IN THE SUPREME COURT

OF THE STATE OF FLORIDA

FILED
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FEB 22 1984
CLERK, SUPREME COURT
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MID-FLORIDA TELEVISION CORP., et al.,

Petitioners,

vs.

CASE NO. 63,753

JACK BOYLES,

Respondent.

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

RESPONDENT'S BRIEF ON MERITS

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TABLE OF CONTENTS

Table of Authorities . . . . -ii-

Statement of the Case. . . . . -1-

Statement of Facts. . . . . -3-

Issues Involved. . . . . -6-

Argument

I. THIS COURT LACKS JURISDICTION BECAUSE THE DECISION SUB JUDICE IS NOT IN EXPRESS AND DIRECT CONFLICT WITH FROM V. TALLAHASSEE DEMOCRAT, INC., 400 SO. 2D 52 (FLA. 1ST DCA 1981) . . . . . -7-

II. THE FIFTH DISTRICT COURT OF APPEAL DID NOT ERR IN REVERSING THE DISMISSAL OF RESPONDENT'S DEFAMATION COMPLAINT . . . . -10-

Conclusion . . . . -21-

Certificate of Service . . . . -22-

<u>TABLE OF AUTHORITIES</u>

<u>CASES</u>

<u>Auld</u> v. <u>Holley</u>,
418 So. 2d 1029 (Fla. 4th DCA 1982) 14

<u>Barry College</u> v. <u>Hull</u>,
353 So. 2d 575 (Fla. 3d DCA 1977). 14

<u>Bobenhausen</u> v. <u>Cassat Avenue Mobile Homes, Inc.</u>,
344 So. 2d 279 (Fla. 1st DCA 1977) 14

<u>Boyles</u> v. <u>Mid-Florida Television Corp.</u>,
431 So. 2d 627 (Fla. 5th DCA 1983) 7,8,9,11,13,14,18

<u>Brown</u> v. <u>Tallahassee Democrat, Inc.</u>,
400 So. 2d 52 (Fla. 1st DCA 1981). 7,8,9

<u>Brown & Williamson Tobacco Corp.</u> v.
<u>Jacobson & CBS, Inc.</u>,
713 F. 2d 262 (7th Cir. 1983) 18

<u>Costello</u> v. <u>Capital Cities Media, Inc.</u>,
445 N.E. 2d 13 (Ill. 5th DCA 1982) 18

<u>Fogus</u> v. <u>Capital Cities Media, Inc.</u>,
444 N.E. 2d 1100 (Ill. 5th DCA 1982). 18

<u>From</u> v. <u>Tallahassee Democrat, Inc.</u>,
400 So. 2d 52 (Fla. 1st DCA 1981). 7,8,9,16

<u>Gertz</u> v. <u>Robert Welch, Inc.</u>,
418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) . 7,8,11,12,14,15,16,18

<u>Heard</u> v. <u>Mathis</u>,
344 So. 2d 651 (Fla. 5th DCA 1977) 14

<u>Hillman</u> v. <u>Metromedia, Inc.</u>,
452 F. 2d 727 (D. Md. 1978). 16

<u>Hood</u> v. <u>Connors</u>,
419 So. 2d 742 (Fla. 5th DCA 1982) 14

<u>Jacron Sales Co., Inc.</u> v. <u>Sindorf</u>,
350 A. 2d 688 (Md. 1976). 15

CASES

Kyle v. Kyle,
139 So. 2d 885 (Fla. 1962) 7

Lundquist v. Alewine,
397 So. 2d 1148 (Fla. 5th DCA 1981) 14

Memphis Publishing Co. v. Nichols,
569 S.W. 2d 412 (Tenn. 1978) 16

Metromedia Inc. v. Hillman,
400 A. 2d 1117 (Md. 1978) 16,17

Renwick v. News & Observer Pub. Co.,
304 S.E. 2d 593 (N.C. 1983). 18

MISCELLANEOUS AUTHORITIES

W. Prosser, Handbook on the Law of Torts,
§112 at p. 763 (4th Ed. 1971) 13

Florida Standard Jury Instruction 4.1,
Comment 2. 19

STATEMENT OF THE CASE

The Respondent, Jack Boyles, disagrees with Petitioners' Statement of Case in part. The areas of disagreement are as set forth below.

1. The Respondent's action was commenced on March 2, 1981. [The appellate court decision which states that suit commenced on March 2, 1982 is in error (R. 31) [See Trial Court Record 1-15]

2. As discussed in the decision of the Fifth District Court of Appeal _sub judice_, the basis of the Petitioners' Motion to Dismiss Respondent's defamation action and the trial court's ruling was as follows:

> "The ruling of the trial court in dismissing Count I apparently was prompted by a two-fold argument of the defense: 1) the tort of libel per se no longer exists in regard to defamation actions against the media as a result of the United States Supreme Court decision in _Gertz v. Robert Welch, Inc._, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974); and 2) if such a cause of action does not exist, the plaintiff's complaint herein fails to allege it because of its reliance on innuendo, which is superfluous in an action for libel per se." [R. 34]

> "It would appear from the record, and more particularly fromthe defense motion to dismiss the libel count, that the trial court may have accepted the argument that words which imply a libelous meaning, rather than directly stating it, must be classified as libel per quod rather than libel per se." [R. 37-38]

3. With regard to the trial court's dismissal of Respondent's defamation action -- Counts I and IV -- the Fifth

District Court of Appeal held as follows:

A. Count I of Respondent's Complaint stated a cause of action for defamation because: 1) the words of the broadcasts themselves convey the defamatory meaning; 2) the broadcasts are alleged to be false; 3) the broadcasters are alleged to have been negligent in publishing the broadcasts; and 4) the Respondent alleges that he has suffered actual injury from the defamation.

B. Count IV of Respondent's Complaint stated a cause of action for punitive damages for the defamation because: 1) the words of the broadcasts themselves convey the defamatory meaning; 2) the broadcasts are alleged to be false; 3) the broadcasters are alleged to have had actual malice in publising the broadcasts; and 4) the Respondent alleges that he has suffered actual injury from the defamation.

C. Although _Gertz_ v. _Robert Welch, Inc._, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) terminated the presumptions of fault and actual damage in a _per se_ action against a media defendant by a private individual, a distinction still remains between _per se_ and _per quod_: the necessity in the latter action for pleading and proving the innuendo. [R. 31-47]

STATEMENT OF FACTS

Respondent disagrees with Petitioners' Statement of Facts in its entirety. The issue before this Court is whether the Respondent's Complaint states a cause of action in defamation for actual and punitive damages against the Petitioners. Therefore, the only "facts" material to that issue are the allegations of the Complaint.

The Fifth District Court of Appeal set forth the facts in the case sub judice as follows:

> "The material allegations of Count I (libel) are incorporated in paragraphs six through twelve of the complaint, as follows:
>
> 6. That on or about October 26, 1980, "CHANNEL 9", broadcasted to the public a report prepared by the Defendant, PAT BEALL, which purported to be an "update" on a previous story concerning Mrs. Mildred Coffey, mother of the Plaintiff, JACK BOYLES. A child, Curtis Duncan, had died while under Mrs. Coffey's care in her home for mentally retarded children. The broadcast of October 26, 1980, showed a photograph of the Plaintiff, JACK BOYLES, and while the photograph was on the screen, the following statement was made concerning the Plaintiff:
>
> > "that her son, a worker at Sunland, had been repeatedly reprimanded while at Sunland for taunting the retarded patients in his care."
>
> 7. That the above allegation is false and defamatory per se, in that it alleges conduct incompatible with the exercise of

the Plaintiff's profession as a Resident Life Assistant at the Sunland facility for retarded patients. The Plaintiff's occupation involves the care of many retarded patients. "CHANNEL 9", knew or should have known that the above statement was false and defamatory.

8. That on or about January 2, 1981, the Defendant, PAT BEALL, prepared a second report which was broadcasted by the Defendant "CHANNEL 9" on the same day. The broadcast of January 2, 1981, showed a photograph of the Plaintiff on the screen while the following statements were made:

> "now, questions about the foster group have surfaced again. This time in connection with a worker in the home, Coffey's son... it was here at Sunland that he was accused of raping one of the retarded patients. But HRS was forced to drop the charges. The patient was not verbal. An internal HRS memo into Curtis Duncan's death notes that Coffey's son had been reprimanded on a number of occasions for taunting the Sunland's clients while they ate. Mildred Coffey maintains that it was a feeding incident that caused the fatal blow to Curtis Duncan's head... but the State Attorney's Office was given three different explanations of who was feeding Curtis Duncan at that time. One of which involved Coffey's son."

9. That the above allegations are false and defamatory for the following specific reasons:

(a) The words quoted above imply that the Plaintiff was a suspect in the death of Curtis Duncan.

(b) The words imply that the Plaintiff was a habitual tormentor of retarded patients.

(c) The words imply that the Plaintiff raped a patient in his care at Sunland and escaped punishment therefor, because the patient was unable to communicate.

(d) The words imply that the incident involving the rape accusation was recent in origin and had prompted the news report of January 2, 1981.

10. That all of the above allegations are false. The Defendant, PAT BEALL, knew or should have known of the falsity of the allegations when the report was prepared for broadcast. Further, there was no good motive by the Defendant for the publication of the broadcast of January 2, 1981.

11. That the above allegations constitute libel per se, and slander per se, in that they accuse the Plaintiff of conduct incompatible with the exercise of his profession as a Resident Life Assistant at Sunland, and they accuse him of acts of moral turpitude; specifically, taking sexual advantage of patients in his care who are unable to resist or defend themselves.

12. That a a result of the above described defamation the Plaintiff, JACK BOYLES, has suffered mental pain and anguish, damage to his reputation, humiliation and depression, and an impairment of his ability to seek employment in his field at an institution other than the one at which he is currently employed." [R. 33-34]

"Additionally, under Count IV, wherein the Plaintiff incorporates Count I by reference, the Plaintiff alleges that the acts were performed with malice and in reckless disregard of the rights of the Plaintiff, and that the Defendants had knowledge of the statements' falsity, which they disregarded." [R. 36]

ISSUES INVOLVED

I. WHETHER THIS COURT HAS JURISDICTION OF THE CASE SUB JUDICE ON THE BASIS OF EXPRESS AND DIRECT CONFLICT BETWEEN DECISIONS.

II. WHETHER THE FIFTH DISTRICT COURT OF APPEAL ERRED IN REVERSING THE DISMISSAL OF RESPONDENT'S DEFAMATION COMPLAINT.

ARGUMENT

I. THIS COURT LACKS JURISDICTION BECAUSE THE DECISION SUB JUDICE IS NOT IN EXPRESS AND DIRECT CONFLICT WITH FROM V. TALLAHASSEE DEMOCRAT, INC., 400 SO. 2D 52 (FLA. 1ST DCA 1981).

The "express and direct conflict" between decisions which is a prerequisite to jurisdiction of the case sub judice is present only if the "holdings" of two cases are in conflict. [Kyle v. Kyle, 139 So. 2d 885 (Fla. 1962)] The points of law settled, i.e. holdings, of the Fifth District in Boyles and by the First District in From, supra, are not the same. In From, supra, the First District upheld the dismissal of a libel action against a newpaper based upon its finding that the statements in the article were opinions, which are non-actionable, rather than statements of fact.

The fact/opinion issue of From is not an issue in Boyles. Rather, the issue in Boyles is whether use of the words, per se, in a media defamation action warrants dismissal where the words are defamatory on their face without the need for innuendo, and the complaint alleges the elements of fault and actual damages as required by Gertz. The Fifth District found the dismissal to be improper. Therefore, because the holding in the From decision does not involve the same issue as the holding in Boyles, express and direct conflict does not exist.

Petitioners contend that express and direct conflict exists 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 is simply dicta and it cannot provide the express and direct conflict which is essential to the invocation of this Court's discretionary jurisdiction. Moreover, even assuming arguendo that dicta can serve as the basis for conflict, conflict does not exist between the From dicta and the Boyles decision. The From Court was simply stating that the presumptions of fault and damage no longer exist in defamation actions against media defendants, except that the presumption of damage may be employed where the plaintiff demonstrates actual malice. [See 400 So. 2d at p. 57]

The Boyles decision does not contradict this statement. Rather, Boyles simply recognizes that the phrase libel or defamation per se has more than one meaning: 1) words which are defamatory on their face without the need for innuendo; and 2) actionable without proof of fault or damage. Where actual malice is not present, Gertz abolishes the second meaning, but not the first meaning. Therefore, Boyles holds that use of the words per se in a media defamation action does not warrant dismissal where the words are defamatory on their face without the need for innuendo and the complaint alleges the elements of fault and actual damages. Thus, conflict between the Boyles decision and the From dicta does not exist.

This conclusion is bolstered by the most recent defamation decision of the First District Court of Appeal, the Court which decided From. In Brown v. Tallahassee Democrat, Inc., 440 So. 2d 588 (Fla. 1st DCA 1983) the First District reversed the dismissal of a complaint for libel *per se*, citing the Boyles decision. In addition, the First District stated as follows:

> "We acknowledge the Democrat's point on rehearing, that for purposes of presuming damages from published matter defamatory on its face, the doctrine of libel per se was pronounced "no longer a viable doctrine" by From v. Tallahassee Democrat, Inc., 400 So. 2d 52, 27 (Fla. 1st DCA 1981), pet. for rev. den., 412 So. 2d 465 (Fla. 1982), since in all cases not involving actual malice "pleading and proof of actual injury are required" by Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).
>
> Our single reference to "libel per se" in the principal opinion is no resuscitation of presumed damages, as we trust the opinion elsewhere demonstrates; rather it is but recognition that here the alleged defamatory meaning may be considered fairly present on the face of this publication. Because that is so, the complaint does not require allegations of inducement and innuendo as explained by Boyles v. Mid-Florida Television Corp., 431 So. 2d 627, 635 (Fla. 5th DCA 1983)." [440 So. 2d at p. 590]

Accordingly, due to the absence of express and direct conflict, this Court lacks jurisdiction to consider this case and must dismiss the Petition.

II. THE FIFTH DISTRICT COURT OF APPEAL DID NOT ERR IN REVERSING THE DISMISSAL OF RESPONDENT'S DEFAMATION COMPLAINT.

The Respondent, Jack Boyles, is a private individual, who was defamed in broadcasts published by Petitioners, Pat Beall and the corporate media defendants, known as "Channel 9", on October 26, 1980, January 2, 1981 and February 23, 1981. [R. 32-33] These broadcasts were clearly orchestrated to imply that Jack Boyles was responsible for the death of Curtis Duncan. In addition, the broadcasts mark Mr. Boyles as a rapist, who escaped prosecution because the victim could not talk and label Mr. Boyles as a cruel and inhumane person, who repeatedly teased and taunted retarded individuals in his care. [R. 31-34, 37] Although suit was instituted by the Respondent, Jack Boyles, on March 2, 1981 [Trial Court Record 1-15], Mr. Boyles has yet to be accorded a trial.

The Complaint of Mr. Boyles sets forth the content of the broadcasts, alleging that they are defamatory _per se_. In addition, the Complaint alleges that the broadcasts are false; that Petitioners, Pat Beall and "Channel 9", knew or should have known that the broadcasts were false; and that as a result of the defamatory broadcasts, Jack Boyles has suffered actual damages. Moreover, in support of his claim for punitive damages, Mr. Boyles alleges that the broadcasts were published with malice, in reckless disregard of his rights, and that

Petitioners knew that the broadcasts were false. [R. 32-34; 36-37]

The media Petitioners contend that the Fifth District erred in reversing the dismissal of Respondent's defamation action because the Boyles decision retains liability without fault. The Petitioners' interpretation of the Boyles decision and their position before this Court are totally incorrect. In order to demonstrate the fallacy of Petitioners' stance, the decision Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) must be examined.

In Gertz, supra, the United States Supreme Court held in defamation actions by private individuals against media defendants that:

> "... so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing interests involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. At least this conclusion obtains where, as here, the substance of the defamatory statement 'makes substantial danger to reputation apparent'. [i.e. defamation per se] This phrase places in perspective the conclusion we reach today. Our inquiry would involve considerations somewhat different from those discussed above if

a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential... Such a case is not now before us, and we intimate no view as to its proper resolution." [Emphasis and bracketed material supplied, 418 U.S. at pp. 347-348]

"... the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." [Emphasis supplied, 418 U.S. at p. 349]

The decision of the Fifth District in Boyles does not retain liability without fault or violate the Gertz mandate. [See Brown v. Tallahassee Democrat, Inc., 440 So. 2d 588 (Fla. 1st DCA 1983)] The Fifth District states in Boyles that:

"As for the fault required under Florida law in order for a private individual to recover actual damages, the appropriate standard after Gertz is negligence[1] -- i.e., publication of false and defamatory statements without reasonable care to determine their falsity. Tribune Co. v. Levin, 426 So. 2d 45 (Fla. 2d DCA 1982); Miami Herald Publishing Co. v. Ane, 423 So. 2d 376 (Fla. 3d DCA 1982); Cape Publications, Inc. v. Teri's Health Studio, Inc., 385 So. 2d 188 (Fla. th DCA 1980); see also: Florida Standard Jury Instructions in Civil Cases, M.I. 4.3"

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[1]Note that this issue is currently pending before this Court in Miami Herald Publishing Co. v. Ane, 423 So. 2d 376 (Fla. 3d DCA 1982), on appeal Case No. 63,114 (Fla. argued January 10, 1984). In the event that this Court were to adopt a fault standard other than negligence,

> In the instant case, the plaintiff clearly alleged in his complaint that the broadcaster knew or should have known that the statements were false and defamatory, thereby meeting the standard of negligence. The plaintiff also met the burden in regard to pleading damages. In paragraph 12 of the complaint, the plaintiff states that he has suffered mental pain and anguish, damge to his reputation, humiliation and depression, as well as the impairment of his ability to seek employment as a result of the defamation. Clearly, this provides a basis for actual injury as that term is defined in Gertz. Additionally, under Count IV, wherein the plaintiff incorporates Count I by reference, the plaintiff alleges that the acts were performed with malice and in reckless disregard of the rights of the plaintiff, and that the defendants had knowledge of the statements' falsity, which they disregarded. This meets the Gertz-New York Times standard for actual malice as a prerequisite for the punitive damage claim." [R. 36]

In addition, the Fifth District found that the words of the Petitioners' broadcasts were defamatory on their face, without the need for innuendo, i.e. defamation per se. [R. 37]

The decision of the Fifth District in Boyles recognizes that the phrase libel or defamation per se has more than one meaning: 1) words which are defamatory on their face without the need for innuendo; and 2) actionable without proof of fault or damage. [See W. Prosser, Handbook on the Law of Torts, §112 at p. 763 (4th Ed. 1971)] Where actual malice

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it should be noted that the Respondent pled actual malice in Count IV. [R. 36] Moreover, in the event this Court adopts a standard other than negligence, the Respondent must be given an opportunity to amend his Complaint in accord with such new standard.

is not present, Gertz, supra, abolishes the second meaning, but not the first meaning. Thus, Boyles found that the Respondent's use of the words per se did not warrant the dismissal of Respondent's Complaint.

The fallacy of Petitioners' stance is equally clear in the remainder of their contentions. Petitioners contend: 1) that Florida courts and Standard Jury Instructions do not follow the mandate of Gertz; 2) out of state cases have concluded that the doctrine of libel per se is not viable since Gertz; 3) the burden of proof regarding the element of falsity in defamation actions rests with the plaintiff. Apparently, Petitioners believe that these contentions require the reversal of the Fifth District's decision in Boyles.

In contending that Florida courts have not followed the Gertz mandate, Petitioners state that: "Florida courts have continued to allow presumed damages and have further presumed fault or malice." [Petitioners' Brief at pp. 11, 20, 21] The Petitioners cite Hood v. Connors, 419 So. 2d 742 (Fla. 5th DCA 1982); Barry College v. Hull, 353 So. 2d 575 (Fla. 3d DCA 1977); Lundquist v. Alewine, 397 So. 2d 1148 (Fla. 5th DCA 1981); Heard v. Mathis, 344 So. 2d 651 (Fla. 5th DCA 1977); Bobenhausen v. Cassat Avenue Mobile Homes, Inc., 344 So. 2d 279 (Fla. 1st DCA 1977) and Auld v. Holley, 418 So. 2d 1020 (Fla. 4th DCA 1982) in support of this statement. [Petitioners' Brief at pp. 11, 20, 21] However, all of these cases involve

non-media expression. The Gertz holding was limited to media expression. [See Jacron Sales Co., Inc. v. Sindorf, 350 A. 2d 688, 694 (Md. 1976)] Therefore, Petitioners' contention is incorrect.

In Jacron, supra, Maryland extended the Gertz holding to non-media expression as a matter of state law. To date, Florida has not followed Maryland in extending the Gertz holding to non-media expression. The situation at bar does not present this issue for resolution as the alleged defamation was committed by the media Petitioners.

Petitioners continue to confuse and misrepresent the status of Florida defamation law by making the following comments regarding the Florida Standard Jury Instructions:

> "Indeed, the Florida Standard Jury Instructions also embody the principal of presumed malice." [Petitioners' Brief at p. 20]

> "Under the Florida Standard Jury Instructions, all a juror has to do is to decide whether the publication was made as claimed and whether the Defendant was negligent in making this claim. [See Florida Standard Jury Instruction M.I. 4.3 regarding the negligence standard being applied to a news media defendant.] The falsity and malice are presumed." [Petitioners' Brief at p. 21]

An examination of the Florida Standard Jury Instructions on defamation M.I. 4 clearly shows that Florida has followed the Gertz mandate. Again, Petitioners confuse media with non-media expression. For example, the instructions for an

actual damage defamation claim by a private individual against a media defendant concern the following issues:

1. Whether the publication was made as claimed;

2. Whether the publication was false and defamatory;

3. Whether defendant was negligent in publishing the matter complained of;

4. And if so, the amount of plaintiff's actual damages. [See Florida Standard Jury Instructions 4.3 and 4.5]

Secondly, Petitioners contend that out of state cases have concluded that the doctrine of libel _per se_ is not viable since _Gertz_. IN support of this conclusion, Petitioners cite _Memphis Publishing Co._ v. _Nichols_, 569 S.W. 2d 412 (Tenn. 1978); _Hillman_ v. _Metromedia, Inc._, 452 F. 2d 727 (D. Md. 1978); and _Metromedia, Inc._ v. _Hillman_, 400 A. 2d 1117 (Md. 1978). [Petitioners' Brief at pp. 13, 14, 24, 25] An examination of each of these cases reveals that statements made regarding the _per se_/_per quod_ distinction were similar to the statements made by the _From_ court, i.e. that the distinction is no longer valid in defamation actions against media defendants regarding the presumptions of fault and damage.

Moreover, the Maryland court in _Metromedia, Inc._ v. _Hillman_, 400 A. 2d 1117, 1123 expressly recognizes the viability of the phrase libel per se post _Gertz_ for the same reason as the

Fifth District did in Boyles. The Maryland court stated in Metromedia, Inc. as follows:

> "Suffice it to say the effect in Maryland of Gertz and Jacron is that in order for a declaration alleging libel in a Maryland court to withstand the test of a demurrer it must allege:
>
> (1) a false and defamatory communication
>
> a- which the maker knows is false and knows that it defames the other, or
>
> b- that the maker has acted in reckless disregard of these matters, or
>
> c- that the maker has acted negligently in failing to ascertain them, and
>
> (2) that the statement was one which appears on its face to be defamatory, as, e.g. a statement that one is a thief, or the explicit extrinsic facts and innuendo which make the statement defamatory, and
>
> (3) allegations of damages with some particularity, since Gertz v. Jacron forbid presumed damges. . .
>
> In sum the only distinction remaining in Maryland between a libel per se and a libel per quod is that to recover the plaintiff must first show that the publication is defamatory. Where the words themselves impute the defamatory character, no innuendo--no allegation or proof of extrinsic facts--is necessary; but otherwise, it is. This is both a pleading rule and an evidentiary requirement. Where extrinsic facts must be shown in order to establish the defamatory character of the words sued upon, the omission to plead them makes the complaint demurrable for failure to state a cause of action. Failure to prove them would justify a directed verdict." [400 A. 2d at p. 1123]

It is also important to note that Petitioners do not cite any case which has discussed or approved the dismissal of a defamation complaint which alleged fault and actual damage, but also used the words per se. The reason for Petitioners' omission is that there is no Court in the country which has committed the injustice which Petitioners request this Court to commit. Indeed, the following cases are examples of instances where courts of other states utilize the phrase per se in media defamation cases post Gertz in the same fashion as the Florida Fifth District did in Boyles. [Fogus v. Capital Cities Media, Inc., 444 N.E. 2d 1100 (Ill. 5th DCA 1982); Costello v. Capital Cities Media, Inc., 445 N.E. 2d 13 (Ill. 5th DCA 1982); Brown & Williamson Tobacco Corp. v. Jacobson and CBS, Inc., 713 F. 2d 262 (7th Cir. 1983); Renwick v. News and Observer Pub. Co., 304 S.E. 2d 593 (N.C. 1983)]

Finally, Petitioners contend that the burden of proof regarding the element of falsity in defamation actions rest with the Plaintiff. Initially, it should be noted that neither the United States Supreme Court nor a Florida court have made this pronouncement.[2] However, contrary to Petitioners' representation, the Florida Standard Jury Instructions place this

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[2]Note that Wilson v. Scripps-Howard Broadcasting Co., 642 F. 2d 371 (6th Cir. 19) which held that the plaintiff has the burden of proving falsity, has been severely criticzed. [Note, 50 Cincinnati Law Rev. 807 (1981)] Also, some courts which have considered this issue have refused to place the burden of proving falsity on the plaintiff. [See eg. Jacron Sales Co., Inc. v. Sindorf, 350 A. 2d 688 (Md. 1976); Memphis Publishing Co. v. Nichols, 569 S.W. 2d 412 (Tenn. 1978)]

burden on the plaintiff in a defamation claim by a private individual against a media defendant. Comment 2 to Florida Standard Jury Instruction 4.1 states as follows:

> "2. Truth and good motives. Article I, §4 of the Florida Constitution provides that in actions for defamation the defendant shall be exonerated "[i]f the matter charged as defamatory is true and was published with good motives." Florida decisions have regarded truth and good motives as an affirmative defense. Miami Herald Pub. Co. v. Brautigam, 127 So. 2d 718 (3d DCA Fla. 1961), cert. den. 369 U.S. 821; Drennen v. Westinghouse Electric Corporation, 328 So. 2d 52 (1st DCA Fla. 1976). The committee has given those decisions effect in MI 4.1, in the case of defamation of a claimant not a public figure, but not in MI 4.2, 4.3 and 4.4, in which proof of defendant's malice or negligence in publishing false matter is an element of claimant's claim." [Note that MI 4.3 is the instruction on a defamation claim by a private individual against a media defendant.]

Respondent expressly pled that the broadcasts of which he complains were false. [See paragraph 7, 9 and 10 of the Complaint, R. 33-34] Whether the Constitution requires that the burden of proof on the element of falsity rests with the plaintiff is not an issue in this case at this time.

Petitioners[3] have excelled throughout the three years of this lawsuit with obscuring the issue involved and delaying

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[3] The brief of Amicus Curiae, The Miami Herald Publishing Company, which traces the history of libel per se, is certainly scholarly, historically interesting and aesthetically pleasing. Unfortunately, for the reasons previously explained, the amicus curiae brief is totally irrelevant to the issues before this Court.

the Respondent from having his day in court. The simple issue of this case is whether use of the words per se in a defamation complaint against a media defendant post Gertz warrants dismissal where the complaint alleges fault and actual damage. As explained throughout this brief, the phrase - libel or defamation per se - means more than simply presumed fault and damage. Gertz did not abolish all meaning of the phrase. Moreover, even assuming arguendo to the contrary, at best Petitioners are entitled to have the words per se stricken from the Complaint. Under no circumstances was the dismissal of Respondent's Complaint proper.

CONCLUSION

Respondent, Jack Boyles, respectfully requests this Honorable Court to dismiss the Petition or affirm the decision of the Fifth District Court of Appeal.

RESPECTFULLY SUBMITTED this 20th day of February, 1984.

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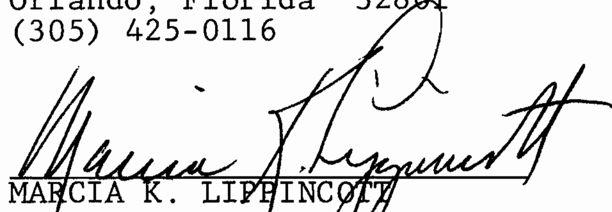

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 20th day of February, 1984 to: JOHN M. ROBERTSON, Esquire, 526 East Washington Street, Orlando, Florida 32801; WILLIAM G. OSBORNE, Esquire, 16 West Pine Street, Orlando, Florida 32801, JOHN L. WOODARD, III, Esquire, Suite 1520, Hartford Building, Orlando, Florida 32801, RICHARD J. OVELMEN, General Counsel, The Miami Herald Publishing Company, One Herald Plaza, Miami, Florida 33101; PARKER D. THOMSON, SANFORD L. BOHRER and GARY PRUITT of THOMSON ZEDER BOHRER WERTH ADORNO & RAZOOK, 1000 Southeast Bank Building, Miami, Florida 33131.

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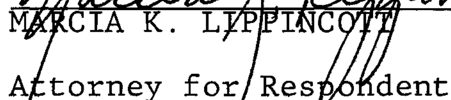

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