

Not final until time expires to file a Motion for Rehearing  
in accordance with Rule 9.330 and, if filed, determined

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

**CMI, INC OF KENTUCKY,**

**Appellant,**

vs

**Appeal No.**

**JOHN C. FABIAN, ET AL.,  
CATHERINE MARSH,  
MORLEY PARENT,  
SARA PENNEY, AND  
KENNETH BAKER, ET AL.,  
STATE OF FLORIDA,  
Appellees.**

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

---

**OPINION**

Opinion filed March 31, 2008.

Appeal from the Sarasota County Court;  
Kimberly Bonner, County Judge  
David Denkin, County Judge  
Phyllis Galen, County Judge.

Michael S. Taaffe and Jarrod Malone  
of Abel Band, Sarasota, for Appellant

Robert N. Harrison, Venice, for Appellees.<sup>1</sup>

BENNETT, CIRCUIT JUDGE.

CMI, Inc. of Kentucky (CMI) appeals the trial courts' orders of civil contempt  
that imposed daily coercive fines for CMI's failure to comply with subpoenas duces

---

<sup>1</sup> Although nominally an appellee, the State of Florida has not made an appearance in this case and is represented solely by the State Attorney for the Twelfth Judicial Circuit. As used in this opinion, the term "Appellee" shall refer to the individuals represented by Mr. Harrison.

tecum without deposition.<sup>2</sup> We affirm the orders and remand for proceedings consistent with this opinion.

CMI is a Kentucky corporation that manufactures the Intoxilyzer brand of breathalyzers, models 5000 and 8000, an instrument used by law enforcement authorities throughout the United States, specifically including Sarasota County, Florida, to measure the level of alcohol in a person's breath. The Appellees are individuals charged with DUI in Sarasota County after submitting to an Intoxilyzer breath test. The parties are before the Court because of Appellees' efforts to compel disclosure of CMI's computer source code, an integral part of the Intoxilyzer's function.<sup>3</sup>

After hearings on Appellees' motions, the County Courts in March 2007, entered orders directing the Clerk to issue subpoenas duces tecum without deposition. The subpoenas commanded CMI to appear at the Sarasota office of the State Attorney on an appointed day with the source code. Alternatively, the subpoenas provided that CMI could properly respond by either furnishing the source code to Appellees' attorney or by sending a written objection to Appellees' attorney. The subpoenas closed with the standard admonition:

You are subpoenaed by the attorneys whose names appear on this subpoena and unless excused from this subpoena by the attorneys or the Court, you shall respond to this subpoena as directed.

---

<sup>2</sup> These five consolidated appeals represent 64 individual defendants charged with DUI in Sarasota County Court. Each of the five civil contempt orders directed CMI to pay \$100 per defendant for each day it failed to obey the order.

<sup>3</sup> "Source code" contains mnemonic abbreviations for each step in a computer program and can be read by expert computer programmers. Once a programmer has access to the source code of a program, he is able to determine the construction of the program and write his own version. For this reason, source code programs are typically compiled (translated) into and sold as object code or machine-readable language, which is not discernable to even an expert programmer. The Appellees sought various versions of the source code for the two Intoxilyzer models.

The subpoenas were subsequently served on CMI's Florida registered agent, NRAI Services, Inc. Instead of responding in one of the approved ways, CMI in April 2007, moved the Daviess District Court of the Commonwealth of Kentucky for an order quashing the subpoenas because they failed to comply with the versions of the "Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings" adopted by Kentucky and Florida.<sup>4</sup> The Daviess District Court quashed the subpoenas by its order dated May 3, 2007.

After hearings on Appellees' motions, the County Courts, in June 2007, entered orders directing CMI to show cause why it should not be judged in contempt for its failure to comply with the subpoenas. The orders specifically referenced the Kentucky order and stated that its legal effect could be addressed at the "show cause" hearing set for July 18, 2007.<sup>5</sup> The orders were served on CMI's Florida registered agent. CMI did not file a response to the orders, but its attorney did send a letter to Appellees' attorney, with enclosures relative to the earlier Kentucky proceedings, which indicated that CMI would not attend the hearing. The Appellees' attorney filed the letter and enclosures with the County Courts.

CMI did not appear at the hearing of July 18, 2007. The resulting contempt orders, entered in August and October 2007, found *inter alia* that CMI had willfully failed to comply with the subpoenas and set daily coercive civil fines for each day of

---

<sup>4</sup> The parties agree that the subpoenas were not issued in accordance with the Uniform Law.

<sup>5</sup> As a matter of judicial economy, all of the hearings were set for the same date and time before the three County Court judges.

continued disobedience.<sup>6</sup> Each order provided that CMI could purge its contempt and fines by producing the source code as directed by the subpoenas. CMI filed a timely “Limited Notice of Appeal” in each County Court case, followed by a motion for protective order filed November 19, 2007.

CMI raises four points on appeal: (1) the County Courts erred when they found the source code was “material” for purposes of Fla. R. Crim. P. 3.220(f); (2) the Uniform Act must be used to subpoena records from an out-of-state non-party, such as CMI, and Appellees’ failure to do so deprived the County Courts of personal jurisdiction to find CMI in contempt; (3) CMI’s lack of response to the subpoenas was not a willful violation and, thus, a contempt ruling was unwarranted; and (4) because the source code is a trade secret, Appellees should have met a higher standard to compel disclosure and the County Courts should have crafted their orders to protect CMI’s confidential interest in its source code.

A judgment of contempt comes to the appellate court clothed in a presumption of correctness and will not be overturned unless a clear showing is made that the trial court either abused its discretion or departed so substantially from the essential requirements of the law as to have committed fundamental error. *See Merrill Lynch Trust Co. v. Alzheimer's Lifeliners Assoc., Inc.*, 832 So. 2d 948, 953 (Fla. 2d DCA 2002)(citing *Northstar Invs. & Dev., Inc. v. Pobaco, Inc.*, 691 So. 2d 565, 566 (Fla. 5<sup>th</sup> DCA 1997)).

The threshold difficulty with CMI’s arguments on appeal is that they were waived by CMI’s failure to make an appearance or argument of any type before the County

---


<sup>6</sup>Three of the orders provided for immediate accrual of the fine, while two granted an additional grace period for compliance before the fine would commence.

Courts.<sup>7</sup> 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. *See In re D.G.*, 970 So. 2d 486, 489 (Fla. 2d DCA 2007) (citing *State v. Hunton*, 699 So. 2d 320 (Fla. 2d DCA 1997)). CMI had ample opportunity to raise its jurisdictional and other arguments to the County Courts but it declined to do so. This Court cannot speculate as to how the County Courts would have ruled on CMI's arguments. We see no fundamental error regarding CMI's jurisdictional argument.

Accordingly, this Court finds that CMI's non-appearance before the County Courts was willful, and therefore the County Courts were correct in issuing orders finding CMI in contempt. The County Courts' finding of contempt, and the daily fines that have accumulated to date, are affirmed. This matter is remanded to the County Courts for further proceedings consistent with this opinion and to craft an appropriate protective order in relation to the source code.

**AFFIRMED.**

RIVA and MORELAND, CONCUR.

  
ROBERT BENNETT, CIRCUIT JUDGE

Conformed copies to:

Hon. Phyllis Galen  
Hon. David Denkin  
Hon. Kimberly Bonner  
Robert N. Harrison, Esq.  
Michael S. Taaffe, Esq.

---

<sup>7</sup> Indeed, the first paper filed by CMI in the County Court cases was a "Limited Notice of Appeal."