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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 OF APPEAL CASE NO.: AS-291

REPLY BRIEF OF PETITIONER, VOLKSWAGEN OF AMERICA, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT ON FIRST ISSUE

"THE SAFETY BENEFITS OF WEARING SEAT BELTS ARE NOT IN DOUBT." MOTOR VEHICLE MANUFACTURERS ASSOCIATION V. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., 103 S.CT. 2871, 77 L.ED. 2d 443, 486 (1983).

Responding first to the primary theme contained in plaintiff's Answer Brief and myriad motions, it is clear that the record and transcript fully justify this Court's acceptance of jurisdiction. Initially, it must be emphasized that it was the plaintiff who objected to defendant's attempt to adduce seat belt evidence from defendant's expert witness, Mr. Blaisdell. (Tr. 678, 682). The trial court excluded the evidence based upon plaintiff's strenuous objections. It is incredible that plaintiff now complains about the non-abundance of the evidence which his arguments caused. In effect, plaintiff wants to exclude all evidence about seat belts and then use such exclusion to avoid the issue.

The record shows that the trial judge allowed VWoA to proffer the expected testimony of Mr. Blaisdell as to the consequences of Walter Long's failure to wear a seat belt and shoulder harness at the time of the accident. (Tr. 689-691; Appendix at 14-16). The trial court accepted this proffer, holding that no further refinement was needed because "the decisions [the court is] relying on, just say its inadmissible." (Tr. 691). Plaintiff apparently is now contending that this proffer was insufficient for either the First District Court of Appeal or this Court to consider the seat belt issue. However, plaintiff did not oppose the proffer on factual grounds at trial. (Tr. 691).

If, indeed, there were no seat belts in the vehicle, plaintiff's counsel had an easy answer to the issue and to the proffer. He remained silent because the truth was that there were safety belts in the vehicle.

Improperly excluded evidence can result in a reversed judgment or a new trial if "the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked." Fla. Stat. § 90.104(1)(b). VWoA's proffer expressly referred to the "seat belt provided in this car." (Tr. 690) (emphasis added). The proffer referred to Mr. Blaisdell's expected testimony based upon his familiarity in his work over "25 years, of the effectiveness of occupant restraint systems, and particularly that of the 1974 Super Beetle." (Tr. 690) (emphasis added). The proffer clearly expressed Mr. Blaisdell's expected testimony regarding his opinion "as to the effectiveness [of] the seat belts in that car." (Tr. 690) (emphasis added).

Upon the court's exclusion of Mr. Blaisdell's testimony, VWoA was thereafter precluded from adducing evidence either as to the seat belt's existence or the effects of their non-use. The court's ruling foreclosed further attempts to adduce seat belt evidence. See AMC v. Ellis, 403 So. 2d 459, 464 (Fla. 5th DCA 1981) cert. denied, 415 So. 2d 1359 (1982); Cason v. Smith, 365 So. 2d 1042, 1043 (Fla. 3d DCA 1978); General Portland Land Development v. Stevens, 291 So. 2d 250, 251 (Fla. 4th DCA 1974). Thus, the question is whether the substance of VWoA's expected

seat belt evidence, including the availability of functional safety belts, was adequately made known to the court through VWoA's offer of proof. The excerpts from VWoA's proffer cited above demonstrate that VWoA's proffer amply made known to the court the availability of safety belts in the subject vehicle. As stated, the trial court accepted the proffer which he held to need no "refinement." (Tr. 691).

The proffer alone is sufficient to dispel plaintiff's claims of deficiencies in the record. Nonetheless, the proffer is reinforced by the trial testimony of Walter Long, given prior to the objection and subsequent exclusion of seat belt evidence. (Tr. 230; Appendix at 13). The availability of functional safety belts is readily "apparent from the context within which the questions were asked." Fla. Stat. § 90.104(1)(b). Clearly, the transcript sufficiently reflects the availability of safety belts in order to justify this Court's consideration of the seat belt issue. Moreover, the First District Court of Appeal's express consideration of the seat belt question on the merits reflects that forum's decision that the seat belt issue is properly presented for appellate review.

The record and transcript similarly contradict plaintiff's contention that the crashworthiness of the 1974 VW Super Beetle was not placed in issue, and that no proof was offered on the "seat defect" allegation. See Respondent's Answer Brief at 6-7. As set forth at length in VWoA's Initial Brief, the plaintiff presented evidence at trial attacking the vehicle's safety and

crashworthiness under both the "seat allegation" and the "rollover propensity" allegation. See Petitioner's Initial Brief at 27-30. The plaintiff presented expert testimony regarding the "rollover propensity" allegation, (Tr. 402-403; 409; 448). Walter Long testified at trial that the right front passenger seat "broke loose" during the accident (Tr. 166-69, 235-238), and the jury continued to consider this allegation after the close of all the evidence. (Tr. 990-991; Appendix at 17-18).

It bears emphasis that neither the "rollover propensity" allegation nor the "seat" allegation were alleged to be the cause of the accident. Instead, these alleged characteristics were considered by the plaintiff to be design defects causing enhancement of injuries, based on the theory that occupant injuries were more likely and severe if a vehicle rolls over or if a seat breaks during an accident sequence. The plaintiff's rollover theory was that injuries, if any, attributable to the tire blowout and a non-rollover accident would have been different or fewer or nonexistant if the vehicle had not rolled over due to its design. Similar considerations underlied plaintiff's seat theory. Further, the plaintiff did not contend that the vehicle's handling characteristics caused the accident, but rather alleged that the handling characteristics affected the performance of the vehicle during an accident sequence.

When a vehicle's safety to avoid or minimize injuries is impugned by the plaintiff in a products case, the vehicle's safety and the product must be evaluated as a whole. See Melia

v. Ford Motor Co., 534 F.2d 795, 800 (8th Cir. 1976) (applying Nebraska law); Curtis v. General Motors Corp., 649 F.2d 808, 812 (10th Cir. 1981) (applying Colorado law); Wilson v. Volkswagen of America, 445 F. Supp. 1368 (E.D. Va. 1978) (applying Virginia law); 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). If a manufacturer chooses one way of addressing a design choice or problem, the manufacturer's use of compensating safety devices is relevant for the fact finder to consider on the question of the product's safety and the claimed "defectiveness." Thus, for example, it is known that doors may open and glass may break in severe accidents allowing occupants to be ejected. In evaluating a claim that breaking glass is allegedly defective, however, it is certainly relevant for the jury to consider that the major compensating safety device preventing ejection is safety belts. cf. Daly v. General Motors, supra. The jury would weigh that factor in the calculus of deciding whether the product was "reasonably safe." Similarly, when a plaintiff urges that a particular vehicle is "defective" because its design causes it to be involved in a more severe or serious accident than another type of accident, the manufacturer's supply of compensating safety devices like seat belts is relevant to ascertain whether the product was not "unreasonably dangerous." For courts to blindly exclude evidence of safety belts in automotive products cases, as plaintiff urges, the courts must, in effect, declare

that critically relevant safety evidence is of no moment.

Since the plaintiff put forward evidence intended to show that the 1974 Volkswagen Super Beetle, taken as a whole, is uncrashworthy, the trial court erred in excluding VWoA's proffered safety belt evidence as it bears on the crashworthiness and safety protection of the vehicle's total design. The plaintiff also "opened the door" to the admission of safety belt evidence by offering the testimony of Mr. Lamar and Mr. Long as to the crashworthiness issue. With the door thus opened, it was error to exclude VWoA's proffered safety belt evidence as bearing on the crashworthiness issue. See, e.g., Florida Power Corporation v. Smith, 202 So. 2d 872, 881 (Fla. 2d DCA 1967); Garvey v. McNulty, 213 So. 2d 319 (Fla. 3d DCA 1968).

Plaintiff does not materially address the duty of reasonable care as it relates to safety belt usage. Hence, VWoA relies upon and reasserts its discussion of this issue in the Initial Brief at 16-23. It cannot be overemphasized that there is a practical certainty of success in preventing or reducing injuries by using safety belts. "The safety benefits of wearing seat belts are not in doubt." Motor Vehicle Manufacture's Association v. State Farm Mutual Automobile Ins. Co., 103 So. Ct. 2856, 2871, 77 L.Ed. 2d 443, 486 (1983).

Plaintiff next argues that the admission of safety belt evidence would contravene the legislative intent underlying the recently enacted child restraint statute, Fla. Stat. § 316.613 (1982 Supp.). See Answer Brief at 8-9. Specifically, plaintiff

focuses upon Fla. Stat. § 316.613(3), which states, in essence, that violation of the statute shall not be admissible as evidence of negligence or comparative negligence. It is clear, however, that this exclusionary provision is grounded in policy considerations which are unique to children five years old and younger, and which are inapplicable to adult occupants of motor vehicles.

From a policy standpoint, the statute precluding evidence, by its terms, applies only to child restraints and not to safety belts generally. Had the legislature intended a similar result regarding evidence of failure to wear safety belts, it could have expressly so provided. Expressio unius est exclusio alterius. Moreover, the child restraint statute is an attempt by the legislature to protect the interests of a class of vehicle occupants, i.e., children up to age 5, who do not have any restraint whatsoever provided with the vehicle. Infants cannot wear ordinary seat belts with which the vehicle is equipped. Thus, they need a supplementary device -- indeed, specialized equipment -- for protection. After weighing competing interests, the legislature determined that parents must provide child restraints and have their small children use them. In its balancing of policies the legislature concluded that the obligation or statutory duty and the cost thereof should devolve upon parents or other adults. The legislature also decided that a balancing feature of this statute would be that a violation of the child restraint law would not constitute evidence of negligence or comparative negligence. This balancing feature was well within the legislature's

province to enact. The important point is that the legislature acted on behalf of a group of persons who would otherwise go unprotected because no other restraint is currently provided for use by infants or very small children.

This situation is far different from the adult who already has widely-publicized protective devices available, which are mandated by statute, and who voluntarily elects not to use them. Such choices, in the absence of a statute to the contrary, are well within the province of tort law to rectify. Indeed, it must be remembered that the prior rulings excluding seat belt evidence are of judicial origin in tort cases. The legislature has not proscribed seat belt evidence; the courts have. It remains for the court to undo the inequity. The legislature imposes neither shackles nor fetters upon this court to align Florida law with modern developments and the modern trend.

From a legal standpoint, children under the age of five are typically incapable of appreciating the constant danger of injury-producing automobile accidents, and are therefore dependent upon parents or other adults to provide, attach, and fasten the child restraint device required by the statute. The statute places the duty upon the parent to provide and use such child restraint devices. See Flat. Stat. § 316.613(1)(a) (1982 Supp.). Consequently, an unrestrained child who is injured in an automobile accident has not breached a duty to himself, because he is incapable of perceiving the duty to use reasonable care to "buckle up." The legislature created this exclusionary

rule in order to avoid penalizing an injured child by reducing or barring recovery due to his parent's negligence. In sharp contrast, adult vehicle occupants are fully able to appreciate the potential dangers of automobile travel, and are able to "buckle up" without the assistance of another. Thus, the legal considerations underlying the child restraint statute exclusionary rule are inapplicable to the duty of reasonable care owed by the adult vehicle occupant to himself.[1] Furthermore, the child restraint statute clearly does not represent a policy by the legislature to exclude evidence of safety belt usage in determining whether the vehicle as a whole is defective, unreasonably dangerous, or uncrashworthy.

Other policy considerations favor allowance of seat belt evidence. For example, fundamental principles of equity dictate that if a manufacturer has a duty to take reasonable measures to avoid or reduce serious injuries in foreseeable automobile accidents, there is a commensurate duty for passengers to use reasonable care to avoid or minimize their own injuries by the simple act of buckling up. Moreover, if court decisions, as is often said, act to influence manufacturing design choices

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[1]In fact, the public policy and legislative intent underlying § 316.613 fully supports VWoA's contentions in this appeal. The statute was expressly enacted "in recognition of the problems with child death and injury from unrestrained occupancy in motor vehicles...." Fla. Stat. § 316.613(4) (1982 Supp.). The problem of adult death and injury from unrestrained occupancy in motor vehicles is equally as acute. See, e.g., Motor Vehicle Manufacturers Association, supra, 103 S.Ct. at 2861-2862. The legislative intent to enforce the use of restraint systems is so strong that criminal penalties are provided for violations of the statute. See, Fla. Stat. §§ 316.072; 316.655 (1981).

by altering conscious design decisions, then court decisions can also influence the individual's personal conduct regarding his own safety.

In the same vein, if a plaintiff can establish through experts the requisite degree of his enhanced injury for purposes of establishing a claim under the theory of crashworthiness, a manufacturer should be able to establish through experts the correlative aspect of injury reduction. The battle of experts is no greater and the quality of testimony is no less in seat belt cases than in crashworthy cases. Expert testimony is no more speculative in one then in the other. In the past, this Court has not chosen to preclude a search for the truth simply because it may be difficult to find.

Finally, this court's concise and illuminating pronouncements in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973), and the cases cited therein, completely rebut the plaintiff's contention that the admissibility of seat belt evidence is "properly reserved for legislative bodies." This Court's discussion and ultimate rejection of the "deference to legislature" issue, as expressed at pages 434-436 of Hoffman v. Jones, supra., is completely applicable to the issue presented in this appeal. See also Duval v. Thomas, 114 So. 2d 791, 795 (Fla. 1959); Ripley v. Ewell, 61 So. 2d 420 (Fla. 1952); Gates v. Foley, 247 So. 2d 40, 43 (Fla. 1971); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).

Perhaps most compelling is the following statement at page

436 of Hoffman v. Jones:

> It may be argued that any change in this rule should come from the Legislature. No recitation of authority is needed to indicate that this Court has not been backward in overturning unsound precedent in the area of tort law. Legislative action could, of course, be taken, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule. (Emphasis supplied). 247 So. 2d 40, 43.

The exclusion of safety belt evidence is an old, unsatisfactory court-made rule which is no longer based upon viable policy considerations. Indeed, applicable public policy operates in favor of admitting such evidence. Consistent with the foregoing authorities, deference to the legislature is neither necessary nor appropriate in this instance, and this Court can and should allow the use of safety belt evidence in Florida courts.

ARGUMENT ON SECOND ISSUE

Respondent labors to defend the trial court's post-trial realignment of parties on a number of grounds. Among other things, he insists that: (1) the court acted properly because Mrs. Long was in fact a plaintiff in her husband's case, and (2) the "case law of Florida" supports the court's action. The following will prove these to be no defense at all. The reply will conclude by correcting the most serious of Respondent's factual and legal distortions.

A. Mrs. Long was Not a Party to Her Husband's Action.

Respondent's key assertion is that the judge's reformulation

of the case was not improper because Mrs. Long was a plaintiff in her husband's cause of action. After commenting that Volkswagen's contention that the case involves separate causes of action "ignores reality", Respondent notes that Petitioner "cites no authority for this novel proposition of law" (Resp. brief at 13).

Volkswagen accepts the challenge to provide decisional support. In Busby v. Winn & Lovett Miami, Inc., 80 So. 2d 675 (Fla. 1955), the Supreme Court held that a wife's claim for personal injuries and her spouse's claim for loss of consortium are separate causes of action with separate parties:

> A tort of a third person which causes personal injury to a married woman gives rise to two causes of action -- one for her own personal injuries and the other for the husband's loss of her society and services and for medical expenses incurred by him on her behalf. The two causes of action are separate and distinct and the husband's action may be maintained without joinder of the wife.

80 So. 2d at 676 (emphasis added). Precisely as in Busby, this case involves two causes of action, each with one plaintiff and one defendant. The post-trial insertion of Mrs. Long as party defendant in her husband's case deprived Volkswagen of its statutory and constitutional rights (See Pet's brief at 36-49).

B. Florida Law Forbids Rather Than Permits the Court's Post-Trial Realignment.

Respondent offers but one case to support the trial court's

amended final judgment, Sundstrom v. Grover, 423 So. 2d 637 (Fla. 4th DCA 1982). Sundstrom reversed a trial court decision for one reason -- the parties agreed it should be reversed. The decision stands for nothing else:

> It is a wise rule that courts will only determine issues which are based on a genuine controversy, supported by a sufficient factual predicate ... This Court has stated that it will not address issues, particularly those of constitutional import, which are neither directly presented nor necessary to the resolution of the dispute at hand.

Askew v. Sonson, 409 So. 2d 7 (Fla. 1981).

If the Sundstrom decision were deemed to be a holding supporting the trial court's action, Petitioner submits that the case is wrongly decided. Long-standing Florida law holds that one cannot apportion liability to a non-party tortfeasor, Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973), that joint and several liability does not apply to a single-defendant lawsuit, Moore v. St. Cloud Utilities, 337 So. 2d 982 (Fla. 4th DCA 1976), and that a defendant must be made so by name, served with process and appear as a defendant. Brecht v. Bur-Ne Co., 108 So. 173 (Fla. 1926). The amended final judgment violates each of these precepts.

C. Factual and Legal Clarifications.

Respondent's statement that Volkswagen created and insisted upon the verdict form is both regrettable and untrue. The trial judge first suggested the form to the parties:

> THE COURT: Okay, I got ya'll 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 ya'll have agreed on here, and then this verdict has the other things you need.

(R. 1014). The parties then revised the form and jointly submitted it to the court:

> MR. LEVIN [Volkswagen]: Both sides have agreed upon the form. That form is acceptable to Mr. Seelie and Mr. Penland...
>
> THE COURT: Is that correct?
>
> MR. SEELIE [for Mr. Long]: That is correct, Your Honor. We reached agreement last night.

(R. 1019). Lest there remain any doubt, during post-trial argument Respondent admitted that the form was submitted jointly:

> In this case the parties agreed upon the form of verdict and it was submitted to Your Honor for use with the jury.

(Post-Trial R 37).

Last, Respondent mischaracterizes Keyes Co. v. Sens, 382 So. 2d 1273 (Fla. 3d DCA 1980). The trial judge there independently gave an erroneous instruction to the jury, resulting in a compensatory award that violated the doctrines of joint and several liability and respondeat superior. Despite counsel's failure to object to the instruction, the Court reversed because the jury award imposed compensatory damages "which are not authorized by law", thus constituting fundamental error. Id. at 1275, 1276. Here as in Keyes, the court's suggested verdict form mislead the jury, and the court's amended final judgment imposed damages in violation of the concept of joint and several liability, as well as the rule of comparative negligence established in Hoffman v. Jones. Keyes mandates reversal of this appeal.

CONCLUSION

For the reasons, arguments and authorities set forth herein, either taken separately or together, VWoA respectfully requests reversal of the decisions of the First District Court of Appeal; reversal of the trial court's final judgment, order amending final judgment, and order denying VWoA's post-trial motions; and further respectfully requests an order requiring a new trial on all issues.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by U.S. Mail this 3rd day of April, 1984, to S. PERRY PENLAND, Esquire, 1103 Blackstone Building, Jacksonville, Florida 32202.

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