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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

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

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**PETITIONER'S REPLY BRIEF ON THE MERITS**

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The applicability of the contractor's statutory implied warranty to the subject condensers is derived from the following syllogism of law and fact:

1. The contractor's statutory warranty covers improvements.

2. Improvements encompass fixtures.

3. The subject condensers are fixtures.

4. Therefore, the contractor's statutory warranty covers the subject condensers.

Rooney and The Associated General Contractors of America ("AGC") (the amicus aligned with Rooney) dispute none of the three premises from which the conclusion is drawn. The AGC merely asserts that the term "improvements" excludes "manufactured personal property." (Amicus Br. at 10.) Rooney merely asserts that whether the condensers are fixtures is irrelevant. (Resp't's Answer Br. at 24, 25.) The undisputed premise that the subject condensers are fixtures renders the AGC's assertion pointless and Rooney's assertion preposterous. Both Rooney and the AGC rely completely (as did the district court of appeal) on the presence of the words "personal property" in the developer's statutory warranty and the absence of those words from the contractor's statutory warranty. To say that whether the condensers are fixtures is irrelevant is to say that whether they are personal property is irrelevant.

Fixtures are not personal property; they are part of the realty and as such are improvements. (See Pet'r's Initial Br.

at 16-19.) The district court of appeal's decision (and Rooney's and the AGC's argument) rests entirely on the supposition that the condensers are personal property. From that faulty foundation, the district court divined the scope of the contractor's warranty by reading the developer's warranty, all the while overlooking the condensers' being fixtures. Rooney and the AGC would have this Court do the same.

What is it about Section 718.203(2) that is difficult to understand? It reads 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.

This statute creates a warranty as a matter of law. It tells us what we need to know about any warranty: (1) the identity of the warrantor (the contractor et al.), (2) the identity of the beneficiary of the warranty (the developer and the purchaser of each condominium unit), (3) the nature of the warranty (fitness), (4) the product warranted (the work performed or materials supplied by the warrantor), and (5) the duration of the warranty (three years as to certain elements of the improvements and one year as to "all other improvements and materials").

The undisputed first premise of the syllogism clearly emerges from the statute: the contractor's warranty covers "improvements." Improvements include fixtures. (See Pet'r's Initial Br. at 17, 19.) The subject condensers are fixtures. (See Pet'r's Initial Br. at 16-17.) Cf. Putnam v. Roudebush, 352 So. 2d 908, 909 (Fla. 2d DCA 1977) (air-conditioning unit that is integral part of condominium is subject to common-law implied warranty of fitness extended to buyer of new condominium). Therefore, Rooney warranted the fitness of the subject condensers.

Rooney and the AGC also contend that the contractor's warranty of fitness is not a warranty of fitness for the uses or purposes intended.[1] They derive this contention, too, from an apples-and-oranges comparison of the language of the two statutory warranties: they mismatch the nature of the developer's warranty ("fitness and merchantability for the purposes or uses intended") with the subject of the contractor's warranty ("fitness as to the work performed or materials supplied").

Throughout Section 718.203, the nature of the respective warranties is introduced by the word "of":

> The developer: "warranty of fitness and merchantability for the purposes or uses intended"
>
> The contractor: "warranty of fitness"

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[1] Rooney contends that the district court of appeal so held. (Resp't's Answer Br. at 22-23.) That is debatable. If the trial court merely mistook the nature of the warranty, its only error was its instruction to the jury. That would require a new trial. The district court, however, ruled that the trial court should have granted Rooney's motion for directed verdict. That would follow only if no statutory warranty applied.

The subjects of the respective warranties are introduced by the phrase "as to":

> The developer: "as to each unit," "as to the personal property that is transferred with, or appurtenant to, each unit," "as to all other improvements for the use of unit owners," etc.
>
> The contractor: "as to the work performed or materials supplied"

"For the purposes or uses intended" (nature) and "the work performed or materials supplied" (subject) do not correspond.

The developer warrants that various categories of items, delineated in subsections (a) through (f) of Section 718.203(1) and introduced by the words "as to," are fit and merchantable for the purposes or uses intended. The contractor warrants that the work performed or materials supplied are fit. Fit for what? The fact that the phrase "for the purposes and uses intended" is not repeated does not change the nature of the contractor's warranty of fitness any more than the omission of the phrase "of fitness and merchantability for the purposes and uses intended" following "warranty" in each subsection of Section 718.203(1) changes the nature of the developer's warranty.

In the context of the Condominium Act, the warranted fitness is for the well-known purpose and use of the residential condominium units being constructed. In this case, the well-known purpose and use of each condenser was to cool a particular condominium apartment under equally well-known design conditions. Here, the engineer made it easier on the contractor by specifying, in BTU's per hour, the cooling capacity of the condensers to be

supplied. The engineer's specification of cooling capacity hardly should exonerate a contractor who supplies condensers that because of a manufacturing defect (not design conditions) inherently lack the specified capacity.[2]

Rooney also contends that it complied with the plans and specifications, hence cannot be liable for design defects. (Resp't's Answer Br. at 15-18.) This contention has absolutely nothing to do with whether Rooney warranted the fitness of the condensers that it supplied. Compliance with the plans and specifications is irrelevant to a warranty claim. Likewise, the cases cited by Rooney for this contention are inapplicable. Neither Atlantic National Bank of Jacksonville v. Modular Age, Inc. (Resp't's Answer Br. at 15-16) nor Charles R. Perry Construction, Inc. v. C. Barry Gibson and Assoc., Inc. (Resp't's Answer Br. at 16-17) involved an implied warranty (much less the contractor's warranty imposed by Section 718.203(2)). Modular Age was a suit for breach of a construction contract and involved responsibility for compliance with applicable codes. No warranty claim was made. Perry turned on the terms of an express warranty. Likewise, United States v. Spearin (Resp't's Answer Br. at 17) involved a construction-contract principle (the "Spearin Doctrine") that has nothing to do with warranties or claims for breach of warranty.

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[2] Rooney continually protests being held responsible for design defects. The defect in question was a manufacturing (product) defect, not a design defect. The jury so found, based on competent, substantial evidence. (R. at 1085, question 1.)

In addition to ignoring the undisputed nature of the condensers as fixtures and the plain language and structure of Section 718.203, Rooney engages in widespread and pervasive distortion of the record. The district court of appeal fell prey to many of those distortions, which Rooney perpetrated as the appellant below. For example:

**DISTORTION #1:**

**Rooney's statement:**

> 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. In order to save $31,000.00, Leisure Resorts eliminated the specified "Carrier Super Efficient" unit, before the Contract with Rooney was signed. 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."

(Resp't's Answer Br. at 4 (footnote omitted); cf. id. at 14.)

**As echoed by the district court of appeal:**

> The architect originally specified "Carrier Super Efficient units with an energy efficiency rating (EER) of 9.0." During contract negotiations, however, the developer downgraded the specified air conditioning unit and instead specified a unit, having a lower EER, manufactured by "G.E., Carrier or equal as approved by Eng."

624 So.2d at 774.

**The record:** In support of its statement that Leisure Resorts "downgraded" the condensers, Rooney cites Page "250, etc." of the record. The citation is to testimony of the project architect, Jorge Dorta-Duque. Mr. Dorta-Duque did not testify that the air-conditioning systems were downgraded (to save money or otherwise).

When asked whether the "whole purpose" of the efforts of Mr. Gross (who was negotiating the contract with Rooney on the developer's behalf) was "to take your original plans and your original specifications and cut it down to get it within a budget," Mr. Dorta-Duque replied as follows:

> No, I don't think that that was his original--the way he intended the original. He was negotiating the overall contract with Frank J. Rooney. That was probably in some areas part of those negotiations. But as far as I'm concerned, the main purpose of this was the actual negotiation of the contract itself and were by really [sic] of the specifications as far as some areas in which Rooney wanted some changes that they felt were going overboard, standard procedure or overboard standard code, that kind have [sic] stuff.

(R. at 250-51 (emphasis added).) Mr. Dorta-Duque also testified that the energy efficiency rating (E.E.R.) of the air-conditioning units did not affect the cooling capacity of the units. (R. at 274.) Furthermore, Rooney, not the developer, architect, or engineer, proposed the change to General Electric equipment. (R. at 89-90, 103-04, 202, 205-207; Pl.'s Ex. 31, R. at 205-207.)

**DISTORTION #2:**

**Rooney's statement:**

> 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." When a condenser "overloads" it automatically shuts off and ceases cooling.

(Resp't's Answer Br. at 5 (citations omitted).)

**As echoed by the district court of appeal:**

> During the course of construction, the developer, architect and engineer recognized that the "stacked condenser" design presented a potential problem with the type of air conditioning unit that might be selected. Specifically, the heated air discharged from the exterior condensing units on each balcony would rise upwards to the next balcony causing the condensers located directly above to overload resulting in an automatic shutdown of the cooling system.

624 So. 2d at 774.

**The record:** Rooney twists the context by quoting from the middle of a sentence. The so-called "warning" was actually Rooney's assurance that the condensers would perform under the recognized design condition. The full statement:

> Per the Owner's request, we confirmed that General Electric would provide a letter confirming the Unit's performance under the designed conditions but that 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.

(Pl.'s Ex. 31 (emphasis added).)

**DISTORTION #3:**

**Rooney's statement:**

> 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. General Electric agreed to guarantee its units if three modifications to the condensing unit were made. 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.

(Resp't's Answer Brief at 5-6 (citations omitted); cf. id. at 15.)

**As echoed by the district court of appeal:**

> One of the manufacturers specified by the architect, Carrier, declined the job because its units discharged hot air straight upwards. Another manufacturer, General Electric, would guarantee the performance of its unit if certain modifications were made. However, it was determined these modifications would increase the cost of the system and detract from the appearance of the building.

624 So. 2d at 774.

**The record:** The evidence directly contradicts Rooney's statement that the "stacked condensers" design made it difficult to find a manufacturer willing to guarantee its units under the design conditions: both General Electric and Frigiking/Tappan were willing to assure the performance of their condensers under those conditions. As support for its statement that Carrier did not want the job (which Rooney characterizes as "undisputed"), Rooney cites Page 505 of the record. The citation is to the testimony of Kenneth Smith, Rooney's "troubleshooter." Mr. Smith's testimony was not based on personal knowledge: he was not involved in Rooney's awarding the subcontract. (R. at 505.) His testimony is contradicted by the testimony of Emilio J. Hospital, the project mechanical engineer, that Carrier originally was specified because Carrier certified that its equipment would produce the specified amount of cooling under the design conditions. (R. at 89.) Furthermore, there is no evidence that Leisure Resorts "refused" to approve the G.E. units--whether because of a cost increase or otherwise. In support of that statement (which Rooney also characterizes as "undisputed"), Rooney cites Pages 511 and 470 of the record. The citation again is to testimony of Kenneth Smith,

the Rooney "troubleshooter." Mr. Smith actually testified that the architect approved the change to G.E. but that the owner neither approved nor disapproved the change. (R. at 510-511.)

**DISTORTION #4:**

**Rooney's statement:**

> 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.

(Resp't's Answer Br. at 6 (citation omitted).)

**As echoed by the district court of appeal:**

> A written change order, prepared and signed by the developer and the architect, specifically directed the contractor to install the Tappan units.

624 So. 2d at 774.

**The record:** As support for the statement, Rooney merely cites the change order itself. Rooney's statement implies that the architect took it upon himself to order the change wholly independently of any act of Rooney and Rooney's subcontractor and supplier. The implication is false. The suggested change from G.E. to Tappan was initiated by Rooney and Rooney's subcontractor. (R. at 207-08, 216-19; Pl.'s Ex. 52.) The change order was merely the formal authorization of the change (agreed to by the architect and engineer only after receiving additional information and assurances from Rooney) that Rooney itself requested. Indeed, the jury so found. (R. at 1085, question 3.)

**DISTORTION #5:**

**Rooney's statement:**

> 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.). The Engineer concluded that the problem was attributable to the design characteristics of the units not being suitable for the application.

(Resp't's Answer Br. at 7 (citations omitted); cf. id. at 20.)

**As echoed by the district court of appeal:**

> The architect and engineer evaluated several of the units and concluded they 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.) They also concluded the problem was attributable to the unsuitability of the unit for the intended application.

624 So. 2d at 774.

**The record:** The engineer initially tested seven or eight units, then concentrated on two or three units. (R. at 146-47.)[3] Rooney's statement that the architect and engineer concluded 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.)" is inaccurate, and the gratuitous parenthetical is disingenuous. In support of that statement, Rooney cites Page 152 of the record. The citation is to testimony of Juan Lagomasino, the engineer who directed and supervised the testing. Mr. Lagomasino's actual testimony was as follows:

> [W]e determined that there was a sufficient amount of recirculation around the condensing units to affect their performance. We also found that the capacity of the units under

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[3] Only three different models were installed. (See Pet'r's Initial Brief at 4-5.)

> several conditions, . . . the units did not meet the capacity that was specified on the contract drawings. Therefore, . . . our final conclusion was that the recirculation of the condensing units was a factor. The refrigerant pipe sizing was a factor, but the main conclusion is that the units were not performing, did not have the capacity sufficient to satisfy the contract documents even under the best conditions.

(R. at 152-53 (emphasis added).) Mr. Lagomasino further testified that this insufficient capacity resulted from "internal effects" and that the units were "somewhere about 60, 70 percent shorter than the capacity published by the manufacturer." (R. at 153.) Thus, the principal problem was an inherent manufacturing defect, not a design defect. The jury so found. (R. at 1085, question 1.)

Rooney proffers additional distortions in its answer brief that do not appear in the district court's opinion. For example:

**DISTORTION #6:**

**Rooney's statement:**

> 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.
>
> . . . .
>
> 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.

(Resp't's Answer Br. at 6, 15 (citations omitted); cf. id. at 14-15, 24-25, 26.)

**The record:** Rooney's statements (which Rooney misrepresents as "undisputed" and as "agreed to" by Leisure Resorts) are false.

As already noted, the suggested change to Tappan (from G.E.) was initiated by request of Rooney or its subcontractor, Couse. (R. at 207-08, 216-19; Pl.'s Ex. 52.) In response to that suggestion, the engineer requested product data and a manufacturer's guarantee that the Tappan units would perform under the design conditions. (R. at 113-18; Pl.'s Exs. 39, 45, 148.) A letter from Tappan's area distributor, S.J.C. Corp., was received. Rooney cites that letter (Pl.'s Ex. 39) as the warranty. That letter at most offered assurances that the units were "well suited" for the intended use. (Pl.'s Ex. 39.) Leisure Resorts received no written manufacturer's warranty for the condensers.[4]

**DISTORTION #7:**

**Rooney's statement:**

> Rooney had no control over the selection of manufactured equipment or its application to accomplish the use intended.

(Resp't's Answer Br. at 17.)[5]

**The record:** The statement is false. Leisure Resorts' only contract for air-conditioning equipment and installation was with Rooney. Leisure Resorts was not in privity with any air-conditioning subcontractor, supplier, or manufacturer. Rooney selected the air-conditioning subcontractor. (R. at 191.) By its

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[4] The question of a written manufacturer's warranty is irrelevant in any event, because under the statute it relates only to "personal property." The subject condensers are fixtures, not personal property.

[5] The AGC makes the same statement. (Amicus Br. at 12.)

contract with Leisure Resorts, Rooney agreed to the following:

> The 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.)[6] 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.) Rooney, of course, was cognizant of the location of the condensers when it was bidding on the job. (R. at 504.) Although the engineer originally specified equipment manufactured by Carrier, Rooney was at liberty to supply equipment manufactured by another company as long as it met the specified requirements under the design conditions. (R. at 89.)

This case may be one of first impression, but it involves important public-policy considerations of long standing. It is part of the Condominium Act, which has a consumer-protection purpose. Indeed, the purpose of all implied warranties is to protect consumers in the modern marketplace. David v. B & J Holding Corp., 349 So. 2d 676, 678 (Fla. 3d DCA 1977). The statute is a partial codification of the common-law implied warranties espoused by Gable v. Silver, 258 So. 2d 11 (Fla. 4th DCA), cert.

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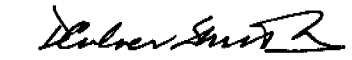
[6] The AGC argues that the contractor's statutory warranty provides that each contractor, subcontractor, and supplier is "individually responsible" to the developer and unit-purchaser, that there "is no vicarious responsibility." (Amicus Br. at 7.) In addition to perverting the language of the statute, that assertion is belied by Rooney's own contractual covenant to the contrary.

discharged, 264 So. 2d 418 (Fla. 1972) (adopting the district court's opinion as its own). Those warranties recognize the imbalance in the relative bargaining power of manufacturers and consumers created by modern mass-production and technology and the superior ability of a builder or supplier to distribute the costs of defects. See also Conklin v. Hurley, 428 So. 2d 654 (Fla. 1983). Hence the demise of the rule of caveat emptor.

The district court of appeal overlooked the character of the condensers as fixtures and mistook statutory language describing the subject of the contractor's warranty for language describing the nature of the warranty. Rooney and the AGC now urge the same fallacious supposition and reasoning upon this Court. Logic and long-standing public-policy considerations demand otherwise.

Respectfully submitted,



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**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, and R. Earl Welbaum, 901 Ponce de Leon Boulevard PH, Coral Gables, FL 33134, on March 31, 1994.

D. Culver Smith III