O/a 8-30-84

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

REPLY BRIEF 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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INTRODUCTION

These amici file this brief in reply to both the brief of the Hitchners and that of their amicus, the Academy of Florida Trial Lawyers (AFTL).

The Hitchners admit that the truth or falsity of the newspaper story is not at issue in this appeal and in fact, the Hitchners have stipulated that the statements of which they complain appear in the State Attorney's records which the reporter reviewed as a source for the article. (R.llO) Furthermore, as this Court can readily discern from the transcript of the criminal trial to which Hitchners and their amicus make reference, the Hitchners were acquitted based on the judge's finding that what they did to their child did not warrant a felony conviction and a possible 15 year prison sentence. (T-84-84) The truth of the scrubbing incident (described by the AFTL as a "symbolic object lesson") is not contested and, as the criminal trial transcript and plaintiff's complaint indicate, its occurrence is unquestioned.[1] Indeed, the Hitchners admitted to

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[1] Amicus the Academy of Florida Trial Lawyers' characterization of the testimony at the Hitchners' criminal trial is wholly inaccurate. There was no testimony that "the child's anal area was red and raw because of a rash," or that "the SOS pad was applied well above the anal area, in the area of the coccyx, and lightly at that." (Brief of Amicus AFTL at 1). The child's testimony revealed that she was scrubbed "on (her) bottom...in the back.. .where (she) go(es) to the bathroom." (T-27). Beverly Jones, the HRS intake counselor who observed the injury, described a "red raw mark in the crack of her behind, and some bruises on her buttocks." (T-64). Sheriff's Office Investigator Christine Barringer described "black and blue marks on her buttocks and in between the crack in her cheeks in the rectum

investigators who questioned them and testified at their criminal trial that Mrs. Hitchner scrubbed the child's rectal area with an SOS pad while Mr. Hitchner held the child down. (T-58, 67, 71).

This appeal concerns solely the issue of whether the newspaper invaded the Hitchners' privacy by accurately printing information taken from government documents. To characterize the action as based on misrepresentations as does the AFTL is a disservice to this Court. Furthermore, to assert, as the Hitchners do, that the reporter engaged in a **"ruse"** to obtain confidential documents is a misrepresentation of what occurred. The state attorney's office freely provided its file to the reporter. (R. 110).

Contrary to AFTL's assertions, the issues raised by these amici as to the applicability and constitutionality of Section 827.07 were raised by the petitioners below and in its briefs in this Court, and are therefore properly before this Court now. **See** Acton V. Fort Lauderdale Hospital, 418 So.2d 1099 (Fla. 1st DCA 1982), approved, 440 So.2d 1282 (1983).

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area it was all rubbed red & raw." (T-50). The child's teacher described the injury as a "horrible red, raw area" **"in** her private parts" "and it had to have been in some manner scraped considerably to be in that **condition."** (T-11-12). The teacher, a mother herself, denied that the injury looked like "diaper rash." (T-14). Another school official described **"a** great deal of red area around the rectum, from the rectum on out to the cheek part." (T-18). While the child did have a rash before the scrubbing, it did not hurt until after the incident. (T-30). In addition, the child testified that her step-mother threatened to scrub her again if she did not tell the truth about taking treats from the kitchen. (T-29-30).

ARGUMENT

I.

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY IN FAVOR OF THE HITCHNERS.

Both the Hitchners and their amicus AFTL contend that the Fifth District Court below did not impose strict liability for the newspaper's publication of information from government records declared confidential by statute. Rather, they argue, the court merely held that the plaintiffs had proven all of the elements of the common law cause of action for invasion of privacy including the privacy of the facts published and the negligence of the publication which both flow from Section 827.07. Clearly, then the court decided that the newspaper was liable as a matter of law notwithstanding the fully asserted constitutional and common law defenses. Indeed, the courts below rejected the argument that defenses of any nature were available to the newspaper. This is the essence of strict liability. The United States Supreme Court clearly has rejected liability without fault in the context of publications by the media, even where those publications are false, in both defamation and in invasion of privacy cases. Cantrell v. Forest City Publishing Co., 419 U.S. 245, 95 S.Ct. 465, 42 L.Ed.2d 419 (1974); Gertz v. Robert Welch, Inc., 418 U.S. 323, 93 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).

The Hitchners did not even plead a cause of action for negligence. The complaint clearly alleges that the newspaper published the statements at issue in this case in direct and willful violation of the statute making the records confidential. Nevertheless, the Hitchners and their amicus now characterize the action as one sounding in negligence because courts below granted judgment in favor of the plaintiffs on the basis that the newspaper was liable as a matter of law where the source records were confidential. Such a cause of action was not even pleaded.

Both the Hitchners and their amicus argue that the Hitchners' action was brought pursuant to the common law of invasion of privacy and the statute was only used to establish that the facts were private, not as a basis for the cause of action itself. Both argue that the repeal of the civil liability provision in the statute has no effect on this case because that provision applies only to custodians, not to the press. However, anomalously, both argue the statutory confidentiality provision and penalty for publication applies to the press as well as to the custodians of records, and the press must heed the legislature's determination that the facts are private. Thus, without any basis in any express statutory language distinguishing the repealed civil liability provision from the remaining provisions, they argue the former only applies to custodians while the latter applies to the press as well. They cannot have it both ways. This free-wheeling, **"intuitive"** grasp of legislative intent is

slippery, indeed.

II.

THE CONSTITUTIONAL FREEDOM TO PUBLISH INFORMATION FROM GOVERNMENT RECORDS CANNOT BE REGULATED BY STATUTE.

Both the Hitchners and the AFTL cite Patterson v. Tribune Co., 146 So.2d 623 (Fla. 2d DCA 1962) as authority for the proposition that the press is bound to observe the confidentiality statute as a prohibition on publication. However, as argued by these amici in their initial brief on the merits and unrefuted by the Hitchners and their amicus, the Patterson case was clearly superseded by the United States Supreme Court decision in Cox Broadcastins Corp. V. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), as well as the Second District's much more recent opinion in Doe v. Sarasota-Bradenton Florida Television Co.. Inc., 430 So.2d 328 (Fla. 2d DCA 1983). In Cox, an analogous criminal statute prohibited the publication of the name of a rape victim; the plaintiff there sued for invasion of privacy asserting that the information was published in violation of the statute. However, directly contrary to the court's holding in Patterson, in which the information declared private by statute was disclosed in the public court docket, the Supreme Court in Cox held that the plaintiff could not recover damages for invasion of privacy where the media obtained the information published from indictments shown to the reporter by the court clerk. The Hitchners' and their amicus' continued

reliance on Patterson, therefore, is misplaced and inexplicable.

Although as indicated, the Supreme Court in **Cox** addressed only the narrow question of whether the media could be liable in damages for publishing embarrassing restricted information obtained from unrestricted documents, there is no indication in the Court's rationale that the decision would have been different if the documents themselves were exempt from disclosure. The Court's opinion clearly indicates that at the very least, disclosure of information in public documents is protected if the facts published were newsworthy as a matter of law. The Hitchners and the AFTL argue that the Court held the opposite: that information not contained in public records is not newsworthy. This perverts the holding of **Cox** and is unsupported by the Court's reasoning and Cox's progeny.

Citing **Cox**, the Court later decided Oklahoma Publishing Co. v. District Court, **430** U.S. **308, 97** S.Ct. **1045, 51** L.Ed.2d **355 (1977),** which is dispositive of this case. There, the Court held that the First Amendment protects the media's publication of information obtained from a hearing which by statute should have been closed, but which court officers allowed the press to attend. These are the same circumstances under which the media in this case obtained the allegedly actionable statements; therefore, the Fifth District was clearly wrong in holding that the First Amendment does not protect the press in this case. Neither the Hitchners nor the trial lawyers offer any argument to

distinguish this case from Oklahoma Publishing.

In addition, contrary to the arguments of the Hitchners and their amicus, whether the statue in question says that the documents lose their confidentiality once they are revealed by the custodian is not determinative of this case. In addition to the Cox and Oklahoma Publishing cases, other courts have clearly held, based on Cox, that information declared confidential by statute, but inadvertently made part of a public file, becomes part of the public record for purposes of the media's privilege to disseminate it. In Howard v. Des Moines Resister, 283 N.W. 2d 289 (Iowa 1979), cert. den., 445 U.S. 904 (1980), for example, a patient medical record indicating that an institutionalized 18-year-old girl had been sterilized, which was confidential pursuant to statute, had been forwarded from the custodian to the Governor's office and made part of a non-confidential file of complaints against the agency authorizing the sterilization. The court ruled that the document lost its confidentiality once the Governor accepted custody of it, and therefore, the press did not invade the girl's privacy when it published the contents.

Similarly in Montesano v. Donrey Media Group, 688 P.2d 1081 (Nev. 1983), cert. den., 466 U.S. 959 (1984), the Nevada Supreme Court held that confidential records regarding a minor, which had been inadvertently included in the public court record, had become part of the public record within the meaning of Cox. Likewise, in Boettser v. Loverro, 502 A.2d 1310 (Pa. Super.

1986), the court ruled that a newspaper could not be punished by civil damages for disclosures resulting from the negligence of custodians of confidential records. There, the plaintiff sued the newspaper based on a statute providing a civil cause of action in favor of persons aggrieved by public disclosure of intercepted oral communications, when the newspaper published a story using confidential transcripts of wiretaps that were inadvertently left in a file open to the public.

When the Hitchners' prosecution terminated in their favor, the prosecutor's case file became subject to public inspection under the Public Records Act. Tribune Co. v. Public Records (Miller/Jent), 493 So.2d 480 (Fla. 2d DCA 1986); Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d 775 (Fla. 4th DCA 1985). The Hitchner records were thus part of a public file when the reporter reviewed them.

However, as the Boettger case indicates, whether the State Attorney improperly disclosed the reports in his file to the newspaper or was bound to disclose the file is not significant. The law does not authorize civil punishment of the media where it publishes information obtained through the failure of a government records custodian to withhold records.

It is a misinterpretation of the media's argument to posit that this case turns on whether or not the information published was information already made **"public."** These amici refer the Court to the arguments fully presented by Petitioners

and on their behalf as to the impropriety of summary judgment based on the statutory cause of action the Hitchners alleged. In addition, neither the Hitchners' complaint nor the law of this State supports a summary judgment here based on the common law cause of action for invasion of privacy. The key elements of the common law cause of action for publication of embarrassing and private facts are 1) that the newspaper published facts about their private life, 2) which would be highly offensive to a reasonable person, and 3) which were not of legitimate interest to the public. Cason v. Baskin, 155 Fla. 198, 206, 20 So.2d 243, 251 (Fla. 1945); Stafford v. Hayes, 327 So.2d 871 (Fla. 1st DCA 1976); Harms v. Miami Daily News, Inc., 127 So.2d 715 (Fla. 3d DCA 1961); see also Restatement (Second) of Torts § 652D. Thus, even if a newspaper publishes "private facts" about a plaintiff, the publisher is not liable where those facts are of legitimate public interest. As thoroughly argued in these amici's initial brief on the merits, facts showing that parents acquitted of child abuse charges who actually had admitted having committed the act that led to the charge and who may have committed other acts of abuse, are facts of legitimate public concern and public interest.

III.

THE CONFIDENTIALITY STATUTE CANNOT CONSTITUTIONALLY APPLY TO THE PRESS.

These amici adopt the arguments of the State Attorney of the Eleventh Judicial Circuit, the Florida Press Association,

the Society of Newspaper Editors, and Representative Elaine Gordon and Roberta Fox, and the arguments of the Petitioners and reiterate their own argument that the confidentiality provision upon which the Hitchners rely was not intended to restrict what the press can publish. The statute, an exemption to the Public Records Act, by its terms and history, governs only the activities of the records custodians. Whether the government can constitutionally deny public and press access to information is not at issue in this case. The fact is that, here, the government itself freely provided the information. Therefore, Houchins v. KOED, Inc., 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978), Florida Freedom Newspapers, Inc. v. McCrary, 520 So.2d 32 (Fla. 1988), In re Adoption of HYT, 458 So.2d 1122 (Fla. 1984), and Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982) are inapplicable here and do not support the lower courts' decisions in this case. These cases concern government controls on access to information, not tort punishment for publication of information legally obtained. None of these cases supports a holding that a court or a legislature can prohibit the media from publishing information in the first instance or that publication would be an actionable invasion of privacy.

Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S.Ct. 2199, 81 L. Ed.2d 17 (1984), also cited by the Hitchners and their amicus, arose in the unusual context of court-compelled pretrial discovery from a libel plaintiff and was expressly

limited by the Court to those facts. There, the Court granted the motion to compel but entered a protective order restricting the newspaper's use of its information to defense of the libel lawsuit. The Court upheld the order on the basis of any court's inherent power to control the discovery process. Furthermore, the interest protected by the order was the constitutional interest in freedom of religion and association, not merely a general right of privacy as asserted by the Hitchners.

Similarly, the Second District Court's decision in Mayer v. State, 523 So.2d 1171 (Fla. 2d DCA 1988), concerned the court's allowing a reporter to attend a confidential proceeding on the agreed condition that she would not publish any information if the judge's further research revealed that the hearing by law should have been closed. The court found that the reporter intentionally violated her agreement and sustained her conviction of contempt on this basis. In the present case, there was no such condition and no such agreement.

Both the Hitchners and the AFTL argue, based on these and other cases, that the First Amendment's protections must be balanced in this case against the privacy interests of the Hitchners. They somehow discern that by enacting the statute, the legislature must have undertaken this analysis, and struck the balance in favor of confidentiality. They further argue that the Hitchners' summary judgment should stand because the legislature has already determined that the facts published are private

facts and cannot under any circumstances be freely published. This argument proves too much: it necessarily admits prior restraint and strict liability which the Hitchners otherwise attempt to avoid. The confidentiality statute, as applied by the lower courts and the Hitchners, is a legislative determination as to what the press may publish. The statute thus construed is a classic example of legislative censorship, prohibited by the First Amendment. In Gardner v. Bradenton Herald, Inc., 413 So.2d 10 (Fla. 1982), cert. den., 459 U.S. 865 (1983), this Court held invalid as applied a virtually indistinguishable statute on the grounds that it was a blanket prohibition on publication of information (the names of unindicted wiretap subjects) incorporating no mechanism for balancing the interests in the privacy of that information against the interests protected by the First Amendment on a case-by-case basis. See also Globe Newspapers v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). As this Court itself has made clear, the legislature does not possess the constitutional power to declare publication of whole categories of information off limits to the press.[2]

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[2] See also Landmark Communications, Inc. v. Commonwealth of Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978). A legislature's determination that confidentiality interests are best served by a prohibition on publication is, and must be, reviewable de novo by the courts.

> 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.

Furthermore, the common law cause of action for invasion of privacy takes the competing First Amendment guarantees and privacy interests into account by providing that the media can be liable for publishing private facts only where they are not of legitimate public concern and interest or related to a matter of such interest. Newsworthiness is a matter which must be left to a case-by-case determination. To allow the legislature to determine in advance that certain facts are not newsworthy and therefore effectively punish their publication a priori, is to allow censorship. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974).

This Court should not be swayed by the assertions of the Hitchners and their amicus that the United States and Florida Constitutions protect their interests in privacy in derogation of the First and Fourteenth Amendments. The cases they cite in support of this argument arose in situations where the government sought to infringe on the privacy of its citizens, not where the countervailing guarantees of a free press were at issue. Both the Hitchners and the AFTL fail to reveal that the court in Doe v. Sarasota-Bradenton Florida Television Co., Inc., 430 So.2d 328 (Fla. 2d DCA 1983), in commenting on the Florida Constitution's protection of its citizens' "right to be let alone," noted that that provision must yield to the federal Constitution's guarantee

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435 U.S. at 844, 98 S.Ct. at 1549, 56 L.Ed.2d at 13.

of press freedom. 436 So.2d at 330.

Also, contrary to the assertions of the Hitchners and the AFTL, the status of the plaintiff does not determine whether the First Amendment protects the newspaper in this case. The cases cited by the Hitchners and the AFTL in support of this assertion are all defamation cases where the plaintiff's status as a public official, public figure, or private person determines the standard of fault applicable to the media. However, the present case does not involve the publication of falsehoods, but the publication of true facts. The newsworthiness of those facts is an absolute defense to this action. Whether facts are newsworthy depends on editorial judgment, not on their source or the status of the Plaintiff as someone other than a public official or figure.

The courts recognize that the media play a vital role in monitoring the activities of government. Were the government authorized to prohibit or punish publication of information by declaring it confidential, the media's role could and would be seriously limited, at the expense of the right of the people to learn about the activities of government. That the criminal justice system may have failed in the Hitchners' case is obviously of serious concern to the citizens of this state. It is of even greater concern that a government secrets act is construed to impose prior punishment on political speech. The statements the Hitchners complain of are therefore newsworthy, and a

contrary determination cannot constitutionally be made in advance for all cases by the legislature.

CONCLUSION

The lower courts' rulings that the newspaper is liable in this case as a matter of law for invading the Hitchners' privacy based on a Public Records Act exemption presents a dangerous precedent for the law of this State. It places the members of this State's media at risk of litigation each time they publish information taken from confidential government records, no matter how important that information might be to the citizens of this State. Protected speech is necessarily chilled, while the government is empowered to cast a shroud of secrecy over unlimited areas of information. To recognize a power in the legislature to declare publications unlawful and unprotected by the First Amendment by enacting confidentiality statutes is to recognize and to condence judicially the power of censorship. Because the statements published in this case are clearly of substantial concern to the self-governing people of this State, this Court should reverse summary judgment for the Hitchners and remand this case to the trial court for entry of summary judgment in favor of the Defendants.

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CERTIFICATE OF SERVICE

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McCrory, Esquire, One Thomas Circle, Suite 800, Washington, DC 20005 this 11 day of July, 1988.

George K. Rahdert, Esquire