

**IN THE CUYAHOGA COUNTY COURT OF COMMON PLEAS  
CIVIL DIVISION**

<b>JAMES RENNER</b>	:	Case No. CV-09-694122
	:	
Plaintiff	:	Judge Nancy Margaret Russo
	:	
v.	:	<b>PLAINTIFF’S MEMORANDUM IN</b>
	:	<b>OPPOSITION TO DEFENDANT</b>
<b>CEGW, INC., et al.</b>	:	<b>COUGHLIN’S PARTIAL MOTION</b>
	:	<b>TO DISMISS</b>
Defendants	:	
	:	

Now comes Plaintiff James Renner, by and through counsel, to present his Memorandum in Opposition to Defendant Coughlin’s Partial Motion to Dismiss.<sup>1</sup> The very story that Defendant Coughlin has claimed is defamatory has been published, therefore, there is absolutely no legal question that any legal dispute between the parties’ regarding Defendant Coughlin’s defamation claim is legally ripe for judicial adjudication, regardless of whether Defendant Coughlin, personally, is ready to prove his claims or not. No court has ever defined the ripeness doctrine based on a litigant’s personal desire, or lack thereof, to litigate. And yet, that is exactly what Defendant Coughlin has asked the Court to do.

**I. Standard of Review**

Defendant Coughlin has asked that this Court to dismiss the declaratory judgment claim against him under Ohio Civ. R. 12(B)(6). In considering a Civ. R. 12(B)(6) Motion to Dismiss, the court “must accept the material allegations of the

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<sup>1</sup> Although captioned as a Motion to Dismiss, Defendant Coughlin’s Motion only seeks dismissal of Plaintiff’s Second Claim for Relief- Declaratory Judgment on Defendant Coughlin’s Defamation Claim—the only Claim for Relief in which he is a party—and not the entire Complaint.

complaint as true and make all reasonable inferences in favor of the [Plaintiff]. For the moving [Defendant] to prevail, it must appear from the face of the complaint that the [Plaintiff] can prove no set of facts that would entitle [him] to relief.”<sup>2</sup> Therefore, Defendant Coughlin can only prevail on his Partial Motion to Dismiss if he can establish that *his own allegations* that the Plaintiff’s story about Defendant Coughlin’s alleged extramarital affair and potentially felonious altering of election petitions is defamatory but is also somehow not ripe for adjudication even after those allegedly “defamatory” allegations were published.

According to the Complaint, almost as soon as Plaintiff Renner was assigned to do a story for Defendant Times-Shamrock on Defendant Coughlin’s alleged affair, Defendant Coughlin contacted Plaintiff’s superiors to threaten litigation. First, Defendant Coughlin personally called *Cleveland Scene* Publisher Matt Fabyan to warn him that Coughlin would sue if any story about any alleged affair was published.<sup>3</sup> The very next day, opposing counsel for Defendant Coughlin sent a letter threatening that the publication of any alleged affair concerning Defendant Coughlin would be defamatory.<sup>4</sup>

Before he had even seen any draft of any story Plaintiff Renner was writing about him, Defendant Coughlin sent out an email to his supporters and people he thought were giving information to Plaintiff Renner alleging that Plaintiff Renner had “established a pattern of defaming” Defendant Coughlin.<sup>5</sup> At one point, Defendant Coughlin had his current counsel send a letter to Times-Shamrock threatening litigation

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<sup>2</sup> *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 465; 2004-Ohio-5717 ¶ 11.

<sup>3</sup> See, Compl. at ¶ 12.

<sup>4</sup> *Id.* at ¶ 13.

<sup>5</sup> *Id.* at ¶ 64.

against them, even if they never published a story about Defendant Coughlin, if Plaintiff Renner continued to contact Defendant Coughlin's associates and "harassing" them.<sup>6</sup>

On April 14, 2009, a blog known as BloggerInterrupted published the last version of Plaintiff Renner's story about Defendant Coughlin's alleged affair and felony crimes that Defendant Times-Shamrock declined to published.<sup>7</sup> In short, the Complaint alleges: 1) an allegation by Plaintiff Renner of felonious criminal wrongdoing and an extramarital affair involving Defendant Coughlin (statement); 2) Defendant Coughlin's repeated claims that any publication of an alleged affair was defamatory (allegation of falsity); and finally, publication by Plaintiff Renner alleging Defendant Coughlin had an affair, Coughlin's denial notwithstanding (publication). It is under these alleged facts that Defendant Coughlin suggests a defamation action is not yet ripe.

## **II. Argument**

Plaintiff has alleged that the story which he wrote about Defendant Coughlin for Defendant Times-Shamrock was not defamatory. According to the Complaint, Defendant Coughlin has publicly stated that the story Plaintiff Renner wrote about him is defamatory. In his Motion to Dismiss, Defendant Coughlin believes that only a person making a legal allegation against another has a right to access to the courts for relief. Plaintiff Renner believes that a party who has been falsely accused of civil wrongdoing deserves their day in court, too. And ripeness is not defined on the personal whims of a Defendant willing to be sued, and rare is the Defendant who does not claim it is "a bad time" to be sued. Yet, these apparently seem to be Defendant Coughlin's entire grounds for dismissal.

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<sup>6</sup> *Id.* at ¶ 34.

<sup>7</sup> *Id.* at ¶ 62.

As Defendant Coughlin correctly notes, Ohio law requires the Plaintiff to establish the following in order to obtain declaratory judgment relief: 1) that a real controversy exists between the parties, 2) that the controversy is justiciable, and 3) that speedy relief is necessary to preserve the rights of the parties.<sup>8</sup> In Defendant Coughlin's Motion, the Defendant only raises the second element of justiciability. The parties clearly are in a real dispute and are not engaging in a "friendly" suit. For the record, the Plaintiff discusses the third element below after addressing Defendant Coughlin's argument regarding ripeness.

**A. A published story that the subject calls defamatory is judicially ripe to determine if it is, as a matter of law, defamatory.**

Defendant Coughlin first asserts that the Plaintiff has no standing, but then concedes it is the Plaintiff's own statements that form the basis of the Defendant's defamation claims. Therefore, the issue is not really standing, but whether the Plaintiff's request for a judicial declaration about the responsibilities, if any, of any party under Defendant Coughlin's defamation claims is judicially ripe.

Plaintiff is unaware of any legal authority that suggests that a published story that the subject calls false and defamatory is not judicially ripe. Given that Defendant Coughlin failed to cite any such legal authority, Defendant Coughlin must also be unaware of any such legal authority to support his Motion to Dismiss. Unlike the party in *R.A.S. Entertainment, Inc. v. Cleveland* (8<sup>th</sup> Dist. 1998), 130 Ohio App.3d 125, or the hypothetical given by Defendant Coughlin on pg. 3, n. 1 of his Motion, Plaintiff is not asking for judicial review for some planned future action. Instead, the Plaintiff is simply asking the Court to declare that a story that has already been published about Defendant

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<sup>8</sup> *R.A.S. Entertainment, Inc. v. Cleveland* (8<sup>th</sup> Dist. 1998), 130 Ohio App.3d 125 (citing *Burger Brewing Co. v. Liquor Control Comm'n.* (1973), 34 Ohio St.2d 93.

Coughlin is not, as a matter of law, defamatory to Defendant Coughlin. Because the Plaintiff's claim concerns past, and not future, behavior, there is nothing advisory or hypothetical about the Court's adjudication of Plaintiff's declaratory judgment action against Defendant Coughlin.

In fact, his own Motion concedes that the matter is judicially ripe (just not personally ripe for Defendant Coughlin): "While Plaintiff has . . . spread rumors about this Defendant in various blogs, this Defendant does not believe there has been sufficient breadth of publication to merit the time and expense that would be necessary in order to pursue a defamation claim against Plaintiff."<sup>9</sup> Implicit in that statement is an acknowledgement by Defendant Coughlin that he could, presently, prosecute his defamation claims if he so desired.

Not content with one admission that the Defendant's defamation claim is ripe, Defendant Coughlin admits it again in his closing: "Whether or not Plaintiff has published defamatory matter concerning this Defendant, this Defendant for the time being – and probably for all time – has chosen not to pursue any legal rights or remedies against Plaintiff, if any." Defendant Coughlin cannot "refrain" from pursuing any legal remedy if he has none because of ripeness. Simply because the Defendant had made a personal choice not to file litigation regarding his defamation claim before the Plaintiff did does not mean the claim is not ripe. Again, Defendant fails to cite what would need to occur before the defamation claims that Defendant Coughlin was making as early as October 2008 would be judicially ripe—at least nothing beyond his own personal desire to litigate them.

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<sup>9</sup> See, Deft. Coughlin's Mot. to Dismiss, p. 2.

Defendant makes yet another admission that his defamation claim is otherwise ripe for adjudication but for his lack of desire to litigate an issue he passionately and vociferously threatened to litigate for the prior eight months: “It is the victim of alleged defamation who should be permitted to decide whether and when to air a dispute such as this in court.”<sup>10</sup> Clearly, Defendant Coughlin believes he has already been “victimized” by the Plaintiff’s alleged defamation. His only protest is that it should be he, not the Plaintiff, who decides whether to adjudicate Defendant Coughlin’s claims in a court of law. However, this, too, is an incorrect statement regarding declaratory judgment. In discussing the federal version of the Uniform Declaratory Judgment Act, the U.S. Sixth Circuit has noted that declaratory judgment, in fact exists for the very scenario presented in this case. The Sixth Circuit, in reversing a district court’s granting of a motion to dismiss similar to Defendant Coughlin’s, noted that declaratory judgment’s purpose “is to provide a remedy to the challenger of a right, who otherwise could not have his challenge adjudicated until his adversary took the initiative.”<sup>11</sup> The law regarding Ohio’s declaratory judgment is similar. First, the Ohio Supreme Court has held, in interpreting the Declaratory Judgment statute, that the “remedy afforded is to be liberally construed and freely applied.”<sup>12</sup> The Declaratory Judgment Act “was primarily designed to correct deficiencies in legal procedure, and its principal object and purpose is to provide a remedy in those situations where either none exists because a cause of action has not yet accrued or the assertion of legal rights is dependent upon the

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<sup>10</sup> Deft. Coughlin Mot. to Dismiss, pg. 3, n. 1.

<sup>11</sup> *Employers’ Liability Assur. Corp. v. Ryan* (1940), 109 F.2d 690, 691.

<sup>12</sup> *Sessions v. Skelton* (1955), 163 Ohio St. 409, syllabus, paragraph 1; *McConnell v. Hunt Sports Ent.* (1999), 132 Ohio App.3d 657, 681; See also, R.C. 2721.13.

act of a third person or upon the passage of time.”<sup>13</sup> As Plaintiff Renner’s rights to protect his professional reputation from Defendant Coughlin’s public allegations that Plaintiff’s published story is false and defamatory would otherwise depend on Defendant Coughlin to file a suit asserting these claims, which he freely admits he has no intention of doing, declaratory judgment is appropriate to have a judicial declaration that, as a matter of law, the Plaintiff has not defamed Senator Coughlin.

Insurance companies frequently seek declaratory judgment against their insureds asking courts to find that the insurance company is not contractually required to defend or insure certain claims. Not once has any Ohio court suggested that it was the alleged victim of the tort that should decide whether, where, or when such claims should be made. Defendant Coughlin is no different.

If Defendant Coughlin sincerely wishes to waive his defamation claims or does not wish to prosecute them in litigation, he could either enter into a settlement agreement with Plaintiff with a full waiver and release of those claims or simply allow default judgment be taken against him in this matter. But his dismissal hardly achieves his stated present intentions, and he does not definitively rule out trying to raise these claims at some later date. So, the Defendant has an option: either finally prosecute his defamation claim in this action, or lose them forever. Dismissal is not an appropriate option.

In reality, the real reason State Senator/Gubernatorial candidate Coughlin and his counsel have not filed any defamation action is that they both know that they highly unlikely to prevail in any adjudication of his defamation claim as a public official.

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<sup>13</sup> *Gray v. Willey Freightways, Inc.* (6<sup>th</sup> Dist. 1993), 89 Ohio App.3d 355, 362. (Citing *Murray v. McCrystal* (1955), 99 Ohio App. 441.)

Therefore, the making of the claim in the court of public opinion has more value than in a court of law, and they are demanding that this Court deny the Plaintiff any remedy to force them to prove their legal claim in a court of law or lose the right to continue to assert them.

What the Defendant and his counsel are essentially suggesting to this Court is that if they engage in a campaign of legal intimidation (which included threatened litigation if the Plaintiff and his former employer continued to look into Defendant Coughlin's alleged affair *even if no story about an alleged affair was ever published*) to the point that virtually no publisher is willing to print a story, then a reporter has no legal recourse if the story is published unless Defendant Coughlin and only Defendant Coughlin has decided that the story was published by a sufficient "critical mass" that would justify in Defendant Coughlin's mind finally litigating his own legal claims in the face of such campaigned legal intimidation to prevent its publication by Defendant Coughlin. When the Defendant and his counsel suggest that the story has not hit a critical mass of publication sufficient for *him* to justify a litigation expense to make the case ripe (a conflation of a personal economic decision not to file litigation with the judicial policy concerning ripeness), he is essentially asking the Court to reward himself for his, and his counsel's, abuse of the legal process to prevent publication of a non-defamatory, but unflattering, portrayal of Defendant Coughlin. Regardless, the story has been published enough that Plaintiff wishes to litigate on Defendant Coughlin's defamation claims and his right to seek legal redress by a jury of his peers should not be precluded simply because Defendant Coughlin does not wish to litigate the issue.

While State Senator Coughlin has the luxury of writing off his prior threats of massively intrusive discovery and "scorched earth" litigation against anyone who gave

negative information about him to the Plaintiff as merely hypothetical, the Plaintiff has had to live with the very real wake of Defendant Coughlin's legal gamesmanship. Because of his, now-admitted empty, threat of litigation, Defendant Coughlin caused Defendant Times-Shamrock to subject Plaintiff Renner's story to extraordinary scrutiny designed to encourage the scuttling of any negative story about Defendant Coughlin. Because Plaintiff Renner was fired for writing to his corporate superiors that Defendant Coughlin's threats were empty and that Coughlin would not actually litigate these claims or prevail if he did (an accurate assessment given the rather stark admissions made in Defendant Coughlin's Motion), it is anything but a mere hypothetical situation for the now unemployed Plaintiff James Renner. Unfortunately for Plaintiff Renner, he cannot walk away from the situation as easily as apparently Defendant Coughlin is now trying. Regardless, as discussed below, because the legal issue regarding whether the story was, in fact, defamatory is a legal gateway issue to the Plaintiff's public policy wrongful termination claim, the Plaintiff needs to adjudicate the issue to protect his rights and interests in this matter.

Regardless of Defendant Coughlin's personal opinion regarding the forum in which Plaintiff Renner's story about Defendant Coughlin was eventually published, the fact remains that it was published—and that is all that Ohio's defamation law requires for a defamation claim to be considered ripe. Based on Plaintiff's Complaint, the Defendant's Motion to Dismiss for ripeness should be denied.

**B. Plaintiff requires speedy relief on the Defendant's alleged defamation claim in this present matter.**

In Plaintiff's Sixth Claim of Relief, the Plaintiff alleges that his e-mail to Times-Shamrock's CEO was protected by the public policy embodied in the First Amendment

freedom of the press jurisprudence expressed in *N.Y. Times v. Sullivan*<sup>14</sup> and its progeny.<sup>15</sup> Because Plaintiff is relying on the non-defamatory nature of his story about Defendant Coughlin for his public policy wrongful termination claim, then the Plaintiff must first establish that the story was not defamatory as a matter of law. If the story Plaintiff wrote about Defendant Coughlin *were* defamatory, then the Plaintiff's public policy claim fails as there is no public policy protecting employees advocating the publication of clearly defamatory publications from termination.

Because Defendant Coughlin is a necessary party to his own defamation claims, the failure to include Defendant Coughlin as a party would be jurisdictionally fatal to the Plaintiff's declaratory judgment action to determine whether his story was non-defamatory.<sup>16</sup> Therefore, Plaintiff Renner had no choice but to join Defendant Coughlin as a necessary party in order to establish that the Plaintiff's story was non-defamatory and, therefore, his termination over his advocacy of publication of his story violated public policy. Therefore, Plaintiff Renner did not have the luxury of waiting to see if Defendant Coughlin would ever file his threatened defamation claim. Furthermore, Defendant Coughlin continues to deny the truth of Plaintiff Renner's reporting. Therefore, a speedy adjudication on this issue is necessary to provide relief to Plaintiff Renner from Defendant Coughlin's otherwise unlitigated defamation claims.

### **III. Conclusion**

Because Plaintiff Renner's declaratory action concerns a defamation claim of a story already published and that Defendant Coughlin has already claimed was defamatory, the Plaintiff's declaratory action does not deal with a hypothetical situation

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<sup>14</sup> (1964), 376 U.S. 254

<sup>15</sup> See, Compl. at ¶ 90.

<sup>16</sup> See, *Bretton Ridge Homeowners Club v. DeAngelis* (8<sup>th</sup> Dist.1988), 51 Ohio App.3d 183.

in which a party is seeking an advisory opinion, but deals with an existing controversy. Therefore, Defendant Coughlin's partial Motion to Dismiss on grounds of ripeness should be denied as reasonable minds, assuming the material facts of the Complaint are true and making all reasonable inferences in favor of the Plaintiff, could find that the Plaintiff has stated a claim entitling him to relief.

Based on the foregoing, the Plaintiff respectfully requests that the Court deny Defendant Coughlin's Motion to Partially Dismiss.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Memorandum has been service upon Ronald S. Kopp, Counsel for Defendant Kevin Coughlin, c/o Roetzel & Andress, LPA, 222 South Main Street, Suite 400, Akron, Ohio 44308 and John F. McCaffrey, Counsel for Defendant Times-Shamrock Communications, 1111 Superior Avenue, Eaton Center # 1350, Cleveland, Ohio 44114-2500 this 26th day of June, 2009.

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Brian R. Hester