

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

ALBERT SNYDER,
Plaintiff

v.

FRED W. PHELPS, SR.,
JOHN DOES, JANE DOES, and
WESTBORO BAPTIST CHURCH, INC.
Defendants

Civil Action No. 06-CV-1389 RDB

MOTION FOR COURT ORDER FOR ALTERNATIVE SERVICE

AND NOW, Plaintiff, Albert Snyder, by and through his undersigned counsel, files the following Motion for a Court Order for Alternative Service:

1. On June 5, 2006, the plaintiff initiated the within action by filing a Complaint against defendant Fred W. Phelps, Sr. and defendant Westboro Baptist Church, Inc.
2. Shortly thereafter, the plaintiff employed a process server, Delbert R. White, to serve the defendants.
3. On June 12, 2006, the defendants' attorneys wrote a letter to the plaintiff and plaintiff's counsel of record. In relevant part, the defendants' attorneys stated: "We represent Westboro Baptist Church (WBC) and her members." *See* attached Exhibit A, pg. 2 of 9.
4. Among other things, the defendants acknowledged that they were aware of the Complaint filed against them by the plaintiff. In fact, the defendants stated that the plaintiff (and his attorneys) "prepare[d] and file[d] a complaint in the United States District Court for the District of Maryland..." Ex. A, pg. 3 of 9.
5. On behalf of their clients, the defendants attorneys demanded a response to their letter of June 12, 2006. On June 15, 2006, in accordance with the defendants' demands, the letter was responded to, and presumably, the response was satisfactory because the defendants

made no further communications regarding their concerns. *See* attached Exhibit B. Quite obviously, the facts and legal conclusions contained within the defendants' letter (Ex. A) are inaccurate, but nevertheless, it is clear that the defendants and their counsel are in receipt of the complaint.

6. Upon information and belief, defendant Fred Phelps, Sr. is both a member and the leader of Westboro Baptist Church.

7. Upon information and belief, Abigail Phelps is the registered representative of Westboro Baptist Church, and further, Abigail Phelps is a member of the Westboro Baptist Church.

8. Having learned that the defendants were represented by legal counsel, all further communications were required to be made directly by and between counsel. Notably, the overwhelming majority of defendant Phelps children are attorneys. In addition, defendant Phelps, upon information and belief, was an attorney at one point in time.

9. Upon information and belief, the defendants' legal counsel are licensed Kansas attorneys. In Kansas, like in Maryland, "a lawyer shall not communicate about the subject of the representation with a person who the lawyer knows is represented in the matter by another lawyer unless the lawyer has the consent of the other lawyer or is authorized by law or court order to do so." Maryland Lawyers' Rules of Professional Conduct Rule 4.2; KRPC 4.2.¹

10. Implicitly, the defendants' counsel acknowledged their understanding of the aforementioned Rule of Professional Conduct. In their letter to plaintiffs' counsel, they stated: "Please immediately advise if you do *not* represent Mr. Snyder in this matter, so that we can direct this communication to him personally, not through counsel." Ex. A, pg. 2 of 9. It follows

¹ Tellingly, the defendants had their relative, Katherine J. Hockenbarger, file an ethics complaint against two of the undersigned counsel on the very same day that the within complaint was filed.

that the defendants and their counsel knew and understood that the plaintiff is required to direct all further communications through the defense counsel.

11. With that background, on July 14, 2006, the plaintiff requested that the defendants waive service, *see* Fed.R.C.P. 4(d)(2), and the defendants were reminded that they had “a duty to avoid unnecessary costs of serving the summons.” *Id*; *see* attached Exhibit C.

12. In addition, the defendants received notice that if they did not waive service that the plaintiff will seek to recover “costs, including a reasonable attorney’s fee, on any motion required to collect the costs of service.” Fed.R.C.P. 4(d)(5).

13. Notwithstanding the foregoing, the plaintiff has continuously attempted to serve the defendants - despite the defendants efforts to avoid service. In fact, Investigator Delbert R. White has attempted to serve the defendants at least twenty-seven times. *See* attached Exhibit D, affidavit of Delbert R. White.

14. Pursuant to Fed.R.C.P. 4(e)(1), the plaintiff has attempted to serve the defendants “pursuant to the law of the state in which the district court is located, or in which service is effected,” *Id*; *see also*, *Izen v. Catalina*, 256 F.3d 324, 327 (5th Cir. 2001). In other words, the plaintiff must serve the defendants pursuant to the laws of Kansas or Maryland. Generally speaking, both states require personal service.

15. In Kansas, service “shall be directed to the sheriff or other proper officer [*e.g.*, Mr. White] of the county where the same is to be executed, who shall serve the same....” K.S.A. § 20-107.

16. In Maryland, service may be made “(1) by delivering to the person to be served a copy of the summons, complaint, and all other papers filed with it; (2) if the person to be served is an individual, by leaving a copy of the summons, complaint, and all other papers filed with it

at the individual's dwelling house or usual place of abode with a resident of suitable age and discretion; or (3) by mailing to the person to be served a copy of the summons, complaint, and all other papers filed with it by certified mail requesting: "Restricted Delivery--show to whom, date, address of delivery." Service by certified mail under this Rule is complete upon delivery." Md. Rule 3-121(a).

17. Although Maryland allows for service by certified mail, *see* Md. Rule 3-121(a)(3), upon information and belief and based upon the defendants' actions thus far, and as more fully described within, the defendants will not retrieve certified mail.

18. The plaintiff's "good faith efforts to serve the defendant pursuant to section (a) of this Rule have not succeeded and that service pursuant to section (b) of this Rule is inapplicable or impracticable, the court may order any other means of service that it deems appropriate in the circumstances and reasonably calculated to give actual notice." Md. Rule 3-121(c).

19. The plaintiff has made "good faith efforts to serve" the defendants. The plaintiff has provided proof "by affidavit that a defendant has acted to evade service". Md. Rule 3-121(c); Ex. D.

20. As an example of the defendants attempts to evade service: On June 12, 2006, Mr. White attempted to serve the defendants at their family law office - Phelps Chartered. Ex. D, ¶9(b). Again, on June 12, 2006, the defendants' attorneys wrote a letter stating that they represent the defendants. Ex. A. On June 12, 2006, members of the Phelps Chartered law firm refused to disclose the whereabouts of the defendants, *see* Ex. D, ¶9(b), even though the defendants' attorneys knew that the defendants had a duty to waive service under the Federal Rules of Civil Procedure.

21. Under the circumstances, the defendants have actual notice of the complaint: (a) the defendants' attorneys repeatedly refer to the allegations in their letter on June 12, 2006 (Ex. A); (b) Mr. White attempted to serve the defendants at their family law firm on the very same day (i.e., 6/12/06)(Ex. D, ¶9(b)); (c) the defendants' attorneys were provided a copy of the complaint via mail and facsimile on July 14, 2006 (Ex. C); and (d) the defendants referenced the complaint on their various websites - www.godhatesamerica.com and www.godhatesfags.com (*see e.g.*, Exhibit E).

22. Courts are allowed "to customize a method of service for situations where good faith attempts at personal service have been made unsuccessfully and prove futile." *Pickett v. Sears, Roebuck & Company*, 365 Md. 67, 83, 775 A.2d 1218, 1227 (2001). Maryland Courts have interpreted Md. Rule 3-121 to allow for "nail and mail" service. *Id.* In other words, under the appropriate circumstances (such as the instant matter), this Honorable Court is authorized to order substitute service in the form of mailing a copy of the complaint and summons via first-class mail and leaving a copy of the same at the defendants' residence. *Id.*

23. As an additional assurance that the defendants will receive "actual notice", the defendants' attorneys have received a copy of the complaint and summons.

24. Under the circumstances, the plaintiff is entitled to alternative service of process. The defendants attempts to evade service should not be rewarded.

25. After service is completed, a subsequent motion will be filed seeking costs of service, to include attorney fees. Fed.R.C.P. 4(d)(5).

WHEREFORE, the plaintiff respectfully requests that this Honorable Court order the plaintiff to serve the defendants by: (1) posting a copy of the complaint and summons at the defendants' last known addresses; (2) mailing a copy of the complaint and summons to the

defendants via first-class mail to their last known addresses; and (3) mailing a copy of the complaint and summons to the defendants' attorneys via first-class mail.

BARLEY SNYDER LLC

By: ____/s/ Sean E. Summers_____
Paul W. Minnich
Rees Griffiths
Craig T. Trebilcock
Sean E. Summers
100 East Market Street
P.O. Box 15012
York, PA 17405-7012
(717) 846-8888

1676570