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IN THE SUPREME COURT OF THE STATE OF IDAHO

EAGLE SPRINGS HOMEOWNERS ASSOCIATION, INC., an Idaho non-profit corporation, Plaintiff and Respondent, v. JAN RODINA, Defendant and Appellant.	**RESPONDENT'S BRIEF** Supreme Court Docket No. 46323 Ada County Case No. CV01-17-11897

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE HONORABLE JUDGE LYNN G. NORTON
District Judge

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RESPONDENT'S BRIEF

Respondent Eagle Springs Homeowners Association, Inc. (the "Association") submits this brief in appeal before this Court.

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I. STATEMENT OF THE CASE

A. Nature of the Case.

The backdrop of this case is an attempt at the old adage, "It is easier to ask for forgiveness than for permission." At the heart of this matter is the construction of a fence, retaining wall, and support for the retaining wall by a homeowner, Appellant Jan Rodina ("Mr. Rodina"). These improvements were completed in a manner that was not approved by Respondent Eagle Springs Homeowners Association, Inc. ("Association"), even though Rodina was contractually required to obtain that approval in advance of the project. Ultimately, the Association brought this action to enforce compliance with the Declaration of Covenants, Conditions and Restrictions for Eagle Springs Subdivision, recorded as Document No. 1995-95074402 in the Recorder's Office of Ada County ("Declaration"), after Mr. Rodina constructed improvements on his lot that deviated from those that the Association had reviewed and approved. (R., Vol. I, p. 8-17).

With these minor supplements, the Association does not object to Mr. Rodina's description of the Nature of the Case.

B. Course of Proceedings.

The Association filed a Complaint in this matter for breach of covenant for the unapproved construction performed by Mr. Rodina on his lot. *Id.* It sought an injunction requiring Mr. Rodina to cease all construction on his lot and "[r]emove all unapproved or noncompliant construction or improvements on [his lot], including the fence . . . at his own expense." *Id.* at 15. The Complaint further sought an injunction requiring Mr. Rodina to landscape the property as it was before the unapproved work began or to apply for alternative approval to the Association's Architectural

Committee. *Id.* at 16. The Complaint then asked for all costs, including attorney fees, incurred by the Association in enforcing the terms of the Declaration, which is expressly allowed by the Declaration. *Id.*

In his Answer, Mr. Rodina alleged the following affirmative defenses: (1) failure to state a claim, (2) waiver, (3), laches, (4) estoppel, and (5) breach of the covenant of good faith and fair dealing and breach of fiduciary duties. *Id.* at 26-28.

The Association moved for summary judgment, not only on its affirmative cause of action against Mr. Rodina, but also against all of Mr. Rodina's affirmative defenses. *Id.* at 52. After briefing and oral argument on the matters, the District Court granted the Association's motion for summary judgment in its entirety and awarded fees to the Association. *Id.* at 242-263. Mr. Rodina then filed a motion for reconsideration of the District Court's ruling on the underlying claim, as well as the affirmative defenses of waiver and breach of the covenant of good faith and fair dealing. *Id.* at 277-313. Mr. Rodina did not move for reconsideration on any of the District Court's rulings on his other affirmative defenses, and, accordingly, the District Court upheld those rulings. *Id.* at 624.

Mr. Rodina's statement of issues on appeal and his brief are silent with regards to the District Court's rulings on the affirmative defenses of failure to state a claim, laches, estoppel, and breach of fiduciary duty. As a result, they are assumed to be waived. I.A.R. 35; *State v. Hoisington*, 104 Idaho 153, 159 (1983). *See also State v. Jones*, 160 Idaho 449, 452 n.2 (2016).

With these supplements, the Association does not object to Mr. Rodina's description of the Course of Proceedings.

C. Statement of Facts.

The Association will supplement Mr. Rodina's Statement of Facts with the following relevant facts, which the Association believes were omitted or were not fully and accurately stated in Mr. Rodina's brief. For clarity and brevity, the Association will initially refer to the numbering system used in Mr. Rodina's brief, although the numbering system stopped part-way through the Statement of Facts portion of his brief.

3. The Association disagrees with the notion that Mr. Rodina is the "reputed record owner" of Lot 30, aka 9825 W. Big Springs Blvd., Boise, ID 83714. (Appellant's Brief ("App.'s Brief") at 6). He is, in fact, the record owner of Lot 30, aka 9825 W. Big Springs Blvd., Boise, ID 83714 (hereinafter "Property" or "Lot") (R., Vol. I, p. 195, L. 26).

4. The Association disagrees with the inclusion of the phrase "constructive notice of" in this factual recitation. (App.'s Brief at 6). This phrase is in relation to his knowledge of the Declaration and its contents at the time of purchase. In paragraph 2 of his Answer, Mr. Rodina admitted that he "purchased the Property subject to the covenants, conditions and restrictions contained in the Declaration[,]" without limitation as to how he may have had notice of the covenants. (R., Vol. I, p. 24, L 21, *compare with* R., Vol. I, p. 9, para. 4). Its inclusion in this factual recitation is irrelevant.

In the first paragraph following fact number "5." on page 7 of Mr. Rodina's brief, Mr. Rodina states as fact his opinion that the Association's "enforcement of the Declaration has been uneven and discriminatory." (App.'s Brief at 7). He then proceeds into a legal argument about

the implied covenant of good faith and fair dealing and fiduciary duties. *Id.* The entirety of this paragraph is not fact, but rather Mr. Rodina's opinion or legal argument.

In the second paragraph on page 8 of Mr. Rodina's brief, Mr. Rodina states as fact that the Approval Form (architectural review application) submitted by Mr. Rodina on May 9, 2016, for the construction work on his lot was "recommended for approval after an inspection by Nick Barber . . . ." (App.'s Brief at 8). Mr. Rodina then includes a footnote stating that "[t]he Record does not contain any documentation that the Architectural Committee ever approved the Barber recommendation." *Id.* This is a mischaracterization of the facts by Mr. Rodina. Rather, the Association, through its Architectural Committee, approved the May 9, 2016 Approval Form (architectural review application) submitted by Mr. Rodina. (R., Vol. I, p. 25, L.18; R., Vol. I, p. 55, paras. 11-12; R., Vol. I, p. 113). This fact was admitted by Mr. Rodina in paragraph 8 in his Answer. (R., Vol. I, p. 25, L. 18, *compare with* p. 11, para. 20). It was also admitted in the Affidavit of Jan Rodina in Support of Defendant's Opposition to Plaintiff's Motion for Summary Judgment ("Affidavit"). (R., Vol. I, p. 196, L. 9).

In the third paragraph on page 8 (and continuing to the top of page 9) of Mr. Rodina's brief, Mr. Rodina lists as facts a number of statements that were made by the Association's attorney, Mr. Rodina's attorney, and Mr. Rodina, himself, during oral argument at the hearing on the motion for summary judgment. (App.'s Brief at 8-9). The Association has no objection to the accuracy in quoting these statements or that they were actually made during oral argument—the Record will speak clearly to all of that. However, statements made by counsel or Mr. Rodina in oral argument are not facts in this case. Specifically, Mr. Rodina's statement during oral argument that

"everybody knew that we'd be building a retaining wall[,]" (App.'s Brief at 8), is not supported by the Record and should not be relied upon or referred to as a fact.

In the third paragraph on page 9 of Mr. Rodina's brief, he lists a number of facts tied to his Affidavit. The Association generally disagrees with several of the facts listed in the paragraph regarding the timeline the Association gave Mr. Rodina to complete the work, representations made to Mr. Rodina regarding the time it was taking to complete the project, and the percentage of work that was complete. However, the Association does not believe these facts are material to the issues on this appeal and thus should be disregarded.

The Association asserts the following additional relevant facts in the Statement of Facts for this matter:

1. Article II of the Declaration subjects all described and annexed property to its terms. This includes Mr. Rodina's Property. (R., Vol. I, p. 66, p. 24, L. 21, *compare with* p. 9, para. 9).

2. Section 1.2 of the Declaration states that the purpose of the Declaration is "to protect, enhance and preserve the value, amenities, desirability, and attractiveness of the Property; to ensure a well-integrated, high quality development . . . ." (R., Vol. I, p. 66). In addition, Article II states that the restrictions are "agreed to be in furtherance of a general plan for the . . . improvement and sale of the Property. . . ." *Id.*

3. Section 3.1 of the Declaration defines the "Architectural Committee" as "the Architectural Committee created by Grantor or the Association pursuant to Article IX hereof." *Id.*

4. Section 3.7 of the Declaration defines "Building Lot" as "a lot shown on the Plat upon which Improvements may be constructed. For voting and membership purposes herein, 'Building Lot' shall mean each single-family residential Building Lot. Building Lot shall not include Common Area." (R., Vol. I, p. 67).

5. Section 3.12 of the Declaration defines "Improvement" as "any structure, facility or system, or other improvement or object, whether permanent or temporary, which is erected, constructed or placed upon, under or in any portion of the Property, including, without limitation, residential structures, accessory buildings, fences, streets, drives, driveways, parking areas, sidewalks, bicycle paths, curbs, landscaping, walls, hedges, plantings, trees, living and/or dead vegetation, rocks, signs, lights, mail boxes, electrical lines, pipes, pumps, ditches, waterways, recreational facilities, grading, road construction, utility improvements, removal of trees and other vegetation, plantings, and landscaping, and any new exterior construction or exterior improvement which may be not included in the foregoing." *Id.*

6. In order to carry out the purpose of the Declaration, "[i]mprovements on the Property shall be made in conformity with the . . . Project Documents" and "[n]o Improvements on any portion of the Property shall be constructed, placed or removed . . . without Architectural Committee approval . . . ." (R., Vol. I, p. 83, § 9.1). The improvements "as permitted by the Architectural Committee" must be "approved in writing." (R., Vol. I, p. 68, § 4.1).

7. Section 4.2.3 of the Declaration provides: "No fence shall be allowed except as approved by the Architectural Committee and in general conformance with the fence style depicted on Exhibit B, attached hereto and made a part hereof. The visual harmony and aesthetic appeal of

the structures on the Building Lots being of mutual concern to all Owners and having a direct bearing on the value of Building Lots and Improvements thereon, the Architectural Committee shall have the right to control the texture, design and color scheme of the outside walls, fences, roofs and patio roofs of all structures erected upon Building Lots, and to require landscaping. . . ." (R., Vol. I, p. 69).

8. Section 4.2.4 of the Declaration provides, in relevant part, as follows:

> Each Owner shall place fencing (as approved by the Architectural Committee) subject to the following restrictions:
>
> (a) Fence and walls shall not extend closer to any street than twenty feet (20') nor project beyond the setback of the principal building on the Building Lot. No fence higher than six feet (6') shall be allowed without the prior approval of Ada County (if required) and the Architectural Committee.
>
> (b) All fences and walls shall be constructed and installed and maintained in good appearance and condition at the expense of the Owner of the Building Lot on which they are located and all damaged fencing and walls shall be repaired or replaced to original design, materials and color within a reasonable time after said damage occurs.
>
> . . .
>
> (d) No fence, wall, hedge, high planting, obstruction or barrier shall be allowed which would unreasonably interfere with the use and enjoyment of neighboring Building Lots and streets, and shall not be allowed if the same constitute an undesirable, noxious or nuisance effect upon neighboring Building Lots.

(R., Vol. I, p. 69).

9. Section 4.4 of the Declaration provides that "[t]he Architectural Committee shall adopt and amend, from time to time, guidelines regulating landscaping permitted and required." (R., Vol. I, p. 70).

10. The Declaration "is intended to serve as authority for the Architectural Committee to use its judgment to see that all Improvements conform and harmonize as to external design, quality and type of construction, architectural character, materials, color, location on the Property, height, grade and finished ground elevation, natural conditions, landscaping, and all other aesthetic considerations." (R., Vol. I, p. 68, § 4.1).

11. Section 9.2 of the Declaration provides: "[t]he actions of the Architectural Committee in the exercise of its discretion by its approval or disapproval of the proposed Improvements on the Property . . . shall be conclusive and binding on all interested parties." (R., Vol. I, p. 83).

12. In furtherance of the discretion of the Architectural Committee, Section 9.5 of the Declaration provides that "[t]he approval of the Architectural Committee of any proposals or plans and specifications or drawings for any work done or proposed, or in connection with any other matter requiring the approval and consent of the Architectural Committee, shall not be deemed to constitute a waiver of any right to withhold approval or consent as to any similar proposals, plans and specifications, drawings or matter whatever subsequently or additionally submitted for approval or consent." (R., Vol. I, p. 84).

13. The Declaration provides a method for inspection of work and correction of defects. (R., Vol I, pp. 84-85, § 9.7). The owner must give written notice of completion to the Architectural Committee, and "[w]ithin sixty (60) days thereafter, the Architectural Committee . . . may inspect such Improvement. If the Architectural Committee finds that such work was not done in substantial compliance with the approved plans, it shall notify the Owner in writing of such non-

compliance within such sixty (60) day period, specifying the particular noncompliance, and shall require the Owner to remedy the same." (R., Vol. I, p. 84, §§ 9.7.1, 9.7.2).

14. If the owner does not remedy the noncompliance, "the Board, at its option, may either remove the noncomplying improvement or remedy the noncompliance, and the Owner shall reimburse the Association, upon demand, for all expenses incurred in connection therewith. If such expenses are not promptly repaid by the Owner to the Association, the Board shall levy a Limited Assessment against such Owner for reimbursement pursuant to the Project." (R., Vol. I, p. 85, § 9.7.3; *see also* R., Vol. I, p. 68, § 4.1).

15. Pursuant to Section 5.6 of the Declaration, the Board has "[t]he power and authority from time to time in its own name, on its own behalf, or on behalf of any Owner who consents thereto, to commence and maintain actions and suits to restrain and enjoin any breach or threatened breach of the Project Documents, and to enforce by injunction or otherwise, all provisions hereof." (R., Vol. I, p. 74, § 5.6.1.2). Further, Section 5.6.2 of the Declaration provides that:

> 5.6.2 Duties. In addition to duties necessary and proper to carry out the power delegated to the Association by the Project Documents . . . the Association or its agent . . . shall have the authority and the obligation to conduct all business affairs of the Association and to perform, without limitation, each of the following duties:
>
> . . .
>
> 5.6.2.10 Enforcement of Restrictions and Rules. Perform such other acts, whether or not expressly authorized by this Declaration, as may be reasonably advisable or necessary to enforce any of the provisions of the Project Documents and any and all laws, ordinances, rules and regulations of Ada County. . . .

(R., Vol. I, pp. 75, 77).

16. Sections 15.5.1 and 15.5.2 of the Declaration provide: "any Owner of any Building Lot shall have the right to enforce any or all of the provisions hereof" and the failure of any Owner to comply is a nuisance which "will give rise to a cause of action in . . . the Association . . . for recovery of damages or for negative or affirmative injunctive relief or both." (R., Vol. I, p. 91, §§ 15.5.1, 15.5.2).

17. Pursuant to Section 8.1 of the Declaration, "[i]n the event an attorney or attorneys are employed . . . to enforce compliance with or specific performance of the terms and conditions of this Declaration, each Owner agrees to pay reasonable attorney's fees in addition to any other relief or remedy obtained against such Owner." (R., Vol. I, p. 81).

18. Mr. Rodina submitted an Eagle Springs HOA Architectural Review and Approval Form to the Architectural Committee on May 9, 2016. (R., Vol. I, p. 25, L. 18, *compare with* p. 11, para. 20; R., Vol. I, p. 113).

19. In that application, Mr. Rodina requested approval to repair and extend his fence on the east side of his property to cover the full length of the house and for landscaping to repair and level the fence with the house. (R., Vol. I, p. 113).

20. This limited request was approved by the Architectural Committee on May 9, 2016, on the condition that the fence be stained to match and that all repairs remain in compliance with the Declaration and applicable codes. *Id.*; *see also* (R., Vol. I, p. 25, L.18, *compare with* p. 11, para. 20; R., Vol. I, p. 55, paras. 11-12).

21. In August 2016, two members of the Architectural Committee became aware that additional work was being performed on the Property which had not been described and approved

by the May 9, 2016 form. (R., Vol. I, p. 56, para. 14). The Architectural Committee then requested that Mr. Rodina submit a second application for the additional work. (R., Vol. I, p. 56, para. 15).

22. The additional work included substantial raising of the grade of the Property, construction of a retaining wall, and relocation and significant elevation increase of the fence on the Property which had not been previously submitted for approval. (R., Vol. I, p. 56, para. 14). The May 9, 2016 application had not described any plans to raise the fence, move the fence, or construct a retaining wall, and such work was not approved. *Id.*

23. At the request of the Board, on or about September 6, 2016, Mr. Rodina submitted a second application to the Architectural Committee, for review of the additional work. (R., Vol. I, p. 26, LL. 1-2, *compare with* p. 11, para. 26-27; R., Vol. I, p. 56, para. 16; R., Vol. I, p. 115).

24. The second application included plans to level the property by using retaining wall blocks and move the fence nearer to Cayuse Way. (R., Vol. I, p. 115).

25. The Architectural Committee reviewed the application for the additional work, in light of the terms of the Declaration, as it does all such applications. (R., Vol. I, p. 56-57, paras. 17-20).

26. The fence that Mr. Rodina had installed as part of the unapproved additional work extended closer to the street than twenty feet (20') and, sited atop of the retaining wall, caused the fence to appear to be eight (8) or nine (9) feet high from the sidewalk adjacent to Cayuse Way and from neighboring lots. (R., Vol. I, pp. 57, 138, 140, 142).

27. After careful consideration of the guidance and authority of the Declaration, the Architectural Committee denied the second application. (R., Vol. I, p. 57, para. 20).

28. The Board sent a letter to Mr. Rodina dated September 27, 2016, explaining the reasons for the denial in detail and inviting Mr. Rodina to revise his plans and submit another application for approval. (R., Vol. I, pp. 57-58, para. 22, p. 124).

29. As of the date of this appeal, Mr. Rodina has never received approval for the additional work performed on his Property, and the Property remains in violation of the Declaration. (R., Vol. I, p. 59, paras. 31-33).

With these corrections, objections, and supplements, the Association agrees with Mr. Rodina's Statement of Facts.

II. ADDITIONAL ISSUES PRESENTED/ATTORNEY FEES ON APPEAL

A. First Issue Presented on Appeal: Approval Without Conditions.

1. Did Mr. Rodina fail to preserve his first issue on appeal at the District Court?
2. Is there substantial and competent evidence to support the District Court's conclusion that Mr. Rodina's first application for architectural review was approved, with conditions, by the Architectural Committee?
3. If the District Court did err, did Mr. Rodina invite the error by admitting to the Court that his first application for architectural review was approved by the Architectural Committee?

B. Second Issue Presented on Appeal: Unfair and Irregular Enforcement (Waiver).

1. Is there substantial and competent evidence to support the District Court's conclusion that the Association did not waive its right to enforce the Declaration?

2. Is there substantial and competent evidence to support the District Court's conclusion that the *Herren* analysis does not apply to this case?

C. Third Issue Presented on Appeal: Implied Covenants of Good Faith and Fair Dealing.

1. Did Mr. Rodina fail to preserve his third issue on appeal at the District Court?

2. Was the District Court's determination that the Architectural Committee was acting in good faith, fairly, and in compliance with the Declaration when it denied Mr. Rodina's architectural review application based upon substantial and competent evidence?

3. Was Mr. Rodina's request to broaden the implied covenant of good faith and fair dealing, as it relates to homeowners associations and enforcement, properly preserved at the District Court?

D. Fourth Issue Presented on Appeal: Doctrine of Reasonable Expectations.

1. Was Mr. Rodina's request that the Doctrine of Reasonable Expectations be reaffirmed in Idaho properly preserved at the District Court?

E. Fifth Issue Presented on Appeal: Attorney Fees.

1. Is the Association entitled to its attorney fees and costs on appeal?

III. ARGUMENT

A. Responses to First Issue on Appeal: Approval Without Conditions.

1. Mr. Rodina failed to preserve the argument that his first architectural review application was never acted upon by the Architectural Committee by not raising the issue with the District Court.

Mr. Rodina's first argument on appeal is that the May 9, 2016 architectural review application he submitted for the work to be performed on his Property was never acted upon by the Architectural Committee and, therefore, was approved, automatically, without conditions. (App.'s Brief at 16-19). In the same section, Mr. Rodina also offers multiple additional arguments: (1) that his Property is exempt from the covenants, conditions, and restrictions contained in the Declaration he is accused of violating, *id.* at 18; (2) that the Declaration is an illegal adhesion contract, *id.* at 19; and (3) waiver resulting from the Association's failure to timely act under Section 9.3.4 of the Declaration. *Id.* However, Mr. Rodina makes these arguments for the first time on appeal; the arguments were never raised with the Association or the District Court in the pleadings, motions or responses to motions, at oral argument in the summary judgment hearing, or in his motion for reconsideration. This Court has stated repeatedly that the law on this subject is very clear: "[a]n issue not raised in the court below will not be considered on appeal." *Kinsela v. State, Dept. of Finance*, 117 Idaho 632, 634, (1990). *See also Sanchez v. Arave*, 120 Idaho 321 (1991); *Smith v. Shinn*, 82 Idaho 141, 149-150 (1960). Therefore, the Court should reject Mr. Rodina's arguments because he failed to raise them or preserve them below.

2. The District Court properly determined that the May 9, 2016 application had been approved by the Architectural Committee.

The District Court's factual determination that the May 9, 2016 architectural review application submitted by Mr. Rodina was approved by the Architectural Committee, with conditions, was supported by substantial and competent evidence and should not be overturned on appeal. "Where the lower court reaches a determination that is contrary to the claim alleged by a

party, based on the evidence presented on both sides of the issue, the court effectively decides that the evidence is insufficient to support that party's contention." *State, Dept. of Health and Welfare v. Roe*, 139 Idaho 18, 21 (2003) (citing *County of Canyon v. Wilkerson*, 123 Idaho 377 (Ct. App. 1993)). This is often characterized as a "negative finding" where a party has failed to satisfy its burden of proof. *Id.* On appeal, the appellate court's standard for review of such a finding is to determine if the lower court's decision is "clearly erroneous." *Id.* (citing I.R.C.P 52(a)). "Clear error will not be deemed to exist if the findings are supported by substantial and competent, though conflicting, evidence." *Id. See also Farm Bureau Ins. Co. of Idaho v. Kinsey*, 149 Idaho 415, 418 (2010); *Flemmer v. Tammany Elementary Sch. Dist. No. 343*, 116 Idaho 204, 207 n.2 (Ct. App. 1989) ("Because we agree with the trial court that no genuine issue of material fact was established with respect to any arbitrary action or bad faith, it follows that the court's findings would also pass muster under a deferential "clear error" standard of appellate review.").

The District Court's factual finding that the May 9, 2016 architectural review application submitted by Mr. Rodina was approved by the Architectural Committee, with conditions, was supported by substantial and competent evidence. As noted above, the evidence considered by the District Court included an admission by Mr. Rodina in his Answer that the application was approved. (R., Vol. I, p. 25, L.18, *compare with* p. 11, para. 20). It included an admission of approval in Mr. Rodina's own Affidavit. (R., Vol. I, p. 196, LL. 9, 14). In addition, on summary judgment, the District Court reviewed a copy of the approved application itself, which on its face, includes conditions for approval. (R., Vol. I, p. 113).

It is irrelevant whether or not the conditions were written by Nick Barber. It is also irrelevant whether or not the portion of the application to be completed by the Association is blank or completed. The Record is replete with evidence showing that the application was approved and approved *with conditions*. Mr. Rodina has admitted that the May 9, 2016 architectural review application was approved by the Architectural Committee. (R., Vol. I, p. 25, L.18, *compare with* p. 11, para. 20; R., Vol. I, p. 55, paras. 11-12; R., Vol. I, p. 196, LL. 9, 14; App.'s Brief at 7). Mr. Barber, the president of the Association and Chair of the Architectural Committee, admitted to writing the conditions on the application as part of the approval. (R., Vol. I, p. 55, para. 12). The Record shows that Mr. Barber met with Mr. Rodina to discuss the May 9, 2016 application and, after meeting with him, approved and signed the application. *Id.*

All of this evidence was uncontroverted before the District Court. Only in his appeal brief did Mr. Rodina begin to challenge whether his original application was approved by the Architectural Committee or approved with conditions. Therefore, the District Court had substantial and competent evidence from which to conclude that the May 9, 2016 application was approved by the Architectural Committee with conditions of approval. The District Court did not commit reversible error when it reached this conclusion. Accordingly, this Court should reject Mr. Rodina's first issue on appeal and the District Court's ruling should not be disturbed.

3. Any error committed by the District Court in regards to the May 9, 2016 architectural application was invited by Mr. Rodina.

Even if the Court concludes that Mr. Rodina's claims about the first architectural review application were properly preserved for appeal, his arguments must still fail because he invited the

reversible error he claims the District Court committed. *See City of Middleton v. Coleman Homes, LLC*, 163 Idaho 716, 727 (2018). A party to an action cannot "successfully complain of errors [the party] has acquiesced in or invited." *Taylor v. McNichols*, 149 Idaho 826, 833 (2010) (quoting *State v. Owsley*, 105 Idaho 836, 838 (1983)). "The doctrine of invited error applies to estop a party from asserting an error when [the party's] own conduct induces the commission of the error." *Thomson v. Olsen*, 147 Idaho 99, 106 (2009) (quoting *State v. Atkinson*, 124 Idaho 816, 819 (Ct. App. 1993)). "The purpose of the invited error doctrine is to prevent a party who caused or played an important role in prompting a trial court to [take certain action] from later challenging that [action] on appeal." *McNichols*, 149 Idaho at 834 (quoting *Woodburn v. Manco*, 137 Idaho 502, 505 (2002)).

In paragraph 20 of the Complaint, the Association alleged that "[o]n or about May 9, 2016, [Mr. Rodina] applied for approval, and *was granted approval by the Architectural Committee* to do some work on the Property." (R., Vol. I, p. 11) (emphasis added). In paragraph 4, the Association alleged that Mr. Rodina bought the Property subject to the covenants, conditions, and restrictions found in the Declaration. (R., Vol. I, p. 9). In paragraph 5, the Association alleged that the Declaration's "covenants, conditions, and restrictions run with the land and are an equitable servitude upon" Mr. Rodina. *Id.* Mr. Rodina admitted each of these allegations in his Answer. (R., Vol. I, p. 24, para. 2, p. 25, para. 8).

In addition, Mr. Rodina admitted in his Affidavit that the May 9, 2016 application for architectural review was approved by the Architectural Committee. (R., Vol. I, p. 197, L. 9). He even added that he relied on the Association's approval. *Id.*

"An admission made in a pleading is binding on the party making it." *Smiley v. Smiley*, 46 Idaho 588, 590 (1928); *see also Christensen v. City of Pocatello*, 142 Idaho 132, 137 (2005); *Weed v. Idaho Copper Co.*, 51 Idaho 737 (1932). By admitting each of these allegations in his Answer and in his Affidavit, Mr. Rodina is now estopped from asserting that approval was never given by the Architectural Committee, that the terms of Section 9.3.4 of the Declaration automatically granted him approval because the Architectural Committee did not timely act, or that the contract is an illegal adhesion contract. If this Court finds that the District Court made an error on any of these issues, any such error stems from Mr. Rodina's admissions. As a result, this Court should reject Mr. Rodina's argument on the first issue on appeal.

B. Responses to Second Issue on Appeal: Unfair and Irregular Enforcement (Waiver).

Mr. Rodina's second argument on appeal, titled as "the Association unfairly and irregularly enforces the provisions of the Declaration," is a mish-mash of various legal and factual theories. (App.'s Brief at 19-26). The argument is headlined by a challenge to the "No Waiver" clause in the Declaration and Mr. Rodina's belief that the Association has waived its ability to enforce the covenants and restrictions against him. *Id.* From there, however, it morphs into a series of tangential arguments, from public policy to adhesion contracts, from homebuyers believing they will be treated fairly to invited error, from racial discrimination to discrimination against lawyers and judges, and from prior knowledge to the covenants of good faith and fair dealing implied in contracts, before finally returning back to waiver. *Id.* Many of these arguments are not appropriate for this appeal because they were not raised in the pleadings or otherwise at the District Court level (*e.g.*, public policy against "No Waiver" clause in Declaration, adhesion contract, homebuyers'

belief in being treated fairly, invited error, and discrimination against lawyers and judges), and, therefore, should be rejected by this Court. *Kinsela v. State, Dept. of Finance*, 117 Idaho 632, 634, (1990). *See also Sanchez v. Arave*, 120 Idaho 321 (1991); *Smith v. Shinn*, 82 Idaho 141, 149-150 (1960). Nonetheless, even those that may have been properly raised and preserved must fail.

1. The District Court properly determined that the Association did not waive its right to enforce the Declaration.

The District Court, on summary judgment, considered the terms of the Declaration and the substantial evidence before it, and properly determined that the Association did not waive its right to enforce the terms of the Declaration. "Waiver is an equitable doctrine based upon fairness and justice." *Hecla Min. Co. v. Star-Morning Min. Co.*, 122 Idaho 778, 782 (1992). It is "the intentional relinquishment of a known right." *Crouch v. Bischoff*, 78 Idaho 364, 368 (1956). It is usually a question of fact "and is foremost a question of intent." *Hecla Min. Co.*, 122 Idaho at 782; *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518, 520 (1982). When a party claims that waiver has occurred, that party must clearly show an intention of the other party to waive a known right and that the party claiming waiver acted in reliance on the waiver. *Id.*; *Riverside Dev. Co.*, 103 Idaho at 518, 520; *Brand S Corp. v. King*, 102 Idaho 731, 734, 639 P.2d 429, 432 (1981).

In its written ruling on summary judgment, the District Court systematically and carefully walked the reader through its analysis of the factual and legal issues in this case—first addressing the Association's motion on the affirmative breach of covenant claim, (R., Vol. I, pp. 246-52), and then turning its attention to Mr. Rodina's affirmative defenses. (R., Vol. I, pp. 252-59). Looking at the evidence submitted on the Association's breach of covenant claim, as well as Mr. Rodina's

evidence in opposition, the District Court concluded that Mr. Rodina had breached the terms of the Declaration. (R., Vol. I, pp. 251-52). The District Court then turned its analysis to Mr. Rodina's affirmative defenses and whether they prevented the Association's enforcement of the terms of the Declaration, starting with waiver. (R., Vol. I, pp. 252-54).

The District Court analyzed three different sources of alleged waiver: the May 9, 2016 application form, other similar improvements in the neighborhood, and Section 9.7 of the Declaration. *Id.* In each instance, the District Court concluded that Mr. Rodina failed to provide evidence showing the Association's intent to waive a known right.

With respect to the May 9, 2016, application form, the District Court said:

> There was no indication on the face of the form, or in any affidavit evidence, that the First Approval allowed for any deviation from the written Declarations or a variance from the architectural provisions. In fact, the admissible evidence in the First Approval Form shows the opposite. From the Record, it is clear that the First Approval Form expressly conditioned approval in a written term that "all repairs to be in compliance [with] CC&Rs . . . ." Thus, the Defendant has failed to produce any evidence that the Association waived its rights to enforce noncompliance with the CC&Rs based on its approval of the First Approval Form Rodina submitted in May 2016.

Id. at 253.

The District Court also carefully considered Mr. Rodina's argument that the existence of other similar improvements in the neighborhood barred the Association from restricting his improvements. *Id.* at 253-54. The District Court, after analyzing the issue, referred to the plain language in Section 9.5 of the Declaration that limits the application of the waiver doctrine:

> No Waiver of Future Approvals. The approval of the Architectural Committee of any proposals or plans and specifications or drawings for any work done or proposed, or in connection with any other matter requiring the approval and consent of the Architectural Committee, shall not be deemed

> to constitute a waiver of any right to withhold approval or consent as to any similar proposals, plans and specifications, drawings or matter whatever subsequently or additionally submitted for approval *or* consent.
>
> Therefore, the plain language of the Declarations clearly states the Committee/Association does not waive the enforcement of the Declarations simply because it has previously approved similar proposals.

Id. at 253.

Finally, the District Court concluded that Section 9.7 of the Declaration also did not evidence waiver on the part of the Association:

> Section 9.7 addresses the Architectural Committee's ability to inspect the work completed and correct any defects as part of an approved plan. Under this section, a Homeowner is required to submit a written notice of completion to the Architectural Committee. *Declarations* § 9.7.1. The Architectural Committee is then granted sixty days to inspect the completed project and notify the Owner in writing of any substantial non-compliance with the approved plans and instruct the Owner to remedy the non-compliance. *Declarations* § 9.7.2. Further, for any reason the Architectural Committee fails to notify the Owner of any noncompliance within sixty (60) days after receipt of the written notice of completion . . . the work shall be deemed to be in accordance with the approved plan." *Declarations* § 9.7.4. Thus, the plain, unambiguous language of the Declarations does not waive noncompliance with an approved plan until sixty days after notification of completion. **There is no material issue of fact that no notice of completion was ever provided by Defendant.** The Committee informed Rodina that he was not in compliance with the approved plan and the Defendant has failed to show a material issue of fact otherwise. Therefore, as a matter of law, the Plaintiff has not waived enforcement under the plain, unambiguous language of the Declarations.

Id. at 253-54. (Emphasis added).

The District Court ultimately concluded that Mr. Rodina failed to provide sufficient evidence to support his defense of waiver. *Id.* at 254. Thus, based on the Association's evidence and Mr. Rodina's *lack of* evidence, the District Court granted summary judgment. *Id.* The evidence relied on is sufficient and competent enough to pass muster under the clear error standard

applicable here, and this Court must reject Mr. Rodina's argument that there is a genuine issue of material fact that the Association has waived enforcement of its architectural provisions in its Declaration.

2. Judge Copple-Trout's opinion had no binding effect on this case and the District Court properly distinguished the principles and rulings in that case from this case.

On reconsideration, Mr. Rodina again raised the issue of waiver based on non-uniform enforcement of the protective covenants—the same argument raised now in his brief. (R., Vol. I, pp. 282-83). In support of his argument, Mr. Rodina cited to a written opinion issued by Judge Copple-Trout in another district court case involving the Association: *Eagle Springs Homeowners Association, Inc. v. Herren*. *Id.* at 282. Acknowledging that "*Herren* is not binding precedent on this Court," the District Court nonetheless "review[ed] that analysis when evaluating the facts of this case." (R., Vol. I, p. 709).

The *Herren* case involved the Association's enforcement of its parking restrictions contained in the Declaration. Judge Copple-Trout held that the defendants in the *Herren* case had violated the parking covenants and restrictions in the Declaration. *Id.* However, Judge Copple-Trout further concluded that the Association had waived their right to injunctive relief in enforcing those covenants by failing to uniformly enforce those particular covenants. *Id.*

The District Court properly found, however, that Judge Copple-Trout's ruling in *Herren* was not applicable to the facts in play here:

> In the present case, [Mr.] Rodina argues that the Association not uniformly enforcing street parking is the equivalent of not uniformly enforcing fencing variations. The Declarations contain clear and absolute terms regarding both street parking and fence requirements. However, this case is distinguishable from *Herren* because, in this case, the Architecture Committee has the ability to allow variances to specific provisions set forth in the Project Documents.

Id.

The District Court then went on to analyze how the Declaration authorizes the Association to grant variances on architectural review requests. *Id.* at 709-710. In those situations, the Architectural Committee is given broad discretion to allow a variance or not:

> Under the Declarations, the Architectural Committee is authorized "to use its judgment to see that all Improvements conform and harmonize as to external design, quality and type of construction, . . . materials, color, location on the Property, height, grade and finished ground elevation, . . . landscaping, and all other aesthetic considerations." *Declarations* § 4.1. *See also Declarations* § 9.1.50. In this case, Defendant had the ability obtain approval from the Architecture Committee for the variances he sought with his fence. The Court thoroughly analyzed Rodina's project and found it did not comply with the plain language of the Declarations. Therefore, Defendant has not shown a genuine issue of fact that the Association acted outside the scope of their authority under the Declarations to deny projects that do not conform to the Declarations after evaluating their impact on the neighborhood.

Id. at 709-710.

For all of these reasons, the District Court properly concluded that Mr. Rodina did not offer additional or sufficient evidence of unfair or irregular enforcement of the Declaration by allowing similar projects to the one for which he sought approval:

> In [Mr.] Rodina's allegation that the Restrictive Covenants of the Declaration have not been interpreted uniformly, he incorrectly asserts this Court "found that the Association failed to uniformly enforce the covenants." For clarification, this Court found there was not sufficient evidence to support a finding that the Committee had approved similar projects. [Mr.] Rodina has failed to present any additional evidence

> to support reconsideration of its finding that the record is insufficient to find a material issue of fact remains that the Association approved substantially similar projects.

Id. at 710.

The District Court had substantial and competent evidence to support its decision that the Association had not waived its right to enforce the Declaration. The Court's opinion on summary judgment is replete with careful analysis, consideration of the admissible evidence available to the Court, and the proper conclusion, based on those facts and analysis, that Mr. Rodina's defenses failed. That careful determination of the District Court should not be disturbed.

C. Responses to Third Issue on Appeal: Implied Covenants of Good Faith and Fair Dealing.

Mr. Rodina's third issue on appeal treads closely with his second issue and overlaps significantly with the arguments about unfair and irregular enforcement of the Declaration. (App.'s Brief at 27-30). It is "waiver" packaged anew based on the claim that "the HOA waives certain provisions for certain people and not others." *Id.* at 28. However, regardless of the trappings, the argument must fail.

1. Mr. Rodina failed to preserve the argument of the implied covenant of good faith and fair dealing with the District Court.

In his brief, Mr. Rodina asserts that the implied covenant of good faith and fair dealing flowing from the Declaration has been breached by the Association in its treatment of this architectural review application and this enforcement action. (App.'s Brief at 27-30). However, the issue was not preserved with the District Court and should be rejected by this Court as being

improperly raised on appeal. *Kinsela v. State, Dept. of Finance*, 117 Idaho 632, 634 (1990). *See also Sanchez v. Arave*, 120 Idaho 321 (1991).

Mr. Rodina may argue that the issue of the implied covenant of good faith and fair dealing was raised in his Motion for Reconsideration. (R., Vol. I, p. 283). The Association acknowledges that it was. However, the argument about the implied covenant was made for the first time on reconsideration. It was not raised in the pleadings, nor in the response to the Association's motion for summary judgment or on oral argument on the motion for summary judgment. Mr. Rodina's Answer simply refers to the Association's directors' and officers' duties of good faith found in Idaho Code sections 30-29-830 and 30-29-842. (R., Vol. I, p. 28). It was also argued this way on summary judgment, which was recognized by the District Court in its opinion. "Rodina asserts the HOA Officers and Board Members violated obligations of good faith and fiduciary duties pursuant to Idaho Code §§ 30-29-830 and -842, arguing '[t]his action is an abuse of power by individuals in violation of their duties and should be deemed void.'" (R., Vol. I, p. 257).

A "trial court [is] not limited to deciding the case on the issues as framed by the pleadings. However, the court's authority . . . to determine a case upon unpleaded theories is limited by the proviso in I.R.C.P. 15(b) that for the court to consider unpleaded issues those issues must have been 'tried by express or implied consent of the parties . . . .'" *M.K. Transport, Inc. v. Grover*, 101 Idaho 345, 349 (1980). "Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue." *Id.* (*quoting MBI Motor Co., Inc. v. Lotus/East, Inc.*, 506 F.2d 709, 711 (6th Cir. 1974)).

Here, no consent was given by the Association, either express or implied. Accordingly, it was improper for Mr. Rodina to raise it for the first time in his Motion for Reconsideration. As the issue was not properly before the District Court, the matter is being truly raised for the first time on appeal. Issues raised for the first time on appeal will not be considered. *Kinsela v. State, Dept. of Finance*, 117 Idaho 632, 634 (1990). *See also Sanchez v. Arave*, 120 Idaho 321 (1991). Therefore, this Court should reject Mr. Rodina's argument because the issue was not properly raised and preserved before the District Court.

2. The District Court properly ruled that the Association did not breach the duty of good faith and fair dealing when enforcing the Declaration's architectural provisions against Mr. Rodina.

Even if this Court determines that the implied covenant of good faith and fair dealing argument was preserved and properly argued by Mr. Rodina at the District Court level, his argument must still fail. Like Mr. Rodina's "waiver" argument, the District Court carefully considered the terms of the Declaration and the substantial and competent evidence before it when ruling that the Association did not breach the covenant of good faith and fair dealing in bringing this action against Mr. Rodina.

The implied covenant of good faith and fair dealing is simply a requirement "that the parties perform in good faith the obligations imposed by their agreement." *Thompson v. City of Idaho Falls*, 126 Idaho 587, 593 (Ct. App. 1994) (*citing Idaho First Nat'l Bank v. Bliss Valley Foods*, 121 Idaho 266, 288 (1991)). "The implied covenant of good faith and fair dealing arises only regarding terms agreed to by the parties." *Taylor v. Browning*, 129 Idaho 483, 491 (1996).

> No covenant will be implied which is contrary to the terms of the contract negotiated and executed by the parties. The covenant requires "that the parties perform in good faith the obligations imposed by their agreement," and a violation of the covenant occurs only when "either party . . . violates, nullifies or significantly impairs any benefit of the . . . contract. . . .

Idaho First Natl. Bank v. Bliss Valley Foods, 121 Idaho 266, 288 (1991) (citations omitted).

"[C]ontract terms are *not* overridden by the implied covenant of good faith and fair dealing." *Bushi v. Sage Health Care, PLLC*, 146 Idaho 764, 768 (2009) (*citing Clement v. Farmers Ins. Exch.*, 115 Idaho 298, 300 (1988); *Olson v. Idaho State Univ.*, 125 Idaho 177, 182 (Ct. App. 1994)). Of course, the contract at issue here is the Declaration. In short, because Mr. Rodina "had notice of the applicable CC&Rs, [he] is bound to abide by them." *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 365 (2004).

Here, the District Court carefully reviewed the evidence submitted by both sides as part of the summary judgment record, and on reconsideration, in conjunction with the applicable law. In issuing its ruling, the District Court first acknowledged the Association's directors' duties to use good faith, as identified in *Steelman v. Mallory*, 110 Idaho 510, 513 (1986), (R., Vol. I, p. 258), before explaining that the business judgment rule protects directors who act in good faith. The District Court then noted, relying on *Steelman*, that the burden of proving bad faith rests on the party making the claim. *Id.* Finally, the District Court discussed the authority and discretion afforded the Architectural Committee by the Declaration, specifically citing to Sections 4.1 and 9.1 of the Declaration. *Id.*

With this foundation in place, the District Court then weighed the evidence and concluded that Mr. Rodina had failed to meet his evidentiary burden:

> Because the unambiguous language of the Declarations grants the Architectural Committee discretion to approve or deny requests for fence construction, retaining wall construction, and landscaping, the evidence submitted by the Plaintiff and any determinations by the Architectural Committee regarding these issues are controlling under the language of the Declarations. The Court finds the Defendant has failed to show a material issue of fact exists that the Board/Committee acted in a manner that was self-serving or outside the scope of their discretion under the unambiguous language of the Declaration.
>
> The Court addressed above that it was unable to compare whether the two other projects approved by the Board were substantially similar to the project completed by Rodina because neither party presented evidence at summary judgment on either of the two completed projects or the approval form(s) for those projects. The Court can only find in the record that the projects related to variances on the fence restrictions contained in section 4.3.2 of the Declarations. When reaching a decision on whether to approve fence variance requests, the Architectural Committee considers factors, including: "property location in the subdivision, visibility of the fence, and the aesthetics of the fence… and [whether [t]he drainage pattern [is] affected." The Association and Rodina submitted evidence showing the "[t]wo fence variance requests [were] submitted and were discussed in detail," which allowed the Committee to consider the "property location in the subdivision, visibility of the fence, . . . the aesthetics of the fence[, and] drainage pattern." The evidence before this court is that only after the committee considered these factors did it approve the variance requests. Rodina has presented no evidence showing that a material issue of fact exists that the Board's actions were self-serving or in violation of the Declarations.
>
> Further, the Committee denied Rodina's Second Approval Form "[a]fter careful consideration of the guidelines in Article IV, Sections 4.24 and 4.12 [of the Declarations]." Plaintiff identified that the completed project "negatively impact[ed] the aesthetics of the subdivision and unreasonable interefere[d] with the use and enjoyment of neighboring lots." Thus, the evidence before the Court is undisputed that the Board acted within its discretion under the Declarations and the unambiguous language of the Declarations permitted that discretion as a matter of law.

(R., Vol. I, p. 258-59).

On reconsideration, the District Court again addressed Mr. Rodina's lack of evidence showing that the Architectural Committee had acted in bad faith or in a self-serving manner. As the District Court noted in its opinion, Mr. Rodina's argument implied "that construction of the

Declarations that allows waiver 'invites bad faith as it would allow [the Association] to approve the plans of friends and relatives while denying the plans of [other homeowners] [*sic*] to in a favored category." (R., Vol. I, p. 710; *compare with* App.'s Brief at 27). But the District Court noted that the implication lacked any substance:

> However, Defendant does not include any argument related to his claim of breach of the good faith and fair dealing, just that the construction of the declaration could result in bad faith dealings.
>
> . . .
>
> On reconsideration, Defendant still does not include any argument or evidence that the Board's decision as to [Mr.] Rodina's Project was made in bad faith. On reconsideration, Rodina makes a policy argument that is not part of the pleadings in this case. [Mr.] Rodina's affirmative defense actually raised was about the Association's decision related to his Second Approval Form but no new evidence was presented at reconsideration to support this claim. Therefore, the Court will not reconsider its decision dismissing [Mr.] Rodina's affirmative defense of bad faith.

(R., Vol I, p. 710-11).

The implied covenant of good faith and fair dealing cannot rewrite the Declaration's terms. *Bushi*, 146 Idaho at 768. The Declaration endows the Architectural Committee with authority to grant variances and to consider a number of factors when determining whether or not to grant variances. (R., Vol. I, pp. 68, 83, 85). This endowment of authority to the Architectural Committee was in the Declaration at the time Mr. Rodina purchased his Property, so he is bound by it. *Shawver*, 140 Idaho at 365. The evidence relied on by the District Court is sufficient and competent enough to satisfy the clear error standard applicable here, and this Court must reject Mr. Rodina's argument that there is a genuine issue of material fact that the Association acted in bad faith when it has taken enforcement action against him and not others.

3. Mr. Rodina failed to preserve at the District Court his request to broaden the implied covenants of good faith and fair dealing as it relates to homeowners associations and enforcement of restrictive covenants.

In the final paragraph of his argument on the third issue on appeal, Mr. Rodina tosses out a request to this Court to expand the implied covenants of good faith and fair dealing. (App.'s Brief at 30). The request is to change the burden of proof as applied in *Steelman*. *Id.* In short, a homeowners association must prove that it acted in good faith when it waived a covenant, condition or restriction against some, but fewer than all owners. *Id.*

Mr. Rodina never raised this argument until his brief for this Court. It was not preserved at the District Court level in any fashion. Therefore, it is improper for argument on appeal. This Court should reject the request. *Kinsela v. State, Dept. of Finance*, 117 Idaho 632, 634 (1990). *See also Sanchez v. Arave*, 120 Idaho 321 (1991). Under *Steelman*, the party claiming bad faith carries the burden of proof. *Steelman*, 110 Idaho at 513. As has previously been discussed, even if the issue were properly preserved, there is no evidence that the Association has acted in bad faith, and the District Court's determination on that issue should not be disturbed.

D. Response to Fourth Issue on Appeal: Doctrine of Reasonable Expectations.

1. The Doctrine of Reasonable Expectations is inapplicable in this case.

Mr. Rodina's final request is for the Court "to [r]eaffirm the Doctrine of Reasonable Expectations." (App.'s Brief at 30). In short, Mr. Rodina argues that the Declaration is a contract of adhesion. *Id.* Therefore, Mr. Rodina alleges that he needs protection from the Association and its actions taken under the Declaration, including this enforcement action. Protection is necessary,

according to Mr. Rodina, because the Association cannot be controlled and will discriminate against him and other homeowners who are not friendly with or related to the members of its Board of Directors. *Id.* at 30-34. However, Mr. Rodina's argument fails for several reasons.

First, like many of his prior arguments, Mr. Rodina is making this argument for the first time on appeal. The Record is void of any reference to the Doctrine of Reasonable Expectations. As this Court has recited numerous times over the years, "[a]n issue not raised in the court below will not be considered on appeal." *Kinsela v. State, Dept. of Finance*, 117 Idaho 632, 634 (1990). *See also Sanchez v. Arave*, 120 Idaho 321 (1991). Therefore, the Court should reject Mr. Rodina's argument.

Second, the Record in this case contains no evidence that supports the application of the Doctrine of Reasonable Expectations in this situation. This conclusion logically follows, of course, because the issue was not raised at the trial court level. Nonetheless, beyond the obvious logic, the Record disputes Mr. Rodina's claim that a "Record full of references" supports his argument. (App.'s Brief at 32). A simple statement that there is evidence does not make it so.

Mr. Rodina argues that the Association's Board of Directors is out-of-control, currying favors from its friends and discriminating against Mr. Rodina (or others). (App.'s Brief at 32). His claims that the Board acts as though they "do not like him because of where he is from or for some other reason[,]" *id.*, are not evidence, and are certainly not supported by the Record. (R., Vol. I, pp. 257-59; R., Vol. I, pp. 710-11). He speculates irrelevantly about the unchangeable nature of the Declaration and "the same dilemma . . . likely confront[ing] him in the next transaction." (App.'s Brief at 32-33). He inappropriately questions his fellow buyers'

"competency" in understanding the Declaration's terms and making their purchases at Eagle Springs, whether they had a "meeting of the minds" with the seller, or whether there was ever an agreement "to all essential terms." *Id.* at 33-34.

However, these implications, speculations, and questions presented by Mr. Rodina in his brief are not evidence of an unconscionable adhesion contract needing judicial intervention under the Doctrine of Reasonable Expectations, and they are not supported by the Record. Likewise, they are not evidence of illegal or unconscionable behavior by the Association or its Board of Directors, requiring application of the Doctrine of Reasonable Expectations. As a result, this Court should reject the argument and not reaffirm the Doctrine of Reasonable Expectations.

Third, Mr. Rodina's argument fails to acknowledge the fact that, unlike true adhesion contracts, the terms of the Declaration can be changed. "[Homeowners] agreed to purchase property governed by restrictive covenants, which could be amended by written consent of seventy-five percent of the existing lot owners. Such agreements are valid under the law." *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 362 (2004) (*citing* 20 Am.Jur.2d *Covenants* § 236 (1995) ("[T]he restrictive agreements in a tract of land may provide for a method of abrogating or modifying such agreements, as, for example, by vote of a certain proportion of the property owners.")). *See also Adams v. Kimberley One Townhouse Owner's Ass'n, Inc.*, 158 Idaho 770, 773-777 (2015). Even new restrictions that were not part of the original covenants, conditions and restrictions may bind a homeowner. *Best Hill Coalition v. Halko, LLC*, 144 Idaho 813 (2007).

The Declaration for Eagle Springs can certainly be amended. Section 15.2 of the Declaration expressly states that the Declaration may be amended by "vote or written consent of Owners representing more than sixty-six percent (66%) of the votes in the Association, and such amendment shall be effective upon its recordation with the Ada County Recorder." (R., Vol. I, p. 90). If the homeowners object to the "No Waiver" clause in the Declaration, they can choose to amend it out. *Id.* If they want to curtail the enforcement authority of the Association's Board of Directors, they can amend the Declaration to impose restrictions on the Board. *Id.* In that way, the Declaration is not an adhesion contract because it is not truly a "take it or leave it" proposition. As a result, the Court should reject Mr. Rodina's request that the Doctrine of Reasonable Expectations be applied in this case.

E. Response to Fifth Issue on Appeal: Attorney Fees.

1. The Association is entitled to its attorney fees on appeal.

The Association is legally entitled to an award of attorney fees on appeal, on a number of bases. First, the Declaration authorizes an award of attorney fees to the Association in the event the Association retains an attorney "to enforce compliance with or specific performance of the terms and conditions of th[e] Declaration . . . ." (R., Vol. I, p. 81, § 8.1; *see also* R., Vol. I, p. 80, § 7.5). The Association's Bylaws also authorize an award of attorney fees. (R., Vol. I, p. 107, § 6.2(b)). Furthermore, the Association is entitled to attorney fees on appeal pursuant to Idaho Code § 12-121. The Association has both a contractual and a statutory basis for an award of attorney fees, and requests such from this Court.

IV. CONCLUSION

In his brief, Mr. Rodina has laid out four different issues on appeal where he alleges that the District Court made reversible errors in the handling of his opposition to the Association's summary judgment motions. As the Association has demonstrated, Mr. Rodina has failed to properly preserve several of these issues. Likewise, he failed to provide sufficient evidence to the District Court to create a genuine issue of material fact to avoid summary judgment. The District Court, in its analysis, carefully reviewed the issues before it and showed, through a detailed written opinion, that it had sufficient and competent evidence on which to enter judgment against Mr. Rodina. Ultimately, Mr. Rodina has failed to meet his burden on appeal, and his claims should be denied and dismissed, reaffirming the entry of Judgment in the Association's favor on all of its claims and Mr. Rodina's affirmative defenses, and awarding attorney fees and costs to the Association.

Respectfully submitted this 2nd day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April, 2019, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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☐ U.S. Mail, Postage Paid
☐ Hand Delivered
☐ Fax Transmittal
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