No. 08-1026

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Fred W. Phelps, Sr., et. al,

Appellants-Defendants,

vs.

Albert Snyder,

Appellee-Plaintiff.

On Appeal from the United States District Court
for the District of Maryland

AMICUS CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

SUPPORTING THE APPELLANT'S REQUEST FOR REVERSAL

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June 18, 2008

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No. 08-1026 Caption: Fred W. Phelps, Sr., et. al v. Albert Snyder

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/s/ J. Joshua Wheeler (signature) June 18, 2008 (date)

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CONSENT TO FILE AS AMICUS CURIAE

This brief is filed with the consent of the parties pursuant to Rule 29 (a) of the Federal Rules of Appellate Procedure.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of amicus curiae briefs in this and other federal courts, and in state courts around the country.

SUMMARY OF THE CASE

The following summary of the case may be found in *Snyder v. Phelps*, 533 F. Supp. 2d 567, 571-73 (D. Md. 2008).

Fred Phelps and his two daughters, Rebekah Phelps-Davis and Shirley Phelps-Roper (collectively "the Phelps") are members of the Westboro Baptist Church, a fundamentalist Christian church that contends God kills soldiers in Iraq and Afghanistan as punishment for America's tolerance of homosexuality in the military and society generally. The church, of which Fred Phelps is founder and pastor, also operates a website on which it disseminates its views.

Albert Snyder's son, Marine Lance Corporal Matthew Snyder was killed on March 3, 2006 during active service in Iraq. His family planned a funeral for him on March 10, 2006 in Westminster, Maryland. Notices of the funeral service were placed in local newspapers.

The Phelps picketed near Matthew's funeral, holding signs bearing messages such as "God hates the USA," "Fag troops," and "Thank God for dead soldiers." None of the signs mentioned Matthew Snyder's name. At no time during the protest did the Phelps fail to comply with local ordinances or police directions with respect to remaining a certain distance from the funeral service. Albert Snyder only learned of the protest through television news coverage later that evening.

A month later, a self-styled "Epic" was posted on the church's website entitled "The Burden of Marine Lance Cpl. Matthew A. Snyder." The essay included statements that indicated Albert Snyder and his wife had "raised [Matthew] for the devil," and "taught him that God was a liar." Albert Snyder found the site after he conducted a Google search of his son's name.

On June 5, 2006, Snyder filed a federal lawsuit against Westboro Baptist Church, Fred Phelps, anonymous members of the church, and later amended to add Rebekah Phelps-Davis and Shirley Phelps-Roper as defendants. Snyder

charged the Phelps with claims of defamation, unreasonable intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress, and civil conspiracy. The court granted summary judgment for the Phelps on the claims for defamation and publicity given to public life. On October 20, 2007, trial commenced on the remaining three claims.

On October 31, the jury handed down a verdict against the Phelps on the claims and awarded compensatory and punitive damages totaling $10.9 million. In reviewing the jury findings, the court affirmed the verdicts but reduced the total amount of damages to $5 million. This appeal followed.

SUMMARY OF ARGUMENT

However abhorrent may have been the message that appellants displayed at the funeral of a deceased member of the United States armed forces, the scope of Constitutional freedom of expression may not turn upon the acceptability of that message. This Court's rulings have consistently and forcefully affirmed that "the first amendment protects from state interference the expression in a public place of the unpopular as well as the popular." *Nat'l Socialist White People's Party v. Ringers*, 473 F.2d 1010, 1015 (4th Cir. 1972). In myriad settings, that precept has been reaffirmed, reflecting then Chief Judge

Wilkinson's wise caution that "pleasing speech is not the kind that needs protection." *Sons of Confederate Veterans, Inc. v. Comm'r of Motor Vehicles*, 305 F.3d 241, 242 (4th Cir. 2002) (Wilkinson, C.J., concurring). Thus, for example, deeply offensive racial stereotyping and caricaturing have received First Amendment protection from this Court, *Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1985), *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993), despite the hateful nature and hurtful impact of such abhorrent imagery. While the message at the core of the present case may seem even more deeply abhorrent than others that have previously tested the scope of constitutional freedom of expression, the basic principles that have shaped the outcome are no less clearly applicable here.

The activities that incurred liability in the court below were undeniably expressive, however opprobrious may have been the particular message. The focus of such expression was upon matters of utmost public interest and concern - specifically the United States' tolerance of homosexuals both in the military and society at large. The charged activities were, moreover, entirely lawful; as the court below recognized, appellants "complied with local ordinances and police directions with respect to being a certain distance from the church." *Snyder v. Phelps*, 533 F. Supp. 2d 567, 572 (D. Md. 2008). Thus,

appellants' activities that gave rise to this lawsuit would seem beyond doubt to merit First Amendment protection, unless one of several narrow exceptions to freedom of speech would justify a contrary result.

The nature of the several claims that occasioned the judgment below further evidence the inappropriateness of imposing such liability. While Maryland law, like that of most states, affords limited legal recourse for persons whose personal or residential privacy or seclusion has been invaded, or who have suffered extreme and intentional infliction of emotional distress, such remedies simply have no logical bearing on the circumstances of this case. Not only did the charged activities all occur in an open and public place – where "privacy" and "seclusion" simply do not exist – but the plaintiff candidly acknowledged (as the court below noted) that he "did not actually see the [appellants'] signs until he saw a television program later that day with footage of the . . . family at his son's funeral." *Id*. Such a setting, moreover, removes any possible doubt that appellants' offending messages concerned a matter of public interest and concern, so vibrant in fact as to merit commercial television news coverage.

The centrality of free speech claims also invites this Court to undertake the most careful de novo review of the rulings questioned by this appeal. The

Supreme Court's mandate in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984) is unmistakably clear and undeniably apposite: Independent review in such a case is essential "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," so that an appellate court must determine "whether a given course of conduct falls on the near or the far side of the line of constitutional protection."

Finally, a reversal of the ruling below would not leave Maryland and other states without legal means to protect the sanctity and integrity of a burial or memorial service for fallen service personnel. Yet such means have to comport more closely with the strictures and safeguards of the First Amendment than which was applied by the court below.

ARGUMENT

I. SEVERAL OF THE DISTRICT COURT'S INSTRUCTIONS ALLOCATE CRITICAL TASKS BETWEEN JUDGE AND JURY IN WAYS INCONSISTENT WITH THIS COURT'S AND THE SUPREME COURT'S FIRST AMENDMENT JURISPRUDENCE.

Several guiding principles provide the essential context for a more detailed analysis of the current appeal. The circumstances that gave rise to this lawsuit involved purely speech and no conduct. The expression for which

appellants were faulted, and on which the judgment below was based, addressed important issues of public interest and concern, albeit in a manner and with a message that deeply offends and shocks most thoughtful Americans. The display of that message complied fully with local ordinances and police directions at the funeral site. There has been no suggestion that, for example, the public display of their messages created an incitement to imminent lawless action or crossed any of the other recognized lines between protected and unprotected speech.

A. Whether speech is protected under the First Amendment is a matter of law for the court, not the jury, to decide.

In Court Instruction No. 21 (Appendix, Vol. XII, p. 3113-3114), the lower court erred in asking the jury to decide a question of law rather than instructing the jury to apply the law to findings of fact. It is well-established that "[t]he inquiry into the protected status of speech is one of law, not fact." *Connick v. Myers*, 461 U.S. 138, 148 n. 7 (1983). The U.S. Supreme Court has cautioned against delegating this question of law to a jury. "Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served to sufficiently narrow the category, nor served to eliminate the danger that decisions by triers of fact may

inhibit the expression of protected ideas." *Bose,* 466 U.S. at 505. The principle of "viewpoint neutrality that underlies the First Amendment itself, see *Police Department v. Mosley*, 408 U.S. 92, 95-96 (1972), also imposes a special responsibility on judges whenever it is claimed that a particular communication is unprotected." *Bose*, 466 U.S. at 505.

The Court's Instruction No. 21 provides just such a general description and poses exactly the risks identified in *Bose*. After a brief exposition of First Amendment doctrine, the instruction asks the jury to determine whether the Phelps' "actions would be highly offensive to a reasonable person, whether they were extreme and outrageous and whether these actions were so offensive and shocking as to not be entitled to First Amendment protection." One serious flaw in this instruction is that it equates conduct with speech. When pure speech is at issue, the principles of the First Amendment play a much more significant role in the analysis than is reflected in this lower court instruction.

The U.S. Supreme Court has repeatedly held that the offensiveness and shock value of speech cannot serve as a basis for liability. "The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Hustler Magazine v. Falwell*, 485 U.S.

46, 55 (1988) (quoting *FCC v. Pacifica Found.*, 438 U. S. 726, 745-56 (1978)); *see also Cohen v. California*, 403 U.S. 15, 21 (1971). Similarly, the high Court has specifically expressed its disfavor towards allowing juries to find liability for intentional infliction of emotional distress on the basis of "outrageous" speech.

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

Hustler Magazine v. Falwell, 485 U.S. at 55.

If First Amendment freedoms are to be fully protected, judges not juries must determine the protected nature of speech. *See Purtell v. Mason*, 2008 U.S. App. LEXIS 10360, at *16 (7th Cir. May 14, 2008) ("Whether the facts established a constitutional violation…requires a determination and application of the proper legal standard for fighting words. These were questions for the court, not the jury.")

B. <u>The Court's Instruction No. 21 fails to recognize the broad nature of First Amendment protection.</u>

If a jury were to decide whether speech is constitutionally protected, then

it stands to reason that it must be instructed on the nature and degree of First Amendment protection. But any such instruction inherently runs the risk of saying too little or too much, confusing the nuances of First Amendment law in the process. Instruction No. 21's inadequate explanation of First Amendment protection evidences why it is imperative that the protected nature of speech be a question of law for the judge to decide. While the instruction correctly states that "[t]he United States Supreme Court has long recognized that 'not all speech is of equal First Amendment protection,'" it fails to note that, unless the speech falls into one of a few recognized categories of less protected speech, any restriction based on the content of speech is *presumptively* invalid. *E.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992). Because the speech at issue does not fall under any of the established categories of speech afforded a lower standard of protection (i.e. obscenity, child pornography, "fighting words," defamation, "true threats," incitement to imminent lawless action, commercial speech)**,** the failure of the court to instruct the jury that the Phelps' speech was presumptively protected warrants reversal.

Instruction No. 21 also created potential confusion by stating that "a distinction has been drawn between matters of public and private concern." Such a statement would be relevant as a preamble to the court asking the jury to

classify the speech as one or the other. Yet this the court did not do. It offered no instruction as to what constitutes a matter of public or private concern but essentially tells the jury it is the latter by directing it to balance the plaintiff's "right to privacy" against the Phelps' First Amendment rights.

Similarly insufficient is the instruction's analysis of the regulation of the time, place, or manner of speech. While the instruction correctly states that time, place, or manner restrictions must be narrowly tailored, it fails to caution the jury that such restrictions in a public forum are permitted only when they "serve a *significant* government interest.'" *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 (4th Cir. 2006) (emphasis added) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). And although the instruction does identify in general terms the government interests served by the torts at issue, it fails to instruct the jury of the requisite heightened degree of government interest. Had the jury been so informed it might well have found that the government interest, although valid, was not significant enough to warrant a limitation on First Amendment rights.

Perhaps more fundamentally, the instruction appears not to recognize that time, place or manner restrictions on speech in a public forum must be content-neutral, especially important in a case in which liability is clearly based on the

content and viewpoint of the expression. According to the court below, "when Snyder turned on the television to see if there was footage of his son's funeral, he did not 'choose' to see close-ups of the defendants' signs and interviews with Phelps and Phelps-Roper." *Snyder,* 533 F. Supp. 2d at 581. But Mr. Snyder did in fact turn on his television to watch for coverage of his son's funeral, presumably believing it would be positive in nature. It is only reasonable to assume that had the content of the news coverage consisted solely of messages of support for the Snyder family or deceased military personnel, no lawsuit would have been instigated. In other words, it was not the fact there was a rally near the funeral that motivated the lawsuit, it was the content of the views expressed at the rally. The same principles apply to Mr. Snyder's Google search of websites mentioning his son's name.

The error of allowing the jury to decide a question of law coupled with an insufficient explanation of the parameters of First Amendment law warrant a reversal of the judgment below.

II. A DE NOVO REVIEW OF THE DECISION BELOW REVEALS A NUMBER OF REVERSIBLE ERRORS IN THE JURY'S FINDINGS OF LIABILTITY FOR UNREASONABLE INTRUSION UPON SECLUSION AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, AND BY EXTENSION CIVIL CONSPIRACY TO COMMIT THOSE TORTS.

The need for careful appellate review is inescapable in a case such as this one involving messages that most members of society find deeply offensive, as well as profoundly unpatriotic. The Supreme Court has consistently demanded that in such cases the appellate courts review the circumstances de novo. *Bose*, 466 U.S. at 505. Such rigorous scrutiny is vital "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," so that a reviewing court must determine "whether a given course of conduct falls on the near or the far side of the line of constitutional protection," *Id.*; *see also Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567 (1995).

Accordingly, this Court has been especially sensitive to the need for special scrutiny in cases that involve, or government actions that seek to suppress, notably unpopular or abhorrent messages, *Nat'l. Socialist White People's Party v. Ringers*, 473 F.2d 1010, 1015 (4th Cir. 1972), reflecting the view that "the First Amendment . . . belongs to a single minority of one [since]

pleasing speech is not the kind that needs protection." *Sons of Confederate Veterans v. Comm'r. of Motor Vehicles*, 305 F.3d 241, 242 (4th Cir. 2002) (Wilkinson, C. J., concurring). A case such as this one, in which the message is almost universally abhorrent, is precisely the kind of case that calls for the most sensitive and rigorous review.

At least since the Supreme Court's ruling in *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964), it has been clear that "what a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel" – a symmetry soon extended to such other remedies as invasion of privacy, *Time, Inc. v. Hill*, 385 U.S. 374 (1967) and eventually to intentional infliction of emotional distress, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). In each instance, the Supreme Court has insisted on analogous treatment of expressive activity in civil and criminal contexts, imposing a comparably rigorous standard in both settings.

With regard to each of the specific tort claims that underlie the judgment that is the focus of this appeal, two deceptively simple principles bound the inquiry: On one hand, both Maryland law and the United States Constitution permit recovery of civil damages in situations that are almost certainly not subject to criminal sanctions. Equally clear, on the other hand, is the severely

limited scope of such remedies essential to maintain their consistency with the free expression guarantees of the First Amendment. The critical issue facing this Court is whether the findings of the court below meet the latter standard or whether, as amicus contends, those findings exceed constitutional constraints and thus call for a reversal.

A. Neither the funeral protest nor the posting of the "Epic" constituted an unreasonable intrusion upon seclusion.

In the Court's Instruction No. 18, the jury was informed that the elements of the claim for Unreasonable Intrusion Upon Seclusion were "(1) An intentional (2) intrusion or prying upon (3) something which is and is entitled to be private (4) in a manner which is highly offensive to a reasonable person." Appendix, Vol. XII, p. 3110. Neither the protest near the funeral nor the posting of the "Epic" can reasonably support a finding that the Phelps' committed an "intrusion." Moreover, any such finding would severely chill the exercise of First Amendment rights.

Where the critical events occur in broad daylight, at a site so public that it would soon be featured on the evening television news, where the subject matter is of profound public interest, and where the charged conduct "complied with local ordinances and police directives" in all respects, (*Snyder*, 533 F.

Supp. 2d at 572), the appropriate source of constitutional guidance is such Supreme Court rulings as *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975) and *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). Such cases recognize, as one must, the possibility of state-law recourse for victims of certain violations of privacy. But the high Court has been unambiguous and consistent in finding such recourse incompatible with First Amendment precepts where the information in issue has not been unlawfully obtained, is factually accurate and addresses "a matter of public significance." Although the Supreme Court has carefully reserved the question of whether and how far private tort remedies might be available in the absence of any or all of these three essential elements, it has never ruled on such a case; indeed, in its most recent entry into this field, in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the high Court actually strengthened First Amendment protection to cover situations in which the suspect material may indeed have been unlawfully obtained, though not by the party against whom damages were sought.

The import of these cases should be clear and compelling in the current context: There has been no suggestion of unlawful conduct on the appellants' part, in sharp contrast to cases where a criminal trespass or unlawful entry

charge might well have accompanied the civil damage claim. *Cf. Mitchell v. Baltimore Sun Co*., 164 Md. App. 497, 883 A.2d 1008 (Md. Ct. Spec. App. 2005). The court below properly dismissed Mr. Snyder's claim that the statements constituted defamation. Finally, and perhaps most telling, the subject matter of appellants' speech was manifestly a "matter of public significance." In the present case, there cannot be serious doubt about the applicability of this standard. The reality of intense public interest was manifest in the extensive media coverage of the funeral; that the source of contention was the acceptance of homosexuality in the U.S. military should leave no doubt about the proper constitutional standard. Cases such as *Seemuller v. Fairfax County School Board*, 878 F.2d 1578 (4th Cir. 1989) amply attest to this Court's sensitivity to the constitutional status accorded to statements that touch upon matters of public concern. A judgment such as that reached in the court below simply does not satisfy the rigorous standards set by *Florida Star*, *Cox*, *Smith* and *Bartnicki*, at least in regard to intrusion upon seclusion claims.

i. The jury was erroneously allowed to consider the funeral protest and the website posting as evidence of a single claim of unreasonable intrusion upon seclusion.

The funeral protest and the website posting were separate and distinct incidents and neither met the elements of an intrusion upon seclusion. The

posting of the "Epic" and the funeral protest were separated in time by a period of four weeks. *Snyder*, 533 F. Supp. 2d at 572. The two incidents do not share either a single act of "intrusion" or a similar "manner" of intruding. Even the content of the speech was significantly different in that the protest signs did not mention Lance Corporal Snyder's name. *Id*.

Given that the content of the Phelps' signs remained out of sight of the funeral goers and the target of the signs was anonymous, it is reasonable to believe that, without considering the website, the jury may have found that the protest did not meet the tort's requisite degree of offensiveness. Similarly, because the "Epic" did not appear until at least four weeks after the funeral and was only accessed by Mr. Snyder some time after its posting, the jury may have found the website posting by itself did not meet the tort element of an "intrusion." Yet, by allowing the jury to consider the protest and the posting as evidence of a single claim of intrusion upon seclusion, the potential was created for the jury to cherry-pick evidence from two distinct incidents in order to meet all the elements of the tort. Failing to require that speech be linked to a particular act of intrusion has chilling implications for freedom of speech — juries may now use speech made in one context to fill the void of a missing intrusion element in a completely different circumstance. As a result of the

lower court's action, one need not only be sensitive to the particular situation in which he or she is speaking, but how that speech might be interpreted in any other context.

ii. The funeral protest cannot reasonably be considered an intrusion upon seclusion.

Court Instruction No. 18 requires that an actual intrusion must have occurred in order to find liability. By the instruction's plain language, therefore, if one intended to intrude but failed to do so, no liability would exist. It is uncontroverted that the Phelps' protest near the funeral did not intrude upon the actual service:

> It was undisputed at trial that Defendants complied with local ordinances and police directions with respect to being a certain distance from the church. Furthermore, it was established at trial that Snyder did not actually see the signs until he saw a television program later that day with footage of the Phelps family at his son's funeral.

Snyder, 533 F. Supp. 2d at 572. Thus, had there been no television coverage, there could be no claim of intrusion based on the protest near the funeral. The Phelps may have desired television coverage, but they had no control over the station's decisions to send a news team to the funeral, about what to include in the news report, and ultimately to broadcast the story. If there was an intrusion, therefore, the television station was responsible both for it and the "manner" in

which it occurred; the Phelps' involvement was limited to providing some of the news report's content.

Maryland courts have emphasized the importance of distinguishing unreasonable intrusion upon seclusion claims from those of other invasion of privacy torts. *See, e.g., Klipa v. Bd. of Educ. of A.A. County*, 54 Md. App. 644, 652, 460 A.2d 601, 606 (Md. Ct. Spec. App. 1983). In an intrusion claim, liability centers on the *manner* of intrusion, not the *content* of the speech. *See Trundle v. Homeside Lending, Inc*., 162 F. Supp. 2d 396, 401 (D. Md. 2001); *see also Pemberton v. Bethlehem Steel Corp*., 66 Md. App. 133, 163-64, 502 A.2d 1101, 1116 (Md. Ct. Spec. App. 1986). In addition, the plaintiff must have a reasonable expectation of privacy in the source of the information. *Trundle*, 162 F. Supp 2d at 401.

Maryland law is clear that for the purposes of an intrusion of seclusion claim, a plaintiff does not have a reasonable expectation of privacy in information that is publicly available, *Hollander et al. v. Lubow*, 277 MD. 47, 351 A.2d 421 (Md. 1975), or an event that is publicly visible, *Furman v. Sheppard,* 130 Md. App. 67, 744 A.2d 583 (Md. Ct. Spec. App. 2000); *see also Barnhart v Paisano Publ'ns, LLC,* 457 F. Supp. 2d 590 (D. Md. 2006). The evidence is undisputed that the Phelps lawfully obtained information about the

funeral service. "Obituary notices were placed in local newspapers providing notice of the time and location of the funeral." *Snyder,* 533 F. Supp. 2d at 571. Thus, the Phelps' expression did not make public either the news of Matthew Snyder's death or the time and location of his funeral service. *Cf. Showler v. Harper's Magazine Found.*, 222 Fed. Appx. 755, 764 (10th Cir. 2007) (Magazine's publication of a photo taken at a funeral service showing the open casket of a Oklahoma soldier killed in the Iraq war did not constitute an intrusion upon seclusion because a newspaper previously published details that the funeral service was open to the public.)

In finding that a non-disruptive protest near a funeral service constitutes an intrusion upon seclusion, the lower court essentially declared that Mr. Snyder's right to privacy was geographically boundless during the time of the service. Indeed, there is nothing in the lower court's reasoning that would have prevented a finding of liability even if the Phelps' protest had taken place 1000 miles, rather than 1000 feet, from the funeral. Such a prospect may seem outlandish until one considers that in both cases the protest signs would not be read by the funeral goers, the speech would be identical, and the act of alleged intrusion would be the viewer's turning on of a television.

Perhaps it would have been reasonable to consider an intrusion claim had there been an actual disruption of the funeral service, or if the Phelps had protested outside Mr. Snyder's house, but neither of those scenarios were presented in this case. As understandable as it might be to seek legal redress for Mr. Snyder in his time of grief, the facts simply do not support a finding that the Phelps committed the particular tort of intrusion upon seclusion.

Nonetheless, the court below upheld the jury finding that an actual intrusion occurred: "A reasonable jury could find, however, that when Snyder turned on the television to see if there was footage of his son's funeral, he did not 'choose' to see close-ups of the defendants' signs and interviews with Phelps and Phelps-Roper, but rather their actions intruded upon his seclusion." *Snyder*, 533 F, Supp. 2d at 581. This analysis confuses an intrusion with the receipt of unpleasant information. The relevant definition of "intrude" is "to thrust oneself in without invitation, permission or welcome." Webster's Ninth New Collegiate Dictionary at 635 (9th ed. 1983). When Mr. Snyder turned on his television, he essentially invited into his home whatever content was on the channels he selected. To hold otherwise would negate the essential element of an intrusion and find it reasonable for a person to expect that their individual

sensibilities can control the content of all television programming (or website content, see Section II., A., iv. below).

iii. Finding that the funeral protest constituted an unreasonable intrusion upon seclusion has chilling implications for freedom of speech.

The lower court's finding that a television broadcast of a lawful protest in a public forum constitutes an intrusion upon seclusion poses a serious threat to First Amendment freedoms. Such a ruling would deny the Phelps any opportunity to express in a public forum their views on the morality of the military's acceptance of homosexuality; given that the Phelps' signs did not mention a specific name, any family who saw a Phelps' protest and who had lost a son or daughter in the war could pursue intrusion of seclusion claims against them. Equally troubling is the prospect of this decision's chilling effect on freedom of the press. Under the lower court's reasoning, the television station that covers the protest is as potentially culpable as the protestors. The initial skepticism of such a prospect diminishes when one applies the elements of the tort to the actions of the television station in the same manner as the court below applied the tort to the Phelps' expression. In both cases, the "intrusion" of the broadcast certainly would be "intentional" and it would concern something "which is and is entitled to be private."

The only remaining tort element would be whether the intrusion occurred in a manner which is "highly offensive to a reasonable person." It would not be unreasonable to attribute to the television station the knowledge that Mr. Snyder might see the coverage and that it would cause him tremendous emotional pain. With such knowledge, why would it not be "highly offensive" for the television station to choose to broadcast a story about something "which is and is entitled to be private"? If the television station was aware that the funeral goers did not actually see the protest, the station's culpability appears even greater for forcing visual notice of the protest upon Mr. Snyder during this time of intense personal grief. Indeed, it is perfectly reasonable to believe a jury would find it "highly offensive" that the television station chose to give the Phelps exactly what they desired – a platform that would not have existed otherwise allowing their highly offensive speech to reach a much greater audience.

Of course no one seriously posits such a basis for potential liability – though explaining why the message-creator is liable while the messenger is immune is a daunting task, and suggests the hazards of such a standard as the one on which this appeal focuses. Whether a jury would ever make such findings may be debatable but it is not an unreasonable prospect. As such, pleadings alleging that such facts constitute an intrusion upon seclusion could

not be dismissed at the earliest stages of litigation or even on a motion for summary judgment. If the lower court's decision is allowed to stand, the news media will have to defend their actions far more extensively in the many more cases that can be expected to be filed.

iv. The website posting of the "Epic" cannot reasonably be considered an intrusion upon seclusion.

To find that the tort of intrusion upon seclusion was committed on the basis of the Phelps' website posting creates the potential for almost limitless application of that tort to lawful expression on the Internet. First, it greatly expands the tort element "something which is and is entitled to be private." The information that Lance Corporal Snyder had been killed was not made public by the Phelps' posting. Indeed, the content of the website revealed no private information whatsoever; it only contained statements of the Phelps' religious beliefs and opinions as to why Matthew Snyder was killed. In reviewing the jury's findings, the court below failed to articulate how the website posting implicated Mr. Snyder's privacy interest, stating only, "[t]here was sufficient evidence in the trial record for a reasonable jury to conclude that Defendant's conduct unreasonably invaded Snyder's privacy and intruded upon his seclusion *during a time of bereavement*." *Snyder*, 533 F. Supp. 2d at 581 (emphasis

added).

The lower court's reference to Mr. Snyder's time of bereavement, coupled with the fact that no private information was revealed in the website posting, implies that any pejorative statement concerning his son's death would implicate Mr. Snyder's privacy interest if made during his time of bereavement. Under this analysis, potentially any anti-Iraq war statement mentioning the name of a deceased soldier would satisfy the privacy element required for a claim of intrusion upon seclusion. In addition, juries and judges would be in the unenviable position of determining what constitutes a legally sufficient period of bereavement for parents who have lost a son or daughter in the war.

Second, the lower court's approach essentially eviscerates the tort's requirement of an actual intrusion. The only intrusion in relation to the website posting occurred when Mr. Snyder accessed the Phelps' website after conducting a Google search of his son's name. The distasteful information that he found does not transform a self-initiated search into an intrusion for the purposes of the tort. As with the television broadcast discussed above, to hold otherwise would mean that it is reasonable for a person to expect that their individual sensibilities can determine Internet content. The statements contained in the "Epic" were certainly despicable, but they were not thrust upon Mr.

Snyder against his will. He chose to enter his son's name in a Google search and chose to access the websites that the search referenced. By so doing he may have been surprised and understandably upset by what he found, but the fact remains that Mr. Snyder sought out the website.

B. It was reversible error to find that the Phelps' expression constituted intentional infliction of emotional distress.

In the Court's Instruction No. 19, the jury was instructed that the elements for Intentional Infliction of Emotional Distress were "(1) that the Defendants' conduct was intentional or reckless; (2) that the conduct was extreme and outrageous; (3) that the conduct caused emotional distress to the Plaintiff; and (4) that emotional distress was severe." Appendix, Vol. XII, p. 3111. Similar to the unreasonable intrusion claim discussed above, the time, nature, manner, and content of the Phelps' expression at the funeral protest and those of the website posting were so distinct that the jury should not have been allowed to consider them as evidence of a single emotional distress claim. If this Court agrees, then reversal is required because when considered separately, neither of the two incidents meets all the elements of the tort.

In considering the website posting by itself, a finding that it constituted "extreme and outrageous conduct" is unwarranted. Today, the act of posting

one's opinion on the Internet is clearly an accepted and permissible act. The content of the Phelps website may be considered "extreme and outrageous"; however, the act of posting is not. This is not to suggest that the content of a website posting could never serve as the basis for an emotional distress claim; rather it is to illustrate that this is not the classic case in which this novel tort remedy seeks to safeguard emotional well-being by allowing liability for a vicious private person-to-person communication--telegram, phone call or individually addressed e-mail--which conveys false information such as the asserted death of a relative or friend solely to frighten or torment the recipient, and succeeds in doing so. Awarding damages against the prankster or harasser in such a situation poses no serious threat to freedom of expression.

The circumstances of the present case, however, are so radically different as to compel a wholly distinct analysis. First and foremost, the website posting was an obvious statement of personal opinion and belief on a subject of public concern. No reasonable person could mistake it for a statement of actual fact about Lance Corporal Snyder. Second, the information contained in the "Epic" was entirely lawful. It did not contain personal information or other material obtained by force or without permission, (*cf. Mitchell v. Baltimore Sun Co.*, 164 Md. App. 497, 883 A.2d 1008 (Md. Ct. Spec. App. 2005). Disclosure did not

violate a pre-existing duty or promise between the Phelps and Mr. Snyder (*cf. Cohen. v. Cowles Media,* 501 U.S. 663 (1991)), nor did it propose to commit an illegal act (*cf. Rice v. Paladin Enters.*, 128 F.3d 233 (4th Cir. 1997), or unlawfully make use of the intellectual property of another (*cf. Zacchini v. Scripps-Howard Broadcasting, Corp.*, 433 U.S. 562 (1977)). Third, the Phelps took no action designed to deliberately make Mr. Snyder aware of the posting. There was no direct person-to-person attempt to write, call, or e-mail notice of its existence.

Similarly, it was reversible error to find that the picketing near the funeral constituted "extreme and outrageous conduct." Peaceful, non-disruptive and lawful picketing is a time-honored means of expressing one's views on political and social issues. While one might argue that picketing that actually disrupts or is in easy view of a funeral service is extreme and outrageous, such an argument is not available in the context of this case. As noted previously, the messages contained on the picketing signs did not mention the Snyder family name, nor did Mr. Snyder "actually see the signs until he saw a television program later that day." To hold a speaker liable for intentional infliction of emotional distress in so public and unfocused a setting suggests a nearly limitless potential scope of tort liability. Just as with the intrusion of

seclusion claim, if the Phelps are potentially liable for such harm, one might ask whether liability could also fall upon the television station that broadcast the news clip that first apprised appellee of the offending message and its source.

Finally, it is only the content of the views expressed on the picket signs that raises the specter of "extreme and outrageous conduct"; it is highly unlikely that picket signs containing only messages of support and gratitude for a soldier's sacrifice would ever serve as a basis for an emotional distress tort. Given that this is a claim based entirely on a distaste for the Phelps' views, they and their messages enjoy a greater measure of First Amendment protection than the judgment below affords them.

III. A REVERSAL OF THE JUDGMENT BELOW WOULD NOT RENDER SOCIETY POWERLESS TO PROTECT THE INTEGRITY AND SANCTITY OF MILITARY FUNERALS.

Although amicus curiae has argued that the relief appellees obtained in the court below exceeds what the First Amendment permits, states are not without recourse to protect grieving families. The sanctity and integrity of military funerals and memorial services can and should be protected in various ways. Surely if such a service takes place within a place of worship or other structure, noise and disturbance beyond its walls may be curbed in ways that are consistent with First Amendment freedoms, yet also ensure a degree of quiet

and decorum during the service. *See Jewish War Veterans v. American Nazi Party*, 260 F. Supp. 452 (N.D. Ill. 1966); *Madsen v. Women's Health Center, Inc*., 512 U.S. 753 (1994). Even where the service takes place outside in a public setting, content-neutral time place and manner restrictions – such as those with which these appellants were acknowledged to have complied fully – may surely be imposed to permit the grieving family and their guests to enter and leave the site without interference or obstruction, and to ensure respectful quiet during the service and attendant activities. Photographing or videotaping such events may not be flatly forbidden, but could also be regulated in ways that would respect and preserve the decorum of the occasion. An actual trespass upon private property would surely occasion relief without abridging freedom of expression. It should also be clear that if a valid case of defamation could be established, a private person (even involved in a matter of public concern) may recover actual damages and upon proof of actual malice may also recover exemplary or punitive damages. Thus it should be apparent that scrupulous observance of First Amendment limitations need not disable society from protecting solemn and tragic occasions of the type that gave rise to the present litigation.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully urges that this Court reverse the judgment of the court below.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1026 **Caption:** Fred W. Phelps, Sr., et. al v. Albert Snyder

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(s) J. Joshua Wheeler

Attorney for The Thomas Jefferson Center for the Protection of Free Expression

Dated: June 18, 2008

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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