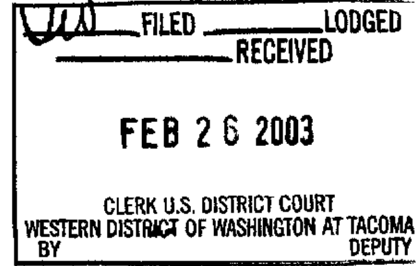
The Honorable J. Kelley Arnold

CV 01 05311 #00000201



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, Defendant.	NO. C01-5311JKA FORD MOTOR COMPANY'S MOTION FOR JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' CLAIMS BASED UPON FAILURE TO PROVIDE ADEQUATE WARNINGS AND CLAIMS ON BEHALF OF RILEY AND SAWYER JARAMILLO FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

INTRODUCTION

Ford Motor Company ("Ford") moves for judgment as a matter of law pursuant to F.R.C.P. 50(a)(1) dismissing plaintiffs' claims under RCW 7.72.030(b) (failure to warn at time of manufacture) and RCW 7.72.030(c) (post manufacture failure to warn), and plaintiffs Riley and Sawyer Jaramillo's claims for negligent

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infliction of emotional distress. Judgment as a matter of law on these claims is appropriate because: (1) adequate warnings accompanied the 1998 Ford Explorer, (2) there is no evidence that the content of the warnings provided (or alleged lack thereof) was a proximate cause of the injuries and damages in this case, and (3) as to Riley and Sawyer Jaramillo, plaintiffs have failed to offer evidence on all of the elements of a prima facie case of a claim for negligent infliction of emotional distress.

STATEMENT OF THE EVIDENCE

The Jaramillo's 1998 Ford Explorer was sold with three distinct warnings addressing the issue of stability. The warning on the sun visor provided:

> **WARNING**
> This multipurpose passenger vehicle or 4x4 truck has special design and equipment features for off-road use. As a result, it handles differently from an ordinary passenger car in driving conditions which may occur on streets and highways and off-road. DRIVE WITH CARE AND WEAR SAFETY BELTS AT ALL TIMES.
> Avoid unnecessary sharp turns or abrupt maneuvers that could cause loss of control, possibly leading to a rollover or other accidents that could result in serious injury.
> Read the Owners Guide and the Supplement for instructions on how to handle this vehicle during emergency maneuvers, and for other safety information concerning safe driving precautions and proper tire replacement.

A guide entitled "Four Wheeling" also explained the difference between an SUV an a passenger vehicle, Trial Exhibit 57.

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1 Ford's Owner's Guide also addresses the proper use of child restraints in the
2 1998 Ford Explorer:

3 > Use a safety seat that is recommended for the size and
4 > weight of the child. Carefully follow all of the
> manufacturer's instructions with the safety seat you put in
5 > your vehicle. If you do not install and use a safety seat
> properly, the child may be injured in a sudden stop or
6 > collision.

7
8 In this case, the manufacturer's instructions for the Grand Explorer explicitly
9 stated that, when using the booster without its shield, a combination shoulder and
10 lap belt must be worn. See Trial Exhibit Nos. A-776, A-784, and A-785.

11 There is no direct evidence that plaintiffs read these warnings or that any
12 warning would have altered their behavior. Mr. Jaramillo testified that he did not
13 personally read any warnings accompanying the Explorer.

14
15 > Q. But you didn't read either Exhibit 56 or 57?
16 > A. No, I didn't.
17 > Q. So you didn't know what warnings or instructions or anything
> of that nature came with the vehicle, isn't that true?
18
19 > A. No. Correct.
20 > Q. And it's also true that you never saw your wife read either
> Exhibit 56 or 57, isn't that true?
21
22 > A. Correct.

23 Trial Transcript, p. 1620.

24 He speculates that Angela Jaramillo read the Owner's Guide, the visor
25 warning, and the Owner's Guide Supplement because she "read up on everything."
26

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1 However, neither Mr. Jaramillo nor any other witness was able to testify that Angela
2 Jaramillo actually read the text of any particular document. Furthermore, the
3 undisputed evidence is that Mr. Jaramillo was ignorant of actual warnings Ford
4 provided.

5-7 Q. Do you know if Ford provided you any instruction with the Explorer regarding the importance of following the manufacturer's instructions with respect to the use of child seats in order to prevent injury?

8 A. I don't know.

9 Trial Transcript, p. 1620. And Mrs. Jaramillo failed to comply with the warnings
10 provided by Dorel with the Cosco Grand Explorer booster seat. See Trial Exhibits A-
11 776, A-784, and A-785.

12

13 **ARGUMENT**

14 Federal Rule of Civil Procedure 50(a)(1) states:

15-19 If during a trial by jury a party has been fully heard on a issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

20 The court applies the same standard when ruling on a motion for judgment
21 as a matter of law as on a motion for summary judgment. Reeve v. Sanderson
22 Plumbing Products, Inc., 530 U.S. 133, 150 (2000). Judgment as a mater of law is
23 appropriate only when the non-moving party "has been fully heard with respect to
24 an issue and there is no legally sufficient evidentiary basis for a reasonable jury to
25 have found for that party with respect to that issue." Jackson v. Quianex Corp., 191

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F.3d 647, 657 (6th Cir. 1999). A "mere scintilla" of evidence is generally insufficient to prevent entry of judgment as a matter of law. James v. Milwaukee County, 956 F.2d 696, 698 (7th Cir. 1992).

A. **Washington Pattern Instructions Governing a Manufacturer's Duty to Warn.**

The Washington Product Liability Act ("WPLA") imposes upon product manufacturers a duty to provide adequate warnings or instructions when the product is sold. RCW 7.72.030(1). The adequacy of a manufacturer's warning is determined by considering whether "at the time of manufacture, the likelihood that the product would cause injury or damage similar to that claimed by the plaintiffs, and the seriousness of such injury or damage rendered the warnings or instructions of the manufacturer inadequate . . ." RCW 7.72.030(1)(b). Washington law also recognizes a "consumer expectation" element of a warning claim which provides that "[a] product is not reasonably safe because adequate warnings or instructions were not provided with the product, if the product is unsafe to an extent beyond that which would be contemplated by the ordinary user." See RCW 7.72.030(3); WPI 110.03.

Washington law also imposes upon manufacturer's a duty to provide warnings or instructions after the product was manufactured. "A manufacturer is subject to liability if the product was not reasonably safe because the manufacturer was negligent in not providing adequate warnings or instructions after the product was manufactured." RCW 7.72.030(1)(c). Liability under this section of the WPLA applies "if a manufacturer learned, or if a reasonably prudent manufacturer should

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have learned, about a danger connected with the product after it was manufactured." Id.

In order to impose liability upon a manufacturer for a warning that was inadequate when the product was sold, or for negligence in failing to provide an adequate warning after the product was sold, plaintiffs have the burden of establishing that the inadequate warning "was a proximate cause of the plaintiffs' injuries and damages." RCW 7.72.030(1); WPI 110.03.01.

Common sense and the law reflect that a manufacturer need not predict and warn against the exact sequence and circumstances of every conceivable accident, and Washington courts have specifically held that there is no duty to warn of obvious or known dangers. Baughn v. Honda Motor Co., 107 Wn.2d 127, 139-41, 727 P.2d 655 (1986); Lockwood v. AC&S, Inc., 44 Wn. App. 330, 366, 722 P.2d 826 (1986)(referring to Appendix of Jury Instructions).

A review of Washington case law illustrates that in determining the adequacy of warnings or instructions, courts consider whether there is sufficient evidence for a jury to conclude that an "adequate" warning would have some efficacy in that case at bar; stated another way, that a different warning would have changed the outcome.

In Hiner v. Bridgestone-Firestone, Inc., 138 Wn.2d 248, 978 P.2d 505 (1999), the Washington Supreme Court affirmed the trial court's judgment as a matter of law on plaintiff's warnings claim under Civil Rule 50(a). Id. at 256-58. In Hiner, the plaintiff was injured when she lost control of her 4-wheel drive vehicle while

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1 driving with studded snow tires mounted on the front wheels only. Plaintiff
2 brought a product liability action against the tire manufacturer alleging that the
3 manufacturer should have affixed a warning on the tires that mounting snow tires
4 on only the front wheels of a 4-wheel drive vehicle was unsafe. The plaintiff had
5 not read the owner's manual, which stated that "snow tires should be mounted on
6 all four wheels; otherwise poor handling may result." Id. at 257-58.
7
8 Plaintiff apparently argued that a different warning (referring specifically to
9 "studded" snow tires) should have been provided and that warnings should have
10 been placed directly on the tires so that even if she did not read them, the person
11 who changed the tires would have. Id. at 258. The Supreme Court in Hiner rejected
12 these arguments and affirmed the trial court's judgment as a matter of law for the
13 defendant, holding that the prospect that a tire changer would have read the
14 warning and mounted snow tires on all four wheels was too speculative and that
15 the warning relating to snow tires sufficiently encompassed "studded" snow tires.
16
17 Id.
18 The Hiner court also considered plaintiff's evidence on proximate cause –
19 which consisted of testimony that plaintiff faithfully followed her physician's
20 "instructions" following the accident – but found this conduct insufficient to prove
21 that different warnings or instructions would have made a difference in the
22 outcome.
23
24 In Ayers v. Johnson & Johnson Baby Prods. Co., 117 Wn.2d 747, 818 P.2d 1337
25 (1997), plaintiffs brought an action when their baby suffered irreversible brain
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1 damage after aspirating baby oil. Id. at 750. No warnings regarding the danger
2 associated with aspiration were provided with the baby oil. Id. The trial court's
3 entry of a JNOV. after a jury verdict for the plaintiffs on a warning claim was
4 reversed on appeal. Id. at 752. The heart of the appeal was whether there was
5 sufficient evidence that the absence of a warning was the proximate cause of the
6 accident. Id. at 752-53. The Supreme Court in Ayers concluded that there was
7 sufficient evidence to present the case to a jury noting that the evidence showed that
8 the child's mother routinely placed dangerous medicines and products on high
9 shelves where they would be beyond the reach of children. Id. at 754-55.
10
11 Finally, in Soprani v. Polygon Apartment Partners, 137 Wn.2d 319, 971 P.2d
12 500 (1999), the Supreme Court affirmed the trial court's dismissal of a warnings
13 claim on summary judgment in a case where a warning was provided, but there was
14 insufficient evidence that the alleged deficiencies in the warning were a proximate
15 cause of the injury. Id. at 321, 325-26.
16
17 In the case at bar, the warnings were entirely adequate. Even if the Court
18 cannot determine as a matter of law that the warnings were adequate, plaintiffs'
19 warnings claims should be dismissed because plaintiffs have not introduced
20 sufficient evidence that the absence of adequate warnings was a proximate cause of
21 the accident or any damages.
22
23 The warnings accompanying the 1998 Ford Explorer plainly disclosed that
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- the vehicle handles differently from an ordinary passenger car in
25 driving conditions which may occur on streets and highways;
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1 • users should avoid unnecessary sharp turns or abrupt maneuvers that
2 could cause loss of control, possibly leading to a rollover; and
3 • an accident or roll over could result in serious injury.
4 The warnings apprise the user of both the nature of the risk associated with
5 use of the vehicle – rollover – and with the nature of the injuries that could result –
6 serious. Plaintiffs may argue that Ford should have provided additional warnings
7 regarding the risks associated with loading the Explorer with gear.[1] But such a
8 revision would *diminish* the warning, not improve it. Certainly to state without
9 qualification that use of this vehicle entails a risk of rollover and serious injury
10 where abrupt maneuvers are attempted is preferable to narrowing the warning to
11 only those instances in which the vehicle is heavily loaded. Just as the warning
12 relating to "snow tires" was adequate to cover "studded" snow tires in Hiner, Ford's
13 warning regarding risk of rollover following an abrupt maneuver in any Ford
14 Explorer is adequate to cover the situation of an allegedly "heavily" loaded Ford
15 Explorer. In addition, if the warnings were provided when the vehicle was sold in
16 1998, there is no evidence that Ford learned anything between 1998 and August 2000
17 that would have triggered a duty to provide a post-manufacture warning.
18 Even if the Court believes plaintiffs' evidence is sufficient to create a jury
19 question on the adequacy of the warnings, the warning claims should be dismissed
20 because the evidence shows a different warning would not have produced a
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[1] Ford strongly contends that the vehicle was not heavily loaded when the accident occurred and plaintiffs have not introduced evidence concerning the loading weight or its affect upon vehicle stability.

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different outcome. The Ayers case is instructive. In Ayers, a case in which no warning was supplied with the product, the court discussed the evidence relating to proximate cause:

> Mrs. Ayers testified that she made a practice of reading labels on products, and that she shelved them at home according to what she read on the labels. Items she knew to be particularly dangerous, such as cleaning waxes or bathroom cleansers, were shelved up high in a cupboard above the kitchen stove or in a box on the top shelf of the bathroom closet. Items she perceived as less dangerous were treated with less care.

Ayers, 117 Wn.2d at 754. The court concluded that this "evidence of causation" was sufficient to sustain the jury's verdict.

In this case, unlike Ayers, Ford did provide a warning. Just as important, the evidence in this case demonstrates vividly and tragically that the warnings were not the proximate cause of plaintiffs' damages. The Court need look no farther than plaintiffs' lack of compliance with the booster seat warnings. The Explorer Owner's Guide directed the Jaramillos to "carefully follow all of the manufacturer's instructions with the safety seat you put in your vehicle." Trial Exhibit 56, at 88-89. The Cosco Grand Explorer warnings and instructions provided, both with text and illustrations, that the booster seat, when used without its shield, should NOT be used with a lap belt only restraint. Despite these clear warnings and the dire consequences that could result from improper used of the booster, the warnings went unheeded.

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B. Plaintiffs Riley and Sawyer Jaramillo have Failed to Establish a Prima Facie Case of Negligent Infliction of Emotional Distress.

Plaintiffs have asserted claims for negligent infliction of emotional distress on behalf of Ken, Riley and Sawyer Jaramillo. However, only Mr. Jaramillo has obtained a medical diagnosis in connection with this aspect of the claim. In Hegel v. McMahon, 136 Wn. 2d 122, 960 P.2d 424 (1998), the Washington Supreme Court outlined a new standard for proving a claim of negligent infliction of emotional distress. Under Hegel, a plaintiff *need not* demonstrate a physical manifestation of emotional distress but *must* demonstrate objective symptomotology of emotional distress. Id. at 133. The symptoms alleged must be "susceptible to medical diagnosis and proved through medical evidence." Id. at 135. Washington opinions subsequent to Hegel have continued to uphold the "susceptible to medical diagnosis" and "medical evidence" requirements. See, e.g., Berger v. Sonneland, 144 Wn. 2d 91, 113 26 P.3d 257 (2001) (describing medical evidence requirement); Berry v. Fleury, 2002 Wn. App. LEXIS 1071, No. 48571-7-I, 14-17 (2002) (requiring medical evidence of a "medically diagnosable, disabling condition"); Savoy v. Tse, 2000 Wash. App. LEXIS 354, No. 24292-3-II, *6 (2000) ("A plaintiff's emotional distress must be . . . susceptible to medical diagnosis and proved through medical evidence."); Fewel v. Swedish Med. Ctr., 1999 Wash. App. LEXIS 1581, No. 42616-8-I, *12-14 (1999) (finding medical evidence insufficient to withstand summary judgment).

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Proof of emotional and mental anguish and distress alone is not sufficient to support this cause of action. With respect to Riley and Sawyer Jaramillo, there is no evidence of any medial diagnosis sufficient to support a jury verdict. Accordingly, plaintiffs' claims for negligent infliction of emotional distress for Riley and Sawyer Jaramillo should be dismissed as a matter of law.

CONCLUSION

For the reasons stated above, Ford moves the Court to enter judgment as a matter of law dismissing plaintiffs' claims for inadequate warnings and for negligent infliction of emotional distress to Riley and Sawyer Jaramillo.

DATED: February 25, 2003

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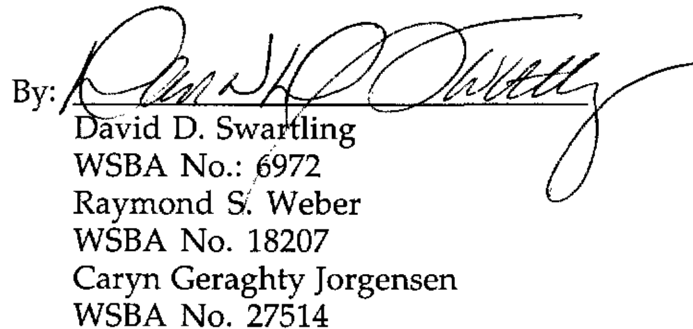
By: 
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