No. 20-2206

IN THE

SUPREME COURT OF THE STATE OF OHIOWA

LOUIS TULLY, AS FATHER AND NATURAL GUARDIAN FOR MINOR L.T. AND IN HIS OWN RIGHT,

Petitioner,

v.

ZUUL ENTERPRISES, AN OHIOWA CORPORATION,

Respondent.

On Writ of Certiorari to the Court of Appeals for the State of Ohiowa Seventh Appellate District Drummond County

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BRIEF FOR RESPONDENT

Team P

ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether a child can recover for a manufacturing defect claim if he is not considered a foreseeable consumer of a tobacco product and used the product in a manner unintended by the manufacturer.

II. Whether the lower court abused its discretion in refusing to include a jury instruction on the read and heed doctrine when the doctrine runs counter to products liability policy and the Tullys were not prejudiced by the omission.

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STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Background. In March 2016, Pete Venkman established Zuul in Cincinnatus, Ohiowa. R. at 3. Zuul is an e-cigarettes and was intended to be a safe alternative to cigarettes. R. at 3. The e-cigarette's button vaporizes flavored liquid stored in the product's cartridge that the user inhales through the product's mouthpiece. R. at 3–4.

In December 2017, a federal district court found Zuul's sweet flavors were created to market the product to children. R. at 4. The final judgment halted Zuul's production of its four most popular sweet flavors. R. at 4. In response, Zuul issued a statement vowing to only produce a "classic tobacco" flavor to signify good faith in its denial of attempting to market its product to children. R. at 4. Zuul redesigned its products to render third-party sweet flavored cartridges incompatible. R. at 4.

Zuul also introduced "Zuul Skins," an adhesive label accessory. R. at 4. Users can customize their own "skin" or purchase skins pre-designed with popular characters and patterns. R. at 4. A warning affixes the packaging of each Zuul e-cigarette. R. at 4. "Zuul Skins" do not contain an additional warning about the e-cigarette. R. at 4.

L.T.'s Acquisition of a Zuul. Dana Barrett owns a Zuul product. R. at 5. Ms. Barrett decorated her e-cigarette with a Zuul skin depicting *Hola Gato*, the main character of a popular cartoon. R. at 5. On July 17, 2018, Louis and Janine Tully left their child, L.T., in the care of Ms. Barrett, who brought her Zuul to the Tully residence. R. at 5. Ms. Barrett repeatedly warned L.T. that playing with the e-cigarette was dangerous. R. at 5. But in Ms. Barrett's absence, L.T. grabbed the e-cigarette, pressed the activation button, and played with the product "in a manner

which mimicked the operation of a leaf blower." R. at 5. The product burst and burned L.T.'s hand. R. at 5.

II. PROCEDURAL HISTORY

The Court of Common Pleas. The Tullys sued Zuul, alleging: 1) a manufacturing defect caused the explosion; and 2) Zuul failed to adequately warn consumers of the product risks. R. at 2. Zuul moved for summary judgment, asserting: 1) the product's manufacturing defect does not establish Zuul's liability to L.T. because he was not a foreseeable user; and 2) the warning on the product's packaging satisfies Zuul's duty to warn consumers. R. at 2–3. The court granted summary judgment in favor of Zuul on the manufacturing defect claim, agreeing that children are not foreseeable users of an e-cigarette. R. at 3. The failure-to-warn claim proceeded to trial. R. at 3. At the charge conference, the Tullys requested a jury instruction on the read-and-heed presumption. R. at 3. Zuul objected, and the lower court agreed a heeding presumption instruction would be inappropriate. R. at 3. The jury found Zuul fulfilled its duty to warn consumers and held for Zuul. R. at 3.

The Court of Appeals. The Tullys appealed both claims, arguing: 1) summary judgment was improper because an issue of material fact remained as to whether a child is a foreseeable user of an e-cigarette; and 2) the lower court abused its discretion by refusing a heeding presumption instruction. R. at 3. The appellate court affirmed the trial court's decision on both counts. R. at 12. The court affirmed the summary judgment on the manufacturing defect claim because there was no genuine issues of material fact as to L.T.s non-status as a consumer; and the court held the Tullys were not prejudiced by the trial court's denial of a heeding presumption. R. at 12.

SUMMARY OF THE ARGUMENT

This appeal considers two products liability questions. The Tullys suggest this Court adopt two interpretations of tort law that impermissibly paves a plaintiff's path to recovery. Both notions are a strained reading of the state legislator's intent and this Court's precedent.

I.

The court of appeals correctly found children were not foreseeable users of Zuul products. As a child, L.T. does not fit within the statutory language of a consumer because he was not among the class of users the manufacturer would contemplate as being subject to the harm.

Ohiowa chose to exclude "ultimate user" when drafting its liability rule. It created the standard that a person recovering must be an expected consumer, which effectively eliminates L.T. from a successful recovery. L.T. does not qualify as a consumer under the plain meaning or definition. Being a user is not enough to inflict liability onto Zuul. Based on the Restatement (Second) of Torts, L.T. was not a person who consumed the product, prepared it for consumption, or acquired the product directly from the seller or an immediate dealers. Being in close proximity or holding the item is not enough to place strict liability on a manufacturer. Thus, L.T. cannot recover.

Zuul did not reasonably foresee L.T. as being subject to the harm and did not expect its product to reach L.T. because its product was not created for children to use. Requiring a manufacturer to create accident-proof products is not contemplated by products liability law policy. Liability is only assumed by a manufacturer if it could reasonably foresee the consumer as being subject to the harm and the product was being used as intended. A child was not foreseen as a user of the product. A child using the product as a leaf blower was an unforeseeable event by Zuul and it cannot be liable for such an event. The foreseeability of the use was

contemplated by the statute and added to ensure the manufacturer is liable only for harm that could have been avoided with a reasonable review of who would be using the product. L.T. was not a foreseeable user and he did not use the product as intended. Thus, he cannot recover.

II.

The trial court's jury instruction was proper because it stated the applicable law and did not prejudice the Tullys. The district court, in rejecting the heeding presumption, correctly determined the law of the land. Most jurisdictions credit the heeding presumption to comment j to the Restatement (Second) of Torts § 402A. This is a misreading of the Restatement because the comment does not address causation, and is meant to benefit the manufacturer, not the user.

The heeding presumption defies legal principles by placing the burden of proof for causation on the defendant. Causation is a vital element of liability and defendants are poorly situated to prove the plaintiff's knowledge and tendencies. Additionally, the heeding presumption is inapplicable because evidence rebuts the presumption. L.T.'s failure to listen to Ms. Barrett's warning, coupled with his classification as a prohibited purchaser of e-cigarettes, demonstrates that a different or additional warning would not have affected the outcome.

Finally, even if the trial court abused its discretion in formulating the jury charge, the Tullys did not meet their burden of proving the omission prejudiced the verdict. The Tullys did not request to reopen evidence, and the record does not indicate a causal relationship between the jury charge and the adverse judgment.

This Court should AFFIRM the lower court's judgment and hold a child is an unforeseeable user and that Ohiowa jurisprudence rejects the heeding presumption, the presumption is inapplicable, and the Tullys were not prejudiced by the trial court's instructions.

ARGUMENT AND AUTHORITIES

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Ohiowa R. Civ. P. 56(a). A decision granting summary judgment is reviewed by construing the evidence in a light most favorable to the nonmoving party. *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 362 (Iowa 2014). A lower court's decision to grant or deny a jury instruction is reviewed for an abuse of discretion. *Barton Protective Servs., Inc. v. Faber*, 745 So. 2d 968, 974 (Fla. Ct. App. 1999).

I. SUMMARY JUDGMENT WAS PROPER ON THE TULLYS' MANUFACTURING DEFECT CLAIM BECAUSE L.T. WAS NOT A FORESEEABLE CONSUMER OF THE PRODUCT.

Ohiowa's statute places liability on a manufacturer of a defective product if: "(a) that consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm . . . ; and (b) the product is expected to and does reach the consumer . . . ." Ohiowa Rev. Code § 5552.368(a)–(b). Consumer is not defined within the statute. R. at 16. To succeed on their claim, the Tullys must establish: (1) he is a consumer; (2) Zuul should have reasonably foreseen him as being subject to the harm; and (3) Zuul expected its product to reach him. Ohiowa Rev. Code § 5552.368(a)–(b). Because L.T. alleged he was injured due to a product defect, he must show he qualified as a consumer under the statute.

L.T. cannot meet the statutory definition for two reasons. First, L.T. is not a consumer under the common definition or the Restatement (Second) of Torts definition. Restatement (Second) of Torts § 402a cmt. l (Am. Law Inst. 1998) (noting consumers include not only those who consume the product, but those who prepare it for consumption). Second, Zuul did not reasonably foresee L.T. as being subject to the harm and did not expect its product to reach L.T. because its product was not created for children. The lower court correctly affirmed the granting of Zuul's motion for summary judgment because L.T. was not a foreseeable consumer of Zuul's

product. Zuul can only be held legally responsible for L.T.'s injuries in Ohiowa if the Tullys can show that their eleven-year-old child belonged to "the class of person's that [Zuul] should reasonably foresee as being subject to the harm caused by the defect or defective condition . . . ." Ohiowa Rev. Code § 5552.368. As they cannot, this Court should affirm the lower court's judgment.

A. Zuul Is Not Liable for the Harm Based on the Plain Language of the Ohiowa Statute.

When a statute fails to define words within the statute, the undefined words must be given their "ordinary or natural meaning." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (citing *Smith v. United States*, 508 U.S. 223, 228 (1993)). The Ohiowa statute imputes strict liability on a manufacturer for defective products that cause physical harm to the consumer or consumer's property. Ohiowa Rev. Code § 5552.368. The consumer must be in the "class of persons that the seller should reasonably foresee as being subject to the harm cause by the defect or defective condition; and the product is expected to and does reach the consumer without substantial alteration . . . ." Ohiowa Rev. Code § 5552.368(a)–(b). The statute does not define "consumer." Under *expression unius est exclusion alterius*, the Court should conclude that the list of terms is complete and there are no additional requirements which bind a party. *Expression unius est exclusion alterius*, *Black's Law Dictionary* (7th ed. 1999); *see also Ellington v. EMI Mills Music, Inc.*, No. 112368/10, 2011 N.Y. LEXIS 6631, at *4 (N.Y. Oct. 21, 2011) (finding by expressly including only predecessors' interests and affiliates that potential future affiliates are excluded from the definition at issue). The only statutory requirement is a *consumer* must be the person subject to the foreseeable harm. Zuul cannot be liable as a matter of law because L.T. cannot reasonably be considered a consumer of Zuul products.

1. A mere user does not fit within the plain meaning of the word "consumer."

A "consumer" is a person who purchases goods or services for personal use. *Consumer*, *Oxford English Dictionary* (2d ed. 2015). The language of the Ohiowa statute does not include language that requires the product be in the hands of an ultimate intended user. The section governing product defects supports the contention that the consumer must be *expected*. Ohiowa Rev. Code § 5552.369(a)(2). The consumer must simply be in the class of people that Zuul should reasonably foresee a being subject to the harm. Ohiowa excluded "ultimate user" when drafting its liability rule. R. at 9. It created the standard that the person recovering must be an expected consumer, which effectively eliminates L.T. from a successful recovery.

The expression of one thing implies the exclusion of others. *See generally* Antonin Scalia & Bryan A. Garner, *Reading Law* (2012). The Supreme Court has consistently resisted reading words or elements into a statute that do not appear. *See Bates v. United States*, 522 U.S. 23, 29 (1997). Omitting "ultimate user" from the Ohiowa statute supports that the legislature intended to exclude it within the word consumer. R. at 14. The only party that may recover under strict liability is one who is a foreseeable user of the product. Based on this rational approach, L.T. is not a consumer.

An injured husband who used his wife's contact lenses could not recover under strict liability because he was not considered an ultimate user or consumer under an Ohio statute. *Perotti v. Johnson & Johnson Vision Prods.*, No. 84278, 2004 LEXIS 6660, at *19 (Ct. App. Ohio Dec. 30, 2004). Recovery is limited to a foreseeable user because a manufacturer only has a duty to warn a foreseeable user. *Id.* at 22. Expanding liability for failure-to-warn claims to any user of a product would unreasonably burden a manufacturer because there is no fool-proof way to warn *everyone* who might come into contact with their product. A manufacturer's burden is

limited to warning only those who qualify as a consumer or user of the product. A mere "ultimate user" is not enough to recover under the Ohiowa statute.

2. The Restatement (Second) of Torts' approach recognizes that manufacturers are not insurers of products.

The American Law Institute revised § 402A of the Restatement because it "has proven so influential in the development of modern product liability law" and the formulation was so "increasingly irreverent and unresponsive to contemporary needs."[1] It attempted to alleviate the material alteration problem by limiting strict liability to cases where the product "is expected to and does reach the user or consumer *without substantial change* in the condition in which it is sold."[2] Some courts have refocused the product defect analysis by reasoning that every manufacturer must design non-defective products. *See, e.g., Vanskike v. ACF Indus., Inc.,* 665 F.2d 188 (8th Cir. 1981); *Pike v. Benchmaster Mfg. Co.,* 696 F.2d 38 (6th Cir. 1983). Courts needed to be able to adjudicate these claims without a jury's interference to ensure manufacturers are not required to create "accident-proof" products. *In re Rhone-Poulenc Rover, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). Even the most liberal courts recognize that strict products liability was never intended to render the manufacturer an insurer of its products. *See Britney v. Sears, Roebuck & Co.*, 782 F.2d 585, 587 (6th Cir. 1986); *Lenoir v. C.O. Porter Mach. Co.*, 672 F.2d 1240, 1244 (5th Cir. 1982); *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301, 1302 (Utah 1981); *Schultz v. Linden-Alimak Inc.,* 734, P.2d 146, 148 (Colo. App. 1986). Allowing a manufacturer to become liable for every accident where the product was misused would stifle the growth of

[1] *See ALI to Begin Work on Restatement (Third); Professors Propose Revisions to Section 402A*, 20 Prod. Liab. Daily (BNA) (Mar. 18, 1992).

[2] Michael Gallub, *Limiting the Manufacturer's Duty for Subsequent Product Alteration: Three Steps to a Rational Approach*, 16 Hofstra L. Rev. 361, 368 (1988).

intellectual property. It would render the growth of products designs unworkable because all manufacturers have required to create a product that was one hundred percent safe to avoid liability.

3. L.T. is not a consumer under the Ohiowa liability statute.

The Ohiowa statute was based on the Restatement (Second) and the lower court looked to it for guidance on defining consumer. R. at 8. The Restatement (Second) of Torts defines a consumer as a person who consumes the product, prepares it for consumption, or acquired the product directly from the seller one or more immediate dealers. Restatement (Second) of Torts § 402A cmt. I. The only other requirement is the product must have been used as intended. *Id.* This caveat releases Zuul from liability because the product was not used as intended. R. at 9.

Other legal sources have defined the word consumer. A "consumer" is defined by *Bouvier's Law Dictionary* as a "person or entity that is the ultimate intended user of a product or service." *Consumer*, *Bouvier's Law Dictionary* (6th ed. 2012). The UCC defines a consumer as an "individual who buys or contracts to buy goods that, at the time of contracting, are intended by the individual to be used primarily for personal, family, or household purposes." U.C.C. § 2-103 (Am. Law Inst. & Unif. Law Comm'n 2008).

L.T. is excluded from consumer status under both the layman and legal definition. Nor can he be considered a consumer under the UCC or Restatement definition. He was not the intended person or entity of the product and he did not purchase the services for personal use. Zuul explicitly denied that its product is marketed towards children. R. at 4. The unequivocal denial supports the position that a foreseeable and intended user was not a child that uses the product as a leaf blower. L.T. did not buy the product; he unintentionally received the product. Zuul cannot

be held liable because the Tullys' petition failed to satisfy the first requirement under the Ohiowa statute.

B. Even if L.T. Is a Consumer, He Is Not in the Class of Persons That the Seller Should Reasonably Foresee as Being Subject to the Harm of the Product.

The policy implications of imposing liability on a corporation for the harm of an unforeseeable user is significant. It would create a burden and duty for every design to safeguard and childproof its product to ensure it could not harm an unintended user. Liability for the harm of a product is triggered if the consumer is in "class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective or defective condition; and the product is expected to and does reach the consumer without substantial alteration . . . ." Ohiowa Rev. Code § 5552.368(a)–(b). L.T. was not a foreseeable user of the product and Zuul could not *reasonably* foresee him as the subject of the harm.

The court must employ an objective inquiry to determine if a consumer is a foreseeable user. *See Gerald v. R.J. Reynolds Tobacco Co.*, 68 V.I. 3, 5 (Super. Ct. 2017). In *Winnett*, a four-year-old was injured by heavy farming equipment at her grandfather's farm. *Winnett v. Winnett*, 310 N.E.2d 1, 2 (Ill. 1974). The focus of the court was whether a four-year-old was a foreseeable user of a forage wagon. *Id.* at 4. The court found the equipment's intended use did not embrace its use by a child because a child is neither a consumer nor a user in products-liability. *Id.* at 10 (citing Restatement (Second) of Torts § 402A(1)). It refused to implicate the manufacturer because "liability of a manufacturer properly encompasses only those individuals to whom injury from a defective product may reasonably be foreseen and only those situations where the product is being used for the purpose for which it is intended or for which it is reasonably foreseeable that it may be used." *Id.* The purpose of the strict liability doctrine was to deter manufacturers

from producing unreasonably dangerous products. *Guerrero v. Allison Engine Co.*, 725 N.E.2d 479, 482 (Ind. Ct. App. 2000) (citing *Maxon Corp. v. Tyler Pipe Indus., Inc.*, 479 N.E.2d 570, 578 (Ind. Ct. App. 1986)).

Moreover, a consumer cannot recover without a purchase of the product by the injured party. In *Thiele v. Faygo Beverage*, an employee was struck in the eye by a piece of glass from a bottle that shattered while moving a case of bottles in a Kroger warehouse. 489 N.E.2d 562 (Ind. Ct. App. 1986). The court refused to find the employee as user or consumer because the relevant statutory definition did not include wholesalers, retailers, other intermediaries, or their employees. *Id.* (citing *Whittaker v. Fed. Cartridge Corp.*, 466 N.E.2d 480 (Ind. Ct. App. 1984)). The court held the employee came into contact with the product before its sale to a first consuming entity. *Id.* The rationale was an entity could not reasonably foresee an employee or bystander becoming subject to harm caused by a defective product. *Id.* The Indiana legislature did not intend for intermediaries or their employees to recover under the IPLA. *Id.*

The language of the Indiana statute and the Ohiowa statute are similar and the court can look to the Indiana court for instruction. Unlike the *Thiele* soda, the Zuul was bought by L.T.'s babysitter, who was a consuming entity. But, Indiana refused to extend protection to a bystander or intermediary who was not a party the transaction. Zuul could not have reasonably foreseen a child snatching the product and using it as a leaf blower, just as the *Thiele* manufacturer could not foresee an employee would be injured from moving a box that contained the bottle. The court should not consider children to be a part of the statutory definition of consumer for an e-cigarette.

The Zuul was not more dangerous than an ordinary consumer would expect. The Restatement's use of "ordinary consumer" when describing an unreasonably dangerous product

is telling of its intent to lessen a person's liability under the statute. Restatement (Second) of Torts § 402A cmt. i. The Restatement explains the article sold must be more dangerous than "would be contemplated by the *ordinary consumer who purchases it . . . .*" *Id.* (emphasis added). The Restatement broadens the scope of who can recover by including passive users who enjoy the benefit of the product. *Id.* The allowance is meant to include plane and car passengers the ability to recover under strict liability. *Id.* L.T. cannot be considered a passive user or an ordinary consumer because he did not enjoy an intended benefit and was not the consumer who purchased the Zuul.

C. The Product Was Not Ultimately Used as Zuul Intended.

Many courts refuse to hold manufacturers liable when children improperly use products intended for adults. *See, e.g.*, *Winnett v. Winnett*, 310 N.E.2d at 1 (finding that farming equipment manufacturer should not envision a child's use); *Borchert v. E.I. DuPont de Nemours & Co.*, 886 F. Supp. 629 (W.D. Mich. 1995) (finding manufacturer, whose product label warned against children using flammable enamel reducer, was not liable for unsupervised child's injuries); *Jennings v. BIC Corp.*, 181 F.3d 1250, 1255–56 (11th Cir. 1999) (finding cigarette lighter was not defective for lacking child-proofing; defectiveness was measured by an objective standard of an ordinary consumer); *Hittle v. Scripto-Tokai Corp.*, 166 F. Supp. 2d 159, 170 (M.D. Pa. 2001) (finding a child is an unintended user of a lighter).

This is because a manufacturer is not strictly liable for all injuries caused by its product. It is only liable when the product is used as intended and ultimately causes harm. *See High v. Westinghouse Elec. Corp.*, 610 So. 2d 1259, 1262 (Fla. 1992). In *BIC Corp.*, the court declined to hold the manufacturer strictly liable because using a lighter as a children's toy was not an intended use. *Jennings v. BIC Corp.*, 181 F.3d at 1256. A child set his pajamas on fire while

playing with a lighter and caused injuries to himself. *Id.* at 1253. The court noted that the intended use of a cigarette lighter is to set fires to things that are intended to be burned. *Id.* The child's use of the lighter as a toy negated the strictly liability requirement because it was not used as intended.

The *BIC Corp.* court noted it was unforeseeable children would buy a lighter without adult supervision. *Id.* at 1257. It was only foreseeable children could use it because it was not child-proof. *Id.* The core of its refusal to hold BIC liable was because it is "unreasonable to require a manufacturer to take all possible measures to ensure products could not be misused by anyone who might, even foreseeably come into possession of them." *Id.* This is directly on point because L.T's operation of the Zuul as a leaf blower negates the strict liability requirement because it was not used as intended. The Zuul is similar to the lighter in that they both operated by the push of the button and a child could potentially operate it. However, to say that it was foreseeable a child would use it as a leaf-blower or anything other than its intended purpose is placing a high burden a manufacturer that it cannot overcome at trial.

While a manufacturer has no duty to produce accident-proof products, it is legally bound to design and build products which are reasonably fit and safe for the purpose for which they are intended. *Liberty Mut. Ins. Co. v. Rich Ladder Co.*, 441 N.E.2d 996, 999 (Ind. Ct. App. 1982) (citing *Zahora v. Harnischfeger Corp.*, 404 F.2d 172 (7th Cir. 1968)); *see Kostidis v. Gen. Cinema Corp.*, 754 N.E.2d 563, 572 (Ind. Ct. App. 2001) (noting Indiana law places no duty on manufacturers to produce accident-proof goods). Foreseeable uses of products include those that might reasonably be expected but does not include all uses which could occur. *Hirsch v. Volvo Cars of N. Am., Inc.*, 226 F.3d 445, 455 n.5 (6th Cir. 2000). This is instructive and analogous to the case at hand because L.T. was able to access and turn on the Zuul but, his actions of using it

as a leaf blower negates strict liability. The Ohiowa statute was drafted to allow for foreseeable users to recover for harm if the product was being used as intended.

The "foreseeable limitation does not allow manufacturers to disclaim liability erroneously. In *Butler v. City of Peru*, the Indiana Supreme Court held an employee who was killed while performing maintenance on a school's electrical transmission system could be a "user" because he was an employee of the product's final user and "maintenance may be a part of the product's reasonably expected use." 733 N.E.2d 912 (Ind. 2000). The court cited the Restatement for support that a "use" of a product could include maintenance and assembly even "where a manufacturer expects a product to reach the ultimate user or consumer in unassembled or uninstalled form." *Id.* at 1141 (citing Restatement (Second) of Torts § 402A).

This is distinguishable because the product L.T. used was assembled. Even if it was not assembled, a child would not be a reasonably foreseeable hand to put together the product. The *Butler* employee performed maintenance on the electrical system that was a part of its intended use. The record is void of any support that Zuul intended for the button on the product to be pushed for a long period of time in the manner of a leaf blower and in the hands of a child. Objectively, there is no support the Zuul product was used as intended and L.T. cannot recover.

Manufacturers can be liable for injuries if they fail to use reasonable care when designing a product to include any person reasonably expected to be within its vicinity when used for its intended purpose. *McCormack v. Hankscraft Co.*, 154 N.W.2d 488, 499 (Minn. 1967). But this rule applies to consumers that are not statutorily excluded from purchasing a product. For example, the court in *McCormack v. Hankscraft Co.* held in favor of a child who tripped over a vaporizer with very hot water. *Id.* at 494 (noting the purpose was for treatment of children's colds). The court noted the manufacturer failed to guard against the reasonably foreseeable

danger that a child would tip the unit over when it was in use. *Id.* at 496. The case at bar is distinguishable because Zuul cannot be expected to reasonably foresee a child would seek out the product and use it in an unintended way. R. at 5.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING A HEEDING PRESUMPTION IN THE JURY INSTRUCTION, AND THE TULLYS WERE NOT PREJUDICED BY THIS DECISION.

The second issue focuses on the trial court's denial of the Tullys' requested jury instruction. A district court has broad discretion in formulating jury instructions and is limited by the principle that the instructions must fully and fairly inform the jury on the applicable law. *Peterson v. St. Paul Fire & Marine Ins. Co.*, 239 P.3d 904, 910 (Mont. 2010). A lower court's denial of a jury instruction is only disturbed when the denial amounts to an abuse of discretion, and that error results in prejudice to the challenging party. *Carter v. Mech. Servs.*, 746 P.4d 807, 811 (Ohiowa 2012).

The Tullys contend the district court abused its discretion by refusing to instruct the jury on the read and heed doctrine, or the "heeding presumption." Because no court in the State of Ohiowa has addressed whether the heeding presumption applies to state failure-to-warn claims, the issue is one of first impression. The heeding presumption allows for a court to find a plaintiff has the requisite proximate causation absent evidence supporting the conclusion. *Needhman v. Coordinated Apparel Grp.*, 811 A.2d 124, 269 (Vt. 2002). The Tullys, without evidence of causation, come before the court asking it to adopt a doctrine that will relieve them of that obligation.

This Court should confirm that public policy does not support adoption of the heeding presumption in the State of Ohiowa. The district court correctly decided the issue and stated the applicable law; consequently, the Tullys were not prejudiced.

A. The Jury Instruction Fairly Stated the Law.

The Tullys claim entitlement to a presumption that a warning provided by Zuul would have been read and heeded. In reviewing a challenge to a jury instruction, prejudice will not be found if the instruction states the applicable law. *McAlpine v. Rhone-Poulenc Agric. Co.*, 16 P.3d 1054, 1057 (Mont. 2000). Here, the jury charge properly omitted the heeding presumption, as neither Ohiowa courts nor its legislature have adopted it. Additionally, the trial court recognized the inapplicability of the presumption to a case where a warning would not have affected the outcome.

1. The court should reject the read and heed presumption.

Strict liability places culpability on a defective product's supplier for injuries the product causes, without requiring proof of negligent conduct. Allan E. Korpela, Annotation, *Failure to Warn as Basis of Liability Under Doctrine of Strict Liability in Tort*, 53 A.L.R.3d 239 (1973). But certain products are regarded as inherently dangerous even absent a manufacturing or design defect, as no amount of care from a supplier can eliminate all user danger. Benjamin J. Jones, Annotation, *Presumption or Inference, in Products Liability Actions Based on Failure to Warn, That User of Product Would Have Heeded an Adequate Warning Had One Been Given*, 38 A.L.R.5th 683, 692 (1996). Producers of such goods must warn consumers of the known risks and how to avoid them. *Id.*

The Supreme Court of Texas articulated the rationale for imposing this duty in *Technical Chemical Co. v. Jacobs*. 480 S.W.2d 602 (Tex. 1972). The court divided product defects into three categories: 1) products that safety legislation prohibits from entering the market; 2) products the ordinary man, knowing the associated risks, would not have marketed; and 3) products the ordinary man would not have marketed without supplying warnings as to the risks

involved and instructions on how to avoid those risks. *Id.* at 605. The first two categories encompass products that are defective per se because the product and the defect are inseparable. *Id.* The third category is distinct due to the severability of the defect and the product because the source of any injuries then stems from inadequate labeling. *Id.* This is the circumstance in which a supplier may be held liable for a failure to warn. *Id.*

For a court to find any supplier strictly liable for a user's injury, the user must establish the supplier proximately caused the user's harm. *Id.* Where a plaintiff alleges a supplier failed to adequately warn users, he must satisfy the causation element with evidence that an adequate warning would have altered her behavior. *See Riley v. Am. Honda Motor Co.*, 856 P.2d 196 (Mont. 1993). As a result, a plaintiff must often testify as to whether he would have read and heeded a warning. *Id.* This poses certain difficulties. *Id.* If the injured is available, there is a likelihood the burden would be met with self-serving testimony. Where the injured is deceased, such testimony is unavailable. *Id.* Some jurisdictions allow plaintiffs to circumvent these evidentiary hurdles by creating a "heeding presumption" that assumes the plaintiff would have read and heeded a warning, had it been furnished. *Id.*

a. Comment j to § 402(a) of the Restatement (Second) of Torts does not support a presumption for the plaintiff.

Comment j to § 402(a) of the Restatement (Second) of Torts states, "[W]here a warning is given, the seller may reasonably assume that it will be read and heeded." Courts generally credit the heeding presumption for a plaintiff to this provision. Kevin Reynolds & Richard J. Kirshman, *The Ten Myths of Product Liability*, 27 Wm. Mitchell L. Rev. 551, 577 (2000). But that interpretation of comment j is counter to the drafter's intent. *Id.* The language instead protects *manufacturers* who provide adequate warnings to their product. *Id.* The plain language of the provision is best explained by Professors Henderson and Twerski:

> [W]hen comment j says that "the seller may reasonably assume," it is not referring to a presumption that any individual plaintiff actually did read and heed the warning; to the contrary, it is certain from the outset that at least some consumers will not have done so. Rather, comment j says that if the warning is adequate and is likely to reach many, even if not all, consumers, then, for purposes of determining whether the defendant has discharged his underlying duty to warn, it reasonably may be assumed that consumers will act on the warning. Once the conclusion is reached that the defendant has satisfied this duty, the plaintiff's claim fails at the threshold and the question of individualized causation never arises.

James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 279 (1990). An application of the comment in favor of the user is a perversion of its purpose. *Id.* The misinterpretation stems from courts' eagerness to adopt doctrines that further delineate negligence from strict liability. *Id.* The pursuit of this distinction seduces courts into "articulat[ing] outrageous positions that both deeply offend traditional notions of moral responsibility and prevent tort law from achieving its objectives." *Id.* To correct this error and avoid a further inversion of principles, the American Law Institute Restatement (Third) of Torts omitted comment j from the Restatement (Third) of Torts. § 2, Reporters' Note, cmt. 1 (Am. Law Inst. 1998). Yet the Tullys would have this Court adopt the backwards standard, regardless of flawed origins.

b. The heeding presumption improperly shifts the burden of proof to the defendant.

When a court applies the heeding presumption, causation is assumed unless rebutted by a manufacturer. Absent the threshold requirement of causation, plaintiffs' unmeritorious claims become viable. Further, this shifts the burden of proof to defendants and gives them little recourse. The Supreme Court of Texas has suggested rebutting the presumption with evidence the plaintiff was blind, illiterate, or intoxicated. *Jacobs*, 480 S.W.2d at 606. There is no foundation for hinging liability on the unlikely happenstance of a plaintiff's conditions where the plaintiff *in fact* may not have read the warning in question.

The Supreme Court of Montana has highlighted the issues that follow the misinterpreted presumption. In *Riley v. American Honda Motor Co.*, a plaintiff motorcyclist alleged the manufacturer's failure to warn users of the vehicle's propensity to "shimmy" when ridden caused his injury. 856 P.2d at 196, 197. When defendant moved for a directed verdict, the plaintiff requested the court apply a heeding presumption and find the causation element satisfied. *Id.* at 198. The court declined, reasoning its adoption of § 402(a) of the Restatement (Second) of Torts was not a wholesale ratification of the accompanying comments. *Id.* at 200. In rejecting the presumption, the court used Riley's circumstances as an example of the unworkable nature of the suggestion. *Id.* The presumption would allow Riley to survive a motion for a directed verdict without establishing a prima facie case. *Id.*

The court's majority acknowledged the policy arguments supporting the presumption. *Id.* The dissent first asserted that it is "common sense" to read and heed a warning; but the court responded real-world experience does not demonstrate people read and heed warnings.[3] Next, the court explained that although plaintiffs encounter difficulties in establishing causation, the defendant is not better-positioned to established the element. Finally, the majority opinion acknowledged the heeding presumption supports strict liability policy; but many changes to products liability law would follow strict liability, "including the elimination of any burden at all." *Id.* In sum, Montana jurisprudence recognizes that the products liability policy to look favorably on a consumer is not betrayed by the principle that a defendant should not have the burden of proof shifted upon him. *Id.*

[3] *See* Hildy Bowbeer & David S. Killoran, Liriano v. Hobart Corp.*: Obvious Dangers, the Duty to Warn of Safer Alternatives, and the Heeding Presumption*, 65 Brook L. Rev. 717 (1999). ("[T]he efforts of researchers to prove by scientific means that on-product warnings are indeed effective to modify safety-related behavior in actual or simulated real-world applications have generally yielded disappointing results.").

Likewise, the states of Nevada, Wisconsin, New Hampshire, and South Carolina proscribe the heeding presumption. *See Savage v. Third Judicial Dist. Court*, 200 P.3d 77, 84 (Nev. 2009) (holding Nevada law does not recognize the heeding presumption because it shifts the burden to the defendant); *In re Zimmer NexGen Knee Implant Prods. Liab. Litig.*, 884 F.3d 746, 755 (7th Cir. 2018) (applying Wisconsin law and finding the consumer could not rely on the heeding presumption); *Wilson v. Bradlees of New Eng., Inc.*, 250 F.3d 10, 21 (1st Cir. 2001) (finding New Hampshire law rejects the heeding presumption); *Odom v. G.D. Searle & Co.*, 979 F.2d 1001, 1003 (4th Cir. 1992) (holding South Carolina law does not permit the presumption). This Court should clarify the confused origins of the presumption predict the issues that follow its real-world application. In *Azzarello v. Black Brothers Co.* the Supreme Court of Pennsylvania articulated the need for limitations in products liability:

> The development of a sophisticated and complex industrial society . . . has inspired a change in legal philosophy from the principle of caveat emptor which prevailed in the early nineteenth century market place to the view that a supplier of products should be deemed to be "the guarantor of his products' safety." The realities of our economic society as it exists today forces the conclusion that the risk of loss for injury resulting from defective products should be borne by the suppliers, principally because they are in a position to absorb the loss by distributing it as a cost of doing business. . . . [T]he original concern for an emerging manufacturing industry has given way to the view that it is now the consumer who must be protected. Courts have increasingly adopted the position that the risk of loss must be placed upon the supplier of the defective product without regard to fault or privity of contract.
>
> While this expansion of the supplier's responsibility for injuries resulting from defects in his product has placed the supplier in the role of a guarantor of his product's safety, it was not intended to make him an insurer of all injuries caused by the product.

Azzarello v. Black Bros. Co., 391 A.2d 1020, 1023–24 (Pa. 1978) (citation omitted),, *rev'd on other grounds by Tincher v. Omega Flex*, 104 A.3d 328 (Pa. 2014). Consumer protection does not justify usurping a jury's role to fabricate fault.

c. The read and heed doctrine neutralizes the causation element and the element is crucial to a plaintiff's case.

Proximate causation is the "vitally important link" necessary to impose tort liability. *Cuthbert v. City of Philadelphia*, 209 A.2d 261, 263 (Pa. 1965). In *Skipworth by Williams v. Lead Industries Ass'n*, a plaintiff suffered from lead poisoning. 690 A.2d 169, 229 (Pa. 1997). The patient could not identify the manufacturer that produced the allegedly harmful paint, but filed claims against several manufacturers. *Id.* The party requested the court adopt the theory of market share liability, wherein a plaintiff does not have to prove proximate causation. *Id.* at 230, 231. The court declined, reasoning a neutralization of the proximate cause element "would lead to a distortion of liability which would be so gross as to make determinations of culpability arbitrary and unfair." *Id.* at 232.

By rejecting the heeding presumption from Ohiowa strict liability law, the trial court here recognized the gravity of proximate causation in a plaintiff's case. The question of causation in a products liability case is one of fact "on which a jury, unaided by presumptions and guided by only the evidence before it, is best qualified to speak." *Potthoff v. Alms*, 583 P.2d 309, 311 (Colo. Ct. App. 1978). Paving a road to recovery that circumvents causation does not avoid an impasse at evidentiary crossroads, "but rather encourages a purely arbitrary result." Hildy Bowbeer & David S. Killoran, Liriano v. Hobart Corp.*: Obvious Dangers, the Duty to Warn of Safer Alternatives, and the Heeding Presumption*, 65 Brook L. Rev. 717, 755 (1999).

2. Even if the State of Ohiowa adopts the heeding presumption generally, it is inapplicable to the case at bar because the facts rebut the presumption.

Courts insulate defendants from the imbalanced effect of the heeding presumption by applying it only where there is no rebuttal evidence. The rebuttal evidence available renders a presumption inappropriate here. Certain jurisdictions find application of the heeding presumption

proper only after a "preliminary inquiry" is conducted.[4] To enjoy the presumption, a plaintiff must first demonstrate an inadequate knowledge of the dangers surrounding the product. *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 762 (Mo. 2011). In *Arnold v. Ingersoll-Rand Co.* the fumes from an automatic compressor exploded in an unvented space. 834 S.W.2d 192, 193 (Mo. 1992). A failure-to-warn claim was brought against the manufacturer of the compressor. *Id.* The trial court included an instruction on the heeding presumption in the jury charge. *Id.* The court of appeals reversed, finding the trial court abused its discretion in instructing the jury on the heeding presumption because the party was "adequately warned." *Id.* at 196. Instead the jury should have been instructed on the plaintiff's contributory negligence. *Id.* at 194.

Similarly, L.T. was adequately warned of the dangers of playing with the Zuul by Ms. Barrett. Ms. Barrett warned L.T. often the Zuul was dangerous for children. R. at 5. L.T. demonstrated comprehension of the warning by waiting until Ms. Barret left him unattended to grab the Zuul. R. at 5. After grabbing it, L.T. played with the e-cigarette in a manner unintended by Zuul. R. at 5. These actions indicate additional warnings would have been lost on L.T., and preclude application of a presumption on the matter.

Other courts apply the read and heed doctrine only where a presumption may operate under Harvard Law Professor James B. Thayer's "bursting bubble" theory of presumptions. The effects of the Thayerian approach resemble other courts' "preliminary inquiry" requirement, but here a court does not place a formal and initial burden on the plaintiff. For example, in *Golonka v. General Motors Corp.*, the plaintiff car owner complained of a defective gear shift. 65 P.3d 956, 961 (Ariz. Ct. App. 2003). The evidence demonstrated that despite the warning in the owner's

[4] *See Zimmerman v. Baker-Perkins, Inc.*, 707 F. Supp. 778, 781 (E.D. Pa. 1989) (applying Pennsylvania law); *R.R. St. & Co. v. Pilgrim Enters., Inc.*, 81 S.W.3d 276, 284 (Tex. App. 2001) (applying Texas law); *Tomaselli v. N.Y. & Presbyterian Hosp.*, 728 F. App'x 41, 46 (2d Cir. 2018) (applying New York law).

manual, the driver did not set the parking brake, turn the engine off, or remove the key. *Id.* at 960. At trial, the charge submitted to the jury included an instruction on the heeding presumption. *Id.* at 967. The defendant manufacturer appealed the instruction when the jury found for the plaintiff. *Id.* Acknowledging the heeding presumption as viable under Arizona law, the court of appeals reversed because the instruction was improper given the evidence. *Id.* at 969. Where the plaintiff's behavior demonstrated a lack of propensity to read and heed, the presumption bubble "bursts." *Id.* at 970. "In such cases, even if the fact-finder might disbelieve the rebuttal evidence, . . . the existence or non-existence of the presumed fact must be determined as if the presumption had never operated in the first place." *Id.*

Likewise, L.T.'s conduct bursts the presumption that a different warning would have affected the outcome. First, L.T. demonstrated a lack of propensity to read and heed when he ignored Ms. Barret's repeated warnings. Second, a warning would not have reached L.T. as a prohibited user of an e-cigarette. Zuul's warning is on the product's packaging. R. at 4. When a product's warning is on its packaging, the warning is not insufficient solely because it does not reach an unforeseeable user. *Perotti v. Johnson & Johnson Vision Prods.*, 2004 LEXIS 6660, at *24. In *Perotti v. Johnson & Johnson*, a husband regularly used his wife's contact lenses and wore them to bed. *Id.* The husband brought a failure-to-warn claim against the contact lens manufacturer after he developed corneal abrasions. *Id.* at *15. The packaging that enclosed his wife's contact lenses warned users to remove the product before sleeping. *Id.* at *18. The husband argued the warning must be on each individually packaged lens, and not just the box containing the lenses. *Id.* Because federal law prohibited the sale of contact lenses without a prescription, the court found the manufacturer did not owe a duty to an individual using a

product prescribed to another. *Id.* at *17, *19. The warning on the box satisfied its duty to warn the wife, a lawful customer. *Id.* at *27.

In this case, the complaining party is also a prohibited user of this product. The Family Smoking Prevention and Tobacco Control Act prohibits the sale of tobacco to persons under the age of 18. 111 P.L. 31, 123 Stat. 1776, Sec. 903 (2009). Because L.T. is eleven years old, he could not buy the product. Zuul's duty to communicate to Ms. Barrett, a lawful and foreseeable customer, was satisfied by the warning on the product's packaging. Ms. Barrett's removal of the Zuul from its packaging rendered the warning inaccessible to all who had properly not purchased it. If the warning were changed, it still would not have reached L.T. Thus, the heeding presumption bubble burst because L.T. did not have a propensity to read and heed; but the presumption became an impossibility at L.T.'s inability to read and heed.

B. The Tullys Have Not Shown They Were Prejudiced by the Jury Instruction.

Where a court finds a jury instruction misstated the applicable law, the judgment will only be set aside if harmful error, or prejudice, occurred. *Morrison Knudson Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1236 (10th Cir. 1999). The party seeking to set aside a judgment must show prejudice. *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943). The Tullys have not met this burden.

1. A motion to reopen evidence would have remedied the alleged error.

The Supreme Court of the United States has repeatedly recognized a trial court's discretion to allow the reception of additional evidence outside of the usual order. *Modern Woodmen of Am. v. Jones*, 98 N.E. 1006, 1007 (Ind. Ct. App. 1912). Evidence may even be admitted two months after trial. *See Beatson v. Bowers*, 91 N.E. 922 (Ind. Ct. App. 1910). In *Modern Woodmen of America v. Jones*, a defendant moved for a directed verdict after the plaintiff rested

her case. 98 N.E. at 1007. The defendant argued the directed verdict was proper because the plaintiff forgot to introduce the proofs of death necessary to validate the relevant insurance certificate. *Id.* The plaintiff, newly understanding the components of the case that would not be presumed, requested to reopen evidence. *Id.* The trial court granted the request, and when the plaintiff again rested, the court instructed a verdict for the plaintiff on its own motion. *Id.*

Here, the trial court's omission of the presumption in the jury charge put the Tullys on notice it could not be relied upon to prove causation. Like the plaintiff in *Woodmen*, the Tullys knew what components of the case would not be presumed. Unlike the plaintiff in *Woodmen*, the Tullys did not request to submit additional evidence to remedy the error. Absent the presumption, the Tullys had to burden to establish a prima facie case. The jury found for Zuul because the Tullys could not meet their burden.

2. The Tullys did not prove harmful error.

An error prejudices a party only when it had a "substantial and injurious effect or influence" on the result. *O'Neal v. McAninch*, 513 U.S. 432, 438 (1995) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). This hurdle enforces the strong policy against retrials where the "claimed error amounts to no more than speculation." *Boyd v. California*, 494 U.S. 370, 380 (1990). In *Mayfield v. Nicholson*, the plaintiff could not satisfy this burden. 19 Vet. App. 103, 107 (2005) (reversed and remanded on other grounds). There, Veteran Estey Mayfield passed away because of congestive heart failure. *Id.* at 107. Veteran Mayfield's surviving spouse filed a claim for dependency and indemnity. *Id.* The Department of Veteran Affairs denied the claim, explaining the evidence did not establish a causal relationship between the Veteran Mayfield's service and his coronary disease. *Id.* Mrs. Mayfield appealed, and the claim was remanded. *Id.* Upon further review of Veteran Mayfield's medical records, his treating physician

credited the coronary disease to a smoking habit and hypertension. *Id.* at 108. Consequently, the claim was denied. *Id.*

Mrs. Mayfield appealed again, alleging she was not properly notified of the need for medical evidence that substantiated causation. *Id.* at 109. Though the court of appeals acknowledged error in the notice, it found Mrs. Mayfield was, as a whole, informed of the evidence necessary to substantiate her claim and nothing in the record suggested that Mrs. Mayfield had evidence she did not provide. *Id.* at 122. These findings led the court to conclude no harmful error, or prejudice, occurred. *Id.* The court explained "the rule of prejudicial error should not permit 'automatic' remands" that would make courts "an impregnable citadel of technicality." *Id.* at 120.

As in the trial court, the Tullys cannot prevail because they cannot prove causation. Because the read and heed doctrine presumes proximate cause, the Tullys must show the jury found a lack of proximate causation to be the dispositive flaw in their case. Lacking evidence that the jury's verdict hinged on this element, is equally plausible that the verdict for Zuul reflected additional deficiencies in the Tullys' case. Thus, there is no "causal nexus between the error and the result." The only facts the record offers as evidence of prejudice are that both parties offered an abundance of evidence for the jury's consideration, and that the jury deliberated for over 16 hours. R. at 12. Without more, the lower court could not find the requisite causal nexus between the alleged error and the result. R. at 12.

Further, the extensive testimony by the Tullys, coupled with the trial court's ruling against the heeding presumption, demonstrates two things. First, the Tullys knew the evidence necessary to substantiate the claim. Second, there is no pertinent yet unprovided evidence. A new trial, the appropriate remedy for flawed jury charges, would only afford the Tullys another opportunity to

fail to establish a prima facie case. *Lakeside v. Oregon*, 435 U.S. 333, 335 (1978). Though L.T., like the veteran's widow in *Mayfield v. Nicholson*, pleads circumstances that elicit compassion, a court must not indulge its sympathies. When the law and facts demand a verdict for one party, "the Court must hold accordingly, regardless of whether the party is an individual or [a] . . . company. Corporations are entitled to the same fair treatment in a court of law as an individual. Courts and judges must execute their obligations without favor." *Pittman v. Mass. Mut. Life Ins. Co.*, 904 F. Supp. 1348, 1389 (S.D. Ga. 1995). This Court should affirm the trial court's verdict for Zuul.

CONCLUSION

Respondent respectfully requests this Court to affirm the decision of the Court of Appeals for the Seventh Appellate District for the State of Ohiowa, declare that a child is an unforeseeable user of an e-cigarette, and reject a heeding presumption in Ohiowa's jurisprudence by finding the trial court did not abuse its discretion in formulating the contested jury instruction.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

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APPENDIX A

Provisions of the Ohiowa Rev. Code

Ohiowa Rev. Code § 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 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 consumer.