Team: J

No. 20-2206

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 Supreme Court of the the State of Ohiowa

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

STATEMENT OF THE CASE

I. Statement of Background Facts Relevant to the Issues Presented

Zuul Enterprises

In 2016, Pete Venkman created Zuul e-cigarettes as a "safer alternative to traditional tobacco cigarettes." To use the device as intended, a person presses a button on the body of the device, heating liquid inside. Simultaneously, the person places their mouth on the mouthpiece and inhales the resulting vapor.

Originally, Zuul offered flavored vapor cartridges. However, in 2017, a federal lawsuit revealed that those flavors attracted children. The district court found that the company was directly marketing to children through those flavors. To make clear that it never intended to attract children, Zuul responded to the suit by discontinuing all flavored cartridges and changing their product design so that consumers could not insert flavored cartridges from other brands. As part of their brand overhaul, Zuul also released a line of adhesive "Zuul skins" for customizing the e-cigarette's exterior. These skins do not come with a warning label, because the product itself has one.

L.T. sustained a hand injury while playing with babysitter's Zuul

On July 17, 2018, eleven-year-old L.T. burned his hand while playing with a Zuul. The e-cigarette belonged to his babysitter, Dana Barrett, who had brought the e-cigarette to L.T.'s parents' home that evening. The e-cigarette was wrapped with a Hola Gato cartoon character skin. More than once, Ms. Barrett had warned L.T. not to play with her Zuul. Despite these warnings, L.T. picked up the Zuul when Ms. Barrett was not paying attention. While holding down the button that heats liquid inside the e-cigarette, L.T. moved the device around "in a manner which mimicked the operation of a leaf blower." The e-cigarette then exploded, resulting in the injuries sustained.

II. Nature of the Case and Procedural History

Louis Tully, L.T.'s father, filed state law actions for manufacturing defect and failure to warn in the Court of Common Pleas for the State of Ohiowa. He alleged (1) that a defect in the Zuul caused the Zuul to explode, and (2) that Zuul did not sufficiently warn consumers about its product's risks. It is unclear whether Mr. Tully alleged that the defect actually caused L.T.'s injuries, which would be necessary to plead a product defect claim under Ohiowa law. Zuul moved for a motion for summary judgment, asserting that (1) Mr. Tully could not prove L.T. was a foreseeable user of the Zuul and, regardless, that (2) Zuul had fulfilled its duty to warn by placing a warning label on each of its e-cigarettes.

The Court of Common Pleas granted partial summary judgment in favor of Zuul, finding that "children were not foreseeable users" of Zuul products. The parties then went to trial on Mr. Tully's failure to warn claim. At trial, Mr. Tully requested that the court instruct the jury regarding the heeding presumption. The court sustained Zuul's objection to that instruction, and the jury ruled in favor of Zuul. Mr. Tully appealed the decision to the Court of Appeals for the State of Ohiowa. First, they alleged that summary judgment was improper, because there was a genuine issue of material fact regarding "whether Zuul could foresee a child as a consumer of its product and thus should be liable for any product defect." Second, they alleged that the Court of Common Pleas erred by not instructing the jury regarding the heeding presumption. The Court of Appeals affirmed the Court of Common Pleas on both issues. Mr. Tully then petitioned this Court to answer two questions set out in the "Questions Presented" section of this brief.

SUMMARY OF THE ARGUMENT

This Court should hold that the Court of Appeals properly affirmed Zuul's motion for summary judgment on Petitioner's manufacturing defect claim because Petitioner cannot establish an essential element of his case: Zuul's liability to L.T.

L.T.'s injury does not subject Zuul to liability because L.T. is not a "consumer" of Zuul's product, pursuant to Ohiowa law. The Ohiowa legislature did not expressly provide a definition of "consumer," but L.T. does not fit within the plain and ordinary meaning of the word. However, if "consumer" is an ambiguous term, or if L.T. does fall within the plain definition of a "consumer," words in a statute must nevertheless be interpreted in a manner consistent with legislative intent.

It is clear that the Ohiowa legislature intended to limit liability to injuries sustained by *consumers* of products. This is evident when reading the language of the statute without inserting additional language. Consumers, as defined by the Restatement (Second), are those who use the product *as intended*. Restatement (Second) of Torts § 402(A). The legislature's intent to limit liability is further demonstrated through its choice to omit the term "ultimate user" which expands liability beyond the term "consumer." Regardless, L.T. is neither a "consumer" nor an "ultimate user," and accordingly, Zuul is not liable for the injury sustained. This interpretation is consistent with the OPLA's goal of protecting consumers. However, even if Petitioner contends different policy objectives, courts cannot change the language of a statute to achieve any perceived purpose, especially when doing so allows a new class of litigants to sue.

Nonetheless, Zuul is not liable to L.T. because he was not a foreseeable user of the product and, therefore, does not fall within the class of persons that Zuul should have reasonably foreseen to be subject to the harm caused by the defect. Therefore, this Court should affirm the Court of Appeals' decision to grant summary judgment to Zuul on the defect claim.

The appellate court properly affirmed the denial of Petitioner's requested jury instructions with respect to the read and heed doctrine in Ohiowa. The denial was proper because Ohiowa law does not recognize a heeding presumption and the absence of this instruction did not result in prejudice to the Petitioner.

The Ohiowa legislature declined to adopt the heeding presumption language from the Restatement (Second) of Torts, despite adopting other doctrines within the Restatement. Moreover, the heeding presumption language of the Restatement (Second) has been highly criticized and was ultimately removed from the Restatement (Third) of Torts. Accordingly, a heeding presumption has no place in Ohiowa law, and this Court should not recognize a doctrine that the legislature did not intend to adopt.

Furthermore, even if Ohiowa law does recognize a heeding presumption in specified circumstances, applying the doctrine to this case would be inappropriate. Jury instructions containing heeding presumptions are only appropriate in failure-to-warn cases where there is a total absence of warning. In the present case, Petitioners do not allege that Zuul wholly failed to provide a warning on the product at issue. Therefore, a heeding presumption is inapplicable to this case.

Moreover, any need for a heeding presumption in this case is negated because Zuul has demonstrated that L.T. would not have heeded an adequate warning anyway. Even if the heeding presumption shifts the burden of production to Zuul, the record shows that L.T. would not have heeded the warning because he had already disregarded an adequate warning given by his babysitter, Ms. Barrett.

Finally, the absence of the requested jury instruction did not prejudice the Petitioner because the heeding presumption would not have affected the jury's decision regarding the

outcome of the case. Accordingly, this Court should affirm the denial of the Petitioner's requested jury instruction.

ARGUMENT

I. Zuul is entitled to summary judgment on Plaintiff's manufacturing defect claim as a matter of law.

When reviewing a lower court's decision to grant summary judgment, courts employ a de novo standard of review. Huck v. Wyeth, Inc., 850 N.W.2d 353, 362 (Iowa 2014). Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to a judgement as a matter of law. Ohiowa R. Civ. Proc. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (finding no genuine issue of material fact because respondent failed to prove an "essential element" of her case, "necessarily render[ing] all other facts immaterial").

The Petitioner contends, and Zuul does not dispute, that Ms. Barrett's e-cigarette was defective under Ohiowa Rev. Code § 5552.369. Nevertheless, summary judgment is proper in this case. As will be discussed below, there is no genuine issue of material fact and Zuul is entitled to judgement as a matter of law. Indeed, the Petitioner has failed to sufficiently prove an essential element of his case: Zuul's liability for L.T.'s injury.

First, L.T. is not a "consumer," pursuant to the plain language of Ohiowa's product defect statute and interpreting the word "consumer" to include "ultimate users" who do not use a product as intended would not effectuate the intent of the Ohiowa legislature. Second, even if this Court interprets "consumer" to include "ultimate users," Zuul is not liable for L.T.'s injuries because he is not in the class of persons that Zuul should have reasonably foreseen as being subject to the harm caused by the defect.

A. Ohiowa's manufacturing defect statute limits liability to "consumers" who are injured while using a product for its intended use.

Petitioner cannot demonstrate that L.T. is a consumer of Zuul e-cigarettes and, therefore, cannot establish Zuul's liability under Ohiowa Rev. Code. § 5552.368(a) (hereinafter "Ohiowa's Rule of Liability").

Zuul is not liable to L.T. because, according to the plain language of Ohiowa's Rule of Liability, he is not a "consumer." Id. Ohiowa's Rule of Liability expressly states that, for a manufacturer or seller to be subject to liability for physical harm caused to a person by their product, that person must first be a "consumer" of the product. Id. While the statute does not give an explicit definition of the word "consumer," this Court should discern its meaning through the principles of statutory interpretation.

When interpreting statutes, courts rely on the "well-settled principles of statutory interpretation." DuTrac Cmty. Credit Union v. Hefel, 893 N.W.2d 282, 294 (Iowa 2017). These rules of construction are especially compelling when a court is considering a statute as a matter of first impression. Pearson v. Robinson, 318 N.W.2d 188, 190 (Iowa 1982). Courts must first look to the language of the statute itself. State v. Sowell, 71 N.E.3d 1034, 1058 (Ohio 2016). If the legislature does not provide a definition, words are generally given their plain, ordinary meaning, unless such an interpretation would clearly be contrary to the legislature's intentions. State v. Davis, 922 N.W.2d 326, 330 (Iowa 2019); In re 6011 Greenwich Windpark, L.L.C., 134 N.E.3d 1157, 1163 (Ohio 2019).

Defining "consumer" within the meaning of the OPLA is an issue of first impression for Ohiowa courts. Docket No. 20-2206 (hereinafter "R.") at 8. Accordingly, the rules of statutory construction are especially compelling when determining its meaning.

i. L.T. is not a "consumer" under the plain language of Ohiowa's Rule of Liability.

Looking to the language of the statute, the Ohiowa legislature "relied heavily" on Section 402A of the Restatement (Second) of Torts in drafting the OPLA. R. 6. Pursuant to comment (1), a consumer is someone who consumes the product or prepares it for consumption. Restatement (Second) of Torts § 402A cmt. 1. "Consumption includes all ultimate uses *for which the product is intended*." Id. (emphasis added); see also, Phelps v. Sherwood Medical Industries, 836 F.2d 296, 302–03 (7th Cir. 1987) (finding that a catheter manufacturer had satisfied its duty to warn, because the surgeon who read the catheter's warning label was a "consumer" pursuant to comment l). A majority of other states have also incorporated 402A into their strict products liability statutes. Vaughn v. Daniels Co. (West Virginia), Inc., 841 N.E.2d 1133, 1140 (Indiana 2006). Given the section's influence, it logically follows that the definition of "consumer" from 402A will be consistent with Ohiowa's strict products liability statute as a whole.

The Ohiowa legislature did not provide a definition of the term "consumer" within the statute. R. 8. The Ohiowa Rule of Liability provides in pertinent part:

> Except as provided in this section, a person who sells, leases, or otherwise puts into the stream of commerce any product that is defective or in a defective condition that is unreasonably dangerous to any *consumer* or to the consumer's property is subject to liability for physical harm caused by that product to the *consumer* or the consumer's property if:
>
> (a) that *consumer* is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defect or defective condition.

Ohiowa Rev. Code § 5552.368. Absent Ohiowa case law defining the term, this Court should look to the ordinary meaning of the word "consumer." The Cambridge Dictionary defines the word "consumer" as "someone who buys goods or services for personal use." Consumer, CAMBRIDGE DICTIONARY (2020). Additionally, the Ohio Consumer Sales Practices Act (Ohio CPSA), a sister-state's statute intended to protect consumers, defines a "consumer" as "a person who engages in a transaction with a supplier." Elder v. Fischer, 717 N.E.2d 730, 734 (1998).

Accordingly, when given its plain and ordinary meaning, a "consumer" is a person who purchases goods or services for personal use or otherwise participates in a transaction with a supplier.

In this case, summary judgement was properly granted because L.T. is neither a "consumer" under the plain language of Ohiowa's Rule of liability, nor is he the type of injured person Ohiowa's legislature contemplated when drafting its manufacturing defect law, which refuses to impose liability on manufacturers for injuries caused during product mis-use. Evidence produced before summary judgment was granted on the manufacturing defect claim and during the trial on the failure-to-warn claim cuts against any potential argument that L.T. is the type of person it intended to protect.

The product at issue is designed to simulate the experience of smoking a cigarette. Zuul deliberately retracted past products that communicated anything but the adult-nature of its product: cigarettes. L.T.'s babysitter provided warnings "many times" to L.T. that the product was dangerous. R. 5. Still, L.T. obtained Ms. Barrett's e-cigarette after she failed to exercise care in keeping it from the eleven-year-old L.T., at which time L.T. began to hold down the mechanism that burns the nicotine product housed inside and waved the cigarette around "in a manner which mimicked the operation of a leaf blower." R. 5. While it is unclear why Ms. Barrett failed to take reasonable measures to ensure her e-cigarette remained in her possession despite her demonstrated knowledge of its danger if mis-used by children, it is clear that the Court of Appeals did not err in concluding that L.T. does not constitute a "consumer" for purposes of the OPLA.

L.T. did not purchase Zuul's product; it belonged to his adult babysitter, Dana Barrett, who brought the product into the Tullys' home during her shift on July 17, 2018. R. 5.

Furthermore, L.T. has never participated in any transaction with Zuul. Therefore, when interpreting the plain language of Ohiowa's Rule of Liability, it is clear that L.T. is not a "consumer" and consequently, Zuul cannot be held liable to him under Ohiowa law.

ii. The Ohiowa legislature's omission of "ultimate user" in its manufacturing defect statute signals its intent to limit liability to injuries sustained while using a product as it was intended.

The Court of Appeals' plain-language interpretation of the OPLA reflects the principle that "[c]ourts are not at liberty to rewrite a statute just because they believe that doing so would better effectuate [the legislature's] purposes." Keen v. Helson, 930 F.3d 799, 806 (6th Cir. 2019). Judge Zeddemore's dissent effectively attempts to rewrite the OPLA by adding language that the Ohiowa legislature specifically chose to exclude. When a legislature includes or excludes language in its statutes, courts must honor that choice in interpreting the statute. A.S. v. J.W., 131 N.E.3d. 44, 48 (Ohio 2019) ("it is the duty of the court to give effect to the words used in a statute, not to delete words used or to insert words not used"); State v. Mathias, 936 N.W.2d 222, 227 (Iowa 2019) ("[w]e determine legislative intent from the words chosen by the legislature, not what it should or might have said"). This principle is especially important when adding a word would permit an entirely new class of litigants to sue under the statute. Keen, 930 F.3d 799 at 806.

This Court need not speculate where Ohiowa's legislative intent is clear. While Ohiowa's Rule of Liability is, in many ways, the same as the Restatement (Second)'s, the OPLA deviates from the Restatement in one material respect: who may recover for product defect. Both the OPLA and the Restatement (Second)'s provision requires "physical harm" caused by products with an "unreasonably dangerous" "defective condition." Ohiowa Rev. Code § 5552.368; Restatement (Second) of Torts § 402A. Also, both provisions cover damage to "property" in certain cases. Id. However, unlike Section 402A, which protects both consumers and "ultimate

users," the OPLA's Rule of Liability states that "a person who sells . . . any product that is defective . . . is subject to liability for physical harm caused by that product to the *consumer*." Ohiowa Rev. Code § 5552.368. The OPLA makes no mention of ultimate users. See Ohiowa Rev. Code § 5552.368–39.

Given that Ohiowa's Rule of Liability takes several phrases from Section 402A verbatim, it is clear that the legislature's omission was intentional. To be sure, if Ohiowa wanted to hold sellers liable to ultimate users, the legislature would have simply imported the words "ultimate user" into its Rule of Liability. Likewise, if the legislature intended for "consumer" to include "ultimate users" by inference, it would have provided a definition for that term. Regardless, this Court cannot add to the OPLA's statutory text, even if the Court believes it would further Ohiowa's legislative objectives.

Even if the Ohiowa legislature intended to incorporate "ultimate user" into its statute, the appellate court would still be correct in affirming summary judgment for Zuul because L.T. is not an "ultimate user," pursuant to Section 402A. Restatement (Second) of Torts § 402A. A "user" of a product is "anyone who passively enjoys the benefit of the product" or repairs the product. Id. The benefit of Zuul's product is that it provides an alternative to traditional tobacco cigarettes. R. 3. By waiving the e-cigarette around like a leaf blower, L.T. was not enjoying the Zuul's benefits or repairing the product.

Undoubtedly, this incident is a tragic one. But "[courts] do not extend, expand, or change the meaning of a statute under the guise of construction, even if [they] believe doing so would mitigate the hardship of a consequence or if [they] question the statute's wisdom." Myria Holdings Inc. v. Iowa Department of Revenue, 892 N.W.2d 343, 348 (Iowa 2017). Accordingly, this Court should find that Zuul is not liable for L.T.'s injuries.

B. Zuul is not liable for injuries occurring to those outside of the class of users that Zuul could reasonably foresee as being subject to the harm.

Even if L.T. is a consumer or an ultimate user, the petitioner still cannot prove Zuul's liability because L.T. is not in the class of persons that Zuul should have reasonably foreseen as being subject to harm from a defect in their product. Ohiowa Rev. Code § 5552.368.

Manufacturers are not subject to liability when children, as ultimate users, would not be foreseen as being subject to the harm due to the nature of the product. Estrada v. Berkel Inc., 14 A.D.3d 529 (2005). For instance, in Estrada the court held that the manufacturer of a meat grinder was not strictly liable for a child's injury despite the child being the ultimate user because the meat grinder is not a product foreseen to be used by children. Id. (holding that even if a meat grinder was defective, imposing strict liability was inappropriate because the injured child was not a foreseeable user of the machine). Likewise, although L.T. used the Zuul as a toy, Zuuls are sold and marketed to adults and therefore not products foreseen to be used by children. Consequently, Zuul cannot be held liable to L.T.

Furthermore, "[t]here is evidence to show that . . . 81.5% of current youth e-cigarette users said they used them *because they come in flavors I like.*" Colgate v. Juul Labs, Inc., 402 F. Supp. 3d 728, 741 (N.D. Cal. 2019) (emphasis added). Indeed, e-cigarette-related lawsuits filed by or on behalf of minors generally involve sweet flavored products. Colgate, 402 F. Supp. 3d 728 at 737 (minor stating that she would not have tried an e-cigarette "but for the fruit flavors offered to her by her friends"); Zampa v. Juul Labs, Inc., 2019 WL 1777730, at *3 (S.D. Fla. 2019) (plaintiff, a minor, accusing e-cigarette company of falsely advertising addictive "candy-like products" even though the flavors are attractive to children); Complaint at 2, The People of the State of Illinois v. Juul Labs, Inc., No. 1:19CV06301 (Ill. Cir. Ct. 2019) (Attorney General accusing e-cigarette company of using "youth-friendly flavors like fruit medley, cool mint, and

creme brulee" to appeal to minors). In contrast, Zuul produces only "classic tobacco" flavor and, as of 2018, their e-cigarettes are incompatible with flavored cartridges from all other brands. R. 4. Therefore, it was not foreseeable that an eleven-year-old would be in the class of persons who would be harmed by a flavorless tobacco product.

Accordingly, this Court should affirm that summary judgment was proper because L.T. is neither a "consumer," nor is he "in the class of persons that [Zuul] should reasonably have foreseen as being subject to the harm caused by the defect" of its product. Ohiowa Rev. Code § 5552.368.

II. The District Court did not commit a reversible error by refusing to give a jury instruction on the heeding presumption.

The district court did not abuse its discretion by refusing to proffer the requested heeding presumption jury instruction. In reviewing a jury instruction for abuse of discretion, a Court "must view challenged jury instructions in their entirety, deciding not whether instruction was completely faultless, but whether the jury was misled in any way." Coleman v. B-G Maintenance Management of Colorado, Inc., 108 F.3d 1199, 1202 (10th Cir. 1997).

The appellate court's decision not to overturn the district court's refused instruction ultimately was correct. The district court's refusal to proffer the requested jury instructions should be affirmed because (1) Petitioner's requested jury instruction did not accurately state the applicable law, (2) the facts of the case did not support giving the instruction, and (3) the failure to instruct the jury on the heeding presumption did not prejudice the plaintiff.

A. Petitioner's requested jury instruction did not accurately state the applicable Ohiowa law because Ohiowa law does not, and should not, recognize a heeding presumption in failure-to-warn product liability claims.

This Court should affirm the Court of Appeals' decision that the district court did not err by refusing to proffer Plaintiff's requested jury instruction. First, the jury instruction requested

would not "fully and fairly inform the jury of the law applicable to the case" because Ohiowa has not adopted the heeding presumption as law. See Peterson v. St. Paul Fire & Marin Ins. Co., 239 P.3d 904, 910 (Mont. 2010). Second, even if Ohiowa recognizes the heeding presumption in some circumstances, the jury instruction is not applicable here because (1) plaintiff's claim is not that the injury was caused by the complete lack of a warning on the product, and (2) the jury instruction was inappropriate because the heeding presumption was rebutted by evidence that L.T. would not have heeded a different warning. Accordingly, this court should affirm the Court of Appeal's decision.

The heeding presumption doctrine is derived from the Restatement (Second) of Torts, comment (j). Restatement (Second) of Torts § 402A cmt. j. The Court of Appeals erroneously applied the heeding presumption to the present case after adopting it as "the law of the land" in Ohiowa. R. 12. However, Ohiowa law does not, and should not, recognize a heeding presumption in failure-to-warn product liability cases.

The Court of Appeals supported adopting the heeding presumption on two grounds. First, the court reasoned that because the Ohiowa legislature "found [the Restatement (Second) of Torts] instructive when drafting product liability laws," it is also appropriate to adopt other portions of the Restatement (Second) without legislative direction. R. 12. Second, the Court of Appeals held that the heeding presumption is supported by comment (j) of the Restatement and public policy. R. 12.

The Court of Appeals was seriously misguided in adopting the heeding presumption as Ohiowa law for two reasons. First, the Ohiowa legislature's selective adoption of doctrines within the Restatement suggests that other Restatement doctrines were intentionally omitted

from its statutes. Second, neither public policy nor comment (j) support adopting the heeding presumption.

i. Comment (j) does not support the adoption of a heeding presumption.

The Court of Appeals points to comment (j) of the Restatement (Second) as compelling the adoption of the heeding presumption. R. 10 ("The 'heeding presumption' arises from the Restatement (Second) of Torts §402(A) cmt. j."). In relevant part, comment (j) provides:

> 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 §402(A) cmt. j (1965).

The court's reliance on the Restatement (Second) is misguided for two reasons. First, the portion of comment (j) upon which the court relies has been highly criticized by commentators and was ultimately dropped from the Restatement (Third) of Torts. See Restatement (Third) of Torts § 2, Reporter's Note, cmt. l (characterizing comment j as containing "unfortunate language" that "has elicited heavy criticism from a host of commentators"). The Restatement (Third) recognized that "warnings may be ignored" by consumers and is inapposite the goal of facilitating higher design and manufacturing standards, not higher warning and labeling standards. See Restatement (Third) of Torts, Products Liability §2, Reporter's Note to Comment l, at 101.

Second, the court inaccurately interprets the heeding presumption in comment (j) as benefiting plaintiffs in failure-to-warn cases when the purpose of the provision is actually to limit a manufacturer's liability. See Coffan v. Keene Corp., 628 A.2d 710, 717–19 (N.J. 1993); Kevin Reynolds & Richard J. Kirshman, The Ten Myths of Product Liability, 27 Wm. Mitchell L. Rev. 551, 577 (2000). As Professors Reynolds and Kirshman explain,

> [a]pplying the language from comment (j), which clearly intended to shield manufacturers who provide adequate warnings with their products, in this manner permits Plaintiffs to omit a crucial element in a failure to warn claim, *causation*. The drafters of the *Restatement (Third)* … have nullified this inequity by eliminating the heeding presumption altogether. Id.

ii. Ohiowa should not adopt a heeding presumption as a matter of public policy.

Contrary to the Court of Appeals' conclusion, public policy supports *rejecting* the heeding presumption, as acknowledged by many jurisdictions which have recently taken up the issue.[1] See, e.g., Rivera v. Philip Morris, Inc., 125 Nev. 185, 190-91, 209 P.3d 271, 274 (2009). Furthermore, reporters for the Restatement (Third) of Torts have since argued that interpreting comment (j) to support adopting the heeding presumption permits a plaintiff's prima facie case to be constructed "from pure rhetoric." See Henderson, Jr. & Twerski, Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn, 65 N.Y.U. L. Rev. 265, 309 (1990). They argue that the presumption effectively removes any "checks on a failure to warn claim," rendering "the drive toward liability … almost unhindered." Id.

Ohiowa would not be alone in its decision to reject a heeding presumption. See e.g., Rivera, 125 Nev. 185 at 190-91 (concluding that the adoption of a heeding presumption was inconsistent with Nevada's strict product liability failure to warn law, which requires the plaintiff to demonstrate that the inadequate warning caused the injuries); Riley v. American Honda Motor Co., Inc., 259 Mont. 128, 856 P.2d 196, 198 (Mont. 1993); DeJesus v. Craftsman Machinery Co., 16 Conn. App., 558, 548 A.2d 736, 744 (Conn. App. Ct. 1988); Harris v. International Truck and Engine, 912 So. 2d 1101, 1109 (Miss. Ct. App. 2005).

[1] In fact, since the 1998 adoption of Restatement (Third) of Torts by the American Law Institute, only one intermediary state court in a state that had not previously adopted a heeding presumption has recognized one. However, even that decision is suspect, as the Pennsylvania Supreme Court accepted an appeal before the case was settled only a few months after the Restatement (Third) was adopted. See Coward v. Owens-Corning Fiberglas Corp., 729 A.2d 614, 620-21 (Pa. Super. 1999); 743 A.2d 920 (Pa. 1999).

Nor would Ohiowa be alone in rejecting the heeding presumption despite relying heavily on the Restatement (Second) of Torts in drafting its products liability statutes. See Rivera, 125 Nev. 185 at 190 (noting that although the Nevada court has relied on the Restatement (Second) and §402(A) cmt. j, "the manner in which we relied on comment j indicates our intention to require the plaintiff … to carry the burden of production … [and] does not support a heeding presumption.")

B. Even if a heeding presumption may be appropriate in some circumstances, the facts in this case do not support giving the instruction.

Even if this court were to hold that a heeding presumption (and a jury instruction thereof) may be appropriate in certain cases, such an instruction would be inappropriate here.

i. First, a heeding presumption instruction applies only in cases involving the absence of any warning.

Even those courts that have adopted the heeding presumption in failure-to-warn cases have generally recognized that the doctrine applies only in the absence of any warning. Eck v. Parke, Davis & Company, 256 F.3d 1013, 1018 (10th Cir. 2001) (holding under Oklahoma law that "[w]here a consumer, whose injury the manufacturer should have reasonably foreseen, is injured by a product sold without a required warning, a rebuttable presumption will arise that the consumer would have read any warning provided by the manufacturer, and acted so as to minimize the risks"); Tenbarge v. Ames Taping Tool Sys., Inc., 190 F.3d 862, 866 (10th Cir. 1999) ("Under Missouri law, a rebuttable presumption that adequate warnings would have been heeded arises if the plaintiff shows that no warning was given.") The appellate court correctly identifies the appropriate application of the heeding presumption in its opinion: "[t]his rebuttable presumption allows the fact-finder to presume that the person injured … would have read and

heeded an adequate warning, *if provided*." R. 10 (citing Dole Food Co. v. N. Carolina Foam Indus., Inc., 188 Ariz. 298, 305, 935 P.2d 876, 883 (Ariz. Ct. App. 1996)) (emphasis added).

The distinction between an inadequate warning and complete lack thereof is instructive. In cases where a warning is purported to be inadequate or ineffective, a presumption instruction absolves the plaintiff of needing to establish causation. Courts acknowledging that this approach is antithetical to the underlying purpose of the heeding presumption have explained that "it is one thing to presume that a person would have heeded a warning had it been given; it is another to presume that the person would have heeded a *better* warning when, *in fact*, he paid no attention to the warning given." Gen. Motors Corp. v. Saenz, 873 S.W.2d 353, 359 (Tex. 1993); see also, Insolia v. Philip Morris Inc., 53 F.Supp.2d 1032 (W.D.Wis.1999); Butz v. Werner, 438 N.W.2d 509, 517 (N.D. 1989); Gillespie v. Century Prods. Co., 936 S.W.2d 50 (Tex. App. 1996).

The heeding presumption does not apply here because Zuul provided a warning on each of its e-cigarettes' packaging. R. 4 ("each Zuul e-cigarette has a warning affixed to its packaging.") Therefore, even if this Court were to adopt the heeding presumption, such an instruction is not appropriate in cases such as this, where the manufacturer did, in fact, warn of dangers associated with using its product.

ii. Any need for a heeding presumption instruction is extinguished by the production of evidence that plaintiff would not have heeded a different warning.

Even assuming the viability of the heeding presumption in Ohiowa, the trial court did not err in declining to proffer the jury instruction because the presumption dissipated in the face of evidence that L.T. would not have heeded such a warning.

The heeding presumption shifts the burden of production to the manufacturer. The manufacturer meets this burden by introducing evidence that would permit reasonable minds to conclude that the injured party would not have heeded an adequate warning. See Helton v. Indus.

Comm'n, 85 Ariz. 276, 279, 336 P.2d 852, 853 (1959); see also Silva, 63 Ariz. at 372, 162 P.2d at 619; Seiler, 52 Ariz. at 548–49, 84 P.2d at 454–55. The heeding presumption operates as a "bursting bubble" presumption that "disappears" the moment rebuttal evidence is offered and "the existence of the previously presumed fact must be determined exactly as if no presumption existed." See Forbes v. Midwest Air Charter, Inc., 711 N.E.2d 997, 999 (Ohio 1999) (rebutted presumption is a "bursting" "bubble"); Golonka v. General Motors Corp., 65 P.3d 956, 971-71 (Ariz. App. 2003) (rebutted presumption "destroyed"); Travelers Indemnity Co. v. HansLing / Anlagenbau Und Verfahrenstechnik GMBH & Co. KG, 189 F. Appx. 782, 787 (10th Cir. 2006) (rebutted presumption "disappears") (applying Oklahoma law); Miller v. Pfizer Inc., 196 F. Supp. 2d 1095, 1127, (D. Kan. 2002) (rebutted presumption "disappears"), aff'd, 356 F.3d 1326 (10th Cir. 2004). Accordingly, where the presumption is rebutted "the court should not refer to the presumption in jury instructions, although the jury may still draw reasonable inferences from the facts originally giving rise to the presumption." Golonka, 65 P.3d 956 at 971; State v. Grilz, 136 Ariz. 450, 456 n. 3, 666 P.2d 1059, 1065 n. 3 (1983).

Courts that have adopted the heeding presumption overwhelmingly take the position that it shifts the burden of production to the defendant, as opposed to the burden of persuasion. See, e.g., Golonka, 65 P.3d 956 at 972. In Golonka, the Arizona Supreme Court addressed the confusion arising out of courts' differing applications of presumptions. Id. The court acknowledged that while some jurisdictions interpret presumptions as applying to *both* the burden of production and the burden of persuasion, those cases offer no justification for its approach. The Arizona court explained that it could "not discern a common thread among the cases for [shifting both burdens]." Id. Accordingly, the court adheres to "the generally held view that a presumption serves to shift the burden of producing evidence, unless the substantive

common law or legislative enactment giving rise to the presumption compels a conclusion that the presumption shifts the burden of persuasion to the party opposing the presumed fact." Id. Therefore, when the heeding presumption is applicable, it shifts the burden of production to the defendant.

The opponent of a heeding presumption rebuts the presumption by producing evidence that the plaintiff would not have heeded a different warning. Miller, 196 F. Supp. 2d 1095 at 1127. Once presented, the presumption is extinguished and "the court should not refer to the presumption in jury instructions." Golonka, 65 P.3d 956 at 972; Grilz, 136 Ariz. at 455–56. For example, in Woulffe, the manufacturer successfully rebutted the heeding presumption by offering testimony from a prescribing doctor that even if the product contained plaintiff's suggested warning, he would have nevertheless prescribed the product. Woulfe v. Eli Lilly & Co., 965 F.Supp. 1478, 1483 (E.D. Okla.1997); See also, Daniel v. Ben E. Keith Co., 97 F.3d 1329 (10th Cir. 1996) (defendant overcame presumption by introducing evidence that a different instruction would not have been heeded because plaintiff was in a hurry and did not look at the label); Miller, 196 F. Supp. 2d 1095 (defendant overcame heeding presumption with doctor's testimony that a different warning would not have altered a his decision to proscribe a particular medication); Clark v. Continental Tank Co., 744 P.2d 949 (Okla.1987) (plaintiff admitted that warning would not have alerted him to something he did not already know, thus, he was not entitled to a heeding presumption); Gosewisch, 153 Ariz. at 404, 737 P.2d at 380 (any heeding presumption was rebutted by evidence that the plaintiff injured in all-terrain vehicle accident ignored existing warnings about carrying passengers and wearing a helmet).

In the present case, there is undisputed evidence that L.T. ignored warnings related to the accident which would allow reasonable minds to conclude that he would have similarly ignored

other warnings. Ms. Barrett, who was tasked with supervising L.T., owned the e-cigarette and knew of the dangers that the e-cigarette posed to L.T. Her knowledge of the dangers inherent in mis-using the product sufficed to warn L.T. "many times" of the dangers associated with "play[ing] with the e-cigarette." R. 5. Despite the warnings, L.T. "began playing with the [e-cigarette] in a manner which mimicked the operation of a leaf blower." Id. Accordingly, the trial court correctly decided that a jury instruction on the heeding presumption was inappropriate because evidence that L.T. would not have heeded an adequate warning "bursts" the presumption bubble.

The jury instruction stated the applicable law in this case. The defendant presented evidence that rebutted the presumption and removed the applicability of the jury instruction. Because the heeding presumption was rebutted, the jury instructions accurately stated the applicable law while omitting an instruction concerning the heeding presumption.

C. Even if the district court erred by failing to give a heeding presumption instruction, the error did not prejudice the Petitioner.

After reviewing the record, the appellate court correctly concluded that the failure to proffer the requested jury instruction did not prejudice the plaintiff. Reversal on the basis of a faulty jury instruction is not easily attained. R. 12. Reversal is warranted only "when a deficient jury instruction is prejudicial." Coleman v. B-G Maintenance Management of Colo., Inc., 108 F.3d 1199, 1201 (10th Cir. 1997).

Courts have modified the heeding presumption to apply only when the injured party cannot testify. Those courts have reasoned that when plaintiffs are available to testify, it is unlikely prejudice could result from the lack of an jury instruction on the presumption. In McDarby v. Merck & Co., the New Jersey Court of Appeals explained that the presumption is "unnecessary" where direct testimony exists because it eliminates the worst-evidence problem

that the heeding presumption helps to address. McDarby v. Merck & Co. 401 N.J. Super. 10, 949 A.2d 223 (App. Div. 2008). Unless the failure to warn injured a plaintiff such that they are precluded from testifying, it is unlikely prejudice could result from the lack of an instruction on the presumption.

In the present case, testimony was given by all named parties and the jury had a "wealth of evidence upon which to base their decision." R. 12. This evidence included undisputed testimony that L.T. received warnings about the dangers inherent in misusing Zuul's product and ignored those warnings. Equipped with this evidence, the jury concluded that the plaintiff should not succeed in his failure-to-warn claim. The jury's verdict demonstrates that the evidence produced at trial sufficiently overwhelmed the plaintiff's evidence such that any presumption would have been effectively destroyed.

This Court should affirm the Court of Appeals' ultimate ruling but on different grounds. First, the trial court did not abuse its discretion by affirming the district court's refusal to give the heeding presumption jury instruction. Second, no prejudice resulted from the refusal to instruct the jury on the heeding presumption.

CONCLUSION

For the foregoing reasons, Respondent, Zuul Enterprises, asks this Court to hold that (1) the appellate court did not err in affirming Zuul's motion for summary judgment on Petitioner's manufacturing defect claim, and (2) that the read and heed doctrine does not apply to strict liability failure-to-warn claims in the State of Ohiowa.

Respectfully Submitted,

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