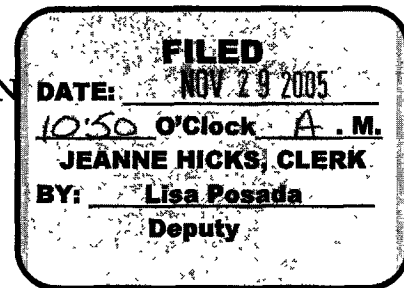


IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI



DIVISION 1

JEANNE HICKS, CLERK

HON. DAVID L. MACKEY

BY: Lisa Posada, Deputy Clerk

CASE NO. CV 2003-0399

DATE: November 23, 2005

TITLE:

JOHN B. CUNDIFF and BARBARA C. CUNDIFF, husband and wife; BECKY NASH, a married woman dealing with here separate property; KENNETH PAGE and KATHRYN PAGE, as Trustee of the Kenneth Page and Catherine Page Trust,

(Plaintiffs,)

COUNSEL:

David K. Wilhelmsen, Esq.
Marguerite Kirk, Esq.
FAVOR MOORE & WILHELMSEN

(For Plaintiffs)

and

DONALD COX and CATHERINE COX, husband and wife,

(Defendants.)

Mark W. Drutz, Esq.
Jeffrey Adams, Esq.
Sharon Sargent-Flack, Esq.
MUSGROVE, DRUTZ & KACK

(For Defendants)

HEARING ON:

Oral Argument

NATURE OF PROCEEDINGS

COURT REPORTER

David Lundy

START TIME: 2:43 p.m.

APPEARANCES: David K. Wilhelmsen, Counsel for Petitioners
Mark W. Drutz, Counsel for Defendants
Jeffrey Adams, Counsel for Defendants

The Court notes this hearing is set for Oral Argument on a Motion for Protective Order, a Motion to Quash Subpoena *Duces Tecum* as well as a Motion for Award of Attorney Fees. The Court will hear the argument in that order, in that a resolution with the Motion for Protective Order and Motion to Quash Subpoena *Duces Tecum* will determine how to go forward with the Motion for Award of Attorney Fees.

Counsel Wilhelmsen presents oral argument.

Counsel Drutz presents oral argument.

Counsel Wilhelmsen presents rebuttal.

The Court advises Counsel that the Court determines the reasonableness of attorney fees and the amount of attorney fees that should be awarded pursuant to case law and pursuant to the elements outlined in §12-341.01. The Court cannot find any legal basis that makes the attorney fees charged by the Plaintiff relevant to the elements outlined.

With respect to Subpoena *Ductus Tecum* and with respect to Mr. Ware, the Court finds no basis for a Third Party Claim. The Court does not find is relevant based upon the Parties of this case, to order Mr. Ware to pay any of the Defendant's attorney fees under §12-341.01.

The Motion for Protective Order with respect to the Subpoena *Ductus Tecum*, served by the Defendant, on Non-Party, Alfie Ware is granted.

The Motion for Protective Order, with respect to the discovery propounded regarding attorney fees is granted.

The Court will make a determination of attorney fees and the reasonableness of attorney fees based upon the elements set for by case law as well as the factors of §12-341.01.

The Motion to Compel is denied. However, because the Court finds this issue to be novel, with little guidance from case law, the Court declines to award either Parties' attorney fees with respect to the Motion for Protective Order and Motion to Compel.

Court and Counsel discuss the Motion for Award of Attorney Fees.

Court and Counsel discuss the form of judgment and objections to the form of judgment.

The Court finds, based on evidence in connection with the Motion, it is commercial in nature, the record is clear and no facts are in dispute.

The Court further finds the record is a matter of law for the Court is to determine. The Court of Appeals will have to decide whether the Court was wrong, based upon the record.

The form of judgment shall recite the first part of the form of judgment "is denied".

Counsel Wilhelmsen advises the Court, the second part of the form of judgment, the unverifiable legal description, is moot and there is no objection.

Counsel both agree the language of paragraph two should be modified based upon the agreement that the Parties have put in their pleadings.

IT IS ORDERED Rule 54(b) shall be referenced in the language of the Judgment.

Court and Counsel discuss the issue of language in other issues held in abeyance and vacating the trial.

IT IS ORDERED taking the issue of attorney fees under advisement.

END TIME: 3:40 p.m.

cc: Div. 1 w/ file (under advisement)