

0/a 8-30-88

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 71,554

CAPE PUBLICATIONS, INC.,
VINCE SPEZZANO and JERE MAUP

Petitioners

v.

PHILIP HITCHNER and
BARBARA HITCHNER,

Respondents

FILED

SID J. WHITE

MAY 25 1988

CLERK, SUPREME COURT

By  Deputy Clerk

On Review of a Decision of the
Fifth District Court of Appeal

BRIEF OF THE
STATE ATTORNEY OF
THE ELEVENTH JUDICIAL
CIRCUIT OF FLORIDA AS
AMICUS CURIAE

JANET RENO
State Attorney
Miami, Florida 33125

PAUL MENDELSON
Assistant State Attorney
Metro Justice Building
1351 Northwest 12th Street
Miami, Florida 33125
(305) 547-7093

TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	1
STATEMENT OF THE FACTS	1 – 2
SUMMARY OF ARGUMENT	3
ARGUMENT	4-11
REPORTS AND RECORDS OF CHILD ABUSE AND NEGLECT ARE NOT EXEMPT FROM DISCLOSURE UNDER THE PUBLIC RECORDS ACT BY SECTION 415.51, (PREVIOUSLY 827.07(15), UNLESS THEY WERE MADE TO OR GENERATED BY HRS.	
CONCLUSION	11
CERTIFICATE OF SERVICE	12

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Cape Publications Inc. v. Hitchner,</u> 514 So.2d 1136 (Fla. 5th DCA 1987)	1,3,5,10,11
<u>Palm Harbor Special Fire Control District v. Kelly,</u> 516 So.2d 249 (Fla. 1987)	8
<u>Tampa-Hillsborough County Expressway</u> <u>Authority v. K.E. Morris Alignment Service, Inc.,</u> 444 So.2d 926 (Fla. 1983).	8
<u>Woodaate Development Corporation v.</u> <u>Hamilton Investment Trust,</u> 351 So.2d 14 (Fla. 1977).	8
<u>OTHER AUTHORITIES</u>	
<u>Fla. Stat.</u>	
Section 119.07 (1)	9
Section 119.07(3)(d)	7,8
Section 119.07(3)(h)	7,8
Section 415.503(3)	10
Section 415.51	3,4,5,9,10,11
Section 415.51 (1)	9
Section 415.51(2)	9
Section 415.502-415.514	9
Section 827.07	6,7
Section 827.07 (1979)	7
Section 827.07 (1981)	3
Section 827.07 (1)	6
Section 827.07(2)(b)	10
Section 827.07(3)	6
Section 827.07(15) (a)	9
Section 827.07(15)	3,4,5,6,7,8,
Section 827.07(18)	6
Laws of Florida Chapter 79-203	6
Laws of Florida Chapter 84-226	9

INTRODUCTION

The decision in Cape Publications v. Hitchner, 514 So.2d 1136 (Fla. 5th DCA 1987), has potentially broad ramifications which raise significant prosecutorial concerns. Permission to file this amicus curiae brief is being sought so that this Court will be aware of these concerns, which affect all prosecutors throughout Florida.

STATEMENT OF THE CASE⁽¹⁾

Phillip and Barbara Hitchner filed a suit against Cape Publications, Inc., and a reporter it employed, alleging invasion of privacy by public disclosure of private facts. The trial court granted partial summary judgment on the issue of liability. Cape Publications, Inc., appealed to the Fifth District Court of Appeal, which on November 5, 1987, affirmed the trial court. On April 14, 1988, this Court accepted jurisdiction to review this decision.

STATEMENT OF THE FACTS

Phillip and Barbara Hitchner were acquitted of the charge of Aggravated Child Abuse. Five days after the trial, a reporter employed by Cape Publications, Inc., examined the Clerk's file and interviewed the Assistant State Attorney who prosecuted the

⁽¹⁾ Since this brief deals with the reach of Cape Publications v. Hitchner, supra, the facts stated herein will be taken exclusively from that decision.

case. Acting under the direction of the Assistant State Attorney, a secretary produced the entire file on the Hitchner case for the reporter. The reporter read the file which contained a dispositional report of the Department of Health and Rehabilitative Services (HRS), the sheriff's case report and a typed interview between the child and the Assistant State Attorney.

A story on the Hitchner case appeared on the front page of the TODAY newspaper, which is published by Cape Publications, Inc. The story contained statements which were not disclosed at trial; but rather came directly from the HRS predispositional report, the sheriff's case report and the typed interview of the child.

SUMMARY OF ARGUMENT

The Court in Cape Publications Inc. v. Hitchner, supra held that Cape Publications, Inc., and its reporter violated the confidentiality requirements of Section 827.07(15) ⁽²⁾ Fla.Stat. (1981) by publishing statements which were contained in a HRS dispositional report, the sheriff's case report and a typed interview between the child and the Assistant State Attorney. The Court reasoned at 516 So.2d 1137 that "[t]hese documents, which were generated as a result of a report of child abuse or neglect, were exempt from the public records act and were not subject to disclosure, Section 827.07(15), Fla.Stat. (1981)." The undersigned submits that the Court reasoned incorrectly in concluding that all three documents in question were exempt from the public records act under Section 827.07(15). Rather, the legislative history of the statute establishes that its scope at its broadest is limited to reports or records received or generated by HRS, such as the dispositional report, and it therefore does not apply to the sheriff's case report or the typed interview of the child by the prosecutor.

(2)

The Court upheld the constitutionality of Section 827.07(15), which has been renumbered as Section 415.51 Fla.Stat. (1987). This holding, as well as the holding that the statute afforded the Hitchners a civil cause of action for invasion of privacy, will surely be sufficiently addressed in the briefs filed by the litigants and press amicus curiae, and will not be analyzed in this brief.

ARGUMENT

REPORTS AND RECORDS OF CHILD ABUSE
AND NEGLECT ARE NOT EXEMPT FROM
DISCLOSURE UNDER THE PUBLIC RECORDS
ACT BY SECTION 415.51, (PREVIOUSLY
827.07(15)), UNLESS THEY WERE MADE
TO OR GENERATED BY HRS.

The undersigned is a strong proponent of the open government which currently exists in Florida, as exemplified by the public records act. The success of and public confidence in the criminal justice system and more particularly, the role of a prosecutor is dependent upon public understanding and awareness. To the extent that the prosecutorial function is not compromised, the undersigned has always encouraged the people of Dade County to be informed. The resulting reaction and input of an informed citizenry have enabled the undersigned to better serve the public.

A limitation of the public's access to information concerning child abuse and neglect could undermine the public's confidence in its officials, who are charged with executing our criminal laws. (3) Of even greater significance, it could result in an impairment in the detection of child abuse and neglect.

(3) Some limitations on the disclosure of child abuse or neglect information is appropriate. See e.g., Sections 119.07(3) (d) and 119.07(3) (h) Fla.Stat, (1987) which exempt from disclosure "active criminal intelligence information and active criminal investigative information", and identifying information of a victim of a child abuse or sexual crime. The significance of these exemptions in ascertaining the legislative intent behind the enactment of Section 827.07(15) will be discussed infra.

The successful apprehension and prosecution of child abusers is greatly aided by the public's awareness of the magnitude and nature of the problem. The tell-tale signs, which in the past might have been overlooked by well-meaning citizens, are now being reported, due in large measure to the recent widespread publicity given cases of child sexual and physical abuse and neglect. Any curtailment of the public's access to information about this most grave problem has serious consequences, and must therefore be given the most thoughtful consideration.

While Section 827.07(15) and current Section 415.51 obviously curtail the public's access to information regarding child abuse and neglect, the validity and extent of such curtailment were open questions until the decision in Cape Publications. Since the statute, especially as broadly interpreted in Cape Publications, could limit public awareness of child abuse and neglect, its validity and scope should be determined by this Court. The undersigned submits that an analysis of the legislative history of Section 827.07(15) discloses that the Court in Cape Publications, erred in according the statute a broad scope clearly beyond that which was intended. (4)

(4)

Of course, this analysis of the extent or scope of Section 827.07(15) need only be undertaken if this Court finds that the statute is constitutionally valid.

The Court's holding in Cape Publications v. Hitchner, *supra* at 1137 that a sheriff's case report and a typed interview between a prosecutor and a child abuse victim "were generated as a result of a report of child abuse or neglect [and] were exempt from the public records act and were not subject to disclosure" under Section 827.07(15), ⁽⁵⁾ is contrary to legislative intent.

Section 827.07(15) was enacted in 1979, as part of a statutory change which substantially reworded Section 827.07. See Laws of Florida Chapter 79-203. Enacted along with Section 827.07(15) was 827.07(1), which stated, in pertinent part, that the legislative intent of the statute

...is to provide for comprehensive protective services for abused or neglected children found in the state by requiring that reports of each abused or neglected child be made to the Department of Health and Rehabilitative Services... ⁽⁶⁾

In order to effectuate this intended goal, the legislature simultaneously enacted stringent reporting requirements, Section 827.07(3); and made the failure to comply with these requirements a misdemeanor, Section 827.07(18).

Having established a procedure which would presumably cause a significant increase in the number of child abuse reports to

(5)

The Court so found, despite Cape Publications arguments in the trial and appellate courts that the interview between the child and the prosecutor was generated by the prosecutor, and was therefore not within the meaning of Section 827.07(15).

(6)

This expression of legislative intent is currently found in Section 415.502 Fla. Stat. (1987).

HRS, the legislature enacted Section **827.07(15)**, which provided that these reports and the information they generated would be confidential. Since these **1979** amendments to Section **827.07** were designed primarily to clarify the role of HRS in the investigation of child abuse, it is logical to conclude that the confidentiality provision of Section **827.07(15)** was intended to apply exclusively to reports or records made to or generated by HRS .

This conclusion is strengthened by consideration of Sections **119.07(3)** (d) and **119.07(3)** (h) Fla. Stat. (**1979**), which exempted from disclosure under the public records act any active criminal intelligence or investigative information or any information which reveals the identity of the victim of a sexual battery or child abuse.⁽⁷⁾ While this provision applied to information in the possession of a criminal justice agency, it did not apply to information in the possession of HRS. Thus, while there was a need in **1979** to protect the confidentiality of child abuse and neglect information possessed by HRS, there was no such need with regard to child abuse and neglect information possessed by criminal justice agencies, such as a sheriff's department or State Attorney's Office. A proper determination therefore of the legislative intent behind the enactment of Section **827.07(15)** in

(7)

The current Section **119.07(3)** (h) also exempts identifying information of the victim of a lewd, lascivious or indecent assault.

1979 is that it is limited in scope to information in the possession of HRS.

This interpretation of the legislative intent behind the enactment of Section 827.07(15) is consistent with well-settled rules of statutory construction. In accordance with these rules, a court should presume that the legislature passes statutes with full awareness of prior statutes and does not intent to enact contradictory legislation. Palm Harbor Special Fire Control District v. Kelly, 516 So.2d 249 (Fla. 1987); Woodgate Development Corporation v. Hamilton Investment Trust, 351 So.2d 14 (Fla. 1977). The Court in Cape Publications overlooks this rule and incorrectly accords to Section 827.07(15) a construction which is conflicting with Section 119.07 as to what reports and records must be disclosed by a criminal justice agency. Also overlooked by the Court, is the rule of statutory construction that a statute should be construed in light of its manifest purpose. Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Service, Inc., 444 So.2d 926 (Fla. 1983). As previously detailed, when Section 827.07 (15) was enacted there was a clear need to protect the confidentiality of sensitive child abuse and neglect information possessed by HRS, but no such need to protect such sensitive information in the possession of criminal justice agencies, which was already appropriately exempted from disclosure under the public records act. See Sections 119.07 (3)(d) and 119,07 (3)(h) , Fla.Stat. (1979). Therefore, the manifest purpose behind the enactment of 827.07(15) was to specify what information in the possession

of HRS should be confidential, and not to create confusion as to the confidentiality of information in the possession of criminal justice agencies.

Indeed, the subsequent history of Section 827.07 (15) makes such a determination even more compelling. In 1983, Section 827.07(15) (a) was transferred to Section 415.51(1), without significant change. In 1984, however, a change was made to Section 415.51(1) which made its scope apparent.

In 1983, Section 415.51(1) read in full, as follows:

In order to protect the rights of the child and his parents or other persons responsible for the child's welfare, all records concerning reports of child abuse or neglect, including reports made to the abuse registry and to local offices of the department and all records generated as a result of such reports, shall be confidential and exempt from the provisions of s. 119.07(1), and shall not be disclosed except as specifically authorized by ss. 415.502-415.514.

The following sentence was added in 1984, See Laws of Florida 84-226.

Such exemption from s. 119.07(1) applies to information in the possession of those entities granted access as set forth in this section.

The only logical explanation for the addition of this sentence is that the legislature intended that the confidentiality afforded by Section 415.51(1) was limited to reports and records made to or generated by HRS, and wanted to make it clear that if such reports or records were disclosed to an exempt entity under Section 415.51(2), they would still retain their confidentiality.

Accordingly, the undersigned submits that a sheriff's case report and a typed interview between a prosecutor and a child abuse victim, are not within the scope of Section 827.07(15) or Section 415.51. The court's apparent holding to the contrary in Cape Publications needs to be corrected.

Another concern which is raised by Cape Publications, is whether the right to privacy recognized by the court is strictly limited to the statute. If so, only reports and records of child abuse committed by a "...parent or other person responsible for the child's welfare" would be confidential, since Section 827.07(2) (b) provided that "child abuse or neglect" can only be committed by such individuals.⁽⁸⁾ The undersigned believes that this would be the correct interpretation of Cape Publications, but is unable to so state with certainty since the question is not expressly addressed. Resolution of this issue by this Court would prove helpful to the undersigned as well as to all agencies who are in the possession of reports and records regarding child abuse committed by someone who is not responsible for a child's welfare.

As the prosecuting attorney in the largest circuit in Florida, the undersigned often receives requests for reports and records in child abuse and neglect cases which are not disclosed

(8) Currently Section 415.503 (3).

in court and are not active criminal intelligence or investigative information. There is currently a conflict between the public records act, which properly mandates a broad disclosure of such information, and the Court's interpretation in Cape Publications of Section **827.07**, now **415.51**, which arguably requires that virtually all such information not be disclosed. A correction of the Court's erroneous interpretation is necessary so that this conflict can be resolved.

CONCLUSION

Based upon the foregoing reasons, the undersigned submits that this Court should hold that the confidentiality requirements of Section **415.51** should be limited to reports and records which are made to or generated by HRS.

Respectfully submitted

JANET RENO
State Attorney

By: Paul Mendelson
PAUL MENDELSON
Assistant State Attorney
Metro Justice Building
1351 Northwest 12th Street
Miami, Florida 33125
(305) 547-7093

CERTIFICATE OF SERVICE - -

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was forwarded to Jack A. Kirschenbaum, Wolfe, Kirschenbaum & Peeples, P.A., P.O. Box 757, Cocoa Beach, Florida 32921; Florence Snyder Rivas, Edwards & Angell, 250 Royal Palm Way, P.O. Box 2621, Palm Beach, Florida 33480; John B. McCrory, Robert C. Bernius (of the District of Columbia Bar), Nixon, Hargrave, Devans & Doyle, One Thomas Circle, N.W., Washington, D.C. 20005; William E. Weller, Esquire, Rose & Weller, Attorney for Appellees, 101 N. Atlantic Avenue, P.O. Box 1255, Cocoa Beach, Florida 32931; George K. Rahdert, Esquire, Alison M. Steele, Esquire, Rahdert, Acosta & Dickson, P.A., 233 Third Street North, St. Petersburg, Florida 33701; Will Strickland, Esquire, Ferrero, Middlebrooks, Strickland & Fischer, P.A., 6th Floor, Blackstone Building, 707 Southeast 3rd Avenue, Suite 600, Ft. Lauderdale, Florida 33302; Gregg D. Thomas, Esquire, Holland & Knight, NCNB Building, Tampa, Florida 33601; George Freeman, Esquire, Deborah Linfield, Esquire, 229 West 43rd Street, New York, New York 10036; Richard Ovelmen, Esquire, One Herald Plaza, Miami, Florida 33132; Joseph P. Averill, Esquire, 710 City National Rank Building, 25 West Flagler Street, Miami, Florida 33130; William G. Mateer, Esquire, David L. Evans, Esquire, Mateer, Harbert & Bates, 100 East Robinson Street, Orlando, Florida 32802; and Bruce Sanford, Esquire, Baker & Hostetler, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, on this the 23rd day of May, 1988.


PAUL MENDELSON
Assistant State Attorney