

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2007 AUG 20 AM 11:02 ✓
V. Rosa

1 Mark W. Drutz, #006772
2 Jeffrey R. Adams, #018959
3 Sharon Sargent-Flack, #021590
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8 Attorneys for Defendants

9 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**
10 **IN AND FOR THE COUNTY OF YAVAPAI**

11 JOHN B. CUNDIFF and BARBARA C.
12 CUNDIFF, husband and wife; BECKY NASH,
13 a married woman dealing with her separate
14 property; KENNETH PAGE and KATHRYN
15 PAGE, as Trustee of the Kenneth Page and
16 Catherine Page Trust,
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18 Plaintiffs,
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20 v.
21
22 DONALD COX and CATHERINE COX,
23 husband and wife,
24
25 Defendants.

Case No. CV 2003-0399
Division No. 1

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' OBJECTION TO COX'S
LODGED FORM OF JUDGMENT ON
MANDATE**

(Assigned to the Honorable David L.
Mackey)

(Oral Argument Requested)

26 Defendants, through counsel undersigned, hereby Respond to Plaintiffs' Objection to Cox's
27 Lodged Form of Judgment on Mandate ("**Plaintiffs' Objection**"). It is clear that Plaintiffs'
28 Objection constitutes a concerted effort by Plaintiffs to improperly reargue matters already settled
by Division One of the Court of Appeals. In doing so, Plaintiffs ask this Court to ignore the plain
and simple ruling from the Court of Appeals on the issue of joinder of the Affected Owners.¹ That

¹The term "Affected Owners" shall have the meaning ascribed in the proposed form of
Judgment on Mandate. In establishing this definition, Defendants believe that all property owners
in the Coyote Springs Ranch subdivision should be joined as parties because they all are subject to

1 effort should be rejected and the Court should enter the proposed Judgment on Mandate. This
2 Response is supported by the following Memorandum of Points and Authorities and the
3 Memorandum Decision issued by the Court of Appeals, which shall be incorporated by reference.
4

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 Plaintiffs attack and object to the proposed Judgment on Mandate on two fronts. First,
7 Plaintiffs argue that the proposed Judgment on Mandate materially alters the decision rendered by
8 the Court of Appeals because that Court allegedly “did not, and could not, grant Cox’s motion for
9 joinder, in part, by holding that the other area property owners are ‘necessary parties.’” See
10 Plaintiffs’ Objection at 4:10-21; see also, Plaintiff’s Objection at 5:10-14 (“Cox have failed to
11 present any factual or legal basis as to why the ‘Affected Owners’ are necessarily (i.e. “necessary”)
12 plaintiffs in this action.... Unless and until this Court determines these non-parties must be joined
13 (i.e., that they are “necessary”) in order for this action to proceed, Cox’s proposed form of [Judgment
14 on Mandate] at paragraphs 3 and 4 are premature.”) (emphasis added). Second, Plaintiffs argue that
15 the Court of Appeals reversed this Court’s denial of the joinder motion only on the basis that it was
16 not filed untimely. Id. at Plaintiffs’ Objection at 4:21-23. However, Plaintiffs completely ignore the
17 Memorandum Decision.
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19 It is true that in reversing this Court’s initial ruling on Defendants’ joinder motion, the Court
20 of Appeals found that that motion was not filed untimely. See Memorandum Decision at 17 at ¶29.
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25 the very same restrictive covenants, albeit ones that were signed and recorded on two separate dates.
26 With the exception of being signed on different dates and affecting different portions of the very
27 same subdivision, the two sets of Declaration of Restrictions are identical in every other respect.
28 Hence, it makes no practical or legal sense that this Court should rule only on the set of Declaration
of Restrictions currently at issue. Otherwise, the Court could end up litigating the very same issue
again.

1 However, the Court of Appeals did not stop there. Rather, on the issue of joinder of the Affected
2 Owners, the Court of Appeals held specifically that the joinder motion was well founded and
3 supported by Rule 19(a), Ariz. R. Civ. P. Id.

4
5 In connection with the foregoing, the Court of Appeals determined that because the
6 Declaration of Restrictions at issue “are mutual, reciprocal, equitable easements in the nature of
7 servitudes in favor of [the Affected Owners] of lots [in the Coyote Springs Ranch subdivision]”, the
8 Declaration of Restrictions constitutes property rights which run with title to the land owned by the
9 Affected Owners. See Memorandum Decision at 19 at ¶32. Based on the foregoing determination,
10 the Court ruled:

11
12 A ruling in this case that the restrictions have been abandoned and are
13 no longer enforceable against the Coxes’ property would affect the
14 property rights of all other owners subject to the Declaration.

15 Id. The Court held further that the foregoing would be the case even if the trial court determined that
16 Defendants’ abandonment defense applied only to the Defendants because the Court must avoid the
17 creation of a “patchwork” of restrictions. Id. at 20 at ¶ 35.

18
19 Following the foregoing analysis, the Court of Appeals determined that the Affected Owners
20 are necessary parties to this action under Rule 19(a), Ariz. R. Civ. P., and ruled that they must be
21 joined as long as (i) they are subject to service of process and (ii) their joinder will not deprive the
22 trial court of jurisdiction. Id. at 21 at ¶ 36 (emphasis added). Plaintiffs have not asserted that the
23 Affected Owners are not subject to service of process; nor have they asserted that the joinder of the
24 Affected Owners will deprive this Court of jurisdiction over this case. This is likely the case because
25 the subject of this dispute pertains to real property owned by the Affected Owners that is located in
26 Yavapai County, Arizona. Thus, it is clear that this Court has jurisdiction over each Affected Owner
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1 pursuant to A.R.S. §§ 12-123 and 12-401 and service can be affected via Rules 4.1 and 4.2, Ariz.
2 R. Civ. P.

3
4 In the event a necessary party cannot be joined then the Court will determine whether that
5 party is “indispensable”. The Court of Appeals stated as follows:

6 The Coxes refer to parties necessary under Rule 19(a) as “indispensable”
7 parties. However, “the court decides who is an indispensable party after it finds that
8 the party is necessary but cannot be joined.” *Gerow v. Covil*, 192 Ariz. 9, 14, ¶ 21,
9 960 P.2d 55, 60 (App. 1998). No evidence was presented below that the other
10 property owners could not be joined if necessary. We, therefore, understand the
Coxes’ argument to be that the other owners are necessary, rather than indispensable,
parties.

11 Id. at 16 at FN2. Because Plaintiffs did not file a Petition for Review with the Supreme Court asking
12 that the Court of Appeals decision be reviewed, they have waived their opportunity to further brief
13 the issue of joinder. Thus, the Court of Appeals’ Memorandum Decision is binding on the parties
14 and this Court. Simply put, the Court of Appeals has already determined “that the absent property
15 owners are necessary parties given the issues to be decided in this case.” Plaintiffs and not
16 Defendants are asking this Court to deviate from the Court of Appeals’ Memorandum Decision.

17
18 Plaintiffs argue also that the burden of joinder should not be on them. See Plaintiffs’
19 Objection at 5:3-12. However, Plaintiffs are the parties seeking to enforce the Declaration of
20 Restrictions at issue. Consequently, they are tacitly and impliedly seeking a declaration from this
21 Court that those restrictive covenants are enforceable against all of the Affected Owners and
22 specifically enforceable against the Defendants. Given this analysis, it is clear that the onus and
23 burden of joining, as Plaintiffs or Defendants, all of the Affected Owners, should rest with the
24 Plaintiffs. Plaintiffs are the parties who have sought the Court’s declaration that the Declaration of
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1 Restrictions is enforceable and thus, they solely should be responsible the burdens of joining all
2 Affected Owners.

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4 Based on the foregoing, Defendants move this Court to enter the proposed Judgment on
5 Mandate.

6 RESPECTFULLY SUBMITTED this 20th day of August, 2007.

7
8 MUSGROVE, DRUTZ & KACK, P.C.

9
10 By _____

11 Mark W. Drutz
12 Jeffrey R. Adams
13 Sharon Sargent-Flack
14 Attorneys for Defendants

15 COPY of the foregoing hand-delivered
16 this 20th day of August, 2007, to:

17 Honorable David L. Mackey
18 Yavapai County Superior Court
19 Division 1
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