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

REPLY TO RESPONSE TO MOTION FOR STAY OF EXECUTION OF JUDGMENT PENDING APPEAL

Defendants/Appellants Shirley Phelps-Roper (Phelps-Roper) and Rebekah A. Phelps-Davis (Phelps-Davis) hereby jointly reply to "Plaintiff's/Appellee's Response to Defendants'/Appellants' Motion for Stay of Execution of Judgment Pending Appeal," with the following suggestions and authorities:

1. Plaintiff/Appellee suggests that since Phelps-Roper has attended two pickets in New York related to the visit by Pope Benedict XVI (which has nothing to do with a funeral), this means she and Phelps-Davis spend great amounts of time away from

their homes and children, and have the funds to pay bonds totaling $225,000 between them. This, of course, is the ultimate issue raised by this case, to wit, can a father who disagrees with defendants' words, about a highly publicized funeral of his son, killed in a war receiving international attention, held at a large Roman Catholic church, which church is a topic of international attention (including the scandal related to its priests sexually abusing young boys and girls), use the legal system, inflame a jury by defendants' Old School Predestinarian Baptist (and today highly unpopular in this nation) religious beliefs and practices, achieve a verdict, and collect on it, with the purpose of financially ruining a little church and its members. This is a highly questionable legal outcome, and that fact standing alone should result in a stay pending appeal.

2. Further, no evidence is provided by plaintiff supporting his claim that both defendants attend every picket published or conducted by Westboro Baptist Church (WBC), and the record shows otherwise. Instead, the various members attend different pickets in relatively small groups, e.g., the picket at issue in this case was attended by seven of the 71 members of WBC, including four of Phelps-Roper's children. In fact, neither of these defendants participates in every picket held by WBC, consistent with the record in this case.

3. Further, on the matter of the children, this record reflects that when defendants picket they often take their children with them. This fact – that the children participate in this faith activity with their parents – was a topic of bitter complaint by plaintiff during the trial. E.g., from Snyder's trial testimony: "I think the other thing

that just really shocked me was to see these little children out there holding signs that were just – it was sick. They were sick." (Tr., 10/23/07, p. 202.) "I pray for their children. Their children need help. To be brought up like that with that kind of hatred is unbelievable. I heard their opening statements yesterday and I didn't hear anything that even resembled my God. My God is a loving God. …" (Tr., 10/24/07, p. 233.) Also, when determining the final amount of punitive damages to be assessed against defendants, the trial court specifically cited as one of the facts for a higher figure being assessed against Phelps-Roper, the fact that she "brought four of her children with her" to the Maryland pickets raised by the case; which was said to be evidence of her "far more aggressive posture" in the matter, see *Snyder v. Phelps*, 533 F.Supp.2d 567, 595 (D.Md. 2008).

4. Of course, how defendants raise their children, including specifically on the questions of who God loves and who God hates, and what the Bible teaches on the topic of God's hate; how those Scripture apply to the events of these days; and if/how often/why defendants have their minor children participate in their faith activities, including picketing; and when the children go with them to a picket or stay with another parent or adult church member at home; should never have been a topic at trial, and is not a valid question on the motion for stay. Certainly this issue goes well beyond the question of whether a funeral was disrupted; but that is how this trial was conducted; that is how these proceedings have gone; and this case is about punishing defendants for an unpopular religious practice, belief and message.

5. The fact that defendants participate in pickets which the record – public and in this case – reflects is the practice of their faith, using plane tickets that could be purchased by any person, not just defendants – does not refute the ***fact*** of the limited income of these defendants, and does not pertain to the income of ***parties*** to this case. E.g., "Ms. Phelps-Roper's husband, for example, is not a defendant in this case. To the extent that he perhaps pays for plane tickets, he's not a party to the case." (Tr., 4/3/08, p. 18.) (Further, attending pickets for two days in New York, when plane tickets can be bought for a few hundred dollars if bought early enough [the Pope's visit was announced well in advance of his arrival, all over the nation's media], hardly reflects expenditures of funds inconsistent with the limited income of these parties, even if they bought all their own tickets, and attended every picket, neither of which has been demonstrated.) The fact is that the *evidence* supports the obvious conclusion that the amount of the bond is prohibitive; a party should not be denied the ability to seek and obtain relief from a prohibitive bond because they spend modest funds, or other loved ones spend modest funds, in the practice of their faith. Particularly in this circumstance, where the published purpose of the litigation is to financially burden and cripple a little church and its members because they publish an unpopular (yet obviously highly relevant) religious opinion about highly public topics.

6. Plaintiff does not dispute the fact that defendants have limited income. Defendants produced all of the financial information the trial court ordered; both during trial and in connection with their post-trial motion for stay. Those records and figures were produced in good faith, and were consistent throughout the proceedings

(e.g., Tr., 4/3/08, pp. 3. 6-7, 16, 25). No evidence was ever produced to refute those figures, even though from the time plaintiff brought this suit in June 2006, and added these two defendants in March 2007, he knew he was going after their income, and had every opportunity to discover any information that may conflict with the evidence of limited income.

7. Plaintiff suggests defendants have a burden of making a "strong" showing on each of the four factors considered by this Court when deciding whether to grant a stay. As set out in more detail in their motion, defendants have made a strong showing on each of the factors enumerated in *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). *Long* was a case by a government entity, involving a policy question that had been studied and debated for years, to wit, at what age a juvenile offender should be treated by the system as an adult. The stay at issue did not involve a large verdict, or any issue about the amount of a bond. This Court has said:

> However, these 'factors [in *Long*] contemplate individualized judgments in each case,' and thus cannot be rigidly applied. *Hilton v. Braunskill*, 481 U.S. 770, 777, 95 L.Ed.2d 724, 107 S.Ct. 2113 (1987). ***Irreparable harm to the party seeking the stay and harm to the opponent of the stay are the most important factors in the balance***. See *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991). ***Consequently, the balance of the hardships should be considered before examining the other factors.***

Belk v. Charlotte-Mecklenburg Bd. Of Education, 1999 U.S. App. LEXIS 34574, at 4 (4th Cir. 1999); emphasis added. Further consider:

> … These four factors, identical to those that determine whether a preliminary injunction should issue, have been analyzed under the framework set forth in *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189, 196 (4th Cir. 1977), governing preliminary injunctions. *Continental Securities v. Shenandoah Nursing Home*, 188 B.R. 205

> (W.D.Va. 1995) (Michael, J.). *Blackwelder* directs the court first to determine whether the plaintiff will suffer irreparable injury if he does not receive injunctive relief. After this inquiry has been resolved, the court must pass upon the likelihood of harm to the defendant should an injunction issue and then weigh this harm against the countervailing injury to the plaintiff without injunctive relief. ***If the balance of harms clearly favors the plaintiff [moving party], the court need only find that the plaintiff has raised substantial and serious questions on the merits for preliminary relief to issue;...***

In re Skinner v. Small Business Administration, 202 B.R. 867, 869-870 (W.D. Va. 1996); emphasis added.

8. The record reflects that the verdict in this case, even at the reduced figure, would bankrupt these defendants – and indeed, it would bankrupt over 99% of Americans (a fact that underscores its impropriety). The record also reflects that any collection on the verdict would tap into a very limited income stream, and threaten the livelihood of defendants and their families. Plaintiff hasn't responded to the motion with evidence of hidden assets; imperiled assets; or any pressing need on plaintiff's part to receive funds from defendants or be in some kind of jeopardy. There is nothing in this record that suggests in any way harm to defendant if he is not able to collect at this time. Nor is there any evidence that the assets will change in any way if a stay is issued. Nor has plaintiff offered any assurance funds would be returned if collected during appeal, in the event the verdict is set aside, nor any mechanism for preserving the funds, if he proceeds with collection herein. The balance of harm clearly favors defendants' motion.

9. Further, it is helpful to recall that the actions by defendants at issue in this case were protected by the First Amendment, and per the authorities cited in their opening

motion (Motion for Stay, 5/5/08, p. 6), the loss of First Amendment rights constitutes per se irreparable harm. The appeal in this case will address whether First Amendment rights were protected, or not. The verdict's stability rests on whether the trial court properly took personal and subject matter jurisdiction; whether the claims in this case should have ever gone to trial given the First Amendment; whether the jury was presented with evidence (repeatedly) that went well beyond the question of whether a single funeral was disrupted, allowing a verdict based on protected acts; whether the jury was properly instructed under the First Amendment; and a variety of other First Amendment questions.

10. On the question of likelihood of success, on the face of this case there are significant First Amendment issues. A verdict of $10.9 million (later reduced to $5.1 million) was rendered against a 71-person church, its pastor, and two of its members, because they spoke words over 1000 feet from a Roman Catholic church, packed full with members of the public, before a funeral heavily covered by the media, of a soldier who died in the Iraq war; the words being about the soldier's death, the Roman Catholic church and its priests (all unquestionably topics of international and national importance and great public interest); and uttered words to the media, and on a passive Web site over 30 days after the funeral. This case begs for appellate review, on the face of the matter. As long as this verdict stands, defendants' First Amendment rights are imperiled and chilled, as well as the First Amendment rights of every member of WBC, and the First Amendment rights of every citizen of this country, particularly those who may dare to have a dissenting religious message.

11. Further, the manner in which the case was tried adds substantial additional questions under the First Amendment. The details will be fully briefed, but a few examples of what was said at the trial gives a sense of how far afield from any legitimate question of whether a funeral was disrupted or not the proceedings went. E.g., during closing argument, these are a few examples of what plaintiff's counsel said to the jury:

> That nonsense that they can create some biblical story about everything they do. They can interpret the Bible however they want and the fact of the matter is no one cares. Just keep it in Kansas. … If we're all going to hell, they don't need to run around the country and tell us that. To them, that's a foregone conclusion. So just stay in Kansas. … And if we're all irreversibly doomed, all of us earth dwellers and that's 99.999% are irreversibly doomed, then fine. Just keep it away from someone's funeral. (Tr., 10/30/07, p. 1009.)
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> Then of course, she [Phelps-Roper][has to refer to the rest of us as earth dwellers because we're not in the 99.999% Got to get a shot in about the religion again. (Tr., 10/30/07, p. 1014.)
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> And Fred Phelps, he's kind of the leader of the pack. This is a 71-person – they can call it a church if they want. It's a cult. 71-person cult. In over 50 some years, there might be ten people who are not related to them that belong to their organization. (Tr., 10/30/07, p. 1015.)
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> Just because 71 people in Topeka think one way and the other 300 million people in this country think a different way doesn't make that reasonable. (Tr., 10/30/07, p. 1069.)
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> To label oneself as angels, prophets, seers, a sword in the hand of God. Who appointed them to that role? Self-appointed, pure arrogance, no humility whatsoever. Pure malicious. Prideful. Only the defendants and their 71-some odd people out in Kansas or in the 00 whatever 1% who know the will of God and everyone else is fair game for their victory all. Malice. (Tr., 10/30/07, p. 1132.)

The trial court expressed similar sentiment when making rulings on motions during the trial. E.g.:

> You're Going To Hell meaning we're all going to hell apparently. According to Ms. Phelps-Davis, 99.9% of us which includes a lot of people here in the courtroom apparently. (Tr., 10/25/07, pp. 555-556.)

> [T]o the extent that this group of people, essentially it's a group that defines themselves as the church. It's undisputed that they have at most 10 to 20 members outside of the family. … Since his ministry started in 1955, there are 20-some people outside of his family that have joined. (Tr., 10/25/07, p. 557.)

12. There are substantial legal authorities that call into question how these proceedings were conducted, and the verdict in this case. These issues were briefed repeatedly and raised repeatedly with the trial court, and will all be presented to this Court. For instance, the Tenth Circuit Court of Appeals has held that the funeral of a soldier was not a private event, see, e.g., *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390 (4th Cir. 2003). This is not a case about contract rights or business disputes between big companies, or a case where a government agency is raising some long-debated public policy question. This is a case that raises fundamental and core constitutional issues, with significant implications, to defendants, and to the public at large. A stay of the verdict, which itself raises significant questions under the constitution, is appropriate; the balance of

harm supports defendants being given a stay; and no harm will result to plaintiff or the public if a stay is allowed.

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,

/s/ Margie J. Phelps

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply to Response to Motion for Stay of Execution of Judgment Pending Appeal was filed electronically on May 9, 2008, and on the same date served by e-mail on Ms. Sean Summers and Mr. Craig Trebilcock.

/s/ Margie J. Phelps

Margie J. Phelps