IN THE SUPREME COURT OF FLORIDA

CASE NOS.: SC10-2292 & SC10-2336
Lower Tribunal Nos.: 5D09-1146, 07-CA-1762

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

PETITIONER T.D. THOMSON CONSTRUCTION COMPANY'S INITIAL BRIEF ON THE MERITS

On Review from the Fifth District Court of Appeal

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INTRODUCTION

The Fifth District Court of Appeal's decision in *Lakeview Reserve Homeowners Ass'n, Inc. v. Maronda Homes, Inc. of Florida*, 48 So. 3d 902 (Fla. 5th DCA 2010), should be quashed as contrary to Florida law on the application of implied warranties under common law. This Court, in *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983), and the Fourth District Court of Appeal, in *Port Sewall Harbor and Tennis Club Owners Ass'n, Inc. v. First Fed. Sav. & Loan Ass'n of Martin County*, 463 So. 2d 530 (Fla. 4th DCA 1985), have held that a purchaser of residential real property does not have a cause of action for breach of implied warranties of habitability, fitness for a particular purpose and merchantability[1] against a developer where the defective work complained of does not pertain to the construction of the house or other improvements "immediately" supporting the house. Examples of improvements that immediately support the house are water wells and septic tank systems, purchased and owned by the individual homeowner, and without which the house would not be habitable; examples of improvements that do not immediately support a residence are roads and drainage systems, owned by a corporate entity (i.e., a homeowners' association).

The trial court below, properly adhering to *Conklin* and *Port Sewall*, granted summary judgment in favor of the Petitioners as to the Respondent's untenable

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[1] Also referred to herein simply as "implied warranties of habitability."

count for breach of implied warranties as to alleged defects in the roads and stormwater drainage system in the common areas of Lakeview Reserve owned by the Lakeview Reserve Homeowners Association. The Fifth District, however, certifying conflict with the Fourth District's *Port Sewall* decision, reversed the trial court. In *Lakeview Reserve*, the Fifth District circumvented binding, on-point precedent and illogically and incorrectly relied on the doctrine of *caveat emptor* to extend the application of implied warranties of habitability to a corporate homeowners' association with respect to common area subdivision improvements that were not purchased by either the individual homeowners or the corporate homeowners' association, that, as correctly recognized by the Fourth District and the trial court, did not "immediately support" the residences, and that did not affect the habitability of the houses.

The Fifth District's decision in *Lakeview Reserve* should be reversed and the Fourth District's decision in *Port Sewall*, and the trial court's entry of summary judgment in favor of the Petitioners, should be affirmed.

STATEMENT OF THE FACTS

Maronda was the owner, developer and constructor of the common areas and most, but not all, of the 159 houses in the Lakeview Reserve subdivision in Winter

Garden, Florida.[2] (R. I/11; R. II/196-98, 200, 287, 314.)[3] Roger Anderson and William Blake Sonne owned 14 of the 159 lots in Lakeview Reserve. (R. I/11-12; R. II/314.)

Thomson, pursuant to its contract with Maronda, performed site development work at Lakeview Reserve including construction of the roadways, retention ponds, underground stormwater drainage system, and preliminary rough site grading. (R. II/190, 227-50, 314.) On February 14, 2001, Thomson's work was certified as being constructed in substantial compliance with the construction plans as approved by the City of Winter Garden. (R. II/189-90, 214-16.)

On March 15, 2001, the Developer, Maronda, formally created the Lakeview Reserve Homeowners Association by incorporating same (hereafter, the "Corporate Association"). (R. II/322-331.) On May 16, 2001, Maronda conveyed to the Corporate Association all right, title and interest to the common areas of

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[2] Lakeview Reserve Homeowners Association, Inc. will be referred to herein as the "Corporate Association" or "Respondent." Maronda Homes, Inc. of Florida will be referred to as the "Developer" or "Maronda" and T.D. Thomson Construction Company will be referred to as "Thomson" or "Petitioner." Maronda and Thomson, collectively, will be referred to as the "Petitioners."

[3] Unless otherwise indicated, citations are to the 5-volume Record on Appeal and 1-volume Supplemental Record on Appeal originally filed in the Fifth District Court of Appeal by the Clerk of the Court of the Circuit Court in and for Orange County, Florida. Citations will be made by the letters "R" and "SR", respectively, and the corresponding volume and page number. For example, "R. I/60" refers to Volume I of the Record at page 60 and "SR. I/984" refers to Volume I of the Supplemental Record at page 984.

Lakeview Reserve which included the roadways, retention ponds[4] and stormwater drainage system of the subdivision. (R. I/3, 16; R. II/287-89, 315, 333-34; R. III/388-89.)

The individual house purchasers in Lakeview Reserve do not own or posses any ownership interest in the common areas (roadways, retention ponds and stormwater drainage system) at Lakeview Reserve. (R. I/16; R. II/333-34; R. V/870.) Rather, the Corporate Association owns the common areas of Lakeview Reserve. (R. II/315, 333-34.)

On October 9, 2006, the Corporate Association, now controlled by the homeowners, served a notice of claim on Maronda as to alleged defects with the common areas at Lakeview Reserve specifically listing the roadways, retention ponds and underground stormwater drainage pipes of the subdivision. (R. II/257-58.) Neither in its October 9, 2006 notice of claim nor at any time thereafter did the Corporate Association claim that repairs needed to be made to any of the individual houses in Lakeview Reserve as a result of the alleged defects with the Corporate Association-owned common areas. (R. II/257-58.)

[4] The ponds in Lakeview Reserve are actually “detention ponds.” Respondent and the Fifth District, however, refer to the ponds in Lakeview Reserve as “retention ponds” and that is how they will be referred to in this brief.

STATEMENT OF THE CASE

The Corporate Association filed a Complaint against Maronda asserting two counts, one for breach of implied warranties of fitness and merchantability and the other for violation of the Florida Building Code. (R. I/1-50.) The trial court granted partial summary judgment in Maronda's favor as to the Corporate Association's building code violation claim. (R. I/182-83.) Maronda asserted a Third-Party Complaint against Thomson for common law indemnity, alleging that in the event Maronda was found liable to the Corporate Association, Thomson was liable to Maronda for any damages associated with the site development work. (R. II/187-258, 259-60.)

The Corporate Association subsequently filed a First Amended Complaint containing a single count for breach of implied warranties of fitness and merchantability against Maronda and concerning the alleged defects in Lakeview Reserve's common areas which were owned by the Corporate Association. (R. II/286-91, 335-36.) Maronda and Thomson both filed motions for summary judgment on the basis that, under the authority of *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983), and *Port Sewall Harbor & Tennis Club Owner's Ass'n v. First Fed. Sav. & Loan Ass'n of Martin County*, 463 So. 2d 530 (Fla. 4th DCA 1985), implied warranties of fitness and merchantability by a developer did not extend beyond the residence and improvements immediately supporting the residence and,

therefore, the Corporate Association's claim relating to the construction and design of the common areas of Lakeview Reserve, which did not pertain to the construction of homes or other improvements immediately supporting the residences, were barred as a matter of law. (R. II/303-10, 311-34.) Thomson also moved for summary judgment as to the third-party claim asserted against it by Maronda. (R. II/311-34.)

The trial court granted the Petitioners' motions for summary judgment on the authority of this Court's decision in *Conklin* and the Fourth District's decision in *Port Sewall* and entered Final Summary Judgment in the Petitioners' favor. (R. V/844-46, 847-80.) The Corporate Association appealed and the Fifth District reversed the trial court, holding that the Corporate Association enjoyed 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). *Lakeview Reserve*, 48 So. 3d at 903-904, 908-909. (*See also* June 8, 2011 Record on Appeal from the Clerk of the Fifth District Court of Appeal at 178-190.) The Fifth District, however, recognized that its decision conflicted with the Fourth District in *Port Sewall* on the same point of law based on essentially the same facts and certified the conflict. *Id*. at 904, 909.

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.'" *Lakeview Reserve*, 48 So. 3d at 906 (quoting *Conklin*, 428 So. 2d at 655 (emphasis added)).

The Fifth District also recognized that in *Port Sewall* a homeowners' association brought suit 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. The Fifth District further noted that the trial court in *Port Sewall* entered a directed verdict in favor of the defendant, based on *Conklin*. 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.

Lakeview Reserve, 48 So. 3d at 908 (quoting *Port Sewall*, 463 So. 2d at 531) (emphasis added). The Fifth District, moreover, "disagree[d] with the Fourth District's conclusion that roads and drainage in a subdivision do not immediately support the residences." *Id.*

The Fifth District, however, went on to state that the Florida Supreme Court's language 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 essential to the habitability of the residence" and "are all essential services" subject to implied warranties. *Id*.

The Fifth District also stated that it had created a new "essential services" test presumably in lieu of the "immediately supports" a residence test for whether an implied warranty of habitability applies. Disregarding the Florida Supreme Court's test in *Conklin*, the Fifth District announced a new test, as follows (although it seems to include multiple tests):

> 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*.

Id. at 908-909 (emphasis added).

Maronda and Thomson invoked the Court's certified conflict jurisdiction to review the Fifth District's decision and the Court accepted jurisdiction and

consolidated the cases. (June 8, 2011 Record on Appeal from the Clerk of the Fifth District Court of Appeal at 192-206, 245-261, 263, 264-265.)

SUMMARY OF THE ARGUMENT

The Court should reject the Fifth District's unwarranted expansion and confusion of Florida law on implied warranties. The doctrine of *caveat emptor*, relied upon by the Fifth District, does not apply or even enter the equation because the house purchasers in the subdivision were never asked to purchase, nor did they purchase or have any ownership interest in, the common areas at issue. For that matter, the Corporate Association did not purchase the roads or drainage systems either. They are, however, exclusively owned by the Corporate Association which is a creature of law and does not inhabit anything. Unlike the unique attributes of condominium common property, the roads and stormwater drainage systems at issue are not owned in undivided shares by all of the house purchasers in Lakeview Reserve; they are owned by the Corporate Association.

Moreover, the common area subdivision improvements complained of are not part of a completed structure and do not immediately support any residence in the subdivision, which is absolutely required for the application of implied warranties of habitability. In *Conklin*, this Court explained that water wells and septic tanks immediately support a residence. This is common sense because without potable water and sewage disposal, a house is not habitable. As the Fourth

District correctly recognized in *Port Sewall*, the same, however, cannot be said of roads and drainage systems in a subdivision, improvements that do not pertain to the construction of a house or other improvements immediately supporting the house. The dissent in *Conklin* conceded to the majority's opinion that improvements such as roads have no relationship to the habitability of a home. There is no allegation and no record evidence that the alleged defects in the common areas have made any residence in Lakeview Reserve uninhabitable.

The Respondent could have sued the Developer under a variety of theories, such as negligence, fraud, failure to warn, and breach of fiduciary. Instead, it chose to pursue Maronda only for breach of purported implied warranties of habitability, a cause of action not available to it under *Conklin* and expressly disapproved of by the Fourth District in *Port Sewall*.

The Fifth District's announcement of a new "essential service" definition/test as to whether a common area subdivision improvement immediately supports a residence was unnecessary given the clear parameters on the application of implied warranties established in *Conklin*, and it does nothing but serve to confuse this area of the law. In any event, even using the Fifth District's own test, paved roads and stormwater drainage systems in a subdivision are simply not essential to the habitability of the residences therein as undoubtedly recognized by

those who live in areas with unpaved roads or without stormwater drainage systems.

STANDARD OF REVIEW

The standard of review on pure questions of law is *de novo*. *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003).

ARGUMENT

I. IMPLIED WARRANTIES OF HABITABILITY ARISE FROM THE PURCHASE OF A RESIDENCE AND SHOULD NOT EXTEND TO COMMON AREA SUBDIVSION IMPROVEMENTS THAT ARE NOT PURCHASED.

The law in Florida is that implied warranties are extended to first purchasers of residential real property, and that these warranties apply only to the construction of a house and other improvements on the property that immediately support the residence. *Conklin v. Hurley*, 428 So. 2d 654, 658-59 (Fla. 1983). In *Lakeview Reserve*, 48 So. 3d 902 (Fla. 5th DCA 2010), the Fifth District has not only applied implied warranties to common area subdivision improvements that do not immediately support a residence, it has extended these warranties to individual homeowners and an incorporated homeowners' association, neither of which purchased the subdivision improvements.

The house purchasers in Lakeview Reserve were not asked to purchase, did not purchase, and do not own the roads and drainage systems in the subdivision.

The Corporate Association also did not purchase the common areas in the subdivision. Maronda conveyed all right, title and interest to the common areas to the Corporate Association shortly after the Corporate Association was created and while controlled by the Developer, Maronda. The homeowners' later control of the Corporate Association did not resemble or constitute a "purchase" which, in turn, created a warranty, implied or otherwise. The Fifth District's reliance on the doctrine of *caveat emptor* as it relates to the <u>sale</u> of residential real property and the public policy of protecting consumers as grounds to extend implied warranties to roads and stormwater drainage systems in a subdivision, therefore, is misplaced. Since the common area subdivision improvements complained of were not purchased, the issue of the relaxation of *caveat emptor* as to the sale of residential real property does not even come into play. *See, e.g.,* 17 *Williston on Contracts* § 50:26 (Richard A. Lord ed., 4th ed. 2011) ("As a general rule, the doctrine of *caveat emptor* applies to contracts for the <u>sale</u> of land in which a vendor conveys title, possession, and control over property to a <u>purchaser</u>." (citing to *Stewart v. Isbell*, 399 N.W.2d 440 (Mich. Ct. App. (1986) (emphasis added)).[5]

[5] The Fifth District erroneously stated that "the Association and/or the homeowners may bring the [implied warranty] claim for these 'privately-owned' structures." *Lakeview Reserve*, 48 So. 3d at 909. It is undisputed, however, that the homeowners in Lakeview Reserve do not own the subdivision improvements and that only the Corporate Association owns the common areas.

In *Conklin*, this Court refused to extend implied warranties to a seawall abutting the residential lots because "[n]one of the petitioners purchased a dwelling from [respondent] Carriage Hill. The seawall was not part of a completed structure." 428 So. 2d at 658 (emphasis added). Here, neither the individual house purchasers nor the Corporate Association "purchased" the subdivision improvements from Maronda and they were not part of a completed structure. The Court should similarly decline to extend implied warranties to the common area improvements of Lakeview Reserve.

In its First Amended Complaint, Respondent defines the "premises" of Lakeview Reserve to be "the lots, improvements, and common property."[6] (R. II/288 at ¶ 10.) Respondent then makes the following allegation that demonstrates the fallacy of extending implied warranties to the alleged defects in the common areas of Lakeview Reserve:

> All of the defects referred to in Paragraphs 12(a) – (e) herein [roadways, retention ponds, underground pipes, site preparation, drainage, grading] were and are hidden or latent defects which … were unknown to the Association and the members of its class at the time they purchased the premises.

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[6] "Common property" is a misnomer to the extent it implies common ownership akin to "condominium property" which is defined as the lands, leaseholds, and personal property "that are subjected to condominium ownership…." Fla. Stat. § 718.103(13). The correct term is "common area" which means "all real property within a community which is owned or leased by an association …." Fla. Stat. § 720.301(2).

(*Id*. at ¶ 13.) (Emphasis added.) Implied warranties do not apply because, contrary to the Respondent's allegation, neither the individual homeowners in Lakeview Reserve nor the Corporate Association purchased the complained of subdivision improvements.

Respondent then alleges that Maronda "was the developer of the Subdivision, and owned the land, and <u>sold</u> the parcels and <u>their appurtenances</u>." (*Id*. at ¶ 13.) (Emphasis added.) Again, if by "appurtenances" Respondent means the subdivision common areas, it cannot be reasonably disputed that Maronda did not sell, and the Corporate Association and the individual house purchasers in Lakeview Reserve did not purchase, the common areas of the subdivision. Respondent also alleges that when Maronda sold houses in Lakeview Reserve it impliedly warranted that the premises were "merchantable." (R.II/288 at ¶ 10.) Roads and stormwater drainage systems, however, unlike certain types of houses, are not mass-produced or "merchantable."

Although it is a personal injury case, *Seitz v. Zac Smith & Co.*, 500 So. 2d 706 (Fla. 1st DCA 1987), is instructive. *Seitz* involved the erection of a floodlight tower at a high school stadium. The tower was defectively erected resulting in the injury of a worker who fell from the tower. The plaintiff sued the various entities responsible for the design, fabrication, erection and inspection of the tower for

negligence, breach of warranty and products liability. The trial court entered summary judgment in favor of the defendants and the plaintiff appealed.

The plaintiff's appeal concerned his negligence claim because, as the First District recognized, "no serious contention has been made by [the plaintiff] that the tower, which was affixed to real estate, constituted a "product" or "good" which was sold in the marketplace so that principles of strict liability or implied warranty apply." *Id*. at 709. The First District cited to, among other cases, *Conklin* and *Port Sewall* for this statement. The *Seitz* court parenthetically noted that, in *Port Sewall*, "purchasers of residential real estate had no cause of action for violation of implied warranties where [the] defective work complained of involved roads and drainage in a subdivision and did not pertain to construction of homes or other improvements immediately supporting residences." *Seitz*, 500 So. 2d at 709.

Similarly, the roads and stormwater drainage system of Lakeview Reserve do not constitute "products" or "goods" and, therefore, the principles of implied warranty do not apply. There is nothing "chattel-like" about roads and drainage systems which, unlike certain types of houses, are not mass-produced.[7] There is no reason, therefore, to expand implied warranties to cover the common area subdivision improvements at issue.

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[7] In *Conklin*, this Court explained that "mass-produced houses" and the "chattel-like quality" of modern houses were reasons for the rejection of *caveat emptor* as applied to the sale of new houses. *Conklin*, 428 So. 2d at 657-58.

Other jurisdictions have rejected the imposition of implied warranties if the plaintiff did not purchase the defective improvements or services at issue. In *Summer Chase Second Addition Subdivision Homeowners Ass'n v. Taylor-Morley, Inc.*, 146 S.W.3d 411 (Mo. Ct. App. 2004), a homeowners' association sued a general contractor for breach of implied warranties of merchantability and fitness in relation to an allegedly defectively designed and constructed retaining wall located behind certain homes in the subdivision that moved and which required repair to prevent further movement. The retaining wall was part of the common areas of the subdivision that the developer conveyed and transferred to the association. *Id*. at 414.

The Missouri appellate court affirmed the trial court's dismissal of the homeowners' association's implied warranty claim because implied warranties only applied in connection with the purchase of a new home by the first purchaser, and the homeowners' association was <u>not</u> a first purchaser of a new home. *Id*. at 415-16. The Missouri appellate court found that the homeowners' association's status as the owner of the common areas was not the same as being a first purchaser of a new home, and that the common areas of the subdivision were conveyed and transferred to the association, not purchased. "Thus, [the association] did not 'purchase' the common areas" and the association could not assert a claim for breach of implied warranty. *Id*. at 416. The court also found that the implied

warranty claim was properly dismissed because the retaining wall was located in the common areas of the subdivision and, therefore, was also not purchased by any specific homeowner. *Id*.

In *Parkway Co. v. Woodruff*, 901 S.W. 2d 434 (Tex. 1995), the Parkway Company performed subdivision improvements such as surveying, regrading and road building. Homeowners in the subdivision alleged that their home was flooded because Parkway failed to properly perform these services and they sued Parkway for breach of an implied warranty to perform development services in a good and workmanlike manner. *Parkway*, 901 S.W.2d at 437.

The Supreme Court of Texas held that the plaintiffs had no viable claim against Parkway "when they neither sought nor acquired the services about which they complain." *Id*. at 439. The *Parkway* court explained that "[t]he requirement that a consumer urging an implied warranty for services seek or acquire that specific service flows from the historical definition of a warranty" which is that "[a] warranty is an express or implied statement of something *with respect to the article sold* which the seller undertakes shall be part of a contract of sale." *Id*. (emphasis in the original) (quoting Arthur Biddle, *A Treatise on the Law of Warranties in the Sale of Chattels* 1 (Philadelphia, Kay & Brother 1884)).

In *Parkway*, the defendant who performed the subdivision improvements did not sell the house to the plaintiffs. However, the reasoning of the case still applies.

Maronda did not agree to construct the subdivision improvements for the individual house purchasers or the Corporate Association. Neither the house purchasers nor the Corporate Association bargained for or purchased the subdivision improvements in Lakeview Reserve. An implied warranty, therefore, should not extend to the subdivision improvements neither bargained for nor purchased by the Corporate Association or its individual members.

In *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.,* 799 P.2d 250 (Wash. 1990), the Supreme Court of Washington explained that one of the reasons an implied warranty of habitability should attach to serious and substantial construction deficiencies that severely restrict the habitability of a residence "is because a <u>purchaser</u>[] 'has a right to expect to receive that for which he has bargained and that which the builder-vendor has agreed to construct and convey to him, that is, a house that is reasonably fit for use as a residence.'" *Atherton*, 799 P.2d at 521-22 (emphasis added) (quoting *Frickel v. Sunnyside Enters., Inc.*, 106 Wash.2d 714, 719-20, 725 P.2d 422 (1986)).

Lack of privity is another reason why implied warranties should not be extended to the subdivision improvements at issue. It is well settled that privity is essential to claims based on express and implied warranties. *See*, *e.g.*, *Whitehead v. Rizon East Ass'n*, 425 So. 2d 627, 629 (Fla. 4th DCA 1983); *Intergraph Corp. v. Stearman*, 555 So. 2d 1282, 1283 (Fla. 2d DCA 1990). The house purchasers were

not in privity with Maronda with respect to the common areas of Lakeview Reserve. Implied warranties, therefore, never came about. The house purchasers in Lakeview Reserve purchased only the house and the lot. They were not offered nor did they purchase the common areas of the subdivision. There simply are no implied warranties that run to a person who did not purchase the property at issue. *See Whitehead, Intergraph, supra*.

A. Condominium Law Does Not Apply

The Fifth District correctly rejected the Respondent's urging to apply cases dealing with statutory condominium warranties. *Lakeview Reserve*, 48 So. 3d at 910 ("we reject the Association's application of cases extending implied warranties to the common areas in condominiums as we find those cases inapplicable precisely because those cases are decided on statutory grounds, not available here."). The Condominium Act, Chapter 718 of the Florida Statutes, at § 718.203, sets forth a developer's statutorily implied warranty of fitness and merchantability to the purchaser of each unit. Unlike the Condominium Act at Chapter 718, the homeowners' association statutory scheme found at Chapter 720 has no provision imposing an implied warranty of fitness and merchantability on a developer.

Another significant difference between condominiums and homeowners' associations is that a condominium purchaser/owner "obtains title to a unit, together with an undivided share in common elements, i.e., all portions of the

condominium property not included in the units." *Turnberry Court Corp. v. Bellini*, 962 So. 2d 1006, 1008 (Fla. 3d DCA 2007) (citing to Fla. Stat. § 718.103(11)) (emphasis added). This is not the case for a purchaser of a house in a subdivision. The purchaser/owner owns the house and his or her lot. The homeowners' association typically owns the common areas. *See* Fla. Stat. § 720.301(2). Here, it is undisputed that the Corporate Association exclusively owns the common areas of Lakeview Reserve, including the roads and drainage systems, not the individual house purchasers.

II. IMPLIED WARRANTIES DO NOT EXTEND TO ROADS AND STORMWATER DRAINAGE SYSTEMS IN A SUBDIVISION BECAUSE THEY DO NOT "IMMEDIATELY SUPPORT" A RESIDENCE

A. This Court's and the Fourth District's Decision in *Conklin*

Implied warranties apply to improvements immediately supporting a residence, such as water wells and septic tanks. In *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983), the petitioners, who purchased vacant waterfront lots improved only by a seawall, filed actions against the developer for breach of implied warranty of fitness over the collapse of the seawall abutting the petitioners' lots. *Id*. at 655-56. The trial court found that an implied warranty of fitness applied to the construction of the seawall, but the Fourth District reversed and certified the following question to this Court:

> Do implied warranties of fitness and merchantability extend to first purchasers of residential real estate for 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?

Id. at 655 (emphasis added).

This Court rejected the urging of the petitioners to extend the holding of *Gable v. Silver*, 258 So. 2d 11 (Fla. 4th DCA 1972), *aff'd*, 264 So. 2d 418 (Fla. 1972), to impute to a developer an implied warranty of fitness covering the collapsed seawall abutting residential lots. *Id*. at 656.[8] The Court set forth the clear parameters of implied warranties by holding that they do not extend to first purchasers of residential real estate for improvements to land other than construction of a house and other improvements immediately supporting the residence thereon, such as water wells and septic tanks, but not a seawall that was not part of a completed structure. *Id*. at 655, 658. In dissent, Justice Adkins would have extended an implied warranty to the construction of the seawall, but he would not extend them to roads.

> I recognize that there are several common improvements made to residential property which have no relation to the fitness or habitability of a home such as landscaping, **roads** and fences. I would not extend implied warranties to improvements which are not an integral part of the real

[8] This Court adopted as its own the Fourth District's decision in *Gable* which recognized an implied warranty in the sale of residences. *Gable*, 264 So. 2d 418 (Fla. 1972).

> estate purchase or are not supportive to the residence or proposed residence.

Id. at 661 (Adkins, J., dissenting) (emphasis added). Here, this Court should similarly reject the Fifth District's unwarranted extension of the holdings of *Gable* and *Conklin* to roadways and drainage systems in a subdivision.

The Supreme Court of Florida approved the decision of the Fourth District Court of Appeal in *Conklin v. Hurley*, 409 So. 2d 148 (Fla. 4th DCA 1983) ("*Conklin I"*). *Conklin*, 428 So. 2d at 659 ("Having fully considered the briefs submitted by the parties and amicus curiae, as well as oral argument on behalf of petitioners and respondent Carriage Hill, the decision of the Fourth District Court of Appeal is approved."). The Fourth District had examined the modern rule set forth in *Gable* that implied warranties applied to the sale of residential realty. *Conklin I*, 409 So. 2d at 149. The Fourth District recognized, however, that the limited relaxation of the doctrine of *caveat emptor* did not do away with the entire concept and stated that "[s]ubsequent decisions have failed to extend the modern view of *Gable* beyond its clear parameters." *Id*. at 150.

In deciding whether to apply implied warranties to a seawall, the Fourth District noted that, in other jurisdictions, implied warranties were extended to "improvements outside of but in support of the house such as wells supplying water to the house" and "septic tanks and drain fields." *Id*. (Citations omitted.) The Fourth District explained that:

> The principle involved in these cases seems to be that, although the defects do not appear in the house structure, the builder is responsible for them and they were placed on the lot in conjunction with and to support the house.

Id. (Emphasis added.)

In approving the Fourth District's decision not to extend implied warranties to the seawall and refusing to further extend the implied warranties created in *Gable*, this Court emphasized that "[t]he seawall was not part of a completed structure." *Conklin*, 428 So. 2d at 658 (emphasis added). Here, the roads and retention ponds at issue were not constructed on the lots of Lakeview Reserve. They were constructed in the subdivision's common areas. Moreover, like the seawall in *Conklin*, the common areas of which Respondent complains are not part of a completed structure in Lakeview Reserve. Implied warranties of habitability, therefore, should not be extended to the subdivision improvements involved in this case.

The trial court in *Conklin* ruled that implied warranties extended to the seawalls because it determined that they were "necessary and essential[9] elements for the building of homes." *Conklin I*, 409 So. 2d at 150-51. The Fourth District rejected this reasoning, as follows:

> the suggestion that this seawall is a part of, or in support of, the house improvement as are water wells and septic

[9] This language is similar to the Fifth District's "essential services" language found in its *Lakeview Reserve* decision. *Lakeview Reserve*, 48 So. 3d at 908-909.

> tanks we feel is a strained extension of the rationale which gave rise to the extension of the doctrine of implied warranty to residential construction.

Id. at 151. Here, the roads and drainage systems at issue are not part of the houses in Lakeview Reserve nor were they necessary and essential elements for their construction. The Fifth District's determination that roads and drainage systems are "essential services" that immediately support a residence, therefore, is an equally strained extension of the rationale underlying the application of implied warranties to residential construction.

The Fourth District found that the extension of implied warranties to a seawall was "too radical a departure from the general rule in this country and the jurisprudence of this state. A drastic change in course as suggested is more appropriate coming from the highest court in the state." *Id.* This Court approved the Fourth District's decision in *Conklin*, and thereby also refused to drastically change the course and extend implied warranties to a seawall that merely abutted the property and was not part of a completed structure. Petitioner respectfully submits that there is no reason for the Court to now drastically change the course of implied warranties, especially when the Respondent has other viable causes of action available to it, and should refuse to extend them to roads and drainage systems in common areas of a subdivision that were not purchased by the homeowners or the Corporate Association, that are not part of any completed

structure or connected to it in any way, and that are not necessary and essential elements of a residence.

B. The Fourth District's Decision in *Port Sewall*

After this Court's decision in *Conklin*, the Fourth District Court of Appeal, in *Port Sewall Harbor and Tennis Club Owners Ass'n v. First Fed. Sav. & Loan of Martin County*, 463 So. 2d 530 (Fla. 4th DCA 1985), properly rejected the argument that implied warranties should be extended to roads and drainage systems in a subdivision. In *Port Sewall*, the original developer defaulted on its mortgage and the developer's obligations were completed by the mortgage company, First Federal. *Id*. at 531. The 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, based upon this Court's decision in *Conklin*, entered judgment for First Federal's upon its motion for directed verdict. *Id*.

The Fourth District affirmed the trial court's directed verdict for First Federal, holding that an implied warranty only pertained to the construction of a residence and other improvements <u>immediately supporting</u> the residence such as water wells or septic tanks and did not apply, therefore, to the roads and drainage system of a subdivision. *Id*.

> The foot bridge in question and the defective work complained of involved <u>roads and drainage</u> 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. 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).

Just as in *Port Sewall*, the Corporate Association here should not be permitted to maintain an action for breach of implied warranties of habitability against Maronda for alleged construction defects involving the roads and drainage system at the Lakeview Reserve subdivision, and the trial court's proper entry of summary judgment in the Petitioners' favor, based on *Conklin* and *Port Sewall*, should be affirmed.

In *Lakeview Reserve*, the Fifth District stated that, in *Port Sewall*, it seemed that the Fourth District defined an improvement that "immediately supports" a residence narrowly as "something that bears or holds up a structure, such as a footer, a foundation or a wall, or is attached to the house." *Lakeview Reserve*, 48 So. 3d at 908. It is doubtful, however, that the Fourth District ascribed such a narrow definition to an improvement that immediately supports a residence. Judge Downey, the author of the *Port Sewall* decision, also authored the Fourth District's

Conklin decision. In that decision, Judge Downey thoroughly examined the extent of implied warranties and cited to cases from other jurisdictions that provided implied warranties for improvements that were "outside of but in support of the house," such as water wells and septic tanks. *Conklin I*, 409 So. 2d at 150. These types of improvements are not footers, foundations, walls or improvements that "hold up a structure" or are necessarily attached to a house. While Judge Downey concluded that for implied warranties to apply the defective improvement did <u>not</u> have to appear in the house structure, it had to be "placed on the <u>lot</u> in conjunction with and to support the house." *Id*. (Emphasis added.) Here, the Fifth District would extend implied warranties to improvements not even on the lots of the house purchasers in Lakeview Reserve, and may not even abut same.

C. The Fifth District's Decision in *Lochrane Engineering*

Following the *Port Sewall* decision, the Fifth District, in *Lochrane Eng'g, Inc. v. Willingham Realgrowth Investment Fund*, 552 So. 2d 228 (Fla. 5th DCA 1989), held that implied warranties extended to a duplex unit's septic tank sewage disposal system. *Id*. at 230. This was consistent with the holdings of *Gable* and *Conklin* and the principle that implied warranties extend only to the construction of the house itself and improvements immediately supporting the residence, such as septic tanks.

D. *Conklin* Is Not Limited to Investors

In *Lakeview Reserve*, the Fifth District attempts to distinguish *Conklin* and limit its holding on the basis that the purchasers in *Conklin* were investors. *Lakeview Reserve*, 48 So. 3d at 907. While this Court discussed the status of the petitioners in *Conklin* as investors, the question the Court addressed was not whether implied warranties extended to investors but, rather, whether implied warranties extended to first purchasers of residential real estate for improvements to the land other than the house built on the land and other improvements immediately supporting the residence "such as water wells and septic tanks." *Conklin*, 428 So. 2d at 655.

Moreover, limitation of *Conklin's* holding to investors would be contrary to the Fifth District's own *Lochrane* decision. In *Lochrane*, the Fifth District determined that even though the purchaser "bought five <u>residential</u> duplex units (ten <u>dwelling</u> units) as an investment for rental, we apply *Gable* . . . and not the narrow exception for investment-related improvement of <u>vacant land</u> made in *Conklin* . . . ." *Lochrane*, 552 So. 2d at 230 (emphasis added). Both *Conklin* and *Lochrane* involved investor purchasers. If the only factor to be considered from *Conklin* was the status of the purchaser as an investor, the *Lochrane* court would have found that <u>no</u> implied warranty existed. The *Lochrane* court, however, also looked to the use of the property. In *Conklin*, the land was vacant. In *Lochrane*,

residential dwelling units had been built. The *Lochrane* court, therefore, did not apply the "narrow exception for investment-related improvement of vacant land" described in *Conklin* because the property in question was improved with dwelling units and the implied warranty related to the construction of an improvement immediately supporting the dwelling, a septic tank system. *Lochrane*, 552 So. 2d at 230.

E. The Trial Court Properly Applied Florida Law on Implied Warranties

Prior to the *Lakeview Reserve* decision, Florida courts clearly identified who was entitled to an implied warranty of habitability and what kinds of defects were covered and what defects were not covered under a claim for breach of such an implied warranty. Defects to improvements that immediately support a residence, such as water wells and septic tanks, were covered; improvements that did not immediately support a residence, such as roads, landscaping, foot bridges and drainage, were not because they did not immediately support a residence. *See Conklin*, 428 So. 2d at 658-59; *Port Sewall*, 463 So. 2d at 531; *Lochrane*, 552 So. 2d at 230.

The trial court below in this case appropriately applied *Conklin*, *Port Sewall*, and *Lochrane* in granting the Petitioners' motions for summary judgment. The trial court recognized that these cases made it clear that for implied warranties to apply, the improvements had to immediately support the residence and that the Supreme

Court of Florida and the Fourth and Fifth District Courts of Appeal had already set forth what immediately supported a residence and what did not – septic tanks and water wells did; seawalls, roads and drainage systems did not. (R. V/851; 857, lines 7-10 and 17-19; 859, line 23, through 861, line 2; 863, lines 14-21; 864, lines 14-23; 865, line 23, through 866, line 8; 866, lines 22-23; 867, lines 9-14.) The Fifth District's extension of implied warranties, on the other hand, is contrary to the clear dictates of *Conklin* and *Sewall* that improvements such as roads and drainage systems that do not immediately support a residence are not covered by implied warranties.

Other courts have also refused to extend implied warranties to roads in a subdivision. In *San Luis Trails Ass'n v. E.M. Harris Building Co.*, 706 S.W. 2d 65 (Mo. Ct. App. 1986), the Court of Appeals of Missouri, citing to this Court's decision in *Conklin* and the Fourth District's decision in *Port Sewall*, also held that a homeowners' association could not recover damages against a residential subdivision developer based on implied warranty for defects in the roads of the subdivision. *Id*. at 68-69 ("We believe that these Florida decisions are in harmony with the concept of implied warranty as developed in Missouri."). The Missouri court noted that the relaxation of *caveat emptor* law was "limited" and because the plaintiff did not allege "deterioration of a house or an improvement outside the house which is an integral part of the structure or immediately supports it," a cause

of action for implied warranty was not available to the association. *Id*. at 69. Just as in *San Luis Trails*, here, the Respondent does not allege deterioration of a house or an improvement that is an integral part of a structure or that immediately supports it. This, combined with the limited relaxation of *caveat emptor*, means that the Respondent does not have a cause of action for implied warranty against Maronda.

F. The Corporate Association Has Other Causes of Action Available to It Against Petitioner Maronda

This Court's reversal of *Lakeview Reserve* and rejection of the expansion of implied warranties to common area subdivision improvements will not leave plaintiffs such as the Corporate Association without a remedy if there are defects in these improvements; there are other causes of action such a plaintiff can assert. In its First Amended Complaint, the Corporate Association alleged that Maronda knew of the defects in the common areas of Lakeview Reserve but failed to disclose them to the Corporate Association. (R.II/287 at ¶ 7.) The Corporate Association, therefore, had causes of action available to it with respect to the defects complained of, just not for breach of implied warranties. The Corporate Association could have asserted legally cognizable causes of action against Maronda for negligence,[10] failure to detect and/or warn of defects,[11] fraud,[12]

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[10] *See Conklin*, 428 So. 2d at 659 ("Our refusal to extend the doctrine of implied warranty to the facts of this case <u>in no way precludes petitioners from recovering</u>

fraudulent nondisclosure,[13] and breach of fiduciary duty.[14] The Corporate Association, however, stubbornly chose to pursue Maronda on a single claim for breach of implied warranty, a cause of action no court had recognized as to defects in a subdivision's common area improvements and which the Fourth District, in *Port Sewall*, had expressly rejected.

III. IMPLIED WARRANTIES SHOULD NOT EXTEND TO COMMON AREA SUBDIVISION IMPROVEMENTS WHICH HAVE NO RELATION TO THE HABITABILITY OF A RESIDENCE

In *Conklin*, the Fourth District explained that one of the reasons justifying the application of implied warranties to the sale of new houses was the recognition that "'the essence of the transaction is an implicit engagement upon the part of the seller to transfer a house suitable for habitation.'" *Conklin I*, 409 So. 2d at 149

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any loses they may be able to prove. As noted by the district court, petitioners may still pursue an action in negligence against the builders of the seawall.") (Emphasis added.)

[11] *See, e.g., Cook v. Salishan Properties, Inc.*, 569 P.2d 1033, 1034 (Or. 1977) (cited with favor in *Conklin*, 428 So. 2d at 658-59).

[12] *Berg v. Capo*, 994 So. 2d 322, 327 (Fla. 3d DCA 2007) ("fraud may be established by either an intentional misrepresentation or omission of a material fact.").

[13] *Johnson v. Davis*, 480 So. 2d 625, 628 (Fla. 1985) (a fraud claim can be based on the breach of an implied duty to disclose, either by concealment or an affirmative representation).

[14] *Concerned Dunes West Residents, Inc. v. Georgia Pacific Corp.*, 562 S.E.2d 633, 638 (S.C. 2002) (a developer breaches its fiduciary duty to a property owners' association if it transfers common areas to it that are not in reasonably good repair and without sufficient funds to bring them up to standard) (cited by Respondent to the trial court below at R.III/434-35, 441-42).

(quoting *Yepsen v. Burgess*, 525 P.2d 1019, 1022 (Or. 1974)). In its decision in *Lakeview Reserve*, the Fifth District determined that roads, drainage systems, retention ponds and underground pipes "are essential to the habitability of the residence" and held that implied warranties applied to their construction. *Lakeview Reserve*, 48 So. 3d at 908-909.

The Fifth District, however, does not explain how the defects in the common areas complained of by the Respondent makes any of the homes in Lakeview Reserve uninhabitable. Do mosquitoes in the retention ponds make the house uninhabitable? Do cracks in the decade old asphalt make the house uninhabitable? If there are multiple roads that lead to one's house, does a defect in a section of one road, or two or three make the house uninhabitable? See, for example, the plat of Lakeview Reserve showing the various roads that dissect the subdivision. (Appendix (highlighting and notations as to "north" and "south" sections supplied); R.III/389-90.) If the roads are unpaved, does this make the houses automatically uninhabitable? How far down the road does this test go? There is neither citation to authority that paved roads or stormwater drainage systems are an essential element of the habitability of a house nor a finding that the health of the house purchasers is at issue, such as in cases involving the supply of potable water and performance of septic tanks. As the dissent in this Court's decision in *Conklin* recognized, roads "have no relation to the fitness or habitability of a home" and

should not, therefore, carry an implied warranty of fitness and merchantability. *Conklin*, 428 So. 2d at 661 (Adkins, J., dissenting).

In other jurisdictions, implied warranties have been applied to improvements other than the house itself, namely, septic tanks and water wells, because without them the house is not habitable. *See, e.g., Luker v. Arnold*, 843 S.W. 2d 108, 116 (Tex. Ct. App. 1992) (recognizing an implied warranty regarding septic tanks and explaining that "[f]or fifteen years, the Texas Department of Health has been concerned about consumers who are financially ruined by septic system failures.");[15] *George v. Veach*, 313 S.E. 2d 920 (N.C. Ct. App. 1984) (if a house lies beyond the reach of public or community sewage facilities, a septic tank or on-site sewage disposal system is generally an element of habitability.); *McDonald v. Mianecki*, 398 A.2d 1283, 1293-94 (N.J. 1979) ("it goes without saying that a potable water supply is essential to any functional living unit; without drinking water, the house cannot be used for the purpose intended."); *Lyon v. Ward*, 221 S.E. 2d 727, 729-30 (N.C. Ct. App. 1976) ("Because an adequate supply of usable water is an absolute essential utility to a dwelling house, we believe that the initial purchaser of a house from the builder-vendor can reasonably expect that a well

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[15] *But see Welwood v. Cypress Creek Estates, Inc.*, 205 S.W. 3d 722, 730 (Tex. Ct. App. 2006) ("The supreme court [of Texas] has not recognized the implied warranty of good and workmanlike development services found in *Luker*, and has rejected a similar implied warranty regarding future development services.") (citing to *Parkway Co. v. Woodruff*, 901 S.W. 2d 434, 439-40 (Tex. 1995)).

constructed on the premises by the builder-vendor will provide an adequate supply of usable water."); *Loch Hill Constr. Co. v. Fricke*, 399 A. 2d 883 (Md. 1979) ("an adequate supply of water to and within the Fricke home was necessary to make it habitable.").

Additional jurisdictions have refused to extend implied warranties to improvements outside of the house if the habitability of the house is not implicated. In *Board of Directors of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc.*, 712 N.E. 2d 330 (Ill. 1999), the Supreme Court of Illinois explained that the implied warranty of habitability only applies where the latent defects complained of directly interfere with the suitability of the house for habitation and refused to extend an implied warranty to defects in a clubhouse constructed as part of the development's common areas. *Id*. at 334-36. *See also Campbell v. Randville Constr. Corp*., 410 A.2d 1184, 1186 (N.J. Super. Ct. App. Div. 1980) (refusing to extend an implied warranty to the death of trees on the property where there was no concern about the habitability of the residence).

It seems obvious that lack of potable water and functioning sewage disposal renders a residence uninhabitable. However, there is no such obvious connection between paved roads and stormwater drainage systems and the habitability of a residence. To the contrary, there is no evidence that any of the alleged defects in the common areas of Lakeview Reserve have made the residences uninhabitable or

that they have directly interfered with the homeowners' use of their houses. There is no evidence that the residents of Lakeview Reserve cannot access or leave their houses because portions of the paved 10 year old roads showed signs of cracking asphalt. The Corporate Association does not allege that individual houses in Lakeview Reserve have been damaged as a result of the allegedly defective roads and stormwater drainage system, and there is no evidence of that. No implied warranty, therefore, should apply to Lakeview Reserve's common areas.

IV. THE FIFTH DISTRICT'S "ESSENTIAL SERVICE" TEST IMPROPERLY EXPANDS AND CONFUSES THE APPLICATION OF IMPLIED WARRANTIES

Gable held that implied warranties extended to the sale of residences. *Gable*, 258 So. 2d at 18. *Conklin* articulated the principle that implied warranties extend 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. *Conklin*, 428 So. 2d at 655. In *Lakeview Reserve*, the Fifth District has extended *Gable* "beyond its clear parameters" (*Conklin*, 409 So. 2d at 150), and obfuscated the straightforward test in *Conklin* by announcing a new test(s) that implied warranties apply to common area subdivision improvements "that immediately support the residence *in the form of essential services*." 48 So. 3d at 909 (emphasis added).

> 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 the 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. We, likewise, hold that the services at issue in this case [roads, drainage systems, retention ponds and underground pipes] are essential to the habitability of the home for purposes of application of the implied warranties.

Id. at 909 (emphasis added).

This gloss or overlay on the Court's existent "immediately supporting a residence" test was unnecessary and causes confusion. The Fifth District's test initially seems to focus on the "absence of the service." What that means is truly ambiguous. Does that mean there must be a complete absence (i.e., no road or no stormwater drainage) or something less than 100% of the improvement? What does it mean when houses are reachable by multiple roads or paths? (See Appendix for the plat of Lakeview Reserve.) If a homeowner has more than one path to his house and only one of the paths is now impassable, how has the homeowner's level of habitability been affected? In fact, there is no allegation or record evidence that any of the homeowners in Lakeview Reserve cannot access their residences on any of the roads, or that the cracks in the asphalt, placed some ten years ago, makes the roads impassable.

The emphasis of the Fifth District's test then appears to transform to "improvements" and then, finally, to "structures." Is a retention pond, a road or an underground pipe a "structure"? In *Westport Ins. Corp. v. VN Hotel Group, LLC*, 2010 WL 5652435 (M.D. Fla. Dec. 9, 2010), the Middle District recognized the difficulty of defining the term "structure" as it is susceptible to "a wide range of meanings." *Id*. at *6. In one case, *Costin v. Branch*, 373 So. 2d 370 (Fla. 1st DCA 1979), the Third District Court of Appeal found that septic tanks and water lines did not fall within the definition of "structure" for purposes of an easement. *Id*. at 371. This suggests that the Fifth District's own test does not even apply to, at the very least, the underground pipes at issue in this case.

The phrase/test "immediately supporting a residence" set forth by the Supreme Court of Florida in *Conklin* is not ambiguous and, as demonstrated by the Fourth District in *Port Sewall*, can readily be applied to common area improvements. The Fifth District already recognized that the test for application of implied warranties as set forth in *Conklin* related to the habitability of a residence. *See Lakeview Reserve*, 48 So. 3d at 908 (recognizing that septic tanks and water wells "obviously 'support' the home by making it habitable, and so, fit for its intended purpose."). There was no need to create a separate test for common area improvements.

The creation of this separate test for common area subdivision improvements along with the modification that they can be "in the form of essential services" is open to all sorts of interpretation and will likely lead to increased litigation in this area and further unwarranted and/or unintended expansion of implied warranties, even to non-purchasers as in this case. If an aging asphalt road with some cracking, owned by others, renders a home uninhabitable, 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? Does this mean that houses in areas without stormwater drainage systems are uninhabitable? The Fifth District's "elegant test" is unworkable. How far down the road does an implied warranty of habitability actually extend?

In any event, as discussed in Section III, *supra*, there is no evidence that the defects complained of in the roads and stormwater drainage system have made the houses in Lakeview Reserve uninhabitable. Moreover, as the Fifth District itself explained, a defect in a common area improvement that is merely "ugly, inconvenient or uncomfortable" does "not render a home unfit for its intended purpose, i.e., habitability." *Lakeview Reserve*, 48 So. 3d at 908. Under the Fifth District's own test, therefore, the roads and stormwater drainage system do not immediately support the residences in the form of essential services and should not be covered by implied warranties.

CONCLUSION

The Court should quash the Fifth District's decision in *Lakeview Reserve*, and should affirm the Fourth District's decision in *Port Sewall* and the trial court's granting of summary judgment in favor of the Petitioners. Reversal of the Fifth District's decision in *Lakeview Reserve* 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 Corporate Association here, does not have a cause of action for breach of implied warranties in connection with the construction of roads and drainage systems in the common areas of a subdivision, improvements which do not immediately support a residence, such as a water well or septic tank system, on a homeowner's property.

The Fifth District's decision cannot be upheld on the basis of the doctrine of *caveat emptor* and merchantability concerns because neither the individual homeowners nor the Corporate Association purchased the roads and drainage system at issue. The Fifth District's decision also cannot be upheld on habitability grounds because there is no allegation or evidence that the defects complained of have made the residences in Lakeview Reserve uninhabitable, and the Corporate Association is a legal fiction that has no home, habitable or otherwise. The *Port Sewall* case out the Fourth District correctly applied this Court's holding in

Conklin, and the Fifth District's conflicting decision and distancing itself from the Court's *Conklin* decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on June 14, 2011, the foregoing has been sent by U.S. Mail to the following: Steven L. Brannock, Esq., Brannock & Humphries, 100 South Ashley Drive, Suite 1130, Tampa, Florida 33602; Scott J. Johnson, Esq./Heather Pinder Rodriguez, Esq., Holland & Knight, LLP, P.O. Box 1526, Orlando, Florida 32802-1526; Thomas R. Slaten, Jr., Esq./John C. Palmerini, Esq., Larsen & Associates, P.A., 300 S. Orange Ave., Suite 1200, Orlando, Florida 32801; Robyn S. Braun, Esq./Patrick C. Howell, Esq., Taylor & Carls, P.A., 150 N. Westmonte Drive, Altamonte Springs, Florida 32714; Nicholas A. Shannin,

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that we have complied with the font requirements of Fla. R. App. P. 9.210(a)(2). This brief has been submitted in Times New Roman 14-point font.

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APPENDIX

Plat of Southern Section of Lakeview Reserve. (Page 1 of 2) (R.III/389.)

Plat of Northern Section of Lakeview Reserve. (Page 2 of 2) (R.III/390.)