12-1-1958

Sales -- Implied Warranty -- Privity Unnecessary

Donald Post

the car would effectively bar liability of the owner for negligence of one other than the bailee.[20] The court found implied consent for the bailee to use the car for all *ordinary purposes* for which an automobile is rented, and evidently included the use of the car by others within that definition.[21] The majority considered the private contract between the bailee and bailor as insufficient to bar the rights of the public or to alter the owner's implied consent to the use of the automobile by others.[22] The dissenting judge felt there was an express witholding of consent to the use of the car by one other than the renter, and therefore the dangerous instrumentality doctrine should not be applied.[23]

The court in the present decision seems to have acted directly contrary to the views of the Supreme Court of Florida as expressed in *Fleming v. Alter*.[24] After an analysis of the dangerous instrumentality doctrine with emphasis on the requisite consent for liability under the doctrine, the majority abruptly concludes its opinion by finding an implied consent to the use of the car by others, without precedent to support such a conclusion. In effect, vicarious liability has been imposed upon rental owners based upon implied consent to the operation of their vehicles by persons other than the bailee, when in actuality such consent *is not* granted and is in fact expressly withheld. It is submitted that Judge Carroll's conclusion in the dissent appropriately asserts the objection to the majority's holding; if public policy considerations call for special imposition of liability upon car rental agencies, then such a determination is for the legislature and not the court.[25]

J. R. STEWART

SALES—IMPLIED WARRANTY—PRIVITY UNNECESSARY

The plaintiff purchased electrical cable, manufactured by the defendant foreign corporation, from a wholesale dealer. After eight months use the cable was found to be defective and several power failures required its removal. Suit was brought for a breach of implied warranty of fitness for the purposes intended. *Held*, privity of contract between plaintiff and the manufacturer was not a necessary prerequisite for recovery upon an implied warranty. *Continental Copper and Steel Indus., Inc. v. E. C. "Red" Cornelius, Inc.*, 104 So.2d 40 (Fla. App. 1958).

20. "This implication [that the rental owner is responsible] is underscored by the nonexistence of any clause in the contract specifying that the motorcar should be operated only by the renter." Fleming v. Alter, 69 So.2d 185, 186, 187 (Fla. 1953).
21. Leonard v. Susco Car Rental Sys., 103 So.2d 243, 247 (Fla. App. 1958).
22. *Ibid.*
23. Leonard v. Susco Car Rental Sys., 103 So.2d 243, 250 (Fla. App. 1958) (dissenting opinion).
24. 69 So.2d 185 (Fla. 1953).
25. Leonard v. Susco Car Rental Sys., 103 So.2d 243, 250 (Fla. App. 1958) (dissenting opinion).

In an action for a breach of warranty, express or implied, the majority of jurisdictions follow the traditional rule that there must be privity of contract between the warrantor and the person seeking recovery.[1] Unless there is a contractual relationship between the parties there can be no recovery in a warranty action.[2] It has been held that there is no privity between the original seller and a subsequent purchaser who is no way a party to the original sale.[3] Generally warranties as to personal property do not attach themselves and run with the article sold.[4] The basis for the original acceptance of the privity requirement is not altogether clear.[5] Several theories have been advanced and those most significant appear to be: (1) the development of the practice of bringing warranty actions in assumpsit may have led courts to regard warranty as strictly a contractual obligation[6]; (2) the rule may have been deliberately adopted as a matter of policy to protect manufacturers and remote sellers against liability to unknown persons; (3) the reluctance of the courts, at the time that the rule developed, to hold a manufacturer as an insurer of his product and allow recovery with no showing of fault or negligence.[7]

A substantial minority of jurisdictions has established exceptions to the privity requirement and allowed recovery in warranty actions against

---

26. Ehrenzweig, note 14, *supra*.

1. Green v. Equitable Powder Mfg. Co., 94 F. Supp. 126 (W.D. Ark. 1950); Dennis v. Willys-Overland Motors, Inc., 111 F. Supp. 875 (W.D. Mo. 1953); Cotton v. John Deere Plow Co., 246 Ala. App. 36, 18 So. 2d 727 (1944); Hood v. Warren, 205 Ala. App. 332, 18 So. 524 (1921); Jordan v. Worthington Pump and Mach. Co., 73 Ariz. 329, 241 P. 2d 43 (1952); Collum v. Pope and Talbot Inc., 135 Cal. App. 2d 653, 288 P. 2d 75 (1955); Burr v. Sherwin Williams Co., 42 Cal. App. 2d 682, 268 P. 2d 1041 (1954); Hermanson v. Hermanson, 19 Conn. Supp. 479, 117 A. 2d 840 (1954); Welshausen v. Charles Parker Co., 83 Conn. 231, 76 Atl. 271 (1910); Barni v. Kutner, 6 Del. 550, 7 A. 2d 801 (1950); Fulton Bank v. Mathers, 183 Iowa 226, 166 N.W. 1050 (1918); Prater v. Campbell, 110 Ky. L. Rep. 23, 60 S.W. 918 (1901); Poplar v. Hochschild, 180 Md. 389, 24 A. 2d 783 (1942); Pearl v. William Filene's Sons Co., 317 Mass. App. Dec. 529, 58 N.E. 2d 825 (1945); Fink v. Viking Refrigerators Inc., 147 S.W. 2d 124 (Mo. App. 1941); Caudle v. F. M. Bohannon Tobacco Co., 220 N.C. 105, 16 S.E. 2d 680 (1941); Wood v. Advance Rumley Thresher Co., 60 N.D. 384, 234 N.W. 517 (1931); Wood v. General Elec. Co., 59 Ohio St. 273, 112 N.E. 2d 8 (1953); Silverman v. Samuel Mallinger Co., 375 Pa. 422, 100 A. 2d 715 (1953); Lombardi v. California Packing Sales Co., 112 A. 2d 701 (R.I. 1955); Odom v. Ford Motor Co., 230 S.C. 320, 95 S.E. 2d 601 (1956); Dobbin v. Pacific Coast Coal Co., 170 P. 2d 642 (Wash. 1946); Cohan v. Associated Fur Farms, Inc., 261 Wis. 584, 53 N.W. 2d 788 (1952).

2. *Ibid.*

3. E.g., where a farmer purchased insecticide from a cooperative there was no privity between the farmer and the manufacturer who sold to the cooperative. Burr v. Sherwin Williams Co., 42 Cal. App. 2d 682, 268 P. 2d 1041 (1954).

4. Pelletier v. Dupont, 124 Me. 269, 271, 128 Atl. 186, 188 (1925).

5. Warranty actions were originally in tort, in the nature of an action on the case for deceit. For the historical development of the action see 1 WILLISTON, SALES § 195-198, 244a (3rd ed. 1948); See also Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888).

6. See Stuart v. Wilkins, 1 Doug. 18, 99 Eng. Rep. 15 (K.B. 1778) The first case in which a warranty action was brought in assumpsit.

7. See Winterbottom v. Wright, 10 M. and W. 109, 152 Eng. Rep. 402 (Ex. 1842); Notes, 7 WASH. L. REV. 351 (1932) and 21 MINN. L. REV. 315 (1937); Warranty is a matter of strict liability, 1 WILLISTON, SALES § 237 (3rd ed. 1948).

remote manufacturers and packers of defective or harmful food,[8] beverages,[9] and drugs.[10] In these cases the courts have found an implied warranty that the product is fit for human consumption. A strong public policy has been evident when such defective products have been placed on the market.[11] But the majority of courts still require privity even when articles for human consumption are involved.[12] As to other manufactured products there have been a few recent cases that have abolished the necessity of privity.[13] Personal injury, death, or damage to property of a consumer caused by the defective product was present in these cases.

Different reasons have been employed in reaching the minority decisions. A number of cases have advanced the theory that the original warranty runs with the title as in a conveyance of land.[14] Other cases seem to consider warranty as a matter of strict liability in tort not depending on any contract between the parties.[15] A somewhat different problem,

---

8. Williams v. Campbell Soup Co., 80 F. Supp. 865 (W.D. Mo. 1948); Ritchie v. Anchor Casualty Co., 135 Cal. App. 2d 245, 286 P. 2d 1000 (1955); Blanton v. Cudahy Packing Co., 19 So. 2d 313 (Fla. 1944); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920); Parks v. Yost Pie Co., 93 Kan. 334, 144 P. 202 (1914); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928); Southwest Ice and Dairy Prod. Co., v. Faulkenberg, 203 Okla. 279, 220 P. 258 (1950); Catani v. Swift, 251 Pa. 52, 95 Atl. 931 (1915); Geisness v. Scow Bay Packing Co., 16 Wash. 2d 1, 132 P. 2d 740 (1942).

9. Dothan v. Chero Cola Bottling Co. v. Weeks, 16 Ala. App. 639, 80 So. 734 (1918); Williams v. Paducah Coca Cola Bottling Co., Inc., 343 Ill. App., 98 N.E. 2d 164 (1951); Dulez v. Coca Cola Bottling Co., 232 S.W. 2d 801 (Mo. App. 1950); Bredenhorn Candy Co. v. Moore, 184 Miss. 721, 186 So. 628 (1939); Nock v. Coca Cola Bottling Wks., 102 Pa. Super. 515, 156 Atl. 537 (1931); Boyd v. Coca Cola Bottling Wks., 132 Tenn. 23, 177 S.W. 80 (1915); Coca Bottling Co. v. Enes, 164 S.W. 2d 855 (Tex. 1942).

10. Davis v. Radford, 233 N.C. 283, 63 S.E. 2d 822 (1951); Roger v. Toni Home Permanent Co., 167 Oh. St. 244, 147 N.E. 2d 612 (1958).

11. See Ketterer v. Armour & Co., 200 Fed. 322 (S.D. N.Y. 1912) and Blanton v. Cudahy, 19 So. 2d 313, 316 (Fla. 1944) for a discussion of the public policy involved.

12. Connecticut Pie Co. v. Lynch, 57 F. 2d 447 (D.C. Cir. 1932); Drury v. Armour, 140 Ark. 371, 216 S.W. 40 (1919); Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186 (1925); Vaccarino v. Cozzubo, 181 Md. 614, 31 A. 2d 316 (1943); Roberts v. Anheuser Busch Ass'n., 211 Mass. 49, 98 N.E. 95 (1912); Degouveia v. H. D. Lee Mercantile Co., 231 Mo. App. 447, 100 S.W. 2d 336 (1936); Russell v. First Nat'l. Stores, Inc., 96 N. H. 471, 79 A. 2d 573 (1951); Smith v. Salem Coca Cola Bottling Co., 92 N.H. 97, 25 A. 2d 125 (1942); Schlosser v. Goldberg, 123 N.J.L. 470, 9 A. 2d 699 (1939); Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923); Thompson v. Ballard Co., 208 N.C. 1, 179 S.E. 30 (1935); Coca Cola Bottling Wks. v. Sullivan, 178 Tenn. 405, 158 S.W. 2d 721 (1942); Colonna v. Rosedale Dairy Co., 166 Va. 314, 186 S.E. 94 (1936); Burgess v. Sanitary Meat Mkt., 121 W. Va. 608, 5 S.E. 2d 785 (1939).

13. McAfee v. Cargill, Inc., 121 F. Supp. 5 (S.D. Cal. 1954); Worley v. Procter and Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W. 2d 532 (1952); DiVello v. Gardner Mach. Co., 102 N.E. 2d 289 (Ohio 1951); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. 2d 409 (1932).

14. Williams v. Paducah Coca Cola Bottling Co., Inc., 343 Ill. App. 1, 98 N.E. 2d 164 (1951); Patargias v. Coca Cola Bottling Co., 332 Ill. App. 117, 74 N.E. 2d 162 (1947); Anderson v. Tyler, 223 Iowa 1033, 274 N.W. 48 (1937); Coca Cola Bottling Wks. v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

15. Nichols v. Nold, 174 Kan. 613, 258 P. 2d 317 (1953); Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913).

but relative here, has been presented where the purchaser of a product relied on representations made by the manufacturer in advertising or labels. In several cases the courts have treated the representation as an express warranty and have allowed recovery without privity of contract.[16] Whatever the theory utilized an increasing number of courts are permitting the plaintiff to recover in an action brought in warranty, without privity and without any showing of negligence.[17]

The holding in the instant case purports to rest mainly on three decisions of the Florida Supreme Court.[18] These cases are all distinguishable from the present decision. In the leading Florida case on the subject, the court held a manufacturer of food liable for breach of implied warranty notwithstanding lack of privity of contract between the parties.[19] A strong public policy in regard to defective food products is indicated in the opinion.[20] In a subsequent case, a wholesaler of seed was held liable to a planter who purchased from a middleman.[21] It was shown that there was a varietal difference between the seed represented for sale and the seed actually purchased. The court discussed implied warranty[22] but seemed to base the liability of the wholesaler on negligence. The mislabeling of seed violated a penal statute[23] and therefore the defendant was negligent as a matter of law.[24] *Matthews v. Lawnlite Company*[25] involved a suit against a manufacturer of aluminum furniture by a prospective purchaser. The plaintiff had a finger severed by a mechanism in a lawn chair which was displayed in a retail store. Adopted by the court here was the doctrine

16. Free v. Sluss, 87 Cal. App. 2d Supp. 933, 197 P. 2d 854 (1948); Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939); Simpson v. American Oil Co., 217 N.C. 542, 8 S.E. 2d 816 (1940); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. 2d 409 (1943).

17. See PROSSER, TORTS § 84 (2nd ed. 1955).

18. Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956); Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953); Blanton v. Cudahy Packing Co., 19 So. 2d 313 (Fla. 1944).

19. Blanton v. Cudahy Packing Co., *Supra* note 18.

20. "The rationale of the implied warranty theory of liability is in effect that the right of recovery by injured consumers ought not to depend upon or turn on the intracacies of the law of sale nor upon privity of contract, but should rest on right, justice and welfare of the general purchasing and consuming public . . . . . The public generally is vitally concerned in wholesome food, or its health will be jeopardized. If poisonous, unhealthful and deleterious foods are placed by the manufacturer upon the market and injuries occur by the consumption thereof then the law should supply the injured person an adequate and speedy remedy." *Id.* at 316.

21. Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953).

22. "There is a conflict of opinion about the accountability of a manufacturer to a consumer on the theory of implied warranty in the absence of privity, but this court has become aligned with those courts holding that suit may be brought against the manufacturer notwithstanding want of privity." Hoskins v. Jackson Grain Co., *supra*, note 21.

23. FLA. STAT., §§ 578.09, 578.12 (1951).

24. "Where one violates a penal statute imposing upon him a duty designed to protect another he is negligent as a matter of law, therefore responsible for such damage as is proximately caused by his negligence." Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1952).

25. 88 So. 2d 299 (Fla. 1956).

expressed in the Restatement of Torts[26] which is concerned with negligence and not absolute liability.

An analysis of the Florida cases indicates that there is little precedent for the holding in the instant case. Research reveals no decision in any jurisdiction that has imposed the absolute liability of warranty in a comparable situation. The strong public policy found in food cases and in cases where personal injuries or death result from defective products is not present here. This holding considered in conjunction with the Florida statute,[27] which gives courts jurisdiction over non-residents doing business within the state, appears to open the door to suits by ultimate purchasers against any manufacturer who ships products, which are defective, into this state.

Notwithstanding the lack of authority and strong public policy, the decision is reasonable when one considers the realities of modern economic life. Manufacturers are in a better position to warrant the fitness of their products than a middleman. Since a consumer can go against his immediate seller who in turn can sue the party from whom he purchased until the manufacturer is ultimately reached, there is no valid reason why a warranty action directly against the manufacturer should not be maintained. It is both practical and just to hold a manufacturer strictly liable to the ultimate consumer when the product is defective. Reasons are seldom given for a strict adherence to the privity rule. Reasons that at one time may have been valid no longer exist. The soundness of the privity requirement is, under present day conditions, highly questionable. But as long as many courts consider warranty to be a contractual obligation, privity will continue to raise its ugly head. It is improbable that the issue is completely settled in Florida even though the present decision assumes that it is settled. A more explicit pronouncement by the court of the reasons or basis for the holding would have been desirable in view of its probable ramifications.

DONALD POST

26. RESTATEMENT, TORTS § 398 (1934).
27. FLA. STAT. § 47.16 (1957).