UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO: 09-2144

MARYJO MILLER, individually and on behalf of her minor daughter, MARISA MILLER; JAMI DAY, individually and on behalf of her minor daughter, GRACE KELLY; JANE DOE, individually and on behalf of her minor daughter, NANCY DOE, Appellees

vs.

GEORGE SKUMANICK, Jr., in his official capacity as District Attorney of Wyoming County, Pennsylvania, Appellant

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ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED MARCH 30, 2009 IN CIVIL ACTION 3:09-CV-00540

REPLY BRIEF OF APPELLANT, GEORGE SKUMANICK, JR.

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(Suggested Answer: Yes)

B. Whether the District Court should not have exercised its jurisdiction and refused to issue injunctive relief because by doing so it interfered with an ongoing criminal prosecution?

(Suggested Answer: Yes)

C. Whether by stepping into the role of child super advocate and determining that no crimes had been committed by the Plaintiffs, the District Court has emboldened on-line predators?

(Suggested Answer: Yes)

D. Whether the District Court erred in making a determination that the photograph of Plaintiff Nancy Doe does not contain nudity depicted for the purpose of sexual stimulation or gratification?

(Suggested Answer: Yes)

II. Argument

A. The District Court erred in granting the preliminary injunction based on the theories that the Plaintiff Parents have asserted a constitutional right to direct the education of their children and a right to be free from compelled speech in refusing to permit their daughters to participate in the course designed to demonstrate the dangers of sexting.

The ACLU argues that the rights of the Plaintiffs were violated because they have the right to direct the education of their children. This is not in dispute. However, the education of their children is not an issue in this action. The real issue is whether a Pennsylvania County District Attorney can enter into an informal adjustment in a juvenile proceeding without the interference of the Federal Courts. The parents of the three (3) Plaintiffs were not forced to have their children accept a teaching with which they had a fundamental disagreement. Instead they were given the option of accepting the informal adjustment or rejecting it and moving forward with the criminal action. *See*, 42 Pa.C.S. § 6323.

The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the "care, custody, and control of their children", however, "the right is neither absolute nor unqualified." Anspach v. City of Philadelphia, 503 F.3d 256, 262 (3d Cir. Pa. 2007)(citations omitted). Plaintiffs cannot maintain a due process violation unless they can

demonstrate that the conduct complained of was a form of constraint or compulsion. The case law which supports Plaintiffs' claims concerns criminalizing actions which should remain firmly in the purview of the parents. *See*, Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (statute required all children between the ages of 8 and 16 to attend public schools); Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (statue made school attendance compulsory and violated Amish parents' First Amendment rights to the free exercise of their religion); Prince v. Massachusetts, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944) (child labor laws were construed to prohibit street sales of religious tracts by children). Here, the activity which District Attorney Skumanick seeks to prohibit is not the parents right to care and guide there children, but instead the production and transmittal of sexually provocative photographs of juveniles. The parents have no right to encourage this behavior.

The ACLU also attempts to posit a civil rights violation by claiming that the Plaintiffs were retaliated against by District Attorney Skumanick. The problem with this argument is that the activity the District Attorney sought to enjoin, the production and distribution of nude and semi-nude photographs of underage girls, is not protected speech. Instead, the ACLU made the strained argument that the constitutionally protected activity was the parents' right to direct the education of

their girls. However, as indicated above, the parents right to direct education can only be infringed where the right is being specifically limited or criminalized.

In general, constitutional retaliation claims are analyzed under a three-part test. Plaintiff must prove (1) that they engaged in constitutionally-protected activity; (2) that the government responded with retaliation; and (3) that the protected activity caused the retaliation. Anderson v. Davila, 125 F.3d 148, 161 (3d Cir. 1997); Rauser v. Horn, 241 F.3d 330, 333 (3d Cir. 2001). The threshold requirement is that the Plaintiff identify the protected activity that allegedly spurred the retaliation. Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 282 (3d Cir. Pa. 2004). Here, the ACLU has argued that the protected activity was the care, custody, and control" of the minor Plaintiffs.

The ACLU, in an attempt to make out a case involving the violation of First Amendment rights makes a circular argument that Nancy Doe was threatened with juvenile prosecution because she refused to accept the probationary program suggested in the informal adjustment. On the contrary, Nancy Doe was threatened with prosecution because she posed naked from the waist up, staring provocatively into the camera, and that she disseminated those photographs on the internet. Neither Nancy Doe nor her Plaintiff mother appeared at the hearing to deny any of this.

The ACLU cites to no cases where any Court held that statements made in a probationary program to avoid prosecution, are violations of the potential criminal Defendant's First Amendment rights. The ACLU argues only that the prosecution could not have been commenced in good faith. Where there is no appearance by the potential Defendant at the hearing and therefore no denial that Nancy Doe disseminated the naked pictures of herself, there is no basis for this Court to hold that the prosecution would not have been legal and well taken.

The course, referred to condescendingly by counsel for the ACLU as a "re-education program", was designed jointly by Wyoming County Children and Youth and the Wyoming County Juvenile probation. The stated goals of the course are:

> To learn about sexual violence and its effects on victims and the community.
> Understand behaviors which foster or encourage violence.
> Identify ways to prevent violence.
> Apply information learned to everyday life.

The course was divided into five (5) sessions. The first three (3) focused on sexual violence and harassment and its implications for the victim and the community. The fourth (4^{th}) session dealt with gender identity and specifically the conflicting messages society and the media send young women. One (1) assignment in this session dealt with identifying how advertisers "use" women to sell products.

The final session dealt with self worth and assigned Maya Angelou's "Phenomenal Women" as a reading assignment.

The ACLU has alleged that the parents of the three (3) Plaintiffs objected to the course because it would violate their right to free speech. However, as proof of this allegation only one (1) of the parents, Mary Jo Miller, expressed any problem with the course. Jami Day, the mother of Grace Kelly, contacted the Wyoming County District Attorney's office in July of this year and indicated she had never wanted to pursue the claim against the District Attorney's office but the ACLU indicated that is was "too late." The Appellant has determined that Ms. Miller will not be prosecuted.

Assuming, *arguendo* that the objections of Ms. Miller are relevant, her complaints dealt with the fact that her daughter would have to come terms with why taking photographs of herself in a bra and panties in a digital format was wrong. Ms. Miller agrees with this. During her testimony she did indicate that the photo should have remained private and it would have been wrong for the photo to be disseminated. Hearing Transcript, p. 31, 35. Ms. Miller went so far as to indicate that she would have punished her daughter for disseminating the photograph. However, the basic concept that simply by her daughter posing for a digital photo in a bra and panties put her in danger of having the photos disseminated without her

daughter's consent was lost on Ms. Miller. The administrators of Tunkhannock Area School District and District Attorney Skumanick understood this concern.

Ms. Miller also objected to the idea that her daughter should be discussing what it means to be a girl in today's society because "There's so many different cultures and beliefs, I mean, who is to say what it is to be a girl in today's society." Transcript, p. 27, lines 22-23. However, the course was not designed to indoctrinate. Instead, the course guidelines specifically state that the those participating must "be respectful of others' opinions even if you disagree with them." Clearly, the assumption was that the discussions would not be one-sided and debate would be encouraged and respected.

Plaintiff Mary Jo Miller also testified that she had engaged the ACLU to represent her prior to knowing anything about the course. Hearing Transcript, p. 33. It can therefore be assumed that none of the plaintiffs had knowledge about the course prior to retaining the ACLU. If the Plaintiffs had not known about the content of the course developed by the District Attorney, the outrage over the course is clearly an afterthought constructed by the ACLU to bolster their cause.

The outrage expressed by the ACLU during the injunction hearing does not change the fact that digital photos of naked, or partially naked under-aged girls have and will find themselves onto the world wide web. In fact, subsequent to the filing

of the ACLU Complaint an arrest was made of an adult male who had received photos of a 14 year-old Tunkhannock High School student, taken by the student. The investigation by the Chief Detective of Wyoming County, in conjunction with the Federal Bureau of Investigation, led to the arrest of Scott P. Swanson for Felony Criminal Solicitation and Corruption of Minors after Mr. Swanson attempted to set up a meeting with the girl. The investigation was instigated at the behest of the step-mother of the 14 year-old girl after the information about sexting made available through the school district and the district attorney's office caused her to become suspicious of her daughters on-line and cell phone activities. The Appellant acted as he did to shield the children of his community from people like Mr. Swanson.

B. The District Court should not have exercised its jurisdiction and refused to issue injunctive relief because by doing so it interfered with an ongoing criminal prosecution.

Contrary to contention of the ACLU, the Pennsylvania Courts *have* determined that a petition does not necessarily need to be filed for a juvenile proceeding to commence. Superior Court of Pennsylvania stated in Commonwealth v. J.H.B., 760 A.2d 27 (Pa. Super. 2000) (*quoting* In the Interest of BPY, 712 A.d 769,770 (Pa. Super. 1998)) that "Under the Juvenile Act, Petitions may be disposed of in three (3) ways: (1) by informal adjustment, 42 Pa.C.S.A. §6323; (2) by Consent Decree, 42 Pa.C.S.A. §6340, or (3) by hearing, 42 Pa.C.S.A. §§ 6336, 6341". However, the

Court made clear that it is not necessary that a Petition for delinquency be filed in order for a criminal proceeding to be commenced. Indeed, a criminal proceeding in the form of an informal adjustment can only be pursued prior to the filing of a Petition. Once the Petition is filed an informal adjustment may not be entered.

According to 42 Pa.C.S. § 6323:

> Before a petition is filed, the probation officer or other officer of the court designated by it, subject to its direction, shall, in the case of a dependent child where the jurisdiction of the court is premised upon the provisions of paragraph (1), (2), (3), (4), (5) or (7) of the definition of "dependent child" in section 6302 (relating to definitions) and if otherwise appropriate, refer the child and his parents to any public or private social agency available for assisting in the matter.

Here, Juvenile Probation, in conjunction with Children and Youth and the District Attorney's Office designed the course to address the needs of the children who had made the mistake of digitizing nude or semi-nude photos themselves. This course was offered as an informal adjustment as allowed by the juvenile law statute. Assuming that Ms. Doe decided not to accept the informal adjustment and prosecution was commenced, the juvenile would have had a wealth of opportunity to challenge the legality of the prosecution. The challenge should properly have been decided by the Court of Common Pleas of Wyoming County, without the interference of the Federal Court.

C. By stepping into the role of child super advocate and determining that no crimes had been committed by the Plaintiffs, the District Court has emboldened on-line predators.

The District Court has determined not only that no criminal action should have been brought against the minor Plaintiffs but also no criminal action may ever be brought against the Plaintiffs for any use of the photographs. This overreaching on the part of the District Court will only result in a chilling effect on all Pennsylvania prosecutors who are dealing with the issue of sexting. As the ACLU has pointed out, 20% of all teenagers have sent or posted on the internet nude or semi-nude photos of themselves. See, Appellees' Brief p. 2. This issue is not going away.

By allowing themselves to be photographed in nude or semi-nude placing their images on-line, teens are increasing placing themselves in the position of vulnerability.

As a direct result of engaging the parents in the Tunkhannock School District after the investigation into the rampant sexting in the district, the step-mother of a 14 year old girl in the district found pornographic photos of her step-daughter on the daughter's phone. More distressing was the fact that the photos had been sent to an adult male and the girl had been communication with the man. The photo was of the girl naked from the waist up. The step-mother's awareness of the problem was a result of the activities of District Attorney Skumanick and the Tunkhannock School District.

With the consent of the child's parents, the Wyoming County Detective reviewed the contents of the juvenile's cell phone and was allowed access to her email account. It was discovered that not only had the juvenile sent photos of herself to the adult male, but had been communicating with him via the internet. This communication included graphic depictions of sexual acts. The adult male also indicated that he would visit the juvenile for the purpose of engaging in sexual intercourse. This information was relayed to the Wyoming County District Attorney's Office and the Federal Bureau of Investigation. The adult male was arrested based on the information obtained by the various law enforcement agencies.

The argument is made in the Brief of the Amicus that "sexting represents the convergence of technology with adolescents' developmental need to experiment with their sexual identity and explore their sexual relationships". They argue that sexting is a good thing because "technology allows teenagers to negotiate this important task of exploring their sexual identity while avoiding the embarrassment of doing so face to face". However, as has been experienced in Tunkhannock sexting provides the gateway for child predators to our children.

The spreading of photographs of naked children on the internet which provides the ability for predators to contact these children is a juvenile act. The ACLU and the Amicus make the argument that District Attorneys should be enjoined from taking

any action under the Juvenile Criminal Statutes to discourage children from posting sexually suggestive naked pictures of themselves on the internet. Every pedophile, every predator, waits with eager anticipation of that ruling. It is the interest of those pedophiles that is being advanced by the ACLU and the Amicus.

D. The District Court erred in making a determination that the photograph of Plaintiff Nancy Doe does not contain nudity depicted for the purpose of sexual stimulation or gratification.

Under the Pennsylvania Child Pornography Statute 18 Pa.C.S.A. 6312.1, "prohibited sexual art" is defined as "...nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction". The photograph of Nancy Doe depicts a young woman posing in an provocative manner with her breasts exposed. Nancy Doe did not testify at the hearing and has provided no evidence regarding the circumstances of the staging of the photo or its dissemination. However, even without any testimony, the District Court made the determination that the photo could not be considered pornography under the Pennsylvania Statute. This is clearly not the job of the District Court. The Pennsylvania Courts have been careful to protect the role of the county prosecutor from anything that may undermine his or her prosecutorial duty. *See*, Commonwealth v. Pritchard, 408 Pa. Super. 221 (Pa. Super. Ct. 1991). As the Pritchard Court noted,

"[t]he District Attorney's function is to represent the Commonwealth in criminal prosecutions. The District Attorney exercises this responsibility by first evaluating complaints to determine whether criminal charges should be brought against an individual." Coincidental to the prosecutors power to initiate prosecutions is his power to withdraw charges when it becomes evident that the charges lack legal basis. In re Private Crim. Complaint of Wilson, 2005 PA Super 211, P16 (Pa. Super. Ct. 2005).

Here, the District Court has usurped the authority of the prosecutor by determining that the photograph of Nancy Doe was not pornographic and District Attorney Skumanick could not prosecute her for any use of the photograph.

III. CONCLUSION

It is respectfully submitted that this Honorable Court should reverse the Order of the United States District Court for the Middle District of Pennsylvania and deny the Motion for Injunctive Relief in favor of Appellees, Jane Doe and Nancy Doe, and that the Court dismiss the Complaint of Appellees, Jane Doe and Nancy Doe also.

Respectfully submitted,

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CERTIFICATIONS

1. Michael J. Donohue is a member in good standing of the Bar of the United States for the Third Circuit Court of Appeals.

2. This Brief contains 2,944 words, excluding Tables, Certifications and any Addenda and is within the typed volume limitation provided by Federal Rule of Appellate Procedure 28(1).

3. On October 23, 2009, an original and ten (10) hard copies of this Brief were filed with the Office of the Clerk.

4. On October 23, 2009, this Brief was checked for viruses using McAfee software and then e-mailed in portable document format (pdf) to the Clerk of Courts at electronic briefs at ca3.uscourts.gov.

5. The hard copies and electronic versions of the Brief are identical.

6. On October 23, 2009, two (2) hard copies of the Brief were served by ECF and First Class Mail upon the following:

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