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 WESTBORO BAPTIST CHURCH & PHELPS TO PLAINTIFF'S RESPONSE TO POST-TRIAL MOTIONS

Defendants Westboro Baptist Church, Inc. and Fred W. Phelps, Sr., through the undersigned counsel, 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

[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

lawsuit was not for a tort called "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.

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. 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

---

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 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.

sound; whether or not anyone ever saw the words in any other setting), the *McQueary* Court assumed without finding 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 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. 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 is

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.

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 and criticized. The

entire case was about all of the signs at the picket that day and then some.

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.

Formatted: Bulletsand Numbering

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?

It is absurd to claim that 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, is why defendants had to

defend their entire religious beliefs. That impropriety is grossly compounded at this hour by *pretending* plaintiff's complaints were limited to three signs.

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. 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, to wit, explain *why* they hold their 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.

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.

6. Plaintiff says the speech in this case was not on public issues. Yet on October 15, 2007 the Court granted

Formatted: Bulletsand Numbering

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.

7. Plaintiff says the fact that an obituary was put in the newspaper (actually several as 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.)

Formatted: Bulletsand Numbering

8. Plaintiff says that 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 from this one. 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. This is the very issue here. *Showalter* said ***the funeral was not private***. Thus, *Showalter* 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.

Showalter is directly applicable; it is the only opinion anyone has found about the soldiers' funerals (before the Eighth Circuit *Phelps-Davis* opinion of Dec. 6, 2007, which is discussed in and attached to defendants' reply on the motion for stay); and the holding is directly on point and legally sound. This funeral was not private. (According to the Eighth Circuit's *Phelps-Roper* opinion, even if it was private, and even if the government has an interest in

preserving some privacy around the funeral, *that is not enough* to prohibit picketing by defendants.)

9. Plaintiff argues that defendants' expert witness said picketing soldiers' funerals was not a necessary part of defendants' religion. Defendants' religious expert testified that in his *personal opinion* the funeral picketing was a stretch; that was not his professional opinion, which was no about the *rightness* or *correctness* of defendants' religious opinions and beliefs (which only defendants are eligible to decide); but rather about the history of people who believed in the TULIP doctrines, or doctrines of Calvinism, which are the doctrinal beliefs of defendants; and the historic activism of people with these religious beliefs. The fact that Dr. Balmer does not personally believe in picketing soldiers' funerals is not a basis for saying defendants are not entitled to engage in this religious practice.

Formatted: Bulletsand Numbering

9. Plaintiff says the statutory cap on noneconomic damages in Md. Cts. & Jud. Proc. art. § 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).

Formatted: Bulletsand Numbering

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.

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 Defendants' reply on the motion for stay.

WHEREFORE, for the foregoing reasons, Defendants move the court to grant their post-trial motions.

Respectfully submitted,

___/s/_____

Jonathan L. Katz

D.Md. Bar No. 07007
1400 Spring St., Suite 410
Silver Spring, MD 20910
(301) 495-4300
Fax: (301) 495-8815
jon@markskatz.com

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by the CM/ECF filing system on December 18, 2007, to:

Sean E. Summers, Esq.
Craig Tod Trebilcock, Esq.

Becky Phelps-Davis (by mail only)
1216 Cambridge
Topeka, KS 66604

Shirley Phelps-Roper (by mail only)
3640 Churchill Road
Topeka, KS 66604

____/s/_____
Jonathan L. Katz