

2005 JUL 18 PM 3: 52

JEANNE HICKS, CLERK ✓

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8 *Attorneys for Defendants*

9 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**

10 **IN AND FOR THE COUNTY OF YAVAPAI**

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

17 Plaintiffs,

18 v.

19 DONALD COX and CATHERINE COX,
20 husband and wife,

21 Defendants.

Case No. CV 2003-0399

Division No. 1

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

(Assigned to the Honorable David L.
Mackey)

22 Defendants DONALD COX and CATHERINE COX, husband and wife (collectively herein,
23 "Defendants"), by and through undersigned counsel, hereby respond to Plaintiffs' Motion *in Limine*
24 to Preclude Defendants' Inappropriate Questioning of Alfie Ware (hereafter ("Motion in Limine")).
25 This Response is supported by the following Memorandum of Points and Authorities and the record
26 on file herein.
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Initially, Plaintiffs' Motion in Limine should be denied because there has been no compliance
3 with Rule 7.2(a), Ariz. R. Civ. Proc.
4

5 Defendants are also uncertain as to the relief Plaintiffs are requesting. On page 1, lns. 18-20
6 of their Motion in Limine, Plaintiffs move "this Court for its order precluding Defendants from
7 calling Alfie Ware, or Jane Doe Ware, to testify to Plaintiffs' attorneys' fee arrangements with
8 counsel and their participation in meetings conducted at their home concerning Plaintiffs' lawsuit."
9 (Emphasis added). Yet, on page 2, ln. 17 and page 3, lns. 8-9, Plaintiffs argue that Defendants
10 should be precluded from questioning the Wares in reference to Plaintiffs' attorneys' fee
11 arrangements and their participation in meetings conducted at the Wares' home.
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14 Defendants do not intend to call Alfie Ware as a defense witness in this case and
15 consequently have no objection to the relief which Plaintiffs seek on page 1, lns. 18-20 of their
16 Motion in Limine. However, in the event that Plaintiffs call Alfie Ware as a witness in their case
17 in chief then Defendants have the right to cross-examine him on his payment of Plaintiffs' attorneys'
18 fees in this case and his participation in meetings conducted at his home concerning Plaintiffs'
19 lawsuit. Contrary to Plaintiffs' assertions, this testimony is relevant to this litigation.
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22 Plaintiff John Cundiff testified as follows:

23 Q. Does Alfie Ware live in the portion of Coyote Springs Ranch that you
24 live in?

25 A. No.

26 Q. Do you have any information regarding why he would be a contact
27 person concerning the action you've brought against Mr. and Mrs. Cox.

28 A. Well, he's furnishing a majority of the funds.

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- Q. What do you mean he's furnishing the majority of the funds?
- A. He's paying the legal expenses.
- Q. Is he paying all of the legal expenses?
- A. So far.

(Deposition of John B. Cundiff taken August 29, 2004 at p. 120, lns. 7-18). A copy of the above testimony is attached as Exhibit "1" hereto.

The jury is entitled to know that Plaintiffs' case is being funded by someone who does not even reside within the area that is subject to the restrictive covenants. This calls into question Plaintiffs' commitment and belief in the merits of their case where their fees and costs in prosecuting the litigation are being paid by someone whose real property is outside of the area subject to the restrictive covenants.¹ Alfie Ware, a non-party in this action, is the person most interested in the enforcement of the restrictive covenants against Defendants.

Furthermore, the payment of Plaintiffs' attorneys' fees by Alfie Ware and his participation in meetings conducted at his house is relevant to the issue of bias on his part and in the event his testimony would be admissible pursuant to Rule 607, Ariz. R. Evid.

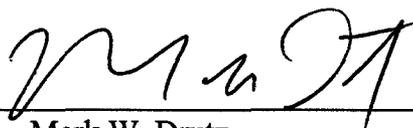
Accordingly, although Defendants will not call Alfie Ware as a defense witness and examine him regarding his payment of Plaintiffs' attorneys fees and his participation in meetings conducted at his house, Defendants are entitled to cross-examine Alfie Ware on these points.

¹Defendants are absolutely entitled to cross-examine Plaintiffs on this issue. Plaintiffs have not filed a Motion in Limine to preclude their examination on this point.

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RESPECTFULLY SUBMITTED this 18th day of July, 2005.

MUSGROVE, DRUTZ & KACK, P.C.

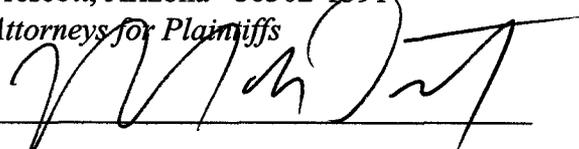
By 

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Attorneys for Defendants

COPY of the foregoing hand-delivered
this 18th day of July, 2005, to:

Honorable David L. Mackey
Yavapai County Superior Court
Division 1
Yavapai County Courthouse
Prescott, Arizona 86301

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

JOHN B. CUNDIFF and BARBARA C.
CUNDIFF, husband and wife;
ELIZABETH NASH, a married woman
dealing with her separate
property; KENNETH PAGE and
KATHERYN PAGE, as Trustees of
the Kenneth Page and Katheryn
Page Trust,

Plaintiffs,

vs.

DONALD COX and CATHERINE COX,
husband and wife,

Defendants.

No. CV 2003 0399

DEPOSITION OF JOHN B. CUNDIFF

Prescott Valley, Arizona
August 25, 2004
9:11 a.m.

REPORTED BY:
RENA F. LOTT, RPR
Certified Court Reporter
Certificate No. 50495

Exhibit "1"

LOTT REPORTING, INC.

316 North Alarcon Street
Prescott, AZ 86301
928.776.1169

COPY

1 being --

2 A. Yes.

3 Q. Now there's someone identified named Alfie in
4 the information published by the Lonesome Valley
13:28:08 5 Newsletter. Do you know who that would be?

6 A. That would be Alfie Ware.

7 Q. Does Alfie Ware live in the portion of Coyote
8 Springs Ranch that you live in?

9 A. No.

13:28:17 10 Q. Do you have any information regarding why he
11 would be a contact person concerning the action you've
12 brought against Mr. and Mrs. Cox?

13 A. Well, he's furnishing a majority of the funds.

14 Q. What do you mean he's furnishing the majority
13:28:46 15 of the funds?

16 A. He's paying the legal expenses.

17 Q. Is he paying all of the legal expenses?

18 A. So far.

19 Q. Are you out-of-pocket anything in connection
13:28:54 20 with the litigation in which you've sued Mr. and Mrs.
21 Cox?

22 A. Not yet.

23 Q. Has anybody contacted you, to your knowledge,
24 in response to the information you've had published in
13:29:11 25 the Lonesome Valley Newsletter?