

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIFIED QUESTION FROM THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

DeAndrea Gist Benjamin, Circuit Judge

Appellate Case No. 2026-001579

Jesse Near, as Personal Representative of the Estate of Douglas Larry Belger,
..... Plaintiff,

v.

Enerco Group, Inc., d/b/a Mr. HeaterRespondent.

PLAINTIFF'S BRIEF

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CERTIFIED QUESTION

Do adequate product warnings preclude a design defect claim as a matter of South Carolina law?

STATEMENT OF THE CASE¹

This action involves a wrongful death and survival claim brought on behalf of the estate of Douglas Belger. Mr. Belger suffered, and ultimately died from, severe and extensive burn injuries when his clothing was ignited by a propane tank-top heater. Mr. Belger's estate alleges the design of the heater was defective and caused Mr. Belger's injuries. Because Mr. Belger did not own the heater and never received the instructions accompanying it, his estate did not assert a warnings defect claim.

On a cold December day, Doug Belger and his nephew, Keith McCullough, were working in McCullough's workshop. McCullough was the purchaser and owner of the subject heater. While they were working, McCullough turned on the heater, and both men would periodically stand near it to warm themselves. At some point, McCullough stepped out to collect wood so he could demonstrate a new

¹For purposes of this brief, plaintiff assumes the Court has available to it the Joint Appendix from the United States Court of Appeals for the Fourth Circuit docket. If not, plaintiff respectfully requests the Court consider the portions of the Appendix referenced below to the extent necessary to supplement matters in the Fourth Circuit's Order of Certification.

wood splitter for his uncle. He was gone less than a minute. As he returned, Mr. Belger ran out of the workshop with his clothes on fire. No one saw the ignition. McCullough testified that Mr. Belger may have backed into or come too close to the heater. Mr. Belger was treated for third degree burns to thirteen percent of his body, including his back, buttocks, and lower legs. He died during recovery.

The heater is a “Mr. Heater” Model MH15T. It is designed and made by Respondent Enerco Group, Inc., d/b/a Mr. Heater (“Enerco”). The heater attaches to the valve of a standard twenty-pound propane cylinder, the kind commonly used with gas grills. Its infrared burner produces radiant heat that nearby users can feel. A metal wire guard sits in front of the burner, and a reflector shield sits behind the burner. A photograph of an operating Model MH15T appears in the Fourth Circuit’s opinion. *Near v. Enerco Grp., Inc.*, 182 F.4th 341, 346 (4th Cir. 2026).

Enerco sold the heater with instructions on the packaging and with warnings on a removable hangtag, within the owner’s manual, and on the heater itself. The hangtag listed minimum clearances from combustible materials of thirty-six inches from the top and front of the heater. However, the hangtag had been removed by McCullough at some point prior to the event. (JA2871, Plf’s Resp. Opp. Summ. Judg. at 12). The heater’s owner’s manual instructed users never to allow clothing, tents, or other combustible materials within thirty inches of the heater face. Both the hangtag and the owner’s manual also had general warnings about fire and

explosion risks. At no point did Mr. Belger see or receive either the hangtag or the owner's manual. On the heater itself, the only warning was the word "HOT" stamped into the reflector shield.

Jesse Near, the personal representative of the estate, brought this action in the United States District Court for the District of South Carolina under its diversity jurisdiction. The complaint asserted products liability claims under South Carolina law based on an alleged design defect in the heater. Near's theory was that the heater should have incorporated a more robust and adequate guard sufficient to keep a user's clothing from igniting when a person gets near it. Near did not allege a separate failure to warn or warnings defect claim.

In support of his design defect claim, Near offered opinion testimony by a number of expert witnesses. One witness, Dr. Nancy Grugle, was offered as a human factors expert. Because Doug Belger had not seen the hangtag or owner's manual, Dr. Grugle's opinions were primarily focused on the safety hierarchy of controls for design engineering. Enerco moved to exclude Dr. Grugle's opinions.

Enerco also moved for summary judgment. Enerco argued that under South Carolina law, an adequate warning cures and precludes a design defect claim. Enerco contended that because the heater's warnings, if followed, would have prevented Mr. Belger's clothing from igniting, the heater could not be defectively designed as a matter of law. This contention was made despite the fact Mr. Belger

never received the warnings and instructions from the hangtag or the owner's manual. Near opposed the motions, but also moved separately to certify the legal question to this Court under Rule 244, SCACR.

On March 25, 2025, the district court excluded Dr. Grugle, denied Near's motion for certification, and granted summary judgment to Enerco. In doing so, the district court considered itself bound by *Hickerson v. Yamaha Motor Corp.*, 882 F.3d 476 (4th Cir. 2018), a prior Fourth Circuit decision affirming summary judgment by another district court interpreting South Carolina law under its diversity jurisdiction. Having excluded Dr. Grugle, the district court treated the heater's warnings as adequate as a matter of law, accepted Enerco's legal argument, and concluded that it need not address whether a design defect existed in this case.

Near appealed and again sought certification of the legal question. The Fourth Circuit heard argument on December 9, 2025. On July 17, 2026, the Fourth Circuit filed its opinion certifying the question to this Court. It also affirmed the exclusion of Dr. Grugle. Because the answer to the certified question was deemed determinative of the district court's summary judgment, the Fourth Circuit deferred ruling on that issue pending this Court's answer to the certified question.

STANDARD OF REVIEW

“When a certified question raises a novel question of law, this Court is free to answer the question ‘based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court’s sense of law, justice, and right.’” *Donze v. Gen. Motors, LLC*, 420 S.C. 8, 11 (2017) (quoting *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101 (2008)).

ARGUMENT

I. ADEQUATE PRODUCT WARNINGS DO NOT PRECLUDE A DESIGN DEFECT CLAIM UNDER SOUTH CAROLINA LAW.

In *Branham v. Ford Motor Co.*, 390 S.C. 203, 220 (2010), this Court adopted the Restatement (Third) of Torts: Products Liability § 2’s risk-utility framework as the “exclusive test” for design defect claims under South Carolina law. Under that exclusive test, a plaintiff must identify a design flaw and an alternative design that would prevent the product from being unreasonably dangerous. *Branham*, 390 S.C. at 225. The alternative design analysis includes consideration of factors like cost, safety, and functionality. *Id.*

Nowhere within this exclusive test is the plaintiff required to establish the inadequacy of warnings or instructions attending the product. This stands to reason. An unguarded, handheld circular saw might well be sold with a warning to the user to “Keep Hands Clear of Blade.” It would be illogical to conclude that

providing such a warning absolves the manufacturer of any liability for designing a handheld circular saw with no guard. Handheld circular saws universally incorporate a blade guard so the user does not accidentally cut their hand off.

This is why different product defect theories are recognized by South Carolina law. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 444 (2010) (South Carolina law recognizes three independent theories of product defect: (1) design defect; (2) manufacturing defect; and (3) warning defect). Some products are unreasonably dangerous due to excessive risk posed by their design. These products can be made safer by reasonable alternative designs. Design defect claims fairly address these products. Other products, like dynamite, are commercially useful but cannot be made safer by design. For products like this, a responsible seller must then take care to adequately warn of the hazards and provide safe instructions for use of the product. Warnings defect claims fairly address these products when the instructions given are inadequate.

This framework promotes good product design policy. The hierarchy of controls for design engineering exemplifies why. The engineering priority for addressing foreseeable safety hazards is to first design out the danger where feasible, guard against it where feasible, and, last, use warnings where it is not feasible to design or guard against a foreseeable risk. Comment 1 to the Restatement (Third) of Torts: Products Liability § 2 speaks directly to this concept,

stating that “adoption of the safer design is required over a warning that leaves a significant residuum of such risks” and that “[w]arnings are not . . . a substitute for the provision of a reasonably safe design.” Restatement (Third) of Torts: Prods. Liab. § 2 cmt. 1 (Am. L. Inst. 1998).

The rule that Enerco advances, the “warnings-over-design rule,” turns this policy on its head, prioritizing the weakest form of hazard mitigation over the strongest. Enerco’s support for this rule is not found in any precedents of this Court but, rather, from a federal court decision interpreting Restatement (Second) of Torts § 402A’s comment j without considering *Branham*, and from intermediate appellate court decisions that all predate *Branham*. See *Hickerson*, 882 F.3d at 484; see also *Near*, 182 F.4th at 356. In certifying the question to this Court, the Fourth Circuit recognized that *Branham* “creates uncertainty” about whether an adequate product warning categorically bars recovery in a modern design defect case. *Near*, 182 F.4th at 356. Notably, *Near* is aware of no South Carolina appellate decision since *Branham* that has applied either § 402A’s comment j or the lower court cases cited in *Hickerson* to hold that an adequate warning defeats a design defect claim.

A rule requiring a plaintiff to also establish a warnings defect claim as a prerequisite of a design defect claim cannot be reconciled with the exclusive design defect test announced by this Court in *Branham*. The existence of warnings can always be considered in the risk-utility analysis, i.e., is a guard preferable to a

warning. But an adequate warning alone should never preclude a design defect claim where the product's unreasonable dangerousness can be eliminated by a feasible alternative design. *This is particularly true here where the user never received the warnings that allegedly bar his claim.* Or where, like a child, the plaintiff lacked capacity to understand any given warnings. For these reasons, this Court should answer the certified question NO.

A. South Carolina recognizes three distinct product defects, and an inadequate warning is not an element of a design defect claim.

“[T]here are three defects a plaintiff in a products liability lawsuit can allege: 1) a manufacturing defect, 2) a warning defect, and 3) a design defect.” *Watson*, 389 S.C. at 444. Each asks a different question. A warning defect plaintiff “alleges that he was not adequately warned of dangers inherent to a product.” *Id.* A design defect plaintiff “alleges that the product at issue was defectively designed, thus causing an entire line of products to be unreasonably dangerous.” *Id.* “Liability for a design defect may be based on negligence, strict tort, or warranty.” *Madden v. Cox*, 284 S.C. 574, 579 (Ct. App. 1985).

The elements of a design claim are settled, and a deficient warning is not one of them. “In an action based on strict tort or warranty, plaintiff’s case is complete when he has proved the product, as designed, was in a defective condition unreasonably dangerous to the user when it left the control of the defendant, and

the defect caused his injuries.” *Id.* at 579-80. A negligent design plaintiff must also show “that the defendant failed to exercise due care in designing the product.” *5 Star, Inc. v. Ford Motor Co.*, 408 S.C. 362, 366-67 & n.3 (2014). And under *Branham*, every design plaintiff must prove a feasible alternative design “and show how his alternative design would have prevented the product from being unreasonably dangerous.” *Branham*, 390 S.C. at 225. This analysis includes consideration of the costs, safety and functionality associated with the alternative design. *Id.* It can also include considerations of feasibility of using warnings in place of product enhancements. *See* Restatement (Third) of Torts: Prods. Liab. § 2 cmt. f.

Branham went on to describe the jury’s task. The trier of fact decides “whether the potential increased price of the product (if any), the potential decrease in the functioning (or utility) of the product (if any), and the potential increase in other safety concerns (if any) associated with the proffered alternative design are worth the benefits that will inhere in the proposed alternative design.” *Id.* at 225 n.16. Each consideration focuses on the feasibility of the alternative design.

A warnings-over-design rule adds an element this Court has never recognized. Under such a rule, a plaintiff who proves that a feasible guard would have prevented her injury at acceptable cost still loses unless she first proves the

product's warnings were bad. It would force every plaintiff in a design defect claim to first establish a warnings defect.

This case shows how that works. Near brought no warnings claim. *Near*, 182 F.4th at 345. This was necessarily so because Mr. Belger never received the hangtag or manual warnings and, as such, a better warning would not have changed his outcome. Despite this, the district court, because it excluded plaintiff's human factors expert, found the warnings adequate as a matter of law and, following *Hickerson*, held that it "need not address whether a design defect existed in this case." *Id.* at 348. The "exclusive test" for a design defect claim under South Carolina law was never reached and plaintiff's alternative guard design was never analyzed.

B. *Branham* adopted the Restatement (Third) framework for design defect claims, and that framework weighs warnings rather than letting them end the inquiry.

1. The risk-utility test focuses on design, not warnings adequacy.

Branham held that the consumer expectations test is "ill-suited in design defect cases" and made the risk-utility test exclusive for design defect claims. 390 S.C. at 220. The reason was the test's subject: "Unlike the consumer expectations test, the focus of a risk-utility test centers upon the alleged defectively designed product." *Id.* at 222. The factfinder weighs the costs and benefits of "the

manufacturer’s decision to employ one design over another,” *id.* at 223, to decide “whether the product was made safe enough,” *id.* at 224.

The Court described its approach as “in accord with the current edition of the Restatement of Torts” and quoted the Restatement (Third)’s definition of a design defect. *Id.* at 223-24 (quoting Restatement (Third) of Torts: Prods. Liab. § 2(b) (Am. L. Inst. 1998)). This Court has since described *Branham* as the decision in which “this Court adopted the Restatement 3rd approach, which uses the risk-utility test for a design defect claim.” *Watson*, 389 S.C. at 450 n.4. The Court of Appeals has read it the same way. *Branham* “refined the risk-utility test to incorporate the American Law Institute’s most recent definition of a design defect.” *Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 649 (Ct. App. 2021), *aff’d*, 443 S.C. 511 (2024).

A warnings-over-design rule would have the design analysis begin at the written warnings and instructions. Such a rule cannot be reconciled with the risk-utility test mandated by *Branham*.

2. The Restatement (Third) makes warnings a factor in the design balance and rejects them as a substitute for safe design.

The risk utility test defines a design defect by reference to a reasonable alternative design. A product “is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of

a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe.” Restatement (Third) of Torts: Prods. Liab. § 2(b). The Institute’s comments explain how warnings fit in that analysis. They are one of the factors: “The factors include, among others, the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product.” *Id.* § 2 cmt. f.

Comment 1 speaks directly to the certified question:

Reasonable designs and instructions or warnings both play important roles in the production and distribution of reasonably safe products. 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. For example, instructions and warnings may be ineffective because users of the product may not be adequately reached, may be likely to be inattentive, or may be insufficiently motivated to follow the instructions or heed the warnings. However, when an alternative design to avoid risks cannot reasonably be implemented, adequate instructions and warnings will normally be sufficient to render the product reasonably safe. . . . Warnings are not, however, a substitute for the provision of a reasonably safe design.

Id. § 2 cmt. 1. The Institute illustrated the point with a garbage truck worker who lost his balance and caught his foot in the compaction chamber despite a large red warning. “The fact that adequate warning was given does not preclude Jeremy from seeking to establish a design defect under Subsection (b). The possibility that

an employee might lose his balance and thus encounter the shear point was a risk that a warning could not eliminate and that might require a safety guard.” *Id.* § 2 cmt. 1, illus. 14.

When this Court departed from § 402A and its comments, which supplied the consumer expectations test, and adopted section 2(b)’s formulation, it took care to explain the departure, noting that “[t]he Legislature has expressed no intention to foreclose court consideration of developments in products liability law.”

Branham, 390 S.C. at 220. Our appellate courts, in *Branham* and since, have looked to the comments of the Restatement (Third) § 2 for guidance in product liability claims. *See Branham*, 390 S.C. at 227 (comment a); *Jolly*, 435 S.C. at 646, 651 (comments j and f). The Fourth Circuit recognized that the Restatement (Third) “explicitly moved away from comment j’s categorical approach.” *Near*, 182 F.4th at 357.

It would make little sense to adopt Restatement (Third) § 2(b) as the exclusive test for design defect while also retaining an outdated application of § 402A’s comment j that the Restatement (Third) rejects. The “warnings-over-design” rule is entirely inconsistent with *Branham* and must be rejected.

3. This Court’s design defect cases have always weighed known and warned-of dangers.

The framework *Branham* adopted was not new to South Carolina. *Branham* notes its rule “adheres to the approach the trial and appellate courts in this state have been following.” 390 S.C. at 222. This Court’s approach has never treated an adequate warning as the end of a design case.

In *Claytor*, the Court listed the factors that determine whether a design is unreasonably dangerous: “the usefulness and desirability of the product, the cost involved for added safety, the likelihood and potential seriousness of injury, and the obviousness of danger.” *Claytor v. Gen. Motors Corp.*, 277 S.C. 259, 265 (1982). A warning is a manufacturer’s effort to make a danger known. Under *Claytor*, a known danger is one factor to be weighed with the others.

In *Kennedy*, a fifteen-year-old worker on the third day of his first job lost his arm in an ice plant conveyor. *Kennedy v. Custom Ice Equip. Co.*, 271 S.C. 171, 173 (1978). The Court held the jury could find that a foreseeable circumstance “required the incorporation of protective shields in the design of the conveyor.” *Id.* at 176. *Branham* cites *Kennedy* for that point and then observes that the “very nature of feasible alternative design evidence entails the manufacturer’s decision to employ one design over another.” 390 S.C. at 223. In some cases that will include the decision to employ a guard versus a robust warning and that decision making is part of what the alternative design analysis considers.

In *Mickle*, the Court held that an automobile manufacturer owes a duty of care in designing the passenger compartment, because “a known risk of harm raises a duty of commensurate care.” *Mickle v. Blackmon*, 252 S.C. 202, 230 (1969). That duty is “to take reasonable precautions in the light of the known risks, balancing the likelihood of harm, and the gravity of harm if it should happen, against the burden of feasible precautions which would tend to avoid or minimize the harm.” *Id.* at 243.

Branham itself arose from a driver’s inattention. The driver took her eyes off the road to quiet the children in the back seat, drifted onto the shoulder, overcorrected, and rolled the vehicle. 390 S.C. at 208-09. The Court held that the driver’s negligence “misses the point,” because “[c]ars are designed with utility and safety in mind, and careless driving is a foreseeable reality.” *Id.* at 233. A manufacturer’s design obligations account for the careless uses it can foresee. A warning to be careful does not make carelessness any less foreseeable, nor does it lessen the duty to design a reasonably safe product.

C. The statute and the comments the General Assembly adopted as its intent do not require a different answer.

The warnings-over-design rule rests in large part on the comments to section 402A, which in 1974 were “incorporated . . . by reference . . . as the legislative intent of [Chapter 73].” S.C. Code Ann. § 15-73-30. As the Fourth Circuit noted,

South Carolina products liability law “clearly begins with § 402A and its comments, but the question is whether it ends there.” *Near*, 182 F.4th at 356. It does not. And that conclusion does not conflict with Chapter 73.

1. The comments explain the statute’s text, but they do not freeze design defect law in its 1974 form.

“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *Doe v. Keel*, 440 S.C. 427, 431 (2023) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85 (2000)). “The plain language of a statute is the best evidence of legislative intent.” *Id.* (citing *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 538 (2012)).

The operative text is section 15-73-10: “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 caused to the ultimate user or consumer.” S.C. Code Ann. § 15-73-10(1). Nothing in that text says an adequate product warning cures an otherwise defective design. Section 402A’s comments were incorporated by reference to help explain what the statute’s words mean. This Court uses them that way. In *Lawing*, the Court observed that section 15-73-10 “does not define ‘user,’” turned to § 402A’s comments l and o to supply the meaning, and held that the plaintiff was a “user.” *Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 221-24 (2015).

Branham confronted the comments directly. The Court acknowledged that in 1974 “our Legislature adopted the Restatement (Second) of Torts § 402A (1965), and identified its comments as legislative intent,” and that “[t]he comments in section 402A are pointed to as the basis for the consumer expectations test.” 390 S.C. at 220; *see id.* at 220 n.10 (comments g and i). This Court nonetheless made risk-utility the exclusive design defect test:

Since the adoption of section 402A, the American Law Institute published the Restatement (Third) of Torts: Products Liability (1998). The third edition effectively moved away from the consumer expectations test for design defects, and towards a risk-utility test. We believe the Legislature’s foresight in looking to the American Law Institute for guidance in this area is instructive. The Legislature has expressed no intention to foreclose court consideration of developments in products liability law. For example, this Court’s approval of the risk-utility test in *Claytor* yielded no legislative response. We thus believe the adoption of the risk-utility test in design defect cases in no manner infringes on the Legislature’s presence in this area.

Id. at 220.

Branham’s reasoning applies with added force now. The Court found it significant that its approval of risk-utility in *Claytor* “yielded no legislative response.” 390 S.C. at 220. *Branham* has yielded none either. The General Assembly has not amended sections 15-73-10, -20, or -30 since they were enacted in 1974. The intent the comments express, in *Branham*’s words, is a legislative “foresight in looking to the American Law Institute for guidance.” 390 S.C. at 220.

The Institute's guidance on this question is § 2's comment 1: "Warnings are not, however, a substitute for the provision of a reasonably safe design." Restatement (Third) of Torts: Prods. Liab. § 2 cmt. 1.

2. Comment j's final sentence, read with the comments around it, only addresses products that cannot be made safer.

Comment j begins with the seller's duty to warn: "In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use." Restatement (Second) of Torts § 402A cmt. j (Am. L. Inst. 1965). Its examples are foods and drugs: common allergies "to eggs or strawberries," ingredients to which "a substantial number of the population are allergic," "poisonous drugs," "alcoholic beverages," and "foods containing such substances as saturated fats." *Id.* Only then does it say: "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." *Id.*

The comment that follows confirms the sentence's limited reach. Comment k addresses products "which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use," and explains that "[s]uch a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous." Restatement

(Second) of Torts § 402A cmt. k. Comment i begins from the same premise.

“Many products cannot possibly be made entirely safe for all consumption.” *Id.* cmt. i.

Professor Owen traced the history and concluded that comment j “actually addresses only the narrow issue of a seller’s duties with respect to food, tobacco, drugs, alcoholic beverages, and similar products containing inherent and unavoidable risks that cannot be designed away.” David G. Owen, *The Puzzle of Comment j*, 55 Hastings L.J. 1377, 1383-84 (2004). The comments, he explained, “were not provided as a complete products liability ‘code.’” Owen, *supra*, at 1389.

Read the way the warnings-over-design rule interprets it, the sentence places warnings at the top of the design hierarchy rather than the bottom. It does not distinguish between types of defects. If a product bearing an adequate warning “is not in defective condition,” then an adequate warning would ostensibly cure a manufacturing defect too. A heater with a cracked burner housing or a miswired valve would be non-defective so long as its instructions were good. A federal court construing a statute much like ours rejected such a reading: “a product with a manufacturing defect . . . cannot be made ‘non-defective’ simply by placing a warning on the product.” *Glover v. BIC Corp.*, 6 F.3d 1318, 1323-24 (9th Cir. 1993). The sentence cannot mean what the warnings-over-design rule needs it to mean.

3. The comments and the statute protect the user who never sees the warning, and they preserve a bar to recovery for the user who knowingly and unreasonably encounters the danger.

The legislative intent of the General Assembly in 1974 did not stop at § 402A's comment j. Comment l defines who may recover. A user need not have bought the product: "He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser." Restatement (Second) of Torts § 402A cmt. l. "'User' includes those who are passively enjoying the benefit of the product." *Id.* This Court relied on comment l in *Lawing* to hold that the plaintiff was a user under § 15-73-10. 415 S.C. at 221-24. Mr. Belger, warming himself by his nephew's heater in his nephew's workshop, is the kind of user comment l describes. Nothing in comment l or the statute makes his claim depend on written instructions he never received.

Comment n addresses the plaintiff's own conduct. "Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence." *Id.* cmt. n. The comment then identifies the one form of plaintiff conduct that bars recovery. "If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery." *Id.*

The General Assembly enacted that last sentence, word for word, as § 15-73-20. S.C. Code Ann. § 15-73-20. It did not enact the last sentence of comment j. When the General Assembly decided that a user's knowing and unreasonable use of a defective product would bar his recovery, it wrote the rule into the statute, and it required three things: that the user discover the defect, that he be aware of the danger, and that he nevertheless proceed unreasonably. Whether the user's conduct was unreasonable is often a question for the jury. *Fleming v. Borden, Inc.*, 316 S.C. 452, 459 (1994) (holding that section 15-73-20 "is not a complete bar to recovery under these facts" because the reasonableness of the plaintiff's continued use "was a jury question").

A warnings-over-design rule reaches the result § 15-73-20 reserves for the knowing and unreasonable user, but it asks for none of what the statute requires. Such a rule does not ask whether the user discovered the defect, whether he knew of the danger, or whether he acted unreasonably. The rule bars a design defect claim simply because an adequate warning existed somewhere with no consideration of the user's knowledge of harm or whether the harm could have been mitigated by an alternative design. Such a rule would categorically bar the claims of non-owner family members, employees, guests, children, and other innocent third parties who never saw or received the product's warnings and instructions at all.

D. No decision of this Court adopts the warnings-over-design rule of *Hickerson*.

In *Hickerson*, the Fourth Circuit expressly acknowledged that “the Supreme Court of South Carolina has not applied [§ 402A’s] Comment j to the precise issue before us.” *Hickerson*, 882 F.3d at 484. The only decision of this Court that *Hickerson* cited for the rule was *Claytor. Id.* It mentioned this Court’s decision in *Curcio v. Caterpillar, Inc.*, 355 S.C. 316 (2003), only as subsequent history. *Id.* Neither decision applied comment j to bar a design defect claim.

In *Claytor*, the plaintiffs claimed that GM defectively designed a lug bolt and failed to warn against overtightening. 277 S.C. at 261-62. The design theory failed because the only reasonable inference from the testimony was that the product “was not in a defective condition unreasonably dangerous when it left GM’s plant” and that the cracks “were caused by subsequent mishandling of the product.” *Id.* at 264. The warning theory separately failed because the danger of overtightening was common knowledge to a mechanic, so “the warning simply was not required.” *Id.* at 265. The Court resolved the two theories separately. It did not use a torque specification to defeat the design claim, and it did not mention comment j. *Near*, 182 F.4th at 350, 354-55.

Curcio came to this Court after the Court of Appeals affirmed the setting aside of a plaintiff’s verdict on comment j grounds. This Court reversed and reinstated the verdict. Because the jury returned a general verdict on both the

design and warning theories, the Court “address[ed] only the warning evidence.” *Curcio*, 355 S.C. at 319. It did not reach the comment j analysis.

The three Court of Appeals decisions on which the *Hickerson* court relied were all decided years before *Branham* adopted risk utility as the exclusive design defect test under South Carolina law. Two did not need the rule to decide the case. The third applied it because no South Carolina decision yet pointed another way.

In *Anderson*, a roofer was electrocuted while moving an aluminum ladder near power lines. *Anderson v. Green Bull, Inc.*, 322 S.C. 268, 270 (Ct. App. 1996). The court cited comment j, but it decided the case on a different ground. The danger of an aluminum ladder near a power line was generally known, and “there was no evidence from which the jury could reasonably infer the ladder was either defective or unreasonably dangerous.” *Id.* at 270-72. The court’s reasoning rested on comment g’s standard of what the ultimate consumer contemplates, *id.* at 271, the consumer expectations formulation *Branham* later set aside for design claims.

In *Allen*, the court reversed summary judgment for an auger manufacturer because the adequacy of its warning was a jury question. *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 428-30 (Ct. App. 1998). The sentence cited by *Hickerson*, that “South Carolina law does not require that a manufacturer refine a product which is made safe for use by an adequate warning so that the product does not need a warning to be safe,” followed the court’s statement that “[w]e need not address

whether a feasible design alternative must be presented to survive summary judgment,” and it rested on the manufacturer’s “concession that the auger was unreasonably dangerous without an adequate warning.” *Id.* at 431. The same opinion rejected the notion that a warning complying with industry standards is adequate as a matter of law, because that rule “would allow the industry to set its own standard of safety” and “is antithetical to the underlying premise of strict liability.” *Id.* at 430. The decedent in *Allen* was using an auger “that did not belong to him.” *Id.* at 424.

In *Curcio*, the Court of Appeals applied *Allen* because it had “found no cases from this jurisdiction that contradict either comment j or the interpretation of this comment in *Allen*.” *Curcio v. Caterpillar, Inc.*, 344 S.C. 266, 275 (Ct. App. 2001), *rev’d on other grounds*, 355 S.C. 316 (2003). The trial court in that case identified what was at stake. It declined the plaintiff’s request to apply the Restatement (Third), “which allows recovery based on defective design even with an adequate warning,” explaining that any retreat from *Allen* “is a matter for the Court of Appeals, not a mere trial judge.” *Id.* at 275. What the *Curcio* court found missing in 2001, a decision of this Court moving South Carolina design defect law in line with the Restatement (Third) of Torts: Prods. Liab. § 2, arrived with *Branham* in 2010.

Hickerson is a federal prediction of South Carolina law built on these same Court of Appeals decisions. The *Hickerson* court failed to address *Branham*. As the certifying court explained, the *Hickerson* court “did not consider *Branham*’s adoption of the risk-utility test as the exclusive test for design defect claims or *Branham*’s reasoning that South Carolina courts may consider developments in products liability law even after § 402A’s codification.” *Near*, 182 F.4th at 352-53.

E. The warnings-over-design rule produces results South Carolina law has not accepted and should not accept.

1. It defeats the claims of people who never receive warnings.

The warnings-over-design rule rests on a presumption that the warning “will be read and heeded.” Restatement (Second) of Torts § 402A cmt. j. That presumption should have no application to a person who never receives the warnings or instructions given. Nor should it apply to minors or others lacking capacity to understand detailed product warnings and instructions. Yet the rule advanced by Enerco would operate to bar similar claims by these types of users and consumers.

It was undisputed in the district court that Mr. Belger never received the warnings or instructions set forth in either the hangtag or the owner’s manual. *See Near*, 182 F.4th at 361. The only warning Mr. Belger would have received was on the heater itself, which bore the word “HOT.” *Id.* at 347. There were no other on-

product warnings available to him alerting him that if he got within three feet of the product it might ignite his clothing.

Mr. Belger was not an outlier. It is obvious that many of us will come into contact with products that pose certain safety hazards that we did not purchase, own, or receive the owner's manuals or instructions. A person "passively enjoying the benefit of the product" is still a user. Restatement (Second) of Torts § 402A cmt. 1; *see Lawing*, 415 S.C. at 221-24. This class of persons should not be precluded as a matter of law from challenging the design of products that hurt them simply because an adequate warning exists somewhere in a manual they never received or understood. The Restatement (Third) § 2 makes the point in comment 1: warnings "may be ineffective because users of the product may not be adequately reached." Restatement (Third) of Torts: Prods. Liab. § 2 cmt. 1.

These persons are not exceptions to be carved out of a warnings-over-design rule. They show why there should be no warnings-over-design rule at all. A rule that defeats the claim whenever the warning misses the person it was meant to protect shifts the cost of the injury to the person least able to avoid it. That violates South Carolina law. Products liability "is premised on the concept that the cost of injuries which flow from a 'product defect' should be borne by the manufacturer or seller rather than the ultimate user." *Fleming*, 316 S.C. at 456; *see Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 542 (Ct. App. 1995) (strict liability places the cost on

the manufacturer “rather than by the ultimate users who are injured by the product and powerless to protect themselves”).

2. It excuses a manufacturer from designing for foreseeable inattention.

Even for the user who receives the warning, the warnings-over-design rule ignores what *Branham* recognized about human behavior: “careless driving is a foreseeable reality.” 390 S.C. at 233. The Restatement (Third)’s illustration makes the same point. The garbage truck worker was warned to keep his hands and feet away; he lost his balance anyway, and the possibility “was a risk that a warning could not eliminate and that might require a safety guard.” Restatement (Third) of Torts: Prods. Liab. § 2 cmt. 1, illus. 14.

3. It rewards the least effective safety measure.

In theory the warnings-over-design rule gives manufacturers a reason to stop at the label. Under it, a manufacturer that warns adequately need never consider whether a feasible design change would totally eliminate a product’s hazard, however serious the hazard and however cheap the change. Professor Owen described where that leads: the rule “would senselessly allow a manufacturer of household fans to substitute a warning on the base of the fan for the fan’s protective cage; it would allow a manufacturer of power mowers to attach a warning on the engine and then remove the protective housing around the blade.”

Owen, *supra*, at 1390. One can easily imagine other absurd results, such as removing seatbelts from vehicles in favor of a visor placard warning drivers not to come into contact with other objects or vehicles.

The Court of Appeals rejected a similar invitation in *Allen*, refusing to let a manufacturer's compliance with industry warning standards settle adequacy because that "would allow the industry to set its own standard of safety," a result "antithetical to the underlying premise of strict liability." *Allen*, 332 S.C. at 430. A rule that lets a warning settle the adequacy of a product's design has the same effect.

4. Rejection of the warnings-over-design rule keeps every legitimate protection for manufacturers in place.

Clarifying that adequate warnings do not cure or preclude a design defect claim as a matter of law does not change the defenses still available to product manufacturers. A plaintiff must still prove a feasible alternative design, with "consideration of the costs, safety and functionality associated with the alternative design." *Branham*, 390 S.C. at 225. A product is still not defective "merely because it 'can be made more safe.'" *Id.* at 224 (quoting *Marchant v. Mitchell Distrib. Co.*, 270 S.C. 29, 35-36 (1977)). Warnings and the obviousness of a danger remain factors the jury weighs. *Claytor*, 277 S.C. at 265; *see also* Restatement (Third) of Torts: Prods. Liab. § 2 cmt. f. A user who discovers the

defect, knows the danger, and proceeds unreasonably is still barred from recovery by statute. S.C. Code Ann. § 15-73-20. And a product that cannot be made safer by a feasible alternative design is not defective in design at all.

A separate opinion in *Lawing* made a parallel point about another doctrine that turns on what a product's user knows. The sophisticated user doctrine "does not operate to defeat any duty. It simply identifies circumstances the jury must consider when determining whether the supplier's duty to warn was breached." *Lawing*, 415 S.C. at 229-30 (Kittredge, J., concurring in part and dissenting in part) (quoting *Lawing v. Trinity Mfg., Inc.*, 406 S.C. 13, 28 (Ct. App. 2013)). A warning is the same kind of circumstance. It bears on whether the product's design and the manufacturer's design choices were reasonable. But the mere existence of an adequate warning should not preclude any design defect claim as a matter of law.

F. Courts across the country reject the warnings-over-design rule.

Should this Court answer the certified question NO, it would not be alone in doing so. The certifying court observed that "later developments in products liability law have also moved away from allowing adequate warnings to preclude design defect claims." *Near*, 182 F.4th at 357. The Institute's Reporters wrote that "[m]any courts have noted that a manufacturer may be obligated to design away dangers when it is reasonable to do so because, given the nature of the user or the

product use, it is foreseeable that warnings or obvious dangers will either not be seen or will be disregarded.” Restatement (Third) of Torts: Prods. Liab. § 2 reporters’ note to cmt. 1. Professor Owen’s survey found that “the vast majority of courts, some rejecting comment j explicitly on this point, hold that the separate forms of defect give rise to separate obligations that may independently support a products liability claim.” Owen, *supra*, at 1392-93. The decisions bear that out.

The Supreme Court of Texas confronted the question on facts far less favorable to the plaintiff than these. The plaintiff was hurt when a tire he was mounting on the wrong size rim exploded. The tire carried a prominent label warning against exactly what he did, and he “ignored every one of these warnings.” *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 331-32 (Tex. 1998). He did not claim the warnings were inadequate. *Id.* at 332. The manufacturer urged the court to follow comment j’s final sentence. *Id.* at 335. The court answered: “For these reasons we refuse to adopt the approach of Comment j of the superseded Restatement (Second) of Torts section 402A.” *Id.* at 337. It agreed with the court of appeals that “the mere fact that a product bears an adequate warning does not conclusively establish that the product is not defective,” *id.* at 331, and that “warnings and safer alternative designs are factors, among others, for the jury to consider in determining whether the product as designed is reasonably safe,” *id.* at 337. The court gave its reason: “it is not at all unusual for a

person to fail to follow basic warnings and instructions.” *Id.* (quoting *Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 358 (Tex. 1993)). Texas, like South Carolina after *Branham*, requires a design plaintiff to prove a safer alternative design. *Id.* at 335. And the dissent, which would have held that the warning made the tire’s design reasonably safe as a matter of law, *see id.* at 337, agreed that “comment j does not correctly state what the law is or should be.” *Id.* at 345 (Hecht, J., dissenting).

The Supreme Court of Kansas answered the same question on certification from the Tenth Circuit. The federal district court had granted summary judgment to the manufacturer of a front-end loader, holding, among other things, that comment j barred the plaintiff’s claims. *Delaney v. Deere & Co.*, 268 Kan. 769, 773, 999 P.2d 930, 935 (2000). The certified question asked whether Kansas follows “the portion of Comment j of the Restatement (Second) of Torts § 402A, which provides that a product bearing an adequate warning is not in defective condition.” *Id.* at 770, 999 P.2d at 933. The court described the central criticism of comment j, “that it allows an adequate warning to absolve the manufacturer of its duty to design against dangers when a reasonably safer design could have been adopted,” and concluded that “just because there is a warning on a piece of equipment, the warning does not prevent the equipment from being dangerous.” *Id.* at 785-86, 999 P.2d at 942. It “decline[d] to adopt that portion of Comment j which holds that a

product bearing a warning which is safe for use if the warning is followed is not in a defective condition or unreasonably dangerous.” *Id.* at 786, 999 P.2d at 942-43.

The Supreme Judicial Court of Massachusetts reached the same conclusion two decades earlier in the negligent design case on which the Restatement (Third)’s garbage truck illustration is based. *See Uniroyal*, 977 S.W.2d at 336 n.5. A town laborer lost his balance while jumping onto the rear step of a refuse truck, and the packer blade caught and severed his foot. *Uloth v. City Tank Corp.*, 376 Mass. 874, 877, 384 N.E.2d 1188, 1190-91 (1978). The manufacturers asked the court “to adopt a rule that there can be no negligent design if the danger is obvious or if adequate warnings are given.” *Id.* at 879, 384 N.E.2d at 1192. The court refused:

An adequate warning may reduce the likelihood of injury to the user of a product in some cases. We decline, however, to adopt any rule which permits a manufacturer or designer to discharge its total responsibility to workers by simply warning of the dangers of a product. Whether or not adequate warnings are given is a factor to be considered on the issue of negligence, but warnings cannot absolve the manufacturer or designer of all responsibility for the safety of the product.

Id. at 879-80, 384 N.E.2d at 1192. “If a slight change in design would prevent serious, perhaps fatal, injury, the designer may not avoid liability by simply warning of the possible injury.” *Id.* at 880, 384 N.E.2d at 1192. The court held that adequate warnings, like the obviousness of a danger, are factors that “should be

considered by a jury in evaluating a claim of design negligence.” *Id.* at 881, 384 N.E.2d at 1193.

Even courts that allow manufacturers to rely on warnings in a design case treat them as a factor. In *Hansen*, the California Court of Appeal held, at the manufacturer’s urging, “that product label warnings are relevant in determining whether a product has a design defect under the risk/benefit test.” *Hansen v. Sunnyside Prods., Inc.*, 55 Cal. App. 4th 1497, 1501, 65 Cal. Rptr. 2d 266, 267 (Ct. App. 1997). But it explained that comment j “is not directly applicable” to a design claim: “Whereas an adequate warning will avoid liability on a failure to warn theory, it is but one factor to be weighed in the balance in a design defect case.” *Id.* at 1517, 65 Cal. Rptr. 2d at 277. “This does not mean that a warning automatically precludes liability.” *Id.*

Federal courts applying the law of other states, including the Fourth Circuit itself, have reached the same conclusion.²

² See *Abbot ex rel. Abbot v. Am. Cyanamid Co.*, 844 F.2d 1108, 1115 (4th Cir. 1988) (“[U]nder Virginia law, an adequate warning does not foreclose a design defect claim in either warranty or tort.”); *Eskridge v. Pac. Cycle, Inc.*, 556 F. App’x 182, 188-89 (4th Cir. 2014) (per curiam) (unpublished) (predicting that West Virginia’s highest court would hold that instructing users how to use a bicycle’s quick-release hub “does not protect the seller, as a matter of law, from liability for failing to adopt a design that would have provided significantly better protection than any warning could”); *Moulton v. Rival Co.*, 116 F.3d 22, 24, 28 (1st Cir. 1997) (Maine law) (affirming a design defect verdict for a one-year-old burned by a potpourri pot whose mother had read its warnings, and explaining that the Maine court’s quotation of comment j “explicitly applies only to claims that a

The majority of courts that have faced this particular question have rejected the idea that an adequate product warning cures or precludes a design defect as a matter of law. Such a rule runs afoul of logic and good engineering practice. It discourages manufacturers from mitigating risk through design in favor of caution stickers. It also closes the door to claimants who never saw or understood the very language barring their design defect claims.

This Court has set forth the exclusive test for design defect claims under South Carolina law. Proof of an inadequate warning is not a part of that test. Nor should it be. This Court should not hesitate to reject the rule predicted by *Hickerson*.

CONCLUSION

For these reasons, the plaintiff respectfully requests this Court answer the certified question “No.”

product is unreasonably dangerous because it lacks an adequate warning”); *see also Butler v. Daimler Trucks N. Am., LLC*, 74 F.4th 1131, 1145 (10th Cir. 2023) (describing *Delaney*’s holding “that the failure of a defective-warning claim does not foreclose a defective-design claim”).