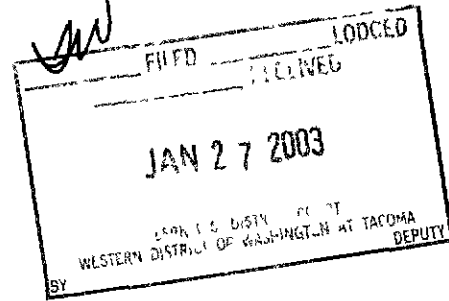


CERTIFICATE OF SERVICE

I certify that I served or mailed a copy of the foregoing document to which this certificate is attached to the attorneys of record of defendant on the 27<sup>th</sup> day of JANUARY 20 03

STRITMATTER KESSLER WHELAN WITHEY COLUCCIO  
By Wash Stanton



The Honorable J Kelley Arnold

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

KEN 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,

v

FORD MOTOR COMPANY, a Delaware  
corporation, et al ,

Defendants

NO C01-5311JKA

**PLAINTIFFS' TRIAL  
MEMORANDUM**



**I. FACTS**

On August 5, 2000, Plaintiffs Ken L Jaramillo, Riley R Jaramillo and Sawyer D Jaramillo were passengers in a 1998 Ford Explorer car driven by Angela L Jaramillo on Highway 20, near Hill City, Idaho. The Jaramillo children Riley, Sawyer and McKenna were in the back. Everyone was belted. The kids were in booster seats that employed the belts of the

PLAINTIFF'S TRIAL MEMORANDUM - 1

108

1 Explorer Everyone but McKenna had both a lap belt and a shoulder belt McKenna was in the  
2 rear center seat, which was equipped with a lap belt only

3 It was after 9 pm and just dark Ken was looking back at his kids, playing a game called  
4 "I Spy" with them He looked forward to see deer in the road (This was near milepost 134 ) As  
5 Angela L Jaramillo steered to avoid the deer, the Explorer swerved left, then right until its right  
6 side tires were on the shoulder, then left again Then the Explorer tipped and rolled, again and  
7 again, smashing out windows and tumbling to a stop hundreds of feet down the road When the  
8 car stopped moving Ken Jaramillo saw that his wife was bleeding profusely from the head The  
9 corner of the roof had crushed in on her head He looked back for his children McKenna, who  
10 had been in the center rear seat, was gone Unfortunately, both Angela and McKenna died with  
11 hours of the collision

12 Ken Jaramillo was the spouse of Angela L Jaramillo and the father of McKenna Lee  
13 Jaramillo He was named personal representative of the Estates of Angela L Jaramillo and  
14 McKenna Lee Jaramillo Gerald R Tarutis was appointed guardian ad litem for Riley R  
15 Jaramillo, a minor child of Ken and Angela Jaramillo Bradford J Fulton was appointed  
16 guardian ad litem for Sawyer D Jaramillo, a minor child of Ken and Angela Jaramillo

17 Plaintiffs will prove at trial that this rollover collision was proximately caused by the  
18 defective design of the Ford Explorer that made it unstable and prone to rolling over In  
19 addition, Plaintiffs will prove that roof of the Ford Explorer was defective in its design because it  
20 failed to protect Angela Jaramillo by preserving her occupant space in a reasonably foreseeable  
21 accident with foreseeable forces Plaintiffs will also prove that the Explorer's left front occupant  
22 restraint system was defective in its design because it failed to properly restrain Angela  
23 Jaramillo, thereby exacerbating her exposure once the roof failed Plaintiffs will also prove that  
24 the Explorer's center rear occupant restraint system was defective in its design because it failed  
25

26 PLAINTIFF'S TRIAL MEMORANDUM - 2

1 to protect and restrain McKenna Jaramillo in a reasonably foreseeable accident with foreseeable  
2 forces

3 **II. PLAINTIFFS' LIABILITY CLAIM**

4 **A. Product Liability Overview**

5 In an effort to consolidate and unify this State's judicial decisions governing defective  
6 products, the Washington Legislature enacted the Washington Product Liability Act of 1981  
7 (Laws of 1981, ch 27), codified primarily in Chapter 7 72 RCW and, to a lesser extent, in  
8 Chapter 4 22 RCW

9 RCW 7 72 010(2) specifically identifies a manufacturer to whom the Act applies as  
10 including a product seller who "designs", "makes", "fabricates" or "constructs" the relevant  
11 product or component part "Product" refers to "any object possessing intrinsic value, capable of  
12 delivery either as an assembled whole or as a component part or parts, and produced for  
13 introduction into trade or commerce" RCW 7 72 010(3) The "relevant products" for the  
14 purpose of this case are the glass, the stability components, the restraints and the roof, in that the  
15 Act defines the "relevant product" to be the component "which gave rise to the product liability  
16 claim" RCW 7 72 030 In other words, the products in this case are the designated defective  
17 components, not the whole vehicle

18 Product liability claims authorized under Chapter 7 72 RCW extend to any cause of  
19 action "brought for harm caused by the manufacture, production, making, construction,  
20 fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions,  
21 marketing, packaging, storage or labeling of the relevant product" that previously would have  
22 been based upon strict liability in tort, negligence, breach of express or implied warranty RCW  
23 7 72 010(4)

1                   **B. The Product Liability Act – Three Theories of Recovery for Product Defect**

2                   **1. Ford had a duty to safely design the Explorer (RCW 7.72.030(1)(a))**

3                   At trial, Plaintiffs will present evidence showing that Defendant Ford Motor Company  
4 breached its duty to safely design the Ford Explorer. Plaintiffs will present testimony by  
5 mechanical engineer Robert Anderson that the Explorer is defectively unstable because it is  
6 capable of, and prone to, tipping and rolling on a smooth, dry surface. Mr. Anderson's testimony  
7 is based in part on testing done by Ford and by consultant Robert Hooker. Mr. Anderson is a  
8 mechanical engineer with many years of experience in automotive testing and accident  
9 investigation and reconstruction. He will also present evidence relating to other similar Ford  
10 Explorer rollovers.

11                   Plaintiffs will also present expert testimony by Donald Friedman, an automotive design  
12 engineer, that the Explorer's roof and restraint systems are defectively designed. Mr. Friedman  
13 will testify that the roof above Angela Jaramillo failed during the accident by crushing down and  
14 to the right, striking Ms. Jaramillo, and eliminating the occupant space that should have  
15 protected her from foreseeable forces of a rollover crash. Dr. Joseph Burton will testify that Mrs.  
16 Jaramillo's death was caused by the failure of the roof and subsequent loss of protected occupant  
17 space.

18                   In addition, Mr. Friedman will testify that the Explorer's restraint systems were  
19 defectively designed and failed to restrain and protect Angela and McKenna Jaramillo. Mr.  
20 Friedman will show that McKenna's belt system failed during the crash and spooled out,  
21 allowing McKenna to be ejected midway through the event. Mr. Friedman will also testify that  
22 the front left belt system used by Angela Jaramillo failed to properly restrain her during the crash  
23 and allowed additional excursion of Ms. Jaramillo's head outside the compromised occupant  
24 space of the vehicle.

1 In enacting the 1981 Product Liability Act, our Legislature expressly granted an injured  
 2 party a cause of action against a manufacturer for defective design consistent with that  
 3 authorized under Section 402A of the Restatement of Torts (Second), as defined and  
 4 implemented in cases such as *Seattle-First Nat'l Bank v Tabert*, 86 Wn 2d 145, 542 P 2d 774  
 5 (1975) Under RCW 7 72 030(1), “[a] product manufacturer is subject to liability to a claimant if  
 6 the claimant’s harm was proximately caused by the negligence of the manufacturer in that the  
 7 product was not reasonably safe as designed”

8 The Legislature more specifically defined “not reasonably safe” in terms of design as  
 9 follows

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

16 In *Couch v Mine Safety Appliances Co*, 107 Wn 2d 232, 239 n 5, 728 P 2d 585 (1986),  
 17 the Washington Supreme Court discussed the legislative history of the *design defect* provision of  
 18 RCW 7 72 030 The court explained that RCW 7 72 030(1)(a) defines a strict liability standard  
 19 for design defect cases, *despite* the use of “negligence” in RCW 7 72 030(1) The court affirmed  
 20 this view in *Falk v Keene Corp*, 113 Wn 2d 645, 782 P 2d 974 (1989) In *Falk*, the court held  
 21 that strict liability, not ordinary negligence, is the standard under RCW 7 72 030(1)(a) for design  
 22 defect claims The Court once again affirmed this view in *Soproni v Polygon Apartment*  
 23 *Partners*, 137 Wn 2d 319, 971 P 2d 500 (1999).

## 24 **2. Consumer expectations of safety (RCW 7.72.030(3))**

25 *Falk* also holds that a plaintiff may establish manufacturer liability for a design defect if  
 26 the product was unsafe to an extent beyond that which would be contemplated by the ordinary  
 consumer under RCW 7 72 030(3) In this case, Plaintiffs will show that the vehicle was

PLAINTIFF’S TRIAL MEMORANDUM - 5

1 targeted for women and children for camping trips. The ads and marketing strategy intentionally  
 2 created a perception of safety. This evidence is highly relevant in a consumer expectations case.  
 3 See, e.g., Restatement (Second) of Torts 402A comment (i), *McCathern v Toyota Motor Corp*,  
 4 985 P.2d 804 (Or. App. 1999), *aff'd* 23 P.2d 320 (Or. S.Ct. 2001), *Leichthamer v American*  
 5 *Motors Corp*, 424 NE 2d 568 (Ohio 1981). Thus, a plaintiff may show that the product was not  
 6 reasonably safe as designed by using either a risk-utility analysis or a consumer expectation  
 7 standard.

8  
 9 **3. Ford had a post-manufacturing duty to warn or recall (RCW 7.72.030(1)(c))**

10 In addition to its duties with respect to the original design, Ford had a duty to warn about  
 11 post-manufacturing defects in that design. RCW 7.72.030(c) provides:

12 A product is not reasonably safe because adequate warnings or instructions were  
 13 not provided after the product was manufactured where a manufacturer learned or  
 14 where a reasonably prudent manufacturer should have learned about a danger  
 15 connected with the product after it was manufactured. In such a case, the  
 16 manufacturer is under a duty to act with regard to issuing warnings or instructions  
 17 concerning the danger in the manner that a reasonably prudent manufacturer  
 18 would act in the same or similar circumstances. This duty is satisfied if the  
 19 manufacturer exercises reasonable care to inform product users.

20 There is a corresponding Washington Pattern Instruction WPI 110.03.01.

21 In addition, Ford had a corresponding duty to warn through the recall apparatus  
 22 established by federal law, 49 U.S.C. §§ 30102-103, 49 U.S.C. 30117-121. Federal law requires  
 23 Ford to maintain a list of current vehicle owners (49 C.F.R. 573.7) and to notify customers of  
 24 safety problems (49 C.F.R. § 573, 49 C.F.R. 573.8 and 49 C.F.R. 577, 479).

25 In spite of mounting evidence concerning the rollover propensity of the Explorer, Ford  
 26 failed to warn consumers or to recall the Explorer. Such failure was a cause of the deaths of  
 Angela and McKenna and the injuries to Ken and his sons Sawyer and Riley.

1                   **B.       Crashworthiness Doctrine**

2                   This case is governed by the rules pertaining to crashworthiness cases that have special  
3 rules of causation. The Washington courts have recognized that the distinction between injury  
4 causation and accident causation in “crashworthiness or enhanced injury cases.” *See, e.g., Couch*  
5 *v. Mine Safety Appliances Co.*, 107 Wn 2d 232, 242, 728 P 2d 585 (1986) and *Baumgardner v*  
6 *American Motors*, 83 Wn 2d 751, 522 P 2d 829. These cases are based upon the concept first  
7 enunciated in *Larsen v General Motors*, 391 F 2d 495 (8th Cir 1968), that an automobile  
8 manufacturer must foresee the environment in which the automobile is used and take into  
9 account in its design the likelihood of cars being involved in foreseeable crashes. The duty on  
10 the manufacturer is not absolute, the duty rather is to design a reasonably safe product that can  
11 withstand foreseeable forces in a reasonably foreseeable accident. Like the instant case, the  
12 leading case in Washington, *Baumgardner, supra*, involved a seatbelt design issue. The court  
13 there noted that the defendant was only responsible for the “enhanced injury” and not for injuries  
14 that would have been caused by the crash itself. In this case, the plaintiff will prove that the  
15 deaths of both Angela Jaramillo and McKenna Jaramillo were proximately caused by Ford’s  
16 failure to design a reasonably crashworthy vehicle.

17                   Under the analysis that applies to crashworthiness causation, contributory fault on the  
18 part of the plaintiff is not a defense. The courts have reasoned that since it is foreseeable that  
19 cars will be in a crash, it is immaterial how the crash occurred, distinguishing injury causation  
20 from accident causation. Trial judges have separated injury causation from crashworthy  
21 causation as a natural outgrowth of the logic and reasoning set forth in *Baumgardner v*  
22 *American Motors*. For that reason, any evidence of Angela Jaramillo’s contributory fault, as it  
23 results to these enhanced injuries in this case is simply not relevant and the defense should be  
24 stricken as a matter of law.

25  
26  
PLAINTIFF’S TRIAL MEMORANDUM - 7

1                   **C. Dorel Must Not Be on the Verdict Form.**

2                   Defendant Dorel was dismissed from the case by order of summary judgment. In Dorel's  
3 motion it argued that it was not at fault. The dismissal of the claim against Dorel by summary  
4 judgment forever resolves the issue of Dorel's fault. Nevertheless, Ford has hinted that Dorel  
5 should appear on the verdict form for allocation of fault purposes even though Dorel was  
6 adjudicated to be without fault. Fault should not be allocated to Dorel for the following reasons:

7                   RCW 4 22 015 defines fault as including acts or omissions that are negligent or reckless.  
8 It further provides that "[l]egal requirements of casual relation apply both to fault as the basis for  
9 liability and to contributory fault." Thus, in order to be a potentially "at fault" entity on the  
10 verdict form, there must be issues of fact as to the party's negligence and proximate cause. By  
11 definition, summary judgment is a determination that there are no issues of fact as to negligence  
12 or proximate cause. Therefore, Dorel cannot be a potential "at fault" entity on the verdict form.

13                   RCW 4 22 070 states

14                   In all actions involving fault of more than one entity, the trier of fact shall  
15 determine the percentage of the total fault which is attributable to every entity  
16 which caused the claimant's damages except entities immune from liability to the  
claimant under Title 51 RCW.

17                   RCW 4 22 070 incorporates the definition of "fault" in RCW 4 22 015, which requires evidence  
18 creating a material issue of fact for the jury as to negligence and proximate cause in order for the  
19 entity to potentially be at fault and come within the apportionment scheme of RCW 4 22 070.

20                   RCW 4 22 070's allocation procedure does not apply when there is no evidence of the  
21 "fault" of an entity. See *Adcox v Children's Orthopedic Hosp*, 123 Wn2d 15, 864 P.2d 921  
22 (1993). By definition, there is insufficient evidence to show "fault" of an entity when that entity  
23 has been granted summary judgment.

24                   The following language from *Adcox* seems applicable here:

25                   RCW 4 22 070 is not self-executing. It does not automatically apply to each case  
26 where more than one entity could theoretically be at fault. Either the plaintiff or

1 the defendant must present evidence of another entity's fault to invoke the  
 2 statute's allocation procedure *Without a claim that more than one party is at*  
 3 *fault, and sufficient evidence to support that claim, the trial judge cannot*  
 4 *submit the issue of allocation to the jury. Indeed, it would be improper for the*  
 5 *judge to allow the jury to allocate fault without such evidence.* If the plaintiff  
 6 signals an intention to present evidence of fault solely against one defendant, as in  
 this case, it is incumbent upon the defendant to provide proof that more than one  
 entity was at fault. The Hospital failed to present any evidence of the possible  
 negligence of Dr. Lush and Dr. Herndon.

7 *Adcox*, at 25-26 (emphasis added). As *Adcox* states, more than a mere claim that an entity is at  
 8 fault is required to have the entity on the verdict form. There must be evidence creating an issue  
 9 of material fact for the jury as to negligence and proximate cause. Obviously here there is no  
 10 such evidence, because summary judgment has been granted.

11 This Court has found Dorel to be fault free. Because of this finding, Dorel is now out of  
 12 the case and no fault may be attributed to Dorel under RCW 4.22.070. The time for Ford to have  
 13 presented any evidence regarding the fault of Dorel was in response to Dorel's motion for  
 14 summary judgment. It is too late now for Ford to point the finger at, or try to attribute fault to,  
 15 Dorel. Ford is precluded from presenting evidence or argument as to the fault of Dorel. Since  
 16 Dorel has been adjudicated as being fault-free, it would be error to include it on the verdict form.

#### 17 **D. Seat Belt Usage/Car Seat Misuse**

18 The Washington Supreme Court has clearly held that a motorist's or vehicle occupant's  
 19 failure to wear a seatbelt is inadmissible to show fault or negligence. *Amend v Bell*, 89 Wn 2d  
 20 124, 134, 570 P 2d 138 (1977), *Derheim v N Fiorito Co*, 80 Wn 2d 161, 171, 492 P 2d 1030  
 21 (1972).

22 Similarly, the Washington Legislature has made it clear that non-use of a seatbelt is  
 23 inadmissible to show negligence in a civil action.

24 Failure to comply with the requirements of this section does not constitute  
 25 negligence, nor may failure to wear a safety belt assembly be admissible as  
 evidence of negligence in any civil action.

26 RCW 46.61.688(6).

PLAINTIFF'S TRIAL MEMORANDUM - 9

1 Even under the broad definition of “fault” contained in RCW 4 22.015, which includes an  
2 unreasonable failure to avoid an injury, non-usage of a seatbelt is still inadmissible. Nor can the  
3 failure of a plaintiff to wear a safety belt be raised as an affirmative defense of contributory fault  
4 under RCW 46 61 688(6). *Clark v Payne*, 61 Wn App 189, 193-195, 810 P 2d 931 (1991)

5 Further, RCW 46 61 688(6) applies equally to a situation in which a child is not strapped  
6 into an appropriate child restraint device or seat belt. Thus, in *Patterson v Horton*, 84 Wn App  
7 531, 929 P 2d 1125 (1997), the Court of Appeals affirmed the dismissal of an action against the  
8 driver for “negligent restraint.”

9 Although evidence of seat belt usage is relevant as to whether or not McKenna  
10 Jaramillo’s safety belt was used to establish that it was defective, conversely, such evidence  
11 cannot be as evidence of fault on the part of the Jaramillos. Thus, the following limiting  
12 instruction should be given

13 The law provides that the failure to wear a safety belt does not constitute fault or  
14 contributory fault, nor can it be used as evidence of fault or contributory fault.  
15 Evidence of safety belt usage was admitted only for the purpose of whether or not  
16 McKenna Jaramillo’s safety belt failed, and should not be considered for any other  
purpose

17 WPI 70 08

18 **E. The Emergency Doctrine**

19 Ford claims that Angela Jaramillo was at fault for the rollover. There is no evidence of  
20 any contributory fault on the part of Angela Jaramillo prior to the time that she suddenly  
21 encountered deer on the highway. Under Washington law,

22 A person who is suddenly confronted by an emergency through no negligence of  
23 his or her own and who is compelled to decide instantly how to avoid injury and  
24 who makes such a choice as a reasonably careful person placed in such a position  
might make, is not negligent even though it is not the wisest choice

25 WPI 12 02

1 Washington courts have held that it was error to refuse to give an emergency instruction  
 2 when the evidence justified its use *Bell v Wheeler*, 14 Wn App 4, 538 P 2d 857 (1975) Here,  
 3 the evidence justifies the giving of an emergency instruction

### 4 III. PLAINTIFFS' DAMAGE CLAIMS

#### 5 A. Plaintiffs' Survival Claims

6 Washington has two survival statutes, the general survival statute (RCW 4 20 046)<sup>1</sup> and  
 7 the special survival statute (RCW 4 20 060)<sup>2</sup> These statutes preserve any causes of actions or  
 8 claims that a person could have maintained had he or she not died *Federated Services v Estate*  
 9 *of Norberg*, 101 Wn App 119, 125, 4 P 3d 844 (2000) ("Washington's general Survival of  
 10 Actions statute was enacted to keep the decedent's claims alive and to allow the personal  
 11 representative to pursue them"), *White v Johns-Manville Corp*, 103 Wn 2d 344, 358, 693 P 2d  
 12 687 (1985) The survival statutes do not create new causes of action See *Whittlesey v Seattle*,  
 13 94 Wash 645, 654, 163 P 193 (1917) They merely preserve underlying actions for personal  
 14 injury, including all elements of damages that would be allowed in a personal injury action See  
 15 *Warner v McCaughan*, 77 Wn 2d 178, 182, 460 P 2d 272 (1969) (quoting *Harvey v Cleman*, 65  
 16

17 <sup>1</sup> The general survival statute (RCW 4 20 046) provides in part that

18 All causes of action by a person or persons against another person or persons shall survive  
 19 to the personal representatives of the former and against the personal representatives of the latter,  
 20 whether such actions arise on contract or otherwise, and whether or not such actions would have  
 21 survived at the common law or prior to the date of enactment of this section PROVIDED,  
 22 HOWEVER, That the personal representative shall only be entitled to recover damages for pain and  
 23 suffering, anxiety, emotional distress, or humiliation personal to and suffered by a deceased on  
 24 behalf of those beneficiaries enumerated in RCW 4 20 020, and such damages are recoverable  
 25 regardless of whether or not the death was occasioned by the injury that is the basis for the action

26 <sup>2</sup> The special survival statute (RCW 4 20 060) provides in part that

No action for a personal injury to any person occasioning death shall abate, nor shall such  
 right of action determine, by reason of such death, if such person has a surviving spouse or child  
 living, including stepchildren, or leaving no surviving spouse or such children, if there is  
 dependent upon the deceased for support and resident within the United States at the time of  
 decedent's death, parents, sisters or brothers, but such action may be prosecuted, or commenced  
 and prosecuted, by the executor or administrator of the deceased, in favor of such surviving  
 spouse, or in favor of the surviving spouse

1 Wn 2d 853, 400 P 2d 87 (1965)), *Ginochio v Hesston Corp*, 46 Wn App 843, 845, 733 P 2d  
2 551 (1987), *Chapple v Ganger*, 851 F Supp 1481, 1486 (E D Wash 1994)

3 The major difference between the two statutes is that the general survival statute  
4 preserves the decedent's cause of action for his or her estate, while the special survival statute  
5 preserves the decedent's cause of action for the decedent's statutory beneficiaries. Compare  
6 RCW 4 20 060 with RCW 4 20 046. See also *Walton v Absher Construction Co, Inc*, 101 Wn  
7 2d 238, 242, 244-245, 676 P 2d 1002 (1984) (discussing legislative history and concluding that  
8 the statutes can be harmonized), *Parrish v Jones, supra, Steven Andrews, Survivability of*  
9 *Noneconomic Damages for Tortious Death in Washington*, 21 S U L R 623 (1998). Neither  
10 statute creates a new cause of action in the beneficiaries. *White*, 103 Wn 2d at 358.

11 The general survival statute also differs from the special survival statute in that it  
12 continues any causes of action that could have been brought by the decedent prior to his or her  
13 death, regardless of the ultimate cause of death. RCW 4 20 046, see also *Cavazos v Franklin*,  
14 73 Wn App 116, 119, 867 P 2d 676 (1994). The special survival statute, on the other hand, is  
15 limited to claims for personal injury resulting in death. RCW 4 20 060, *Andrews, Survivability*  
16 *of Noneconomic Damages for Tortious Death in Washington, supra*, at 632.

17 The survival statutes, being remedial in nature, are to be liberally construed. See *Cook v*  
18 *Rafferty*, 200 Wash 234, 240, 93 P 2d 376 (1939), *Whittlesey v Seattle*, 94 Wash 645, 654, 163  
19 P 193 (1917). The legislative intent underlying the survival statutes was to eliminate the  
20 perverse result under the early common law "that it was more profitable for the defendant to kill  
21 the plaintiff than to scratch him." *Warner v McCaughan*, 77 Wn 2d 178, 183, 460 P 2d 272  
22 (1969), see also *Cavazos v Franklin*, 73 Wn App 116, 120, 867 P 2d 674 (1994) ("To deny a  
23 cause of action in this case would revert back to the old twist of common law, which made it  
24 more profitable to kill than to injure, and would directly contravene the remedial purpose of  
25 Washington statutory law.")

26 PLAINTIFF'S TRIAL MEMORANDUM - 12

1  
2 In light of changes in both statutory and common law that have been brought about by  
3 *Kirk v WSU*, 109 Wn 2d 448, 746 P 2d 285 (1987), and the 1993 amendment to RCW 4 20 046,  
4 both RCW 4 20 046 and RCW 4 20.060 now allow for the recovery of a decedent's pre-death  
5 pain and suffering

6 In the survival claim brought on behalf of Angela Jaramillo's estate, Plaintiff claims  
7 include damages for the net accumulations lost to her estate Net accumulations is the portion of  
8 a decedent's future income recoverable on a survival claim *Wagner v Flightcraft, Inc*, 31 Wn  
9 App 558, 643 P 2d 906 (1982), see *Criscuola v Andrews*, 82 Wn 2d 68, 507 P 2d 149 (1973)  
10 Net accumulation is computed by determining the probable gross earnings of a decedent,  
11 subtracting personal and family support expenditures, and then reducing the figure to present  
12 value. *Wagner v Flightcraft, Inc*, 31 Wn App at 568 (Family support expenditures, deducted  
13 in computing net accumulations, are recoverable on the wrongful death claim )

14 As set forth in previous briefing, Plaintiffs' also claim damages for the shortened life  
15 expectancies and pre-death pain and suffering of both Angela Jaramillo and McKenna Jaramillo

#### 16 **B. Plaintiffs' Wrongful Death Claims**

17 Under Washington's wrongful death statutes, RCW 4 20 010 and RCW 4 20 020, a  
18 wrongful death action may be brought by the personal representative of the decedent's estate on  
19 behalf of the specified statutory beneficiaries for the losses sustained by them as a result of the  
20 decedent's death See *Wood v Dunlop*, 83 Wn 2d 719, 724, 521 P 2d 1177 (1974) Even  
21 though the personal representative is the named plaintiff in a wrongful death action, any recovery  
22 under the wrongful death statutes vests in the statutory beneficiaries *Wood*, 83 Wn 2d at 724

23 Although the wrongful death statute does not list the damages available to the statutory  
24 beneficiaries, Washington courts have interpreted the statute as allowing compensation for the  
25 actual pecuniary loss suffered by the surviving beneficiaries *Jensen v Culbert*, 134 Wash 599,  
26 605, 236 P 101 (1925). Pecuniary loss has been held to include not only the monetary

1 contributions the decedent would have made to the beneficiaries (family support), but also  
2 intangible losses such as loss of the decedent's support, love, affection, care, services,  
3 companionship, society, and consortium See *Parrish v Jones*, 44 Wn App 449, 722 P 2d 878  
4 (1986), *Myers v Harter*, 76 Wn 2d 772, 459 P 2d 25 (1969), *Hinton v Carmody*, 182 Wash  
5 123, 45 P 2d 32 (1935), *Chapple v Ganger*, 851 F Supp 1481, 1487 (E D Wash 1994)  
6 Damage awards are apportioned according to the actual loss suffered by each beneficiary  
7 *Parrish v Jones*, 44 Wn App 449, 454, 722 P 2d 878 (1986)

8 Washington also has a specific wrongful death statute for the death of children RCW  
9 4 24 010 gives a parent a direct action for the death of the parent's minor child The statute  
10 provides in part that "in addition to damages for medical, hospital, medication expenses, and loss  
11 of services and support, damages may be recovered for the loss of love and companionship of the  
12 child and for injury to or destruction of the parent-child relationship in such amount as, under all  
13 the circumstances of the case, may be just " In *Hinzman v Palmanteer*, 81 Wn 2d 327, 501 P 2d  
14 1228 (1972), the court held that "loss of love and companionship" and "destruction of the parent-  
15 child relationship" are separate and distinct items under RCW 4 24 010 and that damages may be  
16 allowed for each In *Wilson v Lund*, 80 Wn 2d 91, 491 P 2d 1287 (1971), an action for the death  
17 of a child brought pursuant to RCW 4 24 010, the trial court instructed that the jury was not to  
18 consider parental grief, mental anguish, or suffering (See the concurring opinion of Justice  
19 Wright ) The Supreme Court reversed construing the language "loss of love and injury to or  
20 destruction of the parent-child relationship" as providing recovery for parental grief, mental  
21 anguish, and suffering in cases involving the wrongful death of or injury to a child under RCW  
22 4 24 010

23 Plaintiffs proposed wrongful death instructions cover claims for the death of Angela  
24 Jaramillo under RCW 4 20 020 and for the death of McKenna Jaramillo Plaintiffs' proposed  
25 instructions also segregate the damages in accordance with *Parrish v Jones, supra*

26 PLAINTIFF'S TRIAL MEMORANDUM - 14

**C. Plaintiffs' Claims for Emotional Distress and Anguish**

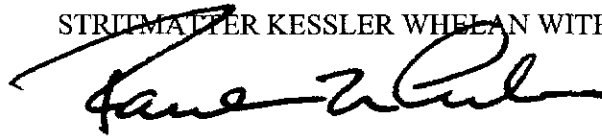
The Washington Supreme Court recognized distress the tort of negligent infliction of emotional distress in *Hunsley v Gard*, 87 Wn 2d 424, 435-436, 553 P 2d 1096 (1976) Recovery for negligent infliction of emotional distress is limited to family members present at the scene See *Gain v Carroll Mill Co*, 114 Wn 2d 254, 260, 787 P 2d 553 (1990) Here, Ken, Riley and Sawyer Jaramillo were present at the scene and each witnessed the deaths of Angela and McKenna Jaramillo As such, they are entitled to recover damages for negligent infliction of emotional distress

**IV. CONCLUSION**

This is a substantial case with important issues of law and fact Plaintiffs anticipate an appropriately substantial verdict

DATED this 27 day of Jan., 2003

STRITMATTER KESSLER WHELAN WITHEY COLUCCIO



PAUL L. STRITMATTER, WSBA #4532  
PAUL W. WHELAN, WSBA #2308  
PETER O'NEIL, WSBA 28198  
GARTH L. JONES, WSBA #14795  
Counsel for Plaintiffs