

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02 - 2491

ST. JOE CORPORATION,

Petitioner,

v.

H. BRUCE McIVER,

Respondent.

On Petition For Review Of A Decision
Of The First District Court of Appeal
Based On Conflict Jurisdiction

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

Table of Authorities.
. iv

Statement of the Case and Facts.
. . 1

Summary of Argument
12

Argument
. 15

POINT I.

THE DISTRICT COURT PROPERLY INTERPRETED DAUER AS ENTITLING McIVER TO A JURY TRIAL ON THE ISSUE OF WHETHER THE STATE'S ACQUISITION OF ST. JOE'S PROPERTIES AT ST. JOE'S REQUEST AND ON ST. JOE'S TERMS CONSTITUTED A "SALE."

Standard of Review
.15

Argument
. 15

POINT II.

THE DISTRICT COURT ERRED BY AFFIRMING THE SUMMARY JUDGMENT ON McIVER'S ALTERNATIVE IMPLIED-IN-FACT CONTRACT COUNT. A JURY COULD FIND THAT McIVER HAD AN IMPLIED-IN-FACT CONTRACT WITH ST. JOE TO RECEIVE A COMMISSION IN THE EVENT THE STATE ACQUIRED ST. JOE'S LANDS BY CONDEMNATION.

Standard of Review
.31

Argument
. .32

POINT III.

THE DISTRICT COURT ERRED BY AFFIRMING THE SUMMARY JUDGMENT ON McIVER'S ALTERNATIVE QUASI-CONTRACT COUNT. A JURY COULD FIND

THAT McIVER HAD A QUASI- CONTRACTUAL RIGHT TO COMPENSATION IN THE EVENT THE STATE ACQUIRED ST. JOE'S LANDS BY CONDEMNATION.

Standard of Review
.36

Argument
. .37

POINT IV.

THE DISTRICT COURT ERRED BY AFFIRMING THE ORDER DENYING McIVER'S MOTION TO AMEND HIS COMPLAINT TO CLAIM A COMMISSION ON THE SALE OF DEER LAKE.

Standard of Review
.39

Argument
. .39

Conclusion
. . 43

Certificate of Service.
.43

Certificate of Type Size and Font
.44

TABLE OF AUTHORITIES

Cases

Arrieta-Gimenez v. Arrieta-Negron, 551 So.2d 1184 (Fla. 1989)	27
Bill Williams Air Conditioning & Heating, Inc. v. Haymarket Coop. Bank, 592 So.2d 302 (Fla. 1st DCA 1991), rev.dismissed, 598 So.2d 76 (Fla. 1992)	41
Bostwick v. Bostwick, 346 So.2d 150 (Fla. 1st DCA 1977)	42
Bould v. Touchette, 349 So.2d 1181(Fla. 1977).....	15
Campbell-Leonard Realty v. El Matador Apt. Co., 220 Kan. 659, 556 P.2d 459 (1976)	24
Commerce Partnership 8098 Ltd. v. Equity Contracting Co., 695 So.2d 383 (Fla. 4th DCA 1997) (en banc)	32,33,37
Danieli Corp. v. Bryant, 399 So.2d 387 (Fla. 4th DCA 1981), rev. denied, 407 So.2d 1102 (Fla. 1981).	36,38
Dauer v. Pichowski, 413 So.2d 62 (Fla. 2d DCA 1982), rev. denied, 419 So.2d 1199 (Fla. 1982)	passim
Davis v. Department of Health & Rehab. Servs., 461 So.2d 210 (Fla. 1st DCA 1984)	38
Dimick v. Ray, 774 So.2d 830 (Fla. 4th DCA 2000)	39,42

Division of Admin., Dep't of Transp. v. Tsalickis, 372 So.2d 500 (Fla. 4th DCA 1979)	27
Emerson C. Custis & Co. v. Tradesmans Nat'l Bank & Trust Co., 155 Pa. Super. 282, 38 A.2d 409 (Pa. Super. Ct. 1944)	18
JFK Medical Center, Inc. v. Price, 647 So.2d 833 (Fla. 1994)	27
Keyes Co. v. Florida Nursing Corp., 340 So.2d 1254 (Fla. 3d DCA 1976)	12,19
Miller, Cowherd & Kerver, Inc. v. De Montejo, 406 So.2d 1196 (Fla. 4th DCA 1981)	28
Moylan v. Estes, 102 So.2d 855 (Fla. 3d DCA 1958), cert. denied, 106 So.2d 199 (Fla.1958)	34,35,36
Pol v. Pol, 705 So.2d 51 (Fla. 3d DCA 1997), rev. denied, 717 So.2d 536 (Fla. 1998)	28
Rabon v. Inn of Lake City, Inc., 693 So.2d 1126 (Fla. 1st DCA 1997)	32,33,37
Southern Bell Tel & Tel. Co. v. Acme Elect. Contractors, Inc., 418 So.2d 1187 (Fla. 4th DCA 1982)	38
Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So.2d 126 (Fla. 2000)	15

Walker v. Senn,
340 So.2d 975 (Fla. 1st DCA 1976) 43

Wilson v. Frederick P. Ross Inv. Co.,
116 Cal. 249, 180 P.2d 226 (1947) 18,35

Other Authorities

3 Corbin on Contracts §564
(1960).....35

Fla. R. Civ. P. 1.190
(c).....41

§73.111, Fla. Stat.
(1993).....22

STATEMENT OF THE CASE AND FACTS

This review proceeding arises out of a summary judgment. All factual issues must therefore be resolved, and all inferences must be drawn, in McIver's favor. Because the issues in this proceeding are entirely fact-dependent, we must give the Court a more accurate set of facts than the one St. Joe provided.

Petitioner St. Joe Paper Company owned, and the State of Florida wanted to purchase, a 685 acre uninhabited and environmentally unique tract of Gulf-front property in Walton County, Florida, known as Topsail Hill (R2.338;R4.786,791; R5.803-806;R6.1023,1123-1125). Respondent H. Bruce McIver was a licensed Florida real estate broker whose specialty was the sale of conservation and preservation lands to the State (R2.372-373,376-377,395-396).

McIver had long represented St. Joe in real estate matters, and often on a "handshake" (R2.254,377-381). In 1988, McIver entered into an oral brokerage agreement with St. Joe, through its chief executive officer, Jacob Belin. Under the agreement, McIver was to arrange the sale of Topsail to the State through Florida's Conservation and Recreation Lands Trust Fund ("CARL") program in return for 2% of whatever consideration St. Joe obtained from the State (R2.283-284,385-388,392-394,399;R3.400-401,495-496;R5.916-917,944,954-955).

St. Joe continuously confirmed to the State that McIver was its agent and entitled to a commission. In a December 1990, State-mandated, "Beneficial Interest and Disclosure Affidavit," Belin stated that McIver, "incident to the sale of [Topsail]"

would be entitled to “2% of Sale Price” as a “Commission and Consulting Fee” (R3.578). In July 1992, Belin notified the State, on the State's “Owner’s Authorized Representative” form, that McIver was St. Joe’s “authorized representative...for any negotiations concerning conveyance of the property” to the State (R4.723). Belin executed another “Owner’s Authorized Representative” form, to the same effect, in August 1994 (R4.724).

Florida acquires environmentally significant lands through its CARL program (R5.821-828;R6.1086-1087). In 1989, because of McIver’s familiarity with the CARL process and his efforts on St. Joe's behalf, the State placed Topsail on its CARL acquisition list (R2.322-330,395;R3.403-407). McIver’s continuing efforts caused Topsail to move up in priority on the acquisition list from seventeenth in 1989 to first in 1994 (R2.293,297-298,304-305,331-337,340-344, 382;R3.407-409,489,503,537,551,577,584,603,605;R6.1087).

McIver thereafter worked continuously to sell Topsail to the State (R2.354-357;R3.411-418,588.R4.603-608). Negotiations between the State and St. Joe stalled, however, in March 1994 when the State offered St. Joe \$25.7 million for the property and St. Joe told the State that it would not sell for less than \$50 million (R2.358-360;R3.418-426;R4.681,750,762,774).

To break this impasse over sale price, McIver proposed to St. Joe that they talk the State into acquiring Topsail by condemnation (R2.276-277;R3.426-427,430,432). McIver knew that before condemnation begins, the State bases the amount of its purchase offer on the property’s then-existing zoning, but that after condemnation

begins, the State could base its offer on the highest and best use of the land regardless of zoning (R3.429-432,448-449;R5.978-979,981-982).

Topsail originally had been zoned for multiple units per acre (R6.1005-1006). In 1993, the State directed Walton County to amend its Comprehensive Plan to downzone Topsail to one unit per five acres (R3.597-598;R4.647-649;R5.820,825;R6.1003,1016,1142-1144). McIver and St. Joe believed that the State engineered the downzoning in order to acquire Topsail at a lower price (R3.429-433;R4.647-649;R5.930,932-933;R6.1009). McIver, however, knew that condemnation would provide St. Joe with an opportunity to negotiate its property's zoning back to a higher, more valuable density (R2.242;R3.426-431). After McIver explained these issues to Belin, Belin told McIver to "see what [he] could get done" to increase the value of the property (R3.432-433).

In accordance with St. Joe's direction, McIver proposed to the State that the parties proceed by condemnation. The State initially responded that condemnation was a "possibility." Subsequently, in the summer of 1994, the State asked McIver to confirm with Belin that St. Joe was in fact amenable to a "friendly condemnation" (R3.434-437,441,443-444). In a friendly condemnation the State agrees to condemn property that the owner desires the State to condemn and the State buys the property at an arms' length negotiated price (R3.441,446-448;R6.1000). After explaining this process to Belin, Belin directed McIver to "tell them to condemn it." McIver communicated St. Joe's agreement to the State (R2.243-244,283,286;R3.442-443,452,445-449,453,455,456).

As a negotiating tactic to maximize Topsail's price and to avoid appearing before a jury in the condemnation action as a willing seller, St. Joe publicly denied the "suggestion" that St. Joe had asked the State to condemn its property (R2.242-243;R3.458-460,465-466;R7.1275& n.1;R8.1423 & n.1). St. Joe, however, simultaneously communicated to the State St. Joe's continuing readiness to sell Topsail to the State for "three to four times" the State's last \$25.7 million offer (R4.789;R5.989-990;R7.1346-1347). The State eventually purchased Topsail for \$84 million -- a sum, as St. Joe had demanded, that was "three to four times" the State's last \$25.7 million offer (R5.838-845).

Condemnation proceedings in CARL acquisitions, McIver testified, were always consensual: "The State doesn't condemn environmentally endangered lands unless there is an acquiescence by the seller" (R2.285); "I was well familiar with the State's position in condemning endangered lands. They didn't do it" (R2.461); "[Condemnation's] a pretty big hammer to go and take away somebody's private property rights and say it's in the public interest for conservation and recreation or preservation. [W]ithout the acquiescence of the landowner they didn't do it" (R2.461); "[I]n our conversations [with the State] it was clear that they would not condemn it unless St. Joe agreed" (R2.462).

Based on the strength of McIver's private assurances that St. Joe wanted to proceed by friendly condemnation, despite its public "posturing" to the contrary (R.242-243), the State quickly authorized the condemnation of Topsail on July 26, 1994 (R3.450,453-455;R4.786,791). On August 4, 1994, following the State's decision to condemn, St. Joe reaffirmed to the State in writing that McIver was still

its authorized agent (R4.724). The State filed its condemnation action on September 30, 1994 (R6.1141).

McIver continued to represent St. Joe after the condemnation process began. St. Joe referred inquiries to McIver as its agent, McIver communicated with State officials and others on St. Joe's behalf, and McIver and Belin had meetings and conversations regarding Topsail as late as 1995 (R2.256-258,260;R3.432-437, 450-451,453,458,462-464,466-478;R4.678-682,797). McIver rendered some of these services after St. Joe hired Toby Brigham as its condemnation attorney in August 1994 (R3.474;R4.795).

In or about October 1994, after confirming to the State in August 1994 that McIver was still St. Joe's agent, Belin changed his mind. He told McIver: "Since this is a taking, there is not going to be a fee paid. If it's a sale your 2 percent stands" (R3.471;R5.854,855). On October 21, 1994, three weeks after the litigation began, St. Joe wrote to the State directing it to address all future communications to its lawyer Toby Brigham. In his employment agreement with St. Joe, Brigham had directed that "[a]ll communications with the [State]" were to occur "exclusively" through his office (R3.483;R4.656,795,798).

St. Joe achieved all its economic objectives through the condemnation process (R6.1007,1028,1056-1057). On the issue of price, St. Joe got the State to agree that Topsail would be appraised based on 8 units per acre -- a 40-fold increase over the prior State-imposed density of one unit per five acres (R5.819,997-998;R6.1009-101155). Throughout the action, St. Joe informed the State that it would not accept less than \$84 million for Topsail. The experienced assistant attorney general

handling the condemnation for the State, said of the experience of bargaining with St. Joe over price:

I learned a lot about negotiating with St. Joe It was like I was negotiating with myself. I'd say 70 million and they'd say 84 million. I'd say 82 million and they'd say 84 million. . . . I never want to deal with them again.

(R6.1062). The State eventually folded and agreed to pay \$84 million for Topsail (R4.683;R5.999;R6.1000-1001,1059-1060,1062;R6.1070-1084).

The State met St. Joe's price because the State knew that St. Joe had the stronger bargaining position. St. Joe, for tactical reasons, was threatening to develop certain coastal properties that the State wanted to keep pristine; Walton County wanted the Topsail area developed and supported St. Joe against the State; and the trial judge appeared to favor higher densities at Topsail, making the State "worried [it] was going to lose" the condemnation action. Additionally, having chosen a "slow" rather than a "fast-take" condemnation, the State felt the economic pressure mounting. Market forces and developmental pressures were increasing the value of the land as the suit progressed. The State knew that it would have to pay whatever the highest-and-best-use value of Topsail had risen to by the time of trial (R6.1006-1007,1013-1017,1045,1055). As the State's condemnation counsel testified:

Throughout the entire CARL condemnation with St. Joe, St. Joe fully had the power and exercised its power to negotiate price of property back and forth with the State; isn't that true.

. . .

There were negotiations throughout the lawsuit, yes.

...

[St. Joe's representatives in the negotiations] weren't exactly the prisoner at the bar in this case, unable to speak up for themselves; were they?

No. *I think [the State was] in the position of the prisoner at the bar [e.s.].*

...

The whole process was tough negotiation. *[St. Joe] had more bargaining position than we did.* So, that made them tough — it put us in a tough negotiating position, and they were tough in their position [e.s.].

(R6.1011-1013).

St. Joe extracted from the State other forms of remuneration in exchange for Topsail. From the beginning of negotiations, St. Joe “insisted upon” changes to the Walton County Comprehensive Plan. The Plan adversely affected building densities at Topsail and at several other coastal properties, see, *infra*, that St. Joe wanted to develop (R6.1008,1020,1047). The State described St. Joe's demand that the Plan be changed to allow greater densities as “crucial” to the negotiations and as a “bigger hurdle to settling the case” than the price for Topsail itself (R6.1008-1009). St. Joe's insistence that the State negotiate an amendment to the Comprehensive Plan if it wanted to acquire Topsail led to the 8 units-per-acre stipulation over density between St. Joe and the State that broke the impasse over Topsail's price (R6.1009-1011,1033-1034). St. Joe refused to compromise on any remuneration

issues because it knew that the State wanted Topsail badly and correctly figured that the State “wouldn’t walk away from it.” (R6.1017).

St. Joe also determined when title to its properties would pass to the State. Under the State's "slow-take" condemnation procedure, St. Joe remained in total possession and control of its property throughout the proceedings. (R6.1013-1015, 1017):

And St. Joe, during the condemnation negotiations, fully had the power and the ability to negotiate as to when title would be transferred...; is that true?

Until we got to the point where a court had made a ruling, that’s correct.

(R6.1025). The State chose the "slow-take" form of condemnation in order *not* to acquire a possessory interest in St. Joe's property at the beginning of the lawsuit.

The State wanted to be able to abandon the condemnation action if the cost of acquiring Topsail grew too great (R6.1013-1015,1017).

St. Joe also controlled the nature and extent of the properties the State might acquire:

Once the condemnation began, St. Joe had the power, the ability freely to also negotiate what property should be sold and what should be included in the condemnation; did it not?

Sure.

(R6.1023-1024). At the initial mediation in July 1995, St. Joe unilaterally redefined the properties and property interests over which the State would be forced to

bargain. St. Joe wanted the State to purchase part of its Deer Lake property, which the State had no authority to condemn and had not sought to condemn; remove the rest of Deer Lake and another St. Joe property, Seagrove, from its acquisition lists; and amend the Walton County Comprehensive Plan to allow development in Deer Lake and Seagrove. St. Joe refused to negotiate the purchase price for Topsail or discuss settling the condemnation action without agreement on these new issues. (R6.1023-1024,1051-1052;1145;R7.1272-Tab3). The State's acquisition of other properties owned by St. Joe as part of its acquisition of Topsail was a strategy first proposed to St. Joe by McIver. (R2.224,308,398;R3.400-401,437-438).

While St. Joe was negotiating the foregoing issues, it was placing further economic and negotiating pressure on the State by challenging the legality of the condemnation. On Friday, December 1, 1995, following an October 19-20 "public purpose" hearing, the judge found that the State had not complied with certain procedural requisites under the CARL statute, and had not proved that the taking was necessary to achieve a public purpose. Judgment was entered dismissing the State's condemnation petition "with prejudice" (R5.820-831;R6.1028-1029,1039, 1049,1145-1146).

On Monday, December 4, 1995, upon learning of the Friday ruling in St. Joe's favor, the State realized it had lost all bargaining power. The State quickly acceded to St. Joe's \$84 million demand for the Topsail tract -- the only significant issue still in contention -- and executed a sales contract entitled "Topsail Consent Final Judgment" (R5.838;R6.1028,1031,1037-1038,1045-1046,1061,1070-1084). The

consent "judgment," the State agreed, "substituted for what would normally be a deposit receipt contract" between a buyer and a seller (R6.1034-1035).

The State did not know whether St. Joe knew of the December 1 ruling, but decided that it was not going to tell St. Joe that it had won before securing St. Joe's signature on the sales contract (R6.1045-1046,1066-1067). The State knew that even though it had lost the case, St. Joe would be bound, like any property owner, once it signed a sales contract (R6.1031,1032,1035-1036,1039). St. Joe did in fact know that it had won the condemnation action before it signed the sales contract but chose to sign the contract anyway (R5.844;R6.1037-1038,1146).

Under the settlement the State agreed to pay St. Joe \$84 million for a portion of Topsail and remove the remainder of Topsail as well as St. Joe's Deer Lake and Seagrove properties from its CARL acquisition lists. As part of the consideration for Topsail, the State agreed that the development rights the parties had negotiated could be applied "to the remaining property at Topsail," as well as to Deer Lake and Seagrove (R5.840-841;R6.1046-1047). The parties agreed that upon the State's payment of the \$84 million into the court registry, fee simple title to the property would vest in the State, and the State would "be entitled to immediate possession of the property" (R5.842). St. Joe also gave the State an option to purchase an additional 172.3 acres of Deer Lake "according to the price and terms agreed upon by the parties" (R5.843;R6.1043). The State exercised its option and paid St. Joe an additional \$13.7 million for Deer Lake (R5.835, 846; R6.1147). The total value to St. Joe of the cash it received for Topsail and Deer Lake and the rights it obtained from the State and the County to commercially develop the land it retained was

approximately \$150 million (R3. 493-495; R5.923; R6.1148,1152-1153). On December 5, 1995, the judge in the condemnation action duly approved the parties' December 4 "Consent Final Judgment" notwithstanding his December 1 ruling dismissing the action (R5.838,843-844;R6.1066-1067).

Following the settlement, St. Joe refused to pay a commission to McIver (R3.584;R4.656,685;R5.854,855). McIver sued St. Joe alleging causes of action in express contract, implied contract, and quasi-contract (R5.892). St. Joe moved for and obtained summary judgment on all counts (R4.689;R8.1423). The First District Court of Appeal reversed the summary judgment on the express contract count but affirmed, without discussion, the summary judgment on the implied contract and quasi-contract counts, and the order denying McIver's motion to amend (828 So.2d 394). This Court granted St. Joe's petition for review based on an apparent conflict between this case and Dauer v. Pichowski, 413 So.2d 62 (Fla. 2d DCA

1982).**SUMMARY OF ARGUMENT**

The District Court correctly interpreted and applied Dauer v. Pichowski, 413 So.2d 62 (Fla. 2d DCA 1982), rev. denied, 419 So.2d 1199 (Fla. 1982) and Keyes Co. v. Florida Nursing Corp., 340 So.2d 1254 (Fla. 3d DCA 1976). Dauer and Keyes Co. do not hold that a brokerage commission can *never* be earned when land is conveyed during the course of a condemnation proceeding. Dauer recognizes, instead, that where the landowner (1) wants to sell to the condemning authority, (2) controls the negotiations over price and the extent of the land to be conveyed, and (3) retains control over the land until the conveyance, the transaction is more analogous to a voluntary sale (on which a commission may be earned) than to a forced taking. Based

on the record in this case, the District Court properly decided that whether St. Joe's conveyance to the State was a voluntary sale or the product of an involuntary condemnation was a disputed factual issue that could not be resolved by summary judgment.

St. Joe needed the vehicle of condemnation to achieve its economic objectives but knew that the State never condemned land for conservation purposes unless the owner first agreed. St. Joe therefore asked the State to initiate a friendly condemnation. Because St. Joe, as the State admitted, had a stronger bargaining position than the State, every critical issue in the proceeding -- the property to be conveyed, the time possession would be surrendered, and the consideration -- was resolved on St. Joe's terms. Moreover, St. Joe agreed to sell its property to the State at a time when the condemnation action had been dismissed with prejudice and St. Joe was under no obligation to negotiate or contract with the State. A jury could find that the State acquired Topsail by "sale" within the meaning of the parties' commission agreement.

The District Court erred by affirming the summary judgment in St. Joe's favor on McIver's alternative implied contract and quasi-contract causes of action. After sales negotiations had reached an impasse, McIver proposed the friendly condemnation mechanism to St. Joe as a way to force up the purchase price and break the impasse. St. Joe directed McIver to arrange the condemnation. McIver, at St. Joe's request, caused the State to initiate the condemnation that led to St. Joe's lucrative sale to the State. McIver rendered these condemnation-related services in the expectation of payment, and St. Joe knew that McIver expected payment. Having directed McIver

to arrange the condemnation, St. Joe would be unjustly enriched if it did not compensate McIver for his efforts. McIver's condemnation-related efforts were not inconsistent with or subsumed within his express oral commission contract which, St. Joe contended and the trial judge found, only applied to a pre-condemnation "sale." McIver is entitled to have the jury consider his alternative implied contract theories if he is unable to convince the jury, on his express contract count, that the condemnation was in the nature of a "sale."

The District Court also erred by affirming the lower court's refusal to allow McIver to amend his complaint to claim a commission against the proceeds from St. Joe's sale of Deer Lake to the State. St. Joe did not prove, and the judge did not find, that the amendment would delay the trial, that St. Joe would be prejudiced by the amendment, that McIver had abused the amendment privilege, or that the amendment would be futile. The judge simply denied the amendment in the erroneous belief that the Deer Lake purchase was unrelated to McIver's initial commission agreement with St. Joe. In fact, the commission agreement extended to whatever consideration St. Joe received from the Topsail deal. The proceeds from the Deer Lake sale were an integral part of the total consideration the State paid, at St. Joe's insistence, to acquire Topsail.

ARGUMENT

POINT I.

THE DISTRICT COURT PROPERLY INTERPRETED DAUER AS ENTITLING McIVER TO A JURY TRIAL ON THE ISSUE OF WHETHER THE STATE'S ACQUISITION OF ST. JOE'S PROPERTIES AT ST. JOE'S REQUEST AND ON ST. JOE'S TERMS CONSTITUTED A "SALE."

Standard of Review

Summary judgments are reviewed *de novo*. Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So.2d 126, 130 (Fla. 2000). Once this Court assumes jurisdiction, it should reconsider and decide on the merits all issues passed upon by the District Court. Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977).

Argument

Dauer v. Pichowski, 413 So.2d 62 (Fla. 2d DCA 1982), rev. denied, 419 So.2d 1199 (Fla. 1982), acknowledges the general rule that a taking by condemnation is not a "sale" for purposes of a brokerage commission because the landowner is not a willing seller. However, Dauer, as the District Court properly recognized, would regard a conveyance during condemnation as a "sale" on which a brokerage commission should be paid if three "tests" or "factors" are met: "the owner agrees on the property to be sold, concurs as to the time at which he is to give up possession, and has the power to negotiate a satisfactory price." 413 So.2d at 64. St. Joe essentially agrees when it cites approvingly to Dauer's three factors that distinguish an involuntary 'taking' from a 'sale' (Brief at 11), and states of the Dauer factors: "The elements which might arguably convert a taking of property of [St. Joe's] type to a 'sale' were not satisfied here" (Brief at 15).

When Dauer states that "a condemnation proceeding does not constitute a sale," and that condemnation is not a "sale" because "in such circumstances [the owner] is not a willing seller," 413 So.2d at 63, 64, Dauer is speaking only of a traditional condemnation thrust involuntarily upon an unwilling and powerless landowner. Dauer is not referring to a conveyance during an owner-initiated condemnation that satisfies the three tests or factors quoted above. St. Joe's brief on

the merits largely ignores Dauer's three tests and the pronounced factual differences between Dauer and the present case.

In Dauer, the owner told the broker that the broker “had no authority to negotiate the sale of [the owner's] property [to the county] and that any of his activities pertaining to that property were being done at his own risk.” 413 So.2d at 63. When the owner learned that the broker was negotiating with the county, he quickly terminated whatever listing agreement may have existed between them. Id. at 65. The owner in Dauer did not want condemnation and never authorized the broker to seek condemnation. Indeed, in Dauer, numerous brokers were trying to sell the property to different purchasers. In St. Joe's case, the State was St. Joe's only prospective buyer and McIver was St. Joe's only broker. St. Joe's objectives --which it fully achieved -- were to force the State, through the friendly condemnation that McIver proposed, to pay the highest possible price not only for Topsail but for other properties that St. Joe wanted to sell but that the State did *not* condemn.

Secondly, in Dauer the county offered the landowner a final price per acre that was less than what the owner was willing to accept. The county also wanted only a small portion of the tract that the owner wanted to convey. When the landowner in Dauer did not meet the county's demands, the county took what it wanted by condemnation. In the present case, St. Joe initiated the condemnation and forced the State to pay the full sales price St. Joe demanded for all the lands, not just Topsail, that St. Joe wanted to sell.

In Dauer, in short, the landowner did not want or invite condemnation, and the condemnation process was entirely outside the landowner's control. In the present

case, St. Joe long had been eager to sell Topsail to the State. To accomplish this purpose St. Joe asked the State to initiate a friendly condemnation knowing that it could negotiate more effectively and obtain what it wanted from the State through that procedural contrivance. St. Joe knew that the State would *not* condemn CARL lands unless St. Joe agreed in advance to that procedure. Having induced the State to commence condemnation, St. Joe aggressively exploited the process. It dominated negotiations, held the State "prisoner" to its demands, sold just what it wanted to sell, and extracted from the State \$34 million more than what it would have accepted for Topsail before condemnation, as well as other valuable benefits. That St. Joe *gained* rather than lost the power to negotiate advantageously through the condemnation that *it initiated*, completely distinguishes St. Joe's case from Dauer and the cases on which Dauer relies. These factors, among others, also distinguish St. Joe's case from the patently dissimilar case of Emerson C. Custis & Co. v. Tradesmans Nat'l Bank & Trust Co., 155 Pa. Super. 282, 38 A.2d 409 (Pa. Super. Ct. 1944), which St. Joe inexplicably claims is "exactly" like this case.

Wilson v. Frederick P. Ross Inv. Co., 116 Cal. 249, 180 P.2d 226 (1947), cited in Dauer, helps underscore the difference between involuntary condemnation and the type of invited condemnation present here. Wilson describes the type of condemnation that will bar a brokerage commission as that which occurs when the government, "regardless of the landowner's desires, takes over what property it wishes and relentlessly moves in on it without consulting the owner." Id. 180 P.2d at 231. Under this customary form of condemnation, "The owner is in court whether he wants to be or not.... He has lost his power to settle advantageously...." Id. at 242. In

Dauer, Wilson, and the other cases Dauer cites, condemnation was neither invited nor welcomed. The fact that in St. Joe's case it was, and that through condemnation St. Joe *gained* rather than 'lost the power to settle advantageously,' are critical differences that render Dauer totally distinguishable from the present case.

Keyes Co. v. Florida Nursing Corp., 340 So.2d 1254 (Fla. 3d DCA 1976), another case St. Joe claims establishes a bright-line rule like Dauer, is similarly distinguishable. The property owner in Keyes Co. refused to voluntarily convey its property to the county. The county was therefore forced to commence a traditional condemnation proceeding to acquire the property from the unwilling seller. St. Joe's assertion that Keyes Co. involved "a consented condemnation" (Brief at 20) is simply incorrect.

Keyes Co., like Dauer, acknowledges the general rule that "an eminent domain proceeding is not a sale," but refuses to elevate that general principle into a bright-line rule barring the payment of a commission in all cases in which condemnation is in any way involved. To the contrary, Keyes Co. recognizes that, in an appropriate factual context, an eminent domain proceeding can be "a continuation of sales negotiations," as well as a voluntary "consummation of the [sales] transaction," and thus compatible with the payment of a real estate commission. 340 So.2d at 1256. Keyes Co., like Dauer, does not hold that a conveyance in the context of a condemnation proceeding can *never* be a voluntary, commission-generating sale.

The District Court in this case did not repudiate the general rule set forth in Dauer and Keyes Co. that a commission is not earned from the usual involuntary or forced condemnation proceeding. The court simply decided that the general rule

should not be applied here as a matter of law because, on the facts in *this* record, a jury could find that St. Joe's conveyance to the State was more like a voluntary sale than an involuntary condemnation.

St. Joe's brief on the merits starts its factual narrative at the point the condemnation action was filed. St. Joe continuously ignores the all-important fact that it was St. Joe who, at McIver's urging, initially proposed condemnation to the State as a way to break the impasse over price, obtain more money for Topsail, and effect a sale. The record shows that McIver discussed the benefits of condemnation with St. Joe and St. Joe directed McIver to propose condemnation to the State *before* the State considered or assented to that process. The State's practice was not to condemn CARL lands without a landowner's consent and thus the State did not broach the subject of condemnation with St. Joe before learning from McIver that St. Joe wished to proceed by that route. The State commenced the administrative process that led to the condemnation authorization only after McIver communicated to the State his client's amenability to condemnation.

Clearly, when a corporate landowner as legally sophisticated and legendarily hard-nosed as St. Joe initiates condemnation in the well-grounded belief that it can exploit that process to maximize its economic return, the resulting condemnation is not forced or involuntary. Nor is the voluntary settlement of a voluntarily initiated condemnation proceeding conceptually different from a voluntary sale. Having proposed condemnation to the State in order to achieve its negotiating objectives, St. Joe can hardly argue that condemnation rendered the resulting negotiated settlement involuntary. Condemnation, in short, was simply St. Joe's way of moving the sales

negotiations into a procedural context that allowed it to obtain the highest value for its property.

The conveyance in this case, a jury could find, meets Dauer's three-part test for distinguishing a "sale" from a "condemnation." 413 So.2d at 64. St. Joe, to begin with, "agree[d] on the property to be sold." St. Joe had wanted to sell Topsail to the State since at least 1988. It hired McIver as its broker and consultant to accomplish that objective using whatever procedures would maximize the value of that parcel. When St. Joe and the State could not agree on value, St. Joe directed McIver to arrange the "friendly" condemnation that McIver had proposed for the purpose of increasing the appraised value of the property. After the condemnation began, St. Joe unilaterally expanded the scope of the action. It insisted that the State bargain to purchase its Deer Lake property -- a property that the State had not sued to acquire and had no authority to condemn -- successfully demanded greater development rights from the State in other parcels it owned, and threatened to withdraw from all negotiations with the State if these demands were not met.

St. Joe argues that it did not dominate or control the negotiations because the State acquired "precisely the property it wanted to obtain -- no more, no less, and at no other location." (Brief at 17,18). The record refutes this assertion. From a \$25.7 million offer for Topsail alone the State ended up enriching St. Joe by approximately \$150 million for Topsail and Deer Lake and development rights for St. Joe in other areas. St. Joe's contention that the State did not have to agree to all this is correct but irrelevant. The State did not *have* to buy Topsail. But the State did have to pay exactly what St. Joe demanded if it wanted Topsail, and the State desperately wanted Topsail

before market forces and St. Joe's negotiating tactics elevated its price beyond reach. The State in fact was forced to acquire more property than it wanted and pay more than it was comfortable paying. St. Joe, by any standard, came out far ahead of the State.

St. Joe was also in control of the second Dauer factor: the "time at which [it was] to give up possession." Under the "slow take" condemnation procedure chosen by the State, St. Joe retained full title and possession to its properties until a condemnation judgment was entered and satisfied by the State. §73.111, Fla. Stat. (1993). A true condemnation judgment, however, was never entered in this case. On the same day it learned that the court had ruled against the taking and dismissed the action St. Joe voluntarily signed a contract with the State under which, at an agreed-upon time, title and possession would pass to the State.

St. Joe misapprehends the voluntary nature of St. Joe's decision to sell to the State after St. Joe learned that the court had ruled in its favor. St. Joe erroneously attaches overriding importance to the fact that St. Joe conveyed its property while the State's motion for rehearing allegedly was "pending," and an appeal by the State was "apparently contemplated, certainly possible." (R8.1427).

To begin with, there is no evidence as to when on December 4 the State served its motion for rehearing. The State may well have served its motion after St. Joe signed the consent judgment. Thus, simply as a matter of timing, there is no record basis to conclude in this case that the State's motion for rehearing was "pending" when St. Joe signed the sales contract.

Nor is there record evidence -- assuming the State did serve its motion for rehearing before St. Joe signed the contract -- that St. Joe *knew* of the State's motion before it signed the contract. The State strategically *mailed* rather than faxed its motion to St. Joe's counsel in *Miami* (R5.832), in order to delay St. Joe from learning that it had won the lawsuit. The State, believing that St. Joe had not yet learned it had won, hoped to secure St. Joe's signature on a sales contract before St. Joe found out. The State feared that it would lose Topsail, or that St. Joe would extract more money and concessions from the State, if St. Joe learned that it had won. St. Joe could not have signed the contract under the duress of a rehearing motion, or the State's secret intention to appeal, of which it then knew nothing.

Even if St. Joe had known of the State's motion for rehearing or intention to appeal before it signed the contract, that knowledge would not, as a matter of law, have rendered St. Joe's conveyance involuntary. St. Joe always had the legal right to contest the motion and defend against the State's possible appeal, rather than complete the transaction. St. Joe's decision to forego its legal rights in favor of selling its property to the State did not render the sale involuntary. Campbell-Leonard Realty v. El Matador Apt. Co., 220 Kan. 659, 556 P.2d 459, 464 (1976).

Moreover, once St. Joe read the State's motion it would have seen that the motion was substanceless and hurriedly interjected simply to preserve a semblance of continuing trial court jurisdiction. The motion questioned the court's jurisdiction, argued some easily remediable procedural deficiencies, asserted a one-sentence boilerplate "against the manifest weight of the evidence" claim, and alleged unspecified evidentiary errors (R5.832).

From the face of this motion, neither the State nor St. Joe could reasonably have expected the court to vacate its carefully drafted, detailed 33-page order over which it had worked for a month-and-a-half (R5.799). Indeed, the State was convinced *before* the order was entered that it was going to lose, and wanted to consummate the agreement with St. Joe *before* a ruling was announced (R6.1045). So convinced was the State that its motion for rehearing would be denied, that it intentionally hid from St. Joe the fact that St. Joe had won in the hope that St. Joe would sign and be bound by the contract before it found out (R6. 1045-1046,1066-1067).

St. Joe constantly asserts in its brief that St. Joe's agreement to settle was involuntary because the State intended to appeal. There is no record evidence, however, that St. Joe knew of the State's appellate intentions when it signed the settlement agreement. St. Joe could not have been coerced into signing by a fact of which it was unaware. Nor would it have been clear to anyone at the time, least of all to the State, that the State would prevail on appeal. The State's somewhat desperate tactic of getting St. Joe to sign a contract before St. Joe learned that it had won shows how great the State's doubts were of its chances on appeal.

The voluntary nature of St. Joe's December 4 conveyance is conclusively demonstrated by the fact that at the time it signed the sales contract with the State, St. Joe *in fact knew* that the condemnation action had been dismissed (R6.1035-1036,1038,1060). St. Joe undoubtedly understood from its skilled eminent domain counsel that it was not under the slightest legal compunction to negotiate with or convey anything to the State unless the dismissal was vacated on rehearing or reversed

on appeal. A jury could find from this fact alone that St. Joe conveyed its properties to the State at a time when it was under no legal obligation to do so.

The third Dauer criterion for a voluntary transfer -- "the power to negotiate a satisfactory price" -- is satisfied in this case as well. St. Joe possessed a far stronger bargaining position than the State, was an intractable negotiator, and was in near total control of the negotiations over price as well as over every other issue. St. Joe had named the minimum price it would accept for Topsail -- "three to four times" \$25.7 million -- before condemnation was even authorized (R4.788-789), and thereafter refused to bargain over that figure. The State eventually capitulated and paid St. Joe the \$84 million purchase price it had demanded for Topsail from the inception. This price, along with the other benefits St. Joe extracted from the State, was far greater than the State ever thought it would have to pay to acquire Topsail, and so great that it reputedly gave at least one Cabinet member "heartburn" (R6.1061).

St. Joe argues throughout its brief that once condemnation began, St. Joe's options were only to "settle or litigate." Thus, St. Joe concludes, it was no different than any other involuntary condemnee. St. Joe's argument fails in two respects.

First, there is no record evidence -- CARL proceedings always being consensual -- that St. Joe and the State could not have agreed to discontinue the lawsuit. St. Joe, of course, had no interest in stopping a lawsuit that it had initiated and was winning. Second, assuming St. Joe's only two options *after* litigation began were to "settle or litigate," St. Joe again ignores an obvious fact: St. Joe's voluntary decision to *initiate* condemnation necessarily made the choice that it knew it would face after that decision, *i.e.*, settle or litigate, equally voluntary.

The consent judgment through which the State and St. Joe expressed their settlement agreement was a judgment in name only. It was actually, as the parties understood, a contract of sale. See JFK Medical Center, Inc. v. Price, 647 So.2d 833, 834 n.1 (Fla. 1994) (quoting Restatement (Second) of Judgments: "a judgment by consent, though it terminates the claim to which it refers, is not an actual adjudication"); Arrieta-Gimenez v. Arrieta-Negron, 551 So.2d 1184, 1186 (Fla. 1989) ("a consent judgment is a judicially approved contract"); Division of Admin., Dep't of Transp. v. Tsalickis, 372 So.2d 500, 502 (Fla. 4th DCA 1979) (consent final judgment in a condemnation action "is a binding contract").

The State and St. Joe each knew that St. Joe had won the condemnation action. Both regarded the consent "judgment" as a stand-alone sales contract that legally bound them even if the trial judge were to refuse to approve it, and thus identical in effect to an ordinary contract of sale. The judge, however, did approve the consent "judgment" and, paradoxically, it is his approval that further confirms the private, contractual nature of the parties' agreement. After laboring for a month and a half over his 33-page decision dismissing the action, the trial judge immediately approved the parties' private contract whose terms were totally irreconcilable with what the judge believed, just four days earlier, to be the proper disposition of the case under the law and in the public interest.

St. Joe relies on the statement in Dauer, 413 So.2d at 63-64, that even where the broker is "the procuring cause of [the] property being acquired by condemnation," he is not entitled to a commission unless "there is a specific provision in the brokerage contract to this effect." St. Joe fails to read on in the case to where Dauer explains that

this rule applies "because in such circumstances [the property owner] is not a willing seller." Id. at 64. Dauer would thus allow a commission after condemnation without a specific brokerage provision to this effect if the owner were a "willing seller." St. Joe, a jury could find, was an entirely willing seller.

A jury could find that when St. Joe promised McIver a commission in the event of a "sale," St. Joe used the term "sale" as shorthand for any procedure that allowed it to obtain from the State the price it wanted for Topsail. Cf. Pol v. Pol, 705 So.2d 51, 53 (Fla. 3d DCA 1997) ("sale" denotes both voluntary and involuntary conveyances), rev. denied, 717 So.2d 536 (Fla. 1998); Miller, Cowherd & Kerver, Inc. v. De Montejo, 406 So.2d 1196, 1198 (Fla. 4th DCA 1981) (failure to define "sale" in a brokerage agreement construed against the party -- in our case St. Joe -- who proposed the terms of the agreement). That St. Joe's use of the term "sale" was consistent with the owner-initiated condemnation present here, is shown by St. Joe's August 4, 1994, notice to the State. In that notice, St. Joe advised the State that McIver was still its agent and was still entitled to a commission. St. Joe filed this notice *after* it had directed McIver to seek condemnation, *after* McIver had successfully initiated the administrative process leading to condemnation, and *after* the Cabinet had publicly voted to authorize condemnation (R4.724,791;R8.1475). The agreement that resulted from the process that St. Joe initiated -- and which St. Joe signed at a time that it had convincingly won the condemnation action and could have refused to agree to anything -- was indisputably voluntary. The agreement gave St. Joe everything it could realistically hope to obtain and was indistinguishable from the best sales agreement St. Joe could have negotiated outside a condemnation context.

St. Joe postulates a number of commercial horrors that will ensue from the District Court's interpretation of Dauer. If the District Court's opinion is approved, St. Joe warns, every broker will be able to convert every condemnation into a commission-producing event. St. Joe's fear is unfounded. All the District Court's interpretation of Dauer will do is allow a jury to determine whether a conveyance during condemnation has sufficient attributes of a "sale." In the vast majority of condemnations in which a broker is involved, the issue will not reach a jury because the condemnation will lack the many indicia of a voluntary "sale" that are present here.

St. Joe's other fear, that the District Court's interpretation of Dauer will provide a "disincentive [sic] to property owners to settle condemnation proceedings" because only then will they owe a commission, is equally baseless. First, contrary to St. Joe's assertion (Brief at 30), it can not be said that the District Court would have or should have interpreted Dauer differently if St. Joe and the State had gone to trial and not settled. The District Court gave the settlement weight, but not controlling weight, in its analysis. The fact remains that St. Joe still initiated and controlled the condemnation process. The latter factors, even without a settlement, tend to prove a "sale" and thus create a jury question on that issue. Moreover, the settlement occurred after St. Joe won a contested case-dispositive motion -- a legal consequence similar to St. Joe winning before a jury.

Ultimately, it is pointless for St. Joe to argue that if the condemnation process had taken a different course, *i.e.*, if St. Joe had achieved all its economic objectives by judgment rather than settlement, the District Court might have decided

the case differently. Obviously, the District Court could only interpret Dauer in light of the facts in *this* case.

Second, St. Joe's argument reveals too much about St. Joe's corporate psyche. Landowners who honor their brokerage agreements and contractual duties of good faith, rather than evade them by drawing pretextual after-the-fact distinctions between 'sales' and 'takings,' will not feel, as St. Joe does, "penalized" (Brief at 31), by settling. We have difficulty, in any event, conceiving of a property owner who would rather litigate than accept a favorable \$150 million settlement simply because an honestly earned 2% brokerage commission is payable from a 'settlement' but not from a 'judgment.'

In future lawsuits with facts analogous to this one, some claims for commissions arising out of a condemnation will survive summary judgment and directed verdict, and some will not. The District Court's reasonable interpretation of Dauer allows a court to view the facts surrounding a condemnation proceeding in their entirety. An inflexible, bright-line rule that a condemnation can *never* have the attributes of a "sale" is false in fact and is unsuited to resolving the frequently complex relationships that exist between property owners, brokers, and condemners. St. Joe has shown nothing illogical, impractical, or unjust in the District Court's interpretation of Dauer. If Dauer, contrary to the District Court's interpretation, does create a bright-line rule, Dauer should be disapproved. The decision below should be affirmed.

POINT II.

**THE DISTRICT COURT ERRED BY AFFIRMING
THE SUMMARY JUDGMENT ON McIVER'S ALTERNATIVE
IMPLIED CONTRACT COUNT. A JURY COULD FIND
THAT McIVER HAD AN IMPLIED-IN-FACT CONTRACT WITH**

**ST. JOE TO RECEIVE A COMMISSION IN THE EVENT THE STATE
ACQUIRED ST. JOE'S LANDS BY CONDEMNATION.**

Standard of Review

See Standard of Review, Point I, supra.

Argument

Count II of McIver's complaint alleges the existence of an implied-in-fact commission agreement between McIver and St. Joe (R5.892). McIver alleged this cause of action as an alternative theory of recovery if the jury were to find, under the express contract count, that the conveyance from St. Joe to the State was not a "sale." The trial judge, in the mistaken belief that the parties' express contract precluded the possibility of an implied contract, granted summary judgment in St. Joe's favor on this cause of action (R8.1424). The District Court, without analysis or discussion, affirmed.

An implied-in-fact contract will be found where the plaintiff performs services for the defendant at the latter's request. An implied-in-fact contract will also be found where the defendant does not expressly request the plaintiff's services, but accepts services from the plaintiff under circumstances where, in the ordinary course of events, a reasonable person receiving such services would expect to pay for them. Commerce Partnership 8098 Ltd. v. Equity Contracting Co., 695 So.2d 383, 385-387 (Fla. 4th DCA 1997) (en banc). The difference between an express contract and an implied-in-fact contract lies simply in "the manner by which the parties manifest assent to the contract." Commerce Partnership, 695 So.2d at 385,390; Rabon v. Inn of Lake City, Inc., 693 So.2d 1126, 1131 (Fla. 1st DCA 1997). Assent in a contract implied

in fact is inferred from the parties' total course of dealings and performance. Commerce Partnership, 695 So.2d at 385; Rabon, 693 So.2d at 1131. Here, if the jury finds that the condemnation was not a "sale" under the parties' *express* contract, the jury could still find that St. Joe, by its conduct, entered into an *implied* contract to pay McIver a commission if it obtained, through condemnation, the benefits of a "sale".

McIver, as St. Joe's agent, recommended friendly condemnation to St. Joe as a way of breaking the impasse over valuation. After McIver had strategized with St. Joe regarding friendly condemnation, St. Joe asked McIver, and McIver agreed, to arrange the condemnation. St. Joe appreciated the financial benefits it would reap by having the sales negotiations conducted in the context of a friendly condemnation: the negotiations over valuation would now be based on Topsail's highest and best use, valuable development rights could be secured, excess properties in St. Joe's inventory could be profitably unloaded, tax benefits would be obtained (R2.442-443), and the fees of St. Joe's attorneys and appraisers in accomplishing all this would be paid by the State.

After McIver succeeded in his efforts to have the State initiate condemnation, St. Joe reconfirmed to the State that McIver was still its broker and consultant. St. Joe then accepted the benefits of McIver's efforts never telling him, until after he had arranged and the State had commenced the friendly condemnation, that it would not pay a commission if a "sale" were consummated -- as eventually it was -- within the context of the condemnation.

McIver did not believe that by proposing a friendly condemnation at his principal's request to achieve his principal's financial objectives he was abandoning his

claim to a commission. Nor did St. Joe suggest to McIver, until after he had fully performed, that the new context in which sales negotiations would continue would cost him his commission. Under these circumstances, St. Joe's request of, and agreement with, McIver to initiate the condemnation process on its behalf constituted an implied agreement to pay McIver a commission based on the conveyance that resulted from the condemnation.

St. Joe and McIver's express oral commission agreement did not prevent there being a subsequent implied commission agreement. Moylan v. Estes, 102 So.2d 855 (Fla. 3d DCA 1958), cert. denied, 106 So.2d 199 (Fla.1958), quoting 3 Corbin on Contracts, §564, calls the idea that an express contract always precludes an implied contract inaccurate and "misleading." Whether an implied contract exists is not an issue of law but a factual issue concerning the parties' intent: "[T]he fact that an express contract has been made does not prevent the parties from making another one tacitly, concerning the same subject matter or a different one." Id. 102 So.2d at 856. St. Joe's agreement with McIver to proceed by friendly condemnation either created by implication a new commission agreement on that subject, or modified, by implication, their original agreement to subsume this new procedure. See Wilson v. Ross Investment Co., 180 P.2d at 231 (broker would have been entitled to a *quantum meruit* recovery notwithstanding condemnation if the condemnation were the result of "subsequent conduct of the parties not covered by the express contract").

When it became clear to McIver and St. Joe in 1994 that the *only* way St. Joe would obtain the price it wanted for Topsail was through friendly condemnation, the parties -- so a jury could find -- impliedly amended the concept of "sale" in their

original commission agreement to cover any conveyance arising out of that condemnation:

[I]t frequently happens..., that, starting with an express contract, the parties soon and plainly, though tacitly, deliberately leave their original compact behind, and so conduct themselves, one performing services or rendering benefit to the other which the latter accepts, that a promise to pay may or even must be implied from their conduct. That is, their actions rather than their words produce implications from which a new contract appears.

Moylan v. Estes, 102 So.2d at 857. Like all contracting parties, St. Joe and McIver were free by their conduct to impliedly modify or alter their original commission agreement to redefine the concept of "sale." 3 Corbin on Contracts §564 (1960); Moylan v. Estes, 102 So.2d at 856.

Otherwise stated, at the moment McIver proposed and St. Joe agreed that McIver was to induce the State to condemn Topsail, the "subject" and terms of the parties' brokerage agreement were implicitly and consensually altered. At that point, a jury could find, the parties had modified or abandoned their original "sale"-dependent brokerage agreement in favor of a new agreement under which McIver would earn a commission on any "sale"-like conveyance consummated as a result of the condemnation process. St. Joe may not, after agreeing with McIver to abandon the initial objective of the brokerage and directing McIver to work toward another objective, deprive McIver of a recovery in implied contract or *quantum meruit* for helping St. Joe achieve its new objective. Danieli Corp. v. Bryant, 399 So.2d 387, 389 (Fla. 4th DCA 1981), rev. denied, 407 So.2d 1102 (Fla. 1981).

In short, if McIver is unsuccessful on his express contract claim, he is entitled to have the jury consider his alternative theory of

recovery: that St. Joe, by instructing him to initiate the condemnation process and thereafter affirming his agent status to the State, tacitly created a new agreement, or impliedly amended its initial, express agreement, to pay him a commission on any conveyance arising out of the condemnation. Whether an implied-in-fact contract was formed under these circumstances is a disputed factual issue and therefore a jury question. The District Court erred by affirming the summary judgment on McIver's implied-in-fact contract cause of action.

POINT III.

THE DISTRICT COURT ERRED BY AFFIRMING THE SUMMARY JUDGMENT ON McIVER'S ALTERNATIVE QUASI-CONTRACT COUNT. A JURY COULD FIND THAT McIVER HAD A QUASI-CONTRACTUAL RIGHT TO COMPENSATION IN THE EVENT THE STATE ACQUIRED ST. JOE'S LANDS BY CONDEMNATION.

Standard of Review

See Standard of Review, Point I, *supra*.

Argument

Count III of McIver's complaint alleges a cause of action in quasi-contract or contract implied in law (R5.892). McIver alleged this cause of action as a second alternative theory of recovery that the jury should consider if it found, under the express contract count, that the conveyance from St. Joe to the State was not the equivalent of a "sale." The trial judge erroneously decided that this cause of action, like the cause of action for a contract implied in fact, Point II, *supra*, was *barred by the presence of an express contract between the parties* (R8.1424-1425). *The District Court affirmed without discussion.*

A quasi-contract is not based on the parties' assent or intent but is a device imposed by the law to prevent unjust enrichment. A quasi-contract will be found where the plaintiff confers a benefit on the defendant, the defendant knows of and accepts the benefit, and the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying for it. Commerce Partnership, 695 So.2d at 386; Rabon, 693 So.2d at 1131-1132.

The express contract between St. Joe and McIver would not preclude an unjust enrichment recovery in quasi-contract if St. Joe requested and knowingly accepted additional, previously unbargained-for services from McIver. See Davis v. Department of Health & Rehab. Servs., 461 So.2d 210, 212 (Fla. 1st DCA 1984) ("where a contract exists and changes or alterations are requested by the owner, the law does imply an obligation" to pay the reasonable value of the additional labor); Southern Bell Tel & Tel. Co. v. Acme Elect. Contractors, Inc., 418 So.2d 1187, 1189 (Fla. 4th DCA 1982) (same). If the jury were to find that the condemnation was not a "sale" under the express contract, and that the parties never discussed or contemplated condemnation at the time of the express contract, then the new condemnation-related services McIver rendered to St. Joe could not be subsumed in, or conflict with, the express contract. A jury could reasonably find in this case that McIver, at St. Joe's request, rendered new and additional services to St. Joe, beyond those contemplated under the parties' original express contract, the value of which it would be inequitable for St. Joe to retain without fairly compensating McIver.

McIver's services consisted of his astute advice to St. Joe that it value and convey Topsail through the consensual device of a friendly condemnation and his

successful efforts to initiate the condemnation. The negotiations that McIver had begun soon culminated in a conveyance to the State that was vastly profitable to St. Joe. McIver, as the trial judge appropriately noted, "was the procuring cause" of the conveyance from St. Joe to the State (R8.1425).

The jury should be allowed to consider McIver's alternative quasi-contractual theory of recovery if the jury decides that McIver is not entitled to recover under his express contract. St. Joe could be unjustly enriched by the friendly condemnation that McIver recommended and, at St. Joe's request, procured, if a remedy in quasi-contract is not allowed. The District Court erred in affirming the summary judgment on McIver's quasi-contract count.

POINT IV.

THE DISTRICT COURT ERRED BY AFFIRMING THE ORDER DENYING McIVER'S MOTION TO AMEND HIS COMPLAINT TO CLAIM A COMMISSION ON THE SALE OF DEER LAKE.

Standard of Review

An order denying leave to amend a complaint is reviewed under an abuse of discretion standard. Dimick v. Ray, 774 So.2d 830, 832 (Fla. 4th DCA 2000). See Standard of Review, Point I, supra.

Argument

McIver moved to amend his second amended complaint to claim a commission on two additional forms of consideration that St. Joe received in the Topsail deal -- certain non-monetary benefits, and \$13.7 million in cash that the State had paid to purchase a portion of St. Joe's Deer Lake property (R5.846, 858; Supp.Record 5). St. Joe's non-monetary benefits included developmental rights in

the portion of its Deer Lake property that it did not sell to the State (R5.835,838, 846;R6.1033-1034,1046-1047,1051-1052).

The trial judge allowed McIver to amend to claim a commission against St. Joe's non-monetary benefits. However, the judge denied McIver's request to claim a commission against the actual proceeds from the sale of a portion of Deer Lake. He believed that the Deer Lake claim was a "a completely separate, new cause of action," and stated, "I won't allow an amendment as to what I see as a new contract." (Supp.Record 16,36. R5.876). The District Court affirmed.

McIver was not asserting a "new contract" or a "new cause of action" by his claim against the proceeds from the sale of Deer Lake. McIver's claim was still based on his original agreement in which St. Joe had promised him a 2% commission computed on whatever it received from the sale of Topsail (R2.385-388,392-394,399;R3.400-401,437,495-496;R5.916-917,944,954-955). As McIver stated, "Topsail was my prime mover. There were other properties that the state discussed with me, and I would relay that to [St. Joe]. If any of those other properties were included, the 2-percent [commission] figure went with it." (R3.401); "Two percent of any value derived to my client, St. Joe, was our fee agreement" (R3.496). Topsail and Deer Lake were negotiated as a unit (R6.1081-1084). The monies that the State paid to St. Joe for a portion of Deer Lake were part of the consideration for Topsail. The attorney for the State who negotiated the package with St. Joe confirms this: "[Deer Lake] was considered as part of the consideration for the whole deal" (R6.1043).

Moreover, the non-monetary benefits claim that the judge did allow, and the sale proceeds claim that he did not allow, involve the same subject, "Deer Lake." The package of land use and developmental rights that St. Joe obtained allowed St. Joe to commercially exploit several of its Walton County properties including the part of its Deer Lake tract that it had not sold to the State. After properly allowing McIver to assert a commission claim against the non-monetary component of St. Joe's remuneration, the trial judge abused his discretion by refusing to allow a claim against a monetary component, where both components were part of and "relate[d] back" to the same underlying "conduct, transaction, or occurrence." Fla. R. Civ. P. 1.190 (c).

Refusal to allow a pleading to be amended under Rule 1.190 constitutes an abuse of discretion "unless it clearly appears that allowing the amendment would prejudice the opposing party; the privilege to amend has been abused; or amendment would be futile." Bill Williams Air Conditioning & Heating, Inc. v. Haymarket Coop. Bank, 592 So.2d 302, 305 (Fla. 1st DCA 1991), rev. dismissed, 598 So.2d 76 (Fla. 1992). "[A]ll doubts should be resolved in favor of allowing amendment." Id. St. Joe did not prove, and the trial judge did not find that any of these factors was present.

Even if the Deer Lake purchase were a "new" issue, as the trial judge erroneously believed, the amendment should have been allowed absent "prejudice" to St. Joe. The 'newness' of an issue, standing alone, is not a legally sufficient basis on which to deny amendment. Dimick v. Ray, 774 So.2d at 834-835. St. Joe could not have been prejudiced by the amendment for two reasons.

First, St. Joe knew all that it could ever know about the Deer Lake purchase. The State's purchase of Deer Lake was part of the same December 4, 1995, sales contract that had been a feature of this case from the inception. St. Joe already had conducted discovery on the subject. Deer Lake was mentioned 37 times in McIver's May 16 deposition, 32 times in the assistant attorney general's deposition, and innumerable times in deposition exhibits and discovery materials.

*Secondly, after granting McIver's motion to amend on the non-monetary benefits issue, the judge continued the trial without date and reopened discovery to allow St. Joe to inquire further into that issue (R5.877). The judge could just as easily have allowed St. Joe to use that continuance and discovery period to pursue additional discovery -- if any more really was needed -- on the Deer Lake sale as well. See Bostwick v. Bostwick, 346 So.2d 150, 152 (Fla. 1st DCA 1977) (error to deny motion to amend where trial continuance, though granted for other reasons, would have obviated any prejudice from the amendment); Walker v. Senn, 340 So.2d 975, 976 (Fla. 1st DCA 1976) (error to deny motion to amend where, *inter alia*, record did not show that amendment "would have necessarily delayed the final hearing."). The denial of McIver's motion to amend, and the District Court's affirmance thereof, were erroneous.*

CONCLUSION

For the foregoing reasons, there is no conflict of decisions and review should be dismissed as improvidently granted. Alternatively, this Court should affirm the decision of the First District Court of Appeal on the express contract count. Regardless of whether this Court reverses or affirms on the express contract count,

this Court should reverse the decision of the District Court on the implied and quasi-contract counts and on the issue of the motion to amend. McIver is entitled to present his implied and quasi-contractual theories to the jury as alternate bases on which the jury could award damages if the jury finds, under the express contract count, that the conveyance arising out of the condemnation proceedings was not a "sale."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Oertel, Fernandez & Cole, P.A., P.O. Box 1110, Tallahassee, Fla., 32302-1110, this ____ day of June 2003.

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I HEREBY CERTIFY that this brief was typed in 14-point Times New Roman.

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