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.

9. Evidence of Great Dane's activities within TTMA is relevant as is its participation in a 'joint defense agreement'

Great Dane, along with nearly every other trailer manufacturer in the country, is a member of TTMA. TTMA is led by a Board of Directors (of which Great Dane has continuously been a member) as well as several committees including: the Engineering Committee (of which Great Dane has always had a member, including Great Dane's own retained expert and 30(b)(6) witness, James Hofstetter) and the Product Liability Committee (Mr. Hofstetter has also been a member of that committee as has other Great Dane staff and counsel). Lavon Watts, while employed at Lufkin, was a member of all three and also signed the joint defense agreement.

The joint defense agreement is the product of the Product Liability Committee, a "top secret" group that meets about safety problems including side underride. Witnesses such as Mr. Hofstetter refuse to testify about the activities of that committee. It is unquestioned that this committee (and Great Dane) have information regarding side underride that it will not disclose.[21] This is proper fodder for cross-examination.[22]

TTMA's lawyer is also Great Dane's lawyer in this case (Glen Darbyshire). He signed the joint defense agreement. He also appears in, and has authored, various documents that have been produced in this case. While defendant may not want it known that its attorney is also TTMA's attorney, the evidence in this case will disclose and leave no doubt about that. Membership and participation in a trade association is a relevant inquiry. *George v. Celotex Corp.,* 914 F.2d 26, 29-30 (2nd Cir. 1990); *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 465 (5th Cir. 1985); *Hamilton v. Garlock, Inc.*, 96 F. Supp.2d 352, 355 (S.D. N.Y. 2000). See also *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 922 (Tex. 1998). The knowledge acquired by the group is relevant and admissible. See e.g. *Dartez v. Fibreboard Corp.*, *supra.*

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[21] We have learned that TTMA paid for at least two side underride studies.
[22] Plaintiffs' counsel has, over the years, obtained some limited information about the 'business' of the Product Liability Committee.

This district has dealt with joint defense agreements under a "common interest privilege" analysis. See e.g. *Broessel v. Triad Guar. Ins. Corp.*, 238 F.R.D. 215 (W.D. Ky. 2006) (holding that any such privilege must be proven by evidence and, absent such, it is discoverable). As stated in Broessel, the party claiming the privilege must come forward with evidence establishing the privilege. 238 F.R.D. at 218. Likewise, any waiver causes the privilege to evaporate. *Id.* Here, the requirements set out in *Broessel* have not been addressed by Great Dane. Further, the joint defense agreement "privilege" has been waived as that document is part of the public domain. Plaintiffs' counsel even has a copy. See also *In Re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002) (rejecting selective waiver).

10. Plaintiffs do not have a "day in the life" video it will offer

As plaintiffs understand a "day in the life" video, they have no intention of offering one depicting either Janice Wilden or her infant son.

11. Plaintiffs will not interject insurance

Plaintiffs agree not to interject insurance into this case; however, certain facts and circumstances regarding Great Dane's resources and standing within the trucking industry are relevant. Its revenues, sales and financial condition are part of the analysis of economic feasibility. Further, Great Dane's financial condition is both discoverable and admissible on the issue of punitive damages. See e.g. *Derby Fabricating v. Packing Material Co.*, 2005 U.S. Dist. LEXIS 28765 (W.D. Ky. 2005).

12. Reference of Great Dane's size, wealth or profitability is relevant

Irrespective of the punitive damages issue, reference of Great Dane's size, wealth or profitability is relevant on product liability issues. A product liability claim in Kentucky invokes the balancing test of risk v. utility which requires proof regarding the manufacturer's costs (and ability to bear those costs). The requirement of proof for a feasible safer alternative design only furthers that inquiry, placing economic feasibility at issue. This evidence also informs the