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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, 4th District, Case No. 92-2003

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

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PETITIONER'S INITIAL BRIEF ON THE MERITS

D. Culver Smith III
Florida Bar Member 105933

JONES, FOSTER, JOHNSTON & STUBBS, P.A.
P.O. Box 3475
West Palm Beach, FL 33402
(407) 659-3000

Counsel for Petitioner

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STATEMENT OF THE CASE AND THE FACTS

Petitioner, Leisure Resorts, Inc., appeals a decision of the District Court of Appeal of Florida, Fourth District, that reversed a final judgment awarding it damages in its indemnity action against Frank J. Rooney, Inc. (now known as Centex-Rooney Construction Co., Inc.). Frank J. Rooney, Inc. v. Leisure Resorts, Inc., 624 So. 2d 773 (Fla. 4th DCA 1993). The judgment was entered following a jury trial in which the jury found that central air-conditioning condensers supplied and installed by Rooney in a condominium project developed by Leisure Resorts were defective. The district court of appeal reversed, holding that the implied warranty of fitness imposed on contractors by Section 718.203(2), Florida Statutes, did not apply to the condensers. The court certified that its decision passed upon a question of great public importance.

Leisure Resorts was the developer of The Waterview Towers, a high-rise residential condominium building located in West Palm Beach. The building contained twenty-two floors of apartments with six apartments on each floor: four interior apartments (with exposures to the east and west) and two "corner" or end apartments (with exposures in three directions). (Pl.'s Ex. 1, pp. A5-A11.) The construction drawings prepared by Leisure Resorts' architects specified a separate central air-conditioning system for each of the 132 apartments. (Pl.'s Ex. 1, pp. M3, M5, M6.)

Rooney was the general contractor for the construction of the building and related improvements. The written contract between Rooney and Leisure Resorts obligated Rooney to supply and install the air-conditioning systems and their component parts. (Pl.'s Ex. 7, art. 2; Pl.'s Ex. 7, para. 17.2E; R. at 191, 234.)

These individual central air-conditioning systems were the type commonly used for single-family houses. (R. at 92-93.) Each system comprised a condenser, an air-handler, and connecting refrigerant lines, air ducts, and vents. (R. at 92; Pl.'s Ex. 1, pp. M3, M5, M6, M8, M9.) Each condenser was to be bolted to the concrete floor of a partially enclosed alcove located adjacent to the balcony off the breakfast room. (R. at 86, 93; Pl.'s Ex. 1, pp. M3, M5, M6, M8, M9.) The condensers were "mechanical elements" that "only serve one individual condominium unit." (R. at 133-34.)

The construction drawings specified the cooling capacities required for each apartment. (R. at 83; Pl.'s Ex. 1, p. M9, "Air Conditioning Equipment Schedule," cols. AC-1,4, AC-2, AC-3.) The mechanical engineer determined the required cooling capacities based on the physical characteristics of each apartment. (R. at 87-88.) A total cooling capacity of 37,000 BTU per hour was specified for the eighty-four interior apartments on each floor other than the top floor. (Col. AC-3.) A total cooling capacity of 42,000 BTU per hour was specified for the four interior apartments on the top floor and for the forty-two corner apartments on each floor other than the top floor. (Col. AC-1,4.) A total

cooling capacity of 46,000 BTU per hour was specified for the two corner apartments on the top floor. (Col. AC-2.)

Because the construction drawings called for the condensers for a given vertical line of apartments to be located in partially enclosed alcoves one above the other, the parties early on recognized the potential for recirculation of heated air discharged from below. Rooney, of course, was cognizant of the location of the condensers when it was bidding on the job. (R. at 504.) The engineer originally specified equipment manufactured by Carrier. He did so in reliance on data supplied by Carrier, which certified that its condensers would produce the specified cooling capacities in the designed conditions. (R. at 88, 89.) The contractor, however, was at liberty to supply equipment manufactured by another company as long as it met the specified requirements under the designed conditions. (R. at 89.)

Leisure Resorts' only contract for air-conditioning equipment and installation was with Rooney. It was not in privity with any air-conditioning subcontractor, supplier, or manufacturer. Rooney selected the air-conditioning subcontractor. (R. at 191.) By its contract with Leisure Resorts, Rooney agreed that "[t]he Contractor shall be responsible to the Owner for the acts and omissions of his employees, Subcontractors and their agents and employees, and other persons performing any of the Work under a contract with the Contractor." (R. at 233-34; Pl.'s Ex. 8, para. 4.3.2.)

Rooney ultimately subcontracted the air-conditioning job to Couse Corporation. (Def.'s Exs. 4, 5A; R. at 438-39.) Couse and

Rooney requested a change to equipment manufactured by Frigiking/Tappan. (R. at 207-08, 216-19; Pl.'s Ex. 52.) The change was not requested by Leisure Resorts or its architect or engineer. (R. at 208.) As had been done in response to earlier proposed changes of equipment, the engineer requested assurances and a manufacturer's guarantee that the Frigiking/Tappan condensers would produce the required cooling capacities under the designed conditions. (R. at 89, 113-18.)[1] In response to that request, Rooney furnished the engineer with product data regarding the condensers (R. at 113-15; Pl.'s Ex. 148), and Frigiking/Tappan's area distributor, S.J.C. Corp., wrote the architect that "our CM condensing units should be well suited for this type of installation." (R. at 115-16; Pl.'s Ex. 39.) The architect and the engineer approved the change to Frigiking/Tappan condensers in reliance on that information and assurance. (R. at 115, 119, 216, 220-21.)[2] Rooney requested a formal change order, and a change order was issued. (R. at 216-19, 261; Pl.'s Ex. 52; Def.'s Ex. 3A.)

Frigiking/Tappan condensers were installed in all 132 apartments. (R. at 124, 221.) As contemplated, three models of

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[1] The district court of appeal wrote that the developer "downgraded" the specified air-conditioning unit and instead specified a unit having "a lower EER" (energy efficiency rating). This reference to "downgraded" was taken directly from Rooney's brief, which cited to testimony of the architect who, in fact, made no such statement. In addition, the architect testified that the energy efficiency rating did not affect cooling capacity. (R. at 274.)

[2] The jury so found. (R. at 1085.)

condensers were used: Model CM 36 in eighty-four apartments, Model CM 42 in forty-six apartments, and Model CM 48 in two apartments. (Pl.'s Ex. 1, p. M9; Pl.'s Ex. 148, "Air Conditioning Unit Index for Waterview Towers"; Def.'s Exs. 6, 3A.) The CM 36 and CM 42 models measured 26-1/4 inches wide, 35-7/8 inches long, and 22 inches high; the CM 48 model measured 27-7/8 inches wide, 45-1/2 inches long, and 26 inches in high. (Pl.'s Ex. 148, p. 2, "Dimension Data.") As specified, the condensers were bolted to the concrete slabs in the partially enclosed alcoves and connected to refrigerant lines running to the air handlers.

The developer sold the centrally air-conditioned apartments to individual purchasers, who began moving in following completion of construction. Within the first year several residents complained of inadequate air-conditioning. (R. at 222, 472.) Several of the condensers were tested and evaluated under different conditions (not just the designed conditions). (R. at 142-59.) Based on the tests, it was determined that due to defects inherent in the condensers themselves they possessed only 60 to 70 percent of the capacity published by the manufacturer and did not have the capacity sufficient to satisfy the contract documents even under the best conditions. (R. at 152-53, 179-81.)[3]

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[3] The district court of appeal wrote that the architect and the engineer concluded that the condensers were incapable of cooling to their intended capacity "due to recirculation (i.e. the condensers discharged heated air which rose to the condenser on the next floor causing it to overheat)." That statement was taken word for word from Rooney's brief below. The statement is inaccurate. Rooney's brief cited to testimony of the engineer who supervised the testing and evaluation of the condensers. His actual testimony was quite different (R. at 152-53) and is cited in the text.

Certain residents, later joined by the condominium association, sued Leisure Resorts and asserted, among others, statutory warranty claims for faulty air-conditioning. (Pl.'s Ex. 131.) Leisure Resorts filed a third-party complaint against Rooney. (R. at 926.) The trial court ordered the third-party action to be tried separately (R. at 958), and the case proceeded to trial on the main action. At trial Leisure Resorts, the unit owners, and the condominium association settled the main action, including the claims based on faulty air-conditioning.

Leisure Resorts then proceeded with its third-party action against Rooney, seeking indemnity for the portion of the settlement and defense costs attributable to the air-conditioning claims. The contract between Rooney and Leisure Resorts contained the following indemnification clause:

> [I]f 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 . . . .

(Pl.'s Ex. 7, art. 28(b).)

Leisure Resorts asserted breach of statutory warranty, breach of contract, and negligence as the theories of liability invoking

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Rooney itself called no expert witness to testify at trial regarding the cause of the faulty air-conditioning.

the contractual indemnification clause. The trial court partially granted Rooney's motion for directed verdict, striking the breach-of-contract and negligence theories and permitting the indemnity claim to go to the jury on the breach-of-statutory-warranty theory. The trial court ruled that under Section 718.203(2), Florida Statutes, Rooney impliedly warranted the fitness of the condensers. The trial court submitted to the jury the factual issues of whether the condensers were defective (not reasonably fit for the specific purpose for which they were supplied), whether Leisure Resorts through its architect and engineer relied on Rooney and its agents in approving the change to Frigiking/Tappan units, and the amount of Leisure Resorts' damages. (R. at 687-92.) The jury returned a verdict finding that the condensers were defective, that Leisure Resorts through its architect and engineer had relied on Rooney or its agents in authorizing the change, and that Leisure Resorts sustained $250,000 in damages for the settlement of the unit owners' air-conditioning claims and $133,000 in damages for defense costs attributable to those claims. (R. at 1085.)

Rooney appealed the judgment to the District Court of Appeal of Florida, Fourth District. The district court reversed, holding as a matter of law that the contractor's implied warranty of fitness imposed by Section 718.203(2), Florida Statutes, did not apply to the condensers and, accordingly, that the trial court should have granted Rooney's motion for directed verdict in full. The district court remanded the case with directions to dismiss Leisure Resorts' third-party complaint with prejudice.

ISSUE PRESENTED

(As certified by the district court of appeal)

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

The district court of appeal erroneously concluded that the contractor's implied warranty of fitness imposed by Section 718.203(2), Florida Statutes, did not apply to the condensers that were component parts of the central air-conditioning systems installed in the apartments at The Waterview Towers. The court based that conclusion on the faulty premise that the condensers were "personal property" and, therefore, not "improvements."

Upon installation the condensers became fixtures and thus part of the realty. Each apartment was served by a separate central air-conditioning system comprising the condenser, an air-handler, and connecting refrigerant lines, air ducts, and vents. Each condenser and the system of which it was a part was fully affixed to and incorporated into the apartment with the obvious intent that the system become a permanent part of the residence. As a fixture, each condenser is part of the "improvements." The contractor's warranty imposed by Section 718.203(2) expressly applies to "improvements."

ARGUMENT

THE CONTRACTOR'S IMPLIED WARRANTY OF FITNESS CREATED BY SECTION 718.203(2), FLORIDA STATUTES, APPLIES TO THE CENTRAL AIR-CONDITIONING CONDENSERS SUPPLIED FOR AND INSTALLED IN THE INDIVIDUAL CONDOMINIUM APARTMENTS AT WATERVIEW TOWERS

The weather in South Florida is hot. Thanks to technological progress, rarely is a new residence built and sold in South Florida today without a central air-conditioning system. The thought of building a new residence in South Florida without central air-conditioning is almost laughable.

The welcome trend toward central air-conditioning took hold early in the second half of this century. At about the same time, thanks to judicial progress, another welcome trend affecting the sale of new residences surfaced: the abolition of the rule of caveat emptor.

The decision of the district court of appeal comes from another time and place. Falling prey to tortured statutory construction, the district court overlooked the permanent, integral relationship between a central air-conditioning system and the residence into which it is incorporated. By doing so, the court has reopened the doors of new homes to that unwelcome intruder, caveat emptor.

A central air-conditioning condenser is not like a refrigerator. It is not like a washing machine or a clothes dryer. A refrigerator is personalty. It does not permanently enhance or

add value to the realty itself. A 19-cubic-foot Whirlpool Model ED20PK refrigerator will hold the same volume and cool to the same temperature regardless of its location in the kitchen or the nature and size of the residence in which it is placed. When the owner sells the residence, he can include the refrigerator or take it with him.

A central air-conditioning system is quite another story. Its components are affixed to and an integral part of the residence. They are fixtures and thus part of the realty. They permanently enhance and add significant value to the realty. The condenser's location at the residence and the configuration and size of the residence will directly determine whether the condenser's cooling capacity is adequate for that residence. And the owner cannot take the central air-conditioning system or its component parts with him when he moves--at least not without leaving the realty less than complete.

The district court of appeal concluded that the contractor's warranty of fitness imposed by Section 718.203(2), Florida Statutes, (1) is not a warranty of fitness for the intended use or purpose and (2) does not apply to the condensers that were installed in the apartments at The Waterview Towers in any event. The district court observed that Section 718.203(2) is "not a model of precision" and "leaves some latitude for varying interpretations." 624 So. 2d at 776. Purporting to engage in "a common sense reading" of the statute, the court instead came under the spell cast by the amicus curiae's arbitrarily arranged, side-

by-side comparison of Section 718.203(2) (the contractor's warranty) with Section 718.203(1) (the developer's warranty), see 624 So. 2d at 776 n.2, and attempted to impose a degree of precision beyond what the statute lacks and what logic and common sense support.

Section 718.203(2) provides as follows:

> 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:
>
> (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.

§ 718.203(2), Fla. Stat. (1993).[4]

The district court of appeal concluded that the contractor's implied warranty of fitness was not a warranty of fitness for the intended use or purpose, because Section 718.203(1) refers to an implied warranty "of fitness and merchantability for the purposes or uses intended," whereas Section 718.203(2) refers to implied warranties "of fitness as to the work performed or materials supplied." 624 So. 2d at 777. The court confused the type of a

[4] The contract between Leisure Resorts and Rooney was executed in 1979. The project was completed in 1981. The relevant language of Section 718.203, however, was the same then and now.

warranty with the subject of a warranty. Every warranty (1) is of a particular kind and (2) applies to particular items. The district court equated the phrase "fitness and merchantability for the purposes or uses intended" with the phrase "fitness as to the work performed or materials supplied." They do not correspond. The former phrase describes only the type of warranty (fitness and merchantability for the purposes or uses intended). The latter phrase describes both the type of warranty (fitness) and the subject of the warranty (the work performed or materials supplied). The drafter of the two introductory paragraphs simply failed to abide by the desirable writing principle of parallel construction--expressing in like form what are like in content or function. See William Strunk Jr. & E. B. White, The Elements of Style 26 (3d ed. 1979).

The developer warrants both merchantability and fitness, whereas the contractor warrants fitness. The fact remains that the contractor's warranty is a warranty of fitness. Fitness for what? Fit to cool an apartment half the size of an apartment at The Waterview Towers? Fit to cool an apartment in Seattle? Hardly. Rooney was not asked to deliver a specific make and model of condenser to a railroad siding for destination and use unknown. The fact that the phrase "for the purposes or uses intended" was not repeated in the statute's second reference to the warranty of fitness is no more significant than the omission of "fitness and merchantability" following "warranty" in every subsection of Section 718.203(1). Does that mean that the developer's "warranty"

referred to in each of those instances is not a warranty of fitness and merchantability?

The district court cited St. George Island, Ltd. v. Rudd, 547 So. 2d 958, 961 (Fla. 1st DCA 1989), for the proposition that when the legislature "has carefully employed a term in one section of the statute, but omits it in another section of the same act, it should not be implied where it is excluded." The First District's reasoning in St. George was disapproved by this Court in Brown v. St. George Island, Ltd., 561 So. 2d 253, 255-56 (Fla. 1990). The Court noted that the critical statutory language in that case, which appeared in the second portion of the subject statute but not in the first portion of the statute, was "not inconsistent with the language of the first portion." 561 So. 2d at 256 (interpreting § 38.10, Fla. Stat.).

Statutory intent is determined primarily from the language of the statute, and the plain meaning of the statutory language is the first consideration. St. Petersburg Bank & Trust Co. v. Hamm, 414 So. 2d 1071, 1073 (Fla. 1982). The courts will not construe a statute so as to achieve an absurd result. McKibben v. Mallory, 293 So. 2d 48, 51 (Fla. 1974); Towerhouse Condominium, Inc. v. Millman, 475 So. 2d 674, 676 n.5 (Fla. 1985).

To say that the contractor's implied statutory warranty of fitness imposed by Section 718.203(2) is not for the intended use or purpose is to repeal the statute. The context and purpose of the statute cannot be ignored. It is part of the Condominium Act. It applies to the development and construction of residential

condominiums. The intended uses and purposes of the subjects of the warranties are well known to all who become involved in the development and construction. Unless the warranty of fitness is for intended use or purpose, the statute in context makes little sense. The district court simply disregarded the very lack of drafting precision that it acknowledged and accorded the differing language an illogical significance.

The question, then, is whether the contractor's warranty of fitness applies to the subject condensers. The district court concluded that it does not, apparently based on substantially the following reasoning:

1. Subsections (b) and (d) of Section 718.203(1) refer to "personal property" and to manufacturers' warranties, whereas Section 718.203(2) does not, rather employs such terms as "materials" and "improvements." 624 So. 2d at 777-78.

2. A term ("personal property") that is used in one section of a statute cannot be implied in another section of the statute from which it is omitted (citing St. George Island, Ltd. v. Rudd, 547 So. 2d 958 (Fla. 1st DCA 1989), and other cases). 624 So. 2d at 777.

3. Therefore, a "manufactured unit such as an individual air-conditioning unit" was intended to be encompassed in the "personal property" terminology of Section 718.203(1) but not in the "materials" and "improvements" terminology of Section 718.203(2). 624 So. 2d at 778.

The district court's reasoning is based on the premise that the condensers are "personal property." The premise is invalid. The condensers are fixtures, not personalty.

A fixture is an article that was once personal property but by becoming physically annexed or affixed to the realty becomes part and parcel of the realty. Commercial Fin. Co. v. Brooksville Hotel Co., 98 Fla. 410, 123 So. 814, 816 (1929). Three criteria determine whether an item is considered a fixture: (1) annexation to the realty, either actual or constructive; (2) adaption or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and (3) intention to make the article a permanent accessory to the freehold. Id.; Sears, Roebuck & Co. v. Bay Bank & Trust Co., 537 So. 2d 1041, 1042 n.3 (Fla. 1st DCA 1989). The intention of the party making the annexation is the key factor. Sears, Roebuck & Co. v. Bay Bank & Trust Co., 537 So. 2d at 1042-43 n.3; General Elec. Co. v. Atlantic Shores, Inc., 436 So. 2d 974, 975 (Fla. 5th DCA 1983). That intent can be inferred from (1) the nature of the article annexed, (2) the relation of the party making the annexation, (3) the structure and mode of the annexation, and (4) the purpose or use for which the annexation has been made. Commercial Fin. Co. v. Brooksville Hotel Co., 123 So. at 816; Sears, Roebuck & Co. v. Bay Bank & Trust Co., 537 So. 2d at 1042-43 n.3.

In Sears, Roebuck and Company v. Bay Bank and Trust Company, 537 So. 2d 1041 (Fla. 1st DCA 1989), the court held that built-in-the-wall air-conditioning units, purchased along with other

appliances, had become fixtures upon installation (while the other appliances remained personalty). 537 So. 2d at 1043. In so doing, the court distinguished the built-in-the-wall air-conditioning units from refrigerators, ranges, range hoods, and dishwashers.

There can be no reasonable dispute that the air-conditioning condensers installed in the apartments at The Waterview Towers are fixtures. Each condenser is a component of a central air-conditioning system that serves the apartment into which it has been incorporated. Each air-conditioning system includes the condenser (located in the exterior alcove), an air handler (located inside the apartment), and connecting refrigerant lines, air ducts, and vents, all of which are integrated into a single system. The condenser is bolted to the concrete slab in the exterior alcove. Obviously, the developer intended for the air-conditioning system, including the condenser, to become an integral part of the realty and to be transferred with the condominium unit upon its sale to an individual purchaser.

Because the condensers are fixtures, they are part of the "improvements." Generally, the word "improvement" includes everything that permanently enhances the value of the premises for general uses. 41 Am. Jur. 2d, Improvements, § 1. It is a broader term than fixtures, encompassing fixtures along with other types of property. Id.; cf. § 713.01(24), Fla. Stat. (1993) (under Construction Lien Law, "real property" means the improved land and "the improvements thereon, including fixtures").

Section 718.203(2) imposes implied warranties of fitness on "work performed or materials supplied" as further delineated in Subsections (a) and (b). Among such "work performed or materials supplied" are "mechanical and plumbing elements," § 718.203(2)(a), Fla. Stat. (1993) (emphasis added), and "all other improvements and materials," § 718.203(2)(b), Fla. Stat. (1993) (emphasis added). Clearly, then, the statutory contractor's warranty for "work performed or materials supplied" encompasses "mechanical and plumbing elements" and "improvements." Restricting those terms by meanings that out of context could be attributed to "work" and "materials" ignores the plain meaning and intent of those terms as used in the statute. What possibly can be meant by "mechanical and plumbing elements"? What if, as is often the case, the individual apartments were air-conditioned by a system that relied on separate air-handlers but common (shared) condensers placed on the roof of the building or elsewhere? Would those condensers be considered "personal property" and thus not part of the "improvements"?

The district court's reasoning invites illogical applications and results. Indeed, Rooney's counsel at trial made a point of eliciting from the project mechanical engineer that the individual condensers were "mechanical elements" that "only serve one individual condominium unit" (R. at 133-34), ostensibly with the language of Section 718.203(2)(a) in mind. If the condensers are mechanical elements, mechanical elements of what? An element is part of something. Obviously, the condensers are mechanical elements of the improvements as a whole. As such, they fall within

the parameters of the contractor's implied warranty of fitness imposed by Section 718.203(2).

This is only logical. Had Leisure Resorts not paid Rooney in full, Rooney could have imposed a construction lien on the realty as improved. § 713.05, Fla. Stat. (1993). The lien would have extended to "the improvements, including fixtures." § 713.01(24), Fla. Stat. (1993). If Leisure Resorts had then suggested that the lien did not extend to the condensers and that Leisure Resorts was entitled to remove and dispose of the condensers, Rooney's position would have been predictable--and correct. That position is contrary to what Rooney asserts and the district court ruled at bar. Cf. Florida Fed. Sav. & Loan Ass'n v. Britt's, 455 So. 2d 1345 (Fla. 5th DCA 1984) (issue of fixtures or personalty for purposes of Section 713.15, Florida Statutes). Likewise, should the county property appraiser value each apartment for tax-assessment purposes as though the condenser were not part of it and the apartment were not air-conditioned? The result would be significantly different. What about valuation of a residence for purposes of eminent domain?

The statutory warranties of Section 718.203 are a codification and expansion of the common-law warranties that are espoused in Gable v. Silver, 258 So. 2d 11 (Fla. 4th DCA), cert. discharged, 264 So. 2d 418 (Fla. 1972) (adopting the district court's opinion as its own). The court reversed the long-established rule of caveat emptor in the sale of real estate and held that there was an implied warranty of fitness and merchantability from the builder of

a condominium to the purchaser of a condominium unit. The court based its decision on policy reasons, recognizing that a homebuilder is far more capable of distributing the costs of defects than is the innocent homebuyer. See also Conklin v. Hurley, 428 So. 2d 654 (Fla. 1983) (further expanding on policy and rationale for abandoning doctrine of caveat emptor).

The district court's construction of Section 718.203(2) signals a retreat from the progress experienced in the last few decades as a result of Gable v. Silver and similar cases. It ignores the reality of modern mass-production and technology, which not only made central air-conditioning systems possible but also created the imbalance in relative bargaining power of manufacturers and consumers that led to the abandonment of the rule of caveat emptor. Cf. Conklin v. Hurley, 428 So. 2d at 656. The contractor's implied warranty of fitness created by Section 718.203(2) benefits individual purchasers to the same extent that it benefits developers. What if the developer is insolvent? Does it make sense that the purchaser of a $200,000 condominium would have recourse if his $25 shower head falls off but not if the air-conditioning condenser serving his condominium is defective? The statutory contractor's warranty allocates the risk of loss to the parties who are better able to avoid the loss in the first instance or to spread the risk further. This risk-allocation is the overriding policy behind implied warranties. The contractor has available to him express-warranty remedies (if he

bargained for them) or common-law implied-warranty remedies against the party who is at fault.

The question is not whether the legislature intended to impose on a contractor the identical warranty that it imposed on a developer. Clearly, it did not. The question is whether the implied warranty of fitness that it did impose on a contractor extends to manufactured equipment that the contractor supplied and installed in the manner and for the purpose intended at bar. The subject condensers are fixtures. As such, they are part of the improvements. Accordingly, they fall within the plain meaning and scope of Section 718.203(2), Florida Statutes. The district court erred when it held otherwise.

CONCLUSION

The individual central air-conditioning condensers supplied and installed by Rooney at The Waterview Towers became fixtures and thus part of the realty. As such, they are part of the improvements and, accordingly, fall within the contractor's implied warranty of fitness imposed by Section 718.203(2), Florida Statutes.

The district court of appeal erred when it held otherwise. Accordingly, the decision of the district court should be reversed and remanded for further proceedings as appropriate.

Respectfully submitted,

D. Culver Smith III
Florida Bar Member 105933

JONES, FOSTER, JOHNSTON
& STUBBS, P.A.
505 South Flagler Drive
Suite 1100
Post Office Box 3475
West Palm Beach, Florida 33402
(407) 659-3000

Counsel for Petitioner

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished by regular mail to James E. Glass, 6161 Blue Lagoon Drive, Suite 350, Miami, FL 33126, on December 9, 1993.

D. Culver Smith III

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