IN THE SUPREME COURT OF FLORIDA

CARLOS A. ALEJANDRO ULLOA, ET AL.

Petitioners,

vs.

CMI INC.,

Respondent.

CASE NO. SC11-2291

PETITIONERS' REPLY BRIEF

On Review From the
District Court of Appeal
Fifth District

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ARGUMENT

I. THE FIFTH DISTRICT IMPROPERLY GRANTED SECOND-TIER CERTIORARI RELIEF IN THIS CASE.

CMI suggests that it is somehow improper for the Petitioners to assert that the Fifth DCA improperly granted second-tier certiorari relief in this case, because the Petitioners failed to raise this issue in the Jurisdictional Brief they filed with this Court. CMI also claims that it was misled by the Petitioners. (CMI Brief on Merits at 7-8).

This Court has repeatedly held that, once it accepts jurisdiction, it may reach any issue properly raised below. *See e.g. Russell v. State*, 982 So.2d 642, 645 (Fla. 2008); *Savoie v. State*, 422 So.2d 308, 310 (Fla. 1982). The Petitioners are certain that CMI was well aware of this rule when it filed its Jurisdictional Brief in this case. Thus, there is absolutely no basis for CMI to suggest that this Court should not address the propriety of the Fifth District's decision to grant second-tier certiorari relief in this case.

Importantly, CMI does not argue that the Petitioners failed to argue that the Fifth District lacked the authority to grant second-tier certiorari in the district court, because such an argument is not supported by the record in this case. Initially, this Court should address the propriety of the Fifth District granting second-tier certiorari relief in this case. If the Court concludes

that second-tier certiorari relief was appropriate, this Court should then address the merits of the instant case and resolve the conflict between the decision reached by the Fifth District and the decisions of the Second District in *CMI, Inc. v. Landrum*, 64 So.3d 693 (Fla. 2d DCA 2010), *rev. denied*, 54 So.3d 973 (Fla. Jan. 26, 2011), and *General Motors Corp. v. State*, 357 So.2d 1045 (Fla. 3d DCA 1987).

The Fifth District improperly granted second-tier certiorari relief in this case, because it failed to identify a grievous error in the circuit court's decision or a miscarriage of justice that resulted from that decision. The Fifth District's decision failed to cite the actual language of any of the statutes in Chapters 48, 607, and 942 of the Florida Statutes that address the issue present in this case. Likewise, the Fifth District failed to provide any in-depth reasoning for its decision.

Instead the Fifth DCA granted second-tier certiorari relief based on the conclusion that granting CMI's petition was the only way to provide this Court with jurisdiction to review this case. As previously asserted, that conclusion was simply incorrect.

Importantly, it is the decision of the Fifth District, not the decision of the Second District in *Landrum* which is being reviewed by this Court. It is beyond dispute that the Fifth District was required to review CMI's petition under the limited standard of review that applies for petitions seeking second-tier certiorari relief. Since relief was not warranted under that standard, this Court

should quash the decision of the Fifth District and remand with instructions that the circuit court's decision be reinstated.

II. THE CIRCUIT COURT PROPERLY CONCLUDED THAT THE SUBPOENAS DUCES TECUM WERE PROPERLY SERVED UPON CMI'S REGISTERED AGENT IN FLORIDA.

The county court and circuit court in this case, and the district courts in *General Motors* and *Landrum*, properly concluded that a subpoena duces tecum requiring only the production of documents does not have to comply with the Uniform Law. The plain language of the applicable Florida Statutes provide support for that conclusion. This Court should resolve the certified conflict in favor of the decisions reached by the district courts in *General Motors* and *Landrum*.

None of the reasons asserted by CMI provide support for a contrary conclusion. First, CMI repeatedly seeks to distinguish the instant case from *General Motors* on the basis that a state attorney's investigatory powers are broader than the rights afforded a criminal defendant in criminal discovery. Despite CMI's assertion to the contrary, a misdemeanor criminal defendant is entitled to substantial discovery under Florida law. *See* Fla. R. Crim. P. 3.220(b) (listing items that must be disclosed to defendants by the State), Fla. R. Crim. P. 3.200(f) (requiring additional discovery upon a showing of materiality).

Here, the county court concluded that the source code for the software used in the Intoxilyzers used to conduct breath tests on

the Petitioners are material and should be provided to them in discovery. That conclusion was not appealed by the State of Florida.

Second, CMI seeks to rely on the district court's decisions in *Packaging Corporation of Amercia v. DeRycke*, 49 So.3d 286 (Fla. 2d DCA 2010), and *Quest Diagnostics Inc. v. Swaters*, 37 Fla. L. Weekly D1694 (Fla. 4th DCA 2012), in support of its contention that CMI's registered agent was not properly served with the subpoenas duces tecum. CMI's reliance on those cases is misplaced.

In *DeRycke*, there is no evidence that a corporation's registered agent was served with a witness subpoena. Additionally, unlike the instant case, the plaintiff was seeking the testimony of the witness at trial, not merely the production of documents. 49 So.3d at 288-90.

In *Quest Diagnostics*, the Fourth District explicitly held that it was not addressing the conflict between the decision of the Fifth District in this case and the decisions in *Landrum* and *General Motors*. Moreover, the Fourth District explicitly distinguished the civil case before it from the instant case, *Landrum*, and *General Motors*, which are all criminal cases. 37 Fla. L. Weekly D1694 at *4.

Third, despite CMI's assertion to the contrary, the relevant portions of the Florida version of the Uniform Law provide full support for the conclusion that there are different rules for subpoenas seeking testimony of a witness than for subpoenas duces tecum requesting only the production of documents. Section 942.02(1), Florida Statutes provides the following:

> If a judge of a court of record, in any state which by its laws has made provision for commanding persons within that state to **attend and testify** in this state . . .

Fla. Stat. 942.02(1) (emphasis added).

Section 942.03(1), Florida Statutes provides the following:

> If a person in any state, which by its laws has made provisions for commanding persons within its borders to **attend and testify** in criminal prosecutions . . .

Fla. Stat. 942.03(1) (emphasis added).

The plain language of both statutes indicates that they only apply where a party is seeking to compel a person to appear and provide testimony. Where, as here, the language of a statute is clear and unambiguous, court should not look behind the statute's plain language for legislative intent. *See Koile v. State*, 934 So.2d 1226, 1230-31 (Fla. 2006). Since this case does not involve subpoenas requiring a witness to provide actual testimony, the plain language of the aforementioned statutes indicate that the Uniform Law does not apply in this case.

Next, CMI erroneously contends that the Petitioners failed to specifically argue below that Fla. Stat. § 607.15101 indicates that service on a corporations registered agent is a proper means of effecting service on a corporation. From the outset, the Petitioners have consistently relied on the district court's decision in *General Motors* to support their arguments. In *General Motors*, the district court explicitly relied on Fla. Stat § 607.327 to support its

decision. 357 So.2d at 1047. The Legislature replaced § 607.327 with § 607.15101 in 1990. *See* 1989 Fla. Sess. Law Serv. 89-154, § 166; 1990 Fla. Sess. Law Serv. 90-179 § 165. The language of the two statutes is virtually identical.

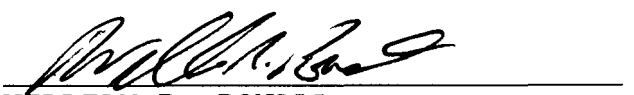
Therefore, it is readily apparent that the Petitioners' reliance on *General Motors* throughout these proceedings was sufficient to preserve the argument that § 607.15101 permitted service upon CMI's registered agent in this case. Section 607.15101(4), when considered along with Sections 48.081(3)(a), 48.091(1), 48.181(2), and 607.1505(2) of the Florida Statutes, provides full support for the county and circuit court's conclusion that the subpoenas duces tecum were properly served upon CMI's registered agent in Florida.

CMI continues to rely on out-of-state and federal caselaw. That reliance is misplaced because the plain language of the applicable Florida Statutes support the decisions reached by the county and circuit courts.

Accordingly, the Fifth District improperly granted second-tier certiorari relief in this case. This Court should quash that decision and remand with instructions that the circuit court's decision be reinstated.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Petitioners's Reply Brief on the Merits is submitted in Courier New 12-point font and thereby complies with the font requirements of Fla. R. App. P. 9.210(a)(2).



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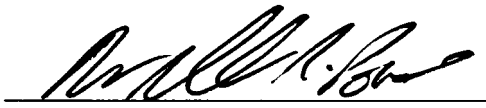
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by mail delivery to Edward G. Guedes, 2525 Ponce de Leon Boulevard, Suite 700, Coral Gables, Florida 33134, on this 24th day of September, 2012.



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