IN THE SUPREME COURT, STATE OF FLORIDA

OLD PORT COVE HOLDINGS, INC., and OLD PORT COVE EQUITIES, INC., Petitioners, v. OLD PORT COVE CONDOMINIUM ASSOCIATION ONE, INC., Respondent.	Case No. SC07-1032 4DCA Case No.: 4D05-3601

On Discretionary Review From a Decision of the Fourth District Court of Appeal

PETITIONERS' BRIEF ON JURISDICTION

MAILING ADDRESS:
JACK J. AIELLO
NICOLE K. ATKINSON
GUNSTER, YOAKLEY & STEWART, P.A.
777 S. Flagler Drive, Suite 500 East
West Palm Beach, FL 33401
561-650-0716
Attorneys for Petitioners

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STATEMENT OF THE CASE AND THE FACTS

In 1977, the developers of a condominium and the condominium association entered into an agreement granting the Association a right of first refusal for the purchase of an adjoining parcel. (App. at 1) The Agreement stated:

> In the event that [the 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 [the 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.

(App. at 1) The Owners, Petitioners here, are the rightful successors in interest to the developers and use the parcel as the parking lot for an adjoining marina property owned by them. (Id.) In 1999, as the Owners were considering the sale of the properties, they discovered the right of first refusal. (Id.)

The Owners believed that the right of first refusal was invalid. (Id.) To be able to sell the integral parking lot with the marina property, the Owners brought an action against the Association for declaratory relief and to quiet title. (Id.) The Owners alleged that the right of first refusal violated the common law rule against perpetuities and was void from its inception. (Id.) Based upon that, the Owners sought a declaration that the right of first refusal was void from its inception and that the Association had no valid interest in the parcel. (App. at 1-2) After a bench trial, the trial court ruled in favor of the Owners. (App. at 2)

The Association appealed to the Fourth DCA. The Fourth DCA relied upon a 1980 decision of this Court not cited by either of the parties in this case, Iglehart v. Phillips, 383 So. 2d 610 (Fla. 1980), concluding that the case was authority for the inapplicability of the rule against perpetuities to a right of first refusal. The Fourth DCA further examined the decision relied upon by the Owners, Fallschase Development Corp. v. Blakey, 696 So. 2d 833 (Fla. 1st DCA 1997). The Fourth DCA concluded that the analysis of the Fallschase Court was flawed or incomplete and, therefore, rejected that decision. The Fourth DCA reversed the trial court's decision and certified conflict with Fallschase to this Court.[1]

SUMMARY OF ARGUMENT

This case presents a classic conflict in which the Fourth DCA has adopted an opposing rule of law to that of another District Court of Appeal. Contrary to the Fallschase decision, the Fourth DCA decided both that: 1) a right of first refusal is an interest that vests immediately upon its creation; and 2) later-enacted statutory versions of the rule against perpetuities apply retroactively to negate the common

[1] Although the Fourth DCA reversed and remanded for consistent proceedings, it is unclear what proceedings are indicated. If the Fourth DCA's decision is that the rule against perpetuities never applied to the right of first refusal, then a judgment for the Association would be indicated; however, if the ruling is that Florida's later-enacted statutory rule against perpetuities applies retroactively, a further hearing before the trial court would be necessary to reform the right of first refusal in accordance with Fla. Stat. § 689.225(6)(c). That reformation procedure, if retroactive, would apply to an interest such as the present one that was created before October 1, 1988. Fla. Stat. § 689.225(6)(a) (2005).

law rule against perpetuities that existed when the Agreement was executed in 1977. First, the Fourth DCA's opinion misapprehends the application of the "vesting" concept and erroneously disagrees with Fallschase on that point. Second, because an interest that violated the rule against perpetuities in 1977 was void *ab initio*, the Fourth DCA erred in rejecting the rule of law from Fallschase that the later-enacted statutes do not apply retroactively.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that is certified to be in direct conflict with decisions of other district courts of appeal. Fla. R. App. P. 9.030(a)(2)(A)(vi).

ARGUMENT

I. THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THIS CASE IS IN DIRECT CONFLICT WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN *FALLSCHASE DEVELOPMENT CORPORATION V. BLAKEY*

A. The Trial Court Correctly Decided This Case Under Fallschase

There was no dispute as to the few relevant facts. First, the Agreement purported to create a right of first refusal for the purchase of the Property of *unlimited duration*. Second, the Agreement was executed in 1977.

As of 1977, Florida's rule against perpetuities was set forth in the common law and is generally stated as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the

interest." Fallschase, 696 So. 2d at 835. When the Agreement was executed, the rule had not been codified by statute. It was first codified in 1979 in Florida Statutes § 689.22 and today is codified in Florida Statutes § 689.225.

Because no interest in the Property had vested in the Association as of the time of the Agreement and no interest in the Property was certain to vest, if at all, not later than twenty-one years after some life in being at the time of the Agreement, the Agreement violated the rule against perpetuities in 1977. Therefore, the Agreement was void at its inception as though it had never been executed and could not be resurrected.

Fallschase is the only case in Florida that is directly on point in addressing the issue raised here. In Fallschase, a 1975 agreement purported to create a right of first refusal with respect to a piece of real property. Id. at 833-834. The plaintiff filed a declaratory judgment action in 1995, seeking a ruling that the agreement violated the rule against perpetuities and was, therefore, null and void from its inception. Id. The defendant, Fallschase, raised many of the issues raised here, including whether the original agreement was subject to reformation to make it conform to the rule against perpetuities, based upon the statutory codifications of the rule. Id. at 834-836. Ruling in favor of the property owner and finding the purported right of first refusal void *ab initio,* the First DCA discussed the same legal principles that apply here. First, the common law rule against perpetuities

applies to any interest created before codification of the rule. Id. at 833. Because the first codification of the rule against perpetuities in Florida became effective in 1979, the agreement in Fallschase (and the one here) must be analyzed under the common law rule against perpetuities.

Next, the Fallschase court stated that when an agreement provides a right of first refusal to a named individual, the right is personal to that individual, who is the measuring life in being. Id. Because such a property interest would vest, if at all, within that individual's lifetime, the interest would not violate the rule against perpetuities. On the other hand, when the agreement purportedly creates an unlimited duration for the exercise of the right of first refusal, the agreement violates the common law rule against perpetuities and is void *ab initio*. Id. at 835-837. (an agreement creating a right of first refusal which is not personal to a named individual but instead attempts to bind parties, their successors, and assigns, violates the rule against perpetuities).

In this case, the Agreement does not make the right of first refusal personal to a named individual. Instead, the Agreement grants the right of first refusal to the Association – a corporation – and attempts to bind the Owners and their successors in interests. Thus, the Agreement created a right of first refusal of *unlimited duration*. Corporations cannot be used as measuring lives in being for purposes of the rule against perpetuities (i.e. because corporations are not certain to

die). Therefore, as the trial court ruled, the Agreement violated the common law rule against perpetuities, and the right of first refusal was void *ab initio*. Although the Association addressed Fallschase by arguing that the most recent change to the statute completely abolished the common law rule of perpetuities in 2000, that legislative action occurred 25 years after the Agreement ceased to exist and could not resurrect it. Because the Agreement was void – as opposed to *voidable* – it could not be brought back to life by the codification of, or any other change to, the rule against perpetuities after the Agreement's inception.

B. The Fourth DCA's Decision Cannot Be Reconciled with the *Fallschase* Decision

The Fourth DCA disagreed with the Fallschase analysis in two ways, only one of which was raised by the Association in this case. First, the Fourth DCA concluded that a right of first refusal vests at the moment of the agreement and is, therefore, unaffected by any rule against perpetuities. (App. 1 at 2-3) The Association did not make that argument in this case. Second, the Fourth DCA concluded that the statutory codification of the rule against perpetuities should apply retroactively to somehow revive the right of first refusal, even if it did violate the rule against perpetuities in 1977. (App. 1 at 4-6)

Although the Association did not make the argument, the Fourth DCA concluded that the right of first refusal "became vested from the moment of the Agreement" and thus did not "really involve any kind of remote vesting" that

would implicate the rule against perpetuities. (App. 1 at 2-3) That analysis confuses the *contract right* (of first refusal) with the interest proscribed by the rule against perpetuities: remote vesting of an *estate* in real property. The rule against perpetuities is aimed at preventing remote vesting of an actual interest in property, and a contractual right of first refusal is *not* a vested estate in real property. See, e.g., Black's Law Dictionary, 8th Ed. (2004), 829, 1595 ("vested interest" is "an interest the right to the enjoyment of which, either present or future, is not subject to the happening of a condition precedent" and is an interest that is "consummated in a way that *will* result in future possession and use.") (emphasis added) Whatever estate in real property might someday have arisen from the 1977 right of first refusal, it was not vested in 1977. That is so because it was not yet certain to occur; it was subject to at least two significant contingencies. First, the owners would have to decide to sell the property and offer it for sale to a third party. Second, the Association would have to exercise the right to purchase the property on the same terms as the owners' offer and do so within thirty days after the owners' offer. See Fallschase, 696 So. 2d at 837 (right of first refusal cannot vest until after the property owner decides to sell the property) (internal citation omitted). Because those conditions must be satisfied before a vested estate or interest in real property would arise in the Association, no vesting occurred at the time of the Agreement, and the rule against perpetuities applied.

In arriving at its conclusion about vesting, the Fourth DCA relied upon case authority that was not cited to the Court by either of the parties. That case was this Court's decision in Iglehart v. Phillips, 383 So. 2d 610 (Fla. 1980). (App. at 2) The Fourth DCA concluded that Iglehart says the rule against perpetuities does not apply to a right of first refusal. (Id.) However, that misconstrues the Iglehart decision. In fact, in Iglehart, this Court recognized that the rule against perpetuities is aimed at preventing remote vesting of *estates* in real property. Id. at 614. Moreover, Iglehart did not decide whether the right of first refusal at issue was subject to the rule against perpetuities:

> *Although we conclude that the option in this case might be subject to the rule against perpetuities, such a finding is not necessary to answer the first question* since we find this repurchase option is more appropriately classified as an unreasonable restraint on the use of the subject property.

Id. (emphasis added) Thus, because the facts in Iglehart supported the analysis of that right of first refusal as an unreasonable restraint on the use of property, this Court did not decide whether it was subject to the rule against perpetuities. Moreover, this Court did not analyze or decide whether a codified version of the rule against perpetuities would apply retroactively.[2] Thus, the Iglehart case does

[2] The version of the statute codifying the rule against perpetuities that expressly excluded "rights in the nature of a right of first refusal" was in effect at the time of the Iglehart decision in 1980 but was repealed in 1988. Regardless, this Court did not decide whether that statute should be applied retroactively.

not provide that a right of first refusal somehow becomes an immediate vested estate in real property, immunizing it from the rule against perpetuities. Moreover, there is no known Florida case authority that stands for that proposition.

The second part of the Fourth DCA's ruling, also contrary to Fallschase, is that the codification of the rule against perpetuities should apply retroactively to revive the right of first refusal, even if it was void in 1977. (App. at 46) In Fallschase, the First DCA surveyed the law of other states. The Court found the courts to be divided and agreed with those that ruled that because whether an estate in real property is created or not is a substantive issue and not a procedural one, the statute should not be applied retroactively to revive an instrument that was void at its inception. See Fallschase, 696 So. 2d at 836-837.[3]

The Fourth DCA – and the Association in their arguments in this case – have effectively treated the Agreement as though it were *voidable* rather than void, as the rule against perpetuities dictated. The Agreement was void *ab initio* because it violated the law *at the time it was executed*. Thereafter, there was no merely *voidable* right of first refusal remaining to which to apply later law, such as a statutory rule against perpetuities.

[3] Florida courts have ruled consistently with Fallschase on this issue in other similar contexts. See, e.g., Damiano v. Weinstein, 355 So. 2d 819, 820 (Fla. 3d DCA 1978) (Marketable Record Title Act); Gotshall v. Taylor, 196 So. 2d 479, 481 (Fla. 4th DCA 1967) (homestead property); Reed v. Fain, 145 So. 2d 858, 866 (Fla. 1962) (statute of limitations).

In expressly rejecting Fallschase, the Fourth DCA further disagreed with the Fallschase opinion's assertion that the remotely-vesting interest impaired a vested property right in the owner. (App. at 6) The Fourth DCA concluded that Fallschase did not identify the vested right and suggested that there was none. (Id.) To the contrary, the Fallschase court identified as a vested property right the owner's freedom to dispose of the lots without the impediment of an unlawful first refusal right. See Fallschase, 696 So. 2d 837.

The Fallschase court correctly applied the rule in existence at the time that the offending agreement was made, and this Court should now reaffirm that interpretation by accepting discretionary review and quashing the contrary decision of the District Court below.

II. CONCLUSION

This Court has discretionary jurisdiction to review the decision below certified by the Fourth DCA, and the Court should exercise that jurisdiction to consider the merits of Petitioners' argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Daniel S. Rosenbaum, Esq.** and **John M. Siracusa, Esq.,** Becker & Poliakoff, P.A., 625 North Flagler Drive, 7th Floor, West Palm Beach, FL 33401; **Paul Erickson, Esq**., Alley, Maass, Rogers & Lindsay, P.A., 340 Royal Poinciana Way, Ste. 321, Palm Beach, FL 33480; **Nanette Gammon, Esq.**, 1555 Palm Beach Lakes Blvd, Suite 1100, West Palm Beach, FL 33401; and **Mayra Colon, Esq.**, Douberly & Cicero, 1550 Sawgrass Corporate Parkway, Sunrise, FL 33323, this _____ day of June, 2007.

GUNSTER, YOAKLEY & STEWART, P.A.
Attorneys for Plaintiffs/Petitioners
777 South Flagler Drive, Suite 500 East
West Palm Beach, FL 33401
Tel.: (561) 650-0716; Facsimile: (561) 655-5677

By: _____
JACK J. AIELLO
Florida Bar No. 440566
NICOLE K. ATKINSON
Florida Bar No. 0167150

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type size and style requirements and has been prepared in Times New Roman, 14 Point Font.

_____
JACK J. AIELLO
Florida Bar No. 440566