No. 20-2206

IN THE

Supreme Court of Ohiowa

LOUIS TULLY,
PLAINTIFF-PETITIONER,
v.

ZUUL ENTERPRISES,
DEFENDANT-RESPONDENT.

On Grant of Certiorari
From the Court of Appeals for the State of Ohiowa

BRIEF FOR DEFENDANT-RESPONDENT

Team ID: N

QUESTIONS PRESENTED

I. Did the appellate court err in affirming Zuul's motion for summary judgment on the Tullys' manufacturing defect claim?

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

STATEMENT OF THE CASE

Zuul is an Ohiowa-based manufacturer of e-cigarettes, established in Cincinnatus. (R. at 4.) Zuul created a product which its founder, Pete Venkman, intended to serve a safer alternative to traditional cigarettes. *Id.* The device works by using an atomizer to heat the liquid in the cartridge into a vapor when the user presses the activator button. (R. at 3-4.) In December 2017, Zuul was enjoined by a federal district court from producing certain sweet vapor flavors, after that court found the sweet flavors were being used to market the e-cigarettes to children.[1] (R. at 4.) The company's stock price subsequently fell and the company was in jeopardy of going bankrupt. *Id.* Responding to the injunction, on June 7, 2018, the company vowed to only produce a "classic tobacco" flavor and made design changes to prevent use of generic cartridges that would circumvent this measure. *Id.* Zuul also began a line of "Zuul skins" adhesive labels that decorate Zuul e-cigarettes, with patterns or images of licensed characters. *Id.* Each Zuul e-cigarette has warnings on its packaging, though the Zuul skins do not contain additional warnings about the danger of the e-cigarettes. *Id.*

On July 17, 2018, L.T., the eleven-year-old child of Louis and Janine Tully, had been entrusted to Dana Barrett, a nineteen-year-old college sophomore. (R. at 5.) Ms. Barrett was a regular caretaker for L.T. *Id.* She was also a frequent used of Zuul brand e-cigarettes since her enrollment in college, and had one such device with her on July 17. *Id.* Ms. Barrett had affixed an "Hola Gato"[2] Zuul skin to her e-cigarette. *Id.* Ms. Barrett had warned L.T. that it was dangerous to play with the e-cigarette "many times." *Id.* Ms. Barrett, at one point that evening,

[1] Zuul contended in litigation, and continues to contend, that it does not market its products to children. *Id.* Still, it continues to operate in good faith to prevent children from using the product. *Id.*
[2] Hola Gato is the titular character in a popular cartoon program. *Id.*

left L.T. and the e-cigarette unattended. *Id.* L.T. eventually gave into the "temptation" to disregard Ms. Barrett's warnings and began playing with the product in the manner of a leaf-blower, while continually depressing the activating button. *Id.* This caused the e-cigarette to explode, causing severe burns to L.T.'s hand. *Id.* Expert testimony at trial identified a faulty connection between the atomizer and activator button on the e-cigarette, overheating the cartridge, increasing pressure, and causing the explosion which injured L.T. (R. at 8.)

Louis Tully brought suit, alleging 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. at 2.) The Court of Common Pleas granted summary judgment for the defendant, Zuul on the manufacturing defect issue, holding that children were not foreseeable users of Zuul's products. (R. at 3.) The warning claim proceeded to trial. *Id.* At trial, the plaintiff sought a jury instruction on the heeding presumption. *Id.* The court sustained Zuul's objection to suggested instruction. *Id.* The jury held for Zuul and the plaintiff appealed. *Id.*

On appeal, Petitioner argued (1) that the trial court erred in granting Zuul's motion for summary judgment on the manufacturing defect claim, and (2) that the trial court committed prejudicial error by refusing to instruct the jury on a "read-and-heed" or heeding presumption. *Id.* The Court of Appeals for the Seventh Appellate District found for Zuul on both issues, over a dissent on the manufacturing defect claim. *Id.* The appellate court unanimously affirmed the trial court's refusal to instruct the jury on a heeding presumption as not prejudicial error. (R. at 13.)

SUMMARY OF THE ARGUMENT

The Ohiowa Product Liability Act (OPLA) requires that a plaintiff be both a consumer and within the class of persons foreseeably subject to harm in order to recover in strict liability. Ohiowa Rev. Code § 5552.368. This recovery standard is narrower than that of the Restatement (Second) of Torts § 402A, on which the statute is based. Noticeable departures from the Restatement's text, such as the absence of the phrase "ultimate user" in the OPLA and the presence of a foreseeability requirement, evince the intention of the Ohiowa legislature to narrow strict liability for defective products.

In the present case, the Petitioner meets neither of the critical thresholds set out in the OPLA, and a finding for the Petitioner would require an expansion of the OPLA standard far beyond its text, or even the text of § 402A. Petitioner was not an intended user of the product, to use the common standard interpreting § 402A, nor was he using the product in an intended or even foreseeable way. To allow recovery under these unfortunate facts would expand Ohiowa's strict liability law, undermining the legislative intent and the unambiguous statutory text.

Petitioner also seeks for this Court to relieve him of his burden of proof on the causation element of the failure to warn claim by adopting into state law a "read and heed" or heeding presumption. The element of causation is an essential aspect of product liability cases, and tort law in general, which assures that liability is reserved for those who are actually responsible for an injury. The heeding presumption allows a plaintiff to avoid having to prove causation in a failure to warn case, shifting the burden onto the defendant instead. Because plaintiffs have unique access to the kinds of evidence relevant to causation, in many cases defendants will be unable to disprove causation and liability will be apportioned unfairly. The causal presumption runs afoul of public policy, is unfair to defendants, and does not logically follow from the

Restatement (Second) of Torts. Perhaps most importantly, the presumption is not based in reality; scientific evidence does not show that people (and especially children) ordinarily read or heed warnings and common experience rebuts such a finding.

Even if this Court adopts a heeding presumption into Ohiowa, it should not reverse the decisions of the trial court and the appellate court, and nor should it disturb the findings of the jury. As several states have recognized, the presumption shifts back to the plaintiff when defendants rebut with evidence that the plaintiff would not have heeded an adequate warning. L.T.'s age, his irresponsible conduct, and his failure to heed Ms. Barrett's repeated warnings, all rebutted the presumption and shifted the burden back to the plaintiff. Petitioner failed to meet that burden and was thus not entitled to an instruction to the jury. Even if Petitioner had been entitled to a jury instruction on the presumption, the record lacks any evidence tending to show causation and thus, this Court would have no basis to find prejudice in the trial court's decision.

ARGUMENT

I. THE TRIAL COURT'S GRANT OF SUMMARY JUDGEMENT FOR RESPONDENT ON PETITIONER'S MANUFACTURING CLAIM WAS PROPERLY GRANTED

A. The OPLA Requires that a Plaintiff Be Both a Consumer and in the Class of Persons Foreseeably Subject to Harm in Order to Recover

The OPLA creates a cause of action for persons injured by a defective product. It sets out four key requirements that must be met in order to impose liability for a manufacturing defect on the manufacturer of a product. First, the product must be defective or in a defective condition that is unreasonably dangerous to a consumer or consumer's property. Ohiowa Rev. Code § 5552.368.[3] Second, the injured party must be a consumer. *Id.* Third, that consumer must be "in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition." *Id.* Finally, the product must be expected to reach and actually reach the consumer without substantial alteration in condition.[4]

Unlike the Restatement (Second) of Torts § 402A (1965), the OPLA's Rule of Liability requires both that the plaintiff be a consumer and that the plaintiff be reasonably foreseeable as a subject of harm in order to recover for defective condition. The OPLA is indeed largely based on § 402A, (R. at 8.), however the OPLA contains key textual differences. Most notably, the OPLA requires that the injured party be a consumer, and that the consumer be "in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defect or defective condition." Ohiowa Rev. Code § 5552.368(a). In contrast, § 402A, allows the party to

[3] To meet this standard, the product must have (1) deviated materially from the design specifications, formula, or performance standards of the manufacturer; (2) been in a condition not contemplated by reasonable persons among those considered expected consumers for the product; or (3) been in a condition that is unreasonably dangerous to the expected consumer when used in reasonably expectable ways. Ohiowa Rev. Code § 5552.369 (a)(1)-(3). The courts below found that there was no dispute on the issue of defective condition. (R. at 8.)

[4] The "no substantial alteration" element is not at issue on this appeal.

be either "an ultimate user *or* consumer," and makes no mention of foreseeability. Restatement (Second) of Torts (emphasis added). Thus, the OPLA narrows liability to only consumers who are foreseeable, while § 402A may allow suit by either a user or consumer, foreseeable or not.

Petitioner has asserted that the introduction of a statutory foreseeability requirement substitutes that foreseeability for the common law "intended use" and "intended user" standards. That argument confuses the role of these standards. These standards are common law tests for determining who constitutes a user or consumer for the purposes of liability. *See Phillips v. Cricket Lighters*, 841 A.2d 1000, 1003 (Pa. 2003). In contrast, the foreseeability requirement is an additional, statutory element that the OPLA requires to make out a cause of action. Foreseeability must be demonstrated to make out a claim under the OPLA, but the fact that a user of a product is foreseeable is not sufficient to consider them a consumer for the purposes of assigning liability.

The use of separate terms for "consumer" and "the class of persons that [are foreseeably injured]" is dispositive of the argument that these concepts are separate; if "consumer" meant merely all users in the class of persons that the seller would reasonably foresee as subject to harm, then the provision would be circular. It would be as if the statute created liability for physical harm where a "consumer was a consumer." Wherever possible, courts construct different statutory words or phrases to carry different meanings. *See e.g. BNSF Railway Company v. Loos*, 139 S.Ct. 893, 902 (2019). The only way to avoid such circularity and to give different meanings to different words, is to read "consumer" as requiring something other than being in a class of persons foreseeably injured.

Moreover, "consumer" is a term of art that carries a definition independent of foreseeability. As the Restatement (Second) observes, common law courts have generally

defined "consumption" as use of a product in the way intended by the producer and that courts have refrained from expanding liability beyond such consumers. § 402A, cmts. (l) and (o). Statutes that contain well-defined words at common law often carry those meanings into their statutory context. *See e.g. Jam v. International Finance Corp.*, 139 S.Ct. 759, 770 (2019). Nor does the ordinary meaning of "consumer" conform to a foreseeability test. *See Consumer*, *Black's Law Dictionary* (11th ed. 2019) (first definition defining consumer as "[s]omeone who buys goods or services for personal, family, or household use, with no intention of resale").

To illustrate this argument, if a statute allowed for "any farmer" to sue if that farmer were "in the class of persons that the seller should reasonably foresee as being subject to the harm caused by a product defect or defective condition," surely nobody would contend that the word "farmer" takes on the meaning of any person foreseeably harmed by the product. Rather, under such a statute, a plaintiff would clearly have to show both that they were foreseeably harmed *and* that they were a farmer in order to recover.

In practice, both status as a consumer and foreseeability will often be present simultaneously. *Riley v. Warren Mfg., Inc.*, 688 A.2d 221, 228 (Pa. 1997). Indeed, when the marketing process (bringing products to the people who foreseeably want to use them) works, both conditions will ordinarily be present. However, the two conditions do not always coincide. There are individuals who could be classified as foreseeably subject to harm, but still do not fall under the OPLA, as they are not the intended users of the product. The trial court granted the summary judgement motion based on the proposition that children are not foreseeable users of Zuul devices, and therefore cannot recover under the OPLA. (R. at 2-3.) The appellate court upheld on the grounds that L.T. is not a consumer for the purposes of the OPLA, given he used the product for purposes unintended for the product. Because neither condition, foreseeability

nor consumer-status, is met under the facts of the present case, this court should affirm the grant of summary judgment.

B. A Child Engaged in the Use of an E-Cigarette Is Not an Intended User and thus Not a Consumer Under the OPLA

The absence of the phrase "ultimate user" in the OPLA, indicates that the legislature intended a more restrictive standard than under § 402A, only allowing recovery if a party is a consumer. (R. at 9.) The statute does not define the word "consumer." Rather, "consumer" is a legal term of art whose definition is best understood by the common law meaning of who constitutes a consumer. *See Info-Hold, Inc. v. Sound Merchandising, Inc.*, 538 F.3d 448, 455 (6th Cir. 2008) (when a statute includes "terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that [the legislature] mean[t] to incorporate the established meaning of [those] terms").

The "intended user" standard forms the common law definition of who is a consumer in product liability law. The comments to § 402A clarify that "consumption includes all ultimate uses for which the product *is intended*." Restatement (Second) of Torts § 402A cmt. (l) (emphasis added). The Pennsylvania Supreme Court, for example, has ruled that "a product need be made safe only for its intended user." *Phillips* at 1003. In *Phillips*, the plaintiff argued that a foreseeability standard applied to a product defect claim, where a child had been injured while using a cigarette lighter. *Id.* at 1006. The Court rejected the argument, stating that, under § 402A "negligence concepts have no place in strict liability" and that strict liability places "the product itself … on trial, and not the manufacturer's conduct." *Id.* at 1007 (quoting *Lewis v. Coffing Hoist Div., Duff-Norton Co*., 528 A.2d 590 (1987); *Kimco Dev. Corp. v. Michael D's Carpet*

Outlets, 637 A.2d 603 (1993)); *see also Rigby v. Beech Aircraft Co.*, 548 F.2d 288, 290-91 (10th Cir. 1977) (employing the "intended use" standard in interpretation of § 402A).

Under the "intended user" standard, children are not consumers of adult goods. In *Riley v. Warren Mfg., Inc.*, the Court held that a child is not the intended user or consumer of a bulk feed trailer. 688 A.2dat 398. Similarly, in *Van Buskirk ex rel. Van Buskirk v. W. Bend Co*., the District Court held that children are not intended users of deep fryers for the purposes of § 402A. 100 F. Supp. 2d 281, 284 (E.D. Pa. 1999), *aff'd sub nom,* 216 F.3d 1078 (3d Cir. 2000). The courts in these cases found that the children were not the intended users of the products, even where it was legal and foreseeable that a child might use these products. The legal prohibition on children purchasing and using e-cigarettes strengthens the case that children are not the intended users of e-cigarettes. (R. at 4.) L.T. was handling a product which he was not legally allowed to procure and did not own. (R. at 5.) It was not a product which Zuul could have legally intended for L.T. In fact, Zuul is *enjoined* by a federal district court from intending children to be the users of these products. *Id.* Thus, as a matter of law, he could not be the intended user. In addition, he used the device against the wishes of the device's actual owner, Ms. Barrett, and in a way not intended by the manufacturer. (R. at 5.) Zuul does not intend for an eleven-year-old child to use their product, especially in this manner. Instead, Zuul products are intended to be used as a safer alternative to tobacco cigarettes. (R. at 3.) It is not a toy.

The previous case regarding flavored cartridges does not bolster the claim that L.T. was a consumer under the OPLA. The finding that Zuul had engaged in marketing to children only applied to conduct occurring before the issuance of the injunction in December 2017, months before the date of the accident, and the findings only related to the marketing of certain sweet vapor flavors, not to the use of adhesive designs. *Id.* Certainly, basic principles of issue

preclusion and fairness would not bind Zuul to the findings of the prior decision, which related to different conduct and a different time period. *See* Wright & Miller, 18 *Fed. Prac. & Proc. Juris.* § 4420 *Issue Preclusion* (3d ed.).

Instead, the record clearly demonstrates that Zuul took major steps to prevent minors from desiring the product and from obtaining the product. Zuul changed its line of flavors to only include tobacco-flavored vapors. (R. at 4.) Moreover, it modified the design of its product to prevent use of generic cartridges, which might circumvent age or flavor restrictions. *Id.* And, the fact that Ms. Barrett, a nineteen-year-old college sophomore, purchased an "Hola Gato" skin is strong evidence that the personalization options offered by these skins were not some covert way for Zuul to market e-cigarettes to children. Instead, there was sufficient demand from adults to add a fun, personal flare to what is clearly an adult product. At any rate, L.T. was not enticed to buy this product, to own this product, or to use this product in any fashion. As in *Riley* and *Van Buskirk*, the child simply misused a product which did not belong to him, and was not intended for him, and thus the manufacturer did not owe him a duty. 688 A.2d 221; 100 F. Supp. 2d 281.

C. When a Plaintiff Misuses a Product, He Is No Longer a Consumer Under the OPLA and Recovery Is Barred

Petitioner's argument at the intermediate appellate level, which hinged on foreseeability, did not address the fact that L.T's manner of use of the product would bar him from being considered a consumer under the OPLA. In order to be a proper, or intended, consumer, one must consume the product as intended. That is to say, how a party consumes a product is part of his classification as a consumer. As Comment h of § 402A makes clear, a seller not liable in the cases of abnormal handling, preparation, or consumption. Restatement (Second) of Torts § 402A

cmt. h. By not using the product properly, L.T. excluded himself from the intended class of consumers as a matter of law.

Zuul's product is not a toy, and is certainly not marketed in any way to be used as a leaf blower. (R. at 3.) The Eleventh and Seventh Circuits, applying § 402A, have ruled that a lighter was not intended to be used as a plaything, and thus the failure to childproof the lighter did not amount to a product defect. *Todd v. Societe BIC, S.A.*, 9 F.3d 1216, 1219 (7th Cir. 1993); *Jennings v. BIC Corp.*, 181 F.3d 1250, 1253 (11th Cir. 1999). The ordinary child-focused design precautions for a toy do not apply to products which are not toys, as a matter of law. *Id.* As in these cases, Zuul's e-cigarettes are not intended to be used as toys the way L.T. used them, even if the harm he suffered were foreseeable.

L.T. was not an intended user and was not using the product for its intended use. He was too young to use the product legally and Zuul did not want its product to fall into children's hands. L.T. could not legally purchase a Zuul e-cigarette, or its cartridges, nor could he legally use the product to inhale nicotine vapor. L.T.'s use of the product, as a toy leaf blower, is not even remotely close to the actual intended use of an e-cigarette. Even if Zuul had marketed e-cigarettes to minors, it was never marketed as a toy for eleven-year-olds to play with. To be a consumer for the purposes of the OPLA, one must be a consumer, meaning an intended user using the product for its intended use. L.T. is not a consumer and therefore, summary judgment was appropriate.

D. A Child Engaged in Misuse of an E-Cigarette Is Not Foreseeably Subject to Harm

In order to recover, Petitioner must demonstrate that L.T. was "in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defect." Ohiowa Rev. Code § 5552.368. Foreseeability is an independent requirement for recovery. Petitioner

failed to make out an issue of material fact on the issue of foreseeability, and thus summary judgment on the issue was appropriate, independent of whether L.T. was an intended consumer using the product as intended.

The Petitioner argued that there is an issue of material fact whether Zuul could foresee a child as a user of its product. (R. at 3.) Simply put, nothing in the record indicates that Zuul did anticipate or should have anticipated that this specific defect would have harmed an eleven-year-old boy. The record indicates that the accident was caused by the repeated pressing of the activating button. (R. at 7-8.) Such misuse is inconsistent with ordinary use of an e-cigarette and more consistent with the highly unusual game that L.T. decided to play. How Zuul was supposed to anticipate an eleven year old child using its tobacco vaporizer like a leaf blower is unclear on this record.

Further, none of L.T.'s unusual conduct was possible without Ms. Barrett's intervening failure to monitor the use of this product. Such intervening causes are often incredibly difficult to predict or foresee. *Halliday v. Sturm, Ruger & Co.*, 770 A.2d 1072, 1094 (2001), *aff'd,* 368 Md. 186, (2002). It is simply unfair to assign strict liability for a product that only made its way into a child's hands through insufficient supervision. These circumstances were entirely unknown and unpredictable to Zuul. In *Halliday, Jennings,* and *Todd,* the courts prevented recover because an adult failed to act on a warning to keep the product out of reach of a child. *Id.*; 181 F.3d at 1256; 9 F.3d at 1218. In these cases, the warning served to establish the adult's knowledge of the danger, in order to show that the harm the child was placed in was unforeseeable. *Id*. A written warning in the present case is unnecessary given Ms. Barrett's actual recognition of the danger her device could pose to a child, and her specific understanding that L.T. should not be allowed access to it, evidenced by her warning to him. (R. at 5.) As in *Phillips*, the injured party was not

intended to be the user of the product, either by Zuul or by Ms. Barrett. Indeed, L.T. proceeded to pick up and operate the device despite warnings given to him by Ms. Barrett. As a result, as the trial court noted, L.T. was not a foreseeable user of the product, and therefore not foreseeably subject to harm. (R. at 3.)

L.T. was neither a consumer of the e-cigarette nor was he a foreseeable subject to harm. Failing either condition would place him outside the protections of the OPLA, and make summary judgement appropriate. Petitioners fail on both counts. This court should affirm.

II. THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON A "READ-AND-HEED" OR "HEEDING" PRESUMPTION

A. The Heeding Presumption Undermines the Traditional Causation Requirement in a Failure-to-Warn Case

In a failure-to-warn case, as in all strict products liability cases, it is the plaintiff who bears the burden of proof. *Rivera v. Philip Morris, Inc.*, 209 P.3d 271, 275 (Nev. 2009) ("[t]o successfully prove a failure-to-warn case, a plaintiff must produce evidence demonstrating the same elements as in other strict product liability cases"). In such a case, the plaintiff bears the burden of proving that "(1) the product had a defect which rendered it unreasonably dangerous, (2) the defect existed at the time the product left the manufacturer, and (3) the defect caused the plaintiff's injury." *Id.* (quoting *Fyssakis v. Knight Equipment Corp.*, 108 Nev. 212, 214 (Nev. 1992)). In a failure-to-warn case, the alleged defect is an inadequate warning and causation can be proved by showing that a better warning would have altered how the plaintiff used the product in a way that would have avoided injury. *Id.*

A heeding presumption, which petitioners are asking to be adopted into Ohiowa law, would depart from the established principles of products liability law and tort law in general. To

upset such well-settled principles would undermine fairness, by placing liability on those not actually responsible for an injury. Moreover, the arguments in favor of a heeding presumption fall far short of what is necessary to work major shifts in the ordinary products liability regime. A heeding presumption relieves the plaintiff of his or her burden of proof on the causation element and places the burden on the defendant to *disprove* causation, by proving that a better warning would not have been read or heeded by the plaintiff. *Id.* Causation is an important limitation on liability to ensure recovery is socially desirable and that liability only falls onto those who are actually responsible for causing harm. *See Klages v. General Ordnance Equip. Corp.*, 367 A.2d 304, 313 (Pa. Super. 1976). While presumptions exist in many areas of the law, they are not the norm and must be affirmatively justified.

B. The Heeding Presumption Impedes the Jury's Truth-Seeking Function

Presumptions are most frequently justified by the high probability that, if some predicate facts are present, a particular fact is so likely to follow that it makes logical and practical sense to presume that fact absent rebuttal evidence.[5] 29 Am. Jur. 2d *Rationale for Presumptions* § 199 (2019); *see also Wager v. Moore*, 193 Conn.App. 608, 617 (Conn. App. 2019) ("[w]hen we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion"). Beyond high probability, Professor McCormick's treatise on evidence cites an additional three bases for the erection of a presumption: (1) fairness based on asymmetric access to proof necessary to prove the burden (i.e. one party has access to evidence that the other party lacks), (2) procedural convenience to avoid an impasse, and (3) the fostering of social or

[5] For example, many courts call for a presumption that a person is dead when nobody has seen or heard from that person in seven years. This presumption is based in the likelihood that such a person has indeed passed. *See* 22A Am. Jur. 2d *Death* § 385 (2019).

economic policy. John W. Strong et al., *McCormick on Evidence* § 343 (4th ed. 1992). Most presumptions are justified by the presence of more than one of these considerations.[6] *Id.*

A presumption that consumers frequently read and heed warnings on products is unsupported by scientific evidence and contradicts common experience. In *Riley v. Honda Motor Co.*, the Montana Supreme Court, in rejecting the heeding presumption, observed the ubiquity of warnings in the modern world and that they "often go unread or, where read, ignored." 259 Mont. 128, 135 (Mont. 1993); *accord Rivera v. Phillip Morris Inc.*, 209 P.3d 271, 277 (Nev. 2009) (quoting *Riley*). The court noted that people may read and heed warnings in an ideal world but that such a reality is not one we live in. *Id.* Indeed, common experience tells us that product users routinely overlook or disregard written warnings for a variety of reasons: the user is distracted or in a rush, the user is basing his usage on the observation of others rather than a written warning, or the user perceives reading warnings as a waste of time. The facts of our present case underscore that many users are simply too impulsive in their use to read warnings or would have difficulty comprehending an adequate warning, if given.

That consumers rarely read, let alone heed, warnings is apparent based on everyday observation but this Court need not rely solely on its own perceptions or the observations of other courts. Significant research effort has sought to empirically substantiate the idea that consumers generally "read and heed," yet researchers have largely failed to find any evidence for such a proposition. *See generally* Hildy Bowbeer & David S. Killoran, *Liriano v. Hobart Corp.: Obvious Dangers, the Duty to Warn of Safer Alternatives, and the Heeding Presumption*, 65

[6] An illustrative example is the burden shifting that occurs in employment discrimination cases. When a plaintiff establishes a prima facie case for discrimination, the defendant must rebut with a non-discriminatory basis for the challenged employment action. *See McDonnell Douglas Corp. v. Greene*, 411 U.S. 792, 802 (1973). This is based on (1) the high probability that when the prima facie case is met, the intent was discriminatory, (2) the employer's superior access to evidence of intent, and (3) the vindication of important statutory and constitutional rights.

Brook. L. Rev. 717, 757 (1999) (citing numerous empirical papers). This applies to controlled research experiments, where test subjects are exposed to warning labels and monitored for changes in behavior, as well as analysis of accident data to see whether the presence of warnings decreased the likelihood of accidents. *Id.* Whether on-product warnings have *ever* been found to modify safety-related behavior of consumers is a matter of debate among researchers. *Id.* (citing Eli Cox, *Do Product Warnings Increase Safe Behavior? A Meta-Analysis*, 16 J. Pub. Pol'y & Marketing 195-204 (1997)). Courts in this country are increasingly demanding rigorous, empirical evidence from litigants before reaching conclusions and yet, Petitioner in this case seeks a presumption unsupported by scientific evidence and contradicted by ordinary experience.

To instruct the jury to follow the heeding presumption is to ask them to presume facts which are unlikely to be present, that is that people ordinarily follow written warnings on products. Given the centrality of the truth-finding function of the jury to our judicial system, a presumption which makes it more difficult for the jury to reach the truth on the relevant evidence should not be adopted into law.

C. The Heeding Presumption Places the Burden of Proof on the Party with the Least Access to Evidence

The heeding presumption is similarly unsupported by the other traditional bases for establishing presumptions in law. It does not, for example, correct an asymmetry in the parties' access to evidence. In assessing the likelihood that the plaintiff would have read and heeded an adequate warning, relevant evidence would show the plaintiff's "knowledge, practices, judgment, attention, and state of mind." *Id.* All of these facts are uniquely accessible by the plaintiff and the presumption shifts the burden onto the party with the least information available to it. *See Riley*, 259 Mont. at 134 ("a defendant certainly 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"). Not only is it unfair to push a burden onto the party with less access to evidence, it makes it all the more likely that the jury will be able to reach an accurate decision based on evidence.

Nor is this presumption necessary to avoid "an impasse." Relevant evidence showing plaintiff's character and condition at the time of the accident, such as the plaintiff's testimony or testimony of those who have observed and know the plaintiff, will generally be easy for the plaintiff to identify and present at trial. There is nothing unique about this element that would make an impasse likely.

Some courts, recognizing a heeding presumption, have noted that while a plaintiff may be able to testify to their propensity for following directions, their ordinary judgment, their state of mind at the time, or other similar considerations, such testimony is "self-serving" and "speculative" and thus of lower probative value. *See e.g. Nissen Trampoline Co. v Terre Haute First Nat'l Bank* 332 N.E. 2d 820, 826 (Ind. App. Ct. 1975); *Coffman v Keene Corp.* 628 A2d 710, 719 (NJ 1993). It is true that in some cases the testimony may be self-serving, but as the court in *Riley* observed, that is not a unique feature to this cause of action or this element. 259 Mont. 128, 135. Juries routinely assess the credibility of witnesses engaged in testimony that is speculative and self-serving, and often without the aid of a presumption favoring the plaintiff. *Id.* Moreover, defendants' rebuttal evidence will by necessity be more speculative and similarly self-serving, given manufacturers rarely have knowledge of a defendant's character, habits, or state of mind at the time of the accident. *Id.*

D. The Heeding Presumption Violates the Public Policy of Ohiowa

Finally, the read-and-heed presumption does not on balance serve political or social interests. It should first be noted that there is no greater public policy goal served by trials than

the truth. A presumption that tends to push juries away from the truth on the issue of causation cannot be justified on generic appeals to "public policy" considerations, given the importance of truth-finding. Indeed, "trial by jury *is* the truth-finding process." *Bowman v. Leverette*, 289 S.E.2d 435, 446 (W. Va. 1982) (emphasis added).

Still, some courts that have recognized the presumption have theorized that expansive liability for failure-to-warn cases would cause manufacturers to put more resources into warning consumers. *See e.g. Coffman* 628 A.2d at 720 (N.J. 1993). However, the heeding presumption has nothing to do with the adequacy of a particular warning but instead whether there was a sufficient nexus between the failure to warn and the injury; the inadequacy element stands independent. If courts wish to encourage more or better warnings, the presumption should relate to the adequacy element, not the causation element. A presumption on causation actually has the perverse effect of imposing liability on those for whom spending additional resources would not have prevented the injury.

Additionally, simply inducing manufacturers to add more prolix warnings to their products, many of which are already covered with warnings, actually makes it less likely that consumers read or heed *any* warnings at all. *See Cotton v. Buckeye Gas Prods. Co*., 840 F.2d 935, 938 (D.C. Cir. 1988) ("[t]he inclusion of each extra item [in a warning] dilutes the punch of every other item. Given short attention spans, items crowd each other out"); *Broussard v. Continental Oil Co.*, 433 So. 2d 354, 358 (La. Ct. App. 1983) ("[a]s a practical matter, the effect of putting at least ten warnings on the drill would decrease the effectiveness of all the warnings").

Without a strong reasonable basis for subverting the ordinary burdens of proof on proximate cause, this Court should refuse to do so.

E. The Heeding Presumption is Not the Logical Corollary of Comment j

The most common justification offered for the heeding presumption is that it logically follows from the presumption created in favor of defendants in Restatement (Second) of Torts, § 402A, Comment j. *See Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534, 537-538 (Pa. Super. 2003) ("[m]any courts that have adopted the 'heeding presumption' have found a rationale for its use in Comment j"). Close analysis of Comment j, though, reveals that the text does not create a presumption in favor of plaintiffs, nor was it intended to do so.

Comment j only creates a presumption in cases where the manufacturer provided a warning and that warning was ignored by the plaintiff. The text of the comment reads:

> In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning on the container, as to its use . . . *Where warning is given*, the seller may reasonably assume that it will be read and heeded; and *a product bearing such a warning*, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

Restatement (Second) of Torts, § 402A, Comment j (emphasis added). The comment allows for manufacturers who provide warnings to assume that consumers will observe those warnings. On its face, the text of Comment j only applies to situations where manufacturers did indeed affix warnings and the comment creates a presumption only in the defendant's favor. *See Potthoff v. Alms*, 583 P.2d 309, 311 (Colo.App. 1978) ("[v]iewed in context, however, the Comment establishes only the sufficiency of warnings or directions as to use 'in order to prevent the product from becoming unreasonably dangerous'").

Rather than confining the presumption to the text, some courts have expanded it to benefit plaintiffs in cases where there had not been an adequate warning, as a "logical corollary" of Comment j. This atextual expansion is not a logical corollary. When the Restatement says

manufacturers may "reasonably assume that [a warning] will be read and heeded," it is not commenting on the likelihood that an individual plaintiff will observe the warning. James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 279 (1990). Rather, it is setting a standard for manufacturers to fulfill their duty to warn consumers. *Id.* Once that duty is met, the cause of action fails and the causation element is not even reached at all. *Id.* As Professors Henderson and Twerski point out "Comment j never addresses the causation issue, as such, nor does it create any presumption of individualized causation benefiting defendants." *Id.*

The argument that Comment j does not support petitioner's construction is supported by subsequent developments in the Restatement. In adopting the Restatement (Third) of Torts: Products Liability, the American Law Institute rejected Petitioner's construction of Comment j. *See Uniroyal Goodrich Tires Co. v. Martinez*, 977 S.W. 2d at 336 (Tx. 1998) (the Third Restatement "expressly rejects the Comment j approach"). The Reporters' Notes in the new Restatement refer to Comment j as having "unfortunate language" that "has elicited heavy criticism from a host of commentators." Restatement (Third) of Torts: Products Liability § 2, Reporters' Note, cmt. l (citing Latin, *Good Warnings, Bad Products, and Cognitive Limitations*, 41 U.C.L.A. L.REV. 1193 (1994); Twerski, et al., *The Use and Abuse of Warnings in Products Liability: Design Defect Comes of Age*, 61 CORNELL L.REV. 495, 506 (1976)). Petitioners would have this court ignore the resounding criticism of those commentators and adopt the atextual reading of Comment j's "unfortunate language" into law.

F. The Trial Court's Refusal to Instruct the Jury of a Heeding Presumption Does Not Constitute Reversible Error, Even if This Court Recognizes a Heeding Presumption

i. The Heeding Presumption Is Inapplicable Where the Plaintiff Had Knowledge of the Danger

The heeding presumption is predicated on the notion that ordinary people will read and heed an adequate warning if one is given. *Arnold v. Ingersoll-Rand Co.*, 834 S.W.2d 192, 194 (Mo. 1999) (en banc). Therefore, for the presumption to be relevant, there must be a finding that the information provided by an adequate warning was not already known to the plaintiff. *Id.*; *accord Blackwell Burner Co. v Cerda*, 644 S.W. 2d 512, 516 (Tex. App. Ct. 1982) ("the failure to warn an individual of a risk which he is already aware of cannot be the producing cause of his accident"). In *Arnold*, the Missouri Supreme Court held that to get the benefit of the presumption, the plaintiff needed to demonstrate that a warning would have imparted additional information. 834 S.W.2d at 194.The court held further that the plaintiff was not entitled to a jury instruction of the presumption where it had not met its burden on this threshold matter. *Id.* ("plaintiffs did not meet their burden of proof on the element of causation and the instruction on failure to warn should not have been submitted to the jury").

In *Viguers v. Phillip Morris*, the Pennsylvania Supreme Court considered whether the heeding presumption applied to a case in which the plaintiff claimed a cigarette manufacturer had failed to warn the plaintiff of the dangers of smoking. 837 A.2d 534, 537-38 (Pa. 2003). The court held that evidence showing public knowledge of the dangers of smoking during the relevant time period adequately rebutted the presumption of causation. *Id.* at 539. The court held that once this evidence had been presented, "the burden of proof had shifted back" to the plaintiff. *Id.* The court affirmed the trial court's grant of summary judgment on the issue of causation. *Id.*

In a strikingly similar case to the one before this Court, the Vermont Supreme Court held that where a seven-year-old child had ignored his father's warnings on how to use a BB gun, not only was the heeding presumption overcome, but the defendant was entitled to summary judgment. *Menard v. Newhall*, 373 A.2d 505, 506-07 (Vt. 1997). That Court recognized a heeding presumption but held that it merely "shifts the burden" and that when the defendant presented evidence that the minor child had been warned by his parent about the dangers of the gun "the presumption disappears." *Id.* at 506. The Court noted that once the defendant had eliminated the presumption by showing the minor had ignored the instructions of his father, there was no issue of fact left for the jury and affirmed the grant of summary judgment. *Id.* at 507.

Plaintiff in this case knew that it was dangerous to play with the product. The record establishes that he had been warned "many times that it was dangerous to play with the e-cigarette" before he picked it up and used it in the manner that he did. (R. at 5.) Once this evidence had been introduced at trial, any presumption of causality had been rebutted and the burden of proof had shifted back to the plaintiff. It would have been inappropriate for the court to inform the jury of a presumption which no longer applied. The court certainly did not commit prejudicial error by refusing to present the presumption.

ii. <u>The Record, Even When Applying the Heeding Presumption, Could Not Support a Finding of Causation for the Plaintiff</u>

There is no evidence in the record to support a finding of proximate cause. In this case, "the jury had a wealth of evidence upon which to base their decision" and "[t]estimony was given by all named parties." (R. at 12.) Yet, no evidence preserved in the record supports the idea that this plaintiff would have read and heeded a manufacturer warning. Presumptions themselves are not evidence and "it is a mental impossibility to weigh a presumption as

evidence." *Speck v. Sarver*, 128 P.2d 16, 21 (Cal. 1942) (J. Traynor, dissenting); *see also* 29 Am. Jur. 2d, Evidence § 160 ("[a] presumption is a rule of law which attaches definite value *to specific facts* or draws a particular inference as to the existence of one fact, not actually known, arising from its connection *with other particular facts which are known or proved*") (emphasis added). The party benefiting from a presumption must still produce some evidence supporting its burden of proof. *Id.* The plaintiff's failure to produce or preserve evidence on the issue of causation creates an uncontroverted record against causation.

Moreover, the facts of this case overwhelmingly rebut a finding that L.T. would have read and heeded a warning. For the jury to believe that L.T. would have in fact read and heeded the warning, it would have to find that (1) he would have read the warning, (2) he would have understood the warning sufficiently to internalize the danger, and (3) he would have heeded the warning and modified his conduct to avoid the injury. Plaintiff was eleven years old at the time. (R. at 5.) Even it can be said that adults ordinarily read and heed warnings, few would contend that children, in their relative impulsiveness and imprudence, read and heed written product warnings. *See Hecht Co. v. Jacobsen*, 180 F.2d 13, 15 (10th Cir. 1950) (children "cannot and do not exercise the same degree of prudence for their own safety as adults, [and] they are often childish and impulsive"). The jury, applying common wisdom, understood that children are rarely found examining consumer products for proper instructions or warnings.

Beyond the plaintiff's age, the facts in the record conclusively show the plaintiff's character for disregarding safety warnings. The plaintiff had been warned "many times that it was dangerous to play with the e-cigarette" but he still gave into the "temptation." (R. at 5.) While L.T.'s injury is indeed tragic, his conduct clearly shows immaturity and a youthful lack of

judgment[7], playing with the e-cigarette in the manner of a leaf blower. *Id.* If L.T. had not yielded to the repeated warnings of a trusted adult caretaker, it is unclear why he would have yielded to an impersonal, written warning from the manufacturer, even assuming he could read understand such a warning.

The notion that this eleven-year-old plaintiff would have read and heeded an adequate warning printed on this product is so fundamentally at odds with everyday experience, that even a presumption operating in law could not support such a finding. The record is clear. The jury operated in its truth-finding function when it found that Plaintiff had not in fact proved its case. This Court should not disturb that finding.

[7] Numerous cases stand for the proposition that laxity of judgment rebuts the heeding presumption, including, notably, *Technical Chemical Co. v Jacobs*, the seminal case for the heeding presumption. 480 S.W.2d 602, 606 (Tx. 1972); *see also Seley v. G. D. Searle & Co.*, 423 N.E.2d 831, 839 (Oh. 1981).

CONCLUSION

For the above stated reasons, respondent asks the Supreme Court of Ohiowa to affirm the judgment of the Court of Appeals of Ohiowa.

Respectfully submitted,

X _____

Team N

Counsel for the Defendant-Respondent

Dated: January 31, 2020