No. 18-131

IN THE SUPREME COURT OF THE STATE OF OHIOWA
January Term, 2020

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
STATE SUPREME COURT OF OHIOWA

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the appellate court erred in granting Zuul's motion for summary judgment on the Tully's manufacturing defect claim when it adopted a strict interpretation of the Restatement (Second) of Torts?
2. In light of the Ohiowa Products Liability Act and the Restatement (Second) of Torts, does the read and heed doctrine apply to strict liability failure-to-warn claims when applied to the benefit of the plaintiff in the State of Ohiowa?

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STANDARD OF REVIEW

1. Summary judgment is appropriate when there is no genuine issue as to any material fact of the claim and the moving party is entitled to judgment as a matter of law. Ohiowa R. Civ. Proc. 56(a). A decision for summary judgment is reviewed de novo, construing the evidence in light most favorable to the nonmoving party. Huck v. Wyeth, Inc., 850 N.W.2d 353, 362 (Iowa 2014).
2. Questions of law are reviewed de novo. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 108 (1989).

STATEMENT OF THE CASE

A. Factual History

Zuul was established in Cincinnatus Ohiowa in 2016. R. 3. The founder, Pete Venkman, intended for his product to be a safer alternative to traditional cigarettes. Id. Zuul e-cigarettes operate by depressing a button which heats the liquid in the cartridge into a vapor for inhalation by the user. R. 3–4. Due to their compact size and various sweet flavors, their products were popular among teens and young adults. R. 4.

In December 2017, a federal district court required Zuul to pay damages and issued an injunction against their products after the court held that they had been using certain flavors such as fruit punch, cotton candy, and Hi-C Ecto Cooler to directly market its e-cigarettes to children. Id. In response, Zuul released a statement on June 7, 2018 affirming the denial of these practices and while pledging that they would only produce the "classic tobacco" flavor with their redesigned cartridges moving forward. Id. At the same time, the company introduced "Zuul Skins." Id. These adhesive labels had customizable as well as pre-decorated options that consisted of patterns, licensed characters, and cartoons. Id.

On July 17, 2018 Louis and Janine Tully entrusted L.T., their eleven-year old son, with a nineteen-year-old college student named Dana Barrett. R. 5. Dana owned a Zuul with a "skin" depicting the animated character *Hola Gato*, of which L.T. is also a fan. Id. Despite warning L.T. that the e-cigarette was dangerous, his curiosity prompted him to seize the Zuul product when it was left unattended. Id. L.T. then depressed the activating button and briefly played with the product in a manner that mimicked a leaf blower. Id. Without warning, the Zuul product exploded and left L.T.'s hands severely burned. Id.

B. Procedural History

The Tullys filed their petition for (1) the manufacturing defect claim and (2) the failure to warn claim. R. 2. Zuul moved for summary judgement on the strict product liability claim arguing, although the product endured a manufacturing defect, Zuul alleged that L.T. was not a foreseeable consumer of the product. R. 3–4. The Court of Common Please held that children were not foreseeable users of the Zuul products and granted summary judgement to Zuul. R. 3. The appellate court affirmed the lower court's decision further explaining that, to be a consumer, one must use the product as intended which L.T. had not. R. 9.

Zuul also moved for summary judgment on the failure to warn claim, arguing that "the warning provided on the packaging of the product sufficiently fulfilled Zuul's duty to warn users." R. 3. Zuul's motion was denied, and the warning claim proceeded to trial. Id. The Tullys requested a jury instruction on the heeding presumption, but Zuul objected to the instruction, which the trial court sustained. Id. The jury found for Zuul, and the Tullys appealed on the grounds that the trial court abuse its discretion in denying the jury instruction on the heeding presumption. Id. The court of appeals affirmed the trial court's decision, finding that while the heeding presumption is the law of the land in Ohiowa, no prejudice resulted from the lack of jury instruction. R. 12. The Tullys again timely appealed, and this Court granted certiorari regarding whether the heeding presumption is the law in Ohiowa. R. 1.

SUMMARY OF THE ARGUMENT

This Court must address two issues: first, whether the Court of Appeals erred in affirming the trial court's grant of summary judgment on the Tully's manufacturing defect claim by adopting a narrow interpretation of the term consumer as applied to Ohiowa's product liability

statutes; and second, whether Ohiowa allows the heeding presumption to apply in a failure to warn claim.

The lower court erred in its adoption and application of a strict interpretation of the term consumer, since this decision ignores the distinct justifications underlying the strict product liability laws it departed from. While this jurisdiction has not articulated its own definition for the term "consumer;" previously expressed policies, neighboring jurisdictions' precedent, and tests provide the most appropriate guidance for the state of Ohiowa to evaluate the liability of a manufacturer. R. 14–15.

Even if L.T. falls within the scope of a general "consumer" as the court desired, Zuul argues that he is not a foreseeable consumer. R. 8. Thus, they argue that they should not incur any liability for the injuries that he incurred and summary judgment should be granted. Id. This argument is misguided because precedent has found that foreseeable use and misuse has been a question for the trier of facts, not the court. Due L.T.'s minor deviation from its intended use and Zuul's previous attempts to market to children, their argument to suggest that an individual such as L.T. foreseeable as a liability is without merit.

Lastly, to ensure a balanced and fair approach to the question of liability in this case and moving forward, the state of Ohiowa should adopt the consumer contemplation test as set forth by the Seventh Circuit. While this test follows the policies of strict product liability, it allows for a narrow and reasoned analysis for all products that would fairly determine the scope of liability that a manufacturer has based on an analysis of the "ordinary consumer."

The read and heed doctrine derives from the Restatement (Second) of Torts § 402A cmt. j (1965). The presumption allows a fact-finder to presume that a plaintiff injured by a product would have read and heeded a warning if provided. Dole Food Co. v. N. Carolina Foam Indus.,

Inc., 935 P.2d 876, 883 (Ariz. Ct. App. 1996). In cases where a warning was defective or inadequate, this presumption works to the benefit of the user injured by the product. Id. The heeding presumption is the prevailing rule adopted by most states. Ohiowa relied on the Restatement (Second) as well as neighboring states when drafting the Ohiowa Products Liability Act ("OPLA"). Further, the heeding presumption when applied to the benefit of the plaintiff is the most consistent with the intended policy of strict products liability. Ohiowa strict liability law and public policy favors the consumer in cases like these, as stated by the appellate court. R. 12. The appellate court also found that the heeding presumption was the law in Ohiowa. Id. Therefore, the heeding presumption is the law in the State of Ohiowa.

ARGUMENT

I. The Court of Appeals Erred in its Adoption and Application of Strict Consumer Test as Applied to the Tullys' Product Liability Claims.

While the lower court was correct in finding the e-cigarette as defective, it erred in its adoption and application of a narrow interpretation of the term consumer. This finding runs contrary to the concept of strict product liability and the neighboring jurisdictions' precedent. In addition, Zuul Enterprises incorrectly argued that they were entitled to summary judgement because L.T. was not a foreseeable consumer. This court should use the consumer contemplation test set forth by the Seventh Circuit, which provides the most appropriate test to evaluate the liability of a manufacturer in the event of an injury to any kind of consumer. Todd v. Societe BIC, S.A., 21 F.3d 1402, 1407–08 (7th Cir. 1994).

A. The Court of Appeals Erred in Departing from Ohiowa's policy of Strict Product Liability to Adopt a Strict Interpretation of the Term "Consumer."

The majority erred in its determination that, to be a consumer, L.T. had to use the product for its exact intended purpose. R. 9. They further explained L.T.'s decision to wave the e-cigarette, although a minor deviation from its intended purpose, was enough to push him from the class of people that Zuul should reasonably foresee as being subject to the harm caused by the product. Id. Judge Zeddemore correctly asserted that "[T]hough the Ohiowa statute fails to provide its own definition of "consumer," it is more practical to consider that the exclusion of "ultimate user" did not remove that category from the foreseeable "class of persons" but instead encapsulated it within the "consumer" term. R. 14.

An analysis of the term "consumer" should be first done through the canons of construction. First, the textual canon provides the plain meaning rule which is applicable when the statutory language is clear, unambiguous, and not controlled by other parts of the act or other acts on the same subject. Smith v. Zachary, 255 F.3d 446, 448 (7th Cir. 2001). Here, the term consumer is not clear or unambiguous as it managed to elicit debate and division amongst the court of appeals. Id. Additionally, a review of similar statutes indicate that the plain meaning of similar rules does not lend any significant support for or against the specific findings of the court of appeals.

Therefore, we turn to the extrinsic legislative sources canon which allows us to review the history of such acts. Due to a lack of legislative records from the state of Ohiowa on the matter, we now turn to the neighboring jurisdiction's states which we have previously drawn influence from in the creation of OPLA. Through a review of the states we find that the terminology within their statutes vary as well. However, it is within their policies that these states specify who is entitled to bring a claim under their respective product liability statutes. Indiana has found that their law "imposes liability upon sellers of a product in a defective

condition unreasonably dangerous to any user or consumer." Weigle v. Spx Corp., 729 F.3d 724, 730 (7th Cir. 2013). Illinois follows a similar policy that was set forth in section 402A of the Restatement (Second) of Torts, which imposes strict liability upon one "who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property." Lamkin v. Towner, 563 N.E.2d 449, 457 (Ill. 1990). Wisconsin has taken a more lenient policy by explaining "If the average consumer would reasonably anticipate the dangerous condition of the product and fully appreciate the attendant risk of injury, it would not be unreasonably dangerous and defective. This is an objective test and is not dependent upon the knowledge of the particular injured consumer." Insolia v. Phillip Morris, Inc., 216 F.3d 596, 599 (7th Cir. 2000). It warrants little analysis to observe that L.T. would easily fall within the class of those that are sought to be protected under these state's strict liability laws because an ordinary consumer could not anticipate or appreciate the risk of an explosion from their e-cigarette from simply pressing a button down as intended.

The same conclusion can be reached after a review of the states in the Sixth and Tenth Circuit as well. Ohio has established that a product must perform in accordance with the expectations of the ordinary user and that if it does not measure up to such expectations it is deemed "unreasonably dangerous" and hence defective. Sours v. General Motors Corp., 717 F.2d 1511, 1514. (6th Cir. 1983). Kentucky courts have extended the protection of products liability to "bystanders" who are injured by the product, but are "not using or "consuming" the product. James v. Meow Media, Inc., 300 F.3d 683, 700 (6th Cir. 2002). Lastly, in Oklahoma, directly adopted the Restatement (Second) of Torts 402(A) by finding a product unreasonably dangerous if it is "dangerous to an extent beyond that which would be contemplated by the

ordinary consumer who purchases it." Rohrbaugh v. Celotex Corp., 53 F.3d 1181, 1183 (10th Cir. 1995).

Lastly, we turn to the Restatement (Second) of Torts §402A which also heavily influenced the creation of OPLA. As Judge Zeddemore stated, its purpose was to make any seller subject to liability "even though he has exercised all possible care in the preparation and sale of the product." Restatement (Second) of Torts §402A cmt. a. The relevant justifications for this policy are that the seller has assumed a special responsibility toward any member of the consuming public who may be injured by it and that the seller is in the best position to afford this protection. Id.

As we turn to Ohiowa's policy we will find, similar to other state's statutes, that OPLA was enacted to enforce liability on a designer, manufacturer, or seller of a product when a defect in the product causes physical harm to the consumer of the product. OHIOWA REV. CODE §§ 5552.368. Judge Zeddemore rightfully asserted that policy that has been expressed should be accepted over an assumptive argument over semantics. R. 14. Therefore, the Court of Appeals erred in its strict interpretation of "consumer" as it runs contrary to the theory of "strict" product liability, its neighboring jurisdictions' precedent, and the Restatement (Second) of Torts §402A.

B. Summary Judgment Would Still be Inappropriate in the Application of a Foreseeable Use Analysis as Indicated in the Seventh Circuit

Through Ohiowa statutes, it is recognized that a manufacturer is only liable to a consumer if that consumer "is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition." OHIOWA REV. CODE § 5552.368. This policy is consistent with the Seventh Circuit's where it recognized a defense "that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably

expected by the seller at the time the seller sold or otherwise conveyed the product to another party." Leon v. Catepillar Indus., Inc., 69 F.3d. 1326, 1341-44 (7th Cir. 1995).

Here, the Court erred in its finding that, because of the type use, L.T. fell outside of the scope of the protected "consumer" class altogether. R. 9. They further explained that, perhaps by pressing the button and raising it to his mouth, he would have been using the product as intended and thus deemed a consumer for purposes of Ohiowa Rev. Code § 5552.368. Id. The Seventh Circuit has found, however, that foreseeable use and misuse are typically questions of fact for a jury to decide. Weigle, at 739 (citing Barnard v. Saturn Corp., 790 N.E.2d 1023, 1028 (Ind. Ct. App. 2003)). While they have conceded that summary, judgment has been appropriately given before, they reserve that for extreme circumstances. Barnard, 790 N.E.2d at 1028. Here, the question should have been L.T. was within the class of individuals that Zuul could have foreseen as subject to the harm that was caused by the defect, consistent with Ohiowa policy.

In Barnard, the plaintiff's husband ignored multiple warnings and used a car jack for unintended purposes which resulted in his death. Id. at 1027. The court found that it was undisputed that Mark, the decedent, acted in "direct contravention" to no less than three instructions that directly contributed to the incident. Id. at 1031. While the court conceded it was unlikely that General Motors could not have reasonably foreseen a user ever deciding to get underneath a vehicle solely by a jack, it was clear that Mark misused the jack and therefore fell out of the class of protected individuals. Id. Here, L.T. did not act in "direct contravention" to any warnings on the e-cigarette and did not "misuse" the product either. Rather, one could characterize his circumstances as "in the process" of its intended use. His actions deviate no more than an individual who is occupied with talking while pressing the button. While L.T. did not fulfill its intended use, he pressed the button just as any other user would and simply did not

inhale the vapor. R. 9. To deprive an individual of a remedy because they did not fulfill the intended purpose of a product before getting injured, barring instances of misuse, is against the policy of strict product liability.

This case is similar to Weigle, where a court found that, despite adequate warning, the defendant was not entitled to summary judgment due to the amount of evidence from which a fact finder could determine a particular use was reasonably foreseeable. 729 F.3d at 739. In that case, two mechanics argued that their use of a lift without a safety pin was foreseeable and provided various testimonies to support their assertions. Id. The court in that instance, found that the dispute of facts would be best decided by a jury due to the opposing claims. Id. Here, the expert testimony dispelled any belief that an ordinary consumer would be able to expect such risks. R. 7–8. In addition, Zuul neither offered any evidence to rebut the claim that the product was defective nor did they state that the misuse that the lower court referenced was a contributing factor. R. 8. Alternatively, Zuul solely relies on the foreseeability of the user while the court raises another argument and focuses on the type of use. This argument fails as it is foreseeable that a child may use their product due to a federal district court's finding that the company had been using its e-cigarette flavors to market to children, resulting in injunctions and a payment in damages.Thus, as the Seventh Circuit has found before, this court should find that the lower court erred in granting summary judgment and vacate and remand the cause for further proceeding to allow a trier of fact determine the foreseeability of the use and user. Id. at 739–740.

C. The State of Ohiowa Should Follow the Consumer Contemplation Test Set Forth by the Seventh Circuit.

OPLA was enacted to enforce liability on a designer, manufacturer, or seller of a product when a defect in the product causes physical harm to the consumer of the product. OHIOWA REV.

CODE §§ 5552.368. While much debate has been raised among the Circuits as to the interpretation of the word "consumer," the Seventh Circuit affirmed that liability should be assessed under the consumer contemplation test. Todd, 21 F.3d 1402, 1407–08 (7th Cir. 1994).

The Seventh Circuit expressly rejected liability assessments that were based on a "foreseeable user" approach. Id. at 1408. The court made this finding in a case where a four-year-old child gained access to a lighter and subsequently started a fire that killed another child. Deducing the lighter's potential for danger, the court stated that an ordinary consumer would expect a lighter, when used appropriately, could produce a substantial fire. Id. at 1407. This possibility, however, did not make it unreasonably dangerous under the consumer contemplation test. Id. It was further defined that the ordinary consumer was one "with the ordinary knowledge common to the community as to [the product's] characteristics." Id. at 1408. In finding against the plaintiff, the court asserts that this test is critical as it prevents the imposition of absolute liability on manufacturers that would otherwise be subject to endless claims due to an injury that any individual may incur during the use of their product. Id. at 1407.

In the immediate case, the ordinary consumer of Zuul's e-cigarette would be teens and young adults. By this standard, Zuul would immediately fail the consumer contemplation test as an ordinary consumer, such as Dana, would not have expected the product to explode in the course of its intended use. The ordinary consumer's expectation is that they would press a button which would lead to the generation of a vapor that could be inhaled. Little weight was given to the foreseeability of a child using a lighter in Todd and the court should make a similar determination here as, similar to that instance, the child in question could have been said to be "in the process" of its intended use. Therefore, Zuul's argument that they should not be liable

because L.T. was not a foreseeable user fails as it is an inappropriate test that seeks to alter the definition of "strict" product liability.

II. The Read and Head Doctrine Applies to Failure-to-Warn Claims in the State of Ohiowa When Applied to the Plaintiff's Benefit Because it is Consistent with the Restatement (Second) and the Policies Behind Strict Liability

The Ohiowa Court of Appeals correctly found that the heeding presumption is the law of the land, "given that public policy tends to favor the consumer…in Ohiowa." R. 11. The heeding presumption has been recognized for decades in the Restatement (Second) of Torts, which in turn has been adopted by the vast majority of states, including many neighboring states of Ohiowa in the Sixth, Seventh, and Tenth Circuit Courts of Appeal. The presumption helps plaintiffs establish proximate cause in a failure to warn claim by presuming that the plaintiff would have read and heeded an adequate warning if given. Dole Food Co., 935 P.2d at 883. Further, Ohiowa has adopted the learned intermediary doctrine from the Restatement (Second). R. 11. The learned intermediary doctrine is one application of the heeding presumption in the context of the duty to warn prescribing physicians. Both rules derive from § 402A comment j.

A. The OPLA is Based Primarily Upon the Restatement (Second) of Torts, From Which the Heeding Presumption Derives

While Ohiowa did not adopt the Restatement (Second) in full, it did rely heavily upon the Restatement (Second) of Torts when drafting the OPLA. R. 6. For a failure-to-warn product defect claim in the State of Ohiowa:

> (b) A product is defective if the seller or manufacturer fails to:
>
> > (1) properly package or label the product to give reasonable warnings of danger about the product; or

> (2) 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 to the consumer

OHIOWA REV. CODE § 5552.369. The plain language of the statute does not specify any standard in proving proximate causation in a failure to warn claim. The plaintiff has the burden of proving that the inadequate warning proximately caused the injury. Thus, turning to the Restatement (Second) and its comments is instructive when interpreting the OPLA:

> [T]he seller may be required to give directions or warning, on the container, as to its use. … 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.

Restatement (Second) of Torts § 402A cmt. j. The heeding presumption allows the fact-finder to presume that the person injured by the product would have read and heeded an adequate warning, if provided. Dole Food Co., 935 P.2d at 883. If an adequate warning was provided, the presumption works to the benefit of the manufacturer/seller because it is presumed the consumer read and heeded the warning. Seley v. G.D. Searle Co., 423 N.E.2d 831, 838 (Ohio 1981). This absolves the seller/defendant of its liability because it has fulfilled its duty to warn the consumer of any non-obvious dangers. Id. If the warning was inadequate, the presumption works to the benefit of the consumer/plaintiff. Id. This presumption is not conclusive, and the defendant may provide evidence to rebut the presumption. Id. For example, the defendant may provide "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 would have been made regardless of the warning." Technical Chemical Co. v. Jacobs, 480 S.W.2d 602, 606 (Tex. 1972).

The influence of § 402A cannot be overstated – "In most, but not all states, citation to § 402A or one of its comments to the text of the note has been the virtual equivalent of citing precedent." 1 Louis R. Frumer & Melvin I. Friedman, *Products Liability* § 8.03 (Matthew Bender, Rev. Ed.). However, the heeding presumption has also been somewhat controversial and was not included in the Restatement (Third). One criticism against the presumption is that it is foreseeable that a warning, even if adequate, may either not be seen, be ignored, or the consumer may have no other choice but to use the dangerous product. Restatement (Third) of Torts: Products Liability § 2, Reporters' Note, cmt. l (2012). Further, critics argued that manufacturers should not be absolved of liability by simply including a warning of danger instead of redesigning the product to be safer. *See* Uloth v. City Tank Corp., 384 N.E.2d 1188, 1192 (Mass. 1978). ("the burden to prevent needless injury is best placed on the designer or manufacturer rather than on the individual user of a product"). However, this conflict only happens when the presumption is applied to the benefit of the manufacturer after an adequate warning was given.

Placing the burden of increasing safety on the manufacturer is still compatible with the heeding presumption. First, the manufacturer or seller can rebut the presumption by showing the warning would not have altered the consumer's use of the product in any way, such as cases in which employees must use dangerous equipment with no alternatives. *See* Id. at 1191 (where a loader slipped and had his foot severed by a garbage truck). The presumption merely helps the plaintiff get over the hump of showing proximate causation in cases where it may be nearly impossible to prove that but for an inadequate warning, the injury would not have happened. It "excuses plaintiff from the necessity of making self-serving assertions that he would have followed adequate instructions." Gen. Motors Corp. v. Saenz, 873 S.W.2d 353, 359 (Tex. 1993).

If the Ohiowa legislature had intended to deviate from the traditional language of § 402A comment j, it could have included language specifying a different standard for proximate cause other than the heeding presumption. *See* DeJesus v. Craftsman Machine Co., 548 A.2d 736, 744 (Conn. Ct. App. 1988). In Connecticut, for example, "[T]he claimant shall prove by a **fair preponderance of the evidence** that if adequate warnings or instructions had been provided, the claimant would not have suffered the harm." CONN. GEN. STAT. § 52-572q(c) (2019) (emphasis added Because Ohiowa did not include language differing from § 402A comment j, the appellate court was correct in adopting the heeding presumption as the law.

B. Most Neighboring States in the Sixth, Seventh, and Tenth Circuits Have Also Adopted the Heeding Presumption, and Those That Have Not Tend to Specify Otherwise

In addition to the Restatement (Second), Ohiowa relied on neighboring jurisdictions in the Sixth, Seventh, and Tenth Circuit Courts of Appeal while drafting the OPLA. R. 6. As in the rest of the country, most states in these Circuits have also adopted the heeding presumption, especially when applied to the benefit of the plaintiff when a warning is inadequate.

Sixth Circuit Court of Appeals

In the Sixth Circuit: Ohio (Seley, 423 N.E.2d at 835.); and Kentucky (Bryant v. Hercules, 325 F. Supp. 241, 246 (W.D. Ky. 1970)) have adopted the presumption, while Tennessee has not. Harwell v. American Med. Sys., Inc., 803 F. Supp. 1287, 1297 (M.D. Tenn. 1992). (court declined to apply the presumption to the defendant). In Michigan, the presumption is only

applied if the person injured by the product is deceased. Allen v. Owens-Corning Fiberglas Corp., 571 N.W.2d 530, 532 (Mich. App. 1997).

Seventh Circuit Court of Appeals

In the Seventh Circuit: Indiana recognizes the presumption. Ortho Pharmaceutical Corp. v. Chapman, 388 N.E.2d 541, 555 (Ind. Ct. App. 1979); Kovach v. Midwest, 913 N.E.2d 193, 199 (Ind. 2009) (citing Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 332 N.E.2d 820, 821 (Ind. Ct. App. 1975) (reversed on other grounds)). The court in Nissen justified the heeding presumption by saying any testimony given to show the plaintiff would have heeded a warning would be speculative at best. 332 N.E.2d at 826. Instead, the court said the heeding presumption is "meritorious, workable, and desirable." Id. It also encourages sellers to release safe product, warn of dangers that may cause injury, and discourage those sellers who would rather risk liability than provide a warning that would hurt sales. Id. at 827. The presumption does not abrogate the issue of causation, "[r]ather, it merely shifts to the manufacturer the burden of proof where the fact-finder could only speculate as to whether the injury could have been prevented by a warning. Id.

Illinois has not explicitly adopted or rejected the heeding presumption. Walker v. Macy's Merch. Grp., Inc., 288 F. Supp. 3d 840, 866 (N.D. Ill. 2017) (court did not determine whether heeding presumption existed). In Wisconsin, the supreme court has never addressed the presumption, but a recent tort reform law in 2011 could be read as killing the presumption – a claimant in a product liability claim must "establish[] all of the following by a **preponderance of the evidence**:" including, "[t]hat the defective condition was a cause of the claimant's damages." WIS. STAT. §895.047(1)(e) (2019) (emphasis added).

Tenth Circuit Court of Appeals

In the Tenth Circuit: Colorado (Potthoff v. Alms, 583 P.2d 309, 310 (Colo. App. 1978).); Kansas (Delaney v. Deere & Co., 999 P.2d 930, 932 (Kan. 2000)); Oklahoma (Cunningham v. Charles Pfizer & Co., 532 P.2d 1377, 1382 (Okla. 1974).); Utah (Kirkbride v. Terex USA, LLC, 798 F.3d 1343, 1345 (10th Cir. 2015).); and Wyoming (Thom v. Bristol-Myers Squibb Co., 353 F.3d 848, 850 (10th Cir. 2003).); have all adopted the heeding presumption. New Mexico has not addressed the issue.

Other Jurisdictions

Most other states also recognize the heeding presumption, including Missouri (Arnold v. Ingersoll-Rand Co., 834 S.W.2d 192, 192 (Mo. 1992)); Texas (Magro v. Ragsdale Brothers, Inc., 721 S.W.2d 832, 834 (Tex. 1986); Saenz, 873 S.W.2d at 359); New Jersey (Coffman v. Keene Corp., 628 A.2d 710, 717-19 (N.J. 1993).); Arkansas (Bushong v. Garman Co., 843 S.W.2d 807, 808 (Ark. 1992).); and Pennsylvania (Coward v. Owens-Corning Fiberglas Corp., 729 A.2d 614, 620 (Pa. Super. 1999).). The Texas Supreme Court in Saenz highlighted in detail the particular difficulties in proving causation in failure-to-warn cases. 873 S.W.2d at 357.

> Proof that a collision between two cars would not have happened had defendant swerved or braked or driven within the speed limit is mostly a matter of physics. Proof that an accident would not have occurred if defendant had provided adequate warnings concerning the use of a product is more psychology and does not admit of the same degree of certainty… In the best case a plaintiff can offer evidence of his habitual, careful adherence to all warnings and instructions…In the worst case, where the user of the product is deceased, proof of what the decedent would or would not have done may be virtually impossible. Id.

In summary, the prevailing view is that the heeding presumption is more consistent with the purpose and justification for strict liability. That is, a seller of a product has "assumed a

special responsibility" to anyone who may be injured by that product. Restatement (Second) of Torts § 402A cmt. c. "[P]ublic policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them." Id. This public policy is what the OPLA was intended to protect.

C. Ohiowa Recognizes the Learned Intermediary Doctrine, Which Bears Similarity to the Heeding Presumption and Both Derive from 402A cmt j.

With the OPLA, Ohiowa adopted the learned intermediary doctrine, which is also derived from 402A comment j. R. 11. Unlike the general heeding presumption, the learned intermediary rule is explicitly included in the most recent version of the Restatement. *See* Restatement (Third) of Torts: Products Liability § 6(d) (2012). According to the learned intermediary doctrine, prescription drug manufacturers have a duty to give physicians an adequate warning of the risks and side effects associated with the prescribed medical product. Beale v. Biomet, Inc., 492 F. Supp. 2d 1360, 1366 (S. D. Fla. 2007). The rule presumes that prescribing physicians will weigh the risks and benefits and use their professional judgment in deciding whether to prescribe a product to a particular patient. Id. Instead of having a duty to warn the consumer, the manufacturer then has a duty to warn the physician. Accordingly, the manufacturer is shielded from liability as long as it provided a warning of the risks to the doctor.

The learned intermediary doctrine is essentially a subset of the read and heed presumption imputed on a physician instead of a consumer in the context of prescription drugs. Serving as the "learned intermediary" between the manufacturer and the consumer, a doctor will presumably read and be able to understand the warnings and be able to act in the patient's best interest. However, there is no guarantee that a doctor will heed such warnings or side effects.

The presumption functions the same whether applied to a consumer or a learned intermediary by shielding the manufacturer from liability as long as an adequate warning was provided.

CONCLUSION

Summary judgment is inappropriate because the court erred in its interpretation of the term consumer and there remains a genuine issue of material fact as to whether a reasonable jury could find that L.T. was a foreseeable user of Zuul's e-cigarette. Accordingly, this Court should reverse the appellate court's granting of summary judgment.