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IN THE SUPREME COURT OF FLORIDA

CASE NO. **71,554**

CAPE PUBLICATIONS, INC., VINCE SPEZZANO and JERE MAUPIN,

Petitioners,

v.

PHILLIP HITCHNER and BARBARA HITCHNER,

Respondents.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

BRIEF OF AMICUS CURIAE, ACADEMY OF FLORIDA TRIAL LAWYERS, IN SUPPORT OF POSITION OF RESPONDENTS

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I
INTRODUCTION

This brief is filed on behalf of amicus curiae, the Academy of Florida Trial Lawyers, in support of the position of the plaintiffs/respondents, Phillip and Barbara Hitchner. Because the case and facts have been stated and the issues have been defined by the parties, we will not belabor those aspects of this proceeding here. A brief general observation is in order, however, concerning the tactics of the defendants and their amici. After reading their briefs, one is left with the impression that the plaintiffs really did scrub their child's anus with an ***SOS*** pad, so hard as to cause the area to become red and raw, and that their civil action is merely an attempt to profit monetarily from that wrong. If that were true, the plaintiffs' motives in this action would indeed be suspect. That is simply not true, however, and the Court can verify as much from the transcript of the criminal trial which the defendants' amici have filed of record here, in which the child's testimony simply did not support the accusation.

According to the testimony adduced at trial, the child's anal area was red and raw because of a rash she had developed from her habitual failure to clean herself after going to the bathroom--and the **SOS** pad was applied well above the anal area, in the area of the coccyx, and lightly at that, solely as a symbolic object lesson. In effect, by pretending that they had to scrub her like a kitchen pot because she would not clean herself, the plaintiffs were simply trying to impress the child with the need for her own personal efforts at hygiene--which is why the State did not prove its case at trial, and the plaintiffs obtained a judgment of acquittal. The newspaper article in issue here tells an entirely different story, of course, which should adequately explain why the defendants were sued. With that introductory observation behind us, we turn to the merits. Our arguments will be brief enough that an introductory summary of them should be unnecessary.

II
ARGUMENT

THE DISTRICT COURT'S DECISION WAS CORRECT, AND IT SHOULD BE AFFIRMED.

The defendants/petitioners have made essentially four arguments in their initial brief. They argue (1)that §827.07(15), Fla. Stat. (1981), does not provide a civil "strict liability" cause of action to the plaintiffs; (2) that the confidentiality provisions of §827.07(15) apply only to the state attorney, and not to them; (3) that the First Amendment protects their publication of the protected material and prevents the plaintiffs from recovering damages for invasion of privacy; and (4) that Florida law prevents the plaintiffs from recovering damages for invasion of privacy.

The defendants' numerous amici make the same arguments, and three additional arguments. The State Attorney for the Eleventh Judicial Circuit argues that §827.07(15) protected only the HRS report, and not the sheriff's case report or the state attorney's interview with the plaintiffs' child. Amici Elaine Gordon, et al., argue that the three reports in question lost their confidentiality once they were turned over to the state attorney. Amici The Times Publishing Company, et al., argue that the district court's decision imposes an impermissible "prior restraint" on the press. Because these additional contentions have not been raised here by the defendants, they are not properly before the Court and therefore should not be considered. ***See Higbee v.*** Housing ***Authority of Jacksonville,*** 143 *So. 560,* 197 So. 479 (1940) (Supreme Court will not pass on grounds urged by an amicus but not presented by the parties). We will respond to them briefly, however, after first responding to the contentions raised by the defendants.

1. The nature of the plaintiffs' cause of **action.**

The defendants contend that, as a threshold matter, the district court erred in "inferring" a cause of action for "strict liability" from 5827.07, Fla. Stat. (1981), since its initial provision for civil penalties was repealed in 1977. In our judgment, this argument

reflects a misunderstanding of both the nature of the plaintiffs' cause of action and the district court's decision. The plaintiffs' cause of action simply was not "inferred" from S827.07. The plaintiffs' cause of action, as the district court expressly recognized, is bottomed upon the common law tort of invasion of privacy--a tort which has been recognized in this State for decades. *See, e.g., Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243, 168 A.L.R. 430 (1944); *Genesis Publications, Inc. v. Goss*, 437 So.2d 169 (Fla. 3rd DCA 1983), *review denied*, 449 So.2d 264 (Fla. 1984); *Harms v. Miami Daily News, Inc.*, 127 So.2d 715 (Fla. 3rd DCA 1961).

Neither did the district court create a cause of action for "strict liability." As the decisions cited above make clear, an invasion of privacy action is a "negligence" action, and the district court did not hold otherwise. It simply held that the stipulated facts proved all elements of the cause of action as a matter of law, including the "private facts" element of the tort. It relied on S827.07 for only one purpose--its conclusion that "[the statute] establishes the privacy of the facts disclosed". *Cape Publications, Inc. v. Hitchner*, 514 So.2d 1136, 1138 (Fla. 5th DCA 1987). In short, no cause of action for "strict liability" was inferred from the statute at all.

The defendants argue nevertheless that the 1977 repeal of the initial civil penalty provision of §827.07, Fla. Stat. (1975), amounted to an express declaration that the plaintiffs have no civil cause of action on the facts in this case. Read in context, however, the civil penalty provision of S827.07, Fla. Stat. (1975), simply created a civil remedy against official custodians of child abuse reports, for "willfully or knowingly" releasing information in those reports--and the very "legislative history" upon which the defendants rely for a contrary position confirms this reading, because the stated purpose of the repeal was to "remove . . . personal liability for the ***release*** of confidential information" (A-2; emphasis supplied). There is nothing in the initial statute or the repeal which even arguably suggests that the legislature intended to abolish the long-established

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tort of invasion of privacy where, once confidential information has been wrongfully ***released*** by an official custodian, it has thereafter been tortiously published in a newspaper of general circulation.

In any event, even if there were some ambiguity in the repeal which might give rise to an interpretation that the legislature meant to abolish the tort of invasion of privacy, that would not be enough. It is thoroughly settled that legislative enactments in derogation of the common law will be strictly construed; that the common law cannot be repealed by mere implication; and that courts will not infer repeals of the common law from statutes which do not clearly and unequivocally express an intent to abolish the common law. ***See Carlile v. Game & Fresh Water Fish Commission,*** 354 So.2d 362 (Fla. 1977); ***Trail Builders Supply*** Co. ***v. Reagan,*** 235 So.2d 482 (Fla. **1970);** 49 Fla. **Jur.2d, *Statutes,*** §192 (and numerous decisions collected therein). In our judgment, the mere repeal upon which the defendants rely for their suggestion--that the legislature intended to abolish common law tort actions for invasion of privacy--comes nowhere close to expressing such an intent with the requisite clear and unequivocal language, and it therefore does not even arguably meet the stringent tests required for such a construction here. The defendants' contention that the plaintiffs have no civil tort remedy for invasion of privacy is therefore without merit.

2. The scope and applicability of the confidentiality provision.

The defendants also argue that the confidentiality provision of §827.07(15) applies only to the state attorney, and not to them--and that once the state attorney turned the confidential documents over to them, the documents lost their confidentiality and became a matter of public record. Of course, there is no support in the statute for such a contention. The statute plainly and unambiguously declares the ***documents*** in issue here ***confidential.*** That is all that it says. It does not say that the documents are confidential unless and until such time as they are wrongfully disclosed, at which point they

lose their confidential status.[1/] The defendants' contention is therefore squarely refuted by the statute itself.

Just as importantly, the defendants' contention has been uniformly rejected in similar contexts by the decisional law. It has been rejected because it simply makes no sense. Stripped of its semantics, the argument amounts to this--the press is not bound to respect valid state statutes protecting the confidentiality of information if the state itself fails actively to prevent a violation of the confidentiality provisions of the statute. Reduced to its further essentials, the argument says, in effect, that the press need not obey confidentiality laws if the state does not bother to enforce them (and if the state does not bother to enforce them, the press may thereafter violate a statutory prohibition against public disclosure with impunity). The argument is preposterous enough on its face that its impropriety probably need no extended discussion. It obviously overlooks the plaintiffs' rights in the matter (which the statute was clearly designed to protect); and it renders the confidentiality aspect of the statute violable at will, and completely meaningless as a result. If the defendants are correct, then the press has a license to steal and publish statutorily protected material with impunity, and the state and its citizenry are helpless to do anything about it in any manner at all. The defendants are not correct, however.

In a case nearly indistinguishable from this one on the legal issue presently under

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1/ Section 827.07(15), Fla. Stat. (1981), reads in pertinent part as follows:

> (a) In order to protect the rights of the child and his parents or other persons responsible for the child's welfare, all records concerning reports of child abuse or neglect, including reports made to the abuse registry and to local offices of the department and all records generated as a result of such reports, ***shall be confidential and exempt from the provisions of*** *s. 119.07(1)*, ***and shall not be disclosed except as specifically authorized by this section.***

(emphasis supplied).

discussion, the District Court of Appeal of Florida, Second District, held that the right to inspect public records "does not apply to all public records since public policy requires that some of them, although of a public nature, be kept secret and free from public inspection"; that a state employee's inadvertent failure to comply with a statute requiring certain information to be kept confidential did not authorize a newspaper to take and print the information; and that the newspaper's retrieval of the information in that fashion was not "lawful" merely because it was inadvertently unprotected by the state employee, since it was protected by a higher authority in the form of a state statute. ***Patterson v. Tribune*** Co., 146 So.2d 623, 626 (Fla. 2nd DCA 1962), ***cert. denied,*** 153 So.2d 306 (Fla. 1963).

The ***Patterson*** court concluded:

> ... The accredited news dispensing agencies of Florida are charged with knowledge of the statute. The fact that information which is not in the public domain has been obtained innocently does not license a publisher, charged with knowledge of the proscribed character of the information, to publish it further and thus compound the wrong.

Id. at 627. A similar conclusion was recently reached in ***The Florida Star v.*** B.J.F., 499 So.2d 883 (Fla. 1st DCA 1986), ***review denied,*** 509 So.2d 1117 (Fla. 1987), ***appeal pending.*** And essentially the same conclusion was more recently reached by the Second District in ***Mayer v. State,*** 13 FLW 602 (Fla. 2nd DCA March 4, 1988). *Cf.* ***In Re Adoption of H.Y.T. v. Smith,*** 458 So.2d 1127 (Fla. 1984).

The defendants argue that a contrary conclusion was reached in ***Jordan v. Pensacola News-Journal, Inc.,*** 314 So.2d 222 (Fla. 1st DCA 1975)--to which the defendants attribute the following holding: "Invasion of privacy claim against newspaper based on §63.181, Fla. Stat. (1971), declaring all records regarding the adoption of minors confidential, dismissed on the ground that the confidentiality statute applied to the custodians of the records, not to the press" (petitioners' brief, p. 26). ***Jordan*** holds no such thing, however. In ***Jordan,*** the newspaper obtained the details of its story concerning the

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plaintiffs' adoption proceeding from an independent investigation, not from court records made confidential by statute. The plaintiffs sued for invasion of privacy, contending that the statute implied a prohibition against the publication of all information contained in the court records, whether the information was obtained from the court records or not. The district court simply declined to read the statute that broadly, and limited the scope of the statute to a prohibition of disclosure of information obtained from confidential court records. In the process, it distinguished (and implicitly approved) *Patterson v. Tribune Co., supra,* in which the newspaper had published information obtained from the confidential court records themselves. In the instant case, of course, the defendants stipulated that they obtained the reported information from the records made confidential by statute, not from an independent investigation--so Patterson, rather than *Jordan,* is clearly the apposite case. And, of course, the lower court in the instant case reached a conclusion which is clearly consistent with both *Patterson* and *Jordan.*

In any event, we commend the rationale of *Patterson* to the Court, because it is the information in the *records* in issue here which is declared confidential by the statute; and if it is the information in the *records* which is confidential, then that information clearly must remain confidential, without respect to the hands into which the records might fall. Clearly, basic common sense requires a conclusion that the press has the same obligation to observe state confidentiality laws that government employees do, else those confidentiality laws are essentially meaningless. *See Houchins* v. ***KQED,*** *Inc.,* **438 U.S.** 1, 98 **S.** Ct. 2588, 57 L. Ed.2d 553 (1978) (the press has no right of access to information held by the government which is superior to that of the public itself); *Florida Freedom Newspapers, Inc. v. McCrary, 520* So.2d 32 (Fla. 1988) (same).

3. The scope **of** First Amendment protection.

Once it is understood that the information published by the defendants was made confidential by law and that the defendants' acquisition of it was in violation of that law

and therefore "unlawful", the decisions relied upon by the defendants as "controlling" here are readily distinguished. In fact, a brief analysis of the decisions will reveal that the issue presented here has been expressly left "open" by those decisions. In ***Cox Broadcasting Corp. v. Cohn,*** **420 U.S.** 469, 95 S. Ct. 1029, 43 L. Ed.2d 328 (1975), the centerpiece of the defendants' argument, the defendant-television station obtained the identity of a rape victim in judicial proceedings "open to public inspection". The defendant urged the United States Supreme Court to hold that the First Amendment protected the publication of all truthful information, however obtained--which is essentially the position urged upon this Court by the defendants here. The Supreme Court declined this request, and narrowed the issue as follows:

> Those precedents, as well as other considerations, counsel similar caution here. In this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society. Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the state may ever define and protect an area of privacy free from unwanted publicity in the press, it is appropriate to focus on the narrower interface between press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records — more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection. We are convinced that the state may not do so.

420 U.S. at 491.

The Supreme Court thereafter narrowly limited its holding, concluding that the First Amendment protects the press from liability for invasion of privacy resulting from publication of information obtained from records "open to public inspection", but it expressly left open the quite different question presented in the instant case--whether the First Amendment protects the press from liability for invasion of privacy resulting from publication of private information obtained from statutorily-protected confidential

records which are, by law, ***not*** "open to public inspection":

> ... At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the State must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish.[26] Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast. [citation omitted]
>
> Appellant Wassell based his televised report upon notes taken during the court proceedings and obtained the name of the victim from the indictments handed to him at his request during a recess in the hearing. Appellee has not contended that the name was obtained in an improper fashion or that it was not on an official court document open to public inspection. Under these circumstances, the protection of freedom of the press provided by the First and Fourteenth Amendments bars the State of Georgia from making appellants' broadcast the basis of civil liability.

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26. We mean to imply nothing about any constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records, such as records of juvenile court proceedings.

420 U.S. at **496-97.** In the instant case, of course, the State of Florida *has* "responded" with a statute designed to prevent the exposure of the type of information exposed by the defendants, and the evidence reflects without dispute that the information was obtained in violation of the statute. Because the issue presented here was expressly left open in **Cox,** Cox clearly is not "controlling" here.

Several of the additional decisions relied upon by the defendants simply follow Cox on similar facts, and they are therefore inapposite here for the same reason. ***E.g.,*** *Oklahoma* ***Publishing Co. v. District Court,*** **430** U.S. ***308,*** 97 S. Ct. **1045, 51** L. Ed.2d **355 (1977)** (name of juvenile learned at court proceedings open to the public; no evidence that

name acquired unlawfully or without State's approval); *Smith v. Daily Mail Publishing Co.,* 442 U.S. 97, 99 S. Ct. 2667, 61 L. Ed.2d 399 (1979) (name of juvenile "lawfully" obtained by merely asking various witnesses; question of "unlawful press access to confidential" information expressly left open); *Doe v. Sarasota-Bradenton Florida Television Co., Inc.,* 436 So.2d 328 (Fla. 2nd DCA 1983) (publication of rape victim's name obtained in open court proceeding protected by First Amendment; observing, however, that the First Amendment would not protect the publication of a rape victim's name obtained from "nonpublic information"); *Williams v. New York Times, Inc.,* 462 So.2d 38 (Fla. 1st DCA 1984) (similar).

An additional decision relied upon by the defendants is somewhat closer to the point, because it addresses the publication of information declared "confidential" by state law. In *Landmark Communications, Inc.* v. *Virginia,* 435 U.S. 829, 98 S. Ct. 1535, 56 L. Ed.2d 1 (1978), the United States Supreme Court was confronted with the following question:

> The question presented on this appeal is whether the Commonwealth of Virginia may subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before a state judicial review commission which is authorized to hear complaints as to judges' disability or misconduct, when such proceedings are declared confidential by the State Constitution and statutes.

435 U.S. at 830. In answering the question, the Supreme Court did not conclude that the First Amendment protected all truthful publications, however obtained; instead, it resorted to a "balancing test", weighing the state's interest in confidentiality against the interests embodied in the First Amendment. It concluded that, because the qualifications of the judiciary were central concerns of a self-governing public, publication of information concerning judicial qualifications "lies near the core of the First Amendment"--435 U.S. at 838--and it held that First Amendment interests outweighed the state's interests in confidentiality on those facts.

It is this type of "balancing test" which provides the appropriate jurisprudential mechanism for resolution of the instant case. The United States Supreme Court's most recent foray into the field of press vs. privacy is particularly instructive here. In ***Seattle Times Co. v.*** *Rhinehart,* **467 U.S. 20, 104 S.** Ct. **2199, 81 L.** Ed.2d **17 (1984),** which arose out of a defamation and invasion of privacy action by Rhinehart (and others) against the Seattle Times, the newspaper sought pre-trial discovery of potentially embarrassing private information. The trial court ordered the plaintiff to comply with the discovery requests, but entered a protective order prohibiting the newspaper from publishing the private information obtained through the discovery process. The newspaper appealed, insisting (as the defendants and their amici have insisted here) that the First Amendment gave it a license to publish anything which came into its hands, by whatever means. The Supreme Court balanced the privacy rights of the plaintiffs and the state's interests in the discovery process against the newspaper's First Amendment rights, and held that the protective order, although a clear impingement on First Amendment rights, was fully justified by the more compelling privacy interests at stake, and therefore a proper limitation upon the First Amendment.

There are, of course, numerous additional decisions in which interests designed to be protected by a constitution, a statute, or by the common law were found to be far weightier than the interests protected by the First Amendment, and in which the "balance" has therefore been struck in favor of the protected interest at the expense of the press. ***See, e.g., Dun & Bradstreet, Inc.*** v. *Greenmoss Builders, Inc.,* **472 U.S. 749, 1055 S. Ct. 2939, 86** L. Ed.2d **593 (1985)** (state's interest in protecting reputations of citizens outweighs First Amendment interests where speech does not involve matter of genuine public concern); ***Gannett*** Co., *Inc.* v. *DePasquale,* **443 U.S. 368, 99 S.** Ct. **2898, 61** L. Ed.2d **608 (1979)** (criminal defendant's Sixth Amendment rights outweigh press's First Amendment rights, justifying closure of pre-trial suppression hearing); ***Miami Herald***

Publishing Co. ***v. Lewis,*** 426 So.2d 1 (Fla. 1982) (same); ***Florida Freedom Newspapers,*** *Inc.* ***v. McCrary,*** 520 So.2d 32 (Fla. 1988) (similar); ***Palm Beach Newspapers, Inc. v. Burk,*** 504 So.2d 378 (Fla. 1987) (similar); *In* ***Re Adoption*** *of* ***H.Y.T.,*** 458 So.2d 1127 (Fla. 1984) (state's interest in protecting privacy rights of citizens in adoption proceedings outweighs First Amendment interests); ***Sentinel Communications*** Co. ***v. Smith,*** 493 So.2d 1048 (Fla. 5th DCA 1986), ***review denied,*** 503 So.2d 328 (Fla. 1987) (privacy interests outweigh First Amendment interests justifying sealing of court records in domestic relations case). *Cf.* ***Rasmussen v. South Florida Blood Service, Inc.,*** 500 So.2d 533, 56 A.L.R.4th 739 (Fla. 1987) (blood donors' privacy interests outweigh litigant's interest in discovery of their names). And, in a case which is presently pending in this Court on a collateral matter, the First District recently held that a rape victim's privacy interests outweigh First Amendment interests, supporting a cause of action for invasion of privacy against a newspaper which obtained the name in violation of a confidentiality provision of the Public Records Act. ***The Florida Star*** *v.* ***B.J.F.,*** 499 So.2d 883 (Fla. 1st DCA 1986), ***review denied,*** 509 So.2d 1117 (Fla. 1987), ***appeal pending.***

Because a "balancing" of the competing interests involved here is clearly required to determine whether the defendants' First Amendment rights prevent enforcement of the plaintiffs' privacy rights, we turn to that clearly necessary task. We begin with the plaintiffs' rights. Those rights are clearly substantial. In the first place, there have been significant developments in the decisional law since **Cox** was decided, and it is now settled that the United States Constitution contains a constitutional right of privacy which protects against the disclosure of personal matters. ***See Whalen v. Roe,*** 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed.2d 64 (1977); *Nixon v.* ***Administrator*** *of* ***General Services,*** **433 U.S.** 425, 97 **S.** Ct. 2777, 53 L. Ed.2d 867 (1977); *Plante v. Gonzalez,* 575 F.2d 1119 (5th Cir. 1978), ***cert. denied,*** 439 U.S. 1129 (1979); *Fadjo v. Coon,* 633 F.2d 1172 (5th Cir. 1981).

In addition, the plaintiffs' common law right of privacy, which clearly encompassed the right to prevent disclosure of embarrassing private details of their family life, has now been elevated to constitutional dimension by the recent addition of a "right of privacy" to the Florida Constitution. Article I, §23, Fla. Const. *See Winfield v. Division of Pari-Mutuel Wagering,* 477 So.2d 544 (Fla. 1985); ***Rasmussen v. South Florida Blood Service, Inc.,*** 500 So.2d 533 (Fla. 1987); ***Doe v. Sarasota-Bradenton Florida Television Co., Inc.,*** 436 So.2d 328 (Fla. 2nd DCA 1983). It also goes without saying that these constitutional rights of privacy are fully protected in the instant case by statute--specifically, §827.07(15)--which is a strong expression of the public policy of this State.

To be balanced against these substantial interests is the defendants' First Amendment right to print the news. In our judgment, that right is insubstantial on the facts in this case. The defendants insist that the information reported in their article was about a crime, and therefore a matter of "public interest" about which the public should be informed without fear of civil or criminal liability. Of course, the defendants were free to report anything and everything which they might have learned at the public trial of the plaintiffs, but that is simply not the issue here. What is at issue here is the defendants' right to report information which they obtained from documents declared confidential as a matter of law by the Florida legislature. And given the existence of §827.07(15), it can fairly be asserted that the Florida legislature has determined, as a matter of public policy, that there is no "public interest" in the publication of that particular material--or, at the very least, that the privacy interests of the plaintiffs in this case outweigh whatever "public interest" there may be in general trafficking in that information.

We should also note that the law has recently shifted its emphasis in this area, and matters of mere "public interest" are no longer the touchstone of First Amendment protection. Today, the touchstone of First Amendment protection is largely status-

related--greater protection being afforded to the publication of information about public officials and public figures, lesser protection being afforded to the publication of information about private individuals, like the plaintiffs in this case, and their private concerns, like the discipline of their daughter. ***See Gertr v. Robert Welch, Inc.,*** 418 **U.S.** 323, 94 **S.** Ct. 2997, 41 L. Ed.2d 789 (1974); ***Time, Inc. v. Firestone,*** 424 **U.S.** 448, 96 S. Ct. 958, 47 **L.** Ed.2d 154 (1976); ***Wolston v. Reader's Digest Ass'n,*** 443 **U.S.** 157, 99 S. Ct. 2701, 61 L. Ed.2d 450 (1979); ***Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,*** 472 **U.S.** 749, 105 S. Ct. 2939, 86 L. Ed.2d 593 (1985); ***Philadelphia Newspapers, Inc. v. Hepps,*** 475 **U.S.** *767,* 106 S. Ct. 1558, 89 L. Ed.2d 783 (1986). ***See generally*** Eaton, ***The American Law of Defamation Through Gertr v. Robert Welch, Inc., And Beyond: An Analytical Primer,*** 61 Va. L. Rev. 1349 (1975).

These recent developments clearly require that something more than mere "public interest" be demonstrated to support the defendants' position. At best, the "private facts" published about the plaintiffs, who were clearly "private persons" where the First Amendment is concerned, were merely "newsworthy"--not of such "real public or general concern" as to justify ignoring the legislature's express declaration of confidentiality of the "private facts" which the defendants unlawfully published. ***See In Re Adoption of H.Y.T.,*** 458 So.2d 1127 (Fla. 1984). We therefore respectfully submit that the "balancing test" required of this Court in this case will admit of only one defensible result: the "private" plaintiffs' substantial constitutional, statutory, and common law interests in avoiding disclosure and publication of the intimate details of their family life far outweigh any interest which the defendants might have in violating the confidentiality provision of §827.07(15) and egregiously invading the plaintiffs' privacy in the process. The district court correctly resolved that balance in the plaintiffs' favor below, and its resolution of that balance should be affirmed here.

4. The scope of Florida privacy law,

Finally, the defendants contend that "[t]he decision below, which imposes strict statutory liability on the press for publishing a report of a criminal trial and the facts and circumstances surrounding that trial, is wholly at odds with settled privacy law" (petitioners' brief, p. 27). Of course, the decision below imposes no such thing. As we have already explained, the plaintiffs' action sounds in negligence. Neither does it seek to impose liability for publishing "a report of a criminal trial"; it seeks to impose liability on the defendants for publishing information made confidential by statute. The statutory confidentiality of the information published also answers the defendants' insistence that a common law invasion of privacy action will not lie for the publication of "matters of general or public interest", since the legislature has declared by §827.07(15) that the plaintiffs' privacy rights outweigh the public's interest in the information published, as a matter of law. Further, this Court recently recognized that privacy interests are entitled to protection where "matters of 'newsworthiness' rather than matters of 'real public or general concern' are involved--In ***Re*** Adoption *of H.Y.T.,* 458 So.2d 1127, 1129 (Fla. 1984)--and given the statutory confidentiality provision protecting the material published in this case, that decision would appear to be dispositive of the defendants' contention that Florida law does not recognize the plaintiffs' right of privacy on the facts in this case.

5. The documents protected by the statute.

The State Attorney for the Eleventh Judicial Circuit argues in addition that §827.07(15) protected only the HRS report, and not the sheriff's case report or the state attorney's interview with the plaintiffs' child. The arguments advanced in support of this construction of the statute ignore the plain language of the statute, however. The statute does not simply declare reports made to the department to be confidential; it plainly declares both those reports and "all records generated as a result of such reports" to be

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confidential. Clearly, the sheriff's case report and the state attorney's typed interview with the plaintiffs' child qualify as additional records generated as a result of the initial report to the department, and to exclude them from the reach of the statute would require this Court to ignore the statute itself. It is axiomatic that the plain and unambiguous language of a statute must be enforced by the judiciary, and it is a certainty that the judiciary cannot construe a statute to read exactly the opposite of what it plainly and unambiguously says. We therefore believe that the state attorney's contention is clearly without merit here.

6. The status of the documents in the hands of the state attorney.

Amici Elaine Gordon, et al., argue that the three reports in question lost their confidentiality once they were turned over to the state attorney, and that the state attorney was therefore free to disclose the documents to anyone he wished. Once again, however, there is nothing in the statute to support such a reading of it. The statute provides that the documents in question "shall be confidential and exempt from the provisions of s. 119.07(1), and shall not be disclosed except as specifically authorized by this section". The statute then provides that "[a]ccess to such records ... shall be granted only to the following persons, officials, and agencies ...", and then lists "[t]he state attorney of the judicial circuit in which the child resides ...".

In other words, the statute plainly says that the documents themselves are confidential, but that the state attorney may have access to them. That is all that it says, and there is simply no way in which this Court could reasonably read the statute in the manner contended for by amici--that once the state attorney is granted access to the confidential documents, the documents lose their confidential status and are open to public inspection, and can be freely republished by the press. In fact, to read the statute in that fashion results in a reading which is exactly contrary to the plain language of the statute, which states in no uncertain terms that the documents "shall not be disclosed

except as specifically authorized by this section".

Amici apparently realize that the plain language of the statute will not support their construction, so they resort to a 1985 amendment to the statute which made explicit what was clearly implicit in the beginning--that the information remains confidential while in the possession of those lawfully provided access to it. Amici then argue that "[w]here the Legislature has thus acted to amend the statute, the courts should not construe the amendment to be a nullity" (amici's brief, p. 14). We think this argument misses the point. To hold that the statute implicitly protected the documents in the hands of the state attorney before its amendment is not to construe the amendment which made this explicit to be a nullity.

The legislature often makes explicit what was only implicit before, and given the plain language of the statute before its amendment, the only reasonable inference from the amendment was that it was meant to make explicit what was only implicit before, to clarify what may not have been clear before, and to safeguard against misapprehension of the existing law. ***See, e.g., State ex rel. Szabo*** *Food* ***Services, Inc. v. Dickinson,*** *286* So.2d 529 (Fla. 1973); ***Florida Patient's Compensation Fund v. Mercy Hospital, Inc.,*** 419 So.2d 348 (Fla. 3rd DCA 1982). Moreover, as we have demonstrated above, to read the amendment as an announcement that the statute meant exactly the opposite before the amendment would require this Court to read the pre-amendment statute in a manner exactly contrary to its plain language. The amici's argument is inventive, but it should be unavailing here.

7. The "**prior restraint**" argument.

Finally, amici The Times Publishing Company, et al., argue that the district court's decision imposes an impermissible "prior restraint" on the press. This contention is simply wrong, and should therefore be entirely disregarded. It is thoroughly settled that ***post-publication*** remedies for damages do not represent "prior restraints" against publish-

ing. ***See, e.g., Landmark Communications, Inc. v. Virginia,*** 435 **U.S.** 829, 98 S. Ct. 1535, 56 L. Ed.2d 1 (1978); ***Mayer v. State,*** 13 FLW 602 (Fla. 2nd DCA Mar. 4, 1988). *Cf.* ***Florida Freedom Newspapers, Inc. v. McCrary,*** 520 So.2d 32 (Fla. 1988). If that were not so, then no civil action could ever lie against a newspaper. The decisional law is replete with cases authorizing defamation and invasion of privacy actions against newspapers, however, and we therefore need not belabor the point.

III
CONCLUSION

It is respectfully submitted that the district court's disposition of the issues below was correct, and that its decision should be affirmed in every respect.

IV
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 20th day of June, 1988, to: William E. Weller, Esq., 101 N. Atlantic Avenue, P.O. Box 1255, Cocoa Beach, Fla. 32391; George Rahdert, Esq., Rahdert, Acosta & Dickson, 233 Third Street North, St. Petersburg, Fla. 33701; Florence Snyder Rivas, **Esq.,** Edwards & Angel, 250 Royal Palm Way, P.O. Box 2621, Palm Beach, Fla. 33480; Jack **A.** Kirschenbaum, Esq., Wolfe, Kirschenbaum & Peeples, P.A., P.O. Box 757, Cocoa Beach, Fla. 32931; John B. McCrory, **Esq.,** Nixon, Hargrave, Devans & Doyle, One Thomas Circle, **N.W.,** Washington, D.C. 20005; Gerald B. Cope, Jr., Esq., and Laura Besvinick, Esq., Greer, Homer, Cope & Bonner, **P.A.,** 4870 Southeast Financial Center, 200 South Biscayne Blvd., Miami, Fla. 33131; Richard J. Ovelmen, Esq., One Herald Plaza, Miami, Fla. 33101; Will Strickland, Esq., Ferrero, Middlebrooks, Strickland & Fischer, P.A., 6th Floor, Blackstone Bldg., 707 S.E. Third Avenue, Ste. 600, Ft. Lauderdale, Fla. 33302; Gregg D. Thomas, Esq., Holland & Knight, NCNB Bldg., Tampa, Fla. 33601; George Freeman, Esq., and Deborah Linfield, Esq., 229 West 43rd Street, New **York,** New York 10036; Joseph P. Averill, Esq., 710 City National Bank Bldg., 25 W. Flagler Street, Miami, Fla. 33130; William G. Mateer, Esq.,

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