RENDERED: AUGUST 19, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000932-MR

JEFFREY FRYMAN; TAMMY GRAY FRYMAN; SHAUN FRYMAN, a minor by and through his father and next friend, JEFFREY FRYMAN; and COURTNEY FRYMAN, a minor by and through her mother and next friend, TAMMY GRAY FRYMAN — APPELLANTS

v.

APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE JOHN W. MCNEILL III, JUDGE
ACTION NO. 02-CI-00093

CHARLES MASTERS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from a summary judgment entered by the Fleming Circuit Court in favor of the defendant in a case alleging outrage/intentional infliction of emotional distress (IIED). For the reasons stated hereafter, we affirm.

Appellants are the parents and siblings of Jeromy Keith Fryman, who was a Fleming County High School senior when

he was killed in an automobile accident on November 7, 2001. Appellee Charles Masters was a teacher who had Jeromy in a freshman biology class several years earlier. Masters testified by deposition that Jeromy had cursed him on at least two occasions, and that Jeromy and other students had made comments on several occasions which suggested to Masters that Jeromy was involved in drug use.

Several days after Jeromy's funeral, a memorial service was scheduled at the high school and the school's flag was lowered to half-mast. According to appellants' brief:

> That morning at school, as reported by the Fleming County and Maysville newspapers, with reference to the memorial service for Jeromy, Masters told his home room students "that he would not be celebrating Jeromy's life but would celebrate his death," and, that:
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>> "He was nothing but a drug dealer and terrorist the whole time he was at Fleming County High School. He had no respect for me and I have none for him."

According to appellants, Masters also made similar statements to other teachers and school employees. It is undisputed that although Masters did not make any of the statements directly to appellants, rumors of the statements were reported to them by numerous other people. Further, the newspapers evidently reported that students staged a walkout and protest until Masters left the school. Masters did not return to the school,

and he ultimately resigned his teaching position. Appellants assert that Jeromy "had no record of acts or charges of any kind related to drugs, weapons, violence, or 'terroristic acts.' Masters knew this and admitted that he had no basis for these statements about the boy."

Masters admitted by deposition that he expressed to several teachers his opinions about the school's response to Jeromy's death, including that it was unlawful to lower the flag to half-mast in memory of a student. He also admitted that he specifically expressed to his homeroom students

> that I would not celebrate [Jeromy's] death, that I think that this whole thing was turning into a celebration every time someone died, and did not – and am certain that I was asked in homeroom by one of my students, but I cannot recall which one, Mr. Masters, well how do you feel about all this, and that was my response, but I definitely did not say that I was going to celebrate his death, I said specifically I would not celebrate his death.

Masters admitted that he "may have" referred at that time to Jeromy as being a drug user, but that he did not know whether he referred to him as being a drug dealer. Further, he admitted to having referred to Jeromy as a "terrorist" based on Jeromy's alleged use of threatening language to teachers.

Appellants filed the action below against Masters, the Fleming County Board of Education, and other school administrators, asserting claims of outrage/IIED. After all the

defendants but Masters were dismissed from the action, Masters sought summary judgment on the ground that under Kentucky law, liability for outrage/IIED does not extend to third parties. The trial court agreed and granted summary judgment in favor of Masters. This appeal followed.

The tort of outrage/IIED is described in the *Restatement (Second) of Torts* § 46 (1965) as follows:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
>
> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
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> > (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
> >
> > (b) to any other person who is present at the time, if such distress results in bodily harm.

The Kentucky Supreme Court recognized the tort of outrageous conduct in *Craft v. Rice,*[1] wherein it adopted subsection (1), but not subsection (2),[2] of Section 46 of the *Restatement.* Panels of

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[1] 671 S.W.2d 247, 251 (Ky. 1984).

[2] *Allen v. Clemons,* 920 S.W.2d 884, 886 (Ky.App. 1996). *See also Stringer v. Wal-Mart Stores, Inc.,* 151 S.W.3d 781 (Ky. 2004); *Wilhoite v. Cobb,* 761 S.W.2d 625 (1988).

this court have subsequently "declined to address subsection (2) . . . because that is a function more properly addressed to our court of last resort[.]"[3]

Here, even if we view the evidence in the light most favorable to appellants, Masters was entitled to judgment as a matter of law.[4] As Masters argues on appeal, although Section 46(1) of the *Restatement* does not specify that outrageous conduct under that subsection must be directed toward a plaintiff in order to be actionable, that fact is implicit in a reading of Section 46 as a whole, since otherwise there would be no reason for the existence of subsection (2) addressing the outrageous conduct which is directed toward someone other than the plaintiff.

The record shows that it is undisputed that appellants were not present when Masters made his offensive comments, and that none of the statements referred to any of the appellants in any way. Instead, all of the comments pertained to Jeromy, who was deceased and therefore obviously not present when they were made. Thus, regardless of whether Masters' comments could be described as extreme and outrageous, and regardless of whether appellants later became aware of the comments through hearsay, it is clear as a matter of law that the comments are not

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[3] *Allen,* 920 S.W.2d at 886.

[4] *See* CR 56.03.

actionable as outrageous conduct for purposes of Section 46(1) of the *Restatement,* and that they are therefore not actionable under present Kentucky law.[5] Moreover, even if Kentucky courts expanded their adoption of Section 46 of the *Restatement* to include subsection (2), as a matter of law Masters' behavior still would not be actionable since none of the plaintiffs were present when Master's comments originally were made.

The court's summary judgment is affirmed.

SCHRODER, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANTS:	BRIEF FOR APPELLEE:
Douglas Miller Cynthiana, Kentucky	JoEllen S. McComb Lexington, Kentucky

[5] *See Mineer v. Williams,* 82 F.Supp.2d 702, 707 (E.D.Ky. 2000).