IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

CMI, INC. OF KENTUCKY,

Petitioner,

vs.

JOHN C. FABIAN, ET AL.,
CATHERINE MARSH,
MORLEY PARENT,
SARA PENNEY,
KENNETH BAKER, ET AL.,
and THE STATE OF FLORIDA,

Respondents.

_____/

Case No. 2D08-2134

Circuit Appeal Case Nos:
2007 AP 010721 NC
2007 AP 010932 NC
2007 AP 010934 NC
2007 AP 010933 NC
2007 AP 012538 NC

County Case Nos:
2006 CT 009733 NC
2005 CT 016113 NC
2003 MM 008714 NC
2003 CT 018637 NC
2005 MM 002364 NC

REPLY OF PETITIONER

COMES NOW, PETITIONER, by and through the undersigned attorney, and files this Reply on the Petition for Writ of Certiorari.

Respondent's Response Brief completely and disingenuously attempts to mislead this Court by asserting Petitioner did not address the ruling of the Circuit Court in its Petition. In fact, the Circuit Court clearly held "we see no fundamental error regarding CMI's jurisdictional argument," and "this Court finds that CMI's non-appearance before the County Courts was willful." Thus, the Circuit Court

not only ruled on the jurisdictional issue, it also ruled on the willful contempt issue. Petitioner appealed and alleged the Circuit Court departed from the essential requirements of the law in its Order and in these rulings, and requested this Court review the same.

The Circuit Court further stated in its Order that "except in cases of fundamental error, appellate courts will not consider an issue that has not been presented to the lower court in a manner that specifically addresses the contentions asserted." It absolutely was fundamental error for the county court to issue a discovery subpoena to a non-party foreign corporation by way of a registered agent because a court has no such power. **There is no long-arm jurisdiction over <u>non-parties</u> with respect to subpoena power.** The Uniform Act codified at F.S. 942 et seq. must be utilized.

There is good reason why courts do not have such power. When a party fails to respond to a lawsuit or court order, a court can issue a default judgment against that party. If an out of state non-party fails to respond to a court order, what recourse does a court have? If that non-party has no presence in the forum state, a court has no ability to enforce its order because that court cannot reach into another state. See e.g., *Syngenta Crop Protection, Inc. v. Monsanto Company,* 908 So.2d 121, 129 (Miss. 2005) ("In sum, we hold that a Mississippi court cannot subpoena a nonresident nonparty to appear and/or produce in Mississippi

documents which are located outside the State of Mississippi, even if that nonresident nonparty is subject in another context to the personal jurisdiction of the court").

Here, subjecting Petitioner to nearly a million dollars in fines, such amount compounding daily, on subpoenas that the county court had no jurisdiction to issue in the first place is fundamental error resulting in a gross miscarriage of justice. Further, as a non-party, Petitioner has no other appellate procedure other than this Petition. Petitioner did not waive any right as to the jurisdiction of the county court because as a non-party it challenged such jurisdiction in its first appearance.

Since the Circuit Court held there was no fundamental error regarding Petitioner's jurisdictional argument and Petitioner's non-appearance was willful, this Court has discretion to review the underlying basis for those rulings.

Further, Respondent misses the point that Petitioner is a non-party, and as a non-party, Petitioner naturally enters the case after some activity has occurred. In this case, prior to Petitioner formally entering the case, a record was laid by the State Attorney and Respondent. Thus, the orders and issues Petitioner now appeals **are in the record**, and in fact were put in the record by Respondent himself, even though CMI was not formally a party in the action below. Respondent even notes in his Response brief that the lower courts were fully aware the subpoenas at issue had been quashed in Kentucky before the production date.

In its Order, the Circuit Court stated on page two that it thought Petitioner did not respond to the subpoena at issue in "an approved way" even though Petitioner objected to the subpoena and quashed it in Petitioner's home state of Kentucky. Yet in the very record laid by Respondent himself is the subpoena at issue, whose plain language notes that **objection to the subpoena is to the attorney, not to the Court**. Further, Respondent himself informed the Court the subpoena was objected to and quashed in Kentucky. Respondent not only received notice of such hearing, he received a motion objecting to the subpoena and Respondent even appeared in Kentucky through counsel and filed his own response!

Petitioner can hardly waive its right to discuss what Respondent himself put in the record. After Respondent informed the Court that the recipient of the subpoena objected, the burden shifted to Respondent to affirmatively move to compel production. The record is devoid of such motion because Respondent never moved to compel production. Respondent jumped right to an order to show cause and contempt. It is clear that the first act of Petitioner when it entered the case was to contest the jurisdiction of the court over it. It is fundamental error for a court to issue a subpoena without jurisdiction.

This case goes far beyond the few hundred DUI cases involved. In opposition to all known jurisdictions in the country, the Order from the lower court

would subject every corporation in the world who had a statutory Florida registered agent to a subpoena duces tecum as **a witness** in a misdemeanor criminal case.[1]

Thus, criminal defendants in any misdemeanor criminal case could issue subpoenas to the manufacturers of all devices used in connection with criminal proceedings, including radar guns, DNA testing equipment, digital fingerprinting at jails, facial recognition software, surveillance equipment or any other software-dependent equipment that provides information that could be admitted in evidence. Because of the onerous burden on out-of-state non-party witnesses who happen to manufacture equipment used in law enforcement, it is imperative that the screening safeguards of the Uniform Act be observed whenever a criminal defendant seeks to subpoena testimony or documents from a non-party witness located in another state.

Petitioner respectfully requests this Court reverse the Circuit Court and/or find that Florida courts are without jurisdiction over non-party foreign corporations because a court cannot exercise long-arm jurisdiction over non-parties by way of service of a discovery subpoena on such non-party foreign corporation's registered

[1] The Texas appellate case of *Reader's Digest Association, Inc. v. Dauphinot*, 794 S.W.2d 608 (Ct. App. Tex. 1990) is particularly instructive because it is so directly on point. The Court of Appeals in Texas found a subpoena was issued without authority where it was served on non-party foreign corporation Reader's Digest's Texas registered agent. The Texas court found that the Uniform Act must be followed for such out of state subpoenas. This case was provided to this Court in a Notice of Supplemental Authority.

agent, and further that Petitioner's non-appearance subsequent to such subpoena in this case was not willful due to lack of jurisdiction and the fact that Petitioner both properly objected to and in fact quashed such subpoena.

Respectfully submitted,

ABEL BAND, CHARTERED
240 S. Pineapple Avenue
Post Office Box 49948
Sarasota, Florida 34230-6948
(941) 366-6660
(941) 366-3999 (fax)
Attorneys for Petitioner

By: _____
Michael S. Taaffe
Fla. Bar No. 490318
Jarrod Malone
Fla. Bar No. 0010595

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via regular U.S. mail to:

Cliff Ramey, Assistant State Attorney
2071 Ringling Blvd.
Sarasota, FL 34236

Robert Harrison, Esq.
825 S. Tamiami Trail, Suite 2
Venice, FL 34285
Attorney for Respondents

this 11 day of June, 2008.

By: _____
Michael S. Taaffe
Fla. Bar No. 490318
Jarrod Malone
Fla. Bar No. 0010595