

## Kentucky Court Dismisses Photo Misidentification Case

By Jon L. Fleischaker And Jeremy S. Rogers

A Kentucky court dismissed a defamation case against the Louisville Courier-Journal arising from a photograph of an individual misidentified as that of an alleged triple murderer. *French v. The Courier-Journal, Inc.*, Jefferson Circuit Court No. 06-CI-02413.

### Background

The plaintiff, Daryl French, sued the newspaper after it published his photograph and identified it as that of Charles Boney, a man who was at the time was charged with murdering an Indiana woman and her two children. Boney has since been convicted of the crimes along with his co-conspirator David Camm.

The Camm/Boney murder trials received intense media attention in the Louisville and Southern Indiana region. Camm is a former Indiana state police officer and was the victims' husband and father. He was convicted at trial in New Albany, Indiana. His conviction was reversed on appeal. After a change of venue, Camm was tried a second time and convicted.

When Boney was first charged in the spring of 2005, the newspaper published a lengthy article about his alleged involvement in the crime. The article contained three photographs: two recent photographs of Boney in an orange jail jumpsuit and a 15 year old black-and-white photograph from Boney's yearbook.

Boney and the plaintiff Daryl French were high school classmates, and both had been members of the high school wrestling team, but the newspaper mistakenly published French's picture with the caption "At New Albany (Ind.) High School, Coach Jim Binkley said Boney, pictured in a yearbook, didn't cause problems on the wrestling team."

The yearbook from which the photograph was taken showed two similar wrestling photos but included information with only the photo of Boney. After the mistake was brought to the newspaper's attention, the newspaper published a correction and the photograph was removed from the article archived on the newspaper's website.

Shortly before Kentucky's one-year libel statute of limitations was due to expire, French sued the newspaper.

The complaint included a copy of the offending article and claimed that the newspaper's publication and misidentification caused French to suffer emotional damages, lost wages and lost earning capacity.

### Motion to Dismiss

The newspaper moved to dismiss the lawsuit for failure to state a claim on a number of grounds. Under Kentucky law, to successfully assert a claim for defamation, a plaintiff must allege and prove each of the following four elements: 1. defamatory language; 2. about the plaintiff; 3. which is published; and 4. which causes injury to reputation. *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004); *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270, 273 (Ky. App. 1981).

The newspaper argued that, because the article was entirely about Boney and did not mention French, he could not prove the article was "of and concerning" him. The newspaper also argued that French could not demonstrate injury to his reputation, which, under Kentucky law, is a substantive element of the tort of defamation rather than simply an element of damages. The newspaper argued that a misidentified photo, without specific language about the plaintiff, could not, as a matter of law, harm the plaintiff's reputation. Readers who did not know plaintiff would have no reason to believe he was involved, and those who knew him would know that it was a case of misidentification and that plaintiff was not the person actually arrested. In either event, no one would infer anything derogatory about plaintiff that could harm his reputation.

After requesting, and being granted, an extension of time to respond to the newspaper's motion, plaintiff did not respond to the motion. The court did not write an opinion but simply dismissed the case with prejudice by signing the one-line order.

*Jon L. Fleischaker and Jeremy S. Rogers of Dinsmore & Shohl in Louisville, Kentucky represented the Courier-Journal. Plaintiff was represented by Kenneth H. Baker and F. Chris Gorman.*