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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-627

Filed 3 December 2024

Iredell County, No. 19 CVS 2577

WARREN PAUL KEAN, Plaintiff,

v.

AMY DELENE KEAN, Defendant.

Appeal by plaintiff from order entered 26 February 2024 by Judge Robert Broadie in Iredell County Superior Court. Heard in the Court of Appeals 6 November 2024.

*Fox Rothschild LLP, by Kip David Nelson, and Pressly Thomas & Conley PA, by Jessie Conley, for plaintiff-appellant.*

*No brief filed by defendant-appellee.*

THOMPSON, Judge.

Plaintiff appeals from the trial court's order concluding, *inter alia*, that defendant had not waived various discovery objections. After careful review, we vacate and remand for entry of an order consistent with this opinion and the law of the case.

**I. Factual Background and Procedural History**

A more complete recitation of the underlying facts in this case can be found in this Court’s prior opinion, *Kean v. Kean*, No. COA21-102, 2022 WL 1153437 (N.C. Ct. App. Apr. 19, 2022) (unpublished) (*Kean I*); we recite below only the facts necessary for proper disposition of this appeal.

In *Kean I*, this Court held that the trial court did not err “in finding and concluding that a litigant who failed to serve timely responses to discovery requests had waived all objections to the requests, including objections based on attorney-client privilege and attorney work-product doctrine.” *Id.* at \*1. Defendant then petitioned the Supreme Court of North Carolina for discretionary review of *Kean I*, which was denied. Defendant filed a motion for reconsideration, and our Supreme Court, *again*, denied defendant’s motion.

In March 2023, the matter was remanded to Iredell County Superior Court, where defendant, *again*, refused to comply with the compel order (compel order) that was the subject of the appeal in *Kean I*. In turn, plaintiff filed motions for contempt and sanctions, which were heard in Iredell County Superior Court on 21 August 2023. By order entered 26 February 2024, the trial court granted plaintiff’s motions for contempt and sanctions.

However, in the order granting plaintiff’s motions for contempt and sanctions, the trial court *also* concluded that, “documents created after [30 September 2020]” are “protected by the attorney-client privilege or work product doctrine[,]” in *direct contradiction* to this Court’s holding in *Kean I*, which found defendant “had waived

all objections to the [discovery] requests, including objections based on attorney-client privilege and attorney work-product doctrine.” *Id.* at \*1. From this order, plaintiff filed timely written notice of appeal.

## II. Discussion

### A. Appellate jurisdiction

As an initial matter, we have appellate jurisdiction over the case at bar. Although the trial court’s order is interlocutory, it affects a substantial right, as our Court has held that “orders of this type [on contempt motions] have been described as affecting a substantial right, and are therefore immediately appealable.” *OSI Rest. Partners, LLC v. Oscoda Plastics, Inc.*, 266 N.C. App. 310, 314, 831 S.E.2d 386, 389 (2019) (internal quotation marks and citation omitted); *see also Dunhill Holdings, LLC v. Lindberg*, 282 N.C. App. 36, 53, 870 S.E.2d 636, 652 (holding that “an order imposing sanctions under Rule 37(b) is appealable as a final judgment”).

We also note that plaintiff has filed a petition for writ of certiorari with our Court to review the trial court’s interlocutory order. However, in our discretion, we dismiss plaintiff’s petition for writ of certiorari, although meritorious, as moot, because the order of the trial court modifying the initial compel order “affects a substantial right” and therefore, “appeal may be taken” pursuant to N.C. Gen. Stat. § 1-277(a) (2023).

### B. Standard of review

On appeal, we *typically* review an order for contempt to determine “whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law[.]” *Spears v. Spears*, 245 N.C. App. 260, 273, 784 S.E.2d 485, 494 (2016) (citation omitted); meanwhile, a trial court’s “award of sanctions under Rule 37 will not be overturned on appeal absent an abuse of discretion.” *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996).

However, as will be discussed at length below, “the trial court had *no discretion* to” modify the compel order that was the subject of the appeal in *Kean I. McLaughlin v. Bailey*, 263 N.C. App. 647, 649, 824 S.E.2d 204, 206 (2019) (emphasis added). Therefore, as in *McLaughlin*—in instances where we are tasked with interpreting the trial court’s compliance with the mandate of the appellate court—we apply a *de novo* standard of review. *See also State v. Watkins*, 246 N.C. App. 725, 730, 783 S.E.2d 279, 282 (2016) (noting that “[a]lthough this issue has never been answered directly, this Court’s interpretation of its own mandate is properly considered an issue of law reviewable *de novo*”). Under a *de novo* standard of review, we consider “the matter anew and freely substitute [our] own judgment for that of the lower tribunal.” *LendingTree, LLC v. Anderson*, 228 N.C. App. 403, 407, 747 S.E.2d 292, 296 (2013).

### **C. Law of the case**

On appeal, plaintiff argues that the trial court “was obligated to follow this Court’s mandate” from *Kean I*, and that the trial court erred in concluding that

defendant had not waived *all* discovery objections in the underlying litigation.” We agree.

Our legislature requires that, “at the first session of the superior or district court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below *shall* direct the execution thereof to proceed.” N.C. Gen. Stat. § 1-298 (emphasis added). It is well established that “the mandate of an appellate court *is binding* upon the trial court and *must* be strictly followed without variation or departure.” *In re S.M.M.*, 374 N.C. 911, 914, 845 S.E.2d 8, 11 (2020) (internal quotation marks, brackets, and citation omitted) (emphases added).

Indeed, “[n]o judgment other than that directed or permitted by the appellate court may be entered. Otherwise, litigation would never be ended, and the [appellate] tribunal[s] of the state would be shorn of authority over inferior tribunals.” *McLaughlin*, 263 N.C. App. at 649, 824 S.E.2d at 207 (citation omitted). “Once an appellate court has ruled on a question, that decision becomes *the law of the case* and governs the question not only on remand at trial, but on a subsequent appeal of the same case.” *N.C. Nat’l Bank v. Va. Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983) (emphasis added).

Finally, “the failure of the trial court to follow the decision or the mandate of the appellate court does not generally render the action of the trial court completely void or invalid but merely erroneous.” *Collins v. Simms*, 257 N.C. 1, 8, 125 S.E.2d 298, 304 (1962) (citation omitted). “Under some circumstances, however, proceedings

in the trial court on remand of a cause *which are contrary to the express direction or mandate of the appellate court must be treated as null and void.*” *Id.* at 8–9, 125 S.E.2d at 304 (citation omitted).

In *Kean I*, this Court affirmed the order of the trial court concluding, as a matter of law, that defendant “had waived all objections to the [discovery] requests, including objections based on attorney-client privilege and attorney work-product doctrine.” *Kean I*, No. COA21-102, 2022 WL 1153437, at \*1. On remand, the *sole* role of the trial court, after receipt of the certificate of determination from *Kean I* where “the judgment [wa]s affirmed[,]” was to “direct the execution thereof[,]” or otherwise effectuate and enforce the judgment of this Court on the compel order. N.C. Gen. Stat. § 1-298.

As appellant notes, it was not the trial court’s “prerogative to modify the mandate [of the compel order] in a way he deemed fit.” That is correct. The trial court’s ruling on the motion to compel, that defendant had *waived all discovery objections*, was *affirmed* by this Court in *Kean I*. Therefore, “the mandate of [our] appellate court [wa]s binding upon the trial court and *must* [have] be[en] strictly followed without variation or departure[,]” *S.M.M.*, 374 N.C. at 914, 845 S.E.2d at 11 (internal quotation marks, brackets, and citation omitted) (emphasis added), because the trial court “*shall* direct the execution thereof.” N.C. Gen. Stat. § 1-298 (emphasis added). Finally, because the trial court’s order was “contrary to the express direction

or mandate of [this Court in *Kean I*,] [the order] must be treated as null and void.”  
*Collins*, 257 N.C. at 8–9, 125 S.E.2d at 304 (citation omitted).

For these reasons, we vacate the order of the trial court and remand for entry of an order consistent with *Kean I*—concluding that defendant *had* waived *all* discovery objections in the underlying litigation—as *should* have occurred following receipt of the certificate of determination from *Kean I*.

### **III. Conclusion**

We conclude that the trial court erred in failing to comply with a statutory mandate and by modifying the compel order contrary to the law of the case that was established in *Kean I*. For these reasons, the order of the trial court is vacated and remanded for entry of an order consistent with this opinion.

VACATED AND REMANDED.

Judges GORE and FLOOD concur.

Report per Rule 30(e).