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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-622

No. COA20-791

Filed 16 November 2021

Rutherford County, No. 17-CVS-442

PHILLIP M. DAVIS and wife, APRIL L. DAVIS, GARY H. TEACHOUT and wife, ROSEMARIE C. TEACHOUT, individually and on behalf of RIVERBEND HIGHLANDS PROPERTY OWNERS ASSOCIATION, a North Carolina non-profit corporation, Plaintiffs,

v.

VISTA NORTH CAROLINA LIMITED PARTNERSHIP, a Delaware limited partnership; VISTA NORTH CAROLINA, INC., a Delaware corporation; MARTIN BIRENBAUM; DAVID BIRENBAUM; DEENA BIRDENBAUM; and EARL SMITH COOLER, JR., Defendants,

RIVERBEND HIGHLANDS PROPERTY OWNERS ASSOCIATION, a North Carolina non-profit corporation, et. al., Nominal Defendants.

Appeal by Defendants Martin Birenbaum, David Birenbaum and Deena Birenbaum from the Order entered on 6 January 2020 by Judge Thomas J. Davis in Rutherford County Superior Court. Heard in the Court of Appeals 5 October 2021.

Ball Barden & Cury, PA, by Alexandra Cury, Cannon Law, P.C., by William E. Cannon, Jr., Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig Dixon Justus, for Plaintiffs-Appellees.

McAngus Goudelock & Courie, PLLC, by John E. Spainhour, The Law Offices of Joshua Offutt & Associates PC, by Joshua G. Offutt, Young, Morphis, Bach & Taylor, LLP, by Paul E. Culpepper, for Defendants-Appellants.

JACKSON, Judge.

¶ 1 Martin Birenbaum, Deena Birenbaum, and David Birenbaum ("Defendants") appeal from an order granting Plaintiffs' motion to compel and motion for sanctions. We hold that Defendants have not properly stated grounds for immediate appellate review and therefore dismiss this interlocutory appeal.

I. Background

¶ 2 Phillip M. Davis, April L. Davis, Gary H. Teachout, and Rosemarie C. Teachout ("Plaintiffs") are property owners in Riverbend Highlands, a subdivision in Rutherford County, North Carolina. On 19 April 2017, Plaintiffs filed suit on behalf of the Riverbend Highlands Property Association ("Association") against Defendants, related to their roles as directors of the Association, for allegedly using Association funds to benefit themselves or companies they have a financial interest in.

¶ 3 In February 2018, Plaintiffs served Defendants with their first set of interrogatories and a request for production. Plaintiffs sought various Association records, as well as the corporate and financial records of transactions between the Association and companies that Defendants have personal stakes in. Defendants objected to many of the interrogatories and demanded a consent confidentiality protective order ("CPO"). In July 2018, the trial court entered a CPO. Despite the CPO and Plaintiffs' repeated requests for discovery responses, Defendants still did

not respond to many of the discovery requests beyond the original objections.

¶ 4 Plaintiffs filed a motion to compel against Defendants on 6 December 2018. Defendants subsequently filed a motion for a protective order claiming to have satisfied discovery requests and attempting to prevent additional discovery. The trial court conducted a hearing on the motions to compel and protective order on 29 March 2019. The trial court reserved ruling on the protective order but entered an order on 16 April 2019 partially granting the motion to compel and attempting to narrow discovery in light of the motion for protective order.

¶ 5 As part of the 16 April Order, Defendants were ordered to produce certain documents related to the Association by 26 April 2019, or to supplement their responses under oath if they claimed to not have possession, custody, or control of the requested documents. However, Defendants did not produce any additional documents by the deadline, supplement their responses, or make efforts to contact any third parties about the requested Association-related documents.

¶ 6 Also following the 16 April Order, additional depositions of Defendants were conducted. During their depositions, Defendants Martin and Deena Birenbaum admitted that they did not read or comply with the 16 April Order. Deena Birenbaum indicated that some of the computer files sought by Plaintiffs were still located at the Riverbend Highlands' office. Martin Birenbaum testified that these files were irretrievably lost, but the trial court later found he lacked credibility.

¶ 7 On 29 July 2019, Plaintiffs filed an amended and restated motion to compel and for sanctions against Defendants, and also sought *in camera* review of the documents in Defendants' privilege log. After reviewing and entering an order on the privilege log at a separate hearing,[1] the trial court conducted a hearing on the motion to compel and for sanctions. The trial court found that, other than presenting the privilege log documents reviewed previously at the *in camera* hearing, Defendants failed to show why discovery requests from February 2018 remained unanswered or incomplete and failed to explain how the attorney-client privilege applied to these requests. The court also found that the documents requested in February 2018 were clearly relevant and discoverable, and Defendants' responses to discovery requests were evasive and incomplete.

¶ 8 Ultimately, the trial court denied Defendants' motion for a protective order and granted Plaintiffs' motion to compel and for sanctions in an order ("Order") entered on 6 January 2020. In the Order, the trial court made the following relevant conclusions of law:

> 5. . . . Rule 37(b) provides a broad range of possible sanctions, including (i) establishing facts as deemed admitted; (ii) striking pleadings, or parts thereof; (iii) ordering judgment by default against the disobedient party; and (iv) finding contempt. In addition, pursuant to Rule 37(a), Rule 37(b), and Rule 37(d), the trial court may award reasonable expenses, including attorney's fees, to

[1] Defendants did not appeal from the order that followed the *in camera* review.

> the moving party. . . . In some instances, courts have ordered parties to make computers available for forensic auditing.
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> 6. Defendants' conduct, especially that exhibited by Martin and Deena Birenbaum, as noted above constitutes a serious and egregious violation of the North Carolina Rules of Civil Procedure, as well as the violation of the April 19, 2018 Order.
>
> 7. This Court has considered the entire range of sanctions available to it under Rule 37 and in light of Defendant Martin and Deena Birenbaum's blatant violations of a court order, only severe sanctions will suffice to be just, to punish said defendants' conduct and to enforce this Court's authority.

¶ 9 Based on the foregoing findings of fact and conclusions of law, the trial court granted Plaintiffs' motions to compel, ordering Defendants to answer several previously unanswered interrogatories, as well as deliver a number of requested documents to Plaintiffs' counsel. Regarding the motion for sanctions, the trial court ordered the following:

> 6. As for sanctions, Defendants Martin Birenbaum and Deena Birenbaum shall pay, jointly and severally to Plaintiffs' counsel . . . the sum of $20,637.50, representing reasonable attorney's fees and costs, including deposition transcript expenses, caused by their failure to properly respond to discovery.
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> 7. As part of complying fully with Plaintiffs' discovery requests, and as a form of sanctions, Defendants Martin Birenbaum and Deena Birenbaum shall allow Plaintiffs to conduct a forensic audit of their electronic systems . . . in order to discover whether any information can be recovered from the computers.

¶ 10 Defendants timely filed written notice of appeal from the Order. Plaintiffs filed a motion to dismiss the interlocutory appeal, which was referred to this panel.

II. Jurisdiction

¶ 11 Because of Plaintiffs' referred motion to dismiss, we must address whether Defendants' appeal is properly before us. We hold that Defendants have not properly stated grounds for immediate appellate review and dismiss the appeal as premature.

¶ 12 Discovery orders are interlocutory and generally not immediately appealable. *Sharpe v. Worland,* 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). An interlocutory order may be appealable, however, when it affects a substantial right of the appellant that would be lost without immediate review. *See id.* at 162, 522 S.E.2d at 579; N.C. Gen. Stat. § 1-277(a) (2019).

¶ 13 Our Supreme Court created a two-part test for determining whether an interlocutory order can be immediately appealed due to a substantial right: "(1) the right itself must be substantial; and (2) the deprivation of that substantial right must potentially work injury to the appealing party if not corrected before appeal from final judgment." *Builders Mut. Ins. Co. v. Meeting St. Builders*, *LLC*, 222 N.C. App. 646, 649, 736 S.E.2d 197, 199 (2012) (citing *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990)) (internal marks omitted). Nevertheless, "[n]o hard and fast rules exist for determining which appeals affect a substantial right." *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984) (citing *Waters*

v. Qualified Pers., Inc., 294 N.C. 200, 208 240 S.E. 2d 338, 343 (1978)). We have repeatedly held that whether "an interlocutory appeal affects a substantial right is determined on a case-by-case basis." *See, e.g., Dewey Wright Well & Pump Co. v. Worlock,* 243 N.C. App. 666, 669, 778 S.E.2d 98, 101 (2015). *See also Waters*, 294 N.C. at 208, 240 S.E.2d at 343 ("It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.")

¶ 14 The appellant bears the burden to show a substantial right in each case. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) ("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[.]"). In order to meet this burden, the appellant "must explain, in the statement of the grounds for appellate review, *why the facts of that particular case* demonstrate that the challenged order affects a substantial right." *Doe v. City of Charlotte,* 273 N.C. App. 10, 22, 848 S.E.2d 1, 10 (2020) (internal quotation and citation omitted). Accordingly, "outside of a few exceptions such as sovereign immunity, the appellant cannot rely on citation to precedent to show that an order affects a substantial right." *Id.*

¶ 15 Here, Defendants acknowledge that the challenged Order is interlocutory. However, Defendants assert in their statement of grounds for appellate review that the Order is immediately appealable because their "substantial rights pursuant to

N.C.G.S. § 1A-1, Rule 26 and 37 have been affected and will be lost without immediate appeal." Defendants essentially propose two arguments for why their substantial rights are affected: (1) the Rule 37 sanctions issued by the trial court are severe and therefore allow immediate appeal; and (2) the discovery order, if complied with, may violate common law work product immunity.

A. Rule 37 Sanctions

¶ 16 First, Defendants contend that the Order is immediately appealable due to the issuance of sanctions, citing to *Feeassco* and *In re Pedestrian Walkway Failure,* which both hold that "when a discovery order is enforced by sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 37(b), the order affects a substantial right and is immediately appealable." *Feeassco, LLC v. Steel Network, Inc.*, 264 N.C. App. 327, 331, 826 S.E.2d 202, 206-207 (2019); *In re Pedestrian Walkway Failure*, 173 N.C. App. 254, 262, 618 S.E.2d 796, 802 (2005) (same).

¶ 17 It is true that an order compelling discovery that also imposes certain sanctions may be immediately appealable. *Id.* However, this is not a strict rule, as we have also held otherwise. *See, e.g., Long v. Joyner,* 155 N.C. App. 129, 134, 574 S.E.2d 171, 175 (2002) ("[A]n order to pay attorney's fees as a sanction does not affect a substantial right."); *Myers v. Mutton*, 155 N.C. App. 213, 213, 574 S.E.2d 73, 74 (2002) ("Plaintiff appeals from an order sanctioning him for failure to comply with a discovery order. We dismiss plaintiff's appeal as interlocutory."); *Bowman v. Alan*

Vester Ford Lincoln Mercury, 151 N.C. App. 603, 611, 566 S.E.2d 818, 824 (2002) ("The award of attorneys fees here was a sanction against defendants. As such, this part of the interlocutory order does not affect a substantial right and hence, is not immediately appealable.").

¶ 18 Here, the specific Rule 37 sanctions imposed by the trial court for Defendants' failure to respond to discovery requests were attorney's fees and a forensic audit of Defendants' computers.[2] To further their argument that the Order is immediately appealable due to these sanctions, Defendants specifically argue the following:

> The Sanctions Order imposed a severe penalty pursuant to Rule 37, including payment of Plaintiffs' attorney's fees in excess of $20,000. . . . Given the severity of the sanctions imposed in the Sanctions Order, and in light of *Feeassco* and *In re Pedestrian Walkway Failure*, this Court should rule that the Sanctions Order affects a substantial right and, therefore, is immediately appealable.

¶ 19 Despite citing to these cases, Defendants do not explain why the rule proposed in *Feeassco* and *In re Pedestrian Walkway Failure* should apply to the particular facts of *this* case, which concerns different sanctions and potentially different substantial rights affected.[3] *Feeassco*, 264 N.C. App. at 332, 826 S.E.2d at 207 (appeal from a

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[2] Because Defendants do not argue that ordering the forensic audit affected a substantial right, we do not specifically address the audit. We note, however, that the trial court had measures in place to allow Defendants to object to any potentially privileged findings uncovered during the audit.

[3] Notably, the trial court does not specify which provision of Rule 37 supports its attorneys' fee award but mentions in the Order that the fees can be awarded "pursuant to

trial court order that "struck Defendant's answer and entered judgment for Plaintiffs as to liability" as Rule 37(b) sanctions). *In re Pedestrian Walkway Failure*, 173 N.C. App. at 261, 618 S.E.2d at 802 (appeal from a trial court order that prohibited the plaintiff from offering certain exhibits and testimony as a Rule 37(b) sanction). As we have explained, the substantial right determination is made on a case-by-case basis, and Defendants cannot merely rely on citing precedent to show that the Order here affects a substantial right. In this case, Defendants' burden to establish the right to immediate appeal is particularly important in light of the contrary holdings of this Court, as mentioned *supra*. Defendants either expect this Court to expand the holdings of *Feeassco* and *In re Pedestrian Walkway Failure* or uncover why the facts of these cases parallel Defendants' case, fundamentally putting the burden on this Court to construct arguments on their behalf.

¶ 20 Therefore, we reject Defendants' first argument and decline to apply the *Feeassco* rule to grant immediate appeal in this case.

B. Work Product Privilege

Rule 37(a), 37(b), and 37(d)." Despite relying on *Feeassco* and *In re Pedestrian Walkway Failure,* which specifically discuss Rule 37(b) sanctions, Defendants do not even establish that we are dealing with the same Rule 37 provision here. It is not clear from the briefing whether Defendants are arguing that the sanctions at issue were also imposed under Rule 37(b) or whether the *Feeassco* rule should apply to any Rule 37 sanctions.

¶ 21 Second, Defendants argue that the Order is immediately appealable because it "potentially violates the attorney client or work product privilege."[4]

¶ 22 Discovery orders that compel the production of materials protected by a recognized common law or statutory privilege may be immediately appealable. *See Sharpe v. Worland*, 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999) (recognizing statutory attorney-client privilege as a substantial right). *See also Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 24, 541 S.E.2d 782, 786 (2001) (applying the *Sharpe* holding to common law attorney-client privilege); *K2 Asia Ventures v. Trota*, 215 N.C. App. 443, 446, 717 S.E.2d 1, 4 (2011) (applying the *Sharpe* and *Evans* holdings to work product immunity).

¶ 23 In order to obtain interlocutory review, the assertion of the privilege must not be "frivolous or insubstantial[.]" *Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581. Consequently, "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 their intended purpose and do not establish a substantial right to an immediate appeal." *K2 Asia Ventures*, 215 N.C. App. at 447, 717 S.E.2d

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[4] Although Defendants also assert that attorney-client privilege is impacted by the Order, Defendants do not actually offer any argument in their brief regarding attorney-client privilege, and Defendants failed to appeal from the trial court's order entered after conducting *in camera* review of Defendants' asserted privileged documents. Therefore, this issue is not properly before us and we only address work product immunity.

at 4-5 (holding that "the blanket general objection provided by [] Defendants based on 'the attorney/client privilege, the work product doctrine, or any other applicable privilege or doctrine' does not comply . . . with the holding of *Sharpe* . . ." (internal marks omitted)). However, "objections made and established on a document-by-document basis are sufficient to assert a privilege." *Sessions v. Sloane*, 248 N.C. App. 370, 381, 789 S.E.2d 844, 853 (2016) (internal quotation and citation omitted) (holding that Defendants' assertion of privilege was not frivolous or insubstantial where they provided a privilege log describing the privilege relating to each withheld document).

¶ 24 Here, Defendants argue that Interrogatory 7, which they have been compelled to answer, will reveal privileged work product and thus affect a substantial right. Interrogatory 7 reads "Please identify and describe all documents, which relate to or support in any way the defenses contained in your answer to the Complaint, including, without limitation, the defenses of statute of limitations, laches, estoppel, waiver, unclean hands or business judgment rule." In what is almost word-for-word like the defendants' objection in *K2 Asia Ventures*, Defendants objected to Interrogatory 7 because "it [sought] information protected by the work product doctrine, attorney-client privilege, or any other applicable privilege or exception." Aside from this written objection provided to Plaintiffs, Defendants never argued to the trial court that the documents sought by this interrogatory, or any of the

interrogatories, were protected work product.

¶ 25 In this appeal, Defendants describe how Interrogatory 7 "patently seeks" protected work product in the form of their attorneys' mental impressions, legal reasoning, and trial strategies. Apart from this blanket assertion of work product immunity, Defendants do not explain how this interrogatory violates a privilege.[5] Defendants do not allege that the documents sought by Interrogatory 7 were those on the privilege log previously reviewed by the trial court *in camera*, and Defendants did not appeal from the trial court's separate order on the privilege log, nor seal these documents for our review. Defendants do not specifically object to any of the numerous documents ordered for production. Therefore, Defendants have failed to demonstrate that the assertion of this privilege is not frivolous or insubstantial such that it would entitle them to an immediate appeal of the Order.

III. Conclusion

¶ 26 Because Defendants have not established that a substantial right will be irreparably injured without immediate review, we conclude that we do not have jurisdiction to hear this interlocutory appeal. We therefore allow Plaintiffs' motion to dismiss.

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[5] Instead, Defendants prematurely argue that the interrogatory is not authorized under Rule 26, asking this Court to, in essence, review the merits of the order and relevancy of this specific interrogatory before determining that a substantial right is affected.

DISMISSED.

Judges DILLON and MURPHY concur.

Report per Rule 30(e).