IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NATALIE WOLF, as the Administratrix of the ESTATES OF JOY L. WARD, JOHN B. WARD, SARAH J. WARD, and as Guardian and Next Friend of HAILEY WARD, a minor,	)	
Plaintiffs	)	C.A. No. N11C-08-149-RRC
v.	)	
TOYOTA MOTOR CORPORATION, a Japanese corporation; TOYOTA MOTOR SALES U.S.A., INC., a California Corporation, and CF SCHWARTZ MOTOR CO., INC., a Delaware corporation,	)	
Defendants.	)	

Submitted: September 9, 2013
Decided: December 9, 2013

Upon Defendants Toyota Motor Corporation, Toyota Motor Sales U.S.A., Inc., and CF Schwartz Motor Co., Inc.'s Motion for Reargument.
GRANTED.

Upon Defendants Toyota Motor Corporation, Toyota Motor Sales U.S.A., Inc., and CF Schwartz Motor Co., Inc.'s November 21, 2012 Motion for Leave to File a Third-Party Complaint.
GRANTED.

MEMORANDUM OPINION

Timothy E. Lengkeek, Esquire, Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware, Attorney for Plaintiffs; Larry E. Coben, Esquire, Anapol Schwartz, Scottsdale, Arizona, and Gregory S. Spizer, Esquire, Anapol Schwartz, Philadelphia, Pennsylvania, Attorneys *pro hac vice* for Plaintiffs.

James M. Kron, Esquire and Somers S. Price, Jr., Esquire, Potter Anderson & Corroon LLP, Wilmington, Delaware, Attorneys for Defendants; Joel A. Dewey, Esquire, DLA Piper LLP (US), Baltimore, Maryland, Attorney *pro hac vice* for Defendants.

COOCH, R. J.

I. INTRODUCTION

These motions stem from a tragic accident which resulted in the deaths of three members of the Ward family: father John, wife Joy, and daughter Sarah. On the morning of August 23, 2009, the Ward family was involved in a head-on collision on SR 30 in Sussex County[1] when Darien Custis ("Custis"), driving a 1994 Mercedes-Benz owned by John F. Warfield ("Warfield"), was distracted by reaching for a bottle of iced tea on the car's floor.[2] The sole survivor in the Ward's Toyota was 8 year old daughter Hailey.[3] Custis was essentially unhurt[4] in the accident and later pled guilty to vehicular homicides involving John, Joy, and Sarah.[5]

Natalie Wolf, as the Administratrix of the Ward family estates and Guardian and Next Friend of Hailey, filed a "crashworthiness"[6] products liability claim against the Toyota Defendants[7] on August 18, 2011.[8] Plaintiffs claim that defects in the Toyota Camry driven by the Wards "enhanced" their injuries. Plaintiffs

[1] Compl. ¶ 7.
[2] Def.'s Mot. for Leave to File a Third-Party Compl. at 1-2.
[3] Compl. ¶ 3.
[4] Pl.'s Supp. Response to Mot. for Leave to File a Third-Party Compl. at 3.
[5] Def.'s Mot. for Leave to File a Third-Party Compl. Ex. 1 ¶ 9.
[6] Courts in different jurisdictions refer to this type of claim with various terms, most commonly "enhanced injury," "crashworthiness," or "second collision." Heather Fox Vickles & Michael E. Oldham, *Enhanced Injury Should Not Equal Enhanced Liability*, 36 S. TEX. L. REV. 417, 417-18 (1995). *See also Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 530 (Del. 1998).
[7] "The Toyota Defendants" is used in this opinion to refer to the three named defendants in this claim: Toyota Motor Corporation, Toyota Motor Sales U.S.A., Inc. and CF Schwartz Motor Co., Inc..
[8] Compl.

elected not to include Custis or Warfield as defendants in their complaint. The claim against Warfield is that of negligent entrustment.

On November 21, 2012, the final day allowable pursuant to the Trial Scheduling Order to permit a motion to join additional parties, the Toyota Defendants filed a motion requesting leave to join Custis and Warfield as third-party defendants under Superior Court Civil Rule 14(a).[9] This Court issued an opinion denying the motion on May 29, 2013.[10] The Toyota Defendants then filed the pending Motion for Reargument. Trial is currently scheduled for April 6, 2015.

For the reasons set forth below, the Court's Order of May 29, 2013 denying the Toyota Defendants' Motion for Leave to File a Third-Party Complaint is **VACATED.** Defendants' Motion for Reargument and their original Motion for Leave to File a Third-Party Complaint are both **GRANTED.**

II. ISSUES PRESENTED

There are two issues before the Court. The first is whether the Court misapprehended the law to the extent that the Motion for Reargument should be granted. The second is whether, pursuant to Superior Court Civil Rule 14(a), leave should be granted to the Toyota Defendants so that they may add Custis and Warfield as third-party defendants.

[9] Def.'s Mot. for Leave to File a Third-Party Compl. at 1, 3.
[10] *Wolf v. Toyota Motor Corp.*, 2013 WL 3864305 (Del. Super. May 29, 2013) (holding that the Toyota Defendants could not join Custis and Warfield as third-party defendants).

III. THE PARTIES' CONTENTIONS

A. Defendants' Contentions

a. The Toyota Defendants' Motion for Leave to File a Third-Party Complaint

The Toyota Defendants contend they are entitled to "indemnification and/or contribution" from Custis and Warfield due to Custis' negligent operation and Warfield's alleged negligent entrustment of the vehicle to Custis.[11] The Toyota Defendants argue that their claims against Warfield and Custis arise out of and relate to the same facts and circumstances as Plaintiffs' "crashworthiness" claim and, although they do not argue that Custis and Warfield have any liability for enhanced injuries due solely from the alleged "crashworthiness" of the vehicle, they seek leave of the Court to add them to the action so the claim includes "all parties that may be legally responsible for Plaintiffs' damages."[12]

The Toyota Defendants posit that under Delaware law they must join Custis and Warfield in the action or be forever barred from doing so.[13] The Toyota Defendants contend that excluding Custis and Warfield from the case will prevent the jury from properly allocating fault and damages.[14] They take the position that this restriction, combined with their assertion that Hailey Ward will present as an extremely sympathetic plaintiff, could lead to "severe[ ] prejudice" against the

[11] Def.'s Mot. for Leave to File a Third-Party Compl. at 2.
[12] *Id.* at 3.
[13] Def.'s Reply to Mot. for Leave to File a Third-Party Compl. at 3.
[14] *Id.*

Toyota Defendants because "there is no one else to hold responsible for her injuries."[15]

b. The Toyota Defendants' Motion for Reargument

The Toyota Defendants contend that their Motion for Reargument, filed pursuant to Superior Court Civil Rule 59(e), should be granted because the Court misapprehended the law when it denied their Motion for Leave to File a Third-Party Complaint.[16] The Toyota Defendants argue that the Court erroneously concluded the defects in the Camry were a superseding cause in Plaintiffs' claim, because Delaware law holds that there may be more than one proximate cause of an injury.[17] The Toyota Defendants maintain that this determination should be left to a jury.[18]

The Toyota Defendants also assert the Court erred when it may have suggested that the Toyota Defendants were trying "to substitute Custis and Warfield as the primary defendant[s]."[19] The Toyota Defendants contend they are seeking to include all parties, including the alleged original tortfeasors Custis and Warfield, who the Toyota Defendants allege are partially responsible for Plaintiffs' damages so that a jury can properly apportion liability.[20]

The Toyota Defendants also contend that the Court failed to consider several defense arguments including: 1) that the Joint Tortfeasor release signed by Custis

[15] *Id.* at 4.
[16] Def.'s Mot. for Reargument at 1-2.
[17] *Id.* at 2 (citing *Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821 (Del. 1995).
[18] *Id.* (citing *Jones v. Crawford*, 1 A.3d 299 (Del. 2010)).
[19] *Id.* at 3.
[20] *Id.*

and Warfield expressly allows for apportionment of damages in this claim,[21] and 2) that the Toyota Defendants are required to join Custis and Warfield at this time or be forever barred from asserting a claim against them.[22]

The Toyota Defendants lastly contend that the cases upon which Plaintiffs now rely to support their position are representative of a minority view that is slowly eroding across the country.[23]

B. Plaintiffs' Contentions

a. The Toyota Defendants' Motion for Leave to File a Third-Party Complaint

Plaintiffs contend that the presence of Custis and Warfield is "irrelevant" in a "crashworthiness" claim under Delaware law.[24] Plaintiffs rely on *Mazda Motor Corporation v. Lindahl*[25] for their assertion that the circumstances of the initial collision should not be brought into this "crashworthiness" claim.[26] *Mazda* focused primarily on burden of proof but also holds that initial and enhanced injuries are separately determined in a "crashworthiness" case.[27]

---

[21] The Plaintiffs originally settled out of court with Custis, Warfield, and Progressive American Insurance Company (Warfield's insurer). A Joint Tortfeasor Release was signed by Plaintiffs releasing Custis, Warfield, and Progressive from future claims for $300,000. It also stated that anyone determined by the court to be jointly or severally liable with Custis and Warfield could reduce their judgment by that amount. Ex. 3 to Def.'s Reply to Mot. for Leave to File a Third-Party Compl..

[22] The Court will resolve the effect, if any, of the Joint Tortfeasor Release on the claim for enhanced injury damages at a later date.

[23] Def.'s Reply to Mot. for Reargument at 3-6.

[24] Pl.'s Response to Mot. for Leave to File a Third-Party Compl. at 2.

[25] 706 A.2d 526 (Del. 1998). This case also cites another case relied on by Plaintiffs, *Larsen v. Gen. Motors Corp.*, 391 F.2d 495 (8th Cir. 1968), the seminal case permitting a "crashworthiness" cause of action.

[26] Pl.'s Response to Mot. for Leave to File a Third-Party Compl. at 2.

[27] *See* 706 A.2d at 533.

Plaintiffs complain that the Toyota Defendants filed the motion to join Custis and Warfield "at the eleventh hour despite knowing about these parties more than one year ago" in an attempt to "back-door" inadmissible evidence into the case.[28] Plaintiffs argue that the real risk of prejudice in this claim is if the jury hears about the actions of Custis causing the accident and, notably, his subsequent lack of injuries.[29] Plaintiffs contend that to allow this evidence takes away from the real focus of the case: how the Toyota Defendants' allegedly defective design turned a "survivable crash" into a crash with deadly consequences.[30]

b. The Toyota Defendants' Motion for Reargument

Plaintiffs contend that the Court's original opinion was correct and the Toyota Defendants merely seek to "rehash arguments already made and rejected…."[31] Plaintiffs rely heavily in their opposition to the Motion for Reargument on the Florida case of *D'Amario v. Ford Motor Company*[32] (now overruled by statute) as articulating well why this Court should exclude the original tortfeasors from the claim.[33] Plaintiffs contend that the Toyota Defendants continue to try to insert Custis and Warfield into the case to confuse the jury as to who is the primary defendant in this "crashworthiness" claim.[34] Plaintiffs argue

[28] Pl.'s Response to Mot. for Leave to File a Third-Party Compl. at 2-3.
[29] Pl.'s Supp. Response to Mot. for Leave to File a Third-Party Compl. at 3
[30] *Id.*
[31] Pl.'s Response to Mot. for Reargument at 1.
[32] 806 So.2d 424 (Fla. 2001).
[33] Pl.'s Response to Mot. for Reargument at 2.
[34] *Id.* at 4.

that any apportionment that results from the Joint Tortfeasor Release could be resolved by a post trial reduction in a potential award of damages by the jury.[35]

Plaintiffs take the position that the cause of the accident is "neither relevant nor admissible" in a "crashworthiness" claim.[36] Plaintiffs contend that although *D'Amario* was legislatively overturned and is no longer good law in Florida, the court's reasoning in the now-overruled majority opinion is the better reasoned approach.[37]

Plaintiffs submit that the Court's application of intervening/superseding cause in its May 29, 2013 opinion[38] was "both … legally sound and correct."[39]

IV. STANDARD OF REVIEW

A. The Motion for Reargument

A motion for reargument under Superior Court Civil Rule 59(e) will be denied unless the Court "overlooked a precedent or legal principle that would have controlling effect, or that it has misapprehended the law or the facts such as would affect the outcome of the decision."[40] Motions for reargument should not be used merely to rehash arguments already decided by the Court.[41] "Under Delaware law,

---

[35] *Id.* at 4-5.
[36] *Id*. at 5.
[37] *Wolf v. Toyota Motor Co.*, C.A. N11C-08-149, at 22-23, (Del. Super. Aug. 27, 2013) (TRANSCRIPT).
[38] This Court's previous opinion concluded that "Custis and Warfield's negligence did not legally cause the Wards' 'enhanced' injuries because any defect in the Camry's design is an 'efficient intervening cause,' or a 'superseding cause'" and therefore they should not be joined as third-party defendants. *Wolf*, 2013 WL 3864305 at *3.
[39] Pl.'s Supp. Response to Mot. for Reargument at 1.
[40] *Monsanto Co. v. Aetna Cas. And Sur. Co.*, 1994 WL 46726, at *2 (Del. Super. Jan. 14, 1994) (quoting *Wilshire Rest. Group, Inc. v. Ramada, Inc.*, 1990 WL 237093, at *1 (Del. Ch. Dec. 27, 1990)).
[41] *See Norfleet v. Mid-Atlantic Realty Co., Inc*., 2001 WL 695547, at *1 (Del Super. Apr. 20, 2001).

parties cannot use Rule 59(e) to raise new arguments."[42] Rule 59(e) allows a party to file a motion for reargument following a Court opinion or decision and, "[t]he Court will determine from the motion and answer whether reargument will be granted."[43]

B. The Motion to Join Third-Party Defendants

Superior Court Civil Rule 14(a) permits a defendant to implead a third party if it "is or may be liable to" the defendant for at least part of the plaintiff's claim.[44] This Court has long recognized the Rule's importance in enforcing the right of contribution:

> The effect of this rule, in an action based on negligence, is to permit a defendant to implead joint tort-feasors from whom he may be entitled to contribution of all or part of the claim asserted against him by the plaintiff.[45]

A defendant may implead a third party under Rule 14(a) if the defendant and the third party are joint tortfeasors with regard to the plaintiff because a right of contribution exists among them,[46] and the defendant's right to contribution from the third party is contingent on the success of the plaintiff's claim.[47]

---

[42] *Plummer v. Sherman*, 2004 WL 63414, at *2 (Del. Super. Jan. 14, 2004). *See also Bd. of Managers of the Del.Crim. Justice Info. Sys. v. Gannett Co.,* 2003, 2003 WL 1579170, at *1 (Del. Super. Jan. 17, 2003) (holding that a motion for reargument is not a device for raising new arguments or stringing out the length of time), *rev'd on other grounds, Gannett Co. v. Bd. of Managers of the Del.Crim. Justice Info. Sys.,* 840 A.2d 1232 (Del. 2003)).
[43] Super. Ct. Civ. R. 59(e).
[44] Super. Ct. Civ. R. 14(a).
[45] *Ingerman v. Bonder*, 77 A.2d 591, 592 (Del. Super. 1950).
[46] 10 *Del. C.* § 6302(a).
[47] *Daystar Constr. Mgmt., Inc. v. Mitchell*, 2006 WL 2053649, at *11 (Del. Super. July 12, 2006) (citing *McMichael v. Del. Coach Co.*, 107 A.2d 895, 896 (Del. Super. 1954)).

V. DISCUSSION[48]

This Court is not the first to consider, in a "crashworthiness" claim, "whether to isolate the action against the motor vehicle manufacturer for this individual defect and the injury alleged to be caused by the defect, or to allow a jury to hear all of the evidence regarding how the accident happened in the first place."[49] Two distinct and opposite conclusions have been reached across the United States:

> The majority view holds that a manufacturer's fault in causing enhanced injuries may be reduced by the fault of those (*i.e.,* the plaintiff or third parties) who caused the initial collision. The minority position, by contrast, maintains that because a manufacturer is solely responsible for its product's defects, it should also be solely liable for the enhanced injuries caused by those defects.[50]

A. The "Majority View"

The apparent majority of courts addressing whether to consider the circumstances of the initial collision hold that concurrent causation and comparative fault apply in "crashworthiness" claims:[51]

> "[A] plaintiff may still recover against a manufacturer for the enhanced injury caused by the product defect, but evidence is permitted as to the cause of the initial impact and injuries in addition to the defect and enhanced injuries, and the

[48] The Court will take this opportunity to observe that the issues and citation to authorities raised by the pending motions have morphed and mushroomed since the Toyota Defendants first filed their Motion for Leave to File a Third-Party Complaint on November 21, 2012. That two and a half page motion filed on the last allowable day to do so under the Trial Scheduling Order (but where the existence of the putative third-party defendants had been known to the Toyota Defendants for a long time) did not cite a single case. Plaintiffs' two and a half page response cited only two cases, both limited to the issue to whether "the cause of, or fault for, the initial collision is irrelevant." Neither party cited *Meekins*, the Delaware case most on point as to the issues now raised. It was only during the briefing on the Toyota Defendants' Motion for Reargument that the parties adduced many more authorities in support of their positions on the complicated issues raised by Defendants' Motion to Leave to File a Third-Party Complaint.

[49] Charles E. Reynolds & Shane T. Costello, *The Enhanced Injury Doctrine: How the Theory of Liability Is Addressed in A Comparative Fault World*, 79 DEF. COUNS. J. 181, 181 (2012).

[50] Edward M. Ricci et al., *The Minority Gets It Right: The Florida Supreme Court Reinvigorates the Crashworthiness Doctrine in D'Amario v. Ford*, 78 FLA. B.J. 14, 14 (2004).

[51] Reynolds & Costello, *supra* note 49, at 186.

> jury is tasked with apportioning fault to each responsible party for the damages proximately caused by that party."[52]

"The majority view recognizes that jurors are asked everyday to consider the complex issues of contributory/comparative negligence and proximate cause and there is no reason to change what we ask them to do simply because the case involves a question of enhanced injury."[53]

Over twenty states and the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY allow fault of the plaintiff or a defendant other than the manufacturer to be considered in a "crashworthiness" claim.[54] Multiple cases and law review

---

[52] *Id.*

[53] Holly M. Polglase & John A.K. Grunert, *ADMISSIBILITY Comparative Fault in a Crashworthiness Case*, 44 No. 4 DRI FOR DEF. 28 (2002).

[54] These states include Alaska: *Gen. Motors Corp. v. Farnsworth*, 965 P.2d 1209 (Alaska 1998); Arizona: *Zuern v. Ford Motor Co.*, 937 P.2d 676 (Ariz. Ct. App. 1997); Arkansas: *Keltner v. Ford Motor Co.*, 748 F.2d 1265 (8th Cir. 1984) (applying Arkansas law); California: *Doupnik v. Gen. Motors Corp.*, 225 Cal.App.3d 849 (Cal. Ct. App. 1990); Colorado: Huffman v. Caterpillar Tractor Co., 645 F.Supp. 909 (D. Colo. 1986), *aff'd*, 908 F.2d 1470 (10th Cir. 1990), *reh'g denied*, (June 12, 1990); Florida: FLA. STAT. § 768.81(3)(b) (2011); Hawaii: *Dannenfelser v. DaimlerChrysler Corp.*, 370 F.Supp.2d 1091(D. Haw. 2005) (Applying Hawaii law); Indiana: *Green v. Ford Motor Co.*, 942 N.E.2d 791 (Ind. 2011), *reh'g denied*, (June 20, 2011); Iowa: *Jahn v. Hyundai Motor Co.*, 773 N.W.2d 550 (Iowa 2009); Mississippi: *Estate of Hunter v. Gen. Motors Corp.*, 729 So.2d 1264 (Miss. 1999); New Hampshire: *McNeil v. Nissan Motor Co.*, 365 F.Supp.2d 206 (D.N.H. 2005) (applying New Hampshire law); New Mexico: *Norwest Bank New Mexico, N.A. v. Chrysler Corp.*, 981 P.2d 1215, (N.M. Ct. App. 1999); North Carolina: *Hinkamp v. American Motors Corp.*, 735 F.Supp. 176 (E.D. N.C. 1989), *aff'd*, 900 F.2d 252 (4th Cir. 1990) (applying North Carolina law); North Dakota: *Day v. Gen. Motors Corp.*, 345 N.W.2d 349 (N.D. 1984); Oregon: *Dahl v. BMW*, 748 P.2d 77(Or. 1987) (en banc); Pennsylvania: *Harsh v. Petroll*, 887 A.2d 209, (Pa. 2005); Tennessee: *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684 (Tenn. 1995); Texas: *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, (Tex. 1984); Utah: *Egbert v. Nissan Motor Co.*, 228 P.3d 737 (Utah 2010); and Washington: *Morris v. Mitsubishi Motors North America, Inc.*, 782 F.Supp.2d 1149 (E.D. Wash. 2011) (applying Washington law). RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §17 (1998) ("The manner and extent of the reduction … and the apportionment of plaintiff's recovery among multiple defendants are governed by generally applicable rules apportioning responsibility"). While the RESTATEMENT does not explicitly discuss the issues raised in these motions, it summarizes *Meekins* in its case citations. *Id.*

articles include Delaware in that list, citing the 1997 Delaware Superior Court case of *Meekins v. Ford Motor Company*.[55]

B. The "Minority View"

The apparent minority view holds it is "impermissible" in "crashworthiness" claims "to allow the fact finder to compare the fault or negligence of the plaintiff and other potentially liable parties and nonparties in causing the accident with the fault or negligence of the manufacturer in designing or manufacturing a motor vehicle."[56] This view holds that the accident is essentially divided into two impacts and two separate causes of action: the accident itself and a second subsequent collision[57] resulting from the vehicle's design.[58] The minority view holds that any "comparative negligence of the plaintiff and other third party tortfeasors in causing the accident is deemed irrelevant and inadmissible" and juries are restricted from hearing it.[59] "In essence, the trial snapshot of evidence…begin[s] at the instant the crash or accident ha[s] occurred."[60] Some

---

[55] While, consistent with our previous opinion, it still seems that no other Delaware case has cited to *Meekins*, additional research shows numerous citations in law review articles and cases. *Dannenfelser*, 370 F.Supp.2d at 1097; *D'Amario*, 806 So.2d at 426, 432-33, 444-45. *See also* Ricci et al., *supra* note 50, at 17-18; Polglase & Gruner, *supra* note 53; Ryan P. Harkins, Comment, *Holding Tortfeasors Accountable: Apportionment of Enhanced Injuries Under Washington's Comparative Fault Scheme*, 76 WASH. L. REV. 1185, 1200-1201 (2001).

[56] Reynolds & Costello, *supra* note 49, at 183.

[57] "The term 'second collision' refers to, for example, the impact between the occupant and the interior of the vehicle, or the ejection of the occupant from the vehicle, while the first or initial collision is the vehicle's impact with another object." *Id.* at 182. There are no facts in the record to support that the accident involved in the present case involved a traditional "second collision" (meaning a temporally separate collision).

[58] *Id.* at 183.

[59] *Id.*

[60] Larry M. Roth, *Florida's Motor Vehicle Crashworthiness Enhanced Injury Doctrine: "Wanted Dead or..."*, 18 BARRY L. REV. 389, 400 (2013) [hereinafter *Wanted Dead*].

states have compared it to liability in a medical malpractice claim.[61] It appears that few states continue to align themselves with the minority view.[62]

C. Delaware Law: *Meekins v. Ford Motor Company* and *Mazda Motor Corporation v. Lindahl*

a. *Meekins v. Ford Motor Company*

The apparent single case in Delaware law that addresses the issue of whether a jury should consider all the circumstances of a collision where enhanced injury damages are sought is *Meekins*.[63] *Meekins* was a "crashworthiness" claim in which the plaintiff sustained injury when an airbag, deployed as a result of a collision, crushed his fingers against the steering wheel.[64] Plaintiff contended the injury was a result of a defectively designed airbag.[65] Defendant Ford contended the injury was a result of "the violent turning of the steering wheel engendered by the collision," charging the plaintiff with contributory negligence.[66]

The late Superior Court Judge N. Maxson Terry, Jr. held in *Meekins* that a plaintiff's negligence should be considered when apportioning fault in a "crashworthiness" claim:

---

[61] *D'Amario,* 806 So.2d at 435.
[62] "*D'Amario* stands mostly alone in this country." Charles T. Wells et al., *D'Amario v. Ford Time to Expressly State the Decision is No Longer Viable*, 85 FLA. B.J. 10, 10 (2011). Prior to his retirement from the Florida Supreme Court, Chief Justice Wells authored the dissent in *D'Amario*. *Id.* at 10 n.a1. "Florida is now an aberrational minority jurisdiction state, and pretty much holds a single finger in the hole of the dam." *Id.* at 16. *See also* Reynolds & Costello, *supra* note 49, at 183 (referring to a "Shaky and Shrinking Minority").
[63] 699 A.2d 339.
[64] *Id.* at 340.
[65] *Id.*
[66] *Id.*

> Our tort law has historically recognized the fact that there may be more than one proximate cause of an injury. Jurors have had no difficulty in apportioning fault equitably between multiple parties where negligent conduct is the proximate cause of injuries. The existence of other proximate causes of an injury does not relieve a plaintiff driver under Delaware's comparative negligence statute from responsibility for his own conduct which proximately caused him injury. Further, I can discern no policy reason why, in an enhanced injury case, the rule should be any different. Public policy seeks to deter not only manufacturers from producing a defective product but to encourage those who use the product to do so in a responsible manner.[67]

The *Meekins* court also held that:

> "[it] is obvious that the negligence of a plaintiff who causes the initial collision is one of the proximate causes of all of the injuries he sustained, whether limited to those the original collision would have produced or including those enhanced by a defective product in the second collision."[68]

The *Meekins* court also discussed, although in *dicta*, that the negligence of all possible negligent parties should be considered, and presented a hypothetical much like the case at bar:

> But what if a plaintiff collides with another vehicle and the driver of that vehicle is negligent? Assume also that the enhanced injuries caused to the plaintiff by a design defect in his car are clearly identifiable. Under ordinary rules of proximate cause the other driver would have potential liability for all of the plaintiff's injuries, but logically, following the enhanced injury theory of the plaintiff, only the manufacturer should have the liability because the other driver's conduct in causing the initial collision would not have caused the injury absent the design defect. Thus, carrying the theory to its logical conclusion, plaintiff should have no recovery against the other driver for his negligence in causing the collision. This result would run counter to well settled principles of tort law.[69]

Several secondary sources and cases quote approvingly and often at some length from *Meekins* when looking for a well-articulated example of the majority view.[70] Even *D'Amario* quotes extensively from *Meekins* in both the majority

---

[67] *Id.* at 345-46.
[68] *Id.* at 346.
[69] *Id.* at 345.
[70] *Dannenfelser*, 370 F.Supp.2d at 1097; *D'Amario*, 806 So.2d at 426, 432-33, 444-45. *See*, e.g., Ricci et al., *supra* note 50, at 17-18; Polglase & Gruner, *supra* note 53; Harkins, *supra* note 55, at 1200-1201.

opinion (although it ultimately did not follow the prevailing view) and in the dissenting opinion (asserting that *Meekins* is the better approach).[71]

In denying the Toyota Defendants' Motion for Leave to File a Third-Party Complaint, this Court then declined to follow the *dicta* in *Meekins*.[72] Upon further reflection, this Court now concludes that *Meekins*, both in its holding and in its *dicta*, is a well-reasoned example of the majority view in considering the circumstances of the initial collision in a "crashworthiness" claim.[73]

b. *Mazda Motor Corporation v. Lindahl*

This case is pertinent to the issue at bar both in that it establishes some foundation for Delaware "crashworthiness" claims[74] and in that Plaintiffs rely heavily upon it to support their claim that circumstances surrounding the initial collision are "irrelevant" in the case at bar.[75] Plaintiffs quote from *Mazda*:[76]

> "To establish proximate cause in a crashworthiness case, the plaintiff must offer evidence that, but for the design defect, the injuries would not have been enhanced. In other words, there must be evidence that the design defect caused injuries *over and above those that would have resulted had the product been properly designed*….Thus, the relevant injury in crashworthiness action is the

[71] 806 So.2d at 426, 432-33, 444-45.
[72] *Wolf*, 2013 WL 3864305, at *2 n.25.
[73] There is scant authority for the concept of the applicability of superseding/intervening cause in "crashworthiness" claims. The potential applicability of the superseding/intervening doctrine is barely discussed in the plethora of articles and cases discussing "crashworthiness" issues. However, *see* Harkins, *supra* note 55, at 1197-98, 1213-14 ("[B]reach of an enhanced-injury duty operates independently of the cause of a primary accident [and] an enhanced-injury duty presupposes the occurrence of a primary accident"). Neither party originally argued the applicability of superseding/intervening cause, although Plaintiffs, in briefing on the Motion for Reargument, stated that the Court's approach as to this issue was correct. Nevertheless, Court believes that issues of superseding/intervening cause ought not to have been originally reached in its May 29, 2013 opinion. That analysis is withdrawn, being unnecessary to the resolution of the issues at bar.
[74] *Mazda*, 706 A.2d at 532 (emphasis in original).
[75] Pl.'s Response to Mot. for Leave to File a Third-Party Compl. at 2; Pl.'s Supp. Response to Mot. for Leave to File a Third-Party Compl. at 1-2.
[76] Pl.'s Supp. Response to Mot. for Leave to File a Third-Party Compl. at 2.

> *additional* injury, if any, that resulted because the product was not as safe as it should have been."[77]

The *Mazda* decision was primarily concerned with the burden of proof requirements for a "crashworthiness" claim. Its use of the word "relevant" was directed to the nature of enhanced injury damages in such a case; *Mazda* does not hold, explicitly or implicitly, that original tortfeasors should not be joined.

The *Mazda* case is consistent with this Court's application of the majority view insofar as inclusion or exclusion of other tortfeasors are concerned. This Court finds no conflict between the core principle presented in *Mazda* that the "relevant injury … is the *additional* injury"[78] and the notion that evidence of the original crash may be presented in a "crashworthiness" claim.[79] Evidence of the crash may be helpful to distinguish the original injury from the relevant enhanced "additional injury."[80] The *Mazda* court itself considered the initial crash when deciding whether proximate cause had been shown.[81]

Lastly, the Toyota Defendants, after oral argument on their Motion for Leave to File a Third-Party Complaint, submitted an order entered by this Court in a case they purport has facts very similar to the case at bar: *Campanella v. General*

---

[77] *Mazda*, 706 A.2d at 532 (emphasis in original).
[78] *Id.*
[79] Plaintiffs also rely on the seminal case of *Larsen v. Gen. Motors Corp.,* 391 F.2d 495 (8th Cir. 1968). *Larsen* stands for the basic premise that car manufacturers have a duty of reasonable care in their vehicle design to avoid "unreasonable risk of injury in the event of a collision" and creates the "crashworthiness" cause of action brought in this case. *Id.* at 502. As *Larsen* is a basic building block of any "crashworthiness" claim, this Court finds that it is not in conflict with either party's arguments in this case. *Larsen* was cited with approval in *Meekins*. 706 A.2d at 531.
[80] Larry M. Roth, *The Florida Supreme Court Needs a Second Look at Second Collision Motor Vehicle Cases*, 78 FLA. B.J. 20, 24 (2004) [hereinafter *Second Look*].
[81] 706 A.2d at 533 ("Decedent's injuries resulted from an automobile accident occurring at a high rate of speed and involving numerous flips and turns of the automobile end over end for over 300 feet…").

Motors Corporation.[82] The order does appear to support the Toyota Defendants' position in that the Motion to File a Third-Party Complaint in that "crashworthiness" claim was granted. The Court has since located a transcript from the case in which the added third party, who had also acquired a signed release from the plaintiff, argued a motion for summary judgment.[83] It appears that the Court denied the motion and permitted the third-party defendant to remain in the case.[84] In any event, the Toyota Defendants' argument is mooted by this decision which seems to comport with the *Campanella* order.

c. *D'Amario v. Ford Motor Company*

Much of the argument nationally about this topic has centered on the Florida *D'Amario* case. In addition to being relied upon now heavily by Plaintiffs (who did not cite it in the original briefing and presented it for the first time in its Response to Defendants' Motion for Reargument), *D'Amario* was the oft-cited example of the minority view from the date it was decided in 2001 by the Supreme Court of Florida until it was legislatively overruled in 2011.[85] The Florida legislature, as a result of a supposed "aggressive campaign seeking to overrule" *D'Amario*,[86] not only changed Florida law by overruling the case, but made the

[82] *Campanella v. Gen. Motors Corp.*, C.A. 92C-10-126 (Del. Super. Aug. 23, 1993) (ORDER); Def.'s Mot. for Reargument Ex. E; Letter dated of February 27, 2013 from James M. Kron, Attorney for Defendants, to the Court; Letter dated of March 6, 2013 from James M. Kron, Attorney for Defendants, to the Court.
[83] *Campanella v. General Motors Corp.*, C.A. 92C-10-126 (Del. Super. Sept. 6, 1996) (TRANSCRIPT), D.I. 251.
[84] *Id.* at 35.
[85] Ricci et al., *supra* note 50, at 20.
[86] Theodore J. Leopold et al., *The Importance of D'Amario v. Ford and How it Protects Florida's Consumers*, 85 FLA. B.J. 18, 18 (2011).

law retroactive and included in the legislative history that their primary purpose was to erase it from Florida law.[87] In the decade that *D'Amario* was good law in Florida, a spirited debate in the legal community resulted in numerous articles both supporting and rejecting the decision.[88]

At the time it was decided, the majority opinion in *D'Amario* conceded that it was adopting the minority position among the states.[89] However, in the years since, a number of minority rule cases relied upon by *D'Amario* have themselves been overruled:

> [Se]veral courts which refused to apply comparative fault to enhanced injury cases in legal systems of pure comparative negligence [on which *D'Amario* relied] have since been expressly overruled. In addition, several of the other aforementioned decisions are distinguishable based on the fact that they were made in legal systems which did not apply pure comparative negligence."[90]

The *D'Amario* court relied on authority from several jurisdictions in its opinion, including *Andrews v. Harley Davidson*,[91] *Green v. General Motors*,[92] *Cota v. Harley Davidson*,[93] and *Reed v. Chrysler Corporation*.[94] Both *Andrews* and *Green* were decided based on state-specific rules that did not allow the application of comparative negligence.[95] *Cota* was overruled by *Zuern v. Ford*

---

[87] *Wanted Dead*, *supra* note 60, at 423-425.
[88] *See* Larry M. Roth, *Crashworthiness Wars, Episode III; Revenge of the Burden of Proof*, 25 No. 1TRIAL ADVOC. Q. 11, Winter 2006.
[89] *D'Amario* at 435.
[90] Reynolds & Costello, *supra* note 49, at 186.
[91] 796 P.2d 1092 (Nev. 1990).
[92] 709 A.2d 205 (N.J. Sup. Ct. App. Div. 1998). Plaintiffs cite *Green* in Pl.'s Response to Mot. for Reargument at 5.
[93] 684 P.2d 888 (Ariz. Ct. App. 1984).
[94] 494 N.W.2d 224 (Iowa 1992). Plaintiffs cite *Reed* in Pl.'s Response to Mot. for Reargument at 6.
[95] Reynolds & Costello, *supra* note 49, at 185-86.

Motor Company, after the adoption of comparative fault in Arizona.[96] Similarly, *Reed* was expressly overruled by *Jahn v. Hyundai Motor Company*, and the Iowa Supreme Court joined the majority view.[97]

D'Amario, after the legislative changes in 2011, is no longer good law in Florida and this Court will not rely on a legislatively overruled case and a series of overruled cases that had relied on *D'Amario* in determining the issue at bar.

D. The majority rule approach is the better reasoned approach: manufacturer defendants in a "crashworthiness" claim may file a third-party complaint against original tortfeasor to allow for proper allocation of fault and to present a more complete account of the accident to the jury.

Before deciding to adopt the majority rule and now allowing the original tortfeasors to be joined as third-party defendants in the case, this Court considered the policy arguments for and against both approaches to this issue.

Some majority view proponents contend that the jury should be able to consider all of the facts when determining a claim.[98] There is a concern from majority view proponents that the minority view serves as "a shield preventing the admissibility of clearly relevant and material accident fact evidence, particularly driver intoxication evidence, thereby creating litigation predicated on less than

---

[96] 937 P.2d at 680-81. "Although causation (or physical contribution to the injury) is a necessary condition precedent to consideration of a person's fault—i.e., the fault must have 'proximately caus[ed] or contribut[ed]' to the claimant's injuries to be considered,—once causation is found the trier of fact must determine and apportion 'the relative degrees of fault' of all parties and nonparties. *Id.* at 681-82 (citations omitted).

[97] 773 N.W.2d at 560.

[98] "[I]t is essential for the jury to know the whole truth and all the facts about a dispute the jury is deciding." Wells et al., *supra* note 62, at 14.

complete facts concerning the causes of the claimed injuries and damages."[99] In other products liability proceedings, juries are expected to listen to and to make determinations about long and complicated testimony about which they may have no prior experience, yet in "crashworthiness" products liability claims minority view courts have concluded that juries are unable to handle this task due to a risk of "confusion."[100] Some majority rule proponents contend any issues of jury confusion or prejudice could be mitigated by the "tools" already available to the judge.[101] They also argue the minority view undermines the great responsibility for truth-seeking placed on jurors in our court system.[102]

Another argument for the majority view is that it makes the claims much easier for juries to understand.[103] When determining the exact details of which injury came from the initial or the "second collision," the jury may have a difficult time.[104] "[I]n the real world of trying a crashworthiness case to a jury this distinction is one without a difference. It is not so easy to separate either by testimony, or evidence, the first crash from the second crash."[105] Some critics have

[99] *Id.* at 12.
[100] *Id.* at 14-15.
[101] *Wanted Dead*, *supra* note 60, at 403.
[102] *Id.*
[103] Harkins, *supra* note 55, at 1200.
[104] In fact, it has been argued that the minority view exclusion of the original accident may, in some cases, create more confusion than if the majority view had been adopted in the first place. Reynolds & Costello, *supra* note 49, at 190-91 ("[T]he minority approach prevents jurors from hearing all the material facts related to the cause of the accident, which itself creates juror confusion, as jurors do not have any knowledge regarding how the accident occurred.").
[105] *Wanted Dead*, *supra* note 60, at 415 ("The fact is that injuries which result from a first collision, whether enhanced or not, take place temporally simultaneous with the underlying crash. The so-called second collision between the occupant and the vehicle interior, or a component part including seat belts or airbags, is an instantaneous event to the first crash.").

argued that the minority view comes from a misunderstanding of how car accidents occur and victims are injured.[106]

Some majority proponents argue that the realities of courtroom practice mandate inclusion of the initial accident. These include majority concerns of what evidence, if any, would a manufacturer be able to present from the first accident to defend itself from a "crashworthiness" claim.[107] In addition, majority proponents ask if a plaintiff would be barred from using that information to establish proximate cause of their enhanced injuries.[108] They also question if courts would have to separate claims where parties allege a car defect caused the crash and then a second defect caused an enhanced injury.[109]

Apportionment is another issue some majority rule supporters argue is better addressed by the majority approach. They maintain that comparative fault systems are often meant for the fact finder to "hear evidence regarding all potential proximate causes of injury and apportion responsibility accordingly"[110] If under the minority view the accident is treated as two separate sets of collisions and injuries, there are additional majority concerns of how to properly allocate fault

[106] *Second Look*, *supra* note 80, at 24.
[107] "If the circumstances of the underlying crash or first collision were not admissible, what evidence from that accident event was? Vehicle speed, angles of impact, velocity changes as a result of impact, and myriad reconstruction details are necessary to evaluate injury potential. A manufacturer needs this to establish a defense such as there was no enhancement of injury due to a defect in the vehicle. For that matter, plaintiff may need the information as well to establish burden of proof that a defect enhanced the injury or was the legal/proximate cause of it." *Id.*
[108] *Id.*
[109] This is an argument most commonly seen in vehicle "rollover cases." *Id.* at 24-25.
[110] Reynolds & Costello, *supra* note 49, at 190.

when an injury, such as death, is determined "indivisible."[111] Many proponents of the majority view argue that states have comparative fault statutes that are broad enough that the jury, even considering evidence of the initial crash, could find that the "entire injury was caused by the defect, or that a specific injury would not have been caused but for the defect."[112]

Public policy concerns often cited by some advocates of the majority view include an assertion that including original tortfeasors in "crashworthiness" claims will help to deter negligent driving, while still holding manufacturers accountable for the vehicle's design.[113] Some majority view supporters contend that by excluding facts of the original accidents, drivers are "not held accountable for their own negligence."[114] This, they argue, "sends an errant and dangerous signal to drivers … that civil responsibility does not necessarily attach to antisocial and illegal driving behavior" in "crashworthiness" claims.[115]

Numerous proponents of the minority view are likewise concerned about apportionment, but they argue that asking jurors to apportion fault between an original tortfeasor and the manufacturer causes "cognitive dissonance" that prejudices plaintiffs.[116] They caution that the majority view's deterrent for negligent drivers may go too far, to the point of burying the liability of a

[111] *Wanted Dead*, *supra* note 60, at 420 ("You are either dead, or you are not dead").
[112] Reynolds & Costello, *supra* note 49, at 190.
[113] Reynolds & Costello, *supra* note 49, at 191; Ricci et al., *supra* note 50, at 18 (quoting *Moore v. Chrysler Corp*, 596 So.2d 225, 238 (La. Ct. App. 1992).
[114] Wells et al., *supra* note 62, at 14.
[115] *Id.*
[116] Leopold et al., *supra* note 86, at 22.

manufacturer under the morally reprehensible behavior of another party.[117] This is especially a concern when accidents include intoxicated drivers.[118] Some articles claim that jurors are just not able to look beyond an intoxicated driver to properly assess manufacturer liability.[119] "Given that the law already punishes the socially reprehensible misconduct of drunk drivers, good public policy should not allow the manufacturer to escape its share of liability for exacerbated injuries suffered by the plaintiff."[120] Some majority advocates attempt to counter this argument by pointing to Rule of Evidence 403 as a remedy to restrict prejudicial information:

> In some cases, where it can be shown that there is an enhanced injury which is clearly distinguishable from the cause of the initial crash and where there is a plaintiff whose actions in causing the crash were particularly loathsome, it may be appropriate for the judge to limit evidence related to the cause of the initial crash under this Rule.[121]

Further, many minority view supporters claim that the majority view reduces the incentive for manufacturers to design safer vehicles:[122]

> "Product manufacturers are motivated by the bottom line. Unfortunately, even with the threat of being haled into civil court to account for injuries caused by a defective product, manufacturers knowingly leave unsafe products in the hands of unwitting consumers. … It stands to reason that without the threat of significant civil liability for the damages caused by defective products, manufacturers will have less incentive to produce safe products."[123]

---

[117] Ellen M. Bublick, *The Tort-Proof Plaintiff: The Drunk in the Automobile, Crashworthiness Claims, and the Restatement (Third) of Torts*, 74 BROOK. L. REV. 707, 708 (2009). *See also* Ricci et al., *supra* note 50, at 21; Harkins, *supra* note 55, at 1217.
[118] Bublick, *supra* note 117, at 708.
[119] "This prediction is borne out by what occurred in the *D'Amario* [case], as well as by Ford's own statistics. The jur[y] in *D'Amario* [was] unable to get past the fault of the drunk driver[ ] in causing the initial accident[ ] to even reach the issue of apportioning any of the plaintiffs' enhanced injury damages to the automobile manufacturer defendants." Leopold et al., *supra* note 86, at 22.
[120] Thomas V. Van Flein, *Allocation of Fault and Products Liability: A Comment on Safety Products and Human Error*, 19 ALASKA L. REV. 141, 150-51 (2002).
[121] *Id.*
[122] Ricci et al., *supra* note 50, at 18-20; Harkins, *supra* note 55, at 1218.
[123] Leopold et al., *supra* note 86, at 24.

It could also lead to less notice to regulators about ongoing issues with certain vehicles.[124]

Minority view courts counter majority view claims that jurors must hear all the facts in a case by asserting that jurors never hear all of the facts because some facts are always excluded by the Rules of Evidence.[125] They argue that the discretion given to judges to exclude irrelevant information is removed by the majority view and will lead to juror confusion.[126] They maintain any issues created by the lack of facts from the initial crash could be solved using carefully worded jury instructions.[127]

The Court is persuaded in this case that the majority rule is the better reasoned approach to the issue at bar. As stated above, practical issues of apportionment are better resolved by allowing the Toyota Defendants to file a third-party claim against the original tortfeasors. Any concerns Plaintiffs may have about Custis' lack of injuries overshadowing the Toyota Defendants' potential liability can be addressed by the traditional rules of evidence and jury instructions. This Court respects the difficult responsibility placed on jurors in these cases and thinks that, if jurors can determine the facts and apportion fault in other types of claims, they should be able to do the same in a "crashworthiness" case. This view is consistent with *Meekins*, the only Delaware case addressing this issue. This Court thus aligns itself with the majority of states on this issue, noting

[124] *Id.*
[125] *Id.* at 22-23.
[126] *Id.* at 23.
[127] *See* Ricci et al., *supra* note 50, at 20.

also that Delaware law provides that there can be more than one proximate cause of Plaintiffs' injuries.[128]

VI. CONCLUSION

A. The Court concludes that it misapprehended the law and that the Toyota Defendants' Motion for Reargument should be granted, and that the Toyota Defendants' Motion for Leave to File Third-Party Complaint should be granted.

This Court concludes it misapprehended the law in its May 29, 2013 decision denying the Toyota Defendants' Motion for Leave to File a Third-Party Complaint. The Court's Order of May 29, 2013 denying Motion for Leave to File a Third-Party Complaint is **VACATED.** Defendants' Motion for Reargument and their Motion for Leave to File a Third-Party Complaint against Custis and Warfield are both **GRANTED.**

IT IS SO ORDERED.

_____
Richard R. Cooch, R.J.

oc: Prothonotary

[128] *Meekins*, at 345; *Duphily*, at 829. "Based upon a purely legal analysis, the majority approach is arguably the correct approach. The key to the issue is the principle of proximate cause, which is the focus of both the enhanced injury doctrine and the comparative fault doctrine. The majority viewpoint recognizes that enhanced injury cases can involve several proximate causes and that the best way to address this is through the universal application of comparative fault." Reynolds & Costello, *supra* note 49, at 190.