

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 BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIESii
JURISDICTIONAL STATEMENT.....	1
STATEMENT OF FACTS.....	1
The Product and Appellants’ Claims	1
Background Facts.....	2
Procedural History	8
POINTS RELIED ON AND SUPPORTING AUTHORITY	10
ARGUMENT.....	15
Point Relied On No. 1	18
Point Relied on No. 2.....	54
Point Relied on No. 3.....	60
Point Relied on No. 4.....	72
Point Relied on No. 5.....	80
CONCLUSION	82
RULE 84.06(c) CERTIFICATION	83
CERTIFICATE OF SERVICE	84
APPENDIX	

TABLE OF AUTHORITIES

Case Law

Page(s)

Aliff v. Cody,

26 S.W.3d 309 (Mo.App. 2000) 54

Arnold v. Ingersoll-Rand Co., (“Arnold I”)

834 S.W.2d 192 (Mo. 1992). 32, 34, 43-46, 49-52

Arnold v. Ingersoll-Rand Co., (“Arnold II”)

908 S.W.2d 757 (Mo.App. 1995). 34, 46, 49-51

Bean v. Ross Mfg. Co.,

344 S.W.2d 18 (Mo. 1961). 36

Brennan v. St. Louis Zoological Park,

882 S.W.2d 271 (Mo.App. 1994). 13, 77, 78

Byers v. Cheng,

238 S.W.3d 717 (Mo.App. 2007). 54

Carter v. Jones Truck Lines, Inc.,

943 S.W.2d 821 (Mo.App. 1997). 74

Childs v. Williams,

825 S.W.2d 4 (Mo.App. 1992). 13, 73

Cole v. Goodyear Tire & Rubber Co.,

967 S.W.2d 176 (Mo.App. 1998). 23, 34, 52

<i>Crawford ex rel. Crawford v. Shop ‘N Save Warehouse Foods, Inc.,</i>	
91 S.W.3d 646 (Mo.App. 2002).	80
<i>Cryts v. Ford Motor Co.,</i>	
571 S.W.2d 683 (Mo.App. 1978).	12, 16, 62, 66, 68, 69
<i>Daniele v. Missouri Dept. of Conservation,</i>	
282 S.W.3d 876 (Mo.App. 2009).	19, 41
<i>Duke v. Gulf & Western Mfg. Co.,</i>	
660 S.W.2d 404 (Mo.App. 1983).	34
<i>Dunn v. Enterprise-Rent-A-Car Co.,</i>	
170 S.W.3d 1 (Mo.App. 2005).	18, 19, 36
<i>Elmore v. Owens-Illinois, Inc.,</i>	
673 S.W.2d 434 (Mo. 1984).	62, 68
<i>Farley v. Johnny Londoff Chevrolet, Inc.,</i>	
673 S.W.2d 800 (Mo.App. 1984).	80
<i>Faught v. Washam,</i>	
329 S.W.2d 588 (Mo. 1959).	14, 81
<i>Grady v. American Optical Corp.,</i>	
702 S.W.2d 911 (Mo.App. 1985).	24, 31
<i>Hill v. Air Shields, Inc.,</i>	
21 S.W.2d 112 (Mo.App. 1986).	32, 37, 38, 50, 63
<i>Houfburg v. Kansas City Stock Yards Company of Maine,</i>	
283 S.W.2d 539 (Mo. 1955).	55

<i>Jackson v. Leland Health Care, LLC.,</i>	
2008 WL 6049187, *10 (Mo.App. 2008)	41
<i>Johnson v. Allstate Indem. Co.,</i>	
278 S.W.3d 228 (Mo.App. 2009).	18
<i>Johnson v. Hannibal Mower Corp.,</i>	
679 S.W.2d 884 (Mo.App. 1984).	12, 16, 61, 62, 69, 70, 71
<i>KRP ex rel. Brown v. Penyweit,</i>	
219 S.W.3d 829 (Mo.App. 2007).	60, 72
<i>Kansas City v. Keene Corp.,</i>	
855 S.W.2d 360 (Mo.banc 1993)	44, 47
<i>Klein v. General Elec. Co.,</i>	
714 S.W.2d 896 (Mo.App. 1986).	12, 16, 66
<i>Klugesherz v. American Honda Motor Co.,</i>	
929 S.W.2d 811 (Mo.App. 1996).	35
<i>La Plant v. E.I. Dupont Nemours & Co.,</i>	
346 S.W.2d 231 (Mo.App. 1961).	38, 42
<i>Lane v. Amsted Industries, Inc.,</i>	
779 S.W.2d 754 (Mo.App. 1989).	61, 65
<i>Lay v. P&G Health Care, Inc.,</i>	
37 S.W.3d 310 (Mo.App. 2000).	62, 69
<i>Long v. St. John’s Regional Health Ctr., Inc.,</i>	
98 S.W.3d 601 (Mo.App. 2003).	11, 56, 58

<i>McNear v. Rhoades,</i>	
992 S.W.2d 877 (Mo.App. 1999).....	65
<i>Morrison v. St. Luke’s Health Corp.,</i>	
929 S.W.2d 898 (Mo.App. 1996).....	19
<i>Myers v. Moffett,</i>	
312 S.W.2d 59 (Mo. 1958).....	14, 81
<i>Nesselrode v. Exec. Beechcraft, Inc.,</i>	
707 S.W.2d 371 (Mo. 1986).....	23, 31
<i>Newman v. Ford Motor Co.,</i>	
975 S.W.2d 147 (Mo. 1998).....	26
<i>Page v. Kankey,</i>	
6 Mo. 227 (Mo. 1840).....	59
<i>Palmer v. Hobart Corp.,</i>	
49 S.W.2d 135 (Mo.App. 1993).....	10, 30, 34, 35, 42
<i>Pettus v. A.R. Casey,</i>	
358 S.W.2d 41 (Mo. 1962).....	55
<i>Pfeffer v. Kerr,</i>	
693 S.W.2d 296 (Mo.App. 1985).....	76
<i>Racer v. Utterman,</i>	
629 S.W.2d 387 (Mo.App. 1981).....	32
<i>Reno v. Wakeman,</i>	
869 S.W.2d 219 (Mo.App. 1993).....	11, 56, 58

<i>St. Louis County v. Meyer Properties, LLC,</i>	
250 S.W.3d 833 (Mo.App. 2008)	60, 72
<i>Scott v. Blue Springs Ford Sales, Inc.,</i>	
215 S.W.3d 145 (Mo.App. 2006)	60, 72
<i>Slusher v. Jack Roach Cadillac, Inc.,</i>	
719 S.W.2d 880 (Mo.App. 1986)	61, 71
<i>Smith v. Brown & Williamson Tobacco Corp.,</i>	
275 S.W.3d 748 (Mo.App. 2008)	10, 19, 21, 32-34, 36-37, 40, 46-47
<i>State ex rel. Collet v. Scopel,</i>	
316 S.W.2d 515 (Mo. 1958)	73
<i>State v. Forrest,</i>	
183 S.W.3d 218 (Mo. 2006)	60, 72, 80
<i>State v. Gardner,</i>	
8 S.W.3d 66 (Mo.banc 1999)	11, 16, 55, 59
<i>State v. Jaynes,</i>	
949 S.W.2d 633 (Mo.App. 1997)	55
<i>State v. Newcomb,</i>	
934 S.W.2d 608 (Mo.App. 1996)	78
<i>Steele v. Evenflo Company, Inc.,</i>	
178 S.W.3d 715 (Mo.App. 2005)	35, 44, 47
<i>Thompson v. Brown & Williamson Tobacco Corp.,</i>	
207 S.W.3d 76 (Mo.App. 2006)	21, 24, 47

Thong v. My River Home Harbour, Inc.,

3 S.W.3d 373 (Mo.App. 1999) 19

Tune v. Synergy Gas Corp.,

883 S.W.2d 10 (Mo. 1994).10, 21, 30, 32-33, 50, 52

Uxa ex rel. Uxa v. Marconi,

128 S.W.3d 121 (Mo.App. 2003). 12, 16, 66, 68

Williams v. Trans States Airlines, Inc.,

281 S.W.3d 854 (Mo.App. 2009). 80

Winters v. Sears, Roebuck & Co.,

554 S.W.2d 565 (Mo.App. 1977). 21

Other Authorities

MAI 25.05 23, 42

MAI 25.09 38

Mo.Const. Art. V, § 3.1

Mo.R.Civ.P. 57.037

R.S.Mo. § 477.0501

R.S.Mo. § 490.065. 73

R.S.Mo. § 491.070. 16, 55, 59

JURISDICTIONAL STATEMENT

This is an appeal by plaintiffs/appellants Jeanne and Monty Moore. The appeal arises from a judgment entered in favor of respondent, Ford Motor Company (“Ford”) on December 17th, 2008, by the Honorable Mark Seigel, Division 3, in the Circuit Court of St. Louis County.

On December 22nd, 2009, the Eastern District Court of Appeals issued an opinion that affirmed the trial court. *See* Appendix, A24. On March 23rd, 2010, this Court sustained appellants’ timely application for transfer and ordered this matter transferred to this Court. This Court has jurisdiction. Mo.Const., Art. V, § 3; R.S.Mo. § 477.050.

STATEMENT OF FACTS

For the Court’s convenience, appellants will outline the background facts pertinent to the legal issues raised herein, their liability claims, and lastly, the pertinent procedural history.

The Product and Appellants’ Claims

This is a product liability case. The product at issue is Jeanne’s 2002 Ford Explorer. Appellants contend that the driver’s seat in Jeanne’s Explorer is defective and unreasonably dangerous because it fails to adequately restrain occupants in foreseeable rear impact collisions. [L.F. Vol. I, pp. 16-18; Tr. Vol. I, p. 240, ll. 13-18; p. 259, l. 1 – p. 260, l. 1]. Appellants asserted at trial that the driver’s seat failed in a wreck and collapsed, allowing Jeanne to strike the rear

seat, which in turn, caused or contributed to cause Jeanne to suffer serious injuries. [Tr. Vol. I, p. 484, l. 22 – p. 485, l. 18; p. 469, l. 21 – p. 470, l. 7; p. 481, ll. 6-20].

In addition, appellants asserted that the Explorer's warnings were defective. [L.F. Vol. I, pp. 16-17]. The Explorer lacked any warnings that: (1) the front seats could collapse in rear impacts; and/or (2) that the front seats were not tested or designed to perform with occupants of Jeanne's size. [Tr. Vol. I, p. 650, ll. 10-17; p. 694, l. 13 – p. 696, l. 2; p. 696, l. 23 – p. 697, l. 8].

Lastly, appellants contend that Ford was negligent with respect to the testing, design and labeling of the Explorer. [L.F. Vol. I, pp. 19-20]. Specifically, appellants contend Ford was negligent in its design of the seat because it was not designed to remain upright and restrain occupants in foreseeable crashes, it was not designed for foreseeable occupants like Jeanne, it was never tested to see how it would perform with an occupant heavier than 220 pounds, and Ford did not equip it with any warnings that the seat could collapse in rear impacts or had not been tested with occupants above 220 pounds. [Tr. Vol. I, p. 218, l. 20 – p. 219, l. 4; p. 243, l. 12 – p. 246, l. 4; p. 263, l. 19 – p. 264, l. 16; p. 268, ll. 20-22].

Background Facts

In April of 2005, Jeanne and Monty Moore purchased their 2002 Ford Explorer. [Tr. Vol. I, p. 693, ll. 2-8]. This case arises out of a wreck involving that Explorer – an event that left Jeanne paralyzed and in a wheelchair for the rest of her life. [Tr. Vol. I, p. 703, ll. 13-23].

The wreck occurred on November 1, 2005. [Tr. Vol. I, p. 64, ll. 9-13]. Jeanne was on her way to work at the St. Louis Special School District on Clayton Road. At the time of the wreck, Jeanne was stopped, waiting to turn left into the parking lot at her work. [Tr. Vol. I, p. 131, l. 9 – p. 132, l. 2]. Ed Holthaus was driving his Ford Expedition on Clayton Road at approximately 33 miles per hour. [Tr. Vol. I, p. 759, l. 12 – p. 760, l. 18]. Mr. Holthaus first saw Jeanne's Explorer when it was approximately 40 feet in front of him and he slammed on his brakes. [Tr. Vol. I, p. 760, l. 19 – p. 761, l. 5]. Mr. Holthaus was unable to stop without hitting the rear of Jeanne's Explorer. [Tr. Vol. I, p. 761, ll. 6-8]. After the collision, Jeanne's Explorer rolled forward on the grass in front of the Special School District and came to rest after hitting the building. [Tr. Vol. II, p. 984, l. 6 – p. 985, l. 25].

Jeanne's co-worker, Shane Trafton, was at her car window within 20 to 30 seconds after the wreck. [Tr. Vol. I, p. 64, l. 14 – p. 65, l. 18]. Mr. Trafton found Jeanne inside her Explorer with her seatbelt on, but with her seat collapsed completely back, almost flat. [Tr. Vol. I, p. 67, l. 9 – p. 68, l. 1]. Jeanne was not moving and appeared unconscious. [Tr. Vol. I, p. 68, l. 2 – p. 69, l. 2].

Jeanne was seriously injured. Her most serious injury was a burst fracture of the T9 vertebra that left her paralyzed. [L.F. Vol. II, p. 251, depo. p. 42, l. 22 – p. 43, l. 4; p. 44, ll. 1-19] [Tr. Vol. I, p. 703, l. 13 – p. 704, l. 10]. She also suffered a concussion and fractured ribs. [Tr. Vol. I., p. 495, ll. 21-23; p. 497, ll. 14-17].

Prior to and on the day of the wreck at issue in this case, Jeanne was six feet tall and weighed approximately 300 pounds. [Tr. Vol. I, p. 688, l. 17 – p. 689, l. 17; p. 690, ll. 6-19]. Her size is an important issue in this case. Prior to the wreck, Jeanne was the kind of person who read warnings, instructions and manuals. [Tr. Vol. I, p. 648, l. 19 – p. 649, l. 6]. In particular, she paid attention to weight warnings because of her size and further, because her husband and son were both tall and heavy. [Tr. Vol. I, p. 690, l. 6 – p. 691, l. 19].

Rather than summarize and paraphrase the testimony for the Court, appellant will provide the Court with the actual testimony. After telling the jury about their 26 year marriage, Monty testified as follows:

Q. And over that 26 years, had you come to know a little bit about Jeanne's personality and characteristics?

A. Oh, most sure, sure, most definitely.

Q. Prior to before the accident in November of 2005, was Jeanne the type of person who would read warnings?

A. Oh yes, she sure was.

Q. Was she the type of person who would read instructions and manuals?

A. Yes.

[Tr. Vol. I, p. 648, l. 22 – p. 649, l. 6]. Monty then offered the following testimony.

Q. Mr. Moore, you had an opportunity, before November of 2005, to look inside Jeanne's Explorer?

A. Yes, I did.

Q. And did you ever see any warnings or any markings or indications anywhere that the seat in Jeanne's Explorer was not designed for people of her size?

A. I did not see nothing.

Q. And if Ford had provided you with some warning or indication that the seat in Jeanne's Explorer was not designed for people of her size, would you have ever purchased that vehicle?

A. I sure would not have.

Q. And would you have ever ridden in that vehicle?

A. No, I would not have.

Q. Would you have done everything in your power to talk Jeanne out of riding in that vehicle?

A. Yes, most certainly.

[Tr. Vol. I, p. 650, l. 10 – p. 651, l. 1]. Jeanne offered similar testimony.

Q. While we're on the topic of weight, when you would buy things like a step stool or a camping chair, did you pay attention to the weight limits on those items?

A. Yeah. You know, I looked at the weight items on it.

(Remaining answer omitted).

[Tr. Vol. I, p. 690, ll. 6-11]. Jeanne looked for but did not find any weight warnings regarding the front seats in her Explorer. [Tr. Vol. I, p. 693, l. 25 – p. 696, l. 2]. Jeanne was precluded by the trial court from offering any further testimony with respect to what she would have done had Ford provided her with appropriate weight warnings regarding the front seats in her Explorer. [Tr. Vol. I, p. 696, ll. 8– 22].¹ Additionally, Jeanne offered the following testimony:

Q. Did you ever see any warnings, either on the vehicle or in the owner's manual, where Ford advised people like you who might purchase or ride in a vehicle that the seats might collapse in a rear-end impact?

A. No.

Q. Did you have any idea that seats in an automobile might collapse in a rear-end impact?

A. I had no idea. I figured that, you know, if you had that you would go forward. I didn't realize I would end up the way I am.

¹ Monty was allowed to offer this testimony. [Tr. Vol. I, p. 650, l. 10 – p. 651, l. 1].

[Tr. Vol. I, p. 696, l. 23 – p. 697, l. 8]. It was undisputed at trial that Jeanne’s Explorer and its owner’s manual carried no warnings whatsoever that the front seats could collapse in rear impacts or that they were more likely to do so with occupants of Jeanne’s size.

Ford’s corporate representative admitted that Ford’s seats are designed and, in fact, intended to collapse rearward in rear impacts. [Tr. Vol. II, p. 937, ll. 1-3]. He also admitted that Jeanne’s seat performed in this subject wreck as expected by Ford. [Tr. Vol. II, p. 963, ll. 14-20].

Q. People don’t understand that’s part of Ford’s design philosophy that seats should do that in a rear impact; isn’t that true?

A. I don’t know how much the average person understands seatback yielding in high speed collisions. It’s probably not something the average person understands. If anyone asks us, we’ll tell them. But it’s not common understanding, I don’t think.

[Tr. Vol. II, p. 939, ll. 6-13].

In binding testimony offered under Mo.R.Civ.P. 57.03(b)(4), Ford admitted that it was “certainly predictable” someone above the 95th percentile in weight – or about 220 pounds – would be in a Ford vehicle. [L.F. Vol. II, p. 301; Tr. Vol. I, p. 268, ll. 4-22]. Ford also admitted that in the normal design process at Ford, it never does seat strength tests with test dummies ballasted to weights above that of

the 95th percentile dummy. The only seat strength tests done by Ford with test dummies ballasted to weights above the 95th percentile are tests done for litigation. [L.F. Vol. II, p. 301].

The parties stipulated that the past medical bills were over \$290,000.00. [L.F. Vol. II, p. 191]. Appellants' evidence showed Jeanne's past and future wage loss, past medical bills and future medical needs, reduced to present value, were over \$5.97 million. [L.F. Vol. II, pp. 262-63, 266, depo p. 89, l. 18 – p. 91, l. 1; p. 102, ll. 5-9; Tr. Vol. I, p. 626, l. 22 – p. 627, l. 2; p. 630, ll. 23-25; p. 633, ll. 2-14].

Procedural History

This case was filed on August 15, 2006. [L.F. Vol I, pp. 1, 9]. Trial began on December 1st, 2008 and lasted 12 days. [L.F. Vol. I, pp. 6, 7]. Appellants rested on December 10th. [Tr. Vol. I, p. 726, ll. 23-25]. The trial court then granted Ford's motion for directed verdict against appellants on their failure to warn claims. [Tr. Vol. I, p. 749, ll. 1-2; p. 751, ll. 1-7]. In response to this ruling, appellants dismissed their remaining negligence claims, leaving only 402A strict liability in the case. [L.F. Vol. I, pp. 186-87].

Ford rested on December 16th. [Tr. Vol II, p. 1250, ll. 6-7]. Appellants and Ford each moved for directed verdict on the remaining strict product liability claim . . . both motions were denied. [Tr. Vol. II, p. 1256, l. 17 – p. 1259, l. 23].

The jury returned a verdict in favor of Ford. [L.F. Vol. II, p. 374]. On December 17th the trial court entered judgment accepting the verdict. [L.F. Vol. II, p. 375].

Appellants filed timely post-trial motions. [L.F. Vol. III, pp. 377-403]. Ford filed written opposition. [L.F. Vol. III, pp. 404-454]. On March 13, 2009, the trial court denied appellants' post-trial motion. [L.F. Vol. III, p. 455]. Appellants' Notice of Appeal was timely filed on March 17, 2009. [L.F. Vol. III, p. 456-464]. The Eastern District Court of Appeals issued its opinion affirming the trial court on December 22nd, 2009. Appellants' motion for rehearing or transfer was denied by the Eastern District on January 25th, 2010. Appellants' timely motion to transfer was granted by this Court on March 23rd, 2010.

POINTS RELIED ON AND SUPPORTING AUTHORITY

Point Relied On Number 1

THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST PLAINTIFFS ON THEIR FAILURE TO WARN CLAIMS, BECAUSE PLAINTIFFS MADE A SUBMISSIBLE CASE, IN THAT, PLAINTIFFS PRESENTED SUBSTANTIAL EVIDENCE FROM WHICH A REASONABLE JURY COULD CONCLUDE THAT THE FORD EXPLORER DRIVER'S SEAT WAS UNREASONABLY DANGEROUS WHEN USED WITHOUT KNOWLEDGE OF ITS CHARACTERISTICS AND FORD WAS NEGLIGENT, ADDITIONALLY, EVIDENCE WAS PRESENTED WHICH RENDERED THE HEEDING PRESUMPTION APPLICABLE UNDER MISSOURI LAW.

- *Palmer v. Hobart Corp.*, 849 S.W.2d 135 (Mo.App. 1993)

- *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10 (Mo. 1994)

- *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748 (Mo.App. 2008)

Point Relied On Number 2

THE TRIAL COURT ERRED IN LIMITING APPELLANTS' CROSS-EXAMINATION OF FORD'S EXPERT, DR. HARRY SMITH, BECAUSE THE CROSS-EXAMINATION RELATED TO A PARAMOUNT ISSUE IN THE CASE, IN THAT, IT WOULD HAVE SHOWN DR. SMITH AGREED WITH PLAINTIFFS' EXPERT AND DISAGREED WITH FORD'S OTHER EXPERT WITNESSES ON AN IMPORTANT ISSUE OF INJURY CAUSATION.

- *Reno v. Wakeman*, 869 S.W.2d 219 (Mo.App. 1993)

- *Long v. St. John's Regional Health Ctr., Inc.*, 98 S.W.3d 601 (Mo.App. 2003)

- *State v. Gardner*, 8 S.W.3d 66 (Mo.banc 1999)

Point Relied On Number 3

THE TRIAL COURT ERRED IN ADMITTING FORD'S STATE OF THE ART EVIDENCE, BECAUSE IT WAS IRRELEVANT, IMMATERIAL AND UNDULY PREJUDICIAL, IN THAT, WHEN THIS EVIDENCE WAS ADMITTED PLAINTIFFS' CASE PROCEEDED SOLELY ON STRICT PRODUCTS LIABILITY, THEREFORE SUCH EVIDENCE ONLY TENDED TO LEAD THE JURY TO DECIDE THE CASE ON THE IMPROPER BASIS OF THE "REASONABLENESS" OF FORD'S CONDUCT.

- *Cryts v. Ford Motor Co.*, 571 S.W.2d 683 (Mo.App. 1978)

- *Johnson v. Hannibal Mower Corp.*, 679 S.W.2d 884 (Mo.App. 1984)

- *Uxa ex rel. Uxa v. Marconi*, 128 S.W.3d 121 (Mo.App. 2003)

- *Klein v. General Elec. Co.*, 714 S.W.2d 896 (Mo.App. 1986)

Point Relied On Number 4

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY FROM FORD'S EXPERT, CATHERINE CORRIGAN, PH.D., BECAUSE SHE WAS NOT QUALIFIED TO OFFER THE OPINIONS SHE GAVE ABOUT THE CAUSE OF MRS. MOORE'S INJURIES AND HER INTERPRETATIONS OF CT SCANS, IN THAT, SHE IS AN ENGINEER, NOT A MEDICAL DOCTOR AND, BY HER OWN ADMISSION, IS NOT QUALIFIED TO OFFER MEDICAL OPINIONS OR DIAGNOSE INJURIES.

- *Childs v. Williams*, 825 S.W.2d 4 (Mo.App. 1992)

- *Brennan v. St. Louis Zoological Park*, 882 S.W.2d 271 (Mo.App. 1994)

Point Relied On Number 5

THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR NEW TRIAL ON THE GROUNDS OF CUMULATIVE ERROR BECAUSE, THE POINTS OF ERROR 1 THROUGH 4 DISCUSSED *SUPRA* JUSTIFY A NEW TRIAL, EVEN IF THIS COURT DOES NOT BELIEVE THAT ANY SINGLE POINT, STANDING ALONE, JUSTIFIES REVERSAL, IN THAT, THE CUMULATIVE EFFECT OF THOSE ERRORS AT TRIAL PREJUDICED APPELLANTS AND AFFECTED THE OUTCOME OF THE TRIAL.

- *Faught v. Washam*, 329 S.W.2d 588 (Mo. 1959)

- *Myers v. Moffett*, 312 S.W.2d 59 (Mo. 1958)

ARGUMENT

Appellants respectfully submit the trial court committed reversible error when it granted Ford's motion for directed verdict on appellants' failure to warn claims. Furthermore, the trial court abused its discretion in the limitation of appellants' cross examination of one of Ford's expert witnesses to the "scope of direct." Lastly, the trial court made other evidentiary errors including: (1) allowing Ford to admit evidence and testimony regarding state of the art issues and industry standards, even after the issues in the case were limited to 402A strict liability; and (2) allowing Ford to offer medical opinion testimony from a witness who admitted she was not qualified to offer medical diagnoses. Individually and/or cumulatively, these errors affected the outcome of trial and require reversal.

The opinion issued by the Eastern District in this matter erroneously failed to reverse the trial court's errors. The reasoning found in the Eastern District's opinion should not be adopted for a host of reasons, but perhaps most importantly, because it conflicts with prior Missouri case law by creating a category of claims termed "time of purchase theory" cases and further, by holding that all such claims are "legally unsound."

Moreover, the Eastern District's opinion failed to conclude that the trial court committed reversible error in granting directed verdict against appellants on their failure to warn claims. Under the applicable standard of review, viewing all the evidence in the light most favorable to the appellants, giving them the benefit of all reasonable inferences, and disregarding Ford's evidence except to the extent

that it aids the appellant's case, under Missouri law, appellants clearly made a submissible case on their failure to warn claims.

Furthermore, the Eastern District's opinion ignored R.S.Mo. § 491.070, *State v. Gardner*, 8 S.W.3d 66 (Mo.banc 1999) and, quite literally, 170 years of controlling Missouri case law that clearly establishes that a party's cross-examination of an opposing witness is not limited to the scope of the direct examination. The trial court erred in refusing to allow appellants to cross-examine one of Ford's expert witnesses on an issue that went to the very essence of the parties' causation theories. The Eastern District affirmed the trial court's error and in so doing, its opinion is at odds with long-established Missouri law.

In addition, the Eastern District inexplicably ignored an entire line of cases holding that state of the art evidence and evidence regarding industry standards is irrelevant and inadmissible in cases limited to 402A liability, as this trial was during Ford's case-in-chief. The cases ignored by the Eastern District include *Cryts v. Ford Motor Co.*, 571 S.W.2d 683 (Mo.App. 1978), *Johnson v. Hannibal Mower Corp.*, 679 S.W.2d 884 (Mo.App. 1984), *Uxa ex rel. Uxa v. Marconi*, 128 S.W.3d 121 (Mo.App. 2003) and *Klein v. General Elec. Co.*, 714 S.W.2d 896 (Mo.App. 1986).

Equally problematic is that the Eastern District failed to convict the trial court of error for allowing a non-physician, who readily admitted she was not qualified to offer medical diagnoses, to disagree with the diagnoses and opinions

of a duly qualified forensic pathologist and further, to offer medical opinion testimony.

Lastly, the underlying opinion from the Eastern District is defective because it failed to recognize that cumulative error requires a new trial.

Appellants are entitled to a new trial on all issues.

Point Relied On Number 1

THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST PLAINTIFFS ON THEIR FAILURE TO WARN CLAIMS, BECAUSE PLAINTIFFS MADE A SUBMISSIBLE CASE, IN THAT, PLAINTIFFS PRESENTED SUBSTANTIAL EVIDENCE FROM WHICH A REASONABLE JURY COULD CONCLUDE THAT THE FORD EXPLORER DRIVER'S SEAT WAS UNREASONABLY DANGEROUS WHEN USED WITHOUT KNOWLEDGE OF ITS CHARACTERISTICS AND FORD WAS NEGLIGENT, ADDITIONALLY, EVIDENCE WAS PRESENTED WHICH RENDERED THE HEEDING PRESUMPTION APPLICABLE UNDER MISSOURI LAW.

Standard of Review

“In reviewing a trial court’s judgment granting a motion for directed verdict, we must determine whether the plaintiff made a submissible case, i.e., whether the plaintiff introduced substantial evidence at trial that tends to prove the essential facts for his or her recovery.” *Dunn v. Enterprise-Rent-A-Car Co.*, 170 S.W.3d 1, 3 (Mo.App. 2005). “We view all the evidence in the light most favorable to the plaintiff, giving him or her the benefit of all reasonable inferences, and disregarding the defendant’s evidence except to the extent that it aids the plaintiff’s case.” *Id.* “Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide the case.” *Johnson v. Allstate Indem. Co.*, 278 S.W.3d 228, 235 (Mo.App. 2009). “The plaintiff may prove essential facts by circumstantial evidence as long as the

facts proved and the conclusions to be drawn are of such a nature and are so related to each other that the conclusions may be fairly inferred.” *Morrison v. St. Luke’s Health Corp.*, 929 S.W.2d 898, 900 (Mo.App. 1996).

“Directing a verdict is a drastic measure.” *Thong v. My River Home Harbour, Inc.*, 3 S.W.3d 373, 377 (Mo.App. 1999). “There is a presumption in favor of reversing a trial court’s grant of a motion for directed verdict unless, upon consideration of the facts most favorable to the plaintiff, ‘those facts are so strongly against the plaintiff as to leave no room for reasonable minds to differ as to a result.’” *Dunn, supra*. “If we find that a submissible case was made, then we *must* reverse the judgment of the trial court.” *Daniele v. Missouri Dept. of Conservation*, 282 S.W.3d 876, 879 (Mo.App. 2009) (emphasis added).

Appellants’ Failure to Warn Claims

“In Missouri, a plaintiff may assert a negligent failure to warn claim pursuant to section 388 of the Restatement (Second) of Torts or a strict liability failure to warn claim pursuant to section 402A of the Restatement (Second) of Torts.” *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 784 (Mo.App. 2008). Appellants asserted both. [L.F. Vol. I, pp. 16-20]. Appellants contended the subject Explorer lacked any warnings that: (1) the front seats could collapse in rear impacts; and/or (2) that the front seats were not tested or designed to perform with occupants of Jeanne’s size. [Tr. Vol. I, p. 650, ll. 10-17; p. 694, l. 13 – p. 696, l. 2; p. 696, l. 23 – p. 697, l. 8].

Appellants' failure to warn claims were a significant part of their case. Ford defended the case, in part, by claiming the driver's seat in Jeanne's Explorer was designed to "yield" in a controlled manner because, Ford argued, this was best for *most* people in *most* collisions by absorbing impact energy.

However, under the circumstances of the case, including Jeanne's weight, the seat could not protect her and didn't "yield." Instead, it collapsed violently, allowing her to strike the rear seat where she suffered a spinal cord injury that has left her paralyzed. Appellants' failure to warn claims would have allowed appellants to argue to the jury that even if the jurors believed Ford's claim that collapsing seats were good for "most people," then, just like every ladder and folding chair manufacturer in the world, Ford should have warned Jeanne that she was not "most people." In other words, appellants' failure to warn claims would have allowed the jury, even if it believed all of Ford's evidence, to conclude the seat was defective due to its lack of warnings or that Ford was negligent for failing to warn.

At the close of appellants' evidence, the trial court directed verdict in Ford's favor on both failure to warn claims and later refused to instruct the jury on either claim. [Tr. Vol. I, p. 751, ll. 1-7; Vol. II, p. 1261, l. 10 – p. 1263, l. 3; L.F. Vol. II, pp. 357, 358]. The trial court erred and must be reversed.

The Trial Court Applied the Wrong Standard to
Determine Whether Appellants Made a Submissible Case

The trial court explained that it granted directed verdict because it believed appellants failed to present adequate expert testimony and further had not offered an alternative design that had an adequate warning. [Tr. Vol. I, p. 747, l. 7 – p. 749, l. 2]. This ruling ignores Missouri law.

Expert testimony is not required to make a submissible case in product liability claims based on failure to warn. *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 14 (Mo.banc 1994); *Winters v. Sears, Roebuck & Co.*, 554 S.W.2d 565, 569 (Mo.App. 1977) (“The existence of a defect may be inferred from circumstantial evidence with or without the aid of expert opinion evidence.”). This Court has held that, in cases analogous to this where no warning is given, “[a] jury would have little trouble discerning that no warning was not an adequate warning.” *Tune, supra*.

The trial court also mistakenly held that appellants were required to prove an alternative design for an adequate warning. In fact, evidence of an alternative design is *not* required to make a submissible case. *Smith*, 275 S.W.3d at 793-94; *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 90, ftn. 5, 91 (Mo.App. 2006).

Additionally, the trial court’s rulings on Ford’s directed verdict motions are inconsistent. The trial court held that a submissible case was made on appellants’ claims for product defect premised in both strict liability and negligence. [Tr. Vol.

I, p. 730, l. 25 – p. 731, l. 2]. It is inconsistent for the court to find that sufficient evidence was presented to make a submissible case that the 2002 Explorer driver’s seat was “defective and unreasonably dangerous” but not that it was “unreasonably dangerous when used without knowledge of its characteristics.” Indeed, the former is more restrictive than the latter. The trial court’s inconsistent ruling further demonstrates it applied the wrong standard of submissibility.

Clearly, the trial court erred in holding that appellants were required to present expert testimony and prove the existence of an alternative warning in order to make a submissible case. The trial court’s error in this regard, alone, requires reversal. However, not only did the trial court apply the wrong standard, appellants did, in fact, present extensive expert testimony and substantial evidence sufficient to make a submissible case on each and every element of their failure to warn claims. Furthermore, the heeding presumption applied which made the case submissible as a matter of law.

Under the applicable standard of review, only one conclusion may be reached . . . the trial court committed error that must be reversed.

Appellants Made a Submissible Case

On Their Failure to Warn Claims Based on Strict Liability

The elements of a cause of action for strict liability failure to warn are as follows:

- (1) defendant sold the product in question in the course of its business;

(2) the product was unreasonably dangerous at the time of sale when used as reasonably anticipated without knowledge of its characteristics;

(3) defendant did not give adequate warning of the danger;

(4) the product was used in a reasonably anticipated manner; and

(5) plaintiff was damaged as a direct result of the product being sold without an adequate warning.

Cole v. Goodyear Tire & Rubber Co., 967 S.W.2d 176, 183 (Mo.App. 1998); MAI 25.05; *see also* L.F. Vol. II, p. 357.

Appellants presented sufficient evidence from which a reasonable jury could have found in their favor on each of the elements above. The evidence presented will be summarized *infra*. In light of the standard of review, the majority of Ford's evidence will be ignored.

(1) Defendant Sold the Product in Question

Ford stipulated that it designed, manufactured and sold the subject Explorer. [L.F. Vol. II, p. 191; Tr. Vol. I, p. 602, ll. 1-18].

(2) Product Was Unreasonably Dangerous If Used Without Knowledge of its Characteristics

In Missouri, the concept of unreasonable danger "is presented to the jury as an ultimate issue without further definition." *Nesselrode v. Exec. Beechcraft, Inc.*, 707 S.W.2d 371, 378 (Mo. 1986). "The jury gives this concept content by applying their collective intelligence and experience to the broad evidentiary

spectrum of facts and circumstances presented by the parties.” *Id.* Accordingly, “[w]hat constitutes the ‘concept of unreasonable danger’ . . . is a question for the jury.” *Thompson*, 207 S.W.3d at 97. “Unless a court can say as a matter of law that a product is not more dangerous than a reasonable user would have expected, the question is one for the jury.” *Grady v. American Optical Corp.*, 702 S.W.2d 911, 915 (Mo.App. 1985).

Though not required to make a submissible case, appellants elicited substantial evidence from expert witnesses sufficient for a reasonable jury to conclude the Explorer seat was unreasonably dangerous when used without knowledge of its characteristics. The testimony from appellants’ experts established three basic facts: (a) Jeanne’s wreck was of a low severity such that she would have avoided serious injury if her seat had remained at least somewhat upright and restrained her; (b) Ford’s seat was too weak to restrain a person of Jeanne’s size – a size of person Ford admitted it knew would occupy its vehicles – even in a low severity collision like Jeanne’s, and (c) these characteristics made the seat unreasonably dangerous, particularly if used without knowledge of such characteristics.

Appellants’ Expert Witnesses

Jerry Wallingford, a registered professional engineer with a forensic engineering firm that predominantly investigates and reconstructs vehicular accidents, testified concerning his reconstruction of the accident. [Tr. Vol. I, p. 87,

l. 10 – p. 88, l. 7; p. 102, ll. 1-4; p.102, l. 22 – p. 103, l. 1; p. 103, l. 24 – p. 104, l. 20].

Dr. Wayne Ross, a medical doctor specializing in forensic pathology and neuropathology and employed as a medical examiner, testified to explain how Jeanne’s paralyzing injury occurred. [Tr. Vol. I, p. 423, l. 15 – p. 424, l. 23].

Louis D’Aulerio, a senior engineering consultant who specializes in the area of crash protection and the development, performance, testing and evaluation of protection devices such as automotive seats and seatbelts, testified about the design of Jeanne’s seat, his testing of the strength of that seat, and its failure during the crash when it collapsed. [Tr. Vol. I, p. 178, l. 13 – p. 179, l. 24; p. 180, l. 21 – p. 181, l. 1].

The Crash Was a Low Severity Event, Survivable Without Serious Injury if
the Seat Remained Upright to Restrain Jeanne

Mr. Wallingford testified that when Jeanne’s Explorer was hit from behind it underwent a “Delta V,” or change in velocity of between 13 and 17 miles per hour (rounded) and that this Delta V occurred in a time span, or “pulse” of 170 to 190 milliseconds, or just under two tenths of a second. [Tr. Vol. I, p. 136, l. 6 – p. 137, l. 2; p. 137, l. 16 – p. 139, l. 5]. The calculations of Delta V and pulse are then used to determine the G forces (“g’s”) involved in the collision which quantify the forces that were experienced by Jeanne and her seat during the collision. [Tr. Vol. I, p. 141, ll. 1-5]. The crash was between 5 and 7g’s (even if Ford’s accident reconstruction numbers are used). [Tr. Vol. I, p. 455, ll. 15-22].

Dr. Ross explained that the forces involved in Jeanne’s wreck were within human tolerance and if her seat had remained upright, she would have walked away from the wreck with only mild to moderate injury and importantly, with no paralysis. [Tr. Vol. I, p. 454, l. 14 – p. 456, l. 13; p. 490, l. 14 – p. 491, l. 21]. Mr. D’Aulerio stated Jeanne’s wreck was “absolutely” survivable and the forces were low enough that she “definitely” should not have been seriously injured. [Tr. Vol. I, p. 256, ll. 4-11]. Mr. D’Aulerio opined that, if she had been properly protected by her seat, Jeanne should have walked away without serious injury. [Tr. Vol. I, p. 256, ll. 12-24].

Dr. Ross testified that Jeanne suffered her paralyzing injury by striking her head and shoulders on the back seat when her seat collapsed and she shot toward the rear of the Explorer. [Tr. Vol. I, p. 484, l. 22 – p. 485, l. 18; p. 469, l. 21 – p. 470, l. 8; p. 481, ll. 6-20]. This is not the first time a person has suffered a serious injury from a weak Ford seat. *See e.g., Newman v. Ford Motor Co.*, 975 S.W.2d 147, 149 (Mo.banc 1998).

Ford’s Seat Was Not Strong Enough to Remain Upright,

Even in the Low Severity Wreck in Which Jeanne Was Involved

At the time of the wreck, Jeanne was six feet tall and weighed approximately 300 pounds. [Tr. Vol. I, p. 688, l. 17 – p. 689, l. 17; p. 690, ll. 6-19]. Mr. D’Aulerio applied Mr. Wallingford’s calculations of Delta V and pulse to the variable of Jeanne’s weight, among other things, in order to calculate the amount of force applied to her driver’s seat in the collision. [Tr. Vol. I, p. 246, l. 8

– p. 250, l. 11]. Mr. D’Aulerio concluded Jeanne’s seat experienced an average load of approximately 17,400 inch pounds. [Tr. Vol. I, p. 250, ll. 12 – p. 251, l. 21]. Mr. D’Aulerio conducted tests that showed the Explorer seat could only withstand 16,870 inch pounds before collapsing. [Tr. Vol. I, p. 206, ll. 1-25; p. 210, l. 20 – p. 211, l. 13]. In short, even in this low severity impact, Ford’s seat was not strong enough to restrain Jeanne. [Tr. Vol. I, p. 251, ll. 1-11].

The Characteristics of the Seat Were Unreasonably Dangerous If Not Known

Mr. D’Aulerio opined that, in order 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 break and collapse in a rear impact any more than a seatbelt should be designed to break in a frontal impact. [Tr. Vol. I, p. 218, ll. 14-19]. A properly designed seat should remain essentially upright in a rear impact collision to provide full support to the person’s torso, neck and head and prevent the occupant from moving rearward and hitting whatever is behind. [Tr. Vol. I, p. 272, l. 21 – p. 273, l. 9]. Mr. D’Aulerio opined that a seat which collapses rearward as much as the seat in Jeanne’s Explorer poses a risk of harm. [Tr. Vol. I, p. 240, ll. 13-18].

Mr. D’Aulerio opined that a properly designed seat should be strong enough to withstand a *minimum* of 30,000 inch pounds of force . . . and that such a seat would have restrained Jeanne, even under Ford’s more aggressive calculation of the speeds and forces. [Tr. Vol. I, p. 235, l. 2 – p. 236, l. 8; p. 252, l.

2 – p. 253, l. 20]. The minimum seat strength of 30,000 inch pounds is selected, in part, to take into account the *weights of foreseeable occupants*. [Tr. Vol. I, p. 237, ll. 12-24]. Mr. D’Aulerio presented the jury with a non-exhaustive list of alternative seat designs found in other production vehicles on the market that are significantly stronger than the seats in Jeanne’s 2002 Ford Explorer, including several stronger than 30,000 inch pounds . . . one of which was in one of Ford’s own vehicles – a 2003 Ford pickup. [Tr. Vol. I, p. 260, l. 2 – p. 263, l. 18].

Mr. D’Aulerio opined that the driver’s seat in Jeanne’s Ford 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]. From this substantial evidence a reasonable jury could have concluded Ford’s seat was unreasonably dangerous if used by Jeanne without knowledge of its characteristics.

Evidence Supporting the Testimony of Appellants’ Experts

Under the applicable standard of review in which the evidence is viewed in the light most favorable to appellants with all inferences drawn in their favor and contrary evidence is ignored, no further review should be needed to find that a submissible case was made. Despite this, appellants will summarize additional evidence supporting the opinions of their experts at trial.

Mr. D’Aulerio’s conclusion that Ford’s seat was too weak to restrain Mrs. Moore even in this relative low severity crash was amply supported by the

forensic evidence on the seat itself and on the backseat. There was observable damage and deformation to Jeanne's seat, which Mr. D'Aulerio described at length for the jury. All of this damage was sustained in the rear-end collision and the damage and deformation allowed Jeanne to strike the backseat. [Tr. Vol. I, p. 195, l. 11 – p. 197, l. 16; p. 198, l. 4 – p. 202, l. 7]. There was also damage to one of the backseat head rests. The nature of this damage indicated it was likely caused by Jeanne hitting it during the crash. [Tr. Vol. I, p. 203, l. 20 – p. 205, l. 14]. Dr. Ross's inspection of the Explorer also revealed that the driver's seat was deflected backward and there were marks on the backseat consistent with Jeanne striking it. [Tr. Vol. I, p. 485, l. 19 – p. 487, l. 14].

Jeanne's injuries were of particular import. The nature of those injuries provided forensic evidence proving that they were suffered because Jeanne's seat failed and collapsed, allowing her to strike the backseat. Dr. Ross concluded that Jeanne's injuries were sustained by moving rearward when her seat collapsed, striking her head and shoulders on the backseat, and causing a "burst" fracture of her T9 vertebra. [Tr. Vol. I, p. 484, l. 22 – p. 485, l. 10; p. 469, l. 21 – p. 470, l. 8; p. 481, ll. 6-20]. Dr. Ross further opined that Jeanne suffered a concussion which she could not have sustained without striking her head on the backseat. [Tr. Vol. I, p. 495, l. 21 – p. 497, l. 13]. Dr. Ross ruled out other injury mechanisms and concluded a compression from her shoulders and head down the spinal cord was the only possible way Jeanne could have sustained the burst fracture that paralyzed her. [Tr. Vol. I, p. 482, l. 18 – p. 484, l. 21].

From all of the evidence discussed above, and the reasonable inferences and conclusions therefrom, a reasonable jury could have concluded that the 2002 Ford Explorer driver's seat was unreasonably dangerous when used without knowledge of its characteristics. Just as in *Tune v. Synergy Gas Corp.*, the jury in this case "was not left to speculation or conjecture." 883 S.W.2d at 14. The trial court committed reversible error by granting directed verdict.

(3) An Adequate Warning was Not Given with the Product

"The lack of an adequate warning in itself renders a product defective or unreasonably dangerous within the meaning of products liability law." *Palmer v. Hobart Corp.*, 849 S.W.2d 135, 140 (Mo.App. 1993). Undisputed evidence showed the Explorer seat lacked any warning of dangers inherent in its design.

Mr. Moore had an opportunity before Jeanne's wreck to look inside their Explorer. He never saw any warnings that the front seats in Jeanne's Explorer were not safely designed for people of her size. [Tr. Vol. I, p. 650, ll. 10-17]. Before her wreck, Jeanne reviewed the owner's manual of her Explorer and never saw any weight related warnings for the front seat, even though she saw, and heeded, weight limits for towing. [Tr. Vol. I, p. 694, l. 13 – p. 696, l. 2]. Jeanne never saw any warnings on the vehicle or in the owner's manual advising that the seats might collapse in a rear-end impact and had no idea such a thing could even happen. [Tr. Vol. I, p. 696, l. 23 – p. 697, l. 8].

Not only did appellants present sufficient evidence to make a submissible case on this element, the evidence was unrefuted.

(4) The Product Was Used In a Reasonably Anticipated Manner

A plaintiff in a strict products liability action is required to show that the product “has been put to a reasonably anticipated use.” *Nesselrode*, 707 S.W.2d at 381. “The concept of reasonably anticipated use, however, includes misuse and abnormal use which is objectively foreseeable.” *Id.* It is not necessary for plaintiff to show the precise circumstances which led to plaintiff’s injuries were foreseeable, only that plaintiff present evidence from which a jury could find it reasonably foreseeable that users would encounter similar situations. *Grady*, 702 S.W.2d at 916.

Jeanne used her Explorer in a reasonably anticipated manner at the time of the collision; i.e. driving herself to work, using the seat and seatbelt in typical fashion. [Tr. Vol. I, p. 243, l. 19 – p. 244, l. 2; Tr. p. 702, l. 1 – p. 703, l. 12]. Appellants’ expert testified and Ford admitted that it was foreseeable for a person of Jeanne’s size to use the Explorer. [Tr. Vol. I, p. 243, l. 4 – p. 244, l. 2; p. 635, l. 25 – p. 636, l. 5] [L.F. Vol. II, p. 301, depo. p. 50, l. 20 – p. 51, l. 12].

Appellants clearly presented sufficient evidence on this element and, as with element (3) above, the evidence was unrefuted.

(5) Plaintiff Was Damaged by the Lack of Adequate Warning

“Under established principles of causation, the proximate cause of an event or injury need only be a substantial factor or efficient causal agent.” *Nesselrode*, 707 S.W.2d at 381. “Showing with certainty that the warning would have succeeded in preventing the injury is not necessary in a failure to warn case.”

Smith, 275 S.W.3d at 789 [citing *Hill v. Air Shields, Inc.*, 721 S.W.2d 112, 119 (Mo.App. 1986)]. “In the absence of compelling evidence that the absence of a warning did not cause the injury the causation question becomes one for the jury.” *Racer v. Utterman*, 629 S.W.2d 387, 394 (Mo.App. 1981). Appellants went well beyond this standard to present substantial evidence that the lack of warnings were a substantial factor causing their damages.

“There are two requirements of causation in a failure to warn case: (1) the product for which there was no warning must have caused plaintiff’s injuries, and (2) the plaintiff must show that a warning would have altered the behavior of those in the accident.” *Tune*, 883 S.W.2d at 14. As for the first requirement, the evidence discussed at length above in support of the second element of plaintiffs’ failure to warn claim is more than sufficient to allow a jury to find that the subject seat caused Jeanne’s injuries. As for the second requirement, evidence was presented giving rise to a presumption under Missouri law that if a warning had been given, it would have altered Jeanne’s behavior and prevented her damages.

The Heeding Presumption Applies Under the Facts of this Case

Missouri law provides a presumption in failure to warn cases that a plaintiff generally unaware of the danger posed by the product would have heeded an adequate warning, if given. *Tune*, 883 S.W.2d at 14. “The presumption that plaintiffs will heed a warning assumes that a reasonable person will act appropriately if given adequate information.” *Arnold v. Ingersoll-Rand Co.*, 834 S.W.2d 192, 194 (Mo.banc 1992). Therefore, it is “not necessary to demonstrate

with certainty that warnings placed directly on the product would have been seen and heeded. This is why the presumption exists.” *Smith* 275 S.W.3d at 789.

“If there is sufficient evidence from which a jury could find that the plaintiff did not already know the danger, there is a presumption that a warning will be heeded.” *Tune, supra; Smith*, at 788. Appellants presented unrefuted evidence that Jeanne was unaware that her seat could collapse rearward in a rear impact and expose her to serious injury, or that there was an increased risk for persons of her size. [Tr. Vol. I, p. 696, l. 23 – p. 697, l. 8; p. 693, l. 25 – p. 694, l. 3]. “The presumption arises if such evidence was presented; it does not require that all the evidence indicate the injured person was unaware.” *Smith, supra* at 790. The heeding presumption clearly applies here.

When the presumption applies, “the injured person has made a submissible case that he or she was injured as a direct result of the defendant’s selling the product without a warning.” *Smith*, at 788. “In this instance, the term ‘presumption’ is used to mean ‘makes a prima facie case,’ i.e., creates a submissible case that the warning would have been heeded.” *Tune, supra*. “[T]he presumption alone is sufficient to make a submissible case, and relying solely on the presumption is not error.” *Smith, supra*. Accordingly, a submissible case was made here due to the presumption . . . no more was required.

Ford incorrectly argued below that it rebutted the presumption. “In rebutting the presumption, simply showing that the injured person knew of the general danger is insufficient. Instead, the defendant must show that the injured

person knew of the specific danger resulting in injury.” *Smith*, 275 S.W.3d at 787 (citation omitted); *Duke v. Gulf & Western Mfg. Co.*, 660 S.W.2d 404, 418 (Mo.App. 1983) (“defendant must show that the plaintiff had knowledge of the *specific danger* arising out of the precise defects asserted”). In *Cole, supra*, it was not enough for the defendant to show that the plaintiff was aware of the dangers associated with mounting tires, rather, he had to be shown to be aware of the *precise* defect . . . that a tire with a multi-strand bead was more vulnerable to failure when mounted and could cause the bead to break and the tire to come off of the wheel. 967 S.W.2d at 179, 185. Similarly, in *Palmer, supra*, where the plaintiff was injured putting his hand inside a meat grinder, the court stated:

A general knowledge of the danger of machinery with moving parts or . . . that if part of the body were to become caught in the moving parts of the machinery it would cause injury is insufficient. The issue is whether plaintiff knew of the danger of cleaning the grinder without switching off the power supply on the wall.

849 S.W.2d at 140.

There was no evidence Jeanne had any knowledge of the specific danger that her seat would collapse in a rear impact, causing her to hit the back seat and suffer a paralyzing injury. Nor is there evidence that she was aware that her weight was even an issue with respect to the seats in her Explorer. Therefore, cases such as *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*”) and *Klugesherz v. American Honda*, 929 S.W.2d 811 (Mo.App. 1996) have no application here. Even if Ford *had* evidence to rebut the presumption, directed verdict was still improper, because “[w]hen the defense is raised that the injured plaintiff had adequate knowledge of the risks so as to obviate the duty to warn, the question of the adequacy of the knowledge is for the jury.” *Palmer, supra*.

Additional Causation Evidence Presented by Appellants

With application of the heeding presumption, a submissible case was made. However, appellants went further, presenting substantial evidence Jeanne would have heeded a warning, if given.

Jeanne was a person who read warnings, instructions and manuals, paying close attention to weight warnings because she, her husband, and son were all above six feet tall and weighed around 300 pounds. [Tr. Vol. I, p. 648, l. 19 – p. 649, l. 9; p. 690, l. 6 – p. 691, l. 19; p. 688, l. 17 – p. 689, l. 7]. Jeanne never would have bought the Explorer if she knew the seats weren’t designed for someone her size. [Tr. Vol. I, p. 693, l. 25 – p. 694, l. 3]. If Mr. Moore had any warning or indication that the seat in his wife’s Explorer was not designed for a person her size, he never would have purchased the vehicle and would have done everything in his power to talk Jeanne out of using it. [Tr. Vol. I, p. 650, l. 18 – p. 651, l. 2]. Above and beyond everything discussed *supra*, this testimony, in and of itself, established causation. *See Steele v. Evenflo Company, Inc.*, 178 S.W.3d 715, 718 (Mo.App. 2005); *Palmer, supra* at 141.

Ford attempted to argue below that a submissible case was not made because of testimony on cross-examination that Jeanne had not looked for weight warnings on seats of other vehicles she owned. [Tr. Vol. I, p. 723, l. 16 – 725, l. 4]. Ford’s argument is misplaced. For starters, under the applicable standard of review all of Ford’s evidence must be disregarded. *Dunn, supra*. Even if one ignored the controlling standard of review, the testimony on which Ford relies in no way defeats submissibility. “A reviewing court may not ‘sift’ a plaintiff’s testimony, ‘so long as a reasonable probability appears that the plaintiff would have heeded a different and more adequate warning.” *Smith*, 275 S.W.3d at 785 [quoting *Bean v. Ross Mfg. Co.*, 344 S.W.2d 18, 28 (Mo. 1961)].

In *Bean*, defendant made the argument Ford makes here . . . that plaintiff did not pay attention to other warnings. In *Bean*, there were actually other warnings the plaintiff disregarded *at the time of the accident*. Nevertheless, this Court held it would be “pure speculation” to hold that a plaintiff who paid little attention to the warnings given would not have heeded a “different and more adequate warning.” *Bean*, 344 S.W.2d at 28. The Court held a submissible case was made. *Id.* The trial court erred in not reaching the same conclusion in this case.

Lastly, appellants presented substantial evidence that damages were suffered as a result of Ford’s failure to warn, chiefly, Jeanne’s spinal cord injury that has left her paralyzed for the rest of her life and confined to a wheelchair. [Tr. Vol. I, p. 703, l. 13 – p. 704, l. 10]. Appellants also presented substantial evidence

of economic damages consisting of past and future medical needs and past and future lost wages exceeding \$5.97 million. [L.F. Vol. II, pp. 196, 262-63, 266 depo. p. 89, l. 18 – p. 91, l. 1; p. 102, ll. 5-9] [Tr. Vol. I, p. 633, ll. 2-15].

Under Missouri law appellants clearly made a submissible case on their 402A strict liability failure to warn claims. At a minimum, viewing the evidence and inferences in appellants' favor, reasonable minds could differ. Accordingly, the directed verdict must be reversed.

Appellants Made a Submissible Case

On Their Failure to Warn Claims Based on Negligence

“Every manufacturer has a duty to warn of dangers in the use of its product.” *Hill, supra*, 721 S.W.2d at 118. While a defendant may be found liable under strict liability without regard to his knowledge or conduct, in a negligence claim, the defendant's standard of care, knowledge and fault are relevant considerations. *Smith*, 275 S.W.3d at 784.

The elements of a claim for failure to warn based in negligence are as follows:

- (1) defendant designed the product at issue;
- (2) the product did not contain an adequate warning of the alleged defect or hazard;
- (3) defendant failed to use ordinary care to warn of the risk of harm from the alleged defect or hazard; and

(4) as a direct result of defendant's failure to adequately warn, plaintiff sustained damage.

MAI 25.09; *see also* L.F. Vol. II, p. 358.

“Although negligence and strict liability theories are separate and distinct, the same operative facts may support recovery under either theory, particularly in a failure to warn case.” *Hill*, 721 S.W.2d at 118. Accordingly, and in the interest of judicial economy, the evidence discussed *supra* is incorporated herein and will not be repeated. Additional evidence will be briefly highlighted below.

(1) Defendant Designed the Product at Issue

As in strict liability element (1), Ford stipulated to this fact.

(2) The Product Did Not Contain an Adequate Warning

This evidence is the same as strict liability element (3).

(3) Defendant Failed to Use Ordinary Care to Warn of Harm from the Alleged Defect

“The pivotal issue” in determining negligence, “is foreseeability; that is, whether the person knew or should have known that some injury might result from his act.” *Hill*, 721 S.W.2d at 118. “[T]he outer limits, within which jurors presently are permitted to find foreseeability, are exceedingly broad and flexible in this jurisdiction as in others.” *La Plant v. E.I. Dupont Nemours & Co.*, 346 S.W.2d 231, 241 (Mo.App. 1961)

As a manufacturer, Ford is “held to the skill of an expert, is charged with superior knowledge of the nature and qualities of its products, and is obligated

reasonably to keep abreast of scientific information, discoveries, and advances with respect thereto.” *Id.* at 240. Appellants presented sufficient evidence from which a jury could conclude that Ford knew or should have known injury could result from its Explorer seat design and its failure to warn users that it may not restrain foreseeable occupants in foreseeable collisions.

It was foreseeable to Ford that persons of Jeanne’s size would use its vehicles. [Tr. Vol. I, p. 243, l. 4 – p. 244, l. 2]. Ford even sold seatbelt extenders for consumers too large to use standard seatbelts. [Tr. Vol. I, p. 244, l. 19 – p. 245, l. 12].² Ford admitted it was “certainly predictable” persons weighing more than a 95th percentile dummy (220 pounds) would use its vehicles. [Tr. Vol. I, p. 635, l. 25 – p. 636, l. 5; L.F. Vol. II, p. 301, depo. p. 50, l. 20 – p. 51, l. 12].

The foreseeability of occupants as large as Jeanne imposed obligations on Ford to factor that into its design of the seat and test it to determine how it would perform with large occupants. [Tr. Vol. I, p. 244, l. 3 – p. 245, l. 12]. Despite this, Ford, *admittedly* never performed any design or development testing with dummies to simulate occupants of Jeanne’s size (even though Ford did such testing to defend this litigation). [Tr. Vol. I, p. 245, l. 13 – p. 246, l. 4] [L.F. Vol. II, p. 301 at depo. p. 50, ll 13-19]. In fact, the largest crash dummy used in the design and development testing by Ford was approximately six feet, one inch tall and weighed 215 to 220 pounds. [Tr. Vol. I, p. 245, ll. 13-21; p. 268, ll. 20-22].

² Jeanne did not require and was not using an extender.

Mr. D'Aulerio testified that a prudent seat designer should make sure that the seat will provide restraint for the people who will be using it, "not just a small section of those people, but everybody from the smallest to the biggest." [Tr. Vol. I, p. 218, l. 20 – p. 219, l. 4]. Mr. D'Aulerio opined Ford was negligent in its design of the Explorer seat because it did not design and test the seat to safely restrain foreseeable occupants like Jeanne. [Tr. Vol. I, p. 263, l. 19 – p. 264, l. 16].

This evidence was sufficient for the jury to conclude Ford knew or should have known people of Jeanne's size would use the Explorer driver's seat. Further, a reasonable jury could conclude that even if Ford did not modify its design to protect people like Jeanne, then Ford had an obligation to tell them its seat was not designed to protect them, or at a minimum, that it had not been tested and its performance with occupants weighing over 220 pounds was unknown. With respect to issues of weight, appellants respectfully submit that it is not unreasonable to expect the manufacturer of a \$30,000 vehicle to exercise the same degree of care met by the manufacturer of a \$100 ladder or a \$15 folding chair.

A submissible case was made and directed verdict must be reversed.

(4) Plaintiff was Damaged by Defendant's Failure to Provide an Adequate Warning

"[C]ausation elements are the same for both strict liability and negligent failure to warn. *Smith, supra* at fn. 107. Thus, the discussion under strict liability applies here. Appellants made a submissible case solely by application of the

heeding presumption, but went above and beyond by eliciting additional specific evidence that Jeanne would have heeded an adequate warning, if given.

Appellants clearly presented sufficient evidence to make a submissible case. At a minimum, reasonable minds could differ. Thus, the trial court erred in directing a verdict against appellants.

The Error was Prejudicial

Removing a submissible claim from the jury is *per se* prejudicial. If a trial court erred entering directed verdict, it must be reversed. *Daniele, supra*, 282 S.W.3d 876. An erroneous grant of directed verdict can only be non-prejudicial where it in no way affects the merits of the action. *See Jackson v. Leland Health Care, LLC.*, 2008 WL 6049187, *10 (Mo.App. 2008) (Rule 84.16(b) memorandum) (where directed verdict was granted in favor of one joint tortfeasor but remaining defendants were found liable and tendered the full amount of damages awarded, directed verdict was not prejudicial). In the instant matter, appellants suffered very real prejudice when the trial court removed their submissible failure to warn claims from the jury.

As discussed *supra*, appellants' failure to warn claims were compelling theories of liability, because the jury could find for appellants even if it didn't conclude Ford's design was "defective and unreasonably dangerous." Additionally, the presumption that an adequate warning would have been heeded by Jeanne could have been fully argued to the jury.

To that end, “a product not at all times inherently dangerous . . . may become so in its use for an intended purpose.” *La Plant*, at 238 (holding trial court correctly refused to enter directed verdict on failure to warn). In other words, a reasonable jury may conclude a product is not “defective and unreasonably dangerous” at all times by virtue of design alone, but that it is “unreasonably dangerous when put to a reasonably anticipated use without knowledge of its characteristics.” MAI 25.05. Indeed, reasonable jurors in this state have previously done just that and their verdicts have been affirmed. *Palmer, supra* at 137, 144. By granting directed verdict when appellants had made a submissible case, the trial court robbed appellants of the opportunity to obtain the same result reached in *Palmer*.

Accordingly, the trial court’s grant of directed verdict was prejudicial and must be reversed. Appellants are entitled to a new trial.

The Opinion Vacated by this Court’s Order of Transfer Reached the Incorrect Result and No Part of Its Reasoning Should be Adopted Here

The opinion in this case that was previously issued by the Eastern District Court of Appeals is deeply flawed. With respect to appellants’ failure to warn claims, to the extent the court held that “time of purchase” failure to warn claims are “legally unsound,” the court has ignored decades of failure to warn jurisprudence. As such, the underlying opinion is confusing, it conflicts with prior decisions of this Court and it creates a split of authority. For the reasons set forth

infra, appellants respectfully ask the Court to reverse the underlying opinion of the Eastern District.

**The Eastern District’s “Time of Purchase” Failure to Warn
Decision is Wrong and also Conflicts with Prior Decisions**

The Eastern District’s opinion singled out a category of failure to warn claims to which the Court refers as “time of purchase theory” claims. The opinion concluded as a general rule that all such claims are “legally unsound.” This holding fundamentally conflicts with prior decisions of this Court and those of virtually every other court in the country.

Specifically, the opinion stated that: “[T]he Missouri Supreme Court held that a time of purchase theory of causation, is legally unsound, ignoring ‘any reasonable concept of proximate cause.’” Opinion pg. 5 (citing *Arnold I*). The court of appeals defined “a time of purchase theory of causation” in footnote 1 of its underlying opinion as follows: “A time of purchase theory of causation states that the lack of information at the time of purchase is a proximate cause of the later resulting accident.” While this holding cites to the *Arnold I* decision, it is actually in conflict with this Court’s decision in *Arnold I*.

Arnold I was a product liability case that arose out of a gasoline explosion at an auto repair shop. Mr. Arnold was an auto mechanic injured in the explosion. *Arnold I*, 834 S.W.2d at 193. The *Arnold I* plaintiffs’ theory was that an automatic switch on an air compressor that was not airtight had ignited gasoline fumes, causing the explosion and plaintiffs’ injuries. *Id.* This Court noted in

Arnold I that the plaintiffs presented two alternative failure to warn causation theories.

Plaintiffs offer two alternate theories of causation: 1) if a warning had been given, the supplier would not have sold the air compressor to Rich's Auto Repair; and 2) if a warning had been given, Darryl Arnold would have altered his behavior on (the day of the explosion).

Id.

This Court held that the first causation theory . . . 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 to begin with . . . “ignores any reasonable concept of proximate cause.” *Id.* The Court (correctly) held that “the traditional approach to proximate cause in failure to warn cases focuses on the effect of giving a warning on the actual circumstances surrounding the accident.” *Id.*³

³ *Arnold I* did not create the “time of purchase” causation theory manufactured by Ford and adopted by the Eastern District in the underlying opinion. To the contrary, this Court simply held that the Arnolds’ thesis that a certain warning would have prevented the seller of the product from selling it to Rich’s Auto Repair strained credulity. Causation must focus on the actors and the event in question, not third parties. *See, e.g., Steele, supra; Kansas City v. Keene Corp.,*

The Court then turned to the second causation theory and held that to prove causation in support of a failure to warn claim, a plaintiff must prove: (1) that her injuries were caused by a product from which a warning is missing; and (2) that a proper warning would have altered the behavior of the individuals involved in the accident. *Id.* at 194. The Court acknowledged that Missouri law presumes a warning will be heeded, but qualified that by noting a plaintiff must prove she didn't already know of the danger absent a warning. *Id.* This Court concluded in *Arnold I* that since Mr. Arnold and everyone else in the repair shop on the day of the explosion knew there was a danger of explosion if gas fumes were allowed to accumulate, a warning would not have imparted any additional information and as such, the heeding presumption was inapplicable and the failure to warn claims should not have been submitted to the jury. *Id.*⁴

855 S.W.2d 360 (Mo.banc 1993) (Finding plaintiff made a submissible case on failure to warn claim because “the jury could find that plaintiff would not have installed the product if a proper warning was given . . .”).

⁴ Ford will contend that if the Court adopts appellants' arguments regarding the submissibility of failure to warn claims, no defendant will ever be able to get a directed verdict or JNOV on failure to warn claims. Not true. *Arnold I* illustrates that under the right circumstances and when they deserve to do so, defendants in product liability cases can prevail as a matter of law on failure to warn claims.

The case was remanded for a new trial that ultimately resulted in a defense verdict and the Eastern District's subsequent opinion, *Arnold II*. On appeal, the Arnolds asserted that the trial court erred in directing a verdict against them on their failure to warn claims. *Arnold II*, 908 S.W.2d at 763. The court rejected that claim, noting that “[t]he Supreme Court held in *Arnold I* the plaintiffs failed to make a submissible case on the issue of causation. We find the evidence on retrial substantially the same and adopt the same position.” *Id.*

Unlike Mr. Arnold, it is uncontroverted that Jeanne didn't know that her seat might collapse in a rear impact or that in designing her vehicle Ford never tested the front seats with dummies heavy enough to replicate Jeanne's weight or something reasonably close thereto. It is uncontroverted that Jeanne didn't know of the danger that a collapsing seat potentially posed to her. As such, appropriate warnings would have imparted additional information to her. The presumption applies. And under *Arnold I* and *Arnold II*, the trial court erred in directing a verdict against appellants on their failure to warn claims. *See also, Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 788-89 (Mo.App.W.D. 2008) (Analyzing *Arnold I* and concluding that plaintiffs made a submissible case on their failure to warn claims because a warning would have imparted additional information to the decedent and as such, the presumption applied to satisfy causation).

This brief review of the *Arnold* decisions illustrates that this Court did *not* establish a category of “time of purchase” failure to warn cases, nor did it

announce a bright line rule holding that in Missouri all such claims were “legally unsound.” This is made all the more clear by the presence of other previous decisions of the appellate courts of this state holding that plaintiffs made a submissible failure to warn claim by asserting causation relating to sale of the product, i.e. – that plaintiff would not have purchased or used the product in question if she had been provided with a warning of the product’s characteristics complained of in the lawsuit. *See Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 789-790 (Mo.App. 2008) (Holding plaintiffs made submissible failure to warn case where evidence supported claim that decedent would not have continued to purchase and use cigarettes if she had been warned by defendant of the dangers inherent in their use prior to 1969.); *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 108 (Mo.App. 2006) (Where evidence showed plaintiff “did not have knowledge of the specific danger confronting him,” that no labels warned of the specific dangers at issue, and that he would not have become a “confirmed Marlboro smoker” if he’d seen specific warnings, the issue of causation in failure to warn was properly submitted to the jury); *Steele v. Evenflo Co., Inc.*, 178 S.W.3d 715, 718 (Mo.App. 2005) (“Plaintiff further stated that if there would have been a warning that the car seat was not intended for children weighing less than forty pounds he would have heeded the warning and not purchased the car seat for [his son]. *** Hence, Plaintiff presented a submissible case for failure to warn.”); *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 370 (Mo. banc 1993) (“Here, 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.”).

Besides, the Eastern District’s opinion would turn failure to warn cases from across the country on their heads. If a plaintiff cannot contend that, given proper warnings, they would not have purchased and/or used certain products, when do any instructions/warnings matter? Certainly, had appellants purchased a ladder that lacked a proper maximum weight warning, they could have pursued a failure to warn claim against the ladder manufacturer, arguing that a proper weight warning would have caused them either not to purchase the ladder or to use it. The examples of absolutely necessary “time of purchase” warnings are virtually limitless . . . appropriate age warnings on children’s toys . . . maximum weight limits on ladders, chairs and step stools . . . drug interaction warnings on medicines . . . proper minimum and maximum heights and weight limits on child safety seats. . . maximum strength on ropes, chains, cables and bungee cords. Indeed, some “time of purchase” warnings are so very important that the federal government mandates not only that they be on certain products so that consumers can make informed choices, in fact, the government has input into the actual content of the “time of purchase” warnings. Cigarettes. Alcohol. Prescription drugs. All-terrain vehicles. And on and on. Failure to warn claims predicated on these types of “time of purchase” warnings are not “legally unsound.” To the

contrary, they are the very cornerstone of failure to warn jurisprudence in not just Missouri, but virtually every other jurisdiction in the country.

If the Eastern District's unprecedented "time of purchase" rule were to be adopted by this Court, it would transport Missouri failure to warn law back to the dark ages. And along with that will go all the advances in consumer safety that have been achieved since the dawn of modern product liability litigation.

**The Eastern District's Underlying Opinion Further Muddles
An Already Confusing Area of Missouri Product Liability Law**

The Eastern District's underlying opinion has further clouded what were already murky waters. In *Arnold I*, this Court held that "plaintiffs must show that a warning would have altered the behavior of the individuals involved in the accident." *Arnold I*, 834 S.W.2d at 194. Just three years later, *in the same case*, the Eastern District Court of Appeals inexplicably affirmed the trial court's decision to preclude the plaintiff from presenting evidence that, *inter alia*, a proper warning would have altered his behavior on the day of the incident at issue. *Arnold II*, 908 S.W.2d at 763.⁵

⁵ The court held that such testimony would be "speculative and immaterial." *Id.* If such testimony is, in fact, speculative and immaterial (and appellants submit that it is not), then how can it be a required element for submissibility?

Defendants in product liability cases exploit this conflict in the law to their benefit. This case presents a perfect example of this conflict. Prior to the testimony of the appellants, Ford moved *in limine* to preclude the appellants from:

commenting on or giving any testimony about, to the effect that a, that they would not have purchased the vehicle if they had known about the performance characteristics of the seat or that they would have, if they had been warned to that extent by something on the vehicle or in the owner's manual, or that after purchasing the vehicle that they would have ceased to use it or sell it or whatever, if they had read the owner's manual afterwards and had found something in there about the performance of the seat in a rear collision.

[Tr. Vol. I, p. 637, l. 21 – p. 638, l. 9]. Specifically citing the *Arnold* cases, Ford argued, *inter alia*, that it was speculative for the appellants to testify about how additional warnings would have altered their behavior. [Tr. Vol. I, p. 638, l. 10 – p. 639, l. 22]. Appellants disagreed with Ford's argument, citing *Tune* and *Hill*. [Tr. Vol. I, p. 639, l. 23 – p. 642, l. 10]. The trial court initially agreed with appellants, but later sustained objections to questions asking Jeanne if she would have purchased and/or kept the subject vehicle if proper warnings had been given to her. [Tr. Vol. I, p. 695, l. 24 – p. 696, l. 22].⁶ Jeanne was, however, permitted

⁶ If allowed to testify, Jeanne would have testified that, had proper warnings been given, she and Monty either would not have purchased the subject vehicle or,

to testify that she “had no idea” that her seat might collapse in a rear impact. [Tr. Vol. I, p. 696, l. 23 through p. 697, l. 8].

This occurs time and time again in product liability cases. Defendants move, citing *Arnold II*, to preclude the plaintiff from offering evidence or testimony 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*. In short, *Arnold I* requires a plaintiff to establish a certain proposition to satisfy causation yet *Arnold II* says that testimony establishing that proposition is speculative and immaterial.

It is not “speculative and immaterial” for an expert witness to opine that, had a surgical patient been given the appropriate antibiotic, the patient would not have died from a fatal infection. Indeed, that testimony is required for a plaintiff to make a submissible case for medical negligence under those facts. Likewise, it is not “speculative and immaterial” for a pedestrian who was ran over by a speeding car and left unable to work to testify that, but for her injuries, she

would have sold the vehicle. [Tr. Vol. I, p. 642, ll. 1-7]. Monty was allowed to offer similar testimony and actually told the jury that had proper warnings been provided to them, he would have “most certainly” done everything in his power to keep Jeanne from riding in the subject vehicle. [Tr. Vol. I, p. 650, l. 10 – p. 651, l. 2].

planned to work until she reached the Social Security retirement age. Again, that testimony is required for the pedestrian to make a submissible case on her claim for lost earnings.

The same logic should apply in failure to warn cases.

If this Court is going to require plaintiffs, as a prerequisite for making a submissible case on their failure to warn claims, to prove that additional or different warnings would have altered their behavior, then plaintiffs should be allowed to offer evidence and testimony to satisfy that requirement. And they should be allowed to rely on application of the presumption.

The underlying Eastern District opinion mentions, but then ignores, the rebuttable presumption. “If there is sufficient evidence from which a jury could find that the plaintiff did not already know the danger, there is a presumption that a warning will be heeded.” *Tune*, 883 S.W.2d at 14. This rebuttable presumption “assumes that a reasonable person will act appropriately if given adequate information.” *Arnold*, 834 S.W.2d at 194. “Thus, a preliminary inquiry before applying the presumption is whether adequate information is available *absent* a warning.” *Id.* It is not enough for the defendant to show that the plaintiff knew of the general dangers associated with the activity; rather, the defendant must show the plaintiff knew of the specific danger that caused the injury. *Cole*, 967 S.W.2d at 185. “In this instance, the term ‘presumption’ is used to mean ‘makes a prima facie case,’ i.e., creates a submissible case that the warning would have been heeded.” *Tune*, 883 S.W.2d at 14.

At a minimum, the testimony of Jeanne and Ford's corporate representative establish that the presumption applies to appellants' failure to warn claim pertaining to the complete lack of warnings regarding the intent by Ford that the front seats in the subject vehicle collapse in a rear impact. Further, appellants submit that the testimony of Jeanne and Monty is sufficient to establish that the presumption applies to appellants' failure to warn claims regarding weight. In completely sidestepping this issue, the Eastern District's underlying opinion misstates, misconstrues and confounds Missouri failure to warn law.

For all these reasons, the underlying opinion should be reversed or vacated and this matter should be remanded for a new trial on all issues.

Point Relied On Number 2

THE TRIAL COURT ERRED IN LIMITING APPELLANTS' CROSS-EXAMINATION OF FORD'S EXPERT, DR. HARRY SMITH, BECAUSE THE CROSS-EXAMINATION RELATED TO A PARAMOUNT ISSUE IN THE CASE, IN THAT, IT WOULD HAVE SHOWN DR. SMITH AGREED WITH PLAINTIFFS' EXPERT AND DISAGREED WITH FORD'S OTHER EXPERT WITNESSES ON AN IMPORTANT ISSUE OF INJURY CAUSATION.

Standard of Review

The trial court's exclusion of evidence is reviewed for an abuse of discretion. *Aliff v. Cody*, 26 S.W.3d 309, 314 (Mo.App. 2000). An abuse of discretion occurs when the court's ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Id.* at 315. To reverse the trial court's determination, appellants must illustrate to the Court that they were prejudiced because the exclusion of evidence materially affected the merits of their action. *Byers v. Cheng*, 238 S.W.3d 717, 726 (Mo.App. 2007).

The Trial Court Committed Reversible Error in Limiting

Plaintiffs' Cross-Examination of One of Ford's Expert Witnesses

The trial court erroneously restricted appellant's cross-examination of Ford's expert, Dr. Harry Smith, when it sustained Ford's improper objection that the cross-examination was "beyond the scope of the direct examination." [Tr. Vol. II, p. 1135, ll. 4-8]. Appellants sought to cross-examine Dr. Smith with contrary

prior statements he made in a published article that related to a paramount issue in the case . . . the cause of Jeanne’s injuries and whether those injuries would have been prevented with a stronger seat. [Tr. Vol. II, p. 1134, l. 24 – p. 1135, l. 8].

“The right to cross-examination is essential and indispensable.” *State v. Jaynes*, 949 S.W.2d 633, 635 (Mo.App. 1997). In Missouri, contrary to Ford’s argument, the trial court’s ruling and evidently, the Eastern District’s opinion, cross-examination of an adverse witness is *not* limited to the scope of direct examination. Instead a party “shall be entitled to cross-examine said witness on *the entire case*.” R.S.Mo. § 491.070 (parenthetical omitted and emphasis added).

“The right to cross-examine a witness who has testified for the adverse party is absolute and not a mere privilege.” *Pettus v. A.R. Casey*, 358 S.W.2d 41, 44 (Mo. 1962). “Any litigant should be freely accorded the right to cross-examine an adverse witness and the court should not unduly restrain or interfere with the exercise of that right.” *Houfburg v. Kansas City Stock Yards Co. of Maine*, 283 S.W.2d 539, 548-49 (Mo. 1955). One of the best overviews of Missouri law regarding the proper scope of cross-examination was done by this Court in *State v. Gardner*, 8 S.W.3d 66 (Mo.banc 1999). In that opinion, this Court acknowledged that, with the very limited exception of cross-examining a criminal defendant (and spouses), Missouri follows the liberal English rule, not the more restrictive federal rule. *Id.* at 71. Citing R.S.Mo. § 491.070 and the language in the statute allowing cross-examination on the “entire case,” this Court stated emphatically that “[t]his means the whole case and nothing less.” *Id.* at 72.

“The court does not have discretion ‘to exclude relevant and material facts merely because such facts are sought to be elicited on cross-examination.’” *Reno v. Wakeman*, 869 S.W.2d 219, 223 (Mo.App. 1993); *Long v. St. John’s Regional Health Ctr., Inc.*, 98 S.W.3d 601, 606 (Mo.App. 2003). “Trial court discretion regarding the impeachment of a witness is similarly limited. The court has no discretion to prevent any cross-examination at all on a proper subject.” *Reno*, 869 S.W.2d at 224; *Long*, 98 S.W.3d at 606.

The Precluded Evidence

Dr. Smith co-authored an article entitled *Assessing Injury Potential in Rear-End Vehicle Collisions*. [Tr. Vol. II, p. 1137, l. 22 – p. 1138, l. 20]. In the article, Dr. Smith concluded as follows:

Injury potential as a function of impact severity can be ameliorated when the head is perfectly braced against relative rearward motion. This notion is supported by tolerance studies involving voluntary human exposure to rear impact (with the head restrained) that reached levels of 28 to 42g.

Plaintiffs’ Exhibit 119, Appendix, A18. The reason this conclusion is significant (and its exclusion was prejudicial) is that it goes to the very heart of the dispute in seat back failure cases where plaintiffs like Jeanne and Monty argue in favor of stronger seats and car manufacturers like Ford argue against stronger seats. Dr. Smith’s conclusion in his paper – properly supporting the body in rear impacts can ameliorate serious injuries in rear impact collisions – supports the entire causation

theme of appellant's case. Since this conclusion supported appellants' causation theory and destroyed Ford's defense to the case, appellants sought to cross-examine Dr. Smith with this statement. The trial court prohibited the cross-examination. Appellants made a specific offer of proof following Dr. Smith's testimony. [Tr. Vol. II, p. 1139, l. 10 – p. 1141, l. 15].

Dr. Smith's conclusion in his article supported the opinion of appellants' expert, Dr. Ross, that rear impacts several times more severe than the 5 to 7g event in which Jeanne was involved are within human tolerance and can be survived without significant injury so long as the head and neck are supported and the seat doesn't collapse. [Tr. Vol. I, p. 454, ll. 14 – p. 456, l. 13; p. 490, l. 14 – p. 491, l. 21]. Equally important, Dr. Smith's conclusion refutes the opinions of two of Ford's witnesses, Roger Burnett and Catherine Corrigan, both of whom opined that stronger seats allegedly pose injury risks by increasing loads on the spine, even in a crash of much lower severity than the 28 to 42g events which, as Dr. Smith highlighted, were survived by *human volunteers*. [Tr. Vo. II, p. 893, l.14 – p. 894, l. 11; p. 1214, l. 24 – p. 1216, l. 25].⁷

⁷ Mr. Burnett is an in-house Ford litigation engineer who testifies on behalf of Ford in seat back failure cases. Dr. Corrigan is a bio-mechanical engineer who was a retained Ford expert.

The Trial Court Abused Its Discretion

The trial court abused its discretion by preventing appellants from cross-examining Dr. Smith with his own article. “In a civil trial, prior inconsistent statements are admissible not only for impeachment purposes, but, under certain circumstances, may also be used as substantive evidence.” *Long, supra*. “The form of the prior inconsistent statement does not matter.” *Id*. “Where a witness’s prior inconsistent statement relates specifically to a paramount issue in the case, the trial court may not prevent impeachment of the witness through use of that statement.” *Reno, supra*.

In *Reno, supra*, plaintiff was precluded by the trial court from cross-examining a defense expert concerning inconsistent deposition testimony. The trial court’s exclusion, “was error because the evidence went ‘to the very root’ of a matter in controversy—causation—the decision of which turned on the weight of the evidence.” *Reno*, 869 S.W.2d at 224. The court noted that the trial court, “prevented any cross-examination at all on the pivotal question of whether Dr. Norgard’s treatment alone [a successive tortfeasor to defendant] caused Plaintiff’s damage or whether it aggravated her damage.” *Id*. Because this was substantive evidence related to a paramount issue, the trial court, “abused its discretion and the judgment must be reversed.” *Id*. The same result must be reached here.

Exclusion of This Testimony was Prejudicial

The trial court’s error in limiting cross-examination was prejudicial. The court’s ruling prevented appellants from bringing to light the fact that the only two

medical doctors to testify to the jury on injury causation were both in agreement on a paramount issue . . . that Jeanne could have survived even a more violent wreck with little to no injury if her head and neck had been properly restrained by a seat that did not collapse. It is easy to see how this point would have been persuasive and excluding it from the jury's consideration is likely to have had a material effect on the outcome.

Even more important is the impact the cross-examination would have had on the jury's consideration of the testimony of Mr. Burnett and Dr. Corrigan. Both Burnett and Corrigan claimed that a stronger seat would have caused increased loads on the spine, and particularly the thoracic spine which is where Jeanne's vertebral fracture occurred. If the jury had learned that both Dr. Smith and Dr. Ross disagreed with Mr. Burnett and Dr. Corrigan, then it would have been far more likely to disregard their testimony that a stronger seat would not have protected Jeanne and that the subject seat was not defective.

Accordingly, the trial court's error was prejudicial and the judgment below must be reversed. Likewise, the Eastern District's opinion, quite literally, ignored R.S.Mo. § 491.070 and the line of Missouri cases embracing the English rule for cross-examination that dates back to 1840.⁸ This case should be remanded for a new trial on all issues.

⁸ *See Page v. Kankey*, 6 Mo. 227, 228 (Mo. 1840) and *Gardner*, *supra*, 8 S.W.3d at 71-72, as well as this Court's Appendix to the *Gardner* opinion.

Point Relied On Number 3

THE TRIAL COURT ERRED IN ADMITTING FORD'S STATE OF THE ART EVIDENCE, BECAUSE IT WAS IRRELEVANT, IMMATERIAL AND UNDULY PREJUDICIAL, IN THAT, WHEN THIS EVIDENCE WAS ADMITTED PLAINTIFFS' CASE PROCEEDED SOLELY ON STRICT PRODUCTS LIABILITY, THEREFORE SUCH EVIDENCE ONLY TENDED TO LEAD THE JURY TO DECIDE THE CASE ON THE IMPROPER BASIS OF THE "REASONABLENESS" OF FORD'S CONDUCT.

Standard of Review

"We review a trial court's admission or exclusion of evidence for abuse of discretion." *St. Louis County v. Meyer Properties, LLC*, 250 S.W.3d 833, 835 (Mo.App. 2008). An abuse of discretion occurs when "a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *State v. Forrest*, 183 S.W.3d 218, 223 (Mo. 2006).

"An error in the admission or exclusion of evidence will only result in reversal if the appellant was prejudiced by it." *Scott v. Blue Springs Ford Sales, Inc.*, 215 S.W.3d 145, 165 (Mo.App. 2006). "Prejudice occurs when the error committed by the trial court materially affects the merits of the action, the result, or the outcome of the trial." *KRP ex rel. Brown v. Penyweit*, 219 S.W.3d 829, 836 (Mo.App. 2007). It has also been held evidence is prejudicial, "if it tends to lead the jury to decide the case on some basis other than the 'established propositions

in the case.” *Slusher v. Jack Roach Cadillac, Inc.*, 719 S.W.2d 880, 882 (Mo.App. 1986).

It Was Error to Admit State of the Art Evidence in Ford’s Case-in-Chief

After the trial court committed reversible error in granting a directed verdict against appellants on their failure to warn claims, appellants attempted to position the case as best they could to obtain a favorable verdict. In that regard, appellants dismissed their remaining negligence claims, electing to proceed solely on strict liability for design defect. [L.F. Vol. I, pp. 186-87].

At the same time, appellants filed a motion *in limine* to exclude state of the art evidence. [L.F. Vol. II, pp. 188-90]. In this motion, appellants gave the trial court Missouri precedent illustrating that, with the liability issues limited to 402A strict liability, evidence relating to the “reasonableness” of Ford’s conduct and design choices was no longer admissible. *See Johnson v. Hannibal Mower Corp.*, 679 S.W.2d 884 (Mo.App. 1984). Some courts have used “state of the art” to mean evidence of industry practice and custom; for convenience, it is given that meaning herein. *Lane v. Amsted Industries, Inc.*, 779 S.W.2d 754, 759, fn. 4 (Mo.App. 1989).

State of the Art Evidence is

Inadmissible in Strict Liability Cases

“[T]he law in Missouri holds that state of the art evidence has no bearing on the outcome of a strict liability claim; the sole subject of inquiry is the defective condition of the product and not the manufacturer's knowledge, negligence or

fault.” *Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434, 438 (Mo. 1984). “State of the art evidence is irrelevant in strict liability cases . . . because . . . the plaintiff need not prove the violation of the standard of reasonable care for product design, but only that it was so defective as to make the product unreasonably dangerous for the anticipated use.” *Hannibal Mower*, 679 S.W.2d at 885. “The manufacturer’s standard of care is irrelevant because it relates to the reasonableness of the manufacturer’s design choice; fault is an irrelevant consideration on the issue of liability in the strict liability context.” *Elmore*, 673 S.W.2d at 438. “The only question before the jury in a strict liability action is whether the product was defective not whether the manufacturer knew it was defective or was negligent. Fault is irrelevant.” *Lay v. P&G Health Care, Inc.*, 37 S.W.3d 310, 332 (Mo.App. 2000). “As such, a product may be dangerous to a degree which the law of strict liability will not tolerate, even though the actions of the designer were entirely reasonable in light of what was known at the time the product was planned and sold.” *Cryts v. Ford Motor Co.*, 571 S.W.2d 683, 688 (Mo.App. 1978). The Eastern District has explained the distinction:

Under a negligence theory, the presence of fault or the existence of knowledge are relevant considerations. Strict liability, however, is not predicated upon the existence of knowledge or fault. In strict liability we are talking about the condition (dangerousness) of an article which is designed in a particular way, while in negligence we are talking about the reasonableness of the manufacturer’s action in

designing and selling the article as he did. Strict liability focuses on the product, not on the conduct of the manufacturer or seller.
(citations omitted)

Hill, supra, 721 S.W.2d at 117.

The Erroneously Admitted Evidence

Once the remaining negligence claims were dismissed, the sole issue for the jury's consideration was whether the condition of the product was defective and unreasonably dangerous. Accordingly, evidence related to (1) how Ford's testing procedures compared with others in the industry, (2) comparisons with other products on the market, or (3) decisions of regulatory agencies, became irrelevant and inadmissible. Yet contrary to Missouri law and over appellants' timely and repeated objections, the trial court allowed Ford to admit just such evidence.

The first time Ford strayed into inadmissible testimony with its non-retained seat design expert and trial representative, Roger Burnett, counsel raised a timely objection and brought up the motion *in limine*. [Tr. Vol. II, p. 793, l. 14 – p. 794, l. 15]. The trial court overruled the objection and allowed the testimony. [Tr. Vol. II, p. 794, ll. 16-20]. Unfortunately, this scenario would be repeated again and again throughout Ford's case. Each category of erroneously admitted evidence is discussed below.

Comparing Ford's Testing and Design Philosophy with Other Manufacturers

The first state of the art evidence admitted over appellants' objection related to the dummy used in Ford's testing that was allegedly "generally

accepted” and used by other manufacturers. [Tr. Vol. II, p. 793, l. 14 – p. 794, l. 20]. The trial court next allowed Ford to adduce testimony that, while “most manufacturers” did seatback testing at a 17 mile per hour Delta V, Ford’s testing was done at 25 miles per hour. [Tr. Vol. II, p. 815, ll. 8-23; p. 820, ll. 9-24]. Mr. Burnett further testified Ford’s testing was significantly more rigorous than its competitors. [Tr. Vol. II, p. 820, ll. 9-24]. Mr. Burnett explained that a 20 mile per hour Delta V is “*four times*” more severe than 10 miles per hour. [Tr. Vol. II, p. 820, l. 25 – p. 821, l. 16]. Here, Ford introduced patently inadmissible state of the art evidence that went beyond the traditional, “we did what everyone else in the industry does,” to, “we actually did *better* than the rest of the industry.”

Appellants’ objection to this testimony led to an extended bench conference in which counsel specifically cited controlling authority in Missouri on the inadmissibility of this testimony. [Tr. Vol. II, p. 815, l. 24 – p. 820, l. 8]. The trial court overruled the objection, relying on a mistaken belief that the testimony had to be allowed in Ford’s case, because evidence bearing on negligence had been admitted in appellants’ case while negligence claims remained in the case. [Tr. Vol. II, p. 817, ll. 11-24; p. 819, l. 24 – p. 820, l. 8]. Ford’s counsel argued this reasoning in support of the inadmissible evidence. [Tr. Vol. II, p. 816, ll. 10-12; p. 817, ll. 1-10].

Unfortunately, this reasoning is flawed. Once the issues were limited to strict liability, the landscape of admissible evidence changed. Indeed, the situation was no different than if the trial court had granted Ford’s motion for directed

verdict at the close of appellants' case on all of appellants' negligence claims, leaving only the strict liability claim. *See, e.g., Lane v. Amsted, supra*, (where plaintiff's claim for punitive damages was removed on directed verdict, evidence of industry standards admitted by defendant while punitive claim was still pending were no longer relevant or admissible in remaining strict liability count and it was open to plaintiff to seek a withdrawal instruction).

If Ford had concern over any claimed prejudice from the admission of evidence probative of Ford's negligence during appellants' case-in-chief, it could have sought an appropriate withdrawal instruction. *Lane*, 779 S.W.2d at 759. Admitting Ford's inadmissible state of the art evidence was not the "fix" for the fact that negligence evidence had been put before the jury earlier in the case. Instead, admitting the evidence only succeeded in placing irrelevant evidence before the jury which was likely to mislead and confuse the jury, making it likely it would decide the case on an improper basis . . . Ford's alleged "due care."

Importantly, Ford's counsel expressly stated that he did not want to move for a mistrial. [Tr. Vol. II, p. 820, ll. 3-8]. By declining to request a mistrial, Ford's counsel made a tactical decision reflecting his belief the evidence received during appellants' case was not so problematic that it could not be handled through less aggressive means, such as a withdrawal instruction. *See McNear v. Rhoades*, 992 S.W.2d 877, 883 (Mo.App. 1999).

Evidence of Ford's product testing and design philosophy and comparisons of that philosophy with others in the industry could only serve one purpose; to

persuade the jury that Ford acted reasonably. In *Cryts, supra*, the product alleged to be unreasonably dangerous was an armrest. Ford attempted to argue in *Cryts*, similar to its contentions here, that, “it built the safest armrest possible under the technology existing in 1957 [when it was made].” 571 S.W.2d at 689. However, under Missouri law, “[s]uch a contention has no bearing on the outcome of a strict liability claim, where the sole subject of inquiry is the defective condition of the product and not the manufacturer’s knowledge, negligence or fault.” *Id.*

In *Klein v. General Elec. Co.*, 714 S.W.2d 896 (Mo.App. 1986), plaintiff sought damages in strict liability for a fire caused by a defect in a coffee maker. Defendant argued that the trial court erred in excluding evidence concerning inspection procedures it used to insure proper fastening of the thermal fuse safety device within the coffee maker alleged to have been defective. The court held that the trial court properly excluded the evidence, as it was irrelevant in a strict liability case. *Id.* at 905. Under *Klein*, Ford’s design and testing procedures were irrelevant and should not have been admitted. The comparisons drawn between Ford’s testing procedures with that of others within the industry were equally inadmissible and even more likely to confuse and mislead the jury.

Uxa v. Marconi, 128 S.W.3d 121 (Mo.App. 2003) was a strict liability action involving a defective child safety seat. In *Uxa*, defendant argued that the trial court erred in excluding its proffered evidence that all of the other seats on the market were virtually identical to the product at issue. 128 S.W.3d at 131. Again,

the court noted that such testimony “is not relevant in a strict liability case”

Id. The trial court abused its discretion by admitting this evidence.

Comparisons with Other Products in the Marketplace

Later, Ford offered testimony that compared the performance of other seats on the market to the subject seat. Mr. Burnett discussed his testing of a BMW 850 seat that revealed high neck loads in the dummy, which he opined were near fatal and caused by the stiffness of the seat. Again, appellants’ objections were overruled. [Tr. Vol. II, p. 879, l. 18 – p. 883, l. 8]. Ford also introduced a series of sled tests Mr. Burnett performed for this case in which an Explorer seat was tested with various speeds, sizes of dummies and seating positions. Those tests were compared to similar tests Burnett ran using two stronger seats on the market – a Chevy Trailblazer and a Buick LeSabre. [Tr. Vol. II, p. 883, l. 25 – p. 884, l. 24; p. 890, l. 22 – p. 891, l. 12]. The trial court allowed this testimony over appellants’ timely and specific objections. [Tr. Vol. II, p. 887, l. 14 – p. 890, l. 20]. Appellants’ objections to exhibits outlining results of the testing were also overruled. [Tr. Vol. II, p. 890, ll. 22-24; 893, ll. 5-8; p. 897, ll. 9-16; p. 898, ll. 3-7; p. 902, l. 23 – p. 903, l. 3; p. 909, l. 24 – p. 910, l. 2].⁹ These exhibits are included in the Appendix hereto at A5-A7. Mr. Burnett testified at length that his testing showed the stronger seats of Ford’s competitors posed dangers that the weaker

⁹ There is an error in the transcript which refers to the exhibit as “BB” on page 909, when it was actually “VV” as referenced on page 902 of the transcript.

Ford seat did not, namely higher loads on the dummy's thoracic spine. [Tr. Vo. II, p. 893, l.14 – p. 894, l. 11; p. 890, l. 22 – p. 922, l. 19].

During testimony of Ford's retained seat design expert, Andrew Levitt, the trial court admitted videotape evidence and testimony about simulated crash testing of Buick and Volvo seats, including a test of a Buick seat and a 5th percentile female dummy. [Tr. Vol. II, p. 1042, l. 13 – p. 1044, l. 18; p. 1045, l. 8 – p. 1046, l. 10]. Mr. Levitt explained that this testing showed the strong seat caused high neck loads, a "negative byproduct" of a strong seat design. [Tr. Vol. II, p. 1046, l. 11 – p. 1047, l. 14].

Evidence concerning the performance of BMW, Volvo, Chevy and Buick seats was patently improper in this case in which, under strict liability, the only issue before the jury was whether *the 2002 Ford Explorer seat* was defective and unreasonably dangerous by reason of its condition. *Elmore, supra*, 673 S.W.2d at 438 ("sole subject of inquiry is the defective condition of the product . . ."). For all of the same reasons and authority discussed *supra*, it was not for the jury to decide whether other seat designs had "negative byproducts" or could be dangerous. The trial court abused its discretion admitting this evidence. *Uxa, supra; Cryts, supra*.

NHTSA's Decision Not to Change the Applicable Standard

Ford also elicited testimony from Mr. Burnett regarding a decision by the National Highway Traffic Safety Administration ("NHTSA") not to change the safety standard applicable to automotive seat strength, despite petitions

recommending that the minimum seat strength standard be raised. [Tr. Vol. II, p. 843, l. 5 – p. 844, l. 6; p. 845, ll. 7-12]. Appellants’ objection to this testimony was overruled. [Tr. Vol. II, p. 844, l. 8 p. 845, l. 4].

Evidence related to government standards had no bearing on any matter in issue at the time that evidence was offered and admitted. Even mere compliance with standards should not have been admitted or considered. “[C]ompliance with the minimum federal standards does not mitigate a manufacturer’s responsibility under the theory of strict liability any more than does compliance with the state of the art” *Cryts, supra* at 689.

In *Hannibal Mower*, the trial court admitted evidence that American National Standards Institute (“ANSI”) standards did not require the product at issue to incorporate the safety devices plaintiff alleged it was defective for lacking. The court held this was reversible error. “The introduction in evidence and consideration by the jury of this evidence of voluntary compliance with standards adopted within the power mower industry as set by ANSI must be deemed prejudicial and as having a material effect in the merits of the case.” *Hannibal Mower*, 679 S.W.2d at 886; *see also Lay*, 37 S.W.3d at 332 (ANSI standards were “clearly inadmissible in a strict liability claim”).

Ford’s evidence went further than merely placing its compliance with standards before the jury – it wandered into a discussion about the nature of the standard and that NHTSA declined requests to change it. This evidence, incorrectly, left the jury with the impression that Ford’s design of the product at

issue was “correct,” or at a minimum, “reasonable,” and implied that the federal government agreed. Admission of this evidence was wholly improper and served no purpose other than to mislead and confuse the jury. Thus, the trial court abused its discretion.

The Trial Court’s Error in Admitting State-of-the Art

Evidence was Prejudicial and Requires Reversal

The testimony comparing Ford’s testing philosophy with that of its competitors was extraordinarily prejudicial. Mr. Burnett testified that Ford’s seatback testing was substantially more rigorous than that used by the rest of the industry. [Tr. Vol. II, p. 820, l. 11 – p. 821, l. 16]. In *Hannibal Mower*, the court held that mere testimony that defendant’s product complied with generally accepted standards was prejudicial. The court explained, “[t]he fact these standards *were widely accepted in the industry* could easily have been interpreted by the jury to mean the product was safe and resulted in the defendant’s verdict.” *Hannibal Mower, supra*, 679 S.W.2d at 886 (emphasis added). The offending testimony here was that Ford not only complied with widely accepted testing practices, but allegedly exceeded them by a large margin. This evidence was even more likely to “have been interpreted by the jury to mean the product was safe and resulted in the defendant’s verdict.” *Id.*

For admission of this evidence alone, the trial court’s error was prejudicial and must be reversed. However, the trial court also erroneously admitted Ford’s litigation testing comparing the performance of its seat with others on the market.

The trial court allowed extensive testimony from Mr. Burnett that this testing showed Ford's seat was allegedly safer than stronger seats offered by Ford's competitors. This was extraordinarily prejudicial evidence, from which the jury could have interpreted that the product was safe and resulted in the defense verdict. Thus, the evidence materially affected the outcome of the case and reversal is required. *Hannibal Mower, supra; Slusher, supra.*

The fact that Mr. Burnett, as Ford's trial representative, was Ford's most important witness, further demonstrates the prejudicial effect of this testimony. Mr. Burnett personified Ford. All of the state of the art evidence was used for the improper purpose of showing, through the "face of the company," that Ford allegedly acted reasonably in its testing and design of the product at issue.

To the extent Ford attempts to argue, as it did in post-trial briefing, that this evidence was properly admitted to rebut appellants' evidence, the argument is of no help to Ford. In *Hannibal Mower*, the defendant argued the offending evidence was "introduced only to rebut plaintiff's evidence of the mower being defective or unreasonably dangerous, and not as a state of the art defense." 679 S.W.2d at 886. The court correctly noted that to allow this argument "would be to contravene the strict products liability theory and the case law of Missouri which makes this evidence irrelevant." *Id.* So too must Ford's argument fail.

Accordingly, the trial court's error in admitting extensive state of the art evidence was prejudicial and the judgment below must be reversed.

Point Relied On Number 4

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY FROM FORD'S EXPERT, CATHERINE CORRIGAN, PH.D., BECAUSE SHE WAS NOT QUALIFIED TO OFFER THE OPINIONS SHE GAVE ABOUT THE CAUSE OF MRS. MOORE'S INJURIES AND HER INTERPRETATIONS OF CT SCANS, IN THAT, SHE IS AN ENGINEER, NOT A MEDICAL DOCTOR AND, BY HER OWN ADMISSION, IS NOT QUALIFIED TO OFFER MEDICAL OPINIONS OR DIAGNOSE INJURIES.

Standard of Review

"We review a trial court's admission or exclusion of evidence for abuse of discretion." *St. Louis County*, 250 S.W.3d at 835. An abuse of discretion occurs when "a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *Forrest*, 183 S.W.3d at 223.

"An error in the admission or exclusion of evidence will only result in reversal if the appellant was prejudiced by it." *Scott*, 215 S.W.3d at 165. "Prejudice occurs when the error committed by the trial court materially affects the merits of the action, the result, or the outcome of the trial." *KRP ex rel. Brown*, 219 S.W.3d at 836.

Dr. Corrigan is Not a Qualified Medical Expert

"To qualify as an expert witness, a person must have specialized knowledge, skill, experience, training, or education within a given profession or

calling.” *Childs v. Williams*, 825 S.W.2d 4, 10 (Mo.App.. 1992) (citing R.S.Mo. § 490.065). Under Missouri law, the diagnosis of injuries “is an important and integral part of the practice of medicine.” *State ex rel. Collet v. Scopel*, 316 S.W.2d 515, 519 (Mo. 1958). For Dr. Corrigan to interpret Jeanne’s injuries and injury patterns, she must be qualified as an expert medical witness.

“Medical doctors are presumptively qualified to testify in the field of medicine.” *Childs*, 825 S.W.2d at 10. “The issue, then, is whether someone with credentials less than a medical doctor . . . can qualify to testify as an expert medical witness.” *Id.* In *Childs*, the court was reviewing the trial court’s grant of summary judgment against plaintiff due to lack of medical expert testimony to support her claim for intentional infliction of emotional distress where plaintiff’s expert was a psychologist, Dr. Miller Boyd. Dr. Boyd admitted he could not “comment on [the plaintiff’s] mental problems with any medical certainty or surmise that they were ‘medically significant.’” *Id.* The *Childs* court held that Dr. Boyd “conceded his own inability to testify as a medical expert witness.” *Id.* at 11. The same is true of Dr. Corrigan.

Dr. Corrigan is an engineer. By her own admission, she does not hold a degree from a medical school, is not a medical doctor of any kind, cannot treat patients, is not qualified to diagnose injuries, interpret and make clinical diagnoses from x-rays, or offer medical opinions. [Tr. Vol. II, p. 1146, ll. 19-22; p. 1225, l. 13 – p. 1226, l. 18]. Just as in *Childs*, Dr. Corrigan has conceded her own inability to testify as a medical expert.

A medical expert is required to express conclusions to reasonable medical certainty. If the conclusions cannot be so expressed, the testimony is insufficient and “expresses only educated speculation, and amounts to nothing more than an assurance that the result was scientifically possible.” *Carter v. Jones Truck Lines, Inc.*, 943 S.W.2d 821, 826 (Mo.App. 1997). Dr. Corrigan did not and could not express any of her opinions to reasonable medical certainty due to her admitted lack of qualifications. [Tr. Vol. II, p. 1226, ll. 16-18]. Therefore, the testimony was improper and insufficient to support a finding that Jeanne’s injuries were caused in the manner to which Dr. Corrigan testified. *Id.* at 826.

The Improperly Admitted Testimony

Concerned that Ford would attempt to present medical diagnosis and injury causation testimony, as it frequently does, through Dr. Corrigan, an engineer, appellants filed a motion *in limine* to exclude any such testimony before trial. [L.F. Vol. I, pp. 42-43, 53-70]. The trial court never ruled on the motion *in limine*, but appellants raised timely and repeated objections to the testimony.

Appellants first objected when Ford’s counsel asked Dr. Corrigan whether there was an injury to Jeanne’s skull. [Tr. Vol. II, p. 1170, ll. 10-24]. However, Ford’s counsel rephrased the question and the court never ruled on the objection. [Tr. Vol. II, p. 1170, l. 25 – p. 1171, l. 12]. Appellants again objected to Dr. Corrigan’s attempt to interpret CT films, though a ruling was withheld until specific questions could be asked. [Tr. Vol. II, p. 1179, l. 7 – 1181, l. 5]. Ford then asked Dr. Corrigan what forces would cause a fracture dislocation of Jeanne’s

T9-T10 vertebrae. [Tr. Vol. II, p. 1183, ll. 4-7]. Appellants' objection was overruled and Dr. Corrigan was allowed to offer the medical opinion that Jeanne's paralyzing fracture was caused by hyperextension. [Tr. Vol. II, p. 1183, l. 8 – p. 1184, l. 3; p. 1185, ll. 17-22]. Dr. Corrigan's medical opinion (an opinion she lacked the qualifications to offer) was opposite that of appellants' medical expert, Dr. Ross, who opined that Jeanne's fracture occurred due to compressive force when she hit her head and shoulders on the backseat. [Tr. Vol. I, p. 484, l. 22 – p. 485, l. 10; p. 469, l. 21 – p. 470, l. 8; p. 481, ll. 6-20].

Dr. Corrigan later drifted into testimony concerning the condition of Jeanne's trabecular bone. [Tr. Vol. II, p. 1190, ll. 2-17]. Again, appellants' objection was overruled and the testimony allowed. [Tr. Vol. II, p. 1190, ll. 18-25]. Appellants sought and received a continuing objection to this testimony, in which Dr. Corrigan proceeded to offer medical testimony concerning the makeup of trabecular and cortical bones, describe what happens to trabecular bones when they are compressed and offer her ultimate opinion that Jeanne's trabecular bone did not suffer a compressive force based on interpretations of radiographs. [Tr. Vol. II, p. 1191, l. 8 – p. 1193, l. 21].

Ford then attempted to elicit medical testimony from Dr. Corrigan regarding Jeanne's CT scans and the density of Jeanne's bones. Appellants objected, yet again, that Dr. Corrigan lacked qualifications to interpret radiological films. The trial court sustained the objection, but gave Ford an opportunity to "lay a better foundation." [Tr. Vol. II, p. 1196, l. 24 – p. 1197, l. 13]. This cycle was

repeated twice as Ford attempted to lay a foundation to admit the evidence. [Tr. Vol. II, p. 1198, ll. 14-21; p. 1200, ll. 1-17]. On the second such occasion, the trial court directed counsel to approach the bench and explained to Ford's counsel what the trial court believed was lacking in foundation. [Tr. Vol. II, p. 1200, ll. 9-17]. Then, Ford attempted to fix the foundational problem as instructed by the court. An objection was raised when Ford asked Dr. Corrigan . . . now for the fourth time . . . to discuss her bone density opinions based on the radiological films. [Tr. Vol. II, p. 1202, ll. 17-25]. At a side bar, an extended discussion was had about the nature of what Ford hoped to adduce from Dr. Corrigan's testimony . . . that radiological films showed an existence of "osteophytes" on Jeanne's vertebra which Ford hoped to persuade the jury made Jeanne's spine weak and prone to break in the area of the fracture. [Tr. Vol. II, p. 1203, l. 1 – p. 1204, l. 17]. The trial court allowed this testimony, so long as the word "osteophytes" was not used. [Tr. Vol. II, p. 1204, l. 18 – p. 1205, l. 5].

The Trial Court Erred by Admitting This Testimony

Dr. Corrigan was not qualified to offer opinions regarding the cause of Jeanne's injuries, nor to interpret Jeanne's CT scans. In *Pfeffer v. Kerr*, 693 S.W.2d 296 (Mo.App. 1985), a wrongful death action, plaintiff appealed after the trial court precluded EMTs called by plaintiff from testifying that decedent's high blood pressure "signified a stroke or possible heart attack." The court noted that neither EMT "demonstrated any expertise in the field of cardiology or in any

particular medical field.” *Id.*, at 304. The trial court’s exclusion of the testimony and judgment for defendant were affirmed. *Id.* at 305.

In *Brennan v. St. Louis Zoological Park*, 882 S.W.2d 271 (Mo.App. 1994), plaintiff alleged that steps at the St. Louis Zoo were negligently designed and caused her to fall, suing the architectural firm which designed the steps. Plaintiff prevailed at trial, and defendant appealed. On appeal defendant argued that plaintiff’s expert witness, Mr. Koesting, was not qualified to testify to the standard of care for an architect. The court held that Mr. Koesting’s training and education as a “registered *professional engineer*,” did not qualify him to testify as to the standard of care ordinarily used “*by architects.*” *Id.*, at 273 (emphasis in original). The same is true of Dr. Corrigan who admitted she was not a medical doctor and could not offer medical opinions.

The trial court advised Ford’s counsel it would allow Dr. Corrigan’s testimony concerning her interpretations of Jeanne’s CT scans if a foundation could be laid that Dr. Corrigan had received some training that would enable her to read CT scans. [Tr. Vol. II, p. 1200, ll. 4-16]. Ford then led Dr. Corrigan into testimony that, as part of her Ph.D., she worked with a thesis advisor developing procedures for laboratory studies. [Tr. Vol. II, p. 1200, l. 17 – p. 1202, l. 6]. She testified that, through this experience, she “learned things like the proper procedures for doing the CT scanning of the specimens.” [Tr. Vol. II, p. 1201, l. 2 – p. 1202, l. 6]. Dr. Corrigan did not testify that she had training in the reading and interpreting of CT scan films. After this testimony was received, the trial

court allowed Dr. Corrigan to testify about Jeanne’s CT scans, over appellants’ objections. [Tr. Vol. II, 1202, l. 17 – p. 1205, l. 5].

The problem with Dr. Corrigan “working with a medical doctor” is that it does not qualify her to do what a medical doctor does . . . interpret CT scans.

Brennan is instructive:

Plaintiff argues that Mr. Koestering’s experience working closely with and overseeing architects for over thirty-five years qualified him to testify as to architects’ standard of care.

* * *

The fact that Mr. Koestering worked closely with architects for a number of years does not mean he is qualified to testify as to the standard of care required of architects by their own profession.

Id.; see also *State v. Newcomb*, 934 S.W.2d 608, 611 (Mo.App. 1996) (DNA expert not qualified to criticize methods of serology expert). Just as in *Brennan*, Dr. Corrigan’s experience working with a medical doctor did not qualify her as a medical expert. Dr. Corrigan isn’t qualified to practice medicine outside of a courtroom and she should not have been allowed to practice medicine inside a courtroom. The trial court abused its discretion allowing Dr. Corrigan to offer medical testimony.

The Trial Court’s Error was Prejudicial

Dr. Corrigan’s medical testimony led to her ultimate medical opinion that Jeanne suffered her injuries, not from striking her head and shoulders on the rear

seat, or compression, but from being out of position and having her back stretched around the right side of the seat frame during the collision – a hyperextension. [Tr. Vol. II, p. 1208, l. 4 p. 1210, l. 17]. Dr. Corrigan’s testimony in this regard was contrary to that of appellants’ injury causation expert, Dr. Ross, a medical doctor specializing in forensic pathology with actual qualifications to offer these types of opinions.

The prejudicial effect of Dr. Corrigan’s testimony is clear . . . it gave Ford an explanation of how Jeanne became a paraplegic in this low severity rear end collision without that injury being caused by a defective condition in Ford’s seat. It cannot be reasonably denied that this testimony could have been responsible for the jury reaching a defense verdict. Accordingly, the judgment below must be reversed.

Point Relied On Number 5

THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR NEW TRIAL ON THE GROUNDS OF CUMULATIVE ERROR BECAUSE, THE POINTS OF ERROR 1 THROUGH 4 DISCUSSED *SUPRA* JUSTIFY A NEW TRIAL, EVEN IF THIS COURT DOES NOT BELIEVE THAT ANY SINGLE POINT, STANDING ALONE, JUSTIFIES REVERSAL, IN THAT, THE CUMULATIVE EFFECT OF THOSE ERRORS AT TRIAL PREJUDICED APPELLANTS AND AFFECTED THE OUTCOME OF THE TRIAL.

Standard of Review

Review of a trial court's denial of a motion for new trial is for an abuse of discretion. *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 866 (Mo.App. 2009). An abuse of discretion occurs when "a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *Forrest*, 183 S.W.3d at 223.

Missouri courts have explained that they are "more liberal in upholding the grant of a new trial than the denial of a new trial." *Farley v. Johnny Londoff Chevrolet, Inc.*, 673 S.W.2d 800, 806 (Mo.App. 1984).

The Trial Court Erred in its Denial of a New Trial

"A new trial can be ordered when there are cumulative errors, even without deciding whether any single point would constitute grounds for reversal." *Crawford ex rel. Crawford v. Shop 'N Save Warehouse Foods, Inc.*, 91 S.W.3d 646, 652 (Mo.App. 2002). Appellants incorporate herein the articulation of error

and prejudice that is set forth above with respect to each allegation of error. While each point discussed above is error that was prejudicial and, standing alone, warrants reversal, assuming *arguendo* that this Court is not so convinced, appellants respectfully submit that it cannot be denied that the cumulative prejudicial effect of these errors justifies a new trial. The trial court's errors in granting directed verdict against appellants on their claims for failure to warn when a submissible case had been made, the admission of improper, inadmissible state of the art evidence in respondents' case, the admission of medical injury causation testimony from respondent's expert witness who was unqualified to give such testimony, and the improper preclusion of appellants' cross examination of respondent's expert witness Dr. Smith, were, in the aggregate, so prejudicial and so affected the outcome of the trial that they justify reversal for a new trial on all issues. *See Faught v. Washam*, 329 S.W.2d 588, 604 (Mo. 1959); *Myers v. Moffett*, 312 S.W.2d 59, 65 (Mo. 1958).

The judgment below should be reversed for a new trial on all issues.

CONCLUSION

For all of the foregoing reasons, appellants respectfully ask that this Court reverse the judgment below. Further, appellants ask that the Court reverse or vacate the underlying Eastern District opinion. Appellants 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 23,009 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.

Counsel for Appellants

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 9th day of April, 2010 to:

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