

O/a 3-3-88.

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IN THE
SUPREME COURT OF FLORIDA

CASE NO. 70,910

DEMPSEY J. BARRON,
Petitioner,

vs.

FLORIDA FREEDOM NEWSPAPERS, INC.,
Respondent.

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BRIEF OF AMICUS CURIAE,
SENTINEL COMMUNICATIONS COMPANY

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INTRODUCTION

SENTINEL COMMUNICATIONS COMPANY ("Sentinel") is the publisher of The Orlando Sentinel, a daily newspaper of general circulation throughout the state of Florida. Sentinel's reporters regularly write news stories on civil court cases, and, in doing so, Sentinel's reporters rely upon access to pre-trial and trial proceedings to gather the information necessary to accurately report on these civil cases. Sentinel's reporters similarly rely upon continuing access to court records to gather information about civil cases which are of interest to the public. For instance, The Orlando Sentinel was the recipient of The Florida Bar Association's 1987 Media Award for the publication of a series of articles on the medical malpractice crisis; those articles were in large part based upon statistics regarding medical malpractice cases which were compiled from a review of court files.

Sentinel has a substantial interest in the court's decision in the instant case because the decision will impact upon Sentinel's right to attend civil court proceedings and to review civil judicial records. It is for this reason, therefore, that Sentinel respectfully submits to the court this Amicus Curiae Brief in support of the position of the Respondent, Florida Freedom Newspapers, Inc.

FACTUAL AND PROCEDURAL STATEMENT

Sentinel adopts the factual and procedural statement as set forth in the answer brief of the Respondent, Florida Freedom Newspapers, Inc.

SUMMARY OF ARGUMENT

Sentinel requests this court to join the First District Court of Appeal in rejecting the concept of "private civil litigation," a dangerous premise which saw its genesis in the case of Sentinel Communications Company v. Smith, and which was applied by the trial court in the instant case to deny public access to the court records and proceedings here. The concept of "private civil litigation" is flawed in the first instance because it relies upon a constitutional right of privacy which attaches only when there is a reasonable expectation of privacy; however, there is no reasonable expectation of privacy in court files. Additionally, the public judicial system is different from private dispute resolution forums (such as arbitration proceedings) in that the public pays for its judicial system. The judicial system maintains the court records sought in this case. The power of the state can be brought to enforce civil court orders. The public therefore has a right to monitor the efficiency and effectiveness of its judicial system, particularly with regard to divorce proceedings, since marriage is an institution of central importance to our society.

Another cornerstone behind the theory of "private civil litigation" is that the public has less of an interest in access to civil judicial records and proceedings than it does in access to criminal judicial records and proceedings. This argument has no legal basis, as it has been held that not only is there a strong common law right of access to civil proceedings, but

there is also a First Amendment right of access to civil proceedings. Access to civil proceedings allows for public checks on the judicial system and promotes public understanding of the judicial process in the same manner that public access to criminal proceedings does. The public's interest in ensuring the integrity of the fact-finding process and judicial decisionmaking process is as great in civil proceedings, including divorce actions (in which it has been said that the State is a third party to the litigation), as it is in criminal proceedings.

In a civil case in which a party seeks to deny public access to court records or proceedings, a trial court should place the burden of proof on the party seeking closure to meet the three-pronged standard of Miami Herald v. State. Adoption of the three-pronged standard is appropriate in civil cases because the policy reasons for public access to civil cases are the same as the reasons for access to criminal cases. Additionally, recent developments in cases before the United States Supreme Court and the Federal appellate courts lead to the conclusion that there is a First Amendment right of access to civil documents and proceedings, both pre-trial and trial. Even if the right of access is held to be based upon the common law rather than the First Amendment, this court has still held that the three-pronged test is applicable when the right of access is non-constitutional.

The concept of "private civil litigation" threatens to eviscerate the strong tradition of public access to the judicial

system which this court has promoted. Such access leads to increased public confidence in, and heightened public understanding of, the judicial system, whether it be in the criminal or civil context. This court should protect that tradition by firmly rejecting the premise of "private civil litigation," and by adopting the three-pronged standard for application to public access issues in civil cases.

ARGUMENT

I.

THE CONCEPT OF PRIVATE CIVIL LITIGATION HAS NO BASIS IN THE COMMON LAW OR IN THE CONSTITUTION, AND THIS COURT SHOULD REJECT THIS DANGEROUS PREMISE.

As the First District Court of Appeal explained in its opinion in the instant case, the trial judge's initial ruling was based upon the right to privacy contained in Article I, Section 23 of the Florida Constitution, and upon the Fifth District Court of Appeal's decision in Sentinel Communications Company v. Smith, 493 So.2d 1048 (Fla. 5th DCA 1986), rev. den., 503 So.2d 328 (Fla. 1987). See Florida Freedom Newspapers v. Sirmons, 508 So.2d 462, 463 (Fla. 1st DCA 1987). In the Smith case, the appellate court affirmed an order denying a motion to unseal a domestic relations file, partly upon the basis that "if the privacy rights of the litigants and third persons in this case are not recognized and respected, then no citizen has any right of privacy in private litigation." 493 So.2d at 1049.

The court's opinion that civil litigants have privacy rights in such litigation was based upon the following rationale:

It is an essential governmental function to provide citizens with an impartial forum in which they may present and resolve their private disputes and controversies. In order to fairly resolve many such private controversies it is necessary for the litigants and witnesses to assert and admit embarrassing intimate details of the private lives of the litigants and of innocent third persons. If this cannot be done without the deterrence of unwanted publicity the legal system cannot meet the basic need for which it is established.

493 So.2d at 1048. No cases were cited by the Fifth District Court of Appeal in support of this premise.

The trial judge's decision in the instant case demonstrates the danger of allowing the Fifth District Court of Appeal's opinion to remain a compelling common law force in this state. In the case at bar, the First District Court of Appeal, after initially affirming the trial court order, attempted in vain to conform its decision to the Fifth DCA's holding in Smith. It could not do so, because there is neither a constitutional nor a common law basis for the concept of "private civil litigation to which the general public -- the State -- is not a party." Sentinel respectfully requests this court to affirm the decision of the First District Court of Appeal in the instant case, and in so doing, to join the First District in rejecting the premise of "private civil litigation."

The so-called concept of "private civil litigation" is based upon two premises. The first is that the constitutional right of privacy gives a party a substantive right to have judicial

proceedings to which he is a party closed from public view. The second is that the public has less of an interest in access to civil trials and records than to criminal trials and records.

A. THERE IS NO CONSTITUTIONAL RIGHT OF PRIVACY IN CIVIL JUDICIAL RECORDS.

In the instant case, Senator Barron claims that the Federal and State Constitutions provide to him a right of privacy which justified the closing of the trial and the sealing of the judicial records, based upon the proposition that "one has a privacy interest in avoiding the public disclosure of personal matters." Petitioner's Initial Brief at p. 23, citing Nixon v. Administrator of General Services, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) and Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). Similarly, in the Sentinel Communications Company v. Smith case, the Fifth District Court of Appeal based its concept of the privacy rights of the litigants upon Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and Article I, Section 23 of the Florida Constitution. 493 So.2d at 1049 n.1. However, as the First District Court of Appeal correctly recognized, constitutional rights of privacy are not properly applicable in this case, or in any other civil case, for the same reason that Senator Barron's (and the Fifth DCA's) central premise is incorrect: the right of privacy does not apply to "personal matters" which are contained in a public court file.

In Palm Beach Newspapers v. Burk, 504 So.2d 378 (Fla. 1987), this court recognized that once deposition transcripts which

are attendant to a case are filed with the court pursuant to Rule 1.400 Fla.R.Civ.P., the transcripts are open to public inspection. 504 So.2d at 384, citing Tallahassee Democrat, Inc. v. Willis, 370 So.2d 867, 870-871 (Fla. 1st DCA 1979). As the First District Court of Appeal correctly noted in the instant case, the right of privacy in the Florida Constitution precludes intrusion into private lives, not public proceedings. 508 So.2d at 463. Thus, as public documents, judicial records are not the type of records to which a right of privacy attaches.

In Winfield v. Division of Pari-Mutual Wagering, 477 So.2d 544 (Fla. 1985), cited by the Petitioner in support of his privacy arguments, this court stated that before the constitutional right to privacy can attach, a reasonable expectation of privacy must exist. id. at 547. However, traditionally, there is no expectation of privacy in court files. Forsberg v. Housing Authority, 455 So.2d. 373, 375 (Fla. 1984) (Overton, J., specially concurring). In that case, indigents who applied for public housing assistance were required to submit "information of a personal and confidential nature concerning their family status and relationship, income, expenses, assets, employment and medical history as a condition to obtaining decent, safe and sanitary housing at a price that they could afford." id. at 374-375 (emphasis supplied by court). Because the right of privacy in the Florida Constitution does not apply to public records, this court found that it offered the tenants no relief from public access to the records. id. at 374. In analyzing the application

