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**NO ALTERNATIVE: A PLAINTIFF IN A PRODUCTS LIABILITY ACTION IN WEST VIRGINIA MUST PROVE THAT A FEASIBLE, ALTERNATIVE DESIGN WAS AVAILABLE AT THE TIME THE PRODUCT AT ISSUE WAS MANUFACTURED**

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## I. Introduction

A feasible, alternative design in a products liability action is a design, which was available for a product designer and/or manufacturer at the time of manufacturing, that could have been utilized by the designer/manufacturer to eliminate the risk complained of in an action by the plaintiff. The issue under West Virginia law is threefold: 1) does the plaintiff have a burden to prove a feasible (and reasonable) alternative design in order to state a *prima facie* product defect case; 2) would the alternative design have made a difference; and 3) under the *Morningstar v. Black & Decker Mfg. Co.*<sup>1</sup> standard, should the manufacturer have utilized that feasible alternative design to make the product reasonably safe?

The West Virginia Supreme Court of Appeals has given minimal attention to whether a plaintiff must prove that a feasible, alternative design was available for a product in order to establish liability in a products liability action. Instead, the question remains whether a plaintiff need only prove that a defect exists rather than proving that a defect exists and that a feasible, alternative design was available. However, two recent opinions, *Nease v. Ford*,<sup>2</sup> a Fourth Circuit decision, and *Mullins v. Ethicon*,<sup>3</sup> a Memorandum Opinion and Order out of the United States District Court for the Southern District of West Virginia, along with recently released West Virginia Supreme Court pattern jury instructions, will shape the future of the judicial landscape in products liability actions in West Virginia. These decisions and instructions establish that a plaintiff is required to prove that a feasible, alternative design for a product, which has

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<sup>1</sup> 253 S.E.2d 666 (W. Va. 1979).

<sup>2</sup> 848 F.3d 219.

<sup>3</sup> No. 2:12-cv-02952, 2016 U.S. Dist. LEXIS 170445 (S.D.W. Va. Dec. 9, 2016) (Memorandum Opinion and Order).

been sufficiently tested for reliability, would have eliminated the risk that injured the plaintiff.

## II. Background of Products Liability and Alternative Design Authority in West Virginia

*Morningstar v. Black & Decker Mfg. Co.* is the seminal products liability case in West Virginia.<sup>4</sup> *Morningstar* establishes the standard of proof needed for establishing a products liability action in West Virginia: “the general test for establishing strict liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended use.”<sup>5</sup> *Morningstar* also establishes that there are three principle defect theories in products liability law: design defect, manufacture defect, and “use” (warnings) defect.<sup>6</sup> This article specifically focuses on a design defect cause of action.

The elements of a design defect claim include the following: “(1) that the product was not reasonably safe (2) for its intended use (3) due to a defective design feature (4) which proximately caused plaintiff’s injury.”<sup>7</sup> The term “reasonably safe” is broken down even further in *Morningstar* into the following elements: “(1) the safety is to be tested by the conduct of a reasonably prudent manufacturer, (2) the relevant time period is the date of manufacture, and (3) the risk-utility analysis is used to determine whether the design was reasonable.”<sup>8</sup>

*Morningstar* does not specifically state that a plaintiff is required to prove that a “feasible, alternative design” was available to a designer/manufacturer in order to

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<sup>4</sup> 253 S.E.2d 666.

<sup>5</sup> *Id.* at syl. pt. 4.

<sup>6</sup> *See id.* at 666.

<sup>7</sup> *See* Phillip Combs and Andrew Cooke, *Modern Products Liability Law in West Virginia*, 113 W.V.L.R. 417, 427 (2001); *see also Morningstar*, 253 S.E.2d 666.

<sup>8</sup> *See* Combs, *supra* note 7, at 427 (citing syl. pt. 4–6, *Morningstar*, 253 S.E.2d 666; *id.* at 687). *Morningstar* required courts to “hav[e] in mind the general state of the art of the manufacturing process . . . at the time the product was made,” not at the time of the litigation. Syl. pt. 5, *Morningstar*, 253 S.E.2d 666.

establish a defect.<sup>9</sup> Likewise, subsequent West Virginia Supreme Court products liability decisions have been, for the most part, silent on the issue. However, two historical West Virginia Supreme Court decisions hold that a feasible alternative design is required to prove a product defect case: *Church v. Wesson*<sup>10</sup> and *Accord v. Phillip Morris USA, Inc. (In re Tobacco Litig.)*.<sup>11</sup> These opinions, however, do not provide a syllabus point which requires a plaintiff to prove a feasible, alternative design. Accordingly, circuit courts have been left to question whether the plaintiff must prove a feasible alternative design was available or whether the plaintiff need only prove that a defect is present.

### **III. West Virginia Law Requires Proof of a Sufficiently Tested Feasible, Alternative Design**

#### **a. Alternative Design Requirement in the West Virginia Pattern Jury Instructions for Civil Cases**

In 2016, the West Virginia Supreme Court published pattern jury instructions for use in civil cases in the state's court.<sup>12</sup> According to a West Virginia Supreme Court of Appeals' press release, "[t]he instructions have been extensively researched and have

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<sup>9</sup> See generally *id.* A feasible, alternative design has been described as follows: "[I]t is not sufficient to say that the feasible alternative is to use a different product or not use any product at all. As we observed in the aforementioned post, that would convert strict liability into absolute liability. As we asked in yet another post on this topic, are motorcycles defective because full-sized automobiles are generally safer? You get the point." Steven Boranian, *A Gem on Alternative Design from a Pelvic Mesh MDL*, DRUG AND DEVICE LAW BLOG (Dec. 16, 2016), <https://www.druganddevicelawblog.com/2016/12/a-gem-on-alternative-design-from-a-pelvic-mesh-mdl.html>. Accordingly, *Morningstar's* reliance on "reasonableness" made sense in 1979, as it does now. Some courts and scholars refer to the alternative design as a "reasonable alternative design."

<sup>10</sup> 385 S.E.2d 393 (W. Va. 1989) (per curiam) (holding that plaintiff "failed to establish a *prima facie*" case because he did not provide evidence of a "feasible" alternative design); see also Restatement (Third) of Torts: Products Liability § 2, Reporter's Note (1998) (*Morningstar* "can only be read to require the production of evidence on reasonable alternative design, to gauge what 'should have been'").

<sup>11</sup> No. 13-1204, 2014 W. Va. LEXIS 1159, at \*1 (Nov. 3, 2014) (memorandum decision) (upholding use of a jury instruction which allowed the jury to consider "whether there was a feasible alternative design for that particular product that was technologically and economically feasible, that would be an acceptable replacement for the existing product and that would have rendered the product reasonably safe").

<sup>12</sup> *WV chief justice publishes pattern jury instructions*, CHARLESTON GAZETTE-MAIL, Feb. 18, 2016, <http://www.wvgazette.com/news/20160218/wv-chief-justice-publishes-pattern-jury-instructions>.

gone through numerous revisions.”<sup>13</sup> However, the actual instructions themselves state the following, “These are pattern jury instructions that were written to help trial judges and lawyers instruct the jury in a civil case. THEY ARE NOT BINDING ON THE TRIAL JUDGE.”<sup>14</sup> Included in the instructions are pattern product liability jury instructions.<sup>15</sup> Specifically, the following instruction was adopted by the West Virginia Supreme Court: “There are many designs which, although they may eliminate a particular risk, are not practicable to produce. To prove that a design is defective, [*name of plaintiff*] must prove that there was an alternative, feasible design that eliminated the risk that injured [*him/her*].”<sup>16</sup> This instruction helps clear up whether a plaintiff needs to prove that a feasible, alternative design would have eliminated the risk that injured the plaintiff, and two subsequent federal court cases, discussed *infra*, resolve any uncertainty that remains on the issue.

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<sup>13</sup> Press Release, Supreme Court of Appeals State of West Virginia, Chief Justice Ketchum’s Pattern Jury Instructions go on sale, (Feb. 17, 2016), [http://www.courtswv.gov/public-resources/press/releases/2016-releases/feb17\\_16.pdf](http://www.courtswv.gov/public-resources/press/releases/2016-releases/feb17_16.pdf).

<sup>14</sup> *West Virginia Pattern Jury Instructions for Civil Cases: Instructions on the Law in Plain Language* Preface (2016 ed.) (hereinafter “W. Va. P.J.I.”).

<sup>15</sup> *Id.* § 400 *et seq.*

<sup>16</sup> *Id.* § 411. The instructions provide the following Notes and Sources relating to § 411:

In Syl. Pt. 4 of *Morningstar v. Black & Decker*, 162 W.Va. 857, 253 S.E.2d 666 (1979), the Court stated:

In this jurisdiction the general test for establishing strict liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended use. The standard of reasonable safeness is determined not by the particular manufacturer, but by what a reasonably prudent manufacturer’s standards should have been at the time the product was made.

See also, *Church v. Wesson*, 182 W.Va. 37, 40, 385 S.E.2d 393, 396 (1989) which relies upon Syl. Pt. 4 of *Morningstar* to uphold a directed verdict for defendant, in a strict liability context, on the ground that the plaintiff had failed to establish feasibility of a proffered alternative design.

*Id.*

**b. *Mullins v. Ethicon*: West Virginia Requires Proof of A Feasible, Alternative Design**

*Mullins v. Ethicon*, pending before the United States District Court for the Southern District of West Virginia, represents the consolidation of 31 cases filed against Ethicon relating to pelvic mesh designed and manufactured by Ethicon.<sup>17</sup> These cases are part of nearly 28,000 cases filed against Ethicon.<sup>18</sup> By way of background, on August 4, 2015, the Court entered a Memorandum Opinion & Order which held that “there is no West Virginia authority requiring plaintiffs to prove, as part of their prima facie case, that [a] proposed safer alternative design would have reduced an individual plaintiff’s specific injuries.”<sup>19</sup> The Court further determined that “plaintiff-specific information is not required to develop or defend against state-of-the-art evidence of a safer alternative design.”<sup>20</sup> After the Court’s ruling, the West Virginia Supreme Court published the *West Virginia Pattern Jury Instructions for Civil Cases: Instructions on the Law in Plainer Language*, and Ethicon moved for the Court to reconsider its prior ruling in light of the instruction on feasible, alternative designs, discussed *supra*.<sup>21</sup>

In response to Ethicon’s Motion to reconsider, Plaintiff’s made three arguments: 1) the instruction is not binding on the Court, 2) the pattern jury instruction applies only in a “non-consolidated trial context” and only when a plaintiff “chooses to defend her design defect claim by advocating a safer alternative design,” and 3) “when read in context with the other design defect pattern instructions and relevant case law, they

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<sup>17</sup> 2016 U.S. Dist. LEXIS 170445 at \*1 (S.D.W. Va. Dec. 9, 2016).

<sup>18</sup> *Id.*

<sup>19</sup> *Mullins v. Ethicon, Inc.*, 117 F. Supp. 3d 810, 811 (S.D.W. Va. 2015) (Memorandum Opinion and Order).

<sup>20</sup> *Id.*

<sup>21</sup> *Mullins*, 2016 U.S. Dist. LEXIS 170445, at \*1.

may choose alternative pathways to proving their cases. Specifically, the plaintiffs argue that they may prove their respective cases by ‘choosing’ to apply the risk-utility test *or* by ‘choosing’ to establish the existence and remedial efficacy of an alternative, feasible design.”<sup>22</sup>

In response to the plaintiffs’ first argument, the Court agreed that the instruction was not binding, but the Court reasoned, “At best, the plaintiffs ask me to simply ignore § 411 because it is not binding, and at worst, the plaintiffs ask me to find that § 411 is an incorrect statement of West Virginia law. I will do neither.”<sup>23</sup> The Court noted that the instruction had “persuasive force” and that it would help “predict how the West Virginia Supreme Court would rule on this issue,” which is “substantial.”<sup>24</sup>

In response to the plaintiffs’ second argument, the Court noted that the plaintiffs had provided no support for their argument.<sup>25</sup> The Court also noted that § 411 makes no mention of consolidation of cases, nor does it state that a plaintiff is allowed to “choose anything.”<sup>26</sup> Instead, § 411 “outlines what a plaintiff must prove to establish a defective design:” a “plaintiff advancing a design defect strict liability claim ‘must’ prove his or her case by demonstrating the existence and remedial efficacy of an alternative, feasible design.”<sup>27</sup>

In response to the plaintiffs’ third argument, the Court walked through each element of a design defect strict liability cause of action.<sup>28</sup> Ultimately, the Court found

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<sup>22</sup> *Id.* at \*12–17.

<sup>23</sup> *Id.* at \*13–14.

<sup>24</sup> *Id.* at \*15.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (citing W. Va. P.J.I. § 411).

<sup>28</sup> *Id.* at 17–20. The Court first cited § 409, which lays out the essential factual elements of a design defect claim:

that the plaintiffs proposition was illogical because the elements for proving a design defect strict liability action work together and help define each other; plaintiffs in no way have a path in which they can "choose" how they wish to pursue their action.<sup>29</sup>

After dismantling the plaintiffs' arguments, the Court gave a clear rendition of its understanding of West Virginia's requirement for plaintiff to prove that a feasible, alternative design was available in a strict liability design defect case:

My inescapable conclusion is that, in a West Virginia strict liability design defect products liability case, a plaintiff must prove that there was an alternative, feasible design—existing at the time of the product's manufacture—that would have eliminated the *risk* that injured the plaintiff. This interpretation is not in conflict with the binding precedent of the West Virginia Supreme Court; instead, it appears to clarify what was already required. See *Church*, 385 S.E.2d at 394-96 (ruling that the appellant had failed to establish a prima facie right of recovery because he had not provided evidence of an alternative, feasible design); see also *Morningstar*, 253 S.E.2d at 682 ("We believe that a risk/utility analysis

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§ 409. Design Defect—Essential Factual Elements

[*Name of plaintiff*] claims the [*name of product*]'s design injured [*him/her*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of defendant*] made the [*name of product*]; and
2. That [*name of plaintiff*] was harmed while using the [*name of product*] in a reasonably foreseeable way; and
3. That the [*name of product*]'s design was defective; and
4. That the [*name of product*]'s defective design was a proximate cause of [*name of plaintiff*]'s injury.

*Id.* at \*17–18 (citing W. Va. P.J.I. § 409). Next, the Court cited, § 410, which "affirms the use of the risk-utility test under West Virginia law when assessing the defectiveness of a product's design:"

§ 410. Design Defect—Risk Utility Test

To determine whether a design was defective, you must decide if the benefits of the design outweigh the risks. To make this decision, you should consider the following:

1. The potential harm resulting from the use of the [*name of product*]; and
2. The likelihood that the harm would occur; and
3. The feasibility of an alternative, safer design at the time of manufacture; and
4. The cost of an alternative design; and
5. The disadvantages of an alternative design; and
6. [*Other relevant factor(s)*].

*Id.* at \*18 (citing W. Va. P.J.I. § 410). The Court noted that three of the factors require consideration of a feasible, alternative, design. *Id.* Lastly, the Court § 411 and noted that § 411 "ties everything together by instructing the jury on what exactly an alternative, feasible design must achieve." *Id.* at \*18–19.

<sup>29</sup> *Id.* at \*17–20.



does have a place in a tort product liability case by setting the general contours of relevant expert testimony concerning the defectiveness of the product. . . . Through [the expert's] testimony the jury is able to evaluate the complex technical problems relating to product failure, safety devices, *design alternatives*, the adequacy of warnings and labels, as they relate to economic costs."<sup>30</sup>

**c. *Nease v. Ford*: Applying *Daubert* to an Expert's Opinions on Possible Feasible, Alternative Designs**

On February 1, 2017, the Fourth Circuit published *Nease v. Ford*, an opinion which further clarified whether a plaintiff must establish that a feasible, alternative design was available at the time that a product is manufactured in West Virginia products liability actions.<sup>31</sup> Not only that, but the decision even goes a step further and vigorously applies *Daubert*<sup>32</sup> to an expert's opinions on feasible, alternative designs.

**i. Factual Background**

Howard Nease was involved in a single-car accident on November 20, 2012, while driving his 2001 Ford Ranger pickup truck.<sup>33</sup> The vehicle had been driven approximately 116,000 miles, with no reported issues with the brakes or throttle system.<sup>34</sup> Plaintiffs alleged that as Mr. Nease was driving westbound on U.S. Route 60 in St. Albans, West Virginia, his vehicle would not slow down when he released the accelerator pedal.<sup>35</sup> Afraid of a collision, Mr. Nease steered his vehicle off the roadway, through a parking lot and into a brick wall at a car wash.<sup>36</sup> Mr. Nease alleged that the

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<sup>30</sup> *Id.* at \*20–21.

<sup>31</sup> 848 F.3d 219.

<sup>32</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

<sup>33</sup> *Nease*, 848 F.3d at 222.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

engine continued to run after he hit the wall, and that the tires spun until the engine blew out.<sup>37</sup>

Plaintiffs filed this action against Ford, alleging that the 2001 Ranger's speed control system was defective because its design made the throttle susceptible to being bound by microscopic debris in an open position, and that Ford should have employed safer alternative designs that would have prevented the potential binding problem.<sup>38</sup>

## ii. Ford Ranger Speed Control Cable

The 2001 Ford Ranger accelerates when a driver presses the accelerator pedal, which is connected to the throttle body by a steel cable referred to as the accelerator cable.<sup>39</sup> Alternatively, a driver can accelerate by using the cruise control system, which controls the vehicle's speed via an electric motor connected to a second steel cable, the "speed control cable."<sup>40</sup> The speed control cable is attached to the throttle plate by a connector that shifts during operation.<sup>41</sup> The steel portion of the speed control cable does not actually move if the cruise control is off; rather, a grey plastic tube referred to as the guide tube moves, along with the connector, up and down the cable.<sup>42</sup> The guide tube shifts within the casing cap, which is a black plastic component at one end of the assembly that remains stationary.<sup>43</sup> The gap between the guide tube and the casing cap in a 2001 Ford Ranger is approximately 0.04 inches.<sup>44</sup> The speed control cable is restrained by return springs that exert approximately 7.2 pounds of continuous force.

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 222–23, 226.

<sup>39</sup> *Id.* at 223.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

Those springs pull the throttle plate closed in less than a second when the accelerator pedal is released.<sup>45</sup>

### iii. Samuel Sero and the Underlying Trial Court Verdict

After the accident, Mr. and Mrs. Nease hired Samuel Sero, an electrical engineer, to inspect Mr. Nease's 2001 Ford Ranger.<sup>46</sup> Mr. Sero believed that he should investigate the accelerator cable "to see if there's anything on it that bound up and prevented it from closing the throttle when the accelerator pedal was released, looking for . . . any kind of grime, grit, or anything that could bind that one."<sup>47</sup> To support his investigation into the accident, Mr. Sero used a borescope to inspect the speed control assembly to see whether particles had lodged between the speed control guide tube and the casing cap of Mr. Nease's vehicle.<sup>48</sup> Upon examining Mr. Nease's vehicle, Mr. Sero did not find any materials wedged between the guide tube and the cap.<sup>49</sup> Despite his findings, Mr. Sero opined that contaminants "had entered and built up in the casing cap over time, causing the guide tube to stick and, therefore, the throttle plate to remain open."<sup>50</sup> Mr. Sero believed that sufficient debris was found in the casing cap, which was sufficient to create the "wedging effect" needed to keep the throttle open.<sup>51</sup> Mr. Sero also concluded that three safer, feasible alternative designs were available at the time Ford manufactured Mr. Nease's vehicle: 1) Ford could have used a "nipple wipe" to

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 223–24.

<sup>48</sup> *Id.* "A borescope is essentially a fiber-optic tube equipped with a light that a mechanic or an engineer can insert into an inaccessible area of the engine and view a given component without having to disassemble the engine." *Id.*

<sup>49</sup> *Id.* Mr. Sero otherwise noted that the speed control cable moved freely. *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* To further support his opinion, Mr. Sero relied on a Ford Failure Mode and Effect Analysis ("FMEA"). *Id.* Mr. Sero claimed that the FMEA directly addressed the fact that binding can occur due to debris in the speed control system. *Id.*

clean contaminants off the cable as it moves, 2) Ford could have used a “boot” which blocks debris and grime from accumulating on the cable, and 3) Ford could have provided a larger gap between the guide tube and the casing cap.<sup>52</sup>

Prior to trial, Ford filed a motion to exclude Mr. Sero’s opinions pursuant to *Daubert*.<sup>53</sup> However, the district court denied Ford’s motion and concluded that Mr. Sero had used “standard engineering methodology to conduct his physical inspection and reach his opinions.”<sup>54</sup>

At trial, Mr. Sero testified that he did not find any materials actually wedged between the guide tube and cap, and he acknowledged that the speed control cable moved freely.<sup>55</sup> Mr. Sero also “agreed that he had never conducted any testing to determine whether enough debris could accumulate in the casing cap during normal operation to resist the 7.2 pounds of force exerted by the return spring and to cause the throttle to stick open.”<sup>56</sup> Instead, Mr. Sero relied upon his observations from the borescope examination.<sup>57</sup> Further, Mr. Sero testified that

several alternative speed control cable designs were available at the time and that Ford could have made the 2001 Ranger safer by incorporating one of these designs. He admitted, however, that he had not tested any of these alternative designs to determine whether any of them would have prevented the accident in question. In Sero’s opinion, testing of the alternative designs he identified was unnecessary because the designs had been in use in other vehicles for years and were therefore “proven commodit[ies].”<sup>58</sup>

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<sup>52</sup> *Id.* at 234.

<sup>53</sup> *Id.* at 227. Ford argued that Mr. Sero had not based his opinions on a reliable methodology, that Mr. Sero had not tested that binding of the speed control assembly could actually occur, and Mr. Sero had no literature to support that binding could actually occur. *Id.* Additionally, Ford argued that Mr. Sero was unqualified to render opinions on automotive design. *Id.*

<sup>54</sup> *Id.* at 225.

<sup>55</sup> *Id.* Mr. Sero “further admitted that he had never actually found a bound speed cable assembly in any vehicle that he had inspected.” *Id.* at 225–26 (emphasis in original).

<sup>56</sup> *Id.* at 226.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 226–27.

The jury found in favor of the Neases on the strict liability cause of action and awarded the Neases \$3,012,828.35.<sup>59</sup> After trial, Ford filed a Renewed Motion for Judgment as a Matter of Law and, in the alternative, a Motion for A New Trial.<sup>60</sup> Specifically, Ford argued in its Renewed Motion for Judgment as a Matter of law that Mr. “Sero never demonstrated unidirectional binding of Mr. Nease's speed control cable, he did not attempt to simulate his theory, he did not conduct any tests that a foreign substance could withstand the seven-pound spring pressure, [and] he did not demonstrate alternative designs were equally or more safe.”<sup>61</sup> The district court denied Ford’s motions and Ford appealed to the Fourth Circuit, arguing that Mr. Sero should have been excluded under *Daubert*.<sup>62</sup>

#### **iv. The Fourth Circuit’s Opinion: Applying *Daubert* to an Expert’s Opinion on Feasible, Alternative Designs**

Before addressing whether Mr. Sero had established that feasible, alternative designs were available for the speed control cable, the Fourth Circuit provided a detailed, thorough, and well-reason opinion on the applicability of *Daubert* to a products liability action.<sup>63</sup> The Court ultimately found that the district court had abandoned its gatekeeping function by allowing Mr. Sero to testify at trial.<sup>64</sup> As such, Mr. Sero should

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<sup>59</sup> *Id.* at 227.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 227–28. The district found that Mr. Sero’s methodology was reliable. *Id.* at 228.

<sup>63</sup> *Id.* at 228–31. First, the Fourth Circuit analyzed whether *Daubert* is applicable to the Neases’ case. *Id.* at 228-30. The Neases argued that *Daubert* “applies only to novel scientific testimony, it does not apply in the expert field of engineering.” *Id.* The Court, citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), found that the Neases were “dead wrong,” and determined that *Daubert* clearly applied to Sero’s testimony. *Id.* at 229.

<sup>64</sup> *Id.* at 231. The Court noted that over and over the district court found that Ford’s arguments about the reliability of Mr. Sero’s testimony “go to the weight the jury should afford Mr. Sero’s testimony.” *Id.* at 230-31.

have been excluded under *Daubert*.<sup>65</sup> The Court reasoned that Mr. Sero had “never seen any vehicle with ‘post-crash’ binding,” he had conducted no testing to arrive at his opinions, and he never tested whether it is possible for debris to accumulate in a 2001 range which would cause the throttle to remain open.<sup>66</sup> Because Mr. Sero did not test his hypothesis, his opinions were unreliable.<sup>67</sup>

The Court also provided analysis on Mr. Sero’s suggested safer, feasible, alternative designs. The Court acknowledged the importance of *Morningstar* in West Virginia and stated that a plaintiff must show that the “product is defective in the sense that it is not reasonably safe for its intended use” in order to establish strict liability under West Virginia law.<sup>68</sup> In its briefing with the Court, Ford had argued that *Morningstar* requires “a products liability plaintiff to prove that a reasonably prudent manufacturer would have adopted a safer design during the relevant time period.”<sup>69</sup>

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<sup>65</sup> *Id.* at 231.

<sup>66</sup> *Id.* at 221–32. Earlier in the opinion, the Court provided a lengthy resuscitation of the *Daubert* guideposts for determining if an expert’s testimony is sufficiently reliable to be admissible: first, the court must determine whether the theory or technique will assist the trier of fact and whether it can be and has been tested; second, the court should consider whether the theory or technique has been subjected to peer review and publication; third, the potential rate of error should be considered; and fourth, general acceptance is relevant to reliability. *Id.* at 229 (citations omitted).

<sup>67</sup> *Id.* at 232. The Court analyzed the *Daubert* guideposts to support its conclusion. Mr. Sero had not published or subjected his theory to peer review. *Id.* Additionally, the FMEA on potential binding was insufficient to prove that the theory had been accepted within the scientific community. *Id.* at 232–33. Instead, the FMEA was part of the design process itself which identified potential failures. *Id.* at 233. As such, the FMEA is not evidence of a recurring design problem. *Id.*

<sup>68</sup> *Id.* (citing *Morningstar*, 253 S.E.2d 666,683). The Court further acknowledged the following West Virginia law:

“The standard of reasonable safeness is determined . . . by what a reasonably prudent manufacturer’s standards should have been at the time the product was made.” Significantly, the West Virginia Supreme Court explained that the determination of what a “reasonably prudent manufacturer’s standards should have been at the time” requires a consideration of “the general state of the art of the manufacturing process, including design.”

*Id.*

<sup>69</sup> *Id.* The Neases, however, relied on two West Virginia Southern District opinions in opposition of Ford’s argument: *Mullins v. Ethicon, Inc.*, 117 F. Supp. 3d 810, 821 (S.D.W. Va. 2015) (overruled); *Keffer v. Wyeth*, 791 F. Supp. 2d 539, 547 (S.D.W. Va. 2011). *Id.*

The Fourth Circuit noted that “West Virginia law on the matter is not crystal clear,” but the Court agreed that “*Morningstar* ‘can only be read to require the production of evidence on reasonable alternative design, to gauge what “should have been.””<sup>70</sup> The Court further stated:

Although *Morningstar* does not use the phrase “alternative design,” a plaintiff in a design case, for all practical purposes, must identify an alternative design in order to establish the “state of the art.” See *Church v. V.R. Wesson*, 182 W. Va. 37, 385 S.E.2d 393, 396 (W. Va. 1989) (holding plaintiff in a defective design case failed to establish a prima facie case because plaintiff’s expert identified an alternative design that was not feasible at the time of manufacture and thus failed to prove that defendant’s design was not “state of the art”).

After establishing the appropriate law to be applied in strict liability caused, the Court then analyzed Mr. Sero’s proposed safer, feasible, alternative designs. Mr. Sero testified below that his three alternative designs; the nipple wipe, the boot, and the larger gap between the guide tube and casing cap; had been used by Ford as alternative design features for many years at the time the 2001 Ranger was manufactured.<sup>71</sup> In response, however, the Court used a *Daubert* based reasoning and held that Mr. Sero “performed no tests or studies to determine whether, in fact, these older, long-standing designs were involved in fewer binding incidents. . . . Similarly, he offered no data from any other studies or accident records to prove that the older designs were less likely to bind than the one incorporated in the Neases’ 2001 Ranger.”<sup>72</sup> Instead, Mr. Sero, without any support at all, claimed that the alternative designs were safer than the design of the speed control cable assembly in the 2001 Ranger.<sup>73</sup> As such, Mr. Sero’s “testimony should have been excluded as it was ‘unsupported by any evidence such as

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<sup>70</sup> *Id.* at 234 (citing Restatement (Third) of Torts: Products Liability § 2, Reporter’s Note (1998)).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

test data or relevant literature in the field.”<sup>74</sup> The Court further stated, “The fact that the alternatives have generally been in use for decades is wholly insufficient to prove that such designs were safer with respect to the alleged binding incident and that reasonably prudent manufacturers would have adopted them.”<sup>75</sup>

Ultimately, the Fourth Circuit reversed the district court’s decision and found in favor of Ford.<sup>76</sup> On the whole, the *Nease* opinion shows how an expert’s opinions on a feasible, alternative design mesh with the *Daubert* factors of admissibility. For example, without some sort of testing or relevant literature in the field, the expert’s opinions on feasible, alternative designs should not be admissible in court. Merely stating that alternative designs have been used for decades is “wholly insufficient to prove that such designs were safer.”<sup>77</sup>

#### **IV. Conclusion**

Although the West Virginia Supreme Court has never announced in a syllabus point that a plaintiff must prove that a feasible, alternative design was available at the time a product was manufactured in order to prove a design defect claim under West Virginia products liability law, the framework has been laid for such an opinion to be issued. With the history of *Church*, the guidance of the Pattern Jury Instruction, the *Mullins* decision, and the *Nease* decision, it is clear that a plaintiff must prove that a feasible, alternative design was available at the time the product was manufactured and that design must have eliminated the risks complained of in the action by the plaintiff in each design defect products liability action. Even more, the plaintiff’s alternative design

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<sup>74</sup> *Id.* (citing *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 249 (4th Cir. 1999)).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 234–35.

<sup>77</sup> *Id.*



must be sufficiently tested and reliable to comply with *Daubert*. The mere fact that a design has been used previously is insufficient to prove that the design is a feasible, alternative. Moving forward, defense lawyers in products liability design defect actions can utilize the Pattern Jury Instruction, the *Mullins* decision, and the *Nease* decision as tools to assist with summary judgment rulings when plaintiffs fail to prove the existence of a feasible, alternative design that has been sufficiently tested.