FLORIDA'S IMPLIED WARRANTY OF HABITABILITY: HOW FAR DOES A HOMEBUYER'S PROTECTION FROM A DEVELOPER'S TICKY TACKY CONSTRUCTION EXTEND?

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I. INTRODUCTION

Little boxes on the hillside,
Little boxes made of ticky tacky,
Little boxes on the hillside,
Little boxes all the same.[1]

Before the 1960s, the doctrine of *caveat emptor*[2] applied to the sale of real property and provided Florida homebuyers with no remedy for shoddy construction absent an express warranty or fraud.[3] The only protection of Florida homebuyers[4] was bargained

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1. Malvina Reynolds, *Little Boxes* (Smithsonian Folkways Recording 2000). "Ticky-tacky" is defined as "sleazy or shoddy material[s] used especially in the construction of look-alike tract houses." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1306 (11th ed. 2003).

2. Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n, Inc., 127 So. 3d 1258, 1263 (Fla. 2013) (citing BLACK'S LAW DICTIONARY 252 (Bryan A. Garner ed., 9th ed. 2009) (defining *caveat emptor* as a doctrine of law holding that a purchaser of real and personal property buys at his or her own risk)). In the 1960s, the seller of real property, including new construction, was not liable to the buyer for any defects. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 352 cmt. a (1965)).

3. Mark S. Dennison, *Builder-Vendor's Liability to Purchaser of New Dwelling for Breach of Implied Warranty of Fitness or Habitability*, 50 AM. JUR. PROOF OF FACTS 3D 543 § 3 (WestlawNext through Sept. 2014); Annotation, *Liability of Builder-Vendor or Other Vendor of New Dwelling for Loss, Injury, or Damage Occasioned by Defective Condition Thereof*, 25 A.L.R. 3D 383 (1969) (sellers were not required to disclose any defects of the home).

for through contract.[5] But with the creation and expansion of subdivisions and planned unit developments across the United States, especially in Florida, courts began adopting a new form of recourse—the doctrine of implied warranty, which afforded more protection to homebuyers.[6] Although American courts were initially hesitant to abolish the doctrine of *caveat emptor* concerning the sale of homes, the continued application of this archaic doctrine countered the growth of modern housing across the United States.[7]

In 1957, Ohio became the first state to acknowledge that the doctrine of implied warranty applied to new home construction and that a new home must be constructed in a "workmanlike manner."[8] Many courts, including Florida's, have since diverged from the doctrine of *caveat emptor*, following the view that a builder[9] of a new home can be liable for damages caused by latent defects in the construction of the home.[10] These courts have reasoned that an individual purchasing a new home relies on the builder's expertise because that homebuyer does not have the

4. In this Article, the term "homebuyer" will encompass any person purchasing a new dwelling.

5. Dennison, *supra* note 3, § 2.

6. *Id.* § 3 (citing E. F. Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835, 837 (1967) (noting that the doctrine of caveat emptor was largely abandoned in the sale of goods during the twentieth century, but there was a growing concern over protecting larger items, such as a home)).

7. *Id.*

8. *Id.* (quoting Vanderschrier v. Aaron, 140 N.E.2d 819, 821 (Ohio Ct. App. 1957) (holding that the homeowners could collect damages resulting from a defective sewer line installed by the builder–vendor because the defect rendered the home unfit for habitation)).

9. In this Article, the term "builder" will encompass any person constructing a new dwelling, such as a developer or builder–vendor.

10. *See generally, e.g.*, Hesson v. Walmsley Const. Co., 422 So. 2d 943, 943–45 (Fla. 2d Dist. Ct. App. 1982) (establishing an implied warranty of habitability for home and land from the builder–vendor to the original purchaser); *Liability of Builder-Vendor or Other Vendor of New Dwelling for Loss, Injury, or Damage Occasioned by Defective Condition Thereof*, *supra* note 3, § 6(a) (the following states have adopted the view that builder–vendors may be liable under the theory of breach of an implied warranty of habitability: Alabama, Arizona, Arkansas, California, Colorado, Illinois, Indiana, Iowa, Maryland, Missouri, Montana, New Hampshire, New York, North Carolina, South Carolina, South Dakota, Texas, Vermont, Washington, Wyoming); Mary Hope, *Cause of Action for Breach of Implied Warranty of Habitability of Residence*, 3 CAUSES OF ACTION 379 §§ 3–4 (WestlawNext through July 2014) (additional states where implied warranty of habitability is recognized: Connecticut, Florida, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, West Virginia).

skill or ability to determine if the dwelling has latent defects.[11] Therefore, the builder should bear the cost of defects hidden at the time of purchase, since the builder is in a superior position to prevent defects.[12]

Small sets of cases discuss the scope of defects beyond the physical structure of a dwelling, which are commonly referred to as off-site defects.[13] In particular, Florida courts have considered the scope of off-site defects, which has resulted in split opinions among Florida courts as to which defects should be covered by the implied warranty of habitability.[14] The Fourth District Court of Appeal considered improvements "immediately supporting the residence[ ]," distinguished from "roads and drainage in [a] subdivision," to be within the scope of the implied warranty of habitability.[15] In October 2010, the Fifth District Court of Appeal, in *Lakeview Reserve Homeowners v. Maronda Homes, Inc.*,[16] considered something essential to habitability, such as drainage and retention ponds, as immediately affecting the habitability of a dwelling—a perspective much broader than previous judicial decisions.[17]

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11. Hope, *supra* note 10, §§ 3–4. A latent defect is one that an ordinary purchaser of a new home would not reasonably be able to discover at the time of purchase. *Id.* § 9 (citing Sims v. Lewis, 374 So. 2d 298, 303 (Ala. 1979)). For example, a basement wall that collapsed after the purchase of a home was considered latent because the homebuyer could not readily discover the defect at the time of purchase. *Id.* (citing Waites v. Toran, 411 So. 2d 127, 130 (Ala. 1982)).

12. Hope, *supra* note 10, §§ 2–4 (noting that most states began to recognize an implied warranty of habitability in response to the increased building of homes, subdivisions, and planned unit developments).

13. *See, e.g.*, San Luis Trails Ass'n v. E.M. Harris Bldg. Co. Inc., 706 S.W.2d 65, 66 (Mo. Ct. App. 1986) (finding that latent structural defects beyond the structure of the home not covered by the implied warranty of habitability exception to *caveat emptor*); Yepsen v. Burgess, 525 P.2d 1019, 1019 (Or. 1974) (en banc) (holding that a septic tank and drainage are so essential for using a house that these improvements are inclusive in the habitability of a home); Florrie Young Roberts, *Off-Site Conditions and Disclosure Duties: Drawing the Line at the Property Line*, 2006 BYU L. REV. 957, 958 (2006) (indicating that on-site conditions are within the property lines, or boundaries, of the property, whereas off-site defects are external to the property line).

14. Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n, Inc., 127 So. 3d 1258, 1263 (Fla. 2013).

15. Port Sewall Harbor & Tennis Club Owners Ass'n, Inc. v. First Fed. Sav. & Loan Ass'n of Martin Cnty., 463 So. 2d 530, 531 (Fla. 4th Dist. Ct. App. 1985) (interpreting Conklin v. Hurley, 428 So. 2d 654, 660–61 (Fla. 1983), to preclude breach of warranty liability for a subdivision's defective road and bridge construction).

16. 48 So. 3d 902 (Fla. 5th Dist. Ct. App. 2010).

17. *Id.* at 908–09 (This holding is much broader than the structural standard established by the Fourth District because it extends beyond the physical structure of a home.).

In an effort to settle the issue, the Florida Supreme Court granted certiorari in *Maronda Homes* on April 20, 2011.[18] But while *Maronda Homes* was on appeal to the Florida Supreme Court, the Florida Legislature quickly enacted Florida Statute Section 553.835 on July 1, 2012.[19] The apparent purpose of Section 553.835 was to overturn the Fifth District Court of Appeal's decision below and to define the limits of the implied warranty of habitability prior to the Florida Supreme Court issuing its opinion.[20] However, the Florida Supreme Court subsequently held that the retroactive application of Section 553.835 to *Maronda Homes* was unconstitutional because it impaired the homeowners' vested rights.[21] *Maronda Homes* was decided on July 11, 2013, and as of the time of publication of this Article, the court has not heard any case requiring an interpretation of Section 553.835.[22]

The present version of Section 553.835 is unclear and loses sight of both the Florida Supreme Court's and Legislature's goal to develop a bright-line rule for the implied warranty of habitability—the existing law does not answer the question of when Florida homebuyers are protected from ticky tacky construction, nor the question of how far that protection extends. This Article suggests an amended version of the Statute, reflecting other states' codification of implied warranties, as well as taking into consideration the court's and Legislature's concerns.

Part II of this Article examines the historical background of the implied warranty of habitability in Florida, discussing key cases in Florida that have shaped the doctrine of implied warranty, specifically in the construction of new homes. Part III examines the 2013 expansion of the doctrine of implied warranty in *Maronda Homes*, as well as the recent passage of Section 553.835, which restricts the doctrine of implied warranty. Finally, Part IV sets forth a balanced resolution that the Florida Legislature could

18. *Maronda Homes*, 127 So. 3d at 1260, 1262.

19. FLA. STAT. § 553.835 (2012); *Maronda Homes*, 127 So. 3d at 1270–71 (noting that the purpose of Section 553.835 is to override the Fifth District decision and akin subsequent decisions).

20. *Maronda Homes*, 127 So. 3d at 1270–71.

21. *Id.* at 1272–73 (finding that "once a cause of action accrues," that action "becomes a vested right"). This Article does not focus on the constitutional aspect of *Maronda Homes*; rather, it focuses on the current implications of Section 553.835 and corresponding common law.

22. *Id.* at 1277–78 (Canady, J., dissenting).

implement, modeled on other states' codifications of implied warranties, to protect Florida's unstable real estate economy.

II. HISTORY OF IMPLIED WARRANTIES OF HABITABILITY IN FLORIDA

The long-existing doctrine of *caveat emptor* was called into question as subdivisions spread across the United States. Florida soon replaced the doctrine of *caveat emptor* with the doctrine of implied warranty, as defined here:

> An implied warranty arises by operation of law and exists regardless of any intention of the vendor to create it; such warranty springs from the vendor's breach of some duty which amounts to taking advantage of the purchaser by reason of some superior knowledge in the vendor or the reliance by the purchaser on the vendor's representation or judgment.[23]

This Historical Part will first discuss the initial expansion of implied warranties into Florida, which was in condominium law. Then, this Part will address the common law expansion and conflicts of implied warranties in new home construction.

A. Common Law and Codification of Condominium Implied Warranty of Habitability

Florida is progressive in condominium law and has extended the implied warranty of habitability to the purchase of new condominiums.[24] *Gable v. Silver*[25] was the case of first impression in the application of implied warranties to real estate within Florida, particularly regarding new condominium construction.[26] The builder of the condominiums in *Gable* argued that no implied warranty attached to the malfunctioning air-conditioning system

23. David v. B & J Holding Corp., 349 So. 2d 676, 678 (Fla. 3d Dist. Ct. App. 1977) (citing 28 FLA. JUR. SALES § 134 (1968)).

24. *Id.* at 678 (citing Burger v. F.N. Hector, 278 So. 2d 636, 637 (Fla. 1st Dist. Ct. App. 1973); Forte Towers S., Inc. v. Hill York Sales Corp., 312 So. 2d 512, 513–14 (Fla. 3d Dist. Ct. App. 1975)).

25. 258 So. 2d 11 (Fla. 4th Dist. Ct. App. 1972).

26. *Id.* at 12, 18.

because the air-conditioner was not critical to the property.[27] However, the court held that the implied warranty of fitness and merchantability also protected Florida condominium purchasers from builders.[28] At this time, there was a growing trend away from the archaic theory of *caveat emptor* in favor of the doctrine of implied warranty to protect ordinary homebuyers, which increased the liability imposed on builders of new condominiums, as well as new homes.[29] Additionally, implied warranties discourage builders from "sloppy work and jerry-building."[30]

Implied warranties for new condominiums were subsequently codified in the Florida Statutes in 1976.[31] Condominiums were placed in a specific chapter—Chapter 718—of Florida's Real and Personal Property Title XI.[32] Section 718.203 distinguishes between the liability of developers and that of contractors, including subcontractors and suppliers.[33] Each unit within a condominium complex has an implied warranty from the developer for three years after the completion of such unit.[34] The law also grants an implied warranty to cover structural components of more than one unit, such as the roof, plumbing, electrical, and mechanical elements for three years after the completion of the complex.[35] Contractors, including subcontractors and suppliers, could implement a similar implied warranty claim against both the developer and purchaser of the condominium.[36] Structural, plumbing,

27. *Id.* at 12. Furthermore, the one-year express warranty for the air-conditioning had expired. *Id.* The court reasoned that the express warranty was not inconsistent with, nor did it preclude, the application of an implied warranty. *Id.* at 13.

28. *Id.* at 18 (extending the doctrine of implied warranty not only to new condominiums, but also to new homes).

29. *Id.* at 17; *see* Paul G. Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 633 (1965) (stating that prior to the doctrine of implied warranty of habitability, "our law offers greater protection to the purchaser of a seventy-nine cent dog leash than it does to the purchaser of a 40,000-dollar house"); Kathleen McNamara Tomcho, Note, *Commercial Real Estate Buyer Beware: Sellers May Have the Right to Remain Silent*, 70 S. CAL. L. REV. 1571, 1577 (1997) (opining that the average homebuyer would be unable to absorb the consequences from a hidden construction defect).

30. *Gable*, 258 So. 2d at 15 (quoting Waggoner v. Midwestern Dev., Inc., 154 N.W.2d 803, 808 (S.D. 1967)).

31. FLA. STAT. § 718.203 (1976).

32. *Id.*

33. FLA. STAT. § 718.203(1)–(2) (2013).

34. *Id.* § 718.203(1)(a).

35. *Id.* § 718.203(1)(e) (or "[one] year after owners other than the developer obtain control of the association, whichever occurs last, but in no event more than [five] years").

36. *Id.* § 718.203(2).

electrical, and mechanical components to more than one unit are warrantied for three years after the completed construction; all other improvements and materials are under warranty for one year.[37]

B. Common Law of New Home Implied Warranty of Habitability

The doctrine of implied warranty of habitability on the construction of new homes, as opposed to condominiums, was governed solely by common law until 2013.[38] Although *Gable* dealt with the application of the implied warranty to condominiums, it also established the applicability of an implied warranty to the purchase of new homes in Florida.[39] Florida courts have struggled with the scope and applicability of the doctrine of implied warranty; since 2013, "[t]he [general] test for a breach of implied warranty [was] whether the premise[ ] meet[s] ordinary, normal standards reasonably to be expected of living quarters of comparable kind and quality."[40] This is an objective standard, and the elements under Florida common law are: (1) the developer sold a new home; (2) to a homebuyer taking possession; (3) of a home with latent defects failing "to meet ordinary, normal standards reasonably to be expected of living quarters of comparable kind and quality;" (4) and the homebuyer was ultimately damaged by the inhabitable home.[41]

It is the third element—the scope of defects that make a home uninhabitable—that has troubled Florida's courts.[42] In *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*,[43] the Fourth District Court of Appeal held that a condominium association could recover under the implied warranty doctrine when the developer failed to install a decorative fence to camou-

37. *Id.* § 718.203(2)(a)–(b).

38. *Id.* § 553.835 (2013).

39. Gable v. Silver, 258 So. 2d 11, 18 (Fla. 4th Dist. Ct. App. 1972) (noting that the decision only applied to "*new homes* or condominiums" (emphasis added)).

40. Hesson v. Walmsley Constr. Co., 422 So. 2d 943, 945 (Fla. 2d Dist. Ct. App. 1982) (citing Putnam v. Roudebush, 352 So. 2d 908 (Fla. 2d Dist. Ct. App. 1977)).

41. Laura B. Coln, *Deconstructing Warranties in the Construction Industry*, 83 FLA. B.J., Apr. 2009, at 9, 17 (citing *Hesson*, 422 So. 2d at 945; Conley v. Coral Ridge Props., Inc., 396 So. 2d 1220, 1222 (Fla. 4th Dist. Ct. App. 1981); *Putnam*, 352 So. 2d at 910).

42. Steven B. Lesser, William E. Stockman & Michele C. Ammendola, *Construction Defect Litigation*, *in* THE FLORIDA BAR, FLORIDA CONDOMINIUM AND COMMUNITY ASSOCIATION LAW 14-1, § 14.12 (2d ed. 2011).

43. 406 So. 2d 515 (Fla. 4th Dist. Ct. App. 1981).

flage air-conditioning units as bargained for in the contract.[44] This directly contradicted the notion that one must prove that a building is uninhabitable. However, this case dealt strictly with condominiums, and must be distinguished from new home construction.

In new home construction, not only the home, but also its corresponding lot, is included under an implied warranty, when the two are sold together.[45] The unsuitable nature of the lot in which a home is built affects the habitability of a home; however, this unsuitable nature of the lot must exist at the time of sale.[46] This rationale is consistent with the holding in *Gable*: that the developer was an expert, while the purchaser was an amateur; the developer was in a better position than the buyer to inspect the property, handle subsurface defects, and cover any related costs to problems related thereto.[47]

The implied warranty of habitability does not apply to unimproved residential lots.[48] The majority in *Conklin v. Hurley*[49] distinguished the facts at bar from more traditional homebuyer situations because the lot was largely unimproved and the purchaser was an investor, rather than a homebuyer.[50] The court did not extend the doctrine of implied warranty to a seawall on an undeveloped residential lot because the seawall was not included in the completed structure of the realty.[51] The court noted that a reasonable purchaser had a duty to inspect a structure such as a seawall more so than a completed home, which is more complex.[52] The majority also reasoned that the purchasers were primarily investors, and that the consumer-protection principles estab-

44. *Id.* at 516, 519; Lesser, Stockman & Ammendola, *supra* note 42, at 14-30 (citing *Drexel Properties, Inc.*, 406 So. 2d at 520).

45. *Hesson*, 422 So. 2d at 945; *see* Burger v. Hector, 278 So. 2d 636, 636–37 (Fla. 1st Dist. Ct. App. 1973) (refusing to extend the implied warranty for a defective lot, purchased separately by the homebuyer that resulted in damage from unusually heavy rains).

46. *Hesson*, 422 So. 2d at 945 (noting that it would be unfair to hold a developer liable for conditions occurring subsequent to purchase). Conditions subsequent to the sale and natural disasters, such as sink holes, do not affect the habitability. *Id.*

47. *Id.*

48. Conklin v. Hurley, 428 So. 2d 654, 654–55 (Fla. 1983); Hal H. Kantor and Amanda R. Caruso, *Express and Implied Covenants and Warranties Contained in Deeds*, *in* THE FLORIDA BAR, FLORIDA REAL PROPERTY SALES TRANSACTIONS 9-1, 9-25 (7th ed. 2013).

49. 428 So. 2d 654 (Fla. 1983).

50. *Id.* at 655, 658–59.

51. *Id.* at 658–59.

52. *Id.* at 658.

lished in *Gable* were intended to protect traditional homebuyers.[53]

The dissent rejected the majority's approach because the damage was caused by a defect.[54] The dissenting justices considered a seawall a complex structure, distinguishing this property with a seawall from a strictly unimproved property.[55] The dissent found "particularly disturbing the majority's basic premise that 'investors' should not fall within the ambit of our policy concerns for consumer protection" as articulated in *Gable*.[56] Most crucially, the dissent recognized the necessity of structurally sound seawalls to Florida's waterfront living.[57] The majority failed to recognize the key elements of the implied warranty: "whether the improvement was an integral part of the structure or immediately supporting the structure," and whether the structural integrity of a waterfront property "completely depend[ed] on the ability of the seawall to retain and support the soil beneath the proposed residence."[58]

In a similar case, the Fourth District Court of Appeal further limited the scope of improvements considered integral to a structure supporting the residence.[59] The court in *Port Sewall*[60] first held that the defective improvements, including a footbridge, roads, and drainage, were not improvements immediately affecting the residences because the homeowners' association provided no evidence regarding the cost of repair for the defective improvements.[61] Second, the court found that even if the defects fell

53. *Id.* at 659. *But see* Lochrane Eng'g, Inc. v. Willingham Realgrowth Inv. Fund, Ltd., 552 So. 2d 228, 230 (Fla. 5th Dist. Ct. App. 1989) (holding that the narrow application from *Conklin* only applied to investors of unimproved land, and did not extend to the buyer of five new residential duplex units).

54. *Conklin*, 428 So. 2d at 660 (Adkins, J., and Alderman, C.J., dissenting).

55. *Id.*

56. *Id.*

57. *Id.* at 661.

58. *Id.* (citing Georgia-Pacific Corp. v. Squires Dev. Corp., 387 So. 2d 986 (Fla. 4th Dist. Ct. App. 1980); Rutledge v. Dodenhoff, 175 S.E.2d 792 (S.C. 1970); Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975)). This test will be referred to as a structural test throughout this Article.

59. Port Sewall Harb. & Tennis Club Owners Ass'n, Inc. v. First Fed. Sav. & Loan Ass'n of Martin Cnty., 463 So. 2d 530, 531–32 (Fla. 4th Dist. Ct. App. 1985).

60. 463 So. 2d 530, 531–32 (Fla. 4th Dist. Ct. App. 1985).

61. *Id.* at 531; *see* San Luis Trails Ass'n v. E.M. Harris Bldg. Co., 706 S.W.2d 65, 69 (Mo. Ct. App. 1986) (relying on *Port Sewall* in holding that streets constructed by a developer were not a defect of the house or improvement outside of the house critical to the

under the doctrine of implied warranty, the homeowners' association incorrectly brought the action against the mortgage lender that was not responsible for constructing the defective improvements.[62]

But these decisions did not define the scope of the implied warranty as to defects beyond the structure of the home and the lot upon which it was built. Whether the doctrine of implied warranty extends to improvements beyond the four corners of the lot, to improvements such as roadways, drainage systems, retention ponds, and underground pipes extending beyond the lot to common areas remained unanswered. Improvements like seawalls or retaining walls may or may not be necessary for structural stability of new homes. An implied warranty for off-site defects, if it exists, has been the focus of only one Florida case—*Maronda Homes*.[63]

III. IMPLIED WARRANTY—THE "ESSENTIAL SERVICES TEST" AND FLORIDA STATUTE SECTION 553.835

The Fifth District Court of Appeal established an "essential services test" in determining the scope of the implied warranty of habitability.[64] However, this test contradicted the existing test of the Fourth District Court of Appeal. In an effort to settle the issue, the Florida Supreme Court granted certiorari in *Maronda Homes* in response to the conflicting district courts.

But while the Fifth District's ruling in *Maronda Homes* was on appeal to the Florida Supreme Court, the Florida Legislature enacted Section 553.835. The purpose of Section 553.835 was to overturn the Fifth District's opinion and to define the limits of the implied warranty of habitability. However, the Florida Supreme Court held that the retroactive application of Section 553.835 to

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structure of the house or immediately supporting; therefore, there were no recoverable damages under the doctrine of implied warranty).

62. *Port Sewall*, 463 So. 2d at 531–32 (citing Chotka v. Fidelco Growth Investors, 383 So. 2d 1169 (Fla. 2d Dist. Ct. App. 1980)). A lender foreclosing a mortgage on an uncompleted or partially completed development is only liable under the doctrine of implied warranty for construction completed by the lender. *Id.* at 531–32. If this was not the case, a lender purchasing an unfinished development could be faced with catastrophic liability. *Id.* at 532. The homeowners' association should have sought relief from the initial developer that was responsible for the latent defects in the common areas.

63. Lakeview Reserve Homeowners v. Maronda Homes, Inc., 48 So. 3d 902, 903–04 (Fla. 5th Dist. Ct. App. 2010).

64. *Id.* at 908.

the case at bar was unconstitutional because it impaired the homeowners' association's vested right. This Part of the Article will first discuss the essential services test established by the Fifth District, then discuss Section 533.835, and finally discuss the subsequent ruling by the Florida Supreme Court.

A. The Fifth District's Novel "Essential Services Test"

The trial court granted Maronda Homes and T.D. Thomson Construction's (the Developer) motion for summary judgment to dismiss Lakeview Reserve Homeowners Association's claim that the Developer breached the implied warranty of habitability[65] for latent defects in common areas including roads, drainage, retention areas, and underground pipes in the homeowners' association's subdivision.[66] The underlying cause of action arose from alleged defects in the development and construction of Lakeview Reserve, a subdivision in Orange County, Florida.[67] The Developer constructed all of the aforementioned improvements, including drainage systems and private roadways, and after completion of the subdivision, transferred the subdivision to the homeowners' association and individual lot owners.[68] Relying on the holdings and rationale from *Port Sewall* and *Conklin*, the trial court found that the implied warranty did not extend to these improvements because they did not immediately support the residences, like the structural requirement from the Fifth District.[69]

The Fifth District then reversed the trial court's decision, and held that the doctrine of implied warranty was applicable to the facts.[70] Although the Fifth District was bound to follow the holding in *Conklin*, the court distinguished the facts from *Conklin*.[71] In particular, the homebuyers were not on equal footing to inspect and assess the property like an investor that has more ex-

65. *Id.* at 903–04; *see generally* MARONDA HOMES, http://www.marondahomes.com/ (last visited Apr. 16, 2015) (the developer's website); *Lakeview Reserve Homeowners Association*, S.W. PROP. MGMT., http://www.southwestpropertymanagement.com/neighborhoods/lakeview/ (last visited Apr. 16, 2015) (the homeowners association's website).

66. *Lakeview Reserve Homeowners*, 48 So. 3d at 904.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

pertise.[72] The homebuyers needed the consumer protection of the implied warranty because both the homes and the improvements were complex, including plumbing and drainage not readily visible or understandable by a traditional homebuyer.[73] The Developer was in a superior position to discover these latent defects in the construction of the homes, subdivision, and improvements, and had the time to cure these defects and problems during the construction of the subdivision.[74]

Furthermore, the Fifth District directly disagreed with the Fourth District's holding in *Port Sewall*.[75] The Fifth District reasoned that there were two meanings to "immediately supporting the residence."[76] The Forth District, in *Port Sewall*, had recognized the more obvious meaning: "something that bears or holds up a structure, such as a footer, a foundation or a wall, or is attached to the house."[77] This meaning narrowly interpreted *Conklin*, which held that an "essential services test" should be used, because *Conklin* specifically indicated "septic tanks and water wells" as improvements immediately supporting the residence.[78] These improvements "support" the house by making it suitable for habitation.[79]

The broader test established by the Fifth District—the essential services test—asked whether, "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?"[80] If so, the doctrine of implied warranty applies.[81] This test encompasses common area structures as "immediately support[ing] the residence

72. *Id.* at 907. "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 . . . ." *Id.* (citing Conklin v. Hurley, 428 So. 2d 654, 657–58 (Fla. 1983)).

73. *Id.* at 907–08. The court acknowledged that its opinion was strengthened by Justice Adkins' dissenting opinion in *Conklin*, in that Justice Adkins reasoned that a seawall was a complex structure and beyond the ability of the normal homebuyer's ability to inspect. *Id.* at 907 (citing *Conklin*, 428 So. 2d at 659–61 (Adkins, J., dissenting)).

74. *Id.* at 908.

75. *Id.*

76. *Id.*

77. *Id.* (indicating that this is the sensible meaning of "immediately support[ing] the residence").

78. *Id.*

79. *Id.*

80. *Id.* at 908–09 (noting the essential services test is "elegant in its simplicity").

81. *Id.* at 909.

in the form of essential services."[82] This test, in addition to being "common sense," is consistent with the policy underlying *Conklin* to protect consumers who rely on developers' expertise in complex structures.[83] If the off-site improvements are free of defects, the Florida real estate marketplace overall improves because properly constructed homes are provided to the initial homebuyer and passed along to subsequent buyers.[84] The Fifth District also rejected the Developers' argument that the extension of the doctrine of implied warranties was a matter for the Legislature because there is no legislative pronouncement regarding implied warranties to new home construction.[85]

B. House Bill 1013 and Florida Statute Section 553.835—Codification of Implied Warranties

The Florida Supreme Court granted certiorari in *Maronda Homes* in response to the conflict between the Fourth and Fifth District Courts of Appeal.[86] However, while the appeal was pending, Republican Senator Frank Artiles filed House Bill 1013 "to affirm the limitations [of] the doctrine of implied warranties."[87] House Bill 1013 expressed that the Legislature did not want to broaden the protections afforded homebuyers from the holdings in *Gable*, *Conklin*, or *Port Sewall*.[88] Furthermore, House Bill 1013 stated that, "as a matter of public policy, . . . the *Maronda* [*Homes*] case goes beyond the fundamental protections that are necessary for a purchaser of a new home . . . and creates uncertainty in the [S]tate's fragile real estate and construction indus-

82. *Id.* at 909. The court considered underground pipes as essential to the habitability of a home. *Id.* at 908. Services or improvements such as community facilities and landscaping could also potentially fall under the scope of this essential services test. Lesser, Stockman & Ammendola, *supra* note 42, § 14.12.

83. *Lakeview Reserve Homeowners*, 48 So. 3d at 909 (indicating that "it would be illogical to provide a warranty to a home that is attached to an improvement, but not to another home that receives the service from the improvement, but does not physically touch it").

84. *Id.*

85. *Id.* at 909–10 (rejecting the application of Section 718.203 of the implied warranty for condominiums).

86. Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n, Inc., 127 So. 3d 1258, 1261 (Fla. 2013).

87. H.R. 1013, 2012 Reg. Sess. 1 (Fla. 2011), *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h1013__.docx&DocumentType=Bill&BillNumber=1013&Session=2012 (original filed version).

88. *Id.*

try."[89] This first version of House Bill 1013 set forth the rule regarding implied warranties, then defined both habitability and improvements.[90] The general rule was that the doctrine of implied warranty does not extend to off-site improvements.[91] Habitability was defined as "the condition of a home in which inhabitants can live free of structural defects that will likely cause significant harm to the health or safety of inhabitants."[92] Off-site improvements included "street, road, 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, or that is located on or under the lot but that does not immediately and directly support the habitability of the home itself."[93]

However, major changes occurred during the staff analyses of House Bill 1013 in order to affirm the Legislature's goal of limiting the application of the implied warranty of habitability to new homes.[94] The Florida House Civil Justice Subcommittee indicated that House Bill 1013's language could arguably include any law, including the "essential services test" established by the Fifth District, which the Legislature explicitly intended to exclude from application to new homes.[95] Second, the committee removed "habitability" from the definition because it was redundant and unnecessary; the term is already defined by common law.[96] The committee then recommended dividing "off-site improvements" into two separate categories, to include homes that are attached or adjoined, such as duplexes or townhomes, in addition to single-family buildings.[97] Additionally, the definition of off-site improvements was clarified and tailored to specific improvements included in *Maronda Homes*.[98]

89. *Id.* at 2.
90. *Id.* at 3.
91. *Id.*
92. *Id.*
93. *Id.*
94. H. CIVIL JUSTICE SUBCOMMITTEE, HOUSE OF REPRESENTATIVES STAFF ANALYSIS, HOUSE BILL 1013, 2012 Reg. Sess. 2 (Fla. 2012), *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h1013.CVJS.DOCX&DocumentType=Analysis&BillNumber=1013&Session=2012.
95. *Id.*
96. Fla. H. of Reps., *Civil Justice Subcommittee* 56:30–57:30 (House Video Player Jan. 31, 2012), http://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2012011356&committeeID=2613.
97. *Id.* at 55:00–58:00.
98. *Id.*

The codified version of House Bill 1013—Section 553.835(4)—provides that "[t]here 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 [off-site] improvements."[99] Section 553.835 provides two separate categories of off-site defects. The first encompasses:

> [t]he 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 . . . habitability of one or more of the other adjoining structures.[100]

The second category encompasses "[t]he 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 . . . habitability of the home itself."[101] For a buyer to establish a cause of action alleging breach of the implied warranty under Section 553.835, he or she must demonstrate that "(1) the claim is regarding a new home[;] (2) the claim is with regard to damage to the home or a structure or improvement on or under the home's lot[;] *and* (3) the complained of improvement or structure immediately and directly supports the habitability of the home."[102] Finally, Section 553.835 took effect on July 1, 2012, and applies to any causes of action that accrued after its enrollment.[103] This is how the Florida Legislature codified implied warranties regarding residential construction and off-site improvements.[104]

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99. FLA. STAT. § 553.835(4) (2013) (taking effect July 1, 2012).

100. *Id.* § 553.835(3)(a).

101. *Id.* § 553.835(3)(b).

102. Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n, Inc., 127 So. 3d 1258, 1272 (Fla. 2013) (citing FLA. STAT. § 553.835).

103. H. CIVIL JUSTICE SUBCOMMITTEE, HOUSE OF REPRESENTATIVES STAFF ANALYSIS, HOUSE BILL 1013, 2012 Reg. Sess. 4 (Fla. 2012), *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h1013.CVJS.DOCX&DocumentType=Analysis&BillNumber=1013&Session=2012.

104. *Maronda Homes*, 127 So. 3d at 1271; THOMAS E. MILLER, RACHEL M. MILLER & MATTHEW T. MILLER, HANDLING CONSTRUCTION DEFECT CLAIMS: WESTERN STATES § 5.10 (2014) (indicating that within Florida, Section 718.203 codifies the implied warranty of

C. *Maronda Homes*—The Florida Supreme Court's Opinion

Shortly after Section 553.835 was passed, the Florida Supreme Court held that retroactive application of the Statute was unconstitutional, and returned to the essential services test established in the decision below from the Fifth District, to any case decided before July 1, 2012.[105] The Court started with the broad policy concerns addressed in *Gable* nearly half a century ago: developers are in the best position to know, discover, and prevent construction defects in residential real estate because they are experts.[106] More importantly, developers of multiple homes, such as subdivisions sprawling across Florida, are not just responsible for building homes, but for building the *entire* developments "from the complete grading to infrastructure, drainage, and other essential items that enable access to and from each lot and are part of the services necessary for the buildings constructed to be used as residential premises."[107] Zoning requirements are adopted throughout the State to cover these aspects of development, and a developer's failure to satisfy these requirements should not be passed on to a new homebuyer.[108]

The Court then discussed the essential services test. The general common law test for implied warranties "'is whether the premises meet ordinary, normal standards reasonably to be expected of living quarters of comparable kind and quality.'"[109] The district courts disagree about the extent of the implied warranty, in particular what is considered to immediately support a residence; the court reasoned that the essential service test fits within this Florida requirement in supporting a residence.[110] "[A]n

habitability for condominium developments and Sections 718.203 and 553.835 codifies the implied warranty of habitability of residential homes).

105. *Maronda Homes*, 127 So. 3d at 1269–70, 1274 (applying the rationale and decisions from *Gable* and *Conklin*, and indicating that the essential-services test fits the general requirement of immediately supporting a residence).

106. *Id.* at 1269.

107. *Id.* at 1267 (This would be an unfair risk allocation to pass on to homebuyers.).

108. *Id.* at 1267–68 (noting that the failure to satisfy zoning requirements "would prevent the safe and sanitary use of structures for residential purposes if not corrected, and this burden should not be transferred to innocent purchasers").

109. *Id.* at 1268 (quoting Hesson v. Walmsley Constr. Co., 422 So. 2d 943, 945 (Fla. 2d Dist. Ct. App. 1982)). "More succinctly, a warranty is breached if the residence is rendered not reasonably fit for the ordinary or general purpose intended." *Id.* (citing Putnam v. Roudebush, 352 So. 2d 908, 910 (Fla. 2d Dist. Ct. App. 1977)).

110. *Id.* at 1261, 1274–75.

improvement that provides essential services that affects the habitability of a residence logically provides immediate support to that residence."[111] The habitability of a home is affected by the defects alleged in that case: defective drainage systems, underground pipes, and retention ponds, as well as soil erosion and abnormal standing water, are all defects that affect the habitability of a residence.[112] These types of defects can impede residents' ingress and egress to his or her property, lead to structural issues of homes, and create dangerous conditions, such as nuisances for children and pest infestation.[113] Thus, the Court agreed with the Fifth District's decision that the doctrine of implied warranty does include improvements that provide essential services to homebuyers, not just to attached improvements or structures, and remanded the case to the trial court.[114]

Although the essential services test contradicts the standard established by Section 553.835, the Court ruled that the retroactive application of the Statute, prior to July 1, 2012, was unconstitutional.[115] "[O]nce a cause of action accrues, it becomes a vested right."[116] "[R]etroactive application of [S]ection 553.835 would abolish" the homeowner associations' vested right.[117] Furthermore, the Legislature's passing of Section 553.835 in response to a pending case "is a clear violation of separation of powers because the Legislature does not sit as a supervising appellate court over our district courts of appeal."[118]

Justice Canady, writing for the dissent, argued that "the majority . . . unduly expands the scope of the common-law implied warranty of habitability enjoyed by purchasers of new homes and disregards the Legislature's primacy in making public policy."[119]

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111. *Id.* at 1270.

112. *Id.* at 1262, 1270 (noting improvements for convenience, such as landscaping and community facilities, are not considered essential services). Chief Justice Polston argues to remand the disputed facts, such as the extent of damage and flooding, for trial. *Id.* at 1276 (Polston, C.J., concurring in part and dissenting in part).

113. *Id.* at 1270 (majority opinion).

114. *Id.* at 1275–76.

115. *Id.* at 1274–75.

116. *Id.* at 1272 (citing Am. Optical Corp. v. Spiewak, 73 So. 3d 120, 125–26 (Fla. 2011)); *see also* Wiley v. Roof, 641 So. 2d 66, 68 (Fla. 1994) (holding that once a cause of action accrues, that action becomes a protected property interest, thus is a vested right).

117. *Maronda Homes*, 127 So. 3d at 1275.

118. *Id.* at 1276; *see* Bush v. Schiavo, 885 So. 2d 321, 329–30 (Fla. 2004) (indicating that no branch may encroach upon another branch's power).

119. *Maronda Homes*, 127 So. 3d at 1277 (Canady, J., dissenting).

Justice Canady reasoned that the common law never extended the doctrine of implied warranty to essential services; rather, the doctrine only applied to the home and on-site improvements.[120] The majority's decision significantly expanded implied warranties in favor of consumer protection, while increasing liability not only for developers, but also for investors of distressed property and foreclosing lenders.[121] But the majority's decision overlooked the Legislature's intention to protect Florida's "fragile real estate"[122] economy; especially, reasoned Justice Canady, the rights and obligations of developers, investors, and lenders acquiring distressed projects.[123] The Florida Legislature's attempt to preempt the court may have motivated the majority's decision to issue such a consumer-friendly opinion.[124] But the Legislature overlooked the consumer protection policy from *Gable*: to protect Florida's homebuyer in making the single largest economic investment of a lifetime—a home.[125]

120. *Id.*

121. *Id.*; MILLER, MILLER & MILLER, *supra* note 104, § 5.10.

122. FLA. STAT. § 553.835(1).

123. *See Maronda Homes*, 127 So. 3d at 1277 (Canady, J., dissenting) (arguing that the legislature, having the power to make public policy, has never expanded implied warranties as far as the majority did in its opinion).

124. *See id.* at 1276 (majority opinion) ("This is a clear violation of separation of powers because the Legislature does not sit as a supervising appellate court over our district courts of appeal." (citing Bush v. Schiavo, 885 So. 2d 321, 329–30 (Fla. 2004))); Marc M. Schneier, *Implied Warranties of Fitness and Merchantability Apply to Infrastructure of Subdivision Development: Roads, Drainage Systems, Retention Ponds and Sewers*, 34 CONSTR. LITIG. REP., Oct. 2013, at 7 (indicating "[t]he [C]ourt's ire with [Section] 553.835 is both manifest and understandable"); Robert S. Tanner, *Warranty Law Exposes Rift Between Florida Legislature and Florida Supreme Court*, MALKA & KRAVITZ, P.A. BLOG, http://www.mkpalaw.com/Articles-Forms/Articles/Warranty-Law-Exposes-Rift.shtml (last visited Apr. 16, 2015) (noting that "[n]ot only did the law expressly take aim at the Fifth District's decision, but it was intended to kill all such warranty claims that were already pending as well as all that might be filed thereafter"); *see generally* MILLER, MILLER & MILLER, *supra* note 104, § 5.10 (describing *Maronda* as "a consumer protection oriented decision"); Brendan Farrington, *Supreme Court: Law Protecting Builder Went Too Far*, BLOOMBERG BUSINESSWEEK NEWS (July 11, 2013), http://www.businessweek.com/ap/2013-07-11/supreme-court-law-protecting-builder-went-too-far ("The bill language specifically cited the homeowners association's lawsuit and had language that was retroactive in an effort to protect Maronda Homes."); Toluse Olorunnipa, *Can't Win in Court? Try the Legislature*, TAMPA BAY TIMES (Mar. 3, 2012, 3:30 AM), http://www.tampabay.com/news/business/cant-win-in-court-try-the legislature/1218181 ("For litigants ensnared in lengthy and expensive legal fights, bypassing the courts by backing legislative changes could pay off financially.").

125. *Maronda Homes*, 127 So. 3d at 1264.

IV. THE CURRENT STATE OF THE IMPLIED WARRANTY OF HABITABILITY

This Part first addresses the problems and concerns arising from Section 553.835. Next, this Part looks to other jurisdictions' codifications of implied warranties for guidance. Finally, this Part sets forth a balanced resolution that the Florida Legislature could implement, modeled on other states' codifications of implied warranties, to protect Florida's unstable real estate economy.

A. Sticky Problems with Florida Statute Section 553.835

Any cause of action accruing before the passage of Section 553.835 should be measured by the essential services test established by the Fifth District and upheld by the Florida Supreme Court.[126] Any cause of action accruing after the passage of Florida Statute Section 553.835 should be subject to the standards set out by the Statute.[127] Unfortunately, Section 553.835 is unclear and poorly drafted.

Section 553.835 starts with the Legislature's concern with the scope and extent of the doctrine of implied warranty applied by State courts, and the impact "in the [S]tate's fragile real estate and construction industry."[128]

Then Section 553.835 narrowly defines off-site improvements and subsequently gives the broad rule of what improvements are included under the implied warranty.[129] The first clause regarding off-site improvements indicates that the term includes a "street, road, driveway, sidewalk, drainage, [or] utilities."[130] Off-site improvements is then further specified in two additional categories. First, the term off-site improvements includes structures or improvements "that [are] not located on or under the lot on which a new home is constructed,"[131] but exclude "improvements that are shared by and [are] part of the overall structure of two or more separately owned homes that are adjoined or attached

126. *Supra* Part III(C).

127. *Supra* Part III(B)–(C).

128. FLA. STAT. § 553.835(1) (2013); Sam Ro, *The Florida Housing Market is on Fire*, BUSINESS INSIDER (Mar. 17, 2013, 10:05 AM), http://www.businessinsider.com/florida-housing-market-on-fire-2013-3 (indicating a rise in Florida's housing market in 2013).

129. FLA. STAT. § 553.835(3)–(4).

130. *Id.* § 553.835(3)(a).

131. *Id.*

whereby such improvements affect the fitness and merchantability or habitability of one or more of the other adjoining structures."[132] This clause is a negative expression. The exclusion in the second clause[133] is actually an inclusion of what improvements fall within the scope of the doctrine of implied warranty of habitability. It is unclear whether these improvements for adjoined or attached homes could also include the "street, road, driveway, sidewalk, drainage, [or] utilities" previously listed.[134]

The Statute also establishes different classes of new home purchasers; one class receives a greater scope of protection, thus violates the Equal Protection Clause of Article I, Section 2 of the Florida Constitution.[135]

> [H]omeowners that share improvements that are part of the structure of attached homes only need to show that the improvements *affect* the habitability of the structure. However, if the improvements are simply on or under the lots of unattached homes, then the homeowners have to show that the structure *immediately and directly supports* [the] habitability of the home. One consequence of these classifications is that, there could be homeowners in the same community that would have an implied warranty cause of action and could seek redress from a developer for breach of implied warranty, while others would be without a remedy and be forced to pay for repairing the defects out of their own pockets, simply based upon the location of the improvement and whether the homes are attached or not.[136]

Furthermore, Section 553.835 does not define "habitability." Common law does define the scope and extent of habitability: *Maronda* used an essential services test to determine the stand-

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132. *Id.*

133. *Id.*

134. Respondent, Lakeview Reserve Homeowners Ass'n, Inc.'s, Supplemental Brief at 11–13, *Maronda Homes, Inc. v. Lakeview Reserve Homeowner's Ass'n, Inc.*, 2012 WL 3077904 at *11–13 (Fla. June 21, 2013) (No. SC10-2292 & SC10-2336).

135. *Id.* at 11. Section 553.835(3) unconstitutionally distinguished between traditional single-family homes and owners of cooperative units. *Id.* Owners of cooperative units, such as townhomes, have more protection under the statute, since they only have to show that the improvements "affect[ed]" the habitability of the dwelling. *Id.* at 8. Whereas, owners of traditional single family home that are freestanding have to show that the improvement "*immediately and directly support[ed]*" the habitability of the dwelling. *Id.* at 8–9 (emphasis in original).

136. *Id.* (emphasis added).

ard of habitability. This standard does include improvements and structures beyond the home and lot, such as roads, retention ponds, and underground pipes.

Second, improvements or structures that are "located *on* or under the lot but . . . [do] not immediately and directly support the fitness and merchantability or habitability of the new home itself" are included within the definition of off-site improvements.[137] The Legislature has grouped structures and improvements that are consider "on" the property within the definition of "off-site" improvements. Furthermore, the Statute does not define the term "habitability," while simultaneously departing from definition of habitability from *Maronda Homes*.

B. Looking to Other Jurisdictions for a Solution

The Florida Legislature should amend Section 553.835 to reflect the policy concerns of both the Court and the Florida Legislature. In doing so, the Florida Legislature might look to codified implied warranties in other states. Other states have established implied warranties via statute in three ways: general, general with specification, and building codes.

Virginia has a general implied warranty statute that requires a new dwelling to be "sufficiently (i) free from structural defects, so as to pass without objection in the trade, and (ii) constructed in a workmanlike manner, so as to pass without objection in the trade."[138] The statute does not specify the types of defects or examples of defects; rather, "structural defects" broadly encompasses "a defect or defects that reduce the stability or safety of the structure below accepted standards or that restrict the normal use thereof."[139]

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137. FLA. STAT. § 553.835 (3)(b) (emphasis added).

138. VA. CODE § 55-70.1 (2013); Wendy B. Davis, *Corrosion by Codification: The Deficiencies in the Statutory Versions of the Implied Warranty of Workmanlike Construction*, 39 CREIGHTON L. REV. 103, 110 (2006); Alice M. Noble-Allgire, *Notice and Opportunity to Repair Construction Defects: An Imperfect Response to the Perfect Storm*, 43 REAL PROP. TR. & EST. L.J. 729, 782 (2009).

139. VA. CODE § 55-70.1(G); Davis, *supra* note 138, at 110 (citing Vaughn, Inc. v. Beck, 554 S.E.2d 88 (Va. 2001) (indicating Virginia's implied warranty statute covered the construction of a well)). Maryland has a similar general codification of the implied warranty of habitability, and Maryland courts have also determined that the construction of a well and retaining wall is a structural defect covered by the implied warranty statute. Davis, *supra* note 138, at 110 (citing Andrulis v. Levin Constr. Corp., 628 A.2d 197 (Md. 1993); Krol v. York Terrace Bldg., Inc., 370 A.2d 589 (Md. Ct. Spec. App. 1977)).

Indiana has a general warranty provision with some specifications: "that a new home will be 'free from defects caused by faulty workmanship or defective materials.'"[140] The term "new home" is further defined as "a new dwelling occupied for the first time after construction" and does not include "a detached garage, a driveway, a walkway, a patio, a boundary wall, a retaining wall not necessary for the structural stability of the new home, landscaping, a fence, nonpermanent construction material, an off-site improvement, an appurtenant recreational facility, or other similar items."[141]

Similar to Indiana, Minnesota has a general statute with specifications for a dwelling and major construction defects.[142] Minnesota divides warranties by vendors into three time periods. First, "the dwelling shall be free from defects caused by faulty workmanship and defective materials" for one year.[143] Second, "the dwelling shall be free from defects caused by faulty installation of plumbing, electrical, heating, and cooling systems" for two years.[144] Third, "the dwelling shall be free from major construction defects" for ten years.[145]

In a separate section, the Minnesota statute defines both "dwelling" and "major construction defects."[146] The dwelling is a new building and "does not include appurtenant recreational facilities, detached garages, driveways, walkways, patios, boundary walls, retaining walls not necessary for the structural stability of the dwelling, landscaping, fences, nonpermanent construction materials, off-site improvements, and all other similar items."[147] This definition of dwelling is very similar to Indiana's codification of "new home";[148] however, Minnesota also defines "major construction defect."[149] A major construction defect is defined as

> actual damage to the load-bearing portion of the dwelling . . . including damage to [the] subsidence, expansion[,] or lateral

140. Davis, *supra* note 138, at 110 (quoting IND. CODE § 32-27-2-8 (Michie 2005)); Noble-Allgire, *supra* note 138, at 781 (quoting IND. CODE § 32-27-2-8).
141. IND. CODE § 32-27-2-4.
142. MINN. STAT. § 327A.01 (2013).
143. *Id.* § 327A.02(1)(a).
144. *Id.* § 327A.02(1)(b).
145. *Id.* § 327A.02(1)(c).
146. *Id.* § 327A.01.
147. *Id.* § 327A.01(3).
148. IND. CODE § 32-27-2-4 (2013).
149. MINN. STAT. § 327A.01(5).

> movement of the soil, which affects the load-bearing function and which vitally affects or is imminently likely to vitally affect use of the dwelling or the home improvement for residential purposes.[150]

Louisiana[151] and Mississippi[152] have tied implied warranty to building codes under New Home Warranty Acts.[153] In Mississippi, every builder has two required warranties for owners of new homes.[154] First, "the home [must] be free from any defect due to noncompliance with the building standards" for one year "following the warranty commencement date."[155] Second, a builder warrants that "the home will be free from major structural defects due to noncompliance with the building standards" six years "following the completion date" of the new home.[156] The statute then states that the builder's warranty excludes the following, unless the parties agree otherwise:

> [d]efects in outbuildings including detached garages and detached carports, except outbuildings which contain the plumbing, electrical, heating, cooling or ventilation systems serving the home; swimming pools and other recreational facilities; driveways; walkways; patios; boundary walls; retaining walls; bulkheads; fences; landscaping, including sodding, seeding, shrubs, trees, and planting; off-site improvements including streets, roads, drainage[,] and utilities or any other improvement not a part of the home itself.[157]

"Major structural defects" is further defined as "actual physical damage to any of the following load-bearing portions of a home caused by failure of the load-bearing portions and its load-bearing functions," including "[f]oundation systems and footings; [b]eams;

150. *Id.* (excluding "damage due to movement of the soil caused by flood, earthquake[,] or other natural disaster").

151. LA. REV. STAT. § 3143(2) (2013).

152. MISS. CODE. ANN. § 83-58-3(b) (2013).

153. Davis, *supra* note 138, at 108; Noble-Allgire, *supra* note 138, at 782.

154. MISS. CODE. ANN. § 83-58-5(1).

155. *Id.* § 83-58-5(1)(a). "Building standards" is further defined in the definition section and "means the standards contained in the building code, mechanical-plumbing code, and electrical code in effect . . . where a home is to be located . . . ." *Id.* § 83-58-3(b).

156. *Id.* § 83-58-5(1)(b).

157. *Id.* § 83-58-5(2)(a).

[g]irders; [l]intels; [c]olumns; [l]oad-bearing walls and partitions; [f]loor systems; [r]oof-framing systems."[158]

The California implied warranty of habitability statute exceeds the local building code requirements, and is the most complex and inclusive standard for determining what improvements fall within the scope of the statute.[159] The building standards "contain[ ] forty-five specific requirements covering most building components, including the integrity of doors, windows[,] and other aspects of the exterior envelope, foundations[,] and other structural issues, soil structure, plumbing, electrical, fire protection, and other systems."[160]

C. Proposed Amendments to Florida Statute Section 553.835

As it stands, Florida courts are bound to Section 553.835's unclear language of the implied warranty of habitability statute, such as off-site improvements, including definitions that do not fall within its ordinary meaning.[161] Thus, Florida should amend and clarify Section 553.835. First, the legislature should amend the general clause of the Statute by striking "off-site improvements" and replacing this term with two clearer, distinct terms—major construction defects and new home. Second, these two terms should be further defined in place of "off-site improvements." These changes address both the Court's concern for Florida homebuyers, as well as the Legislature's intent to limit the scope of the implied warranty. The amended statute would read as follows:

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 *has cre-*

158. *Id.* § 83-58-3(e).

159. Noble-Allgire, *supra* note 138, at 782.

160. *Id.* (citing CAL. CIV. CODE § 896 (2013)).

161. NORMAN J SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 20.8 (7th ed., Thomson Reuters 2013) (citing Ervin v. Capital Weekly Post, Inc., 97 So. 2d 464, 469 (Fla. 1957)).

ated uncertainty in the state's fragile real estate and construction industry.

(2) It is the intent of the Legislature to affirm *certain* 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 *"new home"* means:

(a) *A newly constructed home, including* two or more separately owned homes that are adjoined or attached; *and excluding*

(i) *Condominiums; and*

(ii) *Appurtenant recreational facilities, detached garages, streets, sidewalks, driveways, walkways, patios, boundary walls, retaining walls not necessary for the structural stability of the dwelling, landscaping, fences, and nonpermanent construction materials.*

(4) *As used in this section, the term "major construction defect" is a defect that reduces the stability or safety of a new home, such as a defective load-bearing beam.*

(5) There is *a* cause of action in law or equity available to a purchaser of a *new* home or to a homeowners' association based upon the doctrine or theory of implied warranty of fitness and merchantability or habitability for *a major constructional defects of the new home itself.* 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 [off-site] improvements based upon contract, tort, or statute, including, but not limited to, ss. 718.203 and 719.203.[162]

After addressing the Legislature's intent in the Statute, which is clearly stated and should not be altered, a broad, general clause regarding implied warranties should be articulated. In the

162. The italicized language is the Author's language added to the original statute (adopted and modified from: IND. CODE §§ 32-27-2-4, 32-27-2-8 (2013); MINN. STAT. § 327A.01(5) (2013); VA. CODE ANN. § 55-70.1(G) (2013)).

current version of Section 553.835, the general clause comes after the term "off-site improvements" and states that "[t]here 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 [off-site] improvements."[163] By placing the general clause first, the reader would be able to flesh out the central idea of the Statute, rather than reading a list of definitions first.[164]

Not only should the general clause come prior to the definitions, but this clause should also be amended specifically to address the concerns of both the Court and the Legislature. The general clause should be stated affirmatively. It is much easier for a reader to understand and apply positive language.[165] Instead of stating what is not under the scope of implied warranties, a doctrine established to protect amateur homebuyers, the statute should state what is within the scope of implied warranties. For example, the general clause could state, *there is a cause of action in law or equity available to a purchaser of a new home or to a homeowners' association based upon the doctrine or theory of implied warranty of fitness and merchantability or habitability for major constructional defects of the new home itself.*[166] This definition takes into consideration the Court's intent to protect amateur homebuyers, while making the statute clear and straightforward with positive wording.

In the subsequent section, the term "[off-site] improvement," should be replaced with "new home" and "major construction defect."[167] The current version of Section 553.835 blends these two concepts under "[off-site] improvements."[168] By distinguishing these two terms, the Statute would be much clearer and easier to apply and does not afford more protection to individuals with

163. FLA. STAT. § 553.835(4) (2013).

164. The definitions could also be placed in the definitions section of the title building codes; however, then these definitions would apply to all sections under this title. SINGER & SINGER, *supra* note 161, § 20.9 (described as the "functionalized" definition section).

165. *Id.* § 21. 9 (indicating that a subject of a statute should be affirmatively stated).

166. *See generally* FLA. STAT. § 553.835(4) (keeping the general sentence structure from this statute, but implementing the terms from Indiana and Minnesota); IND. CODE § 32-27-2-4 (using the term "new home" from this statute); MINN. STAT. § 327A.01(5) (using the term "major construction defect" from this statute).

167. IND. CODE § 32-27-2-4 (using the term "new home" from this statute); MINN. STAT. § 327A.01(5) (using the term "major construction defect" from this statute).

168. FLA. STAT. § 553.835(3).

attached homes.[169] The term "new home" on its face represents a newly constructed home, whereas Section 553.835 alternates between "new home" and "home" within different sections.[170] This Statute is intended to apply only to new homes, thus by using the modifying language—"new home"—the Legislature's intent would be properly reflected. The existing statute tries to include duplexes, townhomes, and multiunit dwellings into this Statute under the term "off-site improvements," but these types of dwellings should be included under the term "new home," while still honoring the legislative intent to bring such dwellings within the Statute's purview.[171]

Furthermore, condominiums were intended to be excluded from this Statute, but the Statute is part of the building code title and thus could extend to condominiums.[172] Condominiums need to be expressly excluded under this provision or the legislative intent is undermined.[173] Also, under the excluding clause, the Legislature's concern for "off-site improvements" should be included. Other states have used this approach to specify what is not within the scope of implied warranties.[174] The proposed clarification is as follows: *does not include appurtenant recreational facilities, detached garages, streets, sidewalks, driveways, walkways, patios, boundary walls, retaining walls not necessary for the structural*

169. MICHAEL SINCLAIR, GUIDE TO STATUTORY INTERPRETATION 67 (2000) ("If I am to communicate with others I have to take the language—the *public* language with its *public* meanings—as I find it.").

170. FLA. STAT. § 553.835(1)–(3)(a) (states "new home"); *contra id.* § 553.835(3)(b) (states "home").

171. *Id.* § 553.835(3); *Civil Justice Subcommittee*, *supra* note 96, 57:00.

172. FLA. STAT. § 553.835; H. CIVIL JUSTICE SUBCOMMITTEE, HOUSE OF REPRESENTATIVES STAFF ANALYSIS, HOUSE BILL 1013, 2012 Reg. Sess. 2 (Fla. 2012), *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h1013.CVJS.DOCX&DocumentType=Analysis&BillNumber=1013&Session=2012; Richard E. Berman, *Florida Supreme Court Takes Stand on Implied Warranties in Real Estate Developments*, BERMAN, KEAN & RIGUERA BLOG (July 15, 2013), http://www.bermankean.com/florida-supreme-court-takes-stand-on-implied-warranties-in-real-estate-developments/; Tanner, *supra* note 124.

173. H. CIVIL JUSTICE SUBCOMMITTEE, HOUSE OF REPRESENTATIVES STAFF ANALYSIS, HOUSE BILL 1013, 2012 Reg. Sess. 2 (Fla. 2012), *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h1013.CVJS.DOCX&DocumentType=Analysis&BillNumber=1013&Session=2012.

174. IND. CODE §§ 32-27-2-4, 32-27-2-8 (2013); MINN. STAT. § 327A.03 (2013); VA. CODE ANN. § 55-70.1(G) (2013).

stability of the dwelling, landscaping, fences, and nonpermanent construction materials.[175]

The next term would be "major construction defects," which could address the Florida Legislature's concern about improvements affecting the habitability of the home. A broad definition should be used, such as: a "major construction defects" reduces the stability or safety of the new home[176] and includes damage to load bearing portions of the new home.[177]

V. CONCLUSION

Florida homebuyers need protection from developers' ticky-tacky construction. The passing of Section 553.835 leaves uncertainty in a Florida homebuyer's ability to determine whether they fall within the scope of the implied warranty of habitability because the Statute does not define "habitability." Florida courts disagree on what affects the habitability of a new home, and the Florida Supreme Court's decision in *Maronda Homes* only applies to cases that arose before the Florida Legislature enacted Section 553.835. The Statute tries to address habitability by defining off-site defects, rather than addressing the essential definition of habitability. Furthermore, this Statute distinguishes between traditional single-family homes and connected homes, such as townhomes and duplexes. This distinction could lead to more protection of purchasers of townhomes and duplexes than of purchasers of traditional homes. That was not the intent of the Florida Legislature. Section 553.835 should be amended to create a more balanced resolution to protect Florida's unstable real estate economy.

175. MINN. STAT. § 327A.01(3); *see* FLA. STAT. § 553.835(3) (where the suggested language should be placed).

176. VA. CODE ANN. § 55-70.1(G); *see* FLA. STAT. § 553.835(3) (where the "new home" language should be placed).

177. MINN. STAT. § 327A.01(5); *see* FLA. STAT. § 553.835(3) (where the "load bearing portion" language should be placed).