NO. COA09-1331

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2010

CLARENCE W. FAULKERSON and
AMANDA E. FAULKERSON,
Plaintiffs

v. Union County
No. 09 CVS 482

LARRY ALLEN, and JOHN DOE,
Defendants

Appeal by plaintiffs from order entered 30 June 2009 by Judge W. Erwin Spainhour in Union County Superior Court. Heard in the Court of Appeals 23 March 2010.

The Law Offices of William K. Goldfarb, by Graham T. Stiles, for plaintiffs.

Franklin S. Hancock for defendants.

ERVIN, Judge.

Plaintiffs Clarence and Amanda Faulkerson appeal from an order granting summary judgment in favor of Defendant Larry Allen[1] on

[1] Plaintiffs also alleged in their complaint that they were entitled to recover damages from various individuals or businesses denominated as "John Does" on the theory that they might "be liable to Plaintiffs for some or all of their damages but whose identities, despite the exercise of due diligence, have not yet been" ascertained. The record contains no evidence that summonses were issued for, much less served upon, any of these "John Does." As a result, since Plaintiffs' action against these "John Does" never commenced, *Everhart v. Sowers*, 63 N.C. App. 747, 750-751, 306 S.E.2d 472, 475 (1983), *overruled on other grounds by Hazelwood v.*

Defendant's counterclaims and dismissing Plaintiffs' complaint. After careful review of Plaintiffs' challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

On 6 February 2009, Plaintiffs filed a complaint against Defendant in which they alleged that Plaintiff Clarence Faulkerson suffered serious injuries on 7 February 2009 when he fell through a damaged area of the floor in a trailer that Plaintiffs rented from Defendant, that his injuries were proximately caused by Defendant's negligence, and that they were entitled to recover damages from Defendant for personal injury and loss of consortium. On 16 March 2009, Defendant filed a request for admissions which was accompanied by a certificate of service stating that Plaintiffs had been served by first class mail. On 20 April 2009, Defendant filed an answer denying the material allegations of Plaintiffs' complaint and asserting various defenses, counterclaims seeking the recovery of unpaid rent and cleaning fees, a dismissal motion predicated on the contention that Plaintiffs' complaint did not state a claim for relief, and a motion for summary judgment.

Plaintiffs failed to make any response to Defendant's request for admissions or file a reply to Defendant's counterclaim. On 29 May 2009, Defendant filed a motion seeking an entry of default with respect to his counterclaim. On 12 June 2009, the Union County

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Bailey, 339 N.C. 578,m 453 S.E.2d 522 (1995), the order at issue in this appeal is a final order appealable pursuant to N.C. Gen. Stat. § 1-277(a) (2009) and N.C. Gen. Stat. § 7A-27(b) (2009).

Clerk of Superior Court entered default against Plaintiffs. On 4 June 2009, Defendant filed renewed motions for dismissal and summary judgment predicated on the assertion that Plaintiffs' claims were meritless and that Plaintiffs had admitted the existence of contributory negligence. On 26 June 2009, Plaintiffs filed a response in opposition to Defendant's motions for dismissal and summary judgment which was accompanied by an affidavit executed by Plaintiff Clarence Faulkerson. The response and affidavit addressed Plaintiffs' substantive allegations of negligence without mentioning their failure to respond to Defendant's counterclaim or request for admissions.

On 30 June 2009, Defendant's motions came on for hearing before the trial court. Neither party tendered witnesses or introduced evidence at the 30 June 2009 hearing. Defendant's counsel argued that, given Plaintiffs' failure to respond to his request for admissions, those requests, including assertions to the effect that Defendant was not negligent and that Plaintiffs' claims were barred by contributory negligence, were deemed admitted. Plaintiff Clarence Faulkerson, who appeared *pro se*, informed the trial court that he had "never received nothing" and "was never served." However, when the trial court informed Mr. Faulkerson that valid service of a request for admissions was effectuated by sending that document to Plaintiffs by first class mail addressed to Plaintiffs' last known address, Plaintiff Clarence Faulkerson did not argue that the request for admissions had been sent to the wrong address or advance any other challenge to the service of

Defendant's request for admissions. In addition, Plaintiff Clarence Faulkerson never denied receiving the answer and counterclaims filed by Defendant.

On 30 June 2009, the trial court, having considered matters outside the pleadings, entered an order granting Defendant's motion for summary judgment with respect to his counterclaim, ordering Plaintiffs to pay Defendant $2,400 in damages, and dismissing Plaintiffs' complaint. On 28 July 2009, Plaintiffs noted an appeal to this Court from the trial court's order.

On 9 July 2009, Plaintiffs filed (1) a motion for judgment notwithstanding the verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50; (2) a motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rules 52 and 59; (3) a motion to set aside the court's orders pursuant to N.C. Gen. Stat. § 1A-1, Rules 54, 56, and 58; (4) a motion for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60; and (5) a motion to stay proceedings relating to the enforcement of the trial court's judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 62. Plaintiffs' motions were accompanied by affidavits executed by both Plaintiffs. In Plaintiff Clarence Faulkerson's affidavit, he stated that he had believed that Robert C. Biales, an Ohio attorney, was representing him in this case; that Mr. Biales had informed Plaintiffs that they need not respond to Defendant's request for admissions; and that Mr. Biales directed Plaintiff Clarence Faulkerson to deny having received the request for admissions, despite the fact that he had, in fact, received it, and to refrain from disclosing Mr. Biales' involvement in the case.

Plaintiff Amanda Faulkerson also stated that she believed Mr. Biales represented Plaintiffs in connection with their claims against Defendant. The record does not reflect that the trial court ever ruled on Plaintiffs' 9 July 2009 motions.

II. Legal Analysis

A. Summary Judgment-Related Issues

1. Standard of Review

According to N.C. Gen. Stat. § 1A-1, Rule 56 (2009), summary judgment is appropriate:

> (c) . . . 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. . . .
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> . . . .
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> (e) . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.

"The purpose of [N.C. Gen. Stat. § 1A-1, Rule 56] is to avoid a formal trial where only questions of law remain and where an unmistakable weakness in a party's claim or defense exists." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 123 (2002) (citing *Dalton v. Camp*, 353 N.C. 647, 650, 548 S.E.2d 704, 707 (2001)). "We review a trial court's order granting or denying summary judgment *de novo*. 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig v. New Hanover*

County Bd. of Educ., 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citing *Builders Mut. Ins. Co. v. N. Main Constr.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006), and quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). We conclude that this case "was appropriate for entry of a summary judgment order, because it presents issues of law rather than fact." *Musi v. Town of Shallotte*, __ N.C. App. __, __, 684 S.E.2d 892, 894 (2009) (citing *Adams v. Jefferson-Pilot Life Ins. Co.*, 148 N.C. App. 356, 359, 558 S.E.2d 504, 507, *disc. review denied*, 356 N.C. 159, 568 S.E.2d 186 (2002)).

2. Defendant's Counterclaim

N.C. Gen. Stat. § 1A-1, Rule 7(a) "categorizes a counterclaim as a responsive pleading, where it states '[t]here shall be . . . a reply to a counterclaim denominated as such.'" *Phillips v. Phillips*, 185 N.C. App. 238, 243-44, 647 S.E.2d 481, 485 (2007) (quoting N.C. Gen. Stat. § 1A-1, Rule 7(a) (2005)), *aff'd per curium*, 362 N.C. 171, 655 S.E.2d 350 (2008). According to N.C. Gen. Stat. § 1A-1, Rule 8(d) (2009), "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." "Because defendant's counterclaim was denominated as such in the answer, a reply was required. Thus, all allegations of the counterclaim with the exception of the amount of damages were deemed admitted." *Chappell v. Redding*, 67 N.C. App. 397, 404, 313 S.E.2d 239, 243 (1984) (citation omitted), *disc. review denied*, 311 N.C. 399, 319 S.E.2d 268 (1984). On appeal, Plaintiffs have not

challenged the validity of the manner in which Defendant's counterclaim was served or denied that they failed to respond to Defendant's counterclaim. In addition, Plaintiffs have not challenged the amount of damages imposed by the trial court. As a result, we conclude that the trial court did not err by entering summary judgment in favor of Defendant with respect to his counterclaim.

3. Plaintiffs' Complaint

In granting summary judgment in favor of Defendant with respect to the issues raised by Plaintiffs' complaint, the trial court stated, in pertinent part, that:

> The Court file shows that Defendant Allen properly served REQUESTS FOR ADMISSIONS on Plaintiff Clarence W. Faulkerson on March 14, 2009, and that Plaintiff did not respond in any way[.] . . . Therefore, said REQUESTS are deemed admitted. . . .
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> BASED ON THE ABOVE, summary judgment is appropriate where the record shows that there is no genuine issue of material fact existing, and that Defendant Larry Allen is entitled to judgment as a matter of law.
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> . . . Defendant Allen's Motion for Summary Judgment is GRANTED, and Plaintiffs' claims against him are dismissed.

As Plaintiffs acknowledge, "the trial court's ruling was based entirely on Plaintiff's failure to timely respond to Defendant's Request for Admissions as well as his failure to respond to Defendant's Counterclaim." For that reason, we begin our review of Plaintiffs' challenge to the trial court's decision to grant summary judgment in Defendant's favor with respect to the claims

asserted in Plaintiffs' complaint by examining the law governing failure to respond to a request for admissions.

N.C. Gen. Stat. § 1A-1, Rule 36 (2009), states that:

> (a) . . . A party may serve upon any other party a written request for the admission . . . of the truth of any matters within the scope of Rule 26(b) [and] set forth in the request[,] that relate to statements or opinions of fact or . . . application of law to fact[.] . . .
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> . . . The matter is admitted unless, within 30 days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. . . .

"If a party fails to respond to another party's requests for admissions, the matter is deemed admitted pursuant to N.C. Gen. Stat. § 1A-1, Rule 36 (2007)." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 192 N.C. App. 114, 117, 665 S.E.2d 493, 497 (2008). "'[A]ny matter admitted under this rule is conclusively established unless the court *on motion* permits withdrawal or amendment of the admission.' Facts that are admitted under [N.C. Gen. Stat. § 1A-1,] Rule 36(b) are sufficient to support a grant of summary judgment." *Goins v. Puleo*, 350 N.C. 277, 280, 512 S.E.2d 748, 750 (1999) (quoting N.C. Gen. Stat. § 1A-1, Rule 36(b) (1990), and citing *Rhoads v. Bryant*, 56 N.C. App. 635, 289 S.E.2d 637, *disc. review denied*, 306 N.C. 386, 294 S.E.2d 211 (1982)).

In this case, Plaintiffs clearly did not respond to Defendant's request for admissions or move for withdrawal or amendment of their admissions. As a result, the matters admitted

as a result of Plaintiffs' failure to respond to Defendant's request for admissions are conclusively established for purposes of this case. Although Plaintiffs do not deny that the matters deemed admitted stemming from their failure to respond to Defendant's request for admissions suffice to support the entry of summary judgment in favor of Defendant with respect to the claims asserted in their complaint, they argue on appeal that the request for admissions was not properly served. More particularly, Plaintiffs contend, in reliance on *Goins, id.*, and N.C. Gen. Stat. § 1A-1, Rules 4(j)(2) and 5(b) (2009), that a request for admissions must be served "by registered mail or certified mail, return receipt requested." Plaintiffs' position is without merit.

N.C. Gen. Stat. § 1A-1, Rule 5(b), states, in part, that:

> (b) . . . With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided . . . in Rule 4 . . . . With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to the party or by mailing it to the party at the party's last known address . . . . Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(emphasis added). N.C. Gen. Stat. § 1A-1, Rule 5(b) does not require service of requests for admission "by registered mail or certified mail, return receipt requested."

A certificate of service indicating that Defendant had "personally served the opposing party . . . with a copy of the

document to which this is attached by depositing a copy of same in the United States mail, properly addressed and sealed in an appropriate wrapper, first class mail, properly address[ed] and postage paid," accompanied Defendant's request for admissions. Plaintiffs do not dispute that Defendant's request for admissions was served in the manner outlined in this certificate of service. As a result, based on our review of the certificate of service and the absence of any contention that the certificate of service fails to accurately describe the manner in which Defendant's request for admissions was served upon Plaintiffs, we conclude that Defendant adequately complied with N.C. Gen. Stat. § 1A-1, Rule 5(b).

N.C. Gen. Stat. § 1A-1, Rule 4(j)(2) addresses service of process on a "natural person under disability." In view of the fact that Plaintiffs have not argued that any party was "under disability," N.C. Gen. Stat. § 1A-1, Rule 4(j)(2) has no application to this case. Out of an abundance of caution, given the fact that it was mentioned in *Goins*, 350 N.C. at 280-81, 512 S.E.2d at 750, instead of N.C. Gen. Stat. § 1A-1, Rule 4(j)(2), we have also reviewed N.C. Gen. Stat. § 1A-1, Rule 4(j)(2), which relates exclusively to the issue of proof of service and does not conflict in any way with the provisions of N.C. Gen. Stat. § 1A-1, Rule 5(b), authorizing service of documents such as requests for admissions by mail. As a result, we conclude that the provisions of the Rules of Civil Procedure cited by Plaintiffs do not support their argument that Defendant's request for admissions was improperly served.

Finally, we have reviewed the Supreme Court's opinion in *Goins*, upon which Plaintiffs also rely, and conclude that it does not hold that a request for admissions must be served "by registered mail or certified mail, return receipt requested." Instead, *Goins* simply mentions that the request for admissions at issue in that case was served consistently with N.C. Gen. Stat. § 1A-1, Rules 4(j)(2) and 5(b) without requiring that a request for admissions be served in that manner. On the contrary, in *Dixon v. Hill*, 174 N.C. App. 252, 264, 620 S.E.2d 715, 722(emphasis omitted), *disc. review denied*, 360 N.C. 289, 627 S.E.2d 619 (2005), *cert. denied*, 548 U.S. 906, 165 L.E.2d 954, 126 S.Ct. 2972 (2006), this Court upheld service of a request for admissions by mail, stating that:

> Plaintiffs were obligated to serve the . . . Request for Admissions in accordance with Rule 5 of the Rules of Civil Procedure. [N.C. Gen. Stat. § 1A-1,] Rule 5(b) provides:
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> > ". . . With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by . . . mailing it to the party at the party's last known address . . . .
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> . . . As the plain language of [N.C. Gen. Stat. § 1A-1,] Rule 5(b) indicates – contrary to [defendant's] contention – a party is not required to comply with [N.C. Gen. Stat. § 1A-1,] Rule 4 in serving documents subsequent to the complaint. Instead, [N.C. Gen. Stat. § 1A-1,] Rule 5(b) specifically permits parties to serve another party by mail . . . .

As a result, for all of these reasons, we conclude that Defendant properly served his request for admissions upon Plaintiffs and that, given Plaintiffs' failure to respond, the trial court did not

err by granting summary judgment in favor of Defendant with respect to the claims asserted in Plaintiffs' complaint.

B. Additional Arguments

In addition to their challenge to the trial court's decision to grant summary judgment in Defendant's favor predicated on their contention that Defendant's request for admissions was not properly served, Plaintiffs advance several other arguments on appeal that are not directly related to this issue. As is set forth in more detail below, we have considered these additional arguments and conclude that they lack merit.

1. 9 July 2009 Motions

First, Plaintiffs advance several arguments pertaining to an alleged "denial" of motions for judgment notwithstanding the verdict or directed verdict and appear to contend that, in the event that this Court concludes that Plaintiffs had not successfully moved for a directed verdict or judgment notwithstanding the verdict at the time of the hearing that led to the entry of the trial court's summary judgment order, they had made such motions in their 9 July 2009 filing. The record does not, however, indicate that the motions set out in Plaintiffs' 9 July 2009 filing were ever calendered, heard, or decided by the trial court. According to N.C.R. App. P. 10(a)(1), "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make [and] . . . obtain a ruling upon the party's request, objection, or

motion." As a result, to the extent that Plaintiffs are seeking any relief from this Court based on their 9 July 2009 filing, we conclude that Plaintiffs did not properly preserve any issues pertaining to or arising from the filing of those motions for appellate review.

2. Motions for Directed Verdict and Judgment Notwithstanding the Verdict

In addition, Plaintiffs argue that, at the hearing on Defendant's motions, Plaintiff Clarence Faulkerson "inartfully" moved for a directed verdict and judgment notwithstanding the verdict and that the trial court erred by "denying" these motions. However, Plaintiffs have not identified any statements by Plaintiff Clarence Faulkerson that support this contention, and our independent review of the record does not reveal that Plaintiff Clarence Faulkerson made any statements that might reasonably be construed as the making of such motions. In addition, Plaintiffs have not cited any statements by the trial court "denying" any such motions. Finally, aside from the fact that Plaintiffs have not established the necessary predicate for an appellate ruling on this issue, we conclude that (1) a motion for judgment notwithstanding the verdict, a new trial, or directed verdict would have been inappropriate during or after a nonjury proceeding such as the one at issue here and that (2) even if such motions were cognizable given the procedural posture of this proceeding, properly made and ruled upon by the trial court, those motions were appropriately denied.

"A directed verdict motion tests the legal sufficiency of the evidence to take the case to the jury in support of a verdict for the nonmoving party." *Ferguson v. Williams*, 101 N.C. App. 265, 271, 399 S.E.2d 389, 393, *disc. review denied*, 328 N.C. 571, 403 S.E.2d 510 (1991). "The standard of review of the denial of a motion for a directed verdict and of the denial of a motion for [judgment notwithstanding the verdict] are identical. . . . Both motions require the determination of 'whether the evidence presented at trial is legally sufficient to take the case to the jury.'" *Latta v. Rainey*, __ N.C. App. __, __, 689 S.E.2d 898, 905 (2010) (emphasis added) (quoting *Taylor v. Walker*, 320 N.C. 729, 733, 360 S.E.2d 796, 799 (1987)).

In this case, Plaintiffs have appealed an order entered in response to Defendant's pretrial motion for summary judgment. At the hearing on Defendant's motions, no witnesses testified, no trial was conducted, and no verdict was rendered. In light of the fact that no trial was ever held, a motion for directed verdict or judgment notwithstanding the verdict would not have been properly before the trial court. *See Whitaker v. Earnhardt*, 289 N.C. 260, 264, 221 S.E.2d 316, 319 (1976) (stating that a "motion for judgment [notwithstanding the verdict] must be preceded by a motion for a directed verdict which is improper in non-jury trials"). Moreover, in light of our conclusion that the trial court did not err by granting summary judgment in favor of Defendant, we must also conclude that it would not have erred by denying any motions

for directed verdict or judgment notwithstanding the verdict that Plaintiffs made or were entitled to make.

3. Consideration of Competent "Evidence"

Moreover, Plaintiffs challenge the competence of "evidence" that they contend was introduced at the hearing held in connection with Defendant's summary judgment motion. For example, Plaintiffs contend that Defendant's "evidence" at the hearing "should have been disregarded" and that Plaintiffs offered the "only admissible evidence" presented at the hearing. As discussed above, neither party presented live witness testimony at the hearing. Instead, we understand Plaintiffs' contention to rest upon an affidavit executed by Plaintiff Clarence Faulkerson and Plaintiffs' written response to Defendant's motions, both of which focused exclusively on the merits of Plaintiffs' underlying claims against Defendant. As we have already noted, by failing to respond to Defendant's request for admissions, Defendant's lack of negligence and Plaintiffs' inability to overcome the bar of contributory negligence were conclusively established. As a result, Plaintiffs' arguments predicated on the trial court's treatment of the "evidence" presented at the hearing held on Defendant's motions have no merit.

4. Disregard of Plaintiff Clarence Faulkerson's Statements

Finally, Plaintiffs argue that the trial court "disregarded" Plaintiff Clarence Faulkerson's "numerous statements that he never received [Defendant's] request for Admissions." Contrary to the import of Plaintiffs' argument, any unsworn statements that Plaintiff Clarence Faulkerson made at the hearing on Defendant's summary judgment motion do not constitute "evidence." Furthermore,

the trial court did not "disregard" Plaintiff Clarence Faulkerson's statements; instead, the trial court pointed out in response to Plaintiff Clarence Faulkerson's argument that proper service was effectuated if Defendant mailed the request for admissions to Plaintiffs' last known address. At the hearing, Mr. Faulkerson did not deny that Defendant acted in the manner described by the trial court. On appeal, Plaintiffs have not contested the fact that Defendant's request for admissions was served by first class mail, an approach which we have concluded was entirely proper pursuant to N.C. Gen. Stat. § 1A-1, Rule 5. Thus, Plaintiffs are not entitled to relief as a result of the trial court's alleged failure to consider Plaintiff Clarence Faulkerson's statements at the hearing held in connection with Defendant's summary judgment motion, particularly given the fact that, in the affidavit that he submitted in support of the 9 July 2009 filing, Plaintiff Clarence Faulkerson conceded that he did, in fact, receive Defendant's request for admissions.

III. Conclusion

As a result, for the reasons set forth above, we conclude that the trial court did not err by entering summary judgment for Defendant or by entering judgment for Defendant on his counterclaim. In addition, none of the contentions that Plaintiffs have advanced on appeal are "well grounded in fact" or "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." N.C.R. App. P. 34(a)(1). For that reason, we conclude that Defendant's motion for

sanctions should be allowed; that "reasonable expenses, including reasonable attorneys fees, incurred because of the frivolous appeal" should be awarded to Defendant; and that this case should be remanded to the trial court for "a hearing to determine" the amount of expenses that should be awarded to Defendant. N.C.R. App. P. 34(b)(2)c; N.C.R. App. P. 34(c). As a result, the trial court's order should be, and hereby is, affirmed, and this case is remanded to the Union County Superior Court for a determination of the amount of reasonable expenses, including attorneys fees, that should be awarded to Defendant from Plaintiffs.

AFFIRMED; REMANDED FOR HEARING CONCERNING REASONABLE EXPENSES.

Judges McGEE and GEER concur.

Report per Rule 30(e).