IN THE SUPREME COURT OF FLORIDA

CASE NUMBERS: SC10-2292 & SC10-2336
Lower Tribunal Case Numbers: 5D09-1146, 07-CA-1762

MARONDA HOMES, INC. OF FLORIDA, a Florida corporation,	vs.	LAKEVIEW RESERVE HOMEOWNERS ASSOCIATION, INC.,
Petitioner,		Respondent.
T.D. THOMSON CONSTRUCTION COMPANY,	vs.	LAKEVIEW RESERVE HOMEOWNERS ASSOCIATION, INC.,
Petitioner,		Respondent.

ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT, LAKEVIEW RESERVE HOMEOWNERS ASSOCIATION, INC.'S, SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Outside of Florida

Florida Statutes

Miscellaneous Sources

I. INTRODUCTION

On May 30, 2012, Petitioners, Maronda Homes, Inc. Of Florida ("Maronda") and T.D. Thomson Construction Company ("Thomson"), and Respondent, Lakeview Reserve Homeowners Association, Inc. ("Lakeview"), jointly requested that this Court permit the parties to each file a supplemental brief concerning the impact of Chapter 2012-161, Laws of Florida, creating Section 553.835, Florida Statutes (2012) (hereinafter "Act"), on this case. On June 6, 2012, this Court granted that request. Lakeview submits this supplemental brief in support of its position that the Act should not be retroactively applied to this case or otherwise negate the Fifth District's decision in *Lakeview Reserve Homeowners v. Maronda*, 48 So. 3d 902 (Fla. 5th DCA 2010).

II. ARGUMENT

A. The Act Is Unconstitutional In That It Violates Lakeview's Right Of Access To The Courts, Lakeview's Right To Due Process, and the Equal Protection Clause of the Florida Constitution.

1. The Act violates Article I, Section 21 of the Florida Constitution by abolishing Lakeview's cause of action.

The Florida Legislature was without power to abolish Lakeview's only remedy by adopting section 553.835, Florida Statutes. In *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), this Court first addressed whether the constitutional right of "redress of any injury" prohibits the statutory abolition of an

existing remedy without providing an alternative means for relief. In *Kluger*, this Court established the following test to determine the constitutionality of statutes:

> [W]here a right of access to the courts for redress for a particular injury . . . has become part of the common law of the State pursuant to Fla. Stat. 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Kluger, 281 So. 2d at 4.

Prior to the effective date of the Act, homeowners associations, and their members, had a common law right, pursuant to *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983), to sue for breach of implied warranty of fitness and merchantability for improvements immediately supporting residences. *Conklin*, 428 So. 2d at 655-656. The Fifth District, in *Lakeview Reserve Homeowners v. Maronda*, 48 So. 3d 902 (Fla. 5th DCA 2010), further clarified the breach of implied warranty cause of action by interpreting the phrase "immediately support the residence" as those essential services that make a home habitable and fit for its intended purpose. *Lakeview*, 48 So. 2d at 908. Yet, the legislature has now abolished a homeowner's right to sue for breach of implied warranty, established by these two cases, if the improvement is considered an "off-site

improvement" and has failed to provide a reasonable alternative to the previously established cause of action. Additionally, the legislature is unable to show any "overpowering public necessity" for abolishing the cause of action.

Petitioners may argue that there are reasonable alternatives available to homeowners and homeowners associations; however, other actions require such a high degree of proof and culpability that it is tantamount to providing no remedy at all. Negligence claims could be barred by the economic loss rule; breach of fiduciary duty claims are often barred by the business judgment rule; and fraud claims require a high degree of scienter. These so-called "additional remedies" are not reasonable alternatives. Further, none of these theories are as broad or permit the same amount of relief as provided by a breach of implied warranty claim.

Petitioners may also argue that *Conklin* did not create an implied warranty cause of action, thus, the legislature could not have abolished it. However, to make such an argument would ignore the fact that *Conklin* only held that implied warranties would not apply to *un*improved land. *Conklin*, 428 So. 2d at 659. Black's Law Dictionary defines "improved land" as "real estate whose value has been increased by landscaping and the addition of sewers, roads and the like." *Black's Law Dictionary* 757 (6th Ed 1990). Based upon this definition, the roads and drainage

system are improvements to the land; hence, vesting a cause of action in the Association, and its members, before the effective date of the Act. Since the Act has now abolished a homeowner's right of redress, has failed to provide a reasonable alternative remedy, and has failed to show any overpowering public need, it should be deemed unconstitutional.

2. The Act deprives Lakeview of its vested property interest in violation of Article I, Section 9 of the Florida Constitution.

Even if this Court determines that the Act meets the *Kluger* test so as to not be an unconstitutional restraint on an individual's right to redress, it should be deemed unconstitutional as a due process violation, pursuant to its intended retroactive application. This premise is explained in *Department of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981) and *Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982). Both *Rupp* and *Knowles* addressed the retroactive application of a statutory amendment granting immunity from suit to state agents. *Knowles*, 402 So. 2d at 1156; *Rupp*, 417 So. 2d at 660. At the time the statute was passed, the victims in both cases had already filed lawsuits against state agents. *Knowles*, 402 So. 2d at 1156; *Rupp*, 417 So. 2d at 660. This Court, in both cases, found that the victims had a cause of action, and, thus, a vested property right, before the effective date of the statute. *Knowles*, 402 So. 2d at 1158; *Rupp*, 417 So. 2d at 665-666. Applying the

statute retroactively abrogated the victims' right to a full tort recovery, which violated the victims' right of due process. *Knowles*, 402 So. 2d at 1158; *Rupp*, 417 So. 2d at 665-666. Accordingly, this Court concluded that the statute could not be applied retroactively to causes of actions that had already accrued as of the effective date of the Act. *Knowles*, 402 So. 2d at 1158; *Rupp*, 417 So. 2d at 665-666.

More recently, this Court analyzed a case with facts more akin to those in the case currently before this Court. In *American Optical Corporation v. Spiewak*, 73 So. 3d 120 (Fla. 2011), this Court reviewed whether the 2005 Florida Asbestos and Silica Comprehensive Fairness Act ("2005 Act"), which made significant changes to the common law cause of action for damages resulting from asbestos exposure, could be retroactively applied to pending matters. *Spiewak*, 73 So. 2d at 122. Before the adoption of the 2005 Act, asbestos victims only had to show an injury stemming from an asbestos-related disease in order to support a cause of action for damages. *Id.* at 123. However, after adoption of the 2005 Act, the victims could only maintain a cause of action if they could additionally show that the injury had become malignant or had caused some physical impairment. *Id.* Recognizing that a cause of action is a property interest protected by the due process clause, this Court explained that the 2005 Act, by requiring a new element of an

asbestos cause of action, unconstitutionally abolished their vested property right. *Id.* at 125-26, 130.

Similarly, this recent amendment to Chapter 553, Florida Statutes, alters the previously established implied warranty cause of action by inserting a new requirement that Lakeview show that any improvement is not an "offsite improvement." Prior to Lakeview's lawsuit, it only had to show that the improvements immediately supported the residence. *Lakeview*, 48 So. 3d at 908 (referring to *Conklin*). Then, after the Fifth District's decision, it only needed to show that the improvements were essential to the habitability of the residence, a standard which Lakeview has met. *Lakeview*, 48 So. 3d at 908. However, with the Act's implementation, Lakeview would also have to show that the improvements are not "offsite improvements".[1] Based upon *Spiewak*, adding a new element to an implied warranty cause of action for pending matters is a violation of due process.

Petitioners may argue that the Act is remedial in nature, and, thus, should be applied retroactively to effectuate the legislature's intended purpose. *See, e.g. City of Orlando v. Desjardins*, 493 So. 2d 1027 (Fla. 1986). However, any

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[1] A feat, in and of itself, since the definition of offsite improvement is confusing and vague, raising additional due process questions. Any state interference with an individual's right to fully enjoy one's property demands unambiguity. *See Town of Bay Harbor Islands v. Schlapik*, 57 So. 2d 855, 857 (Fla. 1952). Lakeview owners cannot fully enjoy their property when flooded with water and burdened with sinkholes.

legislation that imposes a new legal burden affects substantive rights and cannot be view as remedial. *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994). As the Act imposes a new legal burden upon Lakeview by requiring it to prove that the improvements are not "offsite improvements," it affects substantive rights and is not remedial. Consequently, based upon *Knowles* and its progeny, the Act cannot be applied retroactively.

3. As the Act impermissibly establishes different classes of purchasers, it violates the equal protection clause in Article I, Section 2 of the Florida Constitution.

The constitutional right of equal protection of the laws means that "everyone is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burdens upon others in a like situation." *Caldwell v. Mann*, 26 So. 2d 788 (Fla. 1976). The Act prohibits purchasers of homes from enjoying the same rights as other purchasers similarly situated. The first obvious arbitrary and unreasonable classification resulting from Section 553.835 is a distinction between owners of single family homes and owners of condominium units or cooperative units. As previously argued in Section C.3. of the Argument portion of Lakeview's Answer Brief on the Merits, there is "no real distinction between the buildings and the common land in the application of the public policy protecting a purchaser of a new or reasonable new home

from latent defects in the building or the required amenities since the purchaser in a substantial degree must rely in either case on the expertise of the building-vendor creating the defect." *Briarcliffe West Townhome Owners Ass'n v. Wiseman Constr. Co.*, 454 N.E. 2d 363, 364 (Ill. App. Ct. 1983), (citing *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171,183 (Ill. 1982); (Ans. Br. at 27; *see also* CAI Amicus Br. at 9-10.)

In addition to the obvious disparate treatment between homeowners and unit owners, the Act appears to separate the following classes of owners of single family homes:

> 1. Homeowners whose driveways, sidewalks, drainage and facilities are not on or under the lot, versus those homeowners who have driveways, sidewalks, drainage and facilities that are on or under the lot;
>
> 2. Homeowners who share drainage and utilities which are part of the structure of the adjoined homes versus those who share drainage and utilities but do not have adjoining homes.

Even within the classes of individuals that still have an implied warranty; the degree of implied warranty available to these individuals appears to be different. In Section (3) (a) of the Act, homeowners that share improvements that are part of the structure of attached homes only need to show that the improvements ***affect*** the habitability of the structure. However, if the improvements are simply on or under the lots of unattached homes, then the homeowners have to show that the structure ***immediately and directly supports*** that habitability of

the home. One consequence of these classifications is that, there could be homeowners in the same community that would have an implied warranty cause of action and could seek redress from a developer for breach of implied warranty, while others would be without a remedy and be forced to pay for repairing the defects out of their own pockets, simply based upon the location of the improvement and whether the homes are attached or not. The legislature has not provided any explanation as why there is a need to separate classes of homeowners. Even the *Lakeview* Court acknowledged the lack of logic in providing a warranty to a home that is attached to an improvement, but not to another home that receives the same utility or like service, but does not physically touch the improvement. *See Lakeview,* 48 So. 3d at 909.

Since the Act basically eliminates some homeowners' right of access to courts and since the right of access to courts is specifically mentioned in the Florida Constitution, it deserves more protection than any implied rights and requires strict scrutiny. *Mitchell v. Moore,* 786 So. 2d 521, 527 (Fla. 2001). Thus, the classifications are only valid if this Court determines that the Act is narrowly tailored to serve a compelling state interest. *Smith v. Fisher,* 965 So. 2d 205, 208 (Fla. 4th DCA 2007). The legislature attempted to justify its decision by advocating that the Act would prevent "uncertainty

in the state's fragile real estate and construction industry." 2012 Fla. Laws 161. Yet, the Act fails to explain how such uncertainty gives rise to a compelling state interest in eliminating an implied warranty for homeowners, when the impact of such law, for example, results in 159 owners, or less, bearing the cost of funding $600,000 worth of repairs. (R. II/344, 352.) Additionally, the legislature failed to provide any compelling state interest that would substantiate increasing the financial burdens of owners in a state that has the highest foreclosure rate and one of the highest unemployment rates. *See* http://www.corelogic.com/about-us/news/corelogic-reports-69,000-completed-foreclosures-nationally-in-march.aspx; http://www.bls.gov/web/laus/laumstrk.htm.

Even applying the rational basis test to determine if the equal protection clause has been violated, the Act would not pass muster. Under the rational basis test, a court must uphold a statute only if the classification bears a rational relationship to a legitimate governmental objective. *Zapo v. Gilreath*, 779 So. 2d 651, 654 (Fla. 5th DCA 2001). In this instance, it appears that the governmental objective is to reduce the uncertainty in the real estate and construction industry. While it is debatable as to whether "reducing uncertainty" is a legitimate state objective, there is not any conceivable rational basis as to why providing some owners a

warranty, while denying others similarly situated the same warranty, accomplishes the objective set forth. In other words, the legislature is unable to show how the location of the improvement or the type of single family home is rationally related to the objective of providing certainty in the real estate and construction market. To the contrary, the Fifth District, in *Lakeview*, did establish a rational relationship between the nature of the improvement and the effect that the defect has on the habitability of the home. Accordingly, Section 553.835 treats similarly situated individuals unequally, in violation of the equal protection clause of the Florida Constitution.

B. The Act Fails To Effectively Overrule The Definition Of Immediately Support, As Defined By The Fifth District.

In the event this Court determines that the Act is not unconstitutional and/or that it can be retroactively applied to this pending matter, Lakeview then asserts that its improvements meet the standard established by the statute. While the Act is confusing and ambiguous, any ambiguities must be construed in favor of, and not in restriction of, access to the courts. *Univ. of Miami v. Exposito*, 2012 WL 1448963, at *7 (Fla. 3rd DCA 2012) (citing *G.B.B. Invests., Inc. v. Hinterkopf*, 343 So. 2d 899, 901 (Fla. 3rd DCA 1977)).

Although the preamble of the bill attempts to expressly reject the decision in *Lakeview*, the language contained in the body of the statute does not contradict the Fifth District's ruling. 2012 Fla. Laws 161. In interpreting *Conklin*, the Fifth District determined that the phrase used in *Conklin*, "immediately support the residence" is susceptible to two meanings. *Lakeview*, 48 So. 2d at 908. The first meaning, applied by the Fourth District in *Port Sewell Harbor & Tennis Club Owners Association, Inc. v. First Federal Savings and Loan Association of Martin County*, 463 So. 2d 530 (4th DCA 1985), is that the phrase means "something that bears or holds up a structure, such as a footer, a foundation or a wall, or is attached to the house." *Id.* The second meaning, rendered by the Fifth District, is that the phrase refers to essential services that "'support' the home by making it habitable, and so, fit for its intended purpose." *Id.* If the legislature wanted to expressly overrule *Lakeview*, then the language of the statute should have reiterated the first meaning; that is, an improvement that bears or holds up the structure. In the alternative, the legislature could have created a laundry list of "offsite improvements" that would not be covered by an implied warranty, and include roads, sidewalks, drainage systems and the like. Instead, it crafted a definition of "offsite improvement" that appears to include the improvements at issue

in this case, thereby still providing a cause of action to Lakeview for breach of implied warranty.

By defining "offsite improvement," the Act appears to create two kinds of improvements that would have implied warranties: one pursuant to section 3(a) and one pursuant to section 3(b). Section 3(a) is not applicable to Lakeview's improvements because none of the homes are attached. However, Section 3(b) is applicable and provides that there is not a cause of action for improvements on or under lots if the improvement does not immediately and directly support the fitness and merchantability or habitability of the home itself. This section brings us back to the phrase in *Conklin*, but adds the term "directly." Thus, if the improvement is on or under a lot and the improvement immediately and directly supports the habitability of the home, then there exists an implied warranty. Again, as explained in *Lakeview*, the phrase "immediately support the [home]" can mean essential services that support the home by making it habitable. *Lakeview*, 48 So. 3d at 908. Inserting the term "directly" does not eliminate the meaning given to the phrase by the Fifth District. In fact, Black's Law Dictionary defines "direct" as "immediate." *Black's Law Dictionary* 459 (6th ed. 1990). Thus, the Fifth District's essential services test can still prevail pursuant to the terms of the Act, as long as the improvements are located on or under the lot. Lakeview

submits that all improvements at issue are located on or under the lot.

Obviously, the grading of the lots is on the lots. Petitioners may argue that grading is not a structure or an improvement. Yet, as explained previously in this brief, one can 'improve' a street by grading, parking, curbing, paving, etc." *Black's Law Dictionary* 757 (6th Ed 1990). While grading may not be a structure, it does meet the definition of improvement.

With the exception of the improper grading of the lots, all improvements at issue in this case concern the drainage system, formally known as the Master Surface Water Management System. (R. I/126-129; II/347-348, 415-425.) In fact, the original permit issued by the St. Johns River Water Management District for the Lakeview Reserve Subdivision provides that: "The Surface Water Management System includes 161 lots, associated roads, placement of stormsewer pipe within an existing creek, four dry detention ponds with underdrain, one sedimentation basin and rear lot swales." (R. I/84; see also R. I/12-13.) (Emphasis added.) While portions of the drainage system consists of pipes and drains that are not under the lots, as a system it operates as one improvement working in unison to drain the storm water away from the lots and streets to the detention ponds. Does the legislature intend for a pipe, that is failing due to improper construction or design, to be covered with an implied warranty

for the length of the pipe under the lot, but as soon as the same continuous pipe reaches the land under the streets, the warranty would cease to exist? Such a hypertechnical reading of the statute would render an absurd result.

And what exactly does the legislature mean by the word "on?" Resorting to dictionary definitions to determine the scope of the word "on" does not assist this Court, as the Oxford English Dictionary gives no less than forty-three definitions of the word and can mean along the side of the lot or road. *See Hancock Adver., Inc. v. Dept. of Transp.*, 549 So. 2d 1086, 1088 (3rd DCA 1989) (citing *State v. Jarvis*, 482 A.2d 65 (Vt. 1984) where a court determined that a defendant was "on a highway" when driving in a parking lot along the highway). In that instance, the roads, drains and detention ponds that are along the lots can be deemed improvements on the lots, falling outside the statutory definition of "offsite improvement." Accordingly, this Court should find that Lakeview has an implied warranty for the improvements at issue in this matter.

III. Conclusion

For the reasons cited herein, Lakeview respectfully requests that this Court declare the Act unconstitutional on its face, or in the alternative, declare the Act cannot be retroactively applied to this case, and affirm the decision of the Fifth District Court of Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Brief has been furnished via U.S. Mail on this 20th day of June, 2012, to the following:

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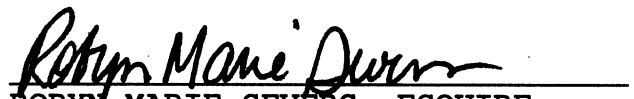

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