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Changing Condominium Construction Law in Florida...; The Extension of the Contractor's Implied Warranty to "Materials"

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Changing Condominium Construction Law in Florida . . .; The Extension of the Contractor's Implied Warranty to "Materials"

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I. INTRODUCTION

In an April, 1995, decision, the Florida Supreme Court effectively made it more expensive for a contractor to do condominium construction in Florida. In *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*,¹ the court extended the implied contractor's warranty by applying it to manufactured items. This was accomplished by defining "materials" broadly to include such manufactured items.²

The basic facts of *Leisure Resorts* include a developer which decided to have a large condominium built on a piece of land it owned. The developer had its architect and engineer draw up the plans and then hired a building contractor. The placement of the air-conditioning condensers in the plans presented a potential problem because each apartment's air-conditioning condenser was to be placed directly above the condenser in the apartment below. This "stacked condenser" design

1. 654 So. 2d 911 (Fla. 1995). For further factual background of this case see also Frank J. Rooney, Inc. v. Leisure Resorts, Inc., 624 So. 2d 773 (Fla. 4th DCA 1993); Petitioner's Initial Brief on the Merits, Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911 (Fla. 1995) (No. 82578); Respondent's Answer Brief on the Merits, Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911 (Fla. 1995) (No. 82578); and the Amicus Curiae Brief of the Associated General Contractors of America, Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911 (Fla. 1995) (No. 82578).

2. See *Leisure Resorts*, 654 So. 2d at 912.

made it difficult for the contractor to find an air-conditioning manufacturer which would guarantee the units because the manufacturer originally specified by the developer refused to do so. Finally, a manufacturer was found, and the developer authorized a change order for the new air-conditioning units. When the residents moved into this new condominium, they found many problems including air-conditioning units that did not adequately cool their homes. The residents sued the developer who settled with them. The developer then sought indemnification from the contractor. A jury found for the developer. The appellate court reversed, and the Florida Supreme Court answered a certified question by extending a contractor's implied statutory warranty to include manufactured items.

This simplified version of the facts lays out the foundation of the case. By inserting names and additional details, it is possible to get a clearer picture of the situation.

In the simplified version above, Leisure Resorts, Inc. is the developer, Frank J. Rooney, Inc. is the contractor, and the condominium is The Waterview Towers located in West Palm Beach, Florida. The main problem with the "stacked condenser" design is that the heated discharged air from one condenser rises up to the condensing unit located directly above and causes the upper unit to overload and automatically shut off.³ The unit owners, unhappy with many things including the failure of the air-conditioning units to provide adequate cooling, sued Leisure Resorts who then sought contribution or indemnity from Rooney for any amounts attributable to construction defects.⁴ At trial,⁵ the jury was instructed that the issue for determination was "whether the air conditioning equipment for the individual condominiums was fit . . . for the specific purpose for which it was supplied."⁶ Under this instruction, the jury returned a verdict against Rooney.⁷ The Florida Fourth District Court of Appeal held that the trial court erred in denying Rooney's motion for a directed verdict because, as a matter of law, Florida Statute section 718.203(2) did not impose a warranty on the contractor that manufactured air-conditioning units be fit for the specific purpose

3. *Id.*; see also Respondent's Answer Brief on the Merits at 5, *Leisure Resorts* (No. 82578).

4. The original action by the unit owners against Leisure Resorts was based on fraud, negligent design, breach of fiduciary duty and construction defects. See *Frank J. Rooney*, 624 So. 2d at 774; Respondent's Answer Brief on the Merits at 7, *Leisure Resorts* (No. 82578).

5. Leisure Resorts' third-party complaint seeking indemnification from Rooney was successfully severed from the original unit owners' action. The unit owners' suit against the developer was settled prior to trial and thus, only the third-party complaint actually went to trial. See *Frank J. Rooney*, 624 So. 2d at 774-75; Respondent's Answer Brief on the Merits at 8, *Leisure Resorts* (No. 82578).

6. Respondent's Answer Brief on the Merits at 9, *Leisure Resorts* (No. 82578).

7. See *Frank J. Rooney*, 624 So. 2d at 775.

intended.⁸ The Fourth District then certified the following question to the Florida Supreme Court:

WHETHER THE PROVISIONS OF SECTION 718.203(2), FLORIDA STATUTES (SUPP. 1992),⁹ 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?¹⁰

The Florida Supreme Court answered the certified question by holding that a contractor's statutory warranty of fitness does apply to manufactured items such as air-conditioning units supplied by the contractor for use in a building project, but that the contractor does not warrant those items for a "specific purpose" under the provisions of section 718.203(2).¹¹

The appellate court certified the question because it involves "great public importance and is likely to have a great effect on the proper administration of justice throughout the state."¹² This Note will examine the importance of the decision and explore what the decision means to both contractors and developers.

II. FLORIDA STATUTE SECTION 718.203

A. *History of the Statute*

Courts have traditionally applied the doctrine of caveat emptor to purchasers of real property.¹³ This "Let The Buyer Beware" approach summarizes the rule that the buyer must examine, test and judge the property for herself rather than depending on the seller or a third party to

8. *See id.*

9. The court uses the 1992 version of section 718.203 which contains the same language as the 1979 statute originally interpreted by the trial court. *See Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 913 n.2 (Fla. 1995). The 1995 version is also identical and will be referred to throughout this Note.

10. *Frank J. Rooney*, 624 So. 2d at 779.

11. *See Leisure Resorts*, 654 So. 2d at 912.

12. *Frank J. Rooney*, 624 So. 2d at 778-79.

13. *See* Mark Somerstein, *The Application of Florida's Statutory Warranty to Commercial Condominiums*, 56 FLA. B.J. 579, 579 (1982); David St. John & Rodney L. Tennyson, *Legal Considerations: Construction Defects in Condominium Conversions—the Legal Issues*, 55 FLA. B. J. 127, 127 (1981). *But see* Bethlahmy v. Bechtel, 415 P.2d 698, 710 (Idaho 1966) (holding that the traditional rule of caveat emptor should not be applied to an inexperienced home buyer); *Waggoner v. Midwestern Dev., Inc.*, 154 N.W.2d 803, 809 (S.D. 1967) (holding that caveat emptor does not apply where the vendor is also the builder and the house is new).

protect her in the event of a defect.¹⁴ *Caveat emptor* can produce harsh results for a careless or unknowledgeable buyer since it places the risk of defect entirely upon the buyer.

Courts began applying quality requirements to consumer goods long before any move was made to do the same for real property purchases.¹⁵ The Uniform Commercial Code ("UCC" or "Code") contains several implied warranties that provide protection to the buyer.¹⁶ Article 2 of the UCC applies to "transactions in goods"¹⁷ and therefore does not apply to services. Yet, the warranties found in Article 2 can be seen as the forerunners of implied warranties which later began to be applied to service contracts such as those between a condominium developer and an individual unit buyer as well as between a contractor and the unit owners or developer.

Section 2-315 of the UCC contains an implied warranty of fitness for a particular purpose.¹⁸ This section states three conditions that must be met in order for such a warranty to be implied at law.¹⁹ First, the seller has reason to know of the particular purpose for which the buyer needs the goods. Second, the seller or manufacturer has reason to know that the buyer is relying on the seller or manufacturer's skill, expertise, or knowledge to furnish the buyer with suitable goods. Finally, the buyer must, in fact, rely on the seller or manufacturer.

The UCC also provides for an implied warranty of merchantability in section 2-314.²⁰ This section of the Code, however, does not clearly define "merchantability." Section 2-314(2) lists six different minimal criteria which goods must meet to be merchantable.²¹ Official Comment 6 to 2-314, however, suggests that the meaning of merchantability is not

14. See BLACK'S LAW DICTIONARY 222 (6th ed. 1990).

15. See Somerstein, *supra* note 13, at 579.

16. See U.C.C. §§ 2-314 to 2-315 (1994) (implied warranty of merchantability and implied warranty of fitness for a particular purpose). The corresponding sections in Florida can be found in FLA. STAT. §§ 672.314-.315 (1995).

17. U.C.C. § 2-102 (1994).

18. The corresponding Florida statutory section is FLA. STAT. § 672.315 (1995).

19. See U.C.C. § 2-315 (1994); see generally Vincent M. Gonzales, Note, *The Buyer's Specifications Exception to the Implied Warranty of Fitness for a Particular Purpose: Design or Performance?*, 61 S. CAL. L. REV. 237 (1987).

20. The corresponding Florida statutory section is FLA. STAT. § 672.314 (1995).

21. At a minimum, to be merchantable goods must:

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purpose for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and

meant to be exhausted by these elements.²² Thus, according to comment 6, goods that meet all the elements listed in 2-314(2) might still not be merchantable. There are, however, two basic legal requirements which must be fulfilled in order for the warranty of merchantability to be implied. First, the seller must be a merchant with respect to the particular goods.²³ Second, the goods must be "fit for the ordinary purposes for which such goods are used."²⁴ There is usually little debate over whether the first requirement is met, but significant litigation has occurred in reference to the second requirement.²⁵

There are policy reasons for implying such warranties which in effect hold the seller liable for any defects.²⁶ The seller has a greater incentive to assure the production of a quality product that will meet the intended purpose. The seller is also in a stronger economic position to spread the cost of nonperformance because it can simply adjust the price of his product. In addition, buyers usually have commercially reasonable expectations, and sellers should bear the risk of nonconformance with such reasonable expectations.

This sampling of the implied warranties provided for by the UCC does not, of course, apply to the sale of real property which is what this Note addresses.²⁷ It is helpful, however, to understand these warranties in relation to the UCC to better appreciate the warranties the Florida Legislature has adopted in regards to condominium sales. It is also important to note that for a period of time in Florida, like in many other states, a buyer of a small personal good would be protected against a defect under the UCC while a home purchaser was awarded no such protection. This dilemma was eloquently described by an Arkansas court:

One who bought a chattel as simple as a walking stick or a kitchen mop was entitled to get his money back if the article was not of merchantable quality. But the purchaser of a \$50,000 home ordinarily had no remedy even if the foundation proved to be so defective that

(f) conform to the promise or affirmations of fact made on the container or label if any.

U.C.C. § 2-314(2)(a)-(f) (1994).

22. "Subsection (2) does not purport to exhaust the meaning of 'merchantable' nor to negate any of its attributes not specifically mentioned in the text of the statute, but arising by usage of trade or through case law." U.C.C. § 2-314, cmt. 6 (1994).

23. *See id.* § 2-314(1).

24. *Id.* § 2-314(2)(c).

25. "There are . . . perhaps tens of thousands, of cases in which the plaintiff's lawyer has had to convince the jury or a judge that the goods . . . were not merchantable. . . ." JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 9-8, at 352 (4th ed. 1995).

26. *See Gonzales, supra* note 19, at 245-47. For a definition of "goods" see U.C.C. 2-105(1) (1994).

27. *See* U.C.C. § 2-102 (1994) (stating that "this Article applies to transactions in goods").

the structure collapsed into a heap of rubble.²⁸

This contradiction encouraged courts to adopt some of the same protections that the UCC provides for the sale of goods to transactions involving real property.

Florida's landmark decision that departed from the doctrine of caveat emptor with regard to residential construction was *Gable v. Silver*.²⁹ In *Gable*, the plaintiff condominium apartment owners were dissatisfied with their air-conditioning systems and attempted to obtain relief from the defendant who was both the builder and developer. The opinion of the Fourth District Court of Appeal, which was later adopted by the Florida Supreme Court,³⁰ began its analysis by first showing that the one year express warranty on the air-conditioning system was not applicable and then deciding that the air-conditioning system was, in fact, realty.³¹ After disposing of these two points, the court addressed the "general and still the majority rule . . . that implied warranties do not apply to realty."³² The court quoted favorably the decisions of other states that adopted an implied warranty to realty.³³ A reference was made to the states not adopting this modern view,³⁴ and the court also restated that the UCC was not applicable because the seller was not a merchant dealing in goods.³⁵ The court based its final decision "upon present day trends, logic, and practical justice in realty dealings."³⁶ The court held and "flatly declare[d] that the implied warranties of fitness and merchantability extend to the purchase of new condominiums in Florida from builders."³⁷ The court then certified the question to the Florida Supreme Court which adopted the lower court's answer.³⁸

The facts of *Gable* limited its immediate application to builder-sellers and to first purchasers of condominium homes. The court acknowledged that it "ponder[ed], but [did] not decide, what result would occur if more remote purchasers were involved."³⁹ The court also realized that the facts of the case limited its decision to "the sale of new homes or condominiums."⁴⁰

28. *Wawak v. Stewart*, 449 S.W.2d 922, 923 (Ark. 1970).

29. 258 So. 2d 11 (Fla. 4th DCA 1972), *cert. discharged*, 264 So. 2d 418 (Fla. 1972).

30. *See Gable v. Silver*, 264 So. 2d 418, 419 (Fla. 1972).

31. *See Gable*, 258 So. 2d at 13-14.

32. *Id.* at 14.

33. *See id.* at 14-16.

34. *See id.* at 16-17.

35. *See id.* at 17-18.

36. *Id.* at 18.

37. *Id.*

38. *See Gable v. Silver*, 264 So. 2d 418 (Fla. 1972).

39. *Gable*, 258 So. 2d at 18.

40. *Id.*

In *Gable*, Florida adopted the modern view and departed from the doctrine of *caveat emptor* with regard to certain classes of residential construction. With the state legislature's subsequent codification of an implied warranty of fitness and merchantability for condominiums,⁴¹ Florida departed from the majority of states that were relying on a case by case decisional approach.⁴² It is this codification and the Florida Supreme Court's decision in *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.* which provide the basis of this Note.

B. Purpose of the Statute

Section 718.203 is part of a much larger statutory scheme adopted in Florida dealing with condominiums. An entire chapter in the Florida statutes is dedicated to condominium law.⁴³ Condominium law issues have been highly litigated over the past fifteen years and an entire new branch of law dealing with condominium law issues has developed.⁴⁴ In the 1995 edition of the Martindale-Hubbel Law Directory, 220 Florida law firms indicate that they consider condominium law one of their specialties.⁴⁵ There is an intricate system in place for dealing with a broad range of condominium disputes. These disputes include the issue of restraints on alienation,⁴⁶ the issue of a developer failing to fulfill the promises of a glossy brochure,⁴⁷ and the issue of a contractor's liability for faulty construction.⁴⁸

Generally, the purpose of the entire structure of condominium law is to provide protection to buyers, and certainty to buyers, sellers, developers, and contractors.⁴⁹ This certainty allows the parties involved to

41. See FLA. STAT. § 718.203 (1995).

42. See Somerstein, *supra* note 13, at 579.

43. FLA. STAT. § 718 (1995).

44. See Robert J. Manne, *Condominium Construction Litigation: Resolving Those Building Disputes Between Unit Owners and Developers*, 54 FLA. B. J. 762, 762 (1980).

45. This information was attained via a computer search on Lexis focusing on Florida firms listing "condominium law" as a practice area. The search parameters were: State(Florida) and practice(Condominium) and not law school (J.D. or L.L.B.).

46. See, e.g., *Camino Gardens Ass'n v. McKim*, 612 So. 2d 636, 640 (Fla. 4th DCA 1993) (holding that a provision prohibiting the conveyance of property to anyone other than an association member is void as a restraint on alienation).

47. See, e.g., *Callihan v. Turtle Kraals, Ltd.*, 523 So. 2d 800, 800-01 (Fla. 3d DCA 1988) (holding that developers were liable for failure to complete the amenities stressed in the sales brochure).

48. See, e.g., *Rogers & Ford Constr. Corp. v. Carlandia Corp.*, 626 So. 2d 1350, 1351 (Fla. 1993) (holding that an individual condominium unit owner has standing to sue a general contractor to recover damages for construction defects in the common area); see also Somerstein, *supra* note 13, at 579.

49. See e.g., FLA. STAT. § 718.203(1)-(2) (1995) (providing for implied warranties of fitness and merchantability for the purchaser by the developer and for the developer and purchaser by the contractor and all subcontractors).

better foresee potential problems and to allocate funds to prevent, mitigate, or compensate for these problems. The law also allows the parties to allocate the risks involved in building and creating a condominium project. Although this could be done on a case by case basis following case law, codification, as Florida has done, is more efficient.

The specific purpose of section 718.203 is to protect the purchaser of each unit as well as the developer of the project.⁵⁰ The section is divided into seven subsections but the applicable substantive portion is in subsections one and two. In order to give an adequate overview of the statute, a brief description of the important subsections follows. Subsections one and two will then be more thoroughly discussed by focusing specifically on the differences between warranties provided by a developer and those provided by a contractor, subcontractor or supplier.

Subsection one focuses on the implied warranty of fitness and merchantability for the purposes or uses intended and is deemed to be granted to the purchaser of each unit by the developer.⁵¹ It is important to note that this is the developer's warranty section and is applicable to individual unit buyers. Subparts (a) through (f) of subsection one describe this implied warranty. Subpart (a) limits it to three years "commencing with the completion of the building containing the unit."⁵² Part (b) specifies that "personal property that is transferred with, or appurtenant to, each unit, [has] a warranty which is for the same period of time as that provided for by the manufacturer of the personal property."⁵³ This warranty commences at the time of the sale's closing or on the date of the unit's possession, whichever is earlier.⁵⁴ Part (c) sets out a three year warranty, for all other improvements, beginning with the date of completion of the improvements.⁵⁵ Part (d) applies to all other personal property for the use of unit owners and provides for a warranty which must be the same as that provided by the manufacturer of the personal property.⁵⁶

Subpart (e) is the longest of the subparts and applies to the roof, structural components or other improvements, and to mechanical, electrical and plumbing elements serving improvements or a building.⁵⁷ These specified items have a warranty good for three years beginning

50. This section is entitled "Warranties."

51. See FLA. STAT. § 718.203(1) (1995).

52. *Id.* § 718.203(1)(a).

53. *Id.* § 718.203(1)(b).

54. See *id.*

55. See *id.* § 718.203(1)(c).

56. See *id.* § 718.203(1)(d).

57. See *id.* § 728.203(1)(e).

with the completion of the building or improvement or one year after owners, other than the developer, take control of the association, whichever occurs last.⁵⁸ In no event, however, will this warranty exceed five years.⁵⁹ This subpart also has an important exception since “mechanical elements serving only one unit” are not included.⁶⁰

The last subpart of subsection one, subpart (f), covers all other property which is conveyed with a unit and supplies an initial purchaser of each unit a one year warranty from the date of closing or possession, whichever is earlier.⁶¹

Subsection two of Florida Statute section 718.203 involves the implied warranties of fitness as to work performed or materials supplied by a contractor, subcontractor or supplier to the developer and to the purchaser of each unit.⁶² This subsection specifically applies to contractors, subcontractors and suppliers and thus can be referred to as the contractor’s warranty section. Subpart (a) provides a warranty to the roof and structural components of the building or improvement and mechanical and plumbing elements serving a building or an improvement, for a period of three years from the date of completion of the building or improvement.⁶³ Once again, there is the exception that this warranty excludes “mechanical units serving only one unit.”⁶⁴ Subpart (b) provides a one year warranty as to all other improvements and materials.⁶⁵

The remaining subsections, (3) through (7), focus on more general aspects of warranties. These subsections are not pertinent to the issues addressed by the court in *Leisure Resorts*.⁶⁶

58. *See id.*

59. *See id.*

60. *Id.*

61. *See id.* § 718.203(1)(f).

62. *See id.* § 718.203(2).

63. *See id.* § 718.203(2)(a).

64. *Id.*

65. *See id.* § 718.203(2)(b).

66. Although not pertinent to the case at hand, subsections (3) to (7) are cited in full here to give an accurate overview of the section:

(3) “Completion of a building or improvement” means issuance of a certificate of occupancy for the entire building or improvement, or the equivalent authorization issued by the governmental body having jurisdiction, and in jurisdictions where no certificate of occupancy or equivalent authorization is issued, it means substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications.

(4) These warranties are conditioned upon routine maintenance being performed, unless the maintenance is an obligation of the developer or a developer-controlled association.

(5) The warranties provided by this section shall inure to the benefit of each owner and his successor owners and to the benefit of the developer.

(6) Nothing in this section affects a condominium as to which rights are established by contracts for sale of 10 percent or more of the units in the

As noted earlier, the purpose of section 718.203 is to provide a codification of the case law finding implied warranties in real property. An implied warranty arises by operation of law and exists regardless of any intention of the vendor to create it.⁶⁷ Such a statutory warranty was first provided for by the enactment to the 1974 Supplement to the Condominium Act. Florida was a trailblazer in this area primarily because the condominium boom began in Florida.⁶⁸ The extension of implied warranties to a condominium may have occurred for reasons very similar to those quoted by the *Gable* court. That court quoted Williston on Contracts and stated: "It would be much better if this enlightened approach [applying an implied warranty to realty] were generally adopted with respect to the sale of new houses for it would tend to discourage much of the sloppy work and jerry-building that has become perceptible over the years."⁶⁹ This is an extraordinarily persuasive policy reason for adopting the rule that the Florida Supreme Court adopted and the Florida Legislature later enacted.

C. Differentiating Contractor and Developer Warranties

Although the Florida Supreme Court in *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.* reversed and remanded the district court's decision, it did agree with the district court's conclusion that the contractor's warranties differ in scope from the developer's warranties.⁷⁰ This distinction can be viewed concretely by focusing on a chart the district court included in its opinion with a footnote that it had "taken literary license of borrowing this helpful format from the brief submitted by the Amicus Curiae," The Associated General Contractors of America.⁷¹

condominium by the developer to prospective unit owners prior to July 1, 1974, or as to condominium buildings on which construction has been commenced prior to July 1, 1974.

(7) Residential condominiums may be covered by an insured warranty program underwritten by a licensed insurance company registered in this state, provided that such warranty program meets the minimum requirements of this chapter; to the degree that such warranty program does not meet the minimum requirements of this chapter, such requirements shall apply.

Id. § 718.203(3)-(7).

67. See BLACK'S LAW DICTIONARY 1587 (6th ed. 1990).

68. See Manne, *supra* note 44, at 766.

69. *Gable v. Silver*, 258 So. 2d 11, 15 (Fla. 4th DCA 1972) (quoting 7 SAMUEL WILLISTON & WALTER H.E. JUEGER, A TREATISE ON THE LAW OF CONTRACTS § 926, at 818 (3d ed. 1963)).

70. *Leisure Resorts*, 654 So. 2d at 914.

71. *Frank J. Rooney, Inc. v. Leisure Resorts, Inc.*, 624 So. 2d 773, 776 n.2 (Fla. 4th DCA 1993); see also Amicus Curiae Brief of the Associated General Contractors of America, at 5-6, *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911 (Fla. 1995) (No. 82578). The emphasis in the chart was in the original district court's opinion.

This chart describes the warranties provided for in Section 718.203 by taking the actual language and separating it into a clear format.

THE DEVELOPER'S WARRANTY	THE CONTRACTOR'S WARRANTY
(1) The <i>developer</i> shall be deemed to have granted to the purchaser of each unit an implied warranty of <i>fitness and merchantability for the purposes or uses intended</i> as follows:	(2) The <i>contractor</i> , and all subcontractors and suppliers, grant to the developer and to the purchaser of each unit implied warranties of <i>fitness as to the work performed or materials supplied</i> by them as follows:
(a) As to each unit, a warranty for 3 years commencing with the completion of the building containing the unit.	
(b) As to the <i>personal property that is transferred with, or appurtenant to, each unit</i> , a warranty which is for the same period as that <i>provided by the manufacturer</i> of the personal property, commencing with the date of closing of the purchase or the date of possession of the unit, whichever is earlier.	
(c) As to all other improvements for the use of the unit owners, a 3-year warranty commencing with the date of completion of the improvements.	
(d) <i>As to all other personal property for the use of unit owners</i> , a warranty which shall be the same as that <i>provided by the manufacturer</i> of the personal property.	

<p>(e) As to the roof and structural components of a building or other improvements and as to mechanical, electrical, and plumbing elements serving improvements or a building, except mechanical elements serving only one unit, a warranty for a period beginning with the completion of construction of each building or improvement and continuing for 3 years thereafter or 1 year after owners other than the developer obtain control of the association, whichever occurs last, but in no event more than 5 years.</p>	<p>(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 <i>all other improvements and materials</i>.</p>
<p>(f) As to all other property which is conveyed with a unit, a warranty to the initial purchaser of each unit for a period of 1 year from the date of closing of the purchase or the date of possession, whichever occurs first.</p>	

The statute delineates the distinction between the implied warranties applicable to developers and the implied warranties applicable to contractors. The developer's warranty is a "warranty of fitness and merchantability for the *purposes or uses intended*."⁷² In contrast, the contractor's warranty is a "warrant[y] of fitness as to the *work performed or materials supplied*."⁷³ Since the legislature used a term in one section of the statute but omitted it in another, the court will not imply it where it has been excluded.⁷⁴ Thus, these two warranties are different, and the Florida Supreme Court acknowledged this difference.

The policy reason for such a difference lies in the fact that "intended use or purpose" is more a matter within the control and scope of the developer through its architect and engineer.⁷⁵ These are the people who have control of the design of the building. The contractor, on the other hand, has control over the competency of the work performed and quality of the materials supplied in constructing condominium buildings based on the plans and specifications.⁷⁶ Thus, both the Fourth

72. FLA. STAT. § 718.203(1) (1995) (emphasis added).

73. *Id.* § 718.203(2) (emphasis added).

74. See *Leisure Resorts*, 654 So. 2d at 914.

75. See *id.*

76. See *id.*

District Court of Appeal and the Florida Supreme Court agreed that the trial court's jury instructions were incorrect.⁷⁷ The trial court instructed the jury that a defect could be found, and the contractor's warranty was thereby violated, if the equipment was not reasonably fit for the specific purpose for which it was supplied.⁷⁸ The jury thus could have found for the developer if the air-conditioning equipment was not reasonably fit for cooling the individual units which would have gone beyond the warranty a contractor has. The trial court's instruction "had the effect of including in the contractor's warranty the design of the condominium buildings."⁷⁹ This effect is not one intended by the statute, nor one supported by policy reasons. As noted earlier, the developer, with its engineers and architects, has the design and intended use or purpose more within its control.

In fact, in *Leisure Resorts*, the developer did have its own engineer and architect who specified a certain brand of air-conditioning units. The originally specified manufacturer, Carrier, declined the job and General Electric, another manufacturer deemed acceptable, would not guarantee its units without modification to the plans.⁸⁰ The developer declined to incorporate the modifications.⁸¹ The developer's architect and engineer did approve the use of Frigiking Tappan units which were the units ultimately installed.⁸² These facts further show that the developer retains control over design of a building and over the specified items that will be used in the construction of a building.

Since it is established that a contractor does not warrant items for a "specific purpose," what exactly does a contractor warrant? What exactly is the contractor's warranty of fitness?

III. THE CONTRACTOR'S WARRANTY OF FITNESS

A. Generally

As described earlier, the contractor has an implied warranty imposed upon him under Florida Statute section 718.203(2). This implied warranty is a warranty of fitness as to the work performed or materials supplied.⁸³ The Florida Supreme Court in *Leisure Resorts*

77. See *id.*; *Frank J. Rooney, Inc. v. Leisure Resorts, Inc.*, 624 So. 2d 773, 776 (Fla. 4th DCA 1993).

78. See *Frank J. Rooney*, 624 So. 2d at 776; see also Respondent's Answer Brief on the Merits at A.10, *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911 (Fla. 1995) (No. 82578).

79. *Leisure Resorts*, 654 So. 2d. at 914.

80. See *id.* at 912.

81. See *id.*

82. See *id.*

83. See FLA. STAT. § 718.203(2) (1995).

stated that in order to be in compliance with this warranty, a contractor "must provide work and materials which conform with the generally accepted standards of workmanship and performance of similar work and materials meeting the requirements specified in the contract."⁸⁴ The court then cited *David v. B & J Holding Corp.*⁸⁵ to support this proposition.⁸⁶

The facts of *David*, however, do not help clarify a contractor's warranty or how it can be met. In *David*, the plaintiff, a buyer of a condominium unit, sued the developer-builder because he did not include proper sound proofing and insulation in the party walls.⁸⁷ The developer-builder failed to construct the walls as specified in the building plans recorded with and approved by the municipal building and zoning department.⁸⁸ There are two factual distinctions between *David* and *Leisure Resorts* which make it difficult to apply the court's reasoning in one to the other.

First, in *David*, the builder and developer were the same entity.⁸⁹ This makes it difficult to apply the warranty distinctions that are made for a developer and a contractor. When the developer is also the contractor, the two types of statutory implied warranties, for "intended use or purpose", and for the work performed or materials supplied, are easily blended. An entity that is simultaneously the developer and the contractor or builder is responsible for *both* types of implied warranties. In contrast, in *Leisure Resorts*, Frank J. Rooney was only the contractor. It did not warrant items for "intended purpose or use" as a developer would.

Secondly, in *David*, the facts indicate that the developer-builder did not construct the building per the plans and specifications.⁹⁰ Even with the slight discrepancies in factual accounts that *Leisure Resorts*, the developer, and Frank J. Rooney, the contractor, presented, there is no indication that Rooney did not construct the building according to the plans and specifications. The change that was necessary to make in reference to the air-conditioning manufacturer was made in writing and signed by *Leisure Resorts*, its architect, and Frank J. Rooney.⁹¹ In submitting the data of the new air-conditioning manufacturer, Frigiking

84. *Leisure Resorts*, 654 So. 2d at 914.

85. 349 So. 2d 676 (Fla. 3d DCA 1977).

86. See *Leisure Resorts*, 654 So. 2d at 914.

87. *David*, 349 So. 2d at 677.

88. See *id.*

89. *Id.*

90. *Id.*

91. See Respondent's Answer Brief on the Merits at 6, *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911 (Fla. 1995) (No. 82578); *Frank J. Rooney, Inc. v. Leisure Resorts, Inc.*, 624 So. 2d 773, 774 (Fla. 4th DCA 1993).

Tappan, Rooney did not certify that the Tappan units complied with the original contract, but the architect and engineer nonetheless specifically approved the Tappan units. The change order signed by the parties specifically directed Rooney to install the Tappan units. Therefore, Frank J. Rooney followed the plans and specifications that were set out by the developer, its engineer and its architect.

Thus, the facts and holding of *David* do not, in actuality, shed much light on the definition of the contractor's implied warranty in general. It is well established that a contractor is responsible for complying with the plans and specifications furnished by the owner.⁹² But that is not the issue here. As a contractor, according to statute, Rooney only has a warranty of fitness as to the work performed or materials supplied.⁹³ This warranty has nothing to do with the "purpose or use intended."⁹⁴

B. *Warranty of Fitness and Its Application to "Materials" Including Manufactured Items*

Because both the Florida Supreme Court and the Florida Legislature have established that a contractor does not warrant for the "purpose and use intended," it is necessary to see how the contractor's warranty of fitness as to the work performed or materials supplied is applied. The focus of the application will be on pre-manufactured items such as the air-conditioning condenser units at issue in *Leisure Resorts*.

Under section 718.203(2), the contractor's warranty covers "materials supplied . . . [f]or a period of 3 years . . ." and "all other improvements and materials" for a period of one year after completion of all construction.⁹⁵ Nowhere in subsection (2), the contractor portion of the statute, is there a reference to manufactured items or even a manufacturer. Manufacturer, however, does show up twice in the developer's portion of the statute.⁹⁶ Subsection (1)(b) of section 718.203 requires the developer to provide a warranty for all "personal property that is transferred with, or appurtenant to, each unit" for a period that is the

92. See, e.g., *United States v. Spearin*, 248 U.S. 132, 136 (1918) (holding that contractor who is bound to build according to plans will not be responsible for the consequences of defects in the plans); *Charles R. Perry Constr., Inc. v. C. Barry Gibson and Assoc.*, 523 So. 2d 1221, 1223 (Fla. 1st DCA 1988) (holding that a contractor's responsibility is only to install the approved system in accordance with manufacturer's instructions); *Atlantic Nat'l Bank of Jacksonville v. Modular Age, Inc.*, 363 So. 2d 1152, 1155 (Fla. 1st DCA 1978) (holding that it is an architect's responsibility to design walls that meet fire code requirements and contractor is not liable for any insufficiency).

93. See FLA. STAT. § 718.203(2) (1995).

94. See *id.* § 718.203(1).

95. *Id.* § 718.203(2)(a)-(b).

96. *Id.* § 718.203(1)(b), (d).

same as the warranty provided by the *manufacturer*.⁹⁷ Section (1)(d) provides “[a]s to all other personal property . . . a warranty which shall be the same as that provided by the *manufacturer* of the personal property.”⁹⁸ If a manufactured item, the condenser in this case, is to fall under the contractor’s warranty, it can only do so by meeting the definition of “materials” in section 718.203(2)(b).

Although it may be possible to consider a manufactured item a “material,” there are several reasons not to do so. The manufactured item has an express manufacturer’s warranty of its own. That warranty is provided to the contractor when he purchases the unit for construction and the contractor turns that warranty over to the developer at construction completion. The developer, in turn, provides the warranty to the purchasers of the individual units.⁹⁹ This process explains why the developer must warrant all personal property in the unit for the same period of time as the manufacturer warranty under Section 718.203 (1)(b) and (1)(d). Therefore, it does not seem necessary to include manufactured items under the definition of “materials” in the contractor’s portion of the statute. Yet, this is exactly what the Florida Supreme Court did in *Leisure Resorts*.¹⁰⁰

The Florida Supreme Court concluded “that manufactured items constitute ‘materials’ as that term is used in section 718.203(2).”¹⁰¹ Manufactured items are now therefore covered by the contractor’s statutory warranty of fitness.

IV. ANALYSIS OF *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*

A. Extension of “Materials”

The Florida Supreme Court¹⁰² begins its decision in *Leisure Resorts* by answering the certified question presented to them from the Fourth District Court of Appeal by “holding that a contractor’s statutory warranty of fitness does apply to manufactured items such as air-conditioning units supplied by the contractor for use in a building project but that the contractor does not warrant those items for a ‘specific purpose’ under the provisions of section 718.203(2).”¹⁰³ The court then gives a recapitulation of the facts of the case similar to the ones discussed earlier

97. *Id.* § 718.203(1)(b).

98. *Id.* § 718.203(1)(d) (emphasis added).

99. See Respondent’s Answer Brief on the Merits at 24-25, *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911 (Fla. 1995) (No. 82578).

100. 654 So. 2d at 914.

101. *Id.*

102. Justice Wells wrote the opinion in *Leisure Resorts* and all justices concurred except Justice Anstead, who was recused.

103. 654 So. 2d at 912.

in this Note. From there, the first issue addressed deals with the Fourth District Court of Appeal's conclusion that manufactured items for which there was a manufacturer's warranty do not fall within the "materials" language as used in section 718.203.

The Florida Supreme Court disapproves of the Fourth District Court of Appeal's decision on this point, interpreting section 718.203 in a "plain and obvious" way.¹⁰⁴ The court simply concludes that manufactured items constitute "materials" and cites two cases in support of its statutory interpretation.

The first case cited involved a certified question to the Florida Supreme Court attempting to ascertain the correct interpretation of a discovery privilege set out in a Florida statute.¹⁰⁵ In *Holly v. Auld*, the court stated that a "statute must be given its plain and obvious meaning" when the language of the statute is clear and unambiguous.¹⁰⁶ But the *Holly* court also acknowledged that a departure from the letter of the statute is appropriate if there are cogent reasons for believing that the letter of the law does not accurately represent the legislative intent.¹⁰⁷

In *Leisure Resorts*, one can strongly argue that the legislative intent, determined by focusing on the statute in its entirety, especially the distinction between contractor and developer warranties, was not to define materials in a way that includes manufactured items. An especially strong argument could be made because the term "manufacturer" is used in section (1) of the statute. Surely, the legislature could have also used "manufacturer" in section (2) had it so intended.

The court also cites *United Bonding Insurance Co. v. Tuggle*,¹⁰⁸ to support the proposition of "plain and obvious" meaning. This case involved the construction of a Florida statute dealing with contracts to indemnify sureties.¹⁰⁹ In *United Bonding*, the court stated that "the legislature must be assumed to have intended the plain meaning of its words."¹¹⁰ Yet, even the court in *United Bonding* acknowledged that the purpose of the statute can be looked at when doubt exists.¹¹¹ In fact, the court stated that "[t]he intent of the legislature is the touchstone."¹¹² In *Leisure Resorts*, doubt exists because of the statute's wording. There-

104. *Id.* at 914.

105. *See Holly v. Auld*, 450 So. 2d 217, 218 (Fla. 1984).

106. *Id.* at 719 (quoting *A.R. Douglas, Inc. v. McRaney*, 137 So. 157, 159 (Fla. 1931)).

107. *See id.*

108. 216 So. 2d 80 (Fla. 2d DCA 1968).

109. *See id.* at 81.

110. *Id.*

111. *See id.* at 82.

112. *Id.*

fore, the Florida Supreme Court should have looked further than the plain and obvious meaning of a single word.

B. *Contractor Warranty vs. Developer Warranty*

After the cursory disposal of the "materials" issue, the court moves to the differing scopes of the contractor's and developer's warranties.

The Florida Supreme Court approves the Fourth District Court of Appeal's conclusion that the warranties differed in scope.¹¹³ They reach this decision by focusing on both case law and policy reasons. The first case cited dealt with the interpretation of a statute to determine if it was self-executing.¹¹⁴ In *Florida State Racing Commission v. Bourquardez*, the court stated that "[t]he legislature is presumed to know the meaning of words and the rules of grammar."¹¹⁵ The Florida Supreme Court in *Leisure Resorts* thus concludes that when the legislature uses one term in part of a statute but does not use it in another, the court will not imply it where it is excluded.¹¹⁶ This reasoning is sensible and the result reached is reasonable. But one must wonder why the court did not use this same reasoning when dealing with the terms "materials" and "manufacturer."

The second case cited interpreted the word "affinity" under the Florida Crimes Compensation Act.¹¹⁷ In *Ocasio v. Bureau of Crimes Compensation Division of Workers' Compensation*, the court discussed the use of technical words but also focused on the principle that the deliberate use of another word is strong evidence that different meanings were intended.¹¹⁸ The *Leisure Resorts* court uses this principle to strengthen its result of acknowledging the different warranty classifications for contractor and developer. Once again, one must question why the court does not adopt this same principle when defining "materials."

The court's policy reason for adopting the differences in the scopes of the warranties is stated quite directly. The developer has control over the design of the building while the building contractor does not.¹¹⁹ Thus, the contractor should not be held liable for a design that is beyond its control.

The court then briefly states the contractor's requirements to satisfy

113. See *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995).

114. See *Florida State Racing Comm'n v. Bourquardez*, 42 So. 2d 87, 88 (Fla. 1949).

115. *Id.*

116. 654 So. 2d at 914.

117. See *Ocasio v. Bureau of Crimes Compensation Div. of Workers' Compensation*, 408 So. 2d 751, 752 (Fla. 3d DCA 1982).

118. See *id.* at 752-53.

119. See *Leisure Resorts*, 654 So. 2d at 914.

his implied warranty.¹²⁰ This single sentence is of little help especially since the one supporting case the court cites, *David v. B & J Holding Corp.*,¹²¹ is factually different. Both this case and the court's sentence were discussed in Section II C of this Note.

C. *The Court's Final Decision*

The court concludes by acknowledging several points and remanding one issue. First, the court held that the trial court erred in its jury instruction since the instruction "had the effect of including in the contractor's warranty the design of the condominium buildings."¹²² This effect went beyond the scope of the contractor's warranty by including within it the developer's warranty.

Next, the court holds that the Fourth District Court of Appeal's decision granting a directed verdict for the contractor with regard to the contractor's statutory warranty was inappropriate. There was evidence upon which a jury could find that the equipment was defective. This evidence, in the form of the engineer's testimony regarding a study of the malfunctioning air-conditioning units, created a jury issue and, thus, a directed verdict should not have been granted.¹²³

The Florida Supreme Court quashed the district court's decision to the extent it was inconsistent with its own and remanded to the Fourth District Court of Appeal so that it may look at the remaining issues.¹²⁴ If these issues did not prove dispositive, the Fourth District must remand for a new trial at which time the jury, after being properly instructed in accord with the Florida Supreme Court's opinion, would decide "whether the air-conditioning units conformed with generally accepted standards of performance of air-conditioning units complying with the specifications of the contract."¹²⁵

The Fourth District Court of Appeal subsequently considered the issues in accordance with this decision and remanded for a new trial.¹²⁶

V. COMMENT

A. *New Problems Raised*

The *Leisure Resorts* opinion by the Florida Supreme Court has a

120. *See id.*

121. 349 So. 2d 676 (Fla. 3d DCA 1977).

122. *Leisure Resorts*, 654 So. 2d at 914.

123. *See id.*

124. *See id.* at 914.

125. *Id.* at 914.

126. *See Frank J. Rooney, Inc. v. Leisure Resorts, Inc.* 666 So. 2d 1053, 1053 (Fla. 4th DCA 1996).

negative effect on contractors. The extent of that negative effect is not yet known, but it is possible to hypothesize about what problems and potential concerns lie ahead.

Rooney, the contractor, thought it was doing everything correctly. The air-conditioning units are "mechanical elements serving only one unit" which clearly takes them outside of section 718.203(2)(a). When the manufacturer of the originally specified units would not guarantee the units, Rooney arranged for another manufacturer, Tappan, to deal directly with the developer, architect, and engineer. Tappan furnished a written warranty directly to the architect that guaranteed its units.¹²⁷ A written change order was executed listing the Tappan units that would be used. The Tappan units were accompanied by a manufacturer's warranty which was delivered by Rooney to Leisure Resorts at the conclusion of the construction.¹²⁸ This manufacturer warranty was or should have been delivered to the individual unit purchasers. Rooney followed all the steps that a prudent contractor would follow. Yet, *Rooney* is still in a position of liability for the air-conditioning units. Although the contractor could always recover from the manufacturer, where the manufacturer has gone out of business, as in this case,¹²⁹ the contractor is left holding the bag. It should not be placed in that position to begin with.

This decision opens up the following questions: Where will the line be drawn? Does every manufactured item that is supplied by the contractor now fit the definition of "materials"? A refrigerator? A microwave? A heater? What is the purpose of requiring a developer to warrant the personal property that is transferred with or appurtenant to each unit for the same period of time as the manufacturer warranty¹³⁰ if that property is a "material" and thus protected under the contractor's warranty?

The inability to answer these questions points to the conclusion that the Florida Supreme Court's decision in *Leisure Resorts* was wrong. The decision seems to take responsibility off the developer's shoulders and burdens the contractor who is only following the developer's specifications and providing the developer with all the manufacturer's warranties. The developer, through its architect and engineer, may often choose equipment from a specific manufacturer because of past use, familiarity, price, or even because of the warranty that the manufacturer provides. If a contractor follows these specifications which it has a min-

127. See Respondent's Answer Brief on the Merits at A.6, *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911 (Fla. 1995) (No. 82578).

128. See *id.* at 24.

129. See Letter from James E. Glass, attorney for contractor, James E. Glass & Associates, (Jan. 30, 1996) (on file with author).

130. This is required under FLA. STAT. § 718.203(1) (1995).

imal, if any, say about, it should not be responsible for faulty equipment. The manufacturer has warranted this equipment and the developer should seek recovery from the manufacturer. If that is not possible, the developer should be the one that has assumed the risk because it has selected the manufacturer by specifying the equipment to be used. After *Leisure Resorts*, however, this is not the law in Florida. In Florida, a contractor's implied warranty now covers manufactured goods. This extension has an effect of making the contractor guarantee manufactured goods that he did not select, could not select, and perhaps even objected to. This is not a fair result, and it is not good business.

B. *Avoiding the Effect of the Decision*

As a condominium contractor in Florida, it is going to be difficult, if not impossible, to avoid the far reaching effects of the *Leisure Resorts* decision. Simply said, if the manufactured item used is defective, the contractor's implied warranty covers it. If the manufacturer has since gone out of business, the contractor will not be able to recover from the manufacturer and thus must pay for the damages. The most obvious way to avoid such a result is to take the position that the manufactured item is not defective at all, but instead the item does not work as anticipated because of faulty design.

The faulty design argument may put the "defect", or problem, back within the scope of the developer's warranty since the developer's warranty is one of fitness and merchantability for the "purposes or uses intended." When *Leisure Resorts* goes back for a new trial, Rooney could attempt to use the argument that the air-conditioning units are not defective at all. The units conform with the generally accepted standards of performance of similar materials meeting the requirements specified in the contract. The units are simply not cooling appropriately because the "stacked design", created by those within the control of the developer, would make it impossible for any unit to work appropriately. The problem is not the air-conditioning unit—the problem is the faulty design. Of course, this argument would be strengthened if Rooney brought in an engineer to counter the developer's engineer who made the study of the malfunctioning units.

In *Leisure Resorts*, the contractor may have one additional way to avoid liability. The contractor could require the developer to show that all of the 122 air-conditioning units in the building are defective. If they are not cooling properly, yet they are not all defective, then the design of the building could certainly be the problem.¹³¹

131. This was an idea generated by the contractor's attorney, James E. Glass. He indicated

VI. CONCLUSION

The *Leisure Resorts* case clarified two points of Florida Statute section 718.203. First, the Florida Supreme Court held that a developer's and contractor's implied statutory warranties are different in scope. The developer's warranty covers the fitness and merchantability for the "purposes or uses intended" while the contractor's warranty was one of fitness as to the work performed or materials supplied. Secondly, the court found that manufactured items were "materials" under the statute and thus were covered under the contractor's warranty. The effects of this decision may not be known for some time, but it is clear that a contractor's implied statutory warranty has been extended significantly.

COLLEEN GRADY*

that this may be a feasible strategy. See Letter from James E. Glass, attorney for the contractor, James E. Glass & Associates (January 30, 1996) (on file with author).

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