No. 20-2206

IN THE SUPREME COURT OF THE STATE OF OHIOWA

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

Petitioner,

v.

ZUUL ENTERPRISES, an Ohiowa corporation,

Respondent.

On Appeal from the Court of Appeals for the State of Ohiowa

BRIEF FOR THE RESPONDENT

Counsel for the Respondent
Team H

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I. Whether the appellate court properly granted summary judgment in favor of a manufacturer after finding a child could not be considered a foreseeable consumer of a product intended for adults.

II. Whether under Ohiowa state law, the trial court abused its discretion in not allowing a jury instruction on the heeding presumption when no Ohiowa statute or court decision recognizes such a presumption and so no prejudice could have occurred as a result.

Statement of the Case

Zuul Enterprises is an e-cigarette company established in Cincinnatus, Ohiowa in March 2016 (R. at 3). Founder Pete Venkman created the e-cigarette known as Zuul as a safer alternative to tobacco cigarettes. (R. at 3). When a user depresses a button on the device, the flavored liquid in a cartridge is heated by an atomizer, thus turning into vapor. (R. at 4). This vapor is then inhaled by the user through the mouthpiece of the device. (R. at 4). Each Zuul came with a warning affixed to its packaging of the danger of use. (R. at 4). The design of the Zuul as well as the variety of flavored liquid cartridges resulted in the immense popularity of the products. (R. at 4).

Zuul's most popular flavors were that of fruit punch, cotton candy, blue raspberry, and Hi-C Ecto Cooler. (R. at 4). In December 2017, a federal district court issued an injunction againt the production of these flavors, holding that Zuul use of the flavors was a marketing tactic to draw children to the product. (R. at 4). Zuul responded, denying any intention of marketing the product to children. (R. at 4).

As a sign of good faith, Zuul resolved to limit its flavors to just one of "classic tobacco" to avoid drawing children to the product. (R. at 4). The product was also redesigned to ensure only Zuul cartridges could be used and prevent the possible use of sweet flavor cartridges from other

companies. (R. at 4). Along with the redesign, product accessory was introduced known as "Zuul skins." (R. at 4). These skins, containing no additional warning labels, allowed users to customize their Zuul by attaching adhesive labels with various decorations and licensed characters. (R. at 4).

On July 17, 2018, Louis and Janine Tully left their 11-year old child, L.T., with Dana Barrett, a college sophomore who babysat often for the Tully family. (R. at 5). Barrett was a user of Zuul e-cigarettes and had been since she entered college. (R. at 5). Barrett also used a Zuul skin to decorate her device with the animated character *Hola Gato.* (R. at 5).

On previous occasions, Barrett had warned L.T. of the danger of playing with the Zuul. (R. at 5). The Zuul was left unattended and in the reach of L.T. (R. at 5). L.T. grabbed the e-cigarette and began playing with the device, pressing the activation button, "mimicking the operation of a leaf blower." (R. at 5). The e-cigarette exploded in L.T.'s hand, resulting in severe burns. (R. at 5).

The Tullys filed a complaint alleging that Zuul Enterprises (1) violated state product liability law due to a manufacturing defect that caused the explosion, and (2) failed to warn of the risks associated with using the e-cigarette. (R. at 2). Zuul moved for summary judgment on the grounds that L.T. was not a foreseeable user of the e-cigarette and that they had provided sufficient warnings to users as seen on the packaging. (R at 3). The Court of Common Pleas granted summary judgment on the first claim, holding that children were not considered foreseeable users of the product. (R. at 3). The failure to warn claim proceeded to trial where the Tullys request a heeding presumption jury instruction. (R. at 3). The lower court denied the jury instruction and held for Zuul Enterprises. (R. at 3).

On appeal, the Tullys raised two claims: (1) that the trial court's granting of summary judgment was inappropriate as there was an issue of material fact that remained, specifically

whether a child could be considered a foreseeable consumer of Zuul products; and (2) that the trial court erred in not allowing the requested jury instruction to be introduced. (R. at 3). The Court of Appeals for the State of Ohiowa found that the trial court's granting of summary judgment was appropriate. (R. at 3). L.T. was not considered a foreseeable consumer, and thus Zuul was not liable for the injuries. (R. at 8-9). The Court of Appeals also found that though the lower court abused its discretion in not allowing the introduction of the jury instruction, the lower court was affirmed since there was no prejudice as a result. (R. at 12).

Summary of the Argument

There is no genuine issue of material fact to be determined on the manufacturing defect claim. Under Ohiowa Rev. Code § 552.368, a manufacturer is only liable for injuries sustained by foreseeable consumers of their product. Additionally, the Restatement (Second) of Torts § 402A cmt. 1 states that for consumers, it is necessary they used the product as intended. Because Zuul manufacturers an e-cigarette that is intended for adults, L.T., being 11 years old, is not considered a consumer in this case. L.T. also misused the product, indicating a deviation from the requirement for consumers. Therefore, there is no genuine issue of material fact to determine because a child is not a reasonably foreseeable consumer of a tobacco product.

The trial court did not abuse its discretion in failing to allow a jury instruction introducing the heeding presumption. As no Ohiowa statute or precedent case law has adopted the heeding presumption, the jury instructions in its entirety informed the fact finders of applicable law. The facts of the case do not present themselves to be ideal for this Court to determine the applicability of the heeding presumption through a variation of users and discrepancies in the adequacy of warnings. Furthermore, the American Law Institute has explicitly rejected the heeding presumption in its promulgation of the Restatement (Third) of Torts.

Where the Ohiowa Court of Appeals found there to be an abuse of discretion in failing to allow the jury instruction, reversal is not required as there was no prejudice as a result. Petitioner failed to prove that the jury would have ruled differently if the instruction was included. This Court should affirm the summary judgment in favor of Zuul Enterprises and find that the trial court did not abuse its discretion pursuant to applicable law of Ohiowa.

Standard of Appellate Review

A moving party is entitled to summary judgment when there is no genuine issue of material fact. Ohiowa R. Civ. Proc. 56(A). A decision for summary judgment is reviewed de novo. *Greubel v. Knappco Corp.*, 160 F.3d 409 (7th Cir. 1998). A lower court's refusal of a jury instruction is reviewed for an abuse of discretion. *Carter v. Mechanical Services,* 746 P.4d 807, 811 (Ohiowa 2012) (see also *McAlpine v. Rhone-Poulenc Ag Co.,* 16 P.3d 1054, 1057 (Mont. 2000)).

Argument

I. There is no genuine issue of material fact to be determined because L.T. was not a foreseeable consumer of the Zuul product and L.T. did not use the Zuul product in its intended manner.

Although the product manufactured by Zuul was found to be defective by the lower court, Zuul cannot be held liable for injuries sustained by L.T. because there is no genuine issue of material fact that he was not a foreseeable consumer and he did not use the product in its intended manner. Therefore, summary judgment should be affirmed on the manufacturing defect claim.

The Ohiowa Product Liability Act (OPLA) dictates when a manufacturer is liable for a defective product that causes physical harm to a consumer. Under the OPLA, Ohiowa Rev. Code § 552.368 establishes liability for a manufacturer when a defective product causes physical harm to the consumer. A manufacturer of a product can only be held liable when (a) the consumer is in

a class of persons the manufacturer can reasonably foresee as being subject to the harm caused by the defective product; and (b) the product that injured the consumer did not undergo a substantial alteration in the condition after the product left the manufacturer's possession. Ohiowa Rev. Code § 552.368. When Ohiowa Rev. Code § 552.368 is applied to this case, Zuul is not liable for harm caused to L.T. because L.T. is not in a class of foreseeable consumers and there is no evidence that the product was never altered before reaching L.T. Further, L.T. did not use the product as intended by Zuul, nor was the product used in a foreseeable manner. Because there is no genuine issue of material fact to be determined, and summary judgment for Zuul was properly granted by the Court of Common Pleas and the Ohiowa Court of Appeals.

A. Zuul cannot be held liable under OPLA for L.T.'s injuries because L.T. was not a reasonably foreseeable consumer of the product.

The Court of Common Pleas held that under OPLA, children, including L.T., are not foreseeable consumers of the products manufactured by Zuul. The Ohiowa Court of Appeals agreed. There is no definition of "consumer" in the OPLA, nor has an Ohiowa court previously established a definition. The Court of Appeals appropriately looked at the Restatement (Second) of Torts upon which the OPLA was based for guidance.

While the Restatement (Second) of Torts was heavily relied on when drafting products liability statutes in Ohiowa, there are notable differences. The Court of Appeals emphasized that the Restatement (Second) of Torts creates liability to "ultimate users or consumers" of a product whereas the OPLA only enforces liability to "consumers" of a product. Under Restatement (Second) of Torts § 402A(1), a seller of a product can be liable for physical harm "caused to the ultimate user or consumer, or to his property…" In contrast, the Ohiowa legislature adopted a narrower approach, stating that liability only extends to "any consumer or to the consumer's

property." Ohiowa Rev. Code § 552.368. The elimination of the phrase "ultimate users" from the Ohiowa statute indicates that the legislature intended to limit the class of those who may recover in a products liability action. Additionally, for someone to be a consumer, it is necessary that they ultimately used the product as intended. Restatement (Second) of Torts § 402A cmt. 1. Comparing the Ohiowa statute with the Restatement (Second) of Torts, the Ohiowa Court of Appeals correctly concluded that a strict reading of the two sources revealed that liability would only extend to consumers, including those that used the product as intended.

In addition to the Restatement (Second) of Torts, the Ohiowa legislature also relied upon state products liability statutes in the Sixth, Seventh, and Tenth Circuits when the OPLA was adopted. In *Todd v. Societe Bic, S.A.*, the Seventh Circuit distinguished an ordinary consumer from a foreseeable user and affirmed summary judgment in favor of a manufacturer after a child used a disposable lighter to start a fire. *Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1413 (7th Cir. 1994). Despite being warned of the danger associated with a lighter, a four-year-old child lit papers on fire in an upstairs bedroom causing a fire that ultimately claimed the life of an individual inside the house. *Id.* A lawsuit was filed against the manufacturer of the lighter, claiming that even though the four-year-old child was not an ordinary consumer of the product, the child was a foreseeable user. *Id.* Using the Restatement (Second) of Torts § 402A as guidance, the court disagreed with this claim and ruled in favor of the manufacturer. *Id.* The court concluded that assessing liability from a child's perspective of a product's expectations "removes well-designed limitations" in any case where a child has suffered an injury. *Id.* at 1408. Considering a child to be a foreseeable user in this case would subject a manufacturer to liability every single time a child is injured. *Id.* In conclusion, the court affirmed summary judgment in favor of the manufacturer because there was no genuine issue of material fact as to the unreasonable danger of a disposable lighter. *Id.* at 1413.

Additionally, in *Rohrbaugh v. Celotex Corp.* the Tenth Circuit affirmed summary judgment in favor of a manufacturer, finding that the manufacturer could not be liable for the death of a third party that was exposed to asbestos dust contained with the manufacturer's product. *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181 (10th Cir. 1995). The decedent had been exposed to asbestos dust contained in her husband's work clothes, which led to life threatening medical issues. *Id.* at 1182. The court stated that in Oklahoma, a consumer is someone "who would be foreseeably expected to purchase the product involved." *Id.* at 1183. The decedent was not a foreseeable purchaser of user of the manufacturer's product; therefore, the manufacturer had no duty to warn the decedent of any potential health problems their product may cause. *Id.* The Tenth Circuit concluded there was no genuine issue of material fact because a manufacturer is not liable to unforeseeable consumers. *Id.*

Like *Todd*, where a child was not considered a consumer of a product manufactured and intended for adults, L.T. cannot be considered a consumer of the e-cigarette manufactured by Zuul. Both L.T. and the child in *Todd* were warned of the dangers of the products in question; however, these warnings were ignored, and injury resulted. Using the analysis set forth by the Seventh Circuit, holding Zuul liable for L.T.'s injuries would contradict the limits in the Restatement (Second) of Torts. A child is not an ordinary consumer, nor a foreseeable user, of an e-cigarette and ruling otherwise would allow for the liability of a manufacturer any time a child has suffered injury as a result of avoiding explicit warnings.

Similar to *Rohrbaugh*, where the Tenth Circuit held that liability does not extend to unforeseeable consumers, there is no liability to L.T. While the court in *Rohrbaugh* uses a stricter law requiring a consumer to be the ordinary purchaser of a product, this ensures the protection of manufacturers from unforeseeable lawsuits. Using this narrow interpretation of a consumer

definition, L.T. would not be a consumer because a child is under the legal age to purchase an e-cigarette. Like the Tenth Circuit has previously ruled, there is no genuine issue of material fact when determining if a manufacturer is liable to an unforeseeable consumer of a product.

Further, the Ohiowa statute mentions that in addition to the consumer being in a specific class of persons, a manufacturer is only liable if the product "reaches the consumer without substantial alteration in the condition in which the product is sold…" Ohiowa Rev. Code § 552.368(b). While the lower court did not address the second subsection of the governing statute, this provides additional support for absolving Zuul from liability. A possible explanation for the lower courts' lack of inquiry into Ohiowa Rev. Code § 552.368(b) could be because in this case, the first required element of Ohiowa Rev. Code § 552.368 was not satisfied because L.T. was not a foreseeable consumer; therefore, it would be unnecessary to proceed with a further, in depth analysis of the statute. However, the facts of this case do not satisfy the required second element of the statute. If L.T. was considered a consumer, there is no evidence indicating the e-cigarette was possessed by L.T. in the same condition that the product was sold by Zuul. The e-cigarette belonged to Ms. Barrett for a period of time before the July 17, 2018 incident occurred. During this time period, it has been established that Ms. Barrett affixed a *Halo Gato* skin to the e-cigarette. One could reasonably conclude this is a substantial alteration to the product in the sense that the outward appearance of the e-cigarette is completely transformed and concealed.

Even though the use of the *Hola Gato* skin attracted L.T., this does not make a child a foreseeable consumer of a product marketed for adults. Many other adult products may appear attractive to a child; however, the child would still not be considered foreseeable consumers of these products. For example, it has been established that children are drawn towards sweet flavors, such as fruit punch, cotton candy, and blue raspberry. While Zuul eliminated these flavors from

their line of products as a way to deter underage individuals from using their products, many companies engaged in alcohol sales rely heavily on these flavors to promote their products. There is no question as to whether or not alcohol is intended for consumers under the age of 21 years old. Similarly, there is no question as to whether or not an 11-year-old child, such as L.T., is the foreseeable consumer of a product manufactured and intended for consumers over the age of 18 years old. As a matter of judicial fairness and efficiency, a manufacturer cannot be held liable every time a product is acquired by a child simply because it is appealing.

B. Even if L.T. was considered a consumer under OPLA, Zuul cannot be held liable because L.T. did not use the product in its intended manner.

The Ohiowa Court of Appeals was correct in finding that L.T. did not use the product as intended to be used by Zuul. Also, the court stated that if L.T. had used the product as intended, he might have had a better chance of being considered a consumer. To reach this finding, the court interpreted the Restatement and concluded that liability of a manufacturer extends to consumers, including consumers who used the product as it was intended.

Zuul's intention for designing and manufacturing their e-cigarette product was to provide consumers with a safer alternative to tobacco cigarettes. The Zuul e-cigarette is similar to traditional cigarettes because both products produce a tobacco-flavored vapor to be inhaled by the consumer. To use a Zuul product properly, a consumer would press the button on the e-cigarette and then inhale the vapor through the mouthpiece on the e-cigarette. Another similarity between an e-cigarette and a traditional cigarette is that both products produce high levels of heat, either through a heating device or an open flame. There is no question as to whether or not a product that

produces heat can be dangerous; therefore, it is critical that a consumer uses the product in the safe, intended manner in which it was manufactured and marketed to be used.

Support can be found in the Restatement (Second) of Torts, as well as the Seventh Circuit Court of Appeals, for determining when a manufacturer should be liable for unintended, misuses of their products. The Restatement claims that for a consumer, it is only necessary that they have used the product as intended." Restatement (Second) of Torts § 402A cmt. 1. Additionally, in *Greubel v. Knappco Corp.*, the Seventh Circuit granted summary judgment in favor of a manufacturer on the grounds that the manufacturer could not be held liable for unforeseeable uses of their product. *Greubel v. Knappco Corp.*, 160 F.3d 409 (7th Cir. 1998). A coal handler suffered severe burns after the coal handler's employer improperly installed an access door that as made by the manufacturer. *Id.* at 410-11. The manufacturer provided a description of the access door and its suitable uses; however, the employer chose to install the door for use in a collector. *Id.* The court found that the use of the door was not foreseeable and affirmed summary judgment for the manufacturer. *Id.* at 413.

L.T. demonstrated a misuse of the product by waving the e-cigarette in front of his body. The Ohiowa Court of Appeals described L.T.'s actions as mimicking someone using a leaf blower. Further, the Ohiowa Court of Appeals noted that a consumer cannot expect a product to perform properly when the product is not used in accordance with its intended use. A reasonable person could conclude that waiving a traditional cigarette in front of one's body could result in substantial harm because this is not the way a traditional cigarette is created for use. Therefore, because of the similarity in the two products, it is equally possible that a reasonable person would find that an individual that waives an e-cigarette in front of their body, while depressing the power button, has not only misused the product, but has also subjected themselves to substantial harm. This is exactly

what L.T. did by picking up a product he knew was dangerous and negligently choosing to waive the engaged, e-cigarette in front of his body. Since L.T. was not a foreseeable consumer of the product and he did not use the product in the intended manner, Zuul is not liable for the physical injury to L.T. and there is no genuine issue of material fact to determine. Accordingly, this Court should affirm summary judgment in favor of Zuul.

II. The trial court did not abuse its discretion in refusing the jury instruction as the heeding presumption does not apply in Ohiowa.

Refusing the proposed jury instruction on the heeding presumption was not an abuse of discretion as it is not applicable law in Ohiowa. In determining whether the refusal of a jury instruction was proper, courts often look to the instruction as a whole, and also in conjunction with the evidence presented at trial. *Carter,* 746 P.4d at 811. "Jury instructions must fully and fairly inform the jury of the law applicable to the case." *Peterson v. St. Paul Fire & Marine Ins. Co.,* 239 P.3d 904, 911 (Mont. 2010). Where the Ohiowa Court of Appeals found that the district court erred in not providing the requested jury instruction, the trial court assured that the instructions given to the fact finder were founded on applicable Ohiowa law.

Restatement (Second) of Torts described the heeding presumption in saying "[w]here warning is given, the seller may reasonably assume that it will be read and heeded." Restatement (Second) of Torts §402A, cmt. j. The presumption is that if an adequate warning is given, it will be read and heeded by the plaintiff. *Seley v. G.D. Searle & Co.,* 423 N.E.2d 831, 838 (1981). Such presumption can be used in favor of the seller or in favor of the plaintiff, when an inadequate warning is given. *Dole Food Co. v. N. Carolina Foam Indus., Inc.,* 935 P.2d 876, 883 (Ct. App. 1996). Benefitting the plaintiff, a rebuttable presumption arises that the inadequate warning proximately caused the plaintiff's injury. *Seley,* 423 N.E.2d 838. Looking to Ohiowa precedent

and applicable law, as well as the progression of the Restatement of Torts, the trial court did not err in refusing the jury instruction on heeding as it was not applicable law.

A. The jury instruction was properly based on law that was applicable to the present case as to not mislead the jury.

When the trial court refused to introduce the jury instruction, the heeding presumption was not considered applicable law in Ohiowa. Neither the OPLA nor any court decision of Ohiowa law says that the heeding presumption is applicable law. For a jury instruction to be proper, the foremost criteria is that it clearly and accurately state applicable state law.

Had the Ohiowa trial court presented the jury instructions, they would have misled the jury with a presumption that was not applicable case law. In *Patch v. Hillerich & Bradsby Co.*, jury instructions were questioned as to whether they properly instructed the jury on failure to warn. *Patch v. Hillerich & Bradsby Co.,* 257 P.3d 383, (Mont. 2011). The instruction in question read:

> A product may cause injury because of inadequate warning. In order to recover for such injury, the Plaintiff must prove:
> First, that the Defendant manufactured or sold the product in a defective condition because of a failure to adequately warn of those dangers which would not be readily recognized by a bystander.
> Second, that the failure to provide adequate warning cause injury to the Plaintiff.

Id. at 390. The manufacturer argued that the use of "bystander" as opposed to "ordinary user of the product" pursuant to Montana Pattern Jury Instruction was erroneous. *Id.* The proffered exclusion of bystander as an interpretation of an ordinary user of the product was found to be "incongruent with this Court's products liability jurisprudence." *Id.* at 387. The manufacturer also argued the court's refusal of a proposed final sentence to the instruction, stating, "Causation for a failure to warn claim requires proof that a warning would have altered the use of a product or prompted precautions to avoid the injury." *Id.* Such sentence introduced a standard of proof that

the court did not recognize as applicable law to the case. *Id.* The court found that the instructions, in its entirety, did correctly state the applicable law. *Id.* at 391.

While some states do recognize the heeding presumption, many other do not. In nineteen jurisdictions, the heeding presumption has been adopted by either a federal or state court. However, four of these jurisdictions, New Jersey, Pennsylvania, Texas, and Wisconsin, have either since abolished by statute, eliminated, or restricted the heeding presumption to solely apply to prescription medical products. The remaining jurisdictions do not recognize a heeding presumption, with the exception of a few jurisdictions that limit the application to prescription medical products. There are eighteen jurisdictions, after the abolition of Wisconsin, who have rejected the adopt of the heeding presumption in any situation. After the adoption of the Restatement (Third) of Torts, there has been no state appellate court which has recognized the heeding presumption. In failing to give the heeding instruction, the trial court did not abuse its discretion. As Ohiowa had not adopted the presumption, and the presumption was repudiated by the American Law Institute, it cannot be constituted applicable law. In rejecting the instruction, the trial court was ensuring that the jury would not be misled by law that was not applicable to the case. This did not constitute an abuse of discretion, but rather a safeguard to the unfortunately ambiguous presumption that has not been recognized by Ohiowa.

B. The present case is not the proper instrument through which Ohiowa should decide the applicability of the heeding presumption.

As product liability law in Ohiowa tends to favor the consumer, this presumption would be interpreted to allow the factfinder to presume that had an adequate warning been provided by Zuul

Enterprises, the consumer would have read and heeded the warning. The Tully's wanted to allow for a jury instruction that would let the fact finder presume had Zuul provided an adequate warning of the dangers of the e-cigarette, the injury to L.T. would not have resulted. However, the particularities of this case do not lend itself to be one where clear precedent could be set for the state of Ohiowa. This Court should choose to follow other states in deciding on the heeding presumption where the facts present a clearer basis for precedent and understanding of the presumption.

In *Duke v. Gulf & Western Mfg. Co.*, Missouri Court of Appeals recognized a heeding presumption when the machinery lacked warnings that, if read, would have caused a change in the consumer's behavior. *Duke v. Gulf & Western Mfg. Co.,* 660 S.W.2d 404 (Mo. Ct. App. 1983). The claimant was operating the manufacturer's die-press. *Id.* at 407. While not using a guard, the claimant was injured by the press, resulting in the amputation of four fingers. *Id.* The issue before the court was whether the claimant had a knowledge of the dangers of operating the press without a guard. *Id.* at 418. For the factfinder's determination, the court agreed with Indiana's use of a rebuttable heeding presumption instruction where the claimant would have heeded a warning to not operate the press without a guard. *Id.* at 419.

In *Coffman v. Keene Corp.,* the New Jersey Supreme Court recognized a rebuttable heeding presumption to assist the plaintiffs in proving proximate causation. *Coffman v. Keene Corp.,* 628 A.2d 710. An electrician was exposed to asbestos products provided by the manufacturer while renovating on his workplace. *Id.* at 712. The court stated that "causation is a fundamental requisite for establishing any product-liability action." *Id.* at 716. As such, the electrician would need to prove that the lack of warning of the risks associated with the use of asbestos products

was the proximate cause of harm. *Id.* If a warning had been given, the jury was instructed to presume that the electrician would have heeded such. *Id*.

The adequacy of the warning is in question since there was no additional warning on the skin whose purpose was to accessorize the e-cigarette. Had instead the Zuul, without the skin, exploded in the hands of Ms. Barrett, this Court could decide whether Ohiowa would adopt the heeding presumption. As such, there could be a causation relationship between Zuul's warnings on the e-cigarette, and Ms. Barrett's reading and heeding of such warning. As in *Duke* and *Coffman,* Ms. Barrett's injury could be proven to be a proximate cause of Zuul's failure to warn.

Where that is not the case at hand, if the heeding presumption were to be applied, causation would be drawn from the lack of warning on the *Hola Gato* skin to L.T.'s injuries. If adopted in this case, the presumption would allow the jury to find that had Zuul affixed an adequate warning to the skin, or the packaging thereof, that L.T. would have read and heeded said warning. However, as L.T. was not the owner of the e-cigarette, it is unreasonable to assume that he would have not only read the warning on the packaging of the e-cigarette, but that he would have read the warning on the skin, if the design of *Hola Gato* somehow incorporated an adequate warning.

Unlike presumptions presented in *Duke* and *Coleman,* adopting a presumption on this case would be based on arbitrary expectations. If the warning were on the packaging, it is reasonable to believe that Ms. Barrett threw out the packaging after affixing the skin. Additionally, L.T., who was an unforeseeable user of the e-cigarette, was previously warned on multiple occasions of the danger of the e-cigarette by the main user, Ms. Barrett. In allowing the heeding presumption, the jury is hoping that a warning in writing from the manufacturer would prove to be more effective than that of L.T.'s babysitter. Where an operator of a machine, as in *Duke,* can

be reasonably presumed to read and take heed of warnings, a minor to whom the product is not designed for cannot be presumed to take heed of warnings. This Court should not decide the application of the heeding presumption based on the facts present in this case as to allow for a clear application to be set as precedent.

C. This Court should follow the Restatement (Third) of Torts in not applying the heeding presumption.

If this Court decides the present case is the instrument through which to decide the applicability of the heeding presumption in Ohiowa, it should not adopt the presumption. No Ohiowa statute or precedent case law has established the adoption of such a presumption. Ohiowa looked to the Restatement (Second) of Torts as instructive when drafting its own product liability laws but chose to not adopt the heeding presumption. The "learned intermediary doctrine," derived from the same comment j, was adopted by Ohiowa. Had Ohiowa wanted to include a presumption in §402A cmt. j, it knew how to do so. As such, the Ohiowa legislature has had a full and complete opportunity to include the heeding presumption in the statute yet chose not to. Furthermore, any move by the State of Ohiowa to adopt the heeding presumption should be taken by the legislature. If this Court were to attempt to define the presumptions taken by consumers and sellers in product liability cases without a foundation in precedent or law, it would essentially infringe on and usurp the function of the legislature.

Even if the Court concludes that the legislature is not due deference here, the Court should not adopt the heeding presumption because it does not accurately state common law. For all practical purposes, the American Law Institute's Restatements embody American common law. In preparing its Restatement (Third) Torts, the institute seems to have explicitly rejected the heeding presumption included in the earlier restatement. A reporter's note describes comment j

as "unfortunate language," having "elicited heaving criticism from a host of commentators." Restatement (Third) of Torts, *Products Liability* §2 cmt. 1. For these reasons, this Court should find that the instruction on heeding presumption was rightfully denied, and that such presumption should not be adopted by the state of Ohiowa.

III. Assuming arguendo that the lower court did abuse its discretion in failing to include the jury instruction, there was no prejudice as a result.

If this Court determines that the lower court erred in refusing a jury instruction on the heeding presumption, reversal is not appropriate as there was no prejudice. Reversal on the grounds of a deficient jury instruction is warranted when the instruction is found to be prejudicial. *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 62 F.3d 1257, 1262 (10th Cir. 1995). Furthermore, this Court has required that a lower court's error must have a prejudicial result for it to be reversed. *Carter v. Mechanical Services,* 746 P.4d 807, 811 (Ohiowa 2012).

In determining whether the refusal of the jury instruction was prejudicial, courts may look to whether the instruction was of the kind that could mislead the jury. *Gardetto v. Mason,* 100 F. 3d 803, 816 (10th Cir. 1995). Stated otherwise, whether the instructions "properly guided the jury in its deliberations." *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.,* 175 F.3d 1221, 1235 (10th Cir 1999). The burden to show prejudice is on the party claiming an error in instruction. *McAlpine v. Rhone-Poulenc Ag Co.,* 16 P.3d 1054, 1057 (Mont. 2000).

Without evidence from petitioner that the refusal of a jury instruction resulted in prejudice, such conclusion cannot be drawn. In *Sherouse v. Ratchner*, instructions given were found to be erroneous in determining the civil rights of two women suspected of robbery. *Sherouse v. Ratchner*, 573 F.3d 1055 (10th Cir. 2009). The instruction read that "[a] police officer's probable

cause determination is not negated if the officer reasonably but mistakenly believed that probable cause existed at the time of arrest." *Id*. at 1059. This instruction was found to be erroneous. *Id.* The Tenth Circuit clarified that "an officer's reasonable but mistaken understanding of the facts justifying a search or seizure does not negate the legitimacy of a probable cause determination, an officer's reasonable but mistaken understanding of the applicable law he is enforcing does." *Id*. The officer's made a mistake of fact; misidentifying the plaintiffs. *Id.* The plaintiff presented no evidence that the officer's made a mistake of law that would prejudice them or mislead the jury. *Id.* The court found there to be no prejudice to have resulted from the erroneous instruction. *Id*. at 1060.

The majority found that no prejudice resulted from the failure to give the requested jury instruction. The petitioner, on appeal, failed to show they were prejudiced by the faulty instruction. The majority remarked that there was a wealth of evidence presented at trial from which the jury could base their verdict. The petitioner offered no proof that they had been prejudiced. Had the heeding presumption been instructed, in conjunction with the evidence presented at trial, there was no showing by the petitioner that the result would have been different. "It cannot be unequivocally stated that the jury would have proffered a different verdict if the requested instruction had been given." (Ohiowa COA Opinion). As in *Sherouse*, though not in the product liability setting, where no proof was offered that the faulty instruction was prejudicial, the petitioner has presented no basis or claim for which prejudice can be found. No proof that the jury would have decided differently with the presumption is present.

The dissent with the majority that no prejudice resulted. As such, each judge who had the opportunity to review the case at hand concluded that failing to give an instruction on the heeding presumption was not an error which required reversal, which conclusion should be upheld.

Conclusion

For the foregoing reasons, we ask this Court to affirm the lower court's judgment holding that summary judgment in favor of Zuul was proper. Additionally, to affirm the lower courts decision that there was no abuse of discretion in refusing the jury instruction, and even if there was, no prejudice occurred as a result.