PLAINTIFF'S PERSPECTIVE ON ALABAMA PRODUCT LIABILITY LAWSUITS

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Manufacturers do not always design products that work as they should or that withstand the tests of foreseeable use. The consumers who are injured by these defectively designed products are entitled to file lawsuits to recover damages for their injuries. The law does not require manufacturers to design products that are accident proof, however, it does require manufacturers to produce products that, when used in an intended and foreseeable manner, will not kill or seriously injure its user. The Alabama Extended Manufacturers' Liability Doctrine (AEMLD), along with negligence and wantonness claims, are available to the consumer as a remedy against the product manufacturer when the consumer is injured by a defective product.

AEMLD

The AEMLD governs product liability actions in Alabama. It is based on the strict liability doctrine propagated by §402A of the Restatement (Second) of Torts, but has distinctive differences. The AEMLD is designed to protect consumers from the injuries caused by defective products. General Motors Corp. v. Edwards, 482 So.2d 1176 (Ala. 1985). Casrell v. Altec Industries, Inc., 335 So.2d 128 (Ala. 1976) and Atkins v. American Motors Corp., 335 So.2d 134 (Ala. 1976), first introduced the doctrine of the AEMLD. Both of these were wrongful death cases.

In Casrell, the decedent was electrocuted by power lines that came in contact with a telescoping arm mounted on decedent's employer's truck. The defendants manufactured, assembled and sold the truck and telescoping arm which the plaintiff

claimed was defective because neither the body of the truck or the arm was properly insulated to prevent electrocution accidents of this type. In Atkins, the decedent died when his 1970 Gremlin automobile burst into flames after being struck from behind by another automobile. The plaintiff alleged that the fuel tank of the Gremlin was defectively designed because the car's rear placement of the gas tank left the tank vulnerable to penetration in an impact and because the tank itself was inadequately protected from external forces. The common argument in both of these cases was that the death of the decedent was caused by a defective product that failed to meet the basic expectations of an unsuspecting consumer. Under the AEMLD as set forth in Casrell and Atkins, 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 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 at 139.

In order to prove the defendant's liability under the AEMLD, the plaintiff must establish:

> (1) that he suffered injury or damages to himself or his property,
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> (2) by one who sold a product in a;
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> (3) defective condition unreasonably dangerous;
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> (4) to him as the ultimate user or consumer; and
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> (5) that the seller was engaged in the business of selling such a product and that;

> (6) the product was expected to, and did, reach the user or consumer without substantial change in the condition in which it was sold.

APJI 32.09. See also Atkins at 141.

However, the presence of a defect cannot be established from injury alone. Sears Roebuck & Co., Inc. v. Haven Hills Farm, Inc., 395 So. 2d 991, 993-96 (Ala. 1981). 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 that this defect proximately caused the injury. Id. at 995.

In Verchot v. General Motors Corp., 812 So.2d 296 (Ala., 2001) the Alabama Supreme Court explained the plaintiff's burden under the AEMLD:

> Liability is not established merely by showing that the product failed in furthering or performing its intended use. *The Plaintiff must prove that the product was substantially unaltered when used by him and must also prove causation in fact, including proof that the defect caused the injury and that the defect is traceable to the Defendant.*
>
> The fact of an injury, of course, does not establish the presence of a defect. Thus, *recovery cannot be predicated on injury alone*, for linking liability to injury rather than to proof that a product is defective creates absolute rather than strict liability.
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> Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 289 (5th Cir. 1975). Necessarily, then, the test is met only by a showing that the product's failure of performance is causally related in fact to the product's defective condition at the time of its sale.
>
> *The evidence and testimony likely to prove the defect-that which rendered the product not fit for its anticipated use-and the defect's link to the Defendant, depend upon the nature of the facts; but ordinarily, expert testimony is required because of the complex and technical nature of the commodity.*

Verchot v. General Motors Corp., 812 So.2d 296 (Ala., 2001) (quoting Brooks v. Colonial Chevrolet-Buick, Inc., 579 So.2d 1328, 1331-32 (Ala.1991)) (emphasis added in original).

DEFECT

A defective product is a product that is unreasonably dangerous to an ordinary consumer and does not meet the consumer's reasonable expectations in regards to its safety; that is, when the product is in a condition that is unreasonably dangerous and not contemplated by the ultimate consumer. See Phillips v. American Honda Motor Co., Inc., 238 Fed.Appx. 537, 2007 WL 1892179 (C.A.11 (Ala.)) (quoting Goree, 958 F.2d at 1541) ("A defective product is … not fit for its intended purpose."). In Bean v. BIC Corp., 597 So.2d 1350 (Ala. 1992), the court stated that:

> " 'Defective' is interpreted to mean that the product does not meet the reasonable expectations of an ordinary consumer as to its safety." *Id.* at 133. " 'A danger is unreasonable when it is foreseeable, and the manufacturer's ability, actual, constructive, or potential, to forestall unreasonable danger is the measure of its duty in the design of its product.' " *Id.* at 131 (quoting *Balido v. Improved Machinery, Inc.*, 29 Cal.App.3d 633, 105 Cal.Rptr. 890 (1972)).

Bean at 1352.

There are generally three types of claims available to a plaintiff under the AEMLD. They are design defects, failure to warn, and manufacturing defects.

Design Defect and Crashworthiness

When a manufacturer designs a product in a manner that causes it to be unreasonably dangerous, liability arises. In design cases, plaintiffs do not allege that the product is damaged, flawed or abnormal-the product may be constructed perfectly. Instead, a plaintiff will contend that the defective design of the product renders the entire

product line unreasonably dangerous. To recover damages on a design defect claim, a plaintiff must prove that:

> 1. Defendant was a manufacturer, supplier, distributor, and/or seller of the product;
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> 2. Defendant did manufacture, supply, distribute, and/or sell the product;
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> 3. The product was defective;
>
> 4. There was no substantial change to the product from the time it left the possession of the defendant until it reached plaintiff;
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> 5. The plaintiff was caused harm or death by the defect in the product; and
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> 6. There was a safer and practical alternative design that the defendant could have used at the time the product was manufactured.

A.P.J.I. 32A.07.

The plaintiff has the burden to prove that the design of the product is unreasonably dangerous. Townsend v. General Motors Corp., 642 So. 2d 411 (Ala. 1994). Although a manufacturer does not have the duty to design an accident-proof product and therefore cannot be an insurer against all harm, the manufacturer has a duty to create products that meet the reasonable expectations of consumers of not being injured by simply using the product in its intended manner.

One important type of design defect action involving motor vehicles is a crashworthiness claim. The "crashworthiness doctrine" is also commonly referred to as the "second collision doctrine" or the "enhanced injury doctrine." This doctrine developed out of cases where the allegation was that the defect in the product was not the cause of the accident, but was only the cause of the injuries suffered therein.

The Alabama Supreme Court first recognized a cause of action for "crashworthiness" in General Motors Corp. v. Edwards, 482 So.2d 1176 (Ala. 1985). In Edwards, a Chevrolet Chevette burst into flames after being struck from the rear by

another automobile. The driver and her husband were severely burned and both of their children died in the fire. The Court in Edwards was persuaded by cases holding that "while a manufacturer is under no duty to design an accident-proof vehicle, the vehicle manufacturer does have a duty to design its product so as to avoid subjecting its user to an unreasonable risk of injury in the event of a collision." Edwards at 1181. In other words, a car should be crashworthy. The Court reasoned that collisions "are a statistically foreseeable and inevitable risk within the intended use of an automobile" and "while the user must accept the normal risk of driving, he should not be subjected to an unreasonable risk of injury due to a defective design." Id.

In order to recover in a crashworthiness case, plaintiffs must prove: 1) that they were involved in an accident in which they were using/affected by the product; 2) that the product was manufactured by the defendant manufacturer; 3) that at the time of the accident, the product was in substantially the same condition as it was when it left the manufacturer; 4) that the product was "defective" that is to say, plaintiff must prove it did not meet the reasonable expectations of an ordinary consumer as to its safety because it was unreasonably dangerous; that is, not fit for its intended purpose; and 5) that the defect in the product proximately caused the plaintiff's harm. See A.P.J.I. 32.22. In proving that the product was defective, a plaintiff must also prove that a safer, practical alternative design was available to the manufacturer at the time. To determine a safer, practical alternative design, the court takes into consideration:

> "(1) The usefulness and desirability of the product-its utility to the user and to the public as a whole.
>
> "(2) The safety aspects of the product-the likelihood that it will cause injury, and the probable seriousness of the injury.
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> "(3) The availability of a substitute product which would meet the same

need and not be as unsafe.

> "(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
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> "(5) The user's ability to avoid danger by the exercise of care in the use of the product.
>
> "(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
>
> "(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product."
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> Other factors that may be considered include:
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> "The intended use of the vehicle, styling, cost to change design, the obviousness of the defect, and the circumstances of the accident itself...."

Edwards at 1188. (Internal citations omitted).

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 requires "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 the same, whether the claim is a general AEMLD claim or a specific crashworthiness design defect claim. Volkswagen of America, Inc. v. Marinelli, 628 So. 2d 378, 385 (Ala. 1993). Therefore, the "alternative design" element of the plaintiff's prima facie case in the crashworthiness context is extended to *all* design-based product liability claims in Alabama.

Failure to Warn

If a manufacturer knows or should know that the product may be dangerous when used in a reasonably foreseeable manner, the manufacturer has a duty to issue adequate warnings. Bean v. BIC Corp., 597 So.2d 1350, 1353 (Ala., 1992). See also Richards v. Michelin Tire Corp., 21 F.3d 1048, 1058 (11th Cir. (Ala.) 1994). If a manufacturer fails to do so, injured plaintiffs can sue under the theory of "failure to warn" of the danger. To establish a failure-to-warn claim under the AEMLD, a plaintiff must prove that: 1) defendant had a duty to warn plaintiff of the product's danger when used in its intended manner; 2) any warning provided by the defendant breached that duty because the warning was inadequate; 3) and the breach of that duty caused plaintiff's injuries. 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: 1) defendant placed the product into the stream of commerce; 2) the product was substantially unaltered when plaintiff used it; 3) the product was imminently dangerous when put to its intended or customary purpose; 4) and the defendant knew or should have known that the product could create a danger when used in its intended or customary manner. *Id.* at 1097. In order to be adequate, the warning must be conspicuous—meaning, of a size, position and coloring calculated to attract the user's attention. 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. Abney v. Crosman Corp., 919 So.2d 289, 293 (Ala. 2005); 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. 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).

Manufacturing Defect

Manufacturing defects are a result of a mistake during the manufacturing or the construction of the product. They are flaws that result in a discrepancy between the actual product produced and the manufacturer's intended product. For instance, GM produces hundreds of thousands of cars a year all designed to contain airbags on both the driver side and passenger side. However, somehow at the assembly plant for one of its model vehicles, several GM cars were assembled without a passenger side airbag. In this instance, there was not a problem with GM's design of its cars, but with GM's failure to install airbags on a minority of its cars. If a passenger in one of these cars is one day killed or seriously injured in a collision where his or her injuries would have been prevented by a deploying passenger side airbag, the victim would have a very good manufacturing defect claim under AEMLD. 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 the manufacturer intended, then the product has a "defect" under the AEMLD. See Interstate Eng'g, Inc. v. Burnette, 474 So. 2d 624, 628 (Ala.

1985).

To recover damages on a manufacturing defect claim, the plaintiff must prove that:

> 1. Defendant was a manufacturer, supplier, distributor, seller of the product;
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> 2. Defendant did manufacture, supply, distribute, or sell the product;
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> 3. The product was defective;
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> 4. The defect in the product caused the harm to or death of plaintiff or decedent; and
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> 5. There was no substantial change to the product from the time it left the possession of defendant until it reached plaintiff.

A.P.J.I. 32A.06.

DEFENSES

Defendants in an AEMLD action may assert several affirmative defenses. They include contributory negligence, product misuse and assumption of the risk. Contributory negligence is the negligence on the part of the plaintiff that proximately contributed to the alleged injury, death or property damage. A.P.J.I. 30.00. Historically, contributory negligence was a complete defense in a negligence action. Thus, if a plaintiff's negligence contributed to his injuries by the slightest degree, the plaintiff was barred from collecting any damages from the defendant. However, exceptions now exist to this rule. Although contributory negligence in the use of a product is a viable defense under the AEMLD in certain cases, Alabama law clearly provides that the defense of contributory negligence as to accident causation is not per se a defense to claims brought under the AEMLD.

> A plaintiff's mere inadvertence or carelessness in causing an accident should not be available as an affirmative defense to an AEMLD action. To allow a plaintiff's negligence relating to accident causation to bar

> recovery will go against the purpose of the AEMLD, which is to protect consumers from defective products. The defense of contributory negligence in an AEMLD action should be limited to assumption of the risk and misuse of the product. The plaintiff's negligence relating to accident causation should not bar recovery.

Dennis v. American Honda Motor Co., 585 So.2d 1336, 1339 (Ala. 1991).

In Dennis, a motorcyclist suffered permanent brain damage when his motorcycle collided with a log truck. The plaintiff argued that the helmet was defective and did not provide adequate protection. The Defendant countered that the Plaintiff was driving negligently and did not use the equipment properly. The Defendant argued that the Plaintiff caused his own injuries by causing the accident with the truck. Defendant asserted that any alleged defect in the helmet did not cause Plaintiff's injuries. The Court held that the defense of contributory negligence as it applied to accident causation was not a defense to recovery in AEMLD actions. The Court reasoned that to allow a plaintiff's negligence relating to accident causation to bar recovery would go against the purpose of the AEMLD, which is to protect consumers from defective products. Id. at 1339.

Alabama courts have distinguished contributory negligence defense in the failure to use reasonable care of the product from the separate affirmative defense of product misuse. In General Motors Corp. v. Saint, 646 So.2d 564, 568 (Ala. 1994), the Court stated: "A plaintiff misuses a product when he or she uses it in a manner not intended or foreseen by the manufacturer . . . a plaintiff is contributory negligent in handling a defective product when he or she fails to use reasonable care with regard to that product."

In Saint, the plaintiff received a severe brain injury when, while driving in her automobile, she lost control and hit a tree. She filed suit against GM under AEMLD

claiming that her car was not crashworthy because the seatbelt assembly failed to protect her adequately from the enhanced injuries she sustained in the wreck. Specifically, she claimed that the seatbelt's "comfort features" allowed extensive slack to develop and, as a result, caused the seatbelt not to properly restrain her in this accident. The jury returned a verdict in her favor, awarding $13 million. GM appealed arguing that the verdict should be reversed because the trial court failed to charge the jury on contributory negligence in the use of the seatbelt. The Supreme Court agreed holding that GM was entitled to a charge on contributory negligence in the use of the seatbelt because GM had presented evidence that the Plaintiff was either not wearing her seatbelt or had introduced the slack in her seatbelt herself. GM clearly foresaw the danger that would result in a passenger's introduction of slack into the seatbelt because GM warned against it in its owner's manual. Therefore, GM was not entitled to the affirmative defense of "misuse of the product" because Ms. Saint alleged introduction of slack into her seatbelt was not an unintended or unforeseen use of the belt by GM. However, the Court determined that because there was evidence that the Plaintiff failed to use reasonable care in wearing her seatbelt, i.e., introduced slack in her seatbelt herself, GM was entitled to a charge of contributory negligence. Notably, the plaintiff in Saint crashed her car into a tree and no evidence was allowed of her negligence in causing the accident.

Culpepper v. Weihrauch KG, 991 F.Supp. 1397, 1399 (M.D. Ala. 1997) also addressed the issue of contributory negligence and product misuse in an AEMLD case. In Culpepper, the plaintiff sued the defendants for damages after she was injured as a result of accidentally shooting herself when she dropped a handgun manufactured by the defendant. The crux of the plaintiff's claims was that the hammerblock safety, a device

on the gun which prevents "drop fire" accidents, was improperly designed and manufactured. The plaintiff sought summary judgment on the defendant's affirmative defenses of contributory negligence, assumption of the risk, and misuse of the product. The defendant conceded that summary judgment should be granted on the assumption of the risk and misuse of product defenses. The only issue before the court was whether the plaintiff was entitled to summary judgment on the defendant's contributory negligence defense in the use of the product. The court held that the plaintiff was entitled to summary judgment on the contributory negligence defense because that defense was only available as to the plaintiff's misuse of the hammerblock safety. The Defendant could not allege contributory negligence in the use of the handgun as a whole. The court noted that "to hold otherwise, would permit Weihrauch to introduce evidence going to Culpepper's contributory negligence related to accident causation, and would directly contravene the Alabama Supreme Court's decision in Dennis." Culpepper at 1401.

In making its ruling, the Court conducted a detailed analysis of product liability cases in Alabama addressing contributory negligence. There seems to be no better or clearer analysis of Alabama law on contributory negligence than Judge Myron Thompson's holding in Culpepper:

> Although contributory negligence serves as a total bar against recovery in AEMLD cases, the Alabama Supreme Court diminished its effect in Dennis, where the court held that contributory negligence related to accident causation was an invalid defense: "A plaintiff's mere inadvertence or carelessness in causing an accident should not be available as an affirmative defense to an AEMLD action." 585 So.2d at 1339. In Dennis, the plaintiff brought suit against the manufacturer of a motorcycle helmet, alleging that the helmet was defective and not fit for its intended purpose. In charging the jury, the trial court gave instructions regarding the defendant's burden of proof for the defense of contributory negligence. The court stated that the defendant could meet its burden "by proving to [the jurors'] reasonable satisfaction that [plaintiff] violated a rule or rules

of the road during the operation of the motorcycle at the time of the accident in question." 585 So.2d at 1338. The Alabama Supreme Court rejected this instruction and stated that contributory negligence could be used as a defense to an AEMLD action only under certain circumstances, such as "plaintiff's misuse of the product" Id. at 1339. In Saint, which the court noted as "just the reverse of that in Dennis," 646 So.2d at 566, the Alabama Supreme Court held that an automobile manufacturer was entitled to jury instructions regarding plaintiff's contributory negligence where the defendant contended plaintiff either did not wear or improperly wore a seatbelt at the time of a car accident. Culpepper interprets these two cases as holding that, in AEMLD cases involving safety devices, only mishandling of the safety feature can be used to support a contributory negligence defense. Culpepper cites two cases as supporting this interpretation: Williams v. Delta Internat'l Machinery Corp. 619 So.2d 1330 (Ala. 1993), and Gibson v. Norfolk Southern Corp., 878 F.Supp. 1455 (N.D.Ala. 1994), *aff'd* 48 F.3d 536 (11th cir. 1995) table opinion). In Williams, the Alabama Supreme Court rejected application of the Dennis rule to a products liability case where the products, a table saw and dado blade, were not safety features and because "the only contributory negligence alleged in this case involved the use of the table saw and the dado blade." 619 So.2d at 1332-33. In Gibson, the court held that contributory negligence could be asserted as a defense where the plaintiff failed to "stop, look, and listen" at the railroad's warning light and sign. 878 F.Supp. at 1461. Neither case directly supports the proposition of law Culpepper has advanced.

Arguing against Culpepper's interpretation, Weihrauch cites to Haisten v. Kubota Corp., 648 So.2d 561 (Ala. 1994). In Haisten, the plaintiff brought an AEMLD action against the manufacturer of a tractor alleging that the manufacturer's failure to include a rollover protection system rendered the tractor defective. The Alabama Supreme Court held that the trial judge correctly charged the jury with instructions to consider the plaintiff's contributory negligence as a defense to the AEMLD claim. Haisten, 648 So.2d at 565. Weibrauch concludes that, since Haisten is factually analogous to the present case, the contributory negligence defense should be permitted. [FN10] The court disagrees. The issue involved in Haisten was whether the tractor was defective for *not* having a rollover safety device, rather than a defect in the safety device rendering the product unreasonably dangerous, as was the case in Dennis, Saint, and the action presently before this court.

In grappling with the issue of whether misuse of the product for the purpose of proving contributory negligence refers to the handgun or the hammerblock safety, the court first notes that in her complaint, Culpepper alleges that "the handgun was unreasonably dangerous and therefore defective." The fact that Culpepper has alleged the product as a whole

> was unreasonably dangerous does not, however, end the court's inquiry. In Saint, the plaintiff brought an AEMLD action alleging that her automobile was unreasonably dangerous – because the seatbelt failed to protect her during the accident – and the court permitted evidence of only her negligence in misusing the seatbelt, rather than the automobile itself. The seatbelt in the automobile in Saint is sufficiently analogous to the hammerblock safety in the handgun here: both are designed to protect the user of the product in case of an accident. The court therefore concludes that Weihrauch may assert the contributory negligence defense only as to Culpepper's misuse of the hammerblock safety, rather than the handgun. To hold otherwise would permit Weihrauch to introduce evidence going to Culpepper's contributory negligence related to accident causation, and would directly contravene the Alabama Supreme Court's decision in Dennis.

Culpepper v. Weihrauch KG at 1400-1401.[1]

The second affirmative defense available under AEMLD is misuse of the product. Misuse of a product, as stated previously, is distinguished from a contributory negligence defense in the failure to use reasonable care of the product. In order to successfully assert the defense of product misuse under the AEMLD, a defendant must show "that the plaintiff used the product in some manner different from that intended by the manufacturer." Kelly v. M. Trigg Enterprises, Inc., 605 So. 2d 1185, 1192 (Ala. 1992). An intended use is one that is "reasonably foreseeable by the . . . manufacturer." *Id.* at 1192. Stated differently, the plaintiff's misuse of the product must not have been reasonably foreseeable by the seller or manufacturer. Halsey v. A.B. Chance Co., 695 So.2d 607, 609 (Ala. 1997). Because there is almost always some evidence of prior similar incidents or some evidence of industry knowledge of a particular hazard, this defense is difficult for a defendant to prove.

[1] It is important to remember that contributory negligence is a defense only as to actions based upon negligence. Contributory negligence is not a legal defense to a plaintiff's cause of action based upon wantonness or willfulness. A.P.J.I. 30.02A.

The final affirmative defense afforded under the AEMLD is that of a plaintiff's assumption of the risk. Assumption of the risk is a form of contributory negligence that involves the plaintiff's actual appreciation of a known risk. H.R.H. Metals v. Miller, 833 So. 2d 18, 26 (Ala. 2002). The three elements essential to assumption of risk in cases of this kind are that the party charged with assumption of risk:

> (1) had knowledge of the existence of the dangerous condition and
> (2) with appreciation of such danger
> (3) failed to exercise care for his own safety by putting himself in the way of such known danger.

A.P.J.I. 30.05

Under the AEMLD, there are at least two versions of the assumption of the risk defense which defendants may assert. First, defendants may 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 also 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 a plaintiff was unreasonable to use the product. See also A.P.J.I. 32.18; Atkins, 335 So. 2d at 143. In automobile product cases, this defense tends to be very simple to overcome from a plaintiff's perspective. The plaintiff's own testimony that he was not aware of any defect or problems in his car or that the defect was hidden should overcome this defense. Plaintiff's expert can also provide testimony that the defect was hidden and that most folks simply are not aware of the defect and certainly would not appreciate the danger of the defect.

PUNITIVE DAMAGES

It is important to couple claims under the AEMLD with wantonness claims since wanton claims allow for the recovery of punitive damages. In product cases, the plaintiffs should vigorously pursue discovery that would support a punitive award. The main goals of a punitive damages action are to bring a defendant's attention to the fact that a product is defective, punish the behavior that allowed that defect, and then to deter that defendant and other similarly situated manufacturers from doing the same thing again. Thus, punitive damages are imposed not simply for punishment and deterrence related to conduct regarding the plaintiff, but also on a "theory of punishment for the general benefit of society and as a restraint on the transgressor." Bowles v. Lowery, 59 So. 696 (Ala.App. 1912). See also, C. Gamble and J. Marsh, Alabama Law of Damages, § 4:1 (5th Ed. 2004).

Alabama Pattern Jury Instruction 11.03 provides that "the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiff by way of punishment to the defendant, and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future." "Since punitive damages are not to compensate a victim for loss, but to punish and deter, the state alone is considered the true party plaintiff, and in seeking punitive damages, a plaintiff is an agent of the state." Maryland Casualty Co. v. Tiffan, 537 So.2d 469 (Ala. 1988). Thus, the jury acts as the "conscious of the community" when determining an award of punitive damages. See Bozeman v. Busby, 639 So.2d 504 (Ala. 1994) (citing Henderson v. Alabama Power Co., 627 So.2d 878, 893 (Ala. 1993) (abrogated on other grounds)). In product liability cases, plaintiffs, more often than not, seek to prove wantonness in order

to obtain punitive damages. Wantonness means conduct which is carried on with a reckless or conscious disregard of the rights or safety of others. A.P.J. I. 11.03.

Alabama has historically treated actions resulting in death different from actions causing physical injuries. Alabama's Wrongful Death Statute provides only for the recovery of punitive damages. Ala.Code §6-5-410. Alabama law has noted that "the enormity of the wrong" in causing someone's death justifies this difference in treatment. See Tillis Trucking Co., Inc. v. Moses, 748 So.2d 847, 889 (Ala. 1999) (quoting Campbell v. Williams, 638 So.2d 804, 810-11 (Ala.1994)). Thus, whether it is a personal injury or a wrongful death case, in order to obtain punitive damages, the law requires that the focus must be on the defendant's conduct, i.e., the enormity of the defendant's wrongdoing, the reckless or conscious disregard of the rights and safety of others, and deterrence to ensure someone else is not injured or killed.

Other Similar Incidents

At trial in product cases, a plaintiff should present evidence of other incidents involving the same or similar conduct or product in order to greatly increase the chances of a punitive damages award. Evidence of other similar incidents is admissible if the condition of the place or thing at such other times was substantially similar to the condition existing at the time of the accident. See General Motors Corp. v. Van Marter, 447 So. 2d 1291 (Ala. 1984) and General Motors Corp. v. Johnston, 592 So. 2d 1054 (Ala. 1992). In product liability actions, evidence of complaints to the manufacturer of the product alleging the same defect is strong evidence supportive of punitive damages. Where a manufacturer has received information about safety-related malfunctions of its

vehicles which are being used by the public, an inadequate response or no response at all may demonstrate sufficient disregard for safety to others to justify punitive damages.

For example, in General Motors v. Johnston, 592 So. 2d 1054 (Ala. 1992), the plaintiff admitted 251 internal reports of stalling problems in vehicles with identical engines as the one in the plaintiff's pickup truck. In that case, the plaintiff's truck stalled as it went through an intersection and was struck by a tractor/trailer truck, killing a seven-year-old passenger. The jury awarded $15 million. (The Supreme Court ultimately remitted the wrongful death award to $7.5 million.) In Hobart Corporation v. Scroggins, 776 So. 2d 56 (Ala. 2000), a jury awarded $10 million in punitive damages as a result of the plaintiff losing a portion of his right index finger in an accident at work using a meat saw. The plaintiff introduced evidence of injury sustained by other meat cutters on the same meat saw. There was also testimony presented regarding a list that purported to contain 97 complaints of injuries since the specific product was placed on the market. (The court reversed the punitive damages award holding that the plaintiff had not presented clear and convincing evidence of wantonness to justify an award of punitive damages.)

In a product liability case handled by our firm against the manufacturer of a bucket truck, the use of other similar incident testimony resulted in a verdict totaling over $114 million. We represented a utility lineman who lost his entire right arm and the use of his left arm when he was severely burned as a result of being electrocuted while in a defectively designed bucket truck. At trial, we presented the testimony of three other linemen who received severe electrical burns and lost multiple limbs under similar circumstances as a result of these defectively designed bucket trucks. Upon speaking

with the jurors after the trial, they wanted to send a message to the industry so that no other lineman would be injured or killed as a result of these defective trucks.

Testing

In product liability cases, pre-injury knowledge by the defendant concerning potential injuries or death may not always come in the form of prior complaints. One of the most common sources of evidence in establishing a reckless disregard for safety can be found in the crash testing performed by the manufacturers. The manufacturer's knowledge of a potential injury can be found in the results of crash tests conducted by the manufacturers. Manufacturers are required to extensively test their vehicles to determine their crashworthiness by simulating collision impact courses. These tests tell the manufacturers how a vehicle's various systems would perform in a collision and may also reveal safety deficiencies that should be remedied but which the defendant often times ignored.

In Grimshaw v. Ford Motor Co., 119 Cal.App. 3d 757, 174 Cal.Rptr. 348 (1981) there was an accident involving an individual who was burned when the Ford Pinto in which he was a passenger burst into flames when struck from behind. The jury awarded $2,576,000 in compensatory damages, but $125 million in punitive damages (which was remitted to $3.5 million by the trial court.) The critical evidence came from the results of crash tests conducted by Ford showing Ford knew that the Pinto's fuel tank and rear structure would expose consumers to serious injury or death in a 20-30 mph collision.

Profits Over Safety

Obviously, if a defendant made a conscious decision not to implement a safety design because of a profit motive then the defendant will be subject to a substantial

punitive award. In GM v. Jernigan, 883 So.2d 646 (Ala. 2003), our firm obtained a $100 million punitive damages award after presenting evidence that GM instituted a cost reduction program wherein it sought to save $2,500 per vehicle by making changes to its cars that significantly weakened the car's structure and degraded the car's ability to withstand the forces of real-world collisions. The motive for GM's decision was to maximize profits at the expense of safety.

In Grimshaw, supra, Ford's internal documents showed that the placement of the gas tank of the Pinto over the axle surrounded with a protected barrier would have cost $9.95 per car and that equipping the car with a reinforced rear structure, smooth axle, improved bumper and additional crush space would have cost only $15.30 per car. Despite this information, management decided to defer these "fixes" based on cost savings. The appellate court noted:

> There is evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost benefit analysis balancing human lives and limbs against corporate profits. Ford's institutional mentality was shown to be one of callous indifference to public safety. There was substantial evidence that Ford's conduct constituted a conscious disregard of the probability of injury to the members of the consuming public.

Grimshaw at 813.

In 1999, a Los Angeles jury awarded $4.9 billion (that is not a typo) to the Anderson family as a result of GM's defectively designed Malibu vehicle. When the Anderson's 1979 Malibu was rear-ended in an accident, the fuel tank was punctured, and immediately caused the car to explode into flames. The plaintiffs, Trisha Anderson and her four children, suffered horrible and debilitating third-degree burns over their bodies as a result of that accident. The worst part of this story is that the injuries were

preventable. GM knew years before the accident that there were defects in the fuel system and placed the Malibu on the market anyway. In fact, GM had performed a cost benefit analysis comparing the cost of human life, in a dollar amount, to the cost of redesigning the fuel tank system. This cost benefit analysis became known as "the Ivey Memo," named for GM engineer Edward Ivey who conducted the cost-benefit analysis at the request of his GM superiors. In that memo, Mr. Ivey found that the estimated 500 fatalities per year caused by fuel fires would cost the company on average, $200,000 per fatality. He further concluded that, based on the numbers of such anticipated fatalities, divided by the number of GM automobiles on the road, that "fatalities related to accidents with fuel-fed fires are costing General Motors $2.40 per automobile in current operation." This amount is much less than the $8.59 it would cost to use the safer over the axle alternative design.

In product liability cases, pursuing discovery on other similar accidents, the manufacturer's testing of the product and related products, and focusing on a theme of the defendant choosing profits over safety will greatly enhance the likelihood of a punitive award, which in turn will greatly benefit the public at large. This type of evidence forces a jury to focus on the defendant's knowledge and its conduct after learning of the problems with its defectively designed product.

Recent Developments on Other Similar Incidents

As previously mentioned, other similar incident evidence provides the jury with a strong foundation to award a substantial punitive damages verdict in product liability cases. However, recent case law developments have complicated the use of similar incident evidence. See Philip Morris USA v. Williams, 127 S.Ct. 1057 (2007). In Philip

Morris, the widow of Jessie Williams, a heavy cigarette smoker, filed suit against Philip Morris, the manufacturer of Marlboro cigarettes, for negligence and deceit out of the death of her husband from smoking. A jury found that Williams' death was caused by smoking; that Williams smoked in significant part because he thought it was safe to do so; and that Philip Morris knowingly and falsely led him to believe that this was so. The jury awarded Ms. Williams compensatory damages of approximately $821,000 and punitive damages in the amount of $79.5 million. The trial judge subsequently reduced the punitive damages award to $32 million. However, on appeal, the appellate court restored the $79.5 million jury award and Philip Morris sought review by the United States Supreme Court. Justice Breyer, delivering the opinion of the Court, framed the punitive damages issue before it as follows:

> The question we addressed today concerns a large state-court punitive damages award. We are asked whether the Constitution's Due Process Clause permits a jury to base that award in part upon its desire to *punish* the defendant for harming persons who are not before the court (*e.g.*, victims whom the parties do not represent). We hold that such an award would amount to a taking of 'property' from the defendant without due process.

Philip Morris, 127 S.Ct. at 1060 (emphasis in the original).

The Supreme Court determined that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." Id. at 1063. However, in making this holding, the Supreme Court also recognized that "conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility." Id. at 1065.

Philip Morris complicates the simple principles of punitive damages and creates a problem for trial lawyers and courts. How does one properly instruct a jury, on the one hand telling them that they can consider evidence of harm to others as evidence of the reprehensibility of the defendant's conduct but, yet, on the other that they cannot award punitive damages on the basis of the harm caused to others by the defendant. The Supreme Court provided little to no instruction on how courts are to accomplish this feat.

> How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injuries to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one – because, for instance, of the sort of evidence that was introduced at trial or the kind of argument that the plaintiff made to the jury – a court, upon request, must protect against that risk. Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases.

Id. at 1065 (emphasis in the original).

The dissenting justices pointed out that, in its application, a jury instruction of this type would clearly confuse a jury.

> While apparently recognizing the novelty of its holding, . . . the majority relies on a distinction between taking third-party harm into account in order to access the reprehensibility of the defendant's which is permitted – from doing so in order to punish the defendant "directly" – which is forbidden . . . this nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhance the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant – directly for third-party harm.

Id. at 1066-67 (Justice Stevens dissenting).

> The Court's Order vacating the Oregon Supreme Court's judgment is all the more inexplicable considering that Philip Morris did not preserve any objection to the charges in fact delivered to the jury, to the evidence introduced at trial, or to opposing counsel's argument. The sole objection Philip Morris preserved was to the trial court's refusal to give defendants'

> requested charge number 34. . . . Under that charge, just what use could the jury properly make of 'the extent of harm suffered by others'? The answer slips from my grasp. A judge seeking to enlighten rather than confuse surely would resist delivering the requested charge.

Id. at 1068 (Justice Ginsberg dissenting).

One obvious result of this case is that new and creative jury instructions must be given to provide the jury with guidance on how to consider evidence regarding harm to others. The Supreme Court hinted that a proper instruction should tell the jury that it "may consider the extent of harm suffered by others in determining what the reasonable relationship is between [the defendant's] punishable misconduct and harm caused [the plaintiff], but you are not to punish the defendant for the impact of its alleged misconduct on other persons . . .." Philip Morris, 127 S.Ct. at 1064.

VENUE

Two cases, Ex parte Suzuki Mobile, Inc., 940 So. 2d 1007 (Ala. 2006) and Ex parte Volvo Trucks North America, Inc., 954 So. 2d 583 (Ala. 2006), recently caused a change in the venue laws for product liability cases. These cases have had a substantial impact on where attorneys may file a product liability case in Alabama. Before these opinions were issued, it was generally understood that the location of where the injury occurred was a proper basis for establishing venue in the county. This understanding was based upon the plain language of Alabama Code Section §6-3-7 (a)(1) –"in the county in which a substantial part of the events or omissions giving rise to the claim occurred." It was assumed, by plaintiff and defense counsel that parts of the "events" giving rise to "the claim" are the injury and the causation, i.e., the defect causing the injury. Without injury and causation, there is no claim. The injury and causation occurs where the

accident happened. Nonetheless, these cases hold that it is the "wrongful acts of the corporate defendant" that determines venue under this statute.

In Ex parte Suzuki Mobile, Inc., 940 So. 2d 1007 (Ala. 2006), the Plaintiff's son was seriously injured in an accident in Choctaw County while using an ATV. The Plaintiff sued Suzuki, the manufacturer of the ATV, and the dealership where he purchased it, under AEMLD, negligence and wantonness. He filed the suit in Choctaw County, where the accident occurred. The dealership was located in Mobile County. The defendants filed a motion to transfer venue to Mobile County. The trial court denied the motion and the defendants petitioned for a writ of mandamus asking the Alabama Supreme Court to transfer the action.

The defendants argued that venue in Choctaw County was not allowed under any of the four categories listed in Alabama Code §6-3-7(a). The plaintiff asserted that because "a substantial part of the events or omissions giving rise to the claim" occurred in Choctaw County, i.e. the accident and the injury, pursuant to §6-3-7(a)(1), venue was proper.

The Alabama Supreme Court held that, even though the injury occurred in Choctaw County, venue was actually proper in Mobile County, where the dealership was located. The Court determined that while the location where the injury occurred used to be a dispositive fact, the July 1999 amendment to the statute focused the inquiry on the location of the "events or omissions giving rise to the claim." The Court reasoned that, because the Plaintiff's complaint alleged the wrongful acts occurred in the design, manufacture, assembly, distribution and sale of the ATV, none of which occurred in Choctaw County, it could not be a proper venue. The Court determined Mobile County

was proper venue for this action because the Plaintiff lived there and the defendants do business there.

This opinion was further clarified by Ex parte Volvo Trucks North America, Inc., 954 So. 2d 583 (Ala.2006). On October 12, 2005, Joseph Freeman, Jr., who was employed by Evergreen Forest Products, was driving a 2004 Volvo tractor trailer. Although he was obeying the speed limit and operating his truck in a safe manner, an oncoming pickup truck crossed over the centerline of the highway and struck Freeman's Volvo truck near the driver side front tire. As a result of the collision, and despite wearing his seatbelt, Freeman was ejected through the windshield onto the pavement. He survived at the scene, but later died as a result of his injuries.

Freeman's daughter filed suit against Volvo and the dealership who sold the truck in Montgomery County, for a defective seatbelt. The defendants filed a motion to transfer the case to Butler County on the basis of *forum non conveniens* because the accident occurred there and because it would be more convenient to the witnesses. The trial court denied the motion and the defendants filed a petition of mandamus with the Supreme Court.

In analyzing the issues, the Supreme Court first noted that, in order to transfer the case to Butler County, Butler County must be a proper venue. Applying Ex parte Suzuki, the Court determined that Butler County was not a proper venue for the action because none of the wrongful acts of the corporate defendants in designing, manufacturing, and selling the truck and its defective seatbelt occurred there. The Court agreed with the Plaintiff and found that Montgomery County was the proper venue because the sale of the defective seatbelt occurred there.

These two opinions have had a significant impact on where cases can and will be filed.

PREEMPTION

One of the most recent developments in product liability law that has created some issues for plaintiffs is preemption. Until recently, most attorneys had never heard of the law of preemption being applied to a state law product liability case. Now, most product liability lawyers will face a defendant who argues that certain federal laws preempt state tort law actions. See Geier v. American Honda Motor Co., 529 U.S. 861, 146 L. Ed. 2d 914, 120 S. Ct. 1913 (2000); Medtronic, Inc. v. Lohr, 518 U.S. 470, 135 L. Ed. 2d 700, 116 S.Ct. 2240 (1996); and Cippilone v. Liggett Group Inc., 505 U.S. 504, 120 L. Ed. 2d. 407, 112 S. Ct. 2608 (1992). During the last eight years, preemption language has appeared in many government regulations, in effect creating a silent tort reform through executive orders and administrative processes, rather than through the legislature and the courts. These attempts to preempt state law tort claims subjugate state's rights and individual's rights to trial by jury.

There are two basic types of preemption: express and implied. Express preemption exists when a federal agency enacts a statute that revokes the states' powers to regulate a specific area if the state law is not identical to the applicable federal statute. Implied preemption can occur in a particular field (implied field preemption) or it can occur when compliance with state and federal law is impossible, or where a state law frustrates the purposes of the federal agency enacting a particular statute (implied conflict preemption).

In the area of automobile product liability, the most prevalent and recent areas of

preemption attacks are in cases involving claims for failure to install airbags, lap belt only claims, and claims dealing with window glass glazing. From a plaintiff's perspective, the results have been mixed. In Geier v. American Honda Motor Co. Inc., 529 U.S. 861, 120 S.Ct. 1913 (2000), the United States Supreme Court specifically preempted certain types of claims for failure to install an airbag in automobile product liability cases. While some courts have found lap belt only claims and glazing claims to be preempted, others have not. See Erickson v. Ford Motor Co., Slip Copy, 2007 WL 2302121 (D.Mont.) (plaintiff's glazing claims were preempted); O'Hara v. General Motors Corp., 508 F. 3d 753 C.A.5 (Tex.) 2007, (plaintiff's glazing claims were not preempted); Burns v. Ford Motor Co., Slip Copy 2008 WL 222711 (W.D. Ark.) (plaintiff's glazing claims were not preempted.); Carden v. General Motors Corp., 509 F. 3d. 227, C.A.5. (Tex.) 2007, (plaintiff's lap belt only claims were preempted); and Wasp v. Forrest Wilson Monuments, Inc., CV04-348 (Circuit Court of Mobile County, Alabama, January 15, 2005) (Alabama trial court ruled that claims that a car was defective because its rear seats were equipped with two-point lap belts instead of three-point lap/shoulder belts are not preempted by federal law.).

For trial lawyers, the moral of this story is be prepared. Every plaintiff attorney should be knowledgeable and fully versed in the law and be prepared to defend his client's claims against defendants' potential claims of preemption.

CONCLUSION

Regardless of whether you sit on the defendant's side of the table or the plaintiff's side, the AEMLD is a tool to be used to spark change in the industry. For example, the Transportation Recall Enhancement, Accountability and Documentation (TREAD) Act

was enacted in 2000 following the Ford/Firestone litigation. Lawsuits involving the Ford Pinto gas tanks led to consumer awareness of the problems and sparked industry change. Since the 1970's, product liability law has evolved and adapted to fit the ever changing technologically advanced world in which we live. But, one thing remains the same-consumer protection. Thanks to the AEMLD, consumers who are injured by defective products are entitled to obtain compensation for their injuries. We as consumers benefit when products are improved as a result of consumer complaints and lawsuits.