No. 20-2206

In the

Supreme Court of the United States

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

Supreme Court of the State of Ohiowa

BRIEF FOR RESPONDENT

Team V

QUESTIONS PRESENTED

1. Whether the appellate court erred in affirming Zuul's motion for summary judgment on the Plaintiff's manufacturing defect claim when the product is used by a user who is not an ordinary consumer and in a manner not reasonably foreseeable?
2. Whether the read and heed doctrine, which would eliminate the need for a plaintiff to prove proximate cause, should apply to a strict liability failure-to-warn claim where the plaintiff provides no evidence that an alternate warning would change their behavior?

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STATEMENT OF FACTS

Petitioners, Louis and Janine Tully (hereinafter "Petitioners" or the "Tullys"), sued Respondent Zuul Enterprises (hereinafter "Respondent" or "Zuul") under state law after an e-cigarette manufactured by Respondent exploded and injured L.T., the Tullys' child. *Id.* Petitioners alleged that (1) Zuul violated state product liability laws by manufacturing a defective product which caused the explosion that injured L.T., and that (2) Zuul failed to adequately warn consumers of the risk associated with their product. *Id.*

The e-cigarette company Zuul was established in Cincinnatus, Ohiowa in March, 2016. R. at 3. Zuul's products operate by depressing a button on the e-cigarette which causes an atomizer to heat flavored liquid into a vapor. R. at 3-4. The consumer can then inhale this vapor through the mouthpiece of the e-cigarette. R. at 4.

Due to their compact size and variety of sweet flavors, Zuul's products became popular among teens and young adults. *Id.* In December 2017, a federal district court determined that Zuul used certain sweet vapor flavors to directly market their product to children. *Id.* The court ordered Zuul to pay damages and issued an injunction against the production of Zuul's most popular sweet flavors. *Id.* On June 7, 2018, Zuul issued a statement which affirmed its denial of attempting to market their product to children. *Id.* Nevertheless, Zuul vowed to only produce a "classic tobacco" flavor, and also redesigned their e-cigarettes to prohibit users from inserting cartridges made by other companies. *Id.*

At the same time it announced the redesign, Zuul announced the launch of a new product, "Zuul skins." R. at 4. Zuul skins are adhesive labels that affix to the surface of the e-cigarette. *Id.* Consumers can either customize the appearance of their skin or purchase from a variety of pre-

decorated skins featuring licensed characters. *Id.* Although each Zuul contains a warning, the skins do not contain any additional warning regarding the dangers of the product they enclose. *Id.*

On July 17, 2018, the Tullys entrusted the care of L.T. to Dana Barrett, a nineteen-year-old college sophomore. R. at 5. Ms. Barrett frequently uses e-cigarettes and, on the day of the accident, she brought her Zuul e-cigarette to the Tullys' house. *Id.* Ms. Barrett's Zuul skin featured the animated character *Hola Gato*. *Id.*

Ms. Barrett warned L.T. many times that it was dangerous to play with the e-cigarette. *Id.* Nevertheless, L.T. obtained the e-cigarette while Ms. Barrett left him unattended and depressed the activating button, using the e-cigarette in a manner that mimicked the operation of a leaf blower. *Id.* The e-cigarette consequently exploded, severely burning L.T.'s hand. *Id.*

Petitioners sued Zuul in the Court of Common Pleas of Ohiowa, alleging that (1) Zuul violated state product liability laws by manufacturing a defective product which caused the explosion, and that (2) Zuul failed to adequately warn consumers of the risks associated with their product. R. at 2. Zuul moved for summary judgment, contending that (1) although L.T. suffered from an injury resulting from the manufacturing defect, liability has not been established because L.T. was not a foreseeable user of the product and that (2) the warning provided on the packaging of the product sufficiently fulfilled any duty to warn users imposed on Zuul. R. at 2-3. The Court of Common Pleas held that children were not foreseeable users of the Zuul product and granted summary judgment on the manufacturing-defect claim. R. at 3; No. 18-CV-1988 (Ct. Comm. Pl. Sep. 28, 2018).

The failure-to-warn claim proceeded to trial. Petitioners requested a jury instruction on the heeding presumption.[1] R. at 3. Zuul objected to the jury instruction, and the trial judge sustained

[1] The heeding presumption, which originates from the language of the Restatement (Second) of Torts, § 402A cmt. j., creates a rebuttable presumption in favor of the plaintiff that if a product contained an adequate warning, that warning

the objection. *Id.* After hearing testimony from all named parties and an expert witness for the Petitioners, the jury returned a verdict in Zuul's favor. R. at 3, 7.

Petitioners timely appealed the verdict to the Court of Appeals for the State of Ohiowa. They argued that the lower court's grant of summary judgment constituted error, as an issue of material fact remained as to whether Zuul could foresee the consumer of its product being a child, and that the lower court erred in failing to allow a jury instruction on the heeding presumption. R. at 3. The Supreme Court of Ohiowa affirmed the grant of summary judgment on the manufacturing defect claim, reasoning that although a material defect existed, L.T. did not constitute a "consumer" of the product because he did not use the Zuul in a reasonably foreseeable manner. R. at 9. As to the failure-to-warn claim, the Supreme Court of Ohiowa held that the lower court's failure to determine the law of the land, while rejecting the jury instruction on the heeding presumption, constituted an abuse of discretion. R. at 10-11. However, the Supreme Court of Ohiowa held that the decision to reject the proposed jury instruction was not prejudicial because "it cannot be unequivocally stated that the jury would have proffered a different verdict if the requested instruction had been given." R. at 12. The Supreme Court of Ohiowa therefore affirmed the decision of the Court of Common Pleas.

SUMMARY OF THE ARGUMENT

This Court should affirm summary judgment of Plaintiff's manufacturing defect claim because Plaintiff does not satisfy Ohiowa Rev. Code § 5552.369(a)(1) under the consumer expectation test. Additionally, the Court should overturn the judgment of the Supreme Court of Ohiowa that the heeding presumption should apply because adopting the presumption would obviate the need for Petitioners to prove proximate causation, and Petitioners provide no evidence

would have been read and heeded. This creates automatic liability on the defendant, as any adequate warning would be read and heeded, preventing the possibility of injury.

that an alternative warning would have been read and heeded. The court's final decision that there was no prejudice in failing to give the presumption instruction, however, should be affirmed.

Under Ohiowa Rev. Code § 5552.369(a)(1), a product is in a defective condition if, at the time it was conveyed by the seller to another party, "it *deviated in a material way* from the design specifications, formula, or performance standards of the manufacturer." (emphasis added). In Ohiowa, the test for whether a product deviated in a material way from the design standards of its manufacturer is the consumer expectations test. *State Farm Fire & Cas. Co. v. Chrysler Corp*. 523 N.D.2d 489, 494 (Ohio 1988). Under the consumer expectations test, the court must determine whether at the time the product left the manufacturer's hands, a product 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.D.2d 489, 494 (Ohio 1988) (emphasis added).

In Ohiowa, a manufacturer is only liable to a consumer if that consumer "is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition. . . ." Ohiowa Rev. Code § 5552.368. The Ohiowa legislature, when defining who a consumer is, specifically chose to exclude the words "ultimate user" from the Ohiowa Product Liability Act ("OPLA"). Instead, the legislature only imposed liability on "consumers" under the consumer expectation test. R. at 9. "Consumers" are those who have ultimately *used the product as intended*, whereas "users" include anyone who passively enjoys the benefit of the product or those utilizing the product for the purpose of repair. R. at 9 (emphasis added).

Although it is uncontested that the Zuul product was in a defective condition, L.T. is not in the class of persons Zuul should foresee as being subject to the harm and is also not an "ordinary consumer" of an e-cigarette under the consumer expectation test. L.T. also did not use the e-cigarette as intended or in a reasonably foreseeable manner. Therefore, Zuul is not liable under

Ohiowa Rev. Code § 5552.369(a)(1), and the Court of Common Pleas correctly granted summary judgment. Imposing liability on Zuul would unfairly expand tort liability against manufacturers whose products are used by unforeseeable users in unforeseeable and unintended ways. This expansion of liability would also ultimately harm consumers.

Additionally, this Court should not adopt the heeding presumption, which places automatic liability on a defendant when the plaintiff can show that an injury occurred due to the use of its manufactured product. Adopting the presumption would eliminate the need for a plaintiff to prove proximate cause. The heeding presumption comes from the Restatement (Second) of Torts, §402A, cmt. j, which states that, "[w]here warning is given, the seller may reasonably assume 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 a defective condition." Some courts read this language as creating a rebuttable presumption that if an adequate warning was provided, the plaintiff would have read and heeded such a warning; therefore, by proving that an injury occurred, the jury simply presumes that the injury was caused by the inadequacy of the warning. This eliminates the need for a plaintiff to prove proximate causation – an essential element to any tort claim.

Some jurisdictions, such as the Seventh Circuit, and the states of Missouri, New York, and Georgia, do not use the heeding presumption unless the plaintiff provides evidence that an alternative warning would have changed the behavior that caused the accident. Petitioners here provided no such evidence. Therefore, should the Court adopt this standard, the presumption would nevertheless not be met.

However, if this Court chooses to adopt the heeding presumption, the decision to reject the proposed jury instruction should not be overturned because sustaining its use at trial did not cause prejudice. The jury in this case heard a plethora of testimony from all named parties and an expert

witness for the plaintiff and deliberated for upwards of sixteen hours. R. at 12. Since "it cannot be unequivocally stated that the jury would have proffered a different verdict if the requested instruction had been given," the decision to deny Petitioners' proposed jury instruction did not cause prejudice, and should not be overturned.

ARGUMENT

I. THE APPELLATE COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO ZUUL ON PETITIONERS' MANUFACTURING DEFECT CLAIM BECAUSE L.T. IS NOT A CONSUMER AS DEFINED BY OHIOWA LAW AND L.T. DID NOT USE THE ZUUL IN A REASONABLY FORESEEABLE MANNER.

This Court should affirm summary judgment of Petitioners' manufacturing defect claim because L.T. is not in the class of persons that Zuul should reasonably foresee as being subject to harm, and L.T. did not use the e-cigarette as intended or in a reasonably foreseeable manner. A decision for summary judgment is reviewed *de novo*, construing the evidence in a light most favorable to the non-moving party. *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 362 (Iowa 2014).

In Ohiowa, a manufacturer is only liable to a consumer if that consumer "is in the *class of persons* that the seller should reasonably foresee as being subject to the harm caused by the defective condition. . . ." Ohiowa Rev. Code § 5552.368. (emphasis added). In addition, under Ohiowa Rev. Code § 5552.369(a)(1), a product is in a defective condition if, at the time it was conveyed by the seller to another party, "it deviated in a material way from the design specifications, formula, or performance standards of the manufacturer." In Ohiowa, the test for whether a product deviated in a material way from the design standards of its manufacturer is the consumer expectations test. *State Farm Fire & Cas. Co. v. Chrysler Corp*. 523 N.D.2d 489, 494 (Ohio 1988). Using the consumer expectations test, the court must determine whether at the time the product left the manufacturer's hands, a product was "more dangerous than an ordinary

consumer would expect when *used in an intended* or reasonably foreseeable manner." *Id*. (emphasis added).

While there is no dispute Zuul's product was defective, (*see* R. at 6.), Zuul is not liable using the consumer expectation test because L.T. is not in the class of persons that Zuul should reasonably foresee as being subject to harm and L.T. did not use the e-cigarette as intended or in a reasonably foreseeable manner. The Supreme Court of Ohiowa's affirmation of the Court of Common Pleas' grant of summary judgment on the manufacturing defect claim was therefore proper.

A. L.T. is Not a Foreseeable Consumer as Defined by Ohiowa Rev. Code § 5552.368.

Under the consumer expectations test, L.T. is not an "ordinary consumer" of an e-cigarette and Zuul is therefore not liable. Ohiowa Rev. Code § 5552.368. L.T. is not a foreseeable consumer of the Zuul e-cigarette because L.T. is an eleven-year-old minor that used the e-cigarette as a toy, in a manner completely unforeseeable by Zuul. In Ohiowa, a manufacturer is only liable to a consumer if that consumer "is in the *class of persons* that the seller should reasonably foresee as being subject to the harm caused by the defective condition." Ohiowa Rev. Code § 5552.368. R. at 8.

Under the consumer expectations test, the court must determine whether at the time the product left the manufacturer's hands, a product 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.D.2d 489, 494 (Ohio 1988) (emphasis added). The OPLA does not provide a definition of "consumer," nor have courts in Ohiowa addressed this issue. Therefore, to determine its definition, the court below relied on the Restatement (Second) of Torts, upon which the OPLA is based, which imposes liability when physical harm is "caused to the *ultimate*

user or *consumer*, or to his property . . .” Restatement (Second) of Torts § 402A(1) (emphasis added). In drafting the OPLA, however, the Ohiowa legislature specifically chose to exclude the words “ultimate user,” and instead only enforced liability for “consumers.” R. at 9. “Consumers” are those who have ultimately *used the product as intended*, whereas “users” include anyone who either passively enjoys the benefit of the product or those utilizing the product for the purpose of repair. R. at 9 (emphasis added). The court below correctly followed the strict plain language of the OPLA in extending liability to consumers, who ultimately used the product as it was intended. R. at 9. Since L.T. did not use the Zuul e-cigarette as intended, he would not be considered a “consumer” and would not fit in the class of persons that Zuul should reasonably foresee as being subject to the harm caused by their e-cigarette.

This Court should consider the manner of Zuul’s commercial advertisements to determine the foreseeable users of their e-cigarette product. Zuul was primarily founded and premised with the intent for their e-cigarette product to be a safer alternative to traditional cigarettes. R. at 3. Zuul’s e-cigarette is built on the idea of making traditional smoking obsolete. *Id.* Zuul’s campaign and marketing does not seek to encourage non-nicotine users to buy Zuul products, and instead markets it toward adults seeking to quit traditional smoking. Although a Federal Court held that Zuul was targeting teens and young adults with its sweet flavors, Zuul issued a statement affirming its denial of any attempt to market its product to children and vowed to only produce a “classic tobacco” flavor in the future as a sign of good faith to them. R. at 4. It is not reasonable that Zuul would foresee an eleven-year-old as a potential consumer of their e-cigarette.

In *Perotti*, the Ohio Court of Appeals held that a consumer who borrowed and wore his wife’s prescription contact lenses was not a foreseeable user of defendant’s product. *Perotti v. Johnson & Johnson Vision Prod., Inc.*, 2004-Ohio-7149, ¶ 15 (Ohio Ct. App. 2004). The plaintiff

argued that despite the lenses being prescribed for his wife, defendants should have included a warning to any non-prescription user that corneal ulcers could arise if that user sleeps wearing the lenses. *Id*. at 18. The Court ultimately held that there was "no evidence to establish that plaintiff falls within the circle of persons defendants should have anticipated would use their prescription ACUVUE contact lenses… to the contrary, the undisputed evidence establishes that defendants did not owe plaintiff a duty because they could not have foreseen him as a potential user of his wife's prescription ACUVUE lenses." *Id.* at ¶ 19.

Similar to *Perotti*, where defendant was not a foreseeable user of his wife's prescription lenses, L.T. is not a foreseeable user of Dana Barrett's Zuul. Zuul's e-cigarettes are intended for use by adults, such as Dana Barrett, and not minors, such as L.T. Similar to ACUVUE, Zuul does not owe a duty to minors, such as the eleven-year-old L.T., because Zuul could not have foreseen minors as potential users of their product.

In *Jeffers*, the Supreme Court of Ohio held that a manufacturer did not owe a duty to a minor who discovered unreturned helium tanks and fatally inhaled helium. *Jeffers v. Olexo*, 539 N.E.2d 614 (Ohio 1989). The court discussed foreseeable and intended users of products, stating "[O]nly when the injured person comes within the circle of those to whom injury may reasonably be anticipated does the defendant owe him a duty of care." *Id*. The court held that the decedent minor was not an *intended user* of the helium because the manufacturer could not have foreseen that their helium tanks would be left in an area easily accessible to attendees and that defendant would subsequently inhale the helium. *Id*.

Like the manufacturer in *Jeffers*, Zuul does not owe a duty to minors such as L.T. Minors are not intended users of their e-cigarettes, and L.T.'s use of the Zuul was completely unforeseeable. A minor, such as the eleven-year-old L.T., is not "within the circle of those to

whom injury may reasonably be anticipated." 539 N.E.2d 614 (Ohio 1989). Zuul could not have foreseen that the e-cigarette would be left in an area easily accessible to L.T. or, as discussed in *Perotti*, *infra*, that a minor would use their product as a toy. R. at 5. This Court should affirm summary judgment because an eleven-year-old minor is not an ordinary consumer of an e-cigarette as defined under Ohiowa Law under the consumer expectations test, and therefore Zuul is not liable for the product defect under Ohiowa Rev. Code § 5552.368.

B. *L.T.'s Use of the Zuul was Not as Intended or Reasonably Foreseeable According to the Consumer Expectation Test.*

In addition to not being a foreseeable consumer of e-cigarettes, L.T. also did not use the e-cigarette as intended or in a reasonably foreseeable manner. Zuul is therefore not liable under Ohiowa Rev. Code § 5552.369(a)(1). Ohio courts have held that "only those circumstances which [the manufacturer] perceived, or should have perceived, at the time of [its] respective actions should be considered… [A] manufacturer need not anticipate all uses to which its product may be put, nor guarantee that the product is incapable of causing injury in all of its possible uses." *Menifee v. Ohio Welding Products, Inc.* (Ohio 1984). Thus, while a manufacturer must design its product using reasonable care so as to make it safe for its intended use, it is not under a duty to render it accident proof or foolproof. *Coleman v. Excello-Textron Corp.*, 572 N.E.2d 856, 862 (Ohio Ct. App. 1989).

In *Mclaughin*, the Supreme Court of Ohio affirmed the granting of summary judgment where the plaintiff's use of the manufacturer's washing machine was found to be unforeseeable and completely incompatible with the product's design. *McLaughlin v. Andy's Coin Laundries*, *LLC*, 112 N.E.3d 57 (Ohio 2018). In *McLaughlin,* Appellant used a screwdriver to pry open a washing machine door while the machine was still turning in order to remove his comforter. *Id*. at 59. Appellant ultimately lost his grip of the comforter and was pulled into the machine while

the drum continued to turn. *Id*. As a result, Appellant's hand was amputated at the wrist. *Id*. The court held that Appellant's acts constituted *misuse*. *Id*. (emphasis added). The court defined "misuse" as a "use which was unanticipated or unexpected by the product manufacturer, or unforeseeable and unanticipated." *Id.; see also Bowling v. Heil,* 31 Ohio St.3d 277, 282 (Ohio 1987) (holding that "[a] defendant in a products liability action is provided with a complete defense if the plaintiff misused the product in an unforeseeable manner.").

Plaintiff's conduct in *Mclaughlin* is directly analogous to L.T.'s misuse of Zuul's e-cigarette as a toy. The Zuul e-cigarette was designed to be operated by depressing a button, at which point an atomizer heats the flavored liquid in the cartridge into a vapor which users can inhale. R. at 3–4. Instead of using the Zuul for the purposes of inhaling the vapor, L.T. depressed the activating button and began playing with the product in a manner mimicking the operation of a leaf blower. R. at 5. This misuse by L.T. is completely incompatible with the product's design, as it was intended to be used as an e-cigarette for adults, and not as a toy by a minor. Since L.T. did not use the e-cigarette for its intended purposes, and his use as a toy constitutes misuse, L.T. is not a "consumer" of the Zuul under Ohiowa Rev. Code § 5552.368 and falls outside of the class of persons from which Zuul should reasonably foresee as being subject to harm caused by the product.

In *Briney*, the Sixth Circuit Court of Appeals considered whether the manufacturer's failure to design a blade guard against a reasonably foreseeable hazard caused the plaintiff's injury. *Briney v. Sears, Roebuck & Co*., 782 F.2d 585, 588 (6th Cir. 1986). The court held that the test for determining whether a particular hazard is foreseeable is "whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." *Id.* The defendant's expert testified that it was reasonably foreseeable that a consumer

would remove the blade guard when in a situation like that of plaintiff, thereby exposing himself to a risk. *Id*. at 590. Not only did experts testify that this was a reasonably foreseeable hazard, but they also supported the argument that the defendants should have, and could have, designed against this foreseeable risk. *Id*. at 589.

Unlike *Briney*, no expert testimony was presented to support the notion that L.T.'s use of the e-cigarette as a toy was foreseeable by Zuul. No expert proposed alternate designs which were mechanically or economically feasible. While it is foreseeable that a user would remove a blade guard when the guard interferes with the ability to cut, like in *Briney*, it is not foreseeable that an e-cigarette would be used by an eleven-year-old minor as a toy. R. at 5. It is only reasonably foreseeable that a consumer would press the activating button on the Zuul and subsequently raise it to their mouth in order to inhale the vapor. The ultimate intent and purpose of the Zuul e-cigarette is to provide a safer alternative to traditional smoking, and L.T.'s use in no way conforms to this purpose. In order to protect against dangers from use of the e-cigarette as a toy by minors, Zuul would need to design a fundamentally different product. Zuul could not have reasonably foreseen this misuse by a minor nor could Zuul have designed the e-cigarette to protect against such unforeseeable conduct.

Lastly in *Griffith*, the Court of Appeals of Ohio held that a manufacturer may be held liable for a product defect if the product "is more dangerous than an ordinary consumer would expect when used in an intended or *reasonably foreseeable* manner." *Griffith v. Chrysler Corp*., 2003-Ohio-3464, ¶ 15 (Ohio Ct. App.) (emphasis added). Appellant's claim for design defect failed in *Griffith* because Appellee produced evidence through expert testimony that Appellant's operation of the stationary car was an unforeseeable misuse. *Id* at ¶ 58. While people do drink and fall asleep in their vehicles with the engine running, Appellant failed to demonstrate that this was a

reasonably foreseeable occurrence. *Id.* The court noted that although a manufacturer is not responsible for all product misuses, the manufacturer's failure to design a product to prevent a foreseeable misuse could be a design defect. *Welch Sand & Gravel, Inc. v. O & K Trojan, Inc.*, 668 N.E.2d 529 (Ohio Ct. App. 1995); *Menifee v. Ohio Welding Products, Inc.*, 472 N.E.2d 707 (Ohio 1984). However, a manufacturer need not anticipate all product uses, nor guarantee the product is incapable of causing injury in all of its possible uses. *Id.* The court held it is obvious that a user should not operate the car as Appellant did, *Id*. at ¶62, and that Appellee produced competent, credible evidence that the operation of the stationary car in this way was an unforeseeable misuse. *Id*. at ¶ 58.

Similar to *Griffith*, where the plaintiff failed to demonstrate that others drinking and falling asleep in their vehicles with the engine running is a reasonably foreseeable occurrence, the Tullys have failed to establish that L.T.'s use of the Zuul as a toy was a reasonably foreseeable occurrence that should have been considered in the product's design. As the court noted, Zuul need not anticipate all potential uses of its product nor must it guarantee that the product is incapable of causing injury in all of its possible uses. It is obvious that a Zuul should not be used by a minor as a toy in the manner mimicking a leaf blower. Such use constitutes an unforeseeable misuse, and Zuul could not have reasonably anticipated this use nor contemplated this use in their design of the e-cigarette. This Court should therefore affirm summary judgment because L.T. did not use the e-cigarette as intended or in a reasonably foreseeable manner and, therefore, Zuul is not liable under Ohiowa Rev. Code § 5552.369(a)(1).

C. *Imposing Liability on Zuul Would Unfairly Expand Tort Liability Against Manufacturers and Ultimately Harm Consumers.*

In *Knitz*, the Ohio Court of Appeals discussed the development of strict products liability in Ohio and noted that "the judiciary has been ever cognizant of the dangers caused by an unduly

liberal approach to strict products liability; said approach potentially leading to catastrophic economic and financial repercussions for manufacturers." *Knitz v. Minster Mach. Co*., No. C.A. L-84-125, 1987 WL 6486, at *17 (Ohio Ct. App. 1987). The law "does not require the manufacturer to produce a perfect product, but only one reasonably safe for its intended use… nor do the courts require the manufacturer to act as an 'insurer' of products." *Id.*

This Court should consider the potential financial repercussions and dangerous precedent that would result from imposing liability on manufacturers, such as Zuul, for injuries like that of L.T. Zuul is not required to produce a perfect product or to act as an "insurer" of its products, but rather Zuul must only produce a reasonably safe product when the product is used as intended. Imposing liability on Zuul removes a basic tenant of tort law and significantly expands tort liability against manufacturers by holding them liable for every possible use of their product. This would eventually curtail manufacturers from creating products, and ultimately harm consumers. As a result, suppliers may seek to produce e-cigarettes and sell them on the black market, with no industry standards or oversight. Increasing liability for such e-cigarette manufacturers would shut down small businesses, and ultimately limit a smoker's access to the tools they need to quit smoking.

In *Sikorski*, the Ohio Court of Appeals held that a manufacturer did not have a duty to ensure that a device was properly installed, and was not liable for an employer's injuries. *Sikorski v. Link Elec. & Safety Control Co*., 691 N.E.2d 749 (Ohio Ct. App. 1997). Here, plaintiff was injured after a device manufactured by defendant was improperly installed by a third-party. *Id.* In its reasoning, the court noted that "[i]f this court were to accept plaintiff's theory imposing a duty on manufacturers to install or oversee every installation of its products, it would impose a severe burden on manufacturers… This proposition could lead to onerous results, *e.g.,* overseeing the

installation and maintenance of smoke detectors." *Id*. at 755. The court was clearly concerned about overburdening manufacturers, and sought to limit potential liability.

A manufacturer like Zuul does not have a duty to ensure their product is properly monitored and kept safely away from minors. The Tully family entrusted their eleven-year-old minor to the care of Dana Barrett, who left the Zuul unattended and afforded L.T. the opportunity to unreasonably use the product in a dangerous manner. Zuul should not be held liable for the independent acts and decisions of both the Tully family and Ms. Barrett, which ultimately led to the misuse of their product. Such liability would impose a severe and unfair burden on manufacturers and allow plaintiffs to shift responsibility from themselves to an unknowing corporation.

In *Paugh*, the Northern District Court of Ohio discussed the inherent risks and dangers of smoking. *Paugh v. R.J. Reynolds Tobacco Co*. 834 F. Supp. 228, 230 (N.D. Ohio 1993). The court cited the Restatement (Second) of Torts, which mentions tobacco as an example of a product which is not defective merely because the effects of smoking may be harmful. Rest. (2d) of Torts § 402A(i); *id.* at 231. The court cited to *Roysdon,* where the Sixth Circuit held that the extensive information regarding the risks of smoking available to the public precluded the existence of a jury question. Since knowledge that cigarette smoking is harmful to your health is widespread and can be considered part of the common knowledge of the community, a jury instruction explaining such was unnecessary. *Roysdon v. R.J. Reynolds,* 849 F.2d 230, 236 (6th Cir.1988). Zuul has no duty to provide warnings regarding the dangers of smoking beyond those already required by the FDA. *See* Cigarette Labeling and Warning Statement Requirements, https://www.fda.gov/tobacco-products/labeling-and-warning-statements-tobacco-

products/cigarette-labeling-and-warning-statement-requirements (last visited January 31, 2020). L.T's conduct went far outside the requisite warning Zuul is required to provide.

This Court should affirm summary judgment in favor of Zuul. Applying the consumer expectations test, this Court should hold that an eleven-year-old minor is not a foreseeable consumer of an e-cigarette and that L.T. did not use the e-cigarette as intended or in a reasonably foreseeable manner. Imposing liability as required under the statute would unfairly expand tort liability and ultimately harm consumers.

II. THE READ AND HEED DOCTRINE DOES NOT APPLY TO STRICT LIABILIY FAILURE-TO-WARN CLAIMS BECAUSE IT ELIMINATES THE NEED FOR PLAINTIFF TO PROVE PROXIMATE CAUSATION AND PETITIONERS PROVIDE NO EVIDENCE THAT AN ALTERNATE WARNING WOULD HAVE BEEN READ OR HEEDED.

This Court should reject the heeding presumption in all strict liability failure-to-warn claims because the heeding presumption allows plaintiff's claims to succeed without proving proximate causation – an essential element of a tort claim – and because Petitioners here did not provide any evidence that an alternate warning would have been read or heeded.

Simply put, adopting the heeding presumption allows a plaintiff's claim to succeed without proving proximate causation. Additionally, Petitioners offer no proof that an alternate warning would be read and heeded. The heeding presumption, which arises from the Restatement (Second) of Torts, states that "[w]here warning is given, the seller may reasonably assume 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 a defective condition." Restatement (Second) of Torts § 402A cmt. j. Some courts read this as creating a rebuttable presumption that the person injured by use of the product would have read and heeded an adequate warning, if such a warning was provided. *Dole Food Co. v. N. Carolina Foam Indus., Inc.*, 188 Ariz. 298, 305 (Ariz. Ct. App. 1996). If this presumption applies, the

existence of an injury serves as proof the warning was not adequate, as the injured party would have read and heeded the warning, preventing the injury entirely. *Id.* While some courts adopt this presumption for all strict liability failure-to-warn cases, comment j has been highly criticized, and was ultimately removed from the Restatement (Third) of Torts. *See* Restatement (Third) of Torts § 2, Reporter's Note, cmt. 1 (characterizing comment j as containing "unfortunate language" that "has elicited heavy criticism from a host of commentators"). Whether the heeding presumption applies is reviewed by this Court *de novo*. *Duncan v. Barr*, 919 F.3d 209, 214 (4th Cir. 2019).

A. The heeding presumption should not be adopted because this would allow plaintiff's claim to succeed without proving proximate causation.

This Court should not adopt the heeding presumption for all strict liability failure-to-warn claims because adopting the presumption would allow a plaintiff's claim to succeed without the plaintiff proving that the alleged inadequate warning caused the injuries. In order for a plaintiff to succeed on a failure-to-warn claim, they must prove 1) causation in fact, showing that the product for which no warning existed caused the injuries, and 2) proximate causation. *See Moore v. Ford Motor Co.*, 332 S.W.3d 749, 761-62 (Mo. 2011); *Riley v. American Honda Motorcycles*, 259 Mont. 128, 132 (1993). A plaintiff can prove proximate causation by showing that an adequate warning would have altered their behavior in a manner that would have prevented the injury. 63 Am. Jur. 2d, *Products Liability*, §§ 356-57 ("It is true that the causation element in a failure to warn claim can be satisfied by evidence indicating that a warning would have altered plaintiff's use of the product or prompted plaintiff to take precautions to avoid the injury."); *Riley*, 259 Mont. at 133-34 (holding that proximate cause was not shown because plaintiff did not provide any evidence that an adequate warning would have altered his behavior); *Sosna v. American Home Products*, 748 N.Y.S.2d 548 (App. Div. 1st Dep't 2002).

Seventeen states and at least three circuit courts expressly reject application of the read and heed presumption. *See* WHO HEEDS THE HEEDING PRESUMPTION? (2014), https://www.druganddevicelawblog.com/2014/11/who-heeds-heeding-presumption.html. Some of these states reject the heeding presumption because their reading of §402A, cmt. j. does not support creation of the heeding presumption. *See Motus v. Pfizer, Inc.*, 169 F. Supp. 2d 984, 992 (C.D. Cal. 2001), *aff'd* 358 F.3d 659 (9th Cir. 2004) ("Plaintiff has cited no California case using comment j to shift either the burden of proof as to causation or the burden of going forward to a defendant in a failure-to-warn case."). In *Motus*, plaintiff sued after her husband committed suicide due to the side effects of a prescription drug manufactured by defendant. *Id.* at 986. Plaintiff alleged that defendants failed to warn against the side effect of suicide, and should therefore be liable for the death of her husband. *Id.* The court rejected the heeding presumption because plaintiff did not provide any case in which a California court adopted the presumption, it was unwilling to opine that one should be adopted. *Id.* at 992. The court found that the testimony of the prescribing doctor did not tend to show that plaintiff could carry her burden of persuasion on the issue of causation, and granted summary judgment in favor of the defendant. *Id.*

Other states cite the need for a plaintiff to prove proximate causation as their reason for rejecting the presumption. *See Dejesus v. Craftsman Machine Co.*, 548 A.2d 736, 744 (Conn. App. 1988) (holding that Connecticut law specifically places the burden of proving proximate causation on the plaintiff). There, plaintiff injured his hand while using a machine manufactured by the defendant. *Id.* at 737-38. The court affirmed the decision of the lower court that no heeding presumption exists because Connecticut law specifically places the burden of causation on the plaintiff. *Id.* at 744 ("The language of the statute is clear. There was no presumption of proximate cause that arose on the jury's finding that Craftsman had failed to provide adequate warnings…").

In jurisdictions where the heeding presumption is adopted, the presumption acts to impermissibly prove proximate causation without any evidence from the plaintiff. Under the presumption, the jury should assume that where an adequate warning is given, the plaintiff would heed such warning. Restatement (Second) of Torts § 402A cmt. j. And if the plaintiff were to heed such a warning, an injury would not be possible. *Id.* Therefore, if one is injured, the heeding presumption allows the jury to infer that the injury was caused by the inadequate warning without proving anything other than that the plaintiff was injured, eliminating the need for the plaintiff to prove proximate cause.

Since the heeding presumption abolishes the need to prove proximate causation, many jurisdictions rightfully do not adopt it. R. at 11; *Odom v. G.D. Searle & Co.*, 979 F.2d 1001, 1003 (4th Cir. 1992); *Thomas v. Hoffman-Laroche, Inc.*, 949 F.2d 806, 812-14 (5th Cir. 1992); *Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10 (1st Cir. 2001); *Dejesus v. Craftsman Machinery Co.*, 548 A2d 736 (Conn. Ap. Ct. 1988); *Rivera v. Phillip Morris, Inc.*, 209 P.3d 271 (Nev. 2009); *Castorina v. A.C. & S.*, 49 N.Y.S.3d 238 (N.Y. App. Div. 2017). Even those jurisdictions that relied on the Restatement (Second) of Torts in developing their tort law are not constrained by the language in comment j. *See Riley*, 259 Mont. at 134-35.

In *Deere & Co. v. Grose*, 586 So. 2d 196, 198 (Ala. 1991), the Supreme Court of Alabama found that because a failure-to-warn case "should not be submitted to the jury unless there is substantial evidence that an adequate warning would have been read and heeded and would have prevented the accident," the lower court erred by not granting a directed verdict on the issue in favor of the defendants. *Id.* In *Deere*, plaintiff sued after her husband died while riding a tractor manufactured by defendants. Deere, 586 So. 2d at 199. During the trial, plaintiff testified her husband knew little about the tractor and that the warning on the tractor did not explain the dangers

associated with the machine. *Id.* The court disagreed, reasoning that since plaintiff provided no evidence suggesting that an adequate warning would have changed the behavior of her husband, she failed to prove proximate cause. The defense should therefore have received a directed verdict on the negligent-failure-to-warn claim. *Id.*

Simply alleging that an adequate warning would change the behavior of plaintiff is not sufficient to prove proximate cause. *See Riley*, 259 Mont. at 135-36. In *Riley*, plaintiff sued after sustaining injuries when riding a motorcycle manufactured by Honda. *Riley*, 259 Mont. at 133. While test driving the motorcycle, Riley lost control and crashed. *Id.* at 30. Riley argued that the motorcycle had a propensity to wobble, and that this wobble caused him to crash. *Id.* The Supreme Court of Montana held that Riley did not supply adequate evidence to prove proximate causation, *Riley*, 259 Mont. at 133, the only evidence Riley supplied came from his testimony that he "respected machinery" and "may have rode the motorcycle differently" if an adequate warning existed. *Id.* at 133-34. The court did not find the fact that Riley "may have" behaved differently to be sufficient to prove that an adequate warning would have changed the behavior of Riley, and affirmed the decision of the district court. *Id.* at 136.

Similar to *Deere* and *Riley*, L.T. provides no evidence that would lead a reasonable juror to believe that had an adequate warning been provided, his behavior would have changed. Although covered by the Zuul skin, the e-cigarette contained a warning. R. at 4. Petitioners, similar to the plaintiffs in *Deere* and *Riley*, provided no evidence that L.T. would have behaved differently had the Zuul contained a different warning or had the Zuul skin also displayed a similar warning. Without satisfying their burden of persuasion in proving that L.T.'s behavior would have differed had an adequate warning been given, plaintiff cannot prove proximate causation, and therefore, could not present a prima facie failure-to-warn case.

Not only would L.T. likely not have read a warning if included on the Zuul skin, it is not reasonable to believe that an eleven-year-old child would understand the dangers of using the Zuul product. If the court were to adopt the heeding presumption, L.T. would be able to succeed on his claim simply because the warning was covered by the Zuul skin. This would obviate the need for proximate causation, and would allow all claims where a person who suffered an injury while using a product to succeed. Such an outcome is at odds with traditional notions of causation, and it is preferable to require a plaintiff to present sufficient evidence of proximate causation to satisfy their failure-to-warn claim.

B. The heeding presumption should not be applied to all strict liability failure-to-warn claims because many jurisdictions expressly reject application of the presumption when the plaintiff did not prove that a different warning would be read or heeded.

Many jurisdictions expressly reject the heeding presumption when the plaintiff does not prove that an additional warning would be read or heeded. The heeding presumption allows the jury to presume that if the product contained an *adequate* warning, plaintiff would have read and heeded the warning, preventing any injuries. Restatement (Second) of Torts § 426 cmt. j (emphasis added). The presumption assumes that a reasonable person would act appropriately if the warning provided adequate information, creating automatic liability on a defendant. *Id.* However, many courts maintain that a plaintiff cannot succeed in applying the presumption without showing that an *alternative* warning would be read and subsequently heeded. *See In re Zimmer*, 884 F.3d 746 (7th Cir. 2018) (holding the presumption did not apply when an actor admitted he did not read the original warning); *see also Arnold v. Ingersoll-Rand Co.*, 834 S.W.2d 192, 194 (Mo. 1992), *aff'd Arnold v. Ingersoll-Rand Co.*, 908 S.W.2d 757 (Mo. 1995); *see also Mulhall v. Hannafin*, 841 N.Y.S.2d 282 (App. Div. 1st Dep't 2007); *see also Dozier Crane & Machinery, Inc. v. Gibson*, 284 Ga. App. 496 (2007); *see also Castorina v. A.C. & S.*, 55 Misc. 3d 968, 972 (N.Y. Sup. Ct.

2017) (citing *Sosna v. American Home Products*, 748 N.Y.S.2d 548 (App. Div. 1st Dep't 2002); *see also Jones v. Amazing Products, Inc.*, 231 F. Supp. 2d 1228 (N.D. Ga. 2002). Without proof that the plaintiff read the original warning, it is impossible for one to believe that a plaintiff's behavior would change with an alternative warning; the plaintiff should not be able to automatically create liability for the defendant, even under an alternative warning theory, through use of the presumption.

In *Arnold*, the plaintiff was injured when a spark from defendant's air compressor allegedly caused gasoline vapors to ignite. *Id.* at 192-93. Plaintiff argued that the provided warning failed to adequately warn of the dangers associated with the product. *Id.* at 194. The Missouri Supreme Court found, and the Court of Appeals of Missouri for the Eastern District affirmed, that because plaintiff already knew and understood the dangers associated with using the product, no warning could have altered defendant's behavior in a way that would have prevented the accident. *Id.*

In *Zimmer*, the plaintiff suffered discomfort after undergoing surgery for a total knee replacement. *Id.* at 749-50. At trial, plaintiff alleged that the company that manufactured the replacement knee failed to warn him that this product would not last forever. *Id.* During deposition, the doctor testified that he did not read the warning accompanying the replacement knee. *Id.* The trial court ultimately excluded the doctor from testifying at trial. *Id.* Without the testimony of the doctor, the court granted defendant's summary judgment motion because the plaintiff could not show that an alternate warning would have been either read or heeded. *Id.* The Seventh Circuit Court of Appeals agreed, holding that without plaintiff showing that an alternative label would have changed the behavior of the one who caused the injury, in this case the doctor, plaintiff could not meet his burden of proof on the issue of causation. *Id.*

Here, the Court should not adopt the heeding presumption because, much like the plaintiff in *Arnold*, Petitioners provide no evidence that an alternative warning would have been read or heeded. Although the Zuul skin covered the warning affixed to the Zuul (*see* R. at 4), L.T. did not provide any evidence that he would have read – or heeded – a warning if one was affixed directly to the Zuul skin. Petitioners provided no evidence that L.T. even looked for a warning before using the device. L.T. was not using the e-cigarette in a manner it was meant to be used, nor in an attempt to act in accordance with any warnings. Since L.T. did not look for a warning in the first place, a new or different warning would have also been ignored, making it impossible for Petitioners to prove proximate cause.

Adopting the heeding presumption would allow just that. The heeding presumption would allow Petitioners' case to continue and succeed without any evidence that tends to prove proximate causation, a longstanding and essential element of a failure-to-warn claim. Much like with the doctor in *Zimmer*, even if Zuul included a warning on the Zuul skin or modified the existing warning to warn against the dangers of a child's use of the product, Ms. Barrett would not have decided not to leave L.T. unattended and L.T. still would not have read the warnings. Since the behaviors of those involved likely would not have changed, the same series of events would have occurred. Since the actions of L.T., not the inadequate warning, caused the injuries, this Court should not adopt the heeding presumption, which would automatically place responsibility for the injuries on Zuul.

Accordingly, this Court should reject the decision of the Supreme Court of Ohiowa and should not apply the heeding presumption to all strict liability failure-to-warn claims because L.T. would not have read nor heeded any additional or different warning.

C. *Even if the Court chooses to adopt the heeding presumption, the decision not to give the proposed jury instruction does not constitute reversible error because it did not cause prejudice.*

Even if this Court chooses to adopt the heeding presumption in all strict liability failure to warn claims, it should still affirm the decision not to accept the proposed jury instruction because denying this instruction did not cause prejudice. Reversal on the basis of a faulty jury instruction is not easily attained. R. at 12. A court should consider a jury instruction faulty, and therefore must reverse that instruction, when "(1) 'we have substantial doubt whether the instructions, considered as a whole, properly guided the jury in its deliberations,' (*Morrison Knudsen Corp. v. Firman's Fund Ins. Co.*, 175 F.3d 1221, 1235 (10th Cir. 1999)); and (2) 'when a deficient jury instruction is prejudicial.'" (*Coleman v. B-G Maintenance Management of Colo., Inc.*, 108 F. 3d 1199, 1201 (10th Cir. 1997)). A jury instruction will be considered prejudicial where, considering the charge as a whole, "the jury charge probably misled the jury in a manner materially affecting the complaining party's substantial rights." *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 142 Ohio St. 3d 257, 266 (2015) (quoting *Kokitka v. Ford Motor Co.*, 73 Ohio St. 3d 89, 93 (1995)). The general rule is that an erroneous instruction does not automatically mislead a jury. *Id.* If the jury instructions, as a whole, fairly state the applicable law to the jury, the failure to give a particular instruction will not constitute error. *Barton Protective Services, Inc. v. Faber*, 745 So.2d 968, 974 (Fla. Ct. App. 1999). The burden to show prejudice falls on the party challenging the decision. *See. R.* at 10.

Even if this Court adopts the heeding presumption, it should affirm the denial of Petitioners' requested jury instruction. While the Record is silent on what the given jury instruction contained, the decision not to include the instruction on the heeding presumption did not cause prejudice. The jury heard a plethora of evidence, including testimony from all named

parties, and deliberated for upwards of sixteen hours. *See R.* at 12. During that testimony, the jury heard from an expert witness. R. at 7-8. The expert testified o the manufacturing defect claim; the testimony did not include the adequacy of the warning. *Id.* The jury likely would have reached the same conclusion regardless of which jury instruction was given, further evidencing that the decision to reject the proposed jury instruction did not cause prejudice.

CONCLUSION

This Court should affirm the Supreme Court of Ohiowa's grant of summary judgment on plaintiff's manufacturing defect claim. Minors such as L.T. are not foreseeable consumers of Zuul's e-cigarette as defined by Ohiowa Rev. Code § 5552.368, and L.T. did not use the Zuul as intended or in a reasonably foreseeable manner.

This Court should reverse the decision of the Supreme Court of Ohiowa that the heeding presumption applies to all strict liability failure-to-warn claims because adopting the heeding presumption would allow a plaintiff to succeed on a failure-to-warn claim without proving proximate cause or that an alternate warning would be read and heeded. This Court should nevertheless affirm the Supreme Court of Ohiowa's decision upholding the jury verdict in favor of Zuul because denying the proposed instruction did not cause prejudice and, therefore, does not constitute reversible error.