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FEDERAL COURT RULES VIRGINIA LAW ALLOWS EVIDENCE OF NON-USE OF SEAT BELT

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A pretrial evidentiary ruling by a Virginia federal district court judge in an automobile crashworthy products liability case permits the manufacturer-defendant to introduce evidence of non-use of a seat belt on the issue of damages.[1]

The March 1978 ruling by Judge D. Dortch Warriner held as admissible under Virginia law[2] evidence that plaintiff was not using available seat belts, and that the failure to do so related to his injuries. The court limited the evidence to the issue of damages, holding that while by Virginia statute[3] the failure to use a seat belt was not negligence and therefore could not bar recovery, the jury could reduce the monetary award in light of expert testimony linking the injuries to the failure to wear the available seat belts.

The ruling is the first recorded decision on the "seat belt defense" by either a Virginia court or a federal court interpreting Virginia law.

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1. Wilson v. Volkswagen of America, Inc., 445 F. Supp. 1368 (E.D. Va. 1978).

2. The federal court had diversity jurisdiction in the case involving the plaintiff, a resident of Virginia, and the defendants, Volkswagen of America, Inc. and Volkswagenwerk, A.G. The single car accident occurred in Virginia and the court, applying the choice of law rules of the forum, applied Virginia law. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). The case was before the district court for the second time, having been remanded by the United States Court of Appeals for the Fourth Circuit upon reversal of a 1976 entry of default judgment against Volkswagen. *See* Wilson v. Volkswagen of America, Inc., 561 F.2d 494 (4th Cir. 1977). The litigants entered into a compromise settlement and the case was stricken from the docket before trial one week after the pre-trial decision to permit introduction of the evidence.

3. VA. CODE ANN. § 46.1-3*9.1 (Repl. Vol. 1974) reads in pertinent part:

> (b) Failure to use such safety lap belts or a combination of lap belts and shoulder straps or harnesses after installation shall not be deemed to be negligence.

Judge Warriner referred to the fact that the Tennessee and Minnesota legislatures adopted much broader proscriptions to seat belt evidence. Both statutes preclude the use of the evidence to mitigate damages. *See* MINN. STAT. ANN. § 169.685(4) (West Cum. Supp. 1978); TENN. CODE ANN. § 59-930 (Repl. Vol. 1968). *See also* IOWA CODE ANN. 321.445 (West Cum. Supp. 1978-1979); ME. REV. STAT. tit. 29 § 1368-A (1964).

I. The Classic Fact Setting

The *Wilson* case presented the court with the classic second collision set of facts. The plaintiff John Wilson was rendered a paraplegic in a single vehicle accident which occurred on April 1, 1973, on Interstate 95 near Fredericksburg, Virginia. In his products liability action, Wilson alleged two defects in the car. First, he asserted that the flexible coupling which connects two portions of the steering column in his Volkswagen Beetle did not contain two critical bolts or, in the alternative, that the bolts had not been properly assembled onto the vehicle and had come off the car immediately before the accident.

Secondly, plaintiff pleaded a second collision theory, alleging that irrespective of the cause of the vehicle's leaving the road, its roof structure was defectively designed in that it permitted an unreasonable intrusion into the passenger compartment upon rollover. Wilson asserted that his paraplegia was a direct result of compression of the roof upon his head and spine. Volkswagen denied both causes of action and shortly before the final pre-trial conference Wilson elected to drop the flexible coupling theory and to proceed solely with the defective roof theory.

The "second collision" or "crashworthy" doctrine is part of an expanding body of product's liability law in the automotive field.[4] It permits an injured plaintiff to prove and recover for "enhanced injuries" received in an accident which he allegedly would not have received absent some defect in the vehicle. Wilson asserted that had the roof not been defective he would have sustained only minor injuries. The fact that Wilson's negligence may have caused the car to leave the road became irrelevant under the plaintiff's theory. His paraplegia, he argued, was his "enhanced injury," which he would not have suffered had the roof been strong enough to sustain the impact.

Volkswagen was prepared to show among other conventional de-

4. Citing an earlier Fourth Circuit opinion, the court assumed that Virginia courts would recognize and thus allow plaintiff to be compensated under the "crashworthy" or "second collision" theory. *See* Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066, 1069-70 (4th Cir. 1974). The Fourth Circuit in the *Dreisonstok* case also assumed for purposes of that decision that Virginia law would recognize the "crashworthy" theory. No recorded Virginia decision has directly addressed the issue.

fenses that the Volkswagen roof was not defectively designed, that Wilson's paraplegia was not caused by roof compression on his spine, and that he would not have sustained a spinal fracture if he had been wearing the seat belt provided by Volkswagen.

Because of the Virginia statute barring evidence of the failure to wear a seat belt as negligence, defendants filed pre-trial motions seeking to permit use of evidence to show that Wilson's paraplegia was proximately caused by his failure to wear a seat belt and to permit such evidence to be considered by the jury in mitigation of damages.

Volkswagen argued that in a crashworthy case, where damages are permitted only for "enhanced injuries," and such are asserted to have been caused by a defective design of the vehicle, the fact that available safety devices designed by the manufacturer are not used is relevant to both the question of the unreasonableness of the design and the extent of the injuries incurred by a plaintiff who fails to use the safety devices. If, under the crashworthy theory, an automobile manufacturer has a duty to design a vehicle which does not pose an unreasonable risk of injury to occupants in an accident, and the manufacturer incorporates safety devices in its design, a failure to use those devices is relevant to the questions of the reasonableness of the design, the proximate cause of the injuries and the amount of damages properly permitted the plaintiff.

The plaintiff, in response to Volkswagen's motion to permit the seat belt evidence, argued that Volkswagen, by seeking to show that the lack of a seat belt caused Wilson's paraplegia, was attempting to prove that he was responsible for his own injuries. This, the plaintiff argued, was the classic defense of contributory negligence, and it must fail because of the statute's mandate that it is not negligence to refuse to use a seat belt.

The plaintiff further argued against Volkswagen's position that evidence of failure to wear the seat belt is admissible on the issue of damages, basing its position on what it described as the well established law in Virginia that the doctrine of mitigation of damages is only applicable where the injury precedes the opportunity to mitigate.

II. THE RULING

The court found Volkswagen's argument persuasive but laid down narrow and specific prerequisites to the admission of the seat belt defense. Volkswagen would have to produce "competent evidence" that the "enhanced injuries" would not have occurred or would have been less severe if Wilson had been wearing a seat belt.[5] The burden is on the defendant to show that the seat belt was available, that it was not in use at the time of the accident, and that its use would have related to Wilson's injuries. The court demanded a causal connection, presumably by expert medical testimony, that the use of a seat belt would have prevented or lessened the specific injury.

Once this prerequisite was met, the court would allow an instruction that the jury would "not award any damages for those injuries you find he would not have received had he used the seat belt."[6] The court's emphasis was on damages, not on liability or causation, and it specifically ruled that failure to use the seat belt was not "in and of itself a bar to his recovery."[7] The holding opened the door for Volkswagen to prove that, had Wilson fastened his seat belt, his injuries would have been less serious and to argue that fact to the jury for consideration in assessing damages.

The *Wilson* court relied upon a New York holding, adopting a two-prong test enunciated in *Spier* v. *Barker*[8] and found in other decisions around the nation.

In *Spier,* the plaintiff, not wearing a seat belt, was thrown from her automobile which then overturned, pinning her legs under a wheel. The trial court allowed the introduction of evidence relating to this fact, including expert testimony that the plaintiff would not have been thrown from the car and would probably not have been injured seriously if the seat belt had been worn. The jury returned a verdict of no cause of action. The New York Court of Appeals affirmed, holding that the evidence of non-use of seat belts was proper before a jury. While rejecting the proposition that the seat

5. 445 F. Supp. at 1372-73. Wilson was expected to testify that he was wearing his seat belt at the time of the accident. Volkswagen was prepared to offer expert testimony to the contrary.

6. *Id.* at 1373.

7. *Id.*

8. 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974).

belt defense can be the basis of a contributory negligence defense, *Spier* held that a jury may nevertheless return, and an appellate court will affirm, a verdict of no damages if the jury is presented with expert testimony upon which to base its decision.

The damage instruction in *Spier* read in part:

> If you find that a reasonably prudent driver would have used a seat belt, and that she would not have received some or all of her injuries had she used the seat belt, then you may not award any damages for those injuries you find she would not have received had she used the seat belt.[9]

Therefore limiting the so-called seat belt defense to damages based on the doctrines of mitigation of damages and avoidable consequences, the court held that the "seat belt affords the automobile occupant an unusual and ordinarily unavailable means by which he . . . may minimize his . . . damages *prior* to the accident."[10] Emphasizing expert testimony which stated that the plaintiff's injuries were caused primarily because she wore no seat belt, the court held the jury has a right to hear evidence which will mitigate the damage:

> We today hold that non-use of an available seat belt, and expert testimony in regard thereto, is a factor which the jury may consider, in light of all the other facts received in evidence, in arriving at its determination as to whether the plaintiff has exercised due care, not only to avoid injury to himself, but to mitigate any injury he would likely sustain. . . .[11]

The classic definition of mitigation of damages is that a defendant generally may show in extenuation or reduction of damages any facts surrounding the injury which tend to reduce the damages.

Mitigation of damages, or, as some commentators refer to it, the "doctrine of avoidable consequences" or the theory of "apportionment of damages," traditionally applies to required actions of the injured party following an accident.[12]

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9. *Id.* at 448, 323 N.E.2d at 166, 363 N.Y.S.2d at 919.
10. *Id.* at 452, 323 N.E.2d at 168, 363 N.Y.S.2d at 922.
11. *Id.* at 449, 323 N.E.2d at 167, 363 N.Y.S.2d at 920.
12. *See, e.g.*, W. PROSSER, LAW OF TORTS 422-24 (4th ed. 1971) [hereinafter cited as

Judge Warriner's ruling requires that the act of mitigation precede the injury. While this is a reversal of the traditional mitigation after the initial injury, there is no logical reason to insist that mitigation can only occur after an injury.

If, under the crashworthy theory, a car manufacturer has a duty to design a vehicle which does not pose an unreasonable risk of harm in an accident because auto accidents are foreseeable, the accident is no less foreseeable to the driver or occupant. It is not, therefore, unreasonable to hold that the driver or occupant cannot claim damages which he reasonably could have prevented.

Professor Prosser endorses this approach, calling it "the better view unless we are to place an entirely artificial emphasis upon the moment of impact . . . ."[13]

In reaching its conclusion, the *Wilson* Court emphasized that the key decision for a court or jury is whether the acts the plaintiff is required to perform are reasonable.[14] Buckling a seat belt, while a nuisance to some, cannot be categorized as an unreasonable requirement when balanced against its resulting benefits both to that person directly and society indirectly.

Although the practical effect of the seat belt defense may be an award of no damages, it is to be distinguished from the doctrine of contributory negligence. Negligence derives from a breach of duty,

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PROSSER]; J. STEIN, DAMAGES AND RECOVERY 215-518 (1972). Stein seems more troubled than Prosser by the fact that the mitigation precedes the damages.

13. Prosser cites as authority for this proposition several cases involving the seat belt issue. He notes:

> A more difficult problem is presented when the plaintiff's prior conduct is found to have played no part in bringing about an impact or accident, but to have aggravated the ensuing damages. In such a case, upon a finding that the plaintiff's excessive speed in driving was not responsible for a collision, but greatly increased the damages resulting from it, the Connecticut court refused to make any division, and held the plaintiff could recover the entire amount. On the other hand the courts . . . [in some states] in analogous situations, have apportioned the damages, holding that the plaintiff's recovery will be reduced to the extent that they have been aggravated by his own antecedent negligence. This would seem to be the better view, unless we are to place an entirely artificial emphasis upon the amount of impact, and the pure mechanics of causation. Prosser, *supra* n. 14 at 423-24.

14. "The obligation to minimize damages never requires a party to exercise more than reasonable care to that end,. . .though one must not exercise less than reasonable care . . . . Reasonably prudent action is required. . . . What constitutes reasonable care depends on the circumstances of the particular case." Annot., 81 A.L.R. 282, 283 (1932) (citations omitted).

and, although arguably an occupant or driver should have a duty to wear a seat belt since accidents are reasonably foreseeable, the Virginia legislature has determined in its enactment of §46.1-309.1(b)[15] that no such duty exists.

Mitigation of damages for failure to wear a seat belt does not derive from a breach of duty, but rather from the common law concept that one may not recover for damages which reasonably could have been prevented. The Restatement of Torts recognizes the distinction. Restatement, §918(1) states that "a person injured by the tort of another is not entitled to recover damages for such harm as he could have avoided by the use of due care after the commission of the tort."[16] The first comment following this Restatement section specifically notes that §918 does not bar recovery as would be the case in a successful contributory negligence setting; rather, it "applies only to the diminution of damages and not to the existence of a cause of action."[17]

III. Conclusion

It may be argued that the Virginia legislature, in enacting the seat belt statute, intended to preclude any evidence of the failure to use a seat belt from going to the jury and that Judge Warriner's ruling merely takes advantage of a technical loophole in the law. The ruling is, however, logically consistent with the development of second collision products liability law. It is not unreasonable to deny an injured plaintiff recovery for damages that could have been avoided by use of a seat belt. If the automobile manufacturer's duty is to design and build a reasonably crashworthy car and it does so, then the injured plaintiff should not recover for injuries sustained by ignoring use of appropriately designed safety devices.

The decision raises several important questions to be considered by the legislature and future courts facing this issue. Firstly, should the public policy of Virginia permit a plaintiff in a second collision design case to recover damages which he reasonably could have prevented by using the safety devices designed by the automobile manufacturer? Should Virginia encourage the use of seat belts and

15. Va. Code Ann. § 46.1-309.1(b) (Repl. Vol. 1974).
16. Restatement of Torts § 918, Comment a (1939).
17. *Id.*, Comment a at 602.

other safety devices by permitting defendants' use of the seat belt defense or the mitigation doctrine?

Secondly, should the seat belt defense be applicable in mitigation of damages in a non-second collision case, such as the *Spier* case relied upon by the *Wilson* court?[18] There is a split of authority in the jurisdictions which have decided this question, with the majority answering in the affirmative. There appears to be no logical distinction between application of the mitigation rule in the second collision and the non-second collision cases.

Thirdly, should seat belt evidence be permitted on the issue of proximate causation? Arguably, a defendant should be permitted to show that the cause in fact of the plaintiff's injuries, or a portion of his injuries, was a failure to wear a seat belt.

Judge Warriner's ruling opens the door for defendants in automobile accident cases to argue for the presentation to the jury of seat belt evidence on the issue of mitigation of damages and causation. The biggest hurdle for the defense in these cases will be expert medical testimony to distinguish the injuries the plaintiff received as a result of the failure to wear a seat belt from the injuries he would have received had the seat belt been used. Similar distinctions, however, are regularly permitted in jurisdictions where plaintiffs' attorneys must prove the "enhanced injuries" in a second collision case.

Finally, the ruling suggests application of the mitigation doctrine to other product liability situations in which there is a conscious

18. For a more detailed review and analysis of the seat belt defense issue, *See* Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976); Henderson v. United States, 429 F.2d 588, 591 (10th Cir. 1970); Benner v. Interstate Container Corp., 73 F.R.D. 502 (E.D. Pa. 1977); Vizzini v. Ford Motor Co., 72 F.R.D. 132 (E.D. Pa. 1976); Pruitts v. W. Lowrey Trucking Co., 400 F. Supp. 867 (W.D. Pa. 1975); Horn v. Gen. Motors Corp. 17 Cal.3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976); Truman v. Vargas, 275 Cal. App.2d 976, 80 Cal. Rptr. 373 (1969); Remington v. Arndt, 28 Conn. Supp. 289, 259 A.2d 145 (1969); Uresky v. Fedora, 245 A.2d 393 (Conn. 1968); Eichorn v. Olson, 32 Ill. App. 3d 587, 335 N.E.2d 774 (1975); Mount v. McClellan, 91 Ill.App.2d 1, 234 N.E.2d 329 (1968); Tiemeyer v. McIntosh, 176 N.W.2d 819 (Iowa 1970); Barry v. Coca Cola, 99 N.J. Supp. 270, 239 A.2d 273 (1967); Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968); Bertsch v. Spears, 20 Ohio App.2d 137, 252 N.E.2d 194 (1969); Fields v. Volkswagen of America, Inc., 555 P.2d 48 (Okl. 1976); Sams v. Sams, 247 S.C. 467, 148 S.E.2d 154 (1966); Sonnier v. Ramsey, 424 S.W.2d 684, (Tex. 1968); Bentzler v. Braun, 34 Wis.2d 362, 149 N.W.2d 626, (1967). *See also* Kircher, *The Seat Belt Defense - State of the Law*, 53 MARQ. L. REV. 172 (1970).

disregard of a safety device. For example, should the mitigation rule apply to the tire changer who ignores use of safety equipment and is injured by an exploding tire caused by a broken bead?

The scope of potential applicability of the doctrine to these and other similar situations is limited only by the creative imagination of the defense bar.