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

CASE NO. 1D23-3211
L.T. Case No.: 2200027CA

HARBOURAGE MARINA, LLC, A Florida limited liability company,
Appellant,

vs.

DOLPHIN BAY OWNERS ASSOCIATION, INC., a Florida Not For Profit Corporation,
Appellee.

ANSWER BRIEF OF APPELLEE DOLPHIN BAY OWNERS ASSOCIATION, INC.

APPEAL FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR BAY COUNTY, FLORIDA
HONORABLE JAMES J. GOODMAN, CIRCUIT JUDGE

MICHAEL P. DICKEY, ESQ.
Florida Bar Number 115606
ROBERT L. KAUFFMAN, ESQ.
Florida Bar Number 069296
DUNLAP & SHIPMAN, P.A.
2063 County Hwy 395
Santa Rosa Beach, FL 32459
850-231-3315 Telephone
850-231-5816 Facsimile
robert@dunlapshipman.com
mdickey@dunlapshipman.com
stephanie@dunlapshipman.com
Counsel for the Appellee

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Statutes, Rules, and Secondary Authorities

PREFACE

References herein to the pages of the Record are cited as (R. __). The parties relevant to this appeal are referenced herein as follows:

Plaintiff/Appellant, HARBOURAGE MARINA, LLC: **Appellant** or **Harbourage**

Defendant/Appellee, DOLPHIN BAY OWNERS ASSOCIATION, INC.: **Appellee** or **Association**

References to the order appealed, the Order Denying Plaintiff's Motion for Summary Judgment and Granting Partial Summary Judgment in Favor of Defendant on Count I of Plaintiff's Second Amended Complaint entered on September 29, 2023 ("**Partial Final Judgment**") are cited as (R. ___ at ¶ __).

References to Appellant's Initial Brief are cited as (I.B. at ___).

STATEMENT OF THE CASE AND OF THE FACTS

This action came before the trial court pursuant to an initial Complaint filed by Harbourage on January 6, 2022. (R. 12 – 16). The operative pleading for purposes of this appeal is Harbourage's Second Amended Complaint (R. 1269 – 1279), deemed filed by court order as of January 5, 2023. (R. 1535). Count I of the Second Amended Complaint, which is the only count at issue in this appeal, asserts a cause of action for Declaratory Judgment, requesting that the trial court declare three separate governing documents relating to the Dolphin Bay community in Bay County, Florida "void and/or unenforceable and [enter] an order striking them from the official records of Bay County, Florida." (R. 1276).

The Association filed its Answer and Affirmative Defenses to the Second Amended Complaint (R. 1763 – 1774), including in relevant part its Sixth Affirmative Defense that Harbourage is "barred from any recovery or relief as the relevant statute of limitations has long passed on any claim involving the referenced recorded instruments." (R. 1773). The parties both filed summary judgment motions directed at Count I (R. 1775 – 1800; R. 2039 – 2046), with the Association's cross-motion directed specifically at the application of the statute of limitations. The trial court, in a well-reasoned and lengthy Partial Final Judgment entered on September 29, 2023, denied

Harbourage's motion and granted the Association's motion. (R. 2084 – 2095). Specifically, the trial court relied upon established Florida law including this Court's opinions in *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n*, 169 So. 3d 197 (Fla. 1st DCA 2015) and *Hilton v. Pearson*, 208 So. 3d 108 (Fla. 1st DCA 2016), holding that:

> Because this action was filed more than five years after said instruments were recorded, any claims challenging the validity of such instruments on the basis that they are void *ab initio* are foreclosed. *Hilton*, 208 So. 3d at 110.

(R. 2093 – 2094 at ¶¶ 34 – 36). Harbourage subsequently moved for rehearing, which was denied by the trial court on November 16, 2023. (R. 2096 – 2098). This appeal ensued.

Dolphin Bay is a primarily residential subdivision located in Bay County that is comprised of both single-family homes and a private Marina located on a canal leading into St. Andrews Bay. (R. 1808 – 1811). The development history and relationship of the parties is complex and is summarized below only to the extent necessary to provide context for the narrow legal questions that are relevant to this appeal. The Partial Final Judgment ably recites a more detailed history. (R. 2085 – 2088, ¶¶ 1 – 13).

The Appellee, Association, is the not-for-profit homeowners' association for Dolphin Bay, incorporated in 1998 under Chapter 617, Florida

Statutes.[1] (R. 1803 – 1807). The Association operates pursuant to the Declaration of Covenants, Conditions and Restrictions for Dolphin Bay ("**Declaration**"), originally recorded in the Bay County Official Records in 1998 (R. 1808 – 1876), as well as its corporate By-Laws also recorded in 1998 (R. 1877 – 1891), as each document has been amended from time to time. The Declaration provides that "Members" of the Association include both "Owners" – defined as those persons who hold record title to a single family residential "Unit" – and "Marina Slip Owners." (R. 1810-11; 1814-15).

The "Declarant" of Dolphin Bay (*i.e.* the developer), initially Suntech Resort Developers of Florida, Inc., created the community through platting and drafting/recording of the aforementioned community governing documents. The Declarant was the initial owner of the private Marina. The Declarant is indisputably a party to the Declaration and governed by its terms, as are the Association and all Members of the Association. (R. 1808 – 1853). The Marina, although classified as a "Private Amenity" that is not a "Common Area" owned by the Association, is a part of the defined Dolphin

[1] Homeowners' associations were governed by §§ 617.301 – 617.312, Fla. Stat., until the adoption of the 2000 Florida Statutes, which created Chapter 720, Florida Statutes, now known as the "Homeowners' Association Act."

Bay "Properties" that are subjected to the Declaration of Covenants. (R. 1808; 1811).

The Declaration provides that it may be amended "only by the affirmative vote or written consent, or any combination thereof, of Owners representing 75% of the total Class "A" votes in the Association" plus the consent of the Declarant during such time as the Declarant could annex additional property to Dolphin Bay. (R. 1849). The Declarant waived its right to annex additional property to Dolphin Bay effective not later than June 25, 2004. (R. 1892 – 1894; R. 2085 – 2086 at ¶ 8). Section 15.2 of the Declaration also provides in relevant part (emphasis added):

> Any amendment shall become effective upon recording in the Official Records, unless a later effective date is specified in the amendment. *Any procedural challenge to an amendment must be made within six months of its recordation or such amendment shall be presumed to have been validly adopted.*

In addition, as initially drafted by the Declarant, the Declaration contained an Exhibit "C" called the "Initial Design Guidelines and Deed Restrictions" which, among other things, provided that owners of Dolphin Bay single-family "Bay front lots" were entitled to purchase a Marina boat slip and that such slip would either pass as an appurtenance with title upon sale of the Bay front lot, or could be sold back to the Marina facility operator. (R. 1865). Sale of the Marina boat slip to a third-party was thus not an option.

Appellant, Harbourage, is the current owner of the private Marina and self-professed successor-in-interest to the original Declarant. (I.B. at 1; R. 2085, ¶ 2). Harbourage purchased the Marina common property and many, but not all, of the Marina boat slips located therein in late 2021. (R. 1950 - 1990). Immediately upon purchase, Harbourage initiated a lawsuit against the Association and eventually amended its pleading to assert the current Count I, seeking to invalidate three Dolphin Bay community documents, all of which had been of record for *over a decade prior to Harbourage's purchase and the filing of its complaint*. Those three documents, which for consistency with the Initial Brief will be collectively referred to herein as the "**Challenged Covenants**", are as follows:

2004 Amendment

A "Certificate Acknowledging Amendment to Declaration of Covenants, Conditions and Restrictions of Dolphin Bay" was executed on November 17, 2004 and recorded on December 7, 2004. (R. 2001 - 2016). This document recites that it is approved "pursuant to the Declaration, Articles of Incorporation, the Bylaws and Chapter 720 of the Florida Statutes." (R. 2002). It was executed on behalf of the Association by its President and Secretary (R. 2003 - 2004). The document amends both Exhibit "C" to the Declaration, which are the "Initial Design Guidelines and Deed Restrictions"

("**Design Guidelines**"), and Exhibit "D" to the Declaration, which are the "Initial Use Restrictions and Rules" ("**Use Restrictions**").

The face of the 2004 Amendment does not contain additional information on how it was approved. Nowhere in the document does it state that it was approved solely by the Association's Board of Directors; to the contrary, the recital that the amendment was properly approved pursuant to the requirements of the Declaration and the Homeowners' Association Act is clear and unambiguous. The Declaration, in Sections 9.3 and 10.2, indicates that the Design Guidelines cannot be amended by the Association's Board of Directors or Owners alone, and instead requires approval of a committee of the Association, appointed by the Declarant, called the "New Construction Committee."[2] (R. 1833; 1836 - 1837).

In the Use Restrictions amendment portion of the document only, the 2004 Amendment specifically recites that the amended Use Restrictions were approved and adopted by the Association's Board of Directors at a duly called meeting on October 11, 2004. (R. 2016). This secondary and apparently additional approval is consistent with Section 10.2 of the

[2] Sections 4.6 and 9.6 of the Declaration provide that the New Construction Committee is treated as a committee of the Association and is indemnified for its actions by the Association. (R. 1817; 1835).

Declaration, which vests the Association's Board of Directors with unilateral authority to amend the Use Restrictions. (R. 1836).

Notably, the October 11 date of the Board of Directors meeting at which approval of the Use Restriction amendment occurred was over one month prior to the November 17 date of execution of the Certificate of Acknowledgement that recites the prior approval of the entire document pursuant to the requirements of the Declaration and Chapter 720. This significant lapse of time is indicative of a separate approval process by the Association – distinct from and in addition to mere Board of Directors approval – having been followed for the Design Guideline amendment portion of the 2004 Amendment.

Harbourage's primary substantive dispute with the 2004 Amendment is the clarification in the Design Guidelines that not only are Owners of Dolphin Bay single-family "Bay front lots" entitled to purchase a Marina boat slip that may not be conveyed to third-parties, but that ownership of Marina slips more generally is limited to Dolphin Bay Owners. (R. 2005).

2009 Amendment

The "Second Amendment to the By-Laws of Dolphin Bay Owners Association, Inc." was recorded on August 19, 2009. (R. 2019 – 2021). The document states "this instrument has been adopted pursuant to the

Declaration, Articles of Incorporation of the Association, By-Laws and Chapter 720 of the Florida Statutes" and that the By-Laws are thereby amended by the Association. As with the 2004 Amendment, the face of the 2009 Amendment does not contain additional specific information on its manner of approval, whether by membership vote or otherwise. The document was executed on behalf of the Association by its President and Secretary. Nowhere in the document does it state that it was approved solely by the Association's Board of Directors; to the contrary, the recital that the amendment was properly approved pursuant to the requirements of the Declaration, By-Laws and Chapter 720 is clear and unambiguous.

The original By-Laws of the Association contain the following clause governing amendments to said By-Laws:

> The By-Laws may be amended, altered or repealed by the Developer until such time as all Lots are owned by Owners other than the Developer or until the Developer elects, at its option, to terminate control of the Association. Upon termination of Developer's control as aforesaid, the By-Laws may be amended by the Members at any regular or special meeting upon the affirmative vote of the Owners of not less than two-thirds (2/3) of the total Lots of the Property.

(R. 1891). The Declarant's attempted reservation of unilateral control over amendments to the Bylaws until all Lots in Dolphin Bay had been sold was invalid under Florida law. Fla. Stat. § 617.3075 (1998) states in relevant part (emphasis added):

> **617.3075 Prohibited clauses in homeowners' association documents.—**
>
> (1) **It is hereby declared that the public policy of this state prohibits the inclusion or enforcement of certain types of clauses in homeowners' association documents**, **including** declaration of covenants, articles of incorporation, **bylaws**, or any other document of the association which binds members of the association, **which** either **have the effect of** or provide that:
>
> > **(a) A developer has the unilateral ability and right to make changes to the homeowners' association documents after the transition of homeowners' association control in a community from the developer to the nondeveloper members, as set forth in s. 617.307, has occurred**.
>
> Such clauses are hereby declared null and void as against the public policy of this state.

In any event, turnover of control of the Association from the Declarant to the Association occurred in 2004, prior to the 2004 Amendment and years before the 2009 Amendment to the By-Laws, rendering the Bylaws amendable by a 2/3 vote of the Lot owners. (R. 2086, ¶ 9).

Harbourage's substantive dispute with the 2009 Amendment is the revision of the eligibility requirement for the Board of Directors from any person permitted by general law to "Unit (Lot) Owners," which it claims disenfranchises Marina Slip Owners such as Harbourage itself.

2011 Marina Agreement

This document, simply entitled "Agreement" was recorded on October 20, 2011. (R. 2024 – 2038). It is a set of multi-party restrictive covenants, easements, and cost-sharing agreements executed and agreed upon by (i) the Association, (ii) Harbourage Yacht Club at Dolphin Bay, Inc.,[3] and (iii) the successor to the Declarant who owned the Marina and a majority of the Marina boat slips at that time – Southern Delta Trust – which is also the predecessor in interest to Harbourage. (I. B. at 1; R. 1899 – 1901; R. 1950 – 1955; R. 2024; R. 2037 – 2038; R. 2085 at ¶ 7; R. 2086 at ¶ 10). As with the 2004 Amendment and the 2009 Amendment, the Marina Agreement does not indicate what internal approval processes were followed by the respective entities, instead simply reflecting the signature of the President of the Association and the officers of the Marina Association. (R. 2036 – 2038). Nowhere in the document does it state that the internal corporate approvals

[3] This "**Marina Association**" was formed in 2008 by the successor to the Declarant and predecessor to Harbourage, Southern Delta Trust, to act as an operation, management, maintenance, and control entity for the Dolphin Bay private Marina. (R. 2086 at ¶ 10). Paradoxically, Harbourage accepts the establishment and jurisdiction of the Marina Association that was created by Southern Delta Trust while it was the owner of the Marina (*see, e.g.* paragraph 5 of the Second Amended Complaint at R. 1270), but it disavows or simply ignores the authority of Southern Delta Trust to execute the 2011 Marina Agreement.

of the Association or Marina Association were solely through their respective Boards of Directors.

Harbourage, over a decade later, now contends that the Marina Agreement is invalid due to alleged lack of any member vote by the Association through its members and the Marina Association through its members. The Marina Agreement is relevant to several currently disputed issues between Harbourage and the Association, including access control through Dolphin Bay's vehicular access gate. However, Harbourage's principal dispute with the document is that Harbourage seeks to expand the Marina facility far beyond its initially contemplated and permitted size, and therefore it seeks to rescind its predecessor's express agreement to not increase the total number of boat slips in the Marina beyond 64 total slips without prior approval by at least 51% of the Lot Owners in the Association. (R. 86; R. 2031).

In multiple instances, the Initial Brief incorrectly characterizes the Association's pursuit of its statute of limitations affirmative defense as meaning that "The Association does not dispute that it acted unilaterally in failing to obtain either the Developers' consent or a member vote of any kind." *See, e.g.* I.B. at 9. To the contrary, the Association repeatedly denied that the Challenged Covenants were improperly or defectively approved

(R.1763 – 1769), and it relies on the unambiguous facial validity of those documents as described above. The 2004 Amendment and 2009 Amendment were explicitly amended "pursuant to the Declaration," the other governing documents of the Association, and the Homeowners' Association Act. In the case of the 2011 Marina Agreement, the document was signed by the Association's President, the officers of the Marina Association,[4] and the Trustee of the then-Marina owner/predecessor in title to Harbourage, the Southern Delta Trust. (R. 2036 – 2038).

[4] These officers include Michael W. Hudlow, an initial Declarant and slip owner identified I.B. at 1 – 2.

SUMMARY OF ARGUMENT

The Challenged Covenants were executed and recorded over 17, 12, and 10 years prior to the commencement of this action. The trial court, acting pursuant to this Court's precedent in *Hilton v. Pearson*, 208 So. 3d 108, 110 (Fla. 1st DCA 2016) and *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n*, 169 So. 3d 197, 201 (Fla. 1st DCA 2015), as well as *Harris v. Aberdeen Prop. Owners Ass'n*, 135 So. 3d 365, 368 (Fla. 4th DCA 2014), properly entered summary judgment holding that Harbourage's claims to have the Challenged Covenants declared void *ab initio* are barred by the applicable five-year statute of limitations. *See* § 95.11(2)(b), Fla. Stat.

Harbourage now attempts to circumvent the statute of limitations with several illusory distinctions between the established law and the facts of this case. In so doing, Harbourage repeatedly assumes success on the merits of its primary argument – its disputed contention that the Challenged Covenants were not properly approved – which is a factual dispute that was correctly not reached by the trial court due to the clear applicability of the statute of limitations. Harbourage then uses this assumption of impropriety to bootstrap its legal arguments that that the Challenged Covenants are illegal or that they were executed contrary to the procedural requirements of the Declaration, and therefore the statute of limitations should not apply.

However, the aforementioned authorities and others discussed herein are clear that a party challenging enactment of a community association covenant is subject to the statute of limitations commencing on the date of recording in the public records, regardless of whether the plaintiff alleges a statutory violation or conflict with other community governing documents. Harbourage's efforts in this case, in which it is attempting to use a decade(s) later absence of corroborating evidence as proof of impropriety, are an excellent demonstration of the sound principles behind the application of the statute of limitations to this situation. *See, e.g. Nardone v. Reynolds*, 333 So. 2d 25, 36 (Fla. 1976) (discussing how "resolutely unfair" it is to award a party that sleeps on its rights while evidence devolves into "tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses").

As a secondary argument, Sections V and VI of the Initial Brief contend that the trial court erred because Harbourage also sought relief in the form of a declaratory judgment to construe conflicting contractual provisions. To the contrary, the trial court correctly held that this issue was never raised in Harbourage's pleadings and could not be raised for the first time in opposition to the Association's Motion for Summary Judgment.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR BY GRANTING SUMMARY JUDGMENT IN FAVOR OF THE ASSOCIATION BECAUSE THE STATUTE OF LIMITATIONS DEFENSE APPLIES EVEN IF RESTRICTIVE COVENANTS ARE ALLEGED TO BE VOID *AB INITIO*

A. Standard of Review.

The First District Court of Appeal applies *de novo* review to legal issues concerning a statute of limitations defense. *Riverside Ave. Prop., LLC v. 1661 Riverside Condo. Ass'n*, 325 So. 3d 997, 999 (Fla. 1st DCA 2021).

B. It is well-established in the First District that the statute of limitations applies to untimely attempts to challenge the validity of recorded covenants.

In Count I of its Second Amended Complaint, Harbourage seeks a declaratory judgment to challenge the validity and the enactment of each of the three documents comprising the "Challenged Covenants." The Challenged Covenants were recorded in the Bay County Public Records on December 7, 2004, August 19, 2009, and October 20, 2011, respectively, thereby evidencing undisputed recording dates ranging from over 10 to over 17 years prior to Harbourage's commencement of this lawsuit. Pursuant to § 95.031(1), Fla. Stat., "a cause of action accrues when the last element constituting the cause of action accrues." From the date that a cause of action accrues, a plaintiff seeking to assert a claim based upon a written

instrument has five years to bring suit. § 95.11(2)(b), Fla. Stat.[5] Thus, the trial court properly held based on undisputed facts that "Because this action was filed more than five years after said instruments were recorded, any claims challenging the validity of such instruments on the basis that they are void *ab initio* are foreclosed." (R. 2093 at ¶ 37).

Argument section I of the Initial Brief attempts to avoid established law that has arisen in the specific context of untimely challenges to the validity and enactment of community association recorded covenants in favor of more general law which the First District and others have held is not applicable to this type of situation. This Court's decision in *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n*, 169 So. 3d 197 (Fla. 1st DCA 2015), the Fourth District Court of Appeal's decision in *Harris v. Aberdeen Prop. Owners Ass'n*, 135 So. 3d 365 (Fla. 4th DCA 2014), and especially this Court's decision in *Hilton v. Pearson*, 208 So. 3d 108 (Fla. 1st DCA 2016), are all sufficiently closely related to the instant case both in factual and legal similarity as to be considered on point and controlling for

[5] "Actions other than for recovery of real property shall be commenced as follows. . . (2) WITHIN FIVE YEARS . . . (b) A legal or equitable action on a contract obligation, or liability founded on a written instrument . . . ."

the trial court. The trial court property relied upon the foregoing authorities in its dispositive ruling within the Partial Final Judgment, ¶¶ 34 - 36.

Contrary to Harbourage's contention, Florida courts have repeatedly held that where a party challenges the *validity* or *enactment* of an agreement encumbering land as being void *ab initio*, §§ 95.11(2)(b) and 95.031(1), Fla. Stat. will apply to impose a five-year statute of limitation commencing on the date of recording of said agreement. *See Harris*, 135 So. 3d at 368; *Silver Shells,* 169 So. 3d at 201; and *Hilton*, 208 So. 3d at 110. In comparison, a declaratory action asking the Court to *interpret* a restrictive covenant or a conflict between two covenants can accrue on a later date, such as the date of acquisition of title by a subsequent purchaser of the property that is subject to said covenant. *See, e.g.*, *Silver Shells*, 169 So. 3d. at 201 (noting *Harris'* distinction between actions challenging validity versus actions seeking interpretation). The instant action challenged only the *validity* of the Contested Covenants, rather than asking for their interpretation.

In *Harris*, a homeowner brought suit against both her homeowners' association and a separate master association, arguing that certain requirements in the governing documents were invalid. Specifically, the master association documents imposed a requirement that all owners be members of a golf club, whereas the homeowners' association documents

did not require membership in the golf club. *Id*. at 266-267. The homeowner sought declaratory relief regarding whether she was required to be a member of the golf club.

The Fourth District rejected the homeowner's claim in part, holding that, to the extent she challenged the validity of the enactment of the mandatory membership requirement, the statute of limitations began to run when the amendment containing the requirement was recorded in the public records, and her claim was therefore barred by § 95.11(2)(b), Fla. Stat. The Fourth District drew a distinction between a count that challenged the *validity* and *procedural enactment* of the long-recorded instrument, and a second count that sought declaratory interpretive relief regarding the allegedly inconsistent obligations in the two separate sets of covenants. *Id.* at 368–369. While the former count was time-barred, the latter was permitted to proceed because the practical need to construe this homeowner's rights and obligations (*i.e.* the last element of the cause of action) did not arise until the plaintiff became an owner whose property was subject to the covenants. *Id*. at 369. By the reasoning in *Harris*, Count One of Harbourage's Second Amended Complaint fails a matter of law because it seeks to challenge the validity and the enactment of the Challenged Covenants over a decade after their recording.

In *Silver Shells*, a condominium association filed suit alleging that the property's Developer had, among other things, improperly failed to convey "Beach Property" to a master owners' association. Under initial restrictive covenants, the Developer had been required to convey certain "common properties" including the Beach Property to the master association, but the Developer later recorded an amendment which had the practical effect of removing that requirement. 169 So. 3d at 199. Nine years later, the Association filed a complaint seeking a declaratory judgment that the amendment exceeded the Developer's authority and was therefore invalid. *Id*. at 199. This Court, following *Harris*, construed the claim as an attempt to invalidate the amendment and agreed with the Developer that the condominium association's claims were subject to the five-year statute of limitations of § 95.11(2)(b), Fla. Stat. *Id*. at 201.

In *Hilton*, this Court explicitly rejected the same argument now made by Harbourage: that improperly enacted homeowners' association covenant amendments are tantamount to forged deeds and such amendments are void *ab initio.* The challenge in *Hilton* involved a lawsuit filed twelve years after the amendment was recorded. As summarized in the opinion:

> In response, the Pearsons argue that the statute of limitations defense was waived below because it was not raised by the association in its answer, and even if the defense was not waived, the trial court correctly rejected the defense because the

> improperly enacted amendments were tantamount to forged deeds that were void ab initio and could be challenged at any time.

208 So. 3d at 110. This Court rejected the Pearsons' argument, and held:

> On the merits of the statute of limitations issue, we agree with the Hiltons that reversal is compelled by *Harris* and *Silver Shells*, which stand for the proposition that a suit challenging the validity of an amendment to restrictive covenants must be filed within five years of the date that the amendment is recorded even if the suit alleges that the amendment was void because it was not properly enacted.

Id.

Similarly, in *Joy v. Oaks Club Corporation*, 343 So. 3d 632 (Fla. 2nd DCA 2022), the Second District followed the lead of the Fourth and First District Courts of Appeal, and held that a complaint challenging the validity of an amendment to a governing document is subject to a five-year statute of limitations, which begins to run on the date the amendment is recorded, regardless of when a plaintiff acquired title to the property. *Id.* at 639. The plaintiff in *Joy* was permitted to pursue its claim because the evidence showed that its complaint was commenced less than five years after the amendment in question was recorded, but the Second District adopted the statute of limitations analysis of *Hilton* and *Harris* in a context where the plaintiff was claiming that a community bylaws amendment was void *ab initio*.

In several sections of the Initial Brief, Harbourage claims that the instant dispute is different from *Harris*, *Silver Shells*, and *Hilton* because of the principle that a void or forged instrument (to which it equates the Contested Covenants) cannot create legal title. Apart from the fact that there is no allegation of forgery here, that this case does not involve any transfer or creation of title, and that *Hilton* expressly rejected the application of this principle in the present context, any extension of this principle to the facts of the instant case is also clearly improper based on the facts of *Silver Shells*. The practical effect of the application of the statute of limitations to *Silver Shells* was that the property Developer – which had been required in recorded covenants to convey the valuable Beach Property to a master association – was able to retain ownership of the Beach Property. The *Silver Shells* court therefore endorsed application of the statute of limitations even in the context of a title transfer, where that title transfer was compelled by recorded covenants. Put another way, the principle of finality with regard to recorded covenants took precedence over the allegation that title had been acquired (or in that case, retained) by an improperly enacted instrument. Meanwhile, the instant case involves only use restrictions and internal corporate procedures, not forged instruments or transfers of title.

In its effort to create a distinction between the instant case and the controlling precedents discussed above, Harbourage attempts to draw several analogies beginning with the comparison to *Reed v. Fain*, 145 So. 2d 858 (Fla. 1962) and its progeny. Those cases stand broadly for the principle that void deeds are not subject to the statute of limitations, which as discussed above is a principle that this Court in *Hilton* explicitly declined to extend to disputes concerning alleged defects in the adoption of covenant amendments. The Supreme Court in *Reed* held that ratification of the deeds at issue by virtue of the statute of limitations would violate *constitutional* homestead property conveyance principles, thereby acting "to breathe life into an instrument made and executed in contravention of constitutional inhibitions." *145 So. 2d* at 871. There is no constitutional violation alleged here.

Other authorities cited in the Initial Brief are also inapplicable in the present context. *Monarch Claims Consultants, Inc. v. Fleming*, 372 So. 3d 758, 762 (Fla. 1st DCA 2023) has nothing to do with a statute of limitations defense or the procedural propriety of a contract amendment, and instead concerned a contract that was substantively invalid for violation of a statutory limit on public adjuster fees. *Gables Ins. Recovery, Inc. v. Citizens Prop. Ins. Corp*., 261 So. 3d 613, 624 (Fla. 3d DCA 2018) also involved a contract that

was substantively invalid due to its violation of a public adjusting fees statute. *Thomas v. Ratiner*, 462 So. 2d 1157, 1159 (Fla. 3rd DCA 1984) concerned an illegal retainer agreement for an attorney. *Moore v. Smith-Snagg*, 793 So. 2d 1000 (Fla. 5th DCA 2001) is another case concerning a forged deed. *Palm Bay Towers Corp. v. Brooks*, 466 So. 2d 1071, 1074 (Fla. 3d DCA 1984), which the Initial Brief cites as applying relevant principles to community associations, has nothing to do with a procedural challenge, amendments to restrictive covenants, or the statute of limitations, and instead it merely evaluates whether a specific provision in a declaration of condominium substantively conflicts with the controlling statute. *Id*. at 1074. Other cases cited by the Initial Brief, such as *McAllister v. Breakers,* 981 So. 2d 566, 571 (Fla. 4th DCA 2008) and *Beau Monde, Inc. v. Bramson*, 446 So. 2d 164, 167 (Fla. 2nd DCA 1984) dealt with alleged procedural deficiencies in amendments that were *timely* challenged.

Nor are the transactions at issue a "unilateral amendment," as suggested on multiple occasions within the Initial Brief. The lead case cited for this proposition, *Tropicana Pools, Inc. v. Boysen*, 296 So. 2d 104 (Fla. 1st DCA 1974), far predates *Hilton* and involved neither restrictive covenants nor any application of the statute of limitations. This principle does not apply to restrictive covenants in the first place, given that the instruments at issue are

uniquely multilateral documents involving numerous parties, including the corporate entity that is the Association, the numerous members of the Association, and the Declarant (including the original Declarant and its successor, Harbourage). All parties are subject to the Declaration and Bylaws, which by their terms may be amended in a certain manner, and which have been amended in the 2004 and 2009 Amendments "pursuant to the Declaration, Articles of Incorporation, the Bylaws and Chapter 720 of the Florida Statutes."[6] (R. 2002; 2019). Unilateral amendment principles do not apply to the more complex procedural processes of these homeowners' association covenant amendments.

Furthermore, and more fundamentally, Harbourage's argument assumes that it has proved the merits of its case, when in fact the trial court never reached those merits because it would be improper to engage in that analysis when the claim is clearly barred by the statute of limitations. Both the "unilateral amendment" and "illegality" arguments presuppose that no party other than the Association's Board of Directors approved the Contested

[6] Or, in the case of the 2011 Marina Agreement, the signature pages reflect the execution of the document by all relevant parties including Harbourage's predecessor in interest, the Southern Delta Trust, which also owned a majority of the Marina boat slips and thereby constituted a majority of the "members" of the Marina Association.

Covenants. That is plainly wrong in the case of the Marina Amendment, which is signed by several other parties including Harbourage's predecessor, and it is contradicted by the facial validity of the 2004 Amendment and the 2009 Amendment. Although the documents at issue are facially valid and the Record is devoid of parol evidence to either dispute *or support* Harbourage's allegations, Harbourage cites the absence of corroborating parol evidence of proper approval as proof of its claims. The Initial Brief incorrectly claims that "The Association does not dispute that it acted unilaterally in failing to obtain either the Developers' consent or a member vote of any kind" and more generally the Initial Brief devotes an extensive amount of time attempting to convince this Court that the Association is a bad actor that did not obtain required approvals for the three "Challenged Covenants."

To the contrary, the trial court did not reach the merits on this issue and Harbourage's arguments are misplaced given the narrow issue on appeal regarding the undisputed untimeliness of the claims asserted in Count I. The Association does not concede that any of the amendment approval procedures specified in the community governing documents were not followed, and it should not be surprising if corroborating evidence is sparse in the 2020's given the *extreme lapse of time* between the accrual of

any cause of action to challenge the validity of the Challenged Covenants and Harbourage's delayed commencement of this lawsuit.

The statute of limitations exists based on long-established and sound policy principles, and the use of the lapse of time as a weapon should not be condoned. "Such statutes protect defendants against claims asserted when all proper vouchers and evidence are lost and after the facts have become obscure from the lapse of time, defective memory or death and removal of witnesses." *Allie v. Ionata*, 503 So. 2d 1237, 1240 (Fla. 1987), citing *Whaley v. Wotring*, 225 So. 2d 177, 181 (Fla. 1st DCA 1969). *See also Nardone v. Reynolds*, 333 So. 2d 25, 36 (Fla. 1976) (discussing how "resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights").

In fact, the Association, a not-for-profit corporation that is run by unpaid community volunteers, is explicitly *not* required to maintain records from nearly as long ago as 2004, 2009, or 2011. The applicable statutory provision governing Florida homeowners' associations only requires retention of meeting minutes for seven years. *See* § 617.303(4)(f), Fla. Stat. (1998), now renumbered § 720.303(4)(f), Fla. Stat. Neither § 617.303(4)(f), Fla. Stat. (1998) nor the Association's Bylaws (*see* Article VI, R. 1887) specifically require maintenance of voting records at all. The Homeowners'

Association Act was only recently amended in 2021 to require retention of "Ballots, sign-in sheets, voting proxies, and all other papers and electronic records relating to voting by parcel owners, which must be maintained for at least ***1 year*** after the date of the election, vote, or meeting." § 720.303(4)(l), Fla. Stat. (emphasis added). Harbourage seeks to disregard the statute of limitations and then hold the Association to a record retention standard as many as 17 times longer than the standard required by Florida law.

Moreover, the Declaration – drafted by the same Declarant to which Harbourage now claims its rights as a successor – specifically states in Section 15.2(c) that:

> Any amendment shall become effective upon recording in the Official Records, unless a later effective date is specified in the amendment. *Any procedural challenge to an amendment must be made within six months of its recordation or such amendment shall be presumed to have been validly adopted.*

(emphasis added). All told, Harbourage's strategy is to (i) disregard the Section 15.2(c) principle of finality that its own predecessor drafted into the Declaration, (ii) wait until multiple years beyond the statute of limitations to commence its claim, (iii) request that the trial court and now this Court disregard established law affirming the proper application of the statute of limitations to this situation, and then (iv) use an absence of evidence from as many as 17 years prior to commencement of its lawsuit as evidence of the

absence of proper approvals. Vindication of Harbourage's strategy would be tantamount to condoning a new method of attacking long-recorded restrictive covenants, whereas *Hilton*, *Silver Shells* and the other precedents discussed above clearly recognize the importance of finality and the ability of all parties to rely upon properly recorded restrictive covenants. *See also Winkelman v. Toll*, 661 So. 2d 102, 107 (Fla. 4th DCA 1995) (noting that Florida has a notice-type recording statute, which functions to give "notice to the world" that a property is subject to any properly recorded provisions and regulations).

Argument I in the Initial Brief cites § 617.306(1)(c), Fla. Stat. (1998) for the proposition that the Contested Covenants are "illegal":

> *Unless otherwise provided in the governing documents as originally recorded*, an amendment may not affect vested rights unless the record owner of the affected parcel and all record owners of liens on the affected parcels join in the execution of the amendment.").

(emphasis added). It further cites *Endruschat v. Am. Title Ins. Co*., 377 So. 2d 738, 741 (Fla. 4th DCA 1979) for the principle that covenants running with the land can only be imposed by the agreement of the owners of the subject real property. Fundamentally, the argument that an allegation of "illegality" avoids application of the Statute of Limitations in this context is incorrect, as discussed in response to Argument Section III, *infra* at p. 36. Furthermore,

§ 617.306(1)(c), Fla. Stat. and *Endruschat* are both inapplicable to the 2004 Amendment and the 2009 Amendment because both amendments, on their face, were promulgated in the manner provided in the governing documents *as originally recorded* and imposed upon the entire Dolphin Bay property. Harbourage is also not a "parcel" owner to which this statute applies, as it emphasizes in section VI.B. of the Initial Brief ("Article 2.2 of the Declaration establishes the Marina as a private amenity with total autonomy"). I.B. at 35.

§ 617.306(1)(c), Fla. Stat. is also inapplicable to the 2011 Marina Agreement because that document is not an amendment to existing homeowners' association governing documents. It is, instead, a new set of restrictive covenants to which the Association, on behalf of its members, the Marina Association, on behalf of its members, and the Southern Delta Trust, as Harbourage's predecessor in interest, are all parties. *Endruschat* is likewise inapplicable because those necessary parties did execute and impose the Marina Agreement upon their respective properties. Apart from Southern Delta Trust's ownership of the Marina property at the time of execution and recording of the 2011 Marina Agreement, its prior imposition of the Marina Declaration of Covenants over the entire Marina (and all boat slips) in 2008 also vested the Marina Association with standing to exert operational control of the Marina, including the authority to adopt use

restrictions and operational agreements on behalf of each and every slip owner, such as those contained in the 2011 Marina Agreement.[7]

The Initial Brief states that it is the "unilateral usurping of Harbourage's property rights and violations of state law that differentiates this case from *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n*, 169 So. 3d 197 (Fla. 1st DCA 2015) and *Hilton v. Pearson*, 208 So. 3d 108 (Fla. 1st DCA 2016)." In short, this distinction fails based on an analysis of those opinions and the undisputed facts of the case. Harbourage cannot disregard the Statute of Limitations, disregard the time bar in the Declaration, and then bootstrap what is in reality an argument over internal approval procedures into an illegality/unilateral act argument. *Silver Shells* and *Hilton* are properly

[7] For example, the Bylaws of the Marina Association provide that it is an entity "to *operate, **manage**, maintain, control and administer* the real property together with the recreation, sailing events, fishing tournaments, green space, ingress and egress, parking, boat slips and related amenities . . ." (R. 1922)(emphasis added). "Management is synonymous with control, direction, governance, government, guidance, [and] handling, among other words." *Seaside Town Council, Inc. v. Seaside Cmty. Dev. Corp*., 347 So. 3d 89, 96 (Fla. 1st DCA 2021) (internal quotations and citation omitted). *See also* the Marina Association Declaration of Covenants, providing that the Marina is subject to such covenants, each Slip Owner is required to be a member of the Marina Association, each member's rights in the Marina are subject to the Marina Declaration, and that the Marina Association can promulgate rules and regulations applicable to the Slip Owners. (R. 1902 – 1903; 1912 – 1913).

applied to this case, which is not a novel situation and falls within the established precedent of this District. As such, the trial court's well-reasoned opinion should be affirmed.

II. THE APPLICATION OF THE STATUTE OF LIMITATIONS TO THE ASSOCIATION'S COUNTERCLAIM IS NOT AN ISSUE FOR THIS APPEAL

A. Standard of Review.

The standard of review is *de novo*. *See* Section I.A., *supra* at p. 15.

B. Harbourage's argument in Section II is procedurally inappropriate and, in any event, inapplicable to the facts of this case.

Section II of the Initial Brief argues, in effect, that the Association's assertion of a counterclaim involving enforcement of certain aspects of the Challenged Covenants should be applied by this Court to waive the Association's statute of limitations defense to Harbourage's independent action that is at issue in this appeal, *i.e*. Count I of its Second Amended Complaint to have each of the Challenged Covenant declared void *ab initio*. As an initial matter, this argument was not raised below, and it is improper to raise this new argument for the first time in this appeal. *See, e.g. Dober v. Worrell*, 401 So. 2d 1322, 1324 (Fla. 1981) ("[I]t inappropriate for a party to raise an issue for the first time on appeal from summary judgment").

To the extent this new argument is considered by the Court, even Harbourage concedes that "the procedural posture for this appeal is slightly different" from the authorities it relies upon. I. B. at 23. In fact, the difference is far more than slight. All authorities cited by Harbourage apply only in the context of an otherwise time-barred claim that is raised in a *defensive* capacity in response to the other party's initiation of a lawsuit involving the same long-ago transaction, not to an *offensive* claim such as the one that Harbourage seeks to assert here.

> A party who seeks affirmative relief, whether through an original complaint or a counterclaim, effectively asserts that he is prepared to prosecute all aspects of that matter. Having sufficient knowledge of the facts to support a complaint and sufficient evidence to prosecute that complaint, he must be prepared to defend against any affirmative defenses arising therefrom.

Allie v. Ionata, 503 So. 2d 1237, 1240 (Fla. 1987). In other words, and without agreeing with or admitting the merits of this position, the principle might be asserted between these parties if the Association attempts to enforce one of the Challenged Covenants against Harbourage in an independent action and Harbourage thereafter asserts, in a defensive posture, that such document was adopted in a defective manner and should not be enforced.

In contrast, the instant proceeding is an appeal involving Count I of Harbourage's Second Amended Complaint, in which Harbourage

affirmatively sued the Association and the Association thereafter appropriately invoked the statute of limitations as a defense. The principle discussed in *Allie* and cited by Harbourage has no place in this appeal. "The court below recognized this principle when it held that 'a party otherwise barred from instituting an action because of a time limitation is freed from that bar when he acts in a defensive posture.'" *Id*. Harbourage has cited no authority for the proposition that this defensive doctrine can be expanded into an avoidance of the statute of limitations in its present attack on long-ago recorded covenants.

In addition to the two procedural defects discussed above, the doctrine at issue does not apply to this dispute between the Association and Harbourage in the first place. The cases cited by Harbourage address the specific context of recoupment or analogous theories that arise from a single transaction or occurrence. Those claims comprise a long-established exception where affirmative relief is available in a defensive posture, even if an independent claim for the same relief would have been barred by the statute of limitations. *See Allie*, 503 So. 2d at 1239 (defensive recoupment claim for breach of fiduciary duty by an accountant's customer, which claim was time-barred as an independent action, was permitted in response to claim filed by accountant); *Ding v. Jones*, 667 So. 2d 894, 895 - 897 (Fla. 2d

DCA 1996) (surviving husband's claim under Wrongful Death Act, which would be barred by statute of limitations as an independent claim, was permitted as a counterclaim against a truck driver who initiated the lawsuit to claim personal injury damages against the husband arising from the same accident).

Word of Life Ministry, Inc. v. Miller, 778 So. 2d 360 (Fla. 1st DCA 2001), which is described in the Initial Brief at p. 23 – 24 as an "analogous" case to the present matter, is completely factually inapposite. That case was initiated in 1997 and involved issues pertaining to amendments of articles of incorporation in 1979, which is the similarity cited by Harbourage. However, the cause of action filed in 1997 was not for invalidation of the 1979 articles of incorporation amendment, but for conversion and equitable relief based on conduct that occurred in 1996. *Id*. at 364 – 365. This was clearly explained by this Court in its holding:

> We reverse, however, the trial court's ruling that the Church's claims were time-barred. The third amended complaint seeks relief on account of what occurred in or after March of 1996 when the putative council of elders purportedly undertook distribution of corporate assets. "A statute of limitations 'runs from the time the cause of action accrues' which, in turn, is generally determined by the date 'when the last element constituting the cause of action occurs.' When suit was filed (no more than nineteen months after the corporate assets were allegedly converted), the statute of limitations had not run.

(internal citations omitted). *Id*. at 366.

Because the principles cited in Section II of the Initial Brief are raised for the first time on appeal and are otherwise inapplicable to the instant affirmative claim filed by Harbourage, the judgment of the trial court should be affirmed.

III. THE CHALLENGED COVENANTS DO NOT CONFLICT WITH STATE LAW AND HARBOURAGE'S CHALLENGE IS BARRED BY THE STATUTE OF LIMITATIONS

A. Standard of Review.

The standard of review is *de novo*. *See* Section I.A., *supra* at p. 15.

B. The Challenged Covenants do not violate state law and Harbourage's assumptions do not avoid the statute of limitations.

As has already been discussed, Harbourage's contention that the Challenged Covenants violate state law assumes success on the merits of its allegations that the trial court did not reach and did not need to reach, because Count I is clearly barred by the statute of limitations. Harbourage's path to success in Count I is to wait over a decade to assert its claim,[8] cite an absence of remaining evidence regarding the details of approval as

[8] The Association has not lost sight of the fact that Harbourage acquired its interest in Dolphin Bay in late 2021. However, at the time of purchase it was well-aware of the Contested Covenants and it affirmatively elected to pursue a cynical development strategy of purchasing the Marina with the intent to litigate decades old documents in an attempt to increase the development capacity of its new property. (R. 86).

evidence of illegality, and then based on that supposed illegality obtain a judgment that the Challenged Covenants are void. This can only be characterized as "unfair" and supports the proper application of the statute of limitations by the trial court based upon this Court's established precedent:

> In such cases how resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances, the quest for truth might elude even the wisest court. The statutes are predicated on the reasonable and fair presumption that valid claims which are not usually left to gather dust or remain dormant for long periods of time.

Nardone v. Reynolds, 333 So. 2d 25, 36 (Fla. 1976)(internal citations omitted). Sections B through E of argument Section III of the Initial Brief are all variations of this same approach and will be discussed together here.

An overarching reason why Harbourage's "illegality" arguments must all fail is that they are already rejected by *Silver Shells* and *Hilton*, discussed *supra* at pp. 16-21, where the facts would have supported similar allegations of illegality. The argument has been rejected elsewhere in the specific context of a plaintiff's arguments that recorded agreements are void *ab initio* due to a violation of a Florida community association statute. In *Prof'l Plaza Condo. Ass'n v. Landmark Infrastructure Holding Co., LLC*, 2021 U.S. Dist. LEXIS 259114 (S.D. Fla. 2021), a plaintiff argued that a telecommunications

easement was void *ab initio* as a violation of § 718.107, Fla. Stat. *Id*. at 6. The Southern District, citing *Harris*, *Silver Shells*, and *Hilton*, stated that "the Court sees no reason to believe . . . that the Florida Supreme Court would decide this matter differently than Florida courts of appeal already have in the aforementioned cases. *Id*. at 10. The court recognized:

> However, as Defendants also point out, Florida courts of appeal have repeatedly held that where a party challenges the validity of an agreement encumbering land ab initio, even where the party seeks declaratory relief, under Fla. Stat. §§ 95.11(2)(b) and 95.031(1), a five-year statute of limitation runs from the recording of said agreement. . . Accordingly, because this case was filed more than five years after the agreements at issue were recorded, the Court finds that any arguments that these agreements are void ab initio are foreclosed by Florida law.

Id. *See also Hunters Run Prop. Owners Ass'n v. Centerline Real Estate, LLC*, 2019 U.S. Dist. LEXIS 169213, *44-45 (S.D. Fla. 2019) (applying *Harris*, *Silver Shells*, and *Hilton* in a similar context of an alleged illegal restraint on alienation and a plaintiff that challenged the validity and enforceability of covenants, as opposed to seeking an interpretation*)*.

Similarly, in *Grove Isle Ass'n v. Grove Isle Assocs., LLLP*, 137 So. 3d 1081 (Fla. 3d DCA 2014), the plaintiff condominium association sought a declaratory judgment that several sections of its Declaration of Condominium are void and unenforceable pursuant to the Condominium Act, Ch. 718, Florida Statutes. When the statute of limitations was raised as a defense,

the Third District did not reject this argument as being inappropriate due to the alleged statutory violations, but instead recognized the proper application of § 95.11(2)(b), Fla. Stat.'s five-year limitations period for this claim involving "a legal or equitable action on a contract, obligation, or liability founded on a written instrument" and then proceeded to evaluate the merits of the defense accordingly. *Id* at 1093.

For the proposition that the Contested Covenants violate state law, Harbourage first cites to § 617.306(1)(c), Fla. Stat. (1998):

> Unless otherwise provided in the governing documents as originally recorded, an amendment may not affect vested rights unless the record owner of the affected parcel and all record owners of liens on the affected parcels join in the execution of the amendment.").

However, this statute could be applied to call *any* procedurally defective homeowners' association amendment "illegal," including the amendments at issue in several of the aforementioned opinions. That made no difference to the proper application of the statute of limitations, as determined by both this Court and the Third District.

This argument that the Contested Covenants violate § 617.306(1)(c) already been addressed in more detail *supra* at p. 28, and fails as to both the 2004 Amendment and 2009 Amendment because the face of the undisputed documents in the record show that the amendments were

approved as provided in the original Declaration. It is inapplicable to the Marina Agreement as well, which is not an amendment to an existing community governing document but is instead a separate agreement between the Marina owner (Harbourage's predecessor), the Marina Association, and the Association.

Harbourage next argues that the 2009 Amendment is void for allegedly violating § 617.306(7), Fla. Stat. (1998), which it characterizes as requiring all community members to be eligible for membership on the Association's Board of Directors notwithstanding any dictate to the contrary in the community governing documents. Setting aside the general inapplicability of this "illegality" argument, the full subsection of this statue is not quoted in the Initial Brief. The full § 617.306(7) contains two references indicating an intent to defer to the community documents (emphasis added):

> (7) ELECTIONS. *Elections of directors must be conducted in accordance with the procedures set forth in the governing documents of the association*. All members of the association shall be eligible to serve on the board of directors, and a member may nominate himself or herself as a candidate for the board at a meeting where the election is to be held. *Except as otherwise provided in the governing documents*, boards of directors must be elected by a plurality of the votes cast by eligible voters.

This argument also overlooks the ambiguity in the governing documents as originally enacted as to whether Marina boat slip owners were ever considered "Members" for purposes of eligibility for service on the Board of

Directors,[9] and the substantial possibility that the Southern Delta Trust, Harbourage's predecessor and holder of Declarant rights to the Marina in 2009, consented to this amendment.

Subsection II.E of the Initial Brief is another instance of Harbourage assuming the merits of its case – its allegation that a vote was not taken – to argue that the 2011 Marina Agreement is illegal and unenforceable. There is no admission or agreement that a member vote was not obtained, and the trial court acted properly in ruling on the dispositive statute of limitations issue and not reaching the merits of Harbourage's argument. Harbourage cannot disregard the statute of limitations, assume the correctness of its purely procedural challenge to the document, and then bootstrap that into an argument that the document is illegal.

Furthermore, Harbourage and the Association agree that the Dolphin Bay Declaration does not incorporate substantive statutory revisions over time, and that therefore the binding substantive law to apply to this dispute

[9] The original Articles of Incorporation of the Association provide that "The Members of the Association shall consist of all Owners (as defined in the Declaration) . . ." (R. 1805). The original Declaration defines "Owners" as those persons who own a "Unit," and "Unit" as "[a] portion of the Properties, whether improved or unimproved . . . which is tended for development, use, and occupancy *as a detached residence for a single family*." (R. 1810 – 1811) (emphasis added).

is Chapter 617, Fla. Stat. (1998). I.B. at 25, FN 8. Nevertheless, Harbourage now argues that § 720.31(6), Fla. Stat., first enacted in the 2010 Florida Statutes, requires approval of the 2011 Marina Amendment by 75% of the Association's total voting interests. The statutory subsection does state that it is "intended to clarify law in existence before July 1, 2010." However, subsection (6) deals with far more than just the new requirement for a 75% vote, and there is nothing to "clarify" where prior versions of the statue (including § 617.31, Fla. Stat. (1998)) had no member vote requirement whatsoever.

Clearly the clarification lies elsewhere, and in fact a review of the legislative history indicates that subsection (6) was enacted in 2010 to clarify that homeowners' associations *are permitted* to acquire leaseholds, memberships, or other possessory or use interests. *See* Military Affairs and Domestic Security Comm., *Bill Analysis and Fiscal Impact Statement S 1196*, March 15, 2010, https://www.flsenate.gov/Session/Bill/2010/1196/Analyses/20101196SMS_2010s1196.ms.pdf; Regulated Industries Comm., *Bill Analysis and Fiscal Impact Statement S 1196*, February 26, 2010, https://www.flsenate.gov/Session/Bill/2010/1196/Analyses/20101196PCSSRI_2010s1196-pcs.ri.pdf. In other words, the clarification of existing law is

that communities such as the Association (operating under the 1998 statute) were already authorized to enter agreements such as the 2011 Marina Agreement. The 2010 law then proceeded to adopt entirely new safeguards against abuse of that authority, such as the 75% vote requirement now cited by Harbourage. However, voting thresholds first enacted in 2010 do not apply when the 1998 statute generally applies to this Declaration, as both parties agree it does. Nor could the new 75% vote requirement apply, pursuant to the binding precedent of the Florida Supreme Court. *See Cohn v. Grand Condo. Ass'n*, 26 So. 3d 8 (Fla. 2009) (following the balancing test of *Pomponio v. Claridge of Pompano Condo., Inc.*, 278 So. 3d 744 (Fla. 1979), to hold that a statutory amendment impairing a condominium association's voting arrangements established under its declaration of condominium is an unconstitutional impairment of contracts in violation of Art. I, § 10, Fla. Const.).

In summary, the Challenged Covenants are not illegal and, even if they were, Count I is time-barred regardless due to the nature of the allegations and the supremacy of the principle of finality for recorded covenants, as embodied by *Hilton*, *Silver Shells*, and *Harris*. The Partial Final Judgment should be affirmed.

IV. HARBOURAGE'S ALLEGATIONS REGARDING THE MANNER OF APPROVAL DO NOT RENDER THE CHALLENGED COVENANTS VOID, NOR DO THEY AVOID THE STATUTE OF LIMITATIONS

A. Standard of Review.

The applicable standard is for review of legal issues concerning a statute of limitations defense, and is *de novo*. *See* Section I.A., *supra* at p. 15. This subsection of the Initial Brief does not deal with "interpretation of restrictive covenants" because no such cause of action has been pled by Harbourage nor is such a cause of action at issue in this appeal. *See* Section V, below.

B. The statute of limitations applies regardless of Harbourage's disputed allegation that the Challenged Covenants were approved only by the Association's Board of Directors.

Section IV of the Initial Brief repeats the same assumption regarding inadequate approval of the Challenged Covenants that has been addressed in Sections I and III of this Answer Brief, and those arguments will not be repeated here. In short, Harbourage assumes that the Challenged Covenants were each approved solely by the Association's Board of Directors and therefore, it argues, they should be considered *ultra vires* acts.

Hilton v. Pearson, 208 So. 3d 108, 110 (Fla. 1st DCA 2016), *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n*, 169 So. 3d 197, 201 (Fla. 1st DCA 2015), and *Harris v. Aberdeen Prop. Owners Ass'n*, 135

So. 3d 365, 368 (Fla. 4th DCA 2014) remain controlling on the dispositive issue of the statute of limitations. Harbourage alleges that the adoption of the Contested Covenants was "*ultra vires*, void and unenforceable," but even assuming the truth of that allegation, the same could be said of the amendments at issue in both *Hilton* and *Silver Shells*, which were both allegedly *ultra vires* due to the absence of proper internal corporate approvals. This Court applied § 95.11(2)(b), Fla. Stat. regardless.

In contrast, the authorities cited by Harbourage in Section IV are easily distinguished. *Buddin v. Golden Bay Manor, Inc.*, 585 So. 2d 435 (Fla. 4th DCA 1991) did not deal with the statute of limitations. *Beau Monde, Inc. v. Bramson*, 446 So. 2d 164, 167 (Fla. 2nd DCA 1984) dealt with *ultra vires* amendments that were *timely* challenged. *Word of Life Ministry, Inc. v. Miller*, 778 So. 2d 360 (Fla. 1st DCA 2001), discussed *supra* at p. 34, was a lawsuit filed in 1997 to challenge allegedly *ultra vires* acts which occurred in 1996.

Even assuming the merit of Harbourage's allegation of *ultra vires* acts, Count I of the Second Amended Complaint is clearly barred by the application of the statute of limitations, as provided in *Hilton* and *Silver Shells*. The Partial Final Judgment should be affirmed.

V. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT WHERE HARBOURAGE DID NOT PROPERLY RAISE

THE ISSUE OF CONFLICTING CONTRACTUAL PROVISIONS IN ITS PLEADINGS

A. Standard of Review.

The First District Court of Appeal applies *de novo* review to legal issues concerning a statute of limitations defense. *Riverside Ave. Prop., LLC v. 1661 Riverside Condo. Ass'n*, 325 So. 3d 997, 999 (Fla. 1st DCA 2021). The interpretation of written pleadings is also reviewed *de novo*. *Banuchi v. Dep't of Corr.*, 122 So. 3d 999, 1001 (Fla. 1st DCA 2013).

B. The trial court did not inject a new legal argument in its Order; it merely recognized the true nature of Harbourage's declaratory judgment claim.

It is clear that Count I of Harbourage's Second Amended Complaint did not even attempt to state a cause of action for *interpretation* or *reconciliation* of allegedly conflicting documents. (R. 1269 – 1276). It is a cause of action to have the Contested Covenants declared invalid and void *ab initio*. Now, in an effort to avoid the statute of limitations and without seeking to amend its pleading or seek different relief, Harbourage attempts to reframe its claim as one for *interpretation* of provisions in the various Dolphin Bay governing documents. Harbourage seeks to shift its burden of pleading into an argument that the Association should have challenged the sufficiency of a claim that was never pled. Likewise, Harbourage seeks to turn the trial court's recognition of the fact that Harbourage's cause of action

challenges *validity* and *enactment* of the Contested Covenants, and does not seek a declaration regarding *interpretation*, into an allegation that the trial court *sua sponte* determined Harbourage's pleading insufficient.

It is hornbook law, recently reaffirmed by this Court, that "[o]nly matters put in issue by the pleadings may be considered in a civil action." *Killick v. Benedict*, 378 So. 3d 715, 716 (Fla. 1st DCA 2024), *citing Des Rocher & Watkins Towing Co. v. Third Nat. Bank*, 106 Fla. 466, 143 So. 768, 770 (Fla. 1932). Paragraph 40 of the Second Amended Complaint states:

> 40. The 2004 and 2009 amendments are void because no owner vote was obtained. The purported amendments conflict with express rights granted to Harbourage's predecessor-in-interest and exceed the authority of the Association under Chapter 720, Florida Statutes. The amendments are unreasonable and unenforceable.

(R. 1275). Paragraph 41 states:

> 41. The 2011 Agreement is likewise unenforceable because the requisite votes were not obtained to amend the Declaration and HYC Declaration. The purported Agreement conflicts with express rights with the Declaration and exceeds the authority of the Association under Chapter 720, including specifically section 720.31(6), Florida Statutes. The Agreement is an unreasonable restriction on the operations of the Private Amenity marina, and although the Agreement purports to run with the land, it does not meet the legal requirements to run with the land nor be binding on Plaintiff as Marina owner. The Agreement was not signed by slip owners or other required parties, further rendering it unenforceable against Harbourage.

Id. Plaintiff's prayer for relief states:

> WHEREFORE, Plaintiff respectfully requests a declaratory judgment from the Court that the 2004 and 2009 Amendments and the 2011 Agreement are void and/or unenforceable and an order striking them from the official records of Bay County, Florida. Plaintiff further requests temporary and permanent injunctive relief enjoining Defendant from enforcing the 2004 and 2009 Amendments and 2011 Agreement against Plaintiff and making false complaints to administrative and governmental agencies regarding the Marina under the guise of enforcing these documents or other recorded restrictions.

(R. 1276).

Harbourage never requested that the trial court construe these documents as valid instruments; rather, it sought to challenge their validity. As the trial court correctly noted in paragraph 37 of the Partial Final Judgment, Harbourage never contended in any filing with the trial court that it was seeking an "interpretation" until it filed its response to the Association's motion seeking summary judgment on its statute of limitations defense. (R. 2050 – 2057). At that time, Harbourage for the first time began to argue that it was actually seeking an interpretation as an attempt to distinguish its time-barred claim from the controlling authorities which had been cited by the Association in its motion for summary judgment. However, Harbourage never moved for leave to amend the Second Amended Complaint and the trial court correctly determined that raising such a claim at this stage is untimely, stating:

> Generally, a party should not be allowed to modify or amend their pleadings through issues raised in opposition to a motion for summary judgment. *See, e.g., Congress Park Office Condos II, LLC v. First-Citizens Bank & Trust Co*., 105 So. 3d 602, 607 (Fla. 4th DCA 2023).

This is not a *sua sponte* legal argument raised by the trial court, as alleged in Section V.B. of the Initial Brief. It is the trial court's determination that Harbourage's attempt to frame the same claim in a new light in order to evade the statute of limitations is unavailing on the facts and procedural posture of this case.

The Third District Court of appeals was recently presented with a similar situation in which a plaintiff pled one declaratory judgment cause of action but then, in its motion for summary judgment, sought a different declaration. *Fla. Ins. Guar. Ass'n v. Feijoo*, 2024 Fla. App. LEXIS 2729, *2 (Fla. 3d DCA 2024). The Third District recognized that it is "well-established . . . that a party is not entitled to summary judgment on a cause of action that was never pled." It then held:

> Review of the record shows Feijoo's motion sought summary judgment on a declaratory claim it did not plead . . . in its motion for summary judgment, Feijoo for the first time asserted it was entitled to summary judgment on a declaratory judgment claim for a declaration that the subject policy was in full force and effect, not void ab initio, and there was no material misrepresentation in the application for insurance. While both were claims for declaratory judgment, the actual declaration sought in the motion for summary judgment was substantially different than the one in the complaint. Accordingly, we find the

> trial court erred in granting Feijoo's motion as Feijoo was not entitled to summary judgment on a declaratory relief claim it never pled.

Id. at 3 – 4.

Notably, Harbourage's claim that it should be allowed to convert its declaratory claim regarding invalidity into a claim for "interpretation" of valid documents is even weaker than Feijoo's unavailing attempt, because at least Feijoo attempted to raise its new issues in its own motion for summary judgment, whereas Harbourage first claimed to be seeking an interpretation in an opposition memorandum to the Association's cross-motion on its statute of limitations defense. This Court should follow the Third District's lead, and many other authorities asserting similar principles, and reject Harbourage's attempt to seek unpled relief. *See also Wilson v. Jacks*, 310 So. 3d 545, 547 (Fla. 1st DCA 2021) ("T]here is a substantial body of case law applying this principle in the context of summary judgment hearings and determining that issues and claims not specifically pleaded in a party's complaint or answer cannot be considered by a trial court reviewing a summary judgment motion"); *Fernandez v. Fla. Nat'l College, Inc*., 925 So. 2d 1096, 1101 (Fla. 3d DCA 2006) ("[I]ssues that are not pled in a complaint cannot be considered by the trial court at a summary judgment hearing"); *Kuehne & Nagel v. Lewis Marine Supply*, 365 So. 2d 204, 205 (Fla. 3d DCA

1978) ("It is axiomatic that a party is never entitled to summary judgment based on a cause of action not pled in the complaint"); *Meigs v. Lear*, 191 So. 2d 286, 289 (Fla. 1st DCA 1966) (summary judgment proceedings are not "designed to be used as a substitute for the parties' pleadings).

The text of Harbourage's Motion for Summary Judgment as to Count I further crystalizes the fact that it was not seeking a declaration to interpret or reconcile allegedly conflicting contractual provisions. It is also hornbook law, both in traditional Florida jurisprudence interpreting the prior Fla. R. Civ. P. 1.510(c) and in Federal jurisprudence interpreting Fed. R. Civ. P. 56, now applicable in Florida, that a party seeking summary judgment must state with particularity the grounds for seeking relief and must identify each claim on which summary judgment is sought. *See Mosley v. Ala. Unified Judicial Sys*., 562 Fed. Appx. 862, 864 (11th Cir. 2014); *Ambrogio v. McGuire*, 247 So. 3d 73, 75 (Fla. 2d DCA 2018) ("It is reversible error to enter summary judgment on a ground not raised with particularity in the motion for summary judgment").

In the concluding section of its Motion for Summary Judgment, entitled "APPLICATION OF LAW" with the subheading "The 2004 Amendment, 2009 Amendment and 2011 Amendment are void and unenforceable,"

Harbourage summarized its arguments and requests for relief in its motion as follows. With regard to the 2004 Amendment:

> 60. Simply put, the Association was without legal authority to adopt the 2004 Amendment; violated applicable procedural requirements in the process; violated express provisions of law and the Declaration; and has engaged in selective enforcement. The 2004 Amendment is void and unenforceable and the Association must be enjoined from enforcing this purported restriction on slip ownership.

(R. 1796). With regard to the 2009 Amendment:

> 63. The plain language of section 617.306(7) trumps any attempts to restrict eligibility of members to serve on the Board of Directors. Furthermore, there is no record evidence of a member vote, and certainly not the consent of all affected parcel owners as required by statute. The 2009 Amendment is void and unenforceable, and the Association must be enjoined from enforcing this purported restriction on board eligibility.

(R. 1797). With regard to the 2011 Marina Amendment:

> The 2011 Restrictive Covenants are void and unenforceable, and the Association must be enjoined from enforcing these purported restrictions.

(R. 1800).

Harbourage's attempts to claim that *Harris v. Aberdeen Prop. Owners Ass'n*, 135 So. 3d 365, 368 (Fla. 4th DCA 2014) supports its position are unavailing. *Harris* is explicit that the five-year statute of limitations, measured from the date of recording, controls as to attempts to directly challenge the validity of the Covenants. That is what Harbourage sought to do in the instant

case. The plaintiff in *Harris* was allowed to measure the statute of limitations from her date of purchase for an interpretation of two separate sets of valid restrictive covenants which, *she argued in a proper pleading*, conflicted and gave rise to a request for declaratory relief to resolve the inconsistency. That does not apply to the current situation, where Harbourage did not plead a cause of action for an interpretive declaration regarding valid but allegedly conflicting Dolphin Bay governing documents. Rather, Harbourage cited an alleged conflict in the documents and sought a declaration of invalidity, which is exactly what the *Harris* court rejected ("any challenge to the validity/enactment of the amendment itself is barred by the applicable statute of limitations"). *Id*. at 368.

Riverside Ave. Prop., LLC v. 1661 Riverside Condo. Ass'n, 325 So. 3d 997, 1000 (Fla. 1st DCA 2021) likewise does not involve the alleged invalidity of a recorded restrictive covenant and provides no support for a finding that Harbourage's cause of action accrued on a date within the statute of limitations. To the contrary, *Riverside* cites *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n*, 169 So. 3d 197, 201 (Fla. 1st DCA 2015), discussed *supra* at p. 19, with approval.

The trial court correctly held that Harbourage could not avoid the statute of limitations simply by reframing its claim as one for interpretation,

for the first time, in its response to the Association's cross-motion for summary judgment. The Partial Final Judgment should therefore be affirmed.

VI. THE STATUTE OF LIMITATIONS APPLIES REGARDLESS OF ANY ALLEGED CONFLICT IN THE GOVERNING DOCUMENTS

A. Standard of Review.

The applicable standard is for review of legal issues concerning a statute of limitations defense, and is *de novo*. *See* Section I.A., *supra* at p. 15. This subsection of the Initial Brief does not deal with "interpretation of restrictive covenants" because no such cause of action has been pled by Harbourage nor is such a cause of action at issue in this appeal. *See* Section V, above.

B. Article 2.2 of the Declaration, in addition to not "superseding" the Challenged Covenants, is irrelevant to the statute of limitations analysis.

The argument in Section VI of the Initial Brief is misplaced and does not compel reversal for multiple reasons, most of which have previously been discussed. First, as discussed in Section V of this Answer Brief, Harbourage never pled nor sought a declaration interpreting the Challenged Covenants in relation to Article 2.2 of the Declaration. This fact is clear when reviewing both its Second Amended Complaint and its Motion for Summary Judgment. There is no request for interpretation, nor, for

example, is there any discussion of contract interpretation principles such as how the trial court should first engage in an analysis to reconcile, if possible, the allegedly conflicting contract clauses. *See, e.g. Nabbie v. Orlando Outlet Owner*, LLC, 237 So. 3d 463, 466 (Fla. 5th DCA 2018); *Harris v. Sch. Bd*., 921 So. 2d 725, 733 (Fla. 1st DCA 2006). A claim seeking a declaratory judgment to interpret allegedly conflicting contractual clauses cannot be raised for the first time in this appeal. *See, e.g. Dober v. Worrell*, 401 So. 2d 1322, 1324 (Fla. 1981) ("[I]t is inappropriate for a party to raise an issue for the first time on appeal from summary judgment").

Rather, Harbourage simply seeks to have the Challenged Covenants declared void *ab initio* for multiple reasons, among them this alleged internal conflict amongst the Dolphin Bay governing documents. When presented with the controlling case law showing that the statute of limitations for its claim began to run on the date of recording of the Challenged Covenants, Harbourage now simply argues that because it has alleged a conflict, that means it is requesting an interpretation. This contention, as the trial court correctly found, was never made in the pleadings and never properly put at issue. Even in Harbourage's Motion for Rehearing, where it argued that the trial court "inadvertently overlooked portions of Harbourage's pleading raising the issue of conflicting contractual provisions," it is clear that

Harbourage still sought only to challenge the *enactment* and *validity* of the Conflicting Covenants, not to pursue any cause of action for interpretation or reconciliation of enacted documents. (R. 2063 – 2065).

Furthermore, Harbourage's argument still hinges on its unfounded assumption that the Contested Covenants were only executed by the Association's Board of Directors. In the case of the 2011 Marina Amendment, this claim refuses to acknowledge that the document is *signed by then-owner of the Marina, then-owner of a majority of the individual boat slips, and Harbourage's predecessor in interest, Southern Delta Trust,* which conclusively renders moot the argument that Article 2.2 of the Declaration "conflicts" with the 2011 Marina Agreement. To the extent that Article 2.2 of the Declaration initially reserved complete autonomy to the Marina owner, Southern Delta Trust was free to agree otherwise when, years later, it executed 2011 Marina Agreement.

The fact that Harbourage may not like the boundaries agreed to by its predecessor in title in an instrument recorded over ten years before Harbourage's acquisition of the Marina does not render the document invalid. This is a situation squarely addressed in *Harris v. Aberdeen Prop. Owners Ass'n*, 135 So. 3d 365 (Fla. 4th DCA 2014), which applied the applicable five-year statute of limitations to a challenge to the validity of

covenants due to an alleged conflict between two documents, notwithstanding any potential availability of a cause of action to seek an interpretation. Harbourage's repeated failure to seek an interpretation does not render the trial court's ruling erroneous, and the Partial Final Judgment should be affirmed.

CONCLUSION

The trial court correctly held that Harbourage's claim to have the Contested Covenants declared void *ab initio*, which is a challenge to their enactment and validity, is barred by the applicable statute of limitations. In so holding, the trial court properly relied upon this Court's controlling precedent in *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n*, 169 So. 3d 197 (Fla. 1st DCA 2015) and *Hilton v. Pearson*, 208 So. 3d 108 (Fla. 1st DCA 2016). Harbourage has shown no compelling reason for this Court to depart from its prior precedents, and Harbourage cannot bypass the statute of limitations simply by alleging illegality or conflict, which would defeat the sound public policy that underlies the statutes of limitations.

Furthermore, Harbourage has never sought, except perhaps for the first time in this appeal, an interpretation of allegedly conflicting contractual provisions. That cause of action has never been pled and the trial court was correct to rule that Harbourage could not avoid the application of the statute of limitations simply by rephrasing its argument in its response to a motion for summary judgment, while at the same time continuing to challenge only the enactment and validity of the Challenged Covenants. As such, issuance of the Final Summary Judgment was proper, and the decision of the trial court should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to Fla. R. Civ. R. Rule 2.516(b)(1)(A) the foregoing Answer Brief of Appellee was filed with the Florida Courts e-filing Portal on this 1st day of July 2024, and served to:

Julia Maddalena, Esq.
16901 Panama City Beach Pkwy, Suite 200
Panama City Beach, FL 32413
Email: jmaddalena@handfirm.com
jsidway@handfirm.com
viseminger@handfirm.com
Attorney for Appellant

/s/ Robert L. Kauffman
MICHAEL P. DICKEY, ESQ.
Florida Bar Number 115606
ROBERT L. KAUFFMAN, ESQ.
Florida Bar Number 069296
DUNLAP & SHIPMAN, P.A.
2063 County Hwy 395
Santa Rosa Beach, FL 32459
850-231-3315 Telephone
850-231-5816 Facsimile
robert@dunlapshipman.com
mdickey@dunlapshipman.com
stephanie@dunlapshipman.com
Counsel for the Appellee

CERTIFICATE OF FONT SIZE AND WORD COUNT COMPLIANCE

I HEREBY CERTIFY that the foregoing was prepared using Arial 14-point font in compliance with Fla. R. App. P. 9.045(b) and contains a total of 12,935 words, excluding cover page, table of contents, table of citations, certificate of compliance, certificate of service and signature block, and inclusive of heading and footnotes, in accordance with Fla. R. App. P. 9.210(a)(2).

/s/ Robert L. Kauffman
Attorney