No-20-2206

THE SUPREME COURT OF THE STATE OF OHIOWA

LOUIS TULLY, AS FATHER AND NATURAL GUARDIAN FOR MINOR L.T. AND IN HIS OWN RIGHT,

PETITIONER,

V.

ZUUL ENTERPRISES, AN OHIOWA CORPORATION,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE STATE OF OHIOWA

BRIEF OF RESPONDENT ZUUL ENTERPRISES, AN OHIOWA CORPORATION

Team B

Counsel for Respondent

Zuul Enterprises, an Ohiowa Corporation

QUESTIONS PRESENTED

1. Whether under Ohiowa law, 1) an underage child, who uses a product that only adults can legally use 2) as though it were a toy, can recover under a theory of strict products liability 3) after the Ohiowa legislature expressly chose to preclude recovery for users when Ohiowa law requires that strict products liability be applied only in cases where the injured party is in a class whose harm the manufacturer could reasonably foresee and the product is being used in a reasonably expectable way of handling and consumption?
2. Whether under Ohiowa law, a jury should not be instructed on the read and heed doctrine that 1) shifts the burden of production on causation from the consumer to the manufacturer and 2) instructs the jury to presume in cases where manufacturers affix warnings to their products that the consumer in fact read and heeded the warning provided, whether that was in fact the case, when the Petitioner ignored multiple warnings from his caregiver of potential danger?

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (continued)

Page

TABLE OF AUTHORITIES

Page

A. Table of Cases

UNITED STATES SUPREME COURT CASES

UNITED STATES CIRCUIT COURT OF APPEALS CASES

TABLE OF AUTHORITIES (continued)

Page

UNITED STATES DISTRICT COURT CASES

STATE CASES WITHIN JURISDICTION

STATE CASES OUTSIDE OF JURISDICTION

TABLE OF AUTHORITIES (continued)

Page

TABLE OF AUTHORITIES (continued)

Page

B. Statutes

C. Rules

TABLE OF AUTHORITIES (continued)

Page

D. Secondary Sources

OPINION BELOW[1]

The decision of the Court of Appeals for the State of Ohiowa is unpublished. A copy of the Memorandum Opinion is attached as Appendix A.

STATUTES INVOLVED

This case involves the interpretation of Ohiowa Revised Code § 5552.368 and Ohiowa Revised Code § 5552.369. A copy of each statute is attached at Appendix B.

STATEMENT OF THE CASE

A. Statement of the Facts

Zuul Enterprises (Zuul) is an e-cigarette company established in Cincinnatus, Ohiowa in 2016. Record 3. The company's mission is to provide a safer alternative to tobacco products already on the market such as cigars, cigarettes and chewing tobacco. *Id*. The product in this case is an e-cigarette manufactured by Zuul. Record 4. To operate the e-cigarette, the consumer depresses a button on the casing that causes an atomizer to heat and vaporize a flavored liquid in the cartridge. *Id*. The consumer then inhales through the mouthpiece the vapor that is dispensed from the e-cigarette. *Id*. Zuul also produces adhesive labels, known as skins, that consumers can apply to the casing of the product. *Id.* As merely adhesive labels, no warning is affixed to the packaging of the skins, but Zuul does affix a warning of the potential danger of the product to e-cigarettes. *Id*.

In 2017, in response to a federal district court order to pay damages and an injunction, Zuul ceased production of sweet flavors as the court ruled that Zuul's products were directly marketed to children. *Id*. Zuul then issued a statement denying any attempt to market its products to children and independently undertook an effort to produce only a traditional tobacco-flavored

[1] Opinion Below and Statutes Involved sections were added and included in the Appendix pursuant to Supreme Court Rule 24.1.

liquid and not merely to cease producing the flavors the court required. *Id*. Zuul, further on its own initiative, redesigned its products so that cartridges produced by other companies could not be placed in Zuul products, in an effort to further guarantee that only tobacco-flavored cartridges could be used in Zuul products. *Id*.

On July 17, 2018, the injured party, L.T. (hereafter referred to as Petitioner), an eleven-year-old child, was under the care of a nineteen-year-old, Dana Barrett, who owned and used Respondent's product that she had decorated with an adhesive label featuring the cartoon character *Hola Gato*. Record 5. Ms. Barrett warned Petitioner on many occasions that he should not play with the product because it was dangerous to do so. *Id.* Disregarding this warning, Petitioner took the product and began playing with it. *Id*. Instead of inhaling the vapor while depressing the activation button as the product was intended to be used, Petitioner pressed the button and waived it around mimicking a leaf blower. *Id*. A malfunction occurred and Petitioner's hand was burned. *Id*.

B. Course Proceedings and Disposition in the Courts Below

The Petitioner filed a complaint in the Ohiowa Court of Common Pleas alleging that 1) Zuul was strictly liable for the injury under state products liability law due to a manufacturing defect in the defect, and 2) that there was no adequate warning of the danger of the product provided to consumers. Record 2. Respondent moved for summary judgment arguing that 1) Zuul was not liable because Petitioner was not a foreseeable user of the product and 2) the warning on the packaging of the product adequately warned consumers of any danger present. Record 2-3. The Court of Common Pleas granted summary judgment to Zuul on the manufacturing defect claim and denied summary judgment on the failure to warn claim. No. 18-CV-1988 (Ct. Com. Pl. Sep. 28, 2018). At trial, Petitioner requested that the court provide a jury

instruction on the heeding presumption. *Id*. The court denied this request and the jury found that Zuul was not liable for Petitioner's injury. *Id*.

Petitioner appealed the decision on the grounds that 1) the Court of Common Pleas inappropriately granted summary judgment to Zuul and 2) the Court of Common Pleas inappropriately denied Petitioner's request for the jury instruction. Record 3. The Court of Appeals for the State of Ohiowa held that the grant of summary judgment was proper and that the Court of Common Pleas did not err when denying Petitioner's request for jury instruction. *Id*. The court reasoned that there was no genuine issue of material fact because Petitioner was not a foreseeable user of the product. Record 6. The court further articulated that while the lower court abused its discretion by not granting the request for the jury instruction, this denial resulted no prejudice to Petitioner. Record 12. Judge Zeddemore dissented in part while agreeing with the majority opinion in holding that no prejudice resulted from the failure to present the jury instruction. Record 13. Petitioner's filed a petition for writ of certiorari, and that petition was granted by this Court. No. 20-2206 (Ohiowa 2020).

C. Standard of Review

This Court has been asked to review two issues: 1) whether the appellate court correctly affirmed Zuul's motion for summary judgment on Petitioner's manufacturing defect claim and 2) whether the read and heed doctrine will apply to products liability failure to warn claims in the State of Ohiowa. This Court reviews the district court's grant of summary judgment de novo. *Anderson v Highland House Co.*, 757 N.E.2d 329, 331 (Ohio 2001). A moving party is entitled to summary judgment as a matter of law when there is no genuine question as to material fact of a claim. Ohiowa R. Civ. Proc. 56(a). A grant of a motion for summary judgment is proper if

there is an absence of evidence on which "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

This Court reviews the lower court's decision not to provide the jury instruction on the heeding presumption for an abuse of discretion. *Barton Protective Servs., Inc. v. Faber*, 745 So.2d 968, 974 (Fla. Ct. App. 1999); *Fisher v. Ford Motor Co*., 224 F.3d 570, 576 (6th Cir. 2000). As such, failure to allow a jury instruction without a showing of demonstrable prejudice does not warrant reversal. *Lovick v. Wil-Rich*, 588 N.W.2d 688, 695 (Iowa 1999).

II. SUMMARY OF THE ARGUMENT

This Court should affirm the ruling of the Court of Appeals affirming the lower court's grant of summary judgment to Zuul. The Court of Appeals correctly concluded that the Petitioner was not in the class of consumers that the manufacturer could foresee being harmed by a manufacturing defect under Ohiowa law. In addition, while Court of Appeals incorrectly held that the read and heed doctrine should apply to strict liability failure-to-warn claims in Ohiowa, the Court of Appeals correctly affirmed the jury verdict in Zuul's favor on Petitioner's failure-to-warn claim.

First, the Court of Appeals correctly affirmed the lower court's grant of summary judgment to Zuul in the manufacturing defect claim. Under Ohiowa law, a plaintiff cannot recover in a strict products liability claim unless the plaintiff can show that the plaintiff was in the class of persons foreseeable to the manufacturer to be harmed by a defect in the manufacturer's product. As petitioner cannot meet this burden and therefore cannot show that there is any genuine issue of material fact, the Court of Appeals correctly affirmed the lower court's grant of summary judgment on the manufacturing defect claim. Further, under Ohiowa law, a product must be used in reasonably expected ways of handling for the product to be found

defective. Thus, even if Petitioner could show that Petitioner was in the foreseeable class of consumers, Petitioner cannot show that operating an e-cigarette as if it were a toy is a foreseeable use of the product. The inverse is also true, wherein if Petitioner could show that the use was foreseeable, recovery would also be precluded if Petitioner could not show he was in a foreseeable class of consumers. Lastly, it is clear through the legislature's decision to remove the word "user" when adopting the language of the § 402A of the Restatement (Second) of Torts' definition of strict products liability, the legislature intended to restrict the category of plaintiff that could recover under strict liability, and Petitioner's actions do not meet this strict definition.

Second, the Court of Appeals correctly affirmed the jury verdict absolving Zuul of liability on Petitioner's failure-to-warn claim. While the Court of Appeals incorrectly held that the read and heed doctrine should apply in failure-to-warn claims, the Court of Appeals correctly found that absence of a jury instruction on the heeding presumption did not warrant vacancy of the verdict as the absence of the instruction did not result in prejudice to Petitioner. The read and heed doctrine illogically eliminates the burden for the plaintiff to prove causation in a strict liability action and shelters defendants from liability by merely affixing warnings to their products. As Ohiowa public policy in this area favors protecting the consumer, this doctrine clearly does not belong in Ohiowa jurisprudence.

The Supreme Court of Ohiowa should affirm the Court of Appeals grant of summary judgment to Zuul. There are no material issues of genuine fact regarding whether the petitioner was of a class of persons that Respondent could foresee being harmed by its product, or whether Petitioner was using the product in a reasonably foreseeable way. He was not. The Supreme Court of Ohiowa determine that the read and heed doctrine has no place in Ohiowa products liability jurisprudence as the doctrine illogically shifts the burden of causation from plaintiff to

consumer, and in allowing manufacturers to escape liability by affixing warnings to their products, does not align with Ohiowa's public policy in favor of the consumer. Zuul respectfully requests this Court reject the ruling of the Court of Appeals ruling that the lower court abused its discretion in denying Petitioner's request for a jury instruction on the heeding presumption.

III. ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT ON THE MANUFACTURING DEFECT CLAIM BECAUSE A) PETITIONER WAS NOT A MEMBER OF THE APPLICABLE CLASS OF CONSUMERS, B) PETITIONER WAS NOT MAKING FORESEEABLE USE OF THE PRODUCT, AND C) THE COURT OF APPEALS GAVE PROPER DEFERENCE TO THE OHIOWA LEGISLATURE IN THEIR STRICT INTERPRETATION OF STATUTORY AUTHORITY.

This Court should affirm the ruling of the Court of Appeals affirming the lower court's grant of summary judgment to Zuul. Under Ohiowa Law, a manufacturer is not liable for the harm caused by a defective product if the consumer is within a class the manufacturer could reasonably foresee being subject to harm from the defect. Ohiowa Rev. Code § 5552.368. Petitioner was not in this class of persons. As a result, Zuul cannot be liable for any harm to Petitioner. There are two separate rationale for this conclusion, each standing on its own merits. First, Petitioner was not a foreseeable consumer within the general meaning of the term as codified in Ohiowa Revised Code § 5552.368. In other words, the product in question was not intended for young children, nor was it reasonably foreseeable that a child of Petitioner's age would use the product. Second, the product was not being used in the way that it was intended. Therefore, even if Petitioner was a foreseeable consumer, the obvious misuse of the product exempts Zuul from liability under Ohiowa Revised Code §5552.369.

Additionally, Respondent asks that this court not construe the statute so broadly as to override its meaning. The state legislature made it very clear what types of manufacturing

actions it wished to include under strict liability, as well as those it wished to exempt in order to foster innovation and opportunity. In considering how to draft the product liability section of the Ohiowa Revised Code, the legislature adopted and modified certain sections of the Restatement (Second) of Torts (Am. Law Inst. 1965), specifically § 402A. Record 5. These adoptions and exclusions shine light on the legislative intent behind the sections in question. Respondent implores this Court to do its duty in expertly interpreting and giving proper meaning to this statute, without engaging in the type of judicial activism that can often see the will of the people improperly usurped.

A. Summary judgment was proper because Petitioner was not within the class of foreseeable consumers as he was a young child that was not legally able to consume the product.

According to the plain text of Ohiowa Revised Code § 5552.368, in order for strict liability to be imposed on a manufacturer, it must be shown that the "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." *Id.* Petitioner does not fall into the "class of persons" that Zuul should reasonably foresee as being subject to harm from this product. Petitioner is not an intended user, purchaser, consumer, or third-party beneficiary. In fact, Petitioner cannot legally use the product in question, being eleven years of age. Record 5. To this point, the company has taken affirmative steps to preclude any incidental targeting of underaged consumers by discontinuing multiple flavors of its product. Record 4. There is no conceivable way that an eleven-year-old child falls into the "class of persons" required for strict liability to be imposed here.

Ohiowa isn't the only state whose legislature has seen fit to enact statutes precluding recovery for unforeseeable plaintiffs. For example, in *Phillips v. Cricket Lighters,* 841 A.2d 1000

(Pa. 2003), the Supreme Court of Pennsylvania admonished attempts to infuse the doctrine of strict liability with ordinary negligence concepts, effectively creating an all-inclusive doctrine that imposed liability regardless of a valid defense to either construction. *Id.* at 1007. *Phillips* involved the tragic instance of a two-year-old child setting his home ablaze with a butane lighter he retrieved from his mother's purse, resulting in the death of multiple members of the child's family. *Id.* at 1003. The Pennsylvania Supreme Court in *Phillips* rejected the overbroad conclusion of the appellate court, ruling that strict liability can only be imposed when a product is not made safe for its intended user, rather than against the use of products by those not intended as consumers. *Id.* at 1005. The *Phillips* court eventually concluded that:

> In a strict liability design defect claim, the plaintiff must establish that the product was unsafe for its intended user. We also explicitly state that a manufacturer will not be held strictly liable for failing to design a product that was safe for use by any reasonably foreseeable user as such a standard would improperly import negligence concepts into strict liability law.

Id. at 1007. Ultimately, the court held that the child was not an intended user of the product, therefore, the trial court properly dismissed the strict liability claim. *Id.* at 1007-1008.

Phillips is illustrative of why Petitioner is not a "consumer" of the product under Ohiowa law. Like the child in *Phillips*, Petitioner was using a product designed and manufactured entirely for adults when the alleged malfunction occurred. Record 4. Lighters were meant for adults, just as e-cigarettes were meant for adults. In both cases, the children were left unsupervised by adults- people who were in the class that harm was foreseeable to occur to. In fact, Petitioner is much less likely to be ruled a consumer than the child in *Phillips.* In *Phillips*, the child's use of the product resulted in the deaths and injury of foreseeable users. *Id.* at 1003. In this case, Petitioner alone was injured, precluding any claims by parties who are *actually* within the contemplated class of persons.

Additionally, it is important to note that the *Phillips* court based its common law strict liability analysis on § 402A as did the Ohiowa legislature, making it more analogous with the case at hand. *Id.* at 1007-1008. In fact, Pennsylvania has declined to adopt a more expansive approach to strict liability other than that offered by § 402A and its own jurisprudence. *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 335 (Pa. 2014). The Pennsylvania Supreme Court in *Tincher* declined to adopt a more expansive view of strict products liability, instead deferring to the current Pennsylvania legal framework. *Id.* at 390. This Court should show the same deference toward the Ohiowa statutory framework.

Another case that shows the distinction between reasonably foreseeable consumers and others outside the scope of intended liability is *Darsan v. Globe Slicing Mach. Co.,* 606 N.Y.S.2D 317 (N.Y. App. Div. 1994). In *Darsan,* a fourteen-year-old child was injured while assisting in the operation of a meatgrinder. *Id.* at 318. The court in *Darsan* found that the minor was not a reasonably foreseeable user of the machine. *Id.* Notably, the court based this decision on the fact that the operation of the referenced machine by a minor would be in violation of New York labor regulations, which precluded minors from such activities. *Id.* New York's adoption of the Restatement (Second) of Torts in *Robinson v. Reed-Prentice Div. of Package Mach. Co.,* 403 N.E.2d 440, 443 (N.Y. 1980) makes this more applicable to the case at hand, as § 402A of the Restatement identifies an even broader class of plaintiffs than Ohiowa Revised Code § 5552.368.

This is strikingly similar to the case at hand, as it shows the presumption that the use of a product being illegal may bolster a defendant's claim that a plaintiff does not fall within the category of a reasonably foreseeable user. Like the teenager in *Darsan,* L.T. was not of the age to engage in use of a tobacco product. 21 U.S.C.A. § 387f.(d)(3). The *Darsan* court reasoned that it would be wrong to force liability on manufacturers for plaintiffs so unforeseeable that

consumers could not even use the product without running afoul of the law. *Id.* at 318. *See also Estrada v. Berkel Inc.,* 789 N.Y.S.2d 172, 173 (N.Y. App. Div. 2005) (manufacturer could not foresee infant's operation of meat grinder). As a result, one could make the argument that an individual who is precluded from using a certain product by law is *per se* not a reasonably foreseeable consumer of that product. This rationale cleanly follows with Ohiowa Revised Code § 5552.368, as it seems illogical for a government to include a person within a class while simultaneously excluded them from said class by law. 21 U.S.C.A. § 387f.(d)(3). Whether due to the foreseeability or outright illegality of its use, Petitioner is clearly not within the class of consumers meant to be covered under strict liability by the Ohiowa legislature.

While Petitioner may argue that the use of the *Hola Gato* skins is evidence to the contrary, this assertion is not grounded in the facts. As mentioned, Zuul removed multiple products from the market to prevent any incidental targeting of an underage market. Record 4. Respondent has redesigned its products and discontinued all but the traditional tobacco-flavor cartridges to discourage underage consumption. *Id*. Any insinuations to the contrary serve no other purpose than to muddy Respondent's intentions and disposition toward its potential consumers.

Through the enactment of Ohiowa Revised Code § 5552.368, the Ohiowa legislature made clear what types of consumers it wanted to be able to recover through strict liability. This clarity is heightened by the prohibition of the use of the product in question by Petitioner. Simply put, an underage child nowhere close to the legal tobacco age is not within the reasonably foreseeable class of persons laid out in Ohiowa Revised Code § 5552.368. As a result, this Court should find that Petitioner was not within the class of foreseeable consumers

contemplated by Ohiowa Revised Code § 5552.368. Thus, there is no genuine issue of material fact and the lower court properly granted summary judgment on the manufacturing defect.

B. Petitioner was not using the product in a reasonably expectable way of handling or consumption as prescribed in Ohiowa Revised Code § 5552.369 when he played with the e-cigarette in a way that imitated the operation of a leaf blower.

Even if a person is within the intended class contemplated by § 5552, Ohiowa Revised Code § 5552.369(a)(3) provides another barrier to recovery under a theory of strict liability. It provides that "[a] product is in a defective condition under this article if, at the time it is conveyed by the seller to another party: … (3) its condition will be unreasonably dangerous to the expected consumer when used in reasonably expectable ways of handling or consumption." *Id.* This passage requires that, in order for the Court to find the product defective, Petitioner must show that the product was used in a reasonably expectable way. Petitioner's use of the product, which was described as "playing with the product in a manner which mimicked the operation of a leaf blower", show definitively that the product was being misused at the time of the malfunction, a situation in which the Ohiowa legislature clearly meant to exempt from strict liability. Record 5. Accordingly, the product in question was not "defective" as defined by the Ohiowa Legislature in § 5552.369.

Even if Petitioner's babysitter, who is a "foreseeable consumer", had been injured while making the same irregular motions, Zuul would be shielded from liability on the basis of Ohiowa Revised Code § 5552.369. Record 5. While the foreseeability of the consumer matters to § 5552.368, the actual use of the product is the focus under § 5552.369. Respondent need only show the inapplicability of one to exempt itself from strict liability.

Comment h of the Restatement (Second) of Torts § 402A (1965) (Am. Law Inst. 1965) is also helpful here, as it states "a product is not in a defective condition when it is safe for normal

handling and consumption. If the injury results from abnormal handling…the seller is not liable…" *Id.* This illustrates the concept of misuse as a defense to strict liability in product actions. The authors cite instances such as abnormal preparation of food or overconsumption as possible misuses. *Id.* These circumstances contemplated by the Restatement are closely analogous to the situation before this Court, concerning a child's abnormal handling of a product.

Other states have applied this doctrine in similar cases. For example, in *McLaughlin v. Sears, Roebuck & Co.,* 281 A.2d 587 (N.H. 1971) a man bought a ladder from a department store, which then fell while he was using it. *Id.* at 588. The court reasoned that "the plaintiff's right to recover would be barred if distortion of the leg or failure to set the ladder up level constituted misuse or abnormal use of the product." *Id*. The *McLaughlin* court applied this standard through the lens of the Second Restatement - specifically comment h. *McLaughlin*, 281 A.2d at 588-589; Restatement (Second) of Torts § 402A, cmt. H (Am. Law Inst. 1965). In *High v. Westinghouse Elec. Corp*., 610 So. 2d 1259 (Fla. 1992), the Florida Supreme Court found that demolition of transformers was not a reasonably foreseeable use of the product as to impose strict liability on the manufacturer. *Id.* at 1262. The court reasoned that "section 402A applies to intended uses of products for which they were produced. When an injury occurs under those circumstances, the manufacturer is strictly liable. We find, under the circumstances in the instant case, that dismantling a product is not an intended use as prescribed by section 402A." *Id*. This shows the application of 402A in a way similar to Ohiowa Revised Code § 5552.369. Both apply very similar standards of misuse as defined by the proper use of the product contrasted with the improper actions of the consumer.

In *Kalik v. Allis–Chalmers Corp.,* 658 F.Supp. 631 (W.D.Pa.1987), the court followed this principle as well, holding that "the dismantling and processing of junk electrical components

was not a reasonably foreseeable use of [defendant's] products." *Id*. at 635. Additionally, in *Hartnett v. Chanel, Inc.,* 948 N.Y.S.2d 282 (N.Y. App. Div. 2012), the court reasoned that "to recover for injuries caused by a defective product, the product must have been used for the purpose and in the manner normally intended or in a manner reasonably foreseeable." *Id*. at 285. As noted, Pennsylvania and New York are both states with a history of strict adherence to § 402A. *See Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 335 (Pa. 2014); *Robinson v. Reed-Prentice Div. of Package Mach. Co.,* 403 N.E.2d 440, 443 (N.Y. 1980).

In the instant case, using the product as a "leaf blower" is certainly not how the product in question is meant to be used. Record 5. The apparent or intended use of an e-cigarette is to hold it to one's mouth to inhale the vapor, not to move it about in an erratic way as if the product were a toy. Toying with an object made for any specific use, so markedly removed from the use in question, cannot be interpreted as a "reasonably expectable" way to use the product. While the injuries to Petitioner are unfortunate, The Ohiowa legislature clearly did not mean to extend strict liability to those situations where product is being used in a way in which it is not intended. To do so would be to ask manufacturers to produce products completely immune to any malfunction, even under increased and unforeseeable stress of misuse, and would flood the courts with litigation born of consumer misuse.

C. The Ohiowa legislature has shown a clear preference toward the limitation of strict products liability by not adopting the "user" language from § 402A of the Second Restatement that should not be construed overbroadly.

When interpreting legislation, courts must not strain to include an expansive definition at odds with legislative intent. *United States v. Boucha*, 236 F.3d 768 (6th Cir.2001) (stating the familiar rule of statutory construction that "[t]he language of the statute is the starting point to interpretation, and it should also be the ending point if the plain meaning of that language is

clear" (quoting *United States v. Choice*, 201 F.3d 837, 840 (6th Cir. 2000))). Thus, the clear and plain meaning of language in the statute controls, unless there is proof that the legislature intended a separate meaning. *Bates v. Dura Automotive Sys., Inc.,* 625 F.3d 283, 286 (6th Cir.2010) ("The plain meaning of legislation should be conclusive, except in rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." (quoting *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 242 (1989))). Notably, most states require courts to construe terms with a technical or particular meaning in accordance with that meaning. *See* Ind. Code Ann. § 1-1-4-1 (West 2019); Ohiowa Rev. Code Ann. § 1.42 (West 2019); Colo. Rev. Stat. Ann. § 2-4-101 (West 2019).

For example, the court in *Murphy v. Mancari's Chrysler Plymouth, Inc.,* 887 N.E.2d 569 (Ill. Ct. App. 2008) refused to apply an expansive interpretation of Illinois' products liability statute. Essentially, the court recognized that Illinois legislators did not intend for courts to read Illinois's products liability statute limiting non-manufacturer liability to include said non-manufacturers whose role in the product liability action was simply placing the product in the stream of commerce expansively. *Id.* at 576-77. This depended upon reading the statute narrowly yet acknowledging the purpose to hold manufacturers responsible for injuries. *Id.* Similarly, in *Zaza v. Marquess & Nell, Inc.,* 675 A.2d 620 (1996), the New Jersey Supreme Court strictly interpreted its legislatures codification of strict liability laws in a showing of deference not unlike what Respondent urges of this Court. *Id.* at 627-628. To this point, the Ohiowa Court of Appeals accurately recognize that Ohiowa legislators intended to limit manufacturer liability to "consumers." Record 9. As in *Murphy*, where the court read the statute narrowly to restrict liability to actual wrongdoers, this Court must read the statute narrowly in

accordance with statutory construction and the legislature's intent to preclude liability toward unforeseeable injuries.

The legislature made a clear decision to incorporate many but not all of the elements of § 402A directly into state tort law. Record 6. Both Ohiowa Revised Code § 5552.368 and § 5552.369 show legislative intent to limit Ohiowa's strict liability doctrine. This interpretation was a choice made by the legislature to foster innovation and growth without imposing overly harsh restrictions on manufacturers pushing into new space or testing novel ideas.

This is a straightforward case of statutory interpretation involving two pieces of legislation. The first, Ohiowa Rev. Code § 5552.368, lays out who can expect to recover on a strict products liability claim - "consumers." The text of § 402A from which this is derived reads: "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the *ultimate user or consumer,* or to his property." Restatement (Second) of Torts § 402A (Am. Law Inst. 1965) (emphasis added). As it was drafted based on the Restatement (Second) of Torts § 402A(1), valuable insight can be gleaned from what the legislature chose to adopt and, perhaps more importantly, what the legislature chose to exclude. As the Court of Appeals noted, the Ohiowa legislature chose to exclude the words "ultimate user" from the Restatement and simply use "consumer." Record 9. The logical assumption from this omission is that the legislature did not want to extend liability past the consumer to anyone who incidentally ends up using the product, as "ultimate user" implies. Again, this is where the illegality of Petitioner even being a consumer is persuasive. There is no legal or societal inference to be drawn wherein an eleven-year-old is a consumer of these types of tobacco products as to impute liability on the seller.

Comment i to § 402A of the Restatement (Second) of Torts clarifies this, where the authors explain that:

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

Id. This comment makes clear that "user" is meant to be a more expansive term than "consumer," encompassing those not contemplated as having direct interactions with the product in question.

As a result, it seems apparent that the Ohiowa legislature meant for § 5552.368 to narrowly decide who could bring a strict liability claim as compared to § 402A. Restatement (Second) of Torts § 402A (Am. Law Inst. 1965). This distinction also lends credibility to the argument that Ohiowa should adopt an approach akin to the Pennsylvania Supreme Court in *Phillips v. Cricket Lighters* with regard to their strict interpretation of a "reasonably foreseeable" consumer. 841 A.2d at 1007. By narrowing this definition through statute, Ohiowa has made clear that it would rather limit liability to "consumers," rather than any conceivable person who would encounter a product.

Considering the exclusion of "user" from the statute, the legislature intended to limit liability solely to "consumers." The legislature relied heavily upon the Restatement (Second) of Torts § 402A (Am. Law Inst. 1965), but notably did not fully copy the language of § 402A verbatim. Record at 9. As previously mentioned, the difference

between "users" and "consumers" under § 402A is vast, encompassing a wide range of liability. § 402A cmt. i. Given that this is a technical term, the legislature's exclusion of it indicates their express intent to limit liability.

The second relevant statute, Ohiowa Revised Code § 5552.369(a)(3), explains what reasonable use will render a product defective. As mentioned, comment h of the Restatement (Second) of Torts § 402A expands upon this concept as well. Ohiowa Revised Code § 5552.369(a)(3) provides that a product must be used in "reasonably expected ways of handling or consumption" for a product to be fund defective. There is little deviation here from the Ohiowa Revised Code to the Restatement, so comparing and contrasting is less useful. However, this section is less cryptic and has a more, effective plain meaning. The legislature clearly intended to exempt products that were being used in an unusual or dangerous way from strict product liability. This allows for businesses to innovate more effectively, without being paralyzed by the time-consuming and arduous creation of safeguards to prevent aberrant scenarios that may arise to unforeseen plaintiffs.

For the reasons above, there is no genuine issue of material fact regarding whether the Respondent is shielded from liability because Petitioner was not within the class of foreseeable consumers. As such, Respondent is not liable for the harm of Petitioner. In addition, the product was not defective under Ohiowa Revised Code § 5552.368 as it was not being used in a reasonably expectable way of handling and consumption at the time of Petitioner's misuse of the product. In order for this Court to find in favor of Respondent, this Court need only find that there is no genuine issue of material fact to one of these issues under Ohiowa law. Ohiowa R. Civ. Proc. 56(a). Either will preclude Petitioner's recovery. As a result, this Court should affirm the grant of summary judgment for Respondent on the manufacturing defect claim.

II. THE READ AND HEED DOCTRINE SHOULD NOT APPLY TO STRICT LIABILITY FAILURE-TO-WARN CLAIMS IN OHIOWA AND THE FAILURE TO INCLUDE IT IN THE JURY INSTRUCTION WAS NOT AN ABUSE OF DISCRETION BECAUSE: A) THE PLAINTIFF MUST BEAR THE BURDEN OF PRODUCTION FOR CAUSATION AND B) OHIOWA PUBLIC POLICY FAVORING THE CONSUMER AND REQUIRING MANUFACTURERS TO MAKE SAFE PRODUCTS DOES NOT SUPPORT THE READ AND HEED DOCTRINE.

Under Ohiowa Rev. Code § 5552.368, a defective product must cause a consumer's injury. Traditionally, the plaintiff carries the burden of production for strict liability actions, including producing evidence of causation. *Graham v. American Cyanamid Co*., 350 F.3d 496, 514 (6th Cir. 2003) (applying Ohio law). The read and heed doctrine usurps this. The doctrine illogically assumes that plaintiffs will always heed warnings. Considering the plaintiff is in a better position to argue whether she would have heeded a warning, it is illogical to thrust this burden to a defendant. Thus, the read and heed doctrine eliminates a plaintiff's burden to prove causation without a logical reason.

While Ohiowa public policy favors the consumer in strict products liability actions, the read and heed doctrine instead favors the manufacturer by protecting a manufacturer who simply posts a warning without making its product safe. If a manufacturer warns a potential user of a danger that causes an injury, then a failure-to-warn claim dissipates. Furthermore, the doctrine goes against human nature because most consumers do not read warnings or have perfect recall of all a product's risks. To apply this presumption is in contravention of the purpose behind strict product liability - public protection. The read and heed doctrine, therefore, should not apply to strict liability failure-to-warn claims in Ohiowa.

A higher court reviews a lower court's decision to grant or deny a jury instruction for abuse of discretion. *Barton Protective Servs., Inc. v. Faber*, 745 So.2d 968, 974 (Fla. Ct. App.

1999). A jury instruction must accurately and completely convey the applicable law but failing to do without demonstrable prejudice does not warrant reversal. *Lovick v. Wil-Rich*, 588 N.W.2d 688, 695 (Iowa 1999). Even if this Court were to apply the read and heed doctrine, the failure of the lower court to give a jury instruction on the presumption does not prejudice Petitioner as instructing the jury on the heeding presumption would not have impacted the jury's verdict.

The read and heed doctrine presents too many problems, so this Court should refuse to adopt it. The doctrine: (1) improperly shifts the burden of producing evidence from the plaintiff to the defendant and (2) opposes Ohiowa public policy to protect consumers. Thus, this Court should affirm the decision of the lower court to not instruct the jury on the heading presumption.

A. The read and heed doctrine should not apply under Ohiowa law because the doctrine improperly shifts the burden of production for evidence of causation from the consumer-plaintiff to the manufacturer-defendant.

The lower court correctly determined that the read and heed doctrine does not apply under Ohiowa law and denied Petitioner's requested jury instruction. This Court should not apply the read and heed doctrine because it disrupts the plaintiff's traditional burden of proving causation. First, the plaintiff in a products liability case is in a better position to prove causation than a defendant without the same knowledge of the plaintiff's habits and behaviors. Second, applying the presumption in this case leads to an illogical conclusion because L.T.'s babysitter warned him about playing with the e-cigarette. Record 5.

The read and heed doctrine originates from the Restatement of Torts (Second) § 402A (Am. Law Inst. 1965). In comment j of the Restatement of Torts (Second) § 402A, there is a presumption that a consumer will read and follow a seller's warning on a product. *Id*. Under this doctrine, the product is safe for use if a consumer follows a warning, and thus it is not defective. *Id.* Courts that follow this presumption note that it protects manufacturers who provide a

warning, while defending consumers in situations where there is no warning. *See Snawder v. Cohen*, 749 F.Supp. 1473, 1479 (W.D. Ky. 1990); *Thom v. Bristol-Myers Squibb Co*., 353 F.3d 848, 855 (10th Cir. 2003). However, critics have harshly criticized the doctrine. *See* Restatement (Third) of Torts: Prod. Liab. § 2, Reporters' Note, cmt. l (1998).

Critics of the doctrine note that it is incompatible with the core purpose of strict products liability- encouraging manufacturers to create safer designs. *Id*. Courts also recognize that the doctrine removes the plaintiff's burden to produce evidence of proximate cause on a failure-to-warn claim. *See Rivera v. Philip Morris, Inc.*, 209 P.3d 271, 277 (Nev. 2009); *Riley v. Am. Honda Motor Co., Inc*, 856 P.2d 196, 200 (Mont. 1993).

Traditionally, the plaintiff in a strict products liability case has the burden of showing that the product's defect was the cause-in-fact and proximate cause of her injury. *See, e.g.*, 63 *Am. Jur. 2d Products Liability* § 591 (2019); *Graham v. American Cyanamid Co*., 350 F.3d 496, 514 (6th Cir. 2003) (applying Ohio law). This extends to failure-to-warn cases. *See Bourne v. Marty Gilman, Inc.*, 452 F.3d 632, 635 (7th Cir. 2006) (applying Indiana law). A plaintiff must prove that the warning would have affected her decision to use the product. *Odom v. G.D. Searle & Co.*, 979 F.2d 1001, 1003 (4th Cir. 1992) (applying South Carolina Law). Ultimately, a question of causation is one of fact for the jury. *Menschik v. Mid-America Pipeline Co.*, 812 S.W.2d 861, 865 (Mo. Ct. App. 1991). The read and heed doctrine improperly removes from the jury's province cases where such a question of fact exists.

Presumptions exist to ease a plaintiff's ability to prove something that logically derives from another point. *McCormick on Evidence* § 343 (7th ed. 2014) ("Most presumptions have come into existence primarily because the judges have believed that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the

truth of fact A until the adversary disproves it."). Courts will also permit presumptions where it would be too difficult for the party to prove the point. *Id*. While the presumption is "only" a presumption, it is still an extraordinary requirement to force a defendant to disprove facts that a plaintiff must normally prove. This could greatly affect the outcome of a case, and courts should not hold it in light regard. *See* Karin L. Bohmholdt, *The Heeding Presumption and Its Application: Distinguishing No Warning From Inadequate Warning*, 37 Loy. L.A. L. Rev. 461, 475 (2003).

The heeding presumption leads to an illogical conclusion in this case that usurps the plaintiff's obligation to prove causation. Petitioner knew he was not supposed to touch the e-cigarette. Record at 5. His babysitter warned him repeatedly not to do so. *Id*. He not only touched the e-cigarette; he played with it as a toy. *Id*. Clearly, a stricter warning would have no effect on his actions and cannot be the cause of his injuries because he ignored the actual warning from his babysitter. *Id*.

Similarly, the court in *Walker v. Macy's Merchandising Group, Inc.*, 288 F.Supp.3d 840 (N.D. Ill. 2017), found a plaintiff's argument on causation woefully insufficient when she failed to prove that a jacket's lack of warning caused her injuries. *Id*. at 865. She suffered extensive burn injuries when her jacket caught fire. *Id*. at 848. Notably, the jacket contained no warning. *Id*. The plaintiff argued that the heeding presumption ought to apply, considering there was no warning on the jacket. *Id*. at 866. But the court found that Illinois law did not recognize the presumption and that the plaintiff failed to produce any evidence suggesting she would have heeded a warning. *Id*. 867. Indeed, the court declared that "liability cannot be based upon surmise or conjecture as to the cause of the injury." *Id*. at 867-868 (quoting *Lee v. Chi. Transit Auth.*, 605 N.E.2d 493, 503 (Ill. 1992)). In the absence of evidence showing that a warning

would have prevented her injury, the court granted summary judgment to the manufacturer. *Id*. Thus, plaintiff failed on claiming that the warning was the proximate cause of her injuries, regardless of whether a presumption applied. *Id*.; *See also Anderson v. Bungee International Manufacturing Corporation*, 44 F.Supp.2d 534, 539-540 (S.D.N.Y. 1999) (granting summary judgment on failure-to-warn claim because plaintiff could not establish any evidence of causation).

Likewise, Petitioner here expects the court to rely upon a wholly self-serving argument that he would have heeded a warning without actual proof. *See* James A. Henderson, Jr. and Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 326 (1990) (presumption prevents court from dismissing weak failure-to-warn claims and should be abandoned in favor of a "more fact-intensive approach"). This is identical to the situation in *Walker*. As the court did in *Walker*, this Court should reject the presumption because the presumption exposes parties to liability based on mere conjecture. *Id*. at 867-868; *See also Deere & Co. v. Grosse*, 586 So.2d 196, 198 (Ala. 1991) (a "[failure-to-warn] 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."). Applying the heeding presumption makes it so Petitioner evades his obligation to show causation when there is evidence suggesting that he would not have heeded any potential warning. Record 5; *See also Mine Safety Appliance Co. v. Holmes*, 171 So.3d 442, 453 (Miss. 2015) (plaintiff was unable to raise a failure-to-warn claim when there was no evidence he would have heeded a proper warning); *Arnold v. Ingersoll-Rand Co*., 834 S.W.2d 192, 194 (Mo. 1992) (not applying heeding presumption when plaintiff had no evidence suggesting he would have heeded warning if provided additional information); *Walker*, 288 F.Supp.3d at 867.

Petitioner's argument relies purely on speculation. The factfinder decides issues of causation only when the evidence is more than mere speculation or a possibility. *Harris v. Int'l Truck and Engine Corp*., 912 So.2d 1101, 1106 (Miss. Ct. App. 2005). Here, Petitioner's arguments are akin to mere speculation because the circumstances suggest he would not have heeded an adequate warning. The warning on the e-cigarette or the countless warnings from his babysitter did not dissuade his decision to play with the e-cigarette. Record 5. Thus, a presumption in his favor obfuscates his traditional burden of showing causation and goes against the logical purpose for a presumption. 29 *Am. Jur. 2d Evidence* § 199 (2019) (presumptions require a "high probability" that "the presumed fact also exists" and merely "permitting the factfinder to infer the presumed fact does not adequately reflect the substantial likelihood that the presumed fact is true."); *Harris*, 912 So.2d 1107 (citing *Wyeth Labs v. Fortenberry*, 530 So.2d 688, 691 (Miss. 1988)) (recognizing that Mississippi requires plaintiff to prove causation in failure to warn cases). Since any presumption that a consumer necessarily reads and heeds warnings is illogical because most consumers do not heed and read warnings, the heeding presumption is unrealistic. *Riley v. Am. Honda Motor Co*., 856 P.3d 196, 200 (Mont. 1993); Howard Latin, *Good" Warnings, Bad Products, and Cognitive Limitations*, 41 U.C.L.A. L. Rev. 1193, 1242 (1994).

The heeding presumption is illogical because it shifts the burden of proving causation to the defendant, even though a plaintiff is in a better position to prove causation. Plaintiffs are far more capable of proving whether they read and heeded a warning. *Riley*, 856 P.2d at 200. Certainly, a defendant manufacturer is far less capable of determining what is inside the plaintiff's head than the plaintiff is. As such, the trial court's decision to have the case go to the jury without the heeding presumption was proper. Since there was evidence that Petitioner would

not have heeded a warning when his babysitter told him not to play with the e-cigarette, this Court should not apply this illogical presumption. Record 5.

Adopting the read and heed doctrine is illogical and inconsistent with the proper allocation of evidentiary burdens for a failure-to-warn case. It does away with causation as a part of a plaintiff's prima facie case because it requires the defendant to automatically disprove a purely rhetorical notion. James A. Henderson, Jr. and Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 309 (1990) ("A plaintiff's prima facie case should not be capable of being constructed from pure rhetoric. The analogy to a car with a gas pedal and no brakes is [appropriate], for there are no longer any effective checks on a failure-to-warn claim. The drive toward liability is now almost unhindered."). While some claim that plaintiffs may be in a difficult position to prove their injury was caused by a manufacturer, this is far more difficult for a manufacturer to prove.

The burden of producing evidence related to a plaintiff's heeding of a warning is equally difficult for a defendant manufacturer and a plaintiff consumer. *Riley*, 856 P.2d at 200; *see also Castorina v. A. C. & S.*, 49 N.Y.S.3d 328, 344 (N.Y. Sup. Ct. 2017) (refusing to apply heeding presumption when plaintiff can better establish whether he would have heeded warning than the defendant). Even where a plaintiff is deceased and unable to testify, whether she would have heeded a warning is still likely provable through favorable witnesses, including the decedent's friends and family. *Ford Motor Co. v. Boomer*, 736 S.E.2d 724, 734 (Va. 2013) (not recognizing heeding presumption and finding that plaintiffs can still prove causation without direct evidence). A defendant does not have access to these individuals the same that the plaintiff would in a case like this, eliminating any argument that this presumption fairly places the burden on the defendant. *See, e.g., Magee v. Rose*, 405 A.2d 143, 146 (Del. Super. Ct. 1979) (noting

plaintiff carries burden of proving decedent suffered conscious pain when dying and mere allegation that plaintiff suffered is insufficient); *Miller v. Allstate Ins. Co.*, 676 N.E.2d 943, 946 (Ohio Ct. App. 1996) (sister not entitled to presumption of damages from decedent's death); *In re Air Crash Disaster Near Chicago, Illinois on May 15, 1979*, 771 F.2d 338, 339 (7th Cir. 1985) (applying Illinois law) (most plaintiffs for wrongful death claim must prove pecuniary damages). Thus, this Court should not apply the read and heed doctrine to strict liability failure-to-warn claims in Ohiowa. This case serves as a poor testing ground for a heeding presumption because there is evidence showing Petitioner would not have heeded a warning. Record 5, 12. The court below did not abuse its discretion when it did not include the presumption in the jury instruction.

B. The read and heed doctrine does not align with Ohiowa public policy favoring the consumer because it 1) allows manufacturers to use warnings to evade liability for manufacturing a dangerous product and 2) presumes that consumers read an innumerable amount of warnings when consumers do not and should not be expected to read every warning that they encounter.

The read and heed doctrine fails to promote Ohiowa public policy favoring a consumer because it gives a warning the same exculpatory treatment as a safe product design. This eliminates a manufacturer's incentive to make its products safer. The doctrine also fails to appreciate that most consumers do not heed warnings, so this presumption fails to protect the public by requiring manufacturers to make safer product designs.

Ohiowa Revised Code § 5552.368 and § 5552.369 are based upon the Restatement (Second) of Torts § 402A, which provides that manufacturers have a special duty to protect consumers. *Id*. at comment c. Thus, Ohiowa law favors the consumer in strict products liability actions. Furthermore, the Court of Appeals adopted the read and heed doctrine because it believed that this would be in furtherance of public policy favoring consumers. For the reasons above, this is an incorrect interpretation of the read and heed doctrine because the doctrine

benefits the manufacturer, where a manufacturer can just adopt a warning in lieu of a safer product design. Therefore, the doctrine is against Ohiowa public policy in strict products liability because 1) manufacturers can simply post warnings to avoid liability instead of designing safer products and 2) the doctrine unrealistically assumes that consumers read every warning they encounter.

First, the read and heed doctrine is inconsistent with Ohiowa public policy in strict products liability because it greatly benefits manufacturers. Manufacturers can use clear and obvious warnings to eliminate any burden they may have to design a safe product. David G. Owen, *The Puzzle of Comment j*, 55 Hastings L.J. 1377 (2004) (showing how manufacturers can elude design defect claims with a careless reading of Restatement (Second) of Torts § 402A comment j). Clearly, however, warnings are no "substitute for the provision of a reasonably safe design." Restatement (Third) of Torts: Prod. Liab. § 2 comment l (1998). Yet the heeding presumption allows a manufacturer to ignore its duty to manufacture a safe design by attaching a warning to its products. *See Rivera v. Philip Morris, Inc.*, 209 P.3d 271, 277 (Nev. 2009) ("[W]e conclude that it is better public policy not to encourage a reliance on warnings because this will help ensure that manufacturers continue to strive to make safe products."). Where there is a warning that the plaintiff is presumed to have read, the manufacturer will likely succeed on a warning claim. *See Uptain v. Huntington Lab, Inc*., 685 P.2d 218, 221 (Colo. App. 1984) (recognizing application of heeding presumption to defendant manufacturer allowed manufacturer to bolster misuse defense). Logically, the presumption in comment j would benefit manufacturers, who are more likely to affix warnings. *Delaney v. Deere & Co.*, 999 P.2d 930, 942 (Kan. 2000) ("[Under comment j], [a] manufacturer or seller is allowed to produce a product with an unsafe design and still escape liability through the use of a warning.").

The capability for manufacturers to escape liability by adding a warning to a product with a faulty design makes the heeding presumption incompatible with Ohiowa strict products liability law favoring consumers. *Uniroyal Goodrich Tire Co*. *v. Martinez*, 977 S.W.2d 328, 336-337 (Tex. 1998) (refusing to adopt comment j because "warnings are an imperfect means to remedy a product defect."). Thus, the legislature would likely not agree that Ohiowa law permits such a doctrine. While Ohiowa followed the Restatement (Second) of Torts § 402A when making its product liability statutes, it did not necessarily adopt the entire statute. For example, the legislature did not include liability for "users" under the statute. Ohiowa Rev. Code § 5552.368; Record 9. The Ohiowa legislature relied on § 402A, but this reliance should not serve as a wholesale adoption of every comment of §402A- particularly adoption of comments that are anti-consumer. *Rivera*, 209 P.3d at 194; *Riley*, 856 P.2d at 200; *Delaney* 999 P.2d 942-43.

Proponents may also attempt to argue that by adopting the presumption, this favors the consumer because it presumes in a consumer's favor on a case with no warning. But this lone instance does not make up for the disservice it does in cases where the product has a warning. Naturally, the read and heed doctrine favors a plaintiff in the instance that there is no warning. *See Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 332 N.E.2d 820, 826 (Ind. Ct. App. 1975), *superseded on other grounds by Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 358 N.E.2d 974 (Ind. 1976). But this view is short-sighted and does not consider that this presumption favors the manufacturer who attaches a simple warning to his product. A manufacturer can attach a warning to a product about an injury that could be prone to occur due to its design. Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. Rev. 1193, 1258 (1994) (arguing that the read and heed doctrine has negative legal consequences, including loosening the burden of a manufacturer to design safer products); *Uloth*

v. City Tank Corp., 384 N.E.2d 1188, 1192 (Mass. 1978) (manufacturer is in better position to minimize risks in product design and simply warning of a risk alone ought not excuse a manufacturer's liability).

This further aligns with reading § 402A comment j's plain language. It merely "provides a basis for concluding that a manufacturer who has provided an adequate warning has discharged its duty to warn." Kevin Reynolds and Richard J. Kirschman, *The Ten Myths of Product Liability*, 27 Wm. Mitchell L. Rev. 551, 577 (2000). Thus, manufacturers who provide a warning reap the benefits of a presumption in their favor, no matter the flawed nature of their product.

Furthermore, proponents of the doctrine wrongfully promote this presumption when the presence of a warning tips the balance in favor of manufacturers. Instead, Ohiowa courts should treat warnings as a component of a design claim that can help indicate whether a manufacturer safely designed a product. *Rogers v. Ingersoll-Rand Co*., 144 F.3d 841, 844-845 (D.C. Cir. 1998). That way, manufacturers will "continue to strive to make safe products" without encouraging consumer reliance on warnings that consumers may or may not read. *Rivera*, 209 P.3d at 277.

Second, further evidence for why the read and heed doctrine does a disservice to consumers comes from realism about the effectiveness of warnings. In *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 U.C.L.A. L. Rev. 1193 (1994), Professor Howard Latin argues that most consumers fail to recall the specifics of warnings. *Id*. For example, only sixty-five percent of student participants in an experiment could recall the number of side effects in a drug warning. *Id*. at 1242. Products bombard consumers with countless warnings, considering that there is a potential misuse for each of the innumerable products people use daily. *Id*. at 1206-1207.

If Ohiowa strict product liability law favors the consumer, then this Court must not apply the read and heed doctrine. The doctrine presumes consumer awareness of the dangers of a product when consumers realistically are unaware of these risks. *Id*. Product consumers include the illiterate, visually disabled, or even children, who cannot or may not pay attention to warnings. A presumption that participants will read and heed warnings fails to encapsulate the reality for most consumers. *Id*. at 1208. Such a law weighs heavily against the consumer.

Further public policy concerns appear to favor the Ohiowa courts not adopting the read and heed doctrine. For example, the Massachusetts Supreme Court in *Uloth v. City Tank Corp*., 384 N.E.2d 1188 (Mass. 1978) found that while warnings are a factor in determining a product defect, they do not discharge a manufacturer's responsibility entirely. *Id.* at 1192. This means that the best way for a manufacturer to avoid the risk is to make a safer product design, rather than simply attach a warning to a defective product. *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 336-337 (Tex. 1998) (refusing to adopt comment j presumption because manufacturers can eliminate the risk of harm whereas individuals may just ignore warnings).

The court in *Uniroyal Goodrich Tire Company v. Martinez* best illustrated the issues that arise under the presumption:

> [Plaintiff's] foot was severed when caught between the blade and compaction chamber of a garbage truck on which he was working. The injury occurred when he lost his balance while jumping on the back step of the garbage truck as it was moving from one stop to the next. The garbage truck, manufactured by [Defendant], has a warning in large red letters on both the left and right rear panels that reads "DANGER—DO NOT INSERT ANY OBJECT WHILE COMPACTION CHAMBER IS WORKING—KEEP HANDS AND FEET AWAY." The fact that adequate warning was given does not preclude [Plaintiff] 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. Whether a design defect can be established is governed by Subsection (b).

Id. at 336 (quoting Restatement (Third) of Torts § 2, comment l (1998)). In this example, the presumption would improperly preclude Plaintiff's claim and limit public policy protecting consumers from shoddy product design. The Texas Supreme Court used this example to demonstrate the failures of comment j to adequately protect consumers. *Id*. Recognizing a warning as an "imperfect" means of addressing a faulty design, the court refused to apply it against a consumer because it would lessen manufacturers' incentive to make safer products. *Id*. Naturally, courts favoring consumers recognize that manufacturers need to utilize effective designs rather than warnings to prevent injuries from even obvious risks. *Uloth*, 384 N.E.2d at 1192-1193.

Some courts and commentators argue that the presumption contained in comment j is an extension of the long-detested patent danger rule. Restatement (Third) of Torts: Prod. Liab. § 2, Reporter's Note, comment l (1998); *Delaney v. Deere and Co.*, 999 P.2d 930, 942 (Kan. 2000) (refusing to adopt comment j because it would support judicial adoption of the patent danger rule); *Uniroyal Goodrich Tire Co*., 977 S.W.2d at 336. This rule precludes a plaintiff's recovery when the dangers of a design are obvious. *Griffin v. Summit Specialties*, 622 So.2d 1299, 1303 (Ala. 1993). The read and heed doctrine gives the same illogical conclusion as the patent danger rule. Restatement (Third) of Torts: Prod. Liab. § 2, Reporter's Note, comment l (1998) ("Comment j of the Restatement, Second, is inconsistent with the judicial abandonment of the patent danger rule and with those cases that take the position that a warning will not absolve the manufacturer from the duty to design against dangers when a reasonable, safer design could have been adopted . . .").

If a manufacturer provides a warning, the court must presume that a plaintiff read and heeded the warning regardless of what injury he suffers. Essentially, where the read and heed

doctrine precludes a plaintiff's recovery merely if the product has a warning, it works the same way as the open and obvious danger rule. A warning is presumed heeded, regardless of where it is placed just as the "obvious" dangers of a design are presumed known. Thus, plaintiffs who suffer injury because of these dangers have a bar to their recovery. Instead of focusing on the danger of the design, both rules preclude recovery for consumers without encouraging manufacturers to make their product designs safer. Refusing recovery for injuries for "open and obvious" dangers follows the same mistaken logic as presuming all consumers follow all warnings. *Compare Mesman v. Crane Pro Servs.*, 512 F.3d 352, 356 (7th Cir. 2008) (recognizing that simple human error can lead to injuries from open and obvious dangers, so this will not preclude recovery) *with* Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 U.C.L.A. L. Rev. 1193, 1206-1207 (1994) (recognizing that people are exposed to innumerable dangers warned of in their products, but cognitive studies show that people cannot adequately guard against these dangers). This cuts against Ohiowa strict products liability law, which favors the consumer in this area.

The primary goal of strict liability in tort for product defects is to promote consumer safety. *Perkins v. Wilkinson Sword*, 700 N.E.2d 1247, 1252 (Ohio 1998). Still, courts ought not subject a defendant to liability unless doing so advances this societal interest in public safety. *Arriaga v. CitiCapital Commercial Corp.*, 85 Cal.Rptr.3d 143, 149-153 (Cal. Ct. App. 2008). Forcing the defendant to disprove causation does not advance this interest because it permits a host of weak claims to flood courts. *See* James A. Henderson, Jr. and Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 306 (1990). While Ohiowa law protects consumers, it does not authorize plaintiffs to skip past their traditional burden under product liability law that a defect caused their injury.

Ohiowa Rev. Code § 5552.368 ("[A manufacturer] is subject to liability for physical harm *caused* by that product to the consumer . . .") (emphasis added); *Deere & Co. v. Grose*, 586 So.2d 196, 198 (Ala. 1991). Even in strict liability, plaintiffs must prove causation. See *Red Hed Oil, Inc*. *v. H.T. Hackney Co.*, 292 F.Supp.3d 764, 773 (E.D. Ky. 2017) (applying Kentucky law); *Dalton v. Teva N. Am.*, 891 F.3d 687, 691 (7th Cir. 2018) (applying Indiana law).

C. <u>There was no prejudice in failing to give the proposed jury instruction.</u>

Even if this Court finds that the presumption applies, this Court should affirm the decision below because there was no prejudice in refusing to give the proposed jury instruction. There was no prejudice because the jury had nearly sixteen hours to review substantial evidence and soundly based their decision. Record 12.

A court's decision regarding a jury instruction must have prejudiced the party challenging the jury instruction to constitute error. *Carter v. Mechanical Services*, 746 P.4d 807, 811 (Ohiowa 2012). Thus, the jury instruction must have failed to guide the jury in their deliberation and constitute significant prejudice. *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1235 (10th Cir. 1999); *Day v. Johnson*, 255 P.3d 1064, 1067 (Colo. 2011). A trial court has a lot of discretion in wording jury instructions. *Aldridge v. Forest River, Inc*., 635 F.3d 870, 876 (7th Cir. 2011) (quoting *Heller Int'l Corp. v. Sharp*, 974 F.2d 850, 860 (7th Cir. 1992)).

The proper standard of review is abuse of discretion when the matter for review is whether the lower court erred when it decided to refuse to give an instruction. *Hynes v. Energy West, Inc*., 211 F.3d 1193, 1197 (10th Cir. 2000). In this case, the proper standard for review is an abuse of discretion because this entails the trial judge's correct decision to not instruct the jury on the presumption. Record 3; *see also Fisher v. Ford Motor Co*., 224 F.3d 570, 576 (6th Cir. 2000) ("[T]here is no support [for] the proposition that a district court's failure to give a

requested jury instruction is subject to *de novo* review.") (citations omitted) (internal quotations omitted); *Sargent v. Shaffer*, 467 S.W.3d 198, 204 (Ky. 2015); *United States v. Maury*, 695 F.3d 227, 261-262 (3d Cir. 2012) (finding that abuse of discretion was appropriate standard of review for trial judge's refusal to give jury instruction of Defendant's definition of liability for criminal negligence).

The court below correctly decided that, even if the heeding presumption applied, it did not constitute prejudice worthy of reversing the verdict. The jury deliberated for sixteen hours. Record at 12. The jury clearly gave careful and prudent consideration of Petitioner's case. *Id*. This Court must respect the decisions of the jury, who possessed substantial evidence to aid their decision. *See Kleinsasser v. Superior Derrick Service, Inc.*, 708 P.2d 568, 570-572 (Mont. 1985) (failure to give jury instruction that accurately restated Restatement (Second) of Torts § 402A was not prejudicial when jury had "substantial credible evidence to support [their] verdict."). Applying the presumption would not have affected the outcome, especially considering the warning Petitioner's babysitter gave him. *See Daniel v. Ben E. Keith Co.,* 97 F.3d 1329, 1332-1333 (10th Cir. 1996) (applying Oklahoma law) (affirming decision to not give a heeding presumption instruction to the jury when there was evidence showing plaintiff would have not acted differently if given a warning); *Eastburn v. Ford Motor Co.*, 471 F.2d 21, 22-23 (5th Cir. 1972) (applying Florida law). Even if the standard of review were de novo, due to a question of law, the heeding presumption still does not apply for the reasons given.

Ohiowa should not adopt the read and heed doctrine and the lower court gave a correct jury instruction. The read and heed doctrine creates an illogical presumption because it assumes that people actually read and follow warnings. The opposite is true; people generally do not follow or heed warnings. It is especially egregious to apply this here when there is evidence

suggesting that Petitioner would have not heeded a warning. Record 5. Furthermore, it is more difficult for a defendant to disprove what a consumer plaintiff claims. Plaintiffs, who have the superior position to offer evidence of whether they themselves would have heeded a warning, do not deserve this presumption. Therefore, this Court should not apply the read and heed doctrine to Ohiowa failure-to-warn cases.

CONCLUSION

For the reasons set above, Zuul respectfully request that the Supreme Court of Ohiowa affirm the Court of Appeals grant of summary judgment to Zuul. The Court of Appeals properly determined that Petitioner could not meet his burden of showing that petitioner was a foreseeable plaintiff, or that the product was used in the manner required to rule the product defective under Ohiowa law. In granting summary judgment to Zuul, the Court of Appeals ruled in a manner consistent with the legislative intent to limit the class of consumers that would be considered foreseeable, and therefore could recover, under Ohio strict products liability law. As the Court of Appeals properly ruled there were no issues of material fact regarding these issues, the district court did not abuse their discretion in determining that Zuul was entitled to summary judgment. Zuul also requests that the Supreme Court of Ohiowa determine that the read and heed doctrine has no place in Ohiowa products liability jurisprudence as the doctrine illogically shifts the burden of causation from plaintiff to consumer, and in allowing manufacturers to escape liability by affixing warnings to their products, does not align with Ohiowa's public policy in favor of the consumer. Zuul respectfully requests this Court reject the ruling of the Court of Appeals ruling that the lower court abused its discretion in denying Petitioner's request for a jury instruction on the heeding presumption.

Respectfully submitted,

_____

Team B

Counsel for Respondent,
Zuul Enterprises

CERTIFICATE OF SERVICE

I certify that a true copy of this Appellee's Brief was served on:

Attorney for Petitioner
Louis Tully

by certified mail, return receipt requested, on January 31, 2020.

_____

Team B

Counsel for Respondent
Zuul Enterprises, an Ohiowa Corporation

APPENDIX A

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

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

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 productperformancewhentheproductisusedinamannerseparatefromitsintendeduse. *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 factfinder to presume that the person injured by use of the product would have read and heeded an adequate warning, if provided. *Dole Food Co. v. 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 factfinder 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 B

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