Court of Appeals

STATE OF ARIZONA
DIVISION ONE
STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007

July 6, 2007

Jeanne Hicks, Clerk
Yavapai County Superior Court
Yavapai County Courthouse
120 S Cortez St No 300
Prescott AZ 86301-3868

Dear Ms. Hicks:

RE: 1 CA-CV 06-0165

CUNDIFF v. COX
Yavapai County Superior Court
CV2003-0399

The following are enclosed in the above entitled and numbered cause:

Original MANDATE
Copy of MEMORANDUM DECISION
Instruments/Minute Entries: 12 Volumes combined

PHILIP G. URRY, CLERK

By _____
Deputy Clerk

Enclosures (as noted)
c:
David K Wilhelmsen
Marguerite A Kirk
Mark W Drutz
Jeffrey R Adams
Sharon Sargent-Flack
Hon David L Mackey, Judge

IN THE

Court of Appeals

STATE OF ARIZONA
DIVISION ONE

JOHN B. CUNDIFF and BARBARA C. CUNDIFF, husband and wife; BECKY NASH, a married woman dealing with her separate property; KENNETH PAGE and KATHRYN PAGE, as Trustees of the Kenneth Page and Kathryn Page Trust, Plaintiffs/Appellants/ Cross Appellees, v. DONALD COX and CATHERINE COX, husband and wife, Defendants/Appellees/ Cross Appellants.	Court of Appeals Division One No. 1 CA-CV 06-0165 Yavapai County Superior Court No. CV2003-0399

MANDATE

TO: The Honorable Yavapai County Superior Court, Arizona in relation to Cause No. CV2003-0399.

GREETING: The above cause was presented in your Court and was brought before Division One of the Court of Appeals of the State of Arizona in the manner prescribed by law. This Court rendered its MEMORANDUM DECISION and caused the same to be filed on May 24, 2007.

The time for the filing of a motion for reconsideration has expired and no motion was filed. The time for the filing of a petition for review has expired and no such petition was filed.

NOW, THEREFORE, YOU ARE COMMANDED that such proceedings be had in said cause as shall be required to comply with the decision of this court, a copy of the MEMORANDUM DECISION being attached hereto.

IT IS ORDERED that the original of the foregoing MANDATE and a copy of the MEMORANDUM DECISION of the Court were mailed to the Clerk of Yavapai County Superior Court, Arizona on July 6, 2007. A copy of the MANDATE and MEMORANDUM DECISION was mailed to the Honorable David L Mackey, Judge, and a copy of the MANDATE was mailed on said day to each party appearing or the attorneys of record.

(SEAL)

PHILIP G. URRY, CLERK

By _____
Deputy Clerk

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOHN B. CUNDIFF and BARBARA C. CUNDIFF, husband and wife; BECKY NASH, a married woman dealing with her separate property; KENNETH PAGE and KATHRYN PAGE, as Trustees of the Kenneth Page and Kathryn Page Trust, Plaintiffs/Appellants/ Cross Appellees, v. DONALD COX and CATHERINE COX, husband and wife, Defendants/Appellees/ Cross Appellants.	1 CA-CV 06-0165 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yavapai County

Cause No. CV2003-0399

The Honorable David L. Mackey, Judge

AFFIRMED IN PART; REVERSED IN PART; REMANDED

Favour Moore & Wilhelmsen, PA — Prescott
By David K. Wilhelmsen
Marguerite A. Kirk
Attorney for Plaintiffs/Appellants/Cross Appellees

Musgrove, Drutz & Kack — Prescott
By Mark W. Drutz
Jeffrey R. Adams
Sharon Sargent-Flack
Attorneys for Defendants/Appellees/Cross Appellants

W I N T H R O P, Presiding Judge

¶1 John and Barbara Cundiff, Elizabeth Nash, and Kenneth and Kathryn Page (collectively "Cundiffs") filed a complaint for declaratory and injunctive relief against Donald and Catherine Cox (collectively "Coxes") alleging the Coxes were in breach of restrictive covenants applicable to the Coxes' property. Following the Coxes' motion for partial summary judgment, the trial court entered partial final judgment pursuant to Arizona Rules of Civil Procedure Rule ("Rule") 54(b), and awarded the Coxes approximately $88,000.00 in attorney fees. Both parties have appealed. For the following reasons, we affirm in part, reverse in part, and remand this matter for further proceedings.

Facts and Procedural Background

¶2 The parties own property in an area known as Coyote Springs Ranch. The Coxes use their property ("subject property") as a "growing yard" for Prescott Valley Nursery and Prescott Valley Growers, the retail and wholesale nursery business they own in partnership with their two sons. Catherine Cox described the subject property in her deposition testimony as one of "three locations" for the partnership. It is used to grow and store inventory for the other two locations that are outside of Coyote Springs Ranch. Partnership employees work at the subject property, but it is not open to the public, and no sales are conducted on it. The Coxes also live on the property part time.

¶3 In 2001, the Coxes applied for an agricultural use exemption for the property from Yavapai County. As part of the application for the exemption, Catherine Cox signed a Statement of General Agricultural Use and Affidavit, acknowledging:

> The exemption for general agricultural purposes is an exemption from zoning regulations for the agricultural use of the land and any residential use thereof shall be customarily incidental to the established agricultural use. The primary use, therefore, is a[n] "agricultural use." When the "agricultural use" is abandoned the zoning district regulations shall again be fully applied.
>
> Any residential use of this property is secondary and must be an accessory use to the principle agricultural use as stated above. Should the property be used for any use not customarily incidental to the agricultural use, the exemption clause shall no longer apply.

"Agricultural Property" is defined in the Statement as:

> property used for the purpose of agronomy, horticulture or animal husbandry:
>
> 1. In which the primary function is to produce an agricultural crop or commodity.
>
> 2. In which the primary investment is for the purpose of farming or stock ranching.
>
> 3. In which the property is capable of being utilized solely for it's [sic] agricultural abilities to sustain economic self-sufficiency and return a nominal profit.

¶4 Coyote Springs Ranch property is subject to a Declaration of Restrictions ("Declaration") that provides in relevant part:

> 1. Each and every parcel of the above-described premises shall be known and described as residential parcels; that is to say, mobile,

> modular or permanent dwellings may be erected and maintained upon said premises, subject to limitations with respect thereto as herinbelow [sic] set forth.
>
> 2. No trade, business, profession or any other type of commercial or industrial activity shall be [initiated] or maintained within said property or any portion thereof.
>
> . . . .
>
> 19. If there shall be a violation or threatened or attempted violation of any of said covenants, conditions, stipulations or restrictions, it shall be lawful for any person or persons owning said premises or any portion thereof to prosecute proceedings at law or in equity against all persons violating or attempting to, or threatening to violate any such covenants, restrictions, conditions or stipulations, and either prevent them or him from so doing or to recover damages or other dues for such violations. No failure of any other person or party to enforce any of the restrictions, rights, reservations, limitations, covenants and conditions contained herein shall, in any event be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof . . . .

¶5 In their complaint against the Coxes, the Cundiffs alleged that the Coxes' use of the subject property violates section two of the Declaration. In response, the Cundiffs asserted the defenses of abandonment, waiver, estoppel, laches and unclean hands.

¶6 The Cundiffs filed two motions for partial summary judgment—one asserting that the Coxes' waiver defense was precluded by section nineteen of the Declaration, and another arguing that the Coxes' use of the subject property violates

section two of the Declaration and that the Coxes could not prove their defenses of estoppel, laches, and unclean hands.

¶7 The trial court denied the motion for summary judgment on the waiver issue because it found "a material factual issue regarding whether the restrictions . . . [had] been so thoroughly disregarded as to result in a change in the area that destroys the effectiveness of the restrictions, defeats the purposes for which they were imposed and amounts to an abandonment of the entire Declaration of Restrictions." The court reasoned that, if the entire Declaration had been abandoned, section nineteen, on which the Cundiffs based their anti-waiver argument, would also have been abandoned.

¶8 Regarding the Cundiffs' second motion for partial summary judgment, the trial court stated:

> Plaintiffs seek summary judgment regarding the Defendants [sic] affirmative defenses of estoppel, laches and unclean hands. This motion also seeks a legal determination that the Declaration of Restrictions contains an unambiguous and enforceable provision prohibiting trade, business, industrial or commercial use. For the reasons set forth above, there is a material factual dispute regarding the enforceability of the terms in the Declaration of Restrictions. The issue of abandonment will have to be litigated before the Court will be in [a] position to decide the enforceability of any term of the restrictive covenants. The Plaintiffs are not entitled to such a summary determination. However, the facts upon which the Defendants rely to support their affirmative defenses do not rise to estoppel, laches and unclean hands as a matter of law. There are no material factual issues that preclude summary judgment in favor of the Plaintiffs on the

> affirmative defenses of estoppel, laches and unclean hands.

The trial court, therefore, granted the motion as to the defenses of estoppel, laches and unclean hands, but denied it "to the extent" it sought "summary declaration as to the enforceability of the Declaration of Restrictions."

¶9 Within forty days of the existing trial date, the Coxes filed a motion entitled "Motion to Join Indispensable Parties Pursuant to Rule 19(A), Ariz. R. Civ. P., or, in the Alternative, Motion to Dismiss Pursuant to rule 12(b)(7), Ariz. R. Civ. P., for Failure to Join Indispensable Parties" ("motion for joinder"). The trial court denied the motion for joinder stating it was "not well founded" and "untimely."

¶10 The Coxes also filed a motion for partial summary judgment arguing that their use of the subject property was "agricultural" and, therefore, did not violate the restriction barring trade, business, professional, or other industrial or commercial activity. The trial court granted that motion, explaining its ruling as follows:

> In construing the language of a contract, the court has to consider the entire contract, and I have reviewed the entire Declaration of Restrictions, including language in Paragraph 3 that provides that these are all over nine acre parcels that are governed by these declarations, that outbuildings can be -necessary outbuildings can be erected pursuant to Paragraph 7(e), and then I look to the case law that provides that, for one, restrictions are not favored and restrictions must be strictly construed.

> Considering the size of the parcels and the types of activities that would typically go on on parcels of this size, I find as a matter of law that the conduct of the Coxes on this parcel does not violate Paragraph 2 of the Declaration of Restrictions, as it is not a trade, business or profession or any other type of commercial or industrial activity initiated or maintained within said property or any portion thereof.

The trial court entered partial judgment in favor of the Coxes on all counts in the complaint relying on the Coxes' alleged violation of section two of the Declaration. The parties agreed this ruling was critical to the remaining issues, and agreed to a form of judgment which could be immediately reviewed on appeal.

Cundiffs' Appeal

¶11 The Cundiffs appeal from the judgment arguing that the trial court erroneously interpreted section two of the Declaration. They also contend the trial court erroneously awarded Coxes their costs and attorney fees. We review a trial court's grant of summary judgment *de novo* to determine whether any genuine issue of material fact exists and whether the moving party was entitled to judgment as a matter of law. *Salib v. City of Mesa*, 212 Ariz. 446, 450, ¶ 4, 133 P.3d 756, 760 (App. 2006); *see also* Ariz. R. Civ. P., 56(c)(1). We view the facts and all reasonable inferences therefrom in the light most favorable to the party against whom summary judgment was granted. *See Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003).

¶12 "A deed containing a restrictive covenant that runs with the land is a contract." *Powell v. Washburn*, 211 Ariz. 553, 555, ¶ 8, 125 P.3d 373, 375 (2006); *see also Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, 634, ¶ 5, 2 P.3d 1276, 1279 (App. 2000). "The interpretation of a contract is generally a matter of law." *Powell*, 211 Ariz. at 555, ¶ 8, 125 P.3d at 375. Thus, we are not bound by the trial court's interpretation of the restrictions at issue here.

¶13 The trial court interpreted existing Arizona case law to hold that restrictions are not favored and must be strictly construed. However, the trial court did not have the benefit of the Arizona Supreme Court's most recent pronouncement in this area. In *Powell*, our Supreme Court rejected the very rule of construction utilized by the trial court. In that case, the court noted that some Arizona decisions have referred to a policy of construing restrictive covenants strictly in favor of the free use of land, but that such references appear exclusively in *dicta*. *Powell*, 211 Ariz. at 557, ¶ 15, 125 P.3d at 377. The court stated the "cardinal principle in construing restrictive covenants is that the intention of the parties to the instrument is paramount." *Powell*, 211 Ariz. at 556, ¶ 9, 125 P.3d at 376 (*quoting Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 449, 868 P.2d 1030, 1032 (App. 1993)). The court then adopted the construction approach set forth in Section 4.1(1) of the

Restatement (Third) of Property (Servitudes): "A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." *Powell*, 211 Ariz. at 557, ¶ 13, 125 P.3d at 377.

¶14 In this case the Declaration does not define the terms "business" or "commercial" used in section two of the restrictions. However, "[w]ords in a restrictive covenant must be given their ordinary meaning, and the use of the words within a restrictive covenant gives strong evidence of the intended meaning." *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, 396, ¶ 13, 87 P.3d 81, 84 (App. 2004); *see also Chandler Med. Bldg. Partners v. Chandler Dental Group*, 175 Ariz. 273, 277, 855 P.2d 787, 791 (App. 1993) ("The controlling rule of contract interpretation requires that the ordinary meaning of language be given to words where circumstances do not show a different meaning is applicable.").

¶15 Nothing in the record suggests a specialized meaning for the words "business" and "commercial" in the Declaration, and the ordinary meaning of these terms will be utilized in characterizing the activity that is undisputedly occurring on the subject property. Although no sales occur on the property, the Coxes admit that the property is used as a tree and shrub farm to

grow and store inventory for their retail and wholesale nursery business.

¶16 The Coxes contend the presence of the nursery inventory on their property is no different than elaborate residential landscaping; however, they do not contest the Cundiffs' description of the inventory kept on the property. Relying on invoices contained in the record, the Cundiffs state that, from January to September, 2002 "Cox purchased and maintained on the Coyote Springs property" 2,777 five-gallon trees, 1,589 fifteen-gallon trees, and 2,013 box trees, fruit trees and shrubs. From January to November 2003, Cundiff states "Cox purchased for production on the subject property" 1,943 five-gallon trees, 2,730 fifteen-gallon trees, 34 twenty-gallon trees and 1,919 box trees, fruit trees and shrubs.

¶17 The Coxes' tree farm is clearly an agricultural business. But nothing in the Declaration suggests that any one type of business was intended to be excluded from section two of the restrictions. On the contrary, the wording used in the restriction is broad, prohibiting *any* "trade, business, profession or any other type of commercial or industrial activity." Moreover, the trees and shrubs cultivated and stored on the property are grown and maintained there for business purposes. They are not landscaping.

¶18 Furthermore, application of the restriction to the Coxes' use of their property is consistent with the Declaration as a whole. *See Powell*, 211 Ariz. at 557, ¶ 16, 125 P.3d at 377 (*quoting Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. Ct. App. 1993) ("Restrictive covenants must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein."). Section one of the Declaration states: "Each and every parcel of the above-described premises shall be known and described as residential parcels . . . ." In her affidavit submitted for the Coxes' agricultural use exemption, Catherine Cox stated that the subject property is used only secondarily as residential property and principally to produce an agricultural crop or commodity. Interpretation of the restriction as the Coxes' urge—to allow agricultural production for business purposes as long as sales do not occur directly on the property—would defeat the residential character of the property obviously intended through the restrictions.

¶19 Finally, both parties rely on the affidavit of Robert Conlin, an original grantor responsible for preparation and recording of the Declaration. Conlin states:

> 3. The recorded covenants and restrictions were intended to ensure that the Coyote Springs Ranch subdivision would be a residential community. The nine-acre lots were intended to ensure that the residential community would retain a rural setting.

> 4. To protect the rural, residential setting of the subdivision, a covenant was included strictly prohibiting trade, business, commercial or industrial enterprises [from] operating in the Coyote Springs Ranch subdivision.
>
> 5. The covenant against trade, business, commercial or industrial enterprises was not intended to prohibit against landowners or occupiers from maintaining a home-office in their residence, from parking or maintaining their business vehicles or equipment on their property, or from indicating to the public that they had a home office at their residence.
>
> 6. I have personally viewed the nursery operation engaged in by Catherine and Donald Cox on their property located in Coyote Springs Ranch. As an original grantor and creator of the recorded Declarations of Restrictions, June 13, 1974, it was my intention that the restrictions prohibit the very activity being conducted on the property by Catherine and Donald Cox. Furthermore, the express language of the restrictions provide such.

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.

¶20 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 that interpretation, the

Coxes' agricultural business use of the property violates section two of the Declaration.

¶21 Having concluded the trial court erred in interpreting the restriction at issue, we vacate the judgment and need not address the Cundiffs' argument regarding the amount of attorney fees awarded therein.

Coxes' Appeal

¶22 The Coxes appeal from the trial court's grant of summary judgment against them on their defenses of estoppel, laches and "unclean hands" and the trial court's denial of their motion for joinder. Initially, we note that the trial court's rulings on these motions are not themselves final judgments. We have jurisdiction to review the trial court's denial of the motion for joinder because the motion sought joinder as to claims for which the trial court has entered final judgment. *See* Arizona Revised Statutes ("A.R.S.") section 12-2102(A) (2003) (appellate court shall review "any intermediate orders involving the merits of the action and necessarily affecting the judgment, and all orders and rulings assigned as error"). Likewise, we address the Cundiffs' motion for summary judgment only regarding those claims resolved by the partial final judgment on review.

¶23 The Cundiffs asserted in their motion for summary judgment that insufficient evidence existed to prove the Coxes' equitable defenses. When a motion for summary judgment is made

and properly supported, "the adverse party's response, by affidavits or . . . otherwise, . . . must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Ariz. R. Civ. P. 56(e). A motion for judgment as a matter of law "should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). In this case, the Coxes did not present evidence in opposition to the motion for summary judgment that would allow a conclusion that the Cundiffs either acted or failed to act in such a manner as to prevent them from bringing their claim under any of the theories on which the Coxes rely.

¶24 "In order to establish equitable estoppel, a party must show: (1) affirmative acts inconsistent with a claim afterwards relied upon; (2) action by a party relying on such conduct; and (3) injury to the party resulting from a repudiation of such conduct." *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 537, ¶ 10, 96 P.3d 530, 535 (App. 2004). Laches "is an equitable counterpart to the statute of limitations, designed to discourage dilatory conduct." *Sotomayor*

v. Burns, 199 Ariz. 81, 83, ¶ 6, 13 P.3d 1198, 1200 (2000). "[It] will generally bar a claim when the delay is unreasonable and results in prejudice to the opposing party." *Id.* Under the doctrine of "unclean hands" a court may deny relief to a party whose conduct in relation to the controversy on which he or she has brought a claim for equitable relief has acted inequitably, himself or herself. *See Am. Credit Bureau, Inc. v. Carter*, 11 Ariz. App. 145, 147-48, 462 P.2d 838, 840-41 (1969).

¶25 In opposition to the Cundiffs' motion for summary judgment, the Coxes relied on their contentions that the Cundiffs had failed to file suit or otherwise complain about the Coxes' activity on the subject property until after the Coxes had invested a substantial amount of money in their growing operation. The Coxes stated that they had begun improvements on the property in 2000, that most of the improvements had been completed by 2002, but the Cundiffs did not complain or file suit until May 2003. By that time, the Coxes had expended over $500,000.00 on the property.

¶26 The Coxes provided no evidence, however, as to when the improvements were visible on the property, when the Cundiffs knew or should have known the purpose of those improvements, or that the Cundiffs knew or should have known the expense the Coxes had incurred in making those improvements. As the Coxes concede, their first production of trees on the property did not begin

until 2002. By that time, the improvements had already been made, and the Cundiffs filed suit in May 2003. On this record, no reasonable fact-finder could find the elements necessary for the Coxes' estoppel or laches claims.

¶27 The Coxes base their claim for "unclean hands" on their allegations that Plaintiffs/Appellants Page and Nash "solicit business from an auto repair shop called Coyote Curt's located in Coyote Springs," and the fact that all Plaintiffs/Appellants "attend[ed] a meeting in 2003 at a church, another non-residential enterprise located within Coyote Springs, to discuss violations by other property owners, including ostensibly the Coxes." These actions, however, are not inequitable given the Cundiffs' claims in this case. We find no error in the trial court's grant of summary judgment in favor of the Cundiffs on the Coxes' affirmative defenses to their alleged violation of section two of the Declaration.[1]

¶28 Lastly, we address the trial court's denial of the Coxes' motion for joinder. The trial court found the motion "untimely" and "not well founded." We review *de novo* questions involving interpretation and application of court rules. *Vega v. Sullivan*, 199 Ariz. 504, 507, ¶ 8, 19 P.3d 645, 648 (App. 2001).

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[1] The Coxes also allege that the Cundiffs are in violation of the Declaration's restriction against above-ground water tanks, an allegation the Cundiffs have made against the Coxes on a claim not at issue in this appeal. Because the trial court's ruling on summary judgment as to the application of the Coxes' affirmative

¶29 Rule 19 does not include a time limit. The Cundiffs have not cited, nor have we found, a time requirement imposed by case law. Rule 12(h) states that "a defense of failure to join a party indispensable under Rule 19 . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." The Coxes' motion, therefore, was not untimely. Moreover, we determine it was well founded, in part.

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede the person's ability to protect that interest (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest.

Ariz. R. Civ. P. 19(a).

¶30 The Coxes argue, as they did below, that all owners of property subject to the Declaration must be joined as parties to this lawsuit because an issue in the case is whether the

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defenses to that claim is not implicated by the court's partial final judgment, we do not address the issue here.

Declaration has been abandoned.[2] They argue that the other property owners have an interest in the enforceability of the restrictions in the Declaration and that the trial court's ruling on the abandonment issue may impair or impede the owners' ability to protect that interest under the doctrines of res judicata and collateral estoppel, and may subject them to inconsistent obligations.

¶31 The doctrines of res judicata and collateral estoppel bar the relitigation of claims or issues when certain prerequisites are met. Res judicata bars a subsequent claim by parties or their privies based on a cause of action already litigated. *In re Gen. Adjudication of all Rights to Use Water in Gila River Sys. & Source*, 212 Ariz. 64, 69-70, ¶ 14, 127 P.3d 882, 887-88 (2006). Three elements must be proved before the doctrine applies "(1) an identity of claims in the suit in which a judgment was entered and the [subsequent] litigation, (2) a final judgment on the merits in the previous litigation, and (3) identity or privity between the parties in the two suits." *Id.* Collateral estoppel, or issue preclusion, requires: "(1) the issue was actually litigated in [a] previous proceeding, (2) the

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[2] The Coxes refer to parties necessary under Rule 19(a) as "indispensable" parties. However, "the court decides who is an indispensable party after it finds that the party is necessary but cannot be joined." *Gerow v. Covill*, 192 Ariz. 9, 14, ¶ 21, 960 P.2d 55, 60 (App. 1998). No evidence was presented below that the other property owners could not be joined if necessary. We, therefore, understand the Coxes' argument to be that the other owners are necessary, rather than indispensable, parties.

parties had a full and fair opportunity and motive to litigate the issue, (3) a valid and final decision on the merits was entered, [and] (4) resolution of the issue was essential to the decision." *Campbell v. SZL Properties, Ltd.*, 204 Ariz. 221, 223, ¶¶ 9-10, 62 P.3d 966, 968 (App. 2003). Further, if collateral estoppel is invoked offensively, by a "plaintiff seek[ing] to prevent [a] defendant from relitigating an issue the defendant previously litigated unsuccessfully" a fifth element, a common identity of the parties, is required. *See id.* at ¶ 10.

¶32 Because none of the absent property owners is a party to this action, the doctrines of res judicata and collateral estoppel could not be employed to limit their claims or defenses in a subsequent case. However, "[r]estrictions as to the use of land are mutual, reciprocal, equitable easements in the nature of servitudes in favor of owners of other lots within the restricted area, and constitute property rights which run with the land." *La Esperanza Townhome Ass'n, Inc.* v. Title Sec. Agency of Ariz., 142 Ariz. 235, 238, 689 P.2d 178, 181 (App. 1984) (*quoting Montoya v. Barreras*, 473 P.2d 363, 365 (N.M. 1970)). A ruling in this case that the restrictions have been abandoned and are no longer enforceable against the Coxes' property would affect the property rights of all other owners subject to the Declaration.

¶33 In *Karner v. Roy White Flowers, Inc.*, 527 S.E.2d 40 (N.C. 2000), the Supreme Court of North Carolina determined that

all property owners subject to the restrictions at issue in that case were necessary parties in the plaintiffs' suit to enforce the restrictions because the defendant had asserted a change-of-circumstances defense. 527 S.E.2d at 436. That defense is, essentially, the abandonment defense the Coxes assert here.

¶34 The Cundiffs distinguish *Karner* on the basis that *Karner* applied a unique feature of North Carolina law that:

> once a lot was released from a restrictive covenant, then the entire sub-division was so released; hence, all other property owners were to be joined to enable them to protect their property interest to enforce the covenants since the non-joined property owner[s] under North Carolina law could lose the right to enforce the covenant.

See Karner, 527 S.E.2d at 437 ("If the restrictive covenant is removed from a lot within a subdivision, that action extinguishes the restrictive covenant on all properties within the subdivision."). The Cundiffs argue that Arizona has no such rule of law; therefore, the holding in *Karner* should not apply.

¶35 However, even if a ruling in favor of the Coxes on their affirmative defense of abandonment were to apply only to the Coxes' property, all property owners rights would still be affected simply by the Coxes' continued use of their property, or by any future use adverse to the restrictions. We have previously found that amendments to covenants must apply to all property subject to them or not at all. *See La Esperanza Townhomes*, 142 Ariz. at 238, 689 P.2d at 181; *Riley v. Boyle*, 6

Ariz. App. 523, 526, 434 P.2d 525, 528 (1967). Similarly, ruling in favor of the Coxes in this case could cause the same unintended "patchwork" of restrictions those cases sought to avoid.

¶36 We conclude that the absent property owners are necessary parties given the issue to be decided in this case. Under the rule, necessary parties must be joined if they are "subject to service of process and . . . [their joinder] will not deprive the court of jurisdiction over the subject matter of the action." Ariz. R. Civ. P. 19(a). The trial court must determine on remand whether these parties are also indispensable under Rule 19(b).

Conclusion

¶37 The judgment is vacated. The trial court's grant of summary judgment on the Coxes' affirmative defenses of estoppel, laches and "unclean hands" is affirmed. This matter is remanded for further proceedings consistent with this decision. In our discretion, both parties' requests for attorney fees are denied. Further, in light of our disposition of the issues, we determine that the parties will bear their own costs on appeal.

Lawrence F. Winthrop
LAWRENCE F. WINTHROP, Presiding Judge

CONCURRING:

Susan A. Ehrlich
SUSAN A. EHRLICH, Judge

SHELDON H. WEISBERG, Judge