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,	)
Petitioners,	)
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 THE PETITIONERS

Team Q

COUNSEL FOR PETITIONERS

QUESTIONS PRESENTED

I. Did the Appellate Court err in affirming Zuul's motion for summary judgment on the Tullys' manufacturing defect claim?

II. Does the read and heed doctrine apply to strict liability failure-to-warn claims in the State of Ohiowa?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Respondent Zuul Enterprises ("Zuul") manufacturers e-cigarettes. R. at 3. Zuul was founded in March 2016 in Cincinnatus, Ohiowa. *Id*. Zuul e-cigarettes "operate by depressing a button on the e-cigarette, whereby an atomizer housed within the e-cigarette heats the flavored liquid in the cartridge into a vapor." R. at 3-4. Users then" inhale the vapor through the mouthpiece of the e-cigarette." R. at 4. Zuul's e-cigarettes have quickly become popular among teens and young adults due to their compact size and variety of sweet flavors. *Id*.

This case is not the first case involving Zuul and a child. *Id*. As recently as December 2017, a federal district court issued an injunction against Zuul's production after the court held that Zuul had been marketing its e-cigarettes to children by using certain sweet vapor flavors. *Id*. Accordingly, Zuul was also required to pay damages. *Id*.

As a result of the litigation, Zuul's stock price dropped, and the company resisted bankruptcy. *Id*. Consequently, Zuul published a statement on June 7, 2018 claiming that they had not attempted to market their e-cigarettes to children and promised to only manufacture a "classic tobacco" flavor moving forward. *Id*. However, in the same statement, the company also presented a new line of decorations for their e-cigarettes, known as "Zuul skins," which could be affixed to the surface of any Zuul e-cigarette. *Id*.

Now, users can modify the appearance of their e-cigarette's "skin," or "purchase skins pre-decorated with various patterns or licensed characters." *Id*. Soon after, Zuul's stock prices returned to their former prices. *Id*. Though each Zuul branded e-cigarette has a warning attached, the "skins" have no supplemental warnings concerning the dangers they pose. *Id*.

This case is borne from a tragic accident that resulted in the petitioner-child L.T.'s hand being scorched while handling an e-cigarette manufactured by Zuul. R. at 5. On July 17, 2018, Louis and Janine Tully entrusted their eleven-year-old child, L.T., to the care of Dana Barrett, a nineteen-year-old college sophomore, who began using a Zuul e-cigarette after matriculating. *Id.* Ms. Barrett often babysat L.T. and they shared several interests, including an appreciation for *Hola Gato*, the titular character of a popular cartoon. *Id.* Several days before, Ms. Barrett purchased a skin for her Zuul e-cigarette depicting the character. *Id.*

On the evening in question, Ms. Barrett arrived at the Tullys' residence with her Zuul e-cigarette adorned in its new skin. *Id.* Despite numerous warnings that the Zuul was a dangerous object, young L.T. was tempted beyond control to operate the device. *Id.* At some point that evening, L.T. gained control of the device. *Id.* L.T. depressed the activating button and began to wave the device in a manner that resembled the operation of a leaf blower. *Id.* Without warning, the Zuul exploded, causing severe burns to young L.T. *Id*. Zuul did not dispute whether the *Hola Gato* skin should qualify as a "substantial alteration" under Ohiowa Rev. Code § 5552.368 (b) as it is not regarded as "substantial" per the statute.

II. NATURE OF THE PROCEEDINGS

The Court of Common Pleas. The Tullys properly sought relief against Zuul, the manufacturer of the defective product, as required under Ohiowa Product Liability Act ("OPLA").

At trial, the Tullys' expert witness testified that L.T.'s burns were proximately caused by the manufacturing defect in the Zuul e-cigarette. R. at 7. The expert formulated this opinion by taking into account the severity of L.T.'s burns and the specifications of the e-cigarette. *Id*. The manufacturing defect, as found by the expert, was due to a "faulty connection between the

activating button and the atomizer," which caused the atomizer to overheat and "the liquid in the vapor cartridge to boil." R. at 7-8. Consequently, pressure began to build in the cartridge, eventually causing the e-cigarette to explode, thus, injuring L.T. R. at 8. Sufficient evidence was presented to show that had there been no defect in the e-cigarette, the e-cigarette would have "operated in accordance with Zuul specifications and would have functioned like any other e-cigarette on the market." *Id*. Zuul offered no evidence to the contrary and did not rebut or otherwise dispute the Tullys' expert witnesses or any fact to show that there was no defect in the e-cigarette. *Id*. Also, Zuul did not offer any evidence to show that e-cigarette had been altered in any way after leaving their control. *Id*. Despite the overwhelming evidence against Zuul, the Trial Court granted defendant-manufacturer Zuul's motion for summary judgment as to the manufacturing defect claim, holding that L.T. was not a "foreseeable user." R. at 3.

The Court of Appeals for the State of Ohiowa. The Appellate Court affirmed Zuul's motion for summary judgment. R. at 12. The court did find that the Trial Court did indeed abuse its discretion in denying the Tullys their requested jury instruction, however, the court found that no prejudice had occurred as a result of the error. *Id*. Consequently, the Court of Appeals for the State of Ohiowa affirmed the decision of the Court of Common Pleas (the "Trial Court"). *Id*. However, the Court of Appeals did not that by "viewing the evidence proffered in a light most favorable to the defendant, there is no dispute as to whether the e-cigarette was in a defective condition as a result of the manufacturing defect. It was." R. at 8.

SUMMARY OF THE ARGUMENT

The petitioners (the "Tullys") come before this Court seeking to hold Zuul liable for the manufacturing defect in their e-cigarette that caused severe injuries to L.T under OPLA. Accordingly, the Tullys respectfully request that this Court reverse the Trial Court's grant of

Zuul's motion for summary judgment, adopt the read and heed doctrine as the applicable law in Ohiowa, and reverse the Trial Court' faulty jury instruction.

It is not disputed as to whether the Zuul e-cigarette in question had a manufacturing defect- it did. Erroneously, both the Trial Court and Appellate Court believed the issue to be whether L.T. was a foreseeable user of the Zuul e-cigarette. Consequently, both courts below failed to apply strict liability to the manufacturer, Zuul, in the claim under OPLA. Instead, strict liability should be applied against Zuul, and the manufacturer should be held liable for the injuries sustained by L.T. Despite this error, L.T. still should have been found to be a foreseeable user. Under both the Restatement (Second) of Torts § 402A and OPLA, a foreseeable user is not necessarily the consumer, it is enough that the injured party be a user of the product. Also, the issue is whether the manufacturer, Zuul, could reasonably foresee L.T. being the kind of person that could be subject to the harm from the defect in the e-cigarette. L.T. was not just a common bystander, he was the ultimate user of the product. Zuul had knowledge that children were using their e-cigarettes. Thus, L.T. was a foreseeable user. In the alternative, a plaintiff need only show that the use of the product in question was merely reasonably foreseeable. In this case, the actions of a person holding down the activating button of an e-cigarette is more than reasonably foreseeable- it is its intended use.

In the future, issues involving manufacturing defects in Ohiowa should be left to finders of fact, whether it be a judge or a jury. Summary judgment should be granted sparingly to manufacturers to ensure strict liability is applied.

This Court should also hold that the read and heed doctrine applies to strict liability failure-to-warn claims in Ohiowa. Primarily, adopting the doctrine support's Ohiowa's consumer-favored policy regarding products liability matters. The heeding presumption also

promotes safety and fairness by encouraging manufacturers to create safer products and lowering the burden of production for injured plaintiffs. Moreover, the doctrine decreases the possibility that juries will consider speculative evidence, thus strengthening the accuracy of verdicts. Because the read and heed doctrine is the law of the land in Ohiowa, this Court should reverse the Trial Court's faulty jury instruction.

ARGUMENT

This is a timely appeal of questions of law including (I) whether summary judgment was erroneously granted to the Zuuls and (II) whether the read and heed doctrine applies to strict liability failure-to-warn claims in the State of Ohiowa.

The decision of summary judgment is reviewed de novo in the light most favorable to the nonmoving party. *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 362 (Iowa 2014). The review of the lower court's decision to grant or deny jury instruction is by an abuse of discretion. *Barton Protective Services, Inc. v. Faber*, 745 So.2d 968, 974 (Fla. Ct. App. 1999). Summary judgment is appropriate when there is no genuine issue as to any material fact of the claim, and the moving party is entitled to judgment as a matter of law. Ohiowa R. Civ. Proc. 56(a). Thus, when there is an issue to any material fact, summary judgment is not appropriate.

The issues involved in this appeal center around two statutes. The general rule for liability in the State of Ohiowa is that:

> a person who sells . . . any product that is defective or in a defective condition that is unreasonably dangerous to any consumer . . . is subject to liability for physical harm caused by that product to the consumer . . . 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 § 5552.368.

Similarly, to determine whether a product is defective, the statute provides that:

> a product is in a defective condition . . . 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.

Ohiowa Rev. Code § 5552.369.

I. THE APPELLATE COURT ERRED IN AFFIRMING ZUUL'S MOTION FOR SUMMARY JUDGMENT ON THE TULLYS' MANUFACTURING DEFECT CLAIM BECAUSE L.T. WAS A FORESEEABLE USER AND COURTS BELOW FAILED TO APPLY STRICT LIABILITY.

This court should reverse the grant of summary judgment in favor of Zuul. The first issue addresses the error in the Appellate Court affirming Zuul's motion for summary judgment on the Tullys' manufacturing defect claim. A genuine issue of material fact exists as to whether L.T. was a foreseeable user of the Zuul e-cigarette and whether Zuul should be held liable for the L.T.'s severe burns which were proximately caused by a defect in the Zuul's product. The question of whether L.T. was a foreseeable user of the e-cigarette is irrelevant as the proper standard for a products liability suit like this is one of strict liability. Zuul had prior knowledge of minor children using their products, so a child was a foreseeable user in this case.

Restatement (Second) of Torts § 402A provides the framework for the Ohiowa Product Liability Act ("OPLA"). R. at 6, 8, 9, and 13. Justice Zeddemore correctly applied the law of Ohiowa in the dissenting opinion. Looking to the plain meaning of OPLA, any manufacturer who generates a product that is in a "defective condition should be held strictly liable to all persons" who could be foreseeably harmed by the defect. R. at 13. Observing that OPLA was drafted based on the Restatement (Second) of Torts § 402A, both opinions note that drafters of OPLA intended to impose strict liability on manufacturers who generate products with defective

conditions, also known as manufacturing defects. R. at 13 (citing No. 18-CV01988 (Ct. Com. Pl. Sep. 28, 2018)).

Looking to the comments of § 402A, the purpose is to hold any seller subject to liability "even though he has exercised all possible care in the preparation and sale of the product." Restatement (Second) of Torts § 402A cmt. a. To justify this strict liability, the drafters rationalized that sellers or manufacturers have "assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has a right to and does expect the seller" to back their product; the "burden of accidental injuries caused by products" should be placed on sellers or manufacturers; and that the seller or manufacturer is in the best situation to provide this protection. *Id*. at § 402A cmt. c. Although nearby victims may be excluded from recovering from the seller or manufacturer for injuries proximately caused by a manufacturing defect, "[t]here may be no essential reason why such plaintiffs should not be brought within the scope of the protection afforded, other than they do not have the same reasons for expecting such protection as the consumer who buys a marketed product . . ." *Id*. at § 402A cmt. o.

A. L.T. was a foreseeable user of the Zuul e-cigarette, however the test is whether the "use" was foreseeable.

A ticking-time bomb- the Zuul e-cigarette that caused severe burns to young L.T. was nothing more than a ticking-time bomb. The Appellate Court was more concerned about who was injured rather than how they were injured. By their logic, if the e-cigarette had exploded and burned its owner, Ms. Barrett, would the court have recognized her as a foreseeable user? Most likely, the answer would be yes, as she was the intended user of the product. However, a foreseeable user is not necessarily an intended user. *Metzgar v. Playskool Inc.*, 30 F.3d 459, 464 (3d. Cir. 1994). It is not a stretch to imagine a scenario in which the e-cigarette could have

exploded and severely injured Ms. Barrett. Should she have kept it in her pocket and the activating button had been depressed due to anything pressing it, due to the manufacturing error admitted to by Zuul. Should she have left the e-cigarette in her purse, anything could have pressed the activating button- a cell phone, car keys, etc. The e-cigarette could easily have exploded in the same manner as it did on July 17, 2018. The Zuul e-cigarette was a ticking-time bomb, just waiting to explode. As fate would unfortunately have it, it happened when eleven-year-old L.T. was holding it. Simply because it was the young child, Zuul believes they are not liable for the injuries as children are not foreseeable users of the product. Not only is this incorrect, but the foreseeable user test is inappropriate in this case. The Trial Court and Appellate Court both erred in applying the foreseeable user test. The appropriate test is one of both design and manufacturing defect, as well as one of strict liability.

As Justice Zeddemore indicated, the Ohiowa statute does not specify what the meaning of "customer" is and OPLA did not include "ultimate user" in the statute. Further, the judge went on to note that the exclusion should not remove the "ultimate user" from the category of "class of persons" foreseeable, but instead allow for the category of "consumer" to capture "ultimate users." As Restatement (Second) of Torts § 402A provided the rationale behind OPLA and this case is one of first impression for the State of Ohiowa, this Court should look to other courts to find how other states have interpreted the section. As one court noted, "a person injured by a product need not have been a 'consumer' of the product in order to assert a strict products liability claim. It is enough that the person was a 'user' of the product." *Mullaney v. Hilton Hotels Corp.*, 634 F. Supp. 2d 1130, 1142 (D. Haw. 2009) (citing *Stewart v. Budget Rent-A-Car Corp.*, 52 Haw. 71, 75, 470 P.2d 240, 243 (1970)). The term "user" includes "those who are passively enjoying the benefit of the product." *Mullaney,* 634 F. Supp. 2d 1130, 1142 (citing

Restatement (Second) of Torts § 402A cmt. l (1965)). The comments of § 402A "indicate that liability requires some direct contact with the defective product." *Mestas v. Air & Liquid Sys. Corp.*, Civil Action No. 18-cv-01006-RM-NYW, 2019 U.S. Dist. LEXIS 45954 (D. Colo. Jan. 29, 2019) (citing Restatement (Second) of Torts § 402A cmt. o).

Moreover, the issue is not whether L.T. was a foreseeable user of the e-cigarette as the lower courts have implied. Under both OPLA and § 402A, the issue is whether L.T. was "the kind of person that Zuul could reasonably foresee as being subject to harm from the defective condition of the e-cigarette." R. at 14. L.T was not a "common bystander" when the e-cigarette exploded. The e-cigarette was in his hand with the button depressed as it was intended to be depressed, and young L.T. was subsequently severely injured as a result of the manufacturing defect. The intended use of the e-cigarette in L.T.'s hand may not have been congruent with the intended use of the e-cigarette in Ms. Barrett's hand, but L.T. should be protected in the same manner Ms. Barrett would have been protected had the e-cigarette exploded in her hand.

Similarly, courts have held that determining whether a product is "unreasonably dangerous" and thus defective for purposes of strict liability is not to be determined by its "intended" use, but whether the use was reasonably foreseeable. *d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886, 890 (9th Cir. 1977); *see* R. Hursh & H. Bailey, 1 American Law of Products Liability, s 4:40 at 758 (2d ed. 1974).

Thus, L.T., as a person who passively enjoyed the benefit of the e-cigarette by holding the device and depressing the button, was indeed a "user" of the product. If Ohiowa is to take Restatement (Second) of Torts § 402A as a way of interpreting OPLA, as it has in the past, then young L.T. is protected as a "user" under § 402A and "consumer" under OPLA.

B. Zuul had knowledge that minors were using their e-cigarettes.

Even though L.T. was indeed a foreseeable user, Zuul argued that children are not foreseeable users of their product. This argument fails because Zuul has firsthand knowledge of children using their product due to their previous injunction. Thus, Zuul had knowledge that minors were using their products, therefore L.T. was a reasonably foreseeable user under Ohiowa Rev. Code § 5552.368 (a).

Again, Justice Zeddemore recognized that Zuul is, at the least, fully aware of the dangers their products cause to children and that children were using their products. This knowledge comes from their previous injunction issued in prior litigation. Zuul then declared that they had not attempted to market their product to children and made several gestures to show "good faith." R. at 4. Rather than leave their changes on a positive note, however, at the same time, Zuul also introduced a new accessory line to decorate their e-cigarettes so that users can customize the appearance of their e-cigarette. *Id*. Justice Zeddemore correctly identified that this accessory line is "simply another way for the company to circumvent a court order and carry on its dubious practice of enticing children." R. at 15. The danger, as Justice Zeddemore goes on to correctly notice, is that by not enforcing the state's intended policy of strict liability for manufacturing defects per § 402A, the ruling of the Appellate Court "only serves as a keymaster, granting Zuul access to illegal and dangerous trade practices." *Id*.

Due to Zuul's knowledge that children were using their products, the question arises why the company did not provide a solution to make their product at least child-resistant. As in the case of *Griggs*, the court reversed the grant of summary judgment in favor of the manufacturer based on the theory that the manufacturer breached its duty to guard against an "unreasonable risk of harm" to the injured child when it failed to design its product, lighters, to be childproof, after knowledge that their product was being used by children, an unintended user. *Griggs v. BIC*

Corp., 981 F.2d 1429, 1430-40 (3d Cir. 1992). While the case shows that manufacturers should take further actions to discourage unintended users from using their products, suggesting Zuul should have taken similar steps to "childproof" their e-cigarettes, this case is distinguishable from *Griggs* in that the lighter in *Griggs* operated as intended, whereas the e-cigarette here did not, as evidenced by the explosion.

C. The test for manufacturers should be strict liability for harm to a foreseeable user.

The test that the court should have used is one of strict liability. Had strict liability been properly applied, the district court would not have granted summary judgment in favor of Zuul.

Under § 402A, the concern is whether "the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him," not the foreseeability of a given injury. *Eshbach v. W. T. Grant's & Co.*, 481 F.2d 940 (3d Cir. 1973) (quoting § 402A, Comment g). Under § 402A, "the duty of a manufacturer or supplier is limited to foreseeing the probable results of the normal use of the product or a use which can be reasonably anticipated." *Kaczmarek v. Mesta Machine Co.*, 463 F.2d 675 at 679 (3rd Cir. 1972). Both the 3rd and 7th Circuits have held that that the limits of responsibility for the manufacturer is whether "the 'use' to which the product was put was intended or foreseeable (objectively reasonable) by the defendant." 481 F.2d 940 at 943 (quoting *Van Dorpe v. Koyker Farm Implement Co.,* 427 F.2d 91 at 93 (7th Cir. 1970)).

The 3rd Circuit continued to hold that the manufacturer "is not required to foresee will be used" for a purpose other than what it is designed for." 481 F.2d 940 at 943. The manufacturer

> is required to foresee an injury resulting from a defect, which injury occurs during the use of the [product] for a purpose for which it was intended, even if the injury did not occur in the particular manner one might expect. It is to this extent, then, and to this extent only, that foreseeability enters into the strict liability equation. The use of the word foreseeability without the limits imposed by strict liability

> concepts improperly distorts the balance between the manufacturer and consumer embodied in § 402A.

Id.

Applying these rules of law to the facts of the case at hand, L.T. was indeed not only a foreseeable user, but Zuul is required to foresee the injury L.T. suffered from the e-cigarette's manufacturing defect. L.T. was handling the e-cigarette when it exploded, depressing the button as it was designed to be depressed, causing injury. OPLA calls for strict liability for such injuries. Thus, Zuul should be held strictly liable for the injuries sustained by L.T.

D. Questions involving manufacturing defects should be left to finder of fact.

Courts should send issues involving a manufacturing defect to the finder of fact. In this case, the Trial Court did not. Specifically, with regards to questions of "intended users" and "foreseeability," the 3rd Circuit Court of Appeals found that "the 'intended user' must be determined in the context of the knowledge and assumptions of the ordinary consumer in the relevant community." 30 F.3d 459, 464. This suggests that the determination should be left to a finder of fact. In other manufacturing defect claims, courts have denied summary judgment to defendant corporations with much less proof showing a defect than the case hand. *See In re Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig.*, 2015 U.S. Dist. LEXIS 140263 (M.D. Ga. Oct. 15, 2015) (Defendant company not granted summary judgment after plaintiff showed that same product had similar defect in one other case, relying on evidence from another trial. Plaintiff showed intent to test product at trial and compare to manufacturing standards). Thus, the Trial Court should not have granted summary judgment in favor of Zuul when more evidence was presented at trial, creating several issues to material fact that should have been left to a finder of fact.

E. Zuul should redesign e-cigarettes to have child-proof or child-resistant features.

As in the *Griggs* case, this case involves a product that has no childproofing features. The Poison Prevention Packaging Act, 15 U.S.C.S. § 1471, et seq., was developed due to a similar issue involving the child-proofing of prescription pill bottles. William E. Hilton, Risk and Value Judgments: A Case Study of the Poison Prevention Packaging Act, 3 Risk: Issues Health & Safety 37, 38-39 (1992). Additional or special packaging is required for household substances, including prescription pill bottles, if it could protect children from harm caused by their "handling, using or ingesting" the product. Poison Prevention Packaging Act of 1970, 15 U.S.C. §§1471-1477 (2006); *see* Poison Prevention Packaging Act § 3. Similar remedies should be required of Zuul to prevent children from using their product if Zuul wishes to be protected at all from products liability claims. Had Zuul installed some sort of child-proof or child-resistant features in their e-cigarette rather than focusing on creating "skins" to entice children to use their product, then L.T. may have been discouraged, rather than encouraged to handle the e-cigarette.

F. Affirming summary judgment would violate public policy.

Allowing for Zuul to avoid liability for their dangerous product injuring an innocent child, despite the corporation having knowledge of use by children, would violate a notion of good public policy. The message that is sent by allowing for Zuul to get away with their product exploding at the hands of a child is that a corporation in Ohiowa can get away with their defective products malfunctioning and causing harm to children, so long as their product was intended, in their own eyes, for use by adults. Better policy can be set by this Court by holding manufacturers of a dangerous product liable for damages when they are aware that children are attracted to, and have knowledge that children are using, their product. This Court should hold Zuul liable for the injuries young L.T. sustained while handling their product.

G. The Tullys have satisfied all of the elements under an OPLA claim, including Ohiowa Rev. Code § 5552.368 and § 5552.369.

The Tullys have shown, through evidence and testimony by the expert witness, that they have brough a valid claim under OPLA. A question of fact remains due to the testimony of the Tullys' expert witness. Therefore, summary judgment was improperly granted to Zuul.

In summary, the Trial Court and the subsequent court of appeals erroneously granted summary judgment in favor of Zuul. Both courts failed to apply strict liability to the manufacturer of the exploding e-cigarette to a reasonably foreseeable user. This error resulted in prejudice against the Tullys. Therefore, this Court should reverse the grant of summary judgment and remand for a new trial.

II. THE READ AND HEED DOCTRINE APPLIES TO STRICT LIABILITY FAILURE-TO-WARN CLAIMS IN OHIOWA BECAUSE THE PRESUMPTION (1) SUPPORTS THE STATE'S CONSUMER-FAVORED POLICY IN STRICT LIABILITY CASES; (2) ENCOURAGES MANUFACTURER'S TO CREATE SAFER PRODUCTS; (3) PROMOTES FAIRNESS; AND (4) AVOIDS THE DILEMMA OF REQUIRING SPECULATIVE TESTIMONY.

This Court should hold that the heeding presumption is the applicable law in Ohiowa and reverse the Trial Court's faulty jury instruction. Under Ohiowa law, a product is defective when a manufacturer fails to "properly package or label the product to give reasonable warnings of danger about the product." Ohiowa Rev. Code § 5552.369. A plaintiff will prevail on a strict liability failure-to-warn claim if he shows (1) that a manufacturer sold a defective product; (2) that the defective product physically harmed him; (3) that he is a reasonably foreseeable user of the product; and (4) that the product was expected to and did reach him without substantial alteration to its condition. § 5552.368.

The e-cigarette in the present case was defective because the Zuul skin that covered the e-cigarette made the product such that it displayed no warning label. Although the e-cigarette itself displayed a warning label, this label was completely covered by the Zuul skin. Therefore, Zuul

failed to package the product in a way that provided reasonable warnings of danger. Regarding the substantial alteration factor, a manufacturer's "superior position to garner information and its corresponding duty to warn is no less with respect to the ability to learn of modifications made to or misuse of a product." *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 240-41 (1998). As such, the presence of the skin on the e-cigarette did not relieve Zuul of its duty to warn because it was reasonably foreseeable that consumers would use the skin and cover the label. Moreover, because this brief previously addressed that L.T. was a reasonably foreseeable user of the product, this element is no longer at issue. Further, because the heeding presumption applies in Ohiowa, the Tullys do not bear the burden of showing that Zuul's inadequate warning caused his harm. Rather, Zuul bears the burden of production with respect to the causation element. Therefore, since the Trial Court failed to instruct the jury on the heeding presumption, this Court should reverse the Trial Court's judgment.

The heeding presumption derives from the Restatement, which states that "[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 if the seller had provided an adequate warning label on the product, the injured party would have read and heeded the warning, thus avoiding injury. *Bachtel v. TASER Intern., Inc.*, 747 F.3d 965, 971 (8th Cir. 2014). From the Restatement's language, courts created the corollary presumption that once the plaintiff shows that a warning label is inadequate, the heeding presumption shifts the burden of production for causation from the plaintiff to the defendant. *Sharpe v. Bestop, Inc.*, 713 A.2d 1079, 1085 (N.J. Super. 1998). The New Jersey Superior Court Appellate Division has explained this burden-shifting analysis:

> [O]nce the heeding presumption comes into play, the burden of coming forward with evidence, i.e. the burden of production, shifts to the defendant to overcome

> or rebut the presumption. As noted in *Graves*, the defendant's failure to produce evidence at this stage "risk[s] a directed finding against it" on the issue of proximate causation. 267 N.J. Super. at 460, 631 A.2d 1248. If, however, the defendant satisfies its burden of production, that is, if defendant presents sufficient evidence to rebut the presumption, an issue we deal with below, the presumption disappears and the plaintiff, consistent with his original burden of persuasion, must prove by a preponderance of the evidence that the failure to warn was a proximate cause of his injury.

Id. (quoting *Graves v. Church & Dwight Co.*, 631 A.2d 1248, 1256 (1993)). Applying the read and heed doctrine, since The Tullys has shown that Zuul failed to provide an adequate warning label, the causation element is presumed to be satisfied unless Zuul produces evidence sufficient to rebut the presumption. Therefore, this Court should hold that the heeding presumption applies to strict liability failure-to-warn claims in Ohiowa because the presumption (1) is consistent with the state's consumer-favored public policy requiring strict liability; (2) creates a safer environment by encouraging manufacturers to develop safer products; and (3) promotes fairness by lowering the injured party's burden.

A. The heeding presumption applies to strict liability failure-to-warn claims in Ohiowa because the doctrine accords with the state's consumer-favored public policy.

The read and heed doctrine is the law of the land in Ohiowa because it supports the state's public policy tradition of favoring consumers in strict liability failure-to-warn cases. According to the Supreme Court of New Jersey, "the creation of a presumption can be grounded in public policy." *Coffman v. Keene Corp*., 628 A.2d 710, 717 (N.J. 1993).

In the products liability context, states should adopt presumptions that further their safety and fairness goals. In *Coffman v. Keene Corp.*, the court adopted the read and heed doctrine because the presumption was consistent with its public policy objectives. *Id.* In deciding whether to adopt the presumption, the court analyzed its public policy history and noted that New Jersey had often adopted presumptions in the products liability context "to advance [the state's] goals of

fostering greater product safety and enabling victims of unsafe commercial products to obtain fair redress." *Id.* at 718. According to the court, the entire concept of strict products liability is based on the presumption that "persons not abusing products are not usually injured unless a manufacturer failed in some respect in designing, manufacturing or marketing the product." *Id.* After this analysis, the court held that "an examination of the strong and consistent public policies that have shaped our laws governing strict products liability demonstrates the justification for [the heeding] presumption." *Id.* at 718. This analysis indicates that states should adopt presumptions that favor their public policy concerns.

Based on precedent and public opinion, the state of Ohiowa is deeply concerned with safety and fairness regarding strict products liability matters. The Ohiowa Court of Appeals held that "public policy tends to favor the consumer in product liability action in Ohiowa" and agreed that the heeding presumption should be adopted to further this policy. Moreover, Ohiowa has based its products liability law largely on the Restatement (Second) of Torts. This assertion is evidenced by the state's adoption of the "learned intermediary doctrine." Therefore, because the read and heed doctrine accords with both the state's public policy goals and custom of incorporating the Restatement (Second) of Torts, this Court should apply the same reasoning as the court in *Coffman* and adopt the heeding presumption.

B. The heeding presumption is the law of the land in Ohiowa because it promotes safety by incentivizing manufacturers to create safer products.

Adopting the read and heed doctrine promotes safety by encouraging manufacturers to create safer products. According to the court in *Coffman*, "The emphasis in strict-products-liability doctrine is on the safety of the product, rather than the reasonableness of the manufacturer's conduct." 628 A.2d at 718. The court further explained the presumption's role in incentivizing safety by holding that

> [t]he heeding presumption thus serves to reinforce the basic duty to warn to encourage manufacturers to produce safer products, and to alert users of the hazards arising from the use of those products through effective warnings. The duty to warn exists not only to protect and alert product users but to encourage manufacturers and industries, which benefit from placing products into the stream of commerce, to remain apprised of the hazards posed by a product. The use of the heeding presumption provides a powerful incentive for manufacturers to abide by their duty to provide adequate warnings.

Id. Based on this reasoning, the heeding presumption supports Ohiowa's fundamental goal of promoting safety and protecting consumers through strict liability law. For this reason, the heeding presumption is the law of the land in Ohiowa.

C. The read and heed doctrine applies to strict liability failure-to-warn claims in the State of Ohiowa because the doctrine promotes fairness.

The heeding presumption is the applicable law in Ohiowa because it promotes fairness by easing the burden of proof for an injured plaintiff. Failing to apply the read and heed doctrine in the products liability context places an unfair burden on the plaintiff. *Payne v. Soft Sheen Products, Inc.*, 486 A.2d 712, 725 (D.C. Ct. App. 1985). In *Payne v. Soft Sheen Products, Inc.*, the court held that

> a rule requiring a plaintiff to prove not only that the failure to warn of a danger in a product made that danger unreasonable and that his injury grew out of the risk caused by that danger, but also that the failure to warn caused his injury, would impose an impossible burden on the plaintiff, and would often prevent his recovery because of pure speculation on the part of the jury.

Id. Because of the evident unfairness in requiring an injured plaintiff to prove that the manufacturer's failure to warn caused his harm, the court adopted the heeding presumption. *Id.*

Moreover, it is in the interest of fairness to require the manufacturer to bear the burden of proving that its product did not cause the harm. In *Coffman*, the court held that "the risk of loss stemming from unsafe products should be rationally allocated to the manufacturers, distributors, and other parties in the stream of commerce." 628 A.2d at 718. The primary focus of strict products liability is that the "actual condition of the product is premised on the principle that

affixing fault and responsibility for product-caused injury should not turn on the ability of the victim to prove the defendant's acts of negligence." *Id.* Therefore, the underlying principle for the creation of strict liability promotes the assertion that fairness requires the heeding presumption. Since the read and heed doctrine reflects the premise of products liability by favoring the consumer and promoting fairness, it should be adopted as the applicable law in Ohiowa.

D. The heeding presumption applies in Ohiowa because it minimizes the likelihood that determinations of causation will be based on unreliable evidence.

The read and heed doctrine applies in Ohiowa because asking a plaintiff to prove that an adequate warning would have changed his conduct amounts to requesting speculative testimony. A jury's retrospective inquiry into whether the provision of a warning would have been followed by the consumer would "most likely be highly speculative." *Coffman*, 628 A.2d at 719.

Applying the heeding presumption minimizes the possibility that the jury will consider speculative evidence on the causation inquiry. In *Coffman*, the court held that without the heeding presumption, a causation determination in a failure-to-warn case asks the jury "to imagine whether a plaintiff, given the various facets of his or her personality and employment situation, would have heeded a warning." *Id.* Such an inquiry is certain to result in speculative and unreliable evidence. This assertion is supported by various courts. For instance, in *Nissen Trampoline Co. v. Terre Haute First Nat. Bank*, the court held that requiring the plaintiff to show that he would have heeded an adequate warning "undermine[s] the purpose of strict tort liability since any such testimony would be speculative at best." 332 N.E.2d 820, 826 (Ind. Ct. App. 1975).

Similarly, the court in Payne held that requiring the plaintiff to prove that the manufacturer's failure to warn caused his injury "would often prevent recovery because of pure

speculation on the part of the jury." *Payne*, 486 A.2d at 725. Moreover, without the heeding presumption, the plaintiff's testimony would be useless because of its self-serving and unreliable nature. *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1281 (5th Cir. 1974). Based on the above analyses, applying the presumption will lead to more accurate causation determinations that are not based on unreliable, speculative, or extraneous evidence. As such, the read and heed doctrine should apply to failure-to-warn cases in Ohiowa.

E. This Court should reverse the Trial Court's erroneous jury instruction because it did not include the heeding presumption.

This Court should reverse the Trial Court's grant of Zuul's motion for summary judgment because the Trial Court failed to allow a jury instruction on the heeding presumption. "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, 910 (Mont. 2010). In the present case, the Trial Court did not "fully and fairly inform the jury of the law applicable to the case" because it failed to instruct the jury on the heeding presumption. An erroneous jury instruction requires reversal when (1) there is substantial doubt that the instructions properly guided the jury on the applicable law and (2) the erroneous instruction is prejudicial. *Coleman v. B-G Maintenance Management of Colo., Inc.*, 108 F.3d 1199, 1201 (10th Cir. 1997). This Court should reverse the faulty jury instruction because the trail court's failure to instruct the jury on the heeding presumption (1) created substantial doubt that the instruction properly guided the jury and (2) resulted in prejudice against Petitioner.

In summary, the heeding presumption is the law of the land in Ohiowa because (1) it accords with the state's public policy in failure-to-warn cases; (2) encourages manufacturer's to create safer products; (3) promotes fairness; and (4) supports the consideration of reliable evidence. Because the read and heed doctrine applies in Ohiowa, the Trial Court erred in

disallowing the jury instruction on the heeding presumption. This error resulted in prejudice against the Tullys. Therefore, this Court should reverse the Trial Court's faulty jury instruction.

CONCLUSION

For the reasons stated in this Brief, the Tullys respectfully request that this Court reverse the Trial Court's grant of Zuul's motion for summary judgment, adopt the read and heed doctrine as the applicable law in Ohiowa, and reverse the Trial Court's faulty jury instruction.

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Respectfully submitted,

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