E.2d at 72 (quotation marks and citation omitted). We review the Commission's conclusions of law *de novo*. *See Shera v. N.C. State Univ. Veterinary Teaching Hosp.*,

__ N.C. App. __, __, 723 S.E.2d 352, 354 (2012). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted).

III. Analysis

On appeal, Plaintiff makes four arguments: (i) the Commission's finding that there was no safety hazard on I-40 is contradictory and not supported by competent evidence; (ii) the Commission's finding that NCDOT lacked notice of the hazard is contradictory and not supported by competent evidence; (iii) the Commission's finding that Plaintiff did not prove what caused Tricia's accident is not supported by competent evidence; and (iv) the Commission's factual findings do not support its legal conclusions. Upon review, we affirm the Commission's decision. Because we base our decision on Plaintiff's third argument, we discuss that issue first.

A. Relevant Law

Plaintiff filed his negligence claim under North Carolina's Tort Claims Act.[2] N.C. Gen. Stat. § 143-291, *et seq.* (2011).

[2] Under the Tort Claims Act, "[t]he North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State." N.C. Gen.

"Actions to recover for the negligence of a State employee under the Tort Claims Act are guided by the same principles that are applicable to other civil causes of action." *Simmons v. N.C. Dep't of Transp.*, 128 N.C. App. 402, 406, 496 S.E.2d 790, 793 (1998) (citing *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988)).

Therefore, we now discuss the necessary elements of any negligence claim:

> To establish a *prima facie* case of actionable negligence, a plaintiff must allege facts showing: (1) the defendant owed the plaintiff a duty of reasonable care, (2) the defendant breached that duty, (3) the defendant's breach was an actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages as the result of the defendant's breach.

Gibson v. Ussery, 196 N.C. App. 140, 143, 675 S.E.2d 666, 668 (2009).

For negligence claims, our Supreme Court has succinctly defined "proximate cause:"

> Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence

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Stat. § 143-291(a) (2011). "The Tort Claims Act was enacted in order to enlarge the rights and remedies of a person who is injured by the negligence of a State employee who was acting within the course of his employment." *Simmons v. N.C. Dep't of Transp.*, 128 N.C. App. 402, 405, 496 S.E.2d 790, 792–93 (1998).

> could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Hairston v. Alexander Tank and Equipment Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984). "Proximate cause is an inference of fact to be drawn from other facts and circumstances. Only when the facts are all admitted and only one inference may be drawn from them will the court declare whether an act was the proximate cause of an injury or not." *Adams v. Mills*, 312 N.C. 181, 193, 322 S.E.2d 164, 172 (1984). "[T]he plaintiff has the burden of showing negligence and proximate cause." *Gibson*, 196 N.C. App. at 145, 675 S.E.2d at 669 (quotation marks and citation omitted). If a plaintiff fails to show proximate cause, the negligence claim will fail. *Adams*, 312 N.C. at 188, 322 S.E.2d at 169.

Plaintiffs may prove proximate cause through circumstantial evidence. *Jackson v. Neill McKay Gin Co.*, 255 N.C. 194, 196, 120 S.E.2d 540, 542 (1961). "[W]hen the plaintiff relies upon circumstantial evidence, he must establish negligence and proximate cause as a reasonable inference from the facts proved and not circumstances which raise a mere conjecture or surmise." *Id.* Our courts have long held that when making a proximate cause determination, "[w]e cannot resort to a choice of possibilities: that is guesswork, not decision." *Hanrahan v.*

Walgreen Co., 243 N.C. 268, 270, 90 S.E.2d 392, 393 (1955); *see also Mills v. Moore*, 219 N.C. 25, 30, 12 S.E.2d 661, 664 (1941).

In the present case, Plaintiff argues the Commission's factual findings regarding proximate cause are not supported by competent evidence. Plaintiff further contends the Commission's factual findings do not support its legal conclusions that Plaintiff failed to prove proximate cause. We disagree.

B. Findings of Fact

In his claim for damages, Plaintiff alleged two related proximate causes of Tricia's death: (i) NCDOT and the Board of Transportation failed to adequately warn drivers about water hazards; and (ii) pooling water from highway design deficiencies caused Tricia to hydroplane. In its opinion and award, the Commission made factual findings about both of these theories. To this effect, Plaintiff challenges the evidentiary competency of Findings of Fact Nos. 27, 30, 31, 32, 33, 34, 35, 36, and 3. We now address the each of these factual findings in turn.

1. Failure to Warn

In Finding of Fact No. 27, the Commission addressed Plaintiff's theory that NCDOT and the Board of Transportation failed to warn drivers about water hazards:

> Plaintiff's evidence that the signs were inappropriate and ineffective was not convincing and credible. Plaintiff's expert, Dr. King, admitted that the 30 inch

> by 30 inch slippery when wet signs would be visible, his concern with the size related to words and word spacing. However, there were no words on the pictogram type sign. Dr. King's opinion that the slippery when wet type sign was not appropriate for the condition at issue, which he indicated was potential hydroplaning, was contrary to plaintiff's other expert, Mr. Mallard, that such a sign was the appropriate one. While both claimed that the last slippery when wet sign was too far away from the alleged hazard near the site of the Couchon accident for a driver to respond, neither gave an opinion on how long a driver, who reacted and slowed because of the warning sign in a rain storm or on a wet road, would take to speed up, or if he would speed up if it continued to rain or the road was wet. Further, Dr. King testified that the time to perceive and react could be 1 to 2 minutes or more, about half of the 3-4 minutes necessary to reach the alleged area of concern. Presumably it would take another 1 to 2 minutes or more to decide to accelerate to a higher speed. By then, such a driver may well have passed the alleged hazard.

This factual finding is supported by competent evidence.

At the hearing before Commissioner Glenn, Dr. King testified:

> [T]he original signs were thirty [inches] by thirty [inches]. The appropriate size of the sign would be forty-eight inches by forty-eight [inches] or four feet by four feet. This is well established for interstate assistance again based on the large amounts of research in the past that you need at least that size to have the letters the appropriate size, to be able to space the letters the appropriate distance apart so they can be read at a distance to give the person time to react to it.

However, Dr. King later acknowledged that the "Slippery When Wet" signs at issue were pictogram signs devoid of words.

Dr. King further testified the signs were inadequate because they only warned drivers of wet pavement, not of hydroplaning risks. Dr. King clarified: "If it would have been left up to me to do something, I would have put up some type of sign that was unique because [hydroplaning risks are] a unique condition, a rarely occurred condition, and you need to have something that would really catch the person's attention." Conversely, Mr. Mallard testified that NCDOT made "an appropriate use of the signs that were readily available."

Lastly, although both Dr. King and Mr. Mallard testified they thought the signs were too far away from the transition area to be effective, they did not suggest a distance at which the signs *would* be effective. Specifically, although the closest "Slippery When Wet" sign was 3.7 miles, or over three minutes driving time, from Tricia's accident, Dr. King testified that typical drivers take only 1.5 minutes to respond to cautionary highway signs.

Given the concessions contained in the testimony of Mr. Mallard and Dr. King, a factual question is created regarding proximate causation based on inadequate warning. Under our standard of review, we must defer to the Commission's decision

in this matter. Thus, we conclude Finding of Fact No. 27 is based on competent evidence.

2. Hydroplaning

The Commission also responded to Plaintiff's allegation that pooling water from highway design deficiencies caused Tricia to hydroplane. Specifically, it addressed this proximate cause theory in Findings of Fact Nos. 30, 31, 32, 33, 34, 35, 36, and 3.

Finding of Fact No. 30 states, "Before and during the time of the accident in question, the evidence did not establish if it was raining, and if it was raining the amount of rainfall, or that there was any ponding or pooling of water on the roadway surface." Similarly, Finding of Fact No. 31 states:

> When the investigating trooper, Charles Ryan Lee, arrived at the accident scene, at some point after the accident, it was raining, but he did not see any ponding or pooling of water on the road, and he was not aware of any prior ponding or pooling of water in the area of the accident. Trooper Lee found that there were no road defects, that Ms. Couchon was initially traveling 65 miles per hour, that she exceeded a safe speed, and that she ran off the road to the left for unknown reasons.

These factual findings are supported by competent evidence. In his Collision Report Form, Trooper Lee indicated it was raining when he arrived at the accident scene; however, he did not state when the rain started or how heavy the rain was.

Additionally, Mr. Mallard testified to Commissioner Glenn that he did not know the intensity of rainfall at the moment of Tricia's crash. Mr. Mallard further testified Trooper Lee said he had not seen water pooling at the accident site and was not aware of water typically pooling in that area.

Furthermore, Trooper Lee's Collision Report Form explicitly indicates: (i) the road had no defects; (ii) Tricia exceeded a safe speed; and (iii) "[f]or unknown reasons, [Tricia's car] ran off the roadway to the left." Given Trooper Lee's Collision Report Form and Mr. Mallard's testimony, we determine Findings of Fact Nos. 30 and 31 are supported by competent evidence.

Finding of Fact No. 32 states, "The condition of the eight-year-old Couchon vehicle immediately before the accident, including the condition of its tires, windshield wipers, suspension, brakes, and defroster, and type of tires and inflation is unknown. The vehicle had been safety inspected in August of 1992, the month prior to the accident." This factual finding is supported by competent evidence.

Plaintiff testified before Commissioner Glenn that Tricia's car was inspected in August 1992 and did not have any defects at that time. Additionally, when Mr. Mallard testified, the following exchange occurred:

> Q: All right. You indicated that you did not examine the vehicle?

> A: No. It wasn't available, as I recall.
>
> . . . .
>
> Q: So you don't know what the inflation of the tires was?
>
> A: No.
>
> Q: You don't know what kind of tire tread there was?
>
> A: No.
>
> Q: You don't know what the mechanical condition of the vehicle was at the time this incident started?
>
> A: That's correct.
>
> Q: You don't know whether something could have failed, such as a windshield wiper or suspension piece or anything like that?
>
> A: No.

Given the testimony of Plaintiff and Mr. Mallard, we determine Finding of Fact No. 32 is supported by competent evidence.

Plaintiff next argues Findings of Fact Nos. 33, 34, 35, 36, and 3 are not supported by competent evidence. All of these factual findings address the lack of causal evidence. Specifically, Findings of Fact Nos. 33 through 36 state:

> 33. There is no evidence that Ms. Couchon lost control of her vehicle before leaving the westbound travel lanes.
>
> 34. If there was a loss of control, it is not known where Ms. Couchon's accident began, if it began in the transition area of

> the left hand curve or outside that area, or if it was due to water on the road or any other cause.
>
> 35. The cause of Ms. Couchon's loss of control of her vehicle is unknown. Further, it is unknown whether there was a loss of control of her vehicle. Her vehicle may have left the travel portions of the roadway and traveled into the oncoming eastbound lanes of travel for other reasons.
>
> 36. Plaintiff's experts' opinions that ponding or pooling of water in the transition to the left-hand curve caused Ms. Couchon to lose control of her vehicle are not supported by the evidence and are pure speculation. There is no evidence in the record to determine that there was any ponding or pooling of water at the accident site. As such, plaintiff's experts' opinions are based on pure speculation and are given no weight as to the cause of Ms. Couchon's accident.

Finding of Fact No. 3 succinctly sums up the other findings by stating, in relevant part, that "[a]s Ms. Couchon was travelling in a westerly direction of travel on I-40, she lost control of her vehicle for unknown reasons."

Plaintiff first argues the Commission erred in making these factual findings because it failed to even consider the testimony of his experts, Mr. Mallard and Dr. King. *See Harrell v. J.P. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (1980) (holding that the Commission committed reversible error when it did not consider relevant evidence). Plaintiff specifically references the testimony of Mr. Mallard and Dr.

King at the hearing before Commissioner Glenn that: (i) deficiencies in I-40's design likely caused water pooling in the transition areas before left-hand curves; and (ii) this pooling likely caused Tricia to hydroplane, lose control of her car, and cross the median into oncoming traffic.

Nonetheless, the record indicates that although the Commission did not agree with Plaintiff's experts, it considered their testimony. In fact, the Commission explicitly acknowledged their testimony when it found "Plaintiff's experts' opinions that ponding or pooling of water in the transition to the left-hand curve caused Ms. Couchon to lose control of her vehicle are not supported by the evidence and are pure speculation."

Plaintiff next contends the challenged factual findings are not supported by competent evidence because Mr. Mallard and Dr. King proved Tricia's accident likely resulted from hydroplaning. However, while Mr. Mallard and Dr. King presented well-reasoned opinions, Plaintiff acknowledged their testimony only provided circumstantial evidence. Additionally, both Mr. Mallard and Dr. King conceded their opinions about the cause of Tricia's crash were based on probability, not certainty.[3]

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[3] Additionally, evidence does not conclusively establish that Tricia actually lost control *in the transition area*. For instance, Trooper Lee's Collision Report Form indicates the

Unfortunately, although Mr. Mallard and Dr. King presented considerable circumstantial evidence that hydroplaning may have caused Tricia's accident, we cannot re-weigh the evidence presented to the Commission; instead, we may only determine if the Commission's decision is supported by competent evidence. *See Simmons*, 171 N.C. App. at 728, 615 S.E.2d at 72 (holding that this Court does not engage in *de novo* review of the Commission's factual findings, but rather only reviews for competent evidence). Since no direct evidence proved hydroplaning caused Tricia's accident, the Commission did not err by determining Plaintiff's experts' opinions were "pure speculation."

"[D]eciding among reasonable inferences remains the role of the Commission and these inferences may not be overturned on appeal." *Id.* at 729, 615 S.E.2d at 73 (internal quotation marks and citation omitted). Thus, we determine the Commission's factual findings are supported by competent evidence, despite evidence to the contrary. *See id.*

C. Legal Conclusions

Given all its factual findings, the Commission made the following legal conclusions:

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portion of I-40W where Tricia lost control was straight and level.

> 6. Plaintiff has failed to show by the preponderance of the evidence that . . . [any] breach [of a duty of care] was a proximate cause of the accident in question.
>
> 7. Plaintiff failed to show by the preponderance of the evidence that any of the alleged employees of the defendant named in his affidavit of claim were negligent, and/or if negligent, that such negligence proximately caused the accident in question.

As we discussed previously, the Commission did not err in finding: (i) the "Slippery When Wet" signs provided an adequate warning of any water hazards; and (ii) Plaintiff's evidence failed to show hydroplaning caused Tricia's accident. Consequently, we determine the Commission did not err in concluding as a matter of law that Plaintiff failed to prove proximate cause.

Since Plaintiff failed to prove proximate cause, his negligence claim fails. *Adams*, 312 N.C. at 188, 322 S.E.2d at 169. Consequently, we decline to address Plaintiff's other arguments.

IV. Conclusion

For the foregoing reasons, the Commission's opinion and award is

AFFIRMED.

Judges BRYANT and McCULLOUGH concur.

Report per Rule 30(e).