

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1093

Filed: 17 November 2020

Wake County, No. 18 CVS 5645

NORTH CAROLINA STATE BAR, Petitioner,

v.

ALAN G. PHILLIPS, Respondent.

Appeal by Respondent from order entered 12 February 2019 by Judge Stephen Futrell; order entered 30 April 2019 by Judge A. Graham Shirley, II; order entered 30 April 2019 by Judge Keith O. Gregory; order entered 15 May 2019 by Judge Keith O. Gregory; order entered 31 May 2019 by Judge Stephen R. Futrell; and order entered 31 July 2019 by Judge Vincent M. Rozier, in Superior Court, Wake County. Heard in the Court of Appeals 25 May 2020.

*The North Carolina State Bar, by Katherine Jean and David R. Johnson, for Petitioner-Appellee.*

*Alan G. Phillips, pro se, Respondent-Appellant.*

McGEE, Chief Judge.

The trial court disbarred Alan G. Phillips (“Respondent”) for repeatedly refusing to comply with the trial courts’ orders to produce documents regarding his

*Opinion of the Court*

out-of-state clients. On appeal, Respondent has failed to establish that the trial court erred during these proceedings, and therefore, we affirm the trial courts' decisions.

I. Factual and Procedural History

Respondent was licensed to practice law in North Carolina, but he advertised himself as available to provide legal services in any state. In January 2017, the North Carolina State Bar (the "State Bar") Grievance Committee issued Respondent a Letter of Warning for, among other things, engaging in conduct constituting the unauthorized practice of law in another jurisdiction in violation of Rule 5.5 of the Rules of Professional Conduct. Respondent accepted the Letter of Warning.

In May 2017, the State Bar received a new allegation that Respondent was continuing to offer to provide legal services in other jurisdictions. The State Bar sent Respondent a Letter of Notice requiring his response to the allegations. The Letter of Notice requested information about out-of-state clients Respondent represented from 2012 to present. Respondent submitted a response to the Letter of Notice; however, he did not include information about his out-of-state clients. The State Bar modified its request to limit any identifying information from the requested information about out-of-state clients. Respondent submitted another response but still did not provide the requested information.

The Chair of the Grievance Committee issued a subpoena for the requested information, and Respondent moved to quash the subpoena. The President of the

NORTH CAROLINA STATE BAR V. PHILLIPS

*Opinion of the Court*

State Bar granted Respondent's motion in part and denied it in part. The Chair of the Grievance Committee then issued a new subpoena to produce the requested information from Respondent modified to be consistent with the President's order. Respondent moved to quash the second subpoena. A successor President of the State Bar denied Respondent's motion and ordered him to comply by 16 February 2019.

The State Bar filed a petition on 17 May 2018 in Superior Court, Wake County to enforce the subpoena. The State Bar served Respondent with discovery requests. Respondent objected to the discovery requests and moved for a protective order. Respondent argued that because he had filed grievances against various State Bar counselors and employees after the grievance file was opened, the State Bar had a conflict of interest requiring it to engage outside counsel to investigate him or ask the court to enforce the subpoena. Accordingly, Respondent filed a separate "Motion in the Cause" seeking to require the State Bar to engage outside counsel.

The State Bar moved to compel Respondent to respond to its discovery requests. At a hearing on 5 February 2019, Respondent reiterated his claim that the State Bar had a conflict of interest and was required to engage in outside counsel. The trial court dismissed Respondent's argument and ordered him to comply with the discovery requests. Throughout this process, the trial court found Respondent in contempt four times for defying its orders compelling him to provide discovery

*Opinion of the Court*

responses. The trial court found that Respondent's refusal to comply with its orders warranted discipline and disbarred him.

Respondent appeals the following orders: the 12 February 2019 order granting the State Bar's motion to compel and denying Respondent's motion for Rule 26(c) protective order, motion to waive Local Rule 5.4, and motion in the cause; the 30 April 2019 order allowing Respondent to amend his pleadings and denying Respondent's motion to stay pending appeal, motion for judgment on the pleadings, and motion for declaratory judgment; the 30 April 2019 order granting the State Bar's motion to hold Respondent in civil contempt and denying Respondent's motion to continue; the 15 May 2019 order granting the State Bar's motion to hold Respondent in civil contempt; the 31 May 2019 order granting the State Bar's motion to hold Respondent in civil contempt; and the 31 July 2019 order granting the State Bar's motion to hold Respondent in civil contempt and the order for disbarment.

II. Standing

Respondent contends that the State Bar lacked standing to sue and that the trial court lacked subject matter jurisdiction to hear the case. We disagree.

The standard of review of a question of standing is *de novo*. The appellate court views "the allegations as true and the supporting record in the light most favorable to the non-moving party." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

*Opinion of the Court*

The General Assembly granted the State Bar power to subpoena witnesses and records in investigations of alleged attorney misconduct. N.C. Gen. Stat. § 84-29 (2019). The General Assembly also granted the State Bar the power to apply to the courts to enforce a subpoena. N.C. Gen. Stat. § 84-28(i) (2019). Accordingly, the State Bar had standing to sue, and the trial court had subject matter jurisdiction to hear the State Bar's claim for enforcement of its subpoena. A party has standing when the record shows that the party has an:

- (1) Injury in fact – an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the Respondent; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Walker v. Hoke Cty.*, 260 N.C. App. 121, 123, 817 S.E.2d 609, 611 (2018).

“Unchallenged findings of fact are ‘conclusive on appeal and binding on this Court.’” *In re C.M.P.*, 254 N.C. App. 647, 654, 803 S.E.2d 853, 858 (2017) (citation omitted). Respondent does not challenge, and therefore concedes, the existence of the second and third prongs. He disputes only the existence of an injury in fact. The documents that the State Bar sought were relevant to the investigation into Respondent's alleged violation of Rule of Professional Conduct 5.5. The State Bar has a legally protected interest in enforcement of its subpoena power. *See Gilbert v. N.C. State Bar*, 363 N.C. 70, 678 S.E.2d 602 (2009). Respondent's refusal to comply with

*Opinion of the Court*

the subpoena impeded an investigation, was “concrete and particularized,” as well as “actual” and “imminent.” Accordingly, the State Bar had standing to sue, and the trial court had subject matter jurisdiction to hear the State Bar’s claim for enforcement of its subpoena.

III. Conflict of Interest

In its 12 February 2019 order, the trial court found that Respondent failed to show a conflict of interest on the part of the State Bar or its lawyers that precluded its investigation into Respondent’s misconduct. Respondent contends that there was a conflict of interest, and that the State Bar should have sought outside counsel, because he had pending grievances against officers and employees of the State Bar. We disagree.

The standard of review of a conclusion of law is *de novo*. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). Rule 1.11 of the Rules of Professional Conduct provides that Rule 1.7 applies to the State Bar lawyers and counselors. Under Rule 1.7, impermissible conflicts of interest only arise when a lawyer has a current or prospective client whose interests conflict with another client, a former client, or the lawyer’s personal interests. The State Bar lawyers only have one client—the State Bar. The State Bar lawyers did not have an attorney-client relationship with Respondent, nor did they have a concurrent conflict of interest in

*Opinion of the Court*

investigating his misconduct. Respondent has failed to show that a conflict of interest existed, and therefore, the trial court did not err.

IV. 12 February 2019 Order

Respondent contends that the trial court erred in its 12 February 2019 order when it denied his motions. We disagree.

Motions for discretionary determination by the court, such as discovery motions, are reviewed for abuse of discretion. *Midkiff v. Compton*, 204 N.C. App. 21, 24, 693 S.E.2d 172, 175 (2010). As provided above, the trial court properly denied Respondent's Motion in the Cause concerning any conflict of interest or requirement of outside counsel.

A. *Motion for protective order*

Respondent contends that the trial court erred in denying his motion for a discovery protective order under N.C. Gen. Stat. § 1A-1, Rule 26. Respondent's motion was based on his belief that the State Bar had a conflict of interest, and he further believed that he did not have to comply with discovery because he sought a protective order. However, Respondent did not satisfy any of the grounds for a protective order contained in Rule 26 – “unreasonable annoyance, embarrassment, oppression, or undue burden or expense.” N.C. Gen. Stat. § 1A-1, Rule 26 (2019). Moreover, Respondent did not object on the grounds of relevancy, privilege, or work product. The trial court determined that because there was no conflict of interest,

*Opinion of the Court*

there was no basis for a protective order. Respondent has failed to show that the trial court's denial of the motion for a protective order was not a reasoned decision. Accordingly, the trial court did not err in denying the motion.

*B. Separation of powers clause*

Respondent contends that the order requiring him to produce discovery violated the separation of powers clause of the Constitution. "The separation of powers doctrine requires administrative agencies to follow the law of the . . . courts [which have] jurisdiction over the cause of action." *Thomas v. North Carolina Dep't of Human Resources*, 124 N.C. App. 698, 709, 478 S.E.2d 816, 823 (1996). "The separation of powers doctrine requires . . . all . . . administrative agencies of the state give full effect to orders of this Court and acquiesce in the statutory and constitutional interpretations determined by this Court and by our Supreme Court." *Id.* Here, Respondent had no legitimate reason for refusing to comply with the subpoena order, and the court's order was intended to prohibit Respondent from avoiding compliance. Such action is within the court's discretion and does not violate the separation of powers doctrine. Accordingly, the trial court did not err.

*C. Unduly burdensome*

Respondent contends for the first time on appeal that the State Bar's discovery was unduly burdensome. "As a general rule, the failure to raise an alleged error in the trial court waives the right to raise it for the first time on appeal." *Khaja v.*



*Opinion of the Court*

*Husna*, 243 N.C. App. 330, 349, 777 S.E.2d 781, 792 (2015). Therefore, since Respondent did not preserve this argument below, we do not reach the merits.

*D. Motion to waive local rule 5.4*

Respondent contends that the trial court abused its discretion in denying his motion to waive local rule 5.4 for civil superior court. Local rule 5.4 required Respondent to certify that he had made a diligent attempt to resolve differences with the opposing party before objecting to discovery. The trial court found that Respondent's sole basis for requesting the waiver was that there was a conflict of interest, a claim that the court found to be "unfounded and without merit." The court also found that even if it had the inherent authority to grant a waiver, Respondent did not show justification for it to do so. Respondent has failed to show that the trial court did not reach a reasoned decision or that the trial court abused its discretion. Accordingly, the trial court did not err.

V. 30 April 2019 Order

Respondent contends that the trial court erred in its 30 April 2019 order when it denied his motions and found him in contempt. We disagree.

*A. Motion for declaratory judgment*

Respondent contends that the trial court erred when it denied his motion for declaratory judgment. Respondent filed a motion for declaratory judgment seeking interpretation of the phrase "alleged misconduct" as it pertains to 27 N.C. Admin.

*Opinion of the Court*

Code 01B.0107(1) (2019). The trial court found that “such relief [by declaratory judgment] . . . is properly sought by filing a civil claim for declaratory judgment, not by motion.” N.C. Gen. Stat. § 1-253 allows a court to “declare rights, status, and other legal relations” between parties. N.C. Gen. Stat. § 1-253 (2019). This Court has previously held that “a declaratory judgment is a separate and independent action” and may not be “commenced by a motion in the cause.” *Home Health & Hospice Care, Inc. v Meyer*, 88 N.C. App. 257, 262, 362 S.E.2d 870, 873 (1987). Here, Respondent has failed to support his argument that a declaratory judgment may be raised upon a motion by a party, or that the trial court abused its discretion in denying his motion for declaratory judgment. Furthermore, Respondent has not demonstrated he was harmed as the trial court granted him leave to amend his answer to state a counterclaim on the issue. Accordingly, the trial court did not err in denying the motion for declaratory judgment.

*B. Motion to stay*

Respondent contends that the trial court erred in denying his motion to stay. Respondent filed a motion to stay pending his appeal of the court’s 12 February 2019 order compelling his compliance with discovery because the appeal was interlocutory. The trial court denied the motion.

Respondent concedes that discovery orders are interlocutory and are not appealable unless they affect a substantial right. *See Sessions v. Sloane*, 248 N.C.

*Opinion of the Court*

App. 370, 380, 789 S.E.2d 844, 853 (2016). However, Respondent contends that his motion for a protective order was a motion to disqualify counsel that was appealable. Respondent relies on *Keyes v. Johnson*, 222 N.C. App. 438, 731 S.E. 2d 269 (2012), *disc. rev. denied*, 266 N.C. 502, 749 S.E.2d 451 (2013). However, the opinion in *Keyes* does not state that an order denying a motion to disqualify opposing counsel is immediately appealable. *Keyes* holds that the party whose lawyer is disqualified must immediately appeal because it affects a substantial right of both the attorney and the client. *Id.* at 440, 731 S.E.2d at 270-71. Respondent has failed to show that the trial court abused its discretion in concluding that his appeal was interlocutory. Accordingly, the trial court did not err.

*C. Judgment on the pleadings*

Respondent contends that he was entitled to judgment on the pleadings. Judgment on the pleadings is available only when the facts in the complaint are admitted and a party is entitled to judgment as a matter of law. *NNN Durham Office Portfolio 1, LLC v. Highwoods Realty Ltd.*, 261 N.C. App. 185, 192, 820 S.E.2d 322, 326 (2018). “When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate.” *Washburn v. Yadkin Valley Bank & Trust Co.*, 190 N.C. App. 315, 322, 660 S.E.2d 577, 583 (2007). In this case, Respondent did not admit to all the facts pled in the petition and he specifically contends that he did not engage in misconduct. Because Respondent refused to admit to the facts in the

*Opinion of the Court*

pleading, there were still issues to be resolved, and a judgment on the pleadings would be inappropriate. Respondent has failed to show that the trial court's denial of this motion was not a reasoned decision. Accordingly, the trial court did not err in denying Respondent's motion for judgment on the pleadings.

*D. Motion to continue*

Respondent contends that the trial court erred in denying his motion to continue the hearing on the State Bar's motion for civil contempt. He cited two reasons for his motion: (1) the order compelling discovery was on appeal and (2) the State Bar had not properly calendared the motion for contempt. Motions to continue are reviewed for abuse of discretion. *Morin v. Sharp*, 144 N.C. App. 369, 374, 549 S.E.2d 871, 874 (2001), *disc. review denied*, 354 N.C. 219, 557 S.E.2d 531 (2001).

Respondent conceded at the hearing that he had received a copy of the calendar request by the State Bar and had responded to it. The court found that Respondent was properly served, and that his appeal was interlocutory and did not deprive the trial court of jurisdiction. Respondent has not shown on appeal that the court's denial of the motion to continue was arbitrary or without reason. Accordingly, the trial court did not abuse its discretion in denying Respondent's motion to continue.

*E. Contempt*

Lastly in this order, Respondent challenges the court's conclusion that Respondent was in contempt. "The standard of review for contempt proceedings is

*Opinion of the Court*

limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.” *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997).

A person who fails to comply with an order of the court may be found in civil contempt upon motion by the opposing party. N.C. Gen. Stat. § 5A-23 (2019). The statutes require a showing of four elements to find a party in civil contempt: (1) the order remains in force, (2) the purpose of the order may still be served by compliance with the order, (3) the non-compliance was willful and (4) the party is able to comply. N.C. Gen. Stat. § 5A-21(a) (2019). Respondent argues that his noncompliance was not willful.

Willfulness in a contempt action requires either a positive action (a “purposeful and deliberate act”) in violation of a court order or a stubborn refusal to obey a court order (acting “with knowledge and stubborn resistance”). *Hancock v. Hancock*, 122 N.C. App. 518, 523, 471 S.E.2d 415, 418 (1996). The trial court found that Respondent’s conduct was willful, because he had posted on social media that he was refusing to comply with the order and that he knew he was in contempt, and because he admitted in open court that he was in contempt. The evidence supports the findings and the findings support the conclusion that Respondent was in contempt. Accordingly, the trial court did not err.

VI. 15 May 2019 Order

*Opinion of the Court*

Respondent contends that the trial court's finding that he failed to comply with the conditions set to purge his contempt was unsupported by competent evidence. We disagree.

The court's 29 April 2019 order required Respondent to fully comply with the court's 12 February 2019 order compelling him to respond to discovery without further objection or other avoidance by 9 May 2019. Respondent submitted responses to the discovery on 8 May 2019, but the documents submitted were so heavily redacted that they failed to comply with the discovery order. Respondent contends that his actions were sufficient to purge his contempt but does not provide authority to support his contention. Accordingly, the trial court did not err.

VII. 31 May 2019 Order

Respondent contends that the trial court erred in finding that he still had not complied with the prior discovery order because that finding was not supported by competent evidence. We disagree.

At the 21 May 2019 hearing, Respondent again failed to comply with discovery, and raised for the first time the defense of attorney-client privilege. However, attorney-client privilege does not extend to "the identity of a client; the fact that the client consulted the lawyer and the general subject matter of the consultation; the identity of a nonclient who retained or paid the lawyer to represent the client; the details of any retainer agreement; the amount of the agreed-upon fee; and the client's

*Opinion of the Court*

whereabouts.” *State v. Tate*, 294 N.C. 189, 192-93, 239 S.E.2d 821, 824 (1978). The State Bar was only seeking information such as the residence of the client and the nature of the representation.

Respondent also contends that he did not have enough time to comply, but this contention fails because he was aware of the information needed since the May 2017 Letter of Notice. Because Respondent continually failed to comply with the discovery orders, the trial court suspended his license. Respondent has failed to show that suspending his license was not the result of a reasoned decision. Accordingly, the trial court did not abuse its discretion.

VIII. 25 June 2019 and 31 July 2019 Orders

Respondent contends that the trial court erred in finding that he had not purged his contempt. We disagree.

The court’s order of commitment following the 25 June 2019 hearing provided that Respondent would be jailed for 45 days for civil contempt. The court did not enter its order on contempt until 31 July 2019. Respondent argues that because the order was entered and served on him well into his sentence, he was unaware of the conditions to purge himself. However, during the hearing, the court informed Respondent that he had to provide the documents for his out-of-state clients. Respondent never showed he made any effort to comply with the order. Respondent

*Opinion of the Court*

has completed his jail time without any effort to comply, and therefore, this issue is moot.

IX. Disbarment

Respondent contends that the trial court abused its discretion in disbarring him from the practice of law. We disagree.

The trial court may impose discipline in a matter pending before the court. *In re Burton*, 257 N.C. 534, 543-44, 126 S.E.2d 581, 588 (1962). Court-imposed discipline is not limited to violations of the Rules of Professional Conduct. *Id.* “A proceeding against an attorney for alleged dishonest or unethical conduct may result in disbarment.” *Id.* Respondent has failed to cite a specific finding of fact or conclusion of law that is alleged error. Moreover, Respondent also presented no evidence concerning the discipline that should have been imposed. Indeed, Respondent repeatedly failed to comply with the court’s orders and has failed to show that the disbarment was not the result of a reasoned decision. Accordingly, the trial court did not err.

X. Rule 11 Sanctions

Respondent raises the issue of Rule 11 sanctions for the first time on appeal. “As a general rule, the failure to raise an alleged error in the trial court waives the right to raise it for the first time on appeal.” *Khaja*, 243 N.C. App. at 349, 777 S.E.2d at 792. Accordingly, the issue is unpreserved, and we decline to reach the merits.



NORTH CAROLINA STATE BAR V. PHILLIPS

*Opinion of the Court*

XI. Conclusion

For the reasons discussed above, we affirm the trial court.

AFFIRMED.

Judges DIETZ and COLLINS concur.

Report per Rule 30(e).