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K. Mortenson

6 IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA
7 IN AND FOR THE COUNTY OF YAVAPAI

8 JOHN B. CUNDIFF and BARBARA C.
9 CUNDIFF, husband and wife; ELIZABETH
10 NASH, a married woman dealing with her
11 separate property; KENNETH PAGE and
12 KATHRYN PAGE, as Trustee of the Kenneth
13 Page and Catherine Page Trust,

11 Plaintiffs,

12 vs.

14 DONALD COX and CATHERINE COX,
15 husband and wife,

16 Defendants.

CASE NO. P1300CV20030399

**OBJECTION TO MOTION TO
STRIKE AND IN LIMINE
(Oral Argument Requested)**

17
18 Plaintiffs Object to Defendants' Motion to Strike and In Limine for reasons more
19 particularly set forth in the accompanying Memorandum of Points and Authorities.

20
21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. Factual Background**

23 As this Court is well aware, this litigation has been on-going for the past ten years. The
24 record in this Court and the Court of Appeals is replete with descriptions of the Coyote Springs
25 Ranch (CSR) subdivision, the CC&Rs which are the subject of the litigation and details about the
character of CSR. The Court of Appeals decision declared that the affidavit of Robert Conlin

1 was relevant to the intent of the Declarant to ensure not only a rural setting, but a rural,
2 residential environment. Defendants recognize the significance of the physical appearance of
3 CSR; they requested that this Court conduct an inspection of CSR in Defendants' Cox Motion
4 For a Site Inspection which they filed on June 5, 2012. In fact, it was that motion which
5 suggested to Plaintiffs that it would be a good idea to capture CSR's appearance at that point in
6 time to document any change in the physical appearance between the time it was filmed and the
7 time that the Court inspected the property. At that time it was not intended to be used at trial,
8 only as impeachment if necessary. Even at the present time, if the Court chooses to inspect CSR
9 before ruling on Plaintiffs' pending Motion for Summary Judgment, the videos Defendants so
10 strenuously seek to exclude would only be cumulative and therefore harmless.

11 II. ARGUMENTS OF LAW

12 A. Defendants' Motion to Strike is a Response to Plaintiffs' Motion for 13 Summary Judgment (in disguise)

14 Rule 56(c)(2) provides that a party opposing the motion must file its response and any
15 supporting materials within 30 days after service of the motion. That rule does not provide for
16 two responses. Defendants' motion unnecessarily expands the proceedings before this Court and
17 should be disregarded. It is with a substantial degree of certainty that the undersigned predicts
18 that the very same argument will appear in Defendants' true response to Plaintiff's motion for
19 summary judgment. Rule 56(c)(2) does not permit anything other than a Rule 56 response and
20 neither should this Court.

21 B. The videos are harmless under Rule 37(c)(1)

22 Rule 37(c)(2) states, in pertinent part, "[A] party who fails to timely disclose information
23 required by Rule 26.1 shall not, **unless such failure is harmless**, be permitted to use as evidence
24 at trial, at a hearing, or on a motion the information or witness not disclosed, except by leave of
25 court for good cause shown." (Emphasis added). As discussed above, the original motivation for

1 filming CSR was to capture the appearance shortly after Defendants requested that the Court
2 inspect CSR in case a long period of time elapsed between the time the request was made and the
3 time the Court or jury inspected CSR. The videos were intended to be impeachment evidence.

4 On August 28, 2012 this Court denied Defendants' request stating that "it is an onsite
5 inspection by the finder to fact that would serve the greatest benefit if an onsite inspection were
6 to occur, and the jury in this matter will not be picked until April 16, 2013."

7 This ruling preceded the deadline for filing dispositive motions. Plaintiffs' Motion for
8 Summary Judgment is potentially a dispositive motion which, if granted would eliminate the
9 need for a trier of fact. If this Court chooses to inspect CSR before ruling on the motion and the
10 inspection reveals that conditions have changed since the June 2012 videos were taken, only then
11 do the impeachment videos become significant. The videos are harmless as they only depict what
12 this Court will see if it inspects CSR as requested by Defendants. If changes have occurred by
13 the time this Court inspects the property, the videos become mere impeachment evidence.

14
15 **C. Adequate foundation exists for the videos**

16 Plaintiff John Cundiff is a resident of CSR. He stated in his affidavit that the videos
17 attached to his affidavit accurately depict the appearance of CSR. Defendants' assertion that the
18 person holding the video camera must be identified is incorrect. There is no such requirement.
19 Contrary to Defendants' assertion that nobody identifies the lots of CSR being filmed and
20 therefore one is unable to determine that the film depicts CSR, John Cundiff did. He said that
21 "[T]he three (3) DVDs attached to this affidavit accurately depict the appearance of Coyote
22 Springs Ranch." It is completely unnecessary to interview or depose the individuals filming
23 CSR. If Defendants think CSR looks any different, that's what they are allowed to show in a
24 proper response to a motion for summary judgment.

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2 mailed this 6th day of
3 February, 2013 to:

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