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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-776

Filed 18 June 2024

Chatham County, No. 17 CVS 921

JULIUS WILLIAM WOODY and SHANNON CHAD GAINES, Plaintiff,

v.

RANDY LYNN VICKREY, individually and in his capacities as Trustee of the Julius William Woody Trust and as Attorney-in-Fact for Julius William Woody, Defendant and Third-Party Plaintiff,

v.

CARRIE F. VICKREY and DONALD G. AYSCUE, Third-Party Defendants.

Appeal by Plaintiff and Third-Party Defendants from orders entered on 24 March 2022 and 22 June 2022 by Judge Allen Baddour in Chatham County Superior Court. Heard in the Court of Appeals 11 April 2023.

Coleman Gledhill Hargrave Merritt & Rainsford, P.C., by Cyrus Griswold, for plaintiff-appellant and third-party-defendants-appellants.

Reiss & Nutt, PLLC, by W. Cory Reiss, for defendant-appellee.

MURPHY, Judge.

Appellants appealed from an interlocutory order and did not argue that any issue on appeal affected a substantial right until they filed their now-denied petition

for writ of certiorari. Thus, we lack appellate jurisdiction and must dismiss the appeal in part.

However, where a party's answer is stricken as a sanction by an interlocutory order of the trial court, that order is immediately appealable. Reviewing Appellants' arguments pertaining to the trial court's sanctions order striking their answer for abuse of discretion, we cannot say any abuse of discretion occurred.

BACKGROUND

This case arises from a complaint filed on 22 November 2017 by Plaintiffs Julius William Woody and Shannon Chad Gaines seeking to quiet title to two tracts of land over which Defendant Randy Lynn Vickrey had an adverse claim. In response, Randy Vickrey filed a verified answer and counterclaim against Gaines, as well as Third-Party Defendants Carrie F. Vickrey and Donald G. Ayscue, alleging that Gaines, Carrie Vickrey, and Ayscue had conspired to exert undue influence and duress on the 88-year-old Woody in order to interfere with Randy's statuses as trustee of Woody's revocable living trust and eventual inheritor of the property in controversy. As discussed in a previous appeal,

[t]he evidence tends to show that on 22 July 2008, Julius William Woody . . . appointed his long-time friend Randy Lynn Vickrey, defendant and third-party plaintiff . . . , as trustee of a revocable trust. Plaintiff Woody executed a general warranty deed and a bill of sale to transfer real property and personal property into the trust.

In the spring of 2017, Carrie Vickrey . . . , Donald Ayscue . . . , and Shannon Chad Gaines . . . (collectively

“Appellants”) moved at least one trailer onto Plaintiff Woody’s parcel and lived on his property. Friends and family members of Plaintiff Woody noticed a change in his home and living conditions after Appellants moved to the property: cameras and sensors were installed around the home, curtains remained closed, Plaintiff Woody became isolated, and his personal property went missing. They were also concerned about his mental and physical wellbeing as he became increasingly feeble and susceptible to scams. Within one month after Appellants moved onto Plaintiff Woody’s property, he executed multiple legal instruments including a revocation of the 2008 trust, a general power of attorney, a will, a certificate of trust, and general warranty deeds—all of which benefited one or more Appellants.

On 30 August 2017, Defendant Vickrey executed a certificate of trust to affirm his status as trustee of Plaintiff Woody’s 2008 trust. To further protect the trust, he also transferred two parcels of land held by the trust to himself.

Plaintiffs Woody and Gaines filed a complaint in the Chatham County Superior Court against Defendant Vickrey on 22 November 2017, seeking to quiet title to the real property that Defendant Vickrey had transferred to himself. In Defendant Vickrey’s answer to the initial complaint, he brought counterclaims including an action for declaratory judgment seeking the court to name him the trustee and sole beneficiary of Plaintiff Woody’s trust, and a claim to quiet title to remove a 2017 deed executed by Plaintiff Woody. Defendant Vickrey also brought third-party claims against Third-Party Defendants Vickrey and Ayscue. These claims were for cancellation or rescission of certain documents signed by Plaintiff Woody in 2007 due to duress, undue influence, and lack of capacity; quiet title to remove a 2017 deed executed by Plaintiff Woody; punitive damages; injunctive relief; conversion; and civil conspiracy. All parties to the case prayed the court for a trial by jury.

Dr. George Corvin, a board-certified forensic psychiatrist, performed a mental examination on Plaintiff Woody in November of 2017 pursuant to court order. Dr. Corvin rendered an opinion with a “reasonable degree of medical certainty” that Plaintiff Woody lacked competence to sign the legal instruments executed in June of 2017 “in a knowing, voluntary, and intelligent manner.” Defendant Vickrey filed his first motion for summary judgment on 10 January 2019, which was denied by presiding judge, the Honorable Allen Baddour, in an order . . . entered pursuant to Rule 58 of the North Carolina Rules of Civil procedure on 10 February 2019. On 1 February 2019, Plaintiff Woody was granted leave to file, and filed, an amended and restated complaint, which brought claims against Defendant Vickrey relating to his alleged breach of fiduciary duties. Defendant Vickrey answered the amended and restated complaint and amended his counterclaims on 22 February 2019.

Defendant Vickrey filed a second motion for summary judgment on 18 September 2019 based on the amended pleadings. On 10 October 2019, the presiding judge, the Honorable Carl Fox, entered an order . . . granting declaratory judgment designating Defendant Vickrey as the trustee and sole beneficiary of Plaintiff Woody’s trust. In his order, Judge Fox granted summary judgment in favor of Defendant Vickrey on the parties’ claims for quiet title and conversion. He also granted summary judgment in favor of Defendant Vickrey on his third-party claim for cancellation and rescission of the 2017 instruments. Finally, Judge Fox denied summary judgment regarding Defendant Vickrey’s third-party claim for civil conspiracy.

Plaintiff Woody voluntarily dismissed his other claims, without prejudice on 22 October 2019. Defendant Vickrey moved for a preliminary injunction on 7 September 2018 to prevent the transfer of assets from the 2008 trust, which the court granted on 1 November 2018.

A permanent injunction was entered on 4 November 2019, by the presiding judge, the Honorable Susan Bray, to

enjoin Plaintiff Gaines and Third-Party Defendants Vickrey and Ayscue from communicating with Plaintiff Woody and from entering his property.

Woody v. Vickrey, 276 N.C. App. 427, 430-32 (2021).

During the previous appeal, we vacated the permanent injunction declaratory judgment regarding the trust and partial summary judgment regarding the cancellation and rescission, quiet title, and conversion claims. *Id.* at 444-45. After remand to the trial court, Defendant and Woody—now represented by a guardian ad litem—voluntarily dismissed all claims against one another. Defendant then filed a motion to dismiss for lack of subject matter jurisdiction with respect to Plaintiff Gaines’s action to quiet title and a motion for sanctions against Gaines, Carrie Vickrey, and Ayscue, both of which the trial court granted. In the sanctions order, the trial court made the following findings of fact:

1. This action was commenced on [22 November] 2017, with the filing of a Complaint by Julius William Woody and Shannon Chad Gaines to quiet title to real property they contended Randy Vickrey had clouded with the recording of a deed.
2. Vickrey was made trustee of the Julius William Woody Trust in 2008 and that he deeded the Trust’s property, consisting of some 141 acres of land . . . to himself on [30 August] 2017.
3. Woody was 88 years old when the action was filed.
4. On [29 January] 2018, Vickrey filed counterclaims and third-party claims alleging that Gaines, Carrie Vickrey,

and Donald Ayscue (collectively the “Defendants”^[1]) had exerted undue influence and duress on Woody to cause him to execute various legal instruments, including a deed of the Property from Woody, individually, to Gaines in June of 2017. Vickrey contends he transferred the Property to himself to protect it and hold it in trust for Woody.

5. Since then, the parties engaged in protracted discovery and motion practice that resulted in disqualification of counsel for Woody as a likely necessary witness, the appointment by consent of a guardian ad litem for Woody due to his age and mental condition, partial summary judgment and entry of a permanent injunction against the Defendants, an interlocutory appeal that returned the matter to this Court for trial on all issues, and other matters.

6. On [21 June] 2021, by and through his guardian ad litem, Woody settled with Vickrey and then voluntarily dismissed his claims; as agreed, Vickrey reciprocated by dismissing his counterclaims against Woody.

7. Trial was peremptorily set for [28 March] 2022.

8. On [24 March] 2022, this Court entered an Order dismissing Gaines’s claims against Vickrey for lack of subject matter jurisdiction.

9. On [24 March] 2022, Vickrey filed the instant Motion for Sanctions, which was set by consent of the parties for hearing on [24 March] 2022, less than a week before the jury trial in this matter was set to begin.

10. On the morning of [24 March] 2022, Gaines filed a Notice of Appeal of the Order dismissing his claims against Vickrey and asserted at the hearing that an automatic stay prohibited the remaining claims from being tried.

¹ To maintain the integrity of the sanctions order’s reproduction—albeit at the risk of some referential confusion—we have left the reference to Gaines, Carrie Vickery, and Ayscue in the order as “Defendants.” However, this reference will be limited to only excerpts from the order.

11. This Court informed the parties it would retain jurisdiction to hear and decide the Motion for Sanctions.

12. The Court finds and concludes that the Motion for Sanctions does not depend upon the validity of the Order dismissing Gaines' affirmative claims for relief on the grounds that the Court lacks subject matter jurisdiction over them.

13. The Motion for Sanctions alleges multiple violations by the Defendants during the discovery process as follows:

a. Gaines fabricated evidence during the discovery period and the Defendants produced that evidence as if it predated the litigation and depicted the condition of Woody's home during a relevant time in early 2017, though the evidence was created in July of 2018;

b. Each of the Defendants refused to testify at their discovery depositions by asserting their Fifth Amendment privilege against self-incrimination[;]

c. The Defendants withheld material evidence until shortly before trial, including emails, documents, and photographs, some of which they had denied possessing.

14. Vickrey served discovery requests on each of the Defendants in 2018 requesting production of "all communications and documents regarding, referencing or about Julius William Woody, the Julius William Woody Trust, or the Property."[] "Documents" was defined in the requests as including photographs.

15. Each of the Defendants responded with written answers, which they verified. Carrie Vickrey served the first written responses on [22 June] 2018, which failed to identify or produce all responsive documents then in the Defendants' possession, including the documents referenced in Paragraph 12(c) above.

16. On [7 December] 2018, Vickrey moved the Court to amend his counterclaims to include claims under the state's Racketeer Influence and Corrupt Organizations statutes, which requires predicate acts in violation of criminal laws. The Court later granted the Motion.

17. Prior to Court hearing the motion to amend counterclaim, Vickrey served notices of deposition upon each of the Defendants and scheduled the depositions for [9 January] 2019.

18. Prior to [9 January] 2019 Counsel for Defendants requested to reschedule the depositions and informed Vickrey's counsel that [Defendants] would invoke their Fifth Amendment Privilege.

19. On [9 January] 2019, Vickrey took the depositions of each of the Defendants. Asserting their Fifth Amendment right to remain silent, the Defendants refused to answer any substantive questions about the claims, counterclaims, and defenses.

20. Over the course of the next six months, Vickrey produced discovery and statements obtained from numerous witnesses who gave accounts that supported his allegations of undue influence and duress.

21. Counsel for Gaines noticed a "for trial" deposition of his own client for [8 March] 2022, which was completed by agreement on [10 March] 2022.

22. When counsel for Vickrey asked Gaines if the reason he pled the Fifth Amendment and later offered to testify was that he "wanted to see the evidence before you decided whether you would testify," Gaines answered, "Yes."

23. Gaines testified he had the benefit of knowing the testimony of other witnesses and expected Carrie Vickrey and Donald Ayscue to testify at trial consistent with his testimony.

24. Gaines testified about a set of photographs that had been produced in discovery, which he said he took in the “July, August time frame” of 2017 and which he testified depicted the poor state of Woody’s home at that time. On cross-examination, Gaines admitted, and the evidence showed, that at least some of the photographs were taken in July of 2018, substantially after Vickrey had filed his original counterclaims and third-party claims.

25. Gaines did not produce the set of photographs with his initial discovery responses on [3 January] 2018, though they were responsive to a discovery request, but rather produced them on [26 September] 2019, a lapse that permitted the insertion of newly taken photographs among those that may have been taken in early 2017.

26. Gaines provided no information prior to his deposition that would have warned Vickrey that some of the photographs had been created after the litigation was initiated and therefore could not be evidence in support of the Defendants’ contentions that they moved onto the Property because of Woody’s poor living conditions, for which they were offered.

27. On [21 February] 2022, the Defendants produced emails between them and Paul Messick, former counsel for Woody and Gaines, which concerned the negotiation and creation of legal instruments at issue in this case. These documents were responsive to discovery requests and should have been produced in 2018.

28. On [15 March] 2022, the Defendants produced 30 photographs that predate and were responsive to Vickrey’s discovery requests served in 2018 and should have been produced then.

29. Also on [15 March] 2022, the Defendants produced receipts that they contend were stuffed into brown paper bags which were depicted in a photograph produced in 2018 and which the Defendants claimed were receipts for wire transfers made by Woody to unnamed “scammers” in 2015,

2016, and 2017. The receipts were material to the Defendants' contention that they did not move onto Woody's property to take it by undue influence and duress but in part to protect him from scammers.

30. Those receipts were the subject of a Motion to Compel filed by the Defendant on [7 September] 2018, seeking an order that Carrie Vickrey "fully respond" to Vickrey's requests for production of documents. In response, counsel for Gaines produced numerous documents, including the photograph of the paper bags with papers stuffed into them, which counsel identified as "Image of Records Given to CCSD," and represented to the Court in a written Response filed [20 September] 2018, that the Motion to Compel was satisfied by voluntary compliance with discovery requests.

31. Vickrey contends the Defendants' multiple discovery violations and abuse of the Fifth Amendment privilege were willful, in bad faith, and egregious and, due to their character, quantity, and prejudicial effect, warrant the sanctions of striking their answers and awarding attorney's fees and costs incurred during discovery and to bring the instant Motion.

Based on these findings of fact, the trial court made the following conclusions of law, striking the answers to Defendant's counterclaims and third-party claims and awarding reasonable attorney fees incurred during discovery:

1. The Court concludes Defendants' actions as set out in the Findings of Fact constitute discovery violations pursuant to Rules 26(g), 30, 34 and 37 of the North Carolina Rules of Civil Procedure.
2. The Defendants had mechanisms available, such as a stay on discovery or a protective order, to protect them from undue prejudice arising from real concern about criminal prosecution, but they chose not to pursue those.

3. Were that an isolated instance of discovery violations, the Court might be less stern. In combination with the manufacture of evidence passed off as pre-dating this litigation and the voluminous omissions from production of documents responsive to years-old discovery requests, however, the Defendants' withholding of testimony for the purpose of obtaining Vickrey's evidence is even more calculating and prejudicial to Vickrey's claims and to the Court's interest in judicial process.

4. Under these facts and circumstances, this Court is empowered to impose appropriate sanctions pursuant to Rule 37(d) without having previously sanctioned the Defendants.

5. The ultimate supplementation of previously withheld responsive documents on the eve of trial did not constitute seasonable supplementation and thus the Defendants violated Rule 26(e)(2). Such violations of Rules 26, 30, and 34 merit a severe sanction under Rule 26(g), Rule 37, and the Court's inherent authority.

6. [sic]

7. The Court has considered sanctions less severe than those requested by Vickrey, which is striking the Defendants' Answers to his counterclaims and third-party claims, resulting in entry of default on those claims, and an award of reasonable attorney fees incurred during discovery and for bringing this Motion.

8. The Court has considered barring the Defendants' testimony at trial due to their bad-faith use of the Fifth Amendment to delay their testimony.

9. Such a sanction also would not be sufficient to satisfy the needs of justice when that misconduct was part of a broader plot to subvert the discovery process.

10. [sic]

11. The Court has considered the lesser sanction of prohibiting the Defendants from using the withheld and fabricated evidence at trial, but that also is inadequate given the violations and the prejudice to Vickrey these violations have caused in combination. Additionally, the fabricated evidence shows wrongdoing by the Defendants which this Court should not prevent Vickrey from using but which is otherwise inadmissible. The Court has also considered other lesser alternatives.

12. Combined, the violations of Rules 26, 30, 34, and 37, [] constitute a willful pattern of violations that a lesser sanction than striking their answers and entering default on the claims against them could not sufficiently address.

AWARD OF FEES AND COSTS

1. The Court will limit its consideration of fees and costs to those related to the discovery violations found in this Order and the Motion for Sanctions.

2. Under Rule 26(g), the Court may award reasonable expenses, including a reasonable attorney's fee, incurred because of the violation. Rule 37(d) also permits an award of attorney's fees caused by the failure to make discovery.

3. The Court finds the pattern of discovery violations likely increased the costs of discovery for Vickrey.

4. The expenses Vickrey incurred in bringing the Motion for Sanctions also were clearly caused by or because of the discovery violations.

5. Counsel for Vickrey submitted two affidavits in support of Vickrey's request of fees and costs: the Affidavit of W. Cory Reiss, lead attorney, and Ronald Merritt, an attorney in the district that includes Chatham and Orange counties.

6. The Affidavit of Reiss sets forth the rates charged by him, other associates, and the relevant paralegal at the law firm of Shipman & Wright, which represented Vickrey

until February of 2020, and the applicable rates charged by Reiss as an attorney and for work performed by a legal assistant from February of 2020 until the present.

7. Reiss attached to his affidavit copies of invoices and billing statements encompassing costs and work associated with preparing for and taking the depositions of the Defendants in 2019 and the second deposition of Gaines in 2022.

8. The Court has [considered] the time spent on discovery matters set forth in the Affidavit of Reiss.

9. The Affidavit of Reiss shows fees and costs associated with the second deposition of Gaines beginning in January of 2022 in the amount of \$5,675.00 and costs in the amount of \$1,274.69. The Court finds that an award of one-half of these fees and costs is reasonable. Defendants are ordered to pay \$2,839.00 in attorney fees and \$636.35 in costs to Vickrey for the second deposition.

10. [sic]

11. The Affidavit of Reiss shows fees and costs associated with the Motion for Sanctions amounted to \$2,800.00, including 8.9 hours of attorney time and 1.5 hours of legal assistant work. Defendants are ordered to pay \$2,300.00 to Vickrey for attorney fees related to the Motion for Sanctions.

12. Based on the affidavits submitted, and the Court having taken judicial notice of the customary hourly rates charged by attorneys in District 15(B), of which the Court has direct knowledge, the Court finds that the hourly rates charged by the attorneys and paralegal working on the case in 2019 were reasonable for the work performed and for like work in the Chatham County area. The Court similarly finds that the hourly rates charged by Reiss and Reiss & Nutt's legal assistant in 2022 were likewise reasonable.

13. The Court finds and concludes that the rates charged are within the customary range for like work in the relevant area, based in part on the Affidavit of Merritt, who testified accordingly and demonstrated that by example, his hourly rate for like work would be \$300. Additionally, Jennifer Scott being an attorney who practices in Chatham County, her hourly rate is reflective of rates charged for work in such matters in this area.

14. Certain fees and costs were caused by and incurred because of the Defendants' discovery violations set forth above.

15. Reiss performed most of the work and billed most of the fees. The Court finds that Reiss has significant experience in complex litigation, of which this case certainly is one. The experience and skill of the other attorneys who billed fees also are more than sufficient to meet the tasks required. The discovery matters for which these attorneys and staff billed were complex in that they involved constitutional and due process matters and the intersection of criminal and civil law. Moreover, while not fully captured in the scope of the Court's fee award, the numerous discovery violations and their legal implications added complicating factors to this action. The attorneys for Vickrey demonstrated the skill and experience[] required to deal with such issues.

16. Accordingly, in its discretion, the Court awards to Vickrey attorney's fees in the amount of \$5,139.00 and costs in the amount of \$636.35.

Gaines, Carrie Vickery, and Ayscue—collectively hereinafter “Appellants”—challenge both orders on appeal, arguing in their principal brief that the trial court's order on Defendant's motion to dismiss constituted a final judgment and that the sanctions order, while not a final judgment, affected a substantial right and was therefore immediately appealable. However, during the pendency of the appeal,

Appellants became aware that their argument pertaining to the dismissal order contained a potential jurisdictional defect and petitioned us for certiorari. We denied certiorari.

ANALYSIS

Appellants argue the trial court erred in granting Defendant’s motion to dismiss and abused its discretion in allowing Defendant’s motion for sanctions. However, appellants incorrectly characterize the trial court’s dismissal order as a final judgment. Accordingly, we first evaluate whether we have appellate jurisdiction over either of Appellants’ arguments, then address any remaining issues.

A. Appellate Jurisdiction

The North Carolina Rules of Appellate Procedure are mandatory, and failure to follow these rules will subject an appeal to dismissal. *Viar v. N. Carolina Dep’t of Transp.*, 359 N.C. 400, 401 (2005) (citation omitted). Rule 28 (b) provides as follows:

An appellant’s brief shall contain . . . [a] statement of the grounds for appellate review. Such statement *shall include citation of the statute or statutes permitting appellate review*. . . . When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

N.C. R. App. P. 28(b)(4) (2023) (emphasis added). In this case, Appellants mischaracterized the trial court’s order granting Defendant’s motion to dismiss as a final judgment pursuant to N.C.G.S. § 7A-27(b)(1) rather than as an interlocutory order under N.C.G.S. § 7A-27(b)(3), causing their “principal brief” to be “wholly

insufficient to establish grounds for appellate review” with respect to that issue.

Larsen v. Black Diamond French Truffles, Inc., 241 N.C. App. 74, 77 (2015).

There are two instances in which an interlocutory appeal may be allowed[.] First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

C. Terry Hunt Indus., Inc. v. Klausner Lumber Two, LLC, 255 N.C. App. 8, 11-12 (2017) (citing *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379 (1994)).

Appellants’ statement to establish the grounds for appellate review did not contain facts or arguments that the dismissal order affected a substantial right. Moreover, any reference to substantial rights that appeared in Appellants’ now-denied petition for writ of certiorari cannot rectify this deficiency in our appellate jurisdiction. *Cf. Larsen*, 241 N.C. App. at 79 (citations omitted) (“[W]here a party fails to assert a claim in its principal brief, it abandons that issue and cannot revive the issue via reply brief. Therefore, in this case, we will not allow [the] [d]efendants to correct the deficiencies of their principal brief in their reply brief.”). It is the appellant’s burden to present appropriate grounds for this Court’s acceptance of an interlocutory appeal; and, as Appellants have not met their burden, their appeal must be dismissed with respect to the dismissal order. *Id.*

With respect to the attorney fees order, Appellants do argue that the trial court's order affects a substantial right in that it struck their answers. They do so primarily by citing other cases in which we have held that the striking of an answer affects a substantial right. We have held that "[n]o hard and fast rules exist for determining which appeals affect a substantial right[.]" *Estrada v. Jaques*, 70 N.C. App. 627, 640 (1984); rather, "[w]hether an interlocutory appeal affects a substantial right is determined on a case by case basis." *McConnell v. McConnell*, 151 N.C. App. 622, 625 (2002). "Consequently, 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." *Doe v. City of Charlotte*, 273 N.C. App. 10, 22 (2020). "Instead, 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." *Id.* (marks omitted). Moreover, "[a] substantial right is a legal right affecting or involving a matter of substance as distinguished from matters of form"; in other words, "a right materially affecting those interests which a man is entitled to have preserved and protected by law" or "a material right." *Schout v. Schout*, 140 N.C. App. 722, 725 (2000) (marks omitted) (quoting *Oestreicher v. Stores*, 290 N.C. 118, 130 (1976)). Ordinarily, then, attempting to argue a substantial right exists in the absence of an explanation of why such a right would be impacted under the particular facts of this case would be insufficient.

However, our cases have been ambiguous with respect to whether the striking

of an answer is one of the “few exceptions” where citation to precedent alone justifies review of an interlocutory order. *Doe*, 273 N.C. App. at 22. Though these exceptions are rare, our research reveals that almost all cases evaluating an interlocutory order striking an answer in its entirety have summarily permitted immediate review without requiring more. *See Adair v. Adair*, 62 N.C. App. 493, 495, *disc. rev. denied*, 309 N.C. 319 (1983) (“We believe that a ‘substantial right’ is involved here, since the dismissal of [the] defendant’s answer and counterclaim deprived her of the assertion of affirmative defenses and counterclaims against the claims asserted by [the] plaintiff in his complaint for absolute divorce.”); *Clark v. Penland*, 146 N.C. App. 288, 291 (2001) (“While this appeal is interlocutory, the order striking [the] defendants’ answer, affirmative defenses, and entering default affects a substantial right.”); *Essex Grp., Inc. v. Express Wire Servs., Inc.*, 157 N.C. App. 360, 362 (2003) (“We note that [the] defendants are appealing from an order of sanctions against them. These sanctions include the striking of [the] defendants’ answer and the entry of default judgment against [the] defendants. Orders of this type have been described as affecting a substantial right.”); *Walsh v. Cornerstone Health Care, P.A.*, 265 N.C. App. 672, 676 (2019) (“Although [the] [d]efendant’s appeal is interlocutory, [the] [d]efendant nevertheless maintains that it is entitled to an immediate appeal from the trial court’s order because it affects a substantial right, in that it strikes [the] [d]efendant’s answer. Indeed, orders of this type have been described as affecting a substantial right.”), *disc. rev. denied*, 373 N.C. 585 (2020). Given this historical

treatment, we hold that the striking of an answer does fall within the small number of topic areas in which citation to precedent alone is sufficient to permit our review of an interlocutory order. Accordingly, we review Appellants' arguments pertaining to the trial court's sanctions order.

B. Sanctions Order

We review the trial court's rulings regarding discovery sanctions for abuse of discretion. *Dunhill Holdings, LLC v. Lindberg*, 282 N.C. App. 36, 54-55 (2022). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547 (1998). "In reviewing the trial court's order under the abuse of discretion standard, any unchallenged findings of fact are binding on appeal[,] while challenged findings are reviewed for competent evidence on the record. *Dunhill Holdings*, 282 N.C. App. at 55. However, "[i]ssues of witness credibility are to be resolved by the trial judge." *GEA, Inc. v. Luxury Auctions Mktg., Inc.*, 259 N.C. App. 443, 455 (2018); *see also Smithwick v. Frame*, 62 N.C. App. 387, 392 (1983) ("It is clear beyond the need for multiple citation that the trial judge, sitting without a jury, has discretion as finder of fact with respect to the weight and credibility that attaches to the evidence."). "The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble v. Coble*, 300 N.C. 708, 712-13 (1980).

Here, Appellants challenge the trial court's jurisdiction to enter the sanctions order; the trial court's findings of fact 15, 20, and 22 through 30²; the trial court's ultimate finding of bad faith with respect to Appellants' invocation of the Fifth Amendment; and the propriety of the trial court, rather than a jury, making such a determination of bad faith.³ We address each argument in turn.

1. Jurisdiction

Appellants first contend the trial court lacked jurisdiction to enter the sanctions order. They base this argument on N.C.G.S. § 1-294, which, during the pendency of an appeal, divests the trial court of jurisdiction to issue rulings affected by the issues appealed:

When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

N.C.G.S. § 1-294 (2023). Appellants argue the sanctions order was affected by the already-appealed dismissal order in this case because, “[w]hen the trial court in this case struck the answer and entered default against Gaines, Carrie Vickrey, and

² Appellants state that their final challenge is to finding 33, but we infer from their quotation of finding 30 and the nonexistence of finding 33 that they intended to challenge finding 30.

³ They also challenge the validity of the order on the freestanding basis that the trial court failed to ask Appellants Carrie Vickrey and Donald Ayscue why they invoked their Fifth Amendment rights. However, as the legal basis for this argument is unclear, we devote no further analysis to it.

Ayscue, it concerned the subject matter of the suit because it effectively determined that Vickrey holds title to the Property.”

However, we have held that “[a]n improper interlocutory appeal does not deprive the trial court of jurisdiction, and thus the court may properly proceed with the case.” *Cnty. of Durham v. Daye*, 195 N.C. App. 527, 534 (2009) (marks omitted), *disc. rev. denied*, 363 N.C. 801 (2010). The dismissal order constituted a nonappealable interlocutory order. We therefore hold the sanctions order was a proper exercise of jurisdiction on the part of the trial court.⁴

2. Findings of Fact

Among the challenged findings of fact, we first address finding 15, then move in numbered order through each of the remaining challenged findings.

Finding 15 states, in relevant part, that “Carrie Vickrey served the first written responses [to discovery] on [22 June] 2018, which failed to identify or produce all responsive documents then in the Defendants’ possession, including [emails, documents, and photographs].” Defendants challenge this finding on the bases that

Appellant Carrie Vickrey did not have possession of all the documents listed in Paragraph 12(c) of the sanction order. The e-mails were between Appellant Shannon Chad Gaines and his former attorney, Paul Messick. The “e-

⁴ Moreover, our caselaw has described orders to which N.C.G.S. § 1-294 does not act as a jurisdictional bar as those that are “not interdependent.” *Bullock v. Newman*, 93 N.C. App. 545, 551 (1989). In this case, the sanctions order did not depend on the merits of the dismissal order, nor did the dismissal order depend on the merits of the sanctions order. Even if, in effect, they would likely bring about a similar material end to the litigation, this does not render the sanctions order “embraced” or “affected” by the dismissal order in the sense required by N.C.G.S. § 1-294.

mails” were produced by Appellant Shannon Chad Gaines. There is no evidence that Appellants Carrie F. Vickrey or Donald Ayscue even knew of the existence of these e-mails. Appellants Carrie F. Vickrey did not produce the “photographs” in discovery because she did not take them and there is no evidence that Appellants Carrie F. Vickrey or Donald Ayscue knew of their existence; rather, Appellant Shannon Chad Gaines produced the “photographs” on [26 September] 2019 because he is the person that took the photographs. There is no evidence in the record that any of the Appellants “denied possessing” photographs.

The record demonstrates that, as of June 2018, Appellants were all represented by the same attorney. We have held that, in the discovery sanctions context, an attorney’s knowledge is imputed to the client. *See Long v. Joyner*, 155 N.C. App. 129, 134-35 (2002) (“[The] [d]efendants argue that only [the] defendants’ counsel had the information required to answer [the] plaintiff’s interrogatories. This argument has no merit. The knowledge of an attorney hired by a client and doing work on behalf of that client is imputed to the client. Therefore the knowledge held by [the] defendants’ attorney was imputed to them.”), *disc. rev. denied*, 356 N.C. 673 (2003). Given Appellants’ mutual representation in June of 2018 and the fact that the trial court was otherwise presented with evidence of Appellants’ coordinated behavior before and during discovery, the trial court’s reference to the documents as collectively possessed in its findings of fact, as well as the imputation of that possession to Carrie Vickrey in particular, was sufficiently supported.

Finding 20 states that, “[o]ver the course of the next six months [after 9

January 2019, Appellee] produced discovery and statements obtained from numerous witnesses who gave accounts that supported his allegations of undue influence and duress” on plaintiff Woody. Appellants contest this finding on the basis that,

from the time period of [9 January] 2019 until [16 July] 2019, Appellants did not propound any discovery on Appellee. During this same time period Appellants also did not take any depositions. Appellee did supplement his previous discovery responses during this time period. But that action was required whether or not Appellants invoked their Fifth Amendment rights. The “statements” produced had previously been produced by Appellee prior to the [9 January] 2019 depositions.

The record demonstrates that, while Appellee did submit a number of witness statements in July 2019, his own responses to interrogatories and document requests were dated 3 January 2019. We therefore disregard this finding as it pertains to the timeframe of Appellee’s discovery responses.

Finding 22 states that, “[w]hen counsel for Vickrey asked Gaines if the reason he pled the Fifth Amendment and later offered to testify was that he ‘wanted to see the evidence before you decided whether you would testify,’ Gaines answered, ‘Yes.’” Appellants contest this finding on the basis that the finding misstates Gaines’ testimony, specifically in that Gaines did not actually respond in the affirmative. Gaines’s deposition testimony reads as follows:

Q. The purpose of taking the Fifth, then, was so that we would have to disclose all of our evidence to you before you would decide you could testify.

A. There’s a difference between the civil aspect of this

lawsuit and a criminal aspect. If you're alleging criminal activity, then, yes, that's a—my law enforcement experience tells me that if you're being accused of something, you should at least have the evidence presented forward, of what the claims are.

Q. Right. So the purpose of you taking the Fifth was so that you could gather up all the evidence in this case so you could make a decision about whether or not you would testify.

A. I don't—not in your terms, no. I'll get back to that RICO claim in particular, what was going to be the outcome of it? If we had known, if indeed there was going to be a criminal investigation or something like that, or it was not, that would have been a determination of if we pled the Fifth that day or not.

Q. I don't understand what you just said.

A. I think I was pretty clear, sir.

Q. Okay. Again, you wanted to see the evidence before you decided whether you would testify.

A. Evidence—when you say evidence, can you be more specific?

Q. I'm using your word. You said evidence.

A. Yes.

Q. Okay. Now, you have now volunteered to testify in this deposition three years later, and you have your own attorney ask you questions, right?

A. Yes.

Q. And except for Carrie and Donnie, who pled the Fifth, the witnesses in this case have already testified through affidavits and depositions, right?

A. Define witnesses, please. Are you talking about your witnesses?

Q. Sure, our witnesses.

A. Yes.

Q. So you know what they have to say.

A. Yes, sir.

Q. And you know what Carrie and Donnie will say if they take the stand.

A. Do I know what they'll say?

Q. Yes, sir.

A. How can I know what they'll say.

Q. Well, you expect them to tell the same story that you told here in your direct examination, don't you?

A. I expect them to tell their story as individuals, yes.

Q. And you would expect it to be consistent with your story.

[A]. Yes.

At minimum, the trial court's characterization of this testimony oversimplified the nature of Gaines's response. To the extent the trial court's findings reflect that Gaines's answer was a simple "yes," that finding is unsupported by the evidence. However, to the extent the trial court understood Gaines's response to whether he invoked the Fifth Amendment so he could see the evidence before he decided to testify was broadly affirmative, such a finding is a plausible interpretation of Gaines's

responses during the deposition and is therefore factually supported.

Finding 23 states that “Gaines testified he had the benefit of knowing the testimony of other witnesses and expected Carrie Vickrey and Donald Ayscue to testify at trial consistent with his testimony.” Appellants contest this finding on the basis that the finding misstates Gaines’s testimony, specifically in that Gaines never actually testified he expected Carrie Vickery and Ayscue to testify at trial. This argument misinterprets the trial court’s finding of fact, however; the trial court did not find that Gaines testified he expected Carrie Vickery and Ayscue to testify in the general sense, but that he testified he expected their testimony would be *consistent with his own*. In that respect, Gaines’s deposition testimony, as reproduced above in connection with finding 22, does provide support for this finding of fact.

Findings 24 through 26 are contested by Appellants only insofar as they impute the fabrication of evidence to Carrie Vickery and Ayscue rather than Gaines alone. However, as stated in connection with finding 15, the record demonstrates that Appellants were represented by the same attorney since 2018, and the trial court otherwise had evidence to believe Appellants’ behavior was coordinated. Thus, for the reasons stated in finding 15, this finding is proper. *See Long*, 155 N.C. App. at 135.

Finding 27 states that,

On [21 February] 2022, the Defendants produced emails between them and Paul Messick, former counsel for Woody and Gaines, which concerned the negotiation and creation

of legal instruments at issue in this case. These documents were responsive to discovery requests and should have been produced in 2018.

Appellants contest this finding on the basis that Carrie Vickrey and Donald Ayscue were not privy to the emails, which they allege were actually between Gaines and Plaintiffs' former attorney, Paul Messick. For the reasons stated in finding 15, this finding is proper. *Id.*

Finding 28 states that, “[o]n [15 March] 2022, the Defendants produced 30 photographs that predate and were responsive to Vickrey’s discovery requests served in 2018 and should have been produced then.” Appellants contest this finding on the basis that there is no evidence Carrie Vickrey or Ayscue ever possessed the photographs. For the reasons stated in finding 15, this finding is proper. *Id.*

Finding 29 states that,

[a]lso on [15 March] 2022, the Defendants produced receipts that they contend were stuffed into brown paper bags which were depicted in a photograph produced in 2018 and which the Defendants claimed were receipts for wire transfers made by Woody to unnamed “scammers” in 2015, 2016, and 2017. The receipts were material to the Defendants’ contention that they did not move onto Woody’s property to take it by undue influence and duress but in part to protect him from scammers.

Appellants contest this finding on the basis that there is no evidence Carrie Vickrey or Ayscue ever possessed the receipts. For the reasons stated in finding 15, this finding is proper. *Id.*

Finding 30 states that the aforementioned receipts

were the subject of a Motion to Compel filed by the Defendant on [7 September] 2018, seeking an order that Carrie Vickrey “fully respond” to Vickrey’s requests for production of documents. In response, counsel for Gaines produced numerous documents, including the photograph of the paper bags with papers stuffed into them, which counsel identified as “Image of Records Given to CCSD,” and represented to the Court in a written Response filed [20 September] 2018, that the Motion to Compel was satisfied by voluntary compliance with discovery requests.

Appellants contest this finding on the basis that their response did not represent that Appellants had voluntarily complied with discovery requests. The 20 September 2018 response referenced in the finding reads as follows:

1. Third-Party Defendant Carrie F. Vickrey served her Objections and Responses to Defendant’s and Third-Party Plaintiff’s Randy Vickrey’s Interrogatories and Requests for Production of Documents on [22 June] 2018.
2. Included with Third-Party Defendant Vickrey’s responses was a list of items that would be made available for inspection pursuant to Rule 34 of the North Carolina Rules of Civil Procedure. The list of items was denoted as “Exhibit A” and incorporated into the discovery responses. (“Exhibit A” is attached hereto as Exhibit 1)
3. Included on Exhibit A was an item entitled “Image of Records Given to CCSD.”
4. Even though Rule 34 of the North Carolina Rules of Civil Procedure only requires documents to be made available for inspection, on [5 September] 2018, undersigned counsel provided PDF copies of the items listed on Exhibit A via Sharefile email to Jennifer Scott in lieu of making the items available for inspection. (A copy of the Sharefile Email and list of documents provided is attached hereto as Exhibit 2)

5. Inadvertently and mistakenly the item entitled “Image of Records Given to CCSD” was omitted from the items provided to Jennifer Scott referenced supra.

6. On [6 September] 2018 Defendant’s and Third-Party Plaintiff’s attorney Cory Reiss emailed Paul Messick and Joshua Lee inquiring about any scheduling conflicts regarding a proposed court date of [24 September] 2018. Attorney Reiss indicated that he would be filing several motions for hearing. Attorney Reiss’s email did not allege any discovery deficiencies related to the “Image of Records Given to CCSD”, nor did the email make any request to cure alleged discovery deficiencies. (A copy of the email is attached hereto as Exhibit 3)

7. Via facsimile, on [7 September] 2018, the undersigned attorney received Defendant’s and Third-Party Plaintiff’s Motion to Compel. Paragraph 7 of the Motion alleges that Third-Party Defendant Carrie Vickrey did not produce the item identified as “Image of Records Given to CCDS.”

8. At no point prior to receiving the Motion to Compel was the undersigned attorney made aware of the discovery deficiency.

9. Via email and facsimile, undersigned counsel has produced the image entitled “Image of Records Given to CCSD” upon counsel for Defendant and Third-Party Plaintiff Vickrey.

10. The discovery deficiency could have been remedied through a good faith effort by counsel for Defendant and Third-Party Plaintiff Vickrey to confer with the undersigned.

11. Pursuant to [N.C.G.S.] § 1A-1, Rule 37 of the North Carolina Rules of Civil Procedure and the Local Rules for Judicial District 15-B, all parties are required to confer or attempt to confer with the party failing to make discovery in an effort to secure the material without court action.

The trial court could have understood item 9, in the context of the response, to convey Appellants' belief that any discovery violations had been rectified by the inclusion of an addendum with the response itself. Finding 30 is therefore supported.

Lastly among the challenged findings, Appellants contest the trial court's ultimate finding that they acted in bad faith in invoking the Fifth Amendment.⁵ In support of this argument, Appellants direct our attention to the record addendum, which contains series of communications between the parties' attorneys in which Appellants' attorney discusses his recommendation that his clients will invoke the Fifth Amendment due to potential criminal liability arising from Defendant's RICO claim. Plaintiffs also point us to the amount of discovery that took place prior to the invocation of Appellants' Fifth Amendment rights. However, all of these arguments ultimately depend on the credibility determinations of the trial court, which we will not reevaluate on appeal. *Smithwick*, 62 N.C. App. at 392.

With the exception of analytically immaterial details of findings 20 and 22, then, the trial court's findings of fact are supported, and we will not reevaluate the ultimate findings of fact resulting from its credibility determinations. *Id.*

⁵ While this finding appeared among the trial court's conclusions of law at number 8, the trial court's determination the Appellants acted in bad faith reads more closely to an ultimate finding of fact than a conclusion of law. *Appalachian Poster Advertising Co. v. Harrington*, 89 N.C. App. 476, 479 (1988) ("Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts."); *see also In re Helms*, 127 N.C. App. 505, 510 (1997) (marks omitted) ("Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact.").

Accordingly, we hold the trial court did not abuse its discretion in entering the sanctions order.

3. Absence of a Jury

Finally, Appellants argue the trial court's sanctions order was improper because it made determinations of fact and credibility that should have been reserved for a jury. Appellants cite no legal authority for this proposition, and our caselaw unambiguously reflects that both functions are properly within the province of the trial court when ruling on a motion for sanctions. *GEA, Inc.*, 259 N.C. App. at 455-56. This argument is without merit.

CONCLUSION

Appellants' appeal from the trial court's interlocutory dismissal order failed to invoke our appellate jurisdiction; therefore, we must dismiss their appeal in part. With respect to the sanctions order, although the appeal affects a substantial right for purposes of our interlocutory review, we hold the trial court did not abuse its discretion.

DISMISSED IN PART; AFFIRMED IN PART.

Judges ZACHARY and CARPENTER concur.

Report per Rule 30(e).