No. 20-2206

In the Supreme Court of the State of Ohiowa

FEBRUARY TERM, 2020

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

v.

ZUUL ENTERPRISES, an Ohiowa Corporation,
RESPONDENT

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS FOR THE STATE OF OHIOWA

SEVENTH APPELLATE DISTRICT DRUMMOND COUNTY

BRIEF FOR THE PETITIONER

TEAM U

QUESTIONS PRESENTED

1. Did the trial court err in granting Zuul's motion for summary judgment on the manufacturing defect claim?
2. Did the trial court err in refusing to instruct the jury on the heeding presumption?

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STATEMENT OF THE CASE

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On July 17, 2018, Louis and Janine Tully's eleven-year-old child, L.T., was severely injured when an e-cigarette manufactured and sold by Zuul Enterprises ("Zuul") exploded. R. at 5. The tragic accident was caused by a Zuul e-cigarette device belonging to Dana Barret ("Ms. Barret"), a nineteen-year-old college sophomore who regularly looked after L.T. when his parents were away from home, and who was babysitting L.T. at the time that the accident occurred. *Id.* Ms. Barret, like many young people her age, has an affection for the e-cigarettes Zuul manufactures. *Id.* Zuul's e-cigarettes have a long, established history of popularity with young people. *Id.* at 4. The e-cigarettes are used by depressing a button on the e-cigarette, which activates an atomizer that heats liquid in the cartridge into a vapor. *Id.* at 4. The user may then inhale the vapor through a mouthpiece on the e-cigarette. *Id.* Originally, Zuul manufactured its e-cigarettes with a variety of sweet flavors that young people could choose from, including cotton candy, blue raspberry, fruit punch, and Hi-C Ecto Cooler. *Id.* These sweet flavors, along with the e-cigarettes' compact size, led to Zuul's products' wild popularity with young people. *Id.*

However, the sweet vapor flavors also landed Zuul in legal trouble. *Id.* In December 2017, a federal district court held that Zuul had been using these sweet vapor flavors to market its e-cigarettes directly to children. *Id.* The ligation forced Zuul to pay damages, and the court issued an injunction preventing Zuul from producing its most popular sweet flavors. *Id.* This lawsuit took a serious toll on Zuul. *Id.* Zuul's stock plummeted, putting the company on the verge of bankruptcy. *Id.*

Then, on June 7, 2018, in an attempt to save face, Zuul issued a statement denying any attempt to market its e-cigarettes to children. *Id.* Zuul promised to only produce a classic tobacco

flavor from that point on and reconfigured its products to be incompatible with cartridges made by other companies. *Id.* However, in the exact same statement, Zuul introduced a new line of accessories called "Zuul skins." *Id.* Zuul skins are adhesive labels that individuals can use to bedeck their e-cigarettes. *Id.* The skins stick to the surface of any Zuul e-cigarette, and come in a variety of patterns. *Id.* Individuals can even choose to customize their own Zuul skins. *Id.* These skins proved tremendously popular with young people like Ms. Barrett and L.T., and within one month of releasing Zuul skins, Zuul's stock rose back to their pre-litigation heights. *Id.* Furthermore, while Zuul markets its e-cigarettes with a warning affixed to its packing, the Zuul skins do not contain an additional warning regarding the potential danger of Zuul's e-cigarettes. *Id.*

The product at issue in this case, Ms. Barrett's Zuul e-cigarette, had a Zuul skin affixed to it. *Id.* at 5. The Zuul skin depicted *Hola Gato*, an animated character from a popular cartoon. *Id.* Like his babysitter, L.T. also enjoys *Hola Gato*. *Id.* Ms. Barrett had babysat L.T. on prior occasions, and she had warned the child several times not to play with the e-cigarette. *Id.* However, when she arrived to babysit on July 17, her e-cigarette was bedecked with the new *Hola Gato* skin she had purchased six days earlier. *Id.* When L.T. was left unattended with the e-cigarette, now decorated with the image of a cartoon character of which he was particularly fond, he picked it up, depressed the activation button, and began playing with Zuul's e-cigarette in manner similar to the operation of a leaf blower, blowing the vapor into the air. *Id.* Zuul's e-cigarette then exploded without warning, severely burning L.T.'s hand. *Id.* Plaintiffs' expert witness would later reveal that the explosion occurred 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. *Id.* at

7-8. The built-up pressure within the cartridge caused Zuul's e-cigarette to explode and severely burn L.T.'s hand. *Id.*

Proceedings

Zuul offered no evidence in this case to dispute Plaintiff's expert's finding that Zuul's e-cigarette was defective. *Id.* Zuul also offered no evidence that its e-cigarette had been altered after it left Zuul's hands. *Id.* As the Court of Appeals for the State of Ohiowa held, "there is no dispute as to whether the e-cigarette was in a defective condition as a result of the manufacturing defect. It was." *Id.* Instead, Zuul made two arguments for summary judgement. *Id.* at 2-3. The first was that, although Zuul's e-cigarette was defective, the company could not be held liable because L.T. was not a foreseeable user of the product. *Id.* The second was that the warning provided on the packaging of the product sufficiently fulfilled Zuul's duty to warn users. *Id.* at 4. The trial court granted summary judgement as to the manufacturing defect, and the Ohiowa Court of Appeals affirmed in a split decision, reasoning that L.T. was not a reasonably foreseeable consumer of Zuul's products. *Id.* at 3, 5-9. Judge Zeddemore dissented from the Ohiowa Court of Appeal's opinion as to the manufacturing defect claim. *Id.* Judge Zeddemore would have held that L.T. was a foreseeable user of the product. *Id.* at 14.

The trial court denied summary judgement on the warning claim, and L.T.'s case proceeded to trial. *Id.* at 3. The Plaintiffs requested a jury instruction on the heeding presumption. *Id.* at 3. Zuul objected, and the lower court sustained the objection. *Id.* The record is silent as to why the trial court sustained Zuul's objection. *Id.* The jury eventually held for Zuul. *Id.* On appeal, the Ohiowa Court of Appeals held that the heeding presumption applies in Ohiowa, so the trial court abused its discretion in failing to allow the jury instruction on the heeding presumption. *Id.* at 10-12. However, the Ohiowa Court of Appeals declined to reverse the trial court's decision, holding

that the refusal to instruct the jury on the heeding presumption did not prejudice Plaintiff's case. *Id.* at 12.

SUMMARY OF THE ARGUMENT

The trial court erred in granting Zuul's motion for summary judgment. The evidence in this case produced two questions of material fact that should properly have been considered by a jury to determine liability for the product's defect: first, whether L.T. used the e-cigarette in such a manner that qualifies him as a "consumer," for whose injuries the producer must be strictly liable, and second, whether even if the jury were to find he was not a consumer, if the activation of an e-cigarette by a child was a foreseeable misuse properly subject to liability under the consumer expectations test.

The consumer expectations test asks whether a certain product is more dangerous than a reasonable consumer of that product would expect it to be. In cases where an injury was undoubtedly caused by a defect in the product, the question becomes whether the danger of the defect was greater than that which would have been expected by an ordinary consumer using the product in a foreseeable way. If someone who is not a reasonable consumer uses a product in a manner wholly alien to the reasonable expectations of an objective observer, the producer may not be held liable for that person's injuries. When, however, a user who merely happens to have some characteristic distinguishing himself from the intended consumer is injured while using the product in a foreseeable manner, which would have caused the same harm to a person not sharing that distinguishing characteristic who was also using the product in the same foreseeable manner, then the producer must stand behind their product and accept liability for the defect. Because L.T. was using the e-cigarette for its intended purpose, holding down the activation button to produce tobacco vapor, and because the explosion was caused by the pressing of the activation button and not by L.T.'s youth, stature, or experience, the Defendant, Zuul, may not escape liability merely because the victim of the explosion happened to be a child.

However, even if the Court does determine that there is no material question whether L.T. used the product in its intended manner as a consumer, Zuul would still face liability under the consumer expectations test, which creates strict liability not only when a product defect occurs in a product used as intended, but also when harm arises from a product misused in a reasonably foreseeable way. Because there is a history of the misuse of e-cigarette products by children, both generally and in the specific past dealings of Zuul, a reasonable observer could find that the company should have foreseen the use of an e-cigarette by an inexperienced and inquisitive child. In particular, the announcement of the line of cartoon skins that enticed L.T. to his injury at the same time that Zuul was recovering from a judicial decision that it had marketed its product to children is a substantial piece of evidence that a reasonable trier of fact could find rendered a child's misuse of an e-cigarette not only objectively foreseeable, but potentially within the actual contemplation at the time. Regardless, it satisfies the standard of a genuine question, material to the proceedings.

On the question of the jury instruction, the trial court abused its discretion when it refused to instruct the jury on the heeding presumption. The trial court's decision resulted in the jury not being fully informed as to the applicable law in Ohiowa. It also prejudiced Plaintiffs' case by depriving Plaintiffs of a presumption in L.T.'s favor. Specifically, because the trail court failed to instruct the jury on the heeding presumption, Zuul never had to overcome its burden in showing that had it provided an adequate warning, L.T. would have ignored it.

The heeding presumption establishes a rebuttable presumption that had Juul provided an adequate warning, the jury could presume that L.T. would have read and heeded its instructions. The Ohiowa legislature intended to adopt the heeding presumption when it enacted the Ohiowa Product Liability Act (OPLA). Three factors evidence this intent. First, when drafting OPLA, the

Ohiowa legislature relied heavily on the Restatement (Second) of Torts § 402A. The heeding presumption comes directly from § 402A's comment j. Therefore, it logically follows that the Ohiowa legislature meant to incorporate comment j into OPLA when it adopted it. Ohiowa has already followed this logical pattern when it adopted the learned intermediary doctrine, which also comes from § 402A's comment j. Second, the Ohiowa legislature also relied on similar statutes in neighboring jurisdictions when adopting OPLA, including the Sixth, Seventh, and Tenth Circuit Courts of Appeal. The vast majority of these jurisdictions recognize the heeding presumption. This strongly suggests that the Ohiowa legislature intended to follow suit. Finally, public policy in Ohiowa favors the consumer. The Ohiowa Court of Appeals recognized this below in its decision to recognize the heeding presumption. The Ohiowa legislature's decision to enact OPLA also demonstrates an intent for public policy in Ohiowa to favor the consumer, and the heeding presumption is a balanced and fair way to forward this policy.

Next, the trial court's decision prejudiced Plaintiffs by depriving L.T. of a presumption that had Juul provided an adequate warning, L.T. would have heeded it. The heeding presumption placed the burden on Juul to demonstrate that had it given an adequate warning, L.T. would have ignored it. Juul never had to meet this burden, and there is no evidence in the record that suggests it could have met this burden. Therefore, because the trial court abused its discretion when it refused to instruct the jury on the heeding presumption, and because this decision prejudiced Plaintiffs' substantial rights, this court should reverse the judgement of the Ohiowa Court of Appeals, and remand for a new trial where the jury is instructed on the heeding presumption.

ARGUMENT

I. The Appellate Court Erred in Affirming Zuul's Motion for Summary Judgment on the Tully's Manufacturing Defect Claim.

The decision to grant a motion to dismiss is reviewed de novo, construing the evidence in the light most favorable to the nonmoving party. *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 362 (Iowa 2014). Material facts are those which might affect the outcome of a suit. *Eagle Imp. & Exp. v. Am. President Lines*, 58 Fed. Appx. 132, 134 (6th Cir. 2003). An issue is genuine "if a reasonable trier of fact could find in favor of the nonmoving party." *Insolia v. Phillip Morris, Inc.*, 216 F.3d 596, 599 (7th Cir. 2000). In regard to the Tully's product liability claim, there are two genuine issues of material fact that should have been tried before the jury: whether the use of an e-cigarette to produce a continuous stream of vapor in the air was a foreseeable use of the product, making L.T. a "consumer" whose subjection to harm was foreseeable to the manufacturer, and whether it was foreseeable that a child would have access to a Zuul device, making the company liable for foreseeable misuse of the product by that class of consumer. Evaluating an ordinary consumer's expectations of a product is a question of fact which a jury is uniquely qualified to handle. *Walker v. Macy's Merch. Grp., Inc.*, 288 F.Supp.3d 840, 860 (N.D. Ill. 2017).

A. L.T. is a Consumer Because, by Pressing the Activation Button to Produce Vapor, He Used a Zuul E-Cigarette in a Foreseeable, Intended Manner.

Ohiowa Rev. Code § 5552.368, establishes a rule of liability for defective products and was adopted from the language of the Restatement (Second) of Torts § 402A. Ohiowa Rev. Code § 5552.368; *see also* Restatement (Second) of Torts § 402A (Am. Law Inst. 1965). Ohiowa utilizes the consumer expectation test, derived from comment i § 402A, which determines whether the product was defective based on whether it was "more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." *State Farm Fire & Cas. Co.*

v. Chrysler Corp., 523 N.E.2d 489, 494 (Ohio 1988); *see also* Restatement (Second) of Torts § 402A cmt. i (Am. Law Inst. 1965).

Zuul contends that, because L.T. was a child playing with the e-cigarette rather than using it for the purpose of consuming tobacco, he is not a consumer and therefore not within the "class of persons" that the company could reasonably foresee using its e-cigarette, and that his injury is not subject to liability. R. at 8; *see* § 5552.368. The Court of Appeals agreed that, because the phrase "ultimate user" appears in § 402A and not § 5552.368, the word "consumer" in § 5552.368 must exclude ultimate users not "consuming" the product in the manner intended by the company. R. at 9; § 5552.368; Restatement (Second) of Torts § 402A. However, the consumer liability test proposed by comment i, as applied by the Sixth and Tenth Circuits, creates liability any time that the harm to the consumer is foreseeable. *Id.* cmt. i. Furthermore, the use to which L.T. was putting the e-cigarette, pressing the button and producing thick clouds of vaporized tobacco, is exactly what such devices are intended to do. The fact that the vaporized tobacco is normally intended for inhalation, rather than to be blow in the air by a child, was not a factor in the explosion that injured L.T.

In *Goree v. Winnebago Industries*, the 11th Circuit addressed the issue of intended use in regard to a paraplegic man whose feet were burned while driving a Winnebago vehicle. 958 F.2d 1537, 1542 (11th Cir. 1992). Winnebago argued that, because the man lacked feeling in his feet, he was not an "ordinary consumer" of the vehicle and the company should not be subject to strict liability for the product defect. *Id.* The court disagreed, based in part on testimony that the defect was of a type that could have caused equally injurious burns to a person who had ordinary sensation in their feet. *Id.* Because Goree was subjected to the same injury that the "intended," ordinary user of the vehicle could have been exposed to, a reasonable juror could have found that Goree was

subject to the same foreseeable harm as a more typical, intended user, and was therefore a foreseeable user of the vehicle for the purposes of defect liability. *See id.*

In this case, L.T. may not have been the *intended* user of a Zuul e-cigarette (although the foreseeability of a child using the device is discussed in Part B below), but he was exposed to the same foreseeable injury as any intended consumer of the device. The defect that caused L.T.'s injuries was an explosion resulting from prolonged holding of the device's activation button. R. at 7-8. Every consumer of the e-cigarette using it for its intended purpose of creating tobacco vapor in one's mouth to inhale must hold the button to activate the device. The record does not reflect any instructions telling users how long to hold the button, or how much vapor they must generate to attain the nicotine high that the vape device is meant to produce. Because of the popularity of vape devices with young, inexperienced smokers, a juror could easily imagine a new smoker experimenting with the device in a manner very similar to L.T., albeit for the purpose of inhalation rather than merely to blow smoke in the air.

A reasonable, prudent smoker who held the activation button just as long as L.T. did would have faced just as dangerous an explosion and been just as gravely injured. For Zuul to claim that L.T. was not a foreseeable user because he was pointing the device in the air rather than into his lungs, is to argue that L.T. should be denied recovery only because he was not inhaling the fumes, and that if only he had used the device, in the exact same manner, but for the purpose of ingesting nicotine, he would be able to recover damages. If anything, Zuul should consider itself fortunate that the explosive defect in its product was discovered by a child holding the device in his hands away from his body, rather than by a person holding the device up to her mouth, exposing not only her hands, but also her face, throat, and lungs to the force of the explosion.

B. A Reasonable Trier of Fact Could Have Found, Based on the Evidence, that the Misuse of the E-Cigarette by a Child Was Foreseeable to a Reasonable Observer.

To overcome a motion for summary judgment, the nonmoving party must show that there is evidence creating a genuine question of material fact requiring the consideration of a trier of fact at trial. *Insolia v. Phillip Morris, Inc.*, 216 F.3d 596, 598 (7th Cir. 2000). A trial court's decision to grant summary judgment is reviewed de novo, construing the evidence in the light most favorable to the nonmoving party. *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 362 (Iowa 2014). Because summary judgment was granted in favor of Zuul Enterprises on the manufacturing defect claim, the facts relevant to that question must be construed in the light most favorable to the Tullys.

A manufacturer is liable for harm caused by a product defect even if the product was misused in a foreseeable way. *See Swix v. Daisy Mfg. Co.*, 373 F.3d 678, 688 (6th Cir. 2004). In *Swix*, the manufacturer of a child's air rifle was found liable for an injury caused by the unsupervised firing of the rifle by one child at another, despite the manufacturer's intention that the gun be fired only with diligent adult supervision present. *Id.* Because the gun was marketed to children and because it was reasonably foreseeable that a user of the gun could fire it in a situation other than the supervised scenario intended by the producer, the producer was liable for the damage caused. *Id.*

Similarly, in *Kinser v. Gehl Co.*, the 10th Circuit held that a company that manufactured farm equipment was liable for the death of a farmer who used a baler without observing all the safety precautions intended by the producer, based on testimony from other farmers that the "misuse" of the baler (in that case, use of the machine without following strict safety protocol) was not only common among operators of the machines, but often required by the practical necessities of farm work. 184 F.3d 1259, 1268 (10th Cir. 1999). Despite the fact that the harm was caused by

the misuse of the machinery, that misuse was reasonably foreseeable as determined by the finder of fact based on evidence at trial. *Id.*

Here, L.T. did not use the Zuul vape device strictly as intended by the manufacturer, in that he did not hold the device to his mouth, hold down the button to produce tobacco vapor, and inhale that vapor into his lungs for the purpose of producing a nicotine high. However, whether or not the specific type of misuse in this case (holding down the button to blow vapor in the air) was foreseeable by the manufacturer is a question of fact that must be determined by a jury. To follow the evidentiary precedent applied in *Kinser* would permit the jury to consider testimony of other users of vape devices, who would be able to describe the average amount of time they tend to hold down the button on their vape devices, and whether holding down the vaporizer button for an extended amount of time is a common misuse that the manufacturer out to have foreseen. *See id*.

Furthermore, there is sufficient evidence to raise the genuine question whether Zuul Enterprises should have foreseen the use of their vape devices by a child, based on the previous litigation over the use of Zuul devices by children and by the marketing of vape skins emblazoned with pop culture and cartoon characters highly likely to appeal to young audiences. R. at 4. This question is material because, if the trier of fact determines that the vape devices were marketed to children, the consumer expectation test applies an even lower standard than it would for a product marketed to adults. "One has no right to demand of a child . . . a prudence beyond his years or capacity." *Swix*, 373 F.3d at 686 (quoting *Sherk v. Daisy-Heddon*, 285 Pa. Super. 320 (Pa. Super. Ct. 1981)). The resulting "reasonable child" standard applies the expectation of the child user to the consumer expectation test, rather than the expectation of a more cautious or prudent adult user. *Id.* It would strain credulity to suggest that the average, reasonably prudent child would suspect

the holding down of a vaporizer button would put them at risk of exposure to an explosion. At the very least, it is possible that a reasonable trier of fact could disagree.

There is a question, then, whether Zuul can be considered to have marketed its products to children, rendering the misuse of the product by a child foreseeable. The record reflects that, despite legal prohibitions on the sale of tobacco products to minors, Zuul's products have been utilized by children in the past, and that at the time of L.T.'s injuries, Zuul was aware that their products had been used by children, having been required to pay damages for the harm done to children through use of their products. R. at 4.

A long history of government regulation and litigation has created an extensive legal record that the manufacture, marketing, and sale of flavored tobacco products and smokeless tobacco devices increase the likelihood that tobacco products will be acquired and consumed by minors. In *U.S. Tobacco Mfg. Co. v. City of New York*, the Second Circuit Court of Appeals agreed that the city's interest in protecting children merited restrictions on the sale of flavored tobacco products. 708 F.3d 428, 436 (2d Cir. 2013). In *Lorillard Tobacco Co. v. Reilly*, the Supreme Court acknowledged that smokeless tobacco products are especially appealing to young people and that special regulation was necessary to prevent underage acquisition and use of tobacco products. 533 U.S. 525, 559 (2001).

More apparent to the parties in this case is the fact that Zuul had recently been forced to pay damages and discontinue the sales of its flavored vapors because a federal district court found that the company had been directly marketing the products at children. R. at 4. This indicates that the company not only should have known, but affirmatively did know that their product could and had been utilized by children. The company did, of course, disavow any attempts to market to children after paying out its fees, but nevertheless created a line of "skins" festooned with licensed

characters and well-known cartoons, such as the *Hola Gato* character that caught the eye of teenage smoker Dana Barrett and inquisitive child L.T., both fans of the popular cartoon. R. at 4-5. While it is not necessary in this case to demonstrate that Zuul intended to market the cartoon skins to children, the fact that the company had previous experience with children consuming its products based on the appeal of cartoon character references (the "Hi-C Ecto Cooler" flavor being a reference to the cartoon ghost "Slimer" from the *Ghostbusters* franchise), create a sufficient basis to establish that a reasonable observer would understand that a Zuul product could, one way or another, foreseeably end up in the hands of a child.

Lest Zuul Enterprises assert that its June 7, 2018 disavowal of any intent to market its product to children relieves them of liability, § 402A comment a specifically asserts that strict liability is established despite the exercise of "all possible care in the preparation *and sale* of the product." Restatement (Second) of Torts § 402A cmt. a (Am. Law Inst. 1965) (emphasis added). Even if Zuul followed through on their promise to try not to market their product to children, the inclusion of the phrase "and sale" suggests that the standards of strict liability apply equally to the distribution of products as to their manufacture, rendering Zuul liable for the reasonably foreseeable use of their product by teenagers and children. *See id.*

Moreover, by incorporating the language of § 402A into its Product Liability Act, the state of Ohiowa intended to create a cause of action based on strict liability. *See id.* To interpret the consumer expectation test in a manner that excludes certain users from the class of "consumers" merely because they use a product in a manner other than that intended by the manufacturer is to create a rule whereby liability is established depending on the degree of foresight exercised by the producer. Because the purpose of Ohiowa's strict liability rule is to require producers to stand behind their products regardless of the degree of care exercised in production, it would subvert the

intentions of the state legislature to fail to apply liability in this case. Zuul designed, produced, and sold a product with a button that, when pressed, superheats vapors to a dangerous level and risks creating a dangerous explosion. Strict liability is meant to hold them accountable for the harm caused by such explosions no matter whose hand pushes the button, and it would be wrong to deny L.T. and his family compensation for L.T.'s injuries merely because he was pumping vapor into the air rather than into his lungs.

II. The Trial Court Abused its Discretion When it Refused to Instruct the Jury on the Heeding Presumption.

A trial court's decisions regarding jury instructions are reviewed for an abuse of discretion. *Carter v. Mechanical Services*, 746 P.4d 807, 811 (Ohiowa 2012). Above all, "[j]ury 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). Therefore, in general, a trial court must instruct the jury on all legal theories supported by the evidence. *Golonka v. General Motors Corp.*, 65 P.3d 956, 974 (Ariz. Ct. App. 2003). A trial court's decision regarding a jury instruction must be reversed when two prongs are met. The first prong is met when the appellate court has "substantial doubt whether the instructions, considered as 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). The second prong is met when the failure to properly instruct the jury results in prejudice to a party's substantial rights. *Golonka*, 65 P.3d at 967.

A. The Trial Court Failed to Fully and Fairly Inform the Jury of the Law Applicable to L.T.'s Case When it Refused to Provide an Instruction on the Heeding Presumption.

The trial court abused its discretion by failing to provide an instruction on the heeding presumption because this failure resulted in the jury not being fully informed as to the applicable law within the state of Ohiowa. *See Peterson*, 239 P.3d at 910. In general, "[a] trial court must

instruct the jury on all legal theories supported by the evidence." *Golonka*, 65 P.3d at 974. In this case, the trial court's error resulted in the jury not being informed of the heeding presumption, which the Ohiowa Court of Appeals below held is applicable to L.T.'s case. R. at 10-12. Without a heeding presumption instruction, there is substantial doubt that the jury was properly guided in its deliberations. *Morrison*, 175 F.3d at 1235.

As the Ohiowa Court of Appeals held below, the heeding presumption applies to strict liability failure to warn cases in Ohiowa. R. at 10-12. Three factors evidence this. First, the Ohiowa legislature relied heavily on the Restatement (Second) of Torts § 402A when drafting the Ohiowa Product Liability Act (OPLA). R. at 6, 11. The heeding presumption comes directly from § 402A's comment j. *See* Restatement (Second) of Torts § 402A cmt. j (Am. Law. Inst. 1965). Second, the Ohiowa legislature relied heavily on similar statutes in neighboring jurisdictions, including the Sixth, Seventh, and Tenth Circuit Courts of Appeal. R. at 6. When interpreting these statutes, courts within these jurisdictions have repeatedly recognized the heeding presumption. *See, e.g.*, *Richter v. Limax Intern., Inc.*, 45 F.3d 1464, 1471-72 (10th Cir. 1995) (applying the heeding presumption under Kansas law). Finally, as the Ohiowa Court of Appeals noted, public policy in Ohiowa tends to favor the consumer, and adopting the heeding presumption would further this policy. R. at 12.

First, as the Ohiowa Court of Appeals noted, the Ohiowa legislature relied heavily on the Restatement (Second) of Torts § 402A when drafting OPLA. R. at 6, 11. The heeding presumption derives directly from the Restatement's comment j, which states "[w]here [a] warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably

dangerous." Restatement (Second) of Torts § 402A cmt. j (Am. Law. Inst. 1965). Courts have repeatedly interpreted this language to:

> [E]stablish a presumption that an adequate warning, if given, will be read and heeded. In such a situation the presumption established works to the benefit of the manufacturer. However, where no warning is given, or where an inadequate warning is given, a rebuttable presumption arises, beneficial to the plaintiff, that the failure to adequately warn was a proximate cause of the plaintiff's use of the product. The presumption, absent the production of rebuttable evidence by the defendant, is sufficient to satisfy the first branch of the plaintiff's proximate cause burden.

Hirsch v. Volvo Cars of N. Am., Inc., 226 F.3d 445, 450 (6th Cir. 2000) (quoting *Seley v. G. D. Searle & Co.*, 423 N.E.2d 831, 838 (Ohio 1981)); *see also, e.g.*, *Knowlton v. Deseret Medical, Inc.*, 930 F.2d 116, 124 (1st Cir. 1991) (noting Massachusetts's adoption of this interpretation of the heeding presumption). Ohiowa has already adopted other doctrines from comment j, including the learned intermediary doctrine. R. at 11; *see also* Restatement (Second) of Torts § 402A cmt. j (Am. Law. Inst. 1965). Therefore, it logically follows that when the Ohiowa legislature relied on § 402A in drafting OPLA, it also relied on comment j's heeding presumption, and meant to incorporate it into OPLA. *Id.*

Respondents in this case, Zuul, will likely make two arguments against adopting the heeding presumption in Ohiowa. Neither is persuasive. First, Zuul will point out that the Restatement (Third) of Torts later criticized comment j and dropped it from that version of the Restatement. *See* Restatement (Third) of Torts § 2, Reporters' Note, cmt. l (Am. Law Inst. 1998). Second, Zuul will note that some jurisdictions, such as Alabama, do not recognize the traditional heeding presumption. *See Deere & Co. v. Grose*, 586 So.2d 196, 198 (Ala. 1991) (requiring "substantial evidence that an adequate warning would have been read and heeded and would have prevented the accident" before a negligent failure-to-warn-adequately case can be submitted to the jury).

The problem with the first argument is that there is no evidence the Ohiowa legislature relied on the Restatement (Third) of Torts § 2 in drafting OPLA. Instead, it is clear that the Ohiowa legislature relied "heavily" on the Restatement (Second) of Torts § 402A to draft OPLA. R. at 6. Furthermore, there is no evidence that the Ohiowa legislature has taken any steps to amend OPLA in the two decades since the Restatement (Third) of Torts § 2 criticized comment j. *See* Restatement (Third) of Torts § 2, Reporters' Note, cmt. l (Am. Law Inst. 1998). Therefore, when interpreting what OPLA demands, this court should rely on § 402A and comment j, not later renditions of the Restatement which the Ohiowa legislature did not rely on when drafting OPLA.

Respondent's second argument is also flawed. While the Ohiowa Court of Appeals noted that Alabama does not recognize the heeding presumption, it is important to note that the case the court cites for that proposition involved a negligent failure-to-warn claim, and does not mention the Restatement, § 402A, or comment j anywhere in its opinion. *See Deere & Co. v. Grose*, 586 So. 2d 196, 198 (Ala. 1991); *see also* R. at 11. The Ohiowa Court of Appeals also noted that certain jurisdictions determine the burden of proving proximate causation in failure-to-warn cases by statute. *See De Jesus v. Craftsman Machinery Co.*, 548 A.2d 736, 744 (Conn. 1988) (noting that a Connecticut statute "specifically place[d] upon . . . [the plaintiff] the burden of proving proximate cause . . . [and that] [t]here was no presumption of proximate cause."). This case is distinguishable from the other cases cited by the Ohiowa Court of Appeals because OPLA was specifically drafted with § 402A in mind, and OPLA is silent as to any presumption of proximate cause. *See* Ohiowa Rev. Code. § 5552.368; Ohiowa Rev. Code § 5552.369.

A second factor evidences that the heeding presumption applies in Ohiowa failure to warn cases. As the Ohiowa Court of Appeals noted, the Ohiowa legislature relied heavily on similar statutes in the Sixth, Seventh, and Tenth Circuit Courts of Appeal when drafting OPLA. R. at 6.

When interpreting theses statutes, courts within the Sixth, Seventh, and Tenth Circuit Courts of Appeal note that Utah, Ohio, Oklahoma, Kansas, Kentucky, and Illinois have all recognized the heeding presumption. *See Kirkbride v. Terex USA, LLC*, 789 F.3d 1343, 1351 (10th Cir. 2015) (applying the heeding presumption under Utah Law); *Hirsch*, 226 F.3d at 451 (applying heeding presumption under Ohio law); *Daniel v. Ben E. Keith Co.*, 97 F.3d 1329, 1332-33 (10th Cir. 1995) (noting that the heeding presumption applies under Oklahoma law); *Richter*, 45 F.3d at 1471-73 (noting that the heeding presumption applies under Kansas law); *Erickson v. Baxter Healthcare, Inc.*, 151 F.Supp.2d 952, 970 (N.D. Ill. July 16, 2001) (holding that, under Illinois law, "plaintiffs are entitled at . . . [the summary judgement stage] to a presumption that a learned intermediary would have heeded the warnings given"); *Snawder v. Cohen*, 749 F.Supp. 1473, 1479 (W.D. Ky. 1990) (applying heeding presumption under Kentucky law, after noting that Kentucky has adopted § 402A, but also noting a lack of precedent on the matter in Kentucky courts).

To Petitioner's knowledge, the only exception to this trend is Wisconsin, where the Seventh Circuit noted it is unclear if the heeding presumption applies. *In Re: Zimmer, NexGen Knee Implant Products Liability Litigation*, 884 F.3d 746, 754 (7th Cir. 2018) (holding that the court did not believe the heeding presumption applied in Wisconsin, but that even if it did the presumption did not apply where the plaintiff's doctor "testified that he did not read the instructions" regarding the allegedly defective product). In summary, the Ohiowa legislature relied heavily on similar statutes in neighboring jurisdictions, including the Sixth, Seventh, and Tenth Circuit Courts of Appeal when drafting OPLA. R. at 6. States within these jurisdictions have overwhelmingly adopted the heeding presumption. *See, e.g.*, *Richter*, 45 F.3d at 1471-73 (noting that the heeding presumption applies under Kansas law). This suggests that the Ohiowa legislature, when it enacted OPLA, meant to follow these jurisdictions' lead and adopt the heeding presumption as well.

Finally, in choosing to adopt the heeding presumption, the Ohiowa Court of Appeals noted that "public policy tends to favor the consumer in products liability actions in Ohiowa." R. at 12. This is demonstrated by the Ohiowa legislature's decision to enact OPLA and model it after § 402A. R. at 7. As comment c to § 402A demonstrates, the justification for strict liability is "that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it." Restatement (Second) of Torts § 402A cmt. c (Am. Law. Inst. 1965). Adopting the heeding presumption would simply further the policy choice already made by the Ohiowa legislature when it adopted OPLA.

For example, when discussing Arizona's adoption of the heeding presumption, the court in *Golonka v. General Motors Corp.* noted that strict liability "stems in significant part from a public policy that seeks to achieve safety in the marketplace by providing a disincentive to manufacturers to place defective and unreasonably dangerous products into the stream of commerce." 65 P.3d 956, 968 (Ariz. Ct. App. 2003). Specifically, the court in *Golonka* noted that "[b]y easing the burden of proving causation, '[t]he use of the heeding presumption provides a powerful incentive for manufacturers to abide by their duty to provide adequate warnings.'" *Id.* at 969 (quoting *Coffman v. Keen Corp.*, 628 A.2d 710, 718 (N.J. 1993)).

The *Golonka* court further noted that the heeding presumption is also procedurally desirable. *Id.* Specifically, the court noted that the presumption keeps the jury from speculating about whether a plaintiff "would have heeded an adequate warning." *Id.* In a similar vein, the presumption also helps plaintiffs prove causation in cases where "evidence of how that person would have reacted to an adequate warning is . . . limited or unavailable." *Id.* This may be the case when the plaintiff dies from their injury or is otherwise severely incapacitated and unable to testify at trial. *Id.*

A similar justification behind the heeding presumption is that "[i]t works in favor of the seller when an adequate warning is given, but favors the plaintiff when an adequate warning is not given." *Dole Food Co. v. N. Carolina Foam Indus., Inc.*, 935 P.2d 876, 883 (Ariz. Ct. App. 1996). In other words, where a manufacturer can establish that its warning is adequate, one can presume that the plaintiff would have followed it. *See* Restatement (Second) of Torts § 402A cmt. j (Am. Law. Inst. 1965). Furthermore, even where the presumption favors the plaintiff because the manufacturer failed to provide an adequate warning, the presumption is still rebuttable, so the manufacturer can still prevail when it shows that the plaintiff would not have followed an adequate warning even if it were provided. *See, e.g.*, *Kirkbride*, 798 F.3d at 1351 (holding that a manufacturer successfully rebutted the heeding presumption by offering evidence that plaintiff did not read the warning that was in the product's manual, and had expressed a negative view of manuals by stating "why would you read a manual?"). Therefore, the heeding presumption strikes a fair balance by allowing the jury to presume a plaintiff would have read an adequate warning if the manufacturer had provided one, but also allowing the manufacturer to rebut this presumption with evidence which illustrates that the plaintiff would not have read an adequate warning even if the manufacturer had provided one. *See Golonka*, 65 P.3d at 968-73.

In conclusion, the trial court abused its discretion in L.T.'s case because it failed to fully and fairly inform the jury of the heeding presumption. *Peterson*, 239 P.3d at 910. Three factors illustrate that the heeding presumption applies in Ohiowa. First, the Ohiowa legislature relied heavily on the Restatement (Second) of Torts § 402A when drafting OPLA. R. at 6. The heeding presumption comes directly from § 402A's comment j. *See* Restatement (Second) of Torts § 402A cmt. j (Am. Law. Inst. 1965). Second, the Ohiowa legislature relied heavily on neighboring jurisdictions, including the Sixth, Seventh, and Tenth Circuit Courts of Appeal when drafting

OPLA. R. at 6. The overwhelming majority of these jurisdictions have adopted the heeding presumption. *See, e.g.*, *Kirkbride*, 789 F.3d at 1351 (applying heeding presumption under Utah Law). Finally, adopting the heeding presumption would be consistent with the policy choice that the Ohiowa legislature made when it adopted OPLA. Specifically, the heeding presumption helps promote public safety and disincentivize sellers from marketing products that threaten consumers and public safety at large. *See* Restatement (Second) of Torts § 402A cmt. c (Am. Law. Inst. 1965).

B. The Trial Court's Refusal to Instruct the Jury Regarding the Heeding Presumption Prejudiced Plaintiffs' Case by Depriving Plaintiffs of the Presumption in Favor of L.T.

The second prong in a jury instruction analysis is whether the trial court's decision to give, or not to give, a jury instruction was prejudicial. *Golonka*, 65 P.3d at 957. Furthermore, as the Ohiowa Court of Appeals stated, "[t]he party defending the instructions on appeal must show that the requested instructions accurately stated the applicable law, the facts supported giving the instruction, and that the instruction was necessary in order to allow the jury to properly resolve all the issues in the case." R. at 9-10. Overall, a trial court's decision regarding jury instructions must be overturned when there is "a substantial doubt that the jurors were properly guided in their deliberations," and the jury instruction prejudiced one of the party's substantial rights. *Golonka*, 65 P.3d at 967, 972.

The heeding presumption is a presumption in the plaintiff's favor, which shifts the burden of proof to the defendant to show that had a warning been given, the plaintiff would not have followed it. *Dole Food Co.*, 935 P.2d at 883-84. If the defendant fails to offer any evidence to rebut this presumption, then the plaintiff is presumed to have established proximate cause in his or her case. *Hirsch*, 226 F.3d at 451.

In *Golonka v. General Motors Corp.*, an Arizona appellate court held that it was an abuse of discretion for the trial court to instruct the jury on the heeding presumption after the defendant had already successfully rebutted the presumption. 65 P.3d at 972. L.T.'s case presents the opposite situation from *Golonka*, as the record indicates that the Defendant in this case, Zuul, was never required to rebut the presumption which should have worked in favor of L.T. *See id*; R. at 3. The trial court denied Plaintiff's request for a jury instruction without requiring Zuul to overcome the heeding presumption, which, at the time, should have applied in L.T.'s favor. R. at 3. In other words, it follows logically from *Golonka* that the trial court abused its discretion when it decided *not* to instruct the jury when the manufacturer, Zuul, was never required to successfully rebut the presumption that, had Zuul adequately warned L.T. of the dangers presented by its product, then L.T. would have followed that warning. *See Golonka*, 65 P.3d at 972; R. at 5.

Zuul may point out that L.T.'s babysitter, Ms. Barrett, warned L.T. that it was dangerous to play with the e-cigarette. R. at 5. There are two problems with this argument. First, it is unclear from the record why the trial court declined to instruct the jury on the heeding presumption. *Id.* at 3. Therefore, unlike in *Golonka*, where the defendant actually introduced evidence to rebut the heeding presumption and the trial court chose to give the instruction anyway, Zuul never formally introduced any evidence to rebut the heeding presumption. *See Golonka*, 65 P.3d at 972; *see also* R. at 3. In other words, it is unclear *why* the trial court chose not to give an instruction on the heeding presumption in this case. R. at 3. If the trial court chose not to give the instruction because it felt that the heeding presumption was not recognized in Ohiowa, which is highly possible given the Ohiowa Court of Appeals recognition that "there is a dearth of common law or legislative precedent in regard to the heeding presumption" in Ohiowa, then the trial court's decision undoubtedly prejudiced L.T.'s case because it failed to instruct the jury on a presumption which,

in the absence of valid rebuttal evidence from Zuul, would have required the jury to presume L.T. would have followed an adequate warning. *See Golonka*, 65 P.3d at 971-72 (noting that "[t]he manufacturer [only] meets this burden by introducing evidence that would permit reasonable minds to conclude that the injured party would not have heeded an adequate warning"); *see also* R. at 11-12.

Second, OPLA specifically states that "[a] product is defective if the *seller* or *manufacturer* fails to" provide an adequate warning. Ohiowa Rev. Code § 5552.369 (emphasis added). While Zuul provides a warning on its packaging, it does not provide a warning on the skins. R. at 4. Therefore, there is no evidence in the record that Zuul ever provided an adequate warning that L.T. could have seen. *Id,* at 4-5. In fact, the record indicates that the e-cigarette exploded "[w]ithout warning*." Id.* at 5. Allowing Zuul to contend that Ms. Barrett's warnings that the e-cigarette was "dangerous" were enough to overcome its presumption would be essentially allowing Zuul to skirt its responsibility as a seller and manufacturer to provide adequate warnings. *Id.* at 5; *see also* Ohiowa Rev. Code § 5552.369. Furthermore, when the court in *Golonka* determined that the defendant manufacturer had successfully rebutted the heeding presumption as a matter of law, it pointed to warnings that the manufacturer had provided in the owner's manual, not warnings provided by a third party like Ms. Barrett. 65 P.3d at 972 (noting that the plaintiff ignored multiple warnings in the owner's manual).

In summary, the trial court abused its discretion when it declined to instruct the jury on the heeding presumption because this decision raises "a substantial doubt that the jurors were properly guided in their deliberations." *Id.* at 967. Furthermore, the trial court's decision prejudiced the Plaintiffs' substantial rights in this case because it deprived the Plaintiff of a presumption that would have worked in L.T.'s favor. *See Dole Food Co.*, 935 P.2d at 883-84; *see also Golonka*, 65

P.3d at 972. Specifically, had the jury been instructed on the heeding presumption, the Defendant, Zuul, would have had to demonstrate that L.T. would have acted the same way even after being adequately warned of the dangers associated with its e-cigarette. Zuul never had to rebut this presumption. R. at 5. Furthermore, nothing in the facts of this case suggests that Zuul could have successfully rebutted the presumption, as the only evidence it has is that Ms. Barrett warned L.T. that the e-cigarette was "dangerous." *Id.* There is no evidence that L.T. ever ignored a warning that Zuul provided. *Id.* Therefore, not only did the trial court's decision result in "a substantial doubt that the jurors were properly guided in their deliberations," it also prejudiced the Plaintiffs' substantial rights by depriving L.T. of the presumption that had he been warned by Zuul, he would have heeded that warning. *Golonka*, 65 P.3d at 967, 972. Therefore, this Court should reverse the trial court's decision not to instruct the jury on the heeding presumption, and remand for a trial where Zuul must satisfy its burden of overcoming the heeding presumption.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Honorable Court to reverse the decision of the Court of Appeals for the State of Ohiowa which affirmed Zuul's motion to dismiss and reverse the decision of the Court of Appeals to affirming the trial court's denial of a jury instruction on the heeding presumption.

Respectfully Submitted,

TEAM U

COUNSEL FOR PETITIONER

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