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DLM

8 **IN THE SUPERIOR COURT OF ARIZONA**
9 **COUNTY OF YAVAPAI**

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

16 Plaintiffs,
17 vs.

18 **DONALD COX and CATHERINE COX,)**
19 **husband and wife,)**

20 Defendants.
21)

Case No. CV 2003-0399

Division 1

PLAINTIFFS' MOTION
IN LIMINE
TO PRECLUDE DEFENDANTS'
INAPPROPRIATE QUESTIONING OF
ALFIE WARE

22 Plaintiffs, John and Barbara Cundiff, Becky Nash, and, Kenneth and Katheryn Page, by and
23 through undersigned counsel, hereby moves this Court for its order precluding Defendants from
24 calling Alfie Ware, or Jane Doe Ware, to testify to Plaintiffs' attorneys' fee arrangements with counsel
25 and their participation in meetings conducted at their home concerning Plaintiffs' lawsuit.

26 This motion is supported by the following memorandum of points and authorities, as well as
the entire record in this proceeding.

RESPECTFULLY SUBMITTED this 29 day of June, 2005.

FAVOUR MOORE & WILHELMSSEN, P.A.

By: 
David K. Wilhelmsen
Marguerite Kirk

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Statement of Case**

3 This case involves Defendants Cox's use of their property as a commercial or business
4 enterprise and other violations of the recorded Declaration of Restrictions. *Cundiff, et al. v. Cox, First*
5 *Amended Complaint, CV 2003-0399, March 18, 2004.* Plaintiffs are neighboring landowners who are
6 also subject to the June 13, 1974 Declaration of Restrictions that apply to Defendants' land. *Id.*
7 Defendants have raised the affirmative defenses of abandonment, waiver, estoppel, unclean hands and
8 laches. *Cundiff, et al. v. Cox, Answer to First Amended Complaint, May 21, 2004.*

9 The Court, in its minute entry dated April 4, 2005, (1) granted Plaintiffs' Motion for Summary
10 Judgment concerning estoppel, laches and unclean hands, thereby precluding Defendants from raising
11 these affirmative defenses to Plaintiffs' claims, but (2) denied Plaintiffs' Motion for Summary
12 Judgment concerning Defendants' right to raise the affirmative defense of waiver of the restrictive
13 covenant prohibiting business and commercial activity.

14 **II. Defendants Should Be Barred From Questioning the Wares**

15 **Concerning Plaintiffs' Attorneys' Fee Arrangements with Counsel and**
16 **Their Participation in Privileged Meetings Conducted at Their Home**

17 It is Plaintiffs' position that Defendants are precluded from questioning the Wares in reference
18 to Plaintiffs' attorneys' fee arrangements with counsel as well as their participation in meetings
19 conducted at the Wares' home concerning this lawsuit as these matters are not relevant to the case in
20 chief. Defendants identify Alfie Ware and Jane Doe Ware as witnesses and state "They will testify
21 as to their knowledge of the events leading up to the filing of the above-referenced matter, his motive
22 for, and arrangements with the Plaintiffs for, the Wares' payment of Plaintiffs' attorneys' fees, costs
23 and expenses, their knowledge of the Declaration of Restrictions and violations thereof, their
24 participation in meetings conducted at the Wares' home concerning this lawsuit, their contacts and
25 communications with the owners of property governed by the Declaration of Restrictions governing
26 the subject Property." (Emphasis Added). Defendants should be limited to questioning the Wares

1 concerning what they have seen in reference to the issues of this litigation—the violations of the
2 Declaration of Restrictions concerning commercial business and activity in the subdivision. The
3 portions underlined above are irrelevant to the case in chief. Defendants should be precluded from
4 questioning the Wares on those issues save for purposes of an award of Plaintiffs' attorneys' fees.


5 **III. Conclusion**

6 Defendants' intention to question the Wares on issues other than enforcement of the
7 prohibition against business or commercial activity in the subdivision is irrelevant to the case in chief.

8 Therefore, Plaintiffs respectfully request that this Court enter its order precluding Defendants
9 from questioning the Wares concerning Plaintiffs' attorneys' fee arrangements with counsel as well
10 as their participation in meetings conducted at the Wares' home concerning this lawsuit as these
11 matters are not relevant to the case in chief.

12 DATED this 29 day of June, 2005.

13 FAVOUR MOORE & WILHELMSSEN, P.A.

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1 Original of the foregoing
filed this 29 day of June,
2 2005, with:


3 Clerk, Superior Court of Arizona
Yavapai County
4 Prescott, Arizona

5 A copy hand-delivered this
29 day of June, 2005, to:

6 Honorable David L. Mackey
7 Division One
Superior Court of Arizona
8 Yavapai County
Prescott, Arizona

9
10 and, a copy mailed this
29 day of June, 2005, to:

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