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## **Old Port Cove Holdings v. Old Port Condominium Association**

**SC07-1032**

>> ALL RISE.

O YE, O YE, O YE.

SUPREME COURT OF FLORIDA IS NOW  
IN SESSION.

ALL THOSE HAVING BUSINESS  
BEFORE THIS COURT, DRAW NIGH,  
GIVE ATTENTION, AND YE SHALL BE  
HEARD.

GOD SAVE THE UNITED STATES, THE  
GREAT STATE OF FLORIDA, AND  
THIS HONORABLE COURT.

>> LADIES AND GENTLEMEN, THE  
FLORIDA SUPREME COURT, PLEASE  
BE SEATED.

>> GOOD MORNING, FRIENDS, AND  
WELCOME TO THE FLORIDA SUPREME  
COURT AND THE ORAL ARGUMENT  
CALENDAR FOR THURSDAY,  
APRIL 10TH.

BEFORE WE BEGIN THIS MORNING,  
WE WOULD LIKE TO TAKE THE  
OPPORTUNITY ON BEHALF OF THE  
COURT TO WELCOME TO OUR SESSION  
TODAY THE FLORIDA ELECTRIC  
COOPERATIVES.

IT'S A GROUP OF I GUESS  
STUDENTS AND ADULTS AND RISING  
HIGH SCHOOL JUNIORS AND  
SENIORS.

WOULD YOU ALL STAND SO WE COULD  
RECOGNIZE THOSE OF YOU FROM,  
FROM THAT GROUP?

MY GOODNESS.

A ROOMFUL.

WELCOME TO TALLAHASSEE AND THE  
FLORIDA SUPREME COURT.

THANK YOU.

AND THOSE SPONSORS WHO'VE  
BROUGHT THEM HERE, PARENTS AND  
SPONSERS AND TEACHERS AND FOLKS  
THAT, THAT WORK WITH YOUNG  
PEOPLE.

THANK YOU VERY MUCH ON BEHALF  
OF THE COURT.

THE FIRST CASE ON OUR CALENDAR  
THIS MORNING IS OLD FORT COVE

HOLDERS V. OLD FORT COVE  
CONDOMINIUM ASSOCIATION.  
READY TO PROCEED?

>> MY NAME IS JACK AIELLO.  
MAY IT PLEASE THE COURT, I  
REPRESENT OLD PORT COVE  
HOLDINGS AND EQUITIES AGAINST  
OLD FORT COVE CONDOMINIUMS.  
>> JUST FROM THE OUTSET, THIS  
IS AN OLD COMMON LAW DOCTRINE  
THAT WE DEALT WITH IN LAW  
SCHOOL ABOUT HOW LONG PROPERTY  
CAN BE HELD WITH CERTAIN  
LIMITATIONS ON IT, AND IT  
APPEARS THE COURTS ACROSS THE  
NATION HAVE SPLIT ON IT.  
THERE MAY BE A MINORITY AND  
MAJORITY VIEW AND RECOGNIZING  
FLOW THAT DEFINITELY DEALT WITH  
THESE THINGS AS OPTIONS AND BE  
THAT AS IT MAY, I WOULD LIKE  
BOTH OF THE PARTIES TO ADDRESS  
FOR US TODAY WHAT IMPACT AND  
WHAT SOCIAL REASONING WOULD GO  
INTO THE ADOPTION OF EITHER  
VIEW?

WHAT IMPACT WOULD IT HAVE IF WE  
TAKE YOUR VIEW AND WHY?  
WHY SHOULD WE ACCEPT THAT  
PARTICULAR PARTY'S VIEW?  
AS PART OF FLORIDA LAW WITH THE  
STATUTES WE HAVE AND JUST  
THE UNDERLYING REASONING,  
PLEASE.

>> YES, YOUR HONOR.  
ADMITTEDLY, THE RULING THAT  
THIS COURT MAKES WOULD AFFECT  
OLDER INTERESTS.  
THIS IS A 1977 AGREEMENT THAT  
CREATED WHAT PURPORTED TO BE AN  
UNLIMITED DURATION.  
THERE IS A STATUTE NOW.  
IT WAS ENACTED INITIALLY IN  
1977 AND THEN REPEALED.  
THE STATUTE THAT SURVIVES TODAY  
WAS ENACTED REALLY IN 1988.  
THAT STATUTE ON ITS FACE  
APPLIES ONLY TO INTERESTS  
CREATED AFTER OCTOBER 1ST,  
1988, WHEN --

>> THERE'S ALSO AN AMENDMENT  
ENACTED IN 2000.

>> AN AMENDMENT.

>> THAT ABROGATED IN

PERPETUITIES.

>> WE MAINTAIN GOING FORWARD  
NOT RETROACTIVELY.

IN FACT, IF THE 2000 AMENDMENT  
ABROGATES THE RULE AGAINST  
PERPETUITIES GOING BACKWARD, IT  
WOULD WIPE OUT --

>> YOU KNOW, I THINK IT WOULD  
BE HELPFUL TO ME, SINCE WE  
DON'T GENERALLY HAVE A  
STIMULATING A SUBJECT AS A RULE  
AGAINST PERPETUITIES FOR YOU  
TO, TO START OFF FOR MY BENEFIT  
AND PERHAPS FOR THE BENEFIT OF  
OUR, THE GALLERY HERE AS TO  
WHAT IS THE RULE AGAINST  
PERPETUITIES FROM OUR POINT OF  
VIEW.

>> OKAY, I WAS HOPING THAT  
WOULD NEVER COME UP.

[LAUGHTER]

>> WASN'T THAT ON YOUR LAW  
SCHOOL EXAMINATION?

>> I THINK THEY DIDN'T PUT IT  
ON AN EXAM BECAUSE THEY HELD A  
LAWYER COULDN'T BE HELD GUILTY  
OF MALPRACTICE IF THEY DIDN'T  
UNDERSTAND, SO IT WASN'T FAIR.  
PERPETUITY NO INTEREST IS GOOD  
UNLESS IT MUST VEST IF AT ALL  
WITHIN 21 YEARS AFTER SOME  
SPECIFIC LIFE IN BEING AT THE  
CREATION OF THE INTERESTS, AND  
THAT MEANS THAT BASED ON THE  
LOGIC OF THE INTERESTS, THE  
LOGIC OF THE LANGUAGE  
CONFERRING THE INTEREST, IT  
MUST, IT HAS TO VEST WITHIN 21  
YEARS AFTER THE DEATH OF SOME  
SPECIFIED PERSON WHO IS ALIVE.

>> WHY DON'T YOU ONCE AGAIN SO  
WE GO REAL LIFE, THIS IS NOT A  
-- THIS IS A FIRST A RIGHT OF  
FIRST REFUSAL, AND WE WILL GET  
TO THAT BUT JUST GIVE, YOU  
KNOW, IT'S ALL COMMON LAW.  
IN WHAT LAW IS LAW OF  
PERPETUITY NOT A GOOD THING.

>> THE RULE AGAINST PERPETUITY  
IS DESIGNED TO PROTECT  
INTERESTS --

>> HOW WOULD IT GO?

LET'S JUST SAY IN 1800, AND WAS  
IS THE PERSON OWNS THE PERSON

OWNS A FARM.

WHAT DID THEY DO THAT WOULD  
HAVE VIOLATED --

>> VIOLATE THE RULE.

>> -- AGAINST PERPETUITY.

>> THEY MIGHT SET UP EITHER A  
COMMERCIAL INTEREST OR BEQUEST  
TO SOMEBODY THAT WOULD VEST IN  
THE GRANDCHILDREN'S CHILDREN OR  
SOMETHING LIKE THAT SO IT GOES  
PERHAPS HUNDREDS OF YEARS INTO  
THE FUTURE.

>> THEY PUT THESE THINGS IN  
TRUST FOREVER.

>> WELL, ISN'T THE MAIN PURPOSE  
HERE OF HAVING SUCH A RULE TO  
BE SURE WE DON'T HAVE SUCH  
RESTRICTIONS.

ON THE ALIENATION OF PROPERTY  
THAT WE DON'T HAVE A BUSY  
MARKETPLACE OUT THERE AND  
PROPERTY'S NOT FREE TO BE  
CONVEYED.

WOULD YOU AGREE THAT'S AT LEAST  
ONE?

>> THAT IS A SIGNIFICANT --

>> TELL US, IF YOU CAN, IF THAT  
REALLY IS THE, THE PURPOSE  
HERE.

HOW THE EFFECT OF THE DISTRICT  
COURT'S RULING AT LEAST IN THIS  
CASE, WHICH VALIDATES THE RIGHT  
OF FIRST REFUSAL.

IS THAT RIGHT?

>> THE OPTION OR WHATEVER YOU  
WANT TO DO IT -- DOLL.

>> THE FOURTH DCA HOW DOES THAT  
VIOLATE THE SPIRIT OF THIS  
REASON FOR HAVING THAT RULE?

THAT IS THAT THE -- THERE'S NO  
RESTRICTION ON THE PROPERTY  
OWNER SELLING THE PROPERTY,  
THAT THE PROPERTY OWNER HAS.

THE ONLY THING IS THIS  
CONTRACTUAL AGREEMENT THAT THE  
ASSOCIATION'S GOING TO GET  
FIRST SHOT.

IS THAT RIGHT?

>> CORRECT.

>> SO WHERE IS THERE ANY  
RESTRICTION ON THE ALIENATION  
OF THE PROPERTY IN THE FACTUAL  
CIRCUMSTANCES THAT, THAT WE'RE  
FACING HERE?

>> STARTING WITH THE PUBLIC POLICY THAT YOUR HONOR HAS STATED.

THAT IS ESSENTIALLY CORRECT AND A REASON FOR THAT PUBLIC POLICY IS TO PREVENT PROPERTY FROM BEING UNABLE TO BE FULLY UTILIZED FOR THE BENEFIT OF SOCIETY AT LARGE AND FOR THE CURRENT OWN SORE HOW THE FOURTH'S DCA'S INTEREST, IMPACTS UPON THAT THIS IS A VERY GOOD CASE TO DEMONSTRATE THAT AND THE REASON FOR THAT IS THE PROPERTY AT ISSUE HERE IS PARCEL 16.

IT SERVES AS THE ENTIRETY OF THE PARKING AREA FOR A PROPERTY RIGHT NEXT TO IT OR NEARBY, WHICH IS CALLED THE NORTH MARINA.

>> WAS THAT THERE AT THE TIME, THE AGREEMENT WAS ENTERED INTO TO?

>> I BELIEVE THE MARINA WAS FORMED AT ABOUT THAT TIME.

>> SO AT THE TIME THEY ENTERED INTO THE AGREEMENT THEY KNEW THAT'S WHAT THIS PROPERTY WAS BEING USED FOR YET THEY GAVE THE CONDOMINIUMS THIS RIGHT OF FIRST REFUSAL.

>> YES.  
THAT'S CORRECT.  
YEAH.

AND THAT'S, THAT'S AN INTERESTING PART BECAUSE I THINK IN ESSENCE THE RULE AGAINST PERPETUITIES IS DESIGNED TO SAVE PEOPLE FROM THEMSELVES.

>> HAVEN'T WE IN AGUILAR V. PHILLIPS REALLY THIS KIND OF PROVISION THE RIGHT OF FIRST REFUSAL OR OPTION TO PURCHASE IS ANALYZED NOT UNDER REALLY A RULE OF PERPETUITIES ANALYSIS BUT ON RESTRAIN OF ALIENATION AND WE DETERMINE WHETHER THAT'S UNREASONABLE OR NOT AND IF IT'S ALREADY ON A FIXED PRICE, WE HELD IT'S AN UNREASONABLE RESTRAINT BUT WHERE IT'S NOT AT A FIXED PRICE, WHETHER THAT'S

REASONABLE OR NOT, THAT'S STILL THE ANALYSIS THAT IS USED UNDER FLORIDA LAW.

NOT WHETHER IT VIOLATES THE RULE AGAINST PERPETUITIES.

>> RIGHT IN THE -- DECISION, WHAT THIS COURT DECIDED IN 1980 WAS THE INTEREST IN ISSUE THERE WAS BETTER CLASSIFIED, CLASSIFIED IS YOUR WORD THAT WAS USED AS AN UNLAWFUL RESTRAINT ON ALIENATION AND THE REASON IS BECAUSE IT WAS AN OBVIOUS UNLAWFUL RESTRAINT. IT HAD A FIXED PRICE AND UNLIMITED DURATION, SO WHAT THIS COURT SAID IN 1980 WAS WHILE THIS INTEREST MIGHT BE SUBJECT TO THE RULE AGAINST PERPETUITIES, WE THINK IT'S BETTER CLASSIFIED AS AN UNLAWFUL RESTRAINT.

>> RIGHT AND WHY -- WHY ISN'T THAT AN ANALYSIS SOUND IN THAT REALLY GETTING BACK TO THE WHOLE PURPOSE BEHIND THE RULE AGAINST PERPETUITIES IT'S REALLY DESIGNED TO PREVENT PERPETUAL SUCCESSION OF PROPERTY.

I DEED TO MY SON AND THEN TO HIS SON AND THEN TO HIS SON BACK THEN IN THE 1800S. WHEREAS RIGHTS OF FIRST REFUSAL AT LEAST IN THIS CONTEXT IS A COMMERCIAL CONTRACT.

IT REALLY HAS VERY LITTLE TO DO WITH THE PURPOSE BEHIND THE RULE AGAINST PERPETUITIES.

>> WELL, I THINK WE'VE CITED CASE LAW THAT THAT ACTUALLY BEGS TO DIFFER WITH THE POLICY PERSPECTIVE, YOUR HONOR. IT DOESN'T MATTER WHETHER IT'S COMMERCIAL OR PART OF A TESTAMENTARY DISPOSITION. THE POINT IS PROPERTY IS BEING -- ALIENABILITY AND IT'S MARKETABILITY ARE BEING REFUSED.

>> WE ARE TALKING NOW ABOUT TWO THINGS.

THE COMMON LAW, WHICH IS NONSTATUTORY WHICH IS WITHIN

THE PREROGATIVE OF THE COURT TO DETERMINE BASED ON HOW THIS WAS OR SHOULD'VE BEEN INTERPRETED AS COMMON LAW, AND POLICY, PUBLIC POLICY.

MY QUESTION WITHOUT REGARDS TO WHETHER THE STATUTE ITSELF SHOULD BE RETROACTIVE IS -- AND IT FOLLOWS UP WITH JUSTICE LEWIS'S FIRST QUESTION IS SINCE THE POLICY OF THIS STATE IS NOW TO SAY THAT RIGHTS OF -- THE RULE AGAINST PERPETUITIES IS NOT, IS NO LONGER TO BE ENFORCED.

AND SINCE THE POLICY IS THAT, THAT THEREFORE THE POLICY IS NO LONGER IN THIS STATE TO BE CONCERNED ABOUT WHETHER A RIGHT OF FIRST REFUSAL.

IT'S NOT ILLEGAL.

IT'S PERFECTLY PROPER.

WHY SHOULDN'T YOU THEN FOLLOW THE, ON THE COMMON LAW THE MINORITY VIEW OF SUCH COURTS, YOU KNOW, THE MASSACHUSETTS SUPREME COURT AND OTHERS THAT HAVE SAID THAT FIRST OF ALL, THIS IS REALLY MUCH MORE OF A CONTRACTUAL INTEREST, NOT A PROPERTY INTEREST, AND FOLLOW THAT MORE NARROW RULING BECAUSE OUR -- IT'S GOING TO BE IRRELEVANT GOING FORWARD AND THE PAST WE HAVE THE OPTION TO LOOK AT IT AND, AND INTERPRET IN THE MOST NARROW WAY CONSISTENT WITH OUR OWN PRECEDENT AS JUSTICE CANTERO'S POINTED OUT.

SO WHY ISN'T THAT THE BETTER THING FOR US TO DO RATHER THAN IF THE POLICY ISN'T GOING TO BE SOMETHING THAT'S GOING TO AFFECT INTERESTS IN THE FUTURE?

>> IT IS, YOUR HONOR, CORRECT.

IT'S GOING TO AFFECT THE PAST INTERESTS, THE OLDER INTERESTS, NO DOUBT ABOUT THAT.

>> DO WE EVEN KNOW HOW MANY INTERESTS THERE ARE OUT THERE?

I GUESS -- I MEAN, HOW MUCH OF AN IMPACT THIS -- WHAT WE SAY TODAY WILL HAVE ON PROPERTY

TRANSACTIONS?

>> BASED ON THE RESEARCH WE'VE DONE OF CASES, THIS HAPPENS PERIODICALLY BUT -- I DON'T THINK THERE'S ANY EASY WAY FOR TO KNOW --

>> WE DON'T SEE AN OUTCRY OF AMICUS BRIEFS SAYING DON'T DO THIS OR DO THIS OR ANYTHING OF THAT NATURE.

>> RIGHT.

>> I THINK THAT'S BECAUSE PEOPLE ARE AFRAID TO SHOW WHATANE AND DON'T KNOW ABOUT THE RULE AGAINST --

[LAUGHTER]

THAT'S JUST MY THEORY YOUR HONOR IN 1977 WHEN THIS AGREEMENT WAS ENTERED INTO THE LAW WAS CLEAR IN INTO, -- IN FLORIDA.

THE CASE WHICH WE CITE IN OUR BRIEF WAS DECIDED IN NOVEMBER 1945.

FOURTH DISTRICT.

JUDGE BILL OWEN WROTE THAT DECISION AND IN NO UNCERTAIN TERMS THE RULE AGAINST PERPETUITIES APPLIES TO RIGHTS OF FIRST REFUSAL THE PARTIES WHO ENTERED INTO THIS AGREEMENT SHOULD NOT HAVE BEEN TAKEN BY SURPRISE.

>> YOU MEAN THE LAWYER WHO ADVISED THE OWNERS AND IN AN ARM'S LENGTH TRANSACTION AS THIS WAS WERE KNOWINGLY ENTERING INTO AN ILLEGAL TRANSACTION?

>> I PRUSUME THEY DIDN'T KNOW BUT THEY SHOULD'VE -- THERE WAS NO SURPRISE.

IF SOMEONE'S LOOKING AT THE ISSUE OF FAIRNESS, FOR EXAMPLE, COULD THEY HAVE KNOWN WHAT THE LAW WAS?

IT WAS CLEAR WHAT THE LAW WAS, ESPECIALLY IN THE FOURTH DISTRICT.

THE U.S. SUPREME COURT HAS LONG SINCE DECIDED THE -- CAN'T SERVE AS A MEASURING LIFE IN BEING.

>> ISN'T THERE A STRONGER -- IF

YOU ARE GOING TO BRING UP THE ISSUE OF FAIRNESS, ISN'T THERE A STRONGER PRINCIPLE OF FAIRNESS THAT YOUR CLIENT OR PREDECESSOR ENTERED INTO THIS AGREEMENT?

>> RIGHT.

>> NO DOUBT.

ALL WE ARE TALKING ABOUT NOW IS A PARTY'S ATTEMPTING TO ENTER INTO A VOLUNTARY AGREEMENT. THAT NOBODY'S CLAIMING THAT THEY WERE COERCED AND/OR WHATEVER AND YOU KNOW, SO IN TERMS OF FAIRNESS, WE'RE JUST TALKING ABOUT ENFORCING A PROMISE THAT WAS MADE AND THIS CIRCLES BACK TO CASES THAT MADE DISTINCTIONS.

BETWEEN CONTRACT RIGHTS AND PROPERTY RIGHTS.

SO WHY SHOULDN'T WE TREAT THIS AS SIMPLY A CONTRACT RIGHT?

>> BECAUSE IT CONFERS AN EQUITABLE INTEREST IN REAL PROPERTY.

WE'VE CITED A COUPLE OF REALLY GOOD CASE ON THAT.

THE FURAREO CASE AND THE STEWART KINGSTON CASE.

>> I AM STILL HAVING A PROBLEM WITH YOU STARTED TO ANSWER MY QUESTION.

OKAY?

AND THEN WE GOT OTHER QUESTIONS AND SO.

>> RIGHT.

>> HOW, HOW DOES THIS AGREEMENT VIOLATE UNDERLYING RATIONALE OR REASONS FOR HAVING THE RULE AGAINST PERPETUITIES?

DOESN'T KEEP PROPERTY IN LIMBO INDEFINITELY IN THE FUTURE OF FOREVER, DOES IT?

IT, YOU'RE --, THE, THE OWNER OF THE PROPERTY IS FREE TO CONVEY THE PROPERTY.

ALL THAT HAS TO HAPPEN IS THE APPELLEE HERE GETS A SHOT AT IT, AT WHATEVER THE PRICE AND TERMS ARE.

SO HOW DOES THIS VIOLATE ANY UNDERLYING REASON FOR HAVING THAT RULE?

>> OKAY.

IT VIOLATES THE RULE BECAUSE IT  
MAKES IS MORE DIFFICULT TO  
MARKET OR TO TRANSFER BOTH  
PROPERTIES.

THE NORTH MARINA AND THE  
MARKING -- PARKING LOT.

IF THE INTEREST IN THE IN -- IN  
HAVING A RULE AGAINST  
PURPETUITIES IS TO PROTECT  
PROPERTY FROM OWNERS SO TO  
SPEAK.

>> I MEAN THOUSANDS OF PARCELS  
OF PROPERTY ARE SOLD EVERY DAY  
WHERE SOMEBODY HAS A RIGHT OR  
FIRST -- RIGHT OF FIRST  
REFUSAL.

I AM HAVING DIFFICULT -- THE  
CONCEPT THAT MAKES IT DIFFICULT  
TO SELL PROPERTY.

WOULDN'T YOU AGREE THAT  
THOUSANDS OF PARCELS OF  
PROPERTY ARE SOLD EVERY DAY?  
WHERE THERE'S A PARTY THERE  
THAT HAS A RIGHT OF FIRST  
REFUSE.

>> I DON'T KNOW NUMBERS BUT  
CERTAINLY PROPERTIES ARE SOLD  
EVERY DAY WHERE THERE'S A RIGHT  
OF FIRST REFUSE.

>> AND IT'S NOT REALLY AN  
OBSTACLE TO THE MARKETING OF  
THE PROPERTY.

>> IT THERE'S A RIGHT OF FIRST  
REFUSAL A THIRD PARTY PURCHASER  
HAS TO CONSIDER THAT AND KNOW  
THAT FOR EXAMPLE IF THEY DO  
SPEND A LOT OF TIME AND MONEY  
DOING DUE DILIGENCE TO  
DETERMINE WHAT THE ECONOMIC  
PROSPECTS ARE FOR THIS PROPERTY  
AND WHAT IT'S DONE IN THE PAST  
AND WHAT THE CAPITAL NEEDS ARE  
THEY MAY MAKE A BID AND IF IT'S  
ACCEPTABLE TO THE OWNER THEY  
MAY LOSE SIMPLY BECAUSE THE  
HOLDING OF THE INTEREST HAS  
EXHAUSTED ITS RIGHT.

SO IF THE THIRD PARTY PURCHASER  
HAS A COUPLE OF PROSPECTS OUT  
THERE WHY WASTE TIME AND MONEY  
IN THIS?

>> SHOULDN'T THE ANALYSIS THEN  
BE WHETHER IT'S AN UNREASONABLE

RESTRAINT ON ALIENATION?

YOU MAY HAVE A VERY GOOD POINT ON ALL THOSE ISSUES BUT THAT SEEMS TO ME POINTS MADE AS TO WHETHER IT'S AN UNREASONABLE RESTRAINT ON ALIENATION.

>> THE CASE IS TALKING ABOUT THE RULE AGAINST PERPETUITIES. DON'T FOCUS NECESSARILY ON ALIENATION BECAUSE THE RULE WAS DESIGNED TO BE SIMPLE ENOUGH TO BE APPLIED.

I KNOW THAT SOUNDS FUNNY.

>> I THINK BECAUSE THE RULE WASN'T DESIGNED FOR THESE KINDS OF COMMERCIAL AGREEMENTS.

>> WELL, I -- THE RULE, ACCORDING TO THE CASE LAW THAT I THINK HAS A VERY GOOD DISCUSSION OF IT, STEWART KINGSTON AND THE FURARO CASE, THE RULE WAS DESIGNED TO, TO RESTRICT OR TO RESTRICT INTERESTS REMOTELY REGARDLESS OF WHERE THEY CAME FROM. REGARDLESS OF THE -- THE ONLY DIFFERENCE BETWEEN A COMMERCIAL TRANSACTION AND A TESTAMENTARY THE COMMERCIAL ONE THEORETICALLY HAS CONSIDERATION FOR IT.

>> I KNOW YOUR INTO YOUR REBUTTAL BUT I WANT TO GIVE YOU AN OPPORTUNITY TO ADDRESS A THRESHOLD CONCERN THAT I HAVE, AND THAT IS THE WHOLE ISSUE OF WHETHER WE SHOULD TAKE THE CASE.

I UNDERSTAND THAT THE FOURTH DISTRICT CERTIFY ADCONFLICT, BUT IT CERTIFY ADCONFLICT ON THE ISSUE OF THE RETROACTIVITY OF THE 2000 AMENDMENT THAT SAID THERE IS NO RULE AGAINST PERPETUITIES IN THE STATE OF FLORIDA.

THE FALLS CHASE CASE WITH WHICH IT CERTIFIED CONFLICT WAS CITED IN -- DECIDED IN 1997 THREE YEARS BEFORE THAT AMENDMENT WAS ENACTED SO HOW COULD?

>> THE LANGUAGE OF FALLS CHASE MAKES CLEAR NO PART OF THE STATUTE CAN BE APPLIED

RETROACTIVELY BECAUSE IT AFFECTS SUBSTANTIVE RIGHTS SO ALTHOUGH THE 2000 AMENDMENT HADN'T COME ALONG THE FALLS CHASE SAID IT CAN'T BE APPLIED RETROACTIVELY IT WAS A 1975 ACTION IN THAT CASE SO THERE IS A DIRECT AND EXPRESS CONFLICT IN THISICATES CASE.

I KNOW I HAVE FOUR MINUTES LEFT IF I CAN RESERVE THOSE.

>> CERTAINLY.

>> THANK YOU VERY MUCH.

>> CERTAINLY.

>> GOOD MORNING.

MAY IT PLEASE THE COURTMENT MY NAME IS DANIEL ROSEN BALM I AM HERE WITH MY ASSOCIATE ON BEHALF OF THE APPELLEE AND WITH THE COURT'S PERMISSION I WOULD LIKE TO ADDRESS AN UNDERLYING MISCONCEPTION WITH WHAT HAS BEEN TERMED THE MAJORITY VIEW ABOUT WHETHER A CONTRACT INTEREST OR A REAL PROPERTY INTEREST IS AT ISSUE BETWEEN THE, BEFORE THE COURT.

BECAUSE THIS COURT IF THE CASE IS ACCEPTED JURISDICTIONALLY HAS TO COME DOWN ON ONE SIDE OR THE OTHER WITH RESPECT TO THAT QUESTION, AND I DON'T BELIEVE AFTER HEARING THIS ANALYSIS YOU WILL HAVE TO REACH THE ISSUE OF WHETHER THE STATUTE IS RETROACTIVE OR NOT, ALTHOUGH I BELIEVE THAT ISSUE IS RESOLVED IN FAVORABLY RETROACTIVITY.

ALSO IN DOING THIS I WOULD LIKE TO ANSWER JUSTICE LEWIS'S QUESTION WHEN I GIVE YOU THIS ANALYSIS.

AS INITIAL MATTER, A PURE RIGHT OF FIRST REFUSAL SUCH AS WE HAVE IN THIS CASE FOSTERS ECONOMIC DEVELOPMENT. THE REASON FOR THAT IS BECAUSE IT GIVES YOU TWO BUYERS INSTEAD OF ONE AND IF YOU ARE A SELLINGER OF PROPERTY YOU CAN HAVE A CONTRACT WITH SOMEONE IN MANY THINGS CAN GO WRONG AND THE SALE CAN FALL THROUGH. SO BUYING HAVE -- SO BY HAVING

A BACKUP BUYER --

>> THIS WOULDN'T BE A BACKUP BUYER.

IT WOULD BE A FRONTLINE BUYER.

>> WELL THE REAL ESTATE CONTRACT WITH THE PURCHASER THAT, THAT, THAT IS.

>> CAN YOU EXPLAIN IN PRACTICE HOW IT WORKED?

DOES THE OWNER HAVE TO TELL THE, THE POSSESSOR OF THE RIGHT OF FIRST REFUSAL WE INTEND TO SELL THIS PROPERTY AT X PRICE BEFORE WE PUT IT ON THE MARKET, WILL YOU BUY IT AT THIS PRICE?

OR DID THEY PUT IT ON THE MARKET AND TELL THEM FIRST -- HOW DOES THAT WORK?

>> IT CAN WORK IN EITHER WAY.

THE ONLY REQUIREMENT HERE IS THAT THERE IS A CONTRACT RIGHT THAT MY CLIENT HAS TO BE NOTIFIED ABOUT -- WITHIN 30 DAYS OF A PROPOSED SALE. WHETHER THAT SAIL IS IN THE CONTRACT FORM OR DISCUSSION FORM BUT IN THE TERMS OF THAT SALE, AND, AND MY CLIENT WOULD THEN HAVE THE ABILITY TO DETERMINE WHETHER THEY WOULD ACCEPT THOSE TERMS.

AND THAT'S WHY I SAY WHAT YOU REALLY GETTING HERE IS, IS THE BENEFIT IF WE WANT TO GO BACK TO THE RULE AGAINST PERPETUITIES WHICH I WOULD ARGUE THAT HAS VERY LIMITED VALUE TODAY.

IN FACT OUR LEGISLATURE MADE A POLICY DECISION THAT IT HAS VERY LIMITED VALUE AND NO VAL SUE WITH RESPECT TO COMMERCIAL TRANSACTIONS BUT THE BIG MISCONCEPTION I THINK THAT'S GOING ON HERE IS THE STATES THAT HAVE TAKEN THE SO-CALLED MAJORITY VIEW AND HAVE SAID ITS A REAL PROPERTY INTEREST HAVE DONE SO MISTAKENLY, AND THAT'S BECAUSE THEY BASE THEIR ANALYSIS ON THE EXISTENCE OF THE REMEDY OF SPECIFIC

PERFORMANCE.

NOW CONTRACT LAW GIVES SPECIFIC PERFORMANCE IN MANY INSTANCES.

FOR EXAMPLE, AS A REMEDY TO SOMEONE WHO BREACHES A NONCOMPETE AGREEMENT. YOU CAN GET SPECIFIC PERFORMANCE.

AS A REMEDY TO SOMEONE WHO LIVES IN AN ASSOCIATION AND DOESN'T MAINTAIN THEIR HOME YOU CAN GET SPECIFIC PERFORMANCE SO THE MISTAKE IN THOSE LINES OF CASES COMES FROM THE FACT THAT THEY ARE TAKING THE REMEDY OF SPECIFIC PERFORMANCE AND MISTAKING THAT WITH REMOTE VESTING.

>> CAN I JUST ASK A QUESTION ON THE FACTS OF THIS CASE? AND IT PROBABLY BECAUSE IT'S AN ISSUE OF WHETHER IT'S RESTRAINT ON ALIENATION ISN'T AT ISSUE AND IF WE DECIDE THAT A RIGHT OF FIRST REFUSAL IS A CONTRACT RIGHT THAT VESTED AT THE TIME OF THE CONTRACT, HELP, THE PROPERTY INTEREST OR THE, WHETHER THE RULE APPLIES IS, IS ANALYSIS DOESN'T NEED TO BE MADE BUT I AM INTERESTED JUST IN THIS CASE BECAUSE MR. ^AIELLO REFERRED TO.

APPARENTLY THERE MAY HAVE BEEN A BAD DEAL MADE AT THE TIME BECAUSE THEY -- IF THERE WAS A MARINA THERE AND A PARKING LOT, SOMEBODY WHO'S GOING TO -- I'M ASSUMING IS GOING TO PURCHASE THE MARINA IS GOING TO ALSO WANT TO HAVE THE PACKAGE OF A PARKING LOT BECAUSE A MARINA AT A PARKING LOT DOESN'T DO -- YOU KNOW, ISN'T VERY GOOD SO WHAT THEY WOULD HAVE IS A PACKAGE OF SAYING HERE, SOMEONE'S WILLING TO BUY THE WHOLE PROPERTY THAT IS THE MARINA AND THE PARKING LOT FOR THIS AMOUNT OF MONEY. NOW ALL THE SUDDEN THEY ACTUALLY HAVE TO BACK OUT AND SAY, ASK THE CONDOMINIUM ASSOCIATION WOULD YOU WANT TO

BUY THE PARKING LOT AND THERE'S NO SEPARATE PRICE SO ISN'T -- IN TERMS OF THIS CASE, ISN'T THAT THE REAL UNDERLYING PROBLEM IS THAT SOMEBODY SHOULD'VE EVEN GIVEN THE ASSOCIATION THE RIGHT OF FIRST REFUSAL FOR BOTH PARCELS SORE THERE WOULD BE A PACKAGE OF THE MARINA AND THE PARKING LOT AND JUST SO WE KNOW REAL WORLD STUFF, BECAUSE OTHERWISE WE ARE TALKING ABOUT WHO'S GOING TO BUY A PARKING LOT, SEPARATE FROM THE MARINA.

IS THAT UNDERLYING THE, WHAT'S THE SUBTEXT HERE.

>> THE RECORD REFLECTS THAT THE PARKING LOT IS A GRASSED AREA WHICH HAS CONCRETE ON IT, AND IS BETWEEN INTERCOASTAL WATERWAY AND THE CONDOMINIUM BUILDING AT ISSUE SO THE CONCERN WAS THAT AS THE MARINA EXPANDS, IF IT DOES, THAT A PARKING GARAGE WOULD BE BUILT THERE AND THE PARKING GARAGE WOULD HAVE A SUBSTANTIAL IMPACT ON NOT ONLY THE ABILITY AND THE VALUE OF THE CONDOMINIUM UNITS TO SEE THE WATER AND TO HAVE ENHANCED PROPERTY VALUE BUT MORE IMPORTANTLY -- IMPORTANTLY, THE EXISTENCE OF A PARKING GARAGE WOULD INCREASE THE TRAFFIC FLOW AND THE UTILITY OF THE AREA AND THEREBY CAUSE MUCH MORE COMMERCIAL TRAFFIC IN A RESIDENTIAL AREA.

>> I'M NOT ASKISH --

>> RESPONDING TO HER QUESTION.

THAT'S THE IMPACT ON YOUR PROPERTY AND SHE'S ASKING FROM THE IMPACT ON HOW IT IMPACTS MARKETABILITY.

>> RIGHT.

>> SO THAT, THAT COULD YOU RESPOND.

>> YES, I SURE WILL.

AS TO MARKETABILITY, THE MARINA GAVE THE RIGHT OF FIRST REFUSAL ON THAT PARKING LOT.

AT THE SAME TIME, THE MARINA  
WAS --

>> I AM NOT TALKING ABOUT  
WHETHER IT IS FAIR OR NOT BUT  
WE ARE TALKING IN ANSWER TO  
JUSTICE ANSTEAD'S QUESTION.

THIS IS A GOOD DEAL.

I HAVE A HOUSE.

SOMEBODY IS GIVING ME TWO  
BUYERS.

WHAT I JUST -- IT OCCURRED TO  
ME IN THE CONTEXT OF THIS CASE  
IT REALLY DOESN'T GIVE YOU TWO  
BUYERS BECAUSE WHO'S GOING TO  
WANT TO BUY A PARKING LOT  
WITHOUT BUYING THE MARINE --  
MARINA -- IT'S GOING TO DEPRESS  
THE VALUE AND AGAIN THAT MAY BE  
OR CONSIDERATION AND MAYBE IT'S  
NOT IN THE RECORD BUT AS A  
PRACTICAL MATTER, ISN'T THAT  
THE REASON THAT THE, THE  
SUCCESSORS TO THE OLD PORT COVE  
DEVELOPER IS POS ABOUT THIS  
DEAL?

>> WELL, JUSTICE PARIENTE, THE  
REASON FOR THAT --

>> AND PO'D IS NOT A TERM OF  
LEGAL ORIGIN.

>> UWHAT THEY ARE DOING IS  
BUNDLING PARCELS.

IN OTHER WORDS, WE CAN ALWAYS  
SAY THE MARINA CAN ONLY BE SOLD  
WITH THE NORTH MARINA AND THEN  
HAVE THE SAME ARGUMENT BEING  
MADE HERE.

THERE'S A CASE RIGHT ON POINT  
ONE OF THE OUT OF STATE  
JURISDICTIONAL CASES HAS THAT  
SPECIFIC ARGUMENT, AND THEY  
SAID YOU CAN'T, YOU CAN'T  
AGGREGATE PROPERTY.

IN ORDER TO MAKE THE ARGUMENT  
THAT IS SOMEHOW THE RULE  
AGAINST PERPETUITY SHOULD BE  
IMPLEMENTED WITH A PURE RIGHT  
OF FIRST REFUSAL BECAUSE THAT'S  
NOT WHAT THE RIGHT OF FIRST  
REFUSAL WAS GIVEN ON.

IT'S THE PARCEL SO THE MARINA  
COULD SELL THE PROPERTY.

THEY COULD ALLOCATE A  
REASONABLE PRICE TO THE, THE  
MARINA AND ALLOCATE FAIR PRICE

TO OTHER PARCELS.

AND WITH RESPECT TO SELLING  
THAT PARCEL, THEY WOULD EITHER  
HAVE A RIGHT OF FIRST REFUSAL  
OR WE WOULD BUY --

>> I THINK AS I UNDERSTAND --

>> I'M SORRY.

I JUST WANT TO UNDERSTAND -- IF  
THE CONDOMINIUM THEN DECIDED TO  
ELIMINATE THE PARKING BECAUSE  
THEY WANTED TO MAKE A  
PLAYGROUND OR WHATEVER IT --

OR, YOU KNOW, SOMETHING.

THEN SO THERE'S A RISK AGAIN,  
AND I DON'T KNOW BECAUSE NO ONE  
MADE THE ARGUMENT.

ALTERNATIVELY THIS WAS AN  
UNREASONABLE RESTRAIN ON  
ALIENITATION OR IT WASN'T A  
FAIR CONTRACT OR THE CONTRACT  
WAS ILLEGAL BUT I APPRECIATE  
YOU ARE GOING TO -- I JUST --  
BUT THAT'S THE REALITY IS IT  
CERTAINLY HAS, CAN HAVE ADVERSE  
EFFECTS OR IN THIS CASE FOR THE  
OWNER.

>> WELL, THERE ARE -- THERE'S  
ALSO A NORTH MARINEA THAT THE  
OWNER OWNS AND THERE'S NOTHING  
TO STOP THEM FROM HAVING  
OFF-SITE PARKING WITH A VALET  
OR HAVING PARKING ON THE  
NORTH MARINA PARKING UP THERE.

>> WHAT CONSIDERATION SHOULD WE  
GIVE THAT IF THE TURNS OUT FOR  
ONE PARTY OR THE OTHER IT TURNS  
OUT TO BE A VERY BAD DEAL IS  
THAT A PROPER FACTOR?

>> YOU -- JUSTICE ANSTEAD, I  
DON'T BELIEVE IT IS BUT HOWEVER  
COURTS DON'T INDULGE IN  
DETERMINING WHETHER ONE PARTY  
OR THE OTHER PARTY MADE A GOOD  
DEAL.

IT'S NOT HISTORICALLY THE ROLE  
OF COURTS.

COURTS LOOK AT WHETHER OR NOT  
THE, THE IN THIS PARTICULAR  
CASE IT'S BEEN UNREASONABLE RE  
STRAINT ON ALIENATION OR  
SOMETHING THAT IMPEDES THE  
ALIENATION OR THE ABILITY TO  
CONVEY TITLE AT SOME REASONABLE  
TIME.

>> LET ME ASK YOU TO ADDRESS -- WE STILL HAVEN'T GOTTEN REALLY TO THE CERTIFIED CONFLICT IF THERE IS ONE, AND THAT IS, IF THE RULE OF PERPETUITIES DOES APPLY TO THIS TRANSACTION, CAN THE STATUTE APPLY RETROACTIVELY TO ABROGATE THE RULE UNDER THIS CONTRACT?

>> I BELIEVE IT CAN THE CASE LAW VERY SPORTF OF OUR OPINION INCLUDING THE FOURTH DISTRICT'S OPINION POINTS OUT CORRECTLY THAT THERE WAS NO VESTING OF A SUBSTANTIVE RIGHT THAT'S BEING IMPER SAID.

WHAT YOU HAVE HERE IS A STATUTE THAT -- IN OTHER WORDS, THERE'S NO RIGHT TO -- THE ONLY RIGHT THAT WE COULD HAVE WOULD BE THE RIGHT TO DECEIVE IN A DEAL.

>> IT WOULD BE A RIGHT TO ALIENATE THE PROPERTY FREELY WITHOUT ANY RIGHT OF FIRST REFUSE.

>> BUT IF IT'S A CONTRACT RIGHT, THEN THERE IS NO IMPAIRMENT.

>> WELL, --

>> THAT'S WHAT IT REALLY HINGES ON, I MEAN, AND, AND IN ANSWER TO THE QUESTION ON CONFLICT, I WOULD ASSUME THAT YOUR POSITION -- YOUR POSITION IS THAT IF, IF WE APPLIES THE FIRST DISTRICT'S REASONING, YOU'D LOSE, WOULD YOU NOT?

>> I BELIEVE WE WOULD.

-- I BELIEVE WE WOULD.

THEY ALSO CERTIFIED THE REFORMATION --

>> THEY ALSO -- THEY FIND THAT, THAT IT, THE RULE AGAINST PERPETUITIES DOES APPLY TO A RIGHT OF FIRST REFUSAL.

>> RIGHT.

>> CORRECT?

AND THEY ALSO APPLIED FIND THAT THIS TO BE A SUBSTANTIVE RULE THAT IS ABROGATED BY THE STATUTE.

>> THAT'S CORRECT HOWEVER I THINK THEY OVERLOOKED THE SUPREME COURT CASE -- WHERE IT

SAYS IT SEEMS CLEAR TO US THAT UNTIL AN OPTIONY EXERCISE AS RIGHT IN ACCORDANCE WITH THE TERMS OF HIS OPTION HAS NO ESTATE EITHER LEGAL OR EQUITABLE IN THE LANDS INVOLVE SODE I DON'T THINK THAT THE, YOU KNOW, GETTING BACK TO THE DICHOTOMY OF CONTRACT AND REAL PROPERTY INTEREST AS WE GET -- GO DOWN THE LINIVE, WE HAVE A SCALE.

IT'S GOING FROM BEING AS WE GO DOWN THE LINE WE HAVE A SCALE IT'S FROM A CONTRACT VENDEE ALL THE WAY DOWN TO FIRST RIGHT OF REFUSEAL AND IF THERE'S NO VESTED RIGHT BECAUSE ALL WE HAVE TO CONTRACT WHICH IMPLICATES THE ABILITY TO BE NOTICED, AND AT THE TIME OF NOTICE WE WOULD THEN ENTER INTO A CONTRACT.

AND IT'S THAT CONTRACT THAT GIVES FORTH THE EQUITABLE OWNERSHIP RIGHTS.

>> WELL ON THE PRELIMINARY ISSUE OF WHETHER THERE IS ACTUALLY CONFLICT OR NOT, IS THERE ANYWAY THAT THIS FIRST DISTRICT CASE CAN REALLY OUT THERE -- LIVE OUT THERE WITH THE FIRST DISTRICT'S RULE WITHOUT THERE BEING A DISPARITY BETWEEN THE APPLICATION IN THE FIRST DISTRICT AND THE APPLICATION IN THE FOURTH DISTRICT?

>> THE ONLY WAY IT COULD WOULD BE ON THE ISSUE OF THE 2000 AMENDMENT TO THE STATUTE. BECAUSE THE 2000 AMENDMENT TO THE STATUTE CLARIFIED, FIRST OF ALL, THEY INCREASED AND, AND CLARIFIED THE LANGUAGE WITH RESPECT TO THE EXCEPTION TO THE APPLICATION STATUTE TO NONCOMMERCIAL TRANSACTIONS. THE SECOND THING THAT IT DID WAS IT POINTED OUT THAT IT ABOLISHED WITH NO UNCERTAIN TERMS ANY VESTIGE OF ANY CONCEIVABLE COMMON LAW RULE AGAINST PERPETUITIES SO IF YOU

DECLINE JURISDICTION, THE CASE LAW WOULD STILL MAKE SENSE BECAUSE YOU WOULD FALLS CHASE, THAT FELL BEFORE THE 2000 STATUTE AND THEN YOU WOULD HAVE OLD FORT COVE.

THE PROBLEM THAT WE HAVE, AND THE ONE THAT I THINK IF YOU WANT TO ADDRESS THE ISSUE WOULD CLARIFY FLORIDA CASE LAW FOR EVERYTHING WHO -- EVERYBODY WHO NEEDS TO REVIEW THAT WOULD BE THAT YOU HAVE THESE TWO CASES, BOTH OF WHICH ARE, ARE CERTIFIED.

ONE IS GREAT PUBLIC IMPORTANCE TO THE SUPREME COURT, AND ONE IS CONFLICT SO IF YOU ADDRESS THE CASE YOU COULD AT LEAST CLEAR UP THAT POINT. SO THE CASE LAW ISN'T LEFT IN THAT LIMBO.

WITH RESPECT TO JURISDICTION AS WE REFERRED TO IN JURISDICTIONAL BRIEF WE DON'T THINK THIS IS A CASE WHERE YOU HAVE TO HAVE JURISDICTION BUT IT MAY BE HELPFUL BASED UPON THE DIALOGUE.

>> CAN I GO BACK TO -- YOU WERE TALKING ABOUT WHETHER IT'S A VESTED RIGHT OR NOT AND THAT'S THE SECOND PRONG OF THE RETROACTIVITY ANALYSIS. YOU FIRST HAVE TO GET TO WHETHER THE LEGISLATURE INTENDED TO RETROACTIVELY ABOLISH THE RULE AGAINST PERPETUITIES AND OF COURSE YOU ARE FAMILIAR WITH THE OUR CASE LAW PRESUME THE LEGISLATURE INTENDED SOMETHING TO BE PROSPECTIVE AND I AM LOOKING AT THIS LEGISLATION AND I DON'T SEE ANY HINT THAT IT IS WAS INTENDED TO RETROACTIVELY ABOLISH THE COMMON LAW RULE OR IT WOULD'VE SO STATED.

>> WELL I THINK THE LANGUAGE THE, THE 2000 AMENDMENT WHICH I BELIEVE MAY HAVE MAY HAVE BEEN PROMULGATED TO AFFECT THE FALLS CHASE CASE, THE COMMON LAW RULE AGAINST PERPETUITIES IS

ABOLISHED.

FALLS CHASE ROSE ON THE COMMON LAW RULE AGAINST PERPETUITIES SO THE STATUTE IS, THROUGH THE LEGISLATIVE ENACTMENT IS SAYING THAT WHAT FALLS CHASE RESTS ON NO LONGER EXISTS.

SO IF NO LONGER EXISTS, THEN IT CAN'T BE APPLIED.

>> THE PROBLEM IS THERE AN INTEREST, HOWEVER YOU CHARACTERIZE THAT INTEREST, SUFFICIENT TO PROHIBIT THAT FROM OCCURRING THAT YOU ARE THEN TAKING SOMEONE'S INTEREST, SOMEONE'S PROPERTY INTERESTS, SOMEONE'S PROPERTY RIGHT? VIA STATUTE ISN'T THAT WHAT THAT COMES DOWN TO THEN? SO IT SEEMS TO ME THAT WE ARE -- REALLY THESE TWO QUESTIONS ARE VERY CLOSELY CONNECTED. THE FIRST QUESTION AS TO WHETHER YOU HAVE AN INTEREST. AND THAT TO DETERMINE WHETHER RULE AGAINST PERPETUITIES IS GOING TO APPLY.

SECOND IF YOU ANSWER THAT YES THEN WE HAVE A PROBLEM OVERCOMING BECAUSE YOU HAVE ALREADY ABKNOWLEDGED THERE IS A SUBSTANTIVE INTEREST.

>> THE SUBSTANTIVE INTEREST -- I THINK THIS IS THE FACTOR, THE SUBSTANTIVE INTEREST IS A PROPERTY INTEREST NOT A REAL CONTRACT INTEREST.

>> I UNDERSTAND THAT BUT IF YOU GET TO THE FIRST PART OF THE QUESTION THEN YOU DON'T GET TO THE SECOND PART IT IS PURE CONTRACTUAL INTEREST.

WHAT I AM SAYING IS FIRST QUESTION REALLY DECIDES THE SECOND.

I MEAN DON'T YOU THINK.

I MEAN REALLY WHEN YOU GET DOWN TO THIS.

>> I REALSY DO AND THAT'S WHY IN MY PRESENTATION I PUT MORE EMPHASIS ON THIS CONTRACT REAL PROPERTY DICHOTOMY BECAUSE THAT'S HOUSE THE CASES IN THE VARIOUS JURISDICTION OF THE

UNITED STATES FALL DOWN, AND  
EVEN THE FEDERAL COURTS, THEY  
ALL START OUT TALKING ABOUT  
WHETHER IT'S A CONTRACT  
INTEREST OR WHETHER IT'S A REAL  
PROPERTY INTEREST.

THE REASON IT IS CONTRACT  
INTEREST AS PARTICULAR TO THIS  
TYPE OF INTEREST IS THE  
VESTING.

THE VESTING IS, IMMEDIATELY AT  
THE TIME OF CONTRACT.  
THE CASES THAT GO THE OTHER WAY  
AND SAY IT'S A PROPERTY  
INTEREST CLAIM THAT THE VESTING  
IS BECAUSE YOU GET SPECIFIC  
PERFORMANCE.

BUT YOU CAN'T GET TO THE  
SPECIFIC PERFORMANCE PART UNTIL  
YOU HAVE THE CONTRACT RIGHT.

>> WELL, LET ME -- YOU SAID  
THAT THE VESTING OCCURRED UNDER  
YOUR VIEW WHEN?

AT THE TIME OF CONTRACTING IS  
WHAT YOU SAID S THAT WHAT YOU  
ARE SAYING?

>> RIGHT.

RIGHT.

BECAUSE A PURE RIGHT OF FIRST  
REFUSINGAL, -- REFUSAL, ALL THE  
ISSUES THAT ARE DISCUSSED,  
PARDON ME, ALL THE REASONS THAT  
ARE DISCUSSED FOR THE PROPERTY  
INTEREST ARE BASED UPON THE  
REMEDY OF SPECIFIC PERFORMANCE.

FALLS CHASE ITSELF SAYS THAT  
AND THE LANGUAGE THAT IT USES

--

>> I AM TRYING TO CLARIFY WHAT  
YOUR ARGUMENT IS FOR MY MIND.  
I'M SORRY IF I'M NOT GETTING IT  
BUT YOU ARE SAYING THAT THE  
CONTRACTUAL RIGHT OF FIRST  
REFUSAL VESTS AT THE TIME OF  
CONTRACTING?

>> YES.

>> AND THAT VESTING IS A  
PROPERTY INTEREST.

>> NO AND VESTING IS NOT A  
PROPERTY INTEREST.

>> O OKAY.

>> VESTING IS NOT A PROPERTY  
INTEREST.

>> SO THAT IS THE PROBLEM WITH THE USE OF THE WORD VESTING BECAUSE IT IS TYPICALLY USED WITH A REAL PROPERTY INTEREST.

>> WELL, THAT'S CORRECT BECAUSE A CONTRACT INTEREST ISN'T, IS NOT SOMETHING THAT'S VESTED. IT'S SOMETHING THAT OCCURRED. BUT WHAT HAPPENS IS AND I THINK THIS IS WHERE THE ERROR IS IN THOSE CASES WHAT HAPPENS IS WHEN YOU HAVE THE BREACH OF FIRST INTEREST WHERE YOU HAVE PURE RIGHT OF FIRST REFUSAL WHEN THE PARTY HOLDING THE, THE RIGHT OF FIRST REFUSAL WANTS TO EXERCISE BUT IS DENIED HIS RIGHT OR HER RIGHT WHAT HAPPENS IS YOU ACTUALLY HAVE THE LAST ELEMENT OF THE CAUSE OF ACTION THAT OCCURS WHICH IS THE DAMAGE AND THAT'S, THAT'S WHETHER THEY MAKE THE MISTAKE THEY ARE CONFUSING THE REMEDY WITH THE CREATION OF THE LAST ELEMENT OF THE CAUSE OF ACTION. YOU ARE THEN DAMAGED.

>> COULD YOU GO BACK TO THE WHOLE ISSUE OF WHETHER OR NOT 689.2257 REALLY IS NOT RETROACTIVELY ABROGATING THE COMMON LAW RIGHT OF RULE AGAINST PERPETUITY?

>> BECAUSE AS I UNDERSTAND YOUR ARGUMENT YOU SAID THAT THE LANGUAGE ITSELF DOES THAT AND WHAT SPECIFICALLY IN THAT STATUTE, LANGUAGE IN THAT STATUTE ARE YOU REFERRING IT.

>> THE FOURTH DISTRICT --.

>> AND PARTICULARLY WOULD YOU ADDRESS WHAT THE, THE PHRASE REGARDLESS OF WHAT IS GOVERNED BY THIS SECTION ADDS TO THAT.

>> WELL AND I THINK THE LANGUAGE I HAVE TO GO TO THE OLD PORT COVE DECISION ITSELF BUT I BELIEVE THAT THE, THE COURT ACTUALLY CITED TO THE LANGUAGE ON PAGE 3 --

>> THE SOLE -- THE SECTION IS THE SOLE EXPRESSION OF ANY RULE

AGAINST PERPETUITIES OR --  
SESTING IN THIS STATE.

NO COMMON LAW RULE AGAINST  
PERPETUITIES OR REMOTENESS IS  
INVESTING SHOW EXISTWISE  
RESPECT TO ANY PRIOR INTERESTS  
OR POWER REGARDLESS OF WHETHER  
SUCH INTEREST OR POWER IS  
GOVERNED BY THIS SECTION.

>> THE LANGUAGE THAT -- I'M  
SORRY, JUSTICE QUINCE.  
THE LANGUAGE DECIDED UPON BY  
THE FORTY DISTRICT COURT THAT I  
AGREE WITH IS 62299 C IF A  
NONVESTED INTEREST OR POWER WAS  
CREATED PRIOR TO AND ON OR  
AFTER OCTOBER 1, 1998, TO  
VIOLATE THIS STATE'S RULE  
AGAINST PERPETUITIES IS THAT  
RULE EXISTED BEFORE OCTOBER 1,  
1988, UPON THE PETITION OF  
INTEREST MAY REFORM THE  
DISPOSITION.

AND THEN IT GOES ON WITHIN  
LIMITS OF PERPETUITY SO THE  
STATUTE IS INTENDED TO GO -- AS  
JUDGE SAID GO BACK BABBLING  
BACKWARD AND FORWARD.

>> BUT IF THE RULE AGAINST  
PERTEETY IS APPLICABLE TO THIS  
TYPE OF INTEREST THEN THE RULE  
-- IF THAT RULE IS APPLICABLE  
HERE, THEN BECAUSE THEY  
VIOLATION WHAT CAN YOU REFORM?  
WHAT IF THE VIOLATES THE RULE  
AGAINST PERPETUITIES WHAT COULD  
YOU REFORM?

WHAT COULD YOU DO ABOUT THIS  
AGREEMENT THAT WOULD BE IN  
KEEPING WITH THE INTENT OF THE  
PARTYS WHO ENTERED INTO IT.

>> THE REFORMATION WOULD BE IN  
ESSENCE A CAP ON THE DURATION  
OF THE INTEREST, AND WHAT WE  
HAD SUGGESTED IN THE TRIAL  
COURT --

>> WOULD THAT BE IN KEEPING  
WITH THE INTENT OF THE PARTIES  
THAT ENTERED INTO THE CONTRACT?  
BECAUSE IT SEEMS VERY CLEAR TO  
ME THIS INTEREST WOULD LACK --

>> I MEAN I I AGREE WITH YOUR  
HONOR.  
IT'S ALMOST TO A CERTAIN DEGREE

A FICTION BUT, BUT WHAT THE  
LEGISLATURE I BELIEVE IS SAYING  
HERE IS THAT IF YOU CAN'T HAVE  
WHAT YOU HAVE, YOU CAN HAVE THE  
NEXT BEST THING.

EVEN THOUGH IT MAY NOT BE  
PERFECT.

AND IT'S ALMOST LIKE A  
RESCISSION.

LIKE BRAYMAN DODGE CASE IF YOU  
CAN'T GET PARTIES EXACTLY BACK  
TO THE STATUS QUO WE WILL GET  
AS CLOSE AS WE CAN AND I  
BELIEVE THAT'S WHAT THE  
SUBSECTION OF THE 2000  
LEGISLATION IS SAYING.

>> WITH YOUR HELP, YOU HAVE  
USED YOUR TIME.

BUT I WOULD LIKE YOU TO TAKE  
ONE MINUTE TO TELL US WHY THIS  
COURT SHOULD ADOPT YOUR  
POSITION THAT THIS IS A  
CONTRACTUAL RIGHT AND WITH  
REGARD TO HOW IT WOULD OPERATE  
AND IMPACT ON FLORIDA?

>>> THE REASON THE COURT SHOULD  
ADOPT THE CONTRACTUAL POSITION  
IS BECAUSE NUMBER ONE, I  
BELIEVE IN REAL PROPERTY AND  
CONTRACT LAW ANALYSIS, IT IS  
CONTRACTUAL IN NATURE AND I  
THINK THAT IS THE CORRECT LEGAL  
ANALYSIS.

NUMBER TWO IS WITH RESPECT TO  
IMPACT ON THE STATE A. RIGHT OF  
FIRST REFUSAL PURE AS IT IS IN  
THIS CASE HAS ABSOLUTELY NO  
NEGATIVE EFFECT WHATSOEVER ON A  
PERSON WHO ENTERED INTO AN  
AGREEMENT TO GIVE IT BECAUSE  
ALL IT DOES IS GIVE SOMEONE  
WHO'S IN THE POSITION OF MY  
CLIENT AN OPPORTUNITY TO BUY  
THE PROPERTY ON THE SAME TERMS  
AND CONDITIONS THAT IS BEING  
OFFERED TO THE OTHER PARTY, AND  
THERE IS ABSOLUTELY NOTHING IN  
IMPEDING THE POLICY REASONS OF  
THE RULE AGAINST PERPETUITIES  
BY REMOTE VESTING.

THERE IS NO REMOTE VESTING.  
THAT'S WHAT THE RULE OF PURP  
TEWDIES IS DESIGNED TODRIES.  
THANK YOU -- PERPETUITIES IS

DESIGNED TO ADDRESS.

THANK YOU VERY MUCH.

>> I WOULD LIKE TO ADDRESS A FEW ISSUES AS QUICKLY AS I CAN THERE'S NOT A LOT OF TIME.

>> I WOULD LIKE TO ASK A QUESTION THAT I DON'T KNOW THAT I SAW IN THE BRIEFS MAYBE I MISSED IT.

AT COMMON LAW, WERE THERE SUCH THINGS AS RIGHTS OF FIRST REFUSE.

>> OKAY -- YES, YOUR HONOR.

>> OKAY SO ARE THERE ANCIENT ENGLISH CASES THAT APPLIED THE RULE AGAINST PERPETUITIES TO RIGHTS AGAINST FIRST REFUSE.

>> NOT BEFORE 1776.

THERE ARE A COUPLE OF CASES AND I DON'T REMEMBER PERSONALLY.

>> THAT'S ANCIENT TO US.

>> OKAY.

>> ALL OF US.

WE CAN AGREE ON THAT BUT THERE ARE A FEW CASES FROM THE 1880S AXACTUALLY CITED BY THE ASSOCIATION IN THEIR BRIEF THAT TALK ABOUT THE ISSUE BUT AS, THEY HAVERAPHER CITED THEM TO POINT OUT THAT THERE ARE NO ENGLISH COMMON LAW CASES THATDRIES THIS ISSUE.

THE ENGLISH COMMON LAW ADDRESS THE ISSUE AGAINST COMMON LAW PERPETUITIES --

>> SO HOW DO WE KNOW THERE WERE RIGHTS OF FIRST REFUSAL BACK THEN?

>> YOU MEAN BEFORE 1776?

>> WHAT HAPPENED IN 1776 -- BESIDES THE OBIATE.

>> WHEN I ANSWERED YOUR QUESTION AT COMMON LAW AT LEAST BETWEEN 1776 AND THE TIME THAT THE STATUTE WAS PASSED THERE WERE RIGHTS OF FIRST REFUSAL. FLORIDA RECOGNIZED RIGHTS OF FIRST REFUSE.

>> AND BUT SO DID IT EVER -- WAS IT EVER APPLIED TO THE RULE AGAINST PERPETUITIES APPLIED TO IT?

>> YES, YOUR HONOR.

>> THIS COURT NEVER RULED ON

THAT ISSUE, CORRECT.

>> THAT'S CORRECT THE WATERGATE CORPORATION V. REAGAN CASE IN 1975 RULED BY THE JUDGE OWEN CASE I ALLUDED TO AND THE FOURTH DCA 15 MONTHS BEFORE THIS AGREEMENT WAS ENTERED INTO SAID THE RULE AGAINST PERPETUITIES APPLIES TO RIGHTS OF FIRST REFUSE.

>> I THINK THE REASON YOU WERE REFERRING TO 1776 IS BECAUSE THE AMERICAN COMMON LAW ADOPTED THE ENGLISH COMMON LAW AS IT EXISTED IN 1776 BUT NOT THEREAFTER.

>> THEREFORE, WE WERE ON OUR OWN WE WERE NOT GOING TO RELY ON THE BRIT APPRECIATE COMMON LAW, THAT'S RIGHT.

>> ONE OTHER -- WOULD YOU SAY A RIGHT OF FIRST REFUSAL WOULD ALWAYS VIOLATE THE RULE AGAINST PERPETUITIES UNLESS IF THERE WAS NO TIME LIMIT ON IT? IN OTHER WORDS, YOU COULD LOOK IN 1978, IF YOU LOOKED AT THIS AGREEMENT YOU WOULD SAY EVEN IF IT WAS INTENDED THAT THE PROPERTY MIGHT BE SOLD IN THE NEXT COUPLE OF YEARS THAT IT VIOLATES THE RULE AGAINST PERPETUITY?

>> IF THAT INTENTION SHOWS ITSELF FROM THE AGREEMENT THAT IT'S ONLY SUPPOSED TO LAST A FEW YEARS, THEN IT WOULDN'T VIOLATE THE RULE BUT HERE MEASURING SIDE IS A CORPORATION BOTH SIDES ARE CORPORATION IT'S UNDISPUTED HERE THAT THE INTENT WAS TO CREATE AN INTEREST CREATED IN PERPETUITY.

>> AT THE POINT OF THE CONTRACT BEING ENTERED INTO, THAT ASSOCIATION AT THAT POINT ACQUIRED A RIGHT OF FIRST REFUSAL.

>> THAT ARE RIGHT.

>> THAT'S RIGHT.

>> MAYBE WHY IF IT VESTED -- IF THE RULE AGAINST PERPETUITIES DOESN'T SAY YOU CAN'T HAVE AN INTEREST THAT LASTS TOO LONG AS

JUDGE FARMER SAID, HOW IS THIS ANYTHING BUT A CONTRACTUAL RIGHT ACQUIRED AT THE TIME OF THIS AGREEMENT.

>> IT'S BOTH.

IT WAS A CRACK BUT IT WAS CONTRACT THAT CREATED AN EQUITABLE INTEREST IN REAL PROPERTY AND THAT INTEREST WAS NOT VESTED.

>> THEN HOW DO YOU DEAL WITH GOAT YEA IN THAT LAST STATEMENT THAT SAYS UNTIL THE OPTIONY EXERCISES THE RIGHT YOU JUST TALKED ABOUT IN ACCORDANCE WITH THE TERMS HE HAS NO ESTATE EITHER LEGAL OR EQUITABLE IN THE LANDS INVOLVED.

>> I THINK PERHAPS THAT STATEMENT FROM THAT CASE DOESN'T AGREE WITH THE MAJORITY OF CASES THAT DOES SEHE HAS AN EQUITABLE CASE IN REAL PROPERTY.

>> WHICH CASE IN FLORIDA T. CITES THE CASES BEGINNING WITH KANSAS IN 1902 AND GOES ON BACK SO IT CITES A LOT OF OTHER JURISDICTIONS.

I CAN SEE THAT THE MINORITY VIEW.

>> IT IS, AS FAR AS THE COMMON LAW IN FLORIDA THAT'S CONSISTENT WITH THE MINORITY VIEW, CORRECT.

>> THE WATERGATE CORPORATION CASE TAKES THE POSITION THAT IT DOESN'T VEST UNTIL THE PROPERTY OWNER SELLS THE PROPERTY.

A RIGHT OF FIRST REFUSAL DOES NOT VEST UNTIL THE PROPERTY OWNER SEEKS TO SELL THE PROPERTY, AND THE REASON IS BECAUSE THIS THIRD PARTY DOESN'T HAVE ANY RIGHT TO ACQUIRE THAT PROPERTY UNTIL THAT TIME.

THE BLACKS LAW DICTIONARY.

>> THE PREEMPTIVE RIGHT.

>> RIGHT.

>> SO IF THE HAD A TIME TRACT OR NEGOTIATED TO SELL THIS PROPERTY SAY TEN YEARS AFTER THE AGREEMENT, WAS ENTERED

INTO, COULD HE AND THE  
CONDOMINIUM ASSOCIATION WANTED  
TO EXERCISE THEIR RIGHT OF  
FIRST REFUSAL, HOW COULD THE  
GRANTER SAY NO YOU CAN'T DO  
THAT BECAUSE THIS AGREEMENT  
VIOLATES RULES OF PERPETUITY  
FROM BEGINNING AND AB INITIO.

>> THE RULE OF PERPETUITIES  
CONSIDERS THAT.

IT IS FORGIVING OF PEOPLE WHO  
TIE UP PROPERTY IN THE WAY  
SOCIETY DOESN'T WANT IT TIED  
UP.

IF THE COURT RULES IT DOESN'T  
VIOLATE RULE OF PERPETUITIES  
AND WAS NOT VOID AB INITIO.

>> WAS FLORIDA A WAIT AND SEE  
STATE AT THAT TIME?

>> UNDER THE STATUTE BUT NO NOT  
AT THE COMMON LAW, NOT AT 1977.

VOID IS VOID AND THAT'S THE  
ORDER OF THE DAY AND THAT'S  
WHAT FALLS CHASE RELIED UPON  
AND THAT'S CORRECT.

>> WITH OUR ASSISTANCE, YOU'VE  
NOW EXHAUSTED NOT ONLY, NOT  
ONLY EXHAUSTED BUT USED  
ADDITIONAL TIME AND ALTHOUGH  
YOU MAY HAVE HAD APPREHENSION  
ABOUT INTEREST IN THIS CASE YOU  
SEE THE COURT IS INTEREST SODE  
WE THANK YOU FOR AN EXCELLENT  
PRESENTATION ON BOTH THE COMMON  
LAW AND THE CURRENT LAW.  
WE'LL TAKE THIS CASE UNDER  
ADVISEMENT.  
THANK YOU VERY MUCH.