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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 PHELPS-DAVIS & PHELPS-ROPER TO RESPONSE OF PLAINTIFF, ALBERT SNYDER, IN OPPOSITION TO MOTION OF DEFENDANTS PHELPS-DAVIS & PHELPS-ROPER TO DISMISS OR FOR SUMMARY JUDGMENT AND FOR OTHER RELIEF

Rebekah A. Phelps-Davis and Shirley L. Phelps-Roper, as pro se defendants herein, hereby jointly make the following reply to plaintiff's response to their motion to dismiss or for summary judgment and for other relief. All arguments, authorities and materials included in defendants' original motion, including all attachments, are incorporated here in full. Defendants will pick up on numbering attachments where the earlier ones left off, starting in this submission with Attachment 17.

Summary Judgment

Plaintiff argues that summary judgment should not be sought or granted because discovery is underway in this case. On its face, Rule 56(b) permits the filing of a motion for summary judgment, with or without supporting affidavits, by a defendant, "at any time." Further,

> When First Amendment values are at stake, summary judgment is a favored remedy. "'[B]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable. [Citation.] Therefore, summary judgment is a favored remedy [in such cases]....'" (*Shulman v. Group W Productions, Inc., supra,* 18 Cal.4th at p. 228, 74 Cal.Rptr.2d 843, 955 P.2d 469.) "'To any suggestion that the outer bounds of liability should be left to a jury to decide we reply that in cases involving the rights protected by the speech and press clauses of the First Amendment the courts insist on judicial control of the jury.'" (*Ibid.*) "While the crucial test as to whether to grant a motion for summary judgment remains the same in free speech cases (i.e., whether there is a triable issue of fact presented in the case), the courts impose more stringent burdens on one who opposes the motion and require a showing of high probability that the plaintiff will prevail in the case. In the absence of such showing the courts are inclined to grant the motion and do not permit the case to proceed beyond the summary judgment stage [citations]." (*Sipple v. Chronicle Publishing Co.* (1984) 154 Cal.App.3d 1040, 1046-1047, 201 Cal.Rptr. 665.)

Lyle v. Warner Brothers Television Productions, 38 Cal.4th 264, 300-301, 132 P.3d 211, 234-235 42 Cal.Rptr.3d 2, 30 (S.Ct.Calif. 2006).

Rule 56(f) provides the answer in a situation where a plaintiff claims he needs more time for discovery to respond to a motion for summary judgment. The rule requires an affidavit that demonstrates what additional discovery is needed and how it is relevant to the issues raised. While plaintiff has conceded the application of Rule 56(f) by attaching his affidavit to his response, he has failed to comply with the requirements of the rule.

> Although Plaintiff does not object to the Court treating Defendant's instant motion as a Motion for Summary Judgment, Plaintiff argues that summary judgment is premature and inappropriate at this stage, as Plaintiff requires additional discovery in order to support his claims.

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> Under Rule 56(f), "summary judgment [may] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Nguyen v. CNA Corp.,* 44 F.3d 234, 242 (4th Cir.1995) (quoting *Anderson,* 477 U.S. at 250 n. 5, 106 S.Ct. 2505 (1986)). Rule 56(f) provides:
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> > **(f) When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.
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> Fed.R.Civ.P. 56(f). The Fourth Circuit has strictly interpreted the requirements of Rule 56(f), emphasizing the need for a Rule 56 affidavit that "particularly specifies legitimate needs for further discovery" and identifies "which aspects of discovery required more time to complete." *Nguyen,* 44 F.3d at 242. Indeed, the Fourth Circuit places "great weight on the Rule 56(f) affidavit" and, to that end, "[a] party may not simply assert in its brief that discovery was necessary and thereby overturn summary judgment when it failed to comply with the requirement of Rule 56(f) to set out reasons for the need for discovery in an affidavit." *Evans,* 80 F.3d at 961 (quoting *Nguyen,* 44 F.3d at 242 (internal citations omitted)).

Amirmokri v. Abraham, 437 F.Supp.2d 414, 419-420 (D.Md. 2006). In *Amirmokri*, the plaintiff "substantively respond[ed]" to the motion for summary judgment, and attached a Rule 56(f) affidavit identifying some specific discovery he desired to take, 437 F.Supp.2d at 420; this still was not sufficient to overcome summary judgment. "Although Plaintiff has asserted the need to conduct additional discovery on a variety of different issues, the Court finds that Plaintiff has failed to demonstrate that the evidence he seeks to discover will materially affect the outcome of this case. A Rule 56(f) motion for additional discovery is properly denied when the additional evidence sought to be discovered would not create a genuine issue of material fact sufficient to defeat summary judgment," *ibid.*

Plaintiff's affidavit does not set out specific discovery items needed, or why the information could not be obtained heretofore. Further, as to the few points of fact touched upon in the affidavit or response relevant to any fact issues raised by plaintiff's claim, in fact, that matters are not in dispute and/or the information would not impact the outcome of this matter.

The two-page affidavit of plaintiff states, in essence, that a) he is awaiting transcripts of the depositions of defendant Phelps and the corporate representative for WBC, Inc.; b) that further depositions are required; c) that he needs to "clarify" the affidavits of defendants submitted with their motion[1]; d) that if defendants Phelps-Davis and Phelps-Roper "stick to their story when being deposed concerning distance from my son's funeral," it will be necessary to depose or get affidavits from police officers or members of St. John's Catholic Church; and e) plaintiff needs to depose the experts identified by defendants Phelps and WBC. None of this information is specific; none of it is tied to the issues in this case; none of it is demonstrated with specificity as being relevant to the issues in this case that are raised by the summary judgment motion; and most of it was in reach to plaintiff before he filed this lawsuit. (Expert witnesses

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[1] Plaintiff complains that defendants would not provide dates for their depositions. At **Attachment 17** is the e-mail exchange between plaintiff's counsel and these defendants. There are significant issues raised by plaintiff's counsel attempting to proceed with discovery as to these two defendants, including this Court's local rule indicating that there should be no discovery until defendants have had a scheduling conference; and including whether these defendants are required to travel to Maryland for their depositions. Further, defendants have raised personal jurisdiction issues with this Court, which they respectfully submit are substantial; participating in discovery while the motion to dismiss for lack of personal jurisdiction is pending would undoubtedly be argued as a waiver by these defendants of those claims. These issues were all properly raised with counsel, and he made no response. That is an accurate description of the status of the matter. Defendants understand the Court will hear at least some of these issues by a phone conference of May 29, and that they are entitled to make a written submission to the Court prior to that date. It is disingenuous to suggest whether these depositions occur or not is in the way of plaintiff responding to the motion for summary judgment, when defendants have submitted detailed affidavits which are not a bit unclear; and when plaintiff and his counsel had a duty to investigate the facts of this matter before filing suit.

which WBC and defendant Phelps have identified, because they are at this juncture being required to prepare for trial, is unavailing as information necessary to answer the instant motion.)

The only substantive topic raised by the affidavit that remotely may touch on the issues raised by the motion to dismiss or for summary judgment is the distance defendants stood from the location of the funeral on March 10, 2006, prior to the commencement of the funeral. The language "stick to their story" is not sufficient to illustrate a fact dispute. More important, all of the evidence – including plaintiff's own testimony – shows that there is no dispute about where the defendants stood on March 10, 2006.

Plaintiff gave testimony and marked the map, and agrees with the location where defendants say they stood: Plaintiff testified in his deposition to where the defendants stood, where he entered, and where the church was located. **Attachment 18** is a copy of the exhibit used during plaintiff's deposition, while he gave testimony. **Attachment 19** contains the pages of plaintiff's deposition where he testified about what he marked on the exhibit, Snyder Depo., pp. 71-72. Plaintiff marked three small x's on the exhibit, where he says the picketers stood. (A second copy of the exhibit is included, in black and white, with the x's highlighted in yellow, as they are small and a little difficult to spot.) He placed defendants exactly where defendants said they were in their affidavits and at **Attachment 6**. Defendants marked "P" where plaintiff marked "x." Defendants also marked **Attachment 6** with "E" for the entrance is where plaintiff might have entered. At **Attachment 18** plaintiff drew in red pen where he entered, and it is the same place where defendants marked "E." At **Attachment 6** defendants marked the church with a "C," and at **Attachment 18** plaintiff circled the church in red; they are the same building. So there is no fact dispute. Everyone agrees where defendants stood; everyone agrees where the

church building is located. There is no need for further discovery on this issue, and it is simply inappropriate for plaintiff to offer an affidavit speaking in terms of whether defendants will "stick to their story," when it's the same "story" he is telling. The parties used the same map – the official City of Westminster map – to do their marking. No one has to testify to the fact that the location where everyone agrees defendants stood, was over 1000 feet from the building everyone agrees is the church where the funeral was held. No one has to testify to the fact that between the picketers and the church are multiple buildings, including a school. There is no fact dispute.

The documented evidence resolves the issue so no further discovery is necessary: Even if the parties were not in agreement about the lay out of the area; where the defendants stood; the fact that the only building in sight of where they stood is the school; and the fact that it is physically impossible to turn into the entrance marked "E" (where plaintiff testified he turned in) and see over the hill to the location where everyone agrees defendants stood. The documents in this record answer the question without the need for anyone's testimony; and no jury could reach any conclusion inconsistent with the physical evidence. The documents at Attachments 6, 7, 11 and 16 – none of which have been disputed in any measure in plaintiff's response to the motion to dismiss or for summary judgment – show ***without regard to anyone's testimony*** – what happened. No jury could conclude anything different from the *facts* that defendants stood over 1000 feet from the church; that large buildings including a school were between defendants and the church; that a row of Patriot Guard members stood between defendants and the school; and that the entrance by the sign where plaintiff entered was over a hill from defendants. These

exhibits tell the story, and a denial of summary judgment is inappropriate when documentation of the events is available, in spite of a plaintiff claiming that it happened otherwise.

The United States Supreme Court recently discussed this point in *Scott v. Harris*, ---- U.S.----, 127 S.Ct. 1769, ----L.Ed.2d----, 2007 WL 1237851 (2007). There, a deputy moved for summary judgment in an action by a motorist who alleged excessive force during a high-speed chase. The deputy alleged that he acted reasonably and was entitled to qualified immunity. The trial court and Eleventh Circuit denied summary judgment, because the plaintiff motorist claimed he was not driving dangerously so the deputy did not have to use such force. The high-speed chase was captured on video tape, and showed that the plaintiff motorist's version of the events was not true. The Court reversed the denial of summary judgment, saying that where there is evidence showing the party's version is so discredited that no reasonable jury could believe him, the trial court should adopt the version of the facts shown in the record for purposes of ruling on the motion for summary judgment.

> At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. Fed. Rule Civ. Proc. 56(c). As we have emphasized, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts .... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (footnote omitted). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.
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> That was the case here with regard to the factual issue whether respondent was

> driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

2007 WL 1237851 at 4-5, 127 S.Ct. at 1776. Thus, it would be inappropriate to deny summary judgment in this case on the basis of any claim by plaintiff about the lay out, where defendants stood, where he drove in, or what could be seen from where he drove in, when the documented contemporaneous record made at the scene shows otherwise. See also *Ingle v. Yelton*, 439 F.3d 191, 195-196 (4th Cir. 2006) (court must undertake a fairly critical assessment of the forensic evidence to determine if officers' statements are supported by the evidence instead of relying on self-serving statements inconsistent with the evidence, in cases involving fatal shootings by law enforcement).

The one potentially relevant fact issue that is addressed by plaintiff's Rule 56(f) affidavit is not a fact that is in dispute. To the extent it matters where defendants stood – when they were engaged in lawful protected speech – that matter is answered in this record. They stood over 1000 feet away, on a public easement, with multiple buildings between them and the church where the funeral was held, out of sight and sound of anyone in or going to the church.

Other factual arguments are made in the response, which are not even reflected in plaintiff's affidavit, which are addressed below. Plaintiff has not satisfied Rule 56(f), and has failed to demonstrate that there are any fact issues which require further discovery in this matter.

Personal Jurisdiction

On the question of personal jurisdiction (minimum contacts), in addition to the arguments and authorities contained in defendants' original memorandum in support of their motion, the legal authority cited by plaintiff at p. 12 of his response is instructive. In *Carefirst of Maryland,*

Inc. v. Carefirst Pregnancy Centers, Inc., 334 F.3d 390 (4th Cir. 2003), defendant had a principal place of business in Illinois; had no physical presence in Maryland (no offices, phone listing, employees or agents); but its Internet website was accessible worldwide, including in Maryland, and it had entered a contract with a corporation with headquarters in Maryland for Web hosting services, 334 F.3d at 394. In finding this was not sufficient contact with Maryland for personal jurisdiction for a trademark infringement claim, the Court addressed when Internet contact can create personal jurisdiction, in a case where an out-of-state defendant has acted outside of the forum in a manner that allegedly injures someone residing in the forum, 334 F.3d at 397-398. The Court said that where a defendant's Internet site is passive, and merely makes information available, the site cannot render the defendant subject to specific personal jurisdiction in a foreign court.

The Court further distinguished the facts of *Carefirst* from the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), where the Court held that California had jurisdiction over Florida reporters who had written an allegedly libelous article for the National Enquirer about a California actress, because California was the focal point both of the story and of the harm suffered; the writers' actions were expressly aimed at California; and the reporters knew that the brunt of the potentially devastating injury would be felt by the actress in the State in which she lives and works and in which the National Enquirer has its largest circulation, 334 F.3d at 398.

In this case, the WBC web site where the epic complained of was placed is passive; there is no activity such as soliciting donations, entering contracts, or soliciting business; on the face of it, the purpose of the website is to publish information. Further, the epic complained of did

not target Maryland, and instead was published for general worldwide dissemination. Further, it is not possible that anyone could believe plaintiff would suffer any injury in Maryland (even assuming for the sake of argument the words of the epic could cause actionable injury), because plaintiff is not a resident of Maryland, and instead is a resident of Pennsylvania.

The Court in *Carefirst* went on to discuss its decision in *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), where the Court addressed whether a Virginia court had jurisdiction over foreign defendants in a libel suit brought by the warden of a Virginia prison against two Connecticut newspapers, 334 F.3d at 400. Despite the warden showing connections to Virginia – including the facts that he was in Virginia; the newspapers posted the articles on Virginia-accessible websites; and the primary effects of the defamatory statements on the warden's reputation were felt in Virginia – the Court held that the Connecticut newspapers did not post materials on their Internet sites with the "manifest intent" of targeting readers in Virginia, and hence the Virginia court lacked jurisdiction over the newspapers.

The Court concluded in *Carefirst* that for the defendant's website to bring defendant within the jurisdiction of the Maryland courts, the company must have done something more than merely place information on the Internet, 334 F.3d at 400. The Court concluded that the Maryland court did not have jurisdiction. See also *Dring v. Sullivan*, 423 F.Supp.2d 540 (D.Md. 2006) (defendant's contact with Maryland through an e-mail message distributed via a listserv was insufficient to subject him to personal jurisdiction in defamation action filed in Maryland under Maryland long arm statute or due process, though three recipients of the e-mail were residents of Maryland).

In this case, on the portions of the complaint dealing with the epic, WBC's website is clearly passive, on its face; plaintiff testified that the only way he found the epic was by Googling his son's name looking for articles; nothing was sent to Maryland; the epic did not target Maryland; and the epic was placed on a website with general information available to anyone in the world. Furthermore, clearly no injury could have occurred in Maryland because plaintiff doesn't live in Maryland. The legal precedents of this Court and the Fourth Circuit make it very clear that there is no personal jurisdiction for the epic. Further, for all the reasons indicated in the memorandum submitted by defendants in support of their motion to dismiss or for summary judgment, the very limited contacts by these defendants with Maryland are totally insufficient to find that minimum contacts occurred so that it satisfied notions of fair play for them to be required to answer in a Maryland court.

Facts

In spite of a complete failure to provide any evidentiary basis upon which to refute the detailed facts set out in defendants' motion, at various points in his response, plaintiff *argues* some facts. No citations to the record are provided; and as will be demonstrated here, the arguments offer factual contentions that are simply not supported in the record. Those fact items (which are in fact irrelevant distractions, and frequently of a tone and nature that raise the question of whether Rule 606 is being violated as to these defendants) will be addressed here, so as to not let them sidetrack from the real issues in this case.

Articles: At p. 2 of his response, plaintiff says that these defendants "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." This is an unfortunate mischaracterization of the record. Plaintiff did not deny the veracity of some of the newspaper articles. Instead, he testified under oath that he lied to a reporter when he told the reporter that he did not see defendants or their signs on the day of his son's funeral, **Attachment 19**, Snyder Depo., pp. 181-182. That doesn't question the veracity of the article; it questions the veracity of the plaintiff. Further, as to the claim that Fred Phelps or Tim Phelps denied newspaper quotes attributed to them or WBC members, plaintiff offered no citations or documentation of this claim, and defendants have reviewed the transcripts and found nothing where either denied a quote attributed to them or any WBC member.[2]

Other picketing or publishing activity by WBC: Throughout this case, in the various filings by plaintiff, there are repeated references to events involving defendants' picketing ministry, which have nothing to do with the funeral event raised in the complaint. Thus, for instance, at pp. 3 and 14 of the response, plaintiff makes statements about the funerals of Amish children and other soldiers. This case is not about those events, and it is untoward to require defendants to correct every statement made by plaintiff and his counsel in this record; nor should these references be permitted to continue. (E.g., WBC did not picket at the Amish funerals; members spoke on a radio program instead.) Throughout the depositions of Fred Phelps and Tim

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[2] Timothy Phelps was not asked about any quotes attributed to him. He was shown a statement by a reporter, with no identified person being quoted, saying that WBC members call family members of soldiers, and Mr. Phelps simply stated that this does not happen. No quote was attributed to anyone – let alone a WBC member; and instead this was a situation where a reporter apparently pulled a myth out of the air and put it on paper. (This is not uncommon in the market place of ideas, and is to be expected; not so much in a court proceeding.) See **Attachment 20**, Phelps, T., Depo., pp. 86-87. This testimony had nothing to do with the articles attached to defendants' motion to dismiss or for summary judgment. In Fred Phelps' deposition, he was asked if he heard defendant Phelps-Roper make a statement attributed to her in a story, and he said he didn't hear it; he didn't deny she said it, he just didn't hear her say it. See **Attachment 21**, Phelps, F., Depo., pp. 101, 103.

Phelps, plaintiff questions various language of signs unrelated in any way to this plaintiff or his son (some not even related to the topic of soldiers' deaths). Regardless of what the Court may end up allowing in the pleadings, these events or viewpoints are not relevant to this case, at all, let alone to the motion to dismiss or for summary judgment. Even if there is some rationale for concluding that what defendants do in publishing public statements on pubic topics, according to their religious beliefs and conscience, can be characterized as tortious conduct; any alleged harm to any person other than plaintiff would be highly prejudicial, and should be disallowed. In *Philip Morris USA v. Williams*, ----U.S ----, 127 S.Ct. 1057, ----L.Ed.2d---- (2007), the Supreme Court held that it was error to disallow a jury instruction telling the jury they could not award punitive damages for alleged harm to persons not parties to the case. The due process implications are considerable; this case is not a referendum on whether defendants are wrong in what they believe about how God is dealing with this nation or on any other topic on which they hold an opinion (religious or otherwise).

A "capacity" red herring: At p. 5 plaintiff states that he cannot be sure what "'capacity' the individual defendants were acting under,'" suggesting this means he needs more discovery. Before suing a church and accusing all of its members of a conspiracy to commit torts, perhaps the better approach would be to investigate the matter. Further, in the depositions of Fred Phelps and Tim Phelps, both stated plainly that each WBC member pays for his or her own travel for this religious ministry (except minors, whose parents pay); and that the church members speak often one with another to be in accord, as the Scriptures requires a church to be, on matters pertaining to the ministry (**Attachment 20**, Phelps, T., Depo., at 66-67, 118; **Attachment 21,** Phelps, F., Depo., at 33-39, 41-42). What question is left to decide and what discovery is lacking

on any issue that would impact the outcome of this case on the topic of "capacity" of the defendants? This kind of vague reference, to some irrelevant mystical issue floating around in the atmosphere, using terms like "capacity" which have no legal significance in the context of the claims, is inappropriate when responding to a motion that sets forth specific facts with clarity, and legal principles that must be addressed in this case.

Evidence the funeral was not meant or thought to be private: Plaintiff says at p. 6 of his response that he wanted a private funeral, and did not want the Patriot Guard to be present. Even if this statement was true, it has nothing to do with this case, because defendants didn't go to the funeral; didn't stay in the area when the funeral was underway; and at all times stood on public right of ways, which is a place by definition not private and not subject to an invitation from any private citizen. Yet even if it was a relevant claim, the record says otherwise. In addition to the public notices of the funeral at **Attachment 4**, which are not disputed; and the high praise and warm salutations exchanged between funeral goers and the Patriot Guard; plaintiff's testimony reflects that he knew the story was public, and that he anticipated that the coverage would be all positive for his son. In fact, the way he learned of the picketers being present, and the content of their signs, was when he went to the basement of his parents' house after the funeral, and someone said, "let's turn on the news and see what they say about Matt," **Attachment 19,** Snyder Depo., pp. 87-90. Further, the way he learned about the epic about which he complains is when he Googled his son's name to see "what articles were on there" about his son, **Attachment 19**, Snyder Depo., pp. 109-113. If plaintiff really believed the funeral was totally private, and was not a public and media event, why did he and his family turn on the TV to see what stories there were, and why did he Google his son's name to find articles?

The meaning of adultery: Plaintiff asserts (at p. 8) that there exists a definition of adultery (while offering two different sources with multiple takes on the meaning), and that defendants are bound by this/these definition/s. The fact that any attention is given to trying to define "adultery" demonstrates that the word is subject to different opinions. By simply Googling "definition of adultery," these defendants immediately found multiple opinions about what constitutes adultery. E.g., "Adultery is going against a promise you made to someone you care for on the grounds of intercourse." "I see adultery as having a sexual relationship with two or more people, without their express consent. A little unorthodox approach, but that is my opinion. If you are having sex with someone, you should ask their permission before having sex with another person." "What if a married person fantasies [sic] about another particular person. Even though they may not act upon it, is that not also bad? Where does adultery start? With a touch or in the mind? There are many things the dictionary cannot tell us and this is one of them." "I also think there is some level of mental adultery. By confiding certain things to anyone who is not your spouse, you are, in a way, breaking the sanctity of the marriage and thus committing adultery." "Adultery is not the actual act of having sex, it is just [the] act of breaking a promise. No promise, no adultery." (See http://allphilosophy.com/topic/1561.) At http://business.gorge.net/zdkf/lawlib/law7.html you can find definitions of *general adultery* ("any perversion or a sex act that is taboo or forbidden"); *specific adultery* (lying carnally with thy neighbor's wife to defile thyself with her, or with betrothed females; or "unjustified divorce [Matthew 19:8-9; Mark 10:11-12; Luke 16:18]," or mental adultery [lusting after another's wife]); or *figurative adultery* ("what is really meant is idolatry"). At http://www.bibleb.com/files/MAC/sg2216.htm you can find this: "Though primarily it refers to

a sexual relationship that violates a marriage, I believe the spirit of it extends further to include any kind of illicit sexual behavior."

The debate about what constitutes adultery could go on indefinitely, between those confessing to have faith and those not. The cites plaintiff provided (see p. 8 of response) add more fodder to the confusion. In *Wright v. Phipps*, 122 Md.App. 480, 712 A.2d 606 (1998) we find a rule that a complainant in an action for fault divorce can sustain a charge of adultery by producing evidence of a disposition on the part of the alleged adulterer and the paramour to commit adultery, and an opportunity for them to do so. The federal code plaintiff cited, 10 U.S.C. Section 933, on conduct unbecoming an officer and a gentleman, refers to one case holding that private sexual intercourse between an offender and his or her superior, unaccompanied by any element of harassment or coercion, is not conduct unbecoming; a second case holding that a per se rule would not be established that sexual intercourse by a married soldier with a person not his or her spouse constituted the offense of adultery; and a third case holding holds that two persons are guilty of adultery when they engage in illicit sexual intercourse if either of them is married to a third person; if unmarried they are guilty of fornication whenever they engage in illicit sexual intercourse under circumstances in which the conduct is not strictly private. There is certainly no clear unanimous binding definition for adultery found in these authorities, despite what plaintiff claims.

Whatever the opinions may be that abound, the *fact* still remains that plaintiff divorced his wife, and voluntarily published this information (which was in a public record to begin with); and, the *fact* still remains that defendants hold the belief that when a man divorces his wife, he teaches his children to commit adultery, based on the language of Matthew 5:32. No definition

from any source contrary to this *opinion* is binding on defendants. Further, there is no cause of action for stating this opinion in response to voluntary publication of information in the context of a public event.

Judge Theis' Opinion & Res Judicata

Plaintiff suggests that an opinion by Judge Franklin Theis in Kansas, where he addressed the question of whether a local Topeka ordinance and Kansas statute pertaining to church and funeral picketing was constitutional, should have res judicata effect in this case. Plaintiff was not a party to the Kansas action, nor was anyone remotely in privity to him. Further, the issues were entirely different. There, Judge Theis was determining whether the government had an interest sufficient to warrant a 90-foot limit by ordinance on where picketers outside of churches or funerals (he upheld the distance for funerals, but only upheld 50 feet for churches); and whether a state statute using the language "before and about" was unduly vague or overbroad (he put a limiting construction on the statute, so that it is to be applied only directly in front of the building). Those issues are not at all the same issues raised in this tort action, where defendants stood over 1000 feet away from a building, and plaintiff is claiming he was harmed by signs he did not see, and an epic that was posted on a passive Web site for general information.

Defendants recognize that the government is placing limits on where they can engage in picketing, and realize that Judge Theis felt the government had an interest in doing so. They are entitled to assert the constitutional constraints to such limits in litigation, and have done so from time to time, as necessary to be able to publish the message a timely, topical religious message according to their consciences. The case cited by plaintiff, *Poulos v. State of New Hampshire*, 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105 (1953), indicates that the First Amendment is not a

promise that everyone with opinions or beliefs can express them any time or any place. That is just another way of saying the government can put a content neutral reasonable time, place and manner restriction on protected activity if they have a valid interest and the restriction is narrowly tailored to carry out that interest. When legislative bodies and/or courts impose such restrictions, defendants and other WBC members fully comply with those restrictions, whether or not they consider them overly broad or otherwise constitutionally infirm, and whether or not they challenge them through court action.

If Judge Theis' decision has any res judicata impact in this case, it is to say that 1000 feet is plenty of distance. The evidence shows that defendants were not in the sight or hearing of plaintiff or anyone else attending the funeral. That would have satisfied Judge Theis (see p. 78 of Theis' order, where he stated that he would construe the Kansas Funeral Picketing Act more broadly, since the conduct it proscribes, "if it is within eyesight, or earshot is immediately injurious, though correctly the extent of injury, in some measure, may be a function of distance"). Plus Judge Theis' ruling came years before soldiers' funerals became major public events, as described by the Tenth Circuit in *Showler v. Harper's Magazine Foundation*, 2007 WL 867188 (10th Cir. 2007), and as the record shows happened in this case. Judge Theis believed that the mere presence of any unsolicited person (which would include the Patriot Guard according to plaintiff's response, see p. 6) "imbued [the site of a funeral as the location for public debate] with compelling governmental interests," see Theis Order, p. 26.

For res judicata to apply under Maryland law, 1) the parties in the present litigation must be the same or in privity with the parties in the earlier dispute; 2) the claims present in the current action must be identical to the ones determined in the prior adjudication; and 3) there

must have been a final judgment on the merits. *Anne Arundel County Board of Education v. Norville*, 390 Md. 93, 107, 887 A.2d 1029, 1037 (Ct.App. Md. 2005). Judge Theis' opinion is final, as it was appealed by the City to the Kansas Court of Appeals, and affirmed. However, the parties are not the same and the issues are not the same. Judge Theis had before him the question of whether 90 feet and directly in front of fairly balanced what he found to be competing interests and rights. The claims here sound in tort, and rest upon the proposition that defendants have no right to publish their religious viewpoint on highly public issues.

Invasion of Privacy

Plaintiff continues to assert in general that his privacy was invaded and his son's funeral disrupted. These general assertions, in the absence of specific evidence, do not suffice to overcome a motion for summary judgment. There is zero evidence that defendants or other WBC picketers were in sight or sound of the funeral or funeral goers. There is zero evidence that any aspect of the visitation, funeral, procession, burial, or any related ceremony was altered or did not proceed as planned because of the presence over 1000 feet away of defendants and WBC picketers (with buildings and bikers in between). There is zero evidence that defendants or other WBC picketers attended the funeral or had any impact whatsoever on the funeral. Disruption has to take some form beyond an amorphous allegation. Every word written contemporaneous to the events reflects that the ceremony was well-attended; well-received; comforting and pleasing to plaintiff and his family; and had every component and ingredient desired or planned. What was disrupted? What changed by virtue of defendants' actions related to the funeral?

The legal authorities plaintiff brings forth in his brief related to invasion of privacy do not support his claim. In *Furman v. Shepherd*, 130 Md.App. 67, 73, 744 A.2d 583 (2000), the Court held that when a private investigator trespassed on property to engage in surveillance activities, during daylight hours, when plaintiff was exposed to public view by his neighbors and passers by, plaintiff did not state a claim for intrusion on seclusion.

In *Mitchell v. Baltimore Sun Company*, 164 Md.App. 497, 883 A.2d 1008 (2005), the Court allowed an intrusion on seclusion claim to go to the jury when two reporters entered the private room of a former Congressman, in a private nursing facility; refused to leave when asked; and continued to ask questions directly of the plaintiff.

In *Shulman v. Group W. Productions, Inc.*, 18 Cal.4th 200, 955 P.2d 469 (S.Ct. Calif. 1998), a woman who was in a traffic accident with her son, pinned under her car for a period, and ended up a paraplegic, sued after a story aired that dramatized the event, claiming intrusion on seclusion. The California Supreme Court concluded that the subject matter of the broadcast as a whole was of a legitimate public concern, because automobile accidents are by their nature of interest to that great portion of the public that travels frequently by automobile. The Court said that the reporter being in the area of the accident, and filming the aftermath and emergency care did not constitute invasion of privacy by intrusion. The Court said the more difficult question was whether the plaintiff's words to emergency workers as she was being extricated from the wreckage, and in the emergency helicopter, were private such that publishing them constituted intrusion on seclusion. These words were captured by a microphone being clipped to the garment of a nurse at the scene, who was the lead emergency worker, without plaintiff's knowledge. Since the care being rendered was not on a very busy highway, and given the up-

close nature of the conversation which plaintiff would not reasonably expect people passing by to hear, the Court reversed summary judgment on those issues. "Cameraman Cooke's mere presence at the accident scene and filming of the events occurring there cannot be deemed either a physical or sensory intrusion on plaintiffs' seclusion. Plaintiffs had no right of ownership or possession of the property where the rescue took place, nor any actual control of the premises. Nor could they have had a reasonable expectation that members of the media would be excluded or prevented from photographing the scene; for journalists to attend and record the scenes of accidents and rescues is in no way unusual or unexpected," 18 Cal.4th at 232.

Defendants' actions were not remotely comparable to what the reporter did in *Shulman*. They did not intrude up close to plaintiff, or his family, or anyone going to the funeral. They were on a public right of way (easement) 1000 feet from the funeral, out of sight and sound. Nor were defendants' actions comparable to the reporters' in *Mitchell*, who went on private property, into a private room, and refused to leave. If defendants had gone into the funeral, made their presence and identity known, drawn attention to themselves, made noise, and refused to leave, perhaps there would be a claim here. Nothing of the kind happened here.

Plaintiff's reliance on *Favish* is also misplaced. The language of the Tenth Circuit in *Showler* illustrates why. There, a reporter entered the building where the soldier's funeral was being held; took photographs of the soldier's body lying in a coffin; and published the photos for money. Family members sued, and the case ended in summary judgment. On the invasion of privacy claim, the Tenth Circuit said:

> Plaintiffs assert three of the four branches of the tort of invasion of privacy: (1) appropriation; (2) publication of private facts; and (3) intrusion upon seclusion. *See* Restatement (Second) of Torts § § 652A-E (1977) (describing the different types of privacy torts). In addition, Plaintiffs assert a claim under Okla. Stat. tit.

21, § 839.1. For these claims, Plaintiffs rely generally on the Supreme Court's decision in *National Archives & Records Administration v. Favish,* which held that the privacy exemption in the Freedom of Information Act ("FOIA") recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images. 541 U.S. 157, 124 S.Ct. 1570 (2004). That case involved a private citizen who requested production under the FOIA of death-scene photographs of Vince Foster, deputy counsel to President Clinton, who was found dead of an apparent suicide. Plaintiffs particularly rely on language in that case that the common law has long recognized "a family's control over the body and death images of the deceased." *Favish,* 541 U.S. at 168; 124 S.Ct. at 1578.

Favish is inapplicable to this analysis because it relies on a statutory privacy right under the FOIA, not a cause of action for invasion of privacy. In fact, the Supreme Court observed in *Favish* that "the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution." *Id.* at 170, 124 S. Ct at 1579 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 762, 109 S.Ct. 1468, 1476 (1989)). Likewise, the Court stated in *Reporters Committee* that "[t]he question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution." *Reporters Committee,* 489 U.S. at 763 n. 13; 109 S.Ct. at 1476. Here, the Court will limit its reliance to the case law construing the tort of invasion of privacy and the specific Oklahoma statute at issue.

Moreover, the Supreme Court's discussion in *Favish* about the cultural history of burial rights of the deceased and surviving family members is inapposite to the facts of this case. The Court references "outrage at seeing the bodies of American soldiers mutilated and dragged through the streets," *Favish,* 541 U.S. at 168, 124 S.Ct. at 1578, as a modern example of "the interests decent people have for those whom they have lost." *Id.* This type of intrusion and exploitation of the family's grief has traditionally been considered a violation of the family's privacy rights. *Id.* Indeed, all of the cases cited by the Court in support of its acknowledgment that the common law has recognized a family's right to control the death images of the deceased, involve death images that are gruesome and none involve images displayed at a public funeral. *See id.* at 169, 124 S.Ct. at 1578-79 (collecting cases).

Courts that have found an invasion of privacy have done so when the case involves death-scene images such as crime scene or autopsy photographs. The photographs here are not death-scene photographs, but images of Sgt. Brinlee in his military uniform that accurately depict the image seen by those who attended his funeral to pay their respects. Coupled with the public nature of this funeral, the

photographs are distinguishable from those at issue in *Favish.*

Showler v. Harper's Magazine Foundation, 2007 WL 867188 at 4-5 (10th Cir. 2007)

Defendants here did not take or seek private photos of the deceased; nor did they pursue private information of any kind. Instead, they *commented* on very public information, facts and events. Many people were commenting on these events; the difference is that the comments by defendants do not comport with what plaintiff believes and thinks, or his expectations about how people should view him or his son. His position proves too much. By his reasoning, if a soldier died, and it was shown that the soldier was a rapist, that statement could not be made without liability, and instead the soldier would have to be referred to as a hero because the family expected it to be so.

Similarly, reliance on *Schuyler v. Ernest Curtis*, 147 N.Y. 434, 42 N.E. 22 (1895) is unavailing. There, family members of a deceased woman sought an injunction against the erection of a statue in her honor, for the reason she was a retiring woman who would not like the attention, and otherwise the statue was not consistent with the plaintiffs' memory of the woman. The injunction was denied and the action dismissed. In emphasizing that any privacy right of the woman died with her, the Court said, "[t]he right which survived (however extensive or limited) was a right pertaining to the living only." This case does not support the conclusion that the right of the living to have memories of the deceased includes prohibiting words on a public right of way, 1000 feet away, about a funeral of a soldier, which topic is one of intense public interest. Indeed, Maryland's law establishing 150 feet as the distance strongly suggests otherwise.

Plaintiff's Public Activity

Of far more importance to this case is the fact that the events were matters of public interest, primarily the death of a soldier in the current context (as discussed by the Tenth Circuit in the *Showler* case); and the fact that the words complained of are clearly religious opinion and not actionable. Yet if the Court is to permit the claims to go forward, plaintiff should be held to the actual malice standard. He thrust himself into the vortex of the controversy when his son died. He had the option of not talking to the media; not talking to his Congressman; not getting on national radio and TV programs; not setting up a Web site to solicit donations and support; and not making his disagreement with defendants' and WBC's message a public cause. He made a conscious decision to do all these things, so he can't be said to be acting still as a private person in this matter. In addition to what has already been provided in the record, plaintiff testified in his deposition in some detail about his participation in newspaper, radio and TV interviews and programs, about his son and his lawsuit, including an appearance on CNN and Fox (where he stayed on and watched defendant Phelps-Roper be interviewed by Julie Banderas after his interview, for "comic relief"), see **Attachment 19**, Snyder Depo., pp. 123-134.

Conclusion

Defendants have demonstrated that the key facts in this case are not in dispute. Defendants have provided substantial legal authority to question the personal jurisdiction and whether valid claims have been stated. For all of the reasons set forth in the original motion and memorandum, all its attachments, and this reply and all its attachments, defendants respectfully request that the Court order dismissal or summary judgment in this matter, and otherwise provide the relief requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that the foregoing Reply of Defendants Phelps-Davis and Phelps-Roper to Response of Plaintiff, Albert Snyder, in Opposition to Motion of Defendants Phelps-Davis and Phelps-Roper to Dismiss or for Summary Judgment and For Other Relief was served on May 21, 2007, as follows:

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