

## Funeral protest ruling is wrong

By Kenneth J. Ashman

Death is never easy. The pain a family suffers at the loss of a loved one is impossible to fathom unless one has suffered a similar loss oneself; burying a child must be the most painful of all. For the parents of soldiers who have lost a loved one in combat, the pain must include a confusing mixture of resentment, anger and senselessness, on the one hand, and honor and duty, on the other. For those of us whose children are not in the military, the sacrifices these soldiers and their families make can only be met with the greatest of humility, respect and appreciation.

That is, unless you are Fred Phelps, his two daughters, and his four grandchildren. They find joy in protesting at the funerals of fallen soldiers, on the warped theory that they deserved to die because of the tolerance Americans afford to gays, especially in the military.

And, before these protests, they issue press releases and alert the media, creating raucous burial events, as they hoist signs saying, "Thank God for Dead Soldiers," "You're Going to Hell" and "God Hates You." If the parents of soldiers burying their children are not pained enough, Phelps and his family make sure that they suffer even more.

Earlier this month, the U.S. Supreme Court, in *Snyder v. Phelps*, 2011 WL 709517 (March 2, 2011), held that Phelps' demonic protests constitute protected speech under the First Amendment, leaving the family of fallen soldiers powerless to stop them.

In *Snyder*, the father of a soldier killed in Iraq secured a multimillion-dollar judgment after a jury trial against Phelps, his daughters and the church he founded, Westboro Baptist Church. The jury found the defendants liable for intentional infliction of emotional distress, intrusion upon seclusion and civil conspiracy.

On appeal, Phelps and his cohorts did not challenge the merit of the findings; instead, they sought reversal solely on the ground that their conduct, even if otherwise tortious, constituted protected speech under the First Amendment.

The 4th U.S. Circuit Court of Appeals agreed with Phelps and reversed the trial court's verdict. On the father's appeal to the Supreme Court, in a decision authored by Chief Justice John G. Roberts, the court affirmed the 4th Circuit's decision, with Justice Samuel A. Alito writing a lone dissent.

The court majority got this one wrong. Almost everyone — save the six lunatics who do the protesting — would agree that what Phelps and his family did is abhorrent. But the reason the court erred is not based on emotions; the court got it wrong on the law, though not necessarily for the reasons Alito articulated.

To its credit, the court's decision is based on the highly

*By wrapping its legal analysis of speech as a public concern in the cloak of a factual analysis of where, when and how that speech took place, the court sidestepped the fundamental First Amendment principle at issue.*

specific facts of the case before it. "Our holding today is narrow. We are required in First Amendment cases to carefully review the record and the reach of our opinion here is limited by the particular facts before us." *Snyder*, 2011 WL 709517 at \*10.

The salient facts are that the protests took place on public land adjacent to a public street, which was approximately 1,000 feet away from the funeral (although the procession passed within 200 to 300 feet of the picketing site); the protestors were nonviolent and did not use profanity; and the plaintiff — Albert Snyder, father of slain Marine Lance Cpl. Matthew Snyder — only saw the tops of the picket signs as he drove to the funeral, not seeing what was written until watching the news later that night.

Both the majority and Justice Alito analyzed the issue as turning on whether the speech was of public or private concern. If the former, according to the majority, such speech is "at the heart of the First Amendment's protection," such that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." 2011 WL 709517 at \*5.

The majority then concluded that because Phelps' signs "plainly relate[d] to broad issues

of interest to society at large, rather than matters of 'purely private concern,' " the speech was of a public concern. Therefore, the majority concluded, the father's claims failed because Phelps' speech was protected by the First Amendment.

Alito differed in that he looked not only at the nature of the speech, i.e., whether it was of a public or private concern, but also against whom the speech was directed. Alito found it significant that the objects of the speech — the family of the fallen soldier — were not public figures, but a private citizens.

As a result, among other reasons, Alito explained that interspersing otherwise actionable speech directed toward a private citizen with protected speech of a public concern does not serve to immunize the actionable speech from redress, likening the situation to a claim for defamation.

"The First Amendment allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern, and there is no good reason why respondents' attack on [the fallen soldier] and his family should be treated differently." 2011 WL 709517 at \*16.

In truth, the issue could have been decided without reaching a public or private speech analysis. In its opinion, the court accepted as established law that speech alone could constitute the tort of IIED. See 2011 WL 709517 at \*5, \*13.

The court did not hold that speech purely of a public concern could never constitute the tort of IIED; rather, it simply held that, in this case, it did not do so. Thus, under other circumstances, say, if Phelps had protested on private land next to the gravesite, such speech could theoretically constitute the tort of IIED under the court's analysis.

In other words, unless the court held that speech of a

Ashman — page 22

*Kenneth J. Ashman is a member of Ashman Law Offices LLC, a business law and litigation boutique with offices in Chicago, Lincolnshire and New York. He can be reached at [KAshman@AshmanLawOffices.com](mailto:KAshman@AshmanLawOffices.com).*

## Ashman

Continued from page 5

purely public concern could never constitute the tort of IIED, where the circumstances are egregious enough, such speech could constitute such tort. Here, the court simply did not think the circumstances were so egregious as to warrant it.

In so doing, however, all the court did was substitute its judgment for that of the jury's. By focusing on the public versus private nature of the speech at issue, both the majority and dissent focused on the weight to be afforded such concerns, but in the process failed to properly consider the unique nature of the IIED tort itself.

The tort of IIED in Maryland — the law governing the case, but which is similar to that of the other states — requires a plaintiff to establish that the "defendant intentionally or recklessly engaged in *extreme* and *outrageous* conduct that caused the plaintiff to suffer *severe* emotional distress." 2011 WL 709517 at \*5 (emphasis added).

The distress must be "so severe that no reasonable man could be expected to endure it" and the defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community." 2011 WL 709517 at \*13 (citations omitted).

Thus, by its very nature, the tort itself has built into it the public-private

concerns addressed by the majority. It is extremely unlikely that protest signs of an entirely public nature, such as, "Impeach Nixon," would ever rise to the extreme and outrageous level required for IIED.

After all, in order to be unendurable to a reasonable person, the speech necessarily must be directed to such person, and not to a general public concern, and "utterly intolerable in a civilized community"; otherwise, the claim would fail.

The court should have either held that speech of a purely public concern can never constitute an actionable tort or it should have affirmed the trial court's judgment.

By wrapping its legal analysis of speech as a public concern in the cloak of a factual analysis of where, when and how that speech took place, the court sidestepped the fundamental First Amendment principle at issue and, instead, embarked upon a fact-finding venture that juries typically perform.

Following a full trial, the jury concluded that Phelps' and his co-protestors' conduct had the type of severe and outrageous impact on the fallen soldier's father as to constitute the tort of IIED. By reversing the ruling, the court, in effect, merely disagreed with this conclusion. In the absence of holding that no reasonable juror could have found as the jury did, the court should have affirmed the verdict.