OA 3-8-84

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. 63,753

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

Petitioners,

vs.

JACK BOYLES,

Respondent.
_____/

PETITIONERS' INITIAL BRIEF ON THE MERITS

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GENERAL TEXT

STATEMENT OF THE CASE

On March 2, 1982, Respondent, JACK BOYLES, brought suit against news reporter, PAT BEAL, and her employer, the corporate owners of a television station known as Channel 9, Mid-Florida Television Corp., Central 9 Corporation, T.V. 9, Inc., Comint Corporation and Florida Heartland Television. (R-1-15). The corporate Petitioner will be referred to as "Channel 9". Respondent's Second Amended Complaint consisted of four Counts: Count I alleged a cause of action for libel and slander; Count II alleged a cause of action for intentional infliction of emotional distress; Count III alleged a cause of action for invasion of privacy; Count IV alleged a cause of action for punitive damages for the wrongs alleged in Counts I through III. (R-126-141).

Channel 9 moved to dismiss the Second Amended Complaint. (R-386-388). The motion included a Motion to Dismiss Count I, stating that the allegations regarding libel per se were insufficient. The motion also stated that the allegations in Count II for intentional infliction of emotional distress were insufficient to state a cause of action. Finally, dismissal of Count III was sought on the basis that there were insufficient allegations to state a cause of action for invasion of privacy. The trial court granted Respondent's Motion to Dismiss

Count II. The Motion to Dismiss Count III was denied by the Court, and the Court reserved ruling on the determination of whether the language of the broadcast complained of was libel per se, and requested that counsel submit memoranda on that issue. (R-442-444).

Memoranda of Law were submitted by Petitioners and Respondent. On September 1, 1981, trial counsel for JACK BOYLES sent a letter to the lower court judge, stating that if the Court should decide to dismiss Count I of the Complaint for failure to state a cause of action for libel per se, the Respondent requested that such dismissal be with prejudice. Therefore, the Court dismissed the allegations of libel per se with prejudice. (R-11-61). The trial court specifically ruled that those portions of the Plaintiff's Complaint referring to this action as libel per se were dismissed with prejudice. Respondent moved for a rehearing or in the alternative to alter, amend or clarify the Order that Dismissed Allegations of Libel Per Se with Prejudice. Thereafter, the entirety of Count I for libel was dismissed with prejudice, (R-1496), at the request of Respondent.

Respondent, JACK BOYLES, filed his Notice of Appeal to the Fifth District Court of Appeal on May 21, 1982. After Briefs were filed and oral argument heard, the Fifth District Court of Appeal entered its opinion on April 20, 1983. As to Count I of the Second Amended Complaint for libel per se the Court held as follows:

(1) Causes of action against the media in Florida for libel per se have not been eliminated;

(2) The allegations of the Complaint of negligence, malice and damages met the prerequisites for a per se action by a private individual against a broadcaster;

(3) Words used in the Complaint were not such that they required innuendo to have a defamatory meaning and, hence, were actionable as libel per se;

(4) A distinction still remains between libel per se and libel per quod and is characterized by the necessity in the latter action for pleading and proving the innuendo.

The Fifth District Court of Appeal reversed the lower court rulings as to Count I for libel per se but affirmed as to Counts II and III for intentional infliction of emotional distress and invasion of privacy, respectively. This opinion also contained several rulings on discovery matters.

Petitioners' Motion for Rehearing to the Fifth District Court of Appeal was denied on May 23, 1983. The Petitioners filed their Petition for Review by Certiorari by this Court on May 31, 1983. This Honorable Court entered its Order Accepting Jurisdiction and setting oral argument on December 8, 1983.

STATEMENT OF FACTS

In its Order dismissing allegations and libel per se with prejudice, the trial court ruled as follows:

> After a hearing on the Motion to Dismiss filed by the Defendants of the Plaintiff's Complaint, the Court by Order of June 15, 1981, took under advisement whether or not the language of the broadcast complained of were libel per se or per quod. The Court, at long last, having studied the memoranda prepared by Plaintiff and Defendants and additional letters citing further cases having been studied by the Court carefully, finds that as a matter of law the broadcast complained of was not libel per se. Gertz v. Robert Welch, Inc., 94 S.Ct. 2 (1974) and From v. Tallahassee Democrat, Inc., 400 So.2d. Therefore, CONSIDERED, ORDERED AND ADJUDGED that those portions of Plaintiff's Complaint referring to this action as libel per se shall be and are hereby dismissed with prejudice. (R-1161).

The allegations contained in Count I of the Respondent's Second Amended Complaint sounded in libel per se and were not categorized as negligence. It has not been determined by the trial court whether or not the Respondent is a private individual or a public official or a public figure. However, one must assume arguendo that the Respondent is a private individual for purposes of this Appeal. If, in fact, the Respondent is found to be a public figure or public official, then the actual malice standard would have to be applied to the Respondent. In

any event, the Court below dismissed the per se portions of Respondent's Second Amended Complaint and the Respondent chose to have the entirety of Count I dismissed with prejudice and not to proceed further.

Respondent took the position with the Fifth District Court of Appeal that the Gertz decision removed the strict liability aspect of an action for defamation per se, but it did not terminate all distinctions between defamation per se and per quod. (Appellants Brief at page 16). Additionally, Respondent urged the Fifth District Court of Appeal to adopt the negligence standard in a per se defamation case. Petitioners, on the other hand, urged the Court to adopt the ruling of From v. Tallahassee Democrat, et al., 400 So.2d, 52 (Fla. 1st D.C.A. 1981), where the Court held that libel per se is no longer a viable doctrine following the Gertz decision.

In Boyles v. Mid-Florida Television Corp., et al., 431 So.2d 627 (Fla. 5th D.C.A. 1983), the Court found that Gertz did not eliminate causes of action against the media in Florida for libel per se, as contended by Petitioner's. The Court opined that Gertz merely added to the pleading and proof requirements (fault and actual damages) for a per se action by a private individual. The Court stated:

> "A distinction still remains between libel per se and libel per quod: the necessity in the latter action for pleading and proving the innuendo.

> . . . . While Gertz has abolished one distinction between libel per se and libel per quod in an action by a private individual against the media - the presumption of damage - it has not abolished the distinction in regard to innuendo. Therefore, it has not abolished the tort of libel per se. Id. at 633

Appellees below filed a Petition for Writ of Certiorari on the basis that the Boyles decision was in conflict with the From v. Tallahassee Democrat, supra, decision.

ISSUE INVOLVED

I. WHETHER THE FIFTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT LIBEL PER SE IS STILL A VIABLE DOCTRINE IN THE STATE OF FLORIDA.

ARGUMENT

I. THE FIFTH DISTRICT COURT OF APPEAL ERRED IN CONTINUING TO RECOGNIZE LIBEL PER SE AS A VIABLE DOCTRINE IN THE STATE OF FLORIDA.

A. APPLICATION OF FEDERAL CONSTITUTIONAL LAW HAS SIGNIFICANTLY CHANGED THE COMMON LAW OF DEFAMATION IN FLORIDA.

In Miami Herald Publishing Company v. Ane, 423 So.2d 37 (Fla. D.C.A. 1982), the Court gave a history of the law of defamation. The Court categorized the New York Times line of decisions as representing the greatest victory won by Defendants in the modern history of torts. "It has literally revolutionized the law of defamation in Florida and every other jurisdiction in the country." Id. at 382-383.

> Prior to the New York Times decision in 1964, Florida tort law followed the common law of defamation. In company with the settled law on the subject throughout the country, Florida has long imposed the strict liability standard in defamation acts in requiring the Plaintiff merely to prove that the material published was defamatory, that it referred to the Plaintiff, and that the Plaintiff was damaged thereby (which was presumed if the defamation was libel per se or slander per se) 'with various affirmative defenses being recognized, including truth with good motive.' (Citations omitted) Florida law had never required proof that the Defendant acted negligently as Gertz v. Robert Welch, Inc., supra, and Firestone v. Time, Inc., supra, now re-

> quire 'in publishing the allegedly defamatory material, much less that the Defendant acted with New York Times "actual malice"'. (Citations omitted). Id. at 383.

Florida Courts are not alone in assessing the significance of the Gertz decision. See Jacron Sales Company, Inc. v. Sindorf, 350 A.2d 688 (MD. 1976), where the Court stated that "undeniably, the Gertz holding effects sweeping changes in the law of defamation", and Dunlap v. Philadelphia Newspapers, Inc., 448 A.2d 6 (Pa. Super.Ct. 1981), acknowledging that a substantial change in the law of defamation was wrought by the decision of Gertz v. Welch, supra. Indeed, From v. Tallahassee Democrat, et al., supra, held that libel per se is no longer a viable doctrine following the Gertz decision.

> The article is not libelous per se under Gertz. In fact, 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. Gertz says, and we quote,
>
> > '. . . [w]e hold that 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. 418 U.S. 349, 94 S.Ct. 2997, 41 L.Ed. 2d 810.'
>
> This language seems to end the distinction between libel per quod and libel per se. See Memphis Publishing Company vs. Nichols, 569 SW 2d 412, 419 (Tenn. 1978), quoting Eaton, at 1434. See also Metromedia, Inc. v.

> Hillman, 400 A.2d 117, 118-119 (Md. 1979). Since pleading and proof of actual injury are required in most cases per Gertz, all libels governed by Gertz are, in effect, libel per quod. As Justice Powell noted:
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> '. . . [t]he doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injuries sustained by the act of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury. 418 U.S. 349, 94 S.Ct. 2997, 41 L.Ed. 2d 811.' Id. at 57-58.

Petitioners to this cause believe that the Gertz ruling prohibits recovery based on either presumed liability or presumed damages. Petitioners further believe that the Fifth District Court of Appeal in the Boyles decision acknowledged the prohibition against presumed damages, but overlooked the prohibition against presumed liability and has sought to retain vestiges of that doctrine.

B. FLORIDA COURTS HAVE NOT BEEN FOLLOWING GERTZ'S MANDATE.

Gertz v. Welch, supra, specifically prohibits states from allowing recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard of the truth. 418 U.S. at 349. However, Courts in Florida have not been following this mandate.

Florida cases have continued to allow presumed damages and have further presumed fault or malice. In Hood v. Connors, 419 So.2d 742 (Fla. 5th D.C.A. 1982), the Court distinguished slander per se from slander per quod as follows:

> The primary difference between them is in per se actions general damages will be presumed, but for per quod actions the Plaintiff must allege and prove special damages. Id. at 743.

The Third District Court of Appeals has also continued to allow presumed damages. In Barry College v. Hull, 353 So.2d. 575 (Fla. 3rd D.C.A. 1977), the Court stated that "words which amount to libel per se import damages and malice and are actionable in and of themselves without allegations or proof of special damages." In making this ruling, the Court in Barry College relied upon the same case as did the Court in Hood v. Conners, supra.[1]

> As stated in Wolfson v. Kirk, 273 So. 2d. 774 (Fla. 4th D.C.A. 1973), defamation (libel and slander) may be defined as the unprivileged publication of false statements which naturally and proximately result in injury to another. Malice is an essential element of the tort. In fact, without malice, either expressed or implied by

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[1] Campbell v. Jacksonville Kennel Club, 66 So.2d. 495 (Fla. 1953). Barry College, supra, also stated that in per se actions malice is presumed as a matter of law, citing Commander v. Pedersen, 116 Fla. 148, 156 So. 337 (1934).

> law, no tort can result from the publication of a defamatory statement concerning another, however untrue it might be. (Citation omitted) Barry College, supra, at 578.

Presumably, all the cases in Florida that have adopted the negligence standard have done so in an attempt to avoid the prohibition against liability without fault. Unfortunately, the Boyles decision has retained liability without fault. The old common law of strict liability of defamation still lingers in Florida in spite of the sweeping changes brought about through interpretations of the First Amendment to the Constitution of the United States. One legal author has stated:

> The law of defamation over the airways is very much in its infancy, but it was an unplanned child of decrepit parents. One legal commentator has gone so far as to say that 'it is doubtful if any major segment of the common law is more medieval in its point of view, more beset by circuitous fictions and uncertain vagaries, than is the law of libel and slander.' See Defamation - Radio or Television, 50 ALR 3rd 1311, 1318.

In effect, the Boyles Court by reserving libel per se has retained a part of the common law fiction and uncertain vagaries which have been rendered unnecessary by the ruling in Gertz v. Welch. Many out-of-state cases have already analyzed the viability of libel per se as a doctrine since Gertz and have concluded that the doctrine has no place in the law of libel.

In Memphis Publishing Company v. Nichols, 569 S.W.2d (Tenn. 1978), a case relied upon by From, supra, the Court analyzed the law of defamation since Gertz. Initially, the Court adopted the negligence standard for the State of Tennessee. Next, the Court acknowledged that under the common law as applied in the State of Tennessee prior to Gertz, defamations were classified as either per se or per quod. The Court then reasoned that libel per se was no longer a viable doctrine. The Court stated:

> Since Gertz has held that presumed damages are no longer permissible, the per se/per quod distinction no longer has any practical meaning. 'A uniform requirement for proof of actual damages obliterates those often illogical distinctions, most of them relics from centuries past.' Eaton, The American Law of Defamation Through Gertz v. Robert Welch and Beyond, 61 Va. L. Rev. 1349, 1434 (1975). We hold, therefore, that the per se/per quod distinction is no longer a viable one. The plaintiff must plead and prove injury from the alleged defamatory words, whether their defamatory meaning be obvious or not. Id. at 419.

The Memphis Publishing Company case has been followed by subsequent courts in the State of Tennessee. See Handley v. May, 588 S.W.2d 772 (Tenn. Ct. App. 1979).

One of the most illuminating cases concerning the demise of the libel per se doctrine is Wilson v. Scripps-Howard Broadcasting Company, 642 F.2d 371 (6th Cir. 1981). In Wilson, supra, the Plaintiff was determined not

to be a public figure to the media event involved. The Court then looked to an issue which it determined to be one of first impression for Federal Appellate Courts, to-wit: "Whether in light of Gertz the first amendment controls the question of who has the burden of proof on the issue of falsity when the Plaintiff is not a public figure." Id. at 374. The Court noted that Tennessee had adopted the negligence standard. Memphis Publishing Company v. Nichols, supra. Wilson, supra, also noted that the Memphis Publishing case determined it would continue to follow the common law rule that the Plaintiff does not have to prove that a statement is false. Rather, falsity is presumed, and a Defendant must prove the truth of a defamatory statement in order to escape liability. Id. at 420. In doing so Wilson, supra, pointed out that Tennessee followed the common law rule which was developed during the era of strict liability in defamation cases. Wilson, supra, discarded that portion of the ruling in Memphis Publishing Co., supra.

> At common law, prior to the application of constitutional standards in the area of libel and slander, the truth of the defamatory statement was an affirmative defense for the defendant to prove. Restatement of Torts §§518, 613(2) (1938). Although falsity was an element of a cause of action for defamation, Id. at §558, once a statement was shown to be defamatory, falsity was presumed. Prosser, Torts, §116,(4th Ed. 1971); Memphis Pub. Co. v. Nichols, 569 S.W.2d at 420. The

burden of nonpersuasion on the issue of truth, the risk of jury uncertainty, fell on the defendant.

This common law allocation of the burden of proof is drawn into question by the constitutional prohibition against liability without fault as established in Gertz, 418 U.S. at 347-48, 94 S.Ct. at 3010-3011. The language of New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964), and later cases makes clear that the burden of demonstrating falsity of the defamatory statement rests on the plaintiff when the malice standard applies. (Citations omitted)

The same rule requiring the plaintiff to prove falsity is required under the First Amendment in libel cases based on negligence or some other standard of fault of lesser magnitude than malice. The Supreme Court in stating that 'demonstration that an article was true would seem to preclude finding the publisher at fault,' Time, Inc. v. Firestone, 425 U.S. 448,458, 96th S.Ct. 958,967, 47 L.Ed. 2d 154, (1976) has suggested that falsity is an element of fault in defamation cases. . Id. at 374-375.

. . . It would ordinarily be impossible to determine whether the defendant exercised reasonable care and caution in checking on the truth or falsity of a statement without first determining the statement was false. The publisher's carelessness must have caused an error, an inaccuracy, an error in failing to ascertain that the defamatory statement was false. The two elements of carelessness and falsity are inevitably linked, for a defendant should not be liable if it 'took every reasonable precaution to insure the accuracy of its assertions.' Gertz, supra, 418 U.S. at 346, 94 S.Ct. at 3010. Fault then must be held to consist of two elements: Carelessness and falsity.

In order for the jury to decide the issue of fault, it must weigh together and balance the facts concerning falsity and the facts concerning carelessness. The degree of uncertainty in the juror's mind on the issue of truth and the degree of uncertainty on the issue of carelessness must be taken into account at the same time in arriving at a conclusion on the issue of fault. Fairness and coherent consideration of the issue lead us to the conclusion that the party with the burden of proving carelessness must also carry the burden of proving falsity as a part of the concept of fault.

In addition, a rule that places the burden of proving truth on the defendant permits the imposition of liability without fault in certain situations. 'When the trier of fact is unable to determine the truth or falsity of a proposition of fact, he must render a decision against the party having the burden of proof. Consequently, in a jury trial the judge by allocating the burden of proof decides each issue of fact when the jury is unable to decide.' E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 70-71 (1956). When the jury is uncertain on the issue of the truth or falsity of the statement, as it may have been in the present case, it must find in favor of the plaintiff. A presumption of falsity thus permits liability without fault in the close case, in the case in which the jury is uncertain . . . In libel and slander cases generally, there is no particular causal connection between the proved fact (the making of a derogatory statement) and the presumed fact (the falsity of the statement). There is no particular reason to presume falsity.

The Supreme Court has said that before the status quo is changed judicially

> in libel cases by an award of money damages against the publisher, the First Amendment requires that the plaintiff prove fault. Falsity is an element of fault under the First Amendment that should be proved and not presumed. The District Court therefore erred in placing the burden on the defendant. As a matter of Federal First Amendment law, the burden must be placed on the plaintiff to show falsity. Id. at 374-376.

Wilson, supra, is the hallmark case for this Court to consider. It clearly points out the key problem involved with superimposing negligence over the old common law standard, rather than simply removing that common law standard which imbodies elements of strict liability. Wilson has been followed by subsequent courts in Tennessee. See Cloyd vs. Press, Inc., 629 SW 2d 24 (Ct. App. Tenn. 1981). Additionally, it should be pointed out that Time vs. Firestone was the U.S. Supreme Court case that gave the Wilson court the direction in finding that falsity is an element of fault in defamation cases.

> Because demonstration that an article was true was seen to preclude finding the publisher at fault, see Cox Broadcasting Company, 420 U.S. at 498-500, 95 S.Ct. at 1047 (Powell, J., concurring), we have examined the predicate for petitioner's contention. We believe the Florida courts properly could have found the 'Milestones' item to be false. Time v. Firestone at 458.

The State of Tennessee and the Sixth Circuit Court of Appeals are not alone in holding that the burden of proving falsity in a defamation case rests upon the

plaintiff. The State of Maryland has endorsed this ruling since 1976. In Jacron Sales Company, Inc. vs. Sindorf, 350 A.2d 688 (Md. 1976), the Supreme Court of Maryland was called upon to decide as a matter of state law whether the law of defamation should have been changed in view of the Gertz decision. After a thorough analysis of the pre-Gertz constitutional law and the Gertz case, the Court determined that as a matter of Federal constitutional law, that defendants who are protected by Gertz will be insulated from strict liability, and presumed and punitive damages in any defamation case maintained by private person. Id.at 694. Accordingly, the Court adopted a standard of negligence, as set forth in Restatement (Second) of Torts, §580B. Id. at 697. The Court went on to state as follows:

> It is to be noted that under the negligence standard which we adopt here, truth is no longer an affirmative defense to be established by the defendant, but instead the burden of proving falsity rests upon the plaintiff, since under this standard, he is already required to establish negligence with respect to such falsity . . .
>
> We hold that proof of fault in cases of purely private defamation must meet the standard of the preponderance of the evidence. This is the quantum of proof ordinarily required in other types of action for negligence and is apt to be more readily understood by juries. Id. at 698. See also, Jenoff vs. Hearst Corporation, 644 F.2d 1004 (4th Cir. 1980).

The law of defamation in Maryland after Gertz was thoroughly discussed as well in Hillman vs. Metromedia, Inc., 452 F.Supp. 727 (D. Md. 1978).

Some Florida district courts of appeal have retained the common law doctrine of strict liability through the imposition of presumed malice, presumed falsity and presumed damages by clinging to the doctrine of libel per se.

Many post-Gertz cases in Florida have held that malice is presumed as a matter of law from publication of words which are deemed to be per se defamations. See Lundquist v. Alewine, 397 So.2d 1148 (Fla. 5th D.C.A. 1981), and Heard v. Mathis, 344 So.2d 651 (Fla. 5th D.C.A. 1977), where the Court stated that defamations per se presumed malice from the words used and, further, conclusively presumes damage as a matter of law from the use of words actionable per se. In Bobenhausen v. Cassat Avenue Mobile Homes, Inc., 344 So.2d 279 (Fla. 1st D.C.A. 1977), the Court stated as follows:

> Words which are actionable in themselves, or per se, necessarily import general damages and need not be pleaded or proved but are conclusively presumed to result. Moreover, malice is presumed as a matter of law from the publication of such words. Id. at 281.

Indeed, the Florida Standard Jury Instructions[2] also embody the principal of presumed malice.

Florida Standard Jury Instruction 4.1b addresses the issue of whether the publication was defamatory, to-wit: whether the statement or publication tended to expose the claimant to hatred, ridicule or contempt or tended to injure the claimant in his business or occupation or charge that the claimant committed a crime.

MI 4.1 states as follows:

> a. Issue whether publication was made as claimed:
> *whether (defendant) [made the statement] [published matter] concerning (claimant) as (claimant) contends; [and,] [if so,]
>
> b. Issue whether publication was defamatory:
>
> whether (defendant's) [statement] [publication] concerning (claimant) tended to expose (claimant) to hatred, ridicule or contempt [or tended to injure (claimant) in his business or occupation] [or charged that (claimant) committed a crime].

This comment to Florida Standard Jury Instruction MI 4.1 was referred to in Auld v. Holly, 418 So.2d 1020 (Fla. 4th D.C.A. 1982).

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[2] Libel or slander per se. The committee recommends that no charge be given using the terms "per se" or "per quod" defamation. If the matter complained of is defamatory per se, MI 4.1b should not be given.

> . . . However, a footnote at the and of instruction 4.1 admonishes the trial court not to give MI 4.1(b) if the alleged defamatory statement is defamatory per se. MI 4.1(b) is the portion of the instruction which allows the jury to determine whether the words in question are defamatory by allowing the jury to decide whether the words intend to expose the claimant to hatred, ridicule, or contempt to tend to injure the claimant in his business or occupation. Of course, the reason 4.1(b) should not be given if the words are defamatory per se is that it is a question for the Court, not the jury. Id. at 1028.

Thus, a close reading of the above-stated cases and jury instruction indicates that if a statement is defamatory per se, then malice and damages are presumed.

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 MI 4.3 regarding the negligence standard being applied to a news media defendant.) The falsity and malice are presumed.

C. LIBEL PER SE IS INCONSISTENT WITH THE NEGLIGENCE STANDARD ADOPTED BY BOYLES.

Boyles, supra, acknowledged that presumed damages may no longer be obtained in a libel per se case. However, that Court did not address the question of implied malice still residing in the libel per se case. The Court

merely distinguished that in the case of libel per quod one must plead and prove the innuendo. Apparently, on this basis alone, the Court was of the opinion that the tort of libel per se was not or should not be abolished. The Boyles Court went on to specifically adopt the negligence standard in an action by private individuals to recover actual damages. Id. at 634.

Gertz, supra, allowed states to adopt any rule of liability concerning private plaintiffs so long as they did not impose liability without fault. Id. at 347. The Boyles Court has adopted the negligence standard but has also retained libel per se as a doctrine. But the negligence standard and libel per se are incompatible doctrines. First, libel per se presumes falsity. Under the law as it exists after Boyles, the burden is still upon the Defendant to prove the truth of the alleged defamatory statement as an affirmative defense. However, it is impossible to determine if a Defendant exercised reasonable care in determining the truth or accuracy of a statement without first determining whether a statement was false. Libel per se also presumes malice and presumes that the statement is, in and of itself, defamatory. Thus, the burden of persuasion again of the absence of malice and falsity lies with the Defendant and not with the Plaintiff. This represents a much higher and different standard than the normal negligence standard which would be ap-

plied in other negligence cases, to-wit: Where the Plaintiff has the burden of proving by a preponderance of the evidence that the Defendant owed a duty to the Plaintiff to use reasonable care, failed to exercise reasonable care, and caused damage to the Plaintiff.

Here, in effect, libel per se means liability per se. Most of the essential elements of the Plaintiff's case are provided by legal presumptions. The burden rests on the Defendant to prove truth and lack of malice. In a close case, where the evidence as to falsity is balanced evenly and the Defendant does not prove truth by a preponderance of the evidence, the Plaintiff prevails even though he may not have been able to prove falsity either by a preponderance of the evidence. This amounts to liability without fault. Liability without fault is prohibited by Gertz.

(1) IN LIBEL PER SE ACTIONS, THE PRESUMPTION OF FALSITY SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT.

Several Courts in Florida other than the Fifth District Court of Appeals have adopted a negligence standard in libel actions. See Miami Herald Publishing Company v. Ane, supra; Tribune Company v. Levin, 426 So.2d 45 (Fla. 2d D.C.A. 1982); and Arnold v. Taco Properties, Inc., 427 So.2d 216 (Fla. 1st D.C.A. 1983).

In Hillman vs. Metromedia, Inc., 452 F.Supp. 727 (D. Md. 1978), the Court addressed the per se/per quod distinction as follows:

> Such an argument invites this Court to address the difficult distinction between libel per se and libel per quod and consequences resulting therefrom. The question raised here 'whether and when special damages must be alleged and proven in a libel action' has been the subject of heated debate from legal scholars in an area of frequent disagreement. Id. 729.

The Hillman Court discussed both the Gertz case and the Jacron Sales Company, supra, case at length. The Court determined that "in one clean stroke the Supreme Court did away with two long standing doctrines of libel law: the recovery of presumed damages and the concept of liability without fault." Id. at 731.

> Clearly then the major characteristics of traditional libel law in Maryland have become non-existent. Presumed damages and liability without fault are gone. Also, the distinction between libel and slander has been effectively eliminated. Murnaghan II at 31. Finally, and most importantly for purposes of the present case, there is no longer any need for the per se/per quod dichotomy. The termination of strict liability negates any rationale for continuing to maintain such a distinction. Since there is now one standard for measuring damages, that of actual injury, there is absolutely no reason to differentiate between cases where the libel is apparent from the words themselves and those where extrinsic facts must be proven to show the defamatory character of the statement. Accordingly this Court holds

> that under Maryland law there is no longer a distinction between libel per se and libel per quod." Id.

Thus, the Hillman ruling goes to the very heart of the distinction rendered by the Fifth District Court of Appeal in this case. The Fifth District reasoned that the remaining distinction in regard to innuendo was, in and of itself, enough to maintain the tort of libel per se. This ruling maintains the presumption of falsity and presumption of the defamatory character of the statement which amounts to strict liability, contrary to Gertz. At best, the distinction that the Boyles Court attempted to draw is not so much a distinction between libel per se and libel per quod but, rather, the question of pleading and proof requirements. See Metromedia, Inc. v. Hillman, 400 A.2d. 1117 (Md. 1979).

Other states have also held that after Gertz, Plaintiffs have the burden of proving falsity in a defamation case. In Dunlap v. Philadelphia Newspapers, Inc., 448 A.2d 6 (Pa. Super.Ct. 1982), the Court considered the issue of whether a Plaintiff in a defamation action has the burden of proving the falsity of the publication or whether the Defendant has the burden of proving its truth:

> The practice in Pennsylvania has been to place the burden of proving truth on the defendant, but the continued validity of this practice has been questioned. Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 274-5 n. 49 (3rd Cir. 1980). The common law rule has been that the defendant has the

> burden of proving truth as an affirmative defense . . .
>
> However, as noted by the Third Circuit, the constitutionality of placing the burden of proving truth on the defendant has been called into question by the decision of the United States Supreme Court in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974). In Gertz the Court said, 'We hold 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.' Id. at 347, 94 S.Ct. at 3010 (footnote omitted). Because the reason for placing the burden of proving truth on the defendant is that falsity is presumed, it has been urged that the common law rule does precisely what Gertz forbids: it holds a defendant strictly liable in a case where truth cannot be proved. Id. at 11-12.

The Dunlap Court chose to discard the practice of placing the burden of proving truth on the Defendant. In doing so, it acknowledged that prior to Gertz, the focus of litigation in a defamation case was normally on the issues where the burden of proof rested with the Defendant: truth and privilege.

> However, a substantial change in the law of defamation was wrought by the decision of the United States Supreme Court in Gertz v. Robert Welch, Inc., (Citation omitted). That case held that, as a matter of constitutional law, liability for defamation may not be imposed without some showing of fault, amounting at least to negligence, on the part of the defendant. (Citation omitted). This change drastically shifts the burden of proof in

> defamation actions and thereby reduces the unusually heavy burden heretofore placed on defendants in such actions. In proving the necessary element of fault to make out his cause of action, the plaintiff will necessarily have to prove facts that would ordinarily negate the existence of a conditional privilege. (Citation omitted). Similarly, as a practical matter, the plaintiff will find it necessary to prove the falsity of the statement in order to establish the necessary element of fault; to this extent, the defendant is relieved of the burden of proving truth as a defense. Id. §582, comment b., & §580B, comment i. Id. at 13.

The Dunlap Court fully endorsed the ruling in Wilson v. Scripps-Howard Broadcasting Co., supra. The State of New York also has endorsed the ruling of Wilson, supra. In Fairley v. Peekskill Star Corporation, 445 N.Y.S. 2d 156 (App. Div. 2d 1981), the Court held as follows:

> Under such circumstances, proof of falsity is again naturally related to the standard of care. Thus, in a case with constitutional implications such as the one at bar, the defamed plaintiff must prove falsity, irrespective of his status. (See Wilson v. Scripps-Howard Broadcasting Co., 6 Cir., 642 F.2d 371).

See also Goodrich v. Waterbury Republican-American, Inc., 448 A.2d 1317 (Conn. 1982), Acknowledging that as a practical matter the burden of proving the falsity of the publication has been shifted to the Plaintiff; Brewer v. Memphis Publishing Company, Inc., 626 F.2d 1238 (5th Cir. 1980), Where the Court stated that presumed malice

and per se actions is no longer permissible because Gertz prohibits states from allowing liability without fault or from "presuming" fault; Gobin v. Globe Publishing Co., 649 P.2d 1239 (Kan. 1982); and McCall v. Courier-Journal and Louisville Times Company; 623 S.W. 2d 882 (Ky. 1981), where the Court stated that it was convinced that Gertz and its phylogeny imposed a burden of proof and risk of non-persuasion on the issue of falsity of the defamatory statement on the plaintiff.

In summary, Federal courts and state courts in Tennessee, Maryland, Pennsylvania, New York, Connecticut, Mississippi, Kansas, and Kentucky agree that after Gertz the burden of proof shifts from the Defendant to the Plaintiff to prove falsity. Without this shift in the burden of proof, the Defendant would still be required to plead truth as an affirmative defense. This will result in liability without fault in the case where the Defendant could not carry the burden of proof in an otherwise close question.

Additionally, the presumption of malice which has been talked about in recent Florida cases no longer has any meaning after the adoption of the a negligence standard. Malice and negligence are incongruous legal entities when they are juxtaposed in the same case.

By preserving the doctrine of libel per se the Boyles decision leaves Florida law of defamation ensnarled with confusing and unnecessary inconsistancies and further

retains substantial aspects of the ancient strict liability doctrines that are prohibited by constitutional considerations. This bramble bush should be cut down and the law should be simplified to conform to modern principles of tort and negligence law.

CONCLUSION

Petitioners do not take issue with the lower court's ruling that negligence is the appropriate standard of fault to be proven in a defamation case brought by a private plaintiff. However, the Supreme Court of Florida has never expressly adopted this standard of care and could adopt the New York Times standard.

Petitioners believe that the correct negligence standard should be as follows: The Plaintiff would have the burden to prove,

(A) that that the statement was false;

(B) that the statement was defamatory to the Plaintiff;

(C) that publication of such statement was without reasonable care to determine its truth or falsity.

(D) that damages were caused by this negligence.

The tort of libel per se no longer exists in regard to defamation cases against the media as a result of the United States Supreme Court decision in Gertz v.

Robert Welch, Inc., supra. The libel per se standard is incompatible with the negligence standard for two reasons:

(A) Libel per se presumes falsity which results in liability without fault.

(B) Liability per se presumes malice which is also an imposition of strict liability against the Defendant.

The doctrine of libel per se is an ancient relic of the law that no longer serves a useful purpose and, in fact, only creates confusing inconsistencies and retains prohibited aspects of liability without fault.

Petitioners respectfully request this Court to reverse the Fifth District Court of Appeal and to affirm the Trial Court in this action.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy was furnished by ~~mail~~/hand delivery to MARCIA K. LIPPINCOTT, ESQUIRE, 512 East Washington Street, Orlando, Florida 32801, this 9th day of January, 1984.

JOHN M. ROBERTSON