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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-801

Filed: 31 December 2020

Swain County, No. 15-CVS-36

THOMAS M. ANDERSON, PERRY POLSINELLI, DORI DANIELSON, WILLIAM HANNAH, DEBORAH HANNAH, RICHARD F. HUNTER, ANDREW JUBY, THOMAS T. SCHREIBER, FRED R. YATES and wife, KARON K. YATES, Individually and on behalf of MYSTIC LANDS PROPERTY OWNERS ASSOCIATION, a North Carolina Non-profit Corporation, Plaintiffs,

v.

MYSTIC LANDS, INC., a Florida Corporation, and AMI SHINITZKY, Defendants.

Appeal by Defendants from orders entered 22 February 2018 and 10 July 2018 by Judge Mark E. Powell in Superior Court, Swain County. Appeal by Plaintiffs from the order entered 12 August 2019 by Judge Marvin P. Pope, Swain County. Heard in the Court of Appeals 3 March 2020.

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*Cannon Law, P.C., by William E. Cannon, Jr., Mark A. Wilson, Tiffany F. Yates, for Plaintiffs-Cross Appellants.*

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McGEE, Chief Judge.

Mystic Lands, Inc. and Ami Shinitzky (collectively “Defendants”)<sup>1</sup> appeal from the trial court’s order of 22 February 2018 by Judge Mark E. Powell determining that: Plaintiff Thomas T. Schreiber (“Schreiber”) entered into a contract with Defendant Mystic Lands, Inc. for the paving in Mystic Ridge and that Mystic Lands, Inc. breached that contract; determining that Plaintiffs did not defame or make unfair or deceptive statements about Defendants; and reserving a determination of the issue of specific performance (“Powell Judgment”). Defendants also appeal the trial court’s order of 10 July 2018 denying Defendants’ Motions for Directed Verdict and Judgment Notwithstanding the Verdict (“JNOV”) or alternatively, a New Trial, and Motion to Stay, and granting Mystic Lands Property Owners Association (“POA”) and individual members of the POA’s (collectively “Plaintiffs” or “Property Owners”)<sup>2</sup> Motion for Decree of Specific Performance (“Powell Motions Judgment” and “Powell Specific Performance Order”).

Plaintiffs appeal from an order signed 10 August 2016 and entered 12 August 2019 by Judge Marvin P. Pope granting Defendants’ Motion for Partial Summary Judgment as to Plaintiffs’ claim that the period of declarant control had expired and claim for injunctive relief (“Pope Judgment”).

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<sup>1</sup> Defendants-Appellants are also Counterclaim Plaintiffs and Cross-Appellees.

<sup>2</sup> Plaintiffs-Appellees are also Counterclaim Defendants and Cross-Appellants.

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For the reasons discussed below, we affirm the trial courts' orders, with the exception of the order granting Defendants' Motion for Partial Summary Judgment on Plaintiffs' claim that declarant control had expired and claim for injunctive relief, on which we reverse.

I. Factual and Procedural Background

A. *Factual Background*

Plaintiffs are property owners in what were originally three separate planned communities—Mystic River, Mystic Forest, and Mystic Ridge—which collectively comprise a community of approximately 239 acres and are referred to as Mystic Lands. The Mystic Lands communities are in Swain and Macon Counties, North Carolina. Defendants are Mystic Lands, Inc., the developer and declarant of Mystic Lands (“Mystic Lands, Inc.,” “ML,” “Developer,” or “Declarant”), and Ami Shinitzky (“Shinitzky”), the sole shareholder and President of Mystic Lands, Inc. In his position, Shinitzky was actively engaged in the management of Mystic's development business and was an appointed member of and President of the property owners association for Mystic Lands. Entwined with his company's dealings, Shinitzky was also referred to in communications as “Declarant” and as the “developer.”

1. *Paving Contract, Specific Performance Claims*

Since 2005 Defendants Shinitzky and Mystic Lands, Inc. and its predecessor companies have developed and sold lots in Mystic River, Mystic Forest, and Mystic

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Ridge in phases, by selling one or more lots, but fewer than the total lots, in each neighborhood. In October 2006, Schreiber and his wife entered into a contract with a Mystic Lands, Inc. predecessor company for the purchase of Lot 28 in Mystic Ridge. The Property Information Sheet for his lot stated: “Streets: The streets throughout Mystic Ridge are private and shall be maintained by the Mystic Ridge Property Owner’s Association. The initial capital expense for the streets, including the asphalt, shall be bourne [sic] by the Developer.” Shinitzky acknowledged that the statement represented Developer’s intention to pave the streets with asphalt. Shinitzky also testified that representations regarding paving made in other communications meant “asphalt paved roads.” Schreiber’s deed described his lot by reference to a plat that contained the statement: “ALL INTERIOR ROADS ARE 14’ GRAVEL.”

Developer paved certain roads with asphalt in phases over time, including the road leading to his own house. The same basic construction was used on all asphalt paved roads. Certain roadways were left unpaved, but Shinitzky continued representing to Property Owners and prospective buyers that the roads would be paved. To reassure owners that he would complete such amenities, he recorded a loan security document, for which there was no promissory note provided, nor was a loan received. He testified the deed of trust was recorded to provide “assurance” to the members that his commitments would be honored.

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Schreiber testified that he had confidence that paving would eventually occur, since most of the roads were paved. Plaintiffs believed Defendants would finish all paving once the real estate market improved.

Shinitzky indicated for the first time in a 2013 Property Disclosure Statement that the roads in Mystic Ridge would be gravel and maintained by the property owners association, a decision he made unilaterally in 2012. He testified that he favored delaying road paving, because paved roads would break in areas with few homes and little traffic. A disclaimer in the document, which was applicable to all representations in the document including the statement about gravel roads, stated: “The following information has been obtained from sources deemed reliable and is believed to be correct. No guarantee to the accuracy thereof is made and information is subject to change without notice.”

Schreiber entered into a contract with Mystic Lands, Inc. in 2013 for the purchase of Lot 38, also in Mystic Ridge. The Property Disclosure Statement is referenced in Paragraph 5 of the 2013 Contract of Purchase and Sale. The final paragraph of the contract refers to other agreements. Incorporated into the purchase contract was an Addendum A which provided: “The roads in Mystic Ridge will be private gravel roads maintained by the Property Owner’s Association.”

*2. Defamation, UDTPA*

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In 2012, Shinitzky hired Greg Diehl (“Diehl”) as the Executive Director of the POA. Diehl’s responsibilities included handling the POA’s daily affairs and financial transactions. In August 2014, Diehl and members of the Board, including Shinitzky, had a disagreement about renewing Diehl’s employment agreement with the POA. Upon Shinitzky’s refusal to renew Diehl’s contract, Diehl disclosed his personal knowledge of Shinitzky’s alleged misuse of POA funds. Following Diehl’s revelations, Plaintiffs believed Shinitzky had misappropriated POA funds and resources and breached contractual obligations to provide neighborhood infrastructure and complete amenities.

Defendants contend that from that point forward, numerous oral and written communications were published by Plaintiffs to third parties. The communications represented that Defendants had misappropriated Mystic Lands POA funds, and that Shinitzky was using drugs and was otherwise abusing power in some unlawful manner.

In September 2014, POA Board member Fred R. Yates (“Yates”) reviewed the POA financial records. Yates found no evidence of cash transactions to substantiate the loans Shinitzky claimed Developer made to the POA in excess of \$250,000, manual journal entries lacking supporting invoices, and unsupported charges to the POA for horse care, and labor and equipment for caring for Shinitzky’s personally owned rental property. Yates subsequently learned from Diehl that no POA tax

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returns existed with which to cross check the alleged debt, because the POA had not filed tax returns for many years. Further, Shinitzky had ordered the POA staff not to invoice him.

Growing concerns led to discussions among Property Owners, who communicated both verbally and in writing. To investigate the bookkeeping irregularities, Property Owners, in their role as Board members, requested disclosure of financial records from Shinitzky. Shinitzky accused Plaintiffs of slander.

The POA Board voted in September 2014 to conduct an independent review of the POA's financial records. The Board hired in December 2014 a certified public accountant to review its books and track money coming into and going out of the POA accounts. ("Gomes Review") The Gomes Review found multiple accounting irregularities that benefitted Developer from direct manipulation and commingling of POA funds. Additionally, Shinitzky personally modified the POA's financial books, refused to turn over POA financial records to Board members before he reviewed them, changed locks on the POA office without advance notice preventing POA Board members from accessing the office, and directed POA staff to submit invoices directly to him without entering them into the POA accounting system.

Plaintiffs assessed the scope of the Gomes Review as "too limited and one-sided to effectively investigate misappropriation by Developer." Plaintiffs believed a thorough review also required review of Developer's corporate books, to which

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Shinitzky denied access. The Gomes Review was further limited by a “materiality” level of \$40,000, for which errors less than that amount were not included. Even so, the Review found “lots of \$2,000 . . . mistakes in the books,” unclear corrections, lack of documentation, and documentation created by Developer, particularly during the years in question of 2006-2009. As a result, meaningful review was limited to the years 2010-2014. Gomes conceded that Shinitzky’s control over both sides of the finances presented “an inherent conflict of interest.”

Through promotional materials and statements by Shinitzky, Developer indicated that roadways within the development would be paved. Subsequent to revelations from the financial reviews, Plaintiffs became concerned that the paving was not completed. Approximately nine years after Schrieber’s purchase of Lot 28, he and Plaintiffs filed a complaint in February of 2015 alleging, among other things, that Defendants had breached a contract to pave the roads within the Mystic Ridge subdivision and committed a multitude of illegal actions and violation of fiduciary responsibilities as related to the operations of the POA. In an order filed 22 July 2016, Judge Pope dismissed all derivative claims.

*3. Declarant Control*

Each neighborhood initially had a separate nonprofit property owners association that was incorporated and operated with recorded bylaws, a Board of Directors, dues, and services. As part of the greater Mystic Lands, the three



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neighborhoods shared amenities. Defendants described the Mystic Forest property owners association as a “super POA” for Mystic Lands, handling issues such as payroll, equipment, and expenses related to common areas.

Mystic River & Village, the first community created, was formed by a declaration recorded 10 June 2005. Winsford Holding, LLC (“Winsford”), a company owned by Shinitzky, purchased the initial 36.5 acres on 2 March 2005; the recorded the plat in the Swain County Registry references the Winsford deed. The declaration contained several covenants, including a provision for a period of special control by the declarant, Defendant Mystic Lands, Inc. The declaration specified that the declarant control period would expire upon the conveyance of 95 percent of the “Residences and Lots.” “Lot” was defined as “any parcel of land shown upon the subdivision plats . . . recorded in . . . Swain County, North Carolina[.]”

Also on 10 June 2005, Mystic Lands Development Corporation filed two plats comprised of fifteen lots in Mystic River, and seventeen lots in Mystic Village, a subsection of Mystic River. The combined plats with a total of 32 lots were subject to the Mystic River declaration. Between 27 June 2005 and 14 November 2005, 31 of those 32 platted lots (96.875%) were conveyed by the declarant to third parties. Subsequently in 2011 and 2012, additional plats were recorded in 2011 and 2012 depicting five more lots in Mystic River and Village.

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The second community, Mystic Forest, was formed with the acquisition of approximately 92 total acres from Winsford and Tim Rook. The declaration for Mystic Forest was recorded on 28 October 2005. Establishing nearly identical provisions to those described in the Mystic River declaration, “Lot” was defined in the Mystic Forest declaration to include “any parcel of land shown upon the subdivision plats for ‘Mystic Forest’ recorded in . . . Swain County [a]nd Macon County, North Carolina[.]” The Mystic Forest declaration filed 3 August 2006 was amended to add a previously omitted property description to the original declaration. These same documents were also filed in Macon County on 10 August 2006.

Soon thereafter on 7 November 2005, Defendants filed three plats depicting a total of 23 lots subject to the Mystic Forest declaration. Three plats were then recorded on 10 August 2006 adding 18 lots to the Mystic Forest declaration, for a total of 41 platted lots. In the next three years between 21 November 2005 and 22 December 2008, 40 of these 41 lots (97.561%) were conveyed to third parties.

The third community, Mystic Ridge, was formed with lots in both Swain and Macon counties. Defendants drafted, but never recorded, a declaration specific to Mystic Ridge. Deeds transferring title to lots sold in Mystic Ridge from November 2006 through November 2012 made those lots subject to Mystic Forest declarations.

A plat was recorded for the Mystic Ridge subdivision on 15 November 2006 showing 30 lots. This recorded plat gave no notice that the depicted lots were subject

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to any declarations. According to Defendants, “[t]he developer inadvertently failed to record a separate declaration for Mystic Ridge, despite having presented an unrecorded copy to purchasers in the subdivision.” By 22 December 2008, 64 of the 65 lots (98.462%) subject to the Mystic Forest declaration were conveyed to third parties.

Mystic Lands Development Corporation was the original declarant named in the Mystic River and Mystic Forest declarations. Defendant Mystic Lands, Inc, is the successor declarant. From the time the earliest lots were sold through the present, Defendants have exercised declarant control by appointing members of the Boards of Directors, removing Directors of the Associations, and preparing and recording amendments to declarations. Defendants have not paid assessments for lots owned in Mystic Lands.

Defendants notified all property owners on 5 October 2012 that the Boards of Directors from each of the three separate communities had “voted to consolidate the three into [] one Mystic Lands POA” in order to “make the POA with its growing scope of responsibilities more effective and efficient[.]” Defendants sent a second notice to lot owners on 26 October 2012 stating that a vote would be held on whether the three neighborhood associations would be combined and providing a ballot. Repeated in this letter was Defendants’ representation that the vote would consolidate the three neighborhood associations, explaining that such an action would “simplify the

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working and management of the POA activities” and would “also result over time in lower annual assessments.” The notice explained that the process included the termination of the Mystic River and Mystic Forest declarations, with a single “Mystic Lands POA’s [sic] Declaration” to be recorded in their place, and emphasized that “[t]he new Declaration is effectively the same as the current one – *no material changes were made, and those made are by and large to accommodate the inclusion of the three Mystics.*” (Emphasis added.) The proposed declaration was not distributed to the property owners prior or subsequent to their vote, nor did Shinitzky recall the boards of each community association being provided copies of the declaration prior to their approval of the combined associations.

The lot owners voted by more than 67 percent in each of the respective neighborhood associations to approve the motion contained in the letter, creating a master association that replaced the three separate neighborhood associations. Each of the Plaintiffs in this appeal who owned property in Mystic Lands in 2012 voted for the motion. Following the vote of the membership of the three neighborhood associations, each neighborhood association filed a resolution of termination reflecting the vote of its membership to replace their respective covenants. On 13 November 2012, Defendants filed the declaration in the registries of both Swain and Macon Counties (“2012 Declaration”). The 2012 Declaration subtracted from

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Declarant's control period the seven years that had already elapsed from the time the first covenants were recorded in 2005.

Resulting from the 2012 Declaration, the new Mystic Lands Property Owners Association, Inc., the POA, was formed and continues to operate. Assets and common areas once owned by the three neighborhood associations were conveyed to the POA. Prior and subsequent to the formation of the POA, Developer continued to appoint directors without objection, up until the filing of this suit in 2015. Following the creation of the POA, Plaintiff Thomas Anderson was appointed as its new President, and Yates was put on the board.

Almost two years later on 3 and 4 November 2014, Defendants recorded a document entitled "Amended Declaration of Covenants, Restrictions and Easements for 'Mystic Lands'" in Swain and Macon Counties.

*B. Procedural Background*

Plaintiffs commenced this action against Defendants by filing the Complaint on 3 February 2015, followed by the First Amendment to the Complaint on 27 May 2015. Defendants filed a Motion to Dismiss on 2 June 2015. Plaintiffs filed the Second Amendment to the Complaint on 13 August 2015, which included claims for judgment declaring the period of declarant control had expired and injunctive relief.

Defendants filed an Answer and Counterclaims on 22 September 2015. Subsequently, on 15 January 2016, Defendants filed an Answer and Amended

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Counterclaims. Plaintiffs replied to the Amended Counterclaims on 18 February 2016.

Defendants filed a Motion for Partial Summary Judgment on 8 June 2016 which was limited to Plaintiffs' Sixth Claim for Relief, requesting declaration that the period of declarant control had expired, and Tenth Claim for Relief, requesting injunctive relief. The trial court heard the motion on 15 July 2016 and entered an Order granting Defendants' motion on 12 August 2016.

Plaintiffs filed a Notice of Appeal on 9 September 2016. This Court entered an order on 9 May 2017 dismissing the appeal as interlocutory.

A jury trial was held at the 6 November 2017 term of the Superior Court of Swain County before The Honorable Mark E. Powell ("Judge Powell"). The trial was split to handle the affirmative claims of Plaintiffs in the first phase, and Defendants' counterclaims in the second phase. Following presentation of Plaintiffs' evidence, Defendants made an oral Motion for Directed Verdict on Plaintiffs' claim for Specific Performance, which was denied. At the close of Defendants' evidence on Plaintiffs' claims, Defendants renewed their Motion for Directed Verdict, which was denied. At the close of the evidence, Defendants tendered a Motion for Directed Verdict as to their defamation counterclaims, which was denied.

On 5 January 2018, Defendants filed a Motion for Special Jury Instructions, Proposed Jury Charge, and Proposed Issues. Defendants also submitted Objections

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to, and Motion for Revisions and/or Corrections to the Court's Jury Instructions and Verdict sheet on 8 January 2018. Also on 8 January 2018, Plaintiffs submitted their Objection to the Issue Sheet and Jury Instructions and supplemental Memorandum of Law in support thereof. Judge Powell entered Final Jury Instructions and a Final Verdict Sheet on 13 January 2018.

Trial was held and judgment entered on 22 February 2018 on the jury verdict determining that Plaintiff Schreiber entered into a contract with Defendant Mystic Lands, Inc. for the paving of the roads in Mystic Ridge, and Mystic Lands, Inc. breached that contract. The judgment reserved the determination of the issue of specific performance.

Following the jury's verdict, the Powell Judgment determined that Plaintiffs were not liable for any of Defendants' remaining counterclaims and dismissed them all with prejudice. After entry of the Powell Judgment, on 22 February 2018, Plaintiffs filed their Motion for JNOV, which was denied. Judge Powell subsequently set a hearing date "for determining whether or not the court, in its discretion, will decree specific performance related to the paving claim and, if so, in what manner."

Defendants filed post-trial motions on 5 March 2018 requesting Judgment Notwithstanding the Verdict or in the alternative, a New Trial, and a Motion to Stay ("Defendants' JNOV Motions"). Defendant Mystic Lands, Inc. filed on 19 March 2018

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a Motion for Denial of Specific Performance. Plaintiffs filed a Motion for Decree of Specific Performance.

A hearing on Defendants' JNOV Motions and the issue of specific performance was held on 29 June 2018. Judge Powell entered a final judgment on 10 July 2018 denying Defendants' JNOV Motions and granting Plaintiffs' Motion for Specific Performance ("Specific Performance Order"). Defendants filed a Notice of Appeal to this Court on 8 August 2018, appealing the Powell Judgment, Powell Motions Judgment, and the Specific Performance Order. On 9 August 2018, Plaintiffs filed Notice of Cross-Appeal to an earlier ruling from The Honorable Marvin Pope granting Defendants' earlier Motion for Summary Judgment on the declaratory judgment claim dealing with declarant control.

II. Defendants' Claims

Defendants contest the trial court's denial of Defendants' Motion for Directed Verdict and JNOV as to the paving claim, and as to counterclaims for defamation and Unfair and Deceptive Trade Practices. Defendants also assert the trial court erred in not ordering a new trial on the paving claim and on "numerous errors of law during the trial," and in decreeing specific performance of the paving claim.

*A. Standards of Review*

This Court reviews a directed verdict or a JNOV as follows:

When considering the denial of a directed verdict or JNOV, the standard of review is the same. The standard of review



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of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. If there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for JNOV should be denied. Further, if, at the close of the evidence, a plaintiff's own testimony has unequivocally repudiated the material allegations of his complaint and his testimony has shown no additional grounds for recovery against the defendant, the defendant's motion for a directed verdict should be allowed. Whether [a defendant is] entitled to directed verdict or JNOV is a question of law. We review questions of law de novo.

*Green v. Freeman*, 367 N.C. 136, 140-41, 749 S.E.2d 262, 267 (2013) (internal citations and quotation marks omitted). This Court reviews the sufficiency of jury instructions *de novo*. *Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc.*, 159 N.C. App. 43, 53, 582 S.E.2d 701, 706-07 (2003).

A trial court's decision on a motion for a new trial is reviewable based on an abuse of discretion standard, except when the court acts based on an error of law, which is reviewable *de novo*. *Cummings v. Ortega*, 365 N.C. 262, 266, 716 S.E.2d 235, 238 (2011).

The standard of review in a claim for specific performance is an abuse of discretion. *Crews v. Crews*, 264 N.C. App. 152, 154, 826 S.E.2d 194, 196 (2019) (citation omitted) ("The remedy of specific performance rests in the sound discretion of the trial court and is conclusive on appeal absent a showing of a palpable abuse of discretion.") When there are questions of law or legal inferences presented in the

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exercise of specific performance, then the standard of review is *de novo*. *Seaman v. McQueen*, 51 N.C. App. 500, 505, 277 S.E.2d 118, 121 (1981).

*B. Paving Contract*

Defendants first argue that the trial court improperly denied their motion for directed verdict and JNOV on Schreiber's paving claim because there was no valid contract to pave the roads. More specifically, Defendants argue that the contract terms for the paving provisions for the 2006 Lot 28 purchase are "too vague as a matter of law to show anything more than ML's plan to pave" and do not create an "absolute obligation to do so." We disagree.

In order to be binding, "the terms of a contract must be definite and certain or capable of being made so." *Williamson v. Miller*, 231 N.C. 722, 728, 58 S.E.2d 743, 747 (1950) (citation and quotation marks omitted). "Where the terms of a contractual agreement are clear and unambiguous, the courts cannot rewrite the plain meaning of the contract. In addition, when a court construes a contract, it must give ordinary words their ordinary meanings." *Internet East, Inc. v. Duro Communs., Inc.*, 146 N.C. App. 401, 405, 553 S.E.2d 84, 87 (2001) (citation and quotation marks omitted).

Here, Schreiber and Developer entered into a contract in 2006 for the purchase of Lot 28 in the Mystic Ridge subdivision. Schreiber received in the transaction a Property Information Sheet providing the "streets throughout Mystic Ridge are private and *shall* be maintained by the Mystic Ridge Property Owner's Association."

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(Emphasis added.) The developer was to cover the “initial capital expenses for the streets, including the asphalt[.]” Shinitzky testified that such language could be interpreted two ways, either as a representation that the streets would be paved or as a statement only of intent to pave.

We find no such ambiguity. *See Williamson*, 231 N.C. at 728, 58 S.E.2d at 747. Under its plain and ordinary meaning, it is the developer’s responsibility to bear the street expenses, including the cost of the asphalt. *See Internet East, Inc.*, 146 N.C. App. at 405, 553 S.E.2d at 87. Lacking in the document is language creating ambiguity or removing Developer’s burden to pave the streets.

Even assuming *arguendo* that the contract’s language invited two different interpretations, as Defendants submit, Developer’s conduct was consistent with an enforceable obligation to pave the roads. If a document is ambiguous, conduct and statements of the parties prior to and after the document is executed can be used to interpret the document. *Lattimore v. Fisher’s Food Shoppe, Inc.*, 313 N.C. 467, 474, 329 S.E.2d 346, 350 (1985). Evidencing obligatory representations, Developer promised paved roads, provided estimates of when road paving would be completed, and subsequently paved roads over time with asphalt using the same basic construction on all paved roads. Developer’s statements were likewise consistent with an enforceable obligation. Shinitzky explained that the deed of trust recorded by Developer was intended to provide “assurance” to the members that his

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“commitments” would be honored. Through conduct, Defendants affirmed a valid contract to pave the roads.

Thus, not only was the contract clear and unambiguous, Defendants’ conduct also affirmed that the contract entered into included an obligation to pave the roads.

*C. Affirmative Defenses*

Defendants next advance affirmative defenses of the statute of limitations, novation, quasi-estoppel, waiver, estoppel, and laches as “absolute bars as a matter of law” to Plaintiff Schreiber’s breach of contract claim. Specifically, Defendants claim that “[r]egardless of what was perceived” as Developer’s obligation to pave the roads prior to 2013, Schreiber “accepted” that the roads would be “gravel only” with his 2013 lot purchase. According to Defendants, the “ripple effect” of purchasing Lot 38, knowing the roads would be gravel, supports multiple defenses.

*1. Statute of Limitations*

Defendants argue that the paving claim is barred by the three-year statute of limitations as a matter of law or was not filed within a reasonable period of time. We disagree.

In North Carolina, the statute of limitations for a breach of contract claim is three years. N.C. Gen. Stat. § 1-52(1) (2019). “The statute begins to run when the claim accrues; for a breach of contract action, the claim accrues upon breach. *Miller v. Randolph*, 124 N.C. App. 779, 781, 478 S.E.2d 668, 670 (1996). Upon the plea of

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the statute of limitations, it is the plaintiff's burden to show they instituted actions within the prescribed period. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 507, 317 S.E.2d 41, 42, (1984).

Defendants contend that even if the 2006 contract for Lot 28 was clear as to Developer's responsibility to pave the roads, no time frame was specified for completion, either through written or oral promises.

"If no time for the performance of an obligation is agreed upon by the parties, then the law prescribes that the act must be performed within a reasonable time. Reasonable time is generally conceived to be a mixed question of law and fact." *Yancy v. Watkins*, 17 N.C. App. 515, 519, 195 S.E.2d 89, 92 (1973) (citations and quotation marks omitted).

Here, Schreiber and his wife purchased Lot 28 on 28 October 2006. The deed was recorded 7 February 2007. During the early days of the development of Mystic Lands, Developer regularly promised and reiterated that roads would be paved and asked the lot owners for patience as the paving occurred. Not only did Shinitzky express his intention to pave the roads, his actions of slowly paving the roads confirm his intention. Additional documents indicate Developer's clear intent to pave the roads. A 27 November 2006 email indicated that Ridge Roads would begin paving after the first of the year. A January 2007 closing checklist indicated that roads would be asphalt.

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Shinitzky justified paving delays in areas where there were few homes built and little traffic, explaining paved roads in such areas would break. In a 26 May 2009 letter to property owners association members, Shinitzky wrote:

Road paving, we have learned the hard way, should wait as long as possible. After constant traffic at Mystic Forest for well over a year, with countless heavy house construction vehicles traveling, we were certain that we could safely pave that section. Take a look at it now and you'll be appalled by the amount of major repairs the road required. Just the other day, driving on an unpaved stretch of road at the Forest, to my surprise I came upon a section, which after more than three years, the portion of the road along the down bank has cracked away, and in need of structural repairs. We have encountered such problems in the younger Ridge, too, after every winter, and we proceed to repair them to the highest standards. Roads carved out of mountains are no [small] challenge. These repairs, by the way, *are not* a POA small expense. Once the roads are paved, however, the POA does take over the costs of their maintenance.

Communications sent in June 2010 confirmed that partial paving would occur that year, followed by a building of a boathouse. Newsletters in December 2010, and September 2011 indicated paving would occur "next year." Shinitzky testified: "I want to give my customers, my neighbors, the best possible community, and it was not until 2010 and '11, that winter that I realized almost at perhaps loss of life, that paving on mountain roads is a poor idea." He was then asked, "So you made that decision for the lot owners?" He replied, "I did." Even so, a 4 April 2015 article in the Smoky Mountain Times, based on a March 2015 interview of Shinitzky, stated

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paving would continue in the development. Shinitzky admitted the interview arose because the lawsuit had been filed. Thus, not only had Shinitzky previously admitted his intention to pave the roads and had acted accordingly, he continued to admit Developer's responsibility to pave the roads.

According to his testimony, Shinitzky expected his promises to complete paving would be believed. And Schreiber did believe the promises, testifying he was confident that paving would eventually occur. The first time Developer provided any outward indication that the roads might not be paved was in the 2013 Property Disclosure Statement for Schreiber's purchase of a second lot in 2013, which indicated the roads would be gravel.

Plaintiffs contend that Developer's breach of contract as to paving promises occurred via anticipatory repudiation, as of 2013 based on the Property Disclosure Statement. Anticipatory repudiation constitutes a breach of contract when a party makes a "positive, distinct, unequivocal, and absolute refusal to perform the contract." *Gordon v. Howard*, 94 N.C. App. 149, 152, 379 S.E.2d 674, 676 (1989).

Based on Shinitzky's reassurances of paving through words and actions, and subsequent revelation that the roads might not be paved, we find that the cause of action for failure to pave the roads accrued no earlier than approximately two years prior to the filing of this action on 3 February 2015, well within the three-year statute of limitations for a breach of contract claim. See N.C. Gen. Stat. § 1-52(1)(2019);

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*Miller*, 124 N.C. App. at 781, 478 S.E.2d at 670. The trial court properly submitted the reasonableness of the delay to the jury.

*2. Novation*

As determined *supra*, under the terms of Schreiber's 2006 lot purchase, the parties entered a valid agreement that Developer would pave the roads. The parties dispute, however, whether the 2013 Property Disclosure Statement was intended to extinguish the existing agreement to pave the roads.

Novation may be defined as a substitution of a new contract or obligation for an old one which is thereby extinguished . . . . The essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract.

*Cities Svc. Oil Co. v. Howell Oil Co.*, 34 N.C. App. 295, 300, 237 S.E.2d 921, 925 (1977) (citation and quotation marks omitted omitted). "The intention of the parties to effectuate a novation must be clear and definite, for novation is never to be presumed." *Kirby Bldg. Sys. v. McNiel*, 327 N.C. 234, 243, 393 S.E.2d 827, 832 (1990) (citations omitted). If such proof is lacking, and parties disagree as to intent of the contract, "[t]here arises . . . a question for the jury to determine . . . the intention of the parties, based upon the writings, the relation of the parties and the surrounding circumstances." *Penney v. Carpenter*, 32 N.C. App. 147, 149, 231 S.E.2d 171, 173 (1977). It is an issue for the jury to determine when there is evidence offered of a



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different understanding of the bargain where the express language of the contract is ambiguous. *Id.* 32 N.C. App. at 147, 231 S.E.2d at 173.

Defendants' position that novation has occurred is based on contrasting language regarding paving found in the 2006 Property Information Sheet and the 2013 Purchase Contract and the incorporated Property Disclosure Statement. The 2006 Property Information sheet states that the streets are "private" with the developer covering the "initial capital expense for the streets, including asphalt[.]"

The 2013 Purchase Contract states:

I AGREE TO PURCHASE THE ABOVE DESCRIBED PROPERTY ON THE TERMS AND CONDITIONS HEREIN STATED. Each purchaser acknowledges receipt of a copy of this agreement and understands this is a legal and binding Contract of Sale and Purchase. Purchaser and Seller agree that this agreement, including all referenced addenda, is the only agreement between them and that no representations, oral or written, have been made or relied upon which are not set out herein.

A disclaimer regarding gravel roads found in 2013 Property Disclosure Statement, which is expressly incorporated into the purchase contract as Addendum "A," provides: "The roads in Mystic Ridge will be private gravel roads maintained by the Property Owner's Association." Also included in the disclaimer is: "No guarantee to the accuracy thereof is made and information is subject to change without notice." Defendants contend pursuant to the Disclaimer statement that the merger clause in the second contract caused a novation of the first contract. According to Defendants,

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the terms of the 2013 Lot 38 Contract concerning the gravel condition of the roads are “so inconsistent” with any agreement to pave the roads found in the Property Information sheet for the 2006 Lot 28 purchase “that the two cannot stand together.”

The documents used in the two purchases differ in both purpose and language. The disclaimer can be read to describe the current condition of the property at the time of sale. Paragraph 5, labeled “Inspection Conditions,” further supports that the Purchaser “accepts the property in its present condition[,]” at the time the contract was executed. Paragraph 5 also references the Property Disclosure Statement as “included as Addendum “A” to this contract.” Together these statements can reasonably be read to mean that the information about roads—gravel roads at the time of the purchase—was subject to change.

Nowhere in the language referenced do we find specific language that rescinds the 2006 paving agreement, nor do we find an intent to rescind the paving agreement. Nowhere do we find a merger clause stated as to all prior representations of the 2006 being merged into the 2013 sale and extinguishing the prior agreement. In fact, the 2013 Contract for Sale specifically addresses the new lot purchase and states in its final paragraph that no other representations outside of the 2013 documents have been made and that the buyer has not relied on any other representations in deciding to buy the lot.

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Defendants have not met the heavy burden to show that the parties executed a contract that would extinguish the old. *See Cities Svc. Oil Co.*, 34 N.C. App. at 300, 237 S.E.2d at 925. Defendants did not express a “clear and definite” intent to execute a new contract in 2013 to supersede the 2006 contract, and we will not presume novation. *See Kirby Building Systems*, 327 N.C. at 243, 393 S.E.2d at 832 (1990). To any extent that there was an ambiguity as to whether the 2013 Contract intended to serve as a novation to the 2006 Contract, the question was appropriate to submit to the jury. *See Penney*, 32 N.C. App. at 149, 231 S.E.2d at 173.

*3. Quasi-estoppel and Waiver*

Defendants’ affirmative defenses of quasi-estoppel and waiver contain merely elements of the legal doctrines and lack any substantive argument. We therefore decline to address these defenses, pursuant to N.C. N.C.R. App. P. 28(a). *See Bridges v. Parrish*, 222 N.C. App. 320, 328, 731 S.E.2d 262, 268 (2012) (holding “[b]ecause plaintiff merely alluded to this theory in the ‘Issue Presented’ section of her brief but did not support it with any substantive arguments, it is deemed waived on appeal”).

*4. Equitable Estoppel*

Defendants argue under the theory of equitable estoppel that Schreiber’s acceptance of the graveled condition of the Mystic Roads with his Lot 38 purchase was in exchange for a discounted purchase price. Equitable estoppel “grows out of such conduct of a party as absolutely precludes him, both at law and in equity, from

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asserting rights which might perhaps have otherwise existed . . . as against another person who in good faith relied upon his conduct, and has been led thereby to change his position for the worse[.]” *Scott v. Bryan*, 210 N.C. 478, 481, 187 S.E. 756, 757 (1936).

While Defendants claim the “undisputed” nature of their reliance upon Schreiber’s acceptance of the graveled condition of the roads resulting in a discount, Schreiber disputed whether the price was discounted and whether he received a discount. Asked whether he paid the full market price for the purchase of lot 38, Schreiber replied:

I believe I did. I believe all the lots at that point were selling for around \$40,000 instead of a hundred and thirty to a hundred and sixty thousand. The market price was different and I paid the asking price. I did not negotiate. Simply paid what was asked.

He further explained that he was “not aware because one price is lower than another price that it was a discount”; rather, he “paid the asking price that was on the sale event that day.”

Under these circumstances, where we see no evidence that Defendants were led to change their position for the worse, Defendants’ claim under the theory of equitable estoppel fails. *See Scott*, 210 N.C. at 481., 187 S.E. at 758.

5. *Laches*

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Under the doctrine of laches, Defendants argue that they “set a discounted price for Lot 38 in part based on not having to incur the cost of paving the roads in Mystic Ridge[,]” and Schreiber did not contest it at the time. This Court has explained that

1) the doctrine [of laches] applies where a delay of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay necessary to constitute laches depends upon the facts and circumstances of each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

*MMR Holdings, LLC v. City of Charlotte*, 148 N.C. App. 208, 209-10, 558 S.E.2d 197, 198 (2001). The burden of proof is on the party asserting laches. *Taylor v. City of Raleigh*, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976). Further, it is well settled that “it is the province of the trial court, not the appellate court, to weigh the evidence and decide the equities.” *In re Bradburn*, 199 N.C. at 549, 556, 681 S.E.2d at, 833.

Here, any time delay as to Schreiber bringing a claim was not unreasonable, based on the recurring promises by Shinitzky to pave the roads and his history of paving the roads over time. Schreiber agreed that he “bought Lot 38 understanding that [Shinitzky] was saying that the roads in Mystic Ridge would be gravel” and that he “would simply debate that issue later.” Defendants have offered no argument nor

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cited to any evidence that there was a change in condition between the parties that disadvantaged or prejudiced Developer. *See MMR Holdings, LLC*, 148 N.C. App. at 209-10, 558 S.E.2d at 198. Defendants have not met their burden of proof in establishing the applicability of the doctrine of laches. *See Taylor*, 290 N.C. at 622, 227 S.E.2d at 584; *In re Bradburn*, 199 N.C. App. at 556, 681 S.E.2d at 833.

*6. Unclean Hands*

Defendants argue that it would be inequitable for the court to enforce specific performance of a 2006 contract regarding road paving when Schreiber had unclean hands for coming to court after receiving benefits of acquiring Lot 38 in Mystic Ridge, which was identified as having gravel roads. In effect, Defendants' assert that Schreiber has unclean hands because the evidence is disputed as to the novation argument. We find this claim lacks merit.

*D. New Trial*

Defendants next claim the trial court erred because it did not order a new trial on the paving claim. Such error was prejudicial, according to Defendants, because Plaintiffs argued implied contract principles to the jury, where no implied contract was pled. We disagree.

“It is a well-established principle that an express contract precludes an implied contract with reference to the same matter, so that, if there is a contract between the parties the contract governs the claim and the law will not imply a contract.”

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*Mancuso v. Burton Farm Dev. Co. LLC*, 229 N.C. App. 531, 536-37, 748 S.E.2d 738, 743 (2013) (citations and quotation marks omitted). Since a party cannot recover on both claims, “it is error to submit an alternative implied contract claim to the jury when an express contract has been proved.” *Catoe v. Helms Const. & Concrete Co.*, 91 N.C. App. 492, 498, 372 S.E.2d 331, 335 (1988) (citations and quotation marks omitted). This Court has further determined that “[o]ne may sue on an express contract and recover on an implied contract unless the allegation is such as to mislead the defendant.” *Paxton v. O.P.F., Inc.*, 64 N.C. App. 130, 132, 306 S.E.2d 527, 529 (1983) (citation and quotation marks omitted) (holding it is a better practice to plead both the express and implied contracts, but recovery on the implied contract would not be denied where plaintiff pleaded but failed to prove a cause of action for express contract, and failed to plead but proved cause of action for implied contract).

Defendants’ assert their position has “always been” that the 2006 contract with Schreiber was valid, but that the contract did not include an agreement to pave the roads in Schreiber’s neighborhood. Plaintiffs alleged in paragraph 78 of their Second Amended Complaint: “As an inducement to Plaintiffs for the purchase of lots in the Mystic Lands Subdivisions, ML agreed to and represented in writing that it would complete and pave all roadways and complete a rotating dome astronomical observatory.” During pre-trial hearings, Developer admitted that Plaintiffs had argued an implied contract during the previous year. At trial, Defendants’ counsel

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read from pre-trial dispositions revealing Plaintiffs' counsel questioned Defendants about oral representations. We find no basis for Defendants' claim of prejudice where both an agreement *and* representations had been raised in pleadings and arguments. *See Paxton*, 64 N.C. App. at 132, 306 S.E.2d at 529. The trial court properly admitted relevant facts into evidence for the jury's determination as to whether an agreement to pave the roads existed. Defendants are not entitled to a new trial.

*E. Specific Performance*

Defendants next argue that the trial court erred in granting specific performance, because the "Paving Claim is not a valid contract." Alternatively, Defendants argue that even if the contract paving language for Schreiber's purchase of Lot 28 is clear, a lack of identified time frame for contract performance prohibits awarding specific performance. Also alternatively, Defendants argue that Schreiber's 2013 acceptance of Lot 38 bars Plaintiffs' specific performance claim. We disagree.

First, Defendants argue that an "absence of facts showing the agreed upon standards for road construction" renders the court powerless to award specific performance. "Specific performance will not be decreed unless the terms of the contract are so definite and certain that the acts to be performed can be ascertained and the court can determine whether or not the performance rendered is in accord with the contractual duty assumed." *N.C. Med. Soc'y v. N.C. Bd. of Nursing*, 169 N.C. App. 1, 11, 610 S.E.2d 722, 727-28 (2005) (citations omitted). This Court has awarded



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specific performance when, although the written document did not expressly state road paving standards, an implied promise was found from standards used on previous parts of the road. *Lyerly v. Malpass*, 82 N.C. App. 224, 228-31, 346 S.E.2d 254, 257-58 (1986). An enforceable contract need not contain, therefore, every fact to which parties agree if other evidence can provide the terms needed. *See Id.*

Here, Defendants assert there “was no proof offered at trial of a clear, definite, specific and unqualified agreement as to any standards for paving roads in Mystic Ridge including materials, specifications and time for construction.” Conflicts of evidence raised by Defendants include plats that show Mystic Ridge gravel roads varying in width from 12-16 feet. Defendants assert that in making his determination, Judge Powell used a plat showing gravel in order to determine the width of paving, and the platted width was “materially different than the platted width for the gravel roads referenced in Schreiber’s later recorded deed.” Other evidence showed, however, that certain roads in Mystic Lands were paved with asphalt using similar specifications. Because Developer used the same construction for existing roads, those same standards could be implied as part of the contract for road paving in Mystic Ridge. *See id.*, 82 N.C. App, at 288-31, 346 S.E.2d at 257-58. That Judge Powell chose to require paving of a 16-foot width does not materially conflict with the fact that there are 12- to 16-foot width of gravel roads.

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Entwined within their statute of limitations argument, Defendants also argue that even if the contract paving language for Schreiber’s purchase of Lot 28 is clear, “there is no timeframe mentioned anywhere for its performance.” Defendants contend that where no time frame is specified for the performance of a contract, the party who wishes to enforce specific performance must come forward within a reasonable time to demand it. Citing *Francis v. Love*, 56 N.C. 321 (1857), in which a period of six years without demand for specific performance was deemed unreasonable, and *Ritter v. Chandler*, 214 N.C. 703, 704, 200 S.E. 398, 399-400 (1939) in which a delay of more than ten years to seek specific performance was deemed too long, Defendants assert that Plaintiffs’ delay of nine years from 2006 to 2015 bars their specific performance claim.

“The rule is that when the contract does not specify the time for [performance of the contract], a reasonable time will be implied as a matter of law.” *J.B. Colt Co. v. Kimball*, 190 N.C. 169, 174, 129 S.E. 406, 409 (1925) (citations omitted). “What is a ‘reasonable’ time . . . is generally a mixed question of law and fact, and, therefore, for the jury, but when the facts are simple and admitted, and only one inference can be drawn, it is a question of law.” *id.*, 190 N.C. at 174, 129 S.E. at 409 (citations omitted).

Here, for the same reasons we determined the statute of limitations was tolled for the time frame in which Plaintiffs could bring their claims—namely, Defendants’

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continued representations that paving would be completed and paving over time—we likewise find the time period in which Plaintiffs brought their claim “reasonable” so as not to bar their claim for specific performance. *See id.*, 190 N.C. at 173, 129 S.E. at 409.

Defendants’ final specific performance argument is that Schreiber’s 2013 acceptance of Lot 38, with his knowledge that Mystic Ridge’s roads were represented as being gravel only, barred Plaintiffs’ specific performance claim. At trial, Shinitzky admitted to the existence of an agreement to pave the roads but claimed that 2013 documents effectively rescinded the 2006 promise. While Schreiber’s lot purchase included the 2013 Property Disclosure Statement that the interior roads would be gravel, his 2006 purchase indicated roads would be paved. Further, many roads in the development *were* paved and *were not* fourteen-foot gravel.

Aligned with our reasoning *supra* that the 2013 contract did not serve as a novation to the 2006 contract, we find under these facts that the trial court did not abuse its discretion in awarding specific performance to Plaintiffs on the road paving claim.

III. Defendants’ Counterclaims

Defendants next argue that the trial court wrongfully denied Defendants’ request for a directed verdict and JNOV as to Plaintiffs’ liability on Defendants’ defamation and Unfair and Deceptive Trade Practices Act (“UDTPA”) counterclaims.

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*A. Defamation*

Although Defendants review in their brief on appeal pertinent aspects of the law of defamation, they provide not a single example of any statement they claim was defamatory *per se*. Their statement is merely, “There was not a ‘scintilla of evidence’ to support the Plaintiffs’ defense of truth as to all of the defamatory *per se* statements.” *See Jim Lorenz, Inc. v. O’Haire*, 212 N.C. App. 648, 650, 711 S.E.2d 820, 822 (2011) (establishing that when considering a JNOV motion, the trial court must determine whether evidence was sufficient to be submitted to the jury). Defendants also argue the trial court improperly instructed the jury, but they fail to make a prejudice argument. They also fail to argue any prejudice from the alleged improper introduction of certain documents at trial.

We therefore decline to address Defendants’ defamation counterclaim, pursuant to N.C. N.C.R. App. P. 28(a). *See Bridges*, 222 N.C. App. at 328, 731 S.E.2d at 268.

*B. Unfair and Deceptive Trade Practices Act*

Defendants argue the trial court erred in its handling of the UDTPA counterclaim. We disagree.

“In order to prevail in a [UDTPA] claim, a plaintiff must show: (1) an unfair or deceptive act or practice . . . , (2) in or affecting commerce, (3) which proximately

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caused actual injury to plaintiff or his business.” *Huff v. Autos Unlimited, Inc.*, 124 N.C. App. 410, 413, 477 S.E.2d 86, 88 (1996) (citation and quotation marks omitted).

Our Supreme Court has instructed that a claim under N.C. Gen. Stat. § 75-1.1 does not extend to a business’s internal operations, but rather extends to acts between a business with another business(es) or a business with a consumer(s). Here . . . the bad acts alleged by the Association did not occur in . . . dealings with [other market participants]. The purported misconduct by the Cornblum family was alleged to have taken place while members of the Cornblum family were controlling directors of the Association. Even taken as true, most of the allegations regarding the actions of the Declarant and the members of the Cornblum family are more properly classified as occurring within a single entity rather than within commerce.

*Conley’s Creek LTD. P’ship v. Smoky Mtn. Country Club Prop. Owners Ass’n, Inc.*, 255 N.C. App. 236, 252-52, 805 S.E.2d 147, 157-58 (2017) (internal citations and quotation marks omitted).

Defendants argue that they do not bring their counterclaims against the POA as members of the POA, but rather bring their claims in as a Developer against the individual property owners. The conduct alleged in support of the claim, however, is against Property Owners as to internal affairs of the POA with the single market participant. Thus, Defendants’ UDTPA claims fail where the actions are best classified as dealing with the internal affairs of a single entity—the Mystic Lands development—rather than within commerce. *See Huff*, 124 N.C. App. at 413, 477 S.E.2d at 88; *Conley’s Creek LTD. P’ship*, 255 N.C. App. at 252, 805 S.E.2d at 157-58.

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Moreover, Defendants base their UDTPA argument is on their presumed success of their defamation claim. They argue that because they are “entitled to JNOV on defamation *per se*, which includes statements that impeached ML in its business activities[,]” they are entitled to a favorable ruling under the UDTPA. As with the lack of proof on their defamation claim, Defendants fail to refer the Court to specific statements that support a UDTPA claim. The trial court properly found that Plaintiffs did not violate the UDTPA, and properly denied a directed verdict on the claim.

IV. Plaintiffs’ Claim

Plaintiffs argue the trial court erred in granting Defendants’ motion for partial summary judgment on Plaintiffs’ claim that the period of declarant control had expired, pursuant to the declarations for the Mystic Lands communities.

A. *Standard of Review*

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen.Stat. § 1A-1, Rule 56(c) (2005). The party who moves for summary judgment has the burden of “establishing the lack of any triable issue of fact.” *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). “[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law.” *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). We review the evidence

in the light most favorable to the nonmoving party. *Id.*

*Midsouth Golf, LLC v. Fairfield Harborside Condominium Ass'n, LLC*, 187 N.C. App. 22, 30, 652 S.E.2d 378, 384 (2007).

*B. Determining the Declarant Control Period*

*1. Declarant Control Period Prior to 2012 Declaration*

The focus of this appeal is the calculation of the time period that Developer reserved for its period of declarant control. Plaintiffs and Defendants agree that period of declarant control helps to protect a developer's completion and marketing of a project. Plaintiffs argue that the declarant control provisions in the Mystic River and Mystic Forest declarations determine the declarant control time period. Pursuant to those declarations, the language is "unambiguous," and Defendants' declarant control "ended several years before Defendants recorded the 2012 Declaration."

Defendants counter that the 2012 Declaration, not prior neighborhood covenants, is the controlling instrument for determining the declarant control period. Defendants contend that the lot owners' vote favoring the 2012 Declaration, in addition to replacing the "Three Neighborhood Associations," also "amend[ed] the Neighborhood Covenants to substitute a new set of covenants or declaration applicable to all property owners within Mystic Lands." The new covenants, according to Defendants, also created a new period of declarant control.

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Mystic Lands, Inc. and each of its neighborhoods are subject to North Carolina Planned Community Act (“NCPCA”), Chapter 47F. Adopted in 1998, the NCPCA applies to all planned subdivision communities created after January 1, 1999, which includes Mystic Lands. N.C. Gen. Stat. §47F-1-102 (2015). The NCPCA establishes in N.C. Gen. Stat. §47F-3-103(d) (2015):

The declaration may provide for a period of declarant control of the association, during which period a declarant, or persons designated by the declarant, may appoint and remove the officers and members of the executive board.

A developer may choose the time period, provided it is disclosed in the declaration. *Anderson v. Seascape at Holden Plantation, LLC*, 241 N.C. App. 191, 207, 773 S.E.2d 78, 89 (2015).

“Restrictive covenants are considered contractual in nature and acceptance of a valid deed incorporating the covenants implies the existence of a valid contract.” *Fairfield Harbor Prop. Owners Ass’n v. Midsouth Golf, LLC*, 215 N.C. App. 66, 75, 715 S.E.2d 273, 282 (2011) (citation omitted). “[S]ince these restrictive servitudes are in derogation of the free and unfettered use of land, covenants and agreements imposing them are to be strictly construed against limitation or use.” *Callaham v. Arenson*, 239 N.C. 619, 625, 80 S.E.2d 619, 624 (1954). If restrictive covenants are “clearly expressed,” they “may not be enlarged by implication or extended by construction [but rather] must be given effect and enforced as written.” *Id*



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Our Supreme Court has explained that “[i]n construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* of the covenants contained in the instrument or instruments creating the restrictions.” *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967). In ascertaining intent, one must consider the purpose to be accomplished, the situation of the parties, and the subject matter of the contract. *DeBruhl v. State Hwy. & Public Works Comm’n*, 245 N.C. 139, 144-45, 95 S.E.2d 553, 557 (1956).

Any amendments to restrictive covenants must be reasonable in light of the contracting parties’ original intent. *Armstrong v. Ledges Homeowners Ass’n*, 360 N.C. 547, 548, 633 S.E.2d 78, 81 (2006). An amendment’s reasonableness “may be ascertained from the language of the declaration, deeds, and plats, together with other circumstances surrounding the parties’ bargain, including the nature and character of the community.” *Id.*, 633 S.E.2d at 81. This limitation serves to protect the interests of owners in preserving the original nature of their bargain. *Id.* at 558, 633 S.E.2d at 87. Further, a waiver based upon express or implied agreement requires intent, which “should be proven and found as fact and is rarely to be inferred as a matter of law.” *Harris & Harris Constr. Co. v. Crain & Denbo, Inc.*, 256 N.C. 110, 119, 123 S.E.2d 590, 596 (1962).

The declarations provided in Section 3.08 as to Declarant Control:

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Notwithstanding any other language or provision to the contrary in this Declaration, in the Articles of Incorporation, or in the By-Laws of the Association, Declarant hereby retains the right to appoint and remove at any time and from time to time any or all members of the Board of the Association and any or all officers of the Association until fifteen (15) days after the first of the following events shall occur: (i) the expiration of twenty (20) years after the date of the recording of this Declaration; (ii) the date upon which 95% of the Residences and/or Lots have been conveyed to third parties other than the builders thereof; or (iii) the surrender by Declarant of the authority to appoint and remove directors and officers by an express amendment to this Declaration executed and recorded by Declarant.

(“Declarant Control Period”) Expressly stated in the declaration is that the Declarant Control Period would end “fifteen days after . . . (ii) the date upon which 95% of the Residences and/or Lots have been conveyed to third parties other than the builders thereof[.]” Also specified, the developer’s rights existed for a maximum of 20 years. Upon the occurrence of either of the above, the declarant’s rights would automatically pass to the lot owners. Subsequent amendments to the declarations could be made solely by the lot owners. Lacking in the declarations was any provision for including unrecorded plats in the calculation of the percentage of the lots sold.

For both Mystic River and Mystic Forest, the declarations defined “lot” as: “[A]ny parcel of land shown upon the subdivision plats . . . recorded in the Office of the Clerk of the Superior Court . . . covering any portion of the Property, as such boundaries may be modified in accordance with Section 6.03.”

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According to the unambiguous language of the declarations and rules of constructing restrictive covenants, the number of existing lots within the Mystic Lands communities—the denominator for calculating the 95 percent threshold—as well as the number of lots conveyed, was to be determined by referring to the publicly available recorded plats and deeds filed with the county. Attorney Kenneth W. Fromknecht, II (“Attorney Fromknecht”), who was employed by Plaintiffs to examine each lot platted or sold, determined based on this formula that as of 10 June 2005, 32 lots were shown on recorded plats existing in Mystic River and Mystic Village, subject to a single set of Mystic River declarations. As of 14 November 2005, 31 of the 32 lots within Mystic River and Mystic Village had been conveyed to third parties (96.875%). As of 22 December 2008, 64 lots out of 65 lots subject to the Mystic Forest Declarations, which included Mystic Ridge, were conveyed to third parties (98.462%). Calculating in this manner results in 95 percent conveyance of lots in both neighborhoods prior to the 2012 Declaration vote. Also determined by Attorney Fromknecht, 95 out of 99 combined lots subject to the Mystic Forest Declarations, which included lots in Mystic Ridge subject to Mystic Forest Declarations by language inserted in the individual deeds, and Mystic River and Mystic Village Declarations, were conveyed to third parties as of 22 December 2008 (95.95%).

Defendants assert that Plaintiffs’ calculations consider a mere “snapshot” of lots platted and conveyed to third parties at a “fixed period of time in the past” rather

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than “those platted of record and conveyed over time, including the possibility of more development of recorded lots into the future.” Prior declarations that “no longer legally exist are irrelevant[,]” according to Defendants. To counter Plaintiffs’ calculations, Defendants engaged Attorney Ann Taylor Rash (“Attorney Rash”). Attorney Rash did not dispute the basic facts regarding the number of lots shown in plats recorded with the Register of Deeds and the percentage of lots transferred to third parties. Attorney Rash’s calculations assumed, among other things, a new period of declarant control after the dates that 95 percent of the lots subject to the original declarations had been filed. Further, her affidavit incorrectly defined a “lot,” and omitted the provision that the plats must be recorded.

Defendants’ calculations treated Mystic Ridge separately from Mystic River and Mystic Forest communities. Lots within Mystic Ridge were made subject to the declarations for Mystic Forest, however, by reference to the declarations in each Mystic Ridge deed recorded. Defendants acknowledge it is the developer who must “take care to insure that covenants are recorded” in order to protect interests of “lot values . . . banks, investors, purchasers and creditors[.]” Notwithstanding Defendants’ admission of such responsibility, Defendants explain that the “developer inadvertently failed to record a separate declaration for Mystic Ridge[.]” Defendants argue that unrecorded parcels not shown on publicly recorded plats should be included in the calculation of lots. Thus, a declaration provision permitting the

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declarant to amend plats means that the denominator for calculating the percentage of lots sold is not fixed by the plats on file in the public record.

Defendants assert that Mystic Lands was a “work in progress” with portions of the property undeveloped at the time declarant control was lost; thus there was no method by which he or anyone else could calculate the number of lots sold divided by the number of unsold lots. They explain that the “denominator of the 95% fraction [is] not static” where the “clear intent” is to “afford the developer time[.]” The 95 percent denominator, according to Defendants, “must await full development . . . [and] the rate of sale after that [] triggers the 95%.” Further, “until the potential number of lots is exhausted, there’s no way to determine the 95[%]” and there is no way to calculate how many lots are in the subdivision. Further, the definition of a “lot” is a “fluid one” that provides “flexibility . . . to adjust . . . and to adopt [sic] to market conditions.” Shinitzky explained, “there’s no set number at any given date, but [sic] which to make this determination . . . [rather], it is a work in progress . . . to be completed within the 20 years allotted for the declarant.” Shinitzky explained further that “pursuant to the clear language of the declarations . . . the 95 percent threshold has not been reached.”

Despite Shinitzky’s position that the 95 percent threshold has not been reached, he also explained in his affidavit that these figures maintain the 95 percent threshold of the lots sold, in both the “totality” of Mystic Lands, and in the separate

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subdivisions. On July 1, 2007, following the plat of phase two at Mystic Ridge, there were 135 Mystic Lands lots surveyed and platted. In 2016, there were 137 platted and recorded lots in Mystic Lands. According to Defendants, “[t]he *grouping* of lots developed and sold to measure the *pace* of the 95% threshold for declarant control has *remained essentially the same* since the early stages of the development.” (Emphasis added.)

Defendants’ calculation method is contrary to plain language. Under the declarations, Defendants could revise plats for lots owned by Defendants. Such revisions could change the denominator in the calculation without running afoul of the declarations. The declarations do not, however, allow a new period of declarant control to be reestablished by filing a new plat containing additional lots, after the 95 percent threshold had been reached.

Under the definition contained in the Mystic Forest Declaration, the Mystic Ridge lots should not be included in the calculation of the Declarant Control Period because they were not shown on subdivision plats for Mystic Forest, and therefore were not “lots” by definition. Thus, they should not be included in the calculation of whether declarant control was lost over Mystic Forest. Moreover, even if the 24 Mystic Ridge lots conveyed subject to the Mystic Forest declaration by reference to the deed are included in the calculation, as part of the denominator for Mystic Forest, the 95 percent conveyance threshold was reached on or before 22 December 2008. At

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that time, 64 of 65 lots made subject to the Mystic Forest declarations by plat or by deed had been conveyed to third parties, thus ending declarant control.

We agree with Attorney Fromknecht's assessment that: no provisions in the declarations support a calculation consistent with the Declarant's testimony; no language in the 2012 Declaration purports to recreate or to reestablish declarant control; the original declarations for Mystic River and Mystic Forest applied because the declarant control expired prior to November 2012, subject to the clear language; and nothing in the public record revealed the property owners acquiesced to a new period of declarant control after the dates that 95 percent of the lots subject to the original declarations were sold. Such an assessment is limited to lots found on recorded plats, following the express language in the declarations, as recorded by the declarant. Notice to an examiner regarding applicable covenants is only provided through recording restrictive covenants in a deed in a chain of title or to refer to recorded covenants in a deed in the chain of title; accordingly, reliance on a "common development plan" based on lots within Mystic Ridge was insufficient.

A calculation performed in this manner is consistent with the requirement that restrictive covenants may only be "imposed by deed or writing duly registered." *Hair v. Hales*, 95 N.C. App. 431, 433, 382 S.E.2d 796, 797 (1989). Constructing restrictive covenants using a plain language interpretation provides proper notice of the extent and duration of declarant control. Because "[a] purchaser of real property is not

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required to take notice of and examine recorded collateral instruments and documents which are not muniments of his title and are not referred to by the instruments in his chain of title[.]” *id.*, only covenants that are recorded are considered attached to lots. Calculations that are in line with the rules of construction set forth by *Long* and *Hair* provide notice of the extent and duration of declarant control.

We agree with Plaintiffs that by 2008, declarant control had reverted to the owners of the lots within Mystic River and Mystic Forest, as well as the Mystic Ridge lots subject to the Mystic Forest declarations. Notwithstanding the change in control, Defendants neither disclosed that such loss had occurred nor recognized their loss of control.

*2. Declarant Control Period After the 2012 Declaration*

Defendants next argue that by expressly approving the 2012 Declaration and affirming their membership in the POA, not challenging the validity or enforceability of any provision, and implying consent through seeking the benefits of certain covenants, Plaintiffs intended to create a new period of declarant control. We disagree.

Shinitzky’s communication to lot owners in 2012 about a new declaration announced that a vote would be taken, representing that the new declaration made “no material changes” and served to join together the “three Mystics.” Compared to



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the prior neighborhood declarations, the difference in the 2012 Declaration regarding declarant control is found in Section 3.09(a), which provided a period of declarant control continuing “until fifteen (15) days after . . .(i) the expiration of thirteen (13) years after the date of the recording of this Declaration[.]”

That the 2012 Declaration subtracted from Declarant’s control period the seven years that had already elapsed from the time the first covenants were recorded in 2005 indicated, according to Shinitzky, a “clear and unequivocal affirmation as to continuity rather than a new beginning at the expense of what preceded[.]” Despite such supposed “continuity,” Defendant Shinitzky admitted that neither the lot owners nor the individual associations were shown the new declaration.

Plaintiffs represent that they were not aware Defendants would use the 2012 Declaration to claim continued control of the associations. Yates, testifying individually and on behalf of the POA, stated in his affidavit, in pertinent part, that he: (1) understood that the terms of the declarations and restrictive covenants applied to his property; (2) understood the reason given for combining the three associations into one was to make the POA more effective and efficient; (3) believed that no material changes were included in the declarations, which would be made for the sole purpose of accommodating the inclusion of the three communities; (4) did not receive a copy of the proposed declarations prior to his vote on November 5, 2012; (5) did not agree to extend or reactivate the period of declarant control; (6) intended only

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to endorse the creation of a single POA; (7) did not intend for his vote to approve the creation of the POA to include consent to extend or reactivate the period of declarant control in effect at the time of his lot purchase; and (10) did not have a meeting of the minds that his vote would extend or reactivate the period of declarant control in effect at the time of his lot purchase. Plaintiffs did not intend to modify the formula for establishing declarant control, nor is an intent to modify the formula apparent from the communication surrounding the votes.

To present the new declaration as lacking any material changes, yet to make changes to the declarant control would be unreasonable and contrary to the lot owners' original intent. See *Armstrong*, 360 N.C. at 548, 633 S.E.2d at 81. We find no evidence in the record that any lot owner was aware that the 2012 Declaration was intended to create a new period of declarant control, and Defendants did not show approval as a matter of law. Accordingly, whether property owners understood that by voting to combine three homeowners associations into one their vote established a new period of declarant control or functioned as a waiver of control raises a genuine issue of material fact not appropriate for summary judgment. See *Harris*, 256 N.C. at 119, 123 S.E.2d at 596.

*C. Defendants' Affirmative Defenses in Support of Summary Judgment*

In support of summary judgment in their favor, Defendants assert affirmative defenses of the statute of limitations and statute of repose, as well as doctrines of

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quasi-estoppel, waiver, estoppel, judicial estoppel, laches, and unclean hands. We address each in turn.

*1. Statute of Limitations and Statute of Repose*

Defendants first argue that Plaintiffs have a one-year statute of limitations in which to challenge the validity of an amendment to a declaration, after its recording. N.C. Gen. Stat. § 47F-2-117(b)(2019) states that it governs amendments to declarations “adopted pursuant to this section.” Plaintiffs contend that Defendants’ addition of a new period of declarant control to the 2012 Declaration was not approved by the lot owners and thus N.C. Gen. Stat. § 47F-2-117(b) would not be applicable to that portion of the declaration. Plaintiffs do not challenge their vote in favor of creating a single POA; rather, they challenge Defendants’ argument that by voting in favor of a single POA, Plaintiffs also approved a new period of Declarant control. The 2012 Declaration was unilaterally recorded by Defendants and never made available to the members of the association prior to the vote. Shinitzky testified that he had no recollection whether the document existed at the time of the vote. Lacking knowledge of the claimed change in declarant control—a material change—Plaintiffs cannot be expected to bring a claim within a statute of limitations period that would assume their knowledge. We find N.C. Gen. Stat. § 47F-2-117 inapplicable to the facts in this case, as it does not include amendments by the declarant under the terms of the declaration. *See* N.C. Gen. Stat. § 47F-2-117(a).(2019)

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Defendants also raised the three-year statute of limitations for bringing a breach of contract claim, *see* N.C. Gen. Stat. § 1-50(a)(3), as well as the statute of limitations for injury to an incorporeal hereditament, whereby actions must be filed within six years of the injury, *See* N.C. Gen. Stat. § 1-56 (2019).

Declarations that affect an interest in land and convey of real property interest evidence an intention that they constitute an instrument under seal. *Dunes S. Homeowners Ass'n v. First Flight Builders*, 341 N.C. 125, 132, 459 S.E.2d 477, 481 (1995). Actions pertaining to a sealed instrument or instrument conveying an interest in real property are subject to a ten-year statute of limitations. N.C. Gen. Stat. § 1-47(2) (2019); *McGuire v. Dixon*, 207 N.C. App. 330, 336, 700 S.E.2d 71, 75 (2010) (holding “the extended limitations period in section 1-47(2) applies to claims on a sealed instrument, even though a shorter limitations period could otherwise apply”).

Here, the applicable statute of limitations is the ten-year statute for actions upon a sealed instrument because Plaintiffs’ claims arose out of sealed instruments, whereby the respective declarations at issue convey real property. *See* N.C. Gen. Stat. § 1-47(2); *McGuire*, 207 N.C. App. at 336, 700 S.E.2d at 75; *Dune*, 341 N.C. at 133, 459 S.E.2d at 481. Further supporting the sealed nature of the instruments, Shinitzky signed, as President of Mystic Lands Development Corporation, both

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Mystic River and Mystic Forest declarations following a statement that the declarations are “duly executed and sealed.”

We agree with Plaintiffs that declarant control was lost in Mystic River on 29 November 2005 and in Mystic Forest on 6 January 2009, because at least 95 percent of the lots had been conveyed to third parties as of each respective date. Any harm at that time was speculative and prospective. Plaintiffs filed their Complaint on 3 February 2015, which was less than ten years after declarant control ended under the Mystic River declaration. Despite losing declarant control, Defendants continued to exercise declarant powers. Each time Defendants exercised expired declarant rights, such as removing or reappointing Board members or failing to pay assessments, the harms to Plaintiffs continued. Such subsequent violations could occur only after declarant control was lost and occurred within the ten-year statute of limitations.

Defendants also assert that the statute of repose bars Plaintiffs’ claims. The statute provides, “[A]n action for relief not otherwise limited by this subchapter may not be commenced more than 10 years after the cause of action has accrued.” N.C. Gen. Stat. § 1-56. As discussed *supra*, other statutes apply to Plaintiffs’ claims, negating the assertion of the statute of repose, and Plaintiffs asserted their claims within relevant time requisites. Thus, statute of repose does not apply.

*2. Quasi-estoppel, Waiver, Estoppel, Judicial Estoppel*

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Defendants next assert that because Plaintiffs agreed to the 2012 Declaration and have not claimed that there is not a unified Mystic Lands association, they are barred by quasi-estoppel from asserting a claim that the period of declarant control had expired. “Under a quasi-estoppel theory, a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument.” *Reidy v. Whitehart Ass’n*, 185 N.C. App. 76, 80, 648 S.E.2d 265, 268-69 (2007) (citation and quotation marks omitted), *disc. rev. denied*, 361 N.C. 696, 652 S.E.2d 651 (2007); *cert. denied*, 552 U.S. 1243, 170 L. E. 298 (2008). “The essential purpose of quasi-estoppel is to prevent a party from benefitting by taking two clearly inconsistent positions[.]” *Landover Homeowners Ass’n v. Sanders*, 244 N.C. App. 429, 436-37, 781 S.E.2d 488, 493 (2015) (citation and quotation marks omitted).

Plaintiffs agreed to the 2012 Declaration understanding that it created a single POA from three different neighborhood associations and made no other material changes. Unchanged in the 2012 Declaration were Plaintiffs’ benefits and obligations such as assessments. Plaintiffs challenge to a new period of declarant control—a material change—is separate and not inconsistent with accepting benefits of the POA. *See Id.* Plaintiffs’ are not estopped under a theory of quasi-estoppel from challenging Defendants’ declarant control.

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Defendants also assert that Plaintiffs' affirmative vote for the 2012 Declaration and implied acquiescence to the new provisions over time constituted a waiver of rights to contest Defendants' exercise of declarant rights. Waiver is a "voluntary and intentional relinquishment of a known right." *Clemmons v. Nationwide Mut. Ins. Co.*, 267 N.C. 495, 504, 148 S.E.2d 640, 647 (1966). "The essential elements of waiver are: 1) the existence, at the time of the alleged waiver, of a right, advantage or benefit; (2) the knowledge, actual or constructive, of the existence thereof; and (3) an intention to relinquish such right, advantage or benefit." *Fetner v. Rocky Mount Marble & Granite Works*, 251 N.C. 296, 302, 111 S.E.2d 324, 328 (1959) (citing 56 Am. Jur., Waiver, sec. 12, p. 113).

Here, Defendants provided no evidence of Plaintiffs' intention to relinquish their right to enforce the period of declarant control by signing the 2012 Declaration. *See id.*, 111 S.E.2d at 328. Plaintiffs testified that they were unaware that the time period for Defendants' loss of declarant control had previously expired prior to 2012. Defendants' reliance on this affirmative defense fails.

Defendants similarly claim Plaintiffs are estopped from contending the period of declarant control had expired based on their approval of the 2012 Declaration and payment of assessments.

North Carolina courts have long recognized the doctrine of equitable estoppel, which applies when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable

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negligence induces another to believe certain facts exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. In such a situation, the party whose words or conduct induced another's detrimental reliance may be estopped to deny the truth of his earlier representations in the interests of fairness to the other party. In applying the doctrine, a court must consider the conduct of both parties to determine whether each has conformed to strict standards of equity with regard to the matter at issue.

*Home Realty Co. & Ins. Agency, Inc. v. Red Fox Country Club Owners Ass'n, Inc.*, 2020 N.C. App. LEXIS 804, \*1, 2020 WL 6733475 (2020) (citation and quotation marks omitted).

Defendants represented that the 2012 Declaration would serve to create a single POA out of three neighborhood associations and that no other material change would be made. Plaintiffs responded by voting affirmatively for the declaration and continuing payments of respective assessments within the different communities. Defendants' claim of detrimental reliance lacks merit, where Defendants induced Plaintiffs' response, not vice versa. *See Id.*

Defendants also claim the affirmative defense of judicial estoppel. Judicial estoppel precludes a party to a legal proceeding who has succeeded in maintaining that position from assuming a contrary position simply based on the party's changed interests. *Whitacre P'ship v. Biosignia*, 358 N.C. 1, 22, 591 S.E.2d 870, 884 (2004).



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Plaintiffs' affirmative vote for the 2012 Declaration supported the unification of three neighborhood associations into one. Plaintiffs' challenge to declarant control is not an inconsistent assertion of facts, *see id.*, 591 S.E.2d at 884, but rather is a separate argument as to the application of the declaration, based on consistent facts. The doctrine of judicial estoppel is inapplicable.

*3. Laches and Unclean Hands*

Defendants next assert the equitable defense of laches, arguing that Plaintiffs delayed seeking their claim. More specifically, Defendants argue that Plaintiffs were on notice of the loss of declarant control because there were “at least 16 conveyances of ‘lots’ in Mystic Lands after the recording of the 2012 Declaration, none of which would refer to any prior covenants.” Defendants argue that because the 95 percent fraction is “substantially determined by matters of public record” or by “communications between the parties that have occurred over many years,” Plaintiffs had “constructive notice” of relevant facts. Further, Plaintiffs knew since 2005 that Defendant Shinitzky continued to exercise declarant rights such as the appointment of directors.

“[T]he mere passage or lapse of time is insufficient to support a finding of laches; for the doctrine of laches to be sustained, the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the

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person seeking to invoke it.” *Taylor v. Raleigh*, 290 N.C. at, 622-23, 227 S.E.2d at, 584-85, (1976) (citation and quotation marks omitted).

Plaintiffs’ affidavits indicate that they were unaware of the loss of declarant control prior to 2012. Although conveyances were a matter of public record. Plaintiffs needed an expert witness to complete a thorough review of each conveyance and numerous plats in order to calculate the number of lots conveyed by the declarant. Even Shinitzky lacked the ability to determine the number of lots that were in his subdivision after suit was filed, and he stated that none of the lot owners could make that calculation. Plaintiffs filed suit less than three years after learning that Defendants had lost declarant control, according to the terms of the previous declarations. Defendants did not provide evidence to prove the contrary, in favor of their defense of laches. Defendants’ reliance on this affirmative defense fails.

Defendants’ motion for summary judgment also asserted the equitable defense of unclean hands. Lacking any argument on appeal that Plaintiffs acted with unclean hands, Defendants’ reliance on this affirmative defense fails. *See* N.C. R. App. P. 28.

For the above reasons, to the extent that the trial court granted summary judgment in favor of Defendants because it considered Defendants to be entitled to “declarant” status due to Plaintiffs’ affirmative vote of the 2012 Declaration continuing Defendants’ declarant control, we hold the trial court erred and reverse the trial court’s grant of summary judgment. Likewise, to the extent that the trial

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court granted summary judgment because it found no genuine issue of material fact based on a lack of ambiguity, we hold the trial court erred and reverse. Because Plaintiffs' cause of action for injunctive relief is based entirely upon a finding of loss of declarant control, we hold Plaintiffs are entitled to an injunction preventing Defendants from exercising further declarant control.

V. Conclusion

On the trial court's award to Plaintiffs' on their breach of contract claim for paving, we affirm. We likewise affirm the trial court's award granting Plaintiffs specific performance as to the paving claim. On the trial court's denial of Defendants' request for directed verdict and JNOV as to Plaintiffs' liability on Defendants' defamation and unfair and deceptive acts claims, we affirm. On the trial court's grant of summary judgment in favor of Defendants because it considered Defendants entitled to declarant status, we find the trial court erred, and we reverse. We hold Plaintiffs are entitled to injunctive relief preventing Defendants from further exercising declarant control.

AFFIRMED IN PART, REVERSED IN PART.

Judges BERGER and ARROWOOD concur.

Report per Rule 30(e).