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 SUPPLEMENTAL BRIEF

On Review from the Fifth District Court of Appeal

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

The newly enacted Residential Construction Warranties Act, Chapter 2012-161, Laws of Florida (the "Act"), takes effect on July 1, 2012, "and applies to all cases accruing before, pending on, or filed after that date." The Act, whether deemed remedial or substantive, applies to this case because it affirms controlling Florida Supreme Court and Fourth District decisions and confirms that there has never been and is not now a common law cause of action for implied warranties for common area improvements in a subdivision. The Act expressly rejects the Fifth District's erroneous decision below in *Lakeview Reserve Homeowners Ass'n, Inc. v. Maronda Homes, Inc. of Florida*, 48 So. 3d 902, 904 (Fla. 5th DCA 2010), it expressly provides for retroactive application, and it affects no vested rights of Respondent Lakeview Reserve Homeowners Association, Inc. (the "Association"). Consequently, the Association, which had or may have had other remedies available to it, has no cause of action based on a theory of implied warranties of habitability, fitness or merchantability. Accordingly, the Fifth District's decision in *Lakeview Reserve* must be overturned, and the trial court's granting of summary judgment in favor of the Petitioners must be affirmed.

STATEMENT OF CASE

The Association asserted a claim against Petitioner Maronda Homes, Inc. of Florida ("Maronda") for an alleged breach of implied warranties of fitness and

merchantability concerning alleged defects in Lakeview Reserve's roadways, drainage systems, retention ponds and underground pipes. Maronda filed a third party action against Petitioner Thomson Construction Company ("Thomson"). The trial court granted Maronda's and Thomson's motions for summary judgment pursuant to the Supreme Court of Florida's decision in *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983), which held that implied warranties by a developer did not extend beyond the residence and improvements immediately supporting the residence, and the Fourth District's decision in *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), which correctly applied *Conklin* and held that a homeowners' association did not have a cause of action based on a theory of implied warranties of fitness, merchantability or habitability relating to the construction and design of the common areas in a subdivision such as roads and drainage systems.

On appeal, the Fifth District, contrary to the *Conklin* and *Port Sewall* decisions, reversed the trial court, held that the Association had a claim based on a theory of implied warranty of fitness and merchantability or habitability for the common area improvements at issue, and certified its conflict with the Fourth District's decision in *Port Sewall*. *Lakeview Reserve,* 48 So. 3d at 903-904, 908-909. Maronda and Thomson invoked, and this Court accepted, certified conflict

jurisdiction to review the Fifth District's decision. The parties briefed the issues and oral argument before the Court was held on December 6, 2011.

On December 7, 2011 and December 12, 2011, identical bills were introduced in the Florida Senate (SB 1196) and Florida House (HB 1013), respectively, responding to and rejecting the Fifth District's *Lakeview Reserve* decision as contrary to the limitations on the applicability of the theory of implied warranties set forth in *Conklin* and *Port Sewall*, and affirming that there never has been and is no cause of action for a home purchaser or homeowners' association based on a theory of implied warranties of fitness and merchantability or habitability for common area improvements. On April 27, 2012, the Governor signed into law Committee Substitute for House Bill 1013 which became Chapter 2012-161, Laws of Florida, "An act relating to residential construction warranties...", a copy of which is attached hereto as Exhibit "A."

The Act provides that:

• the Legislature recognizes and agrees with the limitations on the applicability of the theory of implied warranties for a new home established in *Gable v. Silver*, 258 So.2d 11 (Fla. 4th DCA 1972), *cert. dism.*, 264 So.2d 418 (Fla. 1972), *Conklin*, and *Port Sewall*, and that it does not want "to expand any prospective rights, responsibilities, or liabilities resulting from these decisions";[1]

[1] Under principles of statutory construction, "the Legislature is presumed to know the

• the Fifth District's decision in *Lakeview Reserve*, however, expands the doctrine of implied warranties for a new home to include construction of roads, drainage systems, retention ponds and underground pipes;

• the Legislature finds, as a matter of public policy, that the Fifth District's decision in *Lakeview Reserve* "goes beyond the fundamental protections that are necessary for a purchaser of a new home and that form the basis for imposing an implied warranty of fitness and merchantability or habitability for a new home and creates uncertainty in the state's fragile real estate and construction industry";[2] and

• the Legislature rejects the Fifth District's *Lakeview Reserve* decision to the extent of its unwarranted expansion of implied warranties for a new home to roads, drainage systems, retention ponds and underground pipes.

See Ch. 2012-161, Laws of Fla., "Whereas clauses" (emphasis added).

The Act creates Section 553.835, Florida Statutes, which provides that "[i]t is the intent of the Legislature to affirm the limitations to the doctrine or theory of implied warranty of fitness and merchantability or habitability associated with the construction and sale of a new home." Ch. 2012-161, §1, Laws of Fla., Fla. Stat. §

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existing law when it enacts a statute and also presumed to be acquainted with the judicial construction of former laws on the subject concerning which a later statute is enacted." *Williams v. Jones*, 326 So.2d 425, 436 (Fla. 1976).

[2] "The Legislature has the final word on declarations of public policy...and legislative determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous." *Univ. of Miami v. Echarte*, 618 So.2d 189, 196 (Fla. 1993) (internal citations omitted).

553.835(2). Consistent with *Conklin* and *Port Sewall*, the Act then provides that there is no cause of action available to a purchaser of a home or a homeowners' association based on a theory of implied warranties of fitness and merchantability or habitability for damages to "offsite improvements" which are defined as:

> (a) The street, road, driveway, sidewalk, drainage, utilities, or any improvement or structure that is not located on or under the lot on which a new home is constructed...and
>
> (b) The street, road, driveway, sidewalk, drainage, utilities, or any improvement or structure that is located on or under the lot but that does not immediately and directly support the fitness and merchantability or habitability of the home itself.

Ch. 2012-161, §1, Laws of Fla.; Fla. Stat. § 553.835(3)(a)-(b) & (4).

The Act also confirms that it "does not alter or limit the existing rights of purchasers of homes or homeowners' associations to pursue any other cause of action arising from defects in offsite improvements based upon contract, tort, or statute, including, but not limited to, ss. 718.203 and 719.203." Ch. 2012-161, §1, Laws of Fla.; Fla. Stat. § 553.835(4).

The Act takes effect on July 1, 2012, "and applies to all cases accruing before, pending on, or filed after that date. " Ch. 2012-161, § 3, Laws of Fla.

On May 30, 2012, the parties served a Joint Motion for Supplemental Briefing concerning the Act. On June 6, 2012, the Court directed the parties to provide supplemental briefing on the effect, if any, of the Act on this case.

ARGUMENT

I. THE ACT APPLIES TO THIS CASE AND, CONSEQUENTLY, THE FIFTH DISTRICT'S DECISION IN *LAKEVIEW RESERVE* MUST BE OVERTURNED

A. Retroactive Application Of Statutes

The determination of whether a statute may be applied retroactively involves a two-part test: (1) whether the Legislature intended for the statute to apply retroactively; and, if so, (2) whether retroactive application is constitutionally permissible. *Metropolitan Dade County v. Chase Fed. Hous. Corp.*, 737 So.2d 494, 499 (Fla. 1999). This analysis only applies to substantive law. "Statutes that relate only to procedure or remedy generally apply to all pending cases." *Gupton v. Village Key & Saw Shop, Inc.*, 656 So.2d 475, 477 (Fla. 1995); *City of Orlando v. Desjardins*, 493 So.2d 1027, 1028 (Fla. 1986) ("If a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes."); *Village of El Portal v. City of Miami Shores,* 362 So.2d 275, 278 (Fla. 1978) (explaining that remedial statutes may be held immediately applicable to pending cases).

B. The Act Applies To This Case Because It Is A Remedial Statute

"Remedial statutes simply confer or change a remedy in furtherance of existing rights and do not deny a claimant his or her vested rights." *Rustic Lodge v. Escobar*, 729 So.2d 1014, 1015 (Fla. 1st DCA 1999). In *City of Lakeland v.*

Catinella, 129 So.2d 133 (Fla. 1961), this Court explained that remedial statutes or statutes relating to remedies are statutes "which do not create or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing." *Id.* at 136 (emphasis added). Substantive statutes, on the other hand, "either create or impose a new obligation or duty, or impair or destroy existing rights." *Alamo Rent-A-Car v. Mancusi*, 632 So.2d 1352, 1358 (Fla. 1994).

The Act applies to this case because it is a statute relating to a home purchaser's or homeowners' association's remedies for defects in offsite improvements. The Act does not create a new obligation or duty. Nor does it take away any existing rights because, contrary to the Fifth District's appealed decision in *Lakeview Reserve*, there never has been a cause of action for breach of implied warranties for common area improvements in a subdivision. Instead, the Act confirms those rights already existing to home purchasers and homeowners' associations for defects in offsite improvements. It confirms that, under *Conklin* and *Port Sewall*, there is no cause of action based on a theory of breach of implied warranties for damages to offsite improvements.

The Act further confirms that the rights of a home purchaser or a homeowners' association to pursue viable contractual, tort and statutory causes of action remain unchanged. Ch. 2012-161, "Whereas clauses" & §1, Laws of Fla.; Fla. Stat. § 553.835(4). Here, the Association had viable causes of action available to it for the

alleged defects in the common areas of Lakeview Reserve (e.g., negligence, failure to detect and/or warn of defects, fraud, fraudulent nondisclosure, and breach of fiduciary duty) but chose instead to pursue a single, non-existent cause of action against Maronda.

The Act codifies the Florida common law on the extent of implied warranties and the remedies available to home purchasers and homeowners' associations for defects in a subdivision's common areas. Therefore, it is remedial and applies immediately to this case. *See Metropolitan Dade County, Gupton, Village of El Portal, City of Lakeland, supra. Cf. Tejada v. In re Forfeiture of the Following Described Property: $406,626.11 in U.S. Currency*, 820 So.2d 385, 390 (Fla. 3d DCA 2002) (stating that Fla. Stat. § 896.106, the codification of Florida's fugitive disentitlement doctrine which was enacted to correct the effect of a court decision, was "analogous to a curative statute" and could be viewed as remedial.) Thus, the Court should determine that pursuant to the Act, the Association does not have the remedy of breach of implied warranties for the allegedly defective roadways, drainage systems, retention ponds and underground pipes in Lakeview Reserve, or other offsite improvements. Ch. 2012-161, §1, Laws of Fla.; Fla. Stat. § 553.835(3)-(4).

C. Even If The Act Is Substantive, It Still Applies To This Case

Even if the Act is deemed to be substantive, it still applies to this case because it meets the two-step test for retroactive application of substantive law.

1. The Legislature Intended For The Act To Apply Retroactively

The Act provides that it "applies to all cases accruing before, pending on, or filed after" July 1, 2012. Ch. 2012-161, § 3, Laws of Fla. Thus, the express language in Chapter 2012-161 demonstrates that the Legislature intended for the Act to apply retroactively and the first factor for retroactive application has been met.

2. No Vested Rights Are Affected

As far as the second factor is concerned, retroactive application of a statute is constitutionally permissible unless "the statute impairs vested rights, creates new obligations, or imposes new penalties." *State Farm Mut. Auto. Ins. Co. v. LaForet*, 658 So.2d 55, 61 (Fla. 1995). *See also Gupton*, 656 So.2d at 477 (stating that substantive law that interferes with vested rights will not be applied retrospectively); *Promontory Enters., Inc. v. Southern Eng'g & Contracting, Inc.*, 864 So.2d 479, 483 (Fla. 5th DCA 2004) (stating that "[r]etroactive application is constitutionally permissible if it does not violate due process by abrogating a vested right.").[3]

[3] "[S]tatutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome." *Crist v. Florida Ass'n of Criminal Defense Lawyers*, 978 So.2d 134, 139 (Fla. 2008).

A substantive vested right "must be an immediate, fixed right of present or future enjoyment." *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So.2d 1210, 1218 (Fla. 2d DCA 2004) (emphasis added). On the other hand, "[t]he mere prospect that Plaintiff might recover damages from a defendant on a tort theory is clearly not tantamount to a vested right." *Lamb v. Volkswagenwerk Aktiengesellschaft*, 631 F. Supp. 1144, 1149 (S.D. Fla. 1986).

There can be a vested right to an accrued cause of action. *R.A.M. of South Florida,* 869 So.2d at 1220. Here, however, the Association did not possess a vested right in an accrued cause of action for breach of implied warranties for common area improvements for the simple fact that no such cause of action existed. No Florida court either before or since *Gable* has ever recognized such a cause of action.

To the contrary, in *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983), the Supreme Court of Florida held that implied warranties of fitness and merchantability 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. In *Port Sewall Harbor and Tennis Club Owners Ass'n v. First Fed. Sav. & Loan Ass'n of Martin County,* 463 So. 2d 530 (Fla. 4th DCA 1985), the Fourth District applied *Conklin* and held 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." *Id.* at 531. The trial court below applied *Conklin* and *Port Sewall* and correctly ruled that the Association 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.

In *American Optical Corp. v. Spiewak*, 73 So.3d 120, 127 (Fla. 2011), the Supreme Court of Florida recently discussed the issues of vested rights and the retroactivity of statutes. The Court found that the plaintiffs who suffered from asbestos-related disease "unquestionably had a right under the common law to seek redress against the persons or entities that allegedly caused injury to them." *American Optical*, 73 So.3d at 127 (Fla. 2011). Therefore, they had a vested property interest in the right to pursue a viable cause of action based on their injuries. *Id.* This does not mean that a plaintiff who suffered an asbestos-related disease has a right under the common law to seek redress based on any theory they might wish to pursue. The Supreme Court of Florida then stated that it "has held that statutes that operate to abolish or abrogate a preexisting right, defense, or cause of action cannot be applied retroactively." *Id.* at 133. The court, therefore, refused to retroactively apply the Asbestos and Silica Compensation Fairness Act, which was "intended to reverse years of common law precedent," *id.* at 130, to the plaintiffs' claims because it

"would operate to completely abolish the [plaintiffs'] vested rights in accrued causes of action for asbestos-related injury." *Id.* at 133.

Here, unlike the "unquestionable" cause of action that the plaintiffs possessed in *American Optical*, the Association never had a cause of action based on a theory of implied warranties relating to alleged defects in the common areas of a subdivision. To the contrary, the existing precedent prior to the filing of the Association's lawsuit was *Conklin* and *Port Sewall* which provided that there were no such warranties. Thus, the Residential Construction Warranties Act, unlike the act at issue in *American Optical*, does not affect any vested rights in a common law cause of action. Unlike the act in *American Optical*, the Residential Construction Warranties Act is not attempting to "reverse years of common law precedent." To the contrary, the Residential Construction Warranties Act is a codification, not a reversal, of Florida common law as it relates to implied warranties and the limitations on the applicability of the doctrine.

Moreover, in *American Optical*, the Court found that application of the act at issue would destroy the plaintiffs' vested rights in a common law cause of action based on asbestos-related injuries and that "[t]here is no alternative remedy." *American Optical*, 73 So.2d at 131. Here, unlike in *American Optical*, the Association never had vested rights in a common law cause of action based on a theory of implied warranties for alleged defects in the common areas of a

subdivision and, unlike the plaintiffs in *American Optical*, had a number of alternative viable remedies available to it, but did not pursue them against Maronda.

CONCLUSION

The recently enacted Residential Construction Warranties Act, Chapter 2012-161, Law of Florida, declares that there is no cause of action available to a purchaser of a home or a homeowners' association for implied warranties for offsite improvements. The Act, whether remedial or substantive, applies to this case because it expressly rejects the Fifth District's decision below in *Lakeview Reserve*, it expressly provides that it applies retroactively, and it codifies and confirms Florida common law on the application and limitations of an action for breach of implied warranties.

Under the Act, the Association has no cause of action for breach of implied warranties for the roadways, drainage systems, retention ponds and underground pipes at issue in this case. The Act should be applied to this case to serve the Act's intended purposes, that is, prevention of the unwarranted expansion of implied warranties to offsite improvements and restoration of certainty in the law and in Florida's fragile real estate and construction industries. Application of the Act to this case warrants reversal of the Fifth District's decision in *Lakeview Reserve*, and

affirmation of the trial court's granting of summary judgment in favor of Maronda and Thomson.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on June 20, 2012, 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., Holland & Knight, LLP, P.O. Box 1526, Orlando, Florida 32802-1526; Robyn Marie Severs, Esq., Taylor & Carls, P.A., 7 Florida Park Drive North, Suite A, Palm Coast, Florida 32137; and Patrick C. Howell, Esq., Taylor & Carls, P.A., 150 N. Westmonte Drive, Altamonte Springs, Florida 32714.

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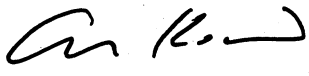
CERTIFICATE OF COMPLIANCE

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.



ANTHONY R. KOVALCIK
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“EXHIBIT A”

CHAPTER 2012-161

Committee Substitute for House Bill No. 1013

An act relating to residential construction warranties; creating s. 553.835, F.S.; providing legislative findings; providing legislative intent to affirm the limitations to the doctrine or theory of implied warranty of fitness and merchantability or habitability associated with the construction and sale of a new home; providing a definition; prohibiting a cause of action in law or equity based upon the doctrine or theory of implied warranty of fitness and merchantability or habitability for damages to offsite improvements; providing that the existing rights of purchasers of homes or homeowners' associations to pursue certain causes of action are not altered or limited; providing for applicability of the act; providing for severability; providing an effective date.

WHEREAS, the Legislature recognizes and agrees with the limitations on the applicability of the doctrine or theory of implied warranty of fitness and merchantability or habitability for a new home as established in the seminal cases of *Gable v. Silver,* 258 So.2d 11 (Fla. 4th DCA 1972) adopted and cert. dism, 264 So.2d 418 (Fla. 1972); *Conklin v. Hurley,* 428 So.2d 654 (Fla. 1983); and *Port Sewall Harbor & Tennis Club Owners Ass'n v. First Fed. S. & L. Ass'n.,* 463 So.2d 530 (Fla. 4th DCA 1985), and does not wish to expand any prospective rights, responsibilities, or liabilities resulting from these decisions, and

WHEREAS, the recent decision by the Fifth District Court of Appeal rendered in October of 2010, in *Lakeview Reserve Homeowners et. al. v. Maronda Homes, Inc., et. al.,* 48 So.3d 902 (Fla. 5th DCA, 2010), expands the doctrine or theory of implied warranty of fitness and merchantability or habitability for a new home to the construction of roads, drainage systems, retention ponds, and underground pipes, which the court described as essential services, supporting a new home, and

WHEREAS, the Legislature finds, as a matter of public policy, that the *Maronda* case goes beyond the fundamental protections that are necessary for a purchaser of a new home and that form the basis for imposing an implied warranty of fitness and merchantability or habitability for a new home and creates uncertainty in the state's fragile real estate and construction industry, and

WHEREAS, it is the intent of the Legislature to reject the decision by the Fifth District Court of Appeal in the *Maronda* case insofar as it expands the doctrine or theory of implied warranty and fitness and merchantability or habitability for a new home to include essential services as defined by the court, NOW THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 553.835, Florida Statutes, is created to read:

553.835 Implied warranties.—

(1) The Legislature finds that the courts have reached different conclusions concerning the scope and extent of the common law doctrine or theory of implied warranty of fitness and merchantability or habitability for improvements immediately supporting the structure of a new home, which creates uncertainty in the state's fragile real estate and construction industry.

(2) It is the intent of the Legislature to affirm the limitations to the doctrine or theory of implied warranty of fitness and merchantability or habitability associated with the construction and sale of a new home.

(3) As used in this section, the term "offsite improvement" means:

(a) The street, road, driveway, sidewalk, drainage, utilities, or any other improvement or structure that is not located on or under the lot on which a new home is constructed, excluding such improvements that are shared by and part of the overall structure of two or more separately owned homes that are adjoined or attached whereby such improvements affect the fitness and merchantability or habitability of one or more of the other adjoining structures; and

(b) The street, road, driveway, sidewalk, drainage, utilities, or any other improvement or structure that is located on or under the lot but that does not immediately and directly support the fitness and merchantability or habitability of the home itself.

(4) There is no cause of action in law or equity available to a purchaser of a home or to a homeowners' association based upon the doctrine or theory of implied warranty of fitness and merchantability or habitability for damages to offsite improvements. However, this section does not alter or limit the existing rights of purchasers of homes or homeowners' associations to pursue any other cause of action arising from defects in offsite improvements based upon contract, tort, or statute, including, but not limited to, ss. 718.203 and 719.203.

Section 2. If any provision of the act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 3. This act shall take effect July 1, 2012, and applies to all cases accruing before, pending on, or filed after that date.

Approved by the Governor April 27, 2012.

Filed in Office Secretary of State April 27, 2012.