IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND – BALTIMORE DIVISION

ALBERT SNYDER,

Plaintiff,

vs. Case No. 1:06-cv-1389-RDB

FRED W. PHELPS, SR.;
SHIRLEY L. PHELPS-ROPER;
REBEKAH A. PHELPS-DAVIS; and,
WESTBORO BAPTIST CHURCH, INC.,

Defendants.

RESPONSE TO PLAINTIFF'S MOTIONS IN LIMINE REGARDING FIRST AMENDMENT ISSUES (TO PRECLUDE A FIRST AMENDMENT DEFENSE & TO EXCLUDE PORTIONS OF DR. BALMER'S REPORT/TESTIMONY) OF DEFENDANTS PHELPS-DAVIS & PHELPS-ROPER

Rebekah A. Phelps-Davis and Shirley L. Phelps-Roper, as pro se defendants herein, make the following response to "Plaintiff's Motion in Limine to Preclude a 'First Amendment Defense'" and "Plaintiff's Motion in Limine to Exclude a Portion of Professor Balmer's Expert Report."

1. The essence of these two motions is that plaintiff wants no mention of any First Amendment defense or issues. These motions are made in spite of the fact that this case has been about the content of defendants' speech from start to finish. The only way you get to claims of emotional distress or defamation is by focusing on content. This is

particularly true given the undisputed facts that defendants' picketed over a thousand feet from the building where the funeral was held, leaving when the funeral began, out of sight and sound of those going to the funeral; and that before, during and after the funeral, other people with flags and signs were directly outside of the church, directly in the view of those attending the funeral; and the only thing that distinguishes defendants from those people (besides proximity) is content. If defendants' signs had said "he's a hero" this lawsuit would not have been filed. Certainly if defendants in any manner "disrupted" a funeral that went off without a hitch, out of sight and sound of the funeral goers, the presence of motorcycle riders and others with large flags and signs was disruptive. The only way to make a claim of disruption by the group furthest away, present the shortest period of time, and fully out of sight and sound, is by the content of their words.

2. Plaintiff bases his request that the First Amendment be silenced in this case on two contentions: First, that this is a matter between private parties; second, that the funeral was private.

Defendants have already addressed the legally flawed suggestion that a claim between private parties does not invoke the First Amendment, when replying to plaintiff's response to defendants' motion for summary judgment. Again, this legal issue has been addressed by the United States Supreme Court. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 265, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964):

> We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court-that 'The Fourteenth Amendment is directed against State action and not private action.' That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. See, e.g., Alabama Code, Tit. 7, §§ 908-917. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised. See *Ex parte Virginia*, 100 U.S. 339, 346-347, 25 L.Ed. 676; *American Federation of Labor v. Swing*, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855.

See also *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 573, 116 S.Ct. 1589, 1598, footnote 17, 134 L.Ed.2d 809 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.")

3. Further, the law does not support the conclusion that all funerals are private. Funerals can be private. Some are; some aren't. They can also be very public. See *Showler v. Harper's Magazine Foundation*, 222 Fed.Appx. 755, 2007 WL 867188 (10th Cir. 2007), at 7:

> Plaintiffs argue on appeal that the family's mourning over Sgt. Brinlee's death was a deeply private manner. They also maintain that Mr. Turnley acknowledged this by contacting Mr. Stephens to request permission to attend, which he would not have done had he believed it to be a public event. Defendants respond that under Comment a to Restatement (Second) of Torts § 652D, the Plaintiffs left themselves "open to the public eye."

> We agree with Defendants that Plaintiffs opened up the funeral scene to the public eye and can not, therefore, establish that Defendants disclosed private facts by publishing the Turnley Photo. The local newspaper notified the public in advance of the time and place of Sgt. Brinlee's funeral, and it was held in a high school gymnasium to accommodate the large crowd expected to attend. Governor Henry spoke at the funeral, which was attended by 1200 people. Most attendees exited the funeral by first filing past Sgt. Brinlee's open casket. Numerous area newspapers published stories about Sgt. Brinlee's death and funeral. These facts belie the notion that the Turnley Photo revealed information that was private and summary judgment is appropriate on this claim.

Soldiers' funerals routinely are very public affairs, with lots of public participation, public ceremony, and public pomp and circumstance. The facts in this case show the funeral at issue here was not private. Plaintiff started talking to the media immediately upon his son's death. Many stories were written or televised by the media before, about, and after the funeral. The media was out in full force at the funeral – and there is zero evidence that would have been any different in defendants' absence. Given that the media was covering the death of plaintiff's son, with plaintiff's full cooperation, the opposite is true. The funeral announcement was published in at least two newspapers, and online. The public was invited, and they attended, inside and outside the church. The Patriot Guard riders were invited before plaintiff had any idea defendants were going to picket. School children, police officers, fire fighters, and the citizenry at large attended. Stories appeared in the newspaper – and would have with or without defendant

being present. Strangers came to the funeral, going inside. There simply is no factual basis for saying this funeral was private. The facts are not in dispute; plaintiff and his house mate glowingly described all this public participation; plaintiff agreed he talked to the media before and after the funeral, and about his son, his death, and the funeral. It belies logic to say **this** funeral was private, and that is the **only** funeral at issue in this case.

4. Further, defendants did not attend the funeral. They were a thousand feet away, out of sight and sound. They stood on a public right of way, where the police directed them to stand. The record shows defendants routinely notify law enforcement when they are going to picket, and obey police orders about where to stand. The real source of plaintiff's anger – that he is mischaracterizing as emotional distress – is the fact that he disagrees with defendants' viewpoint. Plaintiff knows the funeral was not disrupted, and that defendants did not attend or impact the funeral. This case is about content. That means this case implicates the First Amendment. It is unheard of to allow a plaintiff to sue a defendant, for publishing words, and not allow the defendants to assert a First Amendment defense. (Even if plaintiff did see defendants while they were picketing – a physical impossibility, putting plaintiff's credibility into serious doubt – that does *not* equal disrupting a public funeral under the facts of this case.)

Plaintiff's counsel has argued repeatedly that defendants could have picketed at a park in Kansas. If defendants had stood over a thousand *miles* away in Kansas and held

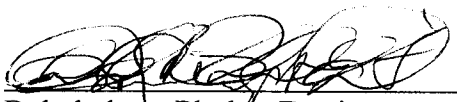
up the very same signs, and published the very same message to the media, *plaintiff would be just as angry*. This is witnessed by the fact that throughout this case, in his deposition, through arguments of his counsel, and in hundreds of e-mail exchanges with people who have written his Web page, plaintiff has bitterly complained about a variety of pickets and messages at a variety of locations all over the country – including things said and pickets conducted by people who are not even parties to this case. Somehow plaintiff has gained the belief that this Court is a forum for him to condemn and attach liability to defendants for everything they believe about God and how He is dealing with this nation. This case is all about content, and only about content. You can't sue someone for content – particularly when the subjects addressed in their content are issues of keen and intense public interest – without invoking the First Amendment. This testimony satisfies the requirement that the information will assist the trier of fact to understand the evidence or to determine a fact in issue, per Rule 702, and is part of the basis of Dr. Balmer's opinion per Rule 703.

5. As to Dr. Balmer testifying about his views and experience related to the First Amendment, that issue should not be decided until Dr. Balmer is questioned about whether this is the type of information an expert of his nature generally would rely on in forming opinions. Dr. Balmer is being called as a person with knowledge and expertise in the historical and religious history of this country, particularly as it pertains to defendants' beliefs and activities – all of which plaintiff is putting on trial in this case. If

experts of that sort rely upon significant historical events, where religious activisim is seen, and that is part of his body of experience that leads him to his expert conclusions and opinions in this case, he should be permitted to testify about it. One of Dr. Balmer's conclusions is that people who believe the Bible is literal have historically been public activists about moral issues in this country. If one of the ways he comes to that expert conclusion is because he has participated in similar kinds of events, he should be permitted to testify to that. There is no basis at this juncture for prohibiting references by Dr. Balmer to the First Amendment, his views about the First Amendment, or the nexus between the First Amendment and people being religious activists. In this record, the opposite conclusion is required, to wit, that this information and testimony is highly relevant to the case and to Dr. Balmer's conclusions and opinions.

This case fully implicates the First Amendment, unless all content is excluded. If all content is excluded, the case is ridiculous on its face. Plaintiff is seeking liability because defendants stood on a public right of way for 30 minutes, out of sight and sound. That clearly does not state a cause of action for *anything*. The motions in limine asking the Court to blind itself to the First Amendment should be denied.

Respectfully submitted,



Rebekah A. Phelps-Davis
Pro Se Defendant
1216 Cambridge
Topeka, KS 66604
785.845.5938
785.233.0766 – fax
beshsncs@cox.net

&

Shirley L. Phelps-Roper
Pro Se Defendant
3640 Churchill Road
Topeka, KS 66604
785.640.6334
785.233.0766 - fax
beshsncs.@cox.net

CERTIFICATE OF SERVICE

We hereby certify that the foregoing response was served on October 12, 2007, as follows:

Copy delivered by regular mail and e-mail to the following counsel, and to the Court:

Mr. Sean E. Summers, Esq.
Mr. Paul W. Minnich, Esq.
Mr. Rees Griffiths, Esq.
Barley Snyder LLC
100 E Market St
PO Box 15012
York, PA 17401

Mr. Craig T. Trebilcock, Esq.
Shumaker Williams PC
135 N George St Ste 201
York PA 17401

Mr. Jonathan L. Katz, Esq.
1400 Spring St., Suite 410
Silver Spring, MD 20910

Rebekah A. Phelps-Davis, Defendant Pro Se

Shirley L. Phelps-Roper, Defendant Pro Se