IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-372

No. COA20-638

Filed 20 July 2021

New Hanover County, No. 18CVS002952

LARRY A. POWELL; And, ALL AMERICAN BAIL BONDING, LLC, a North Carolina Limited Liability Company, Plaintiffs,

v.

MARK WAYNE CARTRET, Defendant.

Appeal by Defendant from order entered 25 February 2020 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 11 May 2021.

Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson Jr. and Susan Renton, for Plaintiffs-Appellees.

The McGougan Law Firm, by Kevin J. Bullard, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant appeals the trial court's order granting Plaintiffs' motion to compel Defendant's doctor to produce Defendant's medical records and ordering the production of those records. We affirm.

I. Factual and Procedural Background

¶ 2 On 20 August 2018, Plaintiffs Larry A. Powell and All American Bail Bonding,

LLC, commenced this action by filing a verified complaint for, inter alia, breach of contract against Defendant. Defendant timely filed an answer and counterclaims, alleging damages to himself and/or his company, Agent Associates Insurance, LLC ("AAI"). Based upon the allegations set forth in Defendant's counterclaims, Plaintiffs served AAI on 18 July 2019 with a subpoena and notice of deposition, requesting that AAI produce designated materials on or before 6 August 2019 and submit for its deposition on 13 August 2019. As owner and manager of AAI, Defendant was the likely designee for the deposition.

¶ 3 Defendant informed Plaintiffs on 18 September 2019 via email that Defendant would be unable to sit for a deposition until 13 January 2020, due to a medical condition.[1] Attached to the email was an electronic copy of a letter, dated 3 September 2019, from Defendant's doctor, Dr. James Pridgen, stating:

> Note to Patient:
>
> _X_May return to work on: Jan 13th, 2020[.] Please excuse from work through Jan 13th, 2020 due to uncontrolled health conditions related to job stress.

¶ 4 On 13 November 2019, Plaintiffs attempted to issue a subpoena to Dr. Pridgen, seeking the production of Defendant's "complete medical file . . . substantiating the

[1] The email sent by Defendant is not in the record. The email is referenced by Plaintiffs in their Motion to Compel Non-Party's [Dr. Pridgen's] Subpoena Duces Tecum and the existence, contents, and date of the email is uncontested by Defendant.

diagnosis of 'uncontrolled health conditions related to job stress.'" The subpoena was not served upon Dr. Pridgen but a copy of the subpoena was faxed to Defendant. Defendant sent a letter to Dr. Pridgen, dated 27 November 2019, stating in relevant part:

> Our firm represents Mark Cartret and AAI, a company that Mr. Cartret is a member of, in a pending action in New Hanover County. We have recently received a copy of a subpoena that appears to be sent to you from Attorney G. Grady Richardson, Jr. requesting a complete copy of our client's medical file from your office.
>
> Mr. Cartret has not executed any medical authorization for the release of his protected healthcare information to the law offices of G. Grady Richardson, Jr., PC and there has not been an order by a Court for the release of this information.
>
> Mr. Cartret objects to the release of any of his medical records and requests that his rights pursuant to HIPAA and relevant state privacy laws be protected.

¶ 5 Plaintiffs issued a second subpoena to Dr. Pridgen, which was served upon him on 9 December 2019. Dr. Pridgen sent an email to Plaintiffs on 18 December 2019, stating:

> On Monday, December 9, 2019 my office received a subpoena from your office to produce medical records of Mark Wayne Cartret at your office on Friday, December 20, 2019. However, on Wednesday, November 27, 2019 [Mr.] Cartret, through his attorney Kevin J. Bullard, sent a letter to me objecting to the release of any of his medical records. Attached is a copy of the letter.

A copy of Defendant's 27 November 2019 letter to Dr. Pridgen was attached.

¶ 6 Plaintiffs served a Motion to Compel Non-Party's [Dr. Pridgen's] Subpoena Duces Tecum and a Notice of Hearing for 19 February 2020 on Defendant and AAI on 10 February 2020.[2] Defendant filed a response on 13 February 2020. The matter was heard before the trial court on 19 February 2020. The trial court entered an order on 25 February 2020 in which it found:

> 1. Plaintiffs' subpoena duces tecum dated 2 December 2019 ("Subpoena") was duly served on non-party, Dr. James Pridgen and his North Whiteville Urgent Care & Family Practice, P.A. (collectively, "Practice"), on 9 December 2019.
>
> 2. There was no written objection to Plaintiffs' Subpoena served by Defendant or the Practice.

Based upon these findings, the trial court concluded:

> 2. Neither the Defendant nor the Practice complied with filing and serving the required written objection under N.C. R. Civ. P. 45(c)(3) to Plaintiffs' Subpoena.
>
> 3. Pursuant to N.C. R. Civ. P. 26 and 45, and in furtherance of the interests of justice, Plaintiffs' Subpoena to the Practice is valid and reasonable.

The trial court granted Plaintiffs' Motion to Compel and ordered Dr. Pridgen to produce the requested medical records, subject to a protective order pursuant to Rule 45(c)(2). Defendant entered notice of appeal.[3]

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[2] Neither the motion nor the notice in the record are file stamped. There is no certificate of service upon Dr. Pridgen in the record.

[3] Dr. Pridgen is not a party to this appeal.

II. Appellate Jurisdiction

¶ 7 We must first determine whether we have jurisdiction to hear this appeal. Interlocutory orders are those "made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy." *Carriker v. Carriker,* 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999) (citation omitted). "As a general rule, discovery orders are interlocutory and therefore not immediately appealable." *Mims v. Wright,* 157 N.C. App. 339, 341, 578 S.E.2d 606, 608 (2003) (citation omitted). However, "immediate appeal is available from an interlocutory order or judgment which affects a 'substantial right.'" *Sharpe v. Worland,* 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citations omitted); *see* N.C. Gen. Stat. § 1-277(a) (2019) and § 7A-27(b)(3)(a) (2019). An interlocutory order affects a substantial right if the order "deprive[s] the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." *Sharpe,* 351 N.C. at 162, 522 S.E.2d at 579 (quotation marks and citation omitted).

¶ 8 Defendant argues that "the Trial Court's Order compelling production of Mr. Cartret's medical records by his non-party medical provider - Dr. Pridgen and North Whiteville Urgent Care and Family Practice - affect appellant Cartret's substantial rights of confidentiality under G.S. § 8-53 . . . and immediate appeal of the Trial Court's Order is permitted under § 7A-27(b)(3)(a) and § 1-277(a)[.]" "[W]hen, as here,

a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right[.]" *Sharpe,* 351 N.C. at 166, 522 S.E.2d at 581. Because the trial court's order required Dr. Pridgen to disclose Defendant's medical records, which Defendant asserts are protected by the physician-patient privilege, the trial court's order is immediately appealable and is properly before us. *See Midkiff v. Compton*, 204 N.C. App. 21, 24, 693 S.E.2d 172, 174 (2010).

III. Analysis

¶ 9 Defendant argues that the trial court erred in its second finding of fact and its second and third conclusions of law, and by ordering Dr. Pridgen to produce Defendant's medical records in response to Plaintiffs' subpoena.

¶ 10 Generally, "[w]hen the propriety of a subpoena *duces tecum* is challenged, it is . . . addressed to the sound discretion of the court in which the action is pending." *Vaughn v. Broadfoot,* 267 N.C. 691, 697, 149 S.E.2d 37, 42 (1966) (citation omitted). However, Defendant's appeal requires this Court to determine compliance with Rule 45 of the North Carolina Rules of Civil Procedure, which is a question of law that we review de novo. *See Estate of Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc.,* 222 N.C. App. 396, 403, 731 S.E.2d 500, 506 (2012) (reviewing plaintiff's compliance with Rule 9(j) of the North Carolina Rules of Civil Procedure de novo because it is a

question of law). Accordingly, we review the trial court's conclusions of law de novo and "consider [the] question[s] anew." *JWL Invs., Inc. v. Guilford County Bd. of Adjustment,* 133 N.C. App. 426, 429, 515 S.E.2d 715, 718 (1999) (quotation marks and citations omitted).

¶ 11 Defendant first argues that the trial court erred by finding that "[t]here was no written objection to Plaintiffs' Subpoena served by Defendant or [Dr. Pridgen]" and, based upon this finding, concluding that "[n]either the Defendant nor [Dr. Pridgen] complied with filing and serving the required written objection under N.C. R. Civ. P. 45(c)(3) to Plaintiffs' Subpoena."

¶ 12 "A subpoena *duces tecum* is appropriate to make discovery of documentary evidence held by a non-party." *Kilgo v. Wal-Mart Stores, Inc.*, 138 N.C. App. 644, 648 n.5, 531 S.E.2d 883, 887 n.5 (2000) (citing N.C. Gen. Stat. § 1A-1, Rule 45). Specifically, a subpoena may include "[a] command to each person to whom it is directed . . . to produce and permit inspection and copying of designated records, books, papers, documents, electronically stored information, or tangible things in the possession, custody, or control of that person therein specified." N.C. Gen. Stat. § 1A-1, Rule 45(a)(1)(b) (2019). A person commanded by a subpoena to produce materials may, within the time period specified, "serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection." N.C. Gen. Stat. § 1A-1, Rule 45(c)(3) (2019). The

following grounds may be sufficient to support an objection:

> a. The subpoena fails to allow reasonable time for compliance.
>
> b. The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.
>
> c. The subpoena subjects a person to an undue burden or expense.
>
> d. The subpoena is otherwise unreasonable or oppressive.
>
> e. The subpoena is procedurally defective.

N.C. Gen. Stat. § 1A-1, Rule 45(c)(3).

¶ 13 Although a party ordinarily has no standing to challenge a subpoena issued to a non-party, a party has standing to challenge a subpoena *duces tecum* when the party has privilege over the documents sought. *Jarrell v. Charlotte-Mecklenburg Hosp. Auth.*, 206 N.C. App. 559, 565, 698 S.E.2d 190, 194 (2010), *rev'd on other grounds by Lassiter v. N.C. Baptist Hosps., Inc.*, 368 N.C. 367, 778 S.E.2d 68 (2015). Indeed, it is well-established in North Carolina that the physician-patient privilege belongs to the patient, *see Cates v. Wilson*, 321 N.C. 1, 15, 361 S.E.2d 734, 742 (1987) and *Mosteller v. Stiltner*, 221 N.C. App. 486, 487, 727 S.E.2d 601, 603 (2012), and that the physician lacks standing to assert the patient's privilege, *see Sims v. Insurance Co.*, 257 N.C. 32, 38, 125 S.E.2d 326, 331 (1962) ("A physician or surgeon may not refuse to testify; the privilege is that of the patient."). Accordingly, the patient bears the burden of establishing the existence of the privilege and objecting to the discovery

of such privileged information. *Mosteller*, 221 N.C. App. at 488, 727 S.E.2d at 603 (citations omitted).

¶ 14 Papers required to be served, including Rule 45 written objections to subpoenas, shall be served upon the party's attorney of record by "handing it to the attorney, leaving it at the attorney's office with a partner or employee, or sending it to the attorney's office by a confirmed telefacsimile transmittal for receipt[,]" or by "mailing a copy to the attorney's office."[4] N.C. Gen. Stat. § 1A-1, Rule 5(b)(1) (2019). "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." *Id.* Furthermore,

> [a] certificate of service shall accompany . . . every paper required to be served on any party or nonparty to the litigation . . . . The certificate shall show the date and method of service or the date of acceptance of service and shall show the name and service address of each person upon whom the paper has been served.

Id. § 1A-1, Rule 5(b1).

¶ 15 In this case, Plaintiffs served AAI with a subpoena and notice of deposition requesting AAI produce designated materials and submit for its deposition.

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[4] Rule 5 has since been amended to allow service to be "made on the attorney by electronic mail (e-mail) to an e-mail address of record with the court in the case." An Act to Amend the Rules of Civil Procedure to Allow for Electronic Filing and Service, S.L. 2020-46, § 2. This amendment became effective 1 October 2020 and applies to service effected on or after that date. *Id.* at § 3.

Defendant informed Plaintiffs on 18 September 2019 via email that Defendant would be unable to sit for a deposition until 13 January 2020, due to a medical condition. Attached to the email was an electronic copy of Dr. Pridgen's letter "excus[ing Defendant] from work through Jan 13th, 2020 due to uncontrolled health conditions related to job stress."

¶ 16 On 13 November 2019, Plaintiffs attempted to serve a subpoena on Dr. Pridgen, seeking the production of Defendant's "complete medical file . . . substantiating the diagnosis of 'uncontrolled health conditions related to job stress.'" The subpoena was not served upon Dr. Pridgen. A second subpoena was issued and personally served on Dr. Pridgen on 9 December 2019. Dr. Pridgen sent an email to Plaintiffs on 18 December 2019, stating that Defendant, "through his attorney Kevin J. Bullard, sent a letter to me objecting to the release of any of his medical records. Attached is a copy of the letter." A copy of Defendant's 27 November 2019 letter to Dr. Pridgen was attached.

¶ 17 Plaintiffs filed a motion to compel on 10 February 2020, seeking to compel Dr. Pridgen to release those records. Plaintiffs' motion was heard before the trial court on 19 February 2020.

¶ 18 Although Defendant sent a letter to Dr. Pridgen "object[ing] to the release of any of his medical records and request[ing] that his rights pursuant to HIPAA and relevant statutory privacy laws be protected[,]" at no point did Defendant serve upon

Plaintiffs written objection invoking physician-patient privilege pursuant to N.C. Gen. Stat. § 8-53 or any other basis, accompanied by a certificate of service, in a manner consistent with Rule 5. Defendant thus failed to object to the requested disclosure of the information he asserts was privileged, and Defendant has impliedly waived any such privilege. *See Adams v. Lovette,* 105 N.C. App. 23, 29, 411 S.E.2d 620, 624 (1992) (concluding defendant impliedly waived physician-patient privilege by failing to object on the grounds of privilege in response to plaintiff's request for production of defendant's medical records).

¶ 19 Moreover, Dr. Pridgen's email to Plaintiffs was not served in a manner specified in Rule 5, was not accompanied by a certificate of service, and did not set forth privilege, or any other grounds, as a valid ground for his objection, in that Dr. Pridgen does not have standing to assert Defendant's patient-physician privilege. *See Sims*, 257 N.C. at 38, 125 S.E.2d at 331. Accordingly, the trial court did not err by finding that "[t]here was no written objection to Plaintiffs' Subpoena served by Defendant or [Dr. Pridgen]."

¶ 20 Although the trial court did err by concluding that neither Defendant nor Dr. Pridgen complied with "filing" a writing objection, as filing is not required under Rule 45(c)(3), this error was harmless as the trial court did not err by concluding that "[n]either the Defendant nor [Dr. Pridgen] complied with . . . serving the required written objection under N.C. R. Civ. P. 45(c)(3) to Plaintiffs' Subpoena."

¶ 21 Because Defendant failed to object to the subpoena *duces tecum*, Defendant waived any argument concerning the validity or reasonability of the subpoena. Accordingly, we do not address Defendant's argument that the trial court erred by concluding that, "[p]ursuant to N.C. R. Civ. P. 26 and 45, and in furtherance of the interests of justice, Plaintiffs' Subpoena to the Practice is valid and reasonable."

IV. Conclusion

¶ 22 Because Defendant failed to serve a written objection in response to Plaintiffs' subpoena, we affirm the trial court's 25 February 2020 order.

AFFIRMED.

Judges ARROWOOD and GORE concur.

Report per Rule 30(e).