ORIGINAL

IN THE SUPREME COURT OF FLORIDA

MORRIS COMMUNICATIONS CORPORATION, etc., et al.,

Petitioners,

v.

SUSANNE Y. FRANGIE, et al.,

Respondents.

CASE NO. 92,321

District Court of Appeal
1st District - No. 97-2864

DISCRETIONARY REVIEW OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT LINCOLN INVESTMENT MANAGEMENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The underlying civil action involves a lawsuit brought by Respondents, Susanne and Frank Frangie (hereinafter "Frangie"), against Respondents, Lincoln Investment Management, Inc., f/k/a Lincoln National Investment Management Corporation (hereinafter "Lincoln"), Baita International, Inc., and Wells Fargo Guard Service of Florida, Inc. The action arises out of a criminal assault by a third party on Susanne Frangie that occurred in the parking lot of a shopping center on May 10, 1995. The underlying lawsuit seeks damages for bodily injury, resulting pain and suffering, disability, disfigurement, mental anguish, loss of the capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss of earnings, loss of ability to earn money, and aggravation of a previously existing condition. (Response of Lincoln to Petition for Writ of Certiorari, Appendix 1).

Susanne Frangie's deposition was originally taken June 12, 1996. (Response of Lincoln to Petition for Writ of Certiorari, Appendix 2 at 1). During this deposition, Susanne Frangie specifically described the incident in question, including her then-existing state of mind, her physical and emotional injuries from the assault, and her relationship with her husband and young daughter since the assault. (Response of Lincoln to Petition for Writ of Certiorari, Appendix 2 at 49-53, 99-102, 110-112, and 148-149).

On April 16, 1996, as part of a special report on rape and the criminal justice system, The Florida Times-Union (hereinafter "The Times-Union") published an article written by staff writer Paul Pinkham, entitled "Waiting for Justice 11 Months of 'Hell,' Rape Victim Says." (Response of Lincoln to Petition for Writ of Certiorari, Appendix 3). In conjunction with this article, and an article entitled "An 'incredibly taxing' job," Susanne Frangie's color photograph appeared on the front page of the April 16, 1996 edition of The Times-Union. (Response of Lincoln to Petition for Writ of Certiorari, Appendix 4). Additionally, Susanne Frangie wrote her own article entitled "Rape - No Discrimination!" which appeared in the May, 1996 edition of the First Coast Victims' Advocate. (Response of Lincoln to Petition for Writ of Certiorari, Appendix 5). Susanne Frangie has not asked either of these publications to correct or retract any of the information printed about her or the assault. (Response of Lincoln to Petition for Writ of Certiorari, Appendix 2 at 218-219).

On May 11, 1997, The Times-Union published an article written by its Sports Editor, Mike Bianchi (hereinafter "Bianchi") entitled "Mother Finds Way to Cope." This article describes Susanne Frangie's physical and emotional injuries from the assault, and her relationship with her young daughter since the assault. (Petition for Writ of Certiorari, Appendix 2).

When she was deposed a second time on July 21, 1997, Susanne Frangie testified that she did not discuss specific details of the rape with Bianchi in order to provide him with information

contained in his May 11, 1997 article. Susanne Frangie also testified that she did not discuss the specifics of her present emotional condition with Bianchi in as much detail as is provided in Bianchi's May 11, 1997 article. (Response of Lincoln to Petition for Writ of Certiorari, Appendix 6 at 74-83, 114-120, and 168-169).

Bianchi's May 11, 1997 article, which was based in large part upon an interview Bianchi conducted with Susanne Frangie, contains at least one questionable factual reference concerning the assailant having blackened Susanne Frangie's eyes during the assault, which differs from Susanne Frangie's deposition testimony and her own written account of the assault. (Petition for Writ of Certiorari, Appendix 2 at 3 and Response of Lincoln to Petition for Writ of Certiorari, Appendix 2 at 52-53, Appendix 5, and Appendix 6 at 168-169,).

On May 29, 1997, Respondent, Lincoln, served Bianchi with a Subpoena for Deposition Duces Tecum. (Response of Lincoln to Petition for Writ of Certiorari, Appendix 7). On June 18, 1997, The Times-Union and Bianchi filed their Motion to Quash Subpoena Duces Tecum. In their motion, Petitioners argued that because Bianchi was not an eyewitness to the rape, any information he might have about the facts at issue in the lawsuit was gathered in his capacity as a reporter and was protected from disclosure by a qualified reporter's privilege. (Petition for Writ of Certiorari, Appendix 3).

On June 30, 1997, Lincoln filed its Memorandum of Law in Opposition to The Times-Union's Motion to Quash Subpoena Duces Tecum. In its memorandum, Lincoln asserted that Bianchi and the Frangies were acquainted with each other before the incident giving rise to the underlying action and have remained acquainted throughout these proceedings. (Petition for Writ of Certiorari, Appendix 4). Lincoln further asserted that Bianchi had personal knowledge of relevant facts concerning the Frangies' claims in the underlying lawsuit and that it sought Bianchi's testimony, among other reasons, for the purpose of potentially impeaching Susanne Frangie's testimony. (Petition for Writ of Certiorari, Appendix 4 and Appendix 5 at 26).

On July 3, 1997, the trial court entered an order denying the motion to quash the subpoena. The trial court found that the defendants were seeking nonconfidential observations and materials obtained during a nonconfidential interview, and that these observations and materials were relevant to discovery of plaintiffs' claimed damages. The trial court further found that Bianchi, in these circumstances, was merely a witness to nonconfidential information and that no qualified privilege existed. (Petition for Writ of Certiorari, Appendix 1).

Petitioners filed a Petition for Writ of Certiorari with the First District Court of Appeal. (Brief of Petitioners on the Merits, Appendix 1). The First District Court of Appeal, in Morris Communications Corp. v. Fransie, 23 Fla. L. Weekly D428 (Fla. 1st DCA Jan. 30, 1998), denied the petition finding "in accordance with

the rationale expressed in Davis v. State, 692 So.2d 924 (Fla. 2d DCA 1997) rev. granted, 22 Fla. L. Weekly 40 (Fla. Sept. 29, 1997), and in the majority opinion in Kidwell v. State, 696 So.2d 399 (Fla. 4th DCA 1997), . . . Florida law does not presently recognize a privilege for nonconfidential sources of a reporter." Morris at D428 (Brief of Petitioners on the Merits, Appendix 4). The First District Court of Appeal also certified the question of whether Florida law provides a qualified privilege against the disclosure of nonconfidential information relevant to a civil proceeding. (Brief of Petitioners on the Merits, Appendix 4).

SUMMARY OF ARGUMENT

Florida law does not provide a qualified reporter's privilege against the disclosure of nonconfidential information relevant to a civil proceeding. The "work product" privilege that Petitioners seek to invoke simply does not exist in Florida unless a confidential source is implicated.

Since there is no statutory authority that mandates application of a qualified reporter's privilege in Florida, the only rational justification for extending a qualified reporter's privilege to Bianchi's testimony derives from the first amendment. This Court, however, has uniformly held that the first amendment protection afforded the press is limited to protecting the press against the dangers associated with unfettered disclosure of a reporter's confidential sources of information, and does not apply to nonconfidential sources of information.

In deciding whether to apply a qualified reporter's privilege in Florida, the determining factor is not whether the reporter was an "eyewitness" to the event. Rather, the determining factor is, and has always been, whether the information sought from the reporter is confidential. The First District Court of Appeal's decision correctly interprets this Court's decision in Morejon in accordance with this rationale, which is clearly expressed in Davis v. State, Kidwell v. State, Goldcoast Publications, Inc. v. State, and Tampa Television, Inc. v. Norman.

The First District Court of Appeal's decision does not eliminate Florida's three-part balancing test. The three-part

balancing test is still applicable where confidential sources are implicated. This Court has never applied a qualified privilege where nonconfidential information is sought from a reporter and should not apply such a privilege under the present facts.

The public's first amendment right to receive information is not adversely affected under the facts of this case. With any right comes responsibilities. As a journalist, Bianchi is free to report information that he believes the public has a right to know. Lincoln has not, even remotely, infringed upon this important right. As a citizen of Florida, Bianchi also has a corresponding responsibility, as do all citizens, to testify concerning his knowledge of relevant nonconfidential information.

There should be no distinction between application of a qualified reporter's privilege to nonconfidential information in the criminal and civil contexts. Prosecutors subpoena reporters as often, if not more often, than do criminal defendants; thus the balancing of a criminal defendant's sixth amendment right against that of the first amendment is only a consideration in less than half of all criminal cases where reporters are subpoenaed. Moreover, where the information sought is not confidential, the relationship to the first amendment is tenuous at best.

Regardless of the context, be it civil or criminal, parties should be permitted to develop relevant evidence that is derived by a news reporter from a nonconfidential source by deposing the reporter. Where, as here, the nonconfidential source happens to be a party to ongoing civil litigation, and by all appearances, has

provided information that would impeach her credibility, it is imperative to our system of justice that a party, such as Lincoln, be permitted to develop such evidence without having to overcome a qualified privilege.

Where the source of information is nonconfidential, the news reporter should not enjoy any privilege, regardless of whether the information derived is relevant to a criminal or civil proceeding. This Court should therefore affirm the First District Court of Appeal's decision and should answer the certified question in the negative.

ARGUMENT

CERTIFIED OUESTION:

DOES FLORIDA LAW PROVIDE A QUALIFIED REPORTER'S PRIVILEGE AGAINST THE DISCLOSURE OF NONCONFIDENTIAL INFORMATION RELEVANT TO A CIVIL PROCEEDING?

I. Florida law does not provide a qualified reporter's privilege against the disclosure of nonconfidential information relevant to a civil proceeding.

A. The First District Court of Appeal's decision correctly interprets this Court's Decision in *Morejon* in accordance with the rationale expressed in *Davis v. State, Kidwell v. State, Goldcoast Publications, Inc.* v. *State* and *Tampa Television, Inc. v. Norman*

In denying The Times-Union's Motion to Quash Subpoena Duces Tecum, the trial court adhered to several binding Florida appellate court decisions concerning proper application of the qualified reporter's privilege. See Tampa Television, Inc. v. Norman, 647 So.2d 904 (Fla. 2d DCA 1994); Gold Coast Publications, Inc. v. State, 669 So.2d 316 (Fla. 4th DCA 1996), rev. denied, 682 So.2d 1099 (Fla. 1996); Davis v. State, 692 So.2d 924 (Fla. 2d DCA 1997) and Kidwell v. State, 696 So.2d 399 (Fla. 4th DCA 1997). These decisions correctly apply the reasoning of this Court as set forth in Miami Herald Publishing Company v. Morejon, 561 So.2d 577 (Fla. 1990) and CBS, Inc. v. Jackson, 578 So.2d 698 (Fla. 1991), wherein this Court rejected application of the qualified reporter's privilege where nonconfidential information was at issue.

Contrary to Petitioners' assertion, the decisions in Jackson, and Morejon indicate that this Court does not recognize a general newsgathering privilege or a qualified reporter's privilege in the absence of a confidential source.

It is incumbent upon Florida trial courts that they not create precedent. Wood v. Frazier, 677 So.2d 15 (Fla. 2d DCA 1996) citing State v. Bamber, 592 So.2d 1129, 1132 (Fla. 2d DCA 1991), app'd, 630 So.2d 1048 (Fla. 1994). Trial courts are obligated to follow decisions of other district courts of appeal in this state in the absence of conflicting authority and where the appellate court in its own district has not decided the issue. Chapman v. Pinellas Countv, 423 So.2d 578 (Fla. 2d DCA 1982). Because there is no conflicting precedent concerning the application of a qualified reporter's privilege to nonconfidential information, the trial court was correct in denying The Times-Union's Motion to Quash Subpoena Duces Tecum, as was the First District Court of Appeal in denying the Petition for Writ of Certiorari.

In its Order Denying The Times-Union's Motion to Quash Subpoena Duces Tecum, the trial court found that Bianchi was a witness to relevant, nonconfidential information. The trial court further found that Bianchi had personal knowledge of Susanne Frangie's then-existing state of mind, as well as the Frangie's claimed damages in the underlying action.

In Florida, a journalist does not have a qualified first amendment privilege against production of relevant, nonconfidential newsgathering materials. Tamaa Television, Inc. v. Norman, 647 So.2d 904 (Fla. 2d DCA 1994), citing CBS, Inc. v. Jackson, 578 So.2d 698 (Fla. 1991); Gold Cost Publications, Inc. v. State, 669 So.2d 316 (Fla. 4th DCA 1996), rev. denied, 682 So.2d 1099 (Fla. 1996); Davis v. State, 692 So.2d 924 (Fla. 2d DCA 1997); and

Kidwell v. State, 696 So.2d 399 (Fla., 4th DCA 1997). Since the trial court properly found that the qualified privilege did not apply under the circumstances of this case, the trial court did not balance the respective interests involved. See Miami Herald Publishing Company v. Morejon, 561 So.2d 577 (Fla. 1990) and CBS, Inc. v. Jackson, 578 So.2d 698 (Fla. 1991).

Petitioners incorrectly contend that the trial court, as well as the First, Second and Fourth District Courts of Appeal, have all misinterpreted the "limited exception" to the privilege articulated in Morejon. While the circumstances in Morejon and Jackson involved reporters' eyewitness observations of relevant events that were sought to be adduced by criminal defendants during subsequent proceedings against them, to limit this Court's refusal to apply the qualified privilege in those cases solely to circumstances involving eyewitness observations, as Petitioners assert, detracts from the quintessential notion flowing from Jackson and More-ion. The appellate courts of this state have correctly found that notion to be one of confidentiality.

In Morejon, the Miami Herald asserted an across-the-board qualified privilege against the compelled disclosure of any information obtained by a reporter while on a newsgathering mission. The Herald contended that the qualified reporter's privilege existed for the purpose of protecting reporters against compelled testimony that might chill the newsgathering process. This Court rejected those arguments and upheld the district court

of appeal's denial of the Herald's petition for writ of certiorari. See Morejon, at 581.

In the proceedings below, Petitioners similarly contended that, "The news persons privilege is intended to avoid impediment to the free flow of information, which is so vital to our democratic system, and to avoid even the appearance of partiality on the part of the press." (Petition for Writ of Certiorari, Appendix 4 at 2). Petitioners further contended that, "The distinction between confidential and nonconfidential sources is irrelevant to the chilling effect that the enforcement of this subpoena would have on the free flow of information to the press and to the public." (Petition for Writ of Certiorari, Appendix 4 at 3).

Neither this Court, nor the United States Supreme Court, has extended the first amendment protection in the form of a qualified privilege to nonconfidential news sources. Carroll Contractins, Inc. v. Edwards, 528 So.2d 951 (Fla. 5th DCA 1988), rev. denied, 536 So.2d 243 (Fla. 1988). See also, CBS, Inc. v. Jackson, 578 So.2d 698, 700 (Fla. 1991), wherein this Court cited Carroll Contracting in support of its finding that there was no first amendment impediment to the discovery being sought. Petitioners seek to draw a distinction where there is none by asserting that the rationale supporting the first amendment protection afforded by a qualified privilege exists in all but the narrowest of circumstances: when the reporter is an eyewitness to a relevant event as it occurs. Instead, what has traditionally motivated

Florida courts to extend a qualified reporter's privilege has been whether the information sought implicates confidential information. In Morejon, Jackson, and every Florida appellate court decision rendered since those cases were decided, Florida courts have correctly focused on whether the information and materials sought implicated any confidential source of information that threatened to chill or impinge the newsgathering process.

For instance, in Tampa Television, Inc. v. Norman, 647 So.2d 904 (Fla. 2d DCA 1994), the plaintiff in a civil action sought "the entire yield of the reporter's newsgathering efforts." Id. at 905. The information sought in Norman was not limited to the reporter's eyewitness observations. The plaintiff in Norman sought to discover taped conversations as well other nonconfidential information compiled by the television station.[1] The Second District Court of Appeal found that the circumstances involved in Norman were controlled by this Court's decision in Jackson and concluded that the trial court did not depart from the essential requirements of law by ordering production of the relevant, nonconfidential material sought. Id. at 905. The court determined that the qualified privilege only extends to confidential sources and not to "the entire yield of the reporter's newsgathering efforts." Id. at 905.

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[1] Although, the specific information that was sought is not discussed in the body of the Norman opinion, attorney for the plaintiff, Martin L. Garcia, has advised the undersigned that the information sought in Norman did not consist of merely videotaped footage as counsel for The Times-Union and Bianchi asserted during the hearing on The Times-Union's Motion to Quash Subpoena Duces Tecum. (See Petition for Writ of Certiorari, Appendix 5 at 10).

In Gold Coast Publications, Inc. v. State, 669 So.2d 316 (Fla. 4th DCA 1996), rev. denied, 682 So.2d 1099 (Fla. 1996), the Fourth District Court of Appeal concluded that the qualified reporter's privilege protects only a journalist's confidential sources. The Court therefore denied the petitioner's petition for writ of certiorari of an order denying a motion to quash a pre-trial investigative subpoena requiring a journalist to appear in a criminal proceeding and disclose information provided by the defendant during an interview for a news article. Id. at 317.

The court in Gold Coast provided a thorough history of the newsgathering privilege and stated,

> Some authorities have extended to reporters limited protection from disclosure of non-confidential news sources and materials acquired in the course of gathering the news... Other jurisdictions have refused to extend the reporter's qualified privilege to non-confidential sources and material in circumstances very much like the instant case. The courts in Florida have generally followed the latter approach which extends protection only to confidential news sources and materials.

Id. at 317, citing Norman, supra. (citations omitted).

In Gold Coast, the court determined that the most important factor influencing this court to find that a qualified newsgathering privilege did not apply in Morejon and Jackson was the fact that the information sought in those cases was nonconfidential. The court further found, as did this Court in Jackson, that a balancing test is unnecessary where the information sought is not confidential. Id. at 318. Finally, the court concluded that the underlying purpose of the qualified

newsgathering privilege is to protect the confidential aspects of the press' newsgathering efforts. Id. at 318.

In Davis v. State, 692 So.2d 924 (Fla. 2d DCA 1997), the Second District Court of Appeal discussed this Court's decisions in Morejon and Jackson. The Davis court stated that in Morejon, "The court noted the absence of any confidential sources and thus distinguished the case from Branzburg. Likewise, in CBS, Inc., the court held that the videotape of an arrest was physical evidence which 'does not implicate any sources of information'." Id. at 926 (citations omitted).

In Davis, the court also aptly noted as follows,

> We can perceive no principle distinction between the 'relevant events' involved in the CBS, Inc. and More-ion cases, and the information sought through discovery in the matter at hand. A victim's explanation of how a crime occurred is an event relevant to the criminal proceeding... The diacritical notion flowing from CBS, Inc. and More-ion, is that of confidentiality. In short, the privilege has no application in a criminal proceeding unless based upon the potential implication of a confidential source.

Id. at 927.

The newsgathering privilege is applicable in civil as well as criminal cases. Gadsden County Times v. Horn, 426 So. 2d 1234, 1240 (Fla. 1st DCA 1983). The analysis regarding whether the privilege should be applied in civil proceedings, where no confidential information is implicated, is also the same. See, Tampa Television, Inc. v. Norman, 647 So.2d 904 (Fla. 2d DCA 1994).

In Davis, events surrounding the proceedings became the focus of pre-trial media attention when the victim in that case was

interviewed by several news organizations. A reporter with the St. Petersburg Times had interviewed the victim and authored an article touching upon details of the alleged crime. The criminal defendant, Davis, attempted to depose the reporter, "asserting that she was a potential source of impeachment evidence against Terry (the victim)." Id. at 925-926. Similarly, Susanne Frangie has been interviewed by reporters for the Times-Union on at least two occasions during the pendency of her action against Lincoln. (See Response of Lincoln to Petition for Writ of Certiorari, Appendix 2 and 3). Lincoln seeks to depose one such reporter, Bianchi, because it believes he is a source of impeachment and other evidence in the underlying case.

In Kidwell v. State, 696 So.2d 399 (Fla. 4th DCA 1997), the Fourth District Court of Appeal found that this Court did not limit its holdings in Morejon and Jackson to eyewitness observations of the commission of a crime itself. Rather, the court in Kidwell correctly noted that, "Instead it [this Court] said that the principle [that there is no privilege qualified, limited, or otherwise which protects journalists from testifying] applies to a 'relevant event' that is later sought to be adduced in a court proceeding." Id. at 405.

Judge Farmer, in writing the opinion of the court in Kidwell, explored the rationale behind the qualified newsgathering privilege. Judge Farmer noted that this court in Morejon distinguished the factual situation involved in that case from the factual situation involved in Branzbura v. Haves, 408 U.S. 665

(1972), based on the fact that the claim of the newsmen in Branzburginvolved confidential sources rather than nonconfidential sources of information. Id. at 401-402.

Petitioners bold assertion that "In Morejon, this Court held that, even in circumstances where a non-confidential source is implicated, an exemption to the reporter's privilege exists onlv under the narrow circumstances where a reporter is an 'eyewitness' to a relevant 'event'" is erroneous. (See Brief of Petitioners on the Merits at 8-9). While some of this language is contained in Morejon, this Court's holding in Morejon is not nearly as limited as Petitioners assert. In fact, Petitioners' citation to page 589 of the Morejon opinion reflects Petitioners' misguided analysis.[2]

Petitioners are similarly misguided in their attempt to create precedent to support their position from this Court's recent decision in In re Graziano, 696 So.2d 744 (Fla. 1997). Petitioners' liberally infer from Graziano, which held that the Judicial Qualifications Committee "was within its discretion in quashing" subpoenas seeking confidential and nonconfidential information from a newspaper reporter, that Graziano "impliedly overrules the First District Court of Appeal's decision in the instant appeal." (See Brief of Petitioners on the Merits at 7-8). However, in Graziano this Court did not discuss the rationale behind its decision. This Court could have found that the JQC was within its discretion in quashing the subpoenas for myriad reasons,

[2] The entire text of the Morejon opinion is found at 561 So.2d 577-583 (Fla. 1990).

none of which apply to the instant appeal. Moreover, because this Court's rationale is not discussed in Graziano, it cannot impliedly overrule anything. Lincoln respectfully submits that if this Court, in Graziano, wished to overrule the decisions of Gold Coast, Kidwell and Davis, as Petitioners contend, it would have done so overtly. The fact that this Court has accepted certified questions in Davis, Kidwell, and the instant appeal, indicates that these cases pose questions of great public importance not discussed in Graziano.

Petitioners argue that Bianchi's testimony is subject to a qualified privilege because he was not an eyewitness to the May 10, 1995 rape by attempting to draw a distinction between eyewitness accounts of an event and other types of relevant information in criminal proceedings. The underlying action is a civil proceeding. The Florida Rules of Criminal Procedure, as well as Florida's common law discussing how witnesses in criminal actions are characterized, are irrelevant to this Court's analysis. Further, as the court correctly noted in Kidwell, "To apply such a distinction leads to absurd results." Kidwell, at 405.

Petitioners also fail to adequately justify why, under their analysis, no privilege exists as to a reporter's eyewitness account of a relevant event, while a reporter's testimony would be qualifiedly privileged if he overheard relevant, nonconfidential inculpatory statements, See e.g., Kidwell, at 405-406 (wherein the court states it is unable to justify why no qualified reporter's privilege exists as to eyewitnesses but such a privilege should

exist, under the newspaper's analysis, as to an admission by a criminal defendant overheard by a reporter while on a newsgathering mission).

Within the civil context, this case, similar to Kidwell, vividly illustrates that nonconfidential sources will speak to the press for their own personal reasons. The mere fact that these reasons appear, in retrospect, to be ill-advised when the comments are later sought to be adduced in litigation is surely no reason to shield the inculpatory statements with a qualified reporter's privilege. See, Kidwell, at 406.

In the underlying action, Bianchi and The Times-Union made no plausible showing that even nonconfidential sources will "dry up" if not protected by a qualified privilege. As in Kidwell, the trial judge in this matter carefully inquired into Lincoln's purpose in seeking to depose Bianchi and reasonably concluded that Bianchi's testimony was relevant, probative, and not being sought for any improper purpose. See, Kidwell, at 406.

To hold that the only nonconfidential newsgathering information which may be subject to production without application of a qualified privilege are the eyewitness observations of a journalist who directly observes an event giving rise to the litigation as it occurs is simply not the law in Florida. The purpose of discovery depositions is to ascertain what relevant information a potential witness may possess. Florida's Rules of Civil Procedure clearly provide that any information reasonably calculated to lead to the discovery of admissible evidence may be

discovered from a witness, Reporters, like other citizens, do have recourse under the rules of civil procedure [Rule 1.280(c), Fla.R.Civ.P. (1997)], if the discovery request is unreasonable. Mere inconvenience alone should not activate the privilege. Many other organizations and occupations [emergency room physicians, hospital record custodians, emergency medical technicians, telephone companies] suffer the inconvenience of frequent subpoenas, yet must respond without being able to assert any privilege.

Bianchi is the only person with first-hand knowledge of statements, both published and unpublished, made by Susanne Frangie during her nonconfidential interview with Bianchi. The trial judge correctly found that Bianchi's testimony concerning these statements is reasonably calculated to lead to admissible evidence in this action. Furthermore, Susanne Frangie was deposed a second time, after Bianchi's May 11, 1997 article appeared in The Times-Union, and testified that she did not discuss specific details contained in Bianchi's article. (See Response of Lincoln to Petition for Writ of Certiorari, Appendix 8 at 80-81, 118-119, and 168-169). Therefore, Bianchi is the only person who can testify about these inculpatory statements. These statements are significant because Susanne Frangie, as well as being the victim, is the only eyewitness to the sexual assault (the perpetrator has never been caught, and no eyewitnesses exist). Susanne Frangie's credibility about facts pertaining to the assault and Lincoln's

right to probe issues concerning Susanne Frangie's credibility is thus crucial to Lincoln's defense.

To constrain Lincoln's ability to depose Bianchi, by applying a qualified reporter's testimonial privilege simply because Bianchi was not an eyewitness to the rape, would be irrational since his testimony carries similar weight to that of an eyewitness in this case. Thus, the determining factor when applying a qualified reporter's privilege in Florida should remain whether confidential information is sought from the reporter.

Petitioners' reliance upon various Florida trial court decisions is misplaced, First, these decisions have absolutely no precedential value in this Court. These decisions also did not bind the trial court since several higher Florida appellate court decisions hold to the contrary. Second, the cases relied upon by Petitioners are distinguishable from the case sub iudice.

In Walker v. United Steel Works, Inc., 19 Med. L. Rptr. 1191 (Fla. 13th Cir. 1991), the trial court focused on whether the reporter was an eyewitness to the accident in order to determine if the information sought, which consisted of published and unpublished photographs and broadcast and unaired videotape of an accident scene taken after the accident occurred, was relevant to the subsequent court proceeding. The trial court framed the "critical question" in that personal injury action involving trusses which had fallen off of a truck and injured the plaintiff as "how the trusses were fastened onto the truck." Id. at 1192. The trial court found that since the journalists did not witness

the truck immediately prior to the accident, or at the time of the accident, they could not shed any light on how the trusses were fastened. Id. at 1192. Basically, the trial court found that the photographs and videotape sought were not relevant to the action because they consisted of after-the-fact accounts of the scene.

The important factual difference in this case is that Bianchi was not subpoenaed in order for him to attempt to shed some light on how the assault occurred: rather, Bianchi was subpoenaed in order to shed some light on the victim, Susanne Frangie's, explanation of her physical and emotional injuries. Thus, the witness verses eyewitness distinction discussed in Walker, and relied upon by Petitioners, is irrelevant just as it was in Tampa Television, Inc. v. Norman, supra.; Gold Coast Publications v. State, supra.; Davis v. State, susra.; and Kidwellv. State, supra. In those cases, the discovery sought consisted of nonconfidential information obtainedby reporters during after-the-fact-interviews, such as the content of unpublished statements made to the reporters, and the reporters' observations of the state of mind of the individuals whom they had interviewed. Lincoln seeks identical relevant information in this case.

Unlike the facts before this Court, in Florida v. Brown, 19 Med. L. Rptr. 1031 (Fla. 2d Cir. 1991), the trial court expressly found that, "Ms. Peck (the reporter) was not a witness to or has any knowledge of the events relevant to these proceedings." Id. at 1032 (emphasis added). The trial court in this case, however, has

already found that Bianchi is a witness who has knowledge of relevant, nonconfidential information.

Finally, Florida v. Morales, 24 Med. L. Rptr. 1606 (Fla. 5th Cir. 1995) overtly relies upon the Second District Court of Appeal's decision in Tribune Co. v. Green 440 So.2d 484 (Fla. 2d DCA 1983) rev. denied, 447 So.2d 886 (Fla. 1983). However, Tribune Co. v. Green has since been deemed "no longer viable" by the Second District Court of Appeal in Davis v. State, supra., at 926.

Petitioners also assert that this Court should follow several federal decisions which Petitioners contend undermine Tampa Television v. Norman, supra.; Gold Coast Publications, Inc. v. State, supra;, Davis v. State, supra.; and Kidwell v. State, supra. Petitioners contend that these federal decisions support a narrow interpretation of Morejon; however, the decisions cited by Petitioners pre-date Morejon. See, United States v. Blanton, 534 F.Supp. 295 (S.D. Fla. 1982), aff'd. 730 F.2d 1425 (11th Cir. 1984)(without discussion of the privilege) and Loadholtz v. Fields, 389 F.Supp. 1299 (M.D. Fla. 1975).

Moreover, the Fourth District Court of Appeal in Kidwell, at 405, correctly found that since the United States Supreme Court has not spoken definitively concerning whether to apply a qualified privilege when nonconfidential sources are implicated, a Florida district court of appeal takes its direction from this Court. See, State v. Dwyer, 332 So.2d 333 (Fla. 1976) (the only federal decisions binding upon the Florida state courts are those of the United States Supreme Court); Brown v. Jacksonville, 236 So.2d 141

(Fla. 1st DCA 1970) ("A decision of a Federal District Court, while persuasive, if well reasoned, is not by any means binding on the courts of a state").

The Fourth District Court of Appeal has further correctly concluded that,

> In a system where the decisions of lower federal courts in Florida are not binding on state courts, there may very well be occasions when the federal courts hold one way, while the state courts hold the contrary, That is after all a consequence of our system of dual sovereignty. The remedy is simple; the United States Supreme Court can eliminate the conflict by simply taking up an appropriate case for review.

Kidwell, at 405.

Additionally, Petitioners assert that, although the Eleventh Circuit Court of Appeal has not decided the issue, four of the five federal circuit courts of appeal have concluded that there is a qualified privilege for news information obtained from nonconfidential sources. However, Florida's Fourth District Court of Appeal has also confronted these federal decisions head-on and has correctly found that Florida courts follow the authority of this Court, which has rejected a claim of qualified privilege where nonconfidential information is sought.

Finally, Petitioners' references to both the common law from other states, and the statutory privileges afforded reporters in Georgia and Alabama, are misplaced. The laws of these states concerning the application of a qualified reporter's privilege have no bearing on this Court's determination of the issue. This is especially true since Florida's Legislature has declined to adopt

a "shield" statute similar to those adopted in other states, including Georgia and Alabama. See, Morejon, at 579 n.1 ("The Florida Legislature has declined to adopt any statutory reporter's privilege or 'shield' statute."); Ala. Code §12-21-142 (1986); and Ga. Code Ann. §24-9-30 (1993). In fact, subsequent to the Morejon decision and as recently as 1993, the Florida Legislature declined to enact a statutory qualified reporter's privilege. Clearly, it is the role of the Legislature to effect such change in the law and the media is free to lobby the Legislature for the adoption of a shield statute. However, when the Legislature specifically has chosen not to adopt a statutory privilege, it is not the judiciary's role to enact new law.

Generally, in Florida privileges exist only by statute. § 90.501, Fla. Stat. (1995)[3]; Southern Bell Telephone and Telegraph Co. v. Beard, 597 So.2d 873, 876 n.4 (Fla. 1st DCA 1992); State v. Castellano, 460 So.2d 480, 481 (Fla. 2d DCA 1984); and Marshall v. Anderson, 459 So.2d 384 (Fla. 3d DCA 1984).

Because there is no statutory privilege in Florida for reporters against compelled disclosure of either confidential or nonconfidential information, whatever privilege exists is based upon Florida case law, specifically the most recent pronouncements of this Court. Moreover, absent a pronouncement from the United States Supreme Court that reporters have an absolute or qualified

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[3] When § 90.501, Florida Statutes, was originally enacted in 1979 the sponsor's note stated, "This section abolishes all common-law privileges existing in Florida and makes the creation of privileges dependent upon legislative action or pursuant to the Supreme Court's rule-making power."

testimonial privilege under the first amendment, Florida courts, including this Court, are not constrained to find the existence of such a privilege, despite differing opinions of lower federal courts or other state courts.

B. The First District Court of Appeal's decision does not eliminate Florida's three-mart balancing test since this test is still asslicable where confidential sources are implicated, although this Court has never applied a aualified privileae where nonconfidential information is sought from a resorter

In Morejon, this Court distinguished the factual situation before it from those situations present in Branzburq v. Hayes, 408 U.S. 665 (1972), Morgan v, State, 337 So.2d 951 (Fla. 1976), and Tribune Co. v. Huffstettler, 489 So.2d 722 (Fla. 1986). This Court found that the factual situations in those cases involved confidential sources which might "dry up" if revealed. See Morejon, at 581. Likewise, when this Court revisited this issue in Jackson, it found that because the requested materials did not implicate any confidential sources of information, there was no realistic threat of restraint or impingement on the newsgathering process by subjecting the video tapes sought by Jackson to discovery. Jackson, at 700.

This Court has previously based its decisions concerning whether to apply the qualified reporter's privilege upon a determination of whether the testimony sought might chill or impinge on the newsgathering process because this is the rationale that supports affording first amendment protection to the press. See, Branzburs v. Haves, 408 U.S. 665 (1972). Morgan and Tribune

Co. v. Huffstettler, cases involving confidential sources, are the only cases where this Court has found a qualified newsgathering privilege. The more recent cases of Morejon and Jackson clearly indicate that in the absence of an issue involving forced revelation of a confidential source, no newsgathering privilege exists.

The fact that the reporters in Morejon and Jackson were eyewitnesses to relevant events perhaps lends support to this Court's conclusion in those cases that the reporters' testimony would not chill or impinge on the newsgathering process. The critical factor in making these determinations, however, was that no confidential sources were implicated in either case that would threaten the ability of the press to gather news.

The application of a qualified reporter's privilege in Florida, as recognized by this Court, is extremely narrow. The privilege is an exception to the long standing principle that "the public . ..has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege." Branzburq v. Haves, 408 U.S. 665 (1972). Indeed, notwithstanding Petitioners attempt to turn the law on its head, in Florida a reporter has the same duty as any other citizen to testify pursuant to a subpoena, subject only to the narrow and qualified privilege against forced revelation of confidential sources.

In the case at bar Lincoln seeks to discover the substance of a conversation between Bianchi and Susanne Frangie; as well as any

notes prepared by Bianchi from that conversation. Bianchi's testimony is essential in order to discover relevant, nonconfidential statements that Susanne Frangie made to Bianchi concerning details of the assault and how this assault has affected her life. These statements, as they relate to Plaintiff's credibility, are relevant to the underlying action and will not threaten the newsgathering process under these limited circumstances. The source of the information is nonconfidential because Susanne Frangie's identity is disclosed in Bianchi's published article. Bianchi is the only person with first-hand knowledge of comments made by Susanne Frangie during her interview. If it must overcome a qualified privilege before deposing Bianchi Lincoln may be denied access to critical evidence concerning Plaintiff's credibility. Under these circumstances, the threat of chilling the editorial process does not exist.

This Court, in Morejon, refused to apply a qualified privilege because the facts in Morejon differed from those in Branzburq. See, More-ion, at 580-581 and Kidwell, at 401-402. Nevertheless, "[T]he issues in Branzburq and Morejon involved a reporter witnessing the actual commission of a crime." Kidwell, at 405. Because both Branzburq and Morejon involved reporters who witnessed the actual commission of crimes, clearly the distinguishing factor favoring application of a qualified newsgathering privilege that is derived from Branzburq and has been recognized by this Court in Morqan v. State, 337 So.2d 951 (Fla. 1976) and Tribune Co. v. Huffstettler, 49 So.2d 722 (Fla. 1986), is that in Branzburq,

Morsan and Huffstettler the information sought implicated confidential sources. Since the information sought from Bianchi in the instant case does not implicate any confidential source, the decision of the First District Court of Appeal should stand, and the certified question should be answered in the negative.

C. The public's first amendment risht to receive information is not adversely affected under the facts of this case

The public's right to receive information from the press, as enumerated in Stanley v. Georsia, 399 U.S. 557, 564 (1969), will not be threatened by requiring Bianchi to testify concerning his personal knowledge of relevant, nonconfidential information obtained during his interview with Susanne Frangie. Complete and objective information is the only information being sought in this matter.

When Bianchi arranged to conduct an interview with Susanne Frangie he was fully aware that the Frangies were involved in a pending civil action concerning the rape. Bianchi, therefore, should have reasonably anticipated that publication of specific details concerning the assault and its effect upon Susanne Frangie, under his by-line, would make him a likely witness in this case.

Lincoln is not seeking to depose Bianchi in order to conduct "a fishing expedition" or to gather facts available from other sources, as Petitioners contend. Nor is Bianchi's testimony being sought in order to utilize Bianchi as a "quasi-expert", or to take advantage of what has been represented as Bianchi's enhanced information-gathering skills.

Under the particular circumstances involved in this case, the source of the information contained in Bianchi's article, Susanne Frangie, with the assistance of her husband, Frank Frangie, a local Jacksonville sports journalist, sousht out The Times-Union, and particularly its sports editor, Bianchi, in order to promote a charity golf tournament that the Frangie's were sponsoring. (See Response of Lincoln to petition for Writ of Certiorari, Appendix 8 at 68-69). Susanne Frangie offered Bianchi a nonconfidential interview. Thus, by complying with the Subpoena Duces Tecum The Times-Union and Bianchiwill not be censored or chilled in any way. There is clearly no risk that confidential sources will "dry up" or in any way be impeded from relying on Bianchi or The Times-Union in the future. The free flow of information will not be affected by Bianchi's testimony, nor will the press' traditional "watchdog" role be diminished.

Lincoln does not deny that The Times-Union and Bianchi should be afforded certain freedoms pursuant to the first amendment. These freedoms are justified by the public's right to receive information. However, with any right comes responsibilities. As a journalist, Bianchi is free to report information that he believes the public has a right to know. Lincoln has not, even remotely, infringed upon this important right. As a citizen of Florida, Bianchi also has a corresponding responsibility, as do all citizens, to testify concerning his knowledge of relevant nonconfidential information.

> The fact that journalists may be somewhat inconvenienced by having to appear in court or other related proceedings

> does not lessen their duty to testify. Ordinary citizens would not be excused from testifying as to what they observed, and the First Amendment should not be interpreted to make journalists' testimony privileged simply because they made their observations while on duty as a reporter.
>
> Morejon, at 581 (emphasis added).

Webster's Ninth New Collegiate Dictionary (1988) defines "observe" in several ways. Among those definitions is "to come to realize or know especially through consideration of noted facts." Given this definition, the facts of this case, and the rationale supporting this Court's decision in Morejon, the public's first amendment right to receive information is not threatened by the First District Court of Appeal's decision in this case.

Petitioners assert that the relationship between a reporter and a nonconfidential interviewee is sacred and should not be intruded upon unless the reporter is an eyewitness to an event. In support of this contention Petitioners rely, largely, upon one commentator's opinion that society should protect relationships between reporters and sources because "as in communications between doctors and patients, lawyers and clients, and husbands and wives, full and candid disclosures between reporters and sources serve important social interests..." (See Brief of Petitioners on the Merits, at 21).

There are two important distinctions that Petitioners neglect to mention. First, even those privileges that attach to communications between doctors and patients, lawyers and clients, and husbands and wives, in Florida, only apply where the

communication was intended to be made in strict confidence[4] and where the privilege has not been waived through disclosure of the communication to a third person.[5] Second, "the privilege not to disclose relevant evidence obviously constitutes an extraordinary exception to the general duty to testify" because "[e]videntiary privileges in litigation are not favored..." Morejon at 581. Thus, the relationships discussed above, and others, are protected because Florida's Legislature has decided to protect them by extending statutory testimonial privileges to those relationships. Without these statutory privileges, those relationships would not be protected at all. See § 90.501, Fla. Stat. (1995)[6]; Southern Bell Telephone and Telegraph Co. v. Beard, 597 So.2d 873, 876 n.4 (Fla. 1st DCA 1992); State v. Castellano, 460 So.2d 480, 481 (Fla. 2d DCA 1984); and Marshall v. Anderson, 459 So.2d 384 (Fla. 3d DCA 1984).

Consequently, The Florida Legislature's decision declining to enact a shield statute that applies to nonconfidential information implies that the Legislature has already weighed the "important social interests" served by the relationship between reporters and sources against the important social interests served by Florida's liberal discovery rules. Clearly, the Legislature has determined

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[4] See §§ 90.502; 90.504; 90.505 Fla. Stat. (1995).

[5] § 90.507, Fla. Stat. (1995).

[6] When § 90.501, Florida Statutes, was originally enacted in 1979 the sponsor's note stated, "This section abolishes all common-law privileges existing in Florida and makes the creation of privileges dependent upon legislative action or pursuant to the Supreme Court's rule-making power."

that in cases involving nonconfidential information, liberal discovery should prevail.

Petitioners incorrectly assert that the burden created by the issuance of subpoenas directed to reporters asking them to testify about their nonconfidential observations falls on the media and the public. Instead, it is clear that just as the public has a right to receive information from the press, and to perceive the receipt of that information as complete and objective, the public also "has a right to every man's evidence." Morejon, at 581.

The distinction that Petitioners make between the application of the reporter's privilege in a criminal and civil proceeding is similarly flawed. Petitioners claim that in a civil case, such as the case at bar, the court need not be concerned with weighing a criminal defendant's sixth amendment right to compulsory process for obtaining favorable witnesses against the first amendment right of the press. However, in the criminal context prosecutors subpoena reporter's as often, if not more often, than do criminal defendants. Thus, the criminal defendant's sixth amendment right is only a consideration in less than half of all criminal cases where reporters are subpoenaed. See e.g. Kidwell v. State, 696 So.2d 399 (Fla. 4th DCA 1997) (where the prosecutor subpoenaed the reporter in order to impeach the criminal defendant's testimony).

Moreover, where the information sought is not confidential, its relationship to the first amendment is tenuous at best. Regardless of the context, be it civil or criminal, courts should always be concerned that a party to litigation be entitled to

develop relevant evidence that impeaches an adverse party's credibility without application of a qualified privilege. The qualified privilege simply should not apply to information developed by a reporter from a nonconfidential source in either a criminal or civil setting.

CONCLUSION

Florida law does not provide a qualified reporter's privilege against the disclosure of nonconfidential information relevant to a civil proceeding. The First District Court of Appeal was correct when it found that the trial court conformed with the essential requirements of law in ruling that Bianchi's testimony is not subject to a qualified privilege. Because Bianchi was a witness to nonconfidential information provided by a party to ongoing civil litigation, no privilege exists and Bianchi, like any other citizen, should have to testify about information developed during his interview of Susanne Frangie.

Petitioner's assertion that a qualified reporter's privilege exists under the circumstances of this case would improperly narrow the decisions in More-ion and Jackson and obliterate all subsequent Florida appellate court decisions interpreting those cases. The "work product" privilege that Petitioners seek to invoke simply does not exist in Florida unless a confidential source is implicated.

In assessing whether a qualified reporter's privilege should apply herein, the determining factor should not be whether Bianchi was an "eyewitness" to the event, but instead, whether the information sought from Bianchi is confidential. Because the information sought from Bianchi is not confidential, Bianchi does not enjoy a qualified reporter's privilege. This Court should therefore affirm the decision of the First District Court of Appeal and answer the certified question in the negative.

Respectfully submitted this 27th day of March, 1998.

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