IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

FILED

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

REPLY BRIEF
BY RESPONDENT, MIORELLI ENGINEERING, INC.

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STATEMENT OF THE CASE AND FACTS

On January 5, 1993, Miorelli Engineering, Inc. ("MEI") contracted with Brevard County ("the County") to construct a spring training baseball facility ("the Project") for the Florida Marlins baseball organization ("the Marlins"). A dispute subsequently arose between the County and MEI, and the County terminated MEI from the Project. The County also withheld the balance due under the contract and refused to pay for enhancements which were requested by the County.

MEI then filed suit against the County, claiming that the County:

1. Breached its contract with MEI by failing to make payment when due;
2. Failed to act in good faith by participating with others in orchestrating changes to the Project;
3. Failed to act in good faith by failing to disclose collateral agreements which provided rights of architectural control to both the Marlins and another co-venturer, The Viera Company; and that the County
4. Waived, by its actions, any contractual requirement that changes to the contract had to be in writing.

(Petitioner's Appendix 2). The County has disclaimed responsibility for MEI's claims on a variety of theories although it does not dispute the fact that work was performed and accepted, without payment in return. In fact, the record shows that the County's Board of Commissioners acknowledged receipt of numerous of

these enhancements, and authorized payment for these claims without benefit of change order (Respondent's Appendix 1, 2).

The County's project representative, William Bibo, has testified that changes were made to the Project by the County and its coventurers without MEI's participation, (Petitioner's Appendix 12, pp. 300, 369), and that cnanges were made to the Project as "swaps," without adhering to the Project's written change order requirements (Petitioner's Appendix 12, PP. 294-95). Significantly, Mr. Bibo also confirmed that certain of these enhancements were not part of the original contract (Petitioner's Appendix 12, p. 280) and in some cases were unnecessary (Petitioner's Appendix 12, p. 344).

Faced with these and other facts and principles of law, the Trial Court denied the County's skeletal Motion for Partial Summary Judgment as it pertained to the doctrine of sovereign immunity without elucidating the basis for its decision (Petitioner's Appendix 4). The County then appealed to the Fifth District Court Of Appeals, claiming irreconcilable differences between Champagne-Webber Inc. v. City of Ft. Lauderdale, 519 So.2d 696 (Fla. 4th DCA 1988) and its progeny, and Southern Roadbuilders Inc. v. Lee County, 495 So.2d 189 (Fla. 2d DCA 1986). The Fifth District affirmed the Trial Court's ruling as to these sovereign immunity issues (Petitioner's Appendix 17), and the County requested the discretionary jurisdiction of this court to resolve the "express" and "direct" conflict between these authorities.

Now that this Court has granted certiorari to resolve this conflict the County attempts to argue "facts" and "legal principles" which are not relevant, and which do not square with the facts and its documents. For example, the County now describes the enhancement for which the County has authorized payment of additional funds as "purported and disputed extra work" (Petitioner's Initial Brief **p.2**). The County now - for the first time - suggests that no express written contract exists between MEI and the County (Petitioner's Initial Brief p.8). More significantly, after certifying conflict to this Court between Champaqne Webber and its progeny, and Southern Roadbuilders, the County now indicates that Champaqne-Webber "makes sense" (Petitioner's Initial Brief, p.15), while concurrently relying upon the converse ruling of the Second District in Southern Roadbuilders.

MEI will not further belabor these and the County's other factual and legal shortcomings given the nature of the proceeding at hand. Because this proceeding stems from a summary judgment determination, all facts and inferences must be resolved in favor of MEI. Similarly, the Trial Court's decision based upon record facts and factual differences *must* **be** deemed ***to*** be correct, and should be affirmed. Finally, to the extent that the Court denied summary judgment upon the basis of factual issues in the record, it is now inappropriate to re-argue those facts. Unlike the County, MEI does not seek to try these facts before this Court, and would respectfully submit that this Court should disregard any analysis

proffered by the County which goes beyond the issue of resolving the conflict between Southern Roadbuilders and Champagne-Webber.

POINTS ON APPEAL

MEI does not believe that the County's statement of the Points on Appeal accurately state the issues. This Court granted certiorari jurisdiction to resolve the conflict between Southern Raadbuilders Inc. v. Lee County, 495 So.2d 189 (Fla. 2d DCA 1986) and Champagne-Webber Inc. v. City of Ft. Lauderdale, 519 So.2d 696 (Fla. 4th DCA 1988), together with its progeny, and the issues which pertain to that question are:

I. WHETHER CHAMPAGNE-WERBER AND SOUTHERN ROADBUILDERS ARE IN DIRECT CONFLICT WITH ONE ANOTHER.

II. WHETHER IMPLIED COVENANTS AND CONDITIONS EXIST IN ALL CONTRACTS, INCLUDING GOVERNMENT CONTRACTS;

111. WHETHER THIS COURT'S DECISION IN PAN-AM TOBACCO V. DEPARTMENT OF CORRECTIONS, 471 SO.2D 4 (FLA. 1984), CHANGES THE LAW OF CONTRACTS BY BARRING AN ACTION BASED UPON IMPLIED COVENANTS AND CONDITIONS;

IV. WHETHER "EXPRESS WRITTEN CONTRACTS" AS DESCRIBED IN PAN-AM INCLUDE THE IMPLIED COVENANTS AND CONDITIONS OF THE TYPE SUED UPON BY MEI; AND

V. WHETHER SOUTHERN ROADBUILDERS - EVEN IF DEEMED BY THIS COURT TO BE CORRECT - BARS AN ACTION BASED UPON FACTUAL ISSUES SUCH AS WAIVER.

ARGUMENT

I. CHAMPAGNE-WEBBER AND SOUTHERN ROADBUILDERS ARE IN DIRECT CONFLICT

As noted above, Petitioner and Respondent are before this Court upon Petitioner's original claim that Champaqne-Webber and Southern Roadbuilders are in express and direct conflict with one another. Although the County now inexplicably attempts to reconcile those cases, the fact remains that these decisions are diametrically opposed to one another insofar as their treatment of implied covenants and conditions in contracts are concerned. On one hand, Southern Roadbuilders stands for the proposition that the breach of an implied covenant or condition in an express, written contract with a governmental agency is not actionable. Southern Roadbuilders, 495 So.2d 189 (Fla. 2d DCA 1986). On the other hand, Champaqne-Webber found that the breach of such an implied condition was indeed actionable. Champagne-Webber, 519 So.2d 696, 698 (Fla. 4th DCA 1988). These divergent approaches cannot be reconciled, and the Southern Roadbuilders decision cannot be reconciled with prevailing Florida law.

Indeed, when faced with this issue, both the Southern and Middle Districts and every other district court in Florida has accepted the Champaqne-Webber view, and has either explicitly or implicitly rejected the view expressed by the Second District in Southern Roadbuilders[1].

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[1] *See,* Phillips & Jordan Inc. v. Florida Department of Transportation, 602 So.2d 1310 (Fla. 1st DCA 1992); Dade County v. American Re-Insurance Co., 467 So.2d 414 (Fla. 3d DCA 1985); Interamerican Engineers and Constructors Corp. v. Palm Beach

Of these cases, the County discusses only Interamerican and Phillips & Jordan in its briefing, and its analysis as to both cases is flawed. First the County claims that Interamerican conflicts with Pan-Am because it allows recovery for additional work outside the original contract (Petitioner's Initial Brief, pp. 16-18). Contrary to the County's argument, Pan-Am did not consider or bar actions arising out of the breach of an implied condition of an express contract. Similarly, Pan-Am did not consider or bar claims arising from a public owner's waiver of its written change order requirement. Interamerican and the case at bar involve both of the foregoing factors, and Interamerican is therefore precisely on point.

The County's discussion of Phillips & Jordan is similarly flawed. The County goes so far as to suggest that the Phillips & Jordan court recognized absolutely no implied conditions arising from a contract which would justify payment (Petitioner's Initial Brief, p. 18). This argument flies in the face of the First District's holding that it would be erroneous to bar claims which arise from an implied covenant or condition in an express contract. Phillips & Jordan, 602 So.2d at 1313, n.2. That being said, the County's flawed analysis cannot change the fact that implied covenants and conditions of the type deemed actionable by

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Housing Authority, 629 So.2d 879 (Fla. 4th DCA 1993); See also, First Texas Savings Association v. Comprop Investment Properties Ltd., 752 F.Supp 1568 (M.D. Fla. 1990); and First Nationwide Bank v. Florida Software Services, 770 F.Supp 1537 (S.D. 1993).

Champaqne-Webber and its progeny exist in all contracts, including government contracts.

If. IMPLIED COVENANTS AND CONDITIONS EXIST IN ALL CONTRACTS, INCLUDING GOVERNMENT CONTRACTS

For some time, this Court has in its opinions embodied this reasoning, finding that:

> ... a contract includes not only the things written, but also terms and matters which, although not actually expressed, are implied by law, and theses are as bindinq as the terms which are actually written...

(emphasis supplied), McGill v. Cockrell, 88 Fla. 54, 101 So.199 (1924); Sharp v. Williams, 141 Fla. 1, 192 So.476 (1939). Indeed, this Court has also recognized that unwritten terms will be implied as part of the contract if:

(1) they are so necessarily involved in the contractual relationship that the parties must have intended them, and

(2) the parties failed to express them only because the were too obvious to need expression.

Bromer v. Florida Power & Light Co., 45 So.2d 658 (Fla. 1950).

Taking this reasoning to its logical conclusion, the Second District has recognized that these implied conditions are as a matter of course "imported into a contract" and that these principles of contract interpretation do ''notcreate an independent agreement, but makes the instrument itself express the full agreement of the parties." Wilcox v. Atkins, 213 So.2d 879, 882 (Fla. 2d DCA 1968). Based upon the foregoing, it is difficult to determine exactly how one can rationalize the Southern Roadbuilders

decision. MEI would therefore respectfully submit that Southern Roadbuilders resulted solely from the Second District's failure to consider **these** long-standing principles, and from its misinterpretation of this Court's decision in Pan-Am. Contrary to the County's stated position, that authority did not consider a claim based upon implied covenants and conditions of an express, written contract, and did not purport to displace those time honored covenants and conditions.

III. PAN-AM TOBACCO DOES NOT PURPORT TO CHANGE THE LAW OF CONTRACTS, AND DOES NOT BAR AN ACTION BASED UPON A BREACH OF IMPLIED COVENANTS AND CONDITIONS

On the contrary, in Pan-Am, this Court quashed a decision by the First District Court of Appeals, holding that:

> . . . where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from [an] action arising from the state's breach of that contract....

Fan-Am Tobacco, 471 So.2d at 5. This decision marked the first time that this Court was willing to recede from prior holdings which found the state to **be** immune from contract claims without expressly consenting to the suit, and in reaching that decision, the Court made no effort to displace implied covenants and conditions from any analysis of governmental contracts. Indeed, the Pan-Am decision did not consider any claim based upon the breach of the implied covenants of good faith and fair dealing, nor did it consider any of the myriad of other implied obligations which have been applied to construction contracts by the courts.

Florida and federal law are consistent in implying certain obligations in contracts, bath with respect to private parties and public agencies. For example, it has long been held that certain implied warranties attach to plans and specifications which are furnished by a public owner, and that the breach of that implied warranty allows a contractor to recover additional costs. See United States v. Spearin, 248 U.S. 132 (1918). See also Acquisition Corp of America v. American Cast Iron Pipe Co., 543 So.2d 878 (Fla. 4th DCA 1989); and James A. Cummings Inc. v. Young, 589 So.2d 950 (Fla. 3d DCA 1991).

Similarly, if a public owner or its authorized agent misinterprets the requirements of a project's plans and specifications, Florida courts have utilized various theories to allow a contractor recovery upon theories of implied or constructive contract or change. See, Davis v. Department of Health & Rehabilitative Services Inc., 461 So.2d 210 (Fla. 1st DCA 1984). For example, project owners - including the government - have an implied duty not to hinder or obstruct the performance of the contractor's work. See, City of Miami v. Nat Harris & Associates Inc., 313 So.2d 99, cert. denied 330 So.2d 15 (Fla. 1976 (Fla. 3d DCA 1975); Southern Gulf Utilities Inc. v. Boca Ciega Sanitary District, 238 So.2d 458 (Fla. 2d DCA 1970), cert. denied, 240 So.2d 813 (Fla. 1970); and PBI Electric Corp. v. United States, 17 Cl.Ct. 128 (1989).

Similarly, both public and private owners have an implied duty not to withhold information or to mislead its contractors. *See*

Jacksonville Port Authority v. Parkhill Goodloe Co., 362 So.2d 1009 (Fla. 1st DCA 1978); and Town of Longboat Key v. Carl E. Widdell & Son, 362 So.2d 719 (Fla. 2d DCA 1978); Miami-Dade Water & Sewer Authority v. Inman Inc., 402 So.2d 1277 (Fla. 3d DCA 1981); and Hendry Corp. v. Metropolitan Dade County, 648 So.2d 140 (Fla. 3d DCA 1994). Contractors also have an implied right to additional compensation when an owner "constructively changes" the contract by requiring a different and more costly method of performance, Diana Stores Corp. v. M&M Electric Company Inc., 108 So.2d 487 (Fla. 3d DCA 1959), or where the owner constructively accelerates the contract by its actions Norair Engineering Corp. v. United States, 666 F.2d 546 (Cl.Ct. 1981), or where conditions are different from those stated in owner's bid or other documents Hollesbach v. United States, 233 U.S. 165, 34 S.Ct 553, 58 L.Ed 898 (1914).

It is respectfully submitted that all of these cases deal with implied duties which have as their genesis the covenant of good faith and fair dealing which is the subject of the Champagne-Webber decision. The Pan-Am decision did not displace these well accepted theories of law; indeed, the Pan-Am court recognized that as a matter of "basic hornbook law" a contract which is not mutually enforceable is an illusory contract, noting that:

> ...where one party retains to itself the option of fulfilling or decline to fulfill its obligations under the contract, there is no valid contract and either party may be bound....

Pan-Am, 471 So.2d at 5.

As noted above, MEI had the right to trust in its local government for the good faith administering of the contract, and:

> .,.where one party acts arbitrarily, capriciously, or unreasonably, that conduct exceeds the justifiable expectations of the second party and consequently, the second party should be compensated for its damages.

(emphasis supplied). Eirst Texas, 752 F.Supp at 1574. Because good faith cooperation of both parties is an implied obligation in every contract, and because the County breached this obligation by acting in bad faith, it follows that MEI's claims are actionable. See also, Brickell Bay Club Association Inc. v. Hernstadt, 512 So.2d 994 (Fla. 3d DCA 1987), and Fernandez v. Vasquez, 397 So.2d 1171 (Fla. 3d DCA 1981).

Obviously, the Pan-Am court did not intend a holding which would allow the County to "pick and choose" the implied conditions with which it would comply, and the County should be held to the same business integrity which the law requires of any other contracting individual or corporation. If any other result obtained, MEI would be required to act in good faith, while the County would not, thereby running afoul the Pan-Am court's desire to prevent contracts between state agencies and public contractors from being illusory, and to ensure that such contracts are mutually enforceable. See Pan-Am, 471 So.2d at 5. That being said, it cannot be seriously argued that the Pan-Am court intended to hold a private contractor to its implied obligations, while relieving the state of its own, and therefore Southern Roadbuilders not only

fails to comply with applicable law, but also throws the balance of justice in favor of the government.

Based upon the foregoing, MEI would respectfully submit that the Southern Roadbuilders decision is bad law, in that it ignores prevailing case law and in that it reads more into this Court's reference to "express, written contracts" than was intended. In lifting the shield of sovereiyn immunity for a government that enters into contracts, the Pan-Am court indicated no intention of changing general contract law, nor did it make any effort to expressly displace implied covenants and conditions from government contracts. On the contrary, the Pan-Am court limited its decision to "express, written contracts" - and these contracts as a matter of course include the implied obligations sued upon by MEI.

IV. EXPRESS, WRITTEN CONTRACTS, AS DESCRIBED IN PAN-AM, INCLUDE ALL IMPLIED COVENANTS AND CONDITIONS PROVIDED BY FLORIDA LAW

After finding that the defense of sovereign immunity will not protect the state from the consequences of its breach of contract, the Court added limiting language restricting its holding to suits on "express, written contracts." Pan-Am, 471 So.2d at 5. This language, in itself, does not itself foreclose an action upon either implied conditions contained in those contracts, or actions based upon a state agency's waiver of express contract terms, and there is no indication that the Pan-Am court considered either of these scenarios. However, notwithstanding these facts, the Southern Roadbuilders court interpreted this language in the narrowest possible sense, and ignored not only the principles of

good faith and fair dealing which apply to all contracts, but also specific implied covenants which apply to construction contracts.

All contracts include not only express conditions, but also implied covenants which must be evenly applied to both contracting entities. Notwithstanding principles of sovereign immunity, the courts of this state have uniformly implied conditions which are not barred by sovereign immunity, even though the contract is silent on the point. See Dade County v. American Re-Insurance Co., 467 So.2d 414 (Fla. 3d DCA 1985); Treadway v. Terrell, 177 Fla. 838, 158 So. 512 (1935) and Florida Livestock Board v. W.G. Gladden, 86 So.2d 812 (Fla. 1956). In analyzing the extent of sovereign immunity as it pertains to prejudgment interest, those cases note without exception that:

> ...in authorizing suits...the statute intends that interest may be adjudged against the state in proper cases where it is necessary to do complete justice and to accomplish the purposes of the statute....

(emphasis supplied). See e.g., Florida Livestock Board 86 So.2d at 813.

Based upon the foregoing, it is clear that this Court has recognized the need to go beyond limiting language in the sovereign immunity statute when "complete justice" and the expressed "purposes of the statute" require. By failing to comply with this charge, the Southern Roadbuilders court stripped away the most fundamental understanding that government must act fairly in its dealings with private citizens - particularly when that government

voluntarily sheds the protection of sovereign immunity when it exercises its right to contract.

In an effort to temper the fundamental unfairness of its own arguments, the County has raised the specter of the need to "protect the public treasury" (Petitioner's Initial Brief, p.12) from "raids" (Petitioner's Initial Brief, p.13) by "unscrupulous contractors" and "unprincipled state employee(s)" (Petitioner's Initial Brief, p.25). In applying these inflammatory statements to the facts of this case, how can a contractor be said to be an unscrupulous raider when the trustees of the public treasury voted substantial, additional monies for the claims which are the very subject of that contractor's lawsuit? (Compare Petitioner's Appendix 2, with Respondent's Appendix 1 and 2.) Similarly, how can the County make innuendos as to the "principles" of its own employees when the recommendations of those employees were acted upon affirmatively by the County's Board of County Commissioners in appropriating additional sums for the Project?

These and other questions raised by MEI through its latest Complaint cannot be answered except through a trial on the merits, and this trial must include an analysis of MEI's claims of bad faith and unfair dealing. At that time, the fact that MEI's work was requested and accepted by the County will be heard - and the jury will also hear that payment was authorized for this work, but never given. That being the case, the County should have to go far to explain its actions, and it should not be permitted to reap the

benefits of a completed contract, without being required to make payment when due.

V. NEITHER PAN-AM NOR SOUTHERN ROADBUILDERS BAR AN ACTION BASED UPON WAIVER OF THE CONTRACT'S CONTRACTUAL CHANGE ORDER REQUIREMENT

In its briefing, the County contends that MEI should be precluded from asserting its claims for additional compensation even though MEI has expressly alleged both specific violations of the implied covenants of good faith and fair dealing, and the factual issue of waiver (Petitioner's Appendix 2, p.2). In making much of these arguments, the County:

1. Fails to mention that no term in the contract operates to displace the time honored covenants of good faith and fair dealing which are implied in that contract; and
2. Does not respond to the MEI's charge that the County, through its actions, waived its own contractual change order requirements.

These omissions are significant, and the County's reliance upon the cases cited at page 27 of its briefing is curious.

In fact, **even** a cursory reading of Flagship National Bank v. Gray Distribution Systems Inc., 485 So.2d **1336** (Fla. 3d DCA 1986) and Riedel v. NCNB National Bank of Florida, 591 So.2d 1038 (Fla. 1st DCA 1991) reveals that those cases are wholly reliant upon the terms of the Uniform Commercial Code ("UCC") - a body of law which is wholly inapplicable to an action upon **a** construction contract. Indeed, neither authority purports to display the above noted doctrines which apply to contracts for services, as opposed to

matters governed by the UCC. These well-established doctrines include the long-standing rule that a contractor may recover additional costs through a subsequent oral agreement or modification of a written contract, even though the contract itself purports to prohibit such oral modification. See King Partitions and Drywall Inc. v. Donner Enterprises Inc., 464 So.2d 715 (Fla. 4th DCA 1985); Pan-American Engineering Co. v. Poncho's Construction Co., 387 So.2d 1052 (Fla. 5th DCA 1980). In addition to the foregoing, courts have allowed recovery to a contractor when the owner, through its actions, waives the written change order requirement. See Eroderick v. Overhead Door Co. of Ft. Lauderdale Inc., 117 So.2d 240 (Fla. 2d DCA 1959). Indeed, these and other doctrines which have fairness and good faith as their genesis have been applied even when the government is a party upon the theory that parties to a contract are always free to modify their undertaking, and that an agreement to modify "may be implied from the conduct of the parties." See E.H. Ladum v. United States, 5 Cl.Ct. 219 (1984).

That being said, it is difficult to visualize the fairness of a legal argument which requests immunity for the actions taken by the County in this matter. Not only did the county act - in essence - as a private developer for the Florida Marlins, but it then disregarded the principles of fairness in failing to disclose its private relationships to MEI and the other project bidders. Then, to appease those private interests, the County orchestrated changes to the Project and publicly agreed to pay for them without

need of written change order. Now, however, the County claims that it acted as an immune "sovereign," and that principles of general and contract law should not apply to them. This action should not be countenanced by this, or any other court.

CONCLUSION

Although Brevard County is a political subdivision of the State of Florida, it is not entitled to immunity from its own actions in breaching the express written contract between the parties, nor is it entitled, to breach the implied covenants and conditions in that contract by acting in bad faith. The extra work claimed by MEI was initiated by the County through undisclosed actions and relationships. The County has accepted this extra work, and has never disputed that the fact that the work was performed. Most significantly, the County has acknowledged responsibility for those claims through written action of its Board of County Commissioners, and has agreed to pay for this extra work. It would now be fundamentally unfair to allow the County to disregard the effect of these actions, and this Court should issue its ruling accordingly.

Respectfully submitted,

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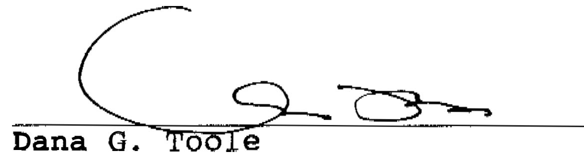
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 7 day of April, 1997 to E.A. "Seth" Mills, Jr., Fowler, White, et al., 501 East Kennedy Boulevard, Tampa, FL 33602, and to Robert A. Hingston, Esq., Welbaum, Guernsey, 901 Ponce de Leon Boulevard, Penthouse Suite, Miami, FL 33134-3009.



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