

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1063

Filed: 1 March 2016

Wilson County, No. 14 CVS 1587

EVIDIO J. CARRAZANA, Plaintiff,

v.

WESTERN EXPRESS, INC., MICHAEL B. CARTER, TRACIE MCCORMICK, INC.
and GLENNWOOD D. TYNDALL, JR., Defendants.

Appeal by defendants Western Express, Inc. and Michael B. Carter from order entered 16 June 2015 by Judge Marvin K. Blount, III in Wilson County Superior Court. Heard in the Court of Appeals 10 February 2015.

Abrams & Abrams, P.A., by Douglas B. Abrams, Noah B. Abrams, Margaret S. Abrams, Melissa N. Abrams and The Josephs Law Firm, by Adam C. Josephs, for plaintiff-appellee.

Martineau King, PLLC, by Elizabeth A. Martineau and James E. Griffin, III, for defendant-appellants Western Express, Inc. and Michael B. Carter.

TYSON, Judge.

Michael B. Carter and Western Express, Inc. (“Defendants”) appeal from the trial court’s order granting in part a motion to compel in favor of Evidio J. Carrazana (“Plaintiff”). We affirm.

I. Background

Opinion of the Court

On 28 October 2014, Plaintiff filed a complaint against Defendants alleging Defendants were negligent with regard to a trucking accident, which had occurred on 9 October 2013. Defendant Michael B. Carter (“Carter”), a truck driver employed by Defendant Western Express (“Western Express”) had stopped his tractor-trailer in the emergency northbound lane of Interstate 95 in Wilson County, North Carolina. Plaintiff was operating his vehicle in the right, northbound lane of Interstate 95. Defendant Glennwood D. Tyndall, Jr. (“Tyndall”), a truck driver employed by Defendant Tracie McCormick, Inc., was driving a tractor-trailer northbound on Interstate 95 in the left lane.

Plaintiff alleges Carter negligently pulled into the right lane of the highway in front of his vehicle, without yielding Plaintiff the right of way. Plaintiff collided with the tractor-trailer driven by Carter. Plaintiff alleges Tyndall negligently operated his tractor-trailer in such a manner, which prevented Plaintiff from being able to move his vehicle into the left lane to avoid the collision. Carter was cited for an unsafe movement. Tyndall was not cited for any violation.

Plaintiff alleges negligence against Western Express and Tracie McCormick, the trucking companies that employ Carter and Tyndall, and claims they are vicariously liable for the negligence of Carter and Tyndall. Plaintiff also alleged Western Express was independently negligent in its hiring, training, supervision,

Opinion of the Court

and retention of its employees, including Carter. Plaintiff suffered catastrophic and permanent injuries as a result of the collision.

Plaintiff served discovery requests on all Defendants, which included the following interrogatories to Carter:

30. State the name, address, and specialty of every medical doctor, chiropractor, physical therapist, radiologist, psychiatrist or other medical practitioner who has treated you during the past ten years for any illness or injury, whether or not such illness or injury resulted from the incident in question, but excluding minor ailments such as colds, upset stomach and other temporary minor illnesses; and for each state separately the dates and reasons for being seen.

31. State the name and address of every hospital to which you have been admitted during the past ten years, either on an in-patient or out-patient basis, whether or not such admission resulted from the incident in question; and with respect to each, state separately the reason for admission and the dates of stay.

32. If a blood alcohol test was performed on you following the accident in question, state the type of test performed, who performed it, where it was performed, when it was performed and the test result in terms of blood alcohol content.

Carter and Western Express responded to Plaintiff's discovery requests. Carter objected to these three interrogatories on the grounds they are overly broad, seek information subject to the attorney-client privilege or work-product doctrine, are irrelevant, and not designed to lead to the discovery of admissible evidence.

Opinion of the Court

On 15 April 2015, Plaintiff filed a motion to compel in Wilson County Superior Court. He sought an order to compel Carter and Western Express to fully answer without objection certain enumerated interrogatories contained in Plaintiff's first interrogatories, including the three set forth, *supra*. The motion also sought an order to compel Carter and Western Express to provide all documents responsive to certain enumerated requests for production contained in Plaintiff's first discovery request.

Plaintiff filed a memorandum of law in support of his motion to compel, and stated he is entitled to a full and complete discovery of, *inter alia*, Carter's hospital records from 9 October 2013, the date of the accident. Plaintiff argued toxicology reports are relevant to show whether Carter was operating his vehicle under the influence of drugs or alcohol. Defendants filed a response to Plaintiff's motion to compel and argued Interrogatories 30 and 31 impermissibly seek privileged medical records. Toxicology results from blood tests performed on Carter the day after the accident were produced, and the results were negative.

The trial court heard Plaintiff's motion to compel on 25 May 2015. The court ordered Carter to supplement his response to Interrogatories 30, 31, and 32 by producing all medical records for the past five years pursuant to a confidentiality agreement, which limited the distribution of such documents to attorneys, expert witnesses, consultants, witnesses, and court personnel involved in this litigation. For

Opinion of the Court

records prior to the incident, the court allowed Carter to apply for an *in camera* review by the court to determine whether the records are to be produced to Plaintiff.

Defendants appeal from the trial court's order on Plaintiff's motion to compel. Subsequent to entry of the notice of appeal, the trial court entered an order, which stayed all proceedings pending the appeal.

II. Issues

Defendants argue the trial court erred by ordering Carter to respond to Interrogatories 30, 31, and 32 by producing "all medical records for the past five years."

III. Interlocutory Appeal

Plaintiff argues this Court should dismiss Defendants' appeal on the grounds that it is interlocutory and does not affect a substantial right, and impose sanctions upon Defendants for filing a frivolous appeal. Even if the interlocutory order affects a substantial right, Plaintiff also argues Defendants have failed to preserve their right to assert the physician-patient privilege.

A. Preservation

Our Court has held "[t]he physician-patient privilege is strictly construed and the patient bears the burden of establishing the existence of the privilege and objecting to the introduction of evidence covered by the privilege." *Roadway Express, Inc. v. Hayes*, 178 N.C. App. 165, 170, 631 S.E.2d 41, 45 (2006) (citation omitted).

Opinion of the Court

Carter objected to the interrogatories regarding his medical records in his responses to Plaintiff's discovery, but failed to specifically cite the physician-patient privilege. Plaintiff argues, under Rule 33 of the North Carolina Rules of Civil Procedure, Carter's failure to object on the grounds of physician-patient privilege in his interrogatory responses waived the privilege.

Rule 33 provides:

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. An objection to an interrogatory shall be made by stating the objection and the reason therefor

N.C. Gen. Stat. § 1A-1, Rule 33 (2015). Carter asserted the privilege in response to Plaintiff's motion to compel, which was submitted to Plaintiff and the trial court prior to the hearing.

Furthermore, at the hearing, Plaintiff's counsel acknowledged Carter was asserting the physician-patient privilege. Plaintiff has argued for the first time on appeal that Carter waived the privilege under Rule 33 by failing to specifically cite the privilege in his discovery responses. Plaintiff did not make this argument before the trial court at the hearing on the motion to compel, and attempts to "swap horses between courts in order to get a better mount" on appeal. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E.2d 836, 838 (1934). Plaintiff's argument that Carter waived the physician-patient privilege is overruled.

Opinion of the Court

B. Affecting a Substantial Right

“An interlocutory order 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. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Generally, “orders denying or allowing discovery are not appealable since they are interlocutory and do not affect a substantial right which would be lost if the ruling were not reviewed before final judgment.” *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 447, 271 S.E.2d 522, 523 (1980).

The discovery order appealed from is interlocutory. Defendants concede the discovery order is interlocutory, but argue it is appealable because the order to compel Carter to produce his medical records affects a substantial right that will be lost without appeal.

“Our appellate courts have recognized very limited exceptions to th[e] general rule [that discovery orders are not immediately appealable], holding that an order compelling discovery might affect a substantial right, and thus allow immediate appeal, if it either imposes sanctions on the party contesting the discovery, or requires the production of materials protected by a recognized privilege.” *Arnold v. City of Asheville*, 169 N.C. App. 451, 453, 610 S.E.2d 280, 282 (2005) (citation omitted). Our Court has determined the trial court’s order compelling discovery is immediately appealable, where it orders a party to disclose matters the party claims to be

Opinion of the Court

protected by the physician-patient privilege. *Midkiff v. Compton*, 204 N.C. App. 21, 24, 693 S.E.2d 172, 174-75, *cert. denied*, 364 N.C. 326, 700 S.E.2d 922 (2010).

The trial court's order as it pertains to Carter's medical records is properly before this Court for review. All other matters ruled upon by the trial court in the order on Plaintiff's motion to compel are interlocutory and not properly before this Court. *Arnold*, 169 N.C. App. at 453, 610 S.E.2d at 282.

IV. Appeal by Defendant Western Express

Both Carter and Western Express have appealed from the trial court's order granting, in part, Plaintiff's motion to compel. The physician-patient privilege belongs solely to the patient, Carter, and cannot be asserted by Western Express. *Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 38, 125 S.E.2d 326, 329 (1962) (“[T]he privilege is that of the patient.”). “It is well-settled that an appeal may only be taken by an aggrieved real party in interest.” *Henke v. First Colony Builders, Inc.*, 126 N.C. App. 703, 704, 486 S.E.2d 431, 432 (citation omitted), *disc. review denied*, 347 N.C. 266, 493 S.E.2d 455 (1997). The order does not affect a substantial right of Western Express. Western Express is not an “aggrieved real party in interest,” and its appeal is dismissed. *Id.*

V. Physician-Patient Privilege

Defendant Carter argues the trial court abused its discretion by compelling him to disclose his privileged medical records for the “past five years.” We disagree.

Opinion of the Court

A. Standard of Review

“[I]t is well established that orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion.” *Evans v. United Servs. Auto. Ass’n.*, 142 N.C. App. 18, 27, 541 S.E.2d 782, 788, *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001). Defendants must “show that the trial court’s ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision.” *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601-02, 617 S.E.2d 40, 45 (2005), *aff’d per curiam*, 360 N.C. 356, 625 S.E.2d 779 (2006).

B. N.C. Gen. Stat. § 8-53

Under Rule 26(b)(1) of the Rules of Civil Procedure, “[p]arties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]” N.C. Gen. Stat. § 1A-1, Rule 26 (2015) (emphasis supplied). N.C. Gen. Stat. § 8-53, which establishes the statutory privilege for confidential communications between patients and their physicians, provides:

No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon[.] . . . Confidential information

Opinion of the Court

obtained in medical records shall be furnished only on the authorization of the patient . . . Any resident or presiding judge in the district, either at the trial or prior thereto . . . may . . . compel disclosure if in his opinion disclosure is necessary to a proper administration of justice.

N.C. Gen. Stat. § 8-53 (2015).

The purpose of the physician-patient privilege is “to induce the patient to make full disclosure that proper treatment may be given, to prevent public disclosure of socially stigmatized diseases, and in some instances to protect patients from self-incrimination.” *Sims*, 257 N.C. at 36, 125 S.E.2d at 329. “Medical records are covered by the statute to the extent that the records contain entries made by physicians and surgeons, or [those] under their direction, that include information and communications obtained by the doctor for the purpose of providing care to the patient.” *Roadway Express*, 178 N.C. App. at 170, 631 S.E.2d at 45 (citing *Sims*, 257 N.C. at 38, 125 S.E.2d at 331).

The statutory privilege is not absolute. “[I]nformation may be disclosed by order of the court if in the opinion of the trial judge disclosure is necessary to the proper administration of justice.” *State v. Drdak*, 330 N.C. 587, 591-92, 411 S.E.2d 604, 607 (1992).

N.C. Gen. Stat. § 8-53 provides the trial court wide discretion in determining what is necessary for a proper administration of justice. “Judges should not hesitate to require the disclosure where it appears to them to be necessary in order that the

Opinion of the Court

truth be known and justice be done.” *Sims*, 257 N.C. at 39, 125 S.E.2d at 331 (citation and quotation marks omitted).

In *State v. Smith*, 347 N.C. 453, 461, 496 S.E.2d 357, 362, *cert. denied*, 525 U.S. 845, 142 L. Ed. 2d 91 (1998), the defendant argued the trial court failed to specifically find that disclosure of the privileged records was “necessary to a proper administration of justice.” *Id.* Our Supreme Court held N.C. Gen. Stat. § 8-53 “does not require such an explicit finding. The finding is implicit in the admission of the evidence.” *Id.*

C. Scope of the Order

Plaintiff alleges in his complaint, *inter alia*, that Carter “negligently and wantonly operated the truck while his ability or alertness was impaired through fatigue, illness, or any other cause as to make it unsafe for him to operate the truck in violation of 49 C.F.R. § 392.3.” Carter was tested for the presence of drugs and alcohol in his body following the wreck. In certain situations, federal regulations require the employer of a commercial truck driver who has been involved in a crash to test the driver’s blood for the presence of alcohol within eight hours. 49 C.F.R. § 382.303(d)(1). The drivers’ blood must be tested for the presence of controlled substances within thirty-two hours. 49 C.F.R. § 382.303(d)(2). The test administered on Carter fell outside of the eight-hour window of time following the crash required under the federal regulation. 49 C.F.R. § 382.303(d)(1). The reason Western Express

Opinion of the Court

gave for the violation of its obligation to test drivers within eight hours of the collision was that Carter was “medically incapacitated.”

Carter argues the trial court ordered a substantially broader disclosure than Plaintiff requested in the interrogatories. N.C. Gen. Stat. § 8-53. Plaintiff’s interrogatories requested: (1) the name, address, and specialty of any medical professional who treated Carter in the past ten years, the dates of service, and reason for the visits; (2) the name and address of any hospital where Carter had been treated during the past ten years and the reason for the treatment; and, (3) information related to any blood tests for the presence of alcohol that were performed on the day of the accident.

The order to compel states as follows:

3. Defendant Michael B. Carter shall supplement his response to Interrogatories # 30-32 by producing all medical records for the past five years pursuant to a confidentiality agreement limiting the distribution of such documents to attorneys, expert witnesses, consultants, witnesses, and court personnel involved in this litigation. For records prior to the incident that is the subject of this litigation, Defendant Carter may apply for *in camera* review by the Undersigned to determine whether such records are to be produced to Plaintiff. Plaintiff agrees that he shall direct his attorneys to return all paper or CD copies of medical records of Mr. Carter and to destroy all electronic copies of said records at the conclusion of this matter, to the extent permitted by the North Carolina Rules of Professional Conduct regarding record retention by Counsel.

Opinion of the Court

Carter also argues the trial court abused its discretion by ordering the production of documents in response to interrogatories. No request for production of the MRIs was mentioned by Plaintiff in his motion to compel or at the hearing. Plaintiff did not request Carter produce his medical records through discovery.

The trial courts have wide latitude to determine what is necessary for the proper administration of justice. *Sims*, 257 N.C. at 39, 125 S.E.2d at 331. Although the order directing Carter to produce his medical records was broader in scope than Plaintiff's requests on the interrogatories, Carter has not shown the order was "manifestly unsupported by reason." *Bourlon*, 172 N.C. App. at 601-02, 617 S.E.2d at 45.

The trial court placed safeguards in the order to protect Carter's privacy. For medical records before the accident, the trial court allowed Carter to apply for an *in camera* review to determine whether the records must be produced or released. The court also limited dissemination of the records and ordered their destruction upon resolution of the case. The trial court did not abuse its discretion in ordering Carter to produce his medical records for the past five years.

VI. Conclusion

The interlocutory order on Plaintiff's motion to compel affects Carter's privileged medical records, a substantial right. Defendant Carter's appeal is properly

Opinion of the Court

before this Court. Defendant Western Express has no standing to assert Carter's physician-patient privilege. Its appeal is dismissed.

Carter has failed to show the trial court abused its discretion in ordering him to disclose a broader scope of medical information than Plaintiff had requested in his discovery requests, motion to compel, and at the hearing. The trial court provided for an *in camera* review by the court and entered an order that addressed Carter's privacy interests. The trial court's order granting Plaintiff's motion to compel with regard to discovery of all of Carter's medical records for the past five years is affirmed.

AFFIRMED.

Judges CALABRIA and Judge DAVIS concur.

Report per Rule 30(e).