IN THE SUPREME COURT OF FLORIDA

LEISURE RESORTS, INC., Petitioner, vs. FRANK J. ROONEY, INC., Respondent.	CASE NO. 82,578 District Court of Appeal, Fourth District, Case No. 92-2003

On Discretionary Review of a Decision of the District Court of Appeal of Florida, Fourth District

AMICUS CURIAE BRIEF OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

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PRELIMINARY STATEMENT

This is a case of first impression in the State of Florida.

The case arises out of the development of a condominium that is subject to the provisions of the Condominium Act (Laws 1976, c.76-222, now Chapter 718, Florida Statutes).

By Section 718.203, the Legislature of the State of Florida imposed certain limited warranties on contractors in derogation of the common law.

The Trial Court interpreted §718.203 as requiring a contractor to warrant the fitness for the purpose or use intended of air conditioners purchased from a manufacturer of air conditioners and installed in the units of the condominium. The Fourth District Court of Appeal reversed, holding that the statute did not impose such a warranty on the contractor.

This case is of critical importance to the contractors in the State of Florida. The liability issue is a threshold issue that exposes contractors to untold potential liability if they are held to be guarantors of manufactured personal property such as air conditioners, washing machines, refrigerators, dishwashers, dryers, fans, electrical fixtures, etc., particularly installed in condominium units.

Statement of Generic Facts

This case follows the usual fact pattern for the development of condominiums in the State of Florida. Generically, this fact pattern is as follows:

A Developer will acquire real property upon which to situate

the condominium. The Developer will then hire an Architect to prepare plans and specifications for the condominium in compliance with local building codes and the laws of the State of Florida and consistent with the overall marketing plan of the condominium as determined by the Developer, i.e., "low income", "luxury", or somewhere in between.

The Architect will then design the condominium and prepare plans and specifications which designate the type of construction, i.e., reinforced concrete, structural steel, wood frame, etc. The plans and specifications will also identify the materials to be used and how they are to be installed. The Architect and Developer will also specify the many manufactured items to be furnished such as air conditioners, dish washers, water heaters, dryers, heat exchangers, which are produced by manufacturers who warrant the products.

After the plans and specifications are prepared, the Developer will then enter into a contract with a Contractor to construct the condominium in accordance with the plans and specifications. The Contractor will, in turn, enter into a number of subcontracts with Subcontractors to perform portions of the work. Since Contractors are normally not licensed or qualified to perform mechanical, electrical, plumbing and roofing work, the Contractor will usually enter into subcontracts with Subcontractors who specialize in these trades and who are specially licensed and qualified to perform the mechanical, electrical, plumbing and roofing work.

In the typical construction process, the Contractor and

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Subcontractors purchase basic materials such as concrete, reinforcing steel, lumber, pipe, electrical conduit, etc. from suppliers and use these materials to build the basic structure. The Contractor and Subcontractors will also be required to purchase and install many items of personal property manufactured by manufacturers, which typically include air conditioners, water heaters, dish washers, washing machines, etc. These items are furnished by the trade Subcontractors, i.e., the Mechanical Subcontractor furnishes the air conditioners, heat exchangers, etc., the Plumber will furnish the tubs, sinks, toilets and water heaters, the Electrical Subcontractor will furnish the electrical fixtures, etc.

After the condominium has been built and the items of personal property installed, the Developer then sells the units to individual unit owners. Section 718.203 provides the unit owners with certain warranties relating to the units and the common elements of the condominium.

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ARGUMENT

A Contractor does not warrant, under Section 718.203 Florida Statutes, the fitness of air conditioning units manufactured by an air conditioning manufacturer.

A statute must be construed and applied in the form enacted. Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976). This is so because the Legislature is assumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute. Id.

For the benefit of purchasers of condominiums, Florida law imposes implied warranties on Developers, as well as on the Contractor, Subcontractors and Suppliers. Florida Statutes Annotated § 718.203 (West, 1988). The Developer's warranties are different from those imposed on the various builders. When the two parts of the statute are compared, it is very clear that no warranty is imposed on the Contractor for manufactured air conditioning units installed in individual units. Instead, this warranty is imposed on the Developer, because it is co-extensive with the express warranty provided by the manufacturer.

Subsection (1) of §718.203 sets forth the warranties imposed on the Developer.

Subsection (2) of §718.203 sets forth the warranties of the builders.

The warranties of the Developer and those of the builders are not co-extensive. The warranties simply do not "line up" when the provisions are compared "side by side" as follows:

The developer's warranty:

(1)
The developer shall be deemed to have granted to the purchaser of each unit an implied warranty of fitness and merchantability for the purposes or uses intended as follows:

(a) As to each unit, a warranty for 3 years commencing with the completion of the building containing the unit.

(b) As to the personal property that is transferred with, or appurtenant to, each unit, a warranty which is for the same period as that provided by the manufacturer of the personal property, commencing with the date of closing of the purchase or the date of possession of the unit, whichever is earlier.

(c) As to all other improvements for the use of the unit owners, a 3-year warranty commencing with the date of completion of the improvements.

The builders' warranties:

(2)
The contractor and all subcontractors and suppliers grant to the developer and to the purchaser of each unit implied warranties of fitness as to the work performed or materials supplied by them as follows:

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(d) As to all other personal property for the use of unit owners, a warranty which shall be the same as that provided by the manufacturer of the personal property.

(e) As to the roof and structural components of a building or other improvements and as to mechanical, electrical, and plumbing elements serving improvements or a building, *except mechanical elements serving only one unit*, a warranty for a period beginning with the completion of construction of each building or improvement and continuing for 3 years thereafter or 1 year after owners other than the developer obtain control of the association, whichever occurs last, but in no event more than 5 years.

(f) As to all other property which is conveyed with a unit, a warranty to the initial purchaser of each unit for a period of 1 year from the date of closing of the purchase or the date of possession, whichever occurs first.

(a) For a period of 3 years from the date of completion of construction of a building or improvement, a warranty as to the roof and structural components of the building or improvement and mechanical and plumbing elements serving a building or an improvement, *except mechanical elements serving only one unit.*

(b) For a period of 1 year after completion of all construction, a warranty as to all other improvements and materials.

Section (1) and Section (2) of the statute delineate the different warranties imposed on each participant in the developing/building process as follows:

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The Developer grants to each purchaser a warranty of fitness and merchantability for the purposes or uses intended. The builders individually grant to the Developer and each unit purchaser warranties of fitness of work performed or materials supplied. The builders' warranties do not address fitness for the purposes or uses intended or merchantability because purposes and uses are matters determined by the Developer and the Developer's Architect. The builders' section of the warranty states that those involved in the building process grant implied "warranties" to the Developer and the unit purchaser. The plural connotes that each builder grants its warranty separately to the Developer and unit purchaser. Subsection (2) specifically refers to "The contractor" and "all subcontractors and suppliers". Each of these grant implied warranties to the Developer and to the purchaser of each unit. The Contractor, Subcontractors and Suppliers do not grant warranties to each other; i.e., the Supplier does not grant a warranty to the Subcontractor who in turn grants it to the Contractor who passes it all to the Developer and unit owner. "The Contractor" is not liable, solely by virtue of being the Contractor, for a warranty from a specialty Subcontractor (the mechanical, plumbing, electrical or roofing sub) or a Supplier such as an equipment manufacturer. The clear import of the statute is that each party is individually responsible. There is no vicarious responsibility.

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The subsections of this statute are grouped into parts, as follows:

(1) Sections (a) and (b) of the Developer's warranty refer to the individual condominium unit and the manufactured personal property transferred with it.

(2) Sections (c) and (d) of the Developer's warranty refer to other improvements and manufactured personal property for the use of unit owners, i.e., the common facilities of the condominium building.

(3) Section (e) of the Developer's warranty and (a) of the builders' warranties cover the main structural components of the entire building.

(4) Section (f) of the Developer's warranty refers to all other property conveyed with a unit, while section (b) of the builders' warranties refers to all other improvements and materials.

Both the Developer's warranty (e) and the builders' warranties (a) have provisions that warrant the structural and mechanical components of the building as a whole but exclude "mechanical elements serving only one unit". These units are covered instead only under section (b) of the Developer's warranty, which warrants personal property that is transferred with the unit for the same period as the warranty provided by the manufacturer. There is no corresponding section in the builders' warranties of Florida Statutes § 718.203!

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Because the time frame of the Developer's warranty is co-extensive with the manufacturer's, section (b) necessarily only refers to manufactured equipment, such as air conditioners, hot water heaters, etc. To read this paragraph as covering other types of personal property, such as wallpaper, would render the section meaningless, because there would be no way to determine the length of the Developer's warranty. The Developer's warranty of manufactured equipment is co-extensive with the manufacturer's warranty, whether for 90 days or two years, because the manufacturer's warranty is transferred to the Developer as a matter of standard building practice.[1] At the closing of a sale of a unit, the Developer will, in turn, deliver the manufacturer's warranties to the unit owner.

The Trial Court erroneously interpreted the phrase "mechanical elements serving only one unit" which was expressly excluded from the builder's warranty under §718.203(2)(a), as being included under "all other improvements and materials". (T.427) Sections (c) and (f) of the Developer's warranty refer to all <u>other improvements</u> for the use of the unit owners or all <u>other property</u> conveyed with a unit. The words "all other improvements" or "property" must necessarily exclude manufactured equipment because they are in different paragraphs from the Developer's warranty of manufactured equipment. Likewise, section (b) of the builders'

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[1] In the case at Bar, Article 28(a) of the Contract required the contractor to "obtain and deliver to the Owner such standard manufacturer's warranties as each equipment manufacturer may furnish with any equipment". This type provision is typical.

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warranties necessarily excludes manufactured equipment because it used the express words "improvements" and "materials". "Where the Legislature uses exact words in different statutory provisions, the Court may assume they were intended to mean the same thing." St. George Island, Ltd. v. Rudd, 547 So. 2d 958, 961 (Fla. 1st DCA 1989). Here, the word "improvements" in section (c) of the Developer's warranty is exclusive of the manufactured personal property of section (b). Courts are supposed to accept statutes as written. Estate of Horner, 188 So. 2d 386 (Fla. 3d DCA 1966). The Fourth District Court of Appeal correctly read the word "improvements" in section (b) of the builders' warranties as also exclusive of manufactured personal property.

The term "materials" does not include manufactured personal property either. "[T]he presence of a term in one portion of a statute and its absence from another argues against reading it as implied by the section from which it is omitted." St. George, 547 So. 2d at 961. The Legislature, in writing Florida Statutes § 718.203, carefully distinguished manufactured personal property from other components of a condominium by putting it in separate paragraphs covered by a different warranty period. The Legislature specifically used different terms and a different warranty period when referring to the builders' warranties of "all other improvements and materials." The Legislature's deliberate use of a quite different term in separate subsections is overwhelming evidence indeed that it intended a quite different meaning. Ocasio v. Bureau of Crimes Compensation, 408 So. 2d 751, 753 (Fla. 3d DCA

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1982) (construing "related by affinity" in Florida Statutes § 960.04(2)(c) as not having the same meaning as "spouse" in § 960.04(1)(c)).

The Fourth District Court of Appeal applied the law of Florida of statutory construction, and correctly concluded that the mechanical elements serving only one unit are exempt from both sections (a) and (b) of the builders' warranties, and are covered by sections (b) and (d) of the Developer's warranty, co-extensive with that of the manufacturer's warranty.

Further evidence that this interpretation is correct can be found in the history of section (7) of the statute, which currently provides that "[R]esidential condominiums may be covered by an insured warranty program...provided that it meets the minimum requirements of this chapter..." Section (7) was rewritten and shortened from its prior form in 1978, when it provided that Florida Statutes § 718.203 would not apply to residential condominiums covered by an insured warranty program that for 10 years covered the roof, electrical, and structural components of a building or other improvement, except mechanical elements serving only one unit. Florida Statutes Annotated § 718.203 (West 1988).

The Legislature did not leave condominium unit owners without recourse as to air conditioning units. The Legislature simply provided that unit owners must look to the party who chose the units (i.e., the Developer) and the party that manufactured the units (i.e., the manufacturer): the manufacturer of the equipment if it is defective, and the Developer if its equipment is not

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suitable for the specified application, i.e., air conditioners that will not cool in the specified application of "stacked condensers" as in the case at Bar. The Legislature imposed the warranty of fitness and merchantability for the purposes and uses intended on the Developer. The Legislature did not place the burden of replacement on the Contractor who has no control over the selection or manufacture of such an item or its application.

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CONCLUSION

In the case at Bar, the Trial Court took a short cut.

The Trial Court did not differentiate

(1) between the warranty of "fitness and merchantability for the purposes or uses intended" imposed on the Developer vs. the warranties of "fitness as to the work performed or materials supplied" imposed on the Contractor;

(2) between the many different words used, i.e. "work", "materials", "personal property", "improvements", "mechanical elements", "other property", etc.;

(3) between warranties of others such as the manufacturers of personal property;

(4) etc., etc.

By not differentiating, the Trial Court simply concluded that the Legislature must have gotten tired of writing when it got to Subparagraph (2) and imposed a 3-year warranty on the Contractor for the roof, structural components, etc., and then imposed an all-encompassing 1-year warranty on the Contractor for everything else.

By proper statutory interpretation, the Fourth District Court of Appeal correctly held that a Contractor does not warrant, under Section 718.203 Florida Statutes, the fitness of air conditioning units manufactured by an air conditioning manufacturer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Amicus Curiae Brief of The Associated General Contractors of America were mailed to:

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