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IN THE SUPREME COURT OF FLORIDA

VOLKSWAGEN OF AMERICA, INC., Petitioner, vs. WALTER LEIGHTON LONG and FLORENCE LONG, his wife, Respondents,	CASE NO.: 64,785 FIRST DISTRICT COURT APPEAL NO. AS-291

ANSWER BRIEF OF RESPONDENTS, WALTER LEIGHTON LONG and FLORENCE LONG, his wife

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STATEMENT OF THE CASE

VW's statement of the case is essentially correct except that the Plaintiff, Walter Leighton Long, was a passenger and non-owner of the vehicle involved in the collision.

The verdict form complained of by VW was a verdict form insisted upon by, created by, and submitted by VW to the trial court. No objection to the verdict form was made and judgment was rendered for the Plaintiffs in keeping with the verdict return. Final judgment for $1,300,000.00 in favor of Mr. Long was entered by the Court based upon the jury verdict of $2,000,000.00 finds Mr. Long guilty of thirty-five percent (35%) contributory negligence.

The allegations of second impact damage or defects as to the broken seat were abandoned at trial.

STATEMENT OF THE FACTS

The statement of the facts of VW are essentially correct except where editorialized. The "surprise allegation" referred to as to the stabilizer bar was opposed by two different witnesses of VW, one from the factory and the other a consulting engineer.

The proffer of VW as to Mr. Long's failure to use a seatbelt asks the expert to assume that "if he wore a seatbelt ...", and no evidence was offered to show existence or non-existence of a functional seatbelt at the trial.

INTRODUCTION

This Court has for consideration the "seatbelt issue" as certified in Lafferty.

VW filed a brief raising three or more issues in addition thereto which were clearly disposed of by the First District Court of Appeal's capital clarifying opinion on the Motion for Rehearing. The Supreme Court took jurisdiction accordingly and declined oral argument.

Mr. Long has pending awaiting ruling in this Court a Motion to Dismiss and a Motion to Quash directed toward the failure of VW to establish by a scintilla of evidence the actual existence of a functional seatbelt in the subject vehicle.

A Motion for Sanctions awaits ruling for the attempt to deliberately mislead this Court by VW and to dismiss this appeal.

The statement in the Motion for Sanctions as to the expanded review being claimed by VW is addressed particularly in paragraphs 6 thru 11, to-wit:

> 6. Petitioner has further transgressed the bounds of professional propriety by seeking to establish upon such non-existent evidence an expanded review by this Court which is contrary to the holding in Savoie and Jollie v. State, 405 So.2d 418, (Fla.1981).
>
> 7. As stated by Justice Thomas in Lake v. Lake, 103 So.2d 639, (Fla. 1958), the District Courts of Appeal "were meant to be courts of final appellate jurisdiction".
>
> 8. The Jollie Court held only those per curiam affirmed citation cases were reviewable

when the issue in the cited case was under review in the Supreme Court or had been reversed by the Supreme Court.

9. In the case at bar, all issues therein were specifically decided by "per curiam" affirmance with no opinion and the Clarifying Opinion points with precise singularity to the "seatbelt issue" only, as cited in Lafferty.

10. The Savoie Court simply held that where undecided Constitutional issues existed in and on the face of a DCA opinion that to avoid peace-meal appeals for dispositive purposes, it would consider unresolved Constitutional issues presented with jurisdictional issues. No unresolved issues exist n the case at bar as the District Court opinion was a DCA affirmance of the trial court.

11. Petitioners have exceeded the bounds of this Court's order accepting jurisdiction by attempting to de novo trial at the appellate level, Urban v. City of Daytona Beach, 101 So.2d 414, (1st DCA 1958).

RESPONSE TO ARGUMENT UPON FIRST ISSUE

THE TRIAL COURT WAS CORRECT IN EXCLUDING THE EVIDENCE OF VWoA PROFFER AS TO SEATBELT USE IN A PRIMARY DEFECT CASE AS EVIDENCE TO MITIGATE INJURIES.

VWoA's position at the trial court level was that seatbelt evidence should have been admissible to show mitigation of damages whereas it has grown during it's appellate travels to now be admissible on "proximate cause".

This Court is asked to reverse and remand for new trial, a favorable verdict and judgment for the Plaintiff grounded on Plaintiff's non-use of seatbelts. Plaintiff, Long, was simply a passenger in the vehicle and not an owner. Plaintiff urges this Court to deny Defendant's request as Defendant admittedly failed to prove the existence of an operable seatbelt. The issue was simply not preserved in the trial court.

Conspicuously, no inquiry was made as to whether or not functional seatbelts existed in the vehicle. Defendant also examined Plaintiff, Long, his wife, investigating officers, emergency relief personnel, photographers, eyewitnesses, a VW factory designer, a VW engineer, a VW master mechanic and a VW field representative. Any one could have established the presence or absence of this vital evidence. If functional seatbelts existed, VW had the duty to inquire in the trial court or did VW deliberately decline for undisclosed reasons.

PLAINTIFF HAS NO PRE-ACCIDENT DUTY TO AVOID THE CONSEQUENCES OR MITIGATE DAMAGES WITHOUT NOTICE.

VW says that Plaintiff has a duty to avoid forseeable consequences or mitigate damages prior to an accident and relies upon S.C. Loveland, Inc. v. East West Towing, Inc., 609 Fed.2d 160, 5th Circuit, cert. den., 446 U.S. 918 1979. This factually dissimilar case in admiralty found the Defendant, State of Florida, guilty of contributory negligence for it's failure to call the Coast Guard once it was notified of the impending danger of a floating barge near Defendant's bridge.

Mr. Long had no prior knowledge or notice of the impending danger of the blowout. The Loveland decision is devoid of guidance on this issue.

Similarly, the Adams v. Warren Rental and Service Center, Inc., 352 So.2d 555, (Fla. 1st DCA 1977), cert denied, 364 So.2d 880, (Fla. 1978), offers no guidance to the Court. The decision cites no authority and bears no factual similarity to the case at bar. Mr. Adams or his co-workers changed the location of end motors that served as guardrails and thereafter, Mr. Adams situated himself outside the motors on the end of a scaffold some distance in the air. He then sued Defendant for not having a permanent guard.

Mr. Long did not sue for failing to have available seatbelts after removing them himself. It is a ludicrous fact comparison.

LONG MAKES NO CLAIM OF CRASHWORTHINESS

VW is clearly mistating the case is saying Plaintiffs' claim in a crashworthy action. It is untrue. Plaintiff

abandoned the seat defect allegation and offered no proof on the issue. This action was tried on the primary issue of a defective suspension system and handling system. Automobile products liability claims have been considered upon defects which, (a) primarily cause accidents and, (b) secondarily enhance injury. Mr. Long's complaints against VW are not and cannot be made second collision or crashworthy defects and there is no authority nor reason for a seatbelt defense in a primary defect case. Each out-of-state citation of VW which embraces the seatbelt defense is a crashworthy or second collision action. For example, Wilson v. Volkswagen of America, Inc., 445 F.Supp. 1368 (E.D. Va. 1978), the Plaintiff involved a defective roof causing spinal fracture after collision. In Melia v. Ford Motor Company. 534 Fed.2d 795 (8th Circuit 1976), the Plaintiff contended that the doorlatch was defective and would open upon impact. Curtis v. General Motors Corporation, 649 Fed.2d 808, (10th Circuit 1981), Plaintiff contended that the convertible automobile manufactured by General Motors had inadequate roll protection for it's occupants after first collision.

Defendant's position in the case at bar is without precedent in this country.

THE LAFFERTY COURT IS EMMINENTLY CORRECT IN IT'S REFUSAL TO ALLOW SEATBELT EVIDENCE.

Evidence of enhanced injury for non-use of seatbelt is as much hindsight from Mr. Long's point of view as it was held to be for Lorraine Lafferty. The evidentary problem created

in regard to relevancy of facts and circumstances surrounding whether or not the Plaintiff should have used his seatbelt before the accident is likewise applicable to Mr. Long's situation. Therefore, no logical reason exists why the opinion in Lafferty v. Allstate should not control the issue before this Court if VW had established the existence of functional seatbelts at trial.

Defendant boldly states that the Court's concern of windfalls to tort feasors is not relevant to automobile manufacturers.

The Plaintiff submits it is fundamentally wrong for VW to place upon the market at great profit a deceptively defective automobile which paralyzed Mr. Long to now take advantage of Mr. Long's ignorance of the defect known to VW.

VW's insistence against the Court's deference to the legislature is ill-founded and evidently misunderstood. A statute such as the one requiring child restraint systems for children under five (Florida Statute 1983 316.613) are resolutions reflecting acceptance of the practice by a majority of the population. It encompasses a social attitude and widespread practice for great social need, as well as notice to the population of the requirement. It is this aspect of notice which Defendant overlooks that rightfully concerns the Lafferty Court. Defendant's compounded analysis of common law and statutory law is unconvincing. Most importantly, to grant the relief sought by Defendant VW

would be direct derogation of the legislative intent of the recent child restraint system law which in part states:

> The failure to provide and use a child passenger restraint shall not be considered comparable negligence, nor shall such failure be admissible as evidence in the trial of any action with regard to negligence.

Defendant's additional policy attacks on Lafferty are equally ill-founded. A footnote cited frequently by Defendant as their springboard for majority use of seatbelt upon which this Court should mandate the seatbelt defense of VW has a further enlightening feature, to-wit: twenty to forty percent (20% to 40%) of the public opposes wearing seatbelts, an even larger portion of the population simply does not wear them because they forget or find them inconvenient and bothersome. (Motor Vehicles Manufactures Association v. State Farm Mutual, 77 Lawyers Edition 443, at pg 460-65, footnote 18).

A careful survey of the jurisdictions which have considered the seatbelt evidence as a defense in any manner have held it to be inadmissible by a significant majority of 24 to 6.

The safety belt defense does not conform readily with the traditional tort doctrines of contributory negligence, avoidable consequences or assumption of risk, and it violates the notion that the Defendant "takes the Plaintiff as he finds him".

Closely related to doctrinal objections is the argument that there can be no negligence unless the Plaintiff has

violated a statutory or common law duty. Most courts have held that there is not a common law duty to use an available safety belt, and that a statutory duty cannot be inferred from the existence of statutes requiring the installation, but not use, of safety belts.

To penalize the plaintiff for not buckling up is a matter of public policy properly reserved for legislative bodies.

It is seriously questioned that safety belts are true safety devices. In some instances, safety belts may inflict more harm than they prevent, such as being trapped in a burning or submerged vehicle.

Courts hve noted that the vast majority of vehicle occupants do not use available safety belts, and align themselves with a majority rule of rejecting the safety belt defense.

The practical implications of allowing the safety belt defense have given courts pause. It is argued that the defense would unduly increase the length and expense of trials, as a battle of experts is likely to ensue. In addition, submitting the safety belt defense to the jury would encourage rampant speculation as to what might have happened. Finally, the courts have pondered whether allowance of safety belt evidence would imply that every conceivable safety device (head rest, helmet, etc.) must be used.

Courts have argued that it would be unfair to reduce the innocent Plaintiff's damages because he/she did not use an available safety belt. The negligent defendant would receive an undeserved windfall because he/she fortuitously injured an unbuckled Plaintiff.

It is further thought that safety belt defense would create an invidious distinction between vehicle occupants because the possibility of a reduction in damages exists only when the vehicle is equipped with safety belts, and not all vehicles are required to have safety belts.

The courts have been exercising judicial wisdom in refusing to accept a seatbelt defense in non-crashworthy cases such as this one.

In summary, there is an undeniable absence of essential proof of available operable seatbelts in the vehicle which eliminates the issue. There is no reliable authority of pre-accident duty of Plaintiff to avoid accidents or injury. The Lafferty Court is eminently correct and the relief sought by Defendant is directly contrary to clear and unequivocal legislative intent. To grant Defendant's relief requires the Court to violate constitutional guarantees of the Plaintiff.

The Court should affirm the lower courts.

ARGUMENT WITH REGARD TO SECOND ISSUE

THERE WAS NO ERROR, FUNDAMENTAL OR OTHERWISE, IN THE USE OF THE DEFENDANT VOLKSWAGEN'S VERDICT FORM, OF WHICH NOW THEY PROTEST

With respect to the second issue contained in the Defendant, Volkswagen's, initial brief, the Plaintiff reserves his position as stated in his Motions to Quash and Dismiss and his Motion for Sanctions. The verdict form issue should not be subject to review as this issue was per curiam affirmed with no opinion by the First District Court of Appeal. The Clarifying Order of the First District Court of Appeal specifically limited itself to the "seat belt" issue of Lafferty. The plaintiff does feel compelled to make the following academic observations.

The Defendant, Volkswagen, claims in it's second issue that the trial judge committed fundmental error by attributing the negligence of a non-party to the Defendant Volkswagen. This alleged issue clearly and completely mistates not only the facts but also the applicable law on this subject.

The Defendant, Volkswagen, states that the Plaintiff Florence Long was not a party to the action of her Plaintiff husband, Walter Leighton Long for damages against the Defendant, Volkswagen. The Plaintiff, Mrs. Long, is a party Plaintiff with her Plaintiff husband with a claim for loss of consortium which was filed in a separate count. The Defendant Volkswagen's contention that the Plaintiff, Mrs. Long, is a "non-party" in relation to her Plaintiff husband's claims

against the Defendant, Volkswagen, ignores reality. The Defendant, Volkswagen, cites no authority for this novel proposition of law that is contrary to the case law of Florida [see Sundstrom vs. Grover, 423 So. 2d 637 (4th DCA, 1982) and Florida Farm Bureau Insurance Company vs. Government Employees Insurance Company, 387 So. 2d 932 (Fla. 1980)].

The Defendant, Volkswagen, protests the verdict form used in the case at bar constitutes fundamental error.

This verdict form was created and insisted upon by the Defendant, Volkswagen, in the trial court.

> VOLKSWAGEN (LEVIN): "Both sides have agreed upon that form. That form is acceptable to Mr. Seelie and Mr. Penland." (TR 1019)
>
> THE COURT: "Okay. Then I disregard the Penland form of verdict; right?"
>
> MR. SEELIE: "Yes, sir."
>
> THE COURT: "And you agreed on the Rumberger form, the Volkswagen form." (TR 1019-20)

Before the verdict form was explained to the jury, the Defendant, Volkswagen, failed to object to any alleged defect in it's verdict form.

> THE COURT: "Before I get to the verdict, do either of you want anything at side bar, either plaintiff or defendant?"
>
> RUMBERGER: "No, sir, Your Honor."
>
> PENLAND: "Not for the plaintiff, Your Honor, Thank you." (TR 1095).

After their verdict form was explained to the jury, the Defendant once again failed to point to a scintilla of

error in it's verdict form which the Defendant, Volkswagen, now claims constituted fundamental error.

> THE COURT: "... you will now retire--let me ask counsel. Is there anything you want to take up?"
>
> RUMBERGER: "No sir, not on behalf of the defendant, Your Honor."
>
> THE COURT: "Mr. Penland?"
>
> PENLAND: "No, thank you." (TR 1100).

The form of verdict must be objected to at trial, or the defect is waived. As Justice Sebring said for the Supreme Court of Florida in Higbee v. Dorgo, Hotel Runnymede v. Dorigo 66 So. 2d 684 (Fla., 1953),

> "No objection was made by either party to the form of the verdicts returned Everett J. Higbee and Carolyn R. Higbee v. Werner Dorigo. Therefore, any defect as to form was waived."

The Volkswagen verdict form is not in error at all. The Defendant, Volkswagen, claims that separate verdicts should have been used in each "cause of action." This proposition is diametrically opposed to the case law of Florida as set out in the Sundstrom case which is precisely on point as to the apportionment of negligence between a Plaintiff spouse, a contributing tort feasor spouse, and another tort feasor. Sundstrom was a suit by a wife and her dentist husband against an oral surgeon for extracting the wife's wrong tooth. The Defendant oral surgeon did not counterclaim the dentist husband for contribution but did raise the affirmative defense of the comparative negligence of both Plaintiffs, as did the

defendant, Volkswagen, in the case at bar. At trial, on special interrogatory verdict, the jury found the Defendant oral surgeon to be 10% negligent, the wife to be 35% negligent, and the dentist husband to be 55% negligent. The jury awarded $20,000 to the wife and $10,000 to the dentist husband. The trial court reduced the wife's award to $2,000 and she appealed. On appeal, both parties agreed that the wife's award should have been reduced to $13,000 based on her being free of negligence to the extent of 65%. The District Court also agreed with this conclusion citing Moore v. St. Cloud, 337 So. 982 (4th DCA, 1976), and reversed. The case at bar is identical to the Sundstrom case on this issue. The award of the Plaintiff, Walter Leighton Long, should be $1,300,000 as he is free of negligence to the extent of 65% on his total jury awarded damages of $2,000,000. Two separate verdict forms are clearly improper both in Sundstrom and in the case at bar.

In Sundstrom, as well as the case at bar, the tort feasor Defendant elected not to counterclaim the tort feasor spouse for contribution. The contribution action was available by statute to the Defendant, Volkswagen, (see Uniform Contribution Among Tort Feasors Act, Florida Statutes, Chapter 768.31). The Defendant, Volkswagen's, failure to seek contribution from a joint tort feasor certainly does not render the Plaintiff, Mr. Long, a "non-party" whose negligence cannot be taken into consideration as was done in Sundstrom.

The Defendant, Volkswagen, claims that the Plaintiff, Mr. Long, has indirectly violated the doctrine of interspousal immunity with the use of the Volkswagen verdict form. This is not the case. The Defendant, Volkswagen's, remedy to this situation is contribution. Contribution by one joint tort feasor is clearly available from another joint tort feasor where the other tort feasor is the spouse of the injured person who has received damages from the first tort feasor. Florida Farm Bureau Insurance Co. v. Government Employees Insurance Co.

The Defendant, Volkswagen, next claims that the use of their verdict form constituted fundamental error and cites as dispositive of the issue the case of Keys Co. v. Sens, 382 So. 2d 1273 (3rd DCA, 1980). The Defendant, Volkswagen, attempts to mislead this Honorable Court by claiming that Keys states that unobjected to defects in verdict forms constitutes fundamental error. This issue was never examined in Keys. This case involved a jury verdict in which, under the theory of respondent superior, an employer was held vicariously liable for a greater amount of compensatory damages than the actively negligent employee. The court held this to be fundamental error. The court never addressed the issue on the merits of whether a defective verdict form can constitute fundamental error. The court did say,

> "By so ruling with reference to the judgment in this case we do not hold or imply that judgments based on verdicts that are incorrect in form, or

> which are inconsistent, or which may be inadequate or excessive in amount, present fundamental error. See, for example, cases cited in footnote 3, supra."

Footnote 3 cites the Higbee v. Dorido case which, as cited earlier, stated that defects as to the form of a verdict are waived unless objected to at trial. The Defendant, Volkswagen, has cited no Florida case which holds that verdict form defect are fundamental, nor do any such cases exist.

In conclusion, the verdict form which was created by the Defendant, Volkswagen, fairly and accurately apportioned the negligence of the parties involved. The verdict form was correct as was the resulting amended final judgment. The law of Florida was correctly applied and the mistatements of law and fact by the Defendant, Volkswagen, should not change this result.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to J. Richard Caldwell, Esquire, of Rumberger, Kirk, Caldwell, Cabaniss & Burke, P.A., Post Office Box 1873, Orlando, Florida 32802, and George N. Meros, Esquire, Post Office Drawer 190, Tallahassee, Florida 32302, by United States Mail, this 9th day of March, 1983.

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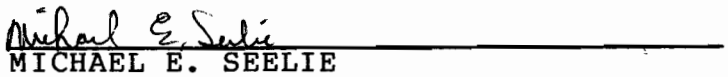

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