

PUBLISHED

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

ALBERT SNYDER,

*Plaintiff-Appellee,*

v.

FRED W. PHELPS, SR.; WESTBORO  
BAPTIST CHURCH, INCORPORATED;  
REBEKAH A. PHELPS-DAVIS; SHIRLEY  
L. PHELPS-ROPER,

*Defendants-Appellants,*

and

JANE DOE; JOHN DOE, JR.,

*Defendants.*

No. 08-1026

THOMAS JEFFERSON CENTER FOR THE  
PROTECTION OF FREE EXPRESSION;  
AMERICAN CIVIL LIBERTIES UNION;  
AMERICAN CIVIL LIBERTIES  
UNION OF MARYLAND,

*Amici Supporting Appellants,*

and

JEFFREY IRA SHULMAN,

*Amicus Supporting Appellee.*

Appeal from the United States District Court  
for the District of Maryland, at Baltimore.

Richard D. Bennett, District Judge.

(1:06-cv-01389-RDB)

Argued: December 2, 2008

Decided: September 24, 2009

Before KING, SHEDD, and DUNCAN, Circuit Judges.

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Judgment reversed and bonds discharged by published opinion. Judge King wrote the opinion, in which Judge Duncan joined. Judge Shedd wrote a separate opinion concurring in the judgment.

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#### COUNSEL

**ARGUED:** Margie Jean Phelps, Topeka, Kansas, for Appellants. Sean E. Summers, BARLEY & SNYDER, L.L.C., York, Pennsylvania, for Appellee. **ON BRIEF:** Craig T. Trebilcock, SHUMAKER WILLIAMS, P.C., York, Pennsylvania, for Appellee. J. Joshua Wheeler, THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, Charlottesville, Virginia, for The Thomas Jefferson Center for the Protection of Free Expression, Amicus Supporting Appellants. Joel Kleinman, David Schur, Ranga Sourirajan, DICKSTEIN SHAPIRO, L.L.P., Washington, D.C., for American Civil Liberties Union and American Civil Liberties Union of Maryland; Steven R. Shapiro, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for American Civil Liberties Union; Deborah A. Jeon, ACLU FOUNDATION OF MARYLAND, Baltimore, Maryland, for American Civil Liberties Union of Maryland, Amici Supporting Appellants. Jeffrey I. Shulman, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., Amicus Supporting Appellee.

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**OPINION**

KING, Circuit Judge:

In June 2006, Albert Snyder instituted this diversity action in the District of Maryland against Westboro Baptist Church, Incorporated (the "Church"), and several of its members (collectively, the "Defendants"). Snyder's lawsuit is predicated on two related events: a protest the Defendants conducted in Maryland near the funeral of Snyder's son Matthew (an enlisted Marine who tragically died in Iraq in March 2006), and a self-styled written "epic" (the "Epic") that the Defendants posted on the Internet several weeks after Matthew's funeral. Snyder's complaint alleged five state law tort claims, three of which are implicated in this appeal: invasion of privacy by intrusion upon seclusion, intentional infliction of emotional distress ("IIED"), and civil conspiracy. After a trial in October 2007, the jury found the Defendants liable for \$2.9 million in compensatory damages and a total of \$8 million in punitive damages. Although the district court remitted the aggregate punitive award to \$2.1 million, it otherwise denied the post-trial motions. *See Snyder v. Phelps*, 533 F. Supp. 2d 567 (D. Md. 2008) (the "Post-Trial Opinion"). The Defendants have appealed, contending that the judgment contravenes the First Amendment of the Constitution. As explained below, we reverse on that basis.

I.

A.

The facts of this case as presented at trial are largely undisputed, and they are detailed in the district court's Post-Trial Opinion:

On March 3, 2006, Marine Lance Corporal Matthew A. Snyder was killed in Iraq in the line of duty. Shortly thereafter, two United States Marines came

to the home of the Plaintiff, Albert Snyder, and told him that his son had died. As Matthew Snyder had lived in Westminster, Maryland, and graduated from Westminster High School, St. John's Catholic Church in Westminster was selected as the site for his funeral, which was scheduled for March 10, 2006. Obituary notices were placed in local newspapers providing notice of the time and location of the funeral.

Defendant Fred W. Phelps, Sr., founded Defendant Westboro Baptist Church, Inc. in Topeka, Kansas, in 1955. For fifty-two years, he has been the only pastor of the church, which has approximately sixty or seventy members, fifty of whom are his children, grandchildren, or in-laws. Among these family members are Defendants Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis. There are approximately ten to twenty members of the church who are not related to Phelps by blood or marriage. According to the testimony of Defendants' expert, the members of this church practice a "fire and brimstone" fundamentalist religious faith. Among their religious beliefs is that God hates homosexuality and hates and punishes America for its tolerance of homosexuality, particularly in the United States military. Members of the church have increasingly picketed funerals to assert these beliefs. Defendants have also established a website identified as [www.godhatesfags.com](http://www.godhatesfags.com) in order to publicize their religious viewpoint.

Defendants' testimony at trial established that their picketing efforts gained increased attention when they began to picket funerals of soldiers killed in recent years. Members of the Phelps family prepare signs at an on-site sign shop at their Kansas church to take with them in their travels. They also

utilize an on-site production facility to produce videos displayed on the church's website.

Phelps testified that members of the Westboro Baptist Church learned of Lance Cpl. Snyder's funeral and issued a news release on March 8, 2006, announcing that members of the Phelps family intended to come to Westminster, Maryland, and picket the funeral. On March 10, 2006, Phelps, his daughters Phelps-Roper and Phelps-Davis, and four of his grandchildren arrived in Westminster, Maryland, to picket Matthew Snyder's funeral. None of the Defendants ever met any members of the Snyder family.

Defendants' rationale was quite simple. They traveled to Matthew Snyder's funeral in order to publicize their message of God's hatred of America for its tolerance of homosexuality. In Plaintiff's eyes, Defendants turned the funeral for his son into a "media circus for their benefit." By notifying police officials in advance, Defendants recognized that there would be a reaction in the community. They carried signs which expressed general messages such as "God Hates the USA," "America is doomed," "Pope in hell," and "Fag troops." The signs also carried more specific messages, to wit: "You're going to hell," "God hates you," "Semper fi fags," and "Thank God for dead soldiers." Phelps testified that it was Defendants' "duty" to deliver the message "whether they want to hear it or not." Lance Cpl. Snyder's funeral was thus utilized by Defendants as the vehicle for this message.

It was undisputed at trial that Defendants complied with local ordinances and police directions with respect to being a certain distance from the church. Furthermore, it was established at trial that

Snyder did not actually see the signs until he saw a television program later that day with footage of the Phelps family at his son's funeral.

Defendants' utilization of Matthew Snyder's funeral to publicize their message continued after the actual funeral on March 10, 2006. After returning to Kansas, Phelps-Roper published an "epic" on the church's website, [www.godhatesfags.com](http://www.godhatesfags.com). In "The Burden of Marine Lance Cpl. Matthew Snyder," Phelps-Roper stated that Albert Snyder and his ex-wife "taught Matthew to defy his creator," "raised him for the devil," and "taught him that God was a liar." In the aftermath of his son's funeral, Snyder learned that there was reference to his son on the Internet after running a search on Google. Through the use of that search engine, he read Phelps-Roper's "epic" on the church's website.

*Snyder v. Phelps*, 533 F. Supp. 2d 567, 571-72 (D. Md. 2008) (internal citation omitted).<sup>1</sup>

B.

1.

When Albert Snyder filed his complaint in June 2006, he sued Fred W. Phelps, Sr., and the Church, later adding its

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<sup>1</sup>The Defendants have a substantial history of protesting at venues other than soldiers' funerals. For example, on the day of Matthew Snyder's funeral, they also protested in Annapolis at the Maryland State House and at the Naval Academy. The Defendants have also been involved in litigation throughout the country relating to their protests. *See, e.g., Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir. 2008); *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008). As a result of such activities, approximately forty states and the federal government have enacted legislation addressing funeral picketing. *See* Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. Kan. L. Rev. 575, 576 (2007).

members Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis as defendants. The complaint alleged five state law tort claims: defamation, intrusion upon seclusion, publicity given to private life, IIED, and civil conspiracy. The Defendants moved for summary judgment on those claims, contending, inter alia, that their challenged words "constitute[ ] expressions of opinion, which are not actionable." J.A. 239.<sup>2</sup> They asserted that their words "are clearly rhetorical, hypothetical, religious and laced with opinion," and that "it is impossible to prove or disprove these things, particularly given that doctrinal viewpoints drive the opinions." *Id.*

On October 15, 2007, the district court granted summary judgment to the Defendants on two of the five tort claims: defamation and publicity given to private life.<sup>3</sup> The court awarded summary judgment on the defamation claim because the Defendants' speech was "essentially . . . religious opinion" and "would not realistically tend to expose Snyder to public hatred or scorn." *Snyder*, 533 F. Supp. 2d at 572-73. On the publicity given to private life claim, the court awarded summary judgment because the Defendants had not made public any private information. In so ruling, the court explained that the Defendants had published only information gleaned from a newspaper obituary and that such publication would not be highly offensive to a reasonable person, because the information was already a matter of public record.

In October 2007, the parties proceeded to trial on the remaining three claims of the complaint: intrusion upon seclusion, IIED, and civil conspiracy. At trial, Snyder testified, "recount[ing] fond memories of his son . . . and the traumatic

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<sup>2</sup>Citations herein to "J.A. \_\_" refer to the contents of the Joint Appendix filed by the parties in this appeal.

<sup>3</sup>Snyder has not cross-appealed the district court's summary judgment awards to the Defendants on his tort claims for defamation and publicity given to private life. Thus, whether the court erred in making those rulings is not implicated in this appeal.

news of his passing." *Snyder*, 533 F. Supp. 2d at 588. In its Post-Trial Opinion, the district court summarized Snyder's testimony:

He described the severity of his emotional injury, stating that he is often tearful and angry, and that he becomes so sick to his stomach that he actually physically vomits. He testified that Defendants placed a "bug" in his head, such that he is unable to separate thoughts of his son from the [Defendants'] actions: "there are nights that I just, you know, I try to think of my son at times and every time I think of my son or pass his picture hanging on the wall or see the medals hanging on the wall that he received from the [M]arine [C]orps, I see those signs." He testified also that "I want so badly to remember all the good stuff and so far, I remember the good stuff, but it always turns into the bad."

Plaintiff also testified as to the permanency of the emotional injury. He testified that "I think about the sign [i.e., Thank God for dead soldiers] every day of my life. . . . I see that sign when I lay in bed at nights. I [had] one chance to bury my son and they took the dignity away from it. I cannot re-bury my son. And for the rest of my life, I will remember what they did to me and it has tarnished the memory of my son's last hour on earth." He stated also that "somebody could have stabbed me in the arm or in the back and the wound would have healed. But I don't think this will heal."

Throughout trial, Plaintiff demonstrated significant emotion, appearing visibly shaken and distressed, and was often reduced to tears. On occasion during the trial, Plaintiff requested and was granted leave from the courtroom to compose himself. The jury witnessed firsthand Plaintiff's anguish and the

unresolved grief he harbors because of the failure to conduct a normal burial.

*Id.* at 588-89 (second and third alterations in original) (internal citations omitted).

Snyder called several expert witnesses to testify concerning the injuries the Defendants had caused him, including the worsening of his diabetes and severe depression. Snyder's treating physician confirmed that the Defendants' actions had exacerbated Snyder's depression, thereby preventing him from going through the normal grieving process. *See Snyder*, 533 F. Supp. 2d at 588. Snyder's psychologist testified "that the demonstration and the things that [Plaintiff] talked about [seeing] in the website . . . have made the depression worse and lengthened it." *Id.* (alterations in original).

During the summary judgment proceedings and the trial, the Defendants repeatedly contended that the First Amendment protects their actions.<sup>4</sup> In that regard, the district court recognized that certain signs carried by the Defendants — such as "America Is Doomed" and "God Hates America" — "express[ed] general points of view" that may have merited First Amendment protection. *Snyder*, 533 F. Supp. 2d at 578. But the court ruled that certain other signs — such as "Thank God for Dead Soldiers," "Semper Fi Fags," "You're Going to Hell," and "God Hates You" — created issues of fact for the jury because they "could be interpreted as being directed at the Snyder family." *Id.* Likewise, the court concluded that statements published in the Epic on the Church website "created similar issues to be addressed by the finder of fact." *Id.*

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<sup>4</sup>The Free Speech Clause of the First Amendment specifically guarantees that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Free Speech Clause applies to the various states as a result of the Fourteenth Amendment. *See Stromberg v. California*, 283 U.S. 359, 368 (1931).

At trial, the Defendants challenged the propriety of the proposed jury instructions regarding the First Amendment.<sup>5</sup> During a hearing on jury instructions, the Defendants specifically objected to Instruction No. 21, which provided in full as follows:

The Defendants in this case claim that their actions were protected by the First Amendment of the United States Constitution, which provides that Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech. The Defendants have a right under the First Amendment to engage in picketing, and to publish their religious message, no matter how much you may disagree with that message. The First Amendment applies to action at the state and local level through the Fourteenth Amendment.

As a general matter, the fact that society may find speech offensive is not a sufficient reason for suppressing it. Speech that is called hateful, or speech that is unpopular, or speech with which you strongly disagree, may still be protected speech. The government, including the courts, can place reasonable time, place, and manner restrictions on how protected speech may be expressed. These restrictions must be narrowly tailored, and should balance the interests of all the people involved. Speech that is vulgar, offensive, and shocking . . . is not entitled to absolute constitutional protection under all circumstances.

The United States Supreme Court has long recog-

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<sup>5</sup>In objecting to a proposed instruction on the intrusion upon seclusion claim, the Defendants sought to limit the jury's consideration to three specific signs. The trial court, however, authorized the jury to consider all of the signs as well as the Epic.

nized that not all speech is of equal First Amendment protection. When speech gives rise to civil tort liability, the level of First Amendment protection varies depending on the nature and subject matter of the speech.

As to the particular subject matter of the speech, a distinction has been drawn between matters of public and private concern. Where the speech is directed at private people and matters of private concern, the Supreme Court has held that the First Amendment interest in protecting particular types of speech must be balanced against a state's interest in protecting its residents from wrongful injury. You must balance the Defendants' expression of religious belief with another citizen's right to privacy and his or her right to be free from intentional, reckless, or extreme and outrageous conduct causing him or her severe emotional distress. As I have previously indicated to you at the start of this case, you as the judges of the facts in this case must determine whether the Defendants' actions were directed specifically at the Snyder family. If you do so determine, you must then determine whether those actions would be highly offensive to a reasonable person, whether they were extreme and outrageous and whether these actions were so offensive and shocking as to not be entitled to First Amendment protection.

J.A. 3113-14 (alteration and omissions in original) (internal quotation marks omitted). In objecting to Instruction No. 21, the Defendants asserted that "the First Amendment has more of a heavy balance even in civil cases than just anybody not wanting to be offended." *Id.* at 2883. Phelps-Roper, who was defending herself on a pro se basis, further objected, stating: "I just want to say that . . . it has never been clear in the record or to me what of our words are actionable and . . . [the court has] not limited the evidence to those words that you would

say were directed to a specific family." *Id.* at 2884. The court overruled the objections to Instruction No. 21, observed that the constitutional issues were preserved, and gave the instruction to the jury.

## 2.

On October 31, 2007, the jury found for Snyder on the three tort claims, awarding him \$2.9 million in compensatory damages and a total of \$8 million in punitive damages. After the district court entered judgment on November 5, 2007, the Defendants filed post-trial motions seeking judgment as a matter of law, judgment notwithstanding the verdict, reconsideration and rehearing, a new trial, relief from judgment, and relief of law and equity. The district court denied each of these motions by its Post-Trial Opinion. The Defendants also moved for a remittitur, contending that the verdict was grossly excessive.

In its Post-Trial Opinion of February 4, 2008, the district court disposed of the Defendants' various legal challenges. The Post-Trial Opinion explained that this case "involves balancing [the Defendants' First Amendment rights of religious expression] with the rights of other private citizens to avoid being verbally assaulted by outrageous speech and comment during a time of bereavement." *Snyder*, 533 F. Supp. 2d at 579. As to the "content of the signs," the court was satisfied that it had "instructed the jury on the First Amendment, specifically the balance between Defendants' First Amendment rights and Maryland's interest in protecting its citizens," such that there "was sufficient evidence in the trial record for a reasonable jury to conclude that Defendants' conduct was so extreme and outrageous as to cause Plaintiff's injury." *Id.* at 581. The court also rejected the Defendants' post-trial contention that the court "should have held as a matter of law that [the Defendants] were entitled to First Amendment protection." *Id.* at 582. The court emphasized that it had permitted the jury to decide if the Defendants' conduct was sufficient to

