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.



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# PETITIONERS' REPLY BRIEF ON THE MERITS

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## 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 DOES NOT LACK JURISDICTION IN THAT THE DECISION SUB JUDICE IS IN EXPRESS AND DIRECT CONFLICT WITH FROM VS. TALLAHASSEE DEMOCRAT, INC., 400 So.2d 52 (Fla. 1st DCA 1981).

As stated on page 1 of Respondent's Statement of the Case, the Fifth District Court of Appeal ruled in this case that the Trial Court dismissed Count I based on the defense that "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 vs. Robert Welch, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)", Respondent's Brief on the Merits at page 1.

The lower court expressly relied upon the case of From vs. Tallahassee Democrat, Inc., 400 So.2d 51 (Fla. 1st DCA 1981) when it initially ruled below that the words per se should be stricken from the Respondent's Complaint. The Trial Court initially struck only the per se allegations to the Complaint. The Respondent chose not to amend his Complaint but instead requested the Court to dismiss the entirety of Count I of the Second Amended Complaint with prejudice so that he could take an appeal. It is important that this Court understand the basis for dismissal of the Complaint by the trial court in order to understand the issues framed to the Fifth District Court of Appeal.

The Boyles decision in in "express and direct conflict" with the decision of From vs. Tallahassee Democrat, Inc., supra. In From vs. Tallahassee Democrat, Inc., the Court stated as follows:

> 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 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 (citation omitted).
>
> This language seems to end the distinction between libel per quod and libel per se. See Memphis Publishing Company vs. Nichols, 569 SW2d 412, 419 (Tenn. 1978), quoting Eaton, at 1434. See also Metromedia, Inc. vs. Hillman, 285 M.D. 161, 400 A.2d 1117, 1118-1119 (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.' Id. at 57.

In reaching its decision, the Boyles Court stated as follows:

> First, we do not agree that Gertz has eliminated causes of action against the media in Florida for libel per se, as contended by appellee. But see, From vs. Tallahassee Democrat, Inc., 400 So.2d 52 (Fla. 1st DCA 1981), rev. den., 412 So.2d 465 (Fla. 1982). Id at 633.

In reaching its opinion, Boyles acknowledged that From, supra, was in conflict. Indeed, on the one hand, Boyles stated that Gertz did not eliminate causes and actions against the media for libel per se, while From stated that Gertz did eliminate libel per se as a viable doctrine against a news media defendant. This Court has already asserted jurisdiction based upon the briefs and arguments previously presented by these parties. The advent of the case of Brown vs. Tallahassee Democrat, Inc., 440 So.2d 588 (Fla. 1st DCA 1983), should not change this Court's previous determination. Brown, supra, did not reverse the From vs. Tallahassee Democrat, Inc., supra, case. Nor did Brown address the inherent presumptions underlying libel per se that were addressed in From, supra. The Brown case does not address the issue of presumed falsity or presumed malice, as outlined in Petitioners' Initial Brief on the Merits in this cause. Rather, it deals only with the presumed damage portion of the libel per se issue. In From, supra, the Court talked generally about libel per quod and libel per se. As such, any general discussion would deal with all the presumptions arising from libel per se, to wit: Presumed damages, presumed falsity, and presumed malice.

As an out-of-district Petitioner, the Petitioner in this cause is entitled to rely upon the From vs. Tallahassee Democrat, Inc. case in terms of establishing a

conflict with a Fifth District Court of Appeal case. The fact that the dissenting judge of the From case attempted to explain part of the ruling of From, supra, in Brown vs. Tallahassee Democrat, Inc. does not change the fact that the From case exists and creates a conflict, expressly and directly, with Boyles, supra.

Contrary to the statement made by Respondent, Petitioner here is allowed to rely on statements which are dicta in order to provide the necessary express and direct conflict. The Supreme Court can review decisions of District Courts of Appeal on the ground of direct conflict even if the statement is regarded as obiter dictum. Sunad, Inc. vs. City of Sarasota, 122 So.2d 611 (Fla. 1960) and Scott vs. National Airlines, Inc., 157 So.2d 237 (Fla. 1963).

As further proof for the proposition that From provides conflict for Boyles and this conflict is not removed the subsequent case of Brown vs. Tallahassee Democrat, Inc., one need only look to the case of Memphis Publishing Company vs. Nichols, 569 SW2d 412, 419 (Tenn. 1978), a case cited by From at page 57. Memphis Publishing Company stated as follows:

> 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

> the centuries past.' Eaton, The American Law of Defamation through Gertz vs. 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.

There is express and direct conflict between the Boyles decision and the From decision, and as such, this court should continue to exert jurisdiction to consider this case and consider the Petition.

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

Petitioner has failed to address Respondent's argument that libel per se is inconsistent with the negligence standard adopted by Boyles. The Boyles Court adopted the negligence standard in an action by private individuals to recover actual damages from a media defendant. Id at 634. However, Boyles also retained libel per se as a viable doctrine. Petitioners have contended that the negligence standard and libel per se standard are incompatible doctrines. Contrary to the comments made by Respondent in his Brief on the Merits, Florida law has not made any distinction between media and nonmedia defendants in libel per se cases. Respondent attempts to draw a distinction in Florida law between media and non-media de-

fendants in the application of libel per se presumptions. However, Respondent only relies upon the Maryland case of Jacron Sales Co., Inc. v. Sindorf, 350 A.2d 688, 694 (Md. 1976), for this proposition. Respondent cites no Florida cases for the proposition that Gertz only applies to media defendants or that libel per se only applies to non-media defendants. In fact, Petitioner can find no Florida cases in which media defendants were distinguished from non-media defendants in libel per se causes of actions. Indeed, in Hood v. Connors, 419 So.2d 742 (Fla. 5th DCA 1982), the Court made no distinction between media and non-media defendants. Hood v. Connors stated that

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

Hood v. Connors, supra, cited as authority the cases of New York Times v. Sullivan, 376 US 254 (84 S.Ct. 710), 11 L.Ed.2d 868 (1964) and Times Publishing Company v. Hoffstetler, 409 So.2d 1112 (Fla. 5th DCA 1982). Both of these cases involved media defendants. Additionally, the case of Barry College v. Hull, 353 So.2d 575 (Fla. 3rd DCA 1977), makes no distinction between the news media defendants and non news media defendants. This case also cites with approval media cases dealing with libel per se.

See e.g. Adams v. News Journal Corporation, 84 So.2d 549 (Fla. 1955). Barry College, supra, also quotes with approval the case of Miami Herald Publishing Company v. Brautigan, 127 So.2d 718, 722 (Fla. 3rd DCA 1961). As pointed out in Petitioner's initial Brief, Barry College, supra, stands for the proposition that words which amount to libel per se import or presume malice. Specifically, Barry College, supra, stated as follows:

> "....Words which amount to libel per se import damages in malice and are actionable in and of themselves without allegations or proof of special damages. ... Malice is presumed as a matter of law." (Emphasis supplied)

Indeed, the Boyles decision makes no distinction between media and nonmedia defendants. Apparently, the only one trying to draw this distinction is Respondent. As a consequence, this Court should clear up the matter as to the application of the doctrine of libel per se.

Respondent's incorrect analysis of Petitioner's argument does not end with the point of media/nonmedia distinctions. It is the very inconsistency between the libel per se and negligence standards that give cause for concern about the Florida Standard Jury Instructions. Under Florida Standard Jury Instruction MI 4.1, no finding of falsity is required. Indeed, this could be classified as the classical libel per se jury instruction. Like all

previous libel per se cases, falsity, malice and damages are presumed as a matter of law by the very nature of the statement written or oral. However, under Florida Standard Jury Instruction MI 4.3, an attempt is made to depart from libel per se and move to a pure negligence standard. However, Boyles, supra, did not adopt a pure negligence standard. In fact, Boyles retained libel per se as a viable doctrine and also endorsed the negligence theory. Even Florida Standard Jury Instruction 4.3 does not address the issue of implied malice. Thus, as a matter of law, under the remaining portions of libel per se after Boyles, malice is implied in cases involving news media defendants.

To point out the extreme confusion in the Law as to what the correct standard of liability is in defamation cases, one need only look to Florida Statute §770.02. §770.02 (1) states as follows:

> "If it appears upon the trial that said article or broadcast was published in good faith; that its falsity was due to an honest mistake of the facts; that there are reasonable grounds for believing that statements in said article or broadcast were true; and that, within the period of time specified in Subsection (2) a full and fair correction, apology, or retraction was, in the case of a newspaper or periodical, published in the same editions or as corresponding issues of a newspaper or periodical in which that article appeared and in as conspicuous place and type as said original article or, in the case of a

> broadcast the correction, apology, or retraction was broadcast at a comparable time, then the plaintiff in such case shall recover only actual damages.

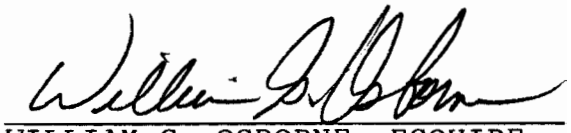
This statutory section flies in the face of a pure negligence standard and in fact falls into a liability without fault category. Indeed, even if a broadcaster is found to not have acted negligently, under Statute §770.02, actual damages can still be obtained against a media defendant. In other words, even if the falsity was due to an honest mistake of the facts or there were reasonable grounds for believing that the statements are true (which is the negligence standard) a jury can still award actual damages, and even punitive damages if a correction, apology or retraction is not made under the statute.

Libel per se has been a doctrine that has evolved in the common law of Florida. As such, cases have defined it as being a doctrine which presumes damages, malice, and falsity. The Boyles decision only dealt with one-third of the presumptions that exist in a libel per se case and left the other presumptions intact by preserving libel per se. The remaining presumptions are inconsistent with the negligence standard and, as such, libel per se should be eliminated in toto as a doctrine in our jurisprudence.

## CONCLUSION

As stated in its previous Brief, Petitioners believe that the doctrine of libel per se is an ancient relic of the law that no longer serves any useful purpose and only creates confusing inconsistencies. The Respondent elected to dismiss his Complaint in toto if the presumptions of libel per se were not left available to him. It is too late for him now to recant from that choice. Petitioners respectfully request this Court to reverse the Fifth District Court of Appeal and to clarify the proper, consistent standard to be utilized in defamation actions.

Respectfully submitted,



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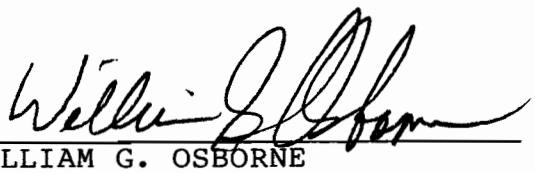
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof was furnished by hand delivery to MARCIA K. LIPPINCOTT, ESQUIRE, 512 East Washington Street, Orlando, Florida 32801, and by mail delivery to JOHN L. WOODARD, III, ESQUIRE, 1520 Hartford Building, Orlando, Florida 32801; RICHARD J. OVELMEN, ESQUIRE, The Miami Herald Publishing Co., One Herald Plaza, Miami, Florida 33101; PARKER D. THOMSON, ESQUIRE, SANFORD L. BOHRER, ESQUIRE and GARY PRUITT, ESQUIRE, 1000 Southeast Bank Building, Miami, Florida 33131, this 5th day of March, 1984.



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