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 Richard D. Bennett
District Court Docket Number 06-CV-1389

REPLY BRIEF OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Defendants/appellants Westboro Baptist Church, Inc. (WBC), Fred Phelps (Phelps), Shirley Phelps-Roper (Phelps-Roper) and Rebekah Phelps-Davis (Phelps-Davis) hereby state:

1. They are **not a publicly held corporation** or other publicly held entity.
2. They do **not** have any **parent corporation**.
3. **No** publicly held corporation or other publicly held **entity owns 10%** or more of the stock of WBC; WBC has no stockholders.
4. **No** publicly held corporation or other publicly held **entity has a direct financial interest** in the outcome of the litigation to their knowledge.
5. They are **not** a **trade association**.
6. This case does **not** arise out of a **bankruptcy** proceeding.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT II

FACTS 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

Tort liability for churches & the role of religion in this case *7*

Public issue/interest speech *13*

There was no balancing; the restriction is way too broad, and is content-based *14*

The dangers of runaway punitive damages awards *19*

Prejudicial bias *20*

A corporation can not conspire with its agents; there is too much piling on in the verdict *23*

The use of words "vulgar," "offensive" and "shocking," in jury instructions, in the context of this case, opened the door to punishing protected speech *24*

CONCLUSION 26

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(E) OR 32(A) 30

CERTIFICATE OF SERVICE 31

TABLE OF AUTHORITIES

Cases

Battle v. Duke University, 54 F.3d 772 (4th Cir. 1995) 23
Bourne v. Center on Children, Inc., 838 A.2d 371, 154 Md.App. 42 (Md.Sp.App. 2003) 10
Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) 3
Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (194) 11
Cook v. Gates, No. 06-2313 (1st Cir. 06/09/2008), 2008.CO1.0000217 ¶¶ 19-20 www.versuslaw.com 13
Downs v. Roman Catholic Archbishop of Baltimore, 683 A.2d 808, 111 Md.App. 616 (1995) .. 11
Exxon Shipping Co. v. Baker, 126 S.Ct. 2605 (2008) 19
FCC v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) 25
Georgia v. Thomas McCollum, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) 26
Hill v. Colorado, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) 18
Hoffman v. Hunt, No. 96-1581 (4th Cir. 1997) 18
Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004) 19
Kairys v. Douglas Stereo, Inc., 83 Md.App. 667, 577 A.2d 386 (Md.Sp.App. 1990), 1990.MD.40165 ¶ 79, www.versuslaw.com 23
Madsen v. Women's Health Center, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) 5
McDonough Power Equipment v. Greenwood, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) 22
Meroni v. Holy Spirit Association for Unification of World Christianity, 506 N.Y.S. 2d 174, 119 A.D.2d 200 (1986) 11
NAACP v. Alabama ex rel Flowers, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1964) 3
New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) 26
Phelps-Roper v. Strickland, No. 07-3600 (6th Cir. 2008), 2008.CO6.0000851 ¶¶ 74-89, www.versuslaw.com 17
Pleasant Glade Assembly of God v. Schubert, No. 05-0916 (Tex. 2008) 11

REPLY BRIEF OF APPELLANT

Appellants Westboro Baptist Church (WBC), Fred Phelps (Phelps), Shirley Phelps-Roper (Phelps-Roper) and Rebekah Phelps-Davis (Phelps-Davis) submit the following reply brief in this matter. "Vol." refers to the 15-volume Appendix submitted with appellants' opening brief. This reply brief will answer appellee's brief (plaintiff), as well as his amicus' brief (Shulman).

Facts

Plaintiff says Phelps was seeking revenge in his picketing activity at issue here, because of actions of some marines, Plaintiff's brief, p. 5. (If the picket at issue was an act of revenge against the marines or military in general, then it did not "target" plaintiff. The quest to make new law in this case, to silence hated words has created chaos in clearly articulating a theory based upon existing law.) This is the testimony by Phelps when asked how many other soldiers' funerals had been picketed by church members:

> I don't remember exactly. But the thing that triggered it was about three years ago and I'm trying to compute here. What was the last straw was when a group of about 12 marines in uniform assaulted one of our humble picket spots where we were peacefully picketing and molested our people and simulated, simulated anal sex and felt that was great stuff. … But that showed us that the and with more evidence we got that the services are replete with homosexuals in spite of the law, in spite of the law of God and the law of man and the law on the books of the United States that says you can't be a member of the marines or army or anything, any other branch of the service if you're a homosexual. But this malicious don't ask, don't tell policy has brought that about and we are warning people about it and warning the nation

> that that is bringing down the wrath of God, such is that is bringing down the wrath of God wither with divorce and re-marriage and killing millions of babies each year. (Vol. VIII, 2226-2227.)

There is not a word in this testimony about revenge; rather, Phelps testified to a few examples of the conduct of the marines that contributed to the conclusions by defendants and other church members about the urgency of warning the nation about its sins, directly in connection with the military. Characterizing these sincere religious beliefs as revenge trivializes them, and is unsupported by the record.

Plaintiff says there was violence at the funeral. This mischaracterizes the record. A law enforcement officer present at the picket testified that one man yelled at defendants from his truck, and when police told him to move on he immediately did so, Vol. VIII, 2287. The record does not reflect what the man yelled, but certainly there is no evidence of any violence. Instead, law enforcement officers present at the picket testified that the picket was uneventful.[1]

Plaintiff's brief complains about a comment by Phelps-Davis in her opening statement about a "bug" being planted in his head. She said in opening: "The evidence will show we sincerely believe if any of the parents, preachers or leaders of this nation would listen to the little bug in their head that our signs and words

[1] Plaintiff makes much of Phelps-Roper's letter to law enforcement asking for their involvement to prevent violence. As set out in defendants' opening brief, Phelps-Roper also testified that the events of violence at all of defendants' picketing have been statistically insignificant. No witness or document refuted this testimony. Advising law enforcement of the plan to picket, and requesting they keep the peace and prevent any potential violence is prudent and responsible.

may plant, maybe, just maybe some of the thousands of soldiers dying will stop dying." Vol. VII, 1956. This statement is not inappropriate, and is consistent with the religious and non-malicious motive to which all defendants testified. This is an example of how every word uttered by defendants in the trial was flyspecked and criticized, and their trial words even became the basis for liability.

Plaintiff says no one else has ever picketed a funeral. One expert witness, Dr. Timothy Boehm, when asked if any of the funerals he had attended had been protested, said: "By all means. I mean, for goodness sake, in the Vietnam era, the Caissons going to Arlington." Vol. X, 2573. The expert plaintiff quotes, Kenneth Doka, only said that "as far as [he knew], it was never done," Vol. XI, 2732. Further, simply because it has not been done by anyone else does not make it tortious or malicious. There has never been a time in this nation like today. Before Rosa Parks there were no sit-ins and refusals to go to the back of the bus.[2]

Plaintiff says he saw the signs, from a 200-300-foot distance.[3] The record does not support this claim. (Even if he did see the signs, that is not sufficient to

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[2] There were significant attempts to criminalize and attach tort liability to the protest activities of black Americans, see, e.g., *Brown v. Louisiana*, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966); *NAACP v. Alabama ex rel Flowers,* 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1964).

[3] Plaintiff says at p. 24 of his brief that there was "ample evidence that funeral goers saw defendants' signs." This is utterly unsupported by the record. No one even *claimed* they saw the signs as they went into the funeral besides plaintiff.

find an invasion of privacy, when speech is in a public place on public topics and where defendants did not in any way confront plaintiff or anyone else going to the funeral.) The Court has available the map of the church and surrounding area, and video footage taken of the area, specifically the funeral procession route. With or without leaves on the branches, it is physically impossible for plaintiff to have seen the picketers. That objective record refutes the subjective claim of seeing the signs.

Plaintiff says defendants disrupted the funeral, and that plaintiff and his priest so testified. Plaintiff and others testified to a full military funeral, no parts left undone, during which plaintiff's focus was on his son. No other person who attended the funeral testified that the funeral was in any way disrupted.[4] The priest who performed the service was unaware of any picketers, including the bikers and students who were directly outside the church. The other priest who testified said that he took it upon himself to re-route the procession and block the windows of

[4] Plaintiff says a "circus" atmosphere was caused by the presence of law enforcement personnel. "Circus" has no legal meaning; there is no evidence that anyone going to the funeral saw any law enforcement officer; not a single witness. Certainly if the presence of law enforcement at the time the procession arrived (vis-à-vis those who were lined up on the 15-mile route to the cemetery saluting, etc.) had been so obvious, at least one person out of the 1200 who attended would have testified to this fact.

the school;[5] and that he otherwise busied himself taking steps to limit the exposure of defendants' picketing which *he* disagreed with personally. The priest is not a plaintiff in this case; neither are any funeral goers beyond plaintiff, or the school children.

Summary of Argument

Plaintiff and Shulman use emotive rhetoric in an effort to establish a new rule of law, to wit, that it is tortious conduct to comment on the streets, on TV, and on the Internet, if the words are critical of a deceased soldier or his father. If this new rule of law is going to become the law of the land, citizens – including defendants – are entitled to reasonable notice. No court has ever found a privacy interest in words said to a reporter that appeared on TV,[6] or words said on a

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[5] These acts, of re-routing the procession, which allowed it to approach from a main artery road and turn in to a drive actually closer to the church (as the map shows); and covering windows of the school; are all easy to do, and do not require Herculean efforts to escape unwanted words. In *Madsen v. Women's Health Center*, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994), the Court found unconstitutional a provision of an injunction regarding abortion picketing that prohibited "images observable" inside the clinics, saying this: "The only plausible reason a patient would be bothered by 'images observable' inside the clinic would be if the patient found the expression contained in such images disagreeable. But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic. This provision of the injunction violates the First Amendment," 1994.SCT.44225 ¶ 54, www.versuslaw.com.

[6] If the unique standards applied to broadcasting are to be applied here, the proper defendant is the media that published the words on the TV or in the newspaper.

passive Website. The *only* rulings by any courts about defendants' picketing related to funeral or death events, have been rulings upholding modest limits on distance, during narrow and specified time periods. No one disputes that defendants were a thousand feet from the church building in this case, and that the physical layout made it impossible for funeral goers to see the signs. Further, the law does not protect people from seeing words with which they disagree.

Everyone is talking about dying soldiers, and the military is particularly determined to keep anyone from saying anything negative, or showing any negative images, about the carnage of the Iraq and Afghanistan theatres. (E.g., the *New York Times* reported on July 26, 2008, in detail, about reporters being denied access to any images of those killed in battle or the aftermath of suicide attacks.) Defendants have a religious viewpoint, to wit, the soldiers are dying for the nation's proud sins. Just because this is unpopular, expressing this viewpoint, directly in connection with the soldiers' deaths, is not something the government should forbid them to do or punish them for doing.[7]

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[7] Defendants' views about the dead soldiers also include their disagreement with calling them *per se* heroes, and with using the event of their deaths under the current circumstances as an occasion to worship the soldiers. Clearly plaintiff, his counsel, and the trial judge, fervently disagree with this religious viewpoint (as does probably 99.9% of the nation, if not the world), and that disagreement permeated the record in this case. (Reports of misconduct by soldiers, such as the recent report that four out of 10 female soldiers are sexually assaulted while in the military, or events in North Carolina involving men soldiers killing women

It is easy to react to defendants' words; everyone in the nation is. This doesn't change the fact that federal courts are gatekeepers and caretakers when it comes to the First Amendment. That role is *meaningless* until faced with a case like this.

Argument

Tort liability for churches & the role of religion in this case

Shulman argues that churches do not have blanket immunity from tort claims. Defendants have never argued that they had blanket immunity. They have only asked to be held to the same rule of law as anyone else, which allows speech on topics of public interest in public places, subject *only* to content-neutral reasonable time, place and manner restrictions, which are narrowly tailored to the government interest.

If defendants had gone into the funeral, and imposed the ceremonies or practices they believed should occur during a funeral, perhaps some of the cases cited in the Shulman brief would be apropos. If defendants had made direct contact with plaintiff and insisted he agree with their view points on pain of some kind of religious act by the church – which is laughable to even consider, it is so removed from the facts of this case – the cases may have applicability. Or if defendants had done what King Josiah did, taking the bones of the dead out of

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soldiers, reflect that whether or not the soldiers are *per se* heroes is a topic of vital public interest and concern.)

sepulchers to burn them and spread their ashes (2 Kings 23:16), perhaps the Shulman brief would fit.

Certainly defendants agree that all the acts of a priest, because he's a priest, are not immune. For instance, if WBC had a pastor that sexually molested young people, immunity would not be claimed for such a thing. If the petition in this case had simply articulated the position that no one should be within X distance of a funeral picketing, defendants would gladly have litigated that case without so much reference to religion. That is *not* what happened in this case. The petition is a full-scale assault on the *religious words* of defendants. There was no way to defend this case without saying what religious beliefs and purposes defendants had. It was wrong; they objected from the beginning; but they still had to defend the case. It takes little imagination to know that this was a good strategy by plaintiff, given how enraged people become at the *message*.

Defendants were forced to talk about their religion, by being accused of maliciously appearing on the public right of way, on the TV screen, and on the Internet through a Web page. Every defendant testified in detail that the picketing was not motivated by malice, but by their duty as they understand it from the Bible to warn people of the consequences of their sin, *especially* as indicated in such passages as Ezekiel 33, *when* the Lord brings a sword on a land (Ezekiel 33:2-6).

On top of demanding an answer from defendants about why they did and said what they did and said, the trial court helped plaintiff craft a claim that *now*, since being sued, they are claiming, "You're Going to Hell," applied to mankind in general; and that *now* the signs do not refer specifically to plaintiff's deceased son, but to society at large and all viewers of the signs.[8] This had the effect of causing defense counsel at trial to conclude he must show the sign movies, to demonstrate that these signs, and their meanings as far as defendants were concerned, were in place well before the funeral at issue.[9]

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[8] Plaintiff repeatedly complains in the record about defendants "targeting" plaintiff. It is not against the law, civil or criminal, to target with words. The government can impose reasonable limitations on focused picketing, which is a concept of physical proximity. To allow liability when the picketing clearly was not focused, as the law describes focused picketing (close proximity; directly in front of the location, which is what the bikers and school children did in this instance), based on some newly-coined artificial "targeting" concept is untenable in the law or the facts. The Court would have to create a new rule of law, that if a person's military son dies, nothing can be said about that person, his son, his church, or his public comments about his son's death, without liability attaching. That is too broad to be supported by *any* government interest.

[9] Plaintiff says the signs "Semper Fi Fags" and "Fag Troops" referred to his son's sexual orientation. The sign movies and testimony reflect that the signs had a general message about the immoral condition of the military, which is not so far fetched considering recent revelations about sexual assaults in the military, but even if believed to be far fetched, all of the undisputed evidence is that these signs were not about an individual soldier, but about the condition of the institution.

Similarly, plaintiff continues in his brief to argue that the sign "You're Going to Hell" meant plaintiff's son was in hell (e.g., Plaintiff's brief, p. 29). Aside from the fact that this is not even a grammatically correct reading of the sign – which speaks of a *future* event – the testimony and sign movie reflect that the sign,

Shulman says this Court does not have to decide whether it's right or wrong to say "God hates fags." Those very words – along with many others[10] – were the basis for liability in this case. When the trial court says, multiple times, that the words "God hates fags," are actionable – that squarely puts the question of whether those words are religiously accurate or not before the Court. It is not proper to put that question before any court to decide; but since liability is based on the content of the words, defendants' religion is put before this Court.

Further, by accusing defendants of malice, their religious beliefs were put on trial. "'[Q]uestions of truth, falsity [and] **malice** … often take on a different hue when examined in the light of religious percepts and procedures ….'" *Bourne v. Center on Children, Inc.*, 838 A.2d 371, 154 Md.App. 42 (Md.Sp.App. 2003), 2003.MD.0000354 ¶ 50, www.versuslaw.com; emphasis added.

"You're Going to Hell" referred to mankind at large, so if it struck one person's heart to be afraid and repent, it referred to that person; if it had no impact on another person, it was not meant for that person.

[10] Trying to establish which words are the actionable words in this case is challenging, to say the least. It is as shifting a target as the time frame or location where words can be said without liability. Plaintiff's objections to referencing the internationally-discussed priest sexual molestation scandal "at a particularly vulnerable moment," Plaintiff's brief, p. 4. During the pretrial conference a few signs were identified as actionable; during trial more signs were complained about; during closing argument *all* signs were complained about; in the order on post-trial motions different signs were discussed than those identified at the pretrial conference; and in their briefs, plaintiff and his amicus complain about yet a different combination of signs. All of this is before you get to the complaint about core doctrines, such as reprobation.

This is not a case where defendants are asking the courts to determine who should be the pastor of a church, *Downs v. Roman Catholic Archbishop of Baltimore*, 683 A.2d 808, 111 Md.App. 616 (1995); or to sanction recruitment and proselytizing, *Meroni v. Holy Spirit Association for Unification of World Christianity,* 506 N.Y.S. 2d 174, 119 A.D.2d 200 (1986); or to sanction an exorcism that resulted in significant physical and mental harm, *Pleasant Glade Assembly of God v. Schubert*, No. 05-0916 (Tex. 2008), 2008.TX.0005447, www.versuslaw.com. Though in each of these cases, the courts held that it was not proper for the court to intercede, so they did not allow tort claims to go forward.

Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), is an example of a case where the Court addressed the difference between claiming blanket immunity by the cloak of religion, and protected religious activity. Two men, Jehovah's Witnesses, went into a predominantly Catholic neighborhood to pass out literature and solicit donations. In that process, they played a record that was very critical of Catholics, including saying they were instruments of Satan. In reversing their conviction, the Court said it was necessary to weigh two conflicting interests, the need to keep the peace and the right to engage in religious speech. The men had not engaged in any physical threats, intentional discourtesy or personal abuse toward the men who complained about them after they played the record for them. "In the realm of religious faith, and in that of political belief,

sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy," 1940.SCT.40579 ¶ 50, www.versuslaw.com.

When ruling on post-trial motions, the trial court said: "Plaintiff also testified as to the permanency of the emotional injury. He testified that 'I think about the sign *[i.e.* Thank God for dead soldiers] every day of my life.... I see that sign when I lay in bed at nights,'" *Snyder v. Westboro Baptist Church*, 533 F.Supp. 567, 589 (D.Md. 2008). The court did not say that plaintiff testified, "I think about the physical presence of a picketer outside my son's funeral every day of my life," because this case is not about physical presence, it's about words and ideas. This testimony and reasoning, which is illustrative of much more like it in this case, forces the Court to determine whether it is theologically right for defendants to believe and say, "Thank God for dead soldiers," or not. The only way to uphold the verdict in this case is to find that this sign – and many others – are theologically wrong, and therefore unprotected speech. That forces religion as the issue; and it

is the *opposite* of defendants seeking blanket immunity. Defendants have only asked that the Court not assume the improper role of deciding whether their religious views are correct. Since defendants were so far in place and time from plaintiff, the only way liability can stand is based on the content of the religious speech.

Public issue/interest speech

Plaintiff continues to ignore the public nature of the topic of defendants' speech. Whether or not plaintiff made himself a public figure, by asserting himself into the public eye by speaking multiple times with reporters before and after the funeral (unrelated to his comments about this lawsuit; certainly by now he has made himself a public figure through his many comments about this case and defendants' picketing), is beside the point. Defendants spoke in public places (public easement; to the media; on a Webpage on the worldwide web); and they spoke on public topics (dying soldiers, homosexuality in the military,[11] the morals/sin of America, the sex/molestation scandal of the Catholic church, and the Catholic church's leaders, the moral implications of divorce). It is unassailable

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[11] In *Cook v. Gates*, No. 06-2313 (1st Cir. 06/09/2008), 2008.CO1.0000217 ¶¶ 19-20 www.versuslaw.com, the Court said: "In 1993, Congress enacted a statute regulating the service of homosexual persons in the United States military. 10 U.S.C. § 654 (2007) (the Act). …. In 2003 the United States Supreme Court invalidated, on substantive due process grounds, two convictions under a Texas law criminalizing sodomy between consenting homosexual adults. *Lawrence v. Texas,* 539 U.S. 558 (2003). Lawrence has reinvigorated the debate about the Act's constitutionality. …."

that these are all topics of critical public interest. It is equally unassailable – by the very specific finding of the trial court in this case – that defendants did not speak to anything private. (The trial court squarely found that no private facts were published, when granting summary judgment on the invasion of privacy through publicity given to private life claim. The *same identical* words formed the basis for *all* of the claims of liability in this case.) And finally, it is unassailable that each forum used by defendants was a traditionally public one. Public speech is not limited to speech about a public figure; it also includes speech on public topics in public places.

There was no balancing; the restriction is way too broad, and is content-based

Assuming for the sake of argument that the Supreme Court would recognize a privacy interest in a purely private funeral[12] that does not support the verdict in this case. Any action by the government – including imposing tort liability – to *balance* the competing interests (family members in burial rites and picketers in speaking on public issues) would have to be a content-neutral time, place and manner restriction, narrowly tailored to the government interest. So if the government interest is in putting a distance between picketers and funeral goers,

[12] "This common-law 'right' [to be let alone] is more accurately characterized as an 'interest' that States can choose to protect in certain situations. See *Katz v. United States*, 389 U.S. 347, 350-351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)." *Hill v. Colorado*, *infra*, 120 S.Ct. at 2490, footnote 24.

imposing broad liability based on content and based on words spoken to media and written on a passive Web page goes far beyond proper constitutional limits.

The trial court said in its February 4, 2008, order denying post-trial motions: "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 v. Westboro Baptist Church*, *supra*, 533 F.Supp. at 581. That makes plaintiff a one-man floating buffer zone for an unspecified period of time, in an unspecified span of distance and time.

Further, the scope of the plaintiff's case at trial – which covered all of the words from the time of plaintiff's son's death up to the epic written weeks later and beyond – as well as how the case was argued to the jury in closing argument, reflects that liability was allowed to attach to every word said by these defendants in any context, in any time, in any place, about plaintiff, his son's death, or anything else having to do with the soldiers and the wrath of God on this nation.

Let us assume for a moment that a funeral service – no matter how much public fanfare attends it,[13] no matter how much the father of the deceased talks to

[13] The Court can take judicial notice of the fact that military funerals have been covered extensively in the media, and that at least in 2004 and 2005, many of them were attended by patriotic and military fanfare, with a noticeable presence of military officials, elected officials, politicians, and media. Plaintiff complains that defendants used the event of his son's death to publish a message. The military

the media,[14] no matter how much the death is of public interest[15] – would be treated by the Supreme Court like a residence or medical clinic. The broad scope of the restriction allowed in this case would never be allowed in those settings. If picketers were a thousand feet away from an abortion clinic or residence, there would never be any attempt to stop them, regulate them or enjoin them – let alone hold them liable for millions of damages. Further, the Court would never permit the *content* of the signs to dictate when government restrictions could be placed on the picketing. Let alone would government restrictions be applied to the picketers' words to the media, or their words on a passive church Web page.

The narrowness with which limits on funeral picketing must be approached – in sharp contrast to the extreme breadth of the restriction in this case – is found in this language by the Sixth Circuit from its ruling on August 22, 2008, in *Phelps-Roper v. Strickland.* The Court found that defendants' picketing was protected activity (which is how you get to the analysis of whether the law is overbroad, which the floating buffer zone was found to be by the trial court,

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does the same; plaintiff did the same; and speech that leverages an event is not unprotected speech.

[14] The record reflects that plaintiff talked to the media about his son, his death, and his funeral, before this lawsuit was filed, close in time to the death and funeral, more than once. Plaintiff does not dispute this fact.

[15] The evidence is that a large church with seating capacity of 1200 was full to capacity; and that a large number of media were present before defendants arrived, who stayed after defendants left. Again, plaintiff does not dispute this fact.

2008.CO6.0000851 ¶¶ 32, 37); and upheld the Ohio funeral picketing law[16] (beyond the floating buffer zone), because it was a narrowly-tailored *balancing* of interests.

> The Funeral Protest Provision only restricts picketing or other protest activities that are directed at a funeral or burial service. The Funeral Protest Provision is similar to the ordinance at issue in Frisby, which the Supreme Court held limited speech focused on a particular place. … The Funeral Protest Provision similarly [to Frisby] employs the singular form to designate the place from which its restrictions apply, given that it restricts protest activities within 300 feet … Thus, properly read, the Funeral Protest Provision restricts only the time and place of speech directed at a funeral or burial service. **** Taking full account of the Funeral Protest Provision's time limitation (within one hour), the provision is in certain senses narrower than the measures in Frisby, Hill, and Madsen. The lesson of Frisby is that a narrow class of speech can be prohibited to further a recognized privacy interest within a geographic scope that extended, at the very least, to the area "before or about" a residence. …. The Funeral Protest Provision is in some respects as or more narrow in scope than the restrictions at issue in Hill. Similar to the law at issue in Hill, the Funeral Protest Provision does not place "limitations on the number, size, text, or images" of placards, … **** Thus, the Funeral Protest Provision is in certain aspects narrower than the analogous measures in Frisby, Hill, and Madsen. Phelps-Roper is not silenced during a funeral or burial service, but must merely stay 300 feet away within a brief window of time, outside of which she may say what she wants, wherever she wants, and when she wants ….

Phelps-Roper v. Strickland, No. 07-3600 (6th Cir. 2008), 2008.CO6.0000851 ¶¶ 74-89, www.versuslaw.com.

This language reflects that the restrictions imposed in this case – through the mechanism of a substantial jury verdict on tort claims – are far more broad than

[16] The first version of this law was passed in 1957, which suggests funeral picketing was taking place in the past, or the law would not have been passed.

what has been allowed by the courts, both in time and space. This breadth is not justified by the undisciplined use of the term "verbal confrontation," or "disruption," in Plaintiff's and Shulman's briefs. The Supreme Court has made it clear what it means by confrontation in the picketing and speech context, and it is an up-close-and-personal physical confrontation. E.g., in *Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), in upholding an 8-foot buffer zone within 100 feet of a clinic, the Court said sometimes picketers impeded access and were "often confrontational," including by immediately surrounding and yelling at patients; and sometimes used strong and abusive language "in face-to-face encounters," 120 S.Ct. at 2486 and footnotes 6-8. The Court also said that the purpose of the law was not to protect the patients from hearing a particular message, but rather was to protect against harm from unwelcome individuals delivering a message "at close range, i.e., within eight feet," 120 S.Ct. at 2491, footnote 25. Thus, "confrontation" in the picketing context has a very specific meaning, which is to be at close range and block passage. Defendants did not do anything of this sort in this case, and liability was not based on "confrontation," but instead on words uttered that are said to have impacted an ongoing time-unlimited grieving process. See also *Hoffman v. Hunt*, No. 96-1581 (4th Cir. 1997), 1997.C04.0002226 ¶ 37, www.versuslaw.com (application of law to threaten arrest for peaceful picketing when plaintiff had not engaged in any physical obstructing

or blocking of access or egress from health care facility raised substantial constitutional questions). And see *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004), 2004.C11.0000154 ¶¶ 83-84, www.versuslaw.com (requiring a showing of "material and substantial threat of disruption" by student's expressive actions in classroom to avoid subjective overbroad claim of disruption).

The dangers of runaway punitive damages awards

Throughout their briefs, plaintiff and Shulman repeatedly refer to many alleged victims. This is a furtherance of the reasoning that was used repeatedly in closing argument to the jury on behalf of plaintiff. This case has been cast in a manner that it is highly likely that the jury awarded damages to compensate or punish defendants in behalf of many beyond plaintiff. Thus, this is a classic case of awarding punitive damages for victims who are not present, contrary to due process, per the Supreme Court, as argued in defendants' opening brief.

The Supreme Court has recently again addressed the inherent dangers in runaway juries. In *Exxon Shipping Co. v. Baker*, 126 S.Ct. 2605 (2008), the Court held that the punitive damages award against Exxon of $5 billion was excessive under maritime common law. In this context the Court noted the problem with punitive damages being so unpredictable, including because of a wide variance in amounts awarded for like or similar conduct. The Court noted that review of punitive damage award under set criteria was inadequate for guarding against

excessive awards, including in Maryland, because the criteria are "brought to bear after juries render verdicts under instructions offering, at best, guidance no more specific for reaching an appropriate penalty," 2008.SCT.0000111 ¶ 98, www.versuslaw.com. "These examples [of state court criteria, including Maryland's] leave us skeptical that verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers," 2008.SCT.0000111 ¶ 104. (Whether guidelines like criminal law are the answer, as the Court suggests, remains to be seen.) This language by the Court underscores the unfairness of the verdict in this case. No one disputes that the verdict in this case is at the high end of awards in Maryland, and well beyond the financial reach of these defendants. Further, it is large enough, and disconnected to any actual tangible injury enough, to indicate in the context of the highly emotional drama in the courtroom coming from plaintiff, his counsel, and at times the trial judge *and* jurors, that it is the product of passion; it violates due process; and it is excessive.

Prejudicial bias

From the time the complaint was filed in this case, up through the closing arguments, an intense hostility was reflected from plaintiff and his counsel. Throughout the trial strong statements of mocking and criticism of the core doctrinal beliefs of these defendants were routine.

In its February 4, 2008 order denying post-trial relief, the trial court said: "This Court never asked any questions of any of the witnesses in this case," *Snyder v. Westboro Baptist Church, supra*, 533 F.Supp. at 584. This is not accurate. During the testimony of Timothy Phelps, the witness who played the sign movies that inflamed the jury to its greatest pitch (short of closing argument), right as things were at their most intense emotion (short of closing argument), the trial court questioned Mr. Phelps, making a point of pinning down who the speaker was in the *Thank God for 911* video. That was one of the most inflammatory things the trial court did.

The trial court also said: "Second, none of the comments were grounded in any predisposed bias but rather reflected Defendants' own testimony concerning their religious beliefs and actions-information which came to light during the trial," *ibid*. at 583-584. Statements such as mocking the testimony by Phelps-Davis that she believed 99.9% of mankind was hell bound, by commenting (without relevance to any legal issue before the court) that this would include people in the courtroom; referring to Phelps-Roper's words in the epic as several pages of "rambling;" telling the plaintiff he did not have to stay in the room and listen to the sign movies or testimony about scriptural content; how do any of these constitute a mere reiteration of testimony or evidence; maintaining an orderly management of trial;

or a trial judge frustrated over defendants repeating their arguments (some would call that making a record)?

Plaintiff says defendants could have used a peremptory challenge to dispose of Juror 13. Defendants *could have* confessed judgment, if the standard is what *could have* been done. If Juror 13 was biased, he should have been removed. The trial court knew the inflammatory nature of the evidence, evinced by its own reaction to it. Saying there was a finite number of days set aside for trial; rushing defense counsel and pro se defendants through the voir dire process; and then denying their challenge in what appears on the record to be a snap impatient decision, given the juror's membership in the church where the funeral was held; his status as a veteran; and his longstanding status as a member of the Catholic church – in this case – was prejudicial. The bias of a juror may be actual (out of his mouth admitted) or implied. "[T]hat is, it may be bias in fact or bias conclusively presumed as [a] matter of law. …. Because the bias of a juror will rarely be admitted by the juror himself, 'partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it,' … it necessarily must be inferred from surrounding facts and circumstances. …" *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984), 1984.SCT.40366 ¶ 34, www.versuslaw.com.

A corporation can not conspire with its agents; there is too much piling on in the verdict

Plaintiff suggests the rule that a corporation cannot conspire with its agents (because it can not conspire with itself)[17] does not apply here because defendants insisted they paid their travel costs. It is a *fact* that the individual defendants each paid their own travel cost. It is also a *fact* that the jury was instructed, at Instruction No. 23, that the corporation was responsible for the acts of its agents. When the jury found WBC liable, it is inherent that it found that the individuals acted as the church's agents; otherwise the church would have no liability. Therefore, the rule applies – a corporation cannot conspire with its agents (itself).

Further, allowing big chunks of damages, compensatory and punitive, for the preacher, two members, and the church, all as separate entities, for the same act and alleged injury, creates a substantial "piling on" effect, which is prejudicial and contrary to due process. By allowing the jury to take the same alleged injury – and the same synergizing anger over words – and make multiple awards, plaintiff was allowed to realize a windfall, even if he was entitled to recover, and even if the

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[17] "No conspiracy can lie between a corporation and its agent acting within the scope of his duties. … 'The law is well-settled … that a conspiracy between a corporation and its agents, acting within the scope of their employment, is a legal impossibility.' … The reason for this is that '[a] corporation acts through its agents and the acts of the agents are the acts of the corporation.'" *Kairys v. Douglas Stereo, Inc.*, 83 Md.App. 667, 577 A.2d 386 (Md.Sp.App. 1990), 1990.MD.40165 ¶ 79, www.versuslaw.com. See also *Battle v. Duke University*, 54 F.3d 772 (4th Cir. 1995).

evidence supported actual injury (beyond his grief over his son's death, and beyond his anger over and disagreement with defendants' words and beliefs). Plaintiff was not injured by the words about his son times four; he was injured once, even if the law recognized such alleged injury.

The use of words "vulgar," "offensive" and "shocking," in jury instructions, in the context of this case, opened the door to punishing protected speech

The jury was instructed in opening instructions, at the outset of the trial, that speech which is "'vulgar', 'offensive', and 'shocking' is not entitled to absolute constitutional protection under all circumstances." Also: "You as the judges of the facts in this case must essentially determine whether the Defendant's 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." Vol. VII, 1916-1917.

No instruction was given in the preliminary instructions about reasonable time, place, manner restrictions, content-neutrality, or the fact that speech does not lose its protection simply because it is unpopular, like Instruction No. 21 in the final jury instructions. Further, Instruction No. 21 also contained the same

language, that speech that is "'vulgar,' 'offensive,' and 'shocking,' … is not entitled to absolute constitutional protection under all circumstances."[18]

In neither instance was "vulgar," "offensive," or "shocking" defined; nor were the circumstances under which they are unprotected specified. That told the jury plainly that it could award damages if any of the words of defendants were considered by them to be "vulgar," "offensive" or "shocking."

This language – vulgar, offensive or shocking – emanates from *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978), the case involving comedian George Carlin's filthy words skit. That language was used in the context of broadcast speech, which the Court observed is more closely regulated than other speech; and the words were not suggested to have been uttered as an essential part of any expression of ideas. The Court specifically said that the fact that society may find speech offensive is not a sufficient reason for suppressing it, and that if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. The trial court's use of this legal standard in this case, where the words *were* directly related to the exposition of ideas, allowed the jury to punish protected speech. It gave too much

[18] Plaintiff says defendants requested Instruction No. 21. Defendants *never* requested the "vulgar," "offensive" or "shocking" language, and instead objected to it throughout the trial. Plaintiff did request reasonable time, place and manner language, from the outset, because that is the legal standard that applies.

opportunity to the jury to find liability on a broad range of words, signs, thoughts and ideas, simply by deciding that these words were shocking, vulgar or offensive.

Conclusion

On March 10, 2006, literally hundreds, if not thousands, of people were speaking about plaintiff's son, his death, and his funeral. Whether they were speaking by being in the church, a stranger to the young man or his father; by being directly outside the church with a flag or sign; by being on the 15-mile processional route with a salute or flashing light; by being a member of the media with a slant on the situation to tell or write about; or by being a member of the clergy of the church with pen and paper in hand to write a letter to the editor. Defendants participated in the same public dialogue. The *only thing* that distinguishes defendants' actions is the *content* of their words.

Defendants are not requesting special, new or exotic legal rulings. It is well settled that regulations on speech must be reasonable, narrow, content-neutral, time, place, and manner restrictions only.[19] Confrontational picketing has been

[19] Plaintiff can not continue to claim that the standard of reasonable time, place and manner does not apply, because it was included in the final instructions, and plaintiff has not appealed that instruction. It is now the law of this case, even though it was not, in fact, followed. It is true that state action is required for the First Amendment to apply. It is equally true that years ago the Supreme Court held that a civil tort action is state action sufficient to invoke the First Amendment, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). See also *Georgia v. Thomas McCollum*, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992)

defined by the Supreme Court, and it clearly is a thing that only happens in close physical proximity to the person who is being buffered by the restriction. That simply did not happen here. That is why this case involved so much discussion about *content* of the signs, because the case could not rest on proximity. That is why this case involved so much discussion about the *grieving process over time*,[20] because the case could not rest on any viable claim of disruption.

The funeral went off without a hitch. Everyone apparently thinks plaintiff's son was a hero other than defendants. The government should not – by its onerous debilitating tort verdict power – force its citizens to call the soldiers heroes, to worship them in death, or to forebear commenting on the sins of the nation in connection with their untimely deaths.

If the scandal of raping priests can not be discussed in connection with a funeral at a Catholic church, where is the limit? Whose sensibilities must be factored in next? If the wrongness of divorce can not be discussed in connection with the funeral of a young man whose parents divorced, and whose father *published that fact* – as religious commentary on the possibility that teaching the young man wrong may have had something to do with his untimely death – where

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(state action is present when criminal defendant uses preemptory challenge sufficient to invoke the Equal Protection Clause).

[20] Plaintiff's brief, p. 8: "In addition, the grieving process is not limited to one moment in time and must be taken as a whole process over time."

is the limit? Whose sensibilities about the dead or divorce must be factored in next? And for how long?

The trial court specifically held that the speech at issue was not defamatory because it was religious opinion; and that the speech at issue was not about any private matter, because it only spoke to items that had been put in the public mainstream. Inexplicably, and over the objection of defendants, the case went to the jury anyway, including on an invasion of privacy claim. How is the speech not religious opinion for one tort as much as it is for the other?

New law will have to be made to put a protective barrier at the hand of government over the entire grieving process of every person who grieves for a dead soldier; and defendants are entitled to notice of that new law. Until this verdict in this case, and all the peculiar legal rulings made leading up to and after it, the only message defendants had from the law in this country, including *Westboro Baptist Church v. City of Topeka*, was that there could be a reasonable time, place and manner restriction. So when the court in Topeka upheld the 90-foot ordinance, defendants complied, as they have with all other funeral picketing laws, state and federal. In fact, the evidence shows that defendants are often significantly further away than the law allows, and at a thousand feet were well beyond the limits set in most jurisdictions. Even if you accept that burial rites should be given some protection and privacy – no matter what the facts of the

funeral involved might be – that *only* translates to balancing that right against speech rights. Defendants' own self-regulation balanced those rights. What plaintiff is asking for is a bubble from the government that is indefinite in time and scope, to stop any words about any dead soldier with which anybody might disagree. That is more than the law of this land allows. The trial court should have done its gatekeeper job and kept the issue from the jury, where torts could be used like a Trojan horse to attack the First Amendment. Instead, the trial court allowed (and by its rulings, actually required) the jury to be showered in words that are very unpopular; in an environment of intense hostility to those words; and then instructed the jury in such sweeping and unspecified language, that a runaway verdict was inevitable. The verdict should be set aside and this case dismissed.

Respectfully submitted,

/s/ Margie J. Phelps

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/s/ Margie J. Phelps

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Margie J. Phelps

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I hereby certify that the foregoing *Reply Brief of Appellant* was filed electronically, and on August 25, 2008, the following service occurred:

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