IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02 - 2491

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ST. JOE CORPORATION,

Petitioner,

v.

H. BRUCE McIVER,

Respondent.

_____

_____

On Petition For Review
Based On Conflict Jurisdiction
To The First District Court of Appeal

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RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

St. Joe Corporation hired H. Bruce McIver, a real estate broker, to sell its 600-acre Topsail property to the State of Florida. The State had long sought to purchase Topsail for conservation purposes. St. Joe promised McIver a 2% commission in the event of a sale to the State. When negotiations between St. Joe and the State reached an impasse over St. Joe's $50 million asking price, McIver advised St. Joe to suggest a friendly condemnation to the State.

McIver knew that the State would have to pay more for Topsail once condemnation began because post-condemnation appraisals of Topsail would then be based on the land's highest and best use, i.e., for development rather than for conservation. McIver also knew that the State never condemned lands for conservation purposes unless the landowner consented in advance to the proceeding. Based on this information, St. Joe directed McIver to tell the State to begin the friendly condemnation (Pet.App.A.2,3,6-7).

Sales negotiations continued after the State began its slow-take condemnation. The experienced Assistant Attorney General representing the State in these negotiations described the State as a "prisoner" to St. Joe's demands. St. Joe named the price it would accept for its land, dictated the amount of land it would convey, and retained title and full control over its land throughout the negotiations. The State eventually agreed to pay St. Joe $84 million for Topsail -- $34 million more than St. Joe's $50 million pre-condemnation asking price (Pet.App.A.7-8).

St. Joe conveyed Topsail to the State at a time that it was under no legal obligation to do so. The trial court had just dismissed the condemnation action because the State failed to prove a sufficient public purpose to condemn St. Joe's lands. Although the instrument of conveyance the parties signed was styled a 'consent judgment,' the parties regarded the document as a contract of sale. (Pet.App.A.7,9-10).

SUMMARY OF ARGUMENT

No conflict exists between this case and 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.

ARGUMENT

NO EXPRESS OR DIRECT CONFLICT EXISTS BETWEEN DAUER AND KEYES CO. AND THE PRESENT CASE.

St. Joe contends that Dauer and Keyes Co. announce a "bright-line" rule that a real estate brokerage commission can never be earned for a transaction in which a condemnation proceeding is in any way involved. Conflict exists, St. Joe argues, because the District Court refused to apply that rule in this case. The First District Court of Appeal, however, correctly decided that Dauer and Keyes Co. do not announce the bright-line rule that St. Joe claims.

Dauer 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, as the District Court in this case recognizes, Dauer 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.

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 a condemnation that satisfies the three tests or factors quoted above. St. Joe's jurisdictional brief ignores Dauer's three tests and the 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 objective --which it fully achieved -- was to force the State, through the friendly condemnation that McIver proposed, to pay the highest possible price for Topsail.

Secondly, in Dauer the county offered the landowner a final price per acre that was far less than what the owner demanded or 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 the entire parcel of land 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, as the District Court noted,

St. Joe asked the State to initiate a friendly condemnation knowing that it could negotiate more effectively and obtain more from the State for its property through that procedural contrivance. 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. 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.

Keyes Co., the other case on which St. Joe relies for conflict, 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.

Keyes Co., again like Dauer, acknowledges the general rule that "an eminent domain proceeding is not a sale," but similarly 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 the continuation of voluntary sales negotiations as well as the voluntary consummation of a sale, and thus compatible with the payment of a real estate commission. 340 So.2d at 1256. Keyes Co., as the District Court in this case implicitly found, 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 clearly 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 did not apply 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 a voluntary contract and sale rather than an involuntary condemnation.

Conflict review is inappropriate where the facts in the case for which review is sought "are not analytically the same" as those in the case relied on for conflict. Department of Revenue v. Johnston, 442 So.2d 950, 951-952 (Fla. 1983). Nor is conflict review appropriate where the allegedly conflicting cases announce different propositions of law. Curry v. State, 682 So.2d 1091, 1092 (Fla. 1996).

The District Court's decision in this case does not announce a rule of law that conflicts with any rule announced in Dauer and Keyes Co., and does not apply a rule of law to produce a different result under substantially the same facts as those in Dauer and Keyes Co. Mancini v. State, 312 So.2d 732, 733 (Fla. 1975). St. Joe therefore fails to satisfy either criterion for conflict review. Indeed, the novelty of the fact-bound issues in this summary judgment case -- a novelty St. Joe tacitly concedes by resorting to out-of-state law in its brief to illustrate the alleged conflict -- "in and of itself bespeaks a lack of jurisdictional conflict" between this case and Dauer and Keyes Co. Kyle v. Kyle, 139 So.2d

885, 887 (Fla. 1962).

CONCLUSION

For the foregoing reasons, St. Joe's petition for review must be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Oertel, Hoffman, Fernandez & Cole, P.A., P.O. Box 1110, Tallahassee, Fla., 32302-1110, this ____ day of December 2002.

CERTIFICATE OF TYPE SIZE AND FONT

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

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