IN THE MISSOURI SUPREME COURT

SUPREME COURT NO. SC90681

JEANNE MOORE and MONTY MOORE,
Appellants,

vs.

FORD MOTOR COMPANY,
Respondent

Appeal from the Circuit Court of St. Louis County, Missouri
Circuit Judge Mark D. Seigel, Case No. 06CC-003222

SUBSTITUTE REPLY BRIEF OF APPELLANTS

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SUPPLEMENTAL STATEMENT OF FACTS

Appellants respectfully submit that some of respondent Ford Motor Company's "facts" ignore the applicable standard of review and violate Mo.R.Civ.P. 84.04(c). Specifically, some of the "facts" set forth by respondent are not "a fair and concise statement of the facts relevant to the questions presented for determination without argument." ***See Evans v. Groves Iron Works,*** 982 S.W.2d 760 (Mo.App. 1998).

Appellants offer the Court the following supplemental facts.

First, notwithstanding respondent's multiple representations to the contrary, appellants offered evidence of vehicles with safer, stronger seats they might have purchased other than the defective Ford Explorer. Plaintiffs' Exhibit 53 (a copy of which appears in the Appendix to respondent's brief) lists several such vehicles, including the 2003 Ford F-150. This exhibit was admitted into evidence. [Tr. Vol. I, p. 261, ll. 5-8].

Secondly, in reply to respondent's host of representations that the front seats in its vehicles are tested to a Delta V of 25, "higher than any other manufacturer in the industry," appellants advise the Court that respondent is being misleading. The truth is that the 2002 Explorer was ***never*** subjected to this test before Jeanne Moore was left crippled by the broken seat in her Explorer. [Tr. Vol. II, p. 954, l. 9 – p. 956, l. 24]. The 25 Delta V test of the seats from the 2002 Explorer was a litigation test, done by Ford as part of its defense to this case, not as part of the development of the 2002 Explorer. ***Id.***

SUPPLEMENTAL ARGUMENT

Appellants respectfully offer the following supplemental argument in support of their request for new trial.

Supplemental Argument in Support of Point Relied On Number 1

Ignoring the applicable standard of review, respondent and its *Amicus*, the Product Liability Advisory Counsel ("PLAC"),[1] have filed briefs bristling with

[1] It is no surprise PLAC raced to respondent's defense. PLAC's membership (Appendix A to PLAC's brief) is a virtual "Who's Who" of corporate tortfeasors. Some of PLAC's prior appearances before this Court have been in defense of manufacturers of lead paint, in opposition to class certification and medical monitoring for children exposed to lead emissions ***and*** in defense of vehicle seats that collapse in rear impacts. ***See City of St. Louis v. Benjamin Moore Paint, et al.,*** 226 S.W.3d 110 (Mo.banc 2007) (*Amicus* brief in support of lead paint sellers); ***Meyer v. Fleur Corporation,*** 220 S.W.3d 712 (Mo.banc 2007) (*Amicus* brief in support of lead smelter defendants that exposed children to toxic emissions); ***Newman v. Ford Motor Company,*** 975 S.W.2d 147 (Mo.banc 1998) (*Amicus* brief in support of respondent wherein a weak Ford front seat collapsed, leaving an innocent consumer paralyzed). PLAC advises the Court that it is simply "seeking fairness and balance" in Missouri's product liability law. ***See*** PLAC brief, p. 1. Not really. PLAC is nothing more than a judicial lobbyist for product manufacturers that seeks to "reform" the law to the benefit of its corporate membership. http://www.plac.com/AM/customsource/security/Login.cfm It is a shame and a sad commentary that Missouri's consumers like Jeanne and Monty do

factual and legal misstatements. Eschewing reasoned legal analysis in favor of hyperbole and contrived hysteria reminiscent of Chicken Little and Henny Penny's quest to tell the King that "the sky is falling,"[2] respondent and PLAC erroneously argue that Missouri common law either does not or should not recognize "point of sale" failure to warn claims. Both urge this Court to approve the injustice perpetuated by the trial court when it directed a verdict against appellants on their failure to warn claims.

Appellants lack the space herein to illustrate and debunk all of the misstatements by respondent and PLAC. Appellants will therefore focus on the most serious misstatements.

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not have an equally well-funded and active judicial lobbyist to ensure "fair and balanced" results.

[2] http://en.wikipedia.org/wiki/The_Sky_Is_Falling_(fable)

Appellants' Failure to Warn Claims

Respondent feigns confusion with respect to appellants' failure to warn claims and criticizes appellants for not offering evidence regarding the warnings appellants contend should have been given. This feigned confusion . . . and indeed, the entire argument . . . is disingenuous.

Respondent had a duty to warn appellants about potential hazards posed by the front seats in the subject Explorer. "Missouri has long recognized that a manufacturer has the duty to warn ultimate users of its products or articles which are inherently dangerous or are dangerous because of the use to which they are put." ***Hill v. General Motors Corp.***, 637 S.W.2d 382, 384 (Mo.App. 1982). This duty to warn of foreseeable and latent dangers is attendant to the proper and intended use of a product. ***Id.*** at 385.

It is uncontroverted that respondent failed to provide consumers with ***any warnings*** that: (1) the front seats in the subject Explorer would fail and collapse rearward in foreseeable rear impacts; and/or (2) Ford had not performed any testing of the seats with dummies ballasted above the weight of a 95th percentile crash test dummy (approximately 220 pounds) and thus, the seats were neither designed nor tested for people larger than 220 pounds. "The lack of an adequate warning in itself renders a product defective or unreasonably dangerous." ***Palmer v. Hobart Corp***., 849 S.W.2d 135, 140 (Mo.App. 1993); ***see also, Tune v. Synergy Gas Corp.,*** 883 S.W.2d 10, 14 (Mo. 1994) ("A jury would have little trouble discerning that no warning was not an adequate warning"); ***Hill v. Air Shields,***

Inc., 721 S.W.2d 112, 119 (Mo.App. 1986) ("When no warning is given, the causation question becomes one for the jury to determine").

Appellants had no obligation to offer examples of alternative warning labels. This is not a requirement under Missouri law. Indeed, evidence of an alternative design is ***not*** required to make a submissible case. ***Smith v. Brown & Williamson Tobacco Corp.***, 275 S.W.3d 748, 793-94 (Mo.App. 2008); ***Thompson v. Brown & Williamson Tobacco Corp.***, 207 S.W.3d 76, 90, ftn. 5, 91 (Mo.App. 2006).

Again, appellants' 402A and negligent failure to warn claims had two components: (1) that the subject Explorer lacked any warnings advising consumers the front seats would collapse in rear impacts; and/or (2) that the front seats were not tested or designed to perform with occupants of Jeanne's size. The first claim was made crystal clear in appellants' opening statement:

> The third reason we've sued Ford arises from simple common sense. Nowhere in the owner's manual or on the on-product labels did Ford tell people who might use the Explorer that it intended the front seats to collapse in a rear impact. That's information we contend in this trial that people are entitled to know before they sit in those front seats. Just as important, I think, that's information we contend in this case that people are entitled to know before they put their children or their loved ones behind these seats. ***None of that information was given to consumers by Ford***. If Jeanne and Monty

would have been warned by Ford or instructed by Ford that the seats in the 2002 Explorer were intended to collapse in a rear impact, they may never have bought their car and we wouldn't be here.

[Tr. Vol. I, p. 10, l. 13 through p.11, l. 3] (Emphasis added).

Importantly, failure to warn claims like these are not foreign to the automobile industry in seatback collapse cases. The plaintiffs in ***Flax v. DaimlerChrysler Corp.,*** 272 S.W.3d 521, 541 (Tenn. 2007) pursued pre- and post-sale failure to warn claims after a front seat in a minivan collapsed in a rear impact, killing a young child. DaimlerChrysler didn't contest the verdict against it for failing to provide a "time of purchase" warning regarding the seat. ***Id.***

Respondent was faced with similar failure to warn claims in ***Ford Motor Company v. Reece,*** 684 S.E.2d 279 (Ga.App. 2009), a case in which Mary Reece suffered a compression fracture to her spine (just like Jeanne Moore) and later died after the front seat in her Ford Tempo collapsed rearward in a rear impact.[3] Likewise, respondent was faced with failure to warn claims in ***Ford Motor Company v. Gibson,*** 659 S.E.2d 346 (Ga. 2008), a case in which seat back failure and a fire in a Ford vehicle took the life of Anne Gibson.

Ford argues that it was entitled to judgment as a matter of law on Gibson's failure-to-warn claims because Ford's failure to warn Ms.

[3] That case was reversed and remanded. It is cited herein to show that appellants' failure to warn claims are commonplace in seat failure litigation.

> Gibson regarding the dangers presented by the Mercury Marquis fuel system, seat backs, and door frame was not the proximate cause of her injuries. However, as there exists some evidence from which a jury could conclude that Ms. Gibson was unaware of (and could not have obviously known about) the potential dangers posed by the Marquis, that Ford was aware of the dangers and failed to adequately warn Ms. Gibson of them, and that the very dangers of which Ford failed to warn Ms. Gibson came to fruition during the car accident that ultimately killed her, this argument is without merit.

Id. at 403.

Respondent must concede that ***Flax, Reece*** and ***Gibson*** involved failure to warn claims pertaining to the manufacturers' failure to warn consumers of the hazards posed by front seats that collapse in rear impacts. Respondent will no doubt argue, however, that these cases have nothing to do with weight.

In that regard, appellants refer the Court to ***Dunne v. Wal-Mart Stores, Inc.,*** 679 So.2d 1034 (La.App. 1996). The plaintiff in ***Dunne,*** weighing 450-500 pounds, was injured when a stationary bicycle collapsed under her. ***Id.*** at 1036. The trial court held that use of the product by someone weighing 500 pounds was not reasonably anticipated. ***Id.*** Plaintiff appealed.

The Georgia Court of Appeals reversed the trial court, stating, "[t]he mere fact that plaintiff was considerably overweight does not place her in a category of persons for whom [the manufacturer] has no responsibility." ***Id.*** at 1037. Like the

seats in the subject Explorer, it was uncontroverted that the exercise bike lacked ***any*** warnings of a maximum weight limit or that the bike had only been tested for certain-sized riders. The court concluded:

> [W]e find that [the manufacturer] failed to exercise reasonable care by failing to warn users that the Aero Cycle had a maximum weight limitation. This failure by [the manufacturer] to warn rendered the product unreasonably dangerous, causing plaintiff's accident and injuries. Moreover, our review of the record convinces us that plaintiff was free from fault as she testified unequivocally that she read the owner's manual before she used the product and that she would have heeded a warning if one had been provided. Also, it is undisputed plaintiff was using the Aero Cycle properly. Accordingly, we find [the manufacturer] solely at fault in causing plaintiff's damages.

Id. at 1038-39.

This was the crux of appellants' weight-related failure to warn claim. Respondent is free to limit the range of potential consumers for whom it tests its products, but it needs to tell people about these limitations and warn those who fall outside the tested range. That is what ladder manufacturers do.[4] And responsible

[4] http://www.sefsc.noaa.gov/HTMLdocs/laddersafety.htm

child safety seat manufacturers.[5] And manufacturers of products as inexpensive as hunting tree stands and camping stools.[6]

The point is that it would have been simple for respondent to include in the owners manual for the subject Explorer and/or in on-product labeling, warnings advising consumers that the front seats in the SUV were intended to collapse in rear impact collisions. It didn't do so. Ford admits that people don't know about this issue. [Tr. Vol. II, p. 939, ll. 6-13]. Jeanne certainly did not know this could happen. [Tr. Vol. I, p. 696, l. 23 – p. 697, l. 8].[7] And it is crucial to remember that ***Ford intended and expected Jeanne's seat to fail and collapse in rear impacts.*** [Tr. Vol. II, p. 937, ll. 1-3]. By collapsing and allowing Jeanne to shoot into the rear seat where she suffered her paralyzing injury, Jeanne's seat performed ***precisely as Ford intended.*** [Tr. Vol. II, p. 963, ll. 14-20]. Yet inexplicably, Ford

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[5] http://www.britaxusa.com/car-seats/fit-my-child

[6] http://www.lonewolfstands.com/shoppingcart/Products/Alpha-Hang-On-Stand__AHO.aspx (tree stand); http://www.ourcampsite.com/stg140.html (stool)

[7] Thus, she was entitled to the heeding presumption on this claim. Respondent's repeated claims that respondents purportedly never offered evidence of what they would have done had they been warned by Ford is not only false (Monty testified that he wouldn't have purchased the vehicle or let Jeanne use it and Jeanne was not allowed by the trial court to offer similar testimony), it ignores the presumption.

made no effort to warn appellants about this issue so they could make an educated decision as to whether they wanted to purchase and/or use the subject Explorer.

Similarly, it would have been simple for respondent to include information or warnings advising consumers that the front seats had only been tested with crash test dummies weighing 220 pounds or less. Again, it failed to do so. Like many people her size, Jeanne was cognizant of and looked for weight-related warnings on products. [Tr. Vol. I, p. 690, ll. 6-11]. She looked for and did not find any weight warnings pertaining to the front seats in the subject Explorer. (Tr. Vol. I, p. 695, l. 9 through p. 694, l. 3]. Jeanne was precluded from telling the jury what she would have done had she been given this information, but Monty told the jury that had such warnings been given, he would have not purchased the vehicle and further, would have done everything in his power to keep Jeanne from using it [Tr. Vol. I, p. 650, l. 10 – p. 651, l. 1; Tr. Vol. I, p. 696, ll. 8– 22].[8]

When the rhetorical excesses of Ford and PLAC are cleared away, there is no doubt but that appellants made a submissible case on their failure to warn claims. Missouri law is clear on this point. ***See Tune, Palmer*** and ***Hill,*** *supra*. The trial court unfairly tilted the playing field in favor of respondent and committed reversible error by directing verdict against appellants. Appellants respectfully ask the Court to remand this case for a new trial on all issues.

[8] As such, not only did the presumption make appellants' failure to warn claims submissible, so to did the appellants' testimony.

The "Time of Purchase" Issue

Respondent and PLAC suggest that appellants' failure to warn claims were limited to "time of purchase" theories. That suggestion is false. While certainly the purchase was part of appellant's claims, it is also clear from the evidence that these claims extended to whether, properly warned, Jeanne and Monty would have ***kept*** and ***used*** the vehicle. Jeanne and Monty gave extensive testimony relevant to their failure to warn claims. [Tr. Vol. I, p. 648, l. 22 – p. 649, l. 6; Tr. Vol. I, p. 650, l. 10 – p. 651, l. 1; Tr. Vol. I, p. 690, ll. 6-11; Tr. Vol. I, p. 693, l. 25 – p. 696, l. 2; Tr. Vol. I, p. 696, l. 23 – p. 697, l. 8]. Some of the questions to Monty referenced not the time of purchase, but rather, ***the month of the wreck***. [Tr. Vol. I, p. 650, l. 10 – p. 651, l. 1]. The only questions to either appellant regarding the "time of purchase" were asked of Jeanne and the trial court improperly refused to allow her to answer those questions. [Tr. Vol. I, p. 696, ll. 8-22].

Respondent and PLAC present convoluted legal analyses of Missouri law, hopelessly intermixed and confused with citations to inapplicable extraterritorial cases and treatises.[9] The ribbon that ties this morass together is a two-part "parade

[9] And lest there be any confusion, what both respondent and the judicial lobbyist for the product manufacturers want is the death penalty for failure to warn claims. This has nothing to do with "fairness and balance," but rather, it is simply about closing the courthouse doors to people like Jeanne, Monty and other Missouri consumers who pursue failure to warn claims against product manufacturers.

of horribles" of what might happen if this Court sanctions "time of purchase" failure to warn claims.

Respondent and PLAC gloss over and, in some instances, misstate, Missouri law. A review of that law proves appellants made a submissible case on their failure to warn claims.

The most recent Missouri product liability case in which failure to warn was a significant issue was ***Smith v. Brown & Williamson Tobacco Corp.***, 275 S.W.3d 748 (Mo.App. 2008).[10] ***Smith*** was a wrongful death case brought against a tobacco company. The Western District engaged in a scholarly analysis of Missouri failure to warn law. ***Id.*** at 784-90. The plaintiffs' failure to warn theory was that, had the tobacco company provided proper warnings on or with its cigarettes, their decedent would have stopped purchasing and using cigarettes.[11] The Western District concluded these claims were properly submitted to the jury. ***Id.*** at 789-790.

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[10] PLAC fails to acknowledge ***Smith.*** Respondent acknowledges the opinion, but uses the "it's a tobacco case" distinction methodology. The fallacy in this distinction is silly . . . ***Smith*** is a product liability case applying Missouri failure to warn law. As such, it is instructive, notwithstanding respondent's legal sophistry.

[11] In other words, it was not only a "time of purchase" theory, but a "use" theory as well, just like appellants' claims herein.

Like ***Smith, Thompson v. Brown & Williamson Tobacco Corp.***, 207 S.W.3d 76 (Mo.App. 2006) was a tobacco case.[12] Unlike ***Smith, Thompson*** was not a wrongful death case. Rather, it was a case brought by a smoker and his wife. ***Id.*** at 85. One of the issues on appeal was whether plaintiffs' failure to warn claims . . . claims that had Mr. Smith been provided warnings on or with its cigarettes, Mr. Smith would have stopped purchasing and using cigarettes . . . was appropriately submitted to the jury.[13] The Western District concluded that Mr. Smith "did not have knowledge of the specific danger confronting him," that no labels warned of the specific dangers at issue, and that Mr. Smith would not have become a "confirmed Marlboro smoker" if he'd seen specific warnings and as

[12] PLAC fails to acknowledge ***Thompson.*** Again, rather than engaging this opinion meaningfully, respondent opts for the "it's a tobacco case" distinction methodology. Under this methodology, one can only assume that ***Newman***, *supra*, is an analogous Missouri case. Like Jeanne Moore, Deborah Newman was left paralyzed after the defective seat in her Ford vehicle failed. Interestingly, neither Jeanne nor Ms. Newman were warned by respondent that their seats would collapse in foreseeable rear impacts. But not surprisingly, respondent attempts to distinguish ***Newman*** too, relying on the "different vehicle, different seat" technique.

[13] Again, not only a "time of purchase" theory, but a "use" theory as well.

such, the issue of causation in failure to warn was properly submitted to the jury ***Id.*** at 107-08.

Smith and ***Thompson*** both involved failure to warn claims with "time of purchase" components (had warnings been given, the actors would not have purchased the cigarettes) as well as "use" components (had warnings been given, the actors would not have continued smoking). As such, both are analogous to this case, in which appellants asserted that, had proper warnings been given, they either would not have purchased the subject vehicle or would have stopped using it. ***Smith*** and ***Thompson*** compel two conclusions: (1) the trial court committed reversible error in directing a verdict against apellants on their failure to warn claims; and (2) the underlying Eastern District opinion misstates Missouri law.

In addition to the uncontroverted testimony from Jeanne and Monty supporting submissibility of their failure to warn claims, appellants also offered the testimony of Ford's corporate representative, Roger Burnett, that Ford only tells consumers about seat back collapse if they call to ask. [Tr. Vol. II, p. 939, ll. 6-13]. It is uncontroverted no warnings are given to consumers like appellants.

Ford and PLAC both cite, but misstate, ***Steele v. Evenflo Co., Inc.***, 178 S.W.3d 715 (Mo.App. 2005).[14] ***Steele*** was a product liability case in which a boy

[14] The undersigned law firms were trial and appellate counsel for the Steele family. As such, some of the information *infra* is from personal knowledge and may not appear in either published opinion.

was crippled in a wreck by a defective child safety seat. Like virtually every other defendant involved in a product liability case applying Missouri law, the defendant in ***Steele*** tried to take advantage of the inconsistencies in Missouri failure to warn law by doing the "***Arnold*** Two Step."[15] Specifically, the defendant, Evenflo, moved for summary judgment on the plaintiff's failure to warn claims, arguing there was no proof that proper warnings would have altered the behavior of the actors involved in the wreck.[16]

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[15] Appellants described this legal dance in their primary brief. Defendants attempt to exploit the inconsistencies in ***Arnold v. Ingersoll-Rand Co.***, 834 S.W.2d 192 (Mo.banc 1992) ("***Arnold I***"), ***Arnold v. Ingersoll-Rand Co***, 908 S.W.2d 757 (Mo.App. 1995) ("***Arnold II***"). Defendants move, citing ***Arnold II***, to preclude the plaintiff from offering evidence to satisfy the second prong of the causation element of failure to warn claims. Then, once successful in excluding the evidence that satisfies the second prong, they then move for directed verdict or JNOV, arguing that the plaintiff failed to prove causation, citing ***Arnold I.***

[16] This point requires some clarification. The injured child was DJ Steele. DJ's father was Damon Steele. DJ was injured in a vehicle driven by Patricia Mullins. Evenflo argued, *inter alia,* that there was no proof that warnings would have altered Ms. Mullins' actions on the day of the wreck.

The trial court didn't buy the "***Arnold*** Two Step." It denied Evenflo's motion. After a verdict in favor of the plaintiff, the case made two trips to the Eastern District. The appeal being discussed was the second appeal.

The primary issue before the Eastern District was whether plaintiff's failure to warn claims were properly submitted to the jury. The court noted that the plaintiff had not heard any negative reports about the subject seat, he read the labels provided on the seat and lastly, testified that had he been properly warned, he never would have purchased the seat. ***Steele,*** 187 S.W.3d at 718.[17] As such, the court concluded plaintiff's claims were properly submitted to the jury. ***Id.***

Steele is squarely on point. It was a "time of purchase" case. The trial court didn't accept the defendant's invitation to dance the "***Arnold*** Two Step" and consequently, DJ and his father were given a level playing field on which to try their case. Appellants respectfully ask the Court to clarify and fix the undeniable conflict between ***Arnold I*** and ***Arnold II.***[18]

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[17] PLAC and respondent misstate ***Steele.*** Both suggest that this testimony came in without objection from the defendant. That's not right. In fact, once it became clear that the trial court didn't buy the "***Arnold*** Two Step," the defendant offered the testimony. It was the plaintiff who did not object.

[18] Appellants explained the dissonance between the two ***Arnold*** opinions in their primary brief and, without being repetitive, they again submit that it is unfair to, on the one hand, require plaintiffs to establish a certain proposition to make a

Another decision of import was this Court's opinion in ***Kansas City v. Keene Corp.***, 855 S.W.2d 360 (Mo.banc 1993).[19] ***Keene*** was an asbestos case brought against a supplier of fireproofing spray that contained asbestos. ***Id.*** at 365. This Court affirmed a judgment in favor of the plaintiff. With respect to the plaintiff's failure to warn claims, the Court held that "[h]ere, the jury could find that plaintiff would not have installed the product if a proper warning was given concerning the health hazard . . . . The court did not err in failing to direct a verdict for Keene on the claim of failure to warn." ***Id.*** at 370.[20] A virtually identical decision was reached in ***Clayton Center Associates v. W.R. Grace & Co.,*** 861 S.W.2d 686 (Mo.App. 1993), another asbestos case.[21] As in ***Keene,*** the court concluded that plaintiffs' failure to warn claim was properly submitted to the jury

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claim submissible and then, on the other hand, preclude plaintiffs from proving that proposition.

[19] PLAC failed to acknowledge ***Keene.*** Respondent cited it twice, but only for the proposition that deference should be given to the trial court with respect to the admission of evidence.

[20] A failure to warn claim asserting that the plaintiff would not have "installed" the product had the plaintiff been properly warned is no different than appellants' claims herein that they would not have purchased or used the product had they been warned.

[21] PLAC and respondent both fail to acknowledge ***Clayton.***

because, *inter alia,* the jury could have concluded that had the plaintiffs been warned about the asbestos, they would not have "installed" it. ***Id.*** at 692.

Appellants could go on, but this list illustrates that this Court and others have allowed "time of purchase" and related failure to warn claims to stand scrutiny. The sole Missouri case relied upon by respondent and PLAC and the only authority cited in the underlying opinion that ostensibly stands for the proposition that "time of purchase" claims aren't valid is ***Arnold I.*** Appellants deconstructed and explained ***Arnold I*** in their prior briefing and will not reiterate that analysis herein, except to remind the Court that Mr. Arnold's first causation thesis was that a warning would have altered the conduct of the seller and purchaser of the air compressor (neither of whom were Mr. Arnold) and caused the air compressor to never be purchased. ***Arnold I***, 834 S.W.2d at 193. The Court held this first theory "ignores any reasonable concept of proximate cause." ***Id.*** Why? Because it had nothing to do with anyone involved in the explosion (like Mr. Arnold). This case is patently different because, like ***Smith, Thompson*** and ***Steele,*** the "time of purchase" causation analysis focuses on the person who was ultimately impacted by the defective product [the smokers (and their decedents) in ***Smith*** and ***Thompson,*** Mr. Steele (as father and Next Friend of his son, DJ) in ***Steele*** and Jeanne and Monty in this case].

Appellants' failure to warn claims included, but were not limited to, a "time of purchase" causation theory. Under the facts of this case, "time of purchase"

causation is viable and proper. The underlying opinion to the contrary misstates Missouri law.

Appellants' Failure to Warn Claims did not Require a Warnings Expert

Respondent persists in arguing that appellants' failure to warn claims must fail because appellants did not have a warnings expert to opine that warnings would have altered appellants' conduct.[22] However, expert testimony is not required to make a submissible case in product liability claims based on failure to warn. ***Tune,*** *supra,* 883 S.W.2d at 14; ***Winters v. Sears, Roebuck & Co.***, 554 S.W.2d 565, 569 (Mo.App. 1977).

[22] Appellants hope the irony of this argument is not overlooked by the Court. Respondent argues it is "speculative" for a plaintiff to testify about how a warning would have changed her behavior and instead, is advocating that only an expert can opine what a plaintiff might have done with additional or better warnings. So under respondent's "logic," it is not proper for this author to opine what he would have done under different facts, but it is fine for a third party to offer that opinion. Respondent's logic is wrong. ***See, e.g., Bagnell v. Ford Motor Company,*** 678 S.E.2d 489, 838 (Ga.App. 2009) (Holding it was reversible error to preclude testimony from a driver in support of a failure to warn claim that the driver would not have driven a Ford van on the day of the wreck if respondent had given appropriate warnings).

Respondent tries to distinguish ***Tune,*** but fails. Indeed, ***Tune*** is squarely on point. ***Tune*** involved a propane gas explosion. 883 S.W.2d at 12-13. The defendant appealed a verdict in favor of the plaintiff. One of the issues was the submissibility of plaintiff's failure to warn claims in the absence of expert testimony that the product was defective and unreasonably dangerous. ***Id.*** at 13.

> Synergy urges this Court to adopt a rule requiring expert testimony to establish product defect or unreasonable danger in every design defect or failure to warn case. In this case, there was expert testimony that the effectiveness of ethyl mercaptan can decrease, that Synergy gave no warning of this characteristic, that propane is very dangerous without knowledge of this characteristic, and the circumstances were consistent with there having been a significant decrease in odorant concentration. The jury had guidance and was not left to speculation and conjecture. Given this information, a reasonable jury would have no problem in determining that propane gas is unreasonably dangerous and should be able to make this determination, particularly where there was no warning at all. ***A jury would have little trouble discerning that no warning was not an adequate warning.*** We decline to adopt the overly-inclusive rule proposed by Synergy in this case.

Id. at 14.

This case presents an even better case than ***Tune.*** Here, the jury heard extensive expert testimony about how the front seats in Jeanne's Explorer were defective and unreasonably dangerous. Mr. D'Aulerio opined that, to be safe, a seat needs to be designed to do the same thing in a rear impact that the seat belt does in a frontal impact; restrain the person in the seat. [Tr. Vol. I, p. 216, l. 23 – p. 218, l. 13]. Therefore, a seat back should not be designed to collapse in a rear impact any more than a seatbelt should be designed to fail in a frontal impact. [Tr. Vol. I, p. 218, ll. 14-19]. A properly designed seat should remain essentially upright in a rear impact to provide full support to the person's torso, neck and head and prevent the occupant from moving rearward. [Tr. Vol. I, p. 272, l. 21 – p. 273, l. 9]. Mr. D'Aulerio opined that a seat that collapses rearward poses a serious risk of harm. [Tr. Vol. I, p. 240, ll. 13-18].

Mr. D'Aulerio opined that the driver's seat in Jeanne's Explorer was defective and unreasonably dangerous "because it did not do the job that it's intended to, that is, to protect people during rear-impacts," and was not strong enough to prevent Jeanne from moving rearward and hitting the backseat. [Tr. Vol. I, p. 259, l. 1 – p. 260, l. 1]. ***Tune*** is binding precedent that requires appellants be given a new trial.

Respondent focuses on a handful of federal decisions. Appellants urge the Court to look closely at the federal opinions upon which respondent relies because they are all in stark contrast to this case.

The lead case cited by respondent is ***Davidson v. Besser Co.,*** 70 F.Supp.2d 1020 (E.D.Mo. 1999). Respondent cites ***Davidson*** for the proposition that failure to warn claims require expert testimony that additional or other warnings would have altered the plaintiff's conduct. In support of this proposition, the ***Davidson*** court cites ***Jaurequi v. Carter Manufacturing Co., Inc.,*** 173 F.3d 1076, 1085 (8th Cir. 1999).

In fact, ***Jaurequi*** stands for no such proposition.[23]

Jaurequi was a product liability case pertaining to injuries suffered when the plaintiff came into contact with a corn head combine attachment. ***Id.*** at 1078-79. The Eighth Circuit affirmed the exclusion of the plaintiff's two experts under ***Daubert***. ***Id.*** at 1081-1084.[24] Turning to defendant's motion for summary judgment, the court noted that, in response to the motion, "Jaurequi did not provide countervailing citations to depositions or even a statement of contested

[23] Two points bear noting. First, ***Jaurequi*** fails to cite ***Tune***, which predated it by five years. Second, none of Missouri's appellate courts (including this Court) have ever cited ***Jaurequi*** for ***any point of law***.

[24] The Court also noted that: (1) warnings on the corn head had been painted over, twice, and thus, any inadequacies could not have proximately caused the plaintiff's injuries; and (2) the plaintiff admitted he was aware of the dangers posed by the corn head and thus, any defective warnings could not be the cause of his injuries. ***Id.*** at 1084.

facts." ***Id.*** at 1085. Jaurequi relied exclusively on the affidavits of his two excluded experts. ***Id.*** In light of Jaurequi's failure to comply with the requirements of Fed.R.Civ.P. 56, the Eighth Circuit held that summary judgment was properly granted. At no point in time did the Eighth Circuit adopt a bright-line requirement for expert witness testimony in failure to warn cases.[25]

[25] Respondent's brief might suggest otherwise. However, the parenthetical quotation on page 23 of respondent's brief is not from the Eighth Circuit opinion in ***Jaurequi*** but rather, is from the opinion of the district court judge. ***Jaurequi v. John Deere Company,*** 971 F.Supp. 416, 431 (E.D.Mo. 1997). Furthermore, respondent misrepresents what the court actually said. In its brief, respondent represents that the district court held that "Thus, plaintiff has failed to present any evidence that his experts' proposed warnings would have in any way altered the behavior of plaintiff." ***See*** respondent's brief, p. 23. Unfortunately, that's not what the district court wrote in its opinion. The actual quote is "[t]hus, plaintiff has failed to present any evidence that his experts' proposed warnings would have in any way altered the behavior of the plaintiff***, in light of the verbal warnings that plaintiff received." Jaurequi,*** 971 F.Supp. at 431. The district court did not adopt a bright-line requirement for expert witness testimony in a failure to warn case but rather, simply concluded that plaintiff couldn't satisfy the second causation prong . . . that an adequate warning would have altered the conduct of

As such, the ***Davidson*** court erred in citing ***Jaurequi*** for this proposition of law. Likewise, the federal district court's reliance on ***Davidson*** for this proposition of law in ***Bryant v. Laiko International Co., Inc.,*** 2006 WL 2788520 (E.D.Mo. 2006) is equally wrong.

A final case relied upon by respondent, ***Arnold v. Amada North America, Inc.,*** 2008 WL 3411789 (E.D.Mo. 2008), does not stand for the proposition that failure to warn claims must be supported by expert witness testimony. ***Arnold*** was a punch press case. The federal district court excluded the plaintiff's liability expert under ***Daubert***. ***Id.*** at 3-8. Having excluded the only liability expert, the district court granted summary judgment in favor of the defendant, holding that "Arnold will be unable to meet his burden under Missouri law in showing the press brake machine was in a defective condition and unreasonably dangerous without the assistance of an expert." ***Id.*** at 10.

In stark contrast to ***Arnold,*** appellants presented exhaustive evidence and testimony establishing that the front seats in the subject Explorer were defective and unreasonably dangerous when used without knowledge of their characteristics. As such, ***Arnold*** supports appellants' contention that the trial court erred in granting a directed verdict in favor of respondent.

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the plaintiff . . . because the plaintiff was verbally warned, yet ignored those verbal warnings.

Lastly, it bears noting that the federal district judges appear to have rectified the confusion caused by misinterpretation of the ***Jaurequi*** opinions. Appellants refer the Court to ***Lawson v. Deboer Transportation, Inc.,*** 2009 WL 1310027 (E.D.Mo. 2009). In ***Lawson,*** defendants urged the district court to find that Missouri law required an expert witness to support a product liability claim. Citing ***Tune,*** *supra,* the district court noted that "[c]ontrary to defendants' assertion here, expert testimony is not required for a submissible case on product defect." ***Id.*** at 3 (Citations omitted). The defendants in ***Lawson*** urged the district court to follow precedent from other jurisdictions that require expert testimony to support product liability claims. The district court concluded that "[b]ecause Missouri law is well settled in this regard, the undersigned declines to look to other jurisdictions for guidance." ***Id.*** at 4.

Missouri law is, in fact, "well settled." Appellants did not need an expert witness to make a submissible case on their failure to warn claims. They presented extensive evidence and testimony establishing that the front seats in the Explorer were defective and unreasonably dangerous. Further, it is uncontroverted: (1) that the subject Explorer lacked any warnings that the front seats would collapse in rear impacts; and/or (2) that consumers were not warned that the front seats were not tested or designed to perform with occupants of Jeanne's size. Lastly, absent warnings, it is uncontroverted that Jeanne and Monty had no idea of the dangers posed by the seats in their Explorer. Proper warnings would have allowed them to make informed, educated opinions about whether to

purchase and/or use the subject Explorer. ***See, Steele, supra*** and ***Kansas City, supra.*** As such, the trial court erred in granting directed verdict on appellants' failure to warn claims.

Supplemental Argument in Support of Points Relied On Numbers 2-5

Appellants respectfully submit that no further briefing is required on these issues.

CONCLUSION

This appeal gives the Court an opportunity to do something extremely important for Missouri citizens. First, the Court can clarify and fix the conflict in the ***Arnold*** opinions so that litigants and trial judges no longer have to struggle through the "***Arnold*** Two Step." Second, the Court can reaffirm that, under the right facts (including the facts in this case), a submissible failure to warn case can be premised upon a "time of purchase" theory. Third and lastly, the Court can give Jeanne and Monty Moore a full and fair opportunity to try their case against respondent on level ground.

For all of the reasons set forth in their briefing, appellants respectfully ask that this Court reverse the judgment below. Appellants respectfully submit that they are entitled to a new trial on all issues.

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RULE 84.06(c) CERTIFICATION

Pursuant to Mo.R.Civ.P. 84.06(c), the undersigned hereby certifies that: (1) this brief includes the information required by Rule 55.03; (2) this brief complies with the limitations contained in Rule 84.06(b); and (3) pursuant to those rules, this brief contains 7,692 words as calculated by the Microsoft Word software used to prepare it.

The undersigned further certifies that the CD-ROM electronic copy of this brief filed with the Court has been scanned for viruses and is virus-free.

_____
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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rules 84.05 and 84.06(g) one copy of the above and foregoing brief plus one copy on a CD-ROM (that appellants hereby certify was scanned for viruses and is virus free) were served via U.S. Mail, postage prepaid this 25th day of May, 2010 to:

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