[Cite as *Trick v. Scherker*, 2015-Ohio-2972.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

TONY L. TRICK	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26461
	:	
v.	:	T.C. NO. 14CV3077
	:	
LAURA L. SCHERKER, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendants-Appellants	:	
	:	

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O P I N I O N

Rendered on the 24th day of July, 2015.

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FROELICH, P.J.

{¶ 1} Dr. Sam N. Ghoubrial and several business entities affiliated with his medical practice[1] in Wadsworth, Medina County, Ohio were subpoenaed in relation to a personal injury lawsuit between Tony Trick and Laura Scherker. Dr. Ghoubrial and the business entities appeal from the trial court's ruling on their motion to quash the subpoenas, which enforced the subpoenas to the extent that they requested documents and set a new date by which the documents should be produced, and quashed the subpoenas to the extent that they required testimony.

{¶ 2} For the following reasons, the judgment of the trial court will be affirmed.

{¶ 3} The lawsuit between Trick and Scherker relates to a traffic accident that occurred in Montgomery County, Ohio on July 27, 2011. Dr. Ghoubrial treated Trick on several occasions in the months following the accident, and the subpoenas related to billing and treatment records.[2] In February 2013, Trick sued Scherker to recover for his personal injuries. The case was dismissed in 2013 and refiled in 2014 pursuant to R.C. 2305.19, all in Montgomery County.

{¶ 4} When the complaint was refiled, Scherker issued the subpoenas in question

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[1]The business entities that received the subpoenas were Hanchrist, L.L.C., Clearwater Billing Services, L.L.C., SGM Holdings, Inc., dba Clearwater Billing Services, L.L.C., and Sam N. Ghoubrial, M.D., Inc. Sam N. Ghoubrial was also served in his individual capacity. Because the questions raised in this appeal overlap with respect to all of these entities, we will simply refer to Dr. Ghoubrial, in the interest of simplicity.

[2]The subpoenas also requested travel records because Dr. Ghoubrial, who is based in Wadsworth, Ohio, regularly traveled to the Dayton area to treat patients.

to Dr. Ghoubrial, who treated Trick several times in August and September 2011. The subpoenas requested the production of certain records or, in the alternative, that the recipients appear to testify in Dayton on a specified date. Dr. Ghoubrial did not comply with the subpoenas, nor did he object to them within 14 days after service, as provided in Civ.R. 45(C)(2)(b). When the deadlines specified in the subpoenas had passed, Scherker filed a motion to hold Dr. Ghoubrial in contempt. Thereafter, Dr. Ghoubrial filed motions for sanctions for frivolous conduct and to quash the subpoenas, on the basis that Scherker did not tender, with the subpoenas, the fees involved for one day's attendance and mileage from another county, as required by Civ.R. 45(B). Dr. Ghoubrial also opposed the motion for contempt.

{¶ 5} In its Order and Entry disposing of Scherker's and Dr. Ghoubrial's motions, the trial court essentially severed each of the subpoenas, quashing one part and enforcing the other. It concluded that the subpoenas were enforceable with respect to the production of documents, because the deficiency in tendering travel fees did not relate to this aspect of Scherker's request. However, it quashed that part of the subpoenas that compelled the recipients to appear to testify, due to Scherker's failure to tender the fees required under Civ.R. 45(B) when a subpoena involves travel by the recipient from another county.

{¶ 6} Dr. Ghoubrial appeals, raising one assignment of error, which states:

The trial court erred in failing to quash the subpoenas in their entirety.

{¶ 7} Dr. Ghoubrial contends that the subpoenas were "invalid and unenforceable" based on Scherker's failure to tender fees for travel expenses, that the trial court misapplied Civ.R. 45, and that, under the Rule, the trial court was permitted to

quash ***or*** modify the subpoena, but not both.[3]

{¶ 8} A trial court has broad discretion over discovery matters. *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913, ¶ 18; *EnQuip Technologies Group, Inc. v. Tycon Technoglass, S.R.L.,* 2d Dist. Greene Nos. 2009 CA 42 and 2009 CA 47, 2010-Ohio-28, ¶ 104. Generally, an appellate court reviews a trial court's ruling to quash or enforce a subpoena under an abuse-of-discretion standard. *Chiasson v. Doppco Dev., L.L.C.,* 8th Dist. Cuyahoga No. 93112, 2009-Ohio-5013, ¶ 10, citing *State ex rel. The V. Cos. v. Marshall*, 81 Ohio St.3d 467, 692 N.E.2d 198 (1998); *Ohio Elections Comm. v. Ohio Chamber of Commerce & Citizens for a Strong Ohio*, 158 Ohio App.3d 557, 2004-Ohio-5253, 817 N.E.2d 447, ¶ 18 (10th Dist.), citing *Petro v. N. Coast Villas Ltd.*, 136 Ohio App.3d 93, 96, 735 N.E.2d 985 (9th Dist.2000). Absent an abuse of discretion, an appellate court must affirm a trial court's disposition of discovery issues. *Bd. of Clark Cty. Commrs. v. Newberry,* 2d Dist. Clark No. 2002-CA-15, 2002-Ohio-6087, ¶ 13. The term "abuse of discretion" implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 9} However, when a trial court's decision to enforce or quash a subpoena is based on a specific construction of law, an appellate court reviews the decision under a de novo standard. *Citizens for a Strong Ohio* at ¶ 18. It is appropriate for an appellate court to substitute its judgment for that of the trial court where matters of law are involved.

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[3]We note that Scherker's brief questions whether the trial court's order and entry was a final appealable order. We addressed this argument in a Decision & Entry filed on April 20, 2015, in response to Scherker's motion to dismiss for lack of jurisdiction, and concluded that it is a final appealable order.

Castlebrook v. Dayton Properties Limited Partnership, 78 Ohio App.3d 340, 604 N.E.2d 808 (2d Dist.1992).

{¶ 10} Civ.R. 45, related to Subpoenas, provides, in pertinent part:

(B) * * * Service of a subpoena upon a person named therein shall be made by delivering a copy of the subpoena to the person, by reading it to him or her in person, by leaving it at the person's usual place of residence, or by placing a sealed envelope containing the subpoena in the United States mail as certified or express mail return receipt requested * * *, and by tendering to the person upon demand the fees for one day's attendance and the mileage allowed by law. * * * *If the witness being subpoenaed resides outside the county in which the court is located, the fees for one day's attendance and mileage shall be tendered without demand.*

* * *

[C](3) On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following:

(a) Fails to allow reasonable time to comply;

(b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies;

(c) Requires disclosure of a fact known or opinion held by an expert not retained or specially employed by any party in anticipation of litigation or preparation for trial as described by Civ.R. 26(B)(5), * * *;

(d) Subjects a person to undue burden.

{¶ 11} On June 4, 2014, subpoenas were issued at Scherker's request by certified mail to the records custodian of Hanchrist, L.L.C., the records custodian of Clearwater Billing Services, L.L.C., the records custodian of SGM Holdings, Inc., the records custodian of Sam N. Ghoubrial, M.D., Inc., and Sam N. Ghoubrial, M.D. The subpoenas commanded the recipients to appear to testify on Thursday, July 3, 2014 at the Dayton offices of Young & Alexander at various times in the morning, with the documents described in the subpoena. It further stated, "* * If documents are received by July 1, 2014, appearance is not necessary.* *" The documents requested related to Dr. Ghoubrial's travel expenses, schedule of appointments, and billing records on each of three specified dates; the dates reflected dates on which Trick was treated by Dr. Ghoubrial in Dayton. It is undisputed that the subpoenas did not tender fees for one day's attendance and mileage, due to the recipients' residing outside the county in which the court was located, as required by Civ.R. 45(B).

{¶ 12} The recipients of the subpoenas did not produce the requested documents by July 1 or appear to testify on July 3, 2014. They also did not object within 14 days after service of the subpoenas, a procedure which is provided for under Civ.R. 45(C)(2)(b). On July 9, Scherker filed a motion to hold the recipients in contempt of court for failure to comply. On July 16, 2014, Dr. Ghoubrial filed motions for sanctions for frivolous conduct and to quash the subpoenas, and a brief in opposition to the motion for contempt.

{¶ 13} In October 2014, the trial court overruled the motion for sanctions and the motion to quash the subpoenas. The trial court found that the subpoenas were "defective," in part, in that they commanded the recipients' attendance without providing

the required fees, but that the "deficiencies [were] easily corrected, and thus, moot." In so holding, the court found that the "failure to tender witness fees in relation to the demand for attendance and testimony does not render the demand for production of documents also defective." Accordingly, the court "modified" the subpoena such that the portion related to the production of documents was to be enforced, and the court gave the recipients of the subpoenas 30 days in which to comply with this portion of the subpoenas.

{¶ 14} Dr. Ghoubrial argues that the trial court should have quashed the subpoenas entirely due to Scherker's failure to include the costs of attendance. In support of this argument, he contends that Civ.R. 45(C)(3) provides for the court to quash **or** modify a subpoena (in the disjunctive), but not to quash it in part and modify it in part, as the trial court did here, and that the failure to include fees when they are required is fatal to the entire subpoena as a matter of law. To some extent this is an exercise of linguistics; the court's ruling in essence modified the subpoena by quashing part of it.

{¶ 15} We agree with Dr. Ghoubrial's assertion that the subpoenas were defective as issued because of Scherker's failure to tender the fees for attendance. The recipients could not have been compelled to appear or be found in contempt for failure to appear based on the original subpoenas. However, Civ.R. 45 does not support the rigid application of the Rule advocated by Dr. Ghoubrial. The Rule states that a subpoena may be quashed or modified in four circumstances, Civ.R. 45(C)(3)(a)-(d), none of which relates to the tendering of required fees with the subpoena; Civ.R. 45(A) provides that fees must be tendered without demand, but that section does not provide a remedy for a party's failure to do so. Because the Rule does not provide a specific means for the

enforcement of this provision, its enforcement falls within the trial court's broad discretion in the handling of discovery disputes, for which various remedies may be appropriate.

{¶ 16} Although Dr. Ghoubrial seeks to strictly enforce the provisions of Civ.R. 45 against Scherker, we note that he did not strictly adhere to the Rule himself. The Rule provides for quashing or modifying a subpoena "on timely motion" of the recipient. But neither Dr. Ghoubrial nor his employees objected to the subpoenas within 14 days, as provided by Civ.R. 45(C) for the protection of persons subject to subpoenas. We are unpersuaded by Dr. Ghoubrial's argument that a subpoenaed party, on the facts before the trial court in this case, can decide for itself whether a defect in a subpoena is fatal, such that no response and no effort to seek the guidance or protection of the court is required. As with many other discovery disputes, the court plays the key role in determining whether the rules have been violated and, if so, in fashioning an appropriate remedy.

{¶ 17} We recognize, as other districts have, that Ohio law is "sparse" regarding the effect of a failure to tender fees on the validity of a subpoena. *See A.O. Smith Corp. v. Perfection Corp*., 10th Dist. Franklin No. 03AP-266, 2004-Ohio-4041, ¶ 26. This may be due in part to the broad discretion afforded to trial courts with respect to discovery and the ease with which subpoenas may be reissued. Nonetheless, at least one appellate court has looked to the federal courts for guidance, because its rule governing the tender of fees with subpoenas is similar to the Ohio rule. *Id.* A number of federal courts have held that failure to tender fees renders a subpoena defective. *Id*. at ¶ 26; *see, e.g., Smith v. Midland Brake, Inc*., 162 F.R.D. 683, 686 (D. Kan. 1995) (discussing problems with service, documentation of receipt, and tendering of fees); *Coleman v. St. Vincent De Paul*

Soc., 144 F.R.D. 92, 94 (E.D. Wis. 1992) (discussing fees associated with the issuance of subpoenas, including travel fees, where the litigant is indigent).

{¶ 18} Other federal courts have recognized, however, that a defect in the tendering of travel fees "may be cured by tendering the fees after the service of the subpoena," so long as fees are tendered "*before* appearance is compelled." *A.O. Smith Corp*. at ¶ 26, citing *Klockner Namasco Holdings Corp. v. Daily Access.com, Inc*., 211 F.R.D. 685, 687 (N.D. Ga. 2002) (emphasis added in *A.O. Smith Corp*.). Similarly, Ohio courts have held that the failure to tender fees precludes a finding of contempt, without finding that this defect in the subpoena cannot be cured. *See State v. Eyrich,* 7th Dist. Monroe No. 794, 1998 WL 473334 (July 22, 1998); *State v. Bates*, 9th Dist. Summit No. 13646, 1998 WL 134288 (Dec. 14, 1998).

{¶ 19} In Dr. Ghoubrial's case, the trial court did not attempt to compel the appearance of the subpoenaed witnesses before the defect in the subpoena was corrected. Rather, it ordered the production of documents under the existing subpoena, because the failure to tender fees did not relate to that request, and it held the subpoena to be not enforceable insofar as it compelled attendance, because the provision of fees was required to compel attendance. This resolution is consistent with the principles discussed in *A.O. Smith Corp.* and with the broad discretion generally afforded to trial courts in the handling of discovery matters.

{¶ 20} Dr. Ghoubrial's assignment of error is overruled.

{¶ 21} The judgment of the trial court will be affirmed.

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FAIN, J. and HALL, J., concur.

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