No. 20-2206

IN THE SUPREME COURT OF THE STATE OF OHIOWA

LOUIS TULLY, as father and natural

guardian for minor L.T.

And in his own right,

Petitioner,

v.

ZUUL ENTERPRISES,

an Ohiowa corporation,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF OHIOWA
SEVENTH APPELLATE DISTRICT
DRUMMOND COUNTY

BRIEF FOR RESPONDENT

TEAM X
COUNSEL FOR THE RESPONDENT

Table of Contents

Table of Authorities

Page(s)

United States Supreme Court Cases:

United States Federal Court Cases:

State Court Cases:

Statutory Provisions:

The Restatement of Torts:

Secondary Sources:

Online Sources:

Questions Presented

I. Whether summary judgment in favor of an e-cigarette manufacturer was appropriate on a product liability claim where a child was injured using the e-cigarette as a leaf blower.

II. Whether the read and heed doctrine, as purportedly found in the anachronistic comment j to Section 402A of the Restatement (Second) of Torts apply to strict liability failure-to-warn claims in the State of Ohiowa?

Statement of the Case

I. Statement of Facts

A. *Zuul Enterprises and Its Vision to Provide Smokers a Safer Alternative*

In March 2016, Zuul Enterprises (hereinafter "Zuul"), an e-cigarette manufacturer, was established by Pete Venkam (hereinafter "Venkam") in Cincinnatus, Ohiowa. R. 3. Venkam envisioned that Zuul's e-cigarettes would be a safer alternative to tobacco products since they do not contain any tobacco. R. 3. Following their conception, Zuul's e-cigarettes became popular among teens and young adults. R. 4. Zuul's e-cigarettes are easy to operate: the consumer presses a button located on the device while simultaneously inhaling the vapor produced through the mouthpiece of the e-cigarette. R. 3-4. On the inside, the e-cigarette works diligently, heating the liquid in the cartridge once the button is pressed and turning the liquid into a vapor. R. 4.

B. *Louis and Janine Tully and Their Son, L.T.*

L.T. is the eleven-year-old child of Louis and Janine Tully. R. 5. Louis and Janine often leave L.T. to the care of Dana Barrett. R. 5.

C. *Dana Barrett*

Dana Barrett (hereinafter "Barrett") is a nineteen-year-old college sophomore and a Zuul e-cigarette consumer. R. 5. Barrett has been a consumer of Zuul's e-cigarette since she enrolled at her college. R. 5. Attached to Barrett's Zuul e-cigarette is a Zuul skin depicting one of her favorite animated characters, *Hola Gato*. R. 5.

D. *The Timeline*

In December 2017, a federal district court held that Zuul's sweet vapor flavors were used to market its e-cigarettes to children, and an injunction was issued against Zuul's production of sweet vapor flavors. R. 4.

Subsequently, Zuul issued a statement maintaining its innocence regarding any attempt to market its product to children and, as a sign of good faith, decided to only produce tobacco flavored cartridges. R. 4. Zuul even announced that it was redesigning its e-cigarettes to prohibit consumers from inserting cartridges made by other companies, thereby ensuring that only the Zuul tobacco flavored cartridges could be used on its e-cigarettes. R. 4. In the same statement in which Zuul maintained its marketing innocence, Zuul introduced a new line of "Zuul skins," which are adhesive labels that affix to the surface of any Zuul e-cigarette. R. 4. Consumers are able to customize the appearance of their skin or purchase pre-decorated skins. R. 4. Although the Zuul skins do not contain an additional warning about possible dangers associated with the product, each Zuul e-cigarette as a warning affixed to its packaging. R. 4.

On July 17, 2018, Louis and Janine Tully left L.T. to the care of Barrett. R. 5. Barrett arrived at the Tully residence along with her e-cigarette encased in the *Hola Gato* skin. R. 5. Barrett made sure to warn L.T. numerous times that the e-cigarette was not his to play with because it was too dangerous. R. 5. However, once Barrett left the e-cigarette unattended, L.T. stole the e-cigarette. R. 5. L.T. pressed the activating button on the e-cigarette and began fooling around with the device as if it was a leaf blower. R. 5. Subsequently, the e-cigarette exploded, leaving L.T.'s hand severely burned. R. 5.

II. Procedural History

A. *The Ohiowa Court of Common Pleas*

Louis and Janine Tully (hereinafter the "Tully's") brought a cause of action under Ohiowa product liability law against Zuul, seeking retribution for the severe burns that L.T. received after using Zuul's e-cigarette as a leaf blower. R. 2, 5. The Tully's complaint alleged that (1) Zuul had violated Ohiowa product liability law because a manufacturing defect caused

the explosion, and that (2) Zuul failed to adequately warn consumers of the risks associated with their product. R. 2.

Zuul moved for summary judgment, maintaining that (1) although the e-cigarette did suffer from a manufacturing defect, liability could not be established because L.T. was not a foreseeable consumer of the e-cigarette, and that (2) the warning on the packaging of the e-cigarette sufficiently fulfilled Zuul's duty to warn consumers. R. 2-3.

The Court of Common Pleas held that children were not foreseeable consumers of Zuul's e-cigarettes and thereby granted summary judgement to Zuul on the manufacturing defect claim. R. 3. The Court of Common Pleas proceeded to trial on the warning defect claim. R. 3. Towards the end of the trial, the Tully's requested a jury instruction on the heeding presumption, which Zuul objected and the court sustained Zuul's objection. R. 3. Ultimately, the jury held in favor for Zuul. R. 3. Following the trial, the Tully's appealed to the Ohiowa Court of Appeals. R. 3.

B. ***The Ohiowa Court of Appeals***

On appeal, the Tully's argued that the Court of Common Pleas (1) inappropriately granted summary judgment because an issue of material fact remained as to whether a child is a foreseeable consumer of an e-cigarette, and (2) erred in failing to allow a jury instruction on the heeding presumption. R. 3. Thus, the two central questions for the Ohiowa Court of Appeals were (1) whether the Court of Common Pleas erred in granting Zuul's motion for summary judgment on the manufacturing defect claim, and (2) whether the trail court erred in failing to allow a jury instruction on the heeding presumption. R. 3.

The Ohiowa Court of Appeals held that (1) summary judgment in favor of Zuul on the manufacturing defect claim was appropriate, and (2) the Court of Common Pleas should have

instructed the jury on the heeding presumption but not instructing the jury was harmless error. R. 3.

With respect to the manufacturing defect claim, the Ohiowa Court of Appeals held that there was no dispute of material fact for a jury to determine because L.T. was not a foreseeable consumer of Zuul's e-cigarettes. R. 6. Although Zuul stipulated to the fact that its e-cigarette was in a defective condition, the Court of Appeals held that the Ohiowa legislature intended to enforce liability "only for those who are 'consumers' of the . . . product." R. 9. The Court of Appeals explained that consumers include those who have ultimately used the product as it was intended to be used. R. 9. Thus, by using the e-cigarette as a leaf blow instead of inhaling the vapor that the e-cigarette produces, L.T. did not use the e-cigarette as it was intended to be used. R. 9. Consequently, the Court of Appeals ruled that Zuul could not be liable and that summary judgment in favor of Zuul was appropriate. R. 9.

With respect to the heeding presumption, the Court of Appeals explained that the heeding presumption is the law in Ohiowa, not because precedent requires it, but because public policy tends to favor the consumer in product liability actions. R. 12. Consequently, the Court of Common Pleas' decision not to instruct the jury about the heeding presumption was an abuse of discretion. R. 12. However, the Court of Appeals ultimately held that failure to instruct the jury about the heeding presumption resulted in harmless error because "it cannot be stated that the jury would have proffered a different verdict if the requested instruction had been given." R. 12. In sum, the Court of Appeals affirmed the decision Court of Common Pleas. R. 12.

Judge Zeddemore of the Ohiowa Court of Appeals issued an opinion, dissenting in part and concurring in part. R. 13. Judge Zeddemore dissented with the majority's summary judgment affirmation. R. 13. Judge Zeddemore believed that the majority's conclusion that

liability only extends to consumers was incorrect because public policy advises that extending liability only to consumers "eliminated the imposition of strict liability." R. 14. Judge Zeddemore added that L.T. was the kind of person that Zuul could reasonably foresee as being subject to harm from the e-cigarette's defective condition. R. 14. Judge Zeddemore assumes that Zuul is aware of the dangers its product poses to children because of the injunction issued to it in a previous litigation. R. 15. As a result, Judge Zeddemore believed that the manufacturing defect should have been remanded for trial. R. 15.

Summary of the Argument

First, this Court should affirm the Court of Appeals' decision to uphold summary judgment in favor of Zuul Enterprises (hereinafter "Zuul") because L.T. is not a consumer under the Ohiowa Product Liability Act (hereinafter the "OPLA"). Under the OPLA, a seller of a defective product is only liable to a consumer if "that consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition . . . ." The Ohiowa legislature relied heavily on the Restatement (Second) of Torts § 402A when drafting the OPLA. The Restatement explains that "consumer" includes those who in fact consume the product. "Consumption" includes all ultimate uses for which the product is intended. Accordingly, consumers are those who ultimately use the product as intended. The Ohiowa legislature intentionally incorporated consumer into the OPLA. Consequently, in Ohiowa, liability to manufacturers only attaches if the individual used the defective product as it was intended to be used and was injured as a result of the defective condition. L.T. did not use the Zuul e-cigarette as it was intended to be used; rather, he used it as a leaf blower. Thus, L.T. is not a consumer under the OPLA and Zuul cannot be liable for L.T.'s injuries.

Alternatively, if L.T. is found to be a consumer under the OPLA, this Court should still uphold the Court of Appeals' ruling that L.T., an eleven-year-old child, is not a foreseeable consumer of Zuul's e-cigarette, and therefore Zuul cannot be held liable for his resulting injuries from the product. The Court of Appeals correctly relied on Section 5552.368, which only attaches liability to manufacturers when the injured party was a foreseeable consumer. Additionally, looking to the Restatement (Second) of Torts § 402A and neighboring jurisdictions, consumers are only those persons who consume the product as intended to be used. Because LT did not use the e-cigarette as intended, but rather pretend it was a leaf blower, he

cannot be considered a consumer under the OPLA. Additionally, LT as not in the class of persons that Zuul should have reasonably foreseen as subject to harm. Zuul's e-cigarettes are marketed to be a safer alternative to traditional tobacco cigarettes. Consequently, children of LT's young age are neither the intended class of consumers for traditional cigarettes nor e-cigarette's, like the Zuul. Thus, liability cannot attach to Zuul for the injuries that LT sustained. Therefore, the Court of Appeals properly granted summary judgement in favor of Zuul.

Second, the read and heed doctrine does not apply to strict liability failure to warn claims in the State of Ohiowa. The Ohiowa Court of Appeals erroneously applied the read and heed doctrine to strict liability failure-to-warn claims by unnecessarily relying on an anachronized interpretation of the criticized Restatement (Second) of Torts § 402A comment j. The State of Ohiowa cannot apply the read and heed doctrine to strict liability failure to warn claims because the doctrine fails to serve any legitimate public policy. In fact, the read and heed doctrine contravenes public policy. The heeding presumption is illogical and not based upon empirical evidence, inappropriately eliminating the plaintiff's burden of proving causation—a cornerstone of products liability law. Moreover, a case involving an e-cigarette is an inappropriate context for the application of the heeding presumption, as courts frequently invoke the presumption only in workplace contexts. Lastly, the trial court's failure to give the Tully's requested heeding presumption jury instruction was, at most, harmless error.

Argument

I. The Ohiowa Court of Appeals Correctly Affirmed Summary Judgement On The Manufacturing Defect Claim Because L.T. Is Not A Consumer In The Class Of Persons That Zuul Enterprises Should Reasonably Foresee As Being Subject To The Harm Caused By The Defective Condition

This Court should affirm the summary judgment decision by the Ohiowa Court of Appeals because L.T. cannot meet the requirements set forth in the Ohiowa Product Liability Act (hereinafter the "OPLA").

Under the OPLA, a seller of a defective product is only liable to a consumer if "that consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition . . . ." Ohiowa Rev. Code. § 5552.368. Therefore, liability to Zuul Enterprises (hereinafter "Zuul") does not automatically attach solely because Zuul's e-cigarette device is in a defective condition. Instead, a plaintiff must meet the requirements set forth in the aforementioned statute in order for liability to attach. Consequently, summary judgment is appropriate because LT is neither (i) a consumer nor (ii) is he in the class of persons that Zuul should reasonably foresee as being subject to harm.

A. L.T. is not a consumer under the OPLA

The Ohiowa Court of Appeals correctly affirmed summary judgment because L.T. is not a Zuul e-cigarette "consumer" under the OPLA since he did not use the e-cigarette as it was intended to be used.

Under the OPLA, there is an additional threshold beyond just being in the class of persons that a seller should reasonably foresee as subject to harm. § 5552.368. Notably, only a "consumer" is able to bring an action against a seller. *Id.* ("a seller of a defective product is only liable to a consumer"). The OPLA does not provide a definition for "consumer." *Id.* However, the OPLA was based on the Restatement (Second) of Torts § 402A (1965). R. 6, 8. Therefore,

the court should consider the Restatement's understanding of "consumer" in order to discern the Ohiowa legislature's intent when it adopted "consumer" into the OPLA's language. *See United States v. Castleman*, 572 U.S. 157, 162 (2014) (noting that if a statutory word or phrase has an established meaning in common law, courts may consider whether the legislature intended to adopt that common law meaning).

Restatement (Second) of Torts § 402A(1) imposes liability on the seller of a product when physical harm is "caused to the ultimate user or consumer. . . ." "'User[s]' include[] those who are passively enjoying the benefit of the product" while "[c]onsumers" are "those who in fact consume the product. . . ." *Id.* § 402A cmt. l. The Restatement importantly notes that "[c]onsumption includes all ultimate uses for which the product is *intended*. . . ." *Id.* (emphasis added). Accordingly, consumers are those who ultimately use the product as intended. Courts "have not gone beyond allowing recovery to users and consumers, as those terms are defined in Comment l." *Id.* cmt. o.

While the OPLA is based on the Restatement, the Ohiowa legislature also relied on the Sixth, Seventh, and Tenth Circuits to draft the OPLA. No. 18-CV-1988 (Ct. Com. Pl. Sept. 28, 2018); R. 6. Surveying those circuits, it is noteworthy that the Indiana Product Liability Act (hereinafter the "IPLA") practically resembles the OPLA. *See* Ind. Code Ann. §§ 34-20-1-1 – 34-20-9-1 (LexisNexis 2020). The OPLA explains that a seller of a defective product is only liable to a "user or consumer" if "that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition." § 34-20-2-1(1). Similar to the Ohiowa legislature, the Indiana legislature heavily incorporated the Restatement's language into the IPLA. *Reed v. Central Soya Co., Inc.*, 621 N.E.2d 1069, 1073 (Ind. 1993) (mentioning that the Indiana legislature "incorporated § 402A nearly verbatim").

However, the OPLA differs from the OPLA because the Indiana legislature incorporated "user or consumer," which comes directly from the Restatement, into the IPLA's statutory language while the Ohiowa legislature only incorporated "consumer" into the OPLA's statutory language. *Compare* Ohiowa Rev. Code. § 5552.368(1), *and* Ind. Code Ann. § 34-20-2-1(1). Despite the minor linguistic differences, Indiana courts consider the Restatement's commentary and recognize that a "consumer" is an individual who uses the product as intended. *See*, *e.g.*, *Vaughn v. Daniels Co*., 841 N.E.2d 1133, 1142 (Ind. 2006) (a worker injured while assembling a product was not a consumer of a coal stump); *Phelps v. Sherwood Med. Indus.*, 836 F.2d 296, 303 (7th Cir. 1987) (holding that a physician was a consumer because he utilized a catheter for the purpose of surgery, which was the catheter's intended use); *Wingett v. Teledyne Indus., Inc.*, 479 N.E.2d 51, 55 (Ind. 1985) (ironworker was not a consumer because dismantling or demolishing of a product would not be recognized as an intended use of the product).

While there is a dearth of case law and legal scholarship on e-cigarettes in the context of product liability, it is well understood that cigarettes and other tobacco products intended uses are to smoke them. *See* Anne M. Payne, Annotation, *Products Liability: Cigarettes and Other Tobacco Products*, 36 A.L.R.5th 541 (1996) (citing *Green v. Am. Tobacco Co.*, 409 F.2d 1166 (5th Cir. 1969); *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961); *Buckingham v. R.J. Reynolds Tobacco Co.*, 713 A.2d 381 (N.H. 1998); *Horton v. Am. Tobacco Co.*, 667 So.2d 1289 (Miss. 1995)).

Here, although the Restatement contains "user or consumer," the Ohiowa legislature purposely omitted "user" while incorporating "consumer" into the OPLA's statutory language. *See* § 5552.368. If the Ohiowa legislature wanted to replicate the exact same duties and liabilities set forth in Restatement (Second) of Torts § 402A, it could have incorporated the

Restatement verbatim just like the Indiana legislature. *See* Ind. Code Ann. § 34-20-2-1. Instead, the Ohiowa legislature decided to extend liability only to the consumers of the product rather than to the users of the product by omitting "user" and only incorporating "consumer." Thus, following the Restatement's commentary, Ohiowa effectively extended liability only to those who have ultimately used the product as it was intended to be used. *See* § 402A cmt. l. Consequently, those who passively enjoy the benefit of the product—the users—do not enjoy the same extension of liability as consumers under the OPLA.

Accordingly, when the product at issue is an e-cigarette, consumers are individuals who use the e-cigarette as it is intended to be used. An e-cigarette's intended use is to smoke it or inhale the vapor of the device. R. 9; *See* Payne, *supra*. Contrary to an e-cigarette's intended use, L.T.'s use of Zuul's e-cigarette mimicked the operation of a leaf blower. R. 5. By activating the e-cigarette's button for a prolonged period of time and waving the e-cigarette around as if it were a leaf blower, L.T. utterly failed to use the product as it was intended to be used. R. 5. Not a single action taken by L.T. indicated that he smoked the e-cigarette or inhaled the vapor that the e-cigarette produced. If, instead, L.T. had pressed the e-cigarette's button for a shorter duration and inhaled the vapor generated by the e-cigarette through his mouth, L.T. would likely have used the product as it was intended it be used. However, it is evident from the record that L.T. did not use Zuul's e-cigarette as it was intended to be used; consequently, L.T. is not a consumer under the OPLA. Therefore, summary judgment was appropriate, and Zuul should not be liable for L.T.'s injuries.

B. Even if L.T. is a consumer under the OPLA, L.T. is not in the class of persons that Zuul should reasonably foresee as being subject to harm

L.T., as an eleven-year-old child, is not a reasonably foreseeable consumer of the e-cigarette, therefore, Zuul cannot be held liable for resulting injuries. Thus, summary judgment was appropriate.

Under Ohiowa statutory law, a manufacturer is only liable to a consumer if that consumer "is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition. . . ." Ohiowa Rev. Code § 5552.368; R. 8. As aforementioned, the Ohiowa legislature relied on the Restatement (Second) of Torts §402(A) when drafting the OPLA, therefore, it is instructive to determine the legislature's intent in drafting this section. R. 6. Restatement (Second) of Torts § 402A cmt. i. provides that "the article sold must be dangerous to an extent beyond that which would be contemplated by the *ordinary consumer* who purchases it, with the *ordinary knowledge* common to the community as to its characteristics. Restatement (Second) of Torts § 402A cmt. i. (emphasis added). Because the Restatement does not define nor lays out a test to determine who the intended consumers of a product are, neighboring jurisdictions have shed light on making this determination.

The focus in products liability claims "is not foreseeability of harm, but whether that harm was to an intended user." *Riley v. Warren Mfg., Inc.*, 688 A.2d 221, 228 (Pa. Super. Ct. 1997); *See Seattle-First Nat'l Bank v. Tabert*, 542 P.2d 774, 779 (Wash. 1975) (noting that the expectations of an ordinary consumer are a principal inquiry). The court in *Klemka v. Dillon Companies, Inc.*, 1996 U.S. Dist. LEXIS 15395 (E.D. Pa. 1996) discussed the analysis when making a determination whether a plaintiff is in the class of persons that a manufacturer should foresee as being subject to harm by its product. The court set forth the following test: "[w]ould

an ordinary consumer have objectively understood that the manufacturer of the product intended it to be used by certain persons, not others? Put another way, if a person was a 'reasonably obvious unintended user,' the product used by that person would not have been employed for an intended use." *Id.* at 6. The court goes on to explain that when analyzing whether a person is an intended user, "intended" is the sole inquiry, not "expected, anticipated, or foreseeable." *Id.* at 4. Furthermore, the court rejected the argument that manufacturers are required to make safe products for the "careless and unintended" users because that reasoning only extends to careless *intended* users. *Id.* (emphases added). Ultimately, the court granted summary judgment in favor of the defendant, a lighter manufacturer, because the injured plaintiff, a child, is not an intended consumer for purposes of strict liability. *Id.* at 13; *See Griggs v. BIC Corp.,* 981 F.2d 1429, 1434 (3d Cir. 1992) (holding summary judgment was proper because plaintiff, a child, is not an intended user of a cigarette lighter); *Todd v. Societe BIC*, *S.A*., 21 F.3d 1402 (7th Cir. 1994) (noting that children "lack knowledge about consumer products, [t]herefore children should not be the standard to measure consumer expectations"); *Borchert v. E.I. DuPont De Nemours & Co.,* 886 F.Supp. 629, 630 (W.D. Mich. 1995) (explaining plaintiff failed to "produce any evidence other than his injury tending to show that it was likely that children would be injured by the product").

In *Kirk v. Hanes Corp. of North Carolina*, 16 F.3d 705 (6th Cir. 1994), the Sixth Circuit Court of Appeals discussed the commonsense reasoning in precluding plaintiffs to shift the "responsibility for safeguarding children away from the adult purchasers and intended users onto the manufacturer." *Id.* at 710. In this case, the plaintiff, an injured child, was trying to attach liability to a lighter manufacturer because the plaintiff's brother ignited her shirt with the product. *Id.* at 706. The court held that liability simply cannot attach to the manufacturer

because the product was marketed to adults, its intended consumers, who can appreciate the possible danger of the product, not children who negligently used the product. *Id.* at 710. Ultimately, for these reasons, the Court of Appeals granted summary judgement in favor of the lighter manufacturer.

The Seventh Circuit Court of Appeals has ruled similarly on cases in which children were harmed by a product intended for adult use. Specifically, in *Todd,* 21 F.3d 1402, the court held that reason dictates that children are unlike ordinary consumers because they do not have the ability to appreciate the dangers of products intended and marketed for adults. *Id.* The court provides a hypothetical scenario to showcase the harmful consequences that would ensue if courts allow children, who use products intended for adults, to recover:

> [I]n all cases where a child is injured[,] manufacturers would face absolute liability every time. The child's attorney would march into court and claim the product failed to perform in the manner the child expected. The attorney would be right, but the failure would be due not to a deficiency in the product, but to the natural deficiency children have in their knowledge of consumer products.

Id. at 1408; *See Borchert,* 886 F.Supp. at 632 (noting that "courts have held as a matter of law that a manufacturer of a product intended to be sold only to adults need not make its product child proof").

With respect to smoking products, multiple jurisdictions have found that the intended consumers are adults, not children. Several courts in neighboring jurisdictions have held that the "ordinary consumer" of a lighter is an adult, not a child. Consequently, the expectations on the products intended use must be viewed from the perspective of an adult, not a child. *See*, *e.g., Insolia v. Philip Morris Inc.,* 216 F.3d 596 (7th Cir. 2000); *Talkington v. Atria Reclamelucifers Fabrieken BV*, 152 F.3d 254, 263 (4th Cir. 1998); *Curtis v. Universal Match Corp., Inc.*, 778 F.Supp. 1421, 1425 (E.D. Tenn. 1991), *aff'd*, 966 F.2d 1451 (6th Cir. 1992);

Kelley v. Rival Mfg. Co., 704 F. Supp. 1039, 1043 (W.D. Okla. 1989); *Welch v. Scripto-Tokai Corp.,* 651 N.E.2d 810, 814 (Ind. Ct. App. 1995); *Bellotte v. Zayre Corp*., 352 A.2d 723, 725 (N.H. 1976); *Calles v. Scripto-Tokai Corp*., 864 N.E.2d 249 (Ill. 2007).

Due to the similarity of cigarettes and e-cigarettes, even Federal agencies, have defined "e-cigarette use as 'smoking.' [In so doing,] [t]he Department focused on the similarity between conventional cigarettes and e-cigarettes." *Competitive Enter. Inst. v. United States Dep't of Transp.*, 863 F.3d 911, 914 (D.C. Cir. 2017). Notably, the Federal Aviation Administration has noted that "[s]moking means the use of a tobacco product, electronic cigarettes whether or not they are a tobacco product, or similar products that produce a smoke, mist, vapor," Fed. Aviation Admin., Dep't of Transp., 14 C.F.R. § 252.3 (West 2019), and that "[the] . . . dynamics of e-cigarette use are similar enough to traditional smoking to necessitate including e-cigarette use within the definition of smoking . . . [e]-cigarettes are generally designed to look like and be used in the same manner as conventional cigarettes." Rules and Regulations, Dep't of Transp., 14 C.F.R. § 252 (West 2019). Because of this parallel, it is evident that cigarette and e-cigarette manufacturers have a common consumer base to which it aims its marketing, adults.

In further support, a recent law, known as the "Tobacco to 21 Act," has been passed which prohibits the sale of tobacco products, including cigarettes and e-cigarettes to those under the age of twenty-one, in every state. Tobacco to 21 Act, S. 1258, 116th Cong. (2019). To further ensure that the unintended consumers of these tobacco products are not using the product, taxes imposed on cigarette sales serve as an effective deterrent to smokers, especially among the nation's adolescents. Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation,* 107 Yale L.J. 1163, 1167-68 (1998). Additionally, large e-cigarette manufactures similar to the Zuul, state directly on the homepage

of their websites that their product is "[t]he alternative for *adult* smokers" JUUL, https://www.juul.com/ (last visited Jan. 17, 2020) (emphasis added); *See* SMOK https://www.smoktech.com/kit/nord-kit (last visited Jan. 17, 2020) (noting their e-cigarette product is "only for adults"); GIANT VAPES https://www.giantvapes.com/aspire-avp-kit/ (last visited Jan. 17, 2020) (mentioning that its company "does not condone the use of vapor products by minors"). From these similar products, it is evident that children are not the intended consumers of e-cigarettes.

Here, L.T. is not in the class of consumers that Zuul should have reasonably foresaw as being subject to harm by its product. L.T., at the time of the incident, was an eleven-year-old child. R. 5. As noted above, minors, especially children as young as L.T., are not the intended consumers of such tobacco products and, specifically, e-cigarettes. Zuul's product mimics that of the products aforementioned, an e-cigarette, which are marketed to adults. R. 2. Moreover, Venkman, Zuul's founder, stated that the intended use of his product is to be a "safer alternative to tradition tobacco cigarettes." R. 3. As noted above, the main market for traditional cigarettes are adults. *See* Hanson & Logue, *supra*.

At the time of injury, L.T. stole Dana Barrett's (hereinafter "Barrett") e-cigarette despite her vehement attempts to warn L.T. of the dangers of playing with such a product. R. 5. While Barrett momentarily left the Zuul unattended, L.T. seized his opportunity to disobey and disregard Barrett's futile warnings and stole the e-cigarette. R. 5. Through his mishandling of the e-cigarette, L.T. depressed the activation button on the product for an elongated period of time while waving it around like a leaf blower. R. 5. Because of L.T.'s action, the e-cigarette exploded resulting in burns to L.T.'s hands. These facts demonstrate exactly why e-cigarettes, and tobacco products in general, are not intended for use by minors, because to their inability to

appreciate the risk involved with such products. *Todd*, 21 F.3d 1402 (7th Cir. 1994). This concern is further exacerbated in the case at bar, wherein Barrett warned L.T. numerous times that he should not be playing with the Zuul, to which L.T. blatantly disregarded. R. 5. In sum, L.T., as an eleven-year-old child, is not a reasonably foreseeable consumer of the Zuul e-cigarette therefore Zuul cannot be held liable for resulting injuries, and, thus, summary judgment was appropriate.

II. A Jury Instruction On The Read And Heed Doctrine Is Inappropriate Because The Read And Heed Doctrine Does Not Apply To Strict Liability Failure-to-Warn Claims In The State Of Ohiowa.

The heeding presumption purportedly arises from the Restatement of Torts, which provides: "[w]here warning is given, the seller may reasonably assume it will be read and heeded." Restatement (Second) of Torts, § 402A, cmt. j. This rebuttable presumption allows the factfinder 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.*, 935 P.2d 876, 883 (Ariz. Ct. App. 1996). Comment j, from which the heeding presumption was originally derived, has been highly criticized by commentators and was ultimately removed from the Restatement (Third) of Torts. R. 11. No "Ohiowa court has had the opportunity to address the issue of whether the heeding presumption applies to state law failure-to-warn claims." R. 10. The Tully's requested a jury instruction on the heeding presumption at trial. R. 3. Zuul objected, and the trial court sustained this objection. R. 3. On this issue, the jury held for Zuul, and the Tully's appealed. R. 3. The Ohiowa Court of Appeals held that the trial court did not err in disallowing a jury instruction on the heeding presumption because no prejudice resulted. R. 3.

Not all states recognize the heeding presumption in failure-to-warn cases, such as Alabama. R. 11. *See Deere & Co. v. Grose*, 586 So. 2d 196, 198 (Ala. 1991). Numerous courts

rejected the heeding presumption expressly. These include the Fourth Circuit, Fifth Circuit, federal district courts in Kansas and Minnesota, the Montana Supreme Court, the Nevada Supreme Court, the New Jersey Superior Court, and the Texas Supreme Court. *Odom v. G.D. Searle & Co.*, 979 F.2d 1001, 1003 (4th Cir. 1992); *Thomas v. Hoffman-LaRoche Inc.*, 949 F.2d 806, 813 (5th Cir. 1992), *cert. denied*, 504 U.S. 956 (1992); *Meyerhoff v. Michelin Tire Corp.*, 852 F.Supp. 933, 944 (D. Kan. 1994), aff'd, 70 F.3d 1175 (10th Cir. 1995); *Ramstad v. Lear Siegler Diversified Holdings Corp.*, 836 F.Supp. 1511, 1520 (D. Minn. 1993); *Rivera v. Philip Morris, Inc.*, 209 P.3d 271 (Nev. 2009); *Riley v. Am. Honda Motor Co., Inc.*, 856 P.2d 196, 200 (Mont. 1993); *Graves v. Church & Dwight Co.*, 631 A.2d 1248, 1256 (N.J. Super. Ct. App. Div. 1993), cert. denied, 636 A.2d 523 (N.J. 1993); *Dresser Indus., Inc. v. Lee*, 880 S.W.2d 750, 755 (Tex. 1993); *Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 359 (Tex. 1993) (rejecting the heeding presumption when a plaintiff ignored a warning). More courts have recognized that the heeding presumption is unfounded in the law. *See Odom v. G.D. Searle & Co.*, 979 F.2d 1001, 1003 (4th Cir. 1992) (finding the heeding presumption nonexistent within South Carolina and refusing to create it); *Thomas v. Hoffman-LaRoche Inc.*, 949 F.2d 806, 813-14 (5th Cir. 1992); *Ramstead v. Lear Siegler Diversified Holdings Corp.*, 836 F.Supp. 1511, 1516 (D. Minn. 1993). Therefore, because of the heeding presumption's frequent criticism, repeated rejection, and lack of support on public policy grounds, the Ohiowa Supreme Court should not recognize the read and heed doctrine in strict liability failure-to-warn claims.

A. <u>The Ohiowa Court of Appeals erroneously applied the read and heed doctrine to strict liability failure-to-warn claims by unnecessarily relying on an unreasonably narrow interpretation of the highly-criticized and anachronistic Restatement (Second) of Torts § 402A comment j</u>

The heeding presumption's purported origins rest in the language of comment j to the Restatement (Second) of Torts § 402A. Comment j provides that "where a warning is given, the

seller may reasonably assume that it will be read and heeded." Restatement (Second) of Torts, § 402A cmt. j. Comment j also provides that "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." *Id.* Although Ohiowa never adopted the Restatement (Second) of Torts as a whole, the legislature found it instructive when drafting the state's products liability laws. R. 11. At least one court has found that there is no indication that comment j creates a heeding presumption. *Potthoff v. Alms*, 583 P.2d 309, 311 (Colo. Ct. App. 1978). Additionally, the more recent Restatement (Third) of Torts: Products Liability, which contains distillations of the law pertinent specifically to the products liability context, abandons Comment J of the Restatement (Second) of Torts, noting that the heeding "presumption" of Comment J was "created by unfortunate language" and "has elicited heavy criticism from a host of commentators." Restatement (Third) of Torts § 2 cmt. l (1998).

The *Riley* court noted that "a number of jurisdictions rely on comment j to Restatement (Second) of Torts § 402A" as a basis for the heeding presumption. 856 P.2d. at 199. However, the fact that a state's supreme court has relied on Restatement (Second) of Torts § 402A or even cited comment j itself does not require adoption of the heeding presumption. *Rivera*, 209 P.3d at 276. Even if a state's supreme court has explicitly adopted the Restatement (Second) of Torts § 402A as particularly instructive in products liability cases, this does not amount to "a wholesale adoption of the comments accompanying that provision." *Riley*, 856 P.2d at 199. Nor, does this constrain a court in developing its own body of products liability law. *Id.* at 200. Thus, similarly, the Ohiowa Supreme Court does not have to blindly concede to the state legislature's deference to the Restatement.

Furthermore, the heeding presumption has allowed courts to manipulate the language of comment j to "engraft" an advantage to the plaintiff in products liability cases. *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534, 538 (Pa. Super. Ct. 2003). The logic of courts relying formally on comment j "is seriously flawed." 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, 265 (1990). Even if plaintiffs were deserving of a presumption regarding causation, "such a presumption cannot be derived logically from comment j." *Id.* Rather, the presumption results from a misreading of comment j.

> When comment j says that 'the seller may reasonably assume,' it is not referring to a presumption that any individual plaintiff actually did read and heed the warning; to the contrary, it is certain form the outset that at least some consumers would not have done so. Rather, comment j says that if the warning is adequate and is likely to reach many, even if not all, consumers, then, for purposes of determining whether the defendant has discharged his underlying duty to warn, it reasonably may be assumed that consumers will act on the warning.

Id. Comment j never specifically addresses the issue of causation. Therefore, relying on comment j "to derive a presumption of actual, individual causation for plaintiffs in failure-to-warn cases is to commit serious error." *Id.* Reading comment j in this manner makes no logical sense. "When a presumption favors the plaintiff, the defendant is basically precluded from the opportunity to convince a court to rule as a matter of law that the failure to warn was not the proximate cause of plaintiff's harm." *Id.* If legal standards are to act as the proper gatekeeper in controlling the types of warning issues that reach a jury, the heeding presumption "must be abandoned." *Id.*

Moreover, the heeding presumption is an "unrealistic" view of human behavior stemming from comment j. Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. Rev. 1193, 1196 (1994). This type of presumption "truncate[s] the court's liability

analysis by excluding consideration" of other issues in the case or alternative methods to improve product safety. *Id.* Comment j boldly assumes that users "can be expected to receive, correctly interpret, and obey every comprehensible warning accompanying every product they use and encounter." *Id.* at 1206. However, "consumer inattention to warnings is very common." *Id.* at 1198.

Each day individuals are exposed to "innumerable risks created by appliances that may malfunction or be mishandled; by potentially toxic pollutants, food additives, and other chemical substances." *Id.* at 1206. It would be nearly impossible for a human being to read every warning on every product they encounter in everyday life. Thus, it is equally absurd to assume they would. There are numerous reasons consumers ignore warnings, such as functional illiteracy, inattentiveness, incompetency, a reliance on explanations from third-parties, a reliance on one's general knowledge or experience, information overload, and competing demands on one's time and attention. *Id.* at 1207–16. Many people ignore written instructions in the belief "they already understand how the product can be used safely." *Id.* at 1210. Though it is difficult to predict exactly what percentage of individuals read warning labels or even notice them, "casual observation suggests that the figure may not be high." *Id.* Warnings create increasing demands on the time and attention of consumers "as products proliferate and manufacturers attempt to avoid liability by providing more extensive statements of risk and safe practices." *Id.* at 1215. Yet, "social science studies have stressed the significant time intervals and effort required for people to read, interpret, and memorize information." *Id.* at 1216. People simply tend to ignore warnings associated with common products to conserve time and attention. *Id.* "In contrast to the comment j presumption that users will read whatever information manufacturers choose to impart," reality demonstrates "people often do not read warnings." *Id.* at 1218. Though the

heeding presumption allows for legal predictability and consistency, these "are not great virtues when a legal rule produces bad results." *Id.* at 1290. Comment j is thus unnaturally "premised on invalid behavioral characterizations." *Id.* It is "unrealistic." *Id.* at 1295.

Lastly, the heeding presumption is incorrectly based on comment j because comment j was intended to benefit defendants, not plaintiffs. The argument that the heeding presumption is a logical corollary to comment j is fallacious. The plain language of comment j states that the presumption is intended to apply to situations where a manufacturer *does* provide an adequate warning, rather than a failure-to-warn case.

> 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 cmt. j. Thus, comment j's text provides no mention or implication of a presumption that the warning would have been *followed*—rather, only that it would be *read and heeded*. The basis for the heeding presumption in comment j in a failure-to-warn context is not logical when analyzing the text of the comment itself. In *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 336-37 (Tex. 1998), the Texas Supreme Court rejected invocation of the heeding presumption based upon Restatement (Second) § 402A Comment j because the Restatement (Third) "expressly rejects the Comment j approach" rendering it an anachronism of the law. The read-and-heed presumption has been superseded by the Restatement (Third) of Torts: Products Liability, *Ackermann v. Wyeth Pharm.*, 526 F.3d 203, 213 (5th Cir. 2008), and should not be adopted by the Ohiowa Supreme Court in strict-liability failure-to-warn claims.

B. The State of Ohiowa cannot apply the read and heed doctrine to strict liability failure-to-warn claims because the doctrine fails to advance any useful public policy

The Ohiowa Court of Appeals rested its decision to recognize the heeding presumption purely on public policy grounds, finding "that the heeding doctrine is the law of the land given that public policy tends to favor the consumer in product liability actions in Ohiowa." R. 12. However, no logical public policy ground exists for adopting the heeding presumption. The heeding presumption lacks any basis in logic and empirical evidence, arbitrarily tilts the ordinarily even-handed scales of justice in favor of plaintiffs and proves contextually inappropriate in a case involving a tobacco product such as here.

1. The heeding presumption is illogical and not based upon empirical evidence

The heeding presumption's rests on an illogical basis lacking roots in empirical evidence. The Restatement (Third) of Torts aptly notes that "it is foreseeable that warnings or obvious dangers will either not be seen or will be disregarded." Restatement (Third) of Torts § 2 cmt. l. Such is the logical absurdity of the heeding presumption in spite of the foreseeability concept at the root of much of tort law. The primary public policy behind strict product liability law "is that manufacturers and distributors of defective products should be held responsible for injuries caused by these products." *Rivera*, 209 P.3d at 277 (emphasis added). Courts contravene this public policy via a heeding presumption. *Id.*

The heeding presumption unduly assumes that a manufacturer can satisfy its duty of making safe products merely by providing sufficient warnings. *Id.* This is illogical. Manufacturers must make products that are not unreasonably dangerous, regardless of the warning on the product. *Id.* It is better policy not to encourage reliance on warnings, as the heeding presumption would do. *Id.*

Like the Ohiowa Court of Appeals, the New Jersey Supreme Court utilized the heeding presumption and rested its decision purely on public policy grounds. *Coffman v. Keene Corp.*, 628 A.2d 710, 720 (N.J. 1993). Yet, *Coffman* involved a plaintiff's exposure to asbestos. 628 A.2d at 714. Moreover, the New Jersey Supreme Court also acknowledged that the heeding presumption "is not firmly based on empirical evidence. It is not therefore a 'natural' or 'logical' presumption." *Id.* at 717. "One cannot logically assume based on objectively-determined facts, that consumers or product users will heed warnings if they are provided." *Id.* In fact, "it is nearly impossible to go through a day without consciously ignoring warnings designed to protect our health and safety." *Id.* Furthermore, "there is no common experience on which we can premise the creation of a presumption that the general public reads and heeds warnings." *Id.*

"Empirical evidence may not demonstrate the soundness of a heeding presumption." *Id.* at 718. Moreover, common experience and the "modern world" do not support the contention that if adequate warnings are given, individuals will read and heed them." *Riley*, 856 P.2d at 200. Warnings are frequently ignored. *Id.* In *Tech. Chem. Co. v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972), the Texas Supreme Court applied the heeding presumption in a strict liability failure-to-warn case involving an exploding can of freon. The plaintiff, a barber, admitted "he did not read the label on the can at the time of the purchase." *Id.* at 602. Thus, the *Jacobs* court illogically applied the heeding presumption in direct contravention to the facts of the case. There, the court absurdly applied the presumption despite the jury's refusal to find the freon manufacturer's failure to warn was a producing cause of the barber's injuries. *Id.* at 606. Ascertaining whether an individual would or would not have read an adequate warning is entirely speculative. *Id.*; *See Coffman*, 628 A.2d at 719. The heeding presumption thus "defies

logic." Richard C. Henke, *The Heeding Presumption in Failure to Warn Cases: Opening Pandora's Box?*, 30 Seton Hall L. Rev. 174, 182.

Additionally, there are several public policy grounds against the heeding presumption. The Montana Supreme Court rejected the heeding presumption in *Riley v. Am. Honda Co., Inc.*, stressing that real-world experience fails to support the proposition underlying the heeding presumption, stating that "warnings are everywhere in the modern world and often go unread, or where read, ignored." 856 P.2d at 200. The entire premise of the heeding presumption (1) is inconsistent with real-world experience that users ignore warnings; (2) is based on evidence that is not sufficiently reliable or scientific; and (3) allows, indeed encourages, speculative evidence to prove what plaintiffs might have done. Studies and real-world experience show that warnings go unread, making it pure conjecture that plaintiffs would have read and heeded warnings. Hildy Bowbeer & David S. Killoran, *Liriano v. Hobart Corp.: Obvious Dangers, The Duty to Warn of Safer Alternatives, and the Heeding Presumption*, 65 Brook. L. Rev. 717, 756-57 (1999). Ordinary experience suggests people often ignore the inundation of warnings in the hectic world around them. Users may be in a hurry, wish to figure a product out on their own, or may have used a product many times, and find reading a label unnecessary. Under *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), courts emphasize that expert opinion evidence must be relevant and reliable to be admissible. Amidst the spirit of *Daubert*, which has been applied in products liability cases (*see Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999)), presuming that an individual would have behaved differently if only a warning were present undermines a court's otherwise valiant efforts to ensure decision-making in products liability cases is based upon reliable evidence rather than speculative presumptions, conjecture, or junk science. Moreover, presuming that a product user would have read and heeded a warning is

inherently speculative. Though the presumption is rebuttable, rebutting this mere conjecture is even more absurd, as one would be forced to rebut an evidentiary conclusion without any logical basis. Professor Latin argues that the comment j presumption, as it applies to manufacturers, provides a disincentive to the development of safer products. Latin, *supra* at 1257. The heeding presumption leads manufacturers to pay for more injuries than those that occur from defective products. This presumption unfairly targets products liability defendants by relieving plaintiffs of a usually required burden to prove causation. When plaintiffs no longer have to meet this burden, they may recover when the product itself did not actually cause the injury, rewarding frivolous claims. Therefore, the Ohiowa Supreme Court should not adopt the heeding presumption due to its illogical, unnatural nature.

2. The heeding presumption inappropriately eliminates the plaintiff's burden of proving causation, a cornerstone of products liability law

The body of products liability law requires plaintiffs to establish causation. *Riley*, 856 P.2d at 200. "Causation is a fundamental requisite for establishing any product-liability action." *Coffman*, 628 A.2d at 717. Additionally, it is well-established law that in strict product liability failure-to-warn cases, the plaintiff bears the burden of proving causation. *Rivera*, 209 P.3d at 273. In strict liability failure-to-warn cases, particularly those relying upon § 402A, "proof that the defect in the product was the cause of the injuries . . . is a necessary element." *Jacobs*, 480 S.W.2d at 604. Because a heeding presumption inappropriately shifts this burden of proving causation from the plaintiff to the manufacturer, neither the law nor public policy can recognize it. *Rivera*, 209 P.3d at 273.

"The determination of which party carries a burden is critical because it can impact the outcome of a case." *Rivera*, 209 P.3d at 274. Thus, application of the heeding presumption is not a trivial matter. In *Riley*, the Montana Supreme Court rejected application of the heeding

presumption in a strict liability failure-to-warn case involving a motorcycle accident stemming from the product's tendency to wobble. 856 P.2d at 200. "A showing of proximate cause is a necessary predicate to a plaintiff's recovery in strict liability." *Id.* at 198. The heeding presumption is, in effect, a rebuttable presumption that a plaintiff would have followed a warning, "thus satisfying the causation element of the failure to warn claim." *Id.* Applying the heeding presumption would depart from the well-established approach of requiring a plaintiff to establish a causal link between the lack of a warning and the injury in a failure to warn claim. *Id.* at 200. States like Nevada and Montana are not alone in rejecting a heeding presumption. *See DeJesus v. Craftsman Mach. Co.*, 548 A.2d 736, 744 (Conn. App. Ct. 1988) (concluding that there is no presumption that an inadequate warning was the proximate cause of the plaintiff's injuries because the plaintiff bears the burden of proving proximate cause); *Harris v. Int'l Truck & Engine Corp.*, 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).

Proponents of the heeding presumption argue that it resolves the difficulty of proving causation. However, "the evidence required to establish this element is not qualitatively different than other testimony given by a party in support of her or his prima facie case." *Riley*, 856 P.2d at 200. Such a concern is a "red herring" that deprives the jury of the opportunity to hear a plaintiff establish a prima facie case of failure to warn. *Id.* Though the policy of strict products liability may weigh in favor of protecting consumers and plaintiffs, this does not require use of the heeding presumption. "Many other changes in a plaintiff's burden of establishing a prima facie case—including the elimination of any burden at all" would be consistent with this policy.

But, this alone does not justify a wholesale shift in the burdens at the heart of products liability jurisprudence. Though it can be argued that in strict liability failure-to-warn cases, there is a problem of proving causation, *Jacobs*, 480 S.W.2d at 606, such a difficulty is not alone sufficient to require the application of a blind presumption in favor of one party to the litigation, preemptively tipping the scales of justice in one direction in an arbitrary fashion. All litigation involves some difficulty for both parties to a suit. This does not imply courts should remove the role of evidence from cases solely to simplify them. Moreover, the fact the heeding presumption is rebuttable does not rectify its absurdity. "A defendant certainly is 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 200. The heeding presumption, regardless of public policy, abandons the traditional causation element and allows non-meritorious claims to survive without proving a prima facie case. *Id.* The heeding presumption "serves to get the plaintiff over the hurdle of establishing causation in all but the weakest of cases. Henderson & Twerski, *supra* at 265. The heeding presumption effectively lightens a plaintiff's burden of proof to assist the plaintiff in surmounting proof of causation. *Sharpe v. Bestop, Inc.*, 713 A.2d 1079, 1083-84 (N.J. Super. Ct. App. Div. 1998). This unfairly tips the supposedly even-handed scales of justice in favor of one party. Courts have been adamant that proof of causation, central to tort law, cannot be excused, even in strict liability cases. *See Jacobs*, 480 S.W.2d at 604. The heeding presumption directly contradicts this cornerstone of tort law. "Applying a presumption is an extraordinary measure, as our system requires the plaintiff to prove the prima facie case. Such an extraordinary measure should require extraordinary justification." Karin L. Bohmholdt, *The Heeding Presumption and Its Application: Distinguishing No Warning from Inadequate Warning*, 37 Loy. L.A. L. Rev. 461, 475 (2003).

Applying the presumption takes the matter of causation out of the hands of the jury without justification. *Id.* Therefore, the Ohiowa Supreme Court should not adopt the heeding presumption because it needlessly alters a fundamental element of products liability law.

3. Cases involving tobacco products are an inappropriate context for the application of the heeding presumption

Tobacco products cases are an inappropriate context for application of the heeding presumption as courts tend to apply the heeding presumption contextually, most often in workplace settings. *See*, e.g., *Ackermann v. Wyeth Pharm.*, 526 F.3d 203, 212 (5th Cir. 2008) (blanketly rejecting adoption of the heeding presumption in pharmaceutical cases decided under Texas law). As an illustration, in adopting the heeding presumption, the New Jersey Supreme Court in *Coffman* based its reasoning on a workplace context—that "a plaintiff who uses or is exposed to a defective product in the course of his or her employment may not be able to exercise meaningful choice with respect to confronting the risk of injury posed by the product." 628 A.2d at 721–22. The failure-to-warn context may in be inappropriate for the heeding presumption altogether. "Minnesota state courts have not adopted the so-called "heeding presumption" within the context of a failure to warn claim." *See Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 99-100 (Minn. 1987) (sustaining failure to warn verdict "without deciding whether a rebuttable presumption exists that a warning would have been heeded"). Pennsylvania courts have also refused to extend the heeding presumption in a failure to warn case. *See Moroney v. Gen. Motors Corp.*, 850 A.2d 629, 634 n.3 (Pa. Super. 2004). With respect to tobacco cases, the Nevada Supreme Court rejected the application of the heeding presumption in a wrongful death, strict liability failure-to-warn suit against a tobacco company. *Rivera*, 209 P.3d at 277. This is one of the only 21st century cases to directly address the specific question of whether a state's body of product liability law recognizes the heeding presumption against a company who sells a

tobacco product. In 2004, the 8th Circuit rejected the heeding presumption in a failure-to-warn case involving a tobacco company. *Tuttle v. Lorillard Tobacco Co.*, 377 F.3d 917, 925 (8th Cir. 2004). Pennsylvania courts have never applied the heeding presumption in tobacco product cases. *Viguers*, 837 A.2d at 537. Pennsylvania has only applied the presumption in workplace asbestos exposure cases. *Id.* Courts adopting the heeding presumption unduly rely on public policy. *Id.* at 538. However, in situations where a "plaintiff is not forced by employment to be exposed to the product causing harm, the public policy argument for an evidentiary advantage becomes less powerful." *Id*. Here, this is not a workplace case. The underlying logic supporting courts' application of the heeding presumption in workplace cases such as those involving asbestos exposure to employees simply bear no parallels to those occurring in a private home involving a child and a tobacco product. Therefore, applying the heeding presumption in the present case is inappropriate.

C. The trial court's failure to give a requested jury instruction concerning the read and heed doctrine was, at most, harmless error

Failure to provide an instruction regarding the read-and-heed doctrine in the present case was harmless error not requiring reversal. R. 3. An improper jury instruction requires reversal when (1) there is 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); and (2) when such an instruction is prejudicial. *Coleman v. B-G Maint. Mgmt. of Colorado, Inc.*, 108 F.3d 1199, 1201 (10th Cir. 1997). Thus, reversal of a jury instruction is a lofty burden. The Superior Court of New Jersey held that a court should not instruct a jury on the heeding presumption unless the plaintiff is dead or unavailable at trial. *Sharpe*, 713 A.2d at 1085–86.

Here, the Ohiowa Court of Appeals held that the trial court did not err in disallowing a jury instruction on the heeding presumption. R. 3. The Ohiowa Court of Appeals reasoned that "no prejudice resulted from the failure to give the requested jury instruction." R. 12. Even Judge Zeddemore, who dissented as to the manufacturing defect claim, agreed with the majority of the Court of Appeals as to the jury instruction, who ruled in favor of Zuul. R. 13. Additionally, this is not a case involving a dead or unavailable plaintiff. There is no indication in the record that L.T. died as a result of his injuries or was unavailable to testify at trial. Here, all named parties provided testimony, and the jury deliberated for more than sixteen hours to reach its verdict in favor of Zuul. R. 12. Accordingly, "it cannot be unequivocally stated that the jury would have proffered a different verdict if the requested instruction had been given." R. 12. Therefore, failure to give the Tully's requested jury instruction concerning the heeding presumption was, at most, harmless error.

Conclusion

For the foregoing reasons, Respondent, Zuul Enterprises, respectfully request that this Court affirm the decision of the Ohiowa Court of Appeals because (1) the petitioner is neither a consumer nor in the class of persons that an e-cigarette manufacturer should reasonably foresee as being subject to harm from a defective condition, and (2) the read and heed doctrine does not apply to strict liability failure-to-warn claims in the state of Ohiowa.

Respectfully Submitted,

/s/_____
Team X
Counsel for Respondent

Appendix A

Appendix A shows the similarities and differences between the Ohiowa Rev. Code § 5552.368, the Ind. Code Ann. § 34-20-2-1 (West 2020), and the Restatement (Second) of Torts § 402A (1964). In short, the Ohiowa legislature decided to exclude "ultimate user" and only purposefully incorporate "consumer" into its statutory language as opposed to incorporating both phrases.

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.

Ind. Code Ann. § 34-20-2-1

Grounds.

Except as provided in section 3 of this chapter, a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to **any user or consumer** or to the user's or consumer's property is subject to liability for physical harm caused by that product to the **user or consumer** or to the user's or consumer's property if:

(1) that **user or consumer** is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition;

(2) the seller is engaged in the business of selling the product; and

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

Restatement (Second) of Torts § 402A

Special Liability of Seller of Product for Physical Harm to User or Consumer.
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to **the ultimate user or consumer**, or to his property, if

(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

l. User or consumer. "Consumers" include not only those who in fact consume the product, but also those who prepare it for consumption; and the housewife who contracts tularemia while cooking rabbits for her husband is included within the rule stated in this Section, as is also the husband who is opening a bottle of beer for his wife to drink. Consumption includes all ultimate uses for which the product is intended, and the customer in a beauty shop to whose hair a permanent wave solution is applied by the shop is a consumer. "User" includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.