

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.

MEMORANDUM IN SUPPORT OF
MOTION BY ALL DEFENDANTS FOR RECONSIDERATION
ON THE STATUTORY CAP QUESTION
AND/OR MOTION FOR CERTIFICATION TO THE MARYLAND COURT OF APPEALS

Defendants Westboro Baptist Church, Inc. and Fred W. Phelps, Sr., through the undersigned counsel, and Rebekah Phelps-Davis and Shirley Phelps-Roper, pro se, move the Court for an order reconsidering its ruling that the statutory cap in § 11-108 does not apply to the noneconomic damage award in this case; and/or for an order certifying the question to the Maryland Court of Appeals. Defendants further move for a stay of execution of any judgment in this matter pending a decision by the Maryland Court of Appeals on the certified question, and all further appellate proceedings, at the state or federal level.

Defendants submit the following authorities in support of this motion.

This Motion to reconsider is made pursuant to Rule 105.10 of the Local Rules of this Court, and the inherent authority of the Court to rehear matters pending before it. *Smith v. Montgomery County, Md.*, 607 F.Supp. 1303, 1306, footnote 5 (D. Md. 1985) (courts have inherent power to reconsider their prior interlocutory ruling). See also *U.S. v. Breit*, 754 F.2d 526, 529 (4th Cir. 1985) (district court has inherent power and jurisdiction to reconsider interlocutory orders prior to entry of judgment on said orders).

In its decision of February 4, 2008, the Court held that the statutory cap of Md. Code. Ann., Cts. & Jud. Proc. §11-108(b)(2)(ii) would be \$665,000 in this case, for damages the Court agrees are noneconomic; but that the cap did not apply because this case involves intentional torts. The Court relied on *Cole v. Sullivan*, 676 A.2d 85 (Md.App. 1996).

The result of the Court's ruling on the statutory cap in the instant civil action, and *Cole*, is to ignore the plain language of the statute - which makes no exception on its face for intentional torts versus non-intentional torts. Furthermore, this holding is contrary to the Constitutional requirement of equal protection, for instance by providing more protection under the statutory cap to an insurance corporation

in a negligence action than to Westboro Baptist Church, which is a religious corporation, in this civil action. Defendants so assert because the basis for *Cole* is that the law was passed to protect insurance companies, so they could sell insurance at lower rates, because they were raising the cost of coverage due to litigation. Furthermore, protecting the insurance industry in the foregoing fashion - even assuming for argument's sake that this is a legitimate government interest -- is not rationally related to treating alleged intentional torts differently from alleged acts of negligence.

For these reasons, as well as all the reasons set out in the Defendants' post-trial motions and replies related thereto, Defendants ask that the Court reconsider its ruling; find that the plain language of the statute makes the cap applicable to this civil action; and reduce compensatory and punitive damages.

In the alternative, defendants request that the Court certify the following question to the Maryland Court of Appeals: Does the statutory cap of § 11-108 apply to a case involving intentional torts? This request for certification is made pursuant to the Maryland Uniform Certification of Questions of Law act, Md. Code Cts. & Jud. Proc. Art. §§ 12-601 - 12-613 (with § 12-603 allowing the Court of Appeals to "answer a question of law certified to it by a court of the United States ... if the answer may be determinative of an issue in pending

litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State.”

Although Judge Motz of this Court in 2003 concluded that Md. Code Cts. & Jud. Proc. Art. §§ 12-601 does not allow certification of an issue decided by the Maryland Court of Special Appeals, on February 20, 2008, a unanimous Maryland Court of Appeals issued a decision on two questions certified from this Court, even though there were prior decisions by the Maryland Court of Special Appeals on the questions. *United States of America v. Julian M. Ambrose*, Misc. No. 2, September Term, 2007, at 9-10 (see opinion at <http://mdcourts.gov/opinions/coa/2008/2a07m.pdf>). *U.S. v.*

Ambrose says in pertinent part:

These questions are matters of first impression for this Court as we have never addressed Sections 11-127 and 21-101.1 (b)(1)'s requirement that the highway or private property be "used by the public." This question, however, has been before the Court of Special Appeals on three separate occasions.

In this case, Defendants ask that a question be certified to the Maryland Court of Appeals which that Court has never heard. (The parties in *Cole* apparently did not seek review of the *Cole* decision by the Maryland Court of Appeals.) Furthermore, the Constitutional equal protection claim that is raised herein was not raised in *Cole*.) If the Maryland Court of

Appeals finds that the statutory cap applies to intentional tort claims, either because of the language of the statute, because of equal protection principles; or because of any other reason under Maryland law, that would have a significant impact on the damages issues in this case. If the statutory cap applies here, not only would the amount of damages for noneconomic injury be reduced from \$2.8 million to no more than \$665,000; but the punitive damages award would also be impacted, given that one of the factors under Maryland law in determining whether a punitive damages award is excessive or inappropriate is the proportionality between compensatory and punitive damages. This is particularly important in this case given the lack of any tangible losses by plaintiff -- such as lost pay, lost property, and medical costs -- making the award of noneconomic damages particularly speculative, and given the piling-on effect of the punitive damages award (even as reduced herein). The issue of whether the statutory cap applies in this case is critical, and this issue has not been resolved by (and should be resolved by) the Maryland Court of Appeals.

WHEREFORE, Defendants respectfully request that the Court reconsider its holding that the statutory cap of §11-108 does not apply to intentional torts in this case; that the Court apply the statutory cap herein and make adjustments to compensatory and punitive damage amounts accordingly; or, in the

alternative, that the Court certify the question of whether the statutory cap applies to claims of intentional torts to the Maryland Court of Appeals. Defendants also ask that the Court stay execution of the judgment in this matter pending a resolution of this question by the Maryland Court of Appeals, and all further appellate proceedings in state and federal court herein.

Respectfully submitted,

MARKS & KATZ, L.L.C.

/s/ Jonathan L. Katz

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