O/a 8-30-88. orig

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 71,554

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

Defendants-Petitioners,

v.

PHILLIP HITCHNER and
BARBARA HITCHNER,

Plaintiffs-Respondents.

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

PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

A. Nature of the Case

Plaintiffs Philip and Barbara Hitchner brought this action for invasion of privacy, premised upon § 827.07, Fla. Stat. (1981), against TODAY Newspaper, its reporter and its publisher (R2-9).[1/] Plaintiffs' claims result from defendants' February, 1981 news report of plaintiffs' criminal trial for child abuse.

Plaintiffs' complaint also includes counts for libel and "false light" invasion of privacy. This appeal does not involve those causes of action. Rather, the question presented to this Court is whether, under Florida statutes and the First Amendment, the decision below properly imposed strict civil liability upon defendants for statutory "private facts'' invasion of privacy. Defendants submit that neither the First Amendment nor the relevant statute supports the analysis of the Court below, and its decision must be reversed.

1/ Citations to the Record on Appeal will appear as (R_____). Citations to the Appendix attached to this Brief will appear as (A-____).

B. Statement of Facts

On December 8, 1980, the State charged the plaintiffs with Aggravated Child Abuse in violation of § 827.03(3), Fla. Stat.[1] (R109). Specifically, plaintiffs were accused of maliciously punishing their 9-year old daughter, by scrubbing her buttocks and rectum with a metallic scouring pad. On January 29, 1981, the plaintiffs' non-jury criminal trial took place. The court directed a verdict of acquittal at the close of the State's case (R109).

The following week, defendant Maupin, a TODAY reporter, learned of the child abuse trial from the court clerk's office. After examining the criminal court clerk's file on the case and scrutinizing photographs of the 9-year old victim, the reporter interviewed the Assistant State Attorney who had prosecuted the case.

Having unsuccessfully attempted to interview the judge who had presided over the trial, the reporter again spoke with the prosecutor in an effort to locate and interview the plaintiffs. At the prosecutor's direction, a secretary gave the State's entire case file to the reporter (R110).

The reporter, who was in the reception area of the State Attorney's office, inspected the entire file for

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2/ The section has been renumbered: § 827.03(1)(c). Fla. Stat.

approximately an hour, and took notes while he studied it (R110).

The file included, among other things, a Department of Health and Rehabilitative Services (HRS) predispositional report, a sheriff's case report and a typed interview of the child victim by the prosecutor.

After leaving the prosecutor's office, the reporter returned to his office and spoke with plaintiff Barbara Hitchner by telephone. (R110).

C. The Newspaper Article at Issue

Based on his investigation, including his examination of the State Attorney's file, the reporter wrote the news article, published in TODAY on February 4, 1981, which is the subject of this lawsuit.

The article reports the plaintiffs' criminal trial for aggravated child abuse, notes their acquittal despite their acknowledged scrubbing of their daughter's rectal area with a steel wool pad, and includes quotations from both the prosecutor and the plaintiff, Barbara Hitchner. The article also reports the trial judge's rationale for acquittal, noting his frustration over the absence of any lesser included offense to the crime of which the plaintiffs were accused.

It is stipulated by plaintiffs that essentially all of the matters in the article were contained in the prosecutor's file (R110). The article states:

Couple acquitted of child abuse

By JERE MAUPIN
TODAY Staff Writer

A Merritt Island couple who admit scrubbing their daughter's bottom and rectum with a steel wool pad has been acquitted of child abuse.

Last week, Circuit Judge Virgil Conkling acquitted Barbara and Philip Hitchner of charges that they "maliciously punished" their 9-year-old daughter Shawn Marie Hitchner with a S.O.S. cleaning pad.

The Hitchners, of 408 Fourth St., acknowledged that "frustration and anxiety" over their daughter's behavior led to the Nov. 23 incident in the doorway of the family bathroom.

But Conkling, confronted with acquittal or imposition of a full-blown judgment of willful child abuse, found the couple not guilty. The judge specifically did not excuse the Hitchners' actions, but noted their difficulty in dealing with the girl, whom prosecutors and defense agreed was a "problem child."

Court records show Shawn Marie's stepmother admitted scrubbing her with the pad while her natural father held her on the floor, legs spread. The Hitchners said the girl repeatedly lied, took food from the refrigerator and messed her underwear.

Color photographs show the girl's buttocks rubbed bright red, though no blood was drawn.

Mrs. Hitchner said Tuesday night, "As far as I'm concerned, the whole thing is over." She declined to discuss the incident or the court's decision.

Shawn Marie wasn't taken to a doctor, prosecutors say, even after her discomfort

was noted two days later by her teacher at Tropical Elementary School on Merritt Island.

Instructor Beal Hallmark reported Shawn Marie's injuries to the principal, who called Health and Rehabilitation Services (HRS) counselors.

The girl testified in court, a scene Assistant State Attorney Glenn Craig called "a tragedy for everyone involved." She said her stepmother had her eat hot peppers in punishment for her lying, and threatened to apply rubbing alcohol to the skin rubbed raw by the S.O.S. pad.

The girl also bore three burn marks credited to a cigarette and a scrape she said came from her stepmother's fingernail during the scrubbing incident. Several bruises were credited to "whippings" her mother administered with a paddle.

Both Shawn Marie and another sister have been living with their grandparents Barbara and Baynard Hitchner since December, upon order of Circuit Judge Gil Goshorn. The judge will soon hear the parents' request that the sisters be returned to them.

Prosecutor Craig said he was "disappointed" with Conkling's acquittal verdict, and maintained he could have imposed less than a punitive, maximum sentence.

Conkling refused Tuesday to discuss the case.

"The very act connotes maliciousness," Craig noted. "But I think some good has come of this; the parents may have a better understanding of their responsibilities.

"You have to be a parent to appreciate the frustrations of raising a child," he said. "But there are no nice child abuse cases."

D. The Cause of Action at Issue

Plaintiffs' invasion of privacy claim is based on Section 827.07(15) and (18)(b), Fla. Stat. (1981)[3/] which provide as follows:

> (15) Confidentiality of reports and records. --
>
> (a) In order to protect the rights of the child and his parents or other persons responsible for the child's welfare, all records concerning reports of child abuse or neglect, including reports made to the abuse registry and to local offices of the department and all records generated as a result of such reports, shall be confidential and exempt from the provisions of s. 119.07(1), and shall not be disclosed except as specifically authorized by this section.
>
> * * *
>
> (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 § 775.082, § 775.083, or § 775.084.

The penalty section of the statute makes no reference whatever to a civil cause of action or civil penalty. The District

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

Court, rather, inferred a civil cause of action from the penal provision.

E. Course of Proceedings

This action was commenced in February 1981. In January, 1987, the trial court granted partial summary judgment to plaintiffs on the issue of liability, and defendants appealed (R114-15). On November 5, 1987, the Fifth District Court of Appeal affirmed. Cape Publications, Inc. v. Hitchner, 514 So.2d. 1136 (Fla. 5th DCA 1987).

The District Court of Appeal held that the article contained information deemed to be private by § 827.07, Fla. Stat. (1981). The Court then sustained plaintiffs' statutory theory of strict civil liability in tort against the newspaper, based on the publication which purportedly violated the criminal statute.

The District Court of Appeal also rejected defendants' arguments that the publication of truthful information about criminal trials and the facts and circumstances surrounding those trials is absolutely privileged by the First Amendment. The District Court held simply that "invasion of privacy is not protected by the First or Fourteenth Amendment." Id., 514 So.2d. at 1138.

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

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal thoroughly misconstrued a confidentiality statute -- enacted to prevent public custodians from disclosing child abuse records in their official possession -- and improperly applied it far beyond its purpose, holding that the statute prevents the press from truthfully reporting about criminal prosecutions for child abuse. This Court must reverse the District Court of Appeal's decision and grant summary judgment in favor of defendants.

First, the District Court imposed strict civil liability on the press for publishing an article, based on official records given to a newspaper, which accurately reports a criminal prosecution for child abuse. The law is clear that once public officials (such as the State Attorney's office in this case) disclose official records to a newspaper, the First Amendment safeguards the right of a newspaper thereafter to republish the content of those records to the general public.

Second, the District Court of Appeal wrongly concluded that § 827.07(15), Fla. Stat. (1981) confers a civil cause of action on plaintiffs. In 1975, the Florida Legislature did add a provision to the statute establishing civil liability for a breach of its confidentiality provisions. However, two years later, and fully four years before publication of the article at issue in this case, the Legislature deleted that civil

liability provision. In any event, even if the statute did establish a cause of action for civil liability, by its very terms the statute restricts only the custodians of child abuse records from disclosing their contents; it does not prevent newspapers to whom information is disclosed from republishing that information.

This case presents important constitutional and statutory issues. Yet underlying this action is a problem in some respects more profound. The District Court of Appeal's decision threatens to silence public discussion of an issue of overwhelming contemporary public concern. Up to 5,000 children die each year as a result of child abuse; there was a 23 percent increase in child abuse deaths between 1985 and 1986 (N.Y. Times, Jan. 1, 1988, at 6, col. 1.). Comprehensive public awareness of all aspects of the child abuse crisis is indispensable to efforts to eradicate those horrible crimes. See Brief of the State Attorney of the Eleventh Judicial Circuit of Florida as Amicus Curiae, pp. 4-5. The decision below can only frustrate that necessary public awareness. That decision must be reversed.

ARGUMENT

POINT I

THE DISTRICT COURT'S IMPOSITION OF STRICT LIABILITY FOR PUBLICATION OF TRUTHFUL INFORMATION VIOLATES THE FIRST AMENDMENT

Defendants' news article reported the criminal prosecution of the plaintiffs for a second degree felony, and the rationale behind the judge's directed verdict of acquittal at the end of their trial. All of the material information in the article came from official records, willingly disclosed to the newspaper by State employees. The article is thus privileged by the First Amendment, as a matter of law.

A. News Reports About the Criminal Justice System Lie at the Heart of First Amendment Protection.

The newspaper article in this case, which reports on a criminal trial and the judicial disposition of criminal charges, lies at the core of the First Amendment. The First Amendment ensures that the public will be sufficiently informed to exercise competently its sovereignty over public institutions. There is practically universal agreement that:

> a major purpose of that Amendment was to protect the free discussion of governmental affairs.

Gardner v. Bradenton Herald, 413 So.2d 10, 13 (Fla. 1982) quoting Mills v. Alabama, 384 U.S. 214, 218, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966). Its central meaning is to foster discussion of the stewardship of public officials (New York Times Co. v. Sullivan, 376 U.S. 254, 275, 84 S.Ct. 710, 11 L.Ed.2d 686 [1964]), which is "the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). See also 2 T. Cooley, Constitutional Limitations 885-86 (8th Ed. 1927). There is a "paramount public interest in a free flow of information to the people" concerning judges and judicial administration. Garrison v. Louisiana, 379 U.S. at 77.

The press plays a particularly important role with respect to judicial proceedings. It enlightens the public by "report[ing] fully and accurately the proceedings of government." It simultaneously performs the corrective function of "bring[ing] to bear the beneficial effects of public scrutiny upon the administration of justice." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). See also, Maryland v. Baltimore Radio Show, 338 U.S. 912, 920, 70 S.Ct. 252, 94 L.Ed.2d 562 (1950) (Frankfurter, J. opinion on denial of cert.).

Press reports of judges and judicial proceedings are near the "core of the First Amendment" and "clearly serve[ ]

those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838-9, 98 S.Ct. 1535, 56 L.Ed.2d 1, 10-11 (1978). See also 1 Z. Chafee, Government and Mass Communications 432-33 (1947).

The interrelationship of the press with the criminal justice system is so close as to have been emphasized even when tensions between robust reporting and the impartial administration of justice have been the greatest:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. 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. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media. . . .

Sheppard v. Maxwell, 384 U.S. 333, 350, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). In short:

> [c]ommentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. . . . [r]obust reporting, criticism, and debate can

> contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

Nebraska Press Assn. v. Stuart, 427 U.S.539, 587, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) (Brennan, J. concurring). As this Court stated in State ex rel. Miami Herald Pub. Co. v. McIntosh, 340 So.2d 904, 910 (Fla. 1976), "[w]hatever happens in any courtroom directly or indirectly affects all the public." The press thus not only has a right to publish articles such as the one at issue in this case; indeed the press has a responsibility to the public to publish it. Cox Broadcasting Corp. v. Cohn, 420 U.S. at 492.

The District Court of Appeal, however, ignored those fundamental constitutional principles, noting merely that the "numerous United States Supreme Court cases which have struck down penal statutes which forbid the publication of statutorily protected matters" were inapplicable. Those "numerous United States Supreme Court cases," however, are dispositive of this case, and require reversal and summary judgment for the defendants.

B. The First Amendment Requires Reversal of the Decision Below and Summary Judgment for Defendants.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) itself requires reversal of this case. Cox was also a civil action for invasion of privacy. The Cox plaintiff complained that a television station had broadcast the name of a deceased rape victim in violation of a Georgia statute which made it a misdemeanor to "publish" or "broadcast" the name or identity of any rape victim.

As in this case, the reporter in Cox was permitted by a clerk to review records from which the reporter obtained the information which he subsequently published. Id., 420 U.S. at 472 n.3, 496. Because a clerk showed a document containing the rape victim's name to the reporter, the information was "publicly revealed." Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979). By showing the records to the reporter, the clerk in Cox had made them public records, just as the office of the State Attorney did with the files in this case. The Supreme Court held that the First Amendment flatly prohibits an invasion of privacy action against the press when it accurately publishes the contents of such records.

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being

> served. . . . and a public benefit is performed by the reporting of the true contents of the records by the media . . . . [T]he States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

Id., 420 U.S. at 495. Once there has been an initial "exposure of private information" by public employees (id., 420 U.S. at 496), privacy interests such as those claimed by the Hitchners are insufficient to overcome the First Amendment protection for publication of truthful information. This Court must, therefore, reverse the District Court of Appeal's decision in light of Cox.

The Supreme Court re-emphasized the crucial importance of encouraging publication of information such as that at issue in this case:

> The freedom of the press to publish that information appears 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.

Id., 420 U.S. at 495. The Court flatly rejected the theory espoused by plaintiffs in this case, as a:

> rule [which] would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published . . .

Id., 420 U.S. at 496. Though there may be privacy interests relating to official records, these interests cannot constitutionally be safeguarded by sanctioning the press; "the States must respond by means which avoid public documentation or other exposure of private information." Id. 420 U.S. at 496. While a prosecutor might therefore constitutionally refuse to turn over his case file to a reporter during an ongoing criminal trial, once he discloses the contents of the file, the First Amendment prohibits the State from imposing civil or criminal liability on the press for republishing the information to the public at large. Cf. Florida Freedom Newspapers v. McCrary, 520 So.2d 32 (Fla. 1988).[4/]

In Smith v. Daily Mail Publishing Co., 443 U.S. 97, 99 S.Ct 2667, 61 L.Ed.2d 399 (1979), the principle of Cox was broadened to afford constitutional protection to the publication of truthful information which is lawfully obtained by the press, regardless of the information's "confidential" nature and despite the unofficial status of its source.

4/ In fact, the records at issue in this case were not covered by the confidentiality provisions of § 827.07(15), and there is no state interest in confidentiality whatever. For this independent reason, the decision below must be reversed. See Brief of the State Attorney of the Eleventh Judicial Circuit of Florida as Amicus Curiae; Initial Brief of Amici Curiae The Florida Press Association, The Florida Society of Newspaper Editors, Representative Elaine Gordon and Representative Roberta Fox.

In Smith, the defendant newspaper learned of a shooting by monitoring a police band radio, and sent reporters to the scene where they learned the name of the alleged perpetrator, a 14 year-old. The newspaper published the juvenile's name and picture, thereby violating a statute prohibiting the publication of the name of a youth involved in a juvenile proceeding. [5/]

Acknowledging a legitimate State interest in protecting the anonymity of juvenile offenders, the Supreme Court nevertheless held that that privacy interest was insufficient to overcome the First Amendment right to publish truthful information obtained through "routine newspaper reporting techniques." Id., 443 U.S. at 102-103. The Court explained that "state action to punish the publication of truthful information seldom can satisfy constitutional standards." Id., 443 U.S. at 102; see also Gardner v. Bradenton Herald, 413 So.2d 10 (Fla. 1982).

Certainly, in the case at bar, defendants gathered the information contained in the news article by using "routine newspaper reporting techniques." And, the state interest in

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5/ W. Va. Code § 49-7-3 provided in relevant part:

> [N]or shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the Court . . .

maintaining confidentiality in this case -- preserving the anonymity of those allegedly involved in child abuse -- is no more significant than preserving the anonymity of youths allegedly involved in juvenile crime.

Even where the State interest in maintaining confidentiality is enshrined in a State constitution, the First Amendment nevertheless protects the publication of truthful information. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978). In Landmark, the Virginia constitution deemed all proceedings before a "judicial review commission," authorized to hear complaints as to judges' misconduct, to be confidential. The defendant newspaper, which nevertheless published an article identifying a judge being investigated, was convicted of violating a related confidentiality statute.[6/] The Supreme Court of Virginia upheld the conviction, concluding that the "sanctions [were] indispensable to the suppression of a clear and present danger

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6/ For constitutional purposes, the fact that Smith and Landmark directly involved criminal prosecutions and this case, like Cox, involves civil liability for invasion of privacy, is irrelevant because:

> what a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law . . .

New York Times Co. v. Sullivan, 376 U.S. at 277; Garrison v. Louisiana, 379 U.S. 64, 67 n.3 (1964).

posed by the premature disclosure of the Commission's sensitive proceedings. . . ." Id., 435 U.S. at 833.

The Supreme Court reversed. The Court agreed that confidentiality served legitimate state interests in "protecting the reputation of its judges" and "maintaining the institutional integrity of its courts" (id., 435 U.S. at 841), but again held that sanctioning the publication of truthful information, legally obtained, violated the First Amendment.

> We conclude that the publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom.

Id., 435 U.S. at 838. The Court flatly prohibited sanctioning of the publication of such information even though it is "withheld by law from the public domain" by confidentiality statutes. Id., 435 U.S. at 840. Accord, Stevenson v. Times Publishing Co., 48 Fla. Supp. 10 (Fla. 6th Cir. Ct. 1978) (no cause of action for invasion of privacy against newspaper which identified plaintiff as a participant in a drug treatment program); Boettger v. Loverro, 502 A.2d 1310 (Pa. 1986) (newspaper's publication of wiretap transcripts inadvertently disclosed by prosecutor held constitutionally protected, relying on Cox, Landmark and Smith).

The information published by defendants in this case was "publicly revealed" when it was released by the office of the State Attorney (as in Cox). But even if the information was "withheld by law from the public domain" (as in Landmark) that factor would not be determinative. In either event, under the holdings of Smith, Landmark and Cox, its publication is protected by the First Amendment. The District Court of Appeal's simplistic holding that "[t]ruth is not a defense against invasion of privacy", and "invasion of privacy is not protected by the First or Fourteenth Amendment" cannot stand. Cape Publications Inc. v. Hitchner, 514 So.2d at 1138. The decision under review must be reversed, and plaintiff's claim for invasion of privacy should be dismissed.

POINT II

THE DISTRICT COURT OF APPEAL WRONGLY UPHELD PLAINTIFF'S STATUTORY PRIVACY CLAIM

Even if the plaintiffs' statutory invasion of privacy claim could withstand constitutional scrutiny, the decision of the District Court of Appeal must nevertheless be reversed. The Legislature has specifically eliminated any civil remedy for violation of § 827.07, and in any event the statute does not apply to the press.

A. The Legislature Specifically Rejected a Civil Cause of Action Based on Violation of § 827.07, Fla. Stat. (1981).

The penalty section of § 827.07, Fla. Stat. (1981) provides only for criminal sanctions: one who violates the statute is "guilty of a misdemeanor of the second degree." Section 827.07 (18)(b), Fla. Stat. (1981). The statute contains no provision for a civil cause of action.

The District Court of Appeal, without any reasoned analysis, inferred a civil cause of action for violation of the statute -- indeed it imposed strict civil liability upon the defendants -- and granted summary judgment to plaintiffs. Notwithstanding the words of the statute, the District Court held that plaintiffs "did not need to show that the information

was knowingly and willfully made public [because plaintiffs] did not institute criminal charges." Cape Publications Inc. v. Hitchner, 514 So.2d at 1138. According to the District Court of Appeal, if a newspaper publishes information made confidential by § 827.07(15), the newspaper is automatically civilly liable for invasion of privacy, regardless of how it obtained the information and regardless of any knowledge, or lack of knowledge, of its purported confidentiality.

The District Court of Appeal's endorsement of a civil cause of action in this case is directly contrary to the expressed intent of the Legislature.

In 1975, the Legislature did authorize a civil cause of action, in addition to a criminal penalty, for violation of the confidentiality section of the statute when it added the following provision to the penalty section:

> 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 (emphasis added).

Ch. 75-101, § 1, Laws of Fla. and Ch. 75-185, § 1, Laws of Fla.

In 1977, fully four years before the publication at issue in this case, the Legislature again amended the penalty section of the statute, and removed the civil liability

provision. As amended, the penalty section was narrowed, with only criminal liability retained.

> (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.

The legislative history accompanying the 1977 amendment to § 827.07 confirms that the Legislature specifically intended to delete any civil liability for violation of the statute. The Staff Analysis and Economic Statement to Senate Bill 827 states unequivocally that the 1977 amendment "[r]emoves the personal liability for the release of confidential information" (A-2), and the Department of Health and Rehabilitative Services Analysis for House Bill 402 confirms both that the 1977 amendment was intended to "remove the personal liability for disclosing confidential information" (A-5) and that punishment for violation of the statute was "lessened" (A-6).

While the courts may, in a proper case, infer a civil cause of action from a criminal statute, they may do so only in the absence of any contrary indication by the Legislature.

Bass v. Morgan, Lewis & Bockius, 516 So.2d 1011 (Fla. 3d DCA 1987), Accord, Cort v. Ash, 422 U.S. 66, 78-9, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). The Legislative intent here is squarely at odds with the decision of the District Court of Appeal.

The decision below overlooked this crucial sequence of legislative actions, and thus inferred a civil action specifically rejected by the Legislature. This Court must accordingly reverse that decision.

B. The Plain Language of § 827.07 Does Not Apply to the Press.

The District Court of Appeal also misread the penalty section of § 827.07, Fla. Stat. (1981). The "confidentiality" statute is intended to limit the ability of custodians of child abuse records to disclose their contents. The statute, by its very terms, applies only to the custodians of the records -- not to the press. § 827.07 does not prevent the press from "publishing" information after a custodian of the records "discloses" it.

First, § 827.07(15) and § 827.07(18)(b) make absolutely no reference to "the press," to "broadcast" or to "print." § 827.07(15) simply declares child abuse records to be confidential and exempt from the public records law; and § 827.07(18)(b) provides a criminal penalty for one who "makes public" or "discloses" confidential child abuse records. The

press, of course, is the surrogate -- the "eyes and ears" -- of the public (Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572-3, 100 S.Ct. 2814, 65 L.Ed.2d 973 [1980]; State ex rel. Miami Herald Pub. Co. v. McIntosh, 340 So.2d 904, 908 [Fla. 1976]), and the information in this case was "made public" once it was "disclosed" to the newspaper reporter by the State Attorney's office. Accordingly, even if the records at issue here were initially within the statutory confidentiality scheme (see supra, n. 4), any statutory violation was completed before the article was ever published by the newspaper.

If the Legislature had determined to attempt to prohibit the publication of information by a newspaper, it would most assuredly have explicitly prohibited the "publication" of this information by the media, as it has done elsewhere. For example, § 794.03, Fla. Stat. (1983) provides that "no person shall print, publish, or broadcast . . ." information identifying the victim of a sexual crime. Although the constitutionality of this statute is presently being litigated (Florida Star v. B.J.F., ___ U.S. ___, 108 S.Ct. 499, 98 L.Ed.2d 498 [1987]), the text of that statute confirms that when the Legislature wants to, it can readily draft a statute which encompasses the press. It has not done so here. See Jordan v. Pensacola News-Journal, Inc., 314 So.2d 222, 223

(Fla. 1st DCA 1975) (invasion of privacy claim against newspaper based on § 63.181, Fla. Stat. [1971], declaring all records regarding the adoption of minors confidential, dismissed on the ground that the confidentiality statute applied to the custodians of the records, not to the press); Logan v. District of Columbia, 447 F.Supp. 1328, 1333 (D.D.C. 1978) ("if anyone should be liable for an invasion of privacy in this case, it should be the official who disclosed the confidential information" to the press).

C. The District Court of Appeal's Interpretation of § 827.07 Disregards More Than Forty Years of Florida Privacy Law.

For more than forty years, Florida common law has protected publication of matters of legitimate public concern. Cason v. Baskin, 155 Fla. 198, 20 So.2d 243 (1944); Jacova v. Southern Radio and Television Co., 83 So.2d 34 (Fla. 1955); Restatement (Second) of Torts § 652D (1977).

> The right of privacy does not prohibit the publication of matter which is of legitimate public or general interest. . . . It has been said that the truth may be spoken, written, or printed about all matters of a public nature, as well as matters of a private nature in which the public as a legitimate interest. . . . 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 . . .

Harms v. Miami Daily News, Inc. 127 So.2d 715, 716 (1961).

The decision below, which imposes strict statutory liability on the press for publishing a report of a criminal trial and the facts and circumstances surrounding that trial, is wholly at odds with settled privacy law. If the Legislature had intended so seriously to restrict publication of news of public concern, most assuredly the legislative history would address that rather draconian step. There is no such discussion, however, because the Legislature had no such intent.

CONCLUSION

In Cox Broadcasting, the Supreme Court emphasized that the commission of a crime and all judicial proceedings arising from it are "without question" events of legitimate public concern which the press has a responsibility to report. Id., 420 U.S. at 492. Most assuredly, the public interest in the functioning of the criminal justice system is not diminished because the victims of violent crime are infants and children. When criminal defendants are acquitted of child abuse, despite their confessions, in part because of the absence of a lesser included offense and limited sentencing options of the trial judge, the public interest is manifest.

The First Amendment protects the publication of news articles concerning such issues, notwithstanding the District Court of Appeal's conclusion that neither the truth nor the Constitution is pertinent to this case. The Legislature has not forbidden such news reports. This Court should reverse the decision and grant summary judgment in favor of defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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