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.

DEFENDANTS PHELPS-DAVIS & PHELPS-ROPER'S ADDITIONAL AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Rebekah A. Phelps-Davis and Shirley L. Phelps-Roper, as pro se defendants herein, hereby jointly offer additional legal authorities in support of their motion for summary judgment related to the issue of the application of the First Amendment to all of plaintiff's claims.

First Amendment Applies to Tort Claims, Especially Intentional Infliction of Emotional Distress

Plaintiff claims in his response to Defendants' motion for summary judgment that the First Amendment does not apply since the government is not involved in this case. This assertion is simply not true and courts routinely review the applicability of the First Amendment to a variety of tort and contract claims between private parties as shown by the following legal authorities.

In *Tompkins v. Cyr,* 995 F.Supp. 664, 683, N.D. Tex, (1998), the Court reversed a jury verdict for intentional infliction of emotional distress against two abortion protestors

where there was no evidence that those defendants engaged in focused picketing at the plaintiff doctor's house, threatened the plaintiff or otherwise harassed plaintiff by confronting him at restaurants or following him. The Court found that picketing by *marching through the neighborhood or picketing at the corner of plaintiff's neighborhood was clearly protected by the First Amendment*, and set aside the verdict and claims against these defendants.

In *Citizen Publishing Co. v. Miller*, 210 Ariz. 513, 519-521, 115 P.3d 107 (2005) the Supreme Court of Arizona, *en banc*, ruled on an intentional infliction of emotional distress case arising out of the Iraq war. In that case some Muslims sued a newspaper for publishing a letter to the editor where the author recommended going to the closest mosque and executing five of the first Muslims encountered, each time an American solider was killed in Iraq. The Court stated, at *id, 517:*

> The First Amendment to the United States Constitution, made applicable to the states by the Due Process Clause of the Fourteenth Amendment, provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." U.S. Const. amend. I. The landmark case of *New York Times Co. v. Sullivan* recognized that the enforcement of state tort law through civil litigation may "impose invalid restrictions on ... constitutional freedoms of speech and press" and thus constitute state action denying due process of law in violation of the Fourteenth Amendment. 376 U.S. 254, 265, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); accord *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 916 n. 51, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) ("Although this is a civil lawsuit between private parties, the application of state rules of law by the ... state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment."). The Supreme Court has most often applied the New York Times doctrine in the context of defamation actions, but it has expressly recognized that the same First Amendment principles apply to tort suits alleging speech-based intentional infliction of emotional distress. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 56, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988).

...[W]hen speech involves a matter of public concern, the balance changes significantly. "[I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment." Id. When speech is about a matter of public concern, state tort law alone cannot place the speech outside the protection of the First Amendment. See id. (stating that although the intent to inflict emotional distress "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"). This is because "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Id.* at 50, 108 S.Ct. 876; *accord Dun & Bradstreet,* 472 U.S. at 758-59, 105 S.Ct. 2939 ("[S]peech on matters of public concern ... is at the heart of the First Amendment's protection.") (internal quotation marks omitted).

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The letter to the editor upon which Plaintiffs' complaint is based involves a matter of undeniable public concern-the war in Iraq. ....

... [T]he only thing that appears to have resulted from the challenged speech was *more* speech, in the form of numerous critical letters to the editor, including one from one of the Plaintiffs. This is precisely what the First Amendment contemplates in matters of political concern-vigorous public discourse, even when the impetus for such discourse is an outrageous statement. *See Whitney v. California,* 274 U.S. 357, 377, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

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In short, we conclude that this letter does not fall within one of the well-recognized narrow exceptions to the general rule of First Amendment protection for political speech. It therefore follows that the Citizen cannot be held liable under Arizona tort law for publishing this letter. The superior court erred in not dismissing the Plaintiffs' claim for intentional infliction of emotional distress, and we remand this case to the superior court with instructions to dismiss that portion of the complaint with prejudice.

In *Ireland v. Edwards*, 230 Mich.App. 607, 584 N.W.2d 632 (1998), the plaintiff sued her ex-husband's attorney for intentional infliction of emotional distress, defamation, false light and invasion of privacy for public statements the attorney made during the divorce. The court stated at 613: "When First Amendment freedoms are involved, this Court's role takes on added importance." In dismissing all of plaintiff's claims the court stated at 624: "Thus, because all of plaintiff's claims are based on the same statements, and because she cannot overcome the First Amendment limitations regarding these statements, summary disposition was properly granted with regard to all of plaintiff's claims."

In *DeCorso v. Watchtower Bible and Tract Soc. Of New York, Inc.*, 78 Conn.App. 865, 829 A.2d 38 (2003), the court dismissed plaintiff's claim of negligent infliction of emotional distress, finding that the defendant church's alleged acts and omissions in their counseling of plaintiff was protected by the First Amendment.

The Texas Court of Appeals in *Hogan v. the Hearst Corporation*, 945 S.W.2d 246, 25125 Media L. Rep. 2134 (1997), affirmed a lower court's decision to dismiss plaintiff's claim of intentional infliction of emotional distress and invasion of privacy on First Amendment grounds where the defendant newspaper published an article regarding the plaintiff's son being arrested for indecent exposure in the city park, and plaintiff's son subsequently committed suicide. The court also found at 250 that:

> The State may not protect an individual's privacy interest by recognizing a cause of action in tort for giving publicity to highly private facts if those facts are a matter of public record. *Industrial Found. of the South*, 540 S.W.2d at 684; see *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494-97, 95 S.Ct. 1029, 1045-47, 43 L.Ed.2d 328 (1975). Once information is made

> a matter of public record, the protection accorded freedom of speech and press by the First Amendment may prohibit recovery for injuries caused by any further disclosure of and publicity given such information.

In *Brekke v. Wills*, 125 Cal.App.4th 1400, 1409, 23 Cal. Rptr. 3d 609, 617, (Cal.App. 3 Dist. 2005), the court allowed plaintiff's claims of intentional infliction of emotional distress, but only after a full and complete analysis of the application of the First Amendment and after finding the speech complained of was outside of First Amendment protections and was on matters of purely private interest, so there was no threat to the free and robust debate on public issues..

In *Henderson v. Times Mirror Co.,* 669 F.Supp. 356, 362 (D.Colo.1987), *aff'd*, 876 F.2d 108 (10th Cir. 1989), the Court dismissed claims for disparagement and intentional interference with a contract because they were based on an expression of opinion protected by the First Amendment.

In *South Dakota v. Kansas City Southern Industries,* 880 F.2d 40, 50-54 (8th Cir. 1989), the Court concluded that plaintiff could not bring a claim for tortuous interference with a contract, because the claim was based on the defendant's filing of a lawsuit, which is an activity protected by the First Amendment.

In *Eddy's Toyota of Wichita, Inc. v. Kmart Corp.,* 945 F.Supp. 220, 224 (D.Kan.1996), the Court held that letters that constituted expressions of opinion were protected by the First Amendment, and could not form the basis for plaintiff's tortuous interference with contract claim.

In *Compuware Corp. v. Moody's Investors Services, Inc.* ---- F.3d ----, 2007 WL2386565 (6th Cir. 2007), the plaintiff's breach of contract claim was dismissed by the

Court because the defendant's corporate ratings downgrade was opinion protected by the First Amendment.

In conclusion, courts routinely review the applicability of the First Amendment to a variety of causes of action between private parties including intentional infliction of emotional distress, invasion of privacy and other tort claims.

Plaintiff Does Not Satisfy the Elements of Intentional Infliction of Emotional Distress

In Maryland, to state a claim for intentional infliction of emotional distress, the plaintiff must show four things:

1. The conduct must be intentional or reckless.

2. The conduct must be extreme and outrageous.

3. There must be a causal connection between the wrongful conduct and the emotional distress.

4. The emotional distress must be severe.

See *Manikhi v. Mass Transit Administration*, 27 Md.App. 497, 533, 733 A.2d 372, 392 (1999).

As to element one, all of the ***evidence*** (distinguished from the ***characterizations***) in this case show that the defendants stood a long distance from a church, on a public right-of-way, out of sight and sound of anyone going to the funeral,[1] to express religious

[1] Defendants are entitled as a matter of law to reach their intended audience, through their form of expression, including words and symbology, see, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 304-306, 104 S.Ct. 3065, 3074-3075, 802 L.Ed.2d 221 (1984) (sleeping at the Mall and Lafayette Park in Washington to symbolize the plight of the homeless was protected activity given purpose and what it conveyed to the audience). In other words, the choice of location/audience is itself a

opinions about a highly public and very important matter, to wit, the deaths of soldiers in Iraq. They did so with the intent of warning people not to sin. They did so out of a duty to God and man, and to fulfill the Scriptural mandate that they love their neighbors as themselves. There is no evidence of anything beyond this statement, and this statement can not, as a matter of law, satisfy the first element.

As to element two, the basis upon which plaintiff claims the conduct was extreme or outrageous, *necessarily is content*. This is proven by the fact that other people, in the scores (if not hundreds) were *also* invited to stand outside the church – much closer; for a much longer period of time, in full sound and sight of those going to the funeral and the burial – many with placards or other items in hand. Thus, the only thing that could make the conduct extreme or outrageous here, is the content of the religious opinion expressed. As discussed above, that can not, as a matter of law, be treated as extreme or outrageous conduct, because of the First Amendment. Sifted down to its bottom line, the complaint in this case is that defendants would not say that plaintiff's son is a hero in heaven. The Court can not use tort liability to force people to believe or say that. *Maybe* if defendants had gone into the funeral; had uttered the words out loud and prevented the funeral from proceeding as planned; *maybe* there would be something to talk about under this element.

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protected element; defendants recognize the government can put reasonable, tailored, content-neutral time, place and manner restrictions on this element; but it is a protected elements. See, e.g., *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1047-48 (9th Cir. 2006). If this includes those attending the funeral, above and beyond those passing by, those watching the media, the Patriot Guard, etc., so long as they act lawfully – which they did – this is a protected act. Even so, in this case, the people going to the funeral did not see or hear defendants. What plaintiff wants is to prevent defendants from conveying to any family member or funeral goer, ***at any time from any location or platform***, the notions that God is punishing the nation by killing the soldiers, or that the soldier is not a hero in heaven. That goes too far.

Though the Tenth Circuit has said that going into a soldier's funeral, taking a picture of the dead body lying in the coffin, and publishing it for money, is not intentional infliction of emotional distress, in the *Harper Magazine* case discussed in earlier briefs.

(Attempting to use the fact that law enforcement were present to generally keep the peace – and oversee the funeral procession to the church and later to the burial – is not a sufficient basis for saying defendants disrupted the funeral. To do so would allow the heckler's veto to rule the day, which the law does not allow.[2]

Even if elements one and two could be satisfied, plaintiff utterly fails on elements three and four. Plaintiff's own testimony shows that when he became emotionally distressed by defendants' words was not during the funeral. Rather, late that night, he made a choice to turn on the TV, and saw/heard some words he didn't like. This testimony has been previously provided. It's his testimony. It is uncontroverted – even

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[2] *See, e.g., Michael v. City of Granite City, Illinois*, 2006 WL 2539719 (S.D. Ill. 2006), at 5::

> The Supreme Court has held in nearly every case involving a "heckler's veto" that it is not acceptable for the state to prevent a speaker from exercising his constitutional rights because of the reaction to him by others. *See Coates v. City of Cincinnati,* 402 U.S. 611, 615-16 (1971) (state may not punish citizens for engaging in conduct "annoying" to others); *Bachellar v. Maryland,* 397 U.S. at 567 (state cannot punish Viet Nam protestors because of the "resentment" of onlookers); *Gregory v. Chi.,* 394 U.S. 111, 117 (1969) (disorderly conduct conviction cannot stand when defendant acted in an orderly manner but surrounding crowd became hostile). Notably, "even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content." *Thomas,* 534 U.S. at 323. Clearly, a state may not keep law and order by depriving its citizens of their rights, *Cooper v. Aaron,* 358 U.S. 1, 16 (1958), and the City of Granite City could not deny a parade permit *simply* because of the concern about the adverse reaction to the marchers by others.
>
> Although the City certainly is not powerless to prevent imminent violence or lawlessness resulting from a clash between the marchers and onlookers, any curtailment of First Amendment rights must be based on a present abuse of rights, not merely a fear of future misconduct.

by him. He chose to look at some media stories that included the words of the defendants, and it made him angry. From then to now – while he has continued to make his son's death a matter of public interest[3] -- plaintiff has continued in his bitter complaints *about the words* of defendants.[4] There is no legally cognizable causal connection between defendants' proximity and words from 9:25-10:19 (that's the outside time by any account), and the distress plaintiff claims over seeing words *later* that he doesn't like.

As to the severity of the emotional distress, the Maryland courts have said that evidence of this distress must show a "severely disabling emotional response" and that the evidence offered to prove this severe distress must have "evidentiary particulars" beyond a plaintiff having to see a medical provider for being upset. See *Manikhi, supra*, citing *Harris v. Jones*, 281 Md. 560, 380 !.2d 611 (1977).

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[3] Besides all of the media interviews plaintiff has given after he decided to file this lawsuit; besides all of the hundreds of e-mails he has exchanged after he set up a public Web site to continue this public debate **(the table listing and summarizing all these contacts plaintiff has had where the public-at-large sing his and his son's praises and roundly condemn defendants, all as part of an ongoing public debate, is, to date, 124 pages long)**; as soon as he knew his son was dead, plaintiff gave interviews to several media members, causing stories to appear in the media about his son and his son's death. He also called Congressman Murtha to talk about the troops and his son's death. And one week after the funeral he gave lengthy interviews to both York, Pennsylvania newspapers, causing large spreads to appear about his son and his son's death, where he also included his comments that he characterizes as against the war but for the troops.

[4] In an effort to overcome these facts, at the 11th hour, plaintiff obtained an affidavit from a priest at the church. This priest did not officiate the funeral, and on the face of the funeral program, had no involvement. This priest does not identify who supposedly was tense or supposedly commented about the funeral, so his testimony is incompetent for this reason. This priest uses lots of subjective and emotive characterizations, rather than objective statements of fact, which characterizes this case. Opinions – even lots of them, even strongly and colorfully worded – aren't the same as facts. Most important, this priest made a statement that is not physically possible, to wit, his general claim that the picketers were in sight of the funeral procession. Not possible. His entire affidavit should be stricken and rejected.

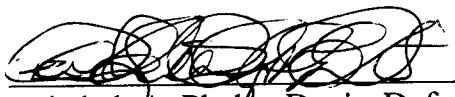
"*Harris* and our subsequent cases have also noted 'two problems which are inherent in recognizing a tort of this character ... (1) distinguishing the true from the false claim, and (2) distinguishing the trifling annoyance from the serious wrong.' [Citations omitted.] In addition, we have made it clear that liability for the tort of intentional infliction of emotional distress should be imposed sparingly, and ''its balm reserved for those wounds that are truly severe and incapable of healing themselves.''" *Caldor v. Bowden*, 330 Md. 632, 642-644, 625 A.2d 959, 963-965 (1993). *Caldor* found that plaintiff had not shown sufficient emotional distress where he was upset, embarrassed, confused, sad, felt bad about himself, and so forth. Further loss of sleep and weight was not sufficient. Most important, plaintiff continued to do the things he had done before.

In this case, as the details from the discovery provided in defendants' summary judgment submissions shows, plaintiff uses lots of strong words to say he is angry at defendants. That's a given, because as he put it in his deposition, he serves a god different from the God served by defendants, so of course he would be angry when defendants articulate what they believe to be the wrath of God against this nation, and the soldiers in Iraq (which would include plaintiff's son). At the same time, he agrees he's doing the same things he did before. He's working; he's socializing; and he's become an activist about stopping defendants. That is not the description of a person disabled by emotional distress. Further, his doctors rely *solely* upon his subjective statements and manifestations of anger and sadness (and can *not* distinguish which part of his being upset is about his son's death compared to how angry he is about defendants' words). The subjective statement – "I couldn't grieve" – doesn't provide objective evidentiary

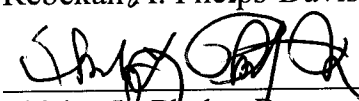
particularities that plaintiff has suffered emotional distress severe enough to state this claim. (Even if he could overcome the First Amendment problems.)

If the Court permits this case to go forward on this claim, when the record shows that this case is about anger over religious words, nothing more, there is no safe speech in this country. There is *not* a rule of law in this nation that you cannot speak to the death of a soldier. There is *not* a rule of law in this country that you must agree that all soldiers are heroes. These soldiers' funerals – at plaintiff's hand, and at others' hands – have been turned into public ordeals. The courts are not properly situated to tell citizens of this nation a) they cannot join that public debate, or b) they have to agree with the majority view that the soldiers are heroes in heaven.

Respectfully submitted,



Rebekah A. Phelps-Davis, Defendant Pro Se



Shirley L. Phelps-Roper, Defendant Pro Se

CERTIFICATE OF SERVICE

We hereby certify that the foregoing supplemental legal authorities was e-mailed to the Court and counsel on October 14, 2007, as follows (and will be filed with the Court October 15).

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