IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC10-2292 and SC10-2336
L.T Case Nos. 5D09-1146, 07-CA-1762

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

vs.

LAKEVIEW RESERVE HOMEOWNERS' ASSOCIATION, INC., a Florida not for profit corporation, Respondent.

T. D. THOMSON CONSTRUCTION COMPANY

vs.

LAKEVIEW RESERVE HOMEOWNERS' ASSOCIATION,INC., a Florida not for profit corporation, Respondent.

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

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,

FIFTH DISTRICT STATE OF FLORIDA

ROBYN SEVERS BRAUN, ESQ.
Florida Bar No.: 154504
Taylor & Carls, P.A.
7 Florida Park Drive North, Suite A
Palm Coast, FL 32137
Telephone: (386) 446-5970 Facsimile: (386) 446-5938
Attorneys for Respondent, Lakeview Reserve Homeowners' Association, Inc.

TABLE OF CONTENTS

TABLE OF CITATIONS

Florida Constitution **PAGES**

Florida Supreme Court Cases

Florida Appellate Court Cases

SUMMARY OF THE ARGUMENT

This Court has jurisdiction to review this case pursuant to Article V, Section 3(b)(4) of the Florida Constitution as the Fifth District Court certified conflict with the decision of the Fourth District. Thus, the question posed herein is whether this Court should elect to exercise its discretion and accept review. Respondent, Lakeview Reserve Homeowners' Association, Inc. (hereinafter "Lakeview"), asserts that it should not. First, the facts between the cases are substantially dissimilar so that the decisions do not actually conflict. Second, the Fifth District confined its ruling to the facts before it, thereby only impacting those parties involved, as opposed to the public in general. Accordingly, this Court should deny Petitioners' request for discretionary review.

ARGUMENT

I. THIS COURT SHOULD NOT GRANT DISCRETIONARY REVIEW AS THE FIFTH DISTRICT'S DECISION IS NOT IN ACTUAL CONFLICT WITH THE DECISION OF THE FOURTH DISTRICT.

Pursuant to Article V, Section 3(b)(4) of the Florida Constitution, it is undisputed that this Court has jurisdiction *per se*, as the Fifth District Court of Appeals certified conflict with a decision rendered by the Fourth District Court of Appeals in *Port Sewall Harbor and Tennis Club Owners*

Association, Inc. v. First Federal Savings and Loan Association of Martin County, 463 So. 2d 530 (Fla. 4th DCA 1985). *See State v. Vickery*, 961 So. 2d 309, 312 (Fla. 2007). While it is unnecessary for us to review the two decisions for a direct conflict to determine jurisdictional authority, such a review is necessary to clarify why this Court should not exercise its authority. Despite the contentions of Petitioners to the contrary, a review of the decisions and the facts surrounding the decisions will show that no actual conflict exists, which would inevitably cause this Court to discharge jurisdiction if review is initially granted.

In at least two prior occasions, this Court initially accepted jurisdiction because of a certified conflict only to discover upon further review that no actual conflict existed. *See State v. Lovelace*, 928 So. 2d 1176 (Fla. 2006); *Renaud v. State, 926 So. 2d 1241* (Fla. 2006). Respondent aims to conserve this Court's judicial resources by showing that jurisdiction should not be exercised on a case where it will eventually conclude that no actual conflict exists.

In *Lovelace v. State*, 906 So.2d 1258 (Fla. 4th DCA 2005), the Fourth District was presented with a writ of prohibition as to whether a violation of the speedy trial rule for a misdemeanor DUI charge prevented a felony DUI charge based upon

the same incident. *Lovelace*, 906 So. 2d at 1258. The Fourth District ruled that it does and certified conflict with the First District's decision in *State v. Jackson*, 784 So. 2d 1229 (Fla. 1st DCA 2001). *Id*. at 1258-59. Since the Fourth District certified conflict, this Court accepted jurisdiction. *State v. Lovelac*e, 928 So. 2d 1176, 1177 (Fla. 2006). However, after accepting jurisdiction, this Court concluded that *Lovelace* and *Jackson* were not in conflict. *Id.* In *Jackson*, the prosecutor filed a nolle prosequi before the misdemeanor speedy trial. *Lovelace*, 928 So. 2d at 1177. Then, after the misdemeanor speedy trial had expired, the state refiled the misdemeanor charge with a felony DUI charge in circuit court. *Id*. In *Lovelace*, the state filed a "no information" after the misdemeanor speedy trial period had run and then refiled a felony DUI charge in circuit court. *Lovelace*, 906 So. 2d at 1259. In a per curiam decision, this Court determined that the facts were not similar and, thus, the cases were not in conflict and discharged its jurisdiction. *State v. Lovelace*, 928 So. 2d at 1177.

Similarly, the facts in *Port Sewall* and in this case are different so as not to create a direct conflict. While Petitioner Maronda Homes Inc. argues that a direct conflict exists because the identical question was posed to both

districts and the cases contained "identical material facts" (Pet. Br. at 1, 3.), those representations are inaccurate.

This Court has already defined a "direct conflict" as one that would effectively overrule the other. *Ansin v. Thurston*, 101 So. 2d 808, 811 (Fla. 1958). Further, in *Nielsen v. City of Sarasota*, 117 So. 2d 731(Fla. 1960), this Court explained that a conflict arises either (1) when a court announces a rule of law which conflicts with a prior ruling of this Court or another district court or (2) when a court applies a rule of law to the same material facts and reaches a contrary result. *Nielson*, 117 So. 2d at 734. When a court confines its decision to the facts in the record before it, the rule of law pronounced by that court cannot conflict with the rule of law espoused by another. *See id.* at 734. As the Fifth District opined that its "holding is limited to the facts of this case," (Op. at 11) it did not announce a rule of law that conflicts with the ruling in *Port Sewell*. In fact, both courts applied the same rule of law that was expounded in *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983) that implied warranties only extend to improvements that immediately support the residence thereon. *Conklin*, 428 So. 2d at 655. However, due to the different facts involved, the districts arrived at different conclusions as to the meaning of the phrase "immediately support the residence."

The constitutional powers of this Court are necessarily limited so as to function as a supervisory court with the district courts acting as the final appellate courts, not as intermediary courts. *Ansin*, 101 So. 2d at 810. To allow otherwise would delay justice. *Id*. Thus, for cases to rise to the level of conflict necessary to warrant a review by this Court, there must be a "real and embarrassing" conflict of opinion and authority. *Id*. at 811. Such a conflict simply does not exist between this case and *Port Sewall*.

First, the questions presented to the courts were different. In *Port Sewall*, the Fourth District considered the following question: "[D]oes the holding in the *Conklin* case prevent a party from recovering against a developer who fails to construct the common elements in accordance with the plans and specifications filed with the governmental regulatory agencies?" *Port Sewall*, 463 So. 2d at 531. In this case, the Fifth District considered a different question: "Whether a homeowners association has a claim for breach of common law implied warranties of fitness and merchantability, also referred to as a warranty of habitability, against a builder/developer for defects in the roadways, drainage systems, retention ponds and underground pipes in a residential subdivision." (Op. at 2.) While the questions are similar, it is clear that the Fifth

District's question was more fact specific than that of the one addressed by the Fourth District.

Second, the cases did not contain the same material facts. In *Port Sewall*, the homeowner's association sued the bank that had acquired title to the development pursuant to a foreclosure. *Port Sewall*, 463 So. 2d at 531. While the bank did complete the construction of the development, it did not construct the roadways and drainage areas that were at issue in the lawsuit. *Id*. Potentially, if the lender had constructed the areas at issue in the *Port Sewall* case, the decision may have been different, as the court opined:

> A lender who forecloses a mortgage on a construction project and becomes a developer of that project is liable to a purchaser of a unit of the project for . . . (a) performance of express representations made to the purchase by the lender; (b) patent construction defects in the entire project; and (c) breach of any applicable warranties resulting from defects in the portions of the project completed by the lender.

Id. at 532 (Emphasis added.) Thus, the fact that the defendant was a lender and was not the entity that constructed the defective improvements caused the Fourth District to reach a different result than that in this case.

Contrary to *Port Sewall*, the defendant in this case was the developer that constructed, or hired a builder to construct, the roadways, drainage system, underground pipes, and retention

ponds that contained defects. (Op. at 2.) These material facts permitted the Fifth District to reach a decision to the contrary that in *Port Sewall*, without creating an actual conflict between districts. The very fact that Petitioners' briefs focused on the facts of the case and used other authorities to bolster their positions lends further support that their arguments are based upon the merits of this case, rather than on a conflict between jurisdictions. *Ansin*, 101 So. 2d at 801.

Instead of being a court of general appellate review, the Florida Supreme Court is concerned with preserving uniformity among the courts of this State and with decisions which create inconsistency among precedents. *Ansin*, 101 So. 2d at 810. *Kincaid v. World Ins. Co.*, 157 So. 2d 517, (Fla. 1963). The Fifth District's decision in this case and the Fourth District's decision in *Port Sewall* may be interpreted consistently with one another and do not create a conflict of precedents. Accordingly, this Court should deny Petitioners' request to review the Fifth District's decision.

II. THIS COURT SHOULD NOT GRANT DISCRETIONARY REVIEW BECAUSE THE DECISION WAS CONFINED TO THE FACTS OF THIS CASE AS OPPOSED TO THE PUBLIC IN GENERAL.

This Court should also not grant discretionary review as this case does not resolve important legal issues that surpass the rights of the parties to the case. While Lakeview would have

preferred a ruling that would apply to all community association common areas, the Fifth District confined the opinion to the facts of this case. (Op. at 11.)

This Court has already addressed the public issue of implied warranties and ruled that they do apply to improvements that immediately support the residences. *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983). In a well-drafted and thorough opinion, this Court explained the history and disintegration of *caveat emptor* and the public policy behind the reasons why *caveat emptor* should not apply in many cases of residential real estate. *Id*. In fact, the Fifth District used the reasoning in *Conklin* to support its opinion in this case. More specifically, it stated "We believe this ruling is in keeping with Florida's strong public policy of protecting consumers in a situation where they must rely on the expertise of the builder/developer for proper construction of these complex structures . . ." (Op. at 11.)

Conklin already answered the broad legal question and policy issue surrounding the applicability of implied warranties to vacant land so that another opinion on the issue would be unnecessary. As noted by the Fifth District in its opinion, *Conklin* reasoned:

> There rationale of the cases which relax or abandon the doctrine of *caveat emptor* is that the purchaser is

> not in an equal bargaining position with the builder-vender of a new dwelling, and the purchaser is forced to rely on the skill and knowledge of the builder-developer with respect to the materials and workmanship of an adequately constructed dwelling house . . . Common threads running through all the decisions extending implied warranties to purchasers of new homes are the inability of the ordinarily prudent homebuyer to detect flaws in the construction of modern houses and the chattel-like quality of such mass-produced houses.

Conklin, 428 So. 2d at 657-58.

This paragraph in *Conklin* answered the general legal question as to when *caveat emptor* should be abandoned. Then, applying this rationale to the facts before it, the *Conklin* Court determined that the public policy concerns were not present and, thus, implied warranties would not extend to the unimproved land. *Id*. at 655.

However, when applying the *Conklin* rationale to this case, the Fifth District determined that public policy required a finding that implied warranties would be available "to the facts of this case." (Op. at 11.) As the Fifth District confined its decision to the parties before it, a review of the case would require an evaluation of the facts and evidence in relation to *Conklin*, which is not the role of the Florida Supreme Court. *See Florida Power & Light Co. v. Bell*, 113 So. 2d 697 (Fla. 1959). Accordingly, this Court should not exercise its jurisdiction in this matter.

CONCLUSION

For all the foregoing reasons, this Court should deny Petitioner's request for discretionary review.

ROBYN SEVERS BRAUN, ESQ.
Florida Bar No.: 154504
Taylor & Carls, P.A.
7 Florida Park Drive North, Suite A
Palm Coast, FL 32137
Telephone: (386) 446-5970
Facsimile: (386) 446-5938
Attorneys for Respondent, Lakeview Reserve Homeowners' Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail to Scott Johnson, Heather Pinder Rodriguez, Holland & Knight LLP, P. O. Box 1526, Orlando, Florida 32802; Steven L. Brannock, Brannock & Humphries, 100 South Ashley Drive, Suite 1130, Tampa, Florida, 33602; and Stephen W. Pickert, Moye, O'Brien, O'Rourke, Pickert & Martin, LLP, 800 South Orlando Avenue, Maitland, Florida 32751, this 11th day of February, 2011.

_____
ROBYN SEVERS BRAUN
Florida Bar No.: 154504

CERTIFICATE OF COMPLIANCE

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

_____
ROBYN SEVERS BRAUN
Florida Bar No.: 154504