

1982

# Malouf Investment Co. v. Roger Boyer et al : Brief of J. P. Koch, Inc.

Utah Supreme Court

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Richard H. Moffat; Christopher J. Burke; Attorneys for Respondent;

George K. Fadel; Attorney for Appellant;

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THE STATE OF UTAH

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**MALOUF INVESTMENT COMPANY,**

Plaintiff-Appellant,

- VS -

ROGER BOYER, KEM C. GARDNER  
and J. P. KOCH, INC., a Utah  
corporation,

**Defendants,**

**J. P. KOCH, INC.,**

**Defendant-Respondent.**

**Case No. 18107**

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# BRIEF OF J. P. KOCH, INC.

Appeal from Order of Dismissal of the  
District Court of the Third Judicial District  
In and For Salt Lake County, State of Utah  
The Honorable Homer F. Wilkinson, Presiding

RICHARD H. MOFFAT and  
CHRISTOPHER J. BURKE  
Attorneys for Respondent  
Suite 300, 261 East Broadway  
Salt Lake City, Utah 84111

GEORGE K. FADEL  
Attorney for Appellant  
170 West Fourth Street  
Bountiful, Utah 84010

FILED

FEB - 4 1982

IN THE SUPREME COURT OF  
THE STATE OF UTAH

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MALOUF INVESTMENT COMPANY,	:	
	:	
Plaintiff-Appellant,	:	
	:	
- vs -	:	
	:	
ROGER BOYER, KEM C. GARDNER	:	
and J. P. KOCH, INC., a Utah	:	Case No. 18107
corporation,	:	
	:	
Defendants,	:	
	:	
J. P. KOCH, INC.,	:	
	:	
Defendant-Respondent.	:	

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RICHARD H. MOFFAT and  
CHRISTOPHER J. BURKE  
Attorneys for Respondent  
Suite 300, 261 East Broadway  
Salt Lake City, Utah 84111

GEORGE K. FADEL  
Attorney for Appellant  
170 West Fourth Street  
Bountiful, Utah 84010

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IN THE SUPREME COURT OF  
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Plaintiff-Appellant,	:	
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- vs -	:	
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ROGER BOYER, KEM C. GARDNER	:	
and J. P. KOCH, INC., a Utah	:	Case No. 18107
corporation,	:	
	:	
Defendants,	:	
	:	
J. P. KOCH, INC.,	:	
	:	
Defendant-Respondent.	:	

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BRIEF OF J. P. KOCH, INC.

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Nature of the Case

J. P. Koch, Inc., Respondent in this appeal (hereinafter referred to as "Koch"), agrees with the Statement of the Nature of the Case contained in the Brief of Malouf Investment Company, Appellant herein (hereinafter referred to as "Malouf").

Disposition in Lower Court

Before answering or otherwise pleading to Malouf's Complaint, Koch filed a Motion to Dismiss Malouf's Complaint as against it, asserting that Malouf's Complaint failed to state a claim against Koch upon which relief could be granted for the reason of lack of privity between Malouf and Koch. The Court granted the Motion to Dismiss.



Relief Sought on Appeal

Koch respectfully requests that the appeal of Malouf be dismissed as it has not been brought pursuant to entry of a final judgment. In the alternative, Koch requests that the action taken by the lower court be affirmed in all respects. Further, Koch requests that it be awarded its costs incurred on appeal.

Statement of Facts

Koch adds to Malouf's Statement of Facts the statement that "the real estate trade referred to in the first paragraph of Malouf's Statement of Facts was between Malouf and Mountain States Telephone and Telegraph Company, who, in turn, acquired the building from Roger Boyer and Kem C. Gardner," which facts are set forth in Malouf's Complaint at Paragraph 3. Koch does not controvert the remainder of Malouf's Statement of Facts regarding the allegations made in Malouf's Complaint and the disposition in the lower court.

Argument

I

THE ORDER OF DISMISSAL OF THE LOWER COURT  
WAS NOT A FINAL ORDER AND, THEREFORE,  
JURISDICTION TO HEAR THIS APPEAL HAS NOT  
BEEN CONFERRED UPON THIS COURT BY RULE 72,  
UTAH RULES OF CIVIL PROCEDURE.

Malouf's Docketing Statement, at Paragraph 1, states that "Rule 72, Utah Rules of Civil Procedure, provides for an appeal to the Supreme Court from all final orders and judgments," and



relies upon this portion of Rule 72 as the authority believed to confer jurisdiction on this Court to hear the appeal.

Rule 54(b) of the Utah Rules of Civil Procedure provides as follows:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all of the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

As set forth in Malouf's Statement of Facts, Malouf brought this action against Roger Boyer, Kem C. Gardner and Koch. The Order of Dismissal entered by the lower court as to Koch adjudicates the liabilities of fewer than all the parties. There being no express direction for the entry of judgment by the lower court, the Order of Dismissal is not a final order upon which jurisdiction to hear this appeal has been conferred upon this Court by Rule 72 of the Utah Rules of Civil Procedure.

In Kennedy v. New Era Indus., Inc., 600 P.2d 534, 536, 537 (Utah 1979), this Court set forth constitutional, statutory and

case law in support of its dismissal of an appeal of a judgment in favor of one, but less than all, of the defendants in an action

The Court stated:

In the case at hand, the order entered by the trial court clearly was not a final order. The action against other defendants and Rosenberger's cross-claim remains alive.

. . . .

The order appealed from in this case was entered by the trial court without a Rule 54 (b) determination, and this Court has not entered an order pursuant to Rule 72(b), permitting an interlocutory appeal.

. . . .

The lost time and effort occasioned by the briefing and oral argument in this case is a small price to pay for insisting that the parties comply with the rules of procedure so that the proper relationship between this court and the trial court may be maintained.

The reasoning set forth in Kennedy, supra, is directly applicable to the instant appeal, which should also be dismissed.

## II

SECTION 70A-2-318, UTAH CODE ANNOTATED,  
DOES NOT GRANT MALOUF A CAUSE OF ACTION  
UPON ANY WARRANTY OF KOCH BECAUSE MALOUF  
CANNOT BE A THIRD-PARTY BENEFICIARY.

Malouf acquired a building as the result of a real property trade with Mountain States Telephone and Telegraph Company, who had purchased the building from Roger Boyer and Kem C. Gardner, who were the original owners of the building in which Koch, as the construction subcontractor, installed heating and air conditioning

Therefore, the question of the extension of any warranty on the part of Koch to Malouf depends upon the law regarding vertical, as opposed to horizontal, privity.

The problem of privity of contract in breach of warranty actions is met on two planes. The issue of horizontal privity raises the question whether persons other than the buyer of defective goods can recover from the buyer's immediate seller on a warranty theory. On the other hand, the question of vertical privity is whether parties in the distributive chain prior to the immediate seller can be held liable to the ultimate purchaser for loss caused by the defective product. Section 2-318 of the Uniform Commercial Code does not purport to deal with vertical privity and Official Comment 3 to Section 2-318 states specifically that the section 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. Thus, at the outset of any case dealing with horizontal privity lies the prerequisite that the buyer himself could have maintained the action for breach of warranty against the given defendant under the ruling case law of a particular jurisdiction. Annot. 100 A.L.R. 3d, 743 at 749 (1980).

The version of Section 2-318 of the Uniform Commercial Code adopted in the State of Utah is intended to extend a seller's warranty not only to his buyer, but to any person who may reasonably be expected to use his buyer's goods. Once the seller's immediate buyer resells the goods (a vertical transfer), he precludes any subsequent third-party or horizontal beneficiary of that warranty. Any further extension of the seller's warranty must be based upon vertical privity. Thus, where Malouf is itself a buyer, it must rely upon the common law of vertical privity to



establish any warranty coverage. Malouf is not a third-party beneficiary of any warranty coverage which may have been extended to another party prior to Malouf in the vertical chain of sales.

### III

ASSUMING KOCH WAS DEEMED A "SELLER" WITHIN THE DEFINITION OF THE UNIFORM COMMERCIAL CODE, THERE WOULD STILL BE NO PRIVACY AS BETWEEN KOCH AND MALOUF.

Malouf's Brief, at Pages 8 and 9, cites Carver v. Denn, 117 U. 180, 214 P.2d 118 (1950), in support of the proposition that Koch is a "seller," as opposed to a mere installer of the heating and air conditioning system, a proposition which is not at issue in this appeal.

Malouf has deleted a sentence from its citation, which sentence sets forth the crucial factor in distinguishing Carver from the factual situation in this appeal. The citation follows, with Malouf's deletion underlined:

We believe the activities of the plaintiff amounted to considerably more than those of a mere installer. It is true that he did the installation work, and that he was called in to give an estimate on what the installation would cost. But in his estimate he included the cost of all the equipment to be used in the installation and he provided and sold all of the equipment, presumably at a profit, which the defendant agreed to purchase. The equipment and the labor were charged by the plaintiff to the defendant, and the defendant is not indebted to anyone else for any of the equipment installed. We fail to see how the plaintiff can be the seller for the purpose of receiving the profits from the transaction and then successfully

establish himself a mere installer for the purpose of avoiding the responsibilities of a seller.

Even if Koch was a "seller," as opposed to an installer, Malouf has not claimed that Koch sold the air conditioning and heating systems to Malouf. Thus, although Koch may have been a "seller," that assumption adds nothing as far as evidencing any vertical privity as between Koch and Malouf.

#### IV

THE RULING CASE LAW OF THIS JURISDICTION PROVIDES NO PRECEDENT WHICH WOULD ALLOW MALOUF TO MAINTAIN AN ACTION FOR BREACH OF WARRANTY AGAINST KOCH.

Malouf's Brief cites Annot., 16 A.L.R. 3d, 683 at 687, in support of the proposition that the requirement of privity is diminishing. The citation refers to "the action for personal injury" and "to the cases where the defective product causes injury to other property," and concluded that in these instances, the distinction between warranty and tort has been subsumed by actions for strict liability in tort. Neither injury to person nor property is alleged in the case on appeal.

If this action had been brought on the ground of strict liability in tort, which it was not, Malouf would still not be able to establish a right to recovery as against Koch.

In Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 158 (Utah 1979), this Court adopted the doctrine of strict liability in tort, as set forth in Section 402A, Restatement (Second) of

Torts. Section 402A allows recovery for physical harm to a user or his property, neither of which has been alleged in this case, and applies to "unreasonably dangerous" products, such danger not having been alleged in this case.

In Hahn, supra at 157, this Court cited Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963), as set forth in Daly v. General Motors Corp., 20 Cal. 2d 725, 144 Cal. Rptr. 380, 575 P.2d 1162 (1978), which was again cited by Malouf in its Brief at Page 8. The citation reads:

We fastened strict liability on a manufacturer who placed on the market a defective product even though both privity and notice of breach of warranty were lacking.

The Court went on to state:

We rejected both contract and warranty theories, express or implied, as the basis for liability.

The instant case was brought on a warranty theory which was rejected as the basis for liability in Greenman. The "Greenman Rule" was the rule later adopted as Section 402A, Restatement (Second) of Torts (see Hahn, supra at 156), and which, as has been discussed, is inapplicable to this case.

Annot. 16 A.L.R. 3d 683 at 687 (1967), cited by Malouf, regarding the diminishing requirement of privity, goes on to state:

There remains considerable doubt as to the liability of the privity concept insofar as it applies to a cause of action by the ultimate purchaser against a manufacturer or other person in the chain of product distribution, where the only damage claimed

is that resulting to the product itself, or consequential damage flowing from the defective condition otherwise than by a violent accident causing injury to a person or to other property.

Malouf's Brief has cited no case law wherein this Court has ruled that the requirement of privity as between the ultimate purchaser and another person in the chain of product distribution has been dispensed within a breach of warranty claim. The better reasoned cases in surrounding jurisdictions have ruled that the vertical privity requirement may not be ignored. These cases include Daughtry v. Jet Aeration Co., 592 P.2d 631 (Wash. 1979); Davis v. Homasote Co., 574 P.2d 1116 (Ore. 1978); Salmon River Sportsman Camps Inc. v. Cessna Air Co., 544 P.2d 306 (Ida. 1975), and Eck v. Helene Curtis Indus., Inc., 453 P.2d 366 (Ariz. 1969). Furthermore, authority contra, for example, Old Albany Estates v. Highland Carpet Mills, 604 P.2d 849 (Okla. 1979), is concerned with removing the middlemen as obstacles between the manufacturer and the ultimate purchasers in the chain of product distribution.

In this case, the "chain of product distribution" had ended before Malouf's purchase. The product had been sold to, and used by, Roger Boyer and Kem C. Gardner, the initial consumers, and then resold to and used by Mountain States Telephone and Telegraph Company before being traded to Malouf. The policy considerations in those cases not requiring vertical privity so as to prevent a manufacturer from shielding itself by the use of



middlemen are not present here. Such considerations should not be extended so as to eliminate the requirement of privity despite an indefinite number of resales and trades of used property after having left the "chain of product distribution."

### Summary

The Appeal of Malouf should be dismissed for the reason that it has not been taken pursuant to entry of a final Order and, therefore, jurisdiction to hear the appeal has not been conferred upon this Court by Rule 72(a), Utah Rules of Civil Procedure.

Malouf cannot claim that it need not establish vertical privity in a breach of warranty claim by invocation of Section 70A-2-318, Utah Code Annotated. Section 70A-2-318 applies to horizontal privity only and, thus, is inapplicable to this case.

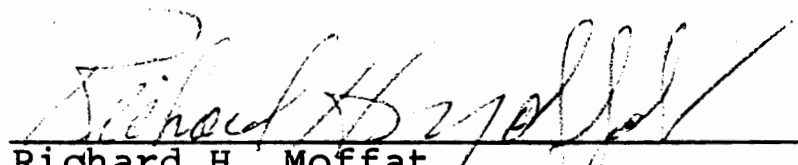
Whether or not Koch is a "seller," as opposed to an "installer," has no effect upon this appeal. Admittedly, Koch did not sell to Malouf and, thus, there is a lack of vertical privity.

There is no case law in this jurisdiction holding that vertical privity is not to be required in a claim by a consumer upon a seller in a breach of warranty action. Where, as in this case, the consumer is not within the "chain of product distribution," there is no policy consideration which would indicate that such a holding would be appropriate.

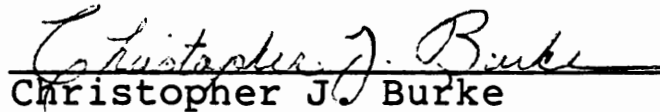
Conclusion

Koch respectfully submits that the appeal of Malouf should be dismissed or, in the alternative, that the action taken by the lower court should be affirmed in all respects and that Koch should be awarded its costs incurred in this appeal.

Respectfully submitted this 4<sup>th</sup> day of February, 1982.



Richard H. Moffat  
Attorney for J. P. Koch, Inc.



Christopher J. Burke  
Attorney for J. P. Koch, Inc.

CERTIFICATE OF MAILING

The undersigned hereby certifies that he mailed two copies of the foregoing Brief of J. P. Koch, Inc. to George K. Fadel, Attorney for Appellant, at 170 West Fourth South, Bountiful, Utah 84010, on this 4<sup>th</sup> day of February, 1982.

Christopher J. Burke