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 OF APPEAL CASE NO.: AS-291



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## PRELIMINARY STATEMENT

This is a review of a decision of the First District Court of Appeal rendered January 5, 1984, as further clarified by an order dated January 25, 1984, and from a final judgment for damages, as amended, in an automobile products liability case involving personal injuries.

References to the transcript of testimony will be indicated by the symbol (Tr.), and references to the Record will be indicated by the symbol (R). Walter Leighton Long and Florence Long, Plaintiffs in the trial court, will be referred to herein interchangeably as respondents or plaintiffs. Volkswagen of America, Inc. was the defendant in the trial court, and will be referred to herein alternatively as petitioner or defendant.

"Seat belt" will be referred to herein interchangeably as "safety belts", "seat belts", "occupant restraint systems", and "occupant restraint devices". These references all refer to a lap belt and shoulder harness occupant restraint system, such as was present in the 1974 Volkswagen Super Beetle.

## STATEMENT OF THE CASE

This action arose from an accident involving a 1974 Volkswagen Super Beetle on August 1, 1976 on Interstate 10 near Live Oak in Suwannee County, Florida. The vehicle was traveling at a speed of 50-55 miles per hour when a blowout of the right rear tire occurred, causing the accident. Uncontroverted testimony adduced at trial revealed that the blowout commencing the accident sequence was caused by a badly worn right rear tire. (Tr. 631-633). The vehicle left the roadway, struck a guardrail, causing it to roll over. Walter Leighton Long, plaintiff and respondent, claimed injuries as a result of this rollover accident. Plaintiff-respondent, Florence Long, claimed damages for loss of consortium. (R 1-9). The respondents made no claim for the blowout of the tire.

The operative complaint sounded in theories of negligence, breach of implied warranties of fitness and for a particular purpose, and strict liability. (R 150-157). The answer raised the affirmative defense of comparative negligence on the part of each or both of the plaintiffs, as well as the defense of changed condition of the automobile after it had left the custody and control of defendant. (R 165).

The verdict form submitted to the jury required the jury to measure the fault of both plaintiffs against Volkswagen of America, Inc., the sole defendant in a single question. There was no claim against Florence Long.

On February 7, 1983, the jury found that Walter Long was 35% at fault, that Florence Long, the driver of the Volkswagen at the time of the accident, was 45% at fault, and that the defendant, Volkswagen of America, Inc. (hereinafter "VWoA"), was 20% at fault. The jury assessed the total amount of damages of Walter Long in the sum of Two Million and 00/100 Dollars ($2,000,000), and awarded Florence Long zero damages. (R 540-41). Final judgment was entered thereon, awarding damages to Mr. Long against VWoA for 20% of the total sum, Four Hundred Thousand and 00/100 Dollars ($400,000). (R 542-543).

Post-trial motions were filed by all parties (R 545-548, 604-605), and were heard on March 25, 1983. (R Volume XII, pages 1-52). Four days later, the trial judge entered the order amending final judgment, (R 695-696), and subsequently entered an order denying all post-trial motions which had not been treated by the order amending final judgment. (R 694).

By the order amending final judgment, the trial court remolded the jury's verdict and assessed against VWoA, the lone defendant, the negligence which the jury attributed to the plaintiff, Florence Long. Her percentage of fault determined by the jury, 45%, together with the percentage of fault attributed by the jury to VWoA, 20%, amounted to 65%. The trial judge entered judgment against the defendant for 65% of the damages of Walter Long, which percentage resulted in the sum of One Million Three Hundred Thousand and 00/100 Dollars ($1,300,000) being assessed against VWoA.

An appeal followed to the First District Court of Appeal. On appeal, VWoA argued that reversible error resulted from denial of VWoA's proffered "seat belt" evidence, that fundamental reversible error resulted from the use of the verdict form required by the trial court, and that petitioner's constitutional rights were denied. VWoA also argued that error resulted from the trial court's rulings allowing plaintiffs' witness, Paul Lamar, to offer expert testimony including surprise defect allegations, and in excluding witnesses offered as experts by VWoA to rebut the surprise defect allegation. The fourth issue raised on appeal was the excessiveness of the verdict reached by the jury.

In an opinion filed December 5, 1983, the First District Court of Appeal issued a per curiam affirmance. Upon VWoA's motion for stay of mandate, the First District Court of Appeal issued a clarified opinion, filed January 25, 1984, indicating that the First District Court of Appeal expressly relied upon and adopted the reasoning in Lafferty v. Allstate Ins. Co., 425 So. 2d 1147 (Fla. 4th DCA 1982). The clarified opinion also cited Insurance Co. of N. Am. v. Pasakarnis, 425 So. 2d 1141 (Fla. 4th DCA 1982) and Brown v. Kendrick, 192 So. 2d 49 (Fla. 1st DCA 1966) as authority for its affirmance on the seat belt issue. This Court subsequently accepted jurisdiction.

## STATEMENT OF THE FACTS

In its five counts, the operative complaint contained allegations proceeding under theories of negligence, breaches

of implied warranty, strict liability, "failure to warn", and Florence Long's alleged loss of consortium. Each of these theories were based upon the following allegations of design defects which allegedly caused the claimed damages in the single vehicle rollover accident: (1) the subject vehicle, a 1974 Volkswgen Super Beetle, "was equipped with a seating mechanism which, upon impact, would bend or break and throw the occupant of the seat into the rear seat so as to cause serious personal injury"; (2) the vehicle in question "had a center of gravity too far to the rear and too high for tire speed"; (3) "said vehicle had understeer and oversteer propensity and had an increased likelihood of rollover." (R 150-57, paragraphs 6, 7, 15, 16, 23, 24 and 29).

The trial began on January 31, 1983. The plaintiff, Walter Long, testified at trial that he was thrown into the back seat and sustained his injuries because the right front passenger seat "broke loose" during the accident. (Tr. 166-169, 235-238).

The plaintiffs' witness, Paul Lamar, testified that the 1974 Volkswagen Super Beetle was "extremely dangerous" due to a "combination of defects". (Tr. 401-403, 408-410). Mr. Lamar testified that the vehicle had a propensity to rollover because of an allegedly high center of gravity and narrow wheel track, (Tr. 401-403, 408-410, 447-449), and that the vehicle's handling characteristics adversely affected the vehicle's behavior during emergency maneuvers commenced by a tire blowout. (Tr. 400-412).

Mr. Lamar also made a "surprise" allegation regarding a lack of a rear stabilizer bar. This allegation was not made either in the operative complaint or in answers to interrogatories. This allegation was disclosed to VWoA on Friday, January 28, 1983, with the trial scheduled to commence on January 31, 1983.

VWoA made a proffer of the testimony of Mr. David Blaisdell, a crash safety expert of unchallenged qualifications, who would testify regarding the injuries sustained in this accident by Mr. Long's failure to use the available seat belt, and the manner in which the damages occurred as the direct proximate result therefrom. (Tr. 689-691). As stated by Volkswagen's counsel during the course of the proffer:

> And then we would ask the ultimate question, do you have an opinion if Mr. Long had worn the seat belt provided in this car he would have received the forces sufficient to cause this severe injury. And his opinion would be that is correct, that is if he wore the belt, the forces would not have been severe enough to cause this injury. Then we would have asked him whether or not in his opinion, whether or not Mr. Long would have remained in the seat and not been subjected to the forces that were occasioned in this accident, and he would say, we believe, yes.

(Tr. 690-691) (emphasis added). The trial judge rejected this proffer and excluded the testimony of the expert, Mr. Blaisdell, regarding the causal connection between the nonusage of the seat belts and Mr. Long's injury. (Tr. 685).

At the close of trial when considering the verdict form to be submitted to the jury, the trial judge referred to the Florida Law Weekly Report of the decision in the case of

Lafferty v. Allstate Ins. Co., 8 Fla. L.W. DCA 1, 1-3 (Fla. 4th DCA, Case No. 81-279, opinion filed December 15, 1982). Responding to discussion regarding the appropriate verdict form, the trial judge stated:

> THE COURT: Okay. I got y'all a verdict. Here's your verdict in this case of Lorraine Lafferty. All you have got to do is revise the first question as to the three things, using the one y'all have agreed on here, and then this verdict has the other things you need. All you will have to do is put the Longs in there and that will do it.

(Tr. 1014). The verdict form thus submitted to the jury on Walter Long's claim required the jury to compare, at one and the same time and in the same question, the respective degrees of fault of Florence Long, Walter Long and VWoA. (R 540-541). The question form contained in the Lafferty verdict form is appropriate for a case which involves a single plaintiff and two defendants. This case, however, involves two plaintiffs and a single defendant. No claim in this case had been made by Walter Long against Florence Long.

The jury returned its verdict assessing degrees of fault as follows: Walter Long, 35%; Florence Long, 45%; and VWoA, 20%. The jury assessed total damages in favor of Mr. Long at Two Million and 00/100 Dollars ($2,000,000); the jury assessed zero damages for Mrs. Long. (R 540-541).

Thereafter, the Honorable trial Court entered the following judgments and orders: Final Judgment dated February 8, 1983 (R 542-543); Order Amending Final Judgment, dated March 29, 1983 (R 695-696); and the Order Denying all of the Defendant's Post-Trial Motions (R 694).

## INTRODUCTION

This brief presents two issues for consideration by the Court. Both issues were properly briefed and argued before the First District Court of Appeal below. The first issue presented -- the admissibility of seat belt evidence -- is the ground upon which this Court accepted jurisdiction. The second issue -- the trial court's apportionment of damages based upon a defective comparative negligence jury verdict form -- raises fundamental constitutional issues surrounding application of comparative negligence in a multi-plaintiff-single defendant case. Petitioner strongly urges the Court to exercise its discretion to consider and decide both important issues presented herein.

Under the requirements of Savoie v. State 422 So. 2d 308 (Fla. 1982), each of the criteria for exercise of the court's discretion to consider and decide the jury verdict issue is met: (i) the issue has been properly briefed, (ii) it has been strenuously argued, and (iii) it will be dispositive of the case by requiring a new trial. Id. at 312.

Moreover, resolution of the issue "will avoid a piecemeal determination of the case." Savoie, 422 So. 2d at 312. If this Court declined to consider the jury verdict issue but reversed on the seat belt issue, the trial court could very well make the same mistake twice and submit a fundamentally defective verdict form to the jury. A final determination of this issue now will avoid any mistake and promote "the efficient and speedy

administration of justice ..." Id. (quoting from Zirin v. Charles Pfizer & Co., 128 So. 2d 594, 596 (Fla. 1961)).

The jury verdict issue needs to be decided by the highest court of this state in its supervisory capacity for guidance of the bench and bar in applying a fundamental concept which this Court imbedded in the tort law of this state. See Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). Petitioner therefore respectfully urges the Court to consider and decide Issue II, in addition to the seat belt issue presented in Issue I.

## ARGUMENT WITH REGARD TO FIRST ISSUE

THE TRIAL COURT ERRED IN EXCLUDING VWoA'S CAUSATIVE SEAT BELT PROFFER WHICH WAS RELEVANT TO CONSIDERATION OF BOTH THE DESIGN OF THE 1974 VW SUPER BEETLE AND THE COMPARATIVE FAULT OF THE PLAINTIFF WALTER LONG.

"[T]he safety benefits of wearing seat belts are not in doubt." M.V.M.A. v. State Farm Mut. Auto. Ins. Co., ___ U.S. ___, 77 L.Ed. 2d 443, 446 (1983).

Several of the early seat belt cases barred seat belt evidence at least partially because the courts therein were not presented with sufficient consensus as to the utility and safety value of seat belts. In its 1966 decision rejecting the use of seat belt evidence, the Florida First District Court of Appeal in the case of Brown v. Kendrick, 192 So. 2d 49 (Fla. 1st DCA 1966), noted that "there has been and still exists controversy over the safety feature of the seat belts." Id. at 51. Some decisions from other jurisdictions during the late 1960's and early 1970's also reflect judicial uncertainty about the effects of seat belt usage. See Petersen v. Klos, 426 F.2d 199, 204

(5th Cir. 1970) (predicting Mississippi law); Britton v. Doehring, 286 Ala. 498, 242 So. 2d 666 (1970); Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65, 69-70 (1968).

These decisions are historical relics which should be accorded no precedential value in modern Florida jurisprudence. There now is a clear consensus that use of seat belts substantially reduces the chance of serious injury and loss of life in automobile accidents. The Supreme Court of the United States has recently stated as an accepted fact "that, if used, seat belts unquestionably would save thousands of lives and would prevent tens of thousands of crippling injuries." Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mut. Automobile Ins. Co., ___ U.S. ___, 77 L.Ed. 2d 443, 464 (1983). The Court thus found that "the safety benefits of wearing seat belts are not in doubt." Id. The Supreme Court's recent observations regarding the undisputed effects of seat belt usage parallels information provided to everyone who seeks a Florida driver's license:

> SAFETY BELTS - All new automobiles are equipped with safety belts. They have proved to be a great factor in reducing deaths and injuries - when worn by persons involved in accidents. You are urged to use seat belts at all times while driving - or riding in - an automobile or truck.

Florida Department of Highway Safety and Motor Vehicles, Florida Driver's Handbook, p. 66. Voluminous statistical and scholarly authorities, undoubtedly presented to this Court in the pending Lafferty and Pasakarnis appeals, irrebuttably support these factual assertions.

It is clear beyond any reasonable doubt that the use of seat belts reduces the risk of serious injury and death in automobile accidents. Common sense and experience gained over the passage of time has eroded the basis for those early decisions, such as Brown v. Kendrick, supra, which questioned the safety value of seat belts. It is simply incorrect to question the reduction in serious injury and death associated with seat belt usage.

### A. Florida Courts Should Consider Seat Belt Evidence In Automotive Product Liability Cases As Bearing On Comparative Negligence, Avoidable Consequences, And Mitigation Of Damages.

Over the years, many state and federal courts have had occasion to consider the admissibility of seat belt evidence. Some courts have rejected the admissibility of such evidence. Other courts have allowed juries to consider such evidence. See Insurance Co. of North Am. v. Pasakarnis, 425 So. 2d 1141, 1143 (Fla. 4th DCA 1982) (Schwartz, J., dissenting). The central principle common to cases considering seat belt evidence is that it is "relevant" and just to do so where there is competent evidence, usually in the form of expert testimony, of a causal link between a plaintiff's injuries and the failure to wear a seat belt. See, e.g., Glover v. Daniels, 310 F.Supp. 750 (N.D. Miss. 1970); Dudanas v. Plate, 44 Ill. App. 3d 901, 358 N.E.2d 1171 (5th Dist. Ill. 1976); Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967); Spier v. Barker, 35 N.Y.2d 444, 363 N.Y.S. 2d 916, 323 N.E.2d 164 (1974); Parise

v. Fehnel, 406 A.2d 345 (Sup. Ct. Pa. 1979); Sonnier v. Ramsey, 424 S.W.2d 684 (Tex. Cir. App. 1968); Foley v. City of West Allis, 335 N.W.2d 824 (Wis. 1983). Although there is substantial variance between the legal theories under which seat belt evidence is admitted in these jurisdictions, it is clear that the so-called "seat belt defense" requires, first, proof of the plaintiff's nonuse of an available occupant restraint system, and second, proof of a causal connection between plaintiff's injuries and plaintiff's nonuse of the available occupant restraints.

Aside from this common principle of causation, however, different formulations of proximate cause, comparative negligence, mitigation of damages, strict liability and crashworthiness affect the persuasive value of cases adopting or rejecting the seat belt defense in other jurisdictions. For example, in some jurisdictions, unlike Florida, comparative negligence may not be a defense to strict liability. See e.g., Vizzini v. Ford Motor Co., 569 F.2d 754 (3d Cir. 1977) (applying Pennsylvania law). Other jurisdictions decided the seat belt issue before adopting comparative negligence. See footnote 1, infra. Still other jurisdictions do not have "pure" comparative negligence, (as does Florida), or have different legal standards of proximate causation. Admission of evidence of seat belt non-use in Florida is harmonious with and should be compelled by Florida's rules of comparative negligence, strict liability, crashworthiness, mitigation of damages, and other applicable principles of modern Florida jurisprudence. Such evidence, moreover, is not automatically

preclusive of recovery as, for example, under older contributory negligence law. Additionally, in automotive products liability claims which impugn the safety of the vehicle, competent evidence about these safety devices is plainly "relevant" under modern standards enshrined in the Florida Evidence Code. Finally, receipt of such evidence effectuates important public policy objectives.

Previous Florida treatment of seat belt evidence predates substantial changes in Florida law which have removed the basis for previous exclusions.

The original Florida decision excluding seat belt evidence, Brown v. Kendrick, 192 So. 2d 49 (Fla. 1st DCA 1966), was cited by the First District Court of Appeal in the instant case. Brown was a case under Florida's guest statute, which required a passenger to prove gross negligence in order to recover against a driver. Fla. Stat. § 320.59 (1965). Seat belt evidence in that case was offered as proof of contributory negligence, in order to completely bar the passenger-plaintiff's claim. Id. at 50-51. The Brown court's refusal to allow seat belt evidence was based on perceived controversy over the effectiveness of seat belts as well as judicial reluctance to establish seat belt non-usage as a complete bar to a plaintiff's recovery. See also Chandler Leasing Corp. v. Gibson, 227 So. 2d 889 (Fla. 3d DCA 1969).

In the sixteen years between Brown and Lafferty, Florida tort law underwent substantial changes. In 1973, this Honorable Court adopted comparative negligence in Florida in the landmark

case of Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). Significantly, the "crashworthiness" doctrine -- a theory imposing a duty to take injury-minimizing precautions in anticipation of foreseeable automobile accidents -- was also adopted in Florida during this period, as was the doctrine of strict liability. See Ford Motor Co. v. Evancho, 327 So. 2d 201 (Fla. 1976); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976). Of course, the guest statute has been abolished since Brown was decided. Federal Motor Vehicle Safety Standard (FMVSS) 208, requiring integrated lap and shoulder safety belts in all automobiles, has come into being since the Brown decision. See FMVSS 208, 49 C.F.R. § 571.208 (1967 and amendments). Finally, and perhaps most importantly, consensus has now developed regarding the undeniable effect of seat belt usage in reducing or preventing incidences of serious injury and death from automobile accidents.

Emergence of this modern consensus and recognition of these substantial changes in Florida law destroy the precedential value of the Brown decision. Therefore, blind reliance upon Brown v. Kendrick fatally flaws the Fourth District's opinions in Lafferty and Pasakarnis and the First District's opinion in the instant case. The seat belt issues squarely before this Honorable Court in this appeal are controlled by these changes in Florida law and the consensus about safety belts which has emerged since Brown was decided.

Four other Florida cases have discussed the admissibility of seat belt evidence, although none of these cases are dispositive

of the issues presented by this appeal. The seat belt issue was addressed only tangentially in the years between Brown and Lafferty. See Quinn v. Mallard, 358 So. 2d 1378 (Fla. 3d DCA 1978) (declining to rule on seat belt issue due to absence of causative evidence); Selfe v. Smith, 397 So. 2d 345 (Fla. 1st DCA), cert. denied, 407 So. 2d 1105 (Fla. 1981) (ruling on other issues prevented court from reaching "troublesomely unconvincing" arguments against seat belt evidence). In Honda Motor Co., Ltd. v. Marcus, 440 So. 2d 373 (Fla. 3d DCA 1983), the Third District Court of Appeal reversed a trial court ruling which had allowed seat belt evidence to be used in an automotive product liability action. Reversal of Marcus, however, was expressly based upon the absence of evidence regarding whether use of the available seat belt would have mitigated the plaintiff's injuries. VWoA, in the case at bar, was prevented from adducing competent expert testimony bearing precisely upon this issue of causation. The Marcus case, decided subsequent to the Fourth District's opinions in Lafferty and Pasakarnis, expressly did not reach the issues presented in these cases because of the apparent lack of causative evidence.

The most recent mention of the seat belt issue arose in Protective Cas. Ins. Co. v. Killane, ___ So. 2d __, 8 Fla. L. Wkly. 2733 (Fla. 4th DCA 1983). Killane was a non-products liability action in which the Fourth District simply relied upon its Lafferty and Pasakarnis decisions without discussion.

The Fourth District Court of Appeal in Killane again certified the seat belt question to this Court.

Thus, it remains for this Court to align Florida's modern law of torts and products liability with the modern consensus about safety belts.

Comparative negligence results when a plaintiff in an automotive personal injury case breaches a duty to use available occupant restraint systems in order to avoid the consequences or mitigate the damages from foreseeable injury causing collisions.

The defense of comparative negligence requires proof that the Plaintiff "owed a duty to herself, that she breached that duty, and that the breach was the proximate cause of the damages sustained". Borenstein v. Raskin, 401 So. 2d 884, 886 (Fla. 3d DCA 1981). Moreover, the Florida comparative negligence rule relates "to whether any negligence of the plaintiff was a legal cause, not of the accident, but of [the plaintiff's] 'damages', 'loss', or 'injury'. Insurance Co. of North America v. Pasakarnis, supra, 425 So. 2d at 1143 (Schwartz J., dissenting). The Florida law of comparative negligence, as established by the landmark case of Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973), is clearly intended to apply to comparative fault of a plaintiff which is a legal and proximate cause of the plaintiff's loss or injury. Id. at 439.

Thus, in the context of automotive products liability cases, the legal issue is not necessarily whether a plaintiff's comparative negligence caused the accident. Instead, the proper focus is whether the plaintiff breached a duty to himself, and

whether this breach is a proximate cause of the plaintiff's injury. A plaintiff's negligence in causing the accident is only relevant to the extent the accident is the proximate and direct cause of the plaintiff's injury. See Cassel v. Price, 396 So. 2d 258 (Fla. 1st DCA) pet. for rev. den., 407 So. 2d 1102 (1981); Fellows v. Citizens Federal Savings and Loan Assoc., 383 So. 2d 1140 (Fla. 4th DCA 1980) (setting forth the standard for proximate causation under Florida law).

Recognition that comparative negligence causally relates to "injury" rather than "accident" obviates the need to distinguish between "comparative negligence" and "mitigation of damages".[1] The rule of "avoidable consequences", upon which mitigation or reduction of damages is based, is grounded in the equitable principle that a plaintiff should not recover for consequences of a defendant's act which were readily avoidable by the plaintiff. See State ex rel Dresskell v. City of Miami, 153 Fla. 90, 13 So. 2d 707 (1943); Banks v. Salina, 413 So. 2d 851 (Fla. 4th DCA 1982); Jenkins v. Graham, 237 So. 2d 330 (Fla. 4th DCA 1970); First Nat'l. Ins. Agency, Inc. v. Leesburg Transfer & Storage,

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[1]See, for example, the New York cases of Spier v. Barker, 35 N.Y.2d 444, 363 N.Y.S.2d 916, 323 N.E.2d 164 (1974) and Curry v. Moser, 454 N.Y.S.2d 311, 315 (N.Y. App. 1982). The pre-comparative fault Spier case is recognized as the landmark decision holding seat belt evidence to be admissible as it relates to mitigation of damages. The Spier court expressly refused to allow seat belt evidence to be considered as bearing on contributory negligence. 363 N.Y.S.2d at 921. After the Spier decision, however, New York adopted comparative negligence. See McKinney's CPLR 1411 et. seq. Subsequently, the Curry case held that seat belt evidence could be admissible as bearing on comparative negligence.

139 So. 2d 476 (Fla. 2d DCA 1962). The doctrines of mitigation of damages and avoidable consequences simply describe duties imposed upon a plaintiff under appropriate circumstances. In tort cases, a "reasonable and prudent man" standard is applied to determine whether, under the circumstances presented, the plaintiff had a duty to mitigate damages and/or avoid the consequences of the defendant's conduct. See Ballard & Ballard v. Pelaia, 73 So. 2d 840 (Fla. 1954); City of Clearwater v. McClury, 157 So. 2d 545 (Fla. 2d DCA 1963). In those tort cases where a plaintiff has a duty to mitigate damages and/or avoid the consequences, breach of this duty is a factor to be considered in evaluating the plaintiff's comparative fault.

Consistent with the foregoing authorities, the failure to use safety belts can only be comparative negligence if the plaintiff/vehicle occupant has a duty to exercise reasonable care by using available safety belts, and if the breach of this duty -- the failure to use available occupant restraints -- is a proximate cause of the plaintiff's injuries. The crucial question presented is whether the plaintiff's failure to use safety belts provided in his or her vehicle could constitute a breach of reasonable care. The answer, which is dispositive of this appeal, is that vehicle occupants always have a duty of reasonable care in connection with using an automobile and that duty includes wearing available seat belts and shoulder harnesses. Breach of this duty of reasonable care, under appropriate circumstances and upon proper proof of causation, amounts to comparative negligence under Florida law.

The duty to act reasonably and use safety belts is derived from the Florida expression of the mitigation of damages and avoidable consequences doctrines, and is a duty to mitigate the damages and avoid the consequences of a defendant's conduct or product. The two-judge majority in the Lafferty case thought that a plaintiff's duty to act for his or her own safety is contrary to ordinary acts taken to mitigate damages, in that such acts usually occur after the defendant's tortious conduct. 425 So. 2d at 1149. However, the reasonable care duty to wear safety belts is by no means unique as a recognized duty to mitigate damages or avoid consequences before an accident occurs. For example, in the case of Adams v. Warren Rental & Service Ctr., Inc., 352 So. 2d 555 (Fla. 1st DCA 1977), cert. denied, 364 So. 2d 880 (Fla. 1978), a scaffold came equipped with a safety harness. The plaintiff's decedent chose to disregard the safety harness while on the scaffolding. He fell to his death. The First District affirmed a summary judgment for the defendant. Clearly, the Adams decision was made on the basis of a factual situation where the decedent had a duty to avoid consequences and mitigate damages by taking the precaution, before the accident occurred, of using the available safety harness. The Adams decision thus presents a compelling analogy to the seat belt question in general and to the instant case in particular.

In S.C. Loveland, Inc. v. East West Towing, Inc., 608 F.2d 160 (5th Cir.), cert. den., 446 U.S. 918 (1979), the Fifth Circuit, applying Florida law, set forth a test for determining

when the duty to mitigate damages and avoid foreseeable consequences exists prior to an accident occurrence. The issue presented was whether the State of Florida, an owner of a bridge, had a duty to take measures to prevent a barge from colliding with the bridge abutments. The lower court, who was the trier of fact in a non-jury trial, found that the state, through its agents, knew that the barge in all likelihood would collide with the bridge unless remedial measures were taken. Id. at 167. The court further found that the state had both the opportunity and the means to prevent the collision, but chose simply to rely upon the Coast Guard. Id. at 169.

The Fifth Circuit affirmed the trial court's finding of comparative negligence on the part of the State of Florida, and held that, under certain circumstances, there is a duty to mitigate damages or avoid consequences prior to the occurrence of an event. The breach of this duty could constitute comparative or contributory negligence. Specifically, the court held that the reasonableness of a plaintiff's failure to mitigate damages or avoid consequences depends on "the extent of threatened injury, as compared with the expense of remedying the situation, and the practical certainty of success in preventive effort." Id. at 168-169 (emphasis added). The Loveland court derived this rule from review of several decisional authorities holding plaintiffs to be comparatively negligent for failing to mitigate damages or avoid consequences of a nuisance caused by a defendant's negligence. See, e.g., Mobile & O.R. Co. v. Red Feather Coal

Co., 218 Ala. 582, 119 So. 606 (1928). The rule asserted by the Loveland court creates a standard for determining whether a plaintiff has a duty, prior to an accident, to mitigate damages or otherwise avoid the consequences of the defendant's conduct or product.

Application of the rule set forth in Loveland impels recognition that a duty exists for vehicle occupants to mitigate damages and avoid consequences of foreseeable collisions by the use of available occupant restraint systems. This is particularly true and even more compelling in cases where the plaintiff's operation, use, or maintenance of the vehicle is also alleged or found to be a comparatively negligent, active cause of the accident itself. In the instant case, for example, Mr. Long was found to be 35% at fault and Mrs. Long was found to be 45% at fault -- even without regard to evidence of nonusage of the available seat belt-shoulder restraint. Thus, where "the extent of threatened injury" stems from the negligent plaintiff himself, it is even more justifiable to expect him to "remedy the situation" "in a preventive effort" prior to the event which he contributed to causing.

Clearly, the extent of threatened injury from automobile accidents is great. The entire law of "crashworthiness" is founded on "the frequent and inevitable contingency that normal automobile use will result in collisions and injury-producing impacts." Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968); Ford Motor Co. v. Evancho, 327 So. 2d 201,

203 (Fla. 1976). Like the threatened impact between barge and bridge in the Loveland case, automobile accidents are "foreseeable and inevitable." Id. at 203. This is particularly true where the plaintiff is himself actively at fault in causing the accident.

On the other hand, there can be no doubt of the minimal expense, and the "practical certainty of success in preventive effort", resulting from the use of seat belts. In 1966, when Brown v. Kendrick was decided, there may have been some question about the effects of seat belt usage. In 1984, however, the United States Supreme Court and countless others have established and recognized the simple fact that safety belts save lives and prevent serious injuries in automobile accidents. There can be no serious or reasonable dispute over the safety associated with use of occupant restraint systems. See Appendix, pp. 13-16.

Thus, the threat of foreseeable injury from automobile accidents is extensive. It is a practical certainty that safety belt usage prevents or reduces the chances of death or serious injury in automobile accidents. As a result, the rule established in the Loveland case compels the conclusion that a vehicle occupant's duty of reasonable care should include the use of available seat belts and shoulder restraints in order to mitigate damages or avoid the consequences of foreseeable injuries resulting from automobile accidents. Upon proper proof of causation, the breach of the duty to wear seat belts -- a "reasonable care" duty owed by the vehicle occupant to himself -- should be admissible as bearing on the issue of comparative negligence.

In the instant case, VWoA suffered prejudicial error by the exclusion of safety belt evidence as bearing on comparative negligence. Walter Long had a duty to mitigate his damages and avoid the alleged consequences of the accident he partially caused by using the available seat belt and shoulder restraint. He breached this duty. (Tr. 230). VWoA was materially prejudiced by the exclusion of proof that Mr. Long's injury was caused by this breach, and that the injury would not have occurred if the restraint system was used. The exclusion of this causative evidence constitutes reversible error.

### B. Seat Belt Evidence Should Be Admissible In The Instant Case As It Relates To The Issue Of Whether The 1974 Volkswagen Super Beetle, Taken As A Whole, Is Defective In Design Or "Reasonably Safe"

The Lafferty and Pasakarnis appeals present to this Court the certified question of whether Florida courts should consider seat belt evidence as bearing on comparative negligence or mitigation of damages. Lafferty v. Allstate Ins. Co., 425 So. 2d 1147, 1151 (Fla. 4th DCA 1982), petition for review pending, ____ So. 2d ____ (Supreme Court of Florida Case No. 63, 251); Insurance Co. of North America v. Pasakarnis, 425 So. 2d 1141, 1147 (Fla. 4th DCA 1982), petition for review pending, ____ So. 2d ____ (Supreme Court of Florida Case No. 63, 312). An affirmative answer to this certified question would be dispositive of the issue raised in this case. However, a negative answer to this certified question would not be controlling because the considerations involved in an automotive safety and "crash-

worthiness" case are different from an ordinary automobile negligence case involving personal injury. Factually, the Lafferty and Pasakarnis cases evolved out of ordinary automobile negligence intersectional collisions. In contrast, the instant appeal arises out of an automotive products liability action. There is an even stronger rationale for allowing safety belt evidence in automotive product liability actions where, as here, the plaintiff alleges that design defects in the vehicle were the legal cause of plaintiff's injury. As a result, the precise seat belt question presented by this appeal is somewhat different from the issues presented in the Lafferty and Pasakarnis cases.

In Ford Motor Co. v. Evancho, 327 So. 2d 201 (Fla. 1976), this court expressly adopted the expression of the "crashworthiness" doctrine set forth in Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968).[2] In Evancho, the plaintiff claimed that the decedent's injuries were enhanced because of the design of the front passenger seat and its attachment to the "carrier rail" 327 So. 2d at 202. The Evancho plaintiff did not claim that the vehicle in question contained a design defect which caused the accident. Id. Instead, the plaintiff alleged that the vehicle contained a defective design which subjected passengers to an unreasonable risk of foreseeable increased or enhanced

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[2]Specifically, the Supreme Court of Florida did not approve of the Larsen court's view of the separate doctrine of concurrent causation: "We do not attempt to answer the question of whether the automobile manufacturer in this instance is a joint tortfeasor .... [That question has not] been properly raised or briefed in this proceeding." Id. at 204 n.4.

injury once the accident commenced. Id. The question presented, therefore, was whether automobile manufacturers had a duty to exercise reasonable care in designing a vehicle in order to reduce the risk of injury resulting from foreseeable automobile accidents.

The Evancho court held that such a duty exists, and is a direct function of "the frequent and inevitable contingency that normal automobile use will result in collisions and injury-producing impacts." Id. at 204; see also 391 F.2d at 502. The frequency, foreseeability, and inevitability of automobile accidents gave rise to the automobile manufacturer's duty to use reasonable care in the design of a vehicle in order to avoid subjecting users of the vehicle to an unreasonable risk of foreseeable injury. Id. at 503. This duty to design crashworthy vehicles as recognized by this court in Evancho is now firmly established in Florida law. See also Ford Motor Co. v. Hill, 404 So. 2d 1049 (Fla. 1981) (permitting plaintiffs to proceed under strict liability in crashworthiness cases).

Courts exploring the contours of the crashworthiness doctrine in the wake of the landmark Larsen decision have addressed several other issues relating to the doctrine's application. Two of these crashworthiness issues are particularly relevant to the instant appeal. First, it is important to recognize that an automobile must be considered as a whole to determine whether the vehicle was defectively designed and unreasonably dangerous. See, e.g., Melia v. Ford Motor Co., 534 F.2d 795,

800 (8th Cir. 1976). It is not sufficient to evaluate one design feature of a vehicle in the abstract and out of context in order to determine whether that vehicle presents an unreasonable risk of foreseeable injury to occupants. Consideration must be given to the "full design of the automobile, including safety factors," when deciding whether the automobile poses an unreasonable risk of foreseeable injury, and is therefore defective. Wilson v. Volkswagen of America, Inc., 445 F.Supp. 1368, 1371 (E.D. Va. 1978) (emphasis added). See also Daly v. General Motors Corp., 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162 (1978); McElroy v. Allstate Ins. Co., 420 So. 2d 214 (La. App.), cert. denied, 422 So. 2d 165 (La. 1982).

Secondly, it must be emphasized that a balancing paradigm involving several competing factors must be employed in order to determine whether an automobile, taken as a whole, is unreasonably dangerous. Even the Larsen court recognized that a manufacturer is not required to make a vehicle which is "accident-proof or "fool-proof", 391 F.2d at 499, a proposition also recognized by Florida courts. See, e.g., Ford Motor co. v. Evancho, 327 So. 2d 201, 204 (Fla. 1976); Royal v. Black and Decker, 205 So. 2d 307, (Fla. 3d DCA 1967); Husky Industries v. Black, 434 So. 2d 988, 991 (Fla. 4th DCA 1983). Instead, several factors are considered in evaluating the reasonableness of a vehicle's ability to protect occupants in the event of a collision. These factors include the size and style of a vehicle, its price, its intended uses, and the cost of adding additional safety

features to a vehicle. See, e.g., Dreisonstok v. Volkswagenwerk A.G., 489 F.2d 1066, 1072 (4th Cir. 1974). Curtis v. General Motors Corp., 649 F.2d 808, 811-812 (10th Cir. 1981); Wilson v. Volkswagen of America, Inc., supra, 445 F.Supp. at 1371. Many such factors are considered in evaluating whether a vehicle's design, taken as a whole, is crashworthy. The provision by a manufacturer of compensating safety devices is "relevant" evidence on the question of whether the vehicle as a whole is defective and "unreasonably dangerous".

The operative complaint in the instant case alleged that the Longs' 1974 Volkswagen Super Beetle was defectively designed and uncrashworthy, and that the vehicle's alleged uncrashworthiness caused Mr. Long's injuries. (R. 150-157). Specifically, the vehicle was alleged to be uncrashworthy due to the alleged bending or breaking of the front right passenger seat, thus allegedly causing Mr. Long to be thrown into the rear during the accident sequence. The complaint further claimed that the 1974 Volkswagen Super Beetle was uncrashworthy due to an alleged increased likelihood to roll over during an accident sequence. Finally, the complaint alleged defects in the vehicle's handling due to an alleged "propensity to oversteer and understeer." (R 151).

Implicit in plaintiffs' rollover theory is the assertion that there is a substantially increased risk of injury as well as enhancement of injury if a vehicle rolls over during an accident. Accordingly, both the seat allegation and the rollover allegation

are fundamentally crashworthiness theories, and are based upon the claim that these alleged design features caused or enhanced Mr. Long's injuries during a foreseeable accident. Moreover, while the "handling" claims are not crashworthiness allegations in the strict sense, they relate to crashworthiness principles because plaintiffs emphasized the relative severity of that kind of accident.

The plaintiff, Walter Long, testified at trial that he was thrown into the back seat and sustained his injuries because the right front passenger seat "broke loose" during the accident (Tr. 166-69; 235-238). Undeniably, the jury was exposed to the seat allegation, and their interest in the issue is demonstrated by an interchange between the court and a juror at the close of evidence. (Tr. 990-991, Appendix at 20-21). It is irrefutable that the jury was exposed to and considered the crashworthiness issue of whether the design of the right front passenger seat caused or contributed to Mr. Long's injuries.

The plaintiffs extended their allegations of crashworthiness by asserting that the vehicle had an increased likelihood of rollover. Plaintiffs' only "expert" witness, Mr. Lamar, testified that, in his opinion, the 1974 Volkswagen Super Beetle was "extremely dangerous" due to a "combination of defects," including a tendency to rollover during an accident. (Tr. 401-403; 408-410; 447-449). Mr. Lamar attributed this rollover tendency to the design of the vehicle. He opined that the vehicle was "top heavy," in that the subject vehicle's center of gravity

was allegedly too high for the vehicle's "track." (Tr. 403; 409; 448). He further testified that, in his opinion, these alleged design defects caused the vehicle to "flip over" during the subject accident occurrence. (Tr. 402).

Consequently, the evidence adduced relating to the seat and rollover allegations placed the subject vehicle's crashworthiness safety in issue before the jury. Moreover, correct analysis of plaintiffs' "handling" allegations compels the conclusion that these allegations also placed the subject vehicle's safety protection in issue before the jury. The plaintiffs' "handling" allegations were the primary design defect allegation presented at trial. Significantly, however, the plaintiffs did not contend that the vehicle's handling characteristics caused the subject accident to occur. Plaintiffs did not seriously dispute testimony that the right rear tire was badly worn. (Tr. 631-633). The accident was caused by a blowout of this tire.

Instead, the plaintiffs claimed that the subject vehicle's handling characteristics adversely affected the vehicle's behavior during emergency maneuvers commenced by a tire blowout. (Tr. 136-139; 401; 450; 455). In other words, plaintiffs claimed that the vehicle's handling characteristics, resulting from an allegedly defective design, created an increased risk of injury-causing collisions during emergency maneuvers caused by foreseeable tire blow-outs. When viewed functionally, it is clear that the plaintiffs' "handling" allegations fall within the purview of the crashworthiness doctrine's policy factors.

The foregoing review leaves no doubt that the jury was asked to evaluate the safety protection of the 1974 Volkswagen Super Beetle. The plaintiffs' seat, rollover, and handling allegations asked the jury to determine whether the design of the 1974 Volkswagen Super Beetle created an unreasonable risk of foreseeable injury to vehicle occupants. Unfortunately, the trial court's exclusion of VWoA's proffered seat belt evidence prevented VWoA from placing before the jury competent expert testimony which would have proved that the design of the 1974 Volkswagen Super Beetle, when taken as a whole, did not pose an unreasonable risk of foreseeable injury to the plaintiff, Walter Long. Such evidence was certainly "relevant" on the fundamental issue of the product's safety protection.

As set forth above, evaluation of a vehicle's crashworthiness requires consideration of the design of the vehicle as a whole, including safety features. See Melia v. Ford Motor Co., 534 F.2d 795, 800 (8th Cir. 1976); Curtis v. General Motors Corp., 649 F.2d 808, 812 (10th Cir. 1981); Wilson v. Volkswagen of America, 445 F.Supp. 1368 (E.D. Va. 1978); Daly v. General Motors Corp., 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162 (1978); McElroy v. Allstate Ins. Co., 420 So. 2d 214 (La. App.) cert. denied, 422 So. 2d 165 (La. 1982). Seat belts and shoulder restraints were placed in the subject vehicle for the express purpose of reducing the injury risk to vehicle occupants. The seat belts and shoulder restraints were vehicular features designed to reduce the risk of foreseeable injury. Consideration of

the safety protection of the vehicle as a whole requires consideration of all design features which reduce the unreasonable risk of foreseeable injury.

If what VWoA proffered is proved -- that Walter Long's severe injury would have been prevented had he been wearing the available seat belt and shoulder restraint system -- then the total design of the 1974 Volkswagen Super Beetle could not be found to create an unreasonable risk of foreseeable injury. The vehicle would not be considered causally defective or unreasonably dangerous in its design because the risks that plaintiffs impugned were balanced by the utility of simple, compensating safety devices.

Simply put, safety belt evidence should be admissible in automotive products liability cases if the jury is being asked to consider the crashworthiness of vehicles as they are designed. Of course, as with respect to any opinion, such evidence requires competent proof by a qualified expert. This proposition reflects the fundamental distinction between ordinary automobile negligence cases, such as the Lafferty and Pasakarnis cases, and automotive products liability cases, such as the instant case. In the ordinary automobile negligence case, the reasonableness of a vehicle's design and whether it was "crashworthy" is not placed in issue. Therefore, even if the Lafferty and Pasakarnis decisions should be affirmed, seat belt evidence should be admissible in cases where the vehicle's design is placed in issue by the plaintiff.

Many courts have held that the absence, defective design, or defective manufacture of seat belts and/or shoulder harnesses can create an unreasonable risk of foreseeable injury, and thus render the whole vehicle uncrashworthy. See, e.g., Fox v. Ford Motor Co., 575 F.2d 774 (10th Cir. 1978); Hurt v. General Motors Corp., 553 F.2d 1181, 1184 (8th Cir. 1977); Baumgardner v. American Motors Corp., 83 Wash. 2d 751, 522 P.2d 829, 833 (1974); Austin v. Ford Motor Co., 86 Wis. 2d 628, 273 N.W.2d 233 (1979). If a vehicle can be considered less crashworthy without seat belts or with defective seat belts, a vehicle must be considered more crashworthy with available, functional seat belts. Permitting recovery for defective seat belts, while preventing mention of the failure to use available occupant restraint systems, would be inconsistent and contrary to the principles underlying the crashworthiness doctrine.

For these reasons, seat belt evidence should be admissible in automotive product liability cases, such as the instant case, as bearing upon a jury's consideration of a vehicle's total design. This would be true even if the Lafferty and Pasakarnis decisions are affirmed by this Honorable Court.

### C. Exclusion Of Seat Belt Evidence Is Not Warranted Or Justified By Judicial Deference To The Legislature Or By Other Policy Considerations Asserted In The Lafferty Opinion.

Finally, objections to the admissibility of evidence on the effects of failure to use a seat belt all appear to be grounded in certain perceived considerations of public policy

and judicial restraint. The Lafferty court expressed concern that the seat belt defense would provide windfalls to certain egregious tortfeasors, such as the hypothetical inebriate speeding through a red light. 425 So. 2d at 1151. Of course, this concern is not relevant to automotive products liability cases. The Lafferty court also expressed distaste for the "veritable battle of experts" presumed to result from allowance of seat belt evidence. Id. at 1150. This concern is similarly irrelevant to products liability cases, which are already, of necessity, "battles of experts". See Bardy v. Sears Roebuck & Co., ___ So. 2d __, 8 Fla. L.W. 2945 (2d DCA 1983).

The two primary objections, however, have been a professed inability to integrate the seat belt defense into a standard verdict form, 425 So. 2d at 1150, and a desire to defer to the Florida legislature in the seat belt issue. Id. at 1149.

Appellant respectfully submits that these objections are illusory and do not affect the question of admissibility of seat belt evidence in Florida law. The deference to legislation concept was necessarily rejected as virtually every jurisdiction in the country adopted the concept of automotive crashworthiness. See generally Hoenig, Resolution of "Crashworthiness" design Claims, 55 St. Johns L. Rev. 633 (1981). The issue of crashworthiness is more far-reaching than that of the seat belt defense. It creates a new theory of recovery despite the existence of legislation directed to the same issue of automobile safety. See The National Traffic and Motor Safety Act of 1966, 15 U.S.C. §§

1381 et. seq. (1976 and Supp. II 1980). New or expanded theories of recovery were similarly established by this Court's landmark decisions on the issues of strict liability, comparative negligence, and sovereign immunity. See West v. Caterpillar Tractor Co., Inc., 336 So. 2d 80 (Fla. 1976); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957). Deference to the legislature has no place in the proper evolution of common law defenses to common law created causes of action.

The Lafferty court's concern regarding the verdict form is likewise unfounded. In automotive product liability cases, seat belt evidence is relevant to the question of whether a vehicle, taken as a whole, is defective in its design. Accordingly, seat belt evidence would be taken into account on the first question on the product liability verdict form, dealing with whether the vehicle was placed on the market with a defect which was a legal cause of the injuries or damage to the plaintiff.

In addition, seat belt evidence is relevant to the comparative fault of the plaintiff as a vehicle occupant. Under the formulation of comparative negligence set forth herein, seat belt evidence would be considered in evaluating all of the plaintiff's potentially comparative negligent acts when assessing comparative negligence on the typical, proper verdict form. Therefore, no change to the proper verdict form presently in use in the Florida courts would need to be made.

Hence, the Lafferty court's policy considerations do not survive close scrutiny. Indeed, applicable public policy

factors operate in favor of the admission of seat belt evidence in Florida courts. As the Supreme Court has noted, "20 to 50% of motorists currently wear seat belts on some occasions." Motor Vehicle Manufacturers Assoc., 77 L.Ed. 2d at 465. Thus, the Lafferty and Pasakarnis decisions are contrary to modern human experience, logic,and the needs of safety. To ignore the transcendent importance of the single most important safety device which obviates or minimizes injuries when accidents occur is to encourage Florida citizens to avoid "buckling up" at peril to their very lives. As Dean Prosser has put it, "the law of torts is a battleground of social theory." The "interest of society in general may be involved in disputes in which the parties are private litigants." Thus, "there is good reason" to make "a conscious effort to direct the law along lines which will achieve the desirable social result, both for the present and for the future." Prosser, Law of Torts, 14-15 (1964) 4th Ed.

For the reasons expressed herein, this Honorable Court should allow seat belt evidence to be admitted in Florida courts.

## ARGUMENT WITH REGARD TO SECOND ISSUE

THE TRIAL JUDGE COMMITTED FUNDAMENTAL ERROR IN ATTRIBUTING THE NEGLIGENCE OF A NON-PARTY TO DEFENDANT VOLKSWAGEN.

This case involved two separate causes of action joined for trial. The first cause was Walter Long, plaintiff, versus VWoA, defendant, for personal injuries. The second was Florence Long, plaintiff, versus VWoA, defendant, for loss of consortium. Florence Long was not a party to her husband's action, and Walter

Long was not a party to his wife's. Yet after entry of final judgment in Walter Long's case, the trial judge reformulated the action by naming Florence Long as party defendant and, in essence, made VWoA jointly and severally liable for negligence attributed to her as a plaintiff by the jury. Without benefit of notice, pleading or jury verdict, Volkswagen's liability was thus more than tripled from $400,000 to $1,300,000.[3] The court's remarkable act violated the law of comparative negligence and joint and several liability, and deprived VWoA of its constitutional right to jury trial and due process of law under the Florida and Federal Constitutions.

### A. The Trial Court's Order Amending Final Judgment Violated the Law of Comparative Negligence

The law of comparative negligence stems from this Court's belief that in "the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault." Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973). In Florida, fault is to be assessed by comparing the negligence of the party plaintiff to that of the party defendant as related to each other. Gutierrez v. Murdock, 300 So. 2d

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[3]All of plaintiffs' post-trial motions were procedurally improper and should not even have been entertained, much less utilized as a basis for the trial court's order amending final judgment. Plaintiffs filed, in effect, three post-trial motions: (1) a motion for judgment in accordance with motion for directed verdict; (2) a motion to set aside judgment; and (3) a motion for "entry of final judgment." (R. 546-548). The first two of these motions were improper under Florida Rule of Civil Procedure 1.480(b), since plaintiffs never moved for a directed verdict. See Hall v. Ricardo, 331 So. 2d 375 (Fla. 3d DCA 1976). The third of these motions is wholly unauthorized by rule or statute.

689, 691 (Fla. 3d DCA 1974); Hoffman, 280 So. 2d at 438. The comparative negligence doctrine thus prohibits a jury or judge from apportioning liability to a non-party tortfeasor. Blocker v. Wynn, 425 So. 2d 166 (Fla. 1st DCA 1983); Gutierrez, 300 So. 2d at 691; Model v. Rabinowitz, 313 So. 2d 59 (Fla. 3d DCA 1975); Souto v. Segal, 302 So. 2d 465 (Fla. 3d DCA 1974); Travelers Ins. Co. v. Ballinger, 312 So. 2d 249 (Fla. 1st DCA 1975).

The jury in Walter Long's case apparently apportioned 35% negligence to Mr. Long and 20% to Volkswagen; in Florence Long's case, 45% negligence to Mrs. Long, 20% to VWoA.[4] The apportionment was obviously defective, as the percentages of negligence did not equal 100% in each cause of action. Hoffman, 280 So. 2d at 438; Gutierrez, 300 So. 2d at 691. Yet the trial judge, rather than awarding a new trial in Walter Long's case[5], amended Mr. Long's final judgment and attributed 45% negligence to Mrs. Long, a non-party to that cause of action. The judge simply ignored the fact that comparative negligence "is limited to the parties of a suit." Ballinger, 312 So. 2d at 251. The cause must therefore be reversed.

B. The Court Violated the Law of Joint and Several Liability

The trial court attempted to justify in part its amended final judgment by citing two decisions, Dept. of Transportation

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[4]Due to a defect in the verdict form, we cannot know whether the negligence the jury attributed to Mrs. Long was in connection with her husband's claim or was vis-a-vis VWoA on her claim for consortium.

[5]No new trial was needed in Mrs. Long's case because the jury found her damages to be zero, making apportionment immaterial.

v. Webb, 409 So. 2d 1061 (Fla. 1st DCA 1981) and Moore v. St. Cloud Utilities, 337 So. 2d 982 (Fla. 4th DCA 1976). These cases stand for the uncontested proposition that joint and several liability remains alive after the advent of comparative negligence. But far from providing support, these decisions demonstrate that the court's action contravened the principles of joint and several liability.

Joint and several liability is designed to ensure full recovery from defendants adjudged to be jointly liable for a plaintiff's injuries. Manifestly, however, joint and several liability only applies to a cause of action in a case with more than one defendant. Hence in Moore v. St. Cloud, the court described the rule as holding "that each of the several defendants will be jointly and severally liable for all damages recoverable by the plaintiff." Id. at 984 (emphasis added). The court went on to hold that contribution is appropriate only if "one of the several defendants is required to pay more than his pro rata share." Id.

Florence Long was not a defendant in Walter Long's case. She was not served with process, she did not file an answer, she did not defend any claim against her. Mrs. Long was simply a lone plaintiff suing a lone defendant for loss of consortium. Because there was only one defendant in Walter Long's case -- VWoA -- the doctrine of joint and several liability did not apply.

Indeed, Florence Long could not have been a defendant in her husband's case. One law firm represented both Mr. and

Mrs. Long in their joined lawsuits. If Mrs. Long had been a defendant either in substance or in form, counsel would certainly have informed the court of a conflict of interest and requested leave to withdraw. See DR 5-105, Code of Professional Responsibility. Counsel did not withdraw because they correctly perceived that Mr. and Mrs. Long had parallel -- yet entirely separate -- lawsuits and, therefore, their interests were not antagonistic so as to cause an ethical conflict.

Equally important, the court's post-judgment inclusion of Mrs. Long into her husband's case accomplished indirectly what Mr. Long could not have accomplished directly: he sued his wife. Raisen v. Raisen, 379 So. 2d 352 (Fla. 1979), makes clear that interspousal immunity barred any effort by Mr. Long to seek damages from his wife. Whether advertent or inadvertent, the court's post-judgment declaration of party status first avoided a motion to dismiss Mrs. Long on grounds of immunity, and thereafter circumvented the bar to recovery by employing joint and several liability to foist total responsibility on VWoA. The result was an abrogation of interspousal immunity and a distortion of joint and several liability.

Plaintiff argued below that Florence Long was a plaintiff in her husband's case and that she could be deemed a defendant by virtue of the jury's attribution of 45% negligence to her. The argument fails for two reasons. First, as noted above, Florence Long was never a party in her husband's suit, but rather a Long plaintiff in a parallel but separate suit. The attribution

of 45% negligence could apply only to her suit. Second, even if Mrs. Long were incorrectly deemed a plaintiff in her husband's case, there are substantive differences between one's status as plaintiff and defendant. A judge cannot reformulate party status after judgment without adversely affecting substantive rights. At common law, the "rule was that the same person might not be both plaintiff and defendant." James, Civil Procedure, § 9.12. This Court adheres to the common law and holds "that persons whose interests are adverse to those of the complainant should be made defendants by name, where they are necessary or proper parties and their names are known. To be made defendants, they must be made so by complainant in the bill and served with process, ..." Brecht v. Bur-Ne Co., 91 Fla. 345, 108 So. 173, 176 (1926).

The facts here illustrate the importance of this rule. By not naming Florence Long as co-defendant in his lawsuit, Walter Long was able to circumvent interspousal immunity and sue his wife without benefit of process or adversary hearing. Additionally, had Mrs. Long been named as defendant, the jury's attribution of negligence to her would have been binding against her in a later contribution suit by VWoA. § 768.31 (4)(f), Fla. Stat. (1983). By virtue of the court's reformulation of party status, VWoA might be deprived of its statutory right and might be required to prove up Mrs. Long's negligence. The rights and liabilities of the parties to this cause have been illegally altered by the court's amendment.

The third case cited in support of the amended final judgment, Sundstrom v. Grover, 423 So. 2d 637 (Fla. 4th DCA 1982), is no support at all. The district court simply reversed a judgment on an issue which the parties agreed was wrongly decided by the trial court. Id. at 638. Moreover, the facts are so sketchy that one cannot determine precisely what issue was decided. Sundstrom simply holds that an appellate court will decide only those issues properly raised and contested by the parties; it neither explicitly nor implicitly sanctions a trial judge's post-judgment realignment of parties and the deprivation of one's right to trial by jury.

### C. The Special Interrogatory Verdict Form Was Fundamentally Defective and Confused the Jury, Requiring a New Trial

At the charge conference Judge McNatt announced that he had found an appropriate verdict form to use:

> THE COURT: Okay, I got y'all a verdict. Here's your verdict in this case of Lorraine Lafferty. All you have to do is revise the first question as to the three things, using the one ya'll have agreed on here, and then this verdict has the other things you need. All you will have to put is the Longs in there and that will do it.

(Tr. 1014). Regrettably, the parties failed to properly revise the verdict form. The parties should have prepared two forms, one evaluating plaintiff Walter Long's negligence vis a vis defendant Volkswagen's negligence and the damages suffered by Walter Long, the second evaluating plaintiff Florence Long's negligence vis a vis defendant Volkswgen's negligence and the

damages suffered by Florence Long.[6] Instead, the verdict form combines the two causes of action. (Appendix at 5). The result was obvious juror confusion. Answer to interrogatory #4 reflects that in both causes, the percentages of negligence of the plaintiff and defendant failed to total 100%. Most importantly, the verdict form permitted the jury to apportion negligence to a non-party -- Florence Long in Walter Long's case, Walter Long in Florence Long's case. Because the jury never compared the negligence of Walter Long solely in relation to the negligence of Volkswagen, the trial judge was obliged to grant a new trial:

> if the jury's verdict fails to square with right and justice of the controversy and reasonable doubt exists in the mind of the trial court to conclude that the jury, in the consideration of the case, acted through ... mistake ..., then the ends of justice require that the verdict be set aside and a new trial awarded.

Trice v. Loftin, 47 So. 2d 6, 8 (Fla. 1950).

Neither plaintiff nor defendant objected to the use of the defective verdict form.[7] This Court must nonetheless grant a new trial because the error was fundamental. Florida law holds that "where it is uncertain who are the persons called to answer, the suit is fundamentally defective. It is a defect

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[6] By way of illustration, two proper sample verdict forms are included in the appendix for the Court's review. For comparison purposes, the appendix also includes a copy of the verdict form actually used.

[7] The trial court once refers to the form as the "Rumberger form", but the record clearly reflects that the verdict form was suggested by the court and was thereafter jointly revised and jointly submitted by plaintiff and defendant. See plaintiff's counsel's post-trial comments on the form of verdict. (R Vol. XII, p. 37).

not of form but of substance." Brecht v. Bur-Ne Co., 91 Fla. 345, 108 So. 173, 176 (1926). Here, the verdict form made uncertain who were "the persons called to answer" in Mr. Long's case, a fact demonstrated by the jury's attribution of fault to a non-party (Mrs. Long).

Dispositive of this issue is the recent decision in Keyes Co. v. Sens, 382 So. 2d 1273 (Fla. 3d DCA 1980). There a jury found employer Keyes liable on the basis of respondeat superior for $25,000 in compensatory damages, but at the same time found three of Keyes' employees liable for a lesser amount. Keyes did not object to the verdict despite clear law holding that an employer cannot be held vicariously liable for compensatory damages in excess of the damages found against the employees/active tortfeasors. Williams v. Hines, 80 Fla. 690, 86 So. 695 (1920). The Third District rejected plaintiff's assertions of waiver and reversed on the grounds of fundamental error:

> On this appeal from the judgment, the appellee-plaintiff argues that notwithstanding that the judgment may be legally defective in the above respects, it should be affirmed because defendants did not object to the instruction given to the jury prior to rendition of the final verdicts, and because of failure of defendants to object to said verdicts prior to the discharge of the jury ...
>
> We hold those arguments of the appellee are not controlling in this case. The defects of these verdicts were not merely as to form, or for inconsistency. The judgment was predicated on verdict awards that were contrary to law, and not permissible by law, so as to cause the judgment based thereon to constitute fundamental error.

382 So. 2d at 1275 (emphasis added). In this case as in Keyes,

the verdict's attribution of negligence to a non-party was explicitly "contrary to law." Similarly, the amended final judgment's application of joint and several liability to a single defendant was "not permissible by law."

Both before and after Keyes, Florida courts have consistently held that an unlawful award of compensatory damages, or an award arising from juror or judicial confusion, constitutes fundamental error reviewable on appeal. Marks v. Delcastillo, 386 So. 2d 1259 (Fla. 3d DCA 1980) (relying on Keyes); Jefferson v. City of West Palm Beach, 233 So. 2d 206 (Fla. 4th DCA 1970); Morrison v. Hansen, 213 So. 2d 306 (Fla. 1st DCA 1968); Wofford Beach Hotel, Inc. v. Glass, 170 So. 2d 62 (Fla. 3d DCA 1964). Courts in other jurisdictions agree. In a remarkably similar case in the state which first adopted comparative negligence, the Supreme Court of Wisconsin held that a jury's improper attribution of negligence in a comparative negligence action was fundamental error reviewable on appeal notwithstanding the absence of an objection. Vroman v. Kempke, 150 N.W.2d 423 (Wis. 1967).

### D. The Trial Court Deprived Volkswagen of its Right to Jury Trial

Article I, Section 22, Florida Constitution, commands that "[t]he right of trial by jury shall be secure to all and remain inviolate." No right is more cherished or more carefully guarded:

> Public policy required that our courts be ever vigilant in making summary disposition of causes lest the application of the rule result in eroding or destroying the fundamental right of litigants under our system of juris-

> prudence to have the issues made by the pleadings tried by a jury of fellow citizens. The importance of preserving the jury system, and the concomitant right of a litigant to a jury trial on the merits of his cause, should be zealously protected.

Gaymon v. Quinn Menhaden Fisheries of Texas, Inc., 108 So. 2d 641, 644 (Fla. 1st DCA 1959).

The trial court's amended final judgment denied VWoA this fundamental right. As noted throughout the brief, the jury was never directed to and never apportioned the negligence of lone plaintiff Walter Long as it related to that of lone defendant VWoA; rather, the jury was directed to apportion the combined negligence of all three parties in one inappropriate question. Upon seeing this error, the court should either have ordered a new trial or resubmitted the case to the jury with instructions to reapportion negligence so that the negligence of Walter Long and VWoA totaled 100%.[8] Hoffman v. Jones, 280 So. 2d at 438. On these instructions the jury might have found that Walter Long's percentage of negligence should be increased or, to the contrary, that some portion of Mrs. Long's fault was attributable to VWoA. The parties and this Court will never

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[8]The trial court's efforts to correct the jury's verdict demonstrate that the defective verdict could only be corrected by the action of a jury making appropriate findings of fact. The judge first attempted to apply the jury's verdict by attributing all of non-party Florence Long's negligence to her husband, resulting in a verdict of $400,000 (20% VWoA negligence x 2,000,000). This was obviously unfair to Walter Long. In an effort to correct the unfairness, however, the judge flipflopped and attributed all of non-party Long's negligence to VWoA (20% VWoA negligence + 45% Mrs. Long negligence x 2,000,000). What was unfair to Walter Long can be no less unfair to VWoA.

know, because the trial judge usurped the jury's function and found, as a matter of fact, that all of Mrs. Long's fault should be attributed to Volkswagen:

> The negligence of the Plaintiff Florence Long is in no wise attributable to the Plaintiff Walter Leighton Long; therefore, the damages should have been reduced by the 35% fault of Walter Leighton Long, and he was and is entitled to judgment against the Defendant in the amount of $1,300,000.

Amended Final Judgment (R 695-696). Florida law does not permit fact-finding by the court:

> [H]ow can it be held, with any semblance of reason, that [a] court, with the consent of the defendant only, may, by assessing an additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept 'an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess.'

Sarvis v. Folsom, 114 So. 2d 490, 492 (Fla. 1st DCA 1959). VWoA had no less a constitutional right to have its factual issue decided by a jury.

Furthermore, the trial judge's amendment violated VWoA's right to jury trial because it constitutes an unlawful additur. The amended judgment reflects that Judge McNatt tripled VWoA's liability to conform to his view of the evidence and the jury's verdict -- a classic additur. This Court has held recently that additur is constitutional only if the affected party has the option of accepting the additur or receiving a new trial:

> Defendants next contend that the statute substantially abridges the right to a jury trial. We disagree. The statute clearly provides for a new trial in the event the party adversely affected by the remittitur or additur does not agree with the remittitur or additur. In other words, the complaining party need not accept the decision of the judge with respect to remittitur or additur. The party may have the matter of damages submitted to another jury.

Adams v. Wright, 403 So. 2d 391, 395 (Fla. 1981). VWoA had no option in this case. The trial judge imposed the additur unconditionally. The court's action was therefore unconstitutional.

### E. The Court Violated Volkswagen's Right to Due Process of Law

Both under the Florida and Federal constitutions, due process provides at least these safeguards: (1) a person's property cannot be taken or diminished without notice, opportunity for pleading and an orderly hearing process, and (2) the taking of one's property must be by lawful means. Art. I, § 9, Fla. Const.; Amend. XIV, § 1, U.S. Const. Perry v. Sinderman, 408 U.S. 593 (1972). The trial court's amended final judgment violated VWoA's rights in both respects.

With regard to VWoA's right to notice and orderly process, this Court must remember that Florence Long was never a defendant in Walter Long's case. She was not served with process, she did not file an answer, she did not defend any claim. It was only after entry of final judgment that Judge McNatt constructed Mrs. Long as party defendant in her husband's case, to VWoA's substantial detriment. This post-hoc realignment of party status violated state notions of due process:

> it is essential that the rights and liabilities of the parties ... should be adjudicated only on proper notice and pleadings before the court. Due process of law requires that [a party] have an opportunity to present his claim in an orderly proceeding adapted to the nature of the case.

Carson v. State, 428 So. 2d 332, 333 (Fla. 2d DCA 1983); Fickle v. Adkins, 394 So. 2d 461 (Fla. 3d DCA 1981). If VWoA was to be tried jointly with a co-defendant in Mr. Long's case, it had a right to notice of that fact and an opportunity to defend itself accordingly. The trial court's actions unconstitutionally deprived VWoA of that right.

Federal notions of due process were violated by the court's action as well. The United States Constitution guarantees that rights conferred by state law cannot be undermined without notice and a fundamentally fair process. Perry v. Sinderman, 408 U.S. 593 (1972). And as noted earlier, Florida law demands that adversary parties be properly designated and aligned: "persons whose interests are adverse to those of the complainant should be made defendants by name, ... To be made defendants they must be made so by complainant in the bill and served with process, ..." Brecht v. Bur-Ne Co., 108 So. at 176. Judge McNatt's action subverted VWoA's right to have Florence Long be served with process and have her proceed as party defendant, contrary to the letter and spirit of the Fourteenth Amendment to the United States Constitution.

The second element of procedural due process requires that the taking of one's property be accomplished by lawful

means. Here, to the contrary, the trial judge more than tripled VWoA's liability for compensatory damages by unconstitutionally realigning the parties and unlawfully applying joint and several liability to a single-defendant case. Some $900,000 of VWoA's property was thus taken, contrary to express Florida decisional law:

> The error of imposing on a defendant compensatory damages which are not authorized by law and which are contrary to law is one that goes to the ultimate merits of the cause .... Moreover, such an error is one of constitutional dimension, for the reason that enforcement of such a judgment would constitute a taking of property from the defendant without due process of law.

Keyes Co. v. Sens, 382 So. 2d 1273, 1276 (Fla. 3d DCA 1980) (emphasis added); Marks v. Delcastillo, 386 SO. 2d 1259 (Fla. 3d DCA 1980). Due process protections under the Florida and Federal Constitutions entitle VWoA to a new trial.

## CONCLUSION

The precise relief sought by the defendant is (1) reversal of the First District Court of Appeal's decision, order denying motion for rehearing, and clarified decision on motion for stay of mandate; (2) reversal of the trial court's final judgment, order amending final judgment, and of the order denying the defendant's post-trial motions; and (3) an order requiring a new trial on all issues. This requested relief is based upon the arguments and authorities set forth with regard to both issues addressed herein either taken together or each taken separately.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by U.S. Mail this 21st day of February, 1984, to: S. PERRY PENLAND, ESQUIRE, 1103 Blackstone Building, Jacksonville, Florida 32202.

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