

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC09-1151
LOWER CASE NO.: 5D08-2096

ORLANDO LAKE FOREST JOINT VENTURE, ETC., ET AL.,

Petitioner,

v.

LAKE FOREST MASTER COMMUNITY ASSOCIATION, INC.

Respondent.

RESPONDENT'S JURISDICTIONAL BRIEF

ON REVIEW FROM THE DISTRICT COURT

OF APPEAL, FIFTH DISTRICT

STATE OF FLORIDA

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I.

STATEMENT OF THE CASE AND FACTS

Respondent, Lake Forest Master Community Association (hereinafter "Association"), submits this Statement of the Case and Facts to clarify some facts asserted by Developer, Orlando Lake Forest Joint Venture, a Florida Joint Venture, ORLANDO LAKE FOREST, INC., a Florida Corporation, NTS MORTGAGE INCOME FUND, a Delaware Corporation, OLF II CORPORATION, a Florida Corporation, and ORLANDO CAPITAL CORPORATION, a Kentucky Corporation (hereinafter collectively referred to as "Developer").

Before the trial court, Developer moved for summary judgment asserting that the Association failed to meet the condition precedent of membership approval for amounts in controversy in excess of \$100,000 before filing the lawsuit, as required by Section 720.303(1), Florida Statutes. The trial court entered final summary judgment in favor of the Developer as to all counts. As a finding of law, the trial court concluded that "proper notice [of the members' meeting at which the required vote was obtained] was not given to all residents of the [Association] entitled to vote." The Association appealed. The trial court did not address whether Section 720.303(1), Florida Statutes, was a condition precedent.

On appeal, the Developer continued to argue that the Association failed to obtain the vote necessary to institute litigation against it, that the vote was a condition precedent,

and that the proper remedy for failing to comply with a condition precedent was dismissal. (Pet. Br., App. at 14.) The Fifth District determined that compliance with Section 720.303(1), Florida Statutes, was not a condition precedent. (*Id.*) Instead, it was a "statutory limitation" that the members of the Association "may or may not elect to enforce." (*Id.*) Since it was not a condition precedent, the proper remedy, if a member elected to enforce such a provision, would be abatement. (*Id.* at 15.) The Fifth District further found there to be genuine issues of material fact such that the entry of a final summary judgment was inappropriate. (*Id.* at 14.)

II. **SUMMARY OF THE ARGUMENT**

This Court should not grant discretionary review for two reasons. First, the rule of law rendered by the Fifth District does not conflict with any decision rendered by this Court or any other district court. The Fifth District decided that membership approval for litigation concerning amounts in excess of \$100,000 was not a condition precedent. No other district court has even addressed the same issue, much less rendered a decision that is contrary to the one rendered by the Fifth District. Second, neither the statute requiring membership approval nor the facts in the case are similar in all material respects with the cases cited by Developer. Therefore, the

decisions are not irreconcilable and do not create a hopeless conflict so as to warrant discretionary review.

III. ARGUMENT

This court should not exercise its discretionary jurisdiction because the Fifth District's decision does not conflict with decisions of other districts. The following issues, if present, could support the exercise of this Court's jurisdiction: (1) the rule of law announced by the Fifth District conflicts with a rule previously announced by this Court or by another district court, or (2) the Fifth District's application of a rule of law to substantially similar facts produced a different result than that in another district or in this Court. *Nielson v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960). The Fifth District's decision does not conflict with another rule of law, nor did it arrive at a different result than another case with substantially the same facts. Therefore, conflict jurisdiction has not been satisfied.

A. This Court should not exercise discretionary jurisdiction because the rule of law adopted by the Fifth District does not conflict with rules of law adopted by other districts or by this Court.

The Fifth District rendered the following rules of law: (1) that Section 720.303(1), Florida Statutes, "is a statutory limitation on the authority of the Homeowners' Association to commit the resources of the Association to litigation, designed

for the protection of its members, which, if violated, the members may or may not elect to enforce," (2) that the statute was not a condition precedent, and (3) any owner could seek abatement if there was a defect in the notice of the meeting at which the vote was conducted. (Pet. Br., App. at 14-15.) Since membership approval was not deemed a condition precedent, the issue as to whether abatement or dismissal for failure to comply with a condition precedent is not ripe for review by this Court. Instead, the rule of law at issue is whether Section 720.303(1), Florida Statutes, is a condition precedent or not.

In all of the cases cited by Developer, the courts have concluded that one party failed to comply with a condition precedent. None of these cases addressed whether Section 720.303(1), Florida Statutes, should be deemed a condition precedent. The only case that Developer presents for support that Section 720.303(1) is a condition precedent is *Alhambra Homeowners Association, Inc. v. Asad*, 943 So. 2d 316 (Fla. 4th DCA 2006). However, *Alhambra* does not stand for the proposition presented by Developer. In *Alhambra*, the homeowners association filed a complaint against owners for a violation of the association's covenants and restrictions. *Alhambra*, 943 So. 2d at 317. The owners filed an affirmative defense alleging that the association failed to comply with a condition precedent, in that it failed to request mandatory mediation, as required by

Section 720.311, Florida Statutes. *Id.* After the owners moved for summary judgment, the association voluntarily dismissed the case. *Id.* at 317-318. The Fourth District did not render a decision that the mandatory mediation provision in Section 720.311 is a condition precedent. *Id.* at 318. Instead, the case concerned an award of prevailing party attorneys' fees when a plaintiff files a voluntarily dismissal. *Id.* at 317. The trial court, much less the Fourth District, never issued a decision that dismissal was appropriate for failing to comply with the mandatory mediation requirement. The district court did not even decide that the mandatory mediation requirement was a condition precedent. Therefore, *Alhambra* does not support Developer's argument that its decision conflicts with that of the Fifth District. Only a conflict of decisions, not opinions, reasons, or expressions, support discretionary jurisdictional review. *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980) (quoting *Gibson v. Maloney*, 231 So. 2d 823, 824 (Fla. 1970)).

Even if *Alhambra* stood for the proposition that mandatory mediation was a condition precedent and that dismissal was warranted for failing to participate in mandatory mediation, that ruling does not conflict with the Fifth District's decision. For a rule of law to conflict with another rule of law, the holdings must be irreconcilable and one would effectively overrule another if decided by the same court.

Aravena v. Miami-Dade County, 928 So. 2d 1163, 1166-1167 (Fla. 2006); *Ansin v. Thurston*, 101 So. 2d 808, 811 (Fla. 1958). Ruling that membership approval was not a condition precedent is reconcilable with a case finding that mandatory mediation is a condition precedent. Thus, the rules of law in *Alhambra* and in this case are not in conflict. Furthermore, Developer failed to argue *Alhambra* in its Answer Brief, and, therefore, is prohibited from raising it now.¹ *Tillman v. State*, 471 So. 2d 32, 34-35 (Fla. 1985).

The rules of law rendered in the other cases cited by Developer also do not create a conflict. Of the six other cases argued by Developer, five concerned lack of compliance with pre-suit notice. *Ferry-Morse Seed Co. v. Hitchcock*, 426 So. 2d 958 (Fla. 1983) (failing to comply with the Florida Seed Law); *Levine v. Dade County School Bd*, 442 So. 2d 210 (Fla. 1983) (requiring plaintiff to notify a state agency); *Progressive Express Ins. Co. v. Menendez*, 979 So. 2d 324 (Fla. 3rd DCA 2008) (confirming a pre-suit notice requirement for overdue PIP benefits); *City of Coconut Creek v. City of Deerfield Beach*, 840 So. 2d 389 (Fla. 4th DCA 2003) (upholding the pre-suit notice requirement for challenging a development order); *Bruce H. Lynn, M.D., P.A. v. Miller*, 498 So. 2d 1011 (Fla. 2d DCA

¹ Developer did argue *Alhambra* in its Motion for Rehearing. However, it was inappropriate to raise the case in the motion as well. *Cartee v. Florida Dep't of Health and Rehab. Servs.*, 354 So. 2d 81,83 (Fla. 1st DCA 1978).

1986)(ordering compliance with medical malpractice pre-suit notice).² Decisions ruling that pre-suit notice is a condition precedent is not inconsistent with a decision finding that membership approval is not a condition precedent. With pre-suit notice requirements, once litigation is filed, it is impossible to satisfy the obligation, as the time to supply the notice has expired. In essence, the defect cannot be cured by abating the case. On the other hand though, it is possible to abate a case and obtain membership approval, thus correcting any potential deficiency. Accordingly, uniformity among the districts is still preserved if this case is upheld, despite the decisions rendered by the cases cited by Developer. See *Jenkins v. State*, 385 So. 2d 1356, 1358 (Fla. 1980).

The other case cited by Developer, as being in conflict, is *Wright v. Life Insurance Company*, 762 So. 2d 992 (Fla. 4th DCA 2000). In that case, the court upheld a dismissal of a life insurance dispute because the plaintiff failed to comply with an insurance contract clause requiring written proof of death. *Wright*, 762 So. 2d at 993. While the *Wright* Court did rule that the clause was a condition precedent, it also noted that abatement could have been a remedy, if requested. *Id.* Even so,

² Developer also asserts that the Fifth District's decision conflicts with two decisions the court had previously rendered. However, this Court only has jurisdiction to review conflicts between districts, not among districts. *Amendments to the Fla. Rules of App. Proc.*, 894 So. 2d 202, 214 (Fla. 2005).

requiring proof of death and requiring membership approval are two separate legal premises. The two decisions can coexist.

Accordingly, since the Developer has failed to show that the rule of law announced in the case below is in conflict with decisions of other district courts, this Court should not grant discretionary review.

B. This Court should not exercise discretionary review because the facts in this case are not substantially similar to those in other districts, or before this Court, so as to mandate the same decision.

This Court should not exercise discretionary review because the same facts did not give rise to antagonistic decisions. To find the Fifth District's decision contrary to the other decisions, the cases must be the same "factually in all material respects." *Florida Power & Light Co. v. Bell*, 113 So. 2d 697, 698 (Fla. 1959). None of the facts in the cases presented by Developer are factually the same in all material respects as the case at bar. First of all, the statutes in two cases cited by Developer clearly state that the pre-suit notice is a condition precedent. *Progressive*, 979 So. 2d at 328; *City of Coconut Creek*, 840 So. 2d at 391. Section 720.303(1), Florida Statutes, does not contain such a provision. That fact, in and of itself, makes the cases materially dissimilar.

Then, Developer erroneously asserts that the statute in *Alhambra* is very similar to the statute in this case. (Pet. Br.

at 6.) However, the statutes are not materially similar. The statute in *Alhambra* concerned administrative remedies that must be pursued before filing lawsuit. Mandatory mediation would allow for an early resolution while requiring membership approval would provide no resolution at all. One is an alternative to a lawsuit, the other can prohibit a lawsuit. Plus, any possible similarity between the statutes is not relevant as neither district found either statute a condition precedent.

Similarly, the purpose of the pre-suit notice requirements is to provide the opposing party with the opportunity to correct the problem and to encourage early resolution of disputes. See, e.g., *City of Coconut*, 840 So. 2d at 392-393. That is clearly not the purpose of the statute in this case. Instead, the purpose, as accurately stated by the Fifth District, is to impose a limit on committing the Association's financial resources to litigation with an amount in controversy over \$100,000.³ Compliance with Section 720.303(1), Florida Statutes, does not facilitate early resolution of disputes. Thus, the facts in the pre-suit notice cases are not substantially similar in all (or any) material respects to this case so as to create

³ It is worthwhile to note that the Association was not required to obtain any approval for the portion of the claim that was less than \$100,000. However, even this portion of the Association's claim was dismissed by the trial court.

antagonistic decisions. To hold otherwise would create a dispute where one does not exist.

Furthermore, the cases cited by Developer do not even universally require dismissal for failure to comply with a condition precedent. In *Wright*, the Fourth District opined, in dicta, that if the plaintiff had asked for abatement to fulfill a condition precedent, that remedy could have been granted. *Wright*, 762 So. 2d at 993. Both *City of Coconut* and *Progressive* recognized that abatement was appropriate when the prerequisite could be cured. *Progressive*, 979 So. 2d at 333; *City of Coconut*, 840 So. 2d at 394. Thus, Developer's cases do not stand for the proposition that dismissal is required for failing to comply with a condition precedent. Accordingly, the decisions rendered by the other districts do not create an inconsistency in the decisions of this State and this Court should deny the request for discretionary review.⁴

IV. **CONCLUSION**

For the reasons cited above, this Court should not grant discretionary review of the Fifth District's decision in this case.

⁴ Developer ends its brief by arguing that "the dismissal versus abatement question under Section 720.303(1) is one of first impression and public importance." Yet, this Court does not have jurisdiction to review cases that a party deems is a question of great public importance. *Allstate Ins. Co. v. Langstrom*, 655 So. 2d 91, 93, (Fla. 1995)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was furnished to T. Todd Pittenger, Esq., Lowndes, Drosdick, Doster, Kantor & Reed, P.A., P.O. Box 2809, Orlando, FL 32802 and Beth-Ann Schulman, Esq., 2420 Lakemont Avenue, Suite 125, Orlando, FL 32814 via U.S. mail, on this 27th day of July, 2009.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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