

IN THE SUPREME COURT OF FLORIDA

CINDY CIRESI,

Petitioner,

vs.

SUPREME COURT CASE No:
LOWER CASE No: 5D11 - 2813

STATE OF FLORIDA,
DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR
VEHICLES,

Respondent.

_____ /

JURISDICTIONAL BRIEF
ON BEHALF OF THE PETITIONER

Eric A. Latinsky, Esquire
1206 South Ridgewood Avenue
Daytona Beach, Florida 32114
(386) 257-5555
Fla. Bar #302831
elatinsky@latinskylaw.com

TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u>	ii
<u>PRELIMINARY STATEMENT OF THE CASE AND FACTS</u>	1
<u>SUMMARY OF THE ARGUMENT</u>	4
<u>ARGUMENT</u>	5
<u>CONCLUSION</u>	10
<u>CERTIFICATE OF SERVICE</u>	10

TABLE OF AUTHORITIES

STATUTES

1. Florida Statute, Sec 57.105..... 2

CASES

2. *Boca Burger, Inc. v. Forum*, 912 So.2d 561 (Fla. 2005)..... 1, 2,
5, 9

3. *Kates v. Millheiser*, 569 So2d 1357 (Fla. 3d DCA 1990)..... 4, 9

4. *Miami-Dade County v. Torbert*, 39 So. 3d 482 (Fl. 3rd DCA 2010)... 4, 8, 9

5. *Nadar v. Department of Highway Safety & Motor Vehicles*,
87 So.3d 712 (Fla. 2012)..... 5

6. *State Dep’t of Highway Safety & Motor Vehicles v. Trauth*,
937 So.2d 758, 759 (Fla. 3d DCA 2006)..... 4, 5,
6, 9

PRELIMINARY STATEMENT OF THE CASE AND FACTS

The Petitioner filed a Petition for Certiorari in the circuit court from an order of the Department sustaining a 12 month revocation of her driver's license after a formal review. On or about April 18, 2011, the circuit court granted the Ciresi's Petition and quashed the order of the Department. On August 1, 2011, the circuit court entered the Final Judgment Awarding Attorney Fees and Costs which cited to *Boca Burger, Inc. v. Forum*, 912 So.2d 561, 570 (Fla. 2005) and states in the most relevant sections:

...Under the revised version, however, a movant need only show that the party and counsel "knew or should have known" that any claim or defense asserted was (a) not supported by the facts or (b) not supported by an application of "then-existing" law. §57.105, Fla. Stat. (2000). The amendments therefore greatly expand the statute's potential use. (Emphasis supplied.)

Despite the language in *Boca Burger*, the Department argues that an "express finding of bad faith" is required citing *Moakley v. Smallwood*, 826 So.2d 221 (Fla. 2002). This Court finds the standards set out in *Boca Burger, Inc. v. Forum*, supra, are applicable to the pending Motion for Attorney Fees. In this instance the Court recognizes that the Respondent was defending an order of its hearing officer, however, in *Boca Burger, Inc. v. Forum*, supra, the Florida Supreme Court found that under appropriate circumstances an appellee may be subject to sanctions pursuant to Florida Statute 57.105 for defending a trial court order.

and:

The defenses of the DEPARTMENT to the Petition for

Writ of Certiorari were not supported by the material facts necessary to establish the defense and/or were not supported by the application of then existing law, including the Florida Supreme Court decisions in *Baker v. Hayes*, 3 So.2d 590 (Fla. 1941) and *Hilton v. State*, 961 So.2d 284 (Fla. 2007). The case citations and others were provided by counsel for Petitioner to the DEPARTMENT on multiple occasions.

The circuit court based upon 57.105 and *Boca Burger v. Forum, supra*, found it was appropriate to award an attorney fee to Ciresi totaling \$5,000.00 and also entered judgment for taxable costs of \$909.50.

The Department filed an appeal from the judgment however the Fifth DCA determined that the Department's method of seeking review was by certiorari rather than appeal. On or about May 15, 2012, the Fifth DCA denied the Department's Writ of Certiorari however the denial was withdrawn and then on June 2, 2012, an Order was issued quashing the circuit court order. The order quashing the circuit court's decision is attached as appendix (A-1) and is in conflict with decisions of other district courts of appeal. Ciresi filed a Motion for Rehearing and Clarification on or about July 16, 2012, which stated in the paragraphs most relevant to this brief:

3. A clarification is requested as to whether the Circuit Court applied the incorrect law and if so the correct standards to be applied. As specifically noted in the Judgment Awarding Attorney Fees and Costs in the circuit court the DEPARTMENT argued below that an express finding of bad

faith is required under *Moakley v Smallwood*, 826 So.2nd 221 (Fl 2002). On review in its Petition the DEPARTMENT argued “a finding of bad faith must be predicated on a high degree of specificity in the factual findings,” see Amended Petition at page 6. The circuit court order found that the defenses of the DEPARTMENT were not supported by the material facts necessary to establish the defenses and were not supported by the application of then existing law to those material facts as set out in 57.105 and *Boca Burger v. Forum, supra*. If circuit court has utilized an incorrect standard or applied the incorrect law a clarification is requested. This issue is repetitive as to requests for attorney fees in Petitions for Certiorari filed from formal reviews. It is requested that this court clarify its ruling as to whether the circuit court utilized the wrong standard and whether a finding of bad faith is required as urged by the DEPARTMENT. If the circuit court applied the wrong law or issued a deficient order which did not comply with the appropriate legal standards CIRESI requests clarification as to whether the circuit court may on remand conduct an additional hearing on the attorney fee issue.

5. CIRESI also would request clarification as to whether the award of costs by the circuit court was proper as opposed to remanding the issue to the DEPARTMENT hearing officer as argued by the DEPARTMENT. This issue is addressed in the Amended Petition at pages 29-30. Whether the Circuit Court can award costs on Certiorari review from a formal review is also a repetitive issue in the circuit courts. Clarification would assist Ciresi and the circuit court in determining the proper manner for CIRESI to seek her taxable costs. (Emphasis supplied.)

The Motion for rehearing and clarification was denied without explanation on July 26, 2012. The Petitioner now timely seeks the discretionary jurisdiction of this Honorable Court and submits this brief in support of her position.

SUMMARY OF ARGUMENT

By quashing the judgment of the circuit court without providing a reason the opinion is in express and direct conflict with multiple opinions of other district courts of appeal. For example, *in Kates v. Millheiser, 569 So. 2d 1357 (Fla. 3d DCA 1990)* the Third District Court of Appeal stated;

However, in the situation where an appellate court per curiam reverses a final order or judgment, without an opinion, neither party is apprised of why that particular legal result was reached. Specifically, the parties are entitled to know exactly why the result reached at the trial level, which was presumed to be correct, was set aside by the appellate court.

It is for this reason that we find paramount among the responsibilities of an appellate court, the responsibility of writing opinions in all reversals and remands.

This language was cited in State, *Dep't of Highway Safety & Motor Vehicles v. Trauth, 937 So. 2d 758, 759 (Fla. 3d DCA 2006)* and also followed in *Miami-Dade County v. Torbert, 39 So. 3d 482 (Fla. 3rd DCA 2010)*. By quashing the ruling of the circuit court without providing a reason (as opposed to a legal conclusion) the ruling of the Fifth District Court of Appeal expressly and directly conflicts with the multiple rulings of the Third District Court of Appeal.

It is requested that this Honorable Court adopt the position of the Third District Court of Appeal and find it is a paramount responsibility of appellate courts to “explain the reason for reversing the lower tribunal.”

ARGUMENT

**THE DECISION OF THE FIFTH DISTRICT IN
STATE V. CIRESI, EXPRESSLY AND DIRECTLY
CONFLICTS WITH DECISIONS FROM
ANOTHER DISTRICT COURT OF APPEAL
INCLUDING *STATE DEP'T OF HIGHWAY SAFETY &
MOTOR VEHICLES V. TRAUTH*, 937 SO. 2D 758
(FLA. 3D DCA 2006) ON THE SAME
QUESTION OF LAW.**

The judgment of the circuit court quashed by the Fifth District Court of Appeal specifically cites to *Boca Burger, Inc. v. Forum*, 912 So.2d 561 (Fla. 2005) and Sec 57.105 as the basis for awarding attorney fees to Ciresi. It accordingly appears that the circuit court applied the correct law as required by *Nader v. Department of Highway Safety & Motor Vehicles*, 87 So. 3d 712 (Fla. 2012). The entire per curiam opinion of the Fifth District Court of Appeal was:

The circuit court, acting in its appellate capacity, departed from the essential requirements of law in awarding attorney's fees. Accordingly, we grant the petition for certiorari review and quash the circuit court's "Final Judgment Awarding Attorney's Fees and Costs."

PETITION GRANTED; ORDER QUASHED.
(Emphasis supplied.)

This decision does not state a reason or apprise the parties or others reading the decision why the judgment of the circuit court was quashed.

In *State Dep't of Highway Safety & Motor Vehicles v. Trauth*, 937 So. 2d 758, 759

(Fla. 3d DCA 2006) the Court stated:

This court has previously explained that the appellate division cannot issue what amounts to a "Per Curiam Reversal," that is, a reversal without written opinion. In [Kates v. Millheiser, 569 So. 2d 1357 \(Fla. 3d DCA 1990\)](#), this court said:

First, it is the responsibility of the appellate courts to guide the trial courts as to questionable procedures or rulings. A per curiam reversal opinion does not give the trial judge any guidance as to how to correct the supposed error which was the basis of the reversal.

Second, to the extent that the reversal relates to evidentiary matters, it fails to place the trial lawyers on notice as to what issues are open for retrial.

Finally, the need for an appellate court to announce the reason for a reversal is essential to the integrity of the judicial process. It is important for litigants and the public to recognize that determinations develop as the result of a fair and just reasoning process as opposed to perceiving judicial decisions as unjustified and arbitrary. Ultimately, it is the responsibility of the judiciary to maintain the integrity of the legal system by ensuring that the judgment processes in the appellate system involve scholarly and fair deliberations which are open for the public to view. When a case is appealed, the judgment under review is clothed with a presumption of correctness. *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla. 1979); *Department of Transportation v. Morehouse*, 350 So.2d 529 (Fla. 3d DCA 1977), cert denied, 358 So.2d 129 (Fla. 1978) If the appellate court per curiam affirms the trial court decision, this means that the appellant failed to rebut the presumption of correctness, but still leaves the parties with

the knowledge as to why the final judgment was reached. **However, in the situation where an appellate court per curiam reverses a final order or judgment, without an opinion, neither party is apprised of why that particular legal result was reached. Specifically, the parties are entitled to know exactly why the result reached at the trial level, which was presumed to be correct, was set aside by the appellate court.**

It is for this reason that we find paramount among the responsibilities of an appellate court, the responsibility of writing opinions in all reversals and remands. See Whipple v. State, 431 So.2d 1011, 1015 (Fla. 2d DCA 1983). We write opinions in all reversals and remands"). In the interests of propriety and fairness, litigants cannot be left to wallow in a sea of confusion as to the rationale supporting a legal result.

.....

As stated by one commentator:

In the broader view, appellate justice can be the last best effort of our government and our law to gain the respect and acceptance of the people. Appellate justice should be a model for the government's dealings with citizens. Appellate courts are the most dignified and receptive authorities to which individuals can turn to express their legal dissatisfactions in a pointed way, with assurance of a direct response. If these courts do not deal justly with litigants, we cannot expect agencies or bureaucracies of lesser sensitivity to legal rights to do so. *It is therefore important that justice on appeal be visible to all.*

Carrington, Meador & Rosenberg, Preface to *Justice on Appeal* at v (1976) [emphasis in original].

Id. at 1358. See also *City of Kissimmee v. Grice*, 669 So. 2d 307, 308-09 (Fla. 5th DCA 1996); *Campbell v. Vetter*, 375 So. 2d 4, 5 (Fla. 4th DCA 1979).

The same principles apply here. As they did below, Trauth and Llamas concede that the appellate division should have issued an opinion.

We conclude that the appellate division departed from the essential requirements of law such that the granting of certiorari is called for in this case. See *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889-91 (Fla. 2003); *City of Kissimmee v. Grice*, 669 So. 2d at 308-09; *Kates v. Millheiser*, 569 So. 2d at 1358.

In *Miami-Dade County v. Torbert*, 39 So. 3d 482 (Fl. 3rd DCA 2010) Court succinctly stated:

The Torberts appealed to the circuit court, and the circuit court reversed the lower tribunal. The circuit court issued a one-sentence opinion which stated, "[t]he Miami-Dade County Board of the County Commission (BOCC) failed to follow the applicable law and its decision was not based on substantial competent evidence." The County appealed.

On second-tier review, this Court determines whether the circuit court afforded procedural due process and applied the correct law. *Dusseau v. Metro. Dade County Bd. of County Comm'rs*, 794 So. 2d 1270, 1274 (Fla. 2001). This Court has held that an appellate court "cannot issue what amounts to a 'Per Curiam Reversal,' that is, a reversal without a written opinion." *State Dep't of Highway Safety & Motor Vehicles v. Trauth*, 937 So. 2d 758, 759 (Fla. 3d DCA 2006). Here, the circuit court's opinion fails to explain the reason for reversing the lower tribunal. Thus, the circuit court issued an opinion which amounts to a per curiam reversal. In so doing, the circuit court departed from the essential requirements of the law. (Emphasis supplied.)

The failure to provide a reason for granting certiorari and quashing the judgment of the circuit court in this cause is expressly and directly contrary to the rulings in *DHSMV v. Trauth, supra, Kates v. Millheiser, supra, and Miami-Dade Cty v. Torbert, supra.*

Respectfully, this Honorable Court should accept jurisdiction. It appears that as the circuit court applied the correct law which was set out in *Boca Burger v. Forum, supra*, and the writ of certiorari should have been denied. Oddly this initially occurred but was withdrawn without explanation. The failure of the Fifth District Court of Appeal to state reasons or a rationale rather than a conclusion for quashing the judgment of the circuit court as stated in *DHSMV v. Trauth, supra*, and *Kates v. Millheiser, supra*, leaves the litigants “wallow in a sea of confusion as to the rationale supporting the legal result.” While the Third District Court of Appeal has stated that it is a “paramount” responsibility of an appellate court to apprise the parties of “exactly why” circuit court was set aside the ruling directly and expressly conflicts with this standard. Certainly any parties desiring to seek attorney fees or costs from the Department of Highway Safety and Motor Vehicle during a certiorari proceeding resulting from a formal review hearing would benefit from a clarification as to the proper standards.

CONCLUSION

Respectfully, the Petitioner requests this court accept jurisdiction and review this matter. It is requested that this Court adopt the position of the Third District Court of Appeal and find that if a judgment of the circuit court is quashed it is of paramount importance that a reason be provided.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been furnished by hand delivery/U.S. Mail/fax to Jason Helfant, Esquire, Department of Highway Safety and Motor Vehicles, Department of Highway Safety and Motor Vehicles, Post Office Box 540609, Lake Worth, Florida 33454-0609 this 31st day of August, 2012.

I HEREBY CERTIFY that the font size in the Petitioner's pleading is New Times Roman 14 point.

S/ Eric A. Latinsky
Eric A. Latinsky, Esquire
1206 South Ridgewood Avenue
Daytona Beach, Florida 32114
(386) 257-5555
Fla. Bar #302831
elatinsky@latinskylaw.com