

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2014 NOV 26 PM 2:44
DONNA McQUALITY, CLERK

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9 SUPERIOR COURT OF ARIZONA
10 YAVAPAI COUNTY

11 JOHN B. CUNDIFF and BARBARA C.
12 CUNDIFF, husband and wife; ELIZABETH
13 NASH, a married woman dealing with her
14 separate properly; 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, *et al.*, *et ux.*,

21 Defendants.

22 *81300*
23 Case No. CV 2003-0399

24 Assigned to Hon. Kenton D. Jones
25 Visiting Judge

26 **JAMES VARILEK'S MOTION TO
27 STRIKE EXHIBITS 5-12 TO
28 MOTION FOR RECONSIDERATION
RE: AUGUST 25, 2014 RULING RE:
ATTORNEYS' FEES AWARDED IN
FAVOR OF VARILEK**

19 For the reasons set forth in the following memorandum of points and authorities, James
20 Varilek ("Varilek") moves to strike Exhibits 5-12 inclusive to the *Motion for Reconsideration Re:
21 August 25, 2014 Ruling Re: Attorneys' Fees Awarded In Favor of Varilek* filed by Defendants ("the
22 Coxes") on November 19, 2014.

23 RESPECTFULLY SUBMITTED November 26, 2014.

24 FAVOUR & WILHELMSSEN, PLLC

25 By: 

26 David K. Wilhelmsen
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28 Attorneys for Property Owner James Varilek

1 Memorandum of Points and Authorities

2 Varilek is mindful that ARCP 7(e) prohibits a reply to the *Motion for Consideration* unless
3 the Court orders one. However, by filing their *Motion for Reconsideration* the Coxes are *blatantly*
4 trying to slip new evidence into what will become the record on appeal; Varilek respectfully urges
5 their bad faith is so obvious that sanctions pursuant to A.R.S. § 12-349(A)(2)-(3) are appropriate.
6 In any event, the new evidence they are trying to slip into the record should be stricken.

7 The *Motion for Reconsideration* purports simply to ask the Court to reconsider its award of
8 attorneys' fees to Varilek on August 25, 2014. But in fact, the portion of the *Motion for*
9 *Reconsideration* supported by Exhibits 5-12 has *nothing* to do with the award of attorneys' fees to
10 Varilek. It is a back-door attempt to reargue that Judge Jones erred when he granted Plaintiffs'
11 *Motion for Summary Judgment* (in which Varilek had joined) on June 14, 2013.

12 It appears the only new argument in the *Motion for Reconsideration* (i.e., not previously
13 made in the self-described "monumental" *Response and Objection to Plaintiffs' Request for Award*
14 *of Attorneys' Fees* the Coxes filed on August 9, 2013) is that the Coxes' abandonment defense was
15 "meritorious" and they "intend to appeal" the award of summary judgment (*Motion for*
16 *Reconsideration* at p. 2, line 16 through p. 3, line 9).

17 This argument has precisely *nothing* to do with whether attorneys' fees should have been
18 awarded to Varilek. The Coxes are simply saying, "Attorneys' fees should not have been awarded
19 to Varilek because we think Judge Jones was wrong in awarding summary judgment and we're
20 going to appeal his ruling." (Significantly, the Coxes' did not move for reconsideration of the award
21 of summary judgment itself, but instead filed their unsuccessful *Motion for New Trial Re: Grant of*
22 *Plaintiffs' Motion for Summary Judgment* seven months later.)

23 The Coxes flesh out this argument at p. 12, line 5 through p. 15, line 11 of the *Motion for*
24 *Reconsideration*. This entire section simply rehashes why the Coxes think Judge Jones was wrong
25 in awarding summary judgment; it is in reality a disguised motion for reconsideration of the award
26 of summary judgment, filed 17 months after the award and three months after the Coxes' *Motion*
27 *for New Trial* was denied.
28

1 The Coxes support their latest bite at the apple with Exhibits 5-12:

2 [S]everal Coyote Springs Property Owners have attested to their
3 personal observations which support the Coxes' position that their
4 defense of abandonment of the Declaration was meritorious. See
5 Declarations of Margaret Crutchfield, Linda Furbee, William Furbee,
6 Grant Griffiths, Pamela Griffiths, Charles Hildebrandt, William
7 Jensen, and Teresa Massardi, attached hereto as Exhibits "5" to "12".

8 *Motion for Reconsideration* at p. 15, lines 6-11.

9 These "Declarations" are entirely new. They were all obtained *long* after Judge Jones' award
10 of summary judgment 17 months ago. They were not attached to the *Response and Objection to*
11 *Plaintiffs' Request for Award of Attorneys' Fees* the Coxes filed on August 9, 2013 or the *Motion*
12 *for New Trial* they filed on January 3, 2014. Indeed, they are all dated immediately before or even
13 *after* Judge Jones' ruling of August 25, 2014, awarding Varilek his attorneys' fees:

- 14 • Exhibit 5 August 3, 2014
- 15 • Exhibit 6 August 14, 2014
- 16 • Exhibit 7 August 14, 2014
- 17 • Exhibit 8 August 18, 2014
- 18 • Exhibit 9 August 18, 2014
- 19 • Exhibit 10 August 15, 2014
- 20 • Exhibit 11 August 10, 2014
- 21 • Exhibit 12 October 3, 2014

22 What the Coxes are attempting is highly improper and painfully obvious. Exhibits 5-12 must
23 not be allowed to cloud the record on appeal. Varilek urges the Court to strike Exhibits 5-12
24 inclusive and to award him his attorneys' fees for the preparation of this motion on the same basis
25 on which fees were previously awarded or as a sanction pursuant to A.R.S. § 12-349(A)(2) and
26 (A)(3) (together with such other sanctions the Court may deem appropriate).

27 RESPECTFULLY SUBMITTED November 26, 2014.

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Mantione Family Living Trust
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Holly Lucero
aka Holly Denise Bowers
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7 Warren Don Oster
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9 Phoenix, AZ 85053

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11 Launder's Family Trust
12 9295 E. Spurr Lane
13 Prescott Valley, AZ 86315

13 Michaelis Family Trust
14 6930 Parsons Trail
15 Tujunga, CA 91042

15 Dave Slate
16 9910 E. Spurr Lane
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25 Rynda and Jimmy Hoffman
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27 Prescott Valley, AZ 86315

27 John and Rebecca Feddema
28 9550 E. Spurr Lane
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19 Prescott Valley, AZ 86315

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21 9150 E. Slash Arrow Dr.
22 Prescott Valley, AZ 86315

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24 Pauline Matheson
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27 Christopher Mattson
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32 Prescott Valley, AZ 86314

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