THE SUPREME COURT

STATE OF OHIOWA

Case No. 20-2206

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LOUIS TULLY, as father and natural

Guardian for minor L.T.

And in his own right,

Petitioner,

v.

ZUUL ENTERPRISES, an Ohiowa

Corporation,

Respondent.

On Appeal from the State of Ohiowa Court of Appeals
For Drummond County

RESPONDENT'S BRIEF ON APPEAL

January 31, 2020

Team T.

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II. Whether the read and head doctrine applies to strict liability failure-to-warn claims in the State of Ohiowa when plaintiff must first prove proximate causation and even if the presumption applied, facts of the present case would be rebutted by the evidence as a matter of law, when the read and heed doctrine is contrary to the State of Ohiowa's public policy, as it is not the law most favorable to the consumer, and when adopting the presumption is outside of the judicial scope.

STATEMENT OF THE CASE

NATURE OF THE CASE. This is an appeal from the Court of Appeals for the State of Ohiowa in the Seventh Appellate District, Drummond County affirming defendant Zuul Enterprise's Motion for Summary Judgment on plaintiffs' manufacturing defect claim and finding that the trial court did not abuse its discretion in denying plaintiffs' requested jury instruction. (Op. at 4). The Supreme Court of the State of Ohiowa granted certiorari. (Op. at 1).

COURT PROCEEDINGS. Plaintiffs, Louis Tully, on behalf of minor L.T., sued defendants Zuul Enterprises in the Court of Common Pleas alleging that Zuul violated state product liability law due to a manufacturing defect in Zuul's e-cigarette. Plaintiffs allege that (1) the Zuul product in question, which exploded in the plaintiffs' child's hand, violated state product liability law in regard to a manufacturing defect, and (2) Zuul's product warning was not sufficient to warn consumers of the risks associated with the product. (Op. at 2). As part of their claim, the plaintiffs requested the Court provide an instruction to the jury on the heeding presumption, a matter of first impression in this jurisdiction. Zuul filed a motion for Summary Judgment on the manufacturing defect claim, which the lower Court granted. (Op. at 2-3). Trial proceeded on the failure-to-warn claim, and the jury found for Zuul after plaintiffs' request for a jury instruction on the heeding presumption was denied. (Op. at 3). Plaintiffs timely appealed the Court of Common Pleas' grant of Zuul's Motion for Summary Judgment and the Court's decision to not provide the jury with the heeding presumption. (Op. at 3).

DISPOSITION BELOW. The Court of Appeals for the State of Ohiowa affirmed the lower Court's grant of Motion for Summary Judgment and ruled that the lower Court did not err by declining to give the heeding presumption to the jury as no prejudice resulted. Thus, the Court of Appeals affirmed the decision of the Court of Common Pleas. (Op. at 3).

THE FACTS. Pete Venkman founded Zuul Enterprises in Cincinnatus, Ohiowa in March of 2016 with the intention of providing a safe substitute to traditional cigarettes. (Op. at 3). In order to operate a Zuul e-cigarette, the user must depress a button on the e-cigarette. The button triggers an atomizer located inside the Zuul to heat a flavored tobacco liquid that is kept within a removable cartridge, also known as a "pod", thereby turning the liquid into a vapor. (Op. at 4). The e-cigarette user then inhales the vapor through a mouthpiece on the product. (Op. at 4). Zuul's products previously offered a variety of sweet flavor "pods," which seemingly attracted young adults.

A year after the founding of Zuul, a court ruled that the company was marketing the e-cigarettes to children based on the sweet vapor flavors. Consequently, Zuul not only paid damages, but was also issued an injunction to stop the production of their most popular sweet flavors, which Zuul readily abided by. Following this compliance, Zuul put forth a statement denying allegations that the company marketed its products to children. Additionally, in a commitment to good faith and care for their users, from thereon, Zuul only produced classic tobacco flavors. (Op. at 4). To further ensure their products were only being used with classic tobacco flavors, Zuul also redesigned their entire line of e-cigarettes to prohibit Zuul users from using flavored "pods" manufactured by other companies for use in the Zuul product. (Op. at 4). In an attempt to rectify Zuul's plummeting stock prices and possible bankruptcy following compliance with the court order, the company introduced a line of accessories for their e-cigarettes called "Zuul skins," which allowed users to decorate their Zuul with either a ready-made or customized design. Zuul's new accessories proved to be effective and the company's stock prices rose once again. (Op. at 4).

Nineteen-year-old college sophomore, Dana Barrett, purchased a "skin" for her Zuul e-cigarette depicting her favorite cartoon character, *Hola Gato.* (Op. at 5). Ms. Barrett babysat plaintiffs Louis and Janine Tully's eleven-year-old son, L.T. On a night when Ms. Barrett was babysitting L.T., she had warned the child over and over not to touch her e-cigarette and that playing with the e-cigarette was dangerous. L.T. ignored Barrett's numerous warnings and, when left alone, he grabbed her e-cigarette, activated it, and began to play with it by pretending to operate the e-cigarette as a leaf blower, clearly outside of the product's intended use. (Op. at 5). While L.T. was using the e-cigarette in this manner, the product exploded in his hand. Consequently, L.T. sustained burns to his hand. (Op. at 5). Subsequently, the Tullys filed this lawsuit, alleging that Zuul had not only violated state product liability law by having a manufacturing defect which may have caused the explosion, but also that Zuul did not adequately warn users of the risks that may be associated with their product. (Op. at 2).

The Court of Appeals for the State of Ohiowa's decision affirming the lower Court's grant of summary judgment and declining Plaintiffs' jury instruction should be **affirmed**.

SUMMARY OF THE ARGUMENT

This appeal addresses two issues: (1) whether defendant is liable regarding a manufacturing defect claim when plaintiff did not use defendant's product in a foreseeable manner and was not a foreseeable user, and (2) whether the read and head doctrine, a matter of first impression in this jurisdiction, applies to strict liability failure-to-warn claims in the State of Ohiowa.

First, according to the consumer expectation test utilized in Ohiowa, a user consumer may not expect the product to perform in the way the manufacturer anticipated if the product is not used as intended. Because plaintiff L.T. used the Zuul as an imaginary leaf blower, which was not an intended or reasonable use of the product, a manufacturing defect claim cannot be sustained.

Even if the consumer expectation test is met, plaintiff is unable to show that defendant is liable, as eleven-year-old plaintiff L.T. was not a foreseeable consumer of Zuul's product. In Ohiowa, a manufacturer is only liable when physical harm is caused to the ultimate user or consumer. To qualify as a consumer, a person must ultimately use the product as it was intended to be used. The Zuul e-cigarette was intended to be used in the same manner as a traditional cigarette. By using the Zuul as a pretend leaf blower, L.T. was not using the product as intended. Thus, L.T. cannot be classified as a foreseeable consumer of the Zuul e-cigarette and Zuul cannot be held liable for any injury caused by L.T.'s misuse.

Second, the read and head jury presumption does not apply in Ohiowa. According to the Restatement (Third) §2 comment l., even if the product could be considered defective due to a failure-to-warn, if a user or consumer would have used the product in the same manner regardless of a warning, the lack of warning is not the legal cause of plaintiff's harm. Here,

despite constant warnings from L.T.'s babysitter that the e-cigarette was dangerous, L.T. proceeded to play with the product anyway. Further, due to his young age and immaturity, it is almost certain L.T. would not have read or heeded any warning included on the product, regardless of the content.

Additionally, the read and heed jury instruction is contrary to Ohiowa's public policy of favoring the consumer. The doctrine can serve as a scapegoat for manufacturers as it allows them to produce a dangerous product but escape liability so long as there is a sufficient warning. If there is sufficient warning, a manufacturer cannot be held liable if a consumer is using the product as intended and injury occurs.

Finally, it is beyond the Court's prerogative to adopt policies such as the heeding doctrine. Adopting new laws should be left to the legislative branch as it has been for other rules regarding product liability in Ohiowa.

The Court of Appeals' holding to grant summary judgment and finding that the read and heed doctrine is of no issue in the present case should be **affirmed**.

ARGUMENT

I. THIS HONORABLE COURT SHOULD AFFIRM ZUUL'S MOTION FOR SUMMARY JUDGMENT ON THE TULLYS' MANUFACTURING DEFECT CLAIM SINCE THERE IS NO GENUINE ISSUE OF FACT REGARDING A MANUFACTURING DEFECT INVOLVING ZUUL'S PRODUCT.

In accordance with Fed. R. Civ. P. 56, governing summary judgment, the moving party bears the initial burden of demonstrating that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party satisfies this burden, it falls on the nonmoving party to show that, nonetheless, there remains a genuine issue of material fact which must be determined in a trial. Fed. R. Civ. P. 56(e)(2). The question of whether an issue is "genuine" falls on if the evidence presented would be enough to persuade the fact finder to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

When considering a motion for summary judgment, "the court does not weigh the evidence, make credibility determinations, or attempt to discern the truth of any factual issues." *Great Plains Real Estate Dev., L.L.C. v. Union Cent. Life Ins. Co.*, 536 F.3d 939, 943-944 (8th Cir. 2008). Therefore, a motion for summary judgment is considered solely on whether a fact finder can properly come to a decision from a factual deliberation. When it is determined that there is nothing a jury can factually deliberate regarding a claim made by a party, then summary judgment is appropriate as this would show that there is no "genuine dispute as to any material fact". Fed. R. Civ. P. 56(a).

Here, the Court of Common Pleas granted Zuul's motion for summary judgment and the Court of Appeals for the State of Ohiowa affirmed the decision, finding that since there was no issue of material fact for the jury to decide, summary judgment was appropriate. Plaintiffs filed a timely appeal and this Court has granted the plaintiffs petition for writ of certiorari. The standard of review when reviewing a grant for summary judgment is de novo, with the evidence viewed in

the light most favorable to the nonmoving party. *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 362 (Iowa 2014).

A. Zuul Has Conceded on Plaintiffs' Manufacturing Defect Claim, Leaving No Genuine Issue of Material Fact to Be Decided by The Fact Finder.

For there to be a genuine issue of material fact in this case, there must be a dispute as to whether there was a manufacturing defect caused by Zuul. Because Zuul has conceded that there was a manufacturing defect in their product, there can be no genuine issue of material fact regarding plaintiffs' claim. If plaintiffs' manufacturing defect claim were to proceed to trial, there would be no issue for the jury to decide on as both parties have already agreed that a manufacturing defect existed.

The relevant portion of the Ohiowa Rev. Code states that in order for a product to be defective, it must have "deviated in a material way from the design specifications, formula, or performance standards of the manufacturer" at the time in which it was conveyed by the seller to another party. Ohiowa Rev. Code §552.369(a)(1). In *State Farm Fire & Cas. Co. v. Chrysler Corp.*, the Supreme Court of Ohio has put forth the consumer expectations test to determine whether a product has deviated in a material way from the intended design standards of the product's manufacturer. 523 N.E.2d 489, 494 (Ohio 1988). The consumer expectation test tasks the Court with determining if the product, from the time it left the manufacturer, was "more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." *Id.* This is the test used in Ohiowa to determine if there is a manufacturing defect in the product.

In *State Farm*, the court sustained defendants' motion for a directed verdict and held that because the plaintiffs had not eliminated all causes of the injury in question, speculation as to causation was not permitted and therefore a directed verdict for the defendants was

appropriate. *Id.* at 496-497. The key language the comes from *State Farm*'s consumer expectation test is that a product needs to be more dangerous than expected "when used in an intended or reasonably foreseeable manner." *Id.* at 494. For a court to find that a product deviated from its intended design, there must first be evidence that the product was being used in an intended manner by the consumer at the time of injury. In the case at hand, it can hardly be said that using the e-cigarette in a manner which mimicked the operation of a leaf blower was the manner Zuul intended for the e-cigarettes to be used. The name of the product itself, an e-cigarette, makes it clear that the Zuul should be used in a way which mimics a traditional tobacco cigarette. Imitating the operation of a leaf blower is far from the foreseeable manner in which an e-cigarette or a traditional tobacco cigarette would be used.

The Supreme Court of Iowa put forth that the consumer expectations test imposes strict liability on manufacturers and can be met regardless of whether the manufacturer exercised all reasonable care when manufacturing their products. *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 167-168 (Iowa 2002). However, despite this stringent strict liability standard, the Court of Appeals of Ohio held in *Pruitt v. General Motors Corp.* that the consumer of a product may not expect the product to perform in the way the manufacturer anticipated if the product is used in a manner outside of its intended use. 599 N.E.2d 723, 726 (Ohio 1991). Applying the holding in *Pruitt* to the facts at hand, we know that L.T. used the Zuul e-cigarette in a way other than that which falls within the foreseeable realm of the e-cigarette's intended use. L.T. was playing with the e-cigarette and used it in a way which imitated the operation of a leaf blower, rather than in the product's intended manner which was identical to that of a traditional tobacco cigarette. Following the reasoning in *Pruitt*, there is no way of knowing whether the Zuul would have

performed in the correct manner, since L.T. was playing with it in a fashion beyond its intended use.

Moreover, in *Allianz Global Corporate and Specialty Marine Ins. v. Watts Regulator Co.*, the District Court in the Southern District of Iowa found that there was a genuine issue of material fact regarding the plaintiffs' claims, making it inappropriate to grant the defendants' motion for summary judgment. Case No. 4:14-cv-00253, 2016 WL 4435094 (S.D. Iowa Apr. 7, 2016). In *Allianz*, each party was presenting their own arguments and evidence regarding the issue of whether the product in question was manufactured by Watts. As such, the Court decided that there was sufficient evidence to find that the product was in a defective condition, and therefore a fact finder could determine the issue one way or another. *Id.*

Allianz is distinguishable from the present matter as, here, Zuul has provided an effective defense that, despite the manufacturing defect in its product, the company is still not liable for L.T.'s injury as L.T. was not a foreseeable user. Here, there is no question that Zuul has manufactured the product and furthermore, Zuul is not disputing plaintiffs' argument that there was a manufacturing defect. Therefore, plaintiffs' claim that Zuul had violated product liability law because of a manufacturing defect, allegedly causing an explosion, is not an issue of fact for the fact finder to decide.

Plaintiffs also presented their own expert witness who testified that there was built up pressure in the cartridge of the e-cigarette, which allegedly caused the explosion. Both the Court of Appeals for the State of Ohiowa and defendant Zuul accepted the expert testimony of plaintiffs. Similar to the finding of the Ohio Appellate Court in *Donegal Mut. Ins. v. White Consol. Indus.*, the plaintiffs have provided enough evidence to determine that there was a defect in the product through the testimony of their expert witness. 852 N.E.2d 215 (Ohio Ct. App.

2006). Zuul did not offer any evidence to rebut the expert testimony and did not offer evidence to establish that the product had been altered since it left their manufacturing facility. Subsequently, the Court of Appeals concluded that there was no dispute regarding a manufacturing defect in the e-cigarette since there was no evidence offered by Zuul to rebut the plaintiffs' testimony.

Thus, there is no genuine issue of material fact for the fact finder to decide regarding this claim – there was a manufacturing defect based on the undisputed testimony of the plaintiffs' expert witness. However, Zuul is still free from any liability that may have been caused by this manufacturing defect since the e-cigarette was used by L.T., an eleven-year-old child who could not be within the realm of foreseeable consumers who would use Zuul's product.

B. Plaintiffs Have Not Provided Evidence to Rebut Zuul's Defense That Despite A Manufacturing Defect in The Product, Zuul Is Still Not Liable Since L.T. Was Not A Foreseeable Consumer of Zuul's Product.

Although plaintiffs have presented an expert witness who analyzed the manufacturing details of Zuul's product and concluded that a manufacturing defect was the proximate cause of the injury to L.T.'s hand, Zuul maintains that it is not liable for L.T.'s injury because L.T. was not a foreseeable consumer of the product. Section 5552.368 Ohiowa Rev. Code, which addresses foreseeable consumers of a product, states that a manufacturer is "subject to liability for physical harm caused by [the manufacturer's] product to the consumer... if: (a) that consumer is in the class of persons that the [manufacturer] should reasonably foresee as being subject to the harm caused by the defect or defective condition." Ohiowa Rev. Code §5552.368. The State of Ohiowa utilized the Restatement (Second) of Torts when drafting the Ohiowa Products Liability Act (OPLA), which plaintiffs rely on for their manufacturing defect claim. The Restatement (Second) of Torts, specifically §402A(1), finds a manufacturer liable when physical harm "is caused the ultimate user or consumer..." of the manufacturer's product. Restatement (Second) of

Torts §402. The Restatement further clarifies that in order for consumers to hold the manufacturer liable, they must have ultimately used the product as it was intended to be used. Restatement (Second) of Torts §402A cmt. 1. In accordance with the language used in the Restatement, a manufacturer's liability extends only to consumers, and consumers are comprised of only those who have ultimately used the product in its intended manner.

In the present matter, Zuul's e-cigarette was intended to be used by inhaling a tobacco-flavored vapor through the mouthpiece on the e-cigarette, similar to the manner in which an ordinary tobacco cigarette is used. The product was in no way intended to be played with by pressing the e-cigarette's activating button and waving the product around in a way that mimics the operation of a leaf blower, as L.T. did. Because this manner of play fell outside the realm of the e-cigarette's intended use, L.T. would not be considered a consumer of Zuul's product. Therefore, Zuul could not have reasonably foreseen that L.T. would be subject to harm from their product, regardless of whether the product had a manufacturing defect. Zuul has sufficiently established that L.T. was not a foreseeable consumer of the product, and, additionally, that he was not using the product in its intended manner. Thus, Zuul is not at fault for the injuries which L.T. has sustained. *Lester v. Magic Chef, Inc.*, 641 P.2d 353 (Kan. 1982).

Furthermore, the imposition of strict liability on Zuul, even though L.T. was not a foreseeable consumer of the product, would not be an adequate finding because such a decision would not align with the intent of the Restatement, which the OPLA is based upon. If the intention of the Restatement was to impose strict liability on manufacturers who produce products with defective conditions, then it would have been superfluous and unnecessary for the class of foreseeable consumers and ultimate users to be defined by the Restatement and the Ohiowa Rev. Code. Since the statute clearly sets out a definition for who constitutes as a

foreseeable consumer of a product, then it cannot reasonably be said that strict liability was intended to be applied to all manufacturers. By putting forth the standard that a consumer "is in the class of persons that the [manufacturer] should reasonably foresee...," the Ohiowa Rev. Code left open the door for liability to be assigned to a manufacturer based on whether the manufacturer could reasonably foresee such consumer would use its product. Ohiowa Rev. Code §5552.368.

Even if the issue was not whether L.T. was a foreseeable consumer to Zuul, Zuul remains not liable for the injuries sustained since this young child was not the kind of person in which Zuul could reasonably foresee as being subject to any harm that may be caused by a defect in their product. Zuul could expect that harm may be sustained by a user or consumer who was using the e-cigarette for the purpose of inhaling tobacco-flavored vapor through the mouthpiece, as Zuul has always intended. However, Zuul could not have expected that harm would result to a child playing with the e-cigarette in a leaf blower-like manner because Zuul could not have predicted or imagined that their product would ever be used in such a way.

By not offering evidence to rebut the Tullys' manufacturing defect claim, Zuul is not admitting fault, as the Court of Appeals' dissenting opinion suggests. (Op. at 14). On the contrary, Zuul is reaffirming its claim that there is no genuine of issue of material to be decided and that they are free from liability based on the defense that L.T. was not a forceable user of the e-cigarette.

Accordingly, due to the fact that Zuul is not liable for the physical injury sustained by L.T., there is no genuine issue of material fact for a fact finder to determine and the Court of Appeals for the State of Ohiowa's grant of summary judgment in favor of Zuul was appropriate and should be affirmed by this Court.

II. THE READ AND HEED DOCTRINE DOES NOT APPLY TO STRICT PRODUCT LIABILITY FAILURE TO WARN CLAIMS IN THE STATE OF OHIOWA.

Plaintiffs requested that the Court provide the jury with the heeding presumption, a presumption that allows the jury to presume in a strict products liability failure-to-warn case that, had there been a warning, the user would have read and heeded the warning. During trial, the Court of Common Pleas refused to instruct the jury with a heeding presumption. Plaintiffs appealed in a timely manner and the Court of Appeals found that, although the lower Court had abused its discretion, plaintiffs suffered no prejudice and the lower Court's holding was affirmed. Plaintiffs filed a timely notice of appeal to this Court.

The Court of Appeals correctly affirmed the Court of Common Pleas holding for defendant Zuul Enterprises. The standard of review for the Court of Appeals' decision regarding jury instructions is for an abuse of discretion, and that error must have resulted in prejudice to the party challenging the jury instruction. *Carter v. Mechanical Services*, 746 P.4d 807, 811 (Ohio 2012).

A. For the Heeding Doctrine to Apply, Plaintiff Must First Prove Proximate Causation and Even if the Presumption Applied, Facts of the Present Case Would be Rebutted by the Evidence as a Matter of Law.

To successfully prove a strict products liability failure-to-warn case, plaintiff must show by a preponderance of the evidence 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 plaintiff's injury. *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 191 (Nev. 2009). In a failure-to-warn case, the alleged product defect does not concern the make-up of the product itself. Rather, the defect is the lack of warning to a user on the potential of the product to cause injury. *Freund v. Cellofilm Properties, Inc.*, 87 N.J. 229 (NJ 1981). The causation element

in a failure-to-warn claim can be satisfied if evidence is provided showing that Plaintiff would have altered her use of the product or taken precautions to avoid injury had a warning been given. 63 Am.Jur.2d, *Products Liability,* §§ 356–57 (1984).

Normally, what constitutes the proximate cause of an injury is a question for the finder-of-fact. *Gosewisch v. American Honda Motor Co., Inc.*, 153 Ariz. 400 (Ariz. 1987). However, the jury is only entitled to decide if something constitutes a proximate cause if the moving party can first put forth a proper evidentiary foundation. *Id.* (citing *Kavanaugh v. Kavanaugh*, 131 Ariz. 344 (Ariz. App. 1982) (proximate cause is a question of law where the evidence is undisputed and reasonable minds could not differ). Without a proper evidentiary foundation, the jury would be forced to speculate whether the alleged information defect was a proximate cause of plaintiff's injury. *Gosewisch*, 153 Ariz. at 380. Thus, a jury instruction is justified if it "relates to a legal theory within the issues raised in the case and if it is supported by the evidence." *Id.* at 403 (citing *Sparks v. Republic National Life Ins. Co.*, 132 Ariz. 529, 539, *cert. denied* (Ariz. 1982); *Kauffman v. Schroeder,* 116 Ariz. 104 (Ariz. 1977) (duty of court to instruct jury on all phases of law applicable to facts developed at trial).

In some jurisdictions, a heeding presumption has been adopted in strict product liability failure-to-warn cases. The heeding presumption is an interpretation of the Restatement (Second) of Torts §402A comment j. Comment j. states that "Where warning is given, the seller may reasonably assume it will be read and heeded…". Restatement (Second) of Torts §402A cmt. j. The rebuttable presumption allows the finder-of-fact to presume that, had there been a warning, plaintiff would have read and heeded the warning. *Coffman v. Keene Corp*., 133 N.J. 581, 591 (NJ 1993). This does not impose absolute liability on the manufacturer, but merely shifts the

burden of proof to the manufacturer to go forward with the evidence. *Nissen Trampoline Co. v. Terre Haute First National Bank*, 332 N.E.2d 820 (Vt. 1975). To rebut the presumption, defendant must show that reasonable minds could conclude that an adequate warning would not have been read or heeded by Plaintiff. *Coffman*, 133 N.J. at 602.

Additionally, the presumption that plaintiff would have read and heeded a warning disappears entirely "upon the introduction of any contradicting evidence and when such evidence is introduced, the existence or nonexistence of the presumed fact is to be determined exactly as if no presumption had ever been operative in the action." *Sheehan v. Peima County*, 135 Ariz. 235 (Ariz. Ct. App. 1983); *Menard v. Newhall,* 135 Vt 53 (Vt. 1977) (once confronted, the presumption ceases and does not have to be "overcome."). Even if the product could be considered defective due to a failure-to-warn, if a user or consumer would have decided to use the product regardless of warning, the lack of warning is not a legal cause of plaintiff's harm. Restatement (Third) of Torts §3 cmt. l. Thus, whether plaintiff is entitled to the heeding presumption hinges on the sufficiency of the evidence presented at trial. *Gosewisch*, 153 Ariz. at 404.

In *Menard v. Newhall*, 135 Vt 53 (Vt. 1977), the Supreme Court of Vermont heard a case on appeal where plaintiff brought action under a strict product liability failure-to-warn theory. Plaintiffs appealed on the grounds that the lower Court erred by not granting the heeding presumption jury instructions at trial. In *Menard*, plaintiff's father instructed the plaintiff on how to use a BB gun. *Id.* While playing with the BB Gun, plaintiff was struck in the eye and sustained an injury. *Id.* The Court held that "[O]nce the plaintiff[1] Newhal ignored his father's instructions, no warning Daisy [manufacturer] could have given would have prevented the accident; thus, the

[1] Note: The opinion in *Newhal* on page 55 mistakenly labels Newhal as defendant. It has been corrected here for clarity's sake.

presumption disappeared and there was no genuine issue of fact as to causation." *Id.* at 55. In *Menard,* a presumption would have been rebutted by the evidence as a matter of law. The Supreme Court of Vermont found that the trial Court did not err in failing to provide the jury instructions and affirmed the lower Court's grant of defendant's motion for summary judgment.

Likewise, in *Gosewisch v. American Honda Motor Co., Inc.,* the Supreme Court of Arizona addressed the heeding presumption as an issue of first impression in a failure-to-warn case regarding a plaintiff who was allegedly injured after he fell off of his all-terrain cycle (ATC). 153 Ariz. 400. The ATC instructions were introduced, but plaintiff made no showing that had he been appropriately warned, he would have altered his behavior to avoid the injury. *Id.* at 380. The court found that even with the benefit of the presumption, plaintiff could not prove that the alleged failure to warn was a proximate cause of his injury. *Id.* In addition to failing to prove that had there been a warning, plaintiff would have read and followed it, the evidence showed that had there been a suitable warning, plaintiff would have ignored it. *Id*. Evidence showed that plaintiff ignored a warning about carrying passengers and he was carrying passengers when he hit a tree while riding on his ATC. Evidence also showed that, despite the warnings being clear to always wear a helmet, plaintiff almost never wore a helmet and was not wearing one on the day of accident. *Id.* The court found that where evidence exists that plaintiff would not have heeded a warning, "it cannot be said that a failure to warn was a proximate cause of the injury." *Id.* (citing W. Kimble & R. Lesher, *Products Liability* § 206, at 224 (1979) (footnotes omitted)). Thus, the court declined to apply the presumption because it would have been rebutted as a matter of law.

In *Menard,* plaintiff minor was instructed by his father on how to use a BB gun. *Menard,* 135 Vt at 55. In the present case, just as the plaintiff in *Menard* ignored his father's warnings,

L.T. disregarded his babysitter's warnings and proceeded to play with the Zuul, which resulted in L.T.'s injury. This court should follow the *Menard* court, which found that once plaintiff minor ignored his father's instructions, no warnings the manufacturer could have given would have prevented the accident. *Id.* In *Menard*, the court held that because defendant manufacturer could not have given directions to prevent the injury, the presumption disappeared and there was no genuine issue of fact as to causation. *Id.* Likewise, here, because L.T. refused to listen to his babysitter's warnings that playing with the Zuul was dangerous, Zuul could not have given directions to prevent the injury. Thus, the presumption that had there been a warning, plaintiff would have read and heeded it, disappears and there is no genuine issue of fact as to causation.

Moreover, in the present matter, just as in *Gosewisch*, even if the benefit of the presumption applied, plaintiff does not make a showing that had there been a suitable warning, he would have followed it. In *Gosewisch*, the evidence showed that warnings were clear to always wear a helmet, and plaintiff almost never wore a helmet. 153 A.Z. at 380. Here, we know plaintiff was warned countless times not to play with the Zuul, and chose to anyway. Because evidence exists that plaintiff would not have heeded the warning, the failure-to-warn cannot be found as the proximate cause of the injury. This Court should decline, as did the *Gosewisch* Court, to adopt the heeding presumption as the evidence shows it would have been rebutted as a matter of law.

Petitioner is unable to show that the failure-to-warn defect was the proximate cause and, thus, the heeding presumption does not apply as it can be rebutted as a matter of law.

B. The Read and Heed Doctrine is Contrary to Ohiowa Public Policy as It is Not the Law Most Favorable to the Consumer.

The State of Ohiowa's product liability law tends to look favorably on the consumer. (Op. at 11). The lower court relied on that trend to find that the heeding doctrine is the law of the

land, claiming the doctrine tends to favor the consumer. However, the heeding doctrine acts to the consumer's detriment. In fact, rejecting the heeding presumption would be the decision least favorable to the consumer.

The heeding presumption is based on the Restatement (Second) of Torts § 402A cmt. j. However, the Restatement (Second) of Torts has been superseded by the Restatement (Third) of Torts in so far as the Restatement applies to products liabilities. The Restatement 3d rejects comment j by excluding it in the updated text and, instead, included commentary criticizing the harmful effects comment j had on failure-to-warn product liability claims. The reporter's notes of the third Restatement refer to comment j as "unfortunate language" that has elicited heavy criticism from a host of commentators. Restatement (Second) of Torts § 402A cmt. J. The Restatement (Third) of Torts focuses on holding the manufacturer to a higher standard such that it should not matter what warnings are given. *Rivera*, 125 Nev. at 195. The Restatement 3d encourages safer designs and advocates for manufacturers to produce safe products rather than rely on adequate warnings.

In a matter of first impression, the Supreme Court of Nevada refused to adopt the heeding doctrine in *Rivera v. Philip Morris, Inc.*, 125 Nev. 185 (Nev. 2009). In *Rivera*, the court addressed the public policy regarding the heeding presumption. *Id.* The Court noted that the public policy behind strict product liability law is that manufactures and distributors of products "should be held responsible for injuries caused by these products." *Id.* at 194 (*citing Allison v. Merck & Company*, 110 Nev. 762, 769 (1994)). The *Rivera* court found 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." *Rivera*, 125 Nev. At 195.

This Honorable Court should hold with the Supreme Court of Nevada and reject the heeding doctrine. The doctrine allows for less than safe products to be manufactured and distributed and puts the risk on the consumer. Rather than relying on warnings, this Court should find that the best policy is to hold manufacturers responsible to make safe products and care about their customers.

If Ohiowa's product liability law truly looks favorably on the consumer, adopting the heeding presumption would go against public policy. Just as Zuul has made changes to our policy and product to protect our users, Ohiowa must select policies that best protects its citizens.

C. Adopting the Read and Heed Doctrine is Beyond the Court's Scope of Powers as It is the Prerogative of the Legislative Branch to Adopt New Legislative Policies.

Previously, the Ohiowa legislature found the Restatement (Second) of Torts instructive when drafting product liability laws. (Op. at 11). The Court of Appeals noted that the Ohiowa legislature previously used the Restatement (Second) of Torts to make laws, not the Court. However, in the Court of Appeals decision below, the Court took it upon itself to broadly interpret the intent of Ohiowa's legislature and adopt the heeding presumption.

The role of the judiciary is to apply and evaluate the laws. It is not within the powers of the court to change or amend the meaning of the law. Rather, it is the prerogative of the legislative branch to decide when new legislation and policy should be adopted. The mere fact that the Restatement (Second) of Torts was utilized by the Ohiowa legislature to draft some Ohiowa products liability law does not give the court agency to readily adopt elements of the Restatement and make it the "law of the land."

It is common practice for legislatures to adopt parts of a Restatement or other authority. This does not give the court power to expand the law as they believe the legislature would have. The Ohiowa legislature explicitly adopted the "learned intermediary doctrine" derived from the

Restatement (Second) of Torts § 402A cmt. j. The heeding presumption comes from the exact same section of the Restatement. Surely, had the legislature intended to adopt the heeding presumption as the "law of the land," it would have done so. Thus, it the court would be overstepping into the scope of legislative powers to adopt this controversial presumption based on speculation of the legislature's actions.

CONCLUSION

For the foregoing reasons, Respondent Zuul Enterprises respectfully requests this Honorable Court **affirm** the decision of the Court of Appeals for the State of Ohiowa affirming the Court of Common Pleas' grant of summary judgment and finding that no prejudice resulted from the court's denial of Petitioner's jury instruction.

Dated: January 31, 2020

Team T._____
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