D/a 8-30-88.

IN THE SUPREME COURT OF FLORIDA
CASE NO. 71,554

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

v.

PHILIP HITCHNER and BARBARA HITCHNER, his wife,
Respondents.

ON REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

BRIEF ON THE MERITS OF
THE TIMES PUBLISHING COMPANY, THE MIAMI HERALD PUBLISHING COMPANY, SENTINEL COMMUNICATIONS COMPANY, THE TRIBUNE COMPANY, NEWS AND SUN SENTINEL COMPANY, MIAMI DAILY NEWS, INC., NEWS-PRESS PUBLISHING COMPANY, PENSACOLA NEWS-JOURNAL, INC., SCRIPPS HOWARD, SCRIPPS HOWARD BROADCASTING COMPANY, FERNANDINA BEACH NEWS-LEADER, INC., GAINESVILLE SUN PUBLISHING COMPANY, LAKE CITY REPORTER, INC., LAKELAND LEDGER PUBLISHING CORPORATION, OCALA STAR-BANNER CORPORATION, SEBRING NEWS-SUN, INC., THE LEESBURG DAILY COMMERCIAL, INC., THE PALATKA DAILY NEWS, INC., THE SARASOTA HERALD-TRIBUNE COMPANY, THE MARCO ISLAND EAGLE, AND THE FLORIDA STAR AS AMICI CURIAE

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TABLE OF CONTENTS

Table of Citations. iii

Statement of the Interest of the Amici. ix

Statement of the Case and Fact. 1

Summary of Argument 6

Argument

I

THE FIRST AND FOURTEENTH AMENDMENTS PROHIBIT STRICT LIABILITY SANCTIONS AGAINST PUBLIC DEBATE CONCERNING JUDICIAL MATTERS OF PUBLIC INTEREST 7

A. Recent United States Supreme Court Analysis Demonstrates that Strict Liability Sanctions Impose an Unconstitutional Chilling Effect Upon First Amendment Freedoms. 7

B. The First and Fourteenth Amendments Protect the News Media's Publication of Newsworthy Facts. 13

C. The First and Fourteenth Amendments Protect Free Speech and Press Despite the Existence of State Confidentiality Statutes 19

D. Florida Courts Acknowledged Strong First Amendment Limitations on the Invasion of Privacy Tort. 22

E. Courts in Other Jurisdictions Reject Privacy Claims Asserted Against Publication of Information in the Public Interest 26

II.

THE FIRST AMENDMENT WILL NOT TOLERATE ANY PUNISHMENT FOR PRINTING THE TRUTH 30

A. Predetermined Liability for Publication of Truthful Information Concerning Statutorily Prohibited Areas of Speech Constitutes Unconstitutional Prior Restraint of Speech and Press 30

B. Section *827.07* is Unconstitutional as Applied to the News Media Because it Constitutes a Prior Restraint on Pure Speech 37

III

THE STATUTE AS APPLIED VIOLATES FUNDAMENTAL DUE PROCESS REQUIREMENTS 39

IV

THE COURT BELOW ERRED IN INTERPRETING AND APPLYING SECTION *827.07* IN THIS CASE. 43

Conclusion. 48

Certificate of Service. 49

TABLE OF CITATIONS

	Pase(s)
Abrams v. United States, 250 U.S. 616, 619 (1919).	9
Beresky v. Teschner, 64 Ill. App.3d 848, 381 N.E.2d 979 (1978)	17
Bisbee v. Conover Agency. Inc., 186 N.J. Super. 335, 452 A.2d 689 (1982).	17
Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d 775 (Fla. 4th DCA 1985)	46
Boyd v. Thomson Newspaper Publishins Co., 6 Med. L. Rptr. 1020 (D.C. Ark. Feb. 13, 1980). . .	17
Brueggermeyer v. Associated Press, 609 F.2d 825 (5th Cir. 1980).	17
Buckley v. W.E.N.H., 5 Med. L. Rptr. 1509 (D.N.H. June 28, 1979)	17
Cantrell v. Forest City Publishins Co., 419 U.S. 245, 95 S.Ct. 465, 42 L.Ed.2d 419 (1974)	13
Cape Publications, Inc. v. Bridges, 423 So.2d 426 (Fla. 5th DCA 1982) rev. den. 431 So.2d 988 (Fla. 1983), cert. den., 104 S.Ct. 239	15, 16
Cape Publications, Inc. v. Hitchner, 514 So.2d 1136 (Fla. 5th DCA 1987).	5, 6, 9, 11, 13, 18, 19, 26, 32
Cason v. Baskin, 155 Fla. 198, 206, 20 So.2d 243, 251 (Fla. 1945). .	14
Coleman v. Newark Morning Ledser Co., 29 N.J. 357, 149 A.2d 193 (1959).	29
Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). .	45
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975)	8, 14, 19, 20, 21, 22, 24, 25, 28, 30, 31, 32, 34

Pase(s)

Doe v. Sarasota-Bradenton Herald Television,
436 So.2d 328 (Fla. 2d DCA 1983). 16, 17, 23, 25, 26, 36

Dubree v. Association of Trial Lawyers of America,
6 Med. L. Rptr. 1158 (D. Vt. April 24, 1980). . 17

Ewing v. A-1 Manasement, Inc.,
481 So.2d 99 (Fla. 3d DCA 1986) 16

FCC v. Pacifica Foundation,
438 U.S. 726 (1978) 10

Fletcher v. Florida Publishing Co.,
40 Fla.Supp. 1 (Fla. 4th Cir. 1974) 22, 23

The Florida Star v. B.J.F.,
499 So.2d 883 (Fla. 1st DCA 1986) 11, 12

Forsher v. Bugliosi,
608 P.2d 716 (Cal. 1980). 29

Freedman v. Maryland,
380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1964). . 40

Fry v. Ionia Sentinel-Standard,
101 Mich. App. 725, 300 N.W.2d 687
(1980). 17, 29

Gardner v. Bradenton Herald, Inc.,
413 So.2d 10 (Fla. 1982),
cert. den., 459 U.S. 865 (1983) 35, 42

Garrison v. Louisiana,
379 U.S. 64 (1964). 31

Gilbert v. Medical Economics Co.,
665 F.2d 305 (10th Cir. 1981) 17

Globe Newspapers v. Superior Court,
457 U.S. 596, 102 S.Ct. 2613,
73 L.Ed.2d 248 (1982) 8, 41

Howard v. Des Moines Resister,
283 N.W.2d 289 (Iowa 1979)
cert. den. 445 U.S. 904 (1980). 29

Hustler Magazine v. Falwell,
___ U.S. ___, 56 U.S.L.W. 4180, 4181
(Feb. 24, 1988) 8, 9, 10, 12, 13

Page(s)

In re Providence Journal Co.,
820 F.2d 1342 (1st Cir. 1986),
modified and aff'd on reh'g,
820 F.2d 1354 (1987),
cert. dismissed, ___ U.S. ___,
___ S.Ct. ___ (May 2, 1988) 42

In re Petition of Post Newsweek Stations,
370 So.2d 764, 780-781 (Fla. 1979). 8

Jacova v. Southern Radio & Television Co.,
83 So.2d 34 (Fla. 1955) 15

KUTV v. Conder,
668 P.2d 513 (Utah 1983). 42

Landmark Communications, Inc. v. Commonwealth of Virginia,
435 U.S. 829, 98 S.Ct. 1535,
56 L.Ed.2d 1 (1978) 6, 28, 32 33, 34

Little v. Washinston Post Co.,
11 Med. L. Rptr. 1428 (D.D.C. Jan. 23, 1985). . . 17

Losan v. District of Columbia,
447 F.Supp. 1328 (D.D.C. 1978). 26, 27, 28

Medico v. Time, Inc.,
643 F.2d 134 (3d Cir. 1981) 28

Miami Herald Publishins Co. v. Collazo,
379 So.2d 333 (Fla. 3d DCA 1976). 8

Miami Herald Publishins Co. v. City of No. Miami,
452 So.2d 572 (Fla. 3d DCA 1984). 47

Miami Herald Publishins Co. v. Tornillo,
418 U.S. 241, 94 S.Ct. 2831,
41 L.Ed.2d 730 (1974) 16, 21, 22, 41

Miami Herald Publishins Co. v. State,
363 So.2d 603 (Fla. 4th DCA 1978);. 8

Miami Herald Publishins Co. v. Lewis,
426 So.2d 1 (Fla. 1982);. 8

Miami Herald Publishins Co. v. Morphonios,
467 So.2d 1026 (Fla. 3d DCA 1985) 36

Page(s)

Mills v. Alabama,
384 U.S. 214, 86 S.Ct. 1434,
16 L.Ed.2d 484 (1966); . . . . . .

Mills v. Doyle,
407 So.2d 348 (Fla. 4th DCA 1981) 46

National Socialist Partv of America v. Village of Skokie,
432 U.S. 54 (1977). 40

Near v. Minnesota,
283 U.S. 697, 713, 51 S.Ct. 625, 630,
75 L.Ed. 1357, 1366 (1931). 34, 38

Nebraska Press Association v. Stuart,
427 U.S. 539, 559, 96 S.Ct. 2791, 2803,
49 L.Ed.2d 683, 697 (1976). 8, 38, 39, 40, 41

New York Times Co. v. United States,
403 U.S. 713, 91 S.Ct. 2140,
29 L.Ed.2d 822 (1971)(Pentagon Papers case) . . 29, 34, 38, 39

New York Times v. Sullivan,
376 U.S. 254, 272 (1964). 11, 12, 13, 31

Oklahoma Publishing Co. v. District Court,
430 U.S. 308, 97 S. Ct. 1045,
51 L.Ed.2d 355 (1977) 6, 31

Patterson v. Tribune Co.,
146 So.2d 623 (Fla. 2d DCA 1962). 25

Pearson v. Dodd,
410 F.2d 701 (D.C. Cir. 1969) 26

Philadelphia Newspapers, Inc. v. Hepps,
475 U.S. 767, 772 (1986). 11, 12, 18, 31

Press-Enterprise Co. v. Superior Court,
___ U.S. ___, 106 S.Ct. 2735,
92 L.Ed.2d 1 (1986);. 8

Reino v. State,
352 So.2d 853 (Fla. 1977) 44

Richmond Newspapers. Inc. v. Virginia,
448 U.S. 555, 100 S.Ct. 2814,
65 L.Ed.2d 973 (1980);. 8

Page(s)

Sheppard v. Maxwell,
384 U.S. 333, 350, 86 S.Ct. 1507, 1515 (1966) . . . 8, 33

Sidis v. F-R Publishing Corp.,
113 F.2d 806 (2d Cir. 1940) 17

Sipple v. Chronicle Publishing,
154 Cal. App.3d 1040, 201 Cal. Rptr. 665
(Cal. Ct. App. 1st 1984). 17, 29

Smith v. Daily Mail Publishing Co.,
443 U.S. 97, 99 S.Ct. 2667,
61 L.Ed.2d 399 (1979) 6, 33

Southeastern Promotions, Ltd. v. Conrad,
420 U.S. 546, 558, 95 S.Ct. 1239, 1247,
43 L.Ed.2d 448, 459 (1975). 39, 40

Stafford v. Haves,
327 So.2d 871 (Fla. 1st DCA 1976) 15

State ex rel. Miami Herald Publishing Co. v.
McIntosh,
340 So.2d 904 (Fla. 1976);. 8, 35

Stevenson v. Nottingham,
48 Fla.Supp. 10 (Fla. 6th Cir. 1978),
aff'd ___ So.2d ___ (Fla. 2d DCA May 9, 1979) . . . 25

Street v. New York,
394 U.S. 576, 579 (1969). 10

Thornhill v. Alabama,
310 U.S. 88, 102, 60 S.Ct. 736, 744,
84 L.Ed. 1093, 1102 (1940). 17

Time, Inc. v. Hill,
385 U.S. 374, 87 S.Ct. 534,
17 L.Ed.2d 456 (1967) 13

Tribune Co. v. Cannella,
458 So.2d 1075 (Fla. 1985). 46

Tribune Co. v. Huffstetler,
489 So.2d 722 (Fla. 1986) 24, 25

Valentine v. C.B.S., Inc.,
698 F.2d 430 (11th Cir. 1983) 17

Page(s)

Worrell Newspapers v. Westhafer.
739 F.2d 1219 (7th Cir. 1984).
aff'd, 105 S.Ct. 1155 (1985). 37

WXYZ v. Hand.
658 F.2d 420 (6th Cir. 1981). 34

Statutes

Chapter 75-101, Laws of Florida. 43
Chapter 75-185, Laws of Florida. 43
Chapter 77-429, Laws of Florida. 44
112.317(b), Fla. Stat. (1987). 24
316.066, Fla. Stat. (1987) 47
327.30, Fla. Stat. (1987). 47
370.07, Fla. Stat. (1987). 47
409.2577, Fla. Stat. (1987). 47
119.07, Fla. Stat. (1987). 47
827.07, Fla. Stat. (1975). 44
827.07, Fla. Stat. (1979). . . . . passim
827.03(3), Fla. Stat. (1979) 1
827.07(11), Fla. Stat. (1975). 44
827.07(14), Fla. Stat. (1975). 44
827.07(15), Fla. Stat. (1979). 3, 5
827.07(18), Fla. Stat. (1979). 4

Other Authorities

Restatement (Second) of Torts. 27. 28
AGO 076-21 (Jan. 28. 1976) 46

STATEMENT OF THE INTEREST OF THE AMICI

The 23 amici joining in this brief are members of the news media whose interests are adversely affected by the decision of the Fifth District Court in this case. The decision substantially limits their ability as newsgatherers and publishers to report truthful information learned from government records. In addition, the decision impairs the ability of the news media throughout this State to rely upon and publish information willingly provided by government officials in the regular course of their duties. The Fifth District's holding would convert every one of the 310 exemptions from the Public Records Act into a strict liability cause of action against a news organization which publishes information from exempt records. The decision chills the amici's discussion of government activities, and erodes the traditional First Amendment protection afforded newsgatherers in the course of fulfilling their responsibilities to inform the public about the activities of government.

This case presents for this Court's review, a decision of the Fifth District Court of Appeal affirming a partial summary judgment on the issue of liability in favor of the plaintiffs in an invasion of privacy action. The decision is reported at 514 So.2d 1136 (Fla. 5th DCA 1987). These amici herein present their brief in support of the Defendants'/Petitioners' position. Throughout, the parties to this action will be referred to as they were in the trial court.

References to the record will be noted with the symbol (R.).

STATEMENT OF THE CASE AND FACTS

In December of 1980, the State of Florida charged Philip and Barbara Hitchner with the crime of aggravated child abuse, a felony.[1] The charge addressed a November 23, 1980 incident during which Philip Hitchner and his brother allegedly forcibly restrained Philip's nine-year-old daughter with Philip's wife, Barbara, "scrubbing Shawn Marie Hitchner's buttocks and rectum with a metallic scrubber pad [an "sos" pad] to maliciously punish her." (Plaintiffs' Third Amended Complaint, Para.5, R. 4, 109).

On January 29, 1981, after the State had presented its case in open court, during which the child herself told of the scrubbing incident, the trial judge entered a directed verdict of acquittal. (R. 109) A few days later, Jere Maupin, a reporter for the Todav newspaper heard about the Hitchners' acquittal from a clerk's office employee. (R. 109) Subsequently, he examined the clerk's court file and interviewed the assistant state attorney who prosecuted the case. (R. 109) After an unsuccessful attempt to interview the trial judge, Maupin determined that to objectively report both sides of the story, he would have to seek

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[1] Section 827.03 (3), Fla. Stat. (1979). The statute under which the Hitchners were charged, provided: "Aggravated child abuse. - Whoever: (1) commits aggravated battery on a child; (2) willfully tortures a child; (3) maliciously punishes a child; or (4) willfully and unlawfully cages a child shall be guilty of a felony of the second degree..." The Hitchners were specifically charged under subsection (3). The statute remains unchanged in the 1987 volume.

comment from the acquitted couple. (R. **58, 109)** A court employee advised him that the assistant state attorney's file contained the couple's home telephone number. (R. 109) Subsequently, at the direction of the prosecutor, a secretary gave the reporter the prosecutor's case file. (R. 110) That file contained, among other items, a Health and Rehabilitative Services (HRS) predispositional report, the Brevard County Sheriff's case report, and the transcript of an interview[2] with the child. (R. 110) None of these documents were marked confidential, and none indicated in any way that their contents were not to be disclosed. (R. **84, 89)**

The reporter sat down in the state attorney's reception area, read over the file and took notes for a period of **45** minutes to an hour. (R. 110) After phoning Barbara Hitchner, who declined to comment, Maupin wrote the story that appeared in the February **6, 1981** issue of Cocoa Today. (R. 110)

The story recounted the couple's acquittal despite the uncontested fact the scrubbing incident occurred. (Petitioner's Brief on the Merits at 3-5) The story also contained several statements, not disclosed at the couple's trial, taken from the HRS report, the Sheriff's report, and the interview with the child. (R. 110)

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[2]The parties to this case stipulated at the trial level that this interview took place between the child and the prosecutor. The plaintiffs' complaint states that the interview was taken by a Brevard County Sheriff's agent.

Mr. and Mrs. Hitchner sued the reporter and the newspaper's publishers, Vince Spezzano and Cape Publications, Inc., claiming that they invaded the couple's privacy by publicly disclosing embarrassing private facts. (R. 2-4) The privacy interests of the Hitchner's daughter/stepdaughter were never asserted as part of their claim.

The Hitchners specifically complained[3] that the following statements were maliciously published in "direct and willful" violation of "§827.07(15), Fla. Stat. (1980)":[4]

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[3]The Hitchners' four count complaint alleged two counts of invasion of privacy, the first under the "disclosure of private facts" branch of the tort, the second under the "false right" theory, and two counts of libel alleging negligence and malice respectively. (R. 2-9) Only the "disclosure of private facts" count is before this Court on the trial court's summary judgment asserting strict liability against the defendants.

[4]Section 827.07(15) does not appear in the 1980 volume. However, it appears in the 1979 volume and is unchanged in the 1981 volume, cited by the courts below. The statute provides, in pertinent part:

> (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 s. 119.07(1), and shall not be disclosed except as specifically authorized by this section.

Subsection (b) of 827.07(15) provides for release of records to HRS employees carrying out child protection investigations: law enforcement; the state attorney: the subject child: parent: perpetrator: and guardian, custodian, or counsel; the court which may release it to the public if necessary: a grand jury: HRS

"a) She said her stepmother had her eat hot peppers in punishment for lying and threatened to apply rubbing alcohol to her skin rubbed by the SOS pad.

b) The girl also bore three burn marks credited to a cigarette.

c) Several bruises were credited to whippings her mother administered with a paddle."

The plaintiffs admitted that the published statements came directly from the three reports in the state attorney's file, ("The following underlined portions of the article...were taken directly from said reports.")(Third Amended Complaint, Para.15, R4)

The reporter and its publishers denied that their publication was malicious or in direct and willful violation of the statute and asserted that the publication was privileged under the First and Fourteenth Amendments to the United States Constitution. (R. 10-15)

Both parties moved for partial summary judgment on stipulated facts. On January 16, 1987, the trial court granted partial summary judgment in favor of the Hitchners on the issue

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officials; bona fide researchers; professionals treating the child or perpetrator.

Section 827.07(18) provides:

> (18) PENALTIES.--
>
> (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 5775.082, §775.083, or 5775.084.

of liability. The court found that publication of the contents of records covered by §827.07(15) was negligent as a matter of law, and further held the statute was valid and created a private cause of action in tort. (R. 114-115)

The Defendants sought review in the Fifth District Court of Appeal, which, on November 5, 1987, affirmed the summary judgment for the Hitchners, ruling the newspaper was liable to the Hitchners as a matter of law for publishing "statutorily protected private facts" irrespective of intent, fault, or newsworthiness of the article. Cape Publications V. Hitchner, 514 So.2d 1136, 1138 (Fla. 5th DCA 1987). The court ruled that because the HRS report, the sheriff's report and the interview transcript were confidential under section 827.07(15), the statute established "the privacy of the facts disclosed." Id. at 1138.

Further, the court held truth was not a defense in an action for invasion of privacy, and the plaintiffs need not prove the defendants' malice or the defendants' acts were "knowing and willful" in order to prevail on the liability issue. Ibid. Rejecting the defendants' assertion that the publication was privileged, the court ruled that "invasion of privacy is not protected by the First or Fourteenth Amendments" and rejected Cape Publications' argument that Section 827.07 was unconstitutional, stating that "the statute is not constitutionally infirm because it does not infringe upon the freedom of press and

publication, but merely establishes the privacy of certain facts by prohibiting their disclosure." Id. at 1138-39. The court distinguished United States Supreme Court cases invalidating similar statutes on the grounds that those were cases in which a party was being punished under a criminal statute for publication of truthful information already in the public domain.[5] Id. at 1138. On December 3, 1987, the newspaper and reporter filed their notice of intent to seek discretionary review by this Court, which this Court granted.

SUMMARY OF ARGUMENT

The Fifth District Court ruled in this case that where a newspaper published true statements taken from government documents declared confidential by statute, the newspaper and its reporter are liable as a matter of law for invasion of privacy. This holding imposes strict liability, liability without fault, on the publication of truth, when the United States Supreme Court has expressly rejected this standard as sufficient even where the media publishes false statements. The court's decision ignores entirely four decades of Florida law which holds that the media are privileged to publish information of public interest, including truthful information concerning the functioning of the criminal justice system, the subject of the article at issue in

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[5] Those cases included Smith v. Daily Mail Publishing Co., 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978); Oklahoma Publishing Co. v. District Court, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977).

this case.

In addition, the confidentiality statute as the Fifth District applied it in this case, clearly constitutes state censorship of the press in favor of privacy interests rejected by the United States Supreme Court as justification for such a drastic measure, and in violation of fundamental due process principles.

Finally, the Fifth District erred in implying a cause of action in a Public Records Act exemption when the legislature clearly intended to deny such a remedy to persons in the Hitchners' position, and such exemptions by their terms and intentions only govern the actions of public records custodians, not of the press.

ARGUMENT

I.

THE FIRST AND FOURTEENTH AMENDMENTS PROHIBIT STRICT LIABILITY SANCTIONS AGAINST PUBLIC DEBATE CONCERNING MATTERS OF PUBLIC INTEREST.

A. Recent United States Supreme Court Analysis Demonstrates that Strict Liability Sanctions Impose an Unconstitutional Chilling Effect Upon First Amendment Freedoms.

In its most recent examination of First Amendment principles limiting governmentally imposed tort sanctions against speech and press, the United States Supreme Court squarely rejected the imposition of strict liability, reasoning that "a rule that would impose strict liability on a publisher for false factual assertions would have an undoubtedly 'chilling' effect on

speech...." Hustler Magazine v. Falwell, ___ U.S. ___, 56 U.S.L.W. 4180, 4181 (Feb. 24, 1988).

The court premised its observation on the recognition that "at the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."[6] Id. at 4181.

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[6]Jerry Falwell, a nationally known evangelist, was regarded as a public figure by the Supreme Court, but this does not present a meaningful factual distinction, because the Court's analysis is premised more broadly on a concern for protecting discussion "on matters of public interest and concern." Hustler, 56 U.S.L.W. at 4181. It is beyond doubt that discussion of judicial affairs, such as the prosecution of child abusers, is a matter of great public interest and concern.

> The court system is no less an institution of democratic government in our society. Because of the courts' dispute resolution and decision-making role, its judgments and decrees have an equally significant effect on the day-to-day lives of the citizenry as the other branches of government. It is essential that the populace have confidence in the process, for public acceptance of judicial judgments and decisions is manifestly necessary to their observance. Consequently, public understanding of the judicial system, as opposed to suspicion, is imperative.

In re Petition of Post Newsweek Stations, 370 So.2d 764, 780-781 (Fla. 1979)(citations omitted). See also, Press-Enterprise Co. v. Superior Court, 478 U.S. ___, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980); Nebraska Press Association v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); Cox Broadcastins Co. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); Mills v. Alabama, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966); Sheppard v. Maxwell, 384 U.S. 333 (1966); Miami Herald Publishins Co. v. Lewis, 426 So.2d 1 (Fla. 1982); State ex rel. Miami Herald Publishins Co. v. McIntosh, 340 So.2d 904 (Fla. 1976); Miami Herald Publishins Co. v. State, 363 So.2d 603 (Fla. 4th DCA 1978); Miami Herald Publishins Co. v. Collazo, 379 So.2d 333

Indeed, as ideas and beliefs come and go, are proven and disproven, are in or out of favor, our experience leads resolutely to the conclusion that it is far more important to protect the system of freedom of expression itself than to enshrine presently held mores or values by strict rules prohibiting or automatically punishing speech and debate about "...statutorily protected private facts" which may never be "publicly disclosed." Cape Publications, Inc. v. Hitchner, 514 So.2d at 1138.

"As Justice Holmes wrote 'when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade and ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market.... '" Hustler v. Falwell, 56 U.S.L.W. at 4181, citing Abrams v. United States, 250 U.S. 616, 619 (1919)(J. Holmes, dissenting).

The Fifth District incredibly concludes that the newspaper article in question "is not protected by the First or Fourteenth Amendment," 514 So.2d at 1138, apparently because the legislature has determined that facts concerning child abuse are "private facts" that are "offensive and objectionable to a reasonable man of ordinary sensibilities." 514 So.2d at 1137. In sharp contrast, the United States Supreme Court has repeatedly

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(Fla. 3d DCA 1976).

rejected the proposition that the government may prohibit the expression of certain facts or ideas merely because they are offensive. "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the market place of ideas." FCC v. Pacifica Foundation, 438 U.S. 726, 745, 98 S.Ct. 3026, 3038, 57 L.Ed.2d 1073, 1091 (1978). "It is firmly settled that...the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." Street v. New York, 394 U.S. 576, 592, 89 S.Ct. 1354, 1366, 22 L.Ed.2d 572, 585 (1969).

In its oft-repeated marketplace-of-ideas metaphor, the United States Supreme Court envisions public debate as a truth-seeking process. While "false statements of fact are particularly valueless" because "they interfere with the truth-seeking function of the market place of ideas," Hustler v. Falwell, 56 U.S.L.W. at 4181, the Supreme Court nevertheless concludes that strict liability for such valueless remarks is prohibited because of the chilling effect that will exert on the process itself. Accordingly, false statements are protected by a proof requirement far different from strict liability, i.e. a burden of proof placed upon the plaintiff requiring a showing of both falsity and

a showing of the "requisite level of culpability." Id. at 4181; see also Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 772, 106 S.Ct. 1558, 1564, 89 L.Ed.2d 783, 790 (1986); New York Times Co. v. Sullivan, 376 U.S. 254, 272, 84 S.Ct. 710, 721-22, 11 L.Ed.2d 686, 702 (1964).

It would be ironic indeed to allow breathing room for the valueless statements of false fact, and yet impose strict liability for public debate of true facts[7] concerning the act of child abuse, the prosecution of alleged child abusers, and their acquittal merely because a legislature has categorically pre-determined that such discussion is "offensive and objectionable" and concerns "private facts," Hitchner, 514 So.2d at 1137, or more to the point, are "of a private nature and not to be disclosed as a matter of law."[8] The Florida Star v. B.J.F., 499

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[7]It is not clear what the Hitchners regard as being the truth in this case. The privacy count of their complaint which frames the only issue now before this Court asserts "injury to reputation" based on publication of information "taken directly from [official government] records." (R. 3, 4) While in one other privacy count the Hitchners claim that certain facts are "false, untrue, never occurred," (R. 5) in libel counts they do not squarely assert falsity but rather finesse the question of truth or falsity thusly:

> The following statements in the Article never occurred in the Plaintiffs' criminal trial nor are they contained in any 'Court Records,! subject to public disclosure and are therefore false.

(R. 7)

[8]As argued by the Florida Press Association, the Florida Society of Newspaper Editors, Representative Elaine Gordon, and Roberta Fox, it is highly questionable that the legislature

So.2d 883, 884 (Fla. 1st DCA 1986).

The Constitution does not distinguish between public and private figures in rejecting strict liability for speech. "Nonetheless, even when private figures are involved, the constitutional requirement of fault supersedes the common law's presumption as to fault and damages." Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 774 (1986). In Justice Rehnquist's affirmation of the system of freedom of expression as a marketplace of ideas in which strict liability has no place, he concludes that the tort of intentional infliction of emotional distress may not be used to impose sanctions for publication about public figures and public officials "without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e. with knowledge that the statement was false or with reckless disregard as to whether or not it was true." 56 U.S.L.W. at 4182. Thus the Court superimposed libel law requirements arising out of the New York Times v. Sullivan, supra, including the strong fault requirement of a showing of "actual malice." In Falwell, as in the fountainhead decision of New York Times v. Sullivan, the Court looks to governmental interests protected by tort liability, and balances those interests against society's broader interest in allowing public debate on matters of public interest and concern. A review of the Third Amended Complaint in this case demonstrates

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intended the result which the court below ascribes to it.

that the specific count in question asserts social interests to be vindicated by tort liability identical to those considered in Falwell and Sullivan. In the damage clause, the Hitchners allege "...damage consisting of mental suffering, injury to their reputation, public humiliation, scorn and ridicule...." (R. 4) Thus, the fundamental analysis of the United States Supreme Court, and its conclusions, apply with equal or greater force here.[9] Furthermore, the Court has clearly rejected the imposition of strict liability in invasion of privacy cases, and has required that plaintiffs satisfy the Sullivan test where the matters complained of are false but of public interest. See Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967); Cantrell v. Forest City Publishing Co., 419 U.S. 245, 95 S.Ct. 465, 42 L.Ed.2d 419 (1974).

B. The First and Fourteenth Amendments Protect the News Media's Publication of Newsworthy Facts.

The Fifth District is simply wrong in asserting that "...invasion of privacy is not protected by the First or Fourteenth Amendment" Hitchner, 514 So.2d at 1138. Florida and federal courts have consistently recognized First Amendment

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[9] If anything, the public's interest inherent in brutal actions taken against a child such as those engaged in by the Hitchners, and the legal system's response, are of a higher order than the interests in protecting Hustler Magazine's parody, a "distant cousin" to serious social commentary, where Hustler states that Reverend Falwell's "'first time' was during a drunken incestuous rendezvous with his mother in an outhouse." 56 U.S.L.W. at 4180.

protection for publication of public interest (newsworthy) information. Such protection is vital to free the marketplace of ideas from the chilling effect of governmentally imposed sanctions.

Courts consistently recognize that the "newsworthiness" of the published matter complained of is a defense to a suit for invasion of privacy based on the publication of "private facts" embarrassing to the plaintiff. The United States Supreme Court recognized this rule in Cox Broadcastins Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), where the Court ruled that the First and Fourteenth Amendments protect the media from sanctions in the nature of civil damages for invasion of privacy where the information published is of interest and concern to the public.[10]

The Florida Supreme Court actually anticipated the Supreme Court's ruling by several decades in the first Florida case which acknowledged a cause of action for invasion of privacy. This Court stated,

> One of the primary limitations upon the right of privacy is that this right does not prohibit the publication of matters of general or public interest or the use of the name or picture of a person in connection with the publication of legitimate news.

Cason v. Baskin, 155 Fla. 198, 206, 20 So.2d 243, 251 (Fla. 1945).

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[10]See pages 17-20, infra, for full discussion of the Cox Broadcasting case.

The Florida Supreme Court in Jacova v. Southern Radio & Television Co., 83 So.2d 34 (Fla. 1955), explained that facts can become newsworthy regardless of the wishes of the subject. In that case, the court held that where the plaintiff, willingly or not, had become an actor in an occurrence of public or general interest by merely being present coincidentally in a cigar store during a gambling raid, and the media defendant had not invaded the plaintiff's right of privacy by publishing his photograph. See also Stafford v. Haves, 327 So.2d 871 (Fla. 1st DCA 1976)(TV station privileged to publish picture of public relations representative who became actor in newsworthy occurrence of public interest when he was evacuated from office at capitol building during bomb threat, resulting in presence in nearby bar); Cape Publications, Inc. V. Bridses, 423 So.2d 426 (Fla. 5th DCA 1982) rev. den. 431 So.2d 988 (Fla. 1983), cert. den., 104 S.Ct. 239 (1983)(newspaper privileged to publish photo of kidnapping victim clothed in dishtowel). The court in Bridges emphasized the broad interpretation given to the terms **"news"** and "public interest" and cited the Restatement (Second) of Torts:

> Authorized publicity, customarily regarded as **"news,"** includes publication concerning crimes, arrests, police raids, suicides, marriages, divorces, accidents, fires, catastrophes of nature, narcotics related deaths, rare diseases, etc. and many other matters of genuine popular appeal...Such accounts are not an invasion of privacy to those who are the victims of crime or are so unfortunate as to be present when it is committed as well as those who are the victims of catastrophes or accidents or are

> involved in judicial proceedings or other events that attract public attention. These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them. As in the case of a voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest and to some extent includes publicity given to facts about the individual that would otherwise be purely private.

Bridges, 423 So.2d at 427 n.2 and 4. See also Ewing v. A-1 Manasement, Inc., 481 So.2d 99 (Fla. 3d DCA 1986)(couple who posted bail for fugitive son involved themselves in event of public interest).

Furthermore, the courts consistently recognize that in light of First Amendment guarantees, the determination of what is newsworthy must be left to the judgment of editors, not usurped by the legislature or the courts. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974); Doe v. Sarasota-Bradenton Herald Television, 436 So.2d 328 (Fla. 2d DCA 1983). Courts throughout the nation have held a wide variety of information to be newsworthy and therefore of legitimate interest to the public as a matter of law, including information that may not be newsworthy standing alone but becomes newsworthy where it is relevant to a matter of legitimate

public concern and interest.[11]

> Freedom of discussion, if it would fulfill its historic function in the nation must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Thornhill v. Alabama, 310 U.S. 88, 102, 60 S.Ct. 736, 744, 84 L.Ed. 1093, 1102 (1940).

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[11] See Valentine v. C.B.S., Inc., 698 F.2d 430 (11th Cir. 1983)(song lyrics describing plaintiff's role as witness to murder); Gilbert v. Medical Economics Co., 665 F.2d 305 (10th Cir. 1981) (plaintiff's doctor's history of psychiatric and personal marital problems, her name, and her photo in article on failure of medical profession to police itself); Bruessermever v. Associated Press, 609 F.2d 825 (5th Cir. 1980)(court order requiring plaintiff to make restitution to defrauded consumers); Sidis v. F-R Publishins Corp., 113 F.2d 806 (2d Cir. 1940)(current activities of man who had been famous prodigy some 27 years before publication of "Where Are They Now" article); Little v. Washinston Post Co., 11 Med. L. Rptr. 1428 (D.D.C. Jan. 23, 1985)(public legitimately interested in credible, detailed information about drug addiction and media privileged to publish plaintiff's name and photo); Buckley v. W.E.N.H., 5 Med. L. Rptr. 1509 (D.N.H. June 28, 1979)(prisoner becomes public figure in whom community continues to be interested during imprisonment and "until he has reverted to lawful and unexciting life led by great bulk of community"); Boyd v. Thomson Newspaper Publishins Co., 6 Med. L. Rptr. 1020 (D.C. Ark. Feb. 13, 1980)(deceased child's name in article on medical malpractice lawsuit); Dubree v. Association of Trial Lawyers of America, 6 Med. L. Rptr. 1158 (D. Vt. April 24, 1980)(fact that personal injury plaintiff was employed as nurse); Sipple v. Chronicle Publishins Co., 154 Cal. App.3d 1040, 201 Cal. Rptr. 665 (Ca. App. 1984)(homosexuality of man who saved President Ford's life in assassination attempt); Bereskv v. Teschner, 64 Ill. App.3d 848, 381 N.E.2d 979 (1978)(narcotics death of plaintiffs' son including prior criminal charges and follow up letters to editor stating that mother had cancer surgery); Frv v. Ionia Sentinel-Standard, 101 Mich. App. 725, 300 N.W.2d 687 (1980)(names of wife and children of man found burned to death with another woman in lake cottage); Bisbee v. Conover Agency, Inc., 186 N.J. Super. 335, 452 A.2d 689 (1982)(photograph and description of interior of plaintiff's recently sold home published in newspaper's real estate section).

The statements published in the Hitchner case are directly related to the newsworthy subject of the defendant's article. As in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 778 (1986), "here the speech concerns the legitimacy of the political process, and therefore clearly 'matters.'" The article was more than a report of the Hitchners' criminal trial and acquittal; it was a report on a possible failure of the criminal justice system. Truthful reports about the functions of the criminal justice system are at the core of the First Amendment's protection; how our system detects and deals with child abuse are matters of obvious legitimate concern to the public. Furthermore, by virtue of their arrest and prosecution the Hitchners had become public figures and objects of legitimate public interest; the information complained of concerned other alleged incidents of threats or abuse and is therefore clearly related to the story about their acquittal. The Hitchners' embarrassment and desire to keep confidential information detailing their actions toward their child/stepchild has no bearing on whether the public is legitimately concerned about the information. It is important to note that the fundamentally embarrassing facts -- their scrubbing of the child's anus with an sos pad and the resulting child abuse charge -- were disclosed in open court and are not disputed in this lawsuit. The records indicating that the Hitchners had threatened additional bizarre punishments to their child are directly related to the public's evaluation of the effectiveness

of the system in dealing with suspected child abusers.

C. The First and Fourteenth Amendments Protect Free Speech and Press Despite the Existence of State Confidentiality Statutes.

The United States Supreme Court consistently has held that the values protected by the First Amendment prohibit a state's imposition of sanctions against the media for publishing information in violation of state confidentiality statutes. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), is the landmark case in this area. Significantly, the Cox facts parallel those here. In Cox, the father of a deceased rape victim sued the television station that published his daughter's identity in violation of a Georgia statute. The plaintiff's cause of action, like the Hitchners', was grounded on the embarrassing-private-facts branch of the invasion of privacy tort. The defendant's reporter had obtained the victim's name from the criminal indictments that the court clerk handed over to him upon his request to view them. The state trial court rejected the defendant's claims that it was privileged to publish the information under state law and the First and Fourteenth Amendments, and granted summary judgment for the plaintiff on the issue of liability, holding that the statute created a civil remedy for its violation in favor of those injured thereby. This procedural history is identical to the Hitchner case below.

On review the Georgia Supreme Court explicitly rejected the argument that the defendant was privileged to publish the victim's name because it was a matter of public interest; rather, that court ruled that the statute prohibiting the publication established as a matter of law that the name of a rape victim is not a matter of public concern, and as such there was no First Amendment protection.

The United Sates Supreme Court reversed, noting that where the basis of plaintiff's complaint was that he was injured by the publication of the information which was truthful but, nevertheless, painful and embarrassing to him, his claim of privacy irreconcilably conflicted the Constitution. The Court noted that bringing public scrutiny to bear on the judicial system, including facts surrounding the arrest and prosecution of the rapist, was the responsibility of the press in reporting on the operations of government. Relying on the Restatement of Torts formulation of the cause of action, the Court held that there is simply no liability for publishing facts already appearing in the public records, because there is no liability under the Restatement's formulation when the press merely give further publicity to already public -- albeit embarrassing -- facts.

The Court explained that it could reach no other conclusion in light of the First and Fourteenth Amendments:

> 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. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information seems to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the states may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public. 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 States 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. 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 you publish or broadcast. See Miami Herald Publishing Co. v. Tornillo, 418

U.S. at 258, 94 S.Ct. at 2840.

Cox Broadcasting, 420 U.S. at 495-96, 95 S.Ct. at 1046-47, 43 L.Ed.2d at 349-50 (emphasis added).

Notwithstanding this compelling authority to the contrary, the Fifth District, in this case, ruled the media were not privileged to publish this particular information, based squarely on the fact that a statute made it confidential, even though the information was revealed freely to the reporter by a government officer and was of distinct interest to the public. This rationale is entirely contrary to the spirit and the letter of the media's constitutional right, and indeed duty, to publish information about activities of government.

D. Florida Courts Acknowledsed Strons First Amendment Limitations on the Invasion of Privacy Tort

The Florida courts recognize that First Amendment's protections prevail over individual privacy interests. In Fletcher v. Florida Publishing Co., 40 Fla.Supp. 1 (Fla. 4th Cir. 1974), the plaintiff sued the newspaper alleging inter alia that the media invaded her privacy by entering her home after a tragic fire in which her 17 year old daughter was killed, photographing and publishing the silhouette of the child on the floor of her bedroom. The trial court dismissed the invasion of privacy action ruling that there can be no recovery for invasion of privacy by the publication of a true story of a matter of public interest. In the Fletcher case, the news photographer gained access to the plaintiff's burned-out home by permission of law

enforcement officials. On review, both the First District Court of Appeal and the Florida Supreme Court upheld the dismissal with prejudice of the invasion of privacy claim. In doing so, the District Court of Appeal also noted that the fire and death of the plaintiff's daughter were obviously of legitimate interest to the public. 319 So.2d 100, 103 (Fla. 1st DCA 1975). The Florida Supreme Court left undisturbed the dismissal of the privacy count and reversed the First District's holding that the media's physical intrusion onto Mrs. Fletcher's property constituted a trespass form of invasion of her privacy. 340 So.2d 914 (Fla. 1976) cert. den., 431 U.S. 930 (1977). In his dissent on other grounds, Justice Sundberg summarized Florida's law of privacy:

> That the published matter complained of is of general public interest has always been considered a defense to a claim of invasion of privacy by publication. Finding that the matter published was of obvious legitimate public interest, the publication, per se, was not an invasion of privacy.

340 So.2d at 919.

The rationale of the privilege to publish facts of interest to the public and the privilege itself are similarly applicable even where the legislature has enacted a statute declaring publication of certain information illegal. In Doe v. Sarasota-Bradenton Florida Television Co., 436 So.2d 328 (Fla. 2d DCA 1983), the plaintiff, a rape victim, sued a television station for invasion of privacy after it broadcast a videotape of her testimony at the trial of her attacker in contravention of a

statute declaring unlawful the publication of information identifying a rape victim. The Second District affirmed dismissal of the action based on Cox Broadcasting, placing the burden of safeguarding plaintiff's privacy squarely on the state officials involved. Once the media had been allowed into the courtroom with their videotape equipment, "they could well assume no responsibility not to publish the video tape." Id. at 331. The court expressly noted that privacy interests of individuals must yield to the rights of the press under the First Amendment because of the importance of the press's role as the vehicle for the nation's citizens to monitor the activities of the government. Furthermore, the First Amendment does not allow the government to legislate taste in publishing; rather, decisions about what to publish must be left to editors.

In Tribune Co. v. Huffstetler, 489 So.2d 722 (Fla. 1986), this Court explicitly held that the private reputational interests of those accused of Florida ethics law violations were subordinate to the public protections afforded by the First Amendment. In that case, in the course of regular newsgathering, the reporter and newspaper had obtained and published information specifically deemed confidential by a state statute. The statute in question there was §112.317(b), Fla. Stat., which prohibited the disclosure of either one's own intent to file a complaint with the Florida Ethics Commission or the existence of a complaint already filed. This Court reversed the reporter's

conviction of contempt for refusal to reveal to a state attorney investigating the statutory violation the identity of his source of the information about the ethics complaint, ruling "that the societal interests underpinning most criminal statutes are not present in the instant statute." Id. at 724. Clearly, under Huffstetler, newsgathering directed to matters of public interest is protected by the First and Fourteenth Amendments' values which outweigh individuals' interests in safeguarding their reputations. Ibid.

Similarly, the Second District affirmed a trial court's dismissal of an invasion of privacy action in Stevenson v. Nottingham, 48 Fla.Supp. 10 (Fla. 6th Cir. 1978), aff'd ___ So.2d ___ (Fla. 2d DCA May 9, 1979). There, the plaintiff alleged the newspaper published her identity as a participant in a drug treatment program in violation of a Florida statute which made records of such programs confidential.

Patterson v. Tribune Co., 146 So.2d 623 (Fla. 2d DCA 1962), on which the plaintiff relied below, holds that a newspaper which printed the name of a committed narcotics abuser taken from the court's progress docket was liable to that person for invasion of privacy because a state statute established the confidentiality of that information. Unquestionably, this precedent was overruled by the United States Supreme Court's decisions in Cox Broadcastins v. Cohn, 420 U.S. 469 (1975) and the Second District's more recent decision in Doe v. Sarasota-Bradenton

Florida Television Co., discussed above.

E. Courts in Other Jurisdictions Reject Privacy Claims Asserted Against Publication of Information in the Public Interest.

The federal courts have addressed and rejected several invasion of privacy claims quite similar to the Hitchners'. Even where information was obtained from sources other than the public record, the source of information is not determinative of whether its publication is an actionable invasion of privacy. In Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969), a United States senator sued columnists Jack Anderson and Drew Pearson for their publication of information from confidential documents stolen from the senator's office by two of his former staffers, facts of which the defendants were aware. The published articles detailed numerous alleged misdeeds of the senator, including his relationships with foreign lobbyists. The court noted that "general public interest" had always been a defense to a claim for invasion of privacy. The court found that in fact because the published information clearly bore on the plaintiff's Senate qualifications, the publication was a "paradigm" of publication in the public interest and formed no basis for a suit for invasion of privacy. Even in light of the columnists' knowledge that the documents were confidential, stolen material, the court declined to impose liability.

In a case factually indistinguishable from the Hitchner case, Logan v. District of Columbia, 447 F.Supp. 1328 (D.D.C.

1978), the court held that a newspaper article reporting the plaintiff's participation in a narcotics treatment program did not violate the confidentiality provisions of the Drug Abuse Office and Treatment Act of 1972, because those provisions and the criminal penalties for their violation are directed only to disclosures by agency employees or officers, and do not apply directly to the press. The plaintiff in Logan made the same statutory argument as the Hitchners make: both argue the statutes establish a legislative policy of privacy that supersedes constitutional standards defining the parameters of invasion of privacy. The court recognized the First Amendment's guarantee of a free press outweighs plaintiff's claims to privacy. The court further noted that there was no indication the confidential information was not freely given by the custodian or that the press itself had obtained it illicitly. The court opined that if anyone should be liable for invading plaintiff's privacy, it should be the official who disclosed the confidential information to the press.

In Logan the district court cited the Restatement (Second) of Torts in explaining the definition of "newsworthiness":

> There are other individuals who have not sought publicity or consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest. They have, in other words, become "news." Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid

> it, but they are nevertheless persons of public interest, concernins whom the public is entitled to be informed. . . . These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them. Section 652 D, Comment f.
>
> Permissible publicity of information concerning either voluntary or involuntary public figures is not limited to the particular events that arouse the interest of the public. That interest, once aroused by the event, may legitimately extend, to some reasonable degree, to further information concerning the individual and to facts about him, which are not public and which, in the case of one who had not become a public figure, would be regarded as invasion of his purely private life. Thus the life history of one accused of murder, together with such heretofore private facts as may throw some light upon what kind of person he is, his possible guilt or innocence, or reasons for committing the crime are a matter of legitimate public interest. Section 652D, Comment H.

Logan, 447 F.Supp. at 1330 (emphasis added).

Similarly, based on Cox and Landmark but in the context of a defamation action, the Third Circuit held in Medico v. Time, Inc., 643 F.2d 134 (3d Cir. 1981), that the First Amendment protects press reports of confidential government documents based on the importance of the press' role in bringing public scrutiny to the administration of government. This important value is not overridden by the confidential nature of the material. In Medico, the plaintiff complained of a newspaper article concerning suspected criminal activities of a congressman and contained statements from a confidential FBI investigatory report describ-

ing the plaintiff as the chief of a Mafia family.

Thus, whether or not the press is privileged under the First Amendment to publish information is not dependent upon whether it comes from public or confidential documents. See also, New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971)(Pentagon Papers case); Coleman v. Newark Morning Ledser Co., 29 N.J. 357, 149 A.2d 193 (1959)(serviceman not previously subject of public interest defamed by Senator McCarthy's public summary of secret congressional hearings; newspaper account held privileged). Rather, publication of information contained in documents open to public inspection is but one of the grounds on which a media report of that information must be found privileged. Clearly, "newsworthiness" is a separate and distinct basis for a privilege to publish information. See Howard v. Des Moines Register, 283 N.W.2d 289 (Iowa 1979) cert. den. 445 U.S. 904 (1980); Fry v. Ionia Sentinel-Standard, 101 Mich. App. 725, 300 N.W.2d 687 (Mich. App. 1980)(that matter is of public record is separate limitation on action for invasion of privacy - separate from limitation that information must be of no legitimate concern to the public); Forsher v. Bugliosi, 608 P.2d 716 (Cal. 1980)(whether information already in public domain is but one factor to be considered in evaluating invasion of privacy claim); Sipple v. Chronicle Publishing, 154 Cal. App.3d 1040, 201 Cal. Rptr. 665 (Cal. Ct. App. 1st 1984)(apart from fact plaintiff made no secret of

homosexuality, media privileged to publish newsworthy facts).

II.

THE FIRST AMENDMENT WILL NOT TOLERATE ANY PUNISHMENT FOR PRINTING THE TRUTH.

A. Predetermined Liability for Publication of Truthful Information Concernins Statutorily Prohibited Areas of Speech Constitutes Unconstitutional Prior Restraint of Speech and Press.

The Supreme Court in Cox Broadcasting deliberately avoided "...the broader question whether truthful publication 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...." 420 U.S. at 491, 95 S.Ct. at 1044, 43 L.Ed.2d at 347. The Fifth District below has done what the Supreme Court refused to do, asserting that legislatively predetermined areas of prohibited speech are wholly withdrawn from the marketplace of ideas by the imposition of automatic, strict liability sanctions. Decisions subsequent to Cox reject the logic of this approach in their holding that "...prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." 427 U.S. 539, 559, 96 S.Ct. 2791, 2803, 49 L.Ed.2d at 697.

Turning to the marketplace metaphor, the Supreme Court observed that "a prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said

that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." 427 U.S. at 559, 96 S.Ct. at 2791, 49 L.Ed.2d 697-98.

Again, in a marketplace of ideas which deems false statements of fact as particularly valueless but nevertheless subject to protection against a chilling effect imposed by government sanctions, the ultimate conclusion is inescapable: truthful publications may not be enjoined by a prior governmental determination. Any such prior restraint declares entire subject areas are off limits to public debate regardless of a case-by-case assessment of the public interest. To allow such a regulation of an otherwise free marketplace of ideas admits no limiting principles upon which such regulation of the market could end.

This point is made most forcefully in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) citing Garrison v. Louisiana, 379 U.S. 64, 74 (1964): "'Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.'" Moreover, "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth...." New York Times, Co. v. Sullivan, 376 U.S. 254, 271 (1964).

In Oklahoma Publishins Co. v. District Court, 430 U.S. 308, 97 S. Ct. 1045, 51 L.Ed.2d 355 (1977), a state statute provided for closed and confidential juvenile court hearings

unless the presiding judge ordered otherwise. However, the press attended such a hearing with full knowledge of the prosecutor and judge and thereafter published information from the hearing. Citing **Cox** the Court ruled that, based on this fact, there was no evidence that the press obtained the information unlawfully or indeed without the implicit approval of the government. Thus, the judge's order prohibiting the press from further publication of the name or picture of the juvenile abridged the freedom of the press in violation of the First Amendment. These are the same circumstances under which the defendants in the Hitchner case obtained their information.

The Court again cited **Cox** for authority in Landmark Communications, Inc. v. Commonwealth of Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978), where it held that the First and Fourteenth Amendments would not permit punishment of the news media for divulging truthful information about confidential proceedings of the state judicial inquiry board even where a state statute imposed criminal sanctions for such publication. The important interests the statute sought to protect, i.e., the protection of judge's reputations, protection of complainants and witnesses, and maintenance of confidence in the judicial system, were nevertheless insufficient in the court's view to justify sanction of the press in light of the fact that operations of the courts and judges' conduct are the operations of government of the utmost interest to the public.

> A responsible press has always been regarded as the handmaiden of effective judicial administration...The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors and judicial processes to extensive public scrutiny and criticism.

435 U.S. at 839, 98 S.Ct. at 1541-42, quoting Sheppard v. Maxwell, 384 U.S. 333, 350, 86 S.Ct. 1507, 1515 (1966). The Court concluded, "Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." 435 U.S. at 844, 98 S.Ct. at 1544.

The express statutory interests at stake here are "the rights of the child and his parents or other persons responsible for the child's welfare." 5827.07 (1979), Fla. Stat. These interests, although important, do not rise to the same level of importance as those systemic interests rejected by the Landmark Communications Court.

In Smith v. Daily Mail Publishing Co., 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979), the Court again held that the First Amendment does not permit sanctions on the press for truthfully reporting the name of a juvenile accused of a crime, in violation of a state statute prohibiting its publication. The Court ruled that the juvenile's interest in reputation did not justify sanctions in the publication of information obtained in the routine course of news gathering. The Court cited Landmark,

Cox and Oklahoma Publishing for this proposition, recognizing that even though the information in those cases was made available to the press by the government in one manner or another, that was not the controlling factor in deciding the scope of First Amendment protection.

In Landmark Communications v. Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978), the Court struck down a state statute which, paralleling the statute at issue here, made it a crime to publish information regarding confidential judicial review commission proceedings. Significantly, the Court rejected the sufficiency of the reasons offered by the state to justify imposing sanctions on the press - the reputational interests of the judges being investigated and the concern for the institutional reputation of the courts.

Likewise, in Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), the Supreme Court dissolved an injunction prohibiting distribution of an anti-Semitic newspaper and based on a statute purporting to allow abatement, as a nuisance, of any "malicious" publications. See also, WXYZ v. Hand, 658 F.2d 420 (6th Cir. 1981)(order and statute suppressing information of sex crimes charge against priest unconstitutional prior restraint).

The Florida Supreme Court has adopted the strict New York Times test (403 U.S. 713 (1971) discussed, infra) as a measure of the validity of prior restraints on pure speech in

State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (1976). There, this Court held invalid a lower court gag order prohibiting the publication of any information about a securities fraud case except testimony given in open court and information appearing in the public records. The order rejected in McIntosh is the very substance of the restraint imposed by the statute in this case, as interpreted by the Fifth District, and the very substance of the plaintiff's assertions in this case, that the legislature constitutionally can limit content of media publications. It must be noted that the Hitchners' Third Amended Complaint draws the same distinction as the forbidden gag order in McIntosh, seeking particularly voracious punishment for printing information taken from official government records, but not addressed in open court. In McIntosh, this Court stated that any form of prior restraint is imbued with a heavy presumption against its validity. To meet this burden, the expression must constitute an "immediate, not merely likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." Id. at 908. Similarly, in Gardner v. Bradenton Herald, Inc., 413 So.2d 10 (Fla. 1982), cert. den., 459 U.S. 865 (1983), this Court struck down as an unconstitutional prior restraint a statute requiring the criminal prosecution of anyone who published the name of an unindicted wiretap subject. The Court noted that while there might be a different rule in cases of national security, on-going investiga-

tion, or criminal trials, that case did not fall into any of those categories. See also Miami Herald Publishing Co. v. Morphonios, 467 So.2d 1026 (Fla. 3d DCA 1985)(judge allowed press to be present at videotaping of testimony of minor sexual battery victim but barred publication; order unconstitutional under First Amendment).

Clearly this Court, like the United States Supreme Court, eschews any requirement that information be contained in the public record for its publication to be protected under the First and Fourteenth Amendments. In neither Gardner nor McIntosh was the information at issue contained in the public record. The critical fact in each case was the media's actual possession of the information, and therefore, the government through neither its courts nor legislature, could constitutionally prohibit the press from publishing it.

In its thoughtfully written opinion in Doe v. Sarasota Bradenton Florida Television Co., 436 So.2d 328 (Fla. 2d DCA 1983), the Second District ruled that a rape victim whose name was published in violation of the state statute prohibiting the publication of that information could not recover against the media on the basis of the statute where the press viewed her testimony at a public trial in open court. The court also stated that Florida's constitutional right of privacy must yield to the federal Constitution's guarantees of free speech and free press. The court in that case placed squarely on government

officials the responsibility of keeping the information confidential if it was the state's judgment that the victim's privacy interests were best served in doing so. However, once the press had learned the information, it could not constitutionally be prohibited from publishing it. *See* also, Worrell Newspapers v. Westhafer, 739 F.2d 1219 (7th Cir. 1984), aff'd, 105 S.Ct. 1155 (1985)("when the press, by whatever means, obtains information contained in a court-sealed document, a state cannot prohibit the publication of the information without violating the First Amendment").

It would be anomalous indeed to establish a principle that the government may prohibit the media from publishing information provided to it by public officials. Worse still would be a principle allowing the government to prohibit the media from publishing information that has not already been revealed to the public, for that type reporting is the essence of investigative journalism on which the public depends to monitor the activities of government. The Court should not sanction the recognition of such censorship authority.

B. Section 827.07 is Unconstitutional as Applied to the News Media Because it Constitutes a Prior Restraint on Pure Speech.

The statute relied upon by the Hitchners in this case is unconstitutional as applied to the press because it constitutes an invalid prior restraint. The courts below ruled that the Florida statute providing for confidentiality of child abuse

records represented a legislative determination that the facts were not of public interest and thus the press can be sanctioned their publication. The courts further held that the First and Fourteenth Amendments do not protect the publication of these facts regardless of their truth or newsworthiness. This holding invests the legislature with the unfettered power to determine what facts are of legitimate public interest and concern without regard to the circumstances of their publication: in effect, legislative regulation of the content of press reports.

This asserted power to censor the news media contravenes the principal purpose of the First Amendment guarantee of a free press, which is to guard against government censorship of the press. Near v. Minnesota, 283 U.S. 697, 713, 51 S.Ct. 625, 630, 75 L.Ed. 1357, 1366 (1931). "Prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." Nebraska Press Association v. Stuart, 427 U.S. 539, 559, 96 S.Ct. 2791, 2803, 49 L.Ed.2d 683, 697 (1976) Therefore, "[a]ny prior restraint on expression comes to this court with a heavy presumption against its constitutional validity," Nebraska Press, 427 U.S. at 558, 96 S.Ct. at 2802, 49 L.Ed.2d at 697.

The United States Supreme Court has never upheld a prior restraint on pure speech. When confronted with such a restraint in New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971), the Court held, per curiam,

that newspapers could not be prohibited, even during war-time, from publishing documents that were classified TOP SECRET, even though they were obtained without permission and possibly as a result of the news source's criminal conduct. The Court held that the press was privileged to print the contents of the documents despite the government's argument that publication of the documents would cause grave, irreparable injury to the nation.

Similarly, in Nebraska Press, the Court struck down an order restraining the news media from publishing accounts of a defendant's confession to several murders, even though the purpose of the order was to protect the defendant's Sixth Amendment right to a fair trial. The Court noted that restraint of news can impose "immediate and irreversible harm" and that even slight delays in dissemination of news when mandated by government authority impose serious consequences.

III.

THE STATUTE AS APPLIED VIOLATES FUNDAMENTAL DUE PROCESS REQUIREMENTS.

In Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), the United States Supreme Court stated that "a system of prior restraint avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." 420 U.S. at 559, 95 S.Ct. at 1246, 43 L.Ed.2d at 459. Such procedural safeguards traditionally include prior notice and

a meaningful opportunity to be heard in an adversarial proceeding attended by counsel before any rights under the First Amendment may be compromised.

On various occasions the Supreme Court has held that this rule applies to any restraint on expression, including Nazis parading in uniform through the streets of Skokie, Illinois, and allegedly obscene films and plays. See National Socialist Party of America v. Village of Skokie, 432 U.S. 54 (1977)(denial of Nazi group's request for parade permit; restraints on right to free speech permissible only if strict procedural safeguards provided); Southeastern Promotions, supra (municipal board's denial of use of public theater for production based on board member's determination that musical was obscene constituted prior restraint requiring strict procedural safeguards before imposition); Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1964)(state statute required submission of films to board for approval; only judicial determination in adversary proceeding ensures necessary sensitivity to freedom of expression).

This due process concept was at the core of the Court's decision in Nebraska Press. The Court noted that truthful reports of the activities of the courts are at the core of constitutionally protected speech. The Court added, "regardless of how beneficent-sounding the purposes of controlling the press might be, we...remain intensely skeptical about those measures

that would allow government to insinuate itself into the editorial rooms of this Nation's press." Nebraska Press, 427 U.S. 560-61, 96 S.Ct. at 2803, citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 259 (1974)(White, J. concurring). The Court fashioned a traditional First Amendment three-prong balancing test for evaluating the government's interests in a presumptively invalid gag order in a particular case. In Nebraska Press, the Supreme Court emphasized that even though at the time it issued its restraint order the trial court did not know whether it could validly close its hearing, once a public hearing had been held those proceedings could not be subject to prior restraint. The same rationale is directly applicable to this case.

The Court has emphasized that the same analysis must be employed when a legislature seeks to prohibit access to judicial proceedings. In Globe Newspapers v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982), the Court struck down a statute mandating closure of trials of certain sex offenders during the testimony of victims under the age of eighteen. Although the state's interest was to protect minor victims from embarrassment and to encourage them to come forward and testify, the Court held that these interests do not justify a blanket closure rule. "Where...the State attempts to deny rights of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a

compelling governmental interest." Id. at 2620. See also, In re Providence Journal Co., 820 F.2d 1342 (1st Cir. 1986), modified and aff'd on reh'g, 820 F.2d 1354 (1987), cert. dismissed, ___ U.S. ___, ___ S.Ct. ___ (May 2, 1988)(order prohibiting publication of information obtained from FBI surveillance logs invalid where issued with prior to full hearing through counsel): KUTV v. Conder, 668 P.2d 513 (Utah 1983)(ex parte order issued during rape trial prohibiting publication of information about defendant's prior convictions and use of term "Sugarhouse Rapist" was unconstitutional prior restraint where issued without notice to media or counsel or hearing).

When this Court in Gardner v. Bradenton Herald, Inc., 413 So.2d 10 (Fla. 1982), struck down as unconstitutional a statute directing the criminal prosecution of any person who truthfully published the name of an unindicted wiretap subject, it did so on the grounds that, among other constitutional infirmities, the statute did not provide for the legally necessary procedural safeguards such as a prior hearing to allow for the balancing of the interests involved.

The statute at issue in Gardner is identical to the statute at issue in this case, and the effect of each is the same. The court below applied section 827.07 as a blanket legislative prohibition on the truthful publication of statements contained in child abuse records, identical to the statute's prohibition in Gardner. Because the statute at issue here, like

that in Gardner, contains no provisions for any procedural safeguards such as a prior hearing at which the interests at stake on each side may be weighed, this statute as applied to the press in this manner is likewise constitutionally infirm.

IV

THE COURT BELOW ERRED IN INTERPRETING AND APPLYING SECTION 827.07 IN THIS CASE.

The Hitchners based their invasion of privacy action on a statute exempting from the Public Records Act HRS records regarding child abuse and imposing criminal penalties for disclosure. The Hitchners argued and the courts below agreed that the statute provided a civil cause of action in favor of the Hitchners against the newspaper for disclosure of information from those records, in spite of the fact that Section 827.07 does not provide for a civil cause of action.

Furthermore, in implying this cause of action, the courts below clearly violated the established rules of statutory construction. In 1975, the legislature did amend the penalty section of Section 827.07 to provide an action for damages in favor of persons aggrieved by disclosure of confidential child abuse records.[12] However, the legislature amended the statute

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[12]The Statute provided:

"Any person who willfully or knowingly makes public or discloses any information contained in the 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.,

again in **1977** eliminating the provision for civil damages and providing only for a criminal penalty for "willful and knowing" disclosure.[13] Furthermore, as pointed out by the amici, The Florida Press Association, Society of Newspaper Editors, Representative Elaine Gordon and Roberta Fox, the legislation repealing this cause of action was summarized by the legislature as providing for a criminal rather than a civil, penalty for willful or knowing publication or disclosure of the child abuse records made confidential by the Statute. Ch. **77-429,** Laws of Fla. Thus, the legislature clearly intended to and did do away with the cause of action the Hitchners assert here. Implying a civil cause of action in the remaining statute flies in the face of both the legislature's intent and the established rules of statutory construction. When a statute is amended, it is presumed that the legislature intended it to have a meaning different from that accorded to it before the amendment. Reino v. State, **352** So.2d **853** (Fla. **1977).** A court cannot imply a cause of action in a statute when legislative history indicates

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codified as Section **827.07(11) (1975).**

[13]**The** statute as amended provided:

> **(14)** Penalties.--
>
> (c) Any person who willfully or knowingly makes public or discloses any confidential information contained in the child-abuse registry or the records of any child-abuse case, except as provided in this section, shall be guilty of a misdemeanor of the second degree, punishable as provided in **s.775.082, s.775.083,** or **s.775.084.**

Ch. **77-429 §3,** Laws of Fla., codified as Section **827.07(14).**

that the legislature intended to deny such a remedy. Cort v. **Ash**, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).

In addition, it would be anomalous to conclude that the legislature intended a simple exemption from the disclosure provisions of the Public Records Act to create either a duty on the part of the press to remain silent as to information covered by such exemption or a cause of action in favor of the subjects of the information.

As indicated in the jurisdictional brief and appendix previously filed by the undersigned, there are approximately 310 exemptions to the disclosure provisions of Florida's Public Records Act scattered throughout the 900-plus chapters of the Florida Statutes. The decisions of the courts below in this case would convert each of those exemptions into a legislative declaration that the press is prohibited from disclosing information concerning these innumerable subject areas.

The courts below have attributed to the Public Records Act a purpose and intention never envisioned by the legislature. The Act itself was intended to protect and facilitate citizens' ability to monitor the activities of the government by guaranteeing access to the records of that information. The courts have recognized that the Public Records Act does not contemplate a right of privacy on the part of persons identified in those records. There is simply no right of privacy inuring to persons identified in government records, even where the records were

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created pursuant to an express contractual agreement by the government to keep the records confidential. Mills v. Doyle, 407 So.2d 348 (Fla. 4th DCA 1981). In Tribune Co. v. Cannella, 458 So.2d 1075, 1078 (Fla. 1985), this Court construed the Public Records Act as providing that "no provision is made for anyone other than the custodian of records to withhold a record.... " The rule on review here would change this presumption, effectively allowing information to be withheld by countless litigants, courts, legislatures, and ultimately the press through self-censorship.

The Public Records Act specifies that all documents made or received in connection with the transaction of official business by any agency constitute "public records." The Act further specifies that such records shall be open to the public for purposes of inspection unless specifically exempted from this disclosure requirement. The fact that records are exempted from the disclosure provision of the Act does not mean that they do not constitute "public records" of the State of Florida. See Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d 775 n.1 (Fla. 4th DCA 1985). In fact, the Attorney General has recognized that the specific records at issue in this case, child abuse records, are still "public records" even though they are exempted from the disclosure provisions of the Public Records Act. AGO 076-21 (Jan. 28, 1976). Thus, the construction placed on the Public Records Act exemption at issue in this case is insupportable and

clearly contrary to prior precedent.

In addition, the interpretation defies logic. The legislature simply could not have intended that persons identified in government records be able to bring civil actions against the news media for disclosing information from documents that happen to fall within one of the 310 exemptions to the disclosure provisions of the Public Records Act.[14] Furthermore, Public Records Act exemptions could not have been intended by the legislature to govern the conduct of the news media when the custodian of the records declines or fails to assert an exemption. Exemptions from the Act's disclosure provisions are to be construed narrowly. Miami Herald Publishing Co. v. City of No. Miami, 452 So.2d 572 (Fla. 3d DCA 1984). The legislative history of Florida's child abuse legislation, contained in the Florida Archives, indicates that the purpose of the confidentiality provisions is to prevent custodians of child abuse records and data from distributing it to other registries or banks of information. There is absolutely no indication that there is a duty upon the news media to keep newsworthy information confidential.

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[14]Among documents exempted from the disclosure provisions of Chapter 119 of the Florida Statutes are public library registration and circulation records, §257.261, Fla. Stat.: information on persons interested in ridesharing, §119.07(3)(l); accident reports involving motor vehicles and boats, §316.066(4) and §327.30(3); saltwater products wholesaler reports, §370.07(5)(a); identities of persons owing child support, §409.2577.

CONCLUSION

Strict liability for truthful speech has no place in a free society. It is censorship which the legislature could not have intended. The decision of the Fifth District Court of Appeal is due to be reversed, and the case remanded to the trial court for entry of summary judgment for Defendants.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to William E. Weller, Esquire, 101 N. Atlantic Avenue, P.O. Box 1255, Cocoa Beach, FL 32391; Gerald B. Cope, Jr., Esquire, 4870 Southeast Financial Center, Miami, FL 33131; Jack A. Kirschenbaum, Esquire, P.O. Box 757, Cocoa Beach, FL 32931; Florence Snyder Rivas, Esquire, 250 Royal Palm Way, P.O. Box 2621, Palm Beach, FL 33480; and John B. McCrory, Esquire, One Thomas Circle, Suite 800, Washington, DC 20005 this 27 day of May, 1988.

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