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

ALBERT SNYDER,
Plaintiff,
vs. Case No. 06-cv-1389-RDB

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

DEFENDANTS' MOTION TO RECONSIDER & STANDING OBJECTION

Defendants move for reconsideration and make their ongoing objection as set out below. The Court is obligated to serve as the gatekeeper so that speech which is, as a matter of law, protected, is not sent to a jury, so a jury can find liability based upon its disagreement with speech. The manner in and reasons for which the Court has permitted this case to go to the jury constitutes reversible error as a matter of established law.

1. **First and foremost error in the Court's analysis is treating the subject of defendants' speech as private. There is a test in the law, from the United States Supreme Court, which must be done to determine if speech if public or private. It is not a subjective determination. There is *never* a per se rule – as the Court seems to have ruled (either in the case of a funeral, and/or in the case of speaking of the dead during the period of mourning, whatever that might be).** Further on this point:

a. Plaintiff argues that funerals are per se private. That conflicts with the need to apply the test. (More on this below.) That conflicts with the Tenth Circuit's opinion in *Showler* (the soldier funeral case provided to the Court on 10/15 in open court and numerous times in filings in this case). That conflicts with the facts of this case. Ask the plaintiff's counsel to produce the document or fact that shows this funeral was intended to be private. There are no facts!

b. If there is a per se rule about funerals – that is, they are as a matter of law, per se, private – *why* is it that in 40 states, and through three laws in Congress, the legislative bodies of this country have *balanced* the *right* to picket *a funeral* against the right to have the funeral without disruption? Why did Maryland limit that space to 100 feet if funerals are per se private? Or if mourning is per se private? Or if speaking of the dead is per se disallowed?

c. The Court is required, as the gatekeeper, to do the analysis – **that is, apply the test** -- the Supreme Court has commanded in the very case the Court keeps referring to, to wit, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 105 S.Ct. 2939, 2946-2947, 86 L.Ed.2d 593(1985), where the Court said:

> The only remaining issue is whether petitioner's credit report involved a matter of public concern. In a related context, we have held that "[w]hether … speech addresses a matter of public concern must be determined **by [the expression's] content, form, and context … as revealed by the whole record**." *Connick v. Myers,*

> *supra*, 461 U.S. at 147-148, 103 S.Ct. at 1690. These factors indicate that petitioner's credit report concerns no public issue. [FN8]
>
> [FN8] The dissent suggests that our holding today leaves all credit reporting subject to **reduced** **[not zero or no]** First Amendment protection. This is incorrect. The protection to be accorded a particular credit report depends on whether the report's "content, form, and context" indicate that it concerns a public matter. (Emphasis added.)

This means *a credit report* could be a public topic with the right content, form and context. See also *Hugger v. Rutherford Institute*, 94 Fed.Appx. 162, 2004 WL 765067 at 3 (4th Cir. 2004):

"Whether ... speech addresses a matter of public concern [or of purely private concern] must be determined by the [expression's] content, form, and context ... as revealed by the whole record." *Connick v. Meyers,* 461 U.S. 138, 147-148, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *see also Greenmoss,* 472 U.S. at 761; *Blue Ridge Bank v. Veribanc, Inc.,* 866 F.2d 681, 686 (4th Cir.1989) ("Because of the obvious importance of banks to the financial health of our communities and the historic governmental interest in the operations and solvency of these institutions, we have no difficulty concluding that ... statements [regarding the financial condition of a community bank] relate to a matter of public concern."); *Mutafis v. Erie Ins. Exch.,* 775 F.2d 593, 595 (4th Cir.1985) (holding that an insurance company's interoffice memorandum instructing its employees on how to handle a certain claim "was on a matter of purely private concern"). Thus, if TRI's press release relates to a matter of public concern,

d. In this case, applying the test:

- **Content**

i. Religious speech "God is killing these soldiers for the sins of this country". This is not commercial speech, it is protected religious speech.

ii. A series of signs which clearly, by their content, are religious in nature.[1]

iii. A series of signs and statements that clearly, by their nature, pertain to such topics as how God is dealing with this nation; why the soldiers are dying; how to stop the soldiers from dying; divorce (which has had enormous impact on the country); and the Catholic Church priest sex scandal. All of these topics are of great public concern.-518, 115 P.3rd 107 (Ariz. 2005): "The letter to the editor upon which Plaintiffs' complaint is based involves a matter of undeniable public concern – the war in Iraq."

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[1] The signs are: (Signs held by defendants): Don't Pray for the USA; God Hates Fags; God Hates You; God Hates America; God's View/Not Blessed Just Cursed. (Signs held by non-defendants): Pope in Hell; God Hates the USA (back side: Thank God for 911); You're Going to Hell; Fag Troops; Thank God for Dead Soldiers; Thank God for IEDs; Priests Rape Boys.

iv. An epic posted on the Internet, which fleshes out the concepts articulated by the signs, with words the Court has found as a matter of law are not defamatory (by granting summary judgment), because they are statements of opinion.

v. Arising out of an ongoing war. Speech on the war is clearly a public issue. E.g., *Citizen Publishing Co. v. Miller*, 210 Ariz. 513, 517-518 (Ariz. 2005). The Court has said as much repeatedly. (E.g., on 10/15 the Court said if the signs had said "bring the troops home" that would be public speech.) Defendants' speech is about the war. The problem is that the Court apparently thinks it is a *viewpoint* about the war that is unacceptable, to wit, the war is happening, and the soldiers are dying in the war, because of America's sins. (It should be noted that the speech about the war in *Citizen Publishing, supra* was a person writing a letter to the editor saying, every time a soldier is killed, an American should go to a Mosque and kill five Muslims. That is certainly a different take on the war than "bring the soldiers home," and certainly is far more likely to be targeted to individual people and cause harm. Yet the court found this was protected speech.)

- **The Form**

i. Public assembly on public fora (public streets are quintessential public forums," *Frisby v. Schultz*, 487 U.S. 474, 480, 108 S.Ct. 2495, 101 L.Ed.2d 420 [1988])

ii. Peaceful religious gathering where all laws were obeyed; one in a long series of over 17 years

iii. A thousand feet away from the church where the funeral was held, and hundreds of feet from away hundreds of other people gathering using their free speech rights

iv. Weeks after the funeral on the Internet

v. Activities that are traditionally highly protected under the law, including picketing and publishing commentary on the Internet

- **The Context**

i. Public notice of the funeral in the newspapers (at least three large newspapers and an Internet posting)

ii. Hundreds and hundreds of "counter protestors" lining the streets

iii. Strangers going to the funeral

iv. Newspaper articles about plaintiff's son before and after the funeral

v. Public police presence to keep the peace and ensure all things are orderly

vi. A recent history of thousands of soldiers dying, a topic of national and international dialogue

vii. A recent history of hundreds of funerals which were high-profile public events

viii. A lot of concern in the country about the soldiers dying.

ix. The plaintiff himself asking in the media before the funeral when the soldiers dying is going to stop

2. For the first time on October 22, 2007, the Court indicated the jury would be told that speech which is "vulgar," "offensive," or "shocking" receives less protection. Doing this in the context of this case is reversible error.

a. **The plaintiff has not alleged the language was "vulgar," "offensive" or "shocking."** That is not the language of the torts at issue; this language is even broader than the language of the torts; and telling the jury from the outset of the case that they can find defendants liable for using language which *they subjectively think* is "vulgar," "offensive" or "shocking" is reversible error in the extreme.

b. **This language is particularly misleading given that these are terms-of-art in First Amendment law; and the jury is given no definition of any kind, let alone a legally-grounded definition.** *Anyone* can say the words they don't like to hear fit this description. To say these words at the outset of this case

underscores the failure of the Court to fulfill its gatekeeper role; and opens up religious speech wide open to being punished (civil is the same as criminal—that's settled in the law and this record) *simply* because the jurors don't like the words. Whether you say that is because the words were said about the dead, or because the words are offensive to most today in any context, either way it amounts to punishing and prohibiting the free exercise of religion.

c. Indeed, **many people could claim they think the entire Bible is "vulgar," "offensive" or "shocking"** – especially if those words are left to a layman's meaning (vs. the legal meaning of the words). See Attachment A hereto with scores of verses with words that any person could say they find "vulgar," "offensive" or "shocking." These words include frequent use of such things as various forms of "piss;" numerous references to "dung;" many references to God slaughtering people; references to dead carcasses; references to people eating their own babies/children/family members; numerous passages using the word "whore" and its derivatives; numerous passages referring to people as perverts; references to people as "sons of Belial" and "bastards;" references to cutting off body parts if they offend you (these are Christ's words); numerous references to hell with various descriptors, including gnawing your tongue for pain, fire coming out of your eye sockets; the smoke of your torment ascending up forever. Not to mention scores of verses referring to God's hate, anger,

wrath, judgment, and covenant with mankind to curse them if they disobey him, in the most graphic language, including through pestilence, famine, sword and the whirlwind. These are just a few examples of the subjects which many could call "vulgar," "offensive," or "shocking." Attachment A has a number of illustrations.

d. This language – "vulgar," "offensive" or "shocking" -- comes from *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). The *FCC* case has zero comparability to our case for at least these reasons:

   i. That case – which pertained to comedian George Carlin's "Filthy Words" -- arises in the context of broadcast communication. The Court spoke in great detail in *FCC* about the fact that the First Amendment has "special meaning" in broadcasting context. E.g., syllabus 9; e.g., footnote 2 saying broadcasting requires special treatment because of four important considerations: 1) children have access to radios and in many cases are unsupervised by parents; 2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference; 3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast;[2] and 4)

[2] The front page of www.godhatesfags.com has a clear warning that the gospel preaching ahead may be offensive to today's society.

there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Also see footnote 17.

ii. The speech at issue had no political or social value according to the record. By sharp contrast here the speech is about critical issues of public importance, including the war, the soldiers dying, how God is dealing with this nation, divorce (which has had an enormous impact on this nation), and the Catholic priest sex abuse scandal. Speaking up on ways to prevent these kinds of horrific woes for the nation has great political and social value – even if you don't agree with the speaker's proposal about how to do so.

> But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even the fact that it satirized contemporary attitudes about four-letter words—First Amendment protection must be required. But that is simply not this case. These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. at 572, 62 S.Ct. at 769. (438 U.S. at 745-746; 98 S.Ct. at 3038-3039.)

iii. The words were readily available to children without supervision, as noted above. The Fourth Circuit has noted that *FCC* applies only to broadcast words dealing with sex that was accessible to children, see *Psinet v. Chapman*, 362 F.3d 227, 234 (4th Cir. 2004).

e. Further, as to "offensive" speech, the United States Supreme Court very recently said this in connection with upholding restrictions on speech by a school of its student (where much more leeway is given):

> Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in *Fraser*.[3] See Reply Brief for Petitioners 14-15. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of "offensive." **After all, much political and religious speech might be perceived as offensive to some.** The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use," *Morse v. Frederick*, 127 S.Ct. 2618, 2629 (2007). (Emphasis added.)

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[3] In *Fraser* the Court established an exception to the rule of law from *Tinker* – all of these cases arising in the context of speech by and directed to youth, in the school setting. *Tinker* established that school officials could limit speech that was disruptive to the school proceedings, and this is a unique body of law that pertains only to schools. *Fraser* modified that rule saying if the speech was lewd, vulgar and plainly offensive rubric, and was unrelated to any political viewpoint, this speech could also be limited in the schools. Hence, here in *Morse* the school tried to stretch *Fraser* to speech that was just plain offensive could be prohibited, and even in the school setting – where "special characteristics of the school environment" justify limiting speech – the Court would not go so far as to say speech which is simply offensive could be limited. And, even in the context of the special environment of schools, **the Supreme Court held in *Tinker* that the First Amendment was violated when a student was not allowed to wear black armbands protesting the Viet Nam War**. See *Morse v. Frederick, supra*, 127 S.Ct. at 2626-2627 (2007).

f. Even if this speech were so offensive it amounts to what many argue is "hate" speech, it is still protected, and characterizing it as "offensive" does not take it out of that realm:

> Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. **Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.** Under a rule like the Louisiana rule, permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, "it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded." Noel, Defamation of Public Officers and Candidates, 49 Col.L.Rev. 875, 893 (1949).

Garrison v. Louisiana, 379 U.S. 64, 73, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964). See also *Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56, 108 S.Ct. 876, 882, 99 L.Ed.2d 41 (1988), where in the context of a claim for intentional infliction of emotional distress the Court said:.

> .... And, as we stated in *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978): **"[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.** For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." (Emphasis added.)

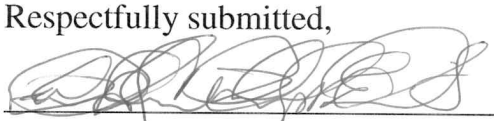
Using the language "vulgar," "offensive" or "shocking" in opening comments to the jury, or at any other time, misapplies the law to this case, in a manner that is highly prejudicial and constitutes reversible error.

3. We object and move for reconsideration of the Court's decision allowing the jury to determine whether their religious words are actionable, as highly offensive or extreme and outrageous or the source of emotional distress. For all the reasons previously said, and all the reasons set out below, this speech of defendants – whether picket signs, the epic, or statements to the media – was all speech of a religious nature, on public matters. As a matter of law, the fact the words may offend, or be considered outrageous or extreme, or cause emotional distress, are not sufficient to remove them from the full protection of the First Amendment. The Court continues to base it's on decision on 1) the concept that the words were offensive (by various words), and 2) the words were about a private matter. As a matter of law, and particularly on the facts of this case, that is simply plain error.

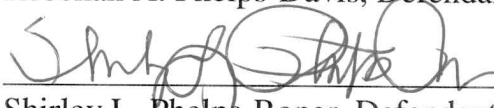
The Court has specifically indicated that distance and passage-of-time are not the issues in this case; rather **the content of the words are the issue**. Please see at least pages 21, 27, 41-44, 56-58, 62, 69-70 and 128-134 of the October 15, 2007 hearing (transcript). Thus the Court continues to fail to have a *reasonable* time, place and manner restriction on speech. (Whether the government action is in the form of an injunction, in the form of a law with criminal penalties attached,

or in the form of a court applying civil penalties—since even speech on issues of private concern have some protection, there must be a *reasonable balancing* of the rights.) The rule of law the Court has imposed is so vague, ambiguous and broad, that it would be impossible for any person to know how to avoid tort liability.

Respectfully submitted,



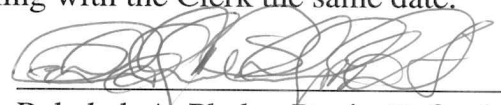
Rebekah A. Phelps-Davis, Defendant Pro Se



Shirley L. Phelps-Roper, Defendant Pro Se

CERTIFICATE OF SERVICE

We hereby certify that the foregoing motion was served on October 23, 2007, by hand delivery in Court to counsel and filing with the Clerk the same date.



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