UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
Baltimore Division

ALBERT SNYDER,	*	
Plaintiff	*	
v.	*	Civ. No.: 1:06-cv-01389-RDB
FRED W. PHELPS, SR., et al.	*	
Defendants.	*	

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DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO MOTION FOR STAY OF PAYMENT PENDING APPEAL

For the following grounds, Defendants Fred W. Phelps, Sr. ("Phelps") and Westboro Baptist Church, Inc. ("WBC") (collectively, "Defendants") respectfully reply as follows to Plaintiff's opposition to Defendants' motion to stay, pending appeal, the imposition of the Court's December 11, 2006, order for the Defendants to pay $3,150 to Plaintiff.

I. ARGUMENT

A. The factors for considering a stay weigh in Defendants' favor.

A "party seeking a stay must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the

public interest will be served by granting the stay." *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). These are the same balancing factors for considering a motion for a preliminary injunction.

Although Senior U.S. District Judge Alexander Harvey, in *U.S. v. Various Articles*, 1996 U.S. Dist. LEXIS 22868 (D. Md. 1996), *aff'd on other grounds, sub nom U.S. v. Kanasco, Ltd.*, 123 F.3d 209 (4th Cir. 1997) asserted the need for a "strong showing of a likelihood of success on the merits" to obtain a stay, the *Various Articles* case is inapplicable to Defendants' present stay motion. The cases cited in *U.S. v. Various Articles*, supra, do not address stays of money payments where, as here, the payment of a supersedeas bond will assure payment to Plaintiff in the event the Court of Appeals denies a stay.

The circumstances of the case dictate whether a strong showing of a likelihood of success on the merits is needed to obtain a stay pending appeal:

> Even the treatise writers have mistakenly equated the stringent standards of those cases [*i.e., Airport Com. of Forsyth County v. Civil Aeronautics Board*, 296 F.2d 95 (4th Cir. 1961) and *First-Citizens Bank & Trust Co. v. Camp*, 432 F.2d 481 (4th Cir. 1970)] with the more flexible rule of *Sinclair Refining*, [55 F.2d 42, 1932 (4th Cir. 1932)]. *See, e.g.,* 7 Moore's Federal Practice, P 65.04[1] at 65-39 n.7 (1975). But there is a difference. The cases relied upon by the district court deal with the question of the issuance *vel non* of an appellate stay pending review of an administrative order or a trial court decision that dealt with the merits of a controversy. n2 Hence they

> propound an appellate standard -- and not one for use in the trial courts.

Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 194 (4th Cir. 1977).

The foregoing *Blackwelder* case acknowledges that" "While the appellate origins of the fourfold rule [for injunctions] have been noted, the proper implications thereof have not. *See* 11 Wright & Miller, Federal Practice and Procedure, § 2948 at 430 (1973)." *Blackwelder Furniture Co. v. Seilig Mfg. Co*., 550 F.2d at 194 n.2. In other words, the strong showing standard is not to be rigidly applied to every factual scenario, particularly here where the payment of a supersedeas bond will assure payment to Plaintiff in the event the Court of Appeals denies a stay. *Id.*

As it turns out, the foregoing cases of *Airport Com.,* 296 F.2d 95 and *First-Citizens Bank & Trust*, 432 F.2d 481 that *Blackwelder* addresses as discussing the strong showing of a likelihood of success on appeal, do not address circumstances, such as ours, where the payment of a supersedeas bond will assure payment to Plaintiff in the event the Court of Appeals denies a stay. *First-Citizens Bank & Trust Co.* appears to be calling for a strong showing of a likelihood of success on the merits as to the granting of equitable relief as opposed merely to requiring payment of the supersedeas bond requested here by

Defendants. In *Airport Com.,* the parties agreed on the applicable stay standard regarding an order of the federal Civil Aeronautics Board that amended certificates of convenience issued to intervenor airlines. *Airport Com.* does not analyze the strong showing of likelihood of success issue, because the parties already agreed on that standard and did not contest it.

Consequently, "[t]here is disagreement among the circuits as to the degree of likelihood of success which must be shown" to obtain a stay pending appeal, *Resident Advisory Board v. Rizzo*, 429 F. Supp. 222, 224 n.1, (E.D. Pa. 1977). In the neighboring Eastern District of Pennsylvania, "it is appropriate to adjust the burden regarding the 'likelihood of success on appeal' where the other factors weigh heavily in favor of a stay." *Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund,* 537 F. Supp. 1036, 1037 (E.D. Pa. 1982).

The foregoing four-factor balancing test weighs in favor of granting a stay as follows:

1. Defendants likely will prevail on the merits of the appeal.

Defendants Opposition to Plaintiff's Motion For Award Of Costs And Fees (Sept. 15, 2006) -– which is reincorporated herein by reference, rather than repeating all arguments made therein -- sets forth most of the grounds that Defendant will

raise on appeal. Those grounds, taken together, make it likely that Defendants will prevail on the merits, as follows.

a. **Plaintiff erred by only contacting lawyers and not Defendants directly about waiver of service.**

Plaintiff's counsel erred by sending their service waiver notice not to Defendants individually, but instead to attorneys who did not claim that they would be entering their appearance for the instant civil action, and who are neither licensed to practice law in Maryland nor before this Court. The law is clear that sending a service waiver to a defendant's lawyers ordinarily is insufficient for obtaining costs and attorney's fees when the defendant does not waive service. *Lewis v. ACB Bus. Servs.*, 1994 U.S. Dist. LEXIS 21318, *slip op.* at 7 (S.D. Ohio 1994) (*slip op.* attached hereto), *dismissal affirmed*, 135 F.3d 389 (6th Cir. 1998).

Plaintiff has tried to escape delivering his service waiver notice directly on the Defendants, rather than on lawyers Margie Phelps and Rachel Hockenbarger, by relying in large part on the attached June 12, 2006, letter ("June 12 letter") from Ms. Phelps and Ms. Hockenbarger to all Plaintiff's counsel in this civil action, to the Barley Snyder law firm, and to Plaintiff Albert Snyder care of his attorneys.[1] However, that June 12,

[1] For whatever it is worth, neither Margie Phelps nor Rachel Hockenbarger have entered their appearance in this civil action (nor are they expected to

2006, letter -– dated just seven days after the filing of the Complaint in this civil action -- reserves the option to sue the letter's addressees for a wide variety of alleged civil wrongs going well beyond the present civil action (including (1) that one or more of the addressees told the media that they were consulting with other attorneys to file other lawsuits with the purpose of intimidating WBC and its members from engaging in further religious picketing (June 12 letter at numbered paragraph 10), and (2) that one or more of the addressees of the June 12 letter had made libelous statements about WBC (June 12 letter at 6-9)). The June 12 letter talks about going on the offensive against one or more of the addressees (and not just against Plaintiff Snyder), has a subject line of "Westoboro Baptist Church, et al. v. Trebilcock, et al.," and does not reasonably communicate that Ms. Phelps, Ms. Hockenbarger, nor their law firms, would be representing the Defendants in this instant civil action, which they are not.

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do so), and neither are licensed to practice law in Maryland nor before this Court (nor does the letterhead of the June 12 letter, attached hereto, indicate otherwise). Moreover, at the time that Ms. Snyder and Ms. Hockenbarger sent their attached letter, undersigned counsel had not yet had contact with either of them, Defendants, nor any other WBC member -– which would not come until August 2006.

Consequently, Plaintiff is not eligible for attorney's fees and costs here where his attorneys failed to send the service waiver notice directly to the Defendants, rather than to Ms. Phelps and Ms. Hockenbarger, who do not represent Defendants in this civil action. If the rule drafters intended to allow service waiver requests to be sent to attorneys rather than to defendants, Rule 4(d) would have said so. Instead, Fed. R. Civ. P. 4(d) clearly sets forth the parties who can be sent waiver requests, and they are not lawyers. Similarly, Fed. R. Civ. P. 4(h) sets forth who may be served to effectuate service on corporations (Defendant Westboro Baptist is a corporation, as conceded in the Complaint); Rule 4(h) lists the same kinds of persons listed in Fed. R. Civ. P. 4(d), and none of them are lawyers, either.

Clearly, then, defendants cannot ordinarily be eligible to pay attorney's fees and costs under Fed. R. Civ. P. 4(d) where Plaintiff mailed notice to attorneys (who have not even appeared in this civil action) and not to Defendants. The Federal Circuit made this abundantly clear in 1997 as follows:

> The mere relationship between a defendant and his attorney does not, in itself, convey authority to accept service. [Citations omitted.] Even where an attorney exercises broad powers to represent a client in litigation, these powers of representation alone do not create a specific authority to receive service. [Citations omitted.]. **Instead, the record must show that the attorney exercised authority beyond the**

attorney-client relationship, including the power to accept service.

U.S. v. Ziegler Bolt & Parts Co., 111 F.3d 878, 882 (Fed. Cir. 1997) (emphasis added). *Accord*, *Wilson v. Prudential Fin.,* 332 F. Supp. 2d 83, 88-89 (D.D.C. 2004).

Consequently, Plaintiff is ineligible for costs and fees for non-waiver, because he sent his waiver request to the wrong persons. *See supra.*

Plaintiff incorrectly invoked Md. RPC 4.2 to fix his failure to send his waiver notice directly to individual Defendant Fred Phelps and corporate Defendant Westboro Baptist Church's officer or managing or general agent or other agent authorized by appointment or law to receive service of process.[2] Md. RPC 4.2(a) provides only that "a lawyer shall not communicate about the subject of the representation with a person who the lawyer knows is represented in the matter by another lawyer unless the lawyer has the consent of the other lawyer or is authorized by law or court order to do so." *Id.* In this instance, the waiver request is not a communication about the "subject" of the representation any more than serving a

[2] Because Plaintiff has aimed many arrows at Fred. W. Phelps, Sr., in this litigation, it bears pointing out that Mr. Phelps is not an officer of WBC, as made plain by checking the Kansas public records of registered corporations.

summons and complaint on a defendant is a communication about the subject of the representation.

Consequently, Defendants have a likelihood of success on this issue on appeal.

b. **Plaintiff is not eligible for attorney's fees for his efforts to obtain alternative service of process.**

Although Fed. R. Civ. P 4(d)(5) specifically provides for reasonable attorney's fees for "any motion required to collect the costs of service" for failure to waive service of process, no rule or other provision of law provides for recovering attorney's fees for filing a motion for alternative service of process. *McCarthy, et al., V. Wolfeboro Restaurant Services, Inc.*, 132 F.R.D. 613 (D. Ma. 724) ("the Federal Rules of Civil Procedure are quite uniform in always following the word 'expenses' or the word 'costs' with the phrase 'including attorney's fees' whenever the drafters intended that attorney's fees be recoverable"). Defendants were unable to raise this argument when Plaintiff filed its Motion for alternative service; service had not yet been perfected, and the Motion was not delivered to Defendants nor the lawyers who signed the June 12 letter.

Despite the foregoing arguments contained here and in Defendants' original opposition to Plaintiff's fee and cost Motion, the Court, nevertheless, ordered Defendants to pay

attorney's fees for Plaintiff's motion to collect (1) the costs of service and (2) for alternative service of process. For the foregoing reasons, Defendants have a likelihood of success on appeal concerning the Court's ordering Defendants to pay attorney's fees for filing the alternative service motion and for the time spent by Plaintiff's counsel in moving for fees for having filed the alternative service motion.

2. Defendants will suffer irreparable injury if the stay is denied.

Defendants will suffer irreparable harm if the stay is denied. Defendants are a preacher and a small church, and $3150 is no small sum for them to be without for any period of time, including consideration that Defendants are already bearing the financial burden of ongoing litigation fees and costs to defend in this Court and on appeal.

Plaintiff mischaracterizes Defendants' ability to pay fees and costs by asserting that Defendants have unlimited funds to travel the country. *First*, undersigned counsel understands that individual Defendant Fred W. Phelps, Sr., does not routinely travel to demonstrations on soldiers' funeral dates. Moreover, undersigned counsel informed the Court during the November 28, 2006, scheduling conference that his health makes it difficult for him to travel, yet Plaintiff lists travel dates subsequent to the scheduling conference date. As to the remaining

Defendant, WBC, undersigned counsel understands that each WBC member pays his or her own way to travel to any demonstrations. Moreover, the WBC members who were in Westminster, Maryland, on the date of the funeral of Plaintiff's son represented a fraction of the WBC church membership, and Plaintiff does not claim that all members go to each demonstration.[3]

3. Plaintiff will not be substantially harmed by the stay,

Particularly if the Court grants Defendants' request to pay a supersedeas bond pursuant to Fed. R. Civ. Proc. 62(d) and Local Rule 110(1), payment to Plaintiff will be accordingly assured in the event Defendants do not prevail on appeal.

4. The public interest will be served by granting the stay.

The public interest will be served by granting the stay. The Court of Appeals' resolution of this appeal may well clarify for future parties –- as well as for this litigation -– such

[3] Plaintiff's Reply goes beyond addressing the merits of Defendants' Motion to Stay by taking the opportunity to attack WBC members' First-Amendment-protected demonstration activity. The First Amendment is needed less to protect popular speech than to protect such unpopular speech as that ascribed to WBC members. *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002) (confirming the First Amendment right to produce, distribute, and possess sexually explicit material depicting adults who appear to be minors, even if the intention is to make them look like minors). Moreover, Defendants' demonstration rights in this instant litigation are further protected by the First Amendment's free exercise of religion clause, because Fred Phelps and other demonstrators were guided by their sincere interpretation of the bible in planning and carrying out the demonstration on the day of the funeral of Plaintiff's sons, no matter how much others may disagree with such biblical

foregoing issues as the circumstances under which a notice for waiver of service may be served upon an attorney rather than directly upon a defendant, and whether and when a plaintiff ever may collect attorney's fees for litigating a motion for alternative service.

B. Defendants Have Followed Rule 11

It is unfortunate that Plaintiff makes a meritless claim under Fed. R. Civ. P. Rule 11(b), because Defendants have adhered to that rule.

The Court's Order directs Defendants to pay in excess of $3,000 in attorney's fees and costs to Plaintiff (and does not direct that the payment be in the name of Plaintiff's counsel). Consequently, the irreparable harm part of the analysis of whether to grant a stay pending appeal reasonably includes consideration of whether Plaintiff will have the ability to return the $3150 if Defendants prevail on appeal. Consequently, relevant to Plaintiff's ability to repay the $3150 if Defendants prevail on appeal are (1) Plaintiff's inability less than five years ago to be current by even $450 with child support payments, together with his having lost his job five years ago, *see* Plaintiff's attached Answer to Amended Petition in *Albert Snyder v. Julia Snyder*, Carroll County Circ. Ct. Civ. No. C-

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interpretation. This litigation has nothing to do with whether one agrees or

2000-32560-DV at paragraph 5 (March 20, 2002) (“March 2002 Answer”), and (2) the solicitation at www.matthewsnyder.com for help with legal expenses, where it is uncertain whether Plaintiff Snyder is advancing legal expenses out of his own pocket, thus reducing his assets accordingly. Even if Plaintiff subsequently became current on his child support payments, the above-described recent financial problems (unemployment five years ago and problems being current with even $450 in child support less than five years ago) is fully relevant to considering Plaintiff’s current ability to repay fines and costs should Defendants prevail on appeal.

Moreover, Plaintiff does not dispute the authenticity of the March 2002 Answer. Furthermore, far from having obtained the March 2002 Answer for any improper means, the March 2002 Answer serves Defendants’ defense against the Complaint’s taking issue at paragraphs 21 and 26 with one or more alleged website statements that Plaintiff and his ex-wife raised their son Matthew for the devil.

The March 2002 Answer shows that Plaintiff was divorced at least several years before his son Matthew was killed. WBC members believe, based on their interpretation of the bible, that when a man divorces, he not only violates the biblical commandment against adultery but that he simultaneously makes

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disagrees with the viewpoints of WBC and its members.

his ex-wife an adulterer, whether or not the ex-wife has any further relationships with men. In that regard, whether or not one agrees with WBC's biblical interpretations, its members consider any act of divorce, including Plaintiff's divorce, to be a violation of the Ten Commandments, and therefore a sin that could subject a person to go to hell rather than to heaven. Defendants have a First Amendment free speech right and First Amendment free exercise of religion right to hold and express such views. Consequently, the information in the March 2002 Answer is fully relevant to Defendants' defense against the Complaint's defamation claim and other claims.

II. **CONCLUSION**

For all the foregoing reasons, Defendants respectfully move for a stay, pending appeal, of the order to pay $3150 in attorney fees and costs to Plaintiff, and move for leave to file a supersedeas bond.

Absent a stay, Defendants' $3150 payment to Plaintiff is due January 10, 2007, and this Reply is being filed January 7, 2007.

Respectfully submitted

MARKS & KATZ, L.L.C.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply was served by the CM/ECF filing system on January , to:

Paul W Minnich, Esquire
Craig Tod Trebilcock, Esquire
Rees Griffiths, Esquire
Sean E Summers, Esquire

___/s/ Jonathan L. Katz_____
Jonathan L. Katz