NO. COA12-309
NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2012

AGUSTIN E. VEITIA,
Plaintiff

v. Watauga County
No. 10 CVS 794

MULSHINE BUILDERS LLC,
Defendant

Appeal by plaintiff from order entered 21 October 2011 by Judge Mark E. Powell in Watauga County Superior Court. Heard in the Court of Appeals 29 August 2012.

Capua Law Firm, P.A., by Paul A. Capua and Michael J. Volpe, for plaintiff-appellant.

Bailey & Thomas, P.A., by John R. Fonda and David W. Bailey, Jr., for defendant-appellee.

CALABRIA, Judge.

Agustin E. Veitia ("plaintiff") appeals from an order compelling discovery in favor of Mulshine Builders, LLC ("defendant"). We dismiss in part and affirm in part.

I. Background

In September 2007, plaintiff contracted with defendant to build a house located at Far Away Drive in Boone, North

Carolina. Defendant, as the general contractor, was to coordinate and supervise the subcontractors that he hired to perform work on the premises. A year later, in late September 2008, the house burned to the ground.

The Watauga County Fire Marshal's Office investigated the fire and determined that the fire was likely caused by a painter's rags that were discarded in an open plastic garbage can. Some of defendant's employees observed the painter, Marty Green ("Green"), "throwing his painting and staining rags into an open plastic trash can."

Plaintiff claims that defendant agreed to "coordinate and oversee the work of third-parties performing work on the premises." Defendant admits that he agreed to supervise subcontractors but his supervision was limited to the individuals that he hired, not third-parties hired directly by plaintiff. Green was not one of the subcontractors defendant hired; plaintiff hired him.

Both plaintiff and defendant were insured by North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau"). On 26 September 2008, plaintiff submitted a claim for the loss of the house to Farm Bureau. Between the date of the fire and 14 October 2008, investigators from Farm Bureau determined that the

amount of the loss and damage exceeded $600,000, but plaintiff's builder's risk policy only provided $250,000 of coverage. In addition, they determined that Green discarded the rags that potentially caused the fire and that plaintiff hired Green, not defendant. On 15 October 2008, Vernie Earl Fountain ("Fountain"), the Manager for the Special Investigative Unit for Farm Bureau, along with two other individuals, determined that there was no evidence of liability on the part of defendant. Since plaintiff was underinsured and Green had no assets from which plaintiff could recoup his losses, Farm Bureau decided to open a liability claim file to protect defendant because of "the anticipation of litigation against" defendant.

Plaintiff hired an independent fire investigator ("the unnamed individual" or "consultant") prior to removing the debris from the area affected by the fire ("the area"). On 16 October 2008, plaintiff's consultant inspected the area and took photographs. In addition, plaintiff removed a wire from the area in the consultant's presence.

On 13 February 2009, Farm Bureau sent plaintiff a letter indicating that their investigation revealed "no legal liability on the part of" defendant, and indicated they were unable to compensate plaintiff for his loss. On 10 November 2010,

plaintiff filed a complaint against defendant alleging breach of contract, negligence and promissory estoppel. On 10 February 2011, plaintiff filed an amended complaint which added a claim for breach of an implied-in-fact contract and another count of negligent supervision. Defendant filed an answer, interrogatories and requests for production of documents. Defendant also conducted depositions to use at trial, including the deposition of plaintiff's interior decorator, Sheila Wilde ("Wilde").

On 12 September 2011, defendant filed a motion to compel discovery, seeking, *inter alia*, production of an investigative report prepared by the unnamed individual along with a request for the court to enter an order compelling plaintiff to answer questions regarding the identity of the unnamed individual and the nature and extent of the relationship between plaintiff and Wilde. On 21 September 2011, defendant also filed a request to inspect a wire that plaintiff had removed from the fire area. On 21 October 2011, subsequent to a hearing, the trial court granted defendant's motion to compel, in part, and denied the motion in part. The specific portions of defendant's motion to compel information that the trial court granted were, *inter alia*, the identity of plaintiff's fire consultant, as well as

production of his report and the materials that had been gathered from the fire scene. Plaintiff was also required to answer questions regarding his relationship with Wilde. Plaintiff appeals. On 14 November 2011, an order was entered granting plaintiff's motion to stay the case pending resolution of the appeal.

II. Interlocutory Appeal

Plaintiff argues that the trial court erred by ordering him to answer questions regarding an alleged affair with Wilde. We find that plaintiff has failed to show that discovery of this issue affects a substantial right, and thus dismiss this portion of plaintiff's appeal as interlocutory.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).

> [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, 522 S.E.2d 577, 579 (1999) (quotation marks omitted).

In the instant case, the trial court's order was not a "final" judgment as to one of the claims or parties. Since the trial court's order was not "final" in nature, the order is not immediately appealable by a Rule 54(b) certification. ***Evans v. United Servs. Auto. Ass'n***, 142 N.C. App. 18, 23, 541 S.E.2d 782, 786 (2001). Therefore, plaintiff "has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." ***Jeffreys v. Raleigh Oaks Joint Venture***, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). In determining whether a substantial right has been affected, "a two-part test has developed – the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." ***Goldston***, 326 N.C. at 726, 392 S.E.2d at 736.

In the instant case, plaintiff initially notes that evidence of an extramarital affair with a non-party is "inadmissible and, hence, not discoverable." However, our statutes indicate that "it is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the

discovery of admissible evidence." N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (2011). Therefore, the fact that the information may be later inadmissible does not determine that the information is not discoverable.

Plaintiff also contends that the testimony in question affects a substantial right because it infringes on state and federal constitutional protections. Specifically, plaintiff contends if he is required to testify regarding the alleged extramarital affair his right to privacy will be violated.

As an initial matter, the trial court's order placed limitations on the questions defendant could ask:

> That Defendant's motion that Plaintiff fully answer questions regarding the nature of the relationship between Plaintiff and witness [Wilde] IS GRANTED. Defendant may ask questions regarding, for example, whether the relationship was professional, platonic, friendly, antagonistic, romantic, and intimate or sexual, may ask questions regarding the duration of the relationship and may ask questions which explore the factual basis for any such label. The Defendant shall not ask questions delving into the nature and extent of private and intimate activities of Plaintiff and [Wilde], if any beyond asking about whether or not there was a sexual component to the relationship.

Plaintiff's claim that the information sought by defendant seeks to "harass" plaintiff and Wilde and "explore and introduce

prejudicial testimony about a supposed affair" fails. The trial court's order specifically notes that defendant "shall not ask questions delving into the nature and extent of private and intimate activities of plaintiff" and Wilde.

Since the trial court's order protects plaintiff's right to privacy, plaintiff has the burden of demonstrating how the trial court's order affects a substantial right. One of the questions plaintiff was required to answer was whether the relationship was professional, platonic, friendly, antagonistic, romantic, and intimate or sexual. Another question was what was the duration of the relationship. Once the questions were answered, plaintiff was also required to provide the factual basis for any such label. "The appellants 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, 679 S.E.2d 512, 516 (2009). Plaintiff's bare assertion that the order affects a substantial right without demonstrating why is insufficient to meet the burden of showing a substantial right. Since plaintiff failed to demonstrate how an inquiry into the nature and extent of his *relationship* with Wilde would affect

his substantial right to privacy, we dismiss this portion of plaintiff's appeal as interlocutory.

III. Discovery of Work Product

As an initial matter, our Supreme Court has held that where "a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right...." *Boyce & Isley, PLLC v. Cooper*, 195 N.C. App. 625, 637, 673 S.E.2d 694, 701-02 (2009). Therefore, plaintiff's issues concerning the discovery of what he considers is undiscoverable work product, is immediately appealable. *See id.*

Plaintiff argues that the trial court erred by finding that the unnamed individual's report was not the type of report that is considered work product under the work product doctrine. We disagree.

"When reviewing a trial court's ruling on a discovery issue, our Court reviews the order of the trial court for an abuse of discretion." *Midkiff v. Compton*, 204 N.C. App. 21, 24, 693 S.E.2d 172, 175, *cert. denied*, 364 N.C. 326, 700 S.E.2d 922

(2010). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

According to our statutes:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

N.C. Gen. Stat. § 1A-1, Rule 26(b)(3) (2011). However, when ordering discovery of such materials, the trial court "may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought." *Id.* Such information concerning the litigation that is "prepared in anticipation of trial" is considered work product and is not discoverable. *Evans*, 142

N.C. App. at 28, 541 S.E.2d at 788-89. The party seeking the protection of the work product doctrine "is required to show: (1) the material consists of documents or tangible things; (2) which were prepared in anticipation of litigation or for trial; (3) by or for another party or its representatives." *In re Ernst & Young, LLP*, 191 N.C. App. 668, 678, 663 S.E.2d 921, 928 (2008), *aff'd in part, modified in part and remanded*, 363 N.C. 612, 684 S.E.2d 151 (2009). "The protection [under the work product doctrine] is allowed not only [for] materials prepared after the other party has secured an attorney, but those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation." *Willis v. Duke Power Co.*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976). Generally, "documents prepared before an insurance company denies a claim ... will not be afforded work product protection." *Evans*, 142 N.C. App. at 31, 541 S.E.2d at 790.

In the instant case, the material plaintiff seeks to protect involves the unnamed individual and material acquired by the unnamed individual. In order to be protected by the work product doctrine, plaintiff must show that the unnamed individual was a protected party and that the material was "prepared under circumstances in which a reasonable person might

anticipate a possibility of litigation." *Willis*, 291 N.C. at 35, 229 S.E.2d at 201. The trial court's order to compel discovery found that the unnamed individual was not a consulting, non-testifying expert, and thus was not a protected party. Plaintiff claims the trial court's ruling was error, and that the unnamed individual was a consulting, non-testifying expert. Even assuming, *arguendo*, plaintiff's contention is correct, that the unnamed individual was a consultant and his report could be considered work product, plaintiff still has the burden to show that the information was "prepared in anticipation of litigation" in order for it to be excluded from discovery. *Ernst*, 191 N.C. App. at 678, 663 S.E.2d at 928.

In the instant case, the fire occurred on 25 September 2008. The next day, plaintiff submitted a claim of loss to Farm Bureau. Between the time of the loss due to the fire and 14 October 2008, Farm Bureau employees investigated the loss and damage. On 15 October 2008, Fountain, along with two other employees, conducted a review of the investigation. Although Farm Bureau employees determined that there was no evidence of defendant's liability, a liability claim file was opened because they anticipated litigation against defendant. At plaintiff's request, the unnamed individual investigated the fire scene on

16 October 2008. Farm Bureau delayed informing plaintiff of its intention to deny coverage until 13 February 2009.

Plaintiff claims that his contact with Farm Bureau in the time period after the fire led him to believe that "Farm Bureau and [defendant] were planning to deny responsibility for the fire." While plaintiff has produced evidence that Farm Bureau anticipated litigation prior to 16 October 2008, this evidence is insufficient to prove that plaintiff also anticipated litigation. When plaintiff hired the unnamed individual to conduct an independent investigation of the fire, he did not have access to Farm Bureau's investigation material or its internal documentation indicating its position that defendant was not liable for the loss. On 29 September 2008, plaintiff spoke with Farm Bureau adjuster Josh Overcash ("Overcash") and asked about defendant's policy. Overcash indicated that a claim had not yet been filed against defendant's policy because the cause of the fire had not yet been determined. While plaintiff stated at that time that he wanted to hire an independent fire investigator, nothing in the log suggests that, at this time, Farm Bureau communicated to plaintiff a reason that he should anticipate litigation. Overcash merely indicated the cause of the fire must be determined prior to determining the negligence

of any party. Furthermore, Farm Bureau's SIU activity log indicates that plaintiff contacted Farm Bureau on 13 October 2008 to inquire about the status of his claim. There is no indication that Farm Bureau communicated to plaintiff that his claim would be denied at that time. Rather, Roy Hensley, a Farm Bureau investigator, told plaintiff that he needed to speak with Green as part of the investigation.

We do not believe that under these circumstances, a "reasonable person" in plaintiff's position would have "anticipate[d] a possibility of litigation" on 16 October 2008. *Willis*, 291 N.C. at 35, 229 S.E.2d at 201. Therefore, we find that the trial court did not abuse its discretion in determining that the report, wire and photographs were not protected "work product" and affirm the order compelling discovery.

Plaintiff also alleges that even if we determine that the information sought was protected work product, the unnamed individual's report is still not discoverable because defendant failed to show a substantial need or undue hardship to obtain the materials. Since we have found that the unnamed individual's report was not protected by the work product doctrine, there is no need to address the substance of this argument.

IV. Conclusion

Plaintiff failed to show how an inquiry into the *nature* and extent of his relationship with Wilde would affect a substantial right. Therefore, we dismiss this portion of plaintiff's appeal as interlocutory. We also find that the trial court did not abuse its discretion in determining that the unnamed individual's report and materials were not protected by the work product doctrine.

Dismissed in part, affirmed in part.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).