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

RESPONSE TO BRIEF OF JURISDICTION BY RESPONDENT, MIORELLI ENGINEERING, INC.

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SUMMARY OF THE CASE AND FACTS

On January 5, 1993, MEI contracted with the COUNTY to construct a spring training facility for the Florida Marlins baseball franchise. Respondent, HARTFORD FIRE INSURANCE COMPANY ("HARTFORD"), was surety for MEI. Various disputes arose between MEI and the COUNTY and resulted in an action by MEI against the COUNTY in a lower court. As a portion of this action, MEI asserted claims for extra work resulting from the allegations of breach of implied conditions of the expressed contract between the parties.

Petitioner, COUNTY, filed a Motion for Summary Judgment asserting that those claims were barred by virtue of the theory of sovereign immunity. The lower court denied this motion and pursuant to Department of Transportation v. Wallis, 20 FLW D1823 (Fla. 5th DCA 1995), the COUNTY filed an appeal on the Non-Final Order Denying Petitioner's Motion for Summary Judgment. However, it should be noted that Wallis is no longer good law. See Department of Education v. Roe, 21 FLW 5341.1 (Fla. July 18, 1996).

The Fifth District Court of Appeal affirmed the decision of the trial court. The Fifth District noted that the COUNTY in this instance was alleged to have waived the change order requirements contained in the contract documents and held that the contract claims based upon breach of implied covenants of good faith and fair dealing should not be barred by sovereign immunity.

Thereafter, Petitioner filed a motion with the Fifth District Court of **Appeal** requesting that the appellate court certify a

conflict between its decision and the decision of another district. This motion was denied by the Fifth District Court of Appeal.

On August 19, 1996, the COUNTY served its Notice to Invoke Discretionary Jurisdiction of the Supreme Court asserting that the decision of the Fifth District Court of Appeal expressly and directly conflicts with the Second District's decision of another district court of appeal on the same question of law.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal found that the claims asserted in a lower court were based upon an express agreement, which included implied conditions as in all contracts. There was no express or direct conflict stated in the opinion by the Fifth District of Appeal at variance with the decision in Southern Road Builders, Inc. v. Lee County, 495 So.2d 189 (Fla. 2d DCA 1986), or the First District's opinion in Phillips and Jordan v. Department of Transportation, 602 So.2d 1310 (Fla. 1st DCA 1992). This Court should not accept jurisdiction as to this cause.

ARGUMENT

I. DOES THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL, HOLDING THAT CONTRACT CLAIMS BASED ON BREACH OF THE IMPLIED COVENANTS OF GOOD FAITH AND FAIR DEALING SHOULD NOT BE BARRED BY SOVEREIGN IMMUNITY, DIRECTLY AND EXPRESSLY CONFLICT WITH THE CASE OF SOUTHERN ROAD BUILDERS, INC. V. LEE COUNTY, 495 SO.2D 189 (FLA. 2D DCA 1986), REV. DEN. 405 SO.2D 768 (FLA. 1987)?

1. Rule 9.030(a)(2)(iv), Florida Rules of Appellate Procedure, provides that the Supreme Court may, in its discretion, accept jurisdiction for review of decisions that "expressly and directly conflict with a decision of another district court of appeal or the Supreme Court on the same question of law."

2. Petitioner's position is that the opinion of the Fifth District Court below "directly and expressly" conflicts with the decision in Southern Road Builders, Inc. v. Lee County, supra. For that reason, Petitioner alleges a conflict is created from which the Supreme Court should take jurisdiction and render a decision.

3. However, Petitioner's position is unfounded and, in fact, the "conflict" asserted by Petitioner does not exist. **The** holding in the Fifth District Court of Appeal's opinion is that:

> "Contract claims based upon the breach of implied covenants of good faith and fair dealing should not be barred by sovereign immunity." (Appendix, page 5)

The Fifth District Court of Appeal adopted the view in Champagne-Webber vs. City of Ft. Lau~~derdale~~, 519 So.2d **696** (Fla. 4th DCA 1988). Further, implicit within the Court's ruling is that **the** COUNTY waived written change orders by directing **changes** to the project without following its own formalities. (Appendix, Page 4)

Neither of the above points are mentioned in the Southern Roadbuilder's, decision, and no part of the Second District's opinion discusses or abrogates the implied covenants of good faith and fair dealing which are contained in all contracts. See 1 S Williston, A Treatise on the Law of Contracts, Section 669 (3d ed. 1961); and Bromer v. Florida Power and Light Co., 45 So.2d 658 (1950).

4. Similarly, no effort was made in Southern Roadbuilders to displace or alter the long standing principle that a party may - through its actions - waive or be estopped from asserting a contractual change order requirement. See Interamerican Engineers and Constructors Corp. v. Palm Beach County Housing Authority, 629 So.2d 879 (Fla. 4th DCA 1993), rev. den. 639 So.2d 980 (Fla. 1994); Acquisition Corp. v. American Cast Iron Pipe Co., 543 So.2d 878 (Fla. 4th DCA 1989); and Pan-American Engineering v. Poncho's Construction Co., 387 So.2d 1052 (Fla. 5th DCA 1980).

5. Indeed, Southern Roadbuilders sets forth an entirely separate suggestion based upon the theory that the lack of a properly executed written agreement bars recovery. Southern Roadbuilders does not deal with the issue of the breach of an implied obligation of a contract, nor does it deal with the issue of waiver of contract provisions as to extra work. These latter two issues are the essence of the Miorelli holding by the Fifth District Court of Appeal.

6. As a result, Petitioner's claim and argument for the jurisdiction of this Court must fail as there is no express, nor

direct, conflict upon the critical issues of the Fifth District Court's opinion in Miorelli and the issues ruled upon by the Second District in Southern Roadbuilders.

7. In passing, Respondent would note that this Court has previously denied review upon the identical issue presented by Petitioner in the case of Interamerican Engineers and Constructors Corp. v. Palm Beach County Housing Authority, 629 So.2d **879 (Fla.** 4th DCA 1993), rev. den. **639** So.2d **980** (Fla. 1994), (cited by the Fifth District Court of Appeal, Appendix, page 4).

II. DOES THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL, HOLDING THAT CONTRACT CLAIMS BASED UPON BREACH OF THE IMPLIED COVENANTS OF GOOD FAITH AND FAIR DEALING SHOULD NOT BE BARRED BY SOVEREIGN IMMUNITY, DIRECTLY AND EXPRESSLY CONFLICT WITH THE CASE OF PHILLIPS AND JORDAN, INC. vs. DEPARTMENT OF TRANSPORTATION, 602 SO.2d 1310 (FLA. 1ST DCA 1992)?

8. In addition to the foregoing, the Petitioner has also attempted to make the argument that the decision of the Fifth District Court of Appeal expressly and directly conflicts with the opinion in Phillips and Jordan, Inc. vs. Department of Transportation, 602 So.2d 1310 (Fla. 1st DCA **1992).** Petitioner's position **is** unfounded and is specifically rejected within the opinion of Phillips and Jordan, Inc., supra.

9. Contrary to Petitioner's view, the Phillips and Jordan, Inc. case is routinely cited as being in accord with Champagne-Webber, supra, not at variance with it. In particular, Respondent would call the Court's attention to Footnote **2** of Phillips and Jordan, Inc., which qualifies its decision as follows:

> Furthermore, we do not construe the trial court's order to bar appellant's claim under

> the doctrine **of** sovereign immunity because it is based on an implied covenant of the contract rather than an expressed term of the contract. Such a view would be erroneous. ***See*** Champaqne-Webber, Inc. vs. City of Ft. Lauderdale, 519 So.2d 696 (Fla. 4th DCA 1988). Rather, we construe the trial court's order to bar appellant's claim because it is outside both the express and implied conditions of the contract. Page 1313 (emphasis added

10. Based upon the foregoing, it would appear that Phillips and Jordan, Inc., supra, is **in** accord with Champaqne-Webber, Interamerican, and with the Fifth District Court of Appeal's determination below. That being the case, there is no conflict.

III. DOES THIS COURT HAVE JURISDICTION TO ACCEPT DISCRETIONARY JURISDICTION UPON A CLAIM IN WHICH AN APPELLATE COURT DECISION "CONFLICTS" WITH VITAL PUBLIC POLICY?

11. Finally, Respondent MEI feels compelled to respond to portions of the **brief** of Petitioner which appear to request this Court to accept jurisdiction upon a claim that "the Fifth District's decision conflicts with vital public policy." (See Summary of the Argument, Petitioner's Brief on Jurisdiction, Page 4; Argument on Point I, Page 7.)

12. This Court's jurisdiction is set forth in Article V, Section 111, Florida Constitution 1980, as reflected in Rule 9.030(a), Florida Rules of Appellate Procedure. There is no grant of authority within the Constitution or within the Rules for this Court to hear an interlocutory appeal or, for that matter, a final appeal upon discretionary grounds or otherwise based upon a "conflict with public policy."

13. Indeed, by rearguing the "public policy" arguments which were advanced by the COUNTY before the Fifth District - and which were ruled upon by that Court - the COUNTY apparently seeks *to* reargue the merits of this matter through its jurisdictional brief. This is improper. See Rule 9.120(d), Florida Rules of Appellate Procedure.

CONCLUSION

Respondent, MEI, respectfully submits that the opinion of the Fifth District Court does not "expressly and directly conflict with the decision *of* another district court of appeal . . . on the same question of law."

Respondent, MEI respectfully prays that the Court, in view of the above argument, decline review of the decision of the Fifth District Court of Appeal below in that no conflict exists as asserted by Petitioner herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true **and correct copy of the foregoing was** furnished **by U.S. Mail this** 9 day **of September, 1996 to E.A. "Seth" Mills, Jr., Fowler, White, et al., 501 East Kennedy Boulevard, Tampa, FL 33602; Robert A.** Hingston, **Esq., Welbaum, Guernsey, 901** Ponce de Leon **Boulevard, Penthouse Suite, Miami, FL** 33134-3009.

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APPENDIX

1. **August 21, 1996 Mandate and Opinion by Fifth District Court of Appeals.**

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL, AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION;

YOU ARE HEREBY COMMANDED THAT SUCH FURTHER PROCEEDINGS BE HAD IN SAID CAUSE IN ACCORDANCE WITH THE OPINION OF THIS COURT ATTACHED HERETO AND INCORPORATED **AS PART** OF THIS ORDER, AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF FLORIDA.

WITNESS THE HONORABLE EARLE W. PETERSON, JR. CHIEF JUDGE OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT, AND THE SEAL OF THE SAID COURT AT DAYTONA BEACH, FLORIDA ON THIS DAY.

DATE: August 21, 1996

FIFTH DCA CASE NO. 95-2772

COUNTY OF ORIGIN: Brevard

TRIAL COURT CASE NO, 94-9783-CA-D

STATE OF FLORIDA, COUNTY OF BREVARD
I HEREBY CERTIFY that the above and foregoing is a true copy of the original filed in this office.
SANDY CRAWFORD, Clerk Circuit and County Court
DATED 8/23/96 BY K. [illegible] D.C.

Frank J. Habershaw
FRANK J. HABERSHAW
CLERK

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

NOT FINAL UNTIL THE 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 ("MEI") 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 a5 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 terrns 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 far 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. Slat. (1335). 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 only economic loss. Sovereign immunity has not been waived as to this type of tort, so the trial court erred in not granting 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.

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.

94-9783-CA-D

FILED IN OFFICE
AUG 23 4 01 PM '96
CLERK CIRCUIT COURT
BREVARD CO. FLA.

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 **5311** (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 G. Toole, Esq.
Robert **A.** Hingston, **Esq.**