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OUR MISSION We preserve and protect the constitutional right to a trial by jury guaranteed by the Seventh Amendment to the United States Constitution by ensuring that every person or business harmed or injured by the misconduct or negligence of others can hold wrongdoers accountable in the one room where everyone is equal - The Courtroom

TIPS FROM THE TRENCHES

Admissibility of Patent Applications & Patents in Products Liability Litigation

By David G. Wirtes, Jr., Britton E. Utsey, and Evelyn S. Prickett¹

We recently were attempting to prove the existence of a safer alternative design in a products case when the manufacturer moved to exclude evidence of its own patent applications and patents that proved the existence of such safer alternative designs. The trial court granted the manufacturer's motion in limine and excluded our evidence. Our research for the motion to reconsider led us to ask: Can a plaintiff introduce evidence of patent documents to prove, among other things, notice, foreseeability, and feasibility of safer alternative designs?

There are only a few reported Alabama decisions concerning patents in products cases. However, courts in other jurisdictions have allowed both patent applications and patents to be admitted for these exact purposes. This article provides an overview of the law and guides Alabama practitioners on how to frame arguments based on analogous principles in existing Alabama case law.

I. Relevance

Patent applications and issued patents, when properly authenticated, can be probative of: (1) the existence and feasibility of safer alternative designs; (2) the defendant's notice of the defect(s) that make its product(s) unreasonably dangerous; (3) the magnitude of the risk of harm posed by the defect(s); (4) the foreseeability of the risk of harm; (5) the elements of causation and proximate cause; (6) the unreasonableness of the defendant's conduct; (7) the need for adequate warnings; (8) the defendant's "state of mind" and indifference to safety; (9) the product's failure to meet the reasonable expectations of ordinary consumers; (10) the justification for punitive damages and deterrence of similar future misconduct; (11) the rebuttal of the defendant's contentions about causation, notice, and contributory fault; and (12) the refutation of testimony from the defendant's expert witness(es).²

Patent applications and patents offer particularly probative evidence in products liability cases, as they are not speculative or informal, but rather sworn, formal disclosures submitted to the federal government by inventors seeking legal protection of their inventions. Under Title 35 of the United States Code, patent applications must include a specification, drawings, and an oath or declaration. 35 U.S.C. § 111. "[T]he inventor must adequately set forth and describe three items: (1) the invention (the description requirement); (2) the manner and process of making and using the invention (the enablement requirement); and (3) the best mode contemplated by the inventor of carrying out his invention (the best mode requirement)."³

Notice, foreseeability, and the feasibility of safer alternative designs are often the central issues in products liability actions and are critical to establishing liability. Thus, sworn disclosures to the federal government detailing a manufacturer's or designer's or distributor's own descriptions of foreseeable hazards and alternative designs can be highly probative of fault. This evidence is admissible because it is for the jury, as the trier of fact, to determine whether a product is defective, and the jury is entitled to consider all relevant and probative evidence in doing so. A patent application or patent can serve as direct evidence that a manufacturer was aware of a hazard, knew of a feasible solution, valued it enough to seek exclusive legal protection of it, but nevertheless failed to implement the design into the allegedly defective product at issue.

II. Procedure

It is incumbent upon plaintiff's counsel to obtain certified copies of the patent applications and patents from the United States Patent Office ("USPTO"). Typically, a Freedom of Information Act ("FOIA") request to the

USPTO requesting certified copies of "any and all documentation including any and all correspondence, filings, assignments and/or material of any type which is related to United States Patent No. _____ regarding the [product]," will result in production of the documents necessary for self-authentication and admissibility.

To make a FOIA request to the USPTO, the requester must submit a written request that sufficiently describes the records sought. The request should identify specific details such as dates, authors, recipients, and subjects, and must be submitted to the USPTO FOIA Officer, who will determine whether the records can be disclosed. The USPTO is required to respond promptly and will notify the requester of any applicable fee exemptions.⁴

Counsel should further authenticate the patent application and representations contained therein, and prove their relevance, by deposing the patent applicant, patent holder, or an expert witness who is familiar with the patent and competent to testify about how the information contained in the application and patent may be relevant to the issues under consideration.⁵

III. Admissibility

A. Alabama's state and federal courts, as elsewhere, hold patent applications and patents admissible in products liability cases.

Patent applications and patents are self-authenticating and admissible pursuant to Ala. R. Evid. 803(6) (records of regularly conducted activity), 803(8) (public records and reports), 801(d)(2) (admission by party opponent), 902(4) (self-authentication of certified copies of public records), 1005 (public records – proof by certified copy), Ala. R. Civ. P. 44(a) (proof of documents) and common law decisions from Alabama and elsewhere.

Case law from Alabama and other jurisdictions recognize to varying degrees that patents are admissible in products liability actions as evidence of manufacturer knowledge, foreseeability of harm, and feasibility of safer alternative designs. A representative sampling illustrates the importance of these holdings. Among the more helpful Alabama opinions are these: *Edwards v. Deere & Co.*, 2019 WL 6339901 (M.D. Ala. Nov. 26, 2019) (Judge Andrew Brasher denies tractor manufacturer's motion to exclude expert testimony regarding safer alternative designs, testimony based largely on patents, holding that it is up to the fact-finder to determine the weight to afford such evidence); *Mallory v. Hobbs Trailers*, 554 So.2d 966 (Ala. 1989) (patents may be admissible to prove foreseeability of the hazard and safer alternative

design when properly authenticated); *Veal v. Teleflex, Inc.*, 586 So.2d 188 (Ala. 1991) (plaintiffs in AEMLD wrongful death products liability case against boat manufacturer concerning use of propeller guards introduced evidence of several patents as proof of safer alternative designs and manufacturer's negligence/wantonness in failing to deploy such alternative designs); *Crawford v. ITW Food Equip. Grp., LLC*, 977 F.3d 1331 (11th Cir. 2020) (objections as to expert testimony about patents revealing notice and knowledge of harm and alternative designs go to weight, not admissibility); *Sands v. Kawasaki Motors Corp., U.S.A.*, 513 F. App'x 847, 850 (11th Cir. 2013) (district court's denial of motion in limine seeking to exclude plaintiff's expert witness' testimony about patented alternative seat back which expert described as reasonably safer alternative design affirmed); *Kirksey v. Schindler Elevator Corp.*, 2016 WL 7116223 (S.D. Ala. Dec. 6, 2016) (Judge William Steele denies manufacturer's motion in limine to exclude evidence of alternative design, finding that under the Fed. R. Evid. 403 balancing test, alternative escalator design evidence is relevant and probative on the issues of the manufacturer's knowledge and the feasibility of a safer alternative design).

Courts in other jurisdictions likewise admit patent evidence for these purposes. See, e.g., *Volz v. Coleman Co.*, 748 P. 2d 1187 (Ct. App. 1986) aff'd in part, rev'd in part, 748 P. 2d 1191 (Az. 1987) (patent evidence admissible to show defendants had long-standing knowledge of product's dangerous characteristics); *Ferayorni v. Hyundai Motor Co.*, 711 So.2d 1167 (Fla. App. 1998) (patents acknowledging the risks of neck-cutting by defective seatbelt design could be found relevant on failure-to-warn-adequately claims); *Cole v. Goodyear Tire & Rubber Co.*, 967 S.W. 2d 176, 181 (Mo. Ct. App. 1998) (at trial, plaintiffs introduced evidence of five patents for purposes of showing the dangers inherent in mounting tires and the desirability of placing warnings on tires before being sold); *Laney v. Coleman Co., Inc.*, 758 F.2d 1299 (8th Cir. 1985) (patent is evidence of foreseeability of harm and unreasonably dangerous design given that low-cost alternative existed); *Foster v. Caterpillar Tractor Co.*, 714 F.2d 654, 655 (6th Cir. 1984) (reverses trial court's directed verdict in favor of manufacturer because of erroneous exclusion of patent evidence demonstrating notice, knowledge, and safer alternative design); *Gen. Motors Corp. v. Harper*, 61 S.W. 3d 118, 125 (Tex. App. 2001) (patents relevant to vehicle restraint systems admissible "to show the state of knowledge in the industry as early as 1968"); *Udac v. Takata Corp.*, 214 P. 3d 1133 (Hawaii App. 2009) (patents for new seatbelt buckle designs that would have prevented design defects which caused

buckle to fail admissible as evidence of manufacturer's notice of defect); *Flock v. Scripto-Tokai Corp.*, 319 F.3d 231, 240 (5th Cir. 2003) (reversing summary judgment for cigarette lighter manufacturer when plaintiff presented evidence – including patents – providing safer alternative designs such that issue of defectiveness should have been decided by the jury); *Kuiper v. Goodyear Tire & Rubber Co.*, 673 P.2d 1208 (Mont. 1983) (locking device patented by Goodyear in the 1930's was relevant evidence of safer alternative design which would decrease the risk of explosive separation); *Moran v. Pittsburgh-Des Moines Steel Co.*, 183 F.2d 467, 472 (3rd Cir. 1950) (exclusion of six patents offered as proof of notice and knowledge of hazard was reversible error).

Patent *applications*, although not automatically admissible, *should* be admitted when properly authenticated and offered for appropriate, non-hearsay purposes. They are particularly probative where they show a manufacturer's early recognition of a hazard, internal development of safer designs, or awareness of the risk of harm prior to the product release.

A number of decisions have allowed the admission of patent *applications* or related records to demonstrate such knowledge and feasibility. *See, e.g., Caterpillar Tractor Co. v. Ford*, 406 So. 2d 854 (Ala. 1981) (patent application for ROPS admissible to show notice of rollover hazard and feasible safer design); *Johnson v. Colt Indus. Operating Corp.*, 792 F.2d 1530, 1532–33 (10th Cir. 1986) (patent applications supported manufacturer knowledge); *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1336 (8th Cir. 1985) (application submitted by engineer supported inference of pre-issuance knowledge); *Narvaez v. Wadsworth*, 165 A.D.3d 407, 408 (N.Y. App. Div. 2018) (authenticated patent application admitted to show awareness of defect and feasible alternatives); *Church & Dwight Co. v. Huey*, 961 S.W.2d 560 (Tex. App. 1997) (application admissible to prove knowledge of defect); *Hodges v. Mack Trucks, Inc.*, 474 F.3d 188, 196 (5th Cir. 2006) (application admissible if supported by expert analysis).

B. Patent applications and patents are deemed admissible under settled exceptions to the hearsay rule, Ala. R. Evid. 803(6), 803(8), 801(d)(2), and Ala. R. Civ. Proc. 44.

Patents themselves fall under the public records exception to the hearsay rule. (Ala. R. Evid. 803(8). Compare, Fed. R. Evid. 803(8). *See, e.g., Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 953 F.2d 1360, 1372 (Fed. Cir. 1991) (rejecting hearsay objection under Rule 803(8) and

holding that “[a]t the time the certificate of correction was offered into evidence, it was a public document ... and of unquestionable relevance to the instant suit”); *Hendricks v. Ford Motor Co.*, No. 4:12CV71, 2012 WL 7958760, at *1 (E.D. Tex. Oct. 15, 2012) (recognizing that patents fall under the public records exception but excluding them where plaintiff failed to offer expert testimony verifying feasibility, safety, or industry workability of the patented designs and failed to establish a hearsay exception for statements within the patents); *Ramirez v. ITW Food Equip. Grp. LLC*, 2018 WL 5816093, at *8 (C.D. Cal. July 3, 2018) (patent evidence admissible under the public records exception and relevant to show technical feasibility and manufacturer knowledge, especially when supported by expert testimony); *R.B. v. Ford Motor Co.*, 2007 WL 2774158, at *2 (N.D. Fla. Sept. 24, 2007) (denying motion to exclude patents; holding patents admissible under the public records exception and relevant for impeachment purposes, and rejecting hearsay and authentication objections because patents are judicially noticeable public records); *Laney v. Coleman Co.*, 758 F.2d 1299, 1305 (8th Cir. 1985) (noting that the trial court admitted “statements in a patent that was issued in 1871” under Rule 803(8)(C), but declining to reach the admissibility issue on appeal); *cf. GMC v. Harper*, 61 S.W.3d 118, 126 (Tex. App. 2001) (holding that patents were admissible under the public records exception but noting that “statements within some of the patents not belonging to the corporation constituted inadmissible hearsay”).

Furthermore, patents, as official government-issued documents, qualify under the public records hearsay exception (Ala. R. Evid. 803(8); Fed. R. Evid. 803(8)). *See, e.g., Charles W. Gamble, et al. McElroy's Alabama Evidence*, §266.01(1) (explaining that certified public records are generally admissible under Alabama's public records hearsay exception, which rests on principles of reliability and necessity, and includes official records from local, state, federal, and foreign agencies regardless of format). *See In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation*, 545 F.Supp.3d 922, 1033 n. 22 (D. Kan. 2021) (holding that “even if the patents were hearsay, they would be subject to the public records exception to the hearsay rule” as records “of a public office setting out its activities”); *see also Hay & Forage Indus. v. New Holland N. Am., Inc.*, 25 F. Supp. 2d 1170, 1180 n.2 (D. Kan. 1998) (citing Rule 803(8)(B) as “providing hearsay exception for records of public agencies setting forth matters observed pursuant to duty imposed by law as to which there is a duty to report”).

Because issued patents are certified government

documents, they are self-authenticating under Ala. R. Evid. 902(4) and admissible without extrinsic evidence of authenticity. *See also* Ala. R. Evid. 1005 (certified copies of public records may be used to prove their contents).

As explained in *Mallory By & Through Hocutt v. Hobbs Trailers*, 554 So. 2d 966, 970 (Ala. 1989), Ala. R. Civ. P. 44(a) (1) sets out the standard for establishing the predicate for authenticity upon which to base admissibility of documents such as patents. A patent is authenticated if it is "evidenced by an official publication thereof or by a copy attested by a person purporting to be the officer having the legal custody of the record, or by the officer's deputy." *Id.* *See also* 28 U.S.C. § 1744 ("Copies of letters, patents, or of any records, books, papers, or drawings belonging to the United States Patent and Trademark Office and relating to patents, authenticated under the seal of the United States Patent Office... shall be admissible in evidence with the same effect as the originals.").

"Generally, when an apparent copy of a public record meets the requirements of such a code section no extrinsic evidence of authenticity is required. Fed. R. Evid. 902(4)." *In re Meeker*, 2011 WL 2650686, at *3 (Bankr. S.D. Ala. July 6, 2011), report and recommendation adopted, No. 10-04927-MAM-13, 2011 WL 7178926 (Bankr. S.D. Ala. July 6, 2011). *See also* *Ramirez, supra*, 2018 WL 5816093, at *8 ("[p]atents are matters of public record, and Courts routinely take notice of patents ... as their authenticity is 'capable of accurate and ready determination by resort to widely used legal online research services.'").

Patent *applications* do not enjoy the same automatic admissibility status as *patents*. However, through creative advocacy, counsel *should* be able to have them admitted as business records under Rule 803(6). *See, e.g., Grail Semiconductor, Inc. v. Mitsubishi Elec.*, 225 Cal. App. 4th 786, 800-01(2014) (admitting patent application file where company officer testified to regular recordkeeping practices); *Game Sys., Inc. v. Forbes Hutton Leasing, Inc.*, No. 02-09-00051-CV, 2011 WL 2119672, at 12-13 (Tex. App. May 26, 2011) (admitting patent assignment based on business-records affidavit that established the document's execution and maintenance in the regular course of business). Be aware that while patent-related documents, such as invention disclosure forms, prosecution histories, and correspondence with the USPTO, *should*, in theory, fall within the business records exception under Rule 803(6), courts sometimes exclude them due to stringent foundational requirements.⁶

Characterizing patent disclosures as party-opponent admissions under Rule 801(d)(2) may avoid the foundational challenges that confront the admissibility

of business records. Alabama Rule of Evidence 801(d) (2), like its federal counterpart⁷, provides that a statement offered against an opposing party is not hearsay if it was made by the party, adopted by the party, or made by someone authorized to speak on the party's behalf, including agents or employees acting within the scope of their relationship. In the context of patent filings, this rule allows a plaintiff to introduce statements made by company inventors, engineers, or attorneys when those individuals submitted the *application* on the defendant's behalf, particularly where the defendant is the patent assignee or designated applicant. The relevant inquiry is not merely who signed the application, but whether the statements were made by someone acting on behalf of the party and within the scope of their authorized role in the patenting process.⁸ If the foundational requirement is met, courts have treated such statements as direct admissions, leaving their evidentiary weight to the jury.⁹ If the filing includes descriptions of a product's deficiencies or improvements, those statements are not hearsay; they are treated as the defendant's own words. Courts have recognized this framework and have left the significance of such admissions to the jury.¹⁰

C. Once Plaintiff in a products liability action presents substantial evidence of a safer alternative design (through, e.g., patent applications, patents, expert testimony, and the like), it is for the jury to determine whether the product at issue is defective and unreasonably dangerous.

Under Rules 401 and 402 of the Alabama and Federal Rules of Evidence, all relevant evidence is admissible if it tends to make a fact more or less probable and is consequential in the action. Patent evidence inherently meets this criterion, serving as concrete proof of notice, knowledge, foreseeability, and feasibility of safer alternative designs.

Alabama courts have admitted patent evidence in products liability cases and have consistently recognized that issues related to the reasonableness and feasibility of alternative designs are jury questions.¹¹ For instance, a representative products liability case unfolded before former United States District Judge for the Middle District of Alabama, Andrew L. Brasher, in *Edwards v. Deere & Co., Inc.*, Case No. 1:17-cv-587-ALB.¹² There, the court denied a motion to exclude expert testimony heavily reliant on patent evidence, emphasizing the jury's role in assessing the weight of expert opinions on safer alternative designs and foreseeability. Specifically, Judge Brasher held

"[plaintiff's expert witnesses'] opinions are admissible. The fact-finder at trial will decide the weight that their opinions should be given."

Id., at Ms. *6. Further,

Deere also moves to exclude [plaintiff's expert witnesses'] opinions on whether alternative designs would have prevented Blackmon's death. Deere asserts that their designs were not feasible at the time the tractor was manufactured and that they have not adequately tested their designs. In a case like this one, a plaintiff must show that a safer, practical, alternative design was available when the product was manufactured. ... **Under Alabama law, it is generally up to the fact-finder to decide whether an alternative design is reasonable.**...

Id. (emphasis added). Ultimately, Judge Brasher concluded that plaintiff's products liability claims, including a claim of wantonness by this manufacturer, should be decided by the jury.

Additionally, under Alabama law, a plaintiff bears the burden to provide substantial evidence demonstrating that the manufacturer failed to exercise due care in the design, testing, or manufacture of its products. For instance, in *McMahon v. Yamaha Motor Corp., U.S.A.*, 95 So.3d 769 (Ala. 2012), the Alabama Supreme Court emphasized that whether a manufacturer breached this duty of due care is a question properly reserved for the jury once the plaintiff meets this evidentiary burden.¹³

Moreover, Alabama courts have consistently allowed wantonness claims to reach a jury where evidence indicates manufacturers were aware of a safety problem yet failed to address it. Notably, *Ray v. Ford Motor Co.*, 792 F.Supp.2d 1274 (M.D. Ala. 2011) reinforces this principle, presenting it as a jury question when manufacturers knowingly fail to correct known safety issues. Similarly, in *Caterpillar, Inc. v. Hightower*, 605 So.2d 1193, 1196 (Ala. 1992), overruled on other grounds by *Life Ins. Co. of Georgia v. Smith*, 719 So.2d 797 (Ala. 1998), the Court found that the record provided "clear and convincing" evidence from which a jury could have concluded that, although *Caterpillar* knew of the substantial likelihood of injuries from intrusions into the operator compartment, it refused to take preventative action. This jurisprudence aligns well with the use of patent evidence to prove a manufacturer's prior recognition and documentation of safer, practical alternatives, but failure to implement those designs.

In *Koehring Cranes & Excavators, Inc. v. Livingston*, 597 So.2d 1354, 1355-56 (Ala. 1992), the Alabama Supreme Court explicitly recognized the jury's pivotal role in determining

whether a product is unreasonably dangerous due to design defects. The Court reaffirmed that "the question of whether a product is unreasonably dangerous is for the trier of fact to decide," and emphasized the importance of applying the hierarchy of engineering design principles. The Court explained:

Of course, the question of whether a product is unreasonably dangerous is for the trier of fact to decide. *Casrell v. Altec Indus., Inc.*, 335 So.2d 128 (Ala. 1976) at 133. *Livingston's* primary argument against *Koehring* was that it failed to follow basic design principles in designing the gantry. All of the experts who testified in this case agreed that certain basic design principles are applied to the design and manufacture of products intended to be used by humans. The experts agreed that any reasonably competent design engineer follows these design principles:

He considers the use of the product and the environment in which it will be used and identifies potential, reasonably foreseeable, safety hazards that might arise while a person uses the product. The design engineer should design identified potential hazards out of the product, if it is possible to do so without defeating the purpose of the product, or if to do so would not make the cost of the product exorbitant. If the hazards cannot be eliminated by design, the design engineer should next consider appropriate guards. If residual danger can be guarded against without adversely affecting the product's intended use or marketability, then good design engineering requires the installation of guards. Finally, if a safety hazard cannot be eliminated by design or guards, then a warning must be provided to the user.

Id.

The Court further noted that the plaintiff's expert "testified that there were defects in this crane that would have been eliminated by generally accepted design principles." Specifically, the expert stated that "the design that is incorporated in this product is an entrapment to the operator and it would be very dangerous for the operator to use this particular configuration." *Id.* at 1356. This testimony affirmed that the hazard was not incidental but stemmed from fundamental design flaws, a theme echoed when manufacturers pursue patents for safer alternative designs yet fail to implement them in practice. "It is well settled that any challenge to the facts upon which an expert bases his opinion goes to the weight, rather than the admissibility, of the evidence." *Baker*

v. Edgar, 472 So. 2d 968, 970 (Ala. 1985) (citing *Dyer v. Traeger*, 357 So. 2d 328, 330 (Ala. 1978)).

Just as the Koehring jury was entitled to consider expert testimony about design defects, juries should likewise consider patent documents that evidence knowledge of the danger and the availability of feasible alternative designs.

D. Do not be stymied by the typical product manufacturer's defense that plaintiff's proposed safer alternative design would burden the manufacturer "to revolutionize the industry."

Manufacturing defendants typically contend that the plaintiff's evidence of proposed safer alternative designs should be rejected by the court in pre-trial motions because to accept the plaintiff's contentions would require the manufacturer to revolutionize their industry with new products. Typically cited is *Elliott v. Brunswick Corp.*, 903 F.2d 1505 (11th Cir. 1990), where that court precluded the use of evidence of alternative propeller guard designs upon holding "that courts cannot burden companies with an immediate burden to revolutionize their industry." *Id.* at 1508.

Note, however, that in subsequent cases, courts have found that the alternative design rejected in *Elliott* warranted submission of an AEMLD claim to the jury. In *Reed v. Tracker Marine, LLC*, 574 F. Supp. 3d 1065 (N.D. Ala. 2021), the court held:

Considering these materials, as it must, in the light most favorable to the Plaintiff, the Court finds that a question of fact remains as to whether propeller guards are practical in this case. Both *Beech* and *Elliott* were decided in 1991, and both decisions acknowledged the possibility for evolving standards to change what is practical. *Beech*, 584 So.2d at 450 ("We also note that, according to present industry standards, the evidence does not conclusively establish that such propeller guards are 'practical.' " (emphasis added)); *Elliott*, 903 F.2d at 1509 ("We do not mean to suggest, by our holding today, that the propeller industry may never design a feasible propeller guard..."). Given that possibility, this Court cannot affirmatively say that no propeller guard existed that would be a safer, practical, alternative design. Because a question of fact remains for the jury to decide, Mercury Marine's motion for summary judgment on Plaintiff's AEMLD claim is due to be denied.

Id., at 1084.

Again, in Alabama, "the reasonableness of an

alternative design is generally a question of fact for the jury." *Hosford*, 223 So.3d at 205; *Edwards v. Deere & Co.*, *supra*.

More fundamentally, industry customs have never been the ceiling for a manufacturer's duty of care. As Judge Learned Hand famously wrote in *The T.J. Hooper*, industry custom is not a definitive measure of reasonable care: "There are precautions so imperative that even their universal disregard will not excuse their omission." 60 F.2d 737, 740 (2d Cir. 1932). In other words, a manufacturer cannot escape liability simply because others in the industry have not yet adopted a safer design. Reasonable care may demand innovation before widespread practice catches up, and whether a safer design is feasible or necessary is a question for the jury, not the inertia of industry norms.

Moreover, excluding Plaintiff's safer alternative design theory due to conflicting expert opinions impermissibly encroaches on the jury's role as factfinder and constitutes an improper use of summary judgment to resolve factual disputes. The United States Supreme Court explicitly recognizes that expert witnesses often differ on issues such as the impact of testing relative to product design and safety. Because expert witnesses may reasonably disagree, the overarching rule is that such conflicting evidence is to be admitted, not excluded, and then tested by thorough cross-examination at trial. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595-96 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Virtually all lower courts agree with these principles. *See, e.g., United States v. 14.38 Acres of Land, more or less situated in Leflore County, MS*, 80 F.3d 1074, 1077 (5th Cir. 1996) (as a general rule, questions relating to the basis and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration); *Globetti v. Sandoz Pharm. Corp.*, 111 F. Supp. 2d 1174, 1177 (N.D. Ala. 2000) (it is the role of the fact finder, not the judge, to decide whether an expert's opinion is correct or worthy of credence); *Whatley v. Merit Distribution Services*, 166 F. Supp. 2d 1350, 1354-55 (S.D. Ala. 2001) ("the exclusion of expert testimony is the exception, not the rule. ..."); *Zoch v. Daimler*, 2018 WL 4610569 at Ms. *5 (E.D. Tex., Sept. 25, 2018) ("If Defendants believe the [] testing and explanation are inadequate, they should demonstrate so on cross-examination of [Plaintiff's expert]"); *C.C. v. Suzuki Mfg., Am. Corp.*, 2018 WL 3861354 at Ms. *6 (E.D. Mo., Aug. 14, 2018) ("defendants' concerns regarding [the expert witness's] lack of testing and his failure to consider the speed and path of the ATV, among other factors, in reaching his

opinion are more appropriate for cross-examination than exclusion.”).

IV. Conclusion

Introducing evidence of patent applications and patents can be a powerful strategy in products liability litigation. When properly obtained, authenticated, and presented, patent evidence can prove critical elements of notice, knowledge, foreseeability, alternative designs, etc. Alabama's courts, consistent with others across the country, have recognized the admissibility and probative value of such evidence. Juries, not judges, must decide what weight to give them. When properly used, patent evidence transforms abstract theories of liability into concrete proof of what was known, what was possible, and what was overlooked or ignored.

(Endnotes)

- 1 David G. Wirtes, Jr. is a member of Cunningham Bounds, LLC in Mobile, Alabama. Britton E. Utsey and Evelyn S. Prickett, summer associates at Cunningham Bounds and students at the University of Alabama School of Law, co-authored this article with Mr. Wirtes.
- 2 See, David G. Wirtes, Jr. & George M. Dent III, Suggested Strategies for Admission of Other Similar Incident Evidence, 30 ALA. ASS'N FOR JUST. J. 51 (2010) (listing parallel reasons why other incidents evidence is relevant in products cases).
- 3 3 Chisum on Patents § 7.01 (2025).
- 4 See 5 U.S.C. § 552(a)(3); See also 69 C.J.S. Patents § 237 (2025) (outlining detailed USPTO-specific FOIA request procedures including required contents, processing methods, fees, and appeals).
- 5 29A Am. Jur. 2d Evidence § 1275. § 44:26. Authentication of U.S. patents, file histories, and other PTO papers, 7 Annotated Patent Digest § 44:26. Section 1275 of American Jurisprudence explains that while public records like patents carry a general presumption of trustworthiness, authentication typically still requires showing the document came from proper custody or was certified by a custodian or other qualified individual. Likewise, § 44:26 of the Annotated Patent Digest notes that U.S. patents, file histories, and other PTO documents, though often admissible as public records, may require supporting testimony or certification to establish relevance and authenticity, particularly when offered for a purpose beyond their face content.
- 6 See, e.g., Peat, Inc. v. Vanguard Research, Inc., 378 F.3d 1154 (11th Cir. 2004) (reversing admission of a compiled exhibit including a patent and technical notes created during litigation); Noble v. Alabama Dep't of Envtl. Mgmt., 872 F.2d 361 (11th Cir. 1989) (excluding summary documents created for trial); Meeker v. Sirote & Permutt, P.C., 2011 WL 2650686 (Bankr. S.D. Ala. 2011) (striking an uncertified patent application not shown to fall within any hearsay exception).
- 7 Fed. R. Evid. 801.
- 8 See Ala. R. Evid. 801(d)(2)(C)-(D) (statements are not hearsay if made by a person “authorized by the party to make a statement concerning the subject” or “by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship”).
- 9 See Dawson v. Dawson, 710 F.3d 1347, 1356–57 (Fed. Cir. 2013) (holding that a party who “copied” language from another patent into its own filing adopted that statement and thus it qualified as a party-opponent admission under Rule 801(d)(2)(B)).
- 10 See, e.g., C R Bard Inc. v. Angiodynamics, Inc., 979 F.3d 1372 (Fed. Cir. 2020) (“statements regarding the capabilities of its own product constituted substantial evidence,” and “the weight assigned to that evidence [was] a question for the jury”).
- 11 Ultimately, the Supreme Court, in a split decision, affirmed the circuit court’s entry of JML for Yamaha on plaintiff’s AEMLD and negligence claims, apparently because the jury could have found plaintiff contributorily negligent, but reversed the JML as to plaintiff’s wantonness claim because “there was substantial evidence introduced at trial from which the jury could have concluded that the Yamaha defendants had specific knowledge of the risk of arm and leg injuries posed by rollover in a Yamaha Rhino and that they wantonly failed to address that risk in a timely manner.” *Id.*, 95 So.3d at 773. The Supreme Court subsequently affirmed a judgment entered on a jury’s verdict in favor of the plaintiff following the trial upon remand on the remaining wantonness claim. See *Yamaha Motor Corp. v. McMahon*, 183 So.3d 145 (Ala. 2015).
- 12 Judge Brasher is now serving as a Judge on the United States Court of Appeals for the Eleventh Circuit.
- 13 See, e.g., *Hosford v. BRK Brands Inc.*, 223 So. 3d at 205. Cf. *Casrell v. Altec*

Indus., Inc., 335 So. 2d 128, 133 (Ala. 1976) (whether a product is “unreasonably dangerous” is a question for the jury); *Gen. Motors Corp. v. Edwards*, 482 So. 2d 1176, 1183 (Ala. 1985) (when sufficient evidence is produced showing defectiveness and proximate cause, it is for the jury to decide whether a defect in fact existed and whether that defect proximately caused plaintiff’s injuries); *Koehring Cranes & Excavators, Inc. v. Livingston*, supra, 597 So. 2d at 1355 (question of whether a product is unreasonably dangerous is for the trier of fact to decide); *Yamaha Motor Co. v. Thornton*, supra, 579 So. 2d at 621 (question of whether a product is unreasonably dangerous is for the trier of fact to decide); *Kelly v. M. Trigg Enters., Inc.*, 605 So. 2d 1185 (Ala. 1992) (question of whether a product is unreasonably dangerous is for the trier of fact to decide); *Entrekin v. Atl. Richfield Co.*, 519 So. 2d 447, 449 (Ala. 1987) (question of whether a product is unreasonably dangerous is for the trier of fact to decide); *Spain v. Brown & Williamson Tobacco Corp.*, 872 So. 2d 101, 130 (Ala. 2003) (Johnstone, J., concurring in part) (question of whether a product is unreasonably dangerous is for the trier of fact to decide); *Joe Sartain Ford, Inc. v. Am. Indem. Co.*, 399 So. 2d 281, 284 (Ala. 1981), overruled on other grounds by *Lloyd Wood Coal Co. v. Clark Equip. Co.*, 543 So. 2d 671 (Ala. 1989) (whether a product is defective is ordinarily a question for the jury); *Schwartz v. Volvo N. Am. Corp.*, 554 So. 2d 927, 932 (Ala. 1989) (whether a defect exists is a jury question); *Horn v. Fadal Machining Centers, LLC*, 972 So. 2d 63, 70 (Ala. 2007) (whether a product is defective is ordinarily a question for the jury); *Williams v. BIC Corp.*, 771 So. 2d 441, 446 (Ala. 2000) (a motion for judgment as a matter of law is properly denied in a products case where there exists any conflict in the evidence for consideration by the jury); *Roberts v. NASCO Equip. Co.*, 986 So. 2d 379, 386 (Ala. 2007) (mechanical engineer’s affidavit clearly established a question of fact for the jury to decide as to defectiveness of the product at issue); *Beloit Corp. v. Harrell*, 339 So. 2d 992 (Ala. 1976) (whether someone misused an allegedly defective product is ordinarily a factual issue for the jury); *Tillman v. R.J. Reynolds Tobacco Co.*, 871 So. 2d 28, 32 (Ala. 2003) (a jury will normally determine the dangerousness of a product) See also *Reed v. Tracker Marine, LLC*, 574 F. Supp. 3d 1065, 1083 (N.D. Ala. 2021) (question of whether a product is unreasonably dangerous is for the trier of fact to decide); *Rudd v. Gen. Motors Corp.*, 127 F. Supp. 2d 1330, 1333 (M.D. Ala. 2001) (question of whether a product is unreasonably dangerous is for the trier of fact to decide); *Bowden ex rel. Bowden v. Wal-Mart Stores, Inc.*, 124 F. Supp. 2d 1228, 1234 (M.D. Ala. 2000) (question of whether a product is unreasonably dangerous is for the trier of fact to decide); *Rodgers v. Shaver Mfg. Co.*, 993 F. Supp. 1428, 1433 (M.D. Ala. 1998) (question of whether a product is unreasonably dangerous is for the trier of fact to decide); *Dickerson v. Cushman, Inc.*, 909 F. Supp. 1467, 1473 (M.D. Ala. 1995) (question of whether a product is unreasonably dangerous is for the trier of fact to decide); *Gougler v. Sirius Prods., Inc.*, No. CV 03-0583-WS-M, 2005 WL 8158578 (S.D. Ala. Mar. 18, 2005), adhered to on reconsideration, 370 F. Supp. 2d 1185 (S.D. Ala. 2005) (question of whether a product is unreasonably dangerous is for the trier of fact to decide); *Robinson v. Ford Motor Co.*, 967 F. Supp. 482, 485 (M.D. Ala. 1997), aff’d, 144 F.3d 56 (11th Cir. 1998) (question of whether a product is unreasonably dangerous is for the trier of fact to decide).



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Dave works behind the scenes on strategic planning, legal issues, and appeals. Dave's efforts over the past forty years have helped protect working men and women in Alabama and throughout the country in ways most will never know: he has won many battles against unfair “tort reform” laws such as indiscriminate caps on recoverable damages, special immunity statutes, and other efforts intended to deprive people of their constitutional rights to

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