IN THE SUPREME COURT OF THE STATE OF FLORIDA

MARONDA HOMES, INC. OF FLORIDA, a Florida corporation, et al.,

Petitioners,

v.

LAKEVIEW RESERVE HOMEOWNERS ASSOCIATION, INC., a Florida not for profit corporation,

Respondent.

_____/

CASE NO.: SC10-2292 & SC10-2336

Lower Tribunal Cases: 5D09-1146, 07-CA-1792

BRIEF OF AMICI CURAE COMMUNITY ASSOCIATIONS INSTITUTE (CAI)

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IDENTITY OF AMICUS CURAE AND INTEREST

Amicus Curiae, COMMUNITY ASSOCIATIONS INSTITUE (CAI), is a national organization which provides education and resources to volunteer homeowners who govern community associations and to professional entities (such as management companies and law firms) which support community associations. CAI advocates for community association interest before the legislature, provides its members with educational materials, assists in building professional relationships and publishes newsletters on community association management, governance, law, and legislative trends.

CAI can assist this Court in its consideration of the issues of this case by bringing to the Court's attention the collective experience of its members regarding how the issue to be addressed affects homeowners' associations. CAI can also contribute to the Court's understanding on how this ruling will impact a homeowners' association's ability to obtain remedies for faulty construction of common areas and the consequential financial impact on the members of said homeowners' association.

SUMMARY OF ARGUMENT

Public policy requires a finding that implied warranties of habitability, fitness and merchantability apply to a community's common area structures that support the residences. A community's developer should impliedly warrant that the community's common area structures and improvements are fit for their intended and ordinary purposes and will not impair the habitability, use and merchantability of the community's residences. Community developers who make homeowners' associations, and by extension the homeowners, financially responsible for the maintenance and repair of the common area structures owe a duty to the homeowners and their homeowners' association to turn over common area structures that are fit for use and do not impair the habitability or merchantability of the community's residences. Developers owe a duty to avoid placing the burden of defective construction on the homeowners and their homeowners' association.

While condominium associations and condominium unit owners enjoy implied warranties of fitness and merchantability pursuant to Chapter 718, Fla. Stat. and common law, Petitioners' contend that homeowners' associations should not receive the same warranties under common law. This conclusion is illogical, inequitable and unsupported by public policy. Accepting Petitioners' argument

guarantees inconsistent results where condominium associations possess a cause of action for defective construction (e.g. defectively constructed road underdrains) while homeowners' associations with identical defects are limited to claims of negligence.

Implied warranties constitute the only effective remedy for defectively constructed common area structures. Florida common law should not require homeowners' associations and their homeowners to essentially accept "as is" defectively constructed common areas from their developer, and therefore burden the homeowners' association and its homeowner members with the financial obligation of repairing the common area improvements.

ARGUMENT

I. PUBLIC POLICY REQUIRES GRANTING HOMEOWNERS' ASSOCIATIONS IMPLIED WARRANTIES OF FITNESS AND MERCHANTABILITY WITH RESPECT TO COMMON AREAS CONVEYED BY THEIR COMMUNITY'S DEVELOPER.

A. Forced acceptance of defective common areas without the opportunity to inspect unfairly burdens members of a homeowners' association.

Petitioners argue that implied warranties of fitness and merchantability should not extend to homeowners' associations because homeowners' associations are not first purchasers of property. However, upon transition of control of a homeowners' association from the developer to the homeowners pursuant to

§720.307, Fla. Stat., the homeowners' association becomes the first and only title holder to the community's common areas. In many ways, transition of title from the developer to the homeowners' association pursuant to §720.307(3)(a), Fla. Stat. places the homeowners' association and homeowners in a much more vulnerable position than a first purchaser of property. Consequently, transition places the use, fitness and habitability of a first purchaser's residence in jeopardy if the developer failed to properly construct the common area structures for their intended use.

A first purchaser of property is afforded an opportunity to inspect a lot and residence prior to purchase. Customarily, a purchaser arranges for an inspection by an independent third party. If the purchaser is dissatisfied with the findings, most residential purchase contracts contain contingency provisions allowing the purchaser to cancel the transaction if the seller fails to satisfy certain conditions identified in the inspection report in order to consummate the sale. See "As Is" Contract For Sale And Purchase as approved by the Florida Association of Realtors and the Florida Bar.

Unfortunately for homeowners' associations and the same home purchasers, no such inspection is customarily provided prior a developer's forced conveyance of the common areas and structures to a homeowners' association. Pursuant to §720.307(3)(a), Fla. Stat., a developer must deed the common areas to the

homeowners' association at the time of turnover of control to the members of the homeowners' association. All too often, a developer merely executes a quit claim deed and shifts the financial burden of addressing any existing common area defects to the homeowners' association and its homeowners.

Petitioners' would have this Court believe that a purchaser's residence is not affected by defects in the common areas because the above referenced improvements are not immediately supporting the residence. However, in addition to the direct impact described by Respondent, an innocent purchaser is exposed to the financial burden of repairing defective common area structures pursuant to the obligations customarily imposed by a homeowners' association's governing documents and the assessments that may be levied against a homeowner's lot and residence pursuant to §§720.308 and 720.3085, Fla. Stat.

Every homeowner's association has a fiduciary duty to maintain its common areas in a safe condition for its residents and in order to maintain proper insurance coverage. Lumbermens Mutual Casualty Company v. Dadeland Cove Section One Homeowners' Association, Inc., 2007 WL 2979828 (S.D. Fla.) As a result, homeowners' associations are often forced to make repairs sooner than later to avoid potential liability. Homeowners' association repairs must be funded through assessments levied against each homeowner's lot and residence pursuant to the

association's governing documents and §§ 720.308 and 720.3085, Fla. Stat. Failure to pay the assessments may result in an assessment lien and lien foreclosure in the same manner as a mortgage foreclosure. In sum, not only do defective common area structures imperil the habitability, use and merchantability of residences, they may cost a homeowner title to their home.

Often, lay purchasers lack any knowledge of latent and patent defects in the common areas structures prior to acquiring his or her lot and residence. A purchaser's typical inspection report is limited to their immediate lot and residence. The typical residential inspection report does not include the community clubhouse, pool, gates, walls, roadways, tot lots, and underground storm water drainage systems. As the Fifth District Court of Appeal correctly noted in Lakeview Reserve Homeowners v. Maronda Homes, Inc., 48 So.3d 902, 908 (Fla. 5th DCA 2010), the planning, permitting, site work and construction of such common area improvements requires expertise far beyond the expertise of the average homebuyer. Other than a visual inspection, the purchaser must rely on the expertise of the developer who is in a superior position to discover and timely cure defects. As a result, a purchaser may lose his or her residence to an assessment foreclosure action caused by common area repairs in instances where the homeowners' association was forced to accept title from its developer without the

benefit of an inspection.

B. Implied warranties of habitability, fitness and merchantability are the most effective causes of actions to hold a developer responsible for common area defects and these warranties should be applied consistently to all community associations.

Public policy requires that the same implied warranties afforded to condominiums by common law and Statute be made available to homeowners' associations to prevent injustice and inconsistent results. CAI believes a brief overview of how condominium and homeowners' associations work is instructive to demonstrate why public policy requires the imposition of implied warranties for homeowners' association common areas structures.

Condominiums are created when a declaration of condominium is recorded in the public records of the County where the property is located per §718.104(2), Fla. Stat. All property located outside the units, as defined in the declaration of condominium, constitutes common elements of the condominium. §718.108, Fla. Stat. The condominium developer is responsible for creating the condominium property. Per §718.103(16), Fla. Stat, the condominium developer eventually turns over control of the condominium to the unit owners when certain §718.301, Fla. Stat. milestones occur.

The Condominium Act expressly provides for implied warranties of fitness

and merchantability. There is a three-year implied warranty for the roof and structural components of the condominium building, mechanical and plumbing elements serving the condominium building and additional improvements described in §718.203(2)(a), Fla. Stat. There is a one-year implied warranty for all other improvements other than those identified in Section (2)(a) above by §718.203(2)(b), Fla. Stat. Any cause of action in favor of the condominium associations including those for breach of implied warranties, "shall not begin to run until the unit owners have elected a majority of the members of the board of administration," according to §718.124, Fla. Stat.

Homeowners' associations are also created by recording a declaration of covenants and restrictions in the public records of the County where the community is located per §720.301(3), §720.301(4) and §720.303(1), Fla. Stat. The declaration and plats establish "Common Areas" of the community, which are defined by §720.301(2) as:

> all real property within a community which is owned or leased by an association or dedicated for use or maintenance by the association or its members, including, regardless of whether title has been conveyed to the association: (a) Real property the use of which is dedicated to the association or its members by a recorded plat; or (b) Real property committed by a declaration of covenants to be leased or conveyed to the association.

The homeowners' association developer creates the community served by

the association and per §720.301(6), Fla. Stat. is responsible for constructing the common areas of the community. After several conditions are satisfied, the homeowners' association developer is required to turn control of the homeowners' association and the community to the owners living in the community. See generally §720.307, Fla. Stat. However, unlike condominiums, Chapter 720, Fla. Stat. does not grant homeowners' associations an express statutory cause of action for breach of implied warranties for the common areas. Therefore, homeowners' associations lack the same statutory rights as their sister condominium associations for construction defects caused by developers.

The instant case involves the developer's defectively constructed retention ponds, underground drainage ponds and poor site preparation. If the Respondent was a condominium association rather than a homeowners' association, the Respondent would clearly possess a cause of action against the Petitioners for breaches of implied warranties of fitness and merchantability under §718.203, Fla. Stat. However, prior to the issuance of the Fifth District Court of Appeal's opinion in Lakeview Reserve, a homeowners' association was arguably precluded from obtaining relief for the same poor construction that exists in both condominiums and homeowners' association communities. Such a result must be void as against public policy.

A more problematic result occurs if a developer opts to create a townhome homeowners' association instead of a condominium townhome. A developer may create a townhome community as a condominium or as a homeowners' association. By creating a homeowners' association, the developer escapes the statutorily imposed implied warranties of fitness and merchantability created by Chapter 718, Fla. Stat. Consequently, two identical townhome communities, both possessing the same common structures and shared association duties to maintain these structures may find themselves with significantly different legal remedies for defective construction. For example, under Petitioner's reasoning, the roads of a condominium townhome community enjoy implied warranties while the identical townhome community's roads maintained by a homeowners' association do not.

Although the townhome homeowners' association described above may seek certain limited remedies, implied warranties remain the only effective remedy for associations for defectively constructed common areas. Express warranties for construction of homeowners' association common areas structures are unavailable because developers enjoy complete control over the drafting and recording of a community's declaration covenants and, as a matter of common practice and obvious self interest, developers routinely refuse to include express warranties in the homeowners' association declaration of covenants.

Petitioners suggest alternatives to express warranties such as negligence, which is insufficient because developers and contractors may blame each other while escaping liability for the defective construction. Developers may argue lack of duty to warn and contractors assert lack of privity or deny third-party beneficiary claims. The end result is that without implied warranties, the homeowners' association and their homeowners pay to repair and pay again to overcome the hurdles of circuitous negligence claims and cross-claims.

C. Alternative public policy reasoning for adopting implied warranties of habitability, fitness and merchantability with respect to common areas.

Other public policy reasons compel granting homeowners' associations implied warranties of habitability, fitness and merchantability for common area structures. First, common area improvements induce owners to buy in a community. Many buyers choose neighborhoods because of gates, swimming pools and other amenities. The existing or proposed amenities become part of the value of the homeowner's residence as well as a useable extension of their property. As noted above, the average homebuyer must rely on a developer's expertise in constructing these amenities while the developer limits or does not extend an implied warranty for improperly constructed common areas. Once common area structural defects are discovered, a potential buyer is likely to view a

residence negatively if the community's amenities are defective. Even if the defects are not apparent to a lay buyer, the selling homeowner is required to disclose the significant assessments levied to repair the defects and these assessment may directly impact a buyer's decision to purchase.

Finally, it is unreasonable to require homeowners to investigate complex community improvements beyond what is contractually obligated in a standard home inspection. It would be cost prohibitive to require a purchaser to inspect his lot, residence and every common area tract and amenity in the community, especially underground drainage and stormwater systems. Most inspection companies lack the means or expertise to give an opinion regarding storm drains underneath the streets. Common area inspections would require costly evaluations by licensed engineers. Additionally, many residences are sold to owners prior to the completion of common area improvements, making it impossible for homeowners to inspect the common areas which they will pay to maintain as part of their membership in the homeowners' association. As a result, additional community roads and pools installed in subsequent phases of a community force purchasers to depend on the developer's expertise to properly complete the improvements.

D. This Court has the authority to adopt Implied Warranties of Habitability, Fitness and Merchantability in the absence

of legislative pronouncement.

This Court has the authority to rule on public policy grounds to avoid the aforementioned injustices. VanBibber v. Hartford Accident & Indemnity Insurance Co., 439 So.2d 880, 883 (Fla. 1983): "While this Court may determine public policy in the absence of a legislative pronouncement, such a policy must yield to a valid, contrary legislative pronouncement." See also Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So.2d 602, 608 (Fla. 2d DCA 1997): "In resolving the issue before us, we acknowledge that our supreme court has mandated that we must strictly adhere to its judicial pronouncements, including those based on considerations of public policy…"

The public policy, as found by the Fifth District Court of Appeal, clearly favors homeowners' associations ability to assert claims for implied warranties of fitness and merchantability for common area improvements if the improvements are essential for habitability. Lakeview Reserve, 48 So.3d 902 at 909. The Fifth District Court of Appeal's ruling is consistent with Florida's strong public policy of protecting consumers. Id. In the purchase of a residence, a consumer must rely on the expertise of a developer for proper construction. Id. A consumer is in an inferior position to inspect work and correct defects where the defects are not readily available to a purchaser in an inspection report. Id. Promoting better

construction should be the goal of public policy in the state of Florida.

II. CONKLIN AND PORT SEWALL ARE DISTINGUISHABLE FROM THE INSTANT CASE ON THE FACTS.

Petitioners' cite to cases which are distinguishable based on the facts and the type of purchasers involved in the transactions. In Port Sewall, the defendant was a mortgage company that did not construct improvements. The Port Sewall Harbor and Tennis Club Owners Association, Inc. v. First Federal Savings and Loan Association of Marion County, 463 So.2d 530, 531 (Fla. 4th DCA 1985). The trial court in Port Sewall directed verdict in favor of the mortgage company stating that there was no implied warranty for the common areas pursuant to Conklin. Id. The Fourth District Court of Appeal held on appeal that the common areas at issue "did not pertain to the construction of homes or other improvements immediately supported the residences." Id.

CAI respectfully suggests Port Sewall is not supported by the principles set forth by the Florida Supreme Court in Conklin or by the legislature's subsequent adoption of Chapter 720, Fla. Stat. See Conklin v. Hurley, 428 So.2d 654, 659 (Fla. 1983). In Conklin, investor-owners of vacant lots sued their developer under an implied warranty of fitness for a collapsed seawall which was apparently on their property. Id. at 656. This Court, in Conklin said the implied warranty of

fitness theory did not extend to the owners of the vacant lots because the seawall was not part of a completed structure. Id. at 658. This Court further held: "Purchasers of such relatively unimproved realty may more reasonably be expected to inspect the property knowledgeably before purchase and may more likely be able to bargain for an express warranty than those who buy as complex a structure as a modern home." Id. This Court also spent a majority of its opinion discussing why persons purchasing property for investment purposes should not receive the same protection as consumers do. Id. It is CAI's position that since the landowners were investors instead of typical homebuyers, this Court determined they should not receive the benefits of an implied warranty. Based upon the dicta of the case, it is reasonable to conclude that this Court would have rendered a different ruling if the landowners were ordinary consumer homebuyers of completed residences. See Id.

In addition to the differences in buyers, the inspection of vacant lots is significantly different than the inspection of common area structures such as retention ponds and underground drainage pipes. An ordinary consumer will not be able to detect defects in the common area structures until the problems manifest. Ordinary consumers do not have the expertise to determine the existence of latent defects and enjoy far less bargaining power than the investors in Conklin.

Additionally, in Port Sewell, it appears that this Court essentially considered the suit to be brought by the owners in the community and not the homeowners' association because this Court held the improvements "did not pertain to construction of homes or other improvements immediately supporting the residences." Port Sewell, 463 So.2d at 531. Homeowners' associations are required by statute and/or their covenants and restrictions to maintain the common areas owned or dedicated to it. The declaration of most communities, including Respondent's, dedicates the common areas to the homeowners' association and transferred title to the common area property to the homeowners' association via deed or dedication. Consequently, homeowners' associations become the first title holders of common area and should be entitled to the implied warranty of fitness for the improvements deeded by a developer.

III. FLORIDA COURTS HAVE RECOGNIZED COMMON LAW BREACH OF IMPLIED WARRANTY CLAIMS TO PROTECT PURCHASERS FROM LATENT DEFECTS.

As the Fifth District Court of Appeal noted, in the absence of a legislative pronouncement, this Court is free to apply common law and the application of common law warranties. In B & J Holding Corporation v. Weiss, 353 So.2d 141 (Fla. 3d DCA 1977), The Third District Court of Appeal upheld a common-law implied warranty for defective construction of condominium common elements. In

B & J Holding Corporation, several unit owners in the Stuart House Condominium brought breach of implied warranty claims against the developer and developer/directors for constructing the common elements and systems in an improper and inferior manner. Id. at 142. The developer argued that the claim for breach of implied warranties of fitness were barred by a one-year statute of limitations set forth in §711.24(1)(g)(3), Fla. Stat. (1973). Chapter 711 was previously referred to as the Condominium Act before it was renumbered to Chapter 718. The court held that the developer's argument lacked merit because the plaintiffs did not bring their cause of action under Chapter 711, Fla. Stat. Id. The court specifically held, "The relief granted was premised upon common law causes of action." Id.

The Third District Court of Appeal, citing David v. B & J Holding Corp., 349 So.2d 676 (Fla. 3d DCA 1977), held that the developer could be liable for construction defects in the common elements. In David, the plaintiffs purchased a unit in the same Stuart House Condominium. Id. at 677. The plaintiff alleged that the developer failed to properly sound proof and insulate the walls of the building. Id. Plaintiff also alleged that the developer's failure to build the walls as specified in the building plans recorded with and approved by the local municipal building

and zoning department constituted a breach of the implied warranty of fitness. Id. The court found a breach of implied warranties. Id.

> An implied warranty arises by operation of law and exists regardless of any intention of the vendor to create it; such warranty springs from the vendor's breach of some duty which amounts to taking advantage of the purchaser by reason of some superior knowledge in the vendor or the reliance by the purchaser on the vendor's representation or judgment.

Common law causes of action of breach of implied warranty for defective construction of condominium common elements was recognized before the State legislature enacted warranties for condominiums in §718.203, Fla. Stat. (1976). Therefore, this Court is free in the absence of legislative pronouncement to find the application of common law causes of action of breach of implied warranty for defective construction of common areas for homeowners' associations.

CONCLUSION

This Court should affirm the holding in Lakeview Reserve Homeowners v. Maronda Homes, Inc., 48 So.3d 902, 908 (Fla. 5th DCA 2010) that developers give homeowners' associations and their homeowners implied warranties of fitness for a particular purpose, habitability and merchantability to common area structures that support the homeowners' residences. This Court should adopt the reasoning of the Fifth District Court of Appeal and determine that the public policy of this

State supports such a holding. To hold otherwise would leave homeowners' association without a viable remedy for common area construction defects that are enjoyed by other community associations such as condominiums through State Statutes and common law. Without a viable remedy, a lay buyer's home purchase will remain one of *caveat emptor* with respect to the multi-million dollar amenities and structures that support communities governed and maintained by homeowners' associations and paid for by the unsuspecting homeowners.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been sent via U.S. Mail to Patrick C. Howell, Esq. Taylor & Carls, P.A., 150 N. Westmonte Drive, Altamonte Springs, FL 32714, Scott J. Johnson, Esq. and Heather Pinder Rodriguez, Esq., Holland & Knight, LLP, P.O. Box 1526, Orlando, FL 32802, and Stephen W. Pickert, Esq., Moye, O'Brien, O'Rourke, Pickert, & Martin LLP, 800 S. Orlando Ave., Maitland, FL 32751 this 12th day of August, 2011.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that I have complied with the font requirements of Rule 9.210(a)(1) of the Florida Rules of Appellate Procedure. It has been submitted in Times New Roman 14-point Font.

/S/ THOMAS R. SLATEN, JR.
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