

IN THE SUPREME COURT OF THE STATE OF NEVADA

INEZ MADELENE FRADY AND JOHN
T. DEVRIES,
Appellants,
vs.
MARIE BURCHETTE,
Respondent.

No. 51479

FILED

AUG 25 2009

ORDER OF AFFIRMANCE

TRACE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

This is an appeal from a district court summary judgment in a quiet title action. First Judicial District Court, Storey County; James Todd Russell, Judge.

The parties own adjoining land in Storey County, Nevada. According to proper person respondent, on having her property surveyed approximately nine years ago, she discovered that her property included the land on which appellant Inez Madelene Frady's family had constructed sheds approximately 80 years ago. In light of that discovery, respondent asserts, she offered to sell Frady's family the land on which the sheds were located, but the offer was rejected. Instead, to obtain title to respondent's land, appellants instituted an action against respondent, pursuant to NRS 40.090. NRS 40.090(1) essentially provides for an action to obtain title to another's land when certain requirements are met, including the payment of "all taxes of every kind levied or assessed and due against the property" for the previous five years by the claimant. Respondent answered appellants' complaint and asserted a counterclaim, alleging that the sheds encroached on her property and seeking the sheds' removal.

Thereafter, respondent moved for summary judgment, asserting that appellants failed to satisfy NRS 40.090's requirement that

they pay “all taxes of every kind” assessed against the property. After appellants opposed respondent’s motion, they filed a countermotion for summary judgment on respondent’s counterclaim, primarily arguing that principles of estoppel and waiver, and the doctrine of laches, precluded the sheds’ removal. The district court entered an order granting summary judgment to respondent, concluding that appellants failed to meet NRS 40.090’s tax-payment requirement and directing that the sheds be removed from respondent’s property. This appeal followed.

This court reviews the order granting summary judgment to respondent de novo. See Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment was appropriate if the pleadings and other evidence on file, viewed in a light most favorable to appellants, demonstrate that no genuine issue of material fact remains in dispute and that respondent was entitled to judgment as a matter of law. Id.

On appeal, appellants provide no argument with respect to the district court’s conclusion that they failed to satisfy NRS 40.090’s tax-payment requirement. They instead contend for the first time that they have a prescriptive easement across respondent’s land where the sheds are located. But as appellants acknowledge in their opening brief, they failed to raise that issue below, and “[a] point not urged in the [district] court . . . is deemed to have been waived and will not be considered on appeal.”¹ See Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

¹Additionally, the issue whether a prescriptive easement exists involves questions of fact that this court is ill-suited to resolve, militating
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Alternatively, appellants argue that although respondent owns the land on which appellants' sheds were constructed, principles of estoppel and waiver and the doctrine of laches preclude the sheds' removal. Fundamental to respondent's ownership of the land, however, is the right to exclude others from its use. See Bergen Ditch & Reservoir Co. v. Barnes, 683 P.2d 365, 366-67 (Colo. Ct. App. 1984); City of Lansing v. Edward Rose Realty, Inc., 502 N.W.2d 638, 642 n.27 (Mich. 1993); Village of East Rochester v. Rochester Gas & E. Corp., 46 N.E.2d 334, 338 (N.Y. 1943); Sammons v. American Auto. Ass'n, 912 P.2d 1103, 1105 (Wyo. 1996); see also Hamm v. Arrowcreek Homeowners' Ass'n, 124 Nev. ___, ___, 183 P.3d 895, 902 (2008) (recognizing real property implicates rights incident to ownership, including the right to possess the property); Ambrose v. First Nat'l Bank of Nev., 87 Nev. 114, 120, 482 P.2d 828, 831 (1971) (noting a "strong public policy against restraining one's use and disposition of property in which no other person has an interest"). Therefore, absent agreement, adverse possession, or easement, a non-owner has no right to use private land, and equitable principles like estoppel, waiver, do not apply.² Given the district court's conclusion that

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in favor of adhering to our policy to decline considering issues raised for the first time on appeal. See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (recognizing that this court is ill-suited to resolve questions of fact); O'Banion v. Borba, 195 P.2d 10, 12 (Cal. 1948) (providing that the question whether a prescriptive easement exists is a question of fact); Smith v. Breen, 614 P.2d 671, 673 (Wash. Ct. App. 1980) (same).

²Under estoppel principles, a party is prevented from asserting a legal right that, "in equity and good conscience, [she] should not be
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appellants failed to obtain title to respondent's land under NRS 40.090—a determination that appellants do not challenge—and given that appellants failed to argue below that they had a prescriptive easement, respondent was entitled to the exclusive use of her land, including removal of appellants' sheds, which encroached thereon. See Colfer v. Harmon, 108 Nev. 363, 368, 832 P.2d 383, 386 (1992) (providing that property owners gained no rights to encroachment on neighboring property by adverse possession when they failed to show that they had paid property taxes on the subject property for the required statutory period).

Consequently, after reviewing appellants' opening brief and appendix and respondent's answering brief,³ we conclude that the district court did not err when it granted summary judgment to respondent and

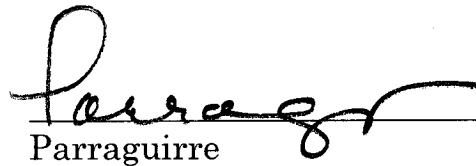
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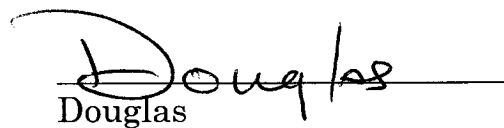
allowed to assert because of [her] conduct.” Attorney General v. Nevada Tax Comm'n, 124 Nev. ___, ___, 181 P.3d 675, 679 (2008) (quoting Nevada State Bank v. Jamison Partnership, 106 Nev. 792, 799, 801 P.2d 1377, 1382 (1990)). Waiver arises when a known right is intentionally relinquished. Nevada Yellow Cab. Corp. v. Dist. Ct., 123 Nev. 44, 49, 152 P.3d 737, 740 (2007). “Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable.” Secretary of State v. Burk, 124 Nev. ___, ___, 188 P.3d 1112, 1125 (2008) (quoting Carson City v. Price, 113 Nev. 409, 412, 934 P.2d 1042, 1043 (1997)).

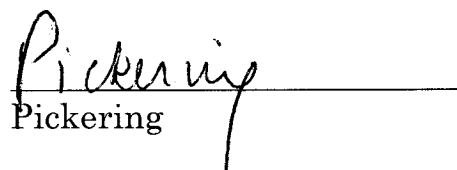
³On February 9, 2009, respondent submitted a letter to this court dated February 2, 2009. In her letter, respondent appears to request leave to file her proposed amended answering brief, which she attached to her letter. We construe the letter as a motion and direct the clerk of this court to file respondent's motion and grant her request for leave to file an amended answering brief. The clerk of this court shall detach and file respondent's proposed amended answering brief.

ordered appellants' sheds removed from respondent's land. Accordingly,
we

ORDER the judgment of the district court AFFIRMED.

 , J.
Parraguirre

 , J.
Douglas

 , J.
Pickering

cc: Hon. James Todd Russell, District Judge
Senior Justice Robert E. Rose, Settlement Judge
Carole Pope
Marie Burchette
Storey County Clerk