No. 20-2206

In the
Supreme Court of the State of Ohiowa

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

v.

ZUUL ENTERPRISES, RESPONDENT.

ON WRIT OF CERTIORARI
FROM THE STATE OF OHIOWA COURT OF APPEALS
FOR THE SEVENTH APPELLATE DISTRICT, DRUMMOND COUNTY

ORIGINAL BRIEF FOR THE RESPONDENT

Team F
Counsel for Respondent

QUESTIONS PRESENTED

I. Did the Appellate Court Err in Affirming Zuul's Motion for Summary Judgment on the Tullys' Manufacturing Defect Claim?

II. Does the Read and Heed Doctrine Apply to Strict Liability Failure-To-Warn Claims in the State of Ohiowa?

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STATEMENT OF THE CASE

I. Statement of the Facts

In March 2016, Respondent, ZUUL Enterprises ("Zuul"), established an e-cigarette company. (R. 3.) In creating the company, Zuul's founders intended for their product to be a safer alternative to traditional tobacco cigarettes. (*Id.*) Zuul products are operated in a fairly simple manner. The user presses a button, which allows an atomizer to warm the flavored liquid into a vapor. (R. 4.) The vapor is inhaled through the mouthpiece of the e-cigarette. (*Id.*) With its convenient size and other benefits, Zuul products have become very popular among the public. (*Id.*)

In December 2017, Zuul was accused of marketing its products to children. Unfortunately for consumers who enjoyed the sweet flavors, the court issued an injunction to stop Zuul from producing those flavors. (*Id.*) Although Zuul never admitted to the accusation, Zuul still complied with the ruling of the district court. (*Id.*) After removing the most popular flavor packs from the market, Zuul ultimately struggled to avoid bankruptcy. (*Id.*)

In June 2018, Zuul issued a statement refuting any allegations that it attempted to market its products to children. (*Id.*) To demonstrate good faith and its strong stance against marketing to children, Zuul decided to only produce a classic tobacco flavor in the future. (*Id.*) In addition, Zuul redesigned the e-cigarettes to prohibit users from inserting cartridges made by other companies, which ensured that Zuul e-cigarettes could only be used with the classic tobacco flavor cartridge. (*Id.*)

At that same time, "Zuul skins" were introduced as a new line of accessories for the e-cigarettes. Zuul skins allow consumers to customize their Zuuls by putting labels on the surface of any Zuul e-cigarette. The Zuul skins do not contain any additional warning regarding the dangers

of e-cigarettes. Additionally, the Zuul has no warning on the product itself, but each Zuul e-cigarette has a warning affixed to its packaging for all consumers to see. (*Id.*)

In July 2018, Louis and Janine Tully ("Petitioners"), entrusted a nineteen-year-old college sophomore, Dana Barrett ("Barrett"), to supervise their eleven-year-old child, L.T. (R. 5.) Barrett frequently babysat L.T. in the past. (*Id.*) Barrett is also known to be an avid fan, and a very frequent user of e-cigarettes since she began college. (*Id.*) In order to customize her Zuul, Barrett purchased a skin for her e-cigarette depicting a cartoon character that she likes. On the day of the accident, Barrett brought her Zuul to the Petitioners' house.

On July 17, 2018, while Barrett supervised L.T., she left her e-cigarette unattended. Barrett warned L.T. repeatedly that it was dangerous to play with the e-cigarette. (*Id.*) Despite her earlier warnings, L.T. capitalized on the opportunity to play with the unattended Zuul. Instead of using the e-cigarette in the expected manner, L.T. pressed the activating button and began playing with the e-cigarette as if it were a leaf blower. As L.T. grossly misused the e-cigarette like a leaf blower, the Zuul's atomizer overheated causing the product to explode, which injured his hand. (*Id.*)

II. Procedural History

Petitioners filed a two-part complaint against Zuul alleging 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. (R. 2.) Zuul filed a motion for summary judgment arguing 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. (R. 3.)

The Court of Common Pleas granted Zuul's Motion for Summary Judgment on the manufacturing defect claim, and held that children, like L.T., were not foreseeable users of the Zuul products. (*Id*.) However, the court did not grant summary judgment for the failure-to-warn claim and that issue proceeded to trial. (*Id.*) At trial, Petitioners requested a jury instruction on the heeding presumption, but Zuul objected to it, and the court sustained the objection. (*Id.*) After hearing testimony from all named parties and after 16 hours of deliberation, the jury found in favor of Zuul. (R. 12.)

Following the jury verdict, Petitioners filed an appeal. Petitioners appealed on two grounds. First, they argued that the lower court's grant of summary judgment was inappropriate because an issue of material fact remained as to whether Zuul could foresee a child as a consumer of Zuul products. (*Id.*) Second, they argued that the lower court erred in failing to allow a jury instruction on the heeding presumption. The Court of Appeals affirmed the rulings of the Trial Court, and Petitioners' petitioned this Court for a *Writ of Certiorari*. This Court granted the petition, and now it is time that this Court decide these two issues in Zuul's favor.

SUMMARY OF THE ARGUMENT

The Court of Appeals did not err in affirming Zuul's Motion for Summary Judgment on Petitioners' manufacturing defect claim. There is no genuine issue of material fact regarding whether L.T. was a foreseeable user. Further, other jurisdictions with similar product liability statutes relieve a manufacturer of liability when harm rises from misuse, such as the case here. By using the Zuul like a leaf blower, L.T. did not use the Zuul as intended, making the harm that arose unforeseeable. Moreover, L.T. does not fit into the class of individuals that Zuul has targeted for the use of its products, further making L.T.'s use unforeseeable. Therefore, because of the class of

individual that L.T. is in and his gross misuse of the product, L.T. was undoubtedly an unforeseeable user of the Zuul.

The read and heed doctrine should not be applied to strict liability failure-to-warn claims in Ohiowa. Where an adequate warning is present, the heeding presumption works in favor of the manufacturer. Ohiowa law goes against the application of the read and heed presumption because the presumption removes Petitioners' burden of establishing causation. Even if this Court decides that the heeding presumption should be applied, the Trial Court did not abuse its discretion by refusing to instruct the jury on it. There is no evidence that an adequate warning would have been read and heeded by L.T. Petitioners did not meet their burden of proof because they did not establish that Zuul's warning was inadequate. Lastly, if the Trial Court ended up instructing the jury on the presumption, it would have been rebutted.

ARGUMENT

I. The Court of Appeals Did Not Err in Affirming Zuul's Motion for Summary Judgment on the Tullys' Manufacturing Defect Claim.

A. Standard of Review

The appropriate standard of review for this issue is *de novo.* When looking at an issue of summary judgment *de novo,* the court is asked to construe the evidence of the record from the lower courts in the light most favorable to the non-moving party. *White v. ABCO Eng'g Corp.* 221 F.3d 293, 300 (2nd Cir. 2000). On *de novo* review, the court looks at the issues on appeal with no deference to the lower court; and the court affirms motions for summary judgment when reasonable minds cannot differ in their conclusions. *Donegal Mut. Ins. v. White Consol. Indus.*, 852 N.E.2d 215, 220 (Ohio Ct. App. 2006). Here, under *de novo* review this Court can find that the lower courts correctly granted and affirmed summary judgment in favor of Zuul. On *de novo,*

this Court should find that there is no genuine issue of material fact as to whether L.T., being a child who used the e-cigarette as a toy, was a foreseeable user or foreseeably misused the item that caused his injuries.

B. The Decision of the Lower Court Granting Summary Judgment in Favor of Zuul Is Appropriate Because There Are No Facts in the Record Demonstrating a Child Using the Zuul as a Leaf Blower Would Be Foreseeable.

The issue at hand is a radical attempt to extend manufacturer liability to a limitless extent in product defect cases. This case has the potential to extend manufacturer liability when an injury has resulted from gross misuse of a product by any individual, including ones outside of the manufacturer's contemplation. The Court of Appeals correctly granted summary judgment in favor of Zuul Enterprises. The Court of Appeals found L.T. was a consumer that Zuul did not intend to use the product, and that liability for his injuries while misusing the product would be inappropriate. (R. 6.)

Summary judgment in favor of Zuul was appropriate because there is not a genuine issue of material fact regarding whether L.T. was a foreseeable consumer of the product. Summary judgment is appropriate when there is no genuine dispute to any material fact, allowing the movant to win as a matter of law. *AINahhas v. Robert Bosch Tool Corp.*, 706 F.App'x 920, 923 (10th Cir. 2017); *Aldridge v. Reckart Equip. Co.,* No. 04CA17, 2006 Ohio App. LEXIS 4904, at *17 (Ohio Ct. App. Sept. 19, 2006). Additionally, a moving may win on summary judgment by demonstrating a lack of evidence on an essential part of the nonmoving party's claim. *Savant Homes, Inc. v. Collins*, 809 F.3d 1133, 1137 (10th Cir. 2016). For a consumer to be considered foreseeable, the class of individuals must have been within the manufacturer's contemplation as people who would use their product. *AINahhas*, 706 F.App'x at 941. Further, the misuse of the product is also unforeseeable for a manufacturer. *Id.*

C. L.T. Used the Product in a Manner Not Contemplated or Expected by the Manufacturer Making L.T. an Individual Who Cannot Be Considered an Expected Consumer of the Product.

Zuul Enterprises should not be held liable for the injuries caused to L.T. by their product igniting in his hand because L.T. was not a consumer that the manufacturer intended to serve. A manufacturer is specifically only liable to consumers "in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defect or defective condition." Ohiowa Rev. Code § 5552.369(a). A "user" of a product is one who consumes the product, meaning an individual who uses a product how it was intended to be used. *Phelps v. Sherwood Medical Industries*, 836 F.2d 296, 302 (7th Cir. 1987).

1. The Use of the Product in an Unforeseeable Manner Cannot Justifiably Extend Liability to the Manufacturer.

Under Ohiowa Law, the Consumer Expectation Test is employed to determine if a product is defective. (R. 6.) Strict liability is often imposed on a manufacturer for harm that results from a product defect regardless of a manufacturer exercising reasonable care. *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 167–68 (Iowa 2002). Importantly, when a product is grossly misused, such as in the case at hand, the consumer can no longer expect the same performance that results from a product's intended use. *Pruitt v. General Motors Corp.*, 599 N.E.2d 723, 726 (Ohio Ct. App. 1991); *Smith v. Howmedica Osteonics Corp.*, 251 F. Supp. 3d 844, 851 (E.D. Pa. 2017).

The case of *Smith* speaks precisely to when a manufacturer should be held liable under the Consumer Expectation Test. The case involved a medical device that malfunctioned after being implanted in a patient. *Smith*, 251 F. Supp. 3d at 846. The court granted the manufacturer's motion to dismiss on the issue of a defect, stating that the plaintiff did not allege significant facts that substantiated a claim for a manufacturer defect. *Id.* The court held, however, that plaintiffs alleged

some viable facts for the defect including that the product broke down "under normal and anticipated use, and in the absence of any secondary causes." *Id.* at 853.

Even though the facts of *Smith* differ, it is still instructive to the case at hand. In the present case, the Petitioners have alleged facts that the product itself specifically had a malfunctioning atomizer. (R. 4.) This allegation was a key piece missing in the plaintiff's case in *Smith*. Contra to *Smith*, however, the plaintiffs in this case have not alleged plausible facts of the product breaking down during normal and anticipated use. Here, the product broke down and caused injuries while being used in the manner of a leaf blower, rather than its intended use as an e-cigarette. (R. 5.) Because this use was not anticipated, it is evident that an essential piece to Petitioners' claim is lacking.

The case of *Aldridge v. Reckart Equip. Co.* exemplified when the use of an item leaves an issue of material fact as to whether the use was within the contemplated possibilities of the manufacturer. 2006 Ohio App. LEXIS 4904, at *39. There, the plaintiff was injured by cleaning a conveyor belt while it was moving. *Id.* at *5. The conveyor belt did not have safety rails as part of the product's design. *Id.* The manufacturer argued that the unforeseeable use of the conveyor belt by cleaning it while it was in motion barred the plaintiff's claim. *Id.* at *6. The court rejected this argument based on the evidence that the only way to effectively clean the conveyor belts was while they were in motion, making the misuse foreseeable. *Id.*

The case at hand is much different than that of *Aldridge* because the misuse of the Zuul by L.T. was not foreseeable by the manufacturer. L.T. used the Zuul in a manner resembling a leaf blower rather than its intended use as an e-cigarette and by doing so, the Zuul combusted and caused injuries to L.T.'s hand. The Zuul itself could not satisfy the first prong of the Consumer Expectation Test because although the product may have been "more dangerous than an ordinary

consumer would expect" due to the condition of the atomizer, this harm arose when the product was not being used as intended. (R. 5.) Unlike *Aldridge*, this Court could find that the misuse of the product was not foreseeable because L.T. did not misuse the product out of a necessity, such as to clean or maintain the product. Rather L.T. misused the product on his own volition.

Further, as the lower court stated, the conduct of a consumer who misuses a product make the consumer one who is outside of the scope of the manufacturer's liability. The case of *Irion v. Sun Lighting, Inc.,* No. M2002-00766-COA-R3-CV, 2004 Tenn. App. LEXIS 210 (2004) speaks to when an ordinary consumer cannot expect a manufacturer to be held liable. Within the case, the consumer-plaintiff argued that a lamp was unreasonably dangerous in design when her eight-year-old son started a fire with the lamp by putting a pillow on top of it while it was on. *Id.* at *4. The court interpreted the test for extending liability, based on the Second Restatement of Torts, section 402(A), to mean that a product must be dangerous "to an extent beyond that which would be contemplated by the consumer who purchases it . . . ." *Id.* at *21. Additionally, the court mentioned that prolonged use of a product, or familiarity of the product's performance, is sufficient to allow an ordinary consumer a reasonable expectation of the product's safety. *Id*.

Here, the ordinary consumer of the Zuul was the babysitter and not L.T. This is further supported, but not conclusively decided by the fact that the babysitter was the source of L.T.'s access to the Zuul. (R. 5.) The babysitter was qualified to reasonably expect safety from the product because she "possessed an affectation for the product and has been a frequent user since she matriculated." (*Id.*) The babysitter, with her great familiarity, was still shown to have contemplated the danger of the product. She warned L.T. on multiple occasions of the dangerous nature of the Zuul and that it should not be played with. (*Id.*) After being warned, L.T. still "held the device as a toy" and used it in a manner similar to a leaf blower. (R. 14.) Under these facts, it cannot be said

that L.T. acted in a manner that was in accordance with what an ordinary consumer would do. Therefore, this Court cannot extend liability for his injuries to Zuul.

2. Ohiowa Should Adopt a Complete Defense of Misuse to Relieve Manufacturers of Liability Like the Circuits with Similar Statutes Have Done.

Under Ohiowa Law, the manner in which a product is determined to be defective is through the Consumer Expectations Test. The Sixth, Seventh, and Tenth Circuits have statutes that are substantially similar to Ohiowa's product liability statute. (R. 6.) Those circuits have misuse as a complete defense against product liability, and thus, Ohiowa should too. (*Id.*) In order for a product to be defective, the test requires that it be "more dangerous than an ordinary consumer would expect *when used in an intended or reasonably foreseeable manner.*" *State Farm Fire & Cas. Co. v. Chrysler Corp.*, 523 N.E.2d 489, 494 (Ohio 1988) (emphasis added). Here, the facts show that the item was not used in a reasonably foreseeable manner when harm arose, and thus, an analysis of the facts under this test is wholly inappropriate.

Importantly, this test requires the product be used in a foreseeable manner when danger arose. A product is misused when the method of using the product is not that which the maker intended or one that could not be reasonably anticipated by a manufacturer. *AINahhas*, 706 F.App'x at 941. There is a distinction between use for an abnormal purpose and use for a proper purpose in a careless manner. *Id.* For example, use for an abnormal purpose occurred within this case by L.T. using an e-cigarette as a toy. Whereas, a use for a proper purpose, but in a careless manner can mean using the e-cigarette as intended but doing so in a way that is not recommended. Use for a proper purpose in a careless manner is not considered to satisfy the foreseeability requirement of the Consumer Expectation Test. *Id.* The abnormal use of an item, however, is a

commonly accepted defense to product liability claims. *Kirkland v. GMC*, 521 P.2d 1353, 1356 (1974).

The defense of misuse requires the injury arose from the abnormal use of the product and precludes the plaintiff from recovery. *Id*. Further, courts have held that a manufacturer may be liable if, while the product is being used in its intended way, an injury results from a defect in the design which the individual is not aware of. *See e.g*., *Greenman v. Yuba Products, Inc.*, 377 P.2d 897, 901 (Cal. 1963) (holding a manufacturer liable in tort for injuries that resulted due to a power tool with a hidden defect). The defense requires that the misuse of the product be the cause of the harm and the misuse would not reasonably be expected by the seller. *Campbell Hausfield/ Scott Fetzer Co. v Johnson*, 109 N.E.3d 953, 959 (Ind. 2018). Furthermore, summary judgment based on misuse is appropriate when the undisputed evidence proves the plaintiff misused the product in an unforeseeable way. *Id.*

The complete defense of misuse for a products liability claim has been accepted to alleviate a manufacturer of liability regardless of whether the product at hand maintained a defect that proximately caused the injury. *Kirkland*, 521 P.2d at 1356. In *Kirkland*, the court held that abnormal use or misuse was a complete defense to liability for a manufacturer. *Id.* at 1367. The plaintiff, who was injured while driving, argued that the cause of the accident was a malfunction in the driver's seat. *Id.* at 1356. The court rejected this argument in favor of the defendants, who offered evidence that the plaintiff misused the automobile by driving while intoxicated. *Id.* at 1357. The court held that a gross misuse of the item could reasonably allow for a complete defense from liability. *Id.* at 1367.

In the present case, the facts show that L.T. grossly misused the product, and this misuse should justifiably act as a complete defense to Zuul's liability. L.T. did not use the Zuul in a manner

intended by the manufacturer. Rather, L.T. used the Zuul as a toy, by depressing the button for a prolonged period of time and creating a sweeping motion with the item to mimic a leaf blower. (R. 5.) Similar to *Kirkland*, this Court can find that this gross misuse of the product in a manner not contemplated by the manufacturer can alleviate the manufacturer from liability. *Kirkland*, 521 P.2d at 1367. Moreover, although the product's atomizer malfunctioned, this Court should still find that regardless of the malfunction, L.T.'s gross deviation from the expected use of the product was so abnormal that it acts as a complete defense to Zuul's liability.

D. L.T. Was Not in a Class of Individuals Targeted by the Manufacturer for Use of the Product, Making Him an Unforeseeable User of the Product.

As stated by the lower court, a manufacturer in Ohiowa is only liable to individuals who can be considered within the class of individuals who are foreseeable consumers of the product. (R. 9.) L.T. can be considered an unforeseeable consumer of the Zuul for reasons other than his complete misuse of the product, as determined by the lower courts. The unforeseeable nature of L.T. as a consumer of the Zuul is, in part, because of the recent litigation history of Zuul. This recent litigation has resulted in a complete redesign of the product and removal of products from Zuul's line, with the sole purpose of lower the allure of the product to children. (R. 4.)

1. The Product Is Generally in a Class of Products Not Intended for Children to Use in Any Manner, Which Makes L.T.'s Use of the Product as a Toy Unforeseeable.

The Zuul is a device that was intended to be "a safer alternative to traditional tobacco cigarettes." (R. 3.) The product is marketed as an alternative to traditional cigarettes, which places it in a class of products not intended to be used by children in any manner. *Welch v. Scripto-Tokai Corp.*, 651 N.E.2d 810, 815 (Ind. Ct. App. 1995). When a product such as the Zuul is used by a child, harm that arises cannot be considered within the scope of harm contemplated by the manufacturer.

The case of *Welch* speaks exactly to this point with similar facts. There, a child was burned by using a hand-held butane cigarette lighter that child accidentally used to light their shirt on fire. *Id.* at 812. The court reasoned that the ordinary consumer of such a product is an adult. *Id.* The court also reasoned that the risk of a child injuring themselves with the product is of normal contemplation for the consumer. *Id.* at 816. Because the risk of a child being hurt by the product if left in the child's possession is open and obvious, a manufacturer of the lighter should not be liable for injuries to the child as a result. *Id.* Additionally, the court found in that case that the product was not overly defective, leading to the injuries. *Id.* at 811.

Similar to the findings of the court in *Welch*, this Court can find that the e-cigarette is a product not intended to be used by a child. *Id.* at 812. The product in this case works as both the lighter and the cigarette being lit together as one single device. (R. 4.) The Zuul injuring a child is within the contemplation of the ordinary consumer, as the babysitter *did* contemplate such a harm and as a result, warned L.T. not to play with the Zuul. (R. 5.) In addition, Zuul should not be held liable regardless of the defect to the product because it is in a class of products not intended to be used by children. This is further supported by the apparent nature of the potential for harm to arise if the product is used by a child, and as a result of an unforeseeable user contributing to their own harm by misusing the product. The nature of the Zuul as a tobacco-containing product inherently shows that L.T., or any other child, cannot be a foreseeable or expected consumer of its product.

2. The Total Removal of Popular Flavor Packs by Zuul for the Sole Purpose of Reducing the Zuul's Appeal to Children Further Supports That L.T. Was an Unforeseeable Consumer.

The litigation history of Zuul is even more telling as to why Zuul could not foresee L.T. as a consumer of its product. Beyond L.T.'s gross misuse of the product, Zuul had intentionally removed products from the market that were previously found to be appealing to children. (R. 4.)

When evaluating the liability of Zuul, "[strict liability] does not mean that a seller is an insurer for all harm resulting from the use of his product . . . ." *Dehring v. Keystone Shipping Co.*, No. 10-CV-13959, 2013 U.S. Dist. LEXIS 104780, at *18 (E.D.N.D. Mich. July 26, 2013); *see also Iliades v. Dieffenbacher N. Am. Inc.*, 915 N.W.2d 338, 339 (Mich. 2018). A manufacturer must "exercise ordinary care in the design and manufacturer of a product to protect *foreseeable* users from *foreseeable risks* of harm." *Tate v. Statco Eng'g & Fabricators*, No. 12-CV-0002-JHP, 2013 U.S. Dist. LEXIS 166845 at *9 (E.D. Okla. Nov. 25, 2013) (citations omitted) (emphasis added).

The case of *Cobbs v. Schwing Am. Inc.*, No. 04-72136, 2006 U.S. Dist. LEXIS 8648 (Feb. 13, 2006) explains when a product's foreseeable harm leads to a manufacturer's liability. There, the plaintiff was injured while working as a laborer on a tunneling project. *Id.* at *2. The project employed a system of pumps manufactured by defendant to perform work on the tunnel, and in the course of his work, the plaintiff's hand was sucked into a pump. *Id.* Plaintiff's case failed, in part, because he could not show that the design of the product was unreasonably dangerous and that an alternative design could have lowered the risk of foreseeable harm. *Id* at *17.

The facts at hand are much different than those of *Cobbs,* but it is still instructive on when alternative designs lower the foreseeability of harm. There, the court held that a plaintiff could show a product misuse is foreseeable if an alternative design is available and can lower the risk of foreseeable harm by the product. *Id.* The foreseeable harm in the present case is the risk of exposing children to tobacco, as shown by the previous litigation history of Zuul. (R. 4.) Zuul changed the product explicitly to lower that risk of harm because Zuul was aware of that potential harm. (R. 4.) Not only did Zuul remove the flavor packs, but Zuul also underwent a product redesign to further eliminate the appeal of the product to children. (R. 4.) By redesigning the

product, Zuul ensured that only tobacco flavored packs could be inserted into the Zuul and expected to have lowered the risk of foreseeable harm to children.

3. The Introduction of "Skins" Does Not Increase the Foreseeability of L.T. Using the Item as a Leaf Blower.

Zuul's introduction of "skins," in an effort to revitalize the economic success of the company, does not increase the foreseeability of L.T. as a user of the product. "Given that most complex product can be made danger by modification, courts have sought to define foreseeability to avoid impose a form of absolute liability . . . on the original manufacturer." *Braswell v. Cincinnati*, 731 F.3d 1081, 1086 (10th Cir. 2013).

The case of *Braswell* explains when a product's modification can lead to manufacturer liability. In *Braswell*, a hydraulic braking system injured plaintiff's arm. *Id.* at 1085. The plaintiff reached into the press to dislodge metal and simultaneously pressed a pedal that started the press. *Id.* at 1084. The hydraulic press was modified by removing the original safety equipment. *Id.* In finding for the manufacturer, the court concluded that reasonably foreseeable modifications causing the accident do not relieve a manufacturer of liability. *Id.* The majority also stated, "courts have sought to define foreseeability to avoid imposing a form of absolute or near-absolute liability on the original manufacturer." *Id.* at 1086.

Here, it is foreseeable that putting a skin on the product may be a foreseeable modification of the Zuul by the babysitter. When looking at the foreseeability of L.T. using the product as a leaf blower, however, this modification does not make the incident at hand an impending guarantee. Like the court in *Braswell*, this Court should not impose a near-absolute bar of foreseeability on Zuul for offering skins for their products. Zuul offered the skins in an effort to save the company from bankruptcy. Having cartoon characters on some of the skins, does not make it a guaranteed that a child would grossly misuse the product as a toy. This is further supported by the fact that

L.T. is younger than the class of children (teenagers) that the district court found the Zuul *originally* appealed to. (R. 4.) Even if the modification in this case could create a foreseeable incident, such as in *Braswell*, that incident would be a natural consequence of the product's intended use, such as children smoking the e-cigarette and not using it as a leaf blower. Therefore, although the product was modified, the resultant misuse and injury were not a foreseeable consequence of that modification.

II. The Read and Heed Doctrine Should Not Apply to Strict Liability Failure-To-Warn Claims in the State of Ohiowa.

A. Standard of Review

This Court will review a trial court's decision regarding jury instructions for an abuse of discretion. *Carter v. Mechanical Servs.*, 746 P.4d 807, 811 (Ohiowa 2012). In order to warrant reversal, the error must have resulted in prejudice to the party challenging the trial court's decision. *Id.* "The test for abuse of discretion is whether the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." *Peterson v. St. Paul Fire & Marine Ins. Co*., 239 P.3d 904, 910 (Mont. 2010).

A trial court has wide discretion in formulating appropriate jury instructions. *United States v. Ridinger*, 805 F.2d 818, 821 (8th Cir. 1986). "[I]ts decision should not be reversed unless the error complained of resulted in a miscarriage of justice or the instruction was reasonably calculated to confuse or mislead the jury." *Barton Protective Servs., Inc. v. Faber*, 745 So. 2d 968, 974 (Fla. Ct. App. 1999) (citation omitted). "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." *Id.* Reversal is warranted when a deficient jury instruction is prejudicial. *Coleman v. B-G Maint. Mgmt*., 108 F.3d 1199, 1202 (10th Cir. 1997) (citation omitted). Thus, the

Petitioners must prove two things: (1) that the Trial Court abused its discretion, and (2) they were prejudiced by that decision. *Valleaire Golf Club v. Conrad*, No. 03CA0006-M, 2003 Ohio App. LEXIS 5866, at *5 (Ohio Ct. App. Dec. 10, 2003).

In regard to the second issue on appeal, the correct standard of review is abuse of discretion. In the present case, the Trial Court did not abuse its discretion in denying the Petitioners' requested jury instruction because the heeding presumption does not conform to Ohiowa law. Even if the presumption is the law of Ohiowa, it is not applicable to this case. If this Court, however, does determine that it was an abuse of discretion for the Trial Court to deny the instruction, then reversal is not warranted because no prejudice resulted from withholding the presumption.

B. The Trial Court Did Not Abuse Its Discretion by Denying Petitioners' Specific Jury Instruction on the Heeding Presumption.

This Court will review the "jury instructions as a whole for whether they fully, correctly, and fairly instruct the jury on the law applicable to the facts at issue in the case." *City of Helena v. Parsons*, 436 P.3d 710, 712–13 (Mont. 2019). The first thing that this Court must determine is whether there is relevant authority for instructing a jury on the heeding presumption. Secondly, whether such an instruction would have been appropriate in this case.

The heeding presumption is derived from the Second Restatement of Torts, section 402(A), comment j, which states, in part, "where warning is given, the seller may reasonably assume that it will be read and heeded." It is notable that the drafters of the Third Restatement of Torts have categorized this comment as "unfortunate language," citing to the heavy criticism that it has elicited from commentators. Restatement (Third) of Torts: Product Liability § 2 cmt l (1998). This "presumption works in favor of the manufacturer when an adequate warning is present." *Tech.*

Chem. Co. v. Jacobs, 480 S.W.2d 602, 606 (Tex. 1972). Where the warning is inadequate, however, this presumption works in favor of the plaintiff. *Id.*

1. There Is No Relevant Authority for Instructing a Jury on the Heeding Presumption, and to the Contrary, This Presumption of Causation Would Go Against the Black Letter Law of Ohiowa.

The jury instruction that Petitioners asked the Trial Court for is a presumption of causation, and when considering Ohiowa law and its origins, they were not entitled to such a presumption. In order for Petitioners to establish their claim, they must prove that Zuul failed to warn adequately of the dangers associated with the use of the Zuul, and that its failure to do so proximately caused the injury of which they complain. *See Deere & Co. v. Grose*, 586 So. 2d 196, 198 (Ala. 1991). In other words, proximate cause is split up into two sub-issues: (1) whether lack of adequate warnings contributed to L.T. misusing the Zuul, and (2) whether the Zuul malfunctioning constitutes a proximate cause of the L.T.'s injury. *See Seley v. G. D. Searle & Co*., 423 N.E.2d 831, 838 (Ohio 1981); *Plummer v. Lederle Laboratories*, *Div. of Am. Cyanamid Co.*, 819 F.2d 349, 358 (2d Cir. 1987).

In product liability law it has been consistently stated that the plaintiff must prove every element of causation. *See Riley v. Am. Honda Motor Co*., 856 P.2d 196, 200 (Mont. 1993); *In re Yasmin v. Bayer Corp*., No. 2100, 2010 U.S. Dist. LEXIS 105532, at *16 (S.D. Ill. Oct. 1, 2010) and cases cited therein. Conversely, "[a] heeding presumption removes the plaintiff's responsibility to carry the initial burden of production as to the element of causation." *Rivera v. Philip Morris*, 209 P.3d 271, 275 (Nev. 2009). Meaning, the plaintiff would not have to prove each element of his strict liability case. Consequently, "shifting the burden of proving causation to the manufacturer in a strict product liability case, even if it is a temporary shift, is contrary to . . . public policy." *Id.* at 274.

The language of Ohiowa Rev. Code § 5552.368 is substantially similar to Indiana Code Annotated section 34-20-2-1, which states, in pertinent part,

> a person who . . . puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user . . . is subject to liability for physical harm *caused by that product* to the user . . . if: (1) that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm *caused by the defective condition* . . . . (emphasis added).

Additionally, Indiana law requires a plaintiff to prove that his injuries were proximately caused by the defective condition. *See Ford Motor Co. v. Rushford*, 868 N.E.2d 806, 810 (Ind. 2007).

Due to the similarity between Ohiowa's statute and Indiana's statue, and because this is an issue of first impression, Indiana case law is instructive on whether this Court should apply the presumption. The Indiana Supreme Court has stated that such a presumption "does not completely dispose of the causation issue in a failure-to-warn case." *Kovach v. Midwest*, 913 N.E.2d 193, 199 (Ind. 2009). At most, the presumption establishes "that a warning would have been read and obeyed. *It does not establish that the defect in fact caused the plaintiff's injury*." *Id.* (emphasis added).

Indiana law still requires that the plaintiff show "that the seller's failure-to-warn adequately of the hazard was a cause-in-fact and a proximate cause of the injury[.]" *Id.* (citation omitted). Similar to the pertinent Indiana code section, Ohiowa Rev. Code § 5552.368 requires causation to be proven in order to hold a seller strictly liable for a defect. The burden is on the plaintiff to prove every element in a strict liability case. *See In re Yasmin.*, 2010 U.S. Dist. LEXIS 105532, at *16. Similar to Indiana, the jurisdiction with the most similar statute, a presumption of causation in Ohiowa would also go against the previously developed law of Ohiowa.

Statutorily speaking, the heeding presumption has no place in Ohiowa law. It is true that in crafting Ohiowa product liability laws, the legislature found the Second Restatement of Torts to

be instructive. It is telling, however, that the legislature did not choose to adopt the above-mentioned language of comment j. This Court should be reluctant to assume that the legislature intended to adopt the entirety of comment j solely because it relied on a portion of it. *See Riley*, 856 P.2d at 200. In *Riley*, the court found that although in the past it had cited comment j in regard to failure-to-warn claims themselves, that did not mean that it meant to adopt the specific language in comment j, which gives rise to the presumption. *Id.* Without an adoption of this presumption recognized in the law of the state, courts have been reluctant to create one. *See Odom v. G. D. Searle & Co*., 979 F.2d 1001, 1003 (4th Cir. 1992); *Thomas v. Hoffman-LaRoche, Inc*., 949 F.2d 806, 813 (5th Cir. 1992).

For the first issue on appeal, the Court of Appeals found that the statute's omission of the word "ultimate user" meant that the legislature did not intend to adopt that portion of the Restatement. (R. 9.) ("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."). Had the Court of Appeals applied this same reasoning to the second issue, it would not have found the presumption to be the law of the land, and it would not have found that the Trial Court abused its discretion. *Id.*

Additionally, the finding of the Court of Appeals that the public policy of Ohiowa tends to be in favor of the consumer pales in comparison to the obligation of the plaintiff to prove every element of causation. *See Riley*, 856 P.2d at 200 (finding that although there were policy arguments to be made in support of the rebuttable presumption, such policy did not convince the court "to abandon the traditional causation element . . . ."). The obligation of a plaintiff in a product liability suit to prove each and every element, including cause-in-fact and proximate cause, cannot be overcome by suggestions from secondary sources and public policy arguments.

In conclusion, a presumption on causation does not conform to the precedents of other states that utilize a substantially similar statute, and it does not conform to Ohiowa product liability law. The fact that Ohiowa tends to favor the consumer is not persuasive enough for this Court to create its own variation of the statute. Given that the heeding presumption is not in accordance with Ohiowa law, it cannot be said that the Trial Court acted arbitrarily without employment of conscientious judgment. Therefore, the Trial Court did not abuse its discretion in denying Petitioners' requested jury instruction.

2. Even If There Was Authority Showing That the Presumption Is in Accordance with Ohiowa Law, an Instruction Would Not Have Been Appropriate in This Case.

Nevertheless, if this Court concludes that the heeding presumption is in conformity with the law of Ohiowa, the Trial Court still did not abuse its discretion in refusing to instruct the jury on it. When looking at facts of this incident, the heeding presumption does not apply. Thus, the judge would not be required to instruct the jury on the heeding presumption.

As mentioned above, one of the requirements of causation that a plaintiff must prove in a failure-to-warn case is "that a warning would have altered the behavior of those involved in the accident." *Klugesherz v. Am. Honda Motor Co*., 929 S.W.2d 811, 814 (Mo. Ct. App. 1996). Without a showing that a more explicit warning would have prevented the plaintiff's injury, they cannot establish that the defendant's alleged failure-to-warn was the proximate cause of their injuries. *Demmler v. SmithKline Beecham Corp*., 671 A.2d 1151, 1155 (Pa. Super. Ct. 1996). Here, there is no evidence in the record that if an "adequate" warning was given by Zuul, that such a warning would have been read and heeded by L.T. to prevent his injury.

In *Klugesherz*, the court found that although Missouri recognized the presumption, it was of no assistance where there was only evidence that the injured party, a child, would not have

heeded an adequate warning anyway. 929 S.W.2d at 814. The evidence demonstrated that the child disregarded an earlier verbal warning from his parents. *Id.* In light of those findings, the court reasoned that "there is no basis for concluding that additional warnings would have altered the behavior of anyone involved in the accident." *Id.* Appropriately, courts have been reluctant to use this presumption where the evidence speaks for itself. *See Potthoff v. Alms*, 583 P.2d 309, 311 (1978) ("Whether the user of a product would have acted in the same manner had a proper warning been given is normally a question of fact on which a jury, *unaided by presumptions* and guided only by the evidence before it . . . .") (emphasis added).

Like the child in *Klugesherz*, L.T.'s frequent babysitter warned him many times that it was dangerous to play with her Zuul. (R. 5.) This warning from the babysitter, however, was not even enough to stop L.T. from playing with the Zuul. (R. 5.) The record is absent of facts that indicate any additional warning would have altered the behavior of L.T. Therefore, a presumption that L.T., an 11-year-old, would have read and followed any additional warning, is speculative and unaided by any evidence before this Court.

In jurisdictions where such a presumption applies, it does not operate to shift the burden of proof. The presumption operates only to shift the burden of producing evidence that rebuts the presumed fact. *See Pavlik v. Lane Ltd./Tobacco Exps. Int'l*, 135 F.3d 876, 883 (3d Cir. 1998). When applied here, the presumed fact is that if Zuul gave an adequate warning, L.T. would read and heeded it. When the plaintiff relies on this presumption, the judge must determine if there is evidence in the record that shows that an adequate warning would *not* have been read and heeded. *People v. Hemmer*, 97 Cal. Rptr. 516, 522 (Cal. Ct. App. 1971) (citation omitted). If this evidence exists, then the presumption disappears and an instruction on it is not warranted. *Id.*

As shown in the record, there is evidence that L.T. would not have heeded a stronger warning to avoid misuse of the Zuul. Given that evidence, any heeding presumption would necessarily have ceased to operate and could not properly have afforded a basis for an instruction on the presumption. *Id*. As a result of the evidence showing that L.T. would not have heeded *any* warning, it would be unnecessary for the Trial Court to give an instruction on the presumption. Therefore, the Trial Court did not abuse its discretion by denying Petitioners' requested jury instruction.

C. Even if the Trial Court Abused Its Discretion, the Exclusion of a Jury Instruction on the Heeding Presumption Did Not Result in Prejudice to Petitioners, and Therefore, Reversal Is Not Warranted.

In order for reversal to be warranted, the Petitioners must have been prejudiced, which is not the case here. Even if the Trial Court abused its discretion, this "'abuse is only reversible if the error affected a substantial right of the complaining party,' i.e., we would subject the abuse to harmless error review . . . . " *United States v. Moore*, 452 F.3d 382, 391 (5th Cir. 2006) (citation omitted). Harmless error analysis applies to faulty jury instructions. *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co*., 175 F.3d 1221, 1236 (10th Cir. 1999) (citation omitted).

Errors are harmless when the erroneous instruction could not have changed the result of the case. *Lusby v. T.G. & Y. Stores, Inc*., 796 F.2d 1307, 1310 (10th Cir. 1986). Moreover, prejudice will not be found where the instructions state the applicable law of the case. *McAlpine v. Rhone-Poulenc Ag Co*., 16 P.3d 1054, 1057 (Mont. 2000). "If there is no inherent prejudice in the inclusion [or exclusion] of a particular jury instruction, prejudice must be affirmatively shown on the face of the record, and *it cannot be presumed*." *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 29 N.E.3d 921, 931 (Ohio 2015) (emphasis added).

1. The Petitioners Failed to Meet Their Burden of Proving All of the Elements of Their Failure-To-Warn Claim Because They Did Not Prove That Zuul's Warning Was Inadequate.

The Petitioners' failure-to-warn claim should not even have reached the jury originally because the Petitioners failed to present evidence of what would have constituted an adequate warning. Given this, Petitioners suffered no prejudice as a result of the Trial Court denying their jury instruction. Failure-to-warn claims may be brought under either a negligence or strict liability theory. *Moore v. Ford Motor Co*., 332 S.W.3d 749, 764 (Mo. 2011). Regardless of the theory chosen by Petitioners, the same facts may support recovery under either theory in a failure-to-warn case. *Id.* (citation omitted). One of the elements that Petitioners must establish, under both theories, is that the product did not contain an adequate warning of the alleged defect or danger. *Id.* at 756, 764. Likewise, the heeding presumption requires a plaintiff prove that the warning was inadequate in order for it to apply. *See Grose*, 586 So. 2d at 198.

As previously noted, Ohiowa's statute is substantially similar to Indiana's statute. In Indiana, in order for a failure-to-warn claim to be submitted to the jury, a plaintiff must offer some evidence of the content or placement of a warning that would have prevented the danger in question. *See Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 358 N.E.2d 974, 978 (Ind. 1976). This evidence is indispensable "to a rational conclusion that such unreasonably dangerous condition was the proximate cause of the accident and injury." *Id.* at 978. If the plaintiff fails to offer this evidence, it places a burden on the court to create hypothetical warnings that would have altered the plaintiff's behavior. *Id.* at 464. Such speculation has no place in a judicial process. *Id*.

Due to the similarity between Indiana's and Ohiowa's statutes, Indiana case law is instructive on this matter, too. As is the case in Indiana, the plaintiff has the burden to prove that the defendant's warning was inadequate. *See id.* As such, Petitioners had the burden in the Trial

Court to prove that the warning Zuul provided was inadequate. Petitioners failed to present evidence that any content or warning would have prevented the incident in question. Zuul had a warning label affixed to its packaging for all to see. (R. 4.) Petitioners had the burden to prove that this warning was inadequate, and Petitioners failed to do so. By failing to provide evidence as to an essential element of Petitioners' failure-to-warn claim, the claim should not have reached the jury in the first place. Therefore, Petitioners experienced absolutely no prejudice in being denied a jury instruction on the heeding presumption.

2. If This Court Finds That Petitioners Were Entitled to a Jury Instruction on the Heeding Presumption, They Were Not Prejudiced by the Exclusion of It Because the Presumption Would Have Been Rebutted.

Even if Petitioners received an instruction on the heeding presumption in the Trial Court, the presumption would have been rebutted, and thus, the jury would have still found for Zuul. Jurisdictions that apply the heeding presumption concede that it "is rebuttable by evidence sufficient to demonstrate that had a warning been provided, it would have been disregarded by the plaintiff." *Theer v. Philip Carey Co*., 628 A.2d 724, 726 (N.J. 1993); *accord Dole Food Co. v. N. Carolina Foam Indus., Inc*., 935 P.2d 876, 883 (Ariz. Ct. App. 1996); *Miller v. Pfizer Inc*., 196 F. Supp. 2d 1095, 1127 (D. Kan. 2002), *aff'd*, 356 F.3d 1326 (10th Cir. 2004).

The presumption can be rebutted by demonstrating that the cause-in-fact of the injury was the plaintiff's conduct, rather than the absence of an adequate warning. *Coffman v. Keene Corp*., 628 A.2d 710, 721 (N.J. 1993). In those circumstances where "the user is cautioned of the risk and ignores that advice, there is no reasonable basis to assume that the user would have heeded a warning from the manufacturer," and therefore, the presumption disappears. *Town of Bridport v. Sterling Clark Lurton Corp*., 693 A.2d 701, 704 (Vt. 1997) (discussing *Menard v. Newhall*, 135 Vt. 53, 53, 373 A.2d 505, 506 (1977)).

In *Menard*, a child ignored his father's instructions as to what he could shoot with a BB gun. *Id.* Instead of heeding the warning, the child shot his friend. *Id.* The court found that where a child ignores previous warning, it meant that no warning could have prevented the accident either way, and "thus the presumption disappeared and there was no genuine issue of fact as to causation." *Id.* Like the child in *Menard*, L.T.'s babysitter warned him many times not to play with the Zuul. (R. 5.) Despite the babysitter's multiple warnings, L.T. disregarded them, picked up the Zuul, and played with it. (*Id.*) By ignoring the warnings from the babysitter, L.T. demonstrated an indifference to safety warnings. L.T.'s indifference is evidence that shows he would not have used it properly regardless of any warning. *See Jacobs*, 480 S.W.2d at 606. Therefore, L.T.'s conduct was the cause-in-fact of his injuries.

If the Trial Court instructed the jury on the heeding presumption, then it also would have instructed the jury on the fact that it is rebuttable. There is evidence in the record that rebuts a presumption that if Zuul provided an adequate warning, then L.T. would have read and heeded such a warning. As noted by the Appellate Court, "the jury had a wealth of evidence upon which to base their decision." (R. 12.) The jury heard testimony from all named parties and deliberated for approximately 16 hours. (*Id*.) Given this, it cannot be stated that the inclusion of the jury instruction would have been the deciding factor in finding for Petitioners. Furthermore, it cannot be said that the alleged error would have changed the result of the case. Therefore, if this Court concludes that the Trial Court abused its discretion, reversal is not warranted because no prejudice resulted from such abuse.

CONCLUSION

For the foregoing reasons, this Honorable Court should AFFIRM the decision of the Appellate Court.

Respectfully submitted,

Team F

APPENDIX

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Ohiowa Revised 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 Revised 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

Indiana Code Annotated § 34-20-2-1 Grounds for Action.

Except as provided in section 3 of this chapter, a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property is subject to liability for physical harm caused by that product to the user or consumer or to the user's or consumer's property if:

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

(2) the seller is engaged in the business of selling the product; and

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