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FILED
SID J. WHITE
AUG 30 1996
CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

COUNTY OF BREVARD, a Political subdivision of the State of Florida, Petitioner, v. MIORELLI ENGINEERING, INC., and HARTFORD FIRE INSURANCE COMPANY, Respondents.	:	CASE NO.: 88,842

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

As its statement of the case and facts, Petitioner, the County of Brevard, hereby adopts by reference the decision of the Fifth District Court of Appeal in this matter. (A.1-2)[1/2/] The relevant portions of the Fifth District's opinion is as follows:

> On January 5, 1993, Miorelli Engineering ("MEI") contracted with Brevard County to construct a spring training facility for the Florida Marlins. . . A dispute subsequently arose between the county and MEI, and the county terminated MEI as contractor and withheld the remaining amounts due under the contract. MEI then filed suit against the county seeking to recover those withheld amounts, as well as payment for extra work.
>
> . . .
>
> The county filed a motion for summary judgment based in part on the sovereign immunity defense.
>
> . . .
>
> The county asserts that MEI cannot bring suit to recover damages for the additional work, since that extra work was not contemplated by the written contract and no written change orders were issued authorizing the extra work as required by the contract. Although there is no explicit legislative waiver of sovereign immunity in contract, the Supreme Court of Florida found an implied waiver, reasoning that since the legislature authorizes entities of the state to enter into a contract, it clearly intends that such contracts be valid and binding on both parties. See Pan Am Tobacco Corp. v. Dept of Corrections, 471 So. 2d 4 (Fla. 1984). The supreme court, though, limited their holding to suits on express, written contracts. Their opinion left open the question as to whether the waiver of sovereign immunity would extend to implied conditions of written contracts.

1/ The Petitioner, County of Brevard, will be referred to as the "County." The Respondent, Miorelli Engineering, Inc. will be referred to as ("MEI").

2/ All references to the Appendix on appeal will be referred to by the symbol "A." followed by the appropriate page number from the Appendix.

The Second District Court of Appeal, relying on Pan Am, held that a contractor's claims for additional costs against a county would be barred by sovereign immunity where the additional costs were not addressed in the original written contract nor in any subsequent written instrument. See Southern Roadbuilders, Inc. v. Lee County, 495 So. 2d 189 (Fla. 2d DCA 1986), rev. denied, 504 So. 2d 768 (Fla. 1987). On the other hand, the Fourth District Court of Appeal adopted a more expansive interpretation of Pan Am. In Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So. 2d 696 (Fla. 4th DCA 1988), the plaintiff contractor sought additional compensation from the city, alleging the city's breach of express and implied covenants within the scope of an express, written contract. The fourth district noted that the supreme court in Pan Am did not indicate that it intended to change established principles of contract law. The fourth district further noted that virtually every contract contains implied covenants and conditions, including an implied covenant that the parties will perform in good faith. The fourth district found it illogical to construe the restrictive language of Pan Am to abrogate the defense of sovereign immunity to only express conditions of written contracts, while refusing to allow the sovereign to be sued for breach of implied conditions within the same contract. The fourth district held that where suit is brought on an express, written contract entered into by a state agency under statutory authority, the defense of sovereign immunity does not protect the state agency from an action arising out of a breach of either an express or implied covenant or condition of that contract. See also Interamerican Engineers and Constructors Corp. v. Palm Beach County Housing Authority, 629 So. 2d 879 (Fla. 4th DCA 1993), rev. denied, 639 So. 2d 980 (Fla. 1994); Phillips and Jordan,Inc. v. Dep't of Transportation, 602 So. 2d 1310, 1313 n.2 (Fla. 1st DCA 1992).

We agree with the fourth district's view in Champagne-Webber, Inc., with regard to the abrogation of sovereign immunity in breach of contract actions. In this case, there was a written contract, and the suit is based on the express and implied covenants of that contract, including the implied covenant to act in good faith. . . Although the written contract between the county and MEI indicated that the project was not to be modified without written change orders. . .[t]hese contract claims based on breach of the implied covenants of good faith and fair dealing should not be barred by sovereign immunity, and the trial court was correct in denying the motion for summary judgment as to these claims.

AFFIRMED IN PART, REVERSED IN PART; REMANDED. (A.1)

Upon receipt of this opinion, the County filed a Motion for Clarification and Certification. (A.2) The Fifth District denied the motion. (A.3) This timely appeal followed. (A.4)

JURISDICTION ISSUES

I. WHETHER AN EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE FIFTH AND SECOND DISTRICT COURTS OF APPEAL BECAUSE THE FORMER HOLDS THAT THE DOCTRINE OF SOVEREIGN IMMUNITY HAS BEEN WAIVED WITH RESPECT TO THE ENFORCEMENT OF IMPLIED COVENANTS OF AN EXPRESS WRITTEN CONTRACT.

II. WHETHER AN EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE FIFTH AND FIRST DISTRICT COURTS OF APPEAL BECAUSE THE FORMER HOLDS THAT A CONTRACTOR MAY SEEK PAYMENT FOR WORK PERFORMED OUTSIDE A CONTRACT WITHOUT FIRST SEEKING A WRITTEN REFORMATION OF THE CONTRACT.

SUMMARY OF THE ARGUMENT

The decision of the Fifth District expressly and directly conflicts with decisions from the Second and First Districts. In Southern Roadbuilders, Inc. v. Lee County, 495 So. 2d 189 (Fla. 2d DCA 1986), rev. denied, 504 So. 2d 768 (Fla. 1987), the Second District determined that the doctrine of sovereign immunity has not been waived with respect to the enforcement of implied covenants of an express written contract. And, in Phillips & Jordan, Inc. v. Dep't of Transportation, 602 So. 2d 1310 (Fla. 1st DCA 1992), the First District held that a contractor's claim for "extras" was barred where the contractor failed to first seek a written reformation of the contract as required by the express terms of the contract. Conversely, in County of Brevard v. Miorelli Engineering, Inc., ___ So. 2d ____ (Fla. 5th DCA 1996), the Fifth District held the doctrine of sovereign immunity has been waived

with respect to the enforcement of implied covenants of an express written contract. Moreover, the Fifth District allowed a claim for extras despite an express term of the contract that required work performed outside the contract to be based upon a written modification of the contract.

Not only does the Fifth District's decision expressly conflict with the decisions from other District's, it also adversely impacts vital fiscal and public policies affecting citizens of this state. This Court has recognized that contract claims, founded upon an express written contract, are not subject to sovereign immunity. This conclusion is premised upon the rational that the government empowers its agencies to enter into contracts. It would be unfair for the party who entered into a valid contract with the state to have no remedy for breach of this agreement by the state.

It is one issue for our State to be liable for obligations it owed to a party and breached under a valid and binding contract. It is another issue for a party to argue that the State is liable for breach of a contract that does not even exist. To protect the State from such meritless claims, as well as to ensure fiscal predictability, courts require the existence of an express written contract before there can be any waiver of sovereign immunity. If the rule were otherwise, parties could freely raid the State's treasury by the mere allegation of a verbal contract.

The State's day-to-day operations should not be disrupted by claims which neither the State, nor the party allegedly contracting with the State, thought important enough to reduce to writing. The decision of the Fifth District directly contravenes this policy.

This Court should, therefore, exercise its discretion and review this case on the merits.

ARGUMENT

I. AN EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE FIFTH AND SECOND DISTRICT COURTS OF APPEAL BECAUSE THE FORMER HOLDS THAT THE DOCTRINE OF SOVEREIGN IMMUNITY HAS BEEN WAIVED WITH RESPECT TO THE ENFORCEMENT OF IMPLIED COVENANTS OF AN EXPRESS WRITTEN CONTRACT.

Under Article V, Section 3(b)(3), Fla. Const., (1980), this Court may exercise its discretionary jurisdiction where an appellate decision expressly and directly conflicts with a decision from another Florida appellate court. That conflict must be expressed and contained within the written rule announced by the court. Jenkins v. State, 385 So. 2d 1356 (Fla. 1980); Dodi Publishing Company v. Editorial America, S.A., 385 So. 2d 1369 (Fla. 1980).

This Court has recognized two situations which authorize the invocation of its conflict jurisdiction. The first circumstance is when the decision announces a rule of law which conflicts with the rule previously announced by another appellate court. The second is when there has been an application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case decided by another appellate court. Nielson v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960). In this case, the decision of the Fifth District expressly and directly conflicts with a decision from the Second District because the Fifth District's decision announces a rule of law that conflicts with a previously pronounced Second District rule of law. To fully comprehend the basis of the conflict, one

must first examine the underlying policy of the sovereign immunity doctrine and its exceptions. Under this doctrine, the state is immune from claims except to the extent immunity is waived pursuant to §768.28, Fla. Stat. Contract claims are not expressly waived under the statute. Nonetheless, this Court has concluded that claims against the state based upon an express written contract are not barred by the sovereign immunity doctrine. This Court noted in Pan Am that sovereign immunity is the rule in Florida, rather than the exception, and is firmly rooted in our state constitution. The Pan Am court specifically limited its implied waiver of sovereign immunity to suits on express written contracts.

This restriction was obviously intended to serve the fundamental policy underlying sovereign immunity: protection of the public treasury. By limiting governmental liability to breaches of express written contractual obligations, courts provide fiscal certainty and predictability to governmental bodies. At the same time, parties dealing with governmental bodies are adequately protected because they are free to refuse additional work in the absence of a written contract or authorization.

This public policy was subsequently followed by the Second District, in Southern Roadbuilders v. Lee County, 495 So. 2d 189 (Fla. 2d DCA 1986). In Southern Roadbuilders, the court held that a contractor, who performed alleged extra work without first obtaining a written change order, was unentitled to pursue his action because the claim for extras was barred by sovereign immunity. The Second District reasoned that the claim for extras was not founded upon express written contracts and, therefore, was protected by sovereign immunity.

Other District Courts of Appeal have rejected the analysis of Southern Roadbuilders. See, e.g., Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So. 2d 696 (Fla. 4th DCA 1986). In its June 28, 1996 opinion in this appeal, the Fifth District adopted the rationale of Champagne-Webber - rejecting the Southern Roadbuilder rule of law - and held that implied covenants of an express written contract are not barred by sovereign immunity.

In addition to conflict with the Second District, the Fifth District's decision conflicts with vital public policy. Pan Am's limitation of liability to breach of express written contractual obligations authorized by the legislature requires parties dealing with a county to contract for the payment of public monies as required by law. To permit recovery on oral contracts allegedly made by some lesser, unnamed county official would thwart this policy. Such unilateral obligation of funds by vendors could wreak havoc upon public budgets and budgeting and create deficits in the budgets of public bodies in violation of Florida's Anti-Deficiency Act. Both from a legal and public policy standpoint, this Court should exercise its discretion to entertain jurisdiction of this matter.

II. AN EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE FIFTH AND FIRST DISTRICT COURTS OF APPEAL BECAUSE THE FORMER HOLD THAT A CONTRACTOR MAY SEEK PAYMENT FOR WORK PERFORMED OUTSIDE A CONTRACT WITHOUT FIRST SEEKING A WRITTEN REFORMATION OF THE CONTRACT.

The Fifth District's opinion additionally expressly conflicts with Phillips & Jordan, Inc. v. Dept. of Transportation, 602 So. 2d 1310 (Fla. 1st DCA 1992). In Phillips & Jordan, a contractor sued the State for extra work in performing certain road clearing. The

extra work had not been authorized by a written change order to the contract, and the contract required that all extra work be authorized by written change orders. In granting summary judgment on behalf of the state and against the contractor, the First District held that the contractor's claim was barred, not by sovereign immunity, but by the terms of the express contract itself. In doing so, the court stated:

> Appellant could have sought written authorization for payment for such work, in effect, a reformation of the contract, under a contractual provision providing for such a reformation where it appears necessary. In fact, under the terms of the contract, appellant is precluded from seeking payment for work performed outside the contractual specifications without first seeking a written reformation of the contract. Therefore, appellant's claim is barred by the express terms of the contract.

Id. at 1313. The First District also noted that there were no implied conditions which arose from such contractual terms which would justify payment. Citing to the exception set forth in Champagne-Webber, the court held that the trial court had properly concluded that the contractor's claim for extra work was outside both the terms of the express contract and any implied conditions of that contract. Id. at 1313, n.2.

Similarly, the underlying written contract between MEI and the County required written change orders for all alleged extra work; MEI did not obtain written change orders prior to performing the extra work; and MEI made a claim, subsequent to the completion of the extra work, for additional compensation. (A.1) On almost identical facts, the First District in Phillips & Jordan concluded that the Champagne-Webber exception had no application and that the

claims were in fact barred by the terms of the express contract itself. The Fifth District's different result on substantially the same controlling facts, creates express conflict under the principle enunciated in Nielson, supra.

CONCLUSION

The Fifth District's decision allows this Court to exercise its discretionary jurisdiction to hear this case on the merits. The decision expressly and directly conflicts with a rule of law announced by the Second District and expressly and directly conflicts with the First District's application of a rule of law to substantially similar facts. The ramifications of the Fifth District's decision are far reaching and provide more than ample justification for this Court to exercise its discretion and review this matter. This Court should, therefore, exercise that discretion and hear this case.

Respectfully submitted,

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APPENDIX

1. Opinion rendered by the Fifth District Court of Appeal
2. Appellee's Motion for Clarification and/or Certification
3. Order Denying Appellee's Motion for Clarification and/or Certification
4. Appellee's Notice to Invoke Discretionary Jurisdiction

Appendix Part 1

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIRST DISTRICT JANUARY TERM 1996

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

COUNTY OF BREVARD,

Appellant,

v. CASE NO. 95-2772

MIORELLI ENGINEERING, INC., et al.,

Appellees

/

Opinion filed June 28, 1996

Non-Final Appeal from the Circuit Court for Brevard County, Edward M. Jackson, Judge.

E. A. "Seth" Mills and Hala A. Sandridge of Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., Tampa, for Appellant.

Dana G. Toole, Tampa, for Appellee Miorelli Engineering, Inc.

DAUKSCH, J.

Brevard County appeals a non-final order denying in part its motion for summary judgment. Generally, an order denying a motion for summary judgment is not appealable. However, the county in its motion raised the affirmative defense of sovereign immunity, and this appeal involves that issue. See Department of Transp. v. Wallis, 659 So. 2d 429 (Fla. 5th DCA 1995).

On January 5, 1993, Miorelli Engineering ("MLI") contracted with Brevard County to construct a spring training facility for the Florida Marlins. It was agreed the project

would be built within a specified time period. MEI began developing the baseball facility. A dispute subsequently arose between the county and MEI, and the county terminated MEI as contractor and withheld the remaining amounts due under the contract. MEI then filed suit against the county seeking to recover those withheld amounts, as well as payment for extra work. In addition to these counts, MEI also alleged fraud in the inducement, asserting that the county failed to act in good faith during the contract award process when it did not disclose collateral agreements it had made with the tenant, the Florida Marlins, and another co-venturer, the Viera Company. MEI additionally raised claims for quantum meruit and common law fraud.

The county filed a motion for summary judgment based in part on the sovereign immunity defense. The county asserted it was immune from MEI's claims for the extra work not expressly included in the terms of the written agreement, as well as the claims for quantum meruit, fraudulent inducement, and common law fraud. The lower court granted the county's motion as to the claims for quantum meruit and common law fraud. The trial court concluded, however, that neither the fraud in the inducement claim nor the contract claims to recover damages for extra work would be barred by the doctrine of sovereign immunity.

The county asserts that MEI cannot bring suit to recover damages for the additional work, since that extra work was not contemplated by the written contract and no written change orders were issued authorizing the extra work as required by the contract. Although there is no explicit legislative waiver of sovereign immunity in contract, the Supreme Court of Florida found an implied waiver, reasoning that since the legislature

authorizes entities of the state to enter into contract it clearly intends that such contracts be valid and binding on both parties. See Pan Am Tobacco Corp. v. Dep't of Corrections, 471 So. 2d 4 (Fla. 1984). The supreme court, though, limited their holding to suits on express, written contracts. Their opinion left open the question as to whether the waiver of sovereign immunity would extend to implied conditions of written contracts.

The Second District Court of Appeal, relying on Pan Am, held that a contractor's claims for additional costs against a county would be barred by sovereign immunity where the additional costs were not addressed in the original written contract nor in any subsequent written instrument. See Southern Roadbuilders, Inc. v. Lee County, 495 So. 2d 189 (Fla. 2d DCA 1986), rev. denied, 504 So. 2d 768 (Fla. 1987). On the other hand, the Fourth District Court of Appeal adopted a more expansive interpretation of Pan Am. In Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So. 2d 696 (Fla. 4th DCA 1988), the plaintiff contractor sought additional compensation from the city, alleging the city's breach of express and implied covenants within the scope of an express, written contract. The fourth district noted that the supreme court in Pan Am did not indicate that it intended to change established principles of contract law. The fourth district further noted that virtually every contract contains implied covenants and conditions, including an implied covenant that the parties will perform in good faith. The fourth district found it illogical to construe the restrictive language of Pan Am to abrogate the defense of sovereign immunity to only express conditions of written contracts, while refusing to allow the sovereign to be sued for breach of implied conditions within the same contract. The fourth district held that where suit is brought on an express, written contract entered into

by a state agency under statutory authority, the defense of sovereign immunity does not protect the state agency from an action arising out of a breach of either an express or implied covenant or condition of that contract. See also Interamerican Engineers and Constructors Corp. v. Palm Beach County Housing Authority, 629 So. 2d 879 (Fla. 4th DCA 1993), rev. denied, 639 So. 2d 980 (Fla. 1994); Phillips and Jordan, Inc. v. Dep't of Transportation, 602 So. 2d 1310, 1313 n.2 (Fla. 1st DCA 1992).

We agree with the fourth district's view in Champagne-Webber, Inc. with regard to the abrogation of sovereign immunity in breach of contract actions. In this case, there was a written contract, and the suit is based on the express and implied covenants of that contract, including the implied covenant to act in good faith. MEI alleged that the county refused to grant extensions of time for excusable delay, and MEI thereby incurred additional expenses by having to accelerate its work schedule. MEI further claimed the county was responsible for much of the delay, by unreasonably withholding its notice to proceed, and not issuing permits in a timely manner. MEI also claimed that it incurred additional costs because during the contract award process the county failed to disclose site conditions which were not readily ascertainable by reasonable pre-bid inspection. As a result of these unknown site conditions, including muck and debris which had to be removed, MEI incurred additional costs. Although the written contract between the county and MEI indicated that the project was not to be modified without written change orders, MEI alleged that the county waived this requirement by directing changes to the project without following its own formalities with regard to preparing written change orders. According to MEI, the county directed changes without submitting written change orders,

but later strictly adhered to the terms of the written contract to obtain extra benefits at no additional cost. These contract claims based on breach of the implied covenants of good faith and fair dealing should not be barred by sovereign immunity, and the trial court was correct in denying the motion for summary judgment as to these claims.

The county also asserts that the count alleging fraud in the inducement is barred by the doctrine of sovereign immunity. This fraud count alleged that the county misrepresented and withheld certain vital information from MEI and other bidders for the project. Specifically, an agreement had been reached between the county and the Florida Marlins which granted the Marlins certain rights of architectural control, and knowledge of this collateral agreement was not imparted to the contractor. Furthermore, there was another collateral agreement reached between the county and another co-venturer, the Viera Company, which granted the Viera Company additional rights of architectural control. Once again MEI was unaware of these dealing before executing the contract. MEI states that it never would have entered into the contract if it had known that the Marlins and Viera Company would demand architectural changes to the stadium project.

The legislature has waived sovereign immunity in tort for personal injury, wrongful death, and injury or loss of property. See § 768.28, Fla. Stat. (1995). Fraud in the inducement causing only economic loss does not fit within any of those categories of injury or loss enumerated in the statute. Section 768.28 states that sovereign immunity for liability in tort is waived, but only to the extent specified in the statute. Moreover, fraud in the inducement is a tort independent of breach of contract. Pan Am recognized the waiver of sovereign immunity to breach of contract actions, and its holding has not been extended

to include the tort of fraudulent inducement causing economic loss. Sovereign immunity has not been waived as to this type of tort, [illegible] the county's motion for summary judgment as to that count. We note, however, that a similar allegation concerning the county's failure to disclose vital information was included in the first count for breach of contract, which also included the allegation that the county violated the implied covenants of good faith and fair dealing.

We therefore affirm that portion of the trial court order which denied the motion for summary judgment as to the breach of contract claims seeking damages for extra work, but reverse that portion of the order which denied the motion for summary judgment as to the fraud in the inducement claim which alleges only economic loss.

AFFIRMED IN PART, REVERSED IN PART; REMANDED

GOSHORN and HARRIS, JJ., concur.

Appendix Part 2

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT
DAYTONA BEACH, FLORIDA

COUNTY OF BREVARD, a Political subdivision of the State of Florida, Appellant. v. MIORELLI ENGINEERING, INC., and HARTFORD FIRE INSURANCE COMPANY, Appellees.	:	CASE NO.: 95-02772

MOTION FOR CLARIFICATION AND FOR CERTIFICATION

The Appellant, County of Brevard ("County"), by and through its undersigned counsel, respectfully requests this Court to clarify the opinion of this Court dated June 28, 1996. In support of this Motion, the County states as follows:

1. The County argued in this appeal that the "extra work" contract claims of the Appellee, Miorelli Engineering, Inc., ("Miorelli") were barred under the doctrine of sovereign immunity. Under this doctrine, the state is immune from claims except to the extent immunity is waived pursuant to §768.28, Fla. Stat. The Florida Supreme Court has held that claims against the state based upon an express written contract are not barred by the sovereign immunity doctrine. Pan Am Tobacco Corporation v. Department of Corrections, 471 So. 2d 4 (Fla. 1984). The District Courts of Appeal are divided as to whether implied covenants arising under an express written contract are barred by the doctrine of sovereign immunity. See Southern Roadbuilders, Inc. v. Lee County, 495 So. 2d 189 (Fla. 2d DCA 1986), rev. denied, 504 So. 2d 768 (Fla. 1987)

(barred) and Champagne Webber, Inc. v. City of Fort Lauderdale, 519 So. 2d 696 (Fla. 4th DCA 1986) (not barred). The County argued that even if the rule of Champagne-Webber applied, the facts of this case were distinguishable because, here, Miorelli did not allege that the claim was founded upon an implied covenant of an express written contract. To the contrary, Miorelli admitted that the extra work claims were not contemplated by nor included within the terms of the express written contract, and that Miorelli was expressly told and understood it would not be paid for the work.

2. In its June 28, 1996 opinion in this appeal, this Court adopted the rationale of Champagne-Webber and held that implied covenants of an express written contract are not barred by sovereign immunity. Presumably, this Court rejected the County's distinction between the facts of this case and Champagne-Webber because this Court did not address this argument.

The County recognizes that this Court adopted the rule in Champagne-Webber. This motion is not intended to reargue the merits of that ruling. Rather, the County requests this Court to clarify that this is the only action which it took, i.e., that this Court did not resolve the merits of the parties' claims or any of the disputed issues of fact in this case.

Although it is clear that this Court did not intend to do so, and indeed could not do so, the County anticipates that Miorelli may attempt to argue that this Court decided certain "facts". Watson v. Hahn, 664 So.2d 1083 (5th DCA 1995). Specifically, there are several places in the opinion in which this Court refers to

allegations of Miorelli's third amended complaint, noting that these are allegations. However, several sentences in this Court's opinion do not note directly that they are not findings of facts but, instead, are allegations of Miorelli that are disputed by the County. These sentences are as follows:

> Page 2: "A dispute subsequently arose between the county and [Miorelli], and the county terminated [Miorelli] as contractor and withheld the remaining amounts due under the contract." (A.3:19-20; 2:34; 2:3)
>
> Page 4: "As a result of these unknown site conditions, including muck and debris which had to be removed, [Miorelli] incurred additional costs." (A.1:14)
>
> Page 5: "Specifically, an agreement had been reached between the county and the Florida Marlins which granted the Marlins certain rights of architectural control, and knowledge of this collateral agreement was not imparted to the contractor. Furthermore, there was another collateral agreement reached between the county and another co-venturer, the Viera Company, which granted the Viera Company additional rights of architectural control. Once again [Miorelli] was unaware of these dealings before executing the contract." (A.2:35-36; 3:12)

Although the context within which these sentences appear indicates they are not this Court's factual determinations, to forestall the inevitable claim by Miorelli that they are, the County requests this Court to add the phrase "MEI alleges that. . ." to the beginning of each of the above sentences. This clarification would more properly reflect the current state of the record.

3. In addition, the County requests that this Court certify the following questions to the Florida Supreme Court based upon the rule conflict now existing between this Court and the Second District's decision in Southern Roadbuilders and the distinction existing between the facts of this case and the Fourth District's decision in Champagne-Webber:

1. Whether the doctrine of sovereign immunity precludes the enforcement against a political subdivision of the state of implied covenants of an express written contract?

2. If not, whether a party's admission that its claim is for work not contemplated by or included in the terms of the express written contract, along with the party's admission that it knew in advance it would not be paid for the work, removes the claim from any purported Champagne-Webber exception because the claim cannot be reasonably implied from the express written contract?

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Dana G. Toole, Esq., 608 W. Horatio Street, Suite B, Tampa, FL 33606, and to Robert A. Hingston, Esq., Penthouse Suite, 901 Ponce de Leon Blvd., Miami (Coral Gables), FL 33134-3009, on July 12, 1996.

Attorneys

Appendix Part 3

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

COUNTY OF BREVARD,
Appellant,

v. CASE NO. 95-2772

MIORELLI ENGINEERING, Inc., et al.,
Appellee.
_____/

DATE: August 2, 1996

BY ORDER OF THE COURT:

Inasmuch as this Court's decision was issued prior to the Florida Supreme Court's ruling of Dept. Of Education v. Roe, 21 Fla.L.Weekly S311 (Fla. July 18, 1996), it is

ORDERED that Appellant's MOTION SEEKING PROPER REMEDY, filed July 25, 1996, is denied. It is further

ORDERED that Appellant's MOTION FOR CLARIFICATION AND FOR CERTIFICATION, filed July 15, 1996, is denied.

I hereby certify that the foregoing is
(a true copy of) the original court order.

Frank J. Habershaw

FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: E.A. "Seth" Mills, Jr., Esq. and Hala Sandridge, Esq.
and Jeffrey M. Paskert, Esq.
Dana C. Toole, Esq.
Robert A. Hingston, Esq.

Appendix Part 4

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT
DAYTONA BEACH, FLORIDA

COUNTY OF BREVARD, a Political subdivision of the State of Florida, Appellant. v. MIORELLI ENGINEERING, INC., and HARTFORD FIRE INSURANCE COMPANY, Appellees.	:	CASE NO.: 95-02772

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that Appellee, County of Brevard, invokes the discretionary jurisdiction of the supreme court to review the decision of this Court rendered June 28, 1996. The decision expressly and directly conflicts with a decision of another district court of appeal on the same question of law.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to DANA G. TOOLE, Esq., 608 W. Horatio Street, Suite B, Tampa, FL 33606, and to ROBERT A. HINGSTON, Esq., Penthouse Suite, 901 Ponce de Leon Blvd., Miami (Coral Gables), FL 33134-3009, on August 19, 1996.

Hala Sandridge
Hala A. Sandridge, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to DANA G. TOOLE, Esq., 608 W. Horatio Street, Suite B, Tampa, FL 33606, and to ROBERT A. HINGSTON, Esq., Penthouse Suite, 901 Ponce de Leon Blvd., Miami (Coral Gables), FL 33134-3009, on August 29, 1996.

Hala A. Sandridge, Esquire