IN THE SUPREME COURT OF FLORIDA

RICHLAND GROVE & CATTLE COMPANY, INC., a Florida corporation,

Appellant,

vs.

TOM EASTERLING,

Appellee.

CASE NO. 70,523

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

APPELLANT, RICHLAND GROVE & CATTLE COMPANY, INC.'s, INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE

In this Brief, the Circuit Court of the Sixth Judicial Circuit of Florida in and for Pasco County, Florida, will be referred to as the Trial Court. The District Court of Appeal of Florida, Second District, will be referred to as the Lower Court. Richland Grove & Cattle Company, Inc., a Florida corporation, the owner of the real estate which was the subject matter of the claimed real estate commission, and which is the Appellant here and the Defendant in the Trial Court will be referred to as the Owner. Following oral argument in the Lower Court, a Notice of Substitution of Parties was filed on behalf of the Appellee, substituting Judy J. Easterling as Personal Representative of the Estate of Thomas A. Easterling as Appellee in place of Tom Easterling, who died following oral argument. In this Brief, the Appellee, Judy J. Easterling, will be referred to as the Broker. Reference to the record on appeal will be referred to by the symbol "R" followed by the page number, and reference to the appendix will be referred to by the symbol "A" followed by the page number.

This is a suit for a real estate broker's commission. This case has twice been appealed to the Lower Court. The first appeal involved an appeal from a summary and final judgment entered by the Trial Court in favor of the Plaintiff (R-13), which summary judgment was reversed and remanded by the Lower Court (R-26, R-28). Richland Grove & Cattle Company v.

Easterling, 460 So.2d 591, (Fla. 2nd DCA 1984). On remand, the jury found for the Plaintiff (R-66). Final Judgment in favor of the Plaintiff Broker was entered on the jury verdict, and Defendant Owner again appealed to the Lower Court. The Lower Court affirmed the Trial Court and entered its opinion (A 1-11).

The Lower Court certified the following question to be of great public importance:

> WHEN A REAL ESTATE BROKER'S CONTRACT DOES NOT PROVIDE A TIME WITHIN WHICH IT IS TO BE PERFORMED, AND THE LAW IMPLIES PERFORMANCE WITHIN A REASONABLE TIME, IS THE QUESTION OF WHETHER PERFORMANCE OCCURRED WITHIN A REASONABLE TIME NORMALLY ONE OF LAW OR FACT?

Defendant Owner timely filed its Notice to Invoke Discretionary Jurisdiction of this Court.

During the jury trial in the Trial Court, the Owner moved for a directed verdict following the close of Broker's case (R-277) and again at the close of Defendant Owner's case (R-332). Following the entry of Final Judgment in favor of the Plaintiff Broker, the Defendant Owner filed its Motion for Judgment in Accordance With Defendant's Motion for Directed Verdict or in the Alternative, a New Trial (R 68-69), which motion was denied by the Trial Court (R-77).

STATEMENT OF THE FACTS

The Broker filed a Complaint against the Owner seeking the recovery of a real estate broker's commission (R-1). The Owner affirmatively pled as a defense that the listing in question was an oral listing which was several years old, that the Broker had failed to perform within a reasonable period of time, and that the listing had expired and Broker had therefore abandoned his contract of employment (R-21, R-22).

The evidence produced at trial showed that the Defendant corporation, Richland Grove & Cattle Company, is a family corporation owned by C. Wynn O'Berry and his family, and that Mr. O'Berry is President of that corporation (R-170). He listed certain property with the Broker, Tom Easterling, in 1979 (R-172). The listing was an open, verbal listing (R-172). The Broker, Tom Easterling, produced a prospective purchaser named Rankin, who submitted an offer to purchase the property, but this deal fell through in November of 1980 (R-247). Thereafter, the Broker, Tom Easterling, had no further contact with the Owner regarding the property until May of 1983 (R-178, R-297), a period of approximately 2½ years (R-261).

Although the Broker claimed that he was showing the grove (R-297), he admitted he never informed the Owner of that fact because "there was no reason to contact him unless I had something going." (R-297). Mr. O'Berry, the President of the Defendant corporation, testified that he had heard absolutely

nothing from the Broker, Tom Easterling, during the 2½ year span of time (R-308, R-309), and that he felt that Easterling had abandoned his contract of employment (R-315). Following the Rankin deal falling through in November of 1980, the Owner heard nothing from the Broker until the Broker, Tom Easterling, showed up at Owner's barn in May of 1983 (R-316).

The Owner sold the property in question to Floyd Philmon and Ruth Philmon (R-171). Floyd Philmon testified that he found out about the property from his son, Tim Philmon, who was a schoolteacher (R-211), and that Tim had found out about the property from a fellow schoolteacher, Yvonne Sickler (R-211), who worked for the Broker (R-212). Tim Philmon testified that he heard about the property at a casual conversation at lunchtime at the schoolhouse (R-238, R-239). When Floyd Philmon first approached O'Berry, the President of the Owner corporation, about the property, O'Berry asked him if he had talked to a realtor, and Philmon indicated that he had not (R-313).

There is testimony in the record about conversations and meetings between Tim Philmon and Broker's saleslady, Yvonne Sickler (R 74-86). However, O'Berry knew nothing about these conversations and meetings and had no contact with Tim Philmon (R-239) or Yvonne Sickler (R-206). Mr. O'Berry testified that at the time he initially talked to Floyd Philmon about the property, he did not feel he had the property listed with the Broker, and he felt that the Broker had abandoned his listing (R-315).

The only evidence in this record of any contact between the

Broker and the Owner during the 2½ year period of time from November 1980 until May 1983 is the testimony of Easterling, the Broker, contained in his deposition which was read to the jury and into the record (R-293A). In that deposition testimony, Easterling mentioned contacting Wynn O'Berry one time about the grove (R-295), stating that a man from Tampa wanted to take half of the property (R-296). Easterling couldn't remember the man's name nor when the conversation took place (R-296), or for that matter, what year it took place (R-295, R-296). In his live testimony at the trial, the Broker, Easterling, testified that this contact with the man from Tampa could have been before the Rankin deal in November of 1980 (R-262). Additionally, the Plaintiff, Easterling, was asked in his deposition the following:

Question: "Was there any other contact that you had with Wynn O'Berry about that grove?"

Answer: "No, not really." (R-297)

The only other testimony regarding any contact during the 30 month gap is found in the record where Mr. Easterling was asked if he had made any contact with Wynn O'Berry about the piece of property, and he responded that:

Answer: "I might or might not have" (R-260),

and on the next page of the record, where he stated that his contacts were not "on a formal basis." (R-261).

SUMMARY OF ARGUMENT

ISSUE ONE: WHEN A REAL ESTATE BROKER'S CONTRACT DOES NOT PROVIDE A TIME WITHIN WHICH IT IS TO BE PERFORMED AND THE LAW IMPLIES PERFORMANCE WITHIN A REASONABLE TIME, IS THE QUESTION OF WHETHER PERFORMANCE OCCURED WITHIN A REASONABLE TIME NORMALLY ONE OF LAW OR FACT?

The rule of law is well settled that when a contract of employment does not contain a time within which the service is to be performed, it will be implied that the service should be performed within a reasonable time. What is a reasonable time is a question of law where the facts are undisputed. In this regard, open, verbal, non-exclusive listings should be treated the same as exclusive, written listing agreements. Certainly open, verbal listings should not be granted a preferential status under the law, and where the facts are undisputed, what is a reasonable time should be a question of law.

ISSUE TWO: ARE THE FACTS IN THE CASE SUB JUDICE UNDISPUTED SO AS TO REQUIRE A RULING AS A MATTER OF LAW THAT THE BROKER, EASTERLING, HAD ABANDONED HIS CONTRACT?

Both the majority opinion and the dissenting opinion concluded that the Broker made no contact with the Owner specifically regarding the property for a period of 2½ years. In

spite of the majority opinion's conclusion in this regard, it paid lip service to the Trial Court's assertion that there were disputed issues of fact regarding the issue of whether any contact was made during this 2½ year period of time. In fact, the record clearly demonstrates that there was no contact. The Broker's own testimony is critical on this issue. The Broker testified in his deposition taken prior to trial that he thought he had contacted the Owner one time about selling half of the property, but later concluded in his live testimony at trial that this possible contact could have been prior to the onset of the 2½ year gap. The Broker also admitted in his testimony that he wasn't sure whether he had contacted the Owner or not, stating that "I might or might not have", but clearly admitting that he did not contact the Owner "on a formal basis." The record is devoid of any contact between the Broker and the Owner for a 2½ year period of time, and as a matter of law, the Broker adandoned his contract.

ISSUE THREE: WAS THE OWNER ENTITLED TO A JURY INSTRUCTION REGARDING ABANDONMENT OF THE BROKER'S CONTRACT?

The entire trial centered around the issue of whether the Broker had abandoned his contract of employment by failing to contact the Owner for a 2½ year period of time. Even though this issue was the focal point of the trial, the Trial Court refused to give the Owner's requested jury instruction on the issue of

abandonment. The Trial Court's refusal to give such a jury instruction sent a clear message to the jury that the Owner's primary bone of contention, which was raised repeatedly throughout the trial by the Owner, was not a serious issue.

ARGUMENT

ISSUE ONE: WHEN A REAL ESTATE BROKER'S CONTRACT DOES NOT PROVIDE A TIME WITHIN WHICH IT IS TO BE PERFORMED AND THE LAW IMPLIES PERFORMANCE WITHIN A REASONABLE TIME, IS THE QUESTION OF WHETHER PERFORMANCE OCCURED WITHIN A REASONABLE TIME NORMALLY ONE OF LAW OR FACT?

The foregoing issue was certified by the Lower Court to this court to be an issue of great public importance (A-6, A-7). In doing so, the Lower Court stated that

> "Important in our determination of this matter is the fact that the contract between the parties was an open, verbal listing and not 'an exclusive agency to sell' or 'an exclusive right to sell' " (A-4).

The Lower Court, in its opinion, cited with approval the case of Shuler v. Allen, 76 So.2d 879, (Fla. 1955), and the "well-settled" rule of law that where a contract of employment does not contain a time within which the service is to be performed, it will be implied that the service should be performed within a reasonable time (A-4, A-5).

The Shuler court also expressed the rule that what is a reasonable time is a question of law where the facts are undisputed. The Lower Court expressed concern with the Shuler opinion as it related to a non-exclusive, open, verbal contract (A-5). The Lower Court reasoned that the Shuler case was based

on the authority of Erswell v. Ford, 205 Ala. 494, 88 So. 429, (Ala. 1921), which involved a written contract for an exclusive right to sell as opposed to an open, verbal, non-exclusive contract, and such rule of law might not therefore apply to such an open, verbal, non-exclusive contract (A-5).

The Shuler case clearly stated that:

> "The law is well settled that where the contract of employment between a seller and the broker does not contain a time within which the service is to be performed, the parties intended that such service should be accomplished within a reasonable time period * * *. It is further clear from the authorities that the question of whether the time consumed is a reasonable time is one of law where the facts are undisputed." at page 882.

The Shuler case relied upon the case of Erswell v. Ford supra in reaching this conclusion. The Lower Court points out that the Erswell case involves an exclusive right to sell, and states that that fact appears to be critical to the court's decision in Erswell (A-5). The Lower Court further stated that other Florida cases in which the reasonable time standard was applied all involved exclusive rights or agencies to sell, and that the Shuler case itself did not actually disclose whether or not it involved an exclusive right to sell.

Owner would respectfully submit that the Lower Court strives too hard to distinguish the Shuler case by stating that it did not disclose whether an exclusive contract was involved. In fact, in the Shuler case, it was stated that

"the sellers orally listed for sale with the broker the Colonial Hotel Court at Holly Hill, Florida." Shuler v. Allen supra at page 881.

While the Shuler court did not state whether or not the claimed listing involved an exclusive right to sell, it did state that the only material evidence in the case was "oral", and that "the following facts were established by the testimony offered by the Plaintiff", Shuler v. Allen supra at page 881, after which the court recited the facts which were established. It seems reasonable to conclude that if an exlusive right to sell had been involved in the Shuler case, the court would have said so. There is nothing in the Shuler opinion to suggest that the listing in that case was exclusive. In any event, the case of Shuler v. Allen supra is akin to the case at bar in that both cases involved an oral listing, and there is no evidence in either case of any exclusive right to sell. There is also nothing in Shuler which suggests that its holding pertained only to exclusive listings (A-10).

While the Erswell case did involve an exclusive right to sell, the Erswell court itself stated:

"The rule of law in Alabama is that--

'When a contract does not specify a particular time, or appoint the happening of a particular event for performance, the presumption is the parties intended performance within a reasonable time.' " Erswell v. Ford supra at page 431.

The case of Alford v. Creagh, 7 Ala.App. 358, 62 South. 254, (Ala. 1913) is cited by the Erswell court for that proposition of law. The Alford case began as an open, verbal listing which was later reduced to a letter agreement but remained an open listing. While the letter agreement did not state whether or not it was an exclusive right to sell, it must be presumed that it was not an exclusive right to sell. The law appears to be that an exclusive right to sell will not be presumed but must be clear and unequivocal from the contract itself. Nicholas v. Bursley, 119 So.2d 722, (Fla. 2nd DCA 1960); Deegan v. Martin, 118 So.2d 647, (Fla. 3rd DCA 1960).

The law announced in the Alford case is that:

> "What is a reasonable time is sometimes a question of fact and sometimes a question of law. Where it depends upon facts extrinsic to the contract, which are matters of dispute, it is a question of fact; when it depends upon the construction of a contract in writing or upon undisputed extrinsic facts, it is a matter of law." Alford v. Creagh supra at page 256.

Owner respectfully submits therefore that both the case of Erswell v. Ford supra, and the case of Alford v. Creagh supra cited by the Erswell court, support the rule of law announced by Shuler, and both cases lend support to the proposition that such rule of law applies to all contracts whether exclusive or open and whether verbal or written.

The Lower Court's opinion appears to create an exception to Shuler v. Allen supra for open, verbal listings. Owner would respectfully submit that such is contrary to public policy and

has the effect of raising open, verbal listings to an exalted status above that of written, exclusive agencies or written, exclusive right of sale. There is simply no reason in the law to give preferential treatment to an open, verbal listing. If an exclusive listing without a time stated in it for performance is to be construed as having to be performed within a reasonable period of time, certainly an open, verbal listing without a time limitation should be performed within a reasonable period of time. Judge Grimes stated this to be the law in his dissenting opinion (A-9). Owner would respectfully submit that there is absolutely no reason to make a distinction between the two, and that the Lower Court's ruling creating an exception to the Shuler rule is effectively saying to trial courts throughout this state that they cannot rule on the question of reasonable time as a matter of law if an open, verbal listing is involved, no matter how clear the facts of the case.

The rule announced in Shuler v. Allen supra, that whether the time consumed is a reasonable time is a question of law where the facts are undisputed, is a good rule of law and should be applied equally to all contracts of employment or listing agreements whether they are exclusive listings or open, verbal listings. There is no reason to create an exception to that rule for open, verbal listings. In fact, it would seem that there is more reason for the rule as it relates to open, verbal listings since they have been proven by the case law to be more troublesome.

Owner respectfully submits that the question certified by the Lower Court to be of great public importance should be answered clearly and unequivocally that when the facts are undisputed, it is a question of law as to whether the contract was performed within a reasonable period of time, and that this rule of law applies to open, verbal listings as well as exclusive agencies or exclusive right of sale.

ISSUE TWO: ARE THE FACTS IN THE CASE SUB JUDICE UNDISPUTED SO AS TO REQUIRE A RULING AS A MATTER OF LAW THAT THE BROKER, EASTERLING, HAD ABANDONED HIS CONTRACT?

The Lower Court concluded in its opinion that there was support for the trial Judge's finding that there existed disputed facts, and that the issue of abandonment of the contract by reason of the lapse of a reasonable amount of time was properly submitted to the jury (A-6). This finding by the Lower Court seems to fly in the teeth of its own conclusion that

> "The prospective purchaser refused the change and the prospective sale fell through in November, 1980. Thereafter, while Appellee and O'Berry remained personal friends and had contact nearly every week, there was no further contact specifically regarding the property until May, 1983." (A-3)

In addition, such a conclusion is directly contrary to the conclusion reached by Judge Grimes in his dissenting opinion when

he stated that

> "More than two and one-half years after Appellee's last contact concerning the grove, Appellant's president, O'Berry, entered into a sales discussion with Floyd Philmon." (A-9)

Judge Grimes further stated

> "There is no dispute over the fact that Appellee did not specifically contact Appellant concerning the property from November of 1980 until May of 1983." (A-10, 11)

It would appear that the majority opinion and Judge Grimes agreed on this point regarding the absence of any specific contacts concerning the property.

In spite of the Trial Court's conclusion that there were disputed issues of fact to be sumbitted to the jury, such is not the case, and the record clearly demonstrates that there are no disputed issues of fact regarding the issue of abandonment and whether there were any contacts by the broker during the 2½ year gap. The Lower Court's determination to go along with the trial Judge's assertions in this regard is placing form over fact. There are simply no disputed issues of fact regarding the issue of abandonment, and in particular the failure of the broker to contact the Defendant during the 30 month interval between the Rankin contract in November, 1980, and the barn meeting in May, 1983.

The Lower Court concluded in its opinion that the Appellee did testify that he had advertised the property for sale and had received inquiries concerning the property in the interim (A-3). While the broker, Easterling, did testify in that regard, Easterling also testified that he never contacted O'Berry and told him about any of that and saw no reason to unless he had "something going" (R-297).

Defendant respectfully submits that there are only two possible areas where the Plaintiff can even contend that there was a disputed question of fact regarding the issue of abandonment and whether or not the broker, Easterling, contacted the Defendant during the 2½ year period of time. The first of these has to do with the mysterious man from Tampa who inquired about buying half of the property. In the Broker, Easterling's, deposition which was taken prior to trial and which was read into the record at the trial (R-293A), Easterling stated that he had made one contact with O'Berry about selling half of the property to a man from Tampa (R-296) but he couldn't remember the man's name, nor could he remember whether the year was 1981, 1982 or 1983 (R-296). In Easterling's live testimony at trial, he admitted that the contact with the man from Tampa who wanted to purchase half of the property "could have been prior to the Rankin deal" (R-262). In his deposition testimony, Easterling was specifically asked

> Question: "Was there any other contact that you had with Wynn O'Berry about the grove?"

Answer: "No, not really." (R-297)

The second area in which the Broker claims that a dispute of fact existed was regarding the informal social meetings that the parties attended together once a month (R-260). In his live testimony, the Broker, Easterling attempted to get off the hook by eluding to some meeting that he and O'Berry had attended together once a month (R-260). Although he admitted to making no formal contact with O'Berry about the property (R-261), he attempted to cloud the issue by stating that "he might have" talked to Mr. O'Berry about the property (R-260).

Easterling's testimony in that regard, which can best be classified as fuzzy, is as follows:

Question: "And then from November 1980 until you went out to the barn and met with Wynn O'Berry, you had no contact with Wynn O'Berry about this piece of property, did you?"

Answer: "Yes, sir. I might or might not have * * *." (R-260)

And again:

Question: "But you didn't contact him and tell him you were advertising it, you didn't contact him and tell him that I was trying to show the property or offering it for sale, did you?"

Answer: "No."

Question: "And that was for a two and a half year period of time, wasn't it?"

Answer: "No, not continuous, because there was times when I got in touch with him, even though it wasn't on a formal basis." (R-261)

This fuzzy testimony on this point is contrasted with O'Berry's testimony in which he testified unequivocally that he heard nothing from Easterling during the 2½ year interval (R-308), either formally or informally (R-311), and he thought Easterling had abandoned the contract (R-311). There is simply no positive testimony in this record on appeal from which reasonable men could conclude that any contact was made between Easterling and O'Berry during the 2½ year gap. The Trial Court should have so concluded and should have granted Defendant's motion for directed verdict.

The burden of proving the existence of a contract of employment is on the broker. Dixson v. Kattel, 311 So.2d 827, (Fla. 3rd DCA 1975). If a broker's contract of employment does not contain a time period within which services of the broker are to be performed, the broker has a reasonable time in which to accomplish the requested services. Shuler v. Allen supra; Wilkins v. W. B. Tilton Real Estate and Insurance, Inc., 257 So.2d 573, (Fla. 4th DCA 1971). If a broker takes a listing, he must make an earnest and continuing effort to sell the property, and if the listing agreement does not expressly contain such a covenant on the part of the broker, one will be implied. Mark Realty Inc. v. Rogness, 418 So.2d 373, (Fla. 5th DCA 1982).

If a broker fails to keep the owner advised of negotiations, the owner has a right to assume that the broker has abandoned his efforts after failing to hear anything from the broker for a reasonable time. Wilkins v. W. B. Tilton Real Estate and

Insurance, Inc. supra; Shuler v. Allen supra; and Futch v. Consolo, 227 So.2d 736, (Fla. 3rd DCA 1969).

In the case of Wilkins v. W. B. Tilton Real Estate and Insurance, Inc. supra, the court stated that

> "The fact that no time period was orally specified for the listing does not give rise to a 'brokerage in perpetuity'; instead such an unspecified listing must be construed to be 'for a reasonable time' to be determined by the circumstances of the particular case." at page 575.

In the Wilkins case, although the broker claimed to have continued his effort in connection with the sale of the property, the court found that there had been no contact between the broker and the seller for a period of 19 months. The court concluded that:

> "The mere fact that the broker had advertised the property for sale and continued to show it to prospective purchasers does not negate an abandonment or give rise to the continuous negotiations necessary to entitle the broker to a commission from the sale in question." at page 575.

The court in Wilkins concluded by quoting from Shuler v. Allen supra, as follows:

> "If the broker voluntarily abandons his efforts, once begun, to find a purchaser for property, or fails to find one within a reasonable time, all without the fault of the owner, then his contract of employment is at an end, and thereafter the owner is at liberty to sell the property to anyone, including the purchaser first found by the broker, * * *." at page 575.

The court in the Wilkins case found that there had been an abandonment of the broker's contract of employment after a period of 19 months.

In the case at bar, we have a period of 30 months from November 1980 until just before the sale in June 1983, in which the broker, Easterling, failed to notify the owner, O'Berry, of any efforts on his part to sell the property.

In Shuler v. Allen supra, the court found an abandonment of the broker's contract of employment when

> " * * * a period of time from October, 1951 to March, 1953 elapsed before the sellers finally sold the property, during which time, so far as the sellers knew, the broker had taken no steps whatever to further negotiate with the purchasers who had tendered a contract which had been rejected or anyone else." at page 882.

In the Shuler case, the court specifically held that

> "It is further clear from the authorities that the question of whether the time consumed is a reasonable time is one of law where the facts are undisputed." at page 882.

In the Shuler case, the court quoted with approval the language of the Texas case of Parkey v. Lawrence, 284 S.W. 283, 287, as follows:

> "If the broker voluntarily abandons his efforts, once begun, to find a purchaser for property, or fails to find one within a reasonable time, all without the fault of the owner, then his contract of employment is at an end * * * " at page 882.

The court concluded in the Shuler case that the lapse of some 16 months in which no contact was made between the broker and the owner was not within a reasonable period of time, and the contract was deemed abandoned.

Whether abandonment occurs is a question to be decided based upon the facts of each particular case. It could be 16 months as in the case of Shuler v. Allen supra, or 19 months as in the case of Wilkins v. W. B. Tilton Real Estate and Insurance, Inc. supra. Clearly the 30 months of silence from the broker in the case sub judice constitutes an abandonment by the broker. As Judge Grimes stated in his dissenting opinion:

> "There is no dispute over the fact that Appellee did not specifically contact Appellant concerning the property from November of 1980 until May of 1983. Therefore Appellee's listing had expired as a matter of law. Such effort as he may have made thereafter amounted to no more than those of a volunteer." (A-10, A-11)

There is simply no credible, positive testimony in this record which would negate abandonment by the broker of his contract of employment.

O'Berry testified unequivocally that there was no contact between the broker and himself for a period of approximately 2½ years. This testimony was uncontradicted, except to the extent of Easterling's fuzzy testimony about "he might or might not have" on an "informal basis." Defendant submits that such testimony by Easterling amounts to no testimony at all, and that O'Berry's testimony in this regard remained uncontradicted.

In the case of Bergh v. Bergh, 160 So.2d 145, (Fla. 1st DCA 1964), the court held that uncontradicted testimony should be accepted as proof of an issue, and not wholely disregared where such testimony consists of facts as distinguished from opinions, and is not illegal, improbable, unreasonable, or contradictory within itself. Owner submits that in the case at bar, O'Berry's uncontradicted testimony established that there was no contact within the 2½ year period of time, and that the court and the jury were bound by the uncontradicted testimony.

Even if the fuzzy testimony of Tom Easterling regarding informal contact with O'Berry should be considered by the court, such testimony was not clear and positive such as to create a preponderance of the evidence on this issue. Such testimony was so equivocal and unclear as to not lead a reasonably cautious man to the conclusion in question or produce a reasonable belief that Easterling had in fact contacted O'Berry. In the case of Saporito v. Bone, 195 So.2d 244, (Fla. 2nd DCA 1967), this court held that a

> "Preponderance of the evidence implies that the evidence must satisfy the mind of the jury such as to lead a reasonably cautious man to the conclusion in question, produce a reasonable belief, and convince as of its truth." at page 245.

The fuzzy testimony of Tom Easterling in this regard certainly could not lead a reasonably cautious man to the conclusion that Easterling contacted O'Berry.

The only testimony on this point came from Easterling and O'Berry. When considering the testimonies of the two men, one of whom testified positively and unequivocally there was no contact, and the other, Tom Easterling, who testified equivocally that there "might or might not have been" on an "informal basis", the verdict of the jury in this case is clearly against the manifest weight of the evidence, and the Trial Court should have decided this issue as a matter of law.

ISSUE THREE: WAS THE OWNER ENTITLED TO A JURY INSTRUCTION REGARDING ABANDONMENT OF THE BROKER'S CONTRACT?

The Owner's requested Jury Instruction #19, which was denied by the court (R-61), states the following:

> "You are instructed that if a broker fails to keep the owner advised of negotiations, the owner has a right to assume that the broker has abandoned his efforts after failing to hear anything from the broker for a reasonable time."

The Owner affirmatively pled that the Broker's listing agreement was several years old, and that the Broker had failed to perform his contract within a reasonable period of time. The Owner further pled that it had not heard from the Broker regarding any attempts by the Broker to sell the subject property for a period of time since November, 1980, and that the Broker had abandoned his contract of employment (R-21, R-22). The

Owner's case primarily involved the issue of abandonment (R-283 through R-322). The subject matter of Owner's motion for directed verdict at the close of Broker's case (R-277), and Owner's motion for directed verdict at the conclusion of all of the evidence (R-332) were primarily based upon the issue of abandonment. Indeed, Owner's closing argument (R-351) was largely devoted to the issue of the abandonment of the broker's contract of employment based upon the 2½ year period of time in which the owner heard nothing from the broker.

In spite of the fact that the entire trial centered around the issue of the 2½ year gap in which the broker abandoned his contract of employment, the Trial Court refused to give a jury instruction on abandonment of the broker's contract of employment. The effect of this refusal was to negate the main thrust of the Owner's case, and in effect, to pull the rug out from under the Owner. The jury, having heard so much from the Owner about the broker abandoning his contract of employment, heard nothing from the court about the law in this connection. Clearly, the Trial Court should have instructed the jury on the issue of the broker abandoning his contract of employment in this case, since this was the focal point of the trial.

The Lower Court concluded that the jury instruction was adequate because the Trial Court instructed the jury that when a contract of employment between a seller and a broker does not contain a time within which the service is to be performed, the parties intend that it be accomplished within a reasonable time.

Owner respectfully submits that this instruction does not speak to the issue of abandonment, which was argued vehemently by the Owner throughout the trial. It also does not counter the unfavorable charge given to the jury by the Trial Court that

> " * * * but that is not the case where the seller and the buyer have purposely excluded the broker from these negotiations by dealing with one another directly." (R-384)

The court's failure to mention the word "abandonment" in its entire instruction to the jury was simply misleading and not fair to this Owner. It sent a clear message to the jury that the Owner's primary bone of contention and the issues which Owner tried and raised repeatedly throughout the trial was not a serious issue. The issue which became the focal point of the trial was not mentioned by the court in its instruction to the jury.

CONCLUSION

The Lower Court should be reversed with instructions to enter its order instructing the Trial Court to enter judgment for the Owner, or in the alternative, to grant Owner a new trial with proper jury instructions regarding the issue of abandonment.

RESPECTFULLY SUBMITTED,

GIBBS, McALVANAH & PARNELL, P.A.

By: ______________________

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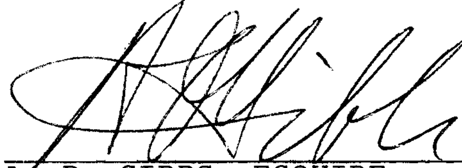
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. regular mail to: CHARLIE LUCKIE, JR., ESQUIRE, P. O. Box 907, Brooksville, Florida 34298-0907, this 5th day of June, A.D., 1987.



A. P. GIBBS, ESQUIRE