

20

1 WILLIAMS MELO, PLC
2 2107B Paseo San Luis, Suite C
3 Sierra Vista, Arizona 85635
4 520-458-2022
5 Paul@WilliamsMeloLaw.com

FILED

2015 JUN 23 PM 1:56

MARY ELLEN DUNLAP
CLERK OF SUPERIOR COURT
DEPUTY JK SV

6 Paul W. Melo, 027705
7 Attorney for: Defendants Ronald Klump, Dayla Heap, and Roy Klump

8 IN AND FOR THE SUPERIOR COURT OF THE COUNTY OF COCHISE

9 DANNY R. HATCH, JR. and DENICE R.
10 HATCH, husband and wife,

CASE NO. CV 2014 00128

11 Plaintiffs,

12 RESPONSE TO
13 PLAINTIFFS' MOTION FOR NEW
14 TRIAL

15 vs.

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

21 Defendants.

22 Defendants, Ronald J. Klump, Dayla Heap, and Roy J. Klump, ("Klumps") by and
23 through undersigned counsel, hereby respond to Plaintiffs' Motion for New Trial.
24
25

1 Memorandum of Points and Authorities

2 **I. Rule of Civil Procedure**

3 Rule 59 (a)(8) of the Arizona Rules of Civil Procedure states:

4 A verdict, decision or judgment may be vacated and a new trial granted
5 on motion of the aggrieved party for any of the following causes
6 materially affecting that party's rights:

7 8. That the verdict, decision, findings of fact, or judgment is not justified
8 by the evidence or is contrary to law.

9 **II. Summary Judgment Granted is supported by Law**

10 An effective dedication of private land to a public use has two general components—an
11 offer by the owner of land to dedicate and acceptance by the general public. *Pleak v Entrada*
12 87 P.3d 831, 837 Allied Am. Inv. Co., 65 Ariz. at 287, 179 P.2d at 439; Restatement (Third)
13 of Prop.: Servitudes § 2.18(1).

14 In this case, the offer to create an easement as recorded states that Continental Service
15 Corporation "do hereby grant and convey to the public for ingress and egress and public
16 utilities, an easement to construct, operate and maintain utilities and appurtenances across, over
17 and under the surface of the premises hereafter described." Thereafter, the easterly 60 feet of
18 parcel 32 is described as part of the public easement for ingress and egress. The offer of the
19 easement does not appear to be in dispute in this case.

20 In *Pleak vs. Entrada*, the Court stated there was "no dispute in this case that the lots in
21 *Entrada* were sold after recordation of the Survey and that the conveyance documents
22 specifically referred to the Survey." *Pleak at 837*. There had been effective acceptance of the
23 common law dedication of the road for public use.

24 In this case, lots were sold and a specific reference to the Survey was made in the
25 Warranty Deed, an effective acceptance of the common law dedication has been completed.

1 In another similar matter, *Hunt v Richardson*, parties purchased their properties with
2 reference to the Survey, thus constituting sufficient acceptance of the common law dedication.
3 163 P.3d 1069.

4 Plain reading of the language used in the easement is clear evidence of the intent of the
5 Grantor to create a public easement.

6 KNOW ALL MEN BY THESE PRESENT, that the undersigned,
7 CONTINENTAL SERVICE CORPORATION, as Trustee under
8 Number 99383, does hereby grant and convey to the public for
9 ingress and egress and public utilities, an easement to construct,
10 operate, and maintain utilities and appurtenances across, over and
11 under the surface of the premises hereinafter described.

12 ***

13 Together with the said easement is granted the right to operate,
14 repair, replace, maintain and use said easement; to add to or alter
15 any improvements and/or facilities at any reasonable time, with
16 access to said easement and egress therefrom to permit normal
17 operations of public utilities in connection with said easement.

18 *** skip to page Exhibit A-6 ***

19 The following described easements for ingress and egress and public
20 utilities....

21 When Continental Service Corporation expressly granted an easement to the
22 public for ingress and egress, in addition to the easement to the public for ingress
23 and egress Continental Service Corporation also granted an easement for public
24 utilities. The easement for public utilities does not qualify, limit, or restrict the
25 public easement for ingress and egress.

1 Plaintiff's claim that "ejusdem generis" operates to limit the initial general
2 language is simply wrong. Black's Law Dictionary (Fifth Edition) states:

3 that the rule ejusdem generis is, that where general words follow an
4 enumeration of persons or things, by words of a particular and
5 specific meaning, such general words are not to be construed in their
6 widest extent, but are to be held as applying only to persons or
7 things of the same general kind or class as those specifically
8 mentioned. The rule, however, does not necessarily require that the
9 general provision be limited in its scope to the identical things
10 specifically named. Nor does it apply when the context manifests a
11 contrary intent.

12 In this case, the grant to the public for ingress and egress is separated by the
13 word "and". The public utilities easement is granted separately, after the "and" in
14 the sentence. The conveyance includes the words "to the public for ingress and
15 egress" as well as "public utilities". The intent is clear that the two phrases are
16 separate and distinct, if this were not the case the use of the word "public" twice
17 would be superfluous and unnecessary. Further, even if this were not the case, the
18 rule of ejusdem generis would not apply because the context of the easement
19 manifests a contrary intent. The context being we are discussing a 60' easement. A
20 60' esement is not necessary simply for the access and use of public utilities. A 60'
21 easement contemplates a road wide enough for traffic to travel in opposite
22 directions at the same time. The plat map specifically referred to in Plaintiffs' deed
23 also indicates that intention of the Grantor of the public easement being used as a
24 60' road.

25 Plaintiffs' reliance on *Kaldec* is misplaced. In *Kaldec*, the language used in granting of
the easement was distinguishable from the language recorded in the easement in this case.

1 In *Kaldec* the Court stated: "A dirt road ran through all three parcels, connecting with
2 public roads to the east and west. Turigliatto conveyed the first, easternmost, parcel "*subject to*
3 *the existing road traversing through the property shown as 'Road Inter-X'*" on a specified
4 survey map. He conveyed the second, central, parcel "*subject to an undefined easement as*
5 *shown*" in the survey described in the first transaction, showing "*Road Inter-X.*" The
6 conveyance of the remaining, westernmost, parcel of property included "an easement over" real
7 property described by metes and bounds and corresponding to the description of the roadway
8 on the survey. All three conveyances were subsequently recorded. *Kadlec v Dorsey*, 223 P.3d
9 674 (*emphasis added*)

10 In *Kaldec*, there was an 'undefined easement.' In this case, the language is clear and
11 unequivocal. The easement is specifically defined and shown on a survey map. Further, the
12 *Kaldec* court in reliance on the judgment from *County of Yuma v. Leidendecker* the court
13 looked to the affirmative actions of the Grantor to determine the land had been dedicated to the
14 public. The difference between the *Kaldec* language in the recorded deeds and the
15 *Leidendecker* language from the deed was factually distinguishable. The court in *Leidendecker*
16 upheld the proposed public use even after thirty years of non use by the public, stating:

17 The rule in that case was to the effect that the mere act of surveying land into lots,
18 streets, and squares by the owner, and the recordation of such plat, constituted an offer to
19 dedicate and was subject to revocation by the dedicator until it was accepted, but the mere act
20 of selling lots with reference to such plat resulted in an immediate and irrevocable common
21 law dedication of areas delineated thereon for public purposes. *Allied American Inv. Co. v.*
22 *Pettit*, 65 Ariz. 283, 179 P.2d 437. See, also, *Frauenthal v. [81 Ariz. 214] Slaten*, 91 Ark. 350,
23 121 S.W. 395; *Mayor and Council of Bayonne v. Ford*, 43 N.J. Law 292.

24

25

1 In the case of *Shea v. City of Ottumwa*, 67 Iowa 39, 24 N.W. 582, it appeared that there
2 had been nonuser of the dedicated street over rough and hilly ground for a period of over thirty
3 years. With reference to this the court said:

4 '* * * It would not do to hold that city streets, dedicated to the public, over hilly, rough
5 land would revert to the dedicator if they were not improved and used by the public until the
6 wants of public travel demanded it. In some of the cities of this state there are streets in some
7 portions thereof over which no vehicle nor even horseman has passed, and yet they were
8 dedicated more than 30 years ago. They have not been used, for the reason that, until graded,
9 they are incapable of use. The dedication will be presumed by the law to have contemplated
10 this state of things, and imposed no condition upon the public to use the street until the public
11 wants demanded and secured their improvement. * * *'

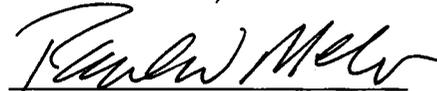
12
13 **III. Conclusion**

14 Plaintiffs are not entitled to a new trial. The Summary judgment was granted based on
15 clear principals of law, founded on factual evidence presented throughout the case, including
16 evidence presented by Plaintiff during the hearing for the preliminary injunction. The evidence
17 includes, the recorded deed of the plaintiffs and the recorded plat map and survey referenced in
18 the deed.

19 Finally, the Klumps are entitled to an award of their attorney's fees and costs pursuant
20 to A.R.S. §12-341.01 and A.R.S. §12-349.

21
22 DATED this ^{June 22} ~~April 15~~, 2015

23 Williams Melo, PLC

24 

25 Paul W. Melo

2107B Paseo San Luis, Suite C
Sierra Vista, Arizona 85635
520-458-2022
Paul@WilliamsMeloLaw.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25