IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

vs.

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

Respondent.

Case Nos. SC10-2292 & SC10-2336

L.T. Case Nos. 5D09-1146 07-CA-1762

ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

INITIAL MERITS BRIEF OF PETITIONER MARONDA HOMES, INC. OF FLORIDA

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INTRODUCTION

Does the warranty of habitability implied in the sale of a new home, extend to the common areas of a subdivision, such as drainage systems and roadways? Nearly 30 years ago this Court answered a very similar question in the negative, holding that the implied warranty does not extend to a seawall on the home site. *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983). *Conklin* held that the implied warranty extended to only the home and essential structures immediately and directly supporting the home such as wells and septic tanks, but not to other structures on the property.

Despite *Conklin's* clear holding, the Fifth District below extended the implied warranty to drainage systems and roadways in direct conflict with *Conklin* and a decision of the Fourth District, *Port Sewall Harbor & Tennis Club Owners Ass'n v. First Fed. Sav. & Loan Ass'n.*, 463 So. 2d 530 (Fla. 4th DCA 1985). This Court has granted discretionary review to resolve that conflict.

In this brief, filed on behalf of petitioner, Maronda Homes, Inc. of Florida ("Maronda"), the developer of the subdivision in this case, we demonstrate that the Fifth District's decision was error and should be quashed. As a threshold matter, the Fifth District was improperly legislating on matters already subject to extensive regulation. Although the Florida Legislature has extended implied warranties to common elements in a condominium project, it has chosen not to extend such

warranties to common elements of a subdivision. The Respondent, Lakeview Reserve Homeowners Association, Inc. (the "Association") now seeks to second guess that policy choice. The Association's request to extend such warranties to common elements should be addressed to the Legislature, not the courts.

Moreover, even if this Court were inclined to revisit the decisions of the Florida Supreme Court and the Legislature, the Association's policy arguments are unavailing. A homeowners' association, like the Association here, is not without remedy for negligent construction. Florida law is clear, however, that the proper remedy is not an implied warranty of habitability. Indeed, this case has nothing to do with damage to anyone's home. If it did, the homeowners themselves would have their own remedies, possibly including an implied warranty. The Association, however, has no right to claim the benefit of implied warranties designed for the limited purpose of protecting the homeowner from damage to his or her home.

The Fifth District's decision should be quashed.

STATEMENT OF THE CASE AND FACTS

The relevant facts are undisputed and can be stated briefly. Maronda was the developer of the Lakeview Reserve subdivision in Winter Garden, Florida ("Lakeview"). Maronda hired T.D. Thomson Construction Company ("Thomson") to perform the site development work at Lakeview, including roadways, retention ponds, drainage systems and site drainage. Maronda constructed most of the homes in the subdivision (R1 11; R2 196-98, 200, 287, 314).

The common areas in the subdivision are owned by the Association, by a quit claim deed from Maronda in 2001 (R2 315, 333-34). In 2006, the Association served notice of a claim on Maronda alleging defects in the common property at Lakeview including roadways, retention ponds, and drainage systems. The notice of claim did not suggest that any individual homes had been damaged by the alleged defects in the common property (R2 257-58).

The Association followed up its claim by filing a two-count complaint against Maronda (R1 1-50). Maronda, in turn, filed its third party complaint against Thomson (R2 184-258). Relevant to this appeal is Count II of the Association's complaint alleging a breach of implied warranty of fitness and

merchantability or habitability.[1] Count I, alleging a building code violation, was disposed of on summary judgment, and the Association has not challenged that order on appeal (R1 182-83).[2]

Summary Judgment Below

After some procedural skirmishing not relevant here, the parties filed cross motions for summary judgment on the implied warranty claim (R2 303-10; 311-34; R3 426-30). Maronda and Thomson argued that implied warranties did not extend to a claim by a homeowners' association concerning damages to roads and drainage or other improvements not immediately supporting the residences (R2 303-10; 311-34). The Association followed with a summary judgment motion of its own in which it asked the court to rule as a matter of law that the Association could bring an implied warranty claim concerning alleged defects in common areas (R3 426-30; 437-56).

The trial court granted summary judgment to Maronda and Thomson and denied the Association's motion for summary judgment (R5 844-46). The trial court ruled that the Association's claims were foreclosed by *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983) and *Port Sewall Harbor & Tennis Club Owners Ass'n v.*

[1] Courts use the terms "merchantability" and "habitability" interchangeably in this context. *See Conklin v. Hurley*, 428 So. 2d at 656. We refer to the warranty in this brief as the warranty of habitability.

[2] After the dismissal of Count I, the Association filed an amended single-count complaint focusing solely on the implied warranty of habitability (R2 284-91).

First Fed. Sav. & Loan Ass'n., 463 So. 2d 530 (Fla. 4th DCA 1985) (R5 844-46). The Association's timely appeal followed (R5 962-66).

SUMMARY OF THE ARGUMENT

The arguments raised by the Association have already been rejected by this Court, which has held that the implied warranty of habitability applies only to the sale of the home itself and structures immediately supporting the home such as a well or septic tank. Following this Court's lead, the Fourth District specifically held that a homeowners' association has no cause of action for implied warranties concerning roads and drainage in the common areas of a subdivision.

The test adopted by *Conklin v. Hurley*, and followed by *Port Sewall* is easy to apply and makes perfect sense. The implied warranty of habitability ends at the front door. If the purported subject of the implied warranty does not immediately support the home, no implied warranty applies. By contrast, the test adopted by the Fifth District, examining whether the common element is "essential," is unworkable and will lead to much litigation. Why is a road that is allegedly damaged (but not impassable) "essential" to the home?

Significantly, this Court does not write on a clean slate. The Legislature has already considered the issue of implied warranties and common elements. In Chapter 718, the Legislature extended implied warranties to common elements of a

condominium, but specifically declined to add a similar implied warranty to Chapter 720, regulating subdivisions. This Court should not second guess this policy choice. Moreover, that policy choice is sound. In a condominium, the common areas are owned by the homeowners, and, for the most part, those common areas directly support the residence. This is in sharp contrast to the common areas of a subdivision which are not owned by the homeowners and do not directly support the home.

In this case, there is no evidence that any of the alleged defects in the common areas have caused damages to any home. Nor is there any evidence that any homeowner has been damaged. The decision below, which departs from *Conklin v. Hurley*, and substitutes its policy choices for those of the Legislature, should be quashed.

STANDARD OF REVIEW

The trial court's ruling on summary judgment is reviewed *de novo*, *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126, 130 (Fla. 2000), as is the question of law concerning the scope of the implied warranty in this case. *State v. Glatzmayer*, 789 So. 2d 297, 301 n.7 (Fla. 2001) (questions of law subject to *de novo* review).

ARGUMENT

I. Implied Warranties of Fitness Do Not Extend to Common Areas of a Subdivision.

A. Florida Courts have Correctly Rejected the Association's Argument.

This is not the first time this issue has been before this Court. Nearly 30 years ago, this Court rejected a similar attempt to extend the implied warranty of habitability beyond the home. In *Conklin v. Hurley*, 428 So. 2d 654, 658-59 (Fla. 1983), the Florida Supreme Court held that implied warranties do not extend to first purchasers of residential real estate beyond the home and improvements such as septic tanks and wells immediately supporting the home. Even the dissent, which would have attached a warranty to the seawall, would not have extended the warranty past the home to common areas such as roadways and landscaping. *Conklin* was correct.

At issue in *Conklin* was a defective seawall supporting a residential lot; the question was whether the lot owner could sue for implied warranties of fitness or habitability. The owner relied on a decision by the Fourth District Court of Appeal, adopted by the Florida Supreme Court, in which Florida joined a growing list of states that accorded implied warranties of fitness and habitability to the purchaser of a residential home. *Gable v. Silver*, 258 So. 2d 11 (Fla. 4th DCA), *aff'd*, 264 So. 2d 418 (Fla. 1972).

The owner in *Conklin*, like the Association here, argued that the implied warranty for the sale of a residential home should apply to improvements on a residential lot, such as the seawall at issue in *Conklin*. The Florida Supreme Court disagreed. Noting that the implied warranty it had previously approved in *Gable* applied to the purchase of a home, the Court held that structures such as seawalls and other lot improvements that did not immediately support the home were not covered. *Conklin*, 428 So. 2d at 657-58. The Court noted that the public policy reasons supporting the implied warranty were the complexity of a modern house and the desire to protect a homeowner's most important investment. Yet, even these considerations did not persuade this Court to extend the warranty to other improvements that did not immediately support the home. *Id*.

As to other improvements not immediately supporting the home, such as a seawall, the Court declined to intrude on the bargain between the buyer and seller. Beyond the home and its immediate supporting structures, the owner is left with other remedies such as express warranties, negligence, or statutory warranties when available, but the Court refused to imply a warranty not negotiated by the parties. *Id*. at 659.

Conklin was decided over vigorous dissent by Justice Adkins (joined by Justice Alderman) who made many of the same arguments that the Association makes here in an effort to expand the warranty. Justice Adkins noted the

importance of the lot purchase, its link to the home, and the possibility that in the future, the integrity of the structure could be impacted by the failure of the seawall. In other words, Justice Adkins saw no reason to treat the surrounding lot and its improvements any differently from the home. *Id*. at 660-61 (Adkins, J. dissenting). These arguments were considered and rejected by the majority opinion.

Of course, the Association's argument is even more difficult than the owner's unsuccessful argument in *Conklin*. The Association is not a homeowner; thus, all of the public policy concerns that Justice Adkins raised simply do not apply in this case. Moreover, the improvements at issue in *Conklin* were on the homeowner's lot, not separate common areas, and still the implied warranty did not apply. In the Lakeview Reserve subdivision here, as in any other subdivision, the Association, not the homeowners, owns the common areas such as roads and drainage facilities. Indeed, even Justice Adkins recognized that his much more broadly conceived implied warranty remedy would not apply to common areas such as landscaping, roads, and fences.[3] *Id.* at 661.

[3] The Association claims that *Conklin* should be disregarded because it concerned investment property. Although the fact that the lots were purchased for investment was a factor considered by this Court, there is nothing in the opinion to suggest that the case would have been any different had the original lot purchaser been in residence on the property. The focus of the Court is the protection of the residence and the homeowner's significant investment in the residence. A seawall was simply too disconnected from the residence. *Conklin*, 428 So. 2d at 657-59.

In short, *Conklin* closes the door to the Association's argument here – a fact that the Fourth District recognized in *Port Sewall Harbor and Tennis Club Owners Ass'n v. First Fed. Sav. and Loan, Ass'n*, 463 So. 2d 530 (Fla. 4th 1985). *Port Sewall* could hardly be more on point. In that case, the association sued for defects in the construction of roads and drainage in a subdivision and asked the court to expand the implied warranty of fitness to the homeowners' association. Analyzing and applying *Conklin*, the Fourth District held that the implied warranty could not extend to improvements not supporting the residence: "the defective work complained of involved roads and drainage in the subdivision and did not pertain to the construction of homes or other improvements immediately supporting the residences. That is the extent of the application of implied warranties to first purchasers of residential real estate in Florida." *Id*. at 531. *Port Sewall* declined to go further than this Court had already declined to go, despite "strong urging" to the contrary. *Id*.

The two cases relied on by the Association below lend no support to its attempt to expand Florida law. In *Lochrane Engineering, Inc. v. Willingham Realgrowth*, 552 So. 2d 228 (Fla. 5th DCA 1989), the Fifth District addressed a homeowner's claim for defective and inadequate septic tanks. But such a claim is firmly within *Conklin* because septic tanks immediately support a residence, as this Court in *Conklin* specifically observed.

The Association's other case, *Strathmore Gate-East v. Levitt Homes, Inc*., 537 So. 2d 657 (Fla. 2d DCA 1989), is equally unhelpful to its cause. In *Strathmore*, the trial court granted a motion to dismiss the claims of an association suing for defects in the common areas. The Second District reversed, holding that the association may have a cause of action. The problem is, the court did not suggest what that cause of action would be and certainly did not provide an implied warranty claim. *Conklin* and *Port Sewall* had already recognized that other remedies, such as negligence, might be available. There is no hint in *Strathmore* that the Second District was extending implied warranties in a way already rejected by the Florida Supreme Court in *Conklin*.

Outside of Florida, virtually every state now recognizes either a common law or statutory implied warranty of habitability. Many of these decisions, like *Conklin v. Hurley*, make clear that the warranty is to protect the *habitability* of the home. Virtually all of the cases hold that the implied warranty applies to the "home" and use the terms "habitability," or "fit for habitation" strongly implying that the warranty relates to the livability of the "home" or "dwelling."[4] Similarly,

[4] Alabama: *Cochran v. Keeton*, 252 So. 2d 313, 314 (Ala. 1971); Arizona: *Columbia W. Corp. v. Vela*, 592 P.2d 1294, 1295 (Ariz. Ct. App. 1979); Colorado: *Carpenter v. Donohoe*, 388 P.2d 399, 402 (Colo. 1964); Idaho: *Tusch Enterprises v. Coffin*, 740 P.2d 1022, 1034 (Idaho 1987); Indiana: *Jordan v. Talaga*, 532 N.E. 2d 1174, 1177 (Ind. Ct. App. 1989); Iowa: *Kirk v. Ridgway*, 373 N.W. 2d 491, 496 (Iowa 1985); Kentucky: *Hardesty v. Scot-Bilt Homes, Inc*., 2008-CA-000564-MR, 2010 WL 743740 (Ky. Ct. App. Mar. 5, 2010), review denied (May 11, 2011);

the concern in these cases is damage to the *home*, even if the case concerns a supporting structure like a well or septic tank.[5]

A few courts, like *Conklin v. Hurley*, have either rejected the extension of implied warranties to common areas, or have defined the limits of the warranty. For example, the Missouri Court of Appeals specifically has held that the implied warranty does not extend to private roads in a subdivision. *San Luis Trails Ass'n v.*

Maine: *Banville v. Huckins*, 407 A.2d 294, 297 (Me. 1979); Massachusetts: *Albrecht v. Clifford*, 767 N.E. 2d 42, 46 (Mass. 2002); Missouri: *Smith v. Old Warson Dev. Co.*, 479 S.W. 2d 795 (Mo. 1972); *Hershewe v. Perkins*, 102 S.W. 3d 73, 76 (Mo. Ct. App. 2003); *San Luis Trails Ass'n v. E.M. Harris Bldg. Co.*, 706 S.W. 2d 65 (Mo. Ct. App. 1986); Montana: *Chandler v. Madsen*, 642 P.2d 1028, 1032 (Mont. 1982); New Hampshire: *Norton v. Burleaud*, 342 A.2d 629, 630 (N.H. 1975); New York: *De Roche v. Dame*, 75 A.D. 2d 384, 387 (N.Y. App. Div. 1980); North Carolina: *Burek v. Mancuso*, 657 S.E. 2d 446 (N.C. Ct. App. 2008); Oklahoma: *Jeanguneat v. Jackie Hames Const. Co*., 576 P.2d 761, 765 (Okla. 1978); Oregon: *Yepsen v. Burgess*, 525 P.2d 1019, 1022 (Or. 1974); Pennsylvania: *Elderkin v. Gaster*, 288 A.2d 771, 776 (Pa. 1972); Rhode Island: *Padula v. J.J. Deb-Cin Homes, Inc.*, 298 A.2d 529, 531 (R.I. 1973); South Carolina: *Rutledge v. Dodenhoff*, 175 S.E. 2d 792, 795 (S.C. 1970); South Dakota: *Waggoner v. Midwestern Development, Inc*., 154 N.W. 2d 803, 809 (S.D. 1967); Tennessee: *Cloud Nine, LLC v. Whaley*, 650 F. Supp. 2d 789, 795-96 (E.D. Tenn. 2009); Texas: *Hollen v. Leadership Homes, Inc*., 502 S.W. 2d 837, 839 (Tex. Civ. App. 1973); Utah: *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 221 P.3d 234, 252 (Utah 2009); Washington: *Stuart v. Coldwell Banker Commercial Group, Inc*., 745 P.2d 1284, 1285 (Wash. 1987); West Virginia: *Gamble v. Main*, 300 S.E. 2d 110, 114 (W. Va. 1983); Wyoming: *Tavares v. Horstman*, 542 P.2d 1275, 1282 (Wyo. 1975).

[5] *See Lehmann v. Arnold*, 484 N.E. 2d 473 (Ill. App. Ct. 1985) (flooding problems); *Jordan v. Talaga*, 532 N.E. 2d 1174 (Ind. Ct. App. 1989) (same); *George v. Veach*, 313 S.E. 2d 920 (N.C. Ct. App. 1984) (faulty septic system); *Kramp v. Showcase Builders*, 422 N.E. 2d 958 (Ill. App. Ct. 1981) (septic system); *Loch Hill Constr. Co. v. Fricke*, 399 A.2d 883 (Md. 1979) (well); *Lyon v. Ward*, 221 S.E. 2d 727 (N.C. Ct. App. 1976) (well); *McDonald v. Mianecki*, 398 A.2d 1283 (N.J. 1979) (lack of a drinkable water supply).

E.M. Harris Bldg. Co., 706 S.W. 2d 65 (Mo. Ct. App. 1986). The Illinois Supreme Court refused to apply the implied warranty to a clubhouse. *Board of Directors of Bloomfield Recreation Ass'n v. Hoffman Group, Inc*., 712 N.E. 2d 330 (Ill. 1999). The Montana Supreme Court noted that the question is whether the defect relates to a structure that is essential to human occupancy. *Chandler v. Madsen*, 642 P.2d 1028, 1032 (Mont. 1982) (citing to cases dealing with water wells and septic tanks). The Washington Supreme Court held that the warranty was limited to defects that rendered a home uninhabitable and did not extend to "exterior nonstructural elements adjacent to the dwelling unit." *Stuart v. Coldwell Banker Commercial Group, Inc*., 745 P.2d 1284 (Wash. 1987). *See also Campbell v. Randville Constr. Corp.*, 410 A.2d 1184 (N.J. Super. App. Div. 1980) (rejecting extension of implied warranties to the death of trees).

Our research discloses no appellate decision extending the warranty to roads and only one appellate level decision arguably extending the implied warranty to improper drainage systems in common areas. *Briarcliffe W. Townhouse Owners Ass'n v. Wiseman Const. Co*., 480 N.E. 2d 833 (Ill. Ct. App. 1985). This decision, however, conflicts with a later Illinois Supreme Court decision declining to extend the warranty to a detached clubhouse. *Board of Directors of Bloomfield*, 712 N.E. 2d 330. Moreover, unlike this case, it appears that the drainage problems in the *Briarcliffe* common area were impacting homes in the development. In discussing

the extent of the implied warranty, the court held that the scope of the implied warranty is "limited to latent defects which interfere with the purchaser's legitimate expectation that the house he is buying will be reasonably suited for a residence." *Briarcliffe*, 480 N.E. 2d at 835. The court then determined that there was sufficient evidence in the trial record to support the existence of the implied warranty, without specifically identifying the connection to any home. *Id*. at 837.

As this survey demonstrates, *Conklin* remains firmly within a near unanimous universe of cases limiting any implied warranty to actual damage to a home and its immediate supporting structures. The decision below gives no basis for extending the warranty in a way that is inconsistent with this overwhelming precedent.

B. The Public Policies Supporting *Gable v. Silver* Do Not Apply Here.

The hesitancy of courts, both in and out of Florida, to imply additional warranties is wise. First, as noted in the next section below, subdivisions and homeowners' associations are heavily regulated. Far better to leave the weighing of these competing policy concerns to the Legislature.

Moreover, the public policy concerns that caused many courts to imply warranties in the sale of a home, do not apply to common areas such as roads and drainage. Much of the focus of *Gable v. Silver* and *Conklin v. Hurley* was the habitability of the home and the importance of the transaction to the typical

homeowner. *See Conklin*, 428 So. 2d at 659 (a home is often the largest investment in a lifetime, and a serious defect in the home may render a family destitute); *Gable*, 258 So. 2d at 15 (purchase of a home is far from an everyday transaction and homeowners should be protected from defects).

These concerns do not apply here. Significantly, there is no showing of damage to any home. Thus, "habitability" is not threatened. Instead, the Association sues for damage to common areas not affecting habitability. Any costs of repairs will be borne by the Association (and thus divided among all the homeowners), and there is no showing of the sort of devastating financial impact that has often been a driving concern in the extension of the implied warranty. Thus, the case is purely a matter of economics, not habitability. When simple economics are at issue, far better to leave the parties to craft their own contractual terms, including warranties.

Moreover, the absence of implied warranties does not necessarily mean that a homeowners' association is without a remedy. For whatever reason, the Association here chose to place all of its efforts into the implied warranty argument in this case, declining to pursue a remedy for negligent construction. The Association's failure to pursue other possible remedies should not drive the decision in this case. *See Conklin*, 428 So. 2d at 659 (noting the possibility that the

homeowner could pursue an action in negligence against the builders of the seawall).

Having considered the policy supporting the implied warranty of habitability, this Court specifically held that those policy considerations did not support expanding the warranty beyond the home. According to this Court: "we fail to see how the policy upon which *Gable* and its kindred were based would be furthered by application here." *Id*. at 658.

We respectfully suggest that the same reasoning applies in this case.

C. The Test Adopted by the Decision Below is Unworkable.

The Fifth District below, while acknowledging the conflict with *Port Sewall*, attempted to reconcile its decision with *Conklin* by suggesting that drainage and roadways are essential to the home within the meaning of *Conklin*. This conclusion overlooks that even the dissent conceded that roads, fences, and landscaping were not essential supporting structures and thus, not subject to the implied warranty. *Conklin*, 428 So. 2d at 661 ("I would not extend implied warranties to improvements which are not an integral part of the real estate purchase or are not supportive to the residence or proposed residence [referring to landscaping, roads, and fences].").

The Fifth District offered no explanation for its disagreement on the question of what is essential to the habitability of the home. In particular, it offered no

reasoned distinction between a seawall and a drainage system, each of which are important and each of which can potentially contribute the structural support of a home. Why is a drainage system more "essential" than a seawall?

As illustrated by *Conklin*, to be "essential," the defect must have a direct impact on the habitability of the home. The reasoning is obvious. A defect in a well or a septic tank will always have a direct impact on the residence itself and could easily be considered an extension of the residence. Similarly, a lot defect that causes a home to settle or flood has an immediate impact on the home. But a defect in road construction or drainage in the common areas of a subdivision or in a seawall will not necessarily have an impact on a residence. Thus, until the Fifth District's decision below, the implied warranty has never been extended beyond the home and its immediate supporting structures.

True, it is possible to imagine a case where a drainage defect could cause flooding to a homeowner's property and result in damage to a home. But that is not our case for at least two reasons. First, no homeowner is involved in this case. The damages sought here are damages suffered by the Association to common areas of the subdivision. The Association has no standing to seek and is not seeking damages to individual homes or lots. If a homeowner believes that defects in the common areas are causing damage to his or her residence or lot, the homeowner can sue, and the court at that time could consider what remedies might

be appropriate to that homeowner. That decision could then be made in the context of a specific claim of a specific defect by a specific homeowner as opposed to the rank speculation here that a defect in the common area might somehow result in damage to some homeowner's residence.

Second, there is no evidence, beyond the purest speculation, that any residence was or could be damaged by the road and drainage defects at issue in this case. If any homeowner has suffered such damages, that is an issue for another day in another lawsuit by another plaintiff addressing the particular damages to a home.

Simply put, the implied warranty stops at the front door. Confining the warranty to damages to a home draws a bright line, easy to apply in practice. If there is damage to the home, a homeowner can bring a lawsuit arguing the implied warranty. If not, as in this case, the parties are left to their alternative remedies.

By contrast, how does one determine when a lot or subdivision improvement is "essential" within the meaning of the opinion below? And what sort of defect qualifies? Perhaps if the only bridge into the subdivision has collapsed, a homeowner might have an argument that their home is no longer habitable, because they cannot get to it. But what about bumps in the road, or potholes, or surfacing problems? What makes such defects "essential" and subject to a warranty of habitability? In short, the Fifth District's test, far from being "elegant

in its simplicity" is instead an open invitation to litigation as parties fight over where to draw these very uncertain lines.

In short the test should remain habitability. Without an impact on the home, there is no implied warranty.

II. The Fifth District's Decision Second-Guessed the Legislature on a Matter of Florida Public Policy.

When *Gable v. Silver* first extended implied warranties to new homes, it was writing in a unique context. *Caveat emptor* had been the rule for centuries, but very quickly, a wave of decisions across the country recognized that this rule, while useful in many contexts, was inequitable when applied to the purchase of a new home. From a legal perspective, almost "overnight" a majority consensus formed as state after state adopted the implied warranty.

There has been much subsequent legislative activity. Condominiums and subdivisions are very much creatures of statute and are extensively regulated. *See* Chapter 718, Fla. Stat. (regulating condominiums) and Chapter 720, Fla. Stat. (regulating subdivisions and homeowners' associations).

In particular, the Legislature has addressed the implied warranty issue. In the condominium context, the Legislature has enacted statutory implied warranties that extend to the common elements of the condominium. *See* §718.203, Fla. Stat. By contrast, the Legislature has not seen fit to adopt a statutory implied warranty either to homeowners or a homeowners' association for defects in common

elements. To the contrary, the Legislature considered and rejected a proposed amendment that would have granted an implied warranty of fitness as to common areas of a subdivision. *See* Senate Bill 2984 (2004) ("SB 2984"); House Bill 1987 (2004) ("HB 1987").

SB 2984 and similar HB 1987, as originally drafted, proposed a new Florida Statute, Section 720.501, which would have provided an implied warranty on common areas in a subdivision. SB 2984 at pp. 38-40; Apr. 8, 2004 Staff Analysis at pp. 16-17; HB 1987 at pp. 44-45. However, the Committee Substitute for SB 2984 "delete[d] language [in CS/SB 2984] providing that a developer shall be deemed to have granted to a homeowners' association an implied warranty of fitness and merchantability for a specified period." SB 2984C2 at p. 46; *see also* Fla. Sen. Comm. on Comprehensive Planning and Regulated Industries, CS/SB 2984 (2004) Staff Analysis and Economic Impact Statement (Apr. 17, 2004).

Thus, the Legislature has specifically considered whether an implied warranty should apply to subdivision common areas and has determined not to extend the implied warranty beyond the home. In effect, the Association asks this Court to overrule this legislative policy choice. No doubt, as is evident from the Fifth District's opinion below, there are public policy arguments to be made on both sides of the issue (A. 8-13). Indeed, the Fifth District spent much of its opinion weighing those issues before disagreeing with *Port Sewall.* Maronda

disagrees with the way the court below dismantled this public policy balance. Important for our purposes, however, is the fact that the court should not have engaged in this balancing at all, once the Legislature made its decision. *See State v. DiGuilio*, 491 So. 2d 1129, 1137 (Fla. 1986).

This Court's *DiGuilio* decision articulates the point nicely, emphasizing that policy choices are for the Legislature, when the Legislature has entered the field:

> This Court is not the forum for a debate on wise public policy. The responsible branch of government has already established the public policy through section 924.33 that appellate courts will not reverse trial court judgments unless it is determined on the record that harmful error has occurred.

Id. at 1137. *See Media Gen. Operation, Inc. v. Feeney*, 849 So. 2d 3, 6-7 (Fla. 1st DCA 2003) ("Although we agree with the House that the disclosure of these telephone numbers may result in unreasonable consequences to the persons called, this argument should be made to the Florida Legislature . . . .").[6]

In sum, the citizens of Florida, speaking through their representatives, have already weighed the public policy concerns at issue and struck the balance against extending the implied warranties beyond the home to the common areas of a

[6] *See also Kush v. Lloyd*, 616 So. 2d 415, 419-20 (Fla. 1992) ("Whether public policy supports such a distinction is a matter for the legislature, not this court, to determine."); *Cont'l Cas. Co. v. Ryan Inc*., 974 So. 2d 368, 394 (Fla. 2007) (if there is an injustice, the argument is "best addressed by the Legislature."); *Parker v. Parker*, 950 So. 2d 388, 394 (Fla. 2007); *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574, 579-80 (Fla. 1st DCA 2007) (Polston, J. concurring in part, dissenting in part) ("[I]t is the Florida Legislature, rather than the court, who must decide Florida's public policy on this issue.").

subdivision. This policy decision should be made by the Legislature, not the courts, particularly when subdivisions and condominiums are largely creatures of statute in the first place. The court below erred by second guessing the Legislature's resolution of this question.

Even if this Court were inclined to reconsider the Legislature's resolution of the issue, the legislative policy choice -- to extend the implied warranty to common areas in condominiums but not to common areas in the subdivision context -- makes sense. Common elements in a condominium unit are actually owned by the homeowners -- each homeowner owns an undivided share of the common elements. Section 718.103(13), Fla. Stat. Thus, to the extent that the expansion of the implied warranty is based on the desire to protect the homeowner and the homeowner's residence, that interest is much stronger in the condominium context where the homeowner actually owns the common elements. Moreover, in a condominium, the common elements are far more likely to directly support the home. They might include the roof, common walls, common hallways, air conditioning and heating, and other common elements that directly support the home. Extending the implied warranty to such common elements is squarely within the existing holding of *Conklin v. Hurley* because all of these elements directly support the home.

Simply put, in the condominium context there is a much stronger connection between defects in a common element and the protection of a homeowner's investment in his or her residence, because these common elements are generally attached to or are a part of the residence and are owned by the homeowners.

In short, the purpose of the implied warranty is the protection of a *home*. Over and over in the cases, the courts refer to the fact that a home is the largest investment many of us make in our lifetimes. It would be a hard court indeed, in these modern times, to leave a homeowner potentially without a remedy for damages to his or her residence.

But this is not the only important principle in play here. Courts are also loathe to imply warranties not negotiated by the parties themselves. Courts are also hesitant to second guess the legislative branch when the people's representatives have already declined to provide the very remedy that the plaintiff then asks the court to imply. Thus, courts have been careful to limit the implied warranty to its original intent -- the protection of homeowners from damages to their home.

This case has nothing to do with protection to a homeowner. No homeowner has brought suit here. This case also has nothing to do with the protection of a home. No homeowner has claimed damages to his or her residence. Indeed, this case has nothing to do with leaving the Association without a remedy.

The only question before this Court is whether an implied warranty exists as to common areas of the subdivision. The Association chose not to seek other remedies such as negligence or fraud.

As *Gable*, *Conklin* and *Port Sewall* have already observed, the focus must be on the homeowner and the residence in examining whether implied warranties apply. Since this case concerns neither the homeowner nor any residence, the answer is easy. If the plaintiffs are to obtain a novel expansion of those principles, that attempt should be directed to the Legislature, not this Court.

CONCLUSION

For all the foregoing reasons, the summary judgment below should be affirmed.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail to Robyn Severs Braun and Patrick D. Howell, Taylor & Carls, P.A., 150 N. Westmonte Drive, Altamonte Springs, Florida 32714, Stephen W. Pickert, Moye, O'Brien, O'Rourke, Pickert & Martin, LLP, 800 South Orlando Avenue, Maitland, Florida 32751, and Neal Hiler, pro se, Neal Hiler Engineering Inc., 2412 Shortleaf Court, Orlando, Florida 32818, this _____ day of June 2011.

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