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. 07-1032
4DCA Case No.: 4D05-3601

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

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PETITIONERS' INITIAL BRIEF

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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PREFACE

Appellant, Old Port Cove Condominium Association One, Inc. shall be referred to as "the Association."

Appellees, Old Port Cove Holdings, Inc., and Old Port Cove Equities, Inc., shall be referred to as "the Property Owners."

All other parties or documents shall be referred to as set forth later in this Brief.

Citations to the Record on Appeal shall be to the Volume and Page Numbers indicated in the Index to Record, as follows: (R_-_)

The trial transcript is included in the Record at Volumes 14-16. References to the trial transcript shall be to the Volume and Page Number as follows: (T_:_-_)

References to, respectively, the Association's and the Property Owners' trial exhibits shall be as follows: (P. Ex. _) and (D. Ex. _)

References to the Appendix to this brief shall be as follows:

(App. _, p. _)

References to the Association's Initial Brief to the 4th DCA shall be as follows: (Assoc. IB at __)

References to the Property Owners' Answer Brief to the 4th DCA shall be as follows: (Prop. Owners AB at __)

INTRODUCTION

In this appeal, the Property Owners seek review of the Fourth DCA's decision reversing the trial court's ruling that the subject agreement was void *ab initio* and created no real property interest in favor of the Association. Jurisdiction is proper in this Court because the Fourth DCA correctly certified conflict with Fallschase Development Corp. v. Blakey, 696 So. 2d 833 (Fla. 1st DCA 1997).

STATEMENT OF THE FACTS AND THE CASE

In February, 1977, OPCI Joint Venture and the Association entered into the agreement at issue ("the Agreement"). (App. C; P. Ex. 9) The Agreement purported to grant the Association a right of first refusal for the purchase of a parcel of real property known as "Parcel 16." (Id.) On November 3, 1977, the Agreement was recorded in the Public Records of Palm Beach County, Florida. (Id.) It is undisputed that the Agreement, on its face, purports to create a right of first refusal of *unlimited duration*. (T 187/25-188/2; R8-1477; Assoc. IB at 5) The Agreement provides, in pertinent part:

> In the event that OPCI elects to sell the real property described on Exhibit A which is attached hereto and by reference made a part hereof, other than to the persons or corporations which form the OPCI Joint Venture, or to any corporation or other entity owned or controlled by OPCI or by any member of said Joint Venture, or a successor or successors "to the interest of any member in the Joint Venture," 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 OPCI, 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. C, pp. 1-2; P. Ex. 9, pp. 1-2)

The Property Owners, Petitioners here, are the successors in interest to the OPCI Joint Venture and are the current owners of Parcel 16. (R 12-2293)

In or about 1999, the Property Owners began to consider the possibility of selling all of their properties, including the properties that they owned in the Old Port Cove Development, such as the office building, the North Marina, the South Marina, the Yacht Club, and the corresponding parking areas. (T14: 37/23-38/7; 32/17-33/3) Parcel 16 is the parking lot for the North Marina. (T14: 36/23-37/6) While considering the possible sale of the properties, the Property Owners came across the Agreement. (T14: 37/23-38/17) After reviewing it, the Property Owners concluded that the Agreement was void *ab initio* because it violated the common law rule against perpetuities and was, therefore, of no effect. (T14: 39/13-23; R 12-2293-94) However, when the issue was brought to the Association's attention, the Association took the position that the Agreement was valid and that it continued to provide a valid right of first refusal for Parcel 16. (T14: 40/1-20)

In order to be able to sell the integral parking lot with the marina, the Property Owners brought this action in October, 2002, seeking a declaration from

the court that the Agreement was void. (T14: 40/21-41/5; R1-1) In the action, the Property Owners sought both declaratory relief and to quiet title to Parcel 16. (R1-1) The Association filed an amended answer and counterclaim. (R12-2202-2238) In their Amended Answer, the Association raised a number of defenses. (Id.) In their Counterclaim, the Association sought a declaratory judgment that the Agreement is valid and enforceable and, alternatively, sought reformation of the Agreement, pursuant to § 689.225, Fla. Stat. (Id.)

On March 14, 2003, Counter-Defendant, Llywd Ecclestone, disclaimed any and all interest in the Agreement and agreed to be bound by any adjudication by the trial court and any subsequent appeals that may be taken, specifically reserving only his right to participate in the event that any party files a motion, action or other pleading seeking monetary damages against him. (R12-2294) On July 15, 2003, the trial court entered a default in favor of the Association on its claims against Counter-Defendant, Acer Holdings. (R12-2295)

Trial was held before the Honorable Amy Smith, Palm Beach County Circuit Court judge, on August 15 and 16, 2005. (T1-252) The trial court entered final judgment on September 7, 2005, in favor of the Property Owners and against the Association on the claims for declaratory relief and to quiet title. (App. B) The trial court also denied all relief sought in the Association's Counterclaim. (Id.) The court pointed out that the Association's representative admitted that the

Agreement purported to create "an unlimited duration for the exercise of the right of first refusal," and ruled that a corporation, such as the Association, cannot be used as a measuring life in being for purposes of the rule against perpetuities, such that the Agreement violated the rule against perpetuities and was void *ab initio*. (App. B, p. 4) The trial court also addressed the Association's affirmative defenses and ruled that none of them were or could be established. (App. B, pp. 4-13)

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. (App. A, pp. 2-3, 6-7) The Fourth DCA further examined the decision relied upon by the Property 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. (App. A, pp. 5-6) The Fourth DCA reversed the trial court's decision and certified conflict with Fallschase to this Court. (App. A, p. 7)

The Property Owners petitioned this Court, and jurisdictional briefs were filed. This Court accepted jurisdiction of this case on October 30, 2007.

SUMMARY OF ARGUMENT

The trial court properly determined that the Agreement was void on its face and therefore created no interest in the real property at issue in favor of the Association. The Agreement violated the rule against perpetuities as it existed at the time of execution by purporting to create a right of first refusal for the purchase of Parcel 16 of *unlimited duration*. There is no doctrine of law that can cure that defect or resurrect an instrument that was void *ab initio*.

The Fourth DCA disagreed with the trial court's decision in two ways, neither of which can be reconciled with the Fallschase decision or with the law in existence at the time of the Agreement. The District Court's conclusion that a right of first refusal vests at the moment of the agreement and, therefore, does not violate the rule against perpetuities, misapprehends the nature of a right of first refusal. It is well settled that a right of first refusal remains inchoate and does not vest until the property owner offers the property for sale. Therefore, a right of first refusal is a nonvested property interest and is subject to the rule against perpetuities. The Fourth DCA's other basis for decision, that Florida's codification of the rule against perpetuities applies retroactively to revive the right of first refusal, is also directly contrary to the Fallschase court's analysis and conclusion that the statute may not be applied retroactively to resurrect an interest that was

void *ab initio*. Therefore, the present case presents an express and direct conflict which is properly presented to this Court.

The defenses argued on appeal by the Association were correctly ruled by the trial court to be invalid. First, the Association argued, and the Fourth DCA agreed, that the Property Owners failed to state a cause of action because the common law rule against perpetuities was abolished in 2000 by Florida Statutes § 689.225. However, that argument fails because the Agreement was executed in February, 1977, long before the statute abolished the common law rule. Because the Agreement was a nullity in 1977, no later enacted statute has any impact. In other words, because the Agreement was void, rather than voidable, there was nothing to revive when the statute was enacted. Moreover, the statute provides that it only applies to nonvested property interests created *on or after* October 1, 1988. In addition, based upon the law relating to the retroactive application of a statute affecting substantive rights, there is no valid argument that the later-enacted statute at issue here can or should be applied retroactively to change the status of an instrument executed twenty-three years before the statute was enacted. Not only does the statute at issue fail to satisfy the requirements for legislatively-intended retroactivity, but even if it did, it would not be constitutionally permissible to apply the statute retroactively because it affects substantive property rights.

The Association's alleged defenses of laches, equitable estoppel, and waiver are likewise invalid. Under the law, no amount of delay and no representation by a party can create an interest in real property where none existed based upon an instrument that was void *ab initio*. Thus, the defenses are *legally* insufficient. In addition, as the trial court explained, the Association offered no evidence that could satisfy the elements of the defenses. Therefore, the defenses were also *factually* insufficient.

Finally, the trial court properly determined that the Association is not entitled to reformation of the Agreement. That is so for the same reason that applies to the other defenses: that the instrument was void *ab initio* and created no interest at all. It is undisputed that the plain language of the Agreement established an intent to create a right of first refusal of *unlimited duration*. Therefore, there is no mutual mistake of fact to be reformed as between the parties. The court cannot cure a void instrument where the instrument effectuates the parties' intent, and the court may not rewrite the instrument for the parties after the fact, supplying its own terms, to create an interest in property where none existed.

As the Fallschase court recognized, the part of the statute that addresses reformation *does* evince a Legislative intention to apply the reformation part of the statute retroactively. The Fallschase court determined that it would be improper to do that and concluded that the statute should not be applied retroactively.

However, if this Court concludes that it is proper to apply that part of the statute retroactively, then the law for reforming a right of first refusal that otherwise violates the rule against perpetuities must be applied. The Fourth DCA did not provide instructions to the trial court about reforming the Agreement. Nevertheless, if reformation is appropriate, the rule that typically applies when a corporation purports to be the measuring life in being should be enforced. Based upon that rule, if the property interest, the right of refusal here, did not vest within 21 years of the grant of that interest, it is no longer valid. Because the right of refusal in this case did not vest within 21 years after it was granted in 1977, this Court may alternatively determine that the interest is no longer valid.

ARGUMENT

I. STANDARD OF REVIEW

The issues of whether the Agreement was void *ab initio*, whether a right of first refusal creates an immediately-vested interest, and whether Florida's codified version of the rule against perpetuities applies retroactively, raise questions of law which are reviewed by this Court *de novo*. Operation Rescue v. Women's Health Center, Inc., 626 So. 2d 664 (Fla. 1993). The issue of the legal sufficiency of the Association's defenses raise questions of law that are also reviewed by this Court *de novo*. Id.

II. THE FOURTH DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT'S RULING THAT THE AGREEMENT WAS VOID *AB INITIO*

A. The Trial Court Properly Ruled That The Agreement Was Void *Ab Initio* Because It Violated the Common Law Rule Against Perpetuities

There is no dispute as to the few facts that are relevant to the determination of this case. First, as set forth above, the Agreement purported to create a right of first refusal in favor of the Association for the purchase of Parcel 16 of *unlimited duration*. Second, the Agreement was executed in 1977.

In 1977, Florida's rule against perpetuities was set forth in the common law. The common law rule against perpetuities is typically 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 Development Corporation v. Blakey, 696 So. 2d 833, 835 (Fla. 1st DCA 1997). The purpose of the rule against perpetuities "is to ensure that property is reasonably available for development by prohibiting restraints that remove property from a beneficial use for an extended period of time." Id. (citing Iglehart, supra). That concern is well exemplified in the present case where the right of first refusal, if valid, makes it extremely difficult to transfer not only Parcel 16 but the entire marina property for which it serves as the parking area. (T14: 36/23-37/6)

In 1979, two years after the Agreement was executed, the first codification of the rule against perpetuities in Florida became effective. Fla. Stat. § 689.22. After various amendments, the rule against perpetuities is codified today in Florida Statutes § 689.225.

The Agreement violated the rule against perpetuities as it existed when it was executed. That fact alone resolves the claims in this case. There is one case in Florida that is directly on point. See Fallschase, supra.

In Fallschase, a 1975 agreement purported to create a right of first refusal with respect to a piece of real property. Id. at 833-34. The plaintiff in Fallschase, just as in this case, was a successor-in-interest to one of the original parties to the agreement. Id. at 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. 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 834-36. 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 834. Because the first codification of

the rule against perpetuities in Florida was not in effect until 1979, the agreement in Fallschase (and the one here) must be analyzed under the common law rule against perpetuities.

Next, the Fallschase court -- like other Florida courts applying the common law rule against perpetuities to rights of first refusal -- 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.; Watergate Corporation v. Reagan, 321 So. 2d 133, 136 (Fla. 4th DCA 1975); Points v. Barnes, 301 So. 2d 102, 104 (Fla. 4th DCA 1974). Because such a property interest would vest, if at all, within that individual's lifetime, the interest would not violate the rule against perpetuities. See Fallschase at 835; Watergate at 136; Points at 104. 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*. See Fallschase at 835-37 (an agreement creating a right of first refusal which was not personal to a named individual but instead attempted to bind the parties, their successors, and assigns, violated 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 purportedly grants the right of first refusal to the Association, a corporation. (App. C; P. Ex. 9) Thus, the Agreement

created a right of first refusal of *unlimited duration*. An interest conveyed with reference to a corporation as the measuring life in being does not comply with the rule against perpetuities because a corporation may continue perpetually (and, therefore, is not certain to die). See Ferrero Construction Co. v. Dennis Rourke Corp., 536 A. 2d 1137, 1144 (Md. App. 1988); Stuart Kingston, supra, at 1383; Fitchie v. Brown, 211 U. S. 321, 334 (1908). 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 against perpetuities in 2000, that legislative action occurred 23 years after the Agreement ceased to exist and could not resurrect it. Because the Agreement was void *ab initio* – as opposed to voidable – it could not be restored to life by the codification of, or any other change to, the rule against perpetuities. The Association holds no valid right or interest in Parcel 16, and the Property Owners were properly awarded a declaration from the trial court to that effect.

B. The Fourth DCA's Decision Cannot Be Reconciled with the Fallschase Decision or With the Law in Existence at the Time of the Agreement

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. A 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 revive the right of first refusal, even if it did violate the rule against perpetuities in 1977. (App. A 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. A 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); Watergate Corporation, supra, at 136 (right of first refusal vests only when seller elects to transfer the subject property).

Whatever interest 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 a significant contingency: the Property Owners would have to decide to sell the property and offer it for sale to a third party. See Fallschase, 696 So. 2d at 837 (right of first refusal cannot vest until the property owner decides to sell the property) (internal citation omitted); Watergate Corporation, supra, at 136; Stuart Kingston, Inc. v. Robinson, 596 A. 2d 1378, 1384 (Del. 1991) ("because the holder of the right of first refusal acquires merely an equitable interest, it remains inchoate until the owner decides to sell thus triggering the right of first refusal"). 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. A 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) 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. Furthermore, this Court did not analyze or decide whether a codified version of the rule against perpetuities would apply retroactively. Thus, the Iglehart case does not provide that a right of first refusal somehow becomes an immediate vested estate in real property, immunizing it from the rule against perpetuities. 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. A at 4-6) In Fallschase, the First DCA surveyed the law of other states. Finding the courts to be divided, the Fallschase court agreed with those that ruled that because the issue of whether an estate in real property is created or not is a substantive issue and not

a procedural one, the statute cannot be applied retroactively to revive an instrument that was void at its inception. See Fallschase, 696 So. 2d at 836-837.[1]

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, which is contrary to the import of the rule against perpetuities. The Agreement was void *ab initio* because it violated the law *at the time it was executed*. Consequently, there was not a merely *voidable* right of first refusal remaining to which to apply later law, such as the statutory rule against perpetuities.

In expressly rejecting Fallschase, the Fourth DCA further disagreed with the Fallschase court's conclusion 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 convey the property without the impediment of an unlawful first refusal right. See Fallschase, 696 So. 2d 837.

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[1] The Fallschase court, in its survey, found that the courts in Virginia and Maryland do not permit retroactive application of those states' statutes codifying the rule against perpetuities. See Lake of the Woods Association, Inc. v. McHugh, 380 S.E. 2d 872 (Va. 1989); Ferrero Construction v. Dennis Rourke Corp., 536 A. 2d 1137 (Md. 1988). The Fallschase court noted that the State of New Jersey permitted retroactive application. Juliano & Sons Enterprises, Inc. v. Chevron, U.S.A., Inc., 593 A. 2d 814 (N.J. Super. A. D. 1991).

Based upon the above, the Fourth DCA correctly certified conflict, and this matter is properly before this Court.

C. The Trial Court Correctly Rejected The Association's Defenses

In the trial court, the main defense argued by the Association was the existence and contended retroactive application of Florida's statutory rule against perpetuities. See § 689.225, Fla. Stat. (2000). After the trial court rejected retroactive application of the statute, the Fourth DCA concluded that the statute should be applied retroactively, as discussed above. The statute and its application is discussed in detail below. In addition, the Association presented to the trial court the additional defenses of laches, equitable estoppel, waiver, and reformation, none of which were discussed or relied upon by the Fourth DCA. Those defenses are also, in turn, discussed briefly below.

1. Florida Statutes § 689.225 Does Not Apply Retroactively to Resurrect the Void Right of First Refusal

Argued at trial as the defense of failure to state a cause of action, the Association contended that the common law rule against perpetuities was abolished by Florida's statutory rule against perpetuities, § 689.225(7), Fla. Stat. (2000). (Assoc. IB at 23) That argument fails for multiple reasons.

First, § 689.225(7) did not become effective until December 31, 2000. The Agreement in this case was executed in February 1977, before any codification of the rule against perpetuities in Florida and long before the effective date of

§ 689.225(7). As explained above, because the Agreement violated the common law rule against perpetuities applicable in 1977, it was void *ab initio*. The impact of the common law rule against perpetuities is well explained in Black's Law Dictionary as follows:

> **Rule against perpetuities**. (*sometimes cap*.) *Property*. The common-law rule prohibiting a grant of an estate unless the interest must vest, if at all, no later than 21 years (plus a period of gestation to cover a posthumous birth) after the death of some person alive when the interest was created. The purpose of the rule was to limit the time that title to property could be suspended out of commerce because there was no owner who had title to the property and who could sell it or exercise other aspects of ownership. If the terms of the contract or gift exceeded the time limits of the rule, the gift or transaction was *void*.

Black's Law Dictionary, 8th ed. (2004), 1357-1358 (emphasis added to "void"). As such, the Agreement was a nullity and of no legal effect in 1977, when it was executed, and continued to be void each year thereafter. If the Association's argument was correct, it would mean that the Agreement, which was null and void for twenty-three years, somehow sprang to life with the statutory amendment on December 31, 2000, and, for the first time, gave the Association a valid interest in Parcel 16. The law does not support such an argument.

Florida courts have ruled consistently on this issue in other similar contexts. For example, in Damiano v. Weinstein, where a master's deed was void *ab initio* because the deed resulted from a foreclosure action in which the fee owner was not

named as a party, the later-enacted Marketable Record Title Act could not be applied retroactively to cure the defect. Damiano v. Weinstein, 355 So. 2d 819, 820 (Fla. 3d DCA 1978). Similarly, in a line of cases involving homestead property, the courts have ruled that where an attempted transfer of homestead property was void *ab initio* for the failure of both spouses to join in the conveyance, the attempted transaction remains void *ab initio* between the parties, and subsequent events cannot resurrect or cure the attempted conveyance. See, e.g., Gotshall v. Taylor, 196 So. 2d 479, 481 (Fla. 4th DCA 1967) (where requirements of the Constitution or statutes are not complied with in alienating homestead real estate, the attempt is a nullity and is void *ab initio* between the parties, and subsequent events "will not breathe life into it."); Robbins v. Robbins, 360 So. 2d 10, 11 (Fla. 2d DCA 1978) (Fla. Stat. § 689.11(2), purporting to validate prior deeds made between husband and wife which would otherwise have been effective except for the fact that the parties were married, cannot cure deed that was void *ab initio* for failure to comply with constitutional requirements for conveying homestead).

The Association's argument to the Fourth DCA confused this issue by asserting the general principle that courts decide cases based upon the law that is in existence at the time of the decision. (Assoc. IB at 22) The Association went on to argue that the court cannot apply the common law rule against perpetuities *now*

because it was abolished in 2000. (Id.) What that argument misapprehends is that the common law rule against perpetuities is not being applied now; it applied in 1977 when the Agreement was executed, such that no interest was created. The right of first refusal Agreement was void *ab initio*, as if the document did not exist, and no future interest could ever spring from it. The impact of the trial court's decision in this case was simply to acknowledge that the common law applied in 1977 and that no interest was ever created. In other words, the Association's argument fails because the instrument was *void* in 1977; the instrument is not being voided today. The Association's argument and, unfortunately, the Fourth DCA's ruling fail to acknowledge what "void" means.

In making its argument, the Association essentially treats the Agreement as an instrument that was "voidable" rather than "void." Florida case law makes an important distinction between the terms "void" (or the identical "void ab initio") and the term "voidable" in their application to written instruments and contracts. See Pitts v. Pastore, 561 So. 2d 297 (Fla. 2d DCA 1990). "[*V]oid* in the strict sense means that an instrument or transaction is nugatory and ineffectual so that nothing can cure it; *voidable* exists when an imperfection or defect can be cured by the act or confirmation of him who could take advantage of it." Id. at 300. Thus, a *void* instrument, or one that was *void ab initio*, is one that is "of no effect whatsoever,. . . a mere nullity, and incapable of confirmation or ratification." Id.

In Reed v. Fain, the Supreme Court ruled that the statute of limitations could not bar an action to cancel a deed that was void because the statute of limitations "cannot make valid that which is void." Reed v. Fain, 145 So. 2d 858, 866 (Fla. 1962). The Court further stated that "[i]t is well established that the recordation of a void deed does not constitute constructive notice of anything." Id. at 870. In this case, as in Reed, the Agreement was void *ab initio* because it violated the law *at the time it was executed*. Thus, the Agreement was a nullity and conveyed no interest in Parcel 16 to the Association.

The Association's argument also implies that § 689.225(7), stating that "no common law rules against perpetuities. . . *shall exist. . .*," applies retroactively to grant property rights where they never before existed. See § 689.225(7), Fla. Stat. (emphasis added). As the trial court correctly ruled, such a result would be contrary to the well-settled law of Florida that statutory provisions affecting substantive rights cannot be applied retroactively. (App. B, p. 5) See Fallschase, 696 So. 2d at 833; see also, Melkonian v. Broward County Board of County Commissioners, 844 So. 2d 785, 789 f.n. 2 (Fla. 4th DCA 2003); Basel v. McFarland & Sons, Inc., 815 So. 2d 687, 692 (Fla. 5th DCA 2002). Under Basel, to determine whether a statutory provision should be applied retroactively, the court must ask two questions. Id. The first question is whether there is explicit or clear evidence of legislative intent to apply the statute retroactively. Id. The

second question is, if so, whether retroactive application is constitutionally permissible. Id. Absent such clear legislative intent, a statute is presumed to apply *only prospectively*. Id. Moreover, even if the legislature *expressly states* that a statute is to apply retroactively, courts may not constitutionally apply the statute retroactively if it affects substantive rights. Id.

It is well-settled that "property rights are among the basic substantive rights expressly protected by the Florida Constitution." Tejada v. In re Forfeiture of $406,626.11, 820 So. 2d 385, 393 (Fla. 3d DCA 2002) (holding that "statutes which create new rights or take away existing rights are substantive in nature and may not be applied retroactively.")

Section 689.225(7), Fla. Stat. (2000), provides in relevant part:

> This section is 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.

Section 689.225(6)(a), Fla. Stat. (2000), provides in relevant part:

> Application –
>
> (a) Except as extended by paragraph (c), this section applies to a nonvested property interest or a power of appointment that is created on or after October 1, 1988.

Applying the two-part inquiry described in Basel to determine whether § 689.225(7) abolishes the common law rule against perpetuities retroactively, the

answer to the first question is no. In fact, the statute tells us that it applies to interests created "on or after October 1, 1988" (with the exception of the discretionary reformation provision, discussed later in this brief). § 689.225(6)(a), Fla. Stat. Moreover, there is no evidence whatsoever that the legislature intended § 689.225(7) to apply retroactively. The statute is, if anything, forward-looking, stating only, "no common-law rule. . . *shall* exist. . ." Thus, the presumption is that the provision applies only prospectively.

Second, even if § 689.225(7) explicitly stated that it was to be applied retroactively, it would not be constitutionally permissible to do so because the provision affects property rights. In this case, the Property Owners' freedom to dispose of Parcel 16 to whomever the Property Owners choose, without the impediment of the right of first refusal, is a basic substantive right protected by the Florida Constitution. See Fallschase, 696 So. 2d at 836-37. Thus, § 689.225(7) cannot be applied retroactively to the Agreement in this case.

Another rule of statutory interpretation also counsels against retroactive application of the statute at issue. Statutes in derogation of the common law, like § 689.225(7), must be construed strictly such that they do not displace the common law any more than is plainly necessary. See Carlile v. Game and Fresh Water Fish Commission, 354 So. 2d 362, 364 (Fla. 1977). Such a statute should not be

interpreted to make any other alteration to the common law than what is required by its clear and unequivocal terms. (Id.)

Finally, the Fallschase decision makes it clear that the common law rule against perpetuities was in effect and is applicable to agreements, like the one in this case, that were executed before any codification of the rule. 696 So. 2d at 834 (applying the common law rule against perpetuities to a right of first refusal created in 1975). The logic of the Fallschase case also rebuts the Association's position argued below and again in their jurisdictional brief to this Court that Fallschase is distinguishable because it was decided before the statute was amended to formally abolish the common law rule against perpetuities. The Fallschase court recognized that the statute may not properly be applied retroactively and that the instrument was void from the time it was created. (696 So. 2d at 836-837) Therefore, the 2000 amendment to the statute has no impact on the basis for the decision in Fallschase. The rule against perpetuities was first codified in 1979. Id. The Agreement in the present case was executed in 1977. The trial court properly determined that the rule of law in existence at the time of the Agreement governed and voided the Agreement at the time it was made. The Fourth DCA erred in reversing that decision.

2. The Trial Court Properly Found That the Defenses of Laches, Estoppel, and Waiver Do Not Apply to a Void Instrument Like the Agreement

The trial court specifically addressed and disposed of the Association's defenses. (App. B, pp. 4-13) Among those defenses, which were not addressed by the Fourth DCA, were laches, estoppel, and waiver. None of those defenses are legally sufficient, nor do they add anything to the analysis here. If the common law rule against perpetuities applied in 1977 to void the right of first refusal and the statutory codification does not apply retroactively, none of these defenses can somehow create an interest where none existed.

The defense of laches is not applicable here. The fundamental reason is that no amount of delay can create an interest in real property where none existed. See Fallschase, supra (affirming trial court's decision that, as a matter of law, defenses such as laches, estoppel, waiver, and statute of limitations cannot apply because the contract at issue was void *ab initio*); Reed, supra, 145 So. 2d at 866-67. In Reed, the Florida Supreme Court held that the doctrine of laches, like the statute of limitations, does not apply to a void instrument. Id. In addition, the Fallschase court, under circumstances almost identical to ours, affirmed the trial court's holding that laches could not apply as a matter of law. 696 So. 2d at 837; (See T16: 244 for discussion of Fallschase trial court's ruling).

As the trial court found, the estoppel defense is also not applicable. An estoppel argument cannot turn an agreement that was void *ab initio* into a valid interest in real property. See Pitts, supra, 561 So. 2d at 300. In fact, in the Fallschase case, the appellate court affirmed the trial court's rejection of estoppel as a defense that could be applied in a case like the present one. See Fallschase, 696 So. 2d 833.

Similarly, the Association's waiver defense has no legal merit. A party cannot waive the legal nullity of an agreement to create an interest in real property. See Pitts, 561 So. 2d at 300.

The trial court also alternatively analyzed the elements of laches, estoppel and waiver and measured the evidence against those elements. The trial court properly ruled that even if such defenses could legally be raised here, they were not factually supported. (App. B, pp. 4-13) The Fourth DCA did not revisit that ruling.[2] (App. A)

3. The Trial Court Properly Determined that the Association is Not Entitled to Reformation of the Agreement

As both an affirmative defense and as part of its amended counterclaim, the Association sought statutory reformation of the Agreement, pursuant to Florida Statutes § 689.225(6)(c). (R 12-2202-2238) Although § 689.225(6)(a) specifies

[2] The Property Owners addressed the elements and limited evidence with relation to the Association's arguments about laches, estoppel, and waiver at pages 17-24 of their Answer Brief to the Fourth DCA. (See Prop. Owners AB at 17-24)

that the statute only applies to interests created on or after October 1, 1988, subsection (6)(c) provides:

> If a nonvested property interest or a power of appointment was created before October 1, 1988, and is determined in a judicial proceeding commenced on or after October 1, 1988, to violate this state's rule against perpetuities as that rule existed before October 1, 1988, a court, upon the petition of an interested person, may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

§ 689.225(6)(c), Fla. Stat. (2000).

Initially, the above clause would seem to give the trial court discretion to reform a nonvested property interest created before October 1, 1988, when that court has concluded that the interest was in violation of the rule against perpetuities as it existed prior to October 1, 1988. However, in Fallschase, the only Florida case on point, the First District held that the provisions of § 689.225(6)(c) could not apply to reform a right of first refusal (created in 1975) which violated the common law rule against perpetuities because the right was void *ab initio,* and the statute could not be applied retroactively because it would impair the vested property right to dispose of the property to whomever the seller chose, without the

impediment of the right of first refusal.[3] 696 So. 2d at 837. Therefore, the provisions of the statute could not apply to reform a right of first refusal that violated the common law rule against perpetuities because the instrument was void *ab initio* and created no right at all.

Just as in the Fallschase case, the Agreement in this case was void *ab initio* because it violated the common law rule against perpetuities applicable in 1977. As a result, no right was ever created, and § 689.225(6)(c) cannot apply to reform the Agreement. Even if the trial court were to attempt to apply the reformation clause to the Agreement, the Agreement in this case could never be reformed in such a way as to effectuate the grantor's intent while coming within the limits of the common law rule against perpetuities applicable at the time the purported right of first refusal was created. The plain language of the Agreement establishes an intent to create a right of first refusal of *unlimited duration*. (App. C; P. Ex. 9) In fact, the Association, both in testimony and in its Brief to the Fourth DCA and filings, admits that intent. (T15:187/25-188/2; Assoc. IB at 4-5; R8-1477) An unlimited duration is precisely what the rule against perpetuities forbids. Thus, the

[3] In its analysis, the Fallschase court noted that, as to the reformation subsection, § 689.225(6)(c), the language *did* evince the intent of the Legislature to authorize the trial court to reform a nonvested property interest that violated the rule against perpetuities as it existed before 1988. See Fallschase at 836. The Court observed that it had previously refused to apply a statute retroactively if it "impairs vested rights, creates new obligations, or imposes new penalties." Id. Based upon that, the Fallschase court certified the question of retroactive application of the reformation subsection as a matter of great public importance. Id. at 837.

reformation the Association seeks would require the court to completely rewrite the Agreement, substituting its own intent for that of the parties to the Agreement. Florida law neither authorizes nor allows that result. See Sander v. Ball, 781 So. 2d 527, 530 (Fla. 5th DCA 2001) (holding that the trial court committed error when it attempted to reform a void agreement for an option to purchase with an unlimited duration, by supplying a fixed term after the fact, contrary to the true intent of the agreement).

Reformation is intended to "correct a defective or erroneous instrument so that it reflects *the true terms* of the agreement which the parties actually reached." Id. at 530 (emphasis added). "Reformation, at its essence, acts to correct an error not in the parties' agreement but in the writing which constitutes the embodiment of that agreement." Id. (quoting Smith v. Royal Automotive Group, Inc., 675 So. 2d 144 (Fla. 5th DCA 1996)). Thus, reformation "is generally appropriate only to cure a mistake of fact, not a mistake of law, as to the legal effect of the parties' agreement." Id.

The Association's suggested use of reformation in this case is legally improper. The Association is asking the court to reform an agreement which, by its true terms, violated the law when it was created. There was *no error* in the instrument embodying the Agreement. Where the parties' true intentions are reflected by the written document which violates the common law rule against

perpetuities, a court of equity will deny reformation. Sander at 530, quoting Wedel v. American Elec. Power Service Corp., 681 N.E.2d 1122 (Ind. App. 1997). The instrument accurately reflected the parties' agreement to create a right of first refusal of *unlimited duration*. The legal effect of that agreement was that the right of first refusal was void *ab initio*, and no interest in Parcel 16 was thereby created. The Association's after-the-fact suggestion of reforming the Agreement to tie the right of first refusal to the life of one of the individuals who was somehow involved in the transaction and who happens to still be alive is not supported in the law and, of course, would not reflect the intent of the parties. (See Assoc. IB at 35) A court cannot cure a void instrument where the instrument effectuates the parties' intent, and cannot rewrite this Agreement for the parties after the fact, supplying its own terms, to create an interest in property where none existed. Therefore, as the trial court found, the Association is not entitled to reformation of the Agreement as a matter of law.

III. ALTERNATIVELY, THE FOURTH DCA'S DECISION FAILED TO INSTRUCT ON REFORMATION

It is the Property Owners' contention, as set forth above, that Florida Statutes § 689.225 may not properly be applied to the Agreement, which was void *ab initio*. However, if this Court were to rule that the statute does apply retroactively, then it is the reformation provision in the statute that must be applied. As set forth above, the statutory language, on its face, gives discretion to a trial

court to, rather than invalidate a nonvested property interest, reform it in the manner that most closely approximates the transferor's intent. Section 689.225(6)(c), Fla. Stat. On its face, the provision applies to nonvested property interests that are created before October 1, 1988, and are determined in a judicial proceeding after October 1, 1988, to violate the rule against perpetuities that previously existed. Id. The Fourth DCA's ruling leaves unclear what additional proceedings the Court intended to take place in the trial court. As discussed above, the Fourth DCA's basis for decision appears to have been two-fold: the Court's view that the right of first refusal somehow created a property interest that was immediately "vested," and the Court's conclusion that the Florida statutory codification of the rule against perpetuities should be applied retroactively. (App. A, pp. 2-3, 6) If this Court affirms the Fourth DCA's basis for decision that Florida's later-enacted statutory rule against perpetuities applies retroactively, then a further hearing before the trial court would be necessary for the trial court to consider reforming the right of first refusal in accordance with Florida Statutes § 689.225(6)(c).

Although no known Florida case law directly addresses how an instrument that conveys a nonvested interest to a corporation may be reformed, some courts in other states have addressed this issue. The common rule is that when the transferee of a nonvested interest is a corporation (or otherwise has no human being as a

measuring life) and the interest may be reformed to conform to the rule against perpetuities, the determinative period (the period in which the contingency must occur to vest the interest) is deemed to be 21 years. See, e.g., United Virginia Bank/Citizens & Marine v. Union Oil Company of California, 197 S.E. 2d 174, 177 (Va. 1973) (where the holder of the interest is not a human being but a corporate entity, the parties have failed to contract with reference to a life in being; in that circumstance, a term of 21 years is used as the determinative period within which the interest must vest); Stuart Kingston, Inc. v. Robinson, 596 A. 2d 1378, 1383 (Del. 1991) (where holder of the interest is not a human being but is a corporation, the interest must vest or fail within 21 years); Washington State Grange v. Brandt, 148 P. 3d 1069, 1075 (Wash. 2006) (the general rule is that "an executory interest without a measuring life must be certain to vest or fail within 21 years of the grant or it violates the rule against perpetuities and must be stricken").

As discussed throughout this brief, the Agreement purported to create an interest that violated the rule against perpetuities at the time it was created and was therefore void *ab initio*. However, if this Court were to conclude that the statutory codification of the rule against perpetuities should be applied retroactively, then the reformation section of the statute is implicated. If the reformation section of the statute were applied to this interest, the rule should be applied consistently with the interpretation of other courts as set forth above, and the determinative period

should be deemed to have been 21 years from the creation of the interest, such that the interest has now expired.

CONCLUSION

The trial court properly ruled that the Agreement was void *ab initio* and that the Association's defenses were neither legally valid nor factually sufficient. The Fourth DCA erred in reversing the trial court's ruling. Therefore, for the foregoing reasons, this Court should quash the decision of the District Court below and reinstate the ruling of the trial court in all respects.

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, Florida 33401; **Paul Erickson, Esq**., Alley, Maass, Rogers & Lindsay, P.A., 340 Royal Poinciana Way, Ste. 321, Palm Beach, Florida 33480; **Nanette Gammon, Esq.**, 1555 Palm Beach Lakes Blvd, Suite 1100, West Palm Beach, Florida 33401; and **Mayra Colon, Esq.**, Douberly & Cicero, 1550 Sawgrass Corporate Parkway, Sunrise, Florida 33323, this _____ day of November, 2007.

GUNSTER, YOAKLEY & STEWART, P.A.
Attorneys for Appellees
Old Port Cove Holdings, Inc. and Old Port Cove Equities, Inc.
777 South Flagler Drive, Suite 500 East
West Palm Beach, FL 33401
Telephone (561) 650-0716/Fax (561) 655-5677

By:_____
JACK J. AIELLO
Florida Bar No.: 440566
NICOLE K. ATKINSON
Florida Bar No.: 167150

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.

By:_____
JACK J. AIELLO
Fla. Bar No. 440566