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# Products Warranty Law in Florida -- A Realistic Overview

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# PRODUCTS WARRANTY LAW IN FLORIDA— A REALISTIC OVERVIEW

WILLIAM M. HICKS\* AND EDWARD I. STERNLIEB\*\*

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## I. INTRODUCTION

The purpose of this article is to provide a complete, analytical survey of warranty law in Florida. In addition, because of its close association and frequent confusion with warranty, the concept of strict liability in tort will be reviewed and presented as an alternative to implied warranty in certain factual situations.

As a preface, a definition of terms should prove helpful. Express warranty is an affirmation of fact, promise, description or model transmitted from the seller to the buyer and made "part of the basis of the bargain."<sup>1</sup> Implied warranty is divided into two categories—merchantability and fitness for a particular purpose. In the former, the law implies a warranty by a seller who deals in goods of that kind to the buyer that such goods are "fit for the ordinary purposes for which such goods are used."<sup>2</sup> The latter division, fitness for a particular purpose, is applicable when the seller "knows the particular purpose for which the goods are required" and the buyer relies on the "seller's skill or judgment."<sup>3</sup>

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1. FLA. STAT. § 672.313(1)(1969). The UNIFORM COMMERCIAL CODE, consisting of Florida Statutes chapters 671-680 inclusive, was adopted in Florida effective January 1, 1967. [Hereinafter cited as UCC.] The effective date of the UCC is particularly significant in classifying cases cited as pre-Code or post-Code.

2. FLA. STAT. § 672.314(1), (2)(1969).

3. FLA. STAT. § 672.315 (1969). The warranty of fitness for a particular purpose might

Strict liability in tort, which basically renders the supplier of a defective product strictly liable for personal injuries caused by the product, is subject to varying characterizations dependent upon the jurisdiction in which it was embraced.<sup>4</sup> However, one thread of consistency runs throughout the strict liability concept—the complete separation of tort and contract. The contractual relationship is forever divorced from the strict tort liability recovery.

## II. EXPRESS WARRANTY

The express warranty, in sharp contrast to its implied counterpart, has been a minor object of judicial attention in Florida. In an early warranty case, the supreme court held that there could not be an express warranty of the quantity of the goods sold in the absence of *reliance* by the buyer on the verbal warranty of the seller.<sup>5</sup> The factor of reliance by the buyer on the express warranty provided by the seller received extensive treatment from the first district court of appeal which has held that:

To constitute an express warranty, the term 'warrant' need not be used; no technical set of words is required, and a warranty may be inferred from the affirmation of a fact which induces the purchase and on which the buyer relies and on which the seller intended that he should so do.<sup>6</sup>

However, the statutory UCC definition of an express warranty<sup>7</sup> does not require reliance by the buyer, thus modifying the case law. The UCC only demands that the warranty become part of the basis of the bargain.

## III. IMPLIED WARRANTY

### A. Food

Implied warranty as a ground for relief to the injured consumer achieved its primary recognition in cases involving foodstuffs. In *Blanton v. Cudahy Packing Company*,<sup>8</sup> the supreme court permitted an injured purchaser of unwholesome canned meat to recover against the manufacturer based upon an implied warranty of merchantability (wholesomeness and fitness for human consumption). The fact that the plaintiff-consumer was not in actual privity of contract with the defendant-manufacturer was found to be inconsequential.

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be more appropriately designated as a hybrid between an express and implied warranty rather than as a pure form of the latter. Similar to the express warranty, the seller knows the very purpose for which the product is to be used; the seller expressly, though in action (the act of selling) and not in words, warrants the suitability of the goods for such use; and the buyer relies upon the seller's superior skill and judgment in purchasing the product.

4. See pp. 262-64 *infra* for a discussion of the leading cases on strict liability in tort.

5. *George v. Drawdy*, 56 Fla. 303, 47 So. 939 (1909).

6. *Escambia Chemical Corp. v. Industrial-Marine Supply Co.*, 223 So.2d 773, 775 (Fla. 1st Dist. 1969).

7. FLA. STAT. § 672.313 (1969).

8. 154 Fla. 872, 19 So.2d 313 (1944).

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 intricacies of the law of sale nor upon the privity of contract, but should rest on right, justice and welfare of the general purchasing and consuming public.<sup>9</sup>

The court spoke in terms of strict liability probably because of the product involved, *i.e.*, food. In any event, there was a relaxation of the requirement that privity exist in order to maintain an action in warranty.

In *Cliett v. Lauderdale Biltmore Corporation*,<sup>10</sup> the supreme court held a restaurant liable for serving impure food, relying on the theory of implied warranty of fitness or wholesomeness, in spite of the possibility that such "transaction [may] be termed a service. . . ."<sup>11</sup> The court avoided the contractual distinction of sale versus service by relegating any discussion of it to the background. A year later, the same tribunal found the retailer of impure food sold in sealed packages to be subject to an implied warranty action brought by the injured consumer.<sup>12</sup>

The next major event in the development of the law of implied warranty of food involved a determination of what constituted an unwholesome product. The presence of worms in spinach was sufficient to render such food unwholesome and unfit for human consumption, and an action based on an implied warranty would lie.<sup>13</sup> In reaching its decision, the court provided the following guideline:

[F]or the masses who have moved ahead of the Indians but who perhaps have not reached the "snail set" such invertebrates as worms and snails are generally frowned upon as totally unwholesome.<sup>14</sup>

Although worms may bear a distorted resemblance to spinach, they were not a *natural* ingredient of such food and thus liability for their presence attached. The "foreign-natural" test was recently rejected by the fourth district court of appeal.<sup>15</sup> The plaintiff was injured by a walnut shell located in walnut ice cream sold by the defendant restaurant; he sued for breach of implied warranty. The trial court employed the "foreign-natural" test and found such shell to be a natural substance of the food served. In reversing the lower court, the fourth district stated that the proper test

should be what is "reasonably expected" by the consumer in the

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9. *Id.* at 876, 19 So.2d at 316.

10. 39 So.2d 476 (Fla. 1949).

11. *Id.* at 478. Under the UCC [FLA. STAT. § 672.314(1)(1969)], the "serving for value of food and drink to be consumed either on the premises or elsewhere is a sale," thus discounting the sale-service dichotomy.

12. *Sencer v. Carl's Market, Inc.*, 45 So.2d 671 (Fla. 1950). The plaintiff became ill upon consuming a can of unwholesome sardines.

13. *Food Fair Stores of Florida v. Macurda*, 93 So.2d 860 (Fla. 1957).

14. *Id.* at 861.

15. *Zabner v. Howard Johnson's, Inc.*, 201 So.2d 824 (Fla. 4th Dist. 1967).

food as served, not what might be natural to the ingredients of that food prior to preparation.<sup>16</sup>

This new test of wholesomeness "is keyed to what is 'reasonably fit,'"<sup>17</sup> *i.e.*, what a reasonable man would normally expect a food product to contain.

Although the immediate seller of impure food is liable to the injured consumer, a different result accrues where the food is provided gratuitously, as evidenced by a decision of the second district.<sup>18</sup> A church member, who was also a professional caterer, donated food for a fund-raising dinner. The plaintiff ate the food prepared by the defendant and suffered food poisoning. In a spirit other than that of brotherly love, the plaintiff brought an action for breach of implied warranty of fitness against the defendant donor of the deleterious food. The court held that "before the doctrine of implied warranty of fitness is applicable, there must be something more than mere voluntary activity on the part of the defendant."<sup>19</sup> Although *Cliett, supra*, implied that a service may be the basis of an implied warranty action, this case required that the service performed be initially based upon a contractual relationship between the relevant parties.

A case of special note involved a suit brought by the owner of a horse against the manufacturer of horse feed for the death of the animal as a result of poisonous substances in the food.<sup>20</sup> Faced with the dilemma of finding the horse feed to be "unfit for human consumption," the court broadened the implied warranty of fitness to include animal food, in light of Florida Statutes chapter 580, the Florida Commercial Feed Law.

In summary, the consumer of impure food can employ the implied warranty action against a) the manufacturer, regardless of the lack of privity of contract, b) the retailer, and c) the restaurant owner, but the action does not lie against the gratuitous supplier of deleterious food.

### B. *Products Intended for Human Consumption*

This category entails all products, other than foodstuffs, that may either: 1) be taken into the body; 2) be applied to the skin; or 3) be used as containers for products intended for consumption.

In the situation where the plaintiff purchased deleterious lipstick from the defendant's store on the advice of a saleslady, the Supreme Court of Florida ruled that an implied warranty of fitness for a particular purpose arose where the buyer both expressed to the seller the particular purpose for which the product was to be purchased and relied on the seller's skill and judgment in purchasing the product.<sup>21</sup> In other words,

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16. *Id.* at 826.

17. *Id.* at 827.

18. *Wentzel v. Berliner*, 204 So.2d 905 (Fla. 2d Dist. 1967).

19. *Id.* at 906.

20. *Valdosta Milling Co. v. Garretson*, 217 F.2d 625 (5th Cir. 1954).

21. *Smith v. Burdine's, Inc.*, 144 Fla. 500, 198 So. 223 (1940).

two requirements must be satisfied: 1) the seller must possess superior knowledge of his goods; and 2) the buyer must inform the seller, either expressly or impliedly, that he is relying upon the seller's skill and judgment.

The issue of the liability of the cigarette manufacturer to one injured from the smoking habit was raised by a Florida plaintiff in federal court.<sup>22</sup> The case, which was exemplified by prolonged litigation, costly appeals, and judicial uncertainty, encompassed an action for breach of implied warranty brought by the widow of the estate of the husband who died of lung cancer, allegedly caused from smoking the cigarettes manufactured by the defendant. The Federal District Court for the Southern District of Florida granted judgment for the defendant. On appeal, the Fifth Circuit Court of Appeals withheld ruling until the Florida Supreme Court answered the following question certified to them: whether the cigarette manufacturer or distributor could be absolutely liable for breach of implied warranty where the dangers to humans from smoking could not be determined through the reasonable application of human skill and foresight by the manufacturer or distributor.<sup>23</sup> The supreme court answered affirmatively: "a manufacturer's or seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty."<sup>24</sup> Upon return to the federal appellate court, the case was held to contain sufficient evidence to go to the trial jury for a determination of whether the defendant's cigarettes were reasonably fit and wholesome for human consumption.<sup>25</sup> The defendant once again prevailed in the second trial in the southern district court. However, the Fifth Circuit reversed and remanded the case, and further directed the lower court to enter judgment for the plaintiff on the question of liability, even though the plaintiff did not conclusively establish an actual defect or adulteration in the product.<sup>26</sup> A year later, on a rehearing en banc, the court adopted the dissent of Justice Simpson in their previous decision,<sup>27</sup> and affirmed the lower court judgment for the defendant manufacturer.<sup>28</sup> In terms of the law of implied warranty, the final outcome of the litigation placed the burden on the plaintiff of proving that there was an *actual* defect or adulteration in the product; the mere existence of injury as a result of using the product did not sufficiently meet that burden. The scope of implied warranty is *reasonable* wholesomeness and fitness for use by the

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22. The history of the case, *Green v. American Tobacco Co.*, and citations will be provided in the text and subsequent footnotes.

23. 304 F.2d 70 (5th Cir. 1962).

24. 154 So.2d 169, 170 (Fla. 1963). Such knowledge, however, does become important in determining the seller's superior position in an action for implied warranty of fitness for a particular purpose.

25. 325 F.2d 673 (5th Cir. 1963).

26. 391 F.2d 97 (5th Cir. 1968).

27. *Id.* at 111 (Simpson, J., dissenting).

28. 409 F.2d 1166 (1969).

public, and the action is not limited by the manufacturer's or seller's inability to detect the defect.

In the warranting of blood provided for human injection, the courts have distinguished between the private blood bank and the hospital, holding only the former liable in implied warranty for the transfusion of impure blood.<sup>29</sup> The transfer of blood by a hospital to a patient was a service, not a sale; thus, there could not be a breach of an implied warranty.<sup>30</sup> However, dissatisfied with the warranty liability of the community blood bank, the state legislature amended the relevant UCC provision<sup>31</sup> so as to grant the commercial blood supplier the same immunity provided by judicial legislation to the hospital transfusion. The sale of blood by a profit-making institution was thus transformed into a service, and the implied warranties of merchantability and fitness for a particular purpose could not attach to such a transaction.

Another transaction in the medical field where warranties of fitness or merchantability may be implied is the sale of prescription drugs on the retail level. However, where the drug supplied was unadulterated, the plaintiff could not hold the defendant, a retail druggist, liable on a breach of implied warranty theory for harmful effects produced by the drug sold.<sup>32</sup> The supreme court refused to place responsibility for the injuries suffered by the plaintiff upon the druggist, who was judged to be without fault. In the sale of a prescription drug, the retail druggist only warrants that:

1. he will compound the drug prescribed;
2. he has used due and proper care in filling the prescription (failure of which might also give rise to an action in negligence);
3. the proper methods were used in the compounding process;
4. the drug has not been infected with some adulterating foreign substance.<sup>33</sup>

The adulterated soft drink or candy bar has resulted in many implied warranty actions by injured consumers. The consumer may maintain an action in implied warranty against the bottler for harm sustained due to the presence of foreign material in the beverage.<sup>34</sup> In a case involving an adulterated soft drink, the supreme court clarified the plaintiff's burden of proof in such a situation: "the consumer is [not] required to present positive evidence negating tampering or a reasonable opportunity for tampering with the contents of the bottle, after it left the bottler's control,

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29. *Community Blood Bank, Inc., v. Russell*, 196 So.2d 115 (Fla. 1967), *aff'g* 185 So.2d 749 (Fla. 2d Dist. 1966).

30. *Hoder v. Sayet*, 196 So.2d 205 (Fla. 3d Dist. 1967). The second district adopted the *Hoder* rationale in *White v. Sarasota County Public Hospital Board*, 206 So.2d 19 (Fla. 2d Dist. 1968).

31. FLA. STAT. § 672.316(5) (1969).

32. *McLeod v. W. S. Merrell Co.*, 174 So.2d 736 (Fla. 1965).

33. *Id.* at 739. The court also discussed strict liability in tort under RESTATEMENT (SECOND) OF TORTS § 402A (1964), but found the theory inapplicable to retail druggists.

34. *Florida Coca-Cola Bottling Co. v. Jordan*, 62 So.2d 910 (Fla. 1953).

in order to recover."<sup>35</sup> Analogizing the sealed candy bar containing pins to the bottled soft drink adulterated with foreign substances, the second district stated that "the rationale of the implied warranty of fitness rule applies with equal force in all these situations,"<sup>36</sup> thus permitting the injured plaintiff to receive damages from both the manufacturer and retailer of the deleterious, pin-studded candy bar.

The rationale of the "bottled or sealed foreign matter" cases has been extended to the containers of such beverages.<sup>37</sup> The purchaser of a soft drink brought an action based upon an implied warranty of merchantability against the bottler and retailer for injuries received when the bottle broke while being opened. In sanctioning the expansion of the doctrine of implied warranty to include glass containers, the court reasoned that the "bottle and its contents are so closely related that it is difficult—if not impossible—to draw a distinction."<sup>38</sup> Although the plaintiff did recover from both the manufacturer and retailer, the vulnerability of the retailer to implied warranty liability was shortlived. The Supreme Court of Florida in *Foley v. Weaver Drugs, Inc.*<sup>39</sup> absolved the retail seller of a product sold in a container from any liability under an implied warranty theory for injuries caused by the container. However, under the UCC, the seller of packaged goods impliedly warrants that the product sold is "adequately contained [and] packaged;"<sup>40</sup> therefore, the retailer's liability appears to have been reinstated. By the inclusion of the manufacturer of a soft drink six-pack carton within the category of seller, the manufacturer would appear to be liable for breach of implied warranty of merchantability when the carton gave way, allowing the bottles to fall and injure the plaintiff's foot. Although the UCC would impose such liability, a case involving a pre-Code transaction did not do so.<sup>41</sup> To recover in such a situation, the first district required the plaintiff to prove that the defendant named *actually manufactured* the defective carton; a mere assembler of the carton would not be liable. This decision seems contrary to the general trend of recent, forward-looking rulings of the Florida courts and courts throughout the country, which hold the assembler of a product responsible not only for the items in the final

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35. *Miami Coca-Cola Bottling Co. v. Todd*, 101 So.2d 34, 36 (Fla. 1958). For additional clarification, the court distinguished the "bottled foreign matter" case from the "exploding bottle" case by commenting that "in the latter situation common experience indicates that rough or unusual handling frequently contributed to the bursting," while in the former situation the entrance of foreign material into the bottle after it is capped is a rare occurrence.

36. *Wagner v. Mars, Inc.*, 166 So.2d 673, 674 (Fla. 2d Dist. 1964).

37. *Canada Dry Bottling Co. v. Shaw*, 118 So.2d 840 (Fla. 2d Dist. 1960).

38. *Id.* at 842. In fact, the plaintiff is entitled to the presumption that a bottle that is not defective will not burst. See *Renninger v. Foremost Dairies, Inc.*, 171 So.2d 602 (Fla. 3d Dist. 1965).

39. 177 So.2d 221 (Fla. 1965). Essentially, this case overruled *Canada Dry Bottling Co. v. Shaw* in regard to the retailer's liability for a defective container, although the court only stated that it disapproved of that part of the *Shaw* case.

40. FLA. STAT. § 672.314(2)(e) (1969).

41. *Gay v. Kelly*, 200 So.2d 568 (Fla. 1st Dist. 1967).



package it actually manufactures, but also for those items manufactured by others.<sup>42</sup> Query, should a bottler be allowed to escape responsibility for a defective six-pack carton produced by a manufacturer of its sole choosing, who, by the time of suit, may be out of business, financially irresponsible, or not amenable to service of process in the jurisdiction where the injury occurred?

The state of the law in this area can be summed up by the following. The purchaser of a defective product intended for human consumption, for bodily application, or for use as a container of a consumable good can recover under warranty from the retailer and the manufacturer. The only exception is that the retailer of a defective container and the assembler, but not the actual manufacturer, of a faulty carton are not liable under the pre-Code case law, whereas they are subject to warranty liability under the UCC.

### C. Other Products

Whereas the warranty law governing the sale or manufacture of deleterious foodstuffs and consumables has become fairly settled, the same cannot be said for those products outside the realm of human consumption and any legal conclusion as to the future course of the law is tenuous at best.

Judicial recognition of implied warranty in Florida began with the case of *Berger v. Berger & Company*.<sup>43</sup> The plaintiff-purchaser sued the defendant-seller of lumber which did not meet specifications requested by the buyer and promised by the seller. The court found the seller liable, stating that:

[w]here a person contracts to supply an article in which he deals for a particular purpose, knowing the purpose for which he supplies and that the purchaser has no opportunity to inspect the article, but relies upon the judgment of the seller, there is an implied condition or 'warranty,' . . . that the article is fit for the purpose to which it is to be applied.<sup>44</sup>

Despite the emergence of implied warranty, caveat emptor remained the general rule. The Fifth Circuit, applying Florida law, held that the seller

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42. See *King v. Douglas Aircraft Co.*, 159 So.2d 108 (Fla. 3d Dist. 1964). This case was cited as controlling authority in *Holman v. Ford Motor Co.*, 239 So.2d 40 (Fla. 1st Dist. 1970), wherein the court held that the automobile manufacturer could not avoid liability under an implied warranty theory by arguing that the defective power brake booster unit (the defect caused the plaintiff's automobile to have brake failure) was manufactured by a supplier corporation other than itself.

It would seem unconscionable to us if Ford were permitted to shrink its duty to stand behind the products that it sells to the public through its dealer organization on the very shallow excuse that the defective component was manufactured by a supplier selected by it rather than by Ford itself.

*Id.* at 42. The same reasoning should apply to the soft drink manufacturer-assembler in the *Gay* decision.

43. 76 Fla. 503, 80 So. 296 (1918).

44. *Id.* at 513, 80 So. at 299.

of a product manufactured by another and available for inspection by the buyer was not subject to an implied warranty of the quality of the particular product sold.<sup>45</sup> The Supreme Court of Florida, relying upon caveat emptor, denied recovery under implied warranty to the purchaser of a defective stepladder even though the seller's agent orally verified the product's strength and longevity.<sup>46</sup> The nature of the product was the key to the decision. The buyer could "know as much as a salesman [about] a stepladder by simply looking at it."<sup>47</sup> Providing the buyer with an equal opportunity to inspect the stepladder nullified superior knowledge on the part of the seller. However, some products, such as seed, were incapable of reasonable inspection to ascertain their true character, and the buyer was forced to rely solely on the seller supplying the proper article. In such a situation, the products sold by the retailer were accompanied by an implied warranty that they were true to their name, irrespective of any inspection made by the buyer.<sup>48</sup> The liability for breach of an implied warranty of particular variety was later extended to the wholesaler who mislabeled the variety of the seed sold.<sup>49</sup>

Related to the situation of seller mislabeling is the problem of the seller's misguidance.<sup>50</sup> During the course of the sale of dynamite, the vendor, though not required to do so, furnished the buyer with special instructions differing from those provided by the manufacturer on the use and handling of the explosives. By volunteering such instructions, an implied warranty arose "that the dynamite caps and fuses were fit for the particular purpose on the condition that the user complied with the specific instructions."<sup>51</sup>

The progress of implied warranty took an uncertain turn in *Matthews v. Lawnlite*.<sup>52</sup> While trying out a lounge chair manufactured by the defendant, the prospective customer had his finger amputated by a moving mechanism located on the underside of the arm of the chair. The supreme court, in the process of finding the manufacturer liable for the injuries sustained, asserted the dual theories of negligence and breach of implied warranty, neglecting to designate either one as the basis of recovery. The court did adopt *Restatement of Torts* § 398, which imposed liability upon a negligent manufacturer of a product made under a dangerous plan or design. The manufacturer in this case did not exercise

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45. *Tampa Shipbuilding & Engineering v. General Construction Co.*, 43 F.2d 309 (5th Cir. 1930).

46. *Lambert v. Sistrunk*, 58 So.2d 434 (Fla. 1952).

47. *Id.* at 435. A different result would occur if there was no opportunity to inspect, *i.e.*, lipstick and canned foods, where the buyer relies exclusively on the seller's judgment.

48. *West Coast Lumber Co. v. Wernicke*, 137 Fla. 363, 188 So. 357 (1939). The case dealt with seed that was incorrectly labelled and of a poorer quality than that sought by the purchaser.

49. *Hoskins v. Jackson Grain Co.*, 63 So.2d 514 (Fla. 1953). The court also alluded to the negligence theory of false and misleading labelling.

50. *Southern Pine Extracts Co. v. Bailey*, 75 So.2d 774 (Fla. 1954).

51. *Id.* at 776.

52. 88 So.2d 299 (Fla. 1956).

reasonable care in the adoption of a safe plan or design when it failed to provide a protective housing for the dangerous mechanism hidden from the plaintiff's view. Not content with only a negligence theory, the court proceeded to intertwine the implied warranty concept. Although the lounge chair was not considered a dangerous instrumentality,<sup>53</sup> the particular concealed moving parts that severed the plaintiff's finger were declared "inherently dangerous." Based upon their dangerous character, the court appeared to extend the implied warranty of merchantability, absent privity of contract, to the prospective or potential purchaser, who was equated with the actual customer.

The first definitive statement concerning the necessity of privity of contract in an implied warranty action against the manufacturer of a nonconsumable product appeared in an action to recover economic loss.<sup>54</sup> Privity of contract was not an essential prerequisite to recovery by the ultimate consumer from the manufacturer for breach of implied warranty in the sale of electrical cable. However, in *Carter v. Hector Supply Company*,<sup>55</sup> the supreme court reaffirmed the need for privity in an implied warranty action against the retailer. The plaintiff, an employee of the purchaser of a riding sulky, brought an action for breach of implied warranty of fitness against the retailer for injuries sustained when the frame of the sulky collapsed due to a latent defect. The court dismissed the action stating that "one who is not in privity with a retailer has no action against him for breach of an implied warranty, except in situations involving foodstuffs or perhaps dangerous instrumentalities."<sup>56</sup> Since the sulky was not a dangerous instrumentality, the plaintiff's only remedy was a negligence action. This holding was immediately accepted by the federal courts located in Florida. The northern district federal court would not permit the employee of the purchaser of a defective tire to seek relief under breach of implied warranty from the retailer or wholesaler of the tire, since there was not privity of contract.<sup>57</sup>

Realizing that the strict construction of privity in *Carter* would lead to overly harsh results in certain situations, the supreme court in *McBurnette v. Playground Equipment Corp.*<sup>58</sup> brought into the circle of those in privity with the retailer the member of the family for whom the article was purchased. The sole issue was whether the retailer's implied warranty

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53. "Dangerous instrumentalities have been defined as those which by nature are reasonably certain to place life and limb in peril when negligently constructed, such as airplanes, automobiles, guns and the like." *Id.* at 301, quoting from *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916). For a thorough treatment of the dangerous instrumentality exception, see *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920).

54. *Continental Copper & Steel Ind., Inc. v. E.C. "Red" Cornelius, Inc.*, 104 So.2d 40 (Fla. 3d Dist. 1958).

55. 128 So.2d 390 (Fla. 1961).

56. *Id.* at 393.

57. *Odum v. Gulf Tire & Supply Co.*, 196 F. Supp. 35 (N.D. Fla. 1961).

58. 137 So.2d 563 (Fla. 1962).

of fitness for use as playground equipment ran only to the father-purchaser or to his injured minor son for whose use the slide set was bought. The court reasoned that:

common sense requires the presumption that one in the position of the minor plaintiff in this cause is a naturally intended and reasonably contemplated beneficiary of the warranty of fitness for use or merchantability implied by law, and as such he *stands in the shoes of the purchaser* in enforcing the warranty.<sup>59</sup>

Though the court had no difficulty in rationalizing that the implied warranty of the retailer should apply to the intended user of the product, it declined the opportunity in a subsequent case to extend such warranty protection to the mere bystander.<sup>60</sup> The plaintiff-bystander was injured when a rubber disc attachment to a sanding kit purchased by his brother disintegrated and caused particles to fly into his eye.

Whatever inroads have been made in recent years toward liberalizing the availability of the implied warranty action against one not in privity with the injured, the courts of this state have never relaxed the requirement that the injured be a user of the product involved.<sup>61</sup>

Various attempts have been made to define the scope of implied warranty in terms of consumers and "intended users." The third district<sup>62</sup> sanctioned an action maintained by the representatives of victims of a plane crash based upon an implied warranty of fitness of the airplane, assembled by the defendant.<sup>63</sup> The airplane manufacturer's implied warranty ran in favor of the airline passengers, the intended users of the product. In a subsequent case, one whose attorney had relied on false information published in the defendant's desk book concerning the statute of limitations for the client's original action could not avail himself of implied warranty recovery against the publisher, since he was not a user of the product.<sup>64</sup>

The liability under warranty of one who manufactured a defective product has been clearly established.<sup>65</sup> While being served a hot drink in a paper cup manufactured by the defendant, the body of the cup came apart, scalding the plaintiff. The supreme court held that privity of

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59. *Id.* at 566 (emphasis added).

60. *Rodriguez v. Shell's City, Inc.*, 141 So.2d 590 (Fla. 3d Dist. 1962).

61. *Id.* at 591.

62. *King v. Douglas Aircraft Co.*, 159 So.2d 108 (Fla. 3d Dist. 1964).

63. "An assembler of a product, who sells the completed product as its own and thereby represents to the public that it is the manufacturer, is considered the manufacturer of the component part." *Id.* at 110. *See also* *Holman v. Ford Motor Co.*, 239 So.2d 40 (Fla. 1st Dist. 1970).

64. *Engels v. Lawyer's Co-operative Publishing Co.*, 198 So.2d 93 (Fla. 3d Dist. 1967).

65. *Lily-Tulip Cup Corp. v. Bernstein*, 181 So.2d 641 (Fla. 1966). The same result can be reached under Florida Statutes § 672.314(2)(e) (1969). *Cf.* *Gay v. Kelly*, 200 So.2d 568 (Fla. 1st Dist. 1967).

contract was not required to support an action by a consumer against a manufacturer for breach of an implied warranty of a product that was neither a dangerous instrumentality nor a foodstuff.<sup>66</sup> Based upon this apparent demise of privity, the third district allowed the remote ultimate purchaser to recover property damage from the manufacturer of a defective component part (a pontoon that exploded upon being attached to the finished watercraft) even though the plaintiff was not in direct privity with the component manufacturer and the product was not within the classification of food or dangerous instrumentality.<sup>67</sup>

The "intended user" category of possible plaintiffs in an implied warranty action was held to include employees of the purchaser, at least in a suit brought against the manufacturer.<sup>68</sup> The employees who were injured as a result of a defective oil discharge hose manufactured by the defendant were permitted to sue under an implied warranty, provided they were using the hose in the manner intended at the time the accident occurred.<sup>69</sup> The availability of the implied warranty remedy to injured employees of the buyer was echoed by the Fifth Circuit Court of Appeals in *Vandercock & Son, Inc. v. Thorpe*.<sup>70</sup> Applying Florida law, the court arrived at the conclusion that the employee-plaintiff could seek damages from the manufacturer of a defectively designed printing press under a breach of implied warranty,<sup>71</sup> in the absence of privity of contract with the manufacturer.

The breakthrough for the bystander injured by the operation of a defective product occurred in the landmark case of *Toombs v. Fort Pierce Gas Co.*<sup>72</sup> Actions for breach of implied warranty were brought by a customer of the defendant gas company, the customer's family, and the occupants of the adjacent apartment dwelling for injuries caused by the explosion of a gas storage tank supplied and owned by the defendant. The supreme court affirmed the lower court verdict, allowing recovery by

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66. The lower court opinion avoided following *Carter v. Hector Supply Co.*, 128 So.2d 390 (Fla. 1961), by limiting it to its facts; *Carter* involved the retailer, while the instant case only concerned the manufacturer. *Lily Tulip Cup Corp. v. Bernstein*, 177 So.2d 362 (Fla. 3d Dist. 1965).

67. *Power Ski of Florida, Inc. v. Allied Chemical Corp.*, 188 So.2d 13 (Fla. 3d Dist. 1966).

68. *Barfield v. Atlantic Coast Line Railroad Co.*, 197 So.2d 545 (Fla. 2d Dist. 1967).

69. In dictum, the second district stated that "where the requirement of privity of contract was once necessary, it is now discarded in most instances where the cause of action is breach of implied warranty." *Id.* at 546.

70. 395 F.2d 104 (5th Cir. 1968).

71. The Fifth Circuit outlined the quantum of proof necessary in an implied warranty action:

(1) the plaintiff must show that a defect existed in the product before it left the manufacturer; (2) that this defect caused the injury; (3) that he was a person who was reasonably intended to use the product; and (4) that the product was being used in the intended manner.

*Id.* at 105. See *School Supply Service Company v. J.H. Keeney & Co., Inc.*, 410 F.2d 481 (5th Cir. 1969), a later decision by the Fifth Circuit, applying Florida law, regarding liability of a seller for breach of implied warranty of sufficiency of product design.

72. 208 So.2d 615 (Fla. 1968). Noted, 23 U. MIAMI L. REV. 266 (1968).

all the plaintiffs, even the bystanders. Based upon the "humane or reasonable" trend established by *Matthews*, *McBurnette* and *Vandercock*, the court undermined the ruling in *Carter*.<sup>73</sup> "the principles stated in the *Carter* opinion [do not] support the novel premise that the warranty remedy, irrespective of privity, is limited to users."<sup>74</sup> To further dispense with the need for privity in this type of accident, the "dangerous instrumentality exception to the privity requirement," as expressed in earlier cases,<sup>75</sup> was acknowledged as expressly applicable, in view of the dangerous character of the butane gas stored in the tanks.<sup>76</sup>

The inherently dangerous instrumentality qualification of the privity requirement in warranty, when applicable, has . . . been regarded as extending liability to those persons one 'should expect to use the chattel lawfully or to be in the vicinity of its probable use.'<sup>77</sup>

Despite the progressive language in *Toombs*, the effect of the case upon warranty law was subsequently scrutinized and qualified by the second district court of appeal.<sup>78</sup> The plaintiff, a policeman, was dispatched to the Island Club to assist the guests suffering from exposure to chlorine gas, which was escaping from pool containers (the gas and containers were supplied by different defendants, but the gas was inserted into the containers prior to delivery). Prior to offering help, the plaintiff was provided a defective gas mask by the management of the Island Club (the gas mask having been supplied previously to the club by the distributor of the gas). As the plaintiff was removing the damaged gas tank, he inhaled large amounts of gas, causing internal injuries. Relying primarily on *Toombs*, the injured policeman sued the suppliers of both the gas and containers for breach of implied warranty of fitness. In addition, the Island Club and gas supplier were alleged to have breached their implied warranty that the gas mask used by the plaintiff was suitable for use in close proximity to chlorine gas. In disposing of the action against the distributor of the gas containers, the court limited *Toombs* to *owners* or *manufacturers* of inherently dangerous instrumentalities, and it did not apply to transporters, as the defendant distributor was alleged to be. The action against the owner and supplier of the gas containers was dismissed

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73. In de-emphasizing the effect of *Carter* on the law of implied warranty, the court also minimized the holding in *Rodriguez* since *Carter* was cited as controlling precedent in the latter.

74. *Toombs v. Fort Pierce Gas Company*, 208 So.2d 615, 617 (Fla. 1968).

75. The primary case relied on by the court was *Matthews v. Lawnlite Co.*, 88 So.2d 299 (Fla. 1956).

76. It is to be noted that the dangerous instrumentality was the butane gas, not the container; thus, the law of sale applied, not that of bailment (the container was leased, while the gas was sold by defendant distributor or owner).

77. *Toombs v. Fort Pierce Gas Company*, 208 So.2d 615, 617 (Fla. 1968). See FLA. STAT. § 672.318 (1969), which extends warranty protection to members of the purchaser's family or household, to household guests, and to employees of the buyer.

78. *Adair v. The Island Club*, 225 So.2d 541 (Fla. 2d Dist. 1969).

upon the basis that the "dangerous instrumentality qualification of the privity requirement in warranty of the chlorine containers [could] not be applied," since the plaintiff "did not act in reliance on the implied warranty of the defendants."<sup>79</sup> Once the plaintiff became aware of the dangerous condition of the gas containers and proceeded to remove them in the face of apparent hazard, he voided any contractual warranty. The warranty action founded upon the defective gas masks was stricken because of the absence of privity of contract between the plaintiff and the suppliers of the gas mask. Since the gas mask was not an inherently dangerous commodity, the privity exception of *Toombs* was inapplicable, and the warranty rule in *Carter* requiring privity of contract, except in certain cases, controlled. The police officer, therefore, was unable to recover from any of the defendants.

When a nonproduct was involved, *i.e.*, professional services, the second district court would not permit the plaintiff-builder to sue the defendant, an engineering firm, for faulty design and specifications under a warranty theory; the plaintiff's only recourse was an action based on negligence.<sup>80</sup> The warranties of merchantability and fitness for an intended use were held "uniquely applicable to goods" and did not apply to the performance of professional services.<sup>81</sup>

In an attempt to highlight the prior law presented, the following comments may be made. The consumer of a defective, nonconsumable product has a valid claim against the manufacturer and retailer in implied warranty for injuries sustained. The retailer's liability under pre-Code law did not extend beyond the family or household of the purchaser, whereas under the UCC (Florida Statutes § 672.318), the seller's implied warranty "extends to any natural person who is in the family or household of his buyer, who is a guest in his home or who is an employee, servant or agent of his buyer." When the defective product is classifiable as a dangerous instrumentality, the manufacturer can be held liable to those expected to be in the vicinity of its probable use, *i.e.*, bystanders, in addition to consumers and intended users. If the product be defective but not a dangerous instrumentality, the manufacturer's liability is limited to consumers and intended users, which includes employees of the buyer.

#### IV. DEFENSES AVAILABLE TO SELLER OR MANUFACTURER

##### A. *Disclaimer*

Based upon the premise that the written contract is supreme, the Supreme Court of Florida has declared that "there will be no implication of warranty in conflict with the express terms of the agreement."<sup>82</sup> Con-

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79. *Id.* at 546.

80. *Audland Lumber & Builders Supply, Inc. v. D.E. Britt Assoc., Inc.*, 168 So.2d 333 (Fla. 2d Dist. 1964).

81. *Id.* at 335.

82. *Steinhardt v. Consolidated Grocery Co.*, 80 Fla. 531, 535, 86 So. 431, 432 (1920).

sequently, the law allowed the seller or manufacturer to "exclude any implied warranty" with reference to a particular characteristic of the product sold by providing an express warranty in the contract of sale relating to the same matter.<sup>83</sup>

The first inroad on the use of the disclaimer as a defense to warranty occurred in a case involving the sale of seed.<sup>84</sup> Even though the seller incorporated into the contract a clause disclaiming any warranties of description, quality, productiveness, etc., of the seed sold, the supreme court acceded to the right of the buyer to bring an action for breach of implied warranty where the seed purchased was of a different variety than that bargained for. "A disclaimer or nonwarranty clause should [not] be considered a defense . . . in cases where the suits are bottomed upon . . . variance in variety."<sup>85</sup> In a further effort to mitigate the effect of the disclaimer, the first district held that in the sale of a defective tractor "the implied warranty of merchantability is not excluded by an express warranty against defective parts and workmanship which is not inconsistent with the implied warranty."<sup>86</sup> Although in *Rozen v. Chrysler Corp.*,<sup>87</sup> the third district adopted this very concept of inconsistent warranties, the court expressed it in language advantageous to the manufacturer of the defective automobile:

Under Florida law, a written warranty of an automobile manufacturer containing a clause that is expressly in lieu of all other warranties express or implied, limited the liability of the manufacturer to the terms of the warranty and excluded any other warranty express or implied which was in conflict with the written warranty.<sup>88</sup>

The Fifth Circuit subsequently circumvented the general rule stated in *Rozen*, by finding the express warranty in the contract of sale of computers to be *consistent* with an implied warranty of fitness for use.<sup>89</sup> The court could not find any conflict between an express warranty "for the making of adjustments and the replacement of broken and defective parts" and an implied warranty of fitness.<sup>90</sup> However, the same court, one year later, held that an express warranty against faulty workmanship

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83. *Cohen v. Frima Products Co.*, 181 F.2d 324 (5th Cir. 1950).

84. *Corneli Seed Co. v. Ferguson*, 64 So.2d 162 (Fla. 1953).

85. *Id.* at 163-64. However, the disclaimer would be a valid defense where the failure was in quality or productiveness.

86. *Posey v. Pensacola Tractor & Equip. Co.*, 138 So.2d 777, 780 (Fla. 1st Dist. 1962).

87. 142 So.2d 735 (Fla. 3d Dist. 1962).

88. *Id.* at 737.

89. *Sperry Rand Corp. v. Industrial Supply Corp.*, 337 F.2d 363 (5th Cir. 1964).

90. *Id.* at 370. Furthermore, the court added that "a contract clause that all agreements are contained in the writing does not operate to bar recovery on an implied warranty of fitness for use." *Id.* at 371. In a concurring opinion by Justice Tillman Pearson in *Friedman v. Ford Motor Co.*, 179 So.2d 371, 372 (Fla. 3d Dist. 1965) (a *per curiam* opinion), the public policy argument against general disclaimers was presented: "the public will requires that certain warranties of dangerous instrumentalities, such as automobiles, exist, even in the face of a general statement that no warranties are given."



and defective materials that was in lieu of all other warranties, either express or implied, was adequate to prohibit an implied warranty action against the supplier.<sup>91</sup>

The effectiveness of the automobile manufacturer's disclaimer of liability was reduced by the Supreme Court of Florida in *Manheim v. Ford Motor Co.*<sup>92</sup> Discovering his newly purchased car to be a "lemon," the buyer promptly sued the dealer and manufacturer for breach of implied warranty of fitness and suitability for use. The court, in reversing a summary judgment entered in the trial court for the manufacturer on the basis of his disclaimer, stated that "the execution of a written warranty agreement between the manufacturer and dealer" which was in lieu of any and all other warranties did not preclude recovery on the ground of "implied warranty of a product due to its defects and lack of fitness and suitability."<sup>93</sup> Although *Manheim* only discussed the warranty liability of the manufacturer, in *Crown v. Cecil Holland Ford, Inc.*,<sup>94</sup> the third district amplified the law established in *Manheim* so that the selling dealer of the defective new car, as well as the manufacturer, was subject to an implied warranty action, regardless of the existence of a warranty provision expressly in lieu of any other express or implied warranties on the part of the manufacturer or dealer. Nevertheless, the disclaimer of the seller was not yet a dead letter. In apparent disregard of the implications of the *Manheim* and *Crown* decisions, the fourth district held that a disclaimer clause in the contract of sale between the tractor dealer and buyer which recited that the "above warranty is in lieu of all other warranties, statutory or otherwise, express or implied" was competent to nullify implied warranties of merchantability and fitness.<sup>95</sup> The disclaimer in a contract between a dealer and his purchaser was found to be clearly distinguishable from the disclaimer in the contract between the manufacturer and its dealer; therefore, *Manheim*, which dealt only with the latter, was not controlling authority in the instant case, or so the court reasoned.<sup>96</sup>

The effect of the UNIFORM COMMERCIAL CODE, particularly Florida Statutes section 672.316, on exclusionary clauses, was the central issue in *Ford Motor Company v. Pittman*.<sup>97</sup> A newly purchased Ford, on its own initiative, internally and externally combusted, destroying itself by fire.

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91. *American Can Co. v. Horlamus Corp.*, 341 F.2d 730 (5th Cir. 1965).

92. 201 So.2d 440 (Fla. 1967).

93. *Id.* at 442.

94. 207 So.2d 67 (Fla. 3d Dist. 1968). However, the third district later held that where a vessel was sold "as is, where is," there could be no warranties as to the performance capabilities of the vessel. *Sokoloff v. Corinto Steamship Co.*, 225 So.2d 554 (Fla. 3d Dist. 1969). See FLA. STAT. § 672.316(3)(a) (1969).

95. *DeSandolo v. F & C Tractor and Equip. Co.*, 211 So.2d 576 (Fla. 4th Dist. 1968). Though the court was in conflict with its prior decisions, its recognition of the validity of the disclaimer was consistent with the UCC provision, Florida Statutes § 672.316 (1969), which stipulates the conditions when a disclaimer would be effective.

96. *Id.* at 579.

97. 227 So.2d 246 (Fla. 1st Dist. 1969).

The bewildered plaintiff sued the manufacturer of the car for breach of implied warranty of merchantability and fitness and for negligent fabrication of the vehicle. In response to the manufacturer's disclaimer defense, the first district set forth the burden of proof to be placed upon the manufacturer who sought to avail himself of the defense. The manufacturer must show that it is a "seller" within the terms of the Code; "it must prove a contract of the type required by §672.2-201;" and "it must prove that the disclaimer clause was in fact a part of that contract."<sup>98</sup> Since the manufacturer was not the "seller" under the UCC, the disclaimer was invalid under prior case law. However, the major significance of the case may be the subtle forecast of the end of the automobile disclaimer as being unconscionable under Florida Statutes sections 672.302 and 672.316(1) (1969). Is it not unconscionable to enforce a disclaimer of implied warranty on an "expensive, complicated, dangerous instrumentality capable of effecting human injury or death and designed to be purchased and used by persons lacking knowledge in mechanics?"<sup>99</sup> In essence, the issue becomes whether the manufacturer or seller can disclaim a warranty, not of its own making, but implied by law to guarantee the "right, justice, and welfare of the general purchasing and consuming public."<sup>100</sup>

#### B. *Lessor or Bailor*

The liability of the bailor for breach of warranty was first stated by the supreme court in *Williamson v. Phillipoff*.<sup>101</sup>

The bailor, by the bailment, impliedly warrants that the thing hired is of a character and in a condition to be used as contemplated by the contract, and he is liable for damages occasioned by the faults or defects of the article hired.<sup>102</sup>

However, the Fifth Circuit Court of Appeals merged the implied warranty remedy into a negligence action against the lessor or bailor in a case involving personal injuries to the plaintiff when the automobile leased from the defendant went out of control on the road.<sup>103</sup> In disposing of the action, the court ruled that it was immaterial whether the lessor's liability be grounded on implied warranty or negligence "because in any

98. *Id.* at 249. Realizing that the manufacturer of stock items may not qualify as a seller to the ultimate consumer under the UCC and recognizing the Code's acceptance of disclaimers on the part of sellers [Florida Statutes §§ 672.316,7 (1969)], Ford Motor Company ingeniously, but unsuccessfully, attempted to convince the court that it was the actual seller of the car and the dealer was only its agent. This argument was quickly discarded by the court since the manufacturer could not qualify as a seller under Florida Statutes § 672.103 (1969).

99. *Ford Motor Co. v. Pittman*, 227 So.2d 246, 250 (Fla. 1st Dist. 1969).

100. *Blanton v. Cudahy Packing Co.*, 154 Fla. 872, 876, 19 So.2d 313, 316 (1944).

101. 66 Fla. 549, 64 So.2d 269 (1914).

102. *Id.* at 554, 64 So. at 271.

103. *Clarkson v. Hertz Corp.*, 266 F.2d 948 (5th Cir. 1959). The case was on appeal from Florida's Southern District Federal Court.

event, in the absence of any contract cases establishing any higher standard of care, the duty on the party to be charged remains one of due care,<sup>104</sup> and the defendant met that duty. Subsequently, the third district, citing this Fifth Circuit opinion as authority, unequivocally restricted the injured bailee-lessee to the lone theory of negligence in a suit against the owner-operator of malfunctioning washing machines.<sup>105</sup>

Under warranty theory, there is no absolute liability on a bailor or lessor of personal property who rents or permits its use by another. The liability of a manufacturer, under the doctrine of implied warranty, has not been extended to one who merely rents or bails personal property [which it has purchased from a manufacturer] to another. The extent of the obligation of the bailor is a duty on his part to exercise due care to furnish an article in a reasonably safe condition.<sup>106</sup>

In direct conflict with the last two cases stands a recent supreme court decision,<sup>107</sup> which reaffirmed the position adopted a half-century before in *Williamson*. Although the court realized that a warranty of fitness would not arise in all lease transactions, the injured bailee for hire did have a valid cause of action against the bailor for breach of implied warranty of suitability of the chattel for the bailee's known and intended use of it if the following condition was satisfied.

In the absence of an agreement to the contrary, where the lessor has reason to know any particular purpose for which the leased chattel is required and that the lessee is relying upon the lessor's skill or judgment to select or furnish a suitable chattel, there is an implied warranty that the chattel shall be fit for such purpose.<sup>108</sup>

### C. *Agent for a Disclosed Principal*

The purchaser of a defective automobile has a cause of action for breach of implied warranty against the manufacturer, but not against the dealer who is in fact the local authorized agent of the manufacturer: "An agent contracting on behalf of a disclosed principal [Ford Motor Company] and within the scope of his authority as agent, cannot be held liable for breach of implied warranty."<sup>109</sup> This rule was reaffirmed in a later decision by the same first district court where it was held that a purchaser who dealt with a disclosed principal could not hold the dealer-

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104. *Id.* at 950.

105. *Brookshire v. Florida Bendix Co.*, 153 So.2d 55 (Fla. 3d Dist. 1963), *cert. denied*, 163 So.2d 881 (Fla. 1964).

106. *Id.* at 58.

107. *W. E. Johnson v. United Airlines, Inc.*, 238 So.2d 98 (Fla. 1970).

108. *Id.* at 100.

109. *Smith v. Platt Motors, Inc.*, 137 So.2d 239, 242 (Fla. 1st Dist. 1962). The result might have been different if the complaint had alleged additional work done by the dealer in assembling and preparing the car for delivery to the plaintiff.

agent liable for breach of implied warranty.<sup>110</sup> However, the more recent cases have refused to accept the contention that an automobile dealer is an agent for a disclosed principal, thus subjecting the dealer to warranty liability even though a different result might accrue under the law of agency.<sup>111</sup>

#### D. *Second-Hand Goods*

Originally, Florida's Supreme Court acknowledged the then general rule that there was no implied warranty as to the condition, adaptation, fitness, or suitability of a second-hand article.<sup>112</sup> The only recourse open to the injured buyer of a defective used product was a cause of action in negligence for the seller's failure to properly inspect and warn of any inherent dangers due to a latent defect.<sup>113</sup> Case law, however, beginning with *Enix v. Diamond T Sales & Service Co.*,<sup>114</sup> gradually became sympathetic to the consumer of the second-hand good. The second district found the earlier allusion to implied warranties of second-hand goods by the supreme court to be "mere obiter dicta," since the particular case involved only express warranties on second-hand articles; consequently, there *may* be an implied warranty on the sale of a second-hand product.<sup>115</sup> In a subsequent case,<sup>116</sup> the second district qualified its previous opinion in *Enix*.

With respect to second-hand articles of personal property, generally the rule is that there is no *implied* warranty as to the condition, fitness or quality of the article. . . . To support liability upon the contractual warranty the purchaser must have relied thereon, and in addition thereto his reliance must have been justified under the circumstances.<sup>117</sup>

Thus, the plaintiff had no cause of action in implied warranty against the seller of a used boat in need of repairs because he was not justified in relying on the seller's statement that the nine-year-old yacht was in perfect shape. Faced with the adoption of inconsistent positions concerning implied warranties of second-hand goods, the second district court of appeal attempted to rectify the dilemma in a subsequent decision.<sup>118</sup> The plaintiff, an employee of a service station, was injured by a defective wheel rim while repairing a tire on a used truck recently purchased from the

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110. *Hardee v. Gordon Thompson Chevrolet, Inc.*, 154 So.2d 174 (Fla. 1st Dist. 1963).

111. *See Ford Motor Co. v. Pittman*, 227 So.2d 246 (Fla. 1st Dist. 1969).

112. *McDonald v. Sanders*, 103 Fla. 93, 137 So. 122 (1931).

113. *Walker v. National Gun Traders, Inc.*, 116 So.2d 792 (Fla. 1960).

114. 188 So.2d 48 (Fla. 2d Dist. 1966).

115. *Id.* at 51. By distinguishing *McDonald v. Sanders*, 103 Fla. 93, 137 So. 122 (1931), the second district reached its desired result.

116. *Keating v. DeArment*, 193 So.2d 694 (Fla. 2d Dist. 1967).

117. *Id.* at 696. Reliance is not a necessary element to establish express warranty liability under the UCC, so the case might have gone the other way if decided under Florida Statutes § 672.313 (1969).

118. *Brown v. Hall*, 221 So.2d 454 (Fla. 2d Dist. 1969).

defendant-seller. The suit against the seller was based on negligence and breach of implied warranty. In determining whether a warranty action was proper, the court stated that although the action was brought prior to the effective date of the UCC,<sup>119</sup>

[w]hen the seller knew the purpose for which the buyer purchased the truck and knew the buyer was relying on his skill and judgment in the selection of a second-hand truck, an implied warranty arose as a matter of law that the truck so sold was in fact fit and in condition for the purpose intended.<sup>120</sup>

The implied warranty remedy was unavailable to the particular plaintiff due to the lack of privity of contract with the seller. The implied warranty "extended no further than the purchaser," thus excluding the "employee of a third person independently contracting with a purchaser to perform repair service on the article in question."<sup>121</sup>

### E. *Contributory Negligence*

Although warranties are governed by contract law,<sup>122</sup> the issue of whether contributory negligence is a defense to breach of warranty has not been resolved in Florida, as evidenced by a recent third district opinion.<sup>123</sup>

## V. PROCEDURE

### A. *Statute of Limitations*

In any statute of limitations inquiry, two questions must be asked: what is the applicable statute; and when does it commence to run? The supreme court recently answered both queries.<sup>124</sup> In an implied warranty action for personal injuries caused by a defective refrigerator door, the plaintiff brought suit one year after the accident and five years after the original purchase. The applicable statute, according to the court, was Florida Statutes section 95.11(5)(e).<sup>125</sup> The three year period under the statute began to run "from the time the plaintiff first discovered, or rea-

119. See FLA. STAT. § 672.315 (1969).

120. *Brown v. Hall*, 221 So.2d 454, 458 (Fla. 2d Dist. 1969). Essentially, the court followed their previous opinion in *Enix* and overruled any of their language in *Keating* that deviated from the rule established in *Enix*.

121. *Id.*

122. "Warranties, as relates to sales, are strictly contractual in nature. This is so, whether the warranty is express or implied." *Brown v. Hall*, 221 So.2d 454, 458 (Fla. 2d Dist. 1969).

123. *Sears, Roebuck & Co., Inc. v. Davis*, 234 So.2d 695 (Fla. 3d Dist. 1970).

124. *Creveston v. General Motors Corp.*, 225 So.2d 331 (Fla. 1969).

125. The implied warranty action was classified as "an action upon a contract, obligation or liability not founded upon an instrument in writing." FLA. STAT. § 95.11(5)(e) (1969). The Fifth Circuit found this same statute to be applicable to implied warranty actions in *Roger Lee, Inc. v. Trend Mills, Inc.*, 410 F.2d 928 (5th Cir. 1969). See also *Hendon v. Stanley Home Products, Inc.*, 225 So.2d 553 (Fla. 3d Dist. 1969).

sonably should have discovered the defect constituting the breach of warranty."<sup>126</sup> Therefore, the plaintiff's suit in warranty was timely.

Displaying a realistic attitude toward the nature of the warranty action lodged against the manufacturer by an injured consumer, the second district court of appeal refuted the alleged applicability of the three year statute of limitations under Florida Statutes section 95.11(5)(e) to such an action, since that particular section dealt with purely contractual remedies.<sup>127</sup>

When a manufacturer cannot absolve himself of liability in implied warranty through contract; when no privity is required for the ultimate consumer or user of the manufacturer's product to bring suit against him; and when the provision of the Uniform Commercial Code pertaining to exclusion or modification of warranties is held to be inapplicable to such suits, it would take a large measure of imagination to find such an action to be contractual in nature.<sup>128</sup>

Unable to label the cause of action based on implied warranty by a consumer against a manufacturer as *ex contractu* or *ex delicto*, the court applied the four year statute of limitations stipulated in Florida Statutes section 95.11(4), which governs "any action for relief not specifically provided for in this chapter." The extra year of eligibility saved the plaintiff's suit. This four year statute of limitations has been extended to implied warranty actions brought against the seller under the UCC,<sup>129</sup> except where the contract of sale specifies a shorter period. However, a disadvantage of the UCC is that the four year limit commences from the date when tender of delivery is made, not from the date of the discovery of the defect.

#### B. *Wrongful Death Actions*

In *Whiteley v. Webb's City*,<sup>130</sup> the Supreme Court of Florida took the position that the Wrongful Death Statute (Florida Statutes section 768) was only designed to apply to actions arising out of torts. Thus, the implied warranty which arose out of contract was not an appropriate basis for an action under the statute. The Florida Legislature responded in 1953 by amending Florida Statutes section 768.01 to "include actions *ex contractu*." The effect of the amendment was "presumably to encompass a death action based on a cause of action for breach of implied warranty. . . ."<sup>131</sup>

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126. *Creviston v. General Motors Corp.*, 225 So.2d 331, 333 (Fla. 1969).

127. *Barfield v. United States Rubber Co.*, 234 So.2d 374 (Fla. 2d Dist. 1970).

128. *Id.* at 377.

129. FLA. STAT. § 672.725(1) (1969).

130. 55 So.2d 730 (Fla. 1951).

131. *Moragne v. State Marine Lines, Inc.*, 211 So.2d 161 (Fla. 1968), *rev'd on other grounds*, 398 U.S. 375 (1970). See also *Public Admin. of New York County v. Curtiss-Wright Corp.*, 224 F. Supp. 236 (S.D.N.Y. 1963), wherein the court applied Florida law.

## VI. MOVEMENT TOWARD STRICT LIABILITY IN TORT

A. *Background*

The strict liability in tort doctrine is divided into two schools of thought—the *Greenman*<sup>132</sup> approach and the *Restatement*<sup>133</sup> rule. The former concept was formulated by Justice Traynor in an attempt to dissipate the confusion that surrounded the warranty action—was it tort or contract? Choosing to label the action as tort, the following rule was adopted:

[a] manufacturer is strictly liable in tort when an article he places on the market, knowing it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.<sup>134</sup>

The strict tort liability under *Greenman* was extended in California beyond manufacturers to retailers,<sup>135</sup> lessors,<sup>136</sup> and bailors<sup>137</sup> of defective products, and the scope of protection was broadened to include injured bystanders,<sup>138</sup> as well as users or consumers. Although difficult to accurately pinpoint the states that have adopted the *Greenman* rule, it is possible to designate those jurisdictions that have either adopted it verbatim or accepted a modified version with a similar result.<sup>139</sup>

The *Restatement* rule on strict liability states that:

One who sells<sup>140</sup> any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is

132. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (hereinafter cited as *Greenman*).

133. RESTATEMENT (SECOND) OF TORTS § 402A (1965) (hereinafter cited as RESTATEMENT).

134. *Greenman*, 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963).

135. See *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

136. See *McClaffin v. Bayshore Equipment Rental Co.*, 274 A.C.A. 487, 79 Cal. Rptr. 337 (1969); see also *Garcia v. Halsett*, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970).

137. *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970).

138. *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969). The bystander could recover damages from both the *retailer* and the *manufacturer* of the defective automobile in *Elmore*. See also *Priessman v. Ford Motor Co.*, 1 Cal. App. 3d 845, 82 Cal. Rptr. 108 (1969).

139. *Ginnis v. Mapes Hotel Corp.*, 470 P.2d 135 (Nev. 1970) (manufacturer); *Suvada v. White*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965) (manufacturer); *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965) (manufacturer) [*Newark v. Gimbel's, Inc.*, 54 N.J. 585, 258 A.2d 769 (1969) (retailer); *Cintrone v. Hertz Truck Leasing, Inc.*, 45 N.J. 434, 212 A.2d 769 (1965) (bailor)]; *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 240 N.Y.S.2d 594, 191 N.E.2d 81 (1963) (manufacturer and retailer).

140. RESTATEMENT § 402A, comment f defines the seller to be either a manufacturer, wholesale or retail dealer, distributor, or operator of a restaurant.

expected to and does reach the user or consumer without substantial change in the condition in which it is sold.<sup>141</sup>

Liability is based purely on tort;<sup>142</sup> however, whether the rule should be applied to nonusers and nonconsumers has not been determined.<sup>143</sup> The *Restatement* principle has found acceptance in a significant number of states: Arizona;<sup>144</sup> Connecticut;<sup>145</sup> Hawaii;<sup>146</sup> Indiana;<sup>147</sup> Minnesota;<sup>148</sup> Mississippi;<sup>149</sup> Missouri;<sup>150</sup> New Hampshire;<sup>151</sup> Pennsylvania;<sup>152</sup> Texas;<sup>153</sup> and Wisconsin.<sup>154</sup>

Although the two approaches are distinguishable on minor points,<sup>155</sup> they yield basically the same end product, using similar means. Under both concepts, the supplier of the defective article that produces *personal injury* (or property damage under the *Restatement*) is rendered strictly liable in tort. The plaintiff, in order to recover, must prove that 1) he was injured by the defendant's product, 2) the injury occurred because the product was defective and unreasonably dangerous for use, 3) the product was defective when it left the hands of the defendant, and 4) it was reasonably foreseeable by the defendant that the plaintiff would use the product in the particular manner intended and suffer injury from such use if the product were defective. However, it should be noted that the *Restatement* rule may be more restrictive than implied warranty in the following aspects: 1) the *Restatement* requires that the product be both defective and unreasonably dangerous, while implied warranty demands only a defective good where the action is brought by one in privity of contract with the defendant; 2) the *Restatement* leaves open the question of liability to bystanders, while the *Toombs* case on its particular facts extended warranty liability to an injured bystander, and even negligence

141. RESTATEMENT § 402A(1).

142. *Id.* at comment m.

143. *Id.* at comment o.

144. *Wagner v. Coronet Hotel*, 10 Ariz. App. 296, 458 P.2d 390 (1969) (manufacturer).

145. *Garthwait v. Burgio*, 153 Conn. 284, 216 A.2d 189 (1965) (manufacturer).

146. *Stewart v. Budget Rent-a-Car Corp.*, 52 Hawaii Adv. 4858, 470 P.2d 240 (1970) (sellers and lessors).

147. *Cornette v. Searjeant Metal Products, Inc.*, 258 N.E.2d 652 (Ind. Ct. App. 1970).

148. *McCormack v. Hanksraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967) (manufacturer).

149. *State Stove Manufacturing Co. v. Hodges*, 189 So.2d 113 (Miss. 1966) (manufacturer).

150. *Keener v. Dayton Electric Manufacturing Co.*, 445 S.W.2d 362 (Mo. 1969).

151. *Buttrick v. Arthur Lessard & Sons, Inc.*, 260 A.2d 111 (N.H. 1968) (retailer).

152. *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966) (manufacturer or distributor).

153. *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967) (manufacturer or distributor).

154. *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967) (manufacturer and seller).

155. *E.g.*, bystanders are protected under *Greenman*, as it has been later interpreted (see note 138 *supra*), but not under the RESTATEMENT (see note 143 *supra*). However, certain states that have embraced RESTATEMENT 402A have allowed bystanders to recover. See *Darryl v. Ford Motor Co.*, 440 S.W.2d 630 (Tex. 1969); *Mitchell v. Miller*, 26 Conn. Sup. 142, 214 A.2d 694 (1965).



law has brought the bystander within the scope of recovery; and 3) the defenses to liability under the *Restatement* include assumption of the risk (comment n) and use of the product by the plaintiff in a way not intended by the manufacturer.

### B. *The Answer to the Privity Dilemma*

The warranty law in Florida is fraught with legal inconsistencies and misapplications as a result of the judiciary's attempt to provide justice to the injured consumer, user, employee, bystander, etc., while still maintaining the age-old contract principle of privity. The incongruities which have permeated the warranty area become self-evident upon an analysis of the judicial decisions which have contributed to the privity dilemma.

In implied warranty actions brought against the manufacturer of a defective and injurious product, the immediate purchaser as well as the remote ultimate purchaser, have been ruled outside the scope of the manufacturer's privity circle; however, the courts merely avoided the obstacle of privity by rendering it unnecessary for recovery in these particular fact patterns.<sup>156</sup> In effect, a third exception to privity was added to the two general exceptions—foodstuffs and dangerous instrumentalities.<sup>157</sup> A fourth exception to privity arose where the injured plaintiff was a consumer or user of the manufacturer's defective goods: even though the product was neither a foodstuff nor a dangerous instrumentality and the plaintiff was not a party to a contract with the manufacturer, recovery was permitted by matter-of-factly dispensing with the requirement of privity.<sup>158</sup> Although employees of the purchaser of an injurious product are even further removed from privity with the manufacturer than are customers or users, they may utilize the implied warranty action to seek damages; the rationale being found in the general assertion that privity is no longer an essential requisite in imposing warranty liability on the manufacturer.<sup>159</sup> Thus, a fifth exception to privity obtains where the employee and the manufacturer are opposing parties.

Nevertheless, these *ex post facto* inroads on the privity defense of the manufacturer are absent when the defendant is the retailer of the defective goods. Evidently, the courts found a justification for differentiating between the two. Only the purchaser or his family or the user can maintain an implied warranty action against the retailer, except where the defective goods are foodstuffs or dangerous instrumentalities.<sup>160</sup> The

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156. *Continental Copper & Steel Industries, Inc. v. E.C. "Red" Cornelius, Inc.*, 104 So.2d 40 (Fla. 3d Dist. 1958) (immediate purchaser); *Power Ski of Florida, Inc. v. Allied Chemical Corp.*, 188 So.2d 13 (Fla. 3d Dist. 1966) (remote ultimate purchaser).

157. *Carter v. Hector Supply Co.*, 128 So.2d 390 (Fla. 1961).

158. *Lily-Tulip Cup Corp. v. Bernstein*, 181 So.2d 641 (Fla. 1966); *Engel v. Lawyers Co-operative Publishing Co.*, 198 So.2d 93 (Fla. 3d Dist. 1967).

159. *Vandercock & Son, Inc. v. Thorpe*, 395 F.2d 104 (5th Cir. 1968); *Barfield v. Atlantic Coast Line Railroad Co.*, 197 So.2d 545 (Fla. 2d Dist. 1967).

160. *McBurnette v. Playground Equipment Corp.*, 137 So.2d 563 (Fla. 1962); *Carter*

extension of seller liability to the family of the buyer was achieved by the expedient of viewing the family member as standing in the shoes of the purchaser, thus bringing him within the purchaser's contractual relationship with the seller.<sup>161</sup> However, the same logic did not obtain in the case of an employee of the purchaser,<sup>162</sup> despite the reasonable conclusion that such employee could certainly be expected to be the intended beneficiary of the warranty provided his employer. Consistent with the negating of the seller's responsibility to the employee of the buyer, the injured employee of an independent contractor doing business with the purchaser of a faulty second-hand good was denied a cause of action for breach of implied warranty against the dealer of the second-hand product.<sup>163</sup> The innocent bystander who is injured by a defective product and who is admittedly devoid of any contractual relationship with either the retailer or manufacturer is without recourse to the warranty remedy unless the product be a foodstuff or dangerous instrumentality.<sup>164</sup>

The dangerous instrumentality exception to the privity requirement, unfortunately, is neither clearly defined nor readily comprehensible. The fact that a product, which is neither fit for use nor merchantable, causes injury to a person should automatically invoke the characterization of being dangerous. However, the judiciary has envisioned a difference between commodities that inflict harm, labeling some as dangerous while others as inherently nondangerous. Consequently, in practical application, butane gas is a dangerous instrumentality and the injured bystander can recover against the owner or manufacturer;<sup>165</sup> conversely, a rubber disk attachment to a sanding kit, which, upon disintegration, causes serious injury to the bystander's eye, is not a dangerous commodity and the retailer is protected from liability by the shield of privity.<sup>166</sup> Similarly, although chlorine gas is termed a dangerous commodity, defective gas masks which permit the deleterious gas to be inhaled by the user-bystander are not dangerous instrumentalities so as to render the owner or distributor of the masks liable for breach of implied warranty.<sup>167</sup> The dangerous instrumentality qualification of the privity requirement in warranty is as impractical as the very concept of privity of contract in those factual situations where the personal injury plaintiff is outside the circle of privity and recovery must be based on a judicially-created exception to guarantee justice. Does the end justify the means?

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v. Hector Supply Co., 128 So.2d 390 (Fla. 1961); *Rodriguez v. Shell's City, Inc.*, 141 So.2d 590 (Fla. 3d Dist. 1962).

161. *McBurnette v. Playground Equipment Corp.*, 137 So.2d 563 (Fla. 1962).

162. *Odum v. Gulf Tire & Supply Co.*, 196 F. Supp. 35 (N.D. Fla. 1961); *Carter v. Hector Supply Co.*, 128 So.2d 390 (Fla. 1961). *But see* FLA. STAT. § 672.318 (1969).

163. *Brown v. Hall*, 221 So.2d 454 (Fla. 2d Dist. 1969).

164. *Toombs v. Fort Pierce Gas Co.*, 208 So.2d 615 (Fla. 1968); *cf. Rodriguez v. Shell's City, Inc.*, 141 So.2d 590 (Fla. 3d Dist. 1962).

165. *Toombs v. Fort Pierce Gas Co.*, 208 So.2d 615 (Fla. 1968).

166. *Rodriguez v. Shell's City, Inc.*, 141 So.2d 590 (Fla. 3d Dist. 1962).

167. *Adair v. The Island Club*, 225 So.2d 541 (Fla. 2d Dist. 1969).

Instead of expanding privity of contract beyond its natural boundaries or abandoning privity under a proliferation of tenuous exceptions, it is urged that the Florida judiciary discard the overburdened and ill-adapted warranty action based on contract as the sole remedy for the noncontractual plaintiff injured by a defective product.

No one doubts that, in the absence of privity, the liability must be in tort and not in contract. There is no need to borrow a concept from the contract law of sales; and it is only by some violent pounding and twisting that 'warranty' can be made to serve the purpose at all. It would be far simpler if it were simply said that there is strict liability in tort, declared outright, without an illusory contract mask.<sup>168</sup>

Strict liability in tort is the alternative open to the courts to disperse the contusion surrounding the implied warranty action and, in particular, the necessity of privity of contract. This is not an endorsement for the blanket substitution of strict liability in tort in place of implied warranty nor is the demise of implied warranty called for. However, it is suggested that in those circumstances where the plaintiff is injured by a defective product, but is devoid of any contractual relationship with the defendant (manufacturer, retailer, owner, distributor, lessor, bailor, etc.), then the proper vehicle for recovery is strict liability in tort, which rejects privity of contract in favor of the test that the plaintiff be a reasonably foreseeable victim of the defective product. Though the third district court of appeal in *Royal v. Black and Decker Mfg. Co.*<sup>169</sup> tacitly approved the strict liability theory expressed in both *Greenman* and the *Restatement*, it did not unconditionally adopt such theory since, in the absence of a defect in the injurious product, there could be no liability of the manufacturer under any remedy, whether it be negligence, warranty, or strict liability. *Toombs v. Fort Pierce Gas Co.*<sup>170</sup> applied the strict tort liability concept, but labeled it under the misnomer of the "dangerous instrumentality exception in implied warranty." The stage has been set for the curtain to rise on strict liability in tort and to forever relegate implied warranty to its proper contractual setting.

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168. PROSSER, LAW OF TORTS § 97, at 681 (3d ed. 1964).

169. 205 So.2d 307 (Fla. 3d Dist. 1967).

170. 208 So.2d 615 (Fla. 1968).