

IN THE SUPREME COURT OF FLORIDA

OLD PORT COVE HOLDINGS, INC., and
OLD PORT COVE EQUITIES, INC.,

CASE NO. SC07-1032

Petitioners,

L.T. Case No. 4D05-3601

v.

OLD PORT COVE CONDOMINIUM
ASSOCIATION ONE, INC.,

Respondent.

**ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT
COURT OF APPEAL**

RESPONDENT'S BRIEF ON JURISDICTION

Daniel S. Rosenbaum, Esquire
Florida Bar No. 306037
Richard Valuntas, Esquire
Florida Bar No. 0151084
BECKER & POLIAKOFF, P.A.
Attorneys for Respondent, OLD
PORT COVE CONDOMINIUM
ASSOCIATION ONE, INC.,
625 North Flagler Drive, 7th Floor
West Palm Beach, Florida 33401
Telephone No. (561) 655-5444
Facsimile No. (561) 832-8987

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESii

PRELIMINARY STATEMENT.....1

STATEMENT OF THE CASE AND FACTS.....3

SUMMARY OF THE ARGUMENT3

ARGUMENT.....3

**THERE IS NO BASIS FOR DISCRETIONARY
REVIEW OF THE FOURTH DISTRICT’S
DECISION IN THIS CASE; NO DIRECT
CONFLICT EXISTS BETWEEN THE DECISION
BELOW AND THE FIRST DISTRICT’S DECISION
IN FALLSCHASE DEV. CORP. V. BLAKEY**

CONCLUSION.....7

CERTIFICATE OF SERVICE.....8

CERTIFICATE OF COMPLIANCE.....9

TABLE OF AUTHORITIES

CASES

Christiani v. Popovich,
363 So. 2d 2 (Fla. 1st DCA 1978)5

Fallschase Dev. Corp. v. Blakey,
696 So. 2d 833 (Fla. 1st DCA 1997)2, 5, 7

Iglehart v. Phillips,
383 So. 2d 610 (Fla. 1980)2

Linder v. Combustion Eng’g,
342 So. 2d 474 (Fla. 1977)5

Old Port Cove Condo. Ass’n One v. Old Port Cove Holdings,
954 So. 2d 742 (Fla. 4th DCA 2007)2, 6, 7

Sander v. Ball,
781 So. 2d 527 (Fla. 5th DCA 2001)6, 7

OTHER AUTHORITIES

Art. V, § 3(b)(4), Fla. Const.3

Fla. R. App. P. 9.030(a)(2)(A)(vi)4

Fla. R. App. P. 9.120(d)4

§ 689.225, Fla. Stat. (1995)5, 6

§ 689.225, Fla. Stat. (2005)5, 6, 7

PRELIMINARY STATEMENT

The respondent, OLD PORT COVE CONDOMINIUM ASSOCIATION ONE, INC., was the defendant in the trial court and was the appellant before the Fourth District Court of Appeal. The respondent will be referred to herein as “the ASSOCIATION.” The petitioners, OLD PORT COVE HOLDINGS, INC. and OLD PORT COVE EQUITIES, INC., were plaintiffs in the trial court and were appellees before the Fourth District Court of Appeal. They will be referred to herein collectively as “the Petitioners”.

STATEMENT OF THE CASE AND FACTS

The facts in this case, as set forth by the District Court’s opinion below, are as follows:

In 1977, the developers of a condominium entered into an agreement with the Condominium Association granting the Association a right of first refusal for the purchase of a parcel of real property adjoining the condominium. The Agreement stated:

“In the event that [developer] elects to sell the real property ... the Association shall have the right of first refusal for the purchase of said real property upon the same terms and conditions as are proposed for its sale and purchase by [developer], said right of first refusal to be exercised by the Association within thirty (30) days following written notice to it of such proposed sale, following which said right of first refusal shall terminate.”

The current owners of the parcel [Owner] are the rightful successors in interest to the developer, and are now using the parcel as the parking lot for an adjoining parcel owned by them. They say that the right of first refusal came to their attention in 1999 as they were preparing their properties for sale.

Believing that the grant was invalid, they brought an action against the Association for declaratory relief and to quiet title. They alleged that the right of first refusal violated the common law rule against perpetuities and was therefore void from its very inception. They sought a declaration of voidness and that the Association had no valid right, title or interest in the parcel, as well as collateral relief quieting title to the parcel in Owner. After a bench trial, the court entered final judgment in favor of the Owner. The Association appeals.

Old Port Cove Condo. Ass'n One v. Old Port Cove Holdings, 954 So. 2d 742, 742-743 (Fla. 4th DCA 2007). The Fourth District, after an exhaustive analysis, reversed the trial court's decision and certified conflict with the First District's opinion in Fallschase Dev. Corp. v. Blakey, 696 So. 2d 833 (Fla. 1st DCA 1997).¹

SUMMARY OF THE ARGUMENT

This Court should decline to exercise its discretionary jurisdiction to review this case because the Fourth District's decision in Old Port Cove is not in direct

¹ Although the assertion in the Petitioners' Jurisdictional Brief that the opinion in Old Port Cove "relied upon a 1980 decision of this Court not cited by either of the parties in this case" is technically correct, it overlooks the fact that the First District's decision in Fallschase specifically relied upon this Court's decision in Iglehart v. Phillips, 383 So. 2d 610 (Fla. 1980). Since both parties cited Fallschase repeatedly below, the Petitioners' suggestion that the Fourth District relied upon authority not contemplated by either party is without merit.

conflict with the First District’s decision in Fallschase. The decision in Fallschase applied and interpreted the language of section 689.225, Florida Statutes, as it existed when the statute was amended in 1988. Nothing in the version of section 689.225 analyzed in Fallschase expressly abolished the common law rule against perpetuities. The opinion in Old Port Cove, however, considered an entirely different version of section 689.225, enacted several years after the Fallschase opinion. The version of section 689.225 addressed in Old Port Cove, unlike the statute analyzed in Fallschase, expressly abolished the common law rule against perpetuities in Florida. Accordingly, the decisions in Old Port Cove and Fallschase are not in direct conflict because each case dealt with a significantly different version of section 689.225, Florida Statutes.

ARGUMENT

THERE IS NO BASIS FOR DISCRETIONARY REVIEW OF THE FOURTH DISTRICT’S DECISION IN THIS CASE; NO DIRECT CONFLICT EXISTS BETWEEN THE DECISION BELOW AND THE FIRST DISTRICT’S DECISION IN FALLSCHASE DEV. CORP. V. BLAKEY

The Petitioners seek to invoke the discretionary jurisdiction of this Court pursuant to Article V, section 3(b)(4), of the Constitution of the State of Florida. This section grants this Court discretionary jurisdiction to review “any decision of

a district court of appeal . . . that is certified by it to be in direct conflict with a decision of another district court of appeal.” Id.; see also Fla. R. App. P. 9.030(a)(2)(A)(vi). The Fourth District’s opinion in this case explicitly rejected the First District’s decision in Fallschase and certified conflict to this Court. However, for the reasons set forth below, this Court should decline to exercise jurisdiction over this case.

The Petitioners initially argue the trial court’s decision in this case was correct and that the Fourth District’s decision in Old Port Cove was erroneous. (Juris. Br. 3-6). Florida Rule of Appellate Procedure 9.120(d) expressly states that briefs on jurisdiction are “limited solely to the issue of the supreme court’s jurisdiction.” Since the first argument in the Petitioners’ Jurisdictional Brief inappropriately addresses the merits of the Fourth District’s decision in Old Port Cove, the ASSOCIATION will not respond to such an argument because it does not involve “the issue of the supreme court’s jurisdiction.” Fla. R. App. P. 9.210(d).

The Petitioners contend the decision in Old Port Cove directly conflicts with the First District’s opinion in Fallschase. (Juris. Br. 6-10). The Petitioners’ argument is flawed because it overlooks a critical issue, i.e., the opinions in

Fallschase and Old Port Cove are distinguishable because each case involved a significantly different version of section 689.225. The law is clear that the courts are bound to apply the existing law in effect at the time a decision is made by the court. Linder v. Combustion Eng'g, 342 So. 2d 474, 476 (Fla. 1977); Christiani v. Popovich, 363 So. 2d 2, 5-6 (Fla. 1st DCA 1978). In Fallschase, the First District held that a right of first refusal clause in a contract for sale of real property was void under the common law rule against perpetuities. Fallschase, 696 So. 2d at 837. Nothing in the law in effect at the time of the Fallschase decision, however, expressly repealed the common law rule against perpetuities in Florida. § 689.225, Fla. Stat. (1995).

The instant case, unlike Fallschase, analyzed and applied the version of section 689.225 enacted in 2000. The law existing at the time of the decision in Old Port Cove stated that section 689.225 was:

. . . the sole expression of any rule against perpetuities or remoteness in vesting in this state. No common-law rule against perpetuities or remoteness in vesting shall exist with respect to any interest or power regardless of whether such interest or power is governed by this section.

§ 689.225(7), Fla. Stat. (2005)(emphasis added).

Under the plain language of the version of section 689.225 enacted in 2000, it is obvious that “the statutory repeal of the common law rule against perpetuities is fully retroactive and operative.” Old Port Cove, 954 So. 2d at 745; Sander v. Ball, 781 So. 2d 527, 528 (Fla. 5th DCA 2001)(acknowledging that the 2000 amendment to section 689.225 clearly abolished the common law rule against perpetuities). The version of section 689.225 addressed in Old Port Cove, which completely abolished the common law rule against perpetuities, did not exist when the First District rendered its opinion in Fallschase. Accordingly, this Court should reject the Petitioners’ assertion that a conflict exists between Fallschase and the instant case.

The Petitioners also maintain that the decision in Old Port Cove conflicts with the First District’s opinion in Fallschase regarding the issue of “retroactivity.” (Juris. Br. 9-10). Again, there is no conflict on the “retroactivity” issue because the decisions in Old Port Cove and Fallschase each analyzed a considerably different version of section 689.225. Compare section 689.225, Fla. Stat. (1995), with section 689.225, Fla. Stat. (2005). The version of section 689.225 addressed in Fallschase did not expressly abolish the common law rule against perpetuities in Florida, whereas the version of section 689.225 considered in Old Port Cove did.

Furthermore, the strength of the “retroactivity” analysis in Fallschase is tenuous at best because: (1) Judge Wolf wrote a well-reasoned dissenting opinion on the “retroactivity” issue, and (2) the majority expressed a significant amount of uncertainty about its decision on the issue. Fallschase, 696 So. 2d at 837-838.

Practitioners in Florida are clearly aware that the common law rule against perpetuities no longer exists in Florida, and that they are bound by the 2000 amendment to section 689.225. See Old Port Cove, 954 So. 2d at 745; Sander, 781 So. 2d at 528; Section 689.225, Fla. Stat. (2005). Thus, the opinion in Fallschase is readily distinguishable from the decision in Old Port Cove, and this Court need not expend its scarce judicial resources by exercising its discretionary jurisdiction over this case. See Baker v. State, 863 So. 2d 293 (Fla. 2003)(declining to exercise discretionary jurisdiction over conflict certified by the district court of appeal).

CONCLUSION

Based on the foregoing arguments and authorities. the ASSOCIATION respectfully requests that this Honorable Court decline jurisdiction over this case.

Respectfully submitted,

BECKER & POLIAKOFF, P.A.
Attorneys for Respondent, OLD
PORT COVE CONDOMINIUM
ASSOCIATION ONE, INC.,
625 North Flagler Drive, 7th Floor
West Palm Beach, Florida 33401
Telephone No. (561) 655-5444
Facsimile No. (561) 832-8987

By: _____
DANIEL S. ROSENBAUM
Florida Bar No. 306037

By: _____
RICHARD VALUNTAS
Florida Bar No. 0151084

(Certificate of Service to follow)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by **U.S. Mail** to: **Nicole K. Atkinson, Esquire**, Gunster, Yoakley & Stewart, P.A., 777 South Flagler Drive, Suite 500 East, West Palm Beach, Florida 33401; **Paul Erickson, Esquire**, 321 Royal Poinciana Plaza, Palm Beach, Florida 33480; **Nanette Gammon, Esquire**, 1555 Palm Beach Lakes Boulevard, Suite 1100, West Palm Beach, Florida 33401; and **Mayra Colon, Esquire**, Douberly & Cicero, 1551 Sawgrass Corporate Parkway, Suite 240, Sunrise, Florida 33323 this _____ day of June, 2007.

BECKER & POLIAKOFF, P.A.
Attorneys for Respondent, OLD
PORT COVE CONDOMINIUM
ASSOCIATION ONE, INC.
625 North Flagler Drive, 7th Floor
West Palm Beach, Florida 33401
Telephone No. (561) 655-5444
Facsimile No. (561) 832-8987

By: _____
DANIEL S. ROSENBAUM
Florida Bar No. 306037
RICHARD VALUNTAS
Florida Bar No. 0151084

(Certificate of Compliance to follow)

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Florida Rule of Appellate Procedure 9.210, that this Brief on Jurisdiction has been prepared in Times New Roman 14pt.

BECKER & POLIAKOFF, P.A.
Attorneys for Respondent, OLD
PORT COVE CONDOMINIUM
ASSOCIATION ONE, INC.
625 North Flagler Drive, 7th Floor
West Palm Beach, Florida 33401
Telephone No. (561) 655-5444
Facsimile No. (561) 832-8987

By: _____
DANIEL S. ROSENBAUM
Florida Bar No. 306037
RICHARD VALUNTAS
Florida Bar No. 0151084

WPB_DB: 001193/113560:319938_1