

# REVISITING ALABAMA'S SEAT BELT DEFENSE: IS THE FAILURE TO BUCKLE UP A DEFENSE IN AEMLD<sup>1</sup> CLAIMS?

The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.

The Federalist<sup>2</sup>

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1. While the focus of this Comment is on AEMLD claims, the general analysis also serves as a starting point for developing seat belt non-use defenses associated with traditional negligence claims. The authority in this Comment should be used with caution in a traditional negligence action, though. Although the contours of these defenses were taken from existing common law, many AEMLD claims have defined and interpreted the available defenses. Thus, it is not always obvious whether the pre-AEMLD definitions of these doctrines were left intact, modified, or simply interpreted in light of the new product liability theory. Differences may exist in the defenses as interpreted under the negligence and AEMLD doctrines.

2. THE FEDERALIST NO. 78 (Alexander Hamilton).

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## I. INTRODUCTION

Nearly one hundred years ago, a young salesman called on an inventor who was building a car in the shed behind his house.<sup>3</sup> The salesman worked for the Columbus Buggy Works in Detroit, Michigan; the inventor had a vision to build a "low-priced car that the farmers and the workers could afford."<sup>4</sup>

The inventor was "looking for solid-rubber tires,"<sup>5</sup> but the salesman suggested that the man try his new product—pneumatic tires pressurized with air.<sup>6</sup> Later, as the car builder left the salesman's warehouse with four of the new tires, he mentioned, "I may be back for more."<sup>7</sup>

This off-hand remark might well rank as one of the biggest understatements made by Henry Ford to his lifelong friend Harvey S. Firestone. In 1906, Ford placed an order for 2,000 tires which, at that time, was "the largest single contract for tires yet signed by an automobile manufacturer."<sup>8</sup> Over the years, Harvey Firestone sold Henry Ford millions of tires.<sup>9</sup> In fact, during the late 1990s, Firestone's company

3. JAMES D. NEWTON, UNCOMMON FRIENDS: LIFE WITH THOMAS EDISON, HENRY FORD, HARVEY FIRESTONE, ALEXIS CARREL, & CHARLES LINDBERGH 48 (1987).

4. *Id.*

5. *Id.* Solid rubber tires were "the old carriage tires that were in use then." *Id.*

6. *Id.*

7. NEWTON, *supra* note 3, at 48.

8. ALLAN NEVINS, FORD: THE TIMES, THE MAN, THE COMPANY 399 (1954). Another commentator placed the 1906 order for Model-T tires at 8,000. Miles Moore, *Action Last Straw for Tire Maker*, RUBBER & PLASTICS NEWS, May 28, 2001, available at 2001 WL 8740034.

9. The August 9, 2000 recall potentially affected over fourteen million tires. NAT'L HIGHWAY TRANSP. SAFETY ADMIN., *Firestone Tire Recall: General Information*, at

was the exclusive supplier of tires on the popular Ford Explorer.<sup>10</sup>

Harvey Firestone, of course, founded Firestone Tire and Rubber Company, and Henry Ford founded Ford Motor Company.<sup>11</sup> Together, these men produced some of our nation's most recognizable products. Moreover, Ford and Firestone were lifelong friends.<sup>12</sup> They took annual camping expeditions and spent much of their free time together.<sup>13</sup> Ford Motor Company's current Chief Executive, William Clay Ford, Jr., is even the great-grandson of Henry Ford and Harvey Firestone.<sup>14</sup> Yet the relationship that joined the families was more than a marriage of persons; it was also a marriage of businesses founded in the solid friendship between the two men.<sup>15</sup> Henry Ford once remarked that he "could trust . . . [Harvey Firestone's] word all the way."<sup>16</sup>

Ford and Firestone have long since passed away and their companies have grown to mammoth proportions.<sup>17</sup> Few remember the chance meeting between these two men that shaped the course of America's automotive industry. Even fewer remember Harvey Firestone's early obsession with quality.<sup>18</sup> Unfortunately, many of us will only recall the

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<http://www.nhtsa.dot.gov/hot/Firestone/Index.html> (last visited Mar. 6, 2002). According to NHTSA, "[m]ost of the tires in question were original equipment on Ford vehicles, primarily the Ford Explorer, although a small number were used as original equipment on other manufacturers' vehicles, and they have been used as replacement tires on a wide variety of models." *Id.*

10. Timothy Aepfel & Stephen Power, *Another Firestone Tire Brand Is Probed*, WALL ST. J., Oct. 2, 2000, at A3, available at 2000 WL-WSJ 26611575.

11. *Nasser's nightmare: The woes of Ford and Firestone*, THE ECONOMIST, June 16, 2001, at 1, available at 2001 WL 7319404.

12. NEWTON, *supra* note 3, at 99-100 (discussing the loss felt by Ford after the death of his friend); see also Bridgestone/Firestone, Inc., *History: 100 Years of Firestone*, at [http://www.firestone100.com/history/100years\\_fr.html](http://www.firestone100.com/history/100years_fr.html) (last visited Mar. 21, 2001) ("Henry Ford, Thomas Edison and Harvey S. Firestone were not only some of the century's greatest inventors, they were also friends.").

13. NEWTON, *supra* note 3, at 16; Mark Hosenball et al., *Bill Ford, Pitchman: 'If You Don't Like Me, Get Somebody Else'*, NEWSWEEK, Mar. 4, 2002, at 6, available at 2002 WL 7293892.

14. Linda A. Moore, *Firestone Worse for Wear After its Handling of Breakup with Ford*, COM. APPEAL (Memphis, Tenn.), June 29, 2001, at C2, available at 2001 WL 19319604. William Clay Ford, Jr. is the son of Henry Ford's grandson, William Clay Ford, and Firestone's granddaughter, Martha Parke Firestone. David Olive, *Ford-Firestone Union Goes Back a Long Way: Relationship Ends 53 Years After "Wedding of Century"*, CHICAGO SUN-TIMES, May 28, 2001, at 44, available at 2001 WL 7232537. Ironically, Henry Clay Ford, Jr. was forced to "put aside the fact his mother is a member of the Firestone family" when he criticized the tire-maker for its role in the sport utility vehicle rollovers. *Id.*

15. NEWTON, *supra* note 3, *passim*.

16. *Id.* at 99.

17. Ford reported 2000 automotive sales exceeding \$141 billion. FORD MOTOR CO., 2000 ANNUAL REPORT 51 (2001), available at <http://www.ford.com/en/ourCompany/investorInformation/companyReports/2000annualReport/printable.htm> (last visited Mar. 6, 2002). Bridgestone Corporation, the parent company of Bridgestone/Firestone, Inc., reported 2001 worldwide sales of "about \$17.5 billion." Bridgestone-Firestone Corp., *News: Corporate News, Bridgestone Corporations Announces 2001 Consolidated Financial Results* (Feb. 22, 2001), at [http://mirror.bridgestone-firestone.com/news/news\\_corporate\\_fr.html](http://mirror.bridgestone-firestone.com/news/news_corporate_fr.html) (last visited Mar. 6, 2002).

18. NEWTON, *supra* note 3, at 76-77 (recounting that, in 1932, Harvey Firestone ceased

crisis that ended the relationship between the companies these men founded.<sup>19</sup>

On August 8, 2000, Bridgestone/Firestone<sup>20</sup> began a voluntary recall of certain tires that were sold on Ford sport utility vehicles.<sup>21</sup> At the heart of the highly publicized dispute between the two companies was Ford's reported recommendation "that vehicle owners keep their tires inflated to 26 pounds a [sic] square inch, a relatively low pressure that would help smooth the ride for passengers."<sup>22</sup> In turn, Bridgestone/Firestone reportedly claimed that, although its investigations "pinpointed a number of manufacturing defects, . . . tires inflated to the recommended pressure had a narrower margin of safety than previously thought."<sup>23</sup> The tire manufacturer asserted that "the vehicle load levels, when coupled with the tire pressure initially specified for the Ford Explorer with the P235/75R15-size tire, resulted in a tire that was approaching the limits of its load-carrying capacity."<sup>24</sup> And though it is unlikely the last development in the ongoing dispute, in June of 2001 Ford voluntarily recalled all Firestone Wilderness AT tires installed on its vehicles.<sup>25</sup> Ultimately, despite intense government and media scrutiny, the root cause of the failures may well remain mired in these unsettled allegations and a string of confidential settlements with injured consumers.<sup>26</sup>

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manufacturing and ordered his engineers to "come up with a [new] tire within forty-eight hours" following tread separation on automobiles equipped with Henry Ford's powerful new V-8 engine).

19. Tom Incantalupo, *Ford-Firestone Split: Angry Tiremaker Ends Alliance Dating to 1906*, *NEWSDAY*, May 22, 2001, at A07, available at 2001 WL 9232582.

20. In 1990, Bridgestone USA merged with The Firestone Tire and Rubber Company. Bridgestone/Firestone, Inc., *Company Profile*, at [http://www.bridgestone-firestone.com/Corporate/Profile\\_fr.html](http://www.bridgestone-firestone.com/Corporate/Profile_fr.html) (last visited Mar. 21, 2001).

21. Bill Vlasic et al., *Tire Woes Shut 3 Ford Plants*, *DETROIT NEWS*, Aug. 22, 2000, available at 2000 WL 3488762.

22. Robert L. Simison, *Ford Draws on Goodyear to Help Avert Concerns Over Tire-Pressure Information*, *WALL ST. J.*, Aug. 22, 2000, at A12, available at 2000 WL-WSJ 3040948.

23. Timothy Aeppel et al., *Firestone Admits Manufacturing Problems But Also Scrutinizes Tire-Inflation Levels*, *WALL ST. J.*, Dec. 20, 2000, at A3, available at 2000 WL-WSJ 26620524 (stating that "in September [Ford] boosted its recommendation for tire inflation pressure from 26 pounds a [sic] square inch to between 26 and 30 PSI").

24. *Id.* at A8.

25. See Joseph B. White et al., *Ford Intends to Replace Millions of Tires: Congress Wants to Renew Hearings on Explorers and Firestone Products*, *WALL ST. J.*, May 23, 2001, at A3, available at 2001 WL-WSJ 2864418; see also Ford Motor Co., *Ford Firestone Wilderness AT Program*, at <http://fordfirestonewildernessatprogram.ford.com/amiaffected.html> (last visited July 15, 2001). Henry Ford likely would have approved of the expensive recall. He once remarked that it is Ford's "first duty to do the right thing, and this will earn us the right money." *NEWTON*, *supra* note 3, at 104.

26. See Davan Maharaj, *Firestone Recall Boosts Efforts to Reduce Settlement Secrecy*, *HOUSTON CHRON.*, Sept. 10, 2000, at 8, available at 2000 WL 24510504; Davan Maharaj, *Observers Say Firestone's Problem Shows Suit-secrecy Agreement Flaw*, *ORLANDO SENTINEL*, Sept. 24, 2000, at G4, available at 2000 WL 26428250. Interestingly, one commentator noted that, despite repeated testing to try and simulate an accident following failure of a tire on Ford



Although the Firestone tire recall raises a host of legal issues, this Comment will only focus on one—the controversial seat belt defense. A 1997 study by the National Highway Transportation and Safety Administration (NHTSA) noted that, on average, 42,000 people die each year in automobile accidents.<sup>27</sup> Nevertheless, in 1997 it was estimated that seat belt usage averaged only 69% nationwide.<sup>28</sup> That same year, NHTSA estimated that increasing national seat belt use to 90% would save 5,536 lives per year, 132,670 injuries per year, and \$8.8 billion per year.<sup>29</sup> A similar 1996 study noted that the average inpatient medical charge for unbelted passenger vehicle drivers was more than 55% greater than the average charge for those who were belted.<sup>30</sup>

The recent recall of Firestone tires, coupled with the significant number of drivers that do not wear seat belts, implicates an arguably unresolved legal question for Alabama practitioners. Namely, is evidence of a plaintiff's failure to use an available seat belt admissible to defend against a product liability claim involving a defective tire?<sup>31</sup> To answer that question, this Comment analyzes the intersection between two legal theories—the Alabama Extended Manufacturer's Liability Doctrine (AEMLD) and the so-called seat belt defense. Part II of this Comment provides a very brief overview of the AEMLD cause of action and then analyzes the available AEMLD defenses as they relate to seat belt non-use. In turn, Part III proposes mitigation of damages as an alternative to these defenses. It analyzes some of the arguments for, and against, the use of mitigation of damages, and it provides an overview of decisions applying the doctrine to the seat belt defense.

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Explorers, testers were "baffled" as to why these accidents were occurring. Csaba Csere, *Why Are Ford Explorers Crashing?*, CAR & DRIVER, Jan. 2001, at 13. The testers were convinced that:

if you experience a tire failure—on an Explorer or any other vehicle—and concentrate on keeping the vehicle rolling straight and on the pavement, you have an excellent chance of bringing it to a safe halt and ensuring that your tire failure remains an inconvenience rather than turning into a tragedy.

*Id.*

27. United States Dep't of Transp. Nat'l Highway Traffic Safety Admin., *Standard Enforcement Saves Lives: The Case for Strong Seat Belt Laws, Introduction*, at <http://www.nhtsa.dot.gov/People/Injury/Airbags/Seatbelt/Intro.htm> (last visited Nov. 28, 2001) ("On America's roads, someone is killed every 13 minutes and someone is injured every nine seconds in traffic crashes.").

28. *Id.* This figure is probably subject to challenge given the high number of states with mandatory seat belt laws. See *infra* note 45.

29. *Id.*

30. United States Dep't of Transp. Nat'l Highway Traffic Safety Admin., *Benefits of Safety Belts and Motorcycle Helmets, Report to Congress February 1996*, at 18, available at <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/CODES/codesrpt.pdf> (last visited Mar. 6, 2002).

31. Obviously the implications of this Comment extend beyond defective tires to other types of product defects that are actionable under Alabama's products liability laws.

## II. THE DOCTRINES CURRENTLY AVAILABLE FOR A SEAT BELT DEFENSE

### A. *A Brief Overview<sup>32</sup> of the AEMLD Cause of Action*

In 1976, the Alabama Supreme Court implemented a "watershed" change in its existing products liability law and adopted the AEMLD.<sup>33</sup> Rather than wholly accepting the strict no-fault concept advocated under the Restatement (Second) of Torts section 402A,<sup>34</sup> the court took a more conservative approach.<sup>35</sup> The touchstone of the new AEMLD cause of action was "that the defendant manufactured or designed or sold a defective product which, because of its unreasonably unsafe condition, injured the plaintiff or damaged his property when such product, substantially unaltered, was put to its intended use."<sup>36</sup> Rather than adopting a pure strict liability approach, the court retained the fault concept that was "ingrained in Alabama substantive law and in Alabama products liability law prior to 1976."<sup>37</sup> The court also retained certain defenses for the manufacturer.<sup>38</sup> Thus, on its face, the scope of Alabama's "seat belt defense" is not easily defined. Generically, it refers to a category of defensive theories that arise from a plaintiff-driver's failure to properly wear a functioning seat belt.<sup>39</sup> However, in the context of an AEMLD action, a seat belt claim is limited by the scope of the AEMLD defensive theories blessed by the Alabama Supreme Court.

In *Atkins v. American Motor Corp.*, the court enunciated the following four affirmative defenses that may be asserted in an AEMLD action: contributory negligence, lack of causal relation, product misuse, and assumption of risk.<sup>40</sup> The lack of causal relation defense is a limited remedy that likely has no application in seat belt defense actions.<sup>41</sup>

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32. Michael Roberts and Gregory Cusimano provide an excellent—and much more thorough—overview of AEMLD actions in their often-cited treatise on Alabama tort law. See MICHAEL L. ROBERTS & GREGORY S. CUSIMANO, ALABAMA TORT LAW §§ 19.0-19.13, at 559-644 (3d ed. 2000 & Supp. 2001).

33. *Id.* at 560.

34. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

35. ROBERTS & CUSIMANO, *supra* note 32, § 19.0, at 560.

36. *Atkins v. Am. Motors Corp.*, 335 So. 2d 134, 139 (Ala. 1976).

37. D. Alan Thomas & Nancy S. Akel, *Products Liability and Contributory Negligence in the Wake of Williams v. Delta International Machinery Corporation*, 54 ALA. LAW. 261, 262 (1993) (noting that the "court specifically retained this 'fault concept' as a prerequisite for the finding of liability on the part of a defendant manufacturer").

38. *Id.*

39. Peter Schaff, Comment, *The Final Piece of the Seat Belt Evidence Puzzle*, 36 HOUS. L. REV. 1371, 1372 (1999) ("Generally a defendant's attempt to offer evidence of a plaintiff's failure to use an available seat belt is known as the 'seat belt defense.'").

40. 335 So. 2d at 143; see also *Dennis v. Am. Motor Honda Co.*, 585 So. 2d 1336, 1339 (Ala. 1991).

41. In general, this defense is available to a distributor or other reseller of the defective

However, contributory negligence, product misuse, and assumption of risk could serve as bases for a seat belt defense. Consequently, the next three subparts explore these affirmative defenses in the context of seat belt non-use.

### B. Contributory Negligence

Alabama's present doctrine of contributory negligence traces its roots to 1831 when the Supreme Court decided *Bethea v. Taylor*.<sup>42</sup> The continued reliance on this doctrine stands in stark contrast to the vast majority of jurisdictions that have abandoned it in favor of comparative negligence.<sup>43</sup> However, because the use of contributory negligence has been debated *ad infinitum*,<sup>44</sup> this Comment will not discuss the merits (or drawbacks) of adopting a system of comparative negligence, nor will it discuss comparative negligence as it relates to the seat belt defense. Rather, this Comment focuses on the well-established doctrine of contributory negligence and the ways in which that theory affects the seat belt defense.

#### 1. Alabama Statutory Authority

In 1991, Alabama followed suit with a growing number of states<sup>45</sup>

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product. See ROBERTS & CUSIMANO, *supra* note 32, at 614-15. This Comment briefly discusses the defense as it relates to tire manufacturers in Part II.

42. 3 Stew. 482 (Ala. 1831).

43. See *Williams v. Delta Int'l Mach. Corp.*, 619 So. 2d 1330, 1334 (Ala. 1993) (Hornsby, C.J., dissenting) (noting that, by 1993, forty-six states had "replaced the outmoded doctrine of contributory negligence with some form of the doctrine of comparative negligence").

44. See *Williams*, 619 So. 2d at 1333. The *Williams* court stated that:

We have heard hours of oral argument; we have read numerous briefs; we have studied cases from other jurisdictions and law review articles; and in numerous conferences we have discussed in depth this issue and all of the ramifications surrounding such a change. After this exhaustive study and these lengthy deliberations, the majority of this Court, for various reasons, has decided that we should not abandon the doctrine of contributory negligence, which has been the law in Alabama for approximately 162 years.

*Id.*; see also *Campbell v. Ala. Power Co.*, 567 So. 2d 1222, 1227 (Ala. 1990) (Hornsby, C.J., dissenting).

45. The only state without a mandatory seat belt law is New Hampshire. At least one author has noted the interesting irony in New Hampshire's state motto—"Live Free or Die." DAVID G. OWEN ET AL., 2 MADDEN & OWEN ON PRODUCTS LIABILITY 538 n.12 (3d ed. 2000). The remaining forty-nine states and the District of Columbia have enacted mandatory seat belt use laws that cover various combinations of drivers, front seat passenger, and back seat passengers. See, e.g., ALA. CODE. § 32-5B-4 (1999); ALASKA STAT. § 28.05.095 (Michie 2000); ARIZ. REV. STAT. ANN. § 28-909 (West 1998); ARK. CODE ANN. § 27-37-702 (Michie 1994); CAL. VEH. CODE § 27315 (West 2000); COLO. REV. STAT. ANN. § 42-4-237 (West 1997 & Supp. 2001); CONN. GEN. STAT. ANN. § 14-272a (West 1999); DEL. CODE ANN. tit. 21, § 4802 (1995 & Supp. 2000); D.C. CODE ANN. § 50-1802 (2001); FLA. STAT. ANN. ch. 316.614 (Harrison 2000 & Supp. 2000); GA. CODE ANN. § 40-8-76.1 (2001); HAW. REV. STAT. ANN. § 291-11.6 (1999); IDAHO CODE § 49-673 (2000); ILL. COMP. STAT. 12-603.1 (2000); IND. CODE § 9-19-

and enacted legislation mandating seat belt use in passenger cars.<sup>46</sup> Under the Alabama Safety Belt Act of 1991, passenger cars are broadly defined as those "carrying 10 or fewer passengers,"<sup>47</sup> and certain motor vehicles<sup>48</sup> and classes of persons<sup>49</sup> are specifically exempted from compliance with the statute.<sup>50</sup>

Possibly anticipating an unfair benefit of a mandatory seat belt requirement to defendants in automobile crashworthiness<sup>51</sup> and product liability actions, the Alabama Legislature limited the evidentiary value of the new statute.<sup>52</sup> Specifically, section 32-5B-7 states that "[f]ailure to wear a safety belt . . . shall not be considered evidence of contributory negligence and shall not limit the liability of an insurer."<sup>53</sup> The

10-2 (2001); IOWA CODE § 321-445 (2000); KAN. STAT. ANN. § 8-2503 (1999); KY. REV. STAT. ANN. § 189.125 (West 2000); LA. REV. STAT. ANN. § 295.1 (West 2000); MA. REV. STAT. ANN. tit. 29-A § 2081 (West 2000); MD. CODE ANN., TRANSP. § 22-412.3 (2000); MASS. GEN. LAWS ch. 90, § 13A (1999); MICH. COMP. LAWS § 257.710e (2000); MINN. STAT. § 169-686 (2000); MISS. CODE ANN. § 63-2-1 (2000); MO. REV. STAT. § 307.178 (2000); MONT. CODE ANN. § 61-13-102 (Supp. 2001); NEB. REV. STAT. § 60-6,270 (2000); NEV. REV. STAT. 484.641 (2000); N.J. STAT. ANN. § 39:3-76.2f (West 2000); N.M. STAT. ANN. § 66-7-372 (Michie 2001); N.Y. VEH. & TRAF. LAW § 1229-c (McKinney 2000); N.C. GEN. STAT. § 20-135.2a (2000); N.D. CENT. CODE § 39-21-41.4 (2001); OHIO REV. CODE ANN. § 4513.263 (Anderson 2000); OKLA. STAT. tit. 47, § 12-417 (1999); OR. REV. STAT. § 811.210 (1999); 75 PA. CONS. STAT. ANN. § 4581 (2000); R. I. GEN. LAWS § 31-22-22 (2001); S.C. CODE ANN. § 56-5-6520 (Law. Co-op. 2000); S.D. CODIFIED LAWS § 32-38-1 (Michie 2000); TENN. CODE ANN. § 55-9-603 (2000); TEX. TRANSP. CODE ANN. § 545.413 (Vernon 2000); UTAH CODE ANN. § 41-6-182 (2000); VT. STAT. ANN. tit. 23 § 1259 (Supp. 2001); VA. CODE ANN. § 46.2-1094 (Michie 2000); WASH. REV. CODE § 46.61.688 (2000); W. VA. CODE § 17C-15-49 (2000); WIS. STATE. § 347.48 (2000); WYO. STAT. ANN. § 31-5-1402 (Michie 2000).

46. Alabama Safety Belt Act of 1991, 1991 Ala. Acts 255 (codified as ALA. CODE §§ 32-5B-1 to 32-5B-8).

47. ALA. CODE § 32-5B-2 (1999).

48. Motorcycles and trailers are specifically exempted from the definition of a "passenger car." *Id.*

49. Rural mail carriers and children wearing passenger restraints in accordance with Alabama Code section 32-5-222 are among those persons exempted. ALA. CODE §§ 33-5B-4(b)(1), (3) (1997).

50. ALA. CODE § 32-5B-4 (1999).

51. See generally *Ferguson v. BMW*, 880 F.2d 360 (11th Cir. 1989) (applying Alabama law to allow the seat belt defense in a crashworthiness action before enactment of the Alabama Safety Belt Act of 1991). The general application of the seat belt defense to crashworthiness actions is beyond the scope of this Comment. However, as it relates to mitigation of damages, it will be discussed in Part III *infra*.

52. Information regarding the legislative intent of Alabama statutes is difficult to obtain because, like so many other states, the legislature does not publish committee reports, debate records, or comparable material.

53. ALA. CODE § 32-5B-7 (1999). Cf. ARK. CODE ANN. § 27-37-703 (Michie 1994 & Supp. 2001) (mandating that the failure of an occupant to wear a seat belt "properly adjusted and fastened" is not admissible in a civil action for any purpose); MICH. COMP. LAWS ANN. § 257.710e (West 2001) (allowing evidence of seat belt non-use as evidence of negligence but limiting "the recovery for damages [to] no more than 5%" of the plaintiff's claim); OR. REV. STAT. § 18.590 (2001) (allowing evidence of failure to wear a seat belt "to mitigate the injured party's damages . . . [up to] five percent of the amount to which the injured party would otherwise be entitled"); TENN. CODE ANN. § 55-9-604 (2000) (excluding evidence of failure to wear a seat belt as a general rule but allowing it "as to the casual relationship between non-compliance and the injuries alleged" in a properly plead products liability claim).



intention of the law seems clear—front seat occupants must wear a seat belt, but failure to wear one will not bar a cause of action under the harsh contributory negligence standard. Unfortunately, a subsequent 5-4 decision in *General Motors Corp. v. Saint*<sup>54</sup> seemingly cast doubt on the notion of a straightforward application of the statute.

## 2. Alabama Common Law Authority

*General Motors Corp. v. Saint* involved a claim that the seat belt assembly on certain GM vehicles failed to protect the driver in a crash.<sup>55</sup> The plaintiff-driver, Pamela Saint, suffered severe and permanent brain damage after she lost control of her 1984 Chevrolet Celebrity and it collided with a tree.<sup>56</sup> The defective design in question was a "comfort feature" which allowed slack to develop in the seat belts and allegedly caused them to perform improperly during a crash.<sup>57</sup> Specifically, Ms. Saint claimed that her seat belt's failure caused the enhanced injuries she sustained in the accident.<sup>58</sup> By contrast, General Motors argued that Ms. Saint "was not wearing her seat belt or, in the alternative, that she put the slack in her seat belt" which caused it to malfunction.<sup>59</sup> The trial court denied General Motors a jury charge on contributory negligence and subsequently awarded Pamela Saint \$13 million.<sup>60</sup> General Motors appealed the denial of its proposed jury charge, providing the Alabama Supreme Court an opportunity to revisit the seat belt defense.<sup>61</sup>

On appeal, Pamela Saint claimed that "traditional contributory negligence" was unavailable in an AEMLD action and that General Motor's only available defense was product misuse.<sup>62</sup> The court rejected Ms. Saint's interpretation of the law, discussing two broad categories of "contributory negligence."<sup>63</sup> The first category arises when a plaintiff negligently handles or uses a defective product.<sup>64</sup> The second category arises whenever a plaintiff is contributorily negligent in *causing an accident*.<sup>65</sup> The next two subparts address these so-called categories of contributory negligence and their application to the seat belt defense.

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54. 646 So. 2d 564 (Ala. 1994).

55. *Saint*, 646 So. 2d at 565.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 566.

60. *Saint*, 646 So. 2d at 565.

61. *Id.*

62. *Id.*

63. *Id.* at 566-68.

64. *Id.* at 568.

65. *Saint*, 646 So. 2d at 565; see also *Culpepper v. Hermann Weirauch KG*, 991 F. Supp. 1397, 1399 (M.D. Ala. 1997) (applying Alabama law).



a. "Negligent Handling" or "Negligent Use" in the Seat Belt Context

The first category of contributory negligence discussed in *Saint* involves either the negligent handling or negligent use of a defective product.<sup>66</sup> At the outset, it should be noted that the court's majority distinguished this so-called negligent use concept from product misuse.<sup>67</sup> According to the court, the defense of product misuse is available when a plaintiff uses a product "in a manner not intended or foreseen by the manufacturer."<sup>68</sup> By contrast, the court stated that a "plaintiff is contributorily negligent in handling a defective product when he or she fails to use reasonable care with regard to that product."<sup>69</sup> While this dubious and confusing distinction in AEMLD cases has been criticized by some members of the court,<sup>70</sup> this aspect of *Saint* has not been explicitly rejected and will be accepted for purpose of discussion.

The *Saint* court reiterated that failure to use reasonable care in the use of a defective product is a viable defense in an AEMLD claim.<sup>71</sup> In *Saint*, because there was evidence that GMC knew of the danger associated with misuse of the seat belt, the court held that product misuse was unavailable to GMC without addressing whether this theory conflicted with section 32-5B-7 of the Alabama Code.<sup>72</sup> Based on the available evidence, the court determined that a jury could find that "Ms. Saint did not use her seat belt in an unintended or unforeseen manner."<sup>73</sup> More significantly, the Alabama Supreme Court found evidence<sup>74</sup> to support a jury charge of contributory negligence in "negligent handling" of the seat belt.<sup>75</sup> A jury thus could have found Pamela Saint contributorily negligent if she failed to exercise reasonable care in using her defective seat belt.<sup>76</sup> As a result, because *Saint* seemingly stands for the proposition that *some* form of contributory negligence is allowed in an AEMLD action involving a seat belt, it would appear that the majority's negligent handling rule robbed section 32-5B-7 of its full

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66. *Saint*, 646 So. 2d at 568. But see ALABAMA PATTERN JURY INSTRUCTIONS—CIVIL 32.19.1 (Supp. 2000) (including pattern jury instructions for a "Product Misuse Defense" but not for a negligent handling defense).

67. See *Saint*, 646 So. 2d at 568.

68. *Id.* Product misuse is discussed in more detail in Part III.B *infra*.

69. *Id.* See also THOMAS & AKEL, *supra* note 37, at 263-65 (discussing the relationship between product misuse and contributory negligence under Alabama law).

70. See, e.g., *Saint*, 646 So. 2d at 569-72 (Ingram, J., dissenting).

71. *Id.* at 568.

72. *Id.*

73. *Id.*

74. Ms. Saint's own expert witness indicated that "she allowed slack to remain in her seat belt." *Id.* at 568.

75. *Saint*, 646 So. 2d at 568.

76. *Id.*

force. This begs an obvious question—how can the Alabama Supreme Court square its holding with section 32-5B-7? At least one answer is that it didn't need to.

One explanation for *Saint* is that the court merely addressed the *improper use* of a seat belt. An even narrower interpretation might posit that *Saint* only addressed the improper use of a *defective* seat belt. By contrast, section 32-5B-7 only prohibits evidence of "failure to wear" a safety belt.<sup>77</sup> Read literally, the Code of Alabama does not address the situation where a safety belt is adjusted to an incorrect height, fastened in a negligent manner, or simply worn incorrectly.<sup>78</sup> The fact that the court stopped short of addressing GMC's claim that Pamela Saint was not wearing her seat belt lends support to this interpretation.<sup>79</sup> Furthermore, it is simply implausible that the supreme court completely ignored the Alabama Safety Belt Use Act in reaching its decision. The conspicuous absence of a statutory discussion is consistent with the *Saint* court's recognition of the distinction between the total failure to wear a seat belt and the negligent handling (or use) of a seat belt.<sup>80</sup> The fact that the court noted a distinction between improper use and non-use further suggests that it did not intend to overrule section 32-5B-7.<sup>81</sup> This reading of *Saint* effectively avoids a conflict between the court's rationale and the legislature's directive, and it leaves section 32-5B-7 completely intact.

An opposing interpretation might posit that *Saint* implicitly recognizes the existence of several variations of contributory negligence and that, by allowing only one variation of contributory negligence, the supreme court has effectively interpreted the Alabama Code to bar only certain *types* of contributory negligence. This argument is not very well grounded, though. Again, the court did not even mention the code in its decision, and it is highly unlikely that *Saint* provides a statutory interpretation of 32-5B-7 "between the lines." It is doubtful that the Alabama Supreme Court would attempt to invalidate or modify section 32-5B-7 without even mentioning its existence—there are much easier ways to construe statutes.

So where does *Saint* leave the seat belt defense in the much more likely case of complete failure to wear a seat belt? Section 32-5B-7 will probably bar most, if not all, non-use claims that are based on the

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77. ALA. CODE § 32-5B-7 (1999).

78. *See id.*

79. The court merely noted that the question of "[w]hether Ms. Saint was, in fact, wearing her seat belt was hotly contested at trial, with testimony from each side supporting its position." *Saint*, 646 So. 2d at 566.

80. *Id.* (noting that "GM maintains that Ms. Saint was not wearing her seat belt or, in the alternative, that she put the slack in her seat belt").

81. *See id.*

premise that the plaintiff was contributorily negligent because he failed to wear a seat belt.<sup>82</sup> No matter how you slice the non-use argument—even as a failure to use an available device that was an integral part of the whole vehicle—it is going to be hard for defendants to avoid the restrictions of section 32-5B-7. At the very least, though, *Saint* stands for the proposition that the doctrine of contributory negligence is alive and well in the context of improper handling or improper use of a defective seat belt in an AEMLD claim.<sup>83</sup> Fortunately for plaintiffs, extending the doctrine to complete non-use requires another step forward.

*b. "Accident Causation" in the Seat Belt Context*

The second type of *contributory negligence*, which one member of the court and Pamela Saint referred to as "traditional contributory negligence," is probably unavailable as a defense in an AEMLD action involving seat belt non-use.<sup>84</sup> As discussed above, section 32-5B-7 likely precludes evidence of non-use to show contributory negligence.<sup>85</sup> Yet, to reach any clearer conclusion about the effect of Alabama case law on seat belt non-use and the so-called accident causation variety of contributory negligence, it is necessary to adopt an interpretation of law that is neither settled nor intuitive. For instance, it is not perfectly clear whether Alabama case law would bar a claim that a plaintiff's enhanced injuries were caused by the failure to use a seat belt (i.e., the plaintiff sustained injuries that could have been prevented with a seat belt). To answer this question, it is perhaps helpful to first address an important (albeit confusing) decision dealing with accident causation as it relates to contributory negligence in an AEMLD action—*Dennis v. American Honda Motor Co.*<sup>86</sup>

In *Dennis*, the Alabama Supreme Court addressed a dispute over an allegedly defective motorcycle helmet and seemingly held that traditional contributory negligence was unavailable as a defense in an

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82. See ALA. CODE § 32-5B-7 (1999).

83. See *Saint*, 646 So. 2d at 564-68. In a much broader sense, it is clear that the affirmative defense of contributory negligence is alive and well in actions involving simple negligence. See *Campbell v. Cutler Hammer, Inc.*, 646 So. 2d 573 (Ala. 1994).

84. *Id.* at 565, 571 (Ingram, J., dissenting). Though the majority does not explicitly refer to this as "traditional contributory negligence," the court's definition is in agreement with the commonly accepted meaning of contributory negligence. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 65 (5th ed. 1984) (defining contributory negligence as "conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection"); cf. *Melia v. Ford Motor Co.*, 534 F.2d 795, 801 (8th Cir. 1976) (utilizing the term "traditional 'contributory negligence' . . . [as] a failure to discover a defect or to guard against it").

85. ALA. CODE § 32-5B-7.

86. 585 So. 2d 336, 1337 (Ala. 1991).

AEMLD action.<sup>87</sup> The plaintiff, Autrey Dennis, sustained permanent injuries after his motorcycle collided with a log truck.<sup>88</sup> He later brought suit against the manufacturer of the used helmet he was wearing at the time of the accident.<sup>89</sup> Dennis claimed that the Honda motorcycle helmet "was not fit for its particular purpose" and that it failed to protect his head during the accident.<sup>90</sup> He introduced evidence at trial that the "log truck was making a wide right turn (using two lanes of traffic)" and claimed that, while the truck driver's negligence was the ultimate cause of the accident, the helmet did not perform its intended function.<sup>91</sup> Testimony from the driver of the truck and witnesses to the accident contradicted Dennis's claims and indicated that he "was speeding and ran into the back of the log truck."<sup>92</sup> As a consequence, Honda claimed that Autrey Dennis's negligent driving and/or his negligent use of the helmet "proximately caused or proximately contributed to cause" his injuries.<sup>93</sup>

The Alabama Supreme Court ultimately rejected Honda's theory and denied the use of accident causation to counter Dennis's AEMLD claim.<sup>94</sup> Because the crux of an AEMLD action is that the defendant placed an unreasonably dangerous product on the market, the court reasoned that a "plaintiff's mere inadvertence or carelessness in causing an accident should not be available as an affirmative defense."<sup>95</sup> In other words, Autrey Dennis's careless operation of the motorcycle was irrelevant to his claim that the Honda helmet was defective.<sup>96</sup>

The *Dennis* holding seems rather straightforward as applied to defective motorcycle helmets and negligent driving. However, application of *Dennis* to seat belt non-use is deceptively difficult—while *Saint* might seem to limit *Dennis*,<sup>97</sup> the relationship between *Dennis* and seat belt non-use is confusing and unsettled. At the very least, *Dennis* seemingly stands for the straightforward proposition that, "as it relates to *accident causation*, contributory negligence is not a proper defense in AEMLD cases."<sup>98</sup> Notwithstanding the obvious restrictions of section

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87. See *Dennis*, 585 So. 2d 1339-41.

88. *Id.* at 1336.

89. *Id.* at 1336-37.

90. *Id.* at 1337.

91. *Id.*

92. *Dennis*, 585 So. 2d 1337.

93. *Id.* at 1338.

94. *Id.* at 1339 (holding that "the defense of contributory negligence as it related to accident causation was not a defense to recovery under this AEMLD claim").

95. *Id.*

96. See *id.* at 1339-40.

97. At the very least, the *Saint* majority distinguished *Dennis*. Accord ROBERTS & CUSIMANO, *supra* note 32, § 19.9, at 626. The majority noted that it was addressing a "contributory negligence" situation that was "the reverse of that in *Dennis*." *Saint*, 646 So. 2d at 565-66.

98. *Saint*, 646 So. 2d at 570 (Ingram, J., dissenting) (noting that "[t]he effect of . . . *Dennis*



32-5B-7,<sup>99</sup> *Dennis*'s bar on the use of the accident causation variety of contributory negligence as a defense in an AEMLD action might seem irrelevant to the seat belt issue. In a very literal sense, it is logical to conclude that the failure to wear a seat belt does not *cause* an accident<sup>100</sup>—the defective product caused the accident. Under this view, the *Dennis* notion of accident causation would not even apply to non-use.

Yet, while this perspective on the relationship between seat belts and accident causation is tempting, it is unlikely to be shared by all litigants or all courts. An excellent counter-argument exists that an unbelted defendant's injuries are, at least partially, the result of unrestrained movement within the vehicle. In other words, had the driver been wearing a seat belt, at least some injuries would not have occurred.

For instance, when an unbelted driver is thrown completely from a vehicle, it might be argued that, but for seat belt non-use, he would have never been ejected. Moreover, if the plaintiff were thrown from a vehicle that subsequently rolls over him and causes fatal injuries, it is arguable that, had he been wearing a seat belt, he would not have been killed.<sup>101</sup> Likewise, it is understandable that many defendants would want to assert non-use to counter crashworthiness claims. Pamela Saint asserted that "her car was not crashworthy because . . . its seat belt assembly failed to protect [her] . . . adequately from enhanced injuries she sustained in the accident."<sup>102</sup> Without a doubt, it would have been absurd to allow her to allege that her car was defective because the seat belt did not function, and then to deny GMC the benefit of some variant of the seat belt defense. As one commentator noted, "[w]hen the shoe is on the other foot, defendants are readily held liable for the damage they did in fact cause or the damage they made worse, even if they did not cause the accident or initial injury."<sup>103</sup>

Obviously, in an AEMLD action, these counter-arguments will need

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was to bifurcate accident causation from products liability claims").

99. It seems logical that plaintiffs should at least attempt to argue that *Dennis* precludes some evidence of traditional contributory negligence that is not already precluded by section 32-5B-7.

100. *But see* *Kington v. Camden*, 507 P.2d 700 (Ariz. Ct. App. 1973) (finding that the driver's failure to fasten her seat belt caused her to lose control of the vehicle).

101. *See, e.g.,* *Tempe v. Giacco*, 442 A.2d 947, 948 (Conn. Super. Ct. 1981) (noting that seat belt non-use is not "under ordinary conditions of travel . . . legally sufficient to support the defense of contributory negligence," but where a passenger was warned "not to lean up against the [faulty] passenger door" . . . a reasonable person would, under the circumstances surrounding the accident, have fastened her seat belt").

102. *Saint*, 646 So. 2d at 565.

103. DAN B. DOBBS, *THE LAW OF TORTS* § 205, at 516-17 n.16 (2000) (referencing the example where a "manufacturer is held liable for defects in a car that make injuries worse when those injuries are caused by other drivers" and citing *Caiazza v. Volkswagenwerk, A.G.*, 647 F.2d 241 (2d Cir. 1981)).



to overcome the logical assertion that, but for the defendant's defective product, the initial accident would never have occurred. However, the difficulty posed by this catch-22 will not be addressed except as a point for further discussion. For now, we must return to the problems posed by *Dennis* because, once a court accepts the notion that non-use is admissible for some purpose other than to show contributory negligence, the next question will inevitably be whether *Dennis* precludes that purpose.

To avoid the *Dennis* bar precluding evidence of seat belt non-use as the source of secondary injuries from a crash, it is crucial to characterize the scope of that decision. First, *Dennis* applies only to contributory negligence.<sup>104</sup> Any claims regarding non-use outside the realm of contributory negligence should not be affected.<sup>105</sup> Moreover, *Dennis* addressed a situation that is not analogous to seat belt non-use.<sup>106</sup> In the typical seat belt defense scenario, the manufacturer would claim that an available safety device (i.e., the seat belt) was not used. By contrast, *Dennis* involved a very unique set of facts. In *Dennis*, the issue was not that the safety device (i.e., the motorcycle helmet) was not used, but rather that the plaintiff caused the accident.<sup>107</sup> Honda tried to avoid liability for an inadequate safety device by invoking the complete bar of contributory negligence, but the "contributory negligence" was wholly unrelated to the safety device.<sup>108</sup> In the current context, the *Dennis* bar might arise if the defendant claimed that the plaintiff's reckless driving precluded AEMLD recovery for injuries resulting after a tire failure.<sup>109</sup> It should not arise from a claim that the defendant did not use the available safety device (i.e., the seat belt).<sup>110</sup>

Second, the defective product was the safety device in *Dennis*.<sup>111</sup> Likewise, if the defendant-manufacturer claims that the seat belt should be viewed as part-and-parcel of the entire vehicle, the "defective product" includes the safety device. It follows that a plaintiff might logically argue that, because the alleged cause of the secondary injuries was the failure to wear a seat belt, *Dennis* would bar that defense. However, under the second-injury formulation proposed in Part III of this Comment, seat belt non-use does not implicate contributory negligence—the seat belt defense implicates damage allocation. As discussed later, some variation of a seat belt defense should thus be allowed as it relates to

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104. See *Dennis*, 585 So. 2d at 1342.

105. See *id.*

106. See *id.* at 1336-38.

107. See *id.* at 1336-40.

108. *Id.*

109. See *Dennis*, 585 So. 2d at 1339-43.

110. See *id.*

111. See *id.* at 1336-37.

the amount of damages the plaintiff can recover.<sup>112</sup> *Dennis* should not have any affect on this type of "defense."

In short, it is completely foreseeable that courts would deny evidence of a plaintiff's failure to use a seat belt as contributory negligence—section 32-5B-7 can easily be read to preclude evidence of non-use for this purpose.<sup>113</sup> However it is unnecessary and incorrect to rely on *Dennis* to bar all evidence of non-use.

### C. Product Misuse

#### 1. Alabama Code Section 32-5B-7 as a Bar to the Product Misuse Defense

The Alabama Safety Belt Act bars evidence of failure to wear a safety belt to show "contributory negligence," but the act does not mention the remaining AEMLD defenses.<sup>114</sup> Arguably, the contributory negligence restriction might also apply to the other defenses available in an AEMLD action. In other words, section 32-5B-7 bars a claim of contributory negligence, so why should it not also bar product misuse or assumption of risk? Unfortunately, this question is difficult to answer because the scope of the term "contributory negligence" is not clearly delineated by Alabama law.

To quote the Alabama Supreme Court, "[w]ords used in a statute must be given their natural, plain, ordinary, and commonly understood meaning."<sup>115</sup> Where the "language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect."<sup>116</sup> Under this statutory canon, the plain language of section 32-5B-7 makes it applicable only to actions involving "contributory negligence."

The fact that contributory negligence is a distinct legal concept lends strong support to the argument that the term is limited to its traditional meaning, yet the court has not always given the contributory negligence its "plain meaning." On more than one occasion, the court has blurred the distinction between contributory negligence and product misuse.<sup>117</sup> For instance, when the *Atkins* court fashioned the AEMLD doctrine, it noted that "the defense of contributory negligence [was]

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112. See *id.* at 1338-43.

113. See ALA. CODE § 32-5B-7 (1999).

114. *Id.*

115. *Blue Cross & Blue Shield of Ala., Inc. v. Nielsen*, 714 So. 2d 293, 296 (Ala. 1998) (quoting *Ex parte Holladay*, 466 So. 2d 956, 960 (Ala. 1985)).

116. *Nielson*, 714 So. 2d at 296.

117. *Dennis v. Am. Honda Motor Co.*, 585 So. 2d 1336 (Ala. 1991); *Atkins v. Am. Motor Corp.*, 335 So. 2d 134 (Ala. 1976).

available in proper cases (e.g., plaintiff's misuse of the product).<sup>118</sup> *Dennis* similarly noted that "[t]he defense of contributory negligence in an AEMLD action should be limited to assumption of the risk and misuse of the product."<sup>119</sup> These cases lend support to an argument that product misuse is a variant of contributory negligence and would therefore be excluded under section 32-5B-7.

Despite the above references, the Alabama Supreme Court has more often than not distinguished the two theories. In *Haisten v. Kubota Corp.*, the court noted that "[c]ontributory negligence is a separate defense from product misuse,"<sup>120</sup> and in *Carruth v. Pittway Corp.*, it stated that misuse "is an affirmative defense to liability under the AEMLD, which the defendant must plead and prove" apart from contributory negligence.<sup>121</sup> *Uniroyal Goodrich Tire Co. v. Hall* similarly noted that "[a]lthough product misuse and assumption of the risk are closely related to the concept of contributory negligence, there are important distinctions" that separate the doctrines.<sup>122</sup> Similarly, in *Culpepper v. Hermann Weirauch KG*, a federal district court cited *Saint* for the proposition that "[f]ailure to use reasonable care in the context of the contributory negligence defense is distinct from the separate affirmative defense of product misuse."<sup>123</sup> Yet, while this characterization of *Saint* is probably correct, it is perhaps important to remember that the *Saint* court was not unanimous on this issue. The *Saint* majority plainly stated that "the theories behind product misuse and contributory negligence are distinct from one another."<sup>124</sup> Justice Hornsby likewise stated in his dissent that "the only relevant defenses in an AEMLD action are '[l]ack of causal relation, product misuse, and assumption of risk' . . . and [that] contributory negligence is not applicable."<sup>125</sup> Justice Ingram also separated the concepts; he advocated retaining the defense of product misuse in AEMLD actions, but concluded that "the majority's decision to continue to incorporate contributory negligence as a defense in products liability cases is a serious impediment to prod-

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118. *Atkins*, 335 So. 2d at 143 (Ala. 1976); see also *Casrell v. Altec Indus., Inc.*, 335 So. 2d 128, 134 (Ala. 1976). It might be argued that the court was really referring to "negligent use" as addressed in *Saint*. If so, the court was using the term "product misuse" quite loosely.

119. 585 So. 2d at 1339.

120. 648 So. 2d 561, 565 (Ala. 1994).

121. 643 So. 2d 1340, 1347 (Ala. 1994).

122. 681 So. 2d 126, 129 (Ala. 1996) (citing Justice Ingram's *Campbell* dissent).

123. 991 F. Supp. 1397, 1399 (M.D. Ala. 1997). More specifically, the district court was referring to the "negligent handling" form of contributory negligence (i.e., "failure to use reasonable care, in actually using the product" as compared to the "plaintiff's negligence in causing the accident"). *Culpepper*, 991 F. Supp. at 1399. If nothing else, this statement is indicative of the lack of clarity in Alabama AEMLD law.

124. *Gen. Motors Corp. v. Saint*, 646 So. 2d 564, 567-68 (Ala. 1994).

125. *Saint*, 646 So. 2d at 568 (Hornsby, C.J., dissenting).

ucts liability law in the state of Alabama.”<sup>126</sup> By contrast, Justices Cook and Kennedy interpreted *Atkins*<sup>127</sup> and *Casrell*<sup>128</sup> “as equating contributory negligence with product misuse.”<sup>129</sup> Justice Cook was “convinced that the [*Atkins* and *Casrell*] Court intended to adopt, in practice, the [Restatement section] 402A concept of contributory negligence.”<sup>130</sup> Though not binding, Justice Cook’s interpretation of *Atkins* and *Casrell* again blurs the distinction between product misuse and contributory negligence and highlights the difficulty in trying to classify the doctrines under Alabama case law.

Finally, while they are not binding authority, the current Alabama Pattern Jury Instructions differentiate contributory negligence and product misuse. Past Alabama Pattern Jury Instructions noted that “[t]he Alabama Supreme Court has equated the term contributory negligence with [product] misuse.”<sup>131</sup> However, the “Notes on Use” included in the current instructions state that “[t]he product misuse defense is different from the defense of contributory negligence.”<sup>132</sup> This contention is further supported by the fact that the instructions on product misuse and contributory negligence are separated in both the older and the current editions.

In sum, the inclusion of “contributory negligence” in section 32-5B-7 should not automatically preclude a product misuse defense. Sound arguments exist for opposing interpretations of the relationship between product misuse and contributory negligence, but even though product misuse has been referred to as a variation of contributory negligence, most precedent seems to indicate to the contrary. The use of the phrase “contributory negligence” in section 32-5B-7 probably signifies an intention to limit the statute to a literal interpretation of that term and, absent definitive guidance from the Alabama Supreme Court, it is safe to say that product misuse and contributory negligence are not the same.

## 2. *Viability of a Product Misuse Defense*

The product misuse doctrine will be circumscribed by section 32-5B-7 in a seat belt non-use claim if it is unequivocally classified as a subcategory of contributory negligence. However, because the Alabama

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126. *Id.* at 572 (Ingram, J., dissenting).

127. *Atkins v. Am. Motor Corp.*, 335 So. 2d 134 (Ala. 1976).

128. *Casrell v. Altec Indus., Inc.*, 335 So. 2d 128 (Ala. 1976).

129. *Saint*, 646 So. 2d at 572-73 (Cook, J., dissenting) (emphasis omitted).

130. *Id.* at 572 (Cook, J., dissenting).

131. ALABAMA PATTERN JURY INSTRUCTIONS—CIVIL 32.19.1 (1992) (internal quotations omitted).

132. ALABAMA PATTERN JURY INSTRUCTIONS—CIVIL 32.19.1 (Supp. 2000).

courts have not made this classification clear, the remainder of this subpart analyzes the product misuse doctrine as it applies to the seat belt defense.

In general, the doctrine of product misuse applies when a plaintiff uses a product in a manner "not reasonably foreseen by the defendant" manufacturer.<sup>133</sup> It is a much narrower concept than contributory negligence which "is little more than the consumer's failure to exercise due care in utilizing a defective product."<sup>134</sup> Yet, as one commentator noted, "[t]he term 'misuse,' especially when considered [as] an affirmative defense, is confusing in products cases."<sup>135</sup> As discussed in the preceding part, Alabama courts often refer to contributory negligence that involves the improper use of a product, so this variation of contributory negligence should be distinguished from the concept of product misuse. Moreover, because it is natural to think of a seat belt as a safety device installed on the defective product, it is perhaps helpful to begin a product misuse analysis with a discussion of the differences between the misuse of a defective product and the misuse of a safety device on a defective product (even though these distinctions ultimately might not affect the seat belt defense).

The *Williams v. Delta Machinery Corp.* court clarified this seemingly relevant distinction between the misuse of a defective product and the misuse of a safety device on a defective product.<sup>136</sup> The *Williams* plaintiff "was a cabinetmaker and woodworker . . . in Goodwater, Alabama."<sup>137</sup> He was pushing a board across the blade of a power table saw when the board "kicked back" into his hand.<sup>138</sup> His hand contacted the blade and he lost his little finger and a portion of his thumb.<sup>139</sup> The defendant, Williams Manufacturing, manufactured the dado blade<sup>140</sup> that was used on the table saw.<sup>141</sup>

The *Williams* court quickly distinguished *Dennis*<sup>142</sup> and noted that, "because the only contributory negligence alleged in this case involved the use of the table saw and the dado blade," the bar against evidence

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133. *Dennis v. Am. Honda Motor Co.*, 585 So. 2d 1336, 1341 (Ala. 1991) (quoting *Young v. Up-Right Scaffolds, Inc.*, 637 F.2d 810, 815 (D.C. Cir. 1980)); see also *Hicks v. Commercial Union Ins. Co.*, 652 So. 2d 211 (Ala. 1993).

134. *Campbell v. Cutler Hammer*, 646 So. 2d 573, 577 (Ala. 1994) (Ingram, J., dissenting).

135. JERRY J. PHILLIPS & ROBERT E. PRYOR, 2 PRODUCTS LIABILITY § 8-21, at 453 (2d ed. 1995).

136. 619 So. 2d 1330 (Ala. 1993).

137. *Williams*, 619 So. 2d at 1331.

138. *Id.*

139. *Id.*

140. "A dado blade is a saw blade that can be adjusted to cut a groove in a piece of wood as narrow as 1/4 inch or as wide as 13/16 inch." *Id.* at 1331 n.2.

141. *Id.* at 1330.

142. 585 So. 2d 336, 1337 (Ala. 1991); see *supra* Part II.B.2.b (discussing the *Dennis* decision).



of traditional contributory negligence (i.e., negligence in causing the accident) did not apply.<sup>143</sup> More importantly, the *Williams* court noted that neither the table saw nor the blades were "safety device[s] being used as intended by the manufacturer to protect people from negligent acts."<sup>144</sup>

Yet, having drawn this seemingly applicable distinction between the misuse of a safety device and the misuse of the defective product itself, an important question remains: What is the defective product?<sup>145</sup> For instance, it is completely logical that an automobile manufacturer would want to distance itself from a "tire failure" by claiming that the *defective product* was not the defective automobile but rather the defective tires. Unfortunately for some defendants, in Alabama the manufacturer cannot dissociate itself from the finished product it sells. In *Foremost Insurance Co. v. Indies House, Inc.*,<sup>146</sup> the Alabama Supreme Court reiterated that the defense of no causal relation "is available only to persons distributing a finished product or in the process of distributing a finished product."<sup>147</sup> "By implication, this defense is not available to the manufacturer of the finished product."<sup>148</sup> Thus, while a tire manufacturer might claim that it was merely a distributor of tires to an automobile manufacturer,<sup>149</sup> an auto manufacturer cannot claim the defense of no causal relation with regard to the same tires.<sup>150</sup> In short, the automobile manufacturer is saddled with responsibility for the entire vehicle.

From a plaintiff's liability standpoint, the product should include the seat belts and the other safety devices because it seems inequitable to force manufacturers to defend their product but then preclude evidence that the plaintiff misused the product's safety components. The *product* should include the vehicle, the tires, the seat belt, and all other original equipment installed on the vehicle. In the case at hand, the failure to wear a seat belt while driving a sport utility vehicle with de-

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143. *Williams*, 619 So. 2d at 1332-33.

144. *Id.* at 1332.

145. Cf. ROBERTS & CUSIMANO, *supra* note 32, § 19.3, at 565-68 (discussing the meaning of "product" under the AEMLD and noting the lack of guidance in this area of the law).

146. 602 So. 2d 380 (Ala. 1992). In the *Foremost* case, the defendant "combined a [refrigerator] with other materials to create a mobile home." *Foremost*, 602 So. 2d at 382. The defendant was deemed to have "manufactured a mobile home, a component of which was an unaltered refrigerator." *Id.*; cf. *Hicks v. Vulcan Eng'g Co.*, 749 So. 2d 417 (Ala. 1999) (distinguishing *Foremost* and holding that the defendant general contractor did not become a "manufacturer" for AEMLD purposes because the product did not become "defective" until after it was installed).

147. *Foremost*, 602 So. 2d at 382.

148. *Id.* at 382.

149. Obviously the tire manufacturer should not be allowed to assert a seat belt defense based on product misuse, though.

150. See *Atkins*, 335 So. 2d at 143 (noting that the "'lack of causal relation' defense is not to be understood as being available to the manufacturer where the defect is in a component part made by a third party").

fective tires thus constitutes the misuse of a safety device on a defective product. Under the *Williams* rationale, this situation is distinguishable from misuse of the defective product—such as when a driver fails to use proper caution while driving a sport utility vehicle with defective tires (e.g., driving on faulty tires at high speeds under icy or rainy road conditions, or driving with severely under-inflated tires). Thus, misuse of the defective product should be limited to a claim that the driver misused the entire vehicle, a component of which is the seat belt.

Product misuse in the seat belt context must consequently begin with two basic arguments. First, the defendant could make an argument that an available seat belt was used improperly (i.e., “in a manner not intended or foreseen by the manufacturer”).<sup>151</sup> However, this argument has limited application. A more likely scenario is that the defendant will lodge a claim that the plaintiff misused the defective vehicle—which again includes everything on the vehicle—by using it in an unforeseeable manner. An obvious shortcoming of this argument is the fact that the defendant manufacturer would need to prove that failure to wear a seat belt was not “reasonably foreseeable by the seller or manufacturer.”<sup>152</sup> The manufacturer must somehow claim that it did not know the driver would misuse the defective vehicle by disregarding its seat belts. Ironically, this position is probably doomed by the fact that so many drivers do not wear their seat belts. It is quite foreseeable that drivers will disregard their vehicle’s safety devices—if Americans wore their seat belts there would be no need for mandatory seat belt laws.<sup>153</sup>

In short, although the product misuse defense might seem tempting, the practical limitations of this argument likely bar its use. Short of proving that a seat belt was worn improperly, a defendant claiming product misuse will stumble over a daunting foreseeability requirement. Although it would seem logical that defendants should be able to claim that a plaintiff disregarded the available safety devices and therefore “misused” the product, defendants probably need to look elsewhere for relief.

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151. See *Saint*, 646 So. 2d at 568 (citing *Kelly v. M. Trigg Enters., Inc.*, 605 So. 2d 1185 (Ala. 1992)). This, of course, assumes that *Saint* is not limited to the improper use of a defective seat belt.

152. *Kelly v. M. Trigg Enters., Inc.*, 605 So. 2d 1185, 1192 (Ala. 1992); see also *Campbell v. Cutler Hammer, Inc.*, 646 So. 2d 573, 577 (Ala. 1994).

153. *Melia v. Ford Motor Co.*, 534 F.2d 795, 800 (8th Cir. 1976) (noting that “foreseeable use includes any particular use which should be known to a reasonably prudent manufacturer” but rejecting the conclusion that a plaintiff misuses a product simply because, after discovering a defect, she does not use her seat belt).

*D. Assumption of Risk**1. Alabama Code Section 32-5B-7 as a Bar to the Assumption of Risk Defense*

In the same way that section 32-5B-7 could bar the product misuse defense,<sup>154</sup> it could also bar an assumption of risk defense if that doctrine is classified as a subcategory of contributory negligence. Thus, as a threshold question, it is necessary to determine whether the statute even allows an assumption of risk claim.

*Prosser and Keeton on the Law of Torts* notes that contributory negligence and assumption of risk "have not clearly been distinguished, and are quite commonly confused."<sup>155</sup> They surmise that this confusion is caused, in part, by the fact that the two doctrines "overlap[] and are as intersecting circles, with a considerable area in common."<sup>156</sup> Despite this confusion, the authors note that a traditional distinction has been drawn in that "assumption of risk is a matter of knowledge of the danger and voluntary acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of conduct of the reasonable person."<sup>157</sup> In even simpler terms, assumption of risk is a subjective test that takes into account the manufacturer's intended use, while contributory negligence is an objective test that looks at the reasonableness of the user's actions.<sup>158</sup> Unfortunately, the Alabama courts have not always drawn such a clear distinction.

In *Atkins v. American Motors Corp.*, the court first set out the available defenses for an AEMLD action.<sup>159</sup> The court may have arguably classified product misuse as a variety of contributory negligence; however, it almost certainly separated the assumption of risk and contributory negligence concepts.<sup>160</sup> The court adopted the Restatement of Torts' treatment of "unavoidably unsafe" products, but it cautioned that "[t]his is not a contributory negligence defense; rather, it is an assumption of risk defense."<sup>161</sup> Similarly, in *Caterpillar Tractor Co. v. Ford*, the court noted that "there is a distinction between contributory negligence and assumption of risk," despite the fact that "certain elements

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154. See *infra* Part III.B.1.

155. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 481 (5th ed. 1984).

156. *Id.*

157. *Id.* at 482.

158. See *Gen. Motors Corp. v. Saint*, 646 So. 2d 564, 571 (Ala. 1994) (Ingram, J., dissenting).

159. 335 So. 2d 134, 143 (Ala. 1976).

160. *Atkins*, 335 So. 2d at 143.

161. *Id.*

are common to both."<sup>162</sup> But, as with the classification of product misuse, the courts are not unanimous over the above distinctions. For instance, in *Cooper v. Bishop Freeman Co.*, the court noted that assumption of risk is "a form of contributory negligence applicable to factual situations in which it is alleged that the plaintiff failed to exercise due care by placing himself or herself into a dangerous position with appreciation of a known risk."<sup>163</sup>

Outside the realm of AEMLD authority, the distinction between the two doctrines is further obscured. When the court articulated the available AEMLD defenses, it arguably retained the concepts as they existed before AEMLD. Thus, arguments for, or against, the categorization of assumption of risk as a variant of contributory negligence might be drawn from pre-AEMLD negligence cases. And although a complete examination of these cases is outside the scope of this Comment, a few decisions provide valuable insight into the confusion in this area.<sup>164</sup>

In *Employers Casualty Co. v. Hagendorfer*, the Alabama Supreme Court discussed assumption of risk in terms of its "primary" and "secondary" meanings.<sup>165</sup> The court stated that "[i]n its primary meaning, plaintiff acts *reasonably* in assuming the risk; this constitutes a denial of defendant's negligence. In its secondary meaning, plaintiff acts *unreasonably* [sic] in assuming the risk; this coincides with the contributory negligence defense."<sup>166</sup> Yet the practical distinction between "coincides" and "synonymous" is unclear. The *Driver v. National Security Fire & Casualty Co.* court noted the problem of "misleading labels" attached to assumption of risk claims that are, in fact, properly categorized as contributory negligence.<sup>167</sup> This is not surprising given that the court itself once stated that "it is often a question of little importance whether a given plea be called one of assumption of risk or a plea of contributory negligence."<sup>168</sup> While this may be true with regard to the final outcome, it oversimplifies the doctrinal differences between the two concepts.

In short, there are numerous AEMLD and pre-AEMLD decisions from which to argue that assumption of risk is (or is not) a variation of contributory negligence. The basis for both arguments can be found in a long line of seemingly inconsistent statements by the courts. Yet, while

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162. 406 So. 2d 854, 857 (Ala. 1981).

163. 495 So. 2d 559, 563 (Ala. 1986), *overruled on other grounds*, Burlington N. R.R. v. Whitt, 575 So. 2d 1011 (Ala. 1990).

164. A further examination of non-AEMLD assumption of risk cases can be found in ROBERTS & CUSIMANO, *supra* note 32, § 2.0, at 51-57.

165. 393 So. 2d 999, 1001 (Ala. 1981); *see also* ROBERTS & CUSIMANO, *supra* note 32, § 2.0, at 51.

166. *Employers Casualty*, 393 So. 2d at 1001 n.1.

167. 658 So. 2d 390, 393 (Ala. 1995).

168. *McGeever v. O'Byrne*, 82 So. 508, 511 (Ala. 1919).

the "correct" characterization of assumption of risk is open to debate, it seems that the two doctrines are distinct and, based upon the available precedent, it should not be automatically assumed that section 32-5B-7 bars the defense.

## 2. *Viability of the Assumption of Risk Defense*

Notwithstanding the fact that section 32-5B-7 could be read by the Alabama Supreme Court to bar an assumption of risk claim, this part analyzes the viability of that defense. Nonetheless, like the product misuse doctrine, assumption of risk may seem attractive at first but its application is equally limited.

Assumption of risk posits that, "[i]f the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."<sup>169</sup> *Prosser and Keeton* notes that, in this situation, the plaintiff "may then be regarded as tacitly or *impliedly* consenting to the negligence."<sup>170</sup> Thus, while contributory negligence may well be distinct from assumption of risk,<sup>171</sup> they have a common advantage in Alabama: both serve as a complete bar to recovery.

Similarly, a common element is that both defenses require "an appreciation or consciousness of the danger with which the risk is attended."<sup>172</sup> Thus, for purposes of the seat belt defense in a tire failure AEMLD suit, it is necessary to break claims into two distinct groups. The first group includes all accidents that happened before the plaintiff's knowledge of the tire defect, and the second group includes all accidents that occurred after knowledge of the defective condition.

Application of the doctrine to the first group seems quite simple. The doctrine is inapplicable because it requires at least a knowledge and appreciation of the dangers inherent in driving on defective tires. Unfortunately, determining whether a *particular* plaintiff falls within this first group is not so easy. The question of whether a particular plaintiff had knowledge of the dangerous condition is a difficult factual issue.<sup>173</sup>

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169. *Atkins v. Am. Motors Corp.*, 335 So. 2d 134, 143 (Ala. 1976); *see also Hicks v. Central Union Ins. Co.*, 652 So. 2d 211, 219 (Ala. 1993).

170. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 481 (5th ed. 1984). For clarity, *Prosser and Keeton* refers to three separate perspectives on "assumption of risk." *Id.* at 480-81. The perspective relevant to the seat belt defense is referred to as the "duty perspective." *Id.* The legal result under this perspective "is that the defendant is simply relieved of the duty which would otherwise exist." *Id.* at 481.

171. *Cf. Gen. Motors Corp. v. Saint*, 646 So. 2d 564, 567-68 (Ala. 1994) (noting that a jury charge on contributory negligence is not effectively a jury charge on product misuse).

172. *Caterpillar Tractor Co. v. Ford*, 406 So. 2d 854, 857 (Ala. 1981) (citing *Kemp v. Jackson*, 145 So. 2d 187 (Ala. 1962)).

173. *McIsaac v. Monte Carlo Club, Inc.*, 587 So. 2d 320, 324-25 (Ala. 1991); *see also* DAVID G. OWEN ET AL., 2 *MADDEN & OWEN ON PRODUCTS LIABILITY* 539 n.18 (discussing the



"A general awareness of danger . . . is not sufficient to establish that one assumed the risk of injury."<sup>174</sup> Rather, a manufacturer would need to prove that a plaintiff-driver had *actual* knowledge of defective tires. In the case of the Firestone recall,<sup>175</sup> this may require knowledge that a particular plaintiff's tires were subject to a recall or were defective. Notwithstanding the problems of proof associated with the scienter requirement, once this requirement is met, the defendant might have a viable defense if the plaintiff knew that the tires were defective but continued to drive on them.

No Alabama Supreme Court cases have squarely addressed assumption of risk in the seat belt defense context. However an assumption of risk argument might exist via an application to existing assumption of risk jurisprudence. In addition, several other states have applied assumption of risk in the seat belt context and these decisions provide some guidance.<sup>176</sup>

In *Reynolds v. Bridgestone/Firestone, Inc.* the Eleventh Circuit noted that Alabama law requires: "(1) knowledge by the plaintiff of the condition; (2) appreciation by the plaintiff of the danger or risk posed by that condition; and (3) a voluntary, affirmative exposure to the danger or risk."<sup>177</sup> As discussed above, the first two elements will likely turn on whether the accident was pre-recall or post-recall. Accordingly, seat belt non-use might be used to show that the plaintiff exposed herself to the known danger. Assuming evidence of non-use is allowed, the issue becomes one for the fact finder and the plaintiff will have an arguably high hurdle to overcome to achieve summary judgment.<sup>178</sup>

Finally, it is foreseeable that a defendant could make an alternative argument that assumption of risk applies even absent a defective condition. This approach maintains that a driver assumes the risk of unbelted operation because driving is an inherently risky activity and accidents are inevitable.<sup>179</sup> However, notwithstanding the fact that this position

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difficulty of meeting a knowledge requirement).

174. *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 470 (11th Cir. 1993) (quoting *Sprouse v. Belcher Oil Co.*, 577 So. 2d 443, 444 (Ala. 1991)).

175. *See supra* Part I.

176. *See Walsh v. Emergency One, Inc.*, 26 F.3d 1417, 1422 (7th Cir. 1994) (applying Illinois law); *Melia v. Ford Motor Co.*, 534 F.2d 795, 799 (8th Cir. 1976) (applying Nebraska law).

177. 989 F.2d 465, 470 (11th Cir. 1993).

178. *See Rodgers v. Shaver Mfg. Co.*, 993 F. Supp. 1428, 1436-37 (M.D. Ala. 1998) (summarizing Alabama law on assumption of risk); *see also Sprouse v. Belcher Oil Co.*, 577 So. 2d 443, 444 (Ala. 1991).

179. *See Ins. Co. of N. Am. v. Pasakarnis*, 451 So. 2d 447, 452 (Fla. 1984) (quoting the court in *Ford Motor Co. v. Evancho*, 327 So. 2d 201, 204 (Fla. 1976), which stated that "a frequent and inevitable contingency of normal automobile use will result [sic] in collisions and injury-producing impacts"), *abrogated in part by* FLA. STAT. ANN. ch. 316.614(9) (Harrison 2000 & Supp. 2001) (rejecting evidence of non-use to mitigate damages but allowing evidence in the comparative negligence calculus).

might be outside the scope of an AEMLD claim,<sup>180</sup> there is a logical counter-argument. Many litigants would argue that driving "has not reached the point where we could hold that an accident is so likely to occur that each and every time one gets into an automobile he must be held to have assumed the risk of injury."<sup>181</sup> While the fallacy and out-dated nature of this argument will be discussed in the next part,<sup>182</sup> for now, it is safe to state that assumption of risk has not been definitively barred by section 32-5B-7, so proper application of this doctrine to a seat belt defense has not been eliminated. While, as a practical matter, winning this argument will be difficult, it is still an available defense.

### III. MITIGATION OF DAMAGES: A LOGICAL COMPROMISE

In 1984, the Florida Supreme Court noted that jurisdictions considering the seat belt defense typically adopt one of the following three approaches: (1) failure to use a seat belt may be evidence of contributory negligence; (2) failure to use a seat belt is negligence *per se*; or (3) failure to use a seat belt may be used to mitigate damages.<sup>183</sup> As discussed in Part II.B above, the Code of Alabama bars evidence of non-use to show contributory negligence. Similarly, in light of the legislature's proscription of contributory negligence,<sup>184</sup> it makes little sense to allow evidence of non-use to demonstrate that a plaintiff's actions were negligent *per se*.<sup>185</sup> However, mitigation of damages, or the doctrine of avoidable consequences, represents an efficient and equitable basis for allowing the seat belt defense in an AEMLD action. Unfortunately, it suffers from a serious flaw—the Alabama Supreme Court has not yet recognized a viable AEMLD defensive theory that incorporates mitigation of damages.<sup>186</sup> The remainder of this Comment thus proposes miti-

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180. The "dangers of driving" (i.e., the negligence of other drivers) are probably irrelevant to the assumption of risk issue. In the AEMLD context, assumption of risk presupposes that the plaintiff voluntarily exposed herself to the known dangers of a *defective product*. *Rodgers v. Shaver Mfg. Co.*, 993 F. Supp. 1428, 1436-37 (M.D. Ala. 1998). The known dangers of driving are of no concern. Though collisions might be an inevitable result of driving, product defects are not.

181. *Miller v. Haynes*, 454 S.W.2d 293, 300 (Mo. App. 1970).

182. See *infra* notes 219-30 and accompanying text.

183. *Ins. Co. of N. Am. v. Pasakarnis*, 451 So. 2d 447, 453 (Fla. 1984), *abrogated in part* by FLA. STAT. ANN. Ch. 316.614(9) (Harrison & Supp. 2000) (allowing non-use evidence in a comparative negligence calculus but abrogating it for mitigation of damages). A "fourth doctrine," comparative negligence, exists as an evolution of the traditional concept of contributory negligence and is also used to incorporate evidence of non-use. See generally DOBBS, *supra* note 103, at 503.

184. ALA. CODE § 32-5B-7 (1999).

185. This should be distinguished from the retention of the negligence *per se* concept which underlies the AEMLD cause of action. See *Atkins v. American Motors Corp.*, 335 So. 2d 134, 139-42 (Ala. 1976) (stating that "selling a dangerously unsafe chattel is negligence within itself").

186. See *id.* at 143 (outlining the defenses permissible in an AEMLD action). This argument

gation of damages as an alternate basis for seat belt claims and as a logical extension of current products liability law in Alabama.

A mitigation of damages defense is grounded in a plaintiff's duty to avoid the damages sustained in an accident.<sup>187</sup> In the context of the seat belt defense, this approach holds that two collisions occur. The defendant directly causes the first collision, but the second collision is the result of the plaintiff's unbelted movement within the vehicle.<sup>188</sup> The proper measure of plaintiff's damages is thus the amount that she would have received had a seat belt been used. In other words, the defendant should not be liable for secondary collision damages that the plaintiff could have avoided with reasonable care.<sup>189</sup>

Admittedly, adoption of this approach requires a shift in the law. To start with, the Alabama Supreme Court would need to adopt a mitigation of damages defense in AEMLD actions involving seat belt non-use. Furthermore, the court would need to condone mitigation of damages in the seat belt context. The first issue seems rather monumental; the second seems moot in light of a 1970 Alabama Supreme Court decision rejecting that proposition. However, as the following discussion shows, these propositions are neither irrational nor insurmountable.

To reach the ostensibly radical conclusion that the Alabama Supreme Court should accept an entirely new defensive theory in some AEMLD actions, we must work backwards from the related and less earth-shattering premise that evidence of non-use is already accepted for limited purposes in AEMLD actions. Subpart A discusses that premise. Accepting the notion that evidence of non-use is already allowed by the courts, we can proceed to the more controversial premise in subpart B that mitigation of damages is entirely consistent with the purposes of AEMLD. Building on these two premises, subpart C demonstrates that, although evidence of non-use was previously barred as a method for mitigating damages, the rationale for the Alabama Supreme Court's decision is outdated and should be revisited.

#### A. Alabama Common Law Already Allows Evidence of Non-use

As a starting point for a mitigation of damages argument, it is necessary to return to a familiar decision—*General Motors Corp. v.*

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is admittedly even more difficult in light of the Alabama Supreme Court's repeated rejection of the comparative negligence doctrine. See, e.g., *Williams v. Delta Int'l Mach. Corp.*, 619 So. 2d 1330, 1333 (Ala. 1993).

187. *Id.*

188. See *Watterson v. Gen. Motors Corp.*, 544 A.2d 357, 364 (N.J. 1988) (discussing "first-collision and second-collision injuries").

189. Cf. *Ridley v. Safety Kleen Corp.*, 693 So. 2d 934, 938-43 (Fla. 1996) (discussing the second collision theory and contrasting the treatment of seat belt non-use under the mitigation of damages, contributory negligence, and comparative negligence doctrines).

*Saint*.<sup>190</sup> While *Saint* is probably more remarkable for its treatment of seat belt evidence, it should be remembered that it was fundamentally a products liability decision. As the court stated, the plaintiff filed suit under the AEMLD, "claiming that her car was not crashworthy."<sup>191</sup> Thus, *Saint* highlights an area of the law in which evidence of seat belt use is already condoned; crashworthiness actions.

The crashworthiness doctrine, also known as the "enhanced injury doctrine," is a particular type of design defect action in which the plaintiff claims that an automobile "was defective, and was involved in an accident, and that the defect, although not causing the accident to occur, contributed to the injuries sustained therein."<sup>192</sup> Under the crashworthiness doctrine, "the manufacturer of a vehicle . . . [has] a duty to design its product so as to avoid subjecting its user to an unreasonable risk of injury in the event of a collision."<sup>193</sup> Yet, stated another way, the "duty to prove so-called enhanced damages is simply a part of the plaintiff's responsibility to prove proximate cause, that is, that the defendant in such a case is liable only for those damages which are within the orbit of risk created by him."<sup>194</sup>

By contrast, AEMLD claims involve "a defect in an automobile [that] causes an accident which injures the ultimate consumer."<sup>195</sup> Despite this doctrinal difference in the source of the injury, AEMLD and crashworthiness cases have an important similarity. As the *Volkswagen of America, Inc. v. Marinelli* court stated:

[T]he plaintiff's burden in establishing causation is identical whether the theory of liability is the AEMLD (that the defect proximately caused the injury) or the crashworthiness doctrine. Contrary to Volkswagen's position, neither doctrine requires proof of *accident causation*; rather, both doctrines focus on the alleged defect as being the proximate cause of the injury or damage.<sup>196</sup>

In a crashworthiness action, "the automobile manufacturer is liable only for the enhanced injuries attributable to the defective product."<sup>197</sup> As stated in Part II.B.2, Alabama defendant-manufacturers may not

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190. 646 So. 2d 564 (1994).

191. *Saint*, 646 So. 2d at 564; see also *Gen. Motors Corp. v. Edwards*, 482 So. 2d 1176, 1191 (1985) (holding that such an action may be brought under the AEMLD), *overruled on other grounds by Schwartz v. Volvo N. Am. Corp.*, 554 So. 2d 927 (Ala. 1989).

192. *Edwards*, 482 So. 2d at 1191.

193. *Id.* at 1181.

194. *Id.* at 1187 (quoting *Larsen v. Gen. Motors Corp.*, 391 F.2d 495, 503 (8th Cir. 1968)).

195. *Id.* at 1181.

196. 628 So. 2d 378, 385 (Ala. 1993).

197. *Edwards*, 482 So. 2d at 1185.



dissociate themselves from the finished product and are liable for defects in the vehicle's components.<sup>198</sup> Consequently, in its defense the manufacturer should be allowed to claim that the total design of the vehicle was crashworthy, and that the true cause of enhanced injuries was the plaintiff's disregard for the vehicle's safety features. Applied to the situation at hand, the manufacturer should be able to claim that the plaintiff disregarded its safety belts.<sup>199</sup> Thus, it would seem that *Edwards* and its crashworthiness progeny implicitly anticipated that a seat belt claim would be brought as a challenge to the plaintiff's prima facie case in the form of a general denial. If the plaintiff claims that the alleged defect (e.g., an SUV with defective tires) proximately caused his injuries, it follows that defendant should be allowed to show that the "product" was installed with safety devices and that the plaintiff's disregard for them enhanced the injuries sustained. In other words, the defective product was not the proximate cause of all the plaintiff's injuries.

Moreover, as discussed in Part II, not all of the AEMLD affirmative defenses have been precluded as bases for the seat belt defense. Section 32-5B-7 obviously precludes evidence of contributory negligence, but the statute does not preclude a product misuse or assumption of risk defense. While the arguments may not be winning ones,<sup>200</sup> the Alabama Supreme Court has not precluded their application to the seat belt defense and introduction of evidence of non-use is certainly not earth-shattering.

In sum, evidence of non-use is certainly not new in AEMLD actions. *Saint* suggests applications of non-use evidence in crashworthiness actions, and it does not take any step forward to apply the concept in other types of AEMLD claims. Furthermore, it is likely that the Alabama Supreme Court has not precluded evidence of seat belt non-use under the other affirmative defenses of product misuse and assumption of risk.

### *B. Mitigation of Damages Is Consistent with the Purposes of AEMLD*

In both *Atkins* and *Casrell*, the court reiterated the notion that "[o]rordinarily, defenses fall within two categories: (1) general denials and (2) affirmative defenses. Thus, the defenses available in a products

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198. See also *supra* notes 147-50 and accompanying text.

199. For some reason, this same rationale seems less harsh when applied to the analogous situation where a hypothetical plaintiff disables the airbags in his vehicle. In that case, it seems intuitive that the driver accepted a certain amount of risk by disabling an integral safety feature of the automobile and should not be able to recover for the additional injuries that would have been prevented by the airbags.

200. See *supra* Parts II.C.2, II.D.2.



liability case may be more meaningfully denominated and discussed in the context of the plaintiff's burden of proof."<sup>201</sup> As stated above, the admissibility of non-use evidence could be introduced as a general denial "to counter the plaintiff's prima facie case."<sup>202</sup> Specifically, the defendant should be allowed to offer evidence showing that at least some of the damages were not proximately caused by a defective product. Rather some of the damages were attributable to avoidable secondary collisions within the vehicle following the initial impact. This does not resolve the relationship between mitigation of damages and the AEMLD, though.

If the mitigation of damages concept is to be used at all, it must be as an affirmative defense. *Prudential Ballard Realty Co. v. Weatherly* made it clear that defendants must "affirmatively plead mitigation of damages as a defense, either in their answer or at any time during the trial."<sup>203</sup> Fortunately, *Atkins* and *Casrell* state quite clearly that certain affirmative defenses are retained; unfortunately, avoidable consequences is not among them. Yet as discussed in Part II.A, the Alabama Supreme Court imbued the AEMLD cause of actions with a "conservative fault-based philosophy."<sup>204</sup>

At the heart of Alabama's AEMLD is the manufacturer's *relative* fault. When it comes to injuries, few things impact on the amount and extent of bodily injury sustained in a car accident like the failure to use a seat belt. Consequently, it is inconsistent to espouse a theory of products liability that retains the concept of fault while turning a blind eye to a safety device consistently proven to limit the extent of a plaintiff's injuries.

Finally, it is certainly logical to question whether the Alabama Supreme Court should simply "reinvent" the available AEMLD defense. Fortunately the answer to that objection has already been answered. Both the *Atkins* and *Casrell* court stated quite clearly that it had "not attempted to answer all the questions which may arise on the trial of every products liability case."<sup>205</sup> There is obviously room to add a limited affirmative defense should the court choose to do so.

So where does that leave mitigation of damages in AEMLD actions? From the standpoint of existing law, the doctrine is not in a very good position. However, from the standpoint of an equitable solution to the

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201. *Atkins v. Am. Motors Corp.*, 335 So. 2d 134, 143 (Ala. 1976); see also *Casrell v. Altec Indus., Inc.*, 335 So. 2d 128, 134 (Ala. 1976).

202. *Atkins*, 335 So. 2d at 143; see also *Edwards*, 482 So. 2d at 1182 (reiterating that "a manufacturer may offer, in addition to the affirmative defenses recognized under the A.E.M.L.D., . . . evidence . . . that the defect proximately caused the injuries suffered").

203. 792 So. 2d 1045, 1048 (Ala. 2000).

204. ROBERTS & CUSIMANO, *supra* note 32, § 19.9, at 620.

205. *Atkins*, 335 So. 2d at 144.

seat belt non-use problem, mitigation of damages is the best option for the Alabama Supreme Court. As discussed in Part II, none of the affirmative defenses outlined in *Casrell* and *Atkins* apply very well to the seat belt non-use issue. Thus, it seems that either the manufacturer can lodge a proximate cause-based general denial, or the court can allow mitigation of damages in this limited context.

### C. Evidence of Non-use Should Be Allowed to Mitigate Damages

Again, it makes sense that the Alabama Supreme Court might question a proposal to adopt the mitigation of damages approach in AEMLD seat belt claims. As discussed in the previous subpart, the Alabama Supreme Court has not yet condoned mitigation of damages as an "AEMLD defense." However, even more problematic is the fact that the court has already addressed the intersection between the seat belt defense and mitigation of damages.

The relationship between mitigation of damages and non-use is semi-charted water for the Alabama courts. In the 1970 pre-AEMLD<sup>206</sup> case *Britton v. Doebling*, the court addressed application of mitigation of damages to the seat belt defense.<sup>207</sup> The court surveyed ten cases from various jurisdictions that had addressed the issue of non-use in the context of mitigation of damages and found that only two jurisdictions supported the admission of seat belt evidence.<sup>208</sup> Eight jurisdictions did not allow evidence of non-use at that time.<sup>209</sup> The court drew from each of those jurisdictions, but quoted extensively from *Lipscomb v. Diamani*<sup>210</sup> and *Brown v. Kendrick*<sup>211</sup> in support of its ultimate holding that the decision to require Alabama drivers to wear seat belts "should be left to the legislature."<sup>212</sup>

Legislative deference in seat belt cases is not uncommon,<sup>213</sup> but of all the arguments against the seat belt defense, this is probably the worst. Clearly the purpose of the Alabama Safety Belt Act is to save lives by encouraging seat belt use.<sup>214</sup> Thus, it is inconsistent for the

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206. Notwithstanding the rationale discussed below for completely abandoning *Britton v. Doebling*, an argument obviously exists that it is inapplicable to AEMLD decisions.

207. 242 So. 2d 666 (Ala. 1970); see also *Coker v. Ryder Truck Lines*, 249 So. 2d 810, 814 (Ala. 1971) (affirming the rule outlined in *Britton v. Doebling*).

208. *Britton*, 242 So. 2d at 672 n.1.

209. *Id.* at 672 n.2.

210. 226 A.2d 914 (Del. Super. Ct. 1967).

211. 192 So. 2d 49 (Fla. Dist. Ct. App. 1966).

212. *Britton*, 242 So. 2d at 675.

213. See, e.g., *Lipscomb v. Diamani*, 226 A.2d 914, 917-18 (Del. Super. Ct. 1967); *Hampton v. State Highway Comm'n*, 498 P.2d 236, 248-49 (Kan. 1972) (quoting *Britton v. Doebling* with approval); *Comer v. Preferred Risk Mut. Ins. Co.*, 991 P.2d 1006, 1013 (Okla. 1999).

214. See ALA. CODE § 32-5B-3 (1999) ("The Legislature finds that it is the policy of the State of Alabama that all precautionary measures be taken to save the lives of the state's citizens from

state to enforce a mandatory seat belt law and then to allow plaintiffs to recover for injuries caused by non-use. In this light, the mitigation of damages concept is entirely consistent with the purpose of the Alabama Safety Belt Use Act.

Opponents will likely argue that the "penalties" for non-use should be limited to the sanctions imposed by the Act. In other words, because the legislature evinced a clear intent not to penalize violators in court, the courts should not judicially expand liability for non-use. However, this argument is not clear from the face of the statute. It is equally arguable that, by enacting section 32-5B-7, the Alabama legislature merely wanted to avoid the harsh consequences of the contributory negligence standard. Otherwise, it could have easily chosen to draft that section to exclude *all* evidence of non-use. Surely the legislature was aware that contributory negligence was not the only defense available in an AEMLD action involving seat belt non-use.

The *Britton* court was also persuaded "by the fact that of those jurisdictions which have decided the question only one has admitted evidence of nonuse to mitigate damages."<sup>215</sup> Following this lead, the court listed seven explicit grounds for its decision to bar evidence of seat belt non-usage.<sup>216</sup> Fortunately, while many of these arguments commonly resurface in decisions dealing with the mitigation of damages issue, most are untenable. As discussed, the *Britton* majority first reasoned that, because there is no statutory requirement to wear seat belts, it should not mandate use.<sup>217</sup> Obviously, this position is outdated in light of Alabama's mandatory seat belt law.<sup>218</sup>

Second, the court noted that requiring the use of seat belts requires drivers to anticipate the negligence of others.<sup>219</sup> Under this rationale, it is unfair to ask drivers to expect that injury will occur in the normal course of driving a vehicle.<sup>220</sup> However, while this is a logical (and common) objection, it is also moot in light of the mandatory seat belt law. Seat belt laws are grounded in the assumption that drivers will eventually engage in negligent activity. Furthermore, as one commentator noted, "[t]his is an old saying that simply is not true."<sup>221</sup> If it were true, plaintiffs could effectively circumvent contributory negligence. Moreover, this criticism "is at odds with the usual view of proximate

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vehicle accidents and thereby, to preserve the most valuable resource of the state.").

215. *Britton*, 242 So. 2d at 675.

216. *Id.*; see also *Coker v. Ryder Truck Lines Corp.*, 249 So. 2d 810, 814 (Ala. 1971).

217. *Britton*, 242 So. 2d at 675.

218. ALA. CODE § 32-5B-4 (1991).

219. See, e.g., *Amend v. Bell*, 570 P.2d 138, 143 (Wash. 1977); *Britton*, 242 So. 2d at 675.

220. This rationale obviously makes much more sense in the context of collisions caused by the negligence of other drivers. See, e.g., *Amend*, 570 P.2d at 143. Thus, it might be argued that drivers should not be responsible for anticipating design or manufacturing defects.

221. DAN B. DOBBS, *THE LAW OF TORTS* 516 n.15 (2000).

cause, in which the intervening negligent acts of third parties are usually deemed foreseeable."<sup>222</sup> As one court stated: "There is nothing to anticipate; the negligence of motorists is omnipresent."<sup>223</sup> Finally, driving with a seat belt probably presents one of those few situations where it does not take much speculation to effectively "anticipate" injuries caused by an automobile accident.<sup>224</sup> Seat belts represent an effective means to avoid the foreseeable dangers of driving, whatever the source of those dangers.<sup>225</sup> While it is true that collisions caused by negligence are more commonplace and foreseeable than those caused by product failures, seat belts do not discriminate between particular types of accidents—nor should the courts. The gravamen of the AEMLD action will still be that the defendant placed an unreasonably dangerous product on the market; the difference will be that another "defense" will be available. Certainly this keeps with the spirit of *Casrell* and *Atkins*.

In a related rationale, some courts reject the mitigation of damages approach as only applying to post-accident conduct.<sup>226</sup> This is often couched in terms of the notion that there is "no duty to mitigate damages prior to sustaining an injury."<sup>227</sup> Some jurisdictions have rejected this rationale outright in light of their adoption of contributory negligence standards that apply to pre-accident conduct.<sup>228</sup> Obviously, this rationale is not applicable in Alabama, but it is noteworthy that other courts have criticized this view as creating an "artificial" distinction.<sup>229</sup> The failure to wear a seat belt often "play[s] a role in causing . . . the injury ultimately sustained,"<sup>230</sup> so it is completely appropriate to factor non-use into the overall damage calculation.

The *Britton* court's third basis was that drivers in vehicles not equipped with seat belts would be penalized if the court allowed evi-

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222. Robert M. Ackerman, *The Seat Belt Defense Reconsidered: A Return to Accountability in Tort Law?*, 16 N.M. L. REV. 221, 224 (1986).

223. *Law v. Superior Court*, 755 P.2d 1135, 1140 (Ariz. 1988).

224. *Accord Ins. Co. of N. Am. v. Pasakarnis*, 451 So. 2d 447, 453 (Fla. 1984), *abrogated in part* by FLA. STAT. ANN. ch. 316.614(9) (Harrison 2000 & Supp. 2001) (rejecting evidence of non-use to mitigate damages).

225. See generally Thomas V. Harris, *Enhanced Injury Theory: An Analytical Framework*, 62 N.C. L. REV. 643 (1984) (discussing the safety implications of seat belts and the seat belt defense as it relates to enhanced injury cases and product liability cases).

226. See, e.g., *Lipscomb v. Diamiani*, 226 A.2d 914, 917 (Del. 1967).

227. *Swajian v. Gen. Motors Corp.*, 559 A.2d 1041, 1043 (R.I. 1989); see also *Clarkson v. Wright*, 483 N.E.2d 268 (Ill. 1985); ROBERTS & CUSIMANO, *supra* note 32, § 40.1, at 1310 (referencing *Britton* for the proposition that mitigation of damages "applies only to a plaintiff's conduct subsequent to the wrongful act of the defendant").

228. See, e.g., *Law*, 755 P.2d at 1142.

229. *Thomas v. Henson*, 696 P.2d 1010, 1016 (N.M. Ct. App. 1984), *aff'd in part and rev'd in part*, 695 P.2d 476 (N.M. 1985) (reversing that part of the opinion that "create[d] a 'seat belt defense'").

230. Ackerman, *supra* note 222, at 223.



dence of non-use to mitigate damages.<sup>231</sup> However, section 32-5B-4 only requires seat belt use by front seat occupants in vehicles "manufactured with safety belts in compliance with Federal Motor Vehicle Safety Standard No. 208."<sup>232</sup> Standard 208 originally required that all cars manufactured after 1968 have seat belts.<sup>233</sup> Thus, under Alabama law, only front seat passengers in cars *equipped* with seat belts are required to use them. Moreover, it is highly unlikely that, in an era when passive restraints are standard equipment on all vehicles, there are many vehicles on the road without seat belts. Thus, the third argument also lacks merit.

Fourth, the court questioned the safety value of seat belts and noted the "controversy which still surrounds the effectiveness of seat belts."<sup>234</sup> Again, in light of the abundance of analytical data indicating that seat belts save lives, this argument is outdated.<sup>235</sup> The current controversy, if there is one, should be that more motorists do not wear their seat belts in spite of the clear evidence that they do save lives. To hold otherwise flies in the face of both reason and common sense.

Fifth, the court felt that allowing the seat belt defense to mitigate damages would allow juries to engage in improper speculation.<sup>236</sup> This rationale, standing alone, is an imperfect basis for rejecting the mitigation of damages approach because there is unavoidable "speculation" inherent in all jury verdicts. Although juries are obviously not permitted to base verdicts on speculation alone, as a practical matter it is nearly impossible to separate the apportioning sheep from the speculating goats. Seat belt litigation will almost invariably involve some form of expert testimony. A jury should no more "speculate" over evidence presented by an expert witness testifying about injuries resulting from non-use than it would over evidence regarding a defective product. Finally, if mitigation of damages is treated as an affirmative defense, the burden of proof is on the defendant. In this instance, courts should not hesitate to allow a seat belt defense over concerns about the defendant's problems of proof where it does not prejudice the plaintiff.

Sixth, Justice Bloodworth speculated that admitting evidence of non-use would allow a jury to effectively employ the doctrine of com-

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231. *Britton v. Doehring*, 242 So. 2d 666, 675 (Ala. 1970).

232. ALA. CODE § 32-5B-4 (1999).

233. 23 C.F.R. § 255.21 (1968). The federal regulation was subsequently modified to require all new passenger vehicles to have either seat belts or airbags by the year 1990. *See* 49 C.F.R. § 571.208 (2001). Nonetheless, the federal requirement for new cars to have seat belts seems unnecessary in light of the overwhelming number of states that now require seat belt use. *See supra* note 45. Moreover, all new cars come equipped with seat belts, and it is unlikely that the absence of a federal statute would affect that trend.

234. *Britton*, 242 So. 2d at 675.

235. *See supra* Part I.

236. *Britton*, 242 So. 2d at 675.



parative negligence.<sup>237</sup> This rationale is likely the strongest against the use of mitigation of damages in Alabama because practical application of the avoidable consequences rule may ultimately prove out this argument. However, this argument presupposes that lower courts will be ineffective in providing proper jury instructions. Moreover, it loses sight of the distinct theories underlying contributory negligence and mitigation of damages.

Comparative negligence and mitigation of damages are distinct concepts. In a traditional comparative fault scenario, "each party's fault has contributed to the [ultimate] harm."<sup>238</sup> The harm that is suffered by the plaintiff cannot be severed into two distinct injuries, so comparative negligence is employed to apportion liability.<sup>239</sup> In a mitigation of damages scenario, two (or more) distinct acts have caused distinct harms.<sup>240</sup> The mitigation of damages approach seeks to limit the defendant's liability to those damages which he or she actually caused and which were unavoidable. By contrast, a comparative negligence analysis would allow the defendant to reduce damages by both avoidable and unavoidable consequences. The focus of a mitigation of damages approach is on the end result—bodily injury resulting from failure to use a seat belt. By contrast, comparative negligence would seek to apportion the initial *liability* of the parties. "[T]he jury will attribute to the plaintiff a percentage of fault to be compared with the fault of the defendant, and the plaintiff's recovery will be reduced by the percentage of his fault."<sup>241</sup> Although these two systems might effectively lead to the same result, they are "two radically different systems for reducing the plaintiff's award."<sup>242</sup>

Furthermore, the rationale that mitigation of damages allows juries to engage in comparative negligence analysis is easily stretched to illogical results. For instance, it is arguable that juries engage in an analysis effectively akin to comparative negligence every time that they calculate damages. Whenever a jury member makes the decision that a plaintiff was somehow negligent and should only recover X damages, isn't that jury member effectively engaging in an analysis that could be likened to comparative negligence? Although the contributory negligence rule is a bright line standard, some flexibility is necessary to compensate for inconsistencies in the application of other defensive

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237. *Id.*

238. DOBBS, *supra* note 103, at 510.

239. *Id.*

240. *Id.*

241. Michael B. Gallub, Note, *A Compromise Between Mitigation and Comparative Fault?: A Critical Assessment of the Seat Belt Controversy and a Proposal for Reform*, 14 HOFSTRA L. REV. 319, 326 (1986).

242. DOBBS, *supra* note 103, at 510.

theories. Adherence to contributory negligence should not limit the application of alternate doctrines simply because they do not fit into an unforgiving legal pigeonhole.

Seventh, the *Britton* court suggested that a mitigation of damages defense would conflict with the established doctrine of contributory negligence.<sup>243</sup> This argument is substantially similar to the preceding rationale that mitigation of damages would ultimately evolve into a comparative negligence approach, and it likewise loses sight of the relative doctrines.<sup>244</sup> Contributory negligence bars recovery for the injury caused by the plaintiff's negligence prior to injury.<sup>245</sup> While avoidable consequences also accounts for the plaintiff's antecedent negligence, it does so in a more direct manner—it focuses on damages and bars recovery of those injuries not caused by the defendant.<sup>246</sup> In other words, a defendant is only responsible for those injuries that she caused. Injuries caused by the plaintiff's failure to limit post-accident impacts are not subject to recovery.

Admittedly, the mitigation of damages approach is not without difficulties. Rather than apportioning damages based on the relative negligence of the parties, juries are tasked with restricting damages to those actually caused by the plaintiff's non-use. Arguably, this task will be easier in some cases than others. As is the case with all expert testimony, the jury faces a difficult task in determining the proper amount of damages, but courts should not shy away from allowing evidence of non-use simply because it will make the jury's role more difficult. Rather, courts should adopt procedural safeguards to ensure that the doctrine is not applied improperly. For example, when the Florida Supreme Court adopted a mitigation of damages approach for the seat belt defense, it proposed a very specific interrogatory to "clearly define the distinction between one's negligent contribution to the accident, on the one hand, and to his damages on the other."<sup>247</sup> Similar interrogatories

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243. *Britton*, 242 So. 2d at 675. Interestingly, Justice Bloodworth also noted that the mitigation of damages doctrine would conflict with the doctrine of assumption of risk and avoidable consequences. *Id.* It is unclear what basis exists for the latter assertion because the doctrines of mitigation of damages and avoidable consequences are ordinarily considered equivalent. See, e.g., DOBBS, *supra* note 103, at 510.

244. *But see* PROSSER & KEETON, *supra* note 155, at 459 ("It is suggested . . . that the doctrines of contributory negligence and avoidable consequences are in reality the same, and that the distinction which exists is rather one between damages which are capable of assignment to separate causes, and damages which are not.").

245. *Id.* at 458.

246. *Id.*

247. *Pasakarnis*, 451 So. 2d at 454. The interrogatory reads as follows:

(a) Did defendant prove that the plaintiff failed to use reasonable care under the circumstances by failing to use an available and fully operational seat belt?

\_\_\_\_ Yes \_\_\_\_ No

would provide guidance to lower courts and would help alleviate inconsistent application of the law. In those cases in which it is too difficult (or impossible) to separate avoidable and unavoidable damages, courts can simply disregard the mitigation of damages approach. Finally, some states provide limits on the use of mitigation evidence such as statutory caps on the recovery of avoidable damages.<sup>248</sup> Again, this safeguard would limit jury discretion and would foster consistent verdicts.

Arguably, both comparative negligence and mitigation of damages ultimately account for the plaintiff's antecedent negligence. However, as previously discussed, there are important distinctions between the two concepts. The mitigation of damages approach places accident causation in a more realistic light. An automobile accident is not an inextricably related incident that results from a single collision. Rather, it is a complex occurrence that can only be explained in light of a series of separate, yet interrelated, events. Seat belt non-use is merely an element in the quantum of injury causation.<sup>249</sup> Moreover, mitigation of damages seeks to bar recovery of particular damages rather than attributing liability solely to their root cause. As one commentator noted,

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If your answer to question (a) is No, you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question (a) is Yes, please answer question (b).

(b) Did defendant prove that plaintiff's failure to use an available and fully operational seat belt produced or contributed substantially to producing at least a portion of the plaintiff's damages?

\_\_\_\_\_ Yes \_\_\_\_\_ No

If your answer to question (b) is No, you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question (b) is Yes, please answer question (c).

(c) What percentage of plaintiff's total damages were caused by his (or her) failure to use an available and fully operational seat belt? \_\_\_\_\_%

*Id.* Again, it should be remembered that the Florida legislature later abrogated *Pasakarnis's* mitigation of damages holding. See FLA. STAT. ANN. ch. 316.614(9) (Harrison 2000 & Supp. 2001) (rejecting evidence of non-use to mitigate damages).

248. See, e.g., MICH. COMP. LAWS § 257.710e (2000) (allowing evidence of seat belt non-use as evidence of negligence but limiting "the recovery for damages [to no] more than 5%" of the plaintiff's claim); OREG. REV. STAT. § 18.590 (2001) (allowing evidence of failure to wear a seat belt "to mitigate the injured party's damages . . . [up to] five percent of the amount to which the injured party would otherwise be entitled"). Cf. CAL. VEH. CODE § 27315(j) (West 2000) (allowing evidence of non-use but not of a statutory violation); FLA. STAT. ANN. ch. 316.614(9) (Harrison 2000 & Supp. 2000) (allowing non-use in a comparative negligence calculus but barring evidence in mitigation of damages); TENN. CODE ANN. § 55-9-604 (1998) (excluding evidence of failure to wear a seat belt as a general rule but allowing it "as to the causal relationship between non-compliance and the injuries alleged" in a properly plead products liability claim).

249. Critics will likely attack this view of an accident as an unrealistic fiction. They will likely argue that the original collision was the cause-in-fact of the second collision and that seat belt non-use was not the cause of the second injury.

mitigation of damages "eliminat[es] altogether the portion of the plaintiff's damages that the defendant proves could reasonably have been avoided by use of a seatbelt but otherwise allowing the plaintiff's claim."<sup>250</sup> Thus, although both concepts have a direct correlation to the plaintiff's negligence, only one is the result of an apportionment of liability.<sup>251</sup>

As discussed, there are solid arguments for, and against, adopting a mitigation of damages approach. Each of the common arguments listed above should be taken into account in reaching a decision. However, this Comment does not advocate a blanket rule allowing mitigation of damages in all AEMLD actions. The seat belt defense is a very specialized claim that requires clear limits, and any adoption of a mitigation of damages approach should be carefully tailored to the seat belt defense to prevent an unintended application of the doctrine.

In sum, the mitigation of damages approach is an equitable basis for incorporating evidence of seat belt usage and is not inconsistent with the AEMLD doctrine. While it does not dovetail neatly with the existing contributory negligence standard, it does not mandate abandonment of the absolute bar to recovery by plaintiffs that engage in negligent acts. Plaintiff-drivers should be aware that excessive injuries are likely if they do not wear a seat belt, and the courts should join the legislature in recognizing that seat belts are an effective means of limiting these injuries.

#### IV. CONCLUSION

If anything can be confidently stated about the introduction of non-use evidence in Alabama, it is probably this: Through section 32-5B-7, the Alabama Code bars evidence of a complete failure to use a seat belt as contributory negligence. However, it is likely that a small piece of the contributory negligence pie is left where a plaintiff improperly uses a seat belt.

Still worse news for plaintiffs is that, while product misuse may seem like a tempting doctrine under which to claim non-use in an AEMLD action, its practical application is limited. And although plaintiffs have a better chance of asserting assumption of risk, this is still not a good avenue for claiming non-use.

With so little options available for a defendant-manufacturer to claim that a plaintiff should have worn his seat belt, it would seem that some shift in the law is required. The most efficient and equitable way

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250. DOBBS, *supra* note 221, at 514.

251. See *Watterson v. Gen. Motors Corp.*, 544 A.2d 357, 364 (N.J. 1988) (distinguishing "first-collision and second collision injuries").

to level the playing field would be to allow manufacturers the chance to allow evidence in mitigation of damages. While this is certainly not a perfect solution, the current situation defies both the logic of common sense and the apparent will of the legislature. While it may be cliché, it is still true that seat belts save lives and the judiciary should join the legislature's fight to protect Alabama's drivers.

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