

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

<p>JOHN B. CUNDIFF and BARBARA C. CUNDIFF, husband and wife; ELIZABETH 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="center">Plaintiffs,</p> <p>vs.</p> <p>DONALD COX and CATHERINE COX, husband and wife,</p> <p align="center">Defendants.</p>	<p align="center">Case No. P1300CV20030399</p> <p align="center">UNDER ADVISEMENT RULING</p>	<p align="center">FILED DATE: MAR 06 2013 4 O'Clock <i>p</i> . M.</p> <p align="center">SANDRA K. MARKHAM CLERK MARY RYAN Deputy</p>
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<p>HONORABLE KENTON D. JONES</p> <p>DIVISION 4</p>	<p>BY: Kathleen Cartier, Judicial Assistant</p> <p>DATE: March 5, 2013</p>
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THIS MATTER comes before the Court on, "Defendants' Motion in Limine Re: Robert Conlin," filed December 5, 2012, with, "James Varilek's Response to Defendants' Motion in Limine Re: Robert Conlin," filed December 12, 2012, "Plaintiffs' Joinder in James Varilek's Response to Defendants' Motion in Limine re: Robert Conlin," filed December 28, 2012, the Veres, "Joinder in Defendants' Motion in Limine Re: Robert Conlin," filed December 24, 2012, and Defendants', "Reply to Plaintiffs' Response to Defendants' Motion in Limine: Re: Robert Conlin," filed December 28, 2012, and oral argument having been heard on February 13, 2013, and the matter, thereafter, taken under advisement, and

WHILE THE COURT has received the, "Stipulation to Dismiss Without Prejudice," filed by the Parties in *Varilek v Veres*, (P1300 CV 2009 0822); that being separately filed litigation previously consolidated with *Cundiff v Cox* (P1300 CV 2003 0399), the Court does not interpret the dismissal of *Varilek, Id.*, as making moot Varilek's Response in regard to this immediate issue or allowing Varilek and/or Veres to extricate themselves from this case, as Varilek and Veres remain necessary Parties to the *Cundiff v Cox*, litigation.

IN CONSIDERATION of the foregoing, Counsel for James Varilek; the same Counsel representing the estate of Robert D. Conlin Sr., has advised the Court that Mr. Conlin, the subject of this Motion in Limine whom Defendants do not wish to have testify to the "intent" of the Declarants at the time of the creation of the CC&R's relevant to this matter, died on May 15, 2007 (Yavapai County Superior Court Cause Number: PB2007-0154). As a result, Counsel asserts the issue of Conlin testifying to intent is moot. Counsel for Varilek also points out that

the issue of the interpretation of the CC&R's has previously been decided by the Arizona Court of Appeals in the immediate matter. (May 24, 2007, Memorandum Decision, 1 CA-CV 06-0165).

Therefore, Varilek asserts in his Response at Page 3 of 6, Lines 5-6, that:

“...In fact, the *only* issue still before the court is Defendants' affirmative defense that Paragraph 2 has been rendered unenforceable through *abandonment*...”

Counsel for Defendant Cox agreed at hearing that this was, in fact, the only remaining issue for trial.

There is no question in regard to the *relevance* of the affidavit; the Court of Appeals stating in regarding to this exact same affidavit:

“...Interpretation of the Declaration is an issue of law for the court. Therefore, to the extent Conlin's affidavit attempts to express a legal opinion, we disregard it. *Limited to evidence of intent, however, the affidavit is relevant....*” (emphasis added)

(Memorandum Decision, Page 12, Paragraph 19).

That position was prefaced by the Court of Appeals' recognition that:

“...both parties rely on the affidavit of Robert Conlin, an original grantor responsible for preparation and recording of the Declaration...”

(Memorandum Decision, Page 11, Paragraph 19).

Beyond asking the Court to prevent Conlin from testifying at trial, they also assert his affidavit should be struck as inadmissible hearsay.

Varilek's Response states:

“...The Court of Appeals noted that the affidavit was relevant as evidence of the intent underlying the Declaration of Restrictions. Having themselves relied upon Mr. Conlin's affidavit (*see id.* at 12), Defendants can scarcely complain about whatever relevant use any party may wish to make of it in regard to the lone remaining issue of abandonment...”

The Court of Appeals relied extensively upon the Conlin Affidavit in ultimately determining the Cox's use of the property violated the Declaration. (*See*, Memorandum Decision, Pages 12-13, Paragraph 20). Specifically, in interpreting the issue of how the relevant provisions of the Declaration should be interpreted, the Court stated:

“...The Coxes seize on Conlin’s use of the word ‘rural’ to argue that the agricultural activity is typically found in rural settings. Therefore, they reason that their use of the property does not violate the intended purpose of the restriction. However, Conlin did not use that word in isolation, and it does not appear in the Declaration itself. As confirmed in Conlin’s affidavit, the Declaration ensures not only a rural setting, but a rural, residential environment. Given the interpretation, the Coxes’ agricultural business use of the property violated section two of the Declaration...”

The sole issue remaining to be tried at this time is whether the restrictions of the CC&R’s have been so broadly violated they must be deemed abandoned throughout the subdivision. In the microcosm of the Cox property, the Court of Appeals found the intent of the Declarant at the time of the creation of the Declaration; both Parties having relied upon that affidavit and having argued its’ interpretation, precluded the commercial use to which the Coxes had placed their property. Applying Conlin’s statement of intent to the specific language of the relevant provisions of the Declaration, the Court of Appeals found that within the Cox microcosm, the restrictions had been violated.

Now, as the matter proceeds to trial and the issue is no longer the microcosm of the Cox property but whether the violation of the Declaration found to exist within the Cox microcosm extends broadly to the macrocosm of the balance of the entire subdivision, Defendants; with the Court of Appeals application of the Conlin Affidavit in hand, no longer wish the intent of the Declarant, as stated within that affidavit, to be used in the interpretation of the Declaration or made known to the trier of fact.

However, as a result of the Memorandum Decision, the non-legal statements of intent contained within the Conlin Affidavit and upon which the Court of Appeals based its Decision now constitute the context by which the provisions of the Declaration are interpreted. As a result of the Memorandum Decision, the provisions of the Declaration have been provided focus through Conlin’s assertion of his intent. That being the case, the Conlin Affidavit cannot be deemed the yard stick by which the Cox violations are deemed to exist by the Court of Appeals, but not be similarly utilized to measure the balance of the alleged violations possibly rising to the level of abandonment throughout the remainder of this litigation. Interpretation of the Declaration through the non-legal, stated intent of Conlin, as contained within the relevant provisions of his Affidavit, has been made a portion of the law of this case by the Court of Appeals.

THEREFORE, and consistent with the Court of Appeals determination, the non-legal assertions of intention as stated within the Conlin Affidavit are relevant, deemed the law of the case, and Defendants’ Motion in Limine is **DENIED** as regards the assertions of intent, themselves.

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