

IN THE SUPREME COURT,
IN AND FOR THE STATE OF FLORIDA

CASE NO. 67,252
Fourth District Court of Ap-
peal, Case No. 83-422

PALM BEACH NEWSPAPERS, INC.; :
THE MIAMI HERALD PUBLISHING :
COMPANY; and NEWS AND SUN- :
SENTINEL COMPANY, :
:

Petitioners, :
:

vs. :
:

THE HONORABLE RICHARD BRYAN :
BURK; LINDA AURILIO; and :
STATE OF FLORIDA, :
:

Respondents. :
:

FILED
SID L. WHITE
DEC 2 1985
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

PETITIONER'S, NEWS AND SUN-SENTINEL
COMPANY, REPLY BRIEF

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INTRODUCTION

All reference to Petitioner's Initial Brief will be made by the notation "B." preceding the respective page number.

All reference to AURILIO's Answer Brief will be made by the notation "A.A.B." preceding the respective page number.

All reference to BURK's Answer Brief will be made by the notation "B.A.B." preceding the respective page number.

ARGUMENT

Respondent's, HONORABLE RICHARD BRYAN BURK ("BURK"), Answer Brief takes issue with only one argument made by the Petitioner, NEWS AND SUN-SENTINEL COMPANY ("NSS"), in its Initial Brief. The area of disagreement concerns the question of whether depositions are considered to be judicial proceedings.

BURK has mischaracterized the arguments made by NSS concerning depositions as judicial proceedings. NSS takes issue with BURK's assertion that "all of the Petitioners argue that pretrial discovery depositions are 'judicial proceedings' to which they have an absolute First Amendment right of access no matter where or when they are held." (B.A.B. at p.7). (Emphasis supplied in BURK's Answer Brief).

Respondent seems to be attempting a magic act, i.e. conjuring up an argument that has not been made and then arguing in rebuttal to the imaginary argument.^{1/}

What the Respondents have done is to join two distinct arguments (depositions as judicial proceedings and First Amendment right of access) into one statement that appears nowhere in NSS' Initial Brief. No argument has been made by NSS that the press

^{1/} Of course Respondents can then state that "None of the Petitioners' cited cases support this proposition" because the proposition was never made.

has any absolute First Amendment rights of access.^{2/} The argument that has been made is that criminal depositions are presumed to be open until an application for a protective order is made and the requirements for such are met.^{3/} In that circumstance, the public should have the right to have the deposition testimony transcribed and filed.

On a final note, at page 13 of BURK's Answer Brief, it is stated that "untranscribed depositions can simply be replaced by reporter-witness interviews, thus the Petitioners' alleged need to see untranscribed and unused depositions is not a compelling one."

2/ At page 13 of AURILIO's Answer Brief she states that NSS claims that "'excluding the public from criminal depositions' will violate the public's First Amendment right of access to criminal proceedings," (Sun-Sentinel-25). NSS has made no such argument that there is an absolute First Amendment right of access to criminal proceedings. What NSS states, (on pages 25 and 26 of its Initial Brief) is that there is sufficient authority for a decision based upon the presumption of openness accorded deposition testimony in criminal pre-trial proceedings and therefore this case need not reach the constitutional issue of access pursuant to the First Amendment.

3/ The Respondent, AURILIO, (p.8) states that the "presumption of openness may ease the burden of the press ... but it obviously begs the question and is clearly erroneous," but the brief stops there and cites no case law that contradicts the authority contained in NSS' Initial Brief supporting the argument that there is a presumption of openness until the requirements for closure are met.

BURK's assertion is in error. The test is not whether there is a compelling need to know, but rather whether the public has a right to know. In this context, the power of the Court has been exercised, i.e., subpoena of the witness for compelled testimony and, therefore, the press, as a representative of the public, has a First Amendment right to the information obtained.^{4/} As a result, information necessary to provide a free and open analysis of the effectiveness of the criminal justice system will insure public confidence in its processes.

In conclusion, Petitioner, NSS, would respectfully resubmit Judge Anstead's dissent in Burk:

[I]t is the public's right of access to the information that is crucial, not the particular form or container in which the information may be found.

Similarly, I cannot accept the totally technical and semantical distinction made by the majority between the right of access to a deposition transcribed and filed, a decision presumably made solely at the discretion of the lawyers involved, and a deposition taken but not transcribed. Again, it is the public's right to access to the information disclosed at the deposition that should be determinative. That determination should not be left to the unbridled discretion of the lawyers, either of whom presumably could order transcription without the permission of the other or court order. Hence, poof!, 'secret' information is transformed into 'public' information.
(emphasis supplied).

^{4/} Obviously, if they [depositions] have not been transcribed, the question of expense is one which will have to be determined by the press.

CONCLUSION

For the foregoing reasons, the Appellant/Petitioner, NEWS AND SUN SENTINEL COMPANY, respectfully requests this Honorable Court to reverse the decision of the Fourth District Court of Appeal in Burk.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's, NEWS AND SUN SENTINEL COMPANY, Reply Brief has been provided by United States mail to all parties noted on the attached Service List, this 26th day of November, 1985.

By: 
Ricki Tannen

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