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

Reply Brief of Petitioners Miami Herald Publishing Company, Sentinel Communications Company, and Florida Publishing Company

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There can be no dispute that the health of a United States Senator is a matter of utmost public concern. Nor can there be any question that Senator Hawkins placed the condition of her health squarely at issue by claiming in her personal injury suit that she is suffering from a permanent handicap or impairment, while simultaneously asserting in her reelection campaign that she was perfectly fit to serve another six year term. The public has a right to know the truth on this question, and there is no good reason to keep the truth from the public.

To learn the truth, the press petitioners requested access to unfiled discovery materials and deposition transcripts relating solely to the Senator's health. The press was forced to litigate the issue because the parties had not filed the documents with the court and refused to provide the information to the press. It is only because the documents were not filed that there is any occasion for this litigation.

Given the absence of any public interest to support withholding the records, and the unpersuasiveness of any argument that the public's right to know should depend on litigants' decisions to file particular documents with the court, it is scarcely surprising that neither Hawkins nor Cowles even attempt to argue the merits of public access to the records sought here. Instead they argue primarily that

the press should never have been permitted to intervene and that the Court's recent decision in Palm Beach Newspapers, Inc. v. Burk, infra, mandates that public access be denied in this case.

Hawkins and Cowles are simply in error. Both the United States and Florida Supreme Courts have always recognized the press' limited right to intervene in cases in which it is not otherwise involved in order to seek access. Contrary to Hawkins' and Cowles' contention, the press does have an "interest" in the "outcome" of their lawsuit: the public interest in ensuring that any outcome is fairly achieved. See Section I.A. infra. Such access to the legal process serves many important public purposes, including promoting the efficiency of the legal system and public confidence in it. See Section I.B. and C. infra.

The Burk decision does not necessitate a denial of access in this case. The argument made in Burk, that access should be denied because the "discovery" nature of the proceedings precludes the parties from knowing what information will be disclosed, cannot be made here. Not only has the discovery concerning Senator Hawkins' health been taken, she was well aware of her condition before that discovery commenced. See Section II.A. infra. Further, the "balance of rights" in this case is very different from the balance that convinced the Burk Court to deny access. In this civil case, the strong constitutional guarantees that

weigh against access in a criminal case are absent, while the public interest supporting access is enhanced because the subject of the access request is the health of a United States Senator. See Section II. B. and C. infra.

ARGUMENT

I. The Press Has The Right To Intervene For The Limited Purpose Of Asserting Third Party Access Claims.

Hawkins and Cowles argue that the press has no right to intervene in their lawsuit to seek access to unfiled discovery materials and deposition transcripts (the "Records") because it has no "interest" in the lawsuit's "outcome." They repeatedly mischaracterize the press' limited intervention in this case as an attempt to subvert the legal system and create an unlimited press right to intervene in any pending civil litigation to compel the production of any information the press desires to know. They conclude that such a right does not and should not exist because it would wreak "havoc" in the courts -- increasing litigation, unduly burdening courts and litigants and turning the courts into a "tool" of the press.[1/]

1/ In fact, most of Hawkins' and Cowles' "responses" are to arguments the press petitioners never made. Thus, Hawkins argues that the press has no greater right of access than the public. Hawkins Ans. Br. at 8-9. This is not in dispute. Likewise Cowles argues that the press has no right of access to the records under the Public Records Law. Cowles Ans. Br. at 8-10. None was ever claimed. Criminal discovery materials became public once disclosed to the defendant but the status of civil discovery materials is not addressed in Chapter 119. See, e.g., Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d 775 (Fla. 4th DCA 1985).

This argument fails for three reasons. First, it ignores the fact that both Florida and federal courts have long recognized a press right to intervene in litigation for the limited purpose of asserting the qualified access right. The fact that the Records happen not to be filed does not affect this fundamental principle. In addition, the press has the right to intervene because it has an "interest" in the "outcome" of this lawsuit. Second, the dire consequences foreseen by Hawkins and Cowles are purely speculative and certainly incorrect. The access sought here would increase judicial efficiency without placing an undue burden on litigants or the courts. Finally, Hawkins and Cowles ignore the enormous public interest served by access to the Records. Unfiled discovery materials and deposition transcripts provide the public a crucial "window" on the legal system in an era when most litigation is resolved prior to trial.

A. Courts Have Consistently Recognized The Press' Right To Intervene For the Limited Purpose Of Asserting The Public's Qualified Right Of Access.

Hawkins and Cowles argue that the press should not have been permitted to intervene in their lawsuit to seek access to the Records. They claim that the press has no "interest" in the "outcome" of their litigation sufficient to

satisfy Rule 1.230, Fla.R.Civ.P., and thus no right to intervene. This is simply incorrect.

As Hawkins recognizes, the press does have "standing to oppose closure orders, even though not a party to the litigation." Hawkins Ans. Br. at 9. In fact, the press' right to intervene in order to assert the public's qualified right of access to the legal system has been consistently recognized by both the United States and Florida Supreme Courts. See, e.g., Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735 (1986) ("Press-Enterprise II") (press obtains access to preliminary hearings in criminal cases); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) ("Press-Enterprise I") (press obtains access to transcript of voir dire proceedings in death case); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (press obtains access to trial testimony of minor victims in sex crime cases); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (press obtains access to criminal trial); Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982) (press obtains access to pretrial suppression hearings in criminal cases); State ex. rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1977) (press obtains reversal of order prohibiting publication of information relating to criminal case).

This Court explained the rationale underlying this intervention right in McIntosh:

> It has been recognized in Florida and elsewhere that the news media, even though not a party to litigation below, has standing to question the validity of an order because its ability to gather news is directly impaired or curtained. This is so, because the public and press have a right to know what goes on in a courtroom whether the proceeding be criminal or civil. A member of the press or newspapercorporation may be properly considered as a representative of the public insofar as enforcement of public right of access to the court is concerned; and the public and press have a fundamental right of access to all judicial proceedings.

McIntosh, 340 So.2d at 908.

The fact that access to "unfiled discovery materials", rather than "judicial proceedings," is sought does not diminish in any way the press' right to intervene. See, e.g., Estrada v. Snyder, Case No. 86-767 (Fla. 3d DCA 1986), jurisdiction declined, Case No. 68,625 (Fla. 1987) (granting press request to attend depositions in criminal case); Short v. Gaylord Broadcasting Co., 462 So.2d 591 (Fla. 2d DCA 1985) (same); cf. Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1367 (Fla. 5th DCA 1980) (granting press request to quash order sealing court records, including depositions); Tallahassee Democrat, Inc. v. Willis, 370 So.2d 867 (Fla. 1st DCA 1979) (granting press request to vacate administrative order sealing all depositions). Even in the Court's recent decision in Palm Beach Newspapers, Inc. v. Burk, 12 F.L.W. 103 (Fla. 1987), in which the Court held the press has no right to attend depositions or obtain unfiled deposition

transcripts, see Section II infra, no suggestion is made that the press does not have the right to intervene to seek access.

Moreover, the press' interest in the outcome of Hawkins' and Cowles' lawsuit satisfies the intervention standard set out in Rule 1.230, Fla.R.Civ.P. The press and public have a direct interest in monitoring the legal system and ensuring that the outcomes achieved are both just and fairly obtained.[2/] There is therefore no basis for Hawkins' and Cowles' contention that the press should not have been permitted to intervene in this case.

B. Public Access to Unfiled Discovery Materials Would Increase Judicial Efficiency Without Unduly Burdening Courts or Litigants

Hawkins contends that a rule permitting public access to "unfiled discovery materials" could be "disastrous". Hawkins Ans. Br. at 17. She envisions a "staggering" increase in the amount and cost of litigation, "incredible" costs, "incomprehensible" amounts of judicial time consumed, and "incalculable" effects on the litigation process. Id.

2/ Hawkins and Cowles also argue that the press has no right to intervene in their litigation to raise a "new" issue -- namely, access to the Records. Hawkins Ans. Br. at 6-7; Cowles Ans. Br. at 3-5. However, intervention is proper even when new issues are raised if such intervention is necessary to "avoid irreparable injury." Miracle House Corp. v. Haige, 96 So.2d 417, 418 (Fla. 1957). In this instance, if press intervention were not allowed, the public would be deprived of essential information and thus injured irreparably.

Yet there is no reason -- certainly Hawkins gives none -- to expect such dire consequences. Prior to 1982 when Florida's filing rule changed,[3/] deposition transcripts and discovery materials were routinely filed. Courts were not deluged with requests for closure then and they will not likely be so now. In fact, third-party access to discovery materials increases, rather than decreases, judicial efficiency. Discovery conducted in one lawsuit is often useful in another. Free access to such materials reduces the need to duplicate costly and often complicated discovery. In Wilk v. American Medical Association, 635 F.2d 1295 (7th Cir. 1980), Judge Wisdom explained:

> This presumption [of access] should operate with all the more force when litigants seek to use discovery in aid of collateral litigation on similar issues, for in addition to the abstract virtues of sunlight as a disinfectant, access in such cases materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process.

Id. at 1299.

3/ As previously explained, the filing rule changed in 1982 for "housekeeping" reasons unrelated to access. See Initial Brief of Petitioners at 12.

Cowles' argument that the access right hinges on filing is simply incorrect. Cowles Ans. Br. at 7. Two of the cases cited -- United States v. Saunders, 611 F.Supp. 45 (S.D.Fla. 1985) and United States v. Miller, 579 F.Supp. 862 (S.D.Fla. 1984) -- address copying, not access, and do not discuss filing. The other case -- Tallahassee Democrat, Inc. v. Willis, supra, -- discusses filing but was decided prior to the rule change, when all such materials were routinely filed.

Discovery is designed to proceed in large part extrajudicially; courts expect litigants to cooperate and exchange information with a minimum of judicial interference. Access to discovery should operate in the same manner. So long as attorneys do not engage in "unnecessary" litigation and "automatically seek protective orders in every case where any potential for embarrassment or harm, no matter how slight, exists," the "staggering" increase in the caseload foreseen by Hawkins will never materialize. See Ericson v. Ford Motor Co., 107 F.R.D. 92, 94 (E.D. Ark. 1986) (denying protective order which would have limited dissemination of discovery materials).

Hawkins concomitant claim that permitting access to discovery materials will turn Florida's courts into the media's "tool" and compromise the sanctity of lawyers' "private" files is likewise mistaken. The access right sought would permit the press to review only documents the litigants obtained through the discovery process. The press has never suggested that it can deploy the courts to force a litigant to disclose information not otherwise produced in discovery. Contrary to Hawkins' claim, "unfiled discovery materials" are not the equivalent of a lawyers' "private files." See Hawkins Ans. Br. at 4. Discovery documents and deposition transcripts which a lawyer has in his files solely because he has chosen not to file them with the court are not "private"; they are "court records" required by law to be

retained. See Rule 2.075, Florida Rules of Judicial Administration (document retention). In contrast, the case files maintained by a lawyer are privileged "work-product" and, because they are not obtained through the processes of the court, are not subject to press access claims.

C. Public Access To Unfiled Discovery Materials Serves Important Public Purposes

Hawkins asserts that permitting public access to unfiled discovery materials would not "in any way contribute to the public's understanding or confidence in the judicial systems." Hawkins Ans. Br. at 12. When no rulings are made, she argues, the public has no need to know how cases are being managed by litigants and their lawyers, even when one of those litigants is a United States Senator running for reelection.

Hawkins' argument is clearly wrong. Discovery access is just as important as courtroom access. In the civil system, as in the criminal, almost all cases are resolved before they reach the "public phase" of trial. Indeed, in many respects, discovery has come to take the place of trial. Access to this meaningful phase of the legal process is therefore essential if the public is to understand and accept its legal system and the results it generates. See Richmond Newspapers, supra, at 572 ("People in an open society do not demand infallibility from their institutions,

but it is difficult for them to accept what they are prohibited from observing."). In fact, in some ways, discovery is more important than courtroom access. The "disinfectant" effect of access takes on added significance in the discovery context precisely because there is no judge present to monitor the proceedings and protect the public's interest. See Press-Enterprise II, supra. Access may expose abusive discovery tactics, unethical lawyers, or unfair settlements. Far from turning the courts into the "newsgathering tool" of the press, discovery access ensures that the courts remain the servant of the public.

II. Burk Does Not Compel The Court To Deny Access To The Records In This Case

On February 19, 1987, after the Initial Brief of Petitioners was filed, this Court issued its opinion in Palm Beach Newspapers, Inc. v. Burk, supra. In Burk, which is currently pending on rehearing, this Court held that the press and public have no right to attend depositions or obtain access to unfiled deposition transcripts in criminal cases. Burk, however, should not control the Court's decision in this case for three reasons: (i) the parties have full knowledge of the contents of the Records and are able to move for a protective order if there is a basis for one, (ii) no Fifth and Sixth Amendment fair trial rights are at stake, and (iii) the fitness for office of a candidate for

re-election to the United States Senate is the subject of the dispute.[4/]

A. The Risks Associated With Public Attendance At Depositions Are Not Present In This Case Because The Parties Know The Contents Of The Records

In Burk, the Court stressed the practical difficulties associated with permitting public access to discovery depositions. The Court expressed concern that the inability of a party or deponent to know "beforehand...with any degree of certainty what information will be discovered" made it impossible for that individual to seek a protective order until it was "too late". 12 F.L.W. at 105. Likewise, the Court worried that the same inability to predict the contents of a deposition would be a "chilling influence" on the lawyers involved. Id. at 106.

4/ Hawkins states that two other district courts have reached the "identically same result" as Burk, and that only one court decision is to the contrary. This is incorrect. Hawkins Ans. Br. at 15-16. Post Newsweek Stations, Florida, Inc. v. State, 474 So.2d 344 (Fla. 3d DCA 1985) ("Fuster") was effectively overruled by the Third District Court of Appeal sitting en banc in Estrada v. Snyder, supra -- a case not included in Hawkins' "count." Moreover, in Fuster, the parents of the children being deposed were in favor of access because they were concerned about the tactics of defense counsel. Florida Freedom Newspapers, Inc. v. McCrary, 497 So.2d 652 (Fla. 1st DCA 1986), is also inapposite. In McCrary, the court denied access to statements provided the defendant in discovery, but required a showing of "cause" before doing so. Id. at 655. No such showing was ever attempted here.

None of these difficulties arise in this case, because every disclosure could be "foreseen" by the parties. Certainly, Hawkins knew what information was contained in her medical records and what information would be disclosed in the depositions of her doctor and her husband. If she desired to maintain the confidentiality of any such information, she was in a position to move for a protective order before any disclosure took place.

Moreover, the discovery sought was conducted prior to the request for access. The parties knew exactly what was in the Records when access was denied. If either wished to move for a protective order prior to public disclosure of the Records, he could have done so. The fundamental reason for denying access asserted by this Court in Burk does not exist in this case.[5/]

B. The Fair Trial Rights Of Defendants Are Not Threatened By Access In This Case Because It Is Civil

In Burk, the Court recognized that the question of access to criminal depositions implicated the Fifth Amendment fair trial rights and Sixth Amendment speedy trial rights of criminal defendants. 12 F.L.W. at 103. The Court balanced

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5/ Neither Hawkins nor Cowles even attempted to argue that predictability is a problem in this case. In fact, in the Memorandum in Opposition that she filed in the trial court, Hawkins offered to move for a protective order. A. 23.

these rights against the public's right of access under the First Amendment and concluded that the defendant's interests outweighed the public's. 12 F.L.W. at 105.

In civil cases such as this one, however, these countervailing constitutional interests are not present. The fundamental constitutional guarantees that protect criminal defendants have no civil counterpart. Consequently, in this civil case, the interests to be weighed against the public's right of access are significantly weaker than in Burk.[6/]

C. The Public Interest In Access In This Case Is Greater Because The Subject Of The Dispute Is The Fitness For Office Of A United States Senator.

In many civil cases, the public interest in access is as strong as, if not stronger than, it is in the criminal context. Many civil cases in which access to discovery materials becomes an issue involve, as this one does, matters of the greatest public concern. For example, in Cipollone v. Liggett Group, Inc., Case Nos. 83-2864, 84-678, Slip Op. (D.N.J. 1986), discovery related to the cigarette industry's

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6/ Cowles also argues that the press has no right of access because this proceeding is civil. Cowles Ans. Br. at 6-7. This is false. The United States Supreme Court has explicitly recognized that civil trials are open, Craig v. Harney, 331 U.S. 367, 374 (1947), and in dicta recognized that the First Amendment access right extends to civil proceedings. Press-Enterprise I, supra, at 827-28; Richmond Newspapers, supra, at 580 n.17; Gannett Co. v. Depasquale, 443 U.S. 368, 386 n.15 (1979).

knowledge of the hazards of smoking, and in In re Agent Orange Product Liability Litigation, 104 F.R.D. 559, 573 (E.D.N.Y. 1985), it concerned the dangers of the controversial chemical "Agent Orange".

The public interest in access, recognized and rejected as insufficient in Burk, is greatly enhanced in this case. At the time access to the Records was sought, Hawkins was a candidate for reelection to the United States Senate. In her campaign, Hawkins claimed to be physically fit for office, but in her personal injury lawsuit, she alleged that her "working ability was impaired." The Records sought related directly to Hawkins' fitness to continue in public office. Thus the legitimate public interest in the Records in the period immediately prior to the election was immense. Moreover, the only interest asserted by Hawkins in opposition to this enhanced public interest in access was privacy -- an interest she had largely, if not entirely, waived by running for public office. See Initial Brief of Petitioners at 34-36. The Court should therefore decline to extend its holding in Burk to this case.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Fifth District Court of Appeal and remand this case to the trial court. The certified question should be answered in the affirmative.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioners Miami Herald Publishing Company, Sentinel Publications Company and Florida Publishing Company was served by mail this 27th day of March, 1987 upon:

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