

SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI

<p>JOHN B. CUNDIFF and BARBARA C. CUNDIFF, husband and wife; BECKY NASH, a married woman dealing with her separate property; KENNETH PAGE and KATHRYN PAGE, as Trustee of the Kenneth Page and Catherine Page Trust,</p> <p align="right">Plaintiff,</p> <p align="center">-vs-</p> <p>DONALD COX and CATHERINE COS, husband and wife,</p> <p align="right">Defendant.</p>	<p>Case No. CV2003-0399</p> <p align="center">UNDER ADVISEMENT RULING</p>	<p align="center">FILED</p> <p>DATE: <u>4-4-05</u></p> <p><u>2</u> O'Clock <u>7</u> .M.</p> <p align="center">JEANNE HICKS, CLERK</p> <p>BY: <u>Argei Kinkead</u> Deputy</p>
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<p>HONORABLE DAVID L. MACKEY</p> <p>DIVISION 1</p>	<p>BY: Joy Shepard Judicial Assistant</p> <p>DATE: April 4, 2005</p>
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The Court took the Plaintiffs' Motions For Summary Judgment and the Plaintiffs' Motion In Limine under advisement after oral arguments on January 31, 2005. The Court has now fully considered the file, the arguments and relevant law.

In order to grant a Motion For Summary Judgment pursuant to Rule 56(c), *Arizona Rules of Civil Procedure*, the Court must conclude that there is no genuine issue of material fact **and** that the requesting party is entitled to judgment as a matter of law.

Plaintiffs' first Motion for Summary Judgment seeks enforcement of the non-waiver provision of the Declaration of Restrictions for Coyote Springs Ranch. Defendants argue the factual disputes that exist regarding abandonment of the restrictions. While there is a distinction between waiver and abandonment, *Burke v. Voicestream Wireless Corp.*, 207 Ariz. 393, 87 P.3d 81, ¶26 (App., 2004) recognized the longstanding test for a complete abandonment of deed restrictions as follows:

“Whether the restrictions imposed upon the use of lots in this subdivision have been so thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of the restrictions, defeat the purposes for which they were imposed and consequently amount to an abandonment thereof.” Citing *Condos v. Home Development Company*, 77 Ariz. 129, 133, 267 P.2d 1069, 1071 (1954).

The Court finds that there is a material factual issue regarding whether the restrictions in this case have been so thoroughly disregarded as to result in a change in the area that destroys the effectiveness of the restrictions, defeats the purposes for which they were imposed and amounts to an abandonment of the entire Declaration of Restrictions. The Plaintiffs are not entitled to summary judgment regarding the enforcement of the non-waiver clause.

THEREFORE, IT IS ORDERED Plaintiffs' Motion for Summary Judgment Re: Waiver of Restrictive Covenant Prohibiting Business and Commercial Enterprises is **DENIED**.

Next, the Plaintiffs seek summary judgment regarding the Defendants affirmative defenses of estoppel, laches and unclean hands. This motion also seeks a legal determination that the Declaration of Restrictions contains an unambiguous and enforceable provision prohibiting trade, business, industrial or commercial use. For the reasons set forth above, there is a material factual dispute regarding the enforceability of the terms in the Declaration of Restrictions. The issue of abandonment will have to be litigated before the Court will be in position to decide the enforceability of any term of the restrictive covenants. The Plaintiffs are not entitled to such a summary determination. However, the facts upon which the Defendants rely to support their affirmative defenses do not rise to estoppel, laches and unclean hands as a matter of law. There are no material factual issues that preclude summary judgment in favor of the Plaintiffs on the affirmative defenses of estoppel, laches and unclean hands.

THEREFORE, IT IS ORDERED Plaintiffs' Motion for Summary Judgment Re: Defendants' Violations of Restrictive Covenants; Affirmative Defenses of Estoppel, Laches and Unclean Hands is **GRANTED, in part**. However, to the extent the motion seeks a summary declaration as to the enforceability of the Declaration of Restrictions, the motion is **DENIED**.

The Court also took the Plaintiffs' Motion In Limine To Preclude Defendants' Introduction of Lay Witness Opinion Testimony under advisement. The Plaintiffs seek to prohibit Defendants from offering lay witness testimony as to the existence of other violations of the Declaration of Restrictions. Rule 602, Ariz.R.Evid. permits testimony on matters of "personal knowledge". Furthermore, Rule 701, Ariz.R.Evid. permits a lay witness offer "opinions or inferences" when the opinions or inferences ". . . are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

The Court will not permit testimony that attempts to state a legal opinion regarding a violation of the Declaration of Restrictions. However, the Court will allow lay witnesses to testify regarding their personal observations and upon appropriate foundation opinions or inferences pursuant to Rule 701, Ariz.R.Evid. There is no showing that the lay witnesses Defendants have disclosed cannot meet those foundational requirements at this time.

The Plaintiffs also object to the use of investigator Sheila Cahill. However, even a paid investigator can testify as to personal observations and upon appropriate foundation offer opinions or inferences pursuant to Rule 701, Ariz.R.Evid.

THEREFORE, IT IS ORDERED the Plaintiffs' Motion In Limine To Preclude Defendants' Introduction of Lay Witness Opinion Testimony is **DENIED**.

Finally, the Court has reviewed the parties' Comprehensive Pretrial Statements.

IT IS ORDERED all expert witnesses shall be disclosed 60 days before trial.

IT IS ORDERED all non-expert witnesses shall be disclosed 75 days before trial.

IT IS ORDERED all discovery shall be completed 45 days before trial.

IT IS ORDERED all dispositive motions shall be filed 60 days prior to trial.

IT IS ORDERED all motions in Limine shall be filed 30 days prior to trial.

IT IS ORDERED the parties shall file a Joint Pretrial Statement, Proposed Voir Dire, Proposed Jury Instructions and Proposed Forms of Jury Verdicts no later than 10 days prior to trial.

The Plaintiffs' First Amended Complaint seeks damages based upon three Counts of Breach of Contract as well relief on their claims for a declaratory judgment and injunctive relief. The Defendants have requested a jury trial on all issues. The Defendants are entitled to a jury determination on the breach of contract claims and to an advisory jury on the claims for declaratory judgment and injunctive relief.

IT IS ORDERED setting a Jury Trial for August 2, 2005 at 9:00 a.m. with six days allotted. The trial days shall be August 2, 3, 4, 5, 9 and 10, 2005.

The Court concludes that given the resources that will be expended to litigate this matter a settlement conference before a Superior Court Judge is appropriate.

THEREFORE, IT IS ORDERED the parties shall participate in a Settlement Conference conducted by a Superior Court Judge.

IT IS ORDERED assigning this case to the Presiding Judge for the assignment of a Judge to conduct a Settlement Conference. This case will remain assigned to this Division for all other matters.

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Presiding Judge