O/a 8-30-84.

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 71,554

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

Defendants-Petitionerg,

v.

PHILLIP HITCHNER and
BARBARA HITCHNER,

Plaintiffs-Respondents.

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

PETITIONERS' REPLY BRIEF

Jack A. Kirschenbaum
WOLFE, KIRSCHENBAUM & PEEPLES, P.A.
P.O. Box 757
Cocoa Beach, Florida 32931
(407) 783-2218

Florence Snyder Rivas
EDWARDS & ANGELL
250 Royal Palm Way
P.O. Box 2621
Palm Beach, Florida 33480
(407) 833-7700

John B. McCrory
Robert C. Bernius
Patricia A. Ayers
NIXON, HARGRAVE, DEVANS & DOYLE
One Thomas Circle
Suite 800
Washington, D.C. 20005
(202) 223-7200

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES — PAGE

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This brief is submitted on behalf of defendants in reply to plaintiffs' Answer Brief (hereinafter cited "Pltf. Ans. Br. __") and to the brief amicus curiae filed in support of plaintiffs (hereinafter cited "Pltf. Amicus __").

Because of plaintiffs' factual arguments, it is important to note what is not at issue on this appeal. Plaintiffs' complaint includes counts for libel and "false light'' invasion of privacy. As an essential element of both of those counts, plaintiffs must prove the falsity of defendants' news report (R5-9). Plaintiffs did not, however, move for summary judgment on those counts. Thus, although defendants claim the article is true, that claim was not presented to, or determined by, the court below. Neither falsity nor truth is at issue on this appeal.

Although plaintiffs and their amicus argue that the article is false and that plaintiffs used an SOS pad on the child only "as a symbolic object lesson," by "pretending to scrub her like a kitchen pot" (Pltf. Amicus 1), the truth of the article remains to be determined at a later stage in this case. The District Court of Appeal also recognized that truth or falsity is not an issue on this appeal. The only cause of action before this Court is plaintiffs' claim for "private facts" invasion of privacy, as to which falsity is not an element. Thus, in the context of this appeal, this Court should not be concerned with truth or falsity, but must

recognize that the legal principles established in this case will most assuredly apply to entirely truthful publications in other cases.

The District Court of Appeal imposed strict civil liability on defendants for publishing truthful information released to the press by state employees. Its decision is squarely at odds with the United States Constitution and established Florida law.

ARGUMENT

POINT I: THE FIRST AMENDMENT REQUIRES REVERSAL

Plaintiffs thoroughly fail to distinguish this case from the constitutional principles established in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); Landmark Communications Inc. v. Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978); and Smith v. Daily Mail Publishing Co., 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979). Under the First Amendment, a state may not impose civil or criminal liability for publication of truthful information, particularly when it is derived from official records as in this case.

Plaintiffs' efforts to avoid the holding of Cox are unsuccessful. In Cox, the U.S. Supreme Court prohibited liability for invasion of privacy when the press accurately publicized the contents of official records disclosed to it by

a state employee. Plaintiffs argue that the records in this case were not "open to public inspection" as they were in Cox (Pltfs. Br. 11-12). Their argument fails, however, because the manner in which the information "was placed in the public domain" in Cox is identical to the means of disclosure to defendants in this case. Oklahoma Publishing Co. v. District Court, 430 U.S. 308, 311 n.2, 97 S.Ct. 1045, 51 L.Ed.2d 355, 359 n.2 (1977).

Both in this case and in Cox, the information published by the defendants came from official records maintained in connection with a public prosecution. In neither case was the disputed information revealed during a court proceeding, but instead was disclosed to the press by a state employee. The court clerk in Cox simply showed the protected records to a reporter, just as the State Attorney's office showed the file to the reporter in this case. Compare R41-47; 109-110 with Cox, 420 U.S. at 472 n.3, 496. When the clerk in Cox showed the records to the reporter, the information was "placed in the public domain" (Oklahoma Publishing Co. v. District Court, 430 U.S. at 311 n.2), and its later dissemination by the press could not constitutionally be deemed a tortious invasion of privacy. By the same token, because the State Attorney's office showed the information at issue in this case to defendant Maupin, any liability of defendants for invasion of privacy is constitutionally forbidden.

Nor do plaintiffs make any serious effort to distinguish this case from the Supreme Court's holding in Smith v. Daily Mail Publishing Co., 443 U.S. at 102-03, that individual privacy interests are insufficient to overcome the First Amendment right to publish truthful information obtained through "routine newspaper reporting techniques." The Smith reporter learned of confidential information by monitoring a police band radio and by questioning the police and a prosecutor. The defendant reporter in this case also used the most fundamental of "reporting techniques" when he asked the State Attorney a question, and simply read the materials willingly supplied to him in response to his inquiry.

Finally, plaintiffs and their amicus fail to provide any basis to distinguish Landmark Communications, Inc. v. Virginia from this case. In Landmark, the Supreme Court vigorously upheld the constitutional right to publish truthful information even though it is deemed confidential both by statute and a state constitution. The right of a free press to publish truthful information in its possession was held paramount, even at the expense of legitimate state interests in protecting the reputation of its judges and the institutional integrity of its courts. Landmark compels reversal in this case.

Unable to support their case under a legitimate constitutional analysis, plaintiffs suggest that the reporter

in this case obtained the information unlawfully (Pltf. Ans. Br. 12; Pltf. Amicus 10), and that defendants seek from this Court a "license to steal" (Pltf. Amicus 5) and the constitutional authority to "purloin" confidential data (Pltf. Ans. Br. 9).

Plaintiffs' derogatory characterizations have no factual support whatsoever in the record. Moreover, plaintiffs thoroughly confuse decisions concerning the rights of the press to gain access to information with holdings discussing the right to publish information already in the press's possession.

First, there is no evidentiary support whatever for the claim that reporter Maupin "stole" or "purloined" the information ultimately published. Plaintiffs' complaint alleges no theft or trespass (R2-9), and the court below obviously reached no such conclusion. The reporter simply asked the State Attorney a question, was voluntarily handed the prosecutor's case file, and read the file for about an hour in the reception room of the State Attorney's office, in full view of anyone who walked by (R41-47; 109-110). Neither the file nor anything in it was marked confidential (R83, 88), and no one made any attempt to withhold any information from the reporter. Contrary to plaintiffs' sinister suggestions, there was nothing unlawful about the reporter's actions, and he had no obligation to ignore information willingly provided to him. *See* Oklahoma Publishing Co. v. District Court, 430 U.S. at 311.

Nor does this case involve a claim by defendants that they must constitutionally be afforded access to confidential data, even though plaintiffs, unable successfully to distinguish this case from the holdings in Cox, Landmark and Smith, attempt to redefine defendants' arguments by shifting the focus from publication to access.

Plaintiffs rely almost exclusively upon decisions which define the scope of the right of access to information it does not have. See In re Adoption of H.Y.T., 458 So.2d 1127 (Fla. 1984). Those access decisions cannot, however, properly be read to limit the right of the press to publish information in its possession, for the constitutional right to publish is obviously more expansive. As this Court recently stated in Palm Beach Newspapers, Inc. v. Burk, 504 So.2d 378 (Fla. 1987), review denied, 506 So.2d 1037 (1987), cert. denied, 56 USLW 3354, 108 S.Ct. 346, 98 L.Ed.2d 372, "[t]he 'right to speak and publish does not carry with it the unrestrained right to gather information.'" Accord, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 585, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (Brennan, J. concurring)("[w]hile freedom of expression is made inviolate by the First Amendment, and, with only rare and stringent exceptions, may not be suppressed [citations omitted], the First Amendment has not been viewed by the Court in all settings as providing an equally categorical assurance

of the correlative freedom of access to information [citations omitted]").

Despite plaintiffs' misperception of the issue, this is **not** a press access case. The information published was freely given to the reporter without any conditions or restrictions on its use. The only issue presented by this appeal is whether defendants invaded plaintiffs' privacy by accurately publishing official information already in its possession. Cox, Smith and Landmark affirm that defendants may not be held liable.

The numerous access cases cited by plaintiffs are therefore inapplicable. Similarly, where access is obtained on condition that publication not take place, quite different constitutional considerations apply. For example, plaintiffs rely on Mayer v. State, 523 So.2d 1171 (Fla. 2nd DCA 1988), where the trial judge permitted a reporter to attend a child custody hearing on the express condition that she would not publish any of the information she obtained. Nevertheless, the reporter published the information, and the court concluded that the reporter could be held in contempt for breaching her express agreement with the court. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), presents an issue of conditional access conceptually similar to Mayer. In Rhinehart, the newspaper, a defendant in the libel case, was granted access to pre-trial discovery information in

that case on the express condition that the information would not be published. The First Amendment was held not to overcome that contractual condition. In this case, the reporter asked for information and a state official voluntarily, and unconditionally, handed it to him. The analyses of "conditional access" in Mayer and Rhinehart are thus irrelevant.

Plaintiffs also rely on The Florida Star v. B.J.F., 499 So.2d 883 (Fla. 1st DCA 1986), review denied, 509 So.2d 1117 (Fla. 1987), appeal pending; and Patterson v. Tribune Co., 146 So.2d 623 (Fla. 2nd DCA 1962), cert. denied, 153 So.2d 306 (Fla. 1963), which, although not controlling, are at least relevant to the issue before this Court. In Patterson, plaintiff claimed that her privacy was invaded when the defendant published a public court docket entry which noted plaintiff's commitment as a narcotic addict. Patterson, decided thirteen years before the Supreme Court's decision in Cox, has unquestionably been superseded by that subsequent Supreme Court ruling.

The decision in The Florida Star v. B.J.F., supports plaintiffs' argument, but is currently pending review on the merits in the United States Supreme Court (No. 87-329), and is also pending in this Court on a certified question. Its reasoning directly conflicts with the holding of Cox, and it should be rejected by this Court in this case. See Doe v. Gonzalez, No. 85-8452-Civ, (slip op. at 7-8, 15) (S.D. Fla.

May 31, 1988) (annexed hereto) (Section 112.317[6] Fla. Stat. applies to the news media, and is thus facially unconstitutional as a matter of law).

The First Amendment requires reversal of the decision below.

POINT 11: FLORIDA LAW REQUIRES REVERSAL

The District Court of Appeal relied squarely on § 827.07, Fla. Stat. (1981) to impose civil liability on defendants, contrary to the intention of the Legislature, which specifically deleted the statute's civil liability provision four years before defendants published the article.

Confronted with the legislative intent, plaintiffs now eschew reliance on the statute (Pltf. Ans. Br. 19) and assert a common law invasion of privacy claim, but simultaneously contend that § 827.07 establishes one element (Pltf. Ans. Br. 19-20; Pltf. Amicus 3), or perhaps all elements (Pltf. Amicus 13, 15), of that common law cause of action, as a matter of law. Whether or not plaintiffs agree, their privacy cause of action is based squarely upon the statute, and is wholly inconsistent with the Legislature's determination to eliminate civil liability for violation of the statute.

Plaintiffs and plaintiffs' amicus are also understandably reluctant to acknowledge that the District Court

imposed strict liability. Instead, they fancifully assert that their action is a "negligence" action (Pltf. Amicus 3, 15), which it clearly is not. The District Court of Appeal held defendants strictly liable for publishing material encompassed within § 827.07, Fla. Stat. The District Court rejected any requirement of scienter, made no mention of a negligence test, and thus imposed liability without fault, in contravention of the First Amendment. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967).

Even assuming plaintiffs do allege a common law invasion of privacy cause of action, their claim still fails because the newspaper article discusses a topic of legitimate public concern and thus, as a matter of law, it is not actionable.

Plaintiffs agree that to establish a common law invasion of privacy action for publication of private facts they must prove that the article:

> (a) would be highly offensive to a reasonable person; and
>
> (b) is not of legitimate concern to the public.

(Pltf. Ans. Br. 22). Included within the scope of legitimate public concern are "matters of the kind customarily regarded as 'news'. . ." Restatement (Second) of Torts § 652D comment g (1977).

In the decision which first recognized the right of privacy in Florida, this Court cautioned that "the right of the general public to dissemination of news and information must be protected and preserved," recognized that the right of privacy "does not prohibit publication of matters of general or public interest," and endorsed the publication of "legitimate news." Cason v. Baskin, 155 Fla. 198, 20 So.2d 243 251 (1944); see Jacova v. Southern Radio and Television Co., 83 So.2d 34 (Fla. 1955); Harms v. Miami Daily News, Inc., 127 So.2d 715, 716 (Fla. 3d DCA 1961).

The news story at issue in this lawsuit reports plaintiffs' criminal trial for aggravated child abuse, and the facts and circumstances relating to that trial. Plaintiffs "don't dispute the First Amendment right of the press to report any matters brought out in" plaintiffs' criminal prosecution (Pltf. Ans. Br. 8). Nor, understandably, do plaintiffs take issue with "the press's assertion of their right to report, criticize and foster debate on the judicial system as a whole" (id.). Plaintiffs, however, seek to have this Court sever the events which occurred at their trial from their factual context.

The news article reports the disposition of child abuse charges. The public interest in knowing about allegations of child abuse, and the response of the police and the courts to those allegations, is not circumscribed to the

extent postulated by plaintiffs. At the very least, the child's pre-trial statements to the prosecutor lend a background to the testimony which she gave at the public criminal trial. For example, only by comparing the child's pre-trial statements with the testimony given in open court can the public assess whether or not the "face-to-face presence [at trial] upset the truthful . . . abused child" and affected the content of her testimony. *Coy* v. Iowa, 56 USLW 4931, 4933 (U.S. June 29, 1988) (No. 86-6757). That assessment, and other issues suggested by the news report, would be proscribed under plaintiffs' unprecedented common law privacy theory. The common law thus rejects plaintiffs' theory: the common law right to report matters of legitimate public concern encompasses all peripheral matters that have some "substantial relevance" to a matter of public interest. Gilbert v. Medical Economics, 665 F.2d 305, 308-309 (10th Cir. 1981). News reports need not be devoid of context. Plaintiffs' claim must fail because there is a "logical nexus" between the statements of which they complain and the report of the trial, concededly a matter of legitimate interest. Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980). Clearly, the entire news article directly relates to plaintiffs' criminal prosecution for aggravated child abuse, and is not actionable.

Defendants' news article reports a particular instance of child abuse and neglect, a problem of the most profound

public interest and concern. In a government report released within the last two weeks, it was found that "an estimated 25.2 children per 1,000 or a total of more than one and one-half million children nationwide experienced abuse or neglect in 1986." National Center on Child Abuse and Neglect, Study of National Incidence and Prevalence of Child Abuse and Neglect, p. vi (December 1987).[1/] "Countable cases" of child abuse increased 74% since 1980 (id at p. vii), and the figures in the report must be regarded as "minimum estimates of the numbers of abused and neglected children" (id at p.7-2, emphasis in original).

It would be tragic to choke off public discussion of child abuse and neglect through an unprecedented expansion of the contours of the tort of invasion of privacy. And it would be equally abhorrent for this Court to grant the Legislature the right to declare, without limitation, what topics may be discussed by the citizens and newspapers of this State. The decision of the court below has done precisely that.

1/ The National Center on Child Abuse and Neglect is an office within the Federal Department of Health and Human Services. See 42 USC § 5105. Its study was released June 30, 1988.

CONCLUSION

This Court must reverse the decision below, and grant summary judgment in favor of defendants on the "private facts" invasion of privacy cause of action.

Dated: July 14, 1988

Respectfully submitted,

Jack A. Kirschenbaum
WOLFE, KIRSCHENBAUM & PEEPLES, P.A.
P.O. Box 757
Cocoa Beach, Florida 32931
(305) 783-2218

Florence Snyder Rivas
EDWARDS & ANGELL
250 Royal Palm Way
P.O. Box 2621
Palm Beach, Florida 33480
(305) 833-7700

John B. McCrory
Robert C. Bernius
Patricia A. Ayers
NIXON, HARGRAVE, DEVANS & DOYLE
One Thomas Circle
Suite 800
Washington, D.C. 20005
(202) 223-7200

John B. McCrory

Attorneys for Defendants-Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioners' Reply Brief has been mailed to the following this 14th day of July, 1988:

William E. Weller, Esq.
101 N. Atlantic Avenue
P.O. Box 1255
Cocoa Beach, FL 32391

Joel D. Eaton, Esq.
25 West Flagler St.
Suite 1201
Miami, FL 33130

Janet Reno, Esq.
State Attorney
Paul Mendelson, Esq.
Assistant State Attorney
Metro Justice Building
1351 Northwest 12th Street
Miami, FL 33125

Gerald B. Cope, Jr., Esq.
Greer, Homer, Cope & Bonner, P.A.
Southeast Financial Center
Suite 4870
200 South Biscayne Boulevard
Miami, FL 33131

George K. Rahdert, Esq.
Alison M. Steele, Esq.
RAHDERT, ACOSTA & DICKSON, P.A.
233 Third Street North
St. Petersburg, FL 33701

Patricia A. Ayers
Patricia A. Ayers