IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,554

Cape Publications, Inc., Vince Spezzano and Jere Maupin,

Defendants-Petitioners,

v.

Philip Hitchner and Barbara Hitchner, his wife,

Plaintiffs-Respondents.



On Discretionary Review of a Decision of The Fifth District Court of Appeal of Florida

# Initial Brief of Amici Curiae Representative Elaine Gordon, Roberta Fox, The Florida Press Association, and The Florida Society of Newspaper Editors

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## INTRODUCTION

Amici Curiae Representative Elaine Gordon, former Senator Roberta Fox, The Florida Press Association, and The Florida Society of Newspaper Editors (the "amici") respectfully request that this Court reverse the decision of the Fifth District Court of Appeal.

In Landmark Communications, Inc. v. Virginia, **435** U.S. **839, 98** S.Ct. **1535, 56** L.Ed.2d **1 (1978),** the United States Supreme Court recognized that truthful reports of public judicial proceedings "[lie] near the core of the First Amendment." Id. at **838.** Consequently, the Court held that such reports are subject to limitation only upon the showing of a "clear and present danger." Id. at **843-45.**

In direct contravention of this established constitutional principle, the Fifth District has held that a newspaper may be held civilly liable, without limitation, for the truthful publication of facts relating to a public criminal trial, even where such facts are obtained from documents provided to the newspaper by a state official. The decision of the Fifth District permits the imposition of strict liability for truthful reports of issues of legitmate public concern -- in this case, child abuse -- in the absence of any countervailing state interest. What is worse, the Fifth District has seen fit to expand liability in these circumstances despite the fact that the Florida Legislature

itself specifically repealed a statute which purported to impose such liability in similar but more limited circumstances.

The decision of the Fifth District is contrary to the legislative intent of the child abuse law and unnecessarily calls the constitutionality of that law into question by striking the wrong balance between First Amendment rights and privacy interests. It should not be permitted to stand.

## STATEMENT OF INTEREST OF AMICI

Representative Elaine Gordon has been a member of the Florida House of Representatives since **1972,** where she has served as Speaker Pro Tempore, Chairperson of the House Committee on Health and Rehabilitative Services, and Appropriations Subcommittee Chairperson. Representative Gordon has sponsored or supported much of the child abuse legislation enacted during the period of her legislative service.

Former Senator Roberta Fox was elected to the House of Representatives in 1976 and the Florida Senate in **1982,** where she served until **1986.** Senator Fox served as Chairman of the Senate Committee on Health and Rehabilitative Services and sponsored or supported much of the child abuse

legislation enacted during the period of her legislative services.

The Florida Press Association is an association of 55 daily and 160 weekly newspapers published in Florida. The Florida Society of Newspaper Editors is a professional association of Florida journalists who exercise editorial control or editorial functions at Florida daily newspapers. The members of the Florida Press Association and the Florida Society of Newspaper Editors have historically reported to the general public news concerning Florida's tragic child abuse problem, important child abuse prosecutions, and significant developments in the child abuse laws.

All amici share a common interest in the goals served by the child abuse laws and believe informed public discussion of the judicial process as it relates to child abuse prosecutions is crucial to those goals. All amici further believe the decision below seriously undermines the goals served by the child abuse laws.

## STATEMENT OF THE CASE AND FACTS

### The Hitchners' Public Trial

On January 9, 1981, Phillip and Barbara Hitchner were acquitted in open court on felony charges of aggravated child abuse. The charges stemmed from a November 23, 1980

incident in which Phillip Hitchner and his brother forcibly restrained the Hitchners' 9-year-old daughter while Barbara Hitchner, the child's stepmother, scrubbed the girl's buttocks and anus with a steel wool scouring pad. R. 109. At the public trial, witnesses from the child's school, from Health and Rehabilitative Services ("HRS"), and from the Sheriff's Department testified regarding the incident. The child's schoolteacher, who reported the incident to the authorities, specifically testified that there was "a horrible red, raw area and it had to have been in some manner scraped considerably to be in that condition." Although the occurrence of the incident was undisputed, the trial judge entered a directed verdict of acquittal. R. 109.

The Article

Upon learning of the case, Jere Maupin, a reporter for the Today newspaper, examined the public court file maintained in the clerk's office and interviewed the assistant state attorney who had prosecuted the case. R. 109. At the prosecutor's direction, a secretary in the state attorney's office provided reporter Maupin with the prosecutor's case file. Included in the file were, among other items, an HRS predispositional report, the sheriff's case report, and the transcript of an interview with the Hitchner child. R. 110.

Based on Maupin's research, the Today newspaper published an article concerning the Hitchners' acquittal (the "Article"). R. 110. The Article, in essence a report of the investigation, prosecution and public trial of the criminal child abuse case, contained certain statements which, although not specifically disclosed at trial, did appear in the documents contained in the case file which had been provided to reporter Maupin by the state attorney's office. R. 110.

## The Hitchners' Privacy Claim and the Decision of the Trial Court

Shortly thereafter, Phillip and Barbara Hitchner sued Maupin, Cape Publications, Inc. and Vince Spezzano, the publisher of the Today newspaper, for invasion of privacy and libel, claiming, in pertinent part, that the Article publicly disclosed certain embarrassing private facts regarding the Hitchners' treatment of their daughter. R. 2-9. The Hitchners' sole ground for their claim of privacy was that certain facts in the Article had come from the reports provided to reporter Maupin by the prosecutor and that these reports were allegedly rendered confidential by statute. Fla. Stat. §827.07(15) (1979). Id.

The parties stipulated to the facts and all parties moved for summary judgment. R. 108-10. On January 16, 1987,

the trial court granted the Hitchners partial summary judgment on their privacy claim, stating:

> The Court is of the opinion that the publication of the contents of records covered by §827.07(15) is negligent as a matter of law and further finds that the statute is valid and confers a cause of action upon the Hitchners.

R. 115.

The Decision of the Fifth District

On appeal, the Fifth District affirmed. 514 So.2d 1136 (Fla. 5th DCA 1987). The court held that to state a claim for invasion of privacy, a litigant must show "only that private facts were publicly disclosed." 514 So.2d at 1138. Here, the court concluded, "Section 827.07(15), Florida Statutes (1981) establishes the privacy of the facts disclosed." Id.

The court specifically rejected Cape Publications' argument that section 827.07 was unconstitutional. The court thus distinguished the Hitchners' civil case from the "numerous United States Supreme Court cases which have struck down penal statutes which forbid the publication of statutorily protected matters:"

> However, this is not an action where a party is being punished under a criminal statute for publication of truthful information which was in the public domain. This is an action where the



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> victim alleges that the statutorily protected private facts were publicly disclosed.

Id. The court recognized that the "statutorily protected" reports were given to reporter Maupin by the state attorney without any indication that they were "confidential." Nonetheless, the court held the newspaper was civilly liable because it "published the private facts thus fulfilling the element of public disclosure." Id.

Cape Publications timely petitioned for discretionary review in this Court and on April 14, 1988, this Court granted review.

## SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal should be reversed. The Fifth District mistakenly interpreted former section 827.07(15) to create civil liability for the truthful publication of reports of child abuse provided to the press by the state attorney's office after a public trial. The lower court's construction of the statute reflects a deep misunderstanding of the Legislature's careful attempt to safeguard the children of this State while simultaneously ensuring that the public has access to and confidence in the process it depends on to protect its children. The problem of child abuse has been of such

continuing public importance to the people of Florida over the past decade that the Legislature has devoted substantial time and attention to the enactment and refinement of appropriate legislation addressing the problem's many facets. Public awareness and informed discussion of the issues have played a vital role in this campaign against child abuse.

The Court below seriously misapprehended the statutory scheme adopted by the Legislature in two ways. First, the Court implied a civil right of action for improper disclosure of certain child abuse reports even though the Legislature had withdrawn this cause of action by a repealer three years prior to the publication of the Article. Compare Fla.Stat. §827.07(11) (1975) with Fla.Stat. §827.07(11) (1977). The purpose of the child abuse laws has since been to act as a shield to protect the children and their legitimate expectations of privacy, not to act as a sword for those seeking to restrict informed public discussion of child abuse prosecutions.

Second, the child abuse reports at issue here were not confidential at the time they were freely given to the press. Under the laws in effect in 1980, the reports lost their confidential status under the child abuse law, section 827.07, when they were provided to the state attorney. At that time, they became criminal investigative records which

remained confidential only until the prosecution of the Hitchners was completed. The child abuse laws were not amended to provide for the continuing confidentiality of such reports until 1985, five years after the Article appeared.

As a consequence of the court's erroneous construction of the statute, the constitutionality of the statute was needlessly called into question. As interpreted by the Fifth District, the statute is indistinguishable from those statutes punishing the publication of truthful speech which this Court and the United State Supreme Court have uniformly held unconstitutional. Since a statute should be construed to be constitutional wherever possible, the decision of the Fifth District should be reversed and the fine balance between First Amendment and privacy interests drawn by the Legislature restored.

## ARGUMENT

### I. Since the Legislature Explicitly Repealed the Civil Action Once Afforded by the Child Abuse Law, the Court Below Erred in Implying Such an Action.

The legislative history of Florida's child abuse laws reflects the substantial and continuing legislative attention that has been given to this fundamental issue. This attention is expressed in the large number of statutory amendments which have been enacted since 1971.

The 1975 version of section 827.07, Florida Statutes, provided for criminal and civil penalties for willfully or knowingly disclosing the records of a child abuse case, except as otherwise authorized by law:

> (11) Penalties. -- Anyone knowingly and willfully violating the provisions of this section shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083. Any Person who willfully or knowingly makes Public or discloses any information contained in the child-abuse registry or the records of any child-abuse case, except as Provided in this section, may be held personally liable. Any Person injured or assrieved by such disclosure shall be entitled to damases.

Fla.Stat. §827.07(11) (1975), codified in 22A Fla.Stat. Ann. 420 (1976) (emphasis added).

In 1977, the Legislature repealed this civil liability provision. Ch. 77-429, Laws of Fla. As summarized in the title, the new Act provided, inter alia, "a criminal rather than a civil, penalty for willful or knowing publication or disclosure of certain confidential information . . . ." 1977 Fla. Laws at 1747. The legislation specifically deleted the phrase "may be held personally liable," and eliminated the sentence, "Any person injured or aggrieved by such disclosure shall be entitled to damages." Ch. 77-429, §3, 1977 Fla. Laws at 1751. The legislative staff reports are in accord.

Despite this clear legislative mandate, the Fifth District implied a civil cause of action under section 827.07. This is error. Where the Legislature has withdrawn a statutory cause of action by repealer, the courts may not imply one. See Reino v. State, 352 So.2d 853, 861 (Fla. 1977) ("When a statute is amended, it is presumed that the Legislature intended it to have a meaning different from that accorded to it before the amendment."); see, e.g., State v. Williams, 417 So.2d 755, 758 (Fla. 5th DCA 1982); Foremost Insurance Co. v. Medders, 399 So.2d 128, 130 & n.2 (Fla. 5th DCA 1981). As the United States Supreme Court has stated, "an explicit purpose to deny such cause of action [is] controlling." Cort v. Ash, 422 U.S. 66, 82, 95 S.Ct. 2080, 2088-91, 45 L.Ed.2d 26 (1975) (footnote omitted) (emphasis in original).

What is worse, the court below implied an even broader cause of action than the Legislature repealed. Repealed section 827.07(11) permitted civil liability to be imposed only where disclosure was "willful or knowing." In contrast, the court below permitted recovery against Cape Publications without any showing of scienter. R. 88-89, 115. Such strict liability for the publication of truthful information is unprecedented.

The court below mistakenly construed the child abuse law to imply a cause of action for invasion of privacy where

the Legislature clearly intended none exist. Accordingly, the court erred in striking the balance in this case between First Amendment rights and privacy interests.

### 11. The Reports Were Nonconfidential When They Were Disclosed to the Reporter.

A fundamental premise of the Fifth District decision is that the child abuse reports at issue were confidential as a matter of law at the time the reporter inspected them. That is incorrect. Although such reports would be confidential under similar circumstances today, they were not in **1980** when the events at issue here transpired.

In **1979,** the Legislature revised section **827.07,** and created a new subsection (15) entitled "Confidentiality of Reports and Records." The statute, which was in effect at the time of the events below, provided that:

> All records concerning the reports of child abuse or neglect . . . shall be confidential . . . and shall not be disclosed except as specifically authorized by this section.

Fla.Stat. **§827.07(15) (1979)** (emphasis added).

The statute, in turn, specifically authorized disclosure to:

> The state attorney of the judicial circuit in which the child resides or in which the alleged abuse or neglect occurred.

Fla. Stat. §827.07(15)(b)(3) (1979) (emphasis added).

It is thus clear that the confidentiality provision of section 827.07 did not apply to the 1980 child abuse reports. Having been disclosed to the state attorney, the reports were no longer confidential under section 827.07. Once in the hands of the state attorney, the reports gained the status of "active" criminal investigative information and were exempt from public inspection by virtue of section 119.07(d) and (h), Florida Statutes (1979). The reports were thus confidential as a matter of law only while the Hitchners' prosecution was "pending." Fla.Stat. §119.011(d)(2) (1979).

The reporter in this case received the child abuse reports after the Hitchners' prosecution was over, however. At that juncture, the investigation was no longer active. See Fla.Stat. §119.011(d)(2) (1979); Tribune Co. v. Public Records (Miller/Jent), 493 So.2d 480 (Fla. 2d DCA 1986), rev. denied, 503 So.2d 327 (Fla. 1987). And, because the investigation was no longer "active," the reports were no longer exempt from disclosure. Accordingly, when the reporter received them, the reports were public records open to inspection by anyone.

That the foregoing analysis is correct is confirmed by subsequent legislative action in amending the child abuse

law. In 1985, the Legislature amended the law to provide that child abuse reports remain "confidential" even after disclosure to other state agencies, including the state attorney. Ch. 85-224, §14, Laws of Fla. The amended confidentiality provision, currently recodified as Fla.Stat. §415.51, now contains the following additional sentence:

> Such exemption from [public inspection] applies to information in the possession of those entities uranted access as set forth in this section.

Fla.Stat. §415.51(1) (emphasis added). Where the Legislature has thus acted to amend a statute, the courts should not construe the amendment to be a nullity. E.g., City of North Miami v. Miami Herald Publishing Co., 468 So.2d 218, 219-20 (Fla. 1985) (citations omitted); Sharer v. Hotel Corp. of America, 144 So.2d 813, 817 (Fla. 1962).

Again, because the Fifth District misconstrued the applicable child abuse law, it struck an incorrect balance between the First Amendment rights and privacy interests at issue.

## III. The Statute Should be Construed to Preserve its Constitutional Status.

The amici incorporate by reference the argument of Petitioners and the press amici with respect to Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43

L.Ed.2d 328 (1975), and Landmark Communications, Inc. v. Virginia, 435 U.S. 839, 98 S.Ct. 1535, 56 L.Ed. 2d 1 (1978). As construed by the Fifth District, section 827.07 (now section 415.51) imposes strict liability in tort (and, where scienter is shown, a criminal penalty as well) where a newspaper publishes information voluntarily provided by the state attorney after a public criminal trial. Not only is it unreasonable to require a non-lawyer reporter to second-guess the legal judgment of the state attorney in producing the file, but such an interpretation infringes unreasonably on First Amendment rights guaranteed by Cox and Landmark and recognized by this Court. Publication of facts relating to public judicial proceedings "lies near the core of the First Amendment" and only a "clear and present danger" justifies its restriction. Landmark, 435 U.S. at 838, 843-45. Accordingly, this Court should reverse the decision of the Fifth District and authoritatively construe the child abuse law to preserve its constitutionality.

## CONCLUSION

For the foregoing reasons, the decision of the Fifth District Court of Appeal should be reversed.

Respectfully submitted,

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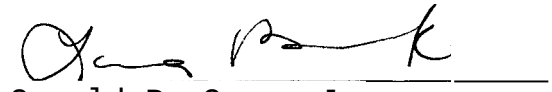
By: 
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Amici Curiae Representative Elaine Gordon, Roberta Fox, The Florida Press Association and The Florida Society of Newspaper Editors was mailed this 27th day of May, 1988 to the following:

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