DOCKET 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 FROM THE SEVENTH APPELLATE DISTRICT, DRUMMOND COUNTY

BRIEF FOR PETITIONERS

TEAM Y

QUESTION PRESENTED

I. Before the petitioner can recover for a manufacturing defect, the petitioner must prove he was a foreseeable consumer and used the product in a foreseeable manner. Following a previous conviction for marketing E-Cigarettes to children, Zuul released new accessories called Skins for their E-Cigarettes, depicting cartoon characters that invited younger users such as L.T. to press the activator button on their device. Did the lower court err in affirming Zuul's motion for summary judgment when L.T. was a foreseeable user of their product?

II. The heeding presumption has been adopted by a majority of jurisdictions on rationales grounded in public policy and supported by the Restatement (Second) of Torts to alleviate a plaintiff's burden of proving causation in failure-to-warn cases. Ohiowa product liability policies look favorably on consumers and were drafted with the instruction of the Restatement (Second) of Torts. Does the heeding presumption apply to strict liability, failure-to-warn cases in Ohiowa?

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STATUTORY PROVISIONS

The Restatement (Second) of Torts § 402A, the Ohiowa Revenue Code § 5552.368, and the Ohiowa Revenue Code § 5552.369 are relevant to the first issue in this case. Additionally, the Restatement (Second) of Torts § 402A is relevant to the second issue. All statutory provisions are reprinted in Appendix A.

STATEMENT OF THE CASE

Factual Background

Zuul Enterprises. Zuul Enterprises "Zuul," an Ohiowa corporation, was founded by Pete Venkman in March of 2016, in Cincinnatus, Ohiowa. R. at 3. Zuul produced e-cigarettes "E-Cigarette" with the intention of providing a safer alternative to regular cigarettes to consumers. *Id*. The E-Cigarette is a compact device that operates by depressing an activating button, causing an atomizer located within the E-Cigarette to heat the liquid in a cartridge and turn it into vapor. R. at 3 & 4.

To promote this product, Zuul developed flavors and designs that attracted young adults to use the E-Cigarette. R. at 4. Consequently, in December 2017, a federal district court convicted Zuul for marketing their E-Cigarette to children through the use of sweet vapor flavors. R. at 4. Subsequently, Zuul's stock plummeted from the restrictions placed on their marketing techniques. *Id*. Zuul released a statement in June 2018 stating their E-Cigarette had been redesigned, and no other company's cartridges could be entered or used in their product. *Id*.

Shortly after the injunction, Zuul released a new line of accessories called Zuul Skins "Skins." R. at 4. Skins are adhesive labels that allow purchasers to decorate their E-Cigarette with various patterns, colors, and licensed characters. *Id*. Consumers may also customize their own Skins. *Id.* As a result of releasing Skins, Zuul's stocks climbed and reflected their status

prior to the 2017 injunction. R. at 4. Unlike the E-Cigarette itself, the Skins packaging did not contain a warning regarding the danger of the product. *Id.*

Babysitting. Dana Barrett, a nineteen-year-old sophomore, started using E-Cigarettes after enrolling in college. R. at 5. When babysitting L.T., Barrett would frequently bring her E-Cigarette into the home. R. at 5. On July 17, 2018, Dana Barrett, babysat L.T. and brought her E-Cigarette with her. R. at 5. However, Barrett warned L.T. the E-Cigarette was dangerous, and he should not play with it. *Id.*

Explosion. On July 17, 2018, Barett encased her E-Cigarette in a Skin depicting the popular cartoon character *Halo Gato* before entering the Tully's residence. R. at 5. L.T. and Dana Barrett shared an interest in *Hola Gato*, which fueled L.T.'s desire to explore the E-Cigarette when the device was left unattended. *Id*. L.T. used the E-Cigarette in a manner that mimicked a leaf blower by pressing the activator button. *Id*. Without warning, the E-Cigarette exploded, causing L.T.'s hand to be severely injured and burned. *Id*. Following this incident, Louis Tully filed suit on behalf of his son, L.T., asking the court to hold Zuul responsible for the injuries resulting from their defective product. R. at 2.

Procedural History

In this action, the Tully's allege that Zuul violated state product liability law due to a manufacturing defect that caused the explosion, and Zuul failed to adequately warn consumers of the risks associated with their product. R. at 2. Zuul then moved for summary judgment. R. at 2. While conceding the product did have a manufacturing defect, Zuul argued L.T. was not a foreseeable user of the E-Cigarette and Zuul believes the warning it provided was sufficient. R. at 2 & 3.

Court of Common Pleas. The lower court held that L.T. and other children were not foreseeable consumers of E-Cigarettes or Zuul products and entered into a summary judgment in favor of Zuul. R. at 3. The claim alleging an inadequate warning proceeded to trial. *Id*. After the Tully's requested a jury instruction regarding the heeding presumption, to which Zuul objected, the lower court sustained this objection, and the jury ruled in favor of Zuul. *Id*.

The Court of Appeals for the State of Ohiowa. The Tully's made a timely appeal raising two issues. First, the Tully's argue that the lower court erred in granting summary judgment to Zuul, because it is still an issue of material fact whether or not L.T. was a foreseeable consumer of the E-Cigarette or Zuul products. R. at 3. Second, the Tully's argue that the court abused its discretion in not allowing a jury instruction regarding the heading presumption. R. at 3. The court ruled in favor of Zuul, holding that summary judgment was appropriate, and there was no error in the lower court's decision regarding the heading presumption. *Id*. The Supreme Court of the State of Ohiowa has granted a writ of certiorari regarding two questions. First, whether the appellate court erred in affirming Zuul's motion for summary judgment. Second, whether the read and heed doctrine applies to strict liability cases in the state of Ohiowa. R. at 1.

SUMMARY OF THE ARGUMENT

A manufacturing defect exists when a product deviates from its intended design at the time it leaves the manufacturer. In addition to proving the harm caused by the manufacturing defect was the direct and proximate cause of the L.T.'s injuries, the petitioner must also prove he was a foreseeable consumer and used the device in a foreseeable manner. Courts generally use the consumer expectation test to determine if a manufacturing defect exists. Before a manufacturing defect is held liable under this test, the court must determine whether (1) there was in fact a defect, (2) the defect existed at the time the product was sold, and (3) the defect was the proximate cause of the injury. Ohiowa Rev. Code § 5552.369.

However, the Ohiowa Rev. Code § 5552.368 Rule of Liability, only holds sellers liable to consumers or, more specifically, "a class of persons that the seller should reasonably foresee as being subject to the harm caused by the defect." In contrast, courts have held foreseeable consumers as individuals who the manufacturer markets its products to. Manufacturers have an additional duty to protect against vulnerable users, and the Courts must establish who may be protected as a consumer under the Restatement (Second) of Torts.

Furthermore, manufacturers may argue misuse as a defense against a defective product. However, when the product is used in a manner that is foreseeable or equivalent to how it would normally be used, the manufacturer may still be liable for the damage a consumer incurs from the product. Direct and circumstantial evidence can be used as a way to establish whether the manufacturer should be held liable for the resulting injury.

In this case, L.T. was a foreseeable user of the product, and Zuul had a duty to protect him as a vulnerable user. Here, the product was used by pressing the activating button, a method that is reasonably foreseeable and an intended use of the product. R. at 6. The product in this

case was not misused, and Zuul should remain liable for the damages incurred by their product. Therefore, the lower court erred when affirming Zuul's motion for summary judgment, and this Court should reverse the lower court's decision.

Furthermore, the State of Ohiowa should adopt the read and heed doctrine. The read and heed doctrine or "heeding presumption" is a rebuttable presumption that shifts the burden of causation to the defendant in strict liability, failure-to-warn cases. This presumption was birthed from common law doctrine and has since been applied with rationales grounded in public policy.

Comment j of Restatement (Second) of Torts § 402A recognizes "where a warning is given, the seller may reasonably assume that it will be read and heeded." The heeding presumption operates reciprocally to comment j as a logical corollary. Ohiowa used the Restatement (Second) of Torts to draft its products liability laws and has even used comment j specifically to derive other doctrines, such as the learned intermediary doctrine.

Although comment j has received some criticism, courts have still applied the presumption on rationales solely based on public policy. More specifically, courts have applied the presumption to hold manufacturers accountable, alleviate undue burdens in proving causation, and prevent speculative testimony. Therefore, regardless of whether the Court decides comment j applies, the Court may still adopt the heeding presumption under public policy rationales.

Some courts fail to apply the heeding presumption in inadequate warning cases or when the learned intermediary doctrine applies. However, those same courts fail to acknowledge the problem of speculative testimony that still exists in these cases that the heeding presumption would solve.

Courts that fail to apply the heeding presumption overlook the benefits the presumption has on the defendant and the court process. While the defendant may carry the burden of causation, the heeding presumption allows the defendant to rebut causation with evidence of a plaintiff's habits or knowledge of the risk involved. Such a process eliminates a plaintiff's self-serving testimony and the need for defense counsel to cross examine the plaintiff, which could be interpreted as an unwarranted attack on the plaintiff by a jury.

ARGUMENT

I. The lower court erred in affirming Zuul's motion for summary judgment on the Tully's manufacturing defect claim.

A manufacturing defect exists when a product deviates from the intended design when leaving the hands of the manufacturer, making it unreasonably dangerous, and the direct and proximate cause of injury. *State Farm Fire & Cas. Co. v. Chrysler Corp.*, 523 N.E.2d 489, 494 (Ohio 1988). A defective product in this manner can be proven by showing a deviation from design standards using blueprints to prove non-conformity, direct or circumstantial evidence, or by showing a non-conformity with external standards. *C. L. Pouncey v. Ford Motor Co.*, 464 F.2d 957, 961 (5th Cir. 1972).

The manufacturer of the defective product may be strictly liable when the product is used by a foreseeable consumer or in a foreseeable manner. *State Farm Fire & Cas. Co. v. Chrysler Corp.*, 523 N.E.2d at 490. Strict liability exists when a consumer is injured while using a defective product in the way it was intended to be used, and the injury was a result of the defect of which the plaintiff was unaware, rendering the product unsafe for its intended use. *Greenman v. Yuba Power Prods. Inc.*, 337 P.2d 897, 900 (Cal. 1963). The Restatement (Second) of Torts § 402A addresses the issue of a "foreseeable consumer", and holds a person who sells any product in a defective condition to the "user or consumer liable for any physical harm caused to the consumer or user if the product did not deviate from the condition in which it was sold. Restatement (Second) of Torts § 402A, cmt. g. Consequently, the manufacturer remains liable when the defective product was used in the manner it was intended to be used in, resulting in harm. *Donegal Mut. Ins. v. White Consol. Indus.*, 852 N.E.2d 215, 221 (Ohio 2006).

A. Because there was a manufacturing defect, the lower court erred in affirming Zuul's motion for summary judgment.

The Restatement (Second) of Torts and the Restatement (Third), establish the consumer expectation test and the risk utility test as mechanisms to use when determining product defects. Sean P. Wajert, *Product Liability Claims, Defenses and Remedies*. While the Restatement (Third) of Torts uses the risk utility test, this method is tailored more towards addressing design and warning defect claims. *State Farm Fire & Cas. Co. v. Chrysler Corp.*, 523 N.E.2d at 494. The Restatement (Second) of Torts, developed the consumer expectation test, which imposes liability on manufacturers when the product is deemed as unreasonably dangerous beyond what is contemplated by the ordinary consumer who purchases it. *Id*. at 494. This test is used for a variety of product defect cases, but it is the most applicable method for manufacturing defects. *Id*. When assessing whether a defect has occurred, the court must determine whether (1) there was in fact a defect, (2) the defect existed at the time the product was sold, and (3) the defect was the proximate cause of the injury. *Id*. at 491. All three elements must be met to hold a manufacturer liable. *Id*. at 495.

Ohiowa Rev. Code § 5552.369 mirrors the language of the consumer expectation test established by the Restatement (Second) of Torts § 402A, showing Ohiowa's reliance on its context and language when determining the existence of a product defect. Ohiowa Rev. Code § 5552.369. As Zeddemore stated in his dissent, "the majority (in this Case) has designated, the OPLA was drafted with the Restatement (Second) of Torts § 402A and thus intended to impose strict liability on manufacturers and sellers of products with defects or defective conditions." R. at 13. In this case, a manufacturing defect in Zuul's product, the E-Cigarette, resulted in L.T.'s injuries. R. at 8. The defective condition was proven through expert testimony and circumstantial

evidence, which confirms that Zuul should be held strictly liable. R. at 7. Therefore, the lower court erred when affirming Zuul's motion for summary judgment.

1. The first element of the consumer expectation test was satisfied when the E-Cigarette deviated from the product's intended design.

A manufacturing defect occurs when the plaintiff can show that the product being used deviated from its intended design resulting in an injury. *In re Coordinated Latex Glove Litig*., 121 Cal. Rptr. 2d 301, 303 (Cal. Ct. App. 2002). When the product in question fails to behave in the manner intended and differs from how the same product would normally function, it may be considered defective. *Maybank v. S.S. Kresge Co.*, 266 S.E.2d 409, 412 (N.C. Ct. App. 1980).

In *Maybank*, a flash cube exploded, causing injury to the consumer. *Id*. at 410. Ultimately, the Supreme Court of North Carolina held the behavior of this version of the flashcube failed to act in a way a normal flash cube would be expected to operate. *Id*. at 412. The Supreme Court of California ruled in a similar fashion when a bottle of soda unexpectedly exploded in a waitress's hand. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 437 (Cal. 1944). The Supreme Court of California in *Escola* ruled in favor of the plaintiff by stating the product was defective when an excess amount of pressure or gas was used or by some defect in the bottle, which made it likely to explode, and there were no other factors contributed to the explosion. *Id*. at 439. While perfection is almost impossible to achieve, a balance of feasibility, utility, and economics still comes into play in determining whether the product is acceptable. *Id.*

Generally, a typical e-cigarette would not explode, and is not intended to behave in that manner. Here, Zuul's product deviated from their initial design, posing as a risk to consumers. R. at 8. In fact, an expert identified a faulty connection that caused the atomizer to overheat and the E-Cigarette to explode. R. at 7 & 8. Zuul did not contest that the product was defective and offered no evidence to rebut the testimony. R. at 8. Instead, the E-Cigarette

deviated from Zuul's intended design, resulting in L.T.'s injury. R. at 6. Therefore, the lower court erred when affirming Zuul's motion for summary judgment, and this Court should reverse their decision.

2. The second element of the consumer expectation test was satisfied when the defect existed when it left Zuul's facility.

In order for a manufacturer to be held liable under this standard, the product must have been defective at the time it left the hands of the manufacturer. *Revlon, Inc. v. Hampton*, 551 S.W.2d 121, 123 (Tex. App. 1977). The Ninth Circuit addressed this issue when a decomposed mouse was found in a beverage that he partially consumed. *Shoshone Coca-Cola Bottling Co. v. Dolinski*, 420 P.2d 855, 857 (Nev. 1996). The manufacturer offered evidence trying to show the mouse could not have been in the bottle at the time it departed from their control. *Id*. at 858.The evidence offered by the manufacturer was sufficient, and the court determined the manufacturer should not be held liable when there was no way to determine whether the mouse was in the soda at the time it departed from the manufacturer's control. *Id*. In contrast, the Sixth Circuit held that a manufacturer should be liable when the defective product existed when in the manufacturer's control. *State Farm Fire & Cas. Co. v. Chrysler Corp.*, 523 N.E.2d at 495.

In *Donegal Mutual Insurance*, the consumer presented evidence at trial to show it had not been tampered with after purchase, and instead, the switch that caused the injury existed at the time it left the manufacturer. *Donegal Mut. Ins.*, 852 N.E.2d at 226. Similarly, the court in *Escola* stated, "the bottle was in some manner defective at the time the defendant relinquished control, because sound and ordinarily carbonated liquids do not typically explode when handled." *Escola*, 150 P.2d at 439.

Here, the expert identified a defect existed when the E-Cigarette had a faulty connection between the activating button and the atomizer. R. at 7 & 8. Similar to *Escola*, the faulty

connection resulted in the explosion that caused, L.T.'s injury, an action that would not typically occur from a normal e-cigarette. R. at 8. The lower court, comparing this case to testimony brought forth in *Donegal Mutual Insurance*, found there was sufficient evidence to show, "if it were not for a defective condition, the E-Cigarette would have operated in accordance with Zuul specifications." R. at 8. Here, Zuul failed to offer evidence that the E-Cigarette was altered after it left the manufacturer's care. R. at 8. Therefore, the lower court erred in affirming Zuul's motion for summary judgment.

3. The third element of the consumer expectation test was satisfied when the defective E-Cigarette was the proximate cause of L.T.'s injuries.

In order for a manufacturer to be held liable for a defective product, the plaintiff must prove through direct or circumstantial evidence the source of the injury. *Thiele v. Chick*, 631 S.W.2d 526, 530 (Tex. App. 1982). Excluding circumstantial evidence would make proving a defect almost impossible. *Id*. The proof offered has to demonstrate the defective condition of the product was the proximate cause of the injury. *Donegal Mut. Ins.*, 852 N.E.2d at 221. The mere injury by a product is not enough by itself to establish this basis, and the case hinges on whether the harm was the direct cause of the defective product. *Revlon, Inc.*, 551 S.W.2d at 122. In *Donegal Mutual Insurance*, the consumer proved the defect and the harm from the product using evidence of the unexpected product performance that resulted in a fire, destroying the consumer's residence. *Donegal Mut. Ins.*, 852 N.E.2d at 221. The plaintiff showed the injury was the proximate cause through expert testimony and circumstantial evidence. *Id*. The court in this case ruled the evidence presented was sufficient to show the injuries sustained were a result of the defective stove. *Id*.

Here, the defective condition of the E-Cigarette was the proximate cause for L.T.'s

injuries. R. at 7. The expert testimony confirmed this by comparing the severity of L.T.'s burns to the manufacturing specifications of the E-Cigarette. R. at 7. The expert determined, without the defect, the E-Cigarette would have operated in accordance with any other e-cigarette within the industry. R. at 8. Therefore, the lower court erred in granting Zuul's motion for summary judgment on the manufacturing defect claim.

B. Because L.T. was a foreseeable consumer, the lower court erred in affirming Zuul's motion for summary judgment.

The Restatement (Second) of Torts § 402A holds a person who sells any product in a defective condition liable for any physical harm caused to the consumer or user, if the product did not deviate from the condition in which it was sold. Restatement (Second) § 402A. Consumer is defined in various ways with the sole understanding being a person who seeks or acquires personal property for personal, family, or household purposes. Sean P. Wajert, *Product Liability Claims, Defenses and Remedies*. Ohiowa Rev. Code § 5552.368 Rule of Liability, defines consumers as "a class of persons that the seller should reasonably foresee as being subject to the harm caused by the defect." Ohiowa Rev. Code § 5552.368 Rule of Liability. Accordingly, the Restatement (Second) of Torts, comment o "expresses neither approval nor disapproval of the expansion of the rule to protect others." *Darryl v. Ford Motor Co.*, 440 S.W.2d 630, 633 (Tex. 1969). As stated in Zeddemore's dissent, "though the Ohiowa statute fails to provide its own definition of "consumer," it is more practical to consider that the exclusion of "ultimate user" did not remove that category from the foreseeable "class of persons" but instead encapsulated it within the "consumer" term. R. at 14. While this conflicting terminology is the centerfold of many manufacturing liability claims occurring today, the Supreme Court of New Jersey uses the language of the Restatement (Second) of Torts § 402A as a reflection of the manufacturer's responsibility to remain liable for any physical harm occurring as a result of their

products on the market. *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 545 (N.J. 1982). This court argued the manufacturer should be liable when the product is defective, even when the manufacturer had no way of foreseeing the risk. *Id*. at 546. Consequently, the mere act of placing a product on the market that resulted in injury may be enough to ensue liability. *Id*. at 544.

When the defendant knew the product would be used by individuals other than the sole buyer, the manufacturer had a duty to protect. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916). Enforcing this standard encourages manufacturers create safer products for consumers. *Micallef v. Miehle Co.*, 384, N.E.2d 571, 576 (N.Y. 1976). Manufacturers maintain the duty to protect users of their products from harm resulting from a defect. *State Farm Mut. Auto. Ins. Co. v. Kia Motors Am., Inc.*, 828 N.E.2d 701, 707 (Ohio 2005). Manufacturers ultimately have the duty to protect vulnerable users from harm from their products. *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 85 (4th Cir. 1962).

Particularly in warning defect cases, there may be a reduced need to include extensive warnings being used by a sophisticated user. *Higgins v. E. I. Du Pont de Nemours & Co.*, 863 F.2d 1162, 1165 (4th Cir. 1988). However, in manufacturing defect claims, the manufacturer is always assessing the protection of vulnerable individuals. *Spruill*, 308 F.2d at 85. When a child died from ingesting furniture polish, the court stated death was foreseeable when the paint would be in close proximity to the child. *Id*. at 84. Regardless of whether the child was using the product within its intended use, the Fourth Circuit held the manufacturer as still being liable. *Id*. Instead, a manufacturer who knowingly selling a product that is defective or otherwise dangerous without warning of the defect or danger is liable. *Id.* at 85. This enforces the fundamental value of protecting individuals who respect and rely on the heightened expectations of product safety. *State Farm Mut. Auto. Ins. Co. v. Kia Motors Am., Inc.*, 828 N.E.2d at 707.

The Supreme Court previously addressed the significant dangers of promoting cigarette sales to minors in *Lorillard Tobacco Company*, in which the Court turned to the Federal Cigarette Labeling and Advertising Act (FCLAA) as a guideline. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 532 (2001). Justice O'Connor delivered the opinion stating that states have the authority to regulate conduct relating to the sale or use of cigarettes by minors. *Id*. at 550. However, today the argument shifts the focus from traditional cigarettes to e-cigarette manufacturers who have used similar techniques to attract young adults to their products. *Colgate v. Juul Labs, Inc.*, 402 F. Supp. 3d 728, 739 (N.D. Cal. 2019). In *Colgate*, the manufacturer amplified their sales of E-Cigarettes by implementing colorful advertisements, unique flavors, and social media to attract young users. *Id*. However, the campaign hid the foreseeable dangers of the products to these individuals. *Id*. at 738. The plaintiffs in this case relied heavily on *Izzarelli v. R.J. Tobacco Company*, where cigarettes were designed to attract young adults and were defective under the consumer expectation test. *Id*. at 753. This Court ruled, even if Juul did not intend for minors to use their products, its marketing techniques would reveal the use of their products among younger generations was foreseeable. *Id*. When placing a highly addictive product on the market, it is foreseeable that illegal use and trade may stem as a result. *Id*. at 762. Similarly, introducing marketing techniques that attract younger generations to a dangerous product, makes the illegal use and resulting harm foreseeable. *Id*.

The marketing techniques being used today by e-cigarette manufacturers mirror the approach used by traditional cigarette companies, showing the need to hold manufacturers of the technologically advanced version of a cigarettes liable for harm imposed by the dangers associated with their product that affect younger generations who are attracted to their product. *Id*. at 739. *MacPherson* establishes the understanding that in the ordinary course of events, the

dangers associated with a certain product will be shared by individuals other than the buyer. *MacPherson*, 111 N.E. at 1053. Therefore, the manufacturer has a duty of care and must ensure the products placed on the market are safe. *Id*. By holding a manufacturer to a higher standard where they maintain liable for harm arising from their product, encourages the manufacturer to develop safer products. *Id*.

As stated by Zeedemore in the dissent, "by the plain language of the Ohiowa Product Liability Act and by the intent of the legislature, it is clear that in Ohiowa, a manufacturer who creates a product with a defective condition should be held strictly liable to all persons who may foreseeably be harmed by the defect." R. at 13. In this case, Ohiowa's Rev. Code § 5552.368, relied on the Restatement (Second) of Torts as a guideline when deciding who should be considered a foreseeable user. R. at 6. While the Ohiowa Rev. Code § 5552.368 only uses the terminology "consumer," it can be viewed as encompassing the term "ultimate user" within its definition. R. at 14. The Restatement (Second) of Torts differentiates between these terms, establishing a presumption that the broad language of Ohiowa's law protects foreseeable "users" as well. R. at 6.

Additionally, Zuul retains the responsibility of protecting foreseeable users, and they must protect vulnerable and susceptible users of their product as well. Here, L.T. is a child using Zuul's product, showing a higher need for protection from Zuul than would be expected for a sophisticated user. R. at 5. Zuul has a duty to protect children and minors from the foreseeable harm associated with their product, and the manufacturer shall remain responsible for any harm resulting as a direct consequence of their defective product. Zuul should also be liable for the harm that occurred when it was foreseeable that young adults and children would be attracted to the design of their product.

Previously, Zuul was required to pay damages, after a federal district court found as a matter of law, that they were using certain sweet vapor flavors to market directly to children. R. at 4. Similar to *Colgate*, Zuul specifically targeted younger users through their advertising mechanisms and establishment of the Skins. R. at 4. The decision to release Skins that depict cartoon characters and bright colorful designs was made a short six months following Zuul's previous injunction that prohibited advertising to children. R. at 4. Zuul knew of the risks associated with attracting younger users, and still created these accessories, with the intent of increasing their profits and amplifying the use of their products. R. at 4. Due to the foreseeability that Zuul's product would attract children and younger generations to use their product, the manufacturer should be held strictly liable for the harm resulting from the E-Cigarette.

C. Because L.T. did not misuse the E-Cigarette, the lower court erred in affirming Zuul's motion for summary judgment.

Misuse can be used as a defense only when the product was used in an unforeseeable manner, and the misuse was the "sole proximate cause of the injury." *Davis v. Cincinnati, Inc.*, 610 N.E.2d 496, 497 (Ohio 1991). This exists when the consumer uses a product in a way that deviates from its intended use or in a reasonably foreseeable manner. *Donegal Mut. Ins.*, 852 N.E.2d at 220. Misuse is often used to remove liability for an injury resulting from a defective product, when the injury occurred from an unintended or unforeseeable manner. *Id*. However, when used in a foreseeable manner, and the defective product serves as the proximate cause for the injuries suffered, the manufacturer may be held liable. *Id*.

1. L.T. used the E-Cigarette in a foreseeable manner when he was injured.

When constructing a product, it is the manufacturer's responsibility to consider the environment in which the product will be used and protect individuals from the ordinary and

intended use of the product in which it was sold. *Ellsworth v. Sherne Lingerie, Inc.*, 495 A.2d 348, 355 (Md. 1984). The court must then decide if the product would safely perform the job for which it was built, and whether the product was used in the way in which it was intended. *Id*. at 590. Manufacturer's must take into account a variety of uses that may be foreseeable when a consumer is using their product, although the action was not subjectively intended. *Id*.

In *Ellsworth*, when a woman's nightgown was being worn inside out and the material caught fire, the court upheld this standard. *Id*. at 350. Since it was foreseeable that an individual may put their clothes on inside out, the manufacturer was held liable for the resulting harm. *Id*. at 588. Furthermore, there is always a need to assess misuse when it comes to vulnerable parties, and a need to protect susceptible individuals. *Spruill*, 308 F.2d at 85. It does not matter if the manufacturer believed harm was unlikely to occur when the product was used in a normal manner. *Ford Motor Co. v. Zahn*, 265 F.2d 729, 733 (8th Cir. 1959). In *Ford,* when a man incurred an eye injury as a result of a jagged edge on an ashtray, the court held for the plaintiff arguing that the product was used as intended, and the manufacturer was liable for the injury of their defective product, no matter how unlikely manufacturer believed it may be. *Id*. at 730.

Here, Zuul had a duty to take into account a variety of uses associated with their product. It was not unforeseeable that L.T., while playing with the E-Cigarette, would press the activating button. R. at 5. In fact, this was the sole method used to activate the device, and pressing the button was how the E-Cigarette was intended to be used. R. at 3. Therefore, the manufacturer should have foreseen that a user of their product, in this case being Dana Barrett, would bring the E-Cigarette into an environment where a child would have access to it. R. at 5. "Young L.T. was more than a common bystander … he held the device in his hand, pressed the button how it was intended to be pressed, and, as a result of the undisputed manufacturing defect, was injured." R.

at. 14. Therefore, L.T. used the product in a foreseeable manner, and the lower court erred in affirming Zuul's motion for summary judgment.

2. Using the E-Cigarette as a leaf blower was not the proximate cause resulting in L.T.'s injuries.

When using misuse as a defense, the manufacturer has a duty to prove the misuse of the product was the sole proximate cause of the injuries. *Davis v. Cincinnati, Inc.*, 610 N.E.2d at 497. In *Venezia*, the court stated that throwing a glass beer bottle was completely unrelated to any normal or intended use and was in fact a deliberate misuse. *Venezia v. Miller Brewing Co.*, 626 F.2d 188, 190 (1st Cir. 1980). Therefore, the defendants were not held liable in this case. *Id*. at 192. In contrast, the court in *Dimond* noted the defendant may be liable when a defective product is the reason for the injury. *Dimond v. Caterpillar Tractor Co*., 134 Cal. Rptr. 895, 900 (1976). *Escola* also confirms this idea by stating when the defective bottle was the proximate cause of the plaintiff's injuries. *Escola*, 150 P.2d 436 at 459.

Unlike *Venezia*, this was not deliberate misuse. Instead, this case relates to *Dimond*, where the defect in the E-Cigarette atomizer, resulted in the explosion and was the proximate cause of L.T.'s injuries. Therefore, the lower court erred when affirming Zuul's motion for summary judgment when it was proven through expert testimony that it w2as the manufacturing defect of the E-Cigarette, and not L.T.'s foreseeable use, that was the proximate cause of L.T.'s injuries.

II. The read and heed doctrine should apply to strict liability, failure-to-warn cases in Ohiowa.

While often difficult to prove, causation is an essential element in strict liability failure-to-warn cases. *Payne v. Soft Sheen Prods., Inc.*, 486 A.2d 712, 725 (D.C. 1985); *Tech. Chem. Co. v. Jacobs*, 480 S.W.2d 602, 604-06 (Tex. 1972). With the hopes of alleviating the futile

obstacles a plaintiff faces in proving causation, courts began to adopt the read and heed doctrine or "heeding presumption." *Coffman v. Keene Corp.*, 628 A.2d 710, 716 (N.J. 1993). This presumption allows the fact-finder to presume the plaintiff would have heeded a product's warning had the defendant provided one. *Id*. The defendant, however, is free to rebut the presumption "with contrary evidence that presumed fact does not exist." *Id*. at 714.

A majority of jurisdictions have now adopted this rebuttable presumption on rationales rooted in public policy and supported by common law doctrine. David G. Owen, Products Liability Law 798 (West's Law School Advisory Bd. et al. eds., 2nd ed. 2008) (noting that "[c]ourts in more than half the states have now adopted the heeding presumption … to help the plaintiff prove causation in warning claims"); Benjamin J. Jones, *Presumption or Inference, in Products Liability Action Based on Failure to Warn, That User Would Have Heeded an Adequate Warning Had One Been Given*, Annotation, 38 A.L.R. 5th 683 (1996) (noting that "a plurality of decisions in those jurisdictions" where the question has been presented have adopted the heeding presumption).

A. Ohiowa's application of the Restatement (Second) of Torts strongly suggests its support of the heeding presumption.

The heeding presumption has been derived from Restatement (Second) of Torts § 402A, comment j. *Coffman*, 628 A.2d at 717. Comment j states, "where a warning is given, the seller may reasonably assume that it will be read and heeded." Restatement (Second) of Torts § 402A, cmt. j. As a logical corollary, the heeding presumption operates reciprocally to comment j. *Coffman*, 628 A.2d at 717.

Courts have used comment j to support its adoption of the heeding presumption. In *Coffman*, a former naval electrician sought relief against an asbestos manufacturer after exposure to the manufacturer's products caused Coffman to develop a pulmonary disease. *Id*. at 715. The

court held the heeding presumption applied after determining the plaintiff would have heeded warnings had the manufacturer warned of the dangers associated with its products. *Id.* The, seller should benefit from the heeding presumption when a warning is not provided considering the manufacturer benefits from the presumption in comment j when a warning is provided. *Id.* at 717.

Ohiowa's product liability laws closely align with the Restatement (Second) of Torts, because the legislature found the Restatement (Second) instructive in the drafting process. R. at 11. This drafting process resulted in a set of laws that look favorably upon the consumers of Ohiowa. *Id*. In accordance with this mentality and as the court did in *Coffman*, Ohiowa should construe to comment j to look favorably upon the consumers of Ohiowa. *Id.* Reliance on comment j would not be unfounded in Ohiowa, as the legislature used comment j to adopt the learned intermediary doctrine. *Id.* Therefore, the Ohiowa should follow suit and adopt the heeding presumption.

B. Ohiowa's adoption of the heeding presumption would further the objectives of public policy in failure-to-warn cases.

Public policy provides a firm basis for the doctrine of strict liability in failure-to-warn cases. *Coffman*, 628 A.2d at 602-03. To some courts, the heeding presumption was adopted under the theory that it was derived from the Restatement (Second) of Torts § 402(A), comment j and further supported by public policy. *Id.* However, "courts have adopted the heeding presumption without reference to comment j." *Golonka v. Gen. Motors Corp.*, 65 P.3d 965, 968 (Ariz. Ct. App. 2003). While courts have acknowledged that the heeding presumption is not supported with "empirical evidence," the legitimacy of the heeding presumption "can be grounded in public policy alone." *Coffman*, 628 A.2d at 717-18.

Under the public policy rationale, the heeding presumption is used to "foster greater product safety and enable victims of unsafe commercial products to obtain fair redress." *Id.* at 718. More specifically, the presumption (1) promotes a manufacturer's basic duty to warn; (2) reduces a victim's burden of proof; and (3) minimizes unreliable testimony when proving causation. *Id*. at 720.

1. Ohiowa's adoption of the heeding presumption would hold manufacturers accountable in failure-to-warn cases.

Requiring a manufacturer to rebut a presumption of causation is consistent with the established doctrine underpinning strict liability torts. *Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 332 N.E.2d 820, 827 (Ind. Ct. App. 1975), *rev'd on other grounds*, 358 N.E.2d 974 (Ind. 1976). Such a presumption would not only encourage manufacturers to provide safer products, but also "discourage those manufactures who would rather risk liability than providing a warning that would [otherwise] impair the marketability of the product." *Id*. Withholding such information goes against a consumer's "fundamental 'right' to important safety information" regarding use of the product and the dangers associated with that product. David G. Owen, Products Liability Law 800 (West's Law School Advisory Bd. et al. eds., 2nd ed. 2008).

Courts have applied the heeding presumption with the sole basis of holding a manufacturer accountable. *Golonka*, 65 P.3d at 968. In *Golonka*, the plaintiff's estate sought relief against a truck manufacturer after the truck's transmission slipped into reverse and ran over the plaintiff. *Id*. at 960. The truck manufacturer argued that the heeding presumption was no longer viable because the Restatement (Third) of Torts dropped comment j of the Restatement (Second) of Torts. *Id*. at 968. However, the court applied the presumption after noting how some courts have adopted the heeding presumption without reference to comment j. *Id*. The court supported its holding by stating:

> In light of the difficulty of demonstrating how an injured or deceased person would have reacted to a particular warning, manufacturers who issue products with inadequate safety warnings could escape any consequence, thereby decreasing the incentive for manufacturers to adequately warn consumers of dangers inherent in product use. By easing the burden of proving causation, "[t]he use of the heeding presumption provides a *powerful incentive* for manufacturers to abide by their duty to provide adequate warnings."

Golonka, 65 P.3d at 968 (emphasis added) (citation omitted) (quoting *Coffman*, 628 A.2d at 718).

Similarly, the court in *Nissen* upheld the heeding presumption with this "powerful incentive" in mind. *Nissen Trampoline Co.* 332 N.E.2d 820 at 827. In *Nissen*, the plaintiff sought relief against a trampoline manufacturer when the plaintiff injured his leg after it slipped through the springs that connected the bed of the trampoline to the frame. *Id.* at 821. Although evidence suggested the manufacturer realized this particular accident was possible in testing, the manufacturer failed to apply any warning regarding this potential hazard. *Id*. The court chose to apply the heeding presumption to discourage the trampoline manufacturer from failing to apply warnings of hazards they knew existed. *Id.* at 827.

The manufacture in *Golonka* argues the heeding presumption should not apply because the Restatement (Third) of Torts dropped comment j. *Golonka,* 65 P.3d at 968. However, this argument should not have any effect on Ohiowa's adoption of the heeding presumption for two reasons. First, as previously discussed, Ohiowa used the Restatement (Second) of Torts, *not* the Resentment (Third) of Torts in drafting its legislation. R. at 11. The legislature has even gone as far to derive other doctrines from the Restatement (Second) of Torts § 402(A), comment j. Secondly, even if the Court found the abandonment of comment j argument persuasive, courts such as *Golonka* and *Nissen* have adopted the heeding presumption without any support of the Restatement (Second) of Torts.

More specifically, the courts in *Golonka* and *Nissen* adopted the heeding presumption under the public policy rationale of holding manufacturers accountable. Here, applying the heeding presumption would encourage Zuul to put safer products into the stream of commerce or, at the very least, discourage them from failing to warn about known dangers in their E-Cigarettes. As stated in *Golonka* and applied in *Nissen*, adopting the heeding presumption would incentivize manufacturers to better warn its consumers, including Ohiowan consumers. Therefore, the heeding presumption should apply in Ohiowa.

2. Ohiowa's adoption of the heeding presumption would alleviate undue burdens in proving causation.

Before a plaintiff can recover under a strict liability claim, courts require the plaintiff to prove that the product's defect was the proximate cause of the plaintiff's injury. *Payne*, 486 A.2d at 725. While causation with regard to manufacturing and design defects are usually put to a well-defined test, causation with regard to failure-to-warn cases is completely different. David G. Owen, Products Liability Law 796 (West's Law School Advisory Bd. et al. eds., 2nd ed. 2008) (acknowledging that causation in failure-to-warn cases, as opposed to causation in manufacture or design defect cases, is "an entirely different kettle of fish").

Evidence used to prove proximate cause in defect cases falls "in the wide gulf between Newtonian physics and Freudian psychology." *Id.* While manufacturing and design defect evidence generally leans towards established physical principles, failure-to-warn claims generally fall within the "vagaries of human psychology" and in the form of speculative testimony. *Id.* This type of evidence is unlikely to allow the plaintiff to prove that the lack of warning was the proximate cause of the plaintiff's injuries. *Payne*, 486 A.2d at 725. Such an "onerous" process leaves the plaintiff with a particularly "unfair burden." David G. Owen, Products Liability Law 800 (West's Law School Advisory Bd. et al. eds., 2nd ed. 2008).

Courts have thus applied the heeding presumption to help plaintiffs overcome this burden of causation in failure-to-warn claims. *Payne*, 486 A.2d at 725. In *Payne*, the plaintiff sought relief against a hair care product manufacture, after the plaintiff's beautician allowed the product to leak on the plaintiff's back, resulting in second degree burns. *Payne*, 486 A.2d at 716-17. The court applied the heeding presumption after acknowledging:

> [A] rule requiring a plaintiff to prove not only that the failure to warn of a danger in a product made that danger unreasonable and that his injury grew out of the risk caused by that danger, but also that the failure to warn caused his injury, would impose an *impossible burden* on the plaintiff, and would often prevent his recovery because of pure speculation on the part of the jury.

Payne, 486 A.2d at 725 (emphasis added).

As discussed by Owen, the type of evidence used to prove causation in failure-to-warn cases drastically differs from the evidence used in manufacturing or design defect cases, and such evidence is often in the form of speculative testimony. David G. Owen, Products Liability Law 796 (West's Law School Advisory Bd. et al. eds., 2nd ed. 2008). Here, absent the heeding presumption, the Tully's would have to prove that a warning by Zuul would have been heeded by placing an eleven-year-old on the stand and forcing him to testify. As in *Payne*, armed only with their own testimony, plaintiffs, such as the Tullys, would bear a hopeless burden of proving causation without the heeding presumption. Therefore, Ohiowa should adopted the heeding presumption to alleviate such a burden.

3. Ohiowa's adoption of the heeding presumption would prevent speculative, self-serving testimony.

Absent the heeding presumption, the burden of causation would lie with the plaintiff. *Coffman,* 628 A.2d at 716. The plaintiff would be required to show that he would have read and heeded the warning had there been a warning available. *Id.* However, such a requirement would inevitably lead to speculative testimony by the plaintiff. *Id.* at 719. Thus, the plaintiff is forced

"into an awkward position of having to provide self-serving testimony on a hypothetical situation." David G. Owen, Products Liability Law 798 (West's Law School Advisory Bd. et al. eds., 2nd ed. 2008). The entire process would "undermine the purpose of the doctrine of strict tort liability since any such testimony would be speculative at best." *Nissen*, 332 N.E.2d at 826.

The heeding presumption was created with the idea of avoiding speculative testimony. In *Technical Chemical*, a mechanic sought relief against the manufacturer of a freon can after the can exploded and injured his hand during installation. *Tech. Chem.,* 480 S.W.2d at 603-04. Although the mechanic admittedly installed the can improperly, the label on the can failed to warn against improper installation or the risks involved with improper installation. *Id.* at 603. The court ultimately held the plaintiff was required to prove the manufacturer's failure to warn was the proximate cause of his injuries. *Id.* at 606. However, in dicta, the court acknowledged the usefulness of a presumption that works alongside the Restatement (Second) of Torts to help prevent speculative testimony. *Id.*

The heeding presumption is particularly useful when the person harmed by the manufacturer's product is unable to testify. *Theer v. Philip Carey Co.*, 628 A.2d 724, 729 (N.J. 1993). In *Theer*, the plaintiff sought relief against an asbestos manufacturer after her husband died from lung cancer. *Id.* at 726. The court applied the heeding presumption to prevent "determinations of causation that are based on extraneous, speculative considerations and unreliable or self-serving testimony." *Id.* at 729. The court specifically acknowledged how beneficial the presumption can be when a plaintiff is deceased and thus unable to provide any testimony about how he would have reacted, given an adequate warning. *Id.* Jury deliberations under these conditions become "highly conjectural." *Id.*

Since *Technical Chemical*, courts have applied the heeding presumption with the underlying policy goal of preventing speculative testimony and the effects such testimony has on the outcome of a trial. For example, here and as discussed by Owen, L.T. would be forced into a "What if?" game on the stand if the heeding presumption did not apply. According to *Theer*, such testimony would open the Tullys up to unfair jury speculation. The jury would thus be forced to make a causation determination with only extraneous, self-serving evidence from an eleven-year-old. As mentioned in *Theer*, jury speculation would be driven to its maximum if L.T. was unable to testify. Therefore, to avoid such an ineffective process, the Ohiowa courts should adopt the heeding presumption.

C. Ohiowa's use of the heeding presumption should apply in every type of failure-to-warn case.

While a majority of states have adopted the heeding presumption when no warnings were available, some states have been more hesitant to apply the presumption when a learned intermediary was involved or when the warning was inadequate. *Ackermann v. Wyeth Pharm.*, 526 F.3d 203, 213 (5th Cir. 2008); *Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 357 (Tex. 1993). However, others have applied the heeding presumption in the face of an intermediary and fail to draw a line between inadequate warnings and no warnings. *O'Gilvie v. Int'l Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987); *Payne*, 486 A.2d at 725.

1. Ohiowa's use of the heeding presumption should apply when an intermediary is involved.

The learned intermediary doctrine permits the manufacturer to only warn an intermediary, instead of the primary user, of the product's risks to fulfill its obligation of warning. *Ackermann*, 526 F.3d at 207. In its most common application, a doctor stands between a patient and the drug manufacturers as a learned intermediary. *Id*. While some states are hesitant

to apply the heeding presumption under this doctrine, others have applied it when an intermediary was involved. *Id*. at 212-13; *Payne*, 486 A.2d at 725.

For example, the Texas law has adopted the heeding presumption under strict liability failure-to-warn cases but fails to apply it when the learned intermediary doctrine applies. *Ackermann*, 526 F.3d at 212-13. In *Ackermann*, the plaintiff sought relief against an antidepressant drug manufacturer after the plaintiff's husband committed suicide while taking the drug. *Id*. at 205-06. The plaintiff argued the manufacturer inadequately warned about the risk of suicide associated with the drug. *Id*. at 209. While the doctor testified that he would have prescribed the medication regardless of the warning, the plaintiff claimed the burden of causation was settled under heeding presumption. *Id*. at 212-13. However, the court held the presumption does not apply to learned intermediaries, because a doctor's testimony is not as self-serving as a plaintiff's testimony. *Id*. at 213.

However, other courts choose to use the apply the heeding presumption when the learned intermediary doctrine in is in effect. *Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1018-19 (10th Cir. 2001). Those courts simply allow the defendant to use the doctor's testimony to rebut the presumption. *Id.* In *Eck*, the plaintiff sought relief from a drug manufacturer for inadequately warning about the negative effects their drug could have when taken with other drugs. *Id.* at 1017. The court chose to apply the heeding presumption, yet held the presumption was rebutted with the doctor's testimony. *Id.* at 1019.

Some courts have even upheld the heeding presumption when intermediaries were involved. *Payne* at 486 A.2d at 725. As previously discussed in *Payne*, a manufacturer's hair-care product chemically burned the plaintiff after the plaintiff's beautician recommended and applied the product. *Id.* at 716-17. Although the court held the manufacturer was only required to

warn beauticians of the dangers to the product, the court acknowledged the plaintiff was still a user and faced with an "impossible burden" in proving causation with only speculative testimony. *Id.* at 723-24. Thus, the heeding presumption applied. *Id.* at 725.

The *Ackermann* court's rationale is flawed. While the doctor's testimony is not overtly self-serving, his testimony will inevitably still be speculative. The doctor has no choice but to place himself in a "What if?" situation to evaluate the effect of an adequate warning. If the doctor communicates those adequate warnings to the plaintiff, the court would have to question whether the plaintiff agreed to take that risk. Under the facts of *Ackermann*, that question is unanswerable, as the plaintiff died from the danger associated with the risk. Too much speculation surrounds a learned intermediary to neglect the efficacy of the heeding presumption. At the very least, the Ohiowa court should apply the heeding presumption when the learned intermediary is doctrine is involved, and, as in *Eck*, allow the defendant to rebut the presumption with the doctor's testimony.

Here, even if the Court should determine that the babysitter, Dana Barrett, was an intermediary, the court should apply the heeding presumption. First and foremost, the babysitter is not a doctor as the intermediary was under *Ackermann*. Secondly, even if the Court should rule that Zuul did not market its products to L.T., the manufacturer still owes a duty to L.T. to provide an adequate warning under *Payne*. Thus, the Court should still apply the heeding presumption in the face of the learned intermediary doctrine.

2. Ohiowa's use of the heeding presumption should apply when an inadequate warning is at issue.

A warning may be deemed inadequate based on "its factual content, its expression of the facts, or the method or form in which it is conveyed." *Rheinfrank v. Abbott Labs.*, *Inc.*, 119 F. Supp. 3d 749 (S.D. Ohio 2015), *aff'd,* 680 F. App'x 369 (6th Cir. 2017). An adequate warning

"'not only conveys a fair indication of the nature of the dangers involved, but also warns with the degree of intensity demanded by the nature of the risk.'" *Id.* at 770-71 (quoting *Seley v. G.D. Searle & Co.*, 423 N.E.2d 831, 837 (Ohio 1981)). Some states have been more likely to apply the heeding presumption when the warning was nonexistent rather than inadequate. *Gen. Motors Corp. v. Saenz*, 873 S.W.2d at 357 (Tex. 1993). However, others refuse to differentiate and apply the heeding presumption regardless of the type of failure-to-warn case. *O'Gilvie v. Int'l Playtex, Inc.*, 821 F.2d at 1444 (10th Cir. 1987).

For example, Texas draws a hard line between inadequate warning and no warning cases. *Gen. Motors Corp. v. Saenz*, 873 S.W.2d at 357. In *Saenz*, the plaintiff's estate sought relief against the truck manufacturer for inadequate warnings after the plaintiff's truck tire blew out causing him to lose control and crash. *Id.* at 354-55. While the truck manufacturer adequately warned consumers of the maximum payload the truck could handle, the plaintiff claimed the manufacturer provided an inadequate warning regarding the risks involved with exceeding that limit. *Id.* at 355. Because the plaintiff failed to heed the maximum payload warning, the Texas court held the heeding presumption did not apply. *Id.* at 357.

However, other courts have discouraged drawing a line between inadequate warnings and no warnings. *O'Gilvie*, 821 F.2d at 1444 (10th Cir. 1987). In *O'Gilvie*, a husband sought relief against a tampon manufacturer after his wife died from toxic shock syndrome. *Id.* at 1440. The husband argued that the manufacturer inadequately warned of the causal relationship between tampon absorbency and toxic shock syndrome. *Id*. at 1441. The plaintiff found relief after the court held "an inadequate warning created a presumption of causation." *Id.* at 1442. On appeal, the manufacturer argued that the plaintiff should not have been granted the causal presumption for disregarding the warning that was available. *Id.* However, the court held that it is "without

logic or legal support" to allow a defendant to "limit its liability by relying on a plaintiff's failure to heed an *inadequate* warning." *O'Gilvie*, 821 F.2d at 1444.

The hard line drawn in *Saenz* is without merit. While a plaintiff might disregard an inadequate warning that simply cautions against an act, knowing the risks involved has a potential to dissuade plaintiffs from taking such acts. For example, in the case at hand, mentioning that the E-Cigarette could potentially blow up if the activation button is depressed for too long would have a drastically different heeding effect that if the warning simply told the user to not depress the activation button for too long. As stated in *O'Gilvie*, punishing a plaintiff by taking away the heeding presumption under these circumstances is nonsensical. Therefore, Ohiowa should apply the heeding presumption regardless of the type of failure-to-warn case.

D. Ohiowa's adoption of the heeding presumption would ultimately benefit the defendant and court process.

The heeding presumption does not eliminate the causation requirement so dearly coveted by those who challenge the legitimacy of the heeding presumption. 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, 306 (1990). The presumption merely shifts the burden of causation to the defendant and allows the defendant to rebut the causal relationship. *Coffman*, 628 A.2d at 714 (N.J. 1993). Therefore, a defendant is free to introduce evidence to prove that the plaintiff would not have heeded the warning if one was given. *Id*. If the defendant meets this burden or proves that the defendant knew of the risk prior to the alleged incident, the presumption disappears. *Daniel v. Ben E. Keith Co.*, 97 F.3d 1329, 1332-33 (10th Cir. 1996).

A defendant may introduce evidence that "the user was blind, illiterate, intoxicated at the time of use, irresponsible or lax in judgment" to rebut the heeding presumption. *Tech. Chem.* 480 S.W.2d at 606. Courts have since expounded upon the number ways to maneuver around this

presumption. *Sharpe v. Bestop, Inc.*, 713 A.2d 1079, 1089 (N.J. Super. Ct. App. Div. 1999), *aff'd,* 730 A.2d 285 (N.J. 1999). First, the defendant may offer evidence that the plaintiff knew "of the very risk the warning was supposed to address." *Id*. Secondly, the defendant may "introduce evidence of the plaintiff's conduct … that demonstrates an indifference to safety warnings." *Id*.

The Supreme Court of New Jersey has clarified the type of evidence permitted when demonstrating a plaintiff's indifference to safety warnings. *Sharpe v. Bestop, Inc.*, 730 A.2d 285, 285-87 (N.J. 1999). In *Sharpe*, the plaintiff was seeking relief from his Jeep's soft-top manufacturer after the plaintiff was ejected through the soft-top canvas during a crash. *Sharpe*, 713 A.2d at 1082. Defense counsel wished to introduce testimony that the plaintiff had a habit of failing to wear his seatbelt, even though a seatbelt warning was located on his visor. *Id.* at 1088. The *Sharpe* court held that "only evidence of habit related to the specific situation of a seatbelt warning, not a character trait, may be offered to rebut the heeding presumption." *Sharpe*, 730 A.2d at 285. Under this common rule of evidence, a plaintiff's character traits are inadmissible. *Id.* at 286.

Some scholars fear defendants risk jury criticism by "attacking" the plaintiff in an attempt to rebut the heeding presumption. 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, 306 (1990). However, those same scholars also recognize the alternative is unreliable, self-serving testimony. *Id*. at 305. Such testimony would then permit the defendant to introduce evidence of the plaintiff's character for untruthfulness under the Federal Rules of Evidence. Richard C. Henke, *The Heeding Presumption in Failure to Warn Cases: Opening Pandora's*

Box?, 30 Seton Hall L. Rev. 174, 179 (1999). This impeachment evidence would inevitably divert the court's attention from the original focus of product safety. *Id*. at 179-80.

Ohiowa's adoption of the heeding presumption would not leave the defendant without options to consider. While Zuul would be restricted from admitting character evidence under common rules of evidence mentioned in *Sharpe*, Zuul is free to rebut the causal presumption with evidence of habit or evidence that L.T. knew of the risks before use. *Sharpe*, 713 A.2d at 1089. For example, Zuul would be free to rebut the heeding presumption with evidence that L.T. is unable to read or comprehend an adequate warning had one been given.

Additionally, Ohiowa's adoption of the heeding presumption would prevent jury confusion. Henderson and Twerski argue that the rebuttal evidence may be seen as attacking the plaintiff in the eyes of the jury. 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, 306 (1990). Their logic is flawed. The defendant's rebuttal evidence will at least play to the facts of the case. In the eyes of a jury, this process will simply seem like the defendant is trying to uncover the truth of whether the plaintiff would have heeded the manufacturer's warning had one been available.

However, if the heeding presumption did not apply, the plaintiff would present testimony about how he would have heeded the warning had there been one. The plaintiff would thus open himself up to cross-examination. On cross-examination, two things will likely happen. First, the defendant will try to rebut the plaintiff's testimony with contrary evidence. This is the same evidence the defendant would admit under the heeding presumption. Thus, the heeding process essentially expedites an otherwise impractical process. Secondly, as discussed by Henke, the defendant would be able to admit evidence of the plaintiff's character for untruthfulness. Richard

C. Henke, *The Heeding Presumption in Failure to Warn Cases: Opening Pandora's Box?*, 30 Seton Hall L. Rev. 174, 179 (1999). Such evidence would stage a mini trial that has nothing to do with the facts of the current case. To a jury, this process would seem like more of an attack on the plaintiff than the defendant's rebuttal evidence under the heeding presumption. Therefore, Ohiowa's adoption of the heeding presumption would expedite court processes and work in favor of defendants.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's decision in affirming Zuul's motion for summary judgment and should adopt the read and heed doctrine in the State of Ohiowa.

APPENDIX

Ohiowa Rev. Code § 5552.368 Rule of Liability.

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

a. that consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defect or defective condition; and

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

Ohiowa Rev. Code § 5552.369 When Product Has Defect.

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

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

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

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

b. A product is defective if the seller or manufacturer fails to:

    1. properly package or label the product to give reasonable warnings of danger about the product; or

    2. give reasonably complete instructions on proper use of the product; when the seller or manufacturer, by exercising reasonable diligence, could have made such warnings or instructions available to the consumer

Restatement (Second) of Torts § 402A.

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.

2. The rule stated in Subsection (1) applies although

a. the seller has exercised all possible care in the preparation and sale of his product, and

b. the user or consumer has not bought the product from or entered into any contractual relation with the seller.