IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 1D20-1598

RIVERSIDE AVENUE PROPERTY, LLC, a Florida limited liability company,

Appellant,

vs.

L.T. Consolidated Case No.: 2014-CA-2848

1661 RIVERSIDE CONDOMINIUM ASSOCIATION, INC., a Florida not-for-profit corporation,

Appellee.

_________________________________/

ON APPEAL FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

This is an appeal of a judgment barring the claims of Riverside Avenue Property, LLC ("Riverside") for declaratory relief under the five-year statute of limitations, section 95.11(2)(b), Florida Statutes. The trial court erred in ruling that Riverside's cause of action—which sought a declaration of rights interpreting the uncertain rights of residential and commercial owners arising under the written covenants, easements, and restrictions governing the subject real property—accrued at the moment Riverside acquired title. (R.4084, 4086-87; R.4406-8.)

Riverside acquired title to the commercial parcel on May 8, 2008.

On May 8, 2008, Riverside Avenue Property, LLC ("Riverside") purchased the commercial parcel in a mixed-use condominium building, known as 1661 Riverside. (R.2524, 2560-63; T.16; T.1359.) The mixed-use building, a blend of residential and commercial condominiums (R.2369), is subject to the Declaration of Community Covenants, Easements and Restrictions for 1661 Riverside Building, as amended (the "Covenants"). (R.2700-92; R.2525, ¶ 3(D).)

Riverside's commercial parcel is located on the building's street level and includes restaurants and other retail spaces that Riverside leases to various commercial tenants. (R.2369; T.32-33.) The residential parcel is owned, in the aggregate, by the fee simple owners of the individual residential condominium units. (R.2369; R.2710, § 1.30.)

Initially, the building's developer, 1661 Riverside, LLC (the "Developer"), managed the mixed-use building and acted on behalf of the condominium association, 1661 Riverside Condominium Association, Inc. (the "Association"). (*E.g.*, T.1044-45.) William I. ("Tripp") Gulliford, III managed the Developer and was a member of the Association's board of directors. (T.16, 33-34; *see* T.1045.)[1] In August 2010, the Developer turned over control of the Association to the building's residential owners, pursuant to section 718.301, Florida Statutes. (R.2524-25.) The Association's board acts as the residential owner. (R.2369-70 (citing R.2710-11, § 1.30).)

The residential parcel is comprised of almost 90% of the building's square footage (exclusive of the parking garage), while Riverside's commercial parcel consists of a little more than 10% of the remaining square footage. (R.2524.) The residential parcel also includes the building's trash rooms and parking garage, which are used by both the commercial and residential owners. (R.2524; R.2371, ¶ 17.)

The Covenants govern the relationship between the residential and commercial owners.

The Covenants govern the relationship between Riverside and the Association. (R.2525, ¶ 3(C).) Included within the Covenants are cost-sharing

[1] Mr. Gulliford was a partner in Midland Development, the building's original owner. Midland Development sold the commercial parcel to Riverside in 2008. (T.16; T.1044-45; T.1359.)

allocations for certain categories of shared expenses. (R.2524-25, ¶ 2; R.2720-23.) With certain exceptions, common assessments levied under the Covenants are allocated at rates consistent with each owner's total square footage: almost 90% to the residential owner, and a little more than 10% to the commercial owner. (R.2371, ¶ 15; *see also* R.2765-66.)

The residential and commercial owners have maintenance responsibilities and cost-sharing obligations for shared portions of the building. (R.2370, ¶ 10.) For instance, the Covenants define "Shared Facilities" to include components that "afford benefits to or serve more than one Parcel in the Building," including those listed in Exhibit E. (R.2712, § 1.36; R.2767-68.) The fire prevention system is one of the components described in the list of "Shared Facilities." (R.2768, ¶ (i).)

The residential owner is responsible for maintenance of "Residential Owner Shared Facilities" (abbreviated as ROSF), which include the building's "trash handling and disposal facilities, including trash rooms, trash chutes, dumpsters, and compactors . . . ." (R.2370, ¶¶ 11, 12; R.2711, § 1.32.) "Residential Owner Shared Expenses" (abbreviated as ROSE), as defined by the Covenants, include, *inter alia*, "[t]rash hauling service from the trash storage room of the first floor of the Building." (R.2370, ¶ 13; R.2711, § 1.31(ix).)

Article II of the Covenants creates and defines the owners' easements and rights. (R.2716-18.) Section 2.3 grants the commercial owner a non-exclusive

easement to certain areas of the building, including the roof, elevators, communication rooms, and trash rooms. (R.2714.) Section 2.7 specifically governs parking, defining both the residential and commercial parking areas. As the commercial owner, Riverside has the authority to establish rules and regulations for its commercial parking area. (R.2717-18.)

Article III of the Covenants sets forth the powers and duties of both the commercial owner and the residential owner. (R.2718-19.) Riverside has the power and duty to maintain, repair, and otherwise manage the Shared Facilities (R.2718, § 3.1(a)), while the residential owner's powers and duties include maintenance, repair, and management of the Residential Owner Shared Facilities (R.2719, § 3.2(a)).

Included within Article IV's Covenant for Assessments is a section governing accounting and budget matters. (R.2722-23, § 4.6.) Each owner must prepare and distribute an annual balance sheet and operating statement reflecting income and expenditures for the Shared Facilities and Residential Owner Shared Facilities for that fiscal year. An itemized budget, on which common assessments are based, is to be prepared and distributed by each owner. (*Id.*)

Riverside and the Developer-controlled Association agreed on the management of the building and its facilities.

From May 2008 (when Riverside acquired title) until August 2010 (when the Developer turned control of the Association over to the residential owners), Riverside had "no dispute at all" with the Developer-controlled Association. (T.524;

see T.525, 527.)[2] Before the August 2010 turnover, Riverside was not uncertain as to any of its powers, privileges, immunities, or rights under the Covenants. (T.524.) Riverside and the Developer agreed on the interpretation of the Covenants, including the operation and allocation of costs. (*See* T.16-18, 524.)

In February 2011, conflicts begin to arise between Riverside and the Association.

After turnover, when the residential owners obtained control over the Association, conflicts related to the building's management arose. (*E.g.*, T.16-17, 524, 527.) The Association, under the control of the residential owners, began to interpret the Covenants differently than when the Association was under the Developer's control. (*See* T.17, 524, 525, 527; R.2983-88.) The residential owner-controlled Association's course of dealing with Riverside changed. (*See* R.4407-8.)

Trash Removal and Access to Trash Rooms. The first dispute, which concerned trash disposal, arose in February 2011. Before 2011, the Developer managed the trash rooms (T.17-18, 86-87; R.2985), which were used by both the residential and commercial owners (T.100-101). The Developer-controlled Association contracted with a waste removal service to haul the entire building's trash and, consistent with the Covenants' cost-sharing allocations, billed Riverside

[2] At trial, counsel and the witnesses referred to correspondence and dealings with "Tripp" (Mr. Gulliford) to describe the Developer-controlled Association's conduct before turnover. (*E.g.*, T.16, 33-34.)

for 10.288% of the cost. (T.86, 89-90; R.2371, ¶ 18; R.2983-88.)

After turnover, the residential owner-controlled Association objected to this arrangement. (T.527.) In February 2011, the Association informed Mr. Bakkar of its intent to cancel the current waste management contract. (T.98-99; R.2985.) The Association then refused to pick up the trash of Riverside's commercial tenants, removed the dumpsters from the trash storage room, and locked Riverside out of the building's trash rooms and chutes. (T.98-99, 527; R.2711.) The Association failed to manage, maintain, or pay for the trash rooms and trash hauling services. (R.2371, ¶ 19; R.2990-93.) Beginning in May 2011, Riverside incurred the cost of trash removal. (R.2372, ¶ 21; T.99.)

Pass Card System. In 2011, Riverside sought to maintain and control the pass card system, defined by the Covenants as one of the Shared Facilities within the commercial owner's control. (T.396, 398; *see* R.2372, ¶ 22-23; R.2718-19, § 3.1.) While acknowledging that the pass card system was included within that definition, the residential owner-controlled Association refused to allow Riverside to manage the card-entry system. (T.396; R.2986-87.)

Management of the ROSF. Although the Covenants authorize the Association to hire a property manager (R.2719, § 3.2(d)), the Association began in 2011 to charge Riverside the wrong percentage for its share of the management fees. (T.527-28; *see* R.2376, ¶ 37.) The Association also hired a second property management

firm, contrary to the Covenants' language. (R.2719, § 3.2(d); R.2376, ¶ 38; T.527-28.)

Budget Reconciliation. Since 2012, the Association has refused to reconcile its actual ROSF expenses with its budgeted expenses and to credit Riverside for any excess amounts. (R.2374, ¶ 32; T.285-86.) This is contrary to the Covenants' requirements. (R.2374, ¶ 32; R.2722-23, § 4.6.)

Commercial Parking and the Garage. The building's parking garage includes spaces for the commercial tenants and their retail customers, along with the residential unit owners. (R.2710, 2770-77; T.24.) Around 2013, the Association began to block one of the entrances to the building's parking garage and to harass the commercial tenants' customers who parked there. (T.185-88, 525.) Riverside claimed this misconduct impaired its easement rights under the Covenants. (T.176-77, 186, 525.) Riverside sought to establish rules and regulations for the commercial parking area. (T.182-83, 525; R.2372-73, ¶¶ 24-26; R.3036-37.)

Fire Protection System. The Covenants define the fire prevention system as one of the Shared Facilities. (R.2375, ¶ 34; R.2767-68.) Beginning in 2013, the Association charged Riverside for fire inspections, notwithstanding that Riverside was also conducting its own inspections. (T.230-32, 526.) Riverside did not consent to the duplicative inspections. (T.232.) Additionally, disputes arose related to the different types of fire protection systems. (*See* R.4029-30.)

Submetering of Parking Garage. In May 2014, allegedly without approval or authorization, the Association began to sub-meter the electrical service in the parking garage. (T.528; R.2375, ¶ 33.) Although the Covenants' First Amendment required the Association to pay more than 80% of the garage's electrical service (R.2780, ¶ 3(d); T.499, 506), the residential owner-controlled Association unilaterally split the service and charged Riverside a higher percentage (R.2375, ¶ 33; T.498, 502). Riverside sought reimbursement for the overcharges and asked that the system be restored to the method permitted by the Covenants. (R.2375, ¶ 33; T.498, 510-13.) The Association asserted that it was within its rights to install the submeter. (T.42.)

The "*Walker Report*." Pursuant to section 3.2 of the Covenants, the Association must perform maintenance and deferred maintenance of the Residential Owner Shared Facilities. (R.2373, ¶ 28; R.2718, § 3.2(a).) In 2011, the Association hired Walker Restoration Consultants to prepare a report of present and future maintenance for the parking garage (the "2011 Walker Report"). (R.2373, ¶ 28; R.3318-78; T.441-42.)

The Association charged Riverside for the proposed maintenance to both commercial and residential parking areas outlined in the 2011 Walker Report. (R.2373-74, ¶ 28; T.441-44.) Riverside asserted that it should not be required to pay for maintenance to the residential parking area, which—as one of the Residential

Owner Shared Facilities—should be paid for by the Association. (T.444, 449, 452-53.) Riverside believed structural, paving, and concrete repairs should be the residential owner's responsibility. (T.458.)

In 2016, Riverside hired the same consultant to evaluate the parking garage. (T.454; R.3380-98.) The 2016 Walker Report reflected proposed and deferred maintenance costs for the commercial parking area (described as "below the [residential] gate") of $37,400. (T.457-58; R.3384.) Riverside paid more than $190,000 for the maintenance reserves. (T.443, 446-49, 450-51, 463.)

The Association conceded that most of the repairs had not been completed. (T.1153; *see also* T.458.) The Association believed its reliance on the 2011 Walker Report, and the budget estimates and reserves assessed, to be reasonable. (T.41; T.1154-55.)

Subsequently, in 2016, a dispute developed between Riverside and the Association as to the characterization of the parking garage; specifically, whether the entire parking garage should be considered one of the Residential Owner Shared Facilities. (T.525-26.) Before 2016, Riverside believed that the commercial and residential owners shared "the same understanding," which was that "from the residential gate [of the garage] down" was a Residential Owner Shared Facility. (T.526.) This designation is important in determining the allocation of costs to each owner. (*See* R.2377-78.)

Dispute as to Roof. Riverside also learned in 2016 that the Association interpreted the Covenants to define all of the building's roofs as one of the Residential Owner Shared Facilities. (T.524-25; R.2377, ¶¶ 42-43.) The Association's interpretation contradicted the Covenants, which defined the roofs above the commercial parcel as ROSF. (T.2377, ¶ 43; R.2769.)

Dispute as to Reserves. Once disputes between the residential and commercial owners' disputes surrounding the definition of ROSF occurred, so, too, did questions concerning the allocation of amounts reserved for maintenance and repair. (R.2377-78.) For instance, in 2016, Riverside learned the Association intended to charge Riverside budget reserves for painting and sealing the entire building. (R.2377-78, ¶ 45; T.526-27.) Contrary to the Association's interpretation, Riverside interpreted the Covenants to allocate budget reserves to the commercial owner only for painting and sealing those parts of the building defined as ROSF. (R.2377-78, ¶ 45.) The Association also mistakenly billed Riverside in percentages not authorized under the Covenants, and for unauthorized conduct. (R.2376, ¶¶ 39-41.)

Late fees and Interest. Riverside refused to pay charges outside those authorized as Residential Owner Shared Facilities. (T.466-69.) Starting in 2015, the Association assessed Riverside with late fees and interest, calculated from January 1, 2014, until July 30, 2015, on the unpaid charges. (T.466.) Riverside considered the Association's assessment of late fees improper. (T.468-69.)

Riverside filed suit against the Association.

On April 23, 2014, Riverside filed its initial complaint against the Association. (R.3-24.) Seeking a declaration of rights under the Covenants, Riverside sued for declaratory and injunctive relief, and for damages. (R.7-11.) Riverside amended its complaint on April 25, 2014, before an answer was filed, to add a claim for slander of title. (R.33-34.)

In March 2016, Riverside asked for leave to file a second amended complaint (R.431-435), which was granted (R.636-37). The second amended complaint included additional allegations to support Riverside's request for damages and for a determination of the commercial and residential owners' rights under the Covenants with regard to the building's management and maintenance, the designation of Residential Owner Shared Expenses, and the allocation of costs. (*See, e.g.*, R.431-32; R.443-47.)

On June 27, 2017, the trial court granted Riverside's *ore tenus* motion for leave to amend its complaint. (R.2366-67.) Riverside's third amended complaint, filed that same date, again included claims for declaratory relief, damages, and slander of title. (R.2368-2384.)

Riverside sought a declaration of its rights under the Covenants, including demands that the Association, *inter alia*: "[i]mmediately commence performance under the [Covenants] by managing and paying for trash hauling services and

maintenance of the trash rooms, subject to reimbursement" by Riverside; "[c]onsent and allow maintenance by [Riverside] of the Shared Facilities, including the pass-card system equipment"; "[c]ease the placement and use of barricades in the Commercial Parking area" and "[c]ease harassing [Riverside's] vendors and customers"; stop "charging . . . [Riverside] for non-ROSF portions of the Walker Report and reimburse . . . [Riverside] for those sums paid to date"; "[c]ompel the [Association] to reconcile its budgets from 2012 going forward and credit . . . [Riverside] for its overpayments"; "[r]estore the electrical service to the garage to [the original meter] and bill it according to the [Covenants]"; "[c]onsent and allow maintenance by [Riverside] of the fire prevention system"; "[c]ompel access and use to . . . [Riverside] to the roof, elevators, communication rooms and all trash rooms"; "[c]ompel the [Association] to properly allocate" certain invoices; "declare that the Roof areas that are ROSF are only those above the Commercial Parcel"; and declare that "the Reserves are limited to those areas that are ROSF and that the Garage-Commercial reserve is improper." (R.2380-81, ¶ 58.)

The Association alleged the statute of limitations as an affirmative defense and asserted its own claims against Riverside.

The Association admitted in its answer that "it has disagreements" with Riverside (R.2389, ¶ 39), but denied Riverside's entitlement to declaratory relief (R.2389-90, ¶¶ 37-42). Among its affirmative defenses, the Association claimed the five-year statute of limitations barred Riverside's claims for declaratory relief and

damages. (R.2390-91, ¶¶ 42-46 (citing § 95.11(2)(b), Fla. Stat.).) The Association alleged that "[t]he final element of declaratory relief accrued when [Riverside] took title," which was "more than five (5) years prior to the institution of this action." (R.2391, ¶¶ 44, 45.)

The Association also filed a counterclaim against Riverside. (R.655-798; R.2395-2429.)[3] The Association sought declaratory relief concerning the Covenants (R.2397-2414) and damages (R.2414-15), along with breach of contract claims (R.2415-24), and claims for breach of an express easement (R.2424-27) and injunctive relief (R. 2427-28). Riverside pled affirmative defenses of estoppel, lack of ambiguity, first material breach, offset, unclean hands, waiver, and, with respect to the claim for injunctive relief, the statute of limitations. (R.812-814; *see also* T.5-6 (relying, without objection, on answer and affirmative defenses to first amended comprehensive counterclaim).)

The Association asked the trial court to grant summary judgment based on the statute of limitations.

The Association sought partial summary judgment against Riverside. (R. 812-58.) Relying primarily on *Harris v. Aberdeen Property Owners Association,* 135 So. 3d 365 (Fla. 4th DCA 2014), the Association argued that section 95.11(2)(b)'s five-

[3] The Association initially filed a separate lawsuit against Riverside seeking declaratory relief under the Covenants. (*See* R.55-56, ¶¶ 2-3.) The trial court consolidated the two cases. (R.57-58.)

year limitations period began to run in May 2008, when Riverside purchased the commercial parcel. (*E.g.*, R.2456, ¶ 10.) The Association contended that Riverside's cause of action for declaratory relief accrued "[t]he moment [Riverside] took title to the Commercial Parcel and became subject to" the Covenants. (R.2456, ¶ 10.)

Moreover, the Association added, when Riverside acquired title, the Covenants were already in existence "and [have] not been altered since." (*Id.*) The Association asserted that a cause of action for declaratory relief "accrues upon a reading of a contract and a finding of ambiguity." (*Id.*) In the Association's view, "Each party to a contract bears their own statutory framework to declare ambiguity of the terms and conditions therein." (*Id.*)

Riverside filed the affidavits of its principal, Ramzy Bakkar, in opposition to summary judgment. (R.2487-88; R.2491-96; *see* R.898-919.) In his November 13, 2017 affidavit, Mr. Bakkar averred that "[p]rior to turnover from the Developer to the Association in August of 2010, no dispute or controversy existed between [Riverside] and any entity as it relates to the Community [Covenants]." (R.2492, ¶ 4.) As Mr. Bakkar explained in his affidavit, the earliest dispute between Riverside and the Association—the handling of the building's trash—occurred in 2011. (R.2494-95, ¶ 11.) The affidavit included additional details related to each of the disputes arising under the Covenants. (R.2492-95.) None of the controversies surrounding the Association's interpretation and enforcement of the Covenants arose

until after 2010, when the Developer turned control of the Association over to the residential owners. (*Id.*)

The trial court denied the Association's motion for summary judgment. (R.2507-10.) "To seek declaratory relief," the trial court explained, "a party must establish a bona[]fide adverse interest concerning a right," along with "doubt about the existence of that right and entitlement to have that doubt removed." (R.2509, ¶ 4.) The trial court found "a material issue of disputed fact as to when [Riverside] had a doubt about the existence or non-existence of a right." (*Id.*) Given the disputed facts surrounding "when the cause of action accrued," the trial court concluded that "partial summary judgment on the issue of the statute of limitations must be denied." (R.2509, ¶ 4 (citing R.2492, ¶¶ 5-6; R.2493-95, ¶¶ 8-13).)

The case proceeded to trial on Riverside's third amended complaint and the Association's counterclaims.

Before trial, Riverside voluntarily dismissed its claim for slander of title. (R.2526, ¶ 5.) The Association dropped the breach of contract counts and certain subparts of its declaratory relief count from its counterclaim. (T.18-22; R.2526, ¶ 5.)

The trial court held a seven-day, non-jury trial on the claims for declaratory relief and damages alleged in Riverside's third amended complaint and the Association's comprehensive counterclaim. (R.4079; T.1-1514.) Riverside and the Association asked the trial court to follow the language of the Covenants. (T.523, 1169-70, 1377, 1415, 1455-56, 1457-69, 1463-64; R.4082-83.)

Riverside did not challenge the Covenants' underlying validity (T.523), but disputed how the Association interpreted the Covenants and allocated costs (T.524). The Association moved to dismiss certain of Riverside's claims for declaratory relief under the statute of limitations. (T.944-45, 953-54, 955-59, 964.) The trial court denied the Association's motion for involuntary dismissal. (T.969-71; T.1410-11.) The trial court allowed evidence at trial on the question of damages. (R.4085, ¶ 10.)

The trial court entered final judgment against Riverside, finding its claims for declaratory relief barred by the five-year statute of limitations.

On February 8, 2019 (almost one year after the trial concluded), the trial court rendered final judgment, ruling that the five-year statute of limitations barred Riverside's declaratory judgment action. (R.4079-87.) Rejecting Riverside's contention that the cause of action could not accrue until there was an actual dispute between the parties, the trial court found that "[f]or the Court to so conclude would tie the accrual of a declaratory judgment action to the parties['] changing understandings of the document and corresponding behavior." (R.4082, ¶ 4.) This, the trial court suggested, is not the purpose of an action seeking declaratory judgment on a written agreement, which exists "to determine the rights of the parties under that document." (*Id.*) The trial court reasoned:

> [T]he cause of action is not triggered by doubt resulting from controversy between the parties but doubt resulting from the actual language of the contract. [Riverside's] counsel asserts that the mere transfer of title to real estate is insufficient to trigger the running of the statute of limitations. The cause of action, per [Riverside], does not

> arise "in the absence of any actual, present practical need for determination of the parties' relative rights and obligations." It is alleged that the disputed interpretation and application of the Declaration provisions was the final element necessary for the cause of action to accrue. **However, a "dispute" is not required for there to be a practical need for a rights declaration. That may occur because the language is sufficiently ambiguous**.

(R.4083, ¶ 5 (emphasis added).)

The trial court added:

> If there is a "dispute" between the parties and the contract language is the source of that controversy, declaratory judgment is not the only cause of action available for remedy. A contract "dispute" regarding language and corresponding rights typically results in a breach of contract action by one party or both against the other. In the process of resolving that issue, the contract is clarified by the Court in the process of resolving the claim of breach and any damages to which a party is entitled or awarded consistent therewith. Unlike declaratory relief, a breach of contract action does accrue when the "dispute" and corresponding breach occurs.

(R. 4083, ¶ 6.) The trial court noted that no claim for breach of contract was alleged in Riverside's third amended complaint, or tried by express or implied consent. (*Id.*)

The trial court found that the five-year statute of limitations on the Covenants accrued May 8, 2008, when Riverside acquired title to the commercial parcel and first became subject to the Covenants. (R.4084, ¶ 7.) The trial court concluded, then, that the limitations period expired May 8, 2013, almost a year before Riverside filed suit on April 24, 2014.

In a separate order, initially entered February 11, 2019 (R.4047-75) and amended that same date (R.4088-4115), the trial court denied the Association's

counterclaims for breach of contract, breach of express easement, and injunctive relief. (R.4114-15, ¶¶ 4-8.) In deciding the Association's declaratory relief claim, the trial court construed the Covenants to find: (1) Riverside was permitted to promulgate certain rules relating to commercial parking (R.4097, ¶ 12); (2) the commercial parking area was a component of the Residential Owner Shared Facilities (R.4099, ¶ 17); (3) there was no right for the Association to receive funds from Riverside as part of the budget reconciliation process (R. 4100 ¶ 19); and (4) certain fire prevention systems were not Residential Owner Shared Facilities (R.4104, ¶ 26). The trial court also ruled that Riverside was estopped from enforcing the Covenants' provisions concerning trash hauling and trash room usage. (R.4101-2, ¶¶ 22-23.) The trial court denied the Association's claim for damages. (R.4114, ¶ 1-3.)

Riverside timely filed motions for rehearing on the final judgments.

Riverside timely filed motions for rehearing directed both to the final judgment on the complaint and the amended final judgment on the Association's counterclaim.

In its motion for rehearing of the amended final judgment on the Association's counterclaim (R.4351-63), Riverside asked the trial court to rehear its findings on the issue of trash responsibilities. Riverside argued it could not be deemed to have implicitly agreed, by its conduct, to the Association's unilateral demands related to

trash hauling services and use of the trash rooms and chutes. (*E.g.*, R.4352.) The Association opposed the motion. (R.4372-76.)

Meanwhile, Riverside also moved for rehearing of the final judgment on its complaint. (R.4338-50.) Riverside emphasized that its claims for declaratory relief did not challenge the Covenants' underlying validity or enactment. (R.4340-41, 4343-44, 4347.) Instead, Riverside sought a declaration of the owners' rights and remedies under the Covenants. Given that the first of Riverside's disputes with the Association's interpretation of the Covenants did not occur until 2011, its complaint was timely. Alternatively, the limitations period on any claim for declaratory relief could not have begun to run, at the earliest, until the August 2010 turnover of the Association to the residential owners' control. (R.4339, 4344-46.)

Riverside explained that the trial court established a limitations period that began before all elements of the claim for declaratory relief were present. (R.4341-42.) Absent a present controversy requiring the court's resolution, however, no cause of action for declaratory relief arises. (R.4342, 4346.) The trial court's ruling discounted the "controversy" or "dispute" element of a claim for declaratory relief, in contravention of Florida law. (R.4346.) The Association opposed Riverside's motion for rehearing of the final judgment on the complaint. (R.4364-68.)

The trial court heard both motions for rehearing, and thereafter allowed the parties to submit additional written memoranda. (R.4406; R.4386-91; R.4392-97.)

In its supplemental memorandum on rehearing of the final judgment (R.4386-91), Riverside argued the cause of action for declaratory relief could not have arisen in May 2008, when Riverside first purchased the commercial parcel. At that time, the interests of the commercial owner and the Association were aligned, not adverse. (R.4387-88.) Only in 2011 did the Association first assert an actual, adverse, and antagonistic interest, which gave rise to the controversy and Riverside's need for a determination of the rights and obligations of the owners under the Covenants. (R.4389.) Any potential breach of contract action (which Riverside did not pursue) did not foreclose the claims for declaratory relief. (R.4390.) Nor did Riverside's reliance on the Covenants' plain language preclude declaratory relief. (R.4389-90.)

The Association, meanwhile, argued in its supplemental memorandum that Riverside knew (or should have known) of the need for a declaration of rights when it first took title and became subject to the Covenants. (R.4392-93.) According to the Association, Riverside's reliance on the language of the Covenants showed its claim should have been for breach of contract. (R.4396.)

Thereafter, on May 12, 2020, the trial court granted Riverside's motion for rehearing of the amended final judgment on the counterclaim. (R.4409-13.) The trial court amended the provisions of the amended final judgment related to trash hauling. (R.4412.) The trial court agreed with Riverside that it had not waived its right to hold the Association responsible for trash services (R.4410-12).

In a separate order filed May 12, 2020, the trial court denied Riverside's motion for rehearing of the final judgment on the complaint. (R.4406-8.) According to the trial court:

> While it is correct that a declaratory judgment action "must involve a justiciable controversy" and "a named defendant with an adverse position" . . ., the existence of an inherent ambiguity in the [Covenants] did create a cause of action for declaratory relief under Chapter 86.

(R.4407, ¶ 2 (citations omitted).) The trial court continued, stating:

> [T]he "*actual, present, practical need*" for a declaration of rights arises from the language of the agreement and not a change in the parties' course of dealing. If there is a change in the parties' course of dealings such that a controversy is created, a breach of contract action may be an appropriate remedy which has a separate statute of limitations all its own. The alleged "*controversy*" was embedded in the language of the agreement but remained unimportant to the parties because of an ongoing course of dealings. The dispute over the interpretation of the declaration occurred when the course of dealings was challenged, giving rise to a potential breach of contract action that was never brought.

(R.4407-8, ¶ 2 (emphasis in original).)

On May 15, 2020, Riverside filed its notice of appeal of the final judgment on the complaint, filed February 11, 2019, and rendered May 12, 2020, upon the denial of Riverside's timely motion for rehearing. (R.4414-45.) The Association did not appeal the amended final judgment on the counterclaim, rendered May 12, 2020.

SUMMARY OF ARGUMENT

The trial court erred in finding Riverside's claims barred by the five-year statute of limitations. No cause of action for declaratory relief accrued until February

2011, when the Association first disputed the Covenants' interpretation—or, at the earliest, until August 2010, when the Developer turned control of the Association over to the residential unit owners. Riverside's complaint, initially filed in April 2014, was timely.

In ruling that no "dispute" between adverse interests is needed to seek a declaration of rights, the trial court disregarded established Florida law. Instead, the trial court reasoned that because Riverside sought declaratory relief on a covenant that runs with the land, its claims were required to be filed within five years of taking title. This was error. Riverside did not challenge the Covenants' underlying validity or enactment. Nor does Florida law support the bright-line rule created by the trial court. A cause of action for declaratory judgment accrues "when the last element constituting the cause of action occurs." § 95.031(1), Fla. Stat. (2011). What constitutes this "last element" will vary, depending on the facts and circumstances of each case. To accept the trial court's rationale would preclude any claim for declaratory relief filed more than five years after a plaintiff takes title subject to a restrictive covenant—notwithstanding the then-lack of any present controversy between adverse parties related to the covenant's interpretation.

The trial court also erred in finding that "changed circumstances," as argued by the Association, occurred "outside the statutory period." (R.4082, ¶ 3; *see* R.4086, ¶¶ 11-12.) Aside from a misapprehension of the law and the facts, the trial court

granted relief that the Association did not request.

Lastly, the trial court erred in relying on the potential availability of a breach of contract action to preclude Riverside's timely-filed claims for declaratory relief. Florida's Declaratory Judgment Act establishes that "the existence of another adequate remedy does not preclude a judgment for declaratory relief." § 86.111, Fla. Stat. (2011). The trial court's ruling contradicts the Act's plain language.

For all these reasons, Riverside is entitled to reversal of the final judgment, and the order denying rehearing. Riverside is entitled to relief on the claims for declaratory relief and damages alleged in its third amended complaint, none of which is barred by the five-year statute of limitations.

ARGUMENT

I. The trial court erred in finding Riverside's claims for declaratory relief barred by the five-year statute of limitations.

Standard of Review. This Court reviews de novo the final judgment denying Riverside's claims for declaratory relief based on the five-year statute of limitations. *See McBride v. Pratt & Whitney,* 909 So. 2d 386, 387 (Fla. 1st DCA 2005); *see also Hamilton v. Tanner,* 962 So. 2d 997, 1000 (Fla. 2d DCA 2007) ("A legal issue surrounding a statute of limitations question is an issue of law subject to de novo review.")

Merits. Because Riverside seeks a declaration of its rights and obligations under the Covenants, the five-year statute of limitations for a "legal or equitable

action on a contract, obligation, or liability founded on a written instrument" applies. (R.4082, ¶ 3; R.4340.) *See* § 95.11(2)(b), Fla. Stat. (2011). The question before this Court, however, is *when* Riverside's claims for declaratory relief accrued. (*See* R. 4082, ¶¶ 3, 4.) Under Florida law, a cause of action accrues "when the last element constituting the cause of action occurs." § 95.031(1), Fla. Stat. (2011); *see, e.g.*, *Toledo Park Homes v. Grant*, 447 So. 2d 343, 344-45 (Fla. 4th DCA 1984). Stated another way, "the limitations period begins to run when the action 'may be brought.'" *Harris v. Aberdeen Prop. Owners Ass'n, Inc.*, 135 So. 3d 365, 368 (Fla. 4th DCA 2014) (citations omitted).

For each of the reasons argued below, the trial court erred in finding Riverside's claims for declaratory relief and damages barred by the statute of limitations. Riverside is entitled to reversal of the final judgment.

A. Riverside timely filed its complaint within the five-year limitations period of section 95.11(2)(b). Its claims for declaratory relief did not accrue until February 2011, when a justiciable controversy first arose between the adverse and antagonistic interests of Riverside and the residential owner-controlled Association.

Florida's Declaratory Judgment Act, enacted as Chapter 86 of the Florida Statutes, is "substantive and remedial," and should be "liberally administered and construed." § 86.101, Fla. Stat. (2011). The Act's purpose is "to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations." *Id*.

To be entitled to declaratory relief, a party must show:

> There is a bona fide, actual, present practical need for declaration; that the declaration should deal with present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of complaining party is dependent on fact or law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; and that the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

May v. Holley, 59 So. 2d 636, 639 (Fla.1952); *accord Ahearn v. Mayo Clinic*, 180 So. 3d 165, 174 (Fla. 1st DCA 2015); § 86.011, Fla. Stat. (2011). Before a court may exercise its jurisdiction to grant declaratory relief, "some justiciable controversy" must exist "between adverse parties that needs to be resolved." *Martinez v. Scanlan*, 582 So. 2d 1167, 1171 (Fla. 1991); *accord Ahearn*, 180 So. 3d at 174.

Here, the trial court erred in finding Riverside's claims for declaratory relief barred by the statute of limitations. Before February 2011, no justiciable controversy existed between Riverside and the Association. When Riverside first purchased its commercial parcel in May 2008, and became subject to the Covenants, the Association was controlled by the Developer. From May 2008 until August 2010, when control of the Association was turned over to the residential owners, the Developer-controlled Association and Riverside agreed on the Covenants'

interpretation, including the management and allocation of costs for the building's facilities. Within months after the August 2010 turnover, the residential owner-controlled Association began to dispute Riverside's interpretation of the owners' rights and obligations under the Covenants and to depart from the established course of dealing.

The first of the disputes arose in February 2011, when the residential owner-controlled Association changed the usual manner in which it handled the trash generated by Riverside's commercial tenants. While the Developer had contracted with a waste management company to haul off trash from the entire building (including the commercial tenants)—and charged Riverside for a little more than 10% of the cost—the residential owner-controlled Association cancelled that contract. The Association locked Riverside out of the trash rooms and removed the dumpsters, forcing Riverside to hire its own waste removal service. A series of disputes between Riverside and the Association followed.

Just three years later, Riverside filed its initial complaint seeking declaratory relief, asking the trial court to interpret and enforce the parties' rights and obligations under the Covenants, and to award damages. (R.3-24.) Riverside timely amended its complaints in 2016 and again in 2017, adding facts to support its requests for declaratory relief and damages as disputes surrounding the Covenants' interpretation continued to arise. (*See* R.431, 436-52; R.2368-82.) The amended complaints related

back to Riverside's original complaint. *See generally Palm Beach Cnty. Sch. Bd. v. Janie Doe 1*, 210 So. 3d 41, 47 (Fla. 2017); Fla. R. Civ. P. 1.190(c). (*See* R.4347; *cf.* R.4086, ¶ 12.)

Riverside's action for declaratory relief, filed April 23, 2014, was timely. Its claims did not accrue—and the five-year limitations period did not begin to run—until February 2011, when the residential owner-controlled Association first disputed Riverside's understanding of the Covenants' interpretation and challenged the owners' corresponding rights and obligations. *See Hardey v. Shell*, 144 So. 3d 668, 672-73 (Fla 2d DCA 2014). Not until then did a "present controversy" and "an actual, present, adverse and antagonistic interest in the subject matter" arise between Riverside and the residential owner-controlled Association. *See id.* at 671. Before February 2011, there was no "bona fide, actual, present practical need" for a declaration of rights under the Covenants. *Ahearn*, 180 So. 3d at 174 (citing *Martinez*, 582 So. 2d at 1171); *see also Ready v. Safeway Rock Co.*, 24 So. 2d 808, 811 (Fla. 1946) (Brown, J., concurring specially) ("a proceeding for a declaratory judgment must be based upon an actual controversy").

Indeed, any request by Riverside for declaratory relief *before* February 2011 would have been premature. *See, e.g.*, *Santa Rosa Cnty. v. Admin. Comm'n, Div. of Admin. Hrgs.*, 661 So. 2d 1190, 1193 (Fla. 1995) ("absent a bona fide need for a declaration based on present, ascertainable facts, the circuit court lacks jurisdiction

to render declaratory relief"); *Ashe v. City of Boca Raton*, 133 So. 2d 122, 124 (Fla. 2d DCA 1961) (declaratory relief "may not be invoked if it appears that there is no bona fide dispute with reference to a present justiciable question"). Florida courts will not render a declaratory judgment on "what amounts to an advisory opinion." *Santa Rosa Cnty.*, 661 So. 2d at 1193; *accord Ahearn*, 180 So. 3d at 174; *Apthorp v. Detzner*, 162 So. 3d 236, 240 (Fla. 1st DCA 2015).

B. The trial court erroneously eliminated the requirement that a justiciable controversy between adverse parties must exist before a cause of action for declaratory relief accrues.

The trial court reasoned, however, that because Riverside sought declaratory relief on a written contract, "a '*dispute*'" was "not required for there to be a practical need for a rights declaration." (R.4083, ¶ 5.) Instead, the trial court found, a "controversy" can be "embedded in the language of the agreement." (R.4407, ¶ 2.) This "inherent ambiguity," even if then "unimportant to the parties" (R.4407, ¶ 2), was enough to create "uncertainty" as to a party's rights and obligations (R.4083, ¶ 5). In the trial court's view, the "actual, present, practical need" for a declaration arose from the language of the Covenants—"not a change in the parties' course of dealings." (R.4407, ¶ 2.) The trial court concluded, then, that Riverside's claims for declaratory relief accrued in May 2008, when it took title to the commercial parcel and first became subject to the inherently ambiguous Covenants. (R.4082-83, ¶¶ 3-

5; R.4084, ¶¶ 7-8.) Riverside's complaint, filed in April 2014, was deemed untimely. (R.4087, ¶ 12.)

The trial court effectively eliminated the need for a "dispute" from the elements of a claim for declaratory relief. (R.4083, ¶ 5.) This was error. Call it a "dispute," a "controversy," or an "uncertainty"—it matters not. Declaratory relief lies only where a "justiciable controversy" exists "between adverse parties that needs to be resolved." *Martinez*, 582 So. 2d at 1171; *accord Ahearn*, 180 So. 3d at 174; *Hardey*, 144 So. 3d at 671-72.

Here, changes in the residential owner-controlled Association's interpretation of the Covenants, and its departure from the established "course of dealings" under that agreement, gave rise to Riverside's claims for declaratory relief. (*Contra* R.4082, ¶ 4.) Notwithstanding that Riverside asked the trial court to "look to the plain language of the [Covenants] for guidance" (R.4082, ¶ 4), no claim for declaratory relief accrued until February 2011. Only then did the residential owner-controlled Association begin to interpret the Covenants in a manner contrary to Riverside's understanding, and altogether different from the Developer's management and allocation of costs under those same Covenants. Until February 2011, Riverside had no basis to ask the trial court to resolve a justiciable controversy surrounding the Covenants' language. *See Hardey*, 144 So. 3d at 671-72; *accord Martinez*, 582 So. 2d at 1171.

Riverside does not contend, as the Association may suggest (T.945), that the language of the Covenants is so plain and unambiguous as to preclude any claim for declaratory relief. Indeed, the parties' arguments at trial reflected how each owner's interpretation of the Covenants differed. (*E.g.*, T.1415, 1455-56, 1457-59.) Nonetheless, declaratory relief may be sought even where a contract is "clear and unambiguous on its face" if extrinsic facts "affect the clear and unambiguous language of the written agreement." *Caidin v. Lakow*, 546 So. 2d 788, 788 (Fla. 3d DCA 1989).

And, to the extent the trial court suggested that an action for declaratory judgment must construe only the written language of a covenant that runs with the land—without considering any "change in the parties['] course of dealings such that a controversy is created"—this, too, was error. (R.4407, ¶ 2; *see* R.4082-83, ¶ 4.) Courts may render a declaratory judgment on the existence, or nonexistence, of "any immunity, power, privilege, or right" or "*any fact* upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend." § 86.011(1), (2), Fla. Stat. (2011) (emphasis added); *accord Higgins v. State Farm Fire & Cas. Co.*, 894 So. 2d 5, 12 (Fla. 2004); *Security First Ins. Co. v. Phillips*, 5D19-2839, 2020 WL 3115493, *2 (Fla. 5th DCA June 12, 2020). In fact, evidence of the parties' course of dealing may be relevant in interpreting the Covenants'

ambiguous language. *See, e.g.*, *Boman v. State Farm Mut. Auto. Ins. Co.*, 505 So. 2d 445, 449 (Fla. 1st DCA 1987).

Contrary to the trial court's findings, an as-yet-unrecognized, "inherent" ambiguity in a written contract does not create a cause of action for declaratory relief. (*Contra* R.4082-83, ¶¶ 4-6; R.4407-8, ¶ 2.) *See Apthorp*, 162 So. 3d at 242); *cf. Beach Towing Servs., Inc. v. Sunset Land Assocs.*, 278 So. 3d 857, 860 (Fla. 3d DCA 2019) (finding that defendants' "insistence that the Covenant's inclusion of the word 'garage' prevents Plaintiff from constructing a parking garage on its Property created 'doubt as to the existence or nonexistence of some right or status,'" sufficient to invoke jurisdiction under the Declaratory Judgment Act) (citation omitted).

Under the trial court's rationale, Riverside would have been required to anticipate ambiguities in the Covenants immediately upon taking title—even before the facts and circumstances eventually giving rise to the disputes occurred. The trial court essentially conceded this flaw in its logic, noting that "there may have been *no practical need for a declaration* of the parties['] rights within the five year period after purchase because there was *no controversy*." (R.4083-84, ¶ 6 (emphasis added).)[4]

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[4] The trial court sought to alleviate potential prejudice from its erroneous ruling, adding that because a plaintiff "may have a breach of contract cause of action" when "the controversy actually occurs," the plaintiff "is not left without a remedy." (R.4084, ¶ 6.) The trial court also erred in relying on an alternative breach of contract claim to prohibit declaratory relief. (*See* Section I(E), *infra*.)

A plaintiff should not be required to preemptively seek declaratory relief in anticipation of every potential ambiguity in a written contract, especially where (as here) that agreement is "inherently" ambiguous. (R.4083, ¶ 4; *see* R.4083-84, ¶ 6; R.4407-8, ¶ 2.) The trial court's interpretation ignores the very definition of a latent ambiguity, which arises only when "some *extrinsic fact or extraneous evidence* creates a necessity for interpretation or a choice among two or more possible meanings." *Barnwell v. Miami-Dade Cnty. Sch. Bd.*, 48 So. 3d 144, 145-46 (Fla. 1st DCA 2010) (emphasis added; quotations omitted); *see also Merriam v. First Nat'l Bank of Akron,* 587 So. 2d 584, (Fla. 1st DCA 1991) (noting that "inherent" ambiguity in a deed "must be resolved by reference to extrinsic evidence"). Here, accrual of the statute of limitations should have been "tied" to the parties' "changing understandings" of the Covenants "and corresponding behavior." (*Contra* R.4082, ¶ 4.)

To accept the trial court's reasoning would require a plaintiff to seek declaratory relief *before* its cause of action accrued. Again, absent an actual controversy—and the need to resolve competing adverse interests—any action seeking declaratory relief would have been nothing more than an impermissible request for an advisory opinion. *See Apthorp*, 162 So. 3d at 242; *accord Ahearn*, 180 So. 3d at 174; *cf. Brautigam v. MacVicar*, 73 So. 2d 863, 864, 866 (Fla. 1952) (affirming dismissal of prematurely-filed action for declaratory relief where there

was “no dispute between the parties,” and each party asked for the same relief).

This Court’s opinion in *Apthorp* illustrates the trial court’s error. The plaintiff in *Apthorp* challenged legislation that effectively permitted political candidates and public officers to avoid disclosing their specific financial interests by creating qualified “blind trusts.” 162 So. 3d at 237. Under the plaintiff’s theory, the legislation violated the full and public financial disclosure requirements of the Florida Constitution’s Sunshine Amendment. *See id.* at 237, 239. When the trial court heard the declaratory judgment action, “no qualified blind trusts were being used by any public officer or candidate seeking office.” *Id.* at 239. The plaintiff argued, however, that the statute’s mere existence was enough to create the requisite element of a “controversy” for a declaratory judgment action. *Id*. The trial court agreed and declared the challenged statute constitutional. *Id*.

On appeal, the First District reversed. *Id*. at 239-42. “[N]otwithstanding the substantial interest in this case from the bench and bar,” the *Apthorp* court ruled, “we are constrained to leave for another day the resolution of this constitutional question because this case lacks a justiciable controversy.” *Id.* at 240. “Florida courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the *possibility* of legal injury on the basis of a hypothetical state of facts which have not arisen and are only contingent, uncertain, [and] rest in the future.” *Id.* (citation omitted).

Consistent with *Apthorp*, Riverside was not required to prematurely seek declaratory relief. Between May 2008 (when Riverside purchased the commercial parcel) and August 2010 (when the Developer turned control of the Association over to the residential owners), the owners consistently interpreted the Covenants' language. There was no "actual, present, practical need" for a declaration of rights until February 2011, when the residential owner-controlled Association altered its conduct and advocated for a different interpretation of the owners' rights and obligations under the Covenants. Riverside's complaint, filed in April 2014, was timely. *See* § 95.11(2)(b), Fla. Stat.

C. At the earliest, the limitations period did not begin to run until the August 2010 turnover.

Even if the mere existence of an "inherent ambiguity" "embedded in the language" of the Covenants somehow created a "practical need" for a declaration of rights—regardless of the lack of any "controversy" or "dispute"—the trial court still erred in finding Riverside's claims barred by the five-year statute of limitations. (R.4407-8; R.4082-83.) At the earliest, Riverside's cause of action against the Association could not have accrued August 2010—when the Developer turned control of the Association over to the residential unit owners. (*See* R.4339, 4342; T.1378-79.) Only then were the "actual, present, adverse and antagonistic" interests all present before the trial court and subject to proper process. *May*, 59 So. 2d at 639; *see also* § 718.124, Fla. Stat. (2011) (providing that statute of limitations for an

action brought by a condominium association "shall not begin to run until the unit owners have elected a majority of the members of the board of administration").

Again, a declaratory judgment action must involve not only a "justiciable controversy," but also "a named defendant with an adverse position." *Jacobs & Goodman, P.A. v. McLin, Burnsed, Morrison, Johnson & Roebuck, P.A.*, 582 So. 2d 98, 100 (Fla. 5th DCA 1991) (citation omitted). Before the August 2010 turnover, the interests of the Association and Riverside were aligned. No dispute surrounding the interpretation of the Covenants existed. Riverside and the Developer-controlled Association consistently interpreted the Covenants. Given that the interests of the owners were not then adverse and antagonistic, the Association could not have been named as a defendant to any declaratory judgment action filed by Riverside. *Cf. Ahearn v. Mayo Clinic*, 180 So. 3d 165, 174 (Fla. 1st DCA 2015) (ruling that clinic's waiver of balance owed by plaintiff/putative class representative precluded claims for declaratory and injunctive relief; plaintiff no longer had any "actual, present, adverse, and antagonistic interest" and there was no "actual controversy"); *Jacobs & Goodman*, 582 So. 2d at 100 (finding that individual defendant, whose interests in interpreting an agreement were aligned with those of plaintiff, could not be named as a "bona fide codefendant" to create "dual venue"). Only after August 2010, when control was turned over to the residential owners, did the Association's interests become adverse. *See May*, 59 So. 2d at 639.

Given that the earliest of the "last element constituting the cause of action" did not occur until August 2010, when the Developer turned control of the Association over to the residential unit owners, Riverside's claims were timely filed. § 95.031(1), Fla. Stat. Riverside filed its lawsuit in April 2014. Its second and third amended complaints, which arise from the same conduct, transaction, or occurrence and seek the same relief, relate back to the initial, timely-filed complaint. *See generally Palm Beach Cnty. Sch. Bd. v. Janie Doe 1*, 210 So. 3d 41, 47 (Fla. 2017); Fla. R. Civ. P. 1.190(c).

Nonetheless, the trial court found all Riverside's claims for declaratory relief and damages barred by the statute of limitations. (*Contra* R.4086, ¶ 12.) Once again, the trial court misapprehended the requisite elements for declaratory relief. Riverside's claims could not accrue, at the earliest, until August 2010; only then could the residential owner-controlled Association's "antagonistic and adverse interests" have been brought before the trial court by proper process. *May*, 59 So. 2d at 639.

D. The trial court mistakenly rejected the requirement for a "dispute" or "controversy" giving rise to a need for a declaration of rights, ruling instead that the cause of action accrued when Riverside took title subject to the Covenants. Florida law does not support such a bright-line rule.

Despite the lack of any "dispute" between adverse interests, or any controversy surrounding the Covenants' interpretation and enforcement before

February 2011, the trial court ruled that Riverside's cause of action accrued on May 8, 2008, when it acquired title to the commercial parcel. Because Riverside did not file its initial complaint until April 23, 2014, almost six years later, the trial court found the claims time-barred. (R.4083, ¶¶ 5, 6; R.4084, ¶ 7.)

The trial court reasoned that any claim seeking declaratory relief on a covenant that runs with the land accrues the moment a purchaser takes title. (*See* R.4082, ¶ 3; R.4083, ¶ 5.) Florida law does not impose such a bright-line rule. Instead, section 95.031(1) establishes that a claim for declaratory relief begins to run when "the last element constituting the cause of action occurs." § 95.031(1), Fla. Stat. (2011). The "last element" giving rise to a cause of action for declaratory relief will vary, depending on the facts and circumstances of each case. *See, e.g.*, *Hardey*, 144 So. 3d at 671-72.

To accept the trial court's rationale would preclude any claim for declaratory relief filed five years after a plaintiff takes title subject to a restrictive covenant—even absent any controversy related to the covenant's interpretation. For that matter, the trial court's ruling could be construed to require a plaintiff to sue for declaratory relief within five years of entering into *any* "inherently ambiguous" contract.

The bright-line rule created by the trial court finds no support in Florida law. A cause of action seeking declaratory relief on a written agreement—even one that runs with the land—does *not* automatically accrue when a party takes title. *See*

Hardey, 144 So. 3d at 671-72; *cf. Victorville W. Ltd. P'ship v. Inverry Ass'n, Inc.*, 226 So. 3d 888, 891 (Fla. 4th DCA 2017) (five-year statute of limitations did not bar suit to cancel restrictive covenant, filed six years after owner purchased golf course); *Pond Apple Place Condo. Ass'n, Inc. v. Russo*, 841 So. 2d 526, 527-28 (Fla. 4th DCA 2003) (five-year statute of limitations did not bar injunctive relief seeking to enforce restrictive covenant). Just as a cause of action for breach of contract accrues at the time of breach,[5] so, too, must a "present controversy"—and an "actual, present, adverse and antagonistic interest in the subject matter"—exist before the limitations period on a declaratory judgment claim begins to run. *Hardey*, 144 So. 3d at 672.

1. The Second District's opinion in *Hardey* illustrates the errors in the trial court's reasoning.

Hardey is instructive. There, a dispute arose between two adjacent landowners over ownership of a waterfront strip of property. 144 So. 3d at 669-70. The legal description had been in existence since 1971. The Hardeys first acquired title in 1992. *Id.* at 670.

The disputed waterfront strip had also been the subject of earlier litigation. In 1997, the Hardeys' then-adjacent neighbor (McLymond) asserted a claim to the

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[5] *E.g.*, *Access Ins. Planners, Inc. v. Gee*, 175 So. 3d 921, 924 (Fla. 4th DCA 2015); *cf. State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So. 2d 818, 821 (Fla. 1996) (ruling that statute of limitations "based on an insurer's failure to pay personal injury protection benefits begins to run when the insurer breaches its obligation to pay," not from the date of the accident).

entire waterfront. After the Hardeys filed suit, the county corrected the tax map to reflect that the waterfront strip was, in fact, part of the Hardeys' lot. *Id*. at 670. The suit was eventually dismissed for lack of prosecution.

Eventually, in 2005, the Shells acquired the same property once owned by McLymond. In 2010, the Shells claimed ownership to the Hardeys' waterfront property and erected a fence along the entire strip of waterfront, including the Hardeys' pool deck. *Id*. at 669-70. That same year, the Hardeys sued the Shells. *Id*. at 671. The Shells defended the lawsuit, claiming the statute of limitations barred the Hardeys' right to seek declaratory relief over ownership of the waterfront strip of land. The trial court agreed with the Shells and granted summary judgment.

The Second District reversed the trial court's ruling. As the Second District noted, once the earlier dispute settled, "[t]here was no longer a 'present controversy' or 'an actual, present, adverse and antagonistic interest in the subject matter' required for declaratory judgment." *Id.* at 671. "Until the Shells laid claim to the Hardeys' waterfront strip in 2010, there was no cause of action and no basis upon which to seek a declaration as to who owned the waterfront strip." *Id*. Only after the Shells built a fence across the Hardeys' pool deck did "a present controversy" between the parties—and "an actual, present, adverse and antagonistic interest in the waterfront strip"—arise. *Id*. at 672. "At that time, the necessary elements for a cause of action for a declaratory judgment had occurred." *Id*. Because the complaint was

filed in June 2010, "well within" the statute of limitations, the Second District reversed summary judgment. *Id.*

Here, like the facts of *Hardey*, Riverside's claims for declaratory relief did *not* accrue on May 8, 2008, when it purchased the commercial parcel. Rather, the statute of limitations began to run in February 2011, when the residential owner-controlled Association first altered its interpretation of the Covenants and changed its course of dealing with Riverside. Only then did a "present controversy" and an "actual, present, adverse and antagonistic interest" arise between Riverside and the residential owner-controlled Association. *Hardey*, 144 So. 3d at 672. Riverside's lawsuit, filed April 23, 2014, was timely.

2. The Fourth District's decisions in ***Harris***, ***Victorville West***, and ***Pond Apple Place*** do not support the bright-line rule imposed by the trial court.

In finding that Riverside's cause of action accrued on May 8, 2008, when it "took title to the commercial parcel . . . under the terms and conditions of the [Covenants]," the trial court relied on the Fourth District's decision in *Harris v. Aberdeen Property Owners Association*, 135 So. 3d 365 (Fla. 4th DCA 2014). (*E.g.*, R.4082, ¶ 3; R.4083-84, ¶¶ 5-7, R.4086, ¶ 12.) *Harris* does not support the trial court's bright-line rule. The lack of any bright-line rule is further illustrated by the Fourth District's decisions in *Victorville West* and *Pond Apple Place*.

First, unlike the facts of *Harris*, Riverside does *not* challenge the validity and enactment of the Community Declaration. *See Harris*, 135 So. 3d at 368. Instead, Riverside seeks a declaration of its rights arising from the residential owner-controlled Association's refusal to comply with the Covenants, including provisions related to disposal of the commercial tenants' trash, control over commercial parking, and the allocation of expenses. Contrary to the facts of *Harris*, the recording of the Covenants did not trigger the statute of limitations on Riverside's claims. *See id.*; *accord Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n, Inc.*, 169 So. 3d 197, 201 (Fla. 1st DCA 2015).

Harris also addressed a homeowner's challenge to conflicting language found in two competing documents: a June 2004 amendment filed by the Aberdeen Property Owners Association ("Aberdeen POA") requiring membership in the Aberdeen Golf & Country Club (the "Aberdeen Club"); and the documents governing the Bristol Lakes Homeowners Association ("Bristol Lakes HOA"), which did *not* require Club membership. 135 So. 3d at 366, 368-69. After litigation ensued, the Bristol Lakes HOA and Aberdeen Club entered into a 2010 settlement agreement, which purportedly required individual Bristol Lakes homeowners to retroactively join the Club and pay dues. *See id*. at 367.

Thereafter, in October 2010, the homeowner filed suit against the Aberdeen POA, Bristol Lakes POA, and the Aberdeen Club. In her claim for declaratory relief,

the homeowner sought clarification regarding whether she was required to join the Club, and whether she owed dues and fees retroactively from 2006, when she purchased property in the Bristol Lakes community. *Id*. at 366-67. The trial court ruled that because the homeowner's declaratory relief claim accrued in 2004 (when the Aberdeen POA's mandatory membership amendment was recorded), her complaint, filed in October 2010, was barred by the five-year statute of limitations. *Id*. at 367.

On appeal, the Fourth District reversed. The *Harris* court agreed with the homeowner that her claim for declaratory relief did not arise until 2006, when she first took title to the property and became subject to the Aberdeen POA's mandatory membership amendment. *Id*. at 367, 368-69. The homeowner alleged that she had relied on the Bristol Lake HOA's documents reflecting that Aberdeen Club membership was not mandatory. *Id*. at 369. Only when she took title did the homeowner acquire an interest in the matter and suffer damages. *Id*.

The trial court relied on *Harris* to find that a cause of action for declaratory relief on a "covenant that runs with the land" necessarily must accrue when a party takes title to real property. *Harris* does not support such a bright-line rule. Indeed, the Fourth District recognized that "[a] cause of action accrues when the last element constituting the cause of action occurs." *Harris*, 135 So. 3d at 368 (quoting § 95.031(1), Fla. Stat. (2005)). What constitutes this "last element," however, will

vary, depending on the facts and circumstances of each case. *Compare Harris*, 135 So. 3d at 368-69 *with Hardey*, 144 So. 3d at 672-73.

The "last element" in *Harris* happened to be the homeowner's act of taking title. Yet in *Harris*, a justiciable controversy and an actual, present, adverse, and antagonistic interest had already arisen from the dispute surrounding the competing language of the Aberdeen POA and Bristol Lakes HOA documents. Only when the homeowner purchased property in the Bristol Lakes community—and became subject to mandatory Club membership and retroactively-imposed dues—did she acquire an interest in, and suffer damages as a result of, the already-existing dispute. 135 So. 3d at 369.

In contrast to the facts of *Harris*, when Riverside first purchased the commercial parcel in May 2008, no dispute or controversy yet existed with regard to the owners' interpretation and enforcement of the Covenants. Only after the residential owners acquired control of the Association (in August 2010), and the Association began to change its interpretation and course of dealings under the Covenants (in February 2011), could Riverside have brought its claims for declaratory relief. Before February 2011, there was no justiciable controversy between adverse parties that required resolution. *See, e.g.*, *Martinez*, 582 So. 2d at 1171.

The Fourth District's opinions in *Victorville West* and *Pond Apple Place* also

reflect the lack of any established Florida law requiring that a claim for declaratory relief on a restrictive covenant accrues when a party first takes title. For example, in *Victorville West*, a partnership purchased a golf course subject to a restrictive covenant. 226 So. 3d at 889-90. When membership significantly decreased, the partnership suffered financially. *Id*. at 890. Six years after acquiring title, the partnership sued to cancel the restrictive covenant, citing substantial changes in circumstances that made it impossible to fulfill the covenant's purpose. *Id*. In concluding the claim was time-barred, the trial court found that the five-year statute of limitations began to run when the partnership acquired title. *Id*.

The Fourth District found this ruling to be error. *Id*. at 891. The statute of limitations begins to run "'when the action may be brought.'" *Id*. (citation omitted). "For the statute of limitations to have begun to run when Victorville purchased the golf course," the Fourth District ruled, "a substantial change in circumstances would have had to have taken place *before* Victorville purchased the property." *Id*. (emphasis added). Without that evidence, the statute of limitations did not bar the partnership's claim. *Id*.

Similarly, *Pond Apple Place* did not find that the statute of limitations began to run on a claim to enforce a restrictive covenant the moment that title was acquired. In that case, a condominium association sought injunctive relief against individual unit owners who had allegedly violated the association's restrictive covenant

prohibiting dogs. The unit owners argued, and the trial court agreed, that the one-year statute of limitations for specific performance barred the claim.

On appeal, the Fourth District reversed. Finding that section 95.11(2)(b) established the relevant statute of limitations, the *Pond Apple Place* court concluded that the association's claim was timely filed. Even though the unit owners had first purchased the condo (subject to the restrictive covenant) in 1994, they were not notified of a violation until 1996. The association's complaint, filed in 2000, was well within the five-year limitations period of section 95.11(2)(b).

Florida law does not impose a bright-line rule establishing when a cause of action for declaratory relief on a covenant that runs with the land accrues. The trial court erred in finding that the statute of limitations began to run on May 8, 2008, when Riverside acquired title subject to the Covenants.

3. Because any "change in circumstances" occurred within the relevant limitations period, Riverside's complaint was timely.

To the extent the trial court relied on "a change in circumstances" to determine when the cause of action accrued, it misapprehended the law and the facts. (*See* R.4082, ¶ 3, citing *Grove Isle Ass'n v. Grove Isle Assocs.*, 137 So. 3d 1081 (Fla. 3d DCA 2014).) As a practical matter, *Grove Isle*—which addresses the validity of a declaration of condominium under Florida law—is inapposite. Even if *Grove Isle* is

relevant to a determination of when Riverside's cause of action accrued, the trial court erred in interpreting the Third District's opinion.

Riverside initially filed its lawsuit in April 2014. For purposes of determining the timeliness of its claim, the relevant limitations period was the five years immediately preceding the filing of the complaint: April 2009 until April 2014. *See Grove Isle Ass'n*, 137 So. 3d at 1092 & n.10; *id*. at 1093-94. Under *Grove Isle*, so long as the "change of circumstances occurred within the limitations period" (in or after April 2009), Riverside's "claim for declaratory relief would not be barred by the statute of limitations." *Id*. at 1094. If a change in circumstances occurred "beyond the limitations period," the claim "would be barred." *Id*.

The trial court misconstrued the limitations period. (*See, e.g.*, R.4082, ¶ 3; R.4086, ¶ 11.) In considering whether Riverside could bring a claim for declaratory relief arising from "changed circumstances," the trial court mistakenly imposed its same bright-line rule, finding that the five-year limitations period accrued when Riverside acquired title on May 8, 2008. (R.4086, ¶ 11.) *Grove Isle* explains, however, that in determining when a cause of action for declaratory relief accrues, the relevant consideration is whether the "change of circumstances" occurred *within* the limitations period. 137 So. 3d at 1094.

Here, the relevant time period began April 2009: five years preceding the filing of Riverside's initial complaint. To the extent Riverside sought declaratory

relief related to the "changed circumstances" surrounding the fire protection system, its claim was timely filed. As the trial court recognized, the fire system was altered in 2013. (R.4086, ¶ 11.) Regardless of the "exact date" in 2013 that the fire system was altered, this change in circumstances indisputably occurred *within* the limitations period—not "outside the statutory period," as the trial court ruled. (R.4082, ¶ 3; *see* R.4086, ¶ 11.) The trial court should have at least allowed Riverside to proceed on its claim for declaratory relief related to the fire protection system.

For that matter, the statute of limitations does not bar any claim arising from change in circumstances more than five years after Riverside acquired title. While the fire protection system is the only "changed circumstance" specifically mentioned by the trial court, the record establishes that all of Riverside's claims for declaratory relief arose from circumstances that changed after the August 2010 turnover of control to the residential owners. Only then did the residential owner-controlled Association begin to dispute the Covenants' interpretation, application, and enforcement.

Indeed, the trial court resolved the *Association's* counterclaims for declaratory relief, which arose from the same controversies alleged by Riverside. (*See* R.4092-4104; R.4409-13; T.1402.) Consistent with its counterclaims, the Association sought limited relief in its motion for involuntary dismissal. (*See* T.944-45, 953, 964, 1402.) Although the Association argued that only certain of Riverside's claims should be

dismissed under the statute of limitations (*see id*. at 944-45, 964), the trial court found *all* of Riverside's claims for declaratory relief "outside the statute of limitations period and . . . thus barred." (R.4086, ¶ 12; R.4087.) At a minimum, the trial court erred in granting relief that the Association did not seek. *See, e.g.*, *Pensacola Beach Elementary School v. Moyer*, 286 So. 3d 945, 946 (Fla. 1st DCA 2019).

The Association—not Riverside—bore the burden of proving whether changes in circumstances occurred before April 2009. *See generally Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 695 (Fla. 2015) ("The defendant has the burden to prove an affirmative defense.") Only then would the five-year statute of limitations bar Riverside's claims for declaratory relief. Because the Association did not—and could not—satisfy its burden of proof, the trial court erred in concluding that all of Riverside's claims for declaratory relief occurred "outside the statute of limitations period and are thus barred." (R.4086, ¶ 12; *see id*. ¶ 11.)

E. The existence of another remedy did not preclude Riverside's declaratory judgment action.

Not only did the trial court mistakenly find that Riverside's cause of action for declaratory relief accrued even in the absence of a "dispute" or "controversy," the trial court compounded its error when it sought to limit Riverside's remedies. (R.4083-84, ¶ 6; R.4407-8, ¶ 2.) The trial court relied on the availability of a potential claim for breach of contract—which Riverside chose not to pursue (*see* R.4085, ¶

10)—to foreclose Riverside's timely claims for declaratory relief. Aside from the trial court's continued misapprehension of the elements of a cause of action for declaratory judgment, its reasoning contradicts the Act's plain language.

Section 86.111 establishes that "the existence of another adequate remedy does not preclude a judgment for declaratory relief." § 86.111, Fla. Stat. (2011); *accord Conley v. Morley Realty Corp.*, 575 So. 2d 253, 255 (Fla. 3d DCA 1991); *Maciejewski v. Holland*, 441 So. 2d 703, 704 (Fla. 2d DCA 1983); *see also* § 86.011, Fla. Stat. (2011) (establishing courts' jurisdiction "to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed"). Under Florida's Declaratory Judgment Act, a contract "may be construed either before or after there has been a breach of it." § 86.031, Fla. Stat. (2011); *see also Conley*, 575 So. 2d at 255 (finding "bona fide dispute about the enforceability of the liquidated damages clause" in an otherwise clear contract "appropriate for declaratory judgment"); *Ennis v. Warm Mineral Springs*, *Inc.*, 203 So. 2d 514, 517 (Fla. 2d DCA 1967) (rejecting argument that "a declaratory decree is only appropriate when one is seeking a guide to future conduct"; claims for accounting and money judgment did not preclude declaratory relief).

Maciejewski is instructive. There, a client sued the lawyer who had previously represented her in a dissolution of marriage action. 441 So. 2d at 703. The client sought a declaratory judgment as to the validity of a promissory note and mortgage

that she had given her attorney. *Id*. The trial court dismissed the complaint with prejudice. *Id*. On appeal, the Second District reversed, ruling that the client could not be "precluded from proceeding in this action merely because she may have been able to file an action either for cancellation of the note and mortgage, or for breach of contract." *Id.* at 704.

So, too, should this Court reverse. *See id*. Riverside properly pled and proved its entitlement to declaratory relief under Florida law. The trial court erred in precluding Riverside's action based on the potential availability of a breach of contract action.

CONCLUSION

For all the foregoing reasons, Riverside asks that this Court reverse the final judgment and the order denying rehearing, and remand for further proceedings on the claims for declaratory relief and damages. The trial court erred as a matter of law in finding Riverside's claims barred by the five-year statute of limitations.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court on October 4, 2022, via the Florida Courts E-Filing Portal and that a true and correct copy of the foregoing has been furnished via email to:

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I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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