IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,482

PALM BEACH NEWSPAPERS, INC., SCRIPPS-HOWARD BROADCASTING COMPANY, THE MIAMI HERALD PUBLISHING COMPANY and THE NEWS AND SUN SENTINEL COMPANY,

Petitioners,

vs.

THE STATE OF FLORIDA

Respondent

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

INITIAL BRIEF OF PETITIONER THE MIAMI HERALD PUBLISHING COMPANY

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STATEMENT OF THE CASE AND FACTS

John S. Freund and John Trent, respondents below, were indicted for murder. Their counsel scheduled discovery depositions of four witnesses for the prosecution, which reporters sought to attend. The defendants favored attendance by the press. (Appendix to Initial Brief of Palm Beach Newspapers, Inc., at 71, 72) (hereinafter "A. ___").

At the beginning of the first deposition, that of Detective Donald Jacobs, the Assistant State Attorney objected to the presence of the press and instructed the witness not to answer in the presence of the press. He claimed that press attendance at criminal deposition is "up to the prosecutor...if he wants them there, that's fine." (A. 140). An immediate hearing was sought before Judge Mounts at which the prosecutor moved for a protective order requesting exclusion of the public and press, claiming press attendance would upset the witnesses. (A. 32-34). The hearing was suspended until the next afternoon so the State could file a written Motion to Require News Media Representatives to Demonstrate the Existence of a Right for Them and the Public to be Present During a Discovery Deposition. At the second hearing, the prosecutor advanced no reasons for closure and asserted the arbitrary power to exclude the public. (A. 91-108). The defendants and press opposed exclusion. In fact, defense counsel stated to the trial

judge: "[I]t is our position and I have confirmed it with my client and I am prepared to represent to the Court that we not only don't object but we would object to the press being excluded from attending these depositions. We think the laundry ought to be aired." (A. 71).

Following Short v. Gaylord Broadcasting Co., 462 So.2d 591 (Fla. 2d DCA 1985), the trial judge noted that applicable rules of procedure "'[give] the trial court control over who may or may not attend depositions; the court's discretion is limited only by the standard 'for good cause shown'. The Rule [1.280(c)] places the burden of obtaining a protective order on the person or party seeking to limit attendance at a deposition.'" (A. 16, quoting Short, 462 So.2d at 592).

The trial court denied the motion for protective order since the State declined to offer any "cause," let alone "good cause" why access should be denied, and directed that access be afforded. (A. 16-18). The depositions were subsequently conducted with the press in attendance. (A. 151, 310).

On the State's petition for writ of common law certiorari, the Fourth District Court of Appeal quashed the trial court's order. (A. 1-2). The Fourth District panel considered itself bound by Palm Beach Newspapers, Inc. v. Burk, 471 So.2d 571 (Fla. 4th DCA 1985), review pending on

questions certified of great public importance, No. 67,352 ("Burk").

Petition for review followed.[1/]

SUMMARY OF ARGUMENT

The trial court correctly recognized that this case is governed by Rule 1.280(c)(5), Florida Rules of Civil Procedure (rendered applicable in criminal cases by Rule 3.220(d), Florida Rules of Criminal Procedure). Rule 1.280(c) provides in part that "for good cause shown, the court ... may ... order ... (5) that discovery be conducted with no one present except persons designated by the court...." The State having failed to show "good cause," the trial court was eminently correct in denying the motion for protective order. The Fourth District erred in quashing the trial court's order.

Under the Rules, the mechanism to limit attendance at deposition is a motion for protective order, and the

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1/ This Court has granted review in two related cases, Miami Herald Publishing Co., et al. v. Hagler, et al., No. 67,479, and Post-Newsweek Stations, Florida, Inc., et al. v. State of Florida, et al., No. 67,671 ("Fuster").

The Miami Herald hereby adopts and incorporates by reference the arguments grounded upon the First Amendment, the common law, and the Public Records Act made by the petitioners in Burk, supra, Fuster, supra, Hagler, supra, and by the other petitioners in the present case.

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standard for exclusion is "good cause".[2/] Just as the Second District correctly so ruled in Short v. Gaylord Broadcasting Co., supra, so did the trial court below in refusing to arbitrarily exclude the press from these depositions.

The Fourth District's contrary position, set forth in Palm Beach Newspapers, Inc. v. Burk, supra, and adopted as binding by the panel below, is fatally flawed. The Burk majority has effectively amended the Rules to allow the lawyers for a party to decide whether there should be public access to criminal depositions. In so doing, the Fourth District abandoned the "good cause" standard, eliminated the presumption of public access created by the Rules, and improperly delegated the judicial authority to regulate depositions to the parties' lawyers.

A review of the text and history of the Rules, and of practice prior to their adoption, reveals that the trial court is the proper authority to regulate public access to depositions. The decision of the Burk majority, followed by

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2/ Where a protective order is sought to exclude the public, "good cause" should be construed in accord with the First Amendment right of access as set forth in Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) and the three-part test recognized by this Court in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982). For a thorough discussion of this proposition, see the Brief of Amici Curiae in Hagler.

the Fourth District in the present case, departs from historical practice and the clear requirements of the Rules and should therefore be reversed.

ARGUMENT

I. BY THEIR EXPRESS LANGUAGE THE RULES OF PROCEDURE BAR EXCLUSION OF THE PUBLIC FROM CRIMINAL DEPOSITIONS ABSENT A SHOWING OF "GOOD CAUSE."

Rule 3.220, Florida Rules of Criminal Procedure, provides (with exceptions not applicable here) that the procedure for criminal discovery depositions "shall be the same as that provided in the Florida Rules of Civil Procedure."

The Florida Rules of Civil Procedure, in turn, create a process for exclusion: "Upon motion ... and for good cause shown, the court ... may ... order... (5) that discovery be conducted with no one present except persons designated by the court...." Fla. R. Civ. P. 1.280(c)(5); see Greene, The Folklore of Depositions, 58 Fla.B.J. 658 (1984).

The trial court followed this straightforward procedure. When the State failed to carry its burden of showing good cause for the exclusion of the public, its motion for protective order was denied. On review, the Fourth District reversed on authority of its closely divided

en banc decision, Palm Beach Newspapers, Inc. v. Burk, 471 So.2d 571 (Fla. 4th DCA 1985), now pending in this Court on certified questions. Case No. 67,452.[3/]

The Burk majority reasoned that, since the public and press are not expressly mentioned in the Rules, they are not entitled to attend. 471 So.2d at 580 n.4. As for Rule 1.280, the court said:

> We construe its application to be limited to instances where the parties do not agree and there is controversy between them as to who may be present. For example, this might be applicable where trade secrets or sensitive matters will be pursued or where one of the parties or his or her friends insist on being present and are disruptive.

471 So.2d at 580 n.4 (emphasis added).

Aside from the fact that the literal language of this rule is contrary to the Court's interpretation, there are a number of additional flaws in the court's reasoning. First, the current Rules do not make express provision for parties, or friends of parties, to attend depositions. Under the majority's reasoning, the Rules do not authorize anyone to attend, other than the court reporter, Fla. R. Civ. P. 1.300(a), a position even the Burk majority does not

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3/ One member of the panel in this case, Judge Letts, was a member of the 5-4 Burk majority. 471 So.2d at 580. Judge Letts suggested that the basis for the First Amendment analysis in the Burk majority opinion had been undercut by later Supreme Court authority. (A. 2).

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take. More fundamentally, it is difficult to fathom a rule which allows parties to bring guests to depositions, while excluding the public or press on matters of general public interest. Second, to the extent Burk suggests attendance at depositions is confined to parties and their counsel, that position is contradicted by the history of Rule 1.280, and the decisions thereunder.

Current Rule 1.280 is the result of a revision adopted in 1972. In re The Florida Bar, 265 So.2d 21, 27-28 (Fla. 1972). As originally adopted in 1954, the applicable rule was Rule 1.24(b), which provided in part, "for good cause shown, the court ... may ... order ... that the examination shall be held with no one present except the parties to the action and their officers or counsel...." (emphasis added). 30 Fla. Stat. Ann. 537-38 (1956). By its plain terms, Rule 1.24(b) dealt with exclusion of persons other than parties and counsel. By necessary implication, the Rule contemplated that persons other than parties and counsel might attend depositions.

Rule 1.24(b) was patterned after former Rule 30(b), Federal Rules of Civil Procedure. See 30 Fla. Stat. Ann. 402 (1967); 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice ¶26.01[20] (1984) (setting forth text of former Rule 30). In 1970, the Federal Rules were reorganized, and "drafting changes were made to carry out and clarify the sense of the rule." 4 J. Moore, J. Lucas & G.

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Grotheer, supra, ¶26.01[21]. The reference to "parties to the action, their officers and counsel" was dropped, id. ¶26.01[20], and the protective order provision was transferred to Rule 26(c). Florida followed the federal change in 1972. In re The Florida Bar, 265 So.2d 21, 27-28 (Fla. 1972).

Plainly, Rule 1.280 does not limit attendance at depositions. As one Florida commentator has put it, "To exclude anyone from a deposition, a party or the deponent must apply to the court for a protective order." Greene, The Folklore of Depositions, 58 Fla.B.J. at 658. Thus, in Florida Civil and Criminal Discovery, the authors state:

> In Cacace v. Associated Technicians, Inc., the plaintiff was properly required to have her deposition taken out of the presence of a plaintiff in a companion suit. No abuse of discretion was shown in prohibiting the attendance at the taking of a deposition of persons not parties to the cause.

J. Adkins and R. Jones, Florida Civil and Criminal Discovery, § 5-17, at 145 (2d ed. 1976) (emphasis added), citing Cacace v. Associated Technicians, Inc., 144 So.2d 82 (Fla. 3d DCA 1962). Cacace was decided under Rule 1.24(b). Neither the Third District nor the treatise suggests the existence of a general rule of exclusion of nonparties; instead, the matter was to be determined by motion for protective order.

Three District Courts of Appeal have ruled that the presence of the press at a criminal deposition "may be regulated by the court under Rule 1.280(c)...." Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1367, 1371 (Fla. 5th DCA 1980); see Short v. Gaylord Broadcasting Co., 462 So.2d at 592 (2d DCA); Tallahassee Democrat, Inc. v. Willis, 370 So.2d 867, 872 (Fla. 1st DCA 1979). A number of Florida trial court decisions have also so held. Florida v. Short, 11 Med. L. Rptr. 1063 (Fla. 6th Cir. Ct. 1984); Withlacoochee v. Seminole Electric, 8 Med. L. Rptr. 1281 (Fla. 13th Cir. Ct. 1982); Florida v. Sanchez, 7 Med. L. Rptr. 2338 (Fla. 15th Cir. Ct. 1981); Florida v. Hodges, 7 Med. L. Rptr. 2424 (Fla. 20th Cir. 1981); Cazarez v. Church of Scientology, 6 Med. L. Rptr. 2109 (Fla. 6th Cir. Ct. 1980); Florida v. Diggs, 5 Med. L. Rptr. 2596 (Fla. 11th Cir. Ct. 1980); Florida v. Alford, 5 Med. L. Rptr. 2054 (Fla. 15th Cir. Ct. 1979); Florida v. Bundy, 4 Med. L. Rptr. 2629 (Fla. 2d Cir. Ct. 1979).[4/]

Where the Florida Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, "federal

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4/ See also Dardashti v. Singer, 407 So.2d 1098 (Fla. 4th DCA 1982). There, the Fourth District held that plaintiff's wife should have been excluded from plaintiff's deposition, under the rule of sequestration of witnesses. Although not decided under Rule 1.280(c), the unspoken premise of the decision is that nonparties may attend a deposition unless excluded by court order.

decisions are highly persuasive in ascertaining the intent and operative effect of various provisions of the rules." Wilson v. Clark, 414 So.2d 526, 531 (Fla. 1st DCA 1982) (citation omitted).

In federal practice, "[a]s a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying public access to the proceedings." AT&T v. Grady, 594 F.2d 594, 596 (7th Cir. 1978), cert. denied, sub nom. AT&T v. MCI Communications Corp., 440 U.S. 971, 99 S.Ct. 1533, 59 L.Ed.2d 787 (1979), citing Fed.R.Civ.P. 26(c). Accord, Phillips Petroleum Co. v. Pickens, 105 F.R.D. 545, 550-51 (N.D.Tex. 1985); Waelde v. Merck, Sharp & Dohme, 94 F.R.D. 27, 28 (E.D.Mich. 1981); In the Matter of Frigitemp Corp., 15 Bankr. 263, 264 (Bankr. S.D.N.Y. 1981). Even when the parties stipulate to a protective order, "it [is] be improper to grant a protective order without first determining there is good cause as required by Rule 26(c)." Sharjah Investment Co. (UK) v. P.C. Telemart, Inc., 107 F.R.D. 81, 82 (S.D.N.Y. 1985); accord, Broan Mfg. Co. v. Westinghouse Electric Corp., 101 F.R.D. 773, 774 (E.D.Wis. 1984).

With regard to attendance at deposition, the United States District Court for the Southern District of Florida has said:

> [T]he Federal Rules of Civil Procedure allow exclusion of persons from discovery only in exceptional circum-

> stances, and then only upon motion and order of the court. The party seeking to exclude persons from depositions must show good cause, and the protection is limited to circumstances where justice requires such exclusion to protect a party from annoyance, embarrassment, oppression or undue burden or expense. Fed.R.Civ.P. 26(c)(5).

Skidmore v. Northwest Engineering Co., 90 F.R.D. 75, 76 (S.D. Fla. 1981) (emphasis added) (denying motion to exclude plaintiff's expert).

In summary, under both the Florida and Federal Rules of Civil Procedure, depositions are presumptively open to the public, subject to their exclusion for good cause shown.[5/] Fla. R. Civ. P. 1.280(c); Fed. R. Civ. P. 26(c). In the present case the trial court correctly denied the State's motion for protective order. The judgment of the Fourth District is in conflict with the Rules and the authorities thereunder, and should be reversed.

5/ This Court has consistently recognized the important values served by public access to the judicial process. See, e.g., Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982); State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1977); see also the discussion in the Initial Brief of The Miami Herald in Burk at 36-38.

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II. CONTRARY TO THE BURK MAJORITY, PUBLIC ACCESS TO DEPOSITIONS HAS HISTORICALLY BEEN REGULATED BY JUDICIAL AUTHORITY RATHER THAN THE ARBITRARY WHIM OF THE PARTIES.

This case is governed by the Florida Rules of Civil Procedure, the requirements of which the Fourth District ignored. Enforcement of Rule 1.280(c) is sufficient for resolution of this case.

There is, however, an additional misconception animating the opinion of the Burk majority which should be dispelled. While giving cursory treatment to the current Rules of Civil Procedure, the Burk majority discussed at some length the practice at common law, saying "'pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at the common law....'" Burk, 471 So.2d at 576, quoting Seattle Times Co. v. Rhinehart, ___ U.S. ___ , 104 S.Ct. 2199, 2207-08, 81 L.Ed. 2d 17, 27 (1984) (citations omitted). Burk also relies on Justice Burger's concurring opinion in Gannett Co. v. DePasquale for the proposition that "no one ever suggested that there was any 'right' of the public to be present" at pretrial discovery proceedings under the common law or under the modern federal rules. Burk, 471 So.2d at 574, quoting Gannett, 443 U.S. 368, 396, 99 S.Ct. 2989, 2914, 51 L.Ed.2d 608, 631 (1979) (Burger, C.J., concurring).

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Any comparison of old common law pretrial practice with present criminal discovery procedure is at best a dubious and difficult enterprise. Prior to the middle of the twentieth century, "there was no discovery as such provided by the Florida Statutes." J. Adkins and R. Jones, supra, § 1-3. Pretrial procedures "did no more than authorize questions before trial to obtain proof, not discovery. Any discovery obtained was merely an accidental incident." Id. The common law procedural rules were developed as an incident to an earlier system of adjudication, which has been superseded by the current Rules.

Additionally, Burk's portrayal of a general practice of common law secrecy is quite mistaken as a matter of historical record. Although some conflicting authorities can be found, there was as early as the nineteenth century substantial authority for the proposition that the public attendance at the taking of a civil deposition was to be regulated by the examiner or magistrate conducting the deposition. In nineteenth century English equity practice, it was the examiner or magistrate, whose duty it was to ask the questions of the deponent, who possessed the authority to admit or exclude the public. Daniell, Chancery Pleading and Practice, vol. I, 906 (6th Am. Ed. 1894). Daniell explained the general rule that:

> The Examiner has power to admit or exclude the public, as he thinks fit.

Id. By statute in Florida in this period, Florida courts observed English practice when the Florida and federal rules were silent. Act of Nov. 7, 1828, § 32, codified in J. McClellan, A Digest of The Laws of the State of Florida, Ch. 16, § 35 (1881); Long v. Anderson, 48 Fla. 27, 37, So. 216, 219 (1904).

Daniell's treatise was followed in a Florida treatise, which held that it was an officer of the court, and not the parties, who possessed the power to control public attendance:

> The examination of witnesses may be conducted in public or private, as the officer may determine.

R.H. Armstrong and W.P. Donahue, Florida Chancery Jurisprudence, § 334 (1927).

The issue of who possessed the power to control attendance at depositions was decided in the landmark mid-nineteenth century decision, Wright v. Wilkin, 4 Jur.N.S. 804 (1858). The plaintiff in that case sought to have a deposition "conducted with open doors and the public admitted," and the defendants objected. The court held that it was for the examiner to determine whether the public might attend; the court therefore affirmed the examiner's decision to grant the public the right to attend the deposition over the defendants' objection.

> As to the public or the short-hand writer, I think the examiner has power to do just as he thinks fit; if he

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> imagines that he is precluded from admitting any persons except the parties, their legal advisers, and the witnesses, I think he is not right.

Id. at 805 (emphasis added).

While precedent construing public access to depositions is not uniform,[6/] even the authority relied upon by the Supreme Court in its Gannett dicta holds that public access to pretrial proceedings was an issue for the court to decide. Relying on F. Maitland, Justice and Police 129 (1885), the Court noted:

> The "preliminary examination of accused persons has gradually assumed a very judicial form .... The place in which it is held is indeed no 'open court,' the public can be excluded if the magistrate thinks that the ends of justice will thus be best answered ...".

Gannett, 443 U.S. at 389, 99 S.Ct. at 2910, 61 L.Ed.2d at 627 (emphasis added). The same passage also acknowledges that an English statute of the time provided "pretrial proceedings should not be deemed an open court and that the public could therefore be excluded," id. (emphasis added),

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6/ Contrary authority is found in In re Western of Canada Oil, Lands, and Works Co., 6 Ch.D. 109 (1877) and United States v. United Shoe Machinery Co., 198 F. 870, 875 (D.Mass. 1912), both of which revolved around the wording of the statute or rule being construed, and E. McCarthy, Florida Chancery Act Annotated, § 45 at 124 (2d ed. 1935), which relied on United Shoe. The decision in United Shoe was reversed by Act of Congress. Olympic Refining Co. v. Carter, 332 F.2d 260, 264 n.6 (9th Cir.), cert. denied, 379 U.S. 900, 85 S.Ct. 186, 13 L.Ed.2d 175 (1964).

but in any event the decision would be that of the presiding officer.

The conclusion which the Burk majority reaches -- that only the parties and their "friends" may attend a deposition, Burk, 471 So.2d at 580 n.4 -- simply has no basis. Burk improperly divests the court of its traditional power to control its own proceedings, and transfers this power to the lawyers for the litigants, a procedure which has no basis in either the history of the common law or in the Florida Rules of Procedure. The decision of the Fourth District must therefore be reversed.

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CONCLUSION

For the foregoing reasons the decision of the Fourth District Court of Appeal should be reversed and the judgment of the trial court reinstated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Petitioner The Miami Herald Publishing Company was served by mail this 14th day of March, 1986 upon the following:

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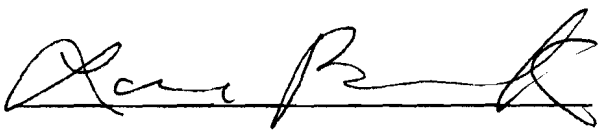

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