

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33810

TERESA ESTEP,
Plaintiff and Appellee,

v.

FORD MOTOR COMPANY,
a corporation doing business in West Virginia, and

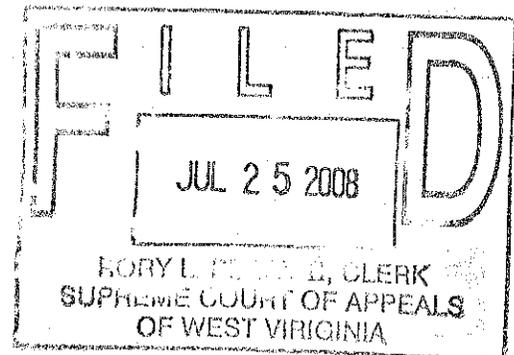
MIKE FERRELL FORD LINCOLN-MERCURY, INC.
a West Virginia Corporation,

Defendants and Appellants

On Appeal from the Circuit Court of McDowell County
Civil Action No. 02-C-228-M

REPLY BRIEF OF APPELLANTS
FORD MOTOR COMPANY
and MIKE FERRELL FORD LINCOLN-MERCURY, INC.

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ARGUMENT

I. There is nothing in the West Virginia statute to bar Ford from using evidence concerning the seat belt to rebut the plaintiff's claim that the occupant-restraint design of this vehicle was defective.

In its opening brief, Ford pointed out that the plaintiff's lawsuit directly attacked the occupant-restraint system in this vehicle and the reasonableness of Ford's design of that system.¹ Ford also described how the airbag and seat belt are integral components of that system, and noted that – both as a matter of logic and unavoidable engineering science – those two components have to be designed to work together and cannot be considered in a vacuum.

Ford further explained that it had offered evidence related to the seat belt in this vehicle to show that the allegedly-defective occupant restraint system was in fact very well designed when *all* of the components included in that design are taken into account. It also wanted to show that this system will protect occupants of the vehicle quite safely, even in accidents like this one, *if* all of the components of that system are used as intended. Simply put, Ford wanted to present this evidence to refute the plaintiff's repeated accusations that there was a "gap" in the protection this design provided.²

Ford thus stressed, as it did in the trial court, that it was not offering this evidence to establish the plaintiff's negligence, contributory negligence, comparative negligence, or failure to mitigate damages.³ It was not offering this evidence to criticize the plaintiff at all; it was offering it to defend the vehicle. It was therefore not offering the evidence

¹ See Brief of Appellants at 15-18.

² There was no such "gap." In fact, in proffered testimony the jury never heard, plaintiff's expert Mari Truman testified that plaintiff would not have sustained this back injury if she had been wearing the seat belt that was designed to cover any such "gap." See Vol 5, pp 11-12.

³ See Brief of Appellants at 12-14.

for any purpose the statute prohibits.

Plaintiff responds to all of these points in the easiest possible way, by ignoring them entirely.

Ford also explained in its opening brief that applying this statute to bar the use of such evidence for a purpose the statutory words do not actually prohibit would violate every relevant rule of statutory construction.⁴ These include the well-established principles that courts must take statutes as they are written, that every word and clause in a statute must have meaning, that a statutory list itemizing things prohibited means those things left off the list are still allowed, and that the legislature is not presumed to intend an absurd result.⁵

Once again, plaintiff responds by avoidance. In fact, she does not even cite, much less try to discuss, any of the cases Ford cited on the principles of statutory construction.⁶ Although she incants the principle that calls for following the words in a statute, she makes little effort to show how the words of this statute support her position. She instead quotes the wording of that statute one time,⁷ and then spends the rest of her brief presenting arguments based on her paraphrasing what she would like those words to say.⁸ But that is not what they do say. And it is not what those words can be taken to mean without defying the basic rules of statutory construction plaintiff would rather not discuss.

Instead, plaintiff points to three states with statutes like the one she would prefer for West Virginia – statutes imposing a broad, absolute, and unqualified ban on all

⁴ See Brief of Appellants at 20-24.

⁵ See Brief of Appellants at 20-24.

⁶ See cases cited in Brief of Appellants at 18-24, none of which appear on Appellees' Table of Authorities.

⁷ Brief of Appellees at 20.

⁸ See, e.g., Brief of Appellees at 21, 23, 24, 21, 30.

evidence of seat belt non-use regardless of the purpose for which it is offered. Citing cases applying those statutes, plaintiff says there is thus a "split of authority" on how the West Virginia statute should be applied. Reasoning from that premise, she asserts that the statute must therefore be construed in the way "most favorable to the plaintiff" under *Blankenship v. General Motors Corp.*, 406 S.E.2d 781 (W.Va. 1991).⁹

This is mistaken. Statutes adopted by the West Virginia legislature are applied according to the words the legislature chose to put in them, and they are construed according to this state's rules of statutory construction. Besides, there is no "split of authority." Every state with a seat belt statute comparable to West Virginia's has applied that statute as Ford requests this statute be applied.

An earnest search for the substance beneath plaintiff's contentions will find they offer nothing to rebut Ford's arguments and authorities. Instead, they slip past those arguments and authorities like a distant ship in the night.

A. Plaintiff can find nothing in the plain words of this statute to support her position, so she seeks to change those words.

Plaintiff insists that the West Virginia seat belt statute absolutely bars any evidence whatsoever about the seat belt, regardless of the purpose for which that evidence is offered, if the plaintiff stipulates to a 5% reduction in recovery of medical damages:

[I]f the plaintiff makes the optional stipulation, all evidence of seatbelt non use must be excluded from the jury's consideration.¹⁰

....

[U]nder this statute, the only time evidence pertaining to the failure of a plaintiff to wear a seatbelt can be admissible in West Virginia is when the plaintiff elects to not stipulate to

⁹ Brief of Appellees at 29-34.

¹⁰ Brief of Appellees at 23 (emphasis in the original).

the 5% reduction in medical bills.¹¹

.....
The Legislature . . . [included] a provision permitting an injured person, such as Teresa, to stipulate to a five percent (5%) reduction in medical damages in return for the exclusion of all evidence of seat belt non-use.¹²

.....
West Virginia, upon the election of the plaintiff, completely excludes from the jury's knowledge any information about seatbelt use while relying on the court to make a post-verdict reduction if causation is at issue.¹³

.....
[The West Virginia statute] bars all evidence of seatbelt use or nonuse from the jury's consideration . . . if the plaintiff agrees to take a 5% reduction in medical damages.¹⁴

This is the central assertion upon which the plaintiff constructs her entire argument on this issue.

But this is simply not what the statute actually says. The words the legislature chose to enact say something else altogether, and those words can neither be ignored nor twisted to say what the plaintiff would like. Simply put, the plaintiff hopes this Court will neither carefully examine nor faithfully apply the words *actually used* in this statute.

That statute prohibits "a violation of this section" from being used to show: (1) negligence, (2) contributory negligence, (3) comparative negligence, or (4) failure to mitigate damages:

A violation of this section is not admissible as evidence of negligence or contributory negligence or comparative negligence in any civil action or proceeding for damages, and shall not be admissible in mitigation of damages. . . .

W. Va. Code §17C-15-49 (d).

As a threshold matter, therefore, the wording does not exclude evidence that the

¹¹ Brief of Appellees at 21.

¹² Brief of Appellees at 24.

¹³ Brief of Appellees at 26.

¹⁴ Brief of Appellees at 30.

plaintiff was *not wearing* a seat belt; it simply excludes evidence that the plaintiff *violated the statute* by not wearing a seat belt.¹⁵ And even assuming the statute should be taken to prohibit evidence of the mere fact of seat belt non-use, it would still do nothing to bar that evidence when it is offered to show something other than negligence, contributory negligence, comparative negligence, or failure to mitigate damages. In particular, it would still do nothing to bar the use of that evidence to show the reasonableness of the design of the vehicle's occupant-restraint system.

For those matters on which the statute does bar the evidence, it then provides one caveat to that exclusion: The plaintiff's non-use of a seat belt *can* be used as evidence of a failure to mitigate damages *if* the trial court first determines that this non-use was a proximate cause of the plaintiff's injuries. In that event, the question of whether the plaintiff failed to mitigate damages may go to the jury:

Provided, That the court may, upon motion of the defendant, conduct an in camera hearing to determine whether an injured party's failure to wear a safety belt was a proximate cause of the injuries complained of. Upon such a finding by the court, the court may then, in a jury trial, by special interrogatory to the jury, determine (1) that the injured party failed to wear a safety belt and (2) that the failure to wear the safety belt constituted a failure to mitigate damages.

W. Va. Code §17C-15-49 (d).

However, even if the jury finds that the plaintiff did, indeed, fail to mitigate damages by not wearing a seat belt, it may not reduce the plaintiff's recovery by more than 5% of medical damages:

The trier of fact may reduce the injured party's recovery for medical damages by an amount not to exceed five percent thereof.

¹⁵ Ford made this point in its opening brief. See Brief of Appellant at 19 n.43. Plaintiff has offered no response.

W. Va. Code §17C-15-49 (d).

Finally, since the plaintiff's failure to mitigate damages by not wearing a seat belt will in no event reduce recovery by more than 5% of medical damages, the issue of *mitigation of damages* will not go to the jury if the plaintiff stipulates to that reduction in advance:

In the event the plaintiff stipulates to the reduction of five percent of medical damages, the court shall make the calculations and the issue of mitigation of damages for failure to wear a safety belt shall not be presented to the jury. In all cases, the actual computation of the dollar amount reduction shall be determined by the court.

W. Va. Code §17C-15-49 (d).

This is the provision the plaintiff would like to re-word. Her whole line of argument is constructed on precisely that effort. But what the statute really says and what she would like it to say are two starkly different things.

This is what the statute *actually* says about the effect of the plaintiff's stipulation:

In the event the plaintiff stipulates to the reduction of five percent of medical damages, the court shall make the calculations and **the issue of mitigation of damages for failure to wear a safety belt shall not be presented to the jury.**

W. Va. Code §17C-15-49 (d) (emphasis added). This is what the plaintiff would *like* the statute to say about the effect of that stipulation:

In the event the plaintiff stipulates to the reduction of five percent of medical damages, the court shall make the calculations and **all evidence of seatbelt non use must be excluded from the jury's consideration.**

See Brief of Appellees at 23. See *also* Brief of Appellees at 21, 24, 26, 30. But that is not what it does say.

A comparison of the language in these two versions of this sentence – one real, the other imagined – precisely defines the issue before this Court. Ford asks to have the sentence in the statute applied as it *is* written. Plaintiff asks to have the sentence applied as she would *like it to be* written. The first is proper; the second is not. That should end the matter.

B. Plaintiff's arguments defy every relevant rule of statutory construction.

The arguments that plaintiff feels compelled to make in order to justify the trial court's application of this statute violate every applicable principle of statutory construction. Ford discussed each of these principles, and their supporting authorities, in its opening brief.¹⁶ Plaintiff has yet to deal with them.

1. Courts must take statutes as they are written.

The most obvious of these principles is that courts must take the wording of a statute as they find it. They can neither ignore words that are there nor add words that are not. See *Phillips v. Larry's Drive-In Pharmacy*, 220 W.Va. 484, 491, 647 S.E.2d 920, 927 (2007); *Banker v. Banker*, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996).

The trial court's ruling, and the plaintiff's arguments in support of that ruling, do both. They seek to remove the words that are there, which do not – regardless of the plaintiff's stipulation – bar the use of this evidence for what Ford offered it to show. And, in their place, those arguments seek to add words that are not there in order to bar the use of this evidence for any purpose whatsoever. This cannot be done without flouting established rules of statutory construction.

¹⁶ Brief of Appellants at 20-24.

Plaintiff has no answer. Simply put, her arguments should be directed to the West Virginia Legislature, not to this Court.

2. No part of a statute can be treated as meaningless.

A related principle is that "the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning." *Evans v. Evans*, 219 W.Va. 736, 740, 639 S.E.2d 828, 832 (2006) (quoting *State ex rel. Johnson v. Robinson*, 162 W.Va. 579, 582, 251 S.E.2d 505, 508 (1979)). See also *Weston, Inc. v. Mineral County*, 291 W.Va. 564, 568, 638 S.E.2d 167, 171 (2006); *State v. Saunders*, 219 W.Va. 570, 576, 638 S.E.2d 173, 179 (W.Va. 2006).

As a result, no part of a statute can be treated as meaningless. See *Savilla v. Speedway SuperAmerica, LLC*, 219 W.Va. 758, 764, 639 S.E.2d 850, 856 (2006). The plaintiff's argument seeks to do exactly that. That argument insists upon treating as meaningless the last half of the sentence describing the effect of stipulating to a 5% reduction in medical damages. The statute says the effect of that stipulation is simply this: "the court shall make the calculations and the issue of mitigation of damages for failure to wear a safety belt shall not be presented to the jury." W. Va. Code §17C-15-49 (d). But that is not the effect the plaintiff wants; so she hopes to treat this part of the sentence as meaningless.

This, too, is contrary to established principles of statutory construction. And, once again, plaintiff has no answer.

3. An itemized list in a statute means that things left off the list were *meant* to be left off.

This statute lists just four specific things for which evidence of "a violation" cannot be used: (1) negligence, (2) contributory negligence, (3) comparative negligence, or (4)

failure to mitigate damages. W. Va. Code §17C-15-49 (d). This is the entire list, and it is the same list regardless of the plaintiff's stipulation.

It is an overwhelmingly well-established rule that a statute listing things for which evidence cannot be used must be taken to mean that the Legislature did not intend to bar use of that evidence for things that were *left off* the list. See, e.g., *Phillips v. Larry's Drive-In Pharmacy*, 220 W.Va. 484, 492, 647 S.E.2d 920, 928 (2007); Syl. Pt.3, *Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984); *Savilla v. Speedway SuperAmerica, LLC*, 219 W.Va. 758, 762, 639 S.E.2d 850, 854 (2006); *Weston, Inc. v. Mineral County*, 219 W.Va. 564, 568, 638 S.E.2d 167, 171 (2006).

Ford did not offer this evidence for any of the four issues appearing on the list the statute prohibits. It offered that evidence on completely different matters concerning the safe design of this vehicle's occupant-restraint system. Those matters are wholly unrelated to the plaintiff's negligence or failure to mitigate damages, and they are not included on the list the statute prohibits. Plaintiff's call to expand that list to prohibit Ford from using the evidence on such matters would violate established principles of statutory construction. Once again, plaintiff should direct her concerns to the Legislature.

Again, plaintiff has no answer.

4. The Legislature is not presumed to intend an absurd result.

Then there is the plain sense of the matter. Plaintiff insists that the effect of stipulating to a 5% reduction in medical damages is that "all evidence of seatbelt non

use must be excluded from the jury's consideration."¹⁷ If this were true, there would be no sound basis on which to avoid the same result in a case where the plaintiff claimed the *seat belt itself* was defective – even though the plaintiff never put it on. If that plaintiff stipulated to this 5% reduction in medical damages, so this reasoning goes, the defendant would be barred from presenting any evidence to show that the plaintiff was *not even wearing* the seat belt, so its alleged defect could not possibly have caused the plaintiff's injury.

Such a result would be absurd, of course, and for this reason alone the statute cannot be construed in this way. It must not be presumed the legislature intended an absurd result, so constructions of a statute that reach such results must be avoided. See, e.g., *State ex rel Simpkins v. Harvey*, 172 W.Va. 312, 320, 305 S.E.2d 268, 277 (1983); *Meadows v. Lewis*, 172 W.Va. 457, 473, 307 S.E.2d 625, 641-42 (1983); *Richardson v. State Compensation Com'r*, 137 W.Va. 819, 824, 74 S.E.2d 258, 261 (1953); *Dickey v. Smith*, 42 W.Va. 805, 26 S.E. 373, 375 (1896).

And, yet again, plaintiff has no answer.

C. Plaintiff is badly mistaken in her reliance on cases construing seat belt statutes elsewhere; there is no “split of authority” – even if that would matter.

Attached as the Appendix to this Reply Brief, at Tab 1, is a chart summarizing the cases construing seat belt statutes in other states. This summary includes all such cases cited by either side in this appeal.¹⁸ It quotes the relevant statute from each

¹⁷ Brief of Appellees at 23 (emphasis in the original).

¹⁸ An additional four cases, involving constitutional due process challenges to the seat belt statutes in other states, were cited in the Brief of Appellees with respect to Ford's "as applied" due process challenge to the statute here. See Brief of Appellees at 36 (citing *Huff v. Shumate*, 360 F.Supp.2d 1197 (D.Wyo. 2004); *Ryan v. Gold Cross Services, Inc.*, 903 P.2d 423 (Utah 1995); *C.W. Matthews Contracting Co., Inc., v. Gover*, 428 S.E.2d 796 (Ga. 1993), and *Bendner v. Carr*, 532 N.E.2d 178 (Ohio App. 1987)).

state, describes the nature of the case and the purpose for which the seat belt evidence was offered, and quotes the appellate court's holding on the admissibility of that evidence under the relevant statute. A thoughtful examination of this chart is revealing indeed.

At the outset, it becomes immediately apparent that the statutes adopted by these various states fall into two distinct groups. The largest group consists of those states whose statutes specifically list the purposes for which seat belt evidence cannot be used, typically barring it from being used to show the plaintiff's negligence or failure to mitigate damages. These states include Delaware, Illinois, Indiana, Kansas, Louisiana, Mississippi, Missouri, New Mexico, South Carolina, and Virginia. See Appendix Tab 1. The statute adopted in West Virginia is in this group.

Judicial decisions applying the statutes in this first group have consistently allowed the use of seat belt evidence when it is offered for some relevant purpose that the statute does not prohibit – such as to rebut the plaintiff's claim that a vehicle's occupant-restraint system was defectively designed. See, e.g. *General Motors Corp. v. Wolhar*, 686 A.2d 170, 176-77 (Del. 1996); *DePaepe v. General Motors Corp.*, 33 F.3d 737, 746 (7th Cir. 1994) (applying Illinois statute); *Hopper v. Carey*, 716 N.E.2d 566, 576 (Ind. App. 1999); *Gardner v. Chrysler Corp.*, 89 F.3d 729, 737 (10th Cir. 1996) (applying Kansas statute); *Floyd v. General Motors Corp.*, 960 P.2d 763, 765 (Kan. App. 1998); *Rougeau v. Hyundai Motor America*, 805 So.2d 147, 158 (La. 2002); *Estate of Hunter v.*

Inc., v. Gover, 428 S.E.2d 796 (Ga. 1993), and *Bendner v. Carr*, 532 N.E.2d 178 (Ohio App. 1987)). Those four cases have not been included on the chart. All of them were straightforward vehicle collision cases in which the plaintiff sued the defendant who allegedly caused the accident and the defendant wanted to show that the plaintiff was not wearing a seat belt. None of these cases involved a product liability claim, much less a crashworthiness claim. And neither side in this appeal has cited any of these four cases on how a statute excluding seat belt evidence should be construed.

General Motors Corp., 729 So.2d 1264, 1267-69 (Miss. 1999); *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 457-59 (4th Cir. 2001) (applying South Carolina statute)¹⁹; *Brown v. Ford Motor Co.*, 67 F.Supp.2d 581, 586-87 (E.D. Va. 1999) (applying Virginia statute).

The second group, on the other hand, consists of those few states whose statutes use sweeping language to categorically and unequivocally exclude *all* seat belt evidence in any civil lawsuit, with no limitation or qualification whatsoever. Those states include Iowa, Minnesota, and Vermont. See Appendix Tab 1. The Nebraska statute is nearly as sweeping, since it precludes any use of evidence of seat belt non-use "in regard to the issue of liability or proximate cause." *Id.* When confronted with those statutes, courts have felt constrained to bar seat belt evidence regardless of the purpose for which it was offered. See *Reed v. Chrysler Corp.*, 494 N.W.2d 224 (Iowa 1992); *Olson v. Ford Motor Company*, 558 N.W.2d 491, 496 (Minn. 1997); *Burck v. Pederson*, 704 N.W.2d 532, 536 (Minn. App. 2005); *Anker v. Little*, 541 N.W.2d 333, 336-38 (Minn. App. 1995); *Ulm v. Ford Motor Co.*, 750 A.2d 981, 987-88 (Vt. 2000).

Cases construing statutes in this second group provide no guidance here. The West Virginia statute is wholly unlike the statutes in Iowa, Minnesota, or Vermont. Despite how much the plaintiff wishes that it did, the statute adopted in West Virginia does not categorically and unequivocally exclude all seat belt evidence regardless of the purpose for which it is offered. Nonetheless, it is the cases in this second group, construing statutes dramatically different from the one in West Virginia, upon which the

¹⁹ With respect to Ford's quotations from this decision, plaintiff asserts that "Ford fails to inform the Court that it is relying on the concurring opinion, not the majority opinion." Brief of Appellees at 27 n.21. It is the plaintiff who is mistaken. The published opinion states that the section from which Ford drew its quotations is, indeed, "the opinion of the court." *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 457 (4th Cir. 2001)

plaintiff principally relies.²⁰

What is more, she is not entirely accurate about the cases she cites. Contrary to her description, for example, *Burck v. Pederson* was not "another crashworthiness case," and the plaintiff in that case did not claim to have been wearing "a defectively designed seatbelt."²¹ It was not a crashworthiness case at all; it was not even a product liability case. The plaintiff in that case sued the other driver, claiming that the force of the collision had caused his abdominal injury by impact with the seat belt. See *Burck v. Pederson*, 704 N.W.2d 532 (Minn. App. 2005). The language of the Minnesota statute is so broad and unequivocal it was held to bar any evidence the plaintiff might have used to show he was wearing the seat belt. Without that evidence, the plaintiff in that case could not prove the cause of his injury, so the appellate court affirmed summary judgment for the defendant. *Id.*

Similarly mistaken is the plaintiff's description of *Newman* as "reaching this same result excluding evidence of non use of a seatbelt."²² That case concerned the plaintiff's complaint on appeal that the trial court had improperly instructed the jury on the *effect* of the seat belt evidence. See *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 155 (Mo. 1998). The *admissibility* of that evidence was never at issue. *Id.*

Likewise, the New Mexico case the plaintiff cites did not involve a product liability claim, much less a crashworthiness claim that the vehicle's occupant-restraint system was defective.²³ It concerned a claim against a garden supply store that had allegedly loaded the trailer improperly and thereby caused the accident. See *Mott v. Sun Country*

²⁰ See Brief of Appellees at 29-34.

²¹ Brief of Appellees at 31.

²² Brief of Appellees at 30.

²³ Brief of Appellees at 34, n.27.

Garden Products, Inc., 901 P.2d 192 (N.M. App. 1995). The New Mexico statute, which says the non-use of a seat belt cannot be used to establish "fault or negligence," was held – not surprisingly – to bar the defendant from showing the plaintiff was not wearing his seat belt in order to establish the plaintiff's fault or negligence. *Id.*

A sensible examination of the cases the plaintiff cites will confirm that she has been unable to find a reported decision from any jurisdiction to support her interpretation of the statute at issue here. She avoids the states with statutes comparable to the one in West Virginia, focuses instead on the three states with categorical and unqualified statutes completely unlike the one adopted in this state, and then does not accurately describe the cases upon which she relies. On that basis, she asserts there is a "split of authority" and that this Court should therefore construe the West Virginia statute in her favor under *Blankenship v. General Motors Corp.*, 406 S.E.2d 781 (W.Va. 1991).²⁴

This is nonsense. To begin with, of course, the application of a West Virginia statute is governed by the words the West Virginia legislature chose to use in that statute, and those words are construed if necessary under the West Virginia rules of statutory construction. It would surely come as a surprise to the members of that legislature to be told the provisions they enact into law for this state will be construed on the basis of a purported "split of authority" in other states.

Besides, there is no "split of authority" over how a statute like this one should be construed. Not only in West Virginia, but in other states as well, a statute that expressly lists the purposes for which certain evidence cannot be used means the use of that evidence for other purposes is still allowed. Every case listed in the Appendix that has

²⁴ Brief of Appellees at 29-34.

addressed this question has so held.

Plaintiff has been unable to find any case to have said otherwise. She wants this one to be the first.

D. Plaintiff cannot now seek to exclude this evidence with an objection she never made below.

Plaintiff treats the Court to a gratuitous discussion on an objection she never raised below. She now argues that the trial court could have excluded this evidence under West Virginia Rule of Evidence 403.²⁵ This discussion might presumably have been directed to the trial court. But it never was. It is thus wholly irrelevant to this appeal.

The only objection to this evidence the plaintiff made below was to contend it was inadmissible under her interpretation of the West Virginia seat belt statute.²⁶ She never mentioned Rule 403. Neither did the trial court, which based its ruling exclusively on the statute.²⁷

It should be fairly obvious that plaintiff cannot now – on appeal – raise a new objection to this evidence that was not raised below and upon which the trial court never had a chance to rule. See Syl. Pt 2, *Coleman v. Sopher*, 201 W.Va. 588, 499 S.E.2d 592 (1997) (“Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal.”); Syl. Pt. 3, *Wilkinson v. Bowser*, 199 W.Va. 92, 483 S.E.2d 92 (1996) (same); Syl. Pt. 2, *Maples v. West Virginia Dept. of Commerce*, 197 W.Va. 318, 475 S.E.2d 410 (1996) (same).

²⁵ Brief of Appellees at 34-36.

²⁶ See ROA 41-47, 77-88.

²⁷ See ROA 89-92 (Order dated Jan. 27, 2006).

Plaintiff cannot change on appeal the grounds for the objection she made below. See *Cochran v. Appalachian Power Co.*, 162 W.Va. 86, 93, 246 S.E.2d 624, 628 (1978) ("The almost universal rule is that an appellate court need not consider grounds of objection not presented to the trial court."). As this Court explained the principle not long ago:

To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace. . . . It must be emphasized that *the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely.*

State ex rel Cooper v. Caperton, 196 W.Va. 208, 170, 470 S.E.2d 162, 216 (1996) (emphasis added).

Plaintiff's whole argument under this heading is beside the point.

There is more, if more were needed. It is scarcely plausible to assume the trial court would have had no choice but be compelled to sustain a Rule 403 objection if the plaintiff had ever made one. It is certainly true the plaintiff would have found very inconvenient the evidence Ford wanted to present. That evidence would have demonstrated the role of the seat belt in the occupant-restraint design of this vehicle, and it would have shown the effectiveness of that design in a crash when its components are used as intended. It would therefore have deflated plaintiff's accusation that Ford left a dangerous "gap" in that design, and it would have forcefully displayed the reasonableness of that design when considered as a whole. Just because adverse evidence will be damaging to one's case, however, scarcely makes

that evidence so “unfairly prejudicial” that it must be excluded under Rule 403. See *State v. Peacher*, 167 W.Va. 540, 574, 280 S.E.2d 559, 581 (1981).

Similarly specious is plaintiff’s contention that, presumably despite careful limiting instructions the trial court would have given, the jury would nonetheless have been “unavoidably confused and misled” as to the purpose of that evidence.²⁸ This is just a veiled claim that West Virginia jurors are so irredeemably stupid they could not be made to understand that the evidence was not being used to criticize the plaintiff, but was being used to show the safety of the vehicle’s occupant-restraint design when all of its components are considered together. Besides, the argument is at least a bit disingenuous. It was the plaintiff, after all, who chose to put the safety of that design directly at issue.

Even if plaintiff had made a Rule 403 objection below, it would have been properly denied. But in any event, it was not made below and cannot be made now.

E. Due process required that Ford be permitted to rebut the plaintiff’s claim that the occupant-restraint system of this vehicle was not reasonably designed.

Plaintiff seems to have missed the point on this issue. As Ford tried to explain in its opening brief, this statute must be deemed unconstitutional as applied if, in a case like this in which the plaintiff directly attacks the design of the vehicle’s occupant-restraint system, the statute is interpreted to prevent the defendant from presenting any evidence to show how the seat belt was meant to work as part of that design.²⁹ This is not a challenge to the constitutionality of the statute as written, nor is it a challenge to the constitutionality of the statute as it may be applied in other cases.

²⁸ Brief of Appellees at 35-36.

²⁹ See Brief of Appellants at 34-35.

In particular, Ford does not challenge the constitutionality of this statute as it would apply to prevent someone who allegedly caused the accident from using seat belt evidence to establish the plaintiff's negligence or comparative fault. That was the nature of the constitutional challenge in all of the cases plaintiff cites, and those cases are therefore off the mark. See *Huff v. Shumate*, 360 F.Supp.2d 1197 (D.Wyo. 2004); *Mott v. Sun Country Garden Products, Inc.*, 901 P.2d 192 (N.M. App. 1995); *Ryan v. Gold Cross Services, Inc.*, 903 P.2d 423 (Utah 1995); *C.W. Matthews Contracting Co., Inc., v. Gover*, 428 S.E.2d 796 (Ga. 1993); *Bendner v. Carr*, 532 N.E.2d 178 (Ohio App. 1987).

Simply put, it would be an unconstitutional violation of due process to apply this statute to allow a plaintiff to accuse the defendant of an unsafe design for its vehicle's occupant-restraint system and then prevent the defendant from showing that the design of that very system is safe. As Ford noted in its earlier brief, "[a] statute may be constitutional as written, yet be unconstitutionally applied in a given case." Syl. Pt. 2, *Miller v. Locke*, 162 W. Va. 946, 253 S.E.2d 540 (1979) (*per curiam*).

It is an essential component of procedural fairness that the defendant get an opportunity to be heard and to present evidence. See *Clay v. City of Huntington*, 184 W. Va. 708, 711, 403 S.E.2d 725, 728 (1991); *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). Since Ford discussed both of these cases in its opening brief,³⁰ plaintiff's announcements that it "argues without legal support" and "cites no decision" are puzzling.³¹ These cases firmly support Ford's position; plaintiff ignores them.

³⁰ Brief of Appellants at 34.

³¹ Brief of Appellees at 36, 37 n.28.

II. Ford was entitled to judgment as a matter of law because the plaintiff's expert did not even attempt to apply, much less satisfy, the standard required to establish that a product is "defective."

Plaintiff does not deny that the only witness who said there was any defect in the design of this vehicle was Gary Derian. Nor does she deny that Derian's only "test" for a design defect was that the airbag should deploy when deployment *would* protect the occupant, but not deploy when deployment would *not* protect the occupant. Indeed, this could hardly be disputed. That is exactly how Derian himself repeatedly described his standard for whether this airbag design was defective:

[T]he issue is, if the airbag is going to protect the driver or our front occupant, then it should deploy, and if the airbag is not going to protect them or perhaps maybe even cause an injury, then it should not deploy. That's the real benchmark.³²

....
[T]he real criteria – and it's backed up in these SAE papers, if the airbag will protect the occupant, it should deploy and if it won't protect them, it shouldn't. . . .³³

....
You know, I know Ms. Estep had somewhat of a pole crash, and the airbag didn't go off, and she got hurt, I don't know all this other stuff that you asked me.³⁴

Nor can plaintiff deny that Derian avoided completely the most fundamental risk/utility trade-off in the design of an airbag system: the fact that a rapidly-inflating airbag can *itself* be a life-threatening hazard. Lowering the impact-force at which the airbag will deploy might add to the occupant's protection in some potential accidents, but it will inevitably increase the risk that the occupant might be injured by the deploying airbag itself in other accidents. This is a scientifically inescapable fact. It is well-known in the industry and by the National Highway Traffic Safety Administration, which has

³² Vol 3, p 207 at lines 13-17.

³³ Vol 3, p 212 at line 23 to p 213 at line 1.

³⁴ Vol 3, p 215 at lines 13-30.

wrestled with the problem at length.³⁵

Derian is well aware of this basic trade-off. In fact, he testified in another case that the vehicle was defective in that the plaintiff was injured because the airbag *did* deploy.³⁶ Nonetheless, he has no idea how that trade-off should be resolved. He did not know where other automobile manufacturers set their impact-speed thresholds for airbag deployment, and he was unable to say what that threshold ought to be – either for vehicles in general or for this 1999 Ranger in particular.³⁷

Wholly unprepared to address this basic risk/utility test, Derian studiously avoided it. Whenever he was pressed on any of these subjects, Derian simply incanted his “benchmark” that the airbag should be designed to deploy when it would protect the occupant and to not deploy when it would not.³⁸ That does nothing to answer the fundamental design question at the heart of this case; it merely restates it.

Plaintiff does not deny any of this. Instead, her response is simply to repeat Derian’s test. She assures the Court that “an airbag is expected to deploy in any severe crash,” states that “the crash at issue was severe,” notes that the “airbag did not deploy,”³⁹ and on that basis confidently announces her conclusion:

Therefore, the Ford Ranger at issue must be considered defective because its airbag failed to deploy in this severe crash. . . .⁴⁰

She then alludes to what she insists were Derian’s suggestions on how the

³⁵ See, e.g., Vol 6, pp 64,141, 160; 62 Fed Reg. 62406-07, 62409; 65 Fed. Reg. 30681, 30683.

³⁶ Vol 3, pp 242-45.

³⁷ Vol 3, pp 206-15. Plaintiff repeatedly makes statements such as this: “crash severity as determined by Ford’s own standards show that the change in velocity which occurred in the crash required mandatory airbag deployment.” Brief of Appellee at 40. This is not accurate, as plaintiff’s failure to include a record citation ought to suggest.

³⁸ See, e.g., Vol 3, p 207 at lines 12-17; p 208 at lines 19-22; p 212 at line 21 to p 213 at line 1.

³⁹ Brief of Appellees at 39-40.

⁴⁰ Brief of Appellees at 40.

airbag system could have been designed to lower its deployment threshold so it would have inflated in this accident.⁴¹ But that is not the point. Lowering the deployment threshold is hardly a difficult matter; it could be easily accomplished simply by adjusting the triggering mechanism. The question is not *how* to lower the deployment threshold, but *where* that deployment threshold ought to be. On that fundamental question, plaintiff presented no evidence at all. The plaintiff's brief in this appeal, and all of the evidence she presented at trial, simply re-states the risk/utility balance itself by announcing that the threshold should be set so the airbag always goes off when it will protect the occupant and never go off when it would hurt them.

As Ford explained in its opening brief, this does not meet the test for establishing a product design defect under West Virginia law.⁴² It does nothing to show how a reasonably prudent manufacturer would have designed this vehicle, and it completely avoids the required risk/utility analysis. Plaintiff offered no evidence to show that Ford's design of this 1999 Ranger deviated from industry or government standards or practice, no evidence to show how other manufacturers determine airbag deployment thresholds on their restraint systems, no evidence comparing any such system to that of the 1999 Ranger, and no evidence suggesting that the risks posed by this occupant-restraint system outweighed the benefits of its design.

As a result, plaintiff failed to present any evidence on basic elements of her claim. See *Morningstar v. Black and Decker Manufacturing Co.*, 162 W.Va. 857, 253 S.E.2d 666 (1979). Whether the plaintiff can cite to a "weight of the evidence" on other

⁴¹ Brief of Appellees at 40-43.

⁴² See Brief of Appellants at 36-41.

matters is irrelevant.⁴³ Ford's motion for directed verdict should therefore have been granted. Finally, and contrary to the plaintiff's implication that this is a matter to be decided by the jury, it is a question of law for this Court to examine *de novo*. See Syl. Pt. 1, *Crystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 139, 459 S.E.2d 415, 416 (1995).

III. Plaintiff's theory for the cause of her spinal injury was based entirely upon a factual assumption that was conclusively proven false.

Plaintiff agrees by silence that the only evidence she submitted to show the cause of her back injury was the testimony from Mari Truman. She also concedes that Truman's theory was that this injury was caused by plaintiff's body "whipping" over the steering wheel with such force that it bent the steering column and fractured her L2 vertebrae.⁴⁴

As Ford explained in its opening brief, Truman herself never looked at the steering column.⁴⁵ She instead relied upon the opinion of another of the plaintiff's experts, Gary Derian. Derian, in turn, simply assumed that the steering column was bent because it did not look "the way I would design it."⁴⁶ That assumption was the foundation for Truman's opinion on the cause of plaintiff's injury. She expressly agreed that this assumption was "central" to that opinion.⁴⁷ She also acknowledged that, if this assumption was wrong, she could not be sure the plaintiff had collided with the steering wheel at all. As she put it:

Well, let's just say that had the steering wheel not shown any

⁴³ Brief of Appellee at 39 (heading for the plaintiff's four pages of argument on this point: "The Weight of the Evidence Supports the Verdict that Ford's Airbag System Was Defective").

⁴⁴ Vol 3, pp 127-28; Vol 4, pp 125-30, 172-76, 202.

⁴⁵ Vol 4, pp 169-70.

⁴⁶ Vol 3, pp 192, 195-96.

⁴⁷ Vol 4, p 205 at lines 3-7.

damage, then that would have been -- then you would have wondered did she really get restrained by it. Okay?⁴⁸

Indeed, Truman testified that she would then have to re-evaluate her causation theory from its very beginning:

Q. Would it make a difference to you if that steering wheel...is the same as it was manufactured, that it really wasn't out of alignment?

A. Well, at this point, then *we'd have to go back and re-evaluate* from the standpoint of we know that there's still a big Delta-V in there but that -- that was -- that is more indicative of her position, and then *we have to take that out of the position because now it becomes ambiguous.*⁴⁹

It turns out, of course, that the steering column was *not* bent. It had just not been designed by Gary Derian. The basic assumption upon which Truman based her entire opinion was just wrong.

It should be too late in the day to contend that the opinion of an expert based upon a demonstrably-false assumption can nonetheless be treated as probative evidence upon which a jury may rely. *See generally San Francisco v. Wendy's International, Inc.*, 221 W.Va. 734, 656 S.E.2d 485 (2007); *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993).

But that is what the plaintiff contends. Beyond that, her response to this point is to be less than entirely candid about the evidence in this record. She suggests, for example, that the bent steering column was not really important to Truman's opinion.⁵⁰ She argues that other evidence, such as "bruises on her thigh" and a concussion that "would only occur if her head struck the windshield," also support that opinion.⁵¹ And,

⁴⁸ Vol 4, p 169 at lines 18-21.

⁴⁹ Vol 4, p 206 at lines 12-19.

⁵⁰ Brief of Appellees at 44-46.

⁵¹ Brief of Appellees at 45-46.

finally, she implausibly insists that the steering column really was bent after all.⁵²

None of these contentions can survive a thorough examination of this record. Truman herself plainly admitted that this assumption was a central foundation to her opinion and that she would feel it necessary to start all over again if it were wrong. The evidence was utterly uncontested that this steering column had always been "bent" as Darien described; it had been designed and manufactured that way. The designers had just not included Gary Derian. The bruises on the plaintiff's thighs were on the *inside* and *backs* of those thighs.⁵³ There were no bruises at all on the *front* of the plaintiff's thighs, where they would have been in contact with the steering wheel if she had "whipped" over it. In fact, there were no bruises or injuries at all on the entire front of the plaintiff's body.⁵⁴

Finally, the assertion that the plaintiff could "only" have sustained a concussion by hitting the windshield is incredible on its face. The plaintiff, after all, was tumbling unrestrained inside the vehicle as it went from the highway thirty feet above the Tug River into the riverbed below, down a steep, wooded hillside. There is no evidence that "only" an impact with the windshield could have caused a concussion, much less that such an impact could only occur as Truman described.

The only evidence plaintiff presented to show the cause of her back injury was based upon a fundamental assumption that was categorically false. Without proof of causation to link her injury to the alleged defect, plaintiff's product liability claim cannot be sustained. See *Morningstar v. Black and Decker Manufacturing Co.*, 162 W.Va. 857, 253 S.E.2d 666 (1979). The trial court should therefore have granted Ford's motion for

⁵² Brief of Appellees at 44-46.

⁵³ DX 49 – DX 60

⁵⁴ Vol 3, pp 51-57; Vol 4, pp 129, 177, 182, 189-95; Vol 6, pp 18-19, 21-24, 40-41, 86; DX 49 – DX 60.

judgment as a matter of law.

IV. The jury should have been given the Model Instruction and thereby told that compliance with the relevant Federal Motor Vehicle Safety Standards for crash protection created a rebuttable presumption that this vehicle was not defective.

The trial court should have given the jury the Model Instruction. As directed by statute, each of those standards was determined by the Department of Transportation to "meet the need for motor vehicle safety." 49 U.S.C. § 30111(a). The United States Supreme Court has described the thoroughness and expertise with which the Department has fulfilled that mandate in setting such standards, and it has stated that the views of that agency "should make a difference." See *Geier v. American Honda Motor Company, Inc.*, 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000). This vehicle complied with every applicable safety standard adopted by that agency. Ford was therefore entitled to a rebuttable presumption that it was safe.

Plaintiff responds that Ford is relying "entirely on out of-state-cases," that it "pays little or no accord to *Johnson v. General Motors Corp.*", and that Ford's argument is "completely at odds with" that decision and with *Miller v. Warren*.⁵⁵ Plaintiff also notes that the Model Instructions "are not the law of this state," and finds Ford's citation of *Geier* "puzzling" because it was a preemption decision and "had nothing to do with an instruction."⁵⁶

Each of these misses the point. Ford does not contend that the Model Instructions have the force of law, and it is not citing *Geier* to invoke preemption. Ford

⁵⁵ Brief of Appellees at 47-48.

⁵⁶ Brief of Appellees at 48-49.

cites both the Model Instruction and *Geier* to show that the rebuttable presumption it requested was eminently reasonable. It has cited out-of-state cases because this is a question of first impression in West Virginia. No decision in this state has yet determined whether a vehicle's compliance with a federal motor vehicle safety standard, directly applicable to the alleged defect, creates a rebuttable presumption that the vehicle is not defective.

As Ford did note in its opening brief,⁵⁷ this court has previously held that compliance with such a regulation is relevant and admissible, but that it is not conclusive. See *Johnson v. General Motors Corp.*, 190 W.Va. 236, 247, 438 S.E.2d 28, 40 (1993). A rebuttable presumption is, by definition, rebuttable and not conclusive. So *Johnson* left that question open.

The decision in *Miller* is easy to distinguish. That involved a trial court's instruction telling the jury that, since the local fire code did not require the defendant motel to have a smoke detector in each room, the motel was presumed to have met the applicable standard of care without those smoke detectors. See *Miller v. Warren*, 182 W.Va. 560, 390 S.E.2d 207 (1990). This court held the instruction erroneous. It explained that a failure to comply with such a regulation would be negligence *per se*, but that compliance is not due care *per se*, and that compliance did not create a rebuttable presumption. 182 W.Va. at 562, 390 S.E.2d at 210.

There is a big difference between the fire code in *Miller* and the Federal Motor Vehicle Safety Standards for crash protection. After all, there is no safety trade-off in adding more smoke detectors in a motel. There is no reason that more smoke detectors would not always be safer.

⁵⁷ See Brief of Appellants at

That is not true for vehicle crash protection. Airbag deployment levels is just one example. As Ford described above and in its opening brief, setting those levels must confront intrinsic trade-offs in safety. A deployment level that would protect the occupants under the conditions of one accident could produce a potentially-fatal hazard in another. The Federal Motor Vehicle Safety Standards on crash protection are therefore not a simplistic "floor." Those standards in general, and the standards on crash protection in particular, are the result of an exhaustive, prolonged, and careful exploration of precisely those kinds of trade-offs. These are the very risk/utility trade-offs, in fact, that Gary Derian should have done and on which the plaintiff should have presented proof.

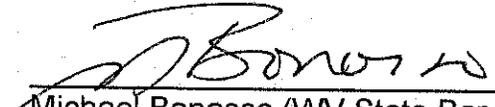
The jury should have been given the Model Instruction on the rebuttable presumption that arises from compliance with such a standard.

PRAYER

For the foregoing reasons, appellants Ford Motor Company and Mike Ferrell Ford Lincoln-Mercury, Inc., ask the Court to reverse the judgment entered below and to then render judgment in favor of the appellants as a matter of law or, in the alternative, remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael Bonasso, counsel for defendants/appellants Ford Motor Company and Mike Ferrell Ford Lincoln-Mercury, Inc., hereby certify that I have caused the foregoing **Reply Brief of Appellants Ford Motor Company and Mike Ferrell Lincoln-Mercury, Inc.** to be served upon each of the following counsel of record, this 25th day of July 2008, as follows:

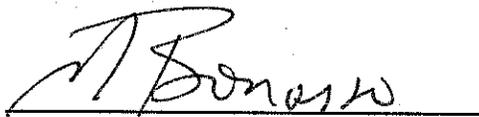
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