In the Supreme Court of the State of Ohiowa

	)	
LOUIS TULLY, as father and natural	)	Case No. 20-2206
guardian for minor L.T	)	
And in his own right,	)	
Petitioner ,	)	
vs.	)	
ZUUL ENTERPRISES, an Ohiowa	)	
corporation,	)	
Appellant	)	
	)	

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

BRIEF OF PETITIONER

Team M

Question Presented

I. Whether a child using an e-cigarette when it explodes is a "consumer" under Ohiowa Rev. Code § 5552.368 Rule of Liability?

II. Whether the trial court failed to properly instruct a jury on a failure to warn claim under Ohiowa Rev. Code § 5552.368(b) by refusing to give read and heed jury instruction?

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Constitutional and Statutory Provisions at Issue

Ohiowa Rev. Code § 5552.368 Rule of Liability

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

(a) that consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defect or defective condition; and
(b) the product is expected to and does reach the consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article

Ohiowa Rev. Code § 5552.369 When Product Has Defect

(a) A product is in a defective condition under this article if, at the time it is conveyed by the seller to another party:
  (1) it deviated in a material way from the design specifications, formula, or performance standards of the manufacturer;
  (2) it is in a condition not contemplated by reasonable persons among those considered expected consumers of the product; or
  (3) its condition will be unreasonably dangerous to the expected consumer when used in reasonably expectable ways of handling or consumption.

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

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

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

I. Statement of the Case

a. Children are drawn to Zuul's e-cigarettes.

Even before today's tragedy, Zuul knew its products were attractive to children. r. at 3-5. In 2017, a federal district court determined Zuul marketed its e-cigarettes to kids by producing sweet, candy-like flavors. r. at 4. It is true, they ceased production of sweet flavors and vehemently advertised these are not for kids. r. at 4. Their stock prices, however, took a dive. r. at. Imprudently, in the same press release, they announced "skins" for their e-cigarette cartridges *after* already claiming they are not trying to attract kids. r. at 4.

Zuul's skins are diverse, colorful, depicting even popular children's characters like Halo Gato; and they did their job, Zuul's stock prices soared back to where they stood before a federal court held Zuul marketed its products toward children. r. at 4-5. On top of being fun and colorful, Zuul's skins obscure any warnings present on their e-cigarettes and lack any warnings of their own. r. at 4. Each Zuul e-cigarette's packaging warns of its dangers, but no warnings about their defective activator or atomizer are described in the record. r. at 4.

b. L.T. suffered severe burn's when Zuul's e-cigarette blew up in the child's hands.

Dana Barrett was hired by Louis and Janine Tully[1] to watch their child, L.T. during the summer of 2018. r. at 5. Ms. Barrett used Zuul's e-cigarette device. r. at 5. She put a skin depicting *Halo Gato*, a popular cartoon character, on her e-cigarette. r. at 5. The child-friendly skin completely covered any warning label on Ms. Barrett's device. r. at 4.

L.T appreciates the *Halo Gato* cartoon character and was tempted by the e-cigaretter. at 5. The child got ahold of it and began playing with it. r. at 5. Without warning, the e-cigarette blew up! r. at 5. Zuul's e-cigarettes have a defective activation button and atomizer. r. at 8. Neither party

[1] Hereinafter: "Petitioners"

disputes this defect caused the explosion. r. at 8. As a result of the defective activator and atomizer, the child was left severely burned. r. at 5.

c. Lower courts' rulings.

Because L.T.'s injuries were so severe, the child's parents ("Petitioners") sued Zuul alleging two state products liability claims: (1) that the defective activator and atomizer caused the explosion severely injuring L.T.; and, (2) that Zuul failed to adequately warn of the defects in their e-cigarettes. r. at 2. The trial court granted summary judgement in favor of Zuul, after determining the product was defective, but that L.T. was not a "consumer" under Ohiowa Rev. Code § 5552.368. r. at 9. The failure to warn claim went to a jury, who found for Zuul. r. 3. The jury, however, never received an instruction on the read and heed presumption. r. at 3. Petitioners timely appealed as of right, r. at 3, but the appellate court affirmed. r. at 13. Ultimately, this court granted certiorari. r. at 1.

II. Summary of the Argument

Whether L.T. is a consumer is, at the very least, a genuine issue of material fact; so, this Court must reverse the trial court on Petitioners' manufacturing defect claim.

Ohiowa law already protects consumers by holding sellers liable for the harm their defective products cause. Zuul's argument to restrict the definition of consumer, however, goes against the evolution of products liability law over the last sixty years and would put Ohiowa odds with the majority of other jurisdictions. To avoid such conflict, this Court must adopt the reasonable foreseeability test. Many courts already apply the reasonable foreseeability test which construes the definition of consumer to meet the policy objectives of products liability law.

Here, it is clear L.T. is a consumer, whether Zuul intended for it or not. From the candy-like flavors it previously sold, to its currently marketed "skins" full of children's cartoons, and the knowledge that Zuul's e-cigarettes are popular among teens and young adults—it is almost

inevitable that a child, like L.T., would use their e-cigarettes. r. at 4. At the very least, whether L.T. is a consumer constitutes a genuine issue of material fact. Thus, summery judgement on issue one was inappropriate, and the trial court must be reversed.

Petitioners were unfairly prejudiced when the trial court improperly excluded a read and heed jury instruction on their failure to warn claim.

Whether a read and heed instruction is required has not been specifically answered by this Court or the legislature, but now is the time for this Court to answer in the affirmative. Ohiowa's statute and case law are silent on the issue. Since *Marburry v. Madison* the role of courts has been to say what the law is, and once again this court must do just that. To make its decision, this Court must look to other jurisdictions and Ohiowan legislative history. By following most other jurisdictions and the natural evolution of product liability law, this Court must hold that courts shall provide read and heed instructions to juries on failure to warn claims.

The read and heed doctrine is the law and is consistent with the strict liability statutory scheme the legislature has designed for Ohiowa. The legislature itself relied heavily on other jurisdictions and the Restatement (Second) of the Law of Torts when developing the Ohiowa Product Liability Act (OPLA). The legislature did not statutorily adopt all of the second restatement but the vast majority including the learned intermediary doctrine. The learned intermediary doctrine is a form of the read and heed doctrine that applies to doctors and other medical professionals that breaks the causal chain linking the manufacturer and the end user in failure to warn cases. Applying one form of the read and heed doctrine, the learned intermediary doctrine, while ignoring the original would not only be illogical; it would also be legally inconsistent with current Ohiowa strict liability law.

Not only does the court follow other jurisdictions when filling in the gaps left by a statute they look to the over-arching policy goals of the State and the role this body of law plays in it. Strict liability laws are implemented to hold manufacturers accountable for their products they place in the market regardless if they were negligent or not. An adequate warning may affect the bottom line of a company by losing a few customers who heed their warnings and choose not to use their product, but that is a small price to pay in order to ensure the safety of all Ohiowan citizens. A warning may lose a lot of customers but negative publicity following wanton disregard for a harm their product caused has ended more than one company in the past.

The heeding presumption is the law of the land in the State of Ohiowa and thus is necessary for a proper jury instruction. L.T. and the Tullys were prejudiced when the trail court failed to apply the proper legal standard. The jury needs to use the heeding presumption in order to establish proximate cause in failure to warn cases. Without the ability to prove the proximate cause of the injury the jury simply could not resolve any failure to warn claim let alone L.T.'s. For these reasons this Court should hold that the read and heed doctrine is the law of the land and the lack of its use in the jury instruction prejudiced the Tullys. This Court should issue a new trial consistent with the read and heed legal standard.

III. Argument

Issue I: L.T. was a reasonably foreseeable consumer of Zuul's e-cigarettes.

Summary judgment is only appropriate when no genuine issue of any material fact exists. Ohiowa R. Civ. P. 56(a). The moving party must show they are entitled to judgment as a matter of law. *Id.* On appeal an order granting summary judgment is reviewed de novo, construing the evidence in a light most favorable to the nonmoving party. *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 362 (Iowa 2014).

A. "Consumer" includes all ultimate users of the product who might be foreseeably harmed by a product in many jurisdictions.

The paramount policy objective of products liability is to promote product safety. *See Perkins v. Wilkinson Sword, Inc.*, 700 N.E.2d 1247, 1252 (1998). Courts interpreting product liability doctrine and Section 402A of the Restatement (Second) of Torts have done so broadly, in a "nonrestrictive manner with a view toward implementing the basic policy considerations justifying the imposition of strict products liability expressed in the comments accompanying the text." *Huff v. White Motor Corp.*, 565 F.2d 104, 107 (7th Cir. 1977). Courts can best protect the interests of human life and safety by subjecting manufacturers to strict liability when their products cause harm. *Leichtamer v. Am. Motors Corp.*, 424 N.E.2d 568, 575 (1981). Doing so provides manufacturers a "strong incentive to design, manufacture, and distribute safe products." *Perkins*, 83 Ohio St. at 513, 700 N.E.2d at 1252. Nowhere does this public policy apply "with more force than where it comes to the protection of our children." *Id.*at 514, 700 N.E.2d at 1252. Defining— consumer— in a strict or technical fashion is inconsistent with that public policy objective. *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 512 (5th Cir. 1984), on reh'g, 750 F.2d 1314 (5th Cir. 1985). A consumer is more than just the purchaser.

In *Butler v. City of Peru*, the Indiana Supreme Court interpreted the state's Product Liability Act, which incorporated Section 402A of the Restatement (Second) of Torts. 733 N.E.2d 912, 918 (Ind. 2000). The court held that a school employee who was electrocuted while trying to restore power to an outlet was a "user or consumer" within the meaning of the statute. *Id.* at 919. Under the statute, "user or consumer" should be broadly characterized to include "those who might foreseeably be harmed by a product at or after the point of its retail sale or equivalent transaction with a member of the consuming public." *Id.* The court further held that the category includes purchasers and any member of the consuming public who may be injured

by the defective product, including "a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser." *Id.* Certainly, an innocent child under the care of a babysitter falls into this expansive category.

In *McCormack v. Hankscraft Co.,* a three-year-old girl tipped over a defective vaporizer causing her severe third-degree burns. 154 N.W.2d 488, 493 (1967). There the child's mother left the vaporizer in the child's room unattended. *Id.* The child got ahold of it and tipped the vaporizer, causing near boiling water to spill out onto her. *Id.* Even though she was neither the purchaser nor user of the vaporizer, that court rationalized that "enlarging a manufacturer's liability to those injured by its products more adequately meets public-policy demands to protect consumers from the inevitable risks of bodily harm created by mass production and complex marketing conditions." *Id.* at 338, 154 N.W.2d at 500. The definition of user or consumer must "includ[e] any person who may reasonably be expected to be in the vicinity of its use." *Id.* at 331–32, 154 N.W.2d at 496.

When determining who is and is not a consumer, courts should apply a foreseeability test. *See Davis v. Gibson Products Co.*, 505 S.W.2d 682, 691 (Tex. Civ. App. San Antonio, 1973), *writ refused NRE*, 513 S.W.2d 4 (Tex. 1974) (citing *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965)). In *Davis* a thirteen-year-old boy cut his hand on a machete while pulling it from its sheath in the defendant's store. *Id.* at 684.The court in *Davis* noted that there is only one jurisdiction which has strictly limited its application to users and consumers. *Id.* at 689. The *Davis* court held that the child met the widely accepted application of user and consumer because "[t]here is no adequate rationale or theoretical explanation why non-users and non-consumers should be denied recovery against the manufacturer of a defective product." *Id.* (quoting *Darryl v. Ford Motor Co.*, 440 S.W.2d 630, 632 (Tex. 1969)). The class of persons

protected by the product liability doctrine are not just users or consumers, but human beings. *Id.* at 691 (quoting *Greenman v. Yuba Power Products, Inc.* 27 Cal.Rptr. at 700, 377 P.2d at 900 (1963)).

Children, like L.T., fall within the foreseeable class of consumers of Zuul's e-cigarettes. Zuul markets its e-cigarettes in an appealing manner to teens and children. Zuul was well aware that its flavored tobacco products were consumed in large part by teens. r. at 4. When it was no longer permitted to sell the sweetened tobacco products, Zuul lost a large amount of revenue from its sales to teens and narrowly avoided bankruptcy. *Id.* In response, Zuul created more vibrant and fun skins, some depicting popular children's cartoons. *Id.* Since the days of the Joe Camel's marketing campaigns, however, cigarette manufacturers have known that cartoon marketing is highly appealing to children. *In the Matter of R.J. Reynolds Tobacco Co.*, 127 F.T.C. 49 (1999). The specific skin at issue, *Hola Gato*, is popular among children and is a favorite of L.T.'s. r. at 5. A reasonable jury could have determined that L.T. is among the class of consumers that Zuul should have reasonably foreseen would be harmed by its undisputedly defective product. r. at 8.

Ohiowa's statute yields toward the foreseeability test. Here, the lower court placed far too great an emphasis on a technical application of the definition of consumer. r at 9. The broader definition described above is supported not only by the general policy goals of products liability and prevailing case law in most other jurisdictions, but also Ohiowa's statute itself. Ohiowa's statute requires a fact finder to determine if L.T. was in the class that Zuul should have foreseen as being harmed by its defective product—not if L.T. was a technical consumer. Ohiowa Rev. Code § 5552.368(a) (all "persons that the seller should reasonably foresee as being subject to the

harm caused by the defect or defective conditions" are consumers). He was, and a reasonable fact finder could agree. Thus, summary judgement was inappropriate

B. The trial court's ruling was too narrowly focused on only the intended use of Zuul's e-cigarettes.

A manufacturer is strictly liable when its product is more dangerous than an ordinary consumer would expect when using it in a reasonably foreseeable manner. *State Farm Fire & Cas. Co. v. Chrysler Corp.*, 523 N.E.2d 489, 490 (1988). Narrowly limiting who is a consumer by the product's primarily intended use breaks from the commonsense rationale prevailing in many other jurisdictions and stands against the policy goals typically promulgated in products liability law. A majority of jurisdictions hold that definition of intended use "encompasses foreseeable risk incident to the normal and intended use of the product." *Huff*, 565 F.2d at 107 (noting that a majority of jurisdictions have adopted this rule originally formulated in *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968)). Here, the lower court's ruling diverges from the majority of jurisdictions by limiting consumers of Zuul's e-cigarette to only those who were using it by "pressing the button and raising it to [their] mouth." r. at 9.

In *Spruill v. Boyle-Midway, Inc.*, a child died after consuming a toxic furniture polish. 308 F.2d 79, 81 (4th Cir. 1962). The manufacturer argued that the child's consumption was not the intended use of the product and so they should not be liable for the death of the child. *Id.* at 83. However, the court held that "intended use" is not an inflexible formula and is merely a "convenient measure of reasonable foreseeability of harm". *Id.* at 84. The manufacturer "must also be expected to anticipate the environment which is normal for the use of his product." *Id.* at 83. The polish was intended to be used in the home, in the close proximity to children. *Id.* at 83–84. And because the container "appear[ed] as harmless as a bottle of soft drink," it was "foreseeable that sooner or later some child would draw the fatal draught." *Id.*

L.T.'s actions that led to the explosion of e-cigarette fits well within the majority interpretation of "intended use." Zuul manufactured its e-cigarettes to be used in a normal household as a safe alternative to traditional tobacco cigarettes. r. at 3. Its cartoon skins made the e-cigarette appealing to children, who would likely be in close proximity to the device. Zuul does not dispute that the e-cigarette was in a defective condition when it was manufactured. r. at 8. The action that caused the explosion was the same action that is required for normal operation of the device: pressing the e-cigarette's activation button. r. at 7–8. Even if L.T.'s actions were not the primary use of the e-cigarette, a child pressing the activation button is as least as reasonably foreseeable as a child drinking the toxic furniture polish in *Spuill.* The record contains no contradictory testimony or facts that suggest L.T. pressed the activation button in any unintended manner. r. at 5–8. The activation button's faulty connection could have caused the explosion at any time, even when used by its owner. A reasonable jury could have determined that a L.T. was a consumer using the e-cigarette as intended or in a reasonably foreseeable manner. Thus summary judgement was inappropriate.

C. Alternatively, now is the time for the Court to adopt the risk-utility test, like most other jurisdictions already have.

An overwhelming majority of states employ some variation of the risk-utility test. *See Branham v. Ford Motor Co.*, 701 S.E.2d 5, 14 (S.C. 2010). Instead of determining the meaning of user or consumer, "the inquiry should focus on the condition of the product, not the plaintiff's use of care in operating the product. Specifically, a jury must determine whether the product was defective, and if so, whether the defect rendered the product unfit for its intended or reasonably foreseeable purposes." *Johansen v. Makita U.S.A., Inc.*, 607 A.2d 637, 642 (1992). The jury is required to impose liability on the manufacturer "if the danger posed by the product outweighs the benefits of the way the product was designed and marketed. *Id.* A manufacturer "cannot

escape liability on the grounds of plaintiff's misuse or abnormal use if the actual use proximate to the injury was objectively foreseeable." *Id.* In some states, the adoption of the risk-utility test is specifically meant to give relief to plaintiffs who would otherwise lose in a consumer expectations case. See *Perkins*, 700 N.E.2d at 1249 (citing O'REILLY & CODY, OHIO PRODUCTS LIABILITY MANUAL (1992) 70–71, Section 6.08).

In *Perkins*, the court applied the risk-utility test to hold a butane cigarette lighter manufacturer falls within the test even when the product is properly functioning. *Id.* at 514, 700 N.E.2d at 1252. In *Perkins*, a four-year-old died after starting a house fire with the defendant's disposable butane cigarette lighter. *Id.* at 507, 700 N.E.2d at 1248. The court in *Perkins* found that lighters are commonly kept around the home where "it is reasonably foreseeable that children would have access to them and attempt to use them." *Perkins* at 1252. Moreover, children playing with lighters cause thousands of fires, resulting in injury and death that is estimated to cost annually between "300 million to $375 million. *Id.* The court held that the risk-utility test, codified in Ohio by statute, "fully contemplates that a manufacturer may be liable for failing to use a feasible alternative design that would have prevented harm caused by an unintended but reasonably foreseeable use of its product." *Id.*

L.T.'s use of the e-cigarette is closely analogous to the four-year-old's use of the lighter in *Perkins*. E-cigarette's are as an attractive toy to a child as a butane lighter, especially one with a *Hola Gato* sticker. As a designed alternative for regular cigarettes, e-cigarettes may be found in the same places as a butane cigarette lighter. r. at 3. Zuul knew that children were using its product and the cartoon skins would be appealing to children. r. at 4–7. It is reasonably foreseeable that children would have access to Zuul's e-cigarettes and attempt to use them. Under a risk-utility test, a reasonable jury could have determined that Zuul should be held strictly

liable because the harm caused by its defect was reasonably foreseeable and it could have reasonably adopted a safer design of its e-cigarette that would have eliminated the harmful defect.

Issue II: The read and heed doctrine is the law of the land in the State of Ohiowa; thus, the trial court abused its discretion by failing to include it in the jury instruction.

It is time for this Court to formally adopt the heeding presumption. This is a matter of first impression for the Court. r. at 10. Many jurisdictions outside of Ohiowa already apply some form of the heeding presumption. r. at 10-11. Neither state law nor case law give any clear guidance to whether applying the heeding presumption is proper. r. at 10. Ohiowan law has always looked favorably upon consumers in products liability actions. r. at 11. When drafting the Products Liability Act, the Ohiowan legislature was heavily influenced by the Second Restatement and neighboring jurisdictions. r. at 6.

A. Adopting the heeding presumption is consistent with the Legislature's intent and with the majority of other jurisdictions.

When a State's statute is silent on a legal issue, the Court may look to other States and Federal Courts for guidance on a particular issue of law. *See Keene v. Brigham & Women's Hosp., Inc.*, 56 Mass. App. Ct. 10, 18–19 (2002); *see also, Ammons v. Canadian Nat'l Ry. Co.*, No. 124454, 2019 WL 6907218, at 3 (Ill. Dec. 19, 2019) (stating if the lower federal courts are uniform the court should find them highly persuasive); *see also*, *Cronin v. Sheldon*, 195 Ariz. 531, 537 (1999) ("Courts make public policy, though 'subject to legislative correction.'").

Many courts already follow the Second Restatement's § 402 (A) which holds manufactures strictly liable for manufacturing a product that is deemed defective when "it is unreasonably dangerous to place the product in the hand of a user without a *suitable* warning." *See Rowson v. Kawasaki Heavy Indus., Ltd.*, 866 F. Supp. 1221, 1232 (N.D. Iowa 1994)

(*emphasis* added). "The duty to warn requires *adequate* warning, and the adequacy of the warning depends both upon its content and upon whether the person under the duty took reasonable care to inform the user of the possible danger of the product." *Id* (*emphasis* added); *see also*, *Pavlik v. Lane Ltd./Tobacco Exporters Int'l*, 135 F.3d 876, 883 (3d Cir. 1998) (holding manufacturers strictly liable for failure to warn claims because the presence or absence of an adequate warning label will affect how the consumer uses the product).

Ohiowa has already adopted most of the Restatement (Second) of Torts in its products liability jurisprudence. r. at 6. The legislature relied heavily on neighboring jurisdictions and the Second Restatement when drafting the products liability act. r. at 6. This Court is not in a position to upend risks and expectations premised upon broad-based arguments. *See Tincher v. Omega Flex, Inc.*, 628 Pa. 296, 340 (2014). Adopting Restatement (Second)'s read and heed doctrine is completely consistent with Ohiowan jurisprudence and would not substantially impact a litigator's expectations regarding products liability in Ohiowa. *See Id.* Failure to adopt the Second Restatement's heeding presumption would not only leave the current issue unresolved it would throw the State's entire products liability code into question.

B. The Second Restatement furthers the goals of maintaining strict liability as a separate body of law free of the taint of its roots in negligence actions.

"[I]t would be illogical and contrary to the basic policy of §402(A), to accept that a product sold without an adequate warning is in a 'defective condition", while simultaneously rejecting the presumption that the use would have been heeded if it had been given." *Pavlik v. Lane Ltd./Tobacco Exporters Int'l*, at 883. The reason for imposing strict liability for failure to warn is premised on the belief that the presence or absence of an adequate warning label will affect the conduct of a product user." *Id.* This premise relies on a presumption that warnings will be read and heeded ultimately changing the user's actions. Thus, the burden shifts to the

defendant (i.e. manufacturer) to rebut the heeding presumption. *See Rowson*, at 1238. Ultimately, whether a different warning would have caused the plaintiff to act any differently or not is a question for the jury; and, failure to read a warning is not dispositive in a failure to warn action. *Id.*

Ultimately, Zuul's product blew up in a child's hand, leaving L.T. severely burned. r. at 5. While Zuul's e-cigarettes come with a pre-printed warning on them, the record fails to address what it specifically warns of. r. at 4. That warning, however, is completely covered by the cartoon skin. r. at 4. This Court is not asked to decide whether L.T. or Ms. Barrett's actions would have changed if they were adequately warned of the defective activator; nor would are we asking this Court instruct a jury on the reasonability of a manufacturer's actions or if failing to provide a warning was negligent on its part. Reasonability and negligence have no place in strict liability law. In cases like L.T.'s a jury must receive a heeding instruction. *See Coward v. Owens-Corning Fiberglas Corp.*, 729 A.2d 614, 621 (Pa. Super. Ct. 1999).

C. Adopting the heeding presumption is entirely consistent with the evolution of products liability in Ohiowa.

Ohiowa's legislature heavily relied upon the Second Restatement when drafting its product liability laws, but they left some gaps that this Court must fill. r. at 11. This Court has used the Restatement (Second) to fill in the gaps before, and it should do so again. r. at 11. Previously, this Court adopted § 402(a) cmt. J which is the "learned intermediary doctrine." r. at 11. In short, the "learned intermediary" doctrine is a form of read and heed that breaks the causal chain linking the manufacturer to the user's injuries. *See Stafford v. Wyeth*, 411 F. Supp. 2d 1318, 1320 (W.D. Okla. 2006). These cases usually involve a physician who has read and understood the warnings associated with the drugs he prescribes and uses their knowledge to either heed the warnings and not prescribe the medication or to assume the risk that the drug may

do harm thus alleviating the manufacturer from a failure to warn the patient. *See Salinero v. Johnson & Johnson,* 400 F. Supp. 3d 1334, 1345–46 (S.D. Fla. 2019). Adopting the heeding presumption is the next natural evolutionary step of products liability law in Ohiowa and is completely consistent with this Court's posture in the past.

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). If Ohiowa's legislatures does not approve of the court's public policy rational and subsequent adoption of the read and heed doctrine pursuant to it, the legislature can make that clear by passing unambiguous legislation. Right now, however, there is an ambiguous law on the books. *See* Ohiowa Rev. Code § 5552.369; *and r.* at 16. There is a discrepancy as to how to apply that law. r. at 10-11. So, it is this Court's duty to say what the law is by adopting the read and heed doctrine.

D. The trial court's failure to include the heeding presumption prejudiced the Tullys.

The lack of the heeding presumption or any explanation of how to establish proximate cause in this failure to warn case prevented the jury from reaching verdict. "When a court instructs the jury, the objective is to explain to the jury how it should approach its task and the factors it should consider in reaching its verdict." *Tincher* at 335. Jury instructions stating the proper standard help plaintiffs and defendants strike a balance and courts must give such instructions upon request. *See CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 842 (2009) (stating trial court should have given the substance of the requested instructions). It is erroneous and harmful to mislead a jury by excluding a material element needed to be considered to properly answer the jury's question. *See Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919). "The instructions must hypothesize the facts essential to the plaintiff's claim." *Tharp v. St. Luke's Surgicenter-Lee's Summit, LLC*, 587 S.W.3d 647, 658 (Mo. 2019).

Failure to include the heeding instruction prejudiced L.T.; without it, the jury could not apply the proper legal standard. *See Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259 (1922). The jurors needed the instruction to determine that Zuul's failure to adequately warn was the proximate cause of L.T.'s burns. *See Tharp at* 658. The trial court erred by selecting one particular prominent fact—Zuul's failure to warn—from the jury's consideration. *See Grand Trunk Ry. Co. of Canada v. Ives*, 144 U.S. 408, 433 (1892) (holding: The jury is bound to consider all the facts and circumstances bearing upon that question.). The trial court chose to treat the jury instruction for failure to warn as substantially similar to the design defect claim, removing any possibility for jury to make any meaningful distinctions between the two claims. *See generally, r.* at 12.

A jury instruction for failure to warn applies a different standard of law than a manufacturing defect instruction. Both actions make a product defective, but they have different rules that govern them. Without instructing the jury as to the heeding presumption the jury did not have the applicable law at their disposal to come to their decision thus had a material prejudicial affect against L.T.

IV. Conclusion

For the foregoing reasons this Court must (1) reverse the trial court order granting summary judgment on the manufacturing defect claim; (2) hold that the trial court abused its discretion and prejudiced L.T. by declining to include a heeding instruction on the failure to warn claim; and, (3) remand both claims for further proceedings.