

O/a 8-30-88

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.

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

Reply 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") file this reply in support of their initial brief and respectfully request that this Court reverse the decision of the Fifth District Court of Appeal.

SUMMARY OF ARGUMENT

The question before this Court is whether the defendants in a public criminal prosecution for child abuse can claim that a news report about their case constitutes an invasion of privacy. The Hitchners, the defendants in the criminal case, and amici curiae Academy of Florida Trial Lawyers (collectively, the "Respondents") argue that they can, based solely on a Florida statute which purportedly exempted certain record sources of the Article from inspection pursuant to Chapter 119 of the Florida Statutes, Florida's Public Records Law.

The Respondents are in error. First, the Article is a news report of a public criminal prosecution and facts relating directly to such prosecution, events which are "without question . . . of legitimate concern to the public and consequently within the responsibility of the press to report." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492,

95 S.Ct. 29, 43 L.Ed.2d 328 (1975). As such, the Article lies "near the core of the First Amendment" and may not constitutionally give rise to liability absent the "need to further a state interest of the highest order." Smith v. Daily Mail Publishins Co., 443 U.S. 97, 104, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979).

That the Article is such a protected news report is borne out by the transcript of the Hitchners' public criminal trial. Accordingly, amici examine the transcript of the proceeding in some detail herein.

Second, the statute relied upon by the Respondents, section 827.07, Florida Statutes, to prove their claim of invasion of privacy is inadequate both to establish the "privacy" of the facts published and to satisfy the "compelling state interest" standard enunciated in Cox and Smith. As amici demonstrated in their initial brief, the Respondents have utterly misconstrued and misapplied the statute.^{1/} The Legislature did not provide the Hitchners

^{1/} The Trial Lawyers assert that this Court should disregard certain of the amici's arguments addressed to this issue on the grounds that these arguments were not made by the party, Cape Publications. This is false: "[A]micus is not at liberty to inject new issues in a proceeding, however, amicus is not confined solely to arguing the parties' theories in support of a particular issue." Keating v. State, 157 So.2d 567, 569 (Fla. 1st DCA 1963) (emphasis added).

with the cause of action they have asserted here, nor did it enact the legislation for the purpose of sanctioning the punishment of truthful speech concerning a child abuse prosecution.

Accordingly, the summary judgment granted by the trial court as well as the decision of the Fifth District Court of Appeal should be reversed.

ARGUMENT

I. No Claim for Invasion of Privacy Lies Because the Article Reported the Facts of the Hitchners' Criminal Prosecution

The Respondents charge that petitioners Cape Publications, Inc., Vince Spezzano, and Jere Maupin and their amici (collectively, the "Petitioners") have misrepresented the circumstances of the Hitchners' prosecution and the content of the Article to this Court. Hitchners Br. 5-6; Trial Lawyers Br. 1. They claim that, contrary to the Petitioners assertions, the Hitchners were somehow vindicated at trial. Thus, the Trial Lawyers specifically invite this Court to "verify as much from the transcript of the criminal trial." Trial Lawyers Br. 1.

In fact, it is the Respondents who have distorted the truth. Contrary to their claims, a review of the trial transcript does not clear the Hitchners. All five witnesses at the bench trial testified that Barbara Hitchner, the

child's stepmother, scrubbed the girl's naked buttocks while Philip Hitchner, the child's father, and her uncle forceably restrained her arms and legs. Tr. 26-27.

Thus, the Hitchners were acquitted, but not because they were found not to have committed the acts charged and reported in the Article. To the contrary, the statement of the trial judge who directed a verdict in the Hitchners' favor makes clear that their acquittal was based solely on the judge's reticence to convict them of **so** serious a crime:

Having been a juvenile judge for some sixteen or seventeen years I wouldn't think what these people in the position of parents have done would amount to fifteen years in the state penitentiary.

* * *

Sometime the stepparent relationship is a tedious one, perhaps more tedious than a natural parent although natural parents sometimes become exasperated with their children and in punishing sometimes they even get angry, which I think they aren't supposed to do according to the best psychological opinions, but I think it is natural for parents sometimes to get exasperated and do things that they wouldn't do if they thought it over several hours or several days later.

* * *

I therefore, assuming that there is no lesser included offense, do not find that the State's case proved beyond all reasonable doubt that the father and the stepmother maliciously punished the child, . . . age nine.

On the other hand I would think all of the professionals involved were by law required to take the acts that they did and the steps that they did. I am sure it is not often that you hear that a Brillo pad was used on the rear end of a child and just the words are almost alarming enough to get people excited. The professionals involved were doing their duty set out by law, it is in Chapter 827.07 dealing with the abuse or neglect of children.

Tr. 83-84.

Far from having "always categorically denied" the allegations as they now assert, Hitchers Br. 6, the Hitchners gave no testimony at all at their trial, and witnesses for the prosecution testified the Hitchners admitted to having committed the acts of abuse. Christine Barringer, the Brevard County Sheriff's Department investigator assigned to the Hitchner case testified without contradiction at trial that Mr. Hitchner admitted the incident:

Q. What specifically did you ask of Mr. Hitchner and what specifically did he tell you concerning the incident in question?

A. I asked him about the bruises sustained by [the child] on the previous Sunday, the 23rd and I asked him what rules of the household she had violated that caused him to punish her and why they felt that scrubbing her rectal area with an SOS pad justified this punishment.

Q. And what did he respond?

A. He said that they did do that and that his wife, Barbara, had done the abuse and he held [the child] down on the floor while she did it.

Tr. 57-58.

This testimony was fully corroborated by the H.R.S. Intake Counselor assigned to the case, Beverly Jones:

A. I asked her did she scrub [the child's] bottom with an SOS pad.

Q. And what did she say?

A. Yes, she did.

Q. What else did you ask and what else did she say?

A. She also informed me that her husband, Philip Hitchner, was present and he held [the child's] legs.

* * *

Tr. 67.

Q. Directing your attention specifically to Philip Hitchner what, if anything, did he say?

A. He said that he was present, that he held her legs. He also informed me that he didn't think that it was child abuse, I explained to him what child abuse, what the law is at the present time. He further went into detail and said when he was growing up he was beaten and so on and so forth and it was not called child abuse then. I explained to him any marks or bruises left within one hour's time of the incident, according to Florida Statutes, is child abuse.

Q. And did you have any further conversation in your interview with defendant, Barbara Hitchner?

A. We talked about punishment, we talked about the possibility of having the children and then going to counseling. At the time they weren't in agreement.

Tr. 71-72.

No witness testified the scrubbing was done softly or lightly in the area above the coccyx as an object lesson, **as** the Trial Lawyers now **assert.**^{2/} Trial Lawyers Br. 1. In fact, all of the testimony was to the contrary. Thus, Beale Hallmark, the school teacher who examined [the child's] buttocks testified:

Q. Now, the area that you examined was this an area of her body that she had complained about?

A. Yes, sir.

Q. Where was this?

A. This was in her private parts.

a. The buttock and between her buttock?

A. And all the way to the front of the pubic area.

A. Well, the observation that I made was that this was a horrible red, raw

2/ The amici can only assume the Trial Lawyers have confused the opening statement made by the Hitchners' trial lawyer with the testimony given on the abuse. **See** Tr. 6-8. Although the Hitchners' lawyer asserted in opening statement that the evidence would show that the child had not been abused, all of the actual testimony was to the contrary.

area and it had to have been in some manner scraped considerably to be in that condition.

Q. Now, did you make any observation about her walk, the way she behaved, the way she sat in her seat during that morning, the chance you had to observe her?

A. Yes, sir. Whenever she walked she walked very slowly and an awkward and peculiar walk.

Q. Can you describe, peculiar is sort of-

A. Something was hurting and her legs were kind of stilted.

Tr. 11-12.

The school's curriculum coordinator, Jeanne Knapp, also personally observed the girl's condition:

A. I observed a great deal of red area around the rectum, from the rectum and out on to the cheek part.

Tr. 18.

Photographs of the raw rectal area were introduced into evidence, Tr. 20, and the child herself testified:

Q. And what happened after you got in trouble because you hadn't cleaned yourself?

A. I got my butt scrubbed.

Q. And who did this?

A. My mom.

Q. And who else was there?

A. My dad and Dana.

Q. And who is Dana?

A. My uncle.

Q. And what did your dad do?

A. Held my legs.

Q. Held your legs. And what did Dana do?

A. Held my arms.

Q. And what did your mother do?

A. She scrubbed me.

Q. Now, the person that we are calling your mother, that is Barbara Hitchner, that is the lady that is sitting over here?

A. Uh huh.

Q. Okay, what did she scrub you with?

A. A SOS pad.

Q. And where did she scrub you with the SOS pad?

A. On **my** bottom.

Q. And where do you mean on your bottom?

A. In the back.

Q. Where you go to the bathroom?

A. Uh huh.

Tr. 26-27.

Investigator Barringer testified she too directly observed the evidence of abuse:

Q. And what did you observe around in her buttocks area when she pulled her jeans off and underpants down?

A. There were black and blue marks on her buttocks and in between the crack in her cheeks in the rectum area it was all rubbed red and raw.

Q. What other observation did you make about her body?

A. There were several smaller black and blue marks on her arms and a red mark in the middle of her upper chest; just underneath the neck.

Tr. 50.

H.R.S. Intake Counselor Jones also testified as to her observations as to the physical abuse of [the child]:

A. On her person we had her take down her underpants, on her rear end there was red, raw mark on the crack of her behind, she had some bruises on her buttocks. There was a bruise on her left arm and a bruise right around her neck area.

Tr. 64.

As to the issue of the rash, the child testified that although she had a rash it was not painful and raw until after the scrubbing. Tr. 30. The testimony of her teacher, Mrs. Hallmark, corroborated the child's account. Tr. 14. No witness testified the raw area was caused by a rash.

In sum, the Hitchners were tried for a serious crime after a thorough investigation by public officials; and they

were acquitted by a judge under circumstances in which it was clear that physical abuse of the child had occurred. The facts relating to this criminal investigation and prosecution were thus of legitimate public concern and in no way exonerated the Hitchners.

II. Section 827.07 Does Not Give Rise To
A Claim For Invasion Of Privacy Nor
Does It Create A "Compelling State
Interest" In Privacy

The Respondents rely in toto on section 827.07, Florida Statutes, to prove their claim of invasion of privacy. They assert that section 827.07, an exemption from Florida's Public Records Law, "establishes the privacy of the facts disclosed,"^{3/} Hitchners Br. 19-20; Trial Lawyers Br. 3.

This is error. First, as previously explained by the amici, the Legislature explicitly indicated its intent that no civil cause of action lie for disclosure of the

^{3/} Both the Hitchners and the Trial Lawyers' claim that there is some difference between an implied cause of action based on section 827.07 and the common law tort of invasion of privacy and that their claim sounds in tort. In fact, there is no difference, as the tort is construed by the Respondents.

[The Hitchners' action] seeks to impose liability on the defendants for publishing information made confidential by statute.

Trial Lawyers Br. 15.

records exempted by section 827.07 when it repealed section 827.07(11) in 1977. See Initial Brief of Amici Curiae at 10.

Second, section 827.07 is an exemption from the inspection provisions of the Public Records Law. **As** such, it does no more than impose a duty on the records custodian to refrain from allowing public inspection of the records. This does not mean that the substance of the records consists of "private facts," Nor does it create a protectable privacy interest. For example, an "exempt" H.R.S. file may have in it all manner of public information -- including newspaper clippings, copies of arrest records, or details of family matters which have already been published. Thus, an exemption to the Public Records Law inherently can not create a common law invasion of privacy action because it does not make any "fact" not already so a "private" fact.

Indeed, the fact that section 827.07 is an exemption from the Public Records Law may well be unrelated to privacy interests. Exemptions from the Public Records Law are created to serve a wide variety of interests. For example, the exemption for "active criminal intelligence information" is predicated on law enforcement interests, not privacy concerns. In this case, the section 827.07 exemption is bottomed in large part on the need to guarantee confidentiality to child abuse informants so that they will come forward, and the need to maintain confidentiality in

cases in which the family members may be able to rehabilitate themselves and their familial relationships. Certainly, the sponsors of the child abuse legislation confidentiality provisions did not pass such legislation because they believed facts relating to the criminal prosecution of acts alleged to be child abuse should be considered "private facts" that should be kept from the public.

Moreover, once it is clear (as it now should be) that section **827.07** does not create a privacy interest inuring to the Hitchners' benefit, the Hitchners' claim must fail the stringent test of Cox and Smith. Stripped of its statutory guise, the Hitchners' common law claim holds no "compelling state interest" sufficient to override the constitutional right of the press to publish truthful reports of public criminal prosecutions. Accordingly, the Hitchners' claim must be rejected.

CONCLUSION


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

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Amici Curiae Representative Elaine Gordon, Roberta Fox, The Florida Press Association and The Florida Society of Newspaper Editors was mailed this 15th day of July, 1988 to the following:

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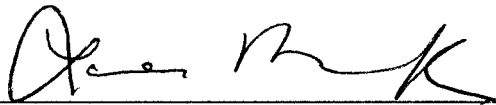
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