

A construction worker was using a nail gun to reshingle the roof of a residence. While the construction worker was near the edge of the roof, a manufacturing defect in the gun caused a nail to be discharged from the gun at an angle rather than directly downward. A 10-year-old child, who was playing in the yard below, was struck by the nail and seriously injured. The child's parents, on behalf of their child, have brought a strict products liability action against the construction company that employed the construction worker. The construction company can establish that, although the child was not negligent, her parents were negligent in allowing her to play near the construction work occurring on the roof.

Can the construction company successfully defend against this action?

- A. No, because the construction company is vicariously liable for the construction worker's conduct.
- B. No, because the nail gun used by the construction worker had a manufacturing defect.
- C. Yes, because the nail gun was used to provide a service.
- D. Yes, because the parents' contributory negligence will be imputed to the child to reduce the construction company's damages.

Explanation:

Strict products liability actions can only be maintained against commercial sellers who are in the business of selling or otherwise distributing the type of defective product that harmed the plaintiff. As a result, someone who **merely used a defective product to provide a service** is **not subject to strict products liability** for any harm to persons or property caused by the defect.

Here, the child was injured because of a **manufacturing defect** in the nail gun. But since the construction worker—and vicariously the construction company—was using the nail gun to reshingle the roof, the defective product was merely used to provide a service. As a result, the construction company can successfully defend against this action for strict products liability.

(Choice A) Employers can be held vicariously liable for an employee's tortious conduct under the doctrine of **respondeat superior**. But here, the construction worker (employee) is not strictly liable for the child's injury caused by the defective nail gun because the worker was not a commercial seller of the nail gun. As a result, the construction company (employer) is also not strictly liable.

(Choice B) The nail gun did have a manufacturing defect, which could impose strict liability (ie, liability without proof of fault) on the manufacturer and other commercial sellers of the gun. But strict liability would not be imposed on someone who merely used the nail gun to provide a service (eg, reshingle a roof).

(Choice D) Under the rule of **pure comparative negligence** (default rule on the MBE), a plaintiff's contributory negligence reduces the plaintiff's recovery by his/her proportionate share of fault. However, a parent's negligence will *not* be imputed (ie, assigned) to a child-plaintiff in a suit against a third party. And even if it were, this would merely reduce the child's damages—not serve as a complete defense to strict products liability.

Educational objective:

Someone who merely used a defective product to provide a service is not subject to strict products liability for harm to persons or property caused by the defect.

References

Restatement (Third) of Torts: Prods. Liab. §§ 1, 20 (Am. Law Inst. 1998) (liability of commercial suppliers).

Commercial supplier/seller
(subject to strict
products liability)



Service provider
(not subject to strict
products liability)

