

Supreme Court: Westboro Picketing May Be Hurtful or Distasteful, But Is Nevertheless Entitled to First Amendment Protection

MICHAEL E. BAUGHMAN | BAUGHMANM@PEPPERLAW.COM

JEFFREY L. VAGLE | VAGLEJ@PEPPERLAW.COM

In a decision released on March 2, 2011, the U.S. Supreme Court held, in, that the picketing activities conducted by members of a Baptist church near a U.S. Marine's funeral service are entitled to "special protection" under the First Amendment, and are thus shielded from tort liability. The decision is significant in cases involving defense against claims based on published content, because it reinforces the principle that speech on matters of public concern that is not provable as false may rarely, if ever, be subject to punishment through state tort claims.

Albert Snyder originally brought an action in tort against the Westover Baptist Church and Fred Phelps, its founder, for picketing near the church where funeral services were being held for Snyder's son, a Marine killed in Iraq in the line of duty. These picketing activities, which included the display of signs bearing messages such as "God Hates the USA/Thank God for 9/11," "Thank God for Dead Soldiers," and "You're Going to Hell," took place on public land next to a public street approximately 1,000 feet from the funeral services. Snyder alleged, among other claims, that Phelps's picketing caused Snyder emotional injury and anguish, resulting in severe depression and other health problems. The district court found for Snyder on his claims of intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. Phelps appealed, arguing that their speech was protected under the First Amendment, and the Court of Appeals agreed, overturning the lower court's decision.

The U.S. Supreme Court in *Snyder* found that the state law claims for intentional infliction of emotional distress were barred by the First Amendment because the speech at issue involved a matter of public concern and the picketing was conducted

lawfully, on public land where the protestors had a right to be. Central to the Court's analysis was the question of whether the speech was of public or private concern, emphasizing that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is subject to special protection." The Court acknowledged that its case law has not set out a clear definition of whether speech involves a matter of public, rather than private, concern, but went on to establish a broad test for whether speech is a matter of public concern: "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,'" or whether it "is a subject of legitimate news interest." Importantly, the Court reinforced the principle that the "controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern."

The Supreme Court found that – although the protestor's speech "may fall short of refined social or political commentary" – it nonetheless involved matters of public concern, because their message turned on "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic church." Significantly, the Court found that even though some of the messages may have been specifically aimed and targeted at the Snyder family, that did not transform the speech into a matter of private concern, because "the overall thrust and dominant theme of Westboro's demonstrations spoke to broader public issues." Having found that the content of the speech was protected, the Court went on to find that, while speech on matters of public concern may be subject to reasonable, content-neutral time, place and manner restrictions, the protestors' actions could not

This publication may contain attorney advertising.

be found improper since they had a right to be where they were during the protests: they complied with local authorities' instructions regarding the protests, and stayed 1,000 feet from the sight of the church and were not unruly.

The ruling is significant because it reinforces the notion that speech that is not false and involves matters of public concern may not be punished simply because the speech may be characterized as "outrageous" or "hurtful." While the court emphasized that its holding was a "narrow" one, the closest issues for the Court involved questions about the time, place and manner of the speech. The decision incorporates a liberal definition of what speech involves matters of "public concern" – any speech involving matters of "legitimate news interest." The question of whether speech is a matter of public concern arises often for news media defendants in determining whether accurate (or

not provably false) speech can be subject to liability for invasion of privacy and other tort claims. While the message of the Westboro Baptist Church may be distasteful to most Americans, the notion that unpopular speech on matters of public interest may not be punished absent a state interest of the highest order is, according to the Court, one that benefits society as a whole. As the Chief Justice put it: "[a]s a Nation we have chosen ... to protect even hurtful speech on public issues to ensure that we do not stifle public debate." Just as the Westboro Baptist Church cannot be punished simply because the content of their speech was "hurtful," the Supreme Court's ruling should reinforce the fact that the news media or anyone else cannot be punished for publishing accurate information or opinions on matters of public concern, simply because they may be hurtful or distasteful to some.

RSS on www.pepperlaw.com

SUBSCRIBE TO THE LATEST PEPPER ARTICLES
VIA RSS FEEDS. VISIT WWW.PEPPERLAW.COM
TODAY AND CLICK ON THE RSS BUTTON ON
THE PUBLICATIONS PAGE TO SUBSCRIBE TO
OUR LATEST ARTICLES IN YOUR NEWS READER.
