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 REPLY BRIEF ON THE MERITS

On Review from the Fifth District Court of Appeal

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I. UNDER *CONKLIN*, IMPLIED WARRANTIES DO NOT EXTEND TO FIRST PURCHASERS FOR IMPROVEMENTS THAT DO NOT "IMMEDIATELY SUPPORT" A RESIDENCE

In *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983), the Supreme Court of Florida comprehensively reviewed the extent to which implied warranties of fitness and merchantability applied to real property and held 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 that immediately support the house, such as water wells and septic tanks. *Id*. at 655. *Conklin*, therefore, applies to this case and is not, as suggested, limited to cases involving vacant lots. (Community Association Leadership Lobby ("CALL") Br. at 6.)

Conklin's application to this case is not affected by the Second District's decision in *Hesson v. Walmsley Constr. Co.*, 422 So. 2d 943, 944 (Fla. 2d DCA 1982), which provides that an implied warranty exists as to both the house and the lot purchased as a "package deal." (CALL Br. at 8.) There is no record evidence that the houses in Lakeview Reserve were "packaged not only with lots but also with roads, retention ponds, underground pipes and drainage." (*Id*.) The residents of Lakeview Reserve purchased only the house and the lot. *Hesson* does not expand implied warranties beyond the house and lot actually purchased to cover roads and drainage systems owned by a corporate homeowners' association.

There is also no record evidence that common area improvements were "a key selling point in the marketing and sale" of the houses in Lakeview Reserve (CALL Br. at 8) or that they induced the purchase of houses or that they became "part of the value of the homeowner's residence as well as an extension of their property." (Community Associations Institute ("CAI") Br. at 11.) As the Florida Supreme Court noted, "although the contract may be couched in terms of the sale of realty, the purchaser sees the transaction primarily as the purchase of a house, with the land incident thereto." *Conklin,* 428 So. 2d at 658. Moreover, because the residents in Lakeview Reserve did not purchase the roads and drainage systems, these common areas are not "an extension of their property" or part of a "package."

The holding of *Conklin* is also not limited to cases involving investors. (CAI Br. at 14.) The Florida Supreme Court in *Conklin* did not just narrowly address the question of whether implied warranties extended to <u>investors</u> as suggested but, rather, whether they applied to improvements other than the house built on the land and other improvements on the land immediately supporting the residence "such as water wells and septic tanks." *Conklin*, 428 So. 2d at 655.

II. *PORT SEWALL* PROPERLY APPLIED *CONKLIN* TO HOLD THAT ROADS AND DRAINAGE SYSTEMS DO NOT IMMEDIATELY SUPPORT A RESIDENCE

In *Port Sewall Harbor and Tennis Club Owners Ass'n v. First Fed. Sav. & Loan Ass'n of Martin County,* 463 So. 2d 530, 531 (Fla. 4th DCA 1985), the

Fourth District applied *Conklin* and upheld the trial court's ruling that implied warranties did not extended to the roads and drainage system of a subdivision because they "did not pertain to the construction of homes or other improvements immediately supporting the residences." This is not "merely dicta." (Resp. Br. at 12.) It is the holding of the case. As in *Port Sewall*, the trial court below correctly applied *Conklin* and *Port Sewall* to rule that Respondent had no cause of action for breach of implied warranties because the roads and stormwater drainage system in Lakeview Reserve did not immediately support a residence. (R. IV/844-79.)

Nor is *Port Sewall* a "lender liability" case as contended. (CALL Br. at 9; CAI Br. at 14.) The lender stepped into the shoes of the developer and became a vendor. The "sole question" decided in the affirmative was whether *Conklin* prevented a party from recovering against a <u>developer</u> under an implied warranty theory for failure to properly construct common elements. *Port Sewall*, 463 So. 2d at 531.

CAI suggests that *Port Sewall* "is not supported…by the legislature's subsequent adoption of Chapter 720, Fla. Stat. [Homeowners' Associations]." (CAI Br. at 14.) To the contrary, in the 29 years since statutes governing homeowners' associations were first enacted, they have never provided for any implied warranty for any type of improvement in an association. Such an absence is notable given that Chapter 718 regarding condominiums, a different form of ownership, does provide such a statutory warranty and has since 1976.

The Fifth District certified conflict with the Fourth District's decision in *Port Sewall*. *Lakeview Reserve Homeowners Ass'n, Inc. v. Maronda Homes, Inc. of Florida*, 48 So. 3d 902, 904 (Fla. 5th DCA 2010). Respondent, however, argues there is no conflict because *Port Sewall* supposedly turned on whether the plaintiff "properly alleged" its claim and, conversely, in *Lakeview Reserve*, the Fifth District held that Respondent "did properly allege" that the roads and drainage satisfied *Conklin's* "immediately supporting" requirement. (Resp. Br. at 11.) That is incorrect. Nowhere in *Port Sewall* is it stated that the homeowners' association "did not properly allege" its cause of action, and the Fifth District in *Lakeview Reserve* did not hold that Respondent "did properly allege" its cause of action.

III. DISTINGUISHABLE CONDOMINIUM LAW DOES NOT APPLY

Respondent and CAI argue that because the facts in *Conklin* and *Port Sewall* are not identical to the instant case, the precedent does not apply. They are willing, however, to apply inapposite condominium law to common area improvements in a homeowners' association. (Resp. Br. at 26-30; CAI Br. at 7-11, 16-18.) This ignores the distinction that condominium owners purchase and own an undivided share in the condominium's common elements and homeowners in an association do not purchase and do not own a share of the common areas in a subdivision. *See Turnberry Court Corp. v. Bellini*, 962 So. 2d 1006, 1008 (Fla. 3d DCA 2007); Fla. Stat. § 718.103(11). This is hardly "a difference without a distinction." (Resp. Br. at

5.) The individual homeowners in Lakeview Reserve neither purchased nor owned the common areas and neither condominium law nor implied warranties apply. Moreover, the cases cited by Respondent in support of its contention that "other jurisdictions have upheld implied warranties on common property that were outside the four walls of the residential building" (Resp. Br. at 28-30)[1] involve condominium property and are inapplicable.

IV. *CAVEAT EMPTOR* DOES NOT APPLY ESPECIALLY WHEN THERE IS NO "PURCHASER"

Common law implied warranties only apply to first purchasers of residential real estate. *Conklin*, 428 So. 2d at 655. Implied warranties attach because a purchaser "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 to use as a residence." *Peterson v. Hubschman Constr. Co.*, 389 N.E.2d 1154, 1158 (Ill. 1979). CALL recognizes that "[t]he key question to be considered is what was being sold by the developer." (CALL Br. at 2.) The answer is that Maronda sold homes. Therefore, arguments that without an implied warranty "residents would be left in a *caveat emptor* situation" as it pertains to common areas (*id*. at 5); and that a "home purchase will remain one of *caveat emptor*" with respect to common areas

[1] *Bd. of Managers of the Village Centre Condominium Ass'n, Inc. v. Wilmette Partners*, 760 N.E. 976 (Ill. 2001), *Herlihy v. Dunbar Builders Corp*., 415 N.E.2d 1224 (Ill. App. Ct. 1980), *Meadowbrook Condominium Ass'n v. South Burlington Realty Corp*., 565 A.2d 238 (Vt. 1989), and *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co*., 799 P.2d 250 (Wash. 1990).

"paid for by" house purchasers (CAI Br. at 19); and that consumer protection issues are implicated (Resp. Br. at 13), fail because Maronda did not sell, and neither the homeowners' association nor the individual house purchasers of Lakeview Reserve purchased, the common areas. *See Summer Chase Second Addition Subdivision Homeowners Ass'n v. Taylor-Morley, Inc.*, 146 S.W.3d 411, 416 (Mo. Ct. App. 2004) (refusing to impose an implied warranty because the association did not purchase the defective retaining wall in the common area of the subdivision); *Parkway Co. v. Woodruff*, 901 S.W. 2d 434, 437-39 (Tex. 1995) (plaintiffs had no cause of action for breach of implied warranty because they "neither sought nor acquired the services about which they complain.").

Heritage in the Hills Homeowners Ass'n v. Heritage of Auburn Hills, LLC, 2010 WL 364186 (Mich. Ct. App. Feb. 2, 2010), an unpublished Michigan opinion cited by Respondent (Resp. Br. at 7-8), is inapplicable. It deals with condominium property and the court was concerned that without an implied warranty claim, the condominium association "would be left without a remedy." *Id*. at *10. That is not the case here. Respondent alleged in its First Amended Complaint that Maronda knew of the defects in the common areas of Lakeview Reserve but failed to disclose them to the Respondent. (R. II/287 at ¶ 7.) Respondent had causes of action available to it against Maronda for negligence, failure to detect and/or warn of defects, fraud, fraudulent nondisclosure, and breach of fiduciary duty.

V. PRIVITY IS REQUIRED FOR AN IMPLIED WARRANTY CLAIM

Under Florida law, privity is required for an implied warranty claim. *Solomon v. Gentry*, 388 So. 2d 52, 54 (Fla. 4th DCA 1980); *Strathmore Riverside Villas Condominium Ass'n v. Paver Dev. Corp.*, 369 So. 2d 971, 973 (Fla. 2d DCA 1979). Neither Respondent nor the individual house purchasers bought the common area improvements from Maronda and is another reason why Respondent's implied warranty action fails. Contrary to Respondent's argument, the Fifth District did not reject this argument. (Resp. Br. at 6.)

Respondent contends that in *Strathmore Gate-East v. Levitt Homes, Inc.*, 537 So. 2d 657 (Fla. 2d DCA 1989), the Second District "held that privity is not necessary for a homeowners' association to maintain a cause of action against a developer for breach of implied warranty. *Id.* at 658." (Resp. Br. at 8.) There is no such holding in *Strathmore.* The court did not state <u>what</u> cause of action the association had against the developer. The words "implied warranty" and "privity" do not appear in the opinion. Respondent improperly and speculatively tries to "explain" the *Strathmore* decision by appending to its brief certain papers that may have been filed in the trial court. "An appellate court, however, may not take judicial notice of the record in a separate proceeding." *Hillsborough County Bd. of Commrs. v. Public Employees Rel. Comm.*, 424 So. 2d 132, 134 (Fla. 1st DCA 1982). The Court should consider only the face of the *Strathmore* decision and refuse to consider

trial court pleadings that may have been part of the record in that case. *See Weintraub v. Weintraub*, 756 So. 2d 1092 (Fla. 3d DCA 2000). Even if the Court considers the *Strathmore* trial court filings, they show that the association asserted causes of action against the developer for breach of implied warranties and negligence. It is just as, if not more, likely that the cause of action the *Strathmore* court found that the association had was for negligence (which does not require privity of contract) rather than breach of implied warranties (which does require privity).

VI. THERE IS NO "DEVELOPING NATIONAL TREND" EXPANDING IMPLIED WARRANTIES TO COMMON AREAS

In the 40 years since this Court's decision in *Gable v. Silver*, 258 So. 2d 11 (Fla. 4th DCA 1972), *aff'd*, 264 So. 2d 418 (Fla. 1972), there has been no nationwide expansion of implied warranties relating to common area improvements outside of the home. To the contrary, courts in several states, including Florida, have refused to so expand implied warranties. Respondent cites to just four cases that purportedly deal with implied warranties and common area improvements. (Resp. Br. at 18-22.) Of the four, only one in Illinois, *Briarcliffe West Townhouse Owners Ass'n v. Wiseman Constr. Co.*, 480 N.E.2d 833 (Ill. App. Ct. 1985), applied implied warranties to common areas. Two cases, *Bd. of Directors of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc.*, 712 N.E. 2d 330, 336 (Ill. 1999) (refusing to extend an implied warranty to a clubhouse in the development's common areas), and *San Luis Trails Ass'n v. E.M. Harris Bldg. Co.*, 706 S.W. 2d

65, 68-69 (Mo. Ct. App. 1986) (citing to *Conklin* and *Port Sewall* in refusing to extend an implied warranty for defects in the subdivision's roads), held opposite to Respondent's claim. The fourth case, *Redbug Coop. Corp. v. Clayton*, 700 S.W. 2d 551, 559 n.17 (Tenn. Ct. App. 1985), upheld an association's judgment for negligence against the developers, not for breach of implied warranties. This hardly demonstrates a "developing national trend" or supports a claim that "courts are slowly, but surely expanding implied warranties for homeowners' associations" to cover common area improvements. (Resp. Br. at 13, 22.) To the contrary, courts are reluctant to expand implied warranties to cover common area improvements, especially because they are not purchased by an association or individual house purchasers. *See Port Sewall, Summer Chase, Parkway, Briarcliffe, San Luis, supra*.

VII. THERE IS NO BASIS FOR RESPONDENT'S "SOCIETAL CHANGE" ARGUMENT

Purchasers are well aware of the numerous differences between living in a condominium (Chapter 718), a community with a homeowners' association (Chapter 720), a cooperative (Chapter 719), a mobile home community (Chapter 723) or a neighborhood without any community association, and can choose accordingly. Respondent, however, proclaims that "it is rare to purchase a new home or any home at all, that is not in a community with a mandatory homeowners' association" and improperly cites to a CAI website, material outside of the record. (Resp. Br. at 24, emphasis added.) The Court should refuse to consider same. *See Altchiler v. State*

Dep't of Prof. Reg., 442 So. 2d 349, 350 (Fla. 1st DCA 1983). The figures listed on the website as to the purported number of residents living in homeowners' associations is provided by a biased entity and applies to the United States as a whole, not to Florida residents only. Should the Court consider this non-record information, Petitioner notes that according to CAI's own study on "pre-purchase awareness," 63% of residents surveyed in 2005 stated that the fact that their home was in a community association had no impact on their decision to purchase or rent a house. This belies CAI's conclusory statement that common areas are an inducement to purchase a house. (CAI Br. at 11.)

VIII. CHAPTER 720 REGULATING HOMEOWNERS' ASSOCIATIONS DOES NOT PROVIDE FOR IMPLIED WARRANTIES

Respondent's suggestion that amendments to Chapter 720 (Homeowners' Associations) evince the legislature's purported recognition "that the members of homeowners associations should be afforded the same protection as those living in condominium associations [Chapter 718]" (Resp. Br. at 26) ignores the fact that the legislature has never amended homeowners' association statutes from their inception 29 years ago to include implied warranties, the central issue in this case.

Respondent also overreaches when it contends, based on the single decision in *Gable* that "[t]his Court has a history of adopting and extending laws in the area of an implied warranty of habitability based on policy arguments where the Legislature has been inactive." (Resp. Br. at 33, emphasis added.) The subsequent

Conklin decision demonstrates this Court's refusal to make an unwarranted extension of the warranty of habitability found in *Gable*.

IX. RESPONDENT WAIVED ANY ARGUMENTS REGARDING LAKEVIEW RESERVE'S INDIVIDUAL LOTS

An argument or issue not raised in the trial court is waived on appeal. *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985). Respondent's contentions about the grading and alleged damages to individual lots in Lakeview Reserve were not raised with the trial court and, therefore, have been waived on appeal. (Resp. Br. at 2, 3, 19, 30.) At the hearing on Petitioners' motions for summary judgment, Respondent insisted that "[t]he problem according to the Complaint are the roads, the drainage system, the retention ponds and the underground pipes." (R. V/866, ln. 24, through 867, ln. 1.) Neither at the hearing nor in any motions or memoranda submitted to the trial court did Respondent contend that individual lots in Lakeview Reserve were damaged as a result of the allegedly defective common areas or grading of lots. Accordingly, the Fifth District recognized that the "sole issue for our review is whether a homeowners association has a claim for breach of implied warranties of fitness and merchantability, against a builder/developer for defects in the roadways, drainage systems, retention ponds and underground pipes in a residential subdivision." *Lakeview Reserve*, 48 So. 3d at 903-904 (emphasis added).

In addition, Respondent's assertion as "fact" that stagnant water on some of the lots in Lakeview Reserve is caused by underground pipes (Resp. Br. at 3) is

based on the deposition testimony of James Campbell who is a Disney food and beverage operations manager and not an engineer. (R. IV/511.) Respondent's engineer, WRS, encountered a well-defined shallow clay layer in the soils of Lakeview Reserve and opined that lot drainage issues were caused by the existence of shallow groundwater which resulted from a shallow clay layer that impedes vertical drainage. (R. III/394-95.) Respondent's own expert said nothing about the underground pipes causing stagnant water on the lots, and there is no record evidence of same.

X. RESPONDENT LACKS STANDING TO SUE FOR ALLEGED DAMAGE TO 36 OUT OF THE 159 INDIVIDUAL LOTS

Respondent acknowledges that it "has the legal authority to initiate legal action on behalf of itself and as a class representative of its members for defects in the common areas of the Association." (Resp. Br. at 4, emphasis added.) The same, however, cannot be said as to defects relating to individual lots in Lakeview Reserve. Even if it did not waive these arguments, Respondent lacks standing to assert an action pertaining to the alleged improper grading of 36 out of 159 total lots. (R. II/289 at ¶ 12(e).) Section 720.303(1), Florida Statutes, provides that a homeowners' association may institute actions "in its name on behalf of all members concerning matters of common interest to the members, including, but not limited to, the common areas…or other improvements for which the association is responsible." (Emphasis added). Similarly, Fla. R. Civ. P. 1.221

provides that an association may institute actions "in its name on behalf of all association members concerning matters of common interest to the members, including, but not limited to: (1) the common property, area, or elements…or other improvements…for which the association is responsible." (Emphasis added.)

Respondent's claim against Petitioner Maronda as to alleged grading defects on individual lots does not pertain to the common areas of Lakeview Reserve or for any other improvement in the subdivision for which the Association is responsible. Neither does Respondent's grading/erosion claim as to the individual lots pertain to matters of "common interest" at Lakeview Reserve as it involves only 36 out of 159 total lots in the subdivision (or 23% of the membership of Lakeview Reserve) and there is no common expense for which the Association's members are responsible in connection with individual lots.

XI. UNDER FLORIDA LAW, IMPLIED WARRANTIES ARE INTERCHANGEABLY REFERRED TO AS WARRANTIES OF FITNESS AND MERCHANTABILITY OR HABITABILITY

Respondent alleged a cause of action for "breach of implied warranties of fitness and merchantability." (R. II/288 at ¶ 8.) In Florida, the term "implied warranty of habitability" is used interchangeably with implied warranties of fitness and merchantability. *See Conklin*, 428 So. 2d at 656, 657 n.2; *Hurley v. Conklin*, 409 So. 2d 148, 149 (Fla. 4th DCA 1982); *Lochrane Eng'g, Inc. v. Willingham Realgrowth Inv. Fund, Ltd.*, 552 So. 2d 228, 230 (Fla. 5th DCA 1989); *Lakeview Reserve*, 48 So.

3d at 903-904. Therefore, there is no need to look to decisions of other jurisdictions as to whether Florida law distinguishes between implied warranties of fitness and merchantability and habitability as Respondent suddenly claims. (Resp. Br. at 14-15.)

The test for implied warranties of fitness and merchantability or habitability is "whether the premises met ordinary, normal standards reasonably expected of living quarters of comparable kind and quality." *Putnam v. Roudebush*, 352 So. 2d 908, 910 (Fla. 2d DCA 1977) (emphasis added). Respondent admits that "it has not alleged that damage has yet to occur within the walls of the residences" (Resp. Br. at 3) and "the record does not show any structural damage to any residential structures." (*Id.* at 30.) Respondent's engineer refers only to "poorly performing" retention ponds, "small washouts," and "mild to moderate" erosion on, at most, a quarter of the lots. (R. III/391-95.) Photographs in his report show streets with minor cracking and alleged dampness in two areas. (R. III/420-22). Respondent's dramatic assertion of "sinkholes" and a temporarily unusable driveway as "facts" (Resp. Br. at 3) appear nowhere in its engineer's report.

XII. INSPECTION OF COMMON AREA IMPROVEMENTS BY LAKEVIEW RESERVE RESIDENTS IS NOT AN ISSUE

CAI contends that implied warranties should extend to common area improvements because they cannot be inspected prior to transfer or purchase. (CAI Br. at 4, 15.) Lakeview Reserve's common area improvements, however, were inspected prior to turnover and are continually inspected by professional engineers.

On February 14, 2001, an engineer issued a "Certificate of Completion" certifying that the paving, grading, drainage, sanitary sewer system, and water distribution system in Lakeview Reserve were constructed in substantial compliance with the construction plans as approved by the City of Winter Garden. (R. II/213-16.) On August 1, 2003, after control of the Association passed from Maronda to non-developer lot owners (R. IV/524), the St. Johns River Water Management District ("SJRWMD") found that the water management system serving Lakeview Reserve was constructed and performing in conformance with SJRWMD requirements. (R. I/94-95; R. IV/808.) The Association was also required, beginning three years after the Certificate of Completion, to hire a registered engineer on a yearly basis to provide an assessment of the subdivision's streets, drainage system and retention ponds. (R. I/22.) Therefore, neither the Association nor individual purchasers were forced to rely solely on the developer's skill and knowledge in regard to the common area improvements in Lakeview Reserve.

CONCLUSION

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 summary judgment in favor of Petitioners should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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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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