IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 71,554

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

Defendants - Petitioners

v.

PHILIP HITCHNER and
BARBARA HITCHNER,

Plaintiffs - Respondents

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

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

On December 8, 1980 the State of Florida by information accused the Hitchners of a violation of §827.03(3) Fla.Stats. with aggravated child abuse. Specifically, the information charged the Hitchners with scrubbing Shawn Marie Hitchner's buttocks and rectum with a metallic scrubber to malicously punish her.

The Hitchners pleaded not guilty and went to trial in Titusville on Thursday, January 29, 1981. After the close of the State's case, they were acquitted on a motion for a directed verdict. The article reporting the background of the Hitchner's case 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 reception 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 the Hitchners contended 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 which 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. (Stipulated Facts)

In January 1987, the trial court granted the Hitchners motion for partial summary judgment on the issue of liability under Count I, Invasion of Privacy-Public Disclosure of Private Facts. The trial court's Order on the issue of liability was affirmed by the Fifth District Court of Appeal at 514 So2d 1136 (Fla.5 DCA 1987).

The Fifth District upheld the constitutionality of Section 827.07. The holding was based on the principles that the State can deny public access to certain documents thereby establishing the privacy of their contents and prohibiting their disclosure. When the newspaper published those private facts, it committed the tort of public disclosure of private facts, Invasion of Privacy, and was properly held liable as a matter of law.

SUMMARY OF ARGUMENT

The discretionary jurisdiction of this Court should be declined under the facts of this case. There is no conflict with any prior case and the constitutionality of the statute under the First Amendment challenge is so well founded under prior case law as to warrant declining review.

The statute does not curtail the right of the press to freely report any information open to the public generally or to report any matter brought out in the forum of a trial. However, to preserve the family life of the parents and children to the maximum extent possible (§827.07(1)(Fla. Stats.(1979)) and to protect the rights of the child and his parents all records concerning reports of child abuse 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. (§827.07(15)(Fla.Stats.1979)).

When the reporter asked for the State Attorney's work file ostensibly to obtain a phone number, and delivery was made, the tort pleaded had not occurred, nor was there an instant transformation of confidential statements to public records. When the defendants spread those matters on the front page of their newspaper, the tort was complete.

The press remains unfettered to gather and disseminate information disclosed or available to the public in child abuse cases without fear of civil damages. They remain free to even

innaccurately report judicial proceedings, subject to possible defamation claims, or to critize the judicial system and members of that tribunal on the editorial page. The lower court opinion merely holds accountable those whose tortious conduct has damaged a class of persons which the legislature has sought to protect.

POINT I

a) THE OPINION BELOW CORRECTLY DECLARED §827.07 FLA. STATS.(1981) VALID AND CONSTITUTIONAL AS APPLIED.

The cases cited by appellants under this point, Cox Broadcasting Corp. v. Cohn, 420 U.S.469, 95 S.Ct.1029, 43 L. Ed. 2d 328 (1975); Smith v. Daily Mail Publishing Company, 443 U.S. 97, 99 S.Ct.2667, 61 L.Ed.2d 399 (1979); Landmark Communications, Inc. v. Commonwealth of Virginia, 435 U.S.829, 98 S.Ct.1535, 56 L. Ed. 2d 1 (1978) and Oklahoma Publishing Company v. District Court, 430 U.S. 308, 97 S.Ct.1045, 51 L.Ed. 355 (1977), are stated to be holdings contrary to the opinion sought to be reviewed. If however, the District Court's opinion is entirely consistent with these holdings discretionary jurisdiction of this Court would serve no purpose other than academic discussion of the "vast uncertainty in the law" and the potential "tide of litigation" which appellants perceive.

The lower court's opinion correctly interprets the Cox decision; however, appellants maintain that when the reporter was handed the file to locate the phone number of the Hitchners the entire contents became public records available for publication with impunity. That argument in the context of the tort pleaded - public disclosure of

private facts - was answered as follows:

> Additionally, while the State Attorney was the custodian of the file and burdened with the responsibility not to disclose, it was the newspaper who published the private facts thus fulfilling the element ~~of~~ public disclosure. Cape Publications, supra at 1138.

See Virgil v. ~~Time~~, ~~Inc.~~, 527 F.2d 1122 (9 CCA 1975).

The remainder of the cases relied upon were also distinquished by the district court of appeal.

This Court should decline review of the lower court opinion on the basis of its conflict with the decisions cited by appellant.

b) LEGISLATIVE HISTORY DOES NOT SUPPORT REVIEW.

The penalty provisions of §827.07 Fla.Stats.(1981) was amended in 1977 as pointed out by appellant. This change to the 1975 provision is now argued to support review on the basis that the finding of liability is contrary to the legislatures intent, i.e. an aggrieved victim is limited solely to criminal prosecution against the perpetrator. Phrased another way, the civil action for invasion of privacy - public disclosure of private facts - was abrogated by the 1977 amendment. The corollary to this theory is that there was only a two year period 1975-1977 during which public disclosure of private matters in a child abuse case could constitute a tort.

In 1979 the legislature adopted §827.07(15)(Fla.Stats.1979) and specifically gave the parents of a child protection from disclosure. The stated legislative intent was "to preserve the family

life of the parents and children to the maximum extent possible by enhancing the parental capacity for adequate child care". Under appellant's logic the legislature was telling parents that they were now assured that all matters in child abuse would be treated confidentially, unless judicial proceedings became involved; however, if you woke up one morning and the matter was spread on the front page of the local paper you are left with the remedy of asking the State Attorney to prosecute for a misdemeanor. Such a strained construction on appellants convoluted logic is not supportive of discretionary review nor does it square with the expressed legislative intent on the face of the statute.

POINT II

a) THERE IS NO CONFLICT WITH ANY PRIOR DECISION.

Doe v. Sarasota Bradenton Florida Television Company, Inc., 436 So.2d 328 (Fla.2d DCA 1983) provides no basis for conflict jurisdiction. In Doe the rape victim testified in an open court proceeding at which any member of the public could attend. The Court in comparing Cox supra held:

> Like the defendant in Cox Broadcasting, appellee here, though its agents, obtained its information from a source already open to public view. Doe supra 329-330.

The Fifth District opinion correctly held on this point:

> While all aspects of the trial in the instant case are public and subject to dissemination by the media, the statements specifically alleged in the Hitchners

complaint were not disclosed at trial. 514 So.2d at 1137.

Turning to the additional cases cited by amici curiae to support conflict jurisdiction, it does not appear that these are inopposite. Florida Publishing Co. v. Fletcher, 340 So.2d 914 (Fla.1976) involved the question whether a reporters presence at a fire scene wherein information was gathered and published was a trespass. The Court adopted the dissent in the district court which found no trespass based on custom. The invasion of privacy claim was discussed under the false light theory of Cantrell v. Forest City Publishing Co., 419 U.S. 245, 42 L.Ed. 2d 419, 95 S.Ct. 465 (1974) which although pleaded by the Hitchners in Count II is not germane to Count I under which liability was founded.

In Tribune Co. v. Huffstetler, 489 So.2d 722 (Fla.1986) the issue was whether a reporter, subpoenaed in a State Attorney's investigation, has a qualified privilege against revealing the identity of a source whose information violated a disclosure statute. In the context of contempt, the reporter's privilege prevailed in that case. The Court also held that the reporter had no standing to challenge the constitutionality of the disclosure statute.

In summary there is no "constitutional analysis" conflict for this Court to resolve.

Amici for the Fla. Press Association, et al, have filed with this Court the criminal trial transcript with the assertion that "the acts of abuse committed by the Hitchners (if not their criminality) were clearly testified to and, in large part, demonstrated in open

court." By footnote they excerpt a portion of the testimony to support their conclusion. While a transcript is irrelevant and immaterial to the jurisdictional issue before this Court, the erroneous conclusion and misstatement of the facts presented to this court require comment. The child demonstrated to the Court the pressure used by her stepmother (p.38 of transcript) which was the same as that used in petting the family dog. She then explained that she had a long standing pre-existing rash on her bottom, akin to a diaper rash, which was being treated by the application of Neosporin (p.39 of transcript). This is what the photographs in evidence confirmed. Finally, she again showed the Court where Barbara Hitchner applied the pad, which wasn't on her bottom nor anywhere near her rash but instead was on her coccyx (p.43 of transcript). All this was brought out in summary (p.79 of transcript) and was the basis for the directed verdict (p.83-85 of transcript). Amici, like the defendants, jumped to a conclusion which they would not have reached had they been present at the trial. The only difference is that the defendants spread their erroneous opinion based solely on confidential sources on the front page of the TODAY paper rather than in a jurisdictional brief.

CONCLUSION

There is no conflict generated by the lower courts opinion and holding. Neither does it create vast uncertainty in a constitutional sense. It applied recognized precedent to a stipulated set of facts and upheld the same conclusion reached by the trial judge that the defendants are liable as a matter of law. The real

basis of the defendants and amici objection to both lower courts holdings is perhaps best summarized in an excerpt from their brief in the district court.

> "The defendant journalists do not challenge the constitutionality of statutes providing for the confidentiality of child abuse records or other public records. Defendant do challenge the boot-strapping of such statutes into multimillion dollar claims for invasion of privacy."

This is not a ground for discretionary review and the same should be denied in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief has been mailed to Florence Snyder Rivas, Esq., P.O.Box 2621, Palm Beach, FL 33480; Jack A.Kirschenbaum, Esq.,P.O. Box 757, Cocoa Beach, FL 32931; and John B. McCrory, Esq., One Thomas Circle, N.W.,Washington, DC 20005, this 15th day of January,1988.

WILLIAM E. WELLER