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IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,684

MIAMI HERALD PUBLISHING COMPANY,
a division of Knight-Ridder, Inc.,
SENTINEL COMMUNICATIONS COMPANY, and
FLORIDA PUBLISHING COMPANY,

Petitioners,

vs.

HONORABLE WILLIAM CARTER GRIDLEY,
Circuit Judge of Orange County,
Ninth Judicial Circuit, State of Florida,
PAULA HAWKINS, W. E. HAWKINS,
COWLES BROADCASTING, INC., and
CHANNEL TWO TELEVISION CO. OF FLORIDA,

Respondents.

QUESTION OF GREAT PUBLIC IMPORTANCE CERTIFIED BY THE FIFTH DISTRICT COURT OF APPEAL OF FLORIDA

Answer Brief of Respondents, Cowles Broadcasting, Inc., and Channel Two Television Company of Florida

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STATEMENT OF THE CASE AND FACTS

The instant case is a civil action in which the plaintiffs contend that they sustained damages as a result of the negligence and carelessness of the defendents. The defendants have denied that they were negligent and have further denied that the plaintiffs sustained any damages as a result of any negligence on behalf of the defendants.

After the case was filed, both parties conducted discovery under the Florida Rules of Civil Procedure by propounding interrogatories and requests for production. Additionally, various witnesses were deposed pursuant to Florida Rule of Civil Procedure 1.310.

Although extensive discovery was conducted by both parties, none of the fruits of that discovery were filed with the Clerk of the Circuit Court. This is consistent with the provisions of the Florida Rules of Civil Procedure which specifically prohibit the filing of discovery materials until such time as those discovery materials must be considered by the Court.

On October 21, 1986, the defendants were served with the Sentinel Communication Company and L. John Haile's Motion to Intervene and Motion to Compel Access to Records. A similar motion was served by Miami Herald Publishing Company and the Florida Publishing Company on October 28, 1986. In those motions, the press sought to intervene in the litigation pending between Mr. and Mrs. Hawkins on the one hand, and Cowles Broadcasting, Inc. and Channel Two Television Company of Florida, on the other hand, for the sole purpose of obtaining access to unfiled answers to interrogatories, deposition transcripts, medical records, hospital records, hospital bills, and video tapes.

On October 29, 1986 a hearing was held before the Honorable William C. Gridley, Circuit Judge, on the motions of the press to intervene and compel access to discovery materials. Although Judge Gridley found that the press had a right to intervene, he

nonetheless denied the motions of the press to compel access to the unfiled discovery materials, as he considered himself bound by the decision of the Florida Fourth District Court of Appeal and Palm Beach Newspapers, Inc. v. Burk, 471 So. 2d 571 (Fla. 4th DCA 1985).

Following the entry of Judge Gridley's Order, the press filed an emergency petition for review of that Order. That motion was summarily denied by the Fifth District Court of Appeal, which nonetheless certified the following question to this Court as a matter of great public importance:

> Are unfiled discovery materials in a civil case accessible to the public and hence to the press?

The press then timely invoked the discretionary jurisdiction of this Court.

SUMMARY OF ARGUMENT

A disinterested party may not intervene into pending civil litigation for the sole purpose of compelling access to unfiled discovery materials. Palm Beach Newspapers, Inc., v. Burk, 12 FLW 103 (Supreme Court of Florida, Feb. 19, 1987). A party wishing to intervene in pending litigation must have an actual interest in the outcome of that litigation. Faircloth v. Mr. Boston Distiller Corp., 245 So. 2d 240 (Fla. 1970); Oster v. Cay Construction Co., 204 So. 2d 539 (Fla. 4th DCA 1967); Baker v. Field, 163 So. 2d 42 (Fla. 2d DCA 1964). Moreover, even if allowed to intervene, a party must first serve a request for production under Fla. R. Civ. P. 1.350 before moving to compel production of documents under Rule 1.280. Fla. R. Civ. P. 1.280; Fla. R. Civ. P. 1.350. By doing so, the party to whom the discovery request is aforded an opportunity to object to the requested discovery. Fla. R. Civ. P. 1.280; Fla. R. Civ. P. 1.350.

In the instant case, no proper discovery request was ever served by Petitioners. However, if such a request had been served, it would have been clearly objectionable, as neither the United States Constitution, the Florida Constitution, the Florida Statutes, nor the common law allow disinterested individuals to compel production of unfiled discovery materials. Palm Beach Newspapers, Inc., v. Burk, 12 FLW 103 (Supreme Court of Florida, Feb. 19, 1987).

ISSUE I

A NON-PARTY MEMBER OF THE PRESS HAS NO RIGHT TO INTERVENE IN PENDING LITIGATION BETWEEN PARTIES FOR THE SOLE PURPOSE OF OBTAINING ACCESS TO UNFILED DISCOVERY MATERIALS.

Mistakenly relying upon Florida Rule of Civil Procedure 1.280(c), the Petitioners assert that they are entitled to obtain an order compelling access to discovery materials absent a showing of good cause by the respondents. This is clearly incorrect. Neither the Florida Rules of Civil Procedure nor the Federal Rules of Civil Procedure allow a disinterested party to intervene in pending litigation for the sole purpose of obtaining access to unfiled discovery materials. Instead, Fla. R. Civ. P. 1.230 specifically states.

> Anyone claiming an interest in pending litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.

The clear language of Fla. R. Civ. P. 1.230 reflects that intervention is to be permitted only in those cases in which the party seeking to intervene has an actual interest in the pending litigation. For example, the pledger of a note may intervene when only the pledgee has been made a party. Cracowaner v. Worthington, 101 Fla. 756, 135 So. 304 (1931). Likewise, a city may intervene in an action to enjoin a nuisance, Wojisch v. Tiger, 193 So. 2d 187 (Fla. 4th DCA 1966), and a property owner

may properly intervene in an action to remove subdivision restrictions. Baker v. Field, 163 So. 2d 42 (Fla. 2d DCA 1964). However, a party who merely has an indirect, inconsequential or contingent interest is not entitled to intervene. Faircloth v. Mr. Boston Distiller Corporation, 245 So. 2d 240 (Fla. 1970); Winkler v. Neilinger, 153 Fla. 288, 14 So. 2d 403 (1943); Morgareidgo v. Howey, 75 Fla. 234, 78 So. 14 (1918); Oster v. Cay Contruction Company, 204 So. 2d 539 (Fla 4th DCA 1967).

In the instant case, it is abundantly clear that the Petitioners do not have any interest in the outcome of the litigation between the plaintiffs, Paula Hawkins and W. E. Hawkins, and the defendants, Cowles Broadcasting Company, Inc. and Channel Two Television Company of Florida. Unlike the pledgee in Cracowaner v. Worthington, the municipality in Wojisch v. Tiger, or the property owner in Baker v. Field, the Petitioners have nothing to gain or lose by the direct legal operation of any judgment entered in the pending litigation. Inasmuch as a party seeking to intervene must show an interest that is created by a claim to the demand in suit, or a claim to property which is the subject matter of the pending litigation in order to demonstrate a right of intervention, it is abundantly clear that the Petitioners do not have any right to intervene in this pending personal injury litigation. Miracle House Corporation v. Haige, 96 So. 2d 417 (Fla. 1957); Citibank v. Black Hawk Heating and Plumbing Company, 398 So. 2d 984 (Fla. 4th DCA 1981).

Despite the fact that the Peitioners have no interest in the outcome of the pending litigation between Mr. and Mrs. Hawkins and Channel Two, the Peitioners incorrectly assert that they are entitled to the entry of an order compelling the production of unfiled discovery materials without first becoming a party to the pending litigation and without first serving a proper request for production under Fla.

R. Civ. P. 1.350. This is blatantly incorrect, as Fla. R. Civ. P. 1.350 provides in part:

> Any party may request any other party (1) to produce and permit the party making the request, or someone acting in his behalf to inspect and copy any designated documents, including writings, drawings, graphs, charts, photographs, phono-records and other data compilations from which information can be obtained, translated, if necessary, by the party to whom the request is directed through detection devices and to reasonably useable form, that constitute or contain matters within the scope of Rule 1.280(b) and that are in the possession, custody or control of the party to whom the request is directed. (emphasis added)

Even a cursory review of this rule of procedure would lead one to the conclusion that such discovery may only be conducted between parties. Obviously, the proper procedure would be for the Petitioners to seek leave to intervene first. Then, if, for some reason, leave to intervene were granted, the Petitioners would be required to file a Complaint in Intervention. Wojisch v. Tiger, 193 So. 2d 187 (Fla. 4th DCA 1966); Trawick, Fla. Prac. and Proc., §4-9(1985). At that point, the Petitioners could serve a proper request for production under Fla. R. Civ. P. 1.350. Pursuant to Fla. R. Civ. P. 1.350(b), the parties from whom documents and records were requested would then have 30 days in which to object, move for protective order or produce the requested documents and records. However, instead of following the proper procedure, the Petitioners have disregarded the requisite procedural safeguards and have requested an order compelling discovery without ever becoming a party to the litigation and making a proper request for discovery.

Addressing a similar issue, this Court has specifically held that the press does not have a right under the Rules of Procedure to attend discovery depositions in criminal cases or to compel copies of unfiled discovery depositions. Palm Beach Newspapers, Inc. v. Burk, 12 FLW 103 (Supreme Court of Florida Feb. 19, 1987). In Burk, the press sought to obtain access to unfiled discovery depositions in a criminal proceeding. In doing so, the press asserted various grounds, including a purported right

under the Rules of Procedure. That argument was specifically rejected by this court, which held that the press did not have a qualified right under the Rules of Procedure to attend those depositions or obtain their unfiled transcripts. In doing so, this court noted that open access to discovery materials would not serve the ends of justice, in that the rights of both party witnesses and non-party witnesses could be abused by allowing the press unfettered access to the fruits of discovery. Palm Beach Newspapers, Inc. v. Burke, supra. at 105.

ISSUE II

THE PRESS HAS NOT RIGHT UNDER THE FIRST AMENDEMENT TO THE UNITED STATES CONSTITUTION TO OBTAIN UNFILED DEPOSITIONS AND DISCOVERY MATERIALS.

Although the Petitioners cite Press-Enterprise Company v. Superior Court, 478 U. S. , 98 L.Ed.2d 1, 106 S.Ct. 2735 (1986) in support of the proposition that the First Amendment provides a qualified right of public access to civil litigation proceedings, the Press-Enterprise decision did not deal with the rights of the media to obtain pre-trial discovery materials in civil litigation. Instead, the Press-Enterprise decision specifically addressed the right of public access to a preliminary hearing in a criminal prosecution. Consequently, any reliance upon Press-Enterprise Company v. Superior Court, is misplaced, as there is no constitutional right of the public to attend civil trial proceedings. Sentinel Star Company v. Edwards, 387 So. 2d 367, 375 (Fla. 5th DCA 1980). Rather, any right to attend civil trial proceedings is derived from the common law. Id.

Because there is no constitutional right of public access to civil trial proceedings, there is, likewise, no constitutional right of public access to judicial records in civil proceedings. Seattle Times Company v. Rhinehart, 467 U.S. 20, 81 L.Ed. 2d 17, 104 S.Ct. 2199 (1984); Gannett Company v. DePasquale, 443 U.S. 368, 389, 61 L.Ed.2d 608, 99S.Ct. 2898 (1979); United States v. Edwards, 272 F. 2d 1289,

1292 (7th Cir. 1982). Instead, any such right is common law in origin. Id. The defendants do not dispute the long-standing common law right of public access to actual court records. However, the defendants disagree with the Petitioners' assertion that the deposition transcripts, answers to interrogatories, medical records, hospital records, medical records, medical bills, and video tapes sought by their Motion to Compel are judicial records. Federal and Florida courts have consistently held that the right of access to pre-trial discovery materials attaches only when those materials are filed with the Clerk of the Court. United States v. Saunders, 611 F.Supp. 45 (S.D. Fla. 1985); United States of America v. Miller, 579 F.Supp. 862 (S.D. Fla. 1984); Tallahassee Democrat, Inc. v. Willis, 370 So. 2d 867 (Fla. 1st DCA 1979). In Seattle Times, the defendants in a defamation action obtained documents pursuant to an order compelling discovery. Although the trial court required the plaintiffs to produce the discovery items, it entered a protective order prohibiting the defendants from publishing, diseminating, or using the information obtained by discovery for any manner other than would be necessary and consistent with its preparation of the case for trial.

After the discovery order was affirmed by the Supreme Court of Washington, the United States Supreme Court granted Certiorari. On review, the Court in an unanimous opinion, held that the protective order did not violate the constitution. Speaking for the Court, Justice Powell stated:

> A litigant has no first amendment right of access to information made available only for purposes of trying his suit. Zemel v. Rusk, 381 U.S. 1, 16-17 14 L.Ed.2d 179, 85 S.Ct. 1271 (1965). Thus, continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations. See In re Halkin, 194 U.S. App. D.C. at 287, 598 F.2d at 206-207 (Wilkie, J. descenting).
>
> Moreover, pre-trial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, Gannett Company v. DePasquale, 443 U.S. 368,

389 61 L.Ed.2d 608, 99 S.Ct. 2898 (1979), and, in general, they are conducted in private as a matter of modern practice. Seattle Times Company v. Rheinhart, 467 U.S. 20 at 32, 33, 81 L.Ed.2d 17, 104 S.Ct. 2199 (1984).

The clear intent of the court in Seattle Times cannot be disputed. Obviously, there is no right of the public, or the media, to attend civil pre-trial proceedings. Moreover, there is no right of the public or the media to obtain copies of pre-trial discovery material which has not been filed with the Clerk of the Court. Florida courts have consistently held that discovery materials do not become part of the official court file until such time as they are filed. Palm Beach Newspapers v. Burk, supra, at 574-576; Tallahassee Democrat, Inc. v. Willis, 370 So. 2d 867, 870 (Fla. 1st DCA 1979); Fla. R. Civ. P. 1.400. Consequently, the Peitioners have no right to compel production of the answers to interrogatories, deposition transcripts, medical records, hospital records, medical bills and video tapes requested in their motion.

If any question remained regarding this issue, it was answered on February 19, 1987 when this Court issued its opinion in Palm Beach Newspapers, Inc. v. Burk, 12 FLW 103 (Supreme Court of Florida Feb. 19, 1987). Specifically addressing the First Amendment rights of the press to compel access to unfiled discovery materials, this court held that there is no affirmative constitution right on the part of the press to attend deposition proceedings or to have access to depositions prior to their filing with the court. Palm Beach Newspapers, Inc. v. Burk, 12 FLW 103, 105 (Supreme Court of Florida Feb. 19, 1987).

ISSUE III

THE PRESS HAS NO STATUTORY RIGHT OF ACCESS TO UNFILED DISCOVERY MATERIALS UNDER CHAPTER 119 OF THE FLORIDA STATUTES.

The Petitioners incorrectly assert that the answers to interrogatories, deposition transcripts, medical records, hospital records, hospital bills and video tapes requested

are pbulic records which, under the laws of Florida are open at all times for personal inspection by any person. This assertion is blatantly incorrect and constitutes a misrepresentation of Florida law. Although the defendants agree with the general proposition that all documents filed with the Clerk of the Court are public records available for public inspection, the defendants contend that answers to interrogatories, deposition transcripts, medical records, hospital records, hospital bills and video tapes which have not been filed with the Clerk of the Court are not public records and are not available for general public inspection. In fact, those records are privileged and specifically excluded from the effect of Chapter 119 of the Florida Statutes. Florida Statute §119.0115 (Fla. 1985); Florida Statute §119.07(1)(a)(1985); Florida Statute §119.07(3)(a)(1985); Florida Statute §395.017(1985); Florida Statute §455.241(1985). A review of the above referenced statutes indicates that hospital records, as well as the patient records of licensed health care practitioners are privileged and not to be furnished to any persons other than the patient or her legal representative without written authorization of the patient. Florida Statute §395.017(1985); Florida Statute §455.241(1985). In construing the effect of the confidentiality of patient records in light of a request for disclosure by the news media under Chapter 119 of the Florida Statutes, the 3rd District Court of Appeal specifically stated that such patient records are specifically exempt from the effect of Public Records Act because they are confidential and otherwise protected from disclosure. Alice P. v. Miami Daily News, Inc., 447 So.2d 1300 (Fla. 3d DCA 1983).

Not only are the records of hospitals and physicians specifically exempted from the effect of the Florida Public Records Act, but video tapes in the possession of a federally licensed television station are exempted from the effect of the Public Records Act as well. Florida Statute §119.0115 specifically states:

> Any video tape or video signal which, under an agreement with an agency, is produced, amde or received by, or is in the custody of, a federally licensed radio or television station or its agent is exempt from this Chapter.

Moreover, this Court has also expressed its rejection of petitioner's argument that the press has a right of access to unfiled discovery materials under Chapter 119 of the Florida Statutes. Palm Beach Newspapers, Inc. v. Burk, 12 FLW 103 (Supreme Court of Florida Feb. 19, 1987). In doing so, this court noted that there is nothing in Chapter 119 which could be construed as allowing the press unfettered access to unfiled discovery materials. Palm Beach Newspapers, Inc. v. Burk, 12 FLW 103, 106 (Supreme Court of Florida Feb. 19, 1987).

CONCLUSION

The Petitioners have no right to intervene in the Hawkins personal injury suit against Channel Two for the sole purpose of compelling access to unfiled discovery materials. Neither the United States Constitution, the Florida Constitution, the Florida Statutes, nor the common law allow disinterested individuals unbridled access to the unfiled fruits of discovery between party litigants. Therefore, the certified question must be answered in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Respondents, Cowles Broadcasting, Inc., and Channel Two Television Company of Florida was served my mail this 2nd day of March, 1987 upon:

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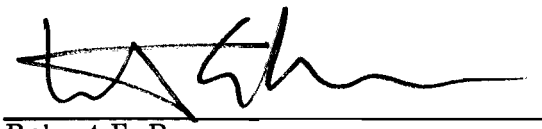

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