IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 24-0632

RUSSELL WADDELL and CASEY MAGAN,

Plaintiffs/Appellants,

v.

PAUL STUDER, RACHAEL STUDER, and the SUMMER RIDGE HOMEOWNERS' ASSOCIATION, a Montana non-profit corporation,

Defendants/Appellees.

APPELLEE SUMMER RIDGE HOMEOWNERS' ASSOCIATION'S ANSWER BRIEF

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

Honorable Judge Peter Ohman

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STATEMENT OF THE ISSUES

II. Whether this Court should dismiss for lack of jurisdiction Appellants Russell Waddell's and Casey Magan's ("Waddells") appeal of the trial court's interlocutory orders, denying their requests for a temporary restraining order and preliminary injunction?

Suggested Answer: *Yes*

II. Whether the District Court properly granted summary judgment to Appellee Summer Ridge Homeowners' Association ("SRHOA") and Appellees Paul and Rachael Studer ("Studers") where:

(1) the plain language of the restrictive covenants required only that the Studers "consider" the impact of their proposed construction on the Waddells' views; and

(2) the uncontroverted evidence established that the Studers considered the impact of their proposed construction on the Waddells' views.

Suggested Answer: *Yes*

III. Whether the District Court erred by awarding attorney's fees to SRHOA where the plain language of the covenants provided that the prevailing party was entitled to recover attorneys' fees.

Suggested Answer: *No*

STATEMENT OF THE CASE

This case revolves around the interpretation of the placement provisions of SRHOA Covenants. The Waddells contend they have a right to a viewshed across the neighboring Studers' lot to view the Bridger Mountains. The Waddells made no claims within any iteration of their Complaint, and there is no evidence on the record, to suggest the Studers' home is too tall, too big, or violated the setbacks. App. A, Supp. Compl.; App. B:13, Or. Granting SRHOA Motions; App. C, Or. Denying Rev. to Prelim. Inj. Denial. The Waddells merely asked for an Order from the District Court requiring the Studers to move their home. App. A, ¶¶ 2-3; App. B-9.

Thus, the only applicable provision of the Covenants is the placement provision which states:

> Placement should take into consideration the location of roads and neighboring dwellings, with allowance for views and solar gains.

App. B:12 (citation omitted); App. D:9, Covenants, Art. V, Site, Sec. 2. This language is plain, unambiguous, and confers no right to a viewshed or viewshed easement across the Studers' lot. App. B-11-16.

The District Court was clear on its interpretation of the Covenants from the beginning. The District Court denied the Waddells' request for a temporary restraining order on the basis they failed to show immediate or irreparable harm. App. E:2, Or. Denying Pls.' Mot. for TRO. No appeal lies from that Order. *Labbitt v. Bunston*, 80 Mont. 293, 260 P. 727 (1927).

The District Court thereafter properly denied the Waddells' request for preliminary injunction on the basis the Covenants do not contain a viewshed easement or obligation on the part of the Studers or SRHOA to protect the Waddells' views with respect to placement of the Studer home. App. F:9-10, Or. Denying Pls.' Mot. for Prelim. Inj. Because the Waddells failed to appeal the Court's Order within 30 days of receiving the Notice of Entry on January 8, 2021, the Waddells waived their right to appeal. App. G, Not. of Entry of Or.; Mont. R. App. P. 6(3)(e); *see also Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, 366 Mont. 224, 286 P.3d 1161; *Caldwell v. Sabo*, 2013 MT 240, 371 Mont. 328, 308 P.3d 81. This is because, as made clear by the Ninth Circuit, "[a] preliminary injunction imposed according to the procedures outlined in Federal Rule of Civil Procedure 65 dissolves *ipso facto* when a final judgment is entered in the cause." *U.S. Phillips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1093; *see also Planned Parenthood of Mont. v. State by and through Knudsen*, 2024 MT 227, ¶ 16, 418 Mont. 226, 557 P.3d 471.

The District Court properly excluded declarations of other homeowners, and the Waddells, seeking to alter the plain and unambiguous meaning of the Covenants. Through those declarations, the Waddells claimed they had a "reasonable expectation" the Covenants protected their views. Opening Br., P. 26. The District Court properly excluded the Declarations on the basis that neither the Waddells nor the other homeowners were original parties and therefore could not opine on the

intent of the Covenants. *Mary J. Baker Revocable Trust v. Cenex Harvest*, 2007 MT 159, ¶ 18, 338 Mont. 41, 164 P.3d 851. Montana law is clear that the reasonable expectations doctrine is an insurance-specific doctrine, and even where used in *Craig Tracts,* the Waddells' argument fails because reasonable expectations, as applied in *Craig Tracts*, favors the Studers' free use of the property. *Craig Tracts Homeowners' Ass'n, Inc. v. Brown Drake, LLC*, 2020 MT 305, 402 Mont. 223, 477 P.3d 283.

Finally, the Waddells failed to preserve any argument related to whether SRHOA is entitled to its fees as a matter of law. The Waddells aver the HOA Board abandoned them and are therefore not entitled to fees. The undersigned is unaware of case law in Montana which would support this contention, and the undisputed facts demonstrate SRHOA did anything but abandon the Waddells. The Covenants clearly provide the prevailing party with a right to attorney's fees. App. D:18, Art. VII, Sec. 2. Because SRHOA was successful on all claims, the District Court's conclusion SRHOA is entitled to its attorney's fees is correct and should be affirmed. App. H, Or. Re Defs.' Claim for Attorneys' Fees.

STATEMENT OF THE FACTS

In 2004, the Waddells became the owners of Lot 7 in the Summer Ridge Subdivision ("Waddells' Property"). Opening Br., P. 9. The home located on Waddells' Property was constructed in 1994. App. I:3, Am. Compl., ¶ 12. In 2018,

the Studers purchased Lot 6 in the Summer Ridge Subdivision ("Studer Property"). Opening Br., P. 9. The Studer Property is immediately east of Waddells' Property. *Id.*, P. 10.

The Summer Ridge Subdivision is subject to a Declaration of Protective Covenants and Restrictions ("Covenants") recorded on December 9, 1993. App. D:1. Under the Covenants, "Member" is defined as "any person or entity owning or purchasing a Lot in Summer Ridge Subdivision.". App. D:3, Art. I, Sec. 2. "Each lot owner shall be a member of the Association and agrees to abide by and be bound by these Covenants ...". *Id.* Thus, all property owners in Summer Ridge Subdivision are members of the SRHOA and, as such, obligated to comply with and agree to be bound by the Covenants.

The Design Review Committee ("DRC") is appointed by the Association's Board of Directors to review building plans and enforce the building restrictions as follows:

> No residential or other structure and no fence, wall, garage, outbuilding, or other structure or landscape shall be made, erected, altered, placed, or permitted to remain upon a Lot until the plans and specifications showing the design, nature, kind, size, shape, height, material, use, and location of the same shall have been submitted to a Design Review Committee consisting of three Members appointed by the Board of Directors of the Homeowners' Association and approval in writing by the Committee as to compliance with the Covenants. The plans submitted shall include such detail and information as the Committee shall reasonably set forth herein, all as more particularly set forth hereinbelow.

App. D:5, Art. IV, Sec. 1.

With regard to plans submitted to SRHOA, "[p]lacement should take into consideration the location of roads and neighboring dwellings, with allowance for views and solar gains." App. D:9, Art. V, Site, Sec. 2; App. F:3; App. J:3, Or. Re Studer Mot. for Summ. J.

The Covenant setback requirements are as follows:

> Front Setback. On Lots of one (1) acre or more, a minimum of fifty (50) feet is required from the roadway easement line (as noted on the recorded plat) to the nearest structural projections, but not including eaves, overhangs, or plantings of any structure. Additional setbacks shall be as designated on the subdivision plat.
> …
> Side Setback. At least thirty (30) feet is required from the side property lines to the building line of any structure, except where the lot frontage boundary line does not exceed one hundred fifty (150) feet. In such event, at least twenty-five (25) feet is required from the side property lines to the building line of any structure.
> Rear Setback. At least fifty (50) feet is required from the rear property line to the building line of any structure.

App. D:9, Art. V, Site, Sec. 1; App. F:3.

Under Architecture, the Building Size and Height requirements state, in relevant part:

> Approval of size and height shall take into consideration unusual designs, blocking views, and solar effects of existing dwellings.
> However, no building for residential use shall exceed thirty-five (35) feet to the top line of the roof joint from an average grade at side elevation. All other structures on the lot may not exceed a height of twenty-four (24) feet to the top line of the roof joint from the average grade to the side elevation.

App. D:12, Art. V, Architecture, Sec. 2; App. F:3.

The Studers submitted plans for the building of their home to the DRC on or about September 30, 2020. App. F:4. Appellant Casey Magan reviewed the Studers' plans with Dean Parson and did not lodge a formal objection. Tr. Proceedings, 57:4-6, Dec. 4, 2020.

The Waddells' residence is the only property situated on the southern portion of the lot. App. B:24. Prior to seeking approval from SRHOA for construction of their residence, the Studers observed and considered that "[t]he majority of the Plaintiffs windows are located on the southern side of the Plaintiffs' residence facing the southern views of the Spanish Peaks and the Gallatin Mountain Range, not the Bridger Mountains." App. F:4.

On October 7, 2020, the Association approved the Studers' proposed plans to construct their residence on the northern portion of the Studer Property. App. F:4; App. J:3.

On October 15, 2020 the Studers submitted revised plans for Association review and approval, which reduced the square footage of their proposed residence. App. F:4; App. J:3-4. These resubmitted plans were approved by the Association on October 15, 2020. App. F:4; App. J:4.

On October 21, 2020, the Waddells sent an email to Dean Parson, Chair of the Design Review Committee, among others, including members of the HOA Board

and Design Review Committee. App. K:1-2, Email from Waddells to SRHOA. That email detailed the Waddells concerns regarding the placement of the proposed structure obstructing their views through their north facing windows. App. K:1-2.

On Sunday, October 25, 2020, Dean Parson sent a detailed email stating:

> Based on your email below submitted to the Architectural Committee and a portion of the HOA board and talking to Casey on Wednesday 10/21/2020, I reached out to Paul Studer by telephone on Wednesday 10/21/2020 to discuss your comments/concerns regarding where the future house on Lot 6 was staked out on Tuesday 10/20/2020. I discussed your concerns with the future visual impacts to your view of the Bridger Mountains when the house is constructed. Paul and I discussed your request to move the house farther south on the lot. I told him that the Architectural Committee supported asking the Studers about your request to move the house farther south on the lot.
>
> Paul and I also talked about the approval letter for construction of the house on Lot 6 that was originally issued on October 7, 2020. A 2nd approval letter was issued on October 15, 2020 based on revised plans submitted removing a 1st floor bedroom on the east side of the house. Paul told me in our telephone conversation that he would discuss with his wife Rachel, the architect and the builder your request and the potential impacts to their plans.
>
> On Saturday 10/24/2020, I called Paul and left him a voicemail to see if they had made a decision on your request to move the house farther south on the lot. He called later the same day and left me a voicemail that he and Rachel had made the decision to move forward with the present plans which do not locate the house farther south on the lot.
> The Summer Ridge covenants do not provide for the Architectural Committee to rescind an approval letter for construction on a lot that has been issued. I discussed this with a member of the Architectural Committee and President of the HOA, and they agreed the approval letter issued could not be rescinded..

App. K:1, Email from Dean Parson to Waddells.

On October 26, 2020, the Waddells sent a letter via email to the SRHOA Board and DRC detailing their concerns over the location of the proposed Studer structure along with pictures. App. L, Letter from Waddells to SRHOA.

On October 30, 2020, the Studers received a letter from SRHOA stating it rescinded prior approval to further consider the concerns raised by the Waddells. App. F:4; App. J:4.

On or about November 12, 2020, SRHOA received a letter from the Studers' counsel, offering to move the proposed location of the Studer residence by 20 feet in exchange for SRHOA paying the re-staking fee. App. F:5; App. J:4.

Although SRHOA was agreeable with this proposal, it is undisputed that the Waddells rejected that offer. App. F:5; App. J:4. Based on this offer, and Paul Studer's testimony, the Court found that, prior to beginning the construction of their residence, the Studers considered the views of neighboring properties, including the Waddells'. App. F:5; App. J:9.

On November 17, 2020, the Studers received an email communication from the SRHOA, advising that the SRHOA was no longer rescinding the prior approval and the Studers were once again approved to move forward with construction of their residence on the northern boundary of the lot per the Association's previous approval. App. F:6; App. J:4.

Phil Merta testified as to the actions taken by SRHOA after the Waddells objected to the Studers' building plans:

> THE WITNESS: Okay. So let me - so the design review committee went through their entire review process and ultimately approved the building plan, and at that point - at that point, then the board was contacted by Mrs. Magan, and that's when we consulted with the design review committee about the entire plan and the Studer construction plan, et cetera.

App. M:7, 24:18-24, Dep. Phil Merta, July 14, 2021.

> Q. Okay. So you tell me, what is our complaint to you, to the HOA?
>
> A. Okay. So your complaint is about the placement of the Studer house and how it relates to your house, and that basically speaks primarily to what your view of the Bridgers - the Bridger range is in that direction.
>
> Q. Right. But you didn't go up there and actually look at the problem from the front. You looked at it from the street, correct? That's the back of it.
>
> A. Yes. And I did actually look at it from the Studer lot when this first occurred, but not - not directly at your house, but it's pretty clear to see what you're talking about.
>
> A. So, you know, after very serious consideration, the board considered all of these issues, and we did take into consideration what the covenants allow us to do, and we know that we took into consideration the effect of the views on your house.

App. M:9, 30:10-24; 32:2-7.

> Q. …Yeah. The classic definition is - and when you apply it to viewshed it's what you can see, the area of what you can see, correct?
>
> A. Yes, that would be correct. The big question is what does that particular passage mean in our covenants when it says, "shall take into consideration." We know that it was taken into

consideration as discussed with the architectural design committee. And what we concluded was it was taken into consideration. We know that your view is going to be slightly compromised. We know that that is a somewhat of an odd-shaped lot, and in terms of all the setbacks and the covenants that were required, there were limits - and not to mention the sewage drain field - there were limits to where the house could actually be placed. And ultimately, they made the best decision with what they had to work with there in terms of that particular lot.

....

Q. Okay. Actually, my question was careful review. That was what the question was. Did you think that was careful review?

A. I certainly do. We spent - we spent - the board literally spent hours on this, and I spent a lot of time not only doing all of that, but basically reviewing the covenants, reviewing virtually everything that was at our disposal.

App. M:11, 38:12-39:4; 39:18-25.

Appellant, Casey Magan, testified at the injunction relief hearing she had viewed the Studer plans with DRC chair at his home prior to approval of the plans:

Q. Okay. I didn't hear that question. So you did see plans for the Defendants' construction prior to the HOA approval, right?

A. I saw the plans without our house on it.

…

Q. In fact, Dean - the Studers' neighbor to the east - is the head of the architectural review committee, isn't he?

A. That's right.

Q. And you went over to his house and took photographs of the plans before the HOA approved it?

A. That's correct.

Q. And you didn't object to it?

A. That's not correct.

Q. You didn't lodge any formal objection at that time, did you?

A. No formal objection, correct.

…

Q. So when you went over to Dean Parson's house - the head of the architectural review committee - did you take photographs of those plans?

A. I took photographs of the first page of the plans, and they are in the complaint as taken.

Q. When was that?

A. I don't recall. It was the - whenever - I'm thinking it might have been in October, and it may be in the complaint - the actual date.

Q. It's not in the complaint. In fact, I don't think there's any reference to you visiting Dean Parson's house and reviewing the plans prior to the HOA approval? But did you take it with your phone?

A. Yes.

....

Q. So on October 6, 2020, you do over to Dean Parson's house – which is the Studers' next door neighbor. He's seen the construction as well – and you view the plans and you take a photograph of them?

A. Correct.

Q. And you don't lodge any formal complaint at that time?

A. Well, I did talk to Mr. Parson.

Q. You did not lodge a formal complaint at that time?

A. No, but I said, "Where does our house appear on here?" And he said, "They're within the setbacks. They're within the minimum setbacks, but they wanted the best view."

…

Q. My question was didn't the Studers convey their willingness to move the house back 20 feet?

A. Through Ms. Corn, I was told, in response to our offer to compromise, that they would do 20 feet.

....

Q. You request that they move their property back 100 feet - or their house back 100 feet?

A. Right. That was the second compromise, and that was rejected with the 20 feet.

Q. So they came to you with a counteroffer of 20 feet, and what was your response?

A. I think that was when I, then, said 100 feet.

Tr. Proceedings, 56:12-15; 56:20-57:6; 57:13-58:1; 58:9-22; 64:21-24; 65:11-15.

SRHOA Covenants provide "[i]n the event of any action to enforce these Covenants, the prevailing party shall be entitled to an award of its costs of suit and reasonable attorney's fees to be set by the court. Any Owner, Declarant, or the Association may enforce these Covenants." App. D:18, Art. VII, Sec. 2.

STANDARD OF REVIEW

Summary Judgment: The Montana Supreme Court conducts "a *de novo* review of a district court's ruling on motions for summary judgment, using the same M. R. Civ. P. 56 criteria as the district court." *McAtee v. Morrison and Frampton, PLLP*, 2021 MT 227, ¶ 11, 405 Mont. 269, 512 P.3d 235. Summary judgment should be granted when the undisputed facts entitle the moving party to judgment as a matter of law. *Capital One, NA v. Guthrie*, 2017 MT 75, ¶ 11, 387 Mont. 147, 392

P.3d 158; Mont. R. Civ. P. 56(c)(3). The Court need not agree with the District Court's reasoning to affirm summary judgment. As this Court's precedent makes clear, this Court "may affirm a judgment for any reason supported by law and the record that does not expand the relief granted by the lower court." *Peeler v. Rocky Mountain Log Homes Canada, Inc*., 2018 MT 297, ¶ 28, 393 Mont. 396, 431 P.3d 911.

Attorney's fees and awards: "A court must award attorney fees if 'a contract provides for their recovery.'" *Lewis and Clark County v. Wirth*, 2022 MT 105, ¶ 40, 409 Mont. 1, 510 P.3d 1206, *modified by Tai Tam, LLC v. Missoula Cnty. by and Through Bd. of Cnty. Commissioners*, 520 P.3d 312 (Mont. 2022). "We review de novo whether there is legal authority to award attorney fees. If legal authority exists, we review a district court's grant or denial of attorney fees for an abuse of discretion." *Town of Kevin v. N. Cent. Mont. Reg'l Water Auth.*, 2024 MT 159, ¶ 6, 417 Mont. 325, 553 P.3d 392 (internal citation omitted).

SUMMARY OF THE ARGUMENT

This Court should dismiss the Waddells' appeal of the District Court's interlocutory orders, denying their requests for a temporary restraining order ("TRO") and preliminary injunction, and affirm the District Court's entry of final judgment in favor of SRHOA and the Studers.

As an initial matter, this Court lacks jurisdiction to review the District Court's denial of the Waddells' requests for a temporary restraining order and preliminary injunction. Montana Rule of Appellate Procedure 6 authorizes this Court to hear appeals only from final judgments and a narrow set of specified interlocutory orders. Rule 4 further conditions this Court's jurisdiction to hear an appeal from final judgments or appealable interlocutory orders on the appellant's timely filing of a notice of appeal. The District Court's denial of the Waddells' requests for a TRO and preliminary injunctive relief were both interlocutory orders. Rule 6 does not authorize appeal from orders denying a request for a TRO. While Rule 6 does authorize appeal from an order denying a request for a preliminary injunction, Rule 4 requires a notice of appeal be filed within 30-days of service of notice of entry of the trial court's order. The Waddells' notice of appeal in this matter came years after the 30-day deadline expired. Additionally, the entry of final judgment and construction of the Studers home have rendered the requests for review moot.

Unlike the interlocutory orders, the District Court's entry of final judgment is properly before this Court for review. This Court should affirm it because it was predicated on a proper interpretation of the Covenants as applied to uncontroverted facts. The District Court correctly concluded the Covenants' placement provision is unambiguous. It requires only that the SRHOA and Studers "consider" the impact of construction on the Waddells' view; it does not confer a viewshed easement or

duty to protect Appellants' views. App. D:9, Art. V, Site, Sec. 2. Because the provision is unambiguous, extrinsic evidence - like the homeowner declarations - was properly excluded. The homeowners' declarations were properly excluded for the additional reasons that the declarants were not original parties to the Covenants, and the "reasonable expectations doctrine" is inapplicable outside insurance law, per *Lenz v. FSC Securities Corp.*, 2018 MT 67, 391 Mont. 84, 414 P.3d 1262. *Craig Tracts* supports the Studers' free use of their lot. 2020 MT 305, ¶ 29, 402 Mont. 223, 477 P.3d 283. The uncontroverted evidence establishes the SRHOA and Studers did consider impact of construction on the Waddells' view. This consideration, without more, fulfilled their obligations.

Finally, the attorney's fees award to SRHOA and the Studers is unassailable. The Covenants entitle prevailing parties to fees, and *Wirth* mandates such awards. *Wirth*, ¶ 40. The Waddells' alleged "bad acts" claims lack evidentiary support, and their views were demonstrably considered, as evidenced by the HOA's investigation into the issues raised by the Waddells and the Studers' offer to relocate their home 20 feet - an offer the Waddells rejected.

SRHOA requests this Court to dismiss the TRO and preliminary injunction appeals, affirm the Orders of the District Court in full, and award SRHOA its appellate attorney's fees and costs incurred.

ARGUMENT

I. The Court should dismiss the Waddells' appeal of the trial court orders denying their requests for a TRO and preliminary injunction.

The Court lacks jurisdiction to hear an appeal from the trial court's denial of the Waddells' requests for TRO and preliminary injunction because: (1) Montana does not authorize this Court to hear appeal from TROs, (2) the time to appeal the court's denial of preliminary injunctive relief is long past, and (3) both requests are moot now that the trial court has entered final judgment. Therefore, this Court should dismiss appeal of these interlocutory orders.

A. Montana law does not authorize this Court to hear an appeal from a TRO.

Montana law does not permit an appeal from a TRO and the Waddells' appeal on this issue should be dismissed as a matter of law. An order denying a party's request for a TRO is interlocutory. Rule of Appellate Procedure 6 sets forth the circumstances under which this Court may exercise jurisdiction to hear an interlocutory appeal. Mont. R. App. P. 6(3). Rule 6 does not provide for appeal of TROs. *Id.*

While Rule 6 authorizes an interlocutory appeal from "an order granting or dissolving, or refusing to grant or dissolve, an injunction or an attachment," Mont. R. App. P. 6(3)(e), this Court has repeatedly held that a TRO is not appealable as an

injunction because of its temporary nature. In *Wetzstein v. Boston & M. Consol. Copper & Silver Min. Co.,* this Court explained:

> …appeal from a restraining order is not possible or contemplated, for the reason that on the hearing, or soon thereafter, the court, in the discharge of its duty, will grant or refuse an injunction, and in either event the restraining order is dead.

25 Mont. 135, 63 P. 1043, 1044 (1901); *See also Labbitt*, 80 Mont. at 293, 260 P. at 731 ("As injunctive orders, granted without notice, are not appealable, they are vulnerable to a motion to vacate, dissolve, or modify."); *Boyer v. Karagacin*, 178 Mont. 26, 30, 582 P.2d 1173, 1176 (1978), *overruled on other grounds by Shammel v. Canyon Resources Corp*., 82 P.3d 912 (Mont. 2003) (discussing the district court's hearing on the injunctive relief requested was that of a preliminary injunction, not a temporary restraining order - "Generally, this Court has determined the appealability of injunctive orders by distinguishing between those which are temporary or permanent in substance, without regard to form.").

The Waddells' Verified Complaint asked for a "TRO under Mont. Code Ann. § 27-19-314, enjoining the Defendants ... from constructing the home at the planned location...." App. N:18, Compl., ¶ 1. It is undisputed that "[j]ust 5 hours after Waddells filed their Complaint and Request for a TRO, the [District] [C]ourt denied it." Opening Br., P. 27. As discussed above, by its very nature, the District Court's determination on that issue is not appealable, especially where, as here, it was not treated as a preliminary injunction. *Boyer*, 178 Mont. at 30, 582 P.2d at 1176.

Following the denial of the Waddells' request for TRO, the District Court held a hearing 14 days later, on December 4, 2020, on their request for a preliminary injunction. Opening Br., P. 29.

For those reasons, the District Court's denial of the Waddells' request for TRO should be affirmed, and the appeal on that issue dismissed as a matter of law.

B. The Waddells' failure to timely file a notice of appeal from the trial court order, denying their request for a preliminary injunction, deprives this Court of jurisdiction to hear an appeal of that order.

Interlocutory orders such as "an order granting, dissolving, or refusing to grant or dissolve, an injunction or an attachment" are immediately appealable. Mont. R. App. P. 6(3)(e); *see also Mont. Cannabis Indus. Ass'n*, ¶ 13. In civil cases, notice of appeal "shall be filed with the clerk of the supreme court within 30 days from the date of entry of judgment or order from which the appeal is taken." Mont. R. App. P. 4(5)(a)(i). "If notice of entry of judgment or order is required to be served under M. R. Civ. P. 77(d), the 30 days or 60 days, as the case may be, shall not begin to run until service of the notice of entry of judgment or order." Mont. R. App. P. 4(5)(a)(i). The failure to timely file a notice of appeal deprives this Court of jurisdiction to hear it. Mont. R. App. P. 4(2)(c); *see also Montana Power Co. v. Fondren*, 226 Mont. 500, 505, 737 P.2d 1138, 1141 (1987).

Here, the Studers served the Waddells with a Notice of Entry of Order on January 8, 2021. App. G. From that date, the 30-day period found in Rule 4 of the

Rules of Appellate Procedure began to run. *See* Mont. R. App. P. 4(5)(a)(i) cited above. The Waddells did not file their Notice of Appeal until October 24, 2024, nearly four years after the injunctive relief order was issued on December 31, 2020 following a full scope of litigation which included substantial discovery, depositions and motions practice. App. F. As a result, the Waddells appeal of the preliminary injunction order is time-barred, and their right to appeal has been waived as a matter of law and should be dismissed.

C. The requests for TRO and preliminary injunctive relief are moot.

Once final judgment is entered, any request for preliminary injunctive relief is mooted. *Scheff v. Banks*, No. 22-2439-CV, 2023 WL 4715174, at *2 (2d Cir. July 25, 2023) (collecting federal cases). The trial court's interlocutory order merges into the final judgment, and the sole question on appeal is whether the final judgment is itself correct. *Id.*

"'The purpose of a preliminary injunction is to 'preserve the status quo and the rights of the parties until a final judgment issues in the cause'.'" *Planned Parenthood of Mont. v. State*, ¶ 16. Per the Ninth Circuit, the controlling rule is that the lifespan of a preliminary injunction ends with the entry of a final judgment. *U.S. Phillips Corp.*, 590 F.3d at 1093.

As the District Court entered final judgment on all issues three years later, denial of the TRO and preliminary injunction became moot. *Capriole v. Uber Tech.,*

Inc., 991 F.3d 339, 343 (1st Cir. Mar. 23, 2021) ("It has long been the law that an appeal from the denial of a preliminary injunction motion becomes moot when final judgment issues because of the district court's denial of the motion merges with the final judgment."). If an interlocutory appeal is mooted by entry of final judgment, the same is true of the Waddells' appeal - for the first time - following the District Court's entry of final judgment and should be dismissed on this ground as well. *See also Harper ex rel. Harper v. Poway Unified School Dist., et al.*, 549 U.S. 1262 ("The District Court, however, has now entered final judgment dismissing petitioner's claims for injunctive relief as moot. We have previously dismissed interlocutory appeals from denials of motions for temporary injunctions once final judgment has been entered.").

The requests are moot for the additional reason that the requested relief can no longer be granted. *See Not In Mont.: £Citizens Against CI-97 v. State, ex rel. McGrath*, 2006 MT 278, ¶ 7, 334 Mont. 265, 147 P.3d 174 (describing "a question as moot when [the court] no longer can grant effective relief"). The Waddells' motions for a TRO and preliminary injunction sought an order preventing the Studers from continuing construction on their house. At this point, the house is fully constructed, and therefore the requested restraining order and injunctions are meaningless.

II. The District Court did not interpret the Covenants provisions "in isolation" or misapply Montana law on the interpretation of Covenants.

A. The District Court properly interpreted the relevant provisions of the Covenants and applied the plain and unambiguous language to the claims raised.

The first issue to be addressed is whether the District Court correctly applied principles of Montana law in the construction of the placement provision. Opening Br., Pp. 33-34. Regardless of whether this Court reviews the District Court's Order on the injunctive relief, or its summary judgment orders, the District Court employed the principles which guide the construction and interpretation of Covenants as previously outlined by this Court. App. B:12; App. F:7; App. O:8-9, Or. Re SRHOA Mot. Summ. J.

Although not a contract, the general rules of contract interpretation apply to restrictive covenants. *Creveling v. Ingold*, 2006 MT 57, ¶ 8, 331 Mont. 322, 132 P.3d 531 ("General rules of contract interpretation apply to restrictive covenants."). The interpretation of a set of Covenants is a question of law. *Wirth*, ¶ 14 ("Like interpretations of contracts, a district court's interpretation of a restrictive covenant is a conclusion of law reviewed for correctness."). Further, "whether an ambiguity exists in a contract is a question of law." *Mary J. Baker Revocable Trust*, ¶ 19.

Restrictive covenants, like contracts, are interpreted to ascertain the intention of the parties. *Craig Tracts*, ¶ 5. "Courts read declarations of covenants on their four

corners as a whole, and terms are construed in their ordinary or popular sense." *Bordas v. Virginia City Ranches Ass'n*, 2004 MT 342, ¶ 24, 324 Mont. 263, 102 P.3d 1219; see also Mont. Code Ann. § 28-3-501. "Where language is clear and explicit, the Court will apply the language as written." *Craig Tracts,* ¶ 9 (citing *Creveling*, ¶ 8); *See also Town & Country Estates Ass'n v. Slate*r, 227 Mont. 489, 492, 740 P.2d 668, 670 (1987).

Here, the Waddells posit *Wirth* to say the District Court committed reversible error by reading the Covenants in isolation. Opening Br., Pp. 33-34. *Wirth* is distinguishable and the Waddells are incorrect about the District Court's legal conclusions. In *Wirth*, this Court reversed the District Court because it failed to refer to the documents of conveyance when construing a negative easement by reference. *Wirth*, ¶¶ 20-25. As this Court explained, when reviewing a negative easement, Montana law requires the District Court review the documents of conveyance to "determine the scope of the easement created." *Wirth*, ¶ 23. "The District Court incorrectly concluded the language was unambiguous by reading the second sentence of § 2.2 in isolation." *Wirth*, ¶ 24. Had the District Court reviewed the documents of conveyance, it would have discovered an ambiguity that needed to be resolved prior to summary judgment. *Wirth*, ¶ 24. ("Reading the entire instrument of conveyance to determine the applicability of § 2.2 to the lots retained by Wirth requires resolving an ambiguity."). Failing to read and apply the clause as a whole,

in combination with failing to review the documents of conveyance when construing a negative easement by reference, was obvious error.

Here, the Waddells do not claim the District Court failed to look at other documents of record, because there are none. The Waddells claim the District Court "interpreted the words of the ... covenant in the isolated context of a single sentence, rather than in the context of Covenants and their purpose as a whole." Opening Br., P. 34. Interestingly, the Waddells admit the Court reviewed multiple provisions of the Covenants and found "the issue here revolves around the interpretation of the terms 'should,' 'shall,' and 'consider.'" Opening Br., P. 34; *See also* App. F:7-8. Specifically, the Court discussed the architectural provisions found in the Covenants that address size, height, *and* placement.

As to the size and height of a structure, "approval ... shall take into consideration ... blocking views ... of existing dwellings." App. B:13; App. F:7; App. O:6; *see also* App. D:12, Art. V, Architecture, Sec. 2. With respect to placement, however, the Covenants language is different. It states that "placement should take into consideration the location of existing roads and neighboring dwellings, with allowance for views and solar gains." App. B:12; App. F:7; App. O:5; *see also* App. D:12, Art. V, Site, Sec. 2. Both provisions were discussed. The District Court specifically noted that different words were used in size and height, namely "shall" versus "should" and that clearly the drafter intended a different meaning.

The District Court determined the Covenants' language through the words "should" and "consider" are permissive, rather than obligatory, creating no obligation to protect the Waddells' views. App. B:13; App. F:8; App. O:15. Regardless of whether the word "should" is the past tense of "shall," under no circumstances does the word "consider" mean "protect." App. B:13. The term "consider" means to "to think about carefully" or "take into account." App. F:8; App. O:22 (citing "Consider." Merriam-Webster.com, Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/consider. Accessed 21 Dec. 2020).

Read together, "should" modifies "consider" rendering the entire clause permissive, and creates no obligation to consider views, let alone protect them. App. D:9, Art. V, Site, Sec. 2. Even if consideration is obligatory, it still creates no obligation to protect existing views because the definition of "consider" does not mean "protect". App. B:13; App. F:8; App. O:15.

This gets us to the heart of the issue: to come to the conclusions that the Waddells do, they assert the term "should" means "shall" and "consider" means to "protect." Opening Br., P. 43. As discussed at length by the District Court, those words are dissimilar, and the fact that the drafter used different words in different context means the drafter intended a different meaning. App. B:13; App. F:7-8; App. O:15. The Waddells ask this Court to "insert" meaning into the plain language of the

Covenants and "omit what is there" by claiming the language "with allowance for views and solar gains" somehow transforms "should" and "consider" to mean "protect." Mont. Code Ann. § 1-4-101 ("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.").

The Waddells further contend that greater emphasis needed to have been placed on the words "with allowance for views." Opening Br., P. 35. To do so would be to read the clause in isolation, which would be error. As admitted by the Waddells in response to the Studer's Motion for Summary Judgment, the Waddells contended those two clauses created an obligation "to consider neighboring dwellings." App. P:12, Pls.' Br. in Opp'n to Studers' Mot. Summ. J. ("The sentence provides, first, that '[p]lacement should take into consideration the location of the roads and neighboring dwellings,' and then concludes with the phrase 'with allowance for views and solar gains.' Reading the two phrases together, the obligation to consider neighboring dwellings and views are mandatory.").

A basic reading does not support the Waddells' contention that their views are meant to be protected by the language "with allowance for views and solar gains". App. D:12, Art. V, Site, Sec. 2. The subject of the placement provision is the Studers' residence, the structure with the proposed "placement," not the Waddells' existing home. App. D:12, Art. V, Site, Sec. 2. The initial clause "placement should take into

consideration the location of existing roads and neighboring dwellings" is separated by a comma before the clause "with allowance for views and solar gains." App. D:9, Art. V, Site, Sec. 2. The "with allowance for views and solar gains" language plainly refers back to the subject of the sentence, *here* the placement of the Studer home. *Id.* Any other reading would result in an absurdity because existing roadways do not have "views or solar gains." *First Natl. Properties, LLC v. Joel D. Hillstead Trust, dated Feb. 25, 1982*, 2020 MT 211, ¶ 30, 401 Mont. 59, 472 P.3d 134 ("'Montana law compels us to reject [a contract] interpretation that would lead to absurdities.'" *citing Mont. Health Network, Inc. v. Great Falls Orthopedic Assocs*., 2015 MT 186, ¶ 21, 379 Mont. 513, 353 P.3d 483).

Thus, the placement provision, when read as a whole, creates no obligation to "protect" the Waddells' views. At most, all that provision could conceivably require SRHOA and the Studers to do is consider the location of the Waddells' existing home, which it is undisputed they did. App. O:8, 18. The only relevant portion relates back to, and is controlled by, the permissive terms "should" and "consider" which create no duty or obligation on the part of SHOA, or the Studers, to protect the Waddells' views. App. B:21-22. As discussed below, when properly read, the placement provisions allow for the Studers' solar gains and views after considering neighbors and roads.

For those reasons, the District Court did not err and SRHOA respectfully requests this Court affirm the District Court in full.

B. The Reasonable Expectations Doctrine does not apply to Covenants.

The Waddells contend the District Court erred by refusing to admit or consider four declarations submitted by member homeowners in Summer Ridge concerning their alleged interpretation of the Covenants to "confer a protected right." Opening Br., P. 48. The Waddells claim that "each described their expectation that the Homeowner's Association would protect their views from unreasonable blocking by neighbors planning new construction." *Id.*

The Waddells cite no law for this proposition or why the reasonable expectation doctrine would apply. The "reasonable expectations doctrine" is inapplicable because it is a "special, insurance-specific rule that supplements generally applicable contract principles in the insurance context." *Lenz*, ¶ 29. "Expansion of the doctrine from a special public policy based rule, narrowly applicable in the insurance context, to a generally applicable contract principle would…contravene the parol evidence rule, thereby destroying the stability and predictability of written contracts." *Id.* ¶ 33. The Doctrine does not apply *here*.

In *Craig Tracts*, following this Court's determination that an ambiguity existed in the Covenants, it discussed the purchaser's "reasonable expectations" when it purchased the property at issue, presumably to balance the parties' rights. ¶

17. This Court held that Brown Drake had a reasonable expectation that it would be allowed to use the property as intended because it knew, prior to closing, that others, including the former HOA president, had used their properties as short-term rentals at the time it purchased the lot. *Craig Tracts*, 2020 MT 305, 402 Mont. 223, 477 P.3d 283. Based on the case's limited scenario, this Court resolved an ambiguity in the Covenants to allow the purchaser's free use of the property. *Id.*

This Court's analysis in *Craig Tracts* works against the Waddells. Their home is the only home in that area situated on the southern portion of the lot. App. B:24. All other homes on the street East of the Studers were built on a small "ridge." *Id.* Applying *Craig Tracts,* assuming first that an ambiguity in the Covenants existed, the Studers' reasonable expectations would be that they, too, were within their right to place their home along the ridgeline. *Craig Tracts,* ¶ 17 ("Brown Drake's members assert they bought the property based upon the understanding that the HOA had previously allowed short term rentals. Under the language of these Amended Covenants, Brown Drake's expectation that it could use the property for such purposes going forward was reasonable.").

As discussed by the District Court in response to the Waddells' arguments in response to SRHOA's initial Motion for Summary Judgment:

> Plaintiffs attached five declarations to their Brief in Opposition to Motion for Summary Judgment. They include Plaintiffs' own declarations and three others from homeowners from the subdivision.... Plaintiffs' purchased their home in 2004. The other three homeowners

> purchased their lots in 2003 and 2010. Given the Covenants were created in 1993, it is clear the declarants were not original parties to creation of the Covenants, and the declarants do not provide the Court with evidence of the circumstances under which the Covenants were made.

App. O:13 (*citing Mary J. Baker Revocable Trust*, ¶ 55).

Plainly put, the Waddells alleged "reasonable expectations" of what the Covenants say do not alter the plain meaning of the text. Montana law is clear that "all questions of law, including...the construction of statutes and other writings... must be decided by the court." Mont. Code Ann. § 26-1-201; *see also Wirth*, ¶ 14 ("Like interpretations of contracts, a district court's interpretation of a restrictive covenant is a conclusion of law reviewed for correctness.").

The Waddells intended to offer evidence of what they hoped the Covenants said, as evidence of what they thought the Covenants meant, not evidence of what the declarants meant. Further, in order for such evidence to be admissible, the court would have to find an ambiguity. *Craig Tracts*, ¶ 9 ("We will consider evidence extrinsic to the language of the restrictive covenant itself if an ambiguity is found."). If, as is undisputed here, no ambiguity exists, the parole evidence in the form of a declaration would not be allowed even for the declarant let alone people who were not there are its creation. *Id.* ("Where language is clear and explicit, the Court will apply the language as written."); *See also* Mont. Code Ann. § 28-2-904 ("The execution of a contract in writing, whether the law requires it to be written or not,

supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."). This means that the Waddells' declarations were properly excluded, and not considered on summary judgment, because not only is the language of the placement provision clear and unambiguous, but the Waddells' declarations seek to such evidence of circumstances and subject matter is not admissible to add to, vary, or contradict the terms of the contract. *Mary J. Baker Revocable Trust*, ¶ 18.

C. The District Court properly determined the three other prior issues were not applicable to the facts *here*.

The Waddells contend "SRHOA knows the covenant is enforceable." Opening Br., P. 41. This is confusing because SRHOA has never taken the position that any provision of the Covenants is unenforceable. The Waddells equate SRHOA's disagreement as to whether the Covenants create a viewshed right with saying the Covenants are not "enforceable." Not so.

Without arguing what legal effect they believe they have, the Waddells cite three prior instances where disputes arose concerning views in the neighborhood: 1) flagpole, 2) Knapic's garage, and 3) Hulstrand-Miano. *Id.* The Waddells were not even aware of the Knapic or Hulstrand-Miano situations until after this litigation began. App. Q, Waddells' Mot. for Leave to file Third Am. Compl. ("Plaintiffs discovered additional information in written discovery and depositions they

conducted…that they did not know at the time they lodged their earlier complaints.").

The flagpole case resulted in litigation between SRHOA and the Walker family concerned a 60-foot flagpole constructed by the Walkers which vastly exceeded the height restrictions under the Covenants. App. R, Or. Re Mots. for Summ. J., *SRHOA v. Walker*. SRHOA sought to enforce the height restrictions. App. R-22 ("requiring Mr. Walker to remove or reduce the flagpole to 24 feet would damage him…The HOA's request for an injunction to require Mr. Walker to lower his flagpole to 24 feet is denied"). The Walkers' dispute is clearly distinguishable because the case was not about placement of the flagpole, but its height, which relates to the size and height restrictions explicitly found in the Covenants.

With respect to the Knapic-Romeo dispute, not only did that dispute relate to the height of the garage, but it also could hardly be called a dispute as there was no action taken by SRHOA. The Waddells concede the matter involved the height of a garage. Opening Br., P. 25 ("Knapic's garage…exceeded the specific height-above-grade limit…"). Chuck Romeo testified "they moved it for the height restrictions... I was never approached again. It was dropped that evening as far as I was concerned. I never went back and asked." App. S-17, 66:2-3, 67:3-7, Dep. Charles Romeo. Design Review Chair, Dean Parson, confirmed the Committee did not require the Knapics to move their garage at all. App. T, Email from Dean Parson (Knapic

"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…For the issue of height…they have removed a feature on top of the building so the structure will be 23 feet high."). The Court found the Waddells were not treated any differently than the Knapics. App. B:22.

As to the Miano dispute, there is nothing in the record to support SRHOA treated that issue any differently than the Waddells. App. B:23. The District Court was apprised of the Waddells allegations and determined the Waddells "presented no evidence that SRHOA has treated them differently than any other member in the association." App. B:22. The Waddells present evidence of SRHOA's consistency, and the fact the DRC considered existing views with respect to placement of the Miano home. Opening Br., P. 24 ("The Board's design review committee investigated and…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 District Court properly determined that, under no circumstances could those prior issues be considered a promise, a representation, misrepresentation, or that the Waddells relied on any of these prior actions to their detriment which would prevent SRHOA from asserting the proper interpretation of the Covenants both *here* and in the District Court. App. B:22. Plainly put, the

evidence in the record did not support the Waddells argument that those other instances applied to this case, and its set of circumstances, in any way. App. B:23.

D. The meaning of "should" and "shall" is irrelevant because it is undisputed that the Waddells' views were "considered".

The Waddells allege their views were not "considered" prior to the final approval on November 17, 2020. Opening Br., Pp. 2-3. The undisputed facts disagree. At the summary judgment stage, the Waddells presented no evidence to refute the substantial evidence put forward by both SRHOA and the Studers, establishing the Waddells' concerns were taken into account. The Waddells' "mere disagreement about the interpretation of" the facts, nor their "'conclusory statements'" related to the same "'do not rise to the level of genuine issues of material fact.'" *Gliko v. Permann*, 2006 MT 30, ¶ 25, 331 Mont. 112, 130 P.3d 155.

The record is replete with undisputed actions taken by SRHOA, the Studers, and the Waddells, to ensure the Covenants' provisions were complied with under the circumstances. The Waddells presented no evidence on the record to contradict the undisputed fact that their views were "considered" by both SRHOA and the Studers. In fact, the evidence advanced by the Waddells at the trial court level demonstrates their concerns *were* considered, addressed, and both SRHOA and the Studers were willing to work with the Waddells on the issue. App. L; App. U, Letter from Studer attorney, re: move 20 feet. The District Court outlined this fact in its Orders on SRHOA's summary judgment motions. App. B:9; App. O:18.

The Waddells do not dispute that the Studers offered to move the structure 20 feet to the south following the HOA's rescinding of the Studer approval. Opening Br., P. 42. In response, the Waddells responded by requesting the Studers move their home 100 feet south. Tr. Proceedings, 65:2-18, Nov. 13, 2024. Moving 100 feet would have required the Studers to move their DEQ approved drain field and considerable additional cost to place their home in a different spot than all their neighbors to the east. App. F:5; Tr. Proceedings; 87:4-14, Nov. 13, 2024.

SRHOA's act of rescinding the Studer approval and discussion between the parties undisputedly included: 1) Design Review Committee Chair, Dean Parson, meeting with Appellant, Casey Magan, and placing his fist on the page where the Studer house would be located; 2) SRHOA DRC meetings to discuss options; 3) discussions of moving the Studer house with SRHOA paying the Studers' re-staking fee; and 4) SRHOA involvement in discussion with the Waddells and the Studers to consider the Waddells' views and potential impacts to the Studers. App. B:9-10; App. F:5; App M:10-11 at 36:1-8, 38:15-39:4; App. O:23; App. U; App. V:4-5, Or. on Pls.' Mot. for Leave to file Mot. Summ. J.

These facts are precisely why the District Court determined it is undisputed the Waddells views were "considered." App. B:19; App. F:10; App. O:15-16. The Waddells' mere disagreement on what constitutes "consideration" does not establish a genuine issue of material fact. *Gliko*, ¶ 25 ("'mere disagreement about the

interpretation of a fact or facts does not amount to genuine issues of material fact."). The only argument made by the Waddells was the Studers never moved their property. Opening Br., Pp. 38-39.

However, the Waddells raise that argument without having considered the delays, expenses and additional meetings between the HOA/DRC and the Studers and the HOA/DRC and the Waddells, to resolve or compromise the Waddells' complaints.

E. The District Court did not Err by failing to "balance the rights of the parties before ruling in favor of the Studers".

The Waddells next contend that Montana "law requires a balancing of the respective property interests of both owners." Opening Br., P. 37 (citing *Toavs v. Sayre*, 281 Mont. 243, 246, 934 P.2d 165, 167 (1997)). The problem is the Waddells do not accurately cite this Court. The proper cite, which is well-established Montana law, is that "Restrictive covenants are to be strictly construed and ambiguities in a covenant are to be construed to allow free use of the property....However, the free use of the property must be balanced against the rights of the other purchasers in the subdivision." *Toavs v. Sayre*, 281 Mont. at 246, 934 P.2d at 167 (internal citations omitted).

The Waddells argument is contrary to the law and their own arguments on appeal. For the balancing of rights principles to apply, it must first be determined that an ambiguity exists within the Covenants. *Toavs v. Sayre*, 281 Mont. at 246, 934

P.2d at 167. However, the Waddells do not assert that an ambiguity exists in the Covenants on appeal. In fact, the Waddells contend on appeal that the covenants are unambiguous. Opening Br., P. 39 ("When the rules of contractual construction are properly applied, the viewshed covenant is unambiguously obligatory, not discretionary.").

The Waddells make a similar argument concerning the maxim of Montana law related to "first in time, first in right." Mont. Code Ann. § 1-3-216. The Waddells claim that "Waddells were here first" as though that means anything under the Covenants. Opening Br., P. 37. In the recital to the Covenants, the declarant is clear that the Covenants shall "inure to and pass with each and every parcel, tract, lot, or division." App. D:1, Recitals. This means that all members rights originate from the Declarant the "owner of the lots" in the Exhibit A attached to the Covenants who intended "to sell, dispose of, divide into lots, and convey the real property above described, hereinafter to be known as Summer Ridge." *Id.* This makes clear that all rights under the Covenants, if any, were confirmed by declarant and run with the land to each successive owner. The remaining provisions within the Covenants create no conflict or ambiguity on this point. The District Court painstakingly reviewed the Covenants and the allegations raised by the Waddells and determined that the relevant provision at issue is the permissive "placement" provision. *Id.*

As discussed by the District Court, the size, height, and setback provisions are meant to protect views, but the placement provisions use of "should" along with "consider" renders the clause discretionary and permissive, rather than mandatory. App. O:21-22.

III. The District Court did not abuse its discretion by awarding SRHOA and the Studers their attorney's fees.

The Waddells failed to preserve whether the Court properly determined the HOA's right to attorney's fees under the Covenants and whether the Court properly utilized the *Plath* factors for determining the reasonable amount of the award for purposes of appeal by failing to make such arguments at the District Court level, and on appeal. *See Mountain W. Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶ 9, 315 Mont. 231, 69 P.3d 652 ("if a party fails to raise an issue or argue it in his or her brief, we will deem the issue waived and will not address it.").

However, to the extent the HOA may be required to respond, the HOA understands the Waddells contend on appeal that the HOA and Studers alleged "bad acts" barred them from receiving an attorneys' fee award, or in the alternative, should have resulted in a decreased award. Opening Br., P. 44. The Waddells allege that the "Summer Ridge Board threw the Waddells under the bus when they unceremoniously and in apparent response to an ultimatum from the Studers lawyers, reissued the suspended permit, stopped all enforcement activity and ran away." *Id.* The Waddells cite no law for the proposition that SRHOA's alleged "bad

acts" is a legal basis for withholding fees and the undersigned has found no support in Montana law, especially considering the HOA was successful on the merits of the Waddells' "bad acts" claims.

Montana law is clear that where an attorney's fees provision exists, the court is obligated to award fees to the prevailing party. *Wirth*, ¶ 40 ("A court must award attorney fees 'if a contract provides for their recovery.'"). The Covenants *here* expressly provide that the prevailing party is entitled to its attorney's fees and costs. App. D:18, Art. VII, Sec. 2. The Waddells have not disputed that. As the prevailing party, SRHOA was entitled to its fees pursuant to the Covenants and SRHOA requests that this Court affirm the District Court's award in full.

Regardless, to say the Waddells' views were not considered and SRHOA abandoned them is simply untrue. As discussed above, in section (C)(3) above, both the HOA and Studers took significant steps to consider the Waddells' views prior to the reinstated approval on November 17, 2020 despite no Covenants obligation to do so. *Refer to* App. B: 9-10, 19; App. F:5, 10; App M:10-11 at 36:1-8, 38:15-39:4; App. O:15-16, 23; App. U; App. V:4-5; *see also* Statement of the Facts and Argument, Sec. (II)(C) herein. The Waddells' misunderstanding of what the Covenant's language provides and rights they convey, if any, does not constitute a "bad act" on the part of SRHOA that would preclude an award of attorney's fees in favor of SRHOA.

CONCLUSION

For the foregoing reasons, the Waddells appeal should be dismissed and the District Court affirmed in all respects. SRHOA respectfully requests this Court to:

(1) Dismiss the Waddells appeal of the District Court's Order on the temporary restraining order because no appeal lies from that Order;

(2) Dismiss the Waddells appeal on the issue of the preliminary injunction as time-barred;

(3) Affirm the District Court's Order on the Preliminary Injunction on the basis the Waddells failed to establish a legitimate cause of action or likelihood of prevailing on the merits;

(4) Affirm the District Court's Grant of Summary Judgment for both SRHOA and the Studers on the basis that the District Court Properly Interpreted, Construed and Applied the relevant Provisions of the Covenants;

(5) Affirm the District Court's award of Attorney's fees for SRHOA in full; and

(6) And for such other relief, including attorney's fees and costs for defending this Appeal.

DATED this 6th day of March, 2025.

By: /s/ David J. HagEstad
David J. HagEstad

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *Appellees Summer Ridge Homeowners' Association's Answer Brief* is proportionately spaced in 14-point Times New Roman and contains 9,905 words excluding the brief's cover, table of contents, table of authorities and certificate of compliance.

DATED this 6th day of March, 2025.

By: /s/ David J. HagEstad
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CERTIFICATE OF SERVICE

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