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 Writ of Certiorari to the
Court of Appeals for the State of Ohiowa
Seventh Appellate District
Drummond County

BRIEF FOR PETITIONER

TEAM O

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether summary judgment is proper on a manufacturing defect claim when the injured party is not a "consumer" under the Restatement (Second) of Torts but a foreseeable user of the product whose injuries were proximately caused by the defective e-cigarette.

II. Whether the read and heed doctrine is applicable in strict liability failure-to-warn claims within the State of Ohiowa and failing to include in jury instructions result in prejudice to the consumer.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT CASES:

UNITED STATES COURT OF APPEALS CASES:

UNITED STATES DISTRICT COURT CASES:

STATE CASES:

STATUTORY PROVISIONS:

RESTATEMENTS:

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

L.T. is the eleven-year-old child of Louis and Janine Tully, the Petitioners (hereinafter "the Tullys"). R. at 5. L.T. was often entrusted to the care of Dana Barrett, a nineteen-year-old college student, as was the case on July 17, 2018. R. at 5. Respondent, Zuul Enterprises (hereinafter "Zuul"), is an e-cigarette company established in Ohiowa in March 2016. R. at 3.

***Zuul's Prior Litigation and Injunction*.** The founder of Zuul, Pete Venkman, intended for e-cigarettes to be a safer alternative to traditional cigarettes. R. at 3. The product operates by pressing a button on the e-cigarette which heats up a flavored liquid in the cartridge and can then be inhaled through the mouthpiece. R. at 3–4. Zuul offers a wide variety of flavors that made the product more enticing to teens and young adults. R. at 4. In December 2017, a court held these flavors were being used to directly market its e-cigarettes to children. R. at 4. Zuul had to pay damages and an injunction was issued against the production of many of their flavors which caused the company to face potential bankruptcy. R. at 4. Zuul issued a statement on June 7, 2018 which posited that they did not market their e-cigarettes to children and that they would produce only a tobacco flavor to show good faith. R. at 4. Zuul also redesigned their product to prevent users from inserting the cartridges of other companies. R. at 4.

"Zuul Skins." In that same statement regarding limiting their flavors and changing their product's design, Zuul introduced adhesive accessories for its e-cigarettes. R. at 4. The labels affix to the surface of Zuul e-cigarettes and can be customized or purchased pre-decorated with patterns or characters. R. at 4. After introducing this new line of products, Zuul's stock prices rose. R. at 4.

Zuul's E-cigarette Explodes. While in the care of Ms. Barrett, L.T. got ahold of the e-cigarette, pushed the button, and used the product in a way that mimicked a leaf blower. R. at 5. Without warning, the product exploded in his hands. R. at 5. This accident cause L.T.'s hand to be severely burned. R. at 5.

II. NATURE OF THE PROCEEDINGS

The Court of Common Pleas. The Tullys sued Zuul under the laws of Ohiowa for violating state product liability law due to a manufacturing defect and for failing to adequately warn consumers of the risks of their product. R. at 2. Zuul moved for summary judgment on the products liability claim because liability could not be established for L.T. asserting that he was not a foreseeable user. R. at 2–3. Zuul also contended that the warning provided on the packaging sufficiently fulfilled their duty to warn. R. at 3. The Court of Common Pleas held children were not a foreseeable user of the product and granted summary judgment. R. at 3. At trial, the Tullys requested the heeding presumption be given as a jury instruction to which Zuul objected and the court sustained. R. at 3. The jury held for Zuul. R. at 3.

The Court of Appeals. The Tullys appealed to the Court of Appeals for the State of Ohiowa. R. at 3. They argued that the lower court's grant of summary judgment was inappropriate because an issue of material fact remained as to whether L.T., a child, was a foreseeable consumer of its product and should thus be liable for the defect. R. at 3. The court of appeals first established that the Ohiowa Product Liability Act was adopted to enforce liability on sellers whose product causes physical harm to consumers. R. at 6. OPLA heavily relies on the Restatement (Second) of Torts § 402A and only claims brought under OPLA can enforce liability against a seller for a defective product. R. at 6. Under OPLA, a product is defective if it deviated from the design specifications, formula, or standards of the manufacturer. R. at 6. Under

various tests set by precedent and under a doctrine of strict liability, the court of appeals determined that Zuul's e-cigarette was defective as a manufacturing defect. R. at 8. The Tullys' expert witness testified that the injury was caused by a faulty connection between the activating button and the atomizer which caused the liquid in the cartridge to overheat and boil. R. at 7–8. The built-up pressure caused the e-cigarette to explode. R. at 8. Zuul did not offer any evidence against the claim that the product was defective, and the court held its condition to be undisputed. R. at 8. Zuul argued it was not foreseeable that L.T. could be subject to harm caused by the defect because he was not in the class of person reasonably foreseen as being subject to harm by the defect. R. at 8. Looking to definitions in OPLA as well as the Restatement, the court of appeals reasoned that enforcing liability on products that cause harm to a consumer does not extend to L.T. because he was not a consumer by definition. R. at 9. This court of appeals affirmed the decision of the lower court and concluded that the grant of summary judgment was appropriate because L.T. was not a foreseeable user. R. at 6.

The Tullys also argued the lower court erred in failing to allow the jury instruction on the heeding presumption. R. at 3. The heeding presumption comes from comment j of the Restatement. R. at 10. It is a presumption that the injured person would have heeded a warning if one were properly provided. R. at 10. Though it is a highly criticized presumption, the heeding doctrine was determined to be the law of the land in Ohiowa because it tends to look favorably upon the consumer. R. at 11–12. The court of appeals determined that the lower court abused its discretion by improperly disallowing the jury instruction but found there was no prejudice as a result. R. at 12. The decision of the lower court was affirmed. R. at 3.

SUMMARY OF THE ARGUMENT

The Restatement (Second) of Torts § 402A sets out liability upon a seller and manufacturer when the product produced has a manufacturing defect. Liability is established when the proximate cause of an injury is due to the defect and the injured party was a proper user of the product. This Court should find Petitioner was a foreseeable consumer of the e-cigarette and as such, the summary judgment in favor of Respondent on Petitioner's manufacturing defect claim was improper. The determination of whether Petitioner was a foreseeable user is a question of material fact. The policy behind the OPLA was to prevent sellers from escaping liability. This Court should find it is in the best interest of the public to not use the narrow interpretation of consumer when a user's injury is proximately caused by the defective product. The lower court's granting of summary judgment fails to protect the consumer from manufacturing defects and allows manufacturers and sellers to escape liability. Additionally, this Court should find that even with the narrow interpretation of a consumer as used by Zuul, Petitioner is still included within the meaning. Respondent's subjective intent that the e-cigarette be used only by adults does not preclude a foreseeable misuse done by a child such as L.T. The lower court's interpretation of a "consumer" was mistaken and as such, the decision granting summary judgement should be reversed.

The read and heed doctrine applies to strict liability failure-to-warn claims in Ohiowa and L.T. was prejudiced from the lower court's denial of a jury instruction on the heeding presumption. The Ohiowa Court of Appeals correctly found that the lower court's failure to instruct the jury on the heeding presumption was an abuse of discretion. The heeding doctrine is the law of the land given that public policy tends to favor the consumer in product liability actions in Ohiowa. This Court should find that the heeding presumption is the law of the land in

Ohiowa for the following reasons: (1) it is in accordance with the vast weight of authority around the country; (2) not applying the heeding presumption is at odds with public policy that favors its adoption; (3) the heeding presumption is a logical corollary to comment j of the Restatement (Second) of Torts; and (4) failure to apply the heeding presumption would create an unnecessarily narrow and unworkable rule of law. Additionally, this Court should find that Petitioner was prejudiced when the lower court decided not to instruct the jury on the heeding presumption, because the erroneous denial of the heeding presumption misled the jury. The lower court's denial of a jury instruction on the heeding presumption misstated the law and misled the jury, which is grounds for reversal.

ARGUMENT AND AUTHORITIES

This Court should find error in the lower court's granting of summary judgment. Summary judgment is appropriate only when there is no genuine issue of material fact to the claim. Ohiowa R. Civ. Proc. 56(a). A summary judgement ruling 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). Here, this Court should review the evidence in light most favorable to the Tullys, the nonmoving party.

The Court of Appeals for the State of Ohiowa correctly determined that the lower court's failure to instruct the jury on the heeding presumption was an abuse of discretion because the heeding doctrine is the law of the land in Ohiowa. As an initial matter, a decision to give or withhold a jury instruction is to be reviewed for an abuse of discretion. *Carter v. Mech. Servs.*, 746 P.4th 807, 811 (Ohiowa 2012).

I. SUMMARY JUDGMENT IN FAVOR OF ZUUL ON THE TULLYS' MANUFACTURING DEFECT CLAIM WAS IMPROPER BECAUSE L.T. WAS A FORESEEABLE CONSUMER.

The issue presented here is whether the interpretation by the lower courts that L.T. was not a foreseeable user of the e-cigarette was correct and thus precludes him from recovery. The lower courts determined the product was defective and that Zuul is liable, under OPLA, to the consumer of the product. The narrow interpretation of the word "consumer" is erroneous because L.T. was a foreseeable user of the product and used the product in the way it was intended according to the plain language, legislative history, and public policy of the Tullys' claim.

A. The User May Recover, and Thus Zuul Is Liable.

The Court of Appeals for the State of Ohiowa incorrectly ruled on the motion for summary judgment regarding the Tullys' manufacturing defect claim. The courts below improperly found that no liability could be established even though it is uncontested that the product did suffer from a manufacturing defect. For a manufacturing defect under products liability the standard of care is strict liability. The determination of liability under Restatement (Second) of Torts § 402A inherently involves the language of "intended use." Essentially, a product is unreasonably dangerous, thus creating liability upon the seller, when the defect of the product makes it unreasonably dangerous for its intended use. This Court should find that the uncontested manufacturing defect on the e-cigarette, makes it unreasonably dangerous for its intended use thus establishing liability upon Zuul.

For a prima facie case for manufacturing defect injury, the injured party must establish as part of the consumer expectations test that at the "time the product left the manufacturer's hands, it was more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." *State Farm Fire & Cas. Co. v. Chrysler Corp.*, 523 N.E.2d 489, 494 (Ohio 1988). In *East River Steamship Corp. v. Transamerica Delaval, Inc.*, the engines

supplied to a series of corporate entities within the shipping industry had malfunctioning turbine engines. 476 U.S. 858, 869 (1986). The engines were defectively designed resulting in repair fees, ships being out of service, and charters losing revenue. *Id.* The plaintiffs sought recovery for the value of the engine and economic loss that resulted. The Supreme Court of the United States held no basis for economic loss could be established because no person, nor property beyond the engines themselves, was harmed. *Id.* Here, there has been an uncontested defect established through expert testimony that the e-cigarette had a defect in its manufacturing. That defect, unlike in *East River*, resulted in the injury of L.T., a user of the product. R. at 7. Additionally, Zuul failed to offer evidence in the contrary. R. at 8. Thus, there is no dispute that L.T.'s burns were a direct result of the manufacturing defect.

This Court should rule there is a genuine issue of material fact that Zuul could reasonably foresee a child using their product. The issue is not whether the plaintiff was a foreseeable user but that he was a kind of user the defendant could foresee as using the product. In Ohiowa, a manufacturer is liable to a consumer if that consumer "is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition . . . ." Ohiowa Rev. Code § 5552.368. Following the plain language set forth in the Ohiowa Product Liability Act (OPLA), along with the intent of the legislature, a manufacturer does not escape strict liability from a defective product when a foreseeable harm is caused by that defect regardless of whether the user was the "intended" user.

Given that the OPLA was drafted with the Restatement in mind, the purpose of which is for the protection of consumers, this Court should find this protection should be expanded further than "intended user." The policy behind the Restatement's strict liability for manufacturers of defective products was to guarantee liability even when "all possible care in the preparation and

sale of the product" has been given by the manufacturer. Restatement (Second) of Torts § 402A cmt. a (Am. Law Inst. 1965). That is to say, the meaning behind the policy is to ensure the manufacturer and seller of products maintain an assumed responsibility to the products they are creating and selling for the public's consumption. Without such a strict liability in place, it leaves consumers of these products unprotected and shifts the burden to the public to avoid accidental injuries rather than upon the manufacturer who can best prevent potential injuries. *Id.* § 402A cmt. c.

While the Restatement specifically denies recovery to common bystanders, this denial should not be extended to users in direct contact with the defective product whether or not they are the "intended" user of the product as contemplated by the manufacturer. *Id.* § 402A cmt. o. This Court should find that the legislature in drafting the OPLA, did not expressly exclude all users of a defective product from recovering under strict liability. While L.T. may not have been an "intended" user, he was nevertheless a user of the defective e-cigarette that was the proximate cause of his injuries. To remove him from the class of users entitled to strict liability would deprive him of recovery and eliminate responsibility upon manufacturers to ensure the safety of their products.

B. Zuul's Definition of "Ultimate User" Versus "Consumer" as Well as Their "Intended Use" Is Clearly Defined in the Restatement and Should Extend to the Use Exhibited by L.T.

The Ohiowa Product Liability Act (OPLA), which includes the Ohiowa Rev. Codes §§ 5552.368, 5552.369, was enacted to enforce liability on a seller of a defective product when it causes physical harm to a consumer. R. at 6, 16. The language of the statute similarly reflects the language of the Restatement (Second) of Torts § 402A. The most notable difference, however, is the purposeful exclusion of the term "ultimate user." The goal was to allow only "consumers" a

viable option of recovery, thus setting the standard higher to bring a successful suit against a seller. Passive enjoyment of a product, under OPLA, is not enough to bring suit unlike with the Restatement. R. at 9.

The lower courts erred when they granted summary judgment because they falsely misinterpreted the meaning of "consumer." A consumer, in either context, is a type of person who can be hurt by the product and is able to recover. As such L.T. is a consumer because of the interpretation derived from OPLA, the Restatement, and prior case law.

Plain language, legislative history, and policy of the word "consumer" shows that Zuul's use should not exclude L.T.'s use but actually include him as a consumer according to the Restatement (Second) of Torts § 402A. The Ohiowa Rev. Code specifically excluded the word "user" and instead specified that it is harm to the "consumer." Nothing in the Ohiowa code nor the Restatement, however, excludes L.T. as a consumer of the e-cigarette that exploded due to an undisputed finding that the product was defective.

The definitions of ultimate user and consumer are found in *Comment l* of the Restatement. A user is one who passively enjoys the benefit of the product or is someone who utilizes it for the purpose of doing work upon it. *Id.* A consumer is the ultimate user of a product for its intended purpose. *Id.* Intended use is a factor of determining recoverability which is set out in *Pruitt v. General Motors Corp.*, 599 N.E.2d 723, 725 (1991). A product design is in a defective condition to the user or consumer if it is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or if the benefits of the challenged design do not outweigh the risk inherent in such design. *Id.*

The plain language of the Restatement confirms a broader reading of the type of person affected by a defective product. Even with the removal of the word "user" it is clear that L.T.

would be a consumer because a consumer is one who uses the product for which it was intended. Restatement (Second) of Torts § 402A cmt. 1. The purpose of an e-cigarette is to inhale the vapors it emits. A consumer, therefore, would be one who inhales the product. R. at 9. To produce this vapor, however, a person must push the button to activate the heating mechanism to release the vapors. R. at 4. L.T., in the instance he pushed the button and allowed vapors to escape, exhibited the capacity necessary to be considered a consumer because he was the kind of person Zuul could reasonably foresee as being the subject to harm from the defective e-cigarette. R. at 14.

OPLA was enacted to enforce strict liability on sellers, such as Zuul, when their product causes harm to a consumer. Because of their reliance on the Restatement, this Court should look to the intent of its inception. *Comment b* describes a history of sellers producing products to be consumed and how they are held to a high degree of responsibility. Dating back as far as 1266, penalties were imposed against those who served "corrupt" food. *Id.* Applying warranties and/or requiring privity of contract were insufficient means to hold sellers accountable. A seller had to be held liable regardless of their negligence because of the obvious risks to health for consumers. As a result, in 1950, the courts expanded from food to other products and by 1958 to the present-day definition, strict liability now covers the sale of any product which, if defective, may cause physical harm to the consumer. *Id.*

Based on historical intent of the Restatement, a seller, such as Zuul, selling a product, such as an e-cigarette, should be held to a high degree of responsibility because of the current definition followed by Ohiowa. It is evident from the prior release of sweet, popular flavors of vapors as well as cartoon themed skins that Zuul made their product attractive to children. It matters not that these flavors or designs intentionally caused children to use them because of the

strict liability imposed on manufacturing defects when they occur in this jurisdiction. The purpose presented by comment b portrays exactly why a child such as L.T. should be able to recover damages from Zuul. Intended use is the most recent addition to the requirements of a product and history shows the courts have not been limiting in their definition of consumers but have been more inclined to include those who are adversely affected by a seller's product. Comment c explains that a consumer of products is entitled to the maximum protection at the hands of another, and the proper persons to afford it are those who market the products.

Public policy dictates that the definition of consumer should expand to include a child such as L.T. because of the serious injury he sustained. *Boyle v. United Technologies Corp.* held that public safety and the protection of the public interest are major concerns. 487 U.S. 500, 512 (1988). The lower courts came to the conclusion that L.T. was not a consumer because he failed to use the product as intended and that, if he had held the e-cigarette to his mouth, recovery could have been possible and a genuine issue of material fact would have existed. If what the lower courts determined, in dicta, were the requirements in Ohiowa's manufacturing defect suits the damages incurred would be inequitable to any potential recovery amount. The original purpose of OPLA was to allow recovery for physical injuries, the requirement should not extend to a severity of such an extreme nature.

The subjective "intent" that a product be used only by adults does not preclude liability under Restatement § 402A when an "unintended" child user foreseeably misuses the product. In *Phillips v. Cricket Lighters*, Jerome Campbell, a two-year-old, retrieved a Cricket lighter from his mother's purse, ignited linens inside their apartment, and caused the deaths of himself, his mother, and his sibling. 841 A.2d 1000, 1003 (Pa. 2003). Cricket filed for summary judgment which the trial court granted noting that Jerome's estate was required to establish that the Cricket

lighter was unsafe for its intended use. *Id.* The trial court found that "'intended use' necessarily entails the participation of the 'intended user.'" *Id.* The ultimate holding by the Pennsylvania supreme court was that because the lighter was intended to be used by adults, not children, Cricket could not be held strictly liable for "failing to design a product that was safe for use by any reasonably foreseeable user." *Id.* at 1007. As such, the claims were properly granted summary judgment for Cricket by the trial court. *Id.*

Though the claims by Jerome's estate did not succeed, the difference and significance are clear. The argument by the superior court, though reversed, shows the policy argument to be made on behalf of L.T. The Superior Court rejected the trial court's holding that for strict liability purposes, a product must be designed to be safe only for the "intended user," and instead concluded that the product must be safe for its intended use, which it found was to create a flame, when used by any user, either intended or unintended. *Id.* at 1005. The difference here is that the lighter was never specifically marketed to kids and the court was explicit in their reasoning that an intended use could not come from a child. Conversely, the skins that Zuul made show that their audience was not limited to adults and in fact was popular with teens and young adults. R. at 4. Zuul could have reasonably foreseen a consumer such as L.T. using its product for this reason. Furthermore, recovery should not come at the cost of such tragic loss as was the case in *Phillips* and this case. This Court should not deviate from the high standards imposed on sellers under strict liability and create one that would require unimaginable disfigurement to a petitioner who, using the product by holding it up to his face, would have suffered severe burns to more than just his hand.

II. THE READ AND HEED DOCTRINE APPLIES TO STRICT LIABILITY FAILURE-TO-WARN CLAIMS IN OHIOWA, AND PETITIONER WAS PREJUDICED BECAUSE PRODUCT LIABILITY LAW FAVORS THE CONSUMER IN OHIOWA.

The Court of Appeals for the State of Ohiowa correctly determined that the lower court's failure to instruct the jury on the heeding presumption was an abuse of discretion, because the heeding doctrine is the law of the land in Ohiowa. While a trial court is afforded broad discretion in formulating appropriate jury instructions, its decision may be reversed when the error results in a miscarriage of justice. A party defending jury 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 to allow the jury to properly resolve all the issues in the case. Thus, a lower court's decision regarding jury instruction is reviewed for an abuse of discretion, and that error must have resulted in prejudice to the party challenging a jury instruction. *Carter v. Mech. Servs.*, 746 P.4d 807, 811 (Ohiowa 2012).

"Failure to warn claims" allege that a product is "defective as a result of failure to provide adequate warnings." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 470, 509 (1992). In *Cipollone*, the company failed to provide warning about the health consequences of cigarette smoking. Id. Similarly, Zuul's warning was inadequate because it was only on the e-cigarette and not the skins, as was the case when the product exploded in L.T.'s hand. This Court should find that the read and heed doctrine applies in Ohiowa for several reasons: (1) it is in accordance to the vast weight of authority around the country; (2) not applying the heeding presumption is at odds with public policy that favors its adoption; (3) the heeding presumption is a logical corollary to comment j of the Restatement (Second) of Torts; and (4) failure to apply the heeding presumption would create an unnecessarily narrow and unworkable rule of law. Additionally, this Court should find that Petitioner was prejudiced when the lower court decided not to instruct

the jury on the heeding presumption because the erroneous denial of the heeding presumption misled the jury. Therefore, this Court should find that the read and heed doctrine applies to strict liability failure-to-warn claims in Ohiowa and that Petitioner was prejudiced by the lower court's failure to instruct the jury on the read and heed doctrine.

A. The Read and Heed Doctrine Applies to Strict Liability Failure-to-Warn Claims in Ohiowa.

The Ohiowa Court of Appeals correctly determined that the Read and Heed Doctrine applies to strict liability failure-to-warn claims because product liability law in Ohiowa has always looked favorably upon the consumer. Prior to the Ohiowa Court of Appeals' decision, no Ohiowa court had an opportunity to address the issue of whether the heeding presumption applies to state law failure-to-warn claims as this was a question of first impression. The "heeding presumption" is derived from the Restatement, which states: "[w]here warning is given, the seller may reasonably assume it will be read and heeded . . . ." Restatement (Second) of Torts § 402A cmt. j. This rebuttable presumption allows the factfinder to presume that when a product provides an adequate warning, a person injured by use of that product would have read and heeded that warning. *Dole Food Co. v. N.C. Foam Indus., Inc.*, 935 P.2d 876, 883 (Ariz. Ct. App. 1996). However, most jurisdictions have applied the heeding presumption to the benefit of plaintiffs. *Knowlton v. Desert Med., Inc.*, 930 F.2d 116, 123 (1st Cir. 1991); *Plummer v. Lederle Labs.*, 819 F.2d 349, 355–56 (2d Cir. 1987); *Seley v. Searle & Co.*, 423 N.E.2d 831, 838 (Ohio 1981). Across the nation many jurisdictions recognize the heeding presumption and allow the factfinder to presume that had an adequate warning been provided, the plaintiff would have read and heeded the warning. However, the defendant may provide evidence to rebut the heeding presumption. *Miller v. Pfizer Inc.*, 196 F. Supp. 2d 1095, 1127 (D. Kan. 2002), *aff'd*, 256 F.3d 1326 (10th Cir. 2004).

This Court should find that the read and heed doctrine applies in Ohiowa for several reasons: (1) it is in accordance to the vast weight of authority around the country; (2) not applying the heeding presumption is at odds with public policy that favor its adoption; (3) the heeding presumption is a logical corollary to comment j of the Restatement (Second) of Torts; and (4) failure to apply the heeding presumption would create an unnecessarily narrow and unworkable rule of law. In Ohiowa, product liability law has always looked favorably upon the consumer. While Ohiowa did not adopt the Restatement (Second) of Torts in its entirety, it was instructive to the legislature when drafting product liability laws. Ohiowa has even adopted the "learned intermediary doctrine," which originated from the Restatement (Second) of Torts. Restatement (Second) of Torts § 402A cmt. j. Therefore, this Court should affirm the Ohiowa Court of Appeals' adoption of the read and heed doctrine in the State of Ohiowa.

1. The read and heed doctrine is in accordance to the vast weight of authority around the country.

This Court should adopt the read and heed doctrine because it is in accordance with the vast weight of authority around the country. In considering whether the heeding presumption should apply, it is instructive to consider the approaches adopted by other jurisdictions. Although there is a small minority of states that have declined to adopt the heeding presumption, the vast majority of states that have considered the issue have adopted the heeding presumption. A majority of jurisdictions have adopted the read and heed doctrine because it reflects the social policy that a seller or manufacturer is best able to shoulder the costs and to administer the risks involved when a product is released into the stream of commerce. *Davis v. Berwind Corp.*, 690 A.2d 186, 189–90 (Pa. 1997). This is because manufacturers have derived a benefit from engaging in business and are better able to allocate the losses incurred with cost increases and insurance. *Walton v. Avco Corp.*, 610 A.2d 454, 458 (Pa. 1992).

Thus, this Court should affirm the Ohiowa Court of Appeals' decision to adopt the read and heed doctrine. In *Boyle*, the Supreme Court held, "liability for design defects in military equipment cannot be imposed, pursuant to state law." 487 U.S. at 512. The supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. *Id.* Here, Zuul failed to warn consumers about the dangers of the product that were known to Zuul. The e-cigarette was not a toy, even though it had wraps that made it appealable to children. Had the e-cigarette warned the consumer a different result may have occurred.

The State of Pennsylvania faced a similar challenge as presented in the present case when its courts grappled with the applicability of the heeding presumption in failure-to-warn cases in *Coward v. Owens-Corning Fiberglas Corp.*, 729 A.2d 614, 619–21 (Pa. Super. Ct. 1998), *allocatur granted*, 743 A.2d 920 (Pa. 1999). *Coward* involved four personal injury actions from plaintiffs who were diagnosed with mesothelioma or cancer as a result of their exposure to asbestos from their occupations. *Id.* at 617. The jury returned a verdict in favor of the plaintiffs on their failure-to-warn claims and the defendant appealed, claiming that the plaintiffs failed to produce sufficient evidence to establish proximate cause (i.e., the plaintiffs would have avoided the risk had they been adequately warned of it by the manufacturer of the defective product), and that the trial court failed to instruct the jury properly on the plaintiff's burden of proof on this element. *Id.* at 618. The plaintiffs relied on the "heeding presumption" to establish causation. *Id.* The *Coward* court found that the policies underlying Pennsylvania's strict liability jurisprudence would be further advanced by adopting the heeding presumption, rather than by placing the plaintiff with the heavy burden of production on the element of causation. *Id.* at 619–20.

In addition to addressing the public policy reasons for adopting the heeding presumption, the *Coward* court also considered other jurisdictions which provided "persuasive authority." *Id.* at 620. Specifically, the court looked to New Jersey's adoption of a rebuttable heeding presumption in *Coffman v. Keene Corp.*, 628 A.2d 710 (N.J. 1993). Similar to *Coward*, the *Coffman* court was concerned with the difficulties plaintiffs faced in proving causation in failure to warn cases. *Id.* The *Coward* court reasoned "[t]o avoid such results and to deter 'those manufacturers who would rather risk liability than provide a warning which would impair the marketability of the product,' the New Jersey Supreme Court adopted a rebuttable heeding presumption." *Id.* (quoting *Coffman*, 628 A.2d at 719). This led the *Coward* court to hold "[i]n cases where warnings or instructions are required to make a product non-defective and a warning has not been given, the plaintiff should be afforded the use of the presumption that he or she would have followed an adequate warning, and that the defendant, to rebut that presumption, must produce evidence that such a warning would not have been heeded." *Id.* at 621.

In *Coffman v. Keene Corp.*, New Jersey decided to adopt the heeding presumption. 628 A.2d 710. The facts of *Coffman* involved a plaintiff employed as an electrician at the naval shipyard in Philadelphia who was exposed to asbestos through his employment. *Id.* at 714–15. Both the trial court and the appellate court affirmed the plaintiff's use of the heeding presumption and the New Jersey Supreme Court was given the opportunity to consider for the first time "whether, in a strict liability failure-to-warn case, we should recognize a rebuttable presumption that had a warning been provided by the manufacturer, the plaintiff would have heeded that warning by acting to minimize the risk of injury, and whether that presumption, if unrebutted, may constitute proof that a defendant's failure to warn contributed to the plaintiff's injuries." *Id.* After considering a number of social policy arguments the court ultimately adopted

a rebuttable heeding presumption with the following reasoning "[w]e conclude that the heeding presumption in failure-to-warn cases furthers the objectives of the strong public policy that undergirds our doctrine of strict products liability." *Id.* The heeding presumption accords with the manufacturer's basic duty to warn; it fairly reduces the victim's burden of proof; and minimizes the likelihood that determinations of causation will be based on unreliable evidence. *Id.* at 720.

Furthermore, the following jurisdictions routinely apply the heeding presumption to failure to warn claims. *See, e.g.*, *Bushong v. Garman Co.*, 843 S.W.2d 807 (Ark. 1992) (applying heeding presumption in failure-to-warn-claim with chlorine bleach and coil cleaner); *Payne v. Soft Sheen Prods.*, 486 A.2d 712 (D.C. App. 1985) (applying the heeding presumption in a failure-to-warn claim to a permanent wave hair product); *Schutte v. Celotex Corp.*, 492 N.W.2d 773 (Mich. App. 1992) (applying heeding presumption in failure-to-warn claim involving exposure to asbestos); *Hill v. Air Shields, Inc.*, 721 S.W.2d 112 (Mo. App. 1986) (applying rebuttable heeding presumption to failure to warn claim involving incubator that caused baby's blindness); *Seley v. G.D. Searle & Co.*, 423 N.E.2d 831 (Ohio 1981) (applying rebuttable heeding presumption to failure-to-warn claim involving birth control); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420 (Tex. 1997) (applying the heeding presumption to plaintiff's failure-to-warn claim against cigarette manufacturer). For the aforementioned reasons, this Court should adopt the heeding presumption for failure-to-warn claims in Ohiowa.

2. Not applying the read and heed doctrine is at odds with public policy that favors its adoption.

This Court should adopt the read and heed doctrine because failure to adopt it would be at odds with public policy. Adopting the heeding presumption in failure-to-warn claims comports with the policy reasons that led to the adoption of strict products liability. Many jurisdictions

have reaffirmed that "in a modern industrial society, liability should not necessarily be predicated only on a finding that the defendant failed to exercise due care. Rather, we adopted the strict liability cause of action, finding "that the risk of loss must be placed upon the supplier of the defective product without regard to fault . . . ." *Phillips v. Cricket Lighters*, 841 A.2d at 1007. Application of the heeding presumption in failure to warn cases places the risk of loss on the party better able to shoulder the burden.

Other policy reasons for recognizing the heeding presumption have been established by a majority of jurisdictions that have considered the issue. For example in *Coward*, where the Pennsylvania Superior Court justified the heeding presumption because it provides an incentive for manufacturers to provide adequate warnings on products. 729 A.2d at 620. In *Coffman*, the New Jersey Court stated that the heeding presumption deters "those manufactures who would rather risk liability than provide a warning which would impair the marketability of the product." 628 A.2d at 718. The *Coward* court also recognized that requiring a failure-to-warn plaintiff to prove he would have acted to avoid a danger associated with the product had he been warned of the danger would impose an almost impossible burden on the plaintiff, which is inconsistent with Pennsylvania's objectives in adopting strict products liability, such as, that a seller/manufacturer is best able to shoulder the costs to administer the risks of releasing a product into the stream of commerce. *Id.* The heeding presumption serves the purpose of easing a plaintiff's burden of proof on the difficult element of causation. This is specifically useful where the plaintiff dies as a result of the injuries from the hazardous product and is not able to testify. If the person who uses the product dies from using it, any testimony on whether he did or did not read the product warning may be impossible. *Tech. Chem. Co. v. Jacobs*, 480 S.W.2d 602 (Tex. 1972).

Furthermore, the New Jersey Supreme Court in *Coffman* distinguished another policy reason for adopting the heeding presumption that is often used as a justification by other jurisdictions. The heeding presumption reduces the likelihood of unreliable evidence being used to prove causation. The question of whether or not a plaintiff would have heeded an adequate warning had one been given is so speculative and likely to invite self-serving, unreliable evidence, the heeding presumption will discourage this and direct factual inquiries to the real causes of injury in a failure-to-warn case. *Coffman*, 628 A.2d at 719. Comment j of the Restatement (Second) of Torts and its corollary proposition which have been adopted by most states provide other reasons for adopting the heeding presumption. These are that the presumption upholds the assumption that people generally act in their best interests by generally exercising reasonable care for their own safety and that the heeding presumption keeps the focus on the defective nature of the product instead of the plaintiff's actions. Thus, this Court should adopt the heeding presumption for failure-to-warn claims in Ohiowa.

3. The read and heed doctrine is a logical corollary to comment j of the Restatement (Second) of Torts.

This Court should adopt the read and heed doctrine because the heeding presumption is a logical corollary to comment j of the Restatement (Second) of Torts. Although Ohiowa never adopted the Restatement (Second) of Torts in its entirety, the legislature found it instructive when drafting product liability laws. The Ohiowa Court of Appeals found that the heeding doctrine is the law of the land given that public policy tends to favor the consumer in product liability actions in Ohiowa. Comment j stands for the proposition that, "where warning is given the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition nor is it unreasonably dangerous." *Davis*, 690 A.2d at 190. Meaning that comment j benefits the manufacturer by

recognizing that the consumer will ordinarily exercise reasonable care for their own safety by reading and heeding a product warning. Many states that have adopted the heeding presumption have also adopted the corollary proposition that works to the benefit of the user. This stands for the proposition that where the manufacturer has not supplied a product warning, it is presumed that, had an adequate warning been provided, the user would have exercised reasonable care for their safety by reading and heeding the warning.

The *Pavlik* court applying Pennsylvania law explained the logic behind the corollary to comment j, "[s]ince the very idea of 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 the user, it would be illogical, and contrary to the basic policy of § 402A, to accept that a product sold without an adequate warning is in a defective condition, while simultaneously rejecting the presumption that the user would have heeded the warning had it been given." *Pavlik v. Lane Ltd./Tobacco Exps. Int'l*, 135 F.3d 876, 883 (3d Cir. 1998). While some critics have argued that the heeding presumption is not a "logical corollary" to comment j because it is not based on empirically sound evidence that users actually read warnings, this argument is unpersuasive. If a manufacturer can benefit from a presumption on the empirically-unsound assumption that users will ordinarily exercise due care to protect themselves by reading and heeding product warnings, it would be a miscarriage of justice to prevent a user from receiving the same benefit when a product lacks an adequate warning. Hence, this Court should adopt the heading presumption for failure-to-warn claims in Ohiowa.

4. Failure to apply the read and heed doctrine would create an unnecessarily narrow and unworkable rule of law.

This Court should adopt the read and heed doctrine because not applying the read and heed doctrine would create an unnecessarily narrow and unworkable rule of law. Failure to apply the

heeding presumption would make it nearly impossible for a user's estate to prevail in a failure-to-warn-claim where the user died from exposure to a dangerous product. The *Jacobs* court illustrated the harsh consequences that could result from the court's failure to ease the difficult burden a plaintiff faces in proving the element of causation, "[w]e recognize the problems of proving causation in such a case as this. If the user of a product dies from its use, testimony whether he did or did not read the label may be impossible. If the label is inadequate, whether he would or would not have read an adequate label may be speculative." *Tech. Chem. Co. v. Jacobs*, 480 S.W.2d at 606. Not adopting the heeding presumption would place a whole subset of plaintiffs at a disadvantage for proving the difficult burden of causation and allow manufacturers to benefit from the corollary of the heeding presumption. Should a user perish during his use of a defective product, he would be unable to prove causation (i.e., that had there been an adequate warning he would have read it and heeded it).

Additionally, not adopting the heeding presumption makes little sense because it is a miscarriage of justice to allow manufacturers to benefit from comment j which provides, "where warning is given the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition nor is it unreasonably dangerous." *Davis*, 690 A.2d at 190. The Ohiowa Court of Appeals reasoned that product liability law has always looked favorably upon the consumer and that the Restatement (Second) of Torts was instructive to the legislature in drafting product liability laws. Failure to adopt the heeding presumption would put consumers at a disadvantage while protecting manufacturers by shielding them from the damages caused by their defective products. Therefore, justice requires for this Court to adopt the heeding presumption in failure-to-warn claims.

B. Petitioner Was Prejudiced by the Lower Court's Decision Not to Instruct the Jury on the Read and Heed Doctrine.

The Ohiowa Court of Appeals should be reversed because it erroneously denied a jury instruction on the heeding presumption which misled the jury. Courts have determined that a faulty jury instruction requires reversal when (1) "we have substantial doubt whether the instructions, considered as a whole, properly guide the jury in its deliberations," *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1235 (10th Cir. 1999); and (2) "when a deficient jury instruction is prejudicial," *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1201 (10th Cir. 1997). While reversal on the basis of a faulty jury instruction is not easily attained, the present case warrants a reversal because the jury was misled by the failure to give an instruction on the heeding presumption. In reviewing faulty jury instructions, "Court of Appeals reviews de novo whether a district court's jury instructions, considered as a whole, properly stated the applicable law and directed the jury to consider matters within its province." *United States v. Lee*, 54 F.3d 1534, 1536 (10th Cir. 1995). More specifically, the reviewing court looks for, "[W]hether [the] jury was misled in any way and whether it had understanding of the issues and its duties to determine those issues." *Resolution Tr. Corp. v. Stone*, 998 F.2d 1534, 1549 (10th Cir. 1993). Thus, "where a jury instruction is legally erroneous, we must reverse if the jury might have based its verdict on the erroneously given instruction." *City of Wichita v. U.S. Gypsum Co.*, 72 F.3d 1491, 1495 (10th Cir. 1996).

In *Gardetto v. Mason*, a teacher brought a First Amendment claim against a public college and college president. 100 F.3d 803, 808 (10th Cir. 1996). The district court found material issues of fact on whether the president of the school was motivated to suspend the teacher because she exercised her First Amendment rights precluded summary judgment against her and the jury found for the president on the teacher's First Amendment claims, teacher appealed." *Id.*

The court of appeals held that the district court erred by instructing the jury that it could perform a balancing test that *Pickering* requires the court to perform and since the jury, as a result of the instruction, could have reached an incorrect result, a new trial was warranted. *Id.* at 817. In the present case, the lower court failed to instruct the jury on the heeding presumption which would have allowed the fact-finder to presume that if a warning had been on the cartoon skin accessory of the Zuul, Petitioner L.T. would have read and heeded that warning. Therefore, if the jury was instructed on the heeding presumption it would have ultimately allowed the fact-finder to presume L.T. would not have pressed the button of the Zuul had there been an adequate warning on the cartoon skin, preventing L.T. from suffering from severe burns to his hand. In *Gardetto*, the jury, as a result of the incorrect instruction, could have determined that some of the teacher's speech that was legally entitled to First Amendment protection was, in fact, not entitled to such protection, which warranted a new trial. *Id.* Similarly, in the present case the jury, as a result of the denied instruction on the heeding presumption, could have determined that L.T. would not have heeded an adequate warning on the product if one was provided, when in fact, L.T. was entitled to a presumption that had there been an adequate warning he would have read it and headed it.

In *Morrison Knudsen Corp. v. Fireman's Fund Insurance Co.*, the court stated, "[a] trial court's refusal to give a particular instruction for abuse of discretion. That deferential review is superseded, however, by this court's de novo review of the instructions given to determine whether, in the absence of the refused instruction, they misstated the applicable law." 175 F.3d at 1231. Additionally, "[t]his court reviews the instructions as a whole to determine whether they adequately apprised the jury of the issues and the governing law." *United States v. Wolny*, 133 F.3d 758, 765 (10th Cir. 1998). In the present case the lower court misstated the applicable law

to the jury by failing to instruct them on the heeding presumption which would have benefited L.T., which ultimately misled the jury and is grounds for reversal. The Ohiowa Court of Appeals justifies its finding of no prejudice on the fact that the jury had a wealth of evidence upon to base their decision and the fact that they deliberated for sixteen hours. However, these justifications completely ignore the fact that the denial of the instruction on the heeding presumption misstates the applicable law and misleads the jury because they do not presume that L.T. would have read and heeded an adequate product warning if one had been provided, which would have prevented L.T. from suffering severe burns to his hands. This Court should reverse the Ohiowa Court of Appeals and find that L.T. suffered prejudice from the lower court's decision to deny the jury instruction on the heeding presumption because it misled the jury.

CONCLUSION

Petitioner respectfully requests this Court to reverse the judgment of the Court of Appeals for the State of Ohiowa, declare that Petitioner had a genuine issue of material fact that Zuul could reasonably foresee a child consumer using its product, and find the failure to incorporate the heeding presumption in the jury instructions led to prejudicial results.

Respectfully submitted,

_____

ATTORNEYS FOR PETITIONER