ORIGINAL

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 (Plaintiff Below)

v.

ZUUL ENTERPRISES, an Ohiowa corporation,
Respondent (Defendant Below)

On Appeal
from The Court of Appeals
for the State of Ohiowa, Seventh Appellate
District Drummond County

BRIEF OF RESPONDENT

ORAL ARGUMENT REQUESTED

/s/Team R
Team R
Attorney for Respondent

QUESTIONS PRESENTED

1. Under Ohiowa law, in a manufacturing defect claim, the plaintiff must prove the product is unreasonably dangerous using the consumer expectation test. Unforeseeable users of products, such as L.T., are not considered "consumers" under the test, and therefore, where injuries occur to an unforeseen user, no liability is imposed on the manufacturer. Did the Court of Appeals correctly affirm the grant of summary judgment by determining that no genuine dispute of material fact existed as to whether L.T. was a foreseeable user?
2. The "read and heed" presumption permits a fact-finder to presume that a person who was injured by a product would have read and heeded an adequate warning, if such warning had been provided. Ohiowa, which imposes strict liability on failure-to-warn claims through the Ohiowa Products Liability Act, has not adopted the heeding presumption. Did the court err in determining that the heeding presumption is the law of Ohiowa while also finding that no prejudice resulted from the trial court withholding a jury instruction on the heeding presumption?

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STATEMENT OF CASE

A. Nature of Case

Respondent Zuul Enterprises ("Zuul") is the manufacturer of electronic cigarettes, a product intended to be a safer alternative to traditional tobacco cigarettes. Regrettably, the Petitioner, L.T., was injured when left unattended by his babysitter, he used a Zuul e-cigarette in a manner that was not intended by Zuul.

As a result, two issues are now before the Court: first, whether the Court of Appeals properly held that no genuine issues of material fact exist as to whether L.T. was a foreseeable user of the product, and second, whether the "read and heed" presumption is applicable under Ohiowa law, and if so, whether prejudice occurred in the trial court's failure to instruct the jury on the presumption. Accordingly, Zuul first respectfully requests that this Court affirm the ruling of the Court of Appeals on the summary judgment issue. Second, Zuul respectfully requests that this Court reverse the adoption of the heeding presumption by the Court of Appeals, or, in the alternative, affirm the ruling of the Court of Appeals that no prejudice occurred in the denial of the Petitioner's request for a heeding presumption instruction.

B. Course of Proceedings and Disposition in the Court Below

Petitioners filed suit against Zuul alleging that (1) its e-cigarette had a manufacturing defect that caused an explosion, and (2) Zuul failed to adequately warn consumers about the risks associated with their e-cigarettes. (R. at 2.) After the suit was filed, Zuul moved for summary judgment. (R. at 2.) In Zuul's motion for summary judgment, Zuul conceded that its product had a manufacturing defect but claimed that Zuul was not liable for L.T.'s injuries because L.T. was not a foreseeable user of its product. (R. at 2-3.) Zuul also claimed that the warning on the packaging of its products fulfilled their duty to warn. (R. at 3.) The Court of Common pleas

granted Zuul's motion for summary judgment on the manufacturing defect claim and found that children were not foreseeable users of Zuul's products. (R. at 3.) The failure-to-warn claim proceeded to trial. (R. at 3.)

At trial, Petitioners requested a jury instruction on the heeding presumption. (R. at 3.) Zuul objected and the court sustained Zuul's objection and withheld the jury instruction. (R. at 3.) A jury verdict was rendered for Zuul and Petitioners appealed. (R. at 3.) The two issues on appeal were (1) whether the trial court erred in granting Zuul's motion for summary judgment on the manufacturing defect claim, and (2) did the trial court err in not providing a jury instruction on the heeding presumption. (R. at 3.) On December 20, 2019, the Court of Appeals affirmed the decision of the trial court. (R. at 2.) The Court of Appeals found that summary judgment on the manufacturing defect claim was appropriate. (R. at 3.) The Court of Appeals also found that the trial court did abuse its discretion in denying a jury instruction on the heeding presumption but found that since no prejudice resulted the trial court did not err in withholding the instruction. (R.3.) After the Court of Appeals affirmed the decision of the trial court, Petitioner Tully appealed the affirmation to the Supreme Court of Ohiowa. (R. at 1.)

C. Statement of Facts

Respondent Zuul Enterprises is an e-cigarette company that sells e-cigarette products as a safer alternative to traditional tobacco cigarettes. (R. at 3.) Zuul was established in Cincinnatus, Ohiowa, in March 2016. (R.at 3.) To operate its e-cigarette, a user depresses a button on the e-cigarette, which causes the internal atomizer to heat the flavored liquor into a vapor. (R. at 3-4.) This vapor is then inhaled through the mouthpiece. (R. at 4.) In litigation unrelated to the current matters, a federal district court in December 2017 found that Zuul used certain sweet flavors to market its products to children. (R. at 4.) Zuul denied that its products were marketed in such

manner but was required to pay damages. (R. at 4.) An injunction was also issued against Zuul that halted production of certain flavors. (R. at 4.) As a result, Zuul experienced difficult times with falling stock prices and struggling to avoid bankruptcy. (R. at 4.)

Zuul attempts in good faith to make its products undesirable to children

Zuul affirmed its denial of attempts to market its products to children in a statement issued on June 7, 2018. (R. at 4.) As a commitment to Zuul's position, Zuul announced two actions it intended to take as a sign of good faith. (R. at 4.) First, Zuul stated it would only produce "classic tobacco" vapor flavors for its product. (R. at 4.) Second, Zuul furthered its commitment by redesigning its e-cigarettes to prevent non-Zuul vapor cartridges from being inserted. (R. at 4.) Through these actions, Zuul ensured that only Zuul's classic tobacco flavored cartridges could be inserted in Zuul e-cigarettes. (R. at 4.) In addition, the June 2018 statement also included an announcment for a new line of accessories for Zuul customers. (R. at 4.) These accessories were "Zuul skins" that can be affixed to the surface of a Zuul cigarette. (R. at 4.) These skins can be customized or be purchased pre-decorated with patterns or licensed characters. (R. at 4.) While the packaging for Zuul's e-cigarettes contain a warning, the skins do not contain an additional warning. (R. at 4.) After this statement and the launch of these product lines, Zuul's stock price rose. (R. at 4.)

Barrett warned L.T. that the e-cigarette was dangerous

On July 17, 2018, Petitioner Tully left their eleven-year-old child L.T. in the care of nineteen-year-old Dana Barrett. (R. at 5.) Being a college sophomore, Ms. Barrett used e-cigarettes. (R. at 5.) Ms. Barrett used Zuul's products and purchased a *Hola Gato* skin on July 11. (R. at 5.) Ms. Barrett had this e-cigarette in her possession with the *Hola Gato* skin affixed when she watched L.T. on July 17. (R. at 5.) L.T. also happened to know of *Hola Gato* as *Hola*

Gato was a character of a popular cartoon. (R. at 5.) Ms. Barrett had warned L.T. on many occasions that the e-cigarette was dangerous and should not be played with. (R. at 5.) However, when the e-cigarette was left attended by Ms. Barrett, L.T. took the e-cigarette and played with it. (R. at 5.) L.T. depressed the activating button then began playing with the e-cigarette "in a manner which mimicked the operation of a leaf blower." (R. at 5.) While L.T. was playing, the e-cigarette exploded without warning and L.T.'s hand was severely burned. (R. at 5.)

SUMMARY OF THE ARGUMENT

Before this Court are two issues to be resolved: (1) this Court must determine whether summary judgment was proper on the manufacturing defect claim and (2) this Court must determine whether the heeding presumption applies to strict liability failure-to-warn claims in Ohiowa.

First, the trial court did not err in granting summary judgment on the manufacturing defect claim against Zuul. Under Ohiowa law, the consumer expectation test is applied to strict liability claims. That is, Ohiowa law requires the plaintiff to establish that a product was more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. L.T. was neither a consumer or a foreseeable consumer that Zuul could have expected to buy its e-cigarette. To start, Zuul does not market its products to children and has taken considerable steps to make its products less desirable to children. Thus, Zuul could not have reasonably foreseen that a child would use its products. Moreover, L.T.'s manner of using the product was not an intended use. Therefore, Zuul cannot be held liable for L.T.'s injuries caused from the e-cigarette.

Second, the Court of Appeals erred in finding that the heeding presumption is the law of Ohiowa, but correctly determined that no prejudice resulted from the failure to give the

instruction. The issue of whether the heeding presumption applies to strict liability cases is a matter of first impression for this Court. This Court should not adopt the presumption because the legislature did not include it in the Ohiowa Products Liability Act, because the doctrine is highly controversial, and because rejecting the presumption would serve pro-consumer public policy goals, which are respected by Ohiowa law. Thus, this Court should reverse the holding of the Court of Appeals and find that the heeding presumption is not applicable under Ohiowa law.

Even if this Court adopts the heeding presumption, no prejudice occurred due to the trial court's denial of Petitioner's request for a heeding presumption jury instruction. Rejection of the jury instruction did not affect Petitioners' ability to try the issue of causation. Moreover, Zuul provided the jury with ample evidence that L.T. would not have followed an adequate warning, even if given. Even with an instruction, Petitioners would not have prevailed on causation because L.T. ignored a verbal warning thus allowing Zuul to rebut the presumption. Thus, the trial court properly rejected the jury instruction.

STANDARD OF REVIEW

Summary judgment is proper 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). On appeal, the decision on a motion for summary judgment is reviewed de novo, with the evidence viewed in the light most favorable to the nonmoving party. *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 362 (Iowa 2014). Review of a lower court's decision to grant or withhold a jury instruction is for an abuse of discretion. *Barton Protective Servs., Inc. v. Faber*, 745 So. 2d 968, 974 (Fla. Ct. App. 1999).

ARGUMENT

I. The Court of Appeals correctly affirmed summary judgment on the manufacturing defect claim because L.T. was not a foreseeable consumer and did not use the product as intended.

The trial court did not err in granting summary judgment in favor Zuul. To have a viable claim against Zuul, L.T. must establish: (1) that the condition of the product resulted from the manufacturing, (2) that the condition made the product unreasonably dangerous, (3) that the condition existed when the product left the manufacturer's hands, (4) that the plaintiff suffered the injury and (5) the injury was proximately caused by the defective condition. *Hakim v. Safariland, LLC*, 2019 U.S. Dis. LEXIS 180847 at *5 (N.D. Ill. 2019). Petitioners did not and cannot meet this burden.

To prove that a product is unreasonably dangerous, Ohiowa law requires an application of the consumer expectation test. (R. at 5.) *citing State Farm Fire & Cas. Co. v. Chrysler Corp.*, 523 N.E.2d 489, 494 (Ohio 1988). The consumer expectation test is an objective test that is based on the reasonable expectations of an ordinary consumer. *Hakim*, 2019 U.S. Dis. LEXIS 180847 at *5. Specifically, the consumer expectation test considers whether the product was "more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." *State Farm Fire & Cas. Co*, 523 N.E.2d at 494. Under the Ohiowa Products Liability Act ("OPLA"), a key factor of the consumer expectation test is that the use given to the product must be within the intended use or a reasonably foreseeable use. *Id*. Because L.T. was not a foreseeable consumer and did not use the product in the intended manner, summary judgment was proper.

A. L.T. was not a foreseeable consumer because Zuul did not advertise the e-cigarette for children and took a financial loss in order to make its products less enticing to children.

Zuul took drastic steps to ensure that children would not use its products and could not have foreseen that L.T. would be subject to harm from the e-cigarette. Ohiowa imposes liability on a manufacturer only when a 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. Since OPLA does not define "consumer" and the Ohiowa courts have not addressed this issue, the Second Restatement of Torts provides potential guidance. The Second Restatement of Torts imputes liability on the seller of a product when there is physical harm that is "caused to the ultimate user or consumer, or to his property." Restatement (Second) of Torts § 402A(1). The authors of the Restatement elaborated that "it is not necessary that the ultimate user or consumer have acquired the product directly from the seller." Restatement (Second) of Torts § 402A cmt. 1. But, the ultimate user must have used the product as intended. *Id*. The Restatement defines a "user" as anyone who passively enjoys the benefit of the product. *Id*.

In Ohiowa, the legislature has omitted "ultimate user" from its product liability law, OPLA. Ohiowa Rev. Code § 5552.368. Instead, Ohiowa has imposed liability on manufacturers for the injuries to "consumers" of the product. *Id*. Therefore, liability in Ohiowa product's liability law is limited to include consumers who have ultimately used the product in the manner it was intended. *Id*. Thus, the drafters of OPLA did not intend to include any person with access to a product in the term "consumers," and instead, intended to include only "reasonably foreseeable" consumers.

Other jurisdictions have adopted such a definition. The Supreme Court of Oklahoma defined the ordinary consumer as someone who is foreseeably expected to purchase the product.

Woods v. Fruehauf Trailer Corp., 765 P.2d 770, 774 (Okla. 1988). In *Woods*, the plaintiff was hauling gasoline on the manufacturer's tanker trailer and was injured in a fire caused by the manufacturer's defective tanker. *Woods*, 765 P.2d at 772. The court explained that the ordinary consumer of a tanker trailer does not include the general public but rather someone who is in the business of hauling materials for which the tanker is designed to do. *Id.* at 774. There, the court reasoned that an ordinary consumer is a reasonably foreseeable consumer, and that the relevant inquiry is limited to what a reasonable consumer could expect. *Id*. The Oklahoma Supreme Court ruled that manufacturers will be liable only to those users that it can anticipate as foreseeable users of the product. *Id.*

In contrast with the *Woods* plaintiff, L.T. was not a foreseeable user. In *Woods*, the manufacturer of the tanker designed the product specifically to haul and unload material and the product was used by a reasonably foreseeable consumer—the operator of a tanker trailer. Zuul, on the other hand, did not intend for children to use the e-cigarette. Zuul restricted its flavor to only "classic tobacco" in order to solely attract adult smokers. (R. at 4.) Zuul even made the sacrifice in taking its flavored products off of the shelves at great sacrifice to its bottom line. (R. at 4.) Unlike the *Woods* plaintiff, who was a foreseeable and intended user of the manufacturer's product, L.T. is not a foreseeable or intended user of Zuul's e-cigarette.

Moreover, "Zuul skins," a decorative adhesive that Zuul markets for use with its product are not geared toward children. In *Colgate v. Juul Labs, Inc.*, the court found that minors harmed Juul's e-cigarettes were foreseeable users because Juul intentionally marketed its e-cigarette to minors. 402 F. Supp. 3d 728, 754 (N.D. Cal. 2019). Like Zuul in the past, Juul used different flavors such as mango, fruit and crème brulee to attract teenaged users. *Id.* at 741. Juul also used Instagram, Facebook, and Twitter, social media that teens frequently use, to advertise the e-

cigarette and the marketing plan used celebrities and YouTube bloggers to advertise the product. *Id*. at 742. Finally, yet another marketing strategy of the manufacturer was sending e-mails to a list that was not age restricted. The court determined that minors or teenagers were foreseeable users of the e-cigarette since the advertisement and marketing targeted the youth. *Id.* at 754.

Unlike the manufacturer in *Colgate*, Zuul did not advertise its e-cigarette to minors. Zuul did not market or advertise using social media that would reach children. Unlike the manufacturer in *Colgate*, Zuul actually took precautions to avoid enticing children by restricting its flavor to "classic tobacco." (R. at 4.) Zuul also redesigned its e-cigarette so that non-Zuul vapor cartridges are not able to be used with Zuu's e-cigarette. (R. at 4.) Moreover, Juul specifically took measures to reach minors while Zuul actually took measures to avoid attracting minors. (R. at 4.) Zuul intended its e-cigarette to be used by adults only and not children. (R. at 4.) Even when introducing Zuul skins for the e-cigarette, Zuul still intended only adults to use its product. (R. at 4.) For example, the cartoon character "Hola Gato" is not a cartoon loved by only children—L.T.'s much older babysitter loved the cartoon as well. (R. at 5.)

Accordingly, because L.T. was not a foreseeable user of the product, Zuul cannot be liable for his damages.

B. L.T. did not use the e-cigarette for its intended use nor did he use the product in a foreseeable manner.

Zuul's products were designed and intended to function as e-cigarettes, not as toys for children. The consumer expectations test assesses what the ordinary consumer with the "ordinary knowledge common to the community" expects regarding the dangers of a product. *Hisrich v. Volvo Cars of N. Am., Inc.*, 226 F.3d 445, 454-55 (6th Cir. 2000). An ordinary consumer does not have an expectation of the product's performance when the product is used in a manner that

is not an intended use. *Pruitt v. General Motors Corp.*, 599 N.E.2d 723, 726 (Ohio Ct. App. 1991).

The consumer expectations test uses an objective standard of the common consumer and not a subjective standard of a particular individual. *Leichtamer v. American Motors Corp.*, 424 N.E.2d 568, 577 (Ohio 1981). In applying the consumer expectations test, the defect must be within the common consumer's knowledge. *Pruitt*, 599 N.E.2d 723, 726 (Ohio Ct. App. 1991). In *Leichtamer*, the Ohio Supreme Court determined that a vehicle that had been advertised for off-the-road use was used as intended when the plaintiff was injured while using the vehicle off the road because the vehicle's protective gear was inadequate for the driver. *Id.* By contrast, Zuul did not advertise that the e-cigarette could be used as a pretend leaf blower nor could it foresee that this product would serve as a child's toy or distraction. Certainly, the consumer knew that the product was dangerous for children, as Barrett instructed L.T. to stay away from the e-cigarette. (R. at 5.)

In *Weigle v. Spx Corp.*, the court held that the defendant was not entitled to summary judgment because the plaintiff had used the product in a manner that was foreseeable. 729 F.3d 724, 739 (7th Cir. 2013). The plaintiff had been injured from using support stands without the pins, which were an additional piece that needed to be inserted into the stands. *Id*. The court concluded that using the stands without the pins was foreseeable because the stand was functional without the pins. *Id*. Therefore the manufacturer did not prevail in a motion for summary judgment. *Id.*

Unlike the defendant in *Weigle*, Zuul did not foresee a child playing with the e-cigarette. Zuul's e-cigarette was intended to produce a tobacco-flavored vapor to avoid enticing children with sweet flavors. Zuul intended for the vapor to be inhaled by the consumer. L.T. did not

attempt to enjoy the benefits of the e-cigarette by inhaling the vapor. Instead, L.T. used the e-cigarette to imitate using a leaf blower as he pressed down on the button and waved the e-cigarette in front of his body. (R. at 5.) Unlike in *Weigle,* where the manufacturer could anticipate the support stands being used without the pins since the stands could function without the pins in place, Zuul could not have anticipated that a child, an unintended user, would use the e-cigarette as a leaf blower. Zuul also printed warnings on the e-cigarette to let the buyers know of the dangers of using an e-cigarette. Ultimately, Zuul's e-cigarette was never intended for children to play with. The e-cigarette was manufactured to provide the pleasure of a cigarette without the detrimental smoke by-product. Accordingly, Zuul should not be liable for L.T.'s injuries because L.T. did not use the e-cigarette in the manner it was intended. Because no factual dispute exists as to whether L.T. was a reasonable consumer or whether L.T. used the product as intended, summary judgment was proper and the determination by the Court of Appeals should be affirmed.

II. The Court of Appeals erred in adopting the heeding presumption under Ohiowa law, but correctly determined that no prejudice occurred from the trial court's failure to include the instruction.

This Court should reverse the holding of the Court of Appeals because the heeding presumption should not be the law of Ohiowa and is inapplicable to the instant facts. Further, this Court should find that no prejudice resulted from rejection of the 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 & Maine Ins. Co.*, 239 P.3d 904, 912 (Mont. 2010). Reversal is warranted only when "(1) '[the court has] substantial doubt whether the instructions, considered as a whole, properly guided the jury in its deliberations,' *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1235 (10th Cir. 1999) (quotation omitted); and (2) 'when a

deficient jury instruction is prejudicial," *Coleman*, 108 F.3d at 1201. And a court will not find prejudice if the instructions state the applicable law. *McAlphine v. Rhone-Poulenc Ag Co.*, 16 P.3d 1054, 1057 (Mont. 2000).

The heeding doctrine is derived from comment j of the Restatement (Second) of Torts § 402A. Restatement (Second) of Torts, § 402A. Comment J has been construed as creating a presumption where "an adequate warning, if given, will be read and heeded." *Seley*, 423 N.E.2d at 838. Application of the presumption would satisfy a plaintiff's proximate cause burden for strict liability claims. *Seley v. G. D. Searle & Co.*, 423 N.E.2d 831, 838 (Ohio 1981). But, comment j has come under much criticism by commentators and was not included in the Restatement (Third) of Torts. Restatement 3d of Torts: Products Liability, § 2, Reporters' Note, cm. l. The issue of whether the heeding presumption is applicable under Ohiowa law is a matter of first impression. When the issue was before the Court of Appeals, it advanced several reasons why the presumption should be adopted, but Ohiowa's prior reliance on the Restatement (Second) of Torts, adoption of the learned intermediary doctrine, and public policy are not sufficient reasons to adopt the controversial heeding presumption. Because adoption of the heeding presumption is without valid basis, this Court should reverse the holding of the Court of Appeals as to the presumption. Even if should this Court adopts the heeding presumption, itshould uphold the holding of the Court of Appeals that the trial court properly rejected the jury instruction.

A. The heeding presumption is inconsistent with Ohiowa law, is highly controversial, is contrary to Ohiowa public policy goals, and should be rejected.

The Court of Appeals' adoption of the heeding presumption was unjustified. The authors of the Restatement (Third) of Torts note that the heeding presumption "has elicited heavy

criticism." Restatement 3d of Torts: Products Liability, § 2, Reporters' Note, cm. l. The heeding presumption has not seen widespread adoption and has only been adopted in less than half of the states.[1] Several jurisdictions have rejected the heeding presumption.[2] Different jurisdictions have articulated their own reasons for adopting the heeding presumption. But the reasons outlined by those jurisdictions are not applicable to Ohiowa.

While Ohiowa's products liability laws were influenced by the Restatement (Second) of Torts, Ohiowa has never adopted the Restatement (Second) of Torts. Additionally, Ohiowa's adoption of the learned intermediary doctrine should not extend to an adoption of the heeding presumption. Finally, adoption of the presumption does not advance Ohiowa's public policy goals. Because the reasons cited by the Court of Appeals do not support adoption of the heeding presumption, this Court should reverse the finding of the Court of Appeals.

i. While Ohiowa legislature relied on the Restatement (Second) of Torts for drafting products liability laws, it did not adopt the Restatement.

Ohiowa drafted its own laws on product liability instead of adopting the Restatement (Second) of Torts. Because Ohiowa merely relied on the language of the Restatement in drafting

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[1] *See e.g. Golonka v. GMC*, 65 P.3d 956, 968 (Ariz. Ct. App. 2003); *Bushong v. Garman Co.*, 843 S.W.2d 807, 811 (Ark. 1992); *Staley v. Bridgestone/Firestone, Inc.*, 106 F.3d 1504, 1509 (10th Cir. 1997); *Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541, 545-55 (Ind. Ct. App. 1979); *Wooderson v. Ortho Pharmaceutical Corp.*, 681 P.2d 1038, 1057 (Kan. 1984); *Snawder v. Cohen*, 749 F. Supp. 1473, 1479 (W.D. Ky. 1990); *Bloxom v. Bloxom*, 512 So. 2d 839, 850 (La. 1987); *United States Gypsum Co. v. Mayor of Baltimore*, 647 A.2d 405, 413 (Md. 1994); *Wolfe v. Ford Motor Co.*, 376 N.E.2d 143, 147 (Mass. App. Ct. 1978*); Moore v. Ford Motor Co.*, 332 S.W.3d 749, 763 (Mo. 2011); *Coffman v. Keene Corp.*, 628 A.2d 710, 720 (N.J. 1993); *Butz v. Werner*, 438 N.W.2d 509, 517 (N.D. 1989); *Seley v. G. D. Searle & Co.*, 423 N.E.2d 831, 838 (Ohio 1981); *Cunningham v. Charles Pfizer & Co.*, 532 P.2d 1377, 1382 (Okla. 1974); *Coward v. Owens-Corning Fiberglas Corp.*, 729 A.2d 614, 621 (Pa. Super. Ct. 1999); *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1281-82 (5th Cir. 1974); *House v. Armour of Am.*, 929 P.2d 340, 347 (Utah 1996); *Needham v. Coordinated Apparel Group*, 811 A.2d 124, 129 (Vt. 2002).

[2] *See e.g. Deere & Co. v. Grose*, 586 So. 2d 196, 198 (Ala. 1991); *Huitt v. Southern California Gas Co.*, 116 Cal. Rptr. 3d 453, 467 (Cal. App. 2010); *De Jesus v. Craftsman Machinery Co.*, 548 A.2d 736, 744 (Conn. App. Ct. 1988); *Wilson v. Bradlees of New Eng., Inc.*, 250 F.3d 10, 15-16 (1st Cir. 2001); *Odom v. G. D. Searle & Co.*, 979 F.2d 1001, 1003 (4th Cir. 1992); *Harris v. Int'l Truck & Engine Corp.*, 912 So. 2d 1101, 1109-10 (Miss. Ct. App. 2005); *Thomas v. Hoffman-LaRoche, Inc.*, 949 F.2d 806, 813 (5th Cir. 1992); *Riley v. American Honda Motor Co.*, 856 P.2d 196, 200 (Mont. 1993); *Rivera v. Philip Morris*, 209 P.3d 271, 275-77 (Nev. 2009); *Payne v. Novartis Pharms. Corp.*, 767 F.3d 526, 533 (6th Cir. 2014); Wis. Stat. § 895.047(1)(e).

its laws but declined to adopt the Restatement, the heeding presumption should not be adopted. In drafting its products liability laws, Ohiowa relied on the statutes of neighboring jurisdictions as well as the Restatement (Second) of Torts. Ohiowa Rev. Code §§ 5552.368 imposes strict liability against manufacturers in the state of Ohiowa. While Ohiowa imposes strict liability, imposition of strict liability is without formal adoption of the Restatement (Second) of Torts § 402A or comment j. Restatement (Second) of Torts, § 402A.

Several jurisdictions such as Indiana, Kentucky, and Ohio impose strict liability and have adopted the heeding presumption on failure-to-warn claims but have also expressly adopted § 402A. *See Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541, 545-55 (Ind. Ct. App. 1979) (where the court noted that Indiana has expressly adopted the theory of strict liability as delineated in § 402A and used the presumption derived from comment j); *Snawder v. Cohen*, 749 F. Supp. 1473, 1479 (W.D. Ky. 1990) (where the court found that while Kentucky courts have not previously adopted the presumption, Kentucky has adopted § 402A and it was presumed that since § 402A included comment j, the heeding presumption was similarly adopted); *Seley*, 423 N.E.2d at 835-38 (where the court found that Ohio has adopted § 402A for strict liability claims and applied the heeding presumption).

On the other hand, jurisdictions such as Nevada and Montana that have expressly declined to adopt the heeding presumption as they had their own strict liability schemes. *See Rivera v. Philip Morris*, 209 P.3d 271, 275-77 (Nev. 2009); *Riley v. American Honda Motor Co.*, 856 P.2d 196, 200 (Mont. 1993). *Rivera* stated that adoption of the heeding presumption would conflict with Nevada's evidentiary burdens on plaintiffs' strict liability failure-to-warn claims. *Rivera*, 209 P.3d at 275. *Rivera* found adoption of the presumption unacceptable because it would have removed the plaintiff's initial burden on causation. *Id*. Shifting the burden from the

plaintiff would contrast with Nevada's requiring the plaintiff to carry the burden and the court was reluctant to shift the burden. *Id.* Additionally, *Rivera* also declined to adopt the heeding presumption because Nevada had not adopted comment j. *Id.* at 276. While Nevada courts have previously cited to comment j, *Rivera* stated that prior discussion did not extend to wholesale adoption of comment j. *Id*. Nevada stated multiple reasons why it chose not to adopt the heeding presumption. *Id.* at 275-77.

Similarly, the *Riley* court in Montana echoed *Rivera* in stating that prior discussion of comment j or § 402A did not equate wholesale adoption of comment j. *Riley*, 856 P.2d at 200. While Montana has adopted § 402A and imposes strict liability, Montana law requires that the plaintiff "establish a causal link between the lack of warning and the accident and the injuries in a failure-to-warn claim." *Id*. at 198. If Montana adopted the presumption, then the plaintiff would no longer carry the initial burden on causation. *Id*. *Riley* was unwilling to adopt a presumption that would shift evidentiary burdens in a manner contrary to Montana's ordinary approach and declined to adopt the heeding presumption. *Id*. at 200.

Ohiowa may have drawn inspiration from the Restatement (Second) of Torts, but Ohiowa has not adopted the Restatement in full. To that end, Ohiowa, unlike Indiana, Ohio, and Kentucky, has not fully adopted the language § 402A. (R. at 11.) Those states have adopted the heeding presumption by adopting comment j. However, what those states have in common is that adoption of the heeding presumption has been reliant on prior adoption of § 402A for the basis of strict liability.

Instead, Ohiowa is more like Nevada or Montana in that all three states have articulated their own strict liability approach instead of merely adopting § 402A. Ohiowa imposed strict liability through Ohiowa Rev. Code §§ 5552.368, and the statute drew inspiration from the

Restatement (Second) of Torts. (R.11.) But Ohowia did not adopt the Restatement or § 402A. (R.11.) § 402A states:

> "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

Restatement (Second) of Torts, § 402A. In reviewing the language of Ohiowa's product liability statute, Ohiowa's statute states:

> "Except as provided in this section, a person who sells, leases, or otherwise puts into the stream of commerce any product that is defective or in a defective condition that is unreasonably dangerous to any consumer or to the consumer's property is subject to liability for physical harm caused by that product to the consumer or the consumer's property if: (a) that consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defect or defective condition; and (b) the product is expected to and does reach the consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article."

Ohiowa Rev. Code §§ 5552.368. In comparing the language of the Restatement and Ohiowa's statute, while Restatement influence on Ohiowa law is somewhat noticeable, more apparent are the differences between the two. For example, the Ohiowa statute excluded the Restatement's reference to ultimate user and excluded language that referenced to strict liability applying despite the seller exercising "all possible care in the preparation and sale of his product." Restatement (Second) of Torts, § 402A. Both Nevada and Montana articulated their own strict liability schemes and have expressly rejected comment j. And while Montana has adopted § 402A, Montana still maintained its own approach to strict liability failure-to-warn claims through case law. Likewise, Ohiowa's failure to fully adopt the language of the Restatement should lead this Court to infer that this failure was intentional. Thus, this Court

should find that the heeding presumption is not the law of Ohiowa as the doctrine is derived from a Restatement section not adopted by Ohiowa.

ii. Ohiowa's prior adoption of the learned intermediary doctrine should not extend to an adoption of the heeding doctrine.

Ohiowa's adoption of the learned intermediary doctrine should not lead to an adoption of the heeding presumption because Ohiowa adopted a doctrine derived from comment j of § 402A, but did not adopt comment j. The learned intermediary doctrine "shields manufacturers of prescription drugs from liability where the manufacturer adequately warns a patient's prescribing physician of the potential risks inherent in the use of the product." *Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003). Derived from § 402A, this doctrine has been adopted in the prescription medical context in forty-four states. *Id*. at 852. In contrast, support or rejection of the heeding presumption has been split. Furthermore, unlike the criticism that comment j has faced which culminated in its exclusion from Restatement (Third) of Torts, the learned intermediary doctrine was codified in the Restatement (Third) of Torts. Restatement 3d of Torts: Products Liability, § 6.

Rivera stated that prior discussion of comment j of § 402A did not extend to wholesale adoption of comment j. 209 P.3d at 193. The plaintiff in *Rivera* argued that Nevada should have adopted the heeding doctrine because Nevada had adopted comment j. *Id*. at 192. The court disagreed and stated that prior discussion of comment j did not extend to wholesale adoption of comment j. *Id*. at 193. *Rivera* expressly rejected the heeding presumption because presumption conflicted with Nevada law and public policy. *Id*. at 193-95. Despite declining to adopt the heeding presumption, Nevada adopted the learned intermediary doctrine in the *Klasch v. Walgreen Co*. 264 P.3d 1155, 1159 (Nev. 2011). Unlike the heeding presumption, *Klasch* found that the learned intermediary doctrine had sound foundation in public policy. *Id*. While Nevada

chose to adopt the learned intermediary doctrine, Nevada also chose to reject the heeding presumption despite discussing comment j in prior cases.

Like many jurisdictions including Nevada, Ohiowa has adopted the learned intermediary doctrine. (R.11.) But, adoption of this popular doctrine should not extend to adoption of the controversial heeding doctrine. As noted by *Rivera*, the learned intermediary doctrine upheld important policy considerations. The heeding doctrine is much more controversial, which led to the doctrine's removal from the Restatement (Third) of Torts. Nevada's adoption of the learned intermediary doctrine did not spur the adoption of the heeding presumption. Like Nevada, Ohiowa has adopted the learned intermediary doctrine (R. at 11.) But, Ohiowa's adoption of the learned intermediary doctrine puts it on par with many jurisdictions. But the heeding presumption does not experience similar majority support. As such, this Court should find that Ohiowa's adoption of the learned intermediary doctrine should not extend to adoption of the heeding doctrine.

iii. Adoption of the heeding presumption does not serve public policy.

The Court of Appeals erred in citing public policy as a reason to adopt the heeding presumption. Public policy goals of individual states have propelled adoption or rejection of the heeding presumption. Policy considerations prompted some states to decline adopting the presumption. For example, *Rivera* reiterated that the policy of strict liability is to hold manufacturers responsible for defective products that cause harm but found that adoption of the heeding presumption does not serve public policy. *Rivera*, 209 P.3d at 277. It is important to note that the presumption can work in favor of the seller if there was an adequate warning, thus satisfying a defendant's burden. *See Riley*, 856 P.2d at 200. *Rivera* followed this line of thought when it interpreted § 402A comment j to "impl[y] that a manufacturer can satisfy its duty of

making products safe by providing adequate warnings." *Id*. at 277. Nevada believed it was a better "principle that a manufacturer must make products that are not unreasonably dangerous, no matter what instructions are given in the warning." *Id*. The court concluded "that it is better public policy not to encourage a reliance on warnings because this will help ensure that manufacturers continue to strive to make safe products." *Id*. In sum, Nevada was reluctant to adopt the presumption because it feared that adoption would incentivize providing warnings at the expense of disincentivizing making additional efforts to make products safe. *Id*.

Riley advanced its own reasons for rejecting the heeding presumption. 856 P.2d at 200. *Riley* did not believe that it was common sense, as advocated by interpreters of comment j, that a person would have heeded a warning if it was provided. *Id*. *Riley* noted that even though the modern world is filled with warnings, those warnings often go unread or heeded. *Id*. *Riley* noted that the burden of causation is not insurmountably difficult as other jurisdictions claim. *Id*. The fear that testimony would be speculative or unreliable is present in other types of claims, not just in failure-to-warn context. *Id*. *Riley* stated that a manufacturer would be in no better position than the plaintiff to prove that a plaintiff would have heeded a warning. *Id*. *Riley* found that shifting that burden to the manufacturer while eliminating the burden for plaintiffs was untenable. *Id*.

Although the Court of Appeals stated that Ohiowa's "public policy tends to favor the consumer" as the basis for adopting the heeding presumption, the court was silent as to what constitutes "pro-consumer public policy." (R. at 11-12.) As such, this Court must look to other jurisdictions and their considerations. Jurisdictions have rejected the heeding presumption on policy grounds because it provided disincentives for manufacturers to make safer products and they were reluctant to shift the evidentiary burden in a contrary manner.

Nevada advocated for a more proactive manufacturer whose goal was to make safe products, rather than seek to avoid liability by only providing warnings. Manufacturers should focus on producing safe products instead of only satisfying its burden by providing warnings and not taking additional efforts to create safer products. Montana's approach rejects the notion that it is common sense that a person would heed a warning if given one. Modern society's complacency as to heeding or reading warnings is not unfounded. Considering the sheer amount of warnings that the average person is exposed to on a daily basis, it is unlikely that even a fraction of those warnings are read, let alone heeded.

A better public policy is not to rely solely on a company to provide warnings in the hopes that the outcome will be safer products. Especially when the reality is that warnings are largely ignored by modern society. Instead, a better approach is to have companies go to the root of the issue and have companies focus on providing safely designed products not just adequate warnings. This is the approach proffered by Nevada and Montana, and it is urged that Ohiowa follow suit.

As to policy regarding evidentiary burdens, the Court of Appeals was silent on Ohiowa's observation of evidentiary burdens in the strict liability failure-to-warn context. All the cited authorities agree that the heeding doctrine shifts the burden of proving the causation element from the plaintiff to the defendant. Determination on whether to adopt the presumption has been contingent on whether the resulting burden shift would contrast with the state approach.

Although the Court of Appeals was silent on Ohiowa's evidentiary approach, Ohiowa's choice to enact its own products liability laws instead of adopting the Restatement (Second) of Torts implies that the policy concerns as to burden shifting are not present in Ohiowa. If Ohiowa wanted to shift the burden to the benefit of the plaintiff, then Ohiowa would have expressly

adopted the Restatement or statutorily provided for such action. (R. at 11.) Shifting the burden does not guarantee that companies will work to make the product safer. Instead, they will work to making sure to provide the warnings, but not a safer product. Therefore, considering the policy of Ohiowa and the approaches taken by Nevada and Montana, this Court should reject the presumption as it does not further policy.

B. The Court of Appeals correctly determined that the trial court did not err in deciding to withhold a jury instruction on the heeding presumption.

The appellate court did not err in finding that no prejudice resulted from the trial court's withholding of the jury instruction as to the heeding presumption. Failure to give a jury instruction is prejudicial when it seems probable that the "error prejudicially affected the verdict." *Soule v. General Motors Corp.*, 882 P.2d 298, 317 (Cal. 1994). Courts generally look at the nature of the error "including its natural and probable effect on a party's ability to place his full case before a jury." *Id*. Reversal is only warranted if the error resulted "in a miscarriage of justice." *Id*. On these facts, however, the lack of instruction did not impact Tully's case and no prejudice resulted.

i. Denial of the jury instruction did not impact Tully's ability to try the issue of causation.

The trial court correctly rejected the jury instruction because the evidence shows that application of the heeding presumption would not have aided Tully's causation burden. When no warning or an inadequate warning is given, the heeding presumption states that if there had been an adequate warning, it would have been read and heeded. *Seley*, 423 N.E.2d at 838. This presumption, if unrebutted, acts to satisfy a plaintiff's causation burden. *Id*. The causation burden for failure-to-warn is showing that there is a connection between the lack of adequate warnings

and the plaintiff's injury. *Id*. However, this is a rebuttable presumption and a defendant is permitted to rebut the presumption with evidence. *Id*.

The court in *Bloxom* held that the manufacturer successfully rebutted the presumption by showing that plaintiff would not have read an adequate warning even if one had been provided. *Bloxom v. Bloxom*, 512 So. 2d 839, 850 (La. 1987). The court found that the manufacturer failed to provide an adequate warning as to the dangers of plaintiff's vehicle and the heeding presumption arose. *Id*. But, the manufacturer successfully rebutted the presumption through testimony of plaintiff which demonstrated he had not read the owner's manual. *Id*. The plaintiff further testified that it was not his practice to look at the manual unless there was something wrong. *Id*. The court concluded that even if the plaintiff had been provided an adequate warning, such a warning would have been futile based upon plaintiff's testimony. *Id*. at 851. Thus, the plaintiff was unable to satisfy his causation burden because even with the heeding presumption, the defendant successfully rebutted the presumption with evidence. *Id*.

Likewise, even if there had been an adequate warning on the e-cigarette, L.T. would not have heeded such warning because he ignored a warning given to him by Ms. Barrett. While the Court of Appeals is silent as to what warning was on the e-cigarette, it is known that the packaging contains a warning and the skin does not contain an additional warning. (R. at 4.) On the day of the accident, there was a skin on Ms. Barrett's e-cigarette. (R. at 5.) Therefore, it is unknown what warnings were and were not present on the day of the accident. However, the record does show that Ms. Barrett "warned L.T. many times that it was dangerous to play with the e-cigarette." (R. at 5.) Despite Ms. Barrett's repeated warnings, L.T. went ahead and took the e-cigarette anyway. (R. at 5.) L.T.'s conduct is analogous to the plaintiff's in *Bloxom* in demonstrating the futility of providing a warning. Even when presented with a warning, L.T.

ignored that warning. (R. at 5.) Therefore, Tully's ability to prevail on causation was unaffected by a denial of the jury instruction because Zuul would have rebutted it based on the trial record.

ii. Tully was not prejudiced by the trial court's denial of the requested jury instruction.

The trial court properly withheld the jury instruction because no prejudice resulted. Reversal is warranted only when "(1) '[the court has] substantial doubt whether the instructions, considered as a whole, properly guided the jury in its deliberations,' *Morrison*, 175 F.3d at 1235 (quotation omitted); and (2) 'when a deficient jury instruction is prejudicial,' *Coleman*, 108 F.3d at 1201. But a court will not find prejudice if the instructions state the applicable law. *McAlphine*, 16 P.3d at 1057. To determine whether there was prejudice, courts weigh "(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." *Soule*, 882 P.2d at 318.

The court in *Soule* found that the defendant was not prejudiced by the trial court's rejection of the requested jury instruction because the court determined that there was a low possibility the jury was misled, or the verdict was affected. *Soule*, 882 P.2d at 318. The defendant requested a jury instruction "that any design defect was not a 'substantial' or 'contributing' cause of plaintiff's 'enhanced' injuries if those same injuries would have occurred even with a nondefective design." *Id.* at 311. Instead, the court instructed the jury that "that plaintiff could not recover for a design defect unless the defect was a 'substantial' factor in producing her 'enhanced' injuries." *Id*. The court stated that the failure to use exact language was harmless. *Id*. at 318. *Soule* acknowledged "the fact that no other instructions covered GM's well-supported theory with the required specificity may weigh in favor of a finding that prejudice." *Id*. at 317. Even so, the *Soule* court ultimately determined that no prejudice resulted when all the factors were weighed. *Id*. Both parties gave substantial evidence and arguments on the issue of

causation. *Id*. It was clear from the evidence, arguments, and instruction that the defendant could escape liability if the plaintiff's injury would have occurred regardless of any defects. *Id*. The court also noted that the jury did not appear confused or that their deliberations were affected by the absence of the jury instruction. *Id*. Thus, the court found no prejudice because there was nothing to suggest the lack of jury instruction affected the verdict or misled the jury. *Id*.

The heeding presumption applied to just one element of Tully's claim. For Tully to prevail, Tully would have to prevail on all the elements for a strict liability failure-to-warn claim in Ohiowa. *See* Ohiowa Rev. Code §§ 5552.368. But, the Court of Appeals only states that the jury rendered a verdict for Zuul. (R. at 3.) The opinion does not state which elements Tully satisfied and failed, only that the jury held for Zuul. (R. at 3.) As to the jury instruction, the Court of Appeals was silent on actual wording of the requested jury instruction or what other instructions were given. (R. at 12.) Therefore, we cannot determine in what ways the jury instruction would have prejudicially impacted Tully's case, if at all. But the effect of a jury instruction is just one of several factors weighed by courts.

The other factors weigh in favor of a finding of no prejudice because, like the *Soule* jury, the jury had all the evidence it needed to render a verdict and did not appear confused. The opinion gave great weight to the breadth of information and evidence available to the jury when it rendered its verdict. (R. at 12.) That information included testimony by all named parties. (R. at 12.) There was evidence presented about the warnings provided by Zuul on its packaging, but not its "skins." (R. at 4.) The jury also heard that Ms. Barrett had warned L.T. many times about the danger of using the e-cigarette. (R. at 5.) With this information, the jury had the information it needed to weigh the warning issue and render a verdict. The jury was also not misled or confused by a lack of the requested instruction because the jury deliberated for nearly sixteen

hours before it rendered a verdict. (R. at 12.) Despite not receiving a jury instruction on the heeding presumption, the jury had ample information to guide its deliberations. The requested jury instruction would not have guided the jury because it was an instruction on inapplicable law since the heeding presumption should not be applied in Ohiowa. This Court should find no prejudice resulted from the trial court's failure to instruct the jury on the heeding presumption.

CONCLUSION

Therefore, L.T. cannot be considered a consumer of the e-cigarette and did not use the product as intended or reasonably foreseen. L.T. was not in the class of persons that Zuul would reasonably foresee could be harmed by the use of a defective e-cigarette. If L.T. had imitated using a cigarette instead of a leaf blower, then L.T. would be considered a consumer under Ohiowa Rev. Code § 5552.368.

Furthermore, this Court should find that adoption of the heeding presumption was in error. Review of jurisdictions that have and have not applied the heeding presumption should lead this Court to find that the heeding presumption should not be adopted. Ohiowa has not adopted the Restatement (Second) of Torts for its strict liability laws and instead drafted its own statutes. And while Ohiowa has adopted the learned intermediary doctrine, that doctrine has majority support unlike the heeding presumption. Finally, public policy in Ohiowa can still be served through a rejection of the heeding presumption. As to the instructions, rejection of the jury instruction did not impact Tully's ability to try the causation issue and no prejudice resulted. Thus, the trial court did not abuse its discretion in rejecting the requested jury instruction.