



Crashworthiness-Based Product Liability and Contributory Negligence In the Use of the Product

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Seventeen years ago, *The Alabama Lawyer* published a commentary on the state of the law in Alabama concerning contributory negligence in product liability cases.¹ The focus at that time was upon the Alabama Supreme Court's decision in *Dennis v. American Honda, infra.*, and whether the application of contributory negligence in product liability cases was "dead" in this state. The verdict at the time prompted the authors of the earlier article to quote one of Mark Twain's famous lines—namely, "The reports of my death are greatly exaggerated."

Twenty years after the release of *Dennis*, it is apparent that certain confusion remains. However, it appears that contributory negligence in the use of the product in an Alabama Extended Manufacturer's Liability Doctrine ("AEMLD") case should be considered—even if the contributory negligence causes the accident in question, so long as it is in the use of the product alleged to be defective.

No matter how it may be phrased, however, the concept of fault is so woven into the fabric of the AEMLD that no amount of argument should be able to separate the examination of the alleged fault of the manufacturer from that of the plaintiff in his/her use of the product. A product is still a product, and negligence is still negligence. Why then, we ask, should a jury not be allowed to consider the fault of all parties who potentially contributed to an accident or injuries when using the product alleged to be defective? The answer, as it was 17 years ago, remains relatively simple and straightforward: In AEMLD cases where there is evidence of negligence in the use of a product by a plaintiff, Alabama law requires the jury to consider that evidence.

On November 15, 1985, the Supreme Court of Alabama released its landmark decision in *General Motors Corporation v. Edwards*² and adopted what was then termed "the crashworthiness doctrine."³ The *Edwards* opinion followed the supreme court's decisions in *Atkins v. American Motors Corp.*⁴ and *Casrell v. Altec Industries, Inc.*⁵ which created the AEMLD and retained the "fault" concept for proving liability against a product manufacturer.⁶

Part and parcel of the fault-based concept under the AEMLD was the contemporaneous survival of lack of causal relation, assumption of the risk and contributory negligence as affirmative defenses.⁷ Indeed, as the supreme court noted, "the practical distinction, then, between our holding and the *Restatement [of Torts 2d, § 402A]* is that our holding will allow certain affirmative defenses not recognized by the *Restatement's* no-fault concept of liability."⁸

Edwards was simply an expansion of the type of case that could be maintained under the AEMLD. Prior to that opinion, a product liability cause of action arguably did not arise without some allegation that the defect caused the incident in question to occur.⁹ The supreme court, analyzing the different legal views of various national jurisdictions, preferred to adopt what was deemed as "the crashworthiness doctrine," finding that it was "in keeping with the purpose of the AEMLD, which is to protect consumers against injuries caused by defective products."¹⁰ Equally important, the court's adoption of "the crashworthiness doctrine" did nothing to modify the "fault"-based concepts implicit within the AEMLD, including the availability of contributory negligence as a defense.¹¹

Despite a singular reliance on the *Restatement of Torts 2d, § 402A's* "no-fault" concepts since *Edwards*, the Supreme Court of Alabama has reiterated on numerous occasions that contributory negligence in the use of the product alleged to be defective remains an available defense in a product liability case. Likewise, the December 2009 Alabama Pattern Jury Instructions explicitly recognize this key concept of AEMLD law, stating in the "Notes on Use": "Negligence by the plaintiff in the use of the product in question is a defense to an AEMLD claim, but plaintiff's negligence in causing the accident is not a defense to an AEMLD claim when the alleged contributory negligence does not relate to plaintiff's use of the product."¹² Equally important, the updated pattern jury instructions also note that "[t]here is no distinction between 'crashworthiness' and an AEMLD design defect claim."¹³ Thus, under current Alabama jurisprudence, there should never

be a difference between the available defenses in what some may deem a "traditional" AEMLD case as opposed to a "crashworthiness" case. Indeed, given the breadth of authority, one might think the availability of contributory negligence in any AEMLD case is well-settled law; yet, approximately 25 years after the supreme court's holding in *Edwards*, the debate rages on across the state.

Although some may argue that contributory negligence is "dead" in product liability, most simply try to limit its use by seeking a narrowly-tailored definition of the product in question to include only a specific portion or component part of the product as a whole. On this issue, significant precedent exists to guide the bench and bar. When involved in a complex product liability case, it is important to understand how "the product in question" is defined so that contributory negligence in the "use" of that product may properly be presented to the jury.

The Debate Begins

Dennis v. American Honda

The recognition of contributory negligence as a defense in AEMLD "crashworthiness" cases remained relatively unscathed until the Supreme Court of Alabama's decision in *Dennis v. American Honda Motor Co.*¹⁴ *Dennis* is a case where unique facts created a narrow exception. Accordingly, that opinion has little practical application in the vast majority of product liability cases in Alabama. Unfortunately, the narrow holding in *Dennis* is often cited for a sweeping proposition that contributory negligence is unavailable as a defense to a defendant in a "crashworthiness"-based case if the negligent act(s) relate to the cause of the accident in question, or if the negligent act(s) do not relate to the specific component and/or safety feature of the product alleged to be defective. Such assertions, however, are belied by the facts of the *Dennis* case and are contradictory to the basic tenets upon which Alabama product liability law is founded.

In *Dennis*, the plaintiff was injured when the motorcycle he was riding collided with a truck.¹⁵ The plaintiff brought claims against the helmet manufacturer and American Honda under the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD") for alleged defect(s) in the helmet, not the motorcycle on which the plaintiff was riding.¹⁶

Despite its ultimate holding, the supreme court found that (under the AEMLD) certain defenses remain available to a defendant, including contributory negligence.¹⁷ However, based on the very particular circumstances of that specific case, the court held that the trial judge improperly allowed a charge on contributory negligence of the plaintiff in the use of one product (the Yamaha motorcycle) while a separate product (the motorcycle helmet being worn by the plaintiff) was the product alleged to be defective.¹⁸ In finding that contributory negligence as it related to accident causation was not available to the defendant in that case, the court stated, "[a] Plaintiff's mere inadvertence or carelessness in causing an

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accident should not be available as an affirmative defense to an AEMLD action."¹⁹

The Supreme Court Clarifies The *Dennis* Confusion

Williams v. Delta Machinery

Following *Dennis*, there was, admittedly, a great deal of confusion in Alabama as to the viability of contributory negligence in an AEMLD case. In fact, the argument was made across the state that contributory negligence in product liability was "dead." In response, the Supreme Court of Alabama took the opportunity in *Williams v. Delta Machinery* to clarify the *Dennis* court's limited holding.

In *Williams*, the plaintiff was injured while pushing a board across an expandable dado blade.²⁰ The plaintiff sued Powermatic and Delta Machinery under the AEMLD.²¹ The trial court charged the jury on contributory negligence as a complete defense to the plaintiff's claims.²² Even though the supreme court found that the plaintiff had not properly preserved an objection to the contributory negligence charge, it felt compelled to speak on *Dennis* because of the confusion as to that case's proper interpretation.²³

Justice Houston, writing for the court, stated, "...we direct the attention of the Bench and Bar to the specific holding in *Dennis*..."²⁴ Justice Houston clarified that the unique facts in *Dennis* led to the holding from that court, explaining:

If the contributory negligence instruction had been limited to the plaintiff's failure to exercise reasonable care in his wearing of the helmet ..., then such an instruction would have been proper under this court's previous interpretations of the AEMLD.²⁵

The *Williams* Court further pointed out that:

The trial error in *Dennis* was in not limiting the contributory negligence charge to the plaintiff's use of the helmet as opposed to the plaintiff's alleged negligent operation of his motorcycle.²⁶

With this language, the supreme court clearly reaffirmed the existence of contributory negligence in product liability cases under the AEMLD.

Much like the supreme court's opinion in *Williams*, the factual and legal scenarios played out in *Dennis* are not the same as many of the product liability matters brought in this state. For instance, many times the actual product being used by the plaintiff will be the product alleged to be defective with a specific defect in a component part being the primary focus of the case, i.e. an automobile is alleged defective under the AEMLD with the primary focus being on the particular plaintiff's seat belt restraint system.

Analyzed under the holding in *Williams*, it is clear that a plaintiff's contributory negligence in causing an accident is an appropri-

ate defense when the accident-causing act is in the use of the product alleged to be defective. The supreme court has further reiterated this point in *Campbell v. Cutler Hammer, Inc.*²⁷, *General Motors Corp. v. Saint*²⁸, *Uniroyal v. Hall*²⁹ and *Haisten v. Kubota Corp.*, *infra*.

Contributory Negligence Can Cause the Accident

Haisten v. Kubota Corp.

On October 14, 1994, the Supreme Court of Alabama rendered its decision in *Haisten v. Kubota Corp.*³⁰ The court's opinion solidified the contributory negligence defense in an AEMLD case based on "crashworthiness." In *Haisten*, the plaintiff was injured when his Kubota tractor overturned and the attached rotary blade cut his legs.³¹ The plaintiff sued Kubota under the AEMLD alleging that the tractor was "defective" because it "did not contain a rollover protection system."³² Kubota introduced evidence that, at the time of his injury, the plaintiff was operating the tractor on a sloping bank.³³ Kubota argued that the plaintiff was contributorily negligent in using the tractor on a slope.³⁴ The trial court gave a jury charge on contributory negligence as a defense to the plaintiffs' AEMLD claim(s), and the jury found in favor of Kubota.³⁵

On appeal, the plaintiff argued that the trial court erred by charging the jury with respect to contributory negligence as a defense in an AEMLD action.³⁶ The Supreme Court of Alabama held that contributory negligence was an available defense because the jury could find that the plaintiff failed to use reasonable care with regard to the tractor by operating it on a slope.³⁷ The *Haisten* court also noted that the foreseeability of the plaintiff's actions, though relevant to the defense of product misuse, was not relevant to the defense of contributory negligence.³⁸

Haisten, of course, was decided after *Dennis* and *Williams* but clearly reaffirmed the law on contributory negligence in a "crashworthiness"-based case. The plaintiff's contributory negligence in *Haisten* was operating the "tractor" (product alleged to be defective) on a slope. This operation "caused" the accident in question. Thus, contributory negligence was an appropriate defense for Kubota despite the fact that plaintiff's only allegation was one sounding in "crashworthiness" under the AEMLD (i.e. failure to incorporate an appropriate rollover protection system or "ROPS"). In addition, one may also properly surmise from *Haisten* that the product alleged to be defective is the whole product, not just one particular component or safety feature. Although *Haisten* seemingly resolved both issues, some advocates continue to try and limit the product to a component or feature, as opposed to the completed product as a whole.

The Product Must Be Considered as a "Whole"

Burleson v. RSR Group Florida, Inc.

Burleson v. RSR Group Florida, Inc. was decided September 21, 2007.³⁹ In *Burleson*, the plaintiffs alleged that the defendants "defectively designed and manufactured a firearm."⁴⁰ More specifically, the plaintiffs asserted a "crashworthiness" type claim that the firearm was defective in that it did not utilize a "passive

safety device that would have prevented it from discharging."⁴¹ In other words, although the plaintiffs alleged a specific defective condition in the gun/product (lack of passive safety device), they claimed that the gun/product was defective as a whole.

To cause the accident, the plaintiff's decedent "was hanging the revolver in its holster on a gun rack in his home when the revolver fell from the holster; it struck a desk and discharged. [Plaintiff's decedent] was struck in the abdomen by the discharged round and died as a result of the wound."⁴² The defendants argued, in part, that "[Plaintiff's decedent] was contributorily negligent because he failed to engage the manual safety and [because] he was putting the revolver away with a cartridge chambered directly in line with the hammer and the firing pin." In other words, the defendants alleged contributory negligence in both the improper use of the firearm by not properly engaging the safety, and also in causing the accident by putting the firearm away with a live round in the chamber. The defendants moved for summary judgment and it was granted by the trial court.

The Supreme Court of Alabama affirmed the trial court's ruling on contributory negligence in the decedent's failure to not engage the safety *and* in causing the accident by storing the product with a live round in the chamber.⁴³ The importance of the supreme court's holding is the court's affirmation that a plaintiff or decedent's contributory negligence in an AEMLD case is not just in his/her use of the components and/or safety features alleged to be defective, but in his/her use of the product as a whole. Simply stated, the product may not be parsed out into many different sub-parts for an AEMLD claim, but it must be considered as a total and complete product, including in its alleged defectiveness and in the plaintiff's use of it.

As a Practical Matter

A recent case is instructive in framing the current state of the debate. The plaintiffs filed suit under the AEMLD alleging that an automobile's brake interlock system was defective and that it was the cause of the plaintiffs' harm.⁴⁴ Prior to trial, the plaintiffs moved *in limine* to "exclude all testimony, argument, documents, or the like regarding accident causation or accident fault."⁴⁵ The District Court denied the plaintiffs' motion.

The plaintiffs attempted "to circumvent *Campbell* and its progeny by relying on [the *Dennis*] case for the proposition that 'contributory negligence relating to accident causation will not bar a recovery in an AEMLD action.'⁴⁶ However, the court explained that "*Dennis* is distinguishable from the Plaintiffs' claim" because "[i]n *Dennis*, the plaintiff was suing a helmet manufacturer because the defective helmet allowed greater harm to befall the plaintiff during a motorcycle accident..."⁴⁷ The District Court agreed that "[t]he Alabama Supreme Court [in *Dennis*] found that it was error for the trial judge to instruct the jury as to the plaintiff's contributory negligence in driving the motorcycle because the theory of the case was not that the motorcycle had caused the accident, but that the defective helmet was the cause of the plaintiff's damages during the accident."⁴⁸

In comparison, the district court held that in *Ray*, the plaintiffs alleged that the automobile "was defective and, unlike the helmet from *Dennis*, was the cause of the harm that the plaintiffs suffered."⁴⁹ The court further explained that the *Ray* defendant contended "that the plaintiff was negligent in the use of the

product-automobile and that a jury could find that the plaintiff used the automobile in a negligent way.⁵⁰ The court stated, “[t]o reiterate, contributory negligence bar[s] recovery to an [AEMLD] case if a proximate cause of the accident was the unreasonably dangerous condition of the product, [and] a contributing proximate cause of the accident was the plaintiff’s failure to use reasonable care [in using the product].”⁵¹

One of the significant aspects of the court’s order was the recognition of several key aspects concerning the application of contributory negligence under the AEMLD, including the fact that “[c]ontributory negligence also bar[s] recovery in an [AEMLD] case if a ... contributing proximate cause of the accident was the plaintiff’s failure to use reasonable care [in using the product].”⁵² In addition, the court noted that “[i]n Alabama, [t]he question of contributory negligence is normally one for the jury.”⁵³

So, the question is, “How can the misconceptions from Dennis play out in the real world when applying the teachings of Alabama courts?” For example, take our plaintiff-to-be, “Bubba,” who is the operator of his ex-brother-in-law’s new motorcycle.⁵⁴ Bubba is hanging out with some friends on Saturday morning, watching a re-run of the previous night’s X-Games on television. Showing currently is the “triple jump air 360 motorcycle stunt competition.”

Roddy Halpiper, an X-Games hall-of-famer, performs his famous quadruple air loop handstand with a double-stuff twirl. Bubba turns to his buddies and says, “That ain’t so tough. I could do that in my sleep.” Bubba’s best friend, Johnny, knowing Bubba cannot resist a good double-dog dare, replies, “You couldn’t even so much as do a handstand on the handle bars of the motorcycle if it was sitting still in your driveway.” Bubba makes the classic mistake of turning to his buddies and saying, “Watch this.”

Bubba then proceeds to attempt not only a handstand, but a double back flip off the handle bars of Johnny’s newly purchased motorcycle. At the one and one-half roll position, Bubba’s hand slips, presses the start button and sends the motorcycle speeding into the side of the family’s above-ground pool. After a rather spectacular crash, Bubba decides it was the motorcycle’s fault that he is hospitalized. In the ensuing product liability case, Bubba contends that the design of the motorcycle is defective because it did not have a start switch “guard,” and that defect proximately caused the motorcycle to crash into the side of the pool, thus injuring Bubba.

When faced with the manufacturer’s defense of contributory negligence, Bubba’s attorney responds that the plaintiff is not contending the entire motorcycle is defective—only the start switch. Moreover, the plaintiff contends that he was “using” the handlebars, not the start switch; therefore, he was not using the “product” alleged to be defective. The manufacturer did not sell just the handlebars or the start switch. The manufacturer sold an entire motorcycle. Based upon the Alabama Supreme Court’s analysis, it is obvious that Bubba was using the “motorcycle,” which was the “product” alleged to be defective, and that Bubba’s

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contributory negligence in that use was a proximate cause of the crash. The crash, of course, was a proximate cause of Bubba’s injuries. Thus, Bubba’s contributory negligence must be considered by the jury.

In another example, Bubba recovers from his quasi X-Games attempt and purchases a table saw at his local Tool Mart. Not having learned from his motorcycle experience, Bubba succeeds in severing his left ring finger and causing extensive property damage to his wedding ring, attempting to use the saw with one hand while talking on the phone with Johnny with the other. Of course, this made his lovely wife, Sallie Sue, none too happy.

In the ensuing product liability case against the table saw manufacturer, Bubba claims that the dado blade supplied as original equipment was defectively designed because it was designed with 12 teeth, instead of 14, per inch. In response to the saw manufacturer’s attempt to invoke contributory negligence, Bubba’s attorneys

argue that while he was operating the table saw, the product alleged to be defective is just the dado blade. The plaintiff contends that his actions in having caused the accident, injuries and damages [the aforementioned ring] should not be considered as contributory negligence, nor should the actual facts leading up to the accident be admissible at trial. When the trial court properly did not buy Bubba’s argument, his second attempt was to make the allegation that the table saw was not equipped with an appropriate guard to prevent fingers from ever being able to contact the saw blade. In this regard, Bubba argued that he could not possibly be contributorily negligent in the use of the “product” [the guard], which did not exist. The judge was similarly unimpressed with Bubba’s argument.

Finally, Bubba purchases his lovely wife, Sallie Sue, a new car. Sallie Sue is the envy of her co-workers until one day she is involved in a rollover crash. Unfortunately, Sallie Sue was not wearing her seat belt and was injured. In the ensuing product liability case against the automobile manufacturer, Bubba and Sallie Sue’s attorneys contend that the automobile was defective due to the “excessive” roof deformation sustained by the vehicle as it landed at the bottom of a ravine. The plaintiffs contend that Sallie Sue’s failure to wear the seat belt and her alleged contributory negligence in driving the vehicle into a ravine while attempting to apply her lipstick are irrelevant because the “product” was the “roof,” not the seat belts or the handling and stability of the vehicle. Bubba and Sallie Sue’s attorneys argue that Sallie Sue’s alleged contributory negligence in causing the crash did not pertain to her “use” of the “roof”; therefore, she was not contributorily negligent in “using” the “product.”

The defendant automobile manufacturer cited the supreme court’s decisions set forth above, including *Haisten v. Kubota Corp.* Faced with this clear and unequivocal precedent, Bubba and Sallie Sue’s attorneys argued that the *Haisten* decision was distinguishable from their case because they allege the vehicle was not equipped with an appropriate rollover protective structure, i.e. a stronger roof. The plaintiffs concede that under the

holding of the Alabama Supreme Court, Sallie Sue's contributory negligence would be an issue if Sallie Sue's vehicle was a convertible and did not have a roof. However, because Sallie Sue's automobile did have a roof, her attorneys argue that contributory negligence would not be applicable because she was not "using" the "roof." The trial court similarly rejected this argument.

Conclusion

A common-sense reading of the last 25 years of Alabama precedent, including that of the Alabama Supreme Court, indicates that the defense of contributory negligence in AEMLD cases is alive and very well. Moreover, as a basic and fundamental element to Alabama's "fault-based" concepts in product liability, contributory negligence continues to protect the notion that every party is responsible for his or her own actions in both designing and manufacturing an allegedly defective product and in using that product in a negligent manner, whether those actions contributed to cause the accident in question or enhance the injuries to the plaintiff. Finally, a product must be judged as a "whole" and should not be "parsed" out into multiple different parts and sub-parts simply as a means for negating the contributory negligence defense. These foundational principles are borne out by recent decisions of the Alabama Supreme Court. | AL

Endnotes

1. D. Alan Thomas and Nancy S. Akel, "Products Liability and Contributory Negligence in the Wake of *Williams v. Delta International Machinery Corp.*," 54 *Alabama Lawyer* 261 (1993).
2. 482 So. 2d 1176 (Ala. 1985).
3. Also referred to as the "second collision doctrine" or the "enhanced injury doctrine." *Edwards* at 1181.
4. 335 So. 2d 134 (Ala. 1976).
5. 335 So. 2d 128 (Ala. 1976).
6. *Atkins* at 137.
7. *Id.* at 143.
8. *Id.* at 137.
9. *Edwards* at 1181 (citations omitted).
10. *Id.* at 1181-82.
11. *Id.* at 1192 ("[T]he defendant manufacturer may offer, in addition to evidence to counter plaintiff's prima facie case, the two affirmative defenses recognized as available to manufacturers under the AEMLD—(1) assumption of the risk, and (2) contributory negligence—and, of course, the defense that the proximate cause of the injury or death was the wrongful conduct of the striking driver or other intervening agency.")
12. APJI 32.13—Defense—Contributory Negligence—Notes on Use (database updated December 2009) [emphasis added].
13. APJI 32.07—Design Defect—Elements—Notes on Use (database updated December 2009).
14. 585 So. 2d 1336 (Ala. 1991).
15. *Id.*
16. *Id.*
17. *Id.* at 1339.
18. *Id.*
19. *Id.*
20. 619 So. 2d 1330 (Ala. 1993).
21. *Id.*
22. *Id.*
23. *Id.* at 1332.
24. *Id.* [emphasis added].
25. *Id.*
26. *Id.*
27. 646 So. 2d 573 (Ala. 1994) [wherein on certified question from the U.S. Court of Appeals for the Eleventh Circuit, the Supreme Court of Alabama answered the following question in the affirmative:
"Does contributory negligence bar recovery in an [AEMLD] case if a proximate cause of the accident was the unreasonably dangerous condition of the product, but a contributing proximate cause of the accident was the plaintiff's failure to use reasonable care [in using the product?]"
28. 646 So. 2d 564 (Ala. 1994) [reaffirming *Williams*, *supra.* and further distinguishing the defenses of contributory negligence and product misuse].
29. 681 So. 2d 126 (Ala. 1996) [finding error in trial court's charge that "Contributory negligence as it relates to accident causation is not a legal defense to the plaintiff's cause of action based upon the [AEMLD]."]
30. 648 So. 2d 561 (Ala. 1994).
31. *Id.* at 562.
32. *Id.*
33. *Id.*
34. *Id.* at 565.
35. *Id.*
36. *Id.*
37. *Id.* at 562.
38. *Id.*
39. 981 So. 2d 1109 (Ala. 2007).
40. *Id.* at 1110.
41. *Id.* at 1112.
42. *Id.*
43. *Id.* at 1114.
44. *Ray v. Ford Motor Company*, 2011 WL 6182531 (M.D. Ala. 2011).
45. *Id.* at *1. [Although the plaintiffs contended in part that their claims fell under the "crashworthiness doctrine," the court dismissed this contention finding that the plaintiffs alleged the "part" in question "caused the accident," thus making the "crashworthiness doctrine" "irrelevant" to the plaintiffs' motion.]
46. *Id.* [brackets supplied].
47. *Id.*
48. *Id.*
49. *Id.* at *2.
50. *Id.* [emphasis added].
51. *Id.*; quoting *Campbell*, 646 So. 2d at 574. [brackets supplied in original].
52. *Id.* at *1; quoting *Campbell v. Cutler Hammer, Inc.*, 646 So. 2d 573, 574 (Ala. 1994) [brackets in original]; notation to see also *Hannah v. Gregg, Bland & Berry, Inc.*, 840 So. 2d 839, 860 (Ala. 2002) [citing *Campbell* for the rule that "a plaintiff's contributory negligence will preclude recovery in an AEMLD action."]
53. *Id.*; quoting *Hannah*, 804 So. 2d at 860.
54. The scenario in this example is purely hypothetical and is not based on any specific past, current or contemplated claims or litigation.