SXP

No. 08-1026

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ALBERT SNYDER,

Plaintiff/Appellee,

vs.

WESTBORO BAPTIST CHURCH, INC., et al.,

Defendants/Appellants,

Appeal from the District of Maryland
Trial Court Judge: Honorable Robert D. Bennett
District Court Docket Number 06-CV-1389

MOTION FOR STAY OF EXECUTION OF JUDGMENT PENDING APPEAL BY DEFENDANTS/APPELLANTS PHELPS-ROPER & PHELPS-DAVIS

Defendants/Appellants Shirley Phelps-Roper (Phelps-Roper) and Rebekah A. Phelps-Davis (Phelps-Davis) hereby jointly move the Court for a stay of execution of the verdict and judgment herein pending appeal.

1. This motion is made pursuant to Rules 8 and 27, Federal Rules of Appellate Procedure, this Court's Local Rules 8, and 27(a)-(f), any other applicable rules, and the inherent power and authority of the Court.

2. Pursuant to Rule 27(a), plaintiff's/appellee's counsel was notified that this motion would be filed, and advised that plaintiff's position is that he is opposed.

3. A motion for stay of the execution of judgment was made in the first instance to the trial court. On April 3, 2008, during a phone conference, and by written order on April 4, 2008, the trial court conditioned a stay upon Phelps-Roper posting a cash bond of $125,000, and Phelps-Davis posting a cash bond of $100,000.

4. ***The cash bond amount is prohibitive***; is in an amount that these defendants cannot post; is not supported by financial evidence submitted by defendants; and is unreasonable given the significant First Amendment, jurisdictional and punitive damages issues raised by this appeal. Thus, pursuant to Rule 8(a)(2)(A)(ii), defendants state that a motion has been made for a stay pending appeal, and the trial court failed to afford the relief requested.

5. The transcript of the April 3, 2008 hearing, reflect these ***facts, supporting defendants' position that the bond amount is prohibitive and unreasonable***:

a. Defendants promptly submitted financial information as ordered by the trial court (Tr., 4/3/08, p. 36, lines 6-7), and were willing to have a lien placed on properties, subject to claims such as homestead, pending the appeal (Tr., 4/3/08, p. 16, lines 10-11; p. 31, lines 10-17; p. 45, lines 18-23; p. 50, lines 7-10).

b. Phelps-Roper has an income of $20,000 or less per year (Tr., 4/3/08, p. 41, line 25 – p. 42, lines 1-4) and in the current year is working substantially less and will make just over $15,000 (Tr., 4/3/08, p. 44, lines 1-4). Assuming she used

none of her modest income to take care of her nine children in the home, this bond amount constitutes 8.3 years of Phelps-Roper's income.

c. In setting the cash bond, the trial court went well beyond Phelps-Roper's annual income, and included in the analysis to reach this figure her half of the equity in the home she and her husband own and where they live with, raise and care for their nine children (Tr., 4/3/08, p. 41, lines 9-21; p. 43, lines 2-7; lines p. 45, lines 6-7 (even though the trial court would not accept Phelps-Roper's offer to allow a lien to her portion of the equity in the homestead, Tr., 4/3/08, p. 50, lines 7-12, although earlier in the hearing the court indicated a pledge of real estate would suffice, Tr., 4/3/08, p. 41, lines 2-3). This figure also included the money that Phelps-Roper and her husband both contribute to the church as their tithe which was clearly identified as a religious practice, and their duty to God (Tr., 4/3/08, p. 38, line 10 thru p. 40, line 17).

d. Phelps-Davis has an annual income of $55,000, and has four minor children to take care of and a house to run (Tr., 4/3/08, p. 56, lines 17-18). In setting a cash bond at nearly twice Phelps-Davis's annual income, the trial court considered her full equity in her homestead where she lives with her children (Tr., 4/3/08, p. 57, lines 17-18; p. 58, lines 8-10), as well as the contributions she makes to her church as her tithe which is her religious practice (Tr., 4/3/08, p. 54, lines 12-14, p. 58, line 7). Bond was set at $100,000, though Phelps-Davis indicated she could only afford a cash bond of $5,000 (Tr., 4/3/08, p. 56, lines 6-9).

e. In setting these cash bonds the trial court set figures that would require these defendants to mortgage their homesteads where their families live, and give up their entire annual income with none of it going to care for their children; all of which is not attainable, particularly in light of the high profile oversized verdict in this case (which any lender would undoubtedly factor in); all of which would cause financial hardship to their families; all of which is unreasonable given the limited assets of these defendants.

f. The fact that the verdict in this case is high profile (coupled with the unpopular nature of defendants' religious message) makes it unlikely that either defendant would be able to secure a loan against the equities in their homestead, which would be the only way these defendants could even hope to try to raise the amount of cash required by the trial court. (Tr., 4/3/08, p. 30, lines 11-13, p. 44, lines 4-6; p. 45, lines 14-18.)

6. ***Reasons for granting the relief request and the facts relied on.***

a. ***A stay pending appeal is appropriate*** if the movant shows a substantial likelihood of success on the merits; that she will suffer irreparable injury if the stay is denied; that issuance of the stay will not cause substantial harm to other parties; and that issuing the stay will not harm the public interest. *See Long v. Maryland*, 432 F.2d 977 (4th Cir. 1970).

i. *Substantial likelihood of success on the merits*: The docketing statement filed herein, as well as information contained in a prior related appeal (No. 07-6968), shows that the verdict in this case of $10.9 million (remitted to $5.1

million) against a church, its pastor, and two of its members, based upon words on a picket sign about 1,000 feet from the church where a public soldier's funeral was held, out of sight and sound of the funeral-goers; as well as words said to the media and in a document published on a church non-interactive Web page over a month after the funeral; raises substantial questions related to the First Amendment[1], whether the trial court should have taken subject matter or personal jurisdiction, the amount of punitive damages, and otherwise; these are issues arising in a unique context which require the attention of the appellate courts, making the verdict one of first impression and of such a questionable nature, that a stay pending appeal is appropriate. Also see *Suarez Corporation Industries v. McGraw*, 202 F.3d 676, 684 (4th Cir. 2000) (stay pending appeal of immunity question appropriate).

[1] The Chief Justice of the United States Supreme Court recently publicly commented about First Amendment law in a speech he gave at the University of Kansas in Lawrence, Kansas. His response to a question from a student in the audience, with Westboro Baptist Church members outside holding their signs, strongly suggests the well-established First Amendment law upon which defendants/appellants have relied from the outset of this case, continues to be the law of this land, making defendants'/appellants' likelihood of success on this appeal quite high. See http://www.kansas.com/news/story/390108.html (last checked May 2, 2008), and specifically the following quote from that article: "Annie Van Allen, a senior business school student, asked Roberts how he viewed the court's role in free-speech cases. Before Roberts' lecture began, a small group of protesters from Topeka's Westboro Baptist Church stood outside as part of their ongoing protests against homosexuality, along with a few counterprotestors. 'It's certainly the responsibility of the Supreme Court to uphold freedom of speech, even when it's unpopular,' Roberts said. He mentioned flag-burning as an example: 'We allow that kind of speech even though we find it offensive.'" Also see http://www.cjonline.com/stories/050108/kan_274071593.shtml (last checked May 2, 2008) and specifically this quote from that article: "'We have rules,' Roberts said. 'We have books.' Roberts said he personally found flag burning, as a political protest, 'an awful thing to do.' But the court has long held the act to be protected by the First Amendment, he said. Allowing the nonconformist and unfashionable to be heard is why members of the Supreme Court have lifetime appointments, he said. 'The framers recognized we would have to uphold unpopular speech from time to time,' he said. 'If people don't like what we're doing, it's kind of too bad.'"

ii.*Irreparable harm*: "Peaceful picketing is an expressive activity protected by the First Amendment. *Olmer v. Lincoln,* 192 F.3d 1176, 1179 (8th Cir .1999). It is well-settled law that a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality)." *Phelps-Roper v. Nixon*, 509 F.3d 480, 484-495 (8th Cir. 2007) (*rehearing pending*).

> [T]he Supreme Court has explained that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). With respect to the harm that would befall if an injunction were put in place, Jouett is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing a regulation, which, on this record, is likely to be found unconstitutional. The final prerequisite to the grant of a preliminary injunction is that it serve the public interest. Surely, upholding constitutional rights serves the public interest. *Cf. Homans v. Albuquerque,* 264 F.3d 1240, 1244 (10th Cir.2001) ("[W]e believe that the public interest is better served by following binding Supreme Court precedent and protecting the core First Amendment right of political expression.").

Newsom ex rel. Newsom v. Albemarle County School Bd., 354 F.3d 249, 261 (4th Cir. 2003).

The record in this case shows that the combined net worth of all four defendants, if you include homestead properties, and if every asset was fully liquidated (or able to be liquidated given current real estate markets), is less than $1 million. The personal income of these two defendants is very limited, and they have virtually no assets. These defendants literally cannot raise or

post a bond of the size required by the trial court. Forcing these defendants to respond to aid in execution proceedings, while prosecuting this appeal with all its substantial issues, would be financially burdensome. Allowing execution of the judgment to go forward would cause irreparable harm on many levels, including irreparable financial harm to these defendants, whose personal incomes are at peril. Both defendants have minor children (Phelps-Roper, nine in her home, with her husband; Phelps-Davis, four in her home); putting these defendants in financial peril pending this appeal would be unfair under the circumstances, and lead to irreparable and unwarranted harm. Further, the likelihood of the verdict being set aside on current established case law is significant, so it would be imprudent for collection on the verdict to occur at this juncture, only to turn around and require the return of the funds.

iii. *No harm to the plaintiff.* During the hearing on the motion for stay, and particularly the question of a bond, held by the trial court on April 3, 2008, defendants made it clear they would maintain any property they owned in status quo; they have lived in their current homes and circumstances for many years; and anything that they have that plaintiff would ultimately be able to recover – which is precious little – will not be altered during this appeal. If the Court concludes that it is appropriate to attach weight to the ability of plaintiff to take what worldly goods these defendants possess – which again is precious little – because of words – that factor should weigh in favor of a stay, given that nothing will change about those few assets pending this appeal.

iv. *No harm to the public.* The proper analysis of this issue is whether it is in the public's interest to allow two church members, mothers, of a modest living, to have their few assets seized and garnished while this Court reviews significant first-impression constitutional issues in the context of a runaway verdict. The desire of plaintiff and what may be the majority of the public to stop the message defendants and their church deliver to the nation – that God is punishing this country in his wrath for their persistent proud sins, including by killing soldiers of this nation on the battlefield – is not a legitimate factor to consider when determining public interest.

b. ***The size of the bond is prohibitive.*** Just as the size of the verdict would bankrupt defendants, even at the remitted figure, this bond would have the same effect. Given the modest means of these defendants, $125,000 is as prohibitive as $10.9 million. Nothing is gained by setting a bond in this amount other than to reach into the income stream of these two defendants – and their households – in an effort to debilitate them financially so they cannot travel to deliver their message. That has been the pronounced goal of the proceedings at the trial court from the outset, and continues to be the goal. Verdicts are not supposed to financially cripple defendants, and neither are bonds. Yet both have that effect in this case, and enforcing the bond, or denying a stay without the bond pending this appeal, would have the practical impact of denying a meaningful opportunity to get appellate review of this verdict and its underpinnings.

7. ***Denying a stay in this case, so the status quo is preserved, is prudent, to avoid repayment of funds collected.*** Defendants respectfully submit that this appeal involves questions of considerable constitutional error at the trial court level; and that the record in full will reflect that the trial in this matter was a referendum on their Predestinarian Old School Baptist religion and religious practices, which is not allowed by law. Considerable time was spent during the trial by plaintiff's counsel, witnesses, and even the trial court, addressing the core doctrines, beliefs and practices of these defendants; the jury was inflamed because defendants' views about God's hate, anger and wrath, and about hell and eternity, are exceedingly unpopular in this society today; and the verdict was a product of passion resting on a platform of constitutional error. If collection efforts go forth in this case, they will be time consuming, expensive, and produce very little results, because these defendants do not have substantial assets (they have indicated in the record in the past this is because their religious beliefs cause them not to store up treasures on earth). If through the appeal process the verdict is reversed, that will be time and money wasted, and plaintiff will have to return the funds. It is not prudent to proceed with collection on this record; it is not possible for defendants to put up a cash bond; given the significant constitutional issues raised by this appeal, defendants submit that a stay without bond is appropriate in this case.

8. ***Relevant parts of the record***:

a. The Scheduling Order for Payment of Cash Bond filed April 4, 2008, is attached.

b. The transcript of the April 3, 2008 hearing regarding the motion for stay and bond amount is attached.

c. The motion for stay filed by Phelps-Roper and Phelps-Davis on November 8, 2007; plaintiff's response in opposition with appendix filed November 26, 2007; and defendants' reply filed December 6, 2007; are attached hereto.

WHEREFORE, defendants/appellants Rebekah Phelps-Davis and Shirley Phelps-Roper request that this Court enter its order staying the execution of the judgment herein, without bond, pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Stay of Execution of Judgment Pending Appeal by Defendants/Appellants Phelps-Roper and Phelps-Davis was served on May 2, 2008, as follows

Original and three (3) copies, with attachments, by express mail to:

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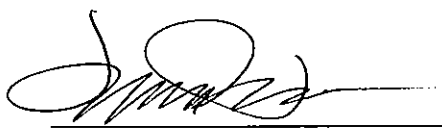

Margie J. Phelps