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The Heeding Presumption In South Carolina: A Balanced Approach

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I. Introduction

295. Cases are often won or lost based on the determination of which party caries the burden of proving certain critical elements.[2] In the context of warning defect cases, the heeding presumption is a burden-shifting device capable of significantly affecting the outcome of a case.[3] A number of courts have utilized the heeding presumption in an effort to resolve the unique causation issues posed by warning defect cases. In such cases, the presumption assumes that, had a manufacturer provided adequate warnings, the warnings would have been read and heeded by the plaintiff, thus preventing the accident at issue.[4] Not all courts embrace the heeding presumption, however, and their reasons are certainly not without merit.[5]

296. The South Carolina Supreme Court has never addressed the heeding presumption in a preventable-risk warning[6] defect case and the Court of Appeals failed to clearly announce a position on the issue when given the opportunity.[7] Adding to this uncertainty is the Supreme Court's recent decision in Branham v. Ford Motor Co., where the court adopted the Restatement (Third) of Torts: Products Liability § 2.[8] The Third Restatement effectively does away with language from comment j to section 402A of the Restatement (Second) of Torts that many courts have relied upon as the doctrinal basis for the presumption. However, despite the elimination of the doctrinal rationale, there still exists a policy basis for applying the heeding presumption.[9] Yet, as of now, no South Carolina court has addressed policy rationales for the heeding presumption.

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2 *Rivera v. Philip Morris Inc.,* 209 P.3d 271, 274 (Nev. 2009)*;* See also Aaron D. Twerski & Neil B. Cohen, *Resolving the Dilemma of Nonjusticiable Causation in Failure-to-Warn Litigation*, 84 S. Cal. L. Rev. 125, 139 (2010).

3 *Tech. Chem. Co. v. Jacobs,* 480 S.W.2d 602, 606 (Tex. 1972).

4 DAVID G. OWEN, PRODUCTS LIABILITY LAW 797 (2nd ed. 2008).

5 See, e.g., *Rivera v. Philip Morris Inc.,* 209 P.3d 271, 274 (Nev. 2009); *Riley v. American Honda Motor* Co., 856 P.2d 196, 200 (Mont. 1993).

6 See *Odom v. G.D. Searle & Co.*, 979 F.2d 1001, 1003 (4th Cir. 1992) (citing *Thomas v. Hoffman-LaRoche, Inc.*, 949 F.2d 806, 812–14 (5th Cir. 1992)).

7 See *Allen v. Long Mfg. NC, Inc.,* 505 S.E.2d 354, 359–60 (Ct. App. 1998).

8 *Branham v. Ford Motor Co.,* 701 S.E.2d 5, 14 (2010).

9 See DAVID G. OWEN, PRODUCTS LIABILITY LAW 797–799 (2nd ed. 2008).

297. In light of the Supreme Court's recent acceptance of the Third Restatement in Branham and the uncertainty of the policy basis for the heeding presumption, it is unclear what the court will decide when it is called upon to address the heeding presumption issue in the context of preventable-risk warnings. A rational solution would be to apply the presumption in situations where the circumstances warrant its application, but to refrain from allowing a plaintiff to benefit from the presumption when it is not absolutely necessary. For example, where the plaintiff is killed or otherwise incapable of providing testimony, the heeding presumption should provide a basis for causation. However, there is no justification for its application when the plaintiff is capable of testifying; accordingly, the court should refrain from applying the presumption in this situation. This solution provides a logical balance between the interest in providing recourse for individuals injured by defective products and the importance of the causation element, an element that is "too important . . . to be tossed to the wind without the most compelling reasons." [10]

298. Part II of this Note provides background about the special causal issues that exist in warnings cases; it examines the two underlying rationales courts have used to justify applying the heeding presumption and concludes by commenting on the presumption's current status in South Carolina. Part III discusses the erroneous reliance on comment j as the doctrinal basis for the presumption and asserts that the South Carolina Supreme Court's decision in Branham eliminates reliance on comment j as the doctrinal foundation for the presumption. Part IV discusses the policy arguments both for and against adoption of the presumption and demonstrates the difficult challenges courts face when determining whether to apply the heeding presumption. Finally, Part V notes the absence of a "perfect" solution and offers a simple and rational solution for applying the heeding presumption in South Carolina. Part VI concludes by recommending a balanced approach to the heeding presumption.

II. Background

Causation in Warnings Cases

299. Proving causation is fundamental to establishing any product defect action; the plaintiff must demonstrate that the defect was the proximate cause of his injury.[11] However, proving causation in a failure to warn case is a substantially more difficult undertaking than proving causation in other products liability actions. For instance, proving that a vehicle rollover would not have occurred in the absence of a design defect is

10 See DAVID G. OWEN, PRODUCTS LIABILITY LAW 797 (2nd ed. 2008).

11 *Coffman v. Keene Corp.*, 628 A.2d 710, 716 (N.J. 1993) (citing *Michalkov. Cooke Color and Chem. Corp.,* 451 A.2d 179, 183 (N.J. 1982)).

a matter of physics. The causal link between the defect and the injury can be clearly established or clearly rebuked using the accepted principles of cause and effect. Thus, design and manufacturing defect cases have the luxury of hard science to aid in establishing causation. In contrast, proving that a plaintiff would have avoided injury had an adequate warning been provided is a matter of psychology, which makes proving causation in these types of cases inherently speculative.[12]

300. Since parties cannot rely on hard science to prove causation in warning defect cases, they must rely on evidence describing human responses to information. For example, determining whether a person, who ignores warnings and instructions pertaining to a particular product's appropriate use, will heed a more specific warning of the dangers associated with the product is speculative at best. Typically, the best evidence available to prove causation in a warnings case is the injured person's self-serving testimony that he would have changed his behavior and avoided the resulting injury had the manufacturer provided an adequate warning or instruction. To alleviate this causation problem, some courts adopted the heeding presumption. The presumption spares the plaintiff of the "awkward position of having to provide self-serving testimony," and provides a basis for causation where the particular circumstances make proof virtually impossible to obtain because the plaintiff is dead or otherwise incapable of testifying.[13] The following Sections describe the heeding presumption's two basic rationales.

The Doctrinal Rationale: Section 402A Comment j

301. The doctrinal basis for the heeding presumption comes from one sentence in comment j to section 402A of the Second Restatement:[14] "Where warning is given, the seller may reasonably assume that it will be read and heeded."[15] One example of a court relying on comment j as a foundation for applying the heeding presumption is Technical Chemical Co. v. Jacobs. In that case, the plaintiff was servicing his vehicle's air conditioner when a can of freon exploded in his hand.Had the plaintiff connected the hose to a valve on the low side of the compressor, the record established that the accident would not have occurred; however, the facts showed that the plaintiff connected the hose to a valve on the high side of the compressor causing the can of freon to explode. At trial, the plaintiff claimed that the defendant's failure to provide adequate warnings about the dangers associated with connecting the hose to the high side of the compressor caused the accident. In contrast, the defendant contended that the accident would have oc-

12 DAVID G. OWEN, PRODUCTS LIABILITY LAW 796–97 (2nd ed. 2008).

13 DAVID G. OWEN, PRODUCTS LIABILITY LAW 797–98 (2nd ed. 2008).

14 See *Tech. Chem. Co. v. Jacobs,* 480 S.W.2d 602, 606 (Tex. 1972); see also DAVID G. OWEN, PRODUCTS LIABILITY LAW 798 (2nd ed. 2008).

15 RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (AM. LAW. INST. 1965).

curred regardless because the plaintiff would not have read a more specific warning had one been provided.

302. The Jacobs court acknowledged the previously mentioned problems associated with proving causation in warnings cases, but also recognized that proving causation was essential to establishing a prima facie warnings case. Faced with this dilemma, the court cited comment j and reasoned that because the presumption works in the manufacturer's favor when an adequate warning is given, it should work in the plaintiff's favor when no adequate warning is present. The court also noted that the presumption may be rebutted upon individual facts such as "evidence that the user was blind, illiterate, intoxicated at the time of the use, irresponsible or lax in judgment or by some other circumstance tending to show that the improper use was or would have been made regardless of the warning."[16] As a result, the rebuttable heeding presumption was born. It is important to note that, in 1974, the South Carolina Legislature adopted section 402A and its comments;[17] thus providing the courts with a doctrinal basis for applying a heeding presumption.

Manufacturer Responsibility: The Policy Rationale

303. The heeding presumption has been applied based on public policy considerations, sometimes without reference to comment j.[18] Proponents of the heeding presumption offer several policy purposes for its application in warning defect cases. First, it incentivizes manufacturers to adequately fulfill their basic duty to warn; second, it reduces the plaintiff's burden of proof when difficult causation issues exist; lastly, it minimizes the chances that speculative and unreliable evidence will determine causation.Coffman v. Keene Corp. is a prominent case that articulates the public policy grounds for the heeding presumption. In Coffman, the plaintiff claimed that the defendant had a duty to warn of the dangers associated with asbestos in the workplace. The defendant claimed that the failure to warn was not the cause of the plaintiff's injury because the plaintiff did not present any evidence showing that he would have heeded such a warning. The lower court applied the presumption, ruling that the plaintiff had met his causation burden because the defendant failed to present evidence rebutting the presumption.

304. The Coffman court noted that the trial court relied on comment j to establish the rebuttable presumption that the plaintiff would have heeded the presumption, but it agreed with the defendant that this justification was illogical because it was not based on empirical evidence. Despite dismissing the doctrinal rationale provided by comment

16 *Tech. Chem. Co. v. Jacobs*, 480 S.W.2d 602, 603–606 (Tex. 1972)

17 S.C. CODE ANN. § 15-73-30 (1976).

18 See *Coffman v. Keene Corp.*, 628 A.2d 710, 717 (N.J. 1993); see also DAVID G. OWEN, PRODUCTS LIABILITY LAW 799 (2nd ed. 2008).

j, the court asserted that the presumption could be grounded in public policy. First, it noted that use of the presumption encourages manufacturers to make safe products and reinforces their basic duty to warn. It then noted that the presumption eases the burden of proving causation, allowing an injured plaintiff a fair opportunity to recover.The court also found that using the presumption would eliminate the need for self-serving testimony to prove causation.[19] Many courts cite to similar policy considerations as justification for applying the heeding presumption.[20] The following section asserts that, at the present time, the policy rationale is likely the only viable foundation for applying the heeding presumption in South Carolina.[21]

Branham v. Ford Motor Co.

305. On August 16, 2010 the Supreme Court decided Branham v. Ford Motor Co.52 This decision is sure to have a major impact on South Carolina products liability law in the coming years. In Branham, the plaintiff, a passenger in a 1987 Ford Bronco, was severely injured in a rollover accident. In the plaintiff's design defect case against Ford, the South Carolina Supreme Court, relying on the Restatement (Third) of Torts: Products Liability § 2, held that the risk-utility test, as opposed to the consumer expectations test derived from comment j, was the exclusive test for determining design defectiveness in South Carolina.[22]

306. It is important to note that, in 1974, the South Carolina Legislature expressly adopted the Restatement (Second) of Torts § 402A and identified its comments as legislative intent.[23] Nevertheless, the Supreme Court embraced the Third Restatement's position that the risk-utility test is the only proper test for design defectiveness. The court justified its decision by noting that the enacting legislature looked to the American Law Institute for guidance when adopting 402A and had expressed no intent to foreclose the court's consideration of developments in products liability law as evidenced by the absence of any legislative response to prior decisions approving the risk-utility test. Accordingly, the court held that the risk-utility test rather than the consumer expectations test would determine defectiveness.

307. In sum, it is now clear that South Carolina courts are required to independently determine design defectiveness based on the risk-utility test. [24] However, Branham's

19 *Coffman v. Keene Corp.*, 628 A.2d 710, 714, 717–20, 799 (N.J. 1993); see also DAVID G. OWEN, PRODUCTS LIABILITY LAW 799, 718–719 (2nd ed. 2008).

20 See e.g., DAVID G. OWEN, PRODUCTS LIABILITY LAW 799 (2nd ed. 2008); Mark Geitsfeld, *Inadequate Product Warnings and Causation,* 30 U. Mich. J.L. Reform. 309 (1997).

21 *Branham v. Ford Motor Co.,* 701 S.E.2d 5 (2010).

22 *Branham v. Ford Motor Co.,* 701 S.E.2d 5, 8 (2010).

23 See S.C. CODE ANN. § 15-73-30 (1976).

24 *Branham v. Ford Motor Co.,* 701 S.E.2d 5, 14, 27, 16-17 (2010).

overall effect on the Defective Product Act of 1974, which adopted section 402A and its comments, is unclear.[25] Significantly, the comments to section 2 of the Third Restatement do not contain the "read and heed" language from section 402A comment j.[26] Thus, the Supreme Court's decision in Branham likely eliminates the doctrinal rationale for the heeding presumption.[27]

The Heeding Presumption: Uncertainty in South Carolina

308. The status of the heeding presumption in South Carolina is unclear for two reasons. [28] First, there is no case law addressing the policy basis for shifting the causation burden to the manufacturer. Second, the Supreme Court's decision in Branham has likely eliminated future reliance on comment j. The unique difficulties associated with proving causation in risk-reduction warning cases demand a solution; unfortunately, the heeding presumption has flaws and is not always appropriate.[29] The presumption's weaknesses calls for a solution that is flexible and balances both the interest in providing an appropriate remedy for injured plaintiffs and the interest in respecting the importance of the causation element.

III. The Comment J Problem

Comment j's "Unfortunate Language"

309. "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."[30] Unfortunately, this sentence from section 402A comment j can be interpreted to mean — that a warning, even an inadequate one, eliminates the manufacturer's fundamental duty to design products that are safe for consumers. An in depth discussion of the "puzzle" of comment j is beyond the scope of this note.[31] However, it is important to reveal how comment j has

25 J. Rhoades White, Jr. Comment, *Products Liability Law for Design Defects in South Carolina: The Aftermath of Branham v. Ford Motor Co.*, 62 S.C. L. Rev. 781, 791 (2011).

26 See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. l (AM. LAW. INST. 1998).

27 See J. Rhoades White, Jr., Comment, *Products Liability Law for Design Defects in South Carolina: The Aftermath of Branham v. Ford Motor Co.*, 62 S.C. L. Rev. 781, 793 (2011).

28 See J. Rhoades White, Jr. Comment, *Products Liability Law for Design Defects in South Carolina: The Aftermath of Branham v. Ford Motor Co.*, 62 S.C. L. Rev. 781, 793 (2011).

29 See Aaron D. Twerski & Neil B. Cohen, *Resolving the Dilemma of Nonjusticiable Causation in Failure-to-Warn Litigation*, 84 S. CAL. L. REV. 125, 139 (2010).

30 RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (AM. LAW. INST. 1965).

31 See David G. Owen, *The Puzzle of Comment j*, 55 HASTINGS L.J. 1377 (2004).

been misunderstood for the purposes of demonstrating that the doctrinal rationale for the heeding presumption has been a misguided tactic for addressing, what is essentially a policy based issue.

310. The proper interpretation of the sentence in comment j stands for the narrow proposition that manufacturers of inherently dangerous products have a duty to warn consumers of foreseeable hidden dangers that are unavoidable. Professor David Owen came to this conclusion by examining the context in which comment j was written. Upon a close reading of comments i, j, and k, together with their legislative intent, Owen found that these comments were exclusively directed at a limited class of products — food, whiskey, cigarettes, drugs, and other products naturally containing unavoidable dangers that cannot be designed out of the product without eliminating the product's utility. Unfortunately the titles to comment i and j suggest general applicability; however, when read with comment k entitled "Unavoidably unsafe products" it is evident that the interrelated comments are limited to inherently dangerous products. Thus the comments, read together, explain that inherently dangerous products are not defective when accompanied by appropriate warnings.[32]

311. In the limited context of inherently dangerous products, the relationship between design and warning is proper because the warning is the only way to fill the gap for the consumer. Such a product has dangers that naturally make the product unsafe; however, there is utility in the product despite its inherent dangers. Therefore, to fulfill its obligation, the manufacturer must warn the consumer in order to make the product non- defective. Thus, the proper interpretation of comment j's concluding sentence establishes that the provision actually means: "Where [adequate] warning [of any hidden dangers] is given, the seller [of inherently dangerous products like food, drugs, alcoholic beverages, and cigarettes] may reasonably assume that [the warning] will be read and heeded [because there is nothing else the seller can do to avoid the danger]; and [such] a product bearing such a warning, which is safe for use if it is followed, is not in [a] defective condition, nor is it unreasonably dangerous."[33]

312. Unfortunately some courts have applied this sentence generally to all products, allowing manufacturers to circumvent liability for defectively designed products by simply providing warnings. This muddies the line between the manufacturer's independent and most fundamental obligation — to design safe products. Fortunately, the Third Restatement is premised upon the substantial independence of these different forms of defect.[34]

32 David G. Owen, *The Puzzle of Comment J*, 55 HASTINGS L.J. 1377, 1381, 1382–83 (2004).

33 David G. Owen, *The Puzzle of Comment J*, 55 HASTINGS L.J. 1377, 1382, 1383 (2004).

34 David G. Owen, *The Puzzle of Comment J*, 55 HASTINGS L.J. 1377, 1380 (2004).

South Carolina Cases Misinterpreting Comment j

313. In order to understand South Carolina court's error in interpreting comment j and to demonstrate the significance of adopting the Third Restatement's view in Branham, it is necessary to look at the cases that got it wrong. In Allen v. Long Mfg. NC, Inc., the plaintiff was killed while operating a portable grain auger that upended and struck him in the head. Although the auger had warnings instructing the user to either support the discharge end or anchor the lower end, the plaintiff did neither. The lower court ruled that the warnings were adequate as a matter of law and that the adequate warnings fulfilled the defendant's duty of safe design; thus granting the defendant's motion for summary judgment. On appeal, the court held that there was an issue over adequacy of the warnings, but that a design defect could be remedied by adequate warnings: "If warning is given which, if followed, makes the product safe for use, the product cannot be deemed defective or unreasonably dangerous."[35]

314. If the warnings in Allen would have been adequate, the court's interpretation of comment j would have relieved the manufacturer of the grain auger from its duty to design the auger as safe as reasonably possible, allowing adequate warnings to serve as a substitute for safe design. The court refused to address whether a feasible alternative design was available at the time the defendant manufactured the auger,[36] which is where the proper analysis should have begun. If the auger could have reasonably been designed in a safer manner and the risks associated with its use could have reasonably been designed out, the reasonable alternative design should have been required over a warning.[37]

315. In Curico v. Caterpillar, Inc., the plaintiff was crushed to death by cab of the defendant's track loader while performing maintenance. In order to remove the engine, the cab had to be tilted forward; unfortunately, the plaintiff did not disconnect the batteries or follow the correct procedures, which were provided in the disassembly and assembly manual, for tilting the cab. Instead, the plaintiff tilted the cab into the "laid over" position; a practice that other mechanics testified was common. The personal representative of the plaintiff's estate brought an action in negligence and strict liability for wrongful death based on defective design and warning claims.[38]

316. The trial court ruled that the warnings were adequate as a matter of law and that there was sufficient evidence to sustain the design defect claim.[39] This ruling was

35 *Allen v. Long Mfg. NC, Inc.*, 505 S.E.2d 354, 354–358 (Ct. App. 1998) (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt j (AM. LAW. INST. 1965).

36 *Allen v. Long Mfg. NC, Inc.*, 505 S.E.2d 354, 359 (Ct. App. 1998).

37 See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. l (AM. LAW. INST. 1998).

38 *Curcio v. Caterpillar, Inc.*, 543 S.E.2d 264, 268–270 (S.C. 2003).

39 *Curcio v. Caterpillar, Inc.*, 543 S.E.2d 264, 270 (S.C. 2003).

consistent with the majority view and the Third Restatement's view that the design obligation and the warning obligation are independent obligations.[40] However, following a subsequent motion by the defendants, the trial court set aside its verdict based on the erroneous notion from comment j that a warning can cure defective design.[41] On appeal, the Court of Appeals re-enunciated the trial court's reading of comment j, citing Anderson v. Green Bull,[42] emphatically declaring that the manufacturer of a defectively designed product may prevent its product from being deemed unreasonably dangerous as long as it slaps an adequate warning on the product. However, the plaintiff maintained the position that, despite the adequacy of the warning, there was in fact a reasonable and economically feasible alternative design that could have prevented the accident; hence the track loader was defectively designed. The court noted that the plaintiff relied on the Third Restatement's view, which permits a finding of defective design despite an adequate warning, but chose to decline entertaining the notion that a "warning is not a Band-Aid [capable of covering] a gaping wound."[43] Contrary to the majority of jurisdictions, South Carolina's interpretation of comment j in Allen and Curico relieves manufacturers from their fundamental duty of safe design.[44] Prior to Branham, in South Carolina, a manufacturer could fulfill his duty of safe design by simply adding an adequate warning to its product even if there were reasonable alternative design options that would completely eliminate the risk associated with the product. In other words, a product designed "unsafe" could be deemed "safe" by simply applying a warning.[45]

Branham to the Rescue

317. As noted above, South Carolina courts have incorrectly interpreted comment j to mean that warnings trump design. Thankfully, the Supreme Court's decision in Branham, has finally resolved comment j's unfortunate reading in South Carolina. The Third Restatement straightforwardly corrects the ambiguity that has led South Carolina courts to misconstrue comment j by requiring design defect claims to be determined based on the availability or lack thereof of a reasonable alternative design. "In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks." Adopting the Third Restatement's view in the context of

40 See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. l (AM. LAW. INST. 1998).

41 *Curcio v. Caterpillar, Inc.*, 543 S.E.2d 264, 272 (S.C. 2003).

42 *Anderson v. Green Bull, Inc.*, 471 S.E.2d 708, 710 (S.C. App. 1996).

43 See *Curcio v. Caterpillar, Inc.*, 543 S.E.2d 264, 273–275 (S.C. 2003); *Glittenberg v. Doughboy Recreational Indus.*,491 N.W.2d 208, 216 (Mich. 1992).

44 David G. Owen, *The Puzzle of Comment J*, 55 HASTINGS L.J. 1377, 1392 (2004).

45 *Allen v. Long Mfg. NC, Inc.*, 505 S.E.2d 354, 357 (Ct. App. 1998).

design defect cases has effectively eliminated reliance on comment j in South Carolina. [46] Still, the policy question lingers.

IV. The Heeding Presumption: The Policy Arguments

The "Good Policy" Position

318. As previously noted, affirmatively establishing the causation element in warnings cases is an elusive and often impossible task. Accordingly, the heeding presumption's application is often vital to the sustainability of an injured plaintiff's claim. Indeed, it is crucial in some contexts.[47] For example, without the heeding presumption, a plaintiff who developed mesothelioma as a result of extended exposure to asbestos during the course of employment would likely never be able to recover based on a failure to warn claim. Under these circumstances, there would undoubtedly be some question as to whether the plaintiff had the ability to make a meaningful choice, making it nearly impossible for him to affirmatively demonstrate that he would have avoided exposure had he been warned. Similarly, the heeding presumption is crucial for recovery when the plaintiff is deceased. It would be manifestly unfair to bar recovery in every instance where a plaintiff is killed and unable to testify. The fact that deserving plaintiffs are likely to be denied recovery based on an inability to establish causation without the use of the heeding presumption provides a common sense policy argument in favor of the presumption.[48] The notion is one of fundamental fairness.[49]

319. The presumption also reinforces the manufacturer's basic duty to warn by giving product manufacturers an incentive to create safe products and to provide safety information to consumers. The duty to warn is not only designed to protect and alert consumers to product dangers, but more importantly, to encourage manufacturers who profit from placing their products into the stream of commerce, to remain informed and acquainted with the hazards associated with the use of their product in order to consistently make reasonably safe products.[50].

320. Since one of the primary goals of products liability law is premised on ensuring the safety of consumers and protecting their interests, the law ought to offer some form of redress when a manufacturer fails to meet its obligation to create products that are

46 RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. l (AM. LAW. INST. 1998).

47 *Coward v. Owens-Corning Fiberglas Corp.*, 729 A.2d 614, 620 (Pa. Super. Ct. 1999).

48 See *Coffman v. Keene Corp.*, 628 A.2d 710, 721, 718 (N.J. 1993).

49 See Karin L. Bohmholdt, *The Heeding Presumption and Its Application: Distinguishing No Warning from Inadequate Warning,* 37 LOY. L.A. L. REV. 461, 470 (2003).

50 *Coffman v. Keene Corp.*, 628 A.2d 710, 718 (N.J. 1993)

free from defect. [51] Such redress is available to deserving plaintiffs in the context of design defect and manufacturing defect claims; however, without the use of the heeding presumption in the context of warning defect claims, deserving plaintiffs will often be denied redress based on the unique causal challenges associated with defective warning claims.[52] Simply put, manufacturers have a fundamental duty, first to produce safe products and second to warn of any foreseeable dangers associated with the product that may not be readily apparent to consumers.[53] But for the heeding presumption, the manufacturer would have little incentive to warn because there would be little consequence to omitting this duty, as many plaintiffs would face causal problems that would be impossible to overcome.[54]

321. The heeding presumption also provides manufacturers with an incentive to stay informed and acquainted with the hazards that may be associated with their products, in order to fulfill their basic duty to warn. This incentive is significant to a society that strives to minimize risks associated with commercial products. Take for example, a manufacturer of widgets that produces a widget in a manner that makes it a reasonably safe product, free from defect. The manufacturer recognizes that there are foreseeable dangers associated with the widget; however, there are no reasonable alternative design options that would eliminate the possible danger. Nonetheless, the product has great utility despite its dangers; therefore, in order to fulfill its obligation to warn, the manufacturer provides adequate warnings describing possible dangers and the magnitude of such dangers if the widget is not used properly. After the widget has been on the market for a year, a previously unforeseeable danger is brought to light as multiple consumers suffer fatal injuries from this newly discovered danger. In a world that applies the heeding presumption, this manufacturer of widgets would have been incentivized to keep itself informed of these new dangers and first attempt to design the danger out without destroying the widgets utility or, in the alternative, to warn of this newly found danger. In a world devoid of the heeding presumption, if this manufacturer were certain there was no reasonable design alternative, it would have no incentive to warn of this new danger because the affected consumers would have no method for overcoming this causal conundrum associated with failure to warn claims. Thus, the incentive to warn provided by the heeding presumption supports the goal of protecting consumers from unsafe products, which is, at its core, the foundation of products liability law.[55]

322. Advocates of the heeding presumption offer other policy arguments worth mentioning. For instance, the primary consideration for imposing strict product liability

51 See Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back,* 60 U. CIN. L. REV. 1183, 1184–1186 (1992).

52 See DAVID G. OWEN, PRODUCTS LIABILITY LAW 796 (2nd ed. 2008).

53 See *Coffman v. Keene Corp.*, 628 A.2d 710, 718 (N.J. 1993).

54 See also DAVID G. OWEN, PRODUCTS LIABILITY LAW 797 (2nd ed. 2008).

55 See *Coffman v. Keene Corp.*, 628 A.2d 710, 718 (N.J. 1993).

rather than negligence was to ease the burden of proof for injured plaintiffs by focusing on the product itself rather than the manufacturers conduct. Thus the heeding presumption is consistent with the policy behind strict product liability because its application serves to lighten a plaintiff's burden of proof concerning proximate causation. Also, applying the presumption avoids the necessity of having a plaintiff present self-serving testimony that may be unreliable.[56] While some of the policy arguments favoring the heeding presumption seem clear and unimpeachable, others are hotly debated and lack substance.

The "Bad Policy" Position

323. Opponents of the heeding presumption argue that the presumption is not rooted in fairness because it is fundamentally unfair.[57] There is no precise way to separate plaintiffs who would have likely been influenced by an adequate warning from those who would have simply ignored an adequate warning had one been provided.[58] According to Aaron Twerski and Neil Cohen, "[n]ot only would such a result clash with fundamental principles of fairness and corrective justice, but it has no parallel in design and manufacturing defect cases where the law does not hold manufacturers responsible for harm they do not cause."[59]

324. In Riley v. American Honda Motor Co., Inc., the Montana Supreme Court rebutted several familiar policy arguments favoring the heeding presumption. The court recognized that we do not live in an ideal world where the heeding presumption would make perfect sense in warning defect cases; rather, we live in a world where warnings are often unread or flat out ignored. In its analysis, the Riley court, recognized the causal difficulties present in warnings cases but rationalized that the evidence required to establish a prima facie warnings case is not qualitatively different than testimony required in other contexts and further asserted that concerns about a plaintiff dying before testimony is taken is not exclusive to warning defect cases. The court concluded that the plaintiff had a full opportunity but failed to establish a prima facie case; therefore, the court reasoned that it would be unfair to allow the cause of action to continue by applying the heeding presumption. Finally, the court addressed the argument that the heeding presumption is consistent with the policy underlying strict products liability — to ease the burden on injured plaintiffs.[60] The court acknowledged the fact that

56 *Coffman v. Keene Corp.*, 628 A.2d 710, 719 (N.J. 1993).

57 See *Rivera v. Philip Morris, Inc.*, 209 P.3d 271, 277 (Nev. 2009); *See also Riley v. Am. Honda Motor Co., Inc.*, 856 P.2d 196, 200 (Mont. 1993).

58 Aaron D. Twerski & Neil. B. Cohen, *Resolving the Dilemma of Nonjusticiable Causation in Failure-To-Warn Litigation,* 84 S. CAL. L. REV. 125, 129 (2010).

59 DAVID G. OWEN, PRODUCTS LIABILITY LAW 800 (2nd ed. 2008).

60 *Riley v. Am. Honda Motor Co., Inc.*, 856 P.2d 196, 200 (Mont. 1993).

applying the heeding presumption would lighten the plaintiff's burden, but effectively revealed that argument's flaw in reasoning by contending that a "defendant certainly is in no better position to rebut a presumption which totally excuses a plaintiff from meeting the causation element than a plaintiff is in establishing the causation element as part of the prima facie case."

325. In 2009, the Nevada Supreme Court held that public policy was best served by not adopting the heeding presumption. Citing Riley, the court reasoned that it was illogical to presume that a plaintiff would have read and heeded an adequate warning if one had been provided because warnings often go unread or ignored in the modern world. The court's primary policy argument was premised on the indisputable principle that a manufacturer's most important duty is to make products that are safe for consumers. The duty to manufacture safe products is paramount and does not rely on information given in a warning; consistent with this reasoning, the court concluded that public policy is best served by discouraging reliance on warnings and ensuring that manufacturers strive to produce safer products.[61]

326. Other arguments opposing the heeding presumption from a policy standpoint are worth mentioning. For one, applying the heeding presumption opens the door for character evidence that is otherwise inadmissible and generally disfavored in court. A defendant must focus on character flaws in order to rebut the presumption because other evidence is generally limited. Further, no studies show that the heeding presumption results in better warnings and no studies show that safer warnings lead to fewer injuries. In light of this statistical evidence, it appears that the heeding presumption does not further the central policy behind products liability law — to protect consumers from unsafe products.[62]

Public Policy: It's a Draw

327. Reasonable minds often differ. That is the beauty of the adversarial system; arguments grounded in reason, locked tight with seemingly no gaps, can be exposed. Often times, the superior argument from a policy standpoint is not clear. Creative and talented lawyers can frame most any argument to support their reasoning in a policy dispute. Therefore, a court's determination of which outcome promotes "better policy" often depends on which lawyer most effectively frames his argument. This is evident

61 *Rivera v. Philip Morris Inc.,* 209 P.3d 271, 277 (Nev. 2009).

62 Carrie A. Daniel, *Guide to Defeating the Heeding Presumption in Failure-to-Warn Cases Defense Counsel Must Oppose the Distortion of Comment J's Language into A Presumption That Users Would Read and Heed Instructions*, 70 DEF. COUNS. J. 250, 259 (2003) (citing *Crowston v. Goodyear Tire & Rubber Co.*, 521 N.W.2d 401, 411 (N.D. 1994)).

in case law addressing the heeding presumption's policy rationales.[63] The truth of the matter is that the facts of each individual case often dictate whether or not applying the heeding presumption implements sound policy.

328. An analysis of several of the most significant conflicting arguments is instructive. First, there is the position that the heeding presumption is good policy because it incentivizes manufacturers to fulfill their basic duty to warn. Opponents of the heeding presumption rebut this argument by asserting that the superior policy is to encourage manufacturers to focus their resources on striving to create safe products, rather than relying on crafting warnings. This view is consistent with the Third Restatement's focus on design adequacy rather than warnings.[64] After all, "warnings are an imperfect means to remedy a product defect."[65]

329. It is also clear that easing the burden on the plaintiff is not a sound argument in favor of the heeding presumption. While such policy may be consistent with some of the underlying goals of strict products liability, this position is flawed. As the Riley court noted, the entire elimination of the plaintiff's burden would further this policy greatly; yet that does not make it sound policy. Shifting the causation burden to the defendant is generally not fair because "[a] defendant certainly is in no better position to rebut a presumption which totally excuses a plaintiff from meeting the causation element than a plaintiff is in establishing the causation element as part of the prima facie case."[66] Indeed, there is merit in the notion that deeply rooted products liability law burdens of proof should not be altered.[67] Nevertheless, as explained in the following paragraph, this "easing the plaintiff's burden" policy may be worth its salt depending on the circumstances.

330. A popular argument among proponents of the heeding presumption is that it eliminates the need for self-serving testimony.[68] In fact, one court has gone as far as calling such testimony "useless."[69] Though it may be true that self-serving testimony is not

63 Compare *Coffman v. Keene Corp.*, 628 A.2d 710 (N.J. 1993) (adopting the heeding presumption based on policy reasons), with; *Riley v. Am. Honda Motors Co, Inc.*, 856 P.2d 196, 200 (1993) (declining to adopt the heeding presumption based on policy reasons).

64 Carrie A. Daniel, *Guide to Defeating the Heeding Presumption in Failure-to-Warn Cases Defense Counsel Must Oppose the Distortion of Comment J's Language into A Presumption That Users Would Read and Heed Instructions*, 70 DEF. COUNS. J. 250, 258 (2003).

65 *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 336 (Tex. 1998).

66 *Riley v. Am. Honda Motor Co., Inc.*, 856 P.2d 196, 200 (Mont. 1993).

67 Carrie A. Daniel, *Guide to Defeating the Heeding Presumption in Failure-to-Warn Cases Defense Counsel Must Oppose the Distortion of Comment J's Language into A Presumption That Users Would Read and Heed Instructions*, 70 Def. Couns. J. 250, 257 (2003) (citing Kevin J. O'Connor, *New Jersey's Heeding Presumption in Failure to Warn Product Liability Actions: Coffman v. Keene Corp., and Theer v. Philip Carey Co.*, 47 RUTGERS L. REV. 343, 356 (1994).

68 See e.g., *Coffman v. Keene Corp.*, 628 A.2d 710, 719 (N.J. 1993).

69 *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1281 (5th Cir. 1974).

the ideal method for establishing reliable evidence, it is a far cry from being "useless." Concerns that testimony may be self-serving are not unique to warning defect actions. Certainly, there is some value in allowing a plaintiff to present his testimony to a jury of his peers.[70] A jury is quite capable of determining credibility. Indeed, when a criminal defendant chooses to testify, his very liberty often rests on a jury's determination of his credibility. Such testimony is inevitably self-serving, yet it would never be considered useless in this context.[71] Furthermore, self-serving testimony is generally appropriate in actions based on misrepresentation.[72] Misrepresentation claims and warning defect claims are conceptually similar to the extent that both claims invoke the notion of injury caused by the conveyance, or lack thereof, of inaccurate or inadequate information. In sum, self- serving testimony is clearly not an ideal means for establishing convincing and reliable evidence; yet, under appropriate circumstances, it is still useful and necessary to establish causation in warning defect cases.

331. While it is clear, both from case law and common knowledge, that the heeding presumption is not a logical presumption,[73] it is equally clear that the law's interest in fairness demands it in certain circumstances. From a policy standpoint there must be a balance, as there is virtue in both arguments. There is a substantial interest in allowing injured plaintiffs to recover and unfortunately, without the heeding presumption, that can be practically impossible in some situations. However, there is nearly an equal interest in separating non-deserving plaintiffs from those who truly deserve redress. This can create quite a conundrum for courts. On one hand, a court may choose not to apply the heeding presumption, which would practically assure that the representative of a deceased plaintiff would not be able to carry the burden of proving causation. On the other hand, if the court applies the heeding presumption, an undeserving plaintiff will have no problem establishing a prima facie cause of action because the causation element is essentially thrown out the window. This places the manufacturer in an unfair position because, while it is difficult for a plaintiff to convince a jury that he would have heeded an adequate warning, there is likely greater difficulty in presenting evidence that the plaintiff would not have heeded an adequate warning.[74] Thus, fundamental fairness requires a balancing of these interests, dictated by the distinct circumstances of each particular case. By no means is the heeding presumption perfect. It does not merit universal application; but currently, it is the only solution in the context of warning defect cases capable of sustaining fairness in certain circumstances. However, as illustrated

70 See *Riley v. Am. Honda Motor Co., Inc.*, 856 P.2d 196, 200(Mont. 1993).

71 See *Johnson v. State*, 461 S.E.2d 209, 210 (Ga. 1995).

72 See e.g., *Richard v. Tri-J Indus. Const., Inc.,* 478 So. 2d 215, 217 (La. App. 3d Cir. 1985).

73 See *Rivera v. Philip Morris Inc.,* 209 P.3d 271, 277 (Nev. 2009) (citing *Riley v. Am. Honda Motor Co., Inc.*, 856 P.2d 196, 200 (Mont. 1993)).

74 See Carrie A. Daniel, *Guide to Defeating the Heeding Presumption in Failure-to-Warn Cases Defense Counsel Must Oppose the Distortion of Comment J's Language into A Presumption That Users Would Read and Heed Instructions*, 70 DEF. COUNS. J. 250, 259 (2003).

above, applying the presumption universally will promote unfairness in some circumstances; consequently, a well-defined rule controlling proper application of the heeding presumption is necessary.

V. A Solution

332. A simple, all encompassing, rule for dealing with the difficult causation issues is not possible without completely reworking the traditional standards for warning defect cases.[75] Nevertheless, a clear workable rule for applying the heeding presumption is quite capable of reasonably balancing the competing fairness interests. The basic premise of the rule is simple; South Carolina courts should apply the heeding presumption only when fairness demands it. Thus, courts should apply the presumption in two different situations. The most obvious situation where fairness demands its application is when the plaintiff is dead or testimony is otherwise impossible or at least impracticable. In this scenario, the rebuttable heeding presumption will satisfy the causation element. If the defendant presents sufficient evidence to rebut the presumption, consistent with the general rule, the plaintiff must establish that the warning defect was the proximate cause of the accident.[76]

333. Fairness also demands application of the heeding presumption when the injury occurs in the workplace context where there is evidence to support a doubt concerning whether the plaintiff had a meaningful choice to heed warnings. Likewise, the heeding presumption will satisfy the causation element in this scenario. Consistent with the New Jersey Supreme Court's approach to this situation, in order to overcome the presumption in the workplace context, a manufacturer must show two things. First, "that had an adequate warning been provided, the employer itself would not have heeded the warning by taking reasonable precautions for the safety of its employees and [second, the employer] would not have allowed its employees to take measures to avoid or minimize the harm from their use or exposure to the dangerous product."[77] Conversely, fairness demands that courts refrain from applying the heeding presumption in injury cases where the plaintiff is normally capable of testifying. Applying the presumption in this scenario would create a windfall for undeserving plaintiffs with weak cases while filling the dockets with claims that should have been dismissed at summary judgment. Although self-serving testimony is not ideal, it is warranted in this scenario because the interest in providing redress for injured plaintiffs is usually outweighed by the interest in separating weak claims from good claims out of fairness to manufacturers who

75 See Aaron D. Twerski & Neil B. Cohen, *Resolving the Dilemma of Nonjusticiable Causation in Failure-to-Warn Litigation*, 84 S. CAL. L. REV. 125, 139 (2010).

76 See *Sharpe v. Bestop, Inc.*, 713 A.2d 1079, 1085 (N.J. 1998).

77 *Coffman v. Keene Corp.*, 628 A.2d 710, 724 (N.J. 1993).

face a considerable disadvantage when the causation burden is shifted. This balanced approach to the warning causal conundrum is not overwhelmingly profound. In fact, the Montana Supreme Court, who coincidentally, authored an emphatic rejection of the heeding presumption in Riley, recently embraced a similar "flexible" approach for applying the heeding presumption in *Patch v. Hillerich & Bradsby Co.*, where the court concluded that the presumption's application should be dictated by the facts.[78] While this method for applying the heeding presumption appears to be the logical approach any capable court would take when faced with this issue, we must be mindful that bad facts create bad law. There is a tangible possibility that a court would sweepingly adopt the heeding presumption when faced with a "perfect storm" of bad facts. This would open the door for plaintiffs with weak cases to benefit from the heeding presumption at the expense of manufacturers and, more importantly, at the expense of fairness.

VI. Conclusion

334. In sum, the solution is simple: the heeding presumption should substitute for causation when the plaintiff is dead or testimony would otherwise be impossible. Likewise, it should substitute for causation in the workplace context when it is determined that the plaintiff lacked a meaningful choice of whether to heed warnings or not. However, it should not apply when the plaintiff is cable of testifying. Granted, this solution has noticeable weaknesses. It allows most death cases, even weak ones, to proceed, and it does nothing to alleviate the difficult causal issues faced by deserving plaintiffs. Yet, it balances the competing interests involved in warning defect cases in the most appropriate manner currently available. "In the end, despite its substantial weaknesses, the heeding presumption, subject to rebuttable defeasance, appears worth the candle."[79]

78 *Patch v. Hillerich & Bradsby Co.*, 257 P.3d 383, 389 (Mont. 2011).

79 DAVID G. OWEN, PRODUCTS LIABILITY LAW 800 (2nd ed. 2008).