IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 63,753

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

Defendants, Petitioners,

vs.

JACK BOYLES,

Plaintiff, Respondent.

PETITION TO INVOKE DISCRETIONARY JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

GENERAL TEXT

STATUTES AND RULES

ARGUMENT

I. THE APRIL 20, 1983 DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IS IN EXPRESS AND DIRECT CONFLICT WITH A PRIOR DECISION BY THE FIRST DISTRICT COURT OF APPEAL.

This Petition to Invoke Discretionary Jurisdiction is brought pursuant to Rule 9.030(2)(A)(iv). On April 20, 1983, the Fifth District Court of Appeals rendered a decision in this case which affirmed in part and reversed in part the decision of the lower court. (See Appendix) On April 28, 1983, Petitioner herein moved for a rehearing or for clarification to the Fifth District Court of Appeal. This motion was denied by the Fifth District Court of Appeal on May 23, 1983. On May 27, 1983, Petitioner filed its Notice to Invoke Discretionary Jurisdiction with this Court.

Petitioner believes that direct conflict exists between the BOYLES decision and From vs. Tallahassee Democrat, Inc., 400 So.2d 52 (Fla. 1st DCA 1981), review denied, 412 So.2d 465 (Fla. 1982). At page 4 of the Fifth District Court of Appeals opinion, the Court noted the conflict with From, supra. The Court used the signal "But see". "But see" indicates that the cited authority suggests a contrary statement. "A Uniform System of Citation", 12th Edition (1976).

In dismissing COUNT I for failure to state a cause of action for libel per se, the trial court relied upon From, supra. In From, supra, the Court held that libel per se is no longer a viable doctrine following the decision of Gertz vs. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct 2997, 41 L.Ed.2d 789 (1974).

> "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,
>
> > '... We hold that the state 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 Co. vs. Nichols, 569 S.W.2d 412, 419 (Penn. 1978), quoting Eaton, at 1434. See also Metro Media, Inc. vs. 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:
>
> > '... The doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury

> sustained by the act of the false fact. More to the point, the states have no substantial interest in securing for plaintiffs such as Petitioner gratuitous awards of money damages far in excess of any actual injury. 418 U.S. 349, 94 S.Ct. 2997, 41 L.Ed2d 811'"

The Fifth District Court of Appeal acknowledged in its Opinion at page 5 that Gertz abolished one distinction between libel per se and libel per quod in an action by a private individual against the media, to-wit: the presumption of damage. However, the court stated that it did not abolish the distinction in regard to innuendo, and therefore, Gertz did not abolish the tort of libel per se.

Petitioner believes that the abolishing of the primary distinction between libel per se and libel per quod, in effect, abolishes the cause of action in total. As stated in Hood v. Connors, 419 So.2d 742 (Fla. 5th DCA, 1982):

> "Slander 'per se' is actionable on its face, but slander 'per quod' requires additional explanation of the words used to show they have a deflamatory meaning or that the person defamed is the plaintiff. The primary difference between them is for per se actions no damages will be presumed, but for per quod actions the plaintiff must allege and prove special damages."

The Fifth District Court of Appeal acknowledges that Gertz has done away with presumed damages against the media defendant. In Memphis Publishing Co. vs. Nichols,

569 S.W.2d 412 (Penn. 1978), a case relied upon by From, supra, the Supreme Court of Tennessee also found the per se/per quod distinction to be no longer valid.

> "Since Gertz has held that presumed damages are no longer permissible, the per se/per quod distinction no longer has any classical 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 to Gertz vs. Robert Welch and Beyond, 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 injuries from the alleged defamatory words, whether their defamatory meaning is the obvious or not." Id. at 419.

Petitioner contends that the major distinction between per se and per quod actions has been obliterated and, therefore, there no longer remains a valid reason to plead either per se or per quod. As stated in Metro Media, Inc. vs. Hillman, 400 A.2d 117 (Md. 1979), another case relied upon by From, supra, any pleading should contain a "clear statement of the facts necessary to constitute a cause of action". Id. at 1122. The Hillman court saw the question not so much as a distinction between libel per se and libel per quod, but rather, as a question of what is necessary to put the defendant on notice and what will satisfy the pleading requirements. Following

this reasoning, the court held that a pleading "to be sufficient must show a basis for believing that the plaintiff has sustained actual injury . . .". Id. at 1123. Hillman also held that libel per se is no longer a viable doctrine.

The confusion created by this conflict between the From and Boyles Opinions is well illustrated in the Miami Herald Publishing Company vs. Ane, 423 So.2d 376 (Fla. 3rd DCA 1982).

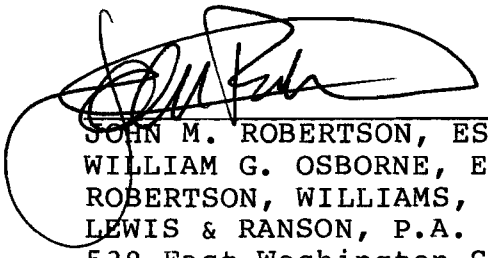
> "Under Florida law, a false and defamatory statement accusing someone of a crime, as here, is considered to be per se actionable without proof of special damage. (Citation omitted). The First Amendment, however, requires proof of some actual damage before compensatory damages can be awarded in a defamation action involving negligence; one element of such damages may be, as here, mental anquish and personal humiliation. Gertz vs. Robert Welch, Inc., 418 U.S. at 348-50, 94 S.Ct. at 3011. "

The above quote clearly points out the needless distinction of libel per se. Damages must be pled and proved, regardless of the per se/per quod distinction. The only remaining distinction left after Gertz is the distinction in regard to innuendo. This is a meaningless distinction in that it makes no difference any more as to the damage question.

CONCLUSION

Petitioner suggests that this court should resolve the conflict between the First District Court of Appeals and the Fifth District Court of Appeals as to whether or not libel per se is still a viable doctrine. Clearly, this is a matter of great importance within the District Courts of Appeal in Florida. Petitioner respectfully requests this court to invoke its discretionary jurisdiction to resolve said conflict.

Respectfully submitted,



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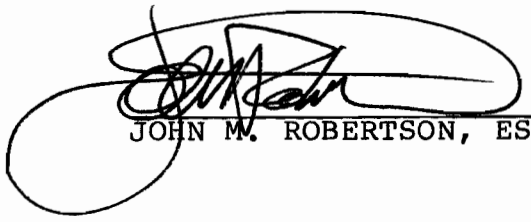
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and conformed copy of the Peition to Invoke Discretionary Jurisdiction has been furnished this 6th day of June, 1983 by mail/hand delivery to MARCIA K. LIPPINCOTT, P.A., 512 East Washington Street, Orlando, Florida 32801 and to RICHARD WILSON, ESQUIRE, 212 East Ridgewood, Orlando, Florida 32803.



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