

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

FILED

JUN 29 1983

SID J. WHITE
CLERK SUPREME COURT

Chief Deputy Clerk

MID-FLORIDA TELEVISION
CORP., et al. and PAT BEALL,

Petitioners,

vs.

Case No. 63,753

JACK BOYLES,

Respondent.

ON APPLICATION FOR REVIEW OF THE DECISION
OF THE DISTRICT COURT OF APPEAL, FIFTH
DISTRICT, CASE NO. 82-701--
DIRECT CONFLICT OF DECISIONS

JURISDICTIONAL BRIEF OF RESPONDENT

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ARGUMENT

- I. THE APRIL 20, 1983 DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IS NOT IN EXPRESS AND DIRECT CONFLICT WITH A PRIOR DECISION BY THE FIRST DISTRICT COURT OF APPEAL.

Petitioners contend that the decision of the Fifth District Court of Appeal in the case sub judice is in express and direct conflict with the decision, From v. Tallahassee Democrat, Inc., 400 So. 2d 52 (Fla. 1982). In making this argument, Petitioners fail to comprehend the meaning of the term "express and direct conflict." This Court announced in Kyle v. Kyle, 139 So. 2d 885 (Fla. 1962) that:

"... jurisdiction to review because of an alleged conflict requires a preliminary determination as to whether the court of appeal has announced a decision on a point of law, which if permitted to stand, would be out of harmony with a prior decision of this court or another court of appeal on the same point, thereby generating confusion and instability among the precedents. We have said that conflict must be such that if the later decision were rendered by the same court, the former would have the effect of overruling the later... If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise." [139 So. 2d at pp. 885-886]

The points of law settled by the Fifth District in the Boyles decision and by the First District in the From decision are not the same. In From, the First District

upheld the dismissal of a libel action against a newspaper based upon its finding that the statements in the article were opinions, which are non-actionable, rather than statements of fact. The holding in the From decision is totally distinct from the holding in the Boyles decision.

In Boyles, the Fifth District reversed the dismissal of a libel action finding that an action for libel per se still exists providing the additional pleading and proof requirements of Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed. 2d 789 (1974) (fault and actual damage) are met.

Petitioners contend that there is an express and direct conflict between the two decisions because the First District in From made the following statement:

"... libel per se is no longer a viable doctrine where the defendant is a member of the news media and the plaintiff cannot demonstrate 'actual malice' on the part of the defendant." [400 So. 2d at p. 57]

However, this statement was not necessary for the resolution of any of the issues involved in From. Therefore, the statement was simply dicta and it cannot provide the "express and direct conflict" which is essential to the invocation of this Court's discretionary jurisdiction.

II. ASSUMING ARGUENDO THE EXISTENCE OF EXPRESS AND DIRECT CONFLICT, THIS COURT SHOULD DECLINE TO INVOKE ITS DISCRETIONARY JURISDICTION.

The Fifth District found that the Respondent, JACK BOYLES, fully and completely complied with the additional pleading requirements of Gertz, i.e. fault and actual damages. [Petitioners' Appendix, 6-7] Therefore, Petitioners are requesting this Court to expend its valuable time to answer an academic semantical question which has no practical significance.

Even assuming arguendo that the words per se have no meaning in the context of a libel action against a media defendant, the Respondent's use of those words to describe its action would not justify the total dismissal of his action. Since the Respondent's complaint clearly contains the Gertz requirements of fault and actual damage, the Petitioners would, at most, be entitled to have the words "per se" stricken from the complaint. Therefore, Petitioners fail to present a matter which is worthy of this Court's valuable time and attention.

CONCLUSION

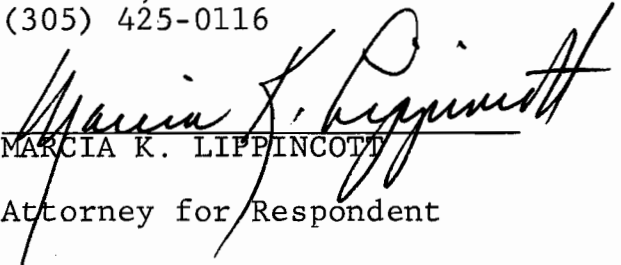
For the reasons stated herein, the Respondent, JACK BOYLES, respectfully requests this Honorable Court to deny the Petitioners' request to invoke its discretionary jurisdiction.

RESPECTFULLY SUBMITTED this 27th day of June, 1983.

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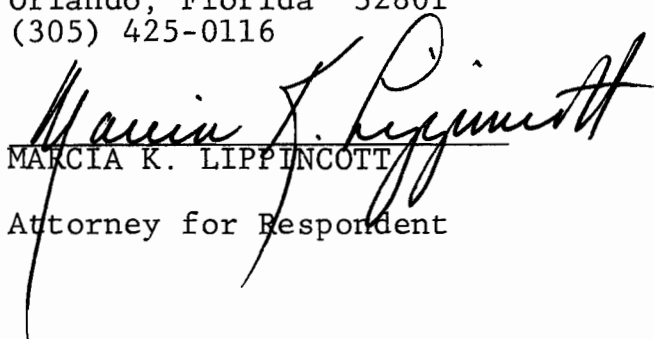

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Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 27th day of June, 1983 to: JOHN M. ROBERTSON and WILLIAM G. OSBORNE, Esquires, 538 East Washington Street, Orlando, Florida 32801 and to RICHARD WILSON, Esquire, 1212 East Ridgewood, Orlando, Florida 32803.

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