

**PRODUCT LIABILITY ALERT**

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**FEDERAL APPEALS COURT PREDICTS RESTATEMENT  
(THIRD) FOR PENNSYLVANIA STRICT LIABILITY**

In a recent decision, the Third Circuit has predicted a significant change to Pennsylvania product liability law. In *Berrier v Simplicity Mfg., Inc.*, No. 05-3621, 2009 U.S. App. LEXIS 8431 (3d Cir. Apr. 21, 2009), the Third Circuit held that if confronted with the issue of whether a bystander could maintain a strict liability cause of action, the Pennsylvania Supreme Court would adopt the Restatement (Third) of Torts, Sections 1 and 2 “and thereby afford bystanders a cause of action in strict liability. . . .” *Id.* at \*2.

Ashley Berrier, a minor, was injured when her grandfather engaged in reverse the blades of a riding mower manufactured by defendant, Simplicity Manufacturing (“Simplicity”), and backed over Ashley’s left leg. *Id.* at \*3. Ashley’s parents filed suit against Simplicity alleging negligence and strict liability theories. Simplicity filed a motion for summary judgment. *Id.* at \*16. The district court granted Simplicity’s motion, holding that Pennsylvania’s product liability law did not permit recovery for Ashley’s injuries because she was a bystander, not an intended user, of the riding mower. *Id.* at \*16-17. Plaintiffs appealed this decision, and the Third Circuit reversed and remanded the matter to the district court.

In reviewing the development of Pennsylvania’s product liability law, the Court noted the efforts to separate negligence concepts from strict liability actions. As part of this analysis, the Court reviewed the Pennsylvania Supreme Court’s decision in *Phillips v. Cricket Lighters*, 576 Pa. 644, 841 A.2d 1000 (2003), in which the Court declined to extend strict liability to any “reasonably foreseeable user,” finding that doing so would “improperly import negligence concepts into strict liability law.” *Berrier, supra* at \*30 (citation omitted). In analyzing this decision, the Third Circuit focused on Justice Saylor’s concurring opinion, in which he indicated that a review of Pennsylvania law “demonstrates a compelling need for consideration of reasoned alternatives, such as are reflected in the position of the Third Restatement.” *Id.* at \*41. The Third Circuit concluded that Justice Saylor’s concurring opinion in *Phillips* indicates that the Pennsylvania Supreme Court would adopt Sections 1 and 2 of the Third Restatement’s definition of a cause of action for strict product liability in deciding strict liability issues in the future. *Id.*

In predicting the future course of product liability in Pennsylvania, the Third Circuit interpreted the Third Restatement as not limiting a strict liability cause of action to the user or consumer, but broadly permitting any person harmed by a defective product to recover in strict liability. *Id.* at \*43. The Court determined that the Third Restatement would eliminate much of the confusion caused in Pennsylvania by attempting to insulate negligence concepts from strict liability claims. *Id.* at \*46.

The Third Circuit believes that the Pennsylvania Supreme Court will adopt Justice Saylor’s concurring opinion and find that concepts from negligence are embedded in strict product liability in Pennsylvania and that the character of the product and the conduct of the manufacturer are largely inseparable. *Id.* at \*48.

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Significantly, prior to issuing the *Berrier* decision, the Third Circuit certified the following question to the Pennsylvania Supreme Court: “whether, under Pennsylvania law, a plaintiff minor child may pursue a strict liability claim for injuries caused by a riding lawnmower where the child is neither an intended user nor consumer of the mower.” The Supreme Court entered an Order respectfully declining the Third Circuit’s petition for certification, continuing to leave this issue open in Pennsylvania. *Id.* at 64 n. 33.

Notwithstanding the above, Pennsylvania’s Supreme Court will soon have the chance to address the Third Circuit’s prediction. Pending before the Court is the matter of *Bugosh v. I.U. North America, Inc.* in which the Court will decide the following issue: “whether this Court should apply Section 2 of the Restatement (Third) of Torts in place of Section 402A of the Restatement (Second) of Torts.” 942 A.2d 897 (Pa. 2008) (per curiam).

With the Third Circuit’s decision in *Berrier*, the landscape of product liability law in Pennsylvania may be on the way to a significant, fundamental shift.

*The Product Liability Alert is intended to keep readers current on product liability matters and is not intended to be legal advice. For information or assistance regarding any of the information noted above, please contact Dennis P. Ziembra at 215.851.8538 or dziembra@eckertseamans.com, Jodi Dyan Oley at 215.8518473 or joley@eckertseamans.com or any other attorney with whom you have been working.*