O/a 8-30-88.

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 71,554

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

Defendants-Petitioners,

v.

PHILLIP HITCHNER and
BARBARA HITCHNER,

Plaintiffs-Respondents.

On Review of a Decision of the
Fifth District Court of Appeal

ANSWER BRIEF

William E. Weller
ROSE & WELLER
101 N. Atlantic Ave.
P.O. Box 1255
Cocoa Beach, F1.32931
(407)784-0147
Attorney for
Plaintiffs-Respondents

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STATEMENT OF THE CASE AND FACTS

A) Nature of the Case.

Plaintiffs, Phillip and Barbara Hitchner, brought an action for invasion of privacy - public disclosure of private facts - against Cape Publications, Inc. (Today Newspaper) its reporter and publisher. The claim was for damages sustained as a result of the defendants' front page article purportedly about the plaintiffs acquittal in a criminal trial on aggravated child abuse charges held six days prior thereto.

B) Statement of Facts.

The following stipulated facts were before the lower court for the hearing on the parties respective motions for partial summary judgment:

On December 8, 1980, the State of Florida by information accused the Plaintiffs of a violation of §827.03(3) Fla. Stats. The information was assigned Case No. F-80-2331-CF-A & B and charged Plaintiffs with aggravated child abuse. Specifically, the information charged the plaintiffs with scrubbing Shawn Marie Hitchner's buttocks and rectum with a metallic scrubber to

malicously punish her.

The Plaintiffs pleaded not guilty and went to trial in Titusville on Thursday, January 29, 1981 at 1:00 P.M. At 3:30 P.M. that afternoon, after the close of the State's case, the Plaintiffs were acquitted on a motion for a directed verdict. The article reporting the background of the Hitchners' case (Exhibit A to the Complaint and the subject to this lawsuit) was written by Jere Maupin. At the time, Maupin was assigned to Cocoa Today's Titusville bureau, where he covered the Courthouse and Sheriff's Department. His duties included reporting on law enforcement matters, politics in the Sheriff's Department, Trials, and other issues in the Courthouse.

On Tuesday, February 3, 1980, Maupin heard about the case while in the Courthouse in Titusville from someone in the Clerk's office. He examined the clerk's file in the Criminal Court Clerk's office. An employee of the Clerk's office also showed him photographs of the child's unclothed buttocks area. Maupin then interviewed Glenn Craig, Assistant State Attorney, who prosecuted the case. No documents were supplied to Maupin during this interview, but Craig did discuss the case and was quoted in the story. Following this interview, Maupin went to the office of the trial judge, Virgil Conkling, and requested an interview, which the Judge through his secretary declined to give.

The Reporter's next step was to contact the Hitchner's but he did not know their phone number. He talked to Buzzy Paterson, an administrative assistant in the State Attorney's office, who told him to call Glenn Craig which he did by phone from the State Attorney's office. He told Mr. Craig he needed to speak with the Hitchners to complete the story and was told that their phone number was in Craig's file. A secretary acting under Craig's direction, produced the entire file to Maupin, left it with him in the State Attorney's receiption room and walked away. She made no statements to Maupin concerning the file.

The Reporter read the entire contents of the State Attorney's files over a period of 45 minutes to an hour and 15 minutes and took notes. Within these files were, among other papers, an H.R.S. Pre-Dispositional Report, a Sheriff's Case Report, and a typed interview of Shawn Hitchner with the State Attorney, Glenn Craig.

After reading the files and taking his notes, the Reporter called his metro editor, Mike Bales, about 4:00 P.M. from the Courthouse and advised him of the story about a Merritt Island couple that had been acquitted of child abuse even though they admitted scrubbing the child's bottom with a steel wool pad.

The Reporter then went to the newspaper's Cocoa office and called the Hitchner home. Mrs. Hitchner answered and

gave Maupin the quote which appeared in the article. The story was then written.

On Wednesday, February 4, 1980, the story essentially as the reporter had written it was published on the front page of the TODAY paper. Most of the statements which Plaintiffs contend to be an invasion of privacy and defamatory came from the Health and Rehabilitative Services report, the Sheriff's Department report, and the interview with Shawn Marie Hitchner, all of this were in the State Attorney's file. With the exception of the phrase "her natural father held her on the floor 'legs spread'", the H.R.S. report, the Sheriff's report and Shawn Marie Hitchner's statement mention all the matters in the article (R-108-110).

C) Course of Proceedings.

The action was commenced in February 1981. After taking the deposition of the reporter who wrote the article, the complaint was ammended to its present posture of four counts - two for invasion of privacy and two for defamation. In January 1987 the trial court granted plaintiffs partial summary judgment on liability as to Count I - Public Disclosure of Private Facts and defendants appealed.

On November 5, 1987, the Fifth District Court of Appeal affirmed. Cape Publications, Inc. v. Hitchner, 514 So.2d 1136 (Fla. 5 DCA 1987). The Court held that the statements complained of in the article came directly from documents protected under $827.07 Fla.Stats.(1981), the statute protected the plaintiffs and that under the stipulated facts summary judgment on liability was proper. The Court also upheld the constitutionality of $827.07 Fla.Stats.(1981) against the defendants First Amendment challenges.

On April 14, 1988 this Court granted defendants' petition to review the Fifth District Court of Appeal's decision.

D) The Newspaper Article at Issue:

On February 14, 1981 a retraction of the February 3 article appeared in the "Today" newspaper and was before the trial court (A-1).

Despite this attempt to set the record straight the media and their amicii in both the jurisdictional briefs and their briefs on the merits continue to assert and imply by reference to the criminal trial transcript, gratuitously filed with this Court, that the plaintiffs admitted the charges. Further that the only reason the Hitchners were

acquitted was because there was no lesser included offense, and that the alleged incidents of whippings, burns with cigarettes, applying rubbing alcohol to the skin "rubbed raw", eating hot peppers, and her father holding her with "legs spread" were somehow "true". To a reader, these statements and innuendos suggest a miscarriage of justice at the very least. If unanswered they leave one to ponder how such individuals could even be termed fit parents, let alone have the temerity to bring this action against the crusading media. Although the truth or falsity of the matters is not an issue in this tort it must be emphasized that the plaintiffs have always categorically denied ever perpetrating these indignities on the child. They simply did not occur and the fact that the media said they did as confirmed by "court records" is why the action was filed. The directed verdict of acquittal was entered because the evidence showed the alleged offense did not happen.

SUMMARY OF ARGUMENT

The lower courts correctly held that the state can deny public access to certain documents and that the statute in this case was not unconstitutionaly infirm because it did so. The purpose of the statute was to protect the rights of the child and the parents by declaring certain documents private. Based on the stipulated facts there was no genuine issue of any material fact and the publication as occurred in this case subjected the defendants to liability as a matter of law under invasion of privacy by public disclosure of private facts.

Plaintiffs cause of action is founded under Florida Common law not S827.07 Fla. Stats. (1981). The fact that the civil liability provision was removed in 1977 does not affect the holding of the lower courts. In 1979 the statute was amended by the addition of §827.07(15) which set forth the plaintiffs as those persons whom the legislature was protecting by the confidentiality provisions.

The prohibition on public disclosure applied expressly to the media in the context of the cause of action on which liability was based.

There simply is no substantial First Amendment right that is being affected by this decision when balanced against the private individuals constitutional right of privacy and Florida's avowed purpose of preserving the family unit.

ARGUMENT

POINT I

DEFENDANTS LIABILITY FOR INVASION OF PLAINTIFFS RIGHT OF PRIVACY DOES NOT VIOLATE THE FIRST AMENDMENT.

The statements in the defendants article of which the plaintiffs claim were an invasion of their right of privacy came from documents not subject to public inspection and were not mentioned in the plaintiffs criminal trial.

A. The portions of the defendants article upon which liability was based were not reports of any criminal proceeding.

Plaintiffs don't dispute the First Amendment right of the press to report any matters brought out in a judicial proceeding. Nor is there any argument to the press's assertion of their right to report, criticize and foster debate on the judicial system as a whole. However, as both lower courts have pointed out the defendants information, as stipulated by the parties, came from documents not subject to public inspection, were not revealed at trial, were exempt from public disclosure and are considered private facts.

B. The lower courts holding is not contrary to the First Amendment or to Cox and its progeny.

The issue here is whether the First Amendment shields the press from an invasion of privacy involving the publication of a clearly private matter where the information was obtained in violation of a statute that required its confidentiality be maintained and was published in violation of a statute which prohibited its publication. The newspaper's argument rests on a basic flaw - that the information published was "publicly revealed or in the public domain when it was released by the office of the State Attorney". An idential argument was rejected in Mayer v. State ~~of Fla.~~, 523 So.2d 1171 (Fla. 2 DCA 1988). Stated another way - the press is not required to respect a valid State statute protecting the confidentiality of information if the State itself fails actively to prevent a violation of the confidentiality provisions. If through a ruse as was employed in this case - requesting the file to find a phone number - and then purloining the confidential information, the newspaper can publish with impunity then the confidentiality protection to the individual is meaningless. The newspapers printing the protected information as was done in this case was not lawful merely

because it was inadvertently unprotected by the secretary to the State Attorney. The information and the plaintifffs were protected by a higher authority in the form of a State statute upon which they were entitled to rely. In Patterson v. Tribune Co., 146 So.2d 623, 626 (Fla.2d DCA 1962) cert. denied 153 So.2d 306 (Fla.1963), the Court held on this point:

> ...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.

The press has the same obligation to observe a valid state statute that the State Attorney or his secretary had and absent that conclusion the law requiring confidentiality is meaningless. The law must apply to everyone - including the press - and its violation and subsequent damage to the plaintiffs made the newspaper accountable.

Once it is accepted that : (1) the information published was made confidential by law; (2) that it was not miraculously transformed into a public record by the

secretary failing to monitor the reporter: and (3) that the publication of that information was in violation of law and therefore "unlawful" the decisions cited by the newspaper as controlling are distinquishable.

Cox Broadcasting Corp. v. Cohn, 420 U.S.469, 95 S.Ct.1029, 43 L.Ed.2d 328 (1975) involved a reporter who obtained the identity of a rape victim in open judicial proceedings and from an information "open to public inspection". The defendant argued for the Court to hold that the First Amendment protected the publication of all truthful information, however obtained. The Court declined to so hold and narrowed the issue to 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. It held only 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." The decision left open the question in this case - whether the First Amendment protects the press from liability for invasion of privacy - public disclosure of private facts - resulting from statutorily proscribed publication of private information obtained from

statutorily - protected confidential records which are by law, not "open to public inspection."

The newspapers assertion that the secretary to the State Attorney by permitting the reporter to view the file unsupervised to obtain a phone number made the confidential information public records as in Cox is not only absurd it is a misstatement of the facts in Cox.

In Smith v. Daily Mail Publishing Co., 443 U.S.97, 99 S.Ct.2667, 61 L.Ed.399 (1979) the issue was whether a newspaper only could be subject to criminal sanctions for publishing the name of a juvenile offender which it obtained by the lawful means of interviewing witnesses. The Court expressly left open the issue of "unlawful press access to confidential judicial proceedings "citing Cox supra. 61 L.Ed.2d 406.

Landmark Communications, Inc. v. Virginia, 435 U.S.829, 56 L.Ed 2d 1, 98 S.Ct.1535 (1978) is slightly closer to the instant case. The narrow and limited question in Landmark was whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission. 56 L.Ed.2d 9. The Court did not hold that the First Amendment protected all truthful publications, especially of public officials, however, the information was obtained:

instead it resorted to a balancing test which contrasted the States interest in confidentiality against the interests embodied in the First Amendment i.e. that the conduct of judges are matters of utmost public concern and discussion of governmental concerns was what the First Amendment was adopted to protect. Additionally in Landmark the publisher had obtained the information by legal means and not from the inquiry proceeding itself.

This balancing test was again used by the Court in Seattle Times Co. v. Rhinehart, 467 U.S.20, 81 L.Ed.2d, 104 S.Ct.2199 (1984). This case was a defamation and invasion of privacy action against a newspaper for various articles about a leader of a spiritual group. The newspaper obtained pre-trial discovery rights of potentially embarrasing private information and was prohibited from publishing that information so obtained. In sustaining the prohibition only as to information acquired through the discovery process the Court held that there is opportunity for litigants to obtain - incidentally or purposefully - information that not only is irrelevant but if publically released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes. 81 L.Ed.2d 28.

An application of the balacing test to this statute is required and has been utilized previously in deciding

competing privacy interests versus First Amendment claims. In Re Adoption of H.Y.T., 458 So.2d 1127 (Fla.1984). First the privacy rights of the parents. It is now settled that the United States Constitution encompasses a right of privacy which protects against the disclosure of personal matters. Whalen v. Roe, 429 U.S.589, 51 L.Ed.2d.64, 97 S.Ct.869 (1977). The parents common law right of privacy, which encompasses the right to prevent public disclosure of embarrassing and objectionable private details of their lives is accorded them in Article 1, §23 Fla.Const.

The intent of the legislature in providing for the confidentiality of the reports is set forth in §827.07(1) Fla.Stats.(1979). Among other reasons the legislature determined that this section would "preserve the family life of the parents and children to the maximum extent possible by enhancing the parental capacity for adequate child care." Certainly this expression of the public policy of the State supports the reasons why privacy rights of all concerned, including the child, should be maintained over the right of the media to publically air these matters.[1]

To hold, as the press argues, that the First Amendment

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[1] See also Doe v. Sarasota-Bradenton Florida Television, 436 So.2d 328, 332 (Fla. 2 DCA 1983) where the Court was precluded from utilizing the balancing test on the same competing interests due to the application of Cox on the facts of that case.

extends to all matters in the confidential reports, would seem to deny the existance of "private" facts, for if facts be facts - that is the reports contain these matters - they would not (at least to the press) be private. The press accordingly would be free to publicize them to the extent it sees fit. The extent to which areas of privacy continue to exist, then, would appear to be based not on rights bestowed by law but on the taste and discretion of the press. The legislature did not find this result consistent with its policy in preserving the family unit and neither should this Court. In Re Adoption of H.Y.T., 458 So.2d 1127 (Fla.1984).

From a practical standpoint the expressed policy of the State should be considered. All three of the confidential source materials predated the filing of the criminal charges. The Hitchners were open and candid to both the H.R.S. personnell and representatives of the Sheriff's department, who always prefaced their interviews with Miranda warnings. These parents had nothing to hide because they honestly believed and it was subsequently found that they did not abuse the child. Intimate and extremely personal and private matters were bared and recorded in the reports ostensibly protected under the statute, with the view of the authorities to see how to best handle the family unit. Would charges be filed; would dependency

status be sought: would counselling be recommended? How, unless confidentiality be maintained, is the State going to get cooperation from the family members? Would any parent or family member be as open as was done in this case if they knew that what was said was only as confidential as some sensationalistic reporter thought it should be. The answer was obvious to the legislature and should be equally so to this court.[2]

To be balanced against these substantial privacy interests is the media's First Amendment right to print the news. News in this case requires a broad definition since the front page spread was of a six day old event. The media insists that child abuse is a matter of public interest about which the public should be informed without fear of civil or criminal liability. There is no argument that the crime and all aspects relating thereto in the public domain should be fully reported. If that was all that was done, this case would not be here. Matters of mere public interest are no longer the touchstone of First Amendment protection. In Florida the press has no

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[2] See also the Florida Department of Health & Rehabilitative Services - Child Welfare Services in Florida - August 1985, pp. 3-5, which further expounded on the States commitment to preserve and strengthen the family unit. The same preceeding report published in August 1983 also stressed that policy. The report concludes, "compared to the costs of family breakup, family support services are a bargain" 1985 report p.7.

qualified privilege to defame a private individual simply by virtue of the matter being of public concern. Ortega v. Post-Newsweek Stations Florida, Inc., 510 So.2d 972 (Fla. 3 DCA 1987). Today, the touchstone of First Amendment protection - is largely status related with lesser protection being afforded to the publication of information - about private individuals as opposed to public officials and figures. Gertz v. Robert Welch, Inc., 418 U.S.323, 41 L.Ed.2d.789, 93 S.Ct.2997 (1374); Eaton, The American Law of Defamation Through Gertz v. Robert Welsh, Inc. and Beyond: An Analytical Primer, 61 VA.L.Rev.1349 (1975), something more than mere public interest must be shown to render the media not accountable for the havoc it wrought on the lives of this family, because a statute was blatently violated. A statute expressly conferring protection on these plaintiffs.

The balancing test will admit of only one defensible result: the plaintiffs substantial constitutional, statutory and common law interests in avoiding public disclosure of privileged, confidential, private, protected and non public material outweigh the asserted First Amendment privilege obtained in violation of the law. If in fact there is any impairment of First Amendment rights by the upholding of this statute it affects only matters of

slight "newsworthiness" rather than matters of real public or general concern.

POINT II

THE DISTRICT COURT OF APPEAL PROPERLY UPHELD THE TRIAL COURTS SUMMARY JUDGMENT OF LIABILITY ON THE INVASION OF PRIVACY COUNT.

The plaintiffs cause of action was not a "statutory" one but a common law right. The only purpose of the Statute, as correctly held by the District Court of Appeal was to define what was private. The repeal of the civil remedy did not abrogate a common law right of action for invasion of privacy and the press can be held liable in tort under the theory pleaded.

A. An Invasion of Privacy action has not been precluded by statute as a result of the penalty provision of S827.07 being limited to a second degree misdeameanor.

Plaintiffs cause of action - public disclosure of private facts - has been recognized in Florida at least since Cason v. Baskin, 20 So.2d 243 (Fla. 1945). The media's categorization of plaintiffs claim as statutory is as misplaced as is their assertion that this is a case of "strict liability". The only thing that 5827.07 Fla.

Stats. (1981) did which is relevant to the tort theory is that it established the private nature of the materials. On this point the District Court of Appeal decision is clear. The common law right of action upon which liability was based did not depend upon the civil remedy language in effect from 1975 through 1977; nor, did its removal in 1977 abrogate those rights.[3]

For the purposes of argument, even assuming that Florida had not recognized cause of action for invasion of privacy and that a cause of action had to be "statutory" the medias theory of abrogation by removal of the civil remedy language in 1977 fails.

Bass v. Morgan Lewis & Bockius, 516 So.2d 1011 (Fla. 3 DCA 1987) cited by the media for the principal that mere violation of the penal statutes does not give rise to liability per se is a qualified statement of the law. Bass further holds that such liability could arise only from the violation of a provision which imposes a duty for the benefit of a special class of persons. id. citing Lavis Plumbing Services v. Johnson, 515 So.2d 296, 298 (Fla.3 DCA

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[3] Compare Ch.23138, Laws of Fla.(1943) currently §771.01 Fla.Stats. and Rotwein v. Gersten, 36 So.2d 419 (Fla. 1948).

1987).

In 1977 the penalty provision of Chapter 827 (Fla.Stats.1977) was limited to a second degree misdeameanor. Correspondingly there was no provision in the chapter which imposed any duty on anyone to "protect the rights of the child and his parents or other persons responsible for the childs welfare" by keeping the reports confidential. In other words the duty imposed for the benefit of the plaintiffs had not been enacted. The statute was silent on whom the legislature was trying to protect. In 1979, with just the criminal penalty in place, the legislature enacted §827.07(15) and definitely stated to whom the duty of non disclosure ran - the parents and other persons responsible for the childs welfare. By doing so the legislature clearly bought the cause of action within the holding of Rosenberg v. Ryder Leasing, Inc., 168 So.2d 678, 680 (Fla.3 DCA 1964). It would have been superfluous after stating that the duty of non disclosure ran to the parents to also state that a civil remedy was also available as that had already been accomplished by the adoption of §827.07(15) in 1979.

B. The duty of non disclosure applies to the press.

The cause of action in Count I, upon which liability

was found by the trial court under the stipulated facts and the deposition of the reporter on file, was "public disclosure of private facts". This is one of four separate torts under the broad designation of invasion of privacy. Prosser, Law of Torts (4th ed. 1971) 804-14. The American Law Institute Restatement (Second) of Torts §652 D (1977) describe it as "Publicity given to Private Life". The black letter reads:

> "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for unreasonable invasion of his privacy, if the matter publicized is of a kind which:
> (a) would be highly offensive to a reasonable person: and
> (b) is not of legitimate concern to the public.

"Publicity" as it is used in this Section, differs from "publication" as that term is used in connection with liability for defamation. Publication in the defamation (libel-slander) context, is a word of art, which includes any communication by the defendant to a third person. "Publicity" on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.

Thus it is not an invasion of the right of privacy to communicate a fact concerning the plaintiffs private life to a single person or even a small group of persons. However, any publication in a newspaper or broadcast by the media which reaches a large audience is sufficient to meet the test of publicity as used in the tort. There is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public - e.g. the criminal trial. There is also no liability for giving further publicity to what the plaintiff himself leaves open to the public eye. Talking freely to a member of the press, knowing the listener to be such, is not then in itself making public. That communication can be said to anticipate that what is said will be made public and would be construed as a consent to publicize but that is not the situation before this Court. When the newspaper published, as the district court held, the element of public disclosure was fulfilled and the tort was complete. Cape Publications v. Hitchner, supra, 1138. When the legislature prohibited making these matters "public" certainly they did so with a rudimentary understanding of what that term means in the context of public disclosure of private facts tort law. Who else but the media has the inherant capability of making public? The answer is obvious.

C. The District Court of Appeal's decision comports with Florida's case law.

Cason v. Baskin, 20 So.2d 243 (Fla. 1945) is considered to be the case which established the right to bring an action for invasion of privacy in this State. The case cites the 1890 Harvard Law Review article written by Warren and Brandeis which is generally considered to be the root of the theory in American jurisprudence since it was not an early common law action. Cason recognized the validity of the tort in Florida by upholding the plaintiffs second count as stating a cause of action. Cason supra 254. In the forty some years since then the cases previously cited have refined the tort into its present four subheadings. The media's assertion that the offending portions of the article was merely "a report of a criminal trial and the facts and circumstances surrounding that trial "is a misstatement of the facts as is their conclusion that it conflicts with Cason.

CONCLUSION

The actions of the media in obtaining and publishing the statutorily protected documents as was done in this case and categorizing such highly offensive matters as truth, "court records" or trial testimony constituted negligence as a matter of law. On balance, the individuals expectation and rights of privacy together with the States purpose for confidentiality in order to preserve the family unit and promote the gathering of information to accomplish this outweights and does not significantly impinge on the medias' ability to gather and report the news.

The decision of the lower Court should be affirmed.

Respectfully submitted,

William E. Weller
ROSE & WELLER
101 N. Atlantic Ave.
P.O. Box 1255
Cocoa Beach, Fl. 32931
(407)784-0147
Attorneys for
Plaintiffs-Respondent