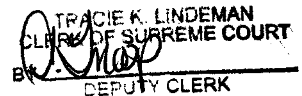
IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY MAPLES, AN INDIVIDUAL; AND ANN MAPLES A/K/A AMIE MAPLES, AN INDIVIDUAL,
Appellants,
vs.
DONALD QUINN,
Respondent.

No. 53621



OCT 04 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment granting a permanent injunction in real property action. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Having reviewed the parties' briefs and record on appeal, we conclude that the district court did not err when it concluded that appellants' property was classified under the CC&Rs as property prohibited from housing horses and issued a permanent injunction enjoining appellants from keeping horses on their property. See Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (noting that this court reviews orders granting summary judgment de novo); A.L.M.N., Inc. v. Rosoff, 104 Nev. 274, 277, 757 P.2d 1319, 1321 (1988) (reviewing de novo a district court's decision to issue a permanent injunction because it issued the permanent injunction concurrent with granting a motion for summary judgment). On appeal, appellants contend that the CC&Rs are ambiguous as to the classification of appellants' property. But appellants failed to argue that the CC&Rs are ambiguous in the district court, and "[a] point not urged in the [district] court . . . is deemed to have been waived and will not be considered on appeal." Old Aztec Mine, Inc. v.

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Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Appellants have thus failed to raise any genuine issue with regard to the material fact that the designation of their property on the map that they relied on in the district court most closely corresponded to the designation of the class of property in the CC&Rs prohibited from housing horses.[1] See Wood, 121 Nev. at 731, 121 P.3d at 1031 (noting that summary judgment is appropriate if the pleadings and other evidence on file, viewed in a light most favorable to appellant, demonstrate that no genuine issue of material fact remains in dispute and that respondent is entitled to judgment as a matter of law).

With regard to the district court's denial of appellants' motion for reconsideration of its summary judgment, appellants' motion mostly reasserted arguments that the district court rejected in granting summary judgment to respondent and presented new evidence that, without more, was unclear as to the certainty of the inferences that could be drawn from it. Under those circumstances, the district court did not abuse its discretion in denying appellants' motion for reconsideration. See DCR 13(7) (stating that "[n]o motion once heard and disposed of shall be renewed in the same cause, nor shall the same matters therein embraced

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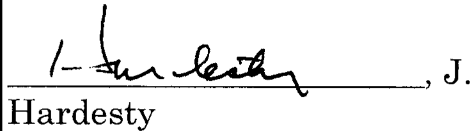
[1]Our dissenting colleague suggests that respondent had a duty to provide the actual deed to appellants' property to support his summary judgment motion. However, we note that appellants failed to provide the deed to their own property in response to the summary judgment motion. We also note that both parties relied upon the content of the sales map with respect to the property in arguing to resolve their competing views concerning the deed restriction.

be reheard, unless by leave of the court granted upon motion therefor"); Harvey's Wagon Wheel v. MacSween, 96 Nev. 215, 217-18, 606 P.2d 1095, 1097 (1980) (reviewing a district court's decision to grant a motion for reconsideration for an abuse of discretion).

Accordingly, we

ORDER the judgment of the district court AFFIRMED



_______________, J.
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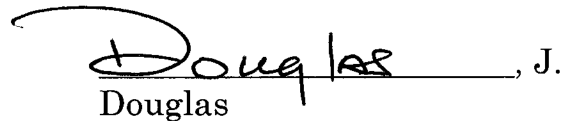


_______________, J.
Douglas

cc: Hon. Robert W. Lane, District Judge
Carolyn Worrell, Settlement Judge
Law Offices of Leslie Mark Stovall
Ellsworth Moody & Bennion Chtd.
Nye County Clerk

PICKERING, J., dissenting:

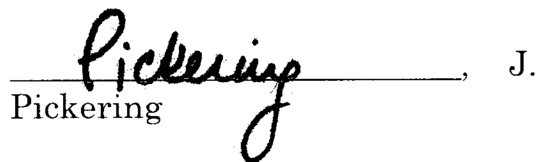
I respectfully dissent. It is hornbook law that, "Covenants and agreements restricting the free use of property are not favored by the law and will be strictly construed against limitations upon such use." 20 Am. Jur. 2d Covenants § 170, p. 697 (West 2005). The corollary follows that, "Doubt will be resolved in favor of the unrestricted use of property, so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of land." Id. at 698.

Here, Quinn was the proponent of a restrictive covenant forbidding the Maples from keeping horses on their land, despite its permissive zoning. As such, Quinn had the burden of proving both the no-horse restriction and that it applied to the Maples' land. The fact Quinn proceeded by summary judgment rather than trial did not change the burden of proof. See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) (if the party moving for summary judgment "will bear the burden of persuasion [at trial], that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence").

Quinn supported his motion with a generic "deed of restrictions" covering the entire development, which established six categories of lots. However, the motion did not include the grant deed for the Maples' particular lot. Further, the motion conceded that, of the six

categories of lots the deed of restrictions established, two included single family residential lots like the Maples owned—one permitting horses, the other not permitting them. The only other evidence offered to support the motion was a sales map, unaccompanied by affidavit or other explanation, and an order from another case to which the Maples weren't party.

I acknowledge that the Maples, who represented themselves in the trial court, did not argue that the deed of restrictions was ambiguous. However, the Maples did make the point that their zoning permitted horses and, without more, the zoning should carry the day. This argument, though incomplete, is correct. If Quinn's motion had been properly supported, it might not have been enough to defeat summary judgment. However, the motion did not establish more than that the Maples lot might or might not be subject to a restrictive covenant forbidding them from keeping horses. Affirming summary judgment on this record comes close to affirming summary judgment by default, without considering the sufficiency of the moving papers, which I am not prepared to do. See William Schwarzer, Wallace Tashima & James M. Wagstaffe, Federal Civil Procedure Before Trial, ¶ 14:99.1 (2010) (noting cases that have held summary judgment should not be granted by default). I therefore dissent.



__________, J.
Pickering