CITIZEN PUBLISHING CO. V. MILLER: PROTECTING THE PRESS AGAINST SUITS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Katherine Flanagan-Hyde

I. BACKGROUND

On December 2, 2003, the Tucson Citizen ("Citizen") published a letter to the editor by Emory Wetz Wright, Jr. on the Op-Ed page:

> We can stop the murders 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. [1]

Over the next few days, the newspaper published twenty-one letters from readers critical of Wright's letter, including one from Aly W. Elleithee.[2] On January 13, 2004, Elleithee and Wali Yudeen S. Abdul Rahim filed a complaint against the newspaper for assault and intentional infliction of emotional distress.[3] The plaintiffs claimed to represent a class of "all Islamic-Americans who live in the area covered by the circulation of the Tucson Citizen, including the reach of the Internet website published by the Tucson Citizen."[4]

The newspaper moved to dismiss the complaint for failure to state a claim under Arizona Rule of Civil Procedure 12(b)(6).[5] The Pima County Superior Court dismissed the assault claim, but refused to dismiss the claim for intentional infliction of emotional distress, holding that reasonable minds could differ as to

---

1. Citizen Publ'g Co. v. Miller, 115 P.3d 107, 109 (Ariz. 2005).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

conduct.[6] The court also rejected Citizen's argument that the letter was protected political speech under the First Amendment.[7] Rather, the court categorized the letter as a "public threat of violence directed at producing imminent lawlessness and likely to produce such lawlessness," and therefore unprotected speech under the incitement doctrine.[8] Thus, the court allowed the plaintiffs to proceed with their claim for intentional infliction of emotional distress.[9]

Citizen then filed a special action petition in the Arizona Court of Appeals, seeking review of the superior court's order refusing to dismiss the claim for intentional infliction of emotional distress.[10] The court of appeals denied the petition, but the Arizona Supreme Court granted Citizen's petition for special action review because of the public importance of the First Amendment issues.[11] In a unanimous decision authored by Justice Hurwitz, the court held that the trial court erred in not dismissing the claim for intentional infliction of emotional distress, and remanded the case with instructions to dismiss with prejudice.[12]

II. SPECIAL ACTION REVIEW OF FIRST AMENDMENT ISSUES

Justice Hurwitz justified the "unusual" exercise of discretionary review of interlocutory rulings by stressing the First Amendment concerns at the heart of the case.[13] While the general rule is that the Supreme Court of Arizona will not review the court of appeals' discretionary refusal to accept jurisdiction on a special action challenge, the court has occasionally found good reason to depart from that general rule and did in this case.[14] In *Scottsdale Publishing, Inc. v. Superior Court*, the court granted special action review of a denial of summary judgment because of the "public's significant first amendment interest in protecting the press from the chill of meritless libel actions."[15] Along the same line, the *Citizen Publishing* court held that special action review of a motion to dismiss may be appropriate when an appellate court determines, from the pleadings, that an outcome-determinative First Amendment defense exists.[16] By granting review in these circumstances, a court saves litigants from undertaking costly and futile trials while simultaneously protecting First Amendment rights.[17] Because the *Citizen Publishing* letter was included in its entirety in the pleadings and its content was not in dispute, the only issue before the court was whether the letter was entitled to First Amendment protection.[18]

---

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 115.
13. *Id.* at 110.
14. *Id.*
15. 764 P.2d 1131, 1133 (Ariz. Ct. App. 1988).
16. *Citizen Publ'g*, 115 P.3d at 110.
17. *Id.*
18. *Id.*

III. POLITICAL SPEECH AND LIABILITY FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The *Citizen Publishing* court assumed arguendo that the plaintiffs' complaint stated a claim for intentional infliction of emotional distress under Arizona tort law.[19] In *New York Times Co. v. Sullivan*, the United States Supreme Court recognized that state tort law, through civil litigation, may unconstitutionally restrict speech protected by the First Amendment.[20] Balancing the interests protected by state tort law against First Amendment concerns, the Court held that public officials who sue others for defamation must prove that the allegedly defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[21] Although the *New York Times* case was based on a defamation claim, the Supreme Court later extended the rule in that case to claims for speech-based intentional infliction of emotional distress in *Hustler Magazine v. Falwell*.[22] Moreover, the Arizona Supreme Court, in *Citizen Publishing*, noted that the distinction between speech concerning private matters and speech concerning public concerns should also be taken into account when balancing First Amendment rights against the state's interest in enforcing tort law.[23]

In accordance with *Falwell*, Justice Hurwitz stressed that "when speech involves a matter of public concern, the balance changes significantly," and that state tort law cannot strip away the First Amendment's protection of political speech.[24] The court recognized that the war in Iraq is clearly a matter of public concern; thus the defendant's free speech interest trumps the state's interest in enforcing tort law.[25] However, the Court clarified that even political speech is not entitled to absolute First Amendment protection. Therefore, when the political speech at issue falls into one of several recognized exceptions, the First Amendment cannot shield the speaker from tort liability.[26]

IV. EXCEPTIONS TO GENERAL FIRST AMENDMENT PROTECTION FOR POLITICAL SPEECH

Political speech does not enjoy First Amendment protection when it falls within one of the "well-defined" and "narrowly limited" exceptions.[27] The court addressed three potential exceptions which might have applied to the letter published by Citizen: (1) incitement, (2) fighting words, and (3) true threats.[28]

---

19. *Id.*
20. 376 U.S. 254, 265 (1964). The First Amendment applies to the states through the Fourteenth Amendment. *See* Virginia v. Black, 538 U.S. 343, 358 (2003).
21. *N.Y. Times*, 376 U.S. at 279–80.
22. 485 U.S. 46, 56 (1988).
23. *Citizen Publ'g*, 115 P.3d at 111.
24. *Id.*
25. *Id.*
26. *Id.* at 112.
27. *Id.*
28. *Id.* at 112–15.

A. Incitement

Using the test from *Brandenburg v. Ohio*,[29] the superior court ruled that the letter at issue was not protected speech because it was intended to incite imminent lawless action and was likely to produce such action.[30] Under *Brandenburg*, speech incites violence when it goes beyond an endorsement of violence in the abstract, is aimed at producing imminent lawless action, and is likely to have such an effect.[31] "[V]ery few statements" will meet such a demanding test, which requires "careful consideration of the actual circumstances" surrounding the speech.[32] For example, in *NAACP v. Claiborne Hardware*, an NAACP activist stated in a public address that if blacks were caught violating a boycott of racist stores, "we're going to break your damn neck."[33] Isolated instances of violence occurred, but only long after the speech. Thus, the court held that the speech did not threaten imminent violence.[34]

In light of this precedent, the Arizona Supreme Court in *Citizen Publishing* held that Wright's letter to the editor fell far short of the incitement exception.[35] The letter did not advocate "imminent lawless action" because any action was premised on a future "assassination or other atrocity."[36] The context of the letter's publication in a newspaper was also relevant to the likelihood of imminent lawless action, because an individual reader of the Op-Ed page seems unlikely to resort to immediate lawlessness.[37] The court contrasted this context with a public address before an angry mob, where the same statement might have a greater chance of producing lawlessness.[38] The court also pointed out that plaintiffs had alleged no act of violence in the month between the publication of the letter and the date of filing suit.[39] Finally, the court noted that the result of the letter was not violence, but more speech in the form of letters expressing contrary points of view, which is "precisely what the First Amendment contemplates in matters of political concern—vigorous public discourse."[40] Thus, rather than being likely to incite imminent violence, the letter in fact stimulated healthy political debate.

The source of disagreement between the superior court and the supreme court is a differing application of the incitement exception to First Amendment protection for political speech. By refusing to allow this letter to fall into the

---

29. 395 U.S. 444 (1969).
30. *Citizen Publ'g*, 115 P.3d at 112.
31. *Brandenburg*, 395 U.S. at 447.
32. *Citizen Publ'g*, 115 P.3d at 112 (quoting Texas v. Johnson, 491 U.S. 397, 409 (1989)).
33. 458 U.S. 886, 902 (1982).
34. *Id.* at 928.
35. *Citizen Publ'g*, 115 P.3d at 113.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* The fact that the letter did not actually produce lawless action does not necessarily make it less likely to have done so at the time of publication. Such reasoning is post hoc and therefore illogical.
40. *Id.*

category of incitement, the Arizona Supreme Court sought to protect the freedom of the press and healthy political discourse, despite the outrageousness of the statements. The court quoted Justice Brandeis for the theory that unrestrained speech fosters the triumph of more enlightened ideas: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[41] The court's decision implies that the plaintiffs' first response, a letter to the editor expressing contrary opinions, was a more effective tactic to deter the perceived "evil" in Wright's letter than was a suit for intentional infliction of emotional distress.

B. Fighting Words

Another exception to First Amendment protection of political speech is the category of "fighting words," which are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[42] Because the fighting words doctrine has generally been limited to face-to-face interactions with the target of the statement, the court rejected the application of the doctrine to a letter to the editor.[43] In addition, the court pointed out that the letter used general language rather than personally abusive terms or language targeting a particular individual.[44]

C. True Threats

A third exception to protection of political speech is the category of speech known as "true threats." The United States Supreme Court stated that the true threat doctrine allows the government to prohibit speech that "means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[45] It is sufficient that the speaker intends to place the victim in fear of bodily harm or death; the speaker need not intend to carry out the threat.[46]

The *Citizen Publishing* court noted that the Arizona Court of Appeals has adopted a "substantially similar" test for determining whether a statement constitutes a true threat.[47] The court of appeals, in *In re Kyle M.*, held that true threats are statements made "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of [a person]."[48] The *Citizen*

---

41. *Id.* (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).
42. Cohen v. California, 403 U.S. 15, 20 (1971).
43. *Citizen Publ'g*, 115 P.3d at 113.
44. *Id.*
45. Virginia v. Black, 538 U.S. 343, 359 (2003).
46. *Id.*
47. *Citizen Publ'g*, 115 P.3d at 114.
48. *Id.* (quoting *In re* Kyle M., 27 P.3d 804, 808 (Ariz. Ct. App. 2001)).

Publishing court drew on this language when applying the true threat test from the United States Supreme Court.[49]

The *Citizen Publishing* court focused on the context of the statement at issue, because both *Virginia v. Black* and *Watts v. United States*[50] stressed the importance of context to the analysis of true threats.[51] Justice Hurwitz noted the "vast constitutional difference between falsely shouting fire in a crowded theater and making precisely the same statement in a letter to the editor."[52] The court concluded that, based on the content and context of the statement at issue, Wright's letter to the editor was not a true threat.[53]

The court focused on several factors to reach the conclusion that the letter to the editor was not a true threat. The letter contained statements as part of a "plainly political message," which the court called "far less likely to be true threats than statements directed purely at other individuals."[54] The court also characterized the general circulation newspaper's Op-Ed page as a public arena dedicated to political speech, rather than a "traditional medium for making threats,"[55] since public discourse is less likely to be perceived as a true threat than a statement in private communications or face-to-face confrontations.[56] The court also noted that the letter premised the threatening action on future assassinations or other atrocities.[57] The court pointed out that the letter's use of the word "we" is ambiguous, because it could refer to members of the Armed Forces or the general public.[58] There is further ambiguity as to the intended victims of violence, who could be Muslims in Iraq, in Tucson, or worldwide.[59] Using the test from *Virginia v. Black*, the court concluded that, based on the ambiguity and conditional nature of the language in the letter, a reasonable person could not find that the letter was a "serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[60] Thus, the letter did not fit into any of the three narrow exceptions to the First Amendment's protection of political speech. The court held that the letter was protected political speech under the First Amendment, because it could not be categorized as incitement, fighting words, or a true threat.[61] Therefore, Citizen was protected from liability for intentional infliction of emotional distress.[62]

---

49. *Id.*
50. 394 U.S. 705 (1969).
51. *Citizen Publ'g*, 115 P.3d at 114.
52. *Id.* at 115.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*

V. CONCLUSION

The Arizona Supreme Court disagreed with the superior court's application of the incitement exception to First Amendment protection of political speech, and its interpretation of the letter's content and context. The court focused on several factors to conclude that the letter was not likely to produce imminent lawlessness, including the political nature of the speaker's message, the context of the Op-Ed page in a newspaper, the conditional nature of the offensive language, and the language's ambiguity. By requiring that offensive speech meet a high standard to properly fall within the incitement exception, the court strongly supported the freedom of the press to publish offensive and outrageous statements, despite potential emotional harm to readers.

This decision asks readers who are offended by statements published in the newspaper to respond not with lawsuits for defamation or intentional infliction of emotional distress, but with further political speech. The court drew on Brandeis's concept that the proper remedy for "evil" speech is more speech,[63] perhaps in hopes that well-reasoned and articulate arguments written in response to hateful rhetoric will persuade offensive speakers to realize their error and consider the merits of more tolerant expression. Though it is idealistic to think the better idea will always prevail, maybe the mere possibility of this triumph is preferable to "enforced silence." This decision aims at preventing a chilling effect on freedom of speech and cultivating an atmosphere in which tolerance of offensive ideas may eventually lead to a higher level of political discourse. By setting a high standard for speech that purports to fall into one of the narrow exceptions to First Amendment protection for political speech, the *Citizen Publishing* court supports the continuing vitality of public debate over sensitive and troubling public issues.

63. *Id.* at 113.