IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR SARASOTA COUNTY, FLORIDA

Consolidated Appeal Case Nos.

2007 AP 10721 NC
2007 AP 10932 NC
2007 AP 10934 NC
2007 AP 10933 NC
2007 AP 12538 NC

CMI, INC. d/b/a CMI, INC. of KENTUCKY,

Appellant,

vs.

JOHN FABIAN, CATHERINE MARSH, MORLEY PARENT, SARA PENNEY, KENNETH BAKER, STATE OF FLORIDA,

Appellees.

On Appeal from the Twelfth Judicial County Court

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY TO ANSWER BRIEF OF APPELLEE

In his answer brief Appellee failed to properly address the two most critical issues in this consolidated appeal. First, could the county court issue a subpoena duces tecum to a non-party out-of-state corporation without utilizing the Uniform Act in the first place? This issue is critical, directly ties in with the difference between personal jurisdiction and subpoena power, and affects virtually all other county court criminal cases.

The second critical issue is whether Appellant willfully violated the subpoenas duces tecum? Even if the subpoenas that were issued were valid, Appellant did not willfully violate the subpoenas and so the contempt and fines cannot stand.

The Critical Distinction Between Personal Jurisdiction And Subpoena Power

Appellee exhausted 6 pages of argument on the topic of personal jurisdiction, yet somehow managed to fail to address the most important issue of all, the difference between personal jurisdiction and subpoena power. The lower court did not have personal jurisdiction over Appellant because the lower court and Appellee failed to recognize the distinction between **parties** and **non-parties**.

Appellee lists case after case asserting that under Florida case law and Fla. Stat. 607.1505, a foreign corporation registered to transact business is subject to the same liability as a domestic corporation. Appellee argues over and over that where a court has obtained personal jurisdiction over a defendant, such jurisdiction extends to that defendant's papers and offices outside of that jurisdiction.

Appellant would like to make it clear this is not in dispute. Had Appellee sued Appellant for injury from the breath instruments in question, and Appellant was an actual party to that suit, Appellant might be subjected to the personal jurisdiction of that court. However, Appellant is not a party to the underlying case, it is a non-party who was subpoenaed pursuant to discovery.

Appellant was unable to discover any Florida state case law on this distinction between personal jurisdiction and subpoena power. Thus, it appears to be a matter of first impression. Appellant did find cases from numerous sister state Supreme Courts who have addressed the distinction. When this is a matter of first impression in Florida, this Court must give great weight to the holdings of its sister states as persuasive precedent.

The State Supreme Courts of Mississippi, Lousiana, and Alabama, all have held the underlying concepts of personal jurisdiction and subpoena power are

entirely different. See *Syngenta Crop Protection, Inc. v. Monsanto Company,* 908 So.2d 121, 129 (Miss. 2005); *Phillips Petroleum Co. v. OKC Limited Partnership,* 634 So.2d 1186, 1187-88 (La. 1994); *In re: National Contract Poultry Growers' Association,* 771 So.2d 466, 469, 470 (Ala. 2000).

Thus, where the lower court may have had personal jurisdiction over Appellant had Appellant been a party to litigation, it did not have subpoena power over Appellant where Appellant is a non-party foreign corporation who is simply registered to transact business in Florida.

Appellant Did In Fact Properly Object To The Subpoenas Duces Tecum

Appellee claims Appellant did not object to the subpoenas duces tecum prior to the production date. However, the record shows differently. Appellant did properly object to the subpoenas. Therefore, Appellant could not have been held in contempt.

First, the subpoenas for all five of the consolidated cases can be found in the Fabian record. (*Fabian* Vol. 1, p.85, 86, 106) The plain language of all of these subpoenas state to the receiver **"You have the right to object to the production**

pursuant to this subpoena at any time before production by giving written notice to the attorney whose name appears on the subpoena."

The subpoena itself tells the receiver objection to the subpoena is not to the court but to the attorney whose name appears on the subpoena. The name of the attorney who appears on the subpoenas at issue is Robert Harrison, attorney for all of the consolidated Appellees. The production date for the subpoenas was April 18, 2007 for *Baker* (*Fabian* Vol. 1, p.85), and May 16, 2007 for *Fabian, Marsh, Parent* and *Penney*. (*Fabian* Vol. 1, p.86, 106) A motion objecting to the subpoenas and to quash them was filed in Kentucky Davies District Court on April 12, 2007. (*Fabian* Vol. 1, p.72) The attorney for the Appellees was specifically Noticed and served with a copy of this objection and motion to quash on April 12, 2007, **prior to the production dates.** (*Fabian* Vol. 1, p.83) Therefore, the attorney named on the subpoenas was in fact provided written notice of objection to the production.[1] Appellants therefore could not have been held in contempt because they followed the exact instructions on the subpoena itself. Furthermore, as this Court can see by the letter dated May 14, 2007 from Robert Harrison to Appellant, he was fully aware Appellant objected to the production of the Source Code prior to the specified production date. (*Fabian* Vol. 1, p.124) Also, in this

[1] Counsel for Appellee actually appeared in Kentucky through counsel in these proceedings and lost.

written objection, Appellant asserted that the Source Code requested was a trade secret. (*Fabian* Vol. 1, p.74, para. 7) ("The source code for the Intoxilyzer 5000 is a trade secret of CMI.")

Once Appellant provided written notice to Appellees objecting to the subpoenas and informing them it was a trade secret, it was up to counsel for Appellees to provide this information to the lower court. Once Appellant informed Appellee it objected to the subpoena, Florida Statute 90.506 entitled "Privilege with respect to trade secrets" must be followed. Florida Statute 90.506 states in pertinent part "When the court directs disclosure, it shall take the protective measures that the interests of the holder of the privilege, the interests of the parties, and the furtherance of justice require."

Pursuant to this statute, "When trade secret privilege is asserted as the basis for resisting production, the trial court must determine whether the requested production constitutes a trade secret; if so, the court must require the party seeking production to show **reasonable necessity** for the requested materials." *Rare Coin-it, Inc. v. I.J.E., Inc.*, 625 So.2d 1277, 1278 (Fla. 3DCA 1993) (emphasis added).

The lower court never held any hearing or discussed in any way this "reasonable necessity" standard. Reasonable necessity is a much higher standard than materiality. Additionally, the lower court was **obligated** under 90.506 to take protective measures prior to considering production of a trade secret. This was never done even though the lower court knew the requested information was a trade secret.

In the Sarasota County case of *Irish*, which held extensive evidentiary hearings on the Source Code issue, Judge Denkin noted that "both the State and the defense experts agree that the source code constitutes a trade secret." *State v. Jack Irish*, Criminal Case No. 2006 CT 02109 SC (Order on Defendant's Motion to Compel Production of the Source Code dated May 4, 2006).

Furthermore, the Fifth District Court of Appeals has held that "It is also without dispute that the code is a trade secret of CMI, Inc. and that CMI, Inc. has invoked its statutory and common law privileges protecting the code from disclosure." *Moe v. State*, 944 So.2d 1096 (Fla. 5th DCA 2007). The Fifth DCA found Appellant had invoked its trade secret privileges even though the discovery request in that case was to the State, and not to Appellant, and Appellant never had any correspondence or involvement in *Moe* asserting any trade secret privilege.

Appellant could not then have been in contempt of the subpoenas because it properly objected in writing to the attorney of record, and it asserted trade secret privilege. Appellant could not then be in contempt for failure to provide the Source Code at the production date, especially where all parties involved, including the lower court, knew the Source Code was a trade secret but failed to provide any protective measures whatsoever to protect the proprietary nature of Appellant's protected information.

General Motors

Appellant informed this Court in its initial brief that *General Motors Corp. v. State*, 357 So.2d 1045 (Fla. 3DCA 1978), is not controlling and should be limited to its facts. Appellee maintains that since *General Motors* has not been specifically overturned, it is binding and must be followed regardless of the fact that all other case law throughout the United States disagrees with it. This argument holds no merit.

More recent Florida cases have directly contradicted *General Motors* and called into questions its holdings. See e.g., *Delit v. State*, 583 So.2d 1083, 1085-1086 (Fla. 4DCA 1991); *State v. Kocis*, Criminal Case No. 05-2284-CFA

(Seminole Circuit Court), Order Denying Defendant's Motion for Leave of Court to Issue Subpoena Duces Tecum dated January 11, 2007; *Mastrapa v. South Florida Money Laundering Strike Force*, 928 So.2d 421 (Fla. 3DCA 2006).

Since *General Motors* was a 1978 Third District Court of Appeals Case that has been directly contradicted, even by a recent Circuit Court decision in *Kocis*, it is no longer binding. It should be strictly limited to its facts in that in the subpoena in question was a State Attorney investigatory subpoena and in 1978 it was unsettled whether such subpoenas applied to subpoenas duces tecum.

Several months ago the Supreme Court of Florida noted that "stare decisis bends where ... there has been an error in legal analysis ... Perpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the Court." *Strand v. Escambia County*, 2007 WL 2492294, at p.10, 32 Fla. L. Weekly S550 (Fla. 2007).

Initial Determination of Materiality In Order To Issue Subpoena Duces Tecum

Appellee maintains that Appellant cannot challenge the initial determination of materiality because the recipient of a subpoena cannot challenge the relevancy of the requested material. However, Appellee entirely misses the point that

Appellant is not challenging the relevancy of the Source Code. Appellant asserts, as a matter of law, rather than fact, it was an abuse of discretion for the lower court to issue the subpoena in the first place. If the subpoena should not have been issued than Appellant cannot be in contempt.

Appellee argues the Florida Legislative Amendments to 316.1932(f)(4) "only provides, the State does not have to provide the software to criminal defendants if the software is not in the actual possession of the State." However, Appellee misses the plain language of the statute wherein it states **"Additionally, full information does not include information in the possession of the manufacturer of the test instrument."** Fla. Sta. 316.1932(f)(4). Appellant is that manufacturer.

The Florida legislature fully intended to prevent Appellee from obtaining the Source Code from anyone, including the Appellant, because it is not material to the Appellee's defense. Since it is a trade secret, it certainly is not reasonably necessary. Thus, the lower court erred as a matter of law in finding that the Source Code was material because they failed to recognize the legislative intent to deny Appellee access to the Source Code.

Furthermore, the lower court erred as a matter of law in finding materiality because the evidentiary hearing wherein that determination was made was grossly flawed.[2] Appellee would also like this court to alter the standard for determining materiality. However, all known courts in Florida[3] to address the issue, including *Jugov*, have used the *James v. State* standard for materiality. *James v. State*, 453 So.2d 786, 789 (Fla. 1984).

Florida Rule of Criminal Procedure 3.220(f) states that "On a showing of materiality, the court may require such other discovery to the parties as justice may require." When the Florida Legislature added this section, if they intended the standard to be the same as all other requests for discovery, they would not have used the precise language, "on a showing of materiality."

Furthermore, Fla.R.Crim.Pro. 3.220(h)(D) prohibits the taking of depositions in misdemeanor criminal cases unless "good cause" can be shown.

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[2] Contrary to the assertions of Appellee that the record does not support that the County Court refused to allow the State Attorney its due process right to present evidence on the issue of materiality, and that Appellant did not cite the actual transcript, Appellant would direct this Court to the *Baker* record page 14-21. Appellant cited the transcript that was contained within the motion filed by the State and Appellant would urge this Court to review these pages.

[3] Recently the Sarasota County Court reversed its previous position and found, in contradiction to the rest of the State and its own prior decisions, that the *James* standard does not apply to subpoenas duces tecum to non-parties. Sarasota County Court now uses a lower standard that looks to whether the information requested "is reasonable calculated to lead to the discovery of admissible evidence." *State v. Udice*, Criminal Case No. 2006 CT 9705 SC (Sarasota County Court), Order On Defendant's Motion for Rehearing on Defendant's Requesting Issuance of Subpoena Duces Tecum Compelling Production Of The Source Code For The Intoxilyzer 8000 From CMI dated October 8, 2007.

The Florida legislature intended that discovery be limited in misdemeanor criminal cases because of the potential for abuse and unnecessary clogging of the dockets.

It does not then make sense that a criminal defendant be allowed to issue a subpoena duces tecum to any non-party in every case in the hopes that it might lead to the discovery of admissible evidence, which is the general discovery standard, but that for a deposition a defendant must show good cause. The potential for abuse and harassment with subpoenas to non-parties in misdemeanor criminal cases is too great.

The Uniform Act provides another safeguard to potential abuses of subpoena power. Under the Uniform Act, a Florida county court must certify to the sister state the information sought is material. That certificate is provided to the sister state's court, which makes an independent determination of materiality, and then issues the subpoena under that states authority.

Willful Contempt

Appellee did not cite authority whatsoever to refute the fact Appellant did not willfully violate the lower courts order.

At the time Appellant received the subpoenas duces tecum in these cases and was held in contempt, there were two outstanding orders from Sarasota County Court and the Kentucky Daviess Court that held Appellant did not have to respond to the subpoenas duces tecum. In *State v. Irish* (Criminal Case No. 2006 CT 2109 SC) Order dated May 4, 2006, Judge Denkin noted in Footnote 22:

> This court also declines to accept defendant's argument that CMI, Inc. was properly served with a subpoena duces tecum and willfully refused to provide the source code. This court finds that CMI, Inc. must be served pursuant to section 942.01, Fla. Stat. (2005) and adopts the ruling announced [the Daviess Court].

This order was in effect and binding at the time Appellant was held in contempt by the other lower court.[4] *Irish* was the law at the time Appellant was held in contempt. Thus, Appellant was told it was **not** in willful violation, the Uniform Act applied, and Appellant didn't have to respond to the subpoenas by one Sarasota County court, and then another Sarasota County Court found it was in contempt without even addressing *Irish*. Counsel for Appellee should have been held in contempt for moving for and obtaining an Order to Show Cause in *Fabian* where *Irish* had told him he could not.

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[4] In yet another complete turnaround, the Sarasota County Court has now reversed its earlier position in *Irish* that the Uniform Act applies. Without issuing another subpoena to Appellant, and relying upon the original subpoena issued a year prior, the Judge Denkin reversed the *Irish* decision in an order dated August 20, 2007, and found that Appellant had in fact willfully refused to respond to the earlier subpoena. That case and contempt proceedings against Appellant are still pending.

Appellant was also told by its Kentucky courts it did not have to respond to the Subpoenas issued outside of the Uniform Act in Orders quashing the subpoenas.[5]

Therefore, not only did Appellant follow the instructions of the subpoena by objecting to the attorney of record and asserting trade secret privilege, but it also relied on Orders from both Sarasota and Kentucky stating it did not have to respond, and at least in one case was specifically ordered not to respond.

To then find Appellant willfully violated the Sarasota subpoenas is remarkable, since to do so the lower court had to have found that Appellant should have determined its own court in Kentucky didn't have jurisdiction, and disobeyed that courts direct order, when at the same time virtually all courts everywhere in Florida and Kentucky all contradict Sarasota County Court, and Sarasota County itself was telling Appellant it didn't have to respond.

[5] Furthermore, in another case from Charlotte County, also involving counsel for Appellee, Appellant was specifically **ordered** by the Kentucky Daviess Court not to respond to subpoenas out of the State of Florida not comporting with the Uniform Act. *State v. Adkins*, (KY Sixth Judicial District Court Case # 06-C-01500). This case has been provided to this Court in hardcopy format.

CONCLUSION

Hopefully Appellant has shown this Court that what has occurred in these Source Code cases is nothing but a travesty of justice. Some of these DUIs, such as *Baker*, are three years old. Many of the defendants have gotten arrested a second time for DUI during the pendency of these cases. Appellee is using these motions as a vehicle to delay justice. Appellant is respectfully requesting this Court rule on three issues.

First, it was an abuse of discretion for the County Courts to find the Source Code was "material" and the proper standard for determining materiality is that of *James v. State*. Second, there is a difference between personal jurisdiction and the power to subpoena, the Uniform Act must be utilized to subpoena a non-party out of state corporation, and *General Motors* is no longer good law. Finally, Appellant did not "willfully" fail to respond to the subpoenas duces tecum because Appellant properly objected to them, they had been quashed in Kentucky prior to production, and it was reasonable for Appellant to rely on the Sarasota and Kentucky Orders telling Appellant it did not have to respond.

CMI is respectfully requesting this Court reverse the County Court Orders of Civil Contempt.

DATED: January 15 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by ordinary U.S. Mail to: Cliff Ramey, Assistant State Attorney, 2071 Ringling Blvd., Sarasota, FL 34236, Robert Harrison, 825 S. Tamiami Trail, Suite 2, Venice, FL 34285, Kerry E. Mack, Esq., 2022 Placida Road, Englewood, FL 34224, and Paul Cherry, Office of the Public Defender, 4000 S. Tamiami Trail, Venice, FL 34293 this 15 day of January, 2008.

By: [signature] for
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Initial Brief is submitted in Times New Roman 14-point font.

DATED: January 15 2008.

By: [signature] for
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Fla. Bar No. ~~490318~~ 10595