IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-58

Filed 01 August 2023

Harnett County, No. 22 CVS 234

KIMBERLY CAMPBELL, ADMINISTRATOR OF THE ESTATE OF JOSEPH H. MATTHEWS, Plaintiff,

v.

A1A ARC OF DUNN, LLC, d/b/a ARC OF DUNN, A1A MANAGEMENT ADVISORS, LLC, Defendants.

Appeal by North Carolina Department of Health and Human Services from an order entered 4 October 2022 by Judge Charles W. Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 23 May 2023.

Gugenheim Law Offices, P.C., by Stephen J. Gugenheim, for Plaintiff-Appellee.

No brief filed by Defendants-Appellees.

Attorney General Joshua H. Stein, by Assistant Attorney General Juliane L. Bradshaw, for Appellant North Carolina Department of Health and Human Services.

RIGGS, Judge.

On 12 August 2021, Joseph Matthews, an elderly resident of an adult care home called ARC of Dunn, fled from the facility and was found—nonresponsive,

dehydrated, and covered in fire ants, bees, and insect bites—in a nearby field 20 hours after his escape. Mr. Matthews was hospitalized, suffered a heart attack, and required dialysis and intubation for acute hypoxic respiratory failure, septic shock secondary to pneumonia, and multiorgan failure. Mr. Matthews died roughly two weeks later.

The North Carolina Department of Health and Human Services ("DHHS") launched a regulatory investigation into ARC of Dunn in connection with Mr. Matthews' elopement and ultimately assessed a violation against the facility for causing "serious physical harm and serious neglect." Plaintiff Kimberly Campbell, as administrator of Mr. Matthews' estate, filed suit against Defendants A1A ARC of Dunn, LLC, d/b/a ARC of Dunn and A1A Management Advisors, LLC, in connection with Mr. Matthews' elopement and subsequent death. During the course of litigation and facing a failure to receive requested information from Defendants in discovery, Plaintiff moved to compel DHHS to produce its unredacted investigatory notes in the hopes of identifying potential fact witnesses. The trial court granted that motion subject to a protective order, and DHHS now appeals that decision.

On appeal, DHHS contends that the trial court's order violates a statutory mandate established by N.C. Gen. Stat. § 131D-2.14(3), which, in connection with licensing investigations, provides that DHHS "shall not disclose . . . [t]he name of anyone who has furnished information concerning a facility without that person's consent." N.C. Gen. Stat. § 131D-2.14(3)b. (2021). In making that argument,

however, DHHS overlooked a fundamental issue necessary to this Court's authority: our limited jurisdiction over interlocutory orders. Because it is every appellant's obligation to show that jurisdiction is proper, and because DHHS has failed to do so in this case, we are constrained to dismiss DHHS's appeal.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff filed an amended complaint against Defendants on 1 April 2022 for negligence, medical malpractice, wrongful death, and punitive damages arising out of Mr. Matthews' elopement and death. On 30 March 2022, Plaintiff served Defendants with discovery, including requests for production and interrogatories seeking information about persons who were working at ARC of Dunn on the day of Mr. Matthews' elopement. Defendants gave limited answers to those requests and, in an effort to gather more facts, Plaintiff subpoenaed DHHS for the production of, *inter alia*, "[a]ll documents (unredacted) relating to the survey of ARC of Dunn on or about 8/23/2021" and "[a]ll surveyor notes (unredacted) relating to the survey of ARC of Dunn on or about 8/23/2021."

DHHS objected to the subpoena *duces tecum* on several grounds, including that the requested documents "contain confidential information regarding the investigation and may identify complainants by statute and rules promulgated. *See* N.C. Gen. Stat. §§ 131D-2.14." DHHS did, however, produce redacted surveyor notes and a "Summary Statement of Deficiencies" with the names of interviewed witnesses obscured or omitted. Per those documents, DHHS interviewed several employees,

healthcare providers, ARC of Dunn residents, and Harnett County Sheriff's Office employees, as well as a neighbor who had witnessed a previous elopement by Mr. Matthews.

No closer to identifying potential fact witnesses due to Defendants' scant discovery responses and DHHS's redactions, Plaintiff moved to compel productions from both parties. The trial court heard those motions on 28 September 2022, and DHHS objected to the requested disclosure of unredacted witness names because: (1) the information could be obtained through compelling Defendants to comply with their ordinary discovery obligations; and (2) the trial court, in any event, lacked authority to order release of the names under N.C. Gen. Stat. § 131D-2.14. As a policy matter, DHHS argued that the statute's confidentiality provisions were fundamental to its ability to collect trustworthy information during investigations aimed at protecting North Carolinians residing in adult care homes.

The trial court ultimately granted both of Plaintiff's motions to compel. By written order entered 4 October 2022, the trial court compelled Defendants to respond to several interrogatories and requests for production and, pursuant to a concurrently entered protective order, required DHHS to produce its unredacted survey notes. DHHS filed a notice of appeal from that order on 26 October 2022 and subsequently obtained a stay pending appeal.

II. ANALYSIS

DHHS maintains that the trial court's order violates the statutory privilege found in N.C. Gen. § 131D-2.14(3), which, per DHHS, unambiguously and without exception for court orders prohibits the disclosure of "[t]he name of anyone who has furnished information concerning a facility without that person's consent," in connection with licensing investigations. N.C. Gen. Stat. § 131D-2.14(3)b. Plaintiff disagrees, arguing that the statute unambiguously stands for the inverse proposition. We ultimately do not decide which of these competing readings is correct, as the following unambiguous language from elsewhere in our law clearly controls:

> An appellant's brief shall contain, under appropriate headings and in the form prescribed by Rule 26(g) and the appendixes to these rules, in the following order:
>
> . . . .
>
> (4) A statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. . . . When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

N.C. R. App. P. 28(b)(4). DHHS's brief omits the statement of the grounds for appellate review required by this Rule and presents no argument concerning whether the trial court's discovery order is interlocutory and affects a substantial right.

Some appellate rule violations are nonjurisdictional. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.,* 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). But our caselaw is clear that this Court ordinarily lacks jurisdiction over an appeal from an

interlocutory discovery order unless it affects a substantial right. *Crosmun v. Trs. of Fayetteville Tech. Cmty. Coll.*, 266 N.C. App. 424, 432, 832 S.E.2d 223, 231 (2019). Concomitantly, "[t]o confer appellate jurisdiction based on a substantial right, '*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.'" *Doe v. City of Charlotte*, 273 N.C. App. 10, 21, 848 S.E.2d 1, 9 (2020) (emphasis added) (quoting *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019)). Thus, Rule 28(b)(4) is jurisdictional in the context of interlocutory appeals, and an appellant's failure to comply with its provisions mandates dismissal. *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 77-79, 772 S.E.2d 93, 96 (2015).

Plaintiff noted the above jurisdictional issues in her appellee brief, even going so far as to concede that the violation of a statutory privilege generally affects a substantial right and jurisdiction exists in this case under that rationale. But Plaintiff cannot meet DHHS's burden for it. *See, e.g., id.* at 79, 772 S.E.2d at 96 ("Because it is the *appellant's burden* to present appropriate grounds for this Court's acceptance of an interlocutory appeal, and Defendants have not met their burden, Defendants' appeal must be dismissed." (emphasis added) (cleaned up)). And though DHHS could not have cured its jurisdictional error by reply brief, *id.*, it always had the option of pursuing review by petition for writ of certiorari once put on notice by Plaintiff's appellee brief, *Doe*, 273 N.C. App. at 22-23, 848 S.E.2d at 10-11.

Instead of petitioning for writ of *certiorari*, DHHS contended at oral argument, for the first time, that the trial court's order was a final judgment because it fully resolved all issues between Plaintiff and DHHS as a nonparty to the underlying litigation. This proposition appears at odds with our Rules of Civil Procedure, which generally treats any order that determines less than all claims against all parties as interlocutory. N.C. R. Civ. P. 54 (2021).[1] DHHS offered no caselaw, either at oral argument or by memoranda of additional authority, in support of this argument, and we can find none from this jurisdiction.

The rationale offered by DHHS, to the extent it is colorable despite its tardiness, does bear some resemblance to a rule of *federal* appellate law called the "collateral order doctrine." That doctrine permits review of orders which, among other requirements, "conclusively determine[] the question in the trial court, [and] resolve[] an important question independent of the subject matter of the litigation." *Bever v. Gilbertson*, 724 F.2d 1083, 1085 (4th Cir. 1984), *abrogated on separate grounds by Young v. Lynch*, 846 F.2d 960 (4th Cir. 1988). But discovery orders aimed at nonparties *are still interlocutory* under that doctrine, and they do not always fall within the rule. *See generally MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116 (4th Cir. 1994) (holding appeal from a discovery order compelling production by a

[1] Rule 54(b) does allow for entry of "a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment." N.C. R. Civ. P. 54(b). The order appealed in this case contains no such certification.

nonparty was interlocutory and not subject to immediate appeal under the collateral order doctrine). In any event, our Supreme Court has acknowledged that the substantial right test—not the collateral order doctrine—controls in appeals to this Court. *See Goldston v. American Motors Corp.*, 326 N.C. 723, 727-28, 392 S.E.2d 735, 737 (1990) (noting that federal appellate law, including the collateral order doctrine, is inapposite in state court appeals, as "our Court has taken a different approach and developed the *Wachovia* two-prong [substantial right] test").

We do, of course, have discretion to treat DHHS's brief as a petition for writ of *certiorari*, grant that petition, and cure the jurisdictional issue. *Doe*, 273 N.C. App. at 23, 848 S.E.2d at 11. But such action "is truly rare." *Id.* We decline to do so in this case for several reasons, including that: (1) the allegedly privileged disclosure by DHHS is governed by a well-crafted protective order; (2) DHHS has not enunciated any particular harm or danger to the named witnesses through disclosure under that protective order; (3) as argued by Plaintiff on appeal and DHHS below, many—if not all—of these identities are discoverable through other avenues, further undermining any potential harm; and (4) neither the trial court's order nor this opinion constitute precedent binding DHHS in future litigation.[2]

[2] Indeed, we express no opinion as to the propriety of the trial court's order, and our dismissal—done without reaching the merits—is of limited impact even on the case at bench. *See Goetz v. N.C. Dep't of Health & Human Servs.*, 203 N.C. App. 421, 433, 692 S.E.2d 395, 403 (2010) (observing that appeals dismissed as interlocutory do not contain any decisions of law that become the law of the case).

III. CONCLUSION

In sum, DHHS was required to assert and demonstrate the risk to a substantial right in its appellate brief, and its omission of a grounds for appellate review containing such an assertion constitutes a jurisdictional defect mandating dismissal. *Larsen*, 241 N.C. App. at 77-79, 772 S.E.2d at 96. DHHS has not petitioned this Court for a writ of *certiorari* to cure that defect, and we decline in our discretion to treat its brief as such. Lacking jurisdiction, we dismiss DHHS's appeal.

DISMISSED.

Judges HAMPSON and FLOOD concur.

Report per Rule 30(e).