

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC 02-2491

Lower Tribunal No.: 1D 01-2358

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

Petitioner,

vs.

H. BRUCE MCIVER,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>Page</u>
Table of Citations	ii
Preliminary Matters	1
Argument	
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	3
II. THE DISTRICT COURT DID NOT ERR BY AFFIRMING SUMMARY JUDGMENT DENYING RESPONDENT’S QUANTUM MERUIT CLAIM	16
III. THE DISTRICT COURT DID NOT ERR BY AFFIRMING SUMMARY JUDGMENT DENYING RESPONDENT’S UNJUST ENRICHMENT CLAIM	21
IV. THE DISTRICT COURT DID NOT ERR BY AFFIRMING THE TRIAL COURT’S ORDER DENYING RESPONDENT’S MOTION TO AMEND	23
Conclusion	29
Certificate of Service	30
Certificate of Font Style	30

TABLE OF CITATIONS

<u>CASES</u>	<u>Page</u>
<u>Arrieta-Gimenez v. Arrieta-Negron</u> , 551 So.2d 1184 (Fla. 1984)	14
<u>Bostwick v. Bostwick</u> , 346 So.2d 150 (Fla. 1st DCA 1977)	28
<u>Brown v. Montgomery Ward & Co.</u> , 252 So.2d 817 (Fla. 1st DCA 1971)	25
<u>Campbell-Leonard Realty v. El Matador Apt. Co.</u> 220 Kan. 659, 556 P.2d 459 (1976)	12, 13
<u>Danieli Corp. v. Bryant</u> , 399 So.2d 387 (Fla. 4th DCA 1981) <u>rev. den.</u> 407 So.2d 1102 (Fla. 1981)	20
<u>Dauer v. Pichowski</u> , 413 So.2d 62 (Fla. 2d DCA 1982)	3-7, 9, 10, 12, 16 18, 19
<u>Davis v. Department of Health and Rehabilitative Services</u> , 461 So.2d 210 (Fla. 1st DCA 1984)	21, 22
<u>Dimick v. Ray</u> , 774 So.2d 830 (Fla. 4th DCA, 2000)	25
<u>Division of Administration v. Tsalilckis</u> , 372 So.2d 500 (Fla. 4th DCA 1979)	14
<u>Emerson C. Custis & Co. v. Tradesman Nat. Bank & Trust Co.</u> , 38 A.2d 409 (Sup. Ct. Pa. 1944)	10
<u>Florida Star v. B.J.F.</u> , 530 So.2d 286 (Fla. 1988)	2
<u>Harding Realty, Inc. v. Turnberry Towers Corp.</u> 436 So.2d 983 (Fla. 3d DCA 1983)	17

<u>Hermanowksi v. Naranja Lakes Condominium Number Five, Inc.</u> 421 So.3d 558 (Fla. 3d DCA 1982)	18
<u>International Patrol and Detective Agency, Inc. v. Aetna Casualty & Surety Co.</u> , 396 So.2d 774, 776 (Fla. 1st DCA 1981)	25
<u>JFK Medical Center, Inc. v. Price</u> , 647 So.2d 833 (Fla. 1994)	13, 14
<u>Keyes Company v. Florida Nursing Corporation</u> , 340 So.2d 1254 (Fla. 3d DCA 1976)	10-12
<u>Miller, Cowherd & Kerver, Inc. v. De Montejó</u> , 406 So.2d 1196 (Fla. 4th DCA 1981)	15, 16
<u>Moylan v. Estes</u> , 102 So.2d 855 (Fla. 3d DCA 1958)	20
<u>Pol v. Pol</u> , 705 So.2d 51 (Fla. 3d DCA 1997)	15
<u>Southern Bell Tel. & Tel. Co. v. Acme Electrical Contractors, Inc.</u> , 418 So.2d 1187 (Fla. 4th DCA 1982)	22
<u>Totura & Co., Inc. v. Williams</u> , 754 So.2d 671 (Fla. 2000)	27
<u>Walker v. Senn</u> , 340 So.2d 75 (Fla. 1st DCA 1976)	28
<u>Whipple v. State</u> , 431 So.2d 1011 (Fla. 2d DCA 1983)	1
<u>Wilson v. Frederick R. Ross Investment Co.</u> , 116 Colo. 249, 180 P.2d 226 (Colo. 1947)	3-6, 11

STATUTES

Section 73.11, Fla. Stat.	8, 9
Section 95.11(3)(k), Fla. Stat.	26

RULES

Fla. R. Civ. P. 1.190(c)	26
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PRELIMINARY MATTERS

The Court should not rule on the issues raised by Respondent in his answer brief with respect to his *quantum meruit*, unjust enrichment and motion to amend complaint claims. The First District Court of Appeal disposed of these issues without opinion. (App., P. 10) See Petitioner's Motion to Strike Respondent's Answer Brief on the Merits in this regard, previously filed with the Court. This Court, in its Order dated August 18, 2003, has deferred ruling "on whether the issues raised in the answer brief were properly before the Court."

This Court should be free to discharge its judicial policy-making function of clarifying the law and promulgating new rules of law, which are matters which have an impact on those other than the individual litigants in any given case. See Whipple v. State, 431 So.2d 1011 (Fla. 2d DCA 1983). The opinion of the First District Court of Appeal with respect to the issue raised by Respondent for the first time in his answer brief are equivalent to a per curiam affirmed decision and, it is respectfully suggested, should not be reviewed by this Court. The District Court's decision in this regard, being without opinion, will have no impact beyond this proceeding and necessarily cannot be in conflict with other district court decisions or otherwise be of a nature to require this Court to exercise its discretion. These are matters in which the First District Court of Appeal should have final appellate jurisdiction. As this Court

has noted in Florida Star v. B.J.F., 530 So.2d 286, 288, note 3 (Fla. 1988), the Court does not “have subject matter jurisdiction of a district court opinion that fails to expressly address a question of law, such as opinions issued without opinion or citation. Thus, a district court decision rendered without opinion or citation constitutes a decision from the highest state court empowered to hear the cause. . . .”

The additional issues raised by Respondent were not only disposed of without opinion, they are separate and distinct from the issue currently before this Court as a result of its conflict jurisdiction. It is respectfully urged that these issues, having been ruled upon by the First District Court, should not now be unnecessarily ruled upon by this Court.¹

¹ It is noted that in his Statement of the Case and Facts, Respondent makes numerous factual assertions which were not raised in his Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment, served on January 22, 2001. (R. 1317-1328) It is further noted to the Court that Respondent is inappropriately argumentative in its statement of the facts. For example, Respondent refers to the Consent Final Judgment entered in the condemnation proceeding as a “sales contract.” While that may be Respondent’s position in its argument, it is an inappropriate characterization in its statement of the facts. Additionally, the quotation of Robert Schanlan on page 9 of the Respondent’s brief omits Mr. Scanlan’s additional comment, “[u]ntil we had an order of taking, yes that would be true.” (R. 1023) Respondent’s additional factual assertions, however, are irrelevant in that they are in no way inconsistent with the Order of Final Summary Judgment entered by the trial Court.

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

Respondent's Answer Brief attempts to mischaracterize the decision in Dauer v. Pichowski, 413 So.2d 62 (Fla. 2d DCA 1982), as stating only a "general rule" that a taking of property by condemnation does not constitute a "sale" for purposes of a brokerage commission. McIver further misapprehends the decision in Dauer as subjecting this "general rule" to a three part "test." (Answer Brief at 15)

Dauer, however, unambiguously recognizes 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.

Id. at 63. (Emphasis added.) This holding is in accordance with holdings in other states, which consistently have held that condemnations are not to be treated as sales for purposes of entitlement to a real estate commission.

The language relied upon by Respondent and attributed to the Dauer court—describing the three conditions that must be present for a transaction to be considered a sale—is 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). See Petitioner's initial brief on the merits at 10-12.

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. To reiterate, Dauer then held, “[o]bviously, condemnation meets none of these tests.” (Emphasis added) Id. Respondent fails to acknowledge that 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. As noted in St. Joe’s initial brief on the merits at 11, 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 in early 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 trial Court order in this proceeding. 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.

Respondent's Answer Brief is mistaken when it asserts that, with respect to the purported tests, "St. Joe essentially agrees when it cites approvingly to Dauer's three factors that distinguished an involuntary 'taking' from a 'sale'" (Answer Brief at 15). St. Joe's brief on the merits clearly states the three tests which distinguish condemnations from sales. They do not differentiate condemnations which are to be treated as condemnations from condemnations which are to be treated as sales. It is misleading to characterize Petitioner St. Joe's analysis as approval.²

Respondent's entire analysis of Dauer relies entirely and mistakenly upon his false predicate that Dauer only applies to what Respondent refers to as "a traditional

² Similarly, the language quoted from St. Joe's brief at page 15 (which in fact appears at page 20) is not inconsistent with St. Joe's argument. The Wilson elements are not present in a condemnation to "convert" it to a sale because they cannot be. The elements are inconsistent with a condemnation action.

condemnation” (Respondent brief at 16), a construction neither used nor relied upon by Dauer or Wilson. By applying a false predicate, Respondent arrives at a false conclusion. 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. Public policy favors settlement and a resolution of litigation. Respondent’s claim would create disincentives for property owners to settle condemnation actions.

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 not over. The state was taking the Topsail parcel to create a preserve. The land has unique qualities and natural resources. The likelihood of a Court of Appeal holding the State could not condemn such a natural area to create a preserve was not likely. Accordingly, given the context in which the State acquired St. Joe’s property—a condemnation proceeding—the elements discussed in the Dauer opinion that may affect when a “transaction may be considered a sale” (identification of the

property, time of transfer, and price) are not 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 Petitioner St. Joe, controlled the time at which the State took possession of the property. Moreover, to a large extent, 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, Florida Statutes. 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,

Florida Statutes. 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 Respondent's Answer Brief and in the Dauer opinion—the price to be paid for the property—was also not ultimately within Petitioner 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 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.

Respondent repeatedly asserts that Petitioner St. Joe “forced the State to pay the full sales price St. Joe demanded” by means of a “friendly condemnation.” (Answer Brief at 17) This is both ludicrous and a non sequitur. Presumably, if a condemnation is truly “friendly,” the result is not forced. The record in the Circuit Court below was undisputed that while the State's condemnation was vigorously defended by St. Joe, the State had proceeded using a “slow take.” The State was not forced to pay anything or acquire anything. St. Joe, however, upon the commencement of condemnation proceedings could not withdraw from the taking

action. To reiterate, the State was not St. Joe's prisoner. 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.³

Respondent errs in stating that Emerson C. Curtis & Co. v. Tradesman's Nat'l Bank & Trust Co., 155 Pa. Super. 282, 38 A2d 409 (Pa. Super. Ct. 1944), is "patently distinguishable." (Respondent brief at 18) On the contrary, Emerson states that:

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. In the present case a sale never took place because, prior to condemnation proceedings, no price was ever agreed upon.

Respondent likewise errs in asserting that Keyes Co. v. Florida Nursing Corp., 340 So.2d 1254 (Fla. 3d DCA 1976), is distinguishable and does not hold, like Dauer, that a condemnation is not a sale for purposes of a brokerage commission. Respondent states that, "the property owner in Keyes Co. refused to voluntarily convey its property to the County." This, argues Respondent, forced the County to commence "a traditional condemnation proceeding." (Respondent brief at 19) The

³ Respondent attempts to bolster its argument by speculating as to what "St. Joe's objectives" were. (Respondent brief at 16) This is mere speculation and constitutes improper argument.

condemnation in Keyes occurred for the same reason the State initiated and followed through with a condemnation in the present case. The government entity wanted the property. The government entity could not agree on terms for a sale. Notwithstanding the inability to agree on terms, the governmental entity still wanted to acquire the property. Respondent further errs in asserting that it is incorrect to state that in Keyes the property was eventually taken in a consented condemnation.

As the Keyes court clearly states, Dade County and the property owner “agreed to a price and conditions of a judgment of condemnation” 340 So.2d at 1256. The condemnation action in Keyes like the condemnation action between the State and St. Joe was resolved by settlement. As Keyes properly held, this did not convert the condemnation into a “sale” for brokerage commission purposes. Keyes further 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). In his brief to this Court, Respondent McIver misreads Keyes when he states that there the Court “recognized” that ““in an appropriate factual context, an eminent domain proceeding

can be a continuation of a sales negotiation, ‘as well as a voluntary’ consummation of the [sales] transaction”” and thus support payment of a real estate commission. (Answer Brief at 19)

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.

413 So.2d at 64, note 2.⁴

Respondent’s reliance on Campbell-Leonard Realty v. El Matador Apt. Co., 220 Kan. 659, 566 P.2d 459 (1976), is wholly misplaced. The case did not involve an eminent domain action, and has no applicability here. In Campbell-Leonard, a real estate broker sued for his commission under both express contract and *quantum meruit* theories. The trial court found no express contract, but awarded damages

⁴ Keyes only states the obvious. Since the agreement there did not reference a brokerage commission due upon a sale, but when and if “the transaction is fully consummated,” it might be held that the “condemnation” could equal “consummation.” The Keyes Court concluded: “. . . an issue remains upon the allegation that the plaintiff found a purchaser and the defendant frustrated the sale by its own actions.” This, for the reasons stated at page 22 of St. Joe’s Initial Brief, is wholly unlike the present case.

under the implied contract (*quantum meruit*) theory. The defendant (seller of property) argued against *quantum meruit* recovery on several grounds, including that it did not voluntarily accept any benefits from plaintiff's efforts (i.e., the sale of the property to buyers located by plaintiff), but accepted them (by closing on the sales contract) only under duress. The Court rejected the seller's claim of duress, and affirmed the broker's recovery under *quantum meruit*.

The seller's voluntary act of agreeing to sell its property rather than to litigate the validity of the contract in Campbell-Leonard provides no basis for comparison of that case to the matter before this Court. In Campbell-Leonard, the seller's voluntary choice to honor the contract (and sell the property) was preceded by another voluntary act of the seller: entering into a contract with the buyer. In the instant case, however, St. Joe did not enter into a contract to sell its property to the State; the State and St. Joe, despite Respondent's involvement, could not reach agreement on a contract. After no voluntary agreement could be reached, the State initiated condemnation proceedings.

Respondent cites several cases to support its assertion that a consent judgment is not a true judgment. The first Florida case cited by Respondent in this regard is JFK Medical Center, Inc. v. Price, 647 So.2d 833 (Fla. 1994). JFK simply held that the voluntary dismissal, with prejudice, of a claim against an active tortfeasor does not

bar continued litigation against the passive tortfeasor. Any distinction JFK makes between consent judgments and “adjudicated” judgments, turns on the unique aspects of suing (and settling with) joint tortfeasors, and not on any perceived inherent inferiority of consent judgments.

Respondent’s quotation from Arrieta-Gimenez v. Arrieta-Negron, 551 So.2d 1184 (Fla. 1984) (“a consent judgment is a judicially approved contract”) is so incomplete and selective as to be misleading. What this Court actually said was:

Appellant’s argument attempts to differentiate between a consent judgment and a final judgment entered after trial on the merits. . . . While it is true, as appellant argues, that a consent judgment is a judicially approved contract, and not a judgment entered after litigation, it is a judgment nonetheless. As such, it is entitled to the same preclusive, res judicata effect as any other judgment issued by a Florida court.

551 So.2d at 1186 (emphasis added). While Respondent would like to characterize the consent judgment as something less than a judgment, this Court has clearly and expressly rejected this argument: A consent judgment is a judgment.

Respondent’s citation to Division of Administration v. Tsalickis, 372 So.2d 500 (Fla. 4th DCA 1979), for the principle that “a consent final judgment in a condemnation action is a binding contract” is also misleading. In Tsalickis, the two property owners who had been the condemnees in a condemnation suit filed a motion to assess interest on the original award of damages, although the final judgment in the

condemnation action had made no provision for the award of interest. The Fourth District concluded it would be inappropriate to grant one of the sides greater relief than the parties had agreed to. The consent final judgment, in addition to being a judgment, was also a bargained-for contract, and the court would not allow one side to seek additional benefits that had not been part of the bargain.

The last two cases relied upon by Respondent are easily distinguished. Pol v. Pol, 705 So.2d 51 (Fla. 3d DCA 1997), involved a property held by two individuals, following their divorce, as a tenancy in common. Upon the former wife moving to partition and equitably divide the property, her former husband offered to buy the property, agreeing in exchange that she would receive 50% of the profits if he “sold or transferred interest in the property” within five years and it involved more than \$650,000. Id. at 52. This case did not involve a claim for a broker’s commission and does not support Respondent’s contentions.

In Miller, Cowherd & Kerver, Inc. v. De Montejo, 406 So.2d 1196 (Fla. 4th DCA 1981), a broker claimed a commission as a result of an executed joint venture agreement, which the broker argued constitute a “sale” under a listing agreement. The trial court granted summary judgment for the property owner. The Fourth District Court of Appeal affirmed and approved the trial Court’s holding that if the broker

wants a commission, the broker should have spelled that out in the contract. Id.⁵

It is disingenuous for Respondent to argue now that 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.” (Answer Brief at 28) That is not what the agreement relied upon by Respondent in its Complaint provides. Respondent cannot argue that the agreement means something other than what Respondent alleged. The requirement for any such provisions to be specifically expressed in a contract is clearly necessary, since in the absence of such specific provisions, brokers could argue after the fact that a brokerage agreement could have or should have so provided.

II. THE DISTRICT COURT DID NOT ERR BY AFFIRMING SUMMARY JUDGMENT DENYING RESPONDENT’S QUANTUM MERUIT CLAIM

If Respondent failed to perform his express contract and thus receive a 2% commission, he cannot rely upon an “implied contract” in order to seek the same 2% of sales price (especially considering no sale took place). Koutan v. Fredricksen, 449

⁵ Miller not only does not support Respondent’s contentions, it supports Petitioner St. Joe’s position. As held by Dauer, in the event of a condemnation, “[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.” (Emphasis added.) Id. at 63-64.

So.2d 1 (Fla. 2d DCA 1984) (“The law will not imply a contract where an express contract exists concerning the same subject matter.”)

Harding Realty, Inc. v. Turnberry Towers Corp., 436 So.2d 983 (Fla. 3d DCA 1983), dealt with a broker who sued for a real estate sales commission based both on the existence of an express contract and on the implied contract theory of *quantum meruit*. The broker, though alleging the existence of an express contract, nonetheless did not recover for failure to comply with the terms of the contract. The Third District Court of Appeal held that the broker’s attempt to recover based upon the theory of *quantum meruit* was barred by the well established rule that the law will not imply a contract where a valid express contract exists. 436 So.2d at 984.

In affirming the denial of a broker’s claimed commission of 3% of a sales price, the Court held that:

Since it is uncontroverted that the subject closings never took place, Harding’s recovery is precluded as a matter of law by the terms of its express contract with Turnberry.

Id. The Court in Harding Realty, further held that:

Harding’s complaint also sought recovery on the theory of quantum meruit. However, the law will not imply a contract where a valid express contract exists. *Hazen v. Cobb*, 96 Fla. 141, 117 So. 853 (Fla. 1928); *Sollutec Corp. v. Young & Lawrence Associates, Inc.*, 243 So.2d 605 (Fla. 4th DCA 1971); see *Bloom v. Frese*, 123 So.2d 47 (Fla. 3d DCA 1960). Consequently, the trial court properly entered summary final judgment as to Harding’s entire action.

Id. See also Hermanowksi v. Naranja Lakes Condominium Number Five, Inc., 421 So.3d 558 (Fla. 3d DCA 1982). It is clear that in his third amended complaint Respondent is claiming the same 2% commission he would only be entitled upon a sale of the Topsail Hill property. Specifically, Respondent's third amended complaint only refers to an oral agreement to provide services in connection with the sale of Topsail Hill and for Respondent to receive 2% commission of the sale price. (R. 893) Moreover, in its *quantum meruit* count, Respondent only refers to 2% of the sales price, specifically demanding "2% of the total sales price" and alleging "full performance by the Plaintiff" (R. 900) Accordingly, since the express contract was not performed and covered the same subject matter, Respondent may not obtain by *quantum meruit* the contractual 2% for the alleged performance of the contract.

It is noted that both Count II (*quantum meruit*) and Count III (unjust enrichment) of Appellant's Third Amended Complaint incorporate each of the general allegations in the Amended Complaint respecting the existence of an express "oral contract." The *quantum meruit* and unjust enrichment claims are accordingly negated by the alleged existence of an express oral contract in preceding portions of the complaint.

Further Dauer requires that a brokerage contract expressly provide for any commission claimed in connection with condemnation. 413 So.2d at 63-64.

Therefore, an implied contract, even if it existed, would be insufficient. However, it does not exist. It is undisputed that prior to the State's condemnation proceeding St. Joe wrote to each Cabinet member vehemently objecting to such a proceeding. It is equally undisputed that upon the State's filing of the condemnation action, the State was notified that Respondent was no longer to be contacted with respect to the property in question; that Respondent had no role in this condemnation proceeding; that St. Joe defended itself and sought to defeat the condemnation proceedings; and that the State did not consider the condemnation "friendly." (Petitioner's initial brief on the merit at pp. 3-4)

Under these circumstances, particularly when viewed in connection with Respondent's failure to follow the directives of Dauer that any agreement for a commission in connection with condemnation be express, there is no basis for Respondent's assertion that a jury could find, impliedly, that St. Joe agreed to pay Respondent a commission upon the taking of its property in condemnation. It is completely illogical for Respondent to state that it "did not believe that by proposing a friendly condemnation . . . he was abandoning his claim to a commission." (Answer Brief at p. 34.) Respondent had not performed its contract to sell the property. Negotiations were at impasse. He had no "claim to a commission" to abandon. Further, the third amended complaint alleges that, after Petitioner notified the Cabinet

that it objected to the initiation of condemnation proceedings, “the State requested that Plaintiff obtain a memo from the Defendants [sic] consenting to the condemnation of the Topsail Hill property.” (R. 895). No such memo was provided by St. Joe to the State. (R. 452)

Respondent’s reliance on Moylan v. Estes, 102 So.2d 855 (Fla. 3d DCA 1958), cert. den. 106 So.2d 199 (Fla. 1958), is misplaced. In that case, the broker secured a contract for the sale of property, and the purchaser initially refused to close. The purchaser and seller immediately negotiated a subsequent contract for the sale of only a portion of the property but at a higher per-acre price; the broker, despite his efforts, was excluded from such negotiations. The broker was found to be entitled to his commission under an implied promise to pay, as he “was the procuring factor in the eventual sale,” id. at 857, even though he was excluded from the final negotiations. In Moylan, a broker had been retained to sell a piece of property, he procured a buyer and obtained a contract, and the seller in fact sold the property (or at least a portion of it), to that buyer. Moylan is clearly distinguishable from the present case, where an impasse had been reached in contract negotiations, no sale agreement was ever entered into, and condemnation proceedings ensued. Danieli Corp. v. Bryant, 399 So.2d 387 (Fla. 4th DCA 1981) rev. den. 407 So.2d 1102 (Fla. 1981), is similarly distinguishable.

III. THE DISTRICT COURT DID NOT ERR BY AFFIRMING SUMMARY JUDGMENT DENYING RESPONDENT’S UNJUST ENRICHMENT CLAIM

For the same reasons discussed in Argument II, supra., the District Court did not err in affirming summary judgment denying Respondent’s unjust enrichment claim. Similarly, in his third amended complaint count claiming recovery for unjust enrichment, Respondent again claims the same 2% commission he would be entitled to upon a sale of the Topsail Hill property. The third amended complaint specifically referred to Respondent’s express contract with Petitioner and alleges that Respondent, “was the procuring factor in the sale between the State of Florida and the Department” (R. 901)

It is further noted that the cases cited by Respondent to support his contention that “an express contract does not preclude an unjust enrichment recovery in quasi-contract” (page 31 of Initial Brief) are easily distinguishable. Davis v. Department of Health and Rehabilitative Services, 461 So.2d 210 (Fla. 1st DCA 1984), concerned a complaint filed by a landlord (Davis) seeking additional compensation for after-hours utilities and janitorial services for his state agency tenant (HRS) under various theories, including unjust enrichment. In the process of soliciting bids for the leased office space, the state agency had told bidders to assume that the office space would be used 8:00 a.m. to 5:00 p.m., Monday through Friday, except holidays. Davis was

awarded the contract and he constructed the building. After HRS occupied the building, HRS notified Davis that it would occasionally use the facility beyond those normal office hours, and that Davis was expected to provide any additional utility and janitorial services at no additional cost. Davis sued, and his complaint was dismissed for failure to state a cause of action.

The Davis Court reversed the dismissal and sent the matter back for trial, finding that the complaint stated a cause of action for unjust enrichment noting:

If the trial court finds that the lease terms incorporated the use limitation developed during the pre-bid conference, then Davis will be entitled to reasonable payment for use of the facility in excess of that agreed upon.

461 So.2d at 212. In other words, the parties' express contract may have, by limiting the use of the premises to particular hours, necessarily excluded other hours. The state agency's conscious choice to use the offices during the "excluded" hours would entitle the landlord to payment.

In Southern Bell Tel. & Tel. Co. v. Acme Electrical Contractors, Inc., 418 So.2d 1187 (Fla. 4th DCA 1982), a building owner contracted with a general contractor for an addition to its building, and the general contractor subcontracted out the electrical work. The owner subsequently requested many changes from the electrical subcontractor; "many of the changes requested by [the owner] were outside the contract between [the owner] and the general contractor." 418 So.2d at 1188. The

Fourth DCA affirmed a jury verdict for the subcontractor, noting both the absence on an express contract between the owner and the subcontractor, and the fact that the owner specifically requested and received changes and alterations from the original work plan. In both of those cases, there was a clear understanding of the scope of services which were expected to be provided.

IV. THE DISTRICT COURT DID NOT ERR BY AFFIRMING THE TRIAL COURT'S ORDER DENYING RESPONDENT'S MOTION TO AMEND

The trial judge did not abuse his discretion in denying Respondent's motion to amend his complaint to claim a commission on a separate parcel of property, known as Deer Lake. It should be noted that the proceeding below was initiated by the filing of a one count verified complaint in October, 1996. (R. 1-3) In response to a timely motion to dismiss, Respondent served an amended complaint in June, 1997, followed by a second amended complaint in July, 1997. (R. 106-116) A motion to dismiss the second amended complaint was denied, and the case progressed through the pleading, discovery, and trial preparation stages.

On July 31, 2000, almost four years after the initial complaint was filed, Plaintiff/Respondent filed a motion for leave to serve a third amended complaint. (R. 858-872) A portion of the subject of the amendment which Plaintiff sought to introduce into the litigation through the proposed third amended complaint was his

alleged entitlement to a commission and consulting fee for the sale price of the “Deer Lake” property. Respondent simply errs when he states that, through his proposed amendment, he “was not asserting a ‘new contract’ or a ‘new cause of action’ by his claims against the proceeds from the sale of Deer Lake.” (Answer Brief at 40) This assertion is disingenuous.

In his proposed third amended complaint, provided to the trial court with his motion for leave to amend, Respondent for the first time asserted he entered into an oral contract with St. Joe to procure a sale of “certain properties” other than Topsail including, “Deer Lake.” (R. 862) In his Second Amended Complaint, Appellant had only claimed the existence of an alleged contract with respect to “Topsail Hill.” (R. 107)

The proposed additional allegations make it clear that Respondent was attempting for the first time to raise the existence of a contract relating to Deer Lake. If this was not the case, there is no explanation for the Second Amended Complaint only raising a breach of contract count with respect to Topsail Hill, and the proposed Third Amended Complaint for the first time additionally raising a breach of contract count with respect to Deer Lake. Clearly, an attempt was being made to interject new issues into the proceeding below. The trial court below correctly compared Respondent’s proposed third amended complaint with the previously allowed second

amended complaint in order to determine what additional matters were being proposed for insertion into the existing proceeding. Since the portion of the proposed amended complaint not allowed alleged a new “transaction,” (commission for sale of Deer Lake) and would be futile (untimely), no abuse of discretion by the trial judge occurred. Accordingly, Dimick v. Ray, 774 So.2d 830 (Fla. 4th DCA, 2000), does not support Respondent’s position.

In International Patrol and Detective Agency, Inc. v. Aetna Casualty & Surety Co., 396 So.2d 774, 776 (Fla. 1st DCA 1981), the First District Court of Appeal held that:

Although generally leave to amend should be liberally granted so that matters may be tried on the merits, such amendments are not allowable if they would change the issue, introduce new issues, or materially vary the grounds for relief.

In Brown v. Montgomery Ward & Co., 252 So.2d 817, 819 (Fla. 1st DCA 1971), the First District Court of Appeal similarly held:

The court may, in its discretion, deny any party the right to amend his pleadings if the proposed amendments will change or introduce new issues or materially vary the grounds for relief, or where the filing of such pleadings will delay the suit by necessarily requiring a continuance under circumstances which would be unduly prejudicial to the opposing party.

(Footnote omitted.)

Respondent states that the portion of the proposed amendment which the trial court did allow and the portion not allowed both dealt with Deer Lake. Respondent accordingly argues that they should have both been allowed as they dealt with the same subject matter and related back to the same underlying “conduct, transaction, or occurrence.” Fla. R. Civ. P. 1.190(c). Respondent is mistaken in this assertion. The portion of the proposed third amended complaint allowed by the trial court dealt with alleged compensation for the sale of the Topsail Hill property. Therefore, the trial judge held that it related back to the claim originally made for a commission in connection with the sale of the Topsail Hill property. By comparison, the portion of the proposed third amended complaint not allowed by the trial judge related to the sale of a different piece of property, Deer Lake. The trial judge correctly held that a claim for a commission for this sale of Deer Lake did not relate back to the previous claim for a commission for the sale of Topsail Hill.

Moreover, since McIver did not seek to interject these issues into the proceeding until July 2000, more than four years after the entry of an eminent domain Court order dealing with the Deer Lake property, Appellant’s claim would have been barred by the statute of limitations. The applicable limitation appears to be four years for “a legal or equitable action on a contract, obligation, or liability not founded on a written instrument.” Section 95.11(3)(k), Florida Statutes.

The running of the statute of limitations would necessarily serve as a basis for denying the amendment. The claim for commission on Deer Lake, a separate parcel of property, was a separate cause of action. The attempted amendment did not “relate back” to the filing of the original complaint. Any amendment, if granted, would only have related back to the date the motion to amend was filed, which was outside the limitations period. See Totura & Co., Inc. v. Williams, 754 So.2d 671, 680 (Fla. 2000).

Further, Respondent appears to willfully misapprehend the extent of prejudice to Petitioner St. Joe by its late-filed proposed amended complaint. For the first time, an oral contract with St. Joe was alleged to exist providing for a commission upon the sale of Deer Lake. It is simply incorrect for Respondent to state “St. Joe knew all that it could ever know about the Deer Lake purchase.” (Answer Brief at 42)

The prejudice to St. Joe of the late attempt to interject the “Deer Lake” claim into the proceedings below are demonstrated by the fact that St. Joe Chairman Jake Belin, with whom Appellant alleged he entered into an oral agreement concerning Deer Lake, died at the end of May, 2000. (Supplemental R. 13) Mr. Belin was deposed on August 5, 1997 in order to preserve his testimony. It was only after Mr. Belin’s death that the Motion for Leave to Amend was filed. Mr. Belin’s deposition was taken to preserve testimony. At that time Respondent was only raising a Topsail Hill claim and

not a Deer Lake claim. This circumstance was related to the Court below during the hearing on Respondent's Motion for Leave to Amend. (Supplemental R. 13) The extreme prejudice to St. Joe in these circumstances is obvious.

A continuance would not have obviated this prejudice. Accordingly, Bostwick v. Bostwick, 346 So.2d 150 (Fla. 1st DCA), cited by Respondent, is distinguishable and does not support Respondent's position. On the contrary, Bostwick states that there leave to amend should have been allowed given, unlike the instant case, "the lack of prejudice to appellee" Id. at 151-152. Similarly, Walker v. Senn, 340 So.2d 975, 976 (Fla. 1st DCA 1976), does not support Respondent ("[o]rdinarily within the trial court's sound discretion as to whether to allow or disallow amendments to pleadings. However, under the facts of the case it is clear that no prejudice could have resulted to appellees.") Again, in the present case, the prejudice to Petitioner is apparent.

The trial judge properly recognized that Respondent's claim for a commission on the State's purchase of St. Joe's Deer Lake property was a separate and distinct claim, and he would not allow the amendment in these circumstances. By contrast, Respondent's claim for compensation for services allegedly rendered in connection with greater density being extended to property which St. Joe did not transfer to the State was allowed, in that such increased development rights were alleged by

Respondent to be one component of the compensation paid to St. Joe by the State for Topsail. However, the trial Judge properly only allowed amendments to the extent they involved compensation allegedly received by St. Joe for the State taking the Topsail Hill property. Neither abuse of discretion on the part of the trial judge nor error by the District Court of Appeal on this point has been demonstrated by Respondent.

CONCLUSION

For the foregoing reasons and those set forth in Petitioner's Initial Brief on the Merits, the decision of the District Court of Appeal reversing summary judgment with respect to Respondent's express contract count should be reversed. In all other respects, this Court should not consider Respondent's other points on appeal to this Court seeking review of the District Court of Appeal affirmance of summary judgment on the *quantum meruit* and unjust enrichment counts and affirmance of trial Court partial denial of leave to amend. Alternatively, if this Court does review those portions of the decision of the District Court of Appeal, it should affirm that Court's holding with respect to the same.

Respectfully submitted this _____ day of September, 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 September, 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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