IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1077

Filed: 21 April 2015

JAMALE LAMONT RASBERRY,
Administrator of the Estate of
HENRY JUNIOR KORNEGAY,
Plaintiff,

v.

CURTIS BERNARD JACOBS,
NASH-FINCH COMPANY, and
GTL TRUCK LINES, INC.,
Nash Finch Company,
Defendants.

Martin County
No. 13 CVS 341

Appeal by Defendants from order entered 29 May 2014 by Judge Marvin K. Blount, III, in Martin County Superior Court. Heard in the Court of Appeals 18 February 2015.

Henson & Fuerst, PA, by Carmaletta L. Henson, for Plaintiff-appellee.

Young Moore and Henderson, P.A., by David M. Duke, Shannon S. Frankel, and David A. Senter, Jr., for Defendants-appellants.

DILLON, Judge.

This wrongful death action was commenced by Jamale Lamont Rasberry, administrator of the estate of Henry Junior Kornegay, ("Plaintiff"), against Curtis Bernard Jacobs, Nash-Finch Company, and GTL Truck Lines, Inc. ("Defendants").

Defendants appeal from a trial court's order granting Plaintiff's motion to compel the production of certain medical and pharmacy records of Defendant Jacobs. For the following reasons, we affirm trial court's order.

I. Background

On 19 November 2012, a tractor trailer driven by Defendant Jacobs and owned by Defendants Nash-Finch and/or GTL Truck Lines collided with a farm tractor being operated by decedent Henry Junior Kornegay on Highway 64 in Martin County, resulting in Mr. Kornegay's death. Following the accident, Defendant Jacobs was charged with driving while impaired from the use of drugs and careless and reckless driving, in violation of N.C. Gen. Stat. §§ 20-138.1 and 20-140.

In May 2013, Plaintiff filed this wrongful death action against Defendants. Defendants filed their answer, denying Plaintiff's claims, and raising, *inter alia*, the defense of sudden emergency.

Plaintiff filed his first set of interrogatories and requests for production of documents to Defendant Jacobs seeking, *inter alia*, his medical and pharmacy records going all the way back to November 2007, five years before the accident.

Defendant Jacobs served his responses to Plaintiff's request for discovery, generally objecting "to each Interrogatory and Request for Production to the extent it seeks information subject to the attorney-client, work-product, or any other applicable privilege or protection," and specifically objecting to Plaintiff's medical related discovery requests as being "vague, overly broad, unduly burdensome, and

not reasonably calculated to lead to discovery of admissible evidence" and calling "for the disclosure of confidential medical information."

Plaintiff filed a motion to compel seeking Defendant Jacobs' medical and pharmacy records. Defendants responded to Plaintiff's motion, making a number of arguments, including that the requested medical and pharmacy records were protected from disclosure based on the physician-patient privilege.

On 29 May 2014, following a hearing on Plaintiff's motion to compel, the trial court entered an order compelling Defendant Jacobs to produce his medical and pharmacy records from 19 November 2007 (five years before the accident) until 19 May 2013 (six months after the accident), subject to a confidentiality agreement. Defendants filed timely notice of appeal from this order.

II. Interlocutory Appeal

On appeal, Defendants contend that the trial court erred by entering a discovery order compelling Defendant Jacobs to produce his medical and pharmacy records. Defendants concede that "this is an appeal from an interlocutory order" but contend that it is otherwise appealable because it affects a substantial right that will be lost without appeal--the production of records protected by the physician-patient privilege.

Though "[g]enerally, an interlocutory order is not immediately appealable[,]" *Builders Mut. Ins. Co. v. Meeting Street Builders, LLC*, ___ N.C. App. ___ , ___ , 736 S.E.2d 197, 199 (2012), a party may immediately 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." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). Our Supreme Court has held that a ruling on an interlocutory discovery order affects a substantial right when the assertion of a statutory privilege directly relates to the matter to be disclosed under the order. *Sharpe v. Worland*, 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999).

Here, Defendants argue that they do not have to produce Defendant Jacobs' medical and pharmacy records based on the physician-patient privilege under N.C. Gen. Stat. § 8-53 through § 8-53.13. Accordingly, we have jurisdiction to consider Defendants' arguments on appeal that the trial court's order violates the physician-patient privilege.

III. Analysis

"[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 (2001). "To demonstrate an abuse of discretion, the appellant 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), *affirmed per curiam*, 360 N.C. 356, 625 S.E.2d 779 (2006).

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 (2013) (emphasis added).

In the present case, Defendants argue that the trial court erred by compelling Defendant Jacobs to produce his medical and pharmacy records, as they are protected by the physician-patient privilege. Indeed, by enacting N.C. Gen. Stat. § 8-53, our General Assembly created a privilege for certain information acquired by a physician in attending a patient. *See Sims v. Charlotte Mut. Ins. Co.*, 257 N.C. 32, 36, 125 S.E.2d 326, 329 (1962) (stating that the physician-patient privilege was not recognized at common law, but is purely statutory). Our Supreme Court has held that this privilege is not absolute, but rather the privilege is qualified, *id.* at 38, 125 S.E.2d at 331; belongs to the patient, *id.*; and may be waived, *Crist v. Moffatt*, 326 N.C. 326, 331, 389 S.E.2d 41, 44 (1990).

G.S. 8-53 further provides that, even where the privilege has *not* been waived, a trial judge may "compel disclosure [of privileged information] if *in his opinion* disclosure is necessary to a proper administration of justice[.]" N.C. Gen. Stat. § 8-53 (2013) (emphasis added). Our Supreme Court has construed this provision as affording "the trial judges wide discretion in determining what is necessary for a

proper administration of justice." *State v. Efird*, 309 N.C. 802, 806, 309 S.E.2d 228, 231 (1983).

In ordering Defendant Jacobs to produce his medical and pharmacy records for a 5 ½ year period, the trial court determined that "in its discretion" the production of these records "is necessary so that the truth may be known and for the proper administration of justice." The record clearly establishes that a key factual issue in this case is whether Defendant Jacobs was under the influence of a drug at the time the tractor trailer he was driving collided with Mr. Kornegay, the decedent. For instance, in the complaint Plaintiff alleged that at the time of the collision, Defendant Jacobs was "driving erratically . . . traveling on and off the roadway" and was "impaired from the use of drugs[.]" Documentary exhibits produced as part of discovery state that an eyewitness observed the tractor trailer swerving in and out of lanes before the wreck; that following the accident Defendant Jacobs was charged with driving while impaired, a charge which Defendants challenged on the grounds that the substance that Defendant Jacobs was taking was Lorazepam; and that Defendant Jacobs was under the instructions of his physician that the prescribed dosage would not affect his ability to safely operate a motor vehicle. As part of their discovery responses, Defendant Jacobs admitted that "[m]y prescription bottle of Lorazepam was in the truck at the time of the incident[,]" and Defendants produced correspondence from Defendant Jacobs' physician assistant stating that "Mr. Jacobs experienced no adverse effects from the Lorazepam 1 mg, only therapeutic benefit. It

was safe for him to operate a motor vehicle while taking the Lorazepam 1 mg." Accordingly, we do not believe it was an abuse of discretion for the trial court to conclude that without Defendant Jacobs' medical and pharmacy records the truth could not be determined regarding his usage of prescription medications on the day in question, and, specifically, whether these medications had impairing effects on Defendant Jacobs causing him to breach his duty of care while operating the tractor-trailer.

Defendants argue that even if the trial court did not abuse its discretion in determining that certain medical and pharmacy records were required to be disclosed for the proper administration of justice, the trial court nonetheless abused its discretion by permitting discovery of *5 ½ years* of records. Specifically, Defendant contends that the trial court abused its discretion by not conducting an *in camera* review of the records to determine the relevance of each document, citing *Roadway Express, Inc. v. Hayes*, 178 N.C. App. 165, 167, 631 S.E.2d 41, 43 (2006). In *Roadway Express*, this Court held that the trial court did not abuse its discretion in conducting an *in camera* review of a party's medical records and ordering the production of certain records, determining that "disclosure [was] necessary to a proper administration of justice." While we agree that in many circumstances the better practice would be for the trial court to conduct an *in camera* review of a party's medical records to determine which of those records should be produced to the other party, our holding in *Roadway Express* does not *require* a trial court to conduct this

review. Rather, this Court has repeatedly held that whether to conduct an *in camera* review before ordering production is within the trial court's discretion. *See Lowd v. Reynolds*, 205 N.C. App. 208, 213-14, 695 S.E.2d 479, 483-84 (2010); *Midkiff v. Compton*, 204 N.C. App. 21, 35-36, 693 S.E.2d 172, 181-82 (2010). Here, we cannot say that the trial court acted with no consideration of Defendant Jacobs' interest in the privacy of his records by including in its order that the records be produced "subject to a Confidentiality Order" to be agreed upon by the parties.

Defendants further argue that compelling the production of *5 ½ years* of medical and pharmacy records constitutes an abuse of discretion because the claims only concern Defendant Jacobs' condition on the day of the accident. We note, however, that Plaintiff is also claiming punitive damages against Defendant Jacobs, alleging that his consumption of "an impairing substance" was a conscious and intentional disregard for the rights and safety of others, or otherwise amounted to willful and wanton conduct. *See* N.C. Gen. Stat. § 1D-15(a)(3) (2013). "Willful or wanton conduct" means "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." N.C. Gen. Stat. § 1D-5(7) (2013). In determining the amount of punitive damages the trier of fact may consider "[t]he reprehensibility of the defendant's motives and conduct[;]" "[t]he degree of the defendant's awareness of the probable consequences of its conduct[;]" "[t]he duration of the defendant's conduct[;]" and "[t]he existence and frequency of

any similar past conduct by the defendant." N.C. Gen. Stat. § 1D-35 (2013). Therefore, while another trial court may have chosen to exercise its discretion by entering an order more narrow in scope, we cannot say that it was an abuse of discretion for the trial court in this case to determine that Defendant Jacobs' medical and pharmacy records from 19 November 2007 to 19 May 2013 would be "necessary to a proper administration of justice[,]" as those records may be critical to prove whether Defendant Jacobs' actions were willful or wanton and, if found liable, in determining the amount of punitive damages against Defendant Jacobs.

Defendants make other arguments that by requiring "unfettered access to [5 ½] years of [Defendant] Jacobs' confidential and personal medical records," the order "is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence." However, we cannot address the merits of these arguments as we are compelled by *Hammond v. Saini*, ___ N.C. App. ___, ___, 748 S.E.2d 585, 588 (2013), *affirmed in part, modified in part, and remanded* by ___ N.C. ___, 766 S.E.2d 590 (2014), to conclude that we lack jurisdiction to consider them in this interlocutory appeal as they "do not invoke a recognized privilege or immunity" and Defendants make no specific argument how these arguments affect any substantial right. *Id.*

We note that Defendants argue that Defendant Jacobs did not waive his physician-patient privilege as Plaintiff asserts. However, we need not decide this issue as we have concluded that, assuming the records are still subject to the

statutory privilege, the trial court did not abuse its discretion in compelling the production of these records.

For the foregoing reasons, the trial court's order is

AFFIRMED.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).