An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-268

Filed: 6 November 2018

Forsyth County, No. 16 CVS 5241

HEATHER A. COUSAR, Plaintiff,

v.

CARL R. MARTIN, and Elizabeth W. MARTIN, Named Defendants,

and

NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY, Unnamed Defendant.

Appeal by plaintiff from an order entered 24 August 2017 by Judge Anderson D. Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 20 September 2018.

Bowman Law, PLLC, by Joseph S. Bowman, for plaintiff-appellant.

Robert B. Laws for defendant-appellee.

BERGER, Judge.

Heather A. Cousar ("Plaintiff") challenges an August 24, 2017 order compelling Plaintiff to produce certain documents (the "Discovery Order"). We find the Discovery Order is interlocutory and does not affect a substantial right. Therefore, we dismiss.

Factual and Procedural Background

On August 27, 2013, Plaintiff was operating a city bus when she was struck from behind by a vehicle driven by Carl R. Martin and owned by Elizabeth W. Martin. On August 29, 2016, Plaintiff filed a complaint against Carl and Elizabeth Martin (the "Named Defendants"), claiming negligence and damages for injuries arising from the accident. Nationwide Property and Casualty Insurance Company ("Nationwide") answered the complaint on October 7, 2016, on behalf of the Named Defendants (Nationwide and the Named Defendants are collectively referred to as the "Defendants").

Nationwide served its first set of interrogatories and requests for production of documents on Plaintiff on October 10, 2016. Plaintiff responded to these requests on January 13, 2017. On March 31, 2017, Nationwide filed a motion to compel Plaintiff to respond more fully to its interrogatories and requests for production of documents. The trial court granted Nationwide's first motion to compel on May 18, 2017 in an order that required Plaintiff to respond to inquiries about Plaintiff's physicians prior to the accident and post-accident physical and/or mental disabilities and to produce documentation of Plaintiff's hourly wage and hours worked per week since the date of the accident.

Nationwide served its second set of requests for production of documents on Plaintiff on April 12, 2017. On May 10, 2017, Plaintiff filed a motion for extension of

time to answer Nationwide's second set of request for production of documents. On July 10, 2017, Nationwide filed a motion to compel Plaintiff to respond to Nationwide's document request. On the same day, Nationwide also moved for sanctions against Plaintiff for the "failure of Plaintiff's Counsel to comply with the terms of the Order compelling discovery entered . . . on or about May 18, 2017."

The trial court held a hearing to address Nationwide's second motion to compel on July 24, 2017. As a result of that hearing, the trial court entered an order on August 1, 2017, granting Nationwide's motion to compel and ordering Plaintiff to respond to Nationwide's outstanding discovery requests. After the July 24, 2017 hearing and various email communications between the parties and the trial court, the trial court entered the Discovery Order on August 24, 2017, finding that Plaintiff had not complied with the August 1, 2017 order and compelling Plaintiff to respond accordingly.

Plaintiff appeals, challenging the Discovery Order and asserting that the trial court erred by (1) making unsupported findings of fact; (2) entering the Discovery Order without proper jurisdiction; (3) relying on Nationwide's purported *ex parte* communications; (4) failing to provide Plaintiff meaningful notice and an opportunity to be heard before entering the Discovery Order; (5) omitting reference to any authority on which the trial court relied; and (6) allegedly setting a trial date in the Discovery Order. However, because the Discovery Order is interlocutory and does

not affect a substantial right, we dismiss Plaintiff's appeal.

Analysis

> The threshold question is whether this case is properly before us. An order is either interlocutory or the final determination of the rights of the parties. . . . An appeal is interlocutory when noticed from an order entered during the pendency of an action, which does not dispose of the entire case and where the trial court must take further action in order to finally determine the rights of all parties involved in the controversy.

Beroth Oil Co. v. N.C. Dep't of Transp., ___ N.C. App. ___, ___, 808 S.E.2d 488, 496 (2017) (citations and quotation marks omitted). "While an interlocutory appeal may be allowed in exceptional cases, this Court must dismiss an interlocutory appeal for lack of subject-matter jurisdiction, unless the appellant is able to carry its burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature." *C. Terry Hunt Indus., Inc. v. Klausner Lumber Two, LLC*, ___ N.C. App. ___, ___, 803 S.E.2d 679, 682 (2017) (citations and quotation marks omitted). "This Court will not construct appellant's arguments in support of a right to interlocutory appeal." *Union Cnty. v. Town of Marshville*, ___ N.C. App. ___, ___, 804 S.E.2d 801, 806 (2017) (citation omitted).

The two most common instances in which an interlocutory appeal may be allowed include

> when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal [pursuant to Rule 54(b) of the

> North Carolina Rules of Civil Procedure]. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (citations and quotation marks omitted). "A 'substantial right' is a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a person is entitled to have preserved and protected by law: a material right." *Myers v. Mutton*, 155 N.C. App. 213, 216, 574 S.E.2d 73, 76 (2002) (*purgandum*[1]).

"Discovery orders are generally not immediately appealable because they are interlocutory and do not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Stokes v. Crumpton*, 369 N.C. 713, 719, 800 S.E.2d 41, 45 (2017) (*purgandum*). "Our appellate courts have recognized very limited exceptions to this general rule, holding that an order compelling discovery might affect a substantial right, and thus allow immediate appeal, if it either imposes sanctions on the party contesting the discovery, or requires the production of materials protected by a recognized privilege." *Arnold v. City of Asheville*, 169 N.C.

[1] Our shortening of the Latin phrase "*Lex purgandum est.*" This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

App. 451, 453, 610 S.E.2d 281, 282 (2005).

Appeals under these narrow exceptions, however, are "contingent upon the proper assertion of the claimed privilege." *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atlantic, Inc.*, ___ N.C. App. ___, ___, 788 S.E.2d 170, 174 (2016), *aff'd as modified*, 370 N.C. 235, 805 S.E.2d 664 (2017). For example, "blanket general objections purporting to assert attorney-client privilege or work product immunity to all of the opposing parties' discovery requests are inadequate to effect [sic] their intended purpose and do not establish a substantial right to an immediate appeal." *K2 Asia Ventures v. Trota*, 215 N.C. App. 443, 447, 717 S.E.2d 1, 4-5 (2011).

Here, Plaintiff concedes that the Discovery Order is interlocutory and the trial court did not certify the Discovery Order for immediate appeal pursuant to Rule 54(b). Rather, Plaintiff asserts that immediate appeal is proper because the Discovery Order affects a substantial right. However, Plaintiff does not assert either of the two recognized exceptions to overcome the general rule that orders compelling discovery are generally interlocutory and not subject to immediate appellate review. More specifically, Plaintiff does not contend that compliance with the Discovery Order would infringe upon a protected statutory privilege or that the Discovery Order imposes sanctions. The Discovery Order states that Plaintiff does not owe costs or attorney's fees "based upon the Court's determination that Plaintiff has substantially complied with the terms of the Court's July 24, 2017 Order." The Discovery Order

further states that sanctions *may* be available to enforce any potential future non-compliance by Plaintiff. This provision is insufficient to affect a substantial right.

In lieu of asserting one of these recognized exceptions, Plaintiff argues that the Discovery Order affects a substantial right for two reasons. First, Plaintiff alleges that "Plaintiff's Counsel's substantial right to due process will be lost or irremediably adversely affected if the order is not reviewed before final judgment as Plaintiff's Counsel would be required to either comply with the order—which requires both the production of documents and a mandatory injunction to obtain documentation from a third party—or be subject to penalties."

However, this Court has held that "all discovery orders, so long as they comport with the rules of civil procedure, conclusively do not burden a [party's] due process rights." *K2 Asia Ventures v. Trota*, 209 N.C. App. 716, 723, 708 S.E.2d 106, 111 (2011). "[A]voiding the expenditure of time and money is not a substantial right justifying immediate appeal." *Id.* at 719, 708 S.E.2d at 109. Here, Plaintiff's chief complaint is that the Discovery Order "requires both the production of documents and a mandatory injunction to obtain documentation from a third party," but Plaintiff does not contend that these discovery requests violate North Carolina's Rules of Civil Procedure.

Second, Plaintiff alleges that the Discovery Order affects a substantial right "[b]y setting the trial date in a manner that did not comport with the local rules, [the

trial court], without notice and opportunity to be heard, substantially shorten[ed] the period of time over which Plaintiff could make discovery, thereby thwarting Plaintiff's ongoing discovery efforts."

We will not address the merits of this argument because the Discovery Order on appeal does not set or even reference a trial date. Even if we were to vacate the Discovery Order on appeal, this would have no effect on the calendaring of trial as the Discovery Order did not set a trial date.

Conclusion

Plaintiff has failed to satisfy her "burden of demonstrating that the order from which . . . she seeks to appeal is appealable despite its interlocutory nature." *C. Terry Hunt Indus., Inc.*, ___ N.C. App. at ___, 803 S.E.2d at 682 (citations and quotation marks omitted). Therefore, we dismiss.

DISMISSED.

Judges TYSON and INMAN concur.

Report per Rule 30(e).