No. 20-2206

IN THE

Supreme Court of the State of Ohiowa

LOUIS TULLY, AS FATHER AND NATURAL GUARDIAN FOR MINOR L.T.

AND IN HIS OWN RIGHT,

Petitioner,

v.

ZUUL ENTERPRISES, AN OHIOWA CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE STATE OF OHIOWA

BRIEF FOR RESPONDENT

Team D

QUESTION PRESENTED

1. Did the appellate court err in affirming Zuul's motion for summary judgment on the Tully's manufacturing claim?
2. Does the read and heed doctrine apply to strict liability failure-to-warn claims in the State of Ohiowa?

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STATEMENT OF THE CASE

Zuul Enterprises

Zuul Enterprises ("Zuul") is a Cincinnatus, Ohiowa based company. R. at 3. Pete Venkman, the founder, invented Zuul e-cigarette to provide a safer alternative to traditional tobacco cigarettes. R. at 3. Zuul devices activate by pressing a button on the e-cigarette. R. at 3. An atomizer within the e-cigarette heats the flavored fluid liquid inside the cartridge into a vapor. R. at 4. The user inhales the vapor from the mouthpiece of the device. R. at 4. Zuul became instantly popular among users because of its conveniently compact size and variety of flavors. R. at 4. Included on the packaging of each Zuul e-cigarette is a warning regarding the dangers of the enclosed device. R. at 4.

On June 7, 2018, Zuul issued a statement that it was introducing a new line of accessories — Zuul skins — to decorate the e-cigarette. R. at 4. Zuul skins are stickers that a user can stick to the surface of a Zuul device. R. at 4. Accordingly, users can apply Zuul skins and create custom decorations for their e-cigarette devices. R. at 4. Although there was not a warning included with the individual Zuul skins, Zuul continued to provide a warning included in the packaging of each Zuul e-cigarette device. R. at 4.

In the same statement, Zuul also indicated it will only produce the "classic tobacco" flavor cartridge in response to an injunction that was ordered against the production of Zuul's "sweet" flavor cartridges. R. at 4. To meet this goal, Zuul redesigned their e-cigarette devices to prohibit users from inserting flavored cartridges from different competing brands. R. 4. The redesign ensured that only the classic tobacco flavor cartridge could be used in Zuul's e-cigarettes.

The Incident Involving J.T.

On July 17, 2018, the Petitioner asked Dana Barrett (a nineteen-year-old sophomore in college) to babysit J.T., his eleven-year-old son. R. at 5. Ms. Barret has had an affinity for e-

cigarettes and has frequently used Zuul's products since turning eighteen. R. at 5. Ms. Barrett's Zuul e-cigarette was decorated with a Zuul skin. R. at 5. Throughout the evening, Ms. Barrett warned J.T. numerous times of the dangers of playing with e-cigarettes. R. at 5. L.T. did not listen to Ms. Barrett's warnings. R. at 5. At some point in the evening, Ms. Barrett left her Zuul unattended. R. at 5. L.T. grabbed the e-cigarette, pressed the activating button, and began playing with the e-cigarette as if it was a leaf blower. R. at 5. The e-cigarette exploded, resulting in L.T. severely burning his hand. R. at 5.

Procedural History

The Petitioner filed a complaint in the Court of Common Pleas alleging that Zuul had (1) violated state product liability law due to a manufacturing defect resulting in the device exploding and that (2) Zuul failed to adequately warn customers of the risks associated with their products. R. at 2-3. Zuul moved for summary judgment; Zuul's manufacturing defect claim was granted on September 28, 2018. R. at 3. However, the failure-to-warn claim proceeded to trial. R. at 3. During trial, the Petitioner's requested a jury instruction on the heeding presumption. R. at 3. The court sustained Zuul's objection relating the Petitioner's requested jury instruction regarding the heeding presumption. R. at 3.

The Petitioner appealed to the Court of Appeals for the State of Ohiowa. On December 20, 2019, the Court of Appeals affirmed the ruling granting summary judgment to the manufacturing defect claim. R. at 3. Although the Court of Appeals found there was a manufacturing defect in the e-cigarette, Zuul was not liable because liability only extended to consumers, which include persons using the product as intended. R. at 9. Thus, L.T. was not a foreseeable consumer of the product. R. at 9. Moreover, Zuul could not reasonably foresee L.T. being subject to harm caused by the product. R. at 9. Accordingly, Zuul was not liable for the physical injuries L.T. incurred. R. at 9.

Regarding the second issue on appeal, although the Court of Appeals recognized the heeding presumption, the court ultimately affirmed the Court of Common Pleas' ruling disallowing a jury instruction because no prejudice resulted. R. at 3. To support the finding of no prejudice, the Court of Appeals emphasized that the jury deliberated for sixteen hours and had a wealth of evidence to base their decision along with testimony admitted by the named parties. R. at 12.

The Petitioner's timely appealed to the Supreme Court of the State of Ohiowa. R. at 1.

SUMMARY OF THE ARGUMENT

Summary judgment is proper when there remains no genuine issue as to a material fact of the claim and the moving party is entitled to judgment as a matter of law. Because it was not disputed that there existed a manufacturing defect in Zuul's product, L.T. failed to offer sufficient evidence to prevail on a products liability claim in the State of Ohiowa. In the state of Ohiowa claims brought against a manufacturer must be brought under the Ohiowa Products Liability Act ("OPLA"). OPLA mandates that manufacturers are liable for injuries sustained as a result of a defect in the product only to those individuals that are in the class of reasonably foreseeable consumers. In order to be a foreseeable consumer, facts are interpreted but it is of necessity that to be a foreseeable consumer, the product must be used as is intended; Because L.T. failed to prove that he was an intended user, he is not a reasonably foreseeable consumer. Therefore, because there are no other issues of material fact, the summary judgment award is proper.

The original heeding presumption provides what where a warning is given, the seller can assume that it will be read and heeded. Upon adoption, the presumption was intended to work in favor of the manufacturer when an adequate warning was present. However, over time, various jurisdictions began to interpret the heeding presumption in favor of the plaintiff in instances where a warning was not given. As such, courts recognizing the heeding presumption eased the plaintiff's burden of causation by assuming that any plaintiff would have read a warning, if given. In turn,

the manufacturers were tasked with rebutting the heeding presumption by providing contrary evidence that the plaintiff would not have heeded a warning. Thus, the read and heed doctrine works as a rebuttable presumption that allows a factfinder to assume a warning would have been heeded and shifts the burden of causation from the plaintiff to the manufacturer.

First, the State of Ohiowa should reject recognizing the heeding presumption because it departs from traditional causation requirements by assuming any warning has been heeded. The temporary shift of the burden of causation is contrary to products liability public policy. Additionally, the State of Ohiowa should reject adopting the read and heed doctrine because it was incorrectly founded by the language contained in comment j of the Second Restatement. The language of comment j. recognizes only the sufficiency of warnings given, and only affords protection to manufacturers that provide adequate warnings. Therefore, the heeding presumption applied in some jurisdictions is an illogical corollary to the express language of the text.

Moreover, the State of Ohiowa should reject the heeding presumption because the doctrine conflicts the with the real-world experience of consumers. Consumers are surrounded by warnings in their day-to-day lives, yet consumers ignore and avoid reading warnings for a multitude of reasons. Further, allowing the presumption allows a potential plaintiff to present self-serving testimony that they would have heeded a warning, if provided. Finally, the State of Ohiowa should reject the read and heed doctrine because public policy is better served by applying the Third Restatement of Torts. The Third Restatement does away with the heeding presumption altogether. Moreover, the Third Restatement emphasizes the principle that a manufacturer makes a product that is not unreasonably safe. Further, the Third Restatement clarifies that a plaintiff must always prove proximate causation in a failure-to-warn claim.

Accordingly, this Court should affirm Zuul's motion for summary judgment on the Petitioner's manufacturing defect claim and affirm that the Petitioner was not prejudiced by the trial court rejecting a heeding presumption jury instruction. Additionally, this court should reverse the Court of Appeals' finding that the read and heed doctrine applies to strict liability failure-to-warn claims in the State of Ohiowa.

ARGUMENT

In a situation where a plaintiff fails to proffer sufficient evidence to support an assertion of fact, the court should grant summary judgment under a standard of de novo review. *Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St. 3d 108 (Ohio 1991). In a strict products liability claim, the applicable test for liability is the consumer expectation test as set out in *State Farm Fire & Cas. Co. v. Chrysler Corp.*, 37 Ohio St. 3d 1, 6 (Ohio 1988).

Under the consumer expectations test, a manufacturer may be held strictly liable for a defective product that caused the product to fail to perform as safely as an ordinary consumer would expect when the product is used in an intended or reasonably foreseeable manner. *Id.* The test asks whether at the time the product left the manufacturer's hands, it was "more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." *Id*. The consumer expectations test is typically applied in matters in which the product's use violated minimum safety assumptions of an ordinary consumer. *Id*. Therefore, a reasonably foreseeable consumer is one that ultimately used the product as intended and entitled to recovery. *Id*. As such, summary judgment was properly awarded because no evidence was provided to establish or to reasonably infer that L.T. was a foreseeable consumer and used the product as it was intended to be used.

Additionally, in a strict product liability failure-to-warn claim, the plaintiff carries a burden of proving that the inadequate warning caused their injuries and the burden or persuasion. *Rivera*

v. Philip Morris, 125 Nev. 185, 190-91 (Nev. 2009). Therefore, in order for a plaintiff to successfully prove a failure-to-warn case, a plaintiff must produce evidence "(1) the product had a defect that rendered it unreasonably dangerous, (2) the defect existed at the time the product left the manufacturer, and (3) the defect caused the injury. *Id.* at 191. The elements required in a failure-to-warn claim are the same as other strict liability claims require. *Id.* In a strict liability failure-to-warn claim a product may be found to be "unreasonably dangerous" if the manufacturer failed to provide an adequate warning. *Id.* (citing *Yahama Motor Co. v. Arnoult*, 114 Nev. 233 (Nev. 1998)). Additionally, a plaintiff's causation burden can be satisfied in a failure-to-warn case by demonstrating that a "different warning would have altered the way the plaintiff used the product or would have 'prompted the plaintiff to take precautions to avoid the injury.'" *Riley v. Am. Honda Motor Co.*, 259 Mont. 128, 132 (Mont. 1993).

However, over time, some courts have convoluted the text of the Restatement (Second) of Torts § 402 cmt j. (Am. Law. Inst. 1965) and interpreted to read a heeding presumption in the favor of the plaintiff in the absence of a warning. *Id.* at 134-35. In other words, several jurisdictions entitle a plaintiff to a presumption that they would have heeded an adequate warning, if given. *Coffman v. Keane Corp.*, 133 N.J. 581, 597 (N.J. 1993). When applied, the presumption shifts the burden of causation from the plaintiff to the manufacturer, who must rebut by demonstrating that the plaintiff would not have heeded a different warning. *Id.* at 603.

Nevertheless, shifting the burden to the manufacturer, even if it is only temporary, is contrary to strict liability law and public policy. *Rivera*, 125 Nev. at 190. The heeding presumption is contrary to strict liability law, because Restatement (Third) of Torts suggests that in a product's liability case, a plaintiff's conduct should be treated no differently than a routine tort matter. Restatement (Third) of Torts: Products Liability §17 cmt. b (Am. Law. Inst. 1998). Accordingly,

the Petitioner should not be entitled to a presumption that L.T. would have heeded a warning if provided. *See Rivera*, 125 Nev. at 190.

Further, the lower court did not abuse its discretion by rejecting the heeding presumption jury instruction. A lower court's decision to grant or deny a jury instruction is subject to an abuse of discretion standard of review. *Barton Protective Services, Inc. v. Faber*, 745 So.2d 968, 974 (Fla. Ct. App. 1999). "A faulty jury instruction requires reversal when (1) 'we have substantial doubt whether the instructions, considered as w whole, properly guided the jury in deliberations,' *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1235 (10th Cir. 1999) (quotation omitted); and (2) 'when a deficient jury instruction is prejudicial,' *Coleman v. B-G Maintenance Management of Colo., Inc.*, 108 F.3d 1199, 1201 (10th Cir. 1997).

Finally, the heeding presumption should not be recognized in the State of Ohiowa because it departs from traditional proximate causation requirements, is incorrectly based on the Restatement (Second) of Torts § 402 A, cmt. j., the heeding presumption is at odds with the real-world experience of consumers, and public policy is better recognized by adopting the Third (Restatement) of Torts — which eliminated the presumption altogether.

Accordingly, this Court should affirm upholding Zuul's motion for summary judgment on the Petitioner's manufacturing defect claim and affirm the ruling that there was no prejudice by disallowing a jury instruction on the heeding presumption. Moreover, this Court should expressly reject applying the read and heed doctrine to strict liability failure-to-warn cases in the State of Ohiowa.

I. The State of Ohiowa Did Not Err in Affirming Summary Judgment on the Tully's Manufacturing Defect Claim.

As an Ohiowa Enterprise, Zuul is only liable to reasonably foreseeable consumers of its product that would be subject to physical harm caused by a defect in its product, as provided by

the Ohiowa Products Liability Act, hereinafter referred to as "OPLA." Ohiowa Rev. Code § 5552.368. The OPLA was adopted to "enforce liability on designer, manufacturer, or seller of a product when a defect in product causes physical harm to the consumer." R. at 4. However, while there is no exact definition of consumer, it is widely accepted that "it is only necessary that the product was used as intended" as noted in the Restatement (Second) of Torts § 402A cmt. 1 (Am. Law. Inst. 1998). This is because it is questionable to impose liability on a manufacturer for a defective product for every injury to any human being simply because they used the product in some way other than its intended use. *Howes v. Hansen*, 56 Wis.2d 247 (Wis. 1972). However, issues often arise in courts when an individual is harmed by a defective product that they are not entitled to use, such as the instant case because L.T. was not old enough to be entitled to use a Zuul e-cigarette.

In 2017, a federal district court held that Zuul had been using sweet flavors to market its e-cigarettes directly to children, ultimately requiring Zuul to pay damages and was issued an injunction against the production of Zuul's most popular sweet flavors. This litigation detrimentally affected Zuul stock prices. R. at 4. Yet, Zuul still issued a statement affirming their denial of marketing to children and vowed to produce only "classic tobacco" flavored cartridges in 2018. *Id*. Zuul demonstrated signs of good faith when they redesigned the device to only function with Zuul-manufactured tobacco cartridges, so as to prohibit anyone who may prefer a sweet flavor or a tobacco flavored cartridge manufactured by another e-cigarette company.

Nevertheless, whether a plaintiff is entitled to the strict protections of tort liability hinges on whether it can fairly be said that the conduct in question was reasonably foreseeable. *Mieher v. Brown*, 54 Ill.2d 539 (1973). Additionally, foreseeability means that which it "is objectively reasonable to expect, not merely what might conceivably occur." *Winnett v. Winnett*, 57 Ill.2d 7,

13, 310 N.E.2d 1 (1974). A plaintiff cannot bring a strict products liability suit if the plaintiff's conduct was not objectively reasonably for the manufacturer of the product to expect. *Id.* In *Winnett*, a four-year-old child injured herself when she was attracted to a dangerous forage wagon on her grandfather's farm, placed her hands in a conveyor belt it and injured her hands. *Id.* at 9. The court found that the scope of the forage wagon's intended use is only relevant when the plaintiff is a person entitled to protections afforded by strict tort liability against manufacturers. *Id.* at 10. Similarly, just as L.T. was likely attracted to the defective Zuul device because of the "Hola Gato" sticker encasing the Zuul device, this fact immaterial for the same reason: L.T. had no objective reason to own a Zuul device, he was eleven. A court in a similar jurisdiction held a meant manufacturer not liable for injuries to a three-year-old girl who wandered from her mother at a grocery store and put her hand in a meat grinder in an unattended and unlocked work area. *Yassin v. Certified Grocers of Illinois, Inc.*, 150 Ill. App. 3d 1052, 1058 (1986). In this case, the court held that the manufacturer of the meat tenderizer was not liable because the machine was in a separate work area from the environment the grocery store could reasonably foresee the plaintiff entering and the conduct of the child was not reasonably foreseeable in such an environment. *Id.* In another case looking at objective another, another a child-plaintiff was injured by a meat grinder, but is distinguishable from the facts of *Yassin* because he had been shown how to use the machine for its intended purpose and was using it in an environment that the manufacturer could reasonably expect the intended purpose to be carried out, and the manufacturer was not liable in this instance. *Pierce v. Hobart Corp.,* 512 N.E.2d 14, 18 (1987). The key distinction between the two is the plaintiff's showing of awareness of the product's intended use.

Furthermore, there is no evidence to support that L.T. had ever been shown how to use a Zuul device for its intended purpose. In fact, quite the opposite; the record reveals otherwise that

L.T.'s babysitter warned him multiple times about the dangers of e-cigarettes, but this is insufficient because there was no indication that the device with the Hola Gato sticker was the same device he had previously been warned about. It is also unknown whether or not the babysitter had shown him before. R. at 5. Just like the facts of *Yassin*, L.T. was unattended when he was harmed. However, L.T. failed to show any evidence that he knew what the purpose or intended use of the Zuul device was when he pressed the button and mimicked a leaf-blower.

In terms of functionality and conduct, two actions are required for proper intended use of a Zuul device. First, the consumer operates the Zuul by depressing a button on the e-cigarette, whereby an atomizer inside the e-cigarette heats flavored liquid into a cartridge which turns into a vapor that a user can inhale through a mouthpiece. R. at. 4. It is not disputed that L.T. handled the device and that he pressed the button. Technically, L.T. completed one step of use, but never placed the device up to his mouth to complete the action. R. at 4. Yet, even if L.T. had raised the device to his mouth, he would not qualify as a foreseeable consumer entitled to recovery unless he intended to inhale tobacco vapor.

Accordingly, because there is no way to construe L.T. as a foreseeable consumer based on the facts, Zuul cannot be liable for the injuries proximately caused by its manufacturing defect because if L.T. is not a foreseeable consumer, there can be no logical finding that it was reasonably foreseeable that L.T. could be subject to harm caused by the manufacturing defect.

II. The State of Ohiowa should reject applying the read and heed doctrine to strict liability failure-to-warn claims.

The heeding presumption arose out of the Second Restatement, which provides "[w]here warning is given, the seller may reasonably assume that it will be read and heeded . . ." Restatement (Second) of Torts §402A cmt. j.

The original heeding presumption adopted in the Restatement (Second) of Torts was intended to work in favor of a manufacturer when an adequate warning was present. *Id.* Nevertheless, after the Second Restatement was adopted, Courts began to interpret the doctrine to recognize a possibility of a heeding presumption to exist in favor of a plaintiff. *Tech. Chemical Co. v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972). "Where there is no warning, as in this case, however, the presumption that the user would have read an adequate warning works in favor of the plaintiff user." *Id.* Additionally, the manufacturer may rebut the presumption if the manufacturer provides contrary evidence that the user would not have heeded the warning. *Id.* To rebut the presumption, the manufacturer may "produc[e] evidence that the user was blind, illiterate, intoxicated at the time of use, irresponsible or lax in judgment or by some other circumstance tending to show that the improper use was or should have been made regardless of the warning." In other words, heeding presumption is a rebuttable assumption that allows the finder of fact to posit a warning would have been heeded, if given, and then shifts the burden of causation from the plaintiff to the manufacturer. *Rivera*, 125 Nev. at 187.

By interpreting a heeding presumption in favor of the plaintiff-user when no warning was present, the doctrine was manipulated by the courts into something that was never anticipated by the drafters of the Second Restatement. *See Gen. Motors Corp. v. Saenz ex rel. Saenz*, 873 S.W.2d 353, 358 (Tex. 1993); *Potthoff v. Alms*, 583 P.2d 309, 311 (Colo. Ct. App. 1978). Consequently, the State of Ohiowa should reject applying the read and heed doctrine to strict liability failure-to-warn claims because the heeding presumption departs from traditional proximate causation requirements, is incorrectly interpreted from comment j., inaccurately depicts consumer's real-world experience, and public policy is better served applying the Third (Restatement) of Torts, which eliminated the heeding presumption altogether

A. The State of Ohiowa will depart from traditional proximate causation requirements if it adopts the read and heed doctrine.

Adopting the heeding presumption in failure-to-warn claims gives Plaintiffs a dramatic advantage, which strays from traditional proximate causation requirements because the presumption assumes that any warning provided would have been heeded.

A failure to warn of an injury causing risk relates to "technically pure and fit product" can cause such product to be unreasonably dangerous. *Riley*, 259 Mont. at 132. Further, the elements of a failure-to-warn cause of action are the same as any other strict liability cause of action: "(1) The product was in a defective condition, 'unreasonably' dangerous to the consumer; (2) the defect caused the accident and injuries complained of; and (3) the defect is traceable to the defendant." *Id.* Moreover, it is firmly rooted in strict liability failure-to-warn law, that the plaintiff bears the burden of production and must prove causation. *Rivera*, 125 Nev. at 187-88.

A motorcyclist who lost control of his motorcycle when it began to shimmy and shake, drove onto the left shoulder of the highway, flipped the motorcycle, and was thrown off of a steep embarkment filed suit alleging failure-to-warn under strict products liability. *Riley*, 259 Mont. at at 130. The motorcyclist attempted to argue that he would have ridden the motorcycle differently had a warning of the "wobble" been given, and, in the alternative, argued that he was allowed the rebuttable heeding presumption that he would have followed a warning. *Id.* at 132. In *Riley*, the Montana Supreme Court, recognized the causation element could be satisfied by introducing evidence stating that a warning could have altered plaintiff's use of a product. *Id.*; *see also Krueger v. General Motors Corp.*, 240 Mont. 266, 279 (Mont. 1989) (concluding that the plaintiff presented sufficient testimony to support that he would have altered the method of repairing his pickup truck had he known his pickup truck with a new transfer case engaged differently than a conventional transfer case). Nevertheless, the Court ultimately refused to rely on the heeding presumption to

because the motorcyclist testified that he *may* have rode the motorcycle differently. *Riley*, 259 Mont. at 133. Accordingly, the motorcyclist failed to establish a causal relationship between the lack of warning of the propensity to wobble and his injury. *Id.* at 133; *see also DeJesus v. Craftsman Mach. Co.*, 16 Conn. App.558, 574 (Conn. App. Ct. 1988) (concluding that because the plaintiff bears the burden of causation, there is no recognized presumption that the inadequate warning was the proximate cause of the plaintiff's injuries).

More recently, the Nevada Supreme Court expressly rejected the heeding presumption as contrary to Nevada state law because the presumption incorrectly shifts the burden of causation to the manufacturer who must rebut the presumption by proving the plaintiff would not have heeded a different warning. *Rivera*, 125 Nev. at 188. As such, a widower, whose wife had smoked for decades and died of lung cancer, unsuccessfully argued that a heeding presumption should have been applied in his failure-to-warn case. *Id.* 189-90. "[W]e conclude that shifting the burden of proving causation to the manufacturer in a strict product liability case, even if it is a temporary shift, is contrary to this state's law as well as public policy." *Id.* at 190. Additionally, in strict liability cases, the plaintiff carries both the burden of production to establish a prima facie case as well as the burden of persuasion to present enough evidence to convince a judge that a fact has been established. *Id.* at 191 (citing 29 Am. Jur. 2d Evidence § 171 (2008); *Hurley v. Hurley*, 754 A.2d 1283, 1286 (Pa. Super. Ct. 2000)). In order to establish its burden of causation in failure-to-warn cases, a plaintiff can demonstrate a different warning would have altered their use of the device or product or taken additional safety measures to avoid injury, the court found. *Rivera*, 125 Nev. at 191; *see Harris v. Int. Truck and Engine*, 912 So.2d 1101, 1109 (Miss. Ct. App. 2005) (declining to adopt the heeding presumption and affirmed Mississippi law "explicitly placed on

the plaintiff the burden of proving that the allegedly inadequate warnings" had caused their injuries).

Further, a plaintiff cannot prove proximate causation against a manufacturer if they are aware of the danger associated with a product, and thus, not entitled to a heeding presumption. *Ramstad v. Lear Siegler Diversified Holdings Corp.*, 836 F. Supp. 1511, 1516 (D. Minn. 1993). The Fourth Circuit affirmed the conclusion that the plaintiff failed to prove causation in his failure-to-warn claim against the manufacturer, because under Minnesota law, "a manufacturer's failure to warn is not the cause of an injury when the user was actually aware of the danger." *Id.* As such, the court expressly refused to adopt heeding presumption (unrecognized by Minnesota state courts) when the plaintiff presented no evidence that a warning regarding the danger would have prevented the plaintiff from acting putting his foot near a grain auger. *Id.*; *see also Odom v. G.D. Searle & Co.*, 979 F.2d 1001, 1003 (4th Cir. 1992) (rejecting the heeding doctrine when there is a learned intermediary — a physician who has independent knowledge of a risk associated with a drug or device and still prescribes the device anyways — because the plaintiff is unable to establish proximate causation of their injuries to the manufacturer whose duty to warn extends only to the prescribing physician).

L.T.'s cause of action alleging strict liability for failure-to-warn should fail because J.T. is unable to prove Zuul was the proximate cause of the alleged injuries. *See Rivera*, 125 Nev. at 191; *Riley*, 259 Mont. at 133. The initial Zuul device did, in fact, contain a warning for all users about the dangers of the product. As such, any user of the product was aware of the dangers of using the e-cigarette. In this instance, L.T. was told numerous times of the dangers of e-cigarettes by Ms. Barrett. *See Ramstad*, 836 F. Supp at 1516. Additionally, the dangers associated with using tobacco products are well-known and prominent in environments L.T. would have been exposed

to on a day-to-day basis, such as school settings and cartoons. *See id.* Further, by taking the e-cigarette from Ms. Barrett, the Petitioner's cannot prove that L.T. would have heeded the warning provided with the Zuul which was included with the device's packaging. *See Rivera*, 125 Nev. at 191. In the alternative, even if the heeding presumption is recognized in the State of Ohiowa, the Petitioner's claim must fail because Zuul could have demonstrated that L.T. would not have read any warning provided, supported by the fact that L.T. did not heed verbal warnings. *See id.*; *DeJesus*, 16 Conn. App. at 547.

Nevertheless, Courts have recognized adopting the heeding doctrine based on public policy grounds. *Coffman*, 133 N.J. at 597. One of the public policy factors for adopting the heeding presumption includes easing the plaintiff's burden relating to proximate causation. *Id.* at 600. As such, adopting the heeding presumption fairly limits the plaintiff's burden of proof relating to proximate causation. *Id.* at 603. As such, the plaintiff is afforded the presumption they would have heeded a warning and the defense must rebut the presumption by offering evidence that such warning would not have been heeded. *Id.* Notably, the *Coffman* court agreed with the manufacturer's assertion that the heeding presumption is not a logical presumption because it is not firmly based on empirical evidence. *Id.* However, even though the court in *Coffman* adopted the heeding presumption, the presumption, as applied in Pennsylvania, is limited to workplace asbestos exposure. *Viguers v. Philip Morris USA, Inc.*, 837 A.2 534, 537-38 (Pa. Super. Ct. 2003) (holding that the heeding presumption does not apply to situations where the plaintiff faces a voluntary choice to use a product; also concluding that in situations where the plaintiff is not forced to be exposed to the product causing the injury, like in the employment context, public policy arguments for the heeding presumption become less influential). As such, the presumption should

not be recognized in Ohiowa, at all, and especially for instances where a plaintiff *voluntarily* exposes himself to the product causing the injury. *See Id.*

B. The read and heed doctrine was incorrectly founded on the Restatement (Second) of Torts § 402A, Cmt. J.

Whether or not a jurisdiction adopts the heeding presumption relies largely on public policy concerns — inequities result whether or not courts adopt or reject the heeding doctrine. However, the heeding presumption should be rejected in the State of Ohiowa because the heeding presumption was incorrectly based on an illogical corollary interpreting comment j.

A majority of jurisdictions have framed products liability according to the Restatement (Second) of Torts § 402A. *Potthoff*, 583 P.2d at 311. As such, § 402 A clearly mandates that in order for strict liability to injure a potential consumer, the defective product must be proved to be unreasonably dangerous. Further, comment j. "establishes only the sufficiency of warnings or directions as to use '[i]n order to prevent the product from being unreasonably dangerous' and affords such protection to the *seller* of products such as foods and drugs whose potentiality of danger is not generally recognized." *Id.*

A widow, whose husband was killed after being run over by a scraper filed suit against the manufacturer and retailer claiming strict liability of defective product was unreasonably dangerous because the scraper did not have rearview mirrors, backup alarms, or other safety features. *Id.* The widow alleged that she was entitled to a heeding presumption regarding the issue of causation. *Id.* at 311. The appellate court, in *Potthoff*, expressly rejected reading cmt. j to create a special presumption to a plaintiff relating to proximate causation. *Id.* Accordingly, whether a user of a product would have acted in the same or different manner had warnings or instructions been provided is a question of the finder of fact to determine "unaided by presumptions and guided only by the evidence before it." *Id.*

Moreover, the state supreme courts have also expressly criticized the heeding presumption as not being founded in comment j. *Rivera*, 125 Nev. at 192 (concluding that § 402 cmt. j. does not support a heeding presumption); *Saenz*, 873 S.W.2d at 358 (stating that comment j. merely recognizes the obvious — that if a seller provides an adequate warning and instructions, it cannot be liable for the buyer's failure to follow such warning and instructions).

The drafters of comment j. initially intended to allow the read and heed doctrine to benefit the manufacturer in situations where the manufacturer provided an adequate warning. *See Sanez*, 873 S.W.2d at 358. According to comment j., the heeding presumption should have only applied in situations where a manufacturer provided an adequate warning. *See Potthoff,* 583 P.2d at 311. As such, the State of Ohiowa should not read in an illogical corollary into the text comment j. *See id.* Doing so goes beyond the plain meaning of the text. *See Rivera,* 125 Nev. at 192. The Petitioner should not be entitled to a presumption that immensely eases his burden of causation — questions of causation should be left to the factfinder to determine. *See Potthoff*, 583 P.2d at 311. Further, the Petitioner was not prejudiced by the jury not applying the presumption because there was ample evidence presented at trial to support the notion that L.T. would not have read or heeded any warning provided. *See Pothoff*, 583 P.2d at 311.

The Petitioner, as well as other jurisdictions who recognize the read and heed doctrine, asserts that the heeding presumption was first adopted in *Technical Chemical*, decided by the Texas Supreme Court. 480 S.W.2d 602 (Tex. 1972). The injured barber filed strict liability suit claiming that the label on the can gave no warning relating to the danger of connecting the high-pressure side of the compressor to the can. *Id.* As such, strict liability cases require that proof that the defect in the product was the cause of the injuries. *Id.* "When the defect is due to inadequate labeling . . . the defect and product are inseparable . . . 'the aspect of the defendant's conduct that

made the sale of the product unreasonably dangerous [i.e., the label] must be found to have contributed to the plaintiff's injury.'" *Id.* at 405 (citing Keeton, *Products Liability – Inadequacy of Information*, 48 Texas L. Rev. 398, 413 (1970). Nevertheless, the court was unable to say that the Plaintiff established that the failure-to-warn was a producing cause of his injuries, therefore the manufacturer prevailed. *Id.* Further, the contrary to Petitioner's assertion, the *Technical Chemical* court did not in fact adopt the heeding presumption. *See Dressler Indus. Inc. v. Lee*, 880 S.W.2d 750, 753 (1993) (finding that *Technical Chemical* did consider, but did not adopt the read and heed doctrine, but rather found that if there was such a heeding presumption, there was sufficient evidence to demonstrate that the plaintiff would have disregarded any warning).

C. The State of Ohiowa should not recognize the read and heed doctrine because the heeding presumption is at odds with the real-world experience of consumers.

Providing the heeding presumption to a plaintiff in a failure to warn strict liability case is inconsistent with real world experience, as such, the State of Ohiowa should outright reject the doctrine.

"While this might be common sense in our ideal world, our own experience does not support it; warnings are everywhere in the modern world and often go unread, or where read, ignored." *Riley*, 259 Mont. at 135.

In *Riley*, the Montana Supreme Court also recognized that the heeding presumption allowed to both plaintiffs and defendants departs from real world experience. *Riley*, 259 Mont. at 135. However, the *Riley* court expressly rejected the motorcyclist's that he might have ridden differently because his contentions were not supported by the evidence of the record and it was at odds with the real-world experiences of consumers. *Id.* at 133-35. As such, the court concluded that consumers, surrounded by warnings everywhere in the real world, often ignore or do not read warnings provided on products. *Id.* at 135. Accordingly, the heeding presumption as relating to

warnings should not be given to neither the consumer-plaintiff, nor the manufacturer-defendant, the court concluded. *Id.* Additionally, concerns relating to self-serving testimony — that a plaintiff testifies they would have heeded instructions — are not unique to strict liability claims and should not ease plaintiff's burden of establishing a prima facie case of failure-to-warn. *Id.*

Further, the Texas Supreme Court has also addressed difficulties a plaintiff faces in order to prove causation in a failure-to-warn cause of action. *Saenz* S.W.2d 353 at 357. Proof that an accident would not have occurred had a manufacturer provided an adequate warning "is more psychology and does not admit of the same degree of certainty." *Id.* As such, a plaintiff must offer evidence to demonstrate their habit to read and adhere to instructions and warnings. *Id.* As a result, plaintiff presents self-serving evidence that he would have been "mindful of an adequate warning given" under circumstances central and necessary to proving his causation and damage claims. *Id.* Further, it is consumer and buyer's real-life experience to ignore or fail to follow warnings and instructions. *Id.* at 358. Additionally, when a plaintiff ignores the instructions and warnings provided with a product, it is inappropriate to apply the presumption that a plaintiff would have followed better instructions when the plaintiff, inf fact, "paid no attention to the warning given, which if followed would have prevented his injuries." *Id.* at 359 n.4.

A forgery worker, who developed various respiratory diseases sued the supplier of silica products alleging a failure to warn of the risks related of inhaling silica dust which resulted in his injuries. *Dressler Indus*, 880 S.W.2d at 751. The forgery worker alleged that the absence of warning labels on the silica supplier's products made them unreasonably dangerous. *Id.* The court, in Dressler, refused to adhere to the heeding presumption that had been previously adopted because the forgery working conditions were "other circumstances tending to show that the improper use would have occurred regardless of the proposed warnings or instructions." *Id.* at 754 (quoting

Magro v. Ragsdale Bros, Inc., 721 S.W.2d 832, 834 (Tex. 1986). There was evidence introduced at trial which also found the forger, whose highest level of education was eighth grade, had difficulty reading, often ignored warnings, and worked without a mask or respirator because of the high heat in the forgery. *Dressler*, 880 S.W.2d at 754. Accordingly, "we simply do not assume that such person will always read and heed and follow instructions," the *Dressler* court stated. *Id.* at 754, n.3. As such, the heeding presumption was rejected — the silica supplier was entitled to have the jury resolve the issue of causation relating to the forgery worker's injuries. *Id.* at 754. *See also* Howard Latin, *Good Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. Rev. 1193, 1206 (1994) ("The comment j presumption embodies the behavioral assumption that "reasonable" users can be expected to receive, correctly interpret, and obey every comprehensive warning accompanying every product they use or encounter.").

In a modern-day society, the everyday consumer is bombarded with products with warnings that are ignored and disregarded. *See Riley*, 259 Mont. at 135. Therefore, applying a doctrine that assumes a plaintiff will read and heed a warning, if provided, is at odds with real-world experience as consumers. *See id.* Additionally, allowing the presumption permits a plaintiff, like L.T., to present self-serving testimony that he would have heeded any warning. *See Sanez*, 873 S.W.2d at 357. This presumption could be especially detrimental to a defendant in a case with emotional or sympathetic patterns. As such, manufacturers are at a severe disadvantage to counteract the sympathetic plaintiff's self-serving and speculative testimony that they would have heeded a warning. *See id.*

Nevertheless, the Petitioner argues he was entitled to the heeding presumption that he would have read and heeded an adequate warning, had it been provide. Notably, the heeding presumption is recognized in jurisdictions, like Maryland. Under the read and heed doctrine, direct

evidence that the plaintiff would have heeded a warning is not an essential element to prove causation, thus, easing their burden of causation. However, the heeding presumption should not be recognized in the State of Ohiowa and is not appropriate in relating to this fact pattern. In *White*, the Plaintiff alleged that the manufacturer's cigarettes were unreasonably dangerous because they were highly addictive, caused serious diseases, failed to perform as safely as the users would expect, and failed to provide sufficient warnings. *Estate of White v. R. J. Reynolds Tobacco Co.*, 109 F. Supp. 2d. 424, 431(D. Md. 2000). However, the manufacturer presented ample evidence relating to the danger smoking cigarettes as well as public statements condemning smoking — in songs, cartoons, movies, newspaper articles, and school textbooks — reaching a wide variety of potential users. *Id.* at 434. As such, the federal district court refused to apply the heeding presumption in failure-to-warn cases because the dangers of smoking were commonly known and there was a general widespread knowledge of the dangers of cigarettes. *Id.* at 435. The evidence presented that the decedent would not have heeded any warning, therefore, the plaintiff could not meet their burden proving causation. *Id.* at 435. As such, the heeding presumption should not be recognized in Ohiowa, because the dangers of smoking — regardless of cigarette smoking or e-cigarettes — is widespread and well known throughout Ohiowa. *See Id.* at 434.

D. The read and heed doctrine should not be recognized in the State of Ohiowa because public policy is better served applying the Third (Restatement) of Torts, which does away completely with the heeding presumption.

The consumer's interests in the State of Ohiowa are better served by adopting the Restatement (Third) of Torts application, which removes the heeding presumption altogether.

The Restatement (Third) of Torts suggests that in a product's liability case, a plaintiff's conduct should be treated no differently than a routine tort matter. Restatement (Third) of Torts: Products Liability §17 cmt. b. Additionally, the Third Restatement clarifies that the Plaintiff must always prove causation in a failure-to-warn case by eliminating the heeding presumption

altogether. Restatement (Third) of Torts: Products Liability § 2 cmt. l (Am. Law. Inst. 1998). To further encourage public policy justifications, courts should "strongly adhere to the principle that a manufacturer must make products that are not unreasonably dangerous, no matter what instructions are given in the warning." *Rivera*, 125 Nev. at 195; *see also Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 336 (Tex. 1998).

Public policy is best served by rejecting the heeding presumption, the *Rivera* court held. *Rivera*, 125 Nev. at 194. Relying on the Restatement (Third) of Torts, cmt. l., the Supreme Court of Nevada concluded that "comment j to section 402A of the Restatement (Second) of Torts implies that a manufacturer can satisfy its duty of making products safe by providing adequate warnings." Id. at 194-95 (quotations omitted). Thus, comment j. and its implications are unsound strict liability law. *Id.* at 195. Therefore, it is better practice to adhere to a doctrine that a manufacturer must make products that are not unreasonably dangerous, regardless of any and all warnings provided. *Id.* It is *better public policy* to not rely on warnings because this will warrant manufacturers to continue to strive to make reasonably safe products. *Id.* (emphasis added); *see also Riley*, 259 Mont. at 136 ("A defendant certainly is in no better position to rebut a presumption which totally excuses a plaintiff from meeting the causation element than a plaintiff is in establishing the causation element as part of the prima facie case.").

In analyzing the best approach to public policy justifications, the Texas Supreme Court expressly rejected the approach of comment J. *Uniroyal*, 977 S.W.2d at 337. In *Uniroyal*, the court emphasized the manufacturer's conclusion that warnings are an "imperfect means to remedy a product defect" and that a product's design is more important. *Id.* at 336. As a result, the Restatement (Third) of Torts approach was officially adopted — warnings and safer design alternatives, including other factors, are issues for the jury to consider in determining whether a

product design is "reasonably safe." *Id.* at 337. Thus, in the absence of the heeding presumption, a plaintiff is free to pursue a design defect claim.

Further, legal commentators have also elicited harsh criticism because the heeding presumption is "ridden with inequities." *See* Carrie A. Daniel, *Guide to Defeating the Heeding Presumption in Failure-to-Warn Cases: Defense Counsel Must Oppose the Distortion of Comment J's Language into a Presumption that Users would Read and Heed Instructions*, 70 Def. Couns. J 250, 256-59 (2003) (arguing that it is better public policy to reject a heeding presumption because (1) there is no evidence that fewer injuries result when a jurisdiction applies a heeding presumption; (2) the heeding presumption may deter manufacturers from making safer products because of limited resources in product development; and (3) the heeding presumption does not encourage manufacturers to provide more warnings); Latin, supra, at 1257 (concluding that comment j precludes judicial assessment of alternative methods to improve product safety —where the emphasis belongs — and is inconsistent with product liability doctrines favorable to users).

The State of Ohiowa should reject recognizing the heeding presumption in strict liability failure-to-warn claims. The Restatement (Third) of Torts has effectively rejected the heeding presumption by excluding it form the text altogether. Instead, the focus should be on safer designs and products that are not "unreasonably dangerous." Furthermore, it is better public policy practice to recognize the importance of manufacturer's making products that are not "unreasonably safe" as opposed to incorrectly placing the emphasis on warnings. *See Rivera*, 125 Nev. at 194; *Uniroyal*, 977 S.W.2d at 337. Contrary to Petitioner's assertion, the heeding presumption leaves the consumer worse off, because warnings are an insufficient method to address product defect. *See Rivera*, 125 Nev. at 194; *Uniroyal*, 977 S.W.2d at 337.

CONCLUSION

Accordingly, this Court should affirm upholding Zuul's motion for summary judgment on the Petitioner's manufacturing defect claim and affirm the ruling that there was no prejudice in not allowing a jury instruction on the heeding presumption. Moreover, this Court should expressly reject applying the read and heed doctrine to strict liability failure-to-warn cases in the State of Ohiowa.

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