IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC 02-2491

Lower Tribunal No.: ID 01-2358

ST. JOE CORPORATION, f/k/a
ST. JOE PAPER COMPANY,

Petitioner,

vs.

H. BRUCE MCIVER,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, St. Joe Corporation, f/k/a St. Joe Paper Company, will be referred to as "Petitioner" or "St. Joe." Respondent H. Bruce McIver will be referred to as "Respondent" or "McIver." Petitioner, St. Joe, was the Appellee before the First District Court of Appeal and the Defendant in the Circuit Court proceedings. Respondent, McIver, was the Appellant before the First District Court of Appeal and the Plaintiff in the Circuit Court proceeding.

Citations to the Appendix will refer to the September 13, 2002, decision of the First District Court of Appeal by page number of the decision as follows: (App., P. _____) Petitioner will use the record designations used in the appeal below. The record on appeal consists of nine volumes, including a supplemental volume. In this brief, references to the record will be indicated as (R. _____). The decision of the First District Court of Appeal is reported at McIver v. St. Joe Corporation, 828 So.2d 394 (Fla. 1st DCA 2002).

STATEMENT OF THE CASE AND OF THE FACTS

In Count I of his Third Amended Complaint, Respondent, a licensed real estate broker, alleged the existence of an express oral contract concerning the sale of property owned by Petitioner St. Joe. (R. 893) This property is approximately 660 acres known as Topsail Hill. The alleged oral agreement provided that Respondent was to act as St. Joe's real estate agent in selling the Topsail Hill property to the State of Florida. Respondent alleged that his real estate commission and consulting fee under the oral agreement would have been two percent of the sale. (R. 393, 394, 422) Respondent asserted that if there was a sale, he was to be paid. (R. 422) In addition, an affidavit attached to Respondent's Amended Complaint, entitled "Beneficial Interest and Disclosure Affidavit" provided that Respondent was to receive "2% of the sale price." (Emphasis added.) (R. 721)

The State of Florida never accepted any sale agreement presented or negotiated by Respondent. Respondent admitted this in his Third Amended Complaint. Topsail Hill was never sold to the State of Florida pursuant to any sales agreement, whether negotiated by Respondent or otherwise. The offers made by the State's staff were either not approved by the Governor and cabinet or contained too low a proposed price for the property to be acceptable to St. Joe. (R. 411, 420, 424, 425, 232, 233)

Accordingly, the State of Florida commenced legal proceedings to acquire the Topsail Hill property from St. Joe through condemnation rather than through a negotiated sale. (R. 710-855, 856-857) It is undisputed that at the time the State determined to initiate condemnation proceedings, negotiations for the sale of Topsail Hill were at impasse and that was the "whole reason" for the condemnation. (R. 241) On July 20, 1994, the Chairman of St. Joe wrote to the Internal Improvement Trust Fund of the State of Florida specifically stating, in relevant part:

> The St. Joe Paper Company hereby objects to the taking of its land referenced above and respectfully requests that the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida vote against the Proposed Resolution No. 94-2 purporting to authorize such taking.

(R. 788)

The Third Amended Complaint itself alleged that on or about July 20, 1994, St. Joe notified the State of Florida, that St. Joe did not desire the State of Florida to acquire the subject property through condemnation. The State filed its condemnation action on September 30, 1994. (R. 1141) Respondent McIver was not identified in writing to the State as a St. Joe "agent" subsequent to this filing. (R. 724) On October 21, 1994, St. Joe notified the State in writing that Respondent was no longer to be contacted in any way with respect to the Topsail Hill parcel, although he had

"heretofore been listed." (R. 798) Respondent was copied with the letter. (R. 481-482) There is no basis for any assertion that Respondent McIver had any role in the condemnation proceeding. (R. 483-484, 8l56-857) St. Joe defended itself and sought to defeat the condemnation proceedings. (R. 856-857, 895) It was uncontroverted that the eminent domain proceedings through which the State intended to acquire the Topsail Hill property from St. Joe were considered neither "friendly" nor constituted a "friendly eminent domain suit" by the State. (R. 972, 975, 989)

On December 5, 1995, the Circuit Court for the First Judicial Circuit which was hearing the condemnation case entered its "Topsail Consent Final Judgment." The eminent domain Court had previously dismissed the State's petition. However, the State filed a motion for rehearing. If a consent final judgment had not been entered, the State would have appealed. (R. 799-834, 1038) The Court entered findings that the "taking of the property described on Exhibit A attached and by reference made a part hereof is reasonably necessary for the public purposes set forth in the Amended Petition." (R. 893) In its December 5, 1995, Order, the Court also held that upon payment of the compensation due St. Joe, as specified in the Final Judgment, into the registry of the Court, fee simple title would vest in the State (through the Board of Trustees of the Internal Improvement Trust Fund) and the State would be entitled to immediate possession of the Topsail Hill property.

On February 13, 2001, the trial Court in this matter entered its Final Summary Judgment for St. Joe. (R. 1423-1428) The Circuit Court held:

> The most that can be said . . . is that the Plaintiff was the procuring cause of the property being acquired by condemnation. Since the Plaintiff can point to no evidence in the record to show that the contract between the parties provided for a commission in the event of acquisition by condemnation, the Plaintiff is not entitled to his fee and there is thus no breach of contract.
>
> * * *
>
> Here the parties specifically had not agreed upon the purchase price. . . . For better or for worse, once the proceedings were initiated against the Defendant's property, it had no authority to withdraw from negotiations, or to refuse to sell the property to the State. True, the Defendant had successfully obtained an order of dismissal, but a motion for rehearing was pending, and an appeal was apparently contemplated, certainly possible. If the appeal time had run and the parties continued negotiations that resulted in a sale, the Plaintiff might have an argument. But that is not what happened.

(R. 1425-27) On February 23, 2001, Respondent McIver filed his Motion for Rehearing (R. 1429-1431), which was denied on May 15, 2001. (R. 1476-1477) Respondent's appeal to the First District Court of Appeal followed.

The First District Court of Appeal affirmed the Final Summary Judgment with respect to Counts II (quantum meruit), and III (unjust enrichment) of Respondent's Third Amended Complaint, but reversed and remanded Final Summary Judgment with

respect to Count I. (App., P. 10) The First District Court of Appeal held that the decision of the Second District Court of Appeal in Dauer v. Pichowski, 413 So.2d 62 (Fla. 2d DCA 1982), did not provide for a bright-line rule that conveyances pursuant to condemnation cannot be considered a "sale" for purposes of a brokerage commission. (App. P. 6)

On November 18, 2002, St. Joe filed its Notice to Invoke Discretionary Jurisdiction of Supreme Court, citing conflict with Dauer v. Pichowski, 413 So.2d 62 (Fla. 2d DCA 1982), and Keyes Co. v. Florida Nursing Corp., 340 So.2d 1254 (Fla. 3d DCA 1976). Following the submission of jurisdictional briefs by the parties, this Court accepted jurisdiction of this case on May 8, 2003.

SUMMARY OF ARGUMENT

The trial Court below properly granted summary judgment to St. Joe on Respondent's express contract count. The oral contract, as asserted by Respondent, provided for a two percent commission upon the sale of the Topsail Hill property. No sale occurred. This contract contained no entitlement to a sales commission should the property be taken by condemnation. Condemnation is never considered a sale for purposes of a commission. The contract was not performed and, accordingly, no contractual right to a commission arose. The First District Court of Appeal erred in failing to hold that the taking of property pursuant to condemnation necessarily cannot constitute a sale for purposes of a brokerage commission. The bright-line rule enunciated in Dauer v. Pichowski, 413 So.2d 62 (Fla. 2d DCA 1982), and Keyes Company v. Florida Nursing Corporation, 340 So.2d 1254 (Fla. 3d DCA 1976), which holds that a taking by condemnation cannot constitute a sale for purposes of a commission unless the brokerage agreement provides for such a contingency, should be approved by this Court. The trial Court's Final Summary Judgment with respect to Respondent's Count I (express contract claim) should be affirmed.

I. THE FIRST DISTRICT COURT OF APPEAL ERRED IN FAILING TO HOLD THAT THE TAKING OF PROPERTY PURSUANT TO CONDEMNATION PROCEEDINGS CANNOT CONSTITUTE A SALE FOR PURPOSES OF A BROKERAGE COMMISSION

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).

ARGUMENT

In its Decision, the First District Court of Appeal reversed an order of the trial Court granting summary judgment to St. Joe on a claim by Respondent. Respondent sued for a commission on the State of Florida's taking, by consent judgment in an eminent domain proceeding, of property owned by St. Joe. Summary judgment had been granted, in relevant part, because McIver was only entitled to a commission, if at all, if the subject property was "sold," and, as a matter of law, a condemnation is not a sale. Accordingly, no commission was owed since the broker's agreement with the seller did not expressly provide for a commission in the event of a taking. The First DCA reversed summary judgment, opining that existing case law in Florida does not establish a "bright-line rule" that a condemnation does not constitute a "sale" for

purposes of determining whether a broker is entitled to a commission.

In its brief on jurisdiction, Respondent contended that there was no conflict between the decision of the First District Court of Appeal subject to review by this Court and Dauer v. Pichowski, 413, So.2d 62 (Fla. 2d DCA 1982), and Keyes Company v. Florida Nursing Corporation, 340 So.2d 1254 (Fla. 3d DCA 1976). This Court, however, having accepted jurisdiction, has necessarily determined that conflict exists.

The First District Court of Appeal, in its decision below, did not reject Dauer, but instead misconstrued it. Specifically, the First District stated:

> McIver asserts that St. Joe's conveyance of Topsail to the State satisfies the criteria in Dauer v. Pichowski, 413 So.2d 62 (Fla. 2d DCA 1982), for a 'sale,' and thus a jury could find that the State acquired Topsail by a voluntary 'sale' rather than by involuntary condemnation and McIver would be entitled to a commission pursuant to his express agreement with St. Joe. St. Joe agrees that Dauer controls, but maintains that Dauer established a bright-line test applicable to condemnation cases.

(App., P. 4)

The First District Court of Appeal went on to hold:

> The circuit court adopted St. Joe's view of Dauer as setting forth a bright-line rule that once the State has initiated a condemnation action, any conveyance that occurs while that action is pending does not constitute a sale for purposes of

> a broker's commission, unless the brokerage agreement provides for such a contingency. We do not read Dauer so strictly. Rather, the three 'tests,' or factors, set forth in Dauer should be examined in light of the facts in each case.

(App., P. 5-6)

Dauer, however, unambiguously establishes just such a bright-line test. Dauer holds:

> It is well settled that a condemnation proceeding does not constitute a sale for purposes of the right to be paid a real estate commission. Preston v. Carnation Co., 196 Cal.App.2d 43, 16 Cal.Rptr. 240 (1961); Haigler v. Ingle, 119 Colo. 145, 200 P.2d 913 (1948); Wilson v. Frederick R. Ross Investment Co., 116 Colo 249, 180 P.2d 226 (1947); Schwenn v. S. Goldberg & Co., 88 N.J. Super. 113, 210 A.2d 808 (1965), aff'd 91 N.J. Super. 346, 220 W.2d 421 (1966); Shaw v. Avenue D Stores, Inc., 115 N.Y.S.2d 194 (Sup. Ct. 1952); Emerson c. Custis & Co. v. Tradesman's National Bank & Trust Co., 155 Pa. Super. 282, 38 A.2d 409 (1944).

Id. at 63.

The decision below misconstrues Dauer in requiring that three "tests" or "factors" be examined. The language relied upon by the Court and Respondent below and attributed to the Dauer court–describing the three conditions that must be present

for a transaction to be considered a sale–is in fact the Dauer Court's summary of the Colorado Supreme Court's holding in Wilson v. Frederick R. Ross Investment Co., 116 Colo. 249, 180 P.2d 226 (1947).

Dauer cited to Wilson, supra, for the proposition that a transaction 'may be considered a sale for purposes of a broker's commission only when 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.' Dauer, 413 So.2d at 64. Significantly, Dauer then held, "[o]bviously, condemnation meets none of these tests." (Emphasis added) Id. Dauer does not state that most condemnations fail to meet the 'tests,' but that 'condemnation' meets none of the tests. Wilson itself is clear why this is necessarily the case, holding that an owner subject to condemnation proceedings has two choices, "(1) reaching an accord in respect to compensation for the property condemned, or (2) contesting the case in court. The owner is in court whether he wants to be or not, and his only alternatives are to settle or litigate." (Emphasis added) Wilson, 180 P.2d at 232. This perfectly describes St. Joe's position in the condemnation proceeding through which its property was taken.

Wilson concerned a claim by two real estate firms for a commission for the sale of real estate, when in fact the real estate was taken by the federal government for a munitions plant early in World War II. The Colorado court reversed a judgment for

the real estate brokers, and held that, absent an express provision promising a commission in the event of condemnation, the court would not infer one. Thus, the holding in Wilson is the same as in Dauer, and supports the Circuit Court order appealed to the First District Court below. In this regard, Dauer holds:

> Even where he is the procuring cause of property being acquired by condemnation, a broker can only recover a commission if there is a specific provision in the brokerage contract to this effect. Wilson v. Frederick R. Ross Investment Co.; Shaw v. Avenue D. Stores, Inc. (Emphasis added.)

Dauer, 413 So.2d at 63-64. Respondent did not and could not assert that such a specific contractual provision existed on his behalf.

It is reiterated that the State's acquisition of St. Joe's property took place through a condemnation proceeding. The fact that the final judgment entered in the condemnation proceeding resulted from a settlement rather than one obtained only after a trial is of no consequence. Certainly, many condemnation proceedings are resolved as a result of settlement rather than trial. Nevertheless, they reflect and embody the State's exercise of its eminent domain power through the condemnation process. By contrast, if negotiations fail in the context of a pending eminent domain proceeding, the ultimate fate of the property will be determined by the courts. These courts can include both the trial court as well as the district courts of appeal as a result

of any appeals which might be filed.

Even though the final order of taking in the condemnation proceeding was a consent judgment, the State always retained the right to, at any time, cease negotiations with St. Joe and continue with its condemnation action. This is true even though an order had been entered dismissing the condemnation action. The State had promptly filed a motion for rehearing of that order, and, according to its counsel, would have appealed the dismissal if rehearing was unsuccessful. The fact that negotiations to settle a pending eminent domain proceeding take place through draft consent final judgments does not indicate that there was no real and authentic petition in eminent domain. Indeed, the fact that any potential settlement was proposed to take the form of a consent final judgment in eminent domain indicates that any transfer of the property would be pursuant to an eminent domain case, and not a "sale" to be executed by the parties and approved by the Florida Cabinet sitting as the Board of Trustees of the Internal Improvement Trust Fund.

It was uncontroverted below that if the State of Florida and St. Joe had not settled and resolved the State's eminent domain proceeding, notwithstanding any action which the trial court preliminarily took with regard to the "taking issue," the State of Florida would have appealed. (R. 1038) While St. Joe may have won the first

battle in having the condemnation action dismissed, absent settlement, the war was far from over.

The cases cited in Wilson demonstrated that the Wilson Court's holding did not allow a condemnation action, initiated as a result of the lack of an agreement between the parties as to a sale, to substitute for a sale for purposes of a brokerage commission.

In Tiffany Studios v. Siebert, 166 N.Y.S. 304 (1917), the Court was faced with interpreting a will which provided that heirs should receive stipulated shares upon the sale of certain real estate. Id. at 308. After some of the land was acquired by condemnation, the Tiffany Court found the condemnation to be a sale for purposes of the heirs receiving the "sale" proceeds. Id. This case, as recognized by the Wilson Court, is wholly dissimilar to he one before this Court, and does not stand for the proposition that a condemnation can ever be treated as a sale for brokerage commission purposes. Tiffany only interpreted a "sale" to give meaning to a will's intent. No brokerage commission was involved.

With respect to Tyler v. Seiler, 136 N.Y.S. 394 (1912), the Wilson Court notes the Tyler Court found the condemnation to be a "sale" only because, ". . . the sole purpose of the condemnation proceedings was to clear a defect in title." 180 P.2d 226 at 230. In the instant case, there were no title issues which would have necessitated

such a condemnation. In fact, in the case at hand, the sole purpose of the condemnation was for the State to take the property that St. Joe owned, after they were unable to reach an agreement with St. Joe with respect to a sale price.

Similarly in Emerson C. Custis & Co. v. Tradesman Nat. Bank & Trust Co., 38 A.2d 409 (Sup. Ct. Pa. 1944), a case cited by the Dauer Court, the defendant offered to pay a commission to anyone that could effect a sale at the asking price of $40,000. The Appellant-Broker offered the property to the government at $40,000. Id. The Government was not willing to pay $40,000 and instead began condemnation proceedings. Id. After these proceedings were begun, the seller accepted a valuation of $33,500. Id. at 410. As the Emerson Court held:

> It amounts to nothing that appellant may have conducted negotiations with a prospective purchaser unless the negotiations resulted in making a sale in fulfillment of the stipulated conditions. The situation here was that the government refused to buy at the fixed price, and began proceedings to condemn the property. Id. (Emphasis added)

38 A.2d 409 at 410.

This is exactly the situation in the instant case. Respondent conducted negotiations with the State but was not able to affect a sale on terms acceptable to St. Joe. Subsequent to Respondent's efforts, and without any agreement as to an

acceptable price, the State began condemnation proceedings. The ultimate amount of compensation received for the property is irrelevant.

Respondent and St. Joe originally entered into an oral agreement in December, 1990. By July, 1994, St. Joe had received three different proposals from the State of Florida for the purchase of the property in question. After these negotiations were unsuccessful, the State notified St. Joe of their intention to acquire the property via condemnation. St. Joe immediately notified the State that they did not desire to have their property acquired via condemnation. Nonetheless, the State began condemnation proceedings in 1994.

It was at this point, the beginning of the condemnation proceedings, that the St. Joe necessarily lost ultimate control over all three of the points referenced by Dauer which are present when property is acquired by a sale. All that was left for St. Joe to do was to litigate the government's right to take their property, while at the same time preparing for the possibility of condemnation by building a case for fair compensation. This is exactly what St. Joe did. Ultimately, St. Joe settled the condemnation litigation with the State. Thus, given the context in which the State acquired St. Joe's property–a condemnation proceeding–the elements alleged by Respondent and as found by the First District Court of Appeal that may affect when a "transaction may be considered a sale" (identification of the property, time of transfer, and price) are not

satisfied and can never be satisfied.

In order for the eminent domain proceeding to come to a conclusion, the State, as the condemning authority, had to have been satisfied that it was obtaining precisely the property it wanted to obtain–no more, no less, and at no other location. Regardless of the property which St. Joe may or may not have wanted to sell to the State, the consent judgment in condemnation could only have been entered if it met the State's needs. If the State was not satisfied as to the property it was obtaining, it could have simply declined to enter into a consent judgment, and proceeded on with its rehearing request, its appeal, and its condemnation action.

Likewise, the State, and not St. Joe, controlled the time at which the State took possession of the property. Moreover, the timing issue is irrelevant in this case. The State, rather than electing a "quick take" proceeding whereby it would take ownership of the property at the start of the condemnation proceeding, was satisfied to proceed with a "slow take," and not take possession until after the proceeding. See Section 73.111, Fla. Stat. Clearly, if no consent judgment was acceptable to the State, St. Joe faced the prospect that the State could ultimately take possession within the time established by statute. Section 73.111, Fla. Stat. Thus, it was clearly the State's consent, and not St. Joe's, that was critical to establishment to a time of conveyance.

Finally, the third element discussed in the Dauer opinion–the price to be paid for

the property–was also not ultimately within St. Joe's control because of the State having chosen to exercise its condemnation power. If the State was not satisfied with the price which St. Joe believed represented the fair value of the property, the State could have proceeded with its condemnation action through its motion for rehearing and/or appeal. In such an action, a jury, and not St. Joe, could ultimately determine the price to be paid. The alternative employed in this particular condemnation proceeding to a jury setting the value was the State agreeing to a value.

Regardless of whether St. Joe was a "tough negotiator," or even if St. Joe was unwavering in its assertion as to the value of the property, it was the State's decision to pay that price, and not St. Joe's insistence upon it, that resulted in the consent judgment in condemnation. Again, had the State been dissatisfied with the price eventually contained in the consent judgment, the State could have simply broken off discussions, not supported a consent judgment, and proceeded with the next steps available to it in its condemnation action. To reiterate, it was uncontroverted below that if St. Joe and the State had not agreed upon settlement terms, the State, if necessary, would have appealed the dismissal of its eminent domain petition. (R. 1038) Respondent may wish that the uncontroverted record below showed otherwise, but it does not. Respondent cannot escape the consequences of the uncontroverted record in this appeal.

The trial judge's quote in the Final Summary Judgment from Wilson included language that is instructive on the question of determining the price to be paid for the property. As to the landowner's ability to negotiate price, the Colorado court in Wilson stated:

> In the usual bargaining between seller and purchaser, the seller is in a position where he does not have to convey if the purchaser does not meet his terms; in a condemnation proceeding, the owner has lost the power to withhold the property or any portion of it; his field of negotiation is narrowed down to two choices, (1) reaching an accord in respect to the compensation for the property condemned, or (2) contesting the case in court.

Wilson, 180 P.2d at 231-232 (emphasis added), quoted at p. 4 of Final Summary Judgment. (R. 1426) The Wilson court in no way suggested that, if the landowner in fact "reach[ed] an accord" with the condemning authority as to price, the acquisition would somehow be converted from a taking back into a voluntary sale.

In summary, once the State initiated condemnation proceedings for St. Joe's property, the termination of the proceedings was within the control of either the Court (through judgment or dismissal) or of the State (if it had voluntarily abandoned the condemnation), but not St. Joe. St. Joe was simply in the position that every other defendant in an action is in–the position of being able to defend against the action, and possibly seek its dismissal, or to accept terms of settlement satisfactory to the

Plaintiff, but not to terminate the proceeding simply because the defendant wished it to be terminated. The termination, or conclusion, of the condemnation proceeding for the acquisition of property which the State clearly wanted to acquire could only occur on terms and conditions satisfactory to the State. The State, and not St. Joe, controlled the essential elements of the transaction, whether concerning the property to be taken, the time of acquisition, or the price to be paid. The elements which might arguably convert a taking of property of this type to a "sale" were not satisfied here.

The opinion, Keyes Company v. Florida Nursing Corporation, 340 So.2d 1254 (Fla. 3d DCA 1976), is consistent with Dauer in this regard. Dauer noted that Keyes "acknowledged that an eminent domain proceeding is not a sale . . . ." Dauer at 64. There, the Third District Court was faced with a claim where a broker claimed a real estate commission where title to the property at issue had passed to Dade County through condemnation proceedings. The broker in Keyes first attempted to reach a contract for voluntary sale. When the property was acquired in condemnation it was as a result of a consented condemnation where Dade County and the property owner "agreed to a price and conditions of a judgment of condemnation . . . ." 340 So.2d at 1256. Keyes held:

> Appellee's position is that the agreement to pay a commission was conditioned '. . . upon completion of this sale . . . .' It is, thereupon, urged that an eminent domain

> proceeding is not a sale. This position is well-supported by the cases cited by the court in its opinion. See *Wilson v. Frederick R. Ross Inv. Co.*, 116 Colo. 249, 180 P.2d 226, 170 A.L.R. 1410 (1947).

340 So.2d at 1256. (Emphasis added, additional citation omitted). The fact that the condemnation action was settled by agreement of the parties did not affect the clear distinction between a sale and a condemnation for the Keyes Court.

While the Court in Keyes remanded the case for a trial, however, this was only because the Keyes Court held:

> If the letter agreement is given force as a promise to pay a commission for the finding of a purchaser as is indicated in the opening line thereof, then appellant's position is supported by those cases holding that a seller may not, after a broker has become entitled to a commission for the finding of a purchaser, frustrate the broker's right to proceed with the sale.

Id. at 1256.

The reversal and remand in Keyes was necessitated by the possibility that the agreement between the seller and its broker was for the broker to merely find a purchaser, rather than to effectuate a sale. As explained by the Dauer court,

> There are two types of real estate brokerage contracts. The first entails the employment of a broker to procure a purchaser for the property of another, while the second involves the employment of a broker to effect a sale of the property.

Dauer, 413 So.2d at 64, note 2. There has been no suggestion by Respondent in this case that his express oral contract with St. Joe was of the first type; indeed, it was always understood that the State of Florida was the likely potential purchaser of the Topsail property, and had inquired into purchasing it as early as 1979. Further, it is undisputed that Respondent asserts his contract provided for a 2% commission of any sale price. Thus, the Third District's basis for reversing summary judgment in Keyes-that the realtor may in fact have been promised a commission if it simply found a purchaser-could not arise in this case.

Moreover, the Keyes Court had found that although Dade County had accepted an option agreement for the purchase of the property in question, the property owner:

> [R]efused to go forward with the sale because of a change in management. Dade County was under an immediate necessity to acquire the facility because of a requirement of a state statute. When the defendant (owner) refused to proceed under the option agreement, Dade County began eminent domain proceedings." (Emphasis added.)

Keyes, 340 So.2d at 1256.

In the present case, just as in Keyes, property was taken in an eminent domain proceeding which the parties settled. Unlike Keyes, however, there is absolutely no allegation that St. Joe, as property owner, refused to go forward with an existing agreement for the purchase and sale of the property and therefore "frustrated" a

broker's right to a commission "by its own wrong in refusing to proceed with the sale." Id. On the contrary, there was no agreement at the time the State of Florida initiated condemnation proceedings and had never been. Appellant admits that before the State determined to initiate condemnation proceedings contract negotiations were at impasse because there was no agreement on price. (R. 241). Dauer found that the facts in Keyes were, "wholly different from those of the instant case because in Keyes the property owner had indicated its willingness to sell at a given price . . . ." 413 So.2d at 64. Similarly, the Wilson Court noted that in the case before it, unlike in condemnation action used to clear title, there was "no contract between a purchaser and seller for an agreed compensation." Wilson, 180 P.2d at 230.

In Keyes an agreement to sell the property had been reached prior to condemnation proceedings being initiated, but the property owner had refused to go forward with the sale. Dauer, 413 So.2d at 64. In the present case the commission was dependent upon a sale (not the finding of a purchaser) and, as previously noted, St. Joe had not reached an agreement on terms for sale with the State and then refused to go forward. (It is undisputed that at the time condemnation proceedings to acquire St. Joe's property were initiated, contract negotiations were at impasse.) Since St. Joe did not frustrate a sale previously procured by McIver, the issue remanded in Keyes is not present here. Accordingly, the Keyes holding that a condemnation is not a sale

states a bright-line rule that is unambiguously applicable to the facts of the present case and is in conflict with the opinion of the First District Court of Appeal opinion below.

In its opinion below, the First District Court of Appeal suggested that a jury could find that the condemnation in this case actually did meet the three tests set forth in Dauer and thus constituted a "sale" for purposes of his broker's commission. However, as noted above, Dauer does not provide three tests to be applied to condemnation proceedings. Rather, condemnation proceedings inherently cannot meet the three "tests." Accordingly, the First District Court erred in holding that Dauer did not establish a bright-line rule. Property may transfer by a sale or by condemnation. It cannot transfer by both simultaneously, since a sale and condemnation are inherently different.

II. THE BRIGHT-LINE RULE ENUNCIATED IN THE DAUER AND KEYES OPINIONS SHOULD BE APPROVED BY THIS COURT

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).

ARGUMENT

As discussed in Argument I of this Brief, the First District Court of Appeal erred in holding that the Dauer and Keyes opinions did not set out a bright-line rule that condemnation may never be considered a "sale" for purposes of a brokerage commission. It is further submitted to this Court that the bright-line rule adopted by Dauer and Keyes is the appropriate rule and that it should be approved by this Court.

As demonstrated in Argument I, a condemnation proceeding, once filed, irrevocably alters the dynamics of any process leading to a transfer of property so as to make it impossible for such a condemnation proceeding to be viewed as equivalent to a sale for brokerage commission purposes. This was recognized by the trial Court below when it stated in its Final Summary Judgment for St. Joe that, "[f]or better or for worse, once the proceedings were initiated against the Defendant's [St. Joe's] property, it had no authority to withdraw from negotiations, or to refuse to sell the

property to the State." (R. 1425-26) Here, the trial Court states the essential difference between a sale and a condemnation. In a sale situation, the property owner may choose to continue negotiations in the absence of an agreement, or may, in the absence of an agreement, cease negotiations and tell the potential purchaser, in essence, "goodbye forever." That, as the trial Court recognized, is not an option in a condemnation proceeding. Only the condemning authority can, assuming a slow take as took place in this case, choose to terminate negotiations and voluntarily dismiss the condemnation proceeding. If the litigation is not settled, the issue of the taking of the property and its value will ultimately be determined in the courts, by a judge and jury, respectively.

Moreover, the fact that the State settled the condemnation proceeding with St. Joe for an amount acceptable to St. Joe did not result, as the First District Court of Appeal implies, because the State considered itself "the prisoner at the bar." The State was only the prisoner of its own desire to acquire the property in question. The State could walk away from the condemnation proceeding; St. Joe could not.

Additionally, the fact that the State and St. Joe settled the condemnation case does not alter the essential difference between condemnation and a sale. This is true notwithstanding that the condemnation proceeding was settled during the pendency of the State's motion for rehearing in the condemnation proceeding. It was

uncontroverted below that if the case had not settled, the condemnation proceeding would have been appealed. See page 4, supra.

It is uncontroverted that Respondent McIver had no role in the condemnation proceeding. The reason a condemnation proceeding was initiated was because, as is equally uncontroverted, contract negotiations were at impasse. A sale was not possible. This Court should not approve the decision of the First District Court of Appeal, as it would allow Respondent to claim a brokerage commission for a sale, when in actuality the contract negotiations which were the subject of the brokerage agreement had resulted in an admitted impasse and the subsequent condemnation proceeding was litigated and ultimately settled with no input from Respondent. As the Dauer Court held:

> . . . no matter how much time appellees spent with the county, there is no basis for any recovery because they failed to meet the requirements of their brokerage contract. *See Wilson v. Frederick R. Ross Investment Co.; Emerson C. Custis & Co. v. Tradesman's National Bank & Trust Co.* The fact that Dauer knew of their efforts with the county cannot change the result. A brokerage contract is much like an attorney's contingent fee contract. Despite the most diligent efforts, there is no fee without accomplishment of the results contemplated by the contract. (Emphasis added.)

Dauer, 413 So.2d at 65-66.

This Court likewise should not adopt a rule which would allow a real estate broker who failed to enter into a brokerage agreement providing for a commission in the event of condemnation to nevertheless "convert" it into a transaction which would serve as a substitute basis for a commission. To reiterate, Dauer and Wilson both hold unequivocally that absent an express contractual provision providing a commission in the event of condemnation, no commission is available, since no commission has been earned.

Moreover, this Court should not approve a rule which would, merely because a condemnation proceeding has been settled, allow a real estate broker, who failed to sell the property pursuant to a sale contract, to claim that condemnation should be treated as a sale. This is precisely the consequence of the First District Court of Appeal's decision, if it is allowed to stand.

Such a rule, if approved by this Court, would constitute a disincentive to property owners to settle condemnation proceedings since, having received "full compensation" for the property taken, as required by Article X, Section 6(a), of the Florida Constitution, they would still be potentially liable, as a result of such settlement, to themselves be liable to pay a commission to a real estate agency who failed to effectuate a sale and who had no role in the eminent domain proceeding or

its settlement. Such a result would be contrary to the long standing public policy of this State to encourage and not to penalize the settlement of litigation.

It has long been held that the courts and the law favor the compromise and settlement of litigation. In National Surety Co. v. Willys-Overland, Inc., 138 So. 24, 26 (Fla. 1931), this Court held that:

> . . . the general rule is that courts, and the law itself, favor the compromise and settlement of disputed claims and will sustain such settlements if fairly made between competent parties, because it is to the interest of the state and the parties themselves that there should be an end to litigation.

Similarly, in Florida East Coast Ry.Co. v. Thompson, 111 So.525, 528 (Fla. 1927), this Court held:

> As a means of discouraging litigation, it is the policy of the law to encourage and favor the compromise and settlement of controversies when such settlement is entered into fairly and in good faith between competent parties, and is not procured by fraud or overreaching.

More recently, this Court in Thompson v. Commercial Union Insurance Company of New York, 250 So.2d 259, 263 (Fla. 1971), referred to:

> . . . the settled public policy of this state to encourage and favor compromise and settlement of controversies when such settlement is entered into fairly and in good faith by

> competent parties, and is not procured by fraud or overreaching.

A close reading of the opinion of the First District Court of Appeal below leads one to the inescapable conclusion that had the State's condemnation case against St. Joe gone to trial, no possibility of a "sale" occurring would have been the conclusion of the District Court of Appeal below. The District Court of Appeal was greatly influenced by the settlement negotiations which resulted in the entry of a consent judgment between St. Joe and the State. It saw those negotiations as contractual in nature.

In its review of this case, the First District Court of Appeal attributed great significance to the fact that the State's condemnation action against St. Joe was concluded by the entry of a consent judgment, as opposed to going to trial. The settlement of that case, it was reasoned by the Court, was akin to a sale because it was the product of negotiations between the parties. This analogized the settlement of a condemnation case, in litigation, as being very similar to a free market bargain arrived at through a meeting of the minds of a willing buyer and a willing seller. The record below is uncontradicted that St. Joe vigorously objected before the Governor and Cabinet when that body voted to acquire the Topsail property by condemnation. After the action was taken, St. Joe objected to the taking in the Circuit Court and even

persuaded the Circuit Judge to dismiss the action. When it became clear that the State would appeal, if necessary, St. Joe capitulated and agreed to settle the case.

The Court even quoted favorably from McIver's brief that a "Consent Final Judgment could be viewed as 'a contract of sale and [was] perceived as such by the parties themselves.'" (App., P. 9) If this reasoning of the District Court of Appeal is endorsed by this Court, St. Joe will be penalized for settling the condemnation case. None of the analogies to a "contract of sale" the Court attributes to the settlement negotiations would apply, under that analysis, had the condemnation case gone to trial.

If the decision of the First District Court of Appeal below is affirmed, it will establish an awkward precedent. An owner, whose property is being taken through condemnation will be vulnerable to a claim for a real estate commission had a real estate agent at one time tried to market the parcel. Those are the facts that existed in Dauer and Wilson, supra. Only now, if the decision below is affirmed, the owner will be discouraged from settling the condemnation case, as it could be determined to be a "sale" which could give rise to a claim for a real estate commission. Any such precedent would be against public policy. It could penalize parties who settle condemnation cases opposed to requiring them to go to trial.

The decision of the First District Court of Appeal, if approved and allowed to

stand, would allow licensed real estate brokers to claim sales commissions in situations where they have produced neither a ready and willing acceptable buyer nor a sale. It would further overturn a settled principle under which professional real estate brokers are responsible for unambiguously setting froth in their brokerage agreements their expectations regarding the basis for commission. It would interject ambiguity into such transactions encouraging unnecessary litigation. Prior to the decision by the First DCA of which review is now sought, the decisional case law in Florida had been settled. As Dauer unambiguously holds, "[e]ven where he is the procuring cause of property being acquired by condemnation, a broker can only recover a commission if there is a specific provision in the brokerage contract to this effect." 413 So.2d at 63-64. If the Decision of the District Court of Appeal below is affirmed, it would allow a real estate commission to be claimed in a condemnation where the case was resolved through a consent judgment rather than a final judgment entered after a trial. By creating a disincentive to settle these cases, such a result would go against public policy.

CONCLUSION

Accordingly, for all of the foregoing reasons, it is respectfully requested that this Honorable Court find that the First District Court erred in failing to hold that the taking of property, pursuant to condemnation proceedings, cannot constitute a sale for purposes of a brokerage agreement; approve the bright-line test enunciated in the Dauer and Keyes opinions; and affirm the trial Court's Final Summary Judgment with respect to Count I of Respondent's Third Amended Complaint.

Respectfully submitted this _____ day of June, 2003.

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the true copies of the foregoing have been furnished by U.S. MAIL to **R. STUART HUFF**, 330 Alhambra Circle, Coral Gables, FL 33134; **BEN H. WILKINSON**, Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P. O. Box 10095, Tallahassee, FL 32302; and to **ADAM LAWRENCE**, Lawrence & Daniels, 100 North Biscayne Boulevard, 21st Floor, Miami, FL 33132, this _____ day of June, 2003.

_____
Attorney

CERTIFICATE OF FONT STYLE

This Brief has been prepared using 14 Point Times New Roman, proportionately spaced, Word Perfect format, pursuant to the requirements of Florida Rule of Appellate Procedure 9.210(a).

_____
Attorney

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC 02-2491

Lower Tribunal No.: 01-2358

ST. JOE CORPORATION, F/K/A
ST. JOE PAPER CO.

Defendant/Petitioner,

vs.

H. BRUCE MCIVER,

Petitioner/Respondent.
_____/

PETITIONER'S APPENDIX TO BRIEF ON THE MERITS

A. Opinion of the District Court of Appeal for the First District of Florida, rendered September 13, 2002.

B. Order of the District Court of Appeal for the First District of Florida, rendered October 18, 2002, denying Petitioner's Motion for Rehearing or Certification.