UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

TANYA WILDEN, LEGAL GUARDIAN OF JANICE WILDEN, et al Plaintiffs	)( )( )( )(	
v.	)(	CIVIL ACTION NO.: 3:13CV00784-H
LAURY TRANSPORTATION, LLC, et al Defendants	)( )(	

PLAINTIFFS' RESPONSE TO GREAT DANE'S ADDITIONAL MOTIONS IN LIMINE

Plaintiffs, **TANYA WILDEN**, et al, files the following responses and authorities to Defendant, **GREAT DANE LIMITED PARTNERSHIP**'s (hereinafter "Great Dane") Additional Motions in Limine.

1. Alternative designs do not have to be "in existence" at the time the trailer in question was manufactured.

While Kentucky product liability law requires proof of a safer alternative design that was practical, or feasible, under the circumstances, an alternative design does not have to be "in existence"[1] at the time the trailer in question was manufactured.[2] "Practical" and "feasible" are interchangeable terms. Compare *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35, 41 ("practical under the circumstances") with 136 S.W.3d at 42 ("feasible"). "Feasibility", by definition, means "capable of being done or carried out."[3] If a safer alternative design (whether "in existence or not") was capable of being done or carried out at the relevant time then it is "practical" and "feasible". This does not equate to being "in existence".[4]

[1] Defendant's argument is silent as to what "in existence" would mean. Does it mean drawn? patented? built?
[2] "Practical" and "feasible" are interchangeable terms. Compare *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35, 41 ("practical under the circumstances") with 136 S.W.3d at 42 ("feasible").
[3] "Feasibility", by definition, means "capable of being done or carried out." See, e.g. http://www.merriam-webster.com/dictionary/feasible.
[4] None of the cases cited by defendant, however, stands for the proposition that a safer alternative design had to be in existence at the time the trailer in question was manufactured. *Brock v. Caterpillar, Inc.*, 94 F.3d 220 (6th Cir. 1996) excluded a subsequent design under a **FED. R. EVID. 403** analysis because it was a "substantially different" model. *McCoy v. GMC*, 47 F. Supp. 838 (E.D. Ky. 1998) involved the grant of a summary judgment when a plaintiff's sole expert could not identify why an air bag failed to deploy.

First, a plaintiff in a product liability case is not required to have built a prototype as of the time of trial to meets its evidentiary burden. See *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 432-33 ("The plaintiff is not required to produce a prototype design in order to make out a prima facie case.") See also **RESTATEMENT (THIRD) OF TORTS SEC. 2, CMT. F (1998).** If a prototype is not required then there can be no requirement that a safer alternative design be in existence. **Second**, post-manufacture evidence has been found relevant on the issue of feasibility. In *Hinkle v. Ford Motor Co.*, 2012 U.S. Dist. LEXIS 65568 (E.D. Ky. 2012), the court considered evidence that post-dated the manufacture of the product in question, noting "[o]ther courts within the Sixth Circuit have found that information relating not only to feasibility of an alternative design, but also information regarding the effectiveness of an alternative design and the defendant's knowledge of this technology is relevant in design defect product liability claims." The *Hinkle* court went on, finding,

> "But even if the articles *do not predate the manufacture* of the subject vehicle, the Court is not willing at this time to adopt Ford's argument that these marketing articles are not relevant regarding what Ford "allegedly knew, *and what was allegedly feasible*, when designing [plaintiff's vehicle]."

Hinkle v. Ford Motor Co. at [23]. (emphasis supplied). Likewise, "[d]iscovery of alternative design *information relating to subsequent designs*, such as the third generation of GM U-Van, is likewise relevant under Rule 26(b)." *Brownlow v. GMC*, 2007 U.S. Dist. LEXIS 67973 at [20] (W.D. Ky. 2007) (emphasis supplied).

Plaintiffs recognize that any alternative design that they propose is to be "practical" or "feasible" as of the date of the trailer's manufacture. Contrary to defendant's assertion, plaintiffs' alternative designs do not contain post-sale design advancements; rather, they are designs that, by the application of reasonably and then-existing technology and knowledge, could have been implemented by or before 1998. This has been established by, *inter alia*, plaintiffs' experts. See e.g. *Ponder Depo. at p. 175-76* (the concepts for the alternative design existed in 1998; "the technology and side underride protection certainly [existed in 1998].")

2. The occurrence of other side underride crashes is relevant.

3. Plaintiffs agree, in part, that there should be some limitation regarding other lawsuits; however, defendant's request is not briefed and is overly broad on its face.

Defendant groups these two items together for briefing purposes despite the fact they each raise separate and very different issues.

Other Side Underride Crashes

Whether Defendant is asking the court to exclude references to individual, specific side underride crashes, or to statistical compilations regarding side underride crashes, both are relevant to the degree and unreasonableness of the dangers of the product: a box van trailer without any side underride protection. Plaintiffs recognize that references to individual crashes may require a showing of similarity; however, that showing does not require an exactitude. *Surles v. Greyhound Lines, Inc.*, 474 F.3d 288, 297 (6th Cir. 2007) holding that "[i]ncidents which "occurred under similar circumstances or share the same cause" can properly be deemed substantially similar." These other cases involve circumstances and causes that are similar to the ones here: (1) impact (2) to the side of a trailer (3) that has no side underride protection and (4) caused death or injury (5) due to passenger compartment intrusion.

Certain of those individual crashes were investigated and evaluated by some of plaintiffs' experts and provides a portion of the basis for their opinions. For example, plaintiffs' experts have investigated side underride crashes involving vehicles from compact cars through Suburbans at varying speeds and angles. This involved testing and evaluation of how the proposed alternative designs would react in those wide range of crashes and evaluate those factors into the overall effectiveness of the proposed alternative design.

Likewise, the compilation of side underride crashes in a statistical form (e.g., how many deaths per year, how many severe injuries, etc.) provide evidentiary support that the product is unreasonably dangerous. The happenstance that one or more of defendant's witnesses concede that there is a "potential danger" from a side underride crash undervalues the danger

shown from hundreds of Americans being killed annually from these crashes and the thousands more catastrophically injured. This evidence also addresses plaintiffs' proof that the risks of side underride crashes outweigh any perceived benefit of a trailer without this protection.[5]

Other Lawsuits

Plaintiffs agree that this case should not degenerate into a re-trial of other side underride cases. On the other hand, some mention or reference to other lawsuits may be inevitable. Many of the experts in this case have testified in other similar cases. One can anticipate that one or more of these experts could be cross-examined or impeached from his testimony in a prior case. Second, Great Dane wants to offer a "test" performed specifically for use by lawyers in another case.[6] If that test is allowed into evidence, there will be cross-examination that will undoubtedly inject that prior case. Third, one of Great Dane's own counsel in this case (Mr. Glen Darbyshire) has been involved in underride issues for many years. His name appears in depositions and documents produced in this case. It is inevitable that this will be mentioned. Finally, plaintiffs intend to offer the testimony of witnesses (one deceased) from a prior lawsuit. Again, it is almost inevitable that the other case will be mentioned.

Again, plaintiffs do not wish to re-visit other lawsuits in their entirety; however, some reference is unavoidable and a wholesale grant of a limine would be overly broad.

4. Plaintiffs agree that all parties should comply with Rule 26 and any orders related thereto.

These issues raised here were raised in the parties' respective Rule 702 motions. As such, Plaintiffs agree that all parties should comply with the Court's rulings thereon.

[5] The number and extent of fatalities and injuries is also relevant to the cost/economic feasibility analysis.
[6] For clarity, Plaintiffs have objected to the use of that test in this case.

5. These witnesses are not "late-disclosed".

Plaintiffs have designated multiple witnesses.[7] Great Dane's asserts that *some* of the witnesses *disclosed within the court-ordered time* are "late-disclosed". The Court's discovery order provided that discovery remained open until December 31, 2015. These witnesses were all disclosed prior to that (December 15, 2015). As a matter of course, compliance with the time frame set by a court cannot be "late-disclosed".

Defendant's reliance on *Luty v. City of Saginaw*, 2007 U.S. Dist. LEXIS 38190 (E.D. Mich. 2007) is misplaced. There, the "late-disclosed" witnesses were disclosed approximately 1 month before trial and 10 months *after* the court's discovery deadline. Great Dane's other authority is to the same effect. *Smith v. Pfizer*, 265 F.R.D. 278 (M.D. Tenn. 2010) (holding that witnesses identified after court-imposed deadline and parties' agreement were not timely disclosed). In sum, the witnesses challenged here were disclosed timely and in compliance with court order. This limine should be denied.[8]

6. Deposition testimony obtained in other cases should be handled on a case-by-case basis and in accordance with the Federal Rules of Evidence.

The breadth of this limine renders it inappropriate. For example, the use of deposition testimony from other cases to impeach witnesses in clearly permitted. Plaintiffs do agree that both parties should not be allowed to use or read unfettered excerpts from depositions in other cases.[9] The crux of defendant's argument, however, appears to center on two witnesses:

(1) Lavan Watts

Mr. Watts is the consummate industry insider, having served as the Chief Engineer for the Trailer Division of Lufkin Industries from the 1970s through his retirement in 1998. He also

[7] Defendant's challenge to the initial treating physicians is particularly confusing. Plaintiff had long before disclosed the treating physicians through their designation of the University of Louisville Hospital health care providers and, further, provided those medical records to defendant.

[8] Defendant implies that a party must "immediately" designate any potential trial witness. The purpose of a discovery deadline is to give both parties the opportunity to evaluate (as part of their work product) potential witnesses and make a decision by the court's deadline. Plaintiffs did exactly that.

[9] For example, one of Great Dane's own experts reviewed a deposition from another case and it formed the basis of *all* of his knowledge on that particular topic. *Hofstetter 12-21-15 Depo. at p. 75-78.* Plaintiffs agree with defendant that this is precisely the type of information or testimony that should not be allowed.

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