

**SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI**

<p>CONGRESS ELEMENTARY SCHOOL DISTRICT NO. 17 OF YAVAPAI COUNTY,</p> <p align="center">Plaintiff,</p> <p align="center">-vs-</p> <p>JEAN WARREN, JENNIFER RENEE HOGE, CYNDI REGIS, AND BARBARA REJON,</p> <p align="center">Defendants.</p>	<p>Case No. P1300CV201000162</p> <p align="center"><b>UNDER ADVISEMENT RULING</b></p>	<p align="center"><b>FILED</b></p> <p>DATE: _____</p> <p align="center">_____ O'Clock _____ M.</p> <p align="center">JEANNE HICKS, CLERK</p> <p>BY: _____</p> <p align="center">Deputy</p>
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<p><b>HONORABLE DAVID L. MACKEY</b></p> <p><b>DIVISION 1</b></p>	<p>BY: Cheryl Wagster Judicial Assistant</p> <p>DATE: April 15, 2010</p>
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After oral argument on April 5, 2010, the Court took the Defendants' Motion To Dismiss under advisement. The Court has now fully considered the arguments presented.

The Court first considers the Plaintiff's request for a Declaratory Judgment. The Plaintiff admits that other than the January 13, 2010 letter of Defendant Jean Warren requesting the production of public records consisting of "the complete stewardship list" and "other Public Records Requests made in 2009" there are no other public records requests pending. In addition, the Plaintiff admits that there are no other complaints pending before any agency for which the Plaintiff seeks to have the Court declare the rights of the parties pursuant to A.R.S. §§12-1831, *et seq.* Rather the Plaintiff seeks to have the Court declare that based upon the history of past public records requests and complaints, the Defendants should be enjoined from seeking any further public records before their request is screened by the Court or an entity designated by the Court.

The Court finds that the only portion of Plaintiff's request for declaratory relief that states a claim upon which relief can be granted is the Plaintiff's request regarding Defendant Jean Warren's pending January 13, 2010 public records request. All other declaratory relief sought by the Plaintiff does not set forth a claim upon which relief can be granted. Specifically, the Court finds that Plaintiff's request would require that the Court re-write Arizona's Public Records law as set forth in A.R.S. §39-121 *et seq.* The Court cannot find within the language of those statutes anything that could be interpreted to allow for the establishment of a judicial screening process for multiple or even unreasonable public records requests. The statutes and Arizona case law provides a method by which a party who has their request for public records denied may seek Court review and a method by which a public entity who opposes a public records request may seek Court review before complying with the request. Arizona statutes and case law do not provide for any type of relief from the Court as to future

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public records requests. Whether to establish a screening process for multiple and unreasonable public records requests is a legislative function not within the jurisdiction of the Court. Other than the pending January 13, 2010 public records request of Defendant Jean Warren, the Plaintiff's claim for declaratory relief fails to set forth claims upon which relief can be granted. Those claims should be dismissed.

The Court next considers the Plaintiff's claim based upon harassment. As a matter of law, the Complaint does not allege action by the Defendants which constitute harassment pursuant to A.R.S. §12-1809(R). The Court of Appeals stated the following in *A.J. Lafaro v. Cahill*, 203 Ariz. 482, 56 P.3d 56 (App. 2002):

"The statute permits courts to enjoin such harassment, because a person should not have to endure repeated frightening, dangerous or otherwise alarming and intrusive personal conduct that serves no legitimate purpose."

The Court does not need to address whether the alleged conduct serves a legitimate purpose since there are no allegations of "frightening, dangerous or otherwise alarming and intrusive personal conduct". The economic harm as well as the annoyance and disruption alleged by the Plaintiff cannot as a matter of law constitute a basis for an injunction against harassment. The Plaintiff's request for an injunction against harassment should be dismissed.

The Plaintiff's final claim alleges nuisance. This Court's review of Arizona law regarding a nuisance claim reveals that there are two types of nuisance recognized by Arizona law, specifically private nuisance and public nuisance. The Arizona Supreme Court discussed those nuisance claims in *Armory Park v. Episcopal Community Servs.*, 148 Ariz. 1, 4, 712 P.2d 914, 917 (1985) and stated the following:

"A private nuisance is strictly limited to an interference with a person's interest in the enjoyment of real property. . . . A public nuisance, to the contrary, is not limited to an interference with the use and enjoyment of the plaintiff's land. It encompasses any unreasonable interference with a right common to the general public.

\* \* \*

Thus, a nuisance may be simultaneously public and private when a considerable number of people suffer an interference with their use and enjoyment of land."

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The Plaintiff's nuisance claim does not allege an interference with the use and enjoyment of any land. Although the legal basis for Plaintiff's nuisance claim was not fully briefed by the parties, the Court is being asked to grant injunctive relief pursuant to the nuisance claim. Based upon the Court's review of the file and Amended Verified Complaint For Declaratory And Injunctive Relief, the Court finds as a matter of law that the Plaintiff's allegations do not support a claim for nuisance. Therefore, the Court will not grant injunctive relief based upon the nuisance claim currently before the Court. The request for an injunction based upon a nuisance claim should be dismissed.

The Court next considers the Defendants' argument that Arizona's Strategic Lawsuits Against Public Participation ("SLAPP") statute, A.R.S. §12-751 *et seq.*, requires dismissal of this case. Since the Court has dismissed the majority of the Plaintiff's claims on other grounds, the Court declines to address whether A.R.S. §12-751 *et seq.* applies to the Plaintiff's claims that are dismissed. As to the remaining claim for a declaratory judgment regarding Defendant Jean Warren's pending January 13, 2010 public records request, the Court finds that declaratory actions regarding pending public records requests are not covered by A.R.S. §12-751 *et seq.* It makes no sense to interpret A.R.S. §12-751 *et seq.* to provide for the automatic dismissal of a case seeking the resolution of a public records request pursuant to A.R.S. §39-121 *et seq.* The Court concludes that by the use of the term "exercise of the right of petition" in A.R.S. §12-751(A) the legislature did not intend to include within Arizona's anti SLAPP statute lawsuits involving the resolution of pending public records requests pursuant to A.R.S. §39-121 *et seq.*

For the reasons set forth above, the Court finds that it is appropriate to dismiss all of the Plaintiff's claims against Defendants Jennifer Renee Hoge, Cyndi Regis and Barbara Rejon. The Court further finds that it is appropriate to dismiss all claims against Defendant Jean Warren except the request for declaratory judgment regarding her pending January 13, 2010 public records request.

**IT IS ORDERED** the Defendants' Motion To Dismiss is **GRANTED** as follows:

- 1) All of the Plaintiff's claims against Defendants Jennifer Renee Hoge, Cyndi Regis and Barbara Rejon are **DISMISSED**.
- 2) All claims against Defendant Jean Warren except the request for declaratory judgment regarding her pending January 13, 2010 public records request are **DISMISSED**.

Arizona law requires that before a dismissal based upon the pleadings is final, the Plaintiff be given an opportunity to amend the Complaint to cure the deficiencies found by the Court. Therefore, the Court finds that Plaintiff should be given thirty (30) days to seek leave of the Court to file a Second Amended Complaint pursuant to Rule 15(a), *Ariz. R. Civ. P.* In the event the Plaintiff does not obtain leave of the Court to file a Second Amended Complaint, the dismissals shall become dismissals with prejudice.

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The Court has considered the parties requests for sanctions. The Court finds that there is no legal basis to enter an award of sanctions in favor of the Plaintiff and against the Defendants at this time. The Court will leave open the possibility that upon conclusion of proceedings regarding Plaintiff's request for a declaratory judgment involving Defendant Jean Warren's January 13, 2010 public records request that an award of attorney's fees and costs in favor of the Plaintiff might be appropriate.

The Court finds that an award of sanctions in favor of Defendants Cyndi Regis and Barbara Rejon against the Plaintiff is not warranted at this time. The Court finds that the Amended Complaint is not entirely frivolous as to those Defendants since it is based upon good faith arguments for the extension of existing law that have not been addressed by the Arizona Appellate Courts.

The Court finds that an award of sanctions in favor of Defendant Jean Warren against the Plaintiff is not warranted at this time. The Court finds that the Amended Complaint is not entirely frivolous as to Defendant Warren since there still remains one claim for declaratory judgment as to the January 13, 2010 public records request and since the balance of the claims that were dismissed were based upon good faith arguments for the extension of existing law that have not been addressed by the Arizona Appellate Courts. The Court will leave open the possibility that upon conclusion of proceedings regarding Plaintiff's request for a declaratory judgment regarding Jean Warren's January 13, 2010 public records request that an award of attorney's fees and costs in favor of Defendant Warren might be appropriate.

The Court finds that Defendant Jennifer Renee Hoge's request for sanctions against the Plaintiff presents a colorable claim for an award of sanctions. The Amended Complaint reflects that Defendant Jennifer Renee Hoge is included in this action based upon the following allegations: 1) That she is the daughter of Defendant Jean Warren. See Amended Verified Complaint, paragraph 59; and 2) That she allegedly is part of a "coordinated campaign to harass and impede the functioning of Congress through multiple complaints filed with various governmental agencies, and the abuse of the public records request system codified in A.R.S. §39-121, *et seq.*, from the 2002 school year through the date of this filing." See Amended Verified Complaint, pages 1 through 2. However, the Plaintiff only alleges Defendant Hoge authored two letters requesting action by the Plaintiff on June 12, 2002 and June 27, 2002 as well as one public records request on February 20, 2003. See Amended Verified Complaint, paragraphs 60 through 63. In addition, the Plaintiff's Response To Defendants' Motion To Dismiss lists only the three letters authored by Defendant Hoge in 2002 and 2003.

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Even if the Court were to have accepted the Plaintiff's legal arguments that a declaratory judgment and injunctive relief were appropriate, the Plaintiff's allegations fail to establish Defendant Hoge engaged in any type of "coordinated campaign". Furthermore, the alleged conduct by Defendant Hoge could hardly be classified as harassment or a nuisance even under Plaintiff's interpretation of the law. Rather, it appears to the Court that Defendant Jennifer Renee Hoge was named in this case based on her family relationship with Defendant Jean Warren. Not only is that offensive to this Court's sense of justice, but it is groundless, constitutes harassment and is not made in good faith.

A.R.S. §12-341.01(c) provides for an award of attorney fees "upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and is not made in good faith." Based upon the record, the Court finds there to be clear and convincing evidence to support such an award.

As set forth above, the Plaintiff's claims against the Defendant Jennifer Renee Hoge are not supported by basic facts that would warrant relief. While the Court has previously found that Plaintiff's novel legal theories do not warrant an award of attorney's fees since they constitute good faith arguments for the extension of existing law that have not been addressed by the Arizona Appellate Courts, those same good faith arguments do not apply to the facts alleged against Defendant Hoge. Since those claims when applied to the facts alleged against Defendant Hoge are groundless, the Court concludes that they were not made in good faith and constitute harassment based upon the family relationship between Defendant Jennifer Renee Hoge and Defendant Jean Warren.

Therefore, the Court concludes that unless the Court grants Plaintiff leave to file a Second Amended Complaint that clearly sets forth grounds for claims against Defendant Jennifer Renee Hoge, Defendant Hoge is entitled to an award of attorney fees against the Plaintiff pursuant to A.R.S. §12-341.01(c).

**IT IS ORDERED** the Plaintiff's request for sanctions against the Defendants is **DENIED**.

**IT IS ORDERED** Defendants Cyndi Regis and Barbara Rejon request for sanctions against the Plaintiff is **DENIED**.

**IT IS ORDERED** Defendant Jean Warren's request for sanctions against the Plaintiff is **DENIED**.

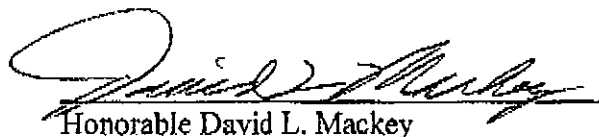
**IT IS ORDERED** Defendant Jennifer Renee Hoge's request for sanctions against the Plaintiff is **GRANTED**, subject to reconsideration in the event the Court determines that the defects in the claims against Defendant Hoge can be cured by granting Plaintiff leave to file a Second Amended Complaint.

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**IT IS FURTHER ORDERED** that within thirty-days of this date, Defendant Jennifer Renee Hoge may submit a form of Order as well as request for attorney's fees and costs supported by an affidavit in compliance with *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (App.1983).

**IT IS FURTHER ORDERED** within thirty (30) days of this date the Defendant Jean Warren shall file an Answer to Plaintiff's claim for a declaratory judgment regarding her January 13, 2010 public records request as set forth in paragraphs 1 through 7, 58, and 135 through 145 of the Amended Verified Complaint.

DATED THIS 15<sup>th</sup> DAY OF APRIL, 2010

  
Honorable David L. Mackey

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