

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

<p>JOHN B. CUNDIFF and BARBARA C. CUNDIFF, husband and wife; ELIZABETH NASH, a married woman dealing with her separate property; KENNETH PAGE and KATHRYN PAGE; as Trustee of the Kenneth Page and Catherine Page Trust,</p> <p style="text-align: center;">Plaintiffs,</p> <p>vs.</p> <p>DONALD COX and CATHERINE COX, husband and wife, et al., et ux.,</p> <p style="text-align: center;">Defendants.</p>	<p>Case No. P1300CV20030399</p> <p>RULING</p>	<p style="text-align: center;">FILED</p> <p>DATE: <u>AUG 25 2014</u> ✓</p> <p><u>9:14</u> O'Clock <u>A</u> M.</p> <p style="text-align: center;">SANDRA K MARKHAM, CLERK</p> <p>BY: <u>K MORTENSON</u></p> <p style="text-align: center;">Deputy</p>
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<p>HONORABLE KENTON D. JONES VISITING JUDGE</p>	<p>BY: Kathleen Cartier, Judicial Assistant DATE: August 22, 2014</p>
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Having been temporarily assigned this matter, through administrative order of the Chief Justice of the Arizona Supreme Court, to address the following pending matters: Defendants' Motion for New Trial; James Varilek's Motion for Award of Attorney's Fees and Statement of Costs; Plaintiffs' Rule 54(g) Motion for Award of Attorneys' Fees and Non-Taxable Costs and Proposed Final Judgment, I address those issues ripe for determination, and otherwise return the balance of the issues to the Yavapai County Presiding Judge for reassignment and further action as required.

I. Defendants' Motion for New Trial.

THIS MATTER having come before the Court for ruling on Defendants Cox's "**Motion for New Trial Re: Grant of Plaintiffs' Motion for Summary Judgment,**" filed January 3, 2014, with "**James Varilek's Response to Motion for New Trial Re: Grant of Plaintiffs' Motion for Summary Judgment,**" filed January 14, 2014, followed by the "**Corrected and Restated James Varilek's Response to Motion for New Trial Re: Grant of Plaintiffs' Motion for Summary Judgment,**" filed January 16, 2014, "**Plaintiffs' Joinder in James Varilek's Corrected and Restated Response to Motion for New Trial Re: Grant of Plaintiffs' Motion for Summary Judgment and Plaintiffs' Response to Motion for New Trial Re: Grant of Plaintiffs' Motion for Summary Judgment,**" filed January 22, 2014, and "**Defendants' Reply in Support of Motion for New Trial Re: Grant of Plaintiffs' Motion for Summary Judgment,**" filed February 10, 2014, and the court having considered the same,

IT IS THE ORDER OF THE COURT that Defendant's Motion for New Trial is **DENIED**.

II. Attorney's Fees.

A. In Re: James Varilek's Motion for Award of Attorneys' Fees and Statement of Costs.

On July 1, 2013, a "Motion for Award of Attorneys' Fees," was filed by James Varilek, seeking an award of \$90,490.00; that award sought only against Defendants Cox. That same date, Varilek filed an "Affidavit of David K. Wilhelmsen in Support of Award of Attorneys' Fees," and a "Statement of Costs and Notice of Taxation of Favour & Wilhelmsen, PLLC," seeking filing fees of \$118.00. The billing attached thereto in support of the requested fees and costs begins with a September 3, 2010 entry and ends with a June 27, 2013 entry.

On August 9, 2013, Defendants filed their "Response and Objection to Plaintiffs' Requests for Award of Attorneys' Fees," and on August 19, 2013, "James Varilek's Reply to *Response and Objection For Award of Attorneys' Fees*," was filed, followed on August 21, 2013, by the filing of a "Separate Response of William M. Grace to Motion by James Varilek for Attorney's Fees."

BASED UPON the foregoing,

IT IS ORDERED attorneys' fees are awarded against Defendants Cox and in favor of Varilek in the amount of \$90,490.00, and costs are awarded to Varilek in the amount of \$118.00.

B. In Re: Plaintiffs' Rule 54(g) Motion for Award of Attorneys' Fees and Non-Taxable Costs.

On July 2, 2013, "Plaintiffs' Rule 54(g) Motion for Award of Attorneys' Fees and Non-Taxable Costs," was filed, requesting in regard to attorney Coughlin's participation on behalf of Plaintiffs, \$86,636.00 in attorneys' fees and \$2,772.63 in costs, and in regard to attorney Wilhelmsen's participation while serving as counsel for Plaintiffs, \$345,622.52 in attorney's fees and \$2,772.63 in costs; the total attorneys' fees sought on behalf of Plaintiffs being \$345,622.52, and total costs sought on behalf of Plaintiffs being \$2,772.63. That same date, "Plaintiffs' Statement of Taxable Costs Paid to Favour, Moore & Wilhelmsen, P.A.," was filed, seeking \$4,117.74.

On July 22, 2013, *Defendant Veres* filed a "Response to Plaintiffs' Cundiff, Nash and Page Rule 54(g) Motion for Award of Attorneys' Fees and Non-taxable Costs," and on July 25, 2013, those same Defendants filed a "Notice of Errata Re: Response to Plaintiffs' Cundiff, Nash and Page Rule 54(g) Motion for Award of Attorneys' Fees and Non-Taxable Costs."

Thereafter, on July 30, 2013, "Robert H. Taylor and Teri A. Thomson-Taylor's Joinder in Defendant Veres's Response to Plaintiffs' Motion for Award of Attorneys' Fees and Non-Taxable Costs," was filed, which asserted they had been joined as indispensable parties and delineated their extremely limited participation (one pleading) in the proceedings. On August 9, 2013, Defendants filed their "Response and Objection to Plaintiffs' Request for Award of Attorneys' Fees." Finally, on August 28, 2013, Plaintiff filed a "Reply in Support of Plaintiffs' Rule 54(g) Motion for Award of Attorneys' Fees and Non-Taxable Costs."

Attorney Wilhelmsen represented Plaintiffs from June 3, 2003 (first billing entry), through March 26, 2009, when attorney Coughlin took over Plaintiffs' representation. Coughlin's billing begins April 7, 2009, and ends with an April 22, 2013 entry.

Attorney Coughlin states within his fees motion:

"This Court is aware of the number of parties who were represented by defense counsel during a portion of the time period following the Court of Appeals decision. An appropriate division of responsibility for the allocation of Plaintiffs' attorneys' fees would be to divide those fees among the Defendants starting with their formal entry into the case. The Adams Law Firm, PLLC filed answers for multiple defendants on multiple occasions"

Defendants accurately assert that review and analysis of attorneys' fees incurred in this action is a monumental undertaking. In fact, referring to it in that fashion may well serve as a substantial understatement. And unlike the specificity as to the Defendant against whom Varilek sought fees, Plaintiffs seek sums against multiple Defendants unspecified within their motion for differing periods of their participation in the case with those periods as to each Defendant not being delineated. That being the case, the materials provided to the court appear to omit, generally, the information necessary to evaluate, much less determine, the appropriateness of the Plaintiffs' motion and requested relief. To the knowledge of the court, those materials might not be coalesced at any given point within the entirety of the record and additional briefing might be required to obtain the information necessary to address the award sought within Plaintiffs' motion. Of additional concern is the likelihood that once each Defendant against whom fees and costs are sought, and their period of involvement with the case is specifically delineated, they may wish to individually dispute the specifics of the fee application in their own unique regard, beyond what has been generally addressed to date.

THEREFORE, determination of this issue is hereby STAYED pending its return to the Presiding Judge of Yavapai County and reassignment for further determination by the court as to how to proceed with this issue.

III. Notice of Lodging of Proposed Final Judgment.

FINALLY, on July 26, 2013, Plaintiff filed a "Notice of Lodging of Proposed Final Judgment." Thereafter, on August 12, 2013, Defendants' "Response and Objection to Plaintiffs' Proposed Final Judgment," was filed, followed by "Plaintiffs' and Varilek's Joint Reply to Response and Objection to Plaintiffs' Proposed Final Judgment," which was filed on August 21, 2013.

IN CONSIDERATION of the foregoing, a determination regarding the proposed Final Judgment that has been filed is hereby STAYED, pending a determination of Plaintiffs' claim of attorneys' fees, as addressed at II (B), and the subsequent modification of the proposed Final Judgment consistent with the rulings, herein, and those anticipated, hereunder.

This matter is reassigned to the Presiding Judge for reassignment of all further proceedings.

cc: Honorable David L. Mackey, Division 1 - w/file
J. Jeffrey Coughlin – electronically via Clerk’s Office (e)
Jeffrey R. Adams – electronically via Clerk’s Office (e)
Mark W. Drutz/Sharon M. Flack – Musgrove, Drutz & Kack – electronically via Clerk’s Office (e)
David K. Wilhelmsen/Lance B. Payette – Favour & Wilhelmsen – electronically via Clerk’s Office (e)
Robert E. Schmitt – Murphy, Schmitt, Hathaway & Wilson – electronically via Clerk’s Office (e)
Noel J. Hebets- Noel J. Hebets, PLC, 2515 North 48th Street #3, Phoenix, AZ 85008
William H. “Bill” Jensen, 2428 West Coronado Avenue, Flagstaff, AZ 86001
Gary and Sabra Feddema- 9601 East Far Away Place, Prescott Valley, AZ 86315
William R. and Judith K. Stegeman Trust- 9200 East Far Away Place, Prescott Valley, AZ 86315
Karen L. and Michael P. Wargo- 9200 East Spurr Lane, Prescott Valley, AZ 86315
Linda J. Hahn- 10367 W. Mohawk Lane, Peoria, AZ 85382
Sergio Martinez and Susana Navarro- 10150 N. Lawrence Lane, Prescott Valley, AZ 86315
Lloyd E. and Melva J. Self- 9250 E. Slash Arrow Drive, Prescott Valley, AZ 86315
Rynda and Jimmy Hoffman- 9650 East Spurr Lane, Prescott Valley, AZ 86315
William and Shaunla Heckethorn- 9715 East Far Away Place, Prescott Valley, AZ 86315
Leo M. and Marilyn Murphy- 9366 E. Turtlerock Road, Prescott Valley, AZ 86315
James C. and Leslie M. Richie- 9800 E. Plum Creek Way, Prescott Valley, AZ 86315
Rhonda L. Folsom- 9305 N. Coyote Springs Road, Prescott Valley, AZ 86315
Kenneth Paloutzian- 8200 Long Mesa Drive, Prescott Valley, AZ 86315
Bonnie Rosson - 8950 E. Plum Creek Way, Prescott Valley, Arizona 86315
John and Rebecca Feddema- 9550 E. Spurr Lane, Prescott Valley, AZ 86315
Robert Lee and Patti Ann Stack/Robert Lee and Patti Ann Stack Trust-10375 Lawrence Lane,
Prescott Valley, AZ 86315
John and Dusti Audsley - 6459 E. Clinton Terrace, Prescott Valley, AZ 86314
Dana E. and Sherrilyn G. Tapp - 8595 E. Easy Street, Prescott Valley, AZ 86315
Richard and Beverly Strissel - 9350 E. Slash Arrow Drive, Prescott Valley, AZ 86314
Jesus Manjarres - 105 Paseo Sarta #C, Green Valley, AZ 85614
Nicholas Corea - 4 Denia, Laguna Niguel, CA 92677
Jack and Dolores Richardson - 505 Oppenheimer Drive #4, Los Alamos, NM 87544
Eric Cleveland - 960 E. Disway, Prescott Valley, AZ 86315
Robert and Patricia Janis - 7685 N. Coyote Springs Rd., Prescott Valley, AZ 86315
Mike and Julia Davis- 9147 E. Morning Star Road, Prescott Valley, AZ 86315
Richard and Patricia Pinney- 10980 N. Coyote Road, Prescott Valley, AZ 86315