ORIGINAL

FILED
SID J. WHITE
APR 17 1998
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

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

REPLY BRIEF OF PETITIONERS

HOLLAND & KNIGHT LLP

GEORGE D. GABEL, JR.
Florida Bar No. 027220

BROOKS C. RATHET
Florida Bar No. 0077658
Suite 3900
50 North Laura Street
Jacksonville, Florida 32202
Tel:(904) 353-2000
Fax:(904) 358-1872

Attorneys for Petitioners

TABLE OF CONTENTS

Note: The following reference is used in this brief: [AB #] for Respondents' Answer Brief (# = Page No.)

TABLE OF CITATIONS

CASES

OTHER AUTHORITIES

ARGUMENT

I. RESPONDENTS MISINTERPRETED THIS COURT'S REPORTER'S PRIVILEGE DECISIONS.

Discounting the facts in Miami Herald Pub. Co. v. Morejon, 561 So.2d 577 (Fla. 1990), as well as this Court's limited and narrow holding, Respondents improperly have framed the issue to be decided in the present case. The question to be answered should not be viewed in terms of confidential versus non-confidential sources, but rather whether non-eyewitness information is implicated by the compelled testimony of newsgatherers.

Respondents concluded in their answer brief that, where a source of information is non-confidential, a news reporter should not enjoy any privilege. (AB 8). Respondents also suggested that for this Court to hold otherwise would represent the creation of new precedent. (AB 10). Morejon is exisitng precedent and it stands for the proposition that a reporter's qualified privilege applies except when a reporter is an eyewitness.

In Morejon, this Court did not frame the issue as one of confidentiality versus non-confidentiality. Instead, it focused on whether a reporter was an eyewitness or not. By using the term "eyewitness", this Court drew a clear distinction between a reporter who sees an event and one who interviews someone after the conclusion of an event. As Judge Klein explained in his special concurrence in Kidwell v. State, 696 So.2d 399 (Fla. 4th

DCA 1997):

> I do not agree with the majority that Miami Herald Publishing Co. v. Morejon, 561 So.2d 577 (Fla. 1990), is controlling, because in Morejon the journalist was an eyewitness to a police search and arrest of the defendant, and our supreme court held that there was no qualified privilege for "eyewitness observations of a relevant event in a subsequent court proceeding." Id. at 580. There is a significant distinction between being an eyewitness to a news event and merely conducting an interview long after, such as was done in this case.

Id. at 407-8. See also Morris Communications Corp. v. Frangie, 704 So.2d 1143, 1144 (Fla. 1st DCA 1998)(Van Nortwick, J., concurring in part and dissenting in part ". . .for the reasons well expressed by Judge Klein in his concurring opinion in Kidwell. . . .").

Respondents failed to distinguish between a reporter who is an "eyewitness", as defined by this Court in Morejon, and one who interviews a source two years after an event. They insisted on suggesting that "eyewitness" means "non-confidential". (AB at 6). That conclusion ignores the facts of the Morejon case and fails to recognize how dramatically different they are from those in the present case. Morejon involved *no* interview sources. Similarly, in CBS, Inc. v. Jackson, 578 So.2d 698 (Fla. 1991), a CBS television cameraman taped an arrest. This Court stressed that since the defendant sought only what the cameraman, through his camera, eyewitnessed, the three-part test would not apply. Id. at 700. Again, the case did not involve an interview source.

Neither Morejon nor Jackson involved reporters gathering information from sources. None of the facts in Morejon nor in

Jackson, nowhere in the holding nor in dicta, did this Court even infer that reporters would be compelled to testify about what they discussed with sources well after an event. Trapped by the narrow application of this Court's holdings to eyewitness situations, Respondents have attempted to broaden the term "eyewitness" to include any reporter who speaks to any source at any time about any event in an underlying action.

Despite the fact that Florida statutes provide clear definitions of the term "eyewitness", Respondents claimed that those definitions are irrelevant because they are found in criminal statutes. (AB 18). Instead, Respondents rejected Florida's statutory definitions of "eyewitness", the word explicitly used in Morejon, in favor of Webster's definition of the word "observe". (AB 31). They did this even though this Court's use and application of the term "eyewitness" in Morejon fit squarely within the statutory definitions. Respondents' expansion upon the meaning of "eyewitness" was illogical. See e.g., Matter of Woodhaven Lumber and Mill Work, 589 A.2d 135 (N.J. 1991)(holding that an eyewitness to the act of destroying property is not the same as a witness to the results of the destruction).

Confused as to the meaning of "eyewitness", Respondents requested from Petitioners an "adequate justification as to why 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, non-confidential inculpatory

statements." (AB 18)(emphasis added). The request is irrelevant to the present case because the facts clearly show that Mike Bianchi gathered information through the planned interview of a source after the date of the underlying event.

Mike Bianchi did not accidentally oversee events or overhear statements, but performed a duty typical to newsgatherers. He gathered information through his relationship with a source during the newsgathering mission. This after-the-fact interview was not what this Court contemplated when it specifically used the word "eyewitness" in Morejon. Respondents, by misconstruing the limitations of the term "eyewitness", also have misinterpreted the Morejon decision.

II. IN ADDITION, RESPONDENTS MISINTERPRETED THE UNITED STATES SUPREME COURT'S BRANZBURG DECISION.

Respondents incorrectly asserted that the United States Supreme Court has not extended First Amendment protection in the form of a qualified privilege to non-confidential news sources. (AB at 12). A proper interpretation of Branzburg v. Hayes, 408 U.S. 665 (1972), however, and review of the history of Florida and federal courts' traditional reliance on the concurring opinion in Branzburg, undermines Respondents' position. It was not until the flawed district courts of appeal decisions in the last two years that certain Florida courts retreated from Branzburg and the cases interpreting it.

The balancing test, which, contrary to Respondents' assertion does preserve the "right to every man's evidence," was

set out in Branzburg and has been recognized even by those Florida District Courts of Appeal that do not agree that it applies to non-confidential sources. Post-Newsweek Stations Florida, Inc. v. State, 704 So.2d 1115, 1116 (Fla. 4th DCA 1998)(the test requires that a party seeking disclosure must establish 1) that the information is relevant; 2) that the information is not available from alternative sources; and 3) there is a compelling need for the information; in addition to Florida state courts, the test also has been recognized by the U.S. Court of Appeals, Eleventh Circuit, in U.S. v. Caporale, 806 F.2d 1487 (11th Cir. 1986)).

Based on Justice Powell's concurrence in Branzburg v. Hayes, the Supreme Court of the United States has etched a case-by-case approach to the protection of news sources and background information, reflecting a concern for the First Amendment's protection of freedom of the press. Justice Powell wrote:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

408 U.S. at 710.

In his concurrence, Justice Powell also stated that no harassment of newsmen will be tolerated. Id. at 709. Respondents sought to convince this Court that Justice Powell's concurrence should not be read to include situations involving non-confidential sources.

The notion that there exists no First Amendment concern just because the party does not seek the identity of confidential sources is a misconception of the scope of the free press interest. N.L.R.B. Labor Relations Board v. Mortensen, 701 F.Supp. 244, 247 (D.D.C. 1988). Regardless of whether a party seeks confidential or non-confidential sources, or whether it seeks disclosure of verification of statements made by non-confidential sources, the party still is attempting to examine the reportorial and editorial processes. Id. at 247. "Such discovery necessarily implicates the First Amendment interest of the journalists." Id. (citing Application of Consumers Union of United States, Inc., 495 F.Supp. 582, 586 (S.D.N.Y. 1980)). Most importantly, in reaching its conclusions, the court in Mortensen indicated that it was "[R]equired to apply the Branzburg balancing test and consider the conflicting interests at issue in this case." 701 F. Supp. at 247.

In U.S. v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), rev. denied, 449 U.S. 1126 (1981), the court held that a reporter's interest in protecting both confidential and non-confidential sources does not change because a case is civil or criminal. The Court stated that, "We do not think that the privilege can be limited solely to protection of sources. The compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes." Id. at 147 (citing Loadholtz v. Fields, 389 F. Supp. 1299, 1303 (M.D. Fla. 1975)).

In addition to Federal precedent, respondents also discounted the relevancy and persuasive effect of the dozen Florida trial cases, several decided after Morejon, listed in the Petitioners' Initial Brief 12, n. 1. The trial courts held that a qualified privilege existed in non-confidential source situations. In the past, this Court has recognized state trial court decisions relevant to the reporter's privilege issue. For example, in Morgan v. State, 337 So.2d 951, 956 (Fla. 1976), this Court found the state trial decision in Harris v. Blackstone Developers, 41 Fla.Supp. 176 (4th Cir. 1974) to be of value in ruling in a reporter's privilege case. Still, despite more than 25 years of federal and Florida jurisprudence supporting application of a three-part test, Respondents instead relied exclusively on the recent misinterpretation of the issue.

III. RESPONDENTS FAILED TO RECOGNIZE THE FIRST AMENDMENT RATIONALE FOR APPLYING THE QUALIFIED PRIVILEGE.

Respondents ignored the First Amendment implications of their subpoena when they compared Mike Bianchi to an emergency room physician, hospital record custodian, emergency medical technician and telephone company. (AB 20). The reason for affording Mike Bianchi and other journalists the protection of a three-part test is not to prevent their inconvenience as suggested by Respondents. Rather, it emanates from the First Amendment, which singles out *the press* as enjoying protection. The ability for any civil litigant to intrude into the newsgathering process, without having to overcome the three-part

burden, is inhibiting, and such inhibition would be inconsistent with the editorial autonomy recognized in Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974), and Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973).

In addition, Respondents failed to recognize the First Amendment implications of this issue by suggesting that, because a source has agreed to speak with a journalist, the privilege disappears. (AB 19). In Los Angeles Memorial Coliseum Comm., 89 F.R.D. 489, 494 (C.D. Cal. 1981), the court answered the question of whether the privilege is waived with respect to those sources who have voluntarily indicated that they gave information to reporters. The court held that, because of the nature of newsgathering, the journalist's privilege belongs to the journalist alone and cannot be waived by persons other than the journalist. Id. (citing to U.S. v. Cuthbertson, 630 F.2d at 147; see also Damiano v. Sony Music Entertainment, Inc., 168 F.R.D. 485, 500-1 (D.N.J. 1996).

The Los Angeles Memorial Coliseum Comm. and Cuthbertson decisions provide the rationale for the privilege. It is not to prevent inconvenience, nor does the distinction between a confidential and non-confidential source matter. Rather, the protection is afforded to the newsgathering process. "Like the compelled disclosure of confidential sources, [the compelled production of a reporter's resource materials] may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege."

Cuthbertson at 147.

The term "privilege" traditionally suggests an absolute bar to evidence, but Branzburg makes clear that a reporter's so-called privilege is *qualified* and requires application of the three-part test. The "privilege" can be more accurately described as newsgathering protection. For example, the court in U.S. v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988), did not use the term "journalist's privilege" when justifying protection against the compelled disclosure of a non-confidential source. Instead, the LaRouche court spoke in terms of weighing the First Amendment interests before compelling disclosure of a journalist's sources and recognized that the choice of terminology was irrelevant:

> Whether or not the process of taking First Amendment concerns into consideration can be said to represent recognition by the Court of a "conditional" or "limited" privilege is, we think, largely a question of semantics. The important point for purposes of the present appeal is that courts faced with enforcing requests for discovery of materials used in preparation of journalistic reports should be aware of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights.

Id. at 1181 (quoting Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 595 (1st Cir. 1980)).

The privilege once applied, protects First Amendment rights, but can be overcome. Therefore, this Court is not faced with the false choice offered by Respondents of either protecting the First Amendment or preventing discovery. See Post-Newsweek

Stations Florida, Inc. v. State, 704 So.2d 1115 (Fla. 4th DCA 1998)(three-part test applied and reporter compelled to testify).

IV. RESPONDENTS IGNORED THE ADVERSE EFFECTS OF ELIMINATING THE QUALIFIED PRIVILEGE.

In addition to the First Amendment rationale for the qualified privilege, Respondents also overlooked the practical reasons for the three-part test. Elimination of application of the three-part test in cases involving non-confidential sources will burden the press unduly by forcing them to testify in the multitude of civil actions mainly flowing from accidents which they routinely cover. Paul H. Gates, Jr., Making the Press Talk After Miami Herald Publishing Co. v. Morejon: How Much of a Threat to the First Amendment?, 17 Nova L. Rev. 497, 514-15 (1992). The failure to apply the test ". . .would turn many [journalists] into professional witnesses, taking them off their beats and causing their newsgathering mission to suffer as a result." Id. at 514.

Viewing civil litigants' discovery interests as more important than First Amendment protection impairs newsgathering. If disclosure becomes commonplace, it seems likely that internal policies of destruction of materials may be devised and choices as to subject matter made to avoid disclosure requests or compliance with requests, thus interfering with the basic function of providing news and comment. U.S. v. LaRouche Campaign at 1182. In addition, frequent subpoenas would preempt the otherwise productive time of journalists and measurably increase

expenditures for legal fees. Id. When there are legitimate First Amendment interests, they must be balanced against the defendant's interests before disclosure may be ordered. Shoen v. Shoen, 5 F.3d 1289, 1295 (9th Cir. 1993).

As two distinguished commentators have written, elaborating on a point touched upon in LaRouche, the compelled disclosure of non-confidential information harms the press' ability to gather information by:

> . . . damaging confidential sources' trust in the press' capacity to keep secrets and, in a broader sense, by converting the press in the public's mind into an investigative arm of prosecutors and the courts. It is their independent status that often enables reporters to gain access, without a pledge of confidentiality, to meetings or places where a policeman or a politician would not be welcome. If perceived as an adjunct of the police or of the courts, journalists might well be shunned by persons who might otherwise give them information without a promise of confidentiality, barred from meetings which they otherwise would be free to attend and to describe, or even physically harassed if, for example, observed taking notes or photographs at a public rally.

Id. at 1295 (citing Duane D. Morse & John W. Zucker, The Journalist's Privilege in Testimonial Privileges 474-75 (Scott N. Stone & Ronald S. Liebman eds., 1983)).

In In re Subpoena Duces Tecum to Stearns v. Zulka, 489 N.E.2d 146 (Ind. Ct. App. 1986), the court applied these principles in a civil case involving a defendant in an automobile accident who subpoenaed newspaper photographs of the accident. The court stated that:

> [T]he job of the newspaper is to gather as much information as it possibly can with respect to all facts of activity of interest and importance to readers . . . . [T]o make the press in effect, the

> investigative arm of every civil litigant . . . inevitably will constrict the flow of information to the press, and ultimately to us all.

489 N.E.2d at 151 (quoting Suede Originals v. Aetna Casualty, 8 Media L. Rptr. (BNA) 2565, 2566 (Tex. App. 1982)).

Respondents wish to depose a newsgatherer without any balancing of interests, even though "the First Amendment occupies a preferred position in the pantheon of freedoms." Baker v. F & F Investment, 470 F.2d 778, 783 (2d Cir. 1972), rev. denied, 411 U.S. 996 (1973). While equating journalists to all other witnesses, Respondents are blind to the fact that journalists are in the business of gathering and disseminating information. See Jay Black et al., Doing Ethics in Journalism: A Handbook With Case Studies 2 (2d ed. 1995)(stating that "the primary role of the journalist is to get and report truthful news"). In turn, "[S]ources are the foundation of a journalist's success, developed and nurtured and often protected for the future." Id. at 197.

Respondents do not care about a potential promise to a source that some facts are "on the record" and some will not be published. In fact, a breach of a promise made to a source could lead to the source's suing the reporter. See e.g, Cohen v. Cowles Media Co., 501 U.S. 663 (1991). Reporters can realistically envision the day that Continuing Legal Education instructors teach seminar attendees to subpoena reporters as an information-gathering tool. With the non-existence of the three-part test, the failure of an attorney to subpoena a journalist

might represent legal malpractice. Therefore, the public's chief information gatherers will become its most frequent courtroom witnesses.

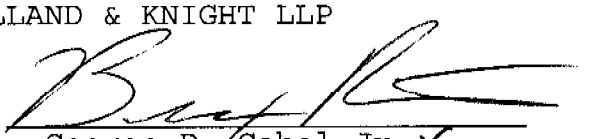
CONCLUSION

In accordance with Florida's tradition of First Amendment protection, this court should ensure that reporters are compelled to testify only as a last resort. This can be achieved by following Branzburg and Morejon and preserving the traditional application of the First Amendment-based three-part test in circumstances involving confidential and non-confidential sources.

This Court should eliminate the First District Court of Appeal's shared "[C]oncern expressed by Judge Klein in his opinion in Kidwell concerning total elimination of the balancing test in all nonconfidential source cases and the potential impact this has on the newsgathering and editorial functions of our newspapers". Morris Communications Corp. v. Frangie, 704 So.2d 1143, 1144. As urged by the dissent in Morris, this Court should hold that a reporter is entitled to a qualified privilege from testifying subject to the balancing test. Id.

Respectfully submitted this 17th day of April, 1998.

HOLLAND & KNIGHT LLP

By: 

George D. Gabel Jr. ✓
Florida Bar No. 027220

Brooks C. Rathet ✓
Florida Bar No. 0077658

Suite 3900
50 North Laura Street
Jacksonville, Florida 32202
Tel: (904) 353-2000
Fax: (904) 358-1872

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by hand delivery to:

Ronald E. Reed, Esquire
Laurence C. Huttman, Esquire
Bullock, Childs, Pendley, Reed,
Herzfeld & Rubin
233 East Bay Street
Suite 711
Jacksonville, Florida, 32202

J. Richard Moore, Esquire
500 North Ocean Street
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

Honorable Frederic A. Buttner
Duval County Courthouse
Room 202
Jacksonville, Florida, 32202

this 16th day of April, 1998.

ATTORNEY