LEGAL NOTICE

NOTICE IS HEREBY GIVEN that Articles of Incorporation have been filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, on July 25, 1988, for the purpose of obtaining a certificate of incorporation. The name of the corporation organized under the Commonwealth of Pennsylvania Business Law, approved May 5, 1933, P.L. 364, as amended, is PETERSON CONSTRUCTION, INC. (A CLOSE CORPORATION). The purpose for which the corporation has been organized is to engage in any lawful business for which corporations may be incorporated under the Business Corporation Law of the Commonwealth of Pennsylvania.

WINGERD AND LONG
P.O. Box 187A
Chambersburg, PA 17201

9/30/88

NOTICE is hereby given that the Board of Waynesboro Borough Authority, has adopted a Resolution signifying its intention to file Articles of Amendment to its Articles of Incorporation with the Secretary of the Commonwealth of Pennsylvania. (1) The name of the Authority is Waynesboro Borough Authority, with its registered office at 57 East Main Street, Waynesboro, Franklin County, Pennsylvania. (2) Said Articles of Amendment are to be filed under the provisions of the Pennsylvania Municipality Authorities Act of May 2, 1945, P.L. 382, as amended. (3) The proposed amendment extends the term of existence of the Authority to a date fifty (50) years from the date of approval of the Articles of Amendment. (4) The Articles of Amendment will be filed with the Secretary of the Commonwealth of Pennsylvania on October 5, 1988.

A. ROBERT MARGIN
Secretary, Waynesboro Borough Authority

9/30/88

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Department of State of the Commonwealth of Pennsylvania, on July 28, 1988, an application for a certificate for the conducting of a business under the assumed or fictitious name of COUNTRY STITCH AND FRAME, with its principal place of business at 48 Linden Avenue, Mercersburg, PA 17236. The name and address or the person owning or interested in said business is Kathy Jo Petrie, 48 Linden Avenue, Mercersburg, PA 17236.

Gregory L. Kiersz, Esquire
239 East Main Street
Waynesboro, PA 17268

9/30/88

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Department of State of the Commonwealth of Pennsylvania, on July 12, 1988, an application for a certificate for the conducting of a business under the assumed or fictitious name of FILL THAT VOID, with its principal place of business at 15139 Buchanan Trail East, Blue Ridge Summit, 17214. The names and addresses or the persons owning or interested in said business are Ruth R. Shepherd and Hilda B. Jones, P.O. Box 757, Cascade, MD 21719.

9/30/88

Charles W. McIntire and Betty L. McIntire, Plaintiffs	: In the Court of Common Pleas of the 39th Judicial District, Pennsylvania, Franklin County Branch
vs.	: A.D. 1987-165
Helen Woodring Haugh, administrator of Jacob Woodring, deceased; and Lillian Woodring Wishard, Hilda Woodring Haugh, Harvey Woodring, Betty McKissick, Richard Woodring, Josephine Shindledecker, Charles Woodring, and Raymond Woodring, their personal representatives, heirs and assigns, Defendants	: Action to Quiet Title

To the Defendants: Helen Woodring Haugh, Lillian Woodring Wishard, Hilda Woodring Haugh, Harvey Woodring, Betty McKissick, Richard Woodring, Josephine Shindledecker, Charles Woodring, Raymond Woodring, their personal representatives, heirs and assigns:

You are notified that the Plaintiffs have commenced an action to quiet title against you which you are required to defend.

You are required to plead to the complaint within twenty days after the service has been completed by publication.

STOUFFER, ET AL. v. PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, C.P. Franklin County Branch, No. A.D. 1986 - 380

Negligence - Contributory Negligence - Mitigation of Damages - Seat Belt Defense

1. In absence of a legislative enactment to the contrary, the courts should reject the "seat belt defense."

2. The public should have the opportunity of knowing in advance what their legal duties are.

3. A seat belt defense is not admissable on a mitigation of damage theory because the duty to mitigate does not arise until after the tortious act has taken place.

4. Non-use of seat belts is a condition, rather than a factor, in causation and is not accurately characterized as "contributory negligence."

Michael E. Kosik, Esq., Attorney for Plaintiffs
Jessie L. Smith, Esq., Attorney for Department of Transportation, Defendant
John N. Keller, Esq., Attorney for Beverly L. Neuder, Defendant

OPINION AND ORDER

KAYE, J., April 13, 1988:

On January 18, 1985, plaintiff, Christine E. Stouffer, was driving a car which struck a utility pole. Her son, plaintiff Jason Stouffer, age 4½ years, was a rear seat passenger in the vehicle at the time of the collision. Subsequent thereto, the instant action was filed.

In the course of the taking of the deposition of plaintiff, Christine E. Stouffer, it was determined that the front seat belts had been removed from the vehicle involved in the collision, and that plaintiff, Jason Stouffer, was not restrained by seat belts or in a child's safety seat. Thereafter, defendant, Beverly L. Neuder, filed a petition for leave to amend her new matter to include that non-use (or non-provision) of seat belts by way of defense on the claim. Plaintiffs filed an answer to the petition in which they assert a number of reasons why they believe the relief sought should be denied.

These matters were placed on the argument list, and the Court now has before it the briefs of plaintiffs and of defendant Neuder,

and has heard the oral argument of counsel representing those parties. The foregoing has been supplemented by correspondence from counsel citing late-arriving authority for their respective positions. Additionally, defendant, Commonwealth of Pennsylvania, has submitted a letter which we received on March 31, 1988 which responded to plaintiffs' post-argument submission.

The parties make a number of arguments in support of their positions:

> 1. Plaintiffs allege that no amendment should be permitted as the non-use of seat belts could have been discovered previously by defendants and an amendment will be prejudicial to plaintiffs.
>
> 2. Plaintiffs allege that 75 P.S. §4581, as amended November 23, 1987, bars the use of the "seat belt defense".
>
> 3. Defendants allege that non-use of seat belts constitutes negligence and "a basis for reduction of any damages to which plaintiff may be entitled to the extent that such damages were caused by plaintiff's non-utilization of a seat belt." (Petition to Amend, ¶ 8).

As of this date, no Pennsylvania appellate court cases have decided squarely the issues presented herein. A number of appellate court cases have skirted the issue, while not resolving it. In *Parise v. Fehnel,* 267 Pa. Super. 79, 406 A.2d 345, (1979), the Superior Court upheld the trial court's refusal to give a jury instruction on the non-use of seat belts by the plaintiff as there was no evidence of a causal connection between the non-use and the injuries sustained. In *dictum,* the Court added:

> Our decision today should not be seen as foreclosing the possibility of a so-called "seat belt defense" in future cases.
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> *
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>
> In *Barry v. Coca Cola Co.,* the New Jersey Superior Court said that it might have allowed the defendant a seat belt defense if he had introduced expert testimony showing a relationship between the plaintiff's injuries and his failure to use seat belts. That is our position.
>
> 267 Pa. Super. at ,
> 406 A.2d at 347
> [Citations omitted].

In *McKee v. Southeast Delco School District,* 354 Pa. Super. 433, 512 A.2d 28 (1986), the minor plaintiff was injured when a school bus

driver had to stop suddenly to avoid a collision, throwing plaintiff forward in her seat. The Superior Court found that evidence of the failure of the bus driver to assure that the passengers utilized seat belts, as he had been instructed to do by the school district authorities, should have been heard by the jury. Such evidence, said the Superior Court, could have been found by the jury to be a breach of the bus operator's duty to protect the children from injury. We note, however, that the "duty" referred to herein, appears to arise from the express instructions given to the school bus driver by the school distict, the benefit of which inured to the young occupants of the bus, so we think this holding is not particularly helpful in the analysis of the instant case.

An earlier case decided in the federal courts, but applying Pennsylvania law, disallowed the use of the seat belt defense, *Pritts v. Walter Lowrey Trucking Co.,* 400 F. Supp. 867 (W.D. Pa. 1975).

The Courts of Common Pleas in Pennsylvania are divided on this issue. In *Turner v. Scaife,* 17 Lycoming Rep. 60 (C.P. Lycoming Co., 1987), the Court refused to disallow as a matter of law the seat belt defense, holding, *inter al.,* "The seat-belt issue is a question of contributory negligence and not a question of mitigation of damages."

The Court of Common Pleas of Allegheny County adopted the following language in its decision in *Reisdorf v. Walker,* 128 P.L.J. 315, 317 (C.P. Allegheny Co., 1980):

> The fact that plaintiff failed to use the seat belts had nothing to do with the happening of the accident, or that he suffered some degree of injuries prescinding, for the moment, from their extent. The failure to use seat belts was not a proximate cause or substantial factor in producing an accident from which "some" injuries flowed or occurred.
> Therefore, the court holds that the failure to use seat belts does not constitute a defense sufficient to bar a recovery to plaintiff or absolve defendant from liability.
>
> [Cited from *Barry v. Coca Cola Company,* 99 N.J. Sup *Company,* 99 N.J. Super. 270, 239 A.2d 273 (1967)]

That court went on to hold that a failure to utilize seat belts goes to the question of damages, not liability. In *Bauknecht v. Mieczkowski,* (No. 180 July 1986, C.P. Berks County, dec. entered 3/10/87), the Berks County Court of Common Pleas sustained a demurrer to the seat belt defense. In *Gaerttner v. Saloum,* 70 Erie L.J. 65 (C.P. Erie Co., 1987), the seat belt defense was allowed in evidence. In *Walters v. Walters, et al.,* 20 Crawford L.J. 174 (C.P.

Crawford Co., 1987), and *Petruolo v. Marberger,* 20 Crawford L.J. 208 (C.P. Crawford Co., 1987), the Court took an intermediate position by holding that it would be premature to rule on the issue on preliminary objections.

Another analysis of this issue exists in *Beerley v. Hamilton,* 17 D&C 3d 732 (C.P. Phila. Co., 1980) in which the Court allowed the defense in a factual setting in which there was evidence that, following the initial impact, the operator of a vehicle was thrown about the interior of the vehicle due to non-seat belt use, and this resulted in a loss of control and a second impact. The decision goes on to note that, nationally, non-seat belt use is permitted in evidence only if that non-use is related to accident causation. Citing 2 Meyer, Law of Vehicle Negligence in Pennsylvania §23.80, Judge Wright notes that permitting a jury to consider non-seat belt usage except when causally related to the collision flies in the face of the established tort principle that one need not anitcipate the negligence of another.

It is our view that in the absence of a legislative enactment to the contrary, the courts should reject the "seat belt defense". There are a number of reasons for our belief that this is the appropriate resolution.

First, we believe that the public should have the opportunity of knowing in advance what their legal duties are. Legislative enactments would provide the public with fair notice of the potential legal implications of their failure to employ specific safety devices, while judicial decisions *post facto* do not.

Secondly, we must consider the legal grounds on which finding a common law basis for an affirmative obligation such as wearing seat belts must lie. The case law in Pennsylvania is widely divided on this point, as noted above.

There is the question of whether a failure to wear seat belts may constitute negligence. As noted by the Court in *Pritts v. Walter Lawrey Trucking Co., supra,* while numerous cases dealing with the issue of contributory negligence state that such negligence is "found in the affirmative question, doe the negligence contribute in any degree to the production of the *injury* complained of?" [Citing *Creed v. Pennsylvania R.R.,* 86 Pa. 139 (1878), emphasis added], it appears that the reference to "injury" is in reality to *causation* of the incident, not in contribution to physical injury. See, e.g. *McClure v. Pennsylvania Taximeter Co.,* 252 Pa. 478, 97 A. 694 (1916), *Hull v. Bowers,* 273 Pa. 429, 117 A. 189 (1922). Non-

use of seat belts thus more accurately ought to be characterized as a condition, rather than as a factor in causing the impact which brings about the injury. Thus, it is not accurately characterized as "contributory negligence."

Similarly, we think that the seat belt defense is not admissible on a mitigation of damage theory. The duty to mitigate damages does not arise until the tortious act has taken place, *Downs v. Scott,* 201 Pa. Super. 278, 191 A.2d 908 (1963), and that duty in a Pennsylvania personal injury case has been held to relate to the obligation to seek treatment of the injury, *Hilscher v. Ickinger,* 194 Pa. Super. 237, 166 A.2d 678 (1961), aff'd on opinion below 403 Pa. 596, 170 A.2d 595 (1961), so a failure to use a seat belt *prior to* the impact that occurred in this case should not be admissible on a mitigation of damages theory, *Turner v. Scaife, supra,* 17 Lycoming Rep. at 63.

While we recognize that there is considerable research indicating that seat belts do reduce injuries and save lives, we think that a policy statement on the impact of failure to utilize seat belts will have on civil law suits should come from the General Assembly, which has recently provided at 75 P.S. §4581 that non-seat belt use may not be used in a civil proceeding. While the collision herein pre-dates that legislation, we note that Judge Robert L. Walker of Crawford County has pointed out in *Petruolo v. Marberger, supra* at 209:

> "It would be somewhat ironic if the failure to use a seat belt at a time when [as in the instant case] there was no mandatory seat belt legislation, could be used against the occupant of the car in civil litigation, but after the passage of mandatory seat belt legislation, it could not be used."

For the reasons set forth herein, we will deny defendant's petition to amend. Due to this disposition, it is unnecessary to consider the other issues raised.

ORDER OF COURT

NOW, this 13th day of April, 1988, the motion of defendant, Beverly L. Neuder, for leave to amend her new matter is denied.