IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1136

Filed: 16 August 2016

Mecklenburg County, No. 13 CVD 11484

MICHAEL M. BERENS, Plaintiff,

v.

MELISSA C. BERENS, Defendant.

Appeal by defendant from order entered 30 July 2015 by Judge Matt J. Osman in Mecklenburg County District Court. Heard in the Court of Appeals 8 March 2016.

No brief filed on behalf of plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by Michelle D. Connell, and Tom Bush Law Group, by Tom J. Bush, for defendant-appellant.

BRYANT, Judge.

Where the trial court did not abuse its discretion in denying defendant-mother's motion to quash and ordering production of video tapes considered to be work product where no substantial equivalent could be obtained without undue hardship, we affirm.

Plaintiff Michael M. Berens ("plaintiff-father") and defendant Melissa C. Berens ("defendant-mother") were married on 23 September 1989 and separated on 20 July 2012 after nearly twenty-three years of marriage. There were six children

born of the marriage, including four children who were minors at the time plaintiff-father filed his verified complaint: Nathan, age fifteen; Claire, age thirteen; Hannah, age nine; and Lindsey, age seven.[1]

On 20 July 2012, the parties separated. Since the date of separation, the children have lived primarily with defendant-mother at the former marital residence located in Charlotte, North Carolina.

On 26 June 2013, plaintiff-father filed a complaint for child custody and equitable distribution and included, *inter alia*, motions for temporary parenting arrangement and for forensic psychological custody evaluation.[2] In December 2013, over defendant-mother's objection, the trial court entered an order for forensic psychological custody evaluation.

Thereafter, the trial court entered a temporary parenting arrangement order that attempted to address the best interests of the children. The trial court found that the children had complained about plaintiff-father acting "weird and creepy." The trial court noted "a resounding theme in the testimony regarding Plaintiff/Father's demeanor is when he does not get his way, he acts inappropriately,

[1] Pseudonyms will be used to refer to the children who were minors at the time of this litigation. N.C. R. App. P. 3.1(b) (2015).

[2] The parties have filed numerous motions throughout the procedural history of this case. This opinion, however, references only those filings and orders necessary to a proper understanding of the issues set forth in the instant appeal.

gets upset, and has 'mini explosions.' " The court also found, in relevant part, as follows:

> 59. Plaintiff/Father has a cold, emotionless demeanor. Plaintiff/Father has a difficult time showing his love and affection to his children in appropriate ways.
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> . . .
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> 62. Plaintiff/Father has not completely accepted responsibility and still needs to take more responsibility as to what occurred in regards to the deterioration of the relationship between Plaintiff/Father and his children. Plaintiff/Father has not gotten to the next step in determining what he needs to do to fix the relationships with his children or to behave in a better manner.

Based on these and other findings of fact, the trial court temporarily denied plaintiff-father supervised visitation with Nathan and Claire, but allowed temporary supervised visitation with the two youngest children, Hannah and Lindsey (the "girls").

Twenty-one supervised visits with the girls occurred from June 2014 through November 2014. The temporary parenting arrangement remained in place until the court entered another order following a hearing in December. In that order, which altered plaintiff-father's supervised parenting time to unsupervised, the trial court found as follows:

> 38. During those post-May 30, 2014 supervised visits, the [g]irls have been rude to [plaintiff-father], which the Court finds per [plaintiff-father's] testimony. The girls do not interact with [plaintiff-father] and when they do their

> behavior is inappropriate and they do not want to engage with their father. The reason for this behavior and the desires of the [g]irls go back to the reasons articulated in Dr. Shelton's report, which is they do not like their father.
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> 39. This Court finds that part of the reason the [g]irls feel this way is the other four children do not like their father either. The other four children hate their father. It is natural as far as that kind of spills over to the little girls. This is what has happened here as well in regards to [Hannah] and [Lindsey's] demeanor and not really engaging with their father.
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> 40. Plaintiff/Father has done the best he can during the supervised visits and has gotten frustrated sometimes, which is understandable.

The court ordered unsupervised visitation with the girls, as follows: every other weekend with Saturdays being a four-hour visit with both girls and Sunday being a four-hour visit with one girl so that once every four weeks each girl would have a four-hour solo visit with plaintiff-father.

Throughout the month of January 2015, plaintiff-father made several attempts to exercise his parenting time. Before each visit, plaintiff-father's attorney had emailed defendant-mother's attorney regarding the dates and times plaintiff-father would arrive to pick up the girls. On 3, 4, 17, and 18 January, plaintiff-father arrived to pick up either Hannah or Lindsey or both girls together and each time the girls refused to go with him anywhere. On 19 January 2015, defendant-mother sent plaintiff-father an email, purportedly canceling plaintiff-father's parenting times on both 31 January and 1 February 2015.

On 30 January 2015, plaintiff-father filed, *inter alia*, a motion requesting the appointment of a parenting coordinator, and a motion for contempt based on defendant-mother's refusal to comply with the order allowing plaintiff-father unsupervised visitation.

On 7 and 8 February 2015, when plaintiff-father again attempted to exercise his parenting rights with Hannah and Lindsey, the girls refused to go with him, and on both days defendant-mother was present and did nothing to encourage the girls to go with their father. On 19 February 2015, plaintiff-father filed another motion for contempt, alleging that defendant-mother had again willfully disobeyed the trial court's order in refusing to ensure that the girls' complied with the order.

On 25 February 2015, plaintiff-father served a subpoena *duces tecum* directly on defendant-mother, requesting production of video recordings made during the children's visitation time with plaintiff-father (the "custody exchange videos"). The subpoenaed videos were to be produced on 2 March 2015 at 10:00 a.m.

Defendant-mother objected and moved to quash the subpoena, arguing, *inter alia*, that the subpoena (1) "was issued in bad faith by Father to get around the time limitations placed upon the parties in a request to produce"; (2) "requires the disclosure of work product material"; (3) "fails to allow a reasonable time for compliance, and was served less than ten (10) days prior to the date of production"; and (4) "is overly burdensome in that same requests Mother to attempt to locate and

provide virtually every photograph taken between March 10, 2014 [in] the presen[ce] of Plaintiff, or any of the minor children." Pursuant to plaintiff-father's motion, an order appointing a parenting coordinator was entered on 13 March 2015.

Plaintiff-father filed several motions to compel discovery of recordings as requested in plaintiff-father's subpoena *duces tecum*. A hearing regarding the subpoena was held in June where the following arguments were made by counsel for plaintiff-father:

> Well, my motion to compel tells you this, but [plaintiff-father], in the middle of February, went to his -- the marital residence to pick up the two little girls for a visitation. He stands at the door as is customary, sees [defendant-mother], who sees him at the door. He happens to look up, and he sees video cameras for the first time pointed at the porch and the driveway. This happened in mid February. We were already noticed for a hearing on my contempt motion because I contend [defendant-mother] is interfering with visitation.
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> Well, so mid February, I learned about this evidence. I've got a hearing two weeks later. So I serve her with a subpoena. [Counsel for defendant-mother] is not correct. We can serve subpoenas on parties but for limited purposes. And those limited purposes are the emergency evidence that we don't have time to get pursuant to Rule 26, 30, and so forth. . . .
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> . . .
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> We still need that evidence to turn it over to [the parenting coordinator], who is trying to help these people communicate. One of the ways in which she'd be looking

> at how they communicate is how does [defendant-mother] talk to [plaintiff-father] at visitations? Who opens the door and closes the door and what goes on? So I want to literally get this videotape and hand it over to [the parenting coordinator]. And they don't want to give it to me.

The trial court found, in relevant part, that (1) the custody exchange videos were relevant to the proceedings, and, while not privileged, they were created by a protected party in anticipation of litigation; (2) plaintiff-father has a substantial need for the videos as there is no other way for him to obtain a substantial equivalent without undue hardship; and (3) defendant-mother failed to show that the videos "contain mental impressions, conclusions, opinions, or legal theories of an attorney . . . ." The trial court then concluded that, while the custody exchange videos are work product, plaintiff-father has a substantial need for the material as there is no other way for him to obtain a substantial equivalent without undue hardship, and ordered defendant-mother to produce the videos requested by plaintiff-father's subpoena. Defendant-mother entered notice of appeal from the order compelling production of the custody exchange videos.

On appeal, defendant-mother argues that the trial court erred by granting plaintiff's motion to compel, denying defendant-mother's motion to quash, and ordering production of videotapes which were protected by attorney work product doctrine.

As a threshold matter, defendant-mother contends that her appeal of the order compelling production of the custody exchange videos, which she maintains are protected under the qualified immunity for attorney work product, N.C. Gen. Stat. § 1A-1, Rule 26(b)(3) (2015), implicates a substantial right. Hence, defendant-mother asserts her interlocutory appeal is reviewable by this Court. We agree.

> A review of discovery orders is generally considered interlocutory and therefore not usually immediately appealable unless they affect a substantial right. "[W]here 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 . . . ."

Isom v. Bank of Am., N.A., 177 N.C. App. 406, 410, 628 S.E.2d 458, 461 (2006) (alterations in original) (quoting *Evans v. United Servs. Auto Ass'n,* 142 N.C. App. 18, 24, 541 S.E.2d 782, 786 (2001)). Additionally, where "[an] appeal affects a substantial right that would be lost if not reviewed before the entry of final judgment, the issue is properly before [this Court]." *Id.* Orders compelling discovery of materials purportedly protected by the work product doctrine are immediately reviewable on appeal despite their interlocutory nature. *See Boyce & Isley, PLLC v. Cooper*, 195 N.C. App. 625, 636–37, 673 S.E.2d 694, 701–02 (2009).

Defendant-mother argues the trial court erred in granting plaintiff-father's motion to compel, denying her motion to quash, and ordering production of items per a subpoena *duces tecum*. We disagree. The dispositive issue is whether the videos

taken by cameras installed by a private investigator working for defendant's attorney are protected by the attorney work product doctrine and should not have been ordered to be produced.

On appeal, we review "the trial court's application of the work product doctrine . . . under an abuse of discretion standard." *Evans*, 142 N.C. App. at 27, 541 S.E.2d at 788. "Under this standard, a trial court's ruling may be reversed only upon a showing that it was manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Hammond v. Saini*, 229 N.C. App. 359, 370, 748 S.E.2d 585, 592 (2013) (citing *K2 Asia Ventures v. Trota*, 215 N.C. App. 443, 453, 717 S.E.2d 1, 8 (2011)).

> In order to successfully assert protection based on the work product doctrine, the party asserting the protection . . . bears the burden of showing (1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant . . . or agent.

Young v. Kimberly-Clark Corp., 219 N.C. App. 172, 179, 724 S.E.2d 552, 557 (2012) (internal citation omitted) (quoting *Boyce & Isley*, 195 N.C. App. at 637, 673 S.E.2d at 702). "Although not a *privilege*, the exception is a qualified immunity and extends to all materials 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*." *Id.* (citations and quotation marks omitted).

"The party asserting the work product privilege . . . bears the burden of showing that the documents were prepared 'in anticipation of litigation.' " *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 310, 628 S.E.2d 851, 864 (2006) (quoting *Evans*, 142 N.C. App. at 29, 541 S.E.2d at 789). Our Supreme Court has stated that such materials prepared "in anticipation of litigation" include "not only 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).

However, "[b]alanced against the importance of protecting work product is the fundamental consideration that procedural rules should be construed to allow discovery of all relevant information in order to facilitate a trial based on the true and complete issues." *Evans*, 142 N.C. App. at 29, 541 S.E.2d at 789 (citation omitted). Accordingly, "[b]ecause work product protection by its nature may hinder an investigation into the true facts, *it should be narrowly construed* consistent with its purpose[,] which is to safeguard the lawyer's work in developing his client's case." *Id.* (emphasis added) (citations and quotation marks omitted).

> [A] party may obtain discovery of documents and tangible things . . . *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.* In

> ordering discovery of such materials when the required showing has been made, the 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 or work product of the attorney or attorneys of record in the particular action.

N.C. Gen. Stat. § 1A-1, Rule 26(b)(3) (2015) (emphasis added); *Boyce & Isley*, 195 N.C. App. at 638, 673 S.E.2d at 702.

Here, there is no dispute that the custody exchange videos are work product—the videos are tangible things prepared in anticipation of litigation or trial and were secured by a private investigator—an agent—of defendant-mother's attorney. *See Young*, 219 N.C. App. at 179, 724 S.E.2d at 557 (citations omitted). The question at issue is whether plaintiff-father has a substantial need for the custody exchange videos and if so, whether there is no other way for him to obtain a substantial equivalent without undue hardship.

In the order from which defendant-mother appeals, the trial court made the following pertinent findings of fact and conclusions of law:

> 5. In or about February, 2015, Defendant/Mother set up video cameras around the former marital residence to record Plaintiff/Father's interactions with [Hannah] and [Lindsey] when he came to pick the girls up for his designated parenting time.
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> 6. Defendant/Mother's attorney arranged for a private investigator to set up the aforementioned cameras and said cameras were set up in anticipation of possible use in this custody litigation.

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> 9. Defendant/Mother now claims that the video evidence is protected work product.
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> 11. The custody exchange videos sought by Plaintiff/Father's Subpoena are clearly relevant to these proceedings as they purports [sic] to show the very custody exchanges that have been the subject of so much litigation.
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> 15. Defendant/Mother has failed to show that the custody exchange videos sought by Plaintiff/Father's Subpoena contain mental impressions, conclusions, opinions, or legal theories of an attorney or representative. The videos are simply a recording of events and nothing more.
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> . . .
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> 5. The custody exchange videos are work product. However, Plaintiff/Father has a substantial need for this material and there is no other way for him to obtain a substantial equivalent without undue hardship.
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> 6. The custody exchange videos do not contain any mental impressions, conclusions, opinions, or legal theories of any attorney or representative of Defendant/Mother.

Defendant-mother nevertheless argues that, even assuming plaintiff-father has established a substantial need for the videos, he has failed to establish an undue hardship to obtain the substantial equivalent. Defendant-mother argues that, with today's technology, plaintiff-father could have simply pulled out a phone to record the

same exchanges recorded by the videos. However, the test for undue hardship is not whether a party "could have done all the same things," or could have obtained the same information at some point in the past, but whether the party is *able* "without undue hardship to obtain the substantial equivalent of the materials by other means." N.C.G.S. § 1A-1, Rule 26(b)(3). Defendant-mother's argument fails where she attempts to claim that it is no undue hardship for plaintiff-father to travel back in time and create his own video recordings of events which have already taken place.

Accordingly, in light of the policy that the work product doctrine should be narrowly construed, *Evans*, 142 N.C. App. at 29, 541 S.E.2d at 789 (citations omitted), as well as the absence of any "showing that the trial court's decision was manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision[,]" *Hammond*, 229 N.C. App. at 370, 748 S.E.2d at 592 (citation omitted), we hold the trial court did not err by ordering production of the custody exchange videos. Defendant-mother's argument is overruled.

We also note that a motion to quash a subpoena *duces tecum* is addressed to the sound discretion of the trial judge and is not subject to review absent a showing of abuse of discretion. *State v. Newell*, 82 N.C. App. 707, 709, 348 S.E.2d 158, 160 (1986) (citation omitted). Based on our dispositive holding affirming the trial court's ruling on production of the custody exchange videos, we need not further address the trial court's discretionary ruling on defendant-mother's motion to quash.

AFFIRMED.

Judges STEPHENS and MCCULLOUGH concur.

Report per Rule 30(e).