NO. 03-35326

FILED
SEP 25 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH L. JARAMILLO, individually and as Personal Representative of the Estates of ANGELA L. JARAMILLO and McKENNA LEE JARAMILLO; GERALD R. TARUTIS as guardian ad litem for RILEY R. JARAMILLO, a minor; and BRADFORD J. FULTON as guardian ad litem for SAWYER D. JARAMILLO a minor,

Plaintiffs-Appellants,

v.

FORD MOTOR COMPANY, a Delaware corporation,

Defendant-Appellee.

On Appeal from the United States District Court for the
Western District of Washington, Tacoma Division
Honorable J. Kelly Arnold
U.S.D.C. No. CV-01-05311-JKA

APPELLEE'S ANSWERING BRIEF

David D. Swartling
Raymond S. Weber
Caryn Geraghty Jorgensen
MILLS MEYERS SWARTLING
1000 Second Avenue, 30th Floor
Seattle, WA 98104-1064
Telephone: (206) 382-1000
Facsimile: (206) 386-7343

Attorneys for Defendant-Appellee.

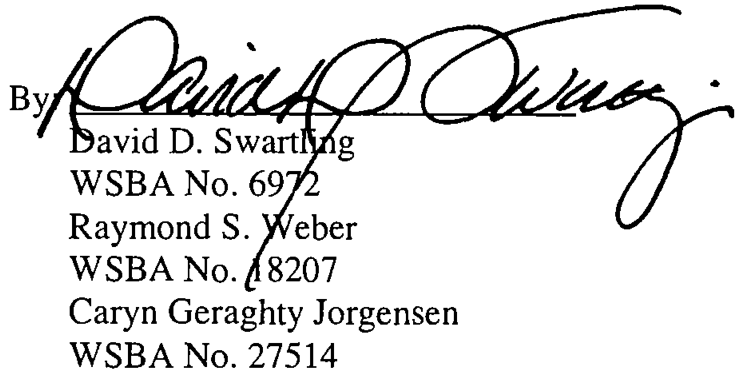
CORPORATE DISCLOSURE STATEMENT
(Fed. R. App. P. 26.1)

Ford Motor Company has no parent corporation and no other corporation has a financial interest in this matter. The following is a list of publicly traded domestic and foreign companies in which Ford Motor Company owns an equity interest of at least 10% but less than 100%.

United States	Ceradyne, Inc. Edelson Technology Partners III FRN of San Diego, LLC FRN of Tulsa, LLC J.D. Power Clubs, Inc. Metropolitan Realty L.L.C. Vastera, Inc.
Argentina	Ford Credit Compañía Financiera S. A.
Canada	Ballard Power Systems
Denmark	Ford Motor Company A/S
Finland	Oyj Ford Abp
Germany	Ford Werke-Aktiengesellschaft
Japan	Mazda Motors Corporation
Norway	Ford Motor Norge A/S
Vietnam	Ford Vietnam Limited

Executed on behalf of Ford Motor Company this 23rd day of September, 2003.

MILLS MEYERS SWARTLING
Attorneys for the Defendant-Appellee
Ford Motor Company



By
David D. Swartling
WSBA No. 6972
Raymond S. Weber
WSBA No. 18207
Caryn Geraghty Jorgensen
WSBA No. 27514

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT (Fed. R. App. P. 26.1)	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
I. STATEMENT OF JURISDICTION	1
II. STATEMENT OF THE CASE	1
III. STATEMENT OF FACTS	3
A. The Jaramillos' Decision to Lease the Explorer	3
B. The Accident	4
C. Plaintiffs' Liability Strategy	5
1. Bronco II evidence	5
2. Plaintiffs' comparative risk analysis	6
3. Evidence of other accidents offered by plaintiffs	8
D. Ford's Defense	8
1. Ford's comparative risk analysis	9
2. Evidence of other accidents	11
IV. SUMMARY OF ARGUMENT	13
V. ARGUMENT	14
A. The Standard of Review	14

Page

		Page
B.	The "Substantial Similarity" Requirement Does Not Apply to the Disputed Evidence	15
C.	Plaintiffs are Barred from Challenging the Comparative Risk Evidence Because They Invited its Admission	18
D.	A Comparative Risk Analysis is Particularly Probative of the Proof Necessary Under the Washington Product Liability Act	20
	1. The accident data was probative on the utility of the Explorer's design and its risks relative to other vehicle designs	21
	2. Accident data is probative of the expectation of the ordinary consumer	24
	3. The accident data was relevant to a determination of whether Ford had a duty to warn of an undue risk of rollover associated with the Explorer	26
	4. Evidence of performance within the automotive industry is relevant under Washington law	27
E.	The Jaramillos Did Not Assign Error to the District Court's Fed. R. Evid. 702 and *Daubert* Ruling; Consequently, Any Such Basis for Appeal Has Been Waived	28
F.	Evidence Regarding Rollover Accidents Involving the Escort and Astro Van Was Properly Admitted	29
VI.	CONCLUSION	30
	CERTIFICATE OF COMPLIANCE TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 03-35326	31
	STATEMENT OF RELATED CASES – CIRCUIT RULE 28-2.6	32
	PROOF OF SERVICE	33

TABLE OF AUTHORITIES

FEDERAL CASES	Page(s)
Barker v. Deere & Co., 60 F.3d 158, 162-63 (3d Cir. 1995)	17
Bammerlin v. Navistar Int'l Transp. Corp., 30 F.3d 898, 901 (7th Cir. 1994)	17, 23
Brown v. Seirra Nevada Mem. Hosp., 849 F.2d 1186, 1190 (9th Cir. 1988)	30
Burgess v. Premier Corp., 727 F.2d 826, 834 (9th Cir. 1984)	18
Cooper v. Firestone Tire and Rubber Co., 945 F.2d 1103, 1105 (9th Cir. 1991)	15
Coursen v. A. H. Robins Co., Inc., 764 F.2d 1329, 1333 (9th Cir. 1985)	15
Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 597 (1993)	28
Drabik v. Stanley-Bostitch, Inc., 997 F.2d 496, 508-09 (8th Cir. 1993)	17
Heath v. Suzuki Motor Corp., 126 F.3d 1391, 1396 (11th Cir. 1997)	16
Johnson v. Ford Motor Co., 988 F.2d 573, 579-80 (5th Cir. 1993)	17
Mukhtar v. California State Univ., Hayward, 299 F.3d 1053, 1063 n. 6 (9th Cir. 2002)	18
Trull v. Volkswagen of America, Inc., 187 F.3d 88 (1st Cir. 1999)	15, 16, 22
United States v. General Motors Corp., 656 F. Supp. 1555, 1575 (D.D.C. 1987), *aff'd*, 841 F.2d 400 (D.C. Cir. 1988)	23
United States v. Kessi, 868 F.2d 1097, 1107 (9th Cir. 1989)	14

FEDERAL CASES (cont.)	**Page(s)**
United States v. Segal, 852 F.2d 1152, 1155 (9th Cir. 1988)	18
White v. Ford Motor Co., 312 F.3d 998, 1009 (9th Cir. 2002)	15, 17

STATE CASES	**Page(s)**
Bittner v. American Honda Motor Co., 533 N.W.2d 476, 487 (Wis. 1995)	23
Crittendon v. Fibreboard Corp., 58 Wash. App. 649, 658-59, 794 P.2d 554, 559 (1990)	27
Falk v. Keene Corp., 113 Wash. 2d 645, 654-55, 782 P.2d 974, 980 (1989)	25, 28
Ruiz-Guzman v. Amvac Chem. Corp., 141 Wash. 2d 493, 504, 7 P.3d 795, 800 (2000)	24
Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 154, 542 P.2d 774, 779 (1975)	21, 25
Stark v. Allis-Chalmers, 2 Wash. App. 399, 406, 467 P.2d 854, 858 (1970)	23

STATUTES	**Page(s)**
RCW 7.72, Washington's Product Liability Act	20
RCW 7.72.030(1)	21
RCW 7.72.030(1)(a)	1, 21, 22
RCW 7.72.030(1)(b)	1
RCW 7.72.030(1)(c)	1, 26
RCW 7.72.030(3)	1, 24

STATUTES (cont.)	Page(s)
RCW 7.72.050(1)	27
OTHER AUTHORITIES	**Page(s)**
Fed. R. Evid. 401	15
Fed. R. Evid. 402	15
Fed. R. Evid. 403	14
Fed. R. Evid. 702	28
Fed. R. Evid. 703	16
Fed. R. Evid. 803(8)	15
Restatement (Third) of Torts § 2 cmt. d, at 19 (1998)	24

I. STATEMENT OF JURISDICTION

Ford Motor Company ("Ford") agrees with plaintiffs' Statement of Jurisdiction.

II. STATEMENT OF THE CASE

This is a product liability action brought under Washington law for injuries and death resulting from a high-speed rollover accident. Plaintiffs contended at trial that the product, a 1998 Ford Explorer, was defectively designed in at least three respects: (1) the vehicle's high center of gravity made it unstable, (2) the vehicle's roof strength was insufficient to protect occupants in foreseeable crashes, and (3) one of the vehicle seatbelts was defective in that it "unspooled" allowing one occupant to be ejected. SER 26. In addition, they contended Ford failed to provide adequate warnings regarding rollover risks.

Based upon these contentions, plaintiffs argued the vehicle was defective under RCW 7.72.030(1)(a), which requires a consideration of a product's risk and utility, and under RCW 7.72.030(3), which involves a determination whether the product is unsafe to an ordinary consumer. Plaintiffs also maintained that Ford failed to provide adequate warnings at the time of manufacture in violation of RCW 7.72.030(1)(b) and post-manufacture in violation of RCW 7.72.030(1)(c).

Ford presented evidence that the rollover was caused by Angela Jaramillo's abrupt and extreme steering inputs as she attempted to avoid deer while driving over 75 mph at night on an unlit, rural highway. The deaths of Angela and McKenna Jaramillo resulted from the severity of the accident – one of the most violent 1 – 2 % of all rollovers. The deaths were not a result of any lack of a "crashworthiness" or failure to warn.

After a 16 day trial in the Federal District Court for the Western District of Washington, the 7-member jury returned a unanimous defense verdict. The special verdict form included the following interrogatories, each of which the jury answered "No":

- Was the subject Vehicle not reasonably safe in design with respect to its stability and was this a proximate cause of injury and damage to plaintiffs?

- Was the subject Vehicle not reasonably safe because Ford failed to provide adequate warnings or instructions with the subject Ford Explorer at the time of manufacture and was this a proximate cause of injury and damage to the plaintiffs?

- Was the subject vehicle not reasonably safe because Ford was negligent in failing to provide adequate warnings or instructions after the subject Ford Explorer was manufactured and was this a proximate cause of injury and damage to plaintiffs?

- Was the roof of the subject vehicle not reasonably safe in design and was this a proximate cause of Angela Jaramillo's death?

- Was the roof of the subject vehicle not reasonably safe in design and was this a proximate cause of McKenna Jaramillo's death?

- Was the rear middle safety belt of the subject vehicle not reasonably safe in design and was this a proximate cause of McKenna Jaramillo's death?

SER 420-24.

Plaintiffs now contend that the trial judge abused his discretion with respect to two evidence issues.

III. STATEMENT OF FACTS

A. The Jaramillos' Decision to Lease the Explorer.

In April 1998, Mr. and Mrs. Jaramillo leased a new Ford Explorer. They traded in their F150 4x4 pickup in favor of an SUV because they wanted a vehicle that could be used for camping with the capability of off-road use. SER 78-79. Mr. Jaramillo also testified that he understood that rollovers were a risk of operating a motor vehicle. SER 82. Angela Jaramillo selected the Explorer based upon internet research and watching television commercials. SER 75-76, 80-81. Mr. Jaramillo testified his wife's research showed the Explorer was the safest vehicle for families. SER 75-76. There was no evidence of the substance of Angela Jaramillo's research, or of the content of the Ford advertising, but plaintiffs told the jury in opening statement the Explorer "was dangerous to an extent that Angela in her research could never have contemplated." SER 25.

B. The Accident.

The accident occurred on August 5, 1998 on Idaho State Route 20, which is a two-lane rural highway with a posted speed limit of 65 miles per hour. SER 382. Signs in both directions warn of deer and of adjoining open range for cattle. SER 28, 29, 382. Both Ken and Angela Jaramillo had driven this section of SR 20. SER 83-85.

The accident occurred at approximately 10:00 p.m. The Jaramillos had been driving almost continuously since 3:00 p.m. that afternoon. SER 86-88. Angela Jaramillo took the wheel at approximately 8:00 p.m. SER 87. Two hours later, Ms. Jaramillo suddenly encountered deer entering the roadway. She steered initially to the left and then back to the right, at which point the passenger side wheels entered the shoulder. She overcorrected to the left in an effort to regain the roadway. ER 65-67. The vehicle entered a counter-clockwise yaw, slid sideways about 117 feet, at which point it tripped, rolled five or six times, and came to rest 275 feet from the trip point. SER 39-40, 89-94.

Plaintiffs' expert testified the vehicle speed at the first yaw mark was between 65 and 73 mph – it was probably higher before that point. SER 41-43. Ford's expert testified the vehicle speed was between 71 and 73 mph at the first yaw mark. SER 95. Assuming light braking, the vehicle was traveling in the

high 70s or low 80s when Angela Jaramillo first made an evasive maneuver. SER 95-99. This accident was one of the most severe of the hundreds of accidents reconstructed by Ford's expert. SER 100-01.

C. Plaintiffs' Liability Strategy.

From the beginning, plaintiffs attempted to prove liability by reference to SUVs as a class and to vehicles other than the subject 1998 Ford Explorer. Despite repeated objections by Ford, plaintiffs opened the door to evidence of other vehicles and other accidents.

1. Bronco II evidence.

Plaintiffs' liability case focused on a Ford vehicle called the Bronco II. Plaintiffs claimed the Bronco II was prone to rollover and therefore defective. The jury was told there was a "genetic link" between the Bronco II and the 1998 Explorer with the latter inheriting the alleged defects of the former. SER 416.[1] One vehicle characteristic emphasized by plaintiffs was "static stability," which is a ratio of an object's width and the height of its center of gravity. A higher static stability number indicates greater stability. ER 45-48.

---

[1] Plaintiffs' strategy was complicated by the fact there were multiple generations of Ford Explorer. The 1998 Explorer was of the second generation, known as the UN 105. It has many different design features from the first generation Explorer known as the UN 46, and is substantially dissimilar to the Bronco II. SER 131-63.

Plaintiffs contended that the centers of gravity of the Bronco II and the Explorer were too high.

In opening statement, plaintiffs' counsel displayed side-by-side photos of the two vehicles and stated that their relationship was important because the "design of these vehicles is so similar." SER 22-23. In plaintiffs' case-in-chief, counsel questioned a witness about a Bronco II test track rollover, as well as a *Consumer Reports* article entitled "How Safe is the Bronco II?" SER 36-38. The article compared the Bronco II rollover rate to that of the Chevy Blazer, GMC Jimmy and Jeep Cherokee. SER 38.

Plaintiffs' expert testified that he (and by implication Ford) could draw information from the earlier Bronco II that should have been useful in designing the Explorer. SER 67-68. However, on cross-examination, plaintiffs' expert admitted he was unaware of the extent of similarity in most of the critical components of the Bronco II and the 1998 Explorer and that he was not relying on any similarity between the two vehicles in reaching his opinions. SER 63-66.

2. Plaintiffs' comparative risk analysis.

Although plaintiffs now assign error to admission of a portion of Ford's comparative risk analysis regarding different vehicles and classes of vehicles,

plaintiffs themselves introduced these concepts in their case-in-chief. Plaintiffs elicited the following testimony from a Ford employee:

- Ford has estimated that about one-fourth of passenger car occupant fatalities result from accidents in which the vehicles have overturned. SER 31.

- Fatalities in rollover accidents, which may or may not be accompanied by roof crush or occupant ejections, are more prevalent in light trucks than in cars. SER 32.

- The rate of fatalities for small utility vehicles exceeds other types of vehicles. SER 33.

- Utility vehicles exhibit relatively higher rollover frequency and, given a rollover, the injury consequences can be more severe. SER 34.

- Overall, light truck rollovers are two to four times the car rate. SER 34.

- Injury rates in a rollover are at least double the rates of non-rollover accidents for both cars and light trucks. SER 35.

Plaintiffs called two experts who testified about Fatal Accident Reporting System ("FARS") data. FARS is a database maintained by the National Highway Traffic Safety Administration ("NHTSA") containing information on all fatal accidents that occur within the United States. SER 268. Plaintiffs' expert, Robert Anderson, described a Ford document entitled "Observations on utility vehicle FARS incidents and implications for vehicle design and testing" that discussed drivers losing directional control of vehicles after an initial excursion off the paved roadway. ER 506-08; SER 72-74. He considered this

document significant because it allegedly showed Ford was aware of this FARS data which described "the kind of thing that the vehicle encounters, so you need to design to protect – or make a vehicle that will be able to do it safely." SER 62. In addition, plaintiffs' expert, Joseph Burton, relied upon FARS accident data to conclude that, had McKenna Jaramillo remained restrained in the vehicle, she would have survived the accident. SER 70-71. Finally, plaintiffs called a rebuttal expert on statistics. SER 383-412.

3. Evidence of other accidents offered by plaintiffs.

Over Ford's objection, plaintiffs introduced evidence of six other accidents in which an Explorer rolled over under circumstances deemed "substantially similar" to the Jaramillo accident. SER 48-57. Plaintiffs argued these six incidents should have placed Ford on notice of a defect in the design of the 1998 Explorer. SER 413-14.

D. Ford's Defense.

The principal focus of Ford's defense was the severity of the accident. Ford's reconstruction expert testified that this accident was among the most severe 1 to 2% of all rollovers with respect to the speed and the number of rolls. SER 100-01.

With respect to design, Ford demonstrated that SUVs necessarily require higher centers of gravity to conform with government regulations and to

perform on and off road. SER 241-47. Ford's design expert, Donald Tandy, explained how the architecture of the Explorer (and other SUVs) was largely dictated by functionality. A higher center of gravity and ground clearance are critical aspects of the design's utility in off-road uses. In addition, the Explorer complied with applicable government standards for SUVs. SER 241-47. Thus, the Explorer is reasonably safe for its intended uses. Ford also presented evidence that the 1998 Ford Explorer incorporated design modifications that made it substantially distinct from the Bronco II, and the first generation Explorer, that had been the focus of much of plaintiffs' case. SER 63-66. With respect to warnings, Ford introduced evidence regarding warnings and instructions relating to handling and stability provided in owners' manuals, other literature, and on the Explorer's visor sticker. SER 257. Ford contended that additional warnings were neither necessary nor would they have prevented the accident.

1. Ford's comparative risk analysis.

Ford offered comparative vehicle accident and occupant injury risk analysis through expert witness Dr. Michelle Vogler. Plaintiffs challenged admission of this evidence and Dr. Vogler's testimony. The issue was comprehensively briefed, and the court conducted an evidentiary hearing prior to allowing the testimony. ER 79-194; SER 258-59. The trial court noted that

plaintiffs "opened the door" to this type of evidence and that it was probative on plaintiffs' liability claims. ER 145-46; SER 258-59.

Dr. Vogler's analysis was based on statistical calculations derived from state and federal accident databases, including the FARS database used by plaintiffs. SER 60-61, 70-71, 268-69. Dr. Vogler's analysis allowed her to present to the jury real-world accident data reflecting, for example:

(1) The 1995-1999 Explorer had a 0.27% risk of involvement in a rollover accident, SER 294, 296;

(2) The 1995-1999 Explorer had a 0.010% risk of involvement in a rollover accident involving a fatal injury, SER 301;

(3) The 1995-1999 Explorer had 0.041% risk of involvement in a rollover accident involving a fatal or severe injury to an occupant, SER 299-300;

(4) The 1995-1999 Explorer had 0.78% a risk of involvement in a rollover accident involving a fatality to a belted occupant, SER 318-21.

Dr. Vogler then compared these risks across vehicle classes. She presented comparisons both of the Explorer to other vehicles and of SUVs relative to other vehicle classes. Her analyses show that the Ford Explorer is in the middle of the range for rollover risk among SUVs, and that SUVs, as a class, have a higher risk of rollover than other classes of vehicles. SER 294-96. Further, the risk of fatal or severe injuries in a rollover accident in an Explorer

is comparable to other SUVs. SER 296-99. Dr. Vogler's analysis also showed that SUVs are the least likely to be involved in side impact crashes. SER 283, 286-88. Dr. Vogler's testimony demonstrated that the Ford Explorer was reasonably safe in comparison with comparable vehicles and across the spectrum of possible accidents. *See also* ER 217; SER 290, 302, 305, 309, 315, 319, 322 (the remainder of the risk analysis charts).

2. Evidence of other accidents.

In opening statement, plaintiffs stated their defect theory in simple terms: "A properly designed passenger vehicle should not rollover on smooth dry pavement." SER 27. "Instead of sliding out, which is what a vehicle should do, especially a family vehicle, this vehicle rolled over." SER 24. Plaintiffs' expert stated his design criteria in starker terms – if a human being, with any steering at all, at any speed at all, can make a vehicle roll over, it's defective. SER 69.

As part of its defense, Ford offered evidence of two rollovers involving a Ford Escort and a Chevrolet Astro Van. Before any testimony was offered, the trial court articulated the basis for allowing its introduction:

> My understanding is that Mr. Tandy is going to describe, at least for the moment, the Escort and the Astro Van. Tell what he knows about those. What the conditions were. How they are similar in terms of steering inputs, frame, roll, as this situation, all for the purpose of supporting the defendant's contention that the criteria that plaintiffs' experts have talked about in terms of what makes a

vehicle roll aren't apparently the only criteria that make a vehicle roll, because these rolled as well.

SER 102.

A fleeting portion of Ford's case involved evidence related to the Escort:

Q: Can you tell us the circumstances under which that vehicle rolled over?

A: Sure. The driver allowed it to go off the right side of the road, and then yanked it back on to the road, and it came into a broadside slide. He overcorrected, and at some point in the roadway, the paved roadway, the vehicle overturned, passenger side leading.

Q: Do you recall how many times it rolled?

A: Well this was reconstructed by my old company, I used to work at. We have a diagram in here, and it looks like two rolls.

ER 76. At this point, plaintiffs established on voir dire that the witness did not know the specific static stability of the Escort and further questioning on the subject of the Escort ceased. ER 77. Ford offered no exhibits in connection with this testimony.

Testimony about the Astro Van was equally abbreviated. After a single sentence of testimony describing an Astro Van rollover, the line of questioning was abandoned. SER 248. No exhibits were offered on the subject. This evidence showed that vehicles other than SUVs roll over.

IV. SUMMARY OF ARGUMENT

In response to testimony introduced by plaintiffs, Ford introduced evidence of comparative risk. This evidence quantified the risk of becoming involved in various kinds of accidents (e.g., roll over, frontal collision, side impact collision) across different vehicle types, and the relative risk of serious or fatal injury associated with a particular kind of accident in a given type of vehicle. This quantitative analysis was based upon national and state data bases routinely relied upon by industry, government safety regulators and the insurance industry. It demonstrated that, although SUVs are more likely to be involved in a rollover accident than some other kinds of vehicles, the risk of fatal or severe injury in an SUV rollover accident is not excessive in comparison with other vehicle classes. Across all types of accidents, the Explorer and SUVs as a class produce fewer fatal and severe injuries. The Ford Explorer lies in the mid-range among SUVs in terms of rollover risk and severity of injury. Ford also introduced evidence that the marginal elevation of the center of gravity in an SUV such as the Explorer was directly related to its utility as a vehicle capable of off-road operation.

This evidence was directly relevant to the statutory standards for design defect and duty to warn under Washington product liability law. The sole issue for review is whether admission of this evidence was an abuse of discretion

under general standards of relevance and not under the more particularized "substantial similarity" standard that only applies when a plaintiff seeks to introduce evidence of other accidents as direct proof of product defect or notice. The trial court did not abuse its discretion in admitting this relevant evidence.

The trial court was also correct in finding that plaintiffs "opened the door" through their own introduction of comparative risk evidence. This Court need not reach the issue of the relevance of such evidence because plaintiffs "invited error" by introducing such evidence and argument early and often.

Ford's evidence regarding two roll over accidents involving an Escort and Astro Van was also relevant given the plaintiffs' position that a rollover means that a vehicle is defectively designed and that SUVs are uniquely susceptible to rollover. In any event, the approximately 16 lines of testimony devoted to these incidents makes any alleged error harmless and easily neutralized had plaintiffs sought a curative instruction.

V. ARGUMENT

A. The Standard of Review.

This Court reviews the district court's "decisions balancing the probative value of evidence against its prejudicial effect for abuse of discretion." *United States v. Kessi*, 868 F.2d 1097, 1107 (9th Cir. 1989). "The admission or exclusion of evidence under Fed. R. Evid. 403 . . . is reversible only for a clear

abuse of discretion." *Coursen v. A. H. Robins Co., Inc.*, 764 F.2d 1329, 1333 (9th Cir. 1985).

B. The "Substantial Similarity" Requirement Does Not Apply to the Disputed Evidence.

The Jaramillo's appeal is based upon the false premise that the "substantial similarity" requirement applies to the evidence at issue. "A 'showing of substantial similarity is required when a plaintiff attempts to introduce evidence of other accidents as direct proof of negligence, a design defect, or notice of the defect.'" *White v. Ford Motor Co.*, 312 F.3d 998, 1009 (9th Cir. 2002) (emphasis added), *quoting, Cooper v. Firestone Tire and Rubber Co.*, 945 F.2d 1103, 1105 (9th Cir. 1991). "The rule rests on the concern that evidence of dissimilar accidents lacks the relevance required for admissibility under Federal Rules of Evidence 401 and 402." *Cooper*, 945 F.2d at 1105. When evidence of other accidents or industry data tracking accidents is offered for other purposes and meets the criteria under Fed. R. Evid. 401 and 402, as it did below, the substantial similarity requirement does not apply.

In *Trull v. Volkswagen of America, Inc.*, 187 F.3d 88 (1st Cir. 1999), the plaintiffs appealed a defense verdict arguing, in part, that testimony by Volkswagen's experts, evaluating FARS data on lap-belt-only restraints, was hearsay and not relevant. *Id.* at 97-98. The First Circuit held that testimony regarding the FARS data was admissible under Fed. R. Evid. 803(8) and Fed.

R. Evid. 703. *Id.* at 97. The court rejected plaintiffs' argument that the substantial similarity requirement applied to the defendant's evidence:

> Appellants rely on case law holding that evidence of prior accidents is admissible only if the proponent shows that the earlier accidents occurred under "'circumstances substantially similar to those at issue in the case at bar.'" The cases they cite, however, all involve attempts by plaintiffs to bring evidence of other accidents before the jury to demonstrate dangerousness or notice of danger, a particularly prejudicial form of evidence when used to counter a defendant's assertion that its product is safe. At bottom, the "substantially similar" requirement is a more particularized approach to the requirement that evidence be probative. In the circumstances here, where *defendants* sought to introduce evidence of other accidents, we think it was adequate for the court to determine more generally whether the evidence was probative and, if so, whether it was unfairly prejudicial.

Id. at 98 n. 9 (emphasis in original, citations omitted). *See also Heath v. Suzuki Motor Corp.*, 126 F.3d 1391, 1396 (11th Cir. 1997) ("In this evidentiary dispute, the reasons and policies which are the basis for the "substantial similarity" doctrine do not apply. The evidence involving rollovers of three dissimilar vehicles was offered by Suzuki to explain how rollovers occur.")

The same distinction applies in this case. In order for plaintiffs' evidence of other rollover accidents to be probative of defect and notice, those accidents needed to be substantially similar to the one in this case. On the other hand, in order for statistical evidence regarding accident and injury *rates* to be probative, it only needed to be relevant to the safety of the Explorer and other SUVs, both in absolute terms and relative to other vehicles that plaintiffs claimed were

safer. *See Bammerlin v. Navistar Int'l Transp. Corp.*, 30 F.3d 898, 901 (7th Cir. 1994) ("That a product failed in a particular accident does not necessarily show 'defect' . . . data on accident rates speak more loudly than abstract arguments."). The trial court applied the same standard to plaintiffs, allowing them to introduce statistical evidence purporting to show that SUVs are more prone to fatal rollover accidents than other vehicles, without requiring them to show that every accident included in that statistical evidence was substantially similar to this one. SER 31-35, 60-62.

The cases cited by plaintiffs simply illustrate this distinction. Each case in which the "substantial similarity" test is applied involves a plaintiff offering evidence of other accidents as proof of defect or notice. *White*, 312 F.3d at 1009 (plaintiff allowed to introduce evidence of other accidents after demonstrating substantial similarity); *Johnson v. Ford Motor Co.*, 988 F.2d 573, 579-80 (5th Cir. 1993) (plaintiff's evidence of dissimilar accidents not admitted); *Barker v. Deere & Co.*, 60 F.3d 158, 162-63 (3d Cir. 1995) (plaintiffs' evidence of dissimilar accidents erroneously admitted); *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 508-09 (8th Cir. 1993) (plaintiff's evidence of dissimilar accidents not allowed to impeach defendant's witness).

With regard to the Escort and Astro Van accidents, the probative value of this evidence was in the dissimilar nature of the vehicles. It rebutted plaintiffs'

claim that the design characteristics of the Explorer and other SUVs make them uniquely susceptible to rollover and that any possibility of rollover makes a vehicle defective. In the case of Dr. Vogler's testimony, the data presented was exactly the opposite of evidence of specific "other incidents." Far from asking the jury to conclude defect from a hand-picked collection of other incidents, Dr. Vogler's testimony informed the jury of the relevant probabilities based on a comparison of overall vehicle performance and rollover rates. The relevance of Dr. Vogler's data comes from its inclusiveness, which allows overall trends to be identified, not from the similarity of each individual incident included within those statistics. Because the substantial similarity requirement does not apply to the evidence at issue, the trial court had only to determine whether the evidence was relevant.

C. Plaintiffs are Barred from Challenging the Comparative Risk Evidence Because They Invited Its Admission.

"Invited error occurs when the appellant opens the door to objectionable testimony by introducing it, rather than waiting for the appellee to do so." *Mukhtar v. California State Univ., Hayward*, 299 F.3d 1053, 1063 n. 6 (9th Cir. 2002); *see also Burgess v. Premier Corp.*, 727 F.2d 826, 834 (9th Cir. 1984); *United States v. Segal*, 852 F.2d 1152, 1155 (9th Cir. 1988). This Court should not review plaintiffs' assignment of error on admission of comparative risk evidence because plaintiffs "opened the door" in their case-in-chief. If

admission of the evidence was error – a proposition Ford disputes – it was invited error.

In opening statement, plaintiffs stated the Explorer "was dangerous to an extent that Angela in her research could never have contemplated." SER 25. Although there was evidence that Ms. Jaramillo conducted internet research and watched commercials, there was no evidence of the substance of the information she reviewed, and the jury was left with the impression that she had been deceived by Ford.

In their case-in-chief, plaintiffs introduced comparative risk evidence similar to that introduced by Ford, including the percentage of passenger car occupant fatalities in rollovers, comparison of rollover fatalities in light trucks and cars, and the rate of fatalities for small utility vehicles as compared to all other vehicles. *See supra* pp. 6-7. Plaintiffs also introduced a report based on FARS data (the same data relied upon Dr. Vogler), arguing the report put Ford on notice of a defect in the Explorer's design. Finally, plaintiffs introduced evidence of six other Explorer accidents. Plaintiffs argued that this evidence, too, constituted notice of a defect and that Ford was obligated to issue additional warnings.

In the first two instances, plaintiffs introduced selective evidence of comparative risk, including statistical evidence, in an effort to establish defect

and a duty to warn. In the third instance, the six other accidents potentially illustrated a risk of harm, but without any context regarding the magnitude of that risk relative to other vehicle designs and the number of vehicles on the road. Thus, this evidence was extremely misleading. After plaintiffs "opened the door," Ford was entitled to demonstrate what a more rigorous and inclusive study of accident data demonstrated in terms of risk and magnitude of harm and the corresponding utility of the Explorer design.

Accordingly, the trial court properly permitted Ford to rebut plaintiffs' assertion, based on other accidents, that the Explorer was defectively designed and that Ford failed to exercise reasonable care. Ford did so by showing that the risk of rollover and the risk of serious injury in a rollover accident are not excessive, either in absolute terms or compared to other vehicles, particularly when considered in the context of the benefits provided by the Explorer design. Whether a product is not reasonably safe and whether a manufacturer exercised reasonable care are issues that necessarily allow, if not require, a comparison of the risks and benefits provided by other vehicle designs.

D. A Comparative Risk Analysis is Particularly Probative of the Proof Necessary Under the Washington Product Liability Act.

The benchmark for determining whether Dr. Vogler's comparative risk analysis was relevant is Washington's Product Liability Act, RCW 7.72 (the "WPLA"). Plaintiffs had to prove the Explorer was "not reasonably safe."

RCW 7.72.030(1). In considering whether a product is not reasonably safe, "[i]t must be borne in mind that we are dealing with a relative, not an absolute concept." *Seattle-First Nat'l Bank v. Tabert*, 86 Wash. 2d 145, 154, 542 P.2d 774, 779 (1975). The WPLA makes the comparative risk analysis particularly relevant on a number of fronts.

1. The accident data was probative on the utility of the Explorer's design and its risks relative to other vehicle designs.

One of the tests for design defect under the WPLA balances a specific risk posed by the product with the utility of the product's design.

> A product is not reasonably safe as designed, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms and the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product . . . .

RCW 7.72.030(1)(a). This theory of liability is commonly referred to as the "risk-utility test."

Plaintiffs challenged the design of a mass-produced product that must perform with reasonable safety in a wide variety of circumstances. This requires an assessment of the overall risks and benefits of the design. Dr. Vogler's testimony was manifestly relevant to the jury's assessment of the risks and benefits of the Explorer design and the "likelihood of harm." RCW 7.72.030(1)(a). The accident data Dr. Vogler presented at trial revealed

that the Explorer's performance in rollover accidents is comparable to other SUVs. This evidence negated any inference that the Explorer presents an unreasonable risk of harm to SUV occupants. Similarly, Dr. Vogler's testimony that Explorers and compact SUVs as a class result in fewer injuries in other types of accidents, compared to different vehicle designs, reflected that the benefits of the SUV design characteristics challenged by plaintiffs outweigh any increase in rollover risks associated with that design. This evidence specifically addressed the statutory criteria of RCW 7.72.030(1)(a), which requires an evaluation of the "likelihood of harm." Indeed, plaintiffs' counsel argued in closing that Dr. Vogler's analysis showed that the likelihood of harm was too high. SER 414-15, 417. Dr. Vogler's data also undermined plaintiffs' effort to link the Bronco II and the Explorer. Despite plaintiffs' claim the two vehicles are substantially similar, the real world data shows the Bronco II has a higher rollover risk than the Explorer. ER 212-13.

Other courts have recognized that comparative statistical analysis is probative on the issue of defect and helpful to a jury charged with making that determination. *See Trull,* 187 F.3d at 97 (in upholding the trial court's admission of evidence of a study based on FARS accident data, the court explained, "[a] threshold question for the jury was whether the Vanagon was defective because its rear seats were equipped only with lap belts. . . . [T]he

company could be neither negligent nor strictly liable if more comprehensive, up-to-date information demonstrated that a seat belt system using only lap belts was reasonably safe."); *Bammerlin*, 30 F.3d 898 at 901 ("That a product failed in a particular accident does not necessarily show 'defect.' . . . Both the lawyers and the experts seemed to think that 'defect' is a question of first principles, to be resolved by jurors as if they were engineers . . . rather than observers asking whether the design of a particular truck unduly increased the risk of injury. Jurors are not engineers, and data on accident rates speak more loudly than abstract arguments."); *see also, e.g., United States v. General Motors Corp.*, 656 F. Supp. 1555, 1575 (D.D.C. 1987), *aff'd*, 841 F.2d 400 (D.C. Cir. 1988) ("If direct evidence of a 'defect' in 1980 X-cars' braking systems is lacking, its presence might nevertheless be inferred circumstantially from accident statistics showing X-cars to be disproportionately involved in accidents of the sort likely to begin with skid-related yaws."); *Bittner v. American Honda Motor Co.*, 533 N.W.2d 476, 487 (Wis. 1995) ("Honda introduced a chart published by the CPSC comparing injury rates associated with snowmobiles, minibikes and trailbikes and ATVs . . . . From this evidence the jury might . . . have inferred that the ATV was neither defective nor unreasonably dangerous or that Honda reasonably designed a safe vehicle."); *Stark v. Allis-Chalmers*, 2 Wash. App. 399, 406, 467 P.2d 854, 858 (1970)

(upholding admission of evidence of a lack of accidents based on statistics compiled by the defendant's chief engineer).

The Washington Supreme Court recognizes that comparisons to other similarly used products and competing designs are relevant to the issue of whether a particular design is defective. *Ruiz-Guzman v. Amvac Chem. Corp.*, 141 Wash. 2d 493, 504, 7 P.3d 795, 800 (2000) (on certification from the Ninth Circuit). "How the defendant's design compares with other, competing designs in actual use is [also] relevant to the issue of whether the defendant's design is defective." *Id.*, *quoting* Restatement (Third) of Torts § 2 cmt. d, at 19 (1998).

Dr. Vogler's evidence showing the relative safety of various vehicle designs available to the Jaramillos when they purchased their Explorer allowed the jury to compare the risk posed by the Explorer design with vehicle classes that serve the same or similar function (SUVs and light trucks) and vehicles that do not serve the same or similar function (passenger cars and vans). Thus, demonstrating how the Explorer performed relative to other vehicles on the market was relevant to a determination of its overall safety.

2. Accident data is probative of the expectations of the ordinary consumer.

RCW 7.72.030(3) provides an alternate means of proving a design defect:

> In determining whether a product was not reasonably safe . . . the trier of fact shall consider whether the product was unsafe to an

> extent beyond that which would be contemplated by the ordinary consumer.

Dr. Vogler's testimony and the underlying FARS and state accident databases also are relevant to the consumer expectation analysis. First, the expectations of an ordinary consumer cannot be evaluated in a vacuum. *Falk v. Keene Corp.*, 113 Wash. 2d 645, 654-55, 782 P.2d 974, 980 (1989) (evidence of industry custom will often be relevant to that which is reasonable for ordinary consumer to expect in way of product safety). The actual performance of a vehicle, particularly as compared to the other vehicles available to a consumer, informs the expectations of the ordinary consumer. Second, Ken Jaramillo testified his wife's research revealed the Explorer was the "safest [vehicle] for families." SER 75. Because plaintiffs offered this conclusionary testimony, Ford was entitled to introduce evidence of the real-world performance of the Explorer as compared to other vehicles available on the market. Finally, Dr. Vogler's testimony provided an evidentiary basis for evaluating the ordinary consumer's understanding that the purchaser of a Volkswagen cannot have the same reasonable expectation as the purchaser of a Cadillac. *Tabert*, 86 Wash. 2d at 154, 542 P.2d at 779.

3. **The accident data was relevant to a determination of whether Ford had a duty to warn of an undue risk of rollover associated with the Explorer.**

Under Washington law, a product is "not reasonably safe" if

> adequate warnings or instructions were not provided after the product was manufactured where a manufacturer learned or where a reasonably prudent manufacture should have learned about a danger connected with the product after it was manufactured.

RCW 7.72.030(1)(c). This theory of liability is commonly referred to as "post-manufacture duty to warn" and was presented to the jury.

Dr. Vogler's testimony highlighted the very data that NHTSA, state governments, and the insurance and automotive industries rely upon to detect safety issues. ER 149-51, 169-70; SER 4. Thus, this evidence was probative of what Ford "knew" or "should have known" regarding the Explorer's actual, on-the-road performance, and what, if anything, a reasonable manufacturer would have done in response to it. The jury was entitled to consider not just evidence of the six isolated Explorer accidents plaintiffs introduced, but also the context in which those accidents occurred. Dr. Vogler's testimony provided that global context. The data revealed the number of vehicles and years each vehicle was exposed to the nation's (or a particular state's) roadways. SER 268-70. Applying a basic mathematical formula, the percentage risk of being in an accident and the risk of being injured in an accident were then evaluated. SER 272-79. This evidence was indispensable to Ford's defense because it

provided the data a reasonable manufacturer would have evaluated in determining whether or not to issue additional warnings or recall its product. The jury was entitled to consider whether Ford acted reasonably in not issuing additional warnings in light of six similar accidents within the context of nearly 3 million vehicle years in which the Explorer was operated. SER 48-57, 275-78.

4. Evidence of performance within the automotive industry is relevant under Washington law.

The WPLA specifically authorizes evidence of industry custom in evaluating whether a product is reasonably safe.

> Evidence of custom in the product seller's industry . . . whether relating to design, construction or performance of the product . . . may be considered by the trier of fact.

RCW 7.72.050(1). In *Crittendon v. Fibreboard Corp.*, 58 Wash. App. 649, 658-59, 794 P.2d 554, 559 (1990), the Washington Court of Appeals held the trial court erred in instructing the jury that historical, medical and scientific knowledge regarding asbestos was not to be considered in evaluating defendants' products. The Court held the jury should have been permitted to consider such information in applying the WPLA's risk-utility test and the consumer expectation tests. *Id.* The information presented by Dr. Vogler is as significant in the automotive industry as scientific, medical, and historical information regarding asbestos was to the construction and manufacturing

industries. Government data regarding accidents informs both the industry and the ordinary consumer regarding the safety of particular vehicles. Consequently, the real world performance revealed through that data provides a basis upon which to evaluate whether the Explorer's design posed an unreasonable risk of harm to its occupants. *See also Falk*, 113 Wash. 2d at 655, 782 P.2d at 980 (evidence of industry custom will often be relevant on the issue of the reasonable expectation of an ordinary consumer to expect in way of product safety).

E. The Jaramillos Did Not Assign Error to the District Court's Fed. R. Evid. 702 and *Daubert* Ruling; Consequently, Any Such Basis for Appeal Has Been Waived.

Although plaintiffs' opening brief criticizes Dr. Vogler's qualifications and methodology, plaintiffs have not assigned error to the Court's ruling under Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993), nor have they provided any legal analysis on this issue. Appellants' Opening Brief at 1-2; SER 425-27. Consequently, this issue is not before the Court. Even if it were, the record on this issue establishes the propriety of the trial court's ruling. ER 147-194; SER 1-21, 258-59. Because Dr. Vogler met the applicable standards, the admissibility of FARS and state database accident data turned on whether the information was relevant.

F. Evidence Regarding Rollover Accidents Involving the Escort and Astro Van Was Properly Admitted.

The evidence of the Escort and Astro Van rollovers was relevant to dispute two propositions asserted in the Jaramillos' case-in-chief: (1) that a vehicle's static stability is an accurate predictor of its propensity to roll, and, therefore, evidence of defect, and (2) that any vehicle that will rollover under any steering inputs at any speed is defective relative to stability. ER 45-48; SER 24, 27, 44-46, 58-59, 69, 418-19. Ford sought to show that even vehicles with higher static stability than SUVs, and much different designs, could roll over. This was relevant to show that the plaintiffs' expert's "no rollover" criterion was unrealistic and invalid as a defect standard. The trial court's decision to admit such evidence, in light of plaintiffs' extreme position, was sound. That the Escort, with a higher static stability, rolled under similar circumstances is probative of the validity of plaintiffs' defect theory.

Plaintiffs' complain on appeal that Ford did not "tie up" its foundation with evidence of the Escort's static stability and that it erred in stating the static stability of the Astro Van was higher than the Explorer. Neither of these complaints renders the trial court's original decision an abuse of discretion. If Ford ultimately failed to lay an adequate foundation, the appropriate remedy in this circumstance would have been a motion to strike and for a curative instruction. Plaintiffs did not seek this relief.

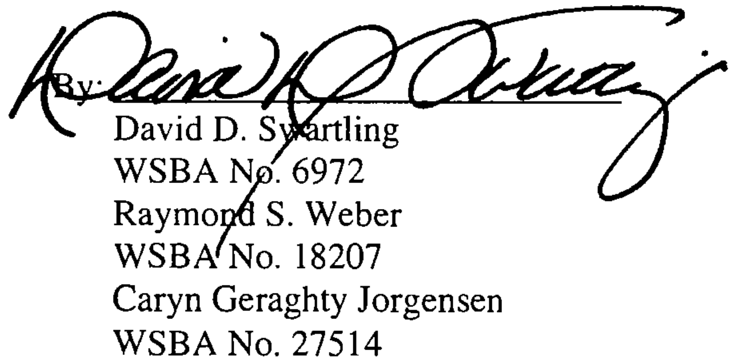
Finally, plaintiffs fail to show how admission of 16 lines of testimony regarding the Escort and Astro Van, in the middle of a 16 day trial, was harmful, regardless of error. If anything, the evidence was not helpful to Ford. Plaintiffs could have highlighted the similar static stability of the Astro Van and the Explorer – a fact that could have served to support, not refute, their theory. ER 78. Under these circumstances it cannot be established that the challenged evidence "more probably than not tainted the verdict." *Brown v. Seirra Nevada Mem. Hosp.*, 849 F.2d 1186, 1190 (9th Cir. 1988).

VI. CONCLUSION

Ford respectfully requests this Court affirm the trial court's discretionary evidentiary rulings and dismiss this appeal. The trial court did not abuse its discretion.

DATED: September 24, 2003.

MILLS MEYERS SWARTLING
Attorneys for the Defendant-Appellee
Ford Motor Company



By: ______________________
David D. Swartling
WSBA No. 6972
Raymond S. Weber
WSBA No. 18207
Caryn Geraghty Jorgensen
WSBA No. 27514

CERTIFICATE OF COMPLIANCE TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 03-35326

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   __X__ this brief contains 6,736 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii),

   or

   ____ this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   __X__ this brief has been prepared in a proportionally spaced typeface using Microsoft Word X in 14 point Times style,

   or

   ____ this brief has been prepared in a monospaced typeface using ____________ with ____ characters per inch in the ______ font.

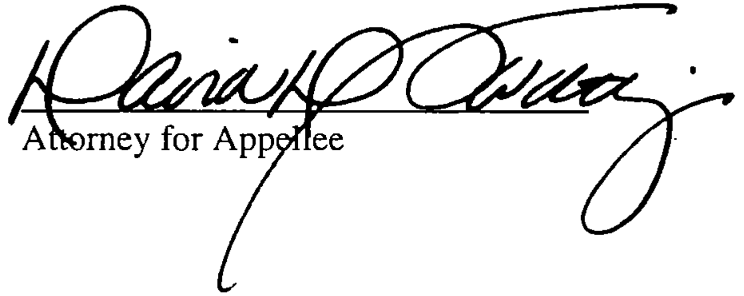
9/24/03
Date

Attorney for Appellee

STATEMENT OF RELATED CASES
CIRCUIT RULE 28-2.6

No other cases in this Court are deemed related to this case.

DATED: September 23, 2003.



Attorney for Appellee

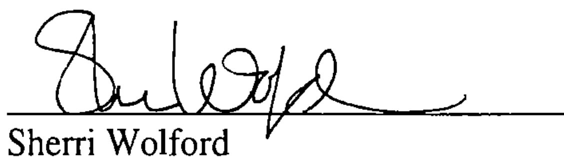
PROOF OF SERVICE

I, Sherri Wolford, declare upon personal knowledge under penalty of perjury that I am over the age of 18 and otherwise competent to testify, and that on September 24, 2003, I caused to be served two copies of the foregoing Appellee's Answering Brief and one copy of Appellee's Supplemental Excerpts of Record by legal messenger at or before the time such documents were filed in this Court:

Paul L. Stritmatter
Paul W. Whelan
Peter O'Neil
Stritmatter Kessler Whelan Withey Coluccio
200 Second Avenue West
Seattle, WA 98119

Attorneys for Appellants.

DATED: September 24, 2003.



Sherri Wolford