

Circuit Court for Anne Arundel County  
Case No. C-02-CV-16-002718

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 0648

September Term, 2018

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CHESAPEAKE REGIONAL INFORMATION  
SYSTEM FOR OUR PATIENTS

v.

WILLIAM THAM, ET AL.

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Fader, C.J.,  
Nazarian,  
Friedman,

JJ.

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Opinion by Fader, C.J.

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Filed: June 24, 2019

\* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant Chesapeake Regional Information System for Our Patients (“CRISP”) challenges a discovery order from the Circuit Court for Anne Arundel County denying its objection to a “Subpoena and Notice of Deposition *Duces Tecum*” (the “Subpoena”) from William Tham, M.D., Physical Medicine & Pain Management Associates, P.C., Sophia Leonard-Burns, PA-C, Michael Weeks PA-C, Amy Fernandez, PA-C, Robert Loya, PA-C, and Karen Scott, PA-C (collectively, the “Subpoena Proponents”). CRISP argues that the circuit court erred in enforcing the Subpoena because (1) the Subpoena Proponents did not comply with the procedural requirements outlined under Maryland Rule 2-510(f), and (2) compliance with the Subpoena would require CRISP to violate both state and federal law. Because the requirements of Rule 2-510(f) were not followed, thus leaving no request for relief on which the circuit court could properly act, we reverse.

### **BACKGROUND**

The underlying litigation began in August 2016 when Jeffrey Buchalter filed a complaint against the Subpoena Proponents and co-defendants Maryland Neurological Institute, LLC and Insys Therapeutics, Inc.,<sup>1</sup> asserting medical malpractice claims related to treatment with opioid pain medication. CRISP is not a party to the litigation.<sup>2</sup>

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<sup>1</sup> We received notice that Insys has filed for bankruptcy in Delaware. Although it is a party below, Insys is not involved in this discovery dispute and, therefore, the automatic stay does not apply. *See Brown v. Jevic*, 575 F.3d 322, 328 (3d Cir. 2009) (“[T]he automatic stay provision [of the bankruptcy code] does not apply generally to non-debtor parties.”). The parties have informed this Court that no stay that would affect this appeal has been issued.

<sup>2</sup> CRISP is the designated “health information exchange” for the State of Maryland. A health information exchange is “an entity that provides or governs organizational and technical processes for the maintenance, transmittal, access, or disclosure of electronic

On September 19, 2017, the Subpoena Proponents served CRISP with the Subpoena, which demanded that CRISP’s custodian of records “[p]ersonally appear and produce” Mr. Buchalter’s medical records on October 23.<sup>3</sup> On September 27, CRISP filed an objection in which it argued that complying with the Subpoena would cause CRISP to (1) violate the Healthcare Insurance Portability and Accountability Act of 1996, (2) violate § 4-306 of the Maryland Health-General Article, and (3) breach its participation agreements with healthcare providers. CRISP also argued that it “is not the legal custodian of any medical records” and so “it also cannot execute the Affidavit of Custodian of Records certifying and authenticating medical records for evidentiary purposes.”

On January 25, 2018, more than three months after the deposition date and nearly four months after CRISP filed its objection, the Subpoena Proponents filed a “Response to Objection to Subpoena and Notice of Deposition *Duces Tecum*” in which they responded

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health care information between or among health care providers or entities through an interoperable system.” Md. Code. Ann., Health-Gen. § 4-301(i)(1).

<sup>3</sup> Specifically, the Subpoena Proponents requested:

Complete medical records from first date of treatment to the present, including but not limited to any records/documents that may be stored digitally and/or electronically; documents, correspondence, correspondence from the patient or patient’s attorney, intake forms, medical reports, doctor’s entries, nurse’s notes, medication administration records, office notes, progress reports, cardiology reports, radiology reports, x-ray reports, MRI reports, CT reports, myelogram reports, lab reports, pathology reports, monitor strips, physical therapy records, occupational therapy records, case history, emergency records, outpatient records, diagnosis and prognosis documentation, admit and discharge records, and notation(s) on any file folder. All emails between physicians and the patient regarding physical complaints, symptoms, and treatment, including secure messages.

to CRISP’s objection and argued that CRISP should be ordered to produce Mr. Buchalter’s medical records. CRISP did not receive service of the filing electronically and the Subpoena Proponents did not otherwise serve a copy on it. CRISP did not become aware of the Subpoena Proponents’ response to its objection to the Subpoena until it received the court’s order.<sup>4</sup>

On May 14, 2018, without any further filings and without a hearing, the court issued a two-page order that resolved seven different disputes in the case. As relevant to this dispute, the court:

**ORDERED**, that Non-Party Chesapeake Regional Information System for Our Patients’ (“CRISP”) Objection to Subpoena and Notice of Deposition Duces Tecum, filed on September 27, 2017, is **DENIED**. The Court finds that the information being sought is relevant to the pending litigation, and is not privileged or protected under the circumstances of this case;

Promptly upon receipt of that order, CRISP filed a Motion to Alter or Amend, which, after further briefing, the court denied in an order that states, in full:

Upon consideration of Defendants’ Opposition to CRISP’s Motion to Alter or Amend Order Entered May 14, 2018, and any Opposition thereto, it is this \_\_\_ day of \_\_\_\_\_, 2018

**ORDERED** that the same be, and hereby is, **GRANTED**; it is further,

**ORDERED** that CRISP comply with this Court’s Order Entered May 14, 2018;

**SO ORDERED.**

CRISP appealed.

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<sup>4</sup> CRISP maintains that it had been checking the docket during the “15-day window for filing a motion to compel production,” *see* Rule 2-510(f), but ceased doing so once that window closed.

## DISCUSSION

CRISP challenges the circuit court’s order denying its objection to the Subpoena. We review a trial court’s discovery rulings for abuse of discretion. *Bacon v. Arey*, 203 Md. App. 606, 671 (2012). A trial court does not have discretion to misapply the law, however, and so it abuses its discretion when a discovery decision encompasses an error of law. *Schlottzauer v. Morton*, 224 Md. App. 72, 84-85 (2016); *see also Wilson-X v. Dep’t of Human Res.*, 403 Md. 667, 675 (2008) (“[T]rial judges do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature.”).

CRISP contends the circuit court erred as a matter of law in denying its objection to the Subpoena based on the Subpoena Proponents’ response to the objection, which, CRISP maintains, was procedurally improper, belated, and not adequately noticed. We agree.

Under Rule 2-510(f), when a person is served with a subpoena to attend a deposition that “also commands the production of documents, electronically stored information, or tangible things at the deposition,” the person served has two avenues to oppose production: (1) “seek a protective order pursuant to Rule 2-403,” or (2) “file, within ten days after service of the subpoena, an objection to production of any or all of the designated materials.” Md. Rule 2-510(f). If an objection is filed, “the party serving the subpoena is not entitled to production of the materials except pursuant to an order of the court from which the subpoena was issued.” *Id.* The Rule then provides for the appropriate manner of obtaining such an order: “At any time before or within 15 days after completion of the

deposition and upon notice to the deponent, the party serving the subpoena may move for an order to compel the production.” *Id.* Thus, once a recipient of a subpoena requesting production of documents files an objection, the serving party’s recourse to compel production is to file a timely motion to compel. Doing so “shifts the burden of obtaining an order compelling the production of documents to the party who served the subpoena[.]” Paul V. Niemeyer, et al., *Maryland Rules Commentary* 528 (4th ed. 2014).<sup>5</sup>

Here, the Subpoena Proponents failed to comply with Rule 2-510(f) in at least three ways. First, they did not file a motion to compel. Instead, they filed a “response” to CRISP’s objection, which is a mechanism not contemplated either specifically by Rule 2-510(f) or generally when seeking an order. *See* Rule 2-311(a) (“An application to the court for an order shall be by motion . . .”). Second, their filing was not timely. Rule 2-510(f) requires the party requesting production to file its motion to compel within 15 days of the deposition. The Subpoena Proponents’ objection came more than three months after the date identified for the deposition and nearly four months after CRISP filed its objection. Third, the Subpoena Proponents failed to serve CRISP with a copy of their response.

The Subpoena Proponents acknowledge that Rule 2-510(f) does not expressly contemplate the procedure they followed, but contend that it was nonetheless an

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<sup>5</sup> Under the Rules, filing of an objection to the production of documents “does not excuse the need to attend the deposition.” Niemeyer, *Maryland Rules Commentary* 528. CRISP notes in its brief that it did not appear for deposition because the Subpoena contains “certain defects” that “rendered appearing to testify impossible.” Appellees did not take issue with CRISP’s failure to appear below or on appeal and so we will not address it.

appropriate way of obtaining an order from the circuit court requiring CRISP to produce the records at issue. Moreover, they argue, any procedural deficiencies were harmless because CRISP ultimately was able to make all of its arguments to the circuit court through its filing of the motion to alter or amend. We disagree. Once CRISP filed its objection, the Subpoena Proponents were required to file a timely motion to compel and to serve a copy of that motion on CRISP. Pursuant to Rule 2-311(b), CRISP would then have had 15 days to respond. Because the Subpoena Proponents did not file a timely motion to compel, there was nothing properly before the court on which to rule. Moreover, to the extent that the court ruled on what was before it, it allowed the Subpoena Proponents to shift improperly the burden to CRISP by requiring them to seek reconsideration.

It is no answer to contend, as the Subpoena Proponents do, that CRISP was ultimately able to make its arguments to the circuit court. Not only was CRISP required to file its motion to alter or amend on an expedited basis, in less time than it would have had to respond to a motion to compel, but the matter was then presented to the circuit court in a different posture. On a motion to compel, the party seeking production bears the burden of demonstrating its entitlement to the production at issue. On a motion to alter or amend, the party from whom production is sought bears the burden of demonstrating that the court should change its mind as to a decision it has already reached. The wide discretion a court has in denying such a motion is embodied in the standard by which we review such decisions, which requires us to ask whether the trial court's decision is "*so egregiously wrong . . . as to constitute a clear abuse of discretion.*" *Stuples v. Balt. City Police Dep't*,

119 Md. App. 221, 232 (1998). Nor can we be assured on this record that the procedural errors did not affect the outcome.<sup>6</sup>

In conclusion, once CRISP filed its objection, the Subpoena Proponents' recourse—short of coming to an agreement—was to file a motion to compel. Once the time passed for the Subpoena Proponents to file a timely motion to compel, their recourse was to serve a new subpoena. Because the Subpoena Proponents failed to follow the proper procedures to enforce the Subpoena, the circuit court erred as a matter of law in ordering CRISP to comply with it and, therefore, abused its discretion. *See Schlotzhauer*, 224 Md. App. at 84-85 (noting that abuse of discretion lies where a trial court's decision is based on an error of law). Because we cannot say that the court's error was harmless in this instance, we reverse.

**ORDER OF THE CIRCUIT COURT FOR  
ANNE ARUNDEL COUNTY REVERSED.  
COSTS TO BE PAID BY APPELLEES.**

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<sup>6</sup> The confusion created by the Subpoena Proponents' failure to follow the procedures outlined in Rule 2-510(f) is reflected in the circuit court's rulings. In its first ruling, the court "denied" CRISP's objection to the Subpoena. Under the Rule, however, the objection was not something to be denied. Instead, the role of the objection is to impose upon the party seeking production the obligation to seek an order to compel. In its second ruling, the court "granted" the Subpoena Proponents' opposition to the motion to alter or amend. In that instance, the court should have ruled on the motion itself, granting or denying it, rather than on the opposition.