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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-797

Filed: 1 December 2020

Buncombe County, No. 17-CVS-04548

TINA T. NOWAK, individually and as administrator of the ESTATE OF CHRISTINA MICHAELA NOWAK, PLAINTIFF,

v.

METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, GREGORY LEE PATTON, individually and in his capacity as an employee of METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, and MICHAEL ROBERT APPOLLO, individually and in his capacity as an employee of METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, DEFENDANTS.

Appeal by defendants from order entered 22 July 2019 by Judge William H. Coward in Superior Court, Buncombe County. Heard in the Court of Appeals 4 February 2020.

Rawls, Scheer, Clary & Mingo, PLLC, by Amanda A. Mingo, for plaintiff-appellee.

Clawson and Staubes, PLLC, by Andrew J. Santaniello and Ryan L. Bostic, for defendant-appellants.

STROUD, Judge.

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Defendants appeal from the trial court's order which grants in part and denies in part their motion for a protective order based upon attorney-client, joint defense, and work product privilege. We affirm.

I. Background

On 6 October 2017, plaintiff, Ms. Tina Nowak, individually and as administrator of the estate of Ms. Christina "Michaela" Nowak, filed a complaint against defendant Metropolitan Sewerage of Buncombe County ("Metro") and two of its employees, Mr. Gregory Lee Patton and Mr. Michael Robert Apollo, in their capacity as employees and individuals, for wrongful death. According to plaintiff, on 14 October 2016, defendants Patton and Apollo parked a defendant Metro truck in the right lane of traffic of U.S. Route 19/23 in Asheville and got out of the truck leaving no appropriate warnings that the truck was parked on the road. Ms. Michaela Nowak struck the truck parked in her lane of traffic and died from her injuries.

Plaintiff brought claims for negligence against defendants Patton and Apollo, alleging willful and wanton conduct and requesting punitive damages. Plaintiff also brought a claim of negligence on the theory of respondeat superior against defendant Metro, along with a claim of negligent retention, training, and supervision; plaintiff also alleged willful and wanton conduct by defendant Metro and requested punitive damages.

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On 29 December 2017, defendants filed a motion to dismiss based on North Carolina Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6) alleging “[s]overeign and/or [g]overnmental [i]mmunity[,]” and public official or officer immunity for defendants Patton and Apollo. Defendants also filed an answer denying many of the substantive allegations but admitting that the truck was parked in the right-hand lane of traffic and Michaela crashed into the truck, resulting in her death. Defendants alleged the affirmative defenses of gross contributory negligence; “[p]roperly [s]topped [p]ublic [s]ervice [v]ehicle; sovereign and governmental immunity; and that punitive damages are barred against local and governmental bodies, officials, and employees.

Defendant Patton filed a counterclaim, alleging he had been struck by the truck when it moved forward after being hit by Michaela. Defendant Patton brought his counterclaim against plaintiff Ms. Tina Nowak individually and the estate of Michaela, alleging Michaela was permissively using a “family purpose vehicle[] owned by” Ms. Tina Nowak, when she “failed to obey the plainly visible signal emitting a flashing left-hand arrow and negligently and carelessly failed to reduce her speed,” thus causing the accident and failing in her duty owed to defendant Patton to follow the rules of the road. Defendant Patton alleged “serious, painful, and permanent bodily injuries” as well as loss of wages. Defendant Patton also pled last clear chance.

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On 12 April 2019, plaintiff issued a subpoena *duces tecum* requesting documents from Mr. Michael Bryant, “an adjuster with the North Carolina League of Municipalities, which insures Defendant” Metro, by 25 April 2019.¹ Mr. Bryant did not respond to the subpoena nor did he file a motion to quash or objection to the subpoena. Thereafter, on 3 May 2019, plaintiff issued a second subpoena *duces tecum* and a notice of deposition of Mr. Bryant, requesting him to turn over “[y]our entire physical and electronic files regarding claim number(s) NCLM 316-80391 and 316-80390.”

On 15 May 2019, defendant Metro responded by filing a motion for a protective order “preventing the deposition of Michael Bryant and quashing the subpoena” asserting “attorney-client privilege; work-product privilege; and/or joint defense privilege and limiting the documents produced to documents not covered by any privilege.” Neither Mr. Bryant nor counsel on his behalf joined in defendant Metro’s motion nor did he file a response, motion to quash, or objection. On 28 May 2019, plaintiff filed a motion to enforce the subpoena and in opposition to defendant Metro’s request for a protective order arguing that plaintiff was not seeking material subject to attorney-client privilege. Plaintiff believed that “incorrect, misleading information” had been communicated to Mr. Bryant who then sent that “incorrect,

¹ The quoted portion of the description of Mr. Bryant is from defendant Metro’s motion for protective order filed on 15 May 2019.

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misleading information” to an accident reconstructionist who had been “identified by the defense as a potential expert witness.”

On 22 July 2019, the trial court entered an amended order regarding the subpoena of Mr. Bryant and the related motions. The trial court made findings of fact regarding the procedural history and discovery sought and ordered:

- 2) Defendant’s Motion for Protective Order is DENIED, except as to emails issued to or from attorney Andrew Santaniello on and after the date he was employed as counsel in this matter (November 1, 2017);
- 3) Plaintiff’s Motion to Enforce Subpoenas (Re: Michael Bryant) is GRANTED;
- 4) Defendant shall tender a complete copy (other than emails issued to or from attorney Andrew Santaniello on and after November 1, 2017) of the documents which Defendant’s attorney submitted to the Court during the hearing of these motions for *in camera* inspection, to Plaintiff’s attorneys not later than July 22, 2019; and
- 5) Mr. Michael Bryant shall appear to be deposed by Plaintiff’s counsel at 10:00a.m. on August 5, 2019, in the office of Defendant’s attorney or at such other time and place as shall be mutually acceptable to the parties.

Defendants appeal.

II. Defendants’ Appeal

We note from the outset that this appeal presents many procedural questions in addition to the substance of defendants’ appeal. We have attempted to address the

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legal issues in logical order but not necessarily in the order presented in the briefs, a motion to dismiss, and a response to the motion to dismiss. As to the substance of the appeal, defendants contend the trial court erred in partially denying their motion for a protective order and partially granting plaintiff's motion to enforce subpoenas. Plaintiff has filed a motion to dismiss the appeal because it is interlocutory and defendants have failed to demonstrate a substantial right as a basis for review. But as a practical matter, we must review the substance of defendants' claim as to alleged privileges to determine *if* defendants have a substantial right which would allow interlocutory review of the trial court's order. Nonetheless, we begin with plaintiff's motion to dismiss and our interlocutory analysis.

Plaintiff contends in her motion to dismiss that defendants appeal from an interlocutory order that does not affect a substantial right of defendants, and thus their appeal should be dismissed. *See generally Hamilton v. Mortgage Information Services, Inc.*, 212 N.C. App. 73, 76, 711 S.E.2d 185, 188 (2011). Defendants acknowledge they appeal from an interlocutory order as it is a discovery order not adjudicating any of the claims before the trial court. *See id.* This Court noted in *Hamilton* the requirements for an interlocutory appeal to be reviewed immediately:

An order is either interlocutory or the final determination of the rights of the parties. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. . . . As a general proposition, only final

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judgments, as opposed to interlocutory orders, may be appealed to the appellate courts. Appeals from interlocutory orders are only available in exceptional cases. Interlocutory orders are, however, subject to appellate review:

if (1) the order is final as to some claims or parties, and the trial court certifies pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed.

The appealing party bears the burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature. If a party attempts to appeal from an interlocutory order without showing that the order in question is immediately appealable, we are required to dismiss that party's appeal on jurisdictional grounds.

Id. at 76-77, 711 S.E.2d at 188-89 (emphasis added) (citation, quotation marks, and brackets omitted). Here, the trial court did not certify the order for immediate appeal so defendants must demonstrate a substantial right. *See id.* at 77, 711 S.E.2d at 188.

When considering whether an appellant has demonstrated a substantial right

we utilize a two-part test, with the first inquiry being whether a substantial right is affected by the challenged order and the second being whether this substantial right might be lost, prejudiced, or inadequately preserved in the absence of an immediate appeal. As a result, the extent to which [an appellant] is entitled to appeal the trial court's order hinges upon whether she has established that delay of the appeal will jeopardize a substantial right and cause an injury that might be averted if the appeal were allowed.

The extent to which an interlocutory order affects a substantial right must be determined on a case-by-case basis. In making this determination, *we take a restrictive*

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view of the substantial right exception to the general rule prohibiting immediate appeals from interlocutory orders. As we previously mentioned, the appellant must demonstrate the applicability of the substantial right exception to the particular case before the appellate court.

Id. at 78–79, 711 S.E.2d at 189–90 (emphasis added) (citations, quotation marks, brackets and footnote omitted).

Defendants list the grounds for their substantial right as “attorney client privilege, joint defense privilege, and work product protections[.]” “[T]he assertion that an order will violate a statutory privilege is generally sufficient to show that an order affects a substantial right and should be immediately reviewed by this Court.” *Gunter by Zeller v. Maher*, 264 N.C. App. 344, 347, 826 S.E.2d 557, 559–60 (2019); *see* N.C. Gen. Stat. §1A-1, Rule 26 (regarding privilege) (2017).² Because considering defendants’ substantial right to an immediate appeal necessarily requires consideration of the substance of the question on appeal – privilege – we review defendant’s appeal, and deny plaintiff’s motion to dismiss.³

² North Carolina General Statute § 1A-1, Rule 26 was amended in 2018. *See* N.C. Gen. Stat. §1A-1, Rule 26 (2019).

³ Plaintiff has also raised arguments regarding the timeliness of defendants’ objections to the subpoenas and to defendants’ right to raise an objection, since Mr. Bryant, the person to whom the subpoenas were directed, has not raised any objection. But assuming for purposes of this appeal that defendants raised a timely objection and that defendants had a right to object to the subpoena based upon attorney-client privilege and work product privilege, we note defendants’ request for a protective order *was allowed* “as to emails issued to or from attorney Andrew Santaniello on and after the date he was employed as counsel in this matter (November 1, 2017)[.]”

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Defendants did not provide either to the trial court or to this court a privilege log nor did they identify any other specific documents they contend are protected by a particular privilege. Here, the documents defendants claim should be protected were reviewed by the trial court in camera and were filed as a North Carolina Rule of Appellate Procedure 11(c) supplement to the record before this Court under seal. The supplement includes approximately 55 pages and consists of notes and emails from Mr. Bryant's investigation of the accident. Defendants' attorney is mentioned only in reference to hiring him and eventually doing so; the few emails to and from Mr. Santaniello at the time of procuring him as defendants' counsel are completely redacted. Other than the emails to or from Mr. Santaniello, which the trial court protected from discovery, we agree with the trial court that the other information in Mr. Bryant's file does not fall under the protection of attorney-client privilege. *See Evans v. United Services Auto. Ass'n*, 142 N.C. App. 18, 31, 541 S.E.2d 782, 790 (2001) ("[C]ourts are obligated to strictly construe the privilege and limit it to the purpose for which it exists. The attorney-client privilege operates to protect confidential communications *between attorneys and their clients*." (emphasis added) (citation omitted)).

Further, we agree with the trial court that the supplement of insurance adjuster documents is not protected by work product immunity:

It appears that the investigation stage of the claims process is one carried out in the ordinary course of an insurer's

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business within the meaning of *Willis* and *Cook*. . . . Consequently, we do not believe that material prepared in the course of the investigatory process is normally entitled to the Rule 26 qualified work product immunity. We acknowledge the possibility of litigation in any such case with catastrophic injuries, but decline to hold that even in such tragic cases litigation can be reasonably anticipated prior to a decision on coverage. Even in cases where coverage is clear, a plaintiff might well disagree with an insurer about the damages to be paid. While that is also true as to almost any case, we cannot conclude that there is a reasonable possibility of litigation in every case.

Thus, documents prepared before an insurance company denies a claim generally will not be afforded work product protection. This general rule is not absolute, of course, and an insurer may produce evidence of circumstances that support the conclusion that it reasonably anticipated litigation prior to denial of the claim. If the insurer argues it acted in anticipation of litigation before it formally denied the claim, it bears the burden of persuasion by presenting specific evidentiary proof of objective facts demonstrating a resolve to litigate.

Id. at 30–31, 541 S.E.2d at 790 (citations, quotation marks, and brackets omitted).

Further, as also noted in *Evans*, as a general rule, documents from an insurance company’s investigation of an accident are not given work product protection, and the insurer “bears the burden of persuasion by presenting specific evidentiary proof of objective facts demonstrating a resolve to litigate” if it argues it is entitled to this protection. *Id.* at 31, 541 S.E.2d at 790 (citation and quotation marks omitted). Here, defendants failed to bear this burden of persuasion. *See generally id.*

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Defendants’ also contend the joint defense privilege extends to Mr. Bryant, and the trial court erred in allowing him to be subpoenaed for a deposition. *See generally Sessions v. Sloane*, 248 N.C. App. 370, 383, 789 S.E.2d 844, 854–55 (2016) (“The joint defense privilege, also known as the common interest doctrine, takes the attorney-client privilege and extends it to other parties that (1) share a common interest; (2) agree to exchange information for the purpose of facilitating legal representation of the parties; and (3) the information must otherwise be confidential. Thus, the joint defense privilege is not actually a separate privilege, but is instead an exception to the general rule that the attorney-client privilege is waived when the client discloses privileged information to a third party. It is generally recognized when parties communicate to form a joint legal strategy.” (citations and quotation marks omitted)).

Pursuant to our analysis above, we conclude there was no privilege to extend for purposes of a joint defense or which would properly quash the subpoenas in the documents that were allowed for discovery. Defendants have failed to identify any privileged information in Mr. Bryant’s file other than the emails which were protected by the trial court’s order. These arguments are overruled.

III. Conclusion

We therefore affirm.

AFFIRMED.

Judges BERGER and COLLINS concur.

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Report per Rule 30(e).