



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**CITIZEN PUBLISHING CO. v. PIMA COUNTY SUP. CT./HON.  
LESLIE MILLER, Respondent; and ALY W. ELLEITHEE and WALI  
YUDEEN S. ABDUL RAHIM, Real Parties in Interest,  
2 CA-SA 04-0041 (Order); CV-04-0280-PR**

**Parties:** Citizen Publishing Company is the petitioner. Aly W. Elleithee and Wali Yudeen S. Abdul Rahim are the Real Parties in Interest.

**Amici Curiae:** (1) The Thomas Jefferson Center for the Protection of Free Expression is represented by David D. Maynard of Maynard Cronin Erickson Curran & Sparks, and of counsel by Robert J. O’Neil and J. Joshua Wheeler of Charlottesville, VA; (2) The Reporters Committee for Freedom of the Press is represented by Daniel C. Barr of Perkins Coie Brown & Bain, and by Lucy A. Dalglish, Gregg P. Leslie, and Grant D. Penrod of Arlington, VA.

**Counsel:** Petitioner is represented by David J. Bodney, Peter S. Kozinet, and Chris Moeser of Steptoe & Johnson. The Real Parties in Interest are represented by Herbert Beigel.

**FACTS:** In December 2003, the *Tucson Citizen* published the following letter on its Op-Ed page:

We can stop the murder of American soldiers in Iraq by those who seek revenge or to regain their power. Whenever there is an assassination or another atrocity we should proceed to the closest mosque and execute five of the first Muslims we encounter.

After all this is a ‘Holy War’ and although such a procedure is not fair or just, it might end the horror.

Machiavelli was correct. In war, it is more effective to be feared than loved and the end result would be a more equitable solution for both giving us a chance to build a better Iraq for the Iraqis.

For three days thereafter, the newspaper published 21 letters from readers who criticized this letter, including one from Aly Elleithee. On December 6, an editor for the *Citizen* published his own commentary, stating that “printing the letter was a mistake,” that the *Citizen* went beyond the limits of the First Amendment, and that the letter “was counterproductive, instilled fear in a group of innocent people and the community at large, and carried the potential to incite violence.”

In January 2004, Islamic-Americans Elleithee and Wali Yudeen S. Abdul Rahim sued the *Citizen* for assault and intentional infliction of emotional distress. They brought the action in behalf of a class of plaintiffs consisting of all Islamic-Americans who live within reach of the Internet website published by the *Tucson Citizen*.

The trial court granted the *Citizen* dismissal of the assault claim but denied dismissal of the emotional distress claim, commenting, in pertinent part, as follows:

The elements of intentional infliction of emotional distress are as follows: 1) the defendant's conduct was "extreme" and "outrageous"; 2) the defendant intended to cause emotional distress or recklessly disregarded the near certainty that such distress would be caused by his conduct; and 3) severe emotional distress did occur. *Ford v. Revlon*, 153 Ariz. 38, 43 . . . (1987) . . . . If reasonable minds could differ about whether the conduct rose to the required level, it is a question for the jury. *Id.* See also, *Johnson v. McDonald*, 197 Ariz. 155, 160 . . . (App. 2000).

The Arizona Courts (following the Restatement (Second) of Torts) define outrageous behavior as "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." *Johnson*, 197 Ariz. at 160. . . . Clearly, reasonable minds could differ in determining whether the publication of the letter rose to the level of extreme and outrageous conduct.

\* \* \*

Defendants also moved for dismissal on the basis that its actions were protected under the First Amendment. While that protection applies in most cases, a public threat of violence directed at inciting or producing imminent lawlessness and likely to produce such lawlessness is not protected. *Brandenburg v. Ohio*, 395 U.S. 444, 447 . . . (1969).

The *Citizen* sought relief by way of a petition for special action filed in the court of appeals, division two. The court declined to accept jurisdiction, Judge Espinosa voting to accept. The Arizona Supreme Court granted the *Citizen's* petition for review.

**ISSUE:** Did the Superior Court violate the First Amendment and Article II, Section 6 of the Arizona Constitution by refusing to dismiss Respondents' claim for intentional infliction of emotional distress, where the claim was based solely on a newspaper's publication of a letter to the editor that did not advocate imminent violent conduct against The Real Parties in Interest?

**Authority:** Art. 2 § 6, Ariz. Const., provides: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."

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