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

REPLY BRIEF ON THE MERITS OF PETITIONER MARONDA HOMES, INC. OF FLORIDA

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ARGUMENT IN REPLY

The Respondent, Lakeview Reserve Homeowner's Association (the "Association") asks this Court to create an implied warranty remedy that, until the decision of the Fifth District below, has been uniformly rejected by every Florida court to consider it (including this Court), and has already been considered and rejected by the Florida Legislature. These rejections are consistent with a near unanimity of decisions from courts outside of Florida. Indeed, no state court has unambiguously adopted the implied warranty sought by the Association here. This is not to say that there is no remedy for alleged shoddy construction of common areas in a subdivision. There are ample contract and tort remedies available, which, for whatever reason, the Association chose not to assert. The Association in this case simply chose to place all of its eggs in the wrong basket.

I. There is a Conflict in this Case

The Association opens by rehashing its argument that there is no conflict in this case. The conflict, however, could hardly be more direct, as the Fifth District itself recognized. The Fourth District in *Port Sewell* held that the implied warranty of habitability did not extend to the roads and drainage areas of a subdivision.[1] The Fifth District below held that it did. The fact that the defendant in *Port Sewell* happened to be the lender played no part in the Fourth District's holding.

[1] *Port Sewall Harbor and Tennis Club Owners Ass'n v. First Fed. Sav. and Loan, Ass'n*, 463 So. 2d 530 (Fla. 4th DCA1985).

According to the Court: "The sole question presented on this appeal is: does the holding in the *Conklin* case prevent a party from recovering against *a developer* who fails to [properly] construct the common areas . . . ." *Id*. at 531 (emphasis supplied).

The conflict with *Conklin* is equally direct.[2] Although this Court discussed many issues during its public policy analysis (including the fact that the purchasers were investors), the actual holding was unequivocal. The certified question asked whether implied warranties of fitness and merchantability apply to "improvements to the land other than construction of a home and other improvements immediately supporting the residence thereon, such as water wells and septic tanks?" This Court answered that question in the negative, and approved the decision of the Fourth District. *Conklin*, 428 So. 2d at 659.

The Association then tries to shoehorn the Fifth District's decision into the *Conklin* framework by arguing that roads and drainage directly support the home within the meaning of *Conklin.* This is a futile effort. Even the dissent in *Conklin*, which enthusiastically supported the extension of the remedy, agreed that the implied warranty would not extend to roads. *Id*. at 661. Surely, if a seawall did not immediately support the home, drainage structures that serve the same general purpose would not. The conflict is express, direct, and unavoidable.

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[2] *Conklin v. Hurley*, 428 So. 2d 654, 658-59 (Fla. 1983).

II. No Public Policy Developments Suggest a Departure from, or the Extension of, this Court's Holding in *Conklin*.

Nothing that has happened since *Conklin* to suggest a departure from the rule it established. There is no national trend supporting the expansion of the implied warranty beyond the home and its immediate supporting structures. To the contrary, the focus of courts around the country remains on the protection of homeowners from significant defects impacting the livability of the home within its four walls. Equally important, subdivisions are much more heavily regulated now than when *Conklin* was decided and the Legislature has specifically declined to extend the implied warranty that the Association seeks.

A. There is no "Developing National Trend."

The Association attempts to build a "national trend" out of what boils down to one ambiguous case out of Illinois, the *Briarcliffe* decision discussed in our initial brief.[3] In our initial brief, we surveyed the national authority and demonstrated that the purpose of the implied warranty is to protect the habitability of the home. Maronda Initial Brief ("IB") at 11-12 n.4. The Association attempts to dilute this overwhelming precedent by arguing that these many cases just happen to arise in the context of the home and do not reflect on whether the courts would expand the implied warranty beyond the home and its immediate supporting

[3] *Briarcliffe W. Townhouse Owners Ass'n v. Wiseman Const. Co.*, 480 N.E. 2d 833 (Ill. Ct. App. 1985).

structures. Association Answer Brief ("AB") at 16-17. To the contrary, in each of these decisions, as in *Conklin*, the courts were faced with describing and articulating the boundaries of the implied warranty. As in *Conklin*, the courts have held that the purpose of the implied warranty is to protect against defects that impact the home.[4]

In contrast to this overwhelming authority, the Association attempts to marshal only three cases nationwide in support of its argument. AB at 18-22. None of them, however, unambiguously apply the implied warranty to common areas of a subdivision. The Association's first case, *Briarcliffe*, was discussed extensively in our initial brief. Although there is some broad language supporting the Association's position, the case is ambiguous because there was evidence that

[4] The holding in many of these cases leaves no room for doubt. *See, e.g.*, *Tusch Enterprises v. Coffin*, 740 P.2d 1022 (Idaho 1987) ("major defects which render the house unfit for habitation" entitle the buyer to relief); *Albrecht v. Clifford*, 767 N.E. 2d 42, 46-47 (Mass . 2002) (the warranty applies to defects that create substantial questions of safety and habitability); *San Luis Trails Ass'n v. E.M. Harris Bldg. Co.*, 706 S.W. 2d 65 (Mo. Ct. App. 1986) (specifically rejecting an extension of the implied warranty to common areas in a subdivision); *Chandler v. Madsen*, 642 P.2d 1028, 1032 (Mont. 1982) (the warranty "essentially relates to useful occupancy of the house"); *Padula v. J.J. Deb-Cin Homes, Inc.*, 298 A.2d 529, 531 (R.I. 1973) (the builder warrants that the construction has been done in a "workmanlike manner" and is "reasonably fit for human habitation"); *Hollen v. Leadership Homes, Inc.*, 502 S.W. 2d 837, 839 (Tex. Civ. App. 1973) (the builder impliedly warrants that the house is "constructed in a good workmanlike manner and is suitable for human habitation"); *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 221 P.3d 234, 252 (Utah 2009) (the builder must prove inhabitants with a "reasonably safe place to live").

the alleged defects were impacting the home, as the Illinois Supreme Court later observed. *Board of Directors of Bloomfield Recreation Ass'n v. Hoffman Group, Inc.*, 712 N.E. 2d 330, 336 (Ill. 1999) (the defects alleged in *Briarcliffe* all affected the habitability of the home). *See* IB at 13-14.

Indeed, the Association's second case is this *Bloomfield* case, also out of Illinois and also discussed in our initial brief. *Bloomfield*, 712 N.E. 2d at 330. IB at 13-14. In *Bloomfield*, the Illinois Supreme Court *declined* to extend the implied warranty to a common area (the clubhouse). In doing so, it stated that the association's reliance on *Briarcliffe* was "misplaced," because the defects at issue in *Briarcliffe* "interfered with the habitability of the owners' residences." *Id*. at 336. This is precisely the point we made about *Briarcliffe* in our initial brief. *See* IB at 13-14. The Illinois Supreme Court's ultimate holding in *Bloomfield* is clear: "The Association's failure to draw any connection between the defects in their clubhouse and the habitability of their homeowners' living units is, therefore, dispositive." *Id*. at 336. Although the supreme court suggested that other *contractual* remedies might exist, including a contractual implied warranty, it rejected the expansion of the implied warranty of habitability to encompass common areas of a subdivision. *Id*. at 336-37.[5]

[5] The Association also cites a Washington case to argue the proposition that structural damage to the home is not necessary. *Atherton Condo. Apt.-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 799 P.2d 250, 257-58 (Wash. 1990).

The Association's third case is *Redbud Cooperative Corp. v. Clayton*, 700 S.W. 2d 551 (Tenn. Ct. App. 1985). *Redbud* is even more ambiguous than *Briarcliffe* on the existence of an implied warranty as to common areas. The case went to the jury on a number of theories including breach of contract, implied warranty, and negligence. On appeal, the question was "whether Redbud's money judgment can be sustained based upon any theory of recovery reasonably embodied in the pleadings." *Id.* "Thus, of necessity, our decision is limited to the facts of this case and should not be construed as defining all potential causes of action that may be asserted against developers of planned unit developments such as Redbud." *Id.* Although the court in one sentence of dicta suggests that an implied warranty "could" be available, *id*. at 558, the court limited its actual review to "only those facts which support the award of damages based upon the developers' negligence." *Id*. at 559. *Redbud* offers slim support indeed.

Finally, the Association and its *amici* seek to make much of the fact that the warranty is variously referred to as a warranty of habitability or of merchantability and fitness. The more important point, however, is that regardless of what the warranty is called, the courts around the country are remarkably consistent in its parameters. The warranty applies to defects that significantly impact the

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The case concerned, however, significant fire code violations that had the "potential to severely restrict the habitability of the condominiums." Thus, Washington, like other states, focuses on habitability.

habitability of the home. IB. at 11-12. As noted in the next section below, the Association concedes that there is no such impact in this case.

B. The Public Policy Considerations that Apply are no Different from Those that Informed the *Conklin* Decision.

All of the public policy arguments raised by the Association in its brief were raised, considered, and rejected in *Conklin*. The simple answer reached by *Conklin* is the same answer that applies today. The protection afforded by the common law warranty of habitability is the protection of the home. If the defect does not significantly impact the home, the warranty does not apply.

Before addressing the Association's substantive argument, we respond briefly to the Association's suggestion that there was, in fact, damage to a home. The record discloses, at most, an allegation that there was some standing water on lots after a Florida thundershower and some water bubbling under the grass, and that one driveway was perhaps unusable for a time. AB at 3. There is no suggestion, however, that any of these defects significantly impacted the habitability of any home. *See* AB at 2 ("the Association concedes that it has not alleged that damage has yet to occur within the walls of residences"). Moreover, even if there were such damage to a home, such damage to the home is the proper subject of a lawsuit by the homeowner, not the Association. IB at 17-18.

As to the Association's argument that the need for an expansive implied remedy has increased, the record shows the opposite. The Association's only

argument is that there are more planned communities now than there were in 1983 when *Conklin* was decided. The Association fails to explain, however, why this increase in numbers makes a difference. In fact, with this increase in numbers has come a significant increase in the regulation of subdivisions, as the Association concedes in its brief. AB at 25. With this increase in regulation, however, comes a decreased need for judicial remedies, as we discuss in Section III, below.

Moreover, we now have the benefit of nearly 30 years of additional judicial experience since *Conklin*. As discussed extensively above, the courts continue, thirty years later, to draw the same line drawn by *Conklin*. The implied warranty stops at the front door.

The Association quibbles with this proposition pointing out that courts have applied the warranty to septic tanks and water wells supporting the home. AB at 17-18. These cases prove our point. As we have conceded, the question is not whether the defect is within the four walls of the home, the question is whether the defect significantly impacts the habitability of the home within those four walls. Wells and septic tanks are included within the implied warranty of habitability because they are structures that immediately support the home. *Conklin*, 428 So. 2d at 655. A home without water or waste disposal is hardly habitable.

The so-called packaged home sales discussed by the *amici* are not to the contrary. These cases hold simply that a defect in a lot may well affect the

habitability of a home. If the lot is inappropriate for construction and a home's structural integrity is impacted as a result, the implied warranty applies. These cases are fully consistent with *Conklin* because the defective lot supplied by the builder directly impacted the home. The critical distinction is that there is no evidence here that any problem on any lot threatened the habitability of any home, as the Association concedes. AB at 2.

Similarly, the Association argues that the statutory extension of implied warranties to common areas of condominium projects compels a similar extension in the subdivision context. Put aside for a moment the fact that the Legislature has already considered and rejected this suggestion. The fact is, condominiums and subdivisions are very different. First is the difference in ownership structure. The owners of each condominium unit also own an undivided share of the common elements. Thus, any defect directly impacts every owners' interest. Second, the common areas in a condominium are much more likely to have an impact on the habitability of a home. Such common elements include roofs, windows, common walls and common ceilings and floors, all of which directly impact habitability. Indeed, those early cases in Florida that extended the implied warranty of habitability in the condominium context all included defects that had a direct impact on the habitability of the condominium unit. *See, e.g., Schmeck v. Sea Oats Condominium Ass'n.,* 441 So. 2d 1092 (Fla. 5th DCA 1983) (water intrusion in the

units); *Drexel Props., Inc. v. Bay Colony Club Condo.*, 406 So. 2d 515 (Fla. 4th DCA 1981) (defects in the roof and windows of the condominiums as well as fencing around the rooftop air conditioning units); *B & J Holding Corp. v. Weiss*, 353 So. 2d 141 (Fla. 3d DCA 1977) (defects in water pumps, water heaters, and window glass).

The balance of the public policy arguments made by the Association and its *amici* concern their plea that there must be a remedy for defective construction of common elements. No one disagrees with this point. The question is whether the proper remedy should include a judicially imposed implied warranty when those defects do not significantly impact any home. As the Florida Home Builder's brief describes in great detail, there are numerous remedies that are available to prevent and to recover for defective construction of common areas. *See* Florida Home Builder's *Amicus* Brief at 8-13. These remedies include breach of contract, fraud, misrepresentation, rescission, negligence, and professional negligence, among others. *Id*. The combined briefs of the Association and its *amici* make virtually no attempt to explain why these remedies are inadequate.

Nor do the Association and its *amici* address the very significant regulation of common areas in a subdivision during the permitting and construction process. Such elements of a development are designed and constructed by professional engineers who are susceptible to negligence claims if they fail in their professional

duties. *See Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999). Similarly, these common elements are constructed with heavy oversight by local authorities, from the development of the applicable building codes and the approval of the plans to construction inspections and approvals. Indeed, the Association concedes in its brief the increasing amount of regulation concerning these common elements. AB at 25. There is simply no basis to suggest that the Association and its homeowners have no protection relating to the common elements.

In sum, the Association offers no persuasive reason to depart from *Conklin*, *Port Sewell*, and the near unanimous universe of cases nationwide rejecting the existence of an implied warranty as to the common elements of a subdivision.

III. The Court Should not Overrule the Legislature's Refusal to Extend an Implied Warranty to Common Areas of a Subdivision.

As we described in the initial brief, the Florida Legislature has extended an implied warranty to the common areas of a condominium but has considered and rejected the extension of a similar implied warranty to the common areas of a subdivision. IB at 19-21. In short, the Legislature has already weighed the competing policy choices discussed throughout this case and has struck the balance against extending the implied warranty beyond the home.

Thus, Maronda's argument does not rest on mere legislative silence or inaction, as the Association suggests. AB at 31. To the contrary, the Legislature, as the Association must concede, extensively regulates subdivisions in Chapter

720, Florida Statutes, just as it extensively regulates condominiums in Chapter 718. Indeed, that regulation is much more extensive than when this Court first considered the implied warranty issue in *Conklin*.

More importantly, in the course of that statutory regulation, the Legislature has considered the very question put to this Court: whether to extend the doctrine of implied warranties beyond the home to the common elements of a subdivision or condominium. As to condominiums the Legislature answered the question affirmatively, but rejected the extension of the implied warranty in the subdivision context. IB at 20. And for good reason, as we explained above. The point is, the Legislature has occupied the field and considered the issue and resolved the policy issue against the Association. As this Court has cautioned, under such circumstances, the courts should be very loathe to substitute their judgment for that of the people's representatives. *State v. DiGuilio*, 491 So. 2d 1129, 1137 (Fla. 1986). *See* IB at 20-22. The Association and its *amici* can cite no cases where this Court has chosen to second guess the Legislature so directly on matters where the Legislature has occupied the field so completely.

The response by the Association and its *amici* is that Florida courts established the implied warranty in the first place in *Gable v. Silver*[6] and this Court set the limits of the doctrine in *Conklin*. But the need for judicial action in this

[6] *Gable v. Silver*, 258 So. 2d 11 (Fla. 4th DCA 1972).

area has sharply diminished since *Gable* and *Conklin* were decided. *Gable* was part of a groundswell of judicial reconsideration of the rule of *caveat emptor* as applied to the purchase of homes. The courts were merely removing a judge-made impediment to recovery that was inconsistent with available remedies in other consumer contexts. Since then, courts have established the limits of the doctrine and *Conklin* is fully consistent with settled precedent nationally. Equally important, the Legislature has since entered the field. The groundswell for action that existed in 1972 when *Gable* was decided simply does not exist today.

Thus, the conditions presented to this Court are nothing like the conditions that led Florida to join with virtually every other jurisdiction in overruling the outdated doctrine of *caveat emptor* as it applied to the sale of a home. Similarly, the conditions are nothing like *Hoffman v. Jones,* 280 So. 2d 431 (Fla. 1972), where this Court overruled the judicially-created contributory negligence doctrine. As noted in the decision itself, the rule was perhaps as uniformly criticized by judges and commentators as any common law tort rule at the time. Indeed, the Legislature itself had 30 years before it successfully passed a bill abrogating the doctrine, only to be thwarted by a veto by the Governor. As in the *Gable* case, the courts were operating within a groundswell (and near unanimity) of public support and judicial and academic agreement. As this Court observed in *Hoffman*, courts can change the law "where great social upheaval dictates." *Id*. at 435.

There is no upheaval here. Indeed, if there is any groundswell here, it is in favor of the limitation long-established by *Conklin*. We do not contest that there are arguments to make on either side, but those arguments have been considered and answered by the Legislature in a manner fully consistent with the courts in this state and around the country. The Fifth District's decision to second guess these policy choices was error and should be reversed.

CONCLUSION

For all the foregoing reasons, the decision of the Fifth District should be quashed and the case remanded with instructions to affirm the summary judgment granted by the trial court.

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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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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 September 2011.

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