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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2015 MAY 15 PM 3: 39 ✓
DONNA McQUALITY, CLERK
BY: K. ALEXANDER

Counsel for Defendants Donald and Catherine Cox

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

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

Plaintiffs,

v.

18 DONALD COX and CATHERINE COX,
19 husband and wife, et al., et ux.,

Defendants.

Case No. P1300CV20030399

Division Pro Tem A

**DEFENDANTS' COXES REPLY TO
CUNDIFF PLAINTIFFS' OBJECTION
TO DEFENDANTS' COXES MOTION
FOR NEW TRIAL RE: AWARD OF
ATTORNEYS' FEES TO CUNDIFF-
PLAINTIFFS PURSUANT TO ARIZ. R.
CIV. P. 59(A) AND, IN THE
ALTERNATIVE, MOTION TO ALTER
OR AMEND JUDGMENT PURSUANT
TO ARIZ. R. CIV. P. 59(L)**

AND

**DEFENDANTS' COX MOTION TO
STRIKE PLAINTIFFS' CROSS MOTION
TO ALTER OR AMEND JUDGMENT
PURSUANT TO ARIZ. R. CIV. P. 59(L)
AS UNTIMELY**

(Evidentiary Hearing Requested)

(Assigned to Honorable Jeffrey G. Paupore)

1 Defendants Donald and Catherine Cox, by and through undersigned counsel, pursuant to
2 Ariz. R. Civ. P. 6(b), 7.1, 59(a)(1), (6), and (8), and 59(l) submit this above-captioned Reply and
3 Motion to Strike Plaintiffs' Cross Motion to Alter or Amend Judgment Pursuant to Ariz. R. Civ.
4 P. 59(l) ("**Cross Motion**") as Untimely. See Court's Ruling and Judgment docketed 04/07/15
5 (the "**04/07/15 Judgment**").

7 **MOTION TO STRIKE PLAINTIFFS' MOTION TO ALTER OR AMEND**
8 **JUDGMENT PURSUANT TO ARIZ. R. CIV. P. 59(L) AS UNTIMELY**

9 More than 15 days following entry of Judgment, Plaintiffs filed their Cross Motion
10 pursuant to Rule 59(l) in derogation of Rule 59(l).¹ An enlargement of time to file a Rule 59(l)
11 motion is permitted in only very limited circumstances. Such circumstances do not apply to the
12 case at bar. Ariz. R. Civ. P. 6(a) provides as follows:

14 [B]ut [the court] may not extend the time for taking any action under Rules 50(b),
15 52(b), 59(d), (g) and (l), and 60(c), except to the extent and under the conditions
16 stated in them, unless the court finds (a) that a party entitled to notice of the entry
17 of judgment or order did not receive such notice from the clerk or any party within
18 21 days of its entry, and (b) that no party would be prejudiced, in which case the
19 court may, upon motion filed within thirty days after the expiration of the period
20 originally prescribed or within 7 days of receipt of such notice, whichever is
21 earlier, extend the time for taking such action for a period of 10 days from the date
22 of entry of the order extending the time for taking such action.

23 Ariz. R. Civ. P. 6(b). [emphasis added]. Plaintiffs' circumstances fail to meet the foregoing 2-
24 prong test. Furthermore, Plaintiffs have not sought leave to enlarge the time for taking such
25 action. *Id.* Our appellate court has held that the "terms of the rule must be strictly followed."
26 *Harold Laz Adv. v. Dumes*, 2 Ariz.App. 236, 237, 407 P.2d 777 (App. 1965). The Cundiff

27 ¹ "A motion to alter or amend the judgment shall be filed not later than 15 days after entry of
28 judgment." The Judgment in this case was entered on 4/7/15. Plaintiffs did not file their Cross Motion
until May 7, 2015.

1 Plaintiffs are not entitled to a new trial on the issue of the denial of the Coughlin legal fees.
2 Plaintiffs' Cross Motion is untimely. For the foregoing reasons, the Court should strike
3 Plaintiffs' Cross Motion.
4

5 **REPLY IN SUPPORT OF MOTION FOR NEW TRIAL RE: AWARD OF**
6 **ATTORNEYS' FEES TO CUNDIFF-PLAINTIFFS PURSUANT TO ARIZ.**
7 **R. CIV. P. 59(A) AND, IN THE ALTERNATIVE, MOTION TO ALTER OR**
8 **AMEND JUDGMENT PURSUANT TO ARIZ. R. CIV. P. 59(L)**

9 Attached as Exhibit "2" to the Cundiff Plaintiffs' Response is a retainer agreement with
10 the Coughlin firm that Plaintiffs John and Barbara Cundiff executed on April 25, 2009.
11 Significantly, the Cundiffs acknowledged therein that non-party Alfie Ware had paid and would
12 continue to pay for the Plaintiffs' litigation expenses:

13 2. Fees. *** You have informed me that the fees and costs in
14 this case will be paid by Alfie and Ce Ce Ware, who are
15 neighbors of yours and who have been paying for these
16 expenses thus far in this litigation. As a result of this
17 arrangement, I will be sending monthly bills to the Wares. If
you would like for me to send you copies of the bills, please let me
know and I will do so.

18 See Exhibit "2" attached to Plaintiffs' Objection, para. 2. [emphasis added]. The foregoing
19 admission by the Cundiffs that non-party Alfie Ware had been funding the litigation all along,
20 only serves to corroborate the 2004 Deposition testimony of John B. Cundiff, Elizabeth Nash,
21 and Katheryn Page, excerpted and attached to the Coxes' Motion for New Trial filed 04/22/15.
22 Specifically, Mr. Cundiff testified that "so far" non-party Alfie Ware had been "paying the legal
23 expenses."
24

25 The May 7, 2015, Affidavit of Plaintiffs' Page attached as Exhibit "3" to Plaintiffs'
26 Objection avers that the Pages 'repaid' \$18,000 to Alfie Ware between 2004 and 2009 (Mr.
27
28

1 Coughlin took over the representation of the Cundiff Plaintiffs in 2009). The May 7, 2015, Page
2 Affidavit is supportive of the Court's Ruling denying the Coughlin fees (which non-party Alfie
3 Ware paid). Consistent with that the Court should deny the Wilhemsen fees (which non-party
4 Alfie Ware also paid -- at least the majority of).

6 Non-party Alfie Ware is not an insurer or indemnitor of the Cundiff Plaintiffs. Alfie
7 Ware owns no property within the portion of Coyote Springs Ranch governed by the Declaration
8 of Restrictions that is the subject of this litigation. Non-party Alfie Ware is not subject to joinder
9 as a party against whom an award or judgment could be entered. The subject Declaration limits
10 recovery of damages or other dues only by "persons owning said premises or any portion
11 thereof." Declaration, p. 3, ¶ 19. Alfie Ware was a volunteer who elected to fund the Plaintiffs'
12 litigation. He does not qualify as a "person owning said premises or any portion thereof."
13

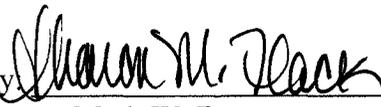
15 Although the Cundiff Plaintiffs contend that, despite the fact that non-party Alfie Ware is
16 paying for the litigation, they satisfy the dual-pronged criteria to qualify for an award of
17 attorneys' fees, the testimony and evidence of record do not support this conclusion. *See*
18 Plaintiffs' Objection, p. 3:3-7. Put another way, there must be an attorney-client relationship and
19 a "genuine financial obligation on the part of the litigant to pay such fees." *Moedt v. General*
20 *Motors Corp.*, 204 Ariz. 100, 103, ¶ 11, 60 P.3d 240, 243 (App. 2003). [emphasis added]. In the
21 case at bar, the Cundiff Plaintiffs do not satisfy the 'genuine-financial-obligation prong', because
22 Alfie Ware has funded the overwhelming majority of the Cundiff Plaintiffs' litigation.
23

25 At best from the *Cundiff Plaintiffs'* perspective, the Cundiff Plaintiffs would be entitled
26 to an award of eighteen thousand dollars (\$18,000.00) in attorneys' fees, which the Pages have
27 attested that they repaid to Alfie Ware between 2004 and 2009.
28

1 For the foregoing reasons, the Court should grant a new trial, or in the alternative, the
2 04/07/15 Judgment should be amended to reflect the amount of attorneys' fees that the Pages
3 have repaid to non-party Alfie Ware (\$18,000.00). To allow the 04/07/15 Judgment to stand
4 would result in a legal impossibility due to the inconsistent findings of fact therein. *Roundy v.*
5 *Stewart*, 140 Ariz. 201, 2013, 682 P.2d 1262 (App. 1984).

7 RESPECTFULLY SUBMITTED this 15 day of May, 2015.

9 MUSGROVE DRUTZ KACK & FLACK, PC

10 By: 

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