IN THE SUPREME COURT OF THE STATE OF FLORIDA

MARONDA HOMES, INC. OF FLORIDA and T.D. THOMSON CONSTRUCTION COMPANY,

Petitioners,

vs. Case No. SC10-2292 and SC10-2236

LAKEVIEW RESERVE HOMEOWNERS ASSOCIATION, INC.,

Respondent.
_____/

COMMUNITY ASSOCIATION LEADERSHIP LOBBY, INC.'S AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT, LAKEVIEW RESERVE HOMEOWNERS ASSOCIATION, INC.

On Review from the Fifth District Court of Appeal
Case No. 5D09-1146

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STATEMENT OF INTEREST

Community Association Leadership Lobby, Inc. ("CALL") is a leading organization working to enhance the quality of life and protect property values for Florida's community association residents and has an interest in the issues raised in this case. CALL advocates on behalf of nearly 4,000 member communities, including homeowners associations, throughout the state. CALL monitors legislation and litigation throughout the state that may significantly impact community associations.

CALL believes that due to its advocacy on behalf of nearly 4,000 community associations that it will shed light upon some of the issues pertaining to this lawsuit, particularly as it relates to homeowners' associations and property improvements supporting homes in a community. Specifically, CALL believes that it has the ability to address consumer concerns as it pertains to implied warranty obligations to similarly situated developments as to the one here.

SUMMARY OF ARGUMENT AND INTRODUCTION

The issue of whether a developer of a residential subdivision provides common law implied warranties for the roadways, retention ponds, underground pipes, and drainage systems throughout that subdivision is one of great importance to hundreds of thousands, if not millions, of Florida residents living in homeowners' associations. It is the position of CALL that a common law implied

warranty exists and should apply to these common area improvements and that the basis for such a warranty exists in a detailed review and examination of the existing law in Florida.

The Fifth District below examined the existing case law and determined that the roadways, underground plumbing, retention ponds and drainage provided essential services to the residential dwellings in the Lakeview Reserve community. CALL believes that this "essential services" test is appropriate. However, even absent this test the common areas at issue are subject to common law implied warranties under existing case law, as the type of property at issue here are residential dwellings, like the property in *Gable*, not vacant lots as in *Conklin*. The key question to be considered is what was being sold by the developer. Distinctions need to be drawn that reflect the increasing complexity of residential housing development in Florida and that what is being sold today is not what was sold or even contemplated 30 or 40 years ago.

Historically, issues of implied warranties arose as they pertained to individual vacant lots. The next evolutionary step was the package sale of a new home on a lot. The next step was a lot with a new home, but located with similar homes in a single subdivision. Now there exist and continue being developed, large master communities with multiple subdivisions, containing hundreds or thousands of lots and homes with appurtenant roadways, underground piping,

retention ponds and drainage areas. These complex arrangements have become common place for the development of tracts of land in Florida and are used extensively for the purpose of marketing and conveying residential dwellings. Further, these common area improvements are necessary in order to utilize the residential dwellings for their intended purpose. The roadways, retention ponds, underground pipes, and drainage of such communities are part and parcel of the sale of the residential dwellings contained in the community at issue here and also in thousands of other communities and subdivisions across the State.

ARGUMENT

I. Common Areas are Part of the Residential Dwelling Package and are Protected by Common Law Implied Warranties

A. Abandoning Caveat Emptor

This Court abandoned *caveat emptor* in *Gable v. Silver*, decided 39 years ago. *See Gable v. Silver*, 264 So. 2d 418 (Fla. 1972). The analysis that this court undertook in *Gable* which extinguished the doctrine of *caveat emptor* and creating common law implied warranties of fitness and merchantability is applicable here. This court in *Gable* adopted the Fourth District's reasoning and agreed that the law, in this field, should continue to keep up with the development trends. *See Gable v Silver*, 258 So. 2d 11, 17 (Fla. 4th DCA 1972)(citations omitted).

Later, this Court acknowledged that the rationale in abandoning "the doctrine of *caveat emptor* is that the purchaser is not in an equal bargaining

position with the builder-vendor of a new dwelling, and the purchaser is forced to rely upon the skill and knowledge of the builder-vendor with respect to the materials and workmanship of an adequately constructed dwelling house." *Conklin v. Hurley*, 428 So. 2d 654, 657-58 (Fla. 1983).

This Court in 1972, when *Gable* was decided, or 1983, when *Conklin* was decided, could not know the direction that real property development would take here in Florida: away from "build on your own lot" to the types of master planned subdivisions and communities we see today. However, this Court in *Gable* specifically referenced "modern home-buying practices" as a basis for abandoning *caveat emptor*. Both *Gable* and *Conklin* "recognize[d] a distinction between modern home-buying practices and traditional real estate sales in which land was the key element." *Conklin*, 428 So. 2d at 657. The same analysis of modern home-buying practices applies to common law implied warranties for common area improvements.

> The movement towards implied warranty, brings the law much closer to the realities of the market for new homes than does the anachronistic maxim of caveat emptor. 'The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected.

Gable v. Silver, 258 So. 2d 11, 17 (Fla. 2d DCA 1972) opinion adopted, 264 So. 2d 418 (Fla. 1972)(citations omitted)(*emphasis added*).

This Court is now being asked to follow the implied warranty of fitness and merchantability created in *Gable v. Silver*, and apply them to the common areas of homeowners' associations. This following would reflect the market realities for the purchase of new homes today which was one of *Gable's* considerations in creating implied warranties of fitness and merchantability in the first place. Acknowledging the move in the sales of homes from build on your own lot, to the packaged home and lot to the master planned communities keeps the existing common law principles abreast to current times. *See Id*.

In the absence of applying the common law implied warranties first created in *Gable*, residents would be left in a *caveat emptor* situation as it pertains to those common areas. The owners of residential dwellings would be responsible to remedy defective common areas through payment of increased assessments to address those items that the developer did not properly design or construct. This is the type of situation that *Gable* sought to avoid in transferring the risk to those with the knowledge of construction and design of these improvements, developers and builders, and away from purchasers. This is especially true when considering that purchases in these homeowners' associations have the reasonable expectation that the common areas will be built to the same high standards and with the same protections they believe apply to their homes. A belief that few, if any, developers try to dissuade.

B. The Distinction between Empty Lots and Package Homes

Notwithstanding the abandonment of *caveat emptor*, this Court in *Conklin*, refused to extend the common law implied warranty to seawalls. Petitioners cite this case primarily to support the argument that as a result no implied warranties can exist here. However, the key facts in *Conklin* were that the petitioners purchased vacant lots, not homes. *Conklin* is distinguishable on its facts.

None of the owners in *Conklin* purchased a dwelling from the builder, and the seawall was not part of a completed structure. "Indeed, each of the petitioners bought what was essentially an empty lot, the only improvement being the defective seawall." *Conklin v. Hurley*, 428 So. 2d 654, 658 (Fla. 1983)(*emphasis added*). The issue at hand does not concern vacant lot sales, but sales of homes on lots in a community planned and developed by Petitioners.

Shortly before this Court decided *Conklin*, the Second District decided *Hesson v. Walmsley*, 422 So. 2d 943 (Fla. 2d DCA 1982). In that case, the purchasers purchased a new house and lot from the builders. The builders selected the lot, and then sold the house and lot as a package. *Id*. at 943-44. Subsequently, cracks developed in the house and the builder was sued on four theories, including for breach of an implied warranty of habitability. *See Id*.

The *Hesson* court noted:

> [i]n recent years it has become more common for purchasers of new homes to buy a package, *i.e.*, a house

> and lot, from a builder rather than merely to select a lot and have a house constructed thereon. As courts have recognized this trend, many have concluded that the implied warranty of habitability is breached not only because of structural defects, but also because of the unsuitable nature of the site on which the house was built.

Id. at 944. The Court explained its rationale, by noting that, the builder-vendor is in a better position than the buyer to investigate the quality of the land to support the house.

> In most instances the builder is the professional, the buyer the amateur. Moreover, we believe that by placing the risk of furnishing the buyer a functional home on the builder-vendor, the builder will be encouraged to exercise greater care in selection of building sites. From an economic standpoint the builder-vendor can more readily handle the risk of subsurface defects and can more effectively cover these risks at a lesser cost than a purchaser.

Id. at 945. The *Hesson* Court concluded and held that there was an implied warranty of habitability in the package sale of a new house and lot by a builder-vendor to an original purchaser.[1] *Id*.

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[1] As noted in Petitioner Maronda's Initial Brief, the terms "habitability" and "merchantability" are often used interchangeably. The Fifth District below found implied warranties of habitability, fitness for purpose and merchantability to apply. *See Lakeview Reserve Homeowners Association, Inc. v. Maronda Homes, Inc*., 48 So. 3d 902, 909 (Fla. 5th DCA 2010). CALL is requesting that this Court affirm the Fifth District's opinion and find that the implied warranty of fitness and merchantability as set forth in *Gable* be applied to the types of common areas at issue here.

The *Hesson* opinion, although issued shortly before *Conklin*, was not referenced in *Conklin*, but neither has it been receded from or distinguished by any other case. The *Gable* and *Hesson* analysis is relevant to the case at hand. If the complexities involving a single residential dwelling necessitates moving beyond *caveat emptor* due to the fact that such homes and lots are packaged together then the need is much greater where the homes are packaged not only with lots but also with roads, retention ponds, underground pipes and drainage. None of common area items are separate from the subdivision itself and are a key selling point in the marketing and sale of these residential dwelling.

C. Courts have acknowledged the distinction between lots and packaged properties.

The distinction between not providing warranties for lots but providing them for packages of homes and lots was acknowledged as noted above in *Hesson*, but also by the Fourth District in *Hurley v. Conklin*. *See Hurley v. Conklin*, 409 So. 2d 148 (Fla. 4th DCA 1982). The Fourth District noted that other cases had refused to extend the common law implied warranties where the property at issue were vacant lots and not homes. *See Burger v. Hector*, 278 So. 2d 636 (Fla. 1st DCA 1973) (refusing to extend the warranty to a builder of a new home where the damage was caused by subsoil conditions on land purchased separately); *Schmitt v. Long*, 290 So. 2d 139 (Fla. 4th DCA 1974) (refusing to apply *Gable* to a purchaser of an unimproved lot).

In considering the applicability of implied warranties to seawalls, the Fourth District stated in *Hurley*, "the real question is whether the rationale which gave rise to the extension of implied warranties to new homes perforce applies to the sale of residential lots on which a seawall has been constructed." *Hurley v. Conklin*, 409 So. 2d 148, 150 (Fla. 4th DCA 1982) (*emphasis added)*. The Fourth District in *Conklin* noted the different analysis for residential lots as opposed to new homes, but did not address the implied warranties provided in the sale of packaged lots and homes in communities where the developer constructed the roads, underground pipes, drainage and retention ponds. In approving the Fourth District's refusal to extend the *Gable* warranty to the lots in question this Court also did not consider this issue or take exception to the *Hesson* analysis.

D. Petitioners' Reliance on Port Sewell is Misplaced

As noted above, the *Conklin* facts relate to a seawall on an otherwise unimproved lot. There was no combination of homes and lots sold, and this Court acknowledged as much in its opinion. As such, the *Conklin* case is not directly on point despite Petitioners reliance on it. In addition to *Conklin*, Petitioners rely on *Port Sewell Harbor and Tennis Club Owner's Association, Inc. v. First Federal Savings and Loan Ass'n of Martin County*, 463 So. 2d 530 (Fla. 4th DCA 1985). However, the facts of the *Port Sewell* case must be closely examined as it is a lender liability case.

In *Port Sewell*, the homeowners' association sued First Federal, who as the court noted "was simply a mortgage lender when this project began in 1972-73." *Port Sewell*, 463 So. 2d at 531. Further, the "developer built the roads and drainage complained of; First Federal had nothing to do with their construction." *Id*. Further, the "improvements were unattended and not maintained for several years before the development began to grow." *Id*. at 531-32. First Federal took over a troubled project that it did not originally develop or construct. These facts are much different than what exists here. As set forth in their own brief, Petitioner, Maronda Homes undertook the development of this property from the beginning and retained T. D. Thompson Construction Company to perform the site improvements.

Also, there is a significant issue as to what First Federal was selling in the *Port Sewell* case. The opinion first states that, "First Federal completed the development and attempted to sell the lots." *Id*. at 530 (*emphasis added*). The court notes later that, "when First Federal took over the property and sought to dispose of the lots it did not become liable for every delict [sic] or breach of contract committed by the original developer." *Id*. at 532 (*emphasis added).* There is no reference in the opinion to anything being sold by First Federal other than lots. There is no reference to First Federal selling homes or packages of homes and lots. Based on the facts, First Federal sold lots in a subdivision in

which the defective improvements had already been completed when it took over the project and no implied warranty was created as First Federal did not create any of the defects. These facts are inconsistent with the facts in the case presented to this Court in this case. Maronda was the developer and sold homes on lots in a community as part of an overall package. As such the *Port Sewell* holding, based upon lender liability, is clearly distinguishable and not on point here.

E. Public Policy favors the application of *Gable v. Silver*

In addition to the public policy arguments raised in *Gable* and restated in *Conklin* abandoning *caveat emptor*, there remain practical public policy reasons for the application of common law implied warranties to the common areas. Homeowners' associations under Chapter 720, Florida Statutes, the responsibility for maintenance and operation of the common areas fall onto the Association. However, by definition the Association is made up of the parcel owners who form its membership:

> Homeowners' association" or "association" means a Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.

Section 720.301(10), Fla. Stat. (2009).

Under existing law a developer: (1) creates a community; (2) creates the corporate association for operation of that community; (3) controls that corporate association; (4) ensures that all who purchase homes from him are mandatory members of that corporate association; (5) the Association is deeded certain common areas, including but not limited to roadways, underground plumbing, retention ponds and drainage; and (6) at some point turns over control of that corporate association. In this scenario, it is manifestly unjust to allow the common areas for which the owners, through the corporate association, are ultimately responsible to have no protections whatsoever in the form of a common law implied warranties of fitness and merchantability.

To allow otherwise would result in owners receiving defective common areas that they must endeavor to keep in good repair, as that is the charter of the corporate association, and by definition the owners are mandatorily required to be part of the Association and must pay assessments to keep such property in good repair lest their parcels be adversely affected by the imposition of a lien. The parcel owners are ultimately the parties who suffer from defective common areas.

A common law implied warranty as to the common area improvements in this case would be following the same analysis used by this Court in *Gable* in extinguishing *caveat emptor*.

II. This Court Can Determine The Scope Of A Common Law Implied Warranty And Is Not Bound By Legislative Action Or Inaction

Petitioners argue that the legislature has not acted to create implied warranties so this court is not allowed to define or create such warranties. Petitioner points to the "unique context" this Court was in when it first decided *Gable v. Silver*. CALL disagrees.

Neither Respondents, nor CALL, are asking for this Court to create statutory warranties or rewrite any portion of Chapter 720, Florida Statutes. Nor is this Court being asked to read something into Chapter 720 that does not exist. Rather, this Court is being asked to follow the *Gable* reasoning pertaining to common law implied warranties to the common areas at issue here. Such implied warranties, by definition, are those that arise and exist under the case law and are not statutory. This Court may review whether the legislature considered and rejected a statutory warranty, but this analysis does not bind this Court to follow the legislature.

This Court's decision in *Gable* was issued in 1972 and created an implied warranty of fitness and merchantability under the common law and set aside centuries of common law which had favored *caveat emptor*. Subsequently, in 1976, the legislature created section 718.203, Florida Statutes, to provide for implied statutory warranties of fitness and merchantability. Clearly, this Court has the ability to apply the doctrine of *Gable* to the common areas here without action

by the Legislature as the common law implied warranties exist separate from any statutory implied warranty.

III. No Additional Difficulties Would Be Added to Judicial Administration

The Amicus Brief filed by the Florida Home Builders Association ("FHBA") and the National Association of Home Builders ("NAHB") restates many of the arguments made by Petitioners. However, one additional argument made is the alleged difficulty in judicial administration presented by common law implied warranties in the homeowners association context. CALL believes that no such difficulty exists as the judges and juries in this state already deal with incredibly complex cases including those in construction settings. Specifically, implied warranties of fitness and merchantability exist in both the common law and statutory context for condominium associations and the judges and juries of this state are able to handle those cases. It is simply not an issue, and to argue that these types of cases are just too complex is without merit.

IV. The Association Is A Proper Representative Of The Unit Owners

There are suggestions in both Petitioner Maronda's brief and the FHBA and NAHB amicus that the individual owners are not actually in front of this court. This position overlooks Florida Rule of Civil Procedure 1.221 which provides in pertinent part:

> A homeowners' or condominium association, after control of such association is obtained by homeowners or unit owners other than the developer, may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all association members concerning matters of common interest to the members, including, but not limited to: (1) the common property, area, or elements; . . .

Similarly Section 720.303(1), Fla. Stat. (2009) provides:

> After control of the association is obtained by members other than the developer, the association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all members concerning matters of common interest to the members, including, but not limited to, the common areas; roof or structural components of a building, or other improvements for which the association is responsible; mechanical, electrical, or plumbing elements serving an improvement or building for which the association is responsible; representations of the developer pertaining to any existing or proposed commonly used facility; and protesting ad valorem taxes on commonly used facilities.

The rule and statute specifically provide that a homeowners' association can bring an action, on behalf of all Association members for common property or common areas. The members of the Association are the parcel owners themselves and are in front of this court, but through the vehicle of the Lakeview Reserve Homeowners' Association.[2]

[2] As both the rule and statute make clear a unit owner also has the right to bring their own claim.

CONCLUSION

CALL respectfully requests this court to apply the common law implied warranties of fitness and merchantability to the roadways, retention ponds, underground pipes, and drainage work undertaken by Maronda Homes and find that these improvements are part and parcel of the sale of residential dwellings in Florida and that such an application is not in derogation of the common law rights set forth in *Gable* but the logical following given the increased complexities in the design, construction, marketing and sale of residential dwellings.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of August, 2011, a true and correct copy of the foregoing has been sent via First Class U.S. Mail to the following:

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CERTIFICATE OF FONT COMPLIANCE

The undersigned certifies that this Motion has been printed in Times New Roman 14 – point font, pursuant to Florida Rule of Appellate Procedure 9.210(a).

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