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Implied Warranty: Bailor-Bailee Relationship

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mental fairness of the proceeding is tantamount to judging the foreign decree in light of common law standards of due process.

Although the instant decision was concerned with ex parte divorces, it may well foreshadow Florida's position regarding bilateral Mexican divorces where neither party acquired bona fide domicile. Such decrees have been recognized only in New York.[19] New York's position may be explained by the limitations of its recently repealed divorce law.[20] The three other states that have considered this issue, New Jersey,[21] New Mexico,[22] and Ohio,[23] have rejected the New York rationale. Florida, in light of *Kittel v. Kittel,* may take the latter stand in order to continue tight control over the domestic relations of its domicilaries.

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IMPLIED WARRANTY: BAILOR-BAILEE RELATIONSHIP

Fort Pierce Gas Co. v. Toombs, 193 So. 2d 669 (4th D.C.A. Fla. 1967)

A propane gas storage tank, owned by the Fort Pierce Gas Company and located at the residence of the Toombs family, exploded, killing a child, injuring others, and causing property damage. The tank was manufactured by the Maddox Foundry & Machine Works and was used by the gas company for approximately six years to supply propane gas to the Toombs family. The plaintiffs, members of the Toombs family and injured bystanders, brought this action against the gas company and the manufacturer to recover damages allegedly caused by breach of implied absolute warranty and ordinary negligence.[1] On these two theories the facts were submitted to the jury, which found the gas company liable to plaintiffs but exonerated the manufacturer. On appeal, the Fourth District Court of Appeal HELD, the trial court incorrectly submitted the case to the jury on the theory of implied warranty, which is not available to a bailee for mutual benefit against his bailor. Reversed for a new trial on the issue of the owner's negligence alone.

19. Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 209 N.E.2d 709 (1965).

20. N.Y. DOM. REL. LAW §170 (McKinney 1964). Effective Sept. 1, 1967, the sole statutory ground for divorce has been amended to include physical or mental cruelty, abandonment for two years, imprisonment for over three years, and a separation for two years under a separation agreement. N.Y. Sess. Laws 1966, ch. 254 §170.

21. Warrender v. Warrender, 79 N.J. Super. 114, 190 A.2d 684 (App. Div. 1963), *aff'd,* 42 N.J. 287, 200 A.2d 123 (1964).

22. Golden v. Golden, 41 N.M. 356, 68 P.2d 928 (1937).

23. Bobala v. Bobala, 68 Ohio App. 63, 33 N.E.2d 845 (1940).

1. Both defendants were charged with breach of implied warranty. The Maddox Foundry & Machine Works was also charged with negligent manufacture, and the Fort Pierce Gas Co. was charged with negligence by overfilling the tank and by failing to exercise reasonable care to ascertain that the tank was safe and suitable for storage of propane gas.

Recently Florida has been in the vanguard of those states expanding the protection afforded by the implied warranty theory, which allows recovery without proof of negligence for damages caused by defects in a product. Implied warranty originally required privity of contract between the injured party and the defendant, but the privity requirement was subsequently relaxed where the product was either a foodstuff or a dangerous instrumentality.[2] Finally, in *Lily-Tulip Cup Corp. v. Bernstein*[3] the Florida Supreme Court held that privity was not required in an action against a manufacturer even though the offending product was neither foodstuff nor a dangerous instrumentality.

Since implied warranty is an aspect of the law of sales it has been held applicable only to transactions recognized as sales.[4] In expanding the coverage of implied warranty Florida has recognized as sales certain transactions formerly classified as services. In *Cliett v. Lauderdale Biltmore Corp.*[5] the Florida Supreme Court held that serving of food in restaurants constituted a sale, and in *Community Blood Bank v. Russell*[6] the same court held that transfusion of blood to a patient also constituted a sale. The principal decision, by denying an implied warranty count in a bailor-bailee relationship, represents a retreat from this trend of expanding products liability.

By refusing the bystander plaintiffs the benefit of implied warranty, the court applied Florida sales law in effect at the time, which required that an injured bystander must be a user of the product at the time of injury to recover on an implied warranty.[7] Since the bystanders were not users of the tank, the court found they were limited to recovery on the theory of ordinary negligence alone.[8] The Florida law of sales has been changed since this decision by our adoption of the Uniform Commercial Code, so that injured bystanders now may be third-party beneficiaries of a seller's implied warranty without the necessity of privity or the requirement of use.[9] By construction of this provision, a court might now hold that the injured bystanders could recover on this theory if the law implied a warranty running to the bailees of the tank.

The bailees of the gas tank stipulated that their relationship to the gas company with reference to the tank was one of bailment for mutual benefit.[10] A bailee for mutual benefit normally assumes the duty of inspecting the bailment since he is presumed to control it.[11] In Florida, there has been no strict liability on a bailor for a mutual benefit. In *Brookshire v. Florida*

2. Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So. 2d 313 (1944); King v. Douglas Aircraft Co., 159 So. 2d 108 (3d D.C.A. Fla. 1963).

3. 181 So. 2d 641 (Fla. 1965).

4. *Cf.* FLA. STAT. §672.2-314 (1965).

5. 39 So. 2d 476 (1949).

6. 185 So. 2d 749 (2d D.C.A. Fla. 1966); *see* Comment, 20 U. FLA. L. REV. 110 (1967).

7. Rodriguez v. Shell's City, Inc., 141 So. 2d 590 (3d D.C.A. Fla. 1962).

8. 193 So. 2d at 672.

9. FLA. STAT. §672.2-318 (1965). The warranty extends to any person who is in the family or household, or a guest—provided that it is reasonable to expect that the person may use, consume, or be affected by the goods.

10. 193 So. 2d at 671.

11. Clarkson v. Hertz Corp., 266 F.2d 948 (5th Cir. 1959).

Bendix Co.[12] the plaintiff was injured while using a coin-operated washing machine owned and maintained by the defendant in an apartment building. The Third District Court of Appeal held that the implied warranty of a seller or manufacturer does not extend to a bailor of property who has not manufactured it.[13] The *Toombs* court accordingly held that the theory of implied warranty was not available to the plaintiffs against the gas company, the mere bailor. The gas company's duty was limited to exercise of reasonable care to ascertain that the tank was safe and suitable at delivery for storage of propane gas.[14]

The facts in *Toombs* justify an exception to mechanical application of the rule that a bailment for mutual benefit by a nonmanufacturer does not carry with it an implied warranty. First, the bailment of the tank in *Toombs* was of a different nature than that in *Brookshire.* The supply of propane gas in the instant case was a service,[15] and the tank, which caused the injury, was merely incidental to the contract. The tank was thrust upon the Toombs family in order for them to receive gas, but in *Brookshire,* the use of the washing machine was the principal purpose of the contract. Where the bailment for mutual benefit is necessary in order for the bailor to perform his contract, and the bailee receives no direct benefit from the article bailed, it may be unreasonable to impose the duty to inspect on the bailee.

Second, the bailor did not have the degree of control over the subject of the bailment in *Brookshire* that the Fort Pierce Gas Company had over the propane gas tank. In *Brookshire,* the washing machines were operated by the bailees, but the gas tank was handled only by the Fort Pierce Gas Company. For this reason, the gas company should have had a greater obligation to inspect than did the bailor in *Brookshire.*

Third, it is reasonable to conclude that an implied warranty should be created by delivery of personal property to a bailee in situations where the quality or fitness of the article for its specified use would not be visible and latent defects would not be discernible by ordinary observers.[16] The duty to inspect such an article of bailment should not shift to a bailee who has no real control over the bailment or technical expertise in the article. This is especially true where there is a potential of great danger, which can result from malfunction of the article bailed. The duty should be allocated to the bailor who is better able to discover latent defects in the complex, technical tank. Judicial imposition of implied warranty on the bailor would force him to execute this duty. For these reasons, Florida law of implied warranty should have expanded in the principal case to include ultra-hazardous bailments.

There is authority in Florida under the decision in *Williamson v. Phillipoff*[17] holding that a bailor impliedly warrants that an article bailed is of

12. 153 So. 2d 55 (1963).
13. *Id.* at 58.
14. 193 So. 2d at 672.
15. See text accompanying notes 5-7 *supra.*
16. Cornelli Seed Co. v. Ferguson, 64 So. 2d 162 (Fla. 1953); Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953).
17. 66 Fla. 549, 64 So. 269 (1914).