

in limine No. 1 insofar as it excluded any evidence or argument regarding the negligence or comparative fault of Deceased. However, the court ruled that “[t]he parties shall be permitted to include evidence and arguments regarding the pre-impact circumstances giving rise to the collision.” Trial Ct. Order, 6/1/06, at 5. The trial court concluded that evidence relating to pre-impact conduct of the Deceased was not used “inappropriately” to show negligence on his part. Trial Ct. Op., 6/14/07, at 5-6. On the contrary, the court concluded that “the evidence was admitted to prove [Appellee]’s theory regarding [Deceased’s] position in the vehicle at the time of air bag deployment and at the time of the vehicle’s impact with the embankment.” ***Id.*** at 6.

¶ 3 I agree that pre-impact evidence would not be admissible to prove contributory negligence, since contributory negligence is not a defense in strict products-liability actions. ***Kimco Dev. Corp. v. Michael D’s Carpet Outlets***, 536 Pa. 1, 7, 637 A.2d 603, 606 (1993). However, I would find that it is admissible to prove lack of defect and causation. The majority concedes that Deceased’s position in the truck at the time of the accident was relevant to the issue of causation. Majority Op. at 27. Nonetheless, the majority “conclude[s] the trial court erred in permitting [Appellee]’s expert witness to testify regarding possible explanations as to why the deceased might have been out of position in the truck.” ***Id.***

¶ 4 The trial court denied Appellant's motion *in limine* No. 3 to exclude any evidence or argument regarding seat belt non-use. The court directed: "[T]he parties shall be permitted to include evidence and arguments regarding the pre-impact circumstances, but shall not be permitted to argue negligence or comparative fault of the decedent." Trial Ct. Order, 6/1/06, at 2. The majority finds statutory mandate in 75 Pa.C.S. § 4581(e)¹ for the exclusion of evidence of non-use of seat belts in civil actions "tried in Pennsylvania courts, for any purpose, including to prove not only contributory negligence but also defect, causation and/or damages." Majority Op. at 15. I respectfully disagree.

¹ Section 4581(e) provides:

(e) Civil actions.--In no event shall a violation or alleged violation of this subchapter be used as evidence in a trial of any civil action; nor shall any jury in a civil action be instructed that any conduct did constitute or could be interpreted by them to constitute a violation of this subchapter; nor shall failure to use a child passenger restraint system, child booster seat or safety seat belt system be considered as contributory negligence nor shall failure to use such a system be admissible as evidence in the trial of any civil action; nor shall this subchapter impose any legal obligation upon or impute any civil liability whatsoever to an owner, employer, manufacturer, dealer or person engaged in the business of renting or leasing vehicles to the public to equip a vehicle with a child passenger restraint system or child booster seat or to have such child passenger restraint system or child booster seat available whenever their vehicle may be used to transport a child.

75 Pa.C.S. § 4581(e).

¶ 5 In ***Grim v. Betz***, 539 A.2d 1365 (Pa. Super. 1988) (*en banc*), this Court opined that seat belt non-use was inadmissible as evidence of contributory negligence in any civil action:

The import of the amendments is clear: the legislature has decided that **a defense of comparative negligence, in the form of a "seat belt defense"**, premised on either the failure of an adult to employ a seat belt for his own protection, or on the failure of an adult to employ a seat belt for his own protection, or on the failure of an adult to protect his minor children with seat belts, will not be available in any civil action in this Commonwealth. Section (E) of § 4581 clearly states that the failure to use a "child passenger restraint system" or "safety seat belt system" shall not be considered, in any civil action, as contributory negligence, and shall not be admissible as evidence in any civil action.

Id. at 1369 (emphasis added). "The terms of the preclusionary provision of subsection (e) are clear. The third clause specifically states that the failure to use a safety seat belt system cannot be considered as contributory negligence." ***Nicola v. Nicola***, 673 A.2d 950, 951 (Pa. Super. 1996) (quotation marks omitted). However, I would find that Section 5481(e) does not preclude evidence of seat belt non-use as to defect and causation. "[N]ot every mention of a negligence-related concept poisons a strict liability claim. Indeed, evidence which is inadmissible for one purpose may be admissible for another." ***Daddona v. Thind***, 891 A.2d 786, 810 (Pa. Commw. 2006) (citations and quotation marks omitted).

¶ 6 In ***Foley v. Clark Equip. Co.***, 523 A.2d 379 (Pa. Super. 1987), the appellant was injured when he was struck by a forklift. He contended that

the manufacturer defectively designed the forklift based upon its lack of a device to alert pedestrians of its presence and because the frontal carriage of the forklift obstructed the driver's view. The trial court did not permit the introduction of evidence that both the appellant and the driver had not paid attention and their negligence, rather than any defect in the design of the forklift, caused the accident. This Court reversed and concluded that "negligen[t] . . . conduct is admissible where it is relevant to establish causation." *Id.* at 393.² Therefore, the appellant's failure to pay attention

² *Compare Dillinger v. Caterpillar*, 959 F.2d 430 (3d Cir. 1992), wherein the court opined:

In our view, *Foley* does not accurately reflect the approach the Pennsylvania Supreme Court would follow in a strict products liability proceeding. . . . Most importantly, there is no meaningful way to reconcile the view that a plaintiff's negligence of the type involved in *Foley* should be admitted to undercut causation with the Supreme Court's prohibition of the introduction of a plaintiff's negligence to defeat liability.

Id. at 443. The *Dillinger* Court recognized:

Two other decisions, *Gallagher v. Ing*, 367 Pa.Super. 346, 532 A.2d 1179 (1987), *allocatur denied*, 519 Pa. 665, 548 A.2d 255 (1988) and *Brandimarti v. Caterpillar Tractor Co.*, 364 Pa.Super. 26, 527 A.2d 134 (1987), *allocatur denied*, 517 Pa. 629, 539 A.2d 810 (1988), also provide some support for Caterpillar's contention that *Dillinger's* allegedly negligent conduct should be admitted to negate the causation prong of plaintiff's claim. *See also Kuisis v. Baldwin-Lima-Hamilton Corp.*, 457 Pa. 321, 329-33, 319 A.2d 914, 920-21 (1974) (intervening negligence of third party). In *Gallagher*, the administratrix commenced a wrongful death action against the defendant car manufacturer, alleging that a defect in the automobile

caused the decedent's accident. The trial court permitted the defendant to introduce evidence of the decedent's blood alcohol level and the jury returned a verdict in favor of the defendant. On appeal, the Superior Court affirmed the trial court's admission of the evidence, holding "[t]he evidence was sufficient, if believed, to show that the decedent was so intoxicated that he was incapable of driving safely and that this was the legal cause for his loss of control of the vehicle which he was driving." 367 Pa.Super. at 352, 532 A.2d at 1182.

Id. at 444 n.23. In *Russo v. Mazda Motor Corp.*, 1999 WL 210232 (E.D. Pa. 1992) (unreported decision), the court looked to footnote 18 in *Dillinger*, which is interpreted as lending some support to the argument that evidence of the existence of the seat belt system should be admissible to prove that the truck was not defective. Footnote 18 provides:

Evidence concerning the mere existence of the alternative braking systems is admissible as it relates to the existence of a defect in the truck. However, Caterpillar effectively framed the issue as one of contributory negligence by stating that Dillinger's failure to use the alternative braking systems caused the accident. In addition, in its closing argument, Caterpillar stated that it "didn't know why" Dillinger had not used the alternative braking systems, but perhaps this was because, as Dillinger had stated in his deposition, he did not know how to operate the 773 safely. Caterpillar then argued that Dillinger's actions, not a defect in the truck, were the cause of his injuries.

Although during the charge conference the court initially stated that it would only permit Caterpillar to introduce evidence concerning the existence of the alternative braking systems because that evidence related to the existence of a defect, the court modified its determination and permitted Caterpillar to argue that Dillinger's actions caused the accident and his injuries, but merely barred Caterpillar from arguing that Dillinger's actions constituted contributory negligence.

Thus, we must determine whether it was proper for the district court to permit the jury to consider Dillinger's conduct as it relates to causation, and not whether the

mere admission of the existence of the braking systems and the operator's manual would have been proper. In reaching our result we do not ignore Caterpillar's contention in its brief that "[i]f evidence of the existence of backing safety systems was properly admitted, which it was, then there was no logical basis for excluding evidence that [Dillinger] failed to take advantage of these systems." While there is force to this argument, we point out that it is not our function to establish Pennsylvania law. Rather, we merely apply the precedents to predict how its Supreme Court would rule. We also point out that our result may not be as anomalous as Caterpillar believes as the presence of the back-up systems goes to the defect vel non of the product whereas Dillinger's failure to use them goes to his negligence, obviously distinct concepts. Thus, the jury could conclude that, without regard for Dillinger's conduct, the existence of the back-up systems precluded a finding that the 773 was defective and such a finding would end the case. On the other hand if the jury found that even with the back-up systems the 773 was defective, then the causation question, defined by the district court in its special interrogatory as whether "the defect was a substantial factor in bringing about some injuries to [Dillinger]", should be limited to the alleged defect in the protection of the hoses or the absence of an adequate warning system, as the back-up systems simply by their very existence could not have contributed to the happening of the accident.

Dillinger, 959 F.2d at 440 n.18. Nonetheless, the **Russo** Court concluded that the evidence of the seat belt system was inadmissible, opining:

In the Occupant Protection Act, the Pennsylvania legislature has expressed a strong public policy concern that evidence of the failure to use a seat belt not be introduced against a plaintiff in a civil action. 75 Pa.C.S.A. § 4581(e). Allowing Defendant to introduce evidence of the existence of the seat implicates this important public policy concern. While footnote eighteen provides some authority, the Court is unwilling to weaken Section 4581(e) without clearer direction from the Third Circuit.

Russo, at *2.

was admissible as to causation. Analogously, in the instant case, Appellant's pre-impact behavior was admissible as to causation.

¶ 7 In **Gallagher v. Ing.**, 532 A.2d 1179 (Pa. Super. 1987), this Court addressed the issue of the admissibility of the decedent's intoxication in an action for wrongful death based upon the contention that the Porsche the decedent was driving was defective. This Court found no error in the trial court's admission of evidence establishing that the decedent's intoxication rendered him incapable of driving safely and that was the legal cause of his loss of control of the vehicle. **Id.** at 1183.

¶ 8 In **Bascelli v. Randy, Inc.**, 488 A.2d 1110 (Pa. Super. 1985), the appellant brought an action to recover for injuries sustained in a one-vehicle accident based upon the theory that the accident was caused by the defective front-end assembly of the motorcycle. This Court held: "An admission by Bascelli that he had lost control of the cycle while going 100 miles per hour was significantly relevant and extremely important evidence. It was admissible to show the cause of the accident; to exclude it for that purpose was error." **Id.** at 1113. The **Bascelli** Court, in reaching its conclusion that the evidence should not be excluded, looked to persuasive decisions of courts in other jurisdictions for guidance:

[T]he evidence could not be excluded merely because it also tended to show "contributory negligence" on the part of the operator. It was admissible for the purpose of showing causation. **See: Greiner v. Volkswagenwerk**

Aktiengesellschaft, 540 F.2d 85 (3d Cir. 1976) (evidence of drinking admissible to show causation); **Englehart v. Jeep Corp.**, 122 Ariz. 256, 260, 594 P.2d 510, 514 (1979) (evidence of plaintiff's intoxication, though not admissible to show contributory negligence, may be admitted on issue of proximate cause); **Honda Motor Co. v. Marcus**, 440 So.2d 373 (Fla. Dist. Ct. App. 1983) (failure to wear seat belt may be shown if it bore causal relation to injuries); **Scott v. Bolan Ford, Inc.**, 420 So.2d 1345 (La. Ct. App. 1982) (intoxication admissible if relevant to causation); **Bendorf v. Volkswagenwerk Aktiengesellschaft**, 90 N.M. 414, 416, 564 P.2d 619, 621 (N.M. Ct. App. 1977) (negligence of plaintiff relevant if his wrongful driving was proximate cause of accident); **Caldwell v. Yamaha Motor Co.**, 648 P.2d 519, 527 (Wyo. 1982) (negligence of motorcyclist admissible if offered to prove causation or to impeach his testimony).

Id. at 1113-1114.

¶ 9 Although not binding precedent, **GMC v. Wolhar**, 686 A.2d 170 (Del. Super. 1996) is instructive. The **GMC** Court opined:

"There is a sharp split of authority amongst courts that have considered the admissibility of safety-belt evidence." **Swajian v. General Motors Corp.**, 559 A.2d 1041, 1043 (R.I. Super. 1989). The **Swajian** Court set forth numerous cases and jurisdictions which have found seat belt non-use admissible. *Id.* at 1043-44. As another court has stated:

Enough has been written about the "seat-belt defense" to show the body of law related to it is split, fragmented and changing. It varies in time, place, rationale, effect and implementation. No doubt the law varies so much because the theory does not fit neatly into traditional tort doctrines of negligence (including duty, breach of duty and causation), strict liability, contributory negligence, mitigation of damages, avoidance of consequences, and comparative fault.

LaHue v. General Motors Corp., 716 F.Supp. 407, 410 (W.D. Mo. 1989).

* * *

The court held that seat belt evidence was not admissible for the purposes of establishing contributory negligence, assumption of the risk, or failure to mitigate damages based upon the prevailing seat belt statute and a survey of common law from other jurisdictions. **Id.** at 410-16. With respect to the reasonableness of the vehicle's design, however, the **LaHue** opinion held that seat belt evidence was admissible. . . .

* * *

Additionally, with respect to the causation factor, the court also allowed the evidence of non-use:

Even though plaintiff may not have had a duty to wear a seat belt, and even though contributory fault would not be relevant in a products liability action, a defendant may attempt to prove that the injuries were caused by something other than an alleged design defect. If evidence shows that all or part of the injury is attributable to something other than a design defect, the critical element of causation is missing. In that instance, a defendant is not, and should not be, liable for harm which that defendant did not cause by way of a design defect.

Id. at 416.

Id. at 173-75.³ **See also *Hodges v. Mack Trucks, Inc.***, 474 F.3d 188 (5th Cir. 2006) (involving Texas statute which provided that “nonuse of a safety belt is not admissible in a civil trial,” the court held that seatbelt nonuse was admissible in a crashworthiness case when relevant to issues other than contributory negligence); ***Gardner v. Chrysler Corp.***, 89 F.3d 729 (10th Cir. 1996) (finding that although the legislature intended to bar evidence of nonuse of a seat belt to establish comparative negligence or to mitigate damages, if introduced to defend allegations of a defect it would be admissible); ***DePaepe v. Gen. Motors Corp.***, 33 F.3d 737 (7th Cir. 1994) (permitting seat belt evidence permitted where the appellant alleged that the sun visor/header system was defective); ***Brown v. Ford Motor Co.***, 67 F. Supp.2d 581 (E.D. Va. 1999) (holding evidence of the failure to wear a seatbelt is admissible as it relates to the issues of negligent design and manufacture, breach of warranty, and product misuse); ***MacDonald v. Gen.***

³ The court noted that the case was decided before the enactment of the statute:

(i) Failure to wear or use an occupant protection system shall not be considered as evidence of either comparative or contributory negligence in any civil suit or insurance claim adjudication arising out of any motor vehicle accident, nor shall failure to wear or use an occupant protection system be admissible as evidence in the trial of **any civil action** or insurance claim adjudication.

Del. Code Ann. tit. 21 § 4802(i) (emphasis added). “Although the Seat Belt Safety Act is inapplicable to the present proceeding, . . . this common-law holding . . . will survive the enactment of that statute. ***GMC***, 686 A.2d at 176 n.9.

Motors Corp., 784 F. Supp. 486 (M.D. Tenn. 1992) (interpreting Tennessee statute forbidding introduction of seat belt non-use in the trial of any civil action to permit seat belt evidence where plaintiff alleged the automobile's brakes were defective to prove proximate cause); **Whitehead v. American Motors Sales Corp.**, 801 P.2d 920 (Utah 1990) (finding seat belt evidence admissible under similar Utah statute on the question of the vehicle's overall design). Similarly, I discern no error in the trial court's evidentiary rulings regarding seat belt non-usage and the deceased's pre-impact conduct.⁴ Accordingly, I would affirm.

⁴ I acknowledge that the resolution of this issue has received disparate treatment in this Commonwealth, as well as in other jurisdictions. Therefore, I would suggest that it is one that should be decided by our Supreme Court. **See, e.g., Carrasquilla v. Mazda Motor Corp.**, 161 F.Supp.2d 181 (M.D. Pa. 2001) (finding, *inter alia*, **DePaepe v. General Motors Corp.**, 33 F.3d 737 (7th Cir. 1994) and **LaHue v. Gen. Motors Corp.**, 716 F. Supp. 407 (W.D. Mo. 1989) unpersuasive, and applying the literal meaning of Section 4581); **see also Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.**, 223 W.Va. 209, 672 S.E. 2d 345 (2008)(interpreting "in any civil action" to encompass design defect cases). The disparity in legislation is illustrative. In some states the issue has been resolved by the legislature. **See, e.g.,** Ark. Code Ann. § 27-37-703(a) (providing that "evidence of such failure may be admitted in a civil action as to the causal relationship between noncompliance and the injuries alleged, in a products liability claim, except where the claim is related to a failure of the seat belt"); **see also** Tenn. Code. Ann. § 55-9-604. In certain states, the evidence of the failure to comply with the seat belt requirement is only admissible in a civil action as evidence of comparative negligence. **See** Fla. Stat. § 316.614(9). Some jurisdictions permit the evidence of a violation of the statute only to mitigate damages for pain and suffering. **See** Colo. Rev. Stat. § 42-4-237(7). In California, in a civil action, violation of the statute "does not establish negligence as a matter of law or negligence per se for comparative fault purposes, but negligence may be proven as a fact without regard to the violation." **See**, Cal. Veh. Code § 27315(j). Some state statutes provide that the evidence is admissible only to mitigate damages,

reducing a plaintiff's recovery by an amount not to exceed a certain fixed percentage after any reductions for comparative fault. **See** Iowa Code Ann. § 321.445(4)(b); Mo. Rev. Stat. § 307.178(4). Legislation enacted in Kansas provides that "[e]vidence of failure of any person to use a safety belt shall not be admissible in any action for the purpose of determining any aspect of comparative negligence or mitigation of damages." **See** Kan. Stat. Ann. § 8-2504(c); **see also** Del. Code Ann. tit. 21 § 4802(i); La. Rev. Stat. Ann. § 32.295.1(E). In Michigan, failure to wear a seat belt may be considered as evidence of negligence, reducing recovery by no more than five percent. **See** Mich. Comp. Laws § 257.710(e)(7). The Nebraska statute provides that the evidence is not admissible as to liability or causation, but may be admissible as evidence concerning mitigation of damages, not to exceed five percent. **See** Neb. Rev. Stat. § 60-6,273; **see also** Or. Rev. Stat. Ann. 31.760 (admissible as to mitigation of damages not to exceed five percent, unless nonuse "is a substantial contributing cause of the accident itself"). New York permits evidence of noncompliance only in mitigation of damages, but not in any civil action in regard to liability. N.Y. Vehicle & Traffic Law § 1229-c(8). In West Virginia, seat belt non-use is not admissible as evidence of negligence, contributory or comparative, or in mitigation of damages, but the court may conduct an *in camera* hearing to determine if it is a proximate cause of the injuries. If the court finds proximate cause, the statute then addresses the issue of mitigation of damages. **See** W. Va. Code § 17C-15-49(d). In the District of Columbia, evidence of non seat belt use is not admissible as "evidence of negligence, evidence of contributory negligence, or a basis for a civil action for damages," nor in mitigation of damages. **See** D.C. Code Ann. § 50-1807; **see also** Ga. Code Ann. § 40-8-76(d); Md. Transp. Code Ann. § 22-412.3(h). In Ohio, the evidence is not admissible as evidence of negligence or contributory negligence, but may "diminish a recovery of compensatory damages that represents noneconomic loss." Ohio Rev. Code Ann. § 4513.263(F)(1), (2)(a), (b), (c). In some jurisdictions, the use or nonuse of a seat belt is not admissible in any civil suit. **See** Conn. Gen. Stat. § 14-100 (C)(3); Oak. Stat. tit. 47, § 12-420; Wyo. Stat. Ann. § 31-5-1402(f). In Wisconsin, the evidence is "admissible in any civil action for personal injuries or property damages resulting from the use or operation of a motor vehicle." **See** Wis. Stat. § 347.48(g).

Case law from other jurisdictions is similarly disparate. In **Waterson v. Gen.I Motors Corp.**, 111 N.J. 238, 251, 544 A.2d 357, 363 (1988), the court noted that as to the admissibility of seat belt evidence in a strict-liability context, the law was in a "state of flux." **See** Lindsey C. Boney IV, *Forum Shopping Through the Federal Rules of Evidence*, 60 Ala. L. Rev. 151, 162 n.58 (2008) (discussing comprehensively the exclusion of seat belt evidence).