SUPREME COURT OF THE STATE OF OHIOWA

No. 20-2206

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

BRIEF FOR THE PETITIONER

Team W

QUESTIONS PRESENTED

I. Was Respondent's motion for summary judgment appropriate when Respondent did not dispute that its e-cigarette contained a manufacturing defect that proximately caused Petitioner's injuries, but instead only argued that Petitioner was not a reasonably foreseeable user of the product and therefore not a consumer?

II. Does the read and heed doctrine apply to strict liability failure-to-warn claims in Ohiowa given the state's consumer-first policy approach to product liability actions, and if so, did the trial court's abuse of discretion and denial of Petitioner's jury instruction on the doctrine prejudice Petitioner?

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Procedural History

Zuul Enterprises' ("Zuul") e-cigarette unexpectedly exploded in eleven-year-old L.T.'s hand resulting in a tragic burn. (R. at 5.) The e-cigarette was in a defective condition as a result of a manufacturing defect. (R. at 8.) Plaintiffs, Louis and Janine Tully ("Tully's"), guardians of minor L.T., brought suit against Zuul under Ohiowa's product liability law in the Court of Common Pleas. The complaint alleged that (1) Zuul violated Ohiowa product liability law due to the manufacturing defect causing L.T.'s burn, and (2) Zuul failed to adequately warn consumers of the risks of its e-cigarette. (R. at 2.)

The Tully's hired an expert witness who testified that, based on the severity of the burns and the specifications of Zuul's e-cigarette manufacturing, a defect in the e-cigarette proximately caused L.T.'s injuries. (R. at 7.) The expert pointed to a faulty connection between the activating button and the atomizer. This faulty connection made the e-cigarette overheat, which caused the liquid inside to boil. (R. at 7, 8.) Pressure increased inside, resulting in the e-cigarette exploding and severely burning L.T.'s hand. (R. at 8.) Zuul offered no evidence to dispute the opinions of the expert, no expert of its own, no evidence to suggest there was not a defect, nor any evidence to suggest the product was altered after it had left Zuul's care. (R. at 8.) Instead, Zuul motioned for summary judgment on both issues, arguing (1) they could not be liable despite the manufacturing defect because L.T. was not a foreseeable user of the product and (2) they adequately fulfilled their duty to warn. (R. at 2, 3.) The trial judge held that children were not foreseeable users of Zuul products, and therefore, granted Zuul's summary judgment on the manufacturing defect claim. (R. at 3, 4.)

The warning claim proceeded to trial. (R. at 3.) The Tully's requested a jury instruction on the read and heed doctrine, which would have informed the jury that a rebuttable presumption assumes that if Zuul failed to adequately warn the user, that failure was the proximate cause of L.T.'s harm. (R. at 3, 10.) Zuul objected to the instruction and the trial court sustained the objection. (R. at 3.) The jury rendered a verdict for Zuul. (R. at 3.)

The Tully's timely appealed to the Court of Appeals for Ohiowa Seventh Appellate District, Drummond County on two grounds: (1) The trial court erred in granting Zuul's motion for summary judgment on the manufacturing defect claim, and (2) the trial court erred in failing to allow the Tully's their jury instruction on the read and heed doctrine. (R. at 3.) On the first issue, the majority affirmed the trial court's granting of summary judgment after finding L.T. was not a foreseeable consumer; and therefore, was not a consumer under Ohiowa product liability laws. (R. at 6.) On the second issue, the majority held that the trial court abused its discretion in denying the Tully's their proposed jury instruction because the read heed doctrine does apply in Ohiowa. (R. at 12.) However, the majority held that the abuse of discretion did not prejudice the Tully's at trial. Thus, the Court of Appeals for Ohiowa Seventh Appellate District affirmed the decision by the Court of Common Pleas on both the manufacturing defect and failure-to-warn claim. (R. at 12.)

Justice Zeddemore filed an opinion, dissenting in part and concurring in part. (R. at 13.) The opinion dissented from the majority's decision to affirm the granting of Zuul's motion for summary judgment on the manufacturing defect claim. (R. at 13.) The opinion reasoned that Zuul's previous litigation in federal court made the corporation fully aware of the danger that its product posed to children. (R. at 15.) It held L.T. was therefore a foreseeable user, and by the majority granting summary judgment, it allowed Zuul to escape liability and obtain "access to

illegal and dangerous trade practice." (R. at 15.) Additionally, Justice Zeddemore wrote that Ohiowa's Product Liability Act (OPLA) was drafted with the intent to impose strict liability on manufacturers and sellers of products with defects or defective conditions. (R. at 13.) The opinion concurred with the majority on the second issue. (R. at 13.) It agreed that the read and heed doctrine is the law in Ohiowa and that the trial court abused its discretion in denying the Tully's their requested jury instruction. (R. at 13.) However, the opinion also agreed that the Tully's were not prejudiced by the abuse of discretion. (R. at 13.) Therefore, the opinion dissented to issue one, the manufacturing defect claim, and affirmed issue two, the warning claim. (R. at 13-15.)

Statement of the Facts

In December 2017, a federal district court held that Zuul was using certain popular, sweet flavors to directly market their e-cigarettes to children. (R. at 4.) Zuul was required to pay damages and an injunction was issued against production of these flavors. (R. at 4.) In a statement denying liability, Zuul vowed to stop production of its sweet flavors, and in the same statement, introduced their new accessories, or "skins", that users could buy to fashion their e-cigarettes with certain designs or cartoon characters. (R. at 4.)

On July 17, 2018, Dana Barrett (Barrett), a nineteen-year-old college student, babysat L.T. (R. at 5.) Barrett, like her peers, frequently used Zuul's e-cigarettes. (R. at 5.) Her specific e-cigarette bore a Zuul skin depicting *Hola Gato*, a popular cartoon character that both Barrett and L.T. enjoyed. (R. at 5.) Because of his affection for the cartoon character, L.T. grabbed the e-cigarette. (R. at 5.) He pressed its activating button and began moving it from side to side with his hand. (R. at 5.) Unfortunately, the e-cigarette then exploded in L.T.'s hand without warning,

causing severe burns. (R. at 5.) After review of Zuul's e-cigarette, the product shows no warning on the skins of the danger it poses. (R. at 4.)

SUMMARY OF THE ARGUMENT

This case is about a morally skewed corporation attempting to avoid strict liability from an 11-year-child who suffered severe burns after using its defective product. Instead of refuting expert testimony, or providing its own evidence to rebut a manufacturing defect claim, Zuul claims L.T. was not a reasonably foreseeable user of its product. Zuul offers this argument despite previously being forced to pay damages for directly marketing its e-cigarette products to children. The court of appeals erroneously agreed with Zuul, relying only on the motion of L.T.'s arm when using Zuul's e-cigarette that exploded in his hand to determine whether he was a consumer under the consumer expectations test. By doing so, the court of appeals erred in affirming a motion for summary judgment in favor of Zuul because L.T. satisfies the requirements of a consumer under Ohiowa law and L.T.'s use of Zuul's e-cigarette was reasonably foreseeable. No adult in the same situation would reasonably expect that pressing down the e-cigarette's button would cause it to explode.

In order to protect L.T. and other Ohiowa consumers, this Court should adopt the read and heed doctrine in failure-to-warn claims to remain consistent with OPLA and the consumer-friendly policies in product liability actions. The read and heed doctrine should be adopted for three reasons. First, it prevents a plaintiff from facing the near impossible burden of proving proximate cause in product liability actions. Second, adopting the doctrine would remain consistent with Ohiowa's consumer-first public policy. Third, the doctrine is procedurally advantageous because it keeps unreliable testimony out of the courtroom. Despite a language change in the Restatement (Third) of Torts, states continue to adopt the presumption and states that had previously adopted the doctrine, continue to recognize it.

As the read and head doctrine is essential to Ohiowa's failure-to-warn claims, the trial court's abuse of discretion and denial of the Tully's requested jury instruction, and the court of appeals failure to find prejudice, should be reversed. The abuse of discretion requires reversal because there is substantial doubt whether the instructions, considered as a whole, properly guided the jury, and the denial of the instruction prejudiced the Tully's.

ARGUMENT

As a policy, strict liability for manufacturers whose products cause harm to persons or property ensures that manufacturers, before placing their products into the stream of commerce, guarantee that their products are safe. (R. at 13.); *Garrett v. Howmedica Osteonics Corp.*, 214 Cal.App.4th 173, 182 (Cal. Ct. App. 2013). Strict liability protects consumers, ensuring "that the loss is borne not by injured consumers but by manufacturers . . . who are better able to reduce the risks of injury and can equitably distribute the loss to the consuming public." *Id.* The manufacturer should assume responsibility toward any consumer in the public that was harmed by its defective product. (R. at 13.) This case presents a manufacturer's attempt to evade strict liability from harm after its defective product exploded in an 11-year-old child's hand, severely injuring him. (R. at. 9)

I. SUMMARY JUDGMENT WAS INAPPROPRIATE BECAUSE ZUUL DID NOT DISPUTE THAT ITS PRODUCT CONTAINED A MANUFACTURING DEFECT, AND A GENUINE ISSUE OF MATERIAL FACT REMAINED AS TO WHETHER L.T. WAS A CONSUMER UNDER THE CONSUMER EXPECTATIONS TEST.

The Ohiowa Court of Appeals Seventh Appellate District erred in granting the motion for summary judgment in favor of Zuul because it applied an incorrect standard on what a "consumer" is under Ohiowa Revised Code § 5552.368. Summary judgment should only be granted where there is no issue of any material fact and the moving party is entitled to judgment as a matter of law. Ohiowa R. Civ. Proc. 56(a). The material fact that remains at issue in the manufacturing defect claim, which should be decided by a jury at trial, is whether L.T. was indeed a consumer under OPLA. If applied correctly under Ohiowa law, which follows the consumer expectations test in product liability cases, OPLA finds a manufacturer strictly liable for physical harm caused by a product in a defective condition that is unreasonably dangerous to "any" consumer. Ohiowa Rev. Code § 5552.368 (emphasis added). Further, the consumer

expectations test finds liability when the product left the manufacturer in a condition more dangerous than a consumer expected 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) (emphasis added); *See also Barker v. Lull Engineering Co.*, 573 P.2d 443, 450-55 (Cal. 1978); *Mikolajczyk v. Ford Motor Co.*, 901 N.E.2d 329, 336 (Ill. 2008). As long as the consumer is "in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defect or defective condition," and the product reaches the consumer "without substantial alteration in the condition in which the product is sold," the defendant is strictly liable. Ohiowa Rev. Code § 5552.368.

The court of appeals held that there was "sufficient evidence to show that were it not for a defective condition, the e-cigarette would have operated in accordance with Zuul specifications and would have functioned like any other e-cigarette on the market." (R. at 8.) Zuul offered no expert witnesses to rebut the findings of L.T.'s expert witness nor other facts to suggest the e-cigarette was not defective. (R. at 8.) Instead, Zuul attempts to evade strict liability by arguing that L.T. was not a foreseeable consumer of its product. (R. at 8.) Erroneously, the court of appeals agreed, applying an incorrect standard on what a consumer is, focusing on the intended use of the product rather than the expectations of the consumer. (R. at 9.) However, L.T. was objectively and subjectively a consumer for the purposes of the consumer expectations test. Further, Zuul knew children like L.T. were consumers because a federal district court recently issued damages against the corporation after it found the corporation had marketed its e-cigarettes directly to children by using sweet flavors. (R. at 4.) L.T. still was a consumer regardless of his mimicking a leaf blower. While his use of the product might not have been the strictly intended use by Zuul, it still was reasonably foreseeable under OPLA. *See*, *Chrysler*

Corp., 523 N.E.2d at 494 (analyzing whether the plaintiff used the product in an "intended or reasonably foreseeable manor"). Therefore, the court of appeal's decision should be reversed and remanded back to the Court of Common Pleas for the jury to determine whether L.T. was a consumer under OPLA who used the e-cigarette in an intended or reasonably foreseeable manner. After all, a reasonable jury should be deciding who qualifies as consumer, because they themselves are consumers and members of the public where the manufacturers release their product.

A. L.T. was a consumer under Ohiowa law because he was objectively and subjectively a consumer under the consumer expectations test, and he was a reasonably foreseeable user of the e-cigarette.

Under the consumer expectations test, courts may apply an objective standard which relies on knowledge that is common amongst community of consumers. *See*, *e.g.*, *Huffman v. Electrolux Home Products, Inc.*, 129 F. Supp. 3d 529, 532 (N.D. Ohio 2015) (applying the ordinary consumer standard); *Deere & Co. v. Grose*, 586 So.2d 196, 198 (Ala. 1991) (reasoning that a consumer is determined objectively as one who "possessed the ordinary knowledge common to the community"); *Morton v. Owens-Corning Fiberglas Corp.*, 33 Cal.App.4th 1529, 1536 (Cal. Ct. App. 1995) (rejecting the expectations of the scientific community in an asbestos case, holding that only the reasonable expectations of consumers is relevant). Other courts apply a subjective standard when determining consumers under the consumer expectations test. *See, e.g.*, *Mason v. Mitcham*, 382 S.W. 3d 717, 720 (Ark. Ct. App. 2011) (holding that the consumer expectations are those of the "plaintiff sitting in the courtroom"); *Hergeth, Inc., v. Green*, 733 S.W. 2d 409, 412 (Ark. 1987) (allowing a plaintiff's "special knowledge, training or experience" to aid in determining a consumer under the test). Under either standard, L.T. was a consumer, thus making Zuul strictly liable for his injuries. Zuul even knew children were foreseeable consumers of its product. (R. at 4.)

1. L.T. was objectively a consumer for the purposes of the consumer expectations test.

In cases involving an injured minor, some courts have assessed the actions of the minor from the standard of an adult. *See*, *e.g.*, *Novak v. Piggly Wiggly Puget Sound Co.*, 591 P.2d 791, 794-795 (Wash. Ct. App. 1979) (holding that there is no "valid justification" to subject a manufacturer to liability for not taking steps to reduce dangers to child users or bystanders); *Curtis Through Curtis v. Univ. Match Corp., Inc.*, 778 F. Supp. 1421, 1425 (E.D. Tenn. 1991), *aff'd*, 966 F.2d 1451 (6th Cir. 1992) (holding that the question of a product being unreasonably dangerous is "premised upon the contemplation of an ordinary adult consumer rather than the viewpoint of the minor child").

In *Curtis*, the minor child, three years old, set fire to a diaper that his younger brother was wearing. 778 F. Supp. at 1424. The plaintiffs alleged that the defendant's disposable lighter was manufactured incorrectly because it was not "child proof." *Id.* The court rejected this argument, assessing the expectations of the minor from an adult's perspective, not a minor child. *Id.* at 1425. In *Novak*, a minor child, nine years old, shot a BB gun that ricocheted into his friend's eye and killed him. 591 P.2d at 409. The court assessed this from an objective standard, as an adult, reasoning that "the ordinary consumer would expect that a BB gun could ricochet and cause harm when fired at a hard surface." *Id.* at 411.

Unlike the minor child in *Curtis*, L.T.'s actions nearly resembled the actions taken by an adult in the same situation. L.T. pressed the button on the e-cigarette as it was intended to be pressed, the same way an adult would have done in the same situation. An adult, in the same situation, would have reasonably expected that, upon pressing the button of the e-cigarette without inhaling, the e-cigarette would not explode. Also, unlike the minor in *Novak*, L.T. did not use the e-cigarette in such a way that would render it dangerous, or in such a way that an

adult using it similarly would expect the e-cigarette to explode in the hand. Both adults and children in pressing of the button, whether it be from pressing the button or it depressing on accident, perhaps from another item in a pocket, expect Zuul's e-cigarettes not to explode. Therefore, L.T. was a consumer under the objective standard for consumers under the consumer expectations test.

2. L.T. was subjectively a consumer for the purposes of the consumer expectations test.

If this court takes L.T.'s subjective expectations into account, he is still a consumer under the consumer expectations test. While the minority approach, the subjective expectations of L.T., the "plaintiff sitting in the courtroom," were reasonable given his age. *Mason,* 382 S.W.3d at 720. L.T. shared an affinity for *Hola Gato*, the cartoon character gracing the skin covering Zuul's e-cigarette. (R. at 5.) This series skins and other skin designs, designed and sold by Zuul, helped elevate Zuul's stock prices after a federal district court held that Zuul had been using sweet flavored vapors to market its e-cigarettes to children. (R. at 4.) L.T. knew what the e-cigarette was, and he knew how to press the button on the e-cigarette because of Barrett. (R at 5.) Judged from L.T.'s subjective expectations, he reasonably expected the product to not blow up in his hand when he pressed the button. Therefore, judged from the subjective view of L.T., he is a consumer under the consumer expectations test.

3. Zuul, found by a federal district court to have marketed its e-cigarettes directly to children, could reasonably foresee L.T. being injured by its product's defective condition.

L.T. is a consumer under OPLA § 5552.368 because Zuul could reasonably foresee L.T. as being harmed by its product's defect. In Ohiowa, a manufacturer is strictly liable for defects to a consumer if the consumer is "in the class of persons that the seller *should reasonably foresee* as being subject to the harm caused by the defect or defective condition," and the product reaches

the consumer "without substantial alteration in the condition in which the product is sold." Ohiowa Rev. Code § 5552.368. In December 2017, a federal district court held that Zuul used sweet vapor flavors to directly market its e-cigarettes to children. (R. at 4.) In June 2018, Zuul released a line of "Zuul skins," adhesive labels designed to stick to Zuul's e-cigarettes to customize their appearance. (R. at 4.) Of these skins, the popular cartoon character, *Hola Gato*, is an option. (R. at 5.) This cartoon character skin covered the e-cigarette that exploded in L.T.'s hand. (R. at 5.) Sweet flavors and a federal court's decision put Zuul on notice that its products directly were being marketed to children. Its skins, using cartoon characters, should do the same. Therefore, under product liability laws, Zuul is strictly liable to L.T. because Zuul could reasonably foresee L.T., an 11-year-old child, as being subject to the harm caused by its exploding e-cigarette.

B. L.T.'s use was well within the reasonably foreseeable uses of the product for the purposes of the consumer expectations test.

While L.T. did not bring Zuul's e-cigarette to his mouth, he pressed the button as it was intended, and expected, to be pressed, and thus used the e-cigarette properly under the consumer expectations test. The court of appeals held that "[h]ad L.T. attempted to use the product as it was intended to be used, perhaps by pressing the button and raising it to his mouth, he would have been using the product as intended and thus deemed a 'consumer' . . ." (R. at 7.) However, the court of appeals also reasoned that "an ordinary consumer may not expect a product performance when the product is used in a manner separate from its intended use." (R. at 7.) (emphasis added).

In Ohiowa, a product is defective if "its condition will be unreasonably dangerous to the expected consumer when used in reasonably expectable ways of handling or consumption." Ohiowa Code § 5552.369(a)(3) (emphasis added). Certainly, "neither a retailer nor a

manufacturer can be held strictly liable for injuries resulting from misuse of its product." *Lamkin v. Towner*, 563 N.E.2d 449, 460 (Ill. 1990). "Misuse," for the purposes of product liability, has been defined as use "for certain purposes or in a manner not reasonably foreseen by the manufacturer." *O.S. Stapley Co. v. Miller*, 447 P.2d 248, 253 (Ariz. 1968). *See also Boeken v. Philip Morris Inc.*, 127 Cal.App.4th 1640, 1669 (Cal. Ct. App. 2005) (finding the consumer expectations test is satisfied when "some degree of misuse and abuse of the product is foreseeable"); *Bunch v. Hoffinger Ind.*, Inc. 123 Cal.App.4th 1278, 1283 (Cal. Ct. App. 2004) (holding a plaintiff's misuse of a product may be the cause of the plaintiff's injuries, but if the manufacturer could foresee the misuse, the manufacturer remains liable unless it provides adequate warning); *Barnard v. Saturn Corp.*, 790 N.E.2d 1023, 1028 (Ind. Ct. App. 2003) (holding that misuse of a product relieves the manufacturer of liability when the manufacturer could not have reasonably foreseen the intervening acts) (emphasis added).

Here, L.T. pressed the e-cigarette's button as it was intended to be pressed. (R. at 14.) Zuul reasonably could expect that anyone would press that button without intending to inhale the tobacco vapor. Even under the standards in *Bunch* and *Barnard*, where some misuse is allowed, L.T. did not misuse the e-cigarette by pressing the button as it was meant to be pressed and holding the product like a leaf blower. While the court of appeals held that L.T.'s use was not the intended use, it also articulated in its opinion that a "consumer" can still be a consumer even if the product is "used in a manner separate from its intended use." (R. at 7.) No acts intervened that caused L.T.'s injuries, nor was any evidence presented that L.T.'s mimicking of a leaf blower caused the e-cigarette to explode. Instead, it was the manufacturing defect of the e-cigarette, and that alone, that caused the severe burns to L.T.'s hand. Therefore, L.T.'s

mimicking of a leaf blower, though not a strictly intended use, was foreseeable by Zuul and not misuse of the product.

C. Zuul's e-cigarette reached L.T. without substantial alteration and its defective condition directly caused L.T.'s injuries.

Zuul's e-cigarette, sheathed in a *Hola Gato* cartoon character skin, exploded in L.T.'s hand, causing him severe injuries, and thus Zuul is strictly liable under Ohiowa law (R. at 5.) Ohiowa law articulates when a product is defective:

> (a) A product is in a defective condition under this article if, at the time it is conveyed by the seller to another party:
> (1) it deviated in a material way from the design specifications, formula, or performance standards of the manufacturer;
> (2) it is in a condition not contemplated by reasonable persons among those considered expected consumers of the product; or
> (3) its condition will be unreasonably dangerous to the expected consumer when used in reasonably expectable ways of handling consumption.

Ohiowa Rev. Code §§ 5552.369(a). The product must leave the manufacturer's hands in a condition "more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." *Chrysler*, 523 N.E. 2d at 494 (emphasis added). *See also* Ohiowa Rev. Code § 5552.368(b) ("the product is expected to and does reach the consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article"). To prove the defective condition, a party can present direct or circumstantial evidence. *Donegal Mut. Ins. v. White Consol. Indus.*, 852 N.E. 2d 215, 226 (Ohio Ct. App. 2006) (citing *Chrysler*, 523 N.E. 2d at 493-494).

Here, L.T. provided expert testimony, similar to the plaintiffs in *Donegal*. 852 N.E. 2d at 226; (R. at 7.) L.T.'s expert witness testified that L.T.'s injury was "proximately caused by a defect in [Zuul's] e-cigarette." (R. at 7.) Specifically, the expert testified that the e-cigarette had a "faulty connection between the activating button and the atomizer, causing the atomizer to overheat and the liquid vapor cartridge to boil. This built up pressure within the cartridge, which

caused the e-cigarette to explode." (R. at 7, 8.) Zuul offered no expert testimony of its own to dispute L.T.'s expert, nor did Zuul put forth any evidence to suggest the e-cigarette contained no manufacturing defects. (R. at 8.) Therefore, the manufacturing defect that was in the e-cigarette was undisputed by Zuul. That manufacturing defect caused L.T.'s injuries and renders Zuul strictly liable.

D. Summary judgment was improper in this strict liability case and the decision of a material fact should be left for the jury.

A reasonable jury is in the best position to determine whether L.T. was a consumer under OPLA and if L.T. used the e-cigarette in a reasonably foreseeable manner. As it was inappropriate for the trial court to grant summary judgment, the manufacturing defect claim should go to trial to let the jury decide.

Summary judgment is only appropriate when (1) there is no genuine issue as to any material fact of the claim, and (2) the moving party is entitled to judgment as a matter of law. Ohiowa R. Civ. Proc. § 56(a). If both elements are not met, the claim proceeds to trial.

In *Moyer v. United Dominion Indus., Inc*, the United States Court of Appeals for the Third Circuit stated that in products liability cases, the majority of jurisdictions give the jury a "central role" in making a strict liability determination. 473 F.3d 532, 539 (3d Cir. 2007). In *Fontenot v. Upjohn Co.*, the United States Courts of Appeals for the Fifth Circuit reasoned that an issue of product defects should not be susceptible to summary judgment, but instead to left to the jury. 780 F.2d 1190, 1196 (5th Cir. 1986). State courts take the same approach. *See Graham v. Sprout-Waldron and Co.*, 657 So.2d 868, 874 (Ala. 1995) (noting that it is the jury's role to reasonably infer whether a product is in a defective condition); *Farm Bureau Ins. Co. v. Case Corp.*, 878 S.W.2d 741, 743 (Ark. 1994) (concluding that evidence of defect should send the strict liability claim to the jury); *Jackson v. Gen. Motor Co.*, 60 S.W.3d 800, 805 (Tenn. 2001)

(holding summary judgment is not appropriate because whether a product is defective or unreasonably dangerous is one for the jury).

Here, while Zuul offered no evidence to rebut the conclusions that its defective product proximately caused L.T.'s injuries, questions of material fact remain as to whether L.T. was a consumer under the consumer expectation and whether he used the product in a reasonably foreseeable manner. Because of the material facts remaining in this case, summary judgment should not have been granted, and the case should have proceeded to trial. A reasonable jury should determine whether L.T. was a consumer and whether he used the product as intended. Ohiowa R. Civ. Proc. § 56(a). In this case, the jury is best situated to review the evidence and testimony and determine whether Zuul was strictly liable under OPLA. *Moyer*, 473 F.3d at 539; *Fontenote*, 780 F.2d at 1196.

II. THE READ AND HEED DOCTRINE SHOULD APPLY IN OHIOWA BECAUSE OF THE STATE'S PUBLIC POLICY AND ITS CONSUMER-FRIENDLY APPROACH TO PRODUCT LIABILITY ACTIONS, AND THE DENIAL OF PETITIONERS JURY INSTRUCTION ON THE DOCTRINE PREJUDICED THEIR FAILURE-TO-WARN CLAIM.

In adopting the read and heed doctrine to strict liability failure-to-warn claims, this Court should reverse the decision below and hold that because the Tully's were prejudiced by the trial court's abuse of discretion and denial of the proposed jury instruction, the failure-to-warn claim requires remanding back to trial. The majority of courts already adopt the read and heed doctrine and it should apply in Ohiowa because of three prevailing policy considerations: first, it eases an incredibly difficult burden on the plaintiff; second, it is consistent with Ohiowa's approach to favor consumers in product liability actions; and third, the presumption is procedurally advantageous by keeping unreliable testimony out of trial. The court of appeals, both the majority as well as the dissenting in part, concurring in part decision, properly adopted the presumption "given that public policy tends to favor the consumer in product liability actions in

Ohiowa". (R. at 12.) However, and despite finding that the trial court abused its discretion in denying the Tully's the proposed jury instruction, the court of appeals erroneously determined that the denial did not prejudice the Tully's failure-to-warn claim. (R. at 12.) However, the Tully's claim was prejudiced at trial because there is substantial doubt as to whether the instructions properly guided the jury and the instructions given resulted in prejudice during jury deliberations.

A. The public policy advantages of the read and heed doctrine allow the state to remain consistent with the Ohiowa Product Liability Act and its consumer-friendly approach in product liability actions.

As a matter of Ohiowa's public policy, the state's product liability laws have always favored the consumer. (R. at 12.) In addition, the legislature modeled OPLA after the Restatement (Second) of Torts, where the doctrine was originally created. (R. at 8, 12.) Despite language being removed from the Restatement (Third) of Torts: Product Liability, courts continue to either adopt the Restatement (Second) of Torts, or for those that have already adopted it, continue to cite it because it remains consistent with each jurisdiction's consumer-friendly public policy. *See*, *e.g., Rheinfrank v. Abbott Labs., Inc.*, 119 F. Supp. 3d 749, 782-785 (S.D. Ohio 2015) (applying Ohio Law); *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 762 (Mo. 2011).

1. The public policy advantages of the doctrine serve the best interest of consumers.

There are three reasons why this Court would continue to promote the state's consumer-friendly approach to product liability actions by adopting the read and heed doctrine. First, it eases plaintiff's difficult burden of proving proximate cause. *Coffman v. Keene Corp.*, 628 A.2d 710, 720 (N.J. 1993). Second, it is consistent with Ohiowa's approach to favor consumers in product liability actions. (R. at 12.) Third, the presumption is procedurally advantageous by

keeping unreliable testimony out of trial. *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 359 (Tex. 1993).

Comment j of Restatement (Second) of Torts § 402A states, "[in] order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use." Restatement (Second) of Torts § 402A (Am. Law Inst. 1965) The pertinent part of comment j, where the doctrine originated, says, "[where] warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." *Id.*

Although written seemingly to favor the seller, a logical corollary extends the benefit to the plaintiff/consumer when no adequate warning exists. *Pavlik v. Lane Ltd./Tobacco Exps. Int'l*, 135 F.3d 876, 883 (3d Cir. 1998); *Daniel v. Ben E. Keith Co.*, 97 F.3d 1329, 1333 (10th Cir. 1996). Thus, the vast majority of jurisdictions have adopted the doctrine and apply it to benefit the plaintiff-consumer. (R. at 10.); *Knowlton v. Desert Medical, Inc.*, 930 F.2d 116, 123 (1st Cir. 1991). In effect, when no warning is given, or if one provided is inadequate, the doctrine creates a rebuttable presumption that assumes that the failure to adequately warn was the proximate cause of plaintiff's harm. *Seley v. Searle & Co.*, 423 N.E.2d 831, 838 (Ohio 1981); *Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 855 (10th Cir. 2003). This presumption shifts the burden of proving causation from the plaintiff to the defendant. *Dole Food Co. v. N.C. Foam Indus.*, 935 P.2d 876, 883 (Ariz. Ct. App. 1996). However, defendants are still able to admit their own rebuttable evidence and shift the burden back to the plaintiff. *Ortho Pharm. Corp. v. Chapman*, 388 N.E.2d 541, 555 (Ind. Ct. App. 1979). Therefore, the presumption works in favor of the plaintiff if no adequate warning is given, but nonetheless allows defendant to rebut and

show evidence that plaintiff would not have followed a warning anyway. *Technical Chemical Co. v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972).

This Court should adopt the doctrine for three policy considerations. First, courts often recognize that by adopting the doctrine, it helps ease the burden of proof away from the plaintiff. *Pavlik*, 135 F.3d 876, 883 (3d Cir. 1998). Without it, plaintiffs face the difficult challenge of proving they would have heeded if an adequate warning was provided. *Boerner v. Brown & Williamson Tobacco Corp.*, 260 F.3d 837 (8th Cir. 2001) (applying Arkansas law). *See also Payne v. Soft Sheen Products*, 486 A.2d 712, 725 (D.C. 1985) (concluding that without the doctrine, plaintiffs would face "an impossible burden", often preventing recovery of damages because of jury speculation); *Coffman*, 628 A.2d at 720 (reasoning public policy favoring consumers should reduce plaintiff's burden of proof). The burden should be on the defendant/seller, who is best position to defend the product.

In that vein, the doctrine still allows the defendant to admit evidence to rebut the presumption. If adopted, Ohiowa would ease plaintiff's burden in failure-to-warn claims while still allowing the defendant to shift the burden back. *See Town of Bridport v. Sterling Clark Lurton Corp.*, 693 A.2d 701, 704 (Vt. 1997) (holding that the presumption is favorable because it allows the defendant to show that the plaintiff would not have heeded even if the warnings were adequate, while still maintaining the state's consumer-friendly policies). Without the doctrine, every plaintiff in failure-to-warn claims must present affirmative evidence to convince the factfinder that they would have acted differently if the defendant had an adequate warning in place. This challenging proximate cause burden is inconsistent with Ohiowa's consumer-first product liability law. (R. at 11.)

Second, adopting the doctrine would allow Ohiowa to remain consistent with the already existing consumer-friendly laws and public policy. It provides a powerful incentive for manufacturers to abide by their duty-to-adequately-warn. *Golonka v. Gen. Motor Co.*, 65 P.3d 956, 969 (Ariz. Ct. App. 2003). It "serves to reinforce the basic duty to warn--to encourage manufacturers to produce safer products, and to alert users of the hazards arising from the use of those products through effective warnings." *House v. Armour of America, Inc.*, 929 P.2d 340, 347 (Utah 1996) (quoting *Coffman*, 628 A.2d at 718). Because the doctrine shifts the burden to the defendant/seller, it discourages a manufacturer from risking liability by marketing products without warnings, but instead encourages the production of adequate ones. *Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 332 N.E.2d 820, 826 (Ind. Ct. App. 1975), *rev'd on procedural grounds*, 358 N.E.2d 974 (Ind. 1976). These policy arguments used by other states match Ohiowa's consumer-friendly product liability laws, which naturally favors consumers in failure-to-warn claims. (R. at 11, 12.) Further, when a doctrine is not articulated in OPLA, Ohiowa courts look to the Restatement (Second) of Torts upon which OPLA was based. (R. at 8.); The doctrine originates in § 402A. Restatement (Second) of Torts § 402A. Additionally, Ohiowa courts have already adopted a Restatement-created doctrine, the learned intermediary doctrine. This Court, in adopting the read and heed, would remain consistent with that decision. (R. at 11.)

Third, adopting the doctrine would be procedurally advantageous because it helps facilitate a fair trial in product liability actions. In practice, because the doctrine shifts the burden of proximate cause to the defendant, it excuses plaintiffs from making "self-serving assertions" that they would have heeded to adequate warnings. *Saenz*, 873 S.W.2d at 359. Thus, it promotes a fair trial. *See Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1282 (5th Cir. 1974) (applying

Texas law) (adopting the presumption to prevent future plaintiff's testimony from being so self-serving that it would be otherwise useless and unreliable). One of the reasons New Jersey adopted the presumption was because it prevented "the excessively-speculative nature" over whether plaintiff would have actually heeded. *Coffman*, 628 A.2d at 719. Ohiowa's judges and juries should not be placed in the unfortunate position where every plaintiff's testimony in a failure-to-warn claim is unreliable.

2. The doctrine continues to be applied because it remains consistent with consumer-friendly public policy and state's product liability laws despite the changing Restatement language.

Even though Restatement (Third) of Torts dropped comment j, this court should nonetheless adopt the doctrine for two reasons. Restatement (Third) of Torts: Products Liability § 2 (Am. Law Inst. 1999). First, jurisdictions have applied and adopted the doctrine without expressly using comment j anyway, so removing language has little to no effect on whether this Court should adopted it. *See Cunningham v. Charles Pfizer & Co., Inc.*, 532 P.2d 1377, 1382 (Okla.1974); *Menard v. Newhall*, 373 A.2d 505, 506 (Vt. 1977). For example, in *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, the United States Court of Appeals for the District of Columbia Circuit held that as long as a reasonable jury could find a failure to provide an adequate warning, the omission may satisfy plaintiff's proximate cause. 736 F.2d at 1538 (D.C. Cir. 1984). Second, jurisdictions that previously adopted the read and heed doctrine continue to recognize it in product liability actions since Restatement (Third) of Torts was released. *See, e.g.*, *Rheinfrank*, 119 F. Supp. 3d at 782-785; *AlNahhas v. Robert Bosch Tool Corp.*, 706 F. App'x 920 (10th Cir. 2017) (applying Oklahoma Law); *Moore*, 332 S.W.3d at 762. These courts continue to use the doctrine because of its consistency, both with its own product liability laws, but also with its consumer-friendly public policy in product liability actions. *Tingey v. Radionics*, 193 F. App'x 747 (10th Cir. 2006) (applying Utah law).

It does matter that the Restatement (Third) of Torts had dropped the language because Ohiowa's consumer-friendly approach to product liability actions has not changed. (R. at 11-13.) This Court should apply the read and heed doctrine without concerns that Restatement (Third) of Torts did not include comment j, much like the court of appeals did in the decision below. (R. at 12-13.)

B. As the Tully's were prejudiced by the trial court's abuse of discretion and denial of their jury instruction, this Court should reverse and remand the failure-to-warn claim back to trial.

The court of appeals erred in determining that no prejudice resulted from the failure to offer the Tully's their requested read and heed jury instruction, and as result, incorrectly affirmed decision on the failure-to-warn claim despite the trial court's abuse of discretion. (R. at 12.)

A trial court's failure to provide jury instructions must be reviewed for an abuse of discretion when Petitioner is prejudiced. *Carter v. Mechanical Services*, 746 P.4d 807, 811 (Ohiowa 2012). Faulty jury instructions require a reversal when (1) there is "substantial doubt whether the instructions, considered as a whole, properly guided the jury in its deliberations," *Morrison Knudsen Corp. v. Fireman's Funds Ins. Co.*, 175 F.3d 1221, 1235 (10th Cir. 1999) (quotation omitted); and (2) "when the deficient jury instruction is prejudicial." *Coleman v. B-G Maintenance Management of Colo., Inc.*, 108 F.3d 1199, 1201 (10th Cir. 1997). Substantial doubt as to whether the jury was properly guided during trial occurs when jury instructions incorrectly convey the law at issue or mislead the jury in understanding the issues and its duties to determine the issue. *Mason v. Oklahoma Turnpike Authority*, 115 F.3d 1442, 1455 (10th Cir. 1997); *Considine v. Newspaper Agency Corp.*, 43 F.3d 1349, 1365 (10th Cir. 1994).

1. There is substantial doubt that the jury instructions properly guided the jury during deliberations.

In this case, there is "substantial doubt as to whether the jury instructions, considered as a whole, properly guided the jury" *Morrison Knudsen Corp.*, 108 F.3d at 1201, and therefore, the first element in proving that the faulty jury instruction requires reversal is met. Here, the trial court erroneously sustained Zuul's objection to the Tully's originally requested jury instruction on the read and heed doctrine. (R. at 3.) As previously mentioned, the read and heed doctrine would have eased the Tully's failure-to-warn claim by alleviating their burden of proving proximate cause by shifting it to Zuul. *Coffman*, 628 A.2d at 719.

Tully's proposed jury instruction on the read and heed doctrine was denied, resulting in an uninformed jury deliberating under the assumption that Zuul's failure to adequately warn was not the proximate cause of L.T.'s injuries. (R. at 5.) This required L.T. to present challenging evidence that he would have heeded if instructed. (R. at 5.) The Tully's proposed jury instruction, had it been granted by the Court of Common Pleas, would have informed the jury that absent Zuul's rebuttable evidence, the failure-to-warn was the proximate cause of the harm. *Coffman*, 628 A.2d at 719. If properly instructed, the jury would have assumed the doctrine shifted the burden of proof and been able to find that Zuul was liable for an inadequate warning. Therefore, there is substantial doubt that the jury was properly guided as it never heard an instruction on the read and heed doctrine. This Court should reverse and remand the failure-to-warn claim back to trial because of the trial court's abuse of discretion.

2. The Tully's were prejudiced by the trial court's denial of their jury instructions.

The second element of Ohiowa's standard requires the Court to reverse a jury instruction "when the deficient jury instruction is prejudicial." *Coleman*, 108 F.3d at 1201. The trial court's denial of jury instructions prejudiced the Tully's because it did not provide the jury with the

correct information for deliberation which ultimately resulted in a jury decision that was uninformed of the relevant state law.

In Justice Spengler's majority opinion, the court of appeals determined that the jury had sufficient evidence to make their decision because they listened to testimony by all named parties and then deliberated for sixteen hours. (R. at 12.) However, simply providing the jury with relevant factual information does not satisfy the necessity of correct jury instructions. *See Fitzgerald v. Mountain States Tel. and Tel. Co.*, 68 F.3d 1257, 1262 (10th Cir. 1995) (allowing counsel to argue on the issue of expenses did not substitute for proper jury instruction on the issue). Although the jury could consider the information provided to them during their deliberations, without a proper jury instruction on the read and heed doctrine, the jury was unable to frame the evidence and their deliberations around the consumer-favored doctrine. *Chapman*, 388 N.E.2d at 555 (Ind. Ct. App. 1979). The jury was not aware that the Tully's did not have to prove proximate cause. The jury also had no idea that the burden of proving proximate cause was instead on Zuul. Therefore, the absence of a jury instruction prejudiced the Tullys, as it resulted in the jury being unable to deliberate on the doctrine itself, and instead relying on the information provided through testimony and arguments. Both decisions in the court of appeals below even concluded that the trial court abused its discretion in denying the jury instruction. That abuse of discretion and the resultant prejudice should require reversal and remand. (R. at 12, 13.)

Thus, both elements necessary to satisfy a faulty jury instruction in Ohiowa are met. First, there is substantial doubt as to whether the instructions, considered as whole, properly guided the jury in its deliberations. *Morrison Knudsen Corp.*, 175 F.3d at 1235. Second, the deficient jury instruction is prejudicial. *Coleman*, 108 F.3d at 1201. This prejudice requires

reversal and remanding back to trial so a new jury could make the decision on the failure to warn claim after being instructed on the read and heed doctrine.

CONCLUSION

Based on the foregoing reasons, Petitioners respectfully request that the Supreme Court of the State of Ohiowa reverse the Court of Appeals for the State of Ohiowa's decision granting summary judgment for the Respondent, hold the read and heed doctrine applies in Ohiowa, and reverse the decision that the Petitioners were not prejudiced by the denial of the read and heed doctrine as jury instructions in trial.

Respectfully submitted,

/s/
Team W
Counsel for the Petitioner
January 31, 2020

APPENDIX A

Ohiowa Rev. Code § 5552.368

§ 5552.368 Rule of Liability. Except as provided in this section, a person who sells, leases, or otherwise puts into the stream of commerce any product that is defective or in a defective condition that is unreasonably dangerous to any consumer or to the consumer's property is subject to liability for physical harm caused by that product to the consumer or the consumer's property if:

(a) that consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defect or defective condition; and

(b) the product is expected to and does reach the consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.

Ohiowa Rev. Code § 5552.369

§ 5552.369 When Product Has Defect.

(a) A product is in a defective condition under this article if, at the time it is conveyed by the seller to another party:

(1) it deviated in a material way from the design specifications, formula, or performance standards of the manufacturer;

(2) it is in a condition not contemplated by reasonable persons among those considered expected consumers of the product; or

(3) its condition will be unreasonably dangerous to the expected consumer when used in reasonably expectable ways of handling or consumption.

(b) A product is defective if the seller or manufacturer fails to:

(1) properly package or label the product to give reasonable warnings of danger about the product; or

(2) give reasonably complete instructions on proper use of the product; when the seller or manufacturer, by exercising reasonable diligence, could have made such warnings or instructions available to the consume.