**No. 20-2206**

**IN THE SUPREME COURT OF THE STATE OF OHIOWA**

Spring Term 2020

**LOUIS TULLY, as father and natural guardian for minor L.T., and in his own right,**

Petitioner,

v.

**ZUUL, an Ohiowa corporation,**

Respondent.

On Writ of Certiorari to the
Seventh Appellate District Court of Appeals for the State of Ohiowa

# BRIEF FOR RESPONDENT

Team L
*Counsel for Respondent*

**Oral Argument Requested**

## QUESTIONS PRESENTED FOR REVIEW

1) Did the appellate court err in affirming Respondent's motion for summary judgement on Petitioner's manufacturing defect claim?

2) Does the read and heed doctrine apply to strict liability failure-to-warn claims in the State of Ohiowa?

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## OPINION BELOW

The decision of the Court of Common Pleas, granting Respondent's motion for summary judgement, appears in the record at R. 3. The decision of the Seventh Appellate District Court of Appeals for the State of Ohiowa, upholding the Court of Common Pleas ruling, appears at R. 1.

## STATEMENT OF JURISDICTION

The requirement of a formal statement of jurisdiction has been waived pursuant to Rule 3(c) of the August A. Rendigs 2020 Competition Rules.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The adjudication of this case involves the statutory interpretation of the Ohiowa Product Liability Act ("OPLA"), Ohiowa Rev. Code § 5552.368 (2019), and the common law interpretation of the Restatement (Second) of Torts § 402A cmt.j. The relevant text of this statute and the common law are attached in the appendices.

## STATEMENT OF THE CASE

### I. STATEMENT OF THE FACTS

The Respondent in this case is Zuul Enterprises. In March 2016, Zuul Enterprises ("Respondent") was established in Cincinnatus, Ohiowa as a innovator of the cigarette industry. R. 3. The founder of Zuul, Pete Venkmen, developed an electronic cigarette ("e-cigarette") as a safe alternative to regular smoking for legal-aged consumers. R. 3. Respondent's goal is to provide legal-aged individuals with a safe and less expensive option to smoking traditional cigarettes. Respondent's e-cigarettes are designed to heat up a liquid through the "pressing" of a button on the outside of the e-cigarette. R. 3. When the button is pressed, the e-cigarette heats the

liquid and then turns the liquid into vapor. R. 4. The vapor is generally consumed by the user as an alternative to regular smoking. R. 4. The liquid comes in cartridges that can be easily inserted into the e-cigarette. R. 4.

Prior to this case, the cartridges came in many different flavors until a federal court issued an injunction against the flavors Respondent used in its e-cigarettes. R. 4. The federal court issued an injunction because it believed that Respondent was marketing to teenagers because the flavors mimicked fruit and candy rather than tobacco. R. 4. However, Respondent respectfully disagrees with the federal court's position. R. 4. In a sign of good faith, Respondent discontinued the production of non-tobacco flavors and only allows for classic tobacco liquid cartridges to be inserted into its e-cigarettes. R. 4. In hopes of increasing its good faith, Respondent redesigned its e-cigarettes to allow only classic tobacco cartridges. R. 4. Consumers can no longer use third party cartridges with Respondent's e-cigarettes. R. 4.

After redesigning its e-cigarettes, Respondent developed adhesive labels that could be placed on the outside of its e-cigarettes. R. 4. Each adhesive label can be designed to replicate the consumer's preference. R. 4. The designs range from patterns to cartoon characters. R. 4. Moreover, the designs are not integral to the functionality of the e-cigarette. The adhesive labels became an instant sensation with Respondent's consumers, and as a result of the popularity, Respondent's adhesive labels became known as "Respondent Skins." R. 4. Through the rise in popularity of Respondent Skins, Respondent was mindful of the federal court's prior injunction. Respondent ensured that each e-cigarette's packaging came with a warning regarding the various hazards that come with using an e-cigarette for the purpose of smoking tobacco. R. 4.

On July 17, 2018, a horrible and unfortunate event happened with one of Respondent's legal-aged consumers. R. 5. Louis and Janine Petitioner ("Petitioner") had Ms. Dana Barrett

("Ms. Barrett") watch their child L.T. R. 5. Ms. Barret had one of Respondent's e-cigarettes and used it quite regularly to smoke. R. 5. While Ms. Barrett was a legal-aged consumer of Respondent's e-cigarettes, she left her e-cigarette in a place where L.T. could physically obtain it without her consent. R. 5. Ms. Barrett warned L.T. numerous times that her e-cigarette was dangerous to play with because it was not a toy. R. 5. Unfortunately, L.T. did not listen to Ms. Barrett's warnings and used the e-cigarette in way the device was not intended. R. 5. L.T. used the e-cigarette for play as a leaf blower. R. 5. While playing with the e-cigarette as a leaf blower, L.T. pressed the button on the e-cigarette and the device malfunctioned. R. 5. As a result of the malfunction, L.T.'s hand was injured. R. 5. L.T.'s parents initiated a lawsuit against Respondent because of Ms. Barrett's misplacement of her e-cigarette and the injury that resulted from L.T. using the e-cigarette in a way which it was not intended. R. 5

## II. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On September 28, 2018, Petitioner filed a legal complaint against Respondent in the Court of Common Pleas ("Trial Court"). R. 2-3. Petitioner stated that 1) Respondent is strictly liable for L.T.'s injury because of the malfunction that happened with Ms. Barrett's e-cigarette; and 2) Respondent did not warn consumers of the risks with using an e-cigarette. R. 2. Respondent countered by moving for summary judgement because Petitioner's material facts did not support its claim. R. 2-3. First, Respondent argued that L.T. was not a foreseeable consumer because he used the e-cigarette in a way which it was not intended, like a leaf blower. R. 3. Second, Respondent argued that its warnings on the e-cigarettes met its obligation to warn consumers of the risk associated with using an e-cigarette. R. 3. The Trial Court ruled in favor of Respondent because L.T. was not a foreseeable user of Respondent's e-cigarette. R. 3. The

Trial Court reasoned that Respondent would not have foreseen a child using its e-cigarette as a leaf blower. R. 3. However, the warning label issue proceeded to trial and the jury found for Respondent because each e-cigarette had a warning on the packaging when sold. R. 3. During the trial, Petitioner moved for the heeding presumption's inclusion with the jury instructions. R. 3. Respondent objected and the Trial Court ruled in favor of Respondent's objection. R. 3.

After the jury and the Trial Court found for Respondent, Petitioner appealed the case to the Court of Appeals for the State of Ohiowa in the Seventh Appellate District of Drummond County ("Appellate Court"). R. 3. Petitioner argued the Trial Court wrongfully granted summary judgement for Respondent because 1) the foreseeability of L.T. using Respondent's e-cigarette was an issue of material fact, and 2) the Trial Court's denial of including the heeding presumption was made in error. R. 3. Respondent maintained the same trial arguments, and the Appellate Court ruled in favor of Respondent. R. 6-12. The Appellate Court stated there was no issue of material fact because L.T. used the e-cigarette as a leaf blower, and the child's conduct was not something the legislature intended for Respondent to be strictly liable. R. 6-9. Furthermore, the Appellate Court ruled the Trial Court's decision to exclude the heeding doctrine did not prejudice the jury because the jury had enough evidence to make a fair decision given the totality of the instructions included. R. 9-12.

Sometime after Petitioner's unsuccessful appeal, Petitioner filed a *writ of certiorari* with the Supreme Court of the State of Ohiowa ("Supreme Court"). R. 1. The Supreme Court granted Petitioner's *writ of certiorari* on whether 1) the "appellate court err[ored] in affirming Respondent's motion for summary judgment on Petitioner's manufacturing defect claim," and 2) "does the read and heed doctrine apply to strict liability failure-to-warn claims in the State of

Ohiowa." R. 1 (alteration in original). Petitioner's case currently awaits this Court's decision regarding the previously mentioned legal issues.

## SUMMARY OF THE ARGUMENT

Petitioner claims Respondent is liable for a defective e-cigarette that was used as a leaf blower by an underage child. However, Respondent could not have foreseen that a minor, who is not legally allowed to use an e-cigarette, would knowingly take his baby sitter's e-cigarette and then use the e-cigarette as a toy. While consumers are favored in Ohiowa, consumers bear the burden of proving strict liability. Petitioner has failed to prove strict liability. Petitioner's failure is supported by the Appellate Court, and the Trial Court, which determined that summary judgment was proper because there was no issue of material fact as to foreseeability. If the child had used the product lawfully, and as an e-cigarette, Petitioner may have successfully denied a motion for summary judgment.

While Respondent does not bear a burden for warnings, Respondent packaged its e-cigarettes with warnings to protect its consumers from using the product in a way that was not intended. Petitioner is partly liable for allowing an adult, who uses e-cigarettes, to supervise his child. While an unfortunate injury happened to Petitioner's child, Respondent could not have foreseen that Petitioner would have their child watched by an adult with an e-cigarette, where the child would wrongfully take the e-cigarette and use it for its unintended purpose.

Second, Petitioner's wrongfully maintain that a heeding presumption applies to strict liability failure-to-warn claims in the State of Ohiowa. However, Ohiowa statutes and common law do not explicitly state that the heed presumption applies to injuries caused by defective products. Petitioner points to the Restatement (Second) of Torts, but fail to acknowledge that Ohiowa has never adopted the entirety of the Restatement. Because Petitioner is defending the

application of the presumption on review, he must satisfy a totality of three necessary elements: that the heeding presumption accurately represents Ohiowa law, the facts supported giving the instruction, and that the instruction was necessary in order to enable the jury to properly resolve all the issues presented.

Assuming, *arguendo*, that the heed presumption was the law of Ohiowa, the jury would not have been prejudiced by the exclusion of the heed presumption from the jury instructions. In Ohiowa, prejudicing the jury requires that without the instruction, the jury would have been able to come to a fair judgment. However, during the trial, the jury heard testimonies from experts and lay witnesses regarding the incident, the e-cigarette's design, and the liability of each party. Furthermore, the jury deliberated for sixteen hours regarding whether the warning label was sufficient. The jury's decision should not be overturned for an instruction that is not the law of Ohiowa. Lastly, as a matter of public policy, Ohiowa’s interest in protecting consumers will not suffer from disallowing the heeding presumption to be codified as Ohiowa State law.

## ARGUMENT

### I. THIS COURT SHOULD AFFIRM THE DECISION OF THE SEVENTH APPELLATE DISTRICT COURT FROM THE STATE OF OHIOWA GRANTING THE SUMMARY JUDGEMENT FOR RESPONDENT, FINDING THAT THE SUMMARY JUDGEMENT IS APPROPRIATE SINCE PETITIONER IS NOT CONSIDERED A FORESEEABLE USER.

The decision of The Court of Appeals for the Seventh Appellate District for the State of Ohiowa ("Appellate Court") should be affirmed for Zuul ("Respondent") because Petitioner has not brought forth a genuine issue against Respondent. According to Ohiowa law, "[s]ummary judgment is appropriate when there is no genuine issue as to any material fact of the claim, and the moving party is entitled to judgement as a matter of law." R. Civ. Proc. 56(a). According to the record the Ohiowa legislature has chosen to "enforce liability only for those who are "consumers" of the seller's product." R. 9. Thus, when strictly following the language of the Restatement (Second) of Torts, "liability would extend only to consumers, which include those who have ultimately used the product as it was intended." Restatement (Second) of Torts (1969).

#### A. Summary Judgement is Appropriate Because the Moving Party has not Construed Sufficient Evidence In Its Favor.

In the state of Ohiowa, product liability law has always looked favorably upon the consumer (in this case, Petitioner). R. 11. The test in Ohiowa of whether a product deviated in a material way from the design standards of its manufacturer is the Consumer Expectations Test. The origins of this test came from the State of Ohio. The Ohio Supreme Court applied a modern consumer expectations test in a case which involved a hood of a truck that fell on a driver. *Pruitt v. General Motors Corp.*, 599 N.E. 2d. 723, 725 (1991). The manufacturer was not held liable since the product was not dangerous to an extent beyond which would be contemplated by a user with ordinary knowledge. The consumer expectations test itself consists of two parts that state "a

product design is in a defective condition to the user or consumer if (1) it is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the benefits of the challenged design do not outweigh the risk inherent in such design." *Id*. at 725. According to the record, Petitioner offered evidence through the use of an expert witness. R. 7. The expert witness identified a faulty connection between the activating button and the atomizer, and this action caused the e-cigarette to explode.

As the record indicates, there "is sufficient evidence to show that were it not for a defective condition, the e-cigarette would have operated in accordance with Respondent specifications and would have functioned like any other e-cigarette on the market." R. 8. Petitioner, through their expert witness, has actually failed under the consumer expectations test to establish the e-cigarette to be more dangerous than a foreseeable user would expect. In this case, the e-cigarette suffered a defect that a foreseeable user with ordinary knowledge would expect. If Petitioner would have attempted to use the product as it was intended, petitioner would be considered a foreseeable user under Ohiowa law. Ohiowa Rev. Code § 5552.368 (2019). Any harm caused by the defect would force liability towards Respondent, but that did not happen. Since Petitioner did not use the product as intended, and instead used the product as a leaf blower, Petitioner could not be considered a foreseeable user with ordinary knowledge.

According to Federal Emergency Management Agency (FEMA), "manual e-cigarettes have a switch that the user depresses to energize the heating element to make the heated vapor." Lawrence A. McKenna, Jr., *Electronic Cigarette Fires and Explosions in the United States 2009-2016*, at 3 (2017). According to the same study by FEMA, it states that "it is likely that the number of incidents (e-cigarette explosions) and injuries will continue to increase." According to the Supreme Court of Ohio, the standard for the consumer expectations test is through an

"objective standard, not the subjective expectations of a particular user or consumer." *Leichtamer v. American Motors Corp.*, 67 Ohio St.2d 456, 467 (1981). Petitioner is outside of the realm of an ordinary user with ordinary knowledge, which Respondent should not reasonably foresee as being subject to the harm caused by the product. Therefore, Petitioner has not construed what needs to be sufficient evidence in their favor since they are not a foreseeable user with ordinary knowledge.

**i. A Jury Instruction that has no Significant Impact would Mislead or Confuse the Jury into Irrelevant Matters and It Would Deviate from the Whole Picture of the Case.**

If there is a pecan pie with six slices, and one slice is missing, that missing slice changes the *whole picture* that there is still a pecan pie. This action distracts one from seeing the *whole picture*. As stated in the record, "if the jury instructions, as a *whole*, fairly state the applicable law to the jury, the failure to give a particular instruction will not be in error." *Baron Protective Servs. Inc. v. Faber.* 745 So. 2d 968, 974 (1999). R. 10. The whole picture of the jury instructions are already presented to the fact finder in this case, and the inclusion of an irrelevant jury instruction would deviates into the so-called "missing slice."

In California, during a criminal case that presented an issue regarding jury instruction, the defense counsel argued that "the prosecution's theory was unsupported by fact, and theory unsupported by fact is like slicing into a pie without the filling." *Salinas v. Horel*, No. CV 07-459-JSL (AGR), 2009 U.S. Dist. LEXIS 124528, at *27 (C.D. Cal. Nov. 6, 2009). The California Court of Appeal analyzed "and concluded each statement was a fair response to defense counsel's argument." *Id*. To which the prosecution argued, that "the defense is coming up with all kinds of tricks and sleight of hand to try to get you to believe that somehow the detectives directed Mr. Keenan to pick out Alfred Salinas in position No. 2 (in the lineup)." *Id.* Ultimately

the United States District Court for the Central District of California did not buy the defense counsel's argument and ruled against them, stating that "even if the prosecutions statements were improper in the first place – which they were not – the trial court's numerous and thorough instructions eliminated any risk that Petitioners were denied due process." *Id.* at 45. Thus, if there are sufficient facts in a case that still make the *whole picture,* one ould be distracted by an insignificant fact that has little bearing on the whole picture.

As the Appellate Court has proclaimed, "We will not find prejudice where the instructions state the applicable law of the case." R. 10. Essentially, if there are enough slices of the pie to make a whole picture, then one slice – the jury instruction – is not persuasive enough. "In reviewing whether a particular jury instruction was properly given or refused, we consider the instruction in its entirety, as well as in connection with all the other instructions given and with the evidence introduced at trial." *McAlpine v. Rhone-Poulen Ag Co.*, 16 P.3d 1054, 1057 (2000). For Petitioner in this case, it is not enough to claim a jury instruction is in err. Instead, Petitioner has to establish the overall connection that the jury instruction has in accordance with the *whole picture***.**

According to the record, "A trial court (in Ohiowa) is accorded broad discretion in formulating appropriate jury instructions and its decision should not be reversed unless the error complained of resulted in a miscarriage of justice." R. 9. Petitioner argues that their jury instruction of the heeding presumption is in err. The Appellate Court ruled that the trial court did err. However, it is not enough for an instruction to be in err in order to overturn the decision; there must be a miscarriage of justice. The missing jury instruction did not deviate the jury of the *whole picture* in front of their eyes. The Appellate Court states, "the jury had a wealth of evidence upon which to base their decision" R. 10. Evidence which consisted of jury deliberation

of upwards to sixteen hours. Furthermore, the Appellate Court did not see how the jury could have ruled otherwise even if they had the missing jury instruction. The Seventh Appellate District for the State of Ohiowa, and the jury as finder of fact, saw the *whole* pie in this case and found sufficient evidence to find that petitioners were not a foreseeable user. Thus, by including petitioner's jury instruction, it would deviate into the "missing slice" and prejudice Respondent into a miscarriage of justice, which is what the state of Ohiowa is seeking to avoid.

**ii. Defect Alone is not Enough Under Strict Liability, Multiple Factors are Considered, Including Economic Feasibility.**

Petitioners already have an advantage in this case, which is that Respondent admitted that the e-cigarette is defective; however, there still needs to be an economically feasible alternative available for the product in question. In a case that involved an action against Boeing (an airplane company) who manufactured a B-52 jet bomber (B-52) that crashed via a malfunction of a right alternator drive (airplane part), the Ninth Circuit held that a showing of feasibility of the use of an airplane part was properly admitted. *Boeing Airplane Co. v. Brown*, 291 F2d 310, 313 (1961).

Petitioner has not included any economically feasible alternative. According to the record, the only thing Petitioner has introduced is how an e-cigarette. R. 7-8. According to *Knitz v. Machine Co.*, "Factors relevant to the evaluation of the defectiveness of the product design are that (1) the likelihood that the product design will cause injury, (2) the gravity of the danger posed, and (3) the mechanical and *economic feasibility* of an improved design." *Knitz v. Machine Co.*, 69 Ohio St. 2d 460, 466 (1982). With regards to the first factor, Respondent has admitted defectiveness, which would satisfy the first factor for petitioner. Regarding the second factor, the gravity of the danger posed is one that a foreseeable user of ordinary knowledge could expect, but because Petitioner is not a foreseeable user of ordinary knowledge they lose on the second

factor. Lastly, in regards to the third factor on economic feasibility, according to Petitioner's expert, Petitioner expert stated "the e-cigarette would have functioned like any other e-cigarette on the market." R. 8. Indicating that Respondent could not have made the product safer in any other way, being that no other way exists in the market. Petitioner statement is also supported by FEMA's prediction that e-cigarette explosions will go up. Lawrence A. McKenna, Jr., *Electronic Cigarette Fires and Explosions in the United States 2009-2016* (2017). Petitioner has failed to introduce anything to there being an economically feasible alternative and has failed to take advantage of his right to introduce such evidence.

### iii. Strict Liability Cannot Apply to Respondent Since Petitioner was not A Foreseeable User and A Warning was Affixed to the Packaging.

In the dissenting opinion, Justice Zeddemore stated, "The purpose of §402A was to make any seller subject to liability "even though he has exercised all possible care in preparation for the sale of their product." R. 13. In order to sell a product of which one would establish liability one must be a foreseeable user of ordinary knowledge of that product. In a case where Nestle-Biech (Nestle), a chocolate manufacturer was held strictly liable to a consumer for a tooth broken after eating a Katydid (chocolate pecan). *Jackson v. Nestle-Beich, Inc.*, 147 Ill 2d. 408, 411 (1992). The Supreme Court of Illinois held Nestle liable because to the consumer because it failed to remove a pecan shell from one of their Katydids. *Id*. The foreseeable consumer of the Katydid used the chocolate pecan in a way that was foreseeable (by putting the Katydid in their mouth and attempting to eat it) and was harmed by an ordinary use of the product. *Id*. The Illinois Supreme Court used the reasonable expectation test. *Id*. Because the reasonable expectation of the product was used in way that was supposed to be, Nestle was deemed liable.

However, if the consumer were to have taken that defective Katydid and threw it against a person and caused an injury, Nestle would not have been held liable since the product was not

used in a properly indicated and reasonably foreseeable way. With regards to petitioner's case, petitioner used the e-cigarette as a leaf blower and the e-cigarette exploded shortly after. Therefore, the product was not used as intended despite the fact the product was defective. A use of which Respondent did not intend nor expect from a reasonably foreseeable user with ordinary knowledge.

The Illinois Supreme Court also states "In this regard, we note that, even if we agreed with Nestle that its Katydids merit classification as an unavoidably safe product, we would nonetheless find it subject to strict liability due to the absence of a warning of the unavoidable risk of injury it posed." *Jackson v. Nestle-Beich, Inc.*, 147 Ill 2d. at 418. Restatement of (Second) of Torts §402S "An unavoidably unsafe product is not defective or unreasonably dangerous when properly prepared and accompanied by proper directions and warning." Restatement (Second) of Torts § 402S (Am. Law Inst. 1965). As stated in the record, "each Respondent e-cigarette has a warning affixed to its packaging...." This warning indicated that Respondent took all necessary precautions. The warning complied with the requirements that an e-cigarette is not for minors.

### B. Restatement (Second) of Torts Clearly Indicates that Statements Create No Obligation of Duty to the Foreseeable User.

According to the Ohiowa Product Liability Act ("OPLA"), the Ohiowa legislature relied on the Restatement (Second) of Torts. *See* Ohiowa Rev. Code § 5552.368 (2019). The Ohiowa legislature clearly specified that only claims which were created under OPLA might be brought against the designer, manufacturer or seller of a product. Just like the Ohiowa legislature, the Supreme Court of Iowa also relied on the Restatement (Second) of Torts when it stated, "a product manufacturer's advertisements and statements do not constitute an undertaking so as to create a duty under Restatement (Second) of Torts §323." *Wright v. Brooke Group Ltd.*, 652

N.W.2d 159, 162 (2002). The argument that a manufacturer should be held liable for an "Hola Gato" sticker statement is superfluous since it is unreasonably unnecessary to hold a manufacturer liable for any statement considered appropriate for society. In this case the "Hola Gato" sticker statement a design that can or cannot be chosen to be placed onto a product.

According to Justice Zeddemore, "These new "skins" are simply another way for the company to circumvent a court order...enticing children to become addicted to its product." R. 15. Justice Zeddemore further states that Petitioner was the kind of person that Respondent could reasonably foresee a being subject to harm from the defective condition of the e-cigarette. Respectfuly Justice Zeddemore has failed on this as it is stated historically in the Restatement of Torts that a mere ad or statement is not just grounds for a manufacturer to have a duty of care to a reasonably foreseeable user, if such reasonably foreseeable user exists, which does not exist in petitioner's case. In addition, according to the record Respondent denied any attempt to market its product to children, and vowed to produce only a "classic tobacco" flavor as a sign of good faith, to which point Respondent has done. R. 4. Respondent has not made any intentional bad faith attempts to market to children. R. 4.

### C. The Trier Of Fact Decides the Expectations for a Foreseeable User on a Case by Case Analysis.

According to the record, "the jury deliberated upwards of sixteen hours," and during that time, they ultimately decided that the expectations for an e-cigarette product in our case are ones that can be reasonably expected by a foreseeable user with ordinary knowledge. In determining such questions, the Ohio Appellate Court stated that "the question of what an ordinary consumer expects in terms of the risks posed by the product is generally one for the trier of fact." R.12. In Ohiowa, the trier of fact decides the plaintiff's expectations. The Trial Court, and Appellate Court, have further clarified Petitioner's expectations. Further proceedings would

overstep the boundaries of the checks and balances that the state of Ohiowa has with its citizens through its democratic means of law making and law interpreting.

## II. THE READ AND HEED DOCTRINE DOES NOT APPLY TO STRICT LIABILITY FAILURE-TO-WARN CLAIMS BECAUSE (1) PETITIONERS CANNOT SATISFY THE NECESSARY ELEMENTS TO DEFEND THE INSTRUCTION, (2) NO PREJUDICE WOULD REMAIN NONETHLESS, AND (3) CONSUMER INTEREST REMAINS PROTECTED.

The decision of the lower court to apply the "heed presumption," Restatement (Second) of Torts § 402A cmt. j., to the State of Ohiowa is misplaced and should be reversed. The "heeding presumption" provides: "[w]here warning is given, the seller may reasonably assume it will be read and heeded…" Restatement (Second) of Torts § 402A cmt. j (Am. Law. Inst. 1965). As a rebuttable presumption, it permits the jury to presume that the person injured by use of the product would have read and heeded an adequate warning, if provided. *Dole Food Co. v. North. Carolina Foam Indus., Inc.*, 185 Ariz. 298, 305, 935 P. 2d 876, 883 (Ariz. Ct. App. 1996).

Because it is an evidentiary presumption, applying the heeding doctrine has the effect of shifting the burden of proof from one party to the other. *Castorina v. A.C. & S.*, 2017 NY Slip Op 27083, 55 Misc. 3d 968, 971 (Sup. Ct); *See* Jerome Prince, Richardson on Evidence § 3-104 (11th ed. 1995). As the Supreme Court of New York has noted, "[t]he presumption, therefore, replaces or operates in place of evidence and relieves the party relying on the presumption of the duty to present evidence until and if the adversary has introduced evidence to rebut the presumption." *Id*. (quoting 8 Carmody-Wait 2d § 56:17 (2d ed. 2016); 57 *Evidence & Material, New York Jurisprudence* (2d ed. 2016). Thus, the heeding presumption "establishes the plaintiff's prima facie case" and shifts the burden to the defendant to rebut it. *American Law of Products Liability* § 34:38 (3d ed. 2016). As a result of the heeding presumption's application, a

defendant is forced to prove that any warning would have been futile, meaning that even if a warning had been given, the plaintiff would not have heeded it. *Castorina*, 55 Misc. 3d at 971.

Moreover, the Seventh Appellate District Court for the state of Ohiowa erred in its application of this presumption for three reasons. First, because Petitioner is defending the instruction on review, they cannot show the requested instruction accurately stated the applicable law, the facts supported giving the instruction, and that the instruction was necessary in order to allow the jury to properly resolve all the issues in the case. R. 9, 10. It is essential to note that petitioners must satisfy the totality of all three elements and if one cannot be shown, then the instruction was improper. Next, even if Petitioners do meet the essential elements listed above, it cannot be unequivocally stated that the jury would have proffered a different verdict if the heed presumption is applied and that no prejudice resulted from the lower court's reluctancy to give the instruction. Lastly, as a matter of public policy, Ohiowa's interest in protecting consumers will not suffer from ridding the heeding presumption.

### A. Petitioners Fail to Satisfy the Totality of the Obligatory Three Elements when Defending the Application of the Heeding Presumption.

As the Seventh Appellate District Court correctly points out in its opinion, a trial court is accorded broad discretion in formulating appropriate jury instructions, and its decision should not be reversed unless the error complained of resulted in a miscarriage of justice. R. 9. Thus, its decision to disallow the heed presumption to be given to the jury is reviewed for an abuse of discretion. R. 9. However, if the jury instruction initially given, as a whole, fairly states the applicable law to the jury, the failure to give a particular instruction will not be an error. *Barton Protective Services, Inc. v. Faber,* 745 So.2d 968, 974 (Fla. Ct. App. 1999).

Petitioners are now in the position to defend the application of the heeding presumption as the law of the land in the State of Ohiowa because the Appellate Court incorrectly enforced the

presumption. Moreover, as Petitioners are defending their request to apply the heeding presumption in the State of Ohiowa, they must show that the requested instructions accurately stated the applicable law, the facts supported giving the instruction, and that the instruction was necessary in order to allow the jury to properly resolve all issues in the case. R. 9, 10. Hence, the vital and invaluable question evolves into whether Petitioners can meet these requirements – they cannot.

**i. The Heeding Presumption Fails to Accurately State the Applicable Law.**

"Jury instructions must fully and fairly inform the jury of the law applicable to the case." *Peterson v. St. Paul Fire & Marine Ins. Co.*, 239 P.3d 904, 910 (Mont. 2010). Plain, clear, concise, and brief jury instructions promote verdicts consistent with the evidence and the law. *Id*. To be absolutely clear, the heeding presumption is not common law, nor does it derive from the legislature. Instead, the presumption arises from the Restatement (Second) of Torts § 402A cmt. j. Comment j states "[w]here 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 cmt. j (Am. Law Inst. 1965) (alteration in original). More importantly, commentators on the Restatement have displayed distaste for comment j as being so lackluster that it was eliminated in its entirety in the new Restatement (Third) of Torts, rendering the presumption as obsolete, which Petitioners now mourn. *Id*. For example, the Supreme Court of Nevada concluded that "shifting the burden of proving causation to the manufacturer in a strict product liability case, even if it is a temporary shift, is contrary to this state's law, as well as public policy." *Rivera v. Philip Morris*, 125 Nev. 185, 190, P.3d 271 (2009).

Ohiowa Rev. Code § 5552.368 and § 5552.369 are the laws applicable to the case at hand. The statute specifies the following:

> [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.

Ohiowa Rev. Code § 5552.368 (2019) (alteration in original). Section § 5552.369 states the following:

> (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.

Ohiowa Rev. Code § 5552.369 (2019). Precedent from other states who share similar statutory language, as the State of Ohiowa, indicate the presumption's language detrimentally departs from the applicable law at hand. The Supreme Court of Nevada proclaimed, "[i]nstead of requiring that the plaintiff prove each element of a strict liability case, a heeding presumption removes the plaintiff's responsibility to carry the initial burden of production as to the element of

causation." *Rivera*, 125; *See Seley v. G.D. Searle & Co.*, 67 Ohio St. 2d 192, 200 (Ohio 1981); *Technical Chemical Company v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972). Therefore, a heeding presumption shifts the burden from the plaintiff to the manufacturer, who must rebut the presumption by proving that the plaintiff would not have heeded a different warning. *Rivera*, 185 P.3d at 192. Correspondingly, Nevada is not alone in its stand against the heed presumption as other states have consistently stated that the plaintiff must prove the element of causation, not the manufacturer. *See Riley v. American Honda Motor Co.*, 259 Mont. 128, 856 P.2d 196 (1993) (concluding that the adoption of a heeding presumption was inconsistent with Montana's strict product liability failure-to-warn law, which requires the plaintiff to demonstrate that the inadequate warning was the proximate cause of the plaintiff's injuries because the plaintiff bears the burden of proving proximate cause); *Harris v. International Truck and Engine*, 912 So. 2d 1101, 1109 (Miss Ct. App. 2005) (declining to adopt the heeding presumption because the Mississippi Supreme Court had an opportunity to do so but did not, instead noting that the plaintiff bore the burden of proving that his injury had been caused by his following the inadequate warning).

Even further, like the other states who have admonished the heeding presumption, the State of Ohiowa has never adopted the Restatement (Second) of Torts in its entirety, meaning that it is not applicable law. Instead, the presumption is merely suggestable, although clearly "illogical" and "unnatural." *In re Diet Drug Litig.*, 384 N.J. Super. 525, 531 (Super. Ct. 2005). Therefore, the Restatement (Third) of Torts should be seen has a guidepost for courts to follow. Thus, this court should harmoniously adhere the prescribed Ohiowa statutory language and refuse to apply the heeding presumption due to its inaccuracies related the applicable state laws. The first element has not been met.

### ii. The Facts Do Not Support the Permission of the Heeding Presumption.

The second element that Petitioners must satisfy is that the facts support the permission of the heeding presumption. R. 9. Accordingly, as the New York Supreme Court noted during its struggle to accept a heeding instruction, "there is authority for the proposition that it is restricted in its use to cases where plaintiff is dead or otherwise unable to testify at a deposition or trial." *Castorina*, 55 Misc. 3d at 975; *See McDarby v. Merck & Co., Inc.*, 401 NJ Super 10, 15 (Super. Ct. App Div 2008). Continuing, it stated, "it bears observing that absent circumstances where a plaintiff decedent was not deposed or was unable to testify, the burden of proving that he or she would have heeded a warning is not onerous, as the burden is satisfied by the bare assertion of the plaintiff, a family member, a coworker or a friend that the plaintiff would have heeded a warning." *Castorina*, 49 N.Y.S. 3d at 976; (*See Matter of New York City Asbestos Litig.*, 27 N.Y.3d 765 (2016) (plaintiff decedent offered evidence that he would have heeded warning). In *Castorina*, the court established that because there was no indication or contention that plaintiffs were not given an ample opportunity to offer evidence that the plaintiff would have heeded a warning about the hazards of asbestos, the presumption was unwarranted and not granted. *Castorina*, 49 N.Y.S. 3d at 976.

First, like the plaintiff in *Castorina*, L.T. is still very much alive, which goes against the restrictions warned of by the Supreme Court of New York to disallow the instruction. *Id*. Moreover, other facts do not support the permission of the heeding presumption. The lower court even acknowledged that the jury had "a wealth of evidence upon which to base their decision." R. 12. Further, it is clear that Petitioner was able to provide ample evidence before the fact-finders, they enjoyed full testimony by all named parties. R. 12. Therefore, the permission of the heeding presumption is unsupported by the facts surrounding L.T.'s unfortunate injury.

### iii. The Heeding Presumption is Transparently Unnecessary in Order to Allow the Jury to Properly Resolve all Issues at Hand.

The final element Petitioners must fulfil, but cannot, is that the heeding presumption was necessary in order to allow the jury to properly resolve all the issues in the case. R. 10. As discussed above and mentioned by the lower court, the criticisms by commentators have resulted in the presumption being dropped from the Restatement of Torts. *See* Restatement (Third) § 2 cmt. 1 (Am. Law. Inst. 1998) (characterizing comment j as containing "unfortunate language" that "has elicited heavy criticism from a host of commentators"). Additionally, the Restatement (Third) of Torts, Products Liability §2 (1998) now overtakes what would have been §402A, which Petitioners ask this court to instill as the law of the land.

It cannot be disputed that fairness continues to thrive in strict liability failure-to-warn claims because plaintiffs can still necessarily have the capacity to be succeed without the heeding presumption. Because the State of Ohiowa is neighbor to jurisdictions including the Sixth and Seventh Circuit Courts of Appeals, it is essential to showcase how states in these jurisdictions do not apply the heeding presumption. R. 6. For instance, Michigan allows an "inference," not a presumption of causation in certain warning defect cases where "the lack of warning is undisputed, and the person exposed is dead." *Allen v. Owens-Corning Fiberglas Corp.*, N.W.2d 530, 535 (Mich. App. 1997). Recently, in Wisconsin (Seventh Circuit), the legislature enacted a new statute that requires claimants in *all* product liability cases to "establish… that the defective condition was a cause of the claimant's damages." Wis. State. §895.047(1)(e). This statute enacted by Wisconsin that assigns a clear burden of proof onto plaintiffs is entirely contradictory to what the heeding presumption attempts to shift onto manufacturers. Yet, juries are still capable of resolving issues in those strict liability failure-to-warn claims. Lastly, to utilize a jurisdiction conceded by even the lower court, in Alabama, a "failure-to-warn adequately case should not be

submitted to the jury unless there is substantial evidence that an adequate warning would have been read and heeded and would have prevented the accident." *Deere & Co. v. Grose*, 586 So. 2d 196, 196 (Ala. 1991).

Here, the jurors from the State of Ohiowa who served as fact-finders for the case at hand had no necessity for the heeding presumption to effectively reach an outcome. Although this outcome was unfavorable for Petitioners, no abuse of discretion occurred in the trial court by disallowing their requested instruction to be given. Moreover, as the lower court even acknowledges, "[i]t cannot be unequivocally stated that the jury would have proffered a different verdict if the requested instruction had been given." R. 12. Thus, by this logic, it remains true that the heeding presumption is not necessary for jurors in the State of Ohiowa to properly resolve the issues of this case. The final element petitioners require has not been met, nor can the totality of all elements be satisfied.

### B. The Appellate Court was Correct when it Acknowledged that Jury Prejudice Remains Untainted Without the Heeding Presumption.

Even if petitioners do meet the elements listed above, no prejudice resulted from the failure to give the requested jury instruction, thus making the heed presumption entirely unnecessary and inapplicable as the law of the land. As the lower court correctly points out, a faulty jury instruction requires reversal when (1) "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) (quotation omitted); and (2) "when a deficient jury instruction is prejudicial." *Coleman v. B-G Maint. Mgmt.*, 108 F.3d 1199, 1201 (10th Cir. 1997).

When looking towards the two elements required for faulty jury instructions to be reversed, it is evident that both have not been met. In regard to the first, substantial doubt whether the

instructions properly guided jury deliberations, the jurors in this case had the opportunity to be guided by the testimony of all named parties. Additionally, the trial court judge is guaranteed broad discretion in formulating appropriate jury instructions. With this in mind, it is irrefutable that the fact-finders here were properly guided in deliberation.

On the notion of prejudice, both the majority and dissenting opinions from the lower court have agreed that no prejudice resulted from the failure to grant the heed presumption. The majority concluded that this was because it cannot be unequivocally stated that the jury would have proffered a different verdict if the requested instruction had been given and the fact that the jury had a "wealth" of evidence upon which to base their decision. R. 12. This includes testimony by all named parties and a jury deliberation for upwards of sixteen hours. R. 12. Consequently, the dissenting judge inevitably concurred with the notion that where no prejudice results from the failure to provide jury instruction, the lower court's decision should not be overturned. R. 13. Thus, as both the majority and minority judges conclude that no prejudice infected the jurors' minds, the district court's decision to disallow the heeding presumption to be given should not be overturned. Hence, the heeding presumption continues to have no home in the State of Ohiowa.

### C. Ohiowa's Public Interest for Protecting Consumers will not Suffer when Disallowing the Heeding Presumption.

When formulating its reasoning to apply the heeding presumption, the lower court ignored that it was presented "a dearth of common law or legislative precedent in regard to the heeding presumption," and nevertheless applied the presumption as the law of land. R. 11-12. This is because public policy favors the consumer in product liability actions in the State of Ohiowa. R. 12. Accordingly, jurisdictions that have adopted a heeding presumption have cited public policy as a reason for their decision. *See Golonka v. GMC*, 204 Ariz. 575, 576 (Ct. App. 2003). While it

is true that manufacturers and distributors of defective products should be held responsible for injuries caused by its products, public policy is best served by rejecting a heeding presumption.

As noted by the Montana Supreme Court, it is not logical to presume that a plaintiff would have heeded an adequate warning, if provided. *See Riley*, 856 P.2d at 135. *Riley*'s logic is sound, as even L.T. ignored his own warnings. Like Ohiowa, Montana's adoption of the Restatement (Second) of Torts § 402A was not a wholesale adoption of the comments accompanying that provision; nor was it constrained by the comments when developing a body of products liability law. *Id*.; *Stenberg v. Beatrice Foods Co*., 176 Mont. 123, 128-29 (1978). Yet, Montana's Supreme Court correctly reached the conclusion that the heeding presumption had no authority. It noted that, in an ideal world, it would be "common sense" for a plaintiff to read an adequate warning and heed the product. *Riley*, 856. P.2d at 135. However, as acknowledged, experiences in life – including that of L.T.'s – bursts the bubble of an ideal world and show that this presumption is simply just not true. "[W]arnings are everywhere in the modern world and often go unread or, where read, ignored… the presumption is not appropriate running in either direction, to the manufacturer/seller where a warning is given or to a plaintiff where it is not." *Id.*

Next, when considering the perceived difficulties involved in requiring a plaintiff to establish the causation element, it is essential to note that the evidence required to establish this element is not qualitatively different than other testimony given by a party in support of his/her prima facie case. *Id*. Here, the jury was able to absorb testimony from all named parties. Thus, it cannot be stated that Petitioner did not have the opportunity to present this evidence when attempting to establish his prima facie case. Instead, because the jurors heard full testimony and were provided ample evidence, the fact-finders were able to reach a conclusion without the necessity or influence of a heeding presumption. Accordingly, as one commentator notes, applying the

heeding presumption would be a slippery slope in the admission for character evidence that is otherwise inadmissible in court, as a defendant would have to focus on character flaws in order to rebut the presumption because other evidence would otherwise be limited. Carrie A. Daniel, *Guide to Defeating the Heeding Presumption in Failure-to-Warn Cases Defense Counsel Must Oppose the Distortion of Comment J's Language into A Presumption That Users Would Read and Heed Instructions,* 70 Def. Couns. J. 250, 259 (2003) (citing *Crowston v. Goodyear Tire & Rubber Co*., 521 N.W.2d 401, 411 (N.D. 1994)). As the commentator continues to note, no studies show that the heeding presumption results in better warnings and no studies show that safer warnings lead to fewer injuries. Hence, the heeding presumption is intrinsically ineffective.

Moreover, the presumption is inconsistent with the policy behind strict liability. To claim that it is consistent with policy would result in "many other changes in a plaintiff's burden of establishing a prima facie case – including the elimination of any burden at all…." *Id*. This court should be unwilling to shift the respective parties' burdens in such a fashion. In order to reubut a presumption of causation, the defendant would need to prove that the warning would not have altered the plaintiff's conduct or that the plaintiff's own negligence caused the injury. *See* 63 Am. Jur.2d., *Products Liability*, § 358 (1984). Undoubtedly, a defendant is in no better position to rebut a presumption which totally excuses a plaintiff from meeting the causation element than a plaintiff is in establishing the causation element as part of the prima facie case**.** *Riley*, 856. P.2d at 136.

Lastly, the Restatement (Third) of Torts, comment j to section 402A of the Restatement (Second) of Torts implies that a manufacturer can satisfy its duty of making products safe by providing adequate warnings. Restatement (Third) of Torts § 2 cmt. i (Am. Law. Inst. 1998). Such a result is logically untenable, as the Nevada Supreme Court has stated. *Rivera*, 125 Nev. at

195. Instead, that court strongly adhered to the principle that a manufacturer must make products that are not unreasonably dangerous, no matter what instructions are given in the warning. *Id*. It therefore concluded that it is better public policy not to encourage a reliance on warnings because this will help ensure that manufacturers continue to strive to make safe products. *Id*. Taking all notions of public policy into consideration, it is clear that a heeding presumption has no home in the State of Ohiowa; even while favoring consumers.

## CONCLUSION

WHEREFORE, Respondent, Zuul Enterprises, requests that this Court: (1) affirm the decision of the Court of Appeals for the Seventh Appellate District Court for the State of Ohiowa because Petitioner does not have sufficient evidence, the Restatement (Second) of Torts contradicts Petitioner's argument, and the expectations for a foreseeable user is one for the trier of fact; and (2) disallow the read and heed presumption because Petitioner cannot satisfy the three necessary elements, prejudice does not infect the fact-finder, and Ohiowa's public policy interest in protecting consumers will not suffer.

Respectfully submitted,

_____/s/Team L_____

Team L
*Counsel for Respondent*

# 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.

**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