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7 PCC No.: 35932
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9 *Attorney for Plaintiffs*

10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
11 IN AND FOR THE COUNTY OF COCHISE

12 DANNY R. HATCH, JR. and DENICE R.
13 HATCH, husband and wife,

14 Plaintiffs,

15 vs.

16 RONALD J. KLUMP and JANE DOE
17 KLUMP, husband and wife, ROY J. KLUMP
18 and JANE DOE KLUMP, husband and wife,
19 and DAYLA HEAP and JOHN DOE HEAP,
20 wife and husband,

21 Defendants

NO. CV 201400128

MOTION FOR NEW TRIAL

Assigned: Hon. John Kelliher

22 NOW COME the Plaintiffs DANNY R. Hatch and DENICE R. HATCH, by and
23 through their Attorney Carl D. Macpherson and prays this Honorable Court grant a new trial
24 in the above cause. This Motion is based upon the files and pleadings contained herein,
25 ARCP 59 (a)(8), and particularly upon the following;

26 STATEMENT OF FACTS

27 1. The final judgment of the Court, prepared by counsel for Defendant's and signed
28 by this Court the 26TH day of May, 2015, in paragraph 3 thereof, expressly finds " there is
a public easement for ingress and egress on the..., East 60 feet...of parcel 32 as show on
the Report of Survey, in book 1 of surveys, pages 56 and 56A, records of Cochise
County,."

2. Plaintiff's aver that the Court erred as a matter of law by interpreting the above

1 defined easement as a public roadway.

2 3. Nowhere in the files, pleadings and Exhibits has there ever been a public
3 dedication of subject 60 foot strip, let alone any evidence of such intent.

4 4. The easement in question is part of the real property deeded to the Plaintiff's.

5 5. In Plaintiff's Answer to the Motion for Summary Judgment and Counter Petition
6 for Summary Judgment, Continental Service Corporation did on December 8, 1976 convey
7 "a right of way easement" stating it does, as Trustee Under number 99383 hereby "grant
8 and convey to the public for ingress and egress and public utilities, an easement to
9 construct, operate and maintain utilities and appurtenances across, over and under the
10 surface of the premisses here and after described" said premisses is described on page 462
11 including "the easterly 60 feet of parcel 32."

12 6. From 1989 through December 29, 2013, Plaintiffs and the predecessors in title,
13 did use said easterly 60 foot strip as a private driveway to their residence, to the exclusion
14 of the general public, including the Defendants.

15 7. In the construction of laws, wills and other instruments, ejusdem generis dictates
16 that general language followed by limited language operates to limit the initial general
17 language.

18 8. Plaintiff's aver that such language expressly defines a public utilities easement
19 that permits ingress and egress to access and maintain said public utilities.

20 9. Plaintiff's aver that the Court's finding that said Easterly 60 feet is a public
21 easement for ingress and egress is contrary to Law.

22 **MEMORANDUM OF POINTS AND AUTHORITIES:**

23 Continental Service Corporation, in creating the "Right of Way Easement" did, by
24 the very language therein, limit same to ingress and egress to access and maintain public
25 utilities. This must be determined by application of ejusdem generis and more particularly
26 upon the fact the conveyance put a comma after utilities. Consequently, Defendants have
27 the burden of proving by clear, satisfactory, unequivocal evidence that the roadway was
28 dedicated to the public. Defendants have presented no such evidence to the Court.

1 In 2010, the Arizona Supreme Court dealt expressly with this issue in Kadlec v.
2 Dorsey, 224 Ariz. 551, 233 P.3d 1130 (Ariz. 2010) holding that a dedication of a public
3 roadway is not presumed and that the party so asserting same has the burden of proof by
4 clear, satisfactory, unequivocal evidence. Absent adequate proof of a dedication to the
5 public, the roadway is just an easement, and, as such, benefits only the dominant estate
6 and burdens only the servient estate. The Court expressly held in paragraph 10;

7 The effect of the decision below is that unless proven otherwise, a private
8 road becomes public whenever the property through which the road runs is
9 subject to a easement. But no Arizona case has so held. To the contrary, we
10 have looked at the affirmative actions of the Grantor to determine the land
11 has been dedicated to the public. See COUNTY OF YUMA v.
12 LEIDENDEKER, 81 Arizona 208, 213-14, 303 P. 2d 531, 535-36
13 (azAPP1956) "emphasizing the proprietors dedicatory statement, which was
14 signed, filed and recorded and subsequent references to such statement in
15 transactions involving the sale of land and issue"; EVANS v. BLANKENSHIP,
16 4 Ariz.307,314-15,39P.812,813 (Terr. Ct. 1895) holding "that recording a
17 service map indicating that land was for public use and making sale in
18 reference to it "showed in irrevocable dedication of land in question to the
19 public)".... Nothing in these cases support the proposition that merely
20 because land can be properly dedicated to the public use it has been.

21 Since the Defendants have made no showing by clear, convincing, unequivocal
22 evidence of a public dedication, the Kadlec, supra, case would control. Therefore, granting
23 summary judgment in favor of the Defendants is erroneous.

24
25 RESPECTFULLY SUBMITTED May 27, 2015

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27 Carl D. Macpherson
28 Attorney for Plaintiffs

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