

IN THE SUPREME COURT
OF FLORIDA

CASE NO. SC11-1256
LOWER COURT CASE NO. 3D10-2983

ARLENE PECORA,

Petitioner,

v.

BRET BERLIN, SIGNATURE GARDENS,
LTD., a Florida limited partnership, DEUX
MICHEL, INC., a Florida corporation,
SIGNATURE GRAND, LTD., a Florida
limited partnership, and GRAND PARTNERS,
INC., a Florida corporation,

Respondents.

**ON DISCRETIONARY REVIEW OF A
DECISION OF THE DISTRICT COURT OF APPEAL
THIRD DISTRICT**

**BRIEF ON JURISDICTION OF PETITIONER
ARLENE PECORA**

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PREFACE

This is Petitioner Arlene Pecora's request for discretionary review of a March 30, 2011 decision of the State of Florida District Court of Appeal, Third District, affirming the probate court's October 13, 2010 Order on Summary Judgment in favor of Respondents Signature Gardens, Ltd., Deux Michel, Inc., Signature Grand, Ltd., and Grand Partners, Inc., on Petitioner's right of first refusal with respect to the sale of Respondents and their assets.

Petitioner Arlene Pecora will be referred to as "Arlene.

Respondents Signature Gardens, Ltd., Deux Michel, Inc., Signature Grand, Ltd., and Grand Partners, Inc. will be referred to as the "Signature Entities."

The Opinion will be cited as "Op.____."

STATEMENT OF THE CASE AND OF THE FACTS

A. Introduction

The Third District's March 30, 2011 Opinion holds that Arlene is not entitled to a right of first refusal ("ROFR") on the sale of Signature Grand, a catering facility located in Broward County (Op. 1). Grand Partners Inc. is its corporate general partner of Signature Grand, Ltd., which owns Signature Grand. The ROFR at issue is contained in a Signature Grand Distribution Agreement that governs the sale of Signature Grand.

While the Opinion cites this Court's decision in *Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Association One, Inc.*, 986 So. 2d 1279 (Fla. 2008), and the Second District's decision in *Pearson v. Fulton*, 497 So. 2d 898 (Fla. 2d DCA 1986), as controlling Florida law on the application of ROFRs, it declines to apply them here to entitle Arlene to an ROFR. Rather, it holds that the cases do not apply as a matter of law to circumstances such as these, where the sale is a court-supervised sale procured by a court-appointed receiver in a statutory dissolution of the Signature Entities (Op. 8). Arlene believes that the Opinion misinterprets the two cases and misapplies them to the facts of this case.

B. Background

The Distribution Agreement provides that in the event of the death of either of the original owners of Grand Partners, Inc.:

the Survivor shall be obligated to market the Corporation's assets and/or shares and the assets, or partnership interests, of the Partnership during the ten (10) year period following the death of either of them. In the event the Survivor has failed to consummate a sale of

the Corporation and the Partnership within three (3) years of the date of death of a Decedent, the Personal Representative is hereby authorized to seek and procure a buyer for the assets and/or shares of the Corporation and Partnership giving the Survivor the right of first refusal on any offer received for the Decedent's interest in the Corporation. In the event that a buyer is procured by the Survivor, the Personal Representative shall have a right of first refusal with respect to such offer (Op. 6) (emphases supplied).

Arlene's 50% ownership interest is based on the tenancy by the entireties doctrine. *See Berlin v. Pecora*, 968 So. 2d 47 (Fla. 4th DCA 2007). Therefore, she jointly owned 50% of Grand Partners, Inc., with her husband, Michael Pecora until his death in 2003. She then became the sole owner of that 50% interest (Op. 2).

After years of curatorships, administrations, receiverships, and other controls imposed by courts in Broward and Miami-Dade Counties, the receiver appointed by the Miami-Dade County probate court in the Estate of Berlin determined to sell Signature Grand and took the position that Arlene was not entitled to the ROFR provided by the Signature Grand Distribution Agreement.

The probate court agreed and entered summary judgment in favor of the Signature Entities on the issue. The Third District affirmed, holding that the ROFR does not apply to a court-supervised sale procured by a court-appointed receiver pursuant to a statutory dissolution of the Signature Entities.

Arlene now seeks this Court's discretionary review on the basis that the Opinion conflicts with the authority of this Court and the Second District on ROFRs.

SUMMARY OF ARGUMENT

The Opinion conflicts with *Old Port Cove* and *Pearson* because it holds, as a matter of law, that a sale procured by a court-appointed receiver under the supervision and authority of a court in a statutory dissolution proceeding cannot be a “voluntary” sale by an “owner” who “manifests a willingness to accept an offer from a third party.”

If the Court accepts conflict jurisdiction on the basis of conflict with *Old Port Cove* and *Pearson*, it should address the issue involving the statutory dissolution proceeding. As the Opinion recognizes, Signature Grand is a facility located in Broward County, which was also the location of the principal offices of Grand Partners, Inc. until appointment of the Receiver. The “statutory dissolution proceeding” recognized in the Opinion, however, is pending in Miami-Dade County. Although Arlene agreed to the sale of Signature Grand, and wishes to exercise her ROFR to purchase it, she has consistently and unsuccessfully opposed the Miami-Dade County probate court’s right to conduct the dissolution proceedings under Chapter 607, Florida Statutes, which place exclusive venue in Broward County.

ARGUMENT

I. THE COURT HAS CONFLICT JURISDICTION BECAUSE THE OPINION ANNOUNCES A RULE OF LAW THAT CONFLICTS WITH OLD PORT COVE AND PEARSON.

Pursuant to article V, section 3(b)(3), Florida Constitution, this Court has subject-matter jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) over decisions of district courts of appeal that “expressly and directly conflict[]” with a decision of another district court of appeal or of this Court on the same question of law. A “conflict” is the “announcement of a *rule of law* which conflicts with a rule previously announced” or the “application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case.” *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960).

Misapplication of existing precedent is a basis for conflict jurisdiction. *See Wallace v. Dean*, 3 So. 3d 1035, 1040 n.6 (Fla. 2009). Applying controlling precedent in cases that materially vary from that precedent is also a basis for conflict jurisdiction. *See Frankel v. City of Miami Beach*, 340 So. 2d 463, 464-65 (Fla. 1976) (citing *McBurnette v. Playground Equipment Corp.*, 137 So. 2d 563 (Fla. 1962)). Even dicta is sufficient to support conflict jurisdiction. *See Twomey v. Clausohm*, 234 So. 2d 338, 340 (Fla. 1970).

The Court’s conflict jurisdiction standards are satisfied in this case. In *Old Port Cove*, 986 So. 2d at 1285, the Court quoted *Pearson*, 497 So. 2d at 900, to

defined an ROFR as “a right to elect to take specified property at the same price and on the same terms and conditions as those contained in a good faith offer by a third person if the owner manifests a willingness to accept the offer.” The Opinion acknowledges the definition but declines to extend it to a sale under the auspices of the court through a receiver. It reaches that conclusion as a matter of law even while recognizing that the owners – Arlene and the Estate of Berlin – are willing sellers because they both agreed to the sale of Signature Grand through the receiver.

The Third District’s refusal to apply *Old Port Cove*’s definition of ROFR as a matter of law to any sale by a receiver under the auspices of a court is both a misapplication of the case and *Pearson* and an application of that precedent to a situation with materially different facts. Nothing in either *Old Port Cove* or *Pearson* supports the conclusion that an ROFR cannot exist as a matter of law in the circumstances of this case, particularly where both Arlene and the Estate of Berlin are willing sellers.

The court’s rejection of *Old Port Cove* and *Pearson* in favor of cases from other jurisdictions is also error, because they involve sales that were truly involuntary, such as those conducted in foreclosure and bankruptcy proceedings, while the sale of Signature Grand is voluntary. See *Huntington Nat. Bank v. Cornelius*, 914 N.Y.S.2d 327, 328 (N.Y. App. Div. 2010) (foreclosure sale); *Royal Oldsmobile Company, Inc. v. Heisler Properties L.L.C.*, 58 So. 3d 483, 492 (La. App. 2010) (bankruptcy sale); *Central Executive Committee of ODWU, Inc. v.*

Carbon County Tax Claim Bureau, 892 A.2d 868, 870 (Pa. Commw. 2006) (forced sale); *Benefit Realty Corp. v. City of Carrollton*, 141 S.W.3d 346, 350 (Tex. App. 2004) (inverse condemnation); *Draper v. Gochman*, 400 S.W.2d 545, 547 (Tex. 1966) (inverse condemnation); *Tadros v. Middlebury Medical Center, Inc.*, 820 A.2d 230, 232 (Conn. 2003) (foreclosure sale).

Unlike the situations in *Huntington* and the other cases on which the Opinion relies, sale of Signature Grand is voluntary and the ROFR is therefore enforceable. Furthermore, in contrast to the ROFR language in the cited cases, the ROFR in this case contains no “desire,” “decide,” or “intend” language. It requires one of the owners to offer the Signature Entities for sale during a particular period with no option to “decide” not to sell. Furthermore, it does not condition the ROFR on sale by one of the owners. It merely gives the nonprocuring party the right “to acquire such assets and/or shares under terms and in an amount matching a third party’s offer” no matter how or by whom the shares and assets are marketed. Even if the sale were not truly voluntary, therefore, and even if the marketing were done by an entity other than an owner, as here, the definition of ROFR provided by this Court in *Old Port Cove* applies.

The Opinion’s concern regarding dueling ROFRs and the “first” ROFR is also no basis to reject the *Old Port Cove* definition as a matter of law (Op. 15-16). Whether Arlene should be considered the “Personal Representative” or “Survivor,” and whether both parties have a right to exercise the ROFR are questions of fact not resolvable by rejecting *Old Port Cove* and deciding the issue as a matter of law. In the unlikely event that both parties exercise the ROFR, as the Opinion projects (Op. 15-16), that could only happen after a valid bid by a third party. The trial court can certainly determine which of the offers is valid, and resolve any bidding war

as a matter of fact.

While the Court's decision to accept a case under its conflict jurisdiction is discretionary even if the constitutional standard is met, Arlene asks that the Court accept this case both because it involves Florida's interpretation of ROFRs in circumstances not specifically addressed in any Florida case and because the out-of-state cases establish both a majority and a minority position. Whether ROFRs are effective in circumstances involving court proceedings such as the one in this case and the impact of the language of the document providing the ROFR are issues that have been addressed by other states but have not been considered or decided by this Court, as the Opinion recognizes (Op. 13). Arlene asks that the Court exercise its jurisdiction to address the issues.

II. THE COURT HAS JURISDICTION TO ADDRESS THE VENUE ISSUE THAT LED TO THE OPINION.

If the Court finds that it has conflict jurisdiction based on *Old Port Cove* and *Pearson*, then Arlene asks that the Court also consider the venue issue that has pervaded these proceedings, as it has the discretion to do. *See State v. T.G.*, 800 So. 2d 204, 210 n.4 (Fla. 2001) (“[O]nce the Court grants jurisdiction, it may, in its discretion, address other issues properly raised and argued before the Court.”).

Throughout the Estate of Berlin proceedings, Arlene has opposed the Miami-Dade County probate court's authority to statutorily dissolve the Signature Entities because their principal offices – until after the receiver was appointed and changed their location – were located in Broward County. Therefore, Chapter

607 requires that their statutory dissolution take place there. Arlene made this exact argument in *Pecora v. Berlin*, 23 So. 3d 727 (Fla. 3d DCA 2009), as the Opinion recognizes. In opposition, the Berlin Estate argued that the dissolution was pursuant to the Distribution Agreements, not Chapter 607, so venue was correct in Miami-Dade County because the Distribution Agreements provided for venue here. The Third District rejected Arlene's position in a per curiam opinion that did not allow this Court's review. The Opinion, however, states that the dissolution proceedings are statutory. They are therefore controlled by Chapter 607 and belong in Broward County, not Miami-Dade County.

Furthermore, only Chapter 607, not the Signature Grand Distribution Agreement, allows a court to appoint a receiver with the breadth of powers given the receiver in this case. The Agreement contains no language allowing the appointment of a receiver or receivership powers such as those contained in the probate court's order to "operate, consolidate, merge, sell, abandon, or otherwise dispose of the Receivership assets" (Op. 3). If the Agreement does not authorize a receivership, or any of the broad powers given the receiver, then the receivership in this case is necessarily under the auspices of Chapter 607. Chapter 607 proceedings belong in Broward County.

CONCLUSION

For the foregoing reasons, the Court should find that it has jurisdiction and consider the issues raised here.

CERTIFICATE OF SERVICE

We certify that a correct copy of this document was furnished by U.S. Mail to the persons on the attached Service List this ____ day of June 2011.

CERTIFICATE OF COMPLIANCE

We certify that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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