Snyder v. Phelps et al Doc. 77

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

ALBERT SNYDER, Plaintiff v. FRED W. PHELPS, SR., SHIRLEY L. PHELPS ROPER. REBEKAH A. PHELPS-DAVIS, and WESTBORO BAPTIST CHURCH, INC. Defendants	Civil Action No. 1:06-cv-1389-RDB Judge Bennett

RESPONSE OF PLAINTIFF, ALBERT SNYDER, IN OPPOSITION TO MOTION OF DEFENDANTS SHIRLEY L. PHELPS-ROPER AND REBEKAH A. PHELPS-DAVIS TO DISMISS OR FOR SUMMARY JUDGMENT AND FOR OTHER RELIEF

I. PROCEDURAL HISTORY

On June 5, 2006, plaintiff initiated the within action against defendants Fred W. Phelps, Sr. ("Phelps") and Westboro Baptist Church, Inc. ("WBC"). After eventually serving Phelps and WBC, Phelps and WBC filed Motions to Dismiss challenging, among other things, this Honorable Court's subject matter jurisdiction and personal jurisdiction. In addition, Phelps and WBC claimed that the complaint failed to state a claim upon which relief could be granted -- i.e., Fed. R. Civ. P. 12(b)(6). Appropriately, on October 30, 2006, this Honorable Court denied the aforementioned Motion to Dismiss. [Doc. No. 28]

Subsequently, plaintiff filed a Motion to Amend his Complaint. In short, plaintiff sought to identify the "John and Jane Doe" defendants. Plaintiff sought to substitute these un-named defendants with their true identity, which is Shirley Phelps-Roper ("Roper") and Rebekah Phelps-Davis ("Davis"). Over Phelps' and WBC's objections, the Court granted plaintiff's Motion to Amend, and subsequently, Roper and Davis were served. [Doc No. 62] In response,

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Roper and Davis filed a Motion to Stay Discovery and for an extension to file a Motion to Dismiss. [Doc No. 71] The Motion to Stay Discovery was appropriately dismissed and the extension to file a responsive pleading was granted, in part. [Doc No. 74]

Thereafter, Roper and Davis filed a *51 page* Motion to Dismiss or, alternatively, a Motion for Summary Judgment and Other Appropriate Relief. [Doc No. 76] In essence, Roper and Davis are attempting to re-litigate the same issues that this Honorable Court already ruled upon concerning Phelps and WBC as they argue their Motion to Dismiss.[1]

The Motion for Summary Judgment argument is a little different -- Roper and Davis expand the issues already decided in the Motion to Dismiss by attaching lengthy self-serving affidavits. To compound the problem, Roper and Davis ask the Court to assume their version of the facts are true. By means of example, Roper and Davis attach newspaper articles to their purported Motion for Summary Judgment. However, Roper and Davis know or should have known that plaintiff has denied the veracity of some of the newspaper articles. Likewise, in Phelps' deposition and in Tim Phelps' deposition (as the corporate designee), they denied newspaper quotes attributed to them or members of WBC.

In its simplest form, a Motion for Summary Judgment requires the Court to assume the opposing parties' facts are true and determine that no reasonable juror could find in favor of a non-moving party. Roper and Davis are asking the Court to assume their facts are true and the Court should construe each and every fact in their favor -- prior to the completion of discovery. Normally, this tactic might be excused by a misguided pro se litigant. In this case, it is, however,

[1] Even assuming *arguendo* that Roper and Davis thought they needed to preserve their objection, a 51 page memorandum regurgitating their versions of the facts was unnecessary.

unfortunate that plaintiff and the Court must respond to this argument at this juncture. These particular pro se defendants are licensed attorneys and aware that discovery is not completed. Furthermore, they are aware that they must consider plaintiff's version of the facts as true for purposes of a motion for summary judgment. Roper and Davis start their argument by stating "[T]he facts set out above . . ." Def.'s Br. at 21. The so called facts they are referring to are their own self-serving affidavits.[2] Nevertheless, plaintiff will respond accordingly.

Roper and Davis attempt to twist plaintiff's claims to fit their supposed defenses. However, plaintiff never asserted defendants could not voice their views. Plaintiff did, however, allege generally that defendants disrupted his son's funeral and he was harmed because of the disruption. In their depositions, defendants have admitted that they did not know anyone in the Snyder family, were not invited to Lance Corporal Matthew Snyder's funeral and their presence was not welcomed. Defendants Phelps and the deisginee, in their respective depositions, claim that they attended the funeral (and other similar funerals) because the media is there and they can get their message out. By means of analogy, a prostitute trades sex for money. Defendants trade a military family's ability to bury their child with dignity and respect for their ability to get media attention.[3]

[2] Plaintiff's counsel has requested deposition dates for Roper and Davis but they have refused to provide dates. According to Roper and Davis, they will not provide dates for depositions until the within motions are decided -- despite this Honorable Court's previous Order denying their motion for a stay.

[3] Obviously, defendants disrupt non-military funerals such as the Amish children in Pennsylvania who were killed and the children from Virginia Tech who were killed. The point is that their particular message has nothing to do with the Snyder family and the protest is only being used to command a captive audience for the purpose of gaining media attention.

Defendants are aware that "[t]he principles of First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction." Poulos v. State of New Hampshire, 345 U.S. 395, 405, 73 S.Ct. 760, 766 (1953). In other words, the First Amendment does not authorize defendants to disrupt a funeral and command a captive audience.

II. MISCELLANEOUS MOTIONS

Roper and Davis ask the Court to reconsider their Motion for a Stay. Def.'s Br. at 4. Because defendants do not expand their previously rejected argument, plaintiff will only point out that nothing has changed since their previous request - other than the filing of a 51 page motion. In the event Roper and Davis add to their argument via reply, plaintiff will seek leave to file a sur-reply to address their argument. Regardless, there is no basis to stay the within action. Ironically, defendants repeatedly refer to their First Amendment rights of freedom of religion, but Roper and Davis simply ignore plaintiff's right to worship in his church and bury his son in his church of choice -- without defendants' disruptive behavior.

Plaintiff is not opposed to the establishment of an answering date or a scheduling conference. However, plaintiff is opposed to delaying the trial date. Further, plaintiff is willing to extend reasonable professional courtesies allowing for a reasonable extension of discovery, as long as the trial date is not extended.

Roper and Davis attempt to distinguish many of their defenses, but the reality is that they are claiming that the First Amendment provides a defense to their conduct. As discussed below, this is wrong. With respect to defendants' concerns related to Intentional Infliction of Emotional Distress, defendants claim plaintiff is "an activist over this, and is fully functioning." Def.'s Br.

at 43. First, this fact is not true, and second, defendants have already received plaintiff's expert reports, which can hardly characterize plaintiff as an "activist." This is a question of fact for the jury to decide. The conspiracy defense is premature. Although Phelps has conceded that all WBC members agree (i.e., conspire) on everything, he also testified, for example, that each WBC member is free to protest funerals as they choose and are required to pay for their own transportation. Prior to completion of discovery, plaintiff cannot be sure what "capacity" the individual defendants were acting under. In fact, depending on the outcome of discovery, this issue may be a question of fact for the jury to decide.

Defendants' request to reduce the Amended Complaint to fit their desires lacks merit. Defendants concede "[a]t the outset, a party may move to strike under Rule 12(f) any 'insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.' A motion to strike, however, is **not favored** and will be denied unless the allegations attacked have **no possible relation** to the controversy and may prejudice the other party." Steuart Inv. Co. v. Bauer Dredging Constr. Co., 323 F. Supp. 907, 909 (D. Md. 1971) (internal citations omitted) (emphasis added). Here, the Amended Complaint puts defendants on notice of the claims against them. There is nothing redundant. Apparently, defendants are proud of their choice of words (regardless of their truth) so they cannot be scandalous.

Venue is proper for the reasons stated below. In addition to the within arguments, plaintiff incorporates by reference this Honorable Court's Memorandum Opinion dated October 30, 3006.

III. SUBJECT MATTER JURISDICTION

At this early juncture, Roper and Davis leap to some conclusions concerning the facts in an effort to assert their claim that the First Amendment supports their disruptive and outrageous behavior. (Perhaps if Roper and Davis would have completed discovery, they would have been able to more accurately identify the allegations in the Complaint and advance their defenses.)[4] Roper and Davis argue that plaintiff "would have sued the Patriot Guard and the St. John's School," and according to them, because plaintiff did not sue each and every potential party, this indicates plaintiff disagrees with defendants' speech. This argument misses the point.

The Patriot Guard and St. John's School did not disrupt Lance Corporal Matthew Snyder's funeral. The children were, however, in school and subjected to defendants' actions. When plaintiff attended his son's funeral, he was aware that the children were in school and would be subjected to defendants' actions. This undoubtedly caused further emotional or psychological damage to plaintiff. Regardless, the children did not disrupt the funeral.

The Patriot Guard's attendance at the funeral was based upon defendants' presence at the funeral. By analogy, defendants would argue that plaintiff should have sued the firefighters and the arsonist and not just the arsonist for damage to the burning house. If anything, the Patriot Guard mitigated damages for defendants. As defendants know, plaintiff testified in his deposition that he wanted a private funeral and did not want the Patriot Guard to attend the funeral. Plaintiff did acknowledge that he appreciated the Patriot Guard's efforts to shield his family from defendants' actions. In other words, plaintiff's first choice was to have a private

[4] Although it should be obvious with these facts, plaintiff has nonetheless attached an affidavit identifying the need for further discovery. See Ex. A.

funeral. When defendants forced themselves upon the funeral, the Snyder family accepted their second best option.

Plaintiff is not challenging defendants' ability to express their purported religious views. Nothing prevented defendants from exercising their views in their own church or at the local park or at some other establishment. The fact of the matter is that defendants disrupted plaintiff's funeral at a Catholic Church. If anything, defendants prevented plaintiff from expressing his religious views. This Court is not being asked to determine religious doctrine. This red herring should be summarily dismissed. In fact, defendants have already litigated the issue of whether they have a religious right to disrupt a funeral.

> Here, plaintiffs contend the picketing of funerals is motivated by their religious beliefs and in furtherance of their religious obligation to go forth and warn the citizenry of the risks of defying what they believe is God's word condemning homosexuality. While it is correct, as fact, that the plaintiffs' personal religious beliefs proscribe any sympathetic tolerance to homosexuality, and correct, as fact, that preaching their beliefs and carrying forth a public warning is part of their religious tenets and training, nevertheless, **the particular means by which they carry forth their message is one of personal preference not one of religious mandate.** The complete elimination of this particular forum, much less a time, place, and manner restriction regarding it, does not disable their religious regimen from exercise in other public forums or by other means to disseminate and "preach" their position that God does not tolerate homosexuals. **There is no religious consequence imposed for failing to picket at a specific location or event.**

Westboro Baptist Church, Inc. et al., v. City of Topeka et al., at 75-76. (Emphasis added)

(Unpublished Opinion will accompany this Brief as Exhibit B)

In other words, defendants have no First Amendment right (or defense) to impose their purported religious beliefs upon plaintiff's son's funeral. Defendants' reliance on United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972), is equally unavailing. Crowthers dealt with the

government choosing who could assemble. Here, we have a private lawsuit making a decision concerning the disruption of a funeral and resulting harm.[5] This Honorable Court could (and should) decide that no one should be allowed to disrupt a funeral. Put differently, defendants are being treated the same as others. By means of example, if a Muslim or Buddhist disrupted a funeral and caused injury, that person would be potentially subject to the same civil claims.

Defendants' next contention is that the Court would be forced to decide religious doctrine when determining the definition of adultery. If the Court would follow defendants' logic, they could claim any statements, no matter how untrue or damaging, were merely religious beliefs. However, this Honorable Court does not have to guess what the definition of adultery is. Maryland courts have resolved the definition of adultery and have never resolved those issues based upon a litigants *subjective* definition of adultery. See, e.g., Wright v. Phipps, 122 Md. App. 480, 712 A.2d 606 (1998). In addition, Lance Corporal Matthew Snyder was a member of the military and the military, similarly, defines adultery. 10 U.S.C. § 933.

Even assuming for sake of argument's sake that a First Amendment analysis is necessary at this premature juncture - which would be wrong to begin with - "a state may protect it citizens from unwelcome communications - including offensive communications - where the communications invade substantial privacy interests in an essentially intolerable manner, as where the communications are directed at citizens in their homes or where the communications

[5] Klagsbrun v. Va'ad Harabonim of Greater Monsey, 53 F. Supp. 2d 732 (D.N.J. 1999), is likewise unavailing. In Klagsbrun, the court was concerned about defining bigamy within a particular faith. Where, as here, plaintiff is alleging that he was accused of teaching his son adultery, Maryland and military law already define adultery and this Court should not abandon those definitions in favor of defendants' subjective definition. Also, in Klagsbrun, "plaintiff's entire defamation claim with respect to paragraphs 5 and 6 of the notice is grounded upon religious doctrine." Id. at 742.

are directed at a 'captive' audience and are so obtrusive that individuals cannot avoid exposure to them." McQueary v. Stumbo, ,453 F. Supp. 2d 975, 990 (E.D. Ky. 2006). To determine whether a significant governmental interest exists, this Court must analyze whether the communication at issue is so intrusive that an unwilling audience cannot avoid it, see Frisby v. Schultz, 487 U.S. 474 (1988), or the Court must determine whether the audience can avoid "bombardment of their sensibilities simply by averting their eyes" Cohen v. California, 403 U.S. 15, 21 (1971).

Obviously, "[f]amily members have personal stake in honoring and mourning their dead and objecting to unwanted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord the deceased person who was once their own." National Archives and Records Admin. v. Favish, 541 U.S. 157, 168 (2003). It follows that:

> A funeral is a deeply personal, emotional and solemn occasion. Its attendees have an interest in avoiding unwanted, obtrusive communications which is at least similar to a person's interest in avoiding such communications inside his home. Further, like medical patients entering a medical facility, funeral attendees are captive. If they want to take part in an event memorializing the deceased, they must go to the place designated for the memorial event.

McQueary, 453 F. Supp. 2d at 992.

Defendants continue to ignore plaintiff's rights to bury his son with dignity and respect and without disruption. "It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of the deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect this memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased." Schuyler v. Curtis, 147 N.Y. 434, 42 N.E. 22, 25 (1895).

The Supreme Court has recognized that civilized people respect burial rites:

> Burial rites or their counterparts have been respected in almost all civilizations from time immemorial. See generally 26 Encyclopaedia Britannica 851 (15th ed.1985) (noting that "[t]he ritual burial of the dead" has been practiced "from the very dawn of human culture and ... in most parts of the world"); 5 Encyclopedia of Religion 450 (1987) ("[F]uneral rites ... are the conscious cultural forms of one of our most ancient, universal, and unconscious impulses"). They are a sign of the respect a society shows for the deceased and for the surviving family members. The power of Sophocles' story in Antigone maintains its hold to this day because of the universal acceptance of the heroine's right to insist on respect for the body of her brother. See Antigone of Sophocles, 8 Harvard Classics: Nine Greek Dramas 255 (C. Eliot ed.1909). The outrage at seeing the bodies of American soldiers mutilated and dragged through the streets is but a modern instance of the same understanding of the interests decent people have for those whom they have lost. Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.

Favish, 451 U.S. at 167-168.

In addition, the Supreme Court has realized that all listeners are not equal. "The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader "right to be let alone" that one of our wisest Justices characterized as "the most comprehensive of rights and the right most valued by civilized men." Hill v. Colorado, 530 U.S. 703, 716-717 (2000) (internal citations and footnotes omitted.) "The right to avoid unwelcome speech has special force in the privacy of the home, and its immediate surroundings, but can also be protected in confrontational settings." Id. (Internal citations omitted.) "[T]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political interests." Hill, 530 U.S. at 716. Likewise, mourners (to include plaintiff) should not be required to undertake Herculean efforts to escape defendants' disruptive behavior -- especially when plaintiff is burying his own son.

A. Defendants' statements were not opinion.

Defendants attempt to take this Honorable Court's previous opinion out of context. Of course, this Court can review the complaint to determine if plaintiff has adequately alleged defamation. However, before the Court can determine whether the defendants' statements are alleged opinions, the Court must consider "[T]he context and tenor of the" defamatory statements." Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180, 184 (4th Cir. 1998). In Biospherics, the court also determined that the allegations were vague, such as "hype" and "hope." In addition, the defendant was a financial magazine discussing potential investment opportunities or businesses. In that context, common sense compels the conclusion that the writer was stating his or her opinion. Here, there is no "context" that would indicate opinion, other than defendants' subjective definition of adultery. Nevertheless, this Court cannot determine the "context" before discovery is completed.

Even if the Court were to consider the factors identified in Biospherics at this premature stage of the proceedings, defendants' argument is of no moment. The Biospherics court discussed "a four-factor test to identify an opinion: "a trial judge should (1) consider the author['s] or speaker's choice of words; (2) decide whether the challenged statement is 'capable of being objectively characterized as true or false'; (3) examine the context of the challenged statement within the writing or speech as a whole; and (4) consider 'the broader social context into which the statement fits." Id. at 183. In the instant matter, defendants' choice of words were clear. Plaintiff taught his son adultery. This statement is not true. The law defines adultery so plaintiff or defendants can prove the truth of adultery and whether plaintiff taught his son adultery. Defendants can call witnesses to assert their purported truth defense. (However,

defendants should be required to assert the legal definition of adultery as the truth, as opposed to their subjective interpretation.) There is no context which would suggest that defendants were offering their opinion. To the contrary, defendants claim they will assert *truth* as a defense. There is no broader social context. As defendants concede, the social context they are referring to is from "defendants' perspective." Defendants' suggestion that their statements concerned "the outcome of the war" or the "deaths of more soldiers" belies their actual statements - this farfetched story should be summarily rejected. Whether plaintiff taught his son adultery has nothing to do with the war or deaths in the war.

B. This Court has personal jurisdiction.

Roper and Davis are Kansas residents and on March 10, 2006, they traveled to Westminster, Maryland to disrupt Lance Corporal Matthew Snyder's funeral. Amended Complaint ¶ 8, 9, and 21. To establish personal jurisdiction, plaintiff must allege: (1) the exercise of jurisdiction must be authorized under the state's long-arm statute; and (2) the exercise of jurisdiction must comport with the due process requirements of the Fourteenth Amendment. Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc., 334 F.3d 390 (4th Cir. 2003). Here, plaintiff has alleged tortious injury in Maryland caused by an act or omission in the state. The long-arm statute is satisfied. See Md. Code Ann., Cts. & Jud. Proc. § 6-103(b)(3).

Constitutional "minimum contacts" are satisfied by specific jurisdiction. Defendants specifically came to Maryland to target Lance Corporal Matthew Snyder's funeral, plaintiff, the Snyder family and the St. John's Catholic Church -- all of which were located in Maryland. Likewise, traditional notions of fair play and substantial justice are established. Asahi Metal Indus. Co. v. Super. Ct. of California, 480 U.S. 102, 113 (U.S. 1987). The burden on defendants

in litigating in Maryland would not be too great. After all, defendants (by their own admission) have traveled to Maryland subsequent to disrupting Lance Corporal Matthew Snyder's funeral. A cursory review of defendants' website shows their extensive travels. (According to www.godhatesfags.com, defendants will be in Washington, D.C. this week. They constantly travel the country.) Defendants will not be inconvenienced at all by traveling and are apparently traveling without regard to the within matter. Maryland has an interest in protecting its citizens from the outrageous actions of defendants.

C. Invasion of Privacy.

Defendants' repeated assertions that Lance Corporal Matthew Snyder's funeral was open to the public contradicts plaintiff's sworn testimony. Not surprisingly, defendants omitted this fact. Furthermore, defendants claim they commented on "public information and issues of intense public interest." Def.'s Br. at 38. Defendants' statements concerning "Got hates fags" has nothing whatsoever to do with "soldiers' funerals" or "the death rate" of soldiers -- likewise, "Maryland Taliban," "Sempri fi fags," and "Pope in Hell" have nothing to do with a private funeral.

"The words and the activity conveying the words is equivalent to an immediate invasion of privacy and an assault." Westboro Baptist Church, Inc. et al., v. City of Topeka et al. at 72.

(a) Intrusion upon Seclusion

The tort of invasion of privacy based upon an "intrusion upon seclusion" depends on three elements. First, the defendant must have committed an intentional intrusion. Second, the intrusion must have involved a private matter. Third, the intrusion must have employed a

method that is "highly offensive" to the reasonable person. See Furman v. Shepherd, 130 Md.App. 67, 73 (2000).

(i) Intentional Intrusion

The intrusion was intentional. Maryland courts have been concerned that a intrusion upon seclusion result from something more than negligence. Bailer v. Erie Ins. Exchange, 344 Md. 515 (1997). But the actions of defendants flow from a repeated course of conduct following the death of American servicemen, both in person at their funerals and remotely from their website. Such consistency indicates intent -- regardless, plaintiff has alleged intentional actions by defendants.

(ii) Private Matter

In order to establish the element that an intrusion concerned a private matter, a plaintiff must show that the defendant's conduct concerned some "private zone" of physical or sensory surroundings or unwanted access to data sources or personal conversations. Mitchell v. Baltimore Sun, 164 Md.App. 497, 523 (2005), citing Shulman v. Group W. Prods., Inc., 18 Cal.4th 200 (1998). Like the third element of the intrusion upon seclusion theory, this second element is highly dependent on the context of the particular intrusion. An intrusion upon private sensory or physical matters can occur in a public area, as with the scene of a severe physical accident following an automobile collision. See Shulman, 18 Cal.4th at 200. Such an intrusion also can occur in the confines of a quasi-public business establishment involving a public figure who makes known a desire to be free from the intrusion. See Mitchell, 164 Md.App. at 503-04. Such private intrusions depend upon the nature of the specific intrusion rather than area of the activity or the person who is the object of the intrusion. The emphasis on the specific nature of

the intrusion rather than the substantive content or viewpoint ensures that the conduct subject to liability is not related to the suppression of ideas. See Mitchell, 164 Md.App. at 524 (quoting Shulman, 18 Cal.4th at 496, with approval).

(iii)"Highly Offensive" to Reasonable Person

Like the latter element of physical or sensory intrusion into a private matter, the third element involving the level of offense of the intrusion to the reasonable person is highly contextual. See Am.Jur.2d Privacy § 39. Intrusive conduct may be "highly offensive" if it continues following a request by the object of intrusion for the intrusion to cease. See Mitchell. It is unreasonably offensive if it involves the public depiction of private matters in a manner that inflicts mental suffering, shame, or humiliation. See Shulman. This element is clearly alleged and essentially admitted.

(b) Publicity to Private Life

In Maryland, the tort of invasion of privacy based upon the theory of giving publicity to private life depends on three elements. First, the disclosed information must be highly offensive to the reasonable person, as with the theory of intrusion upon seclusion. Second, the information, though related to a private matter, must not relate to a matter of legitimate public concern. Furman v. Shepherd, 130 Md.App. 67, 77 (2000)

(i) "Highly Offensive" to Reasonable Person

Like intrusion upon seclusion, invasion of privacy for publicity to private life requires that the invasion of privacy be highly offensive to the reasonable person. The specific application of this element under this cause of action does not materially differ from the highly contextual approach under the latter cause of action. Id. at 78. For the reasons stated above,

defendants committed conduct that a jury could find to be highly offensive to the reasonable person.

(ii) No Legitimate Public Concern

The element of publicity to private life of no legitimate public concern requires both that a defendant genuinely cause information to be made public and that the information not relate to matters within the public record. For information to have been sufficiently publicized, a defendant must have conveyed the information to more than an isolated group of people. Gladhill v. Chevy Chase Bank, 2001 WL 894267 at 20 (Md.App.) (unreported case). Informing a group of people through a magazine or book of even limited circulation, however, is sufficient for information to have been "publicized." Id. It is of no public concern, for example, that plaintiff taught his son adultery.

D. Defamation

Defendants argue that there is no evidence of harm to plaintiff. However, defendants fail to recognize that discovery is ongoing. In addition, defendants, once again, fail to acknowledge that plaintiff has already testified that a co-worker assumed that plaintiff's son was a homosexual. Notwithstanding further discovery on this issue, plaintiff has alleged he was harmed and defendants' assertions to the contrary is a story they can tell to a jury. In fact, defendants have been served with numerous expert reports outlining plaintiff's injuries.

Plaintiff is not a public figure and defendants barely make a straight-faced argument claiming that he is. Indeed, public figure status is established prior to the events giving rise to the claims. Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675 (1979). The defendants so called *facts* are all related to post-complaint activities.

E. There is no privilege

Defendants' claim that their statements are tantamount to advancing social policy are patently absurd. To the contrary,

> Based on the expert evidence admitted of the societal purpose of funerals and the effect on attendees, particularly the emotional status of mourners who may be, but are not exclusively, family members of the deceased, it is overwhelmingly clear and beyond doubt that persons at funeral events who are even perceived by the family or friends of a deceased as "outsiders" and interfering with the family's control of the funeral agenda, much less persons manifesting a presence that is hostile or derisive of the deceased, is per se, conduct that is disorderly and assault provoking. Further, it seems factually beyond dispute that picketing funeral events is, per se, to some degree immediately injurious to family and close friends of the deceased and further, by psychologically interrupting the grieving process of the deceased's survivors and friends, such a presence may, as medical fact, cause some mourners actual physical distress and physical injury.

Westboro Baptist Church, Inc. et al., v. City of Topeka et al. at 24.

IV. PREMATURE SUMMARY JUDGMENT MOTION

Under Rule 56(f), "summary judgment [may] be refused where the nonmoving party has not had the opportunity to discovery information that is essential to his opposition." Nguyen v. CNA Corp., 44 F.3d 234, 242 (4th Cir.1995) (citations omitted.) As an initial matter, this Honorable Court has already ruled on these very same allegations via its October 30, 2006 opinion. Even if there are different defendants at issue now, this Court should, nevertheless, decline the request to reverse its previous decision -- the allegations are the same. Where, as here, the Court has issued an order which establishes a deadline for discovery, plaintiff must be given the opportunity to conclude its discovery before this premature motion is decided.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter

of law." Fed.R.Civ.P. 56(c); see generally Celotex Corp. v. Catreet, 477 U.S. 317, 322 (1986). The Court must resolve all doubts as to the existence of a genuine issue of material fact in favor of the non-moving party. In the instant matter, plaintiff has not been given the opportunity to depose defendants. Interrogatories and Requests for Production are outstanding and discovery has not closed.

V. RES JUDICATA BARS DEFENDANTS FIRST AMENDMENT DEFENSE

The doctrine of *res judicata* bars the re-litigation of a claim if there is a final judgment in a previous litigation where the parties, the subject matter and causes of action are identical or substantially identical as to issues actually litigated and as to those which could have or should have been raised in the previous litigation. Res judicata protects the courts, as well as the parties, from the attendant burdens of relitigation. Anne Arundel County Bd. of Educ. v. Norville, 390 Md. 93, 107, 887 A.2d 1029, 1037 (2005). The elements of *res judicata* under federal law are analogous to those under Maryland law: (1) identical parties, or parties in privity, in the two actions; (2) the claim in the second matter is based upon the same cause of action involved in the earlier proceeding; and (3) a prior and final judgment on the merits, rendered by a court of competent jurisdiction in accordance with due process requirements. Id.

Here, in Westboro Baptist Church, Inc. et al. v. City of Topeka Kansas, et al., WBC challenged the government's authority to enforce a funeral picketing act in Kansas. According to defendants' own motion to dismiss, they are acting on behalf of WBC and, consequently, were a party or a party in privity with WBC. Notably, defendant Phelps was a party, the within corporate designee (Tim Phelps) was a party and defendants' family law firm litigated the matter

on their behalf. Roper and Davis are members of the family law firm. See www.phelpschartered.com.

In the aforementioned Kansas case, the within defendants claimed that the First Amendment prevented the government from enforcing the funeral picketing act. Among other things, the court concluded that the government had a compelling government interest in protecting mourners from defendants' activities. "A fair conclusion to be drawn from the expert testimony as a whole is that picketing a funeral is the equivalent of kicking a person while they're down and correspondingly it hurts these defenseless persons, both physically and mentally." Id. at 25. In addition, "it is clear a funeral service or other rite of respect to a deceased is factually and historically a private event and that factually, an uninvited, particularly negative, intrusion ("protest activities") at such an event may properly and legally be seen as disorderly and immediately injurious to some mourners there present, both emotionally and to some likely degree, physically." Id. at 145.

There was a final judgment on the merits. The trial court wrote a 157 page opinion that was subsequently affirmed in its entirety on appeal. It follows that if the government can enforce a funeral picketing act under a compelling government interest standard then a private party can bring a private lawsuit to enforce a private civil action.

VI. CONCLUSION

At this juncture, the Court's function is to determine if plaintiff has adequately pled his case. For the reasons stated above, plaintiff respectfully requests that this Honorable Court deny all defendants' motions.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I have served the foregoing Response to the Motion of Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis, and accompanying exhibits, by delivering said documents to a third party carrier for delivery on May 11, 2007, addressed as follows:

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