

IN THE SUPREME COURT OF MISSOURI

Appeal No. SC90681

JEANNE MOORE and MONTY MOORE, Plaintiffs-Appellants,

v.

FORD MOTOR COMPANY,
Defendant-Respondent.

Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Mark D. Seigel

**BRIEF AMICUS CURIAE
OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.**

Thomas E. Rice, Jr.	MO #29946	Hugh F. Young, Jr.
Angela M. Higgins	MO #52159	Product Liability Advisory Council, Inc.
Bryan E. Moubert	MO #49388	1850 Centennial Park Drive, Suite 510
BAKER STERCHI COWDEN & RICE LLC		Reston, VA 20191
2400 Pershing Rd., Suite 500		(703) 264-5300
Kansas City, MO 64108		OF COUNSEL
(816) 471-2121		
Fax: (816) 472-0288		

COUNSEL FOR AMICUS CURIAE
THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.

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INTRODUCTION AND INTERESTS OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. (“PLAC”) is a non-profit association with 100 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC’s perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

Since 1983, PLAC has filed over 800 briefs as amicus curiae in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC’s corporate members is attached hereto as Appendix A.

PLAC’s attorneys are familiar with the legal issues raised by this case and the briefs on file in this Court. PLAC believes that its public policy perspective and litigation experience will provide a necessary additional viewpoint on the issues presented in this case. PLAC submits this brief to

inform the court regarding the state of the law on claims of failure to warn in the product liability context, in that appellants' argument proposes a significant shift in existing Missouri law as to plaintiffs' burden of proof on the issue of proximate causation and is contrary to the law of other jurisdictions.

All parties to this appeal have been consulted and consent to PLAC's filing of this brief as *amicus curiae*.

SUMMARY OF ARGUMENT

Appellants propose a dramatic shift in Missouri law. The duty to warn requires manufactures to provide information that would allow a user to alter her conduct in the course of *use* of the product. Appellants' proposed test would focus on conduct at the time of purchase, so remote in time that it has no nexus with the accident.

If plaintiff's injury would have occurred regardless of whether a proper warning had been given, a failure to warn is not the cause of injury, and the plaintiff is not entitled to recover on a failure to warn claim under either negligence or strict liability theories. Missouri law does not impose a futile obligation to warn where a warning would not alter a plaintiff's conduct in the use of the product in a way to avoid injury. Where, as here, the plaintiff could not have used the product more safely so as to avoid injury, there can be no

claim for failure to warn, only a claim of defective design or defective manufacture.

For the reasons set forth below, the decision of the Circuit Court should be affirmed.

LAW AND ANALYSIS

I. The Conceptual Framework of the Failure to Warn Claim.

“Warnings and directions concerning the proper use of a product and the consequences of misuse are intended primarily to lessen the level of risk” associated with the use of that product. *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 382 (Mo. 1986). The body of products liability law is intended to encourage manufacturers to design and label products in such a way as to promote their safe use. Hildy Bowbeer & David S. Killoran, *Liriano v. Hobart Corp.: Obvious Dangers, the Duty to Warn of Safer Alternatives, and the Heeding Presumption*, 65 Brook. L. Rev. 717, 735 (Fall 1999).

Under Missouri law, a plaintiff may bring a failure to warn claim under either negligence or strict liability theories. *Nesselrode*, 707 S.W.2d at 383 (noting that Missouri has adopted both the Restatement (Second) of Torts § 388 model of negligent failure to warn and a strict liability failure to warn claim that is derived from § 402A of the Restatement (Second)). Proximate cause is an

essential element of the failure to warn claim under either theory of recovery. *Id.*; see also *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 14 (Mo. banc 1994); *Mothershead v. Greenbriar Country Club, Inc.*, 994 S.W.2d 80, 89 (Mo. App. E.D. 1999). Proving proximate cause is a “fundamental burden” that must be met by plaintiffs. *Nesselrode*, 707 S.W.2d at 381.

The first prong of the causation test requires proof of a proximate causal link between decedent's injury and the product allegedly lacking a warning or having an inadequate warning. *Tune*, 883 S.W.2d at 14. The second prong requires that the plaintiff show that a warning would have altered the behavior of those involved in the accident. *Id.*

When considering a claim that a manufacturer should have provided a warning, “The tribunal must construct a conceptual bridge between the absence of the desired information and the injury which plaintiff suffered, in order to establish the necessary causal link. For this bridge-building process to have any meaning, the factfinder must be able to hypothesize as to how the plaintiff would have used the missing information had the defendant supplied it.” James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 306 (May 1990).

Proximate cause consists of two components: cause-in-fact and legal

cause. *See Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 861 (Mo. 1993); *Wright v. Barr*, 62 S.W.3d 509, 524 (Mo. App. W.D. 2001); *Heffernan v. Reinhold*, 73 S.W.3d 659, 664 (Mo. App. E.D. 2002). The “cause-in-fact” is synonymous with “but for” causation – without the happening of this occurrence, the injuries would not have been sustained. *Heffernan*, 73 S.W.3d at 664. Legal cause involves a policy decision, excluding events that “are causal in fact but that would be unreasonable to base liability upon because they are too far removed from the ultimate injury or damage.” *Id.* The requirement that plaintiffs prove proximate cause is an important conceptual means of limiting the scope of a defendant’s potential liability. *Nesselrode*, 707 S.W.2d at 381.

“[A] plaintiff may show that the injury proximately resulted from the failure to warn, or from an inadequate warning, by evidence that had a proper warning been given, he would not have used the product in the manner which resulted in his injury, or by evidence that certain precautions would have been taken that would have avoided the accident.” W. Kimble & R. Leshner, *PRODUCTS LIABILITY* § 257, at 296 (1979) (footnotes omitted); see also W. Page Keeton, *Products Liability-Inadequacy of Information*, 48 *Tex. L. Rev.* 398, 414 (1970).

II. A Failure to Warn Claim is Not Viable Where the Only User Behavior That Would Have Prevented Plaintiff's Injuries Is Speculative or Remote in Time From the Accident.

Missouri's failure to warn law focuses upon the dangerous condition of a product when used without knowledge of its characteristics. *See* Mo. Rev. Stat. § 537.760. Both negligent and strict liability theories of recovery example the reasonableness of plaintiff's use of the product at the time of injury, and consider if the use is reasonably foreseeable to the manufacturer. *Tune*, 883 S.W.2d at 14.

Failure to warn law focuses upon the conduct of the user, and the information available to her at the time of use. Appellants urge the Court to roam far afield of this anchoring principle of product liability law, and to invite consideration of a plaintiff's mindset at the time a product is purchased, often years before any injury is suffered.

A. A Time of Purchase Theory of Causation is Legally Unsound, Because it Ignores "Any Reasonable Concept of Proximate Cause."

"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" and not the time of purchase. *Arnold v. Ingersoll-*

Rand Co., 834 S.W.2d. 192 (Mo. banc 1992), (citing Restatement (Second) of Torts, § 433); *cf. Nesselrode*, 707 S.W.2d at 385.

Appellants suggest that, had Ford Motor Company provided an adequate warning regarding the characteristics of the seats of the Ford Explorer that plaintiff Jeanne Moore was driving when she was involved in a collision with another vehicle, that plaintiffs would not have purchased the Ford Explorer three years before the accident occurred. The recognition of a claim for failure to warn predicated solely upon plaintiff's testimony that she would not have purchased or used a product if she had been provided with different warnings would precipitate a broad, fundamental change in Missouri tort law. This departure from decades of Missouri jurisprudence on proximate cause would undermine the public and legal policies underlying the concept of proximate cause.

This Court has previously found that an argument “[t]hat information affecting the sale of a product could proximately cause injury from its use defies logic. To accept this claim as legally sound would be an unprecedented extension of liability.” *Arnold*, 834 S.W.2d. at 193. The Court held, *en banc*, that “a rational jury could perhaps (imaginatively) find that the lack of information at the time of purchase was a ‘but for’ cause of the explosion. This theory, however, ignores any reasonable concept of proximate cause.” *Id.*

To understand just what an unprecedented extension of Missouri law a “time of purchase” theory presents, we must remember that, to establish proximate cause in a failure to warn case, a plaintiff must prove that her injuries were a natural and probable consequence of the failure to warn about the dangers associated with her use of the product. The lack of a warning must be both the cause-in-fact and the legal cause of the plaintiff’s injuries. To trace the causal chain from the plaintiff’s injuries back in time, often (as in this case) over the course of several years, to the time when plaintiff decided to purchase the product would render the very concept of proximate cause moot. It would, moreover, upset a delicate balance between the social utility of strict product liability claims and the countervailing limits on defendants’ potential liability recognized as fundamental public policy by this Court in *Nesselrode*. 707 S.W.2d at 381.

The courts of Missouri and of the majority of other jurisdictions have consistently rejected the viability of a failure to warn claim that is predicated upon plaintiffs’ theory that defendants’ duty to warn can be traced to a time remote from the time of the accident. In *Arnold v. Ingersoll-Rand Co.*, 908 S.W.2d 757, 763 (Mo. App. E.D. 1995), the Court of Appeals, on remand, applied this Court’s rule in *Arnold* to exclude testimony “concerning the possible effect of a missing warning label other than on the date of fire.” *Id.*

Likewise, courts in other jurisdictions that have evaluated the time of purchase theory of causation have found it does not satisfy any reasonable test of proximate cause. In *Day v. Volkswagenwerk Aktiengesellschaft*, 451 F. Supp. 4 (E.D. Pa. 1977), plaintiff sustained injuries when the vehicle in which she was riding was struck by another vehicle that had run a red light. As a result of injuries sustained in the accident, plaintiff was paralyzed and suffered other serious and permanent injuries. Plaintiff alleged, in part, that Volkswagen knew of crash test results that indicated a danger of serious injuries in front-end collisions unique to the rear-engined Volkswagen, but had failed to provide warnings regarding these crash test results. *Id.* at 6. The court found the lack of warnings had no connection with the operation of the vehicle that ran the red light and caused the accident, “and to suggest that had the warnings been given, the [plaintiffs] might not have purchased the van is pure speculation.” *Id.* The trial court refused to submit plaintiff’s failure to warn case to the jury.

Similarly, in *American Motors Corp. v. Ellis*, 403 So.2d 459, 466 (Fla. App. 1981), plaintiff argued that the manufacturer of an automobile should be liable for failing to warn that plaintiff could sustain injuries in a fire caused by a ruptured fuel line. Plaintiff also asserted claims of design defect as to the fuel system. Plaintiff sustained injuries following a collision with a 74,000-pound

tractor trailer traveling at 45 to 50 miles per hour. The court of appeals found that the trial court erred in denying manufacturer's motion for directed verdict on plaintiff's failure to warn claim, as there was no proximate cause between failure to warn and plaintiff's injuries. The court of appeals held that, "only if we were to engage in the speculation that the owner, properly, warned, would not have purchased the car, or would not have allowed it to be driven on interstate highways, could we recognize a causal relationship between breach of a duty to warn and the instant injury." *Id.* The court of appeals noted that it is "difficult to perceive, given the nature of the defect contended by plaintiffs," what warning could have prevented or ameliorated plaintiff's injuries on the date of the accident. *Id.*

The speculative nature of a "time of purchase" theory was also examined in *Morgen v. Ford Motor Co.*, 797 N.E.2d 1146, 1152 (Ind. 2003). There, the Indiana Supreme Court affirmed the trial court's refusal to allow a failure to warn claim to be submitted to the jury. The court did not find sufficient evidence to support such an instruction where the primary evidence consisted of plaintiff's testimony that she would not have purchased the car, would not have let passengers in the back seat, and would not have gotten into the car. *Id.* Without evidence of the "content or placement of warning that would have prevented the danger posed by the alleged defect," the parties "are required to

hypothesize as to specific warnings that would meet muster.” *Id.*

Likewise, the Washington Supreme Court rejected plaintiff’s theory that he would not have purchased a “mini-trail” bike for his son if he had received more adequate warnings. *Baughn v. Honda Motor Co., Ltd.*, 727 P.2d 655, 665 (Wash. banc 1986). “To say that [plaintiff] would not have bought the mini-trail bike if the warnings had been stronger, however, is purely speculative.” The court affirmed the lower court’s grant of summary judgment on plaintiff’s strict liability and negligent failure to warn claims. *Id.* at 669. New York courts have rejected the notion that proximate cause can be established by arguing that the product would not have been purchased. *Elsroth v. Johnson & Johnson*, 700 F. Supp. 151, 166 fn. 18 (S.D.N.Y. 1988).

Proximate cause is a legal test that limits the potentially infinite reach of a cause-in-fact analysis, and instead looks to “the effect of giving a warning on the actual circumstances surrounding the accident.” *Arnold*, 834 S.W.2d at 193. This test requires the fact-finder to consider how a reasonable person would have acted under the circumstances of the accident if warned, and is inconsistent with Appellants’ proposed theory.

B. The Time of Purchase Theory of Causation Unreasonably Privileges the Missing Warning Over All Other Considerations that Influenced the User's Purchase of the Product.

Appellants observe that many products have labels that are present on the product at the time of purchase and may influence a consumer's decision to purchase a product. (App. Brief at 48). But of course any product that enters the chain of commerce with a warning will have that warning present at the time of purchase. Some users will read a warning and determine that the product will not be appropriate to the specific use for which the consumer intends to put it, or that the consumer does not feel that she can use the product in a manner that would reduce the risks of harm, and that consumer will choose not to purchase the product. While certain warnings may prevent purchase, the purpose of a warning (and of Missouri's warning law) is not to prevent purchase, but to alter the user's behavior to avoid harm in the use of the product. Moreover, a multitude of factors, many of them highly idiosyncratic, enter into a consumer's decision to purchase a product.

Appellants cite to *Steele v. Evenflo Company, Inc.*, 178 S.W.3d 715 (Mo. App. E.D. 2005) in support of their contention that Missouri would recognize a time of purchase theory of causation. *Steele* involved a child who was too small to be placed in the car seat purchased by plaintiff.

In *Steele*, plaintiff's testimony that he would not have purchased the infant car seat if he had been warned was admitted without objection by defendant, and thus was never actually challenged or preserved for appellate review. 178 S.W.3d at 718. Indeed, the issue in *Steele* was whether the warning, which was required by federal law, was placed on a label with sufficient permanency to withstand multiple users.

While Appellants categorize the holding in *Steele* as pertaining to a time of purchase duty to warn, not only was this not reached by the holding, in fact it is apparent that the failure to warn simply applied to instructions for the proper *use* of the car seat. The label that fell off the car seat instructed the consumer when to begin and when to cease using the car seat (i.e., not until the child had reached a minimum weight and not after the child had reached a maximum weight). The warning that should have been given is one that would have affected the user's behavior at the time he installed the car seat in his vehicle and each time he placed the child in the car seat. Although the plaintiff in *Steele*, without challenge from the defendant, phrased his causation theory in terms of never having purchased the car seat, he could just as easily have argued that if the warning had been present he would not have placed the child in the seat on the day of the accident, which would have been the appropriate theory under Missouri's well-established causation analysis. Had a warning

been present the day of the accident, and had plaintiff heeded it, an under-sized child would not have been placed into a car seat, the sole purpose of which was to protect the child in the event of a collision. The injuries in *Steele* could have been avoided by conduct near in time to the accident, entirely unlike the circumstances in this case.

All of Appellants' examples are dependent upon the plaintiff's characterization of subjective individual decision-making regarding the purchase of products. While a drug interaction warning may prevent one consumer from taking a subject drug, it may induce another consumer to use the drug but discontinue use of the interacting drugs. While some consumers might choose not to smoke cigarettes, others may simply limit their consumption, or more closely monitor their health for signs of negative effects. While some consumers might choose not to consume alcohol, others will do so in moderation.

Missouri law does not impose upon manufacturers a duty to tell consumers not to use their products, only a duty to advise them how to use those products more carefully so as to minimize the risk of danger. Appellants cite no Missouri law for the proposition that the duty to warn exists to allow consumers to "make informed choices" to avoid purchasing products, as they contend. (App. Brief at 48). Appellants' proposed theory of causation is based

upon the proposition that, if warned, some consumers would choose to avoid a product entirely rather than to purchase it and use it safely consistent with warnings that should be provided. Appellants' theory is not that a product could have been made safer with warnings, but that a subset of consumers could have avoided the product entirely if they had been warned about its characteristics. Appellants cite no Missouri case law in support of this proposition.

A time of purchase theory of causation improperly privileges the warning that plaintiffs contend should have been made above all other factors that plaintiffs actually considered at the time of purchase. A consumer's decision to purchase a product like an automobile is certainly influenced by any number of individualized criteria, including make and model, price, gas mileage, recommendations of friends, the perceived trendiness of the vehicle, and so on. A time of purchase theory credits plaintiffs' dubious testimony that the single most important criteria that would have influenced their purchase of the product was the missing warning. This evidence is irretrievably tainted by the unfortunate accident that ultimately befell the plaintiff, and even plaintiff herself is unlikely to be able to reconstruct, months or years after the purchase, all of the factors that were important to her decision to buy a product. There is simply no reason to credit testimony that the subject matter of a missing

warning would have prevented a consumer from purchasing a product, given the multitude of objective and subjective factors that enter into a purchase consideration.

Moreover, Missouri law on the duty to warn focuses upon the effect of a warning upon a “reasonable person.” *Arnold*, 834 S.W.2d at 194. The presumption that a warning would have been heeded is founded on the assumption that “a reasonable person will act appropriately if given adequate information.” *Id.* No Missouri case has ever construed the “appropriate act” of a consumer in response to a proper warning to consist of avoiding the product entirely. Nor is it clear how a fact-finder would determine what factors considered by a potential purchaser of a product are “reasonable.”

Under the theory proposed by Appellants, juries would be required to determine whether a “reasonable person” would have avoided the product (i.e., whether the “product users” or “product avoiders” are the more reasonable category of persons). As discussed more fully *infra* at pages 31-34, this theory is nothing more than a claim of design defect, asking the fact-finder to determine if the product was so unreasonably dangerous as sold that no reasonable user would have purchased it.

C. The Time of Purchase Theory Is Undermined By Plaintiffs' Actual Behavior.

The time of purchase theory involves a logical fallacy under the facts of this case. Even accepting the theory for the sake of argument, for a missing warning to establish causation, it must have been the single most important piece of information regarding the product, the sole factor that would have caused Appellants to walk away from the purchase. Appellants' own behavior, however, defeats any possible causal link between a "missing warning" regarding the crash test limits and Mrs. Moore's injuries.

Appellants argue that the single most important factor in their purchase of an automobile was that it be suitable for a 300 pound driver. Appellants' theory of causation is that the weight capacity of the vehicle was so essential to their purchase decision that they would not have purchased the vehicle had they known that Ford did not crash test the seats with a dummy matching Mrs. Moore's weight. But Appellants *did* purchase the vehicle without assuring themselves that the seats had been tested for 300 pound occupants.

Appellants argued that Mrs. Moore carefully read labels and sought out products that would be compatible with her 300 pound weight, in recognition that both she and her husband were of greater than average size. (Tr. 690-91). The undisputed facts, however, establish that Mrs. Moore purchased this

product without any specific assurance that it was in fact tested for her weight, which she acknowledged to be well above average. Appellants urge that Ford should have told Mrs. Moore the maximum occupant weight at which Ford performed crash testing, and that this information was so vital to her that it would have dissuaded her from purchasing the vehicle and allowed her to avoid sustaining her injuries, but at the actual time of purchase this information was so unimportant to her that she did not bother to inquire regarding the weight limits at which the vehicle was crash tested.

The fact that Appellants purchased the vehicle without first verifying that the alleged “weight limit” of the seats exceeded 300 pounds disproves their theory of causation. This warning could not be the proximate cause of Mrs. Moore’s injuries, or the sole determining factor in her purchase of a vehicle, because she purchased the vehicle despite not knowing this information. If the absence of the information did not prevent her purchase, then the absence of the information could not possibly be the proximate cause of her injuries under Appellants’ theory.

**D. The Only Evidence Possible Under a “Time of Purchase”
Theory is Too Speculative to Submit to a Jury.**

The difficulty that inheres in a “time of purchase” theory of causation is that it invites the jury “to indulge in pure conjecture or guess” regarding what a

plaintiff would have done, in many cases years before the accident occurred. *Greiner v. Volkswagenwerk Aktiengesellschaft*, 429 F. Supp. 495, 498 (E.D. Pa. 1977), *aff'd*, 540 F.2d 85, 94 (3d Cir. 1976). Such a theory does not reasonably admit of the multitude of factors that may influence a user's decision to buy a product.

If plaintiff can meet her burden of establishing proximate cause merely with her own testimony that she would not have purchased the product, the requirement that plaintiff prove proximate cause is effectively moot. "A plaintiff's prima facie case should not be capable of being constructed from pure rhetoric." *Doctrinal Collapse in Products Liability, infra*, 65 N.Y.U. L. Rev. at 309.

"Self-serving" testimony and conclusory allegations that a plaintiff would not have purchased a product absent a proper warning are insufficient to make a jury-submissible case. *Broussard v. Procter & Gamble Co.*, 463 F.Supp.2d 596, 609-610 (W.D. La. 2006) (granting summary judgment to defendant manufacturer of a heat wrap that allegedly caused burns to plaintiff).

"Testimony by [the plaintiff] as to what she would have done, had proper warnings been provided, would have been both speculative and self-serving." *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1281 (5th Cir. 1974); *Kloepfer v. Honda Motor Co.*, 898 F.2d 1452, 1459 (10th Cir. 1990); *Messenger v.*

Bucyrus-Erie Co., 507 F. Supp. 41, 43 (W.D. Pa. 1980) (“Even expert testimony [that a plaintiff would have followed a different warning] is incompetent and may not be admitted into evidence if the opinion is based on mere conjecture.”).

“[I]t makes no sense from either the legal or public policy perspective to impose a duty to provide such a warning where no one has offered competent proof that the warning would have been effective to make the product safer.” *Obvious Dangers, the Duty to Warn of Safer Alternatives, and the Heeding Presumption, infra*, 65 Brook. L. Rev. at 733 (emphasis added). Plaintiffs’ testimony that they would not have purchased a product had they known of its characteristics has repeatedly been found to be legally insufficient to constitute competent evidence of proximate cause. *See, e.g., Day v. Volkswagenwerk Aktiengesellschaft*, 451 F. Supp. 4, 6 (E.D. Pa. 1977).

Missouri courts recognize that defendants are entitled to introduce evidence that a plaintiff disregarded existing warnings or failed to read a product’s owner’s manual, such that a warning would not have prevented the accident. *See Klugesherz v. American Honda Motor Co., Inc.*, 929 S.W.2d 811, 814 (Mo. App. E.D. 1996). Defendants are thus able to offer evidence, if such exists, to establish the carelessness of the plaintiff in her use of the product or her inattention to warnings, through evidence of plaintiff’s habits or pattern of

practice in the use of the product. By contrast, under the doctrine advanced by Appellants, it would be virtually impossible for defendants to refute plaintiff's testimony that she would not have purchased a product, as it is entirely hypothetical and exists without reference to the factual circumstances of the accident. When reaching a rule of law, the Court should be cognizant of the possible evidence available to support and to refute a proposition determinative of liability.

E. The Time of Purchase Theory of Causation is Inconsistent With Established Principles of Comparative Fault and Would Deprive Manufacturers of Their Statutory Comparative Default Defense.

A failure to warn case is predicated upon the assumption that there is behavior that could have been modified with a proper warning, so as to avoid injury to the plaintiff. This assumption makes it possible to compare the fault of the various actors associated with the accident, including the reasonableness of plaintiff's own behavior.

Mo. Rev. Stat. § 537.765 provides that a defendant product manufacturer may assert as an affirmative defense the comparative fault of the plaintiff, which may bar or limit plaintiff's recovery, including a comparison of:

- (5) The failure to undertake the precautions a reasonably

careful user of the product would take to protect himself against dangers which he would reasonably appreciate under the same or similar circumstances;

Note that the comparative fault defense focuses upon the plaintiff's conduct in the *use* of the product.

The effect of the "time of purchase" theory of causation would be to attribute all of plaintiff's damages to the product manufacturer, by making it impossible to meaningfully compare the fault of actors involved in the accident. This is because the relevant time period for the causation analysis would be limited to the time of purchase and not the circumstances of the accident. The adoption of a "time of purchase" theory of causation would effectively eliminate the comparative fault affirmative defense in product liability cases.¹ A "time of purchase" theory of causation thus becomes a referendum on whether the product should have been sold, which is not the purpose of a failure

¹ While this Court has not specifically addressed the application of the comparative fault defense in crashworthiness or "enhanced injury" cases like this one, the Court should be mindful that the adoption of Appellants' proposed change in the law will extend the rule beyond the facts of this case to impact other categories of product liability claims. *See, e.g., Williams v. Ford Motor Co.*, 454 S.W.2d 611, 617 (Mo. App. St. L. 1970) (noting the evolution of product liability law in Missouri).

to warn claim, in that the failure to warn claim presupposes that a product can be made non-defective and used safely with a proper warning.

“If the plaintiff’s prima facie causation case is too easy to establish, the tools available to defendants to rebut it are almost nonexistent.” *Doctrinal Collapse in Products Liability, supra*, 65 N.Y.U. L. Rev. at 304. Appellants’ theory would deprive product manufacturers of an affirmative defense afforded to them by Section 537.765(5) and well-established common law.

III. A Failure to Warn Claim Fails as a Matter of Law If a Warning Would Not Alter a User’s Behavior So as to Avoid the Accident.

It is apparent that a plaintiff cannot pursue a failure to warn claim where the user could not have changed her behavior in the use of the product in a way that would have avoided the accident. The policy underlying the failure to warn claim is to provide users with better information to allow them to use the product more safely to avoid harm. Where the user’s behavior proximate in time to the accident is not a contributing cause of the accident, a warning would be futile, and Missouri law will not impose liability upon a manufacturer for failing to warn.

A. Proximate Cause is Not Satisfied Where the User’s Conduct Could Not Have Been Made More Safe With a Warning.

In a failure to warn case, the alleged defect in the product is the lack of an appropriate warning regarding the use of the product. Proximate cause requires that plaintiff establish that this lack of warning caused her injuries.

“[T]he 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.” *Arnold*, 834 S.W.2d at 193. In cases where there is no warning, Missouri law affords plaintiffs a presumption that they would have heeded an adequate warning. *Id.*

This Court has recognized that the “heeding presumption” is more complex and nuanced than this basic statement of the rule, however. *Arnold*, 834 S.W.2d at 194. The presumption that plaintiffs will heed a warning is itself based on an assumption that a reasonable person would act differently if given adequate information. *Id.*

Missouri’s claim for strict liability failure to warn derives from the Restatement (Second) of Torts § 402A, comment j, which states: “Where warning is given, the seller may reasonably assume that it will be read and heeded.” “Implicit in that comment, however, is the assumption that the warning could have been heeded to avoid the peril. *Greiner*, 429 F. Supp. at

498.

Greiner presented a failure to warn case involving a claim that an auto manufacturer should have warned of a vehicle's propensity to roll over. The court summarized the issue: "As we see it, the precise question is: Assuming the necessity of a warning of the Volkswagen's propensity to overturn on sharp steering maneuvers, how did the absence of a warning cause the accident? Or conversely, how would its presence have prevented the accident?" *Greiner*, 429 F. Supp. at 497.

The *Greiner* court noted that, even if a warning regarding the possibility of roll-over had been made, it could not have been "heeded" under the circumstances of the accident, in which the driver, seeking to avoid a head-on collision, executed a sharp turn that caused the vehicle to roll. *Id.* at 497. Under the facts of the case, a serious accident was inevitable, and the evidence failed to establish that a warning, as proposed by plaintiff, could have been heeded in a way to avoid the accident. *Id.* As such, the question of proximate cause became one of law for the court because the link between the urged warning and the accident was too remote to submit to the jury. *Id.*

Although Appellants have complained that the trial court should not have required them to propose a feasible warning, it is clear that plaintiffs' burden of proof on proximate cause requires plaintiffs to propose what information, had it

been communicated to them, would have altered their conduct so as to avoid the accident. The concepts of proximate cause and the heeding presumption are closely intertwined.

Thus, a presumption that a warning would have been heeded is proper where the nature of the proposed warning was “both specific and easily followed” and inferred from the factual circumstances of the accident, such as “push the autorotation button immediately on engine failure, do not operate in excess of 6,000 revolutions per minute, use only in well-ventilated area, and do not insert dynamite in freshly drilled hole.” *Greiner*, 429 F. Supp. at 498. In the case of proposed warnings like these, it would require “no guess or conjecture” for a factfinder to determine how the accident could have been avoided by following the warnings. *Id.* Missouri’s heeding presumption would be properly applied under similar circumstances.

By contrast, the *Greiner* court found that, “although the propensity to overturn on sudden maneuvers could be described, whether such description could have avoided this accident would call for pure speculation.” 429 F. Supp. at 498. Likewise, the scope of the proposed warning in this case merely relates that the Ford Explorer’s seats have not been tested for occupants exceeding 220 pounds. This is descriptive, but there is no reason to believe that this information would allow a driver to avoid injury in a rear-end collision like the

one at issue herein, because it does not imply a course of conduct that could be undertaken to avoid the hazard.

The proximate cause analysis encompasses both cause-in-fact and legal cause. There are many events, the occurrence of which would have prevented plaintiff's injuries, which will not be considered for purposes of legal causation. An illustrative case is *DiCarlo v. Keller Ladders, Inc.*, 211 F.3d 465, 467 (8th Cir. 2000) (applying Missouri law). In *DiCarlo*, plaintiff fell from a ladder when the fifth step gave way due to a failure of a component of the step. Plaintiffs' failure to warn claim was premised upon the lack of a warning, common to other ladders, that warned users not to step upon the fifth step due to a risk of losing one's balance. The Eighth Circuit noted that, while such a warning might have prevented plaintiff from standing upon the step that failed, thus establishing cause-in-fact, it was clear that the lack of warning was not the cause of plaintiff's fall, because he did not lose his balance, the step gave way. For proximate cause purposes, plaintiff's injury must be the "natural and probable consequence" of a defendant's conduct. *Id.* (citing *Krause v. U.S. Truck Co.*, 787 S.W.2d 708, 710 (Mo. 1990)). Accordingly, the trial court properly declined to submit the failure to warn claim to the jury. *Id.*

Furthermore, other courts have recognized the logical fallacy of an argument that a warning should have been provided at the time of purchase and

that plaintiff would have avoided the accident by not purchasing the product.

If, as plaintiff seems at times to suggest, the warning should be given in the owner's manual, there arises the question of how that notice could be effective. Plaintiff argues that in his case he would have refused to purchase the vehicle, but in the ordinary case, and in perhaps even in this plaintiff's case, the sale is completed before the purchaser has an opportunity to read the owner's manual. Warnings given to consumers are effective when the consumer is informed of a way in which the product can be used that nullifies or mitigates the risk. Here, however, the risk of injury is from an accident, and that risk is inherent in the operation of a motor vehicle. Moreover, if the notice is required in this case, where there is no defect in design or manufacture of the seatbelt restraint system, it presumably would be required in the case of every manufacturer, and thus every owner's manual would say the same thing.

Mazda Motor of America, Inc. v. Rogowski, 659 A.2d 391, 397 fn. 2 (Md. App. 1995).

The presumption that a user would have heeded an appropriate warning

is simply not properly applied to a case in which there is no way the user could have engaged in different behavior proximate to the accident that would have avoided her injuries. As discussed *infra*, plaintiffs must twist the concept of proximate cause beyond all recognition to purport to sustain a claim for failure to warn where the warning has no substantial nexus to the facts of the accident.

B. This Is Not a Weight Limit Case.

Appellants' causation theory strains credibility under the facts of this case. Appellants repeatedly argue that "maximum weight limit" warnings should always be provided and failure to do so supports a theory of causation that would consider the speculative testimony of plaintiff that she would not have purchased a product if she had been provided a warning about its "maximum weight limit." But this is not a weight limit warning case.

Items like ladders and step stools will fail and become unusable when their maximum weight capacity is exceeded. Under the undisputed evidence in this case, it is clear that Appellants' Ford Explorer did function as intended when used by Ms. Moore for six months prior to the accident. Appellants' difficulty in formulating a proposed warning is instructive, because the "defect" or "dangerous condition" of the seat of which Appellants claimed they were entitled to be warned was *not* that the seat would fail to support an occupant exceeding 220 pounds, whether in normal use or in the event of a collision,

because this was not supported by the evidence. Instead, the “warning” that Appellants contend Ford should have supplied is simply that the seat had not been “crash tested” with a hypothetical occupant whose weight exceeded the 95th percentile of weight for American adults, 220 pounds.

The undisputed evidence was that even in the event of a collision, there is no specific “weight limit” for an occupant, beyond which the seatback would yield in the event of a collision. (Tr. 356, 815). Instead, whether a seatback will yield in a collision is a complex physics problem that involves several variables, including the physical characteristics of the seat occupant, the weight and inertia of the vehicle that strikes the plaintiff’s vehicle, and the direction of impact. (Tr. 307-08, 332-34). By adjusting these variables, it is apparent that an occupant exceeding 300 pounds would not experience a yielding seatback where the speed of the collision was less than the forces involved in this accident. (Tr. 356, 815). The static weight limit on a product like a ladder is completely different than the variable “delta v” forces involved in an automobile accident.

“[A] person cannot, after suffering an accident, simply draw up a warning limited to the dangers involved in that accident and argue that that warning *should* have been conveyed by the manufacturer or seller without first also establishing that that warning is adequate and that it actually could have

been communicated in the manner proposed.” *Meyerhoff v. Michelin Tire Corp.*, 852 F. Supp. 933, 947 (D. Kan. 1994) (emphasis original).

The undisputed evidence simply does not establish that Ford’s seat would yield when used by an occupant who exceeded the test weight of 220 pounds. At best, the evidence establishes that there is an amount of force beyond which the seatback would yield, and that this force is a product of several variables, including but not limited to the weight of the occupant. Accordingly, a warning that the seatback would yield if an occupant weighing more than 300 pounds was involved in a collision is not true or necessitated by the facts. A warning that the seatback had not been tested for occupants exceeding 220 pounds does not provide any information about a dangerous condition of the product. Under well-established Missouri law, manufacturers are not required to provide warnings regarding product characteristics that are not dangerous.

C. Where it Does Not Reasonably Appear That a Warning Would Have Prevented the Plaintiff’s Injuries, Plaintiff Has Failed to Make a Submissible Claim.

A plaintiff makes a submissible case for failure to warn *only* if “a reasonable probability appears” that the product’s user “would have heeded a different and more adequate warning.” *Bean v. Ross Mfg. Co.*, 344 S.W.2d 18, 28 (Mo. banc 1961).

Missouri recognizes several circumstances in which a warning would not alter a user's behavior. For example, where a user has actual knowledge of the danger or is a "sophisticated user" of similar products, there is no viable claim for failure to warn. *See Stevens v. Durbin-Durco, Inc.*, 377 S.W.2d 343, 347 (Mo. 1964) ("where the danger is open, obvious and apparent, or the user has actual knowledge of the defect or danger, there is no liability on the manufacturer"). This is because, where the user knew of the danger, the alleged failure to warn is not a proximate cause of a subsequent injury. *Young v. Wadsworth*, 916 S.W.2d 877, 878-79 (Mo. App. E.D. 1996). The presumption that a warning would have altered the outcome arises only if there is sufficient evidence from which a jury could find that the plaintiff did not already know the danger. *Tune*, 883 S.W.2d at 14.

When plaintiff has failed to meet her burden on proximate cause, her tort claim does not present a jury-submissible question. *Stroot v. Taco Bell Corp.*, 972 S.W.2d 447, 450 (Mo. App. E.D. 1998). While "ordinarily, the jury considers issues of proximate cause," "courts may resolve for themselves the question of legal or proximate causation if they conclude that no reasonable jury could find such causation on the record presented." *Shelcusky v. Garjulio*, 172 N.J. 185, 206, 797 A.2d 138 (N.J. 2002).

There is, thus, ample precedent for the conclusion that Missouri law does

not impose a futile duty to warn where a warning would not have altered the outcome. Moreover, there is considerable precedence for ruling upon the causation issue as a matter of law.

Even in jurisdictions that use a “heeding presumption,” where the evidence fails to establish proximate cause, the presumption is rebutted as a matter of law. *See Gosewisch v. American Honda Motor Co., Inc.*, 737 P.2d 376, 380 (Ariz. 1987) (superseded by statute on grounds other than the proximate cause ruling). A court may dispose of a failure to warn theory as a matter of law where the causal connection between the lack of warning and plaintiff’s injury is too remote to raise a jury question.” *Greiner*, 429 F. Supp. at 497.

“Where the theory of liability is failure to warn adequately, the evidence must be such as to support a reasonable inference, rather than a guess, that the existence of an adequate warning may have prevented the accident before the issue of causation may be submitted to the jury.” *Conti v. Ford Motor Co.*, 743 F.2d 195, 198 (3d Cir. 1984).

To make a submissible case, plaintiff is required to produce substantial evidence for every fact essential to liability. *Klugesherz*, 929 S.W.2d at 814 (citations omitted). “The questions of whether evidence in a case is substantial and whether the inferences drawn are reasonable are questions of law.” *Id.*

Missouri courts will not supply missing evidence or give plaintiff the benefit of unreasonable, speculative, or forced inferences. *Id.* Where there is no basis for concluding that warnings would have altered the behavior of anyone involved in the accident, the heeding presumption is rebutted as a matter of law. *Id.*

D. Where Plaintiff's Causation Theory Focuses Upon the Time of Purchase, the Failure to Warn Claim is Subsumed in the Defect Claim.

Plaintiffs cannot transform design and/or manufacturing defect claims into failure to warn claims simply by alleging that the defendant should have warned that the product contained a design or manufacturing defect. If a characteristic of a product is a design or manufacturing defect, no warning can cure that defect.

Where a proposed warning cannot be shown to have proximately caused plaintiff's injuries, the failure to warn claim simply restates the design defect claim and is duplicative. In *Lujan v. Tampo Manufacturing Co., Inc.*, 825 S.W.2d 505, 510 (Tex. 1992), the Texas Supreme Court granted the manufacturer's motion for summary judgment because plaintiff's claim that the manufacturer should have warned of the absence of a safety device merely restated plaintiff's design defect claim.

In *Hernandez v. Ford Motor Co.*, No. C.A.No.C-04-319, 2005 WL

1693945, *2 (S.D. Tex. July 20, 2005), the trial court granted summary judgment for the defendant on plaintiff's failure to warn claim, because the plaintiff failed to prove causation. The court noted that "the heart of plaintiff's complaint is the claim of a design defect." *Id.* at *1.

The failure to warn claim presumes that the product can be made reasonably safe with proper instructions or warnings. But where plaintiffs also complain of design defect, the only appropriate warning would have been to say "do not buy the product at all." *Hernandez*, 2005 WL 1693945, *2; *accord*, *American Motors Corp.*, 403 So.2d at 466 (finding that plaintiff's only claim was for design defect).

Here, the trial court properly directed a verdict on plaintiffs' failure to warn claim, because it was nothing more than a design defect claim restated. Plaintiffs' inability to formulate a proposed warning, beyond suggesting that they should have been informed that the Ford Explorer's seats were not tested for occupants exceeding 220 pounds, is not a warning regarding how to avoid injury in the use of the product, it is simply a design defect claim in a different guise. Moreover, casting the design defect claim as a failure to warn claim would improperly afford plaintiffs the benefit of a substantially easier standard of proof and a heeding presumption. For these reasons, Missouri courts should not recognize a failure to warn claim that is simply cast as a failure to warn

regarding a defect.

Additionally, the Missouri courts have recognized that, as in the instant case, a failure to warn claim presupposes a defect or failure in the product. *Spuhl v. Shiley, Inc.*, 795 S.W.2d 573, 580 (Mo. App. E.D. 1990); *Sill v. Shiley, Inc.*, 735 F. Supp. 337, 339 (W.D. Mo. 1989). In this case, the jury returned a defense verdict on plaintiffs' design defect claim. A trial court's decision not to submit a failure to warn claim to the jury is supported by the jury's findings for defendant on plaintiff's design defect claim. *See Conti v. Ford Motor Co.*, 743 F.2d 195, 199 (3d Cir. 1984).

CONCLUSION

The policy underlying Missouri's failure to warn law is not to provide a referendum on what products should be sold, but to allow products to be used more safely. Appellants' proposal to look to whether a warning would have prevented a plaintiff from ever purchasing the product is inconsistent with decades of well-established Missouri law on proximate cause, as well as that of the majority of jurisdictions to have considered the issue.

BAKER STERCHI COWDEN & RICE, L.L.C.

Thomas E. Rice, Jr. MO #29946
Angela M. Higgins MO #52159
Bryan E. Moubert MO #49388
2400 Pershing Road
Suite 500
Kansas City, MO 64108
Telephone: (816) 471-2121
Facsimile: (816) 472-0288

-and-

Hugh F. Young, Jr.
Product Liability Advisory Council, Inc.
1850 Centennial Park Drive, Suite 510
Reston, VA 20191
(703) 264-5300
OF COUNSEL
ATTORNEYS FOR AMICUS CURIAE
THE PRODUCT LIABILITY ADVISORY
COUNCIL

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Thomas E. Rice, hereby certify as follows:

a The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Word 97 in Times New Roman, size 14 font, and excluding the cover page, the signature block and this Certificate of Compliance and Service, it contains 8,989 words.

b Pursuant to Supreme Court Rule 84.06(h), the email transmitted this day contains a copy of this brief in Word format. It has been scanned for viruses using McAfee Virus Scan Program and otherwise complies with Supreme Court Rule 84.06(h).

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Randall L. Rhodes	Dan H. Ball
Christopher J. Stucky	Stephen G. Strauss
Benjamin C. Fields	Molly M. Jones
DOUTHIT, FRETTS,	BRYAN CAVE, LLP
ROUSE, GENTILE &	One Metropolitan Square
RHODES, LLC	211 North Broadway, Suite
903 East 104th St., Suite	3600
610	St. Louis, MO 63102
Kansas City, MO 64131	dhball@bryancave.com
rrhodes@dfrglaw.com	sgstrauss@bryancave.com
cstucky@dfrglaw.com	molly.jones@bryancave.com
bfields@dfrglaw.com	

Dated: May 14, 2010

Thomas E. Rice