

2006 MAR 22 PM 4:00
SABLON

1 Mark W. Drutz, #006772
2 Jeffrey R. Adams, #018959
3 Sharon Sargent-Flack, #021590
4 **MUSGROVE, DRUTZ & KACK, P.C.**
5 1135 Iron Springs Road
6 P.O. Box 2720
7 Prescott, Arizona 86302
8 (928) 445-5935
9 Attorneys for Defendants/Cross-Appellants

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

9
10 JOHN B. CUNDIFF and BARBARA C.
11 CUNDIFF, husband and wife; BECKY
12 NASH, a married woman dealing with her
13 separate property; KENNETH PAGE and
14 KATHRYN PAGE, as Trustee of the Kenneth
15 Page and Catherine Page Trust,
16
17 Plaintiffs,
18
19 v.
20 DONALD COX and CATHERINE COX,
21 husband and wife,
22
23 Defendants.

Case No. CV 2003-0399
Division No. 1
**CIVIL APPEALS DOCKETING
STATEMENT RE: CROSS-APPEAL**

19 Defendants/Cross-Appellants Defendants Donald Cox and Catherine Cox, through their
20 undersigned counsel, submit the following Docketing Statement pursuant to the provisions of
21 Rule 12(c) of the Arizona Rules of Civil Appellate Procedure ("ARCAP").
22

23 **A. TIMELINESS OF APPEAL AND CROSS-APPEAL.**

- 24 1. Date judgment/order was entered: February 14, 2006.
25 2. Is the judgment/order signed as required by Rule 58(a)? X Yes ___ No
26 3. Was the time for appeal extended by a motion? ___ Yes X No

1 4. A Notice of Appeal was filed by Plaintiffs on February 17, 2006, a copy of which
2 is attached as Exhibit "A".

3 5. A Notice of Cross-Appeal was subsequently filed pursuant to ARCAP 9:

4 a. A Notice of Cross-Appeal was filed by Defendants/Cross-Appellants on
5 March 8, 2006, copy of which is attached as Exhibit "B".

6 **B. APPEALABLE JUDGMENT OR ORDER.**

7 1. Basis for appellate jurisdiction under A.R.S. § 12-2101
8 (check appropriate statutory subsection),

9 X B E G J L(1)
10 C F(1) H K(1) L(2)
11 D F(2) I K(2) M

12 or under A.R.S. § 12-2101.01(A).

13 1 2 3 4 5

14 2. List all parties involved in the superior court action:
15 (attach separate sheet, if necessary)

16 Plaintiffs: John B. Cundiff
17 Barbara C. Cundiff
18 Becky Nash
19 Kenneth Page
20 Kathryn Page

21 Defendants: Donald Cox
22 Catherine Cox

23 (a) If all parties in superior court are not parties to this appeal, explain in detail
24 (with specific reference to the record on appeal) why those parties are not
25 included in this appeal, e.g., dismissed, not served, or other:

26 N/A

27 3. Give brief description (3-5 words) of each party's separate claims, counterclaims,
28 cross-claims or third party claims, and the trial court's disposition of each claim,

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e.g., bench trial, jury verdict, dismissal, summary judgment, default judgment or other (include specific references to the record on appeal and attach separate sheet, if necessary):

Defendant Donald Cox and Catherine Cox asserted certain affirmative defenses based on equity to Plaintiffs' Complaint for equitable relief to enjoin Defendants from allegedly violating restrictive covenants. On April 4, 2005, the trial court granted Plaintiffs' Motion For Summary Judgment Re: Defendants' Violations of Restrictive Covenants; Affirmative Defenses of Estoppel, Laches and Unclean Hands filed on December 1, 2004. Defendants also asserted that Plaintiffs had failed to join certain indispensable parties as Plaintiffs and Defendants in this litigation. On July 18, 2005, the trial court denied Defendants' Motion To Join Indispensable Parties Pursuant To Rule 19(A), Ariz. R. Civ. P., Or, In The Alternative, Motion To Dismiss Pursuant To Rule 12(B)(7), Ariz. R. Civ. P., For Failure To Join Indispensable Parties filed on June 24, 2005.

- 4. Does the judgment dispose of all claims and all parties? ___ Yes X No
- (a) If no, was it made under Rule 54(b), ARCP? X Yes ___ No
- (b) Specify claims which remain pending in superior court:

The parties stipulated to hold in abeyance Plaintiffs' other claimed violations by Defendants of the restrictive covenants pending the Court's determination of Plaintiffs' appeal.

- 5. Did this case originate in a justice of the peace court or city court? ___ Yes X No
- 6. Does this appeal involve a contempt judgment or order? ___ Yes X No

C. OTHER INFORMATION

1. Disposition below: (check all applicable descriptions)

- | | |
|----------------------------------|------------------------------|
| ___ Bench Trial | <u>Dismissal For:</u> |
| ___ Jury Verdict | ___ Lack of Jurisdiction |
| <u>X</u> Summary Judgment | ___ Failure to State a Claim |
| ___ Review of Agency Action | ___ Failure to Prosecute |
| ___ Grant/Deny Rule 60(c) Relief | ___ Discovery Sanction |
| ___ Grant/Deny New Trial or | ___ Other |
| ___ Judgment Notwithstanding the | |
| Verdict | |
| ___ Injunction | |
| ___ Grant/Deny Special Action | |

1 2. Do you intend to order reporter's transcripts for the appeal? Yes No

2 (a) If so, have all necessary arrangements been made
3 for preparation of the transcript? Yes No

4 (b) Estimated date of completion of transcript. Unknown

5 3. Brief description of nature of action and result in trial court:

6 See description set forth above under Heading B.3. Defendants obtained judgment in their
7 favor as set forth in the Partial Final Judgment entered on February 14, 2006 from which
8 Plaintiffs have appealed.

9 4. Issues to be raised on cross-appeal: Whether the trial court properly granted
10 Plaintiffs' Motion For Summary Judgment Re: Defendants' Violations of Restrictive Covenants;
11 Affirmative Defenses of Estoppel, Laches and Unclean Hands and whether the trial court
12 properly denied Defendants' Motion To Join Indispensable Parties Pursuant To Rule 19(A),
13 Ariz. R. Civ. P., Or, In The Alternative, Motion To Dismiss Pursuant To Rule 12(B)(7), Ariz.
14 R. Civ. P., For Failure To Join Indispensable Parties.

15 5. Do you believe this appeal would be appropriate for an accelerated appeal under
16 Rule 29, ARCAP? Yes No

17 6. Do you believe this appeal would be appropriate for inclusion in the appellate
18 settlement program? Yes No

19 **D. PENDING AND PRIOR PROCEEDINGS IN THIS COURT AND THE ARIZONA**
20 **SUPREME COURT**

21 Has any other notice of appeal, petition for special action or petition for review been filed
22 from the same or consolidated superior court action? Yes; No. If yes, give the case
23 number of that appeal, special action or petition for review.

24 Plaintiffs have filed a Notice of Appeal from the Judgment entered on February 14, 2006
25 in favor of Defendants as set forth on Exhibit "A".

26 **E. RELATED APPEALS**

Are there any other appeals pending in this court involving the same parties, events or
transactions giving rise to this appeal? Yes; No. If yes, give the case number of
that appeal.

F. PROCEEDINGS IN OTHER COURTS

1 Has any bankruptcy court petition been filed or has any other proceeding been commenced
2 in another court which reflects this court's jurisdiction over this appeal? ___ Yes; X No.
3 If yes, please identify that proceeding.

4 **G. SIMILAR ISSUES**

5 Are you aware of any pending appeals in this court raising the same or closely related
6 issues? ___ Yes; X No. If yes, give the case name and number, if known.

7 **H. PERSON FILING DOCKETING STATEMENT**

8 Name of Attorney: Mark W. Drutz, Jeffrey Adams, Sharon Sargent-Flack
9 Musgrove, Drutz & Kack, P.C.

10 Address: 1135 Iron Springs Road, P.O. Box 2720, Prescott, AZ 86302-2720

11 Telephone: (928) 445-5935

12 Check one: X Attorney _____ Party Unrepresented by Counsel

13 Check one: _____ Appellant X Cross-Appellants

14 Name of Parties: Donald Cox and Catherine Cox

15 If this is a joint statement by multiple appellants, add the names and addresses of other
16 counsel on an additional sheet accompanied by certification that they concur in the filing
17 of this statement.

18 **I. OPPOSING COUNSEL ON APPEAL**

19 Name of Attorney: David K. Wilhelmsen, Marguerite M. Kirk

20 Address: 1580 Plaza West Drive, P.O. Box 1391, Prescott, Arizona 86302

21 Telephone: (928) 445-2444

22 Check one: X Attorney _____ Party Unrepresented by Counsel

23 Check one: X Appellant _____ Cross-Appellee

24 Name of Parties: John Cundiff, Barbara Cundiff, Becky Nash, Kenneth Page and Kathryn
25 Page.
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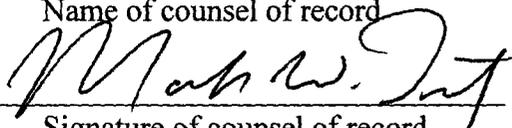
VERIFICATION

I certify that the information provided in this docketing statement is true and complete. In the event there is any change with respect to any entry on this statement, I understand that appellant shall be a continuing obligation to file an amended statement on the prescribed form.

Donald Cox and Catherine Cox
Name of Cross-Appellants

Mark W. Drutz
Name of counsel of record

March 22, 2006
Date


Signature of counsel of record

CERTIFICATION OF SERVICE

I certify that on the 22nd day of March, 2006, I served the above Docketing Statement on all counsel of record by depositing a true copy thereof in the United States mail addressed as follows:

David K. Wilhelmsen, Esq.
Marguerite M. Kirk, Esq.
FAVOUR, MOORE & WILHELMSEN, P.A.
Post Office Box 1391
Prescott, Arizona 86302-1391



1 FAVOUR MOORE & WILHELMSSEN, P.A.
2 Post Office Box 1391
3 Prescott, AZ 86302-1391
4 Ph: (928)445-2444
5 Fax: (928) 771-0450
6 David K. Wilhelmsen, #007112
7 Marguerite Kirk, #018054

2006 FEB 17 PM 3:44
JENNIFER M. BERTON
BY: _____

8 Attorneys for Plaintiffs

9 **IN THE SUPERIOR COURT OF ARIZONA**
10 **COUNTY OF YAVAPAI**

11 **JOHN B. CUNDIFF and BARBARA C.)**
12 **CUNDIFF, husband and wife; BECKY NASH,)**
13 **a married woman dealing with her separate)**
14 **property; KENNETH PAGE and KATHRYN)**
15 **PAGE, as Trustee of the Kenneth Page and)**
16 **Kathryn Page Trust,)**

Case No. CV 2003-0399

Division 1

NOTICE OF APPEAL

Plaintiffs,

vs.

17 **DONALD COX and CATHERINE COX,)**
18 **husband and wife,)**

Defendants.

19 NOTICE IS GIVEN that Plaintiffs appeal to the Court of Appeals, Division One, from the
20 Judgment entered February 14, 2006.

21 RESPECTFULLY SUBMITTED this 17th day of February, 2006.

FAVOUR MOORE & WILHELMSSEN, P.A.

22
23 By: Marguerite Kirk
24 David K. Wilhelmsen
25 Marguerite Kirk
26 P.O. Box 1391
Prescott, Arizona 86302-1391
Attorneys for Plaintiffs

///

1 Original of the foregoing
filed this 17th day of February,
2 2006, with:

3 Clerk, Superior Court of Arizona
Yavapai County
4 120 S. Cortez Street
Prescott, Arizona
5 86302

6 A copy hand-delivered this 17th day
of February, 2006 to:

7 Honorable David L. Mackey
8 Division One, Yavapai County
Superior Court of Arizona
9 120 S. Cortez St.
Prescott, Arizona 86302

10 and, a copy mailed this
11 17th day of February, 2006 to:

12 Mark Drutz
MUSGROVE, DRUTZ & KACK, P.C.
13 1135 Iron Springs Road
Prescott, Arizona 86302
14 Attorneys for Defendants Cox

15
16 By: Marguerite Kirk
David K. Wilhelmsen
17 Marguerite Kirk

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4 1135 Iron Springs Road
5 P.O. Box 2720
6 Prescott, Arizona 86302
7 (928) 445-5935
8 Attorneys for Cross-Appealing Defendants

ORIGINAL FILED THIS MAR - 8 2006
DAY OF _____
JEANETTE BENTON
Clerk Superior Court
By C. Blatter
Deputy

9 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**

10 **IN AND FOR THE COUNTY OF YAVAPAI**

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

17 Plaintiffs,

18 v.

19 DONALD COX and CATHERINE COX,
20 husband and wife,

21 Defendants.

Case No. CV 2003-0399

Division No. 1

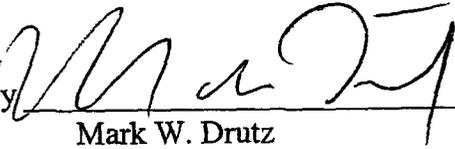
NOTICE OF CROSS-APPEAL

22 **NOTICE IS GIVEN** that Defendants Donald Cox and Catherine Cox appeal to the Court
23 of Appeals, Division One, from the order granting partial summary judgment entered by the Superior
24 Court on April 4, 2005 in favor of Plaintiffs and against Defendants on Plaintiffs' Motion For
25 Summary Judgment Re: Defendants' Violations of Restrictive Covenants; Affirmative Defenses of
26 Estoppel, Laches and Unclean Hands filed on December 1, 2004 and from the order entered by the
27 Superior Court on July 18, 2005 in favor of Plaintiffs and against Defendants denying Defendants'
Motion To Join Indispensable Parties Pursuant To Rule 19(A), Ariz. R. Civ. P., Or, In The

1 Alternative, Motion To Dismiss Pursuant To Rule 12(B)(7), Ariz. R. Civ. P., For Failure To Join
2 Indispensable Parties filed on June 24, 2005.

3 DATED this 8th day of March, 2006.

4 MUSGROVE, DRUTZ & KACK, P.C.

5
6 By 

7 Mark W. Drutz
8 Jeffrey R. Adams
9 *Attorneys for Defendants*

10 COPY of the foregoing hand-delivered
11 this 8th day of March, 2006, to:

12 Honorable David L. Mackey
13 Yavapai County Superior Court
14 Division 1
15 Yavapai County Courthouse
16 Prescott, Arizona 86301

17 COPY of the foregoing mailed this
18 8th day of March, 2006, to:

19 David K. Wilhelmsen, Esq.
20 Marguerite M. Kirk, Esq.
21 FAVOUR, MOORE & WILHELMSSEN, P.A.
22 Post Office Box 1391
23 Prescott, Arizona 86302-1391
24 Attorneys for Plaintiffs

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