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UNBUCKLING THE SEAT BELT DEFENSE IN ARKANSAS

Spencer G. Dougherty*

INTRODUCTION

The “seat belt defense” has been hotly litigated over the decades in numerous jurisdictions across the United States. It is an affirmative defense that, when allowed, reduces a plaintiff’s recovery for personal injuries resulting from an automobile collision where the defendant can establish that those injuries would have been less severe or avoided entirely had the plaintiff been wearing an available seat belt. This is an unsettled legal issue in Arkansas, despite the growing number of cases in which the seat belt defense is raised as an issue. Most jurisdictions, including Arkansas, initially rejected the defense,¹ but the basis for those rejections has grown less compelling over the decades. A growing number of states have recognized the defense in recent years.² In light of recent developments in tort law and the factual reality of the proven efficacy of seat belts, it is time for the Arkansas Supreme Court to revisit the issue and rule definitively in favor of allowing evidence of seat belt non-use for damage reduction.

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1. ARK. CODE ANN. § 27-37-703 (1995), *invalidated by* *Mendoza v. WIS Int’l, Inc.*, 2016 Ark. 157, 490 S.W.3d 298.

2. *See generally Admissibility of Seat Belt Non-Use Evidence State by State Guide*, TRAFFIC RESOURCE CTR. FOR JUDGES, [<https://perma.cc/D5CV-JA2P>] (last visited Jan. 30, 2020); Gary L. Wickert, *Seat Belt Defense in All 50 States*, MATTHIESEN, WICKERT & LEHRER, S.C. (Apr. 25, 2019), [<https://perma.cc/8WV7-LQ5B>] (“A.C.A. § 27-37-703, which made evidence of failure to use a seat belt in a civil action[,] was found unconstitutional by the Arkansas Supreme Court in *Mendoza v. WIS International* The exact implications of this ruling are yet to be determined.”).

To Arkansans, and Americans at large, automobiles offer historically unprecedented mobility and convenience.³ For over a century, the primacy of motor vehicles as the transportation of choice for Americans has gone virtually unchallenged.⁴ The American dependence on automobiles came to be in part because of the relative accessibility and affordability of motor vehicles and in part because the national infrastructure developed concurrently with the motor vehicle boom of the twentieth century.⁵ Americans drive, on average, nearly thirty-two miles every day, and over 88% of Americans over the age of sixteen “reported that they dr[i]ve at least occasionally.”⁶

The convenience afforded by car ownership belies a massive and tragic human cost: An immense number of injurious and fatal traffic accidents occur every year in the United States.⁷ Thousands of those injuries and deaths could be prevented every year by merely wearing a seat belt; however, in a majority of jurisdictions drivers who put themselves and others at risk by not using available seat belts face little chance of having to pay for their omissions in the courtroom.⁸ Most states maintain statutes prohibiting defendants from presenting evidence of seat belt non-use to reduce a plaintiff’s recovery.⁹ The justifications for these statutes, while possibly defensible many years ago, no longer reflect the public policy of Arkansas or the United States.¹⁰

Like many other states, Arkansas (for decades) maintained a statute prohibiting admission of evidence of seat belt non-use for

3. See Edward Humes, *The Absurd Primacy of the Automobile in American Life*, THE ATLANTIC (Apr. 12, 2016), [<https://perma.cc/78JM-EH3D>].

4. See *id.*

5. See Alex Taylor III, *America’s Love Affair with Its Cars Is Far from Over*, FORTUNE (July 3, 2013), [<https://perma.cc/DA8J-9VBR>].

6. BRIAN TEFFT, AAA FOUND. FOR TRAFFIC SAFETY, AMERICAN DRIVING SURVEY: 2015-2016 (2018), [<https://perma.cc/FBE2-KUH6>].

7. Press Release, Nat’l Highway Traffic Safety Admin. (NHTSA), USDOT Releases 2016 Fatal Traffic Crash Data (Oct. 6, 2017), [<https://perma.cc/9QLS-QEDX>].

8. See NHTSA, OCCUPANT PROTECTION IN PASSENGER VEHICLES 1, 6 (2018), [<https://perma.cc/AWS8-M9F2>]; Wickert, *supra* note 2.

9. Steven B. Hantler et al., *Moving Toward the Fully Informed Jury*, 3 GEO. J.L. & PUB. POL’Y 21, 32 (2005).

10. See Michelle R. Mangrum, *The Seat Belt Defense: Must the Reasonable Man Wear a Seat Belt?*, 50 MO. L. REV. 968, 977-78 (1985).

purposes of reducing damages.¹¹ The Arkansas Supreme Court overturned the statute in 2016, but its decision seemed motivated more by a desire to check the procedural rule-making authority of the Arkansas Legislature than to mold evidentiary standards to comport with public policy.¹² The Court overturned the statute as a violation of the separation of powers doctrine, yet failed to rule on whether evidence of seat belt non-use would be admissible in civil actions moving forward.¹³ As a result, the state of the law in Arkansas is unclear, much to the consternation of both plaintiffs' and defense lawyers.¹⁴

The Arkansas Supreme Court's newly-reclaimed power to write its own procedural rules remains vulnerable to further attempts by the legislature to wrest rule-making authority from the judiciary through successor ballot initiatives.¹⁵ There is little question, however, that the time has come for the Arkansas Supreme Court and the other relevant judicial rule-making bodies to allow admission of evidence of seat belt non-use for allocation of comparative fault.¹⁶ Continued judicial fence-sitting on the issue undermines both the state law requiring drivers to wear seat belts and the hard-won public recognition of their efficacy. This Comment analyzes the history of the seat belt defense in the United States, with particular emphasis on Arkansas and neighboring jurisdictions. The Comment will then examine the current state of the law in Arkansas and advocate for allowing admission of evidence of seat belt non-use in Arkansas.

11. ARK. CODE ANN. § 27-37-703 (1995), *invalidated by* *Mendoza v. WIS Int'l, Inc.*, 2016 Ark. 157, 490 S.W.3d 298.

12. *See* Justice J. Brooks, *Mendoza v. WIS International, Inc.: The Supreme Court's Decision Makes Seat Belt Non-Use Relevant Evidence*, 52-WTR ARK. LAW. 34, 34 (2017).

13. *See* *Mendoza v. WIS Int'l, Inc.*, 2016 Ark. 157, 9-10, 490 S.W.3d 298, 303-04.

14. *See* Brooks, *supra* note 12, at 34-35.

15. Although Issue 1 was struck from the ballot, it is safe to assume that similar proposals will follow in the future. *See* Joshua M. Silverstein & Jerry Cox, *Good Riddance to Issue 1*, NW. ARK. DEMOCRAT-GAZETTE (Oct. 21, 2018), [<https://perma.cc/TDB6-NMN8>].

16. *The Policy Basis for Seat Belt Evidence Gag Statutes No Longer Exists*, TAYLOR | ANDERSON, LLP (Nov. 7, 2016), [<https://perma.cc/CJN2-U5NJ>].

I. BACKGROUND

When a careless driver rear-ends another vehicle and causes injuries to its passengers, the question of liability would normally be straightforward. The offending driver, or his or her insurance, would assume total liability for the injuries and compensate the aggrieved party.¹⁷ However, if that injured party were somehow at fault in the accident in some way, they would be expected to have their damages reduced according to their percentage of fault.¹⁸ This notion of comparative fault is not novel or controversial. If, for example, the plaintiff was not wearing his or her seat belt and suffered much worse injuries as a result, the logical conclusion would be that the plaintiff contributed to the proximate cause of their injuries and would therefore be subject to a reduction in damages based on their percentage of fault. This is the rationale behind the seat belt defense. It is a relatively simple theory which provides that in an accident where the injured person was not wearing a seat belt, the responsible party may use the defense to reduce their liability by the amount of damages that would have been avoided if the person had been wearing their seat belt. Even though the rationale seems simple enough, for one reason or another, a shrinking majority of states prohibit defendants from employing the defense by statute.

A. Motivations for Enacting Exclusionary Provisions

In the 1980s the federal government began to aggressively promote seat belt initiatives which eventually led to most states adopting mandatory seat belt use statutes. The National Highway Transportation Safety Administration (NHTSA) issued a regulation in 1984 requiring all passenger vehicles beginning with the 1990 model year to include passive restraints such as seat belts and air bags unless states constituting over two-thirds of the

17. See Charles R. Gueli, *All About Rear-End Accident Claims and Injury Compensation*, INJ. CLAIM COACH, [<https://perma.cc/9CLC-44UQ>] (last visited Feb. 3, 2020).

18. See *Car Accident Liability: Proving Fault in a Car Crash*, FINDLAW, [<https://perma.cc/VQ9T-AEPS>] (last visited Jan. 23, 2020).

nation's population adopted mandatory seat belt statutes.¹⁹ By 1987, a majority of states, including Texas, responded by passing mandatory seat belt use statutes.²⁰ Arkansas followed suit in 1991.²¹ Many of these statutes (including those passed by Arkansas and Texas) included provisions barring the admission of failure to wear a seat belt as evidence in civil actions.²²

At the time, there were legitimate policy justifications for including the exclusionary provisions. When the NHTSA regulation went into effect, less than 13% of motor vehicle occupants nationwide regularly used seat belts.²³ Car manufacturers had only recently been required to install seat belts as standard equipment on all passenger vehicles, and much of the public remained skeptical of seat belts' effectiveness in preventing injuries.²⁴

The exclusionary provisions were also in large part enacted at a time in which many states maintained harsh comparative fault schemes capable of completely barring an otherwise-innocent plaintiff's recoverable damages for failure to wear a seat belt.²⁵ Courts and legislatures were understandably "hesitant to allow a jury to deprive a plaintiff who was not wearing a seatbelt of all recovery against the person who negligently caused the accident."²⁶ Although a majority of states now operate under gentler, modified comparative fault schemes, many of the exclusionary provisions have yet to be updated or discarded.²⁷

19. Federal Motor Vehicle Safety Standard; Occupant Crash Protection, 49 Fed. Reg. 28,962-01, 28,962 (July 17, 1984) (codified as amended at 49 C.F.R. § 571.208).

20. *Nabors Well Servs., Ltd. v. Romero*, 456 S.W.3d 553, 558 (Tex. 2015); TEX. TRANSP. CODE ANN. §§ 545.412(d), 545.413(g) (West 2015) (relevant subsections repealed 2003).

21. ARK. CODE ANN. § 27-37-703 (1995), *invalidated by* *Mendoza v. WIS Int'l, Inc.*, 2016 Ark. 157, 490 S.W.3d 298.

22. *Admissibility of Seat Belt Non-Use Evidence State by State Guide*, *supra* note 2; Wickert, *supra* note 2

23. Peter Scaff, *The Final Piece of the Seat Belt Evidence Puzzle*, 36 HOUS. L. REV. 1371, 1377 n.33 (1999).

24. *See id.* at 1377-78.

25. *See* Hantler et al., *supra* note 9, at 35.

26. *See id.*

27. *See* Wickert, *supra* note 2.

The most commonly cited rationale for barring admissibility is the purported “absence of a duty to wear a seat belt.”²⁸ Courts in these jurisdictions reason that, where there is no duty, a jury should not be able to reduce a plaintiff’s damages for failure to wear an available seat belt.²⁹ Increasingly, however, evolving public policy in many jurisdictions is eroding the rationales against allowing admission of evidence of seat belt non-use.

B. The Unsettled State of the Law in Arkansas

Arkansas’s history with the seat belt defense closely mirrors that of many other states that grappled with the issue. Originally, under the common law of Arkansas, a passenger’s failure to “use a seat belt constituted ‘fault’ under the comparative fault statute and [was] admissible in[to] evidence,” so long as that “failure was a proximate cause of [the plaintiff’s] injuries.”³⁰ However, in 1991 the Arkansas legislature passed a statute mandating seat belt use that also contained an exclusionary provision.³¹ For over two decades, section 27-37-703 of the Arkansas Code (a “gag” statute) barred defendants from introducing evidence of a plaintiff’s non-use of a seat belt in lawsuits arising from motor vehicle collisions.³² Arkansas’s gag statute barred evidence of a plaintiff’s potentially negligent failure to use a seat belt from reaching the jury, even when wearing a seat belt would have fully prevented or lessened the plaintiff’s injuries.³³ Arkansas courts dutifully upheld the statute between 1991 and 2015 on the basis of the unfair prejudice associated with allowing evidence of seat belt non-use into the courtroom.³⁴ However, as early as 1999

28. Mangrum, *supra* note 10, at 977-78 (citing *Petersen v. Klos*, 426 F.2d 199 (5th Cir. 1970); *Taplin v. Clark*, 626 P.2d 1198, 1201 (Kan. Ct. App. 1981); *D.W. Boutwell Butane Co. v. Smith*, 244 So.2d 11, 13 (Miss. 1971); *Amend v. Bell*, 570 P.2d 138, 143 (Wash. 1988) (en banc)).

29. *See id.* at 978.

30. HOWARD W. BRILL & CHRISTIAN H. BRILL, *LAW OF DAMAGES* § 27:2 (6th ed. 2014).

31. ARK. CODE ANN. § 27-37-703 (1995), *invalidated by* *Mendoza v. WIS Int’l, Inc.*, 2016 Ark. 157, 490 S.W.3d 298 (“The failure of an occupant to wear a properly adjusted and fastened seat belt shall not be admissible into evidence in a civil action.”).

32. *See* ARK. CODE ANN. § 27-37-703.

33. Brooks, *supra* note 12, at 34.

34. *Allen v. Greenland*, 347 Ark. 465, 475, 65 S.W.3d 424, 432 (2002).

some Arkansas Supreme Court justices began to question the statute's validity.³⁵

In 2016, the Arkansas Supreme Court substantially muddied the waters in *Mendoza v. WIS Int'l, Inc.*³⁶ In that case, a motor vehicle passenger brought suit against a driver and his employer for personal injuries suffered in a collision.³⁷ The plaintiff was not wearing a seat belt.³⁸ The driver and his employer sought to introduce evidence to that effect and challenge the constitutionality of section 27-37-703.³⁹ Unsure of how to proceed, the United States District Court for the Eastern District of Arkansas submitted a certified question to the Arkansas Supreme Court: “[D]oes section 27-37-703, which restricts the admissibility of seat belt non-use evidence in civil actions, violate the separation-of-powers doctrine found in article IV, section 2, of the Arkansas Constitution?”⁴⁰

The Supreme Court answered in the affirmative and ruled the gag statute unconstitutional, but for reasons which were fundamentally different from the public policy considerations relied upon by other states such as Texas.⁴¹ The Arkansas Supreme Court recognized the legislature's power to make substantive law through statute but unequivocally asserted its authority to determine the rules of evidence.⁴² In the Court's view, the statute represented an unconstitutional usurpation of judicial rule-making authority by the state legislature because it entirely restricted a certain kind of evidence from entering the courtroom.⁴³ Justice Danielson, who authored the opinion, notably wrote “If we were to grant authority to the legislature to determine the relevancy of evidence in court proceedings, we

35. *Grummer v. Cummings*, 336 Ark. 447, 451, 986 S.W.2d 91, 93 (1999) (Imber, J., concurring).

36. *See Mendoza v. WIS Int'l, Inc.*, 2016 Ark. 157, 490 S.W.3d 298.

37. *Id.* at 2, 490 S.W.3d at 300.

38. *Id.*

39. *Id.*

40. *Id.* at 1, 490 S.W.3d 298, 299.

41. *Compare Nabors Well Serv., LTD. v. Romero*, 456 S.W.3d 553, 564 (Tex. 2015), with *Mendoza*, 2016 Ark. at 9-10, 490 S.W.3d at 303-04.

42. *Mendoza*, at 9-10, 490 S.W.3d at 303-04 (quoting *State v. Sypult*, 304 Ark. 5, 7, 800 S.W.2d 402, 404 (1990) (“[W]hen conflicts arise between legislation and rules of evidence and procedure, [the court’s] rules remain supreme.”)).

43. *Id.* at 9-10, 490 S.W.3d at 303-04.

would be depriving the trial courts of their exclusive authority to determine the relevancy of evidence[, thereby creating] an absurd result.”⁴⁴ The Court therefore held that, as an evidentiary rule of procedure, section 27-37-703 violated the separation-of-powers doctrine and overruled the statute.

The split *Mendoza* decision, wherein three justices dissented, highlighted a long-simmering and continuously-developing power struggle between the two branches of the Arkansas government concerning rule-making related to the pleading, practice, and procedure of Arkansas courts.⁴⁵ Two of the dissenting justices reasoned the facts of the case were not even applicable to the “Failure to Comply” statute and that the Court needed not address the events of the *Mendoza* case outside of the scope of the certified question.⁴⁶ Justices Hart and Wood opined in their dissents that Arkansas Rule of Evidence 402 gave the state legislature the authority to statutorily determine evidentiary relevance in court cases.⁴⁷ By that logic, because the legislature had determined that seat belt non-use was irrelevant in its statute, the dissenting justices would have held the gag provision as constitutional.⁴⁸ Although the majority was not convinced by that argument, the question still gave the Court pause enough to direct the Civil Practice Committee to review Rule 402 to determine whether the rule as currently written indeed does endow the legislature with evidentiary rule-making authority.⁴⁹ If so, observers can expect significant changes to Rule 402 to place

44. *Id.* at 9, 490 S.W.3d at 303.

45. *See id.* at 10, 490 S.W.3d at 304.

46. *Id.* at 10-11, 490 S.W.3d at 304 (Baker, K., dissenting); *id.* at 11-19, 490 S.W.3d at 304-09 (Hart, J., dissenting).

47. ARK. R. EVID. 402. (“All relevant evidence is admissible, except as otherwise provided by statute.”).

48. *See Mendoza*, 2016 Ark. at 11-19, 490 S.W.3d at 308-09 (Hart, J., dissenting); *id.* at 19, 490 S.W.3d at 308-09 (Wood, J., dissenting); *see also* Brooks, *supra* note 13, at 35.

49. *See Mendoza*, 2016 Ark. at 6, 9, 490 S.W.3d at 302, 303 n.1 (“We request our Civil Practice Committee to review Rule 402 in light of this opinion. To the extent that any other rules of evidence conflict with *Johnson v. Rockwell*, we refer those rules to the Committee for review as well.”) (citing *Johnson v. Rockwell*, 2009 Ark. 241, 308 S.W.3d 135 (overturning a statute as violating the separation-of-powers doctrine when it “limited the evidence that may be introduced relating to the value of medical expenses, thereby dictating what evidence is admissible.”)).

even more evidentiary rule-making power within the realm of the judiciary.

The Arkansas defense bar, which long fought to assert plaintiffs' comparative fault for failure to wear available seat belts, understandably believed they had achieved a significant victory. Defense attorneys in the state pointed to the greater severity of injury associated with failure to wear a seat belt as justification for their position.⁵⁰ The practical effects of making evidence of non-use admissible are obvious—reductions in plaintiffs' damages based on juries' newfound proclivities for assigning fault for failure to wear seat belts when it becomes evident that the plaintiff's injuries would have been less severe had the plaintiff been wearing a seat belt.

Although the initial reaction might have been to conclude that evidence of seat belt non-use now constitutes relevant and admissible evidence, that question remains very much up in the air. Although *Mendoza* was conclusive on the separation-of-powers issue, the Arkansas Supreme Court failed to specifically answer one crucial question: whether, after the rejection of section 27-37-703, evidence of non-use of a seat belt is now relevant and admissible for purposes of a jury's comparative fault analysis.⁵¹ In the wake of *Mendoza*, Arkansas law regarding admissibility is now unsettled at best and headache-inducing at worst.⁵² It is an issue drenched in confusion. Litigators on both sides of the issue struggle to discern and then articulate the law relating to the admissibility of evidence of seat belt non-use.⁵³ The issue requires resolution, irrespective of whether that resolution comes from the judiciary.

The Arkansas Supreme Court has, in recent years, taken a strong stance against the legislature commandeering judicial rule-making authority.⁵⁴ This power struggle between the two branches has taken place in various arenas, with the most notable

50. See Brooks, *supra* note 12, at 35.

51. The Court's opinion focused on the separation-of-powers issue and failed to make any explicit determination as to whether evidence of seat belt non-use would be admissible moving forward. See *id.* at 34-35.

52. See *id.* at 35.

53. See *id.*

54. Max Brantley, *Judge Pierce Says Issue One Is Unconstitutional and Should Be Removed from the Ballot*, ARK. TIMES (Sept. 6, 2018), [<https://perma.cc/2SLB-36E3>].

example constituting the Issue 1 “Tort Reform” measure, which, had it not been struck from the ballot, would have given complete judicial rule-making authority to the legislature.⁵⁵ If the Arkansas electorate had voted in favor of Issue 1, it is likely that the legislature would have passed merely another gag statute barring admission of evidence of seat belt non-use.⁵⁶ However, the Court remains the entity in charge of its rule-making authority and, at some point, will have to address the viability of the seat belt defense definitively.

II. ANALYSIS

In the wake of the *Mendoza* case, the Arkansas Supreme Court has established its rule-making authority for evidentiary matters and is now the entity responsible for determining whether evidence of seat belt non-use is admissible as evidence of a plaintiff’s comparative fault. The most equitable course the Court can take when next presented with the issue is to rule that such evidence is admissible—doing so would be fairer to both sides if a plaintiff did indeed act negligently by not wearing a seat belt. One thing is clear—the confusion stemming from the law as it stands now benefits none and will not go away until the Court definitively rules one way or another.

A. Arkansas’s Comparative Fault Scheme Allows for Fair Apportionment of Damages Without Fully Barring Non-Negligent Plaintiffs from Recovery

Arkansas courts rendered the decisions barring seat belt use as evidence of a plaintiff’s negligence at a time that an all-or-nothing rule applied. However, given that the modern comparative fault scheme has largely alleviated this concern, the law barring seat belt use as evidence of a plaintiff’s negligence should not be applied by courts in a state like Arkansas that no longer abides by an all-or-nothing contributory negligence

55. *Id.*

56. See Roby Brock, *Will Tort Reform Return?*, TALK BUS. & POLITICS (Feb. 3, 2019), [<https://perma.cc/ZXA8-VT87>].

scheme.⁵⁷ Arkansas's comparative fault infrastructure is well-established and well-suited to accommodate the seat belt defense as a method of reducing damages for failure to comply with the seat belt statute and the standard of ordinary care, just as jurors reduce damages for violation of any other legal duty. While evidence of seat belt non-use, if allowed, would reduce a plaintiff's damages, the average person overwhelmingly understands the safety benefits of seat belt use and an average individual would likely consider non-use to be quite risky.⁵⁸ Pre-comparative fault objections are no longer on point both because there appears to be a duty to wear available seat belts and because plaintiffs should not fear to suffer a complete loss of damages so long as they are not more at fault than defendants.⁵⁹ A plaintiff suffering damages is still entitled to recovery so long as his or her responsibility is not higher than that of the defendant's.⁶⁰

B. Seat Belt Use Is an Exercise of Ordinary Care

Just as most tort duties originate from statutes, Arkansas's mandatory seat belt use law strongly suggests the existence of a duty of ordinary care to wear available seat belts, and failure to comply with this duty now represents a breach of the general duty to exercise reasonable care for one's safety. The public policy rationales underlying states adopting gag statutes now seem archaic and unpersuasive considering the increasing public favor towards seat belt use and jurisdictional acceptance of seat belt use as an exercise of ordinary care. Arkansas's seat belt statute mandates that drivers and front seat passengers of motor vehicles wear seat belts.⁶¹ Failure to comply with this statute, while not

57. ARK. CODE ANN. § 16-64-122 (1991).

58. See generally NHTSA, U.S. DEP'T OF TRANSP., PUB. NO. DOT-HS-812-456, TRAFFIC SAFETY FACTS: SEAT BELT USE IN 2017—OVERALL RESULTS (Apr. 2018), [<https://perma.cc/YJ4W-SF7U>].

59. See *infra* notes 64-66 and accompanying text.

60. ARK. CODE ANN. § 16-64-122(b)(1) (1991) (“If the fault chargeable to a party claiming damages is of a lesser degree than the fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is entitled to recover the amount of his or her damages after they have been diminished in proportion to the degree of his or her own fault.”).

61. The statutory duty to wear a seat belt comes from ARK. CODE ANN. § 27-37-702 (2003). Would not a violation of this statute constitute negligence per se, or at least strong

necessarily negligence per se, should be considered by a jury as evidence of fault. Even the Arkansas Model Jury Instructions reference failure to wear a seat belt (a violation of state law) as evidence of negligence.⁶² It's past time for the Arkansas Supreme Court to definitively rule in favor of allowing evidence of seat belt non-use into the courtroom.

Seat belt non-use fits squarely into the definition of unreasonable conduct. Arkansas law defines "fault" as "any act, omission, conduct, the risk assumed, breach of warranty, or breach of any legal duty which is a proximate cause of any damages sustained by any party."⁶³ A breach of the duty of ordinary care is considered proximate cause under the comparative fault structure, and a growing number of jurisdictions recognize a common law duty of ordinary care to wear seat belts.⁶⁴ Even Arkansas's common law seems to suggest the existence of a duty to wear available seat belts.

Before the State's legislature implemented the now-defunct gag statute, Arkansas courts generally expressed a willingness to allow juries to assess fault to plaintiffs for failure to wear a seat belt if defendants were able to prove that the omission constituted a proximate cause of the plaintiff's injuries.⁶⁵ The most illustrative case in support of this proposition was *Potts v. Benjamin*, in which the Eighth Circuit predicted that Arkansas juries could assess a percentage of fault against a plaintiff if the defendant could demonstrate the degree to which using a seat belt would have reduced the plaintiff's injuries.⁶⁶ The Eighth Circuit

evidence of negligence, to assess corresponding damage reductions? See Ark. Model Jury Instr., Civil AMI 601.

62. See Ark. Model Jury Instr., Civil AMI 601.

63. ARK. CODE ANN. § 16-64-122.

64. See *Baker v. Morrison*, 309 Ark. 457, 462, 829 S.W.2d 421, 423 (1992) ("appellants' failure to wear their seatbelts was a failure to exercise ordinary care"); *Bentzler v. Braun*, 149 N.W.2d 626, 640 (Wis. 1967) ("[A]s a matter of common knowledge, an occupant of an automobile either knows or should know of the additional safety factor produced by the use of seatbelts."); *Dellapenta v. Dellapenta*, 838 P.2d 1153, 1160 (Wyo. 1992) (recognizing a parent's common-law duty to buckle a minor passenger's seatbelt in light of statistics confirming the often dire results of failure to do so).

65. See *Baker*, 309 Ark. at 462, 829 S.W.2d at 423.

66. The Arkansas Supreme Court later validated the Eighth Circuit's reasoning. See *Potts v. Benjamin*, 882 F.2d 1320, 1323 (8th Cir. 1989) (predicting Arkansas law would allow the admissibility of the plaintiff's failure to wear seatbelt as evidence of comparative

further interpreted Arkansas law to hold that, even in the absence of a statute requiring use, failure to wear an available seat belt would constitute negligence under the general common-law standard of ordinary care.⁶⁷

A plaintiff's failure to wear a seat belt would certainly resemble proximate cause (under the usual understanding of the term) if that failure to wear a seat belt, in a natural and continued sequence, caused those injuries, and without that failure, the injuries would not have occurred. The Arkansas Supreme Court further held in *Shelter Mutual Ins. Co. v. Tucker* that a plaintiff's non-use of a seat belt could become an issue for the jury to the extent that that non-use could be connected with the injuries she sustained.⁶⁸ Although the court in *Mendoza* did not rule on the specific admissibility of seatbelt non-use, the Eighth Circuit predicted in 1989 that failure to wear an available seatbelt would constitute admissible evidence of comparative fault.⁶⁹

C. Public Attitudes Toward Seat Belt Use Support Allowing the Defense

The Texas Supreme Court's recent pivot towards allowing the seat belt defense reflects the shifting public attitude towards allowing the seat belt defense, and its public policy considerations should be quite persuasive for the Arkansas Supreme Court. Texas's longtime prohibition and recent allowance of the seat belt defense represents a compelling historical corollary to the current state of the law in Arkansas. For over "forty years[,] evidence of a plaintiff's failure to use a seat belt [was] inadmissible in car-accident cases" in Texas.⁷⁰ The Texas Supreme Court first implemented the rule "in 1974[] to offer[] plaintiffs safe harbor from the harshness of an all-or-nothing comparative fault scheme."⁷¹ The Texas legislature statutorily prohibited evidence

fault); *Baker*, 309 Ark. at 461, 829 S.W.2d at 423 ("we think *Benjamin* correctly applied Arkansas law").

67. See *Potts*, 882 F.2d at 1322.

68. See *Shelter Mutual Ins. Co. v. Trucker*, 295 Ark. 260, 263-64, 748 S.W.2d 136, 137-38 (1988).

69. See *Potts*, 882 F.2d at 1323.

70. See *Nabors Well Servs., Ltd. v. Romero*, 456 S.W.3d 553, 555 (Tex. 2015).

71. *Id.*

of seat belt non-use in all civil cases but then repealed that law in 2003, leaving the Supreme Court's rule to stand alone.⁷² Although the rule may have been appropriate in its time, by 2015, the Court recognized in *Nabors Well Services, Ltd. v. Romero* that its prohibition on seat belt evidence had become an "anachronism."⁷³ The Court rejected the rule as a vestige of an old "legal system and an oddity in light of modern societal norms."⁷⁴

The *Romero* Court centered its decision in part on statutory interpretation based on the legislature's overhaul of Texas's comparative fault scheme from an all-or-nothing bar into a mechanism allowing juries to apportion negligence to plaintiffs without entirely barring the plaintiff's recovery.⁷⁵ The state's updated comparative fault scheme now both allows and requires jurors to consider pre-occurrence, injury-causing conduct such as seat belt non-use.⁷⁶ The second and strongest prong of the *Romero* decision recognized the sound public policy rationale behind allowing the seat belt defense.⁷⁷ The Court recognized that the law required seat belt use as an unquestioned part of daily life for the vast majority of drivers and passengers.⁷⁸ While the Court did acknowledge the abundance of research establishing that seat belts reduce injuries and save lives, it refused to belabor the point with statistics.⁷⁹ To do so, the Court held, would be to acknowledge the existence of a long-ended debate over the propriety of seat belt use.⁸⁰ The Court refused to maintain "a contradictory legal system [that] punished seat-belt nonuse with criminal citations while allowing plaintiffs in civil lawsuits to benefit from juries' ignorance of their misconduct."⁸¹

72. *Id.*

73. *See id.*

74. *Id.*

75. *See Romero*, 456 S.W.3d at 559 ("Gone is the harsh system of absolute victory or total defeat." (quoting *Parker v. Highland Park Inc.*, 565 S.W. 2d 512, 518 (Tex. 1978))). In Texas, a plaintiff is now entitled to a recovery reduced by his responsibility percentage, so long as his responsibility does not exceed 50%. TEX. CIV. PRAC. & REM. § 33.001 (1995).

76. *Romero*, 456 S.W.3d at 564.

77. *See id.*

78. *Id.* at 555.

79. *Id.* at 565.

80. *Id.*

81. *Romero*, 456 S.W.3d at 565.

The American public in the twenty-first century mostly understands and appreciates the life-saving capability of seat belts and the risks associated with failure to use them. In 2016 alone, motor vehicle crashes in the United States caused 37,461 fatalities and over 2.7 million serious injuries.⁸² Over half of those killed in passenger vehicles between the ages of 13 to 44 were not wearing seat belts at the time of the crash.⁸³ NHTSA estimates that seat belt use would have prevented approximately half of those fatalities and injuries.⁸⁴ Although the numbers are bleak, increased seat belt use has contributed to a general downward trend in traffic fatalities over the past decade.⁸⁵ Seat belts saved nearly 15,000 lives in 2016.⁸⁶

In light of the available statistics, it is no small wonder that the public at large today acknowledges the importance of seat belt use. Seat belt use nationwide has increased steadily since the turn of the century.⁸⁷ In 2017, an estimated 89.7% of all motor vehicle occupants nationwide routinely used seat belts.⁸⁸ This sentiment is also nearly universally reflected in state law—forty-nine states have statutes in place requiring seat belt use and sanctioning motorists who fail to use them.⁸⁹ Even the common law of many jurisdictions, deliberative as it may be, now considers seat belt use to be an exercise of reasonable care.⁹⁰

82. See generally NHTSA, U.S. DEP'T OF TRANSP., PUB. NO. DOT-HS-812-456, 2016 FATAL MOTOR VEHICLE CRASHES: OVERVIEW (2017), [<https://perma.cc/7UZE-8CSG>] [2016 FATAL MOTOR VEHICLE CRASHES]; CTR. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., OVERALL MV-OCCUPANT NONFATAL EMERGENCY DEP'T VISITS AND RATES PER 100,000 (2016), [<https://perma.cc/CJ8T-PLXN>].

83. NHTSA, U.S. DEP'T OF TRANSP., PUB. NO. DOT-HS-812-494, TRAFFIC SAFETY FACTS: 2016 DATA (2018), [<https://perma.cc/75VF-MZ3N>].

84. See *id.*

85. 2016 FATAL MOTOR VEHICLE CRASHES, *supra* note 82.

86. See generally NHTSA, U.S. DEP'T OF TRANSP., PUB. NO. DOT-HS-812-454, LIVES SAVED IN 2016 BY RESTRAINT USE AND MINIMUM-DRINKING-AGE LAWS (2017), [<https://perma.cc/TY5P-KYQJ>].

87. 2016 FATAL MOTOR VEHICLE CRASHES, *supra* note 82.

88. *Id.*

89. See generally INS. INST. FOR HIGHWAY SAFETY & HIGHWAY LOSS DATA INST., SEAT BELTS—LAWS (2019), [<https://perma.cc/WMU2-L42S>].

90. See, e.g., *Baker v. Morrison*, 309 Ark. 457, 462, 829 S.W.2d 421, 423 (1992) (“appellants’ failure to wear their seat belts was a failure to exercise ordinary care”); *Bentzler v. Braun*, 149 N.W.2d 626, 639-40 (Wis. 1967) (“[T]here is a duty, based on the common law standard of ordinary care, to use available seat belts independent of any statutory mandate [I]t is obvious that, on the average, persons using seat belts are less likely to

The national consciousness of expecting motorists to use available seat belts predictably permeates the courtroom. Just as the first question people often ask in the immediate aftermath of a car accident is whether the occupant was wearing a seat belt, jurors deliberating civil cases concerning automobile accidents undoubtedly harbor the same question.⁹¹ Although the question of whether a claimant injured in a car crash failed to wear a seat belt would seem germane to a jury's assessment of damages, many states (including, until recently, Arkansas) maintain statutes that completely bar or severely restrict admission of evidence of seat belt non-use.⁹² These gag statutes prohibit defense lawyers in those jurisdictions from asserting the seat belt defense to reduce a claimant's damages for injuries that seat belt use by the claimant would likely have mitigated or prevented.⁹³ To understand why these exclusionary provisions exist in such an apparent contradiction of public policy, it is crucial to address the underlying rationales that existed at the time of their enactment.

Decades ago, the public harbored skepticism towards the effectiveness and safety of seat belt use.⁹⁴ This skepticism in large part led many states to enact gag statutes that still exist today. Many states implemented these laws at a time where cars were not all built with seat belts, and many states did not have laws requiring seat belt use.⁹⁵ Now, the public expectation (enshrined by statute in most states) is that drivers will use available seat belts when on the road. As noted by the Texas Supreme Court, any debate over the effectiveness of seat belts has

sustain injury and, if injured, the injuries are likely to be less serious . . . [A]s a matter of common knowledge, an occupant of an automobile either knows or should know of the additional safety factor produced by the use of seat belts.”)

91. Steven B. Hantler, *Moving Toward the Fully Informed Jury*, 3 GEO. J. L. & PUB. POL'Y 21, 32 (2005).

92. *See id.*

93. *See Potts v. Benjamin*, 882 F.2d 1320, 1322-23 (8th Cir. 1989) (predicting that the Arkansas Supreme Court would, in the absence of a statute requiring use, consider non-use of a seat belt to constitute a proximate cause of a claimant's injury if some or all of the damages sustained would not have occurred had the seat belt been worn); *Baker v. Morrison*, 309 Ark. 457, 461, 829 S.W.2d 421, 423 (1992) (“*Benjamin* correctly applied Arkansas law”); Brooks, *supra* note 12, at 34.

94. *See Mangrum*, *supra* note 10, at 978.

95. *See Brian T. Bagley*, *The Seat Belt Defense in Texas*, 35 ST. MARY'S L.J. 707, 716-17 (2004).

long ended.⁹⁶ Those concerns are no longer on point, and the Arkansas Supreme Court, when next confronted with the issue, will have an opportunity to bring the state's common law into accordance with the well-developed public recognition of the life-saving ability of seat belt use. Arkansas should join a growing number of states that have recently dumped their anachronistic gag statutes.⁹⁷ It is past time for the state's top court to lend judicial recognition to the effectiveness of seat belts and recognize that violation of the statutorily imposed duty to use available seat belts itself constitutes negligence for damage reduction.

It is essential to remember that every collision case in which a trial judge allows the defendant to assert the seat belt defense diminishes an otherwise innocent plaintiff's ability to collect full damages for their injuries.⁹⁸ The result can be a harsh outcome in which a negligent defendant arguably escapes full liability for blaming an injured person for their injuries.⁹⁹ Trial judges presiding over these cases should be mindful that to allow the defense does, to some extent, punish an otherwise innocent party. However, if the plaintiff is unfairly prejudiced, the trial judge will retain broad discretion to bar nonprobative evidence of seat belt non-use. Even if the Arkansas Supreme Court does definitively classify seat belt non-use as relevant evidence, plaintiffs' lawyers will still have a line of defense available that could exclude this

96. An increasing number of state supreme courts and federal courts recognize the policy justifications for allowing the seat belt defense. See *Nabors Well Servs., Ltd. v. Romero*, 456 S.W.3d 553, 565 (Tex. 2015); see, e.g., *Carlson v. Ferris*, 85 P.3d 504, 510 (Colo. 2003); *Waterson v. Gen. Motors Corp.*, 544 A.2d 357, 373 (N.J. 1988).

97. Idaho (2014 Idaho Sess. Laws 793, 795 (repealed 2014)), Oklahoma (2013 Okla. Sess. Laws 1, 3 (repealed 2013)), and Texas (1995 Tex. Sess. Law Serv. 1643, 1643-44 (repealed 2003)) are three states that have invalidated gag provisions through either statutory action or judicial mandate.

98. 1 COMPARATIVE NEGLIGENCE MANUAL § 4:4 (3d ed. 2019).

99. *Id.* ("In contributory negligence jurisdictions, one reason why the seat belt defense has been disfavored is because of the harshness of the result of denying plaintiff any recovery even though his or her failure to wear a seat belt did not cause the initial accident. This objection has been obviated in pure comparative negligence systems, since the plaintiff's recovery may be reduced proportionately rather than totally barred. However, in modified comparative negligence systems which utilize the "50-50" or "49-51" formulas, the objection is still pertinent, since admitting evidence of nonuse of a seat belt as comparative negligence could tip the balance against the plaintiff in the final allocation of the parties' respective negligence, resulting in a denial of recovery for [the] plaintiff.").

evidence any time it unfairly prejudices the plaintiff. Rule 403 of the Arkansas Rules of Evidence dictates that a court may still exclude any relevant evidence if its risk of unfair prejudice substantially outweighs its probative value.¹⁰⁰ Arkansas case law before the imposition of the gag provision frequently held in certain cases that evidence of seat belt non-use might impose unfair prejudice in negligence cases.¹⁰¹ If the Arkansas Supreme Court does definitively rule that evidence of non-use is relevant, as it should, courts will likely apply Rule 403 on a case-by-case basis, as they do for any other piece of evidence. This fight over prejudice will take place in the courtroom, where it belongs, rather than being arbitrarily barred by statute before defendants can even introduce the evidence.

D. Allowing Admission of Evidence of Seat Belt Non-Use Is a Positive Step Towards Fully Informing Juries

Given the enormous stakes that often accompany jury decisions, we expect juries to render decisions considering all relevant facts in the case. The jury is the most critical mechanism in the American judicial system for safeguarding individual rights. Hiding evidence of seat belt non-use from juries in Arkansas deprives the fact finder of crucial information, which then prevents them from proportionally allocating damage awards. Jurors cannot be expected to decide a case fairly when relevant evidence, such as evidence of seat belt non-use, is hidden from them by statute in apparent contrast to the principal of liberal admission of evidence espoused by the judiciary. As previously discussed, preventing evidence of seat belt non-use from reaching the jury goes against the scientifically-accepted safety benefits and public understanding associated with seat belts and undermines the very state law that requires their use in motor vehicles. Preventing a jury from assessing such an essential fact

100. Even if the seat belt defense is affirmatively allowed, plaintiffs are not automatically disadvantaged. If a plaintiff's failure to wear a seat belt had minimal bearing on the damages suffered, and a jury would be likely to view the plaintiff negatively for that failure in spite of the limited factual relevance, the court would exclude that evidence under Rule 403. *See* ARK. R. EVID. 403.

101. *See* Gummer v. Cummings, 336 Ark. 447, 986 S.W.2d 91 (1999).

in determining damages, even when the seat belt use is wholly relevant to a case and might have prevented death or severe injury, seems contradictory to notions of justice that the legal system demands and taints any determination made without that evidence.

The Arkansas judiciary must allow juries to consider evidence of seat belt non-use when allocating fault. Courts entrust jurors with the responsibility of making factual determinations to make fully informed decisions and should not then expect fair outcomes when they prevent access to crucial evidence in adherence to a now-defunct doctrine. Courts must recognize the jury's ability to weigh the value of a piece of evidence and determine whether that evidence might warrant a reduction in damages. Any fight over whether a jury should be able to consider evidence of seat belt non-use should not be decided by statute before any legal proceedings take place—it should be resolved in front of a judge.

CONCLUSION

Arkansans know that seat belts save lives and understand the risks of not using them on the road. The public views the notion of seat belt non-use much more unfavorably now than it did when states, such as Arkansas, implemented gag provisions prohibiting their introduction to establish comparative fault. In this contemporary age, reasonable individuals know that by not buckling up, they put themselves at risk of severe harm in the event of a collision. A growing number of states are tossing aside their exclusionary provisions in recognition of the current comparative fault climate and overwhelming public opinion in support of encouraging and mandating seat belt use. It is time for the Arkansas judiciary to lead from the front and recognize the statutory and common law duty to wear a seat belt and hold individuals equally accountable in negligence actions for their omissions.