Team K

Docket No. 20-2296

IN THE
SUPREME COURT OF THE STATE OF OHIOWA

LOUIS TULLY,

Petitioner,

v.

ZUUL ENTERPRISES,

Respondent.

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

Brief for Petitioner

Oral Argument Requested

QUESTIONS PRESENTED FOR REVIEW

I. Whether the appellate court erred in affirming Zuul's motion for summary judgment on the Tullys' manufacturing defect claim.

II. Whether the read and heed doctrine applies to strict liability failure-to-warn claims in the State of Ohiowa.

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CITATIONS TO THE OPINIONS BELOW

The opinion of the Court of Common Pleas is published at *Tully v. Zuul Enterprises,* No. 18-CV-1988 (Ct. Com. Pl. Sept. 28, 2018). The decision of the Court of Appeals for the State of Ohiowa is unpublished and appears on the record at R. 2.

STATEMENT OF JURISDICTION

The formal jurisdictional statement is waived pursuant to Rule 3(c) of the Thirty-Third Annual August A. Rendigs, Jr. National Products Liability Moot Court Competition Rules.

STATUTORY PROVISIONS

The adjudication of this case involves the interpretation of Ohiowa Rev. Code §5552.368 (2019). Additionally, it requires the application of Ohiowa Rev. Code §5552.369 (2019). These provisions are attached in the appendices.

STATEMENT OF THE CASE

I. Statement of the Facts

Louis and Janine Tully are the parents of L.T., an eleven-year-old child that was tragically burned as a result of an accident involving a Zuul e-cigarette. R. 2. On July 17, 2018, the Tullys entrusted L.T. in the care of their babysitter, Dana Barrett, a nineteen-year old college sophomore. R. 5. Ms. Barrett is a user of Zuul e-cigarrettes and frequently had one in her possession while watching L.T. R. 5

Zuul Enterprises

Zuul is a e-cigarrette company established in Cincinnatus, Ohiowa. R. 3 Zuul's e-

cigarettes require the user to press a button which causes an atomizer within the e-cigarette to heat up the liquid inside the cartridge into a vapor. R. 4. The user then inhales the vapor through the mouthpiece. R. 4.

In December 2017, a federal district court held that Zuul had been marketing sweet vapor flavors and e-cigarettes directly to children. R. 4. The court required Zuul to pay damages and issued an injunction, preventing Zuul from producing most of their popular sweet flavors. R. 4. Following this court order, Zuul struggled to avoid bankruptcy as its stock price plummeted. R. 4.

On July 7, 2018, Zuul issued a statement denying any attempt to market its e-cigarettes to children. R. 4. Zuul vowed to only produce "classic tobacco" flavors in the future. R. 4. Zuul redesigned its products to ensure that users could only use Zuul cartridges in the e-cigarette. Additionally, Zuul introduced "Zuul Skins", adhesive labels that affix to the surface of the e-cigarettes. R. 4. Users can purchase skins with various patterns, licensed characters, or customize their own. R. 4. Shortly after the introduction of the skins, Zuul's stock prices rose back to former heights. R. 4. Zuul e-cigarretes contain a warning on its packaging, however, the skins contain no additional warning regarding the dangers of the e-cigarettes they cover. R. 4.

L.T.

On July 11, 2018, Ms. Barnett purchased a skin depicting *Hola Gato*, a main character in a popular cartoon. R. 5. The adhesive skin covered the warning label on the Zuul e-cigarette packaging. R. 4. L.T. shared this appreciation of *Hola Gato.* R. 5. Ms. Barnett had warned L.T. numerous times that the e-cigarette was too dangerous to play with. R. 5.

On July 18, 2018, when Ms. Barnett was watching over L.T., the Zuul e-cigarette was left unattended. R. 5. L.T. took the e-cigarette and began playing with it in a manner which

mimicked the operation of a leaf blower, while pressing the activating button. R. 5. The e-cigarette exploded without warning and severely burned L.T.'s hand. R. 5.

II. Procedural History

The Tullys filed a complaint that alleged that "(1) Zuul had violated state product liability law due to a manufacturing defect that caused the explosion and (2) Zuul failed to adequately warn consumers of the risks associated with their product." R. 2. Zuul moved for summary judgment on the grounds that L.T. was not a foreseeable user of the product, and that the warning on the packaging of the e-cigarette was sufficient to satisfy their duty to warn. R. 2-3.

The Court of Common Pleas granted the motion on the manufacturing defect claim. R. 3. The Tullys requested a jury instruction on the heeding presumption for the warning claim, which was objected to by Zuul and sustained by the court. R. 3. The claim went to the jury, who found for Zuul. R. 3. The Tullys filed a timely appeal arguing the court erred by granting the summary judgment motion and by failing to allow a jury instruction on the heeding presumption. R. 3.

On December 20, 2019, the Court of Appeals for the State of Ohiowa affirmed the holding of the lower court. The court stated that "viewing the evidence proffered in a light most favorable to the defendant, 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. 8. Zuul had failed to offer any evidence that the e-cigarette had been altered since it left its care. R. 8. Zuul also failed to dispute the Tullys' expert witness who "identified a faulty connection between the activating button and the atomizer, causing the automizer to overheat and the liquid in the vapor cartridge to boil." R. 7-8. This built up pressure within the cartridge which caused the e-cigarette to explode and injure L.T.'s hand. R. 8. However, the court found the grant of summary judgment to be proper as L.T. was not a foreseeable user of Zuul's product. R. 9.

The court also concluded that "the heeding doctrine is the law of the land given that public policy tends to favor the consumer in product liability actions in Ohiowa . . . the lower court's failure to determine the law of the land and allow the jury instruction was an abuse of discretion." R. 12. However, the court determined that no prejudice resulted from the failure to give the requested instruction. *Id.*

This Court granted certiorari to address the following issues: 1) Whether the appellate court erred in affirming Zuul's motion for summary judgment on the Tullys' manufacturing defect claim 2) Whether the read and heed doctrine applies to strict liability failure-to-warn claims in the State of Ohiowa. R. 1.

SUMMARY OF THE ARGUMENT

There are two issues before this Court. Petitioner asks this Court to reverse the lower court's grant of summary judgment to Defendant Zuul for the following three reasons. First, L.T.'s injuries were caused by the e-cigarette's manufacturing defect, not his alleged misuse. Accordingly, this does not preclude recovery under the OLPA, which is based on Restatement (Second) of Torts 402(A). Second, even if L.T was misusing the e-cigarette, it was a foreseeable use for which Defendant Zuul should be liable for. Additionally, foreseeability of a product's misuse is a question of fact for the jury, and thus the grant of summary judgment was improper. Third, as a matter of public policy, allowing manufacturers to avoid liability for injuries caused by a manufacturing defect, when the misuse of the product did not cause or contribute to the plaintiff's injury, would be contrary to the public safety and corporate accountability justifications for strict products liability as defined by Restatement (Second) of Torts 402(A).

As for the second issue, this Court should find that the reed and head doctrine applies to strict liability failure-to-warn claims in the State of Ohiowa. The appellate court incorrectly held

the Tullys were not prejudiced by the failure to provide a jury instruction. First, the Ohiowa courts should provide a heading presumption where the injured individual has not voluntarily exposed themselves to the product. Second, a manufacturer's duty to warn consumers goes to the ultimate user, where there is no learned intermediary. Third, as a matter of public policy, the read and heed doctrine advocates for judicial fairness between the consumer and the manufacturer.

ARGUMENT

I. THE DECISION OF THE APPELLATE COURT SHOULD BE REVERSED BECAUSE ZUUL SHOULD HAVE REASONABLY FORESEEN THAT L.T. WAS WITHIN THE CLASS OF PERSONS SUBJECT TO HARM CAUSED BY THE PRODUCT

The Plaintiff respectfully asks this Court to reverse the appellate court's affirmation of summary judgment in favor of Defendant Zuul. Under Fed. R. Civ. P. 56(a), the moving party is entitled to judgment as a matter of law if there is no genuine issue as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party bears the burden of proving the basis for its motion for summary judgment. *Id.* The party must cite the pleadings, depositions, answer to interrogatories, admissions on file, and affidavits to demonstrate an absence of a genuine issue. *Id.* Substantive law will identify the material facts in each case. *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 247 (1986). Disputes over facts that have the potential to affect the outcome of a case under substantive law will prevent the court from granting summary judgment. *Id.* at 248. A dispute about a material fact is genuine if the submitted evidence would allow a reasonable jury to find in favor of the non-moving party. *Id.*

A reasonable jury could find that L.T. was within the class of persons protected by 402A because his injuries were caused by a manufacturing defect. Alternatively, if this court finds that L.T.'s was misusing the e-cigarette, the foreseeability of the misuse is a question of fact for a jury.

A. L.T. Was Within The Class Of Persons Protected By 402A Because L.T.'s Injuries Were Caused By The E-Cigarette's Manufacturing Defect And Not The Child's Alleged Misuse

The appellate court's order affirming summary judgment for Defendant Zuul should be reversed because the appellate court improperly held that L.T. could not recover under Ohiowa's strict products liability statute as a matter of law. R. 9. Ohiowa Rev. Code § 5552.368 (2019) (the Ohiowa Product Liability Act, hereinafter referred to as "the OPLA") adopts the principles of the Restatement (Second) of Torts § 402A (1965) (hereinafter referred to as "402A") and imposes strict products liability on designers, manufacturers and sellers of a product when the product injures a consumer. R. 6. Under this code, a product has a manufacturing defect "if, at the time it was conveyed by the seller to another party, 'it deviated in a material way from the design specifications, formula, or performance standards of the manufacturer.'" *Id*. Ohiowa uses the consumer expectations test, which states that a product had a manufacturing defect if the court determines that "at the time the product left the manufacturer's hands, it was more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." Ohiowa Rev. Code § 5552.369 (2019). The appellate court held 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." R. 8. It ruled that since L.T. (by using the e-cigarette to mimic a leaf blower) was not using the e-cigarette as it was intended to be used by the manufacturer, he was not a "consumer of the product" and thus "outside the class of persons from which Zuul should reasonably foresee as being subject to harm caused by the product." R. 9.

By excluding L.T from the class of persons who can recover under the OPLA, the appellate court too narrowly defined the scope of those protected by 402A (which the OPLA is

based on) when it held that "strictly following the language of the Restatement, liability would extend only to consumers, which include those who have ultimately used the product as it was intended." R. 9.

Contrary to the appellate court's reasoning, courts have expanded the protection of 402A to beyond just consumers who have used the product as it was intended to be used. For instance, many jurisdictions have extended the protection to bystanders and those injured by foreseeable misuses of a product. *See Mead v. Warner Pruyn Div., Finch Pruyn Sales, Inc.*, 87 Misc. 2d 782, 787 (N.Y. 1976); *Genie Indus., Inc. v. Matak*, 462 S.W.3d 1, 19 (Tex. 2015). Courts have also extended 402A liability to bystanders who were within a product's foreseeable danger zone, such as: a two-year-old plaintiff bystander who was injured when hit by projectiles from a shattered soda bottle that fell through a defective cardboard carton, [1] plaintiffs struck or run over by allegedly defective vehicles, [2] and a five-year-old plaintiff whose arms were ripped off by an engine of a vehicle that he crawled underneath.[3] 1 Louis R. Frumer & Melvin I. Friedman, *Products Liability* § 4.04 (2019) n. 12-18.

The lower courts' holding that L.T.'s alleged misuse of the product disqualified him as a consumer as defined by Ohiowa Rev. Code § 5552.368 (2019), was contrary to applicable 402A case law. Misuse of a product is generally a defense to strict products liability. Randy R. Koenders, *Products Liability: Product Misuse Defense*, 65 A.L.R.4th 263 (2020). The crux of the misuse defense is that the plaintiff's misuse of the product, not the product's design or

[1] *See Coca-Cola Bottling Co., Inc. v. Reeves*, 486 So. 2d 374, 378 (Miss. 1986).

[2] *See Rivers v. Great Dane Trailers, Inc*., 816 F. Supp. 1525, 1530–31 (M.D. Ala. 1993)*; Wirth v. Clark Equip. Co.*, 457 F.2d 1262, 1265–67 (9th Cir. 1972).

[3] *See Komanekin v. Inland Truck Parts*, 819 F. Supp. 802, 809 (E.D. Wis. 1993).

manufacturing, caused the plaintiff's injuries. This is reflected in the text of the Restatements:

> If the *injury results* from *abnormal handling*, as where a bottled beverage is knocked against a radiator to remove the cap, or from *abnormal preparation* for use, as where too much salt is added to food, or from *abnormal consumption*, as where a child eats too much candy and is made ill, *the seller is not liable*.

See Restatement (Second) of Torts, § 402A, (1965) cmt. h. This is reflected in other jurisdictions, like Arizona:

> *if the proximate or legal cause of the injury* is the plaintiff's misuse, and *not a defect in the product*, there is no liability. But when the misuse of the product combines with a defect to cause the injury, the *mere fact that the product was not being used in a manner contemplated* by the manufacturer will not necessarily bar recovery.

See Kavanaugh v. Kavanaugh, 131 Ariz. 344, 349 (Ariz. Ct. App. 1981).

In Pennsylvania, the defendant must prove that the plaintiff's misuse was "the sole or superseding cause of the injuries sustained." *Reott v. Asia Trend, Inc.*, 618 Pa. 228, 250 (Pa. 2011); *see also Perez v. VAS S.p.A.*, 188 Cal. App. 4th 658, 680 (Cal. Ct. App. 2010) (explaining that in order to avoid liability for a product defect, the Defendant was "required to prove, as an affirmative defense, that [Plaintiffs'] misuse of the machine was an unforeseeable, superseding cause of the injury"); *Huynh v. Ingersoll-Rand*, 16 Cal. App. 4th 825, 831(Cal. Ct. App. 1993) ("'[m]isuse' is a defense only when that misuse is the actual cause of the plaintiff's injury, not when some other defect produces the harm"). The case law dictates that a plaintiff's misuse of a product does not, as the lower courts held, remove them from the class of persons protected by 402A. Instead misuse only excuses a defendant's liability when the plaintiff's injuries were proximately caused by their misuse of the product.

For example, in *Todd v. Societe BIC, S.A.*, 21 F. 3d 1402, 1413 (7th Cir. 1993), the court held that it was the misuse of the lighter, not the lighter's design itself, that made the lighter

unreasonably dangerous. The plaintiff left his lighter unattended, which was then used by the plaintiff's four-year-old daughter to start a fire in the infant sibling's bedroom. *Id*. at 1404. The court refused to hold that the defendant's lighter had a defective design because it lacked any child-resistant features. In applying the consumer expectations test, the court held:

> what does an ordinary consumer expect when he purchases a lighter? Quite obviously, the consumer expects the lighter, when activated, to provide a flame. That is exactly how the lighter in this case performed. But the lighter was used to do more; the small flame it produced was used to ignite some papers, causing a deadly fire. The ordinary consumer expects that if a lighter's flame is put to some other combustible object, a larger fire ensues. This makes a lighter dangerous. But it does not make a lighter unreasonably dangerous under the consumer [expectations] test.

Id. at 1407. The court stated that for a product to be unreasonably dangerous, the plaintiff's injuries "must derive from a distinct defect in the product, a defect which subjects those exposed to the product to an unreasonable risk of harm." *Id*. (citing *Hunt v. Blasius,* 74 Ill. 2d 203, 210 (Ill. 1978)).

In the case at bar, L.T. was injured because of a manufacturing defect in the e-cigarette, not because of the child's alleged misuse of the product. The appellate court held that because "L.T. used the product to mimic the operation of a leaf blower by pressing the button and waving the e-cigarette around in front of his body… L.T. would not be considered a "consumer" of the product, placing him outside the class of persons from which Zuul should reasonably foresee as being subject to harm caused by the product." R. 9. However, it is uncontroverted that the e-cigarette exploded because of a faulty connection between the activating button and the atomizer, not because of L.T.'s misuse of the product. R. 7-8. Thus, the e-cigarette was still "in a condtion not contemplated by reasonable persons among those considered expected consumers of the product." Ohiowa Rev. Code § 5552.369 (2019). An ordinary consumer who placed the e-

cigarette to their mouth would not expect the e-cigarette to explode. *See Liggett & Myers Tobacco Co. v. De Lape*, 109 F.2d 598, 600 (9th Cir. 1940). Had L.T. used the e-cigarette as it was intended, he would have likely been injured just as severely, if not more severely, than he was while mimicking a leaf-blower action. *See Atl. Cas. Ins. Co. v. Bellinger*, No. 2:16-cv-00422-SAB, 2017 U.S. Dist. LEXIS 146716, at *2 (E.D. Wash. Sept. 8, 2017) (in which a woman suffered "severe, traumatic injuries" to her mouth, face and chest that required multiple oral surgeries and reconstruction of her jaw after the e-cigarette that she held to her mouth exploded).

The lower courts misconstrued the application of the "misuse" defense to strict products liability in holding that L.T could not recover under 402A because he was not using the e-cigarette as it was intended to be used. Accordingly, by affirming the grant of Defendant's Motion for Summary Judgment, the appellate court improperly denied L.T. his right to recover under the OPLA.

B. Alternatively, If This Court Finds That L.T.'s Misused the E-Cigarette, It Was A Foreseeable Misuse For Which Zuul Is Liable

Defendant's Motion for Summary judgment should not have been granted because a reasonable jury could find that L.T.'s alleged misuse of the e-cigarette was foreseeable to Zuul due to the company's extensive, documented marketing of the e-cigarette towards children. Under 402A, manufacturers are liable for injuries resulting from foreseeable misuses of their products. *Liriano v. Hobart Corp*., 92 N.Y.2d 232, 237 (N.Y. App. Div. 1998); *see also O'Neil v. Crane Co.,* 53 Cal. 4th 335, 362 (Cal. 2012) ("foreseeability is relevant in a strict liability analysis to determine whether injury is likely to result from a potential use or misuse of a product."). Whether a plaintiff's misuse of a product was foreseeable to the defendant is a question of fact for jury. *Johnson v. Johnson Chem. Co.*, 183 A.D. 2d 64, 69 (N.Y. 1992).

Additionally, manufacturers are liable when they supply products to children that they know pose a significant risk to a child:

> "One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them."

Moning v. Alfono, 400 Mich. 425, 443-44 (Mich. 1977) (citing Restatement Torts, 2d, § 390.). Additionally, a "manufacturer who bypasses adults, upon whom the law ordinarily places responsibility, and markets a simple, but dangerous, tool directly to children may not avoid liability on the ground that the child 'should have known better.'" *Kirk v. Hanes Corp*., 16 F.3d 705, 710 (7th Cir. 1994).

For instance, in *Swix v. Daisy Mfg. Co*., 373 F. 3d 678, 680 (6th Cir. 2004), the ten-year-old plaintiff was blinded in one eye after his 11-year-old friend shot him in the eye with the defendant manufacturer's air rifle. The manufacturer moved for summary judgment, contending that it intended for the air rifle to be used only under the direct supervision of an adult. *Id.* at 688. However, the court refused to grant the summary judgment motion, holding that the manufacturer had a duty to protect against foreseeable misuses, and that it was "certainly foreseeable that a twelve year old [sic] child will on occasion use a BB gun which was purchased for his use, without direct supervision, or that any supervision will be inadequate to protect against a split-second decision by the minor to aim at another." *Id*.

In the case at bar, it was certainly foreseeable that an 11-year-old child like L.T. could misuse Defendant's e-cigarette. In previous litigation, Zuul was adjudicated to have bypassed adults and marketed their e-cigarettes directly to children. While Zuul may claim that it ceased

its marketing to children by ending its line of sweet flavored vapes, it began selling "skins" with cartoon characters adored by children like L.T. R. 4. A reasonable jury could find that it was foreseeable that a child-like L.T. could misuse the e-cigarette in a juvenile way, such as mimicking the operation of a leaf blower. Therefore, a genuine issue of material fact exists over the foreseeability of the misuse of the product, making summary judgment inappropriate. Accordingly, the appellate court's decision to affirm summary judgment for Zuul should be reversed.

C. As A Matter Of Public Policy, This Court Should Not Allow Zuul To Escape Liability For Putting A Defective Product On The Market

It would be against the interest of public safety to allow a manufacturer to avoid liability for injuries caused by a defective product without proving that the plaintiffs' misuse of the product was the cause of their injuries. The purpose of strict products liability is to impose a responsibility on manufacturers to not distribute unreasonably dangerous products:

> On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

Restat. 2d of Torts, § 402A (1965) cmt. c. It is uncontroverted that a manufacturing defect, not L.T.'s handling of the e-cigarette, caused the e-cigarette to explode. R. 8. If the lower court's ruling stands, it would allow manufacturers to avoid liability for defective products by producing

evidence that the plaintiff was not using the product as intended, even if the alleged misuse did not cause or contribute to the plaintiff's injuries. This would be contrary to the purpose of 402A, which is to protect the public by holding manufacturers accountable when they distribute defective products. Accordingly, public policy holds that manufacturers, who have the money and resources to ensure their products are as safe as possible, should be liable for their defective products to all those who could be foreseeably injured.

II. THE READ AND HEED DOCTRINE SHOULD APPLY TO STRICT LIABILITY FAILURE-TO-WARN CALIMS IN THE STATE OF OHIOWA.

This Court should uphold the lower court's finding that the read and heed doctrine applies to failure-to-warn claims in the state of Ohiowa. The lower court held "the heeding doctrine is the law of the land given that public policy tends to favor the consumer in product liability actions in Ohiowa." R. 12. However, the lower court erroneously held that the Tullys were not prejudiced by the lower court's decision not to provide a jury instruction in line with the read and heed doctrine. R. 12. First, Ohiowa courts should provide a heading presumption where the injured individual has not voluntarily exposed themselves to the product. Second, a manufacturer's duty to warn consumers goes to the ultimate user, where there is no learned intermediary. Third, as a matter of public policy, the read and heed doctrine advocates for judicial fairness between the consumer and the manufacturer.

A. The Read And Head Doctrine Should Apply Where The Individual Injured Does Not Voluntarily Chose To Be Exposed To The Product That Caused The Harm

The application of the read and heed doctrine should be dependent on whether the injured person voluntarily exposed themselves to the hazard. When determining whether to apply the read and heed doctrine, courts look at the knowledge of the injured individual and whether they voluntarily exposed themselves to harm. Courts have determined that "[t]here is no duty to warn

potential users of that which is known to most people." *Viguers v. Phillip Morris USA, Inc.*, 837 A.2d 534, 538 (Pa. Super. Ct. 2003). Individuals who have knowledge of the dangers associated with a product are presumed to have read the warning.[4] Pennsylvania has reasoned that the read and heed doctrine becomes less powerful where the individual have knowledge of the harm and voluntarily chose to expose themselves to the hazard. *Id*. at 538.

When Courts examine whether a person has voluntarily exposed themselves to the harms of a product, the actions of the person are the determining factors. In *Viguers*, 837 A.2d at 538 the Pennsylvania Superior Court determined that summary judgment in favor of the defendant manufacturer was valid based on the actions of the plaintiff. The plaintiff filed an action against the manufacturer for injuries she suffered as a result of smoking defendant's cigarettes from 1957 until 1985. *Id.* at 536.[5] Plaintiff argued that the heeding presumption should apply and that she would have heeded a warning if it were present.[6] *Id*. at 536-7. The Pennsylvania Superior Court rejected this argument reasoning "that the heeding presumption does not apply in the context of this case, which involves the voluntary choice of a smoker to begin and continue smoking tobacco." *Id*. at 538. The Court explained that the plaintiff's continued use of cigarettes, even after the federally mandated warnings were issued, showed that she voluntarily chose to smoke. *Id*. "[T]he record contained evidence that Aurelia Viguers continued smoking long after

[4] Superior Court of Pennsylvania reasoned that an individual who has smoked continuously for twenty-years is presumed to be aware of all the dangers associated with the activity. *Viguers*, 837 A.2d at 538.

[5]There was a dispute, whether plaintiff quit smoking in 1985 or 1987. However, this ambiguity was not a concluding factor in the case. *Id*. at 536.

[6] Plaintiff died in 2000 from lung cancer, as a result of years of smoking cigarettes. Plaintiff's husband continued the appeal in her place. *Id*.

federally-mandated warnings...appeared on packages in 1969." *Id*. at 538. The court identified that when looking to determine whether one voluntarily exposed themselves to the hazard of a product, courts must scrutinize the actions of the injured individual.

When determining whether exposure to the harm was involuntary, Courts have looked at whether the victim had any choice to be exposed to the product. In *Coward v. Owens-Corning Fiberglas Corp.*, 729 A.2d 614 (Pa. Super. Ct. 1999), the Pennsylvania Superior Court looked to determine whether the heeding presumption should apply in a case "where warnings or instructions are required to make a product non-defective…" *Id*. at 617. In *Coward* a group of plaintiff workers sued defendant manufacturers for failing to adequately warn of the dangers associated with asbestos. *Id*. A jury verdict was entered against the manufacturers in the lower court. The manufacturers challenged whether the plaintiffs should have been given a presumption based off the read and heed doctrine. *Id*. at 618. The Pennsylvania court upheld the decision stating "that in cases where warnings or instructions are required to make a product non-defective and a warning has not been given, the plaintiff should be afforded the use of the presumption that he or she would have followed an adequate warning…" *Id*. at 621. The court reasoned that "[p]laintiff's evidence [was] legally sufficient to establish that they were subjected to substantially more than a mere presence of asbestos in their respective workplaces." *Id*. at 624. The Court noted that plaintiffs did not have a choice, but to expose themselves because of their profession. *Id.* at 623-24. A finding of involuntary exposure required a determination of whether the victim had a choice when they were exposed to the product that caused the harm.

The heeding presumption allows the fact finder to presume that, had the manufacturer placed an adequate warning, the injured party would have read the warning. *Miller v. Pfizer Inc.*, 196 F. Supp. 2d 1095, 1127 (D. Kan. 2002). Ohiowa courts should incorporate the reasoning of

the Pennsylvania Court. An analysis of whether the conduct of the injured individual was voluntary or involuntary should determine the application of the heeding presumption. This conceptual framework would permit the Ohiowa court to make consistent decisions on the application of the the read and heed doctrine. Where a person has voluntarily exposed themselves to the harm, they should not recover. *See Viguers*, 837 A.2d at 537. Where a plaintiff has involuntarily exposed themselves to danger, a presumption that they heeded the warning should apply. Alternatively, where the victim lacks choice, the read and heed presumption should also apply. *Id*. This reasoning would help plaintiff consumers find their day in court, as "in the State of Ohiowa, product liability law has always looked favorably upon the consumer." R.12.

This Court should apply the read and heed doctrine to L.T., as he was not voluntarily exposed to Zuul's vaping device. The vaping device that caused the injury suffered by L.T. was owned by Ms. Barrett, his babysitter. R.5. Ms. Barret bought the vaping device for herself, as well as the skin covering the device. R.5. L.T. was involuntarily exposed to the dangers of the vaping device, and the facts do not support a finding that his parents choose to expose L.T. to the product. Zuul had knowledge when they produced the skins, that the skin would cover the entire device, including the warning. These skins included a design depicting *Hola Gato*, a popular cartoon character and one of L.T.'s favorites. Zuul made the choice to use a children's cartoon to not only cover the warning but advertise to a younger audience. R.4. L.T. did not have a choice to read the warning. L.T. had no knowledge of the vaping device or how it worked. L.T's actions reflected that of someone who lacked knowledge. Had a warning been placed on the skin, L.T. may have read it and prevented his injuries. Accepting the read and heed doctrine allows L.T. the presumption that he would not have picked up the device had he read the warning. This Court should uphold the ruling that the heeding presumption applies and hold that the Tullys were

prejudiced by the exclusion of the reed and head presumption.

B. Zuul's Duty To Warn As A Manufacturer Extends To The Ultimate User Of The Vaping Device

Alternatively, courts have applied the read and heed doctrine based on the absence of learned intermediaries. The state of Ohiowa has adopted the learned intermediary doctrine. R. 11. The learned intermediary doctrine[7] applies where there is a learned individual or medical professional who can take the health or safety of the victim into account. *See Fecho v. Eli Lilly & Co.*, 914 F. Supp. 2d 130, 146 (D. Mass 2012). (In most cases the learned intermediary is a member of the medical profession. *Id*. at 147). Courts have held that the manufacturer has a duty to share or warn a learned intermediary of the dangers associated with their products. *Dopson-Troutt v. Novartis Pharm. Corp.*, 975 F. Supp. 2d 1209, 1213 (M.D. Fla. 2013). Under learned intermediaries "the manufacturer's duty to warn is ordinarily satisfied if a proper warning is given to the specialized class of people that may prescribe or administer the product." *Dole Food Co., Inc. v. N.C. Foam Industries, Inc.*, 935 P.2d 876, 880 (Ariz. Ct. App. 1996).

Reliance on learned intermediaries is based on the need of advance knowledge; if the knowledge is considered common, the warning is directed at the end user. Courts have relied on learned intermediaries because the personal physician should have knowledge of a individual's medical history when deciding whether to prescribe a drug. *Dopson-Troutt*, 975 F.Supp.2d at 1212. This requires the learned intermediary to receive warnings directly from the manufacturer. *Id*. "The physician has the choice of whether to prescribe a drug after weighing the data and warnings supplied by the manufacturer against his patient's medical history..." *Fecho*, 914 F.

[7] The "learned intermediary doctrine" is derived from comment j of the Restatement (Second) of Torts. Restatement (Second) of Torts §402A cmt. j.

Supp. 2d at 146. When a product does not require advance knowledge, the warning goes to the end-user of the product.[8] In this scenario, the end-user of the product is charged with reading the warning provided by the manufacturer. See *Pavlik*, 135 F.3d at 882-83.[9] Application of the read and heed doctrine allows the plaintiff to receive the warning directly from the manufacturer.[10] Courts have traditionally applied the read and heed presumption in cases where there is no learned intermediaries.[11]

In the case at bar there was no learned individual present. Ms. Barnett was the owner of the device that harmed L.T. The device in Ms. Barnett's possession does not require that any specialized knowledge to use nor it is not prescribed by a doctor; the only thing a user must do is purchase the product. There is no special degree required to purchase this device, nor is there any education needed to purchase the skin, that covers the device. The warning is therefore going directly to the consumer, the ultimate user of the product. There was a warning placed on Zuul's e-cigarette that cautioned against the possible dangers. R. 4. However, this warning was covered

[8]"From this, it follows logically that the law should also presume that, when no warning or an inadequate warning is provided, the end-user would have read and heeded an adequate warning had one been given by the manufacturer." *Pavlik v. Lane Ltd./Tobacco Exporters Intern.*, 135 F.3d 876, 883 (3d Cir. 1998).

[9] Holding that the heeding presumption is not applied to a deceased individual who intentionally inhaled butane despite the warning listed on the product.

[10]"The Corollary to this rule presume[s] that, when no warning or an inadequate warning is provided, the end-user would have read and heeded an adequate warning had one been given by the manufacturer." *Fecho*, 914 F. Supp. 2d at 147.

[11]*See Fecho*, 914 F. Supp. 2d at 146-7. Reasoning that where there is no learned intermediary to exercise independent medical judgment regarding prescribing a pharmaceutical drug, strict liability applies. The read and heed doctrine applies to a limited case about involuntary exposure to toxic materials.

by Zuul adhesive skin, placed over the device. R. 4. The warning is not visible to any end-user of the product.

This Court should apply the read and heed doctrine in this case because Zuul's warning warns should be directed to the end-user. Without a need for the prescription and specialized knowledge, Zuul's duty to warn falls to the ultimate user, Ms. Barnett and L.T. The injury suffered by L.T. was not due to the effects of smoking. R.5. Common knowledge regarding vaping does not cover the injuries suffered by L.T. In cases where there is no common knowledge regarding the potential injury and there is no learned intermediary, courts have chosen to apply the read and heed doctrine. Without instructing the jury to consider the read and heed doctrine, Zuul did not have to show that the Tullys would have read the warning, despite the fact that it was covered by the Zuul skins. This court should affirm the holding of the lower court in determining that there was an abuse of discretion in the failure to give the requested jury instruction, and prejudiced the Tullys when it was not given.

C. As A Matter Of Public Policy, The Read And Heed Doctrine Promotes Judicial Fairness

Courts have found that the read and heed doctrine promotes fairness between plaintiffs and defendant, manufacturers. The State of Ohiowa has always been a state friendly to consumers. R. 11-12. Failure-to-warn cases present a difficult challenge for Courts to determine, absent a flawed design, that the defect existed in "the absence of a warning to unsuspecting users that the product can cause injury." *Coffman v. Keene Corp.*, 628 A.2d 710, 716 (N.J. 1993).[12] A case regarding the failure-to-warn, requires the same elements to establish a cause of action

[12] Holding that the read and heed doctrine applies in failure-to-warn cases where the product is used in the workplace and the manufacturer has to prove that they provided adequate warning.

under product defect, including causation. *Id*. Courts have realized that in some situations, it may be difficult to prove proximate cause:

> In light of the difficulty of demonstrating how an injured or deceased person would have reacted to a particular warning, manufacturer who issue products with inadequate safety warnings could escape any consequence, thereby decreasing the incentive for manufacturers to adequately warn consumers of dangers inherent in product use. By easing the burden of proving causation, '[t]he use of the heeding presumption provides a powerful incentive for manufacturers to abide by their duty to provide adequate warnings.

Golonka v. General Motors Corp., 65 P.3d 956, 969 (Ariz. Ct. App. 2003).

To help plaintiffs maintain this incentive courts have applied the read and heed doctrine. Without this doctrine sellers or manufacturers will be able to have an unfair advantage in products liability cases. "Consequently, if a seller or manufacturer is entitled to a presumption that an adequate warning will be read and heeded, plaintiff should be entitled to the same presumption when no warning is given." *Coffman,* 628 A.2d at 717. This presumption is of no consequence to Zuul, as it only goes towards proving causation and can be rebutted. To rebut this presumption, Zuul only has to provide evidence "sufficient to support a finding contrary to the presumed fact." *Viguers*, 837 A.2d at 538. The heeding presumption would not harm Zuul and would promote fairness between the manufacturer and foreseeable users like L.T.

The omission of the read and heed doctrine as a jury instruction was prejudicial to the Tullys and lead to a faulty jury verdict. The decision of a jury should be reversed "when we have substantial doubt whether the instructions, considered as a whole properly guided the jury in its deliberations." *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1235 (10th Cir. 1999). The lower court deemed that the heeding presumption tends to favor consumers in the State of Ohiowa. R. 12. By not allowing the jury to receive the heeding presumption instruction, the jury was not able to fully apply the law. The jury was not aware of the

presumption that had L.T. seen a warning on the Zuul skin, he may not have used the e-cigarette. The evidence in the possession of the jury did not consider this presumption, which lead to a faulty verdict.

In the interest of Judicial fairness, the Tullys should have been allowed the jury instruction containing the read and heed doctrine. Zuul manufactured their e-cigarette devices to prohibit any other company's cartridges to be used with their product. R. 4. This meant that any individual using their e-cigarette would only be able to use it with Zuul products. Afterwards, Zuul created a new product, called the "Zuul skins", that were sold separately from other Zuul products. R. 4. These skins are adhesive and remain fixed to cover the surface of the Zuul e-cigarette. R. 4. The e-cigarette contains a warning regarding use of the device, however the skin has no warning. R. 4. L.T. an eleven-year-old child, is unfamiliar with Zuul's e-cigarettes or Zuul's products. The only warning that L.T. could have seen was covered by a skin, that conceals the entire device. R. 4. However, L.T. is familiar with the cartoon television show *Halo Gato*. R. 5. Zuul chose to create skins with designs featuring popular cartoon characters and pattern, one of which was the character *Halo Gato*. To not allow the Tully family to apply the read and heed doctrine, Zuul effectively is charging L.T. and other users with reading a warning that is underneath the skin of the vaping device. Potential future plaintiffs will be charged with reading a warning despite the manufacturer intentionally creating something designed to cover their entire device. By allowing the application of the read and heed doctrine, the Court can allow plaintiffs to shift the burden to manufacturers, to provide evidence against the presumption. This presumption created by the read and heed doctrine allows for judicial fairness and should be adopted by this court.

CONCLUSION

WHEREFORE, Petitioner Louis Tully, asks this Court to reverse the appellate court's affirmation of Zuul's motion for summary judgment.

Petitioner also requests that this Court affirm the holding of the appellate court that the reed and heed doctrine applies to strict liability failure-to-warn claims in the State of Ohiowa and hold that the Petitioner was prejudiced when the jury instruction was not given.

Respectfully submitted,

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Team K
Counsel for Louis Tully

Appendix A

Ohiowa Rev. Code § 5552.368 Rule of Liability.

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; and

(b) the product is expected to and does reach the consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.

Appendix B

Ohiowa Rev. Code § 5552.369 When Product Has Defect.

(a) A product is in a defective condition under this article if, at the time it is conveyed by the seller to another party:

(1) it deviated in a material way from the design specifications, formula, or performance standards of the manufacturer;

(2) it is in a condition not contemplated by reasonable persons among those considered expected consumers of the product; or

(3) its condition will be unreasonably dangerous to the expected consumer when used in reasonably expectable ways of handling or consumption

(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