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
Court of Appeals for the State of Ohiowa
Seventh Appellate District

_____

BRIEF FOR PETITIONER

_____

Team G
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Seventh Appellate District erred in affirming the trial court's grant of the Respondent's Motion for Summary Judgment on the Petitioner's manufacturing defect claim.
2. Whether the Ohiowa Product Liability Act demands the application of the heeding presumption to strict liability failure-to-warn claims.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

I. Background

Petitioner-Plaintiff's child, L.T., is an eleven-year-old boy who lives with his mother, Janine Tully, and father, Petitioner Louis Tully, in Drummond County, Ohiowa. R. at 5. Like other children, L.T. has a fondness for cartoons, especially the popular *Hola Gato*. R. at 5. But last summer, that fondness ended in injury when L.T. picked up an electronic cigarette ("e-cigarette") manufactured by Respondent-Defendant Zuul Enterprises ("Zuul") wrapped in *Hola Gato* stickers which Zuul had designed to encase the e-cigarette. R. at 5. Because of defective internal wiring, the e-cigarette exploded in L.T.'s hands. R. at 5.

Zuul is an Ohiowa corporation headquartered in Cincinnatus, Ohiowa. Zuul manufactures and sells e-cigarettes. R. at 3. Zuul's e-cigarette works by using an atomizer, a type of heating coil, to vaporize nicotine liquid which users purchase in a cartridge. R. at 3–4. Users can then inhale the addictive vapor through a mouthpiece. R. at 4. Zuul's founder claims the e-cigarettes are intended to "be a safer alternative to traditional tobacco cigarettes." R. at 3. However, Zuul's marketing practices tell a different story. Zuul has a history of targeting underage children to use its products. The corporation produced a range of sweet flavored nicotine cartridges, including flavors like fruit punch, cotton candy, and blue raspberry. R. at 4. In December 2017, a federal district court ruled Zuul was using these flavors to "directly market its e-cigarettes to children." R at 4. Zuul was forced to stop selling those flavors. R. at 4. Its stock tanked. R. at 4.

After months of uncertainty about the company's future, Zuul came up with a plan to bounce back. On June 7, 2018, Zuul put out a statement in which it agreed to only offer one flavor cartridge: "classic tobacco." R. at 4. Zuul denied that it marketed its products to children, but then it introduced a new line of accessories for its e-cigarettes: "Zuul skins." R. at 4. Zuul

skins are stickers, adorned with bright colors, patterns, and children's cartoon characters, that are designed to allow users to customize the appearance of its e-cigarettes. R. at 4. Although the e-cigarette has a warning on its packaging, the stickers Zuul began manufacturing contained no additional warnings. R. at 4.

On July 17, 2018, L.T. was at home. R. at 5. His parents hired a babysitter for the night: Dana Barret, a college sophomore and e-cigarette enthusiast. R. at 5. Ms. Barrett brought her Zuul e-cigarette, which was covered in a Zuul skin featuring the popular children's cartoon character, *Hola Gato*. R. at 5. When Ms. Barrett came to L.T.'s home, L.T. noticed his babysitter's e-cigarette with the *Hola Gato* skin. R. at 5. She warned him not to play with it, but when she left it unattended, L.T. succumbed to temptation. R. at 5. The child went over to the brightly-colored e-cigarette, picked it up, and pressed the button. R. at 5.

As the button was pressed, a faulty wire connecting the button to the heating coil within the e-cigarette caused the coil to overheat. R. at 5. The overheated coil caused the liquid nicotine cartridge to boil. R. at 7–8. Within seconds, the pressure in the e-cigarette rose to a breaking point. R. at 8. Without warning, while L.T. was holding Zuul's e-cigarette, it exploded. R. at 5. L.T.'s hand was severely burned. R. at 5.

II. Lower Court Proceedings

Petitioner-Plaintiff Louis Tully, as the father of his injured child L.T., filed this action alleging (1) a manufacturing defect claim and (2) a failure-to-warn claim. R. at 2. Following discovery, the Respondent-Defendant Zuul moved for summary judgment on the manufacturing defect claim. R. at 2. Even while conceding that defective wiring in its e-cigarette caused the explosion, Zuul argued it should not be held liable for the harm its product caused L.T. because the company could not reasonably foresee that a child could be subject to harm stemming from

its defective products. R. at 2–3. The trial court agreed. R. at 3. The failure-to-warn claim proceeded to trial. R. at 3. Tully requested a jury instruction on the heeding presumption on the element of causation. R. at 3. Zuul objected, and the trial court sustained the objection. R. at 3. The jury held for Zuul. R. at. 3.

Tully appealed both trial court rulings. R. at 3. The Court of Appeals for the Seventh Appellate District affirmed the rulings of the trial court, holding that (1) Tully's child, L.T., was not a "consumer" under state law because he did not bring the exploding e-cigarette to his mouth and thus did not use the product as was ultimately intended, and (2) the trial court's failure to include the heeding presumption in the jury instructions was not reversible error because the faulty jury instructions did not prejudice Tully's case. R. at 13. Tully now appeals those rulings.

SUMMARY OF THE ARGUMENT

Under the Ohiowa Product Liability Act ("OPLA"), which is based on the Restatement (Second) of Torts Section 402A, manufacturers are held strictly liable for placing unreasonably dangerous defective products on the market that cause harm to a consumer. That is exactly what happened here: the Respondent, Zuul Enterprises sold a defective e-cigarette that, because of the defect, exploded in the Petitioner's child's hand. The Petitioner's expert's testimony, comparing the defective e-cigarette with Zuul's manufacturing specifications and drawing a straight line between the defect in the e-cigarette and the explosion that caused harm, is sufficient for the Petitioner to survive summary judgment.

Based on the record, Zuul cannot dispute those facts. It does not even try. Instead, in an attempt to avoid liability, Zuul first asks the Court to invent a new, narrow definition of "consumers" to only include those who "use the product as it was ultimately intended." In doing so, it asks this court to ignore all of Ohiowa's neighboring jurisdictions, the text of the

Restatement, and the purpose and policy of the OPLA in protecting consumers and holding manufacturers strictly liable for its defective products. But even if this Court wished to adopt this novel definition, summary judgment should still be denied because the question of "intended use" is appropriately a question of fact for a jury. Second, in the alternative, Zuul asks the Court to usurp the province of the jury and find that a child is not within the class of persons that Zuul could reasonably foresee being harmed by its defective, exploding product. Questions of foreseeability are fact-intensive inquiries. Asking this Court to rule on foreseeability as a matter of law intrudes on the role of the jury. The Petitioner has provided sufficient facts, from the children cartoon characters on Zuul's e-cigarette adhesive "skins" to a federal district court's explicit finding that Zuul intentionally marketed its adult products to children, that would allow a jury to find that Zuul should reasonably foresee children being harmed by an exploding e-cigarette. Therefore, the Court should reverse the court of appeals and remand for a trial on the manufacturing defect claim.

Moreover, the Ohiowa legislature has imposed a strict liability duty on manufacturers to provide reasonable warnings and instructions for its products. To properly enforce this duty, courts cannot hold plaintiffs to the standard burden of proof on the element of causation. A plaintiff's testimony that she would have read and heeded an adequate warning is generally all that she can offer as proof of causation; since such testimony is inevitably speculative and self-serving, it will be insufficient to persuade a jury that it is more likely than not that the defective warning caused the harm in all but the most egregious cases. To resolve this issue, courts have recognized a rebuttable presumption of causation, commonly known as the "heeding presumption," in order to incentivize manufacturers to provide adequate warnings and thereby promote consumer safety.

Although this presumption lightens a plaintiff's burden of proof, it does not impose absolute liability on defendants. First, a plaintiff must prove the threshold question of whether a warning was defective. Due to information costs, more detailed or more prominent warnings are not necessarily better; a warning is not defective if the manufacturer made reasonable safety decisions about what to communicate and how to display it. Second, the presumption of causation remains rebuttable. With sufficient evidence, the defendant can shift the burden back to the plaintiff who must then affirmatively prove causation.

Finally, the heeding presumption is necessary to keep Ohiowa's strict liability failure-to-warn law from sliding into a negligence regime. Since the question of defect is essentially a negligence question, strict liability must pertain to the element of causation. The heeding presumption serves strict liability's aims of incentivizing socially efficient safety precautions and compensating plaintiffs injured by defective products. Although the text of the OPLA may authorize an alternative causal inquiry that would eliminate analyses related to the plaintiff's conduct, such approach would likely be too hostile to defendants. Thus, the heeding presumption is Ohiowa courts' best tool for enforcing manufacturers' duty to warn while balancing defendants' and plaintiffs' interests.

ARGUMENT

I. The Court of Appeals Erred in Affirming Zuul's Motion for Summary Judgment on Tully's Manufacturing Defect Claim and Should Be Reversed.

A lower court's decision to grant summary judgment is reviewed *de novo*. *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 362 (Iowa 2014). A defendant is entitled to summary judgment only if, construing the evidence presented in the light most favorable to the plaintiff, there exists no genuine issue as to any material fact. Ohiowa R. Civ. Proc. 56(a).

The OPLA enforces strict liability on manufacturers of an unreasonably dangerous defective product that physically harms a consumer of that product. *See* Ohiowa Rev. Code § 5552.368. In crafting the OPLA, the Ohiowa legislature relied heavily on the Restatement (Second) of Torts Section 402A (Am. Law Inst. 1965) and its neighboring jurisdictions in the Sixth, Seventh, and Tenth circuits, but limited available claims to only those created under the OPLA. R. at 6.

A plaintiff alleging a manufacturing defect by the defendant seller must, under the OPLA, establish that (1) the product was in a defective condition that made the product unreasonably dangerous to consumers, (2) the defective condition caused the plaintiff harm, (3) the product was expected to and did reach the plaintiff without substantial alteration, and (4) the plaintiff was a consumer in the class of persons the defendant should reasonably foresee as being subject to the harm. Ohiowa Rev. Code § 5552.368.

The lower court erred when it granted summary judgment for the Respondent Zuul because the record, viewed in the light most favorable to the Petitioner, is such that a reasonable juror could find for the Petitioner for each of the four prongs under the OPLA. Accordingly, this Court should reverse and remand this case for a trial on the manufacturing defect claim.

A. Zuul's E-Cigarette Indisputably Was in an Unreasonably Dangerous Defective Condition as It Could Cause an Explosion at Any Time After the Activating Button Was Pressed.

In a manufacturing defect claim, a product is in a defective condition if, at the time the seller conveys the product to another party, it "deviated in a material way from the design specifications . . . or performance standards of the manufacturer." Ohiowa Rev. Code §§ 5552.369(1). A defective condition may be proven by direct or circumstantial evidence. *State Farm Fire & Cas. Co. v. Chrysler Corp.*, 523 N.E.2d 489, 493–94 (1988). Ohiowa uses the

consumer expectations test to determine whether a product is in an unreasonably dangerous defective condition. *Id.*; *see also* Restatement (Second) of Torts § 402A cmt. i ("[The product] must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it.").

In neighboring jurisdictions, expert witness testimony is sufficient to demonstrate the defective condition in order to avoid summary judgment. *See, e.g.*, *Donegal Mut. Ins. v. White Consol. Indus.*, 852 N.E.2d 215, 226 (Ohio Ct. App. 2006) (determining that the testimony of two experts who examined a malfunctioning stove that burned down a house and testified that a faulty switch inside the stove that could cause fire was sufficient to avoid summary judgment); *Gaumer v. Rossville Truck & Tractor Co.*, 202 P.3d 81, 85 (Kan. Ct. App. 2009) (determining that an expert's testimony analyzing the dangerous condition of a hay baler was sufficient to establish a prima facie case of strict products liability and avoid summary judgment.), *aff'd*, 257 P.2d 292 (Kan. 2011).

During discovery, the Petitioner provided such an expert witness for deposition. The expert examined the Respondent's manufacturing specifications and compared them to the exploding e-cigarette in question. R. at 7. From the examination, the expert discovered the manufacturing defect: faulty wiring between the activating button and the atomizer, a type of heating coil designed to rapidly heat up the nicotine liquid and vaporize it. R. at 7–8. The expert concluded that the faulty wiring caused the heating coil to overheat the liquid in the nicotine cartridge, leading it to boil. R. at 8. The boiling liquid would build up pressure in the cartridge until it caused the e-cigarette to explode. R. at 8. When an ordinary consumer purchases an e-cigarette from Zuul, he or she does not expect that pressing the activating button will cause the product to explode in his or her hand – that is unreasonably dangerous beyond what would be

contemplated. *See, e.g.*, *Owens v. Williams-White & Co.*, No. 83-5626, 1984 U.S. App. LEXIS 13651, at *10 (6th Cir. Nov. 5, 1984) ("[A] product is found to be unreasonably dangerous when it has performed in an unanticipated manner.").

The Respondent did not dispute the expert witness throughout discovery or in the lower court filings. R. at 2, 8. The Respondent did not allege the e-cigarette had been altered by the Petitioner, the owner, or any other third party. R. at 8. In fact, the Respondent, in its initial motion for summary judgment, *conceded* that its product suffered from a manufacturing defect. R. at 2. On this point, the court of appeals was correct: when viewing the evidence in the light most favorable to the nonmovant plaintiff, "there is no dispute as to whether the e-cigarette was in a defective condition as a result of the manufacturing defect. It was." R. at 8.

B. The Wiring Defect in the E-Cigarette Indisputably Caused the E-Cigarette's Explosion, Which Harmed the Petitioner's Child.

To survive summary judgment on causation, a plaintiff must offer evidence from which a jury may conclude that it is more likely than not that, but for the defect, the plaintiff's injuries would not have occurred. *King v. Ford Motor Co.*, 209 F.3d 886, 893 (6th Cir. 2000). In our neighboring jurisdictions, causation is established by producing enough evidence indicating the defendant's defective product was a "substantial factor in bringing about the plaintiff's harm." *See, e.g.*, *id.* (determining that two experts testimony demonstrating circumstantial evidence of causation were sufficient in avoiding summary judgment). But the plaintiff is not required to eliminate every other potential cause, nor is it required that other potential causes lack evidentiary support. *Skinner v. Square D Co.*, 516 N.W.2d 475, 478 (Mich. 1994). Rather, "the plaintiff's evidence is sufficient if it establishes a logical sequence of cause and effect." *Id.*

Here, the Petitioner's expert went beyond speculation. The expert identified the defect within the e-cigarette and analyzed how that defect would lead directly to an explosion. The

explosion is what caused the Petitioner's child harm. The temporal element further supports the expert's conclusion. The e-cigarette did not explode while it was sitting idly on a table. It did not explode when the Petitioner's child picked it up. It only exploded when the child pressed the button down. Like in *State Farm Fire* or *King*, this testimony draws a straight line between the defect and the harm, and should be sufficient to allow this claim to go to trial.

The Respondent, meanwhile, has not disputed the causal relationship between its defective product and the Petitioner's child's harm. In fact, it conceded as much. R. at 2. Based on the record, it has not raised any allegation that *misuse* rather than the *defect* caused the harm. But even if Zuul had, then causation would still appropriately be a question for the jury to balance. *See, e.g.*, *Swartz v. P&G Mfg. Co.*, No. 16-cv-12396, 2018 U.S. Dist. LEXIS 82065, at *10–11 (E.D. Mich. May 16, 2018) (determining that because the plaintiff had sufficiently demonstrated causation, the defense's contention that there was an alternative cause was a question of fact). Because the Petitioner has presented sufficient evidence that a reasonable jury could find the defect was a substantial factor in causing the harm, summary judgment should not be granted.

C. Zuul's Exploding E-Cigarette Indisputably Was Expected to and Did Reach the Petitioner Without Substantial Alteration.

From the time Zuul manufactured its explosive e-cigarette to the time it reached Tully's eleven-year-old child, it was not substantially altered. Zuul manufactured and sold the product. Tully's babysitter purchased the product. Tully's child picked up and used the product. Throughout this chain, there have been no allegations of alteration, substantial or otherwise, that would in any way affect the explosive defective nature of the Respondent's product.

Where, as here, the plaintiff would have the burden of proof of a specific material fact at trial, in order for a defendant to be entitled to summary judgment, that defendant must present

some evidence establishing that no reasonable jury could find the underlying material fact in the plaintiff's favor. *See Dresher v. Burt*, 662 N.E.2d 264, 270 (Ohio 1996) (reaffirming the Ohio standard for summary judgment to mean "the moving party bears the initial responsibility of informing the trial court the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim"); *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014) (reaffirming the same standard in Indiana); *Quist v. Specialties Supply Co.*, 12 P.3d 863, 868 (Colo. App. 2000) (reaffirming the same standard in Colorado).

But Zuul has offered nothing. R. at 8. Zuul provided no evidence alleging *any* alterations, let alone substantial ones, between the time it manufactured the product and the time the product hit store shelves. Zuul offered no evidence alleging an alteration between the time the product was on a shelf and the time it was ultimately purchased by the Petitioner's babysitter. Moreover, Zuul has not alleged that there were any alterations made to the base e-cigarette between the time the Petitioner's babysitter used the product and the time the Petitioner's eleven-year-old child pressed the button. In fact, the only change made to the product on the record during this entire chain was the addition of a brightly-colored cover (a "skin") with cartoon characters that the Respondent Zuul *itself* manufactured for that very purpose. R. at 4–5.

Even if the Respondent had alleged product alterations from the time it manufactured the exploding e-cigarette to the time it was picked up by the Petitioner's child, there is still sufficient evidence on the record to survive summary judgment. Whether a product reached the Petitioner without alteration can be inferred by the fact of defect if the defect is "of a type which could only have arisen in the manufacturing process." *State Farm*, 523 N.E.2d at 497; s*ee also Friedman v. Gen. Motors Corp.*, 331 N.E.2d 702, 706 (1975) (permitting an inference that a defect in factory-

set vehicle transmission with faulty linkages existed at the time of manufacture). Here, there is no speculation necessary: Zuul manufactured and sold the product, the Petitioner's babysitter bought it, and the Petitioner's child picked it up and used it. The only party in the chain that had access to the wiring between the activating button and the heating coils that caused the explosion was the Respondent. Accordingly, this court can properly infer there was no substantial alteration before the Petitioner's child came in contact with the exploding e-cigarette, and so, on this point, summary judgment should be denied.

D. Tully's Eleven-Year-Old Child Is a Consumer Within the Class of Persons Zuul Should Reasonably Foresee as Being Subject to Harm from Its Exploding E-Cigarette.

In order for a plaintiff to recover under the OPLA, she must meet two conditions: *first*, she must be a "consumer," Ohiowa Rev. Code § 5552.368; *second*, she must fall within the "class of persons that the seller should reasonably foresee as being subject to the harm caused by the defect or defective condition." § 5552.368(a). The OPLA contains no definition for the word "consumer," leaving this court to rely on the Restatement (Second) of Torts Section 402A and neighboring jurisdictions to fill in the blanks. But when the court of appeals affirmed the grant of summary judgment, it attempted to provide a definition for "consumer" based on a misreading of Section 402A. R. at 8–9. And when the trial court affirmed the grant of summary judgment, it did so because it believed that children were outside the class of persons that could be reasonably foreseen to be subject to the harm of a defective product for adults, mistaking the central question of foreseeability as a question of law rather than a question of fact.

1. The court of appeals' ruling narrowing the definition of "consumer" to exclude the Petitioner's child from falling within the OPLA misreads the Restatement and misunderstands the legislative intent behind the OPLA.

The Ohiowa legislature based the OPLA on the Restatement (Second) of Torts Section 402A and similar statutes from neighboring jurisdictions who also followed the Restatement. The Restatement stipulates that a manufacturer can be liable for physical harm caused "to the *ultimate user or consumer*[.]" § 402A(1) (emphasis added). The OPLA, meanwhile, excludes the phrase "ultimate user," preferring instead to expose manufacturers to liability for physical harm caused to the "consumer." In lieu of a definition section of the OPLA, the court of appeals claimed to derive some legislative intent from the Ohiowa legislature's exclusion of ultimate user to define "consumer." Apparently relying on a comment of Section 402A, the court attempted to distinguish between "consumer" and "user," splitting hairs to find that a "consumer" is someone who "ultimately used the product as intended." R. at 8–9. Under the court of appeal's theory, the Petitioner's child, though clearly a "user," falls outside the statute because he is not a "consumer."

In doing so, the court of appeals misreads the Restatement and its comments outright. "'Consumers' include *not only* those who in fact consume the product, but also those who prepare it for consumption[.] . . . Consumption *includes* all ultimate uses for which the product is intended." Restatement (Second) of Torts § 402A cmt. l (emphasis added). The lower court *narrowed* the definition of consumer, yet the plain language of this comment *broadens* the definition. Neither the OPLA nor Section 402A require or even contemplate such a narrow reading of the word "consumer," and neither indicate the lower court's definition as the *only* acceptable set of plaintiffs that might be consumers. It merely "*includes*" those who have "ultimately used the product as intended."

Despite this language, the lower court incorrectly assumed that, by excluding "ultimate user" from the OPLA, the Ohiowa legislature's intent was to demonstrate some definitional differentiation between "user" and "consumer." In questions of statutory interpretation, the "surplusage canon" dictates that every word in a statute should be given effect, and none should be given meaning that causes one to have no consequence. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176-77 (2012); s*ee also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 698 (1995) (reading each term in a list as having a distinct meaning because of "reluctance to treat statutory terms as surplusage"). But that is not the case here as the court of appeals does not attempt to give distinct meaning to words *in* the statute. Rather, it attempts to give distinct meaning to one word within and one word outside of the statute, without going deeper into the legislative process to understand *why* this choice was made. The court of appeals simply assumed.

Without a significantly deeper dive into the legislative process that created the OPLA than is apparent from the record, there is no way to know what the legislature intended when it did not include the word "users." After all, "legislative silence is a poor beacon to follow in" statutory interpretation. *Zuber v. Allen*, 396 U.S. 168, 185 (1969). There is certainly nothing on the record to suggest, definitively, that the legislature intended to so significantly circumscribe the applicability of the OPLA to harmed consumers with that exclusion. Perhaps it was a drafting error the legislature failed to notice. *See, e.g.*, *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring) (agreeing with the majority that the Court should read the word "criminal" before "defendant" in 609(a) of the Federal Rules of Evidence despite it not appearing, admitting that the legislature "could understandably have omitted [the word 'criminal'] by inadvertence—and, sometimes, is omitted in normal conversation . . ."). Perhaps

the legislative or agenda rules at play precluded the ability to add the word "users" for one reason or another. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 547–48 (1983) ("It is fairly easy to show that someone with control of the agenda can manipulate the choice so that the legislature adopts proposals that only a minority support. The existence of agenda control makes it impossible for a court . . . to say what the whole body would have done with a proposal it did not consider in fact.") (citation omitted). Or perhaps the legislature, while relying on neighboring jurisdictions who adopted similar Restatement-based product liability acts, correctly recognized these neighboring legislatures and courts were treating the two terms to mean the same thing and wished to avoid that redundancy.

So instead of attempting to divine why the Ohiowa legislature excluded the word "user" in the OPLA, this Court should first look how neighboring jurisdictions upon whom the Ohiowa legislature relied handle this question. Their answer is overwhelming: none have narrowed the class of those protected by strict products liability claims so dramatically, and none have distinguished between "consumer and "user" in this way in manufacturing defect cases at all. The Indiana Products Liability Act ("IPLA") is particularly instructive. The IPLA is a near-copy of the OPLA, down to the wording and grammatical style. *Compare* Ind. Code Ann. § 34-20-2-1 (LexisNexis 2020) (The IPLA's "Rule of Liability") *with* Ohiowa Rev. Code § 5552.368 (The OPLA's "Rule of Liability"). Indiana's Act, like Ohiowa's, is derived from Section 402A of the Restatement (Second) of Torts. However, Indiana's act, unlike Ohiowa's, uses the phrase "consumer or user" in their Rule of Liability. But then the IPLA defines the terms to be *intentionally* redundant. Ind. Code Ann. § 34-6-2-29 ("'Consumer' means . . . any individual who *uses* or consumes the product . . . .") (emphasis added); Ind. Code Ann. § 34-6-2-147 ("'User' has the same meaning as the term 'consumer'"). The Petitioners could find no cases

from any state where *any* meaningful distinction between "consumer" and "user" was drawn in a manufacturing defect claim, and certainly not a distinction that so severely limited the application of strict products liability to injured persons. Ohiowa should not be the first.

Because the legislature made known their intent to base Ohiowa's products liability law on that of the Restatement, R. at 6., the court should also look to the policies behind strict products liability. *See Nat'l Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705, 707 (7th Cir. 1994) (Easterbrook, J.) ("Knowing the purpose behind a rule may help a court decode an ambiguous text."). "Public policy demands that the burden of accidental injuries caused by products . . . be placed upon those who market them." Restatement (Second) of Torts § 402A cmt. c. The doctrine of strict products liability provides manufacturers an incentive to design, manufacture, and distribute safe products. W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* (5th ed. 1984), Section 4 at 25–26. Strict liability in tort law developed from strong public-policy considerations to protect consumers from harm caused by defective products and to impose the cost of defective products on the maker, who presumably profits from the product. *See McCormack v. Hankscraft Co.*, 154 N.W.2d 488, 500 (Minn. 1967).

The lower court's narrow reading of the OPLA would be antithetical to that purpose and policy. The lower court indicated that, under their definition, "had L.T. . . . press[ed] the button and raise[d] it to his mouth, he would have been using the product as intended and thus deemed a 'consumer' [under the OPLA]." R. at 9. In this case, the child was holding Zuul's e-cigarette away from his face at the time it exploded. But there is nothing to suggest that the child *would not* have brought it to his mouth to inhale eventually. Perhaps, had the Respondent's product not exploded because of its manufacturing defect, the child would have brought it to his mouth to inhale. We simply do not know, and we do not know because the e-cigarette exploded due to an

undisputed defect before we could find out. By carving a definition precluding those who did not complete the "intended use" of the product before the defect caused harm, the lower court stood to *reduce* manufacturer incentives to make sure its products conform with its specifications and do not contain defects that will cause harm. The narrow reading would reduce the OPLA's applicability in any given case to a game of roulette, where a defendant by chance could avoid liability if their product happened to malfunction before someone could use it "as it was intended." This would fly directly in the face of the OPLA's purpose to hold a manufacturer who puts a dangerous and defective product on the market strictly liable if that defective product causes harm.

But even if, despite all the reasons against doing so, this court single-handedly narrows the definition of "consumer" to mean someone who "ultimately used the product as it was intended," summary judgment would still be inappropriate because that definition would *create* a question of fact for a jury. Whether a product was used as intended or in a reasonably expected manner is understood to be a jury question because the inquiry involves "questions concerning the ordinary prudent consumer," foreseeability, and significantly different circumstances across cases. *Short by Southerland v. Estwing Mfg. Corp.*, 634 N.E.2d 798, 801 (Ind. Ct. App. 1994). Here, Tully's child picked up the device and pressed the button, exactly as the Respondent intended and would have foreseen. The Respondent is free to argue otherwise – but in a trial, before a jury.

2. The trial court's ruling that Zuul should not reasonably foresee that children could be subject to harm from its defective e-cigarette usurps the province of the jury by answering a triable question of fact.

Though the Respondent asserted to the trial court that its e-cigarettes are made for adults, the record makes it clear that children, like the Petitioner's child, fall within the class of persons

that should be reasonably foreseen to be subject to the harm caused by the defect. To the extent that foreseeability is disputed, it is a disputed question of material fact for a jury, not a question of law for a judge. *Short by Southerland*, 634 N.E. 2d at 801; *see also Winnett v. Winnent*, 310 N.E.2d 1, 5 (Ill. 1974) (holding the same).

The question of whether a child could be reasonably foreseen to be subject to harm by a defective product meant for adults necessarily requires a fact-intensive analysis. Factors our neighboring courts have looked to include whether the product is commonly used, whether it is typically kept around the home, whether a child could likely access it, whether it looks like a toy, and even whether the product was "brightly colored." *Flock v. Scripto-Tokai Corp.*, 319 F.3d 231, 242 (5th Cir. 2003) (toy resemblance); *Blondie v. Bic Corp.*, 739 F. Supp. 346, 349 (E.D. Mich. 1990) ("brightly-colored"); *Perkins v. Wilkinson Sword*, 700 N.E.2d 1247, 1252 (Ohio 1998) (common use, home storage, and children's access). Indeed, "foreseeability is ordinarily a question of fact" for a jury to resolve. *Heinrich v. Master Craft Eng'g, Inc.*, 131 F. Supp. 3d 1137, 1141 (D. Colo. 2015).

Zuul knows that children could conceivably be around and even come into contact with its e-cigarettes. A federal district court went farther, holding that Zuul had "directly market[ed] its e-cigarettes to children." R. at 4. And Zuul's response to the federal district court's injunction clearly further contemplates its knowledge. It vowed to cease production of sweet flavors of its product and only continue to manufacture one – "classic tobacco" – and explained this decision was a "sign of [its] good faith." R. at 4. This decision is best read not as an attempt to stop children from coming into contact with or using its products altogether, but rather an attempt to *deter some* children from using its products. There is nothing on the record to indicate Zuul took measures to *ensure* children did not use or encounter its product, such as recall its flavored

nicotine cartridges or warn adults against having its e-cigarettes in the presence of children. By continuing to sell e-cigarettes without taking such steps to ensure its products are outside of range of children, Zuul brings children within the class of persons it should reasonably foresee as being subject to the harm of an e-cigarette with an explosive defect.

The Respondent's new line of accessories – "Zuul skins" made specifically for its e-cigarettes and featuring cartoon characters – only make it more likely that a child will come in contact with or use the Respondent's product, bringing children further within the class of persons reasonably foreseeable to be subject to the harm of an exploding e-cigarette. *See Blondie*, 739 F. Supp. at 349 (using the fact that Bic distributed "millions of brightly-colored little plastic lighters . . . that children are attracted to" in analyzing whether it was foreseeable to Bic that a child might use its mini-lighters).

Because the record contains sufficient facts that would permit a reasonable jury to find that the Petitioner's child should be reasonably foreseen to be subject to the harm of an exploding e-cigarette, summary judgment is not appropriate. The Respondent may disagree on the element of foreseeability. Like earlier, it will have the opportunity to do so: during trial. Accordingly, this Court should reverse and remand the lower court's decision.

II. The Heeding Presumption Applies to Strict Products Liability Failure-to-Warn Claims as a Matter of Ohiowa Law and Policy.

Under Ohiowa law, manufacturers have a strict liability duty to warn of their products' dangers. Since plaintiffs injured by defective warnings have special problems with proving proximate cause, this Court should recognize and apply the heeding presumption, also known as the read and heed doctrine, in order to enact the will of Ohiowa's legislature and fully enforce manufacturers' duty to warn. This duty serves important public safety objectives as required by Ohiowa's pro-consumer policies. It does not impose absolute liability on manufacturers:

plaintiffs must first prove defect in order to benefit from the presumption, and the presumption is rebuttable by a range of evidence. Rather, the doctrine maintains failure to warn as a form of strict liability, instead of being judged by the standards of negligence. It therefore ensures that the policy goals of strict liability are served while still giving defendants a fair chance to avoid liability where the presumption of causation is inappropriate.

A. The Heeding Presumption Is Necessary to Properly Enforce Manufacturers' Duty to Warn.

Ohiowa's legislature has chosen to recognize failure-to-warn claims as a strict products liability cause of action under the OPLA. It is courts' responsibility to uphold that law. However, the plaintiff's normal burden of production and persuasion would effectively negate the duty to warn, since it is extraordinarily difficult for a plaintiff to produce convincing evidence that she would have read and heeded an adequate warning if it had been provided. The heeding presumption, i.e. a rebuttable presumption that the plaintiff would have acted in accordance with a sufficient warning, solves this problem. This approach serves important public policy objectives, and follows the example of other causes of action where courts are comfortable shifting burdens of proof to enforce a duty when a jury would otherwise be forced to rely on hypothetical, self-serving, or unavailable testimony.

1. Failure-to-warn claims face unique difficulties of causal proof.

Plaintiffs who allege injury from a defective product warning face unique hurdles in proving factual causation. Product malfunction and defective design claims demand a factual inquiry into whether the plaintiff's injury would have occurred if the product had functioned in a reasonably safe manner; the causal question focuses on the product itself. Once jurors have determined that there was a defect in the product in question, it is generally not difficult for them to identify the relationship between the defect and the harm. By contrast, failure-to-warn claims

raise questions about a plaintiff's own, hypothetical conduct: how would she have used the product if an adequate warning had been provided? Under a plaintiff's traditional burden of production and persuasion, she must present evidence to convince jurors that it is more likely than not that she would have read and followed a reasonable warning, and that her injury thereby would have been prevented. *See, e.g.*, *Riley v. Am. Honda Motor Co.*, 856 P.2d 196, 198 (Mont. 1993) (requiring plaintiffs to present evidence that "a warning would have altered plaintiff's use of the product").

Often, the only such evidence available to a plaintiff is her own testimony that she would have read and acted in accordance with a non-defective warning. Courts have recognized that such testimony is of dubious reliability, since it is inevitably "speculative and self-serving." *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1281 (5th Cir. 1974). Any injured consumer suing a manufacturer for failure to warn will naturally claim that she would have read applicable warnings and heeded them had they been provided. It is exceedingly difficult for jurors to determine when such testimony should be trusted. *See Coffman v. Keene Corp*., 628 A.2d 710, 719 (N.J. 1993) (reasoning that, when jurors are faced with "unreliable or self-serving" testimony, they will need to turn to "extraneous, speculative considerations" to evaluate it).[1] In all but the most egregious of cases, jurors will reasonably conclude that it is impossible to say that, more likely than not, the injury would not have occurred had the warning been in place. According to the D.C. Circuit, expecting a plaintiff to prove that the failure to warn caused an injury may "impose an impossible burden" since the jury must rely on "pure speculation." *Payne*

[1] Such extraneous considerations will likely include inappropriate factors such as the plaintiff's education, socio-economic class, race, and/or country of origin. *See, e.g.*, Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 Mich. J. Race & L. 261, 316–17 (1996) (discussing how race affects jurors' credibility determinations). Of course, juries must always make credibility determinations, but when assumptions about a plaintiff's credibility and personal responsibility are virtually all that the jury can consider when evaluating the element of causation, concerns about jurors' innate biases are particularly pressing.

v. Soft Sheen Prods., 486 A.2d 712 (D.C. Cir. 1985). Moreover, following the most serious harms, the plaintiff is deceased or incapacitated, and therefore unable to testify that she would have altered her interaction with a product had she been given a proper warning.

To deal with these difficulties, state courts in approximately nineteen states have recognized a rebuttable presumption of causation for warning defect claims.[2] James M. Beck, *Who Heeds the Heeding Presumption*, DRUG & DEVICE L. (Nov. 7, 2014), https://www.druganddevicelawblog.com/2014/11/who-heeds-heeding-presumption.html. This "heeding presumption" comes from comment j of the Restatement (Second) of Torts Section 402A. According to comment j, "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." Courts have derived from this comment the corollary presumption that, where a warning is not given, factfinders may reasonably assume that it would have been read and heeded if it had been provided. *Technical Chem. Co. v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972). If the defendant produces evidence that could persuade the reasonable factfinder that the plaintiff would not have followed an adequate warning, then the presumption drops out of the case, and the plaintiff must produce her own evidence about how she would have followed the warning. *Miller v. Pfizer, Inc.*, 196 F. Supp. 2d 1095, 1127 (D. Kan. 2002). If the defendant does not produce such evidence, however, then the warning defect is found to have caused plaintiff's injury. *See Coffman*, 628 A.2d at 716 (instructing that a judge may decide the issue of proximate cause as a matter of law in the absence of countervailing evidence); *Seley v. G.D. Searle & Co.*, 423 N.E.2d 831, 838 (Ohio 1981) (finding that plaintiff's causal burden is satisfied if defendant does not

[2] In four of those states, the legislature subsequently abolished or limited the presumption. Federal courts in an additional eleven states have predicted that state courts would apply the presumption if presented with the issue.

produce rebutting evidence). This presumption allows courts to properly enforce manufacturers' duty to warn. Without it, the duty to provide reasonable product warnings and instructions is toothless. It would be inappropriate for courts to effectively negate a duty which the legislature has recognized, particularly in the avowedly pro-consumer state of Ohiowa.

2. Enforcing the duty to warn serves important public safety interests in accordance with Ohiowa's consumer-friendly laws.

As recognized by the Court of Appeals for the Seventh Appellate District, Ohiowa's "product liability law has always looked favorably upon the consumer." R. at 11. This pro-consumer stance provides courts with public policy underpinnings for their interpretations of the state's law. The read and heed doctrine is a consumer-friendly presumption because it both helps individual plaintiffs recover and incentivizes manufacturers to properly instruct the public on the safe use of their products. Without an enforceable duty to warn, sellers may be tempted to under-inform buyers about the dangers their goods pose, since consumers are likely to find obviously hazardous products less desirable. *See Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 332 N.E.2d 820, 827 (Ind. Ct. App. 1975) (commenting that adequate warnings are likely to "impair the marketability of the product"), *rev'd on other grounds*, 358 N.E.2d 974 (Ind. 1976). Making manufacturers liable for absent or ineffective warnings ensures that they will fully instruct the public about their products' risks. This permits the public to make informed safety decisions about if and how they use consumer goods. *See* Michael A. Pittenger, Note, *Reformulating the Strict Liability Failure to Warn*, 49 Wash. & Lee L. Rev. 1509, 1539 (1992) (framing the duty to warn as a matter of market honesty and informed consumer choice).

Against this consensus, certain courts and scholars have argued that the duty to warn generally, and the heeding presumption specifically, hurt public safety because they permit manufacturers to rely on warnings rather than fulfilling the more important responsibility of

creating reasonably safe products for the market. *See, e.g.*, *Rivera v. Philip Morris, Inc.*, 209 P.3d 271, 276–77 (Nev. 2009) (rejecting the heeding presumption both because "it is better public policy not to encourage a reliance on warnings because this will help ensure that manufacturers continue to strive to make safe products" and because Nevada law did not permit the court to shift plaintiffs' burden of proof); Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 U.C.L.A. L. Rev. 1193, 1195–97 (1994) (arguing against a presumption of causation because courts have treated warnings as substitutes for safer product designs). However, this rationale confuses the issue of design defect with warning defect. Warnings are presented either to alert consumers to the inherent risks of a product, or to instruct them in its proper, safe use. A warning cannot cure a defect in a product that is otherwise unreasonably dangerous. *See, e.g.*, *Rogers v. Ingersoll-Rand Co.*, 144 F.3d 841, 844 (D.C. Cir. 1998) (rejecting the contention that a manufacturer can "merely slap a warning onto its dangerous product, and absolve itself of any obligation to do more"). Although some courts *have* suggested that warnings might cure unreasonably dangerous conditions, *see, e.g.*, *McPhail v. Deere & Co.*, 529 F.3d 947, 958 (10th Cir. 2008) (stating that Oklahoma law allows for warnings to cure unreasonably dangerous design defects), this would not be an appropriate application of Ohiowa policy or an appropriate interpretation of Ohiowa code. Under the OPLA, a product is defective if its condition is *unreasonably* dangerous or if it does not present *reasonable* warnings about its implicitly reasonable dangers. Ohiowa Rev. Code § 5552.369. Thus, the duty to warn of inherent dangers in no way undermines manufacturers' responsibility to place reasonably safe products into the stream of commerce. The two duties operate independently of each other. *See, e.g.*, *Emery v. Federated Foods*, 863 P.2d 426, 431–32 (Mont. 1993) (holding that, while

marshmallows are not inherently defective products, it is appropriate to let a jury decide if they require a warning about the choking hazard they pose to young children).

Rather, warnings are fundamental to consumer safety. Some products have inherent risks that cannot be reduced through reasonable redesign. *See* Kenneth Ian Weissman, *A "Comment J" Parry to Howard Latin's "Good" Warnings, Bad Products, and Cognitive Limitations*, 70 St. John's L. Rev. 629, 629–30 (1996) ("[S]ome socially beneficial products are inherently unsafe or cannot be made accident-proof without imposing prohibitive costs."). A life-saving medicine may carry an unavoidable risk of harmful side effects, a powerful machine may be deadly if used incorrectly, and no form of bleach can be safely mixed with an ammonia-based cleaning product. When the Nevada Supreme Court rejected the read and heed doctrine in *Rivera*, which pertained to a wrongful death claim for the manufacture of cigarettes, the justices apparently did not consider that there is no known way to manufacture a non-carcinogenic tobacco product. 209 P.3d at 273, 277. Such products are not more dangerous than consumers expect and are therefore not defective, yet they still carry enormous risks. Consumers have the right to be instructed about their potential hazards and proper operations. Such warnings save limbs and lives.

3. Courts may create a presumption of causation when the alternative is to negate the duty.

Defective warnings are not the only context in which courts have created a presumption of causation in order to enforce a duty. For example, courts have long recognized an affirmative duty to rescue at sea. *Reyes v. Vantage S.S. Co.*, 609 F.2d 140, 142 (5th Cir. 1980). If a sailor falls from a ship, that ship must search the area for as long as it is reasonably possible that the sailor is alive, and if the sailor is visible, the ship must take all reasonable measures to save them. *Id.* If a ship breaches that duty and the sailor drowns, a court faces "difficult and hypothetical issues" of causation: it is very difficult for a jury to conclude that the death likely would not have

occurred had the ship attempted a rescue. *Id.* at 144–45. In many cases, defendants will be able to convincingly argue that the drowned sailor was likely doomed no matter how the ship responded. The plaintiff's standard burden of proof would make the duty exceedingly difficult to effectively enforce. As such, courts have had no difficulty instituting a rebuttable presumption that the ship's negligence was the cause of the sailor's death, since the alternative is for "the rescue doctrine . . . to be utterly stultified." *Id.* (quoting *Gardner v. Nat'l Bulk Carriers, Inc.*, 310 F.2d 284, 288 (4th Cir. 1962)). When the traditional burdens of proof would leave a recognized duty without force or meaning, those burdens must be shifted. This precise logic applies to failure-to-warn claims: the uncertainties about how human beings would have responded to defendants' reasonable care require a presumption of causation for the duty to be enforced.[3]

B. The Heeding Presumption Is Not Overly Burdensome or Unfair to Defendants.

Although Ohiowa is deeply concerned with the wellbeing of consumers, its courts might have legitimate apprehension about any doctrine that was too hostile to defendant manufacturers. However, the heeding presumption is not a standard of absolute liability. Even with the presumption of causation, defendants can defeat failure-to-warn claims on issues of both defect and causation. First, plaintiffs must establish that a warning defect existed in the first instance – which is a higher bar than it may appear at first glance. Second, defendants have sufficient opportunity to rebut the heeding presumption using a variety of evidence.

[3] Such presumptions are properly limited to situations where the duty implicates human behavior, and so the standard rule of but-for causation would force the jury to speculate about how individuals would have responded to reasonable care. Since the existence of the duty indicates that the safety measure in question would prevent a significant number of accidents, it is fair for the jury to presume that it would have made a difference in the case at issue unless evidence is presented to the contrary. The presumption of causation is not properly applied to cases where the plaintiff has trouble proving causation due to the uncertain effects of e.g. pollution or medication, since the causal question does not hinge on predictions about human behavior. Mark A. Geistfeld, *Essentials of Tort Law* 246–47 (2008).

1. A product is only defective under failure to warn if a manufacturer fails to provide a reasonable warning.

The heeding presumption does not risk creating a rule of absolute liability against defendants. To establish liability, a plaintiff must first prove that the warning in question was defective. This is almost always a question of fact for the jury. *See, e.g.*, *Seley*, 423 N.E.2d at 836 (describing the jury's finding of a warning's adequacy as the "central issue" in a strict liability failure-to-warn case). As such, a plaintiff's mere allegation that a product should have contained a more comprehensive, more prominent, or more forceful warning is insufficient to establish defect. Under Ohiowa law, "a product is defective if the seller or manufacturer fails to . . . give *reasonable* warnings of danger" or "give *reasonably* complete instructions on proper use of the product; when the seller or manufacturer, by exercising *reasonable* diligence, could have made such warnings or instructions available." Ohiowa Rev. Code § 5552.369 (emphases added). Reasonableness is the touchstone of the defect analysis.

It is often reasonable for a manufacturer to exclude certain warnings. Injured plaintiffs may try to claim that it was unreasonable for a manufacturer to withhold virtually any proposed warning, since the benefit of disclosure vastly outweighed the cost of the ink and paper to print it. *See, e.g.*, *Moran v. Faberge, Inc.*, 332 A.2d 11, 15 (Md. 1975) (observing that the minimal cost of adding a label to a product "will almost always weigh in favor of an obligation to warn"). However, the full cost of a warning is far more than the expense of a physical label. The true measure of reasonableness comes from information costs: each warning that is presented risks diluting the effect of others. Unnecessary warnings thus make consumers less safe, not more. *See, e.g.*, *Cotton v. Buckeye Gas Prods.*, 840 F.2d 935, 938 (D.C. Cir. 1988) ("The primary cost is, in fact, the increase in time and effort required for the user to grasp the message. The inclusion of each extra item dilutes the punch of every other item."). As such, it is widely

accepted doctrine that manufacturers do no need to warn for risks that are commonly known in the community, that are obvious, or that are unforeseeable according to the industry's best available knowledge. *See, e.g.*, *Phelps v. Sherwood Med. Indus.*, 836 F.2d 296, 303 (7th Cir. 1987) (holding there is no need to warn for obvious or unforeseeable dangers); Restatement (Second) of Torts § 402A cmt. j (disclaiming a duty to warn of generally recognized dangers, such as the risk of getting intoxicated from alcohol). *But see Campos v. Firestone Tire & Rubber Co.*, 485 A.2d 305, 309 (N.J. 1984) (criticizing "obvious danger rule" as bar to recovery); *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 544 (N.J. 1982) (holding asbestos manufacturers liable for failure to warn of risks that were scientifically unknown at the time of sale). Seemingly absurd warnings about unlikely or insultingly obvious dangers may lead customers to be believe that all the product's safety information is just "for the lawyers" and therefore ignore warnings about more salient risks.

Similarly, manufacturers can make reasoned decisions about how to present information. Not only the content, but also the design and conspicuousness of a warning are relevant to its adequacy. *Cooley v. Carter-Wallace, Inc.*, 478 N.Y.S.2d 375, 378 (App. Div. 1984). But here again, placement and presentation are held to a standard of reasonableness. *See, e.g.*, *Woeste v. Wash. Platform Saloon & Rest*., 836 N.E.2d 52, 57 (Ohio Ct. App. 2005) (finding that it was reasonable for a restaurant to print warnings about the risks of eating raw oysters in the menu without displaying additional signs around the dining area). It may be entirely in the interest of customer safety for a seller to, for instance, draw special attention to serious hazards while printing information about more remote risks in a users' guide; if everything is emphasized, then effectively nothing is emphasized. *See, e.g.*, *Scott v. Black & Decker, Inc.*, 717 F.2d 251, 254 (5th Cir. 1983) (rejecting plaintiff's contention that a specific warning should have been printed

directly on an electric saw because "[t]o require that one explicit warning be placed on the saw would be to require all twenty"). The most reasonable placement of a given warning is not necessarily the most prominent.

As such, defendants have ample opportunity to defeat a warning defect claim without needing to address issues of causation. A plaintiff's mere allegation that a warning should have been more comprehensive or more prominently displayed is insufficient to establish defect; reasonable warnings are those which actually make the product safer. Ordinary jurors are well acquainted with the reality of over-warning in our world; defense counsel should have no difficulty convincing them of its dangers. Failure-to-warn claims can and should fail on the question of defect when defendant manufacturers made well-reasoned, consumer-centered decisions about what safety information to display and how to display it.

2. Defendants can rebut the presumption of causation.

Once a plaintiff has established a warning defect, defendants can draw on a range of evidence to rebut the presumption of causation. As classically formulated by the Texas Supreme Court, rebuttal is achieved if the manufacturer can produce some evidence "that the user was blind, illiterate, intoxicated at the time of the use, irresponsible or lax in judgment or by some other circumstance tending to show that the improper use was or would have been made regardless of the warning." *Technical Chem. Co.*, 480 S.W.2d at 606. A defendant may overcome the presumption by showing that the plaintiff had adequate knowledge of the risk in question. *See Vallillo v. Muskin Corp.*, 514 A.2d 528, 530 (N.J. Super. Ct. App. Div. 1986) ("[I]f the user of a product knows at the moment of use the very danger of which the warning would have apprised him, but chooses to disregard that conscious knowledge, then the presence or absence of the warning is irrelevant."). *But see Seley*, 423 N.E.2d at 839 (contending that

consumers might benefit from being reminded of what they already know). Finally, a plaintiff's own testimony can admit that she would not have changed her behavior in the face of an adequate warning. *See Hart v. Honeywell Int'l*, No. 1:15 CV 10000, 2017 U.S. Dist. LEXIS 51163 at *11 (N.D. Ohio Apr. 4, 2017) (holding that plaintiff's testimony that he likely would not have heeded additional warnings rebutted the presumption).

To be certain, the above considerations will not always suffice to rebut the presumption. For example, it may well be that a plaintiff who ignored an inadequate warning would have complied with one that gave a fuller, more accurate account of the risks. *See Cooley*, 478 N.Y.S.2d at 379 (finding a warning inadequate when it did not communicate the magnitude of the potential harm). But all of the above factors can be powerful evidence for a factfinder to conclude that a plaintiff should not be allowed to benefit from the presumption, in which case the jury needs to decide if it is more likely than not that the failure to warn factually caused the plaintiff's harm.

C. The Heeding Presumption Is Necessary to Enforce Ohiowa's Failure-to-Warn Law as a Strict Liability Rule.

This Court recognizes Ohiowa's defective warning law as a rule of strict liability. R. at 1. However, since the identification of a warning defect is a question of reasonableness and therefore of negligence, many courts analyze "strict liability" failure to warn as if it were a negligence cause of action. However, Ohiowa's failure-to-warn law can be preserved as strict liability by reducing the plaintiff's burden of proof on the element of causation. The heeding presumption achieves this end. Alternatively, the Court could reject the heeding presumption and instead interpret the OPLA to demand a less burdensome causal nexus between the defective product and the plaintiff's harm, but this approach would not strike as fair a balance between plaintiffs' and defendants' interests.

1. The heeding presumption ensures that strict liability failure to warn is not analyzed under a negligence standard.

As discussed above, the threshold question of whether a warning is defective is essentially a negligence inquiry, since it centers on whether or not a defendant's design of a warning was reasonable.[4] *See, e.g.*, *Jarrell v. Monsanto Co.*, 528 N.E.2d 1158, 1161 (Ind. Ct. App. 1988) ("In Indiana, the issue of the adequacy of warnings in a strict liability case is governed by the same concepts as in negligence."); *Temple v. Wean United, Inc.*, 364 N.E.2d 267, 272–73 (Ohio 1977) (framing the duty to warn as a negligence standard, even when governed by strict liability). As such, defective warning cases which should, according to the applicable law, be decided under strict products liability often become indistinguishable from negligence cases. *See Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 289 (Iowa 1994) ("Courts basing the application of a strict liability theory . . . [in failure-to-warn cases] cannot help but slip back into the type of analyses virtually identical to those employed in negligence cases."). If Ohiowa courts hold plaintiffs to a negligence standard both for proof of defect and proof of causation, then they will treat a strict liability cause of action as if it were negligence. *See Deere & Co. v.*

[4] Courts sometimes try to distinguish between the two causes of action by saying that negligence asks whether the defendant's conduct was reasonable, whereas strict liability asks whether the product's design was reasonable. *See, e.g.*, *Woodill v. Parke Davis & Co.*, 402 N.W.2d 194, 198 (Ill. 1980) (observing that, although failure to warn has its roots in negligence, strict liability failure to warn is distinguishable because "it is the inadequacy of the warning that is looked to, not the conduct of the particular manufacturer"). However, this difference proves illusory; manufacturers are required to exercise ordinary care in crafting their warnings, whether they are held liable under negligence or strict liability. *See, e.g.*, *Russell v. G.A.F. Corp.*, 422 A.2d 989, 991 (D.C. Cir. 1980) (describing the identical duty of ordinary care under both rules); James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 275–76 (1990) (criticizing the product–conduct distinction as an "imbroglio" that forces courts to make "delphic" pronouncements about the difference between the two). A very limited number of courts, most famously the New Jersey Supreme Court in *Beshada v. Johns-Manville Prods. Corp.*, have distinguished between the two causes of action by saying that, under strict liability, the danger did not need to be scientifically knowable at the time at the time of manufacturer for the plaintiff to recover, whereas the defendant needed to have actual or constructive knowledge of the danger under negligence. 447 A.2d at 545–49. However, these decisions have been intensely criticized. *See, e.g.*, *Anderson v. Owens-Coming Fiberglas Corp.*, 810 P.2d 549, 555 (Cal. 1991) (raising the concern that imposing liability for unknowable risks would discourage innovation); *Bernier v. Raymark Industries, Inc.*, 516 A.2d 534, 539 (Me. 1986) (arguing that to impose liability regardless of the best available knowledge is to turn manufacturers into insurance providers). Even in New Jersey, this expansive definition of defective warnings was subsequently limited to asbestos cases. *Feldman v. Lederle Labs.*, 479 A.2d 374, 387–88 (N.J. 1984).

Grose, 586 So. 2d 196, 198 (Ala. 1991) (emphasizing that a plaintiff must prove causation under Alabama law, which only recognizes negligent failure to warn). This Court, however, has recognized that Ohiowa understands failure-to-warn claims as a form of strict liability. R. at 1.

Strict liability regimes make it easier for a plaintiff to recover than a negligence standard. *See Coffman*, 628 A.2d at 719 (observing that a policy consideration of strict liability is to reduce the plaintiff's burden of proof). There are both deterrence and fairness rationales for imposing strict liability on producers who place defective products on the market, even though they may have exercised all reasonable care. As a matter of deterrence, customers often do not have enough information to demand reasonable safety measures. Not knowing the full hazards of a product, customers will prefer lower up-front costs to truly cost-effective precautions. This incentivizes manufacturers to choose the option which is cheaper to them (and to individual buyers) over the option that is socially efficient. *See Doe v. Miles Labs., Inc.*, 675 F. Supp. 1466, 1471 (D. Md. 1987) (describing how strict liability promotes efficiency by making manufacturers internalize their products' "hidden costs"). In the context of defective warnings, this means that manufacturers may conceal a product's dangers in order to make it more attractive to consumers. *Nissen Trampoline Co.*, 332 N.E.2d at 827. Similarly, in a world of complex production, buyers may have great difficulty identifying negligence, even where negligence exists. *See Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) ("An injured person . . . is not ordinarily in a position to . . . identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is."). Strict liability therefore incentivizes producers to create optimally safe products; as the party that knows the most about what they make, they can best reduce the hazards they have created. And as a matter of fairness, producers profit by putting their products

into the world. It is therefore fair to have them bear the costs when responsible consumers are injured by their defective goods. *See Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963) ("The purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."). Strict liability thus makes the modern world safer and permits innocent plaintiffs to recover for their injuries.

Such considerations presumably motivated the Ohiowa legislature when it passed Ohiowa Rev. Code § 5552.368–69 as the state's law of strict products liability. Although some states, following the Restatement (Third) of Torts, have determined that design defect and defective warning claims follow a negligence standard, Ohiowa's legislature based the state's products liability law on the Restatement (Second). R. at 11. The legislature has given no indication that they desire to follow the lead of tort reform-minded states and treat failure to warn as a species of negligence. Ohiowa courts should continue to uphold this standard by enforcing the appropriate causation injury. *See Pavlik v. Lane Limited/Tobacco Exporters Int'l*, 135 F.3d 876 (3d Cir. 1998) (reasoning that it would be "illogical, and contrary to the basic policy of § 402A" to recognize strict liability for defective warnings without recognizing the heeding presumption). The heeding presumption best serves strict liability's dual purposes of protecting the public and compensating the injured.

2. The alternative strict liability causal rule is likely too hostile to defendants.

In the alternative, this Court could ensure that Ohiowa's courts judge failure-to-warn cases according to a strict liability standard by applying a causal rule focused entirely on the product and its risks, instead of inquiring into the plaintiff's conduct. Under such a rule, there would be no question of whether the defective warning was a but-for cause of a plaintiff's injury.

Rather, the plaintiff would need to demonstrate that the product contained a material risk, that the product's warning was defective with respect to that risk, and the harm the consumer suffered was of the type the warning would have protected against. *See* Pittenger, *supra*, at 1547 (proposing such a rule as a solution to failure-to-warn claims' causal conundrum). Once the product was judged defective due to its inadequate warning, the causal inquiry would focus on the relationship between the defective product's danger and the harm suffered, not on how the plaintiff would have used a non-defective product. *See Jarrell*, 528 N.E.2d at 1167–68 (arguing that the causal analysis for failure-to-warn claims should center on the product, not its defect, as a matter of both Indiana law and strict liability principles).

This manner of causal analysis would enact the plain language of the statute. According to Ohiowa Rev. Code § 5552.368–69, sellers are liable for harms caused by defective products (so long as the harmed consumer is reasonably foreseeable and the product has not been substantially altered), and a product is defective if it lacks either reasonable warnings about its dangers or reasonably complete instructions for its use. States can specify that the defect must be the definitive cause of the injury; Ohiowa has not done so. *See, e.g.*, Wis. Stat. § 895.047(1)(e) (2019) (establishing that the plaintiff must prove that "the *defective condition* was a cause of the claimant's damages") (emphasis added). When an Indiana Court of Appeals interpreted a state statute with practically identical wording to that of Ohiowa Rev. Code § 5552.368, it concluded that, if a product has a defective warning, the causal inquiry properly focuses on the nexus between the product and the harm, not the defect and the harm. *Jarrell* at 1167–68 (citing Ind. Code Ann. § 34-20-2-1). This approach would erase speculative causal issues about the plaintiff's conduct and refocus the inquiry entirely on the product itself, as is appropriate for

strict products liability. It would also clearly delineate how defective warnings are a matter of strict liability, not negligence. *See* Pittenger, *supra*, at 1553

However, this approach would adopt a more pro-consumer stance than any other state currently recognizes. Since Indiana's 1995 amendments to its Product Liability Act abolished strict liability for failure-to-warn cases, no jurisdiction presently resolves the causal problem of warnings by refocusing the analysis entirely on the relationship between the nature of the defective warning and the nature of the harm suffered. *Chesnut v. Roof*, 665 N.E.2d 7, 10 (Ind. Ct. App. 1996). Moreover, this approach would greatly reduce defendants' ability to avoid liability on the issue of causation, while courts have emphasized that one of the virtues of the heeding presumption is that it grants defendants a fair chance at rebuttal. *See, e.g.*, *Pavlik*, 135 F.3d at 883 (stating that the presumption "must be rebuttable" because the plaintiff "still bears the burden of persuasion on the causation prong"). Although the language of the OPLA would seem to authorize this alternate causal approach, this Court may desire more explicit legislative direction before abandoning the heeding presumption, which is a widely accepted solution to the causal issues faced by failure-to-warn plaintiffs. The presumption serves the underlying policy goals of strict liability while striking a fair balance between plaintiffs' and defendants' interests. It does not force plaintiffs to prove the impossible, it allows defendants to avoid liability where the inference of causation is inappropriate, and it incentivizes manufacturers to provide reasonable warnings that will keep consumers safe.

CONCLUSION

For the foregoing reasons, the Supreme Court of Ohiowa should 1) reverse the Court of Appeals for the Seventh Appellate District's decision to grant Zuul's Motion for Summary Judgment and remand for a trial on the manufacturing defect claim, and 2) apply the heeding presumption to strict liability failure-to-warn claims.

Respectfully submitted,

/s/ Team G

Team G

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