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.

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

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

Richard J. Ovelmen
One Herald Plaza
Miami, Florida 33101
(305) 376-2868

Gerald B. Cope, Jr.
Laura Besvinick
Greer, Homer, Cope & Bonner, P.A.
4870 Southeast Financial Center
Miami, Florida 33131
(305) 579-0060

Attorneys for Amici Curiae

TABLE OF CONTENTS

	PAGE
Table of Citations	iii
Introduction	1
Statement of Interest of Amici Curiae	1
Statement of the Case and Facts	2
Summary of Argument	3
Argument	5
I. Since the Legislature Explicitly Repealed the Civil Action Once Afforded by the Child Abuse Law, the Court Below Erred in Implying Such an Action	5
11. The Reports Were Nonconfidential When They Were Disclosed to the Reporter	7
111. The Statute Should be Construed to Preserve its Constitutional Status .	9
Conclusion	10

TABLE OF CITATIONS

CASES PAGE

ty of North Miami v. Miami Herald Publishing Co., 468 So.2d 218 (Fla. 1985) 9

Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975) 7

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) 9

Foremost Insurance Co. v. Medders, 399 So.2d 128 (Fla. 5th DCA 1981) 7

Reino v. State, 352 So.2d 853 (Fla. 1977) 6

Sharer v. Hotel Corp. of America, 144 So.2d 813 (Fla. 1962) 9

State v. Williams, 417 So.2d 755 (Fla. 5th DCA 1982) 7

Tribune Co. v. Public Records (Miller/Jent), 493 So.2d 480 (Fla. 2d DCA 1986) rev. denied, 503 So.2d 327 (Fla. 1987) 8

STATUTES

Fla.Stat. §119.011(d)(2) 8

Fla.Stat. §119.07(d) and (h) (1979) 8

Fla.Stat. §827.07(11) (1975) 4,5

Fla.Stat. §827.07(11) (1977) 4,6

Fla.Stat. §827.07(15) (1979) 7-8

Fla.Stat. S415.51 (1985) 9

RULES

Fla.R.App.P. 9.030(a)(2)(A) 1

INTRODUCTION

Amici Curiae The Florida Press Association, The Florida Society of Newspaper Editors, Representative Elaine Gordon, and former Senator Roberta Fox (the "**amici**") respectfully request that this Court accept jurisdiction of this case pursuant to Rule **9.030(a)(2)(A)(i),** (ii), and (iv), Florida Rules of Appellate Procedure.

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 further believe the decision below seriously undermines those goals.

STATEMENT OF THE CASE AND FACTS

The amici adopt the Statements of Amici Curiae The Times Publishing Company, et al., and Petitioners Cape Publications, Inc., Vince Spezzano, and Jere Maupin. Additionally, the amici emphasize that the article which is the basis of this lawsuit was in primary part a news report of a public judicial proceeding -- the felony prosecution of the Hitchners for aggravated child abuse. The acts of abuse committed by the Hitchners (if not their criminality) were

clearly testified to and, in large part, demonstrated in open court. The amici have lodged the transcript of the Hitchners' trial with this Court so that the Court may consider the Hitchners' charges and the legal issues raised thereby in context.1/

SUMMARY OF ARGUMENT

This Court has jurisdiction because the Fifth District decision expressly declares valid a state statute, expressly construes the Florida and federal Constitutions, and because the decision is in express and direct conflict with the decisions of this Court and the other courts of appeal.

This Court should exercise its discretionary jurisdiction and grant review. 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

---

1/ For example, it was not disputed at trial that in order to punish her nine-year-old stepdaughter, Mrs. Hitchner scrubbed her stepdaughter's bare bottom with a steel wool "SOS" pad, while her father and uncle held her arms and legs. The child's schoolteacher, who reported this "punishment" to the authorities, specifically testified there was "a horrible red, raw area and it had to have been in some manner scraped considerably to be in that condition." Transcript at 12. An investigation ensued, the girl was removed from her home, and Mrs. Hitchner stated, according to the testimony of Christine Barringer, Brevard County Sheriff's Department and Beverly Jones, HRS Intake Counselor that "she didn't care if [the child] came back to the house or not." Transcript at 55, 68.

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 has played a vital role in the 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 in issue. 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, §827.07, when they were provided to the State Attorney. The child abuse laws were not amended to provide for the continued confidentiality of such reports until 1985, five years after the article appeared.

The erroneous construction of the statute adopted below caused the court to strike the balance between First Amendment rights and privacy interests incorrectly. Additionally, the court's construction needlessly calls into question the statute's constitutionality. Since a statute should be construed to be constitutional wherever possible, this Court should exercise its discretion to review and reverse the decision below.

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 reflected 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 aggrieved by such disclosure shall be entitled to damages.

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, cited in the Petitioners' Brief on Jurisdiction, 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).

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.

II. 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 saw 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. When the reporter received them, the reports were public records open to inspection by anyone.2/

2/ 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 confidential as a matter of law only while the Hitchner prosecution was "pending." §119.011(d)(2), Fla.Stat. (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 §119.011(d)(2), Fla.Stat. (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 it was no longer "active," the reports were no longer exempt from disclosure.

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 granted 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 and the privacy interests at issue.

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

The amici incorporate by reference the argument of Petitioners with respect to Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). 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 given to it by the State Attorney. 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 its progeny. This Court should accept jurisdiction and authoritatively construe the child abuse law to preserve its constitutionality.

CONCLUSION

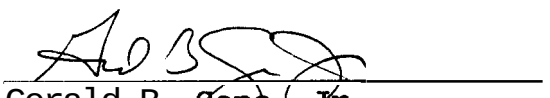
For the foregoing reasons, this Court should exercise its discretion to grant review.

Respectfully submitted,

Richard J. Ovelmen
One Herald Plaza
Miami, Florida **33101**
(305) 376-2868

Gerald B. Cope, Jr.
Laura Besvinick
GREER, HOMER, COPE & BONNER, P.A.
4870 Southeast Financial Center
200 South Biscayne Boulevard
Miami, FL **33131**
(305) 579-0060

Attorneys for **Amici** Curiae

By: 
Gerald B. Cope, Jr.
Laura Besvinick

1497c

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Leave to File Jurisdictional Brief of **Amici Curiae**, the Florida Press Association, the Florida Society of Newspaper Editors, Representative Elaine Gordon and Roberta Fox was mailed this 14th day of December, 1987 to the following:

WILLIAM E. WELLER
101 N. Atlantic Avenue
P. O. Box 1255
Cocoa Beach, FL. 32391

GEORGE RAHDERT
Rahdert, Acosta & Dickson
233 3rd Street North
St. Petersburg, FL. 33701

FLORENCE SNYDER RIVAS
Edwards & Angel
250 Royal Palm Way
P. O. Box 2621
Palm Beach, FL. 33480

JACK A. KIRSCHENBAUM
Wolfe, Kirschenbaum
& Peeples, P.A.
P. O. Box 757
Cocoa Beach, FL. 32931

JOHN B. McCRORY
Nixon, Hargrave, Devans
& Doyle
One Thomas Circle, N.W.
Washington, D.C. 20005

By GERALD B. COPE, JR.
GERALD B. COPE, JR.

1522b