

## Fourth Circuit Reverses \$5 Million Funeral Protest

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In late September, the United States Court of Appeals for the Fourth Circuit reversed on First Amendment grounds a \$5 million jury verdict against infamous Kansas preacher Fred Phelps and other members of his Westboro Baptist Church.

The claim against Phelps and his church members arose from their protest activities at the March 2006 funeral of Lance Corporal Matthew Snyder, a U.S. Marine who was killed in Iraq. At Snyder's funeral in Westminster, Maryland, Phelps and other protesters held up a variety of offensive signs decrying gays, Catholics, and Americans generally. Members of the church also posted an essay on the church's Web site called "The Burden of Marine Lance Cpl. Matthew A. Snyder." The essay contained numerous statements indicating that Snyder was a sinner and was going to hell.

Snyder's father did not actually see the protests or essay until after the funeral was over, but said that when he did, he was traumatized. He filed suit in June 2006 in federal court claiming defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress, and civil conspiracy. While the district court granted summary judgment to the defendants on the defamation and publicity given to private life claims, after trial on the other three claims, the jury awarded Snyder \$2.9 in compensatory damages and \$8 million in punitive damages. The district court lowered the punitive damages award to \$2.1 million, but the defendants appealed the entire award as violative of the First Amendment.

The Fourth Circuit, with Judge King writing for the court, not only reversed the award of damages, but elected not to remand the case to the district court at all, holding instead that "[n]otwithstanding the distasteful and repugnant nature of the words being challenged in these proceedings, we are constrained to conclude that the Defendants' signs and [Web postings] are constitutionally protected."

Though the defamation claim was not at issue, the case law cited by the court was borrowed largely from the Supreme Court's defamation pantheon, most notably *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Citing *Milkovich*, Judge King wrote: "First, the First Amendment serves to protect statements on matters of public concern that fail to contain a 'provably false factual connotation.'"

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Second, Judge King wrote, again citing *Milkovich*, "rhetorical statements employing 'loose, figurative, or hyperbolic language' are entitled to First Amendment protection to ensure that 'public debate will not suffer for lack of imaginative expression or the rhetorical hyperbole which has traditionally added much to the discourse of our Nation.'"

With these principles in mind, the Fourth Circuit held that the district court had "failed to assess whether the pertinent statements could reasonably be interpreted as asserting 'actual facts' about an individual, or whether they instead merely contained rhetorical hyperbole." The court then examined each of the specific signs and the statements at issue from the Web site, and held that they were fully protected by the First Amendment either because they could not reasonably be read to state actual facts or because they were plainly hyperbolic and figurative.

In response to Westboro Baptist's odious activities, a number of states have passed laws sharply limiting, or banning altogether, protesting at funerals.