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

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In a 14-page Decision, the Fourth District Court of Appeal reversed a Final Judgment on Third-Party Action entered in the Fifteenth Judicial Circuit, the Honorable Lucy Brown presiding, and certified to this Court the question of whether Section 718.203(2) imposes on a contractor a warranty that manufactured equipment such as individual air conditioning units be fit "for the intended use and purpose".

The unit owners of the Waterview Towers Condominium sued the developer, LEISURE RESORTS, INC. ("LEISURE RESORTS") for fraud, breach of warranty, breach of fiduciary duty, etc., arising from the sale of the units (the "Fraud Action"). LEISURE RESORTS subsequently filed a Third-Party Complaint for indemnity against FRANK J. ROONEY, INC. ("ROONEY"), the contractor who built the Condominium, for damages relating to the air conditioning units (the "Indemnity Action").

The following symbols will be used:

"R."	Record on Appeal
"A."	Appendix
"Plf.Ex."	Plaintiff's Trial Exhibit
"Def.Ex."	Defendant's Trial Exhibit

This Brief is accompanied by an Appendix (separated by a divider) containing portions of the record and the Decision of the Fourth District Court of Appeal.

Unless otherwise stated, all emphasis is ours.

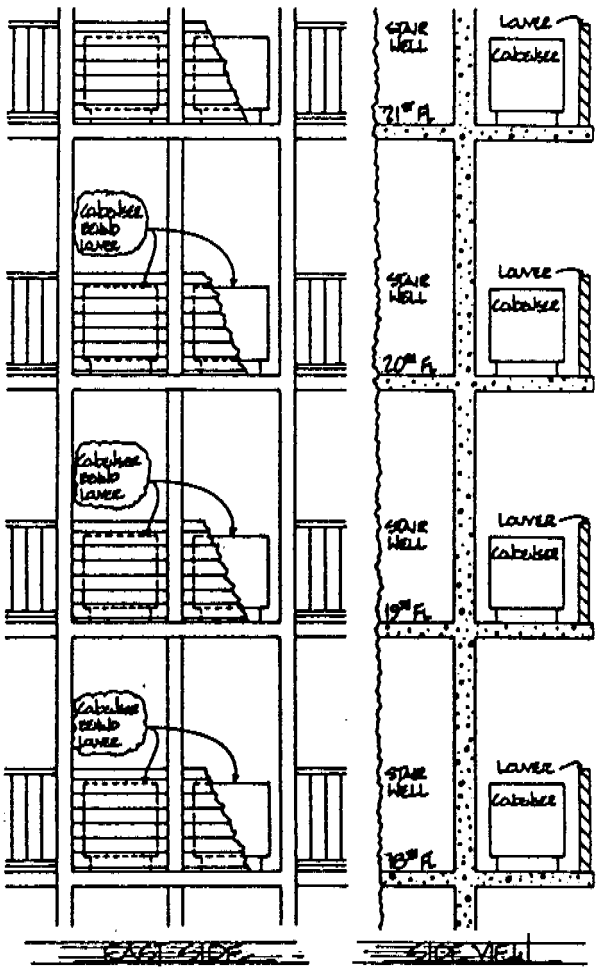
STATEMENT OF THE CASE AND THE FACTS

ROONEY disagrees with the Statement of the Case and the Facts presented by LEISURE RESORTS, and offers this Statement of the Case and the Facts as permitted by Rule 9.210(c), Fla.R.App.P. The nature of the case, the course of the proceedings, and its disposition are as follows:

Nature of the Case

LEISURE RESORTS, the developer of Waterview Towers Condominium, retained the architectural firm of BUIGAS & ASSOCIATES (the "Architect") who in turn hired Emilio Hospital, P.E. (the "Engineer") to prepare plans and specifications for the Condominium and to represent LEISURE RESORTS during construction. [R.46] The Engineer considered a central air conditioning system to be "very expensive" [R.130] and the Condominium was not designed with central air. Instead, the Condominium was designed so that each individual apartment unit had its own separate air conditioning "system" consisting of a simple residential type air handler and condensing unit. [R.86,92] LEISURE RESORTS and ROONEY agree that the air handlers and condensers were mechanical elements that served one individual condominium unit. [R.133-134] Petitioner's Initial Brief on the Merits, page 2.

The Architect/Engineer put the air handler inside the apartment and located the condenser on a little balcony alcove adjacent to the apartment and outside the building. The condensers were thus "stacked" on top of each other up a straight line 22 stories high on the east side of the Condominium overlooking Lake Worth, Palm Beach and the Atlantic Ocean.[1] [R.165-166] This design reduced the cost of piping, etc., greatly reduced the total cost of "air conditioning" the Condominium and was the cheapest to install. [R.132-133] This system was also not permanent. The Architect considered the average life expectancy of a condenser to be "about seven years", meaning that the condenser would have to be replaced about every seven years. [R.271] Since each unit had its own condenser, LEISURE RESORTS contemplated that each unit owner would be responsible for replacing his own condenser. [R.271] This resulted in a reduction of condominium maintenance expenses. [R.96]



[1] This design had not been done before on a high rise in Palm Beach County and the Architect considered it "unique". [R.253]

The Architect originally specified "Carrier Super Efficient" units with an Energy Efficiency Rating ("E.E.R.") of 9.0. During contract negotiations with ROONEY, LEISURE RESORTS downgraded the air conditioning units to save money. [R.250, etc.] In order to save $31,000.00, LEISURE RESORTS eliminated the specified "Carrier Super Efficient" unit, before the Contract with ROONEY was signed.[2] Sheet M9 of the original plan was modified in handwriting to provide that the units be a "minimum E.E.R. to be 6.8 to meet code" and the manufacturer be "G.E., Carrier or equal as approved by Eng. Note: Capacities, C.F.M.'s and E.S.P.'s will vary depending on equipment selected." [Plf. Ex.1; A.1]

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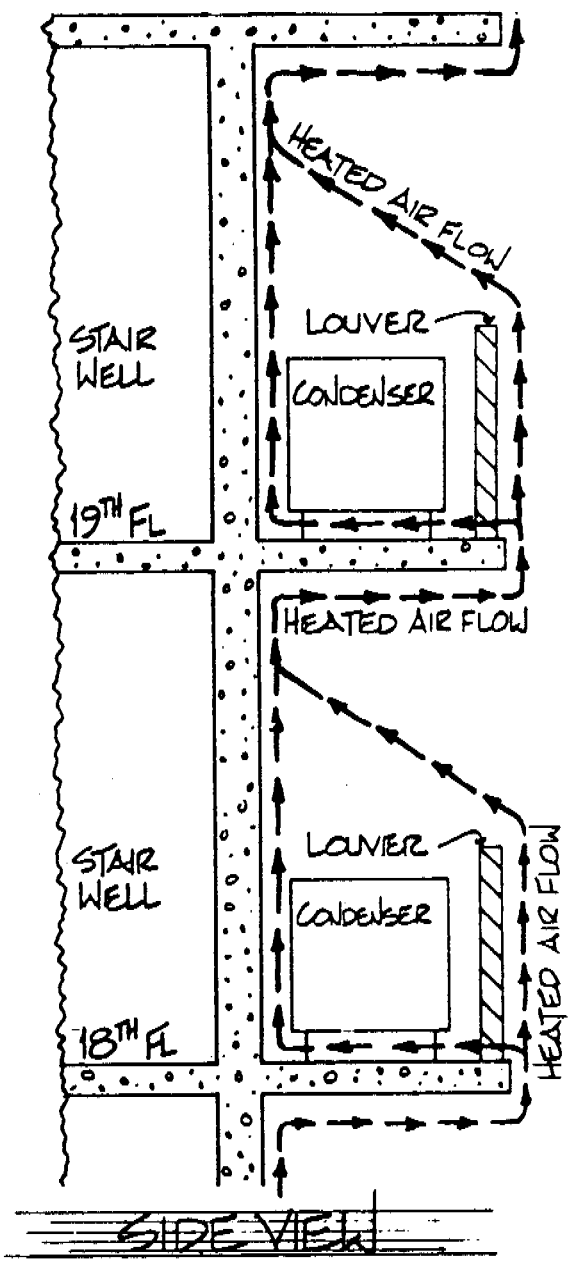
[2] The Contract between LEISURE RESORTS and ROONEY for the construction of the Condominium was a "cost of the work plus fee" type contract.

Under the negotiated Contract between ROONEY and LEISURE RESORTS, ROONEY was to be paid for the cost of the work, plus a $515,000 fee. [Plf.Ex.7] A maximum cap of $12,767,351 was placed on the cost of the work. [Plf.Ex.7, Art. 6] If it cost less than that amount to build the Condominium, the first $200,000 and 75 percent of all additional savings would inure to LEISURE RESORTS. [Plf.Ex. 7, Art. 6] With this strong incentive, LEISURE RESORTS searched for cost savings.

Under the Contract not only did LEISURE RESORTS have the right to approve subcontractors who had subcontracts in excess of $50,000.00, the Contract also had a provision for line item allowances. An "allowance" is an amount of money that a developer and contractor agree on in advance as the cost for an item of work (i.e., "swimming pool ... $45,000"). This gives the developer total control of the item and costs. If the developer wants to upgrade, it costs the developer more money; if the developer wants to down grade, the developer can save even more. Under this provision, LEISURE RESORTS reduced costs in other areas as well, many of which formed the basis for the unit owners' claims of fraud. For example, LEISURE RESORTS advertised to prospective purchasers that the Condominium would have an olympic-sized pool, covered walkways, real wood kitchen cabinets, and luxurious lobby chandeliers and marble. Upon moving in, the unit owners found a pint-sized pool, uncovered walkways open to the elements, no chandeliers, no marble, and pasteboard kitchen cabinets. [Plf.Ex.132; A.4]

During construction, ROONEY and various air conditioning manufacturers recognized that the "stacked condensers" design would cause a problem.

By letter of April 14, 1980, ROONEY warned LEISURE RESORTS' Architect "[t]hat a problem did exist with any type of unit the Owner might select. That problem involved the heated discharged air from the exterior condensing units rising up to the condensing units located directly above on the next respective floor, which would cause the units to overload." [Plf.Ex.31; A.2] When a condenser "overloads" it automatically shuts off and ceases cooling. [R.171]



The Contract required ROONEY to obtain and deliver to LEISURE RESORTS such standard manufacturers' warranties furnished with any manufactured equipment supplied (i.e., refrigerators, washers, dryers, dishwashers, air conditioning units, heaters, pumps, etc.). [Plf.Ex.7] The "stacked condensers" design made it difficult to find a manufacturer willing to guarantee its air conditioning units under

the design conditions. The original manufacturer specified by the Architect, Carrier, did not want the job because its units exhausted heated air straight up. [R.505] General Electric agreed to guarantee its units if three modifications to the condensing unit were made. [Plf.Ex. 31; A.2][3] Although the Architect approved the G.E. units with modifications, LEISURE RESORTS refused to follow its Architect's recommendation and would not approve G.E. because it entailed a cost increase of $28,000. [R.511,470]

Ultimately, LEISURE RESORTS' Architect and Engineer met directly with representatives of another manufacturer, Frigiking Tappan, and obtained a written warranty directly from Tappan to the Architect guaranteeing that its units would function under the "stacked" design condition. [Plf.Ex.39; A.6] In submitting the Tappan manufacturing data, etc, ROONEY did not certify that the Tappan units complied with the Contract, but the Architect and Engineer nonetheless specifically approved the Tappan units. [Def.Ex. 52]

Written Change Order No. 8 was then prepared and signed by the Architect, LEISURE RESORTS and ROONEY which specifically directed ROONEY to install the Tappan units. [Plf.Ex. 3A] ROONEY did so. The exact Tappan units specified in Change Order No. 8 were installed.

ROONEY completed construction of the Condominium and a Certificate of Occupancy was issued on August 18, 1981. [Plf.Ex. 7]

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[3] The three modifications requested by General Electric were (1) furnishing and installing a 90 degree air discharge elbow from each unit with (2) an equivalent size discharge turning vane (louver) at the end and (3) the furnishing and installing of "hard start kits" on each unit. [Pl.Ex. 31, A.2]

After the unit owners moved in, a few of the unit owners mostly on the upper floors, 18th through 21st, complained that their units were not cooling. [R.146] By June of 1982, ROONEY had been notified that a total of ten (10) unit owners had complained. [R.222, Plf.Ex.79] ROONEY and its subcontractors responded to the complaints and corrected all conditions attributable to workmanship. [R.472-473]

The Architect and Engineer tested the capacity of two of the units on the upper floors and found that the units were not capable of cooling to capacity due to recirculation of the air (i.e., the condensers discharged heated air which simply rose to the condenser "stacked" on the next floor causing it to overheat, etc.). [R.152] [See Illustration, page 5, supra.] The Engineer concluded that the problem was attributable to the design characteristics of the units not being suitable for the application. [R.168]

Course of the Proceedings

In 1982, the unit owners sued LEISURE RESORTS for fraud, negligent design, breach of warranty, breach of covenant, unjust enrichment, breach of fiduciary duty and construction defects. The unit owners sued LEISURE RESORTS because the luxury condominium promised by LEISURE RESORTS was not provided: promised covered walkways were missing; the promised jacuzzi was not provided; promised marble columns and chandeliers in the lobby were not provided; the promised wooden kitchen cabinets were actually pasteboard, etc., etc., etc. These "construction defects" which were set forth in EXHIBIT "B" to Complaint had nothing to do with defective construction. [R.793; A.4]

In 1987, LEISURE RESORTS filed a Third Party Complaint against ROONEY, seeking contribution or indemnity for any amounts adjudged against LEISURE RESORTS for construction defects attributable to ROONEY. [Plf.Ex.131]

Over ROONEY's strenuous objection, LEISURE RESORTS successfully severed the trial of the Third Party Complaint from the trial of the Fraud Action with the unit owners. [R.771] During the course of the Fraud Trial and unbeknownst to ROONEY, LEISURE RESORTS settled the Fraud Action and paid the unit owners $1,100,000.00. [R.313]

In 1992, LEISURE RESORTS then proceeded to trial against ROONEY on the Indemnity Action to recover amounts it allegedly paid in settlement of the unit owners' claims regarding air conditioning units. LEISURE RESORTS did not offer any evidence of actual damages. Not a single unit owner testified about repair cost or replacement cost of a single air conditioner, although ten years had passed since the Condominium had been completed and the condenser units only had a life expectancy of seven years. Instead, LEISURE RESORTS offered the testimony of the unit owner's lawyer in the Fraud Action, who over objection offered hearsay testimony that experts he had retained were going to testify (but never actually testified) that it would cost "a range of about $2,000 to $3,000 per unit, that's an approximation" to make the units adequately cool the upper condominium units. [R.305]

LEISURE RESORTS also sought to recover as damages a portion of the costs of defending the Fraud Action. LEISURE RESORTS offered no evidence of actual cost. Again, LEISURE RESORTS offered testimony of the lawyer for the unit

owners in the Fraud Action who testified that approximately 80% of his time was spent on the "construction defects" aspect of the litigation. The "construction defects" included the missing covered walkway, the missing jacuzzi, the undersized pool, the pasteboard kitchen cabinets, etc., etc. [Plf.Ex.132; A.4] which were not ROONEY's responsibility and for which ROONEY was never sued. [R.474]

At the conclusion of LEISURE RESORTS' case in chief and at the close of all the evidence, ROONEY moved for a directed verdict. [R.427,572] The Trial Court found that no viable breach of contract or negligence claims existed. [R.575] The Trial Court nonetheless permitted the case to go to the Jury solely on LEISURE RESORTS' indemnity claim for breach of statutory warranty instructing the Jury as a matter of law that ROONEY was liable to LEISURE RESORTS for any settlement LEISURE RESORTS made to the unit owners for the air conditioners. [R.687] The Trial Court further instructed the Jury that the issue for determination on statutory warranty was "whether the air conditioning equipment for the individual condominiums was ... fit for the specific purpose for which it was supplied". [R.687; A.10] Under this instruction, the Jury had no choice but to return a Verdict against ROONEY on the so-called "air conditioning claim", plus attorney's fees and costs allegedly incurred in defense of that claim.

Disposition Below

The Trial Court entered a Final Judgment on Third Party Action in accordance with the Verdict. [R.1153] The Trial Court thereafter denied ROONEY's post trial motions by an Order Denying Third Party Defendant's Motion for New Trial and Motion for Judgment in Accordance with Motion for Directed Verdict. [R.1174]

ROONEY appealed the Final Judgment on Third-Party Action to the Fourth District Court of Appeal and presented five issues as warranting reversal:

ISSUE ONE: Does Florida Statute § 718.203 impose on a contractor a warranty of fitness that air conditioners manufactured by an air conditioning manufacturer be fit for the specified purpose intended?

ISSUE TWO: Is a contractor responsible for consequences of defects in plans and specifications if the contractor builds according to those plans and specifications?

ISSUE THREE: Must a party claiming indemnity, and its agents, be totally without fault?

ISSUE FOUR: Is an indemnitee required to prove actual damages when the potential indemnitor is precluded from defending the original action?

ISSUE FIVE: Must attorney's fees claimed in an indemnity action be reasonable and related solely to the wrongful act for which indemnity is sought?

The Fourth District did not reach Issues Two through Five. The Fourth District entered a Decision on Issue One and held that the Trial Court erred in denying ROONEY's motion for directed verdict because, as a matter of law, § 718.203 did not impose a warranty on the contractor that manufactured air conditioning units be fit "for the specific purpose intended". [A.16-22]

The Fourth District also certified to this Court the issue hereafter stated and this Petition ensued.

ISSUE PRESENTED

WHETHER THE PROVISIONS OF SECTION 718.203(2), FLORIDA STATUTES (SUPP. 1992), IMPOSE ON A CONTRACTOR AN IMPLIED WARRANTY OF FITNESS FOR THE INTENDED USE AND PURPOSE, WHERE THE CONTRACTOR WITHIN THE CONTEMPLATION OF THE CONTRACT DOCUMENTS SUGGESTS AND SUPPLIES A MANUFACTURED ITEM SUCH AS INDIVIDUAL AIR CONDITIONING UNITS TO A DEVELOPER FOR USE IN A BUILDING PROJECT, WHERE SUCH ITEMS LATER PROVE NOT TO BE FIT FOR THE SPECIFIC PURPOSE FOR WHICH THEY WERE SUPPLIED?

SUMMARY OF ARGUMENT

ROONEY did not design the Waterview Towers Condominium. ROONEY did not market or sell the individual units to the general public. ROONEY did not manufacture the individual air conditioning units that LEISURE RESORTS' Architect/Engineer selected and directed ROONEY to install.

ROONEY constructed the Waterview Towers pursuant to the plans and specifications provided by LEISURE RESORTS' Architect.

Florida Statutes § 718.203 protects the purchasers of condominium units by creating warranties which did not exist in common law. The statute recognizes the different functions of the members of a construction project team, and imposes obligations (i.e., implied warranties) accordingly: (1) the developer, who through its architect, designs the condominium and specifies the manufactured property furnished with the individual units, warrants the "fitness and merchantability for the purposes or uses intended", § 718.203(1); (2) the contractor, subcontractors and suppliers, who by contract must furnish labor and material as specified by the Architect, warrant the "fitness as to the work performed or materials supplied" by them, § 718.203(2). The statute also contemplates that property manufactured by a specialty manufacturer will also be transferred with the unit to the ultimate purchaser, and expressly provides that the developer warrants "personal property that is transferred with, or appurtenant to, each unit, for the same period as that provided by the manufacturer..." § 718.203(1)(b)

ROONEY as a general contractor does not warrant the individual air conditioners "for the purpose or use intended".

ARGUMENT

FLORIDA STATUTE § 718.203 DOES NOT IMPOSE ON A CONTRACTOR A WARRANTY THAT AIR CONDITIONERS MANUFACTURED BY AN AIR CONDITIONING MANUFACTURER BE FIT FOR THE SPECIFIC PURPOSE INTENDED.

LEISURE RESORTS retained the architectural firm of BUIGAS & ASSOCIATES (the "Architect") who, in turn, hired Emilio Hospital, P.E. (the "Engineer") to prepare plans and specifications for the Condominium. The Architect and Engineer selected the many manufactured items to be furnished and installed in the Condominium including, of course, the originally specified "Carrier Super Efficient" condensers and air handlers. Prior to executing the Contract with ROONEY, LEISURE RESORTS down graded the air conditioning units to save money.[4]

As indicated on plan page M9 of Plaintiff's Exhibit 1, the manufacturer of the air conditioners was to be "G.E., Carrier or equal as approved by Eng.--Note: Capacities, C.F.M.'s and ESP's will vary depending on equipment selected." [A.1] These handwritten notations were signed off by all the parties. [Handwriting highlighted on A.1] Thus began the search to find a manufacturer within LEISURE RESORTS' budget. Ultimately, LEISURE RESORTS' Architect and Engineer met directly with Frigiking Tappan and obtained a written warranty directly from Tappan guaranteeing that its units would function under the stacked design

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[4] While the plans were being finalized, one of LEISURE RESORTS' associates, Gerry Gross (a "big builder up North") worked out of the Architect's office to downgrade the plans and negotiate the contract with Rooney. [R.250, etc.] The "cost of the work plus fee" type of contract that Mr. Gross negotiated is explained in Footnote 2, supra.

condition. [Plf.Ex. 39, A.6] ROONEY installed the Tappan air conditioners after receiving Change Order 8 to its Contract with LEISURE RESORTS.

LEISURE RESORTS argued throughout the trial that the change to the Tappan brand was made at ROONEY's request, was for ROONEY's benefit, and by "requesting" the change, that somehow ROONEY guaranteed performance of the Tappan units. However, it was undisputed that:

(1) Carrier (the manufacturer originally specified by the Architect) would not furnish their units because the exhaust on their units went straight up. [R.505]

(2) General Electric units were then considered. [Plf.Ex.31] General Electric ("G.E.") required modifications before it would issue a guarantee of performance under the designed conditions of stacking the units on top of each other in alcoves. [R.511] LEISURE RESORTS' Architect approved the units with those modifications. [R.511] LEISURE RESORTS refused the recommendation of its Architect, and would not approve the G.E. units because of a cost increase of $28,000. [R.511]

(3) The Architect and LEISURE RESORTS selected the Tappan units after obtaining a letter directly from the manufacturer that warranted the capacity of the units as installed. [Plf.Ex.39; A.6]

LEISURE RESORTS' attempt to avoid its Architect/Engineer's design error and shift the blame to ROONEY runs afoul of hornbook law.

If a contractor installs items in accordance with plans and specifications, the contractor is not liable for the items' failure to function properly as a result of its design being improper for the intended use. Atlantic National Bank of Jacksonville v. Modular Age, Inc., 363 So. 2d 1152, 1156 (Fla. 1st DCA 1978). In Atlantic National, the owner entered into an agreement with the contractor to build a motel

with modular unit construction. The owner's architect approved the plans for the modular units and certified that the wall construction complied with the building code. When the original manufacturer's modules turned out to be too expensive, the contractor suggested a unit by a different manufacturer. The architect inspected the modules and approved them, and also certified that the work and materials were in accordance with the plans and installed in a good and workmanlike manner. The owner subsequently sued the contractor, claiming that the modular walls were defective. The First District Court of Appeal affirmed summary judgment in favor of the contractor, holding that the architect was responsible for the design of the walls, even though he did not personally design them. Regardless of the fact that the contractor suggested an alternative system, the duty of the architect cannot be avoided by delegating his design responsibility to the contractor or the manufacturer. The Court further affirmed that the contractor was not obligated under his contractual warranty provision to replace the defective walls.

Another case remarkably similar to the case at bar is Charles R. Perry Constr., Inc. v. C. Barry Gibson and Assoc., Inc., 523 So.2d 1221, 1223 (Fla. 1st DCA 1988). In Perry, the owner's architect approved a submittal by the subcontractor substituting one exterior insulation system for another. The system was installed by the subcontractor according to the plans, the manufacturer's specifications and the approved submittal. The system subsequently leaked and the contractor refused to pay the subcontractor. In an action by the subcontractor for its contract balance, the Court held the subcontractor did not warrant the

adequacy of the design or specifications of the system, and therefore defects in the system did not constitute a breach of its written warranty.

As these cases amply illustrate, a contractor is responsible for complying with the plans and specifications furnished by the owner. The architect is responsible for design and cannot delegate this responsibility to the contractor. This doctrine is by no means new to our system of jurisprudence; it was first enunciated by the United States Supreme Court in United States v. Spearin, 248 U.S. 132, 136, 39 S.Ct. 59 (1918). The "Spearin doctrine" states that when a contractor is bound to build according to plans and specifications prepared by the owner, he is not responsible for the consequences of defects in the plans and specifications. The owner impliedly warrants that if the specifications are complied with, the completed structure will be adequate. Id. at 137.

If the contractor's workmanship is sound, it is not responsible for a failure in the design of the plans. City National Bank of Miami v. Chitwood Construction Co., 210 So.2d 234, 235 (Fla. 3d DCA 1968) (summary judgment proper in case of water leak damage where supervising architect approved installation and found no deviation from plans as to material and workmanship); Burger v. Hector, 278 So.2d 636, 637 (Fla. 1st DCA 1973) (contractor who built home according to plans did not impliedly warrant that owner's lot would have soil such that flooding would not occur after development of adjoining lots).

Since ROONEY had no control over the selection of manufactured equipment or its application to accomplish the use intended, ROONEY and LEISURE RESORTS specifically agreed in a specially typewritten provision that ROONEY's warranty or

guaranty obligation would be limited. Specifically, Article 28(a) of the Contract provided:

> "The Contractor warrants that it will furnish all of the materials and work necessary to complete the improvements in a good and workmanlike and first class manner and will furnish all of the equipment which will be installed in a good and workmanlike and first class manner, as all of the same are called for in the Contract Documents. And, the Contractor shall obtain and deliver to Owner such standard manufacturer's warranties as each equipment manufacturer may furnish with any equipment. The Contractor does not warrant or guarantee the design or sufficiency of the design of the improvements or that the materials and equipment furnished, assuming that they are the materials and equipment specified, will accomplish the purposes intended." [Plf. Ex. 7]

By this express provision, as a matter of contract and law, ROONEY did not warrant or guarantee that the air conditioners would "work". Wood-Hopkins Contracting Co. v. Masonry Contractors, Inc., 235 So.2d 548 (Fla. 1st DCA 1970); Charles R. Perry Constr., Inc. v. C. Barry Gibson & Assoc., Inc., 523 So.2d 1221 (Fla. 1st DCA 1988).

ROONEY did not breach its Contract with LEISURE RESORTS. The Contract contemplated that air conditioning units "approved by Eng[ineer]" would be provided. This was done as formalized by Change Order No. 8 which required that ROONEY install Tappan units. This is exactly what ROONEY did in compliance with the Contract.

At the conclusion of LEISURE RESORTS' case in chief, ROONEY moved for a directed verdict because there was no evidence of a breach of contract. [R.397, et. seq.] In response, LEISURE RESORTS admitted that "there is no technical

breach of contract". [R.412] The Trial Court reserved ruling on the motion. [R.429] Ultimately, even the Trial Court agreed that there was no breach of contract and at the charge conference stated:

> "The Court: There is no issue in this case in the pleadings or in the evidence of breach of contract." [R.593]

ROONEY also moved for a directed verdict on the "indemnity claim" on the grounds that ROONEY did not warrant the units under either the Contract or law. [R.399, et. seq.] This motion was denied. [R.429]

The Trial Court submitted the case to the Jury on the "indemnity claim" predicated on an erroneous interpretation of another provision of the Contract and § 718.203, Florida Statutes.

The contractual provision was the final paragraph of Article 28 of the Contract which provided:

> "Notwithstanding anything above set forth, if the within Project is submitted to a condominium regime, then certain warranties are imposed by Statute upon the Contractor, and in such event, the Contractor shall still be bound by such warranties notwithstanding any limits upon the Contractor's warranties as set forth herein. To the extent that the Contractor is liable for any said statutory warranties where the Project is converted to a condominium, the Contractor will indemnify the Owner against loss for any breach of such warranties by Contractor for which the Owner may also have any liability to others, ..."

Under this provision, ROONEY's warranty liability was limited to the warranties imposed on a contractor by § 718.203. The Trial Court interpreted this provision as one of absolute indemnity and then "interpreted" § 718.203 as imposing on ROONEY a warranty of fitness of the air conditioning units for the specific purpose

for which they were supplied! The Trial Court thus preemptively instructed the Jury that:

> "The Court has further determined and instructs you as a matter of law that, by virtue of certain warranties imposed by statute in regard to the development and construction of condominiums, Rooney warranted the fitness of the air conditioning equipment for the individual condominium units for one year following substantial completion of construction and that Leisure Resorts had liability to the condominium unit owners for any breach of that warranty by Rooney.
>
> The issues for your determination on Leisure Resorts' claim against Rooney for indemnity based on breach of warranty are whether the air conditioning equipment supplied by Rooney for the individual condominium apartments was defective within one year after substantial completion of all construction, and if so, whether such defect was a legal cause of loss or damage sustained by Leisure Resorts through no fault of Leisure Resorts.
>
> The equipment was defective if it was not reasonably fit for the specific purpose for which it was supplied." [R.687; A.28]

(The entire jury charge is at A.7-A.15)

Before ROONEY put any units in, ROONEY told LEISURE RESORTS that almost any unit selected would not work! [Plf.Ex. 31; A.2] It was also undisputed that the units ultimately selected by the Architect and installed by ROONEY under Change Order No. 8 did not cool some units on the upper floors because of the recirculation of the discharged heated air in the "stacked" design. The Trial Court's instruction directed a verdict against ROONEY -- because it imposed a warranty of fitness for the purposes or use intended. Under this charge, the Jury had no choice but to return a verdict against ROONEY.

The Trial Court erred by not granting ROONEY's motion for directed verdict because under § 718.203, a contractor does not warrant air conditioning units

installed in individual condominium units, much less a warranty for the specific purpose or use intended.

To protect purchasers of condominiums, the Florida Legislature enacted Section 718.203 (Warranties). Section (1) of the statute imposed extensive warranties of "fitness and merchantability for the purposes or uses intended" on the developer. Section (2) imposed a limited warranty of fitness as to the work performed or materials supplied on the contractor, all subcontractors and suppliers.

Under Section 718.203(2), a contractor does not warrant the fitness of air conditioning units manufactured by an air conditioning manufacturer. See Amicus Curiae Brief of The Associated General Contractors of America which ROONEY adopts.

The Trial Court erred in instructing the Jury that, as a matter of law, ROONEY warranted the fitness of the air conditioners because Florida Statutes § 718.203(2)(b) does not impose such a warranty on a contractor.

The Fourth District reversed the Trial Court and remanded the case with instructions that the Trial Court dismiss the Third Party Complaint with prejudice, because a contractor does not warrant that air conditioning units manufactured by an air conditioning manufacturer will be fit for their intended purpose or use:

> "The distinction between the implied warranties applicable to developers and contractors is clearly delineated in the statute. The warranty imposed upon the developer and granted to the purchaser of each unit is a 'warranty of fitness and merchantability for the purpose or uses intended'; the implied warranty of the contractor in favor of the developer and unit owner is a 'warrant[y] of fitness as to the work performed or materials supplied.' The 'intended purpose' or 'intended

> use' is seemingly a matter more within the scope and control of the developer through its architect and engineer; whereas, the competency or fitness of the work being performed and the quality of the materials being supplied are more within the control of the contractor.
>
> Under section 718.203(1)(b) and (d), the unit owner receives an implied warranty from the developer that the 'personal property that is transferred with, or appurtenant to each unit' and 'all other personal property for the use of unit owners' will be fit for the 'purpose or use intended' for the 'same period as that provided by the manufacturer.' We believe this broad language was intended to encompass within its scope a manufactured unit such as an individual air conditioning unit." (emphasis in original)

Frank J. Rooney, Inc. vs. Leisure Resorts, Inc., 624 So.2d 773 (Fla. 4th DCA 1993) [A.16]

LEISURE RESORTS misrepresents to this Court the holding of the Fourth District. LEISURE RESORTS states in the first paragraph of its Statement of the Case and the Facts that the Fourth District held "the implied warranty of fitness imposed on contractors by § 718.203(2), Florida Statutes, did not apply to the condensers." Petitioner's Initial Brief on the Merits, page 1. This is not what the Fourth District held. The Fourth District's Decision is at A.16-A.22. The Fourth District clearly articulated the issue presented:

> This appeal requires that we determine the scope and extent of a contractor's 'statutory' warranties. In particular, whether section 718.203(2) was intended to create a warranty as to the fitness of a product for the purpose or use intended, so that by selecting an air conditioning system, the contractor warranted to the developer and purchaser of a condominium unit the fitness of that system for the purpose or use intended, namely, to sufficiently cool the area it was intended to serve. We believe the statute was not intended to

impose on contractors the same warranties applicable to developers. (emphasis in original).

LEISURE RESORTS then argues that the Fourth District's interpretation of § 718.203(2) (i.e., that the contractors' implied statutory warranty of fitness is not for the intended use or purpose) "is to repeal the statute". Petitioner's Initial Brief on the Merits, page 14. LEISURE RESORTS criticizes the Fourth District's side-by-side comparison of § 718.203(1) with § 718.203(2) (which clearly shows the differences between the warranties), and urges a construction of the statute that imposes on ROONEY full responsibility for the design of the condominium. This is not the law. This has never been the law. ROONEY respectfully urges this Court to reject this "tortured statutory construction".

It is understandable why LEISURE RESORTS takes exception to the Fourth District's "side-by-side" comparison of the statutory warranties: the simplified format illustrates with crystal clearness the stark differences between the warranties imposed on the developer as distinguished from the warranties imposed on the contractor. LEISURE RESORTS argues that there is no difference in the warranties and that the drafter just got tired of writing upon reaching § 718.203(2): "the drafter of the two introductory paragraphs simply failed to abide by the desirable writing principle of parallel construction..." citing The Elements of Style by E.B.White. Petitioner's Initial Brief on the Merits, page 13. With all due respect to Mr. White, the explanation offered by LEISURE RESORTS

is contrary to overwhelming judicial authority on the subject of statutory interpretation, and is quite simply, insulting to the Legislature.[5]

LEISURE RESORTS also argues that the Fourth District erred in its construction of the statutes with respect to the terms "mechanical units serving only one unit" vs. "personal property" vs. "fixtures" vs. "improvements". LEISURE RESORTS cites extensive authority on the definition of "fixtures", discussing refrigerators, window air conditioning units, etc., and attempts to boot-strap this classification of the air conditioning units as "fixtures" to impose on ROONEY an obligation for design, i.e., that the "fixtures" be fit for the intended use and purpose. This argument simply has no bearing on the question before this Court.

LEISURE RESORTS and ROONEY agree that:

(1) the Tappan units are "mechanical elements serving only one unit";

(2) Tappan furnished a written warranty directly to the Architect that guaranteed its units;

(3) the Tappan units were accompanied by a manufacturer's warranty;

(4) the manufacturer's warranty was delivered to LEISURE RESORTS at the conclusion of construction; and

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[5] The Fourth District included in its Decision an extensive discussion of the laws of statutory construction. In an effort to save judicial resources, ROONEY herein adopts both the Fourth District's Decision and the Amicus Curiae Brief on the subject of statutory construction.

(5) LEISURE RESORTS delivered [or should have delivered] the manufacturer's warranty to the purchaser of the individual condominium unit.

Under § 718.203(1), the developer [LEISURE RESORTS] and the manufacturer of the air conditioning units [Tappan] warrant the units "for the purposes or uses intended" to the purchaser. Under § 718.203(2), the contractor [ROONEY] does not. Whether the mechanical unit eventually becomes a "fixture" or remains "personal property" is not relevant. If a microwave accompanied by a manufacturer's warranty is furnished with a condominium unit, does it matter whether it's bolted under the counter (arguably a "fixture") or merely sits on the counter (arguably "personal property") in determining whether a contractor by statute warrants that the microwave will work? Of course not!

The Fourth District Court of Appeals recognized the different functions and responsibilities of the contractor and the developer (and its architect) and correctly applied § 718.203 consistent with the intent of the Legislature and the facts of the case.

The Fourth District correctly construed § 718.203 and the Decision of the Fourth District should be approved by this Court.

CONCLUSION

This is a very simple case.

ROONEY was not the developer of the Condominium. LEISURE RESORTS was the developer.

ROONEY did not design the Condominium with a "stacked" condenser design. LEISURE RESORTS' Architect/Engineer did.

ROONEY did not determine that the Tappan air conditioning units would "work" for the intended use. LEISURE RESORTS' Architect/Engineer did (as specifically required by the Contract) and obtained a written warranty directly from Tappan. [Plf.Ex.35; A.6] In fact, before any unit was installed, ROONEY told the Architect that this type of unit would not work. [Plf.Ex.31; A.2]

LEISURE RESORTS built the Condominium under a "cost of the work" Contract. LEISURE RESORTS and its Architect/Engineer determined what was to be built and what equipment was to be furnished. ROONEY properly performed the Contract.

The basic facts are not and never were disputed and under those basic facts ROONEY is without fault and has no warranty liability under §718.203 as a matter of law.

This Court should deny discretionary review or, alternatively, adopt the Decision of the Fourth District.

Respectfully submitted,

JAMES E. GLASS ASSOCIATES

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular mail to **D. Culver Smith III, Esq.**, JONES, FOSTER, JOHNSTON & STUBBS, P.A., 505 South Flagler Drive, Suite 1100, Post Office Box 3475, West Palm Beach, FL 33402, this 27th day of January, 1994.

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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

APPENDIX
TO
RESPONDENT'S ANSWER BRIEF ON THE MERITS

INDEX TO APPENDIX