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.

REPLY OF
DEFENDANTS PHELPS-DAVIS & PHELPS-ROPER'S
TO PLAINTIFF'S RESPONSE TO
POST-TRIAL MOTIONS

Rebekah A. Phelps-Davis and Shirley L. Phelps-Roper, as pro se defendants herein, hereby jointly submit the following brief points of reply to plaintiff's response to their post-trial motions:

1. Plaintiff continues to assert that the funeral was disrupted. Setting aside the fact that the record bears no evidence of disruption, either for the plaintiff himself or any other funeral attendee,[1] this lawsuit was not for a tort called

[1] Plaintiff and his house-mate both testified to the fact that the funeral went forward with all pieces as planned; that they were focused on the funeral; and that it was a beautiful event. They offered no testimony at all of disruption. Plaintiff suggests in passing that Father Leo's participation was disrupted. Father Leo is not a party to this case; he did not offer any evidence that he was disrupted; he only described that he *chose* to conduct meetings and try to insulate the school children (who he later brought out to participate in the very public event that was this funeral); all of which activities had nothing to do with this funeral. Further, Father Leo demonstrated his own *content* bias in this matter by the letter to the editor he wrote and which

"disruption." Further, and more importantly, whether or not the funeral was disrupted is not the issue the Court sent to the jury. The Court allowed the jury to consider claims of outrage and invasion of privacy based on the content of the words; based on whether at any time, in any place, and in any manner plaintiff saw the words; and based on a subjective claim by plaintiff – which the Court suggested should be made on October 15, 2007 – that the signs targeted plaintiff and/or his family (that part is not clear in this record, that is, which was required for liability) and upset him *by their content.*

2. The Court also specifically held that it did not matter how far away the signs were, or whether people going to the funeral saw them. Indeed, plaintiff agreed from start to finish he saw no content of the sign when he went to the funeral (no matter how you try to wrench the 1000 feet). Thus, *Hill*, *McQueary* and all other cases involving captive audiences have no application in this case. In the context of determining whether a law that set funeral picketers back 300 feet (whatever the content of their picket signs; whether or not they were out of sight or sound; whether or not anyone ever saw the words in any other setting), the *McQueary* Court concluded that "the state has an interest in protecting funeral attendees from unwanted communications that are so obtrusive that they are impractical to avoid," 453 F.Supp.2d at 992. In this case, none of the funeral goers saw

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was published a few days after the funeral – which again shows what a public-interest issue this funeral was. Further, the priest who actually conducted the funeral testified there was no disruption.

the defendants; no one even suggested they saw the content of any signs; and certainly no one has testified that the presence of the picketers *by where they were located, not by content*, were obtrusive. There was simply too much distance between the church, the funeral attendees, and the defendants, to claim they were obtrusive. Again, that is not how the Court framed the case; that is not how the instructions were given to the jury; that is not the evidence in the case.

3. Ratcheting up the rhetoric, plaintiff suggests the signs were pornographic. Of course that was not the instruction given to the jury. And the term "pornography" has legal meaning in this country. (If that definition is to change, along with the rest of established law about picketing, citizens should be put on notice of that change before being tagged for millions of dollars in inflammatory verdicts.) Pornography can not be banned unless it's obscene, per the United States Supreme Court, see *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 240, 122 S.Ct. 1389, 1396, 152 L.2d 403 (2002). The term "obscenity" also has legal meaning in this country. Words are not obscene unless taken as a whole they a) appeal to prurient interest in sex, and b) portray sexual conduct in a patently offensive way, and c) do not have serious literary, artistic, political or scientific value. See, e.g., *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973). An anatomically incorrect stick figure coupled with a religious message to drive home a critical point on a vital public issue fails

all three parts of the definition. This dog won't hunt and it's irresponsible to continue to insert such language into a court record.

4. Plaintiff *now* says he limited his claim for liability to three signs, to wit, You are Going to Hell, God Hates You and Semper Fi Fags. This is an utterly unwarranted claim. First, throughout the case, in discovery, in pleadings, and in particular during all aspects of the trial, from opening, to closing, to direct testimony, to cross-examination, with lay witnesses, with defendants, with expert witnesses – all points along the way – many more signs and religious messages were addressed. The entire case was about all of the signs at the picket that day and then some. Every sign was paraded out with virtually every witness. Beyond signs, questions with mocking incredulity were posed to defendants, about their belief in such doctrines as predestination, limited atonement and total depravity.

Further, in spite of repeated requests in writing and orally by defendants, the Court absolutely refused to put any limits on what signs or content went to the jury. Every single sign was given to the jury to find liability.

Not once in this trial did plaintiff limit himself to those three signs. He complained about all the signs; all the message; even mocking the fact that defendants claim to be a church. It is rather unbelievable at this hour for anyone to suggest this case was limited to three signs. If that was so, it would have been plainly stated in the jury instructions, and this trial would

have been substantially shorter in duration. Further, even by targeting three signs by content, it demonstrates *this case is about content.* What difference does it make what the signs say if it is not about content?

What an absurdity for grown educated people to sit in a courtroom and pretend a sign saying "You Are *Going* to Hell" had anything to do with an already-dead person. Or to say "God Hates You," was directed at someone not on the scene and for whom it was a physical impossibility to be on the scene. That kind of totally improper argument, which was permitted throughout this case, is why defendants had to defend their entire religious beliefs. It was completely improper. The impropriety is grossly compounded at this hour by *pretending* plaintiff's complaints were limited to three signs.

As for the Semper Fi Fags sign, new evidence has surfaced since the trial which calls into question the already legally-bizarre suggestion that because the soldier was a marine that makes this sign actionable. One of the central themes throughout the trial was that plaintiff's son was a hero because he died in combat. Shortly after the trial, the official military report about his death was released. A copy of an overview of that report published in the media with lots of details is attached hereto. Plaintiff's son's death had nothing to do with combat. Rather, the driver of the Humvee disobeyed orders of a superior, broke protocol in how to manage the vehicle, and the passengers failed to put on a seat belt. That was the

cause of the son's death. It has nothing to do with combat. That information should have been put in front of the jury. An important question at this hour is to what extent plaintiff or his counsel knew about this report. It puts an entirely different backdrop to the carrying on that was done about the *content* of the Semper Fi Fags, as well as others about the military (e.g., Fag Troops), throughout the trial. For this additional reason a new trial should be granted. This report came out after the original motions; this point is now asserted here in full as newly discovered. (All of these points are before you get to the fact that the role of homosexuals in the military, including the Marine Corps, is such a huge public issue, it's just unbelievable that a jury was allowed to decide whether there was liability based on the publication of this sign.)

5. Plaintiff says the videos shown to the jury are the pieces of evidence that inflamed them; that defendants made the decision to show them; it may have been a legal blunder, but too bad. This position conflicts with the facts and the law. The fact is that plaintiff was allowed to challenge the meaning of the signs, and make a subjective claim about what they meant and who they targeted. That wrongfully put defendants in the position of having to explain what they meant – something no one should have to do in an American courtroom, to wit, explain *why* they hold the religious beliefs deeply held and what their consciences tell them about God and their duty to God. Even so, the defense had to be made. Further, even if it was the

biggest legal blunder in the history of jurisprudence, the product of a biased fact finder can not stand. Whether that bias comes from plaintiff's hand, defendants' hand, the Court's hand, the jurors' hand, or anyone else's hand – a biased verdict can not stand. That is too well established in the law to dispute; any bias in the fact finder violates due process. See, e.g., *United States v. Fulks*, 454 F.3d 410, 432 (4th Cir. 2006). Also see, e.g., *Republican Party of Minnesota v. White*, 536 U.S. 765, 815, 122 S.Ct. 2528, 2555-2556, 153 L.Ed.2d 694 (2002). And see *Concrete Piles and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993). It appears plaintiff now concedes the jurors were inflamed, but argues that since defendants caused it, the product of prejudice must still stand. There is no question in this record that the verdict was the product of passion and prejudice; their passions and prejudices were inflamed from the start to the finish of this trial; that was the whole point of this case, jury nullification.

6. Plaintiff says the speech in this case was not on public issues. Yet on October 15, 2007 the Court granted defendants summary judgment on the invasion of privacy through publication of private facts theory, saying nothing private had been published. Further, the Court granted summary judgment on the defamation claim, saying the words were opinion. This framework, coupled with the content and context of the words all show

plainly that all of the words uttered by defendants that were presented to the jury were public words, in public places, on public topics. If the words were not the publication of private facts – as the Court has already found – then they were on public facts. No one has ever provided a sound answer to the point that the speech was about soldiers dying, the Catholic priest rape scandal, and divorce; and that three more public-interest issues could not be imagined. That's because there is no good answer to this point. Everyone talks about these topics, including on the day of the funeral (at least on the first topic), and frequently after and about the funeral.

7. Plaintiff says the fact that an obituary was put in the newspaper (actually several the record reflects) does not make the funeral public. Probably not standing alone. The obituaries were offered because plaintiff kept insisting the paper published that the funeral was private. Of course the obituaries have no such statement about the funeral. That is a point so secondary that it hardly bears mentioning. Of far greater importance is the fact that the death of this soldier was a highly public topic; the funeral of this soldier was a highly public event, attended by hundreds from the public inside and outside; that the funeral of this soldier was a highly public topic (as have been all of the soldiers' deaths and funerals since this war started); the speech took place in traditional public arenas (sidewalks, media commentary, Internet); and the words of the defendants were all on public issues. *Those* are the attributes of these events that make this public

speech. (It is only secondarily relevant that the obituaries were in the paper; and it is only secondarily relevant that in all likelihood, under the legal standard, plaintiff made himself a limited-purpose public figure *before* he filed this lawsuit. He talked to the media frequently about his son, his life, his death, and the funeral. He talked to his Congressman about the war and his son's death. But even if neither of these points makes the speech public in this case, that doesn't matter. Those are far secondary reasons for why the speech is public.)

8. Plaintiff says in *Showalter* – where the photographer went into the funeral, took a photo of the dead soldier lying in his coffin, and sold it so it was widely published – since the family did not know the photo was taken at the time, that case is distinguishable. Whether or not the family knew the photo was taken at the time is not the issue in that case, and was not discussed by the Tenth Circuit, let alone the basis for its ruling. The issue in that case was whether the funeral was private, and therefore the photographer committed invasion of privacy. The very issue here. The Court said ***the funeral was not private***. Thus, the Court never had to reach the First Amendment questions in that case. That is true here as well. The funeral was not private. The same attributes that made the funeral public in *Showalter* make this funeral public. Lots of media coverage before, during and after; lots of attention by people in the community including elected

officials (like plaintiff's Congressman); lots of strangers attending; lots of interest in the deaths of soldiers. Ditto here.

Further, this Court *specifically* held on October 15 that it did not matter for purposes of liability how far away the picketers were; that it was not a distance issue; and was not about disruption; rather it was about whether plaintiff *at any time*, *in any manner*, with defendants talking *from any place* had the words, in essence, enter his awareness, and he concluded they targeted the family or him or both (again, this is unclear in the record; probably any rendition would have sufficed the way this case was sent to the jury); and it upset him. By that reasoning, the Tenth Circuit would have said if the family *ever* learned the photo was taken, by any means, and got upset by it, it made the funeral not private. That is not what the Tenth Circuit said, and that simply doesn't make sense based on the law.

Showalter is directly applicable; it is the only opinion anyone has found about the soldiers' funerals; and the holding is directly on point and legally sound. This funeral was not private.

9. Plaintiff says the statutory cap on noneconomic damages in 11-108 has no application. Defendants submit that conclusion is not supported by the plain language of the statute, which applies to "any action for personal injury, pain, suffering, ..."; and that this is not a settled issue. The *Cole* case, rendered by the intermediate court, not the state's highest court, says that the statute was intended to get at out-of-control insurance costs, and

since insurance doesn't cover intentional torts the law was not meant to cover intentional torts, no matter its language. Defendants believe this issue should be sent to the Maryland Court of Appeals for resolution, because that court has not reviewed this question. There has been quite a bit of litigation about the coverage of this cap in Maryland, with the highest court at times overturning the intermediate court on rulings about its coverage, and at times the legislature then making changes to the law. See, e.g., *Anchor Packing Company v. Grimshaw*, 115 Md.App. 134, 692 A.2d 5 (1997) (cap based on date injuries came into existence); *United States v. Streidel*, 329 Md. 533, 620 A.2d 905 (1993) (cap does not apply to wrongful death actions, overruling *Potomac Elec. v. Smith*, 79 Md.App. 591, 558 A.2d 768, *cert. denied*, 317 Md. 393, 564 A.2d 407 [1989]); *Murphy v. Edmonds*, 325 Md. 342, 370, 601 A.2d 102, 116 (1992) (in finding the cap constitutional the court noted that it "is also significant that the cap applies to all personal injury claimants equally rather than singling out one category of claimants," thus calling into question whether *Cole* is sound law).

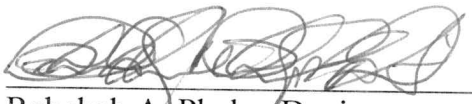
Further, the *Cole* court held that the legislative purpose was to get insurance rates back under control. In *Anchor Packing Company v. Grimshaw, supra,* the court said the primary purposes in enacting the cap were to "alleviate the liability insurance crisis **and to decrease unpredictable and speculative noneconomic damages awards**," 115

Md.App. at 151, 692 A.2d at 13; emphasis added. This concern suggests that the legislature did not intend to exclude intentional torts, because this concern has equal application to intentional torts. Further, the notion that insurance companies are not at all impacted by intentional torts is not accurate. There is ongoing litigation all the time about whether insurance companies have to provide a defense in actions for intentional torts, e.g., *Cole v. State Farm Mut. Ins. Co.*, 359 Md. 298, 753 A.2d 533 (1000) (addressed whether intentional tort is an "accident" for accidental death insurance coverage); and insurance policies cover things like defamation, false imprisonment and malicious prosecution, at times giving rise to litigation over whether coverage has to be provided because elsewhere in the contract there is a provision excluding intentional conduct, see, e.g., Collins, "Level 3 v. Federal Insurance: Do you Know What is in Your Directors' and Officers' Liability Insurance Policy, 73 *UMKC L. Rev.* 199, 207 (Fall 2004). Thus, defendants submit this is not a settled issue; given the unique nature of this case it is an issue that should be reviewed; and should this case need to continue to the Fourth Circuit defendants are likely to ask the Court to consider certifying the question to the Maryland Court of Appeals.

10. One final point: Plaintiff continues to assert in the response to the post-trial motion the same unfounded claims that defendants have lied in this record. Those claims are responded to in greater detail in the reply on the motion

for stay. There is no evidence of any lying; it is inappropriate to inflame this action even further with such unfounded talk; and those allegations should be completely disregarded, with focus on the significant legal issues raised herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

We hereby certify that the foregoing reply was served on December 5, 2007, as follows:

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Military report details crash

No disciplinary action was taken against drive, documents say

By MICHELE CANTY
Daily Record/Sunday News
Article Last Updated: 11/25/2007 09:42:33 AM EST

Marine Lance Cpl. Matthew Snyder

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At bottom: · About him · Civil lawsuit

Nov 25, 2007 — A federal lawsuit against protesters at Marine Lance Cpl. Matthew Snyder's funeral garnered national headlines, but overshadowed the details of how Snyder died.

A military investigation shows Snyder was killed in Iraq when a driver lost control of an armored Humvee after hitting a series of potholes. Documents released in response to a Freedom of Information Act request show the Marines' investigator did not recommend discipline for the driver or others involved.

Snyder, whose father lives in Spring Garden Township and whose mother lives in northern Maryland, was ejected from the Humvee he was riding in as a gunner after it rolled several times on March 3, 2006.

The 20-year-old died from multiple blunt force head trauma. He had been in Iraq fewer than four weeks with his unit, the Combat Service Support Group-1, 1st Marine Logistics Group, I Marine Expeditionary Force.

Four others, three Marines and a private contractor helping translate for the group, were injured in the crash.

Since the war began in March 2003, at least 109 Marines have been killed in crashes, the Department of Defense reported in its November casualty report.

On Oct. 31, a jury awarded Snyder's father, Albert Snyder, $10.9 million after finding

members of the Westboro Baptist Church invaded the family's privacy by protesting at Snyder's funeral.

The judgment doesn't erase the disrespect Albert Snyder family's felt as a result of church members carrying signs that insulted them and his son, Albert Snyder said.

It also won't bring back his son, a boy who had wanted to be a soldier since he was 9 years old, the Marine's father added.

The crash

Marine Capt. Brett Miner's report indicates that, in March 2006, members of Snyder's unit were briefed on their Humvee trip, a resupply mission from Camp Al Asad to Camp Al Qa'im called Operation Mighty Oak.

The Marines were part of a convoy that included four armored Humvees in case the supply chain of Humvees was attacked or ambushed.

As part of the mission, the Humvees would ride together in a convoy that would change positions as it traveled on the mostly single-lane, dirt road as a way to confuse anyone who might be tracking them or planning an attack, Miner reported.

Snyder was riding with four other people, Cpl. Kenrick Allen, Lance Cpl. Marcus Garciaalmarza, Pvt. 1st Class Allen Rome, who was driving, and a civilian contractor, Rafid Kully.

The convoy had been traveling for several minutes when two Humvees, including the one Snyder was riding in, listed as Guardian 14, moved in front of two others.

Superior officers ordered the two Humvees to slow down and get back in line in the convoy, but the order was ignored, documents showed.

Miner found Guardian 14 was traveling between 35 and 50 mph when it passed other vehicles and ran into a series of potholes. The Humvee driver, Rome, drove Guardian 14 onto the road's shoulder to pass a truck in the convoy.

Guardian 14 then came back on the road, but hit another crop of potholes and began fishtailing. Garciaalmarza told Rome, "Whoa, we might want to slow down," but before the driver could respond, the Humvee hit another large pothole.

The vehicle's rear jumped up and swung to the right. Rome fought to control the Humvee, which had armor that adds about 2,000 pounds to its weight.

Miner's report said the Humvee went off the left side of the road, then rolled.

Everyone was ejected from the Humvee. They were not wearing seat belts, Miner's report states.

Snyder was thrown 90 feet and hit his head, documents showed.

Other Marines in the convoy rushed to help the injured.

Snyder was found with a massive head wound and other injuries, and was pronounced dead at the scene, Miner reported.

The Humvee's driver, Rome, was knocked unconscious by the impact and sustained a bruised lung, fractured rib, fractured right scapula and a dislocated right knee. Garciaalmarza had a cut on his head.

Allen, who was thrown 60 feet, fractured his right leg and had cuts and other injuries. The civilian contractor, Kully, had a bruised knee and shoulder, as well as cuts on this head.

The injured, and Snyder's body, were taken to the nearest military facility.

Snyder's mother, Julie Francis, was notified the next day, March 3, 2006.

Shortly after her son's death, Francis said, "He had volunteered for his assignment of the Humvee. There was no fear. This is what he wanted to do."

Francis and Albert Snyder could not be reached for comment on the report and its findings.

Report conclusions

Although it appears from the report that there were some issues about the convoy's formation and Rome's speed, and he is listed in the report as the one responsible for the crash, Miner did not suggest any discipline for anyone involved.

"Rome was injured in the line of duty, and not due to his own misconduct," Miner wrote. Miner could not be reached for comment on the report last week.

The investigator added, however, that Rome's choice not to wear a seat belt contributed to his injuries.

Rome was in the hospital for months and did not remember anything about the crash, Miner reported.

Statements from the others who rode with him filled in some of the blanks, including that the Marines were briefed on, and told to wear, seat belts.

Miner recommended superior officers be responsible for making sure the vehicle occupants wear seat belts. He also suggested the Marines in Snyder's unit review their techniques, policies and procedures in regard to the convoy formation used in Operation Mighty Oak.

He also wanted to add additional Humvee driving training for the Marines stationed in desert areas, and suggested they take Guardian 14 out of service.

Marines supervisors who reviewed his investigation and suggestions did not endorse those recommendations.

They also did not think superior officers should be held responsible for their occupants not wearing seat belts and said the mangled Humvee would be repaired and used.

In memorandums endorsing the final report with its changes, Marines officials said the crash was a tragic accident and offered its condolences to Snyder's family.

Reach Michele Canty at 771-2028 or mcanty@ydr.com.

About him

Marines Lance Cpl. Matthew A. Snyder

Age: 20

High school: Westminster High School in Maryland

Graduated: June 2003

Enlisted: Oct. 14, 2003

Unit: Combat Logistics Batallion-7, Twentynine Palms, Calif.

Family: Parents, Albert Snyder and Julia Francis; sisters Sarah Anne Snyder and Tracie Lynne Snyder

Civil lawsuit

A defamation lawsuit was filed June 5 in U.S. District Court in Maryland on behalf of Albert Snyder, father of Marines Lance Cpl. Matthew Snyder, 20, who died in a Humvee crash March 3, 2006, in Iraq. The lawsuit named Fred W. Phelps, Westboro Baptist Church and others as defendants.

The lawsuit alleged church members violated the family's right to privacy by appearing at Matthew Snyder's March 10 funeral, defamed the Marine and his family during the protest and on their Web site, and conspired to protest at the funeral.

Several members from Phelps' church protested at the service held at a Westminster, Md., church, carrying signs that read, "Semper Fi, Semper Fags" and "Thank God for Dead Soldiers."

Last month, a federal jury in Baltimore found the church violated Snyder's family's privacy, and the jury awarded his father $10.9 million. The church has said it plans to appeal.