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.

BRIEF OF ARGUMENTS AND AUTHORITIES IN SUPPORT OF:
DEFENDANTS PHELPS-DAVIS & PHELPS-ROPER'S
POST-TRIAL MOTIONS, INCLUDING:
MOTION FOR JUDGMENT AS A MATTER OF LAW;
MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT;
MOTION FOR RECONSIDERATION AND REHEARING;
MOTION TO ALTER OR AMEND THE JUDGMENT;
MOTION FOR NEW TRIAL AND/OR REMITTITUR;
MOTION FOR RELIEF FROM JUDGMENT;
AND/OR
MOTION FOR ANY OTHER RELIEF IN LAW AND EQUITY
WARRANTED UNDER THE FACTS AND LAW

Rebekah A. Phelps-Davis and Shirley L. Phelps-Roper, as pro se defendants herein, hereby jointly move for post-trial relief, including judgment in their favor, in full, on all counts and theories, as a matter of law; judgment in their favor, in full, on all counts and theories notwithstanding the verdict; reconsideration and rehearing on all counts, issues and theories; an order altering or amending the judgment on all counts, issues and theories; relief from judgment on all counts, issues and theories; new trial on all counts, issues and theories; strictly in the alternative and under protest, remittitur of the compensatory damages and of the punitive damages; and/or, any other relief

warranted in law and equity, under the laws and facts of this case; all pursuant to Rules 50, 52, 59 and 60, Fed.R.Civ.P., and all other applicable rules and authorities; and ultimately relief from the verdict of October 31, 2007 and the related judgment of November 5, 2007, with a full setting aside of the same. In submitting this motion and brief of arguments, defendants are not waiving any other issue on appeal which may not be specifically addressed herein.

Defendants submit the following brief with legal arguments and authorities in support of this motion is submitted herewith:

Introduction

The verdict of October 31, 2007 and related judgment of November 5, 2007, is the product of passion, prejudice and bias, based specifically and exclusively upon disagreement with defendants' religion; it was brought about by a series of wrong rulings with respect to First Amendment and other issues; and is the result of the manifest bias of the Court and plaintiff's counsel, contained in the record, wrongfully mocking and denigrating defendants' religious beliefs. Further, there is no basis in law or fact for the fact or amount of the verdict; it is not supported by any evidence that would warrant any verdict, let alone an outrageous verdict of this size. The fact that this case was submitted to a jury violates various rules of law related to the gatekeeper role of the trial judge and related to the First Amendment. In addition to a verdict that punishes speech based on content, the verdict also constitutes a violation of the Free Exercise Clause of the First Amendment in that it clearly targeted one religious viewpoint, as reflected in the Court's comments before and during trial; plaintiff's counsels' comments before and during trial;

the jury questions; and the irrational amount of the verdict. This is the most egregious violation of the First Amendment likely in the chronicles of American jurisprudence, and it cannot stand.

Defendants have filed numerous briefs and other pleadings with this Court; and made as many arguments as they could/were allowed in open courts (given the intensely hostile nature of the Court towards defendants, and the fact that from time-to-time the Court simply cut off defendants when they endeavored to make a record). All such previous filings, arguments and authorities are incorporated here, in full, as though set out verbatim, including but not necessarily limited to: proposed jury instructions (which defendants are not able to find on the Court's docket sheet, though they were submitted; perhaps those have not been entered in the Court file as of this time); Doc. Nos. 194 (mistrial motion); 193 (motion for relief); 191 (motion for reconsideration and standing objection); 188 (response to MIL regarding jury bias); 187 (response to MIL regarding various exhibits); 182 (motion to clarify, etc.); 180 (motion for change of venue); 172 (additional authorities in support of motion for summary judgment); 169 (response to MIL regarding sexual activity); 168 (response to MIL regarding First Amendment defense); 164 (MIL by defendants); 150 (reply regarding motion for SJ); 137 (discovery issue); 125 (motion for summary judgment); 123 (sealed document in support of MSJ); 108 (motion to reconsider); 104 (transcript of May 29 proceedings by phone); 80 (reply regarding motion to dismiss or for SJ); 76 (motion to dismiss or for SJ); 72 (motion to stay); 26 (WBC/Phelps reply regarding motion to dismiss); 23 (motion to dismiss); plus all arguments made during phone conferences, including but not necessarily limited to

September 14, September 12, July 30 and May 29, 2007; plus all arguments of October 15, 2007, and all arguments during trial.

All of the points of error in allowing this case to go forward and proceed to jury trial which are reflected in all of the foregoing, and at any other point in this record, are incorporated here as though set out herein. In addition, defendants submit these further arguments and authorities:

Damages

The verdict and related judgment for alleged damages in this case should be set aside; and/or a new trial should be allowed because of the various factual and legal flaws in the verdict; and/or, strictly in the alternative, under protest, defendants move for remittitur, for at least these reasons:

1. The amount of the verdict reflects that it is the product of extreme passion and prejudice. This is supported by the hostility that permeated the proceedings, by the Court and plaintiff's counsel; the extreme mocking and denigration of the core beliefs of defendants throughout these proceedings, including in questions to witnesses and arguments to the jury, which were fully content-based, and went well beyond anything the plaintiff claims to have experienced or claims caused him injury. A verdict which is the product of passion and prejudice can only be cured by setting it aside and/or a new trial.

2. The amount of compensatory damages awarded violates the statutory cap under Maryland law for noneconomic damages of $350,000. See Maryland Code, Art. 11, § 108 (non-economic damages includes nonpecuniary injury; "In any action

for damages for personal injury in which the cause of action arises on or after July 1, 1986, an award for noneconomic damages may not exceed $350,000"). Plaintiff has not claimed any economic injury; instead, he has only claimed an indefinable emotional injury and exacerbation of diabetes.

3. Further, the amount of compensatory damages, even if remitted to the $350,000 statutory cap, is not warranted by the evidence. The evidence – in the light most favorable to plaintiff – supports nothing but a slight increase to depression and diabetes, both of which pre-existed, and both of which are very well under control even with the combination of his son's death and his alleged injuries because he didn't like defendants' words.

4. With regard to punitive damages, the instruction given by the Court was not sufficient to provide a clear standard for assessing and determining the amount of punitive damages; as such, the jury was left to insert its extreme passion and hatred for defendants' religious views into the equation, and render a runaway and absurdly large verdict, all contrary to the requirements of due process through the Fifth Amendment. See *Darcars Motors of Silver Spring, Inc. v. Borzym*, 150 Md.App. 18, 65-66, 818 A.2d 1159, 1185-1186 (2003).

> As the law historically focused on the evil of excessive punitive damages awards, the common law of Maryland has always provided a defendant with the right to seek a reduction, initially from the trial court and, should that effort fail, from the appellate court. "[L]ike any award of damages in a tort case, the amount of punitive damages awarded by a jury is reviewable by the trial court for excessiveness." *Ellerin v. Fairfax Savings*, 337 Md. 216, 242, 652 A.2d 1117 (1995); *Bowden v. Caldor*, 350 Md. At 21, 710 A.2d 267. In line with the relatively recent Supreme Court decisions in *Pacific Mutual Life*

> *Insurance co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); and *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). Maryland now recognizes that a defendant also enjoys an additional constitutional right, under the Due Process Clause of the Fourteenth Amendment, not to be subjected to an excessive punitive damages award. *Alexander v. Evander*, 88 Md.App. 672, 709-15, 596 A.2d 687 (1991); *Bowden v. Caldor*, 350 Md. At 25-26, 710 A.2d 267.

5. In addition to violating due process because of its excessiveness, the punitive damages award violates due process because the jury could have – and obviously did – consider alleged harm to others and/or other matters beyond what injury plaintiff allegedly experienced. Plaintiff and the Court put every core belief of these defendants on trial, and the bulk of the closing argument was a full attack on these religious beliefs, up to and including arguing that this was a case that pitted 300 million Americans against the 70 members of Westboro Baptist Church. See *Philip Morris USA v. Williams*, ---- U.S. ----, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007).

6. Under Maryland law, a trial judge should not hesitate to set aside a jury's verdict, where it is so grossly excessive as to be explainable only on the basis of sympathy or prejudice. See *Ford Motor Co. v. Mahone*, 205 F.2d 267, 272-273 (4th Cir. 1953).

7. Further, under Maryland law, reference to religion to inflame the passions of the jury is improper and prejudicial, and should result in mistrial and/or a new trial. See *Tierco Maryland, Inc. v. Williams*, 381 Md. 378, 410-412, 849 A.2d 504, 523-524 (2004). "Respondents employed race overtly to overwhelm the material

issues of provocation and of the reasonableness *vel non* of the actions of the Six Flags employees. It is apparent to us from our review of the record that the focus of the trial shifted to the propriety of the decision not to let Shaniqua enjoy the ride." Equally, here, it is apparent from the record that the focus of this trial shifted from any injury plaintiff may have actually suffered, to what defendants believe, with plaintiff's counsel and the Court becoming more overt throughout the trial in their mocking and attack of defendants' religious beliefs and practices.

8. Under Maryland law, punitive damages have to be supportable under the facts. See Maryland Code, Art. 10, § 913. The undisputed evidence in this case is that the combined net worth of the defendants is less than $1 million, which the Court acknowledged in addressing the jury. In light of that, the Court should not have allowed the punitive damage issue to be submitted to the jury; and the only remedy at this time is for the Court to wholly set aside that verdict (and the related judgment). Further, at a minimum, actual malice must be shown to recover punitive damages in Maryland. Although actual malice is not adequately defined in Maryland law, and was not adequately defined in the Court's instruction, there is zero evidence in this record that defendants acted with any kind of malice. All of the evidence is in one direction – defendants acted out of a desire to serve God and to do their duty to their fellow man on important and vital issues of public interest and eternity. It is *not* for this Court or *any* jury to determine whether that religious view and practice by defendants is correct. That is the great wrong in allowing this case to go to a jury. Not only was the jury allowed to determine

whether this religious view and practice is proper – clearly they like most Americans think not – but plaintiff's counsel and the Court openly mocked the religious view throughout the trial, and increasingly as it came time for the evidence to conclude and for arguments. Hatred of the religious viewpoint and arguments are *not* evidence.

9. Although there are not sufficient standards under federal and Maryland law combined, either pre- or post-verdict, per the requirements of the United States Supreme Court, to prevent an excessive, unsubstantiated, ungrounded, runaway verdict – such as the one in this case – the standards that are found in Maryland law were clearly not followed in this case, and an application of those standards coupled with the legal duty of the trial court to review the award *de novo*, reflects that this award and related judgment is unwarranted, excessive, the product of passion and prejudice, and must be set aside. Regarding the requirement for due process that there be adequate safeguards and standards in place, and full review *de novo*, see *Fox v. Encounters International*, 2006 WL 952317 (4th Cir. 2006); *Johnson v. Hugo's Skateway*, 974 F.2d 1408 (4th Cir. 1992); *Mattison v. Dallas Carrier Corporation*, 947 F.2d 95 (4th Cir. 1991).

10. A good overview of the standards that do exist in Maryland law is found in *Bowden v. Caldor, Inc.*, 350 Md. 4, 710 A.2d 267, where a $9 million punitive damages award was remitted, and where although the reasons for the remittitur were not upheld, the need to remit was, and the case was remanded for further

proceedings under these standards. A review of the standards found in *Bowden* reflects that the punitive damages award is unwarranted.

Maryland law says the amount of punitive damages must not be disproportionate to the gravity of the defendants' wrong. 710 A.2d at 278. Defendants followed the law; stayed in public places; and said what they believe to be true according to the Sciptures. The only way you get to *any* wrong, let alone grave wrong, is by hatred for the religious viewpoint.

Maryland law says the amount of punitive damages should not be disproportionate to the defendant's ability to pay. 710 A.2d at 278-279. "The purpose of punitive damages is not to bankrupt or impoverish a defendant." 710 A.2d at 278. Of course, the stated purpose of plaintiff is to bankrupt and impoverish defendants, so they will stop saying words plaintiff doesn't want to hear. This religion-bias obviously rubbed off on the jury.

Maryland law says that the deterrence value of the amount awarded should be considered. 710 A.2d at 279. The problem with applying that factor here is that the law does not allow parties to use civil court actions to silence protected activity. There is no history by defendants of noncompliance "with known statutory requirements," and in fact the evidence shows the opposite – defendants always comply with the law, and self-regulate in terms of reasonable (and beyond) time, place and manner restrictions. The record in this case (as discussed further below) shows that there is *no* time, place or manner in which plaintiff would be

satisfied, or which the Court would apply. Hence the jury was given the legally flawed open-ended power to try to punish to the point of silencing.

The proper way to analyze the deterrence factor is shown in Maryland law, to wit, consider what a comparable criminal fine would be, since punitive damages are, in essence, civil fines. 710 A.2d at 279-280. While the evidence of the Maryland law was disallowed and obscured wrongfully in this case, in fact there is a Maryland statute that applies. Maryland Code, Art. 10, § 10-205 regulates funeral picketing, including any obstruction, hindering, impeding or blocking of a person's entry to or exit from a funeral; addressing speech to a person attending which would produce an imminent breach of the peace; and picketing within 100 feet. This is clearly a very applicable criminal provision (in spite of the wrongful distinction made throughout this case, addressed further below). The criminal fine is $1,000 for one occurrence. Even if you multiplied that figure times seven for all seven WBC members present on March 10, 2006, ten times further away than the law allows, blocking no one and directing speech towards no one going in or out, the jury's verdict of $8 million in punitive damages is 1,142.8 times the size of a $7,000 fine. Clearly this is grossly excessive. Maryland law says substantial deference is to be given to the legislative judgment reflected in this law, see 710 A.2d at 280. The criminal law covers identical conduct; the jury should have been given this statute as a standard to follow; the failure to allow this information to get to the jury is partly what caused the grotesquely excessive verdict.

Maryland law says a comparison should be made to other punitive damages awards, especially in comparable cases. 710 A.2d at 280-281. Of course there is no comparable case, because in this country you don't – as a rule – put people on trial for their religious beliefs. In *Bowden* the court noted that the largest punitive damages award that had been upheld by that court was $700,000. Others were in the amount of $100,000, $40,000, $35,000 and $20,000. "We recognize that the awards involved in the older cases cited above, if adjusted for inflation, would be larger in terms of present dollars. Nonetheless, a multi-million dollar award of punitive damages is entirely beyond the range of punitive damages awards previously upheld by this Court." 710 A.2d at 281.

Maryland law says where separate torts are alleged out of a single occurrence or episode, that fact should be considered when reducing punitive damages awards. 710 A.2d at 282. In this case, lots of questions were put on the verdict form – with no guidance, and no requirement that the jury articulate which words they relied on for finding liability – giving the jury many opportunities to keep adding millions of dollars. All of this over a very small collection of words that plaintiff didn't like. Clearly this is contrary to Maryland law. The piling on is manifest, extreme, and the product of passion and prejudice.

Maryland law says the reasonable costs and fees incurred by plaintiff should be provided to the jury, which would give them the "'aid of one fairly definite factor which they may take into account in fixing the amount' of punitive damages," 710 A.2d at 283. That would have at least provided *one* standard in

this case. Since the compensatory damages award was so far beyond the evidence – there was *zero* evidence left to justify the punitive damages award. In this case, plaintiff has maintained a Web page through his attorneys, through which he has solicited funds throughout these proceedings. That information should have been given to the jury. Further, his attorneys have stated publicly they are doing this case pro bono, so plaintiff has not incurred fees. This factor militates against this ridiculously large verdict, and further underscores it is the product of passion, prejudice, bias, and religious hostility.

Maryland law says that the ratio of punitive damages to compensatory damages should be considered. In this case, since Maryland law limits nonpecuniary damages to $350,000 (which amount the evidence does not in any way support in this case, given the very vague and limited nature of any alleged injury), that is the figure – at most – that should be considered for the ratio. That means that the punitive damages of $8 million were 22.8 times the amount of proper (at most) compensatory damages. Again, a strong indication that this verdict was the product of passion, prejudice, bias, and religious hostility.

The standards set out in *Bowden* mandate a new trial (or strictly in the alternative, under protest, a remittitur). There were no life-threatening injuries here and in fact no permanent injury. There was no pecuniary loss. The events were of very short duration, and no matter how much anyone involved in this case dislikes it, were nothing but a small collection of words flowing from the religious beliefs of these defendants, in public arenas. There is no method by which the

jury could have determined the arbitrary figures awarded – as to compensatory damages or punitive damages. The award is over a thousand times higher than the highest criminal penalty that could have been assessed. This is clearly a runaway verdict, based solely upon passion and prejudice, and it (as well as the related judgment) must be set aside. It is an indictment of what defendants believe, nothing more or less.

11. The jury instructions on punitive damages were not adequate; they did not define actual malice and other key terms properly; they did not inform the jury that it could not use its religious bias as a basis to compute punitive damages; they did not provide any basis on which to compute punitive damages; they did not include the standards of Maryland law such as they exist; and they did not reflect the requirement that punitive damages not be excessive.

12. The instructions did one thing right, which the jury *completely* disregarded, to wit, they told the jury they could not award punitive damages in an amount that bankrupted the defendants. Of course, the jury was so inflamed by the time they went to deliberate, by the improvident arguments of counsel and the demonstrated bias of the Court, they most likely did not even hear the instructions. They certainly did not follow them.

First Amendment Issues

Defendants have raised First Amendment issues throughout this case. As noted above, all those previous arguments and authorities are incorporated herein in full, by this reference, as though set out herein. All of the detailed arguments and authorities will not

be repeated here, therefore, and instead these are a recap of the error that occurred in this case as far as the First Amendment is concerned.

13. The Court continued throughout this case to make a distinction between criminal and civil cases, to suggest the First Amendment had no or less application. Further, plaintiff made these arguments to the jury, in questions to witnesses and in arguments. That is a flawed legal position. The Supreme Court has repeatedly indicated that a civil tort action is *the equivalent* of a statute, ordinance or injunction, in terms of what constitutes a government regulation. In other words, the government regulation is found *equally* in the civil tort action as it is found in the legislative act or an injunction. See *Cohen v. Cowles Media Company*, 501 U.S. 663, 668, 111 S.Ct. 2513, 2517-2518, 115 L.Ed.2d 586 (1991); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916, fn 51, 102 S.Ct. 3409, 3427, 73 L.Ed.2d 1215 (1982) ("Although this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment. *New York Times v. Sullivan, supra,* at 265, 84 S.Ct. at 718.") This issue is too well settled to justify the error on this issue in the instant case. It was simply prejudicially misleading to the jury, and an error of law by the Court, to treat this case as not covered by the First Amendment with its full force, and all its principles of law.

14. This case was all about content. Earlier in the case, plaintiff would claim it was not. Then upon receiving clear signals from the Court that content would be

allowed, and strategic suggestions about how to sweep in all of the religious beliefs (e.g., by an allegation, totally unwarranted from any evidentiary source, that defendants contrived meanings and intents for this lawsuit, thus leading to the need to *defend against that attack* by showing that the religious beliefs are long standing, pervasive, and well-established, all of which inflamed the jury as hoped by the plaintiff), content came to full bloom. This case was all about content, from start to finish, and *content* is the sole basis for the verdict. The evidence was clear that – in the multitude of words, signs and other public displays associated with the premature death of plaintiff's son – it was defendants' words alone with which he took exception and about which he sought the court's (government's) punishment. Thus, as a content-based – instead of content-neutral – regulation, it is subject to the strictest scrutiny. That means the government interest must be compelling, and the regulation must be the most narrow necessary. See, e.g., *Denver Area Educational Telecommunication Consortium, Inc. v. FCC*, 518 U.S. 727, 797-799, 116 S.Ct. 2374, 2412-2413, 135 L.Ed.2d 888 (1996); *RAV v. City of St. Paul, Minn.*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Of course, it is absurd to talk about a narrow regulation within the four corners of this case. The opposite is what happened.

15. Further, because the case also targeted religious speech and practices – above and beyond mere speech – the regulation this case imposes is subject to the strict scrutiny and narrowly tailored requirements for this further reasons. See *Church of the Lukami Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217,

124 L.Ed.2d 472 (1993). Again, this case cannot survive the strict scrutiny analysis.

16. The Court has persisted throughout this case in treating the speech at issue as private. This has been addressed extensively by defendants, including in Doc. 191, all of which previous filings, arguments and authorities, are fully incorporated here. Funerals, as a matter of law, are not per se private. The Tenth Circuit in the *Showler* case found that a soldiers' funeral from the current war was public. *Greenmoss*, the case the Court repeatedly referred to, requires a specific analysis (see this detailed discussion in Doc. 191). The analysis was never done; and the conclusion that this speech was private is flawed, as a matter of fact and law. The facts show that the funeral itself was public. The facts show that plaintiff inserted himself into the vortex of the controversy – about soldiers' deaths in Iraq and Afghanistan – with a desire to impact the outcome. More important, the facts show that the media covered *this* death and funeral, extensively.[1] The facts show the media is covering the soldiers' deaths and funerals nationwide extensively. The facts show the Patriot Guard riders were present, and planned to be present before anyone had the slightest hint that defendants would be present, at the request of plaintiff's family. The facts show the citizens of the community

[1] On Friday, November 2, 2007, *20/20* aired a segment about WBC's picketing ministry. This segment included footage of the funeral of plaintiff's son. This footage was not known or available to defendants before that airing. A copy is submitted herewith. This is new evidence which is another basis for a new trial. This footage shows that the media was present filming the procession, with defendants no where in sight, and in fact it appears to be as the procession is leaving the church (long after defendants were gone). This is further proof that the media was covering this funeral independent of anything defendants did. See footage on DVD submitted herewith as **Attachment A**.

lined up for 15 miles to sound off on this soldier's death and funeral. Everyone in the round world is talking about the soldiers' deaths and funerals – the number of deaths, the types of deaths, the causes of deaths, the meaning of deaths, the relative likelihood of deaths given this or that political/military strategy, etc. – flood the media and public dialogue daily. The speech in this case is public speech.

17. Even if the speech had a private component, the way to address that is to *balance* the privacy rights/needs (assume for this paragraph that is an element in this case and is a legitimate government interest) with the right of defendants to picket. Of course, the Maryland legislature already did that. But defendants did it too, and more so, by being at least a thousand feet away, being out of sight and sound. The same holds true with regard to the epic, which was weeks later, published on a public passive Internet site.

18. Even if the speech had a private component, and if the regulation in this case was content neutral, the rule of law is that the regulation must be a *reasonable* time, place and manner restriction, doing no more than is necessary to protect the government interest. In this case, the time restriction is overly broad, covering from the moment of death to several weeks later. (It is noteworthy that on October 15, first the Court set the time period to a couple of days after the funeral; then upon learning that the epic was written several weeks later, the Court promptly and arbitrarily changed the time. That is not a reasonable time limit or a reasonable way to identify one.) The place regulation is – well – nowhere. The

manner regulation is – well – none. The holdings of this Court, and the impact of the verdict, is to say that no words can be said if they are the words defendants said, within at least weeks of the death, at any location or in any manner if it is possible someone in the family will hear or see the words and not like them. That is the *opposite* of a reasonable time, place and manner restriction. And, of course, the regulation in this case is *not* content-neutral.

19. The Court's use of the "shocking, offensive and vulgar" language from the *FCC* case, in opening instructions, and again in final instructions (with the mitigating time, place and manner language *only* in the closing instructions), was erroneous and highly prejudicial. These words apply to broadcast communication, which the Supreme Court has said is unique because it goes directly into the home, is difficult to regulate, can be heard by children, and gives no warning of what might be coming. Broadcast communication language has *nothing* to do with this case. Yet the jury was misled into thinking if *they* found *any* of the religious words or practices of defendants shocking, offensive or vulgar, they could tag defendants. Of course that is why they rendered a runaway verdict.

20. The language in this case was clearly opinion speech. The Court recognized this when granting summary judgment on the defamation claim. Yet inexplicably the same standard was not applied to the other claims. The only way a jury could resolve this case is to decide whose *opinion* is right.

21. Similarly, the language in this case was clearly about religious doctrine. Thus, the only way the jury could decide this case is to decide whose religious doctrine is correct. Nothing could be more violative of the First Amendment.

22. The one slight buffer to this onslaught on the religious speech and practices of defendants was found in the requirement that plaintiff prove falsity in the defamation case. The Court granted summary judgment on that claim, but left the epic in; and wrongfully allowed plaintiff to boot strap (contrary to a ruling on a motion in limine) statements that the epic was libelous and untrue. Thereby the burden was wrongfully put on defendants to prove falsity; and this in the context of pretrial activity which carried over to trial where the Court utterly cut defendants off from inquiring about plaintiff's sexual activity.

23. Through the civil conspiracy claim, the First Amendment right of association was further violated. The principle of law that comes from *NAACP v. Claiborne Hardware Co., supra,* is that the First Amendment forbids liability for members of a group who come together to engage in protected activity – even if some of the members engage in unlawful violence. Thus, holding these defendants liable – even letting the issue go to the jury – because they came together for protected activity violates the Free Association clause of the First Amendment. This is another example of where the passion, prejudice and bias of the jury are manifest. Even though different individual defendants had different roles in the events about which plaintiff complains, identical amounts were awarded against each defendant in the verdict. Even if, for the sake of argument only, defendant Phelps-Roper did

something unlawful in writing her epic, the civil conspiracy theory wrongfully applied in this case allowed the jury to award equal damages against all the defendants for the one person's actions. This is the byproduct of turning over protected speech which is unpopular to an inflamed jury – which was the goal all along in this case, and which violates multiple principles of law.

If the topics of defendants' speech were public, there is no basis for *any* restriction or regulation. If the funeral itself has any privacy element to it, a balancing, which is content-neutral, is to occur. That occurred, and only at defendants' hand. The jury should have been told that if defendants complied with Maryland law, there is no liability. All of these First Amendment errors are additional reasons the verdict (and related judgment) is flawed and must be set aside.

Additional Errors

24. The Court erred in denying the motion for change of venue. The voir dire was horribly inadequate to eradicate bias, and clearly the jurors were biased. Much more should have been done to prevent this at the front end. Especially after the motion for change of venue was filed; and especially with the Court knowing its own bias about the case, and as the Court itself said, the emotional nature of the case. Instead, the opposite was done; a relatively perfunctory voir dire was done; defendants were not permitted adequate inquiry; erroneous rulings were made that disallowed removal for cause when it should have been allowed; too-few peremptory challenges were allowed defendants; and then the Court allowed counsel to make prejudicial statements through the trial, and the Court itself made

some. All of these resulted in an extremely unfair trial, which should have led to mistrial, as defendants asked. On top of all this, the Court created an environment of such hostility toward defendants – particularly the pro se defendants, and through the course of the trial toward counsel for the two represented defendants – that it became impossible to even make a record of all the things going on in the courtroom. The Court's demeanor and tone toward defendants was routinely hostile, clipped, interruptive, and prohibitive of proper exchanges, and at times this was done in front of the jury.

25. The Court erred in denying a mistrial. The Court permitted its own religious and/or military and/or other bias to color this case (such bias demonstrated by the Court in a variety of ways, such as by commenting that defendant church is not a church; by referring to defendant Phelps-Roper's scripture-based writing – an exhibit being used by a witness – as 4 or 5 pages of rambling, by mockingly commenting on defendant Phelps-Davis' testimony that her religious belief holds that 99.9% of today's population is going to hell, which would include people in the courtroom; by mocking the fact that the church has a significant number of members who are family; and otherwise; and the Court made comments reflecting his military bias in the record at times as well). By the time the trial was nearing an end it had permeated the environment. The only remedy was a mistrial.

26. The Court erred in disallowing evidence of sexual activity by plaintiff. He was allowed to present himself as innocent and wrongly accused in that regard, and yet we know from what hints there are in this record that is likely not accurate. The

evidence should have been given from his records, and the questions should have been allowed.

27. The evidence does not support a finding of invasion of privacy through intrusion upon seclusion. The Court rested heavily upon the notion that it was more than a physical intrusion, and could be a sensory intrusion. But the evidence shows there was *no* intrusion into *anything* – not the funeral, not plaintiff's home, not his psyche. Every word plaintiff saw that he didn't like, happened at *his* hand. *He* reached, even eagerly dug, into a public place and *chose* to read or hear the words. Citizens speaking on public topics in public places should not be found liable for intrusion upon seclusion.

28. The evidence does not support the elements of intentional infliction of emotional distress. At a minimum, plaintiff did not show severe and specific injury as Maryland law requires.

29. Further, the *only* way to satisfy the requirements of "highly offensive" or "extreme and outrageous" is to go to the content of religious speech. The fact that the words were uttered in clearly and traditionally public fora tells us that they cannot be turned into actionable words by mere disagreement with – or in this case, by all the players, hatred for – the words.

30. The Court erred in letting the jury find civil conspiracy, as a separate basis for liability (since it was all one event).

31. The Court erred in letting the jury find civil conspiracy against WBC for the acts of its agents, because under Maryland law this is not allowed. See *Alexander v. Evander*, *supra*, 88 Md.App. 672, 695, fn 6, 596 A.2d 687, 698 (1991).

32. The Court erred in allowing plaintiff's counsel to continually mock defendants and their religion throughout the trial. See *Alexander v. Evander, supra*, 88 Md.App. at 702, 596 A.2d at 703.

33. The Court erred in disallowing admission of the various news articles in this case, because those articles were critical to showing that the death and funeral of plaintiff's son was a very public event, similar to the *Showler* case from the Tenth Circuit.

34. The Court erred in denying the mitigating language in the jury instructions requested by defendants, which would have reminded the jury that protected speech cannot be the basis for liability.

35. The Court erred in denying the requested verdict form, which would have required the jury to specify the language it found actionable. Since all of the religious words of defendants were put on trial, that verdict form – and related instructions – was critical to this record.

36. The Court greatly erred in finding that the Court had personal jurisdiction over these defendants. Established case law shows that when a person travels into a state, obeys all its laws, and engages in protected activity, for an hour, it violates notions of fair play, due process and justice, for that person to expect to be haled

into federal court in that state. Further, posting something on a passive Website in another state has expressly been found *not* to warrant personal jurisdiction.

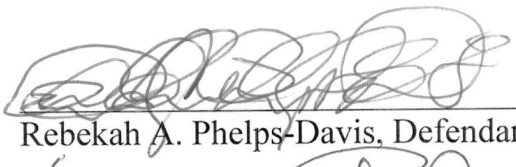
37. The Court greatly erred in taking subject matter jurisdiction over any part of this case. Defendants' words were on public topics and of a religious nature. That debate belongs on the streets and in the churches – not in a federal courtroom with military attorneys on the attack, before a judge with a military background who demonstrates bias and hostility, before an inflamed jury.

38. All previous discovery requests, relief by way of summary judgment or dismissal, objections or evidentiary rulings, requests for instructions, and otherwise, in this record, are hereby preserved through this reference, and fully incorporated, for purposes of appeal. In submitting this motion and brief of arguments, defendants are not waiving any other issue on appeal which may not be specifically addressed herein.

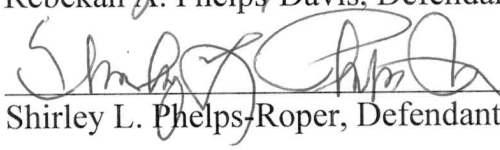
All references to the record here are made from defendants' best memory; a transcript of the full trial is being prepared, and defendants stand on that record.

WHEREFORE, defendants pray for all post-trial relief set forth above, and for full relief from all aspects of the illegal verdict of October 31, 2007 and related judgment of November 5, 2007, including setting aside the verdict and judgment in full; and entering judgment for the defendants. Defendants also request all necessary reconsideration of prior rulings necessary to correct the error reflected in the verdict and judgment.

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 brief was served on November 7, 2007, as follows:

Original + 2 copies, with 2-hole punch, by express mail, with return envelope, to:

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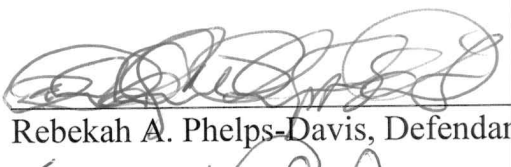

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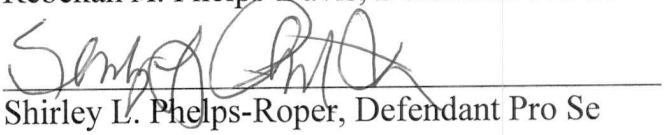

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