

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

2021-NCCOA-249

No. COA20-484

Filed 1 June 2021

Iredell County, No. 15 CVD 2107

PETER PISTONE, Plaintiff,

v.

JESSICA HELBERG, Defendant.

Appeal by plaintiff from order entered 30 September 2019 by Judge Carole Hicks in Iredell County District Court. Heard in the Court of Appeals 23 March 2021.

David P. Parker, PLLC, by W. Carey Parker, for plaintiff-appellant.

Pope McMillan, P.A., by Clark D. Tew, for defendant-appellee.

DIETZ, Judge.

¶ 1 Plaintiff Peter Pistone appeals the trial court's imposition of discovery sanctions under Rule 37 of the Rules of Civil Procedure. He contends that the chosen sanctions—which conclusively established some facts and prohibited Pistone from introducing certain evidence—were unwarranted and an abuse of the trial court's discretion.

¶ 2 As explained below, we lack jurisdiction to consider this appeal. Pistone did not appeal the sanctions order for the purpose of both challenging the sanctions and

testing the underlying discovery order that he violated. Instead, he seeks only to challenge the particular sanctions imposed. Under precedent from this Court, the issues raised in this appeal are interlocutory ones that do not affect a substantial right. Accordingly, we dismiss this appeal for lack of jurisdiction.

Facts and Procedural History

¶ 3 Plaintiff Peter Pistone and Defendant Jessica Helberg have two minor children. They are currently litigating a child custody and support proceeding involving rather substantial motions practice. During the proceeding, Helberg submitted discovery requests and, after receiving unsatisfactory responses, moved to compel. The trial court granted the motion. Helberg later moved for sanctions on the ground that Pistone continued to refuse to adequately respond to her discovery requests.

¶ 4 After a hearing, the trial court found that Pistone “willfully refused to fully respond to” Helberg’s discovery requests in bad faith and that Pistone’s conduct prejudiced Helberg’s “ability to prepare for and schedule a hearing on the issue of temporary child support.” The court entered a sanctions order establishing that Pistone was earning \$30,000 per month for the purposes of temporary child support and that, if Pistone did not comply with the discovery requests going forward, the court would find his income remained at that level for permanent child support. The court also barred Pistone from introducing testimony or evidence from the time period

before the court's sanctions hearing.

¶ 5 Pistone appealed the sanctions order, and Helberg moved to dismiss the appeal for lack of jurisdiction.

Analysis

¶ 6 We begin our analysis by examining our jurisdiction to hear this appeal. “Ordinarily, this Court hears appeals only after entry of a final judgment that leaves nothing further to be done in the trial court.” *Crite v. Bussey*, 239 N.C. App. 19, 20, 767 S.E.2d 434, 435 (2015). “The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts.” *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 76, 772 S.E.2d 93, 95 (2015).

¶ 7 There is a statutory exception to this general rule when the challenged order affects a substantial right. N.C. Gen. Stat. § 7A-27(b)(3)(a). To confer appellate jurisdiction in this circumstance, the appellant must include in its opening brief, in the statement of the grounds for appellate review, “sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.” *Larsen*, 241 N.C. App. at 77, 772 S.E.2d at 95.

¶ 8 The parties agree that this appeal, from a discovery sanctions order, is interlocutory and that there is more to be done in this proceeding in the trial court. But Pistone argues that the sanctions chosen by the trial court were unwarranted

and that the sanctions order affects a substantial right based on case law permitting an immediate appeal of certain discovery sanctions.

¶ 9 “An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment.” *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). But our Supreme Court has held that “when a civil litigant is adjudged to be in contempt for failing to comply with an earlier discovery order, the contempt proceeding is both civil and criminal in nature and the order is immediately appealable for the purpose of testing the validity both of the original discovery order and the contempt order itself where, as here, the contemnor can purge himself of the adjudication of contempt only by, in effect, complying with the discovery order of which he essentially complains.” *Willis v. Duke Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976).

¶ 10 Importantly, the immediate appealability of this type of discovery sanction applies only where the litigant refuses to comply with a discovery order, is held in contempt in order to challenge the underlying order, and then brings an appeal that “tests the validity of both the discovery order and the sanctions imposed.” *In re Pedestrian Walkway Failure*, 173 N.C. App. 254, 262, 618 S.E.2d 796, 802 (2005).

¶ 11 Here, Pistone does not challenge the underlying discovery order. His only argument is that the particular discovery sanctions chosen by the trial court were an

PISTONE V. HELBERG

2021-NCCOA-249

Opinion of the Court

abuse of the court’s discretion. This case is therefore analogous to *In re Pedestrian Walkway Failure*, in which the trial court sanctioned a litigant for refusing to comply with discovery and ruled that the litigant would be precluded from offering any exhibits or testimony concerning the alleged injury. *Id.* at 261, 618 S.E.2d at 802. We held that this Court lacked appellate jurisdiction because the litigant appealed “the sanctions imposed pursuant to discovery orders without contesting the validity of the underlying discovery orders themselves.” *Id.* at 263, 618 S.E.2d at 803.

¶ 12 Nevertheless, this Court invoked Rule 2 of the Rules of Appellate Procedure in *In re Pedestrian Walkway Failure*, construed the litigant’s briefing as a petition for a writ of certiorari, and accepted the case on discretionary review after finding “the need for finality and certainty in this complex and ‘exceptional’ litigation,” which raised issues “in the public interest.” *Id.*

¶ 13 Here, by contrast, there are no exceptional factors in the public interest in this case. It is a routine family law proceeding. We decline to take the extraordinary step of invoking Rule 2. Moreover, Pistone has not provided any other reason why the challenged sanctions order affects a substantial right. His argument that the trial court’s chosen sanctions are an abuse of discretion remains preserved, and he can assert it in an appeal after entry of final judgment. Accordingly, we dismiss this appeal for lack of appellate jurisdiction.

Conclusion

¶ 14 We dismiss this interlocutory appeal for lack of appellate jurisdiction.

DISMISSED.

Judges MURPHY and GORE concur.

Report per Rule 30(e).