

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2015 MTWCC 10

WCC No. 2015-3549

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JEFFREY BROWN

Petitioner/Claimant

vs.

TINA MORIN, MORIN LAW FIRM, PLLC

Respondent

MONTANA STATE FUND

Insurer.

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ORDER DENYING RESPONDENT'S MOTION FOR CONTEMPT

**Summary:** Respondent moved to hold Petitioner and his attorney in contempt and sought sanctions, including dismissal of this case, on the grounds that Petitioner did not produce documents at his deposition pursuant to a subpoena *duces tecum*.

**Held:** Petitioner had no obligation to produce the documents at his deposition because he was not properly served with the subpoena *duces tecum* under M.R.Civ.P. 45.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.331.** Since ARM 24.5.331 requires that the Court look to M.R.Civ.P. 45, the court follows M.R.Civ.P. 45 to determine if a subpoena is properly served.

**Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure – by Section: Rule 45.** Where a party attempted to serve a subpoena *duces tecum* on Petitioner by mailing it to Petitioner's attorney, the Court held that service was improper. A party to a case cannot serve a subpoena personally.

**Discovery: Subpoenas: Issuing.** Where a party attempted to serve a subpoena *duces tecum* on Petitioner by mailing it to Petitioner's attorney, the Court held that service was improper. A party to a case cannot serve a subpoena personally.

**Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure – by Section: Rule 45.** Where a party attempted to serve a subpoena *duces tecum* on Petitioner by mailing it to Petitioner's attorney, the Court held that service was improper. A party cannot properly serve a subpoena by mailing it.

**Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure – by Section: Rule 5.** While M.R.Civ.P. 5(b) and M.R.Civ.P. 45(c) impose an obligation on a party to provide notice of any subpoena served by serving the party's attorney with a copy, the obligation to notify parties of a subpoena does not trump the requirements that a subpoena *duces tecum* be personally served upon the party commanded to produce the documents by a person who is not a party to the case.

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**Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure – by Section: Rule 45.** Where a subpoena *duces tecum* was improperly served by mailing it to the opposing party's attorney less than 10 days before that party's deposition, the party improperly served had no duty or obligation to object to the improper service or to move to quash the subpoena.

**Discovery: Subpoenas: Subpoena *duces tecum*.** Where a subpoena *duces tecum* was improperly served by mailing it to the opposing party's attorney less than 10 days before that party's deposition, the party improperly served had no duty or obligation to object to the improper service or to move to quash the subpoena.

¶ 1 On May 7, 2015, Respondent Tina Morin, Morin Law Firm, PLLC (Morin), moved this Court to hold Petitioner Jeffrey Brown and his attorney Richard Buley in contempt for failing to respond to a subpoena *duces tecum* that Brown mailed to Buley prior to Brown's deposition.<sup>1</sup> She also requests that this Court dismiss this case "as a sanction for this kind of discovery abuse."<sup>2</sup> Morin also seeks her attorney's fees and costs for bringing her motion and the costs she incurred in taking Brown's deposition.<sup>3</sup> Brown opposes Morin's motion, responding that he was under no obligation to comply with the subpoena *duces tecum* since it was not properly served upon him.<sup>4</sup>

#### Background

¶ 2 On April 17, 2015, Morin mailed a Notice of Deposition, a subpoena, and a subpoena *duces tecum* to Buley on behalf of his client. Although Brown and Buley appeared for Brown's deposition on the noticed date of April 28, 2015, Brown testified that he did not receive the subpoena *duces tecum*. Buley informed Morin that he had not given the subpoena *duces tecum* to Brown because he contended it was improperly served.<sup>5</sup>

¶ 3 Morin argues that this Court should award her sanctions against Brown and Buley because their refusal to respond to the subpoena *duces tecum* "was deliberate, was intended to prevent Respondent from defending against Petitioner's claims and prejudiced Respondent's ability to develop her defense" and that M.R.Civ.P. 45(f) provides that failure to obey a subpoena may be deemed a contempt of court.<sup>6</sup>

¶ 4 Morin contends that she served the subpoena *duces tecum* pursuant to M.R.Civ.P. 45 and ARM 24.5.331. She argues that the applicable rules do not require personal service on a party, and that Brown also failed to object to the subpoena. Morin

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<sup>1</sup> Respondent's Motion for Contempt and Brief in Support (Opening Brief), Docket Item No. 23.

<sup>2</sup> *Id.* at 4.

<sup>3</sup> *Id.* at 1.

<sup>4</sup> Petitioner's Response to Respondent's Motion for Contempt (Response Brief), Docket Item No. 26.

<sup>5</sup> Opening Brief at 1-2.

<sup>6</sup> Opening Brief at 2.

maintains that personal service on a represented party is effectuated through service on his attorney.<sup>7</sup>

¶ 5 Brown responds that Morin failed to comply with M.R.Civ.P. 45(b), which requires that a subpoena be served by personal service, and since Morin did not effect personal service upon Brown, he had no obligation to comply with the subpoena.<sup>8</sup> Brown further argues that he had no obligation to object to the subpoena *duces tecum* because it was not properly served.<sup>9</sup>

¶ 6 Morin replies that under M.R.Civ.P. 5(a)(1)(C), a “discovery paper” must be served upon a party unless otherwise ordered by the Court, and under M.R.Civ.P. 5(b), if a party is represented by an attorney, service must be made on the attorney unless the Court orders service on the party. Morin argues that since Brown is a party represented by an attorney, she properly served the subpoena *duces tecum* upon him by mailing it to Buley.<sup>10</sup>

#### Law and Analysis

¶ 7 ARM 24.5.331(1) states, “Every subpoena must comply with M.R.Civ.P. 45.” M.R.Civ.P. 45(b), in turn, states:

A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person’s attendance is commanded, by tendering to that person the fees for one day’s attendance and the mileage allowed by law.

M.R.Civ.P. 45(c)(3) provides that proof of service “shall be made by filing with the clerk of court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.” This Court agrees with Brown that, by its plain language, M.R.Civ.P. 45(b) requires that a subpoena be personally served. In addition, this Court notes that the plain language requires the subpoena be served by a person who is not a party to the case.

¶ 8 This Court has previously refused to enforce subpoenas that were not served in accordance with M.R.Civ.P. 45(b). In *Vandervalk v. Montana State Fund*, this Court

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<sup>7</sup> Opening Brief at 2-3.

<sup>8</sup> Response Brief at 2.

<sup>9</sup> Response Brief at 3.

<sup>10</sup> Respondent’s Response to Petitioner’s Reply to Respondent’s Motion for Contempt at 1-2, Docket Item No. 29.

quashed a subpoena because the claimant personally served it instead of having it served by a person not a party to the action.<sup>11</sup> This Court also denied the claimant's motion to compel on another subpoena because he served the subpoena by mail instead of having it personally served.<sup>12</sup>

¶ 9 In this case, the service was improper because Morin is a party to this case, and therefore could not serve the subpoena *duces tecum*. The service was also improper because it was made by mail. Since the service was improper, Brown had no obligation to produce the documents or otherwise respond.<sup>13</sup>

¶ 10 This Court is not persuaded by Morin's argument that service of the subpoena *duces tecum* on Buley as Brown's attorney was proper under M.R.Civ.P. 5(b). "It is a well-settled rule of statutory construction that the specific prevails over the general."<sup>14</sup> M.R.Civ.P. 45 is the specific rule and controls the service of a subpoena. While M.R.Civ.P. 5(b) and M.R.Civ.P. 45(c) impose an obligation on Morin to provide notice of any subpoena she served by serving Buley with a copy, the obligation to notify parties of a subpoena does not trump the requirements that a subpoena *duces tecum* be personally served upon the party commanded to produce the documents by a person who is not a party to the case. This Court understands that requiring personal service might seem to elevate form over substance in this case since M.R.Civ.P. 30(b)(2) allows a party to include requests for production in a deposition notice to a party deponent, but when determining whether to hold someone in contempt or to impose severe sanctions, this Court must strictly apply the plain language of the rules.

¶ 11 This Court does not agree with Morin that *Patch v. Hillerich & Bradsby Co.*,<sup>15</sup> supports her argument. In *Patch*, nonparties moved to quash subpoenas because, *inter alia*, they alleged that the defendant failed to provide notice of the subpoena to the plaintiffs. In rejecting this argument, Judge Seeley noted that the certificate of mailing attached to the subpoenas showed that copies of the subpoenas were, in fact, served upon plaintiffs, as required by M.R.Civ.P. 45(c), which states: "Notice shall be provided to all parties no less than 10 days before the commanded production of documents . . .

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<sup>11</sup> 2009 MTWCC 24, ¶ 4.

<sup>12</sup> 2009 MTWCC 35, ¶ 54.

<sup>13</sup> *Cf. Ihnot v. Ihnot*, 2000 MT 77, ¶ 8, 299 Mont. 137, 999 P.3d 303 (citation omitted) (recognizing that improper service of a complaint and summons "undermines a court's jurisdiction, and a default judgment subsequently entered is thereby void.")

<sup>14</sup> *Ditton v. Dep't of Justice Motor Vehicle Div.*, 2014 MT 54, ¶ 22, 374 Mont. 122, 319 P.3d 1268 (citation omitted). See also § 1-2-102, MCA ("In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it.")

<sup>15</sup> *Patch*, 2009 Mont. Dist. LEXIS 312.

and shall be served on each party in the manner prescribed by Rule 5(b).” Contrary to Morin’s claim, *Patch* does not stand for the proposition that a party can require an opposing party to produce documents pursuant to a subpoena *duces tecum* by mailing it to the opposing party’s attorney, as that was not the issue before the court.<sup>16</sup> Rather, *Patch* simply holds that under the plain language of M.R.Civ.P. 45(c), when a party properly serves a subpoena on a nonparty, the party also has to provide notice of the subpoena to the other parties in the case by providing them a copy of the subpoena pursuant to M.R.Civ.P. 5(b).

¶ 12 This Court also disagrees with Morin’s argument that Brown had the duty to object to the improper service or move to quash the subpoena *duces tecum* before Brown’s deposition. Brown had no duty or obligation to do anything because he was not properly served.<sup>17</sup> For this reason, Morin’s reliance on *Prindel v. Ravalli County*<sup>18</sup> is misplaced. The *Prindel* court explained that the plaintiff “properly served” a request for inspection; thus, the Court held that the defendant’s failure to respond “may not be excused on the grounds that the discovery sought . . . is objectionable.”<sup>19</sup> Since Morin did not have the subpoena properly served upon Brown, *Prindel* is inapplicable. Moreover, Morin did not serve the subpoena *duces tecum* in the time that would have required Brown to object or move to quash it before his deposition. M.R.Civ.P. 45(c)(1) requires that notice be provided to all parties no less than 10 days before the commanded production of documents. Even assuming *arguendo* that service of a subpoena by mail from one party to an opposing party’s attorney was allowed, Brown’s deposition occurred prior to the end of this time period.<sup>20</sup>

¶ 13 Since Morin did not cause the subpoena *duces tecum* to be properly served on Brown in accordance with M.R.Civ.P. 45, Respondent’s motion for contempt is **denied**.

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<sup>16</sup> ARM 24.5.324; M.R.Civ.P. 34.

<sup>17</sup> *Watson v. Montana*, 2006 WL 2850583 (D. Mont. October 3, 2006) (ruling that requests for admissions were not properly served and thus opposing party “had no duty to respond.”).

<sup>18</sup> *Prindel*, 2006 MT 62, 331 Mont. 338, 133 P.3d 165.

<sup>19</sup> *Id.*, ¶ 60.

<sup>20</sup> Since Morin mailed the subpoena *duces tecum* on April 17, 2015, under ARM 24.5.320(1)(b), whenever a party serves a notice or paper by mail, the Court adds three days to the prescribed period. Therefore, Brown would have had until April 30, 2015 – two days after his scheduled deposition – to object to the subpoena *duces tecum*.

DATED this 9<sup>th</sup> day of June, 2015.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

c: Richard Buley  
Tina L. Morin  
Greg E. Overturf

Submitted: June 4, 2015