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

PETITIONERS' BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

I. STATEMENT OF THE CASE AND OF THE FACTS

Plaintiffs Phillip and Barbara Hitchner have brought this suit for invasion of privacy and defamation against TODAY newspaper, its reporter and its publisher.

The facts relevant to the motion for summary judgment were stipulated, in writing, by the parties. In December 1980, the State of Florida charged the Hitchners with aggravated child abuse. On January 29, 1981, they were tried on the child abuse charges, and were granted a directed verdict of acquittal.

The following week, defendant Maupin, a TODAY newspaper reporter, heard about the child abuse trial while he was in the clerk's office. After reviewing the criminal court clerk's file and photographs of the plaintiffs' child, he interviewed the Assistant State Attorney who had prosecuted the case. The reporter also spoke with one of the plaintiffs.

Acting under the direction of the Assistant State Attorney, a secretary gave the entire case file to the reporter. Maupin read its entire contents and took notes. Included in the file was a Health and Rehabilitation Service predispositional report, a Sheriff's case report, and a typed interview of the abused child by the Assistant State Attorney.

Based upon his investigation, including his review of the State Attorney's case file, reporter Maupin wrote the news article, published in TODAY on February 4, 1980, which is the subject of this litigation.

In this action, plaintiffs' invasion of privacy claim is based on § 827.07(15), Fla. Stat. (1981)[1] which provides as follows:

> (15) CONFIDENTIALITY OF REPORTS AND RECORDS - (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 § 119.07(1), and shall not be disclosed except as specifically authorized by this section.
>
> **(b)** Any person who knowingly and willfully makes public or discloses any confidential information contained in the abuse registry or in the records of any child abuse or neglect case, except as provided in this section, is guilty of a misdemeanor of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

In January 1987, the trial court granted plaintiffs' partial summary judgment motion on the issue of liability, and defendants appealed. On November 5, 1987, the Fifth District Court of Appeal affirmed, in a written opinion.[2]

The Fifth District expressly upheld the validity of Section 827.07(15), Fla. Stat. (1981). The court sustained strict liability in tort against the newspaper for violating the criminal statute. The District Court also rejected defendants' constitutional challenge to the validity of the

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1/ The statute has been renumbered. §§ 415.51(1), 415.513(2), Fla. Stat. (1983)

2/ The opinion is annexed as an appendix to this brief, and is cited as "A__".

statute, holding that "invasion of privacy is not protected by the First or Fourteenth Amendment" (A3).

SUMMARY OF ARGUMENT

This Court has discretionary jurisdiction to review the decision of the Fifth District Court of Appeal for three distinct reasons. First, the decision expressly declared § 827.07, Fla. Stat. (1981) valid. Second, the District Court rejected the defendants' constitutional challenge, under the First Amendment, to the application of the statute to the facts of this case. Finally, the decision expressly and directly conflicts with a decision of the Second District Court of Appeal. Fla. R. App. P. 9.030(a)(2)(A)(i, ii, iv).

This Court should exercise its jurisdiction and grant review. The confidentiality statute serves a salutary purpose by restricting the ability of governmental employees to disclose child abuse records in their official possession. However, the District Court improperly applied the statute much more widely, and held that it restricts the right of the press truthfully to discuss incidents of child abuse of which newspapers lawfully become aware.

Once public officials disclose official records to the press, as here, it is unconstitutional thereafter to impose strict civil liability upon the press for republishing the content of those official records to the public at large. The

decision below, which specifically held the First Amendment inapplicable (A3), directly violates holdings of the United States Supreme Court.

If left undisturbed, the Fifth District decision will create vast uncertainty in the law in this State, particularly now, when public attention has been focused on the widespread problem of child abuse. Until the decision below, Florida newspapers could freely discuss and analyze child abuse issues so long as they had come by their information legally. Under the District Court's rationale, such discussion is now tortious even if true, for "truth is not a defense against an action for invasion of privacy"(A3). The Fifth District opinion thus awards civil damages, as a matter of strict liability, even to those privacy plaintiffs who are guilty of child abuse. The decision may well foster a tide of litigation, and even more ominously threatens to silence public discussion of an issue of vital public concern.

Finally, the District Court's conclusion that § 827.07, Fla. Stat (1981) confers a civil action on plaintiffs is contrary to the specific intention of the Legislature. In 1975, a provision establishing civil liability, in a fashion consistent with the District Court's analysis, was added to the statute. That civil liability provision was specifically deleted by the Legislature in 1977. The District Court's validation of strict civil liability, despite a directly contrary legislative determination, itself warrants review by this Court.

ARGUMENT

POINT I: THE OPINION BELOW EXPRESSLY, AND ERRONEOUSLY, DECLARES § 827.07, FLA. STAT. (1981) VALID AND CONSTITUTIONAL

a. The District Court erroneously held that the statute is constitutionally valid.

The District Court expressly rejected defendants* constitutional challenge to the validity of § 827.07, Fla. Stat. (1981), holding inapplicable the '*numerousUnited States Supreme Court cases which have struck down penal statutes which forbid the publication of statutorily protected matters" (A3). This Court thus has discretionary jurisdiction to review both the statutory and constitutional issues involved in the decision, since the District Court at once expressly declared valid a state statute and construed the First Amendment to the Federal Constitution. Fla. R. App. P. 9.030(a)(2)(A)(i, ii).

Since the District Court seriously misapplied the constitutional doctrine, this Court should exercise its discretion and grant review.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), is directly on point. Cox was also a civil action for invasion of privacy. The Cox plaintiff complained that a television station broadcast the name of a deceased rape victim, in violation of a Georgia statute. As in this case, the reporter in Cox was permitted by a clerk to

review records, from which he obtained the victim's name (id., 420 U.S. at 472 n.3). The disclosure by the court clerk is the only fact relied on by the Supreme Court to support its characterization of the Cox records as public. By showing the records to the reporter, the clerk in Cox had in effect made them public records, just as the State Attorney's secretary did with the files in this case. The Supreme Court held that the First Amendment flatly prohibited an invasion of privacy action against the television station:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served . . . and a public benefit is performed by the reporting of the true contents of the records by the media . . . [T]he States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection. Id., 420 U.S. at 495.

Once there has been such an "exposure of private information" (id., 420 U.S. at 496), privacy interests such as those claimed by the Hitchners are insufficient to overcome the First Amendment interests at stake. This Court should assess the Fifth District decision in light of Cox.

Again, in Smith v. Daily Mail Publishing Company, 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979), the Court struck down a West Virginia law which made it a crime to publish the name of a juvenile offender. The Court held that the admittedly legitimate state interest in protecting the

anonymity of juvenile offenders was insufficient to justify sanctions upon the publication of lawfully obtained information. In Smith, the newspaper was constitutionally privileged to publish information it had gathered -- as defendants did in this case -- through "routine newspaper reporting techniques." Id., 443 U.S. at 103. Accord, Landmark Communications, Inc. v. Commonwealth of Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) (truthful publication by the press of confidential information about judicial disciplinary proceedings is protected by the First Amendment); see Oklahoma Publishing Company v. District Court, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977); Gardner v. Bradenton Herald, 413 So.2d 10 (Fla. 1982), cert. denied, 459 U.S. 865 (1983).

This Court should review the Fifth District's decision which, defendants respectfully urge, is contrary to the foregoing governing authorities.

b. Legislative history forbids a finding of statutory validity in this case

Wholly apart from the constitutional error in the Fifth District's decision, review by this Court is independently compelled by the legislative history and specific wording of the statute, both of which refute the District Court's analysis.

The District Court held that plaintiffs have stated a valid civil cause of action for violation of the criminal statute. § 827.07(15)(b), Fla. Stat. (1981). The District

Court's judicial discernment of an implicit civil cause of action in § 827.07 defies the law's legislative history.

In 1975, the Legislature specifically authorized such a civil action when it enacted the following provision in the penalty section of 827.07:

> Any person who wilfully or knowingly makes public or discloses any information contained in 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.

Ch. 75-101, § 1, Laws of Fla. and Ch. 75-185, § 1, Laws of Fla. In 1977, however, the Legislature affirmatively deleted that civil liability provision. In the Staff Analysis and Economic Statement to Senate Bill 827 (p. 2), the amendment was described as "remov[ing] the personal liability for the release of confidential information." The Department of Health and Rehabilitative Services Analysis for House Bill 402 confirms that the amendment was intended to "remove . . . the personal liability for disclosing confidential information" and that punishment for violation of the statute was accordingly "lessened."

This Court should, on this independent basis, review the Fifth District decision in order to resolve its disregard of the intent of the Legislature. The statutory cause of action validated by the District Court was expressly eliminated by the Legislature ten years ago.

POINT 11: THE DECISION BELOW CONFLICTS WITH A PRIOR DECISION OF ANOTHER DISTRICT COURT ON THE SAME CONSTITUTIONAL QUESTION OF LAW.

Express conflict may exist even where the appellate decision for which review is sought does not explicitly identify conflicting decisions. Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981).

The opinion below stands in direct and express conflict with Doe v. Sarasota Bradenton Florida Television Company, Inc., 436 So.2d 328 (Fla. 2d DCA 1983). In Doe, a rape victim testified at a criminal trial pursuant to an assurance by the State that her name would not be published. A videotape of her testimony, during which she was identified by name, was later broadcast on television. Relying upon Cox Broadcasting, supra, the Second District dismissed the plaintiff's privacy action.

The Second District held, quoting Cox, that "[i]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information [citation omitted, emphasis supplied]." Doe v. Sarasota Bradenton Florida Television Company, Inc., supra, 436 So.2d at 330. To the contrary, in this case the Fifth District simply disregarded the fact that once-private information was voluntarily "exposed" to the press by public officials. In that respect, the constitutional analysis below conflicts with that of the Second District, and this Court should resolve it.

CONCLUSION

This appeal presents straightforward facts and issues of law. This Court should accept jurisdiction and, following briefing and oral argument on the merits, reverse the decision below. As the Supreme Court stated in Cox (420 U.S. at 486):

> "Delaying final decision of the First Amendment claim . . . could only further harm the operation of a free press.'. . . [A] failure to decide the question now will leave the press in [Florida] operating in the shadow of the civil . . . sanctions of a rule of law and a statute the constitutionality of which is in serious doubt . . .".

Respectfully submitted,

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