IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,321

District Court of Appeal,
First District Case No. 97-2864

MORRIS COMMUNICATIONS COMPANY,
et al., Petitioners,

vs.

SUSANNE Y. FRANGIE,
et al., Respondents.

AMICUS CURIAE BRIEF OF FERNANDINA BEACH NEWS-LEADER, INC.; FLORIDA SOCIETY OF NEWSPAPER EDITORS; GAINESVILLE SUN PUBLISHING COMPANY; KNIGHT-RIDDER, INC., PUBLISHER OF THE MIAMI HERALD; LAKE CITY REPORTER, INC.; LAKELAND LEDGER PUBLISHING CORPORATION; OCALA STAR-BANNER CORPORATION; PALATKA DAILY NEWS, INC., PUBLISHER OF THE DAILY NEWS AND THE MARCO ISLAND EAGLE; SARASOTA HERALD-TRIBUNE CO.; SEBRING NEWS-SUN, INC.; TAMPA TELEVISION, INC., D/B/A WFLA-TV CHANNEL 8; AND THE TRIBUNE COMPANY, PUBLISHER OF THE TAMPA TRIBUNE.

Charles A. Carlson
Florida Bar No. 716286
Barnett, Bolt, Kirkwood & Long
601 Bayshore Boulevard
Suite 700
Tampa, FL 33606
(813) 253-2020

Counsel for Amici

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF INTEREST OF AMICI

Amici,[1] as members of the news media, regularly receive subpoenas seeking information obtained during the course of newsgathering efforts. Such subpoenas are frequently invasive, burdensome, and disruptive of the business of journalism. Often, alternative sources of the information sought are readily available. For decades, a qualified First Amendment privilege protected Amici from subpoenas seeking newsgathering work product if the media's First Amendment interests outweighed the interests of parties seeking this material. This Court -- in accordance with the United States Supreme Court and prevailing law from other jurisdictions -- has recognized this qualified privilege. See, e.g., Tribune Co. v. Huffstetler, 489 So.2d 722 (Fla. 1986); Morgan v. State, 337 So.2d 951 (Fla. 1976). This Court, again consistent with law prevailing nationally, excluded a reporter's eyewitness observations from the scope of the privilege in Miami Herald Publishing Company v. Morejon, 561 So.2d 577 (Fla. 1990) and CBS, Inc. v. Jackson, 578 So.2d 698 (Fla. 1991). The district court of appeal's decision extends this "eyewitness" exception to all cases that do not implicate a confidential source -- including cases in which a reporter was not an eyewitness to anything, but instead has only "second-hand" information. Kidwell v. McCutcheon, 962 F. Supp. 1477, 1479 (S.D. Fla. 1996) (Ferguson, J.). This is a marked departure from the decisions of this Court and the established body of law upon which this Court's decisions were grounded. "If the privilege does not apply in this case as a

---

[1] Fernandina Beach News-Leader, Inc.; Florida Society of Newspaper Editors; Gainesville Sun Publishing Company; Knight-Ridder, Inc., publisher of The Miami Herald; Lake City Reporter, Inc.; Lakeland Ledger Publishing Corporation; Ocala Star-Banner Corporation; Palatka Daily News, Inc., publisher of the Daily News and the Marco Island Eagle; Sarasota Herald-Tribune Co.; Sebring News-Sun, Inc.; Tampa Television, Inc., d/b/a WFLA-TV Channel 8; and the Tribune Company, publisher of The Tampa Tribune.

matter of law, there is a question whether any newsgathering activity remains protected by the First Amendment." Id. (discussing trial court's ruling in Kidwell v. State, 696 So.2d 399 (Fla. 4th DCA 1997)).

Amici seek reaffirmation of this long recognized qualified First Amendment privilege, because the absence of such reasonable protective measures will interfere significantly with the independent newsgathering process. The privilege balances legitimate, recognized free-press interests with the needs of parties seeking newsgathering information. Discovery of the media's work product without a clear showing of the civil litigant's need for such information "would be an unwarranted assault on the reporter's rights and the First Amendment." Management Information Technologies, Inc. v. Alyeska Pipeline Service Co., 151 F.R.D. 471, 478 (D.D.C. 1993).

The newsgathering process requires reporters to involve themselves as disinterested observers in matters that are likely to result in litigation. From routine traffic incidents to in-depth investigations of corporate or governmental corruption, the subject matter of the daily news is inherently the stuff of lawsuits -- civil and criminal. Occasionally, journalists or their cameras are eyewitnesses to an event that is central to a subsequent criminal proceeding. But more often day-to-day newsgathering involves the dogged pursuit of information through interviews on an array of subjects from a vast network of primary and secondary sources and the editorial processing of that information for publication.

Because the news so often concerns matters in litigation, newsrooms are obvious and frequent targets of subpoenas. The decision of the district court of appeal obliterates an essential check against unwarranted intrusion of First Amendment protected activity. Undoubtedly, if as

held below the First Amendment balancing test is abolished in all cases not involving a confidential source, the number of invasive subpoenas directed to the news media will multiply, and the independent newsgathering process will be severely disrupted.

Unchecked civil discovery into all facets of the newsgathering process implicates a host of First Amendment concerns. As Justice Grimes explained nearly twenty years ago, these concerns are present even in a case in which -- unlike Morgan v. State, 337 So.2d 951 (Fla. 1976) -- no confidential source is implicated:

> Morgan dealt with the confidentiality of an anonymous news source, whereas the case at hand involves the confidentiality of statements to a reporter by a known source. In any event, there are serious first amendment questions which must be considered before a court can compel a news reporter to testify concerning information received from his sources, and these issues must be explored in a proceeding which is fair to all concerned parties.

Times Publishing Co. v. Burke, 375 So.2d 297, 299 (Fla. 2d DCA 1979) (emphasis added). Those "serious first amendment questions" include journalists' autonomy. Media independence is compromised when reporters are forced to assist litigants or the state. "When a reporter appears on the witness stand ... he runs the risk of being perceived as a partisan for whichever side benefits from his testimony." Johnson v. Miami, 6 Med. L. Rptr. 2110, 2111 (S.D. Fla. 1980).[2] Even when sources do not require confidentiality, they reasonably expect reporters to be independent. Subpoenas force reporters to breach this expectation and to testify against their sources. See, e.g., Kidwell v. State, 696 So.2d 399 (Fla. 4th DCA 1997) (ordering reporter jailed for 70 days for refusing to testify against defendant-source). An invasion of the relationship

---

[2] A copy of this decision is included in the accompanying appendix as Exhibit B.

between a reporter and source "has the potential to offset the vitality of the free exchange of information between journalist and interviewee." Damiano v. Sony Music Entertainment, Inc., 168 F.R.D. 485, 496 (D.N.J. 1996). Therefore, reporters' credibility suffers when courts compel them to serve as litigants' investigators. See Kidwell v. State, 696 So.2d at 408 (Klein, J., concurring specially) (noting "the disadvantage of a journalist appearing to be 'an investigative arm of the judicial system or a research tool of government or of a private party'") (quoting United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988)). Moreover, trial subpoenas lead to the sequestration of reporters. When journalists, who would otherwise be free to cover trials, are made witnesses, they are barred from those trials except when testifying. Additionally, the independence of the editorial process is threatened if the editorial decisions must be revealed, questioned and explained.

A qualified privilege limits these and other such injuries to First Amendment interests and -- as one district court of appeal recently noted -- "protects the integrity of the newsgathering process." Davis v. State, 692 So.2d 924, 926 (Fla. 2d DCA), review granted, 700 So.2d 687 (Fla. 1997). The privilege is by no means absolute. It merely creates a mechanism to examine First Amendment interests and allows freedom of the press to be considered and protected when not outweighed by competing interests.

For these reasons, Amici have a substantial interest in this litigation and the fate of the reporter's privilege in Florida. The outcome of this case will necessarily affect Amici's rights to be free from undue and unwarranted encroachment upon the independence of the newsgathering process. Amici, therefore, seek to present to the Court arguments in support of the limited reporter's privilege in civil cases that was rejected by the court below.

SUMMARY OF ARGUMENT

The district court of appeal misapplied this Court's decision in Miami Herald Publishing Co. v. Morejon, 561 So.2d 577 (Fla. 1990). In Morejon, this Court determined that journalists who are eyewitnesses to a crime or other event relevant to a criminal case are not privileged to refuse to testify concerning what they have seen. Id. at 580.[3] Morejon did not advance the broad proposition espoused by the district court of appeal in this case -- i.e., that "there is no qualified privilege" in a civil case for information a reporter obtains from a non-confidential source. Morris Communications Corp. v. Frangie, 23 Fla. L. Weekly D428 (Fla. 1st DCA, January 30, 1998). Yet the district court of appeal based its decision upon Morejon and two recent district court decisions citing Morejon. See id. (citing Davis v. State, 692 So.2d at 924, and Kidwell v. State, 696 So.2d at 399); see also Gold Coast Publications v. State, 669 So.2d 316 (Fla. 4th DCA), review denied, 682 So. 2d 1099 (Fla. 1996). This misreading of Morejon conflicts with settled law not altered by Morejon, with case law this Court relied upon in Morejon, and with subsequent case law interpreting the Morejon decision.

The decision below also is inconsistent with Branzburg v. Hayes, 408 U.S. 665 (1972), which limits attempts to compel reporters to testify. Further, the decision below conflicts with this Court's opinion in In re Graziano, 696 So.2d 744, 752 (Fla. 1997), in which this Court approved an order quashing a witness subpoena seeking non-confidential information from a newspaper reporter.

---

[3] See also CBS, Inc. v. Jackson, 578 So.2d 698, 699-700 (Fla. 1991) (requiring network that videotaped police operation to produce videotape depicting defendant in police custody); Tampa Television, Inc. v. Norman, 647 So.2d 904, 905 (Fla. 2d DCA 1994) (requiring television station that was party to civil case to produce its videotape of events at issue in that case).

These very same issues are presented in State of Florida v. Davis, Case No. 90,457, presently pending before this Court. In that case, Amici presented a brief arguing that the Second District's Davis decision conflicts with this Court's Morejon and Jackson decisions, with the substantial body of case law upon which those decisions relied, and with the First Amendment. This Court would not be substantially assisted by repetition of those arguments and authorities here. Therefore, rather than repeat those arguments in this brief, Amici respectfully refer the Court to their brief in Davis. A copy of the Davis Amicus brief is included in the accompanying appendix as Exhibit A and is incorporated herein by reference.

However, because the subpoena under review in this case arose in civil litigation, reasons for vacating the decision below and answering the certified question in the affirmative are presented here that are not presented in Davis. "[C]onsiderations in civil discovery are vastly different from those in the criminal context." Loadholtz v. Fields, 389 F. Supp. 1299, 1302 (M.D. Fla. 1975). In criminal cases, courts are called upon to protect a defendant's constitutional rights, including the Sixth Amendment right to compulsory process. When a criminal defendant subpoenas the news media, therefore, the court must weigh that interest against the news media's First Amendment rights. In a civil case, a subpoena targeting the news media implicates only one constitutional interest: the First Amendment rights of the press. Hatch v. Marsh, 134 F.R.D. 300, 302 (M.D. Fla. 1990). Thus, press subpoenas in civil disputes are not in the same category as subpoenas in criminal cases.

The district court of appeal's failure to recognize this distinction is significant for a number of reasons. The decision below (if upheld) will force journalists to become frequent witnesses in civil cases, will encourage invasive probing of constitutionally protected activity, and

will hamper journalists' efforts to provide detached, impartial accounts of newsworthy events. The majority opinion below conceded these dangers by expressing "concern" about "the potential impact" that "total elimination of the balancing test in all nonconfidential source cases" would have upon "the news gathering and editorial functions of our newspapers." Frangie, 23 Fla. L. Weekly at D428. To prevent these significant injuries to First Amendment interests, this Court should reaffirm Morejon; should recognize that the First Amendment provides qualified[4] protection for reporters' non-confidential, non-eyewitness information; and should answer the certified question in the affirmative.

ARGUMENT

I. Like the Second District's Davis decision, the appellate opinion below misreads this Court's Morejon decision and is inconsistent with the First Amendment.

As Amici explained in their brief in Davis, the theory that no privilege applies to newsgathering material from a non-confidential source is inconsistent with this Court's Morejon and Jackson opinions, with the case law this Court relied upon in those opinions, and with the First Amendment. Rather than repeat those arguments here, Amici incorporate herein by

[4] Amici do not seek an absolute privilege. The First Amendment requires only a qualified privilege, as this Court and the district courts of appeal previously have recognized. See, e.g., Tribune Co. v. Huffstetler, 489 So.2d 722, 722 (Fla. 1986) (applying "limited and qualified" privilege); Morgan v. State, 337 So.2d 951, 955 (Fla. 1976) (weighing interests asserted in support of discovery against First Amendment interests); Tribune Co. v. Green, 440 So.2d 484, 485-86 (Fla. 2d DCA 1983) (privilege inapplicable if party seeking information shows relevance, compelling need, and lack of alternative sources), review denied, 447 So.2d 886 (Fla. 1984); Gadsden County Times, Inc. v. Horne, 426 So.2d 1234, 1241 (Fla. 1st DCA) (same), review denied, 441 So.2d 631 (1983).

reference the argument and authorities presented at pages five through twenty-one of the Davis Amicus brief. See Exhibit A.

II. The district court of appeal's decision overlooks material differences between civil and criminal cases.

Moreover, even if the Davis opinion were correct in holding that no reporter's privilege exists in criminal cases absent a confidential source, that decision would not preclude the existence of a qualified reporter's privilege in civil cases, such as this one. When a defendant in a criminal case seeks newsgathering information, the court must "weigh a criminal defendant's sixth amendment right to compulsory process for obtaining favorable witnesses against the first amendment rights of the press." Hatch v. Marsh, 134 F.R.D. 300, 302 (M.D. Fla. 1990). In a civil case, however, such constitutionally significant interests are not present. Consequently, though a reporter's privilege is properly recognized in criminal cases, that privilege is even more appropriately upheld in civil cases.

Federal courts consistently recognize that a civil litigant's interest in discovery is not as great as that of the state or a defendant in a criminal case. For example, in Hatch v. Marsh, 134 F.R.D. at 300, a federal court found this Court's Morejon reasoning inapplicable in a civil case. The liberal discovery provisions embodied in federal rules of procedure, the court explained, did not rise to the constitutional significance of First and Sixth Amendment rights. Id. at 302. Consequently, the Hatch court upheld a television station's privilege claim in a civil case. Id.

Hatch and other civil cases are distinct from criminal prosecutions in which the defendant seeks discovery form the news media. For example, the Davis case currently before this Court

concerned a criminal defendant's attempts to obtain potential impeachment evidence. 692 So.2d at 926. The defendant's request for this evidence implicates the Sixth Amendment to the United States Constitution. As a criminal case, therefore, Davis requires the weighing of a criminal defendant's Sixth Amendment rights and the news media's First Amendment rights. Cf. Hatch, 134 F.R.D. at 302 (discussing balancing of interests in criminal case).

Frangie, however, requires no such balancing of constitutional interests. Like any other civil case, the only issue in Frangie is whether a civil litigant's interest in liberal discovery outweighs the constitutional rights of the news media. Specifically, in Frangie a defendant in a premises-liability case wants to obtain from a newspaper testimony that might show a minor inconsistency in a crime victim's description of her injuries. See Lincoln Investment Management's Response to Petition for Certiorari at Pages 2-3. The trial court rejected the notion of even qualified First Amendment protection for such information. See Trial Court's Order Denying Motion to Quash Subpoena Duces Tecum at Page 2. Citing Davis and Kidwell v. State, the district court of appeal affirmed. 23 Fla. L. Weekly at D428.

This is a non sequitur. Davis and Kidwell v. State rely upon this Court's Morejon decision -- a criminal case. Nothing in Morejon -- or in any of this Court's modern jurisprudence -- supports the theory that no qualified First Amendment privilege exists in civil cases. Though the appellate court below claimed to be simply following Davis and Kidwell v. State, in fact the court made new law by effectively holding that traditions of liberal discovery in civil cases will always trump the First Amendment.

Considerable case law rejects this view.[5] For example, the Middle District of Florida's Hatch decision relied upon Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975). In Loadholtz, a civil litigant sought documents and testimony from a reporter who had written about the parties. The district court denied a motion to compel, explaining that "the paramount interest served by the unrestricted flow of public information protected by the First Amendment outweighs the subordinate interest served by the liberal discovery provisions embodied in the Federal Rules of Civil Procedure." Id. at 1300. First Amendment concerns prevailed, the Loadholtz court added, even though the case did not involve a confidential source, because the subpoenas nevertheless would chill the flow of information to the public. "The compelled production of a reporter's resource materials is equally as invidious as the compelled disclosure of his confidential informants." Id. at 1303.

The appellate decision below gives no weight to these interests. Though recognizing the "potential impact" of "total elimination of the balancing test in all nonconfidential source cases," the majority opinion nevertheless directs trial courts to ignore First Amendment interests absent a confidential source. Frangie, 23 Fla. L. Weekly at D428. Under this view, a civil litigant's curiosity outweighs the constitutional interests this court recognized in Tribune Co. v. Huffstetler,

---

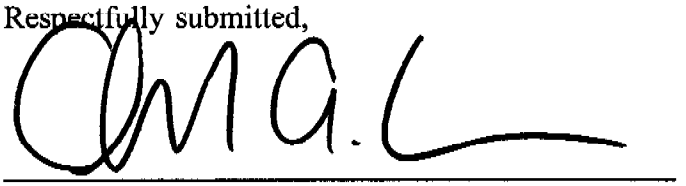
[5] See, e.g., Shoen v. Shoen, 48 F.3d 412, 416-18 (9th Cir. 1995) (reversing contempt citation entered against journalist who refused to appear for deposition and to furnish documents sought in civil case); Damiano v. Sony Music Entertainment, Inc., 168 F.R.D. 485, 496-500 (D.N.J. 1996) (refusing to compel non-party journalist to produce newsgathering material sought in civil case); Penland v. Long, 922 F. Supp. 1080, (W.D.N.C. 1995) (same); Warzon v. Drew, 155 F.R.D. 183, 186-88 (E.D. Wisc. 1994) (refusing to compel non-party journalist to produce newsgathering material or to submit to deposition in civil case); Management Information Technologies, Inc. v. Alyeska Pipeline Service Co., 151 F.R.D. 471, 477-78 (D.D.C. 1993) (same); Kurzynski v. Spaeth, 538 N.W.2d 554, 560-61 (Wisc. Ct. App. 1995) (reversing order that would have required non-party journalists to produce newsgathering material and to submit to depositions regarding their coverage of civil case).

489 So.2d 722 (Fla. 1986) and in Morgan v. State, 337 So.2d 951 (Fla. 1976). Unless a reporter has promised confidentiality, a civil litigant's interest in broad discovery will always trump the First Amendment. This result, Amici submit, is a clear and unwarranted extension of Morejon that must be reversed.

CONCLUSION

The qualified reporter's privilege strikes an appropriate balance on a case by case basis between valid First Amendment interests and the interests of litigants in disclosure of the information sought. Wholesale abrogation of the privilege in all cases not involving confidential sources creates an unnecessary intrusion upon protected First Amendment activity. The risks to the independent functioning of the press are particularly acute if newsgathering is subjected to civil discovery without a mechanism for paying due deference to valid First Amendment concerns. The decision of the district court of appeal, therefore, should be vacated, and the certified question should be answered in the affirmative.

Respectfully submitted,

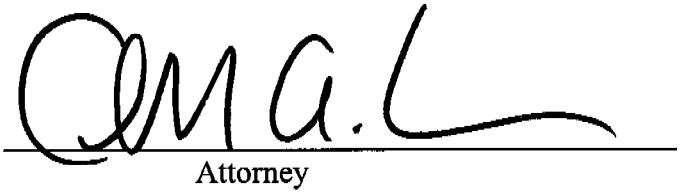


Charles A. Carlson
Florida Bar No. 716286
Barnett, Bolt, Kirkwood & Long
601 Bayshore Boulevard, Suite 700
Tampa, Florida 33606
(813) 253-2020
(813) 251-6711 - facsimile

Attorneys for Amici

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 9, 1998, a true and correct copy of the foregoing brief, together with the accompanying appendix, has been furnished by U.S. Mail to J. Richard Moore, Esquire, and J. Richard Moore, Jr., Esquire, 500 N. Ocean Street, Jacksonville, Florida 32202-3126; Ronald E. Reed, Esquire and Laurence C. Huttman, Esquire, Bullock, Childs, Pendley, Reed, Herzfeld & Rubin, 233 E. Bay Street, Suite 711, Jacksonville, Florida 32202; Harvey L. Jay, III, Esquire, 225 Water Street, Suite 1000, Jacksonville, Florida 32202; Thomas M. Beverly, Esquire, The Bedell Building, 101 East Adams Street, Jacksonville, Florida 32202 and George D. Gabel, Jr., Esquire, Holland & Knight LLP, 50 North Laura Street, Jacksonville, Florida 32202.



Attorney