IN THE SUPREME COURT OF THE STATE OF OHIOWA

Case No. 20-2206

LOUIS TULLY, as father and natural guardian for minor L.T.
And in his own right,

Plaintiffs – Appellant

V.

ZUUL ENTERPRISES, an Ohiowa corporation,

Respondent.

BRIEF FOR THE PETITIONER

Team E
Counsel of Record
Attorneys for the Petitioner

JANUARY 31, 2020

QUESTIONS PRESENTED

I. Whether the Court of Common Pleas erroneously granted Zuul's motion for summary judgment by finding that there was no genuine issue of material fact regarding children as foreseeable consumers of Zuul's defective electronic cigarette, despite evidence that suggests children were Zuul's target demographic?

II. Whether the read and heed doctrine applies to strict liability failure-to-warn claims in Ohiowa as a matter of the law of the land and public policy, particularly regarding items that are unavoidably dangerous, and without which instruction the jury decision would be prejudiced?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

STATEMENT OF THE CASE

On July 17, 2018, Louis and Janine Tully left their eleven-year-old son, L.T., in the care of college student Dana Barrett (hereinafter referred to as "Barrett"). R. at 5. Barrett was nineteen years old, and frequently babysat L.T. *Id*. Barrett was also a regular electronic cigarette (hereinafter referred to as "e-cigarette") user, and carried her e-cigarette on her person. As a result, Barrett brought her e-cigarette with her to the Tully's residence when she babysat L.T. that evening. *Id*.

The e-cigarette that Barrett favored was made by Zuul Enterprises, an e-cigarette company. R. at 3. Zuul was established in Cincinattus, Ohiowa in March 2016 with the goal to make "a *safer* alternative to traditional tobacco cigarettes." *Id*. (emphasis added.)

Zuul's products were manufactured for ease of use: all one has to do is press a button on the Zuul e-cigarette to prepare the device for consumption by triggering an atomizer housed within the product, which heats a flavored liquid in the cartridge into a vapor. R. at 4. While Zuul includes a warning on the packaging of their e-cigarette product, there is no warning on the e-cigarette itself. R. at 3. To appeal to a wide audience, including children, Zuul's vapor pods—which are inserted into the device—came in a wide variety of flavors, including fruit punch, cotton candy, and, notably, Hi-C Ecto Cooler. *Id*.

In December 2017, a federal district court held that Zuul had used these flavors to directly market e-cigarettes to children and issued an injunction against Zuul's sweet flavors. R. at 4. Zuul subsequently issued a statement on June 7, 2018, promising to only produce a "classic tobacco" flavor. *Id*. However, Zuul's stock price plummeted after this decision. *Id.*

To combat the loss of their sweet flavors, Zuul then targeted children by introducing a new line of accessories for their e-cigarettes, including "Zuul skins" (hereinafter referred to as "skins") to make up for their loss in profit following the December 2017 judgment. *Id*. The skins are

adhesive stickers that affix to the surface of the e-cigarette, and they come in a variety of designs, including popular children's cartoon characters. *Id*. Zuul did not include a product warning on their skins. *Id*.

Barrett purchased a skin for her e-cigarette in the design of popular cartoon character, *Hola Gato,* on July 11, 2018—mere days before babysitting L.T. R. at 5. When Barrett arrived at the Tully's to babysit L.T. on July 17, she had already affixed the skin to the device. *Id*. There was no warning on the skin packaging or the skin itself. *Id*.

In the past, Barrett had cautioned L.T. not to play with the e-cigarette. *Id*. However, as a fellow *Hola Gato* fan*,* L.T. was attracted to the e-cigarette and picked it up when Barrett left the device unattended. *Id*. L.T. first depressed the activating button, and then began to play with the e-cigarette as though it were a leaf blower. *Id.* Unprompted and without warning, the e-cigarette exploded, and L.T.'s hand was severely burned. *Id*.

Louis and Janine Tully promptly filed suit on strict liability grounds, claiming 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 risks associated with their product. R. at 2.

Zuul filed a Motion for Summary Judgment on the manufacturing defect claim, and on September 28, 2018, the Court of Common Pleas ruled against the Tully's, granting summary judgment for Zuul and permitting the warning claim to proceed to trial. R. at 5. Louis and Janine Tully asked for a jury instruction regarding the heeding presumption, which was rejected by the court. R. at 3. After sixteen long hours of deliberation over what was inadequately deemed a wealth of evidence, the jury found for Zuul on the warning claim and the Court denied the Tully's request for a heeding presumption jury instruction. *Id.*, R. at 12.

The Tullys appealed the lower court's decision to the Court of Appeals for the State of Ohiowa on the grounds that (1) there was a remaining issue of material fact regarding whether children were foreseeable Zuul consumers, which made summary judgment improper; and (2) failure to provide a jury instruction on the heeding presumption prejudiced the outcome of the failure to warn claim. *Id.*

On December 20, 2019, the Court of Appeals for the State of Ohiowa (hereinafter referred to as "the Court") affirmed the lower court's decision on summary judgment and found that the lower court did not err in denying the requested jury instruction. R. at 3.

SUMMARY OF THE ARGUMENT

The manufacturing defect claim should have been presented to a jury for determination because whether Zuul is strictly liable for the Petitioner's injuries is contingent on a genuine issue of material fact regarding whether children were foreseeable consumers. R. at 3. The Court of Common Pleas erred in granting summary judgment because although the Petitioner (hereinafter referred to as "L.T.") met his burden to prove that Zuul's e-cigarette had a manufacturing defect under the Ohiowa Product Liability Act (OPLA), there was substantial evidence to raise an issue of fact as evidence suggests that children were foreseeable consumers. R. at 8.

The lower court's decision to grant summary judgment on the manufacturing defect claim in *Tully v. Zuul Enterprises* was improper because the Court incorrectly determined that children were not foreseeable consumers. The lower court's erroneous decision resulted in Zuul escaping strict liability for a manufacturing defect that gave an eleven-year-old child severe burns when the e-cigarette exploded in his hand. R. at 6. For these reasons, this Court reviews summary judgment *de novo. Huck v. Wyeth, Inc.,* 850 N.W.2d 353 (Iowa 2014).

The failure-to-warn claim should have been accompanied by the heeding presumption as a jury instruction, 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. (1965). Although the burden reasonably rests on the plaintiff to establish defectiveness when there is claim of an insufficient warning, different rules should apply when a product contains no warning that place the burden on the manufacturer to rebut the failure-to-warn presumption. Under Ohio product liability law, which looks favorably upon consumers, this jury instruction should have been allowed because (1) this was a failure-to-warn case, to which the heeding presumption strongly applies; (2) the heeding presumption has been utilized by a large number of states, including Ohio;

(3) the heeding presumption particularly pertains to a narrow subset of dangerously hazardous materials, such as cigarettes, and (4) the presumption removes an inappropriate burden to prove failure-to-warn on little more than speculation from L.T., and places the appropriate burden to rebut the presumption on Zuul. As a result, the Court correctly found that the lower court erred in not considering the heeding presumption as the law of the land and omitting it as a jury instruction.

However, prejudice incurred by failing to give the heeding presumption jury instruction because the Court did not abide by a potential law of the land, and the facts of this case are not sufficiently concrete to determine that the jury unequivocally would not have made a different verdict if the instruction had been given. For these reasons, the Court erred in finding no prejudice.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY GRANTED ZUUL'S MOTION FOR SUMMARY JUDGMENT AS THERE WAS A GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER CHILDREN WERE FORESEEABLE CONSUMERS OF ZUUL'S DEFECTIVE ELECTRONIC CIGARETTE.

A. Whether Children Were Foreseeable Zuul Consumers Is A Genuine Issue of Material Fact, as Evidence Suggests Children Were Zuul's Target Demographic.

The Petitioner's manufacturing defect claim should have been presented to a jury because whether Zuul is strictly liable for his injuries is contingent on a genuine issue of material fact: whether an eleven-year-old child constitutes a foreseeable consumer of Zuul's e-cigarette under the OPLA. R. at 3. In this case, L.T. received severe burns when Zuul's defective e-cigarette exploded in his hand. This occurred after L.T. depressed the e-cigarette activation button, an action Zuul intended users to complete. R. at 2-3; 7-8. As the Court of Appeals made explicitly clear, "there is no dispute as to whether the e-cigarette was in a defective condition as a result of the manufacturing defect. *It was.*" R. at 8 (emphasis added). Thus, the question before this Court is specifically whether the Court of Common Pleas erroneously granted Zuul's motion for summary judgment by finding that there was no genuine issue of material fact regarding children as foreseeable consumers, despite evidence that suggests children were Zuul's target demographic. But for the lower court's erroneous finding, Zuul would be strictly liable for the L.T.'s injuries under the OPLA because the existence of a manufacturing defect in Zuul's e-cigarette triggered strict liability. R. at 7; *see Wright v. Brooke Group Ltd*., 652 N.W.2d 159, 167-68 (Iowa 2002) (interpreting Restatement (Second) of Torts § 402A to find strict liability even where a manufacturer used all reasonable care to prevent harm).

Judge Spengler of Ohiowa's Court of Appeals for the Seventh Appellate District correctly noted that summary judgement is proper when, in the light most favorable to the non-moving party,

there is "*no* genuine issue as to any material fact of the claim," and the court can rule on the issue as a matter of law. Ohiowa R. Civ. Proc. 56(a) (emphasis added); *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52 (1986) (summary judgment is improper when "the evidence presents a sufficient disagreement to require submission to a jury," and proper when the evidence is "so one-sided that one party must prevail as a matter of law."). Further, summary judgment is appropriate as a matter of law when the nonmoving party fails to "present 'significant probative evidence' to demonstrate that there is more than 'some metaphysical doubt as to the material facts.'" *Griffin v. Reznick*, 609 F. Supp. 2d 695, 701 (W.D. Mich. 2008) (citing *Appalachian Railcar Services, Inc. v. Boatright Enterprises, Inc.,* 602 F.Supp.2d 829, 845 (W.D. Mich. 2008)).

However, here L.T. presented "significant probative evidence" that shows that not only did Zuul foresee children as consumers of its e-cigarette, but also that Zuul *knew* that children were consumers because the company targeted that demographic. *Id.* Thus, the Court of Common Pleas should have recognized that whether children were foreseeable consumers raised a genuine issue of fact with "sufficient disagreement," that required the issue to be determined by a jury. *Anderson,* 477 U.S. at 251-52.

1. Neither the Ohiowa Product Liability Act nor the Restatement (Second) of Torts § 402A explicitly preclude children from being consumers.

The OPLA limits strict liability for manufacturing defects claims to "consumers," while the Restatement extends strict liability to both "users," and "consumers," of a particular product. Ohiowa Rev. Code §§ 5552.368; Restatement (Second) of Torts § 402A cmt. l (1965). However, whether children constitute foreseeable consumers under the OPLA, and the Restatement (Second) of Torts (on which the OPLA was based), is a fact-based issue on which both texts are silent. Yet Zuul's sole argument for summary judgment was that the company is entitled to judgment as a matter of law, and should escape strict liability, because children are not foreseeable "consumers."

R. at 2-3; 8. The Court of Common Pleas decision was erroneous because Ohiowa courts have yet to address this issue, and L.T.'s classification as a "consumer," cannot simply be determined as a matter of law. R. at 8. To find otherwise is an endorsement of judge-made law.

In Ohiowa, manufacturers owe foreseeable consumers a duty to produce their product defect-free. *See* Ohiowa Rev. Code §§ 5552.368 (emphasis added); R. at 6. However, the OPLA does not provide a definition of 'consumer' within the statute. R. at 8. Under Ohiowa Rev. Code § 5552.368, a manufacturer is only liable for the injuries of a consumer if that person "is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition…." R. at 8. And though the OPLA does not provide a definition for consumers, the Restatement (Second) of Torts § 402A, on which the OPLA was based, does. R. at 8; Restatement (Second) of Torts § 402A cmt. l (1965). Under the Restatement, consumers are not limited to those who purchase the product as "[t]he liability is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant." *Id.* (emphasis added). Yet, the issue of whether children are explicitly precluded from constituting 'consumers' is again left unaddressed.

Under the Restatement, "'consumers' include not only those who in fact consume the product, but also those who prepare it for consumption." *Id*. In fact, "[c]onsumption includes *all ultimate uses* for which the product is *intended*." *Id*. (emphasis added). For example, "the housewife who contracts tularemia while cooking rabbits for her husband is included within," the definition of consumer. *Id*. In this case, a consumer would be a person who consumes Zuul's e-cigarette by inhaling the vapor, as well as a person who prepares Zuul's e-cigarette for consumption by depressing the activating button but does not inhale the vapor. It was not necessary for L.T. to raise the e-cigarette to his mouth, and inhale the flavored vapor, to constitute a consumer

because he activated the e-cigarette in the way it was intended to be used, by depressing the activating button to turn the device on. R. at 9; *see Carroll v. Alliant Techsystems, Inc.*, 2006 WL 3008472, ¶ 14 (Ohio Ct. App. October 24, 2006) (finding ammunition acted as intended by discharging when its primer was stuck, although the box of ammunition fell from a shelf). Thus, L.T.'s injury was reasonably foreseeable, regardless of the fact that he was playing with the device *after it was activated,* because he first depressed the activating button on Zuul's e-cigarette—and this action prepared the device for consumption. R. at 5.

While it is not a manufacturer's responsibility to be "an absolute insurer," it is a manufacturer's responsibility to prevent such harm as is reasonably foreseeable. *Coney v. J.L.G. Indus.*, 97 Ill.2d 104, 111 (Ill. 1983) (finding the "imposition of strict liability was not meant to make the manufacturer an absolute insurer."); *Drayton v. Jiffee Chemical Corp.*, 591 F.2d 352, 357 (6th Cir. 1978) (finding "[i]t is the duty of the manufacturer to use reasonable care under the circumstances to so design his product as to make it not accident or foolproof, but safe for the use for which it is intended."). Thus, the child who activates Zuul's e-cigarette, but does not inhale the vapor, and receives severe burns from the defective e-cigarette's explosion should constitute a foreseeable consumer just as the wife who cooks rabbit for her husband, but does not eat it, and nevertheless contracts tularemia. Restatement (Second) of Torts § 402A cmt. l (1965).

2. It was foreseeable that children would be injured by defective Zuul electronic cigarettes because Zuul marketed its products towards that demographic.

Children were clearly foreseeable consumers of Zuul products because Zuul had actual knowledge that children consumed and/or prepared its products for consumption, and Zuul marketed its products toward that target demographic. R. at 4. However, here constructive knowledge would be sufficient: where a manufacturer targets a particular demographic, it is foreseeable that members of that demographic will be consumers of its products. *See Izzarelli v.*

R.J. Reynolds Tobacco Co., 701 F. App'x 26, 31 (2d Cir. 2017) (finding children to be the "target demographic," for R.J. Reynolds's Salem Kings flavored cigarette as new smokers that disliked the taste of nicotine). Thus, Zuul should be strictly liable for injuries to children, caused by its defective e-cigarettes, because the company knew that children consumed and prepared its e-cigarettes for consumption as it targeted that specific demographic.

For example, in *Colgate v. JUUL Labs, Inc.*, the plaintiffs successfully alleged "that minors were the intended users of JUUL's product and that due to the inability of minors to fully appreciate the risks of using JUUL's [electronic nicotine delivery system], the products [were] defective," under the consumer expectation test. *Colgate v. JUUL Labs, Inc.*, 402 F.Supp.3d 728, 754 (N.D. California 2019) (finding a manufacturing defect where minors were unable to appreciate the risk of the electronic nicotine delivery system that was marketed towards their demographic). There, the Second Circuit court relied on *Izzarelli v. R.J. Reynolds Tobacco Co*., which found that R.J. Reynolds' Salem Kings cigarettes were designed to "attract young, new smokers, who disliked the bitterness of nicotine and preferred flavorful cigarettes." *Izzarelli*, 701 F. App'x at 31. The Court emphasized that the "minors—who compose the bulk of new smokers and have *strong brand loyalty*—were Salem Kings' target demographic," which the Court said was relevant to determining strict liability. *Id.* Notably, the plaintiff in that case was twelve years old when she became a consumer of R.J. Reynolds' Salem Kings flavored cigarettes. *Id.*

Similar to the companies in *Colgate* and *Izzarelli*, Zuul had actual knowledge that children were consumers of its e-cigarette for several reasons. First, a federal court found that Zuul marketed its e-cigarette towards children in December 2017, over a year prior to eleven-year-old L.T. coming in contact with Zuul's e-cigarette. R. at 4. Second, Zuul changed the flavors of the nicotine cartridges it offered because the company recognized children were attracted to the sweet

flavors. R. at 4. Third, Zuul changed the shape of the replaceable cartridges it offered because the company knew that its e-cigarette had an alternative black market-use, as the e-cigarette was being modified and used with non-Zuul cartridges. R. at 4; *see In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2018 WL 6628898, at *5 (N.D. Ohio Dec. 19, 2018) (finding where there is a "legitimate," market for drugs, there is also an "illicit, black market."); *Crowther v. Ross Chemical & Mfg. Co.*, 42 Mich. App. 426, 432 (Mich. Ct. App. 1972) (finding whether the glue manufacturer should have known that glue sniffing was a common alternative usage of the glue to be an issue of fact).

Zuul had constructive knowledge that children were consumers of its products because the company relied on children for a substantial portion of its product sales as its target demographic. R. at 4. Zuul should have known that children were consumers of its products and had a "strong brand loyalty," when it saw a drastic loss in sales after announcing it would stopped selling "sweet vapor flavors," like fruit punch and "Hi-C Ecto Cooler." R. at 4; *Izzarelli*, 701 F. App'x at 31. Notably, Zuul's sales dropped after the company began to sell only "classic tobacco," flavoring, in an attempted good faith effort to not market its products toward children. R. at 4.

Nonetheless, after Zuul's sales plummeted and the company almost went bankrupt, Zuul chose to advertise decorative skins for its e-cigarette in a ploy to make up the loss of children's sales. R. at 4. Thus, when Zuul noticed their "stock prices [rise] to their former heights," Zuul should have known children were among those consumers. Zuul undermined its alleged good faith effort to not market its products towards children by selling skins, merely as a different means to target the same demographic and seeking to escape strict liability, despite acknowledging that their e-cigarette had a manufacturing defect. R. at 2.

3. Zuul should have foreseen children consumers being attracted to cartoon-themed skins, affixed to its electronic cigarette.

Zuul should have foreseen children being consumers of its products because the company advertised skins in designs of "various patterns or licensed characters," such as characters from popular cartoons like *Hola Gato*. R. at 4. By selling cartoon-themed skins, Zuul not only advertised its products to adult-consumers but marketed their product toward the entire audience of the cartoon shows, which includes children. However, Zuul's decision to sell skins was arguably not the company's first-time using popular culture to attract younger consumers, as it can be inferred from the record below that the company's name and one of the vapor flavors were based on references to the hit 1980s movie, *Ghostbusters*. GHOSTBUSTERS (Columbia Pictures 1984).

Zuul Enterprises should have anticipated that children would be attracted to its products especially because the company shares its name with the lead villain in *Ghostbusters*. *Id*. And even if it is coincidental that the company and the villain share the same name, it is precisely because Zuul offered flavors like "Hi-C Ecto Cooler," a reference to a popular '90s drink based on *Ghostbusters*' "ectoplasmic" slime, that Zuul should have anticipated that their product would be attractive to fans of *Ghostbusters,* including children. Ned Ehrbar, Thanks to "Ghostbusters," Ecto Cooler is coming back to stores, CBS News (May 20, 2016, 2:23 PM), https://www.cbsnews.com/news/ghostbusters-ecto-cooler-is-coming-back-to-stores/; GHOSTBUSTERS, *supra*. Hi-C Ecto Cooler drink was re-released in 2016, the same year that Zuul Enterprises was established in Cincinnatus, Ohiowa, to coincide with the release of *Ghostbusters: Answer the Call,* in an attempt to target a younger viewer audience. *Id.*; R. at 3; GHOSTBUSTERS: ANSWER THE CALL (Columbia Pictures 2016).

In this case, cartoon-themed Zuul skins are no different than movie-referenced nicotine flavors, as it relates to their targeted audiences as both *Hola Gato* and *Ghostbusters'* audiences

include children. When Zuul began advertising cartoon-themed skins for its e-cigarette, like the *Hola Gato* themed skin Barrett purchased on July 11, 2018, it became foreseeable fans of that cartoon—including children—would become consumers of Zuul's e-cigarette, just like the fans of *Ghostbusters*. R. at 4. Thus, Zuul should have foreseen being strictly liable to a child injured by its defective e-cigarette when the e-cigarette is affixed with a cartoon-themed "skin." R. at 4.

Children were foreseeable consumers of Zuul's e-cigarette, even if Zuul's products were only marketed towards adults, because Zuul should have anticipated that its e-cigarette with a skin on it would look like a toy and therefore attract children. For example, in *Bondie v. BIC Corp.,* the United States District Court for the Eastern District of Michigan found that brightly colored, little lighters attract children. *Bondie v. BIC Corp.*, 739 F. Supp. 346 (E.D. Mich. 1990). The Court found, "[a]s a matter of fact, [that] Bic [knew] that children can and will operate the lighter, despite a parent's reasonable efforts to keep it from the child." *Id.* at 349. The Court determined that children would be tempted by the lighter because it was colorful, small, and handheld. *Id.* Similar to lighter manufacturer in *Bondie*, Zuul should have foreseen its handheld e-cigarette being attractive to children when equipped with a popular cartoon-themed skin. R. at 4. Further, Zuul should anticipate that children "can and will operate" their e-cigarette, "despite parents [or babysitters] efforts to keep it" out of their reach because the cartoon-themed skin would be too tempting for children. *Bondie,* 739 F.Supp. at 349.

L.T. "seized the opportunity," to play with Barrett's e-cigarette, which was affixed with an *Hola Gato* themed skin, when she left it unattended around the Tully's home where it was accessible to him. R. at 4-5. It was foreseeable that a child would try to play with a small, hand-held device where it is commonly used, kept around the home, and accessible. In *Perkins v. Wilkinson Sword, Inc.*, the Supreme Court of Ohio declined to "preclude liability for harm caused

by the foreseeable use of a lighter by a child," despite that the manufacturer marked its lighters toward adults. *Perkins v. Wilkinson Sword, Inc.*, 83 Ohio St. 3d 507, 514, 700 N.E.2d 1247, 1252 (Ohio 1998). The Court found that "[l]ighters are commonly used and kept around the home, and it is reasonably foreseeable that children would have access to them and attempt to use them." *Id.* at 513, 1252. The *Perkins'* Court emphasized that "the public interest in human life and safety can best be protected by subjecting manufacturers of defective products to strict liability in tort when the products cause harm." *Id*. at 514, 1252.

The Court's rationale in *Perkins* should apply to this case because, like the lighter manufacturer, Zuul is in the best position to protect foreseeable consumers from harm caused by their defective e-cigarettes. E-cigarettes, like lighters, are handheld devices with heating capabilities that require some sort of preparation prior to use; a lighter is sparked by hand and the e-cigarette's activating button is depressed. R. at 3. Similarly, it was foreseeable that L.T. would attempt to activate Zuul's e-cigarette (i.e. prepare the e-cigarette for consumption) because (1) Barrett frequently used e-cigarettes, which are popular products that are commonly used amongst youth; (2) Barrett brought the e-cigarette with her to his home; and (3) the e-cigarette was left unattended. R. at 5. Thus, as a child, L.T. *was* part of a class of persons reasonably foreseeable to be injured by a manufacturing defect in Zuul's e-cigarette. R. at 4. To allow Zuul to escape strict liability because the e-cigarette injured a child and not an adult is contrary to public policy.

Manufacturers are strictly liable for manufacturing defects because its primary purpose "'is to promote product safety.'" *Perkins*, 83 Ohio St. 3d at 13, 700 N.E.2d at 1252 (citing Prosser & Keeton [Law of Torts (5 Ed. 1984)], Section 4 at 25-26); *see Wright*, 652 N.W.2d at 167-68. Thus, the rationality behind strict liability applies with even more force "where it comes to the protection

of our children," because it is important to protect them from defective products as foreseeable members of the consuming public. *Perkins,* 83 Ohio St. 3d at 513, 700 N.E.2d at 1252.

II. THE COURT CORRECTLY DECIDED THAT THE LOWER COURT ERRED IN FAILING TO ALLOW A JURY INSTRUCTION ON THE HEEDING PRESUMPTION, BUT ERRED IN FINDING NO PREJUDICE RESULTED FROM FAILURE TO GIVE THE REQUESTED JURY INSTRUCTION.

In a failure to warn cause of action, the plaintiff must establish that the product is defective because it did not contain an adequate warning of some danger the product posed to the user. Karin L. Bohmholdt, *The Heeding Presumption and Its Application: Distinguishing No Warning from Inadequate Warning,* 37 Loy. L.A. L. Rev. 461, 467 (2003), citing Restatement (Third) of Torts: Product Liability §2(c) (1998). Although the burden reasonably rests on the plaintiff to establish defectiveness when there is claim of an insufficient warning, different rules should apply when a product contains no warning. Many states have adopted the heeding presumption, derived from Comment j of 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. (1965).

Given that the State of Ohiowa product liability law has always looked favorably upon the consumer and due to the purpose of Comment j, this Court correctly decided that the heeding doctrine is the law of the land, and that the lower court's refusal to consider it was an abuse of discretion. R. at 11, 12. However, the Court incorrectly decided that the deficient jury instruction was not prejudicial.

A. The Jury Instruction Should Have Been Allowed.

The present case deals with a strict liability failure to warn. Zuul put a warning on their e-cigarette packaging, but no warning existed on the actual e-cigarette. R. at 3. Additionally, Zuul

failed to include a warning on their skins. R. at 4. Under product liability law, "it is the manufacturer's duty to warn inadequately informed users about the risk of danger involved with the use of a product." *Krueger v. Gen. Motors Corp.*, 783 P.2d 1340, 1348 (Mont. 1989), citing *Streich v. Hilton–Davis*, 692 P.2d 440, 445 (Mont. 1984).

1. The heeding presumption applies because this is a failure-to-warn case.

The Ohiowa Rev. Code § 5552.369(b)(1) states that a product is defective if the seller or manufacturer fails to properly package or label the product to give reasonable warnings of danger about the product. The burden of proving proximate cause falls on the plaintiff to demonstrate why the warning was inadequate. Ohiowa Rev. Code § 5552.369(b)(1). There are two types of failure-to-warn claims: Insufficient warning and no warning claims.

When there is an insufficient warning, the plaintiff must prove proximate cause, and that the warning did not pass the following three-factor test: A warning must (1) be designed so it can reasonably be expected to catch the attention of the consumer; (2) be comprehensible and give a fair indication of the specific risks involved with the product; and (3) be of an intensity justified by the magnitude of the risk. *Pavlides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338 (5th Cir. 1984), citing *Bituminous Casualty Corp. v. Black & Decker Manufacturing Co.,* 518 S.W.2d 868, 872–73 (Tex.Civ.App.—Dallas, 1974). However, this is *not* an insufficient warning case: There was no warning on the skin and therefore nothing to catch L.T.'s attention; no comprehension or notice of risk; and no justifiably intense warning. Due to lack of warning, L.T. was an inadequately informed user and was owed a warning.

In failure-to-warn cases—such as this—it is fairer to assume the heeding presumption, for "where there is no warning… the presumption of comment j is that the user would have read and heeded an adequate warning." *Nissen Trampoline Co. v. Terre Haute First Nat. Bank*, 332 N.E.2d

820, 826 (Ind. Ct. App. 1975), *superseded*, 265 Ind. 457, 358 N.E.2d 974 (Ind. 1976). This shifts the burden from the plaintiff to prove insufficient warning, to the defendant—where it rightfully belongs—to explain why the item did not warrant a warning.

2. The heeding presumption has been utilized by a large number of states.

The heeding presumption offers strong public policy protection for the plaintiff, for it provides a powerful incentive for manufacturers to abide by their duty to provide adequate warnings. *Coffman v. Keene Corp*., 628 A.2d 710, 718 (N.J. 1993). And though Zuul would have the Court see it as a controversial doctrine, nearly half of all states see it as a friendly face: Twenty-three states and the District of Columbia have utilized the heeding presumption. James M. Beck, *Who Heeds the Heeding Presumption?*, DRUG & DEVICE LAW BLOG (Nov. 7, 2014), https://www.druganddevicelawblog.com/2014/11/who-heeds-heeding-presumption.html. In particular, Ohio has adopted the heeding presumption. *Seley v. G.D. Searle & Co.*, 67 Ohio St. 2d 192, 423 N.E.2d 831 (Ohio 1981). Additionally, and similarly to the doctrine of *res ipsa loquitur,* here too the defendant holds the "critical information that can demonstrate whose conduct created the plaintiff's injury," and keeps the plaintiff from speculation. *Coffman,* 628 A.2d at 715.

3. The heeding presumption particularly pertains to cigarette cases.

In an attempt to shield themselves from liability, Zuul has argued that the heeding presumption should not be recognized in Ohiowa due to language that "has elicited… criticism… from commentators." R. at 11; see Restatement (Third) § 2, Reporters' Note, cmt. 1. (1998). However, scholars have ascertained that comment j is specifically tailored for the "narrow category of unavoidably dangerous products such as alcohol, drugs and cigarettes whose inherently hazardous nature makes warnings the only way to improve their safety." D. Owen, Products Liability Law §11.4 (3d ed. 2015). And, although states and courts are not obligated to accept the

Restatement in its entirety, the state of Ohiowa has found it instructive when drafting product liability laws. R. at 11; *see also Riley v. Am. Honda Motor Co.*, 856 P.2d 196, 200 (Mont. 1993). Implicit in [comment j…] is the assumption that the warning could have been heeded to avoid the peril." *Greiner v. Volkswagenwerk AG*, 429 F.Supp. 495, 497 (E.D.Pa 1977). These warnings are extraordinarily important when the object is hazardous, and particularly when in the hands of children who are old enough to read and understand danger, but not old enough to ascertain for themselves the danger without a caution notice, for with this type of product, "providing a warning is all a manufacturer […] can do to reduce the risk of harm—after which, a seller has nothing else to do except to 'assume that [it] will be read and heeded.'" *Krueger,* 783 P.2d at 1340; D. Owen, *supra.* In this case, a warning such as ones normally contained on lighters, could have been heeded to avoid L.T.'s injury. *See Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1404 (7th Cir. 1994) ("The warning on the lighter… read… "KEEP OUT OF REACH OF CHILDREN").

4. The heeding presumption places an appropriate burden on Zuul to rebut the presumption.

Adopting the heeding presumption does not remove any agency from the defendant. Rather, Zuul is free to rebut the presumption "with contrary evidence that the presumed fact did not exist… this may be accomplished by the manufacturer's producing evidence that the user was… irresponsible or lax in judgement… to show that the improper use was or would have been made regardless of the warning." *Nissen Trampoline Co. v. Terre Haute First Nat. Bank*, 332 N.E.2d at 827*,* citing *Technical Chemical Co. v. Jacobs*, 480 S.W.2d 602 (Tex. 1972). Instead of simply arguing that L.T. was not a foreseeable user and therefore Zuul is not strictly liable, the heeding presumption places the reasonable public policy burden on the company to explain their omission. By arguing against this jury instruction, Zuul relieves themselves from the burden of responsibility for their failure to warn.

Though Zuul may argue that the e-cigarette came with a sufficient warning on the packaging and that the warning should transfer to the object itself, Zuul did not affix a warning on the skin. R. at 4. Under the Restatement of Torts, comment h, the e-cigarette was transformed into a novel item. Restatement (Second) of Torts § 402A (1965) ("no reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole"). The e-cigarette with the *Hola Gato* skin did not have a warning, and it was in this state that L.T. was attracted to the object and began to play with it. R. at 5. L.T., a child clearly of reading age, could very easily have heeded the warning if there had been one on the e-cigarette, and would have avoided the needless pain and suffering that commenced when the e-cigarette exploded in his hands.

Given the heeding presumption's massive incentive to manufacturers to create safer products, deference toward the unwarned user, and tailored application to unavoidably dangerous items like cigarettes, the heeding presumption should be adopted as the law of the land and the jury instruction should have been allowed.

B. Prejudice Incurred by Failing to Give the Heeding Presumption as A Jury Instruction.

The lower court's failure to allow the jury instruction is inherently prejudicial if the heeding presumption is determined as the law of the land, as it is in Ohio. When relevant law is raised in a case, "our Government must proceed according to the 'law of the land'—that is, according to written constitutional and statutory provisions." *In re Winship*, 397 U.S. 358, 382 (1970). Further, the Court stated that they would not find prejudice where the instructions state the applicable law of the case. R. at 5, *McAlpine v. Rhone-Poulenc Ag Co.,* 16 P.3d 1054, 1057 (Mont. 2000). Thus, failing to abide by a relevant law of the land is inherently prejudicial to the outcome of the case.

1. There is not unequivocal evidence that the jury would have decided this case differently with the given jury instruction.

There is also recent case law that demonstrates that juries take heeding presumption instruction seriously, and have acted favorably toward the plaintiff given either the heeding presumption or an understanding of a better warning. In 2015, an Ohio court found that "a reasonable jury could conclude that, had the warning existed, [the user] would have examined the bolts [on a crib] and tightened them… A reasonable jury could conclude that the warning in question would have given her reason to examine [the product]." *Byrge v. Dorel Juvenile Group*, 2015 WL 13016359 (Ohio 2015). In another 6th Circuit case, "even though this instruction did not give [the user] the benefit of any heeding presumption, the jury found he would have heeded a better warning." *Tamraz v. BOC Grp., Inc.,* No. 1:04-CV-18948, 2008 WL 2796726, at *4 (N.D. Ohio July 18, 2008), *rev'd sub nom. Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665 (6th Cir. 2010). In light of these juries, the court cannot in good faith find that the jury would not have proffered a different verdict if the requested instruction had been given, and therefore prejudice—the ability to decide this case based on a law of the land—resulted from the failure to give the requested jury instruction.

The heeding presumption provides essential protection for not only L.T., but for all consumers: it provides incentive for manufacturers as least-cost avoiders to provide adequate warnings, places the injured and disadvantaged victim in favored light, and places the burden on the manufacturer to rebut the presumption. The heeding presumption is familiar doctrine in nearly half of the United States, and it should be in the state of Ohiowa as well. Petitioner asks that the Court right the lower court's wrongful abuse of discretion and follow numerous states in implementing the heeding presumption as the law of the land.

However, the Court erred in finding no prejudice from the omission of this jury instruction. Although the Court did not unequivocally think that the jury would have found a different verdict, the cases that suggest this type of deliberation tend toward cases of precise, mathematical results where no other result could have logically occurred. Furthermore, there are cases that demonstrate juries deciding for the plaintiff when given the heeding presumption instruction, and relevant law of the land must be considered.

CONCLUSION

As the existence of a manufacturing defect in Zuul's e-cigarette is undisputed, Zuul should be strictly liable for the injuries to the Appellant. Further, whether children were foreseeable consumers of Zuul's e-cigarette is a genuine issue of material fact that should have been presented to a jury. Thus, the Lower Court erroneously granted Zuul's motion for summary judgement. It is for these reasons that the Petitioner asks this Court to overrule the lower court's decision *de novo*.

The Court correctly decided that the lower court suffered an abuse of discretion in failing to determine the law of the land, and thereby failing to allow a jury instruction on the heeding presumption. However, the inability to decide a case based on the law of the land is prejudicial, and the Court wrongfully stated that there was no unequivocal evidence that the jury would have decided differently with this instruction. For these reasons, the Petitioner asks that this Court reverse and find prejudice from the failure to give the requested jury instruction.