

No. 01-55487

No. 01-55788

No. 01-55789

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLAN J. FAVISH,
PLAINTIFF-APPELLANT/CROSS-APPELLEE,

v.

OFFICE OF INDEPENDENT COUNSEL,
DEFENDANT-APPELLEE/CROSS-APPELLANT, and
SHEILA FOSTER ANTHONY; LISA FOSTER MOODY,
DEFENDANTS-IN-INTERVENTION-APPELLEES/CROSS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY/ANSWERING BRIEF OF DEFENDANTS-IN-INTERVENTION-
APPELLEES/CROSS-APPELLANTS
SHEILA FOSTER ANTHONY AND LISA FOSTER MOODY

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ARGUMENT

Ms. Anthony and Ms. Foster submit this Reply/Answering Brief solely to express their strong disagreement with plaintiff Favish's conclusion that the privacy interest of Vince Foster's survivors is "greatly overstated."

Reply/Answering Brief of Favish, pp. 7-11. This is in part so, Favish says, because "[i]t is unlikely that the declarants will be in a situation where they will have to see any of these photographs for any period of time longer than it takes to turn their head or change a channel." *Id.* pp. 9-10. Moreover, he says, "there is no evidence that anybody will force them to look at the photos."

These statements not only ignore the pervasiveness of the modern-day media, they also betray a callousness and disregard of human emotions that escape comprehension. We are constrained to ask what Mr. Favish's feelings would be if, instead of Vince Foster, the photographs showed one of his loved ones lying dead in Fort Marcy Park with blood stains on his or her body and clothing. No argument, no matter how sophisticated, can obscure the fact that seeing these photographs, if only for fleeting moments, will bring intense anguish to Family members and violate their memories of Mr. Foster. Mr. Favish's own insensitivity should not be the controlling standard. Indeed, this Court already has recognized that the Family has a cognizable privacy interest in avoiding the foreseeable

consequences that would flow from the release of the photos. *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000).

Mr. Favish suggests that, because only Ms. Anthony and Ms. Moody submitted Declarations, the other Family members do not care if the photographs are released. That suggestion is absurd. The Declarations demonstrate that Ms. Anthony and Ms. Moody speak for other Family members.¹ Surely,

¹ In her Declaration Ms. Anthony said:

More than ever before, I fervently believe that releasing any photographs depicting Vince's body post-mortem would constitute a painful unwarranted invasion of my privacy, my mother's privacy, my sister's privacy, and the privacy of Lisa Foster Moody (Vince's widow), her three children, and other members of the Foster family....

I implore the Court to do all it can to protect our family, but particularly Vince's children and his 86 year old mother, from further invasion and the distressing events that surely would result from the release of these photographs.

Amended Decl. of Sheila Foster Anthony, Appellant's Excerpt of Record ("Record") at 528.

And Ms. Moody, in her Declaration, said:

It is inconceivable to me how the misguided, twisted curiosity of a stranger could justify my children having to see pictures of their dead father on the nightly news, on the Internet and on the supermarket shelves. I respectfully implore the court to be sensitive to the wishes of the members of our family and wholly-legitimate privacy concerns and to reconsider releasing these photographs.

Ms. Moody can speak for her three children. Surely, Ms. Anthony can speak for her mother and sister. And why would anyone presume to conclude that Ms. Foster's three children, his mother or his other sister would not care and not be wounded if pictures of his blood-stained body are widely circulated in the media and on Mr. Favish's now-overflowing Internet site? This argument is another example of Mr. Favish's inability to gauge normal human feelings.

Mr. Favish seemingly contends that, because Ms. Moody gave one interview to The New Yorker magazine, she somehow has waived the Family's privacy interests.² But the fact that she participated in a dignified, restrained interview certainly does not mean that she and the rest of her family would not be repelled by seeing photographs of Mr. Foster's lifeless body widely displayed in the media. There is a great difference between an anguishing violation of the memory of a deceased loved one and a discussion with one reporter designed to honor the memory of that person. Moreover, the media reaction to the article was far different than the media frenzy that likely would be caused by the release of gruesome photographs.

Amended Decl. of Lisa Foster Moody (“Moody Decl.”), Suppl. Excerpts of Record, at Tab 2.

² This was the only interview given by a Family Member. There have been no television interviews and none of any sort by Ms. Anthony. *See* Moody Declaration, Record at 531. The New Yorker article contained no picture of Mr. Foster's body.

We also strongly disagree with the statement that "any privacy interest Intervenor may have in photos of Foster is diminished by the fact he was a public official." The families of public officials -- such as the families of the Challenger astronauts -- have substantial privacy interests in preserving the memories of their loved ones, just as other families do.³ It may be that -- in some circumstances where matters have not been so thoroughly investigated as in the situation here -- there is an enhanced public interest in knowing how a public servant died. But to say that is not to disparage, as Mr. Favish has done, the wholly legitimate privacy interests that rest with the survivor's family.⁴

³ Courts have recognized this. *See New York Times v. NASA*, 782 F. Supp. 628 (D.D.C. 1991) *on remand from*, 920 F.2d 1002 (D.C. Cir. 1990) (*en banc*) (recognizing family privacy interests as to tapes of the crew's final moments in the Challenger disaster); *Katz v. National Archives & Records Admin.*, 862 F. Supp. 478, 482 (D.D.C. 1994) (recognizing Kennedy family's interest in the autopsy records of President Kennedy).

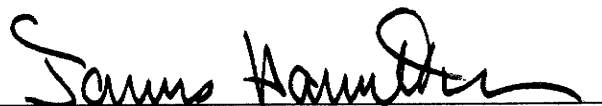
⁴ We fail to see how those legitimate interests will be protected by redaction of the photographs. Any portion of the photographs Mr. Favish wishes to see -- e.g., portions showing blood on his neck -- will invade the Family's privacy.

CONCLUSION

For these reasons, and for the reasons previously stated by Intervenors and the Office of Independent Counsel, this Court, after examining the photographs at issue, should rule that all ten photographs are exempt from disclosure, reverse the trial court's decision that five of the photographs should be released, and affirm the trial court's decision that five of the photographs should not be disclosed. Alternatively, this Court should reverse the trial court's decision to release five photographs and remand for further proceedings.

Respectfully submitted,

Date: October 24, 2001

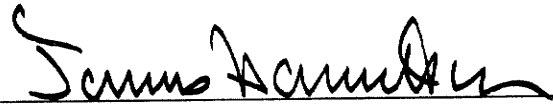


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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Opening/Answering Brief is proportionately spaced, has a typeface of 14 points and contains 1081 words.

A handwritten signature in black ink, appearing to read "James Hamilton", written over a horizontal line.

James Hamilton
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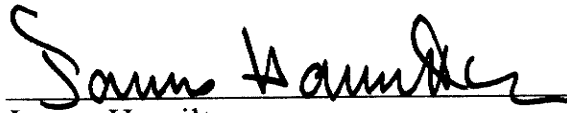
Date: October 24, 2001

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2001, I caused the foregoing "Reply/Answering Brief of Defendants-in-Intervenors-Appellees/Cross-Appellants Sheila Foster Anthony and Lisa Foster Moody" to be served upon the Court and upon the following counsel by Federal Express Overnight Delivery:

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