

PRODUCTS LIABILITY LAW IN ALABAMA

I. ROOTS OF ALABAMA PRODUCTS LIABILITY LAW: PRE-AEMLD

A. Negligence Actions

One of the first cases to deal with products liability issues, *Winterbottom v. Wright*, dates back to 1842. See 152 Eng. Rep. 402 (Ex. 1842). *Winterbottom* established the general rule that recovery in a products liability action is unattainable unless the person injured dealt directly with the manufacturer of the product in question. See *id.* at 404-05. The strict nature of this rule caused many courts to question its soundness and, just ten years after *Winterbottom*, in *Thomas v. Winchester* the court created an exception to the privity of contract rule in products liability actions. See *Thomas v. Winchester*, 6 N.Y. 397, 409-11 (1852). In *Thomas* the Court of Appeals of New York allowed claims to proceed against manufacturers of inherently or imminently dangerous products. *Id.*

As time progressed, so did the exceptions to the rule of privity as originally pronounced in *Winterbottom*. A leading case in this country was *MacPherson v. Buick Motor Co.*, where Justice Cardozo, writing for the Court of Appeals of New York, created such a wide-ranging exception to the *Winterbottom* rule that it practically lost all significance. See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389 (1916). The *MacPherson* court held:

[T]he principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.

Id. (emphasis added).

B. Alabama and The Manufacturer's Liability Doctrine

In the years following *MacPherson*, courts across the United States began undoing the old privity requirement.

Among these courts was the Supreme Court of Alabama, which in *Jones v. Gulf States Steel Co.* followed the principle outlined in *MacPherson* to develop less stringent privity requirements in negligence claims. See *Jones v. Gulf States Steel Co.*, 88 So. 21

(Ala. 1921). In *Jones* the Alabama Supreme Court recognized that isolated exceptions to the general rule of privity existed by stating, “[t]o this rule, however, there are well-recognized exceptions, as, for instance, where [the] defendant has been guilty of fraud or deceit in the sale of the article, or where the thing causing the injury is of an obnoxious or dangerous character.” *Id.* at 22. This departure from the traditional privity requirement in third-party negligence suits was eventually recognized by the Alabama Supreme Court as the “manufacturer’s liability doctrine.” See *Miles v. Chrysler Corp.*, 191 So. 245, 247 (Ala. 1939) (expressly describing the concepts behind the “manufacturer’s liability doctrine”). Basically, this doctrine stood for the concept that manufacturers in Alabama were under a duty to make their respective products in a careful manner. See *Defore v. Bourjois, Inc.*, 105 So. 2d 846, 848 (Ala. 1958). This decision by the Alabama Supreme Court, *Defore v. Bourjois Inc.*, described the “manufacturer’s liability doctrine” in further detail:

This doctrine applies in those limited cases where there is no privity of contract between the ultimate user and the manufacturer and where the manufacturer has negligently placed on the market a product which is inherently or imminently dangerous to human life or health, or which, although not dangerous in itself, becomes so when applied to its intended use in the usual and customary manner. Where the user thus sustains an injury which is the natural and proximate result of this negligence in the manufacture or sale of the article and if the injury might have been reasonably anticipated [or foreseeable], then the manufacturer is liable to the user under the manufacturer’s liability doctrine.

Id. (emphasis added).

However, those manufacturers of “inherently or imminently dangerous” products facing a negligence-based products liability claim under the “manufacturer’s liability doctrine” could escape liability by proving that the product was manufactured with “due care.” See *id.*

C. Breach of Warranty Claims

The availability of the “due care” defense to manufacturers in a negligence-based products liability claim posed a difficult proof problem for plaintiffs seeking recovery under the manufacturer’s liability doctrine. In response to this bar to recovery, courts began developing alternative avenues of recovery, namely claims for breach of express and implied warranties. Products liability claims under breach of express and implied warranties claims are distinguishable from negligence claims because in a warranty claim a manufacturer could still be held liable “even though [the manufacturer] had exercised all reasonable care” in the manufacturing of a specific product. See W. Page Keeton, Et al., *Prosser & Keeton On Torts* § 97 at 690 (5th ed. 1984).

However, the privity requirement still existed in contract actions, such as breach of warranty. The policy of the courts during that era is perhaps best illustrated in the case of *Birmingham Coca-Cola Bottling Co. v. Clark*, where the Alabama Supreme Court stated, “[t]he warranty of the seller of personal property does not, as a rule, impose any liability upon him as to third persons who are in no way a party to the contract.” *See, e.g., Birmingham Coca-Cola Bottling Co. v. Clark*, 89 So. 64, 65 (Ala. 1921) (emphasis added).

Not until 1960, did American courts begin undoing the privity requirement in breach of warranty claims. In fact, the New Jersey Supreme Court completely disregarded the privity requirement for an implied warranty products liability suit in the landmark decision of *Henningsen v. Bloomfield Motors, Inc.* *See, e.g., Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960). *Henningsen* involved a breach of warranty claim brought by a plaintiff who had sustained injuries when her new automobile suddenly malfunctioned and ran off the road. *Id.* at 75. The court commented on the lack of privity between the plaintiff and the defendant manufacturer by noting that there was not a logical “basis for differentiating between a fly in a bottle of beverage and a defective automobile. The unwholesome beverage may bring illness to one person, the defective car, with its great potentiality for harm to the driver, occupants, and others, demands even less adherence to the narrow barrier of privity.” *Id.* at 83. The court abolished the privity requirement in the implied warranty of merchantability claim and held the manufacturer liable for the plaintiff's injuries. *Id.* at 100.

D. Alabama and Breach of Warranty Claims

While many other state courts followed the decision in *Henningsen* to eradicate the privity requirement in breach of warranty actions, the Supreme Court of Alabama, when faced with a similarly situated breach of warranty products liability lawsuit, ruled otherwise. *See Harnischfeger Corp. v. Harris*, 190 So. 2d 286, 290 (Ala. 1966). In this case, the Alabama Supreme Court in *Harris* stated:

We are requested to overturn the long-existing rule in this jurisdiction that there must be privity of contract between a seller and a person injured by a defect in the article sold who seeks to recover for such injury in an action against the seller for a breach of warranty. Although this is a “judge-made” rule which could be changed by another “judge-made” rule, we entertain the view that, because of its long existence as a part of the jurisprudence of this State, it would be more appropriate for its demise to be effectuated by legislative action, if it is to be overturned.

Id. at 289-90.

Shortly after this decision, however, Alabama legislators answered *Harnischfeger Corp.* and adopted the Uniform Commercial Code (UCC), which alleviated the privity

requirement in warranty-related consumer products liability suits where the plaintiff had sustained personal injury.

II. THE AEMLD

A. Alabama's Adoption of the AEMLD

The most famous case in the field of products liability, was *Greenman v. Yuba Power Products*. 377 P.2d 897 (Cal. 1963). In *Greenman*, the plaintiff filed negligence and breach of warranty claims against the manufacturer of a piece of equipment. After a jury verdict in the plaintiff's favor, Justice Traynor of the California Supreme Court noted that the defendant's culpability was not implied "by an agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties or negligence but by the law of strict liability in tort." *Id.* at 901.

Soon after this decision, the American Law Institute (ALI) (Justice Traynor was a member) took an almost identical stance as that of the California Supreme Court and adopted Section 402-A of the Restatement (Second) of Torts, which reads in its entirety:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement Second of Torts § 402A (1965).

Two Alabama Supreme Court cases decided in 1976, *Casrell v. Altec Industries, Inc.*, and *Atkins v. American Motors Corp.*, gave us the law we now operate under. 335 So. 2d 128 (Ala. 1976).; 335 So. 2d 134 (Ala. 1976).

B. AEMLD in Alabama

The court opted to adapt the existing negligence-based concepts of liability found in the "manufacturer's liability doctrine" into a separate legal theory that eventually came to

be known as the Alabama Extended Manufacturer's Liability Doctrine (AEMLD). First articulated in *Casrell* as the “extended manufacturer's liability doctrine,” this theory was actually a hybrid version of strict liability. *See Casrell*, 335 So. 2d at 132.

The newly created extended manufacturer's liability doctrine applies to suppliers and sellers that were in any way associated with the injury producing product. *Id.* However, the “middleman” may establish that his conduct did not contribute to the defective condition of the product. This defense is based on the old “sealed package” doctrine which held that a dealer was not legally responsible for a defect in a product that the dealer was unaware of and did not have a superior opportunity to learn of.

In order to hold the defendant liable for a claim brought under the AEMLD, the plaintiff is required to prove the following:

- (1) he suffered injury or damages to himself or his property by one who sells a product in a defective condition unreasonably dangerous to the plaintiff as the ultimate user or consumer, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) Showing these elements, the plaintiff has proved a prima facie case although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from, or entered into any contractual relation with, the seller.

Casrell, 335 So. 2d at 132-33.

In creating this new theory of products liability law, the Supreme Court of Alabama diverged from its previous decision in *Harnischfeger Corp. v. Harris* where the court refused to interfere with the duties of the state legislature by overturning the long standing privity rule. Yet, the court in *Casrell* and *Atkins* had no trouble overhauling the law of products liability through judicial modification.

III. ALABAMA PRODUCT'S LIABILITY LAW TODAY

A. Alabama's “Merger Doctrine”

After the creation of AEMLD in Alabama, many questions remained as to its application. The most prominent of these questions dealt with whether the AEMLD was the sole theory under which a products liability action could be initiated or were warranty

and negligence claims still viable. With no precedent from the Alabama Supreme Court on this issue, a trend emerged in the federal courts to “merge” the previously distinct common law and statutory remedies into the AEMLD. More specifically, these courts held both breach of warranty and negligence and wantonness claims were subsumed into the AEMLD in cases where the plaintiff’s allegations focused on unreasonably dangerous products.

B. The “Merger Doctrine” Questioned

In June 2003, however, the Supreme Court of Alabama decided *Spain v. Brown & Williamson Tobacco Corp.* and *Tillman v. R.J. Reynolds Tobacco Co.* 872 So. 2d 101 (Ala. 2003); 871 So. 2d 28 (Ala. 2003). In these cases, the court expressly overruled the well-established “merger doctrine” in regards to both breach of implied warranty claims as well as negligence and wantonness claims. *See Spain*, 872 So. 2d 101; *Tillman*, 871 So. 2d 28. Prior to overruling the theory behind the merger doctrine in the recent decisions of *Spain* and *Tillman*, the Alabama Supreme Court’s rationales were controlled by the arguments in favor of merging both breach of warranty and negligence and wantonness claims into the AEMLD as was prescribed in *Shell* and *Veal*. However, these decisions had, and continue to have, a significant impact on the validity of the “merger doctrine” as it relates to products liability claims.

IV. FULL DISCLOSURE: COMBATING STONEWALLING AND OTHER DISCOVERY ABUSES

In products liability cases plaintiff’s attorneys often face multiple attempts by the defense to stonewall, or abuse the discovery process. Francis Hare, Jr., James Gilbert, and Stuart Ollanik present in their book, Full Disclosure, ways in which to combat and address discovery abuses frequently faced by plaintiff’s attorneys. Francis Hare, Jr., et al., *Full Disclosure: Combating Stonewalling and Other Discovery Abuses* (Cathy Krivant, et al. ed., ATLA Press 1994).

A. Stonewalling in Product’s Liability

In modern products liability litigation discovery practice is sometimes as complex as the case itself. Thus, while the fair determination of a claim turns on the facts, justice often turns on fair discovery. *Id.* at 73. The ultimate outcome of a products case hinges on the plaintiff’s battle for discovery. *Id.* at 74. The defendant and counsel always enjoy a significant advantage over plaintiff’s counsel with respect to technical complexity in many areas such as:

- 1) knowledge of the technology involved
- 2) possession of any and all documents concerning design
- 3) access or employment of qualified experts
- 4) access to a collaborative mechanism to assist local counsel in case prep
- 5) superior economic resources

In general, discovery rules governing both federal and state courts provide for broad disclosure prior to trial. Litigants must act in timely fashion in response to discovery requests by opponents.

When the parties play by these rules, the system has a chance to work. Both sides become aware of the available evidence and the strengths and weaknesses of their cases. This promotes settlement of valid claims on reasonable terms. Frivolous claims can be quickly identified and dismissed. And a policy of openness helps level the playing field, providing less wealthy parties with genuine hope that their cases will be resolved on the merits.

What are the most common tactics? The following is a quick rundown of the most often seen discovery abuses...

1. The open-ended response or boilerplate objections

Product liability defendants frequently respond to document requests by indicating that their initial document production may be supplemented if additional documents are found. This stance sounds reasonable, but in practice it is sometimes used as license to deliberately withhold relevant records. If the plaintiff obtains a document from another source and confronts the defendant with it, asking why it had not been produced in the litigation, the defendant can say, "We told you we were still looking." *Id.* at 83.

2. Use of Semantics and False Responses

Another variation of the games played by product liability defendants is to respond to a discovery request by providing only a subset of the documents requested or an answer to only part of the question asked. But instead of expressly objecting to providing the rest of the information sought, the defendant subtly slips the limitation into its response. For example, in a case where the issue is whether Mechanism A, a component of Vehicle X, caused an injury, the plaintiff gives the defendant this request: "Provide all documents concerning defects or potential defects in Mechanism A." The defendant has documents indicating defects with respect to Mechanism A, but they concern Vehicles Y and Z, not Vehicle X. Instead of providing those documents or objecting to the scope of the request, defendant simply responds, "There are no documents regarding Vehicle X concerning the risk of Mechanism A." A plaintiff's lawyer could easily fail to notice that the defendant has unilaterally limited the scope of the discovery request, and the documents will remain hidden. *Id.* 86-90.

GM tried similar tactics in a case called, *Sellon v. Smith*. See 112 F.R.D. 9, 11 (D. Del. 1986).

3. Claims of attorney-client privilege

Product makers often hide damaging documents behind the broad banner of attorney-client privilege and its cousin, the attorney work-product doctrine. Unscrupulous companies and their lawyers have taken advantage of this doctrine. They simply assert the privilege, sometimes as to numerous documents and often without elaboration or adequate inspection, and hope that will be the end of the matter. The Alabama Supreme Court has recently amended Rule 26 of the Alabama Rules of Civil Procedure to require a party asserting a privilege, upon request by the propounding party, to provide a privilege log with sufficient information to determine the applicability of the asserted privilege. This federal rules have the same requirement; however, the log is supposed to be provided with the response to discovery without a request.

4. Delay and Protective Orders

Product liability defendants, claiming that public disclosure of product information will reveal essential business secrets to competitors, frequently insist on elaborate secrecy agreements -- called protective orders -- prior to providing discovery to the plaintiff. These complicated orders assist defendants by delaying the release of crucial documents, requiring plaintiffs' attorneys to spend time negotiating the orders and complying with their sometimes complex provisions, and -- often most importantly -- keeping harmful information out of the hands of attorneys representing other persons claiming injuries from the same product -- and keeping it away from government regulatory officials. Often there are no genuine trade secrets in need of protection, but plaintiffs' lawyers, anxious to move forward on behalf of their clients, accept the restrictions anyway. *Id.* at 95.

Product liability defendants often respond incompletely or not at all to plaintiffs' discovery requests. They will wait until plaintiffs go to court asking the judge to order the disclosure or to impose sanctions. Or a corporate defendant will refuse to hand over documents until the court actually rules on the plaintiff's motion and orders the defendant to do so. Sometimes defendants will release some insignificant documents to create the appearance of cooperation.

6. Failure to comply with court orders compelling discovery

7. Blatant concealment or destruction of documents

8. Seeking refuge in the appellate courts

B. Stonewalling in Depositions

Written discovery is not the only avenue by which defense counsel employs certain tactics to avoid discovery. In fact, many of the following tactics are found in everyday depositions.

1. Failing to produce a knowledgeable deponent (30(b)(6))

In many situations, corporate defendants send a professional witness who cannot supply any relevant information and simply articulates the manufacturer's defenses. *Id.* at 104.

2. Instructing the deponent not to answer a legitimate inquiry

Often times, a lawyer will instruct the deponent not to answer a question. However, it is important to remember that they may only give that instruction if the question actually calls for privileged information, or information protected by a court order. Otherwise, the counsel may break and seek a protective order on other grounds such as annoying, oppressive, or bad faith on the part of the questioning attorney. *Id.*

3. Using objections to be disruptive or signal the witness

This tactic justifies sanctions and the court has found such conduct as “unprofessional and insulting.” *Id.* at 105; citing *Stengal v. Kawaski Heavy Indus.*, 116 F.R.D. 263, 268 (N.D. Tex. 1987).

C. Conclusion

In *Full Disclosure*, the authors provide an excerpt from the case of *Malautea v. Suzuki Motor Co.*, highlighting the Eleventh Circuit's observations on stonewalling. Judge Fay concludes stating:

Having examined the misconduct in this case and affirmed the sanctions imposed, we feel compelled to remark on the disturbing regularity with which discovery abuses occur in our courts today. The Federal Rules of Civil Procedure were adopted in 1937 in the hope of securing “the just, speedy, and inexpensive determination of every action.” Fed.R.Civ.P. 1.

Today, fifty-six years later, the drafters of these rules certainly would be disappointed to see how far from that ideal we remain. The discovery rules in particular were intended to promote the search for truth that is the heart of our judicial system. However, the success with which the rules are applied toward this search for truth greatly depends on the professionalism and integrity of the attorneys involved. Therefore, it is appalling that attorneys, like defense counsel in this case, routinely twist the discovery rules into some of “the most powerful weapons in the arsenal of those who abuse the adversary system for the sole benefit of their clients.”

All attorneys, as “officers of the court,” owe duties of complete candor and primary loyalty to the court before which they practice. An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly. This concept is as old as common law jurisprudence itself. In England, the first licensed practitioners were called “Servants at law of our lord, the King” and were absolutely forbidden to “decei[ve] or beguile the Court.” In the United States, the first Code of Ethics, in 1887, included one canon providing that “the attorney's office does not destroy ... accountability to the Creator,” and another entitled “Client is not the Keeper of the Attorney's Conscience.”

Unfortunately, the American Bar Association's current Model Rules of Professional Conduct underscore the duty to advocate zealously while neglecting the corresponding duty to advocate within the bounds of the law. As a result, too many attorneys have forgotten the exhortations of these century-old canons. Too many attorneys, like defense counsel in this case, have allowed the objectives of the client to override their ancient duties as officers of the court. In short, they have sold out to the client.

We must return to the original principle that, as officers of the court, attorneys are servants of the law rather than servants of the highest bidder. We must rediscover the old values of our profession. The integrity of our justice system depends on it.

Id. at 116; *citing Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1546-47 (11th Cir.), *cert. denied*, 114 S. Ct. 181 (1993) (citations omitted) (emphasis added).

This statement unfortunately holds true today as the abuses mentioned above continue to burden our justice system and prevent meaningful discovery for deserving plaintiffs.