

2004 OCT -5 PM 4: 00

JEANNE HICKS, CLERK

BY: *Chilton*

1 FAVOUR, MOORE & WILHELMSSEN, P.A.
2 Post Office Box 1391
3 Prescott, AZ 86302-1391
4 928/445-2444
5 David K. Wilhelmsen, #007112
6 Marguerite Kirk, #018054

7 Attorneys for Plaintiffs

8 **IN THE SUPERIOR COURT OF ARIZONA**

9 **COUNTY OF YAVAPAI**

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)**
15 **Kenneth Page and Kathryn Page Trust,)**

16 Plaintiffs,

17 vs.

18 **DONALD COX and CATHERINE COX,)**
19 **husband and wife,)**
20 **Defendants.)**

Case No. CV-2003-0399

Division 1

**Plaintiffs' Reply to Defendants'
Response to Plaintiffs' Motion for
Summary Judgment
Re: Waiver of Restrictive Covenant
Prohibiting Business and Commercial
Enterprises**

(Oral Argument Requested)

21 Plaintiffs, by and through undersigned counsel, hereby reply to Defendants' response to
22 Plaintiffs' motion for summary judgment on Defendants' affirmative defense of waiver of the
23 prohibition against business and commercial enterprises contained in the Declaration of Restrictions
24 governing Coyote Springs Ranch.

25 The issue before the Court presents a pure question of law, and therefore, is appropriate for
26 summary judgment. This reply is supported by the following memorandum of points and authorities,
as well as the entire record in this proceeding.

///

///

///

DIV. 1
OCT -7 2004

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

RESPECTFULLY SUBMITTED this 5th day of October, 2004.

FAVOUR, MOORE & WILHELMSSEN, P.A.

By Marguerite Kirk
David K. Wilhelmsen
Marguerite Kirk
Post Office Box 1391
Prescott, AZ 86302-1391
Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF MATERIAL RELEVANT FACTS

NOT IN DISPUTE

Defendants and Plaintiffs admit that each are all owners of real property located in that portion of Coyote Springs Ranch, Yavapai County, Arizona that is governed by a recorded Declaration of Restrictions dated June 13, 1974.. *Plaintiffs' Separate Statement of Facts in Support of Motion for Summary Judgment (hereinafter "SSOF")* at ¶¶1-3, 7, and at Exhibit 3; *Defendants' Controverting Statement of Facts (hereinafter "DSOF")* at ¶¶1, 5, and at Exhibit 1. Both parties further agree and admit that the recorded Declaration of Restrictions, provides in relevant part:

2. No trade, business, profession or any other type of commercial or industrial activity shall be initiated or maintained within said property or any portion thereof.

* * *

7. (e) No structure whatsoever other than one single family dwelling or mobile home, as herein provided, together with a private garage for not more than three (3) cars, a guest house, service quarters and necessary out buildings shall be erected, placed or permitted to remain on any portion of said property.

* * *

15. No outside toilet or other sanitary conveniences or facilities shall be erected or maintained on the premises.

* * *

17. The foregoing restrictions and covenants run with the land and shall be binding upon all parties and all persons claiming through them until June 1, 1994, at which time said covenants and restrictions shall be automatically extended for successive periods of ten (10) years, or so long thereafter as may be now or hereafter permitted by law.

1 * * *

2 19. If there shall be a violation or threatened or attempted violation of any of said
3 covenants, conditions, stipulations or restrictions, it shall be lawful for any person or
4 persons owning said premises or any portion thereof to prosecute proceedings at law
5 or in equity against all persons violating or attempting to, or threatening to violate any
6 such covenants, restrictions, conditions or stipulations, and either prevent them or him
7 from so doing or to recover damages or other dues for such violations. No failure of
any other person or party to enforce any of the restrictions, rights, reservations,
limitation, covenants and conditions contained herein shall, in any event, be construed
or held to be a waiver thereof or consent to any further or succeeding breach or
violation thereof. The violation of these restrictive covenants, condition or stipulations
or any or more of them shall not affect the lien of any mortgage now of record, or
which hereafter may be placed of record, upon said premises or any part thereof.

8 *Plaintiffs' SSOF at ¶¶4-6; Defendants' DSOF at ¶4, and at Exhibit 1.*

9 Defendants admit that they have raised the affirmative defense of waiver. *Plaintiffs' SSOF at*
10 *¶13; Defendants' DSOF at ¶1.* Defendants do not deny that paragraph 19 of the recorded Declaration
11 of Restrictions, at issue in this case, concerns waiver, nor do they contend that the provision is
12 ambiguous. In particular the provision expressly provides: "No failure of any other person or party
13 to enforce any of the restrictions, rights, reservations, limitation, covenants and conditions contained
14 herein shall, in any event, be construed or held to be a waiver thereof or consent to any further or
15 succeeding breach or violation thereof." *Plaintiffs' SSOF at ¶6, and Exhibit 1; Defendants' DSOF at*
16 *¶4, and Exhibit 1.*

17 Therefore, there are no genuine issues of material fact that Plaintiffs and Defendants each own
18 property subject to the recorded Declaration of Restrictions dated June 13, 1974; and, that paragraph
19 19 of the Declaration of Restrictions is a non-waiver provision. These are the dispositive facts on
20 Plaintiffs' motion for summary judgment regarding Defendants' affirmative defense of waiver.

21 **II. LEGAL STANDARD FOR SUMMARY JUDGMENT**

22 It bears repeating that a party is entitled to summary judgment where there is no genuine issue
23 of material fact and the moving party is entitled to judgment as a matter of law. *Orme School v.*
24 *Reeves*, 166 Ariz. 301, 802 P.2d 1000 (1990); *Giovanelli v. First Federal Sav. & Loan Ass'n of*
25 *Phoenix*, 120 Ariz. 577, 587 P.2d 763 (App.1978); *Dutch Inns of America, Inc. v. Horizon Corp.*, 18
26 Ariz.App. 116, 500 P.2d 901 (1972). A motion for summary judgment is appropriate and "should be

1 granted if the facts produced in support of the claim or defense have so little probative value, given
2 the quantum of evidence required, that reasonable people could not agree with the conclusion
3 advanced by the proponent of the claim or defense." *Orme School, supra*, at p.1008. Defendants
4 incorrectly state to this Court that it "must believe" the evidence of the non-movant, "namely,
5 Defendants." *Defendants Response to Motion for Summary Judgment, p.9 at lines 9-10.*

6 In this case, there is no genuine issue of fact that Plaintiffs' and Defendants' land in Coyote
7 Springs Ranch is subject to recorded Declaration of Restrictions dated June 13, 1974, and this
8 Declaration provides an unambiguous no-waiver provision. As a matter of law, the non-waiver
9 provision in the recorded Declaration of Restrictions is unambiguous and enforceable. Therefore,
10 Defendants are precluded by law from asserting the affirmative defense of waiver.

11 **III. DEFENDANTS CONFUSE THE AFFIRMATIVE DEFENSE OF WAIVER WITH**
12 **THE AFFIRMATIVE DEFENSE OF ABANDONMENT**

13 Defendants have raised the affirmative defense of waiver, as well as a variety of other
14 defenses, including other equitable defenses and tort-based defenses. *Defendants' Verified Answer,*
15 *at "Affirmative Defenses," p.3, ¶¶22-29.* Indeed, Defendants' verified answer separately sets forth
16 the affirmative defense of abandonment separately from the affirmative defenses of estoppel and
17 waiver. *Defendants' Verified Answer, at "Affirmative Defenses," p.3, ¶¶23 and 24.*

18 Defendants contend that the restriction prohibiting business or commercial activity has been
19 waived by subdivision homeowners' acquiescence for alleged other violations of the same covenant.
20 However, even assuming for sake of argument only, the existence other business or commercial
21 activities conducted in the subdivision, the non-waiver provision does not foreclose enforcement of
22 the restriction against Defendants. As Defendants fail to appreciate in their response, the issue
23 presented in Plaintiffs' motion for summary judgment is whether Defendants can assert the affirmative
24 defense of waiver; *not whether the restrictive covenants have been abandoned.* Waiver and
25 abandonment are two separate legal defenses to the enforcement of recorded covenants. Waiver
26 concerns a party's right to enforce a restriction; abandonment goes to the non-existence of what is

1 sought to be enforced. The distinction between the two is clear in reading the appellate court's
2 decision in *Burke v. Voicestream Wireless Corp.*, 422 Ariz. Adv. Rep. 16, 87 P.3d 81, 83 (App. Div.1
3 2004). Consequently, any of Defendants' purported evidence of other landowner's violations of the
4 restrictive covenants is immaterial to the issue presented to this Court in the instant summary
5 judgment proceeding.

6 The Arizona Court of Appeals decision in *Burke* is controlling in the present case. In *Burke*
7 the appellate court unequivocally held that where, as here¹, there is an unambiguous non-waiver
8 provision in recorded covenants and restrictions, a party's or other landowner's previous alleged
9 failure to enforce a particular restriction does not preclude that party from later enforcing the same
10 restriction. *Burke*, 87 P.3d at 86. As the *Burke* court stated, to "hold otherwise would render the non-
11 waiver provision meaningless and violate the expressed intention of the contract among the property
12 owners." *Id.*

13 The Arizona Court of Appeals in *Burke* rejected defendants' argument that the *waiver* of a
14 particular covenant was sufficient to *constitute abandonment* of the restrictions as a whole, thereby
15 rendering the non-waiver provision unenforceable. *Ibid.* The Arizona supreme court has held that
16 abandonment of restrictive covenants will only be established upon a showing that the restrictions,

17 ...have been so thoroughly disregarded as to result in such a change in the area as to
18 destroy the effectiveness of the restrictions, defeat the purposes for which they were
imposed and consequently [] amount to an abandonment thereof.

19 *Id.* at ___, 87 P.3d at 86-87, quoting *Condos v. Home Development Company*, 77 Ariz. 129, 133, 267
20 P.2d 1069, 1071 (1954).

21 The appellate court in *Burke* concluded that the evidence failed to establish that the prior
22 violations of the restrictive covenants had "destroyed the fundamental character of the neighborhood."
23 *Id.* at ___, 87 P.3d at 87. Therefore, as a matter of law, the non-waiver provision was enforceable as

24
25 ¹The non-waiver provision in the recorded covenants discussed in *Burke* is virtually identical
26 to the non-waiver provision in the recorded Declaration of Restrictions, dated June 13, 1974, at issue
in this case.

1 written, and plaintiff-homeowners were not barred from seeking judicial enforcement of the restriction
2 based upon their or their predecessors acquiescence in prior violations of that or other restrictive
3 covenants. *Ibid.*

4 However, the *Burke* court did not hold that waiver requires a showing of abandonment, or vice
5 versa. Its ruling was simply that where there is a non-waiver provision in recorded covenants, a
6 defendant is precluded from asserting the defense of waiver, and further using evidence of waiver to
7 establish abandonment.

8 IV. CONCLUSION

9 There is no genuine issue of material fact that both Plaintiffs and Defendants own land subject
10 to recorded Declaration of Restrictions, dated June 13, 1974. There is further no dispute that the
11 recorded Declaration includes in unambiguous terms a non-waiver provision. Therefore, as a matter
12 of law based upon the appellate court's decision in *Burke*, Defendants are precluded from asserting
13 the affirmative defense of waiver against Plaintiffs' claims. Furthermore, as a matter of law as set
14 forth in the *Burke* decision, Defendants are similarly barred from raising the legal argument that any
15 alleged waiver of enforcement constitutes evidence of abandonment of the recorded Declaration of
16 Restrictions, dated June 13, 1974. Consequently, Defendants are precluded, as a matter of law, from
17 introducing evidence of any other alleged business operation in the subdivision subject to the
18 undisputed recorded covenants and restrictions to support their affirmative defenses and claims of
19 waiver, estoppel or acquiescence in defense of this action.

20 DATED this 5th day of October, 2004.

21 FAVOUR, MOORE & WILHELMSSEN, P.A.

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

1 ORIGINAL of the foregoing
2 filed this 5th day of October, 2004
3 with:

4 Clerk, Superior Court of Arizona
5 Yavapai County
6 120 S. Cortez
7 Prescott, Arizona 86302

8 A copy hand-delivered this 5th day
9 of October, 2004 to:

10 Honorable David L. Mackey
11 Division One
12 Superior Court of Arizona
13 Yavapai County
14 120 S. Cortez
15 Prescott, Arizona 86302

16 and, a copy hand-delivered this
17 5th day of October, 2004 to:

18 Mark Drutz
19 Jeffrey Adams
20 MUSGROVE, DRUTZ & KACK, P.C.
21 1135 Iron Springs Road
22 Prescott, Arizona 86302

23
24 By: Marguerite Kirk
25 Marguerite Kirk
26