

Kentucky Court of Appeals Grants Summary Judgment to Newspaper Over Prom Photo

By Jon L. Fleischaker, Jeremy S. Rogers and
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Late last month the Kentucky Court of Appeals upheld a Knott (County, Kentucky) Circuit Court's grant of summary judgment dismissing a libel suit brought by a high school student over a photograph in the school newspaper that depicted her dancing at the prom with her skirt lifted to her underwear. *Combs v. Knott County Publishing Company, Inc.*, No. 2003 000372, 2004 WL 2413579 (Ky.App. Oct. 29, 2004) (designated not for publication). The decision can also be found at www.kycourts.net/Appeals/COA_Opinions.shtm.

Although the girl's face was blacked out, the photograph clearly depicts her lifting her skirt to expose her upper thigh and underwear as she slow-danced at the Knott County Central High School prom in May 2001.

The photograph accompanied an editorial in the school newspaper of Knott County Central High School, *Patriot Voices*. The editorial was entitled "KCC Prom XXX-sposed," and criticized the prom attendees for their behavior at the prom.

The student editorial writer lamented the provocative dress, dirty dancing, and crude behavior of prom-goers but did not name any names. The editorial described the prom generally as "just down right nasty" quoting the observation of one student that "[i]t was sex with clothes on." The editorial discussed students groping one another and contained a caption "Shame! Shame! Shame!"

The school newspaper was routinely distributed as an insert to the local newspaper, *The Troublesome Creek Times*. The plaintiff claimed to be the girl pictured in the photograph and sued the publisher of *The Troublesome Creek Times*. She did not sue the high school or *Patriot Voices*. Because she was a minor when the lawsuit was initiated, her mother sued on her behalf.

The plaintiff alleged that many of her classmates recognized her in the photograph and that the school principal asked her to stay out of school for a couple of days because of the photograph. She admitted that the photograph was an accurate depiction of her dancing at the prom. However, plaintiff seized on the phrase "sex with

clothes on" and pursued the theory that the article falsely insinuated that she actually engaged in sex with her clothes on at the prom.

The newspaper moved for summary judgment. The newspaper argued that the article was protected opinion, was not of and concerning the plaintiff, that the *Times* lacked the requisite state of mind, and that the *Times* was protected by a news carrier defense.

At oral argument, the trial court judge stated his disbelief that the plaintiff's identity could be ascertained from the photograph. The trial court granted the newspaper's motion for summary judgment in a one sentence opinion and order.

Editorial Was Protected Opinion

The Court of Appeals performed a de novo review and held that the editorial was opinion as a matter of law. Therefore, the editorial was protected by the First Amendment, and the plaintiff failed to present the element of a defamation case requiring a false statement of fact concerning the plaintiff. The Court stated that the editorial amounted at most to a "crude metaphor" and was not presented as a factual report that sexual intercourse had actually occurred.

Additionally, because the comments were phrased as a blanket indictment of the behavior of a substantial group of attendees, the Court held that the editorial was not of and concerning the girl in the photograph. The Court did not reach the news carrier defense or the arguments concerning the defendant's state of mind.

As of the date of this article, the plaintiff has not appealed the decision to Kentucky's Supreme Court.

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**MLRC would like to thank Fall Interns
Odelia Levy, Brooklyn Law School; and
Alison M. Norris, NYU Law School
for their contributions to
this month's MediaLawLetter.**