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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-304

Filed 3 December 2024

Harnett County, No. 23 CV 1753-420

LINDSAY JOHNSON, Plaintiff,

v.

JOHN DANIEL JOHNSON, Defendant.

Appeal by defendant from an order entered 7 November 2023 by Judge C. Winston Gilchrist in Superior Court, Harnett County. Heard in the Court of Appeals 22 October 2024.

*Parker Bryan Britt Tanner & Jenkins, PLLC, by Alicia D. Journey, for plaintiff-appellee.*

*Player McLean, LLP, by Stacey E. Tally and James A. McLean, III, for defendant-appellant.*

ARROWOOD, Judge.

John Daniel Johnson (“defendant”) appeals from order entered 7 November 2023 denying defendant’s motion to dismiss pursuant to Rule 12(b)(6) and strike certain allegations of plaintiff’s complaint. Lindsay Johnson (“plaintiff”) filed a motion to dismiss defendant’s appeal for lack of appellate jurisdiction on

15 April 2024. For the following reasons, we deny plaintiff's motion to dismiss the appeal and reverse the trial court.

I. Background

Because this appeal on the 12(b)(6) motion arises out of the pleading stage of the trial, we rely upon the facts as alleged in plaintiff's Complaint submitted to the Harnett County Superior Court. *See Lannan v. Board of Governors of University of North Carolina*, 285 N.C. App. 574, 576 (2022). Plaintiff and defendant were married on 27 September 2014. They separated around 1 November 2018 and are divorced at the time of this filing. Plaintiff is an active-duty officer of the United States Armed Forces and has been a servicemember since 2003. Defendant is an active-duty officer in the United States Army Medical Corps. Defendant is a licensed physician and is a health care provider employed by the Department of Defense ("DoD"). While plaintiff was stationed at Fort Liberty, her primary health care providers were located at Byars Clinic and Womack Army Medical Center ("WAMC"), both of which are DoD facilities. Defendant worked at Tripler Army Medical Center as an orthopedic resident from 1 July 2013 to June 2018 and has worked at WAMC as an orthopedic surgeon since June 2018.

While defendant was working as a provider for DoD, he had electronic access to medical records through the Essentris and AHLTA systems for all inpatient and outpatient care to patients at DoD health care facilities. Before, during, and after

plaintiff and defendant's marriage, defendant accessed plaintiff's healthcare records without her authorization and consent. Specifically, an audit revealed that defendant had violated the Health Insurance Portability and Accountability Act ("HIPAA") because he improperly accessed and viewed plaintiff's protected health information twenty-two times. Additionally, plaintiff learned of several adulterous extramarital affairs with at least seventeen different women during the parties' marriage.

Based on the allegations above, plaintiff filed a complaint with the Cumberland County Superior Court ("Previous Complaint") on 19 April 2021 for two claims: (1) intrusion upon seclusion and (2) intentional infliction of emotional distress ("IIED"). Plaintiff's intrusion upon seclusion claim was based on the allegation that defendant improperly accessed her medical records and invaded her privacy. Plaintiff's bases for the intentional infliction of emotional distress claim were that defendant had accessed plaintiff's medical records without authorization, defendant engaged in adulterous extramarital affairs with at least seventeen different women during the parties' marriage, and defendant made false allegations against plaintiff to military personnel that was intended to damage plaintiff's career. Paragraph 21(b) of plaintiff's Previous Complaint specifically alleged that defendant was "[e]ngaging in adulterous extramarital affairs with at least 17 different women during the parties' marriage. Upon information and belief, one of the women with whom Defendant had an affair because pregnant with Defendant's child in July 2016, and Defendant persuaded the woman to have an abortion."

In response to the Previous Complaint, defendant filed a motion to dismiss under Rule 12(b)(6) alleging that the intrusion upon seclusion claim was barred by the statute of limitations and the intentional infliction of emotional distress claim could not be based on allegations that defendant engaged in any adulterous extramarital conduct during the parties' marriage. The Cumberland County Superior Court found that plaintiff's intrusion upon seclusion claim was timely and denied defendant's motion to dismiss regarding this claim. However, the Superior Court, relying on *Poston v. Poston*, 112 N.C. App. 849 (1993), held that plaintiff's IIED claim must be dismissed because adultery cannot be the basis of an IIED claim. Based on this ruling, plaintiff voluntarily dismissed her Previous Complaint without prejudice.

Plaintiff then brought this action ("Subsequent Complaint") in Harnett County Superior Court on 4 April 2023. In this complaint, plaintiff again raises the same two claims as before: (1) intrusion upon seclusion and (2) intentional infliction of emotional distress. Plaintiff's intrusion upon seclusion claim remained largely the same however, plaintiff provided more details regarding how defendant accessed her medical records. Plaintiff added in her complaint that when defendant accessed her medical records on 19 February 2019, he learned that plaintiff was receiving medical treatment and used this information during his testimony in a child custody proceeding. Plaintiff also provided more details on when defendant accessed her

medical records, how much time he spent viewing her medical records, and what specific records defendant accessed.

For plaintiff's IIED claim in the Subsequent Complaint, the claim brought in Harnett County remained largely the same as the claim brought in Cumberland County with the exception that plaintiff removed her allegation that defendant had affairs with at least 17 different women while they were married. Instead, this allegation was moved to the portion of the complaint where plaintiff seeks punitive damages for her claims. Under the punitive damages section of plaintiff's Subsequent Complaint, paragraph 29(a) states:

Defendant had no respect for Plaintiff's rights to privacy or bodily integrity. Defendant engaged in adulterous extramarital affairs with at least 17 different women during the parties' marriage. After Plaintiff learned that Defendant had been involved in numerous adulterous extramarital relationships in which he engaged in unprotected sexual intercourse with other women, Plaintiff had to be tested to determine whether she had contracted a sexually transmitted disease from Defendant. One of the women with whom Defendant had engaged in unprotected sexual intercourse contacted Plaintiff and informed her that she had tested positive for genital herpes, and on March 12, 2018, Plaintiff told Defendant about her communication with Defendant's paramour and concern that Defendant had transmitted genital herpes to her (Plaintiff). Upon information and belief, after Plaintiff told Defendant about her communication with Defendant's paramour and concern that Defendant had infected her with genital herpes, Defendant accessed Plaintiff's medical records without her knowledge or consent on the same day as set out in paragraph 16.e above. Defendant's conduct demonstrated a conscious and intentional disregard of indifference to Plaintiff's rights and safety.

In response to plaintiff's Subsequent Complaint, defendant filed a motion to dismiss plaintiff's claim for punitive damages pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and strike certain scandalous allegations from plaintiff's complaint pursuant to Rule 12(f) of the North Carolina Rules of Civil Procedure. Specifically, defendant sought to dismiss:

Plaintiff's claim for punitive damages, and any other claim Plaintiff purports to raise in her Complaint, insofar as said claim is based on any allegations that Defendant engaged in any adulterous extramarital affair(s) during the parties' marriage and any allegations related thereto that were raised or could have been raised in the prior action, on *res judicata*, collateral estoppel/issue preclusion, and statute of limitations grounds.

Defendant further argued that plaintiff's punitive damages claim "must be dismissed to the extent that it relies on any invalid cause of action and/or any allegations of fact attendant only to such invalid causes(s) of action," and there was no valid underlying claim. Defendant also filed a motion to strike Paragraph 29(a) from the complaint, which specifically discussed the infidelity allegation.

The trial court denied defendant's motion to dismiss and motion to strike, concluding that plaintiff's allegations regarding adultery by defendant were not barred by the order entered by the Cumberland County Superior Court on the Previous Complaint. The trial court also found that plaintiff's allegations in paragraph 29(a) were not redundant, irrelevant, immaterial, impertinent, or scandalous.

Defendant filed notice of appeal from this denial on 7 December 2023. In response, plaintiff filed a motion to dismiss defendant’s appeal for lack of appellate jurisdiction on 15 April 2024.

## II. Discussion

Before addressing the merits of defendant’s appeal, we address plaintiff-appellee’s motion to dismiss defendant’s appeal for lack of appellate jurisdiction. Plaintiff alleges that the trial court’s denial of defendant’s motions to dismiss and strike do not affect a substantial right because the trial court’s dismissal does not give rise to a risk of two actual trials resulting in two different verdicts. Defendant argues in response that the Harnett County trial court’s order denying defendant’s motions is an interlocutory order that affects a substantial right and thus, this court has appellate jurisdiction over the appeal.

### A. Appellate Jurisdiction

“Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725 (1990). “An interlocutory appeal is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. City of Durham*, 231 N.C. 357, 362 (1950) (citations omitted).

[I]mmediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final

judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay . . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a substantial right.

*Sharpe v. Worland*, 351 N.C. 159, 161–62 (1999) (internal quotations omitted).

Our Supreme Court has previously defined a substantial right as “a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right” *Sharpe v. Worland*, 351 N.C. 159, 162 (1999) (cleaned up). “The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order.” *Embler v. Embler*, 143 N.C. App. 162, 166 (2001).

In *Bockweg*, our Supreme Court discussed why a denial of a motion to dismiss based on the defense of *res judicata* can affect a substantial right and may be immediately appealable: “while [t]he right to avoid one trial on the disputed issues is not normally a substantial right that would allow an interlocutory appeal, . . . the right to avoid the possibility of two trials on the same issues can be such a substantial right.” *Bockweg v. Anderson*, 333 N.C. 486, 490–91 (1993) (cleaned up).

Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them. Thus, a motion for summary judgment based on *res judicata* is directed at preventing the possibility that a successful defendant, or one in privity with that defendant, will twice



have to defend against the same claim by the same plaintiff, or one in privity with that plaintiff. Denial of the motion could lead to a second trial in frustration of the underlying principles of the doctrine of *res judicata*. Therefore, we hold that the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable.

*Id.* at 491 (internal citations omitted).

“An interlocutory appeal of the ‘denial of a motion to dismiss premised on *res judicata* and collateral estoppel does not *automatically* affect a substantial right; the burden is on the party seeking review of the interlocutory order to show how it will affect a substantial right absent immediate review.’” *Bartels v. Franklin Operations, LLC*, 288 N.C. App. 193, 195–96 (2023) (quoting *Whitehurst Inv. Properties, LLC v. NewBridge Bank*, 237 N.C. App. 92, 95 (2014)). “[T]o meet its burden of showing how a substantial right would be lost without immediate review, the appealing party must show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.” *Whitehurst*, 237 N.C. App. at 96 (cleaned up).

Furthermore, when the appeal is interlocutory, “the appellant must include in its statement of grounds for appellate review ‘sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.’” *Johnson v. Lucas*, 168 N.C. App. 515, 518 (2005) (quoting N.C.R. App. P. 28(b)(4)). “The appellant[] must present more than a bare assertion that the order affects a

substantial right; they must demonstrate *why* the order affects a substantial right.” *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277–78 (2009).

Here, defendant agrees that his appeal is on an interlocutory order as the trial court has not issued a final judgment on plaintiff’s intrusion upon seclusion and IIED claims in the Subsequent Complaint. However, defendant argues that the trial court’s denial of his motion to dismiss and motion to strike affects a substantial right because of the doctrines of *res judicata* and collateral estoppel. Specifically, defendant argues that the partial dismissal of plaintiff’s IIED claim from the Previous Complaint precludes plaintiff from pursuing any recovery from defendant based on these adultery grounds and the Harnett County Superior Court’s denial of his motion to dismiss creates the possibility of inconsistent results. We agree.

Defendant meets his burden of showing the trial court’s denial of his motion to dismiss affects a substantial right by demonstrating that the same facts of adultery are alleged in both complaints. The factual allegations surrounding adultery in Paragraph 29(a) of the Subsequent Complaint allege the same facts as the Previous Complaint in regard to defendant having extramarital affairs with at least seventeen women, which the Cumberland County Superior Court previously ruled could not be a basis for an IIED claim, but the Subsequent Complaint merely adds additional details about one of those extramarital affairs. Defendant clearly demonstrates that he could be subject to inconsistent results should plaintiff be allowed to re-allege previously dismissed claims for adulterous conduct in her request for punitive

damages. Similarly, defendant correctly asserts that the denial of defendant's motion to dismiss would allow a jury to decide the IIED claim based on the adultery allegations, which the Cumberland County trial court ruled was impermissible in its dismissal order. Thus, because separate fact finders could reach conflicting results on the issue of allowing the plaintiff to recover punitive damages based on allegations of adultery, this Court does have appellate jurisdiction over this issue.

B. Defendant's Appeal

On appeal, defendant argues: (1) the trial court erred in denying his motion to dismiss the punitive damages claim due to *res judicata*, (2) the trial court abused its discretion in denying defendant's motion to strike paragraph 29(a) from the complaint for punitive damages, and (3) in an alternative argument, this Court should exercise its discretionary powers under Rule 2 of the North Carolina Rules of Appellate Procedure to dismiss this claim for failing to meet the statute of limitations for both claims. We reverse the trial court's order.

1. Rule 12(b)(6) Motion to Dismiss

First, defendant argues that the trial court erred in denying his motion to dismiss plaintiff's claims under Rule 12(b)(6) insofar as they relate to defendant's adulterous conduct. Specifically, defendant argues that any of plaintiff's claims related to defendant's adulterous conduct is barred by *res judicata* and collateral estoppel. We agree.

“The standard of review for an appeal from a denial of a Rule 12(b)(6) motion is well settled.” *Leonard v. Bell*, 254 N.C. App. 694, 697 (2017).

The motion to dismiss under [Rule] 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

*Stanback v. Stanback*, 297 N.C. 181, 185 (1979) (citations omitted). “This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.” *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400 (2003) (cleaned up).

“Under the doctrine of *res judicata* or ‘claim preclusion,’ a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies.” *Williams v. Peabody*, 217 N.C. App. 1, 5 (2011) (cleaned up). For a subsequent action to be barred by *res judicata*, a party must demonstrate that “the previous suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both the party asserting *res judicata* and the party against whom *res judicata* is asserted were either parties or stand in privity with parties.” *Id.* “A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.” *Veazey v. Durham*, 231 N.C. 357, 361–62 (1950) (cleaned up). Finally, this Court has previously found that if a plaintiff voluntarily dismisses any

surviving claims after a trial court has issued an order dismissing part of a plaintiff's complaint, then the plaintiff's claim is no longer interlocutory and is instead a final judgment. *See Goodman v. Holmes & McLaurin Attorneys at Law*, 192 N.C. App. 467, 471–72 (2008).

Here, it is undisputed that the parties in the Subsequent Complaint are the same parties that litigated the first suit. Additionally, both claims in both complaints filed by plaintiff arise out of the same factual circumstances: that defendant improperly accessed plaintiff's medical records and defendant engaged in adulterous affairs with at least 17 different women. In the Previous Complaint, plaintiff alleged that defendant's adulterous conduct caused her severe emotional distress. The Cumberland County Superior Court conducted a hearing to review the IIED claim on the merits to determine if plaintiff can recover damages from an IIED claim based on adulterous conduct. Relying on *Poston v. Poston*, 112 N.C. App. 849, 436 (1993), the Cumberland County Superior Court issued an order dismissing plaintiff's IIED claim "only insofar as said cause of action is based on allegations that Defendant engaged in any adulterous extramarital conduct during the parties' marriage[.]" Thus, in the previous action, both parties had an opportunity to fully litigate the issue of whether adulterous conduct could be the basis of an IIED claim.

Based on oral arguments from both parties, the trial court dismissed this IIED claim in the Previous Complaint and stated that the dismissal "removes entirely from the purview of this case Plaintiff's claim for intentional infliction of emotional distress

related to Defendant's alleged adultery, and the parties shall not engage in discovery related to the topic of Defendant's alleged adultery." Plaintiff did not appeal this dismissal and voluntarily dismissed her remaining claims, leaving her intrusion upon seclusion claim largely intact and not at issue in this appeal. Accordingly, *res judicata* attached to the Previous Complaint when the Cumberland County Superior Court dismissed plaintiff's IIED claim as it related to defendant's adulterous conduct and plaintiff did not appeal the dismissal.

Given that *res judicata* attached to the Previous Complaint when plaintiff did not appeal the Cumberland County Court's dismissal of her IIED claim as it related to adultery and voluntarily dismissed her remaining claims, the order to dismiss her IIED claim is considered a final judgment on the merits. Thus, the trial court's holding leaves plaintiff no avenue in which defendant's adulterous conduct can be used as a basis to assert an IIED claim.

In the Subsequent Complaint, plaintiff removed this allegation from her IIED claim, however, she included the allegation in her request for punitive damages. Plaintiff's request for punitive damages is premised on her claims for intrusion upon seclusion and IIED and therefore, part of the requested relief for her IIED claim is premised on the adulterous conduct allegations. As discussed above, plaintiff is precluded from reasserting these allegations under a punitive damages claim. Accordingly, the trial court erred in denying defendant's motion to dismiss plaintiff's claims as set forth in defendant's 12(b)(6) motion.

2. Defendant's Motion to Strike

Next, defendant argues that the trial court abused its discretion by denying his motion to strike paragraph 29(a) from the Subsequent Complaint. Specifically, defendant argues that paragraph 29(a) should be stricken from the complaint in compliance with the Previous Complaint's holding that an IIED claim cannot be based on an allegation of adulterous conduct. We agree.

This Court reviews the trial court's decisions regarding motions to strike for abuse of discretion. *See Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 25 (2003). Rule 12(f) of the North Carolina Rules of Civil Procedure allow a court to strike "from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter." N.C.R. Civ. P. 12(f) (2023). "Matter should not be stricken unless it has no possible bearing upon the litigation. If there is any question as to whether an issue may arise, the motion [to strike] should be denied." *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 316 (1978).

Here, the trial court denied defendant's motion to strike paragraph 29(a) from the Subsequent Complaint finding that the allegation was not redundant, irrelevant, immaterial, impertinent, or scandalous such that it would be appropriate to grant defendant's motion to strike. The trial court erred in denying defendant's motion to strike because as stated above, defendant correctly asserted that the adulterous conduct allegations cannot be a basis for an IIED claim. This Court has previously held that when an allegation is insufficient to plead a recognizable cause of action,

the allegation should be stricken from the claim upon a motion to strike from the defendant. *See Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 114 (1976) (holding that because plaintiff's claim for punitive damages was properly dismissed, the supportive allegations of the complaint were also properly stricken from the complaint).

Here, because plaintiff cannot recover punitive damages on an IIED claim based on adulterous conduct, the trial court should have granted defendant's motion to strike paragraph 29(a) from the complaint. This complaint solely discusses defendant's alleged adulterous conduct and does not address any other basis for plaintiff's IIED claim. Because this allegation would be considered immaterial for an IIED allegation and would have no bearing on litigating an IIED claim in the Subsequent Complaint, the trial court abused its discretion in denying defendant's motion to strike. In view of our above stated holding we need not reach defendant's Rule 2 request.

### III. Conclusion

For the following reasons, we reverse the trial court's order denying the motion to dismiss the punitive claims and to strike paragraph 29(a).

REVERSED.

Judges ZACHARY and GRIFFIN concur.

Report per Rule 30(e).