

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2005 APR 22 PM 3:56
JEANNE LICKS, CLERK
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9 **IN THE SUPERIOR COURT OF ARIZONA**
10 **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 **Kathryn Page Trust,)**
17 Plaintiffs,)
18 vs.)
19 **DONALD COX and CATHERINE COX,)**
20 **husband and wife,)**
21 Defendants.)

Case No: [REDACTED]
District: [REDACTED]

22 **PLAINTIFFS' MOTION FOR**
23 **RECONSIDERATION**
24 **RE DENIAL OF SUMMARY**
25 **JUDGMENT ON AFFIRMATIVE**
26 **DEFENSE OF WAIVER**

17 Plaintiffs, John and Barbara Cundiff, Becky Nash, and, Kenneth and Katheryn Page, by and
18 through undersigned counsel, pursuant to Rule 7.1(e) hereby request that this Court reconsider its
19 ruling of April 4, 2005, denying Plaintiffs' motion for summary judgment on the affirmative defense
20 of waiver.

21 This motion for reconsideration is supported by the following memorandum of points and
22 authorities.

23 RESPECTFULLY SUBMITTED this 22nd day of April, 2005.

24 FAVOUR MOORE & WILHELMSSEN, P.A.

25 By: [Signature]
26 David K. Wilhelmsen
Marguerite Kirk

DIV. 1
APR 26 2005

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 On April 4, 2005, this Court entered its ruling granting Plaintiffs' motion for summary
3 judgment precluding Defendants' from raising the affirmative defenses of laches, estoppel and unclean
4 hands. However, the Court denied Plaintiffs' motion for summary judgment on the affirmative
5 defense of waiver of the recorded restrictive covenants at issue in the case. This motion for
6 reconsideration requests the Court review its decision with respect solely to the denial of summary
7 judgment on the affirmative defense of waiver.

8 In this case, the recorded restrictive covenants at issue expressly provides a non-waiver
9 provision. Under the Arizona Court of Appeals holding in *Burke v. Voicestream Wireless Corp.*, 207
10 *Ariz. 393, 87 P.2d 81 (App. Div.1 2004)*, where the recorded covenants contain a non-waiver clause,
11 as a matter of law, a defendant may not raise the defense of waiver in an action to enforce the
12 covenants.

13 This is not to say that the defendant cannot raise the affirmative defense of abandonment of
14 the recorded restrictions. Where a defendant contends that the restrictions have been so thoroughly
15 disregarded as to render them abandoned and of no force or effect, the defendant is asserting that all
16 the restrictive covenants are thereby legally inoperative. The confusion arises when, as in this case,
17 the covenants defendant argues are abandoned contain a non-waiver provision. Under *Voicestream*,
18 the only way a defendant can assert waiver in the face of a non-waiver clause in the recorded
19 restrictions is to raise the affirmative defense of abandonment. In other words, when the recorded
20 covenants contain a non-waiver provision, the *Voicestream* decision precludes a defendant as a matter
21 of law from raising the affirmative defense of waiver, and limits the defendant to raising the
22 affirmative defense of abandonment.

23 In this case, permitting Defendants to assert waiver leads to a dubious legal result. The
24 Arizona appellate court has expressly stated that the non-waiver provision forecloses any defendant
25 from claiming waiver as a defense to enforcement of the covenants. Defendants may still assert
26 abandonment of the restrictive covenants, which requires a showing that the covenants have been so

1 thoroughly disregarded that the purpose for the restrictions is defeated. In so arguing, Defendants are
2 necessarily contending that *all* covenants contained in the recorded restrictions are a legal nullity,
3 including the non-waiver provision. Unless Defendants by clear and convincing evidence establish
4 abandonment of the covenants, they cannot separately assert a defense of waiver, as this argument is
5 legally foreclosed by the non-waiver provision.

6 To allow Defendants to assert both affirmative defenses of waiver and abandonment, when the
7 former is precluded under *Voicestream*, and the latter necessarily includes the non-waiver clause, leads
8 to the incongruous result that the jury will be instructed on a defense – waiver – which it cannot
9 consider.

10 Therefore, as Defendants are only legally entitled to assert the defense of abandonment, which
11 is the only way the non-waiver provision would be rendered inoperative, Plaintiffs request that this
12 Court reconsider its ruling allowing Defendants to raise a defense of waiver notwithstanding the
13 Arizona appellate court's ruling in *Burke v. Voicestream Wireless Corp., supra*.

14 DATED this 22nd day of April, 2005.

15 FAVOUR MOORE & WILHELMSSEN, P.A.

16
17
18 By: _____

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24 Original of the foregoing
25 filed this 22nd day of April, 2005
26 with:

27 Clerk, Superior Court of Arizona
28 Yavapai County
29 Prescott, Arizona

30 A copy hand-delivered this 22nd day
31 of April, 2005 to:

1 Honorable David L. Mackey
2 Division One
3 Superior Court of Arizona
4 Yavapai County
5 Prescott, Arizona

6 and, a copy hand-delivered this
7 22nd day of April, 2005 to:

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By: 
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