

ENCANTO JUSTICE COURT
620 West Jackson Street, Ste 1045
Phoenix, AZ 85003
602 372-6300



Case Number: **JC2009-117320**

PLAINTIFF:
STATE OF ARIZONA

DEFENDANT :
JOEL GABRIEL NELSON
KRISTY THEILEN
JASON ANTHONY OHDNER

ATTORNEY FOR PLAINTIFF:
ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY
LAWRENCE TUROFF
DEPUTY COUNTY ATTORNEY

ATTORNEY FOR DEFENDANT:
NANCY MARSHALL, ESQ. (NELSON)
SHANA HIGA, ESQ. (THEILEN)
KEVIN M. BUMSTEAD, ESQ. (ODHNER)

Case Number: **JC2009-117320001**

PLAINTIFF:
STATE OF ARIZONA

DEFENDANT :
MONICA SANDSCHAFER

ATTORNEY FOR PLAINTIFF:
ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY
LAWRENCE TUROFF
DEPUTY COUNTY ATTORNEY

ATTORNEY FOR DEFENDANT:
SEAN LARKIN, ESQ.

Case Number: **JC2009-180900**

PLAINTIFF:
STATE OF ARIZONA

DEFENDANT :
RAQUEL TERAN

ATTORNEY FOR PLAINTIFF:
ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY
LAWRENCE TUROFF
DEPUTY COUNTY ATTORNEY

ATTORNEY FOR DEFENDANT:
DANIEL R. ORTEGA, ESQ.
ROUSH, McCracken, GUERRERO,
MILLER & ORTEGA

When the State rested in these consolidated disorderly conduct prosecutions, the Court, after expressing its disappointment that these charges had been brought, directed verdicts of acquittal. It then directed the parties to brief the issue of the Court's power to award the Defendants their attorney's fees. In its "State's Response To Defendants' Motions For Attorney's Fees" dated September 25, 2009, the County Attorney describes this case as follows:

"During the meeting [of the Board of Supervisors on December 17, 2008], the Defendants disrupted the proceedings by standing up and applauding during and after speeches by members of the public. The Chairman of the Board of Supervisors repeatedly asked the Defendants to cease their applause, due to the fact that it was disrupting the meeting and making it difficult for the supervisors to hear the speakers and the business taking place.

"After asking the Defendants to stop the disruptive behavior several times to no avail, the Defendants were arrested and removed from the auditorium.

In the audio recording of Ms. Theilen immediately after she was arrested, one can hear her, between her sobs, describing, and the actions of the arresting officer, Deputy Acritelli, as those of a "fascist".

This Court was so startled to read in its post-trial memorandum the County Attorney's written description of the proceedings before the Board of Supervisors that it went back and reviewed anew all the recordings submitted in this action in their entirety. The Court now sadly concludes that Ms. Theilen's description of the events is more balanced and objectively accurate than that of the County Attorney.

The first recording submitted this action is a Board of Supervisors' meeting of June 18, 2008, in which a speaker praised the efforts of Sheriff Arpaio to enforce immigration laws. At that meeting the meeting was disrupted by long periods of standing, applauding, and cat-calling in support of the speaker. There was absolutely no effort by law enforcement at that meeting, however, to restrain or discipline the crowd.

At the December 17, 2008, meeting, the significant events took place after about fifty minutes of meeting, at the end of the agenda, during the call to the public. Four speakers, including the Defendant Rachel Teran, addressed the Supervisors, then were politely applauded, and sat down. After the fifth speaker concluded and was being applauded, Supervisor Kunasek, who as Chairman was presiding, stated, "I respectfully ask that you not clap. It makes it hard to hear when I call the next name." Two more speakers came forward, were politely applauded, and sat down. Then a Spanish-speaking woman came forward to address the Supervisors, and Rachel Teran returned to the podium to provide the speaker with an English translation.

Deputy Acritelli swung into action after the Spanish-speaking woman and during renewed polite applause. The County Attorney distorts the record when he says that "the Defendants disrupted the proceedings." Deputy Acritelli disrupted the meeting by moving through the audience, pointing at people who were sitting down with their hands in their laps, and insisting that they were being disorderly and had to leave. In virtually the same moment the arrests started. It is simply false to say that these arrests came after "repeated" warnings; they are surprising and disturbing arrests. The ironic moment then came when the Chairman of the Board of Supervisors called Kristy Theilen to the podium. One can hear Deputy Acritelli saying to Ms. Theilen "You're not speaking, you're leaving." Defendant Monica Sandschaeffer suffered the same fate when the Chairman called upon her. Surely this was a perverse way for Deputy Acritelli to interpret Chairman Kunasek's earlier request for help in having the people he was calling upon to speak hear his invitation.

At the conclusion of the State's case, when this Court directed a verdict of acquittal, it observed that the duty of any professional law enforcement officer at that meeting would have been to escort Ms. Theilen and Ms. Sandschaeffer to the podium to address the Supervisors. Any other course of action was a course of disrespect for the First Amendment right to petition the government to redress grievances. It is a disappointment -- another, profound disappointment -- that the State in its response does not even mention the First Amendment.

Moreover, it is important to note the message constantly being telegraphed by Deputy Acritelli by his words and manner at both the Supervisor's meeting and his courtroom appearance. Deputy Acritelli communicates that he believes that it is his role to make uncomfortable anyone who express views that disagree with the Sheriff. Were he to be candid, he would probably acknowledge

being somewhat proud of it.¹ This is not a very significant factor for purposes of the decision this Court must make. It does, however, tend to justify Ms. Theilen's epithet.


The Defendants herein argue that A.R.S. Section 22-327 authorizes the award of attorney's fees in their favor. To the extent that statute provides such authority, the Court shall quite willingly "certif[y] in the minutes that the prosecution was malicious [and] without probable cause.


The State, for its part, argues that A.R.S. Section 12-348 H(7) "specifically forbids an award of attorney's fees against a state, city, town or county when the original proceedings are brought pursuant to Title 13 or Title 28." The State's argument, however, goes too far. The cited statute does not authorize such an award, but it also doesn't prohibit it.

The best basis for an award of the Defendants' attorney's fees, however, is probably the "private attorney general" doctrine recognized in Arnold v. Arizona Department of Health Services, 160 Ariz. 593, 609, 775 P.2d 521 (1989). This is such an extreme case, with Sheriff's Deputies trampling on the First Amendment and being aided and abetted by the County Attorney. It has to stop.

Accordingly, this Court shall award the Defendants their attorney's fees. The Defendants are directed to promptly submit itemized Affidavits supporting the specific amounts requested.

Dated November 30, 2009


C. Steven McMurry
Justice of the Peace



¹ On the stand Deputy Acritelli characterized the ruling of another judge who had dismissed similar charges a mistake, and insisted he would make the same arrests again if given the opportunity.