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7  
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. )**

Case No. CV 2003-0399

Division 1

**PLAINTIFFS' OBJECTION TO  
COX'S LODGED FORM OF  
JUDGMENT ON MANDATE**

21 Plaintiffs, John and Barbara Cundiff, Becky Nash, and Kenneth and Kathryn Page (hereinafter  
22 collectively referred to as "Cundiff"), pursuant to Rule 58(d), Ariz.R.Civ.Proc., hereby object to  
23 Defendants Donald and Catherine Cox's (hereinafter "Cox") form of judgment upon remand from the  
24 Court of Appeals. This objection is supported by the following memorandum of points and authorities,  
25 the Memorandum Decision issued by the Court of Appeals, Division One, May 24, 2007, as well as  
26 the record in this matter.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of August, 2007.

FAVOUR MOORE & WILHELMSSEN, P.A.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 As this Court is well-acquainted with the facts and procedural history of this case, only a brief  
4 rendition pertinent to Cundiff's objection to Cox's form of judgment on mandate is provided. This  
5 litigation stems from Cox's use of their real property located in Coyote Springs Ranch in violation of  
6 recorded Declaration of Restrictions which prohibit commercial, industrial, and business uses. After  
7 obtaining an agricultural use permit from Yavapai County, attesting to their principal use of the  
8 property for business purposes, Cox's began using the property in Coyote Springs Ranch for purposes  
9 of storing, growing and producing trees, shrubs and other items they later re-sold at their retail and  
10 wholesale nursery businesses. In May, 2003, Cundiff filed this action, based upon Cox's multiple  
11 violations of the recorded covenants and restrictions, principally, Cox's violation of the recorded  
12 covenant prohibiting commercial activities. In a shot-gun approach, Cox raised a number of affirmative  
13 defenses, including laches, estoppel, "unclean hands," and abandonment of the recorded Declaration  
14 of Restrictions.

15 At the deadline for filing dispositive motions, and virtually on the eve of trial, Cox filed two  
16 motions relevant to their lodged judgment on mandate and this objection. Cox filed a perfunctory  
17 motion for 3-page summary judgment regarding their commercial use of the property. Relying on  
18 dictionary definitions, Cox argued that since the activity was agricultural, they were not in violation  
19 of the recorded covenants. With just weeks before trial was to commence, Cox also filed a motion for  
20 joinder of all property owners subject to the recorded restrictions, asserting that these property owners  
21 were necessary and indispensable parties to the proceedings.

22 On Cundiff's appeal from the grant of Cox's summary judgment motion based upon a strict  
23 construction of the restrictive covenants, Cundiff cross-appealed this Court's denial of the motion for  
24 joinder on the grounds that it was untimely. The Court of Appeals reversed the grant of summary  
25 judgment to Cox, as well as reversing this Court's denial of Cox's motion for joinder of all area  
26

1 property owners. Upon remand from the appellate court, Cox has lodged a form of “judgment on  
2 mandate.”

3 **II. COX’S FORM OF JUDGMENT MATERIALLY DEVIATES**  
4 **FROM THE JUDGMENT ENTERED BY THE COURT OF APPEALS**

5 While Cox’s form of judgment on mandate regurgitates procedural history of the case, it  
6 substantively alters the Court of Appeals decision on the issue of Cox’s Rule 19 joinder motion. In  
7 its memorandum decision, on the issue of joinder, the Court of Appeals held:

8 We conclude that the absent property owners are necessary parties given the issue to  
9 be decided in this case. Under the rule, necessary parties must be joined if they are  
10 “subject to service of process and . . . [their joinder] will not deprive the court of  
11 jurisdiction over the subject matter of the action.” Ariz.R.Civ.P. 19(a). **The trial  
court must determine on remand whether these parties [all other landowners  
subject to the recorded Declaration of Restrictions] are also indispensable under  
Rule 19(b).**

12 *See, Cundiff v. Cox, 1 CA-CV 06-0165, May 24, 2007 at ¶36, p.21 (emphasis added).* In their  
13 proposed form of judgment, Cox materially deviates from the decision rendered by the Court of  
14 Appeals. Cox’s form of judgment provides:

15 **2. Defendant’s [Cox’s] Motion to Join filed on June 24, 2005, is and shall be**  
16 **hereby granted, in part,** in that the Affected Owners that own property in the Coyote  
Springs Ranch subdivision located in Yavapai County, Arizona re hereby deemed  
17 necessary parties.

18 **3. Plaintiffs shall have \_\_\_ days within which to amend the Amended Complaint,**  
**which amendment shall be solely for purposes of naming the Affected Owners as**  
**parties to this case.**

19 **4. Plaintiffs shall have \_\_\_ days** following the filing of the amendment of the  
20 Amended Complaint **within which to serve all of the Affected Owners** named as  
21 parties in this case.

22 *See, Cox’s Notice of Lodging Judgment on Mandate, as Exhibit 1, “Judgment on Mandate,” at pp.3-4*  
23 *(emphasis added).* **None** of Cox’s demands are supported by the Court of Appeals’ memorandum  
24 decision.

25 Arizona law is clear on a parties’ attempt to deviate from an appellate judgment. The Court  
26 of Appeals has succinctly stated:

1 The law is well settled that the final opinion of an appellate court is binding upon the  
2 trial court which is “absolutely without jurisdiction to render a judgment differing in  
one jot or tittle from that which (the appellate court) directed it to render.”

3 *Zellerbach Paper Co. v. Valley Nat. Bank of Ariz.*, 18 Ariz.App. 301, 305, 501 P.2d 570, 574 (1972)  
4 quoting *State v. Griffith*, 54 Ariz. 436, 441, 96 P.2d 752, 754 (1939); other internal case citations  
5 omitted; see also, *Scates v. Arizona Corp. Comm’n*, 124 Ariz. 73, 75, 601 P.2d 1357, 1359 (App.  
6 1979), (“Upon a specific remand with specific directions, a superior court does not possess  
7 jurisdiction to enter a judgment which materially varies from that which an appellate court orders it  
8 to render.”) Cox’s form of judgment as to paragraphs 2, 3 and 4 all materially alter the decision  
9 rendered by the Court of Appeals.

10 With respect to paragraph 2 of Cox’s proposed form of order, the Court of Appeals did not,  
11 and could not, grant Cox’s motion for joinder, in part, by holding that the other area property owners  
12 are “necessary parties.” Undoubtedly, the Court of Appeals is well aware of the fact that Rule 19 is  
13 no longer written in terms of necessary and indispensable parties, this distinction having long been  
14 rejected. *Rule 19, Ariz.R.Civ.Proc., State Bar Committee Note, 1966 Amendment* (“The present rule,  
15 with its judicial gloss in terms of indispensable, necessary, and proper parties has proved confusing  
16 and difficult to apply.”) While the analysis of a party’s joinder to an action still proceeds under the  
17 former “necessary-indispensable” dichotomy, those terms are no longer employed to characterize a  
18 non-party’s connection with an action. *Ibid.*, and see, *Rule 19(a) and (b), Ariz.R.Civ.Proc.* Thus, the  
19 Court of Appeals could not “grant, in part,” Cox’s motion for joinder and order that other area  
20 landowners are “necessary” parties, as Cox has formulated their proposed judgment on mandate. See,  
21 *Cox’s Notice of Lodging Judgment at Exhibit 1, “Judgment on Mandate,” at ¶2, p.3.* Rather, the  
22 appellate court only found substantive merit in Cox’s joinder motion, reversing the trial court’s denial  
23 of that motion on the grounds that it was untimely. The Court of Appeals’ decision directs the trial  
24 court to proceed with a Rule 19(b) analysis of the joinder of other property owners subject to the  
25 recorded restrictive covenants. See, *Court of Appeals, Memorandum Decision, at ¶36, p.21.* In order  
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RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of August, 2007.

FAVOUR MOORE & WILHELMSSEN, P.A.

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Original of the foregoing filed  
this 6<sup>th</sup> of August, 2007, with:

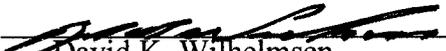
Clerk, Superior Court of Arizona  
Yavapai County  
120 S. Cortez Street  
Prescott, Arizona 86302

A copy of the foregoing  
hand-delivered this 6<sup>th</sup> day  
of August, 2007, to:

Honorable David L. Mackey  
Division One  
Superior Court of Arizona  
Yavapai County  
120 S. Cortez Street  
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and, a copy mailed this  
6<sup>th</sup> day of August, 2007, to:

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