

CV 01-05311 #00000063

The Honorable J Kelley Arnold

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UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA

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,

Plaintiff,

v

FORD MOTOR COMPANY, a Delaware corporation, and DOREL INDUSTRIES, Inc, d/b/a-a/k/a COSCO HOME AND OFFICE PRODUCTS, INC., a foreign corporation,

Defendants

NO C01-5311JKA

DEFENDANT FORD MOTOR COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUES OF PRE-DEATH PAIN AND SUFFERING AND LOSS OF ENJOYMENT OF LIFE

NOTED FOR HEARING ON MOTION CALENDAR JANUARY 17, 2003

I. RELIEF REQUESTED

Defendant Ford Motor Company ("Ford" or "Defendant") requests an order dismissing plaintiffs' damages claims for pre-death pain and suffering and for loss of enjoyment of life

Plaintiffs seek damages for pain and suffering experienced by Angela Jaramillo and McKenna Jaramillo prior to their deaths, however, Plaintiffs have

DEFENDANT FORD MOTOR COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF PRE-DEATH PAIN AND SUFFERING AND LOSS OF ENJOYMENT OF LIFE (NO C01-5311JKA) - 1

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1 produced insufficient evidence to support their claims. The evidence in this case  
2 demonstrates that McKenna was unconscious from the time of her injury until the  
3 time of her death and that Ms Jaramillo was conscious for, at the most, a few  
4 seconds, which is an insufficient length of time, as a matter of law, to recover for  
5 pre-death pain and suffering. Furthermore, plaintiffs have not provided an expert  
6 to testify that either McKenna or Angela was capable of experiencing pain given  
7 their unconsciousness and the type and extent of their injuries. Accordingly, Ford is  
8 entitled to judgment as a matter of law on the issue of pre-death pain and suffering.

9 Plaintiffs further seek damages for the decedents' loss of enjoyment of life.  
10 Because plaintiffs fail to produce any evidence that either Angela or McKenna  
11 Jaramillo consciously experienced loss of enjoyment of life, plaintiffs' claims therefor  
12 must be dismissed.

## 12 II. FACTS

13 On the evening of August 5, 2000, Angela Jaramillo was driving eastbound on  
14 U S Highway 20 near Hill City, Idaho in the family's 1998 Ford Explorer. Amended  
15 Complaint, ¶ 31. Ms. Jaramillo was traveling at a speed of at least 65 miles per  
16 hour.<sup>1</sup> Declaration of Raymond S. Weber in Support of Defendant Ford Motor  
17 Company's Motion for Partial Summary Judgment ("Weber Decl."), Exhibit A, p. 7.  
18 Riding as passengers were her husband, Kenneth, and their three children, Riley,  
19 Sawyer, and McKenna. Amended Complaint, ¶ 31.

20 Ms. Jaramillo swerved to avoid one or more deer that had entered the  
21 roadway. Amended Complaint, ¶ 31. Ms. Jaramillo first swerved to the left into the  
22 on-coming lane and then swerved back to the right to avoid another deer, crossing

23 <sup>1</sup> Ford asserts that Ms. Jaramillo was traveling at a substantially higher speed. However, this  
24 disputed fact is irrelevant for purposes of this motion.

1 onto the right shoulder of the road. Weber Decl , Exhibit B, 106-16 – 107-24. She  
2 then jerked the wheel back to the left to move the car back on to the pavement  
3 Weber Decl., Exhibit B, 112-3-8 Upon returning to the roadway, the vehicle entered  
4 into an uncontrolled, counterclockwise yaw. Weber Decl , Exhibit C, p 5. Both of  
5 the rims of the wheels on the right side gouged the pavement, causing the vehicle to  
6 trip and roll with its passenger side leading Weber Decl , Exhibit A, p 6 The  
7 vehicle rolled several times Amended Complaint ¶ 3 1.

8 Ms Jaramillo was non-responsive and was pronounced dead at the scene  
9 Weber Decl., Exhibit D, p 7 McKenna was ejected from the vehicle Weber Decl ,  
10 Exhibit D, p. 10. Mr Jaramillo found McKenna unconscious and lying beside the  
11 road after the accident Weber Decl., Exhibit B, 114-5 - 115.5, 116-8-11, 117-10-16, 23-  
12 25, 118-1-11 McKenna never regained consciousness and died approximately six  
13 hours later due to closed head trauma Weber Decl , Exhibit D, p 10-11  
14 Undeniably, Ms Jaramillo and McKenna received substantial and serious injuries  
15 when the vehicle rolled. Ms Jaramillo's head impacted the pavement in the course  
16 of the rollover and McKenna sustained severe head trauma Weber Decl , Exhibit D,  
17 pp 13, 17. Other members of the Jaramillo family received less serious injuries  
18 Amended Complaint, ¶¶ 5.3-5 5

### 18 III. ARGUMENT

19 A motion for summary judgment must be granted "if the pleadings,  
20 depositions, answers to interrogatories, and admissions on file, together with the  
21 affidavits, if any, show that there is no genuine issue as to any material fact and that  
22 the moving party is entitled to a judgment as a matter of law " Fed R Civ P 56(c)  
23 The Supreme Court has held that Rule 56(c)

1 mandates the entry of summary judgment, after  
 2 adequate time for discovery and upon motion, against a  
 3 party who fails to make a showing sufficient to establish  
 4 the existence of an element essential to that party's case,  
 5 and on which that party will bear the burden of proof at  
 6 trial. In such a situation, there can be "no genuine issue  
 7 as to any material fact," since a complete failure of proof  
 8 concerning an essential element of the nonmoving  
 9 party's case necessarily renders all other facts immaterial.

10 *Celotex Corp v Catrett*, 477 U.S. 317, 322-23 (1986) "[T]he mere existence of some  
 11 alleged factual dispute between the parties will not defeat an otherwise properly  
 12 supported motion for summary judgment, the requirement is that there be no  
 13 genuine issue of material fact" *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 247-48  
 14 (1986) (emphasis in original)

15 Plaintiffs have the burden of proof on the issues of pre-death pain and  
 16 suffering and loss of enjoyment of life. They have failed to demonstrate that  
 17 McKenna consciously experienced any pain or that Ms. Jaramillo was conscious for  
 18 more than a few seconds. Plaintiffs have further failed to provide any expert  
 19 testimony to support their claims. Consequently, summary judgment must be  
 20 entered in favor of Ford.

21 **A. Plaintiffs' Claims for Pre-Death Pain and Suffering Fail, As a Matter of**  
 22 **Law, Because Plaintiffs Cannot Produce Sufficient Evidence Upon Which a**  
 23 **Jury Could Find That Either Decedent Consciously Suffered.**

24 **1. The Testimony of Witnesses at the Scene of the Accident**  
 25 **Demonstrates that McKenna Was Not Conscious After her Initial**  
 26 **Injuries and that Ms. Jaramillo Was Not Conscious for any**  
**Appreciable Period of Time.**

Only one Washington case, *Bingaman v Grays Harbor Community Hospital*,  
 103 Wash. 2d 831, 699 P.2d 1230 (1985), has addressed the evidence required to  
 support recovery for pre-death pain and suffering. In *Bingaman*, the Washington  
 Supreme Court placed great emphasis on the fact that the decedent plaintiff was  
 consciously aware of the pain she suffered prior to her death. The plaintiff in

1 Bingaman died of childbirth-related eclampsia after consciously suffering mental  
2 anguish and physical pain for hours *Id.* at 833. The court noted that plaintiff had  
3 "introduced uncontradicted evidence of Mrs. Bingaman's *physical agony* and  
4 *awareness* of impending death." *Id.* (emphasis added). Additionally, Mrs. Bingaman  
5 suffered three seizures, but "[f]ollowing each seizure, *she regained consciousness and*  
6 *was alert.*" *Id.* at 834 (emphasis added). Furthermore, the court found that "the  
7 record reflects that Mrs. Bingaman was in severe pain *and aware of it*" *Id.* (emphasis  
8 added). Finally, the court noted that

9 [a]lthough the decedent was unconscious during some  
10 part of her last 35 hours of life, due to her condition or  
11 sedation or both, substantial evidence was presented  
12 from which the jury could find *that during much of that*  
*period of time* she not only suffered extreme *conscious* pain,  
fear and despair at not being helped, but also had the  
*conscious* realization her life and everything fine that it  
encompasses was prematurely ending

13 *Id.* at 837 (emphasis added)

14 No other Washington cases have expanded upon or more clearly explained  
15 the requirements for recovery for pre-death pain and suffering. However, similar to  
16 *Bingaman*, courts in other jurisdictions have held that the plaintiff must demonstrate  
17 the decedent *consciously* experienced pain and suffering prior to death in order to  
18 recover for pre-death pain and suffering. For example, the Alaska Supreme Court  
19 has held that "[r]ecovery can be had only for pain consciously experienced, and  
20 events subsequent to unconsciousness are not compensable." *Northern Lights Motel*  
21 *v. Sweaney*, 561 P.2d 1176, 1190 (Alaska 1977) (quoting *Burrous v. Knotts*, 482 S.W.2d  
22 358, 363 (Tex. Civ. App. 1972)). Similarly, in discussing damages in a suit for pre-  
23 death pain and suffering stemming from the crash of an aircraft into a private home,  
24 the Fifth Circuit held

1           There was in fact no evidence that Mrs Giancontieri was  
 2           conscious after the impact of the plane with the ground  
 3           Because the house was destroyed around Mrs  
 4           Giancontieri, it is impossible to attribute any significance  
 5           to the fact that her body was found in a position which  
 6           could be characterized as a "crawling-type" position  
 7           The pathologist testified that he could not state whether  
 8           any of the decedents were conscious after the impact  
 9           There is simply no direct or circumstantial evidence from  
 10           which it could be inferred that Mrs Giancontieri felt  
 11           anything between the impact of the plane and her death  
 12           This award must therefore be reversed

13           *In re Air Crash Disaster New Orleans, Louisiana on July 9, 1982*, 767 F 2d 1151, 1157  
 14           (5th Cir 1985) Other courts have similarly held that the decedent must have  
 15           consciously suffered pain for an appreciable amount of time to recover for pre-death  
 16           pain and suffering *See, e g , Ghotra v Bandila Shipping, Inc* , 113 F 3d 1050, 1061  
 17           (9<sup>th</sup> Cir 1997) (noting that, to recover for "pre-death pain and suffering, the  
 18           beneficiary must show 'that the decedent was conscious for at least some period of  
 19           time after he suffered the injuries which resulted in his death'"), *Carter v Azaran*, 774  
 20           N E.2d 400, 411 (Ill. App. 1st Dist 2002) ("To recover damages for pain and  
 21           suffering, Illinois courts have further required evidence that the injured party was  
 22           conscious of his or her pain and suffering . [and] the evidence presented must  
 23           provide more than 'mere speculation that the [injured party] was conscious and  
 24           suffered pain.'"); *Samuel v. Baton Rouge Gen Med. Ctr.*, 798 So 2d 126, 129 (La App.  
 25           1st Cir 2000) ("Where there is no indication that a decedent consciously suffered, an  
 26           award for pre-death pain and suffering should be denied "), *Carr v Arthur V. Little,*  
*Inc* , 204 N E 2d 466, 474-78 (Mass 1965) (finding that the plaintiff must consciously  
 suffer pain to recover and holding that mere moaning, groaning and reflexive  
 movements were not sufficient evidence of conscious suffering because this can  
 occur whether a person is conscious or unconscious)

1 Plaintiffs have the burden of proof on the issue of pre-death pain and  
2 suffering. See *McCoy v Courtney*, 25 Wash 2d 956, 600, 172 P.2d 58 (1946) (noting  
3 that plaintiff has burden of proving duty, breach, and injury in a wrongful death  
4 case). They have failed to meet that burden.

5 **a. McKenna Was Not Conscious After Her Initial Injuries.**

6 Witnesses on the scene uniformly testified in their depositions that McKenna  
7 was unconscious. According to Mr Jaramillo's testimony, the first bystanders  
8 arrived at the accident scene "immediately" after the accident. Weber Decl., Exhibit  
9 B, 114.5-8, 114.20 -115.5. David and Diane Willis witnessed the accident and were  
10 the first to arrive and lend assistance. Weber Decl., Exhibit E, 14 3-21. Mr Willis  
11 testified that McKenna was unconscious the entire time, except possibly for one  
12 second when her eyes fluttered. Weber Decl., Exhibit E, 21 3-13.

13 Diana and Fred "Forrest" Meckling came upon the accident scene awhile  
14 after the accident occurred, but before McKenna had been located. Weber Decl.,  
15 Exhibit G, 18 17-20, 34 6-12. After McKenna was located, Ms Meckling went to help  
16 Mr Jaramillo with her. Weber Decl., Exhibit G, 35 2 - 36 4. Ms Meckling testified  
17 that McKenna was "absolutely not" conscious and never regained consciousness.  
18 Weber Decl., Exhibit G, 36 19-20, 41 2-4. Mr Meckling likewise testified that  
19 McKenna was never conscious. Weber Decl., Exhibit H, 13 7-13.

20 Similarly, paramedics on the scene testified that McKenna was never  
21 conscious. Elizabeth Hazelwood, a flight nurse who tended to McKenna, testified  
22 that McKenna was "not moving at all," "had no response to anything we did," and  
23 was never conscious during the time that Ms Hazelwood cared for her. Weber  
24 Decl., Exhibit J, 25 14-22. Melissa Schaefer, another paramedic who assisted with  
25 McKenna, also testified that she was never conscious. Weber Decl., Exhibit K, 45 14-

1 17, 57 7-10 Erik Smith, a third paramedic who assisted McKenna, further testified  
2 that she was not conscious at any time Weber Decl , Exhibit L, 19 24 – 20 5, 33 12-14

3 Finally, Mr Jaramillo testified that his daughter appeared unconscious at all  
4 times Weber Decl , Exhibit B, 118 1-11 Mr Jaramillo was the first person to find his  
5 daughter after she was ejected from the car, and he stayed with her until the medics  
6 arrived. Weber Decl , Exhibit B, 117 10-16, 117 23-25, 118 17-25, 119 6-12 He  
7 testified that McKenna appeared unconscious and never seemed to regain  
8 consciousness Weber Decl , Exhibit B, 118 1-11

9 The deposition testimony of witnesses to the accident, paramedics, and  
10 Mr Jaramillo lead inescapably to the conclusion that McKenna was unable to  
11 consciously experience any pain Accordingly, Defendant is entitled to judgment as  
12 a matter of law on Plaintiffs' claims related to McKenna's pre-death pain and  
13 suffering

14 **b. Ms. Jaramillo Was Conscious for No Longer than a Few  
15 Seconds.**

16 Ms Willis testified that she was with Ms Jaramillo for over an hour and that  
17 Ms Jaramillo was unconscious the entire time. Weber Decl , Exhibit F, 19 4-10,  
18 19 19-21 In addition, Ms Meckling stayed with Ms Jaramillo while her husband  
19 helped Mr Jaramillo with Riley and Sawyer Weber Decl , Exhibit G, 20 6-12, 24 15-  
20 Ms. Meckling testified that Ms Jaramillo never spoke and was unconscious the  
21 entire time she was with her Weber Decl , Exhibit G, 24 15-20, 27 12-21.

22 Paramedics who assisted Ms. Jaramillo also testified that she was never  
23 conscious For example, Brian Chevalier, a paramedic who assisted Ms Jaramillo,  
24 testified that she was never conscious while he was assisting with her care Weber  
25 Decl , Exhibit I, 16 22 – 17 1 Additionally, David Hanks, who also tended to Ms  
26 Jaramillo, testified that she "never" regained consciousness "at any point in time."

1 Weber Decl., Exhibit M, 22 9 – 23.1, 32.9-20. Erik Smith, who assisted Ms Jaramillo  
2 in addition to assisting McKenna, further testified that Ms Jaramillo was not  
3 conscious at any time Weber Decl , Exhibit L, 13:21 – 14 2

4 Furthermore, Mr Jaramillo found his wife completely non-responsive  
5 immediately after the accident. Weber Decl., Exhibit B, 115 9-25 Mr Jaramillo's  
6 testimony further supports that Ms Jaramillo was unconscious at all times

7 The only testimony that contradicts that of the foregoing six witnesses is the  
8 testimony of Lesia Knowlton, a paramedic who briefly encountered Ms Jaramillo on  
9 her way to tend to McKenna Weber Decl., Exhibit N, 18 23-25, 19 1-8, 20 14-21 Ms  
10 Knowlton testified in her deposition that when she came up to the Jaramillo vehicle  
11 she saw Diane Willis standing beside the car and heard Ms Jaramillo cry out for  
12 help Weber Decl , Exhibit N, 20:1-10 According to Ms. Knowlton, Ms Jaramillo  
13 cried out. "Help me, God Help me, God Oh, Jesus Somebody help me." Weber  
14 Decl , Exhibit N, 20 1-10

15 Despite that fact that Ms. Knowlton's testimony contradicts that of all other  
16 witnesses on the scene, including that of Ms Willis who was standing right beside  
17 Ms Jaramillo at the time she allegedly spoke, this testimony is to be viewed in the  
18 light most favorable to the plaintiffs for purposes of summary judgment *See Lyons*  
19 *v England*, 307 F 3d 1092, 1103 (9th Cir 2002) Viewed in the light most favorable to  
20 the plaintiffs, Ms Knowlton's testimony provides evidence that Ms Jaramillo was  
21 coherent just long enough to say the eleven words that Ms Knowlton alleges she  
22 heard Ms Jaramillo speak Essentially, Ms Knowlton's testimony has the possibility  
23 of establishing, at the most, that Ms Jaramillo was conscious for a few seconds  
24 Plaintiffs have provided no other evidence that Ms Jaramillo was conscious at any  
25 time before or after she allegedly spoke these eleven words Indeed, no such

1 evidence exists because all other witnesses have testified that Ms Jaramillo never  
2 spoke, was non-responsive, and was unconscious at all times.

3 Courts that have addressed this issue have determined that a brief moment of  
4 consciousness is insufficient to support a claim for pre-death pain and suffering. In  
5 *St Louis, Iron Mountain & Southern Railway v. Craft*, 237 U.S. 648, 655 (1915), for  
6 example, the Supreme Court noted that a decedent cannot recover for pain and  
7 suffering that is "substantially contemporaneous with death or mere incidents to it."  
8 In this case, the decedent was found to have consciously survived for thirty minutes  
9 after being run over by a train. *Id.* at 654-55. The *St Louis* court upheld the jury's  
10 award of damages for pain and suffering but found this case to be "close to the  
11 borderline." *Id.* Other courts have reached similar conclusions. *See, e.g., Ghotra*, 113  
12 F.3d at 1061 ("[T]en seconds of insensible consciousness does not meet the  
13 'appreciable period of time' threshold for recovery of pre-death pain and suffering  
14 damages"); *In re Air Crash Disaster Near New Orleans*, 767 F.2d at 1157 (evidence that  
15 death from third degree burns was not instantaneous and took five to thirty seconds  
16 is insufficient to support recovery for pain and suffering); *Horsford v. Horsford*, 561  
17 P.2d 722, 729-30 (Alaska 1977) (refusing to allocate portion of settlement to  
18 survivorship claim for pre-death pain and suffering because "there is nothing in the  
19 record which indicates that any pain and suffering which William Horsford may  
20 have suffered was other than momentary"). The Ninth Circuit has noted that:

21 What constitutes an "appreciable period of time" will vary,  
22 depending on the circumstances of each case. In some cases,  
23 ten minutes may not prove to be a sufficient period of  
24 consciousness. In other cases, one minute may prove to be  
25 adequate.

26 *Cook v. Ross Island Sand & Gravel Co.*, 626 F.2d 746, 751-52 (9th Cir. 1980) (internal  
27 citations omitted). In *Cook*, the Ninth Circuit relied upon expert testimony that

1 explained what the decedent was likely to have experienced during the period of  
2 consciousness between injury and death to determine that two and a half minutes of  
3 consciousness was sufficient *Id* at 752

4 Viewed in the light most favorable to Plaintiffs, the evidence shows that Ms  
5 Jaramillo was conscious for, at the most, a few seconds This brief moment of  
6 consciousness is insufficient, as a matter of law, to support claims for Ms Jaramillo's  
7 pre-death pain and suffering. Further, plaintiffs have provided no expert testimony  
8 to demonstrate that Ms Jaramillo was conscious for any period of time Therefore,  
9 Ford is entitled to summary judgment on plaintiffs' claims related to Ms Jaramillo's  
10 pre-death pain and suffering

11 **2. Plaintiffs Have Not Provided Expert Testimony Necessary to  
Support Their Pre-Death Pain and Suffering Claims.**

12 Washington courts have not addressed how or whether a plaintiff may prove  
13 pre-death pain and suffering in a case where the evidence indicates that the  
14 decedent was unconscious at all times after his or her initial injury or was conscious  
15 for no more than a moment Courts that have considered these issues have turned  
16 to expert testimony to determine whether there is sufficient evidence to allow  
17 recovery for pre-death pain and suffering. *See, e g , In re Air Crash Disaster New*  
18 *Orleans*, 767 F 2d at 1157, *Ghotra*, 113 F 3d at 1061; *Cook*, 626 F 2d at 752, *Carr*, 204  
19 N.E 2d at 469

20 For example, the Ninth Circuit noted, in *Ghotra*, that witnesses on the scene  
21 testified that the decedent was unconscious at all times *Ghotra*, 113 F 3d at 1061 As  
22 a result, plaintiffs offered expert testimony from a doctor that it was "highly likely"  
23 that Mr Ghotra was conscious for at least ten seconds after the accident *Id*  
24 However, the court did not allow plaintiffs to recover for pre-death pain and

1 suffering because it found that "ten seconds of insensible consciousness does not  
2 meet the 'appreciable period of time' threshold for recovery of pre-death pain and  
3 suffering damages." *Id.* In *Cook*, the court also looked to expert testimony *Cook*, 626  
4 F 2d at 752 The expert in *Cook* asserted that time felt longer during a drowning and  
5 the Ninth Circuit relied upon this evidence to determine that the decedent should  
6 recover for pain and suffering that occurred during a drowning that lasted over two  
7 minutes. *Id.* at 752 In another case, the Supreme Court of Massachusetts relied  
8 upon expert testimony stating that the decedent's moaning and groaning and  
9 reflexive bodily movements were not sufficient evidence of the ability to consciously  
10 experience pain. *Carr*, 204 N E 2d at 469-71 Furthermore, the Fifth Circuit has  
11 found that expert testimony stating that a decedent died 100% of third-degree burns  
12 and that death was not instantaneous, but took five to thirty seconds, provided  
13 insufficient evidence of pre-death pain and suffering *In re Air Crash Disaster New*  
*Orleans*, 767 F 2d at 1157.

14 Plaintiffs provided expert witness disclosures on August 14, 2002 However,  
15 Plaintiffs did not identify an expert who would testify that McKenna would have  
16 been able to consciously experience pain and suffering despite the nature and  
17 severity of their injuries and also despite the fact that she appeared unconscious at  
18 all times Plaintiffs also did not identify an expert who would testify that Ms  
19 Jaramillo was conscious at any time, much less that she was conscious for more than  
20 a few seconds at the most Neither have Plaintiffs provided expert witness reports  
21 that address these issues In fact, one of the expert witness reports provided by  
22 plaintiffs lends further support to the fact that Ms Jaramillo and McKenna were  
23 rendered unconscious as a result of their injuries Weber Decl., Exhibit D, pp 7, 10  
24 This report indicates that both Ms Jaramillo and McKenna struck their heads during

1 the rollover accident, sustaining massive head trauma Weber Decl , Exhibit D,  
2 pp 13, 17 There is no evidence in the record either that McKenna would have  
3 remained conscious or would have been able to experience pain after sustaining  
4 such severe injuries or that Ms. Jaramillo was conscious for more than a moment in  
5 time

6 Plaintiffs failed to produce evidence that McKenna was conscious at any  
7 point after she was injured Plaintiffs further failed to produce any evidence that  
8 Ms Jaramillo was conscious for more than a few seconds Because plaintiffs have  
9 not met their burden of proof on pre-death pain and suffering their claims therefore  
10 should be dismissed

11 **C. Plaintiffs Cannot Prove That Either McKenna or Angela Jaramillo  
12 Consciously Experienced Loss of Enjoyment of Life.**

13 Plaintiffs' claims for loss of enjoyment of life fail, as a matter of law, because  
14 they cannot show that either McKenna or Angela Jaramillo consciously experienced  
15 such a loss Indeed, as is the case with pain and suffering, loss of enjoyment of life,  
16 by the very nature of this element of damage, requires that the one suffering from it  
17 survive her injuries for a sufficient amount of time to be aware of her loss

18 Recovery for loss of enjoyment of life is designed to compensate for loss of  
19 enjoyment of "a specific unusual activity such as ballet dancing" or other "specific  
20 artistic or athletic skills" not otherwise compensated through recovery for disability  
21 or pain and suffering *Kirk v. Washington State Univ* , 109 Wash 2d 448, 461, 746  
22 P.2d 285 (1987) The analysis of whether a plaintiff or decedent has suffered loss of  
23 enjoyment of life is the same as that for pain and suffering The decedent must be  
24 consciously aware of his or her loss The Washington Supreme Court has cited the  
25 following description of this element of damage

1 [T]o a large extent it has been the plaintiffs' consciousness of his or her  
2 inability to enjoy life that we have compensated under the rubric of  
3 "loss of life's pleasures " Unlike one who is permanently injured, one  
4 who dies as a result of injuries is not condemned to watch life's  
amenities pass by Unless we are to equate loss of life's pleasures with  
loss of life itself, we must view it as something that is compensable  
only for a living plaintiff who has suffered from that loss

5 *Wooldridge v Woollet*, 96 Wash 2d 659, 666, 638 P 2d 566 (1981), citing *Willinger v*  
6 *Mercy Catholic Medical Center*, 393 A 2d 1188 (Pa 1978)

7 *Wooldridge* held that loss of enjoyment of life (or "shortened life expectancy")  
8 was not recoverable under the pre-1993 general survival statute, RCW 4 20 046(1),  
9 because such damages "represented a back door method of obtaining compensation  
10 for pain and suffering " *Id* at 666 Prior to 1993, pain and suffering damages were  
11 not permitted under the general survival statute Although pain and suffering is  
12 now permitted under the general survival statute, this does not change the  
13 *Wooldridge* court's analysis comparing damages for "loss of enjoyment" to "pain and  
14 suffering damages" in that both require that the injured person *actually* suffer the  
pain or the loss *Id* at 666

15 The need for the decedent or plaintiff to actually suffer the "loss of life's  
16 amenities" is confirmed in *Kirk v Washington State University, supra* Indeed, under  
17 *Kirk*, the claim for loss of enjoyment of life was predicated on the fact that plaintiff, a  
18 previously talented dancer and athlete, had to live the rest of her life without the joy  
19 of pursuing her talents. *Kirk*, 109 Wash. 2d at 461-62. As is evident in *Kirk*, in order  
20 to recover for loss of enjoyment of life, plaintiff must survive a compensable injury  
21 and be conscious of her inability to enjoy life in the way she did prior to the injury  
22 *Kirk*, 109 Wash. 2d at 461-62 Loss of enjoyment of life is a comparative, before and  
23 after concept If the injured person dies contemporaneously with the injury, he or  
she cannot suffer loss of enjoyment of life, as there is no "after" upon which to

1 compare Indeed, Ford could find no Washington case that permitted recovery for  
2 loss of enjoyment of life in a situation where, as here, the decedent suffered fatal  
3 injuries and did not regain consciousness for any appreciable period of prior to  
4 death

5 *Chapple v Ganger*, 851 F Supp 1481 (E D. Wash 1994) is illustrative of the  
6 point that loss of enjoyment of life is an element of damage that must be consciously  
7 suffered. In *Chapple*, a mother and her minor son were involved in a motor vehicle  
8 accident. The mother died at the scene and the ten-year-old son suffered a severe  
9 brain injury. Following an admission of liability by defendant, the parties agreed to  
10 submit the plaintiffs' damages claims to a Magistrate Judge for determination The  
11 court analyzed and applied Washington's wrongful death, survival and personal  
12 injury damages law in determining the recovery available to the plaintiffs The  
13 court's careful inventory of the available elements of recovery for the mother's  
14 survival claim and the son's personal injury claim reveal that "loss of enjoyment of  
15 life" is an element of damage reserved for injured parties who survive to consciously  
16 experience the loss

17 In calculating the loss to the estate under RCW 4.20 060, the court considered  
18 the following elements of damage: loss of net earnings, medical and hospital  
19 expenses, funeral expenses, property damage, pain and suffering, and fear *Id.* at  
20 1486-87 The court granted an award for each element of damage except pain and  
21 suffering. *Id.* With regard to pain and suffering the court, relying on *Bingaman*, 103  
22 Wash. 2d at 837, found loss of consciousness was instantaneous with the accident  
23 and, therefore, pain and suffering was not recoverable *Chapple*, 851 F Supp at 1486-  
24 87 Consistent with Ford's position here, the court did not include loss of enjoyment  
25 of life as an element of damage under RCW 4.20 060

1 To the contrary, in evaluating the son's personal injury claim, the *Chapple*  
2 court did include loss of enjoyment of life as an element of his potential recovery *Id*  
3 at 1499 The court found, however, insufficient evidence to support recovery for loss  
4 of enjoyment of life

5 Under the *Kirk* definition, there has not been sufficient evidence that  
6 Christopher is unable to participate in any avocational activities He is  
7 pursuing athletics in school and is capable of traveling throughout the  
country. Accordingly, no damage award is made for the loss of  
enjoyment of life

8 *Id.*, citing *Kirk v Washington State Univ., supra* The *Chapple* court's comprehensive  
9 evaluation of Washington damages law reveals that, in the circumstances of this  
10 case, there is no evidence or other basis on which to find that either McKenna or  
11 Angela Jaramillo consciously suffered the loss of enjoyment of life

12 Under Washington law, a plaintiff in an action under RCW 4 20 060 must  
13 prove that the decedent consciously was aware of his or her inability to enjoy life as  
14 he or she had before the injury As is discussed above, there can be no doubt that  
15 neither McKenna nor Angela Jaramillo was aware of or otherwise consciously  
16 suffered the loss of the ability to enjoy life as it had been prior to the accident  
Plaintiffs' claims for loss of enjoyment of life, therefore, must be dismissed

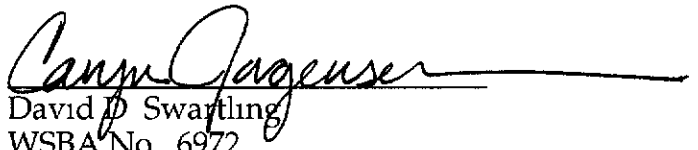
17 **IV. CONCLUSION**

18 The discovery deadline was December 6, 2002, and the deadline to disclose  
19 expert witnesses was August 14, 2002 These deadlines are now past, yet plaintiffs  
20 have presented insufficient evidence to support their claims of pre-death pain and  
21 suffering and loss of enjoyment of life It is undisputed that Ms Jaramillo and  
22 McKenna were gravely injured during the rollover of the vehicle Indeed, it is the  
23 nature and extent of those injuries that lead to the unavoidable conclusions that

1 McKenna did not consciously experience any pain and that if Ms Jaramillo was  
2 conscious, it was for a brief, few seconds at the most Because plaintiffs have not  
3 provided any evidence, expert or otherwise, to refute these conclusions, Ford is  
4 entitled to summary judgment on the issue of pre-death pain and suffering and loss  
5 of enjoyment of life

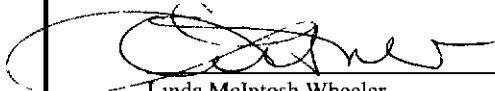
6 Respectfully submitted this 12<sup>th</sup> day of December, 2002

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14 **CERTIFICATION**

15 I hereby certify that on December 12, 2002, I  deposited in the mails  
16 of the United States of America,  placed with legal messengers,  
17  faxed a copy of the document to which this certification is attached  
18 for delivery to all counsel of record

19   
20 Linda McIntosh Wheeler  
21 Mills Meyers Swartling