

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. 06-CV-1389 RDB

**PLAINTIFF’S MOTION IN LIMINE TO PRECLUDE A
“FIRST AMENDMENT DEFENSE”**

Plaintiff, Albert Snyder, by and through counsel, files the within Motion in Limine to Preclude a “First Amendment Defense.”

1. Upon information and belief, one or more defendants will assert, argue and potentially elicit testimony concerning the First Amendment of the United States Constitution. More specifically, defendants will seek to excuse their behavior based upon *their interpretation* of the First Amendment.

2. Initially, it is important to identify that the within matter is a private dispute by and between private parties, or in other words, all of the parties are non-government actors.

3. Indeed, defendants’ actions cannot be defended upon First Amendment grounds because plaintiff is not the government or a government actor. 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.

4. Defendants cannot identify “a constitutional [defense] premised on the allegation that [plaintiff] violated [its] First Amendment right to freedom of religion.” Magallanes v. Cracker Barrel Old Country Store, 2002 WL 92928.

5. “[T]he First Amendment would not immunize [defendants] 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).

6. Reliance upon Hustler Magazine v. Falwell, 485 U.S. 46, 108 S.Ct. 876 (1988) is inappropriate. The unequivocal holding of Hustler Magazine is that, “[t]hus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of *public* debate about *public* figures.” Id at 53, 108 S. Ct. at 881 (emphasis added).

7. Instantly, it would be preposterous to suggest that plaintiff is a public figure. Furthermore, “the government has a legitimate interest in protecting the privacy of one’s place of worship as well.” St. David’s Episcopal Church v. Westboro Baptist Church, Inc., 22 Kan. App.2d 537, 549, 921 P.2d 821, 830 (1996). Stated differently, plaintiff’s place of worship is not a public place.

8. If this Honorable Court allows defendants to present a so-called First Amendment defense, the Court will negate plaintiff’s First Amendment right to freedom of religion.

9. Importantly, “the particular means by which [defendants] carry forth their message is one of personal preference not one of religious mandate.” Westboro Baptist Church,

Inc., et al v. City of Topeka, et al. at 75. Furthermore, “[t]here is no religious consequence imposed for failing to picket at a specific location or event.” Id at 76.

10. On March 10, 2006, defendants could have expressed their message at unlimited locations - instead of targeting a captive and defenseless audience. Defendants traded plaintiff’s only opportunity to bury his son with dignity and respect for the sole purpose of gaining media attention.

11. Courts have unanimously agreed that funerals are unique and defendants are not entitled to defend their actions based upon the First Amendment.

12. “Thus, while a state cannot protect citizens from communications solely because the citizens may find the communications offensive, a state may protect citizens from unwelcome communications-including offensive communications-where the communications invade substantial privacy interests¹ 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 (2006).²

13. If anything, “the state also has a significant interest in prohibiting interference with funerals. This is because the state has an interest “in guaranteeing citizens the right to participate in events or demonstrations of their own choosing without being subjected to

¹ Obviously, a funeral involves a substantial privacy interest. “The words and 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. “[I]t is clear a funeral service or other rite in respect to a deceased is factually and historically a private event and that factually, an uninvited, particular negative activity, 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.

² Notably, “McQueary asserts that he has picketed funerals with the Westboro Baptist Church.” Id. at 978.

interference by other citizens.” An intrusion into another event “is an interference with the rights of other citizens to enjoy the event or demonstration in which they have chosen to participate, in an area reserved for them.” Id. at 987. (Internal citations omitted.) Put differently, plaintiff has a First Amendment right not to be subjected to defendants’ actions.

14. Further, a First Amendment defense would defeat plaintiff’s “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.”” Id. at 991. (Internal citations omitted.)

15. “A funeral is a deeply personal, emotional and solemn occasion. Its attendees have an interest in avoiding unwanted, obtrusive communications.” Id. at 992. If funeral attendees “want to take part in an event memorializing the deceased, they must go to the place designated for the memorial event.” Id. Indeed, “the state has an interest in protecting funeral attendees from unwanted communications that are so obtrusive that they are impractical to avoid.” Id.

16. Even if the Court balances the respective First Amendment interests, “the balance of harms among the parties and the public interest weigh toward denial” of a First Amendment defense. Phelps-Roper v. Nixon, 2007 WL 273437 (W.D. Mo.) at 5.

17. Defendants will likely argue “that mourners are not a captive audience, powerless to avoid the message of the WBC. To the contrary, [Phelps-Roper] asserts that mourners make the choice to voluntarily attend funeral services, and they can “avert their eyes” to avoid any unwanted communication.” Phelps-Roper v. Taft, 2007 WL 915109 (N.D. Ohio) at 5. Indeed, “the Court finds [Phelps-Roper’s] Motion to be without merit.” Id. at 5. In sum, “the State of Ohio has an interest in protecting mourners, a captive audience, from unwanted speech.” Id. at

5. Likewise, the State of Maryland has an interest in protecting its mourners, captive audiences, from unwanted speech.

18. All of the aforementioned cases deal with the state protecting mourners. It follows that if a state can protect mourners by a statute then a private party can protect himself by means of a civil action.

19. It can hardly be argued (at least not with a straight face) that courts have concluded that these defendants have a First Amendment right to disrupt funerals. To the contrary, courts have unanimously concluded that these defendants cannot disrupt funerals.

20. In sum, the law does not support defendants' assertion of a First Amendment defense and they should not be allowed to present a so-called First Amendment defense.

WHEREFORE, plaintiff Albert Snyder respectfully requests that this Honorable Court preclude defendants from presenting evidence, eliciting testimony or arguing that their actions were allowed, justified or otherwise excused under the law.

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CERTIFICATE OF SERVICE

I hereby certify that on this date true and correct copies of Plaintiff's Motion in Limine to Preclude a "First Amendment Defense" are being served in the following manner:

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Date: October 5, 2007