

09-751 DEC 23 2009

No. 09- ~~OF THE CLERK~~
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IN THE
Supreme Court of the United States

ALBERT SNYDER,

Petitioner,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fourth Circuit reversed a jury determination in favor of Albert Snyder (“Snyder”) for the intentional harm perpetrated against him by Fred W. Phelps, Sr., Westboro Baptist Church, Incorporated, Rebekah A. Phelps-Davis and Shirley L. Phelps-Roper (collectively, “Phelps”). Snyder’s claim arose out of Phelps’ intentional acts at Snyder’s son’s funeral. Specifically the claims were: (1) intentional infliction of emotional distress, (2) invasion of privacy and (3) civil conspiracy. These claims were dismissed by the Fourth Circuit notwithstanding that (a) *Hustler Magazine, Inc. v. Falwell* does not apply to private versus private individuals; (b) Snyder was a “captive” audience; (c) Phelps specifically targeted Snyder and his family; (d) Snyder proved that he was intentionally harmed by clear and convincing evidence;¹ and (e) Phelps disrupted Snyder’s mourning process. The Fourth Circuit’s decision gives no credence to Snyder’s personal stake in honoring and mourning his son and ignores Snyder’s right to bury his son with dignity and respect.

Three questions are presented:

1. Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter?

2. Does the First Amendment’s freedom of speech tenet trump the First Amendment’s freedom of religion and peaceful assembly?

¹ Because Snyder sought punitive damages, he was required to prove his case by clear and convincing evidence. Furthermore, Snyder was required to prove actual malice. Snyder carried his burden on both issues.

3. Does an individual attending a family member's funeral constitute a captive audience who is entitled to state protection from unwanted communication?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at *Snyder v. Phelps, et al.*, 580 F. 3d 206 (4th Cir. 2009). The Fourth Circuit reversed the October 31, 2007 jury verdict and the decision of the District Court of Maryland reported at 533 F. Supp. 2d 567 (D. Md. 2008). See Appendices A-B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Fourth Circuit's opinion was rendered on September 24, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

On March 3, 2006, Snyder's son, Lance Corporal Matthew Snyder, was killed in Iraq. Thereafter, two uniformed Marines notified Snyder of his son's death and that his son would be transported back to the United States for burial. The Snyder family planned a traditional Christian burial at St. John's Catholic Church in Westminster, Maryland. An obituary was submitted to the local newspapers concerning Snyder's son's death. Snyder requested a private funeral.

In response to Lance Corporal Matthew Snyder's tragic and unfortunate death, Phelps issued a news or press release indicating their specific intention to picket his funeral. Phelps were not invited to Matthew Snyder's funeral, and in fact, they knew that their presence would not be well-received by the Snyder family. Furthermore, Phelps knew that their presence could elicit violence, and in this regard, Phelps requested law enforcement protection. In response to Phelps' concerns for violence, law enforcement deployed a team of five sheriffs to escort Phelps and provide security for them during their picket. Indeed, the sheriffs' presence was for the express and limited purpose of providing security for Phelps. Law enforcement determined that Phelps' presence created a credible threat of violence. In this regard, local law enforcement deployed a SWAT team and a command post was established. Additionally, the fire department, ambulances and miscellaneous government equipment were in the area on standby to prepare for the violence associated with Phelps' presence. The command center consisted of an incident commander (also a member of

the SWAT team), local, county and state police, a traffic engineer, and communication clerks. The enormous amount of government resources associated with Phelps' presence required a Winnebago to be utilized as a command center, not to mention police cruisers, fire trucks and ambulances.

Not surprisingly, Phelps disrupted Snyder's son's funeral at his church. Indeed, Phelps' presence did not allow for normal access to the church campus and changed the entire atmosphere of the religious services for Snyder and his family. In short, Phelps' presence created a negative and circus-like atmosphere during a solemn and religious occasion. Phelps' activities added insult to injury during a time of grief and mourning. In addition to harming the Snyder family, Phelps' activities also injured parish families who were present to share in the Snyder family's grief.

Directly across the street from where Phelps gathered, there is a parish elementary school. Because of the Phelps' presence at the funeral, law enforcement and church officials found it necessary to take the necessary steps to protect school children from Phelps. In this regard, all teachers were required to pull down the blinds so that the children could not see Phelps. In addition, each parent received advance warning of Phelps' appearance and officials notified parents that their children should avoid using the main entrance of the school. Tellingly, the school was in a lock-down mode as a safety precaution. Further, the children were not allowed to play outside and there would be no dismissal until Phelps left the church area. While attempting to mourn, Snyder watched this series of events take place.

Snyder watched his family and friends witness this horrific series of events take place during a time when his family, friends and parishioners were attempting to mourn.

In accordance with their threats, Phelps traveled from Kansas and across the country to Westminster, Maryland for the express purpose of protesting Lance Corporal Matthew Snyder's funeral. With law enforcement protection, Phelps were escorted by sheriff personnel from the outskirts of town to the church. Phelps' sole purpose for traveling to Westminster, Maryland was to picket and protest the funeral. Phelps knew that the funeral was at a Catholic church and consequently targeted the Snyder family by bringing and flaunting a sign that stated "Pope in Hell." Additionally, Phelps knew that Matthew Snyder was a Marine and brought a sign that said "Semper Fi Fags." Because the funeral was in Maryland, Phelps brought a sign that said "Maryland Taliban" to the funeral. Phelps even brought a sign to the church which pictured two men performing anal sexual intercourse. Perhaps most notably, Phelps brought a sign that said "Matt in Hell," "You're Going to Hell," and "God Hates You" to Matthew Snyder's funeral. Matthew was the only deceased person at the church so it follows that Phelps were referring to Matthew. Indeed, Snyder testified that it was obvious to him that Phelps were referring to his son. The Catholic priest, Father Leo, who was present and assisted in the Snyder family's Christian burial, had never observed anyone protesting a funeral or church service or disrupting it in such a manner. Captain Maas has been in law enforcement for 31 years and had never witnessed anyone specifically protesting a funeral.

Major Long has been in law enforcement for 37 years and had never observed a funeral being intentionally protested.

Admittedly, Phelps had no concern for the Snyder family and only used the funeral as a means of commanding an audience. Indeed, Phelps use funerals as a platform to command an audience. As Phelps admitted, they capitalize on military funerals because it is more “efficient” to get their message to more media.

These facts are the facts that Snyder and his family will live with for the rest of their lives. After all, Snyder had one (and only one) opportunity to bury his son and that occasion has been tarnished forever. Snyder deserved better. Matthew deserved better. A civilized society deserved better.

REASONS FOR GRANTING THE PETITION

The question of whether *Hustler Magazine, Inc. v. Falwell* is applicable to private individuals versus private individuals requires resolution by this Court. If *Hustler Magazine* is applied in this fashion, the victimized private individual is left without recourse. Complicating matters further, the Fourth Circuit has allowed Phelps (in this instance) to dictate what is a matter of public concern. Indeed, the Fourth Circuit’s analysis encourages individuals to engage in “loose, figurative or hyperbolic language” to afford more First Amendment protection — even if that language is targeted at another private individual at a private,

religious funeral — it encourages harsh rhetoric.² Put succinctly, the Fourth Circuit has extended *Hustler* to private versus private individuals, allowed speakers to subjectively determine what is a matter of public concern, and afforded more First Amendment protection to speech that is outrageous.

Whether the freedom of religion and assembly is subordinate to the freedom of speech is an important question because by necessary implication, one of the tenets of the First Amendment is undermined. By extending *Hustler Magazine, Inc. v. Falwell* to private versus private individuals, the Fourth Circuit necessarily determined that the freedom of religion and peaceful assembly is subordinate to freedom of speech. The Fourth Circuit chose one individual's First Amendment rights over those of another.

Assuming that this Court extends *Hustler Magazine, Inc. v. Falwell* to private versus private individuals, another question arises as to whether “captive” funeral attendees have any recourse where individuals intrude upon a private religious funeral. The Fourth Circuit failed to address this issue and thus determined, by implication, that funeral attendees (peacefully assembling and practicing religion) are defenseless in the face of personally directed protests.

² Although the Fourth Circuit excused (or even encouraged) Phelps' behavior as rhetorical, a cursory review of the record reveals that Phelps meant his words literally, not rhetorically.

I. REVIEW IS WARRANTED TO DETERMINE IF *HUSTLER MAGAZINE, INC. V. FALWELL* APPLIES TO PRIVATE PERSONS VERSUS PRIVATE PERSONS CONCERNING PRIVATE MATTERS.

A. Extending *Hustler Magazine, Inc. v. Falwell* is not warranted.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court determined that “the Constitution delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable.” *Id.* at 283. Thereafter, this Court held that:

[P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with ‘actual malice,’ i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988).

In *Snyder v. Phelps, et al.*, 580 F. 3d 206 (4th Cir. 2009), the Fourth Circuit recognized that this Court has limited the *Times* and *Hustler* line of cases to public figures and public officials, *id.* at 218 (quoting *Curtin*

Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967)), and the court further conceded that this Court stopped short of extending *Times* to speech targeting private figures. *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 344-346 (1974)). Nevertheless, the Fourth Circuit has now, on its own accord, extended *Times* and *Falwell* to speech targeting private figures.³

By extending *Hustler*, the Fourth Circuit has determined, among other things, that (1) a private individual can verbally attack another private individual without a civil remedy, (2) the speaker subjectively

³ The Fourth Circuit places significant weight on *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). However, *Milkovich* is a defamation case as opposed to an intentional infliction of emotional distress matter. Moreover, even in *Milkovich*, this Court stated,

“[t]hus, where a statement of “opinion” on a matter of public concern reasonably implies false and defamatory facts regarding *public figures or officials*, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault as required by *Gertz*.”

Id. at 20-21 (emphasis added). In the instant matter, the Fourth Circuit has determined (1) that Phelps’ words and actions were matters of public concern — notwithstanding the context of a funeral and a “captive” audience, and (2) that, as a matter of law, Snyder cannot prove any level of intentional harm required by *Gertz*. Even pursuant to *Milkovich*, a plaintiff is entitled to prove that he or she was intentionally harmed.

dictates the definition of a matter of public concern, (3) the speaker has incentive to act outrageously or use harsh rhetoric in order to be afforded more First Amendment protection, (4) a private individual's private matter can be utilized as another's platform for speech, and (5) private individuals have no recourse if they are intentionally harmed.

B. Extending *Hustler Magazine, Inc. v. Falwell* necessarily creates a conflict of First Amendment rights and intrudes upon a funeral attendees' right to mourn the deceased.

Herein lies the dilemma with extending *Times* and *Falwell* (especially in the funeral or "captive" context). In extending these cases, the Fourth Circuit has determined that Phelps' First Amendment right to free speech was more important than Snyder's right to exercise his religion or assemble peacefully. As we know, the First Amendment provides, among other things, that Congress shall make no law prohibiting the free exercise of religion. When Snyder buried his son Matthew at his church, he was exercising his religious beliefs. Further, the First Amendment states that Congress shall not prohibit the right of people to peacefully assemble, as family members must do at a funeral.

The Fourth Circuit did not attempt to juxtapose these equally important Constitutional principles on the freedom of speech. The Fourth Circuit's reasoning would make more sense if Snyder had gone to Phelps' church to practice his religion. The unfortunate reality is that Phelps came to Snyder's church to disrupt his

peaceful assembly and mourning process.⁴ When the Fourth Circuit chose to extend *Times* and *Falwell* to private versus private individuals, it necessarily chose to subordinate Snyder's First Amendment rights — even though Snyder was the victimized party. It goes without saying that Phelps had a multitude of other venues to express their views.

Additionally, the Fourth Circuit has concluded, implicitly, that Snyder has no privacy interest at his church when burying his son. However, the Sixth Circuit has concluded just the opposite. “Individuals mourning the loss of a loved one share a privacy right similar to individuals in their homes or individuals entering a medical facility.” *Phelps-Roper v. Strickland*, 539 F.3d 356, 364-365 (6th Cir. 2008) (citing *Hill v. Colorado*, 530 U.S. 703 (2000); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994); *Frisby v. Schultz*, 487 U.S. 474 (1988)). The Sixth Circuit also concluded that the “[u]nwanted intrusion during the last moments the mourners share with the deceased during a sacred ritual surely infringes upon the recognized right of survivors to mourn the deceased.” *Id.* at 366 (relying upon *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 168 (2003)).⁵ As the Sixth Circuit pointed out,

⁴ The Fourth Circuit focused entirely on speech and ignored the totality of the circumstances. For discussion purposes, assume that Phelps went to a location other than St. John's Catholic Church in Westminster, Maryland. Phelps could have expressed the same so called message and Matthew Snyder's funeral would not have been disrupted. Similarly, the grieving and mourning process would not have been disrupted.

⁵ Similarly, this Court has also protected victims from being solicited for a 30 day period following an accident or death,

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“it goes without saying that funeral attendees are also emotionally vulnerable.” *Id.*

II. REVIEW IS WARRANTED TO RESOLVE WHETHER CAPTIVE FUNERAL ATTENDEES HAVE A RIGHT TO AVOID UNWELCOME COMMUNICATIONS.

Snyder submits that the Fourth Circuit incorrectly determined that Phelps activities were protected under the First Amendment despite the fact that Snyder was a private individual and Phelps was a private individual. Nevertheless, even assuming, *arguendo*, that the Fourth Circuit’s decision to grant an absolute First Amendment defense was appropriate, it failed to consider the counterveiling impact of the fact that Snyder was a “captive audience” at his son’s funeral. Review of this issue in the present case is necessary because there is a split among the Circuits as to whether an individual attending a family member’s funeral is a captive audience and entitled to state protection from unwanted communication.

This Court has held that “the State is warranted in protecting individuals from unwanted communication that implicates certain privacy interests when the listener is somehow ‘captive’ to the message.” *See Phelps v. Strickland*, 539 F.3d 356, 363 (6th Cir. 2008) (citing *Frisby v. Schultz*, 487 U.S. 474 (1988) (holding that a city could completely ban intrusive residential picketing

(Cont’d)

in a commercial speech context. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

in order to protect residential privacy). In effect, the Court has recognized that the state has an interest in protecting the rights of individuals in situations where the “the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.” *Hill v. Colorado*, 530 U.S. 703, 718 (2000). Thus far, courts have applied the captive audience doctrine to uphold reasonable restrictions on speech where, for example, the communications at issue are directed to individuals in their homes, *see, e.g., Frisby*, or “are so obtrusive that individuals cannot avoid exposure to them.” *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 990 (E.D. Ky. 2006); *see also Hill*, 530 U.S. at 732 (upholding, on the basis of the captive audience doctrine, a statute that prohibited the unwanted approach within eight feet of another person outside an abortion clinic “for the purpose of engaging in oral protest, education, or counseling”).

However, a distinct split among the Federal Circuits has arisen as to whether and to what extent the captive audience doctrine applies in the context of funeral protests. In *Phelps v. Strickland*, the Sixth Circuit was asked to determine whether an Ohio statute imposing time and space limitations on protest activities was violative of the First Amendment. 539 F.3d at 359-60. The court specifically analyzed the question of whether “a state has a significant interest in protecting funeral attendees from unwanted communication.” *Id.* at 362. Citing *Frisby* and *Hill*, the Sixth Circuit concluded that “[i]ndividuals mourning the loss of a loved one share a privacy right similar to individuals in their homes or individuals entering a medical facility,” and that Ohio had an important interest in the protection of such

individuals' privacy rights. *Id.* at 366. In reaching this conclusion, the court expressly acknowledged the important stake family members have in honoring and mourning their dead, and the fact that “mourners cannot easily avoid unwanted protests without sacrificing their right to partake in the funeral or burial service.” *Id.*

In *Phelps v. Nixon*, 545 F.3d 685 (8th Cir. 2008), the Eighth Circuit Court of Appeals was confronted with a First Amendment challenge, *by the same defendants*, to a Missouri statute that criminalized picketing “in front of or about” a funeral location or procession. However, despite a near identity of the facts and issues with the *Strickland* case, the Court reached precisely the opposite conclusion. The court specifically determined that in the context of the First Amendment, an individual attending a funeral was different than an individual remaining in his home. *Phelps v. Nixon*, 545 F.3d at 692 (quoting *Olmer v. Lincoln*, 192 F.3d 1176, 1178 (8th Cir. 1999) (“[T]he home is different,’ and, in our view, unique. Allowing other locations, even churches, to claim the same level of constitutionally protected privacy would, we think, permit government to prohibit too much speech and other communication.”)). On this basis, the Eighth Circuit refused to extend the captive audience doctrine to protect the privacy interests of individuals outside of their homes.

In sum, no Circuit Court would dispute that Snyder had a privacy interest in attending his son’s funeral without unwanted intrusion by Phelps. The question that requires further attention by this Court is whether Snyder’s privacy interest as a captive audience prevails

over Phelps' First Amendment right to free speech. Snyder contends that, as determined by the Sixth Circuit in *Phelps v. Strickland*, he was a captive audience because he could not avoid Phelps' protests. He had but one opportunity to mourn his son at the funeral service, and could not very well "turn his head" to avoid Phelps' malicious and targeted speech. At a minimum, the Eighth Circuit decision of *Phelps v. Nixon* raises the broader question of whether an individual can be a captive audience outside of his home.

In any event, presently, the Fourth Circuit gave no consideration to this issue whatsoever, but found Phelps' First Amendment rights to be an absolute bar to Snyder's claim for some compensation. This Court should undo the damage caused by the Fourth Circuit by appropriately defining the contours of the captive audience doctrine to include attendance at a family member's funeral.

CONCLUSION

For all of the foregoing reasons, Petitioner Albert Snyder respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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