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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1074

Filed 4 June 2024

Wake County, No. 22CVS8960

PAUL K. BROOKS, Plaintiff,

v.

SCOTT CUNNINGHAM, Defendant.

Appeal by plaintiff from an Order denying Plaintiff's motion to show cause and granting attorney's fees entered 14 September 2023 by Judge Claire V. Hill in Wake County Superior Court. Heard in the Court of Appeals 1 May 2024.

E. Gregory Stott, for plaintiff-appellant.

WakeMed Legal Department, by Robert E. Desmond, for third party-appellee.

Brown, Crump, Vanore & Tierney, PLLC, by Michael W. Washburn, for defendant-appellee.

FLOOD, Judge.

Paul K. Brooks ("Plaintiff") appeals from the trial court's Order denying his motion to show cause directing the records custodian of American Anesthesiology – NC ("American Anesthesiology") to appear, and the trial court's grant of sanctions in

the form of attorney's fees to WakeMed Health and Hospitals ("WakeMed"). Because Plaintiff fails to make any arguments refuting the trial court's finding that Plaintiff's motion to show cause lacked a justiciable issue, we affirm both the trial court's denial of Plaintiff's motion to show cause as well as its award of attorney's fees.

I. Factual and Procedural Background

Plaintiff filed a complaint on 19 July 2022 requesting, *inter alia*, monetary damages from Scott Cunningham ("Defendant") for personal injuries sustained as the result of a boating accident involving Plaintiff's boat, driven by Defendant. In an attempt to obtain Plaintiff's own medical records for use in this negligence action, Plaintiff's counsel issued a subpoena for medical records to "Records Custodian c/o American Anesthesiology – NC, 3000 New Bern Avenue, Raleigh, North Carolina 27610." This address, however, corresponds with the location of WakeMed's Raleigh Campus, not with American Anesthesiology's office. Though American Anesthesiology has provided anesthesia services at WakeMed facilities, American Anesthesiology is a distinct corporate entity that does not accept service or correspondence at WakeMed's Raleigh Campus.

On 12 June 2023, a deputy of Wake County Sheriff's Office served a subpoena for medical records on Marilu Garcia, a WakeMed employee working in the Health Information Management Department at WakeMed. Garcia is not a records custodian for American Anesthesiology. By 15 June 2023, WakeMed's Office of Legal Affairs had not yet realized that the subpoena had been directed to the wrong entity,

and a litigation paralegal called Plaintiff's counsel to advise him that the subpoena was insufficient without patient authorization. Plaintiff then provided patient authorization that failed to comply with HIPAA requirements. WakeMed's paralegal responded with a legally sufficient patient authorization form for Plaintiff to execute.

On 29 June 2023, Plaintiff's counsel elected not to submit a patient authorization from Plaintiff on the form provided, and instead informed WakeMed's paralegal that Plaintiff's counsel would file a motion for contempt if WakeMed's records custodian did not deliver the documents Plaintiff's counsel had requested from American Anesthesiology by 10 July 2023. The WakeMed paralegal called Plaintiff's counsel on 29 June 2023 and explained the need for a HIPAA compliant authorization, but Plaintiff's counsel stated he "[did] not discuss legal matters with paralegals." The WakeMed paralegal then brought the matter to the attention of WakeMed's counsel, who discovered that the subpoena was not directed to WakeMed, but was instead directed to American Anesthesiology. Because hospital care is billed separately from anesthesiology care, WakeMed does not have access to medical records or bills that are in the possession of American Anesthesiology. Accordingly, WakeMed's counsel advised Plaintiff's counsel that the records could be obtained only by a subpoena requesting medical records from American Anesthesiology.

On 5 July 2023, Plaintiff's counsel filed a motion for an order to show cause. On 25 July 2023, Plaintiff's counsel sent Garcia a Notice for a 7 August 2023 hearing on Plaintiff's motion to show cause where Plaintiff's counsel sought to hold the records

custodian for American Anesthesiology in criminal and civil contempt for failure to provide the medical records. On 4 August 2023, WakeMed's counsel wrote to Plaintiff's counsel:

To be clear: your motion is frivolous because there is not a "Records Custodian c/o American Anesthesiology – NC" at 3000 New Bern Avenue, Raleigh, NC 27610. Undoubtedly, American Anesthesiology has a records custodian; however, that person is not Marilu Garcia and that person is not employed at 3000 New Bern Avenue, Raleigh, NC 27610. This is because American Anesthesiology is a totally distinct entity from WakeMed, which is located at 3000 New Bern Avenue, Raleigh, NC 27610. A subpoena for American Anesthesiology records should be issued to American Anesthesiology, not to WakeMed. The information in the preceding paragraph is not new to you and, in fact, was known to you prior to your pursuit of the frivolous motion.

Plaintiff's counsel never responded to the 4 August 2023 letter.

On 7 August 2023, Plaintiff's motion to show cause was heard and ultimately denied. In its Order denying Plaintiff's motion, the trial court made three findings of fact:

1. The subpoena issued by [Plaintiff's counsel] on May 30, 2023 ("Subpoena"), sought to require appearance and production by the Records Custodian of American Anesthesiology NC, a corporate entity wholly distinct from WakeMed and not located at 3000 New Bern Avenue, Raleigh, NC 27610. As such, the Subpoena is not a valid order that remains in force.
2. WakeMed did not willfully fail to comply with the invalid Subpoena.

3. As to WakeMed's Motion for Attorney's Fees in Nonjusticiable Cases, brought pursuant to N.C. Gen. Stat. § 6-21.5, there was a complete lack of a justiciable issue of either law or fact raised by Plaintiff in its pursuit of the Motion[.]. Counsel for WakeMed informed Plaintiff's Counsel verbally and in a letter dated August 4, 2023 that American Anesthesia – NC was a separate corporate entity with a separate Records Custodian; Plaintiff's counsel persisted in pursuit of a frivolous motion for contempt; WakeMed is the prevailing party, and, in the exercise of the Court's discretion, an award of attorney's fees in the amount of \$250.00 is appropriate.

Plaintiff's counsel did not object to the trial court's consideration of the motion requesting attorney's fees. After a hearing on the motion to show cause, WakeMed was awarded \$250 in attorney's fees.

On 15 September 2023, Plaintiff appealed to this Court both the denial of his motion to show cause, and the trial court's award of attorney's fees. Subsequent to the filing of the appeal, the parties to the negligence action settled the underlying personal injury case, and a voluntary dismissal was filed.

On 12 February 2024, Plaintiff filed a reply brief pursuant to North Carolina Appellate Procedure Rule 28(j). Attached to the reply brief was a screenshot titled "Addendum 1" of what appeared to be an address for American Anesthesiology. On 28 February 2024, WakeMed moved under North Carolina Appellate Procedure Rules 37 and 34(a) to strike Plaintiff's reply brief for gross and substantial non-jurisdictional appellate rule violations. The motion was referred to this Court on 19

March 2024. On 6 March 2024, Plaintiff filed a motion to amend the record on appeal to include Addendum 1 and asked that in the event that this Court grants WakeMed's motion to strike Plaintiff's reply brief, to also strike WakeMed's Appellee brief under Rule 37. These motions were also referred to this Court on 19 March 2024.

II. Jurisdiction

"[A] voluntary dismissal with prejudice is a final adjudication on the merits." *Cameron Hosp., Inc. v. Cline Design Assocs.*, 223 N.C. App. 223, 225, 735 S.E.2d 348, 351 (2012). The underlying negligence action in this case was voluntarily dismissed by Plaintiff, and accordingly, this Court has jurisdiction over this final judgment from the Superior Court of Wake County pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Analysis

On appeal, Plaintiff contends the trial court erred in denying his motion to show cause and in imposing sanctions on Plaintiff in the form of attorney's fees. We first address the three referred motions from the parties and will then address each argument in turn.

A. The Motions

Before reaching the merits of Plaintiff's appeal, we address (1) Plaintiff's motion to strike WakeMed's Appellee brief, (2) WakeMed's motion to strike Plaintiff's reply brief, and (3) Plaintiff's motion to amend the Record on appeal.

1. Motions to Strike

Under Rule 37 of North Carolina Appellate Procedure, a motion “shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based[.]” N.C. R. App. P. 37(a). Under Rule 34(a):

A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney . . . when the court determines that . . . any proceeding in an appeal was frivolous because of one or more of the following:

. . . .

(3) a petition, motion, brief, record, or other item filed in the appeal was grossly lacking in the requirements of propriety . . . or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

N.C. R. App. P. 34(a)(3). “[A]n appellate court should impose a sanction of any type only when a party’s non-jurisdictional rule[] violation[] rise[s] to the level of a ‘substantial failure’ under N.C.R. App. P. 25 or a ‘gross violation’ under N.C.R. App. P. 34.” *Hardin v. KCS Int’l, Inc.*, 199 N.C. App. 687, 693, 682 S.E.2d 726, 731–32 (2009). “The court may consider, among other factors, whether and to what extent the noncompliance impairs the court’s task of review and whether and to what extent review on the merits would frustrate the adversarial process.” *Cunningham v. Goodyear Tire & Rubber Co.*, 273 N.C. App. 497, 502, 849 S.E.2d 880, 884 (2020).

i. *Plaintiff’s Motion to Strike WakeMed’s Appellee Brief*

Plaintiff's motion to strike alleges that WakeMed made conclusory, false, and misleading assertions in its brief when it stated that "3000 New Bern Avenue, Raleigh, North Carolina 27610 is not the mailing address, principal office address, registered office address or registered mailing address of American Anesthesiology." As to a specific provision and grounds warranting striking WakeMed's brief, Plaintiff contends only that the brief "violates the spirit and intent of Rule 28 . . . by including conclusory, false, and misleading assertions." Given Plaintiff's failure to state with particularity the specific grounds upon which this assertion was based, we deny Plaintiff's motion to strike WakeMed's brief. *See* N.C.R. App. P. 27, 34.

ii. *WakeMed's Motion to Strike Plaintiff's Reply Brief*

WakeMed's motion to strike alleges that Plaintiff's counsel, "provide[d] . . . a hyperlink to the website that Plaintiff's counsel had visited to create Addendum 1." WakeMed argues that in providing this Addendum, and falsely referring to it as American Anesthesiology's "own web page," Plaintiff repeatedly submits a misrepresentation of fact in its reply brief. A separate addendum attached to WakeMed's motion confirms that the screenshot of the address did not, in fact, come from American Anesthesiology's own website, but instead came from "www.healthgrades.com," and that Plaintiff had thus referenced this Addendum in "no less than three sections of the Reply Brief" as alleged "evidence of American Anesthesiology's own web page."

In providing this Addendum, and falsely referring to it as American Anesthesiology’s “own web page,” Plaintiff repeatedly submits a misrepresentation of fact in the reply brief resulting in a gross disregard of the requirements of fair presentation of issues to this Court. *See* N.C. R. App. P. 34(a)(3); *see also Hardin*, 199 N.C. App. at 693, 682 S.E.2d at 731–32.

We therefore grant WakeMed’s motion to strike Plaintiff’s reply brief, as Plaintiff’s filing of Addendum 1 disregarded the requirements of a fair presentation of the issues to this Court and rose to the level of a gross violation of our Appellate Rules of Procedure.

2. Plaintiff’s Motion to Amend Record on Appeal

In his motion to amend the Record on appeal, Plaintiff argues this Court should amend the Record on appeal to include Addendum 1 attached to Plaintiff’s reply brief because it is necessary to rebut WakeMed’s assertion that the listed address does not belong to American Anesthesiology. The decision to grant or deny a motion to amend the record on appeal is “a decision within the discretion of the Court of Appeals[.]” *State v. Petersilie*, 334 N.C. 169, 177, 432 S.E.2d 832, 837 (1993). As we have granted WakeMed’s motion to strike Plaintiff’s reply brief containing Addendum 1 for gross violations of our appellate rules, we, in our discretion, deny Plaintiff’s motion to amend the Record on appeal.

B. The Trial Court’s Order

Turning to the merits of Plaintiff's appeal, Plaintiff first argues that WakeMed did not have standing to challenge the subpoena for medical records, as it is a non-party to the suit. We disagree.

"Issues pertaining to standing may be raised for the first time on appeal, including *sua sponte* by the Court." *Myers v. Baldwin*, 205 N.C. App. 696, 698, 698 S.E.2d 108, 109 (2010). The standard of review for questions of the trial court's subject matter jurisdiction is *de novo*. *Smith v. Smith*, 247 N.C. App. 166, 169, 785 S.E.2d 434, 437 (2016).

Pursuant to N.C. Gen. Stat. § 5A-23(a1) (2023), *an alleged contemnor* must be provided with at least five days' notice to allow *the alleged contemnor* the opportunity to be heard. N.C. Gen. Stat. § 5A-23(a1). The United States Supreme Court "has consistently recognized that the custodian of corporate or entity records holds those documents in a representative rather than personal capacity." *Braswell v. United States*, 487 U.S. 99, 109–10, 108 S. Ct. 2284, 2291 101 L. Ed. 2d 98, 109 (1988). Though Plaintiff argues that WakeMed has not been served nor properly intervened in this case, WakeMed has standing to object to the subpoena as an alleged contemnor. As Plaintiff initiated via written motion and notice of hearing a proceeding for civil contempt against Marilu Garcia, one of WakeMed's record custodians, WakeMed is thus the alleged contemnor in this case and has standing to be heard under Section 5A-23(a1). *See* N.C. Gen. Stat. § 5A-23(a1).

1. Denial of Plaintiff's Motion to Show Cause

Plaintiff does not bring forward any argument or authority in his brief to support the presented issue of the denial of his motion to show cause, reasoning that this issue has been “rendered moot” by the voluntary dismissal of the underlying personal injury case.

As our review is restricted to questions supported by the arguments made in Plaintiff’s brief, this assignment of error is deemed abandoned. *See* N.C.R. App. P. 28(b)(6); *see also Starr v. Gaston Cty. Bd. of Educ.*, 191 N.C. App. 301, 305, 663 S.E.2d 322, 325 (2008) (“Where a party fails to bring forward any argument or authority in their brief to support their assignments of error, those assignments of error are deemed abandoned.”).

2. Award of Attorney’s Fees

Plaintiff next argues that the trial court erred when it awarded attorney’s fees to WakeMed because (a) Plaintiff submitted a justiciable issue, (b) the trial court misinterpreted the statutory framework of Section 6-21.5, and (c) the trial court erred by failing to make sufficient findings of fact to support the award of attorney’s fees. N.C. Gen. Stat. § 6-21.5 (2023).

Examining a lower court’s award of attorney’s fees under Section 6-21.5 requires applying “differing standards of review to the questions arising from the lower court’s award.” *McLennan v. Josey*, 247 N.C. App. 95, 97, 785 S.E.2d 144, 147 (2016); *See* N.C. Gen. Stat. § 6-21.5. First, this Court will “determine whether or not the [p]laintiff[] presented a justiciable issue in their pleadings,” which is “a question

of law that this Court reviews *de novo*.” *Id.* at 97, 785 S.E.2d at 147 (citations omitted). Second, this Court will review the trial court’s decision to award attorney’s fees under an abuse of discretion standard. *Id.* at 98, 785 S.E.2d at 147. Finally, this Court “will examine the award of costs and expenses to the prevailing party,” presenting a question of law as to whether “the trial court has properly interpreted the statutory framework” reviewable by this Court *de novo*. *Id.* at 98, 785 S.E.2d at 147. The reasonableness and necessity of the award, however, is reviewed for an abuse of discretion. *Peters v. Pennington*, 210 N.C. App. 1, 25, 707 S.E.2d 724, 741 (2011). A trial court abuses its discretion where its decision is “manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.” *McLennan*, 247 N.C. App. at 98, 785 S.E.2d at 147.

a. *Justiciability of the Issue*

Section 6-21.5 provides that:

in any civil action . . . the court, upon motion of the prevailing party, may award a reasonable attorney’s fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading.

N.C. Gen. Stat. § 6-21.5. A justiciable issue is one that is “real and present as opposed to imagined or fanciful.” *Woodcock v. Cumberland Cnty. Hosp. Sys.*, 384 N.C. 171, 177, 884 S.E.2d 633, 637 (2023). The complete absence of a justiciable issue may be found where it “conclusively appear[s] that such issues are absent even giving the pleadings the indulgent treatment they receive on motions for summary judgment or

to dismiss.” *Id.* at 177, 884 S.E.2d at 637. Even where a pleading “read alone sets forth a justiciable controversy[,] . . . when read with a responsive pleading[,]” it may “no longer present a justiciable controversy.” *Id.* at 177, 884 S.E.2d at 637.

Here, the trial court found:

there was a complete lack of a justiciable issue of either law or fact raised by Plaintiff in its pursuit of the Motion. Counsel for WakeMed informed Plaintiff’s Counsel verbally and in a letter dated August 4, 2023 that American Anesthesiology – NC was a separate corporate entity with a separate records custodian; Plaintiff’s counsel persisted in pursuit of a frivolous motion for contempt[.]

The trial court went on to find that, because American Anesthesiology is “a corporate entity wholly distinct from WakeMed[,] . . . WakeMed did not willfully fail to comply with the invalid Subpoena,” and therefore could not be held in contempt.

By misaddressing the subpoena to WakeMed, with the intended recipient being American Anesthesiology, the subpoena was procedurally defective. Moreover, WakeMed, in observing the mistake, verbally and in writing objected to the subpoena and endeavored to advise Plaintiff of the mistake in the address. Further, WakeMed informed Plaintiff’s counsel that it did not have the medical records that Plaintiff sought, and that Plaintiff was pursuing a frivolous motion for contempt. Because Plaintiff’s subpoena was not sent to the Records Custodian of American Anesthesiology, the face of Plaintiff’s contempt motion evinced the absence of a justiciable controversy. The trial court, therefore, correctly determined there was an

absence of a justiciable contempt issue where WakeMed did not “willfully fail to comply with an invalid subpoena.”

b. Interpretation of the Statutory Framework of Section 6-21.5

Plaintiff next argues the trial court erred in interpreting the statutory framework of Section 6-21.5 in awarding attorney’s fees because WakeMed did not file a written motion requesting sanctions or provide Plaintiff with notice that it would be seeking sanctions. *See* N.C. Gen. Stat. § 6-21.5.

To support its award of attorney’s fees under Section 6-21.5, a trial court must make one or both of the findings that Plaintiff was:

- (1) reasonably . . . aware, at the time the complaint was filed, that the pleading contained no justiciable issue; or (2)
- . . . found to have persisted in litigating the case after the point where [he] should reasonably have become aware that pleading [he] filed no longer contained a justiciable issue.

McLennan, 247 N.C. App. at 99, 785 S.E.2d at 148 (citing *Credigy Receivables, Inc. v. Whittington*, 202 N.C. App. 646, 655, 689 S.E.2d 889, 895 (2010)).

Notably, Section 6-21.5 does not contain a written notice requirement. *See* N.C. Gen. Stat. § 6-21.5. Moreover, Plaintiff was provided with notice that WakeMed’s counsel would seek attorney’s fees when it provided Plaintiff with the opportunity “to withdraw [his] motion without . . . subjecting [him]self to exposure for legal costs associated with [counsel’s] defense of WakeMed.”

In making its award of attorney's fees, the trial court concluded that the "complete lack of a justiciable issue" and Plaintiff's persistence "in pursuit of a frivolous motion for contempt" were grounds for an award of \$250 in attorney's fees. Given WakeMed's extensive efforts to indicate to Plaintiff that they were in fact a separate entity from American Anesthesiology, Plaintiff should have been reasonably aware at the time his motion to show cause was filed that there was no longer a justiciable issue, yet Plaintiff persisted in litigating the case. *See Whittington*, 202 N.C. App. at 655, 689 S.E.2d at 895.

The exercise of the trial court's discretion in awarding attorney's fees was thus in furtherance of the statute's policy to discourage frivolous litigation, and in making both of the required findings, the trial court did not err in its discretion to award the fees to WakeMed, the prevailing party. *See* N.C. Gen. Stat. § 6-21.5; *see also McLennan*, 247 N.C. App. at 101, 785 S.E.2d at 149 (holding that although the order did not explicitly state why the court exercised its discretion, that the award was in furtherance of the policy of the statute to discourage frivolous litigation).

Accordingly, in performing all relevant analyses and making conclusions of law and fact under N.C. Gen. Stat. § 6-21.5, the trial court properly interpreted the statutory framework and made the proper findings to support its award of attorney's fees. *See McLennan*, 247 N.C. App. at 99, 785 S.E.2d at 148.

c. The Superior Court's Award of Attorney's Fees

Finally, Plaintiff argues that the trial court's order awarding attorney's fees was in error because it contained no findings of fact based on affidavits or testimony concerning the basis for its award of \$250 attorney's fees.

“As a general matter, a trial court's award of attorneys' fees must be supported by proper findings considering ‘the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.’” *ACC Constr. v. SunTrust Mortg., Inc.*, 239 N.C. App. 252, 271, 769 S.E.2d 200, 213 (2015) (quoting *Belcher v. Averette*, 152 N.C. App. 452, 457, 568 S.E.2d 630, 633 (2002)). However, a “[c]omprehensive review of the order, the motion, and the affidavit and its attachments provides sufficient findings of fact to support the award of attorney's fees.” *Winston-Salem Wrecker Ass'n v. Barker*, 148 N.C. App. 114, 119, 557 S.E.2d 614, 618 (2001).

Here, the trial court considered the evidence WakeMed provided detailing the history of communications and relevant issues between the parties, as well as Plaintiff's motion to show cause. Notably, Plaintiff did not challenge any findings of fact as being unsupported and instead argues that different evidence should have been considered such as affidavits or other testimony, an argument that necessarily fails given the court's discretion in awarding attorney's fees. In making its finding that the motion was frivolous, because “there is not a ‘Records Custodian c/o American Anesthesiology – NC’ at a 3000 New Bern Avenue, Raleigh, NC 27610,” the trial court made a sufficient finding of fact such that its decision to award attorney's

fees in the amount of \$250 was not “arbitrary” or unsupported by reason. *See McLennan*, 247 N.C. App. at 98, 785 S.E.2d at 147.

Accordingly, the trial court did not err or abuse its discretion in calculating the amount of attorney’s fees it awarded WakeMed in light of Plaintiff’s frivolous motion. *See ACC Constr.*, 239 N.C. App. at 271, 769 S.E.2d at 213 (holding that the trial court did not err or abuse its discretion in calculating the amount of sanctions it awarded as attorney’s fees in Plaintiff’s frivolous lawsuit).

IV. Conclusion

As Plaintiff fails to make any arguments to refute the trial court’s finding that Plaintiff’s motion to show cause lacked a justiciable issue, we conclude that the trial court did not err in its finding that Plaintiff’s motion lacked a justiciable issue, nor did it abuse its discretion in its award of attorney’s fees under N.C. Gen. Stat. § 6-215. We accordingly affirm the trial court’s denial of Plaintiff’s motion to show cause and award of attorney’s fees.

AFFIRMED.

Judges HAMPSON and GORE concur.

Report per Rule 30(e).