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

STATE OF FLORIDA,
Plaintiff,

vs.

DEFENDANT'S NAME	CASE NUMBER
KENNETH BAKER,	2005 MM 002364 SC
BELINDA BARNETT,	2005 CT 011034 SC
CAROLE BJORKLAND,	2004 CT ~~011406~~ SC 014406
DOMINIC BURCH,	2004 CT 012605 SC
KAREN BURNHAM,	2005 CT 008620 SC
MARTHA BURNS,	2005 CT 011691 SC
DARIN BUSHONG,	2005 ~~2004~~ CT 001158 SC
CARMEN CARTER,	2005 CT 011089 NC
WILLIS CHAMBERS	2005 CT 007721 SC
BARBARA CHANDLER,	2005 CT 011268 NC
KATHLEEN C. CHARLES,	2004 CT 011430 SC
ROBERT CORREIA,	2005 CT ~~007721~~ SC 11514
JAMES DALE,	2005 CT 010255 SC
LOUIS DARNA,	2004 CT 012684 SC
VITTORIO DELLASALA,	2005 CT 004846 SC
JOHN DOWNING,	2002 CT 004894 SC
FRANK FARLEY,	2005 CT 009121 NC
MARIO FELIX,	2005 CT 006391 NC
LISA FREDERICKSON,	2004 CT 018161 NC
ALMASSO FOCO,	2005 CT 012186 NC
JAROLD FRENCH,	2005 CT 009097 SC
JESUS GARCIA,	2005 CT 009965 SC

DEFENDANT'S NAME	CASE NUMBER
MICHAEL GANEY,	2005 CT 003195 NC
MICHAEL GANEY,	~~2005 CT 004247 NC~~ 2005mm 4274
MICHAEL GANEY,	2005 CT 009041 NC
ANN GEIGER,	2005 CT 006398 SC
DANN GRAFF,	2005 CT 006385 SC
RYAN GREEN,	2005 CT 010636 SC
JAY L. GROEPEL,	2003 CT 001756 SC
SHANE HALE,	2005 CT 012050 NC
HORTENSE HARMON,	2005 CT 009607 NC
CARROLL HARTLOVE,	2005 CT 005624 NC
GEORGES HILAIRE,	2005 CT 011530 SC
THOMAS JAHNKE,	2005 ~~2004~~ CT 001214 NC
JAMES JOYCE,	2005 CT 007664 SC
BERNARD KILLION,	2005 CT 003999 SC
GARY MICHAEL LEE,	2005 CT 004425 SC
DANIELLE LYNCH,	2005 CT 003233 SC
JOSE MARES,	2005 CT 008574 NC
LUIS MARTINEZ,	2005 CT 011258 NC
JASON ROSE	2005 CT 000873 NC
PIERRE SANTILLIANA,	2005 CT 008274 NC
ADAM SMITH,	2005 CT ~~004305~~ NC 014305
DANIEL SAULS,	2005 CT ~~013737~~ NC 013732
JUSTIN LEE SCHRIEBER	2005 CT 009128 NC

Defendants.

KAREN E. RUSHING
CLERK OF CIRCUIT COURT
SARASOTA COUNTY, FL
2005 SEP -6 PM 4:13
CRIMINAL LAW
FILED FOR RECORD

STATE'S MOTION TO STRIKE DEFENDANTS' MOTION FOR SUPPLEMENTAL DISCOVERY

COMES NOW the State of Florida by and through its undersigned Assistant State Attorney, and files State's Motion to Strike Defendants' Motion for Supplemental Discovery and as grounds therefore, states as follows:

Defendants have requested supplemental discovery, but have failed to properly plea any facts to support the "materiality" and "reasonable necessity" requirements for such a request. By making such naked conclusory request, Defendants' have violated Rule 3.220(f), and the corresponding case law, which requires a showing of materiality and reasonable necessity, and thus have

failed to place the State on notice of any evidence they intend to present.

I. Defendants have not properly pled facts sufficient to carry their burden of "materiality" and "reasonable necessity."

Defendants' four (4) paragraph Motion for Supplemental Discovery seeks production of the source code software used in the various breath tests. Paragraph 4 of their Motion merely alleges that:

> ". . . Defendant seeks this information to determine whether the Intoxilyzer actually used in this case was using a software program approved by 11D8.003 [Florida Administrative Code] or a modified version of this program, and if a modified version was used, what extent the modification would have on the reliability of the Intoxilyzer."

However, Florida Rule of Criminal Procedure 3.190(a) requires Defendants to "state a ground or grounds on which [their motion] is based." Fl. R. Cr. P. 3190(a). Defendants' have not pled any facts, let alone any facts that would support a claim of "materiality" and "reasonable necessity."

A. Defendants' have failed to show "materiality."

Defendants' have failed to plea any facts to support a claim of materiality. Florida Rule of Criminal Procedure 3.220(f) requires the Defendants' Motion show "materiality." Fl. R. Cr. P. 3.220(f). Defendants' claim that they need the source code to determine if any modifications have occurred, and

if so whether they render the Intoxilyzer unreliable, yet the claim has no factual assertion to back it up.

In Esprit v. State, the defendant filed a two-page conclusory motion "which did not explain the basis for any of [defendant's] claims." 750 So.2d 150 (Fla.App. 3rd DCA 2000). Defendant' motion was denied for its improper pleading. Id; Florida Elections Com'n v. Florida Educ., --- So.2d ---, 2005 WL 1832770 (Fla.App. 1st DCA 2005)(Request denied "because the [movant] failed to allege and demonstrate specific facts supporting [the] relief requested.)

In our case(s), Defendants' have filed a two (2) page pleading consisting of only four (4) paragraphs, in which they explain none of their assertions. Nor have they provided a single legal or factual ground for their request. Therefore, the State asks this Court to strike Defendants' request as improperly pled.

B. Defendants' have not shown "reasonable necessity."

Defendants' have requested the State produce a source code which is a trade secret of CMI, Inc., a Kentucky Corporation. See Exhibit 1, Affidavit. When a party to an action requests a trade secret from another party, "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.App 3rd 1993).

In our case, Defendants' have asked for the production of a source code trade secret. The Third District has reasoned that:

> ". . . production of the source code, without a finding of reasonable necessity, would cause [the non-requesting party] irreparable harm. This is true even when the trial court orders production subject to a protective order."

Id. at 1279. Production of the source code in this case would result in irreparable harm to CMI. Therefore, since the Defendants' have not pled facts to support a claim of reasonable necessity, the State asks this Court to strike Defendants' Motion(s) as improperly pled. Without a proper pleading, the State is not on notice of the evidence which the Defendants' wish to present to the Court.

II. Conclusion

Since the Defendant have failed to carry their burden of materiality and reasonable necessity, State asks this Court to strike the Defendants' Motion(s) in its (their) entirety.

WHEREFORE, the State of Florida requests this Court strike Defendant's Motion(s) for Supplemental Discovery in its (their) entirety.

Respectfully submitted,

EARL MORELAND
STATE ATTORNEY
TWELFTH JUDICIAL CIRCUIT

JASON M. MILLER, 0624551, ASA
2071 Ringling Blvd.,
Suite 400
Sarasota, Florida 34237
(941) 861-4300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail, fax or hand delivery to the following:

Office of the Public Defender, 2071 Ringling Blvd., Sarasota, Florida, 34237;
The Byrd Law Firm, P.A., 2151 Main Street, Suite 201, Sarasota, Florida, 34237; fax (941) 954-0880;
Finebloom & Haenel, P.A., 100 Wallace Ave., Suite 130, Sarasota, Florida, 34237; f (941) 365-6579;
Kerry Mack, Esq., 2022 Placida Rd., Englewood, Florida, 34224; f (941) 475-0729
Robert N. Harrison, 825 S. Tamiami Trail, Suite 2, Venice, Florida, 34285; fax: (941) 488-8551;
Brett McIntosh, Esq., 766 Hudson Avenue, Suite B, Sarasota, Florida, 34236; fax (941) 957-8002;
John J. Pangallo, Esq., 2201 Ringling Blvd., Suite 205, Sarasota, Florida, 34237; f (941) 955-1182
Varinia Van Ness, Esq., 46 N. Washington, Blvd., Suite 9, Sarasota, Florida, 34236; fax (941) 362-3632;

this 6 day of Sept., 2005.

JASON M. MILLER

AFFIDAVIT

Comes the Affiant William Schofield, and being first duly sworn, states as follows:

1) My name is William Schofield. I am the Manager of Engineering for CMI, Inc., located at 316 East 9th Street, Owensboro, Kentucky.

2) CMI manufactures, among other things, the Intoxilyzer 5000. CMI sells this product throughout the United States. It has sold the Intoxilyzer 5000 to the Florida Department of Law Enforcement for use by law enforcement agencies and offices throughout Florida.

3) CMI has not disclosed the source code for the Intoxilyzer 5000 to any of its customers in any city or county in Florida. CMI has not provided this information to the Florida Department of Law Enforcement.

4) CMI considers the source code for the Intoxilyzer 5000 as proprietary information and a trade secret of CMI. Disclosure of the source code would allow our competition, both actual and potential, to have a blueprint for our product.

5) I have personal knowledge of the matters set forth in this Affidavit.

6) I swear or affirm that all of the above statements are true and correct to the best of my knowledge and belief.

Exhibit 1

This 25TH day of May, 2005.

William Schofield
Title: Manager of Engineering,
for CMI, Inc.

COMMONWEALTH OF KENTUCKY)
COUNTY OF DAVIESS)

Subscribed and sworn to before me by William Schofield, Manger of Engineering for CMI, Inc., on this 25 day of May, 2005.

Notary Public, State at Large
My commission expires: 10-22-07

750 So.2d 150, 25 Fla. L. Weekly D307
Briefs and Other Related Documents

District Court of Appeal of Florida,Third District.
Curtis ESPIRIT, Appellant,
v.
The STATE of Florida, Appellee.
No. 3D00-66.

Feb. 2, 2000.

An appeal under Fla. R.App. P. 9.140(i) from the Circuit Court for Dade County , Michael A. Genden, Judge.

Curtis Espirit, in proper person.
Robert A. Butterworth, Attorney General, for appellee.

Before JORGENSON , COPE and LEVY, JJ.

PER CURIAM.
Appellant filed a two-page conclusory motion under Florida Rule of Criminal Procedure 3.850 which did not explain the basis for any of appellant's claims. The motion was properly denied. On appeal, defendant has filed a forty-six page brief which outlines his position, but the arguments he now makes were never made to the trial court. Accordingly we do not consider them.

This affirmance is without prejudice to the appellant to refile a proper Rule 3.850 motion. In so saying, we do not express any opinion on the merits of appellant's claims.

Affirmed.

Fla.App. 3 Dist.,2000.
Espirit v. State
750 So.2d 150, 25 Fla. L. Weekly D307

Briefs and Other Related Documents (Back to top)

• 3D00-66 (Docket) (Dec. 27, 1999)

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Westlaw.

625 So.2d 1277

625 So.2d 1277, 18 Fla. L. Weekly D2218
(Cite as: 625 So.2d 1277)

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625 So.2d 1277, 18 Fla. L. Weekly D2218

District Court of Appeal of Florida, Third District.
RARE COIN-IT, INC., Petitioner,
v.
I.J.E., INC., Respondent.
No. 93-914.

Oct. 12, 1993.
Rehearing Denied Nov. 23, 1993.

Owner of source code for video game program that worked on only one type of hardware brought action for breach of contract, replevin, injunction, unfair competition, and specific performance against developer of program for play on another type of hardware. The Circuit Court, Dade County , Margarita Esquiroz, J., issued order requiring defendant to produce source code for other type of hardware, subject to protective order. Defendant filed petition for writ of certiorari. The District Court of Appeal held that order granting discovery would be quashed when plaintiff failed to demonstrate reasonable necessity for production of source code and order failed to address whether disclosure was reasonably necessary.

Certiorari granted.

West Headnotes

[1] Pretrial Procedure 307A ⇐33
307Ak33 Most Cited Cases
When trade secret privilege is asserted as basis for resisting production, trial court must determine whether requested production constitutes trade secret; if so, court must require party seeking production to show reasonable necessity for requested materials. West's F.S.A. § 90.506 ; West's F.S.A. RCP Rule 1.280(c)(7).

[2] Pretrial Procedure 307A ⇐41
307Ak41 Most Cited Cases
Order requiring production of source code for video game program on one type of hardware, subject to protective order, would be quashed where owner of source code for same program that worked on only another type of hardware failed to demonstrate reasonable necessity for production in its action for breach of contract and unfair competition, and where court's order failed to address whether disclosure was reasonably necessary; source code was trade secret, ownership of source code was ultimate issue in case, and production of source code without a showing and finding of reasonable necessity would cause irreparable harm. West's F.S.A. § 90.506 ; West's F.S.A. RCP Rule 1.280(c)(7).

***1278** Wilson, Johnson & Jaffer , and Clyde H. Wilson , Sarasota, Lawrence H. Rogovin, North Miami Beach, for petitioner.
Brown Raysman & Millstein , and Julian S. Millstein , New York, Weintraub & Rosen , and Lee I. Weintraub, Miami, for respondent.

Before SCHWARTZ , C.J., and NESBITT and GERSTEN, JJ.

ON PETITION FOR WRIT OF CERTIORARI

PER CURIAM.
Petitioner, Rare Coin-It, Inc. (Rare), seeks a writ of certiorari from the trial court's order granting Respondent's, I.J.E., Inc.'s (IJE), motion to compel discovery of a trade secret subject to a protective order. We grant certiorari.

Rare and IJE entered into contracts providing for Rare to develop video game programs of the " Wheel of Fortune" television game show, for play only on Nintendo hardware. Computer video game programs are written in source code which directs the computer hardware. IJE already owned the rights to the IBM source code for the "Wheel of Fortune" video game program. The IBM source

code worked only on IBM hardware. IJE delivered its IBM source code to Rare for use in developing the Nintendo program. The parties now dispute the ownership of the Nintendo source code.

IJE sued Rare for breach of contract, replevin, injunction, unfair competition, and specific performance. During discovery, IJE requested that Rare produce the Nintendo source code. Rare refused, claiming the source code was a trade secret. Nonetheless, IJE moved to compel production of the trade secret.

At the hearing on the motion to compel discovery, IJE conceded that the source code was trade secret information. However, IJE claimed its production was needed to distinguish the difference between the disputed Nintendo source code and the IBM source code. The trial court issued an order requiring Rare to produce the source code subject to a protective order.

Rare asserts that reasonable necessity has not been shown, and that production of the source code is neither necessary nor relevant to interpreting the parties' contracts and determining the issue of the source code's ownership. IJE contends that production of the Nintendo source code is absolutely necessary to its case since only then can IJE determine that Rare did not copy the IBM source code.

Section 90.506, Florida Statutes (1991), states that " [a] person has a privilege to refuse to disclose, and to prevent other persons from disclosing, a trade secret owned by him if the allowance of the privilege will not conceal fraud or otherwise work injustice." Rule 1.280(c)(7), Florida Rules of Civil Procedure, provides that upon motion by a party from whom discovery is sought, and for good cause shown, the court may order that a trade secret not be disclosed or be disclosed only in a designated way.

[1] 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. *1279*General Hotel & Restaurant Supply Corp. v. Skipper,* 514 So.2d 1158 (Fla. 2d DCA 1987) ; *Eastern Cement Corp. v. Department of Envtl. Regulation,* 512 So.2d 264 (Fla. 1st DCA 1987) ; *Goodyear Tire & Rubber Co. v. Cooey,* 359 So.2d 1200 (Fla. 1st DCA 1978). If production is then ordered, the court must set forth its findings. *General Hotel,* 514 So.2d at 1159; *Eastern Cement,* 512 So.2d at 266.

[2] Here, Rare asserted, and IJE conceded, that the source code was a trade secret. Ownership of the Nintendo source code is the ultimate issue in this case. However, IJE failed to demonstrate a reasonable necessity for production of the source code and the court's order failed to address whether the disclosure was reasonably necessary.

Production of the source code, without a showing and finding of reasonable necessity, would cause Rare irreparable harm. This is true even when the trial court orders production subject to a protective order. Accordingly, we find that there has been a departure from the essential requirements of law and this will result in a material injury that is irreparable on appeal. *General Hotel,* 514 So.2d at 1159. Petition for certiorari is granted and the order granting discovery is quashed.

Certiorari granted.

Fla.App. 3 Dist.,1993.
Rare Coin-It, Inc. v. I.J.E., Inc.
625 So.2d 1277, 18 Fla. L. Weekly D2218

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