

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2014 DEC 23 PM 3:11 ✓

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6
7 **SUPERIOR COURT OF ARIZONA**

8 **YAVAPAI COUNTY**

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

12
13 Plaintiffs,

14 v.

15 DONALD COX and CATHERINE COX, }
16 husband and wife, *et al.*, *et ux.*, }

17 Defendants.

P1300

Case No. CV 2003-0399

Assigned to Hon. Kenton D. Jones
Visiting Judge

**REPLY TO RESPONSE TO
MOTION TO STRIKE EXHIBITS 5-
12 TO MOTION FOR
RECONSIDERATION RE: AUGUST
25, 2014 RULING RE: ATTORNEYS'
FEES AWARDED IN FAVOR OF
VARILEK**

18 The Coxes' *Response* is, in fact, non-responsive. The Coxes cannot articulate an
19 intelligible reason for attaching Exhibits 5-12 to their *Motion for Reconsideration*.

20 The Coxes first argue the Arizona Rules of Civil Procedure do not preclude the attachment
21 of exhibits to a motion for reconsideration. The Coxes falsely say Varilek "contends" exhibits are
22 precluded, when in fact Varilek's *Motion to Strike* says nothing of the kind.

23 The remainder of the Coxes' *Response* is almost comically circular in its reasoning.
24 Exhibits 5-12, they say, help show their affirmative defense of abandonment was "meritorious"
25 and thus Varilek's request for an award of attorneys' fees should have been denied or drastically
26 reduced.

27 At the risk of beating a dead horse, Varilek will again point out:

- 28
- the *absence of merit* in the Coxes' abandonment defense is precisely why Plaintiffs' *Motion for Summary Judgment* was granted on June 14, 2013;

- 1 • the Coxes did not move for reconsideration of the award of summary judgment but
2 instead filed their unsuccessful *Motion for New Trial Re: Grant of Plaintiffs' Motion*
3 *for Summary Judgment* seven months later;
- 4 • the information set forth in *Exhibits 5-12* was readily available to the Coxes before
5 summary judgment was awarded, before they moved for a new trial, and before they
6 filed their *Response and Objection to Plaintiffs' Request for Award of Attorneys' Fees*
7 on August 9, 2013, yet the Coxes did not obtain these affidavits until shortly before or
8 even after Judge Jones' ruling of August 25, 2014, awarding Varilek his attorneys'
9 fees; and
- 10 • *Exhibits 5-12* have no bearing on the award of attorneys' fees to Varilek but are instead
11 an obvious attempt to cloud the record on appeal in regard to the award of summary
12 judgment.

13 There was nothing legally or factually complicated about the Coxes' abandonment defense.
14 They simply failed to establish a genuine issue of material fact. If they had moved for
15 reconsideration of the award of summary judgment 18 months ago and had attempted to introduce
16 *Exhibits 5-12* at that point, they would not have been allowed to do so. *See generally*, 2B Ariz.
17 *Prac., Civil Rules Handbook* R 56 ("A party who fails to seek relief under Rule 56(f) may not
18 simply file affidavits after the hearing on the motion for summary judgment, unless their contents
19 constitute newly discovered evidence which could not previously have been obtained by due
20 diligence."); *Phil. W. Morris Co. v. Schwartz*, 138 Ariz. 90, 94, 673 P.2d 28, 32 (App. 1983) (it
21 was proper to reject affidavits filed with a motion for reconsideration "because the parties
22 submitting the affidavits had not shown that they contained newly discovered material or that they
23 could not with reasonable diligence have been discovered and produced at the time of the
24 hearing."); *accord, Tilley v. Delci*, 220 Ariz. 233, 238, 204 P.3d 1082, 1087 (App. 2009) ("The
25 superior court was not required to accept and examine evidence presented to it for the first time in
26 connection with Tilley's motion for reconsideration."). *See also, Overson v. Cowley*, 136 Ariz. 60,
27 72, 664 P.2d 210, 222 (App. 1982) ("Appellants had their day in court and obtained a ruling on the
28 issues presented. It would be inappropriate to grant them another opportunity to present additional
evidence which was available at the time of the original summary judgment proceeding. If such
were permissible, there would be no end to litigation.").

The Coxes' must not be allowed to do now what they could not have done 18 months ago.
Their blatant attempt to slip *Exhibits 5-12* into the record on appeal does indeed warrant the
imposition of sanctions or at least a further award of attorneys' fees to Varilek.

1 RESPECTFULLY SUBMITTED December 23, 2014.

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18 3650 N. Zircon Drive
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20 Michael Furness
21 9990 E. Turtle Rock Road
22 Prescott Valley, AZ 86315

23 Aaron and Kathleen Cormier
24 9860 E. Turtle Rock Road
25 Prescott Valley, AZ 86315

26 Dennis J. Booth
27 9425 E. Mummy View Drive
28 Prescott Valley, AZ 86315

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- 3 Daniel C. Mussey
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- 5 Michael and Lisa Faircloth
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6 Prescott Valley, AZ 86315
- 7 Michael and Julie Davis
9147 E. Morning Star Ranch Road
8 Prescott Valley, AZ 86315
- 9 Ann and Noel Fidel
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10 Phoenix, AZ 85007
- 11 Dick Living Trust
9955 E. Disway
12 Prescott Valley, AZ 86315
- 13 Ronald J. Smith
9180 E. Spurr Ln.
14 Prescott Valley, AZ 86315
- 15 Gary and Sabra Feddema
9601 Far Away Place
16 Prescott Valley, AZ 86315
- 17 David L. and Lisa P. Bradley
9450 E. Spurr Ln.
18 Prescott Valley AZ 86315
- 19 David and Lori Rentschler Revocable Living Trust
9251 E. Far Away Place
20 Prescott Valley, AZ 86314
- 21 Madelein C. Alston and Nicholas Faulstick
Madelein C. Alston Trust
22 9270 E. Turtle Rock Road
23 Prescott Valley, AZ 86314
- 24 Angel and Lillian Aguilera
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25 Prescott Valley, AZ 86315
- 26 Joyce E. Ridgway
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10 Warren Don Oster
11 3401 W. Mauna Loa Lane
12 Phoenix, AZ 85053

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16 Launders Family Trust
17 9295 E. Spurr Lane
18 Prescott Valley, AZ 86315

19 Michaelis Family Trust
20 6930 Parsons Trail
21 Tujuga, CA 91042

22 Dave Slate
23 9910 E. Spurr Lane
24 Prescott Valley, AZ 86315

25 Donn and Valerie Jahnke
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35 9715 E. Far Away Place
36 Prescott Valley, AZ 86315

37 Rynda and Jimmy Hoffman
38 9650 E. Spurr Lane
39 Prescott Valley, AZ 86315

40 John and Rebecca Feddema
41 9550 E. Spurr Lane
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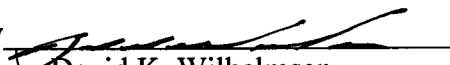
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