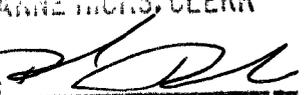


2005 JUN 29 PM 3:34 ✓

JEANNE HICKS, CLERK

BY: 

1 FAVOUR MOORE & WILHELMSSEN, P.A.
2 Post Office Box 1391
3 Prescott, AZ 86302-1391
4 Ph: (928)445-2444
5 David K. Wilhelmsen, #007112
6 Marguerite Kirk, #018054

7 Attorneys for Plaintiffs

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'
INTRODUCTION OF THE DEFENSE
OF WAIVER

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 using
24 waiver as a defense to the issues of Plaintiffs' complaint.

25 This motion is supported by the following memorandum of points and authorities, as well as
26 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 Introducing**

15 **Evidence in Support of the Affirmative Defense of Waiver**

16 It is Plaintiffs' position that Defendants are precluded from raising waiver as an affirmative
17 defense at trial based on the ruling in *Burke v. Voicestream Wireless Corp.*, 422 Ariz. Adv. Rep. 16,
18 87 P. 3d 81, 83 (App. Div. 1 2004), stat, and the entirety of the arguments contained in Plaintiffs'
19 Motion for Summary Judgment dated July 28, 2004. Based on the *Burke* decision, the non-waiver
20 provision in the Declaration of Restrictions is enforceable as a matter of law; this argument is raised
21 in Plaintiffs' Motion for Summary Judgment and incorporated herein in order to preserve the record
22 on appeal for this issue and obviate the necessity of making repeated objections at trial.

23 **III. Conclusion**

24 Defendants are legally proscribed from raising waiver as a affirmative defense to Plaintiffs'
25 enforcement of prohibition against business or commercial activity in the subdivision, and precluded
26 from introducing evidence of alleged waiver by acquiescence of alleged similar violations by their

1 predecessors or neighbors. Consequently, Defendants should not be allowed to introduce evidence
2 of any other business operations in Coyote Springs Ranch as evidentiary support for a claim of waiver.

3 Therefore, Plaintiffs respectfully request that this Court enter its order precluding Defendants
4 from introducing evidence of waiver at trial.

5 DATED this 29 day of June, 2005.

6 FAVOUR MOORE & WILHELMSSEN, P.A.

7
8 By: 
9 David K. Wilhelmsen
10 Marguerite Kirk
11 Post Office Box 1391
12 Prescott, Arizona 86302-1391
13 Attorneys for Plaintiffs

11 Original of the foregoing
12 filed this 29 day of June,
13 2005, with:

14 Clerk, Superior Court of Arizona
15 Yavapai County
16 Prescott, Arizona

17 A copy hand-delivered this
18 29 day of June, 2005, to:

19 Honorable David L. Mackey
20 Division One
21 Superior Court of Arizona
22 Yavapai County
23 Prescott, Arizona

24 and, a copy mailed this
25 29 day of June, 2005, to:

26 Mark Drutz
Jeffrey Adams
MUSGROVE, DRUTZ & KACK, P.C.
1135 Iron Springs Road
Prescott, Arizona 86302
Attorneys for Defendants Cox

By: 
David K. Wilhelmsen
Marguerite Kirk