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

ALBERT SNYDER, Plaintiff v. FRED W. PHELPS, SR., SHIRLEY L. PHELPS-ROPER, REBEKAH A. PHELPS-DAVIS, and WESTBORO BAPTIST CHURCH, INC. Defendants	Civil Action No. 06-CV-1389 RDB

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS PHELPS-DAVIS AND 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 FORM JUDGMENT; AND/OR MOTION FOR ANY OTHER RELIEF IN LAW AND EQUITY WARRANTED UNDER THE FACTS AND LAW

I. Introduction

Defendants Shirley-Phelps Roper ("Roper") and Rebekah Phelps-Davis ("Davis") proclaim that "the Court and plaintiff's counsel" wrongfully mocked and denigrated "defendants' religious beliefs." Def's Br. At 2. However, plaintiff's counsel made appropriate argument to the jury based upon the evidence presented at trial, and Roper and Davis fail to identify any evidence "contained in the record" that they are referring to.[1]

The evidence did not target one religious viewpoint over another. To the contrary, plaintiff testified that he did not care what defendants' purported religious beliefs were. Further, defendants' own expert testified that defendants' so-called religion did not require them to protest

[1] Plaintiff will not comment on Roper's and Davis' accusations made against the Court. In any event, the Court did not make any comments that would warrant a new trial or any other remedy.

funerals. Just because defendants claim that their religion was on trial does not make it so, and indeed, would conflict with common sense and their own expert's testimony.

Despite being attorneys, defendants have repeatedly complicated the trial by incorporating each and every objection by reference. Courts have repeatedly disregarded "incorporation by reference" arguments. *See*, *e.g.*, *Cray Communications, Inc. v. Novatel Computer Systems, Inc.*, 33 F.3d 390, 396 n.6 (4th Cir. 1994); *see also Longworth SK # 4812 v. Ozmint*, 302 F. Supp. 2d 535, 542 n.4 (D.S.C. 2003) ("The Court also rejects any attempt by Petitioner to maintain objections by incorporating arguments presented in earlier briefs by reference."). Assuming, *arguendo*, that defendants may incorporate all of their previous arguments by reference, plaintiff hereby incorporates all of his previously filed documents and any and all arguments made at any proceeding.

1. Roper and Davis have failed to identify anything that plaintiff did to inflame the jury. Indeed, the most inflammatory evidence admitted at trial were defendants' own exhibits. Def's Trial Ex. 41a-f. If there was any hostility from the jury as defendants complain, the hostility was created by defendants' own evidence. Indeed, Mr. Katz apologized for presenting defendants' evidence at trial. However, defendants have never apologized for anything.

2. Not surprisingly, Roper and Davis misstate the law. "We glean no legislative intent to protect individuals from the economic consequences of intentional misconduct. In sum, § 11-108's cap does not apply to intentional torts." *Cole v. Sullivan,* 110 Md. App. 79, 93, 676 A.2d 85, 92 (Md. Ct. Spec. App. 1996).

3. Damages are within the sound discretion of the jury. Roper and Davis also fail to realize that they take the plaintiff as they find him. Plaintiff's experts testified that defendants

interjected themselves into plaintiff's grieving process. Consequently, plaintiff will be required to remember defendants' actions for the rest of his life. The jury, appropriately so, concluded that compensatory damages were $2.9 million.

4. There was no evidence that the jury demonstrated any "hatred for defendants' religious views" and just because defendants continually say so does not make it true. What defendants fail to realize is that no one cares about their religious beliefs -- as hateful as they may be. The evidence presented at trial was that defendants disrupted plaintiff's son's funeral. Plaintiff did not disrupt defendants' purported religion.

5. The jury is allowed to consider deterrence as an appropriate purpose to award punitive damages. Defendants repeatedly claimed that they will continue disrupting funerals regardless of the jury verdict. Additionally, defendants had the opportunity to apologize for their actions and explicitly refused to do so -- they expressed no sorrow for their misdeeds. Plaintiff's concerns regarding "300 million Americans against the 70 members of Westboro Baptist Church" is not accurate and was taken out of context. Defendants argued in closing that they did not have the intent to harm plaintiff and, consequently, should not be held liable. Either (1) defendants did not understand the law, or (2) defendants were attempting to confuse the jury. In rebuttal, plaintiff appropriately told the jury that the applicable standard was what the average American thinks and not the subjective intent of a 71-person church.

6. The jury verdict was appropriate based upon the facts presented at trial.

7. Plaintiff did not refer to religion to inflame passions. Regardless, defendants so-called religion is of no consequence. Defendants disrupted plaintiff's son's funeral -- plaintiff did not disrupt defendants' religious service.

8. Punitive damages were supported by the facts, especially when taken in the light most favorable to plaintiff. Defendants' continued claims that their assets were accurately disclosed is deserving of a factual hearing concerning their actual assets, what was disclosed during discovery and the testimony previously given at depositions. The jury was allowed to conclude (and did conclude) that defendants were not telling the truth regarding their assets. As the Court knows, plaintiff did not have an opportunity to challenge defendants' purported financial disclosures during trial.

Next, defendants claim that there is "zero" evidence that defendants acted with malice. Again, all evidence must be construed in the light most favorable to plaintiff. With that standard in mind, defendants' claim that there was "zero" evidence of malice is worthy of sanctions, *see* Fed. R. Civ. P. 11(c)(1)(B), but not worthy of a response by plaintiff.

Defendants' continued complaints that "plaintiff's counsel and the Court openly mocked their religious views throughout the trial" is another mischaracterization of the evidence. Again, no evidence was presented to demonstrate that any religious viewpoint was appropriate, better or different from any other religious viewpoint. Notably, defendants' own expert (Dr. Balmer) testified that defendants' purported religion did not require them to disrupt funerals or even travel across the country to plaintiff's son's funeral.

9. Assuming, *arguendo*, that the Court might question the jury's judgment, any safeguards or standards are premised upon the accuracy of defendants' statements concerning their ability to pay and/or their net worth. Importantly, defendants have failed to tell the truth and should not be rewarded for making deliberate misstatements under oath.

Defendants' concerns regarding passion or prejudice are misplaced. While defendants would have a legitimate concern if plaintiff had inflamed the jury, they cannot benefit from their own efforts to intentionally inflame the jury.[2] Def's Trial Ex. 41a-f.

10. Defendants' *application* of *Bowden v. Caldor, Inc.*, 350 Md. 4, 710 A.2d 267 (Md. 1998), is misplaced. Again, the facts must be construed in a light most favorable to plaintiff (defendants continuously ignore this standard). The *Bowden* court noted that "[t]he most important legal rule in this area, applicable to every punitive damages award, is that the amount of punitive damages 'must not be disproportionate to the gravity of the defendant's wrong.'" *Id.*, 710 A.2d at 278. Defendants disrupted plaintiff's son's funeral. As defendants were told years ago, protesting a funeral is tantamount to kicking a person while they are down. *Westboro Baptist Church, Inc. v. City of Topeka, Kansas*, Case No. 95-CV-1031, District Court of Shawnee County, Kansas (Doc. No. 78, filed 5/11/07). Defendants knew or should have known that plaintiff would be in a fragile mental state when he was burying his only son. As defendants conceded, they knew the Snyder family was Catholic. According to Dr. Doka (not to mention common sense), the Snyder family would necessarily rely upon their religion when they were attempting to grieve and defendants' words and actions tarnished the Snyder family's only opportunity to bury their son.

Defendants' continued claims that someone has a "hatred for their religious viewpoint" simply ignores the evidence. Defendants' "wrong" was traveling to Westminster, Maryland for the sole purpose of disrupting Lance Corporal Matthew A. Snyder's funeral -- with complete

[2] If defendants were not attempting to intentionally inflame the jury with their DVDs, it can only be described as a legal blunder that they are responsible for. Defendants are attorneys and were represented by attorneys at trial. Plaintiff cannot be held accountable for defendants' actions.

disregard for the harm to the Snyder family. Defendants freely admit that they could have protested anywhere on March 10, 2006, and plaintiff testified to the same. "Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Bowden*, 710 A.2d at 278 (internal citations omitted).

Admittedly, defendants' ability to pay should be considered when assessing the appropriate amount of punitive damages. Where, as here, defendants have made deliberate misstatements under oath, they should not be permitted to benefit from their misstatements and half-truths. If the Court is willing to entertain this factor, it is appropriate to hold a hearing concerning defendants' previous testimony, and if applicable, the Court should make findings of fact concerning defendants' truthfulness, or lack thereof.

Interestingly, defendants claim that plaintiff's purpose "is to bankrupt and impoverish defendants." However, there was no evidence presented to the jury concerning this claim so this red herring can be summarily dismissed.

As defendants concede, "one of the purposes of punitive damages is to deter the defendant from engaging in the type of conduct forming the basis for the award, the deterrence value of the amount awarded by the jury, under all of the circumstances of the case, is relevant." *Bowden*, 710 A.2d at 279. Defendants readily admit that they would continue to disrupt funerals and, consequently, this admission was considered by the jury. Even though defendants have been repeatedly told that they are injuring grieving families, they continue their actions. Any concerns about a reasonable time, place and manner can be summarily dismissed. Nothing is

reasonable about defendants' timing (a funeral), place (someone else's religious institution) and manner (e.g., the circus like atmosphere, the anal sexual intercourse signs).

Curiously, defendants suggest that $7,000 should be the appropriate amount of punitive damages. If $10.9 million in compensatory and punitive damages will not stop defendants from harming grieving families, it is absurd to think that $7,000 would act as any deterrent.

Aside from the heinous acts perpetrated on plaintiff in this matter, the Court can consider whether defendants took "remedial or corrective action, promptly after the misconduct giving rise to the award of punitive damages." *Bowden*, 710 A.2d at 279. Defendants took no remedial actions and have repeatedly claimed that they will continue to carry out their misdeeds. "On the other hand, repeated or frequent misconduct of the same nature, misconduct of long duration, attempts to conceal or cover-up the misconduct, failure to take corrective action, and similar circumstances, support the deterrence value of a significant award." *Id*. Here, defendants conduct is repeated and of the same nature. Additionally, defendants have made deliberate misstatements to mitigate the gravity of the punitive damage award. In an attempt to mislead the jury, defendants lied about the positioning of their signs at the funeral (i.e., cover-up) and have failed to take any corrective action. For example, defendants could have apologized and stated that they have learned their lesson and will not protest more funerals.

Defendants' next fallback position is that plaintiff has incurred no legal expenses. In other words, defendants are asking the Court to reward defendants for plaintiff's counsel's pro bono activities. Common sense dictates that this is nonsensical.

The ratio of punitive damages to compensatory damages is appropriate. Defendants' argument depends on the assumption that there is a cap on non-pecuniary damages. However,

this argument is simply incorrect. *See Cole v. Sullivan*, 110 Md. App. 79, 93, 676 A.2d 85, 92 (Md. Ct. Spec. App. 1996). The ratio of compensatory to punitive damages is approximately 2.5 times -- clearly, this is a reasonable ratio.

11. Defendants fail to cite any authority concerning jury instructions--essentially, they are merely offering their personal opinion concerning what they believe an appropriate jury instruction should have been.

12. The jury correctly concluded that defendants made deliberate misstatements. If the Court reduces the punitive damage award based upon defendants' unchallenged financial disclosures, defendants will be rewarded for perjury. The jury members used their common sense when they concluded that defendants were not telling the truth.

13. Defendants continue to believe that the First Amendment allows them to say anything, anywhere and at anytime. Reliance upon *Cohen v. Cowles Media Company*, 501 U.S. 663 (1991), by defendants is curious. In *Cohen*, the court explains that all actions cannot be justified by the First Amendment. *Id*. at 669-670 (discussing numerous types of events that do not trigger the First Amendment issues because laws or causes of action are incidental to enforcement).

N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, is equally unavailing. In *Claiborne*, there was "expression on public issues" as opposed to the targeting of a specific family. *Id*. at 913. Additionally, *Claiborne* discussed "peaceful" activity. The competent evidence in the instant matter demonstrated that defendants knew their presence invoked violence. Importantly, in *Claiborne*, "it [was] not disputed that a major purpose of the boycott . . . was to influence governmental action." *Id*. at 914. Where, as here, defendants targeted the

Snyder family to inflict grief -- there was no purpose to influence government action. Defendant Fred Phelps admitted that no one in the Snyder family had any political clout.

The First Amendment to the U.S. Constitution does not protect speech directed at a captive audience. *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 990 (E.D.Ky. 2006). The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified by our Supreme Court. It is an aspect of the broader "right to be let alone" that our Supreme Court characterized as the most comprehensive of rights and the right most valued by civilized men. *Hill v. Colorado*, 530 U.S. 703, 716-717 (2000). Funeral attendees have an interest in avoiding unwanted, obtrusive communications which is at least similar to a person's interest in avoiding such communications inside his home. *McQueary*, 453 F. Supp. 2d at 992 (All internal citations omitted).

In the event that the Court finds merit in any of defendants' purported First Amendment arguments, the very same 'government action' will be tantamount to the Court choosing defendants' rights over plaintiff's rights.

14. Despite defendants' claims that "[t]his case is all about content," the evidence *presented by plaintiff* was not about content. At one point during trial, defendants felt it necessary to explain their despicable actions concerning the U.S. flag. However, plaintiff testified very succinctly concerning the signs that harmed him. Specifically, plaintiff testified concerning the signs that stated --You're going to hell, God hates you and Sempri Fi Fags. This Honorable Court required plaintiff to prove that these signs targeted the Snyder family and the jury factually concluded that the Snyder family was targeted.

15. Defendants' concerns regarding the targeting of religious speech are revealing. Indeed, it was defendants who targeted plaintiff's religious speech. It was defendants who disrupted plaintiff's religious activities. Further, it was defendants who disrupted plaintiff's peaceful assembly. Defendants' so-called religion has nothing to do with the facts of this case. On the other hand, defendants have failed to even attempt to explain how their purported "freedom of religion" allows them to disrupt someone else's freedom of religion.

16. *Showler v. Harper's Magazine Foundation*, 222 Fed. Appx. 755 (10th Cir. 2007) is readily distinguishable. In *Showler*, plaintiff was not aware that pictures of the deceased had even been taken. In our case, defendants disrupted a funeral. Their presence changed everything -- defendants' presence disrupted Father Leo's participation in the funeral, plaintiff's daughter was concerned about defendants' presence, which naturally affected plaintiff, and, among other things, defendants' signs were tantamount to pornography (e.g., anal sexual intercourse) at someone else's funeral.

While discussing intentional infliction of emotional distress in *Showler*, the court, tellingly, stated, "[g]enerally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'". In the instant matter, the jury could easily exclaim "outrageous." *Id*. at 3.

Even assuming, *arguendo*, that others are talking about soldiers' deaths, defendants are not entitled to disrupt a funeral. Attending Lance Corporal Matthew A. Snyder's funeral and proclaiming "You're going to hell" has nothing to do with "the number of deaths, the types of

deaths, the causes of death, the meaning of deaths, the relative likelihood of deaths given this or that political/military strategy, etc."

17. This Honorable Court did balance the private nature of a funeral. Plaintiff was required to prove that defendants targeted him and his family. Further, the jury was able to consider defendants' purported First Amendment defense. Defendants' "thousand feet away, being out of sight and sound" argument underscores the frivolity of defendants' argument. At this juncture, defendants are required to analyze the facts in a light most favorable to plaintiff. In this regard -- aside from disrupting the funeral -- defendants were 200-300 feet from plaintiff. Despite defendants' attempts to misstate the facts to their advantage, plaintiff did see defendants' signs.

18. As discussed above, there is nothing reasonable about defendants' time, place or manner.

19. It is difficult to understand defendants' argument other than by assuming that they are merely complaining about everything, no matter how frivolous. The vast majority of the First Amendment instruction came from defendants, except, of course, the incorrect version of the law. Interestingly, defendants attempt to distinguish broadcast communication cases by reasoning that these cases are unique because they go into the home, are difficult to regulate, can be heard by children and give no warning of what might be coming.

By comparison, defendants' words and actions go directly to a captive audience -- i.e., funeral attendees. There is no reasonable way to regulate defendants' actions. Defendants' story that they self-regulate is patently absurd. It is clear that they are incapable of self-regulating and their version of decency should not be imposed upon the rest of society. Certainly, there is no

advance warning of what might be coming with defendants and their signs. Even assuming, *arguendo*, that defendants do provide advance warning, funeral attendees are a captive audience and cannot reasonably avoid defendants' words and actions. *See McQueary v. Stumbo*, 453 F. Supp. 2d 975 (E.D.Ky. 2006).

20. Disrupting another person's funeral is not "opinion speech." Furthermore, the elements of defamation are different from the elements of invasion of privacy and intentional infliction of emotional distress, and those claims were resolved on their own merits. One has nothing to do with the other.

21. According to defendants, they can say or do anything and claim it is "religious doctrine." The law does not support this argument and defendants have identified no legal authority for their position.

22. Plaintiff's sexual activity had nothing to do with anything -- it is irrelevant and defendants' attempts to interrogate plaintiff concerning the same amount to harassment.

23. Defendants disrupted a private funeral -- such is hardly a protected activity. Indeed, defendants conceded the civil conspiracy claim and their only defense was that they were not liable if the jury found them to be not liable on the remaining claims. If there was an argument on this point, defendants waived it by failing to raise it earlier.

24. Upon information and belief, all jurors who were challenged for cause were dismissed. Therefore, it is difficult to understand defendants' complaints other than by assuming that they are merely complaining about everything, no matter how frivolous. Any comments from counsel were based upon evidence presented at trial. Plaintiff will not comment on any accusations against the Court other than to say two things: (1) no comments were made in the

presence of the jury that "created an environment of hostility" and (2) personal attacks on the Court should result in the levy of sanctions on defendants.

25. Plaintiff is unaware of the religious, military or other background of the Court. Consequently, it is difficult to respond to defendants' frivolous accusations (other than to point out that the Court should sanction defendants for their comments).

According to defendants, they are prophets and all other earthdwellers are going to hell. Accordingly, the Court stated the obvious logical conclusion with respect to defendants' own words. It is difficult to understand how defendants can cite their own testimony as prejudicial. Nevertheless, any such comments were made outside of the presence of the jury. As far as rambling, Roper repeatedly and continuously rambled every time she spoke. If the Court did not end her rambling, trial would never have begun and the Court is required to maintain some control over the process.

26. As discussed above, plaintiff's sexual activity is not relevant.

27. A funeral is a private event and defendants disrupted it. *See McQueary v. Stumbo*, 453 F. Supp. 2d 975 (E.D.Ky. 2006). Further, defendants were previously put on notice that a funeral is a private event. *Westboro Baptist Church, Inc v. City of Topeka, Kansas*, Case No. 95-CV-1031, District Court of Shawnee County, Kansas (Doc. No. 78, filed 5/11/07).

28. Plaintiff demonstrated that his depression and diabetes were exacerbated. Further, plaintiff had one chance to bury his son, and defendants tarnished that memory forever. Presumably, defendants understand that they must analyze the facts in the light most favorable to plaintiff.

29. Disrupting a funeral is, in and of itself, highly offensive and extreme and outrageous. Everything done by defendants was, by their own admission, offensive and extreme and outrageous.

30. Defendants do not explain this argument and do not cite any law in support. Further, defendants waived this purported argument by failing to raise it prior to the present Motions.

31. The jury made a factual conclusion concerning civil conspiracy. Remarkably, defendants conceded the conspiracy at every stage of the proceeding and only now complain that the facts did not support a conspiracy.

32. Plaintiff's counsel did not mock defendants. However, fair argument was made based upon the facts presented.

33. No articles demonstrated that the funeral was a public event. Defendants argued that the obituary made the funeral a public event. The jury used their common sense to determine that a standard obituary does not make a funeral public. Pursuant to defendants' logic (or lack thereof), any funeral would be public because obituaries are common practice.

34. The jury instruction weighed heavily in defendants' favor. In fact, the Court should have given the funeral instruction requested by plaintiff.

35. Defendants have cited no law to support their argument and have none. Tellingly, defendants are requesting that the jury identify the specific facts it relied upon to reach its conclusion. This type of specific factual finding by a jury would not normally be required even in a capital case.

36. The Court had jurisdiction over defendants.

37. This argument is more of the same rambling and has been addressed above. Defendants' prejudice to veterans is abundantly clear but there are no legal consequences of their prejudicial behavior and they have identified none.

38. When defendants incorporate by reference, they violate the minimum page requirement set forth in the local rules. L.R. 105.3. Further, they complicate the issues and make response impossible.

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CERTIFICATE OF SERVICE

I hereby certify that on this date true and correct copies of the foregoing Brief in Opposition to Pro Se Defendants' Post-Trial Motions are being served in the following manner:

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