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Commercial Law--Privity of Contract Necessary for Implied Warranty

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The Kentucky Court of Appeals took an altogether contrary view in the principle case. To interpret the court's ruling as holding wiretap evidence admissible in Kentucky, however, does not necessarily follow. The attachment of the microphone to the telephone was held not to be a wiretap within the meaning of Federal Communications Act. Even though the federal rule of evidence does not operate mandatorily on the states, the court may well disallow evidence gained by a true wiretap.

In the past, the court of appeals, in its judicial discretion, has excluded evidence seized in violation of the fourth amendment. The court was not at the time bound to do so by rulings of the Supreme Court. The same policy considerations seem present where there has been a violation of a federal statute.

George W. Mills

Commercial Law—Privity of Contract Necessary for Implied Warranty.—The plaintiff, a citizen of Kentucky, purchased a refrigerator compressor unit from a Kentucky retailer and installed it in a supermarket that same day. The next day, when the plaintiff removed his test gauges from the unit, it exploded, causing the plaintiff personal injuries. The explosion was attributed to the presence of defective casting. The plaintiff sued the manufacturer of the unit, a Michigan corporation, in federal district court in Michigan to recover damages for personal injuries. The jury, having been instructed to consider two theories, negligence in manufacture and breach of implied warranty, returned a verdict for the plaintiff. Held: Reversed and new trial ordered. It was error to submit the case to the jury under the theory of implied warranty. Being a diversity case, Kentucky law is applicable. Under Kentucky law the absence of privity between the plaintiff and the manufacturer precludes the plaintiff from recovering from the manufacturer for breach of implied warranty. Schultz v. Tecumseh Products, 310 F.2d 426 (6th Cir. 1962).

The prevailing rule is that “privity of contract” is an essential element for recovery on the implied warranty theory. Privity of contract is required even though the action for breach of warranty was

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1 The court reversed on the ground that if a case is submitted to a jury on more than one theory of recovery and reversible error is committed in the submission of one of these theories, a general verdict returned in favor of the plaintiff must be set aside.

originaly a tort action. The emphasis upon the buyer-seller relationship in commercial transactions and the early social policy of protecting the manufacturer and seller have focused the attention in tort cases on privity of contract rather than the foreseeability of injury. This emphasis resulted in courts requiring a contractual relationship between the manufacturer of a defective product and the injured party, not only in actions for breach of implied warranty, but also in actions based on negligence. Beginning with MacPherson v. Buick Motor Co., the absence of privity no longer precluded recovery by injured purchasers in actions based on negligence. Subsequent cases have extended this liability to members of the purchaser's family, bystanders, and users who are reasonably expected to be affected by the goods. Some jurisdictions have lifted the privity requirement in food and drink cases.

The question before the federal district court in the principal case was the present status of Kentucky law on privity of contract. The most recent pronouncement of the Kentucky Court of Appeals involved a boat explosion which resulted in an injured guest's bringing a personal injury action against the seller of the boat. The court of appeals stated where there is no contractual relationship shown between the guest and the seller of the boat, the seller was not responsible for the guest's injury under the theory of implied warranty. Despite this clear statement of the Kentucky law on privity in 1958, there was a dissent in the principal case which contended that the Kentucky law was uncertain. The dissent relied on dicta in North American Fertilizer v. Combs to the effect that privity may spring from a warranty. However, the Kentucky Court of Appeals stated its adherence to the privity requirement in a later case. Also, the dissent relied upon

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3 Prosser, Torts 507 (2d ed. 1955).
5 Prosser, op. cit. supra note 3, at 501.
7 Caplinger v. Werner, 311 S.W.2d 201 (Ky. 1958).
8 Id. at 203. But see Ky. Rev. Stat. 355.2-318 (1962) [hereinafter cited as KRS]. This section provides that a seller's warranty, whether express or implied, extends 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.
9 307 Ky. 869, 212 S.W.2d 526 (1948). The court denied recovery in a direct suit by the consumer against the manufacturer based on warranty of fitness for a particular purpose arising by usage of trade.
11 Caplinger v. Werner, supra note 7.
C. D. Herme, Inc. v. R. C. Tway Co., in which the Kentucky court accepted the MacPherson doctrine in negligence cases. Even though Kentucky has adopted the MacPherson doctrine, which might indicate a trend toward abolishing privity in the implied warranty cases, the federal court was required to apply the present Kentucky law.

Several recent decisions have held privity of contract not to be necessary to an action for breach of implied warranty. To what extent will Kentucky follow these decisions? Kentucky's adoption of the Uniform Commercial Code in 1960 removed the privity requirement under certain circumstances. The Code gives members of the family, household, or guests of the buyer a direct action against the seller. However, the manufacturer-consumer relationship of the principal case is not affected by this provision. Unless the complaining party can bring himself within a specific Code provision, he must satisfy the privity requirement under present Kentucky case law. Yet, present economic and social conditions indicate that the more enlightened view would be to drop the privity requirement. In this age of advertising, the consumer purchases goods in reliance upon the manufacturer's ability to produce them free of defects. Kentucky should extend the express or implied warranty not only to the buyer's family, household, and guests, but also to the subsequent buyer. The manufacturers would become more defect conscious and the public would be guaranteed safer products. Furthermore, manufacturers are more able to sustain loss and spread the loss throughout society as a cost of production.

Larry Garmon

Torts—Contributory Negligence—Proximate Cause—"But For" Rule.—Plaintiff pedestrian brought an action against the defendant motorist to recover for injuries sustained by the plaintiff when struck by the defendant's automobile at an intersection. The trial court instructed the jury that if the plaintiff violated any of the duties imposed upon him and if such violation on his part caused or helped to bring about the accident and the resulting injuries, then the law in this case is for the defendant. On the basis of this instruction the jury found for the defendant. Held: Reversed. The use of an instruction

12 294 S.W.2d 534 (Ky. 1956).
14 KRS 355.2-318.
15 Uniform Commercial Code § 2-318, official comment 3.