

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

ALBERT SNYDER,
Plaintiff

v.

FRED W. PHELPS, SR.,
JOHN DOEs, JANE DOEs, and
WESTBORO BAPTIST CHURCH, INC.
Defendants

Civil Action No. 06-CV-1389 RDB

PLAINTIFF'S MEMORANDUM OF LAW IN RESPONSE TO
DEFENDANTS' MOTION TO DISMISS

Plaintiff, Albert Snyder, by and through counsel, respectfully submits the following Response to Defendants' Motion to Dismiss.

I. INTRODUCTION

On June 5, 2006, the plaintiff filed a Complaint alleging defamation, invasion of privacy, intentional infliction of emotional distress and civil conspiracy against all named defendants, and some to-be-named defendants. On September 18, 2006, rather than responding to the merits of the allegations, the defendants filed a Motion to Dismiss and a supporting Memorandum based upon supposed technical deficiencies in the Complaint. This Memorandum of Law is submitted in response to Defendants' Motion to Dismiss.

II. SUMMARY OF RESPONSE

The defendants attack the plaintiff's complaint through vague and unsupportable arguments and by reference to claims that are not ripe for determination at this early juncture. All of the defendants' concerns can be explored during discovery. Stated differently, if there is any merit to the defendants' defenses -- and there is not -- they are being raised prematurely.

First, the defendants challenge the jurisdictional amount in controversy without any factual or legal basis to do so. Second, incredibly, the defendants suggest that citizenship for purposes of subject matter diversity is questionable--as if the defendants *genuinely* dispute that they are Kansas citizens. Third, the defendants appear to challenge whether the term “defendants” includes defendant Phelps. Defendant Phelps, the central actor in controversy, is so clearly a defendant in this action that this argument barely warrants mention. Fourth, defendant Phelps challenges personal jurisdiction by claiming the Complaint does not allege he was in Maryland - this is wrong - defendant Phelps was present and participated in the disruption of a private funeral and the subsequent defamation of the plaintiff. In addition, defendant Westboro Baptist Church, Inc. (“WBC”) sent its agents to Maryland, thus establishing jurisdiction and a claim against WBC. Finally, with minimal explanation, the defendants attempt to claim that the First Amendment defeats the within claims. However, defendants fail to put forth even a straight-face argument that plaintiff Snyder is a public figure or that a private funeral is a public debate.¹

III. ARGUMENT

A. The Complaint establishes diversity jurisdiction with this Honorable Court.

Evidently the defendants do not challenge the actual citizenship and domicile of the parties but rather dispute the technical reading of the Complaint. Regardless, the defendants’ argument lacks merit.

A cursory review of plaintiff’s Complaint reveals that it specifically lays out the diverse citizenship of the parties. The Complaint provides that “Plaintiff, Albert Snyder, is a resident of York, Pennsylvania...” Complaint ¶1, and that “Plaintiff, Albert Snyder, is an adult individual

¹ The defendants purportedly attempt to continue arguing over service. However, their argument is too incoherent to properly address.

who resides at 760 Spring Lane, York, Pennsylvania 17403.” Complaint ¶5. Defendant Phelps is an adult individual who, upon information and belief, lives, resides and works at 3701 S.W. 12th Street, Topeka, Kansas 66604. Complaint ¶6. Defendant Phelps is an especially notorious individual, and by all accounts, is a citizen and resident of Kansas and has his domicile in Kansas. Defendant WBC is a corporation *organized* under the laws of the state of Kansas with its principal place of business located in Kansas. Complaint ¶7. The unnamed defendants reside in or around the Westboro Baptist Church compound, which is located in Topeka, Kansas. Complaint ¶8. These defendants will be, at a minimum, the adult members of WBC that participated in the disruption of Lance Corporal Matthew A. Snyder’s funeral and subsequent defamation.² In addition, in regards to the unnamed defendants, diversity is determined at the time the citizenship becomes known and should therefore not be a decisive issue at this point. *See Curry v. U.S. Bulk Transport, Inc.*, 2006 WL 2527952, at *2 (6th Cir. 2006), (“There is no question, therefore, that at the moment of removal, complete diversity existed between the identified parties, and the district court properly exercised diversity jurisdiction.”).

Additionally, rather than belabor the obvious citizenship of the parties, this Honorable Court can certainly defer the ruling concerning personal jurisdiction until a later time.

If the existence of jurisdiction turns on disputed factual questions the court may resolve the challenge on the basis of a separate evidentiary hearing, or may defer ruling pending receipt at trial of evidence relevant to the jurisdictional question. But when, as here, the court addresses the question on the basis only of motion papers, supporting legal memoranda and the relevant allegations of a complaint, the burden on the plaintiff is simply to make a prima facie showing of a sufficient jurisdictional basis in order to survive the jurisdictional challenge. In considering a challenge on such a record, the court must construe all relevant pleading allegations in the light most favorable to the plaintiff, assume credibility, and draw the most favorable inferences for the existence of

² Sadly, WBC has children participate in their hateful protests, but for obvious reasons, the children will not be named as defendants.

jurisdiction. Properly assessed on that basis here, the plaintiffs made a sufficient prima facie showing to survive the jurisdictional challenge.

Combs v. Bakker, 886 F.2d 673, 676 (4th Cir. 1989) (internal citations omitted). In the present case, the defendants are not *genuinely* claiming that they are not Kansas residents and it will not serve the interests of justice to hold a hearing limited to jurisdiction. Nevertheless, if the defendants believe a hearing for the purpose of establishing personal jurisdiction is necessary, this Honorable Court can certainly order a hearing to establish that the defendants are citizens of Kansas for purposes of diversity of citizenship. On the other hand, without such a factual hearing, “the court must construe all relevant pleading allegations in the light most favorable to the plaintiff, assume credibility, and draw the most favorable inferences for the existence of jurisdiction.” *Id.* Based upon that standard, the plaintiff has clearly demonstrated subject matter jurisdiction.

Finally, the citizenship of the defendants has been established in prior federal court litigation, and is specifically stated on the WBC website. According to the Tenth Circuit, “Fred W. Phelps, Sr., . . . and . . . the Westboro Baptist Church” and the rest of the Phelps clan are from Topeka, Kansas. *See Phelps, Sr. v. Hamilton*, 122 F.3d 1309, 1313 (10th Cir. 1997).³ And, according to the WBC website, the defendants are citizens of Topeka, Kansas: “the city [i.e., Topeka] and state [i.e., Kansas] where WBC’s members are long-standing well-known citizens.”⁴

Apparently, defendant Phelps is not challenging his actual citizenship or domicile but is challenging the wording contained in the Complaint. Complaint ¶6. Notably, if there was any

³ WBC, with the assistance of the ACLU, has recently challenged various funeral protest laws in at least three different states - Missouri, Kentucky and Ohio. Each one of those lawsuits refers to WBC as an entity from Topeka, Kansas.

⁴ *See* www.godhatesfags.com/writings/20051212_legislation-message.pdf.

basis for defendants' position, it may have been helpful for them to attach an affidavit declaring their purported citizenship for purposes of diversity of citizenship rather than superficially attacking the language in the complaint.

B. The amount in controversy exceeds \$75,000.

In the defendants' motion to extend the time to file a responsive pleading, they acknowledged that the Complaint exposes them to "devastating financial liability." Nevertheless, defendants presently complain that the complaint is purportedly not specific enough concerning damages and injury to the plaintiff. Let there be no mistake, the plaintiff has alleged the jurisdictional amount, \$75,000, but believes and therefore avers that a jury will award an amount *significantly* in excess of \$75,000 in the form of compensatory and punitive damages. The complaint adequately details the plaintiff's injuries caused by the defendants and a jury will ultimately decide how much those injuries are worth---after all, the jury will not be able to give the plaintiff what he deserved: the dignity of peacefully burying his son in accordance with the Snyder family's chosen religious beliefs and with dignity and respect. *See* Complaint ¶¶1, 27, 31, 32, 52, 53 (discussing the injuries caused by the defendants).

Before this Honorable Court can dismiss the within matter for failing to allege the jurisdictional amount in controversy, "[i]t must appear to a legal certainty that the claim is for less than the jurisdictional amount." *Mas v. Perry*, 489 F.2d 1396, 1400 (5th Cir. 1974). "The sum claimed by the plaintiff controls if the claim is apparently made in good faith." *Id.* Here, the defendants have not alleged, (nor could they after admitting to potential "devastating financial liability"), that there is "bad faith" on behalf of the plaintiff. By way of comparison, in *Powder Power Tool Corporation v. Powder Actuated Tool Company, Inc.*, 230 F.2d 409 (7th Cir. 1956), the plaintiff *did not even allege an amount in controversy* and yet *after a trial on the merits*, the court did not enter a finding concerning the jurisdictional amount. The plaintiff, in

Powder Power Tool, was given the opportunity to prove damages but apparently did not prove the jurisdictional amount *after* a trial on the merits.

Even assuming *arguendo* that the plaintiff ultimately recovers less than \$75,000, it is of no consequence. *Mas v. Perry*, 489 F.2d 1396, 1400 (5th Cir. 1974). The jurisdictional “amount in controversy is determined by the amount claimed by the plaintiff in good faith,” *id.* (internal citations omitted), not by the ultimate reward. *Id.* (internal citations omitted) (“Federal jurisdiction is not lost because a judgment of less than the jurisdictional amount is awarded.”)

C. The Complaint alleges a claim against Defendant Fred Phelps.

The defendants evidently are arguing that the complaint is not specific enough in reference to Phelps. However, this argument is easily dismissed.

Initially, it should be noted that this Honorable Court must “review here a . . . motion to dismiss, and therefore must accept as true all the factual allegations in the complaint.”

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164, 113 S. Ct. 1160, 1161 (1993). In addition:

[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is ‘a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’

Conley v. Gibson, 355 U.S. 41, 48, 78 S.Ct. 99, 102 (1957) (footnote omitted); *see also* Fed. R. Civ. P. 8(a), 8(e). In the present case, the plaintiff has fulfilled this requirement by alleging the elements of each cause of action, and evidently, the defendants concede this point because they fail to identify any specific element of any claim that is missing. The defendants sole supposed argument is that there is some ambiguity concerning the word “defendants.” If there is any

doubt, “defendants” means what it says-all defendants-and, therefore, the defendants are on notice of claims against them.⁵

D. The Complaint alleges a claim against Defendant Westboro Baptist Church, Inc.

Beyond the defamatory statements on the WBC website directed towards the plaintiff and his family, the individual defendants acted as agents of WBC. Complaint ¶9. Specifically, the defendants perpetrated the same outrageous conduct and defamation as WBC -- disrupting Lance Corporal Matthew A. Snyder’s funeral. Complaint ¶20. Once the plaintiff has alleged that the individual defendants’ acted as agents of defendant WBC, a claim against the principal and jurisdiction are established. *Mackey v. Compass Marketing, Inc.*, 392 Md. 117, 892 A.2d 479 (2006).

E. This Honorable Court has personal jurisdiction over the Defendants.

A federal court sitting in diversity has personal jurisdiction over a non-resident defendant if (1) an applicable state long-arm statute confers jurisdiction and (2) the assertion of that jurisdiction is consistent with constitutional due process. Maryland's long-arm statute permits jurisdiction to the limits permitted by due process. Thus, in the present case, the Honorable Court has personal jurisdiction over the defendants if such jurisdiction would not violate due process. *See Nichols v. G.D. Searle & Company*, 991 F.2d 1195, 1199 (4th Cir. 1993) (internal citations omitted).⁶

“When a court exercises jurisdiction over a suit that does not arise out of the defendant's activities in the forum state, this jurisdiction is called “general jurisdiction.” Jurisdiction over a

⁵ Other than the defamation claim (discussed below), the defendants do not specify the claim that they are referring to so the elements of the various claims cannot be adequately highlighted for the Court. Nevertheless, all claims have been alleged with enough specificity to provide the defendants notice.

⁶ It is true that there is a two step process for jurisdiction concerning the long arm statute and due process, but, in this case, it is a distinction without a difference. Besides, the defendants do not attempt to distinguish the two, apparently conceding that if the long arm statute is met then so is due process.

suit that arises out of the defendant's activities in the forum state is called “specific jurisdiction.” *Nichols*, 991 F.2d at 1199 (internal citations omitted). “In every case, it is essential that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thereby invoking the benefit and protection of the laws of the forum state.” *McGann v. Wilson*, 117 Md.App. 595, 602, 701 A.2d 873, 876 (Md. App. 1997). “Specific jurisdiction exists where the cause of action arose out of a party's contacts with the forum state.” *Id.* (internal citations omitted). Simply put, the defendants committed their torts in Maryland and availed themselves to the benefit and protection of the law. Complaint ¶¶ 18, 19, 25, 39; *id.* ¶ 56 (“defendants reached an agreement and conspired to travel from Kansas to Maryland”). After availing themselves to the benefits and protections of Maryland, the defendants consequently are subject to this Honorable Court’s jurisdiction.

Having alleged that the individual defendants committed a tort in Maryland, jurisdiction is established. *See* Md. Ann. Code, Cts. Jud. Proc. art., § 6-103(b)(3) and (4). In addition, defendant Phelps and the unnamed defendants acted as agents for WBC. Complaint ¶9. Once defendant WBC sent its agents to Maryland to commit a tort, jurisdiction was also established over it. *See, e.g., Mackey v. Compass Marketing, Inc.*, 391 Md. 117, 892 A.2d 479 (2006).

F. The venue is proper in this Honorable Court.

For the reasons stated within, it follows that venue is proper in the District of Maryland.

G. The Complaint alleges a claim upon which relief may be granted.

Without much explanation, the defendants put forth two additional arguments for dismissing plaintiff’s Complaint at this preliminary stage of the proceedings.⁷ Both of these arguments fail.

⁷ Presumably, the defendants are only capable of making superficial arguments with little or no facts because this motion was filed at an inappropriate time, or in other words, before discovery has been completed.

First, the defendants argue that the defamation claim is not specific enough. This argument, however, can be summarily dismissed based upon the unambiguous interpretation of the Federal Rules of Civil Procedure--i.e., notice pleading. *See* Section III, C, *supra*.

Second, the defendants question whether the First Amendment to the United States Constitution bars the claims against WBC for their reprehensible conduct. Unfortunately for the defendants, the First Amendment is not a defense to their outrageous conduct--especially at this early stage of the proceedings. The defendants' reliance on *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876 (1988), underscores the weakness of their argument. The unequivocal holding of *Hustler Magazine* is "[t]hus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of *public* debate about *public* figures." *Id.*, at 53, 108 S.Ct. at 881 (emphasis added). Thus, *Hustler* is inapplicable to this case.

Initially, it is preposterous to suggest that the plaintiff, Mr. Snyder, is a public figure (an issue that was conceded in *Hustler Magazine*). Second, at the least, defendants have alleged a factual issue that must be resolved during discovery, and not at this early juncture upon the present meager record. Third, even if this Honorable Court would extend *Hustler Magazine* to private individuals and private funerals, plaintiff Snyder has alleged "actual malice" and thus can still recover damages in this case. *Id.* at 882.

In regards to public *debate*, there is simply no public debate at a private funeral, and *WBC has already challenged this issue and lost in other litigation. See St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, 22 Kan. App. 2d 537, 921 P.2d 821 (1996).⁸ *Id.* at

⁸ At a subsequent stage of the proceedings and during discovery, the plaintiff will discover the facts necessary to determine if WBC is *forever precluded* from challenging its despicable acts in a private lawsuit. In other words, when WBC lost in *St. David's*, issue preclusion may very well preclude WBC from re-litigating the same issues.

549, 921 P.2d at 830 (“We agree with the trial court and find that, in addition to the government interest in protecting residential and clinical privacy, the government has a legitimate interest in protecting the privacy of one’s place of worship as well.”) Here, the defendants completely disregarded the plaintiff’s right to enjoy his freedom of religion,⁹ and it follows that “the right of free exercise would be a hollow one if the government could not step in to safeguard that right from unreasonable interference from another party.” *Id.* at 549, 921 P.2d at 830. In *St. David’s*, the defendants were disrupting religious services, and in our case, the *same* defendants were disrupting a private funeral at St. John’s Catholic Church in Westminster, Maryland. Complaint ¶14.

After discovery is completed and a jury has heard the evidence, it will be quite obvious that plaintiff Snyder was a “captive” listener and this speech is not protected. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495 (1988).¹⁰ Indeed, plaintiff Snyder is not trying to restrict the defendants’ speech but rather has alleged that the defendants have intentionally defamed him and interrupted a private funeral, thereby violating plaintiff Snyder’s freedom of speech and freedom of religion.

See, e.g., John Crane, Inc. v. Puller, 169 Md. App. 1, 899 A.2d 879 (2006) (discussing issue preclusion and the consequences thereof).

⁹ WBC’s motivation is not free speech. “We aren’t anti-war protestors; we aren’t anti-don’t-ask-don’t-tell protestors; we’re the prophets of God. We don’t care who’s in office; we don’t care about your politics; we don’t care about your policies on the war.” *See* www.godhatesfags.com/writings/20051212_legislation-message.pdf (last visited October 3, 2006). “The other fact is that there are a variety of view points among Americans and Iraqis about whether we should be at war; the purpose of the war; and how it’s going. All of that is irrelevant to us.” *Id.* “If any family of a dead soldier wants a private funeral, all they have to do . . .” *Id.* In other words, if a grieving family -- at their weakest moment -- gives up their freedom of speech and freedom of religion and succumbs to the defendants’ wishes, the defendants will allow grieving families to have a private funeral. That is not freedom of speech -- that is terrorizing a family during a solemn and sad occasion.

¹⁰ As another example of the defendants’ tendency to take advantage of a captive audience, the defendants have proclaimed that they will protest and disrupt the funeral of Amish children recently killed in Lancaster, Pennsylvania. *See* www.godhatesfags.com/fliers/oct2006/20061003_pennsylvania-school-girls.pdf (last visited October 3, 2006). There is no line of decency that the defendants will not cross.

H. The Defendants were served.

Admittedly, this portion of the defendants' argument is difficult to follow. Curiously, the defendants incorporate by reference their argument supposedly advanced "in its motion against the imposition of monetary sanctions." But in that motion, the defendants state, "Defendant expects to argue in its Motion to Dismiss . . . , with all due respect, that the Order for alternative service had no sufficient basis in law or fact." *See* defendants brief at 12 (titled Defendants' Opposition to Plaintiff's Motion for Award of Costs and Fees). Further, the defendants stated "Defendants expect to argue in the Motion to Dismiss why the alternative service order was improvidently granted." *Id.* at 13.

Defendants are apparently complaining about the request that Attorneys Phelps and Hockenbarger accept service. However, plaintiff never asked them to accept service so this issue can be easily disposed of. After the attorneys -- officers of the court -- stated that they represent the defendants, the defendants were sent waiver forms through their attorneys. Subsequently, the Court, presumably taking attorneys Phelps and Hockenbarger at their word, ordered that the attorneys receive a copy, once again, of the Complaint, as an additional safeguard to ensure notice of the Complaint.

Again, it is difficult to follow the "I will argue it later-I argued it before" purported defense that is supposedly incorporated by reference. Anyway, there is no basis to dismiss the Complaint for lack of service. This argument, or the lack thereof, underscores the credibility, or the lack thereof, of the defendants' entire motion to dismiss.

IV. CONCLUSION

Based upon the foregoing, plaintiff Albert Snyder respectfully requests that this Honorable Court deny the defendants' motion to dismiss.

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