

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

CMI Inc of Kentucky, :  
 :  
 Petitioner, :  
 :  
 Vs. : **CASE NO. 2D08-2134**  
 :  
 John C. Fabian, et. al., Catherine :  
 Marsh, Morley Parent, Sara :  
 Penney, Kenneth Baker, et. al., and :  
 the State of Florida, :  
 :  
 Respondents. :  
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**RESPONSE TO PETITION FOR WRIT OF CERTIORARI**

John C. Fabian, et al.<sup>1</sup>, files this Response to the Petition for a Writ of Certiorari.

*STANDARD OF REVIEW*

CMI Inc of Kentucky (Hereinafter CMI) is seeking to have this Court review the Circuit Court's affirmance of the three County Court Orders finding CMI in contempt for failing to comply with a subpoena duces tecum and failing to appear

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<sup>1</sup> The case against Mr. Fabian individually was resolved with a negotiated plea on May 12, 2008. The other consolidated cases are still pending.

at a hearing to Show Cause why it should not be held in contempt. District Courts may exercise discretion to review a decision of the Circuit Court acting in an appellate capacity only when there has been a violation of a **clearly established principal of law** resulting in a miscarriage of justice. *Combs v. State*, 436 So.2d 93 (Fla. 1993); *Stilson v. Allstate Insurance Co.*, 692 So.2d 979 (Fla. 2d DCA 1997); *Haines City Community Development v. Heggs*, 647 So.2d 855 (Fla. 2d DCA 1994); affirmed, 658 So.2d 523 (Fla. 1995). (Emphasis added).

#### *FACTUAL BACKGROUND*

CMI was served with a subpoena duces tecum in each of the consolidated cases. After CMI failed to comply with the subpoenas, each County Judge entered an Order to Show Cause (Record of *State v. Baker et al.*, page 41; Record of *State v. Marsh*, Page 21 – 22; Record of *State v. Fabian et al.*, Pages 110 – 111). Each Order to Show Cause provided:

This Court is aware of the Order Quashing Subpoenas, dated May 3, 2007 by the Daviess District Court in Kentucky, 07-C-00691; what legal effect, if any, this Court must give to this Order may be addressed at the Show Cause Hearing. (Record of *State v. Baker et al.*, page 41; Record of *State v. Marsh*, Page 21 – 22; Record of *State v. Fabian et al.*, Pages 110 – 111; Appendix C, Page 137)

CMI failed to appear at the Show Cause Hearing. (Appendix C, Page 137) The first appearance CMI made in these proceedings was the filing of the Notice of Appeal. (Appendix C, Page 139) The Circuit Court ruled that CMI failed to preserve the issues raised in the appeal below. (Appendix C, Pages 138 -139) The Circuit Court also found the issues raised by CMI do not constitute fundamental error. (Appendix C, Page 139) Finally, the Circuit Court ruled the issues raised by CMI in its appeal were waived, for they were not raised in the County Court. (Appendix C, Pages 138 - 139)

### *Argument*

CMI does not contest the ruling of the Circuit Court that the issues raised by CMI could not be raised for the first time on appeal. There is no challenge to the finding that CMI failed to raise an issue that would constitute fundamental error or that CMI waived all of the issues by failing to respond to the Order to Show Cause. CMI, by failing to contest any of the findings of the Circuit Court in the initial Petition to this Court, waived these issues. *City of Miami v. Steckloff*, 111 So.2d 446 (Fla. 1959). If CMI elects to address the rulings of the Circuit Court in its Reply Brief, they cannot be considered. Issues raised for the first time in a reply

brief are not properly before the court and cannot be considered. *Plichta v. Plichate*, 899 So.2d 1283 (Fla. 2d DCA 2005).

This Court does not have discretion to review this matter for CMI has failed to allege in its Petition any violation of a clearly established principal of law by the Circuit Court. CMI's Petition only addresses why CMI believes the County Court erred. The question before this Court is not whether the County Court committed error when it found CMI in contempt; the question is whether the Circuit Court erred in affirming the orders of the County Court, and if so, did the Circuit Court fail to follow a clearly established principal of law. CMI is merely seeking a second appeal of the issues in this matter, rather than a review of the Circuit Court's decision. CMI merely submitted to this Court the same argument presented to the Circuit Court. A Petition of Certiorari is not to be used merely to obtain a second appeal. *State v. Clements*, 968 So.2d 59 (Fla. 1<sup>st</sup> DCA 2007).

The Circuit Court ruled against CMI, finding all of the issues raised by CMI in its appeal were waived, for CMI failed to make an appearance in the County Court of any type prior to filing a Notice of Appeal. (Appendix C, Pages 138 – 139). The Circuit Court also found that the issues raised by CMI did not amount to fundamental error, CMI's non-appearance before the County Court was willful, and therefore the County Courts were correct in issuing orders finding CMI in

contempt. (Appendix C, Page 139). In CMI's Petition to this Court, CMI fails to discuss, argue or otherwise reference a clearly established controlling principal which the Circuit Court was bound by in entering its decision, but failed to follow. In fact, the entirety of CMI'S Petition addresses why the County Court erred.

CMI has not argued that there was a controlling legal precedent which the Circuit Court was bound to follow, but failed to do so. CMI in its Petition for Certiorari has not alleged that the Circuit Court disregarded any controlling precedent. CMI merely makes the legal assertion that there has been a violation of a clearly established principal of law but fails to allege anywhere what that violation was. CMI's discussion of the Circuit Court proceedings is limited to one sentence; the remainder of the brief address why CMI believes the County Court erred<sup>2</sup>. In the portion of the petition titled "The Nature of the Relief Sought", CMI wrote:

The nature of the relief sought by this Petition is a Writ of Certiorari, ruling that the Circuit Court departed from the essential requirements of the law by affirming the County Court Orders of Contempt, such ruling causing Petitioner irreparable harm by way of hundreds of thousands of dollars in fines. (Petition for Writ of Certiorari, pages 4 – 5)

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<sup>2</sup> Since the issue before this Court is not whether the County Court correctly found CMI in contempt, there is no need for the Respondents to restate the argument made to the Circuit Court. To the extent the Respondent's positions are necessary for background information, the Respondents readopt and incorporate its brief filed below. (Appendix C, pages 45-70.)

There is no discussion whatsoever in either the “Summary of Argument” or “Argument” of CMI of how the Circuit Court departed from the essential requirements of law of how CMI was irreparably harmed. CMI failed to assert any basis for this Court to find the Circuit Court departed from the essential requirements of law. The Respondent cannot respond to CMI’s argument as to why CMI’s believes the Circuit Court departed from the essential requirements of law, for there is no such argument anywhere in CMI’s Petition to this Court.

### *Conclusion*

CMI neither asserted nor established that the Circuit Court violated a clearly established principle of law when it ruled “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.” Furthermore, CMI neither asserted nor established that the Circuit Court violated a clearly established principle of law when it ruled the claims raised by CMI did not constitute fundamental error and that all issues raised by CMI in the Circuit Court were waived. CMI’s Petition should be denied.



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been furnished by regular U.S. mail to Cliff Ramey, Assistant State Attorney, State Attorney's Office, 2071 Ringling Blvd., Sarasota, FL 34237 and Michael S. Taaffe, Esquire, PO Box 49948, Sarasota, FL 34230 on this 2nd day of June, 2008.



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Robert N. Harrison

**CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS**

I hereby certify that this Petition complies with the font requirements of Rule 9.210.



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Robert N. Harrison

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<sup>3</sup> Robert N. Harrison is representing all of the Respondents in this cause, except for the State of Florida