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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2012 DEC -5 PM 4:11
BY: J. Ericson

10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

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

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

18 Plaintiffs,

19 v.

20 DONALD COX and CATHERINE COX,
21 husband and wife, et al., et ux.,

22 Defendants.

P1300
Case No. CV 2003-0399

Division No. 6

**DEFENDANTS' MOTION IN LIMINE
RE: ROBERT CONLIN**

(Assigned to the Hon. Kenton Jones)

(Oral argument requested)

23 Defendants, by and through undersigned counsel, hereby move *in limine* to preclude
24 Plaintiffs from calling Robert Conlin as a witness for purposes of providing interpretation of the
25 subject Declaration of Restrictions. This Motion is supported by the accompanying Memorandum
26 of Points and Authorities and the record on file.
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MEMORANDUM OF POINTS AND AUTHORITIES

In support of their claims against Defendants, Plaintiffs wish to resort to parol evidence for purposes of providing the Court with Plaintiffs' preferred interpretation of paragraph 2 of the subject Declaration of Restrictions. In this regard, Plaintiffs have identified Robert D. Conlin as a witness who Plaintiffs assert will testify in this case as follows:

Mr. Conlin ... will testify as to the intent of the recorded covenants and restrictions, particularly the covenant restricting business, trade, commercial or industrial enterprises. Further, Mr. Conlin will testify that he has personally viewed Defendants Cox's nursery operation located in the sub-division and that it was his intention to restrict the very activity conducted by Defendants Cox.

See Plaintiffs' Third Supplemental Rule 26.1 Disclosure Statement attached hereto as Exhibit "1".

Plaintiffs also have disclosed an affidavit from Mr. Conlin in which he attests to the alleged intent of paragraph 2 of the subject Declaration of Restrictions. See Exhibit "2" attached hereto. However, we believe that the parol evidence rule and the judicially accepted rules of construction for written instruments such as the subject Declaration of Restrictions prohibit Mr. Conlin's anticipated testimony and the admission of his affidavit into evidence in this case.

On the subject of parol evidence, the law is clear. "When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 854 P.2d 1134 (1993) remand on other grounds, 182 Ariz. 39, 893 P.2d 39 (Ct.App. 1994), vacated on other grounds, 185 Ariz. 174, 913 P.2d 1092 (1996) citing 3 Arthur L. Corbin, *Corbin on Contracts* § 573, at 357 (1960) and *Rental Dev. Corp. v. Rubenstein Const. Co.*, 96 Ariz. 133, 136, 393 P.2d 144, 146 (1964).

1 A declaration of covenants, conditions, and restrictions constitutes a contract between a
2 subdivision's property owners as a whole and the individual lot owners, and interpretation of those
3 restrictions is a question of law. *Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631,
4 633–34, ¶ 5, 2 P.3d 1276, 1278–79 (App.2000). Court's interpret restrictions to give effect to the
5 intent of the parties who created the document as determined by the language of the instrument and
6 the circumstances surrounding the creation of the restrictions. *Scalia v. Green*, 229 Ariz. 100, 271
7 P.3d 479 (Ct.App. 2011) citing *Spurlock v. Santa Fe Pac. R.R. Co.*, 143 Ariz. 469, 474, 694 P.2d
8 299, 304 (App.1984); see also, *Powell v. Washburn*, 211 Ariz. 553, 556–57, ¶ 13, 125 P.3d 373, 377
9 (2006). A contract is not ambiguous merely because the parties disagree as to its meaning. *Triangle*
10 *Construction v. City of Phoenix*, 149 Ariz. 486, 720 P.2d 87 (App.1985); *Autonumerics, Inc. v.*
11 *Bayer Industries, Inc.*, 144 Ariz. 181, 696 P.2d 1330 (App.1984). An agreement is ambiguous only
12 if the language can reasonably be construed in more than one sense and the construction cannot be
13 determined within the four corners of the instrument. *McCutchin v. SCA Services of Arizona, Inc.*,
14 147 Ariz. 234, 709 P.2d 591 (App.1985); *Cecil Lawter Real Estate School, Inc. v. Town & Country*
15 *Shopping Center Co., Ltd.*, 143 Ariz. 527, 694 P.2d 815 (App.1984). Absent fraud,
16 misrepresentation or mistake, when a written instrument is unambiguous, the intent of the parties
17 must be discerned from the four corners of the document. *Id.* at *Scalia* citing *Spurlock*; see also,
18 *Isaak v. Massachusetts Indem. Life Ins. Co.*, 127 Ariz. 581, 584, 623 P.2d 11, 14 (1981) citing
19 *Standage Ventures, Inc. v. State*, 114 Ariz. 480, 562 P.2d 360 (1977); *Brand v. Elledge*, 101 Ariz.
20 352, 419 P.2d 531 (1966); and *LeBaron v. Crismon*, 100 Ariz. 206, 412 P.2d 705 (1966).

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27 In reviewing Mr. Conlin's anticipated testimony as disclosed by Plaintiffs and Mr. Conlin's
28 affidavit, it should be clear to the Court that Plaintiffs wish to narrow the reach of paragraph 2 of the
subject Declaration of Restrictions. In this regard, they seek to use the parol evidence – namely the

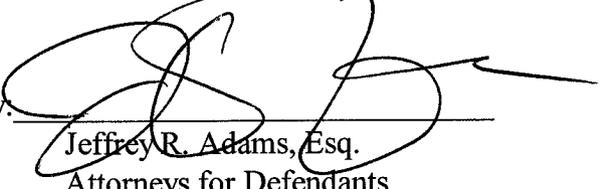
1 testimony of Mr. Conlin – to provide a definition for what is meant by the words “business, trade,
2 commercial or industrial enterprise” and they likewise seek to exclude certain types of business
3 activities from the foregoing restriction. In other words, Plaintiffs seek to “vary and contradict” the
4 express language of the Declaration of Restrictions through the use of Mr. Conlin’s “antecedent
5 understanding” of the Declaration of Restrictions in violation of the parol evidence rule and the rules
6 of construction set forth above, *supra*. *Id.* at *Taylor*. However, the Declaration of Restrictions
7 contain no limiting language in paragraph 2 as it pertains to the prohibitions contained therein; nor
8 do they describe any specific types of business, trade, commercial or industrial activities that either
9 are or are not allowable indicating a clear intent to preclude all types of businesses, trades and
10 commercial and industrial activities regardless of their nature, scope, purpose or extent or how or
11 why they are operated on, at or within the properties governed by the Declaration of Restrictions.
12 Accordingly, this Court should let the Declaration of Restrictions speak for themselves and the Court
13 should preclude the testimony of Mr. Conlin and admission of his affidavit as his perspective on the
14 Declaration of Restrictions is unnecessary given the unambiguous language set forth therein. This
15 should especially be the case because at no time during this case have Plaintiffs argued or alleged
16 that the Declaration of Restrictions, and specifically paragraph 2, is ambiguous. To the contrary,
17 Plaintiffs have taken the opposition position – namely that the Declaration of Restrictions are clear
18 on their face.

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24 Based upon the foregoing, Defendants respectfully request that the Court preclude Mr. Conlin
25 from testifying about his current view of the Declaration of Restrictions and especially in a manner
26 that is inconsistent with the express language of the Declaration of Restrictions. We likewise request
27 that the Court preclude Mr. Conlin from rendering any opinion about whether Defendants Coss’ use
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1 of their property is permissible under the Declaration of Restrictions and that the Court preclude
2 Plaintiffs from seeking to have Mr. Conlin's affidavit admitted into evidence.

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4 Respectfully submitted this 5 day of December, 2012.

5 **THE ADAMS LAW FIRM, PLLC**

6
7 By: 

8 Jeffrey R. Adams, Esq.

9 Attorneys for Defendants

10 COPY of the foregoing mailed
11 this 5 day of December, 2012, to:

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21 Ann Trust utd March 13, 2007
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Marguerite Kirk, #018054

4 Attorneys for Plaintiffs

5 **IN THE SUPERIOR COURT OF ARIZONA**
6 **COUNTY OF YAVAPAI**
7

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

12 Plaintiffs,)
13 vs.)

14 **DONALD COX and CATHERINE COX,)**
husband and wife,)

15 Defendants.)
16

Case No. CV 2003-0399

Division 1

**PLAINTIFFS' THIRD
SUPPLEMENTAL
RULE 26.1
DISCLOSURE STATEMENT**

17 Pursuant to Rule 26.1(b)(2), Ariz.R.Civ.Proc., Plaintiffs, John and Barbara Cundiff, Becky
18 Nash, and Kenneth and Kathryn Page, hereby supplement their Rule 26.1 disclosure statement and
19 make the following additional disclosure.

20 **III. Identity of Witness(es) and Substance of Expected Testimony**

21 (G) Robert D. Conlin
Glen Arm Land Company
22 Clarkdale, Arizona
86324-0870
23 P: (928) 634-3760

24 Description of Testimony: Mr. Conlin, one of the original owners and grantors of the Coyote Springs
25 Ranch subdivision, will testify as to the intent of the recorded covenants and restrictions, particularly
26 the covenant restricting business, trade, commercial or industrial enterprises. Further, Mr. Conlin will

1 testify that he has personally viewed Defendants Cox's nursery operation located in the sub-division
2 and that it was his intention to restrict the very activity conducted by Defendants Cox.

3 **VIII. Existence, Location, Custodian and Description of Tangible Evidence and Documents**

4 Plaintiffs have identified the following tangible document and evidence that may be introduced
5 at time of trial:

6 (H) Affidavit of Robert D. Conlin, dated November 4, 2004 (a true and correct copy attached
7 hereto; bate-stamped 000288-000289).

8 Plaintiffs reserve the right to supplement their disclosure statements as discovery progresses.

9 DATED this 9th day of November, 2004.

10 FAVOUR MOORE & WILHELMSSEN, P.A.

11
12
13 By: Marguerite Kirk
14 David K. Wilhelmsen
Marguerite Kirk

15
16 Original of the foregoing mailed
this 9th day of November, 2004 to:

17 Mark Drutz
18 Jeffrey Adams
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Attorneys for Defendants Cox

21
22 By: Marguerite Kirk
Marguerite Kirk

23
24
25
26

AFFIDAVIT OF ROBERT D. CONLIN

STATE OF ARIZONA)
) ss.
COUNTY OF Yavapai)

ROBERT D. CONLIN, upon his oath and affirmation, and after being first duly sworn, deposes and states as follows:

1. I am over the age of eighteen and otherwise competent to testify to the following based upon my personal knowledge.
2. As an original owner and grantor, I am responsible for the preparation and recording of the Declaration of Restrictions, pertaining to Coyote Springs Ranch, recorded June 13, 1974 (a true and correct copy attached hereto as Exhibit "A"). The covenants and restrictions were intended to benefit the landowners.
3. The recorded covenants and restrictions were intended to ensure that the Coyote Springs Ranch subdivision would be a residential community. The nine-acre lots were intended to ensure that the residential community would retain a rural setting.
4. To protect the rural, residential setting of the subdivision, a covenant was included strictly prohibiting trade, business, commercial or industrial enterprises for operating in the Coyote Springs Ranch subdivision.
5. The covenant against trade, business, commercial or industrial enterprises was not intended to prohibit against landowners or occupiers from maintaining a home-office in their residence, from parking or maintaining their business vehicles or equipment on their property, or from indicating to the public that they had a home office at their residence.
6. I have personally viewed the nursery operation engaged in by Catherine and Donald Cox on their property located in Coyote Springs Ranch. As an original grantor and creator of the recorded Declarations of Restrictions, June 13, 1974, it was my intention that the restrictions prohibit the very activity being conducted on the property by Catherine and Donald Cox. Furthermore, the express language of the restrictions provide such.

FURTHER AFFIANT SAYETH NOT.


Robert D. Conlin

SUBSCRIBED AND SWORN TO before me this 4th day of November, 2004, by Robert D. Conlin.

Cheryl Keating
Notary Public

My Commission Expires:

10/19/08



AFFIDAVIT OF ROBERT D. CONLIN

STATE OF ARIZONA)
) ss.
COUNTY OF Yavapai)

ROBERT D. CONLIN, upon his oath and affirmation, and after being first duly sworn, deposes and states as follows:

1. I am over the age of eighteen and otherwise competent to testify to the following based upon my personal knowledge.
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4. To protect the rural, residential setting of the subdivision, a covenant was included strictly prohibiting trade, business, commercial or industrial enterprises for operating in the Coyote Springs Ranch subdivision.
5. The covenant against trade, business, commercial or industrial enterprises was not intended to prohibit against landowners or occupiers from maintaining a home-office in their residence, from parking or maintaining their business vehicles or equipment on their property, or from indicating to the public that they had a home office at their residence.
6. I have personally viewed the nursery operation engaged in by Catherine and Donald Cox on their property located in Coyote Springs Ranch. As an original grantor and creator of the recorded Declarations of Restrictions, June 13, 1974, it was my intention that the restrictions prohibit the very activity being conducted on the property by Catherine and Donald Cox. Furthermore, the express language of the restrictions provide such.

FURTHER AFFIANT SAYETH NOT.


Robert D. Conlin