ORIGINAL

No. 20-2206

IN THE SUPREME COURT OF THE STATE OF OHIOWA

LOUIS TULLY, Father and Natural Guardian
For L.T., and in his own right,
Plaintiffs-*Petitioner*

v.

ZUUL ENTERPRISES, an Ohiowa Corporation
Defendant-*Respondent*

On Appeal
From the Court of Appeals
For the State of Ohiowa

BRIEF OF THE PETITIONER

ORAL ARGUMENT REQUESTED

S/s Team S
Team S
Attorney for Plaintiffs-Petitioner

QUESTION PRESENTED

I. In design defect cases, Ohiowa law applies the consumer expectations test, which provides that a foreseeable user of a product is a user that is in the class of reasonably foreseeable users. L.T. was injured by an e-cigarette that was covered in decorative adhesive that displayed the picture of "Hola Gato," a popular cartoon character. Did the Court of Appeals err in affirming summary judgment where there is a genuine dispute of material fact as to whether the L.T. was a foreseeable user?

II. In strict liability failure-to-warn cases, a significant number of jurisdictions have adopted a consumer-friendly heeding presumption, the "read and heed" doctrine, which presumes that a consumer would have read and heeded an adequate warning if provided. The Court of Appeals determined that the heeding presumption is applicable under Ohiowa strict products liability law, but determined that no prejudice occurred from the trial court's failure to grant a jury instruction on the presumption. Did the appellate court err where prejudice was the clear result of the denied jury instructions?

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STATEMENT OF THE CASE

A. Nature of the Case

L.T. is an eleven-year-old child who was tragically burned when a defective electronic cigarette manufactured by Zuul Enterprises ("Zuul") exploded in his hands. L.T.'s injuries were the result of a manufacturing defect that caused the atomizer in the product to overheat and explode. But L.T. was not warned of this danger—the e-cigarette was covered in a "Zuul skin," an adhesive label decorated with patterns or licensed cartoon characters like "Hola Gato," which did not contain a warning.

This Court must now consider two issues: first, whether summary judgment was appropriate on L.T.'s manufacturing defect claim where disputes of material fact exist as to whether L.T. was a foreseeable user of the product, and second, whether the trial court's failure to instruct the jury on the "read and heed" doctrine prejudicially affected the outcome of L.T.'s failure-to-warn claim.

Therefore, Petitioners respectfully request that this Court reverse the holding of the Court of Appeals on the summary judgment issue and find that L.T. was a foreseeable user of Zuul's e-cigarettes. Additionally, Petitioners respectfully request that this Court adopt the "read and heed" presumption, and reverse the determination by the Court of Appeals that no prejudice occurred from the trial court's failure to instruct the jury on the doctrine.

B. Course of Proceedings and Disposition in the Court Below

Louis Tully, as father and natural guardian for minor L.T., instituted this products liability action in the Ohiowa Court of Common Pleas alleging a design defect that violated state product liability law and that Zuul failed to adequately warn consumers of the risks associated with its product. (R. at 2). Zuul filed a Motion for Summary Judgment, arguing that although the product

did suffer from a manufacturing defect, liability could not be established because L.T. was not a foreseeable user of the product, and that the warning provided on the packaging of the product was sufficient to fulfill the company's duty to warn users. (R. at 2, 3).

On September 28, 2018, the Court of Common Pleas held that children were not foreseeable users of Zuul products and granted the Defendant's Motion for Summary Judgment on the manufacturing defect claim. (R. at 3). The Tullys appealed this decision, arguing that the Defendant's summary judgment motion was incorrectly granted because there still exists a material fact as to whether L.T. was a foreseeable user of Zuul's product. (R. at 3). The Court of Common Pleas allowed the warning claim to proceed to trial, where the Tullys requested a jury instruction on the heeding presumption. (R. at 3). The request for the heeding presumption was denied and the jury ultimately held in favor of Zuul. (R. at 3). The Tullys appealed the results of the trial in the Court of Common Pleas arguing that the trial court reversibly erred by failing to instruct the jury on the heeding presumption.

C. Statement of Facts

Zuul is an electronic cigarette manufacturer that creates small electronic devices designed and marketed with the purpose of helping smokers of traditional tobacco cigarettes to curtail their use of that product. (R. at 3). The company was founded in 2016 in Cincinnatus, Ohiowa by Pete Venkman. (R. at 3). To operate a Zuul e-cigarette, the users depress a button on the side of the device, activating the atomizer inside. (R. at 3, 4). The atomizer then heats up and turns the liquid in a user-inserted cartridge into a vapor. (R. at 4). Users inhale the vapor, which delivers flavored nicotine into the throat. (R. at 4).

In December of 2017, a federal district court found that Zuul was directly marketing its products to children by using sweet flavors in its cartridges. (R. at 4). The court required Zuul to

pay damages and an injunction was issued against Zuul's manufacture of its sweetly flavored vapor cartridges. (R. at 4). As a result of the ban on the manufacture of the flavors, Zuul struggled to avoid bankruptcy due to its stock prices falling dramatically. (R. at 4). On June 7, 2018, Zuul issued a statement in response to the prior litigation. (R. at 4). In the statement, Zuul denied ever marketing its product to underage consumers; and promised, as a sign of good faith, to only produce its "classic tobacco" flavor in the future. (R. at 4). Zuul then redesigned its devices to only properly operate with Zuul cartridges. (R. at 4).

But, in the very same statement, Zuul announced production of its new product "Zuul skins." (R. at 4). The new accessory was called a "Zuul Skin", and it is an adhesive label that is affixed to the surface of a Zuul e-cigarette. (R. at 4). Consumers could buy pre-decorated skins with various patterns or licensed characters to personalize their e-cigarette. (R. at 4). The new "Zuul Skins" brought the Zuul stock price back to its former heights. (R. at 4). However, the new "Zuul Skins" accessory that is applied to the e-cigarette and covers the product, has no additional warning regarding the dangers of the product that they enclose. (R. at 4).

Dana Barrett, a nineteen-year-old college sophomore, was attracted to Zuul's devices and its skins. She purchased and used the products regularly. (R. at 5). On July 17, 2018, Ms. Barrett was providing caretaker services to Louis and Janine Tully's eleven-year-old son, L.T. (R. at 5). Just a few days earlier, on July 11, Ms. Barrett purchased a skin depicting her favorite cartoon character, *Hola Gato*. (R. at 5). L.T. was also a fan of the *Hola Gato* cartoon character that was depicted on Ms. Barrett's "Zuul skin". (R. at 5).

On the night in question, L.T. saw his favorite cartoon character on his caretaker's Zuul device and picked the device up to play with it. (R. at 5). L.T. depressed the button on the side of the device and vapor was emitted out of the mouthpiece. (R. at 5). Without warning, the Zuul

device violently exploded in young L.T.'s hand, causing significant damage and burns. (R. at 5). As a result, Petitioners filed the instant action in the Ohiowa Court of Common Pleas.

SUMMARY OF THE ARGUMENT

This Court must address the following two issues: first, the Court must determine if genuine issues of material exist fact regarding whether L.T. was a foreseeable user of Zuul's product; and second, whether the lower courts erred in failing to allow a jury instruction on the heeding presumption.

First, the lower courts correctly adopted the consumer expectation test and determined that a design defect existed as a matter of law. Zuul also admitted to the existence of a manufacturing defect in its product. The consumer expectation test is used by several circuits in order to determine whether a particular manufacturing design is unreasonably dangerous based on the level of dangerousness an ordinary consumer would expect a particular product to have. But, the lower court did not properly apply the test in determining that there was no genuine issue of material fact as to whether L.T. was a foreseeable user of Zuul's product. Accordingly, the Tullys respectfully request that this Court reverse the lower courts' grant of summary judgment.

Second, the lower court abused its discretion by not finding that the heeding presumption is Ohiowa law, and the appellate court erred by holding that the Tullys were not prejudiced by the denied jury instruction on the heeding presumption. Where a warning is given, the manufacturer can reasonably expect the user to read it and heed it. If no warning is given, the plaintiff would be entitled to rely on the presumption in order to prove that the absence of a warning had proximately caused his or her harm. The Tullys were entitled to a jury instruction on the heeding presumption, and suffered prejudice when the request was denied because the jury was not given the applicable law to properly resolve all issues of the case, and because L.T.

was not afforded the full benefit of the presumption. Therefore, the Tullys respectfully request that this Court reverse the appellate court's affirmation of the lower courts' holdings.

STANDARD OF REVIEW

The standard of review for Issue I, whether L.T. was a foreseeable user of Zuul's products, is de novo. A court properly grants summary judgment when the movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant must cite specifically to the record to demonstrate that there is no genuine dispute of material fact. *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986). If the movant satisfies this burden, the burden shifts to the non-moving party to produce specific facts demonstrating a genuine dispute at trial. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-48 (1986).

As to Issue II, whether the lower court erred in denying a request for a "read and heed" instruction, a lower court's decision to grant or deny a jury instruction is reviewed for an abuse of discretion. *Barton Protective Services, Inc. v. Faber*, 745 So. 2d 968, 974 (Fla. Dist. Ct. App. 1999). The trial court commits a clear abuse of discretion when an error of law occurs that controls the outcome of the case. *Roverano v. John Crane, Inc.*, 177 A.3d 892, 897 (Penn. Super. Ct. 2017). The party defending the instructions on appeal must show that the requested instructions accurately stated the applicable law, the facts supported giving the instruction, and that the instruction was necessary in order to allow the jury to properly resolve all the issues in the case. *Reyka v. Halifax Hosp. Dist.,* 657 So. 2d 967 (Fla. Dist. Ct. App. 1995). If the jury instructions, as a whole, fairly state the applicable law to the jury, the failure to give a particular instruction will not be an error. *CSX Transp., Inc., v. Whittler,* 584 So. 2d 579 (Fla. Dist. Ct. App.1991). *See also Schreiber v. Walt Disney World, Co.,* 389 So. 2d 1040 (Fla. Dist. Ct. App. 1980) (each party is entitled to have the jury instructed on his or her theory of the case).

ARGUMENT

I. The lower courts erred in granting and upholding summary judgment in Zuul's favor because L.T. was a foreseeable user of the defective product.

Zuul could have, and should have, known that L.T. was a foreseeable user of its product . The consumer expectation test relies on the rationales developed in the Restatement (Second) of Torts § 402A, which established the liability of manufacturers and sellers when their products cause harm to consumers and users. Restatement (Second) of Torts § 402A cmt. j (Am. Law Inst. 1965).

Specifically, § 402 sets out that manufacturers are to research their products before releasing them to consumers in order to determine the likelihood of damage to those consumers or to the final users of the product. *Id*. Based on that research, manufacturers must then correct any defects before releasing their product into the hands of users. *Id*. Thus, the consumer expectation test both relies and builds on the principles set out in § 402 by creating the standard for liability based on what a reasonable consumer would expect a product to do or what harms it may cause.

The lower courts correctly held that the consumer expectations test should be applied here the case at hand. However, the court incorrectly applied the test in determining that there was no genuine issue of material fact as to whether L.T. was a foreseeable user of the Zuul. The consumer expectation test is used to determine whether a product deviated in a material way from the design standards of the manufacturer of the product. *State Farm Fire & Cas. Co. v. Chrysler Corp*., 37 Ohio St.3d 1, 523 N.E.2d 489, 494 (1988). The test sets out that a product has deviated in a material way from the design standards of the manufacturer when, at the time the product left the manufacturers' hands, it was "more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." *Id*.

As the concurrence to the court's opinion correctly noted, L.T. was of a class of persons that Zuul could reasonably foresee as being subject to harm from the use of one of its defective products. L.T. used the product in a reasonably foreseeable manner. L.T. was using the product as Zuul intended: he was pressing the button on the side of the device with the intention of emitting vapor from the end. (R. at 5). Even though L.T. chose not to put the device up to his lips, he was still using the functions of the product as intended.

By contrast, the Court of Appeals correctly declined to adopt the modified consumer expectation test, which weighs various factors in determining the liability of manufacturers. In the Ohiowa jurisdiction, strict liability of manufacturers is based on the expectations of the ordinary consumer. Ordinary consumers of electronic cigarettes expect that when they depress the button on their device, it will emit nicotine-filled vapor. Such consumers also expect that the device will not explode while in use. Thus, when the electronic cigarette L.T. used exploded in his hand, as an ordinary user, he could assume that Zuul would maintain liability for the incident.

Thus, the consumer expectations test is the most appropriate test for determining whether a design defect exists because it holds manufacturers accountable while protecting the ultimate consumer, like L.T. The common law dictates that L.T. was a foreseeable user of Zuul's products because it availed itself to children through its marketing techniques. The marketing techniques Zuul chose to employ availed itself of liability here. Additionally, L.T. was a foreseeable user of Zuul's products because the Defendant was put on prior notice of its product's susceptibility to use by children by both prior litigation and an injunction.

A. L.T. was a foreseeable user of the product because the Defendant was put on prior notice of its device's susceptibility to use by children.

Zuul could have and should have foreseen that children might use its products. L.T. was a foreseeable user of Zuul's products because the company was put on prior notice of its product's

susceptibility to use by children in previous litigation. A foreseeable user is one that the manufacturer could have reasonably expected to use their product. L.T. was a foreseeable user because Zuul chose to market its products to children and were put on prior notice of the device's susceptibility to use by children.

A manufacturer has a duty to appropriately market its products so as to not market dangerous products to children. *Wagatsuma v. Patch*, 10 Haw. App. 547, 554 (1994). In the *Wagatsuma* case, the court considered whether a pool company was liable to the family whose child drowned in a pool it marketed and sold. *Id*. at 548. The court noted that marketing a product to children avails a manufacturer to liability from claims that may arise from damages caused to children by its product. *Id*. at 572.

In *Moning*, the court considered whether slingshots marketed to children availed the manufacturer of liability for damages caused by the products. *Moning v. Alfono*, 400 Mich. 425, 432 (Mich. 1977). The court held that manufacturers owe a duty to children when they directly market to them. *Id*. The court found that the issue of whether the company's marketing to children created an unreasonable risk of harm was a question for a jury, as reasonable minds could differ. *Id*. Nonetheless, the court held that a manufacturer who markets a product owes a legal duty. *Id*. at 433. It follows, therefore, that a manufacturer who chooses to market its product to children owes a legal duty to those children who fall victim to its schemes.

Just like the manufacturer in *Moning*, Zuul chose to market its products to children. Therefore, just like in *Moning*, Zuul should be liable to children, specifically L.T., for damages caused to them by the marketed product. Additionally, the question of whether Zuul's marketing tactics created an unreasonable risk of harm to children should be submitted to a jury, requiring this Court to reverse the grant of summary judgment in this matter.

Nonetheless, even if it is assumed that Zuul exercised all reasonable care in manufacturing and marketing its product, it can and should still be held liable for injuries caused. *Wright v. Booke Group Ltd*., 652 N.W.2d 159, 167-68 (Iowa 2002). If the electronic cigarette that injured L.T. had functioned as Zuul intended it too, L.T. would not be harmed. Thus, Zuul should be liable for the physical injury sustained by L.T. as a result of a manufacturing defect, and the granting of Zuul's motion for summary judgment was improper.

Zuul was put on prior notice by relevant case law and statutory provisions of the dangers of its products. In *Colgate v. Juul Labs, Inc*., the lower court held that Juul used research from the tobacco industry in order to target underage consumers. 402 F. Supp. 3d 728, 736 (N.D. Cal. 2019). Juul executives accessed those marketing tactics that large tobacco companies used through public record from the litigation that followed. *Id*. As a result of that litigation, tobacco companies were banned from using certain forms of advertisement and marketing techniques that targeted younger audiences. *Id*. Juul replicated and used those very tactics. *Id*. The court also noted that Juul chose to market its products through sale at gas stations, where the product is more easily accessible to minors. *Id*. at 739. Additionally, the court referenced the United States Health and Safety Code provision which reads: "targeting of minors causes substantial physical injury to them." Health & Saf. Code, § 25967, subd, (a)(5). The relevant section of the code goes on to explain that such targeting is dangerous because the earlier a person begins to use tobacco products, the more likely it is that he or she will never be able to quit. *Id*.

Just like Juul, Zuul chose to employ banned cigarette company marketing tactics in order to direct its products into the hands of children. The advertising schemes were made public record, in part, to put companies like Zuul on notice about what types of advertising and marketing are disallowed. Instead of heeding such a warning, Zuul used those very tactics to market its products

to children. Thus, Zuul made the conscious decision to both seek out and use banned tactics in order to target minor consumers of tobacco products. Additionally, Zuul was put on notice by the relevant sections of the United States Health and Safety Code that underage consumption of tobacco was both serious and dangerous. Despite all these warnings, Zuul forged ahead.

Since Zuul chose to directly market to children through its use of cartoon characters to relate to its products, its availed itself to strict liability for any potential harms that befell its underage users. L.T. is one such user, and Zuul has directly availed itself of liability for his damages. Additionally, the skins, such as the one L.C.'s caretaker had affixed to her Zuul device, have no warnings to children that indicate that the product the skin contains is dangerous. L.T., therefore, viewed the device as a toy, as a child would with small things emblazoned with characters from their favorite cartoons. Not only did the device look like a toy with its bright, compact design, it functioned like one as well. With the simple press of a button, L.T. was able to emit a smoky vapor from the end. The child did not know that the vapor was dangerous, whether or not he knew the device itself was dangerous.

In the final days of 2017, a federal district court issued an injunction against Zuul's manufacture of certain sweet vape flavors for use to directly market to children. (R. at 5.) The court found that the company was using the flavors to market its devices and products to underage individuals. (R. at 5.) Zuul issued a statement claiming that it was not directly marketing to children and vowed to only produce the "classic tobacco" flavor in the future. (R. at 5.) This, however, caused the stock prices of the company to plummet. In response to the lower stock value, Zuul began to market to children again by introducing a line of skins and other accessories for its product that were emblazoned with popular cartoon characters, often enjoyed by children. Thus, Zuul reengaged its marketing strategy targeting children. The strategy worked and stock prices rose.

Additionally, it was found that electronic cigarettes are to be classified as a matter of law in the same way that traditional cigarettes are. *Nicopure Labs, LLC v. FDA*, 266 F.Supp. 3d 360, 366 (2017). Thus, electronic cigarette manufacturers are subject to the same marketing restrictions as traditional cigarette manufacturers are. *Id*. Manufacturers of traditional cigarettes are banned from marketing directly to children. *Colgate*, 402 F. Supp. 3d 728, 736.

The Tullys are entitled, as a matter of law, to present their case as to the manufacturing defect to a jury of their peers because there exists a genuine issue of material fact as to whether L.T. was a foreseeable user of Zuul's products. Consequently, summary judgment on the manufacturing defect claim should not have been granted by the lower courts, and constitutes reversible error.

B. Zuul is liable for L.T.'s damages because he used the electronic cigarette product in a reasonably foreseeable manner.

Zuul's product was designed with the intention of the user depressing the button on the side to activate the atomizer inside. (R. at 3). The atomizer is then meant to heat up the liquid in the user-inserted cartridge in order to emit a vapor. (R. at 4). L.T. used the product in precisely this manner. (R. at 5). He pressed the button on the side of the device, activating the atomizer inside. He then watched with glee as the smoky vapor was emitted from the end of the device. (R. at 5). After a mere few seconds of pressing the button, the device exploded in the young boy's hands. (R. at 5).

In *Kuster v. Gould Nat'l Batteries*, the court considered a manufacturer's liability for the explosion of one of its batteries causing injuries to a user. 71 Wn.2d 474 (Wash. 1967). The battery in question had functioned properly in the months leading up to the explosion. *Id*. The court noted that if a manufacturing defect was the cause of the explosion, the manufacturer should be held liable for any damages said explosion caused. *Id*. at 485. Though the defense argued that the

battery had been used improperly, the court found that the battery had been properly used and had nonetheless exploded. *Id*. at 486.

Just like the battery in *Kuster*, Zuul's product worked properly until it suddenly exploded, injuring a user. Unlike the defendant in *Kuster*, Zuul admits to the manufacturing defect responsible for L.T.'s injuries. Thus, Zuul should be held strictly liable for injuries caused by the explosion of its defective electronic cigarette device.

In *Henkel*, the court considered the case of a child injured by a fragment of glass from a broken soda bottle. *Henkel v. R & S Bottling Co*., 323 N.W.2d 185, 187 (Iowa 1982). The plaintiffs argued that the child's dropping of the bottle which caused the shattered glass was a foreseeable use that the manufacturer should be held liable for. *Id*. The court found that, "negligent use of a product by a consumer is reasonably foreseeable by the producer and is therefore not 'misuse' for liability purposes." *Id*. at 190. The court held that the child's dropping of the bottle was a foreseeable use that the manufacturer should have anticipated and should then be held liable for. Id. at 191.

Just like the child in *Henkel*, L.T. used Zuul's product in a way that the manufacturer should have foreseen. Whether or not it was the intended use, a foreseeable misuse, according to *Henkel*, subjects the manufacturer to the same liability as if the product had been used in accordance with the manufacturer's exact specifications. Thus, no matter if L.T. was a foreseeable user or misuer of Zuul's product, Zuul is subject to liability.

II. The appellate court correctly adopted the read and heed doctrine, but erred in finding that no prejudice occurred from the abuse of discretion.

The appellate court took one step forward in adopting the read and heed doctrine as Ohiowa law, but took two steps back when it failed to apply it to its inaugural case. Applying the read and heed doctrine, otherwise known as the heeding presumption, to strict liability failure-to-

warn cases is an issue of first impression in the State of Ohiowa. Currently, nineteen jurisdictions have adopted the heeding presumption, and the appellate court adopted the heeding presumption as the law of the land in its prior decision[1] (R. at 12). The heeding presumption derives from the Restatement (Second) of Torts, the same Restatement the Ohiowa legislature found instructive when drafting its product liability laws. The Restatement provides: "[w]here warning is given, the seller may reasonably assume it will be read and heeded. . . ." Restatement (Second) of Torts § 402A cmt. j (Am. Law Inst. 1965).

Ohiowa product liability law has traditionally looked favorably upon the consumer, and the heeding presumption is another measure to ensure the safety of consumers. While the heeding presumption favors the consumer, it also offers protection for manufacturers in the form of a rebuttable presumption. The rebuttable presumption allows the fact-finder to presume that the person injured by the use of the product would have read and heeded an adequate warning if provided. *Miller v. Pfizer Inc.*, 196 F. Supp. 2d 1095, 1127 (D. Kan. 2002), *aff'd*, 356 F.3d 1326 (10th Cir. 2004). However, the defendant may provide evidence to rebut the presumption. *Id*.

The heeding presumption is the appropriate law in this case, and the appellate court held that the lower court abused its discretion in not granting the requested jury instruction on the heeding presumption. But, the appellate court held that the Tullys suffered no prejudice from the

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[1] *Golonka v. General Motors Corp.*, 935 P.3d 957, 968-69 (Ariz. Ct. App. 2003); *Bushong v. Garman Co*., 843 S.W.2d 807, 811 (Ark. 1992); *Payne v. Soft Sheen Products, Inc.*, 486 A.2d 712, 725 (D.C. 1985); *Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541, 555 (Ind. Ct. App. 1979); *Wooderson v. Ortho Pharmaceutical Corp*., 681 P.2d 1038, 1057-58 (Kan. 1984); *Bloxom v. Bloxom*, 512 So. 2d 839, 850 (La. 1987); *United States Gypsum Co. v. Mayor of Baltimore*, 647 A.2d 405, 413 (Md. 1994); *Evans v. Lorillard Tobacco Co.,* 990 N.E.2d 997, 1023-24 (Mass. 2013); *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 762-63 (Mo. 2011); *Coffman v. Keene Corp.*, 628 A.2d 710, 717-19 (N.J. 1993); *Hoffman-Rattet v. Ortho Pharmaceutical Corp.,* 516 N.Y.S.2d 856, 861 (N.Y. Sup. Ct. 1987); *Crowston v. Goodyear Tire & Rubber Co.,* 521 N.W.2d 401, 410 (N.D. 1994); *Seley v. G.D. Searle Co.,* 423 N.E.2d 831, 838 (Ohio 1981); *Cunningham v. Charles Pfizer & Co*., 532 P.2d 1377, 1382 (Okla. 1974); *Coward v. Owens-Corning Fiberglas Corp.,* 729 A.2d 614, 620-21 (Pa. Super. Ct. 1999); *Technical Chemical Co. v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972); *House v. Armour of America, Inc.,* 929 P.2d 340, 347 (Utah 1996); *Needham v. Coordinated Apparel Group, Inc*., 811 A.2d 124, 129 (Vt. 2002); *Tanner v. Shoupe*, 596 N.W.2d 805, 817-18 (Wis. Ct. App. 1999).

rejection of the requested jury instruction. (R. at 12). This holding is reversible error, and this Court should find that the Tullys did suffer prejudice from the rejection of their requested jury instruction. The party challenging a jury instruction must show prejudice, and prejudice will not be found where the instructions state the applicable law of the case. *McAlpine v. Rhone-Poulenc Ag Co.*, 16 P.3d 1054, 1057 (Mont. 2000).

Prejudice was clearly present because the lower court failed to grant the jury instruction to state the applicable law, and the failure to include the heeding presumption instruction is prejudicial because it would have established the element of causation. The instruction would have allowed the jury to presume that L.T. would have read the warning and would have heeded it, preventing the injury to L.T. Reversal is required ". . . when (1) 'we have substantial doubt whether the instructions, considered as a whole, properly guided the jury in its deliberations,' *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1235 (10th Cir. 1999) (quotation omitted); and (2) 'when a deficient jury instruction is prejudicial,'" *Coleman v. B-G Maintenance Management of Colo., Inc.*, 108 F.3d 1199, 1201 (10th Cir. 1997). It is impossible to say that the jury was properly guided in its deliberations when the applicable law was absent in the deliberations; therefore, it is apparent that the denied jury instruction on the heeding presumption was prejudicial to the Tullys. This Court should reverse the decision of the appellate court in favor of the Tullys because the denied jury instruction prevented the jury from properly resolving all issues of the case, resulting in prejudice.

A. The heeding presumption is appropriate for determining whether a consumer would not have used the product if an adequate warning were present, and because it is rooted in principles supported by the Restatement (Second) of Torts.

While not yet adopted, the heeding presumption acknowledges Ohiowa product liability law's public policy favoring consumers. (R. at 11). The heeding presumption comes from the

language of the Restatement, and provides: "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 . . . Where warning is given, the seller may reasonably assume that it will be read and heeded. . . ." Restatement (Second) of Torts § 402A cmt. j (Am. Law Inst. 1965). The heeding presumption encourages manufacturers to provide adequate warnings for their own protection, which advances the public policy purpose of providing adequate warning of inherent product dangers. Benjamin J. Jones, Annotation, *Presumption or Inference, in products liability action 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 (1996). Where an adequate warning is not provided, the presumption works for the plaintiff, which advances the public policy purpose of encouraging adequate warnings of inherent danger and risk. *Id*. Ohiowa product liability law is consumer-friendly, and has been influenced by the Restatement. (R. at 12). The heeding presumption allows the plaintiff-consumer to establish proximate cause as a matter of law where it is not rebutted by the defendant, and this creates a prima facie case of failure-to-warn where the other elements have been established. *Coffman v. Keene Corp*. 628 A.2d 710, 717 (N.J. 1993). The heeding presumption protects consumers from inherently dangerous products by encouraging manufacturers to provide adequate warnings on their products.

The heeding presumption has never been applied to state law failure-to-warn claims in Ohiowa courts, and it is presented to this Court as a question of first impression. The appellate court joined nineteen other states that have adopted the heeding presumption as law in failure-to-warn cases[2]. But, seventeen states have refused to adopt the heeding presumption as the law of

[2] However, federal courts in Alaska, Georgia, Hawaii, Illinois, Iowa, Kentucky, Maine, South Dakota, and Wyoming have "predicted" the expansion of state tort liability by recognizing a heeding presumption in the absence of any supporting state-court precedent. This prediction would increase the majority to 28 states that have adopted the heeding presumption.

their State. Of the states that have chosen to adopt or reject the heeding presumption, a majority of those states have adopted it as state law. Of the states that have adopted the heeding presumption as law, almost every state adopted the presumption on the basis of comment j of the Restatement (Second) of Torts § 402A[3]. The appellate court based its decision to adopt the heeding presumption on the same principles as the nineteen other states did, and on the same principles that the Ohiowa legislature looks to. This supports the appellate court's finding that the heeding presumption is the appropriate law for this state, compared to not applying the presumption at all, which leaves consumers vulnerable to irreparable harm.

The heeding presumption provides a shield of protection for both manufacturers and for consumers. The heeding presumption ". . . 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." *Coffman*, 628 A.2d at 718. The heeding presumption was borne from the Restatement (Second) of Torts § 402A, comment j, which reads "[w]here warning is given, the seller may reasonably assume that it will be read and heeded…." This presumption protects manufacturers where adequate warnings are given, but where warnings are inadequate, the presumption is in essence one of causation. *Kovach v. Caligor Midwest*, 913 N.E.2d 193, 199 (Ind. 2009) (citing Restatement (Second) of Torts § 402A cmt j. (Am. Law Inst. 1965)).

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[3] *Golonka v. General Motors Corp.*, 65 P.3d 956, 968-69 (Ariz. Ct. App. 2003); *Kovach v. Caligor Midwest*, 913 N.E.2d 193, 199 (Ind. 2009); *Wooderson v. Ortho Pharmaceutical Corp.*, 681 P.2d 1038, 1049 (Kan. 1984); *Wolfe v. Ford Motor Co.*, 376 N.E.2d 143, 147 (Mass. App. Ct. 1978); *Coffman v. Keene Corp.*, 628 A.2d 710, 717 (N.J. 1993); *Crowston v. Goodyear Tire & Rubber Co.*, 521 N.W.2d 401, 410 (N.D. 1994); *Seley v. G.D. Searle Co.*, 423 N.E.2d 831, 838 (Ohio 1981); *Coward v. Owens-Corning FIverglas Corp.,* 729 A.2d 614, 621 (Pa. Super. Ct. 1999); *Technical Chemical Co. v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972); *House v. Armour of America, Inc.*, 929 P.2d 340, 347 (Utah 1996); *Needham v. Coordinated Apparel Group, Inc.*, 811 A.2d 124, 129 (Vt. 2002); *Tanner v. Shoupe*, 596 N.W.2d 805, 817-18 (Wis. Ct. App. 1999).

Ohiowa product liability law is traditionally consumer friendly, and the heeding presumption follows this trend. The presumption lightens the plaintiff's burden of proof concerning the proximate cause of his or her injuries in strict liability cases. *Coffman*, 628 A.2d 710, 719 (N.J. 1993). The presumption also encourages the introduction of reliable evidence, whereas in the absence of a heeding presumption, testimony as to whether an adequate warning would have been heeded would be self-serving and unreliable. *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1281 (5th Cir. 1974).

The presumption is a rebuttable one, and shifts the burden of proof of causation from the plaintiff to the defendant. The presumption arises if it is proven that the consumer would have read any warning provided by the manufacturer, and acted to minimize any risk. *Cunningham v. Charles Pfizer & Co., Inc.*, 532 P.2d 1377, 1383 (Okla. 1974). In the absence of evidence rebutting the presumption, a jury finding that the defendant's product was the producing cause of the plaintiff's injury would be sufficient to hold him liable. *Id*. To rebut this presumption, the defendant would need to introduce "[e]vidence that a plaintiff would have disregarded an adequate warning would tend to demonstrate that the plaintiff's conduct, rather than the absence of a warning, was the cause in fact of the resultant injury." *Coffman*, 628 A.2d at 721.

If a jurisdiction has not adopted the heeding presumption, then consumers are more vulnerable to a greater magnitude of injuries, and have a more challenging burden to overcome to remedy their suffered injuries. Manufacturers are less incentivized to comply with the duty to warn and create safer products if a jurisdiction has not recognized a heeding presumption. In Alabama, a failure-to-warn claim "should not be submitted to the jury unless there is substantial evidence that an adequate warning would not have been read and heeded and would have prevented the accident." *Deere & Co. v. Grose*, 586 So. 2d 196, 198 (Ala. 1991). Connecticut is

the only state that has rejected the heeding presumption because the burden of proving proximate cause in a failure-to-warn case is determined by statute. *DeJesus v. Craftsman Machine Co.*, 548 A.2d 736, 744 (Conn. Ct. App. 1988). By not recognizing a heeding presumption, manufacturers risk litigation and consumer safety by not creating a safer product, or by not placing adequate warnings on products.

The lack of a heeding presumption raises the difficulty of a victim to recover from the manufacturer, and may lead to the increase of the determinations of causation being based on unreliable evidence. The heeding presumption protects both the consumer and the manufacturer, and advances strong public policy considerations. If a state chooses not to adopt the heeding presumption, it only harms the consumer in the end.

Ohiowa public policy dictates that the heeding presumption is the appropriate and applicable law in this case. The heeding presumption upholds traditional notions of Ohiowa law that tends to favor the consumer. The presumption does this by establishing the proximate cause of the plaintiff's injuries if there is no warning provided. This advances the public policy that manufacturers should create safer products, and provide warnings for their products in order to shield themselves from litigation, and to protect the consumer.

B. Under the heeding presumption, the Tullys were prejudiced by the jury not receiving the proper instruction at the close of trial, preventing the jury from properly resolving all issues of the case.

The lower court improperly denied the requested jury instruction on the heeding presumption from the Tullys. There is a presumption in products liability actions that an adequate warning, if given, will be read and heeded; if an inadequate warning is given, however, a rebuttable presumption arises that the failure to adequately warn was a proximate cause of the

plaintiff's injuries. *Boyd v. Lincoln Elec. Co.*, 902 N.E.2d 1023, 1032 (Ohio Ct. App. 2008). The appellate court held that the heeding presumption is Ohiowa law. (R. at 12).

The party defending the instructions on appeal must show that the requested instructions accurately state the applicable law, the facts supported giving the instruction, and that the instruction was necessary in order to allow the jury to properly resolve all the issues in the case. *Reyka v. Halifax Hosp. Dist.,* 657 So. 2d 967 (Fla. Dist. Ct. App. 1995). If the instructions, as a whole, fairly state the applicable law to the jury, the failure to give a particular instruction will not be an error. *Barton Protective Services, Inc. v. Faber*, 745 So. 2d 968, 974 (Fla. Dist. Ct. App. 1999). This Court reviews a lower court's decision regarding jury instructions for an abuse of discretion, and that error must have resulted in prejudice to the party challenging a jury instruction. *Carter v. Mechanical Services*, 746 P.4d 807, 811 (Ohiowa 2012).

i. The Heeding Presumption raises the presumption that if an adequate warning is given, it will be read and heeded; however, if an inadequate warning is given, a rebuttable presumption arises that the failure to warn was a proximate cause of the plaintiff's injuries.

The heeding presumption is a presumption that if an adequate warning is given, it will be read and heeded; however, if an inadequate warning is given, a rebuttable presumption arises that the failure to warn was a proximate cause of the plaintiff's injuries. *Seley v. G. D. Searle & Co.*, 67 Ohio App. 2d 192, 200 (Ohio Ct. App. 1981). The heeding presumption aids the plaintiff-consumer in establishing the proximate cause of his or her injuries by showing that the product wholly lacked a warning of its inherent dangers, or that the provided warning was inadequate to shield the consumer from harm. It shows that if an adequate warning would have been given, it would have been read and heeded by the plaintiff-consumer, and injury from the product would have been prevented.

To apply the presumption, the court should look to see if there was any warning at all on the product, and if one is present, the court must determine if the warning is adequate or not. The heeding presumption establishes that a warning would have been read and obeyed if present. *Kovach v. Caligor Midwest*, 913 N.E.2d 193, 199 (Ind. 2009). Furthermore, "such a presumption works in favor of the manufacturer when an adequate warning is present." *Ortho Pharmaceutical Corp v. Chapman,* 388 N.E.2d 541, 555 n. 12 (Ind. Ct. App. 1979) (quoting Restatement (Second) of Torts § 402(A) cmt. j. (Am. Law Inst. 1965)). When a warning is absent, the presumption that the user would have read an adequate warning works in favor of the plaintiff. *Id*.

Be that as it may, a manufacturer simply does not escape liability if a warning is present on the product. The warning, if present, must be adequate to for the presumption to work in favor of the manufacturer. A warning that is inadequate because it is not properly displayed can be the proximate cause of harm even if the user did not read the warning. *Boyd v. Lincoln Elec. Co.*, 902 N.E.2d 1023, 1032 (Ohio Ct. App. 2008) (quoting *McConnell v. Cosco, Inc*. 238 F.Supp.2d 970, 978 (S.D. Ohio 2003)). In fact, "[a]n inadequate warning may make a product as unreasonably dangerous as no warning at all." *Crislip v. TCH Liquidating Co.*, 556 N.E.2d 1177, 1182 (Ohio. 1990). A court must consider not only the actual warning, but the method of delivery of the warning. *Boyd.*, 902 N.E.2d at 1031.

In *Boyd*, the Ohio Court of Appeals held that a warning that is inadequate in manner, content, form, or communication can be the proximate cause of the injuries, even if the user did not read the warning. 902 N.E.2d at 1034. The petitioner, Boyd, was a boilermaker welder from 1977 to 2004, and was eventually diagnosed with manganese-induced parkinsonism in 2004 as a result of his profession. *Id.* at 1025. Boilermaker welders used manganese to fuse metals

together, and it was known that manganese fumes and gases were hazardous to one's health. *Id*. Manufacturers began placing warning labels on the manganese containers to warn of the dangers of manganese exposure. *Id*. Boyd never saw the warnings on the containers of manganese because he did not have access to the containers. *Id.* at 1026. Boyd testified that he would have abided by the warnings if he would have seen or read them. *Id*.

The Ohio Court of Appeals examined the warning itself, and the method it was delivered by. *Id.* at 1030. The court found that until 1997, none of the warnings provided the consumer with warning that overexposure could cause central nervous system damage. *Id*. Furthermore, the actual welding consumables did not have a warning. *Id*. The court found the display of warnings inadequate, and found that "a warning that is inadequate because it is not properly displayed can be the proximate cause of harm even if the user did not read the warning. *Id.* at 1033. The court held that Boyd could not read a warning he could not see, but if he could have read it, the warning was inadequate to warn of the potential danger. *Id.* at 1034. The court found that Boyd was entitled to have a jury determine whether the inadequacy of the manufacturers' warning was the proximate cause of his injuries. *Id*.

In order for the presumption to have worked in favor of Zuul in this case, there needed to be an adequate warning affixed to the packaging of the Zuul Skins, and each Zuul Skin itself. Analogous to *Boyd*, L.T. suffered injuries due to an inadequate warning. Zuul has placed warnings on the packaging for each e-cigarette, yet the record is silent as to the content of the warnings and if there was a warning on the product itself. (R. at 4). 902 N.E.2d at 1031. Additionally, the "Zuul Skins" have no additional warnings regarding the dangers of e-cigarettes. (R. at 4). The manganese containers had warnings affixed to them, but the actual product had no warnings, just like the Zuul skins in the instant case. L.T. was injured because he picked up a

Zuul e-cigarette with no warning affixed to it. (R. at 5). The warning only on the package is analogous to *Boyd*, because the end user could not read and heed a warning that he or she would never see. 902 N.E.2d at 1031. Furthermore, both used inherently dangerous products, and the product itself had no warning. This Court should find that the warning that Zuul placed on the e-cigarette packing was inadequate in regard to the method in which it is conveyed. *Seley*, 67 Ohio App. 2d at 198. The only warning given by Zuul had a very low chance to reach the end consumer, thus making it inadequate. The "Zuul Skins" were completely void of any warning whatsoever. This Court should not hold it against L.T. that he did not read a warning before picking up the e-cigarette. Moreover, this Court should apply the reasoning employed in *Boyd*, and find that the jury should determine that if L.T. were presented with an adequate warning, that he would have read and heeded the present danger. 902 N.E.2d at 1034.

At the end of trial, L.T. was entitled to have the jury instructed on the heeding presumption. Zuul should not be able to escape liability by simply placing a warning on the packaging of the e-cigarette, and "checking the box" to shield themselves. The warning was inadequate because of its placement, and because of the likelihood it would never be seen by the end user. Additionally, the Zuul skins never had any additional warnings affixed to the product or the package. Although Zuul did provide a warning on the packaging of the e-cigarette, L.T. is entitled to have the jury instructed on the heeding presumption, because the warning was inadequate.

ii. The application of the heeding doctrine establishes that L.T. was prejudiced by the Lower Court in not allowing the jury instruction, preventing the jury from properly resolving all issues of the case.

Ohiowa products liability law has traditionally been consumer friendly, and the appellate court adhered to this tradition up until the point where L.T. was denied the opportunity to realize the full benefit of the heeding presumption.

As to Issue 2, whether the lower court erred in denying a request for a "read and heed" instruction, a lower court's decision to grant or deny jury instruction is reviewed for an abuse of discretion. *Barton Protective Services, Inc. v. Faber*, 745 So. 2d 968, 974 (Fla. Dist. Ct. App. 1999). Where the trial court commits a clear abuse of discretion is when an error of law occurs that controls the outcome of the case. *Roverano v. John Crane, Inc.*, 177 A.3d 892, 897 (Penn. Super. Ct. 2017). The party defending the instructions on appeal must show that the requested instructions accurately stated the applicable law, the facts supported giving the instruction, and that the instruction was necessary in order to allow the jury to properly resolve all the issues in the case. *Reyka v. Halifax Hosp. Dist.,* 657 So. 2d 967 (Fla. 5th DCA 1995). If the jury instructions, as a whole, fairly state the applicable law to the jury, the failure to give a particular instruction will not be an error. *CSX Transp., Inc., v. Whittler,* 584 So. 2d 579 (5th DCA 1991). *See also Schreiber v. Walt Disney World, Co.,* 389 So. 2d 1040 (Fla. 5th DCA 1980) (each party is entitled to have the jury instructed on his theory of the case). Reversal is required ". . . when (1) 'we have substantial doubt whether the instructions, considered as a whole, properly guided the jury in its deliberations,' *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1235 (10th Cir. 1999) (quotation omitted); and (2) 'when a deficient jury instruction is prejudicial,'" *Coleman v. B-G Maintenance Management of Colo., Inc.*, 108 F.3d 1199, 1201 (10th Cir. 1997).

Here, the requested instructions would have stated the applicable law. The appellate court found that the heeding presumption is the law of the land, and even found that the lower court's

failure to establish this law was an abuse of discretion. (R. at 12). The heeding presumption was the applicable law because Ohiowa public policy tends to favor the consumer, and the heeding presumption is consumer friendly. (R. at 12).

Additionally, the facts supported giving the jury an instruction on the heeding presumption. It has been established that the Zuul Skins had no warning affixed to it, or its packaging. (R. at 4). L.T. was subsequently injured by an explosion caused by a Zuul e-cigarette, with no warning affixed to the product. (R. at 5). As discussed earlier, Zuul should not be able to escape liability even though its product had a warning affixed to it. The warning was inadequate, so the facts support giving the jury instruction. Accordingly, the facts establish that the heeding presumption would have guided the jury as to giving L.T. the presumption that he would have read and heeded a warning on the e-cigarette, if one was present.

Furthermore, the instruction was necessary to in order to allow the jury to properly resolve all issues of the case. The jury could not have properly resolved the issue of the causation of L.T.'s injuries without the heeding presumption instruction. The heeding presumption requires the defendant to come forward with evidence to rebut the presumption that the failure to warn is the proximate cause of the injuries to the plaintiff. If the defendant does not rebut this presumption, then it risks a directed finding against it as to the presumed facts. The jury, although they deliberated for sixteen hours, could not have properly resolved the issue of causation without the presumption. The presumption would have established the proximate cause of L.T.'s injuries as the lack of warning provided by Zuul.

The appellate court, when holding that L.T. did not suffer prejudice, stated that "[r]eversal on the basis of a faulty jury instruction is not easily attained". (R. at 12). But reversal is required in this case.

The jury could not have been properly guided in its deliberations when the instructions, considered as a whole, were completely devoid of the heeding presumption. The jury spent upwards of sixteen hours deliberating, and had a wealth of evidence upon which to base its decision. (R. at 12). Yet, it was all for naught, because the jury was not properly guided. Although there was "a wealth of evidence" for the jury to base its decision on, the jury was not properly instructed on how to weigh or analyze the evidence to reach its decision. (R. at 12). The heeding presumption instruction would have instructed the jury that Zuul did not have adequate warnings on its products, leaving no need to deliberate on the proximate cause of L.T.'s injuries, because they are already established. The record is silent as to what instructions were given to the jury, but it cannot be said that the jury was properly guided in its deliberations without the heeding presumption instruction. (R. at 1-16).

Additionally, prejudice was clearly present from the failure to give the requested jury instruction, because if the jury is not instructed on the heeding presumption, then the plaintiff is unable to gain the full benefit of the doctrine. *Facendo v. S.M.S. Concast, Inc.*, 670 A.2d 44, 50 (N.J. Super. Ct. 1996).

In *Facendo*, the plaintiff was a steel worker injured by an explosion. *Id*. at 48. The plaintiff established at trial that there were no warnings present in the workplace, or manuals given to him, that warned of explosions occurring on the job. *Id*. at 47. The plaintiff further asserted that if he had been told there were explosions in the area he worked then he would not have taken the job. *Id.* at 48. The plaintiff requested the jury be instructed on the heeding presumption, and the trial court judge denied the request. *Id*.

The plaintiff appealed on the same basis as the Tullys did, that the judge's refusal to instruct the jury on the heeding presumption was error. *Id*. New Jersey law requires that the jury

be instructed on the heeding presumption in failure-to-warn cases in order for the plaintiff to gain the full benefit of the doctrine. *Id.* at 50.

The court found that a jury of reasonable persons could differ as to whether the providing of an adequate warning of the danger of explosion and its consequences would have caused plaintiff to remove himself from the risk of such harm. *Id.* at 51. But, the court reasoned that a "proper and complete jury charge as to available inferences based on the heeding presumption was required in these circumstances". *Id*. The court held that the plaintiff was entitled to the full benefit of the heeding presumption, including a jury instruction on the presumption, and reversed and remanded due to the trial court's error in refusing to give the instruction. *Id.* at 51.

Similar to the plaintiff in *Facendo*, L.T. was injured by an explosion where there was no warning that an explosion would, or could, occur. (R. at 5). At trial, the Tullys requested that the jury be instructed on the heeding presumption, or that L.T. would have read and heeded a warning if one were present, thus avoiding danger and injury. (R. at 3). The lower court rejected the Tullys jury instruction request on the presumption, just like the court in *Facendo* had. 670 A.2d 48.

The Tullys were prejudiced by the rejected jury instruction on the heeding presumption because he was never able to gain the full benefit of the doctrine. The heeding presumption effectively proves the causation element, unless the defendant can rebut the presumption with evidence. *Theer v. Philip Carey Co.*, 133 628 A.2d 724, 729 (N.J. 1993). A proper jury instruction would have advised the jury that it may infer that if a proper warning of the danger of the use of the product were provided, it would be heeded. If the jury was properly instructed, it would have been able to consider, from the evidence, whether L.T. was afforded a meaningful choice with respect to avoiding the risk of injury. In this instance, he was not afforded a choice to

avoid the danger because no warning was present on the Zuul Skins. (R.at 4). Therefore, under the heeding presumption, it should have been determined as a matter of law that the injuries L.T. suffered were proximately caused by the inadequate warnings. The jury should have been instructed on this, and the failure to do so prevented the Tullys from gaining the full benefit of the doctrine, just like the plaintiff in *Facendo*. 670 A.2d 51. This failure to properly instruct the jury resulted in clear prejudice to the Tullys, and this error by the lower court requires reversal.

The Tullys have sufficiently shown that the requested instructions would have accurately stated the applicable law, the facts supported giving the instruction, and that the instruction was necessary in order to allow the jury to properly resolve all the issues in the case. The heeding presumption was adopted as Ohiowa law by the appellate court. The facts supported giving the instruction because the Zuul Skin affixed to the e-cigarette lacked a warning on the product, giving the presumption that if one had been there, L.T. would have read and heeded such warning. The instruction would have also allowed the jury to properly resolve all issues in the case, specifically the issue of proximate cause because the presumption would have determined the element satisfied as a matter of law. Finally, the rejection of the heeding presumption jury instruction resulted in prejudice to the Tullys because he was unable to gain the full benefit of the doctrine in jury deliberations. Therefore, reversal is required.

CONCLUSION

This Court should find that there exists a genuine issue of material fact as to the manufacturing design defect claim. Based on the proper application of the consumer expectations test, the Tullys are entitled to present their case to a jury of their peers. Also, Zuul had a duty to warn users of its skins of the dangerous product which they were designed to encase. Accordingly, this Court should find that summary judgment was incorrectly granted in this case. Additionally, this Court should find that the Tullys were prejudiced by the rejection of their requested jury instruction. The jury should have been instructed on the heeding presumption in order to properly resolve all issues of the case. This Court should find that the Tullys were prejudiced because the heeding presumption was not presented to the jury, that omission divested the Tullys of receiving the full benefit of the presumption, and this Court should reverse the holding of the appellate court.