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Implied Warranty -- Sales by Retailers -- Third Party Beneficiary

John B. White

facts and circumstances that have occurred since the rendition of the original decree.

If a case similar to the present one arises in the future, there appears to be a sufficient conflict in the cases discussed herein to enable the Florida Supreme Court to grant a writ of certiorari.[30] Thus, a uniform rule as to recognition of foreign custody decrees could be established throughout the state.

MICHAEL J. OSMAN

IMPLIED WARRANTY—SALES BY RETAILERS—THIRD PARTY BENEFICIARY

The plaintiffs, a father and his minor son, brought suit against the retailer and manufacturer of playground equipment for injuries sustained by the minor son when his finger was amputated while using a piece of their equipment. The father had made the purchase from the retailer. Both plaintiffs appealed from the decision dismissing the suit against the retailer for breach of implied warranty of merchantability. On certiorari to the Florida Supreme Court, *held*, reversed: an action for breach of implied warranty may be maintained against the retailer by the father, who was in privity of contract with the retailer, and by the minor son, who was the "intended beneficiary" under the contract of sale of goods intended for family or household use. *McBurnette v. Playground Equip. Corp.*, 137 So.2d 563 (Fla. 1962).

The early common-law courts developed the rule that an action for breach of an express or implied warranty of the fitness of goods would not lie in the absence of a contractual relationship between the parties at suit.[1] The general theory was that to permit suits by unknown purchasers or users would retard technological progress and development of useful products.[2] The rule was re-enforced from a practical pleading point in that a warranty

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30. FLA. CONST. art. V, § 4(2) states: "The supreme court may review by certiorari any decision of a district court of appeal . . . that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law . . . ."

1. Prior to the 1800's the courts applied the maxim "caveat emptor" in the absence of express warranty or fraud. Kurriss v. Conrad & Co., 312 Mass. 670, 46 N.E.2d 12 (1942). For a history of regulation of products and their sale in the market place during the middle ages, see Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931); Murray, *Implied Warranty Against Latent Defects: An Historical Comparative Law Study*, INS. L.J. 547 (1961).

2. "The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty." Winterbottom v. Wright, 10 M. & W. 109, 115, 152 Eng. Rep. 402, 405 (Ex. 1842).

action, although originally in tort, was generally enforced in assumpsit,[3] which required the complaining party to be in privity of contract with the warrantor.[4]

The majority of jurisdictions in this country adhere to the contractual development of warranty.[5] The apparent tort characteristics of the warranty action generally have not been recognized as sufficient to form the basis of an action in tort. The vast majority of American courts continue to require the privity element in order to recover for personal injuries on the theory of an implied warranty of fitness of use[6] or merchantability[7] in the

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3. Stuart v. Wilkins, 1 Doug. 18, 99 Eng. Rep. 15 (K.B. 1778) is generally cited as the first reported case holding that an action for breach of warranty could lie in contract, as well as in tort. "[O]riginally warranty was an action on the case for breach of an assumed duty—a tort action in the nature of deceit, but in which the intent to deceive did not have to be alleged. A historical accident subsequently brought warranty actions into the orbit of assumpsit and this characterization has resulted in the formalism overriding the underlying meaning of the obligations involved." FRANK, *A View of the Law of Products Liability*, in LEGAL ESSAYS OF THE PLAINTIFF'S ADVOCATE 391, 396 (1961).

4. "Historically, it appears that the remedy on implied warranty by a consumer against a manufacturer or seller for injuries suffered from a defective or dangerous product did not originate as a contractual concept, but that the original implied warranty action was tortious in nature." Chapman v. Brown, 198 F. Supp. 78, 103 (D. Hawaii 1961). The tort action was based upon a breach of an assumed duty. The wrong was considered to be the misrepresentation of a fact which the seller purports to know. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943). See generally Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888); Prosser, *The Assault Upon The Citadel (Strict Liability To The Consumer)*, 69 YALE L.J. 1099, 1124 (1959-60).

5. Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64 (1921); Crystal Coca-Cola Bottling Co. v. Cathey, 83 Ariz. 163, 317 P.2d 1094 (1957); Collum v. Pope & Talbot, Inc., 135 Cal. App. 653, 288 P.2d 75 (1955); Tralli v. Triple X Stores, Inc., 19 Conn. Supp. 293, 112 A.2d 507 (1954); Barni v. Kutner, 45 Del. 550, 76 A.2d 801 (1950); Simmons Co. v. Hardin, 75 Ga. App. 420, 43 S.E.2d 553 (1947); Abercrombie v. Union Portland Cement Co., 35 Idaho 231, 205 Pac. 1118 (1922); Fulton Bank v. Mathers, 183 Iowa 226, 166 N.W. 1050 (1918); Caplinger v. Werner, 311 S.W.2d 201 (Ky. 1958); Strother v. Villere Coal Co., 15 So.2d 383 (La. App. 1943); Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186 (1925); Vaccarino v. Cozzubo, 181 Md. 614, 31 A.2d 316 (1943); Kennedy v. Brockelman Bros., 334 Mass. 225, 134 N.E.2d 747 (1956); Smith v. Ford Motor Co., 327 S.W.2d 535 (Mo. Ct. App. 1959); Smith v. Salem Coca-Cola Bottling Co., 92 N.H. 97, 25 A.2d 125 (1942); Marler v. Pearlman's R.R. Salvage Co., 230 N.C. 121, 52 S.E.2d 3 (1949); Wood v. Advance Rumely Thresher Co., 60 N.D. 384, 234 N.W. 517 (1931); Wood v. General Elec. Co., 159 Ohio St. 273, 112 N.E.2d 8 (1953); Miller v. Hand Ford Sales, Inc., 216 Ore. 567, 340 P.2d 181 (1959); Lombardi v. California Packing Sales Co., 83 R.I. 51, 112 A.2d 701 (1955); Odom v. Ford Motor Co., 230 S.C. 320, 95 S.E.2d 601 (1956); Whitethorn v. Nash-Finch Co., 67 S.D. 465, 293 N.W. 859 (1940); Brown v. Howard, 285 S.W.2d 752 (Tex. Civ. App. 1955); H.M. Gleason & Co. v. International Harvester Co., 197 Va. 255, 88 S.E.2d 904 (1955); Williams v. S.H. Kress & Co., 48 Wash. 2d 88, 291 P.2d 662 (1955); Burgess v. Sanitary Meat Mkt., 121 W. Va. 605, 5 S.E.2d 785 (1939); Cohan v. Associated Fur Farms, Inc., 261 Wis. 584, 53 N.W.2d 788 (1952). See Burgess v. Sanitary Meat Mkt., 121 W. Va. 605, 611, 6 S.E.2d 254 (1940) (concurring opinion).

6. "[W]here a person contracts to supply an article in which he deals for a particular purpose, knowing the purpose for which he supplies it 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,' as it is called, that the article is fit for the purpose to which it is to be applied." Berger v. E. Berger & Co., 76 Fla. 503, 508, 80 So. 296, 299 (1918).

7. Merchantability is defined as fair, average quality. In Taylor v. Jacobson, 336

sale of goods or chattels.[8]

The gradual elimination of the privity requirement in negligence actions[9] has influenced a minority of United States courts to allow recovery for breach of implied warranty by recognizing exceptions to or abandoning the privity requirement. The earlier cases were for breach of an implied warranty of wholesomeness and fitness for human consumption in the preparation of foods[10] and drugs.[11] Later decisions drew an analogy to the food cases and permitted recovery in animal food cases, apparently on the bold theory that food is food.[12] From the food cases, another exception was developed as to articles intended for external bodily use.[13] More recently, several major cases have permitted recovery on implied warranty in the absence of privity for personal injuries or property damages from an exploding grinding wheel,[14]

Mass. 709, 716, 147 N.E.2d 770, 775 (1958), the court described the warranty of a retailer as "no wider than that they are reasonably suitable for the ordinary uses for which goods of that description are sold when used in accordance with reasonable, intelligible and adequate warnings and instructions known, or which should have been known, to the purchaser."

8. Courts tend to merge both warranties since the objective is the same in either case. McBurnette v. Playground Equip. Corp., 137 So.2d 563 (Fla. 1962); Smith v. Burdine's Inc., 144 Fla. 500, 198 So. 223 (1940); Brennan v. Shepherd Park Pharmacy, 138 A.2d 494 (Wash., D.C. Munic. Ct. 1958).

9. The early common-law decisions refused to permit actions against manufacturers for negligence in the construction, design or inspection of the product unless the parties were in privity of contract. *E.g.*, Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842). A major exception was recognized to permit recovery by one not in privity of contract if the product was from its nature inherently dangerous. *E.g.*, Thomas v. Winchester, 6 N.Y. 397 (1852) (a sale of poison in a mislabeled bottle). This exception was later broadened to include products which if defectively made could be very dangerous and would probably be used by persons other than the first purchaser without making any tests or inspection. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). The landmark *MacPherson* case has been extended from personal injuries suffered by the purchaser: to property damage, Todd Shipyards Corp. v. United States, 69 F. Supp. 609 (D. Me. 1947); to protection of purchaser's employees, Rosebrock v. General Elec. Co., 236 N.Y. 227, 140 N.E. 571 (1923); to members of purchaser's family, Baker v. Sears Roebuck & Co., 16 F. Supp. 925 (S.D. Cal. 1936); to subsequent purchasers, Quackenbush v. Ford Motor Co., 167 App. Div. 433, 153 N.Y. Supp. 131 (1915); to other users of the chattel, Reed & Barton Corp. v. Maas, 73 F.2d 395 (1st Cir. 1934); to casual bystanders, McLeod v. Linde Air Prods. Co., 318 Mo. 397, 1 S.W.2d 122 (1927). Prosser reports that 48 states have adopted the *MacPherson* doctrine. Prosser, *The Assault Upon The Citadel (Strict Liability To The Consumer)*, 69 YALE L.J. 1099, 1102 (1959-60).

10. For a resumé of states either accepting or rejecting the privity exception for foods, see, Prosser, *The Assault Upon The Citadel (Strict Liability To The Consumer)*, 69 YALE L.J. 1099, 1107-10 (1959-60).

11. Gottsdanker v. Cutter Laboratories, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960), 79 A.L.R.2d 290 (1961); Davis v. Radford, 233 N.C. 283, 63 S.E.2d 822 (1951).

12. Midwest Game Co. v. M.F.A. Milling Co., 320 S.W.2d 547 (Mo. 1959) (fish food); McAfee v. Cargill, Inc., 121 F. Supp. 5 (S.D. Cal. 1954) (dog food).

13. Graham v. Bottenfield's, Inc., 176 Kan. 68, 269 P.2d 413 (1954) (hair dye); Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953), 37 A.L.R.2d 698 (1954) (clothing); Krupar v. Procter & Gamble Co., 113 N.E.2d 605 (Ohio App. 1953), *rev'd on other grounds*, 160 Ohio St. 489, 117 N.E.2d 7 (1954) (soap).

14. Di Vello v. Gardner Mach. Co., 46 Ohio Op. 161, 102 N.E.2d 289 (C.P. 1951).

exploding cinder blocks,[15] defective electrical cable,[16] a defective automobile tire,[17] a defective truck,[18] and an inflammable hula skirt.[19] One state has taken the lead by permitting a noncontractual party to enforce an implied warranty even when the seller had given a disclaimer against any implied warranties.[20]

Those courts which follow the minority view have grounded their decisions upon several different theories. An early theory was that the original warranty runs with the title as in a conveyance of land.[21] A number of cases predicated recovery upon the nature of the article and permitted recovery if it tended to be inherently or imminently dangerous.[22] In other decisions the courts reverted back to the tort characteristics of warranty and found strict liability in tort.[23] The latest decisions permit recovery on public policy grounds[24] and recently enacted statutes.[25] The privity requirement

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15. Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 874 (1958).

16. Continental Copper & Steel Indus., Inc. v. E.C. "Red" Cornelius, Inc., 104 So.2d 40 (Fla. App. 1958), 13 U. MIAMI L. REV. 252 (1958).

17. B.F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959).

18. Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 569 (1959).

19. Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961).

20. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), 75 A.L.R.2d 1 (1961); Pabon v. Hackensack Auto Sales, Inc., 63 N.J. Super. 476, 164 A.2d 773 (Super. Ct. 1960).

21. 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 Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

22. Mahoney v. Shaker Square Beverages, Inc., 46 Ohio Op. 250, 102 N.E.2d 281 (C.P. 1951); Di Vello v. Gardner Mach. Co., 46 Ohio Op. 161, 102 N.E.2d 289 (C.P. 1951); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913).

23. A federal court in applying Kansas law stated that warranty was not contractual, but that "it is an obligation raised by the law as an inference from the acts of the parties or the circumstances of the transaction and it is created by operation of law and does not arise from any agreement in fact of the parties." B.F. Goodrich Co. v. Hammond, 269 F.2d 501, 504 (10th Cir. 1959). See also Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961); Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953); Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958).

24. Judge John D. Voelker (perhaps better known as Robert Traver, author of the novel, *Anatomy of A Murder*) declared in Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873, 878 (1958): "Saddled with such a doctrine and its hair-splitting exceptions, it is not surprising that while a few of our decisions have afforded passing illusory comfort to all, certainty has been afforded to none . . . . Legal confusion has inevitably resulted. Aggrieved plaintiffs have scarcely known whether to sue in deceit or fraud or for negligence or breach of warranty—or indeed whether it was worth-while to sue at all." See also Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Greenberg v. Lorenz, 9 N.Y.2d 195, 213 N.Y.S.2d 39, 173 N.E.2d 773 (1961); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942), 142 A.L.R. 1479 (1943). The foundation of the public policy aspect may be traced to Judge Traynor's concurring statement in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) that: "If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market."

25. A Georgia statute enacted in 1957 provides that every manufacturer of any product sold as new should warrant to the ultimate consumer that the article sold is merchantable and fit for the purpose. GA. CODE ANN. § 96-307 (1957). The statute was

has been by-passed in a number of cases by construing the commercial advertising and labeling techniques of the manufacturer as express warranties upon which the ultimate consumer or user has a right to rely.[26] Two popular theories followed by courts which do not desire to abandon the privity requirement, but do wish to permit recovery from the retailer in some situations by one not the immediate purchasing party are the agency and third party beneficiary rationales. The agency theory permits the party supplying the consideration[27] to recover regardless of whether the seller knew he was dealing with an alleged agent.[28] The third party beneficiary rationale is predicated upon a showing that both seller and buyer intended to benefit a third party or that from the nature of the goods, it was presumed the purchase was for the benefit of a third party.[29] The increasing number of courts supporting these theories clearly indicates a trend to extend to a greater number of persons the right to rely upon implied warranties in the sale of all kinds of goods.[30]

The Florida Supreme Court in the instant decision retains its adherence

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upheld as constitutional in Bookholt v. General Motors Corp., 215 Ga. 391, 110 S.E.2d 642 (1959). For other state statutes and supporting cases see Annot., 75 A.L.R.2d 69, 98-101 (1961).

26. *E.g.*, Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958). For other cases see Annot., 75 A.L.R.2d 112 (1961). These cases are to be distinguished from suits based upon express warranties made by the seller, orally or in writing at the time of sale. For a discussion of the cases recognizing an exception to the privity requirement for express warranties, see Annot., 67 A.L.R.2d 619 (1959). *Cf.* Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670 (1959), an express warranty case wherein the court in dictum displayed a desire to jettison entirely the requirement of privity for any warranty on any product and seems to foreshadow strict liability to the consumer for virtually everything sold.

27. The element of consideration is generally the decisive factor as to the agency argument; however, at least one case has recognized the agency relationship in a gift situation. Conklin v. Hotel Waldorf Astoria Corp., 5 Misc. 2d 496, 161 N.Y.S.2d 205 (N. Y. City Ct. 1957). The issue of consideration is also subordinated under the "household agency" view. Parish v. Great Atl. & Pac. Tea Co., 13 Misc. 2d 33, 177 N.Y.S.2d 7 (N.Y.C. Munic. Ct. 1958).

28. Twombley v. Fuller Brush Co., 221 Md. 476, 490, 158 A.2d 110, 117 (1960): "It is not disputed that Mrs. Twombley purchased the cleaner as a household necessity and that she was the agent of Mr. Twombley in so doing and that privity of contract exists between him and the defendant." *Accord*, Mouren v. Great Atl. & Pac. Tea Co., 1 N.Y.2d 884, 154 N.Y.S.2d 642, 136 N.E.2d 715 (1956); Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931); Freeman v. Navarre, 47 Wash. 2d 760, 289 P.2d 1015 (1955). See generally Gillam, *Judicial Legislation, Legal Fictions, and Products Liability: The Agency Theory*, 37 ORE. L. REV. 217 (1958).

29. Dryden v. Continental Baking Co., 11 Cal. 2d 33, 77 P.2d 833 (1938); McBurnette v. Playground Equip. Corp., 137 So.2d 563 (Fla. 1962); Conklin v. Hotel Waldorf Astoria Corp., 5 Misc. 2d 496, 161 N.Y.S.2d 205 (N.Y. City Ct. 1957); Parish v. Great Atl. & Pac. Tea Co., 13 Misc. 2d 33, 177 N.Y.S.2d 7 (N.Y.C. Munic. Ct. 1958); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928). The older cases tended to reject the third party beneficiary argument. Borucki v. MacKenzie Bros., 125 Conn. 92, 3 A.2d 224 (1938); Hazelton v. First Nat'l Stores, Inc., 88 N.H. 409, 190 Atl. 280 (1937); Pearlman v. Garrod Shoe Co., 276 N.Y. 172, 11 N.E.2d 718 (1937); Salzano v. First Nat'l Stores, Inc., 268 App. Div. 993, 51 N.Y.S.2d 645 (1944).

30. For an interesting analysis of 29 techniques used by courts to get around the lack of privity, see Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 153-55 (1957).

to the privity requirement by adopting the third party beneficiary rationale.[31] The court held that:

> [C]ommon 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.[32]

The court reasoned that the presumption of intended benefit is not a legal fiction, but rather it is a logical application of the "principles controlling contracts for third party beneficiaries."[33] The court restricted its decision to articles purchased for family use as opposed to allowing a stranger to claim the benefits of the implied warranty in a suit against a remote vendor.[34] The court further stated that the extension of the implied warranty to members of the family is not an infringement or abandonment of the privity requirement in Florida. Warranties do not "run with" personal property. "The decision here is simply that an implied warranty may run initially to one in the position of the minor plaintiff."[35]

The instant decision demonstrates that Florida is retreating from its strict view of requiring privity in implied warranty actions.[36] An analysis of

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31. The court without extensive discussion recognized the plaintiff father's right to recover for his own consequential damages because the father was in privity of contract with the seller. 137 So.2d at 565.

32. *Id.* at 566. The court cites the following cases for this proposition of law: Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961) (rejecting the privity requirement); Lindroth v. Walgreen Co., 329 Ill. App. 105, 67 N.E.2d 595 (1946) (express warranty); Twombley v. Fuller Brush Co., 221 Md. 476, 158 A.2d 110 (1960) (extension of warranty by the household agency theory); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, (1960), 75 A.L.R.2d 1 (1961) (implied adherence to third party beneficiary theory); Greenberg v. Lorenz, 9 N.Y.2d 195, 213 N.Y.S.2d 39, 173 N.E.2d 773 (1961) (extension of warranty to members of household on public policy grounds); Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953) (no discussion of the absence of the privity).

33. 137 So.2d at 567.

34. The court stresses the restriction to the family by citing to the UNIFORM COMMERCIAL CODE § 2-318 wherein it is stated that a seller's warranties extend to any natural person "who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty." The comment which accompanies this provision states that beyond the beneficiaries which the provision names the provision is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties given to his buyer who resells "extend to other persons in the distributive chain." UNIFORM COMMERCIAL CODE § 2-318, comment at 100.

35. 137 So.2d at 567.

36. The trend is no doubt substantially influenced by the abandonment of the privity requirement for actions in negligence in the field of products liability. Recent pronouncements by the Florida Supreme Court permit the institution of suits for injuries resulting from negligently constructed products regardless of privity. Carter v. Hector Supply Co., 128 So.2d 390 (Fla. 1961); Matthews v. Lawnlite Co., 88 So.2d 299 (Fla. 1956). "'[A] retailer may be held liable to a third party in a *negligence action* if the retailer can be charged with actual or implied knowledge of the defect.'" McBurnette v. Playground Equip. Corp., 137 So.2d 563, 565 (Fla. 1962), quoting McBurnette v. Playground Equip. Corp., 130 So.2d 117, 118 (Fla. App. 1961).

past Florida decisions reveals little precedent for the holding in the instant case. To sustain its position the court relied upon a number of recent decisions from other jurisdictions.[37] The effect of the instant case is to permit suit if the injured party is a third party beneficiary, express or implied, under the sales agreement. The court for the present, restricts the benefits of this theory to members of the purchaser's family. To have extended the beneficiary theory beyond the family circle would have created a conflict with another recent decision of this court, *Carter v. Hector Supply Co.*[38] In this decision the court refused to permit an employee of the purchaser to bring an action against the retailer for breach of an implied warranty because of the absence of privity between the injured employee and the retailer.[39] It would appear that an employee of the purchaser who is injured by a product purchased for his use should be entitled to rely upon the third party beneficiary rationale. But in the instant case, the court refused to retreat from its holding in the *Carter* decision thereby denying extension of the scope of implied warranty to employees, third party users or other remote vendees. In the immediate future, it would appear that only members of the purchaser's family will achieve success under this new theory of action.[40]

The decision is well supported by an increasingly strong public policy to impose strict liability upon retailers as well as manufacturers.[41] The weight of public policy has already prompted the Florida Supreme Court to recognize major exceptions to the requirement of privity in the area of foodstuffs[42]

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37. Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961); Lindroth v. Walgreen Co., 329 Ill. App. 105, 67 N.E.2d 595 (1946); Twomblev v. Fuller Brush Co., 221 Md. 476, 158 A.2d 110 (1960); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Greenberg v. Lorenz, 9 N.Y.2d 195, 213 N.Y.S.2d 39, 173 N.E.2d 773 (1961); Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953).

38. 128 So.2d 390 (Fla. 1961).

39. Until the *McBurnette* decision, the *Carter* decision was the last pronouncement by the Florida Supreme Court on implied warranty. In *Carter* certain language tends to conflict with the instant decision: " 'warranties do not run with personal property. Accordingly, it has been held that the buyer's tenant, the buyer's employee, *or a member of the buyer's family* who is injured through the article sold cannot base his action against the seller on an express or implied warranty.' " Carter v. Hector Supply Co., 128 So.2d 390, 393 (Fla. 1961), quoting 46 AM. JUR. *Sales* § 810 (1943). (Emphasis added.)

40. Odum v. Gulf Tire & Supply Co., 196 F. Supp. 35 (N.D. Fla. 1961) (employee of retailer dismissed for lack of privity); Rodriguez v. Shell's City, Inc., 141 So.2d 590 (Fla. App. 1962) (bystander, related to the purchaser, dismissed for lack of privity).

41. In *McBurnette*, the court stresses the following cases which have abandoned the privity concept on strong public policy grounds: Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Greenberg v. Lorenz, 9 N.Y.2d 195, 213 N.Y.S.2d 39, 173 N.E.2d 773 (1961).

42. Food Fair Stores v. Macurda, 93 So.2d 860 (Fla. 1957); Florida Coca-Cola Bottling Co. v. Jordan, 62 So.2d 910 (Fla. 1953); Sencer v. Carl's Mkt., 45 So.2d 671 (Fla. 1950); Cliett v. Lauderdale Biltmore Corp., 39 So.2d 476 (Fla. 1949), 3 MIAMI L.Q. 638 (1948-49); Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So.2d 313 (1944).

and dangerous instrumentalities.[43] The restriction or abandonment of the privity concept does not mean automatic judgment for the injured party. The plaintiff must overcome the formidable obstacles of proving a defect in the product and that his injuries resulted from that defect.[44] But a new burden of contingent liability has been cast upon the retailer and a new breach made in the ramparts of the "citadel of privity."

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43. Matthews v. Lawnlite Co., 88 So.2d 299 (Fla. 1956). The Florida Supreme Court has stated: "The sum of our holding here simply is 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 . . . ." Carter v. Hector Supply Co., 128 So.2d 390, 393 (Fla. 1961).

44. For a discussion of burden of proof and the theory of *res ipsa loquitur* see: Prosser, *The Assault Upon The Citadel (Strict Liability To The Consumer)*, 69 YALE L.J. 1099, 1124-34 (1959-60); FRANK, *A View of the Law of Products Liability*, in LEGAL ESSAYS OF THE PLAINTIFF'S ADVOCATE 391, 394 (1961). In the instant case the court stated that the plaintiffs must prove the defect, proximate cause between the defect and the minor's injuries, and reliance upon the seller's skill and judgment of the fitness of a particular article for the purpose intended in order to recover. 137 So.2d at 565.