IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 24-0632

RUSSELL WADDELL AND CASEY MAGAN,

Plaintiffs and Appellants,

*vs*.

PAUL STUDER AND RACHAEL STUDER, AND
THE SUMMER RIDGE HOMEOWNERS ASSOCIATION,
A MONTANA NON-PROFIT CORPORATION,

Defendants and Respondents.

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# APPELLANTS' OPENING BRIEF

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On Appeal from the Eighteenth Judicial District Court, Gallatin County, Montana
Cause No. DV-20-1267A
Honorable Peter B. Ohman

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## STATEMENT OF THE ISSUES

**One.** The District Court erred by denying Waddells' verified petition for a temporary restraining order where the undisputed facts established that Defendant Studers' threat to build their two-story home on the Waddells' neighboring lot was imminent and would block Plaintiffs' Covenant-protected views of the Bridgers, and devalue their property.

**Two.** The District Court erred by determining ultimate issues of fact at the preliminary injunction stage based on an incomplete factual record and before any discovery had been conducted, denying Waddells due process. The Court compounded its error when it entered summary judgments in favor of both Defendants as to all of Plaintiffs' claims based on the flawed and incomplete findings and conclusions from the Preliminary Injunction proceedings.

**Three.** The District Court erred by interpreting the restrictive viewshed covenant in isolation and without considering the stated purpose of the Covenants as a whole and by misapplying the Montana rules of contract interpretation, and this Court's opinions to grant final summary judgments in favor of Studers and the Summer Ridge Homeowner's Association as to all of Plaintiffs claims.

**Four.** The District Court erred when it granted attorney fees in the amount of $417,000 without considering the actions of the Studers and the actions of the SRHOA and its attorneys that precipitated and necessitated this litigation.

## STATEMENT OF THE CASE

### Nature of the case.

On **November 20**, **2020**, Waddells sued Studers for temporary and permanent injunctive relief and damages after Studers refused to change the proposed location of a two-story house on their neighboring one-acre lot to allow for and block less of the Waddell home's panoramic views of the Bridger Mountains. Summer Ridge views of the Bridgers and the Gallatin Valley are specifically protected by Summer Ridge Covenants that are intended to preserve the value and character of the subdivision. As the record shows, the Summer Ridge viewshed covenant provisions have historically been administered and enforced by the SRHOA.

### Relevant procedural history.

**November 20 - TRO is denied.** Five hours after the case was filed and with only the Waddells' verified complaint before it, the district court denied Waddells' request for a 14-day TRO which would have preserved the *status quo* by halting Studers' construction before it began. (App. 1, Doc. 2, TRO denial).

**December 1 - SRHOA is joined to the suit.** Waddells joined the Summer Ridge Homeowner's Association (SRHOA) to the case on **December 1**, after it reversed course and ***re***-approved the same Studers' plan after revoking its approval three weeks earlier because the plans failed to consider the impact on Waddells'

views as required by the Covenants. (App. 2, Ex. 4, Nov. 17, 2020 Email). In the amended complaint, Waddells alleged that the SRHOA had abandoned its covenant enforcement duties; arbitrarily re-approved the original Studers' plan and abandoned the Waddells by telling the parties to "work it out between yourselves." (*See* Doc. 4, Am. Compl., p. 12).

On **December 4,** the court held a show cause hearing on Waddells' request for a preliminary injunction. It took evidence and heard testimony at a four-hour hearing.

On **December 31**, the district court denied the Plaintiffs' request for a preliminary injunction. It did not set a hearing date for a permanent injunction. Instead, it decided the merits of Plaintiffs' claims by ruling as a matter of law - based on the record as it then existed - that the words of the Summer Ridge viewshed covenant requiring that new home construction should consider and allow for the views and solar gains of existing neighbors when planning location, *is **not** ambiguous*; *does **not** require* the Studers to move the location of their house, and *imposes **no** duty* on Studers or the Summer Ridge Homeowner's Association "to protect [other neighbors'] viewsheds above and beyond the [specific] size, height and setback requirements." (App. 1, Doc. 23 at 10). This ruling on the merits effectively nonsuited all of Plaintiffs' claims.

Following the District Court's December 31 decision, Studers and the SRHOA **moved for summary judgment** on Waddells' claims. The motions were based on the court's December 31 findings and the legal conclusion that the viewshed covenant compels nothing; is but a nod to good manners, and is otherwise without legal affect. (*See* MSJs at Docs. 45, 46, 86, 87). Waddells sought to delay the summary judgment proceedings and moved twice for leave to conduct discovery in order to make a factual record adequate to persuade this Court to overturn a dispositive ruling of a district judge. (Docs. 71, 100). Their efforts to have discovery and to make an adequate record were vigorously opposed by Defendants. (*E.g.,* Docs. 61, 121).

The court granted both motions for summary judgment (App.1, Docs. 184, 231), and dismissed all of Waddells' claims in the Final Judgment, (App. 1, Doc. 379), ordering Waddells to pay over $400,000 in attorney fees and costs to these defendants as the prevailing parties under the Covenants' attorney fee provision. (*Id*.). The Judgment is Final. Notice of appeal was timely filed on October 24, 2024.

# STATEMENT OF FACTS

**The Summer Ridge Covenants.** All of the lots and all of the owners in Summer Ridge Subdivision are subject to protective and restrictive covenants that limit an owner's use and enjoyment of the land. The purposes of the Covenants are to "maintain a uniform and stable value, character, architectural design, use and development of the premises…" (App. 2, Ex. 1 Covenants, Recitals, p. 1).

The Covenants "…are for the benefit of said property, lots, and subdivisions and the owners thereof, and shall run with the land…" (*Id.*).

The Covenants include a "viewshed covenant:"

> Article V,
> Minimum Building and Use Requirements
> SITE:
>
> Section 2. Building Orientation. Placement should take into consideration the location of roads and neighboring dwellings, with allowance for views and solar gains.
>
> (*Id.*, p. 7).

> Article V,
> Minimum Building and Use Requirements
> ARCHITECTURE:
>
> Section 2. Building Size and Height. No one level single family dwelling house shall have less than one thousand seven hundred (1700) square feet of ground floor area. No split level single family dwelling house shall have less than one thousand five hundred (1500) square feet on the main level. No two level single family dwelling house shall have less than one thousand four hundred (1400) square feet on the main level. This is exclusive of garages, carports, porches, or any other addition thereto. In addition, no structure more than two (2) stories shall be constructed. Approval of size and height shall take into consideration unusual designs, blocking views, and solar effects of existing dwellings.
>
> (*Id.*, p. 10).

The Covenants require the approval of all construction plans by the SRHOA before construction may begin. (*Id*., Art. IV, ARCHITECTURAL CONTROL, pp. 4-5).

Waddells read the Summer Ridge Covenants before they purchased their home. They saw the viewshed covenant and that the purpose of the Covenants is to maintain a uniform and stable value and character of the neighborhood. (12/04/20 Tr. 45:21-23:15; Doc. 52 at Ex. 4, R. Waddell Decl., and Ex. 8, C. Magan Decl.).

**Orange stakes appear on the lot next door.** On the morning of October 21, 2020, Casey looked out the window of her home office and saw several orange stakes on the adjacent, vacant one-acre lot that stands between her front windows and her panoramic views of the Bridger Mountains. This is what she saw:

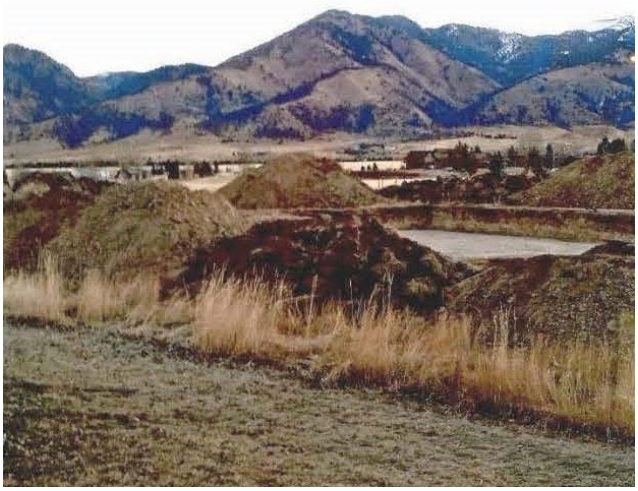
Studers' lot - October 21, 2020
(Doc. 4, Am. Compl. at 8).

This picture also represents the *status quo* as it existed on November 20, the day Waddells filed their Complaint in district court (Doc. 1, Compl., ¶ 21) and when the court denied Waddells' request for a TRO later that same day. (App. 1, Doc. 2).

Excavation begins. November 30, ten days after the court denied the TRO, and four days before the show cause hearing on the preliminary injunction:

Studers' jobsite – November 30
(Doc. 4, Am. Compl. at 16).

**The dig is done.** By the morning of the December 4 show cause hearing, excavation for the foundation was complete, the structural fill was in, and the *status quo* was this:



Jobsite – December 4
(12/04/20 Tr. 53, Ex. 5)

After the court denied Waddells' request for a preliminary injunction, Studers' construction continued to its conclusion. Waddells' views of the Bridgers looked like this on February 26, 2021:

Jobsite – Feb 26, 2021 (Doc. 92 at 7).

On March 19, it looked like this:


Jobsite – March 19 (Doc. 92 at 8).

Today, it looks like this:

(Doc. 289 at 25)

**Background and historical facts.**

Waddells' and Studers' one-acre lots are adjacent. Waddells bought their home in **2004**. (12/04/20 Tr. 66). Studers bought their lot in **2018**. (Doc. 20 at 3, ¶

20). Waddells had enjoyed their panoramic views of the Bridger Mountains from the front of their home since the day they moved in, believing their viewshed would be protected by these Covenants. In the intervening years, Casey served as President of the HOA and member of the Covenants Committee. (Doc. 52, Ex. 8, Magan Decl., p. 1, ¶ 1). She knew that the Board had intervened when other planned construction threatened views and understood that the Covenants require the Board to enforce the Siting and Architectural Covenants of Article V, which includes the viewshed covenant. (*Id*. at ¶ 2). On the day she saw the orange stakes, Casey knew what her rights were under the Covenants and knew who to contact and what to do.

On **October 26, 2020** Waddells expressed their concerns in a letter to the Summer Ridge Board that the proposed location of Studers' house would unreasonably block their views of the Bridgers and negatively impact the value of their home. Waddells expressed concern that Studers' site plan depicted Parson's home to the east of Studers, but not their home to the west. Dean Parson was Studers' neighbor to the east and head of the Summer Ridge Design Review Committee (DRC) at this time. (*See, e.g*., 12/4/20 Tr. 57:13-15; 58:9; 61:24-62:4). Parson had approved Studers' plans before the orange stakes went up. (*See* 10/26/20 Letter attached to Doc. 52, Ex. 8).

Studers' approval is rescinded. On **October 30** the Board informed Studers that its prior decision to approve their plans had been rescinded:

> Dear Mr. and Mrs. Studer,
>
> The Board has rescinded the approval letter issued by the Design Review Committee to build on your lot. No further action regarding construction on your lot is allowed until this matter is resolved.
>
> The reason for our decision is that the issued approval appears to be in violation of the Covenants Article 5 Section 2., (p.7) which states:
>
> "Section 2. Building Orientation. Placement [of the new house on the lot] should take into consideration the location of roads and neighboring dwellings, with allowance for views and solar gains."
>
> In summary, the board determined that your architectural plan fails to consider the impact on the residence to the west of your lot (708 Evening Star Lane), particularly its view shed toward the Bridger Mountain range.

(App. 2, Ex. 2, Oct. 30 ltr. to Studers).

On **October 31** the Board required Studers to submit a new site plan to include Waddells' house to the west in order "…to evaluate the impacts of the existing views of Lot 7 by the construction of your house on Lot 6." (App. 2, Ex. 2, Oct. 31 ltr. to Studers). Studers were given 15 days to resubmit their plans. They never did. Meanwhile, their permission to build remained rescinded. On November 1, 2020, the HOA wrote the Studers that their plan was deficient as it "fails to consider the impact on the [Waddells'] residence to the west of your lot, particularly its view shed toward the Bridger Mountain range," again requesting that the Studers resubmit a revised plan no later than November 15, 2020. (App. 2, Ex. 2, Nov. 1 ltr. to Studers).

On **November 4**, Studers' counsel informed the Board the Studers were scheduled to break ground "on or around November 20, 2020." (App. 2, Ex. 3, Excerpt from Rabb Firm's Nov. 4 letter to Board).

**November 15** came and went. Studers did not provide new plans for approval to build by this date. Studers never provided a new plan.

On **November 17**, the Board informed Studers, Studers' counsel, and the Waddells by email that it was withdrawing its request for new plans; reinstating Studers' approval to build, and that it had determined to "leave this issue for the two parties to work out between yourselves." (App. 2, Ex. 4, Nov. 17 email). Three days later the Waddells filed suit seeking to maintain the status quo pending a hearing on the merits.

**Covenant Enforcement under the Summer Ridge Covenants.**

Article V, Sec. 18 of the Covenants allows any lot owner to enforce them. "Any provisions herein may be enforced by any Owner…" (App. 2, Ex. 1, Covenants, p. 15). The Covenants *require* the Board to enforce the covenants found in Article V, the "Minimum Building and Use Restrictions," which includes the viewshed covenant. "The Association's Board of Directors shall enforce the terms of Article V." (*Id*., p. 16).

A lot owner may enforce violations or attempted violations of the Covenants by actions at law or in equity and may seek to restrain or recover damages or both. (*Id*. pp. 16-17).

**No choice but to sue.** Abandoned by the Board and ignored by the Studers, Waddells filed suit on **November 20**. They sought a temporary restraining order and an injunction that would have halted the construction of the two-story house before it started and before it blocked a significant portion of Waddells' views of the Bridger Mountains. Waddells also made claims for breach of contract (breach of a restrictive covenant), an alternative damage claim for diminution in value of their home, breach of the duty of good faith and fair dealing, nuisance, and a claim for declaratory relief. (Doc. 1, Compl., 12-18).

**The TRO – a verified complaint alleging irreparable harm.**

Waddells alleged in their Verified Complaint that the Studers' threat to commence construction was imminent. (Doc. 1, ¶41). They alleged that the Studers' house, if constructed *per* their original plans, would significantly impair their views of the Bridgers, would violate the restrictive viewshed covenant and cause them to suffer permanent and irreparable injury to their views and to the value of their home (*Id*., ¶ ¶ 41, 43).

At the time the district court denied Plaintiffs' TRO, the only facts before the court were those in Waddells' verified complaint.

**The December 4 Preliminary Injunction hearing.**

On **December 4, 2020** the court held a show cause hearing. On December 31, the court ruled as a matter of law that the viewshed covenants create no legal obligations on a lot owner or the SRHOA to take any action to avoid blocking a neighbor's views. Nor does the viewshed covenant oblige Studers to relocate their house or take any other action with respect to Waddells' concerns that the Studers' two-story home would block their view of the Bridgers. (App. 1, Doc. 23, pp. 8, 10).

**The summary judgment proceedings.**

In **April and August of 2021** respectively, Studers and the HOA moved for summary judgment as to all of Plaintiffs' claims on the grounds that the dispositive issue had been decided by the court's December 31, 2020 ruling. (*See* Docs. 45, 87). On **August 25, 2021** the Studers' motion was argued. At that hearing, the court expressed confidence in its December 31 ruling and dismissed the idea of certifying an issue for appeal to this Court. (8/25/21 Tr., pp. 46, 47).

On **August 16 and September 30, 2021**, Plaintiffs moved to continue the summary judgment proceedings to allow discovery on matters relating to the custom and usage of the viewshed covenant and any prior interpretations by the SRHOA Board. (Doc. 75, pp. 6-7; Doc. 98, pp. 10-16).

On **November 16, 2021**, the court denied Plaintiffs' discovery motion on the grounds that "[t]o the extent the language of the Covenants is clear on its face and susceptible of only one reasonable interpretation, there are no [additional] facts which would be relevant to the court's analysis." (Doc. 143, p.5)

Also during the summary judgment phase of these proceedings, Plaintiffs offered the Declarations under penalty of perjury of six homeowners (including Waddells) in the Summer Ridge subdivision who were prepared to testify that the views in the subdivision were one of the reasons they bought a home in Summer Ridge; that they believed the viewshed covenant would protect their views from unreasonable obstruction by new neighbors; that they were aware of prior SRHOA efforts to enforce the viewshed covenant and that they expected the SRHOA to enforce the viewshed covenant as it had in the past. (All summary judgment Declarations are attached at App. 2, Ex. 5). These Declarations were discussed at length during the August 25 hearing but the decision on the merits had already been made. (08/25/21 Tr., pp. 23-31). The Court's orders do not reflect that the court ever considered these Declarations.

On **January 4, 2022** the court granted Studers' Motions for Summary Judgment. (App. 1, Doc. 184). On **April 25, 2022** the court granted Summer Ridge Home Owner's Association's Motions for Summary Judgment. (App. 1, Doc. 231). The district court found that "the core facts … were presented at the

[December 4, 2020] hearing in (*sic*) Plaintiffs' Motion for Preliminary Injunction and continue to exist through the summary judgment briefing process, [and] have not changed." (App. 1, Doc. 184, p. 9; App. 1, Doc. 231, p. 14).

**Facts adduced at the December 4 preliminary injunction hearing.**

**Studers' architect Pierson** helped Studers plan the location of their house. He was asked this question at the hearing:

> Q. And why did you depict Dean's [Parson's] house and not the Wadells' house?
>
> A. Well, I developed that image early on in the design process with the Studers, and it was,basically, to help them understand the relationship of their house with the neighbor to the east, and we were messing around with the orientation of the house trying to exam -- you know, ***to get the best views and stuff*** like that. There's absolutely no reason – you know, deliberate reason to leave the people to the west out it.
>
> (12/04/20 Tr. 88, emphasis added).

**Other facts discovered after the court's December 31 ruling.**

**Studers could have moved their house 40 feet.** At the December 4 hearing, Studer's architect Trevor Pierson testified that Studers could have moved the location of their house as much as 40 feet to the south and still maintain all setbacks and minimum required distance (10') to the drainfield. (*See* 12/4/20 Tr. at 87:12-4). This is confirmed in text messages between Studers' contractor Matt Schuyler and Paul Studer. On December 1, 2020, Schuyler texted Studer that "It

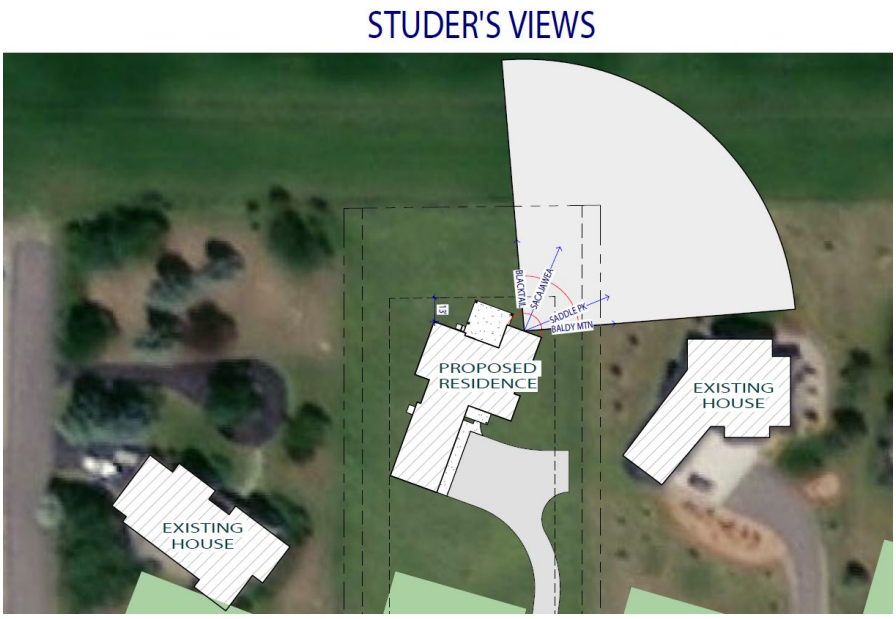
woulda been an easy give to go 30' before we dug… Now 2' is a big of a deal as 30' " (App. 2, Ex. 11, Text (foundation dug)).

According to architect Pierson, by constructing the house in its original location (right up to the north setback line), Studers ended up with a full 180 degree panoramic view of the Bridgers unobstructed by Parsons or Waddells or any other neighbor. Here's an excerpt of one of Pierson's renderings depicting the impact of Parson's house on Studers' views ***if*** Studers' house had been moved 40 feet south:


Waddells' existing house Studers' proposed house Parson's existing house

(Doc. 52, Ex. 8, p.2).

According to this rendering, moving the Studers' house approximately 40 feet to allow for, and block less of Waddells' views of the Bridgers results in the loss of Studers' views of Saddle Peak and Baldy Mountain and only an overall 18% *decrease* in Studers' Bridger views. When Studers built in the original location, they lost none of those views and to this day have a full 180 degree view of the Bridgers:




Instead of considering Waddells' views of the Bridgers and allowing for them on their plans, Studers ultimately chose to build on their original planned location, ensuring that no neighbor blocked *their* views of Blacktail Peak, Sacajawea Peak, Saddle Peak or Baldy Mountain.

**Prior Summer Ridge viewshed disputes.**

The record in this case includes the Board's involvement in three other Summer Ridge viewshed disputes, each occurring before or at the time of this one.

They are the Hulstrand-Miano dispute, the Flagpole dispute, and the Knapic's Garage dispute. The first two had been resolved by the time Studers bought their lot. Miano and the flagpole case were decided in 2017. Knapic's garage was resolved on or before November 9, 2020.

Hulstrand-Miano. Miano located his proposed house on his lot in a way that his neighbor Hulstrand did not like. The Summer Ridge Design Review Committee required that Miano's proposed structure must be located in the "*least possible spot to block views*." (App. 2, Ex. 6). The Board's design review committee investigated and, in the end, found that Miano's house could not be moved from its location on the plans because it was already in the spot that blocked views the least and violated no other covenants. The Board completed its job and fulfilled its duties under the Covenants.

The Flagpole case. Judge John Brown presided over *Summer Ridge Homeowner's Association vs. Bret Walker,* Cause No. DV-15-284. Walker submitted a landscape plan to the Board. It included a 60-foot flagpole. The Board approved the plan. Walker erected the flagpole and began to fly a large American flag. Then, the neighbors complained about the height of the pole and the "giant flag" at the top of it. The Board met with Walker and "*air[ed] his neighbor's concerns about the flagpole, its size* ***and impeding views of the Bridger Mountain****s*." (App. 2 Ex. 7*,* p. 7, emphasis added).

"The HOA's primary complaints about the flagpole are that it impedes certain neighbor's viewsheds and that it is noisy." (*Id.* p. 9).

Walker then offered to reduce the height of the flagpole to 35 feet. The Board sent Walker a notice that he would be required to reduce his flagpole to 24 feet. Litigation ensued. Judge Brown found that the covenants did indeed limit the flagpole to 24 feet but held that the SRHOA's prior approval of his landscape plan, coupled with the Board's failure to respond to Walker's offer to reduce the height of the flagpole, had waived the height restrictions under the covenants, thus estopping the SRHOA from enforcing the 24-foot limit and allowing the 35' flagpole to remain. (*Id*. at 20-22). The result was not in the Board's favor but it acted consistent with its enforcement duties and saw the dispute to a conclusion without abandoning the aggrieved lot owner.

Knapic's garage. Knapic wanted to build a detached garage. It exceeded the specific height-above-grade limit and was the subject of a viewshed complaint lodged by Romeo, Knapic's next-door neighbor. Romeo was specifically complaining about the garage blocking his views of the Bridgers.

The history of Knapic's garage viewshed/height dispute from start to conclusion is described by Dean Parson, DRC member, in his November 9, 2020 email regarding the "Knapic Garage" dispute:

Jerry/Kathy,
I have received an updated submittal package for the proposed new detached garage at the above referenced lot and address.
From the previous submittals, they have moved the structure to be 62 feet south of the north property boundary. The west property boundary remained at 32 feet setback. They had originally proposed a 30 feet setback from the north property boundary. I think they may have moved the structure farther south so ·that the overall height of the building from the average grade would meet the covenant height limitation of 24 feet above grade. Moving the structure farther back on the lot has also helped with the potential impacts to views of the Bridger Mountains from the house on Lot 48 to the west. The location now is in line with conifer trees on Lot 48. Chuck Romeo, the adjacent property owner Lot 48, has agreed not to try to have the Knapics move the garage farther south. I talked to Alex Knapic, and they will keep it where the plans show it.

(App. 2, Ex. 9).

Knapic moved his house downgrade, thus solving the height problem. He moved the location of his garage 32 feet south, solving the viewshed problem to Romeo's satisfaction. The Board did its duty, Knapic did his. Both problems were solved.

## The 20-foot ultimatum.

On **November 12**, The Rabb Law Firm sent a letter to the SRHOA Board President and Phil Merta on behalf of Studers claiming that "the residence can be moved back *no more than 20 feet* from the current location before significant costs related to drainage and grading would come into play." (Emphasis original). They wrote that Studers would agree to move the house 20 feet and submit new plans if SRHOA would pay their thousand dollar re-staking expense and if the SRHOA would "**confirm by no later than November 17, 2020 that, upon submission of revised plans relocating placement of the residence back 20 feet from the prior**

**approved location, the HOA will reissue its approval of the plans without requiring any further changes."** (Emphasis original). (App. 2, Ex. 10, p. 2).

**The Board's reversal of course.** The Board did not accept Studers' demand. Instead, on November 17 it reversed its position; re-approved the Studers' construction, and left the parties to work it out among themselves. (App. 2, Ex. 4). Studers never submitted a new plan or moved the location of their house. It stands today in the originally-planned location.

**Witness Phil Merta.** Mr. Merta was SRHOA Board Secretary and SRHOA member since 2017. (App. 2, Doc. 177, "Merta depo." at p. A-56). He was deposed in July of 2021 (long after the Court had already ruled) and asked about the Board's about-face on the question of the Covenant's enforceability:

> A. You know what? So the board was in the same exact boat that you're talking about here. We originally thought that we could enforce that and that we would enforce that, but as it turns out, upon legal observation and legal advice and then ultimately the summary judgment, we found out that we really couldn't.
>
> **Q. So it was legal advice that prompted you to go for an unenforceability finding by the Court; is that right?**
>
> A. It was one factor.

Merta Depo. p. 184

And,

> **Q. (By Mr. Waddell) There is a method, isn't there, for changing the covenants?**
> A. There is, yes.
> **Q. And there's a vote. It takes a vote, doesn't it?**
>
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>
> A. Yes, it does.

*Id*. at 185-186

## STANDARDS OF REVIEW

**Denial of injunctive relief.** When, as here, the District Court's ruling denying injunctive relief is an erroneous legal conclusion, this Court conducts a *de novo* review. *City of Whitefish v. Bd. of Cnty. Comm'rs of Flathead Cnty*., 2008 MT 436, ¶ 16, 347 Mont. 490, 199 P.3d 201.

**Interpretation of restrictive covenants**. A district court's interpretation of a restrictive covenant is a conclusion of law which this Court reviews *de novo* to determine whether the court's conclusion is correct. *Czajkowski v. Meyers*, 2007 MT 292, ¶ 12, 339 Mont. 503, 172. P.3d 94, citing *Creveling v. Ingold,* 2006 MT 57, ¶ 5, 331 Mont. 322, 132 P.3d 531. *De novo* review is independent review and

does not defer to the district court's rationale or decision. *Planned Parenthood v. State*, 2015 MT 31, ¶ 25, 378 Mont. 151, 342 P.3d 684.

**Summary judgment orders.** Review is *de novo*. *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 51, 345 Mont. 12, 192 P.3d 186, .

**Attorney fee awards.** If this Court reverses the District Court's decision on the merits, Waddells ask this Court to vacate the award of attorney fees and costs to Defendants. If the Court affirms the District Court's decision on the merits, review of both the award and the amount of attorney fees have been presented to this Court for review. The standard of review is for abuse of discretion. *In re Marriage of Cameron,* 2009 MT 302, ¶ 17, 352 Mont. 375, 217 P.3d 78.

## SUMMARY OF ARGUMENT

Views may be ruined by a neighbor's new construction. The Summer Ridge viewshed covenant has been in force since the subdivision was created in 1993. The Summer Ridge Covenants run with the land. Upon purchase of a property in the subdivision the buyer is contractually bound to them. The viewshed covenant's purpose is to protect the views and values of existing homes from unreasonable or intransigent neighbors who refuse to budge an inch. It benefits the subdivision as a whole. Because owners of an existing home cannot move it to protect their views, Montana's maxim of jurisprudence "*[b]etween rights otherwise equal, the earliest*

*is preferred*" is particularly apt and should inform this Court's analysis of the issues. § 1-3-216, MCA.

The District Court should have granted Waddells' request for a TRO. Their verified complaint was uncontradicted and alleged facts sufficient to establish irreparable harm if Studers were allowed to build. There was no legal or factual reason for District Court to deny the TRO.

The District Court's decision to determine the merits of this case at the preliminary injunction stage before the SRHOA had filed a responsive pleading and before any discovery had been done by the parties is a practice that has been condemned many times by this Court. The practice denies due process and is fundamentally unfair.

The District Court erred as a matter of law when it decided that the Summer Ridge viewshed covenant imposes no legal duties on anyone and is without legal significance. The error occurred because the District Court misapplied the statutory and common law rules that guide the interpretation of HOA covenants. It interpreted the viewshed covenant in isolation without considering the context of the protective and value-preserving purposes of the Covenants as a whole and arbitrarily chose certain dictionary definitions of critical words over others without explanation or reason.

The District Court erred when it held that prior documented efforts by the SRHOA to enforce the viewshed covenant and the Declarations of other Summer Ridge homeowners regarding their reasonable expectations with respect to the covenant were not relevant to the court's interpretation.

Proper application of the rules of construction reveals the District Court's numerous errors. Contrary to the District Court's conclusion, and as a matter of both fact and law, adherence to the Summer Ridge covenant is obligatory, not optional. The District Court's Summary Judgments as to all of the Plaintiffs' claims are the product of these same errors of law and should be vacated with instructions to enter judgment in favor of Waddells.

Finally, the District Court erred when it awarded attorney fees without considering that the litigation was necessitated by the unreasonable and arbitrary conduct of the Defendants.

## ARGUMENT

**The District Court erred by denying Waddells' verified petition for a temporary restraining order where the undisputed facts established that Defendant Studers' threat to build their two-story home on the Waddells' neighboring lot was imminent and would block Plaintiffs' Covenant-protected views of the Bridgers, and devalue their property.**

The Waddells advised the District Court in their November 20, 2020 verified complaint that the Studers were threatening to break ground that very day, (Doc. 1, p. 1 and ¶¶ 31, 41, 54). They alleged that Studers' stated intent was to erect a "two-

story home as a permanent fixture to the property, forever blocking Plaintiffs' view, causing permanent injury to Plaintiffs from the resulting devaluation of their home and Plaintiffs' enjoyment of their property." (*Id*. at ¶ 43). They alleged they had no adequate remedy at law (*Id*., ¶ 44) because pecuniary compensation would not afford adequate relief. (*Id*., ¶ 47). A TRO "is intended to preserve the *status quo* until a show cause hearing can be held." *Eliason* v. *Evans,* 178 Mont. 212, 216, 583 P.2d 398,401 (1978). The *status quo* at that time was a vacant lot with orange stakes.

The court was required to accept Waddells' verified allegations as true. *TruTemp Refrigeration & Commercial Climate, LLC v. Mowbray*, 1:23-cv-667-ECM [WO] (M.D. Ala. Nov 17, 2023) (quoting *Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976)).

Just five hours after Waddells filed their Complaint and request for a TRO, the court denied it, finding that it "[did] not set forth a sufficient factual basis for the Court to find that Plaintiffs' [sic] will suffer immediate and irreparable injury if a temporary restraining order is not issued prior to allowing Defendants to be heard in opposition," (App. 1, Doc. 2 at 2). Now greenlighted by the court's denial of the TRO, the Studers started their excavation of their foundation at the original planned location four days before the hearing on the Preliminary Injunction. By

that day they had dug the footings and added structural fill. (12/04/20 Tr. 105, 106; App. 2, Ex. 11 – TEXT (foundation dug)).

The District Court misapprehended the meaning of "immediate harm" and "irreparable injury" and applied that misapprehension of the law to the uncontested facts in the Verified Complaint to arrive at a clearly erroneous legal conclusion. The effects of this first fundamental legal error have rippled through this case.

**The District Court erred by determining ultimate issues of fact at the preliminary injunction stage based on an incomplete factual record and before any discovery had been conducted, denying Waddells due process. The Court compounded its error when it entered summary judgments in favor of both Defendants as to all of Plaintiffs' claims based on the flawed and incomplete findings and conclusions from the Preliminary Injunction proceedings.**

Since the 1979 amendments to Montana's injunction statutes, this Court has been reversing district courts that decide the merits of cases at the TRO or preliminary injunction stages of proceedings.

*Knudson v. McDunn*, 271 Mont. 61, 894 P.2d 295 (1995) involved a dispute over whether the height of a new house violated a restrictive covenant that prohibited "block[ing] the view of the surrounding territory…" *Id.*, 894 P.2d at 296. Knudsen sought a preliminary injunction. At the show cause hearing on the preliminary injunction, the district court denied the injunction, decided the merits of the case, and awarded attorney fees to McDunn. This is exactly what the Court did here. This Court held that the district court should have determined the merits

at a trial after responsive pleadings had been filed and after allowing "full discovery by the parties." *Knudson*, 271 Mont. at 65, 894 P.2d, 296 -298. This Court reversed the judgment and the award of attorney fees and remanded for further proceedings.

The December 4, 2020 show cause hearing in this case was held 14 days after Waddells filed suit. The December 31 Order was based on the December 4 record. No discovery had been done by those dates. Neither Defendant had filed a responsive pleading before the hearing. Studers filed their responsive pleading on December 30, 2020. (Doc. 22). Summer Ridge did not file its responsive pleading until February 24, 2021. (Doc. 36).

Waddells set forth sufficient facts in their Verified Complaint to warrant the granting of a TRO before construction had even started. They showed at least enough to warrant the preliminary injunction before Studers' foundation had been poured and the location of the structure and its impact on Waddells' views literally cast in concrete.

In *Fox Farm Estates Landowners Ass'n v. Kreisch,* 285 Mont. 264 , 947 P.2d 79 (1997), this Court held that at the injunctive relief stage, "the court should decide merely whether a sufficient case has been made out to warrant the preservation of the property or rights in *status quo* until trial, without expressing a final opinion as to such rights. An applicant need not make out such a case as

would entitle him to final judgment on the merits." *Fox Farm* at 82. This District court exceeded its authority when it found against Waddells on the merits of their claim at the preliminary injunction stage of these proceedings and before any discovery had been done.

*Yockey vs. Kearns Properties, LLC,* 2005 MT 27, 327 Mont. 28, 106 P.3d 1185, was a boundary/easement dispute as well as a covenant violation case. "The limited function of a preliminary injunction is to preserve the *status quo* until trial…*and nothing more*." *Yockey* at ¶¶18, 20 (emphasis added). The district court was reversed and the case remanded. *Id*., ¶ 20. This district court likewise exceeded its duties by ruling on the merits of this dispute at this early stage before discovery had even begun.

In *City of Whitefish v. Bd. of County Com'Rs*, 2008 MT 436, 347 Mont. 490, 199 P.3d 201, this Court again emphasized the line of cases that condemn merits decisions at the TRO and preliminary injunction stages of any proceeding. *Id*., ¶18.

When the District Court entered its findings of fact and conclusions of law on December 31, not only did it dispose of the merits of Waddells' claim, but by denying injunctive relief, it *increased* the potential harm to both parties. Moving the house 30 or 40 or any number of feet *on the plans* before construction begins is

much cheaper than moving it after construction has begun and much cheaper than a damage lawsuit.

Waddells were eventually allowed to conduct some discovery long after the December 31 decision on the merits. But the District Court ruled that the discovery had not changed "the core facts" and that the court had "…*already interpreted the Covenants through its prior Order on Plaintiffs' Motion for Preliminary Injunction,…*" (App. 1, Doc. 184 at 9; Doc. 231, p. 14) (emphasis added).

By the time of the December 4, 2020 hearing, it had been established law for 40 years that preliminary injunctive proceedings are not an appropriate vehicle for determining the merits of a case. There was no reason for Waddells to suspect that the District Court would ignore 40 years of established precedent or this Court's admonishments. The abbreviated and summary procedure was a surprise, unfair, and a denial of both substantive and procedural due process.

**The District Court erred by interpreting the restrictive viewshed covenant in isolation and without considering the stated purpose of the Covenants as a whole and by misapplying the Montana rules of contract interpretation and this Court's opinions to grant final summary judgments in favor of Studers and the Summer Ridge Homeowner's Association as to all of Plaintiffs claims.**

The viewshed covenant requires that proposed construction "should take into consideration neighboring dwellings, ***with allowance for views*** and solar gains." (App. 2, Ex. 1, p. 7, Facts, *supra*, p.6, emphasis added). It requires that "approval

of size and height shall take into consideration…***blocking views*** and solar effects of existing dwellings." (*Id*., p. 10, Facts, *supra*, p. 6, emphasis added).

**The Purpose of the Covenants.**

The purpose of the Covenants is to *"maintain[ ] a uniform and stable value, character, architectural design, use, and development of the premises,…*" (*Id*., p. 1, Recitals, emphasis added). To advance these purposes, the Covenants require that all building plans must be submitted for approval to the SRHOA Design Review Committee before any construction may begin. (*Id*., Art. IV, Sec. 1, p. 4).

**The Rules of covenant interpretation**.

The District Court's decision on the merits at the preliminary injunction phase of this case ignored or violated some of the basic rules of construction that apply to the interpretation of restrictive covenants. Some of those rules are:

- The same rules that apply to the construction of contracts apply to the construction of restrictive covenants.[1]

- There is implied in every contract an obligation of good faith and fair dealing which requires that neither party do anything unreasonable which deprives the other of the benefits of the contract."[2]

[1] *Milltown Addition Homeowner's Ass'n v. Geery*, 2000 MT 341, ¶ 11, 303 Mont. 195, 15 P.3d 458.
[2] MPI 2d 13.18, citing *Story vs. City of Bozeman*, 242 Mont. 436, 791 P. 2d 767 (1990).

- Words of a contract should be interpreted in their ordinary and popular sense rather than according to their strict legal meaning.[3]
- Covenants should be read as a whole in order to ascertain their meaning and purpose, rather than reading any one covenant or part of a covenant in isolation.[4]
- Particular clauses of a contract are subordinate to its general intent.[5]
- Courts should consider the whole of a contract together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other.[6]
- Restrictive covenants should be construed so as to allow free use of property while balancing the rights of other owners.[7]

In arriving at its December 31, 2020 merits decision, the District Court violated a fundamental Montana rule of restrictive covenant interpretation which requires district courts to read restrictive covenants together "each clause helping to interpret the others,' where '[p]articular clauses of the agreement are subordinate to the general intent of the contract.' " *Lewis & Clark Cnty. v. Wirth*, 2022 MT 105, ¶ 16, citing §§ 28-3-202 and 307 MCA. Here, the District Court

[3] § 28-3-501, MCA.
[4] *Gosnay v. Big Sky Owners Ass'n*, 205 Mont. 221 at 227, 666 P.2d 1247 at 1250, (1983); *Grassy Mountain Ranch Owners Assn. v. Gagnon*, 2004 MT 245, ¶¶10-13, 323 Mont. 19, 98 P.3d 307; *Bordas v. Virginia City Ranches Assoc.,* 2004 MT 342, ¶ 24, 324 Mont. 263,102 P.3d 1219; *Milltown Add. Homeowner's Ass'n v. Geery,* 2000 MT 341 ¶11, 303 Mont. 195, 15 P.3d 458, .
[5] § 28-3-307, MCA.
[6] § 28-3-202, MCA.
[7] *Toavs v. Sayre*, 281 Mont. 243, 934 P.2d 165, 166-67 (1997).

interpreted the words of the viewshed covenant in the isolated context of a single sentence, rather than in the context of Covenants and their purposes as a whole. (*See*, App. 1, Doc. 23, p. 8). This is precisely the same reversible error committed by the district court in *Wirth*.

The District Court held that "*the issue here revolves around the interpretation of the terms 'should,' 'shall,' and 'consider*.'" (App. 1, Doc. 23, pp. 7-8). But the District Court's methodology for analyzing these words and their definitions is questionable. After consulting the Merriam-Webster definitions of the word "should" the Court held that "*'Should' is not 'shall' or 'must'…"* (App. 1, Doc. 23, p. 8). But according to Merriam-Webster, "should *is* the past tense of shall."[8] Merriam-Webster provides five principal usages of the word "Should."[9] Depending on the context, "should" may be obligatory, or it may be discretionary. The District Court arbitrarily chose a discretionary usage when it held that "***[i]n this context**, 'should' is used to express **propriety** of doing so, but it does not create an **obligation** to do so*." (App. 1, Doc. 23, pg. 8, emphasis added). The Court cites no authority and provides no reasoning for why it limited the term's context to "*the sentence*" rather than the Covenants as a whole. (Id.). The Court's

[8] "Should." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/should. Accessed 22 Dec. 2024.
[9] *Id*.

interpretation is *ipse dixit* and its errors are the direct result of not considering the Covenant's whole context and purpose.

When the District Court analyzed the term "consider" it did not examine the term in its proper context which is to "*take into consideration neighboring dwellings, **with allowance for views**,"* and "***blocking views.**"* Instead, it applied the same superficial and legally flawed analysis to "consider" as it did to "should."

The Court violated more rules of covenant construction when it held that the Covenants do not require consideration or allowance for views "*above and beyond the size, height, and set back requirements*." (App. 1, Doc. 23, p. 10). In addition to these requirements, the Siting requirements of the Covenants require consideration of "location" and "placement." (App. 2, Ex. 1 Covenants, Site, p. 7). The Court omits these important terms. As the history of viewshed disputes in Summer Ridge demonstrates, location or placement of structures has been both the problem and the solution of those Summer Ridge viewshed disputes. When interpreting covenants, "the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." *Creveling v. Ingold,* 2006 MT 57, 331 Mont. 322, 132 P.3d 531. This error also violates the rule that requires avoiding voidness (§ 1-3-232, MCA) and the rule that requires the judge to construe contracts in a way that gives meaning to each provision. (§ 1-4-101, MCA).

The District Court's misapplication of these rules rendered the viewshed covenant meaningless, inoperative, void, superfluous and thus contrary to Montana legal principles.

The context rule of construction also requires consideration of the stated purpose of the covenants. *Czajkowski* at ¶ 22. Here, the stated purpose of the SRHOA Covenants is preservation of "…*a uniform and stable value, character, architectural design, use, and development of the premises…*" ***This*** is the proper context of the words of the viewshed covenant. This stated purpose warrants the conclusion that the viewshed covenant expresses the need for action – not mere contemplation – when considering and allowing for one's neighbors' views when locating new construction. Attempting to understand the viewshed covenant without considering the purposes of the Covenants as a whole has led the linguistic analysis astray, placing the District Court into error.

The District Court concluded that the viewshed covenants required the Studers and the SRHOA to do nothing more than to contemplate in some abstract manner the Waddell's concerns that a two-story house, located as far north toward the Bridgers as possible, would take more of their view than is necessary, fair or **reasonable**.[10] According to the District Court, all one must do is think about it for

[10] Covenant of good faith and fair dealing requires reasonableness.

a bit and if you then decide - like Studers - not to budge an inch, you will have violated no rule. This is wrong and is an error of law.

**The District Court did not balance the rights of the parties** before ruling in favor of Studers. In the context of restrictive covenants, the law requires a balancing of the respective property interests of both owners. *Toavs,* 934 P.2d at 166-67. The District Court's interpretation of the SRHOA's viewshed covenant does not balance the respective interests of both property owners in this case. Both paid a premium for a spectacular view of the Bridgers and the surrounding valley. Both purchased with the understanding that they and their respective properties are both burdened and protected by the SRHOA Covenants and the Board's obligations to enforce them. Both bought with knowledge (or are charged with knowledge) that the viewshed covenant had been enforced by SRHOA in the past. In these ways their interests are similar, though at odds. But here is where their interests diverge: Waddells cannot move their point of view; Studers can. After the Board restored Studers' permit to build and then turned tail and ran, Studers alone held the power to effect a reasonable resolution of this dispute. Only Studers *could* move their house. *Between rights otherwise equal, the earliest is preferred*. § 1-3-216, MCA. The Montana maxim of jurisprudence that recognizes "first in time, first in right" actually matters here. Waddells were here first. Established homeowners cannot move; newcomers can. Studers refused. They were

unreasonable. They violated the viewshed covenant and the covenant of good faith and fair dealing.

In further error, the District Court does not consider the role of the Covenants' term requiring that building plans must take into consideration and "*make allowance for*" the views and solar gains of neighbors. In the context of the Covenants as a whole and in light of their purposes, "allow for" contemplates the taking of some action such as "considering the impact of my house plans on my neighbor's views and making allowance for them when I re-draw my plans." How did the Studers "allow for" Waddells' views by not moving a single inch?

The command that property owners and the SRHOA should consider and make allowance for neighbors' views when proposing or approving view-blocking structures must be understood in the context of the express purposes of the Covenants. A court "must read the document as a whole in order to ascertain its meaning, rather than reading any one part in isolation." *Milltown Add. Homeowner's Assn*, citing *Hillcrest Homeowners Ass'n v. Wiley*, 239 Mont. 54 at 56, 778 P.2d 421 at 423 (Mont. 1989). These cases say that the SRHOA viewshed covenant must be read and interpreted in the context of the Covenants' purpose of maintaining a uniform and **stable value**, **character**, architectural design, use, and development of the premises, and all improvements placed or erected thereon. (App. 2, Ex. 1, RECITALS, p. 1, emphasis added).

The District Court erred when it analyzed the viewshed covenant in isolation, untethered to the Covenants' overall purpose. Considering the viewshed covenant in the isolation of just part of one sentence is reversible error, because here it led to the wrong analysis and the wrong legal conclusion.

When the rules of contractual construction are properly applied, the viewshed covenant is unambiguously *obligatory*, not merely discretionary. It is not, as the District Court thought, simply a friendly reproof to "be good neighbors" (App. 1, Doc. 23, pp. 8-9) with no actual consequences if one chooses instead to be unreasonable and, like Studers, not budge an inch.

When construed in accordance with accepted legal rules of construction correctly applied the Covenants and their purpose compel the conclusion that the viewshed covenant is obligatory and requires reasonable allowance for the views of one's neighbors when in the planning stage and before the threat of harm becomes a claim for actual damages.[11] Studers violated the viewshed covenants by refusing to move their structure a single inch when they themselves acknowledged they could have moved up to 40 feet without significant expense. (*E.g.*, Facts, *supra*, at 18).

[11] The Covenants expressly permit an owner to pursue both equitable relief and a claim for damages against anyone "violating or attempting to violate any covenant." (App. 2. Ex. 1. pp. 16-17).

Studers violated the Covenants and the SRHOA's reasonable requests to put the Waddells on their site plan in order to allow everyone the opportunity to assess the impact of Studers' construction on Waddells' views. The SRHOA violated its obligations under the Covenants when it capriciously ceased its enforcement efforts and re-authorized the building of the very structure in the very same location that it had previously halted because it violated the viewshed covenants.

A four-corners analysis of the Covenants compels the conclusion that the District Court was simply wrong when it held at the preliminary injunction stage:

> Accordingly, the Court concludes that neither the Studers nor the Association have breached a duty or obligation within the Covenants with regard to the Studers' building plans, or deprived Plaintiffs of any expected benefits under the same. As a result, the Court further concludes that Plaintiffs have not established they are entitled to the [injunctive] relief demanded or that the planned actions of the Defendants will violate Plaintiffs' rights. (App. 1, Doc. 23, p. 10, emphasis added).

The District Court's holding defies common sense. What real estate developer or subdivider would charge a premium for a lot with stunning views of the Bridgers and offer an *intentionally* meaningless viewshed covenant to purchasers willing to pay a big premium for the stunning views? What purchaser would pay premium dollars for a view-lot knowing that the viewshed covenant is just window-dressing and would offer no protection whatsoever against a newcomer who might have no respect for the prior rights of existing neighbors?

We could end our arguments here. But there is more compelling evidence that the District Court's interpretation of the viewshed covenant is simply wrong.

**The SRHOA knows the covenant is enforceable.**

Since at least 2017, Summer Ridge HOA and its Design Review Committee have understood that the viewshed covenants impose affirmative obligations upon the HOA and its members. Since then, the enforcement actions of the Board and the DRC in this dispute; the Hulstrand-Miano dispute; the Flagpole dispute; and the Knapic's Garage dispute, have been entirely consistent with the understanding that the Summer Ridge viewshed covenants require lot owners to take into consideration and allow for the views of existing neighbors when locating new construction.

When Summer Ridge HOA filed its Proposed Conclusions of Law and Findings of Fact on December 21, 2020, its lawyer took a legal position contrary to SRHOA's own historical interpretation of the viewshed covenants. (*E.g.*, Doc. 19, p. 3, ¶ 19, p. 5, ¶ 9). This was the first time that it had ever been suggested to the Waddells that the viewshed covenant was a toothless, unenforceable plea.

The SRHOA has never adequately explained its sudden about face regarding the enforceability of the covenants. According to SRHOA's counsel, after having found that the Studers' plans violated the viewshed covenant because they failed to consider and allow for Waddells' views, the Board suddenly decided that it no

longer wanted to take part in a dispute between the parties and that Studers' plans "generally complied with the requirements contained in the covenants":

> 22. Rather than take part in a dispute between the parties, the Association determined that the plans as submitted generally complied with the requirements contained within the Covenants and reinstated the approval for the Studer plans. Compl., Ex. 2 (Nov. 17, 2020 email).

(Doc. 19, p. 4, ¶ 22, HOA's 12/21/20 Proposed findings).

**The 20 foot ultimatum.** We expect that both Defendants will attempt in their briefing to make much of this ultimatum, which they prefer to describe as an "offer." On November 1, the Board gave Studers 15 days to submit a new site plan depicting both Waddells home to the west and Parson's to the east. On November 12, 2020, Studers' lawyers sent SRHOA and Phil Merta a letter couched as "an offer of compromise". It is in reality an ultimatum directed at the SRHOA and Phil Merta. It was a take-it-or-leave-it demand made directly to the SRHOA but not Plaintiffs, that Studers would move the building site *"no more than 20 feet"* – supposedly the "maximum extent feasible" according to their builder – if the HOA would by November 17, agree to pay Studers' thousand dollar re-staking fee and re-issue approval of the plans "*without requiring further changes"* by November 17. (App. 2, Ex. 10, Rabb Firm Nov. 12 ltr.). On November 17, without notice to Waddells, the SRHOA withdrew its request for new plans; reinstated Studers' permit to build and abandoned the Waddells to their own resources. (App. 2, Ex. 4). The question is why did they abandon the Waddells and hand the Studers the

shovel? Board member Phil Merta explained at his deposition that counsel for the SRHOA had advised them the covenant is unenforceable. *See* Facts, supra at pp. 22-23.

Had the SRHOA and its DRC *really* believed the viewshed covenants were toothless suggestions or mere gentle admonitions, there would never have been an effort by the SRHOA to enforce the viewshed covenants in *this* case or the three prior Summer Ridge viewshed controversies known to this record.

**The reasonable expectations of other homeowners in Summer Ridge subdivision are relevant to the intent of the covenant.**

The District Court was offered four declarations of other Summer Ridge homeowners who explained why they *know* that the viewshed covenants confer a protected right. They are in Appendix 2 at Exhibit 5. Each was a homeowner in the subdivision at the time they gave their evidence. Each described the role the viewshed covenant played in their purchase of their lot or home. Each described their expectation that the Homeowner's Association would protect their views from unreasonable blocking by neighbors planning new construction.

From the moment of the purchase of their lot in 2018, Studers became personally, contractually bound by the Covenants that run with land they bought. (App. 2, Ex. 1, Art. I, Sec. 1, 2, p. 1; Art. II, Sec. 1 Membership, p. 2). **This** is the relevant contract at issue in this case. When Studers bought their lot, it was common knowledge that the HOA would enforce and had enforced the viewshed

covenant on other occasions. The understandings of these four homeowners are relevant and completely consistent with every other bit of evidence in this case. The District Court's refusal to consider this evidence is another error of law.

The District Court erred when it granted attorney fees in the amount of $417,000 without considering the actions of the Studers and the actions of the SRHOA and its attorneys that precipitated and necessitated this litigation.

The District Court abused its discretion by refusing to consider Defendants' bad acts to disallow or reduce their allowed attorney fees. (*See* App. 1, Doc. 360, p. 4). The Summer Ridge Board threw the Waddells under the bus when they unceremoniously and in apparent response to an ultimatum from Studers' lawyers, reissued the suspended permit, stopped all enforcement activity and ran away. Waddells' reasonable expectations that the SRHOA would enforce the covenants was based on their experiences living there for the last 20 years.

The District Court's decision has literally rewarded what can only be described as bad faith behavior on the part of these defendants with an attorney fee award of over $400,000, all because Waddells tried to stand up for a well-established and valuable contract right that they had every right to seek to enforce.

## CONCLUSION

A district court judge has no special knowledge or understanding of these covenants that is superior or even equal to the knowledge of those who live there; who paid premium dollars for their views; who bought their property subject to the

covenants and in reliance on the protections they promise to provide; who pay HOA dues, and go to annual meetings of the HOA. When the District Court refused to consider the evidence from six residents of the subdivision and when it held that the evidence of prior enforcements of the viewshed covenant were not relevant to the court's interpretation of the covenants, it was error.

It was another significant legal error for the District Court not to consider the history of the SRHOA's prior viewshed enforcements which are relevant to prove that the Summer Ridge Covenants and its viewshed provisions are contractual rights that are enforceable and which contain the implied obligation that neither party do anything unreasonable which deprives the other of the benefits of the contract. *Story v. City of Bozeman*, 242 Mont. 436, 791 P. 2d 767 (1990).

Until the District Court denied Waddells' TRO and the SRHOA quit the game, all parties in this matter conducted themselves in a manner which demonstrates understanding and knowledge of the enforceability of the viewshed covenants. When the District Court denied Waddells' TRO, it greenlighted the Studers' construction which immediately commenced on the same location that had caused the Waddells' original concerns. Studers didn't move an inch even after "offering" to move 20 feet. What they did not tell the District Court at the December 4 hearing is they could have moved 40 feet without encountering set-

back or drainfield issues. Yet they now claim they "considered" and "allowed for" the Waddells views when locating their house and acted at all times in good faith.

**Relief Requested.**

Waddells ask this Court to reverse the entire judgement of the District Court, including the award of attorney fees to Defendants. They ask that this Court award them attorney fees and cost for this appeal. This Court has the power to remand the case to the District Court with instructions to enter judgment in Waddells' favor. *Jarrett v. Valley Park, Inc.,* 277 Mont. 333, 346, 922 P.2d 485 (1996). Waddells ask that the Court remand the case with those instructions and for a trial on damages and an award of prevailing-party attorney fees and costs.

Dated this 8th day of January, 2025.

By: /s/ Michael G. Eiselein
Michael G. Eiselein
Attorney for Appellants

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rules 11 and 16 of the Montana Rules of Appellate Procedure, I certify that this brief is displayed with a proportionately spaced typeface of 14 points; is double spaced (except that footnotes and quoted and indented material is single spaced); with left, right, top and bottom margins of not less than one inch; and that the word count calculated by Microsoft Word is 9954 words including 436 pdf words, textboxes, footnotes, and endnotes. Excluded from the count are the Caption, Table of Contents, Table of Authorities and this Certificate of Compliance.

By: /s/ Michael G. Eiselein

**DA 24-0632**

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

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RUSSELL WADDELL AND CASEY MAGAN,

Appellants and Plaintiffs,

v.

PAUL STUDER AND RACHAEL STUDER, AND
THE SUMMER RIDGE HOMEOWNERS ASSOCIATION,
A MONTANA NON-PROFIT CORPORATION,

Appellees and Defendants.

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On Appeal from the Eighteenth Judicial District Court,
Gallatin County, Montana
Cause No. DV-16-2020-1267A
Honorable Peter B. Ohman

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# Appellants' APPENDIX 1

## (RELEVANT JUDGMENT AND ORDERS)

[Bookmarked]

DA 24-0632
Waddell and Magan v. Studers and Summer Ridge HOA
APPENDIX 1
TABLE OF CONTENTS

## CERTIFICATE OF SERVICE

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