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JEANNE HICKS, CLERK

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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.)
CUNDIFF, husband and wife; ELIZABETH)
9 NASH, a married woman dealing with her)
separate property; KENNETH PAGE and)
10 KATHRYN PAGE, as Trustee of the Kenneth)
Page and Catherine Page Trust,)

11 Plaintiffs,

12 v.

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

15 Defendants.
16

CASE NO [REDACTED]

DIVISION 1

**SUPPLEMENTAL CITATION OF LEGAL
AUTHORITY RE: MOTION *IN LIMINE*
TO PRECLUDE DEFENDANTS'
INTRODUCTION OF LAY WITNESS
OPINION TESTIMONY**

(Assigned to the Hon. David L. Mackey)

17 Defendants, by and through undersigned counsel, hereby supplement the legal authorities set
18 forth at page 3, lines 3-8 and page 4, line 7 through page 5, line 3 of their Response to Plaintiffs'
19 Motion In Limine to Preclude Defendants' Introduction of Lay Witness Opinion Testimony, which
20 seeks to preclude the following individuals from testifying: Christin Bowra, Jeff Westra, Mychel
21 Westra, Wendy Ditterman, Bill Jensen, Kevin Eickleberry, Charles Hildebrandt and Sheila Cahill.

22 1. Arizona Rules of Evidence 601 and 702 expressly permit s lay witness to testify and to
23 offer their opinions. The conditions that exist govern such such testimony are that the testimony must
24 be based on the witness's first hand knowledge or observation and the opinions offered must be helpful
25 to understanding the testimony or determining a fact in issue. See Crane McClennen, Arizona
26 Courtroom Evidence Manual Article 7 at 701-1 (3rd ed. 2001). Those rules provide as follows:

27 Every person is competent to be a witness except as otherwise provided in these rules
28 or by statute.

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1 See Rule 601, Ariz. R. Evid.

2 If the witness is not testifying as an expert, the witness' testimony in the form of
3 opinions or inferences is limited to those opinions or inferences which are (a) rationally
4 based on the perception of the witness and (b) helpful to a clear understanding of the
5 witness' testimony or the determination of a fact in issue.

6 See Rule 702, Ariz. R. Evid.; see also, State v. Doerr, 193 Ariz. 56, 63, 969 P.2d 1168, cert. den. 119
7 S.Ct. 1471, 526 U.S. 1073, 143 L.Ed.2d 555 (1998) (“Lay witness may give opinion testimony, even
8 as to the ultimate issue, when it is ‘rationally based on the perception of the witness and ... helpful to
9 a clear understanding to the witness’ testimony or the determination of a fact in issue.”).

10 In ruling on witnesses such as those Plaintiffs seek to preclude from testifying, Arizona courts
11 have routinely allowed lay witnesses to testify and to assert their opinions so as to help understand or
12 determine facts in issue. See e.g., State v. King, 180 Ariz. 268, 883 P.2d 1024 (1994) (witnesses, who
13 were defendant’s acquaintances, were permitted to view surveillance tapes and give their opinions
14 whether person in tape was defendant); Lewis v. N.J. Rieve Enter., Inc., 170 Ariz. 384, 825 P.2d 5
15 (1992) (because plaintiff had eight years’ experience and testified that he was familiar with job market
16 in area, trial court did not abuse discretion in ruling plaintiff could give opinion about employability of
17 average carpenter); State v. White, 155 Ariz. 452, 747 P.2d 613 (Ct. App. 1987) (because officers
18 based their opinions on what they personally observed, they did not need to be qualified as experts);
19 Ring v. Taylor, 141 Ariz. 56, 685 P.2d 121 (Ct. App. 1984) (witness allowed to give opinions that two
20 vehicles were “racing” based on her observations of vehicles’ actions). Further, “[t]estimony in the
21 form of an opinion or inference otherwise admissible is not objectionable because it embraces an
22 ultimate issue to be decided by the trier of fact.” See Rule 704, Ariz. R. Evid.

23 DATED this 1 day of February, 2005.

24 MUSGROVE, DRUTZ & KACK, P.C.

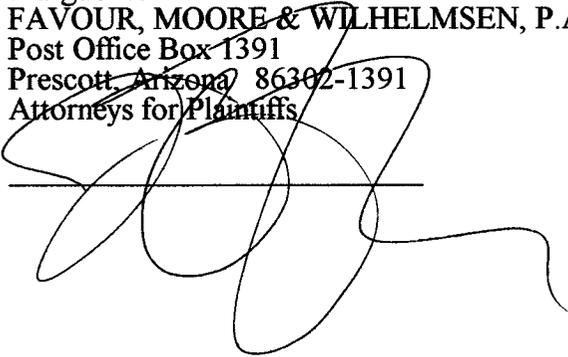
25 By _____

26 Mark W. Drutz
27 Jeffrey R. Adams
28 *Attorneys for Defendants*

1 A copy of the foregoing was
hand-delivered this / day of
2 February, 2005 to:

3 The Honorable David L. Mackey
Yavapai County Superior Court
4 Division 1
Yavapai County Courthouse
5 Prescott, Arizona

6 David K. Wilhelmsen
Marguerite M. Kirk
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10  A large, handwritten signature in black ink is written over a horizontal line. The signature is highly stylized and cursive, appearing to be the name of one of the attorneys listed above. It spans across lines 9, 10, 11, and 12.

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