IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1109

Filed: 4 June 2019

Iredell County, No. 17 CVS 3116

ELIZABETH LUKE as Guardian ad Litem, For JANE DOE (a minor), Plaintiff,

v.

WOODLAWN SCHOOL, J. ROBERT SHIRLEY individually and as AGENT FOR WOODLAWN SCHOOL, and THE WOODLAWN SCHOOL BOARD OF TRUSTEES, Defendants.

Appeal by plaintiff from orders entered 12 June 2018 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 25 April 2019.

Collum & Perry, by M. Shane Perry, for plaintiff-appellant.

Dean & Gibson, PLLC, by Michael G. Gibson, for defendant-appellees.

YOUNG, Judge.

Where plaintiff's counsel was likely to serve as a witness in the case, the trial court did not err in granting defendant's motion to disqualify plaintiff's counsel. Where plaintiff fails to show a substantial right that would be jeopardized absent review of the trial court's preliminary denial of plaintiff's requests for admissions and

to deem admissions admitted, we dismiss such argument as interlocutory. Where plaintiff failed to properly designate an order in her notice of appeal as one from which appeal was taken, we dismiss the appeal with respect to that order. Where plaintiff failed to obtain a ruling on her requests for the entry of findings of fact, that issue is not preserved for appeal, and we dismiss it.

I. Factual and Procedural Background

From August 2014 through March 2016, Jane Doe[1], a minor child, attended Woodlawn School (Woodlawn), a private school in Iredell County. On 24 March 2016, Jane Doe's father received a phone call from J. Robert Shirley (Shirley), interim head of school and later member of the Woodlawn School Board of Trustees (the Board), informing the father that Jane Doe was to be expelled effective immediately. Shirley informed the father that the reason for Jane Doe's expulsion was the behavior of her mother, including a Facebook post in which the mother joked about attacking a student. On 21 December 2017, Jane Doe, through guardian ad litem Elizabeth Luke (collectively, plaintiff), brought an action against Woodlawn, Shirley both individually and as an agent of Woodlawn, and the Board (collectively, defendants), alleging unfair or deceptive trade practices, negligent infliction of emotional distress, intentional infliction of emotional distress, constructive fraud, breach of fiduciary duty, and conversion. Plaintiff sought damages, punitive damages, a permanent

[1] The record omits the name of the minor child. As such, and for ease of reading, a pseudonym is used.

injunction precluding defendants from "maligning or disparaging Jane Doe or her parents[,]" and attorney's fees and court costs.

On 26 January 2018, defendants requested and were granted an extension of time to respond to plaintiff's request for admissions. On 5 March 2018, defendants filed their answer and a motion to dismiss pursuant to Rules 12(b)(2) and (b)(6) of the North Carolina Rules of Civil Procedure. On 9 March 2018, defendants served responses to plaintiff's request for admissions. In many of their responses, defendants contended that by identifying the minor child as Jane Doe, plaintiff had not sufficiently identified the subject matter of the request for admission, and thus summarily denied the request.

On 2 April 2018, plaintiff filed a motion to determine the sufficiency of defendants' answers to plaintiff's requests for admission, and to deem answers admitted. That same day, plaintiff moved for the entry of a protective order, allowing plaintiff to forestall further denials by defendants by stipulating to Jane Doe's name on a sealed document.

On 11 May 2018, defendants filed a motion to disqualify plaintiff's counsel, on the grounds that he was a material witness. Specifically, defendants cited the complaint, in which counsel was named as plaintiff's father and the primary person who interacted with defendants in the circumstances described in plaintiff's complaint.

On 12 June 2018, the trial court entered an order on plaintiff's motions to determine the sufficiency of answers and deem them admitted (the Admissions Order). The trial court denied plaintiff's request for sanctions and to have the requests for admission deemed admitted, but ordered defendants to properly respond to plaintiff's requests for admission by 6 July 2018. The court left open the possibility that, should defendants fail to fully respond, the court would consider all appropriate sanctions. The trial court also entered an order on defendants' motion to disqualify (the Disqualification Order). The trial court noted that the Rules of Professional Conduct "do not allow an attorney to both represent a party and act as a witness for that party in a civil action[,]" and that there was "a substantial risk of confusion, a conflict of interest, and violation of the Rules of Professional Conduct." The court therefore granted defendants' motion, and disqualified plaintiff's counsel. Finally, the trial court also entered an order on plaintiff's motions for protective order and to deem her request for admissions admitted (the Protective Order). The trial court denied the motion for protective order, but required the parties to limit information on Jane Doe to that "necessary to prosecute or defend the litigation in this matter." The trial court also denied plaintiff's motion to deem her request for admissions admitted, but ordered defendants to properly respond to the request for admissions.

Plaintiff gave timely notice of appeal. In her notice of appeal, plaintiff cited the Disqualification Order and the Admissions Order, but not the Protective Order.

II. Motion to Disqualify Counsel

In her first argument, plaintiff contends that the trial court erred in granting defendants' motion to disqualify counsel. We disagree.

A. Standard of Review

"Decisions regarding whether to disqualify counsel are within the discretion of the trial judge and, absent an abuse of discretion, a trial judge's ruling on a motion to disqualify will not be disturbed on appeal." *Travco Hotels v. Piedmont Nat. Gas Co.*, 332 N.C. 288, 295, 420 S.E.2d 426, 430 (1992). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

B. Analysis

At trial, plaintiff argued that (1) plaintiff's counsel did not suffer from a conflict of interest, and (2) that Rule 3.7 of the Rules of Professional Conduct only precludes an attorney from acting as a witness and advocate at trial, not at a hearing. As such, plaintiff argued, there was no reason to disqualify plaintiff's counsel. The trial court disagreed, and granted defendant's motion to disqualify. On appeal, plaintiff contends that this was error.

Plaintiff's complaint alleges, in great detail, the circumstances of Jane Doe's expulsion from Woodlawn, including conversations with Shirley and his explanations of the reasons for the expulsion. Starting with paragraph 37 of the complaint, and extending for roughly twenty additional paragraphs, the narrative is from the perspective of Jane Doe's father, plaintiff's counsel. These allegations detail an extensive conversation between counsel and Shirley, counsel's encounter with law enforcement officers when he arrived at the school, and counsel informing Jane Doe of her expulsion, and her reaction. It is clear that these facts, comprising roughly three pages of the complaint, were central to plaintiff's allegations against defendants. It is similarly clear that plaintiff's counsel, as a witness to these events, would likely be called to act as a witness. Counsel conceded as much at trial, acknowledging that he "might actually have [him]self called as a witness[.]"

The North Carolina Rules of Professional Conduct provide that:

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

N.C.R. Prof. Conduct 3.7(a). Counsel conceded at the hearing that the issue was contested. He further acknowledged that he had "another lawyer lined up for trial[,]" so it was clear that the deprivation would not cause his client hardship.

This matter is vested in the trial court's discretion. Absent an abuse of that discretion, we will not disturb the trial court's decision. Given the clear acknowledgment that plaintiff's counsel was a key witness and would likely act as such, that the issues on which he would testify were contested, and that his disqualification would not work substantial hardship on his client, we cannot say that the trial court's decision was "so arbitrary that it could not have been the result of a reasoned decision." Accordingly, we affirm the trial court's order granting defendant's motion to disqualify plaintiff's counsel.

III. Answers

In her second, third, and fourth arguments, plaintiff contends that the trial court erred in failing to enter an order on plaintiff's motion to determine the sufficiency of defendants' answers, in denying plaintiff's motion to deem those answers insufficient, and in denying plaintiff's motion to deem them admitted. Because this issue is interlocutory, we dismiss it.

A. Standard of Review

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736

(1990). "[W]hen an appeal is interlocutory, the appellant must include in its statement of grounds for appellate review 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (quoting N.C.R. App. P. 28(b)(4)), *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005).

B. Analysis

In the Admissions Order, the trial court denied plaintiff's motions to determine the sufficiency of defendant's answers and to deem plaintiff's requests for admissions admitted. However, it did not do so with finality. Rather, the trial court denied the motions as a preliminary matter, while still holding the matter open if defendants failed to properly respond to plaintiff's requests for admissions in a timely fashion.

Our Supreme Court has held that "[a]n order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). And while our courts have long recognized that an exception to this rule exists when a party is subject to contempt for failure to comply with discovery, *see Willis v. Duke Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976), in the instant case, the trial court was clearly not at a point where contempt was an option.

Because an appeal of this issue is therefore interlocutory, the burden is on plaintiff, as the appellant, to demonstrate that a substantial right would be affected were we to fail to address this issue prior to a final adjudication on the merits. Plaintiff acknowledges in her brief that this appeal is interlocutory, but does not allege a substantial right with respect to these issues. Rather, plaintiff asks that this Court treat the appeal of these issues as a petition for writ of certiorari. In our discretion, we decline to do so.

"It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that 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, 380, 444 S.E.2d 252, 254 (1994). We hold that plaintiff has failed to make this showing, and therefore dismiss these arguments as interlocutory.

IV. Protective Order

In her fifth argument, plaintiff contends that the trial court erred in denying plaintiff's motion for a protective order. Because plaintiff failed to give proper notice of appeal with respect to this order, we dismiss this argument.

A. Standard of Review

Pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, notice of appeal must "designate the judgment or order from which appeal is taken[.]" N.C.R. App. P. 3(d). "In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). "A jurisdictional default, therefore, precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008).

B. Analysis

The trial court entered three orders: the Admissions Order, which was simply captioned "Order," relating to "Plaintiff's Motion to Determine Sufficiency of Answers and to Deem Admitted[;]" the Disqualification Order, captioned "Order to Disqualify," relating to "Defendants' Motion to Disqualify[;]" and the Protective Order, captioned "Order Denying Motion for Protective Order and Motion to Deem Request for Admissions Admitted," relating to "Plaintiff's Motion for Protective Order and Motion to Deem Request for Admissions Admitted[.]" Plaintiff, in her notice of appeal, sought appeal from "the Orders filed on June 12, 2018, in the Superior Court of Iredell County, 1) granting Defendants' motion to disqualify counsel and 2) denying Plaintiff's motion to determine sufficiency and deem admitted." It is clear that the

first order cited in plaintiff's notice of appeal is the Disqualification Order, and the second order cited in plaintiff's notice of appeal is the Admissions Order. Plaintiff did not, therefore, give notice of appeal from the Protective Order. Because plaintiff failed to give proper notice of appeal from the Protective Order, in violation of Rule 3, we must dismiss this portion of plaintiff's appeal.

V. Findings of Fact

In her sixth argument, plaintiff contends that the trial court erred in failing to enter findings of fact upon request. We hold that this issue was not properly preserved for appeal, and dismiss it.

A. Standard of Review

"[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." *Dogwood*, 362 N.C. at 195-96, 657 S.E.2d at 364.

B. Analysis

Plaintiff contends that, after the trial court announced its orders in open court, plaintiff made a request for findings of fact the next day, and the following day. Plaintiff contends that the Rules of Civil Procedure mandate the entry of findings of fact where requested by a party, and that the trial court's failure to enter findings constitutes reversible error.

In the instant case, plaintiff made no request for findings during the hearing in this matter. Nor did plaintiff make any formal written motion requesting findings. Rather, plaintiff's only purported requests consist of a pair of emails sent to the court. In these emails, plaintiff even acknowledged that this request was improper, noting in one, "Please let us know . . . if this request will suffice under the rules[,]" and in the other, "I don't know that it is proper for us to argue this by email."

Even assuming *arguendo* that these requests were proper, however, there is no evidence in the record on appeal that the trial court responded to or ruled on them.

> In order 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 if the specific grounds were not apparent from the context. *It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.*

N.C.R. App. P. 10(a)(1) (emphasis added). Plaintiff's failure to obtain a ruling on these requests, assuming they were proper to begin with, constitutes a failure to preserve them for appeal. As such, we hold that plaintiff's requests for findings of fact are not preserved, and dismiss this argument.

AFFIRMED IN PART, DISMISSED IN PART.

Judges INMAN and ARROWOOD concur.

Report per Rule 30(e).