No. 20-2206

In the **Supreme Court of the State of Ohiowa**

LOUIS TULLY, as father and natural	)
guardian for minor L.T.	)
And in his own right,	)
Petitioner,	)
v.	)
ZUUL ENTERPRISES, an Ohiowa	)
corporation,	)
Respondent.	)

Writ of Certiorari Granted

NOTICE is hereby given that the petition for writ of certiorari is hereby GRANTED, limited to the following two questions:

I. Did the appellate court err in affirming Zuul's motion for summary judgment on the Tullys' manufacturing defect claim?

II. Does the read and heed doctrine apply to strict liability failure-to-warn claims in the State of Ohiowa?

THE COURT OF APPEALS FOR
THE STATE OF OHIOWA
SEVENTH APPELLATE DISTRICT
DRUMMOND COUNTY

LOUIS TULLY, as father and natural guardian for minor L.T. And in his own right, *Petitioner*, v. ZUUL ENTERPRISES, an Ohiowa corporation, *Respondent.*	)))))))))	OPINION Decided: December 20, 2019

Before Spengler, Zeddemore, and Stantz, Appellate Division Judges

SPENGLER, J.:

This case was borne out of a tragic accident that resulted in severe burns to L.T., a young child. Plaintiffs, Louis and Janine Tully, sued Zuul Enterprises ("Zuul") under state law when an e-cigarette manufactured by Zuul exploded and injured L.T., the Tullys' child. The complaint alleged that (1) Zuul had violated state product liability law due to a manufacturing defect that caused the explosion, and (2) Zuul failed to adequately warn consumers of the risks associated with their product.

Zuul moved for summary judgment, contending that (1) although the product did suffer from a manufacturing defect, liability could not be established, because L.T. was not a

foreseeable user of the product, and (2) the warning provided on the packaging of the product sufficiently fulfilled Zuul's duty to warn users.

The Court of Common Pleas held that children were not foreseeable users of the Zuul products and granted summary judgment to Zuul on the manufacturing defect claim. No. 18-CV-1988 (Ct. Com. Pl. Sep. 28, 2018). The warning claim proceeded to trial. The Tullys requested a jury instruction on the heeding presumption. Zuul objected, and the lower court sustained the objection. The jury held for Zuul, and the Tullys timely appealed.

The Tullys appealed the results on two grounds. They argued that the lower court's grant of summary judgment was inappropriate, as an issue of material fact remained as to whether Zuul could foresee a child as a consumer of its product and thus should be liable for any product defect. Additionally, the Tullys argued that the lower court erred in failing to allow a jury instruction on the heeding presumption.

There are two central questions in this appeal. (1) Did the trial court err in granting Zuul's motion for summary judgment on the manufacturing defect claim? (2) Did the lower court err in failing to allow a jury instruction on the heeding presumption? We conclude that the grant of summary judgment was appropriate and the lower court did not err in disallowing a jury instruction on the heeding presumption as no prejudice resulted, and therefore we AFFIRM the court's decision.

I. Background and Procedural History

A. *Zuul*

The e-cigarette company Zuul was established in Cincinnatus, Ohiowa in March 2016. Zuul's founder, Pete Venkman, intended for his product to be a safer alternative to traditional tobacco cigarettes. Zuul's products operate by depressing a button on the e-cigarette, whereby

an atomizer housed within the e-cigarette heats the flavored liquid in the cartridge into a vapor. The user can then inhale the vapor through the mouthpiece of the e-cigarette. With their compact size and variety of sweet flavors, Zuul's products quickly became popular among teens and young adults.

In December 2017, a federal district court held that Zuul had been using certain sweet vapor flavors to directly market its e-cigarettes to children. As a result of this litigation, Zuul was required to pay damages, and an injunction was issued against the production of Zuul's most popular sweet flavors: fruit punch, cotton candy, blue raspberry, and Hi-C Ecto Cooler. Subsequently, Zuul's stock price plummeted, and the company struggled to avoid bankruptcy.

Zuul issued a statement on June 7, 2018 affirming its denial of any attempt to market its product to children, and vowing to only produce a "classic tobacco" flavor in the future as a sign of its good faith. Additionally, Zuul redesigned their e-cigarettes to prohibit users from inserting cartridges made by other companies, thereby ensuring that Zuul e-cigarettes could only be used with Zuul's classic tobacco vapor cartridges.

In the same statement, Zuul also introduced a new line of accessories with which to bedeck their e-cigarettes. "Zuul skins" are adhesive labels that affix to the surface of any Zuul e-cigarette. Users can customize the appearance of their "skin," or purchase skins pre-decorated with various patterns or licensed characters. Within a month after the introduction of this new line of products, Zuul's stock prices rose to their former heights.

Although each Zuul e-cigarette has a warning affixed to its packaging, the "skins" contain no additional warning regarding the dangers of the product they enclose.

B. *Mr. and Mrs. Tully and L.T.*

Louis and Janine Tully often entrusted their eleven-year-old child, L.T., to the care of Dana Barrett, a nineteen-year-old college sophomore. July 17, 2018 was another such occasion. In accordance with many of her peers, Ms. Barrett possesses an affectation for e-cigarettes, and has been a frequent user since she matriculated. Ms. Barrett is also a fan of the animated character *Hola Gato*, and on July 11 she purchased a skin depicting this character for her Zuul e-cigarette.

L.T. shares an appreciation for *Hola Gato*, the titular character of a popular cartoon. On the night in question, Ms. Barrett arrived at the Tullys' residence with her e-cigarette encased in its new skin. Though she had warned L.T. many times that it was dangerous to play with the e-cigarette, the temptation proved too much for the child. At some point in the evening, the e-cigarette was left unattended and L.T. seized the opportunity. L.T. procured the e-cigarette, depressed the activating button, and began playing with the product in a manner which mimicked the operation of a leaf blower. Without warning, the e-cigarette exploded. As a result of this incident, L.T.'s hand was severely burned.

II. Jurisdiction

This Court has jurisdiction of Appellant's appeal pursuant to Ohiowa Rev. Code § 1217. The Court of Common Pleas' order granting Appellee's motion for summary judgment is a final appealable order under Ohiowa Rev. Code § 1218.

III. Standards of Review

Summary judgment is appropriate when there is no genuine issue as to any material fact of the claim, and the moving party is entitled to judgment as a matter of law. Ohiowa R. Civ. Proc. 56(a). A decision for summary judgment is reviewed de novo, construing the evidence in a

light most favorable to the nonmoving party. *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 362 (Iowa 2014). We also review a lower court's decision to grant or deny jury instruction for an abuse of discretion. *Barton Protective Services, Inc. v. Faber*, 745 So.2d 968, 974 (Fla. Ct. App. 1999).

IV. Discussion

A. Summary Judgment of the Manufacturing Defect Claim

We affirm the lower court's decision and find that there was no dispute of material fact to determine because L.T. was not a foreseeable consumer of its product. Thus, Zuul should not be liable for the physical injury sustained by L.T. as a result of a manufacturing defect, and the granting of Zuul's motion for summary judgment was proper.

Like similar statutes in neighboring jurisdictions, including the Sixth, Seventh, and Tenth Circuit Courts of Appeal, the Ohiowa Product Liability Act (OPLA) was adopted to enforce liability on a designer, manufacturer, or seller of a product when a defect in the product causes physical harm to the consumer of the product. *See* Ohiowa Rev. Code §§ 5552.368. The Ohiowa legislature relied heavily on these jurisdictions and on the Restatement (Second) of Torts § 402A (1965) to draft the OPLA, but it clearly specified that only claims which were created under the OPLA might be brought against the designer, manufacturer or seller of a defective product. No. 18-CV-1988 (Ct. Com. Pl. Sep. 28, 2018). Under Ohiowa Rev. Code § 5552.369(a)(1), a product is in a defective condition if, at the time it was conveyed by the seller to another party, "it deviated in a material way from the design specifications, formula, or performance standards of the manufacturer."

In Ohiowa, the test for whether a product deviated in a material way from the design standards of its manufacturer is the consumer expectations test. *State Farm Fire & Cas. Co. v. Chrysler Corp.*, 37 Ohio St. *1, *6, 523 N.E.2d 489, 494 (Ohio 1988). From this test, the court

must determine whether at the time the product left the manufacturer's hands, it was "more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." *Id.* Imposing strict liability among manufacturers, this condition may be found even though the manufacturer had exercised all reasonable care. *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 167-68 (Iowa 2002). However, an ordinary consumer may not expect a product performance when the product is used in a manner separate from its intended use. *Pruitt v. General Motors Corp.*, 74 Ohio App. 3d 520, 525, 599 N.E.2d 723, 726 (Ohio Ct. App. 1991). The defective condition can be shown by the injured party through direct or circumstantial evidence, so long as it establishes the condition was present when it left the manufacturer's hands. *Donegal Mut. Ins. v. White Consol. Indus.*, 166 Ohio App. 3d 569, 584, 852 N.E.2d 215, 226 (Ohio Ct. App. 2006), *citing State Farm Fire & Cas. Co.*, 523 N.E.2d at 493-94.

In *Donegal Mut. Ins.*, the plaintiffs presented evidence through the testimony of an expert, who testified at length that the defendant's stove was the source of the fire that burned down the plaintiffs' residence. 852 N.E.2d at 226. Additionally, the expert testified that the fire originated because an electrical switch inside the stove failed, and that the existence of the failed switch was enough to infer the existence of a manufacturing defect. *Id.* A second expert also testified that the fire patterns present at the back of the stove demonstrated that the fire was caused at the rear of the stove, where the faulty switch was located. *Id.* at 227. Thus, the court found that the plaintiffs provided sufficient circumstantial evidence to establish that a manufacturing defect could be inferred. *Id.*

Here, the Tullys' expert witness testified that, based on the severity of L.T.'s burns and the manufacturing specifications of the Zuul e-cigarette, the injury was proximately caused by a defect in the e-cigarette. Specifically, the expert identified a faulty connection between the

activating button and the atomizer, causing the atomizer to overheat and the liquid in the vapor cartridge to boil. This built up pressure within the cartridge, which caused the e-cigarette to explode and injure L.T.'s hand. Like the experts' testimony in *Donegal Mut. Ins.*, there is sufficient evidence to show that were it not for a defective condition, the e-cigarette would have operated in accordance with Zuul specifications and would have functioned like any other e-cigarette on the market. In response, Zuul offered no evidence to dispute the opinions of the Tullys' expert witnesses nor any other facts which might suggest there was no defect in the e-cigarette. Zuul also failed to offer any evidence that the e-cigarette had been altered after it had left its care. Thus, viewing the evidence proffered in a light most favorable to the defendant, there is no dispute as to whether the e-cigarette was in a defective condition as a result of the manufacturing defect. It was.

Instead, Zuul argued that it should not be held liable for the injury to L.T. because L.T. was not a foreseeable consumer of its product. Therefore, it was not foreseeable that L.T. could be subject to the harm caused by the defective condition. In Ohiowa, a manufacturer is only liable to a consumer if that consumer "is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition. . . ." Ohiowa Rev. Code § 5552.368. The OPLA does not provide a definition of "consumer," nor have courts in Ohiowa addressed this issue. Therefore, we look first to the Restatement (Second) of Torts upon which the OPLA was based.

Restatement (Second) of Torts § 402A(1) imposes liability on the seller of a product when physical harm is "caused to the ultimate user or consumer, or to his property . . ." The authors further explain that "it is not necessary that the ultimate user or consumer have acquired the product directly from the seller." Restatement (Second) of Torts § 402A cmt. l. For

consumers, it is only necessary that they have ultimately used the product as intended. *Id.* Additionally, a "user" includes anyone who passively enjoys the benefit of the product or those utilizing the product for the purpose of repair. *Id.*

In drafting the OPLA, the Ohiowa legislature chose to exclude the words "ultimate user" and to enforce liability only for those who are "consumers" of the seller's product. Thus, when strictly following the language of the Restatement, liability would extend only to consumers, which include those who have ultimately used the product as it was intended. It is evident from the record that the product was designed to produce a tobacco-flavored vapor which the consumer would inhale. However, L.T. used the product to mimic the operation of a leaf blower by pressing the button and waving the e-cigarette around in front of his body. Accordingly, L.T. would not be considered a "consumer" of the product, placing him outside the class of persons from which Zuul should reasonably foresee as being subject to harm caused by the product. Had L.T. attempted to use the product as it was intended to be used, perhaps by pressing the button and raising it to his mouth, he would have been using the product as intended and thus deemed a "consumer" for purposes of Ohiowa Rev. Code § 5552.368.

Since Zuul was not liable for the physical injury to L.T., the decision to grant the motion for summary judgment in Zuul's favor was proper.

B. Failure to Give the Requested Jury Instruction

A trial court is accorded broad discretion in formulating appropriate jury instructions and its decision should not be reversed unless the error complained of resulted in a miscarriage of justice. A decision to give or withhold a jury instruction is to be reviewed for an abuse of discretion. The party defending the instructions on appeal must show that the requested instructions accurately stated the applicable law, the facts supported giving the instruction, and

that the instruction was necessary in order to allow the jury to properly resolve all the issues in the case. If the jury instructions, as a whole, fairly state the applicable law to the jury, the failure to give a particular instruction will not be an error. *Faber*, 745 So.2d at 974.

Thus, we review a lower court's decision regarding jury instructions for an abuse of discretion, and that error must have resulted in prejudice to the party challenging a jury instruction. *Carter v. Mechanical Services*, 746 P.4d 807, 811 (Ohiowa 2012).

i. Jury Instruction

"Jury instructions must fully and fairly inform the jury of the law applicable to the case." *Peterson v. St. Paul Fire & Marine Ins. Co.*, 239 P.3d 904, 910 (Mont. 2010). Plain, clear, concise, and brief jury instructions promote verdicts consistent with the evidence and the law. *Id.* The party challenging a jury instruction must demonstrate prejudice. We will not find prejudice where the instructions state the applicable law of the case. *McAlpine v. Rhone-Poulenc Ag Co.*, 16 P.3d 1054, 1057 (Mont. 2000).

As no Ohiowa court has had the opportunity to address the issue of whether the heeding presumption applies to state law failure-to-warn claims, the issue now confronts this Court as a question of first impression.

The "heeding presumption" arises from the Restatement, which provides: "[w]here warning is given, the seller may reasonably assume it will be read and heeded. . . ." Restatement (Second) of Torts § 402A cmt. j. This rebuttable presumption allows the fact-finder to presume that the person injured by use of the product would have read and heeded an adequate warning, if provided. *Dole Food Co. v. N. Carolina Foam Indus., Inc.*, 188 Ariz. 298, 305, 935 P.2d 876, 883 (Ariz. Ct. App. 1996). Most jurisdictions have applied the presumption to the benefit of the plaintiff. *Knowlton v. Deseret Medical, Inc.*, 930 F.2d 116, 123 (1st Cir. 1991); *Plummer v.*

Lederle Laboratories, 819 F.2d 349, 355-56 (2d Cir.), *cert. denied*, 484 U.S. 898, 98 L. Ed. 2d 191, 108 S. Ct. 232 (1987); *Seley v. Searle & Co.*, 67 Ohio St. 2d 192, 423 N.E.2d 831, 838 (Ohio 1981).

Many courts that recognize the heeding presumption allow the fact-finder to presume that had an adequate warning been provided, the plaintiff would have read and heeded the warning. However, the defendant may provide evidence to rebut the presumption. *Miller v. Pfizer Inc.*, 196 F. Supp. 2d 1095, 1127 (D. Kan. 2002), *aff'd*, 356 F.3d 1326 (10th Cir. 2004).

Comment j, from which the heeding presumption was originally derived, has been highly criticized by commentators and was ultimately dropped from the Restatement (Third) of Torts. Zuul argues that the heeding presumption should not be recognized in Ohiowa. See Restatement (Third) § 2, Reporters' Note, cmt. l (characterizing comment j as containing "unfortunate language" that "has elicited heavy criticism from a host of commentators").

As such, not all states recognize the heeding presumption in failure-to-warn cases. In Alabama, a "failure-to-warn-adequately case should not be submitted to the jury unless there is substantial evidence that an adequate warning would have been read and heeded and would have prevented the accident." *Deere & Co. v. Grose*, 586 So. 2d 196, 198 (Ala. 1991). In other states, the burden of proving proximate cause in a failure-to-warn case is determined by statute. *DeJesus v. Craftsman Machine Co.*, 548 A.2d 736 (Conn. Ct. App. 1988).

In the State of Ohiowa, product liability law has always looked favorably upon the consumer. Although Ohiowa never adopted the Restatement (Second) of Torts in its entirety, the legislature found it instructive when drafting product liability laws. For example, Ohiowa has previously adopted the "learned intermediary doctrine," derived from the Restatement (Second) of Torts. Restatement (Second) of Torts § 402A cmt. j. Although there is a dearth of common

law or legislative precedent in regard to the heeding presumption, this Court finds that the heeding doctrine is the law of the land given that public policy tends to favor the consumer in product liability actions in Ohiowa.

The record from the lower court shows that the plaintiff's proposed instruction was summarily rejected. This Court finds that the lower court's failure to determine the law of the land and allow the jury instruction was an abuse of discretion.

ii. Prejudice

"A faulty jury instruction requires reversal when (1) 'we have substantial doubt whether the instructions, considered as a whole, properly guided the jury in its deliberations,' *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co*., 175 F.3d 1221, 1235 (10th Cir. 1999) (quotation omitted); and (2) 'when a deficient jury instruction is prejudicial,' *Coleman v. B-G Maintenance Management of Colo., Inc.*, 108 F.3d 1199, 1201 (10th Cir. 1997). Therefore, reversal on the basis of a faulty jury instruction is not easily attained.

Here, the jury had a wealth of evidence upon which to base their decision. Testimony was given by all named parties, and the jury deliberated upwards of sixteen hours. It cannot be unequivocally stated that the jury would have proffered a different verdict if the requested instruction had been given. Consequently, we find that no prejudice resulted from the failure to give the requested jury instruction.

V. Conclusion

For the foregoing reasons, we conclude that summary judgment on the manufacturing defect claim was appropriate; and that although the trial court abused its discretion in denying plaintiff's jury instruction, no prejudice resulted from this error. We therefore affirm the decision of the Court of Common Pleas.

AFFIRMED.

ZEDDEMORE, J., dissenting in part and concurring in part:

By the plain language of the Ohiowa Product Liability Act (OPLA) and the intent of the legislature, it is clear that in Ohiowa, a manufacturer who creates a product with a defective condition should be held strictly liable to all persons who may foreseeably be harmed by the defect. Additionally, it is also clear that where no prejudice results from the failure to provide jury instruction, the lower court's decision should not be overturned. Therefore, I dissent on the majority's affirmation of summary judgment, and I concur with the majority's affirmation of the jury instruction.

As the majority has designated, the OPLA was drafted with the Restatement (Second) of Torts § 402A and thus intended to impose strict liability on manufacturers and sellers of products with defects or defective conditions. No. 18-CV-1988 (Ct. Com. Pl. Sep. 28, 2018). But where the majority has focused on the letter of the law as it was written, it has failed to see the forest for the trees. The purpose of § 402A was to make any seller subject to liability "even though he has exercised all possible care in the preparation and sale of the product." Restatement (Second) of Torts § 402A cmt. a. The justifications for this policy include: that the seller has assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has a right to expect the seller to stand behind its product; that the burden of accidental injuries caused by a product should be placed on the one placing it into the market; and that the seller is in the best position to afford this protection. *Id.* at § 402A cmt. c. Though common bystanders may be denied recovery for injury proximately caused by a defective product, "[t]here may be no essential reason why such plaintiffs should not be brought within the scope of the

protection afforded, other than they do not have the same reasons for expecting such protection as the consumer who buys a marketed product . . ." *Id.* at § 402A cmt. o.

Though the Ohiowa statute fails to provide its own definition of "consumer," it is more practical to consider that the exclusion of "ultimate user" did not remove that category from the foreseeable "class of persons" but instead encapsulated it within the "consumer" term. By ignoring the policy behind the OPLA and carving out exceptions for certain classes of users, the majority has eliminated the imposition of *strict* liability.

Furthermore, the issue is not whether the plaintiff was a foreseeable user of the product, but that he was the kind of person that Zuul could reasonably foresee as being subject to harm from the defective condition of the e-cigarette. Young L.T. was more than a common bystander when the product exploded. He held the device as a toy in his hand, pressed the button as the button was intended to be pressed, and, as a result of the undisputed manufacturing defect, was injured. Though perhaps his intended use was not the same as his babysitter's, L.T. had a right to expect that Zuul would assume responsibility for any injury caused to him, just as Ms. Barrett would expect the same had she, in that instance, pressed the button.

When a defendant fails to proffer evidence to the contrary on a fact material to a product defect claim, it is essentially admitting fault and liability for this action. Perhaps in doing so, a manufacturer may be attempting to save the reputation of its company that was so recently tarnished by actions taken against them. Perhaps it believes that the Court will grant it some leniency as a sign of its good faith. Whatever its reasoning to protect the company, disclaiming liability to a child simply because the product was not being used as intended voids any attempts to display good faith and well-meaning intention.

As a result of the injunction issued in the previous litigation, Zuul Enterprises is—at a minimum—fully aware of the dangers that its product poses to children. Yet, instead of finding ways to avoid marketing to children, it introduces a new product accessory that allows a person to affix cartoon characters to its e-cigarette. These new design "skins" are simply another way for the company to circumvent a court order and carry on its dubious practice of enticing children to become addicted to its product. By not enforcing the state's intended policy of strict liability for a manufacturing defect, the majority only serves as a keymaster, granting Zuul access to illegal and dangerous trade practices.

Therefore, I dissent from the majority's decision to affirm the granting of the motion for summary judgment in favor of the respondent and recommend that the claim be remanded for trial.

APPENDIX

Ohiowa Rev. Code § 5552.368 Rule of Liability.
Except as provided in this section, a person who sells, leases, or otherwise puts into the stream of commerce any product that is defective or in a defective condition that is unreasonably dangerous to any consumer or to the consumer's property is subject to liability for physical harm caused by that product to the consumer or the consumer's property if:

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

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

Ohiowa Rev. Code § 5552.369 When Product Has Defect.

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

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

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

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

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

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

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