IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

ALBERT SNYDER, Plaintiff v. FRED W. PHELPS, SR., SHIRLEY L. PHELPS ROPER. REBEKAH A. PHELPS-DAVIS, and WESTBORO BAPTIST CHURCH, INC. Defendants	Civil Action No. 1:06-cv-1389-RDB Judge Bennett

RESPONSE OF PLAINTIFF, ALBERT SNYDER, IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS REBEKAH PHELPS-DAVIS AND SHIRLEY PHELPS-ROPER

I. PROCEDURAL HISTORY

Plaintiff initiated the within action against defendants Fred Phelps, Sr. (hereinafter "Phelps") and Westboro Baptist Church, Inc. (hereinafter "WBC") on June 5, 2006. Thereafter, plaintiff joined, with leave of Court, defendants Shirley Phelps-Roper ("Roper") and Rebekah Phelps-Davis ("Davis") as defendants via an Amended Complaint filed on February 23, 2007. The claims against all defendants are: (1) Defamation; (2) Intrusion upon seclusion (Invasion of Privacy); (3) Publicity given to private life (Invasion of Privacy); (4) Intentional Infliction of Emotional Distress; and (5) Civil Conspiracy.

On April 24, 2007, Defendants Phelps-Roper and Phelps-Davis, pro se, filed a Motion to Dismiss or for Summary Judgment and for Other Relief, which was addressed by the Court in its Memorandum Opinion and Order dated June 4, 2007, whereby the motion to dismiss was denied and defendants were directed to answer the Amended Complaint. Defendants filed their Answer

to the Amended Complaint on June 19, 2007, and on June 26, 2007, filed an interlocutory appeal to the Fourth Circuit. Discovery continued pending the appeal and closed on August 6, 2007.

On September 4, 2007, Phelps-Roper and Phelps-Davis filed Additional Facts in Support of Summary Judgment as well as a Renewed Motion for Summary Judgment & Incorporation of Prior/Other Summary Judgment Motions & Preservation of Issue & Motion to Clarify & Supplement to Motion for Summary Judgment.[1] Plaintiff files this response in opposition to defendants Phelps-Roper and Phelps-Davis motions for summary judgment.

II. FACTS

On March 3, 2006, plaintiff Albert Snyder's son, Lance Corporal Matthew Snyder, was killed in Iraq. Thereafter, two uniformed Marines notified plaintiff of his son's death and that his son would be transported back to the United States for burial. The Snyder family planned a traditional Christian burial at St. John's Catholic Church in Westminster, Maryland. A traditional obituary was submitted to the local newspapers concerning plaintiff's son's death; however, plaintiff requested a private funeral. Snyder Depo. pp.83-84 at Appendix Ex. 2.

[1] Roper and Davis incorporate their motion to dismiss by reference. However, this argument fails for several reasons. First, the standard of review for Fed. R. Civ. P. 12 is different than Fed R. Civ. P. 56.

Next Roper and Davis, to complicate matters, do not apply the undisputed facts to the law, as is required pursuant to Rule 56. Their purported rendition of the facts (i.e., their affidavits) do not reflect the entire record and plaintiff should not be required to scour the record to dispute each and every fact. As noted by the Seventh Circuit, "Judges are not like pigs, hunting for truffles buried in' the record." Albrechtsen V. Board of Regents of University of Wisconsin System, 309 F.3d 433, 436 (7th Cir. 2002) -- neither is opposing counsel. See also Doeblers' Pennsylvania Hybrids, Inc. v. Doebler, 442 F.3d 812, 820 n.8 (3d Cir. 2006).

Lastly, courts have repeatedly disregarded "incorporation by reference" arguments. See, e.g., Cray Communications, Inc. v. Novatel Computer Systems, Inc., 33 F.3d 390, 396 n. 6 (4th Cir. 1994), and see also, Longworth SK # 4812 v. Ozmint, 302 F. Supp. 2d 535, 542 n. 4 (D. S.C. 2003)(The Court also rejects any attempt by Petitioner to maintain objections by incorporating arguments presented in earlier briefs by reference.). In the event that the Court allows defendants to incorporate by reference, plaintiff hereby incorporates all of its previously filed documents.

In response to Lance Corporal Matthew Snyder's tragic and unfortunate death, defendants issued a news or press release indicating their intention to picket his funeral.[2] Phelps-Davis Depo. Ex. 1 at Appendix Ex. 17. Importantly, defendants were not invited to Matthew Snyder's funeral, and in fact, defendants knew that their presence would not be well-received by the Snyder family. Phelps-Roper Depo. pp. 101, 146 at Appendix Ex. 13. Furthermore, defendants knew that their presence could elicit violence, and in this regard, defendants requested law enforcement protection. Phelps-Davis Depo. Ex. 4 at Appendix Ex. 7. In response to defendants' concerns for violence, law enforcement deployed a team of five sheriffs to escort the protestors and provide security for the protestors during their picket. Long Depo. pp. 32-33 at Appendix Ex. 6. Indeed, the sheriffs' presence was for the express and limited purpose of providing security for the protestors. Stated differently, the sheriff personnel were only necessary because of the protestors' presence. Long Depo. p. 70 at Appendix Ex. 6. Law enforcement determined that the protestors' presence created a credible threat of violence. Maas Depo. p. 32 at Appendix Ex. 8. In this regard, local law enforcement deployed a SWAT team and a command post was established. Maas Depo. pp. 8, 19, 29 at Appendix Ex. 8. Additionally, the fire department, ambulances and miscellaneous government equipment were in the area on standby to prepare for the violence associated with defendants' presence. Maas Depo. p. 30 at Appendix Ex. 8. The command center consisted of an incident commander (also a member of the SWAT team), local, county and state police, a traffic engineer, and communication clerks. Maas Depo. pp. 30-31 at Appendix Ex. 8. The enormous amount of government resources associated with defendants' presence required a Winnebago to be utilized

[2] Defendants agree that picket is synonymous with protest. Phelps-Davis Depo. p. 103 at Appendix Ex. 5.

as a command center, not to mention police cruisers, fire trucks and ambulances. Maas Depo. pp. 30-31 at Appendix Ex. 8.

Not surprisingly, defendants' presence disrupted plaintiff's son's funeral. Father Leo Affidavit ¶9 at Appendix Ex. 3. Indeed, defendants' presence did not allow for normal access to the church campus and changed the entire atmosphere of the religious services for plaintiff and his family. Id. In short, defendants' presence created a negative and circus-like atmosphere during a solemn occasion. Id at ¶10. The protestors' activities added insult to injury during a time of grief and mourning. Id at ¶11. In addition to injuring the Snyder family, defendants' activities also injured parish families who were present to share in the Snyder family's grief. Id.

Directly across the street from where defendants protested, there is a parish elementary school. Father Leo Affidavit ¶13 at Appendix Ex. 3. Because of the protestors' presence at the funeral, law enforcement and church officials found it necessary to take the necessary steps to protect school children from the protestors' presence. In this regard, all teachers were required to pull down the blinds so that the children could not see the protestors. Father Leo Affidavit ¶12 at Appendix Ex. 3. In addition, each parent received advance warning of the protestors' presence and officials notified parents that their children should avoid using the main entrance of the school. Id. Tellingly, the school was in a lock-down mode. Id.; Long Depo. p. 26 at Appendix Ex. 6. Further, the children were not allowed to play outside and there would be no dismissal until the protestors left the church. Long Depo. p. 26 at Appendix Ex. 6.

In accordance with their threats, defendants traveled from Kansas and across the country to Westminster, Maryland for the express purpose of protesting Lance Corporal Matthew Snyder's funeral. With law enforcement protection, defendants were escorted by sheriff

personnel from the outskirts of town to the protest. Phelps-Roper Depo. p.100 at Appendix Ex. 13. Defendants' sole purpose for traveling to Westminster, Maryland was to picket and protest the funeral. Id at pp. 62, 67. Defendants knew the funeral was at a Catholic church and consequently targeted the Snyder family by bringing and flaunting a sign that stated "Pope in Hell." Phelps-Roper Depo. pp. 112, 116 at Appendix Ex. 13. Additionally, defendants knew that Matthew Snyder was a Marine and brought a sign that said "Semper Fi Fags." Id. p. 124. Because the funeral was in Maryland, defendants brought a sign that said "Maryland Taliban" to the funeral. Id p. 134. Disgustingly, defendants brought a sign which pictured two men performing anal sexual intercourse. Phelps-Davis Depo. p. 120 at Appendix Ex. 5. Defendants even, unbelievably, brought a sign that said "Matt in Hell" to Matthew Snyder's funeral. Snyder Depo. p. 90 at Appendix Ex. 2.

The Catholic priest, Father Leo, who was present and assisted in the Snyder family's Christian burial had never observed anyone protest a funeral or church service. Father Leo Affidavit ¶16 at Appendix Ex. 3. Captain Maas has been in law enforcement for 31 years and had never witnessed anyone protest a funeral. Maas Depo. pp. 28-29 at Appendix Ex. 8. Major Long has been in law enforcement for 37 years and had never observed a funeral being protested. Long Depo. p. 69 at Appendix Ex. 6. Again, defendants' sole purpose for traveling to Maryland was to protest and picket the funeral. Phelps-Davis Depo. pp. 62, 67 at Appendix Ex. 5. Indeed, defendants could have protested anywhere on March 10, 2006, but specifically chose to target a captive audience. Phelps-Roper Depo. p. 51 at Appendix Ex. 13; Phelps Depo. pp. 79-81 at Appendix Ex. 5; Tim Phelps Depo. p. 114 at Appendix Ex. 15. Importantly, all decisions, to include protests, are unanimously agreed upon by all WBC members. Tim Phelps Depo. pp. 57,

118 at Appendix Ex. 15; Phelps Depo. pp. 39, 55 at Appendix Ex. 5; Phelps-Davis Depo. p. 109 at Appendix Ex. 6; Phelps-Roper Depo. p.105 at Appendix Ex. 13.

Tellingly, defendants had no concern for the Snyder family and only used the funeral as a means of commanding an audience. Phelps Depo. p. 96 at Appendix Ex. 4. Indeed, WBC members use funerals as a platform to command an audience. Tim Phelps Depo. p. 116 at Appendix Ex. 15. Heartlessly, WBC's corporate designee admitted that defendants capitalize on funerals because it is more "efficient" to get their message to more media. Tim Phelps Depo. pp. 116-117 at Appendix Ex. 15. Finally, defendants did not even care if their presence at the funeral was not welcome. Phelps Depo. p. 89 at Appendix Ex. 4.

Indeed, there was no consideration whatsoever given to the Snyder family's feelings. Id at 90. The adult protestors did not even have any discussions concerning harm to the Snyder family. Id. at 91. Even at this juncture, defendants are not sorry for protesting the funeral. Phelps-Davis Depo. pp. 171-172 at Appendix Ex. 5. "Q: Do you regret that -- that you, your children, your sister or your father, traveled to Westminster, Maryland, on March 10, 2006, and protested? A: Absolutely not." Phelps-Roper Depo. 136 at Appendix Ex. 13. According to defendant Phelps, the pastor of the church, no one is sorry for protesting the funeral. Phelps Depo. p. 120 at Appendix Ex. 4.

III. ARGUMENT

A. Summary judgment standard.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter

of law." Fed.R.Civ.P. 56(c); see generally Celotex Corp. v. Catreet, 477 U.S. 317, 322 (1986). The Court must resolve all doubts as to the existence of a genuine issue of material fact in favor of the non-moving party. See Brock v. Extra Computer Ctrs., 933 F,2d 1253, 1259 (4th Cir. 1991). The moving party bears the initial burden of presenting evidence sufficient to demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. Once the moving party has met its burden, the party opposing summary judgment may not simply rely on the pleadings or mere denials of the allegations; rather, the non-moving party must "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, and designate specific facts showing there is a genuine issue for trial." Id., 477 U.S. at 324 (internal quotations omitted). Summary judgment should be granted where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden at trial." Id. If the evidence adduced by the non-movant is merely colorable or not significantly prohibitive, summary judgment is appropriate. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986).

B. There is no government action.

Roper and Davis cite a plethora of cases that are easily distinguishable -- plaintiff is not a government actor, and consequently, their so-called First Amendment defense must fail. In Tilton v. Richardson, 6 F.3d 683, 686-687 (10th Cir. 1993)(internal citations omitted), the court stated,

> Mr. Tilton has alleged Appellees aimed at interfering with his right to freedom of religion in violation of the First Amendment, his right to pursue his chosen profession as guaranteed by the Fifth and Fourteenth Amendments, and his right to a fair and impartial jury. These rights are not protected against private infringement. There are few rights protected against private, as well as official, encroachment. The Supreme Court has recognized only " the Thirteenth

> Amendment right to be free from involuntary servitude, and, in the same Thirteenth Amendment context, the right of interstate travel." The right of free speech is not such a right.

The court explained further,

> The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The guarantees of the First Amendment run only against the federal government. Of course, by incorporation into the due process clause of the Fourteenth Amendment, these guarantees also run against the State, but this does not make the First Amendment a protection against Appellees' private conspiracy. Mr. Tilton's Fifth and Fourteenth Amendment claims likewise fail as these Amendments do not erect a shield against merely private conduct however discriminating or wrongful.

Id. (Internal citations omitted.)

Other courts have reached the same conclusion. "It is a bedrock principle of constitutional law that most protections of individual rights and liberties contained in the Constitution and its amendments, apply only to the actions of governmental entities. By its own terms, the First Amendment extends only to protect individuals against actions taken by the government. Plaintiff has not alleged that defendant is a governmental entity or that it is associated with the government. Consequently, plaintiff has failed to state a constitutional claim premised on the allegation that defendant violated her First Amendment right to freedom of religion." Magallanes v. Cracker Barrel Old Country Store, 2002 WL 92928.

"The Supreme Court has recognized that the First Amendment's protection "... embraces two concepts,-freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." Thus even if we were to find that the California Church is a

religious institution, the free exercise clause of the First Amendment would not immunize it from all common law causes of action alleging tortious activity." Van Schaick v. Church of Scientology of California, 535 F. Supp. 1125, 1134 (D.C. Mass. 1982).

Plaintiff is not challenging defendants' ability to express their purported religious views. Nothing prevented defendants from exercising their views in their own church or at the local park or at some other establishment. The fact of the matter is that defendants disrupted plaintiff's funeral at a Catholic Church. If anything, defendants prevented plaintiff from expressing his religious views. This Court is not being asked to determine religious doctrine. This red herring should be summarily dismissed. In fact, defendants have already litigated the issue of whether they have a religious right to disrupt a funeral.

> Here, plaintiffs contend the picketing of funerals is motivated by their religious beliefs and in furtherance of their religious obligation to go forth and warn the citizenry of the risks of defying what they believe is God's word condemning homosexuality. While it is correct, as fact, that the plaintiffs' personal religious beliefs proscribe any sympathetic tolerance to homosexuality, and correct, as fact, that preaching their beliefs and carrying forth a public warning is part of their religious tenets and training, nevertheless, **the particular means by which they carry forth their message is one of personal preference not one of religious mandate.** The complete elimination of this particular forum, much less a time, place, and manner restriction regarding it, does not disable their religious regimen from exercise in other public forums or by other means to disseminate and "preach" their position that God does not tolerate homosexuals. **There is no religious consequence imposed for failing to picket at a specific location or event.**

Westboro Baptist Church, Inc. et al., v. City of Topeka et al., at 75-76 at Appendix Ex. 22. (Emphasis added) (Unpublished Opinion previously filed as Lengthy Exhibit with Plaintiff's opposition to defendants' motion to dismiss and for summary judgment, Doc. no. 78)

In other words, defendants have no First Amendment right (or defense) to impose their purported religious beliefs upon plaintiff's son's funeral. Defendants' reliance on

United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972), is equally unavailing. Crowthers dealt with the government choosing who could assemble. Here, we have a private lawsuit making a decision concerning the disruption of a funeral and resulting harm.

Any concerns regarding deciding religious viewpoints is a red herring that should be summarily dismissed. "When a civil dispute merely involves a church as a party, however, and when it can be decided without resolving an ecclesiastical controversy, a civil court may properly exercise jurisdiction." Dixon v. Edwards, 290 F. 3d 699, 714 (4th Cir. 2002).

Klagsbrun v. Va'ad Harabonim of Greater Monsey, 53 F. Supp. 2d 732 (D.N.J. 1999), is likewise unavailing. In Klagsbrun, the court was concerned about defining bigamy within a particular faith. Where, as here, plaintiff is alleging that he was accused of teaching his son adultery, Maryland and military law already define adultery and this Court should not abandon those definitions in favor of defendants' subjective definition. Also, in Klagsbrun, "plaintiff's entire defamation claim with respect to paragraphs 5 and 6 of the notice is grounded upon religious doctrine." Id. at 742.

C. The Defamation.

Roper's and Davis' attack on the defamation claim is equally unavailing. "[P]laintiff must prove: (1) that the defendant made a defamatory communication to a third person; (2) that the statement was false; (3) that the defendant was at fault in communicating the statement; and (4) that the plaintiff suffered harm." Samuels v. Tschechtelin, 135 Md.App. 483, 544, 763 A.2d

209, 242 (2000)(Internal citations omitted.) "The "fault" element of the calculus may be based either on negligence or actual malice." Id.

In the instant matter, defendants claimed that plaintiff taught his son adultery and posted that accusation on the internet. According to defendants, plaintiff taught Matthew Snyder to commit adultery.[3] Phelps Depo. Ex. 12 at Appendix 12. Plaintiff did not teach his son adultery or commit adultery.[4] Snyder Depo. pp. 113-114, 173-174 at Appendix Ex. 2. Where, as here, defendants did no investigation to determine the truthfulness of their statements, they are at fault for purposes of defamation. Phelps Depo. p. 98 at Appendix Ex. 4, Phelps-Roper Depo. p. 71-72 at Appendix Ex. 13. Plaintiff was harmed. Snyder Depo. p. 97-98 at Appendix Ex. 2; Report of Chaplain (MAJ) Terry Callis at Appendix Ex. 18; Report of Kenneth J. Doka, PhD at Appendix Ex. 19 ; Report of Scott R. Mann, M.D. at Appendix Ex.20; Report of Jeffrey D. Willard, Ph.D. at Appendix Ex. 21. In short, plaintiff has established a defamation claim.

Even assuming for sake of argument's sake that a First Amendment analysis is necessary - which would be wrong to begin with - "a state may protect its citizens from unwelcome communications - including offensive communications - where the communications invade substantial privacy interests in an essentially intolerable manner, as where the communications are directed at citizens in their homes or where the communications are directed at a 'captive' audience and are so obtrusive that individuals cannot avoid exposure to them." McQueary v. Stumbo, 453 F. Supp. 2d 975, 990 (E.D. Ky. 2006). To determine whether a significant

[3] Defendants may argue that defendant Roper is solely liable for the defamation claim. However, defendants committed a civil conspiracy as well. In this regard, defendants are adamant that they agree on each and every decision, to include their defamatory comments. Phelps Depo. p. 39 at Appendix Ex. 4, Tim Phelps Depo. pp. 16, 57, 100 and 118 at Appendix Ex. 15.

[4] Even assuming *arguendo* that the Court will allow defendants to present their definition of adultery, this issue becomes a question of fact for the jury.

governmental interest exists, this Court must analyze whether the communication at issue is so intrusive that an unwilling audience cannot avoid it, see Frisby v. Schultz, 487 U.S. 474 (1988), or the Court must determine whether the audience can avoid "bombardment of their sensibilities simply by averting their eyes" Cohen v. California, 403 U.S. 15, 21 (1971).

Obviously, "[f]amily members have personal stake in honoring and mourning their dead and objecting to unwanted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord the deceased person who was once their own." National Archives and Records Admin. v. Favish, 541 U.S. 157, 168 (2003). It follows that:

> A funeral is a deeply personal, emotional and solemn occasion. Its attendees have an interest in avoiding unwanted, obtrusive communications which is at least similar to a person's interest in avoiding such communications inside his home. Further, like medical patients entering a medical facility, funeral attendees are captive. If they want to take part in an event memorializing the deceased, they must go to the place designated for the memorial event.

McQueary, 453 F. Supp. 2d at 992.

Defendants continue to ignore plaintiff's rights to bury his son with dignity and respect and without disruption. "It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of the deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect this memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased." Schuyler v. Curtis, 147 N.Y. 434, 42 N.E. 22, 25 (1895).

The Supreme Court has recognized that civilized people respect burial rites:

> Burial rites or their counterparts have been respected in almost all civilizations from time immemorial. See generally 26 Encyclopaedia Britannica 851 (15th ed.1985) (noting that "[t]he ritual burial of the dead" has been practiced "from the very dawn of human culture and ... in most parts of the world"); 5 Encyclopedia of Religion 450 (1987) ("[F]uneral rites ... are the conscious cultural forms of one of our most ancient, universal, and unconscious impulses"). They are a sign of the respect a society shows for the deceased and for the surviving family members. The power of Sophocles' story in Antigone maintains its hold to this day because of the universal acceptance of the heroine's right to insist on respect for the body of her brother. See Antigone of Sophocles, 8 Harvard Classics: Nine Greek Dramas 255 (C. Eliot ed.1909). The outrage at seeing the bodies of American soldiers mutilated and dragged through the streets is but a modern instance of the same understanding of the interests decent people have for those whom they have lost. Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.

Favish, 451 U.S. at 167-168.

In addition, the Supreme Court has realized that all listeners are not equal. "The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader "right to be let alone" that one of our wisest Justices characterized as "the most comprehensive of rights and the right most valued by civilized men." Hill v. Colorado, 530 U.S. 703, 716-717 (2000) (internal citations and footnotes omitted.) "The right to avoid unwelcome speech has special force in the privacy of the home, and its immediate surroundings, but can also be protected in confrontational settings." Id. (Internal citations omitted.) "[T]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political interests." Hill, 530 U.S. at 716. Likewise, mourners (to include plaintiff) should not be required to undertake Herculean efforts to escape defendants' disruptive behavior -- especially when plaintiff is burying his own son.

D. Defendants' statements are not opinion.

Defendants' next fallback position is that their defamatory statements are opinion. Before the Court can determine whether the defendants' statements are supposed opinions, the Court must consider "[T]he context and tenor of the" defamatory statements." Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180, 184 (4th Cir. 1998). In Biospherics, the court also determined that the allegations were vague, such as "hype" and "hope." In addition, the defendant was a financial magazine discussing potential investment opportunities or businesses. In that context, common sense compels the conclusion that the writer was stating his or her opinion. Here, there is no "context" that would indicate opinion, other than defendants' subjective definition of adultery. Again, assuming *arguendo* that the Court allows defendants to argue that their definition of adultery is correct, this is a question for the jury.

Even if the Court were to consider the factors identified in Biospherics, defendants' argument is of no moment. The Biospherics court discussed "a four-factor test to identify an opinion: "a trial judge should (1) consider the author['s] or speaker's choice of words; (2) decide whether the challenged statement is 'capable of being objectively characterized as true or false'; (3) examine the context of the challenged statement within the writing or speech as a whole; and (4) consider 'the broader social context into which the statement fits." Id. at 183. In the instant matter, defendants' choice of words was clear. Plaintiff taught his son adultery. Phelps-Davis Depo. Ex. 12 at Appendix Ex. 16. This statement is not true. (Snyder Depo. pp. 57-58, 113-114 at Appendix Ex. 2) The law defines adultery so plaintiff or defendants can prove the truth of adultery and whether plaintiff taught his son adultery. Defendants can call witnesses to assert their purported truth defense. (However, defendants should be required to assert the legal

definition of adultery as the truth, as opposed to their subjective interpretation.) There is no context which would suggest that defendants were offering their opinion. To the contrary, defendants claim they will assert *truth* as a defense. There is no broader social context. As defendants concede, the social context they are referring to is from "defendants' perspective." Defendants' suggestion that their statements concerned "the outcome of the war" or the "deaths of more soldiers" belies their actual statements - this farfetched story should be summarily rejected. Whether plaintiff taught his son adultery has nothing to do with the war or deaths in the war.

Furthermore, even assuming *arguendo* that defendants' defamatory statements contain some form of opinion based upon a so-called religious belief, that is not a defense.

> While the tort of defamation is generally viewed as one based upon false assertions of fact, it may also be based upon the expression of an opinion to a third person if the "opinion contains implied assertions of underlying objective fact." Although "loose, figurative, or hyperbolic language" expressing a mere opinion may not fairly be viewed as being defamatory," a false statement of fact cannot escape liability for defamation under the guise of opinion." [A] statement, even if expressed in terms of an opinion, can be defamatory under certain circumstances.... When the underlying facts used to form the opinion are not given along with the defamatory statement, the statement itself may be treated as being factual and therefore potentially defamatory."

Murray v. United Food and Commercial Workers International Union, 289 F.3d 297, 305-306 (4th Cir. 2002)(Internal citations omitted.).

E. Defendants invaded plaintiff's privacy.

Importantly, defendants have previously litigated this matter and a court has determined that defendants' activities constitute an invasion of privacy. "The words and the activity conveying the words is equivalent to an immediate invasion of privacy and an assault." Westboro Baptist Church, Inc. et al., v. City of Topeka et al. at 72.

Defendants' repeated assertions that Lance Corporal Matthew Snyder's funeral was open to the public contradicts plaintiff's sworn testimony. Snyder Depo. p. 65, 67-69, 74. Not surprisingly, defendants omitted this fact. Furthermore, defendants claim they commented on "public information and issues of intense public interest." Def.'s Br. at 38. Defendants' statements concerning "Got hates fags" has nothing whatsoever to do with "soldiers' funerals" or "the death rate" of soldiers -- likewise, "Maryland Taliban," "Sempri fi fags," and "Pope in Hell" have nothing to do with a private funeral.

1. Intrusion upon Seclusion.

The tort of invasion of privacy based upon an "intrusion upon seclusion" depends on three elements. First, the defendant must have committed an intentional intrusion. Second, the intrusion must have involved a private matter. Third, the intrusion must have employed a method that is "highly offensive" to the reasonable person. See Furman v. Shepherd, 130 Md.App. 67, 73 (2000).

a. Intentional Intrusion.

The intrusion was intentional. Maryland courts have been concerned that an intrusion upon seclusion result from something more than negligence. Bailer v. Erie Ins. Exchange, 344 Md. 515 (1997). But the actions of defendants flow from a repeated course of conduct following the death of American servicemen, both in person at their funerals and remotely from their website. Such consistency indicates intent -- besides, defendants admit that they intentionally traveled to St. John's Catholic Church to protest a funeral. Phelps-Davis Depo p. 62, 67 at Appendix Ex. 5. After all, no one forced defendants to protest Matthew Snyder's funeral -- even defendants concede this fact. Phelps-Roper Depo. p. 53 at Appendix Ex. 13.

b. Private Matter.

In order to establish the element that an intrusion concerned a private matter, a plaintiff must show that the defendant's conduct concerned some "private zone" of physical or sensory surroundings or unwanted access to data sources or personal conversations. Mitchell v. Baltimore Sun, 164 Md.App. 497, 523 (2005), citing Shulman v. Group W. Prods., Inc., 18 Cal.4th 200 (1998). Like the third element of the intrusion upon seclusion theory, this second element is highly *dependent on the context* of the particular intrusion. An intrusion upon private sensory or physical matters can occur in a public area, as with the scene of a severe physical accident following an automobile collision. See Shulman, 18 Cal.4th at 200. Such an intrusion also can occur in the confines of a quasi-public business establishment involving a public figure who makes known a desire to be free from the intrusion. See Mitchell, 164 Md.App. at 503-04. Such private intrusions depend upon the nature of the specific intrusion rather than area of the activity or the person who is the object of the intrusion. The emphasis on the specific nature of the intrusion rather than the substantive content or viewpoint ensures that the conduct subject to liability is not related to the suppression of ideas. See Mitchell, 164 Md.App. at 524 (quoting Shulman, 18 Cal.4th at 496, with approval). Where, as here, the intrusion was upon a funeral, courts have consistently recognized the private nature of a funeral.

c. "Highly Offensive" to Reasonable Person.

Like the latter element of physical or sensory intrusion into a private matter, the third element involving the level of offense of the intrusion to the reasonable person is highly contextual. See Am.Jur.2d Privacy § 39. Intrusive conduct may be "highly offensive" if it continues following a request by the object of intrusion for the intrusion to cease. See Mitchell.

It is unreasonably offensive if it involves the public depiction of private matters in a manner that inflicts mental suffering, shame, or humiliation. See Shulman. This element is clearly established and essentially admitted.

Even defendants realize that their presence is not wanted, Phelps-Roper Depo. p. 40 at Appendix Ex. 13, and that their presence invokes violence. Phelps-Roper Depo. p. 41 at Appendix Ex. 13; Phelps-Davis Depo. Ex. 4 at Appendix Ex. 7.

2. Publicity to Private Life.

In Maryland, the tort of invasion of privacy based upon the theory of giving publicity to private life depends on three elements. First, the disclosed information must be highly offensive to the reasonable person, as with the theory of intrusion upon seclusion. Second, the information, though related to a private matter, must not relate to a matter of legitimate public concern. Furman v. Shepherd, 130 Md.App. 67, 77 (2000)

a. "Highly Offensive" to Reasonable Person.

Like intrusion upon seclusion, invasion of privacy for publicity to private life requires that the invasion of privacy be highly offensive to the reasonable person. The specific application of this element under this cause of action does not materially differ from the highly contextual approach under the latter cause of action. Id. at 78. For the reasons stated above, defendants committed conduct that a jury could find to be highly offensive to the reasonable person.

b. No Legitimate Public Concern.

The element of publicity to private life of no legitimate public concern requires both that a defendant genuinely cause information to be made public and that the information not relate to

matters within the public record. For information to have been sufficiently publicized, a defendant must have conveyed the information to more than an isolated group of people. Gladhill v. Chevy Chase Bank, 2001 WL 894267 at 20 (Md.App.) (unreported case). Informing a group of people through a magazine or book of even limited circulation, however, is sufficient for information to have been "publicized." Id. It is of no public concern, for example, that plaintiff taught his son adultery.

F. Plaintiff is not a public figure.

Plaintiff is not a public figure and defendants barely make a straight-faced argument claiming that he is. Indeed, public figure status is established prior to the events giving rise to the claims. Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675 (1979). The defendants so called *facts* are all related to post-complaint activities. See Plaintiff's Response to Defendants' Phelps and WBC Statement of Material Facts, ¶¶ 35-36.

G. There is no privilege.

The Fourth Circuit has laid out the proper method for determining whether a citizen's free speech rights have been violated in ACLU, Student Chapter - University of Maryland, College Park v. Mote, 423 F.3d 438 (4th Circ. 2005). In ACLU, the court held that the test for determining whether such a violation has occurred involves an examination of (1) whether the type of speech is protected, (2) where the speech takes place, and (3) whether there are sufficient justifications for excluding the speech. However, these elements address protected First Amendment speech in the context of government regulation. Notably, in the present case, the conflict is between two private parties, and there is **no state actor**.

Defendants' claim that their statements are tantamount to advancing social policy are patently absurd. To the contrary,

> Based on the expert evidence admitted of the societal purpose of funerals and the effect on attendees, particularly the emotional status of mourners who may be, but are not exclusively, family members of the deceased, it is overwhelmingly clear and beyond doubt that persons at funeral events who are even perceived by the family or friends of a deceased as "outsiders" and interfering with the family's control of the funeral agenda, much less persons manifesting a presence that is hostile or derisive of the deceased, is per se, conduct that is disorderly and assault provoking. Further, it seems factually beyond dispute that picketing funeral events is, per se, to some degree immediately injurious to family and close friends of the deceased and further, by psychologically interrupting the grieving process of the deceased's survivors and friends, such a presence may, as medical fact, cause some mourners actual physical distress and physical injury.

Westboro Baptist Church, Inc. et al., v. City of Topeka et al. at 24.

H. Intentional Infliction of Emotional Distress

In Maryland, intentional infliction of emotional distress is as follows: "(1) The conduct must be intentional or reckless; (2) [t]he conduct must be extreme and outrageous; (3) [t]here must be a causal connection between the wrongful conduct and the emotional distress; (4) [t]he emotional distress must be severe." Mitchel v. Baltimore Sun Company, 164 Md.App. 497, 525, 883 A.2d , 1008, 1024 (2005).(Internal citations omitted.)

Importantly, this claim is fact driven and dependent on the factual circumstances. Defendants traveled across the country to protest Matthew Snyder's funeral. Phelps-Davis Depo. p. 67 at Appendix Ex. 4. If defendants' conduct was not extreme and outrageous, no conduct will ever be. Plaintiff's injuries are directly related to defendants' actions. Indeed, plaintiff is suffering from depression and exacerbated diabetes, both of which resulted from defendants' protest. Report of Chaplain (MAJ) Terry Callis at Append ix Ex. 18; Report of Kenneth J. Doka,

PhD at Appendix Ex. 19 ; Report of Scott R. Mann, M.D. at Appendix Ex.20; Report of Jeffrey D. Willard, Ph.D. at Appendix Ex. 21. The emotional distress is so severe that it has caused depression and problems with diabetes. Further, plaintiff thinks about defendants' protest all of the time. Snyder Depo. p. 65 at Appendix Ex. 2. Plaintiff felt like he was kicked in the teeth. Snyder Depo. p. 63 at Appendix Ex. 2. "Every time I lay in bed at night, I think about my son's funeral. I have to see their ugliness. I only had one chance to bury my son, and I'll probably have to live with [defendants] the rest of my life." Snyder Depo. p. 122 at Appendix Ex. 2. Sadly, plaintiff still wakes up in the middle of the night. Snyder Depo. p. 136 at Appendix Ex. 2. The emotional distress is severe.

I. Defendants conspired.

It is hard to imagine more compelling evidence concerning a conspiracy. Defendants are adamant that they agree on each and every decision. Tim Phelps Depo. p. 16, 57, 100, 118 at Appendix Ex. 15; Phelps Depo. p. 39, 55 at Appendix Ex. 4; Phelps-Davis Depo. p. 109 at Appendix Ex. 5; Phelps-Roper Depo. p. 105 at Appendix Ex. 13. WBC members agree on everything.

J. Res Judicata Bars Defendants First Amendment Defense.

The doctrine of *res judicata* bars the re-litigation of a claim if there is a final judgment in a previous litigation where the parties, the subject matter and causes of action are identical or substantially identical as to issues actually litigated and as to those which could have or should have been raised in the previous litigation. *Res judicata* protects the courts, as well as the parties, from the attendant burdens of relitigation. Anne Arundel County Bd. of Educ. v. Norville, 390 Md. 93, 107, 887 A.2d 1029, 1037 (2005). The elements of *res judicata* under federal law are

analogous to those under Maryland law: (1) identical parties, or parties in privity, in the two actions; (2) the claim in the second matter is based upon the same cause of action involved in the earlier proceeding; and (3) a prior and final judgment on the merits, rendered by a court of competent jurisdiction in accordance with due process requirements. Id.

Here, in Westboro Baptist Church, Inc. et al. v. City of Topeka Kansas, et al., WBC challenged the government's authority to enforce a funeral picketing act in Kansas. According to defendants' motion to dismiss, they are acting on behalf of WBC and, consequently, were a party or a party in privity with WBC. Notably, defendant Phelps was a party, the within corporate designee (Tim Phelps) was a party and defendants' family law firm litigated the matter on their behalf. Roper and Davis are members of the family law firm. See www.phelpschartered.com.

In the aforementioned Kansas case, the within defendants claimed that the First Amendment prevented the government from enforcing the funeral picketing act. Among other things, the court concluded that the government had a compelling government interest in protecting mourners from defendants' activities. "A fair conclusion to be drawn from the expert testimony as a whole is that picketing a funeral is the equivalent of kicking a person while they're down and correspondingly it hurts these defenseless persons, both physically and mentally." Id. at 25. In addition, "it is clear a funeral service or other rite of respect to a deceased is factually and historically a private event and that factually, an uninvited, particularly negative, intrusion ("protest activities") at such an event may properly and legally be seen as disorderly and immediately injurious to some mourners there present, both emotionally and to some likely degree, physically." Id. at 145.

There was a final judgment on the merits. The trial court wrote a 157 page opinion that was subsequently affirmed in its entirety on appeal. It follows that if the government can enforce a funeral picketing act under a compelling government interest standard then a private party can bring a private lawsuit to enforce a private civil action.

IV. CONCLUSION

Plaintiff Albert Snyder respectfully requests that defendants motion for summary judgment be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on this date true and correct copies of Plaintiff's Response in Opposition to Defendants' Rebekah Phelps-Davis and Shirley Phelps-Roper's Motion for Summary Judgment, are being served in the following manner:

Via ECF to:
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