IN THE SUPREME COURT OF FLORIDA

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

Petitioners, **Case No. SC10-2292**

vs.

LAKEVIEW RESERVE HOMEOWNERS ASSOCIATION, INC.,

Respondent.
_____/

PETITIONER'S JURISDICTIONAL BRIEF

_____

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

_____

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STATEMENT OF THE CASE AND FACTS

Petitioner, T.D. Thomson Construction Company ("Thomson"), pursuant to Fla. R. App. P. 9.120(d), files this brief in support of its notice invoking the Court's certified conflict jurisdiction under Article V, § 3(b)(4) of the Florida Constitution and Fla. R. App. P. 9.030(a)(2)(A)(vi), and states as follows.

Petitioner Maronda Homes, Inc. of Florida ("Maronda") was the developer of Lakeview Reserve, a residential subdivision in Orange County, Florida. Op. 2. Maronda's development of the subdivision included the construction of roadways and a stormwater drainage system. *Id.* Maronda subcontracted with Thomson to construct this site work under its direction at Lakeview Reserve. *Id.* Maronda created the Lakeview Reserve Homeowners Association, Inc. (the "Association") and ultimately transferred ownership of the roads and drainage system to the Respondent Association. *Id.*

The Association filed a complaint against Maronda for breach of implied warranties of fitness and merchantability (also referred to as a warranty of habitability), claiming that the common areas of Lakeview Reserve, specifically its roadways, retention ponds, and underground stormwater pipes, were defectively constructed (Op. 2-3) which allegedly caused cracking in certain areas of the aging asphalt roads and depressions in certain lots. Maronda then filed a third-party complaint against Thomson. Op. 2.

Maronda and Thomson filed motions for summary judgment "[a]rguing that the common law implied warranties of fitness and merchantability do not extend to the construction and design of private roadways, drainage systems, retention ponds and underground pipes, or any other common areas in a subdivision, because these structures do not immediately support the residence." Op. 3. The trial court, relying on this Court's decision in *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983), and the Fourth District Court of Appeal's decision in *Port Sewall Harbor & Tennis Club Owners Ass'n, Inc. v. First Fed. Sav. and Loan Ass'n of Martin County*, 463 So. 2d 530 (Fla. 4th DCA 1985), agreed and entered summary judgment against the Association. *Id.*

The Association appealed, and the Fifth District reversed the trial court's grant of summary judgment holding that there was a common law warranty of habitability as to the construction of the common areas at issue (even though these areas were not owned by the homeowners themselves). Op. 2, 3, 13. The Fifth District, however, recognized that it reached the opposite conclusion than the Fourth District in *Port Sewall* on the same point of law based on essentially the same facts and certified the conflict.

> Although we are constrained by the holding in *Conklin*, it is our opinion that the facts of the instant case are distinguishable from the facts in *Conklin*. **We, nevertheless, reach a different conclusion than our sister court in *Port Sewall*, which applied the holding in *Conklin* to a similar set of facts as presented here. We, therefore, certify conflict with the Fourth District Court of Appeal.**

Op. 3 (emphasis added).

In its opinion, the Fifth District specifically addressed this Court's controlling holding in *Conklin* that "implied warranties of fitness and merchantability do not extend to first purchasers of residential real estate for improvements to land other than the construction of a home and other improvements '***immediately supporting*** the residence thereon, such as water wells and septic tanks.'" Op. 6-7 (quoting *Conklin*, 428 So. 2d at 655 (emphasis added)). The Fifth District noted that in *Port Sewall*:

> a homeowners association brought suit on behalf of the individual homeowners, based on breach of implied warranties of fitness and merchantability, to recover for defects in the construction of certain roads and drainage area in the community. *Port Sewall*, 463 So. 2d at 530. The trial court entered a directed verdict in favor of the defendant, based on *Conklin*, and the Fourth District affirmed, stating:
>
> > The foot bridge in question and **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.

Op. 9-10 (emphasis added). The Fifth District, however, "disagreed[d] with the Fourth District's conclusion that roads and drainage in a subdivision do not immediately support the residences." Op. 10.

The Fifth District stated that the phrase "immediately support the residence" in *Conklin* was ambiguous. *Id.* In addition to meaning "something that bears or holds up a structure," the Fifth District found "that the phrase also refers to essential services . . . ." *Id.* It then concluded that the common areas at issue, that is, roads, drainage systems, retention ponds and underground pipes, "are all essential services" subject to implied warranties. *Id.* Actual ownership of the roads and stormwater drainage system or the location of same (whether on the homeowners lot or not) did not seem to factor into the Fifth District's opinion.

The Fifth District also stated that it had created a new test as to whether an improvement immediately supports a residence in the form of an "essential service" and is therefore covered by implied warranties.

> Thus we announce a test that is elegant in its simplicity: in the absence of the service, is the home inhabitable, that is, is it an improvement providing a service essential to the habitability of the home? If it is, then implied warranties apply. Stated another way, we expressly hold that implied warranties of fitness for a particular purpose, habitability, and merchantability apply to structures in common areas of a subdivision that immediately support the residence **in the form of essential services**.

Op. 11 (emphasis added). The Fifth District again acknowledged that "**[b]ecause the Fourth District reached a contrary conclusion in *Port Sewall*, we certify conflict with that opinion**." Op. 11-12 (emphasis added).

SUMMARY OF THE ARGUMENT

This Court has jurisdiction because the Fifth District expressly certified that

its decision directly conflicts with a decision of the Fourth District. The Court should exercise its discretionary jurisdiction to resolve the conflict and uncertainty created by the Fifth District's decision. Review is warranted so that developers will know if common law implied warranty obligations will be imposed on them as to the construction of common areas in subdivisions such as roadways and drainage systems; and so that homebuyers and homeowners associations will know if such a remedy, in addition to others that they have, will be available to them.

This Court should also exercise its jurisdiction to review the Fifth District's examination of the "immediately support" language in this Court's decision in *Conklin*, its finding that such language is ambiguous, and its announcement of a new "essential service" definition/test as to whether an improvement immediately supports a residence.

ARGUMENT

I. THIS COURT HAS JURISDICTION BECAUSE THE FIFTH DISTRICT CERTIFIED ITS DECISION TO BE IN DIRECT CONFLICT WITH THE FOURTH DISTRICT'S DECISION IN *PORT SEWALL*

Under Article V, § 3(b)(4) of the Florida Constitution, this Court may exercise its jurisdiction to review "any decision of a district court of appeal that . . . is certified by it to be in direct conflict with a decision of another district court of appeal." Here, the Fifth District Court of Appeal certified conflict between its decision and the decision of the Fourth District Court of Appeal in *Port Sewall Harbor and Tennis*

Club Owners Ass'n v. First Fed. Sav. and Loan Ass'n of Martin County, 463 So. 2d 530 (Fla. 4th DCA 1985), in which the Fourth District rejected the application of implied warranties to roads and drainage systems in a subdivision.

In *Port Sewall*, the original developer defaulted on its mortgage and its subdivision improvements were completed by the mortgage company, First Federal. 463 So. 2d at 531. The Port Sewall Harbor and Tennis Club Homeowners Association (the "Port Sewall Association") sued First Federal for breach of implied warranties of fitness and merchantability arising out of defects in the construction of the subdivision's roads and drainage areas. *Id.* The trial court entered judgment in First Federal's favor on the basis that, under this Court's decision in *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983), no implied warranty existed for the defective work complained of by the Port Sewall Association. *Id*.

The Fourth District Court of Appeal affirmed the trial court's judgment. It explained that implied warranties of fitness and merchantability only extended to the construction of a residence and other improvements on the homeowners property immediately supporting the residence such as water wells or septic tanks (neither of which "holds up a structure") and did not apply, therefore, to the roads and drainage system of a subdivision. *Id.* The Fourth District further explained that:

> The Supreme Court of Florida completely reviewed the extent of the application of implied warranty to real property in the *Conklin* case

> and under strong urging to do so declined to further extend the theory of liability. Therefore, the trial judge was correct in his conclusion that *Conklin* precluded liability for the defects complained of on the theory of implied warranty.

Id. (emphasis added).

The Fifth District, however, disagreed with the Fourth District and, accordingly, certified its decision to be in direct conflict with the Fourth District's decision in *Port Sewall*. As a result, this Court has jurisdiction over the Fifth District's decision under Article V, § 3(b)(4) of the Florida Constitution. *See also* Fla. R. App. P. 9.030(a)(2)(A)(vi).

II. THIS COURT SHOULD EXERCISE ITS JURISDICTION TO RESOLVE THE CERTIFIED CONFLICT AND RESULTING UNCERTAINTY IN THE LAW WITH RESPECT TO THE APPLICABILITY OF IMPLIED WARRANTIES OF HABITABILITY TO THE CONSTRUCTION OF COMMON AREAS IN A SUBDIVISION SUCH AS ROADWAYS AND DRAINAGE SYSTEMS OWNED NOT BY THE HOMEOWNERS, BUT RATHER THE HOMEOWNERS ASSOCIATION

This Court should exercise its jurisdiction to resolve the certified conflict between the instant decision of the Fifth District and that of the Fourth District in *Port Sewall*. "[T]he very act of certifying conflict creates confusion or uncertainty in the law that should be resolved by the Court, a view that the Court has approved." Harry Lee Anstead et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 530 (2005) (citing *Clark v. State*, 783 So. 2d 967, 969 (Fla. 2001)). Resolution of the certified conflict in this matter

is necessary so that developers know for certain if they are subject to implied warranty claims in connection with construction of common areas of a subdivision such as roadways and drainage systems; and so that home buyers and homeowners associations know whether or not they can pursue an action for implied warranty in addition to other claims that they have (such as negligence, fraud or breach of fiduciary duty) against a developer in connection with defects in such common areas.

Exercise of jurisdiction would afford the Court an opportunity to clarify the law and to reject, consistent with its prior decision in *Conklin* and the Fourth District's decision *Port Sewall*, the Fifth District's improper expansion of implied warranties. In *Conklin*, this Court rejected the urging of the petitioners to extend the holding of *Gable v. Silver*, 258 So. 2d 11 (Fla. 4th DCA), *cert. dismissed*, 264 So. 2d 418 (Fla. 1972), to impute to a developer an implied warranty of fitness as to a collapsed seawall abutting the lots at issue. *Conklin*, 428 So. 2d at 656.[1] Here, the Court should review the Fifth District's decision which, if allowed to stand, would extend the holdings of *Gable* and *Conklin* to the construction of roadways and drainage systems in a subdivision, an extension of a magnitude previously rejected by this Court in *Conklin* and by the Fourth District in *Port Sewall*.

[1] This Court adopted as its own the decision of the Fourth District in *Gable* which recognized an implied warranty of habitability in the sale of new residences. *Gable*, 264 So. 2d at 418.

III. THIS COURT SHOULD EXERCISE ITS JURISDICTION TO ADDRESS THE FIFTH DISTRICT'S NEW "ESSENTIAL SERVICE" TEST AS TO WHETHER AN IMPROVEMENT IMMEDIATELY SUPPORTS A RESIDENCE

The Court should also exercise jurisdiction to address the Fifth District's newly announced "essential service" test for determining whether an improvement immediately supports a residence and, therefore, is covered under an implied warranty of habitability. In *Conklin*, this Court articulated the principle that an implied warranty of habitability extends to first purchasers of residential real estate only as to the construction of a residence and other improvements immediately supporting the residence, such as a water well and a septic tank, not a seawall on the property which was not part of a completed structure. *Conklin*, 428 So. 2d at 655, 658.

The Fifth District has modified this straightforward principle by pronouncing that implied warranties apply to improvements "that immediately support the residence ***in the form of essential services***." Op. 11 (emphasis added). Petitioner respectfully submits that this gloss on the Court's existent "immediately supporting a residence" test was unnecessary. The phrase "immediately supporting a residence" is not ambiguous and, as demonstrated by the Fourth District in *Port Sewall*, can readily be applied. On the other hand, the addition of the phrase "in the form of essential services" will likely lead to increased litigation in this area of implied warranties. If an aging asphalt road with some cracking, owned by others, renders a

home inhabitable, how close (or far away) must the cracks be? Do all unpaved roads now render homes inhabitable for those that access their homes via these roads? The Fifth District's "elegant test" is unworkable. How far down the road does an implied warranty of habitability actually extend?

CONCLUSION

This Court has discretionary jurisdiction to review the Fifth District's decision below in which it certified direct conflict with the Fourth District's decision in *Port Sewall*. This Court should exercise its discretion and accept jurisdiction to review the Fifth District's decision so that it can resolve the conflict and reject an unwarranted expansion and confusion of Florida law on implied warranties. This would be consistent with this Court's controlling decision in *Conklin* and the Fourth District's decision in *Port Sewall* which provide that a plaintiff, such as the Association here, does not have a cause of action for breach of an implied warranty of habitability in connection with the construction of roads and drainage systems in a subdivision, improvements which do not immediately support a residence such as a water well or septic tank on the homeowners property. The Court should also accept jurisdiction to address the Fifth District's unnecessary and problematic "essential service" test it has created in connection with the determination of whether an improvement immediately supports a residence for purposes of implied warranties.

Respectfully submitted this 1nd day of December, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 1, 2010, the foregoing has been sent by U.S. Mail to the following: Steven L. Brannock, Brannock & Humphries, 400 North Ashley Drive, Suite 1100, Tampa, Florida 33602; Scott J. Johnson, Esq./Heather Pinder Rodriguez, Esq., Holland & Knight, LLP, P.O. Box 1526, Orlando, Florida 32802-1526; Robyn S. Braun, Esq./Patrick C. Howell, Esq., Taylor & Carls, P.A., 150 N. Westmonte Drive, Altamonte Springs, Florida 32714; Thomas R. Slaten, Jr., Esq./John C. Palmerini, Esq., Larsen & Associates, P.A., 300 S. Orange Ave., Suite 1200, Orlando, Florida 32801; Nicholas A. Shannin, Esq., Page Eichenblatt, Esq., Bernbaum and Bennett, P.A., 214 East Lucerne Circle, Orlando, Florida 32801; and Keith C. Hetrick, Esq., Florida Homebuilders

Association, 201 East Park Avenue, Tallahassee, Florida 32301.

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STEPHEN W. PICKERT

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Jurisdictional Brief complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and has been submitted in Times New Roman 14-point font.

_____
STEPHEN W. PICKERT

APPENDIX

Fifth District's October 29, 2010 opinion in Case No. 5D09-1146