THE BASICS OF ALABAMA'S PRODUCT LIABILITY LAW

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I. ALABAMA EXTENDED MANUFACTURERS' LIABILITY DOCTRINE

Product liability actions in Alabama are governed by the Alabama Extended Manufacturers' Liability Doctrine ("AEMLD"). The AEMLD is predicated on the strict liability doctrine promulgated by Section 402A of the Restatement (Second) of Torts ("Section 402A"), but the AEMLD has important differences.

A. The Origin of the AEMLD.

The Alabama Supreme Court first articulated the AEMLD in Casrell v. Altec Industries, Inc., 335 So. 2d 128 (Ala. 1976) and Atkins v. American Motors Corp., 335 So. 2d 134 (Ala. 1976). See also Ala. Code §6-5-500 et seq. (1993) (defining "product liability action"). Both Casrell and Atkins were wrongful death cases. In Casrell, plaintiff's decedent was electrocuted by power lines which came in contact with a telescoping arm mounted on a truck, which defendants manufactured, assembled and sold to decedent's employer. In Atkins, plaintiff's decedent died when the 1970 Gremlin automobile in which he was riding was struck from behind by another car and burst into flames. In both cases, plaintiffs alleged that a defect in the product proximately caused the decedent's death.

The Alabama Supreme Court used Casrell and Atkins to announce the AEMLD, which includes the following principles: the manufacturer, the supplier and the seller shall be subject to liability; the tort concept of fault is retained; a defendant who markets a product which is not reasonably safe when applied to its intended use in the usual and customary manner is negligent as a matter of law; the defendant may present evidence to rebut any element of the plaintiff's prima facie case; and the defendant may assert the affirmative defenses of contributory negligence, assumption of the risk, product misuse, and lack of causal relation. See Casrell, 335 So. 2d at 132, 134; Atkins, 335 So. 2d at 143.

After considering the no-fault strict liability concept from Section 402A, the court decided to retain the concept of fault. In Atkins, the court explained the nature of fault under the AEMLD as follows:

> The gravamen of the action is not that the defendant failed to exercise due care in the manufacture, design, sale or placing in the commercial stream a defective product; rather, the gravamen of the action is that the defendant manufactured or designed or sold a defective product which, because of its unreasonably unsafe condition, injured the plaintiff or damaged his property when such product, substantially unaltered, was put to its intended use.

Atkins, 335 So. 2d at 139.

B. Plaintiff's Case under the AEMLD

To establish liability under the AEMLD:

(1) A plaintiff must prove he suffered injury or damages to himself or his property by one who sold a product in a defective condition unreasonably dangerous to the plaintiff as the ultimate user or consumer, if

(a) the seller was engaged in the business of selling such a product, and

(b) it was expected to, and did, reach the user or consumer without substantial change in the condition in which it was sold.

(2) Having established the above elements, the plaintiff has proved a prima facie case although

(a) the seller had exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer had not bought the product from, or entered into any contractual relation with, the seller.

Atkins, 335 So. 2d at 141.

The plaintiff's prima facie case under the AEMLD was further defined in Sears, Roebuck & Co., Inc. v. Haven Hills Farm, Inc., 395 So. 2d 991, 993-96 (Ala. 1981), where the plaintiff's delivery truck suffered a tire blowout which caused an accident. The court held that the existence of a defect cannot be inferred from a mere product failure or an accident involving the product. See id. at 994-95. Rather, the plaintiff must prove that the product contains a defect, that the product left the defendant's control in this defective condition, that the product was substantially unaltered by the plaintiff, that the defect is traceable to the defendant, and most importantly, that this defect proximately caused the injury. See Haven Hills, 395 So. 2d at 994-95; Townsend v. General Motors Corp., 642 So. 2d 411, 415 (Ala. 1994) (stating the well-established principle that proof of an accident and injury is not sufficient to establish liability under the AEMLD, as plaintiff must affirmatively prove the defect in the product); Brooks v. Colonial Chevrolet-Buick, 579 So. 2d 1328, 1333 (Ala. 1991) (holding that res ipsa loquitur is not applicable in products liability cases in Alabama).

1. The Elements of a Cause of Action under the AEMLD:

a. Meaning of "Product".

Although there is little controversy over the meaning of "product" under the AEMLD, there have been a few occasions when the definition of product has been an issue. For example, when a fixture is attached to a house, then that fixture is not a "product" because a house cannot be classified as a "product" under the AEMLD. See Wells v. Clowers Construction Co., 476 So. 2d 105, 106 (Ala. 1985) (holding that a fireplace is not a product). In addition, a service, such as the issuance of an insurance contract, is not a "product." See Oxford Lumber Co. v. Lumberman's Mutual Ins. Co., 472 So. 2d 973, 978 (Ala. 1985). In a very recent case, however, the Alabama Supreme Court held that a utility pole, despite the fact that it is installed in the ground, is a "product" for purposes of the AEMLD. Bell v. T.R. Miller Mill Co., ____ So. 2d ____, 2000 WL 127191 (Ala. 2000).

b. Meaning of "Sale".

Liability under the AEMLD is not limited to situations where a formal sale has occurred. See First National Bank of Mobile v. Cessna Aircraft, 365 So. 2d 966, 968 (Ala. 1978); see also Cain v. Sherton Perimeter Park South Hotel, 592 So. 2d 218 (Ala. 1991) (holding that free oysters offered in hotel lounge were a "sale"). A manufacturer, supplier or seller is subject to liability once the defective product is put "into the stream of commerce." See Cessna Aircraft, 365 So. 2d at 968. According to the "stream of commerce" doctrine, AEMLD liability can arise with respect to products at any point in the chain of distribution.

If the defendant has not offered the product for sale but merely kept it for internal use, however, then the AEMLD does not apply. See American States Ins. Co. v. Lanier Business Products, 707 F. Supp. 494, 496-98 (M.D. Ala. 1989). In addition, where a defendant sells or rents a product as a one-time only exchange, then that individual cannot be liable under the AEMLD because he is not "in the business" of selling that product. See Baugh v. Bradford, 529 So. 2d 996, 999 (Ala. 1988) (quoting the Restatement Comment, which states:

> This rule does not, however, apply to. . . the owner of an automobile who, on one occasion, sells it to his neighbor. . .. For large corporations in the business of manufacturing and selling goods, the definition of the word 'product' will rarely shield them from AEMLD liability.).

c. Meaning of "Defective".

A product is defective when it is unreasonably dangerous and does not meet the reasonable expectations of an ordinary consumer with respect to its safety; that is, when the unreasonably dangerous product is in a condition not contemplated by the ultimate consumer. See Flemister v. General Motors Corp., 723 So. 2d 25, 27 (Ala. 1998) (rejecting "risk/utility" as sole

defect test, and stating that plaintiff's burden is to prove that product was not "unreasonably dangerous, that is, not fit for its intended purpose"); Casrell, 335 So. 2d at 133. Even a flawed product is not "defective" when it is in a condition expected by the consumer. See Hawkins v. Montgomery Industries International, Inc., 536 So. 2d 922, 925-26 (Ala. 1988) (holding that the clogging of a blowpipe vacuum devise is not a defect, where the users expected the clogging problem and believe that all such vacuum devises have a similar problem with clogging). See Edwards, 482 So. 2d at 1183; Haven Hills, 395 So. 2d at 994. Whether a product is unreasonably dangerous generally is a question for the trier of fact. See Casrell, 335 So. 2d at 133.

There are three types of defects which give rise to a cause of action under the AEMLD: manufacturing defects, design defects and the failure to warn.

i. Manufacturing Defect (Flaw in the Product).

When a particular product has an unintended flaw or abnormality which renders it more dangerous than it would have been if it had been constructed as intended, then the product has a "defect" under the AEMLD. See Interstate Eng'g, Inc. v. Burnette, 474 So. 2d 624, 628 (Ala. 1985); Haven Hills, 395 So. 2d at 993-95.

ii. Design Defect.

AEMLD liability will arise where the product's design causes it to be unreasonably dangerous. See Banner Welders, Inc. v. Knighton, 425 So. 2d 441, 443 (Ala. 1982); Ammons v. Massey-Ferguson, Inc., 663 So. 2d 961, 962, 965 (Ala. 1995). This liability will arise because a manufacturer has a duty to design and manufacture a product that is reasonably safe for its intended purpose and use. See Toole v. Brown & Williamson Tobacco Corp., 980 F. Supp. 419, 424 (N.D. Ala. 1997). While the manufacturing defect cases focus on a flaw in one particular example of the product, the design defect cases focus upon the entire line of products. In design cases, plaintiffs do not allege that the product is damaged, flawed or abnormal -- the product could be constructed perfectly. Rather, plaintiffs allege the design of the product renders the entire product line unreasonably dangerous.

To prove that the design of a product is defective, a plaintiff must prove that a safer, practical, alternative design was available to the manufacturer at the time the product was manufactured. See Richards v. Michelin Tire Corp., 21 F.3d 1048, 1056 (11th Cir. (Ala.) 1994). An alternative design would be deemed safer if plaintiff can prove that his injuries would have been eliminated or reduced by the use of such a design. See Brest v. Chrysler Corp., 939 F. Supp. 843, 846 (M.D. Ala. 1996). To determine if the utility of the alternative design outweighs the original design (i.e., "practical"), the following factors should be considered: the intended use of the product; its styling, cost and desirability; its safety aspects; the foreseeability of a particular accident; likelihood of injury if accident occurred; obviousness of defect; and the manufacturer's ability to eliminate the defect. See id. at 846. Significantly, "simply because 'a feasible [alternative design] could have been designed by a proper use of a manufacturer's resources,' [that does not mean] that an 'alternative design' existed." Beech v. Outboard Marine Corp., 584 So.2d 447, 450 (Ala. 1991).

Plaintiff has the burden to prove that the design of the product is unreasonably dangerous, because a manufacturer is not an insurer against all harm arising from the use of a product, and the designer is not under a duty to design an accident-proof product. See Townsend v. General Motors Corp., 642 So. 2d 411, 415 (Ala. 1994).

To rebut a design defect claim, a manufacturer can offer proof that the design was "state of the art." See Frantz v. Brunswick, 866 F. Supp. 527, 534 (S.D. Ala. 1994). However, once plaintiff proves the existence of an alternative safer, practical design, defendant manufacturer cannot assert compliance with industry standards as an absolute defense, because it may indicate failure on the part of the entire industry. See Elliot v. Brunswick Corp., 903 F.2d 1505, 1508 (11th Cir. (Ala.) 1990); Frantz, 866 F. Supp. at 534. Nevertheless, compliance with industry standards can be considered by the jury on the issue of whether the product was defective, see General Motors Corp. v. Edwards, 482 So. 2d 1176, 1198 (1985), and "courts cannot burden companies with an immediate duty to revolutionize their industry," Elliott, 903 F. 2d at 1508.

(1) CRASHWORTHINESS

One important type of design defect action involving motor vehicles is a crashworthiness claim, recognized in Alabama in Edwards, 482 So. 2d at 1176.[1]

In a crashworthiness action, the plaintiff does not claim that the design defect caused the collision. Rather, the plaintiff claims that the vehicle did not properly protect the user during a crash, thereby proximately causing or enhancing his injuries. See Edwards, 482 So. 2d at 1181-1183. Alabama adopted the theory, first articulated by the Eighth Circuit in Larsen v. General Motors Corp., 391 F. 2d 495, 498-500 (8th Cir. 1968), that while a manufacturer is under no duty to design an accident-proof vehicle, it does have a duty to design the vehicle to avoid subjecting its user to an unreasonable risk of injury in the event of a collision. See Edwards, 482 So. 2d at 1181.

The court articulated Alabama's crashworthiness doctrine as follows:

> In order to recover against the automobile manufacturer in such cases, a plaintiff must prove the following:
>
> I. That the plaintiff (or one upon whose behalf he brings suit) was involved in an automobile accident.
>
> II. That an automobile involved in that accident was

[1] Brooks v. Colonial Chevrolet-Buick, Inc., 579 So. 2d 1328, 1331-32 (Ala. 1991), recognizes that the case, Schwartz v. Volvo North America Corp., 554 So. 2d 927 (Ala. 1989) (holding that a car manufacturer is not liable under the AEMLD for the failure to install an airbag system), overruled Edwards on other grounds. However, nothing in Schwartz altered the basic structure of the crashworthiness doctrine as set out in Edwards.

manufactured by the defendant manufacturer.

III. That, at the time of the accident, that automobile was substantially unchanged since leaving the manufacturer.

IV. That the automobile was defective. That is to say, that it did not meet the reasonable expectations of an ordinary consumer as to its safety because it was unreasonably dangerous, i.e., not fit for its intended purpose, which is to travel the streets, highways, and other thorough-fares. In order to prove defectiveness, the plaintiff must prove that a safer, practical, alternative design was available to the manufacturer at the time it manufactured the automobile. The existence of a safer, practical, alternative design must be proved by showing that:

(a) the plaintiff's injuries would have been eliminated or in some way reduced by use of the alternative design, and that;

(b) taking into consideration such factors as the intended use of the vehicle, its styling, cost, and desirability, its safety aspects, the foreseeability of the particular accident, the likelihood of injury, and the probable seriousness of the injury if that accident occurred, the obviousness of the defect, and the manufacturer's ability to eliminate the defect, the utility of the alternative design outweighed the utility of the design actually used.

V. That the defect in the automobile proximately caused his injuries.

Edwards, 482 So. 2d at 1191-92.

While a plaintiff must demonstrate that a safer, practical design was available, plaintiff need not prove precisely which of his injuries were caused by the design defect and which injuries were caused by some other source. See id. at 1189. If plaintiff proves that an alternative design would have eliminated or reduced his injuries, then the manufacturer is jointly and severally liable along with the other driver who caused the collision. See id. at 1190.

In Volkswagen of America, Inc. v. Marinelli, 628 So. 2d 378, 385 (Ala. 1993), the court clarified that neither a general claim under the AEMLD nor a crashworthiness claim require

"proof of accident causation, both doctrines focus on the alleged defect as being the proximate cause of the injury or damage." The plaintiff's burden of proof in establishing causation is identical, whether the claim is a general AEMLD claim or a specific crashworthiness design defect claim. See id. at 385. Therefore, the "alternative design" element of the plaintiff's prima facie case in the crashworthiness context has been extended to all design-based product liability claims in Alabama.

iii. Failure to Warn.

Where a manufacturer knows that the product might be dangerous when used in a reasonably foreseeable manner, then the manufacturer has a duty to issue adequate warnings. See Richards v. Michelin Tire Corp., 21 F.3d 1048, 1058 (11th Cir. (Ala.) 1994). To establish a failure-to-warn claim under the AEMLD, a plaintiff must prove the following: defendant had a duty to warn plaintiff of the product's danger when used in its intended manner; any warning provided by the defendant breached that duty because the warning was inadequate; and the breach of that duty caused plaintiff's injuries. See Campbell v. Robert Bosch Power Tool Corp., 795 F. Supp. 1093, 1097 (M.D. Ala. 1992).

To establish the defendant's duty to warn, plaintiff must show the following: defendant placed the product into the stream of commerce, the product was substantially unaltered when plaintiff used it; product was imminently dangerous when put to its intended or customary purpose, and defendant knew or should have known that the product could create a danger when used in its intended or customary manner. See id. at 1097. In order to be adequate, the warning must be of a size, position and coloring calculated to attract the user's attention. See Carruth v. Pittway Corp., 643 So. 2d 1340, 1344 (Ala. 1994). A manufacturer is under no duty to warn when the danger associated with the product is open and obvious. See Gurley v. American Honda Motor Co., Inc., 505 So. 2d 358, 361 (Ala. 1987); Ford Motor Co. v. Rodgers, 337 So. 2d 736, 739 (Ala. 1976); Brest v. Chrysler Corp., 939 F. Supp 843, 848 (M.D. Ala. 1996). Finally, as to causation, plaintiff must prove that he would have read and heeded the warning, had it been included or had it been adequate. See Deere & Co. v. Grose, 586 So. 2d 196, 198 (Ala. 1991) (holding that in negligent-failure-to-warn-adequately case, plaintiff must produce substantial evidence that the adequate warning would have been read and heeded and would have prevented the accident, which is required to show proximate cause); E.R. Squibb & Sons v. Cox, 477 So. 2d 963, 970 (Ala. 1985) (holding that where the plaintiff did not read any of the warnings included, he cannot claim that additional warnings would have prevented the injury).

d. The Necessity of Expert Testimony.

Whether the AEMLD claim is based on a manufacturing defect, a design defect, or a failure to warn, the plaintiff is always trying to prove that the product is defective. Expert testimony -- as a practical matter -- is required when plaintiff seeks to prove a defect, especially in design and manufacturing flaw cases.

For complex or technical products, a plaintiff must produce expert testimony in order to prove that the product is defective. See Haven Hills, 395 So. 2d at 995. Examples of products deemed to be sufficiently complex or technical include the following: Britt v. Chrysler Corp., 699

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So. 2d 179, 181 (Ala. Civ. App. 1997) (automobile airbag system), Townsend, 642 So. 2d at 415 (automobile brake system), Brooks v. Colonial Chevrolet-Buick, Inc., 579 So. 2d 1328, 1333 (Ala. 1991) (automobile brake system); Robinson v. Ford Motor Co., 967 F. Supp. 482, 485. (M.D. Ala. 1997) (automobile steering system), affirmed, Robinson v. Ford Motor Co., 144 F.3d 56 (11th Cir. 1998); Dickerson v. Cushman, Inc. 909 F. Supp. 1467, 1472-73 (M.D. Ala. 1995) (150 gallon sprayer system).

The Alabama Supreme Court has not yet determined whether Alabama will follow the lead of the federal system and adopt the Daubert standard for the admissibility of scientific evidence. In fact, the court, on procedural grounds, refused to look at the issue in a very recent case. See, Courtaulds Fibers, Inc. v. Long, ___ So. 2d ____, 2000 WL 1310515 (Ala. 2000). As such, the law in Alabama remains that scientific evidence must pass the "general acceptance" test set out in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and adopted by the Alabama Supreme Court in Ex parte Dolvin, 391 So. 2d 677 (Ala. 1980). Ex parte State, 746 So. 2d 355, 361, n. 7 (Ala. 1998); Gamble, McElroy's Alabama Evidence, § 127.02(4) (5th Ed. 1996). The "general acceptance" test is well capsulized in the following language from Frye:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye, 293 F. Supp. at 1014.

e. Damages.

In order to bring an AEMLD claim, a plaintiff must have suffered either bodily injury or damage to property, because one cannot recover in tort under the AEMLD for damage to the product itself. See Lloyd Wood Coal Co. v. Clark Equipment Co., 543 So. 2d 671, 672-73 (Ala. 1989).

In White Consol. Indus., Inc. v. Wilkerson and Vesta Fire Ins. Co., the Alabama Supreme Court held that the trial court erred in permitting the jury award damages based on the plaintiffs' claim of mental anguish. White Consol. Indus., Inc. v. Wilkerson and Vesta Fire Ins. Co., 737 So. 2d 447 (Ala. 1999). In this case, a loose wire inside a window unit air conditioner caused a fire that destroyed the plaintiff's home. The trial court allowed the jury to consider the plaintiff's claim of mental anguish and the jury awarded general damages. The court stated that "the law will not allow recovery of damages for mental distress where the tort results in mere injury to property." Id. at 449 (quoting Reinhardt Motors, Inc. v. Boston, 516 So. 2d 509 (Ala. 1986)). An exception to this general rule exists, however, where the injury to property is committed under circumstances of insult or contumely. In White Consol. Indus., the plaintiffs

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were not home at the time of the fire. Because they were not within the "zone of danger" of the product, they could not receive damages from their mental anguish claim.

f. Punitive Damages -- Wantonness.

When a plaintiff brings a product liability claim which does not involve a death, plaintiff must prove wantonness on the part of the defendant with clear and convincing evidence in order to obtain punitive damages. Ala. Code § 6-11-20(a) ("Punitive damages may not be awarded in any civil actions . . . other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously and deliberately engaged in . . . wantonness . . . with regard to the plaintiff"); see also Richards v. Michelin Tire Corp., 21 F. 3d 1048, 1057-58 (11th Cir. (Ala.) 1994); Sears, Roebuck and Co. v. Harris, 630 So. 2d 1018, 1031-32 (Ala. 1993).

Ala. Code section 6-11-20(b)(3) defines "wantonness" as "[c]onduct which is carried on with a reckless or conscious disregard of the rights or safety of others." The Alabama Supreme Court has defined "wanton" conduct as follows: wanton conduct involves the conscious doing of some act or the conscious omission of some duty with knowledge of the existing conditions and while conscious that from the doing of that act or by the omission of that duty injury will likely or probably result. Before a person can be said to be guilty of wanton conduct, it must be shown that with reckless indifference to the consequences he consciously and intentionally did some wrongful act or omitted some known duty and that the act or omission produced the injury. Pitt v. Century II, Inc., 631 So. 2d 285, 287 (Ala. 1993). In order to meet the clear and convincing standard to prove wantonness, plaintiff must produce,

> Evidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence of the substantial weight of the evidence, but less than beyond a reasonable doubt.

Ala. Code § 6-11-20(b)(4) (1975).

Where the manufacturer has actual knowledge of the product's defect or capacity to cause injury and does not take any action to correct the problem, the manufacturer probably will be deemed to have acted wantonly. See Savage Industries v. Duke, 598 So. 2d 856, 859 (Ala. 1992) (holding that a gun manufacturer, who knew that its gun would discharge after being dropped, who corrected the problem in adult versions of the gun, but who failed to correct the problem in the youth model, acted wantonly). In Hobart Corp. v. Scoggins, however, the Alabama Supreme Court affirmed compensatory damages but reversed a $7.5 million punitive damages award because the plaintiff failed to prove by clear and convincing evidence that the defendant knew that a saw it manufactured was dangerous. Hobart Corp. v. Scoggins, ____ So. 2d ____, 2000 WL 681081 (Ala. 2000). The court held that the plaintiff failed to present clear

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and convincing evidence that the defendant designed and manufactured the slant-blade saw with knowledge that it had dangerous propensities, noting that such knowledge must have pre-dated the manufacture of the subject saw. Id. at *3. The court concluded, therefore, that the jury should not have been allowed to consider an award of punitive damages. See id. at *3.

g. Failure to Recall is not a Cause of Action in Alabama.

There is no cause of action for a failure to recall in Alabama, because there is no post-sale duty to recall (or maintain, redesign, modify, alter or upgrade) a product. See Lampley v. Bridgestone, Inc., No. 90-A-907-N (M.D. Ala., March 31, 1992). Although this rule is articulated in a federal district court order, the rule seems to be widely accepted across jurisdictions, as the court states that no other state imposes a common law duty to recall. See id. In addition, the court states that there is no federal duty to recall, relying on Lowe v. General Motors Crop., 624 F. 2d 1373, 1378 (5th Cir. 1980) and 15 U.S.C. section 1402. See Lampley, slip op. at 2.

C. The Defendant's Case under AEMLD.

1. Defendant's Rebuttal Evidence.

Defendants can offer evidence to rebut each element of plaintiff's prima facie case. See Atkins, 335 So. 2d at 143. Examples of such rebuttal evidence would include assertions by the manufacturer that any defect occurred after the product left its control. See id. In addition, the manufacturer may produce evidence that the product complies with government regulations or safety standards. See Richards v. Michelin Tire Corp., 21 F.3d 1048, 1059 (11th Cir. (Ala.) 1994); General Motors v. Edwards, 482 So. 2d 1176, 1198 (Ala. 1985). However, proof of compliance with government or industry standards is not an absolute defense, as the jury can find that the product is still unreasonably dangerous. See Sears, Roebuck and Co. v. Harris, 630 So. 2d 1018, 1032-33 (Ala. 1993) ("Compliance with such industry standards does not allow a manufacturer to close its eyes to injuries caused by its products and do nothing to alter their design or to warn users").

In addition, for design defect cases, defendants can produce evidence that the design of the product was "state of the art" in order to refute the allegations that the design was defective or that there was an alternate design available. When defendant produces such "state of the art" evidence and plaintiff cannot offer evidence to counter this testimony, then defendant should prevail. See Coca-Cola Bottling Co. v. Stripling, 622 So. 2d 882, 885-86 (Ala. 1993).

2. Defendant's Affirmative Defenses.

In addition to the rebuttal, defendants can assert several possible affirmative defenses to AEMLD actions. Casrell and Atkins set out several defenses: contributory negligence, assumption of the risk, product misuse and lack of causal relation. Over the past decade, other affirmative defenses have been asserted, including the learned intermediary doctrine and the sophisticated user defense.

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a. Contributory Negligence.

Contributory negligence is an absolute defense under the AEMLD. See Atkins, 335 So. 2d at 143. Contributory negligence is the failure of the plaintiff to exercise reasonable care in the use of the product. See A.P.J.I. 30.00. When a plaintiff is contributorily negligent, he has not acted in a way that a reasonably prudent person would have acted under the same or similar circumstances. See id. If a defendant can prove that a plaintiff's negligence proximately contributed to his injury, then defendant cannot be liable under the AEMLD.

In Alabama, contributory negligence historically has been a complete defense in both negligence and AEMLD actions, which means that if a plaintiff's negligence contributed to his injuries in any degree, then the plaintiff is completely barred from collecting any damages. Although most other states have adopted a comparative negligence doctrine, which would allow a plaintiff to collect a portion of the damages even when the plaintiff's negligence contributed to his injuries, Alabama has retained the absolute defense of contributory negligence. See Williams v. Delta International Machinery Corp., 619 So.2d 1330, 1333 (Ala. 1993).

The cases of Dennis v. American Honda Motor Co., 585 So. 2d 1336 (Ala. 1991)(holding that contributory negligence in causing motorcycle accident is not a defense for helmet manufacturer, where the plaintiff claims that his motorcycle helmet did not adequately protect against injuries in crash with a truck), and Williams v. Delta International Machinery Corp., 619 So. 2d 1330 (Ala. 1993), carve out a limited exception to the general rule that contributory negligence is a defense in AEMLD cases. In crashworthiness or safety guard cases, where the plaintiff does not allege that the product defect caused the injury but claims that the defect failed to protect him from enhanced injury, a plaintiff could argue that his contributory negligence is not an affirmative defense. See Dennis, 585 So. 2d. at 1339; Williams, 619 So. 2d at 1332. Nevertheless, a defendant automobile manufacturer, for example, should argue that the plaintiff's contributory negligence in causing an accident is a bar to his recovery regardless of the defect allegation. In a crashworthiness case, the product alleged to be defective is the automobile, so the plaintiff's negligence is using the automobile should bar his recovery.

In Williams, the court addressed the confusion which arose after Dennis, held that Dennis did not eliminate the defense of contributory negligence from all AEMLD cases, and limited the rule in Dennis to its facts. See Williams, 619 So. 2d at 1332-33. Accordingly, there should be no doubt that the absolute defense of contributory negligence is available in AEMLD cases, as reflected by the court's holdings in subsequent cases. See, e.g., General Motors v. Saint, 646 So. 2d 564, 565-68 (Ala. 1994); Haisten v. Kubota Corp., 648 So. 2d 561, 565 (Ala. 1994); Campbell v. Cutler Hammer, Inc., 36 F.3d 1073, 1073-74 (11th Cir. (Ala.) 1994); Reynolds v. Bridgestone/Firestone, Inc., 989 F.2d 465, 470 (11th Cir. (Ala.)1993); Charpie v. Lowes Home Centers, Inc., 930 F. Supp. 1498, 1502 (M.D. Ala. 1996).

Moreover, "a plaintiff may be contributory negligent as a matter of law," Sutton v. Mitchell Company, 534 So. 2d 289, 290 (Ala. 1988), and the Alabama Supreme Court has

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imposed the defense as a complete bar under widely varying circumstances. See, e.g., Watters, 537 So. 2d at 24 (plaintiff operated crane near power line knowing that power line was energized); Sutton, 534 So. 2d at 290 (plaintiff fell on broken sidewalk knowing that defect existed); Baker v. Helms, 527 So. 2d 1241, 1244 (Ala. 1988)(contributory negligence of plaintiff in crossing highway); Wallace v. Doege, 484 So. 2d 404, 406 (Ala. 1986)(plaintiff attempted to clean saw without turning off power). Significantly, the Alabama Supreme Court has found contributory negligence as a matter of law in cases involving drivers of motor vehicles or pedestrians who are involved in accidents while under the influence of alcohol. See Carroll v. Deaton, Inc., 555 So. 2d 140, 141 (Ala. 1989); Snow v. Parrish, 505 So. 2d 368, 369-70 (Ala. 1987).

In Carroll, the plaintiff was injured when the vehicle he was driving swerved off the highway and hit a trailer owned by the defendant. The defendant's trailer was not equipped with head lamps or tail lights as required by Alabama law. Blood tests performed on the plaintiff following the accident, however, showed his blood alcohol level to be 0.259 percent. Carroll, 555 So. 2d at 140. In holding that the plaintiff was contributorily negligent as a matter of law, the court stated:

> Under [Ala.] Code § 32-5A-194(b)(4), a person with a blood alcohol level of .10 percent or more is presumed under the influence of alcohol. . . Generally, violation of a traffic ordinance or rule of the road constitutes negligence per se. Simpson v. Glenn, 264 Ala. 519, 88 So. 2d 326 (1956). The record shows nothing to take this case out of that general rule.

The court affirmed summary judgment in favor of the defendant, holding that the plaintiff's own contributory negligence had proximately caused the accident. Id. at 141.

Similarly, the court in Snow found the plaintiff's decedent contributorily negligent as a matter of law for violating section 32-5A-221 of the Alabama Code regarding pedestrians under the influence of alcohol. Snow, 505 So. 2d at 370. Section 32-5A-221, like section 32-5A-191 regarding driving under the influence, provides that "[a] pedestrian who is under the influence of alcohol or any drug to a degree which renders himself a hazard shall not walk or be upon a highway." The plaintiff's decedent, who had been struck by the defendant's vehicle while crossing a highway, had a blood alcohol level of 0.29 percent at the time of her death. Id. As in Carroll, the Alabama Supreme Court agreed with the trial court's conclusion that the plaintiff's decedent "was guilty of contributory negligence that proximately contributed to her death, as a matter of law." Id.

Typically, the negligence of a parent cannot be imputed to an injured minor. In Williams v. BIC Corp., however, the Alabama Supreme Court affirmed a jury verdict in favor of a cigarette lighter manufacturer in a case where a child set fire to an apartment after having been shown how to use the lighter by adults and where his mother was aware of his fascination with fire but permitted lighters to be brought into the apartment. Williams v. BIC Corp., ___ So. 2d ____,

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2000 WL 548219, *9 (Ala. 2000). The court stated that "[t]he parental duty of supervision looking to the care and welfare of a child includes protecting it from known and obvious dangers . . . . If the parent has either been warned, or if the condition is or should be obvious to the parent, the [parent's] failure properly to supervise its child is the proximate cause of a subsequent injury." Id. (quoting Williamson v. Tyson Foods, Inc., 626 So. 2d 1261 (Ala. 1993)); see also BIC Corp. v. Bean, 669 So. 2d 840 (Ala. 1995). The court further concluded that "in this particular case it was appropriate the charge the jury that it is not foreseeable that a parent would fail to undertake basic precautions to safeguard her children from an obvious risk well known to the parent." Id. at *10.

b. Plaintiff's Assumption of Risk.

Assumption of risk is one of the affirmative defenses available under the AEMLD. See Sears v. Waste Processing Equipment, Inc., 695 So. 2d 51, 53 (Ala. Civ. App. 1997); Atkins, 335 So. 2d at 143. A definition of assumption of the risk is provided by Comment n to Section 402A of the Restatement, "If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."

In Cooper v. Bishop Freeman Co., 495 So. 2d 559, 563-64 (Ala. 1986), the court clarified the difference between the affirmative defenses of contributory negligence and assumption of the risk and enumerated the following elements to an assumption of the risk defense: "(1) knowledge by the plaintiff of the condition; (2) appreciation of the danger under the surrounding conditions and circumstances; and (3) failure of the plaintiff to exercise reasonable care in the premises, but with such knowledge and appreciation to put himself into the way of danger." Id. at 563.

There are at least two versions of the assumption of the risk defense which defendants can assert. First, defendants can argue that the product was unavoidably unsafe, that the plaintiff was aware of the danger either because the danger was apparent or because of a warning, and that the plaintiff unreasonably used the product. See A.P.J.I. Instruction 32.17; see also Entrekin v. Atlantic Richfield Co., 519 So. 2d 447, 450 n. 5 (Ala. 1987); Atkins, 335 So. 2d at 143. Alternatively, defendants can argue that, even if the product was defective, plaintiff was aware of the danger or should have been aware of the danger and that plaintiff was unreasonable to use the product. See A.P.J.I. 32.18; Atkins, 335 So. 2d at 143. This defense is especially important to defendants because, even where the jury determines that the product was unreasonably unsafe, if the defendant can prove that the plaintiff assumed the risk, then the defendant is shielded from liability.

c. Product Misuse Defense.

To assert product misuse as a defense under the AEMLD, defendant must put forth evidence "showing that the plaintiff used the product in some manner different from that intended by the manufacturer." See Kelly v. M. Trigg Enterprises, Inc., 605 So. 2d 1185, 1192 (Ala. 1992). For purposes of the AEMLD, use is intended if it is one that is "reasonably foreseeable by the . . . manufacturer." See id. at 1192. The doctrine of product misuse applies to the use of the product by the plaintiff, the plaintiff's decedent, or a third party. Id. at 1192; See Sears, Roebuck & Co. v.

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Harris, 630 So. 2d 1018, 1028 (Ala. 1993); Dickerson v. Cushman, Inc., 909 F. Supp. 1467, 1475 (M.D. Ala. 1995).

Although one federal district court has classified "product misuse" as a part of the broader defense of contributory negligence, see Campbell v. Robert Bosch Power Tool Corp., 795 F. Supp. 1093, 1097 (M.D. Ala 1992), the Alabama Supreme Court recognizes "product misuse" as an independent affirmative defense. See Carruth v. Pittway Corp., 643 So. 2d 1340, 1346 (Ala. 1994). As confirmation of the fact that "product misuse" is distinct from contributory negligence, it has a separate jury instruction included in the Alabama Pattern Jury Instructions. See A.P.J.I. 32.19.1.

d. Lack of Causal Relation Defense.

To successfully assert the defense of "lack of causal relation," first established in Casrell and Atkins, the defendant must prove, for example, that he is in the business of either distributing or processing finished products; he received a product already in defective condition; he did not contribute to this defective condition; he had neither knowledge of the defective condition nor an opportunity to inspect the product which was superior to the knowledge or opportunity of the consumer. See Caudle v. Partridge, 566 So. 2d 244, 248 (Ala. 1990); Atkins, 335 So. 2d at 143.

This defense is available only to a retailer or distributor, not the original manufacturer. The manufacturer of a product can never assert the lack of causal relation defense, even where it received component parts from a third party. See Atkins, 335 So. 2d at 143; see also Foremost Ins. Co. v. Indies House, Inc., 602 So. 2d 380, 382 (Ala. 1992) (holding that the company which assembled a mobile home is deemed the manufacturer of the home as a whole, including finished component parts such as the refrigerator). This defense for retailers and distributors is based upon the "sealed package" doctrine established in Kirkland v. Great Atlantic & Pacific Tea Co., 171 So. 735 (1936), which holds that grocers cannot reasonably inspect the quality of the food contained in cans, bottles and other sealed packages. See Allen v. Delchamps, 624 So. 2d 1065, 1067 (Ala. 1993). However, if the retailer sells the product under its own trade name, then the defense of "lack of causal relation" is not available. See Atkins, 335 So. 2d at 143.

The Alabama Supreme Court upheld the trial court's grant of summary judgement as a matter of law in Hicks v. Vulcan Eng'g Co. on the plaintiff's AEMLD claim as to a general contractor who merely connected a machine to a system and made no modifications to it. Hicks v. Vulcan Eng'g Co., 749 So. 2d 417 (Ala. 1999). In this case, James Hicks was killed when the machine he was working on switched from manual mode to automatic and crushed him without warning or alarm. The defendants, the general contractor for the project upon which Mr. Hicks was working, prepared the foundation for the machine and attached it to the conveyor line. The defendants asserted that the alleged defect could not be traceable to it because they did not manufacture the machine, were not required to know its inner workings, and did not program the computer that controlled the machine. See id. at 422. The court stated that "[i]n this case of first impression, and under these circumstances, to hold that Vulcan engineering is a manufacturer would be an unsupported extension of AEMLD liability." Id. at 424.

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e. The Learned Intermediary Doctrine.

Defendants can assert the "learned intermediary" doctrine as an affirmative defense in a failure-to-warn action. When a manufacturer of prescription drugs or medical devices informs the prescribing physician of the possible dangers, then the manufacturer has satisfied his duty to warn and cannot be liable to a patient in a failure-to-warn case under the AEMLD. See Stone v. Smith, 447 So. 2d 1301, 1304-05 (Ala. 1984). Stone adopted this "learned intermediary" theory from Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1276 (5th Cir. 1974) ("[W]here *prescription* drugs are concerned, the manufacturer's duty to warn is limited to an obligation to advise the prescribing physician of any potential dangers that may result from the drugs's use. This special standard for prescription drugs is an understandable exception to the Restatement's general rule that one who markets goods must warn foreseeable ultimate users of dangers inherent in his products.")(emphasis in the original).

While Reyes first defined this doctrine as pertaining to prescription drugs, Alabama has extended the learned intermediary doctrine to include medical devices or other products which a patient must obtain through a doctor. See, e.g., McGee v. Corometrics Medical Systems, 487 So. 2d 886, 894-95 (Ala. 1986) (holding that defendant manufacturers are due a summary judgment when sued by users of a fetal heart monitoring system on a failure-to-warn claim because this complex medical equipment requires extensive classroom training to use, because it is not foreseeable that the machine would be operated by laymen, and because it would be impossible to include all the instructions and warnings on the machine); Toole v. McClintock, 999 F.2d 1430, 1433 (11th Cir. (Ala.) 1993) (holding that the adequacy of the silicone gel breast implant manufacturer's warning was to be determined by its effect on physicians, not patients).

f. Sophisticated User Defense.

This defense of giving warnings to intermediaries was expanded from the medical profession to the industrial setting with the "sophisticated user" doctrine. See Vines v. Beloit, 631 So. 2d 1003, 1005-06 (Ala. 1994). In Vines, the plaintiff was an employee of Scott Paper and was injured while working on a paper machine manufactured by Beloit. Plaintiff sued the manufacturer, claiming that it failed to warn of the possible risks. The court held that the manufacturer was not liable, because Beloit had given Scott warnings and suggestions for safety practices, because Scott failed to heed these warnings, because Scott was a "sophisticated user" of such equipment, and because Scott retained control over the machine. See id. at 1006; see also Reynolds v. Bridgestone/ Firestone, Inc., 989 F. 2d 465 (11th Cir. (Ala.) 1993) (holding that the manufacturer's duty to warn of dangerous condition in the workplace can be satisfied by informing the employer of the dangerous condition); Ex parte Chevron Chemical Company, 720 So. 2d 922 (Ala. 1998); Purvis v. PPG Industries, Inc., 502 So. 2d 714, 720 (Ala. 1987)("[A] manufacturer . . . ought not be held liable where it has made reasonable efforts to convey warnings and/or product information that, due to circumstances beyond the manufacturer's control, were not passed on to or

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received by the ultimate user. Where the third party has an independent duty to warn the ultimate user, . . . the manufacturer is justified in relying upon the third party to perform its duty.").

g. Preemption.

Some AEMLD defendants have attempted to argue that federal law preempts the state law tort claim. This strategy was unsuccessfully attempted in Richards v. Michelin Tire Corp, 786 F. Supp. 959 (S.D. Ala. 1992). In contrast, Cantley v. Lorillard Tobacco Company, Inc., 681 So. 2d 1057 (Ala. 1996), the Alabama Supreme Court applied to hold that a claim for fraudulent suppression against a tobacco company is preempted by the Federal Cigarette Labeling Act. In that case, the plaintiff conceded that her failure to warn claim under the AEMLD was preempted, but contended that her claim for fraudulent suppression fell outside the causes of action fuond to be preempted in Cipollone. The court held, however, that any claim against a tobacco company which relies on a state law duty to disclose facts, whether couched as an AEMLD claim or as a suppression claim, is preempted on the basis of Cipollone. There are three ways in which a state law can be preempted: (1) Congress may preempt state law through the express language of the applicable statute, (2) a court may infer it is Congress's intent to occupy the entire field of regulation through its enactment of a comprehensive regulatory scheme which completely excludes state law, and (3) state law may be implicitly preempted to the extent that it directly conflicts with or interferes with a regulatory scheme.

D. Claims Accompanying an AEMLD Claim.

When a plaintiff brings a negligence or wantonness claim along with an AEMLD claim based upon the same incident, the defendant should argue that the claims are merged into the AEMLD claim. Wakeland v. Brown & Williamson Tobacco Corp., 996 F. Supp. 1213 (S.D. Ala. 1998) ("[U]nder Alabama law, a negligence action is merged into a claim under AEMLD; therefore no separate action for negligence will lie when a plaintiff claims he is injured by a defective and unreasonable dangerous product); Pitts v . Dow Chemical Co., 859 F. Supp. 543, 550-51 (M.D. Ala. 1994) (holding that where a plaintiff attempts to call a claim regarding an unreasonably dangerous product a negligence claim, that claim must be analyzed under the AEMLD); Veal v. Teleflex, Inc., 586 So. 2d 188, 190-91 (Ala. 1991) (holding that a trial court did not err in refusing to charge the jury on negligence and wantonness in connection with an AEMLD claim).

Moreover, there are two arguments to be made in favor of merging fraud claims into claims made under the Alabama Extended Manufacturer's Liability Doctrine (AEMLD). The first argument asserts that if negligence claims can be merged into AEMLD claims, then so should fraud claims that are made without evidence of intent. That is, a fraud claim made without evidence of intent is essentially an innocent or negligent misrepresentation and is therefore analogous to a negligence claim in that both can be established by proving the elements of an AEMLD claim. The second argument utilizes language from Pfizer, Inc. v. Farsian, 682 So. 2d 405, 407 (Ala.1996) which indicates that product liability claims encompass intentional fraud claims. See also Ford

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Motor Company v. Rice, 726 So. 2d 626 (Ala. 1998).

The arguments in favor of merger of fraud claims is reinforced by Ala. Code section 6-5-501 (1975 & Supp. 1997), which states that a "product liability action" includes damages caused by:

> (a) negligence, (b) innocent or negligent misrepresentation, (c) the manufacturer's liability doctrine, (d) the Alabama extended manufacturer's liability doctrine, as it exists or is hereafter construed or modified, (e) breach of any implied warranty, or (f) breach of any oral express warranty and no other.

Thus, it appears that the legislature intended for misrepresentation to be included with negligence claims in the category of claims encompassed by a products liability claim.

Finally, a defendant can argue that breach of warranty claims also are merged into the AEMLD when the claims are based upon a purported product defect. This is consistent with the language of section 6-5-501, and the argument is supported by several opinions from the Alabama Supreme Court. See Yarbrough v. Sears, Roebuck & Co., 628 So. 2d 478, 483 (Ala. 1993); Shell v. Union Oil Co., 489 So. 2d 569, 571 (Ala. 1986)(stating that "[w]hether this product is unreasonably dangerous, therefore, is not a question properly addressed. . . under the. . . U.C.C. That question could be properly raised in an action brought under [the AEMLD]. . ..").

II. BREACH OF WARRANTY

A. Theory of Liability

Traditionally, a plaintiff's ability to recover under breach of warranty theories was restricted due to privity and notice requirements. However, Alabama's adoption of the Uniform Commercial Code has made breach of implied warranty a viable products liability theory because it has eliminated the privity and notice requirements that previously existed. Ala. Code (1975) § 7-2-314 and § 7-2-315 set forth the implied warranties of merchantability and fitness for a particular purpose. These warranties can attach to any consumer product unless excluded or limited by disclaimers meeting the requirements of Ala. Code (1975) §7-2-316. However, implied warranties cannot be limited or excluded with regard to personal injury. See §7-2-316 (5).

As mentioned above the UCC has eliminated the privity requirement through §7-2-318 which extends the benefit of implied warranties "to any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty." A seller may not exclude or limit the operation of this section. Additionally, the UCC eliminated the requirement of an injured person to notify the manufacturer or seller that a breach of implied or express warranties occurred. Simmons v. Clemco Indus., 368 So. 2d 509 (Ala. 1979). To establish liability for breach of warranty for personal injury requires

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different proof than a claim under the AEMLD. See Shell v. Union Oil, 489 So. 2d 569, 571 (Ala. 1986); and Tucker v. GM, 769 So 2d 895 (Ala.Civ.App. 1999)(affirmed in part and reversed in part on other grounds, Ex parte General Motors, 769 So. 2d 903 (Ala. 1999)). APJI lists the items of proof to establish a breach of warranty of merchantability a plaintiff must prove:

1. That the defendant was a merchant or seller with respect to goods of the same kind as the product or article question, in this case _____;

2. The defendant sold the product or article in question;

3. That product or article in question was used for the ordinary purposes for which such products are used.

4. That the product or article in question was defective, or unmerchantable, i.e. not fit for the ordinary purposes for which such products are used.

5. That a defect or defects in the product or article proximately caused injury to the plaintiff.

APJI 32.02

In other words, a product is not merchantable if it is not "fit for the ordinary purposes for which such goods are used; . . ." Ala. Code (1975), § 7-2-314. In fact, in products liability cases, the Alabama Supreme Court has defined "defective" as follows:

> 'Defectiveness' under the AEMLD has been defined by [The Supreme Court] to mean that the product does not meet the reasonable expectations of an ordinary consumer as to its safety, *i.e.*, that the product is not reasonably safe for its intended purpose and use.

Ammons v. Massey-Ferguson, Inc., 663 So. 2d 961, 965 (Ala. 1995)(citing Townsend v. General Motors Corp., 642 So. 2d 411 (Ala. 1994); and Casrell v. Altec Industries, Inc., 335 So. 2d 128 (Ala. 1976)). With the exception of the word "safe" the AEMLD definition of "defective" is identical to the requirements of merchantability set out in § 7-2-314. Therefore, in a breach of warranty claim, if a product does not meet the reasonable expectations of an ordinary consumer as to its intended purpose and use, the warranty of merchantability has been breached. Unlike a claim for AEMLD, to establish that a product is **not merchantable**, a plaintiff does not need to provide expert testimony. Tucker, 769 So 2d at 899.

To prove a claim for breach of implied warranty of fitness for a particular purpose a plaintiff must establish essentially the same elements as with the warranty of merchantability but must also establish:

(1) The seller has reason to know the buyer's particular purpose;

(2) The seller has reason to know that the buyer is relying on the seller's skill or judgment to furnish the appropriate goods; and

(3) The buyer, in fact, relied upon the seller's skill or judgment.

Tucker, 769 So. 2d at 901. Again, the elements can be established without the need or requirement of expert testimony. *Id.*

B. Defenses to Liability

While the breach of warranty theories have advantages, there are several draw backs to their use. In most cases involving economic or property damage, breach of warranty theories do not apply to the manufacturer of the product and the requirement of privity and notice have not been eliminated. See *e.g.*, Rhodes v. General Motors Corp., 621 So. 2d 945 (Ala. 1993); Wellcraft Marine v. Zarzour, 577 So. 2d 414 (Ala. 1990); Tucker v. General Motors Corp., supra. Only in cases involving personal injury has the privity requirement and notice requirement been eliminated by the adoption of the UCC. Therefore, absent personal injury a manufacturer can raise the privity defense to a UCC implied warranty claim. While an implied warranty theory has restrictions for property damage cases, the theories can be very useful to a personal injury plaintiff. As stated above the burden of proof can be easier than an AEMLD claim and the applicable defenses can be beneficial. A claim for breach of warranty is essentially a contract claim and eliminates the defendant's ability to raise assumption of the risk or contributory negligence as a bar to the plaintiff's recovery. Essentially, the defendant is restricted to the customary contract defenses and the plaintiff's conduct is not an issue.

C. Damages

Since a breach of warranty claim is essentially one of contract, punitive damages are not available in either a property damage or personal injury case. In most cases, the only damages available are those which place the plaintiff in a position he/she would have been in had the warranty not been breached. However, a plaintiff would be entitled to incidental and consequential damages arising out of the breach of warranty. In a personal injury case this can be significant in that it allows for recovery of pain and suffering, medical expenses, permanent injury andother typical personal injury damages. Additionally, breach of warranty claims are limited to some degree by the UCC where only economic damages are claimed. In such an instance, privity of contract is required. AGIO Indus. Inc. v. Delta Oil Co., 485 So. 2d 340 (Ala.Civ.App. 1986). Additionally, where only economic damages are sought, there can be no claim for breach of an implied warranty against a manufacturer without privity. Wellcraft Marine Div. of Genmar Indus., Inc. v. Zarzour, 577 So. 2d 414 (Ala. 1990).

D. Other Warranty Limitations

Alabama law is not clear on the exact application of implied warranty claims in conjunction with personal injury damages related to a defective product. The only case in Alabama to truly address the dichotomy between breach of warranty claims for personal injury and personal injury claims under the AEMLD is Shell v. Union Oil, 489 So. 2d 569 (Ala. 1976). In explaining the difference between the two claims the Shell Court stated:

> [The] law, whose statutory language makes no reference to tort law in connection with products liability concerns itself with the quality of the product by establishing standards of merchantability for a particular purpose . . .[While the tort law] concerns itself with safety standards by imposing strict liability upon the one who sells an unreasonably dangerous product which causes physical harm. The consideration supporting either of the principles are not affected by the considerations underlying the other and the standards of quality of a product, with the intended risk of the bargain are entirely distinct from its standards of safety, with a possible unreasonable risk of harm. It follows that a violation of the standard of safety which result in physical harm to the unreasonably dangerous product itself subjects the seller to tort rule of strict liability.

Shell at 571 (quoting Mid-Continent Aircraft Corp. v. Curry County Spraying Service, Inc., 553 S.W. 2d 935, 940 (Tex.Civ.App. 1977)). The Court further stated that the issue of whether a product is reasonably dangerous is not one properly brought under the warranty theories of the UCC but are more properly raised under the AEMLD.

> The implied warranty mandated by this section of the UCC is one of *commercial fitness* and suitability, and a private right of action is afforded only where the user or consumer is injured by the breach of that *warranty*. That is to say, the UCC does not impose upon the seller the broader allegation to warn against health hazards inherent in the use of the product when the warranty of commercial fitness has been complied with.

Shell at 572.

In Shell, the plaintiffs, employees of Goodyear, who had contracted cancer after being in contact with a product used by Goodyear in its industrial process and manufactured by the defendant. The plaintiffs alleged that the product was not fit for its intended purpose because it allegedly caused their cancer. The product in question had been developed to Goodyear's specifications for use in its manufacturing process. The Court reasoned that under the particular circumstances the plaintiffs' remedy was outside the scope of the UCC and should be brought under the AEMLD.

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In Shell, because the product at issue was manufactured to Goodyear's specification and suited for its purpose in Goodyear's manufacturing process, the issue of its defectiveness was related to its safety and not whether the product was a good commercial quality. Therefore, the question for a plaintiff, particularly a personal injury plaintiff, is whether claims for breach of warranty relate to the safety of a product or to its commercial quality. For example, if a plaintiff is injured in an automobile collision while wearing a defective seat belt, does a breach of warranty claim exist or is the only remedy under AEMLD and the crashworthiness doctrine? There are no Alabama cases that address this issue. Obviously, if a seat belt fails to properly restrain an occupant as it is required to do under Federal Motor Vehicle Safety Standards, there can be an argument that the seat belt fails to meet commercial quality standards as well as safety standards. However, if one can present a legitimate argument with regard to quality issues, the plaintiff's burden is substantially lessened in establishing liability. If a seat belt does not meet commercial quality standards, it appears that a plaintiff could recover by establishing that the seat belt does not meet the reasonable expectations of a consumer, thereby establishing liability without the need of proving a better alternative to design under the crashworthiness doctrine. Again, there are no Alabama cases addressing this issue but taking the theories to their logical conclusion it would appear that a personal injury plaintiff can pursue warranty claims with regard to commercial quality rather than focusing on the unreasonably dangerous nature of a product to establish a product "defect".

In the case of used automobiles, the Alabama Supreme Court had also held that there are no implied warranties. Kilbourne v. Henderson, 65 So. 2d 533 (Ala.Civ.App. 1953); Trax, Inc. v. Tidmore, 331 So. 2d 275 (Ala. 1976); and Osbourne v. Custom Truck Sales and Service, Inc., 562 So. 2d 243 (Ala. 1990). However, the Court's pronouncement in this area all involved economic and not personal injury damages. In fact, there appear to be no Alabama cases on the issue of whether an implied warranty attaches to a used automobile for personal injuries. Recent Alabama Supreme Court opinions on this issue all rely on the opinion in Kilbourne v. Henderson, supra, which was a case decided prior to the adoption of the UCC in Alabama. It was decided based upon the old Uniform Sales Act. In fact, in Trax, Inc. v. Tidmore, supra, the Supreme Court states that there have been no cases in Alabama on this issue since the adoption of the UCC. Again, the Tidmore case involves purely economic damages and the Court states that its holding in Tidmore is specific to that particular case and the facts before it and that it does not make any general holding as to whether an implied warranty attaches to a used vehicle in all circumstances. Therefore, it seems inevitable that the rule in Alabama, under the UCC, is that no implied warranties exist in a case involving purely economic damages. However, it can be argued in the case of personal injury, that implied warranties do attach to used vehicles. Ala. Code (1975), § 7-2-316 (5) states as follows:

> Nothing in subsection (2) or subsection (3) (a) or in § 7-2-317 shall be construed so as to limit or exclude the seller(s) liability for damages for injury to the person in the case of consumer goods.

Therefore, it is arguable that the UCC states that in the case of personal injury, an implied warranty cannot be limited or modified and attaches to used vehicles with regard to personal injuries. Again, there are no Alabama cases which address this issue.

III. WRONGFUL DEATH STATUTE.

When a plaintiff alleges that he was injured by a defective product, he sues under the AEMLD. But when the injury leads to death, then the decedent's representative sues for wrongful death, which is governed by statute in Alabama. Ala. Code section 6-5-410 states:

> **Wrongful act, omission or negligence causing death.**
>
> (a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the state of Alabama, and not elsewhere, for the wrongful act, omission or negligence of any person, persons or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission or negligence if it had not caused death.
>
> (b) Such action shall not abate by the death of the defendant, but may be revived against his personal representative and may be maintained though there has not been prosecution, conviction or acquittal of the defendant for the wrongful act, omission or negligence.
>
> (c) The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions.
>
> (d) Such action must be commence within two years from and after the death of the testator or intestate.

Ala. Code § 6-5-410 (1975); see also Ala. Code § 6-5-391 (1975) (Wrongful Death of Minor).

The first issue raised by the express terms of the statute is whether this statute will be applicable in an action for wrongful death brought outside the State of Alabama. Paragraph (a) quoted above explicitly states that wrongful death actions under the statute are to be brought "in a court of competent jurisdiction within the State of Alabama, and not elsewhere . . .." Ala. Code

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§ 6-5-410(a) (1975). However, the courts of other states have applied Alabama's Wrongful Death Statute regardless of this explicit restriction. See Stevens v. Pullman, Inc., 388 So. 2d 580 (Fla. Dist. Ct. App. 1980); Spriggs v. Dredge, 140 N.E.2d 45 (Ohio Ct. App. 1955); Yount v. Nat. Bank of Jackson, 327 Mich. 342, 42 N.W.2d 110 (1950) (all cases where the foreign state court applied Alabama's Wrongful Death Statute when the injury at issue occurred in Alabama). Nonetheless, an argument can be made in favor either of a transfer of the cause to Alabama or for application of the wrongful death law of the host state based on the express language contained in this statute.

If Alabama's Wrongful Death Statute is applicable, only punitive damages are available to the plaintiff. See Tillis Trucking Co., Inc. v. Moses, ____ So. 2d ____, 1999 WL 6991 (Ala. 1999). It is a well-established rule that the damages in a wrongful death action in Alabama are strictly punitive, depending upon the quality of the wrongful act and the degree of culpability of the defendant. See Alabama Power Co. v. Irwin, 72 So. 2d 300, 304 (Ala. 1954); E.E. Lowe v. GMC, 624 F.2d 1373, 1382-83 (5th Cir. 1980). Damages under this action are not designed or available to compensate the victim or the plaintiff for the decedent's loss of life, suffering or pecuniary loss. Deaton, Inc. v. Burroughs, 456 So. 2d 771 (Ala. 1984) (holding that the punitive damages in a wrongful death action are determined by the gravity of the wrong done, the propriety of punishing the wrongdoer, and the need for deterring others from committing the same or similar wrongful conduct).

In a general AEMLD case, a plaintiff would have to prove wantonness on the part of the defendant in order to collect punitive damages. But in a wrongful death action, the plaintiff need not prove wantonness, but must prove merely "the wrongful act, omission or negligence of any person." Thus, the wrongful act does not have to be felonious, Hanna v. Riggs, 333 So. 2d 563, 565 (Ala. 1976), and the placing of a defective product on the market -- the wrongful act in AEMLD cases -- is sufficient to bring an action under this section. See Atkins, 335 So. 2d at 143.

In addition, the two year limitation on commencement of wrongful death actions is an element of the plaintiff's substantive case, and it should not be treated as an affirmative defense by the defendant. See Downtown Nursing Home, Inc. v. Poole, 375 So. 2d 465, 466 (Ala. 1979), cert. denied, 445 U.S. 930 (1980).

1. Claims in Wrongful Death Cases.

The proper role and treatment of breach of warranty claims in AEMLD/wrongful death actions in Alabama has been established by the Supreme Court of Alabama in the leading cases of Geohagan v. General Motors Corp., 279 So. 2d 436 (Ala. 1973), and Benefield v. Aquaslide, 406 So. 2d 873 (Ala. 1981).[2] The earlier Geohagan case stands for the proposition that a breach of warranty by the defendant cannot be the "wrongful act" which triggers the punitive damages claim of a wrongful death case. Geohagan, supra. The Court held that punitive

[2]A defendant should argue, however, that the breach of warranty claim is merged into the AEMLD cause of action. See Section I.C.

damages should not be allowed for breach of a contract, because damages for breach of contract are designed to put the party in the same position he would have been in had the contract not been violated and damages for wrongful death are designed to protect human life, to prevent homicide, and to impose civil punishment on takers of human life. See id. at 439, 440.

Eight years after the Geohagan decision, Aquaslide erased some of the ensuing confusion surrounding breach of warranty/wrongful death claims. In Aquaslide, the Court held that it was possible to obtain simultaneous recovery of both punitive damages for wrongful death under a tort claim and compensatory damages for injuries suffered by the decedent between the date of his injury and the date of his death under a contract claim. Aquaslide, 406 So. 2d at 874. In Aquaslide, the deceased broke his back after sliding down a swimming pool slide and died nine days later. Plaintiff, the administrator of decedent's estate, filed an action under (1) the AEMLD for wrongful death, and (2) breach of warranty theory for compensatory damages, including pain and suffering and medical expenses between the date of the accident and the date of decedent's death. The Court held that these two claims were separate and distinct, stating,

> Even though the claims arise out of the same occurrence, the fact that one is a tort claim and the other a contract claim is a sufficient distinction. The tort claim for wrongful death seeks punitive damages only and the contract claim for breach of warranty seeks compensatory damages only. Thus, there can be no double recovery.

Aquaslide, 406 So. 2d at 875.

The rule from Aquaslide, which allows two separate claims, was clarified in Industrial Chemical & Fiberglass Corp. v. Chandler, 547 So. 2d 812, 820 (Ala. 1988), a case where a worker was killed after an explosive fire consumed the tank in which he was working. While there was no clear way to determine how long decedent lived before perishing in the flames, the evidence put forth indicated that he died almost instantaneously. Defendants argued that Aquaslide only allowed separate claims in contract and in wrongful death where the original injuries and the death are separated by time. See id. at 820. Defendants further argued that where the accident causes instantaneous death, a decedent's representative cannot bring an action for breach of warranty seeking compensatory damages. But the Alabama Supreme Court ruled in favor of the plaintiff, allowing the jury to infer that the decedent lived for a "perceptible duration of time," during which he suffered pain and mental suffering for which he could be compensated. See id. at 820.

IV. COLLATERAL SOURCE RULE.

As a part of tort reform in 1987, the Alabama legislature passed section 6-5-522, which states:

> In all product liability actions where damages for any medical or hospital expenses are claimed and are legally recoverable for personal injury or death, evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed (1) by medical or hospital insurance or (2) pursuant to the medical or hospital payment provisions of law governing workmen's compensation, shall be admissible as competent evidence in mitigation of such medical or hospital expense damages. In such actions upon the admission of evidence respecting reimbursement or payment of medical or hospital expenses, the plaintiff shall be entitled to introduce evidence of the cost of obtaining reimbursement or payment of medical or hospital expenses. Such portion of the costs of obtaining reimbursement or payment of medical or hospital expenses as the trier of fact finds is reasonably related to the reimbursement or payment received or to be received by the plaintiff shall be a recoverable item of such damages for medical or hospital expenses.

Ala. Code § 6-5-522 (1993). Further, section 6-5-523 states, "In all product liability actions information respecting reimbursement or payment obtained or which may be obtained by the plaintiff for medical or hospital expenses shall be subject to discovery."

V. CONTRIBUTION AND INDEMNITY.

The availability of indemnity in products liability actions in Alabama is restricted to specific circumstances which establish a narrow exception to the general rule denying contribution among joint tortfeasors. The leading case on contribution and indemnity in product liability actions in Alabama is Consolidated Pipe & Supply Co. v. Stockham Valves & Fittings, Inc. 365 So. 2d 968, 970 (Ala. 1978). Consolidated Pipe involved an explosion of an underground steam valve which killed two men. Plaintiffs filed AEMLD actions against the manufacturer, the intermediate distributor, and the local distributor. The local distributor cross-claimed against both the intermediate distributor and the manufacturer, and the intermediate distributor cross-claimed against the manufacturer for indemnity in the event that they were found liable to plaintiffs.

The court's first response was to reaffirm the rule in Alabama that an action for contribution is not allowed among or between joint tortfeasors. See id. at 970. Further, the Court found that the distributors' failure to prove the "no causal relation" defense available to them under the AEMLD caused them to be deemed joint tortfeasors by the jury. Id. However, the Court did recognize an exception to the no-contribution rule which allows indemnity if the party seeking

indemnity is totally without fault but is held liable because of "an absolute non-delegable duty to the injured plaintiff." (e.g., a manufacturer or distributor of a product under its own name in AEMLD cases). Id. at 970; see also City of Mobile v. George, 253 Ala. 591, 45 So. 2d 778 (1950); Walter L. Couse & Co. v. Hardy Corp., 274 So. 2d 316 (Ala. Civ. App. 1972); Mallory Steam Ship Co. v. Druhan, 84 So. 874 (Ala. App. 1920) (cases which create the "innocent indemnitee" exception to the no-contribution rule).

VI. CONCLUSION.

The general state of product liability law in Alabama has not changed extensively since the advent of the AEMLD in Casrell and Atkins. The requirement that the plaintiff must prove a "feasible, practical alternative design," typically by expert testimony, has heightened the plaintiff's burden. The greatest area of development, however, has been in the variety of affirmative defenses available to a defendant. In addition to the original defenses of lack of causal relation, contributory negligence, assumption of the risk, and product misuse, defendants can now assert such defenses as the learned intermediary doctrine and the sophisticated user defense. The court's classifying product misuse as a separate defense from contributory negligence is a positive step for defendants, because it allows yet another affirmative defense to be read to the jury in the charge and because it covers product misuse by third parties, as well as by the plaintiff. The merging of the negligence claims and the AEMLD claims helps to streamline these cases for defendants, and defendants are still able to introduce evidence that plaintiff's medical expenses are covered by other sources. Therefore, the past decade has seen some positive developments for defendants in AEMLD cases.

The Basics of Alabama's Product Liability Law

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AEMLD

- Elements
  - Sale of product
  - Defective and unreasonably dangerous
  - By one in business of selling
  - No substantial change in condition
  - Causation
  - Injury

Types of Defects

- Design defect
  - Safer practical design alternative
  - Would have prevented injury
  - Crashworthiness
- Manufacturing defect
- Failure to warn
- Requirement of expert testimony

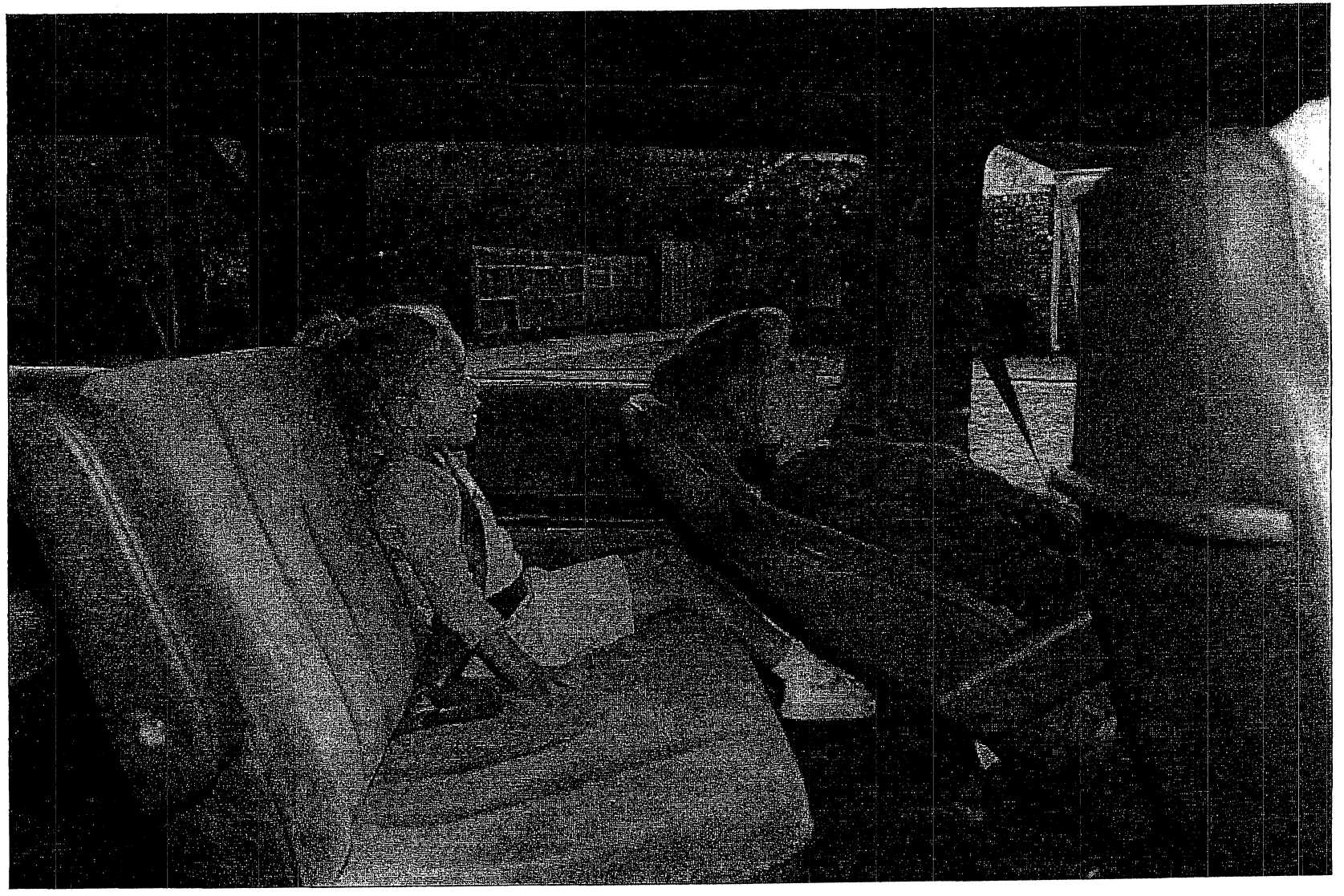
Damages

- Compensatory
  - Medical/physical
  - Lost wages
  - Mental anguish
  - Loss of consortium
- Punitive damages if wantonness proven

Defendant's Case Under the AEMLD

- Get experts early to understand issues
- Rebut elements of plaintiff's case
  - No Defect
    - Daubert
    - Complies with standards and regulations
    - State of the art (judged at date of sale)
      - No post-sale duty to warn
    - In step with industry
    - Low incident rate/good track record
    - Dispute alternative designs
    - No more dangerous than expected (e.g. knife)
  - Substantial alteration
    - Extension chain example
  - Failure to warn
    - Read & Heed
  - No causation
    - F-14 example
    - Surrogate work

Lack of Causation



Affirmative Defenses

- Contributory Negligence
  - Causing accident
    - Tractor Example
  - But in crashworthiness cases
    - Contrib. in causing accident is no defense
    - Contrib. in using safety device is
      - Putting on helmet wrong (Dennis)
    - Exception – Tractor rollover cases
- Assumption of Risk
  - Unavoidably unsafe products
  - Defective products
- Product Misuse
- Lack of Causal Relationship
- Learned Intermediary
- Sophisticated User
- Preemption
- Economic Loss Rule
- Open and obvious

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Merger Issues

- Fraud
- Negligence
- Wantonness
- Warranty

Breach of Warranty

- Express Warranty
  - From manufacturer
  - No privity required
- Implied Warranties
  - Privity required absent personal injury
  - Can be disclaimed except in personal injury cases
- Lower standard of proof required
  - Not fit for ordinary purposes or merchantable
  - Expert testimony not required
- Damages

Defending Warranty Claims

- Defenses
  - No privity (non-personal injury cases)
  - Lack of notice
  - Disclaimer (if no personal injury)
  - No implied warranty with used cars
  - Merger into AEMLD
- Damages
  - No punitive damages
  - Magnuson - Moss

Wrongful Death

- Brought by representative
- Punitive damages only
  - Except in Aquaslide cases
- Punitive damages for mere negligence
  - Wantonness not required

Defending Death Claims

- Restrictions on evidence
  - Good person, Father, etc.
  - Lost wages
  - Sadness of family
- Difficult to prove defenses (Contrib., Assumption of Risk)

Collateral Source Rule

- Ala. Code § 6-5-522
  - Defendant can prove medical expenses paid by insurance
  - Plaintiff can prove they had to pay it back
  - Recent case removed all doubt on this

Contribution and Indemnity

- General rule is Joint and Several Liability
- No common law contribution or indemnity
  - Can have by contract
  - MVFA
  - Very narrow exception: Consolidated Pipe
    - No fault and co-defendant had "absolute non-delegable duty to plaintiff"