IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1344

Filed: 5 April 2016

Wake County, No. 11 CVD 11288

THOMAS A. STOKES, III, Plaintiff,

v.

CATHERINE C. CRUMPTON (formerly Stokes), Defendant.

Appeal by Plaintiff from order entered on 7 August 2014 by Judge Anna E. Worley in District Court, Wake County. Heard in the Court of Appeals on 22 April 2015.

Shanahan Law Group, PLLC, by Kieran J. Shanahan, Christopher S. Battles, and Kenzie M. Rakes, for Plaintiff-appellant.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, K. Edward Greene, and Robert A. Ponton, Jr., for Defendant-appellee.

STROUD, Judge.

Thomas A. Stokes, III ("Plaintiff") appeals from an order denying Plaintiff's motions seeking post-award discovery in an action resolved by voluntary arbitration under the Family Law Arbitration Act. We dismiss Plaintiff's appeal because Plaintiff has not demonstrated that this interlocutory order deprives him of a substantial right which will be jeopardized without review prior to a final determination on the merits of his motion to vacate the arbitration award and set aside the trial court's order confirming the arbitration award.

I. Background

Plaintiff and Catherine C. Crumpton ("Defendant") were married in June 1989 and separated in April 2011. Plaintiff filed an action in July 2011 seeking equitable distribution of the parties' marital assets and child support. Plaintiff and Defendant entered into a written agreement on 13 July 2011 to resolve the action through arbitration under North Carolina's Family Law Arbitration Act ("the arbitration agreement"). The trial court entered a Consent Order to Arbitrate Equitable Distribution and Child Support on 18 August 2011.

The arbitration agreement outlined the scope of pre-arbitration discovery. Plaintiff, through counsel, deposed Defendant as part of this pre-arbitration discovery. During Defendant's deposition, Defendant testified she was the C.E.O. and majority shareholder of Drug Safety Alliance, Inc. ("DSA"), a company that managed adverse event reporting for pharmaceutical, biotech, animal health, and over-the-counter dietary supplement companies. Defendant testified she had "no intention of selling" DSA at that time, although many people had contacted her who were interested in purchasing DSA. Defendant also testified she had commissioned an appraisal of DSA, which valued the company at less than $3,500,000.00. There appears to be no dispute that Defendant's interest in DSA was a marital asset.

Plaintiff and Defendant entered into an Equitable Distribution Arbitration Award by Consent on 18 May 2012 ("the equitable distribution agreement"). The

equitable distribution agreement provided, in part, that Defendant would pay Plaintiff $1,000,000.00 in a lump sum and then $650,000.00 over six years with interest. Moreover, in the event that Defendant sold her ownership interest in DSA, the entire balance owed to Plaintiff would become due. The trial court entered an Order and Judgment Confirming Equitable Distribution Arbitration Award by Consent on 18 May 2012.

Plaintiff filed a Verified Motion to Vacate Arbitration Award and Set Aside Order and Motion to Engage in Discovery on 26 November 2012. In the motion, Plaintiff alleged that "Defendant signed a Letter of Intent on [5 July] 2012 to sell [all] of the shares of DSA" to another company and that DSA was sold in August 2012 for $28,000,000.00. Plaintiff also alleged that Defendant was planning on selling DSA for this large sum during arbitration and that she fraudulently induced Plaintiff to accept a distribution of only $1,650,000.00 based on her prior representations about the company. Plaintiff and Defendant then filed a number of competing motions to compel discovery and motions for protective orders from discovery, respectively. In an order entered on 7 August 2014 ("the order"), the trial court concluded:

> 1. There is no pending action between Plaintiff and Defendant in which discovery may be propounded.[1]

[1] The dissent states that the trial court erred in concluding that "[t]here is no pending action between Plaintiff and Defendant in which discovery may be propounded" because Plaintiff's motion to vacate is pending. It is correct that Plaintiff's *motion* to vacate was pending, but the trial court concluded, and we agree, that the *action*—the arbitration of the parties' equitable distribution action—had concluded, and the pending motion was "not a claim within which discovery may be conducted."

> 2. Plaintiff's Verified Motion to Vacate Arbitration Award is not a claim within which discovery may be conducted. Plaintiff's [request for] written discovery is therefore inappropriate.
>
> 3. All of Plaintiff's Motions to Compel [Discovery] . . . should be denied.

Plaintiff appeals.

II. Interlocutory Appeal

Plaintiff appeals from the order of the trial court denying his motions seeking post-award discovery. The order does not rule on Plaintiff's motion to vacate the arbitration award. Accordingly, Plaintiff concedes that the order is interlocutory. *See Bullard v. Tall House Bldg. Co.*, 196 N.C. App. 627, 637, 676 S.E.2d 96, 103 (2009) ("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.") (citation omitted). Interlocutory orders are generally not immediately appealable. *Id.*, 676 S.E.2d at 103.

> Nonetheless, in two instances a party is permitted to appeal interlocutory orders. First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment [pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (2013)] that there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant

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The parties had already conducted discovery during the arbitration, which was governed by the arbitration agreement and N.C. Gen. Stat. § 50-49 (2011).

> of a substantial right which would be jeopardized absent a review prior to a final determination on the merits [pursuant to N.C. Gen. Stat. § 7A-27(b)(3)(a) (2015) and N.C. Gen. Stat. § 1-277(a) (2015)]. Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds.

Id., 676 S.E.2d at 103 (citation omitted). The trial court did not certify this order as immediately appealable under Rule 54(b). On appeal, Plaintiff argues only that this Court should review his appeal because the order of the trial court "affect[ed] a substantial right."

As a preliminary matter, for actions litigated under the Family Law Arbitration Act ("FLAA"), N.C. Gen. Stat. § 50-60(a) (2015) provides that

> An appeal may be based on failure to comply with the procedural aspects of this Article. An appeal may be taken from any of the following:
>
> (1) An order denying an application to compel arbitration made under G.S. 50-43;
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> (2) An order granting an application to stay arbitration made under G.S. 50-43(b);
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> (3) An order confirming or denying confirmation of an award;
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> (4) An order modifying or correcting an award;
>
> (5) An order vacating an award without directing a rehearing; or
>
> (6) A judgment entered pursuant to provisions of this Article.

Cf. Bullard, 196 N.C. App. at 638, 676 S.E.2d at 103 (noting similar limitations under N.C. Gen. Stat. § 1-569.28(a) (2005), which defines the appeals that may be taken in actions litigated under the Revised Uniform Arbitration Act ("RUAA")). Plaintiff does not identify any way in which the order on appeal raises any issue of a "failure to comply with the procedural aspects of" Chapter 50, Article 3, nor is it one of the rulings specifically listed under N.C. Gen. Stat. § 50-60(a). *See* N.C. Gen. Stat. § 50-60(a).

It would seem logically inconsistent that an order, which itself is non-appealable under the substantive statute that governs appeals of such orders could be made appealable under another statute merely because it is interlocutory. The dissent cites *Bullard* for the proposition that "even when a specific order is not listed as one of the types of appeals permitted under the FLAA, an appeal of an interlocutory order may still be permitted if an appellant can demonstrate that absent immediate review, he would be deprived of a substantial right." *See Bullard*, 196 N.C. App. at 637, 676 S.E.2d at 103. But in *Bullard*, this Court held that "the list enumerated in N.C. Gen. Stat. § 1-569.28(a) includes the *only* possible routes for appeal under the Revised Uniform Arbitration Act":

> Therefore, we conclude that the list enumerated in N.C. Gen. Stat. § 1-569.28(a) includes the *only* possible routes for appeal under the Revised Uniform Arbitration Act. Furthermore, the statute reads that "an appeal *may* be taken . . . ." *See* N.C. Gen. Stat. § 1-569.28(a) (emphasis

> added). "Ordinarily when the word 'may' is used in a statute, it will be construed as permissive and not mandatory." *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) (citations omitted). Thus, the orders and judgment enumerated in N.C. Gen. Stat. § 1-569.28(a) are the only situations where an appeal could possibly be taken under the RUAA, though one is not required. [*See New Hanover Child Support Enforcement v. Rains*, 193 N.C. App. 208, 212, 666 S.E.2d 800, 803 (2008)]; *In re Hardy* at 97, 240 S.E.2d at 372.

Id. at 635, 676 S.E.2d at 102 (emphasis added, citation and brackets omitted, and ellipsis in original).

The statutory language of the FLAA and the RUAA are substantively very similar and we interpret both the same way. *See* N.C. Gen. Stat. §§ 1-569.28(a), 50-60(a) (2015). In *Bullard*, we engaged in a substantial right analysis *only after* we had determined that the appellant had appealed "from an order which has *both* currently appealable and non-appealable issues" under the RUAA. *Id.* at 637, 676 S.E.2d at 103 (emphasis added). The other two cases on which the dissent relies also do not support the dissent's position. *See The Bluffs v. Wysocki*, 68 N.C. App. 284, 285-86, 314 S.E.2d 291, 292-93 (1984); *Laws v. Horizon Housing Inc.*, 137 N.C. App. 770, 771, 529 S.E.2d 695, 696-97 (2000).

We also disagree with the dissent's statement that N.C. Gen. Stat. § 50-60(a)(6) is a "catch-all" provision. Subsection (6) refers to "[a] judgment entered pursuant to provisions of this Article." N.C. Gen. Stat. § 50-60(a)(6). The dissent emphasizes that the RUAA refers to "[a] *final* judgment entered pursuant to this Article." *See* N.C.

Gen. Stat. § 1-569.28(a)(6) (emphasis added). The dissent argues that the absence of the word "final" in N.C. Gen. Stat. § 50-60(a)(6) indicates that a party can appeal *any* order so long as it affects a substantial right. But this slight difference in language is immaterial in this case. The order on appeal is neither a "judgment" nor final. Although the terms "order" and "judgment" are sometimes used interchangeably, the term "judgment" normally refers to a court's final ruling. *See Bullard*, 196 N.C. App. at 637, 676 S.E.2d at 103 ("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. 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.") (emphasis added).

In addition, the language, "[a] judgment entered *pursuant to provisions of this Article*[,]" suggests that we construe the term "judgment" *in pari materia* and identify other uses of the term "judgment" in the FLAA. *See* N.C. Gen. Stat. § 50-60(a)(6) (emphasis added). Only two other provisions in the FLAA use the term "judgment": N.C. Gen. Stat. § 50-57 (2015), which is entitled "Orders or judgments on award" and N.C. Gen. Stat. § 50-59 (2015). N.C. Gen. Stat. § 50-57 provides in pertinent part: "Upon granting an order confirming, modifying, or correcting an award, an order or judgment shall be entered in conformity with the order and docketed and enforced as any other order or judgment." N.C. Gen. Stat. § 50-57(a). N.C. Gen. Stat. § 50-59

provides in pertinent part that "[m]aking an agreement . . . confers jurisdiction on the court to enforce the agreement under this Article and to enter judgment on an award under the agreement." N.C. Gen. Stat. § 50-59(a). In both instances, "judgment" refers to a court's final ruling after confirmation, modification, or correction of the arbitration award. Accordingly, a "judgment entered pursuant to provisions of this Article" is a final judgment, similar to the RUAA's provision in N.C. Gen. Stat. § 1-569.28(a)(6). *See* N.C. Gen. Stat. § 50-60(a). The interlocutory order on appeal here is not a judgment.

Despite the clear language of the FLAA, Plaintiff seeks to rely upon N.C. Gen. Stat. § 7A-27(b)(3)(a) which provides that an "appeal lies of right directly to the Court of Appeals . . . . [f]rom *any* interlocutory order or judgment of a superior court or district court in a civil action or proceeding that . . . . [a]ffects a substantial right." (Emphasis added.) Plaintiff argues that "an appellant may appeal either under N.C. Gen. Stat. § 50-60, if the type of order is specifically listed, or under N.C. Gen. Stat. § 7A-27(b)(3)(a), if the order affects a substantial right." Even assuming, without deciding, that Plaintiff may seek to have the order reviewed under N.C. Gen. Stat. § 7A-27(b)(3)(a), Plaintiff has failed to demonstrate that he would be deprived of a substantial right without appellate review of the order before a final judgment has been entered.

Generally, the interlocutory denial of a motion to compel discovery "affect[s] a substantial right and is appealable" only when

> the desired discovery would not have delayed trial or have caused the opposing party any unreasonable annoyance, embarrassment, oppression or undue burden or expense, and if the information desired is highly material to a determination of the critical question to be resolved in the case[.]

Dworsky v. Insurance Co., 49 N.C. App. 446, 447-48, 271 S.E.2d 522, 523 (1980). In addition, "orders regarding discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion." *Id.* at 448, 271 S.E.2d at 523.

Plaintiff contends that his "discovery requests [sought] 'highly material' information to help Plaintiff establish . . . that the arbitration award was procured by a multi-million dollar fraud[,]" and that the order denying him post-award discovery "foreclose[d] Plaintiff's ability to meaningfully prosecute" his motion to vacate the arbitration award. (Portion of original in caps.) In support of this contention, Plaintiff directs this Court to *Fashion Exhibitors* and *William C. Vick Construction Co.*, both of which stand for the proposition that "parties to [an] arbitration may depose the *arbitrators* relative to [their alleged] misconduct[] and that such depositions are admissible in a proceeding [arising from a motion] to vacate an award[,]" but only when "an objective basis exists for a reasonable belief" that the arbitrators engaged in misconduct during arbitration. *See Fashion Exhibitors v.*

Gunter, 291 N.C. 208, 219, 230 S.E.2d 380, 388 (1976) (emphasis added); *William C. Vick Construction Co. v. N.C. Farm Bureau Federation*, 123 N.C. App. 97, 102, 472 S.E.2d 346, 349, *disc. review denied*, 344 N.C. 739, 478 S.E.2d 14 (1996). Without addressing whether the holdings in *Fashion Exhibitors* and *William C. Vick Construction Co.* might extend to allow post-award discovery in cases where one of the *parties* to the arbitration allegedly engaged in misconduct, we believe these cases are distinguishable from this case.

Specifically, the parties who lost at arbitration in *Fashion Exhibitors* and *William C. Vick Construction Co.* identified specific, "objective" evidence of misconduct *prior* to seeking post-award discovery as part of a motion to vacate an arbitration award. *Fashion Exhibitors*, 291 N.C. at 219, 230 S.E.2d at 388; *William C. Vick Construction Co.*, 123 N.C. App. at 99, 472 S.E.2d at 347. In *Fashion Exhibitors*, the parties were engaged in a commercial property lease dispute. *Fashion Exhibitors*, 291 N.C. at 209, 230 S.E.2d at 382. After the litigants were notified of the arbitrators' final decision, the losing parties noticed there was an "obvious [mathematical] inconsistency [between] the award [and] the evidence presented *at the hearing*." *Id.* at 219, 230 S.E.2d at 388 (emphasis added). They deposed the arbitrators and confirmed that the inconsistency occurred because the arbitrators had conducted their own investigation into the matter before them. *See id.*, 230 S.E.2d at 388. In *William C. Vick Construction Co.*, the losing party learned, after an

arbitration award had been entered, that the arbitrator "had been indicted for racketeering, mail fraud, bank fraud, and impeding the function of a United States government agency" and also that the arbitrator had "undisclosed relationships" with counsel for the other party in the arbitration. *William C. Vick Construction Co.*, 123 N.C. App. at 99, 472 S.E.2d at 347. A subsequent deposition of the arbitrator confirmed that the arbitrator had "significant business relationships and friendships" with counsel for the other party. *Id.* at 101-02, 472 S.E.2d at 348-49.

Here, Plaintiff and Defendant entered into the equitable distribution agreement in May 2012, in which Plaintiff agreed, in part, to a cash distribution of approximately $1,650,000.00. Prior to entering into this agreement, Defendant had DSA appraised for less than $3,500,000.00 and represented that she did not have specific plans to sell DSA. Less than two months after the award was entered, Defendant allegedly signed a letter of intent to sell DSA, and DSA was then sold for $28,000,000.00 a month after that. Although Plaintiff finds this sequence of events suspicious, he has not directed this Court to any specific, "objective" evidence of misconduct by Defendant that would necessitate post-award discovery. *See id.* at 102, 472 S.E.2d at 349; *Fashion Exhibitors*, 291 N.C. at 219, 230 S.E.2d at 388. In essence, Plaintiff believes that he "smells smoke," and he wants the courts to help him see if there is a fire. This is exactly the kind of "fishing expedition" expressly prohibited by *Fashion Exhibitors*. *See Fashion Exhibitors*, 291 N.C. at 216, 230

S.E.2d at 386 ("The requirement of an objective basis of misconduct . . . reflects the court's concern that 'fishing expeditions' might be encouraged without the objective evidence requirement.") (citation omitted).

Moreover, even if Plaintiff were properly positioned to engage in post-award discovery, Plaintiff has not articulated in his brief how he would be prejudiced by waiting until *after* the trial court entered a final judgment to appeal the trial court's conclusion of law that his motion to vacate the arbitration award was "not a claim within which discovery may be conducted." *See Bullard*, 196 N.C. App. at 637, 676 S.E.2d at 103 ("[An] order deprives the appellant of a substantial right [when that right] would be jeopardized absent a review prior to a final determination on the merits.") (citation omitted). Accordingly, Plaintiff's interlocutory appeal is dismissed.

Although we dismiss the appeal as interlocutory, we stress that this opinion should not be construed as having any effect whatsoever upon the merits of Plaintiff's motion to vacate, which has yet to be decided by the trial court. The dissent appears to address the merits of the underlying motion to vacate by its extensive discussion of the evidence and in expressing concern that "[u]ntil plaintiff is permitted the ability to engage in the limited discovery he requests, plaintiff will not be able to establish the grounds that the award was procured by corruption, fraud, or other undue means to support vacating the award." (Citation and quotation marks omitted.) The trial court's ruling upon the discovery motion was discretionary, and

even if another judge may have ruled differently, we find no abuse of discretion. On the substantive issues raised by Plaintiff's motion to vacate, we express no opinion since it is still pending and is not before us on appeal.

DISMISSED.

Judge TYSON concurs.

Judge CALABRIA dissents.

CALABRIA, Judge, dissenting.

Although the majority correctly cites *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 271 S.E.2d 522 (1980) regarding the substantial right justifying immediate appeal of an interlocutory order denying discovery, I do not believe the majority correctly applies the law to the facts of this case. Plaintiff has demonstrated he would be deprived of the substantial right contemplated by *Dworsky* sufficient to justify immediate review. Alternatively, I would allow plaintiff's petition for a *writ of certiorari* to address his appeal on the merits. Either way, the trial court erred by concluding there is no pending action within which discovery may be propounded and abused its discretion by denying plaintiff's limited discovery requests. The trial court's ruling should be reversed and this case should be remanded. For these reasons, I respectfully dissent.

I. The Order's Appealability

The majority correctly states that pursuant to the Family Law Arbitration Act ("FLAA"), there is no statutory right to appeal from an order or judgment denying discovery, *see* N.C. Gen. Stat. § 50-60(a) (2015), and that a common canon of statutory construction is that statutes of general application yield to statutes of more specific application. However, the catch-all language of FLAA's subsection (a)(6) provides plaintiff a route to appeal this interlocutory order. *See* N.C. Gen. Stat. § 50-60(a)(6) (permitting appeal from "[a] judgment entered pursuant to provisions of this Article"). Notably absent from that provision is the requirement under the North Carolina

Revised Uniform Arbitration Act ("RUAA") that this be a "final" judgment. *See* N.C. Gen. Stat. § 1-569.28(a)(6) (2015). Although the majority acknowledges that "order" and "judgment" are often used interchangeably, *see, e.g.*, *Bullard v. Tall House Bldg. Co.*, 196 N.C. App. 627, 636, 676 S.E.2d 96, 102 (2009) (interpreting the RUAA and concluding that "[a]s the order before us directs further arbitration, it is not a final judgment"), it asserts that judgments normally refer to a court's final ruling. Although this may be true, the majority's reasoning is conclusory: citing to a case for authority which quotes the familiar distinction made between a "*final* judgment" and an "*interlocutory* order," *see Veazey v. City of Durham*, 231 N.C. 357, 361, 57 S.E.2d 377, 381 (1950) (emphases added), begs the question of whether judgments are typically final. That N.C. Gen. Stat. § 7A-27(b)(3)(a) (emphasis added) explicitly provides for appeal from "any *interlocutory judgment* or order" seems to indicate that even judgments may be interlocutory. The legislature acknowledged by statute that in drafting the FLAA, it considered certain provisions of the RUAA. *See* N.C. Gen. Stat. § 50-62(a) ("Certain provisions of this Article have been adapted from the Uniform Arbitration Act formerly in force in this State, the [RUAA] in force in this State, the North Carolina International Commercial Arbitration and Conciliation Act, and Chapters 50, 50A, 50B, 51, 52, and 52C of the General Statutes. This Article shall be construed to effect its general purpose to make uniform provisions of these Acts and Chapters[.]"). However, the majority appears to interpret the legislature's

decision to exclude the term "final" from the FLAA, in contradiction to the RUAA, as evidence the legislature intended to include it.

Assuming that the legislature purposefully excluded "final," as the six subsections governing appeals pursuant to the RUAA and FLAA are identical save for this lone difference, subsection (c) provides that "[t]he appeal shall be taken in the manner and *to the same extent* as from orders or judgments in a civil action." N.C. Gen. Stat. § 50-60(c) (emphasis added). N.C. Gen. Stat. § 7A-27(b)(3)(a), which provides for the extent of appeals in civil actions, permits a plaintiff the right to appeal an interlocutory order or judgment that affects a substantial right. *Id.* (permitting appeal from "*any* interlocutory order or judgment of a . . . district court in a civil action or proceeding that . . . [a]ffects a substantial right") (emphasis added).

Furthermore, this Court has considered whether an interlocutory order would deprive an appellant of a substantial right, even where there was no statutory right of appeal from arbitration. *See Bullard*, 196 N.C. App. at 637, 676 S.E.2d at 103 (engaging in a substantial right analysis of an interlocutory order specifically noted by this Court as nonappealable pursuant to the governing arbitration statute); *see also* Laws v. Horizon Hous., Inc., 137 N.C. App. 770, 771, 529 S.E.2d 695, 696 (2000) (considering whether appeal from an order not listed in the governing arbitration statute affects a substantial right)*; Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 284, 314 S.E.2d 291, 292 (1984) (same). Therefore, even when a specific order or judgment is

not listed as one of the types of appeal permitted under the FLAA, an appeal of an interlocutory order or judgment may still be permitted if an appellant can demonstrate that absent immediate review, he would be deprived of a substantial right.

II. Substantial Right Implicated

Orders denying or allowing discovery are generally interlocutory, and therefore, typically not appealable unless they affect a substantial right which would be lost if the ruling were not reviewed before final judgment. *Dworsky*, 49 N.C. App. at 447-48, 271 S.E.2d at 523 (citation omitted). Whether an interlocutory ruling affects a substantial right requires consideration of the facts of the case and the procedural context of the order on appeal. *Dep't of Transp. v. Rowe*, 351 N.C. 172, 175, 521 S.E.2d 707, 709 (1999) (citation omitted). A party has a substantial right justifying immediate appeal of an order denying discovery if

> the desired discovery would not have delayed trial or have caused the opposing party any unreasonable annoyance, embarrassment, oppression or undue burden or expense, and if the information desired is highly material to a determination of the critical question to be resolved in the case[.]

Dworsky, 49 N.C. App. at 447-48, 271 S.E.2d at 523; *see also Tennessee-Carolina Transportation Inc. v. Strick Corp.*, 291 N.C. 618, 629, 231 S.E.2d 597, 603 (1977) (holding that a pretrial order denying discovery of evidence "highly material to the determination of the critical question to be resolved" in the pending action deprived

appellant of a substantial right sufficient to justify immediate appeal); *Starmount Co. v. City of Greensboro*, 41 N.C. App. 591, 593, 255 S.E.2d 267, 268 (1979) (dismissing appeal of interlocutory order denying discovery in light of *Tennessee-Carolina Transportation*, because "the information denied the defendant in the case . . . [was not] crucial to its defense").

The majority does not attempt to distinguish this case from *Tennessee-Carolina Transportation* or *Dworsky* or even address those cases at all. Instead, the majority focuses its discussion on distinguishing two cases—*Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 291 N.C. 208, 219, 230 S.E.2d 380, 388 (1976) and *William C. Vick Constr. Co. v. N.C. Farm Bureau Fed'n*, 123 N.C. App. 97, 472 S.E.2d 346, *disc. review denied*, 344 N.C. 739, 478 S.E.2d 14 (1996)—that held the trial court was permitted to grant a party to an arbitration post-award discovery based on potential arbitrator misconduct, cases which plaintiff advanced to support his position that "the [d]istrict [c]ourt clearly *has authority to allow discovery* in the context of Plaintiff's Motion to Vacate." (emphasis added).

In light of the applicability of *Tennessee-Carolina Transportation* and *Dworsky* to plaintiff's appeal, I find it appropriate to address these cases. The substantial right claimed in the instant case originated from *Tennessee-Carolina Transportation*. As this Court recently explained:

> In *Tennessee-Carolina Transportation*, the defendant sold 150 trailers to the plaintiff, and the plaintiff subsequently

> sued the defendant for breach of an implied warranty of fitness based upon allegations that certain metal in the trailers did not "measure up to the proper degree of hardness." Prior to trial, the defendant appealed from the trial court's discovery order prohibiting the defendant from taking the deposition of an out-of-state expert witness who, at the plaintiff's request, had conducted tests on some of the trailers to determine the hardness of the relevant metal.
>
> The Supreme Court held that the appealed order affected a substantial right of the defendant because the order "*effectively preclude[d] the defendant from introducing evidence* of the 'readings' concerning the hardness of the metal obtained by the tests which [the expert] made"—evidence that was "*highly material to the determination of the critical question to be resolved*" at trial. The Court further noted that nothing in the record indicated that the taking of the expert's deposition would have delayed the trial or would have caused the plaintiff or the expert any unreasonable annoyance, embarrassment, oppression, or undue burden or expense.

Britt v. Cusick, 231 N.C. App. 528, 531-32, 753 S.E.2d 351, 354 (2014) (internal citations omitted) (emphasis added). In addition, the *Tennessee-Carolina Transportation* Court reasoned:

> It would be highly impractical to proceed with the third trial of this complex action and then let the defendant, if unsuccessful again before the jury, appeal for the reason that it was denied the right to offer evidence of the "readings" obtained by [the expert's] testing of a now undetermined number of the trailers. *The sensible thing to do is to determine this question* before the parties, their witnesses and the trial court are put to the expense and time consuming effort of a third trial on the merits.

Tennessee-Carolina Transportation, 291 N.C. at 625, 231 S.E.2d at 601-02 (emphasis added).

In *Dworsky*, the plaintiffs sought to recover hospital and medical expenses that the defendant-insurer refused to pay under an insurance policy. The plaintiffs appealed from the trial court's pretrial order denying a discovery request to inspect and copy the entire contents of a file maintained by the defendant in connection with the plaintiffs' claim under the insurance policy. This Court held that the pretrial order did not affect a substantial right when the plaintiffs had failed to identify, and the record failed to disclose, "what relevant and material information . . . sought [was] so crucial to the outcome of [the] case that it would deprive them of a substantial right and thus justify an immediate appeal." 49 N.C. App. at 448, 271 S.E.2d at 524.

Tennessee-Carolina Transportation and *Dworsky* illustrate the difference between a discovery order that affects a substantial right sufficient to justify immediate appeal and one that does not. *See, e.g.*, *Britt*, 231 N.C. App. at 532, 753 S.E.2d at 355 (distinguishing *Tennessee-Carolina Transportation* because the discovery order appealed from merely regulated the manner of discovery, but did not prohibit it, and therefore did not "effectively preclude[] the defendant[s] from introducing evidence" that was "highly material to the determination of the critical question to be resolved"); *Harbour Point Homeowners' Ass'n, Inc. v. DJF Enters., Inc.*, 206 N.C. App. 152, 161, 697 S.E.2d 439, 446 (2010) (distinguishing *Dworsky* because

discovery order *granted* discovery and because the plaintiff failed to show the two-page memo in question was "highly material" to the "critical question to be resolved in the case"); *James v. Bledsoe*, 198 N.C. App. 339, 345-46, 679 S.E.2d 494, 498 (2009) (distinguishing *Dworsky* because the plaintiff failed to show the discovery sought was "highly material to a determination of whether [the defendants] published false statements with actual malice"). Unlike the cases seeking discovery of evidence that is not highly material to a critical issue in the pending action, the discovery order in the instant case precluded plaintiff from introducing evidence related to the communications, negotiations, and agreements to sell DSA to United Drug, evidence that is "highly material" to whether the arbitration award was "procured by corruption, fraud, or other undue means." N.C. Gen. Stat. § 50-54(a)(1). Plaintiff has sufficiently demonstrated that this discovery order affects the substantial right contemplated by *Tennessee-Carolina Transportation* and *Dworsky*.

In the instant case, the trial court concluded "[t]here is no pending action between Plaintiff and Defendant in which discovery may be propounded[.]" However, plaintiff's Motion to Vacate Arbitration Award and Set Aside Order based on allegations that the arbitration award was procured by fraud is pending. The "relevant and material information" plaintiff has identified would help the court to determine whether defendant concealed and omitted material facts regarding the eventual sale of DSA to United Drug. More specifically, the information would

enlighten the court's inquiry as to "whether Defendant had begun negotiations with United Drug prior to settling Plaintiff's equitable distribution claim, and whether she withheld information supporting a higher valuation of her interest in DSA than what the parties had stipulated." The majority inaccurately describes plaintiff's investigation as a "fishing exhibition." This is an unfair characterization because plaintiff's discovery request is narrowly focused with a stated objective. *See Dworsky*, 49 N.C. App. at 448, 271 S.E.2d at 524 (noting that while some relevant and material evidence may be contained in the entire contents of the file the plaintiffs sought, "plaintiffs are not entitled to a fishing expedition to locate it").

Moreover, "[a]ppellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment." *City of Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951) (citations omitted). The purpose of the rules limiting immediate appeal of interlocutory orders is "to prevent . . . appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard." *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980) (citations omitted).

In the instant case, dismissing plaintiff's appeal as interlocutory serves only to delay the administration of justice with regard to the pending action, as well as to burden both parties and the courts with unnecessary expense. The concern that the

whole case is not presented for appeal is nonexistent when plaintiff is effectively precluded from discovering and introducing the "*clear* evidence[,]" *Pinnacle Grp., Inc. v. Shrader*, 105 N.C. App. 168, 171, 412 S.E.2d 117, 120 (1992), required to support the grounds under which he seeks to vacate the arbitration award. *See* N.C. Gen. Stat. § 50-54(a)(1) (providing for vacation of an arbitration award "procured by corruption, fraud, or other undue means").

The practical reasoning of the *Tennessee-Carolina Transportation* Court is particularly instructive: "It would be highly impractical" to proceed with plaintiff's motion to vacate without addressing the discovery order and let him, if unsuccessful, appeal again for the reason that he was denied his right to discover evidence regarding the timing of the sale. "The sensible thing to do is to determine this question" now. *Tennessee-Carolina Transportation*, 291 N.C. at 629, 231 S.E.2d at 603-04. Plaintiff's appeal should proceed.

III. Discovery Order

The majority correctly states that this Court reviews a trial court's discovery ruling under an abuse of discretion standard. *Dworsky*, 49 N.C. App. at 448, 271 S.E.2d at 523. "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, 617 S.E.2d 40, 45 (2005) (internal citations omitted). The majority

also correctly cites to *Fashion Exhibitors* and *William C. Vick Construction Co*. for the proposition that when "an objective basis exists for a reasonable belief" of arbitrator misconduct, parties may depose arbitrators as to that alleged misconduct and such evidence is admissible in a proceeding to vacate an award. However, I disagree with the majority's discussion and application of these cases to the instant case.

The majority determined that the trial court properly denied discovery by conflating "an objective *basis* . . . for a *reasonable belief*" with "specific, 'objective' evidence" of misconduct. It is a misinterpretation of significant magnitude to apply so broadly a holding that appears to be carefully narrowed. *See Fashion Exhibitors*, 291 N.C. at 219, 230 S.E.2d at 388 ("[W]e hold that *where an objective basis exists for a reasonable belief that misconduct has occurred*, the parties to the arbitration may depose the arbitrators relative to that misconduct[.]") (emphasis added). Discovery yields specific, objective evidence. Since "an objective basis . . . for a reasonable belief" precedes the "specific, 'objective' evidence" sought to be discovered, I do not believe the requirement under *Fashion Exhibitors* to show an "objective basis . . . for a reasonable belief [of misconduct]" equates with the majority's requirement to "identify specific, 'objective' evidence of misconduct."

Furthermore, I believe the holdings of these cases should extend beyond arbitrator misconduct and apply to the conduct of a party. The logical extension of

the principle promulgated by *Fashion Exhibitors* is that if post-award discovery may be propounded to uncover evidence of arbitrator misconduct, it may also be propounded to uncover evidence that an award was "procured by corruption, fraud, or other undue means" of a party, as both are statutorily recognized as grounds to vacate an arbitration award. *Compare* N.C. Gen. Stat. § 1-569.23(a)(1) (specifying grounds to vacate under the RUAA), *with* N.C. Gen. Stat. § 50-54(a)(1) (specifying identical grounds to vacate under the FLAA). The majority's interpretation might effectively bar post-award discovery—discovery based on an "objective *basis* for a *reasonable belief*" of misconduct that is sought to identify the specific, objective evidence of misconduct required to vacate an arbitration award—unless the moving party can somehow first identify the specific, objective evidence of misconduct it seeks to discover. Declining to apply *Fashion Exhibitors* to the instant case, "would deprive the aggrieved party of its most effective means of ascertaining and proving the alleged misconduct." *Fashion Exhibitors*, 291 N.C. at 219, 230 S.E.2d at 388 (emphasis added).

IV. Specific, Objective Evidence of Misconduct

Even if *Fashion Exhibitors* and *William C. Vick Construction Co.* stand for the principle that the majority concludes—that a party must first identify "specific, 'objective' evidence of misconduct *prior* to seeking post-award discovery as part of a

motion to vacate an arbitration award"—I conclude that plaintiff has carried his burden.

Plaintiff presented the following evidence: The trial court entered the Consent Order to Arbitrate Equitable Distribution and Child Support on 18 August 2011. The parties disagreed for months about the value of defendant's shares of stock in DSA. Both parties retained business appraisers to arrive at an agreeable valuation of the stock. Plaintiff's expert, A.E. Strange, based his valuation of defendant's shares with the understanding, based on his requests for the production of documents and interviews with defendant, that there were no written or oral offers to purchase DSA and defendant had no intent to sell any or all of DSA. Strange explained (emphasis added): "Information with respect to any written or oral offers to purchase DSA, or any plans to sell all or part of DSA, would have been material to my final valuation and conclusions, as information regarding a sale, potential sale, or plans to sell, is *critical* to any business valuation." In April 2012, plaintiff and defendant entered into a pre-arbitration agreement, which was submitted to the arbitrator in advance of the arbitration proceeding to settle equitable distribution. In this agreement, defendant contended her value of shares of stock in DSA ranged from $3,340,000 to $3,934,930, and plaintiff contended defendant's value of stock ranged from $3,750,000 to $4,275,000.

At arbitration, the parties stipulated that the value of defendant's ownership interest in DSA was worth $3,485,000. The parties entered into an Equitable Distribution Arbitration Award by Consent on 18 May 2012, which was judicially confirmed that same day. Only 48 days later, on 5 July 2012, defendant allegedly signed a letter of intent to sell DSA to United Drug for $28,000,000.[2] Nevertheless, the majority concluded that "[a]lthough Plaintiff finds this sequence of events suspicious, he has not directed this Court to any specific, 'objective' evidence of misconduct by Defendant that would necessitate post-award discovery." I disagree.

Plaintiff directed this Court to a series of e-mails beginning in November 2011 between Doug Townsend and Liam Logue discussing the potential sale of DSA to United Drug, which provided in pertinent part:

> Liam,
>
> Cathy Stokes asked me to follow up with you regarding yours and United Drug's interest in strengthening its US-based pharmacovigilence services.
>
> My schedule the next couple of weeks is flexible. Are there a few times that would be convenient for you to discuss United Drug and DSA??
>
> Thanks,
>
> Doug Townsend
>
> . . . .

[2] Plaintiff indicates the exact ownership of defendant's shares at the time of sale was unknown but might have ranged between 67% to 86%.

Liam,

Enjoyed our discussion as well. I will see Cathy tomorrow to speak with her, but here's what we would like to do as next steps after executing a NDA [non-disclosure agreement]:

1. Conference Call. . . . The major agenda item for me would be to hear Mary Anne (and you as well) discuss thoughts about how DSA would strategically and operationally fit into the [United Drug] Alliance family. There is no "wrong" answer here. I am simply looking to see how Mary Anne thinks about acquisitions and operational integration which would include all thoughts about operating DSA as a standalone brand entity or simply merging its operations into the Alliance brand. . . .

. . . .

4. Delivery of Expression of Interest. Assuming the meeting in Durham does not derail interest levels, then we would ask that U-D/Alliance provide a written, non-binding expression of interest to DSA. . . .

From there, we can determine if there is good reason to consider moving forward with confirmatory diligence.

I will also reiterate that DSA is not necessarily for sale, but it is interested in examining unique strategic opportunities. I plan to recommend to Cathy that U-D/Alliance, based on a productive first discussion, appears to meet this test.

Let me know any additional thoughts you may have as I will be meeting with Cathy tomorrow afternoon.

Regards,

Doug

Plaintiff also directed this Court to Strange's affidavit, where Strange states that when he was retained by plaintiff in May 2011 to perform a valuation of defendant's ownership interest in DSA, Strange sent defendant a list of "Documents Requested for a Business Valuation," including "requests for copies of any buy-sell agreements and/or written offers to purchase or sell company stock," which defendant never produced nor later supplemented. Strange testified that when he interviewed defendant on 7 December 2011, he specifically asked defendant whether she had received any written or oral offers to purchase DSA over the past five years, and she responded that she had not. Strange stated that he asked defendant to describe any plans to sell all or part of DSA, and defendant replied that she had no such plans.

Plaintiff further directed this Court to defendant's testimony from depositions taken on 17 and 20 January 2012, which provided in pertinent part:

> Q. Have you discussed selling your business with anyone at any time?
>
> A. Yes.
>
> Q. Tell us about who that was with and the context of the conversation or offer or whatever it might be.
>
> . . . .
>
> A. There was no offer. We've had conversations throughout the course of DSA's existence as far as capital, structure, if it's buy-sell, if it's a merger opportunity, if it's a partnership opportunity. Whatever I can do best for the sake of the company is what I explore.

> Q. Tell me about all of those.
>
> A. The specifics of all of those?
>
> Q. Yes, ma'am.
>
> A. We have folks that send me emails every other day that I have no idea who they are or what they're all about, about opportunities to invest or to acquire or to partner, strategic alliances. I get those constantly and have been since we started.
>
> Q. Do you have those records?
>
> A. Most likely they'd be in my email.
>
> Q. Let's go back to the issue of selling. Has anyone ever made an offer to buy your business?
>
> A. No.
>
> . . . .
>
> Q. Doug Townsend. Have you discussed with him the subject of selling your business?
>
> A. Yes. I've discussed lots of topics with Doug.
>
> Q. And have you discussed any particular numbers that might be appropriate by which or for which you would sell your shares?
>
> A. No.
>
> Q. You've never discussed that?
>
> A. No.

It is undisputed that plaintiff's Motion to Vacate Arbitration Award and Set Aside Order is currently pending in district court. Indeed, the majority's decision to

dismiss this appeal as interlocutory necessarily passes on this question and answers it in the affirmative. However, the majority states that plaintiff's motion to vacate is merely a "motion" and not an "action." Although it is clearly a motion, its filing constituted an action. *See, e.g.*, *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 203 (2000) (labeling "motions to confirm, vacate, or modify [arbitration awards]" as "actions"); *see also* Black's Law Dictionary 83 (8th ed. 2004) ("An action has been defined to be an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong[.]" . . . "More accurately, it is . . . any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree . . . .").

The filing of this motion initiated an action, which is subject to the North Carolina Rules of Civil Procedure. Rule 26 provides that "[p]arties may obtain discovery regarding any matter . . . relevant to the subject matter involved in the pending action[.]" N.C. Gen. Stat. § 1A-1, Rule 26(b)(1). Discovery is necessary for plaintiff to carry his evidentiary burden to demonstrate grounds to vacate the arbitration award. "[T]he party seeking to vacate [an arbitration award] must shoulder the burden of proving the grounds for attacking its validity[,]" *Pinnacle Grp.*, 105 N.C. App. at 171, 412 S.E.2d at 120 (citation omitted), and "[o]nly *clear* evidence will justify vacating an award." *Id.*

The information that plaintiff seeks pertains to the timing and circumstances of defendant's sale of her interest in DSA to United Drug. The interrogatories that plaintiff requested provided, in pertinent part:

> 3. Identify the date on which Defendant or anyone affiliated with DSA (including any third parties acting on behalf of DSA) first had any contact with United about a potential merger with, or purchase or acquisition of DSA by United or any of its affiliates. Identify all individuals who were involved in such contact and describe the method of such contact (whether email, phone, letter, or otherwise).
>
> . . . .
>
> 4. Identify the date on which United first presented DSA or Defendant with any Non-Disclosure Agreement ("NDA") or equivalent document regarding a potential merger with, or purchase or acquisition of DSA by United or any of its affiliates, and identify the date such NDA or equivalent document was signed by either party.
>
> . . . .
>
> 5. Identify the date on which United first presented DSA or Defendant with any Term Sheet or equivalent document, in draft form or otherwise, regarding a potential merger with, or purchase or acquisition of DSA by United or any of its affiliates.
>
> . . . .
>
> 6. Identify the date or dates on which United or any of its affiliates presented DSA or Defendant with any offer or proposal to purchase, acquire, or merge with DSA. Conversely, identify the date or dates on which DSA or Defendant presented United or any of its affiliates with any offer to be sold to, acquired by, or merged with United or any of its affiliates.

. . . .

16. Identify the date on which you first discussed a potential merger with, or purchase or acquisition of DSA by United with any person or persons affiliated with DSA, including employees, and identify any such person or persons with whom you discussed the potential merger, purchase, or acquisition.

. . . .

17. Identify the date on which DSA or Defendant first discussed a potential merger with, or purchase or acquisition of DSA by United with attorney Robert Ponton. . . .

. . . .

18. Identify the date on which DSA or Defendant first discussed a potential merger with, or purchase or acquisition of DSA by United with attorney Theron "Tad" vanDusen. . . .

. . . .

19. Identify the date on which DSA or Defendant first discussed a potential merger with, or purchase or acquisition of DSA by United with Robert McKenzie.

. . . .

20. Identify the date on which DSA or United first commenced any due diligence activity, including requesting or providing documents and information, with respect to a merger with, or purchase or acquisition of DSA by United.

. . . .

> 22. Identify the date of the first in-person meeting between DSA and Untied during which the parties discussed a potential merger with, or purchase or acquisition of DSA by United. . . .

Plaintiff also requested the production of documents pertaining to information relating to the sale of DSA to United and filed requests for admission with defendant. Subsequently, plaintiff filed motions to compel responses to plaintiff's first set of interrogatories, responses to plaintiff's request for production of documents, and responses to plaintiff's requests for admission with defendant. In his Motion to Vacate Arbitration Award and Set Aside Order and Motion to Engage in Discovery, plaintiff requested from the trial court an order allowing the parties to engage in this "limited discovery."

It is well settled that

> parties to an arbitration will not generally be heard to impeach the regularity or fairness of the award. Exceptions are limited to such situations as those involving fraud, misconduct, bias, exceeding of powers and clear illegality.

Carolina-Virginia Fashion Exhibitors v. Gunter, 41 N.C. App. 407, 410-11, 255 S.E.2d 414, 417 (1979) (internal citations omitted). "Judicial review of an arbitration award is confined to determination of whether there exists one of the specific grounds for vacation of an award under the arbitration statute." *Semon v. Semon*, 161 N.C. App. 137, 141, 587 S.E.2d 460, 463 (2003) (brackets omitted) (quoting *Fashion Exhibitors*, 41 N.C. App. at 410-11, 255 S.E.2d at 418).

As plaintiff explained in his Motion to Vacate Arbitration Award and Set Aside Order and Motion to Engage in Discovery:

> A multi-million dollar corporate acquisition, particularly one involving a foreign company like Untied [sic] Drug, is a complex, multilayered process that can take months or even years to complete. It is highly unlikely, if not impossible, for DSA to have initiated negotiations with United Drug, arrived at mutually agreeable terms, performed sufficient due diligence, and executed a Letter of Intent in the span of about six (6) weeks. More likely, Defendant intentionally concealed the discussions and negotiations between DSA and United Drug during discovery and arbitration in an attempt to keep the apparent value of her ownership interest artificially low and convince Plaintiff to agree to an unfair settlement, thereby reaping a financial windfall by selling her ownership interest to United Drug months later. What is clear is that at the time of settlement, Plaintiff had been improperly led to believe, based on Defendant's failure to properly disclose material information, that Defendant had no intention or plans to sell her ownership interest in DSA, and Plaintiff decided to settle arbitration in reliance on that belief.

Until this Court decides whether plaintiff is permitted to engage in the limited discovery he requests, plaintiff will not be able to establish the grounds that the "award was procured by corruption, fraud or other undue means" to support vacating the award. N.C. Gen. Stat. § 50-54(a)(1).

V. Conclusion

Whether the evidence that plaintiff seeks would be favorable or unfavorable to his position is speculative. However, plaintiff has demonstrated the substantial right

contemplated by *Carolina-Tennessee Transportation* and *Dworsky* sufficient to justify immediate review. Plaintiff has identified, and the record discloses, "relevant and material information" that is "highly material" to the "critical question to be resolved" in his pending action: whether defendant concealed or otherwise failed to disclose the potential sale of DSA to United Drug during the parties' equitable distribution proceedings, thereby significantly diminishing the valuation of defendant's business. Furthermore, because the trial court denied plaintiff's Motion to Engage in Discovery and concluded that "[t]here is no pending action between Plaintiff and Defendant in which discovery may be propounded[,]" plaintiff has been "effectively precluded" from introducing additional evidence in his pending motion to vacate and set aside. However, plaintiff has presented an "objective basis . . . for a reasonable belief" of misconduct sufficient to justify the limited post-award discovery he now seeks. Because the discovery sought is limited to information related to the communications, negotiations, and agreements to sell DSA to United Drug, plaintiff's focused investigation is not a "fishing exhibition." Unless this Court reverses the trial court to allow discovery, plaintiff will be unable to introduce the "*clear* evidence[,]" required to prove the grounds that the "award was procured by corruption, fraud or other undue means" sufficient to vacate. N.C. Gen. Stat. § 50-54(a)(1).

For these reasons, I conclude plaintiff has a right to appeal the trial court's discovery order. In the alterative, I believe this Court should grant plaintiff's petition

for *writ of certiorari* to address his appeal on the merits. The trial court abused its discretion by denying plaintiff's limited discovery request, and there is no just reason to delay plaintiff's appeal. The trial court's order should be reversed, and the case should be remanded.