IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-210

ROTEMI REALTY, INC., et al.,

Petitioners,

-vs-

ACT REALTY CO.,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

REPLY OF RESPONDENT TO *AMICUS CURIAE* BRIEF OF CRES COMMERCIAL REAL ESTATE OF TAMPA BAY, INC.

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INTRODUCTION

In this reply brief, the parties are referred to as they stood in the lower court, by proper name, or as Respondent and Petitioner where appropriate. The *amicus* party, CRES Commercial Real Estate of Tampa Bay, Inc., shall be referred to as CRES.

ARGUMENT

THE THIRD DISTRICT COURT O F APPEAL'S HOLDING THAT THE CONTINGENCY FEE CONTRACT IN THIS CASE VIOLATES PUBLIC POLICY AND IS THUS VOID *AB INITIO* SHOULD BE AFFIRMED.

CRESS Commercial Real Estate (hereinafter,CRES) argues in its *amicus* brief that the case law with respect to contingency fee agreements for the procurement of public funds has held that they are valid in the absence of proof of actual corruption. In short, the *amicus'* position rests entirely on *Robert & Co. v. Mortland,* 33 So. 2d 732 (Fla. 1948), and therefore begs the central question in this case. The big issue this Court must decide[1] is whether the time has come to put *Robert & Co. v. Mortland* to rest — particularly in light of the concerns of the School Board and the obvious danger of public corruption posed by contingency commissions for the procurement of public monies. The point at issue is that *Robert & Co. v. Mortland,* is anomalous *vis-à-vis* the long history of decisional law

[1]This Court need not decide this case on the basis of the public policy question if the Court finds that the brokers were not the cause of procurement and thus failed to meet the contract's condition precedent. It would seem, however, that a simple determination that the contract was not fulfilled would leave the question of the contract's validity up in the air.

holding such fee agreements void *ab initio* because they violate public policy by *inviting* future corruption. The case law, which dates back to 1853, does not require proof of actual wrongdoing in order to sustain a finding that the nature of the agreement tends to undermine the public trust by opening the door to illicit inducements. The reason such proof is not required is simple. If there is evidence of improper means to obtain the object of the contract, then the actors are guilty of a felony. But since corrupt means are usually well hidden from public view, it is often very difficult to prove. Thus courts have done away with the necessity of proving actual corruption and have rejected such contracts on their face. Justice Oliver Wendell Holmes clearly explained this concept when he wrote the following:

> [T]he validity of the [contingency fee contract for procurement of public funds]depends on the nature of the original offer, and, whatever their form, the tendency of such offers is the same. ***The objection to them rests in their tendency, not in what was done in the particular case.*** Therefore a court will not be governed by the technical argument that when the offer became binding, it was cut down to what was done, and was harmless. The court will not inquire what was done. If that should be improper, it probably would be hidden, and would not appear. *In its inception, the offer, however intended, necessarily invited and tended to induce improper solicitations, and it intensified the inducement by the contingency of the reward. Marshall v. Baltimore & O. R. Co.* 16 How. 314, 335, 336, 14, L. ed. 953, 962, 963.

The general principle was laid down broadly in

> *Providence Tool Co. v. Norris,* 2 Wall. 45, 54, 17 L. ed. 868, 870, that an agreement for compensation to procure a contract from the government to furnish its supplies could not be enforced, irrespective of the question whether improper means were contemplated or used for procuring it. *McMullen v. Hoffman,* 174 U. S. 639, 648, 43 L. ed. 1117, 1121, 19 Sup. Ct. Rep. 839. And it was said that there is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. 2 Wall. 55, 17 L. ed. 870. In *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 336, 14 L. ed. 953, 962, it was said that all contracts for a contingent compensation for obtaining legislation were void, citing, among other cases, *Clippinger v. Hepbaugh,* 5 Watts & S. 315, 40 Am. Dec. 519, and *Wood v. McCann,* 6 Dana, 366. *See also Mills v. Mills,* 40 N. Y. 543, 100 Am. Dec. 535. There are other objections which would have to be answered before the bill could be sustained, but that which we have stated goes to the root of the contract and is enough to dispose of the case under the decisions heretofore made.

George C. Hazelton v. Margaret R. Sheckels, 202 U.S. 71, 79 (1906) (emphasis added); *see also, Marshall v. Baltimore & Ohio Railroad Co.,* 57 U.S. 314 (1853) (contingency fee contract for the procurement of legislation favorable to railroad company was void *ab initio*); *Providence Tool Company v. Norris,* 69 U.S. 45, 49 (1864) (contingency fee agreement for the procurement of a contract from the government to purchase tools from Providence was against public policy and void *ab initio.* The Court held that " it is not necessary for the element of sinister or

personal influence to be contemplated by the agreement, or to be, in fact, resorted to by the agent, in order to render such agreement for service obnoxious to the law, is directly asserted in other cases.").

CRES also relies on this Court's recent decision in *St. Joe Corp. v. McIver,* 875 So. 2d 375 (Fla. 2004). *St. Joe Corp.*, however, does not say what CRES wants it to say. In fact, it says *nothing* about the public policy question presented here because the issue was never raised and was not contemplated by this Court. Hence, not a single case involving the public policy question at issue here is cited in that decision.

This Court's silence about a legal question that was not raised cannot logically be taken to imply anything at all. The principle of *stare decisis* operates only when a holding articulates a positive statement of law which is capable of future application. The absence of a statement of law is not indicative of a shadow holding.

The issue in *St. Joe Corp.,* was whether a condemnation of land can constitute a sale for purposes of a real estate brokerage commission, where the owner of the property actively sought the condemnation in lieu of a sale. *Id.* at 379. This is how this Court framed the issue:

> In the circumstances of voluntary condemnations,

> whether a broker is entitled to a commission for condemnation of property should be analyzed according to ordinary contract principles, including those applicable to oral contracts and contract modification. The focus should be on the agreed scope of the broker's employment, not on extraneous factors such as when the state should take possession.

St. Joe Corp., 875 So. 2d at 381. The public policy prohibition against contingency fees for the sale of property or services to the state was never asserted by St. Joe as a defense and there is no evidence that this Court considered the question on its own. Therefore, this Court decided the case solely on contract principles, viz., whether the agreement in question contemplated that the broker should collect a commission in the event of a condemnation as opposed to a sale. That is all that *St. Joe Corp.* stands for; it did not tacitly approve of continency brokerage fees from a public policy perspective as presented in the case *sub judice*.

CONCLUSION

For the foregoing reasons, and in the manner described in Respondent's brief on the merits, Br. 42, the judgment of the court of appeals, that the contingency fee contract is against public policy and is therefore invalid, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U.S. mail to Sheldon R. Rosenthal, 25 W. Flagler Street, Suite #1040, Miami, Florida 33130-1717; Jorge L. Gonzalez, 321 Palm Avenue, Hialeah, Florida 33010-4715; Henry T. Sorensen II, Brokers Legal Group, P.A., 32801 US Highway 19 N., Suite 100, Palm Harbor, Florida 34684-3123; Melinda L. McNichols, School Board of Miami-Dade County, 1450 N.E. 2 Avenue, Miami, Florida 33132-1308; David Moliver, president of ACT Realty, Inc., 9415 Sunset Drive, Suite #123, Miami, FL 33173; Alicia Trujillo, 1000 N.W. 111 Avenue, Room #6135, Miami, Florida 33172-5800, this 20th December, 2004.

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SILVIA M. GONZALEZ, ESQ.

CERTIFICATION OF FONT

Undersigned counsel certifies that the font used in this brief is 14 point proportionately spaced Times Roman.

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