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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MARIA MARU RODRIGUEZ
Plaintiff

CHAD R. COHEN, ET AL
Defendant

Case No: CV-09-700949

Judge: BRENDAN J SHEEHAN

JOURNAL ENTRY

OPINION AND JUDGMENT ENTRY. O.S.J.

Judge Signature Date

08/15/2011

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MARIA ("MARU") RODRIGUEZ,	)	CASE NO. CV 09 700949
	)	
Plaintiff,	)	
	)	JUDGE BRENDAN J. SHEEHAN
v.	)	
	)	
CHAD R. COHEN,	)	
	)	**OPINION AND JUDGMENT**
Defendant.	)	**ENTRY**
	)	

I. ISSUES PRESENTED

This matter is before the Court on Plaintiff's Motion to Exclude the Testimony of Dr Kirk Thibault. The issues have been fully briefed to the Court.

This case arises out of a traffic accident in which Plaintiff Maria Rodriguez, a passenger on a motorcycle, was struck by a car driven by Defendant Chad R. Cohen. Plaintiff seeks damages that arise, in part, from head injuries sustained in the collision.

Plaintiff was not wearing a helmet while riding the motorcycle. It is uncontested that Plaintiff was not required by statutory law to wear a helmet.

Defendant has proffered Dr. Kirk Thibault, a biomechanical engineer who is expected to testify as an expert witness with the opinion that Plaintiff's injuries would have been less severe had she worn a motorcycle helmet.

Plaintiff seeks to exclude Dr. Thibault's testimony on three grounds: 1) that Plaintiff had no statutory or common law duty to wear a helmet at the time of the accident, 2) Dr. Thibault's testimony is related to the defense of primary assumption of the risk, which Plaintiff maintains is inapplicable in this case and 3) Dr. Thibault has failed to produce sufficient information related to his prior expert testimony.

Plaintiff's second argument, that Defendant's primary assumption of the risk defense is inapplicable, is tantamount to seeking partial summary judgment on a defense. Because this argument, in itself, is insufficient to bar Dr. Thibault's testimony (which could be offered on other grounds), the Court denies this ground for relief for purposes of this motion.[1] Plaintiff's third basis concerning the inadequacy of Dr. Thibault's testimonial history has been resolved and will not be considered further by this Court.

Consequently, the Court turns to Plaintiff's first basis for excluding Dr. Thibault's testimony—that Plaintiff was under no duty to wear a motorcycle helmet so evidence of non-use is properly excluded as a matter of law.

II. LAW AND ANALYSIS

A. Existing Precedent

The Court has conducted an exhaustive review of decisions related to the admissibility of evidence of non-use of motorcycle helmets. The Court has found little applicable case law from Ohio or other jurisdictions on this matter because 1) statutory law concerning motorcycle helmets varies between states and 2) the law concerning contributory and/or comparative negligence varies between states and over time within each state.

Ohio law addressing this issue appears to favor admissibility of the evidence if there is a sufficient basis upon which a jury could make a reasonable allocation of causation. In *Smiley v. Leonard* (1994), 1994 WL 47675, the Court stated: "The Franklin County Court of Appeals held that generally recognized rules, such as that the use of safety devices may reduce injuries, cannot be considered in a judicial proceeding

[1] Defendant maintains that he has asserted the defenses of contributory negligence and implied assumption of the risk, not the defense of primary assumption of the risk.

unless there is factual evidence to support contentions that the injuries sustained by the plaintiff would have been reduced or prevented by the use of such devices. *Woods v. Columbus* (1985), 23 Ohio App.3d 163, 167. See, also, *Bantel v. Herbert* (1987), 31 Ohio App.3d 167, 168. A jury's consideration of negligence based solely on the nonuse of a safety device would require the jury to speculate as how to allocate such negligence. *Id.*"

The Court further noted: "[The defendant] did not present any expert testimony to indicate that [the plaintiff's] failure to wear a helmet contributed to his injuries or caused the accident. Absent any evidence that [the plaintiff] could have reduced or prevented his injuries by wearing a helmet, the trial court could not properly instruct the jury to consider the effect of [the plaintiff's] failure to wear a helmet." *Id.* [2]

The court in *Smiley* appeared to presume admissibility of expert testimony concerning the effect of wearing a helmet although the record is devoid of the arguments or considerations that lead to the court's conclusion that the evidence, if proffered, would have been admissible.

A review of decisions in other jurisdictions is even more unavailing. Those courts that have found evidence of helmet use to be inadmissible have generally relied on similar factors: the lack of a statute mandating helmet use, the belief that antecedent acts should not affect liability for damages, and a policy decision to avoid battles of experts. See e.g. *Cordy v. Sherwin Williams Co.* (1997), 975 F.Supp. 639; *Meyer v. City of Des Moines,* 475 N.W.2d 181, 191; *Dare v. Sobule* (1984), 674 P.2d 960, 962-63; *Hukill v. DiGregorio* (1985), 136 Ill.App.3d 1066, 1067-68; *Bond v. Jack* (1980), 387 So.2d 613, 616; *Rogers v. Frush,* (1970) 257 Md. 233, 240-44, *Burgstahler v. Fox* (1971), 290 Minn. 495, 496.

The decisions of these courts have been criticized or distinguished on various grounds including the statutory history of individual states for both helmet use and contributory/comparative fault. See e.g., *Warfel v. Cheney* (1988), 157 Ariz. 424, 427, 1988); *Halvorson v. Voeller* (1983), 336 N.W.2d 118, 119; *Dean v. Holland* (1973), 350 N.Y.S.2d 859.

The Court finds the decisions in other jurisdictions to be largely inapplicable to the law, both statutory and common law, in Ohio and turns instead to well-established principles of Ohio law for its determination.

B. General Considerations For Excluding Evidence Under Ohio Law

Plaintiff seeks to exclude Dr. Thibault's testimony as evidence as a matter of law. It must first be noted that all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute, by the Ohio Rules of Evidence, or by other rules prescribed by the Supreme Court of Ohio. Evid. R. Rule 402.

Evidence is relevant if it has any "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid. R. Rule 401.

Statutes or rules limiting admissibility are generally construed narrowly when the subject evidence is presumably reliable and subject to cross-examination.[3] For example, United States Supreme Court has held that certain privileges protect substantial individual interests that outweigh the public interest in the search for truth. *United States*

[3] Obviously, hearsay is excluded from this analysis because the underlying rationale for barring hearsay evidence is its potential unreliability which, in many instances, arises from the inability to examine the source of the out-of-court statement under oath. There is no current contention that Dr. Thibault's testimony should be excluded as hearsay.

v. Bryan (1950), 339 U.S. 323, 331, 70 S.Ct. 724, 94 L.Ed. 884. Such privileges, however, are narrowly construed and are accepted only to the "limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth. * * * " *Elkins v. United States* (1960), 364 U.S. 206, 234, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (Frankfurter, J., dissenting).

While Plaintiff is not seeking to assert a privilege, the effect of Plaintiff's position is the same: evidence which may be relevant and material would be excluded on a basis of policy. If the proffered evidence is relevant, then it may only be excluded under narrow circumstances in which an overriding interest outweighs the public interest in ascertaining the truth at trial.

Plaintiff's asserts that the evidence is inadmissible as a matter of law because she had no statutory or common law duty to wear a helmet at the time of the accident. Stated alternatively, Plaintiff's position is that the public policy protecting an individual's decision to ride motorcycles without a helmet—as reflected in the lack of a statute mandating helmet usage—outweighs the public interest of admitting evidence related to the helmet nonuse.

C. Applicability of Existing Seat Belt Statutes

In seeking to exclude evidence of nonuse of a helmet, Plaintiff, like many litigants and courts, relies in part on law related to seat belt use. The comparison between seat belts and helmets does not favor exclusion of helmet evidence. R.C. §4513.263, effective April 7, 2005, allows evidence of seat belt usage to be considered to diminish

compensatory damages for noneconomic loss that attributable to plaintiff' s failure to wear a seat belt.[4]

Additionally, precedent concerning seat belt use is of questionable value given the inherent differences between automobiles and motorcycles. The Federal Highway Administration reports: "The number and rate of motorcyclist deaths on U.S. roads are rising dramatically. Motorcycle rider fatalities rose 115 percent between 1997 and 2005 Motorcycle riders face more risks of crashing and being injured than passengers in four-wheeled vehicles. Two-wheeled motorcycles are more difficult to operate and more unstable than four-wheeled cars and trucks. Some roadway design and maintenance features add additional risks." United States Department of Transportation - Federal Highway Administration website, http://www.fhwa.dot.gov/motorcycles/.

Automobiles have built-in safety devices, including the car's weight distribution, crumple zones, door beams, and air bags, all of which are specifically designed to protect the car's occupants in the event of a crash. These safety features are designed to create a sort of shell around the occupants to protect them while they remain inside the vehicle. Seat belts function as a safety device in part by preventing the occupants from being jettisoned from the vehicle thereby affording them the benefit of the other safety devices.

None of these devices can be applied to motorcycles. Motorcyclists usually separate from the motorcycle at some time during a crash making structural safety features on a motorcycle relatively ineffective in protecting riders. As noted by the National Highway Traffic Safety Administration ("NHTSA"), unhelmeted injured motorcyclists are three times as likely to suffer a brain injury compared to helmeted

[4] Although R.C. §4513.263 expressly provides that evidence of seat belt use "shall not be considered or used by the trier of fact in a tort action as evidence of negligence or contributory negligence", the evidence is nonetheless admissible to reduce compensatory damages.

injured motorcyclists and "the protective apparel worn by a motorcyclist provides the only defense against injury in a crash." [5] The NHTSA concludes: "In the event of a crash, no existing strategy or safety equipment offers protection comparable to a FMVSS 218 compliant helmet."

Thus, while helmets are not statutorily mandated, the publicly available data on their efficacy as the sole, best way to minimize injury simply cannot be judicially ignored without cause. Based on these established facts, the Court takes judicial notice that the motorcycle helmet as a "safety device" generally reduces risk of death and significant head injury in the event of a traffic accident.

D. Analysis of Plaintiff's Duties Under Statutory And Common Law

Plaintiff's primary contention is that evidence of helmet use is not admissible because Plaintiff had no duty to wear a helment. It is uncontested that there is no statutory law in Ohio requiring that all motorcycle riders wear helmets. However, the lack of a statutory duty neither disposes of the issue in its entirety nor negates any common law duties that may otherwise exist. The lack of a statutorily or judicially imposed duty means only that the conduct at issue does not establish a prima facie case of negligence or constitute negligence *per se*.

Under common law, the standard of conduct necessary to avoid injury to self or others "may be specifically established by legislative enactment; by judicial decisions on identical or similar facts; or, in the absence of legislative enactment or judicial decision, by a consideration by the trial judge or jury of the facts and circumstances of the

[5] Statistical information concerning motorcycle safety, as cited herein, is available on the NHTSA website: http://www.nhtsa.gov/people/injury/pedbimot/motorcycle/00-nht-212-motorcycle/human27-29.html.

particular case. [Internal citations omitted]. In the latter case, ... the standard of conduct required is that of a reasonably prudent person under the same or similar circumstances, there being contemplated a fallible human being exercising those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of all persons." *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367, 371-372.

As other courts have noted concerning the effect of an absence of statutory law on common law, "there is a difference between saying, 'It is up to you to decide whether or not to wear a safety helmet,' and saying, 'You will never, under any circumstances, have to suffer legal consequences for not wearing a helmet.' " *Halvorson v. Voeller* (1983), 336 N.W.2d 118, 122.

For example, there is no statute that requires individuals to examine the ground before walking on it yet there is undeniably a common law duty to avoid treading indiscriminately into a hazard. Indeed, doctrines such as the "open and obvious doctrine" ultimately have their genesis in the well-established law that individuals have a duty to exercise ordinary care for their own safety. *Cleveland Rolling-Mill Co. v. Corrigan* (1889), 46 Ohio St. 283, 290; *Monaco v. Ohio Expositions Comm.* (1995), 74 Ohio Misc.2d 103, 109.

The duty to exercise ordinary care for one's own safety is limited, however, in that "one need not anticipate the negligence of another if there is no reason to apprehend any." *See, e.g., Baldridge v. Wright Gas Co., Inc.* (1951), 154 Ohio St. 452; *S. S. Kresge v. Holland* (1946), 158 F.2d 495, 498; *Northwest Airlines v. Glenn L. Martin Co.* (1955), 224 F.2d 120, 127.

While Plaintiff was under no duty to anticipate Defendant's specific negligence, motor vehicle accidents are certainly a substantial foreseeable risk for anyone entering a public thoroughfare. As one court noted with regard to seat belts, "The primary purpose is to provide a means of protecting the vehicle's occupants from injury or death in motor vehicle accidents, which are equally foreseeable by the occupants". *Woods v. City of Columbus* (1985), 23 Ohio App.3d 163, 167.

Accordingly, Plaintiff's duty to exercise ordinary care for her own safety is not precluded as a matter of law by Defendant's subsequent negligence.

Additionally, the fact that Plaintiff did not contribute to the accident does not preclude review of her actions as a matter of law. Her conduct, choosing not to wear a helmet, occurred before the crash while the motorcycle was still stationary. However, antecedent conduct that contributes to the harm is properly considered. The Restatement of Torts provides that:

(1) The plaintiff's negligence is a legally contributing cause of his harm if, but only if, it is a substantial factor in bringing about his harm and there is no rule restricting his responsibility for it.

(2) The rules which determine the causal relation between the plaintiff's negligent conduct and the harm resulting to him are the same as those determining the causal relation between the defendant's negligent conduct and resulting harm to others. REST 2D TORTS § 465.

The notes to this section offer further on point instruction : "Such apportionment may also be made where the antecedent negligence of the plaintiff is found not to contribute in any way to the original accident or injury, but to be a substantial

contributing factor in increasing the harm which ensues. There must of course be satisfactory evidence to support such a finding, and the court may properly refuse to permit the apportionment on the basis of mere speculation." *Id.*

III. CONCLUSION

Based on the foregoing, the Court finds that evidence of Plaintiff's choice to ride a motorcycle without a helmet may be admissible as evidence relevant to issues presented in this case. The Court expressly notes that it is *not* finding that there is a duty to wear a helmet whenever one rides a motorcycle. Rather, the Court finds only that there is no exception by statutory or common law that excludes motorcycle rider's conduct from principles applicable to all individuals conducting their everyday affairs.

It may very well be that a jury could determine, upon considering factors such as the availability of a helmet, where Plaintiff was riding the motorcycle at the time of the accident, the prevailing custom of helmet use at the time of the accident, Plaintiff's experience with motorcycles and any other relevant facts, that Plaintiff acted reasonably in riding the motorcycle without a helmet.

If, however, the jury determines that Plaintiff's conduct was unreasonable, then Plaintiff must bear the consequence of the free choice not to wear a helmet. The Court cautions that a reduction in any award of damages is not automatic. It is the jury's function to decide, based upon competent evidence presented by Defendant, if: 1) a reasonable person exercising ordinary care would have worn a helmet to avoid or lessen injury in the event of an accident and, if so; 2) there is competent evidence establishing a causal connection between Plaintiff's failure to wear a helmet and the injuries she

received. Only if both factors are proven may a jury reduce damages to the extent that Plaintiff's injuries were enhanced by the lack of a protective helmet.

JUDGE BRENDAN J. SHEEHAN

Dated: 8·15·11

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AUG 16 2011

GERALD E. FUERST, CLERK

By _____ Deputy

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the following this 15 day of August, 2011.

Steven W. Albert
Skylight Office Tower
1660 W. 2nd Street, Suite 1100
Cleveland, OH 44113

Jan L. Roller
1200 Fifth Third Center
600 Superior Ave., E.
Cleveland, OH 44114